THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

Case No. 2006-CP-32-3221

Johnny O. Bennett.....Petitioner,

v.

State of South Carolina.....Respondent.

APPENDIX

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The Court: Thank you, sir. Step down.

R. 1979, l. 21 – 1980, l. 18. (emphasis added).

Defense counsel Floyd moved for a mistrial and for a dismissal based on prosecutorial misconduct. Counsel argued that on several occasions the defense had brought to the judge's attention the solicitor's attempts to insert race into this case "with a all-white jury and a black defendant." Counsel noted that up to that point the court had refused to grant relief. R. 2012, l. 21 – 2013, l. 7. Floyd argued:

> In this case, it was one of the most despicable performances I've ever seen where a solicitor inserted race into the case. Now, he tried to get the witness to admit that Judie Hardee was white, that's why he asked him, did Judie Hardee love him, who whose Judie Hardee. He wanted that witness to say that was that white jailer that was friendly with Johnny. He wanted the jury to find that out.
>
> When he wouldn't tell him that, Mr. Myers then told the jury, that's that blonde lady. So what's he telling the jury? He's got a white lover. Now you can kill him. Now you can take it out on him.

R. 2013, ll. 8 – 18.

The solicitor denied he was injecting race into the case. R. 2013, l. 22 – 2014, l. 11. Defense counsel responded that everyone in the courtroom had to know the solicitor was telling them that was a white woman , "I think it's clear and I think the record will be clear on that." R. 2014, ll. 13 – 20. The judge denied the motion for a mistrial. R. 2014, l. 19 – 2015, l. 6. The following bizarre, fatuous colloquy took place:

> The Court: [W]hen somebody says blonde, I don't necessarily see a white woman. You know, that doesn't mean the jury's got the same standards I have, but either way, I just don't see that. I'm sorry.

Mr. Myers: I think of Dennis Rodman.

The Court: Well, I don't think of Dennis Rodman. But either way, I'm going to deny the motion, Counsel.

R. 2015, ll. 3 – 9.

At the end of the defense case, defense counsel Floyd again renewed his motion for a mistrial or dismissal for prosecutorial misconduct based on the solicitor injecting race into the case by referring to Judi Hardee as the "blonde lady." R. 2037, ll. 13 – 20. The judge again denied the motion.

Defense counsel again renewed his motion on this issue when he moved for a new trial. R. 2363. The judge in his order also refused to grant a new trial on this ground. R. 2407.

Discussion

The use of racial arguments to obtain a criminal conviction is improper and constitutes reversible error. Miller v. North Carolina, 583 F.2d 701, 706 (4th Cir. 1978). As the Florida Court of Appeals stated in Terrazas v. State, 696 So.2d 1309, 1310 (Fla 2d DCA 1997), attempts to attribute criminal conduct to people based on their race "have been uniformly condemned." See State v. Rogan, 91 Hawaii 405, 984 P.2d 1231 (1999) (prosecutor's closing remarks that "every mother's nightmare" is to discover "some black . . . guy on top of your daughter" warranted mistrial and was sufficiently egregious to bar retrial).

Specifically, courts have disallowed the use of interracial relationships to "aggravate any lingering prejudice against interracial couples among the jurors." Bryant v. State, 25 S.W.3d 924, 926 (Tex. Ct. App. 2000); Rogan, supra. In Bryant, the black

defendant was charged with battering his interracial child. During cross-examination, the prosecutor asked the defendant about a prior, unrelated sexual partner: "Did you get a white girl named Rebecca pregnant who had your baby in May of '99 whose daddy is Tim Lyons?" Id. at 25 S.W.3d 925. The Texas Court of Appeals granted a new trial, ruling that the question was irrelevant and racially inflammatory, and admonishing the state that "racially prejudicial remarks and appeals to racial prejudice have no place in a courtroom." Id. at 25 S.W.3d 926, citing Allison v. State, 157 Tex.Crim. 200, 248 S.W.2d 147, 148 (1952).

In Moore v. Morton, 255 F.3d 95 (3d Cir. 2001), the defendant, a black man married to a white woman, was accused of raping a white woman. Identity was the critical issue. The prosecutor asserted in closing argument that the defendant's "preference" for white women was evidence of his guilt, and that, because the defendant's wife had been ill, the defendant would "have his greatest need for sexual release" at the time of the assault. Id. at 255 F.3d 100-101. After the defendant unsuccessfully appealed his conviction in the New Jersey state courts, the Third Circuit issued a writ habeas corpus on the basis that these racially inflammatory comments, along with a third reference to the defendant's failure to testify, denied the defendant a fair trial. Id.

In United States v. Grey, 433 F.2d 1043 (6th Cir. 1970) cert. denied, 400 U.S. 967, 91 S.Ct. 380 (1970), the Sixth Circuit held that the prosecutor's comments on the black defendant's character witness "running around with a white go-go dancer" warranted a new trial. Similarly, the Supreme Court of Nevada, in Dawson v. State, 103 Nev. 76, 734 P.2d 221 (1987), granted a new trial on the basis that the prosecutor's

closing remarks that defendant had a "preference for white women" and had had a "physical relationship" with a white woman were prejudicially improper.

Judie Hardee's race, hair color (or girth, for that matter) were completely irrelevant to any fact at issue in appellant's case. This evidence was presented for the sole purpose of arousing "lingering prejudice" against interracial relationships among the all white jury. In a case where the solicitor injected race at every available opportunity, his reference to Ms. Hardee's whiteness was fatally prejudicial. The reference was particularly inflammatory in light of the closing argument, discussed in issue 5, infra. Since the trial judge refused to grant a mistrial based upon the injection of race into this case through the *blonde* interracial sex statement, appellant should now receive a new sentencing hearing.

5.

The court erred by refusing to grant a new trial where the solicitor in his closing argument compared appellant to King Kong and a Caveman. The court erroneously ruled these were not impermissible and objectionable racial stereotypes that this court had previously ruled in *Toyota of Florence, Inc. v. Lynch* were unacceptable in the courts of this state.

Relevant facts

As noted, the solicitor made repeated references to race throughout appellant's sentencing hearing. He made the following remarks near the start of his closing argument:

> Do you remember this Mary Felder Rice, that nice black lady that testified? Johnny Bennett does what Johnny Bennett wants to do. And it's Shannon Gilbert's fault. He's in a coma for 13 days. It's Aaron McGough's fault because he's in a coma for four days when Johnny Bennett beats him to the ground and stomps him nearly to death. It ain't old Johnny's fault.
>
> And, you know, I don't know whether it was the young black lady that was inside eating with her boyfriend or the tall white boy that was outside that drove through, said that they looked out . . . Johnny was even pulling one of them by his hair. *Kind of like an old caveman, dragging him by his hair.*

R. 2062, ll. 5-18 (emphasis added).

The solicitor went on to portray appellant as a manipulative thug who had concealed his violent nature in order to dupe defense witnesses into testifying on his behalf. R. 2074, l 24 - 2079, l. 18. He urged the jury to vote for a death sentence, as follows:

> You give him life, the real Johnny will come back. You give him life and he'll come back out. *Meeting him again will be like meeting King Kong on a bad day. Vile Johnny.* Mean Johnny. Murderous Johnny. You give him life, those guards better button up their vests because he's coming back in force.

R. 2079, ll. 2-7.

At the post-trial hearing, defense counsel moved for a new trial on the basis that these comments were calculated to de-humanize appellant and inflame racial prejudice against him. R. 2169, l. 17 - 2171, l. 20; R. 2184, l. 15 - 2185, l. 25. In the written motion for a new trial filed July 27, 2000, counsel stated that he did not contemporaneously object to the comments because the solicitor had dropped his voice for dramatic effect, out of counsel's earshot. The configuration of the large courtroom, which physically isolates defense counsel from the jury box, prevented defense counsel from hearing the offensive comments. Motion at p. 2363 - 2364, p. 2372, with attached affidavit of Hervery B. O. Young, R. 2378. The court denied appellant's motion, holding that the "King Kong" comment was a legitimate reference to appellant's large physique and that it logically responded to defense counsel's characterization of appellant as a "teddy bear." The court held that the "caveman" comment was racially neutral, that it referred only to the hair-pulling allegations of the past offense, and that it logically responded to defense counsel's portrayal of appellant as a model prisoner. R. 2418 - 2421.

Discussion.

As a threshold matter, this issue should be reviewed despite appellant's failure to lodge a contemporaneous objection. Defense counsel did not object to the "King Kong"

and "caveman" comments because they were spoken in a hushed tone, on the far side of the large courtroom, and counsel could not hear them. This solicitor is well known for his extremely effective oratory that includes changing from a booming voice to almost a whisper in his dramatic closing arguments in capital cases. Thus, counsel raised this issue at his first opportunity.

In Toyota of Florence, Inc., v. Lynch, 314 S.C. 257, 263-264, 442 S.E.2d 611, 615 (1994), this Court ruled that even in the absence of a contemporaneous objection, a new trial should be granted if "vicious, inflammatory argument results in clear prejudice." See also Dial v. Niggel Associates, Inc., 333 S.C. 253, 509 S.E.2d 269 (1999); South Carolina State H'way Dept. v. Nasim, 255 S.C. 406, 179 S.E.2d 211 (1971). "King Kong" and "Caveman" are far beyond the pale, and other states follow the same general rule. See, e.g., Miller v. North Carolina, 583 F.2d 701 (4th Cir. 1978); State v. Belgarde, 110 Wash2d 504, 755 P.2d 174 (1988) (in trial of Native American, prosecutor's unchallenged references to American Indian Movement as "deadly group of madmen" and "butchers who kill indiscriminately" warranted mistrial because they were "so flagrant and ill-intentioned that no curative instruction could have obviated the prejudice").

In the Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986), context, this Court has condemned the use of racial stereotypes to justify peremptory strikes in *voir dire*. In State v. Tomlin, 299 S.C. 294, 384 S.E.2d 707 (1989), this Court ruled that the state's purported rationale for striking a black woman, that she "walked slow, talked low and might not be able to withstand the trial," or, as the trial court suggested, "had a lack of education, was extremely sluggish" and would be a "filler" if seated on the jury, along

with the rationale for striking a black man in same case, that he "shucked and jived" as he walked, were based on impermissible racial stereotypes. Id. at 299 S.C. 298-299, 384 S.E.2d 709-710. See also Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998) ("redneck" is impermissible racial stereotype in Batson context).

The comments challenged by appellant are sufficiently inflammatory and prejudicial that counsel's failure to object should be overlooked, especially since it was caused by a combination of courtroom acoustics and the solicitor's theatrics, and not by any dereliction on counsel's part.

As noted above, the use of racial arguments to obtain a criminal conviction is improper, and constitutes reversible error. Miller v. North Carolina; Terrazas v. State; State v. Rogan; all supra; See also Commonwealth v. Lara, 39 Mass.App.Ct. 546, 658 N.E.2d 692 (1995) (prosecutor's repeated references to defendant's Dominican ethnicity warranted new trial); Jackson v. State, 364 Md. 192, 772 A.2d 273 (2001) (judge's remarks about others moving out of the city to escape "uncivilized" people like the defendant, who were like "animals" living in "ghettos" with "guns and drugs" warranted resentencing), citing Contee v. State, 223 Md. 575, 583, 165 A.2d 889, 894 (1960) (a trial court "should not countenance or permit unwarranted and improper appeals to racial prejudice to be made or go unnoticed."); United States v. Cannon, 88 F.3d 1495 (8th Cir. 1996) (prosecutor's characterization of black defendants as "bad people" was appeal to juror bias); United States v. Doe, 903 F.2d 16 (D.C. Cir. 1991) (evidence presented by the state that local drug trade was controlled by persons of Jamaican extraction, as were defendants, was improper appeal to racial bias); United States ex rel. Haynes v. McKendrick, 481 F.2d 152, (2d Cir. 1973), cert. denied, (racial comments about "people

of the colored race," including remarks about "their weaknesses and inability to do certain things that maybe are commonplace for the ordinary person to do" and their "custom and habit" of having "exotic hair dos" warranted new trial).

In the 1933 movie and various remakes of the same title, King Kong is a monstrous black ape, brought to America from a wild jungle, who terrorizes the helpless, fragile, *blonde* Faye Raye. See Universal Studios, Inc. v. Nintendo Co., 746 F.2d 112 (2d Cir. 1984); "King Kong" at www.badmovieplanet.com/3btheater/tributes. The common image of a caveman is of a preliterate, aggressive, sub-human primate -- not far removed from King Kong. See State v. Magee, 517 So.2d 433 (Ct.App.La. 1st Cir. 1987) (court correctly instructed witness not to refer to defendant as "caveman" even though that was the defendant's nickname); Leahey v. Leahy, 308 Or. 659, 303 Pa.2d 952 (Or. Sup. Ct. 1956). By presenting these images, the solicitor plainly intended the jury to perceive appellant as a big, black, primitive monster. The challenged remarks not only slurred appellant's race but portrayed him as animalistic and sub-human -- a creature the jurors could destroy without reflection or remorse. See Gregg v. Georgia, 428 U.S.153, 182, 96 S.Ct. 2909, 2929 (1976) (death penalty procedure must reflect "the basic concept of human dignity at the core of the [Eighth] Amendment."). Motion for a New Trial at 3 R. p. 2365; See also Bates v. Bell, No. 02-6436 (6th Cir., filed March 23, 2005) (references to defendant as "rabid dog" were dehumanizing and "patently improper"); Bonifay v. State, 680 So.2d 413, 418 (Fla. 1996) (use of "exterminate" or any similar term which tends to dehumanize a capital defendant is improper).

Appellant's case resembles State v. Blanks, 479 NW.2d 601 (Iowa Ct. App. 1992). Blanks involved the prosecution of a black man for assaulting a white woman.

The prosecutor, describing the alleged crime during closing arguments, referred to the movie "Gorillas in the Mist," which portrays field research on wild gorillas. The Iowa Court of Appeals granted a new trial, holding that "the comparison of a defendant to gorillas, apes, other animals or other demeaning descriptions by itself may constitute reversible error." Id. at 479 N.W.2d 603, citing Volmor v. United States, 13 F2d 594, 595 (6th Cir. 1926) (new trial granted where prosecutor referred to the defendant as a "skunk", an "onion", a "weak-faced weasel", and a "cheap, scaly, slimy crook").

The solicitor's likening of appellant to King Kong and a caveman were open appeals to the all white jury's prejudice and denied appellant a fair trial. The remarks were racially inflammatory, and overtly calculated to diminish appellant's humanity in the eyes of the jury. The resulting death sentence should not stand. Appellant should receive a new hearing.

6.

The court erred by refusing to allow defense counsel to ask the same "would you just vote with the majority" series of questions that resulted in the reversal of appellant's initial death sentence, since this was legitimate and valuable defense *voir dire*?

Relevant Facts

Appellant was previously tried on the same indictment, convicted, and sentenced to death. This Court reversed the death sentence on the following grounds. During *voir dire* at the first trial, defense counsel asked a particular juror if, having determined that a life sentence was appropriate, the juror would maintain his position against the majority of other jurors, if they disagreed, or would follow the majority. The juror answered that he "would have to go with the majority." State v. Bennett, 328 S.C. 251, 256, 493 S.E.2d 845, 847-848 (1997).

The trial court qualified the juror over defense counsel's objection. On appeal, this Court ruled that the trial court abused its discretion. Id. Citing Morgan v. Illinois, 504 U.S. 719, 729, 112 S.Ct. 2222, 2230 (1992), this Court ruled that if "even one juror" who would vote for the death penalty in every case "is impaneled and the death sentence is imposed, the State is disentitled to execute sentence." Bennett at 328 S.C. 257, 493 S.E.2d 848. This Court, further, endorsed Morgan's reasoning that general questions about impartiality and fairness are not always sufficient to detect unqualified jurors in a capital case. Id., citing Morgan at 504 U.S. 735, 112 S.Ct. 2233.

During *voir dire* for the resentencing trial, defense counsel asked potential juror Stokes the following question:

> If you were in a position where you held a view one way or another, either for life or death, and it was different from the rest of the jurors and after deliberating on it and you still believed that that is your view, would you be able to hold fast to your view?

R. 110, l. 12-17.

Ms. Stokes answered in the affirmative and was qualified to serve without objection. Defense counsel asked a variation of the same question to potential jurors Sands, Garrett, and Brown. Each answered affirmatively and was qualified without objection. R. 131, ll 7-18; R. 142, ll. 7-14; R. 154, ll. 20-24. The state later used peremptory strikes to remove Ms. Stokes and Ms. Sands from the petit jury. R. 832, ll. 1-7. Ms. Garrett served on the petit jury, and Mr. Brown, the only black petit juror, was excused because of his social relationship with a potential witness. R. 820, l. 23 - 824, l. 2; p. 832, ll. 9-14.

During *voir dire* of potential juror Ashley Ray, defense counsel asked the following question:

> Now, if you felt after discussing it with the other jurors that life imprisonment was the proper punishment but all the other jurors thought the death penalty was proper, what will you do then?

R. 176, ll. 4-7.

The state objected on the basis that the hypothetical question committed Ms. Ray to a future course of action, effectively "invading" the unanimous verdict. R. 176, ll. 16-21. Defense counsel responded that he should be permitted to ask the question because the reversal of appellant's prior death sentence was based on a juror's answer to a similar question. R. 176, l. 23 - 177, l. 1. The court, acknowledging that this Supreme Court

"has said that certainly you want to be sure that each juror understands that they operate independently," asked counsel to rephrase the question, which he did thus:

> Ms. Ray, if after deliberating with the other jurors you felt that the proper punishment would be life in prison but the other 11 jurors felt that it would be the death penalty, could you stand up to what you felt was right or would you go along with the other 11?

R. 177, ll. 14-18.

Ms. Ray answered that she would maintain her position. She was qualified without objection and served on the petit jury. R.. 177, l. 19 - 178, l. 16; p. 833, ll. 11-18.

Defense counsel asked the following question of potential juror Locklair:

> In the event that you hold a position that is different than the rest of the jurors, for or against life or death, and you believe after deliberating that your position is the right position or the appropriate position as far as punishment would you be able to hold fast to your position?

R. 195, ll. 6-10.

The solicitor did not object. Ms. Locklair answered affirmatively, was qualified without objection, and served on the petit jury. R. 195, l. 25 - 196, l. 4; R. 833, ll. 18-24.

Defense counsel asked the following question of potential juror Porter:

> Now, if you were serving on this jury and all the other jurors wanted to vote for death and you wanted -- you thought life was the proper punishment, would you stick to your position?

R. 209, ll. 22-25.

The solicitor did not object. Ms. Porter answered affirmatively and was qualified without objection. R. 219, ll. 1-11. Appellant later exercised a peremptory strike to remove Ms. Porter from the petit jury. R. 834, ll. 2-6.

Defense counsel asked the following question of potential juror Harris, again without the solicitor's objection:

> If the situation comes that you hold a different opinion as to what the appropriate punishment is from the other jurors, whether it's life or death, and you believe after talking it over with the other jurors that your position is the right position or the appropriate punishment would you be able to hold fast to your position?

R. 231, ll. 14-19.

Ms. Harris answered affirmatively and was qualified. R. 233, ll. 3-13. The state later used a peremptory strike against her. R. 834, ll. 9-11.

Ms. Joan Follmer was the fifteenth potential juror presented during *vior dire*. Defense counsel asked her the following question:

> [I]f you were on the jury and you wanted to give -- you thought life was the proper punishment but all the other members of the jury felt that the death penalty was proper, would you stand up for your position or would you just go along with it?

R. 250, l. 22 - 251, l. 1.

The state objected to the question. *In camera*, the court noted that Bennett, supra, did not address whether the question before that court was proper, but only whether a juror's negative answer disqualified him. The solicitor argued that Bennett did not address the question's overall propriety because it was not raised at trial. He stated that "since then, I have consistently objected."[3] R. 252, l. 8 - 252, l. 19. He argued that while this Court had not addressed the issue of whether jurors may be asked about the

[3] As shown by the *voir dire* of potential jurors Stokes, Sands, Garrett, Brown, Ray, Locklair, Porter, and Harris, however, the solicitor had not, in fact, "consistently objected."

possibility of a deadlock, the "majority view" was that such questions "could not reasonably be expected to result in an answer bearing upon a juror's qualification." R. 253, l. 3 - 255, l. 10.

Appellant argued that his question was not intended to elicit jurors' attitudes regarding specific facts of the case, but only to ensure their independence. He asserted that to ask a juror if he could remain independent despite opposition was no more intrusive or fact-specific than to ask if the juror could objectively consider the evidence and follow the law as instructed. R. 255, l. 13 - 256, l. 13. He argued that, had the question been inappropriate, this Court would not have relied on it in reversing his death sentence. R. 257, l. 20 - 258, l. 1. The court sustained the state's objection on the basis that the question improperly suggested the possibility of a hung jury and artificially pitted the jurors against one another. R. 258, l. 18 - 264, l. 13. This ruling was error.

Discussion

S.C. Code § 16-3-20 controls procedure and punishment in murder trials. Under the statute, any person called as a juror in a capital case must be examined by defense counsel. S.C. Code § 16-3-20(D). The jury in a capital case must unanimously agree on, and designate in writing signed by each juror, the existence of statutory aggravating factors. S.C. Code § 16-3-20(C)(b)(10). If one or more aggravating factors is found, the jury must also unanimously agree on, and designate in writing signed by each juror, whether to recommend the death penalty. Id. The jury may not recommend a death sentence unless the vote is unanimous. If the jurors cannot agree on a penalty, the judge must discharge them and impose a life sentence. Id.

Because each member of the jury must individually sign the verdict form in a capital case, defense counsel should be permitted to examine potential jurors about whether they could maintain their independence during deliberations. This is valid defense *vior dire*, no more objectionable than asking jurors if they could be fair to both sides, consider all the evidence, and follow the law as instructed.

This Court recently addressed a similar issue in State v. Hill, 361 S.C. 297, 604 S.E.2d 696 (2004), another capital case. In Hill, the trial court refused defense counsel's request to ask jurors "whether they would give up their vote in order to go with the majority." Id. at 361 S.C. 308, 604 S.E.2d 702. This Court affirmed, the majority rejecting Hill's proposition that Bennett approved the " 'go with the majority' question." Id. In affirming Hill's conviction and sentence, however, this Court did not rule on the propriety of the question. It held that "no particular formula of questions is mandated to achieve this goal." Id.

Appellant's case differs from Hill in several respects. First, appellant did not ask jurors whether they would give up their vote, but the positive converse: whether they would maintain their independence in the face of opposition. See Hill at 361 S.C. 308, 604 S.E.2d 702. Appellant asked his question to establish independence, not impartiality.

In Hill, this Court affirmed, in part, on the basis that the appellant could not point to a single biased juror. Hill at 361 S.C. 309-310, 604 S.E.2d 702-703. However, without the "majority" question, the juror who was ultimately disqualified from appellant's first jury would not have been identified. As experienced capital counsel Jeffrey Bloom argued before this Court in Hill, the "go with the majority" inquiry is the single most instrumental question asked when selecting jurors for a capital case.

Jurors routinely are asked, and they agree that they will consider the views of their fellow jurors during deliberations. Respectfully, this Court should now reconcile Bennett and Hill by permitting defense counsel to establish potential jurors' independence by asking if they could maintain their view of the evidence despite the opposition of others. Given the statutory emphasis on juror unanimity and independence, the question at issue is valid and permissible. And, since petitioner was allowed to establish the independence of only three petit jurors (Garrett, Ray, and Locklair), his case should be remanded for resentencing. See Bennett, 328 S.C. 251, 257, 493 S.E.2d 845, 848 (1997), above, citing Morgan v. Illinois, 504 U.S. 719, 729, 112 S.Ct. 2222, 2230 (1992) (the State may not execute the defendant if "even one juror" would vote for the death penalty in every case, and general questions about impartiality and fairness are not always sufficient to detect unqualified jurors in a capital case).

CONCLUSION

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

Respectfully submitted,

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By _____
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January 30, 2006

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

Marc H. Westbrook, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHNNY O. BENNETT, JR.

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William Edgar Salter, III, Esquire, this 30th day of January, 2006.

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Assistant Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 30th day of January, 2006.

(L.S.)
Notary Public for South Carolina

My Commission Expires: April 8, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Lexington County
Honorable Marc H. Westbrook, Circuit Court Judge

THE STATE,

Respondent,

vs.

JOHNNY O'LANDIS BENNETT, JR.,

Appellant.

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STATEMENT OF ISSUES ON APPEAL

I.

Did the trial judge abuse his discretion by permitting the mothers of the two 1988 Pizza Hut A.B.I.K. victims to testify concerning the injuries Appellant inflicted on their sons?

II.

Did the trial judge abuse his discretion by allowing the State to present photographs depicting the injuries of the two 1998 Pizza Hut victims?

III.

Did the trial judge abuse his discretion by allowing the State to present evidence that Pizza Hut victim Shannon Gilbert had a dream, while he was in the hospital after the attack by Appellant, of being chased by Indians he thought were black?

IV.

Did the trial judge err by denying Appellant's mistrial motion based upon the Solicitor's cross-examination of defense witness Byron Collins as to whether he remembered Appellant's lover, prison guard Judie Hardee, merely because the Solicitor referred to her as a "blonde haired lady"?

V.

Assuming *arguendo* that Appellant's argument is not procedurally barred by his failure to make a contemporaneous objection, did the trial judge deny his motion for new trial based upon the State's closing argument?

VI.

Did the trial judge properly rule that Appellant could not ask *veniremen* whether they would give up their vote in order to "go with the majority."

STATEMENT OF THE CASE

The Lexington County Grand Jury originally indicted Appellant at the March 1991 term of court. However, the State *nolle prossed* that indictment because of certain errors contained in it and he was reindicted at the September 1993 term of court for murder, kidnapping, armed robbery and grand larceny (93-GS-32-2354). The State served its Notice of Intent to Seek the Death Penalty and Notice of Evidence in Aggravation in March 1993.

On October 9-18, 1995 Appellant received a jury trial before the Honorable Ralph King Anderson, Jr. The jury convicted him on all charges and ultimately imposed the death penalty following a separate sentencing proceeding. A timely Notice of Appeal was served and filed.

This Court affirmed Appellant's convictions, but reversed his death sentence and ordered a new sentencing trial on direct appeal. *State v. Bennett,* 328 SC 251, 493 S.E.2d 845 (1997). Following motions hearings on June 30, 2000, Appellant received a new sentencing proceeding before the Honorable Marc H. Westbrook and a jury on July 10 -16. The jury found the statutory aggravating circumstances that the murder was committed while in commission of a robbery while armed with a deadly weapon; that the murder was committed while in the commission of larceny while armed with a deadly weapon; that the murder was committed while in the commission of kidnapping; and that the murder was committed while in the commission of physical torture. S.C. Code Ann. §16-3-20(C)(a)(1)(b), (d), (e) & (h) (Supp. 2005). The jury recommended the death penalty and Judge Westbrook sentenced Appellant to death for murder. Although the sentence for kidnapping was subsumed by the murder conviction, he imposed concurrent sentences for armed robbery and five years for grand larceny of a motor vehicle. **R. pp. 2148-49; 2157-58.** Wayne Floyd and Hervery B.O. Young represented Appellant at trial. Eleventh Circuit Solicitor Donnie Myers, as well as Deputy Solicitor Dayton Riddle and Assistant Solicitor Shawn Graham prosecuted the

case.

A timely Notice of Appeal was served and filed. This appeal follows.

STATEMENT OF FACTS

The direct and circumstantial evidence concerning the murder presented at trial, viewed in the light most favorable to the State, is as follows. In November 1990, twenty-four year old Benton Smith lived with his parents in the Happy Town area of Gaston, South Carolina[1]. Benton was the youngest of five children. He was a quiet person, who had always lived at home and had never stayed out late or caused his parents any problems. He was unemployed at the time and received an unemployment check each week in the mail. **R. pp. 1133-39; p. 1146-47; 1161-63; 1735-39; 1742-45; 1747.**

Benton was driving his mother's blue 1980 Toyota Corolla **(State's Ex. 14)** at the time of his murder. He never allowed other people to drive the car, and he was very possessive of the belongings that he kept in his car[2]. He had personalized floor mats in the car with his name on them **(State's Exs. 20-21)**, 2 pillows with ducks on them **(State's Exs. 14-15)**, 2 small wine glasses **(State's Exs. 17-18)**, a pair of red "spy" glasses with lights on them **(State's Ex. 19)**, a Polaroid camera **(State's Ex. 11)**; a Bible; a walking cane with a gold duck head on it **(State's Ex. 23)**;a pair of speakers; a radar detector; and a shaving kit in which he kept money. **(State's Ex. 22)**. His brother-in-law, Melvin Harrison, testified that there was a "wad" of money in the kit and that Benton had planned to buy a car with it. **R. pp. 1136-48; 1162-63; 1735-40; 1742-43.**

Appellant, who also lived in the Happy Town community, was Benton's "friend." On Tuesday morning, November 27,1990, Benton received his unemployment check. Both Benton's father, Paul Smith, and his sister, Cynthia Harrison, testified that Appellant went with Benton when

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[1] This is in Lexington County.

[2] He also did not allow anyone to smoke in it and had a "No Smoking" sign in the car.

he left the house. Unfortunately, this was the last time Mr. Smith and Benton's other family members saw him alive. **R. pp. 1146-48; 1165-66;1742-43; 1746-48.** At 11:56 a.m. on Tuesday, Benton cashed his $147.00 unemployment check at the Republic National Bank located on Highway 6, in Swansea. Pamela Herlong, the drive-in teller who handled the transaction, testified that Benton was accompanied by someone. While she could not remember who was with him, a reasonable inference from the testimony of Benton's family members is that Appellant was this other person, since Mr. Smith and Mrs. Harrison saw Appellant leave the house with him. **R. pp. 1168-88.**

Benton' family became concerned when he did not return home Tuesday night and immediately began looking for him. They also called the Lexington County Sheriff's Department and reported him missing. Deputy Mark Jones began searching for Benton on Wednesday. He found Benton's blue Corolla parked behind Swansea High School between 10:30 and 11:00 p.m. on Wednesday[3]. The windows were rolled up and the car was locked. The only unusual thing Deputy Jones noticed in the car were some chicken boxes. Deputy Jones later had Benton's father confirm that the car was his son's. Deputy Jones allowed Mr. Smith, who did not have a key to the car, to take it home but instructed him not to open it until advised by law enforcement. Mr. Smith thereafter took the car home and did not open it. Melvin Harrison testified that none of Benton's belongings were in the car when it was retrieved by the family. **R. 1118-20; 1122-28; 1131; 1148-51; 1737-38.**

In late 1990, Bonita and Pamela Gonsalves (her sister), lived in Orangeburg. Bonita dated Appellant. Appellant often got a ride from someone or drove a friend's car to Orangeburg. However, neither woman had ever met Benton Smith, and Appellant had never driven Benton's car there before Tuesday, November 27, 1990. **R. pp. 1190-92; 1216-20.**

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[3] It was near the cafeteria area of the school. Appellant's mother worked in the cafeteria of Swansea Middle School **R. pp. 1123, ll. 2-13; 1125-26.**

Between 5:00 and 5:30 Tuesday afternoon, however, Appellant came to Pamela's apartment looking for Bonita. He was alone and was driving Benton's blue Toyota. Pamela testified that she saw a "No Smoking" sign that family members testified Benton kept in his car, the personalized floor mats, the two pillows with ducks on them and stereo speakers. When she asked Appellant who owned the car, he would not tell her. Eventually, he took Pamela to her sister's apartment and she stayed there for awhile. Both women testified Appellant had a bandage on his right eyebrow and a bandage around his left hand. When asked how he received these injuries, he told both women he received them in a fight with either his brother, Gucci. **R. pp. 1193-97; 1209-10; 1222-25; 1227; 1246-47.** Appellant told Pamela that he was going to make telephone call and left. She got tired of waiting for him to return and also left. **R. pp. 1196-97.** Appellant returned to Bonita's residence sometime later and took Bonita to a pay phone, so that she could call her mother. While in the car, she also saw the "No Smoking" sign and the personalized floor mats. Appellant and Bonita had previously argued about money,[4] and Appellant left her Tuesday night because of another argument over money. **R. pp. 1220-22; 1224-27; 1246-47.**

Appellant, again, showed up at Pamela's apartment in Benton's car on Wednesday morning. As they were painting the apartment, Appellant took off his shirt and she saw scratches on his chest, which he said he got in a fight with his brother. Later that day, Appellant and Bonita returned to her residence in Benton's car. In the trunk of the car, Pamela saw two shot glasses. Also, the speakers were missing; and Bonita got Benton's cane[5] out of he back seat. Appellant tried to sell a radar detector to her. However, Bonita took it and gave it to her. **R. pp. 1197-1203; 1210-11.** Bonita

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[4] Bonita wanted to visit her mother for Thanksgiving, but could not afford to do so. Appellant had promised to get her the money but did not.

[5] The cane was not broken at that time.

testified that Appellant returned to her house on Wednesday, and he took both her and her daughter to an area mall in the blue car. At the mall, he bought her daughter a doll and a fur coat. While they were in Orangeburg, he went to South Carolina State University and visited a friend who was on the basketball team. They later went to Pamela's house and helped her paint. Bonita also saw the scratch marks on Appellant's chest. She testified that she gave her sister a radar detector that Appellant had given to her. Appellant gave Bonita the 2 pillows with ducks on them (**State's Exs. 15 and 16**), the Polaroid camera (**State's Ex. 11**), and 2 wine glasses. Also, she saw the victim's cane (**State's Ex. 23**), which had been in the trunk. She said it was not broken. Finally, he gave her the shaving kit (**State's Ex. 22**). **R. pp. 1227-34.**

Jackie Robinson testified that he is originally from Swansea. He had been life-long friends with Appellant,[6] and he was a cousin and friend of Benton. He was attending South Carolina State in November 1990. Appellant came to the school one day, accompanied by a woman. They were in a small blue car. Robinson rode with them briefly and said that Appellant tried to sell Benton's Polaroid camera to him. When asked where he had gotten the camera, Appellant replied, "you don't need to know all of that." In the car, Robinson also saw Benton's unbroken cane. Appellant left after roughly 25 or 30 minutes. On Thursday or Friday, Robinson learned that Benton and Benton's car were missing. Because he knew that the car Appellant had been driving on Wednesday was Benton's, he went to law enforcement and told them what he knew. **R. pp. 1259-66.**

Based upon Mr. Smith's own investigation, he and Melvin Harrison went to Orangeburg very early Thursday morning, and he spoke with Pamela Gonsalves. Although she did not know Benton, she identified his car and some of Benton's possessions from the description Mr. Smith had given.

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[6] Robinson testified that Appellant was approximately 6'5" or 6'6" tall and weighed roughly 300 pounds. **R. p. 1266.** ***See*** **Argument V,** ***infra.***

Also, she told him what had happened the past two days. Mr. Smith then spoke with Bonita, and she gave him Benton's pillows. **R. pp. 1151-53; 1204-06; 1235-42; 1244; 1738-39.** When Bonita saw Appellant later Thursday morning, she asked him why Mr. Smith came to her house looking for Benton. He told her not to worry. He also assured her that the victim was okay and was in Swansea. Although he claimed Benton had allowed him to use the car, he became upset when asked about it. He asked her to go somewhere with him but she refused because "[s]omething just didn't feel right." Bonita later gave the shot glasses, the camera and the shaving kit to members of the Lexington County Sheriff's Department **R. pp. 1204-06; 1235-42; 1244.**

After they came back from Orangeburg on Thursday, Mr. Smith and Mr. Harrison went to Stillinger's Gas Station, in Swansea. There, they saw Appellant, who was carrying Benton's cane. By then, part of the cane was missing. When Mr. Smith asked him where Benton was, Appellant said, "I don't know where he is and I don't give a damn where he is."[7] **R. pp. 1155-56; 1524-1528 1739.**

Det. Frederick R. Hamer, of the Lexington County Sheriff's Department, first became actively involved in this case on Thursday, November 29. He met with Mr. Smith and other family members. He also acquired a bench warrant that had been issued for Appellant's arrest based upon his failure to appear in court on charges that he had stolen gasoline from Stillinger's Gas Station, for which he was convicted and sentenced to thirty days or payment of a $ 237.00 fine. **(See State's Ex. 28)**[8]. Det. Hamer located Appellant at his home on Jasper Sutton Road and arrested him on Friday,

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[7] Mr. Harrison testified that Appellant said, "I haven't seen him and, frankly I don't give a damn where he is."

[8] Mr. Thomas Stillinger, the owner of the business, testified that he saw Appellant steal gas on October 23, 1990. **R. pp. 1109-14.**

November 30. Det. Hamer took Appellant to the Lexington County Sheriff's Department. After being advised of and waiving his *Miranda*[9] rights, Appellant agreed to discuss Benton's disappearance. **R. pp. 1269-77.**

On this occasion, Appellant admitted he met Benton at the Smiths' residence, in Happy Town, on Tuesday morning. They left somewhere around 11:00 or 11:30 a.m. and went to the bank in Swansea. Afterwards, they went job hunting in Columbia and West Columbia. They also stopped and ate. Then, they went to see some girls in Orangeburg and came back later that evening. Benton dropped Appellant off under a tree near Stillinger's and said that he was going bak to Swansea. Appellant allegedly did not know what happened to Benton and suggested that he might have gone somewhere with the girls from Orangeburg. He also agreed to help get information regarding Benton's whereabouts. **R. pp. 1278-80.**

On Saturday, December 1, Det. Hamer and Det. Charlie Jones spoke with Appellant after he bonded out of jail on the Stillinger charges. Det. Hamer again advised Appellant of his *Miranda* rights. Appellant his rights and spoke to the officers. On this occasion, he claimed that he and Benton had gone back to Swansea after job hunting in Columbia, instead of going straight to Orangeburg. They then went to Orangeburg and met with the young ladies that Benton had met. When they returned to Swansea, Benton dropped Appellant off under the tree near Stillinger's. Appellant again promised to help the officers further. **R. pp. 1282-84.**

Later that evening, Det. Hamer received a radio transmission that Appellant wished to speak with him. Therefore, he and Det. Jones went to Appellant's residence around 8:30 or 9:00 p.m. After Det. Hamer made sure that he still understood his *Miranda* rights, Appellant agreed to talk to

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[9] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

the him. Appellant told the officers he would help them locate some people who may possibly know the victim's whereabouts: Isadore Mack, Tommy Ferlick and Andre Haskins. He said they were at Theodore Reed's club[10]. So, the officers took him there. **R. pp. 1287-88; 1343-44.** They found Mack at the nightclub. The officers spoke to Mack after they got him outside[11]. Det. Hamer then told Appellant that Mack had not provided him with any information. Det. Hamer told Appellant that the officers knew Benton was dead and explained they needed to find him because his family deserved to know and "put some things to rest." Appellant said, "... I know them pretty well, I know the way they think. ... Drive, let's go." **R. pp. 1288-90; 1343-46.**

He immediately directed the officers back to his sister's trailer in the Happy Town community. They arrived around 11:00 or 11:30 p.m. They exited the car and followed Appellant into some woods just beyond a firebreak near his sister's trailer. Soon, they found Benton's body buried underneath some limbs, leaves and other debris. (***See* State's Ex. 19**)[12]. Appellant acted as if he was going to be ill when he saw the body. Before they left, Det. Hamer showed Appellant's sister and brother-in-law where they had found the victim's body. She fainted when she saw what the officers had found. By the time the area was secured, it was Sunday morning, December 2. **R. pp. 1290-1300; 1348-50.** Based on information Appellant had provided to them, the officers located and arrested Haskins on an outstanding narcotics warrant[13]. They thereafter took both Haskins and

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[10] These people were "laying low" and "hiding out" because of a recent drug sweep in the area. **R. p. 1286.**

[11] Det. Jones' investigative report reflects that Appellant went inside and had a private conversation with Mack. After this conversation, Appellant said the three men had robbed Benton and placed the body in a wooded area off Happy Town Rd. **R. p. 1346.**

[12] Benton's body was only thirty or forty yard away from the trailer. **R. pp. 1348-50.**

[13] He was claiming that Mack, Haskins and Furtick were responsible for what occurred to Benton.

Appellant back to the Lexington County Jail. After the officers obtained statements from Mack, Furtick and Haskins, they spoke with Appellant around 4:00 a.m. **R. pp. 1300-05 1350-53.**

In his taped statement (**State's Ex. 32**),[14] he gave a different account concerning his activities on the previous Tuesday and Wednesday. He suggested that Mack, Haskins and Furtick were involved in the murder, and that they had taken Benton around 6:55 p.m. from Stillinger's. Allegedly, Benton and Haskins had made a "big score" and each had about $1,000.00. He also claimed that the camera he had given to Bonita was his; and he denied going to Orangeburg on Tuesday night. Yet, he somehow got Benton's car, which he parked at an old baseball field on Happy Town Rd. Officers arrested Appellant immediately after he gave this statement. **R. pp. 1305-12; 1354-55.** On the afternoon of December 2, Benton's car and its contents were processed for latent fingerprints. Two latent lifts from the rear view mirror matched Appellant's left thumb. Two more prints taken from a Kentucky Fried Chicken box found in the car matched his right middle finger. **R. pp. 1313-14; 1452-56.**

In November 1990, James Hickman was an Investigator and Identification Officer for the Lexington County Sheriff's Department. He and SLED Agent John Christy went to the crime scene early on December 2, 1990, and processed the scene. The prosecution published to the jury the photographs that they took of the grave as officers found it and before any debris had been removed (**St.'s Exs. 40-41**), as well as photographs as the debris was removed (**State's Exs. 42; 72-74**). **R. pp. 1440-51; 1666-71.** Initially, the only parts of Benton's body that were visible were one white tennis shoe and Benton's left arm, which had been damaged by animals. After the debris was removed, they saw that there was a tree between Benton's legs. When Inv. Hickman returned on

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[14] Once again, Appellant was advised of and waived his *Miranda* rights before making the statement. *See* **State's Ex. 31.**

December 5, he used a metal detector and found a wooden handled screwdriver (**State's Ex. 51**) near where Benton's waist had been laying. **R. pp. 1440-51; 1462-64; 1666-71.**

On Monday, December 3, Det.s Hamer and Jones went to Swansea and to Orangeburg, in an effort to check out the information which Appellant had given them. They spoke with Bonita Gonsalves, who also gave them the wine glasses, the Polaroid camera and the black shaving kit. They also spoke with Tommy Furtick. Later, they returned to the Sheriff's Department and spoke with Appellant. **R. pp. 1312-15.** After he waived his *Miranda* rights, yet again, Appellant spoke to Dets. Hamer and Jones. Again he started blaming Mack, Haskins and Furtick. Det. Hamer immediately stopped Appellant and said he knew Appellant was lying. Appellant sat silently for several minutes. Then, he wrote a one sentence, signed statement in which he said, "I, Johnny Bennett need help!" **(State's Ex. 33). R. pp. 1315-1319; 1355-57**[15].

He subsequently gave another taped statement, **State's Ex. 35**[16]. In this statement(a transcription of which was introduced as **State's Ex. 34**), he claimed he met Benton around 11:30 a.m. on Tuesday. First, they went to Republic National Bank, in Swansea; and Benton cashed his check. Afterwards, they went to Columbia and filled out job applications. As they were coming back through Swansea, Appellant told Benton he wanted to go to Orangeburg, and Benton allegedly agreed. So, Appellant drove to Bonita Gonsalves' apartment. However, he and Bonita got into a fight. So, he and Benton left Orangeburg and headed back towards Swansea. **State's Ex. 34, R. pp. 1321-23;1358; 1398-99.** When Appellant was approximately seven miles from Swansea, he slammed on brakes. Benton asked if he was alright. Instead of replying, Appellant simply looked

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[15] This was signed at 7:40 p.m. on December 3, 1990.

[16] Before making the statement he *again* made both a written and verbal waiver of his *Miranda* rights.

at him. So, Benton got out and walked to the driver's side. He again asked if Appellant was alright. This time, however, he touched Appellant. Appellant jumped out of the car and struck Benton in the jaw. This blow knocked Benton unconscious. Appellant picked up Benton and put him on the passenger's side of the car. After driving back to Swansea, Appellant drove to the old ball field in Happy Town and parked. He then got out of the car and sat on the hood. **(State's Ex. 34, R. pp. 1360-62; 1399; 1405).**

Roughly fifteen minutes later, Benton regained consciousness. According to Appellant, Benton got out of the car and started "chop-popping," or running his mouth:

> HAMER: And what did he say to you?
>
> BENNETT: I didn't um, he said ah, 'what happened? What did you do? Why [are] you doing this,' and all this and that ... So that time when he went ... to touch me again and I pushed him away and that's when he scratched me on the shoulder and that's when I snapped.

State's Ex. 34, R. pp. 1324; 1394-96; 1399-1400; 1405-07. Appellant said he hit Benton again, and Benton fell to the ground. Appellant immediately reached in the car, grabbed a Phillips head screwdriver and repeatedly stabbed Benton.[17] He described the screwdriver as rusty, about 3" or 4" long, with a brown handle; and he told the officers it should still be at the crime scene. He also admitted he picked up Benton's wallet when it fell out of Benton's pocket. However, he allegedly threw it back on the ground without checking to see if there was any money in it. **State's Ex. 34.**

After stabbing Benton, he picked up Benton's body and put it in the trunk of the car. He then drove to his sister's house and left the body in the woods. Sometime later, he went by and visited a friend. When he left his friend's residence, he drove to Orangeburg and picked up Pamela

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[17] When asked how many times he stabbed Benton, Appellant replied, "I'd say around thirty times." **States Ex. 34.**

Gonsalves. They then drove to Bonita's residence, and he took Bonita "to use the phone." On the way home, however, they had another fight. Appellant eventually drove back to his sister's house (after returning to the old ball field) and stayed there from approximately 7:50 to 10:15 p.m. Wednesday morning, he drove Benton's car to Orangeburg. When he returned Wednesday night, he parked the car behind the Swansea high school and got into another car with Mack, Haskins and Furtick[18]. Finally, he told the officers he was willing to take the officers to help find the wallet. **R. pp. 1324-25; 1400-03; 1405-07; 1419-20; State's Ex. 34.** After the statement, he said that he knew that he would eventually would kill someone because he had thought about killing a family member. **R. pp. 1324; 1364-65**[19]. Dets. Hamer Jones, and Hickman along with other officers, picked him up at the Lexington County Jail on December 5. Following his directions, they went to an open field on Lewis Rast Road, where they found Benton's eyeglasses and key case. They thereafter went to Orangeburg and searched a playground near Bonita Gonsalves' apartment, in an unsuccessful effort to find Benton's wallet[20]. **R. pp. 1324-28; 1420-21; 1426; 1456-61.**

As a result of a search initiated by phone calls from Appellant on December 10 and December 11 [21] and with his assistance, officers located the victim's floor mats in an area off of Huckabee Mill Road, between Swansea and Orangeburg on December 12. Finally, Appellant again led the officers in an unsuccessful effort to find the victim's wallet. **R. pp. 1328-31; 1434-35; 1465-69.**

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[18] He claimed he left the keys in the car.

[19] On December 4, Appellant received a copy of the transcribed statement. **R. p. 1323.**

[20] Before they left, Appellant was again advised of and waived his *Miranda* rights.

[21] Appellant was being represented by counsel at the time, and the officers reminded him of this. However, he waived his right to counsel and his other *Miranda* rights when advised.

Dr. Joel S. Sexton, a forensic pathologist, performed an autopsy on Benton's body. Benton was approximately 5'8" tall and only weighed about 135 pounds. Dr. Sexton noted the presence of some postmortem animal destruction[22]. However, he found much more serious injuries that were inflicted before death. First, he found three abrasions on the bottom of Benton's chin: two were on the bottom left side and one was on the bottom right side of the chin. There was even some laceration on the left side. These wounds were premortem and had bruising underneath them. There was also subarachnoid hemorrhaging on the surface of the brain associated with these wounds,[23] and Benton's jawbone was dislocated and easily movable. These findings indicated that these were very forceful injuries. **R. pp. 1676-81; 1688-97.**

The fact that three injuries were in the same area was consistent with the perpetrator hitting the victim repeatedly with a fist in this area but the injuries could have been caused by other objects hard enough to scrape the victim's skin on impact, such as the victim's head being repeatedly thrown against an object or the victim falling on his chin. The amount of subarachnoid hemorrhaging that Dr. Sexton found generally results in unconsciousness for some period of time and could possibly result in death. Also, they would cause a headache if the victim was conscious after the blow However, other injuries in this case would have caused a more rapid death. **R. pp. 1692-97; 1701-02.**

The most extensive injuries were caused by more than sixty-four individual stab wounds to the victim's head, neck, shoulders, upper chest and left hand. **R. pp. 1679-1681; pp. 1699-1722;**

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[22] The victim's entire right hand had been destroyed by animals, as had part of the inside surface of his left upper arm and his nose.

[23] The subarachnoid hemorrhaging on the surface of the brain is generally caused by a forceful impact on the jaw. **R. pp. 1694-95.**

State's Ex. 78. Dr. Sexton found six defensive wounds on Benton's left hand and arm[24]. Although these wounds were superficial because they did not penetrate the hand, Dr. Sexton opined that (1) they were consistent with Benton using his arm and hand to protect himself from the other blows he received; (2) they would have been painful to a conscious person; and (3) Benton was conscious during the period he was attempting to shield his head[25]. **R. pp. 1697-1701; 1721-22.** The remaining wounds were primarily "on the back of the head, the left side of the head, the upper back, and the upper part of the chest, and the left shoulder. Only four of these wounds penetrated very deeply into the skin. Those wounds penetrated the lung and the vessels in the neck, and they caused internal bleeding in the chest cavity. Almost three pints of blood were in the chest. Most of the wounds in these locations had a cross-type pattern on the surface, which Dr. Sexton opined was consistent with the Phillips head screwdriver recovered at the scene. **R. pp. 1697-1722.**

Dr. Sexton counted multiple stab holes on the back of the head which penetrated through the scalp and in some cases created a cross type of imprint or depression in the skull. Many actually stuck into the skull approximately a 1/8", but did not penetrate it. Most of these wounds had star or cross markings. He found similar wounds on the left side of the head and down the left side of Benton's neck. These wounds tended to have a mark which trailed off at the edge. Dr. Sexton opined this was consistent with movement between the time the stab wound occurred and the object was pulled away. **R. pp. 1697-1722.**

A stab wound above the left ear actually penetrated the skull approximately 1". Even though

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[24] At least two wounds were on the back of the forearm, and two were on the back of the wrist. The fifth wound was on the back of his hand; and a sixth wound was on the front, upper palm of Benton's left hand, just below the thumb.

[25] He agreed with the statement that the parts of the body which have more precise movement contain more "pain receptors" than other parts of the body.

this wound did not have much hemorrhaging associated with it and did not penetrate the brain, Dr. Sexton opined it could have rendered Benton unconscious. Based upon the presence of so many wounds which did not cause severe injury to the brain and the degree of force necessary to inflict the wounds, Dr. Sexton opined Benton's head did not move much during the time they were inflicted. He further opined it would take a considerable amount of force for an object with a blunt tip, such as the Phillips head, to actually penetrate the skull. Also, the head was most probably against some surface at the time this blow was inflicted. Finally, Dr. Sexton gave detailed testimony concerning the force necessary for each of the wounds he found, the degree of pain the wounds would cause a conscious person and he opined that Benton was conscious for at least part of the attack based upon the defensive wounds and the fact all of the wounds were not in the same location. He listed the cause of death as internal bleeding or asphyxiation secondary to the stab wounds in the upper neck, chest and head. **R. pp. 1697-1722.**

ARGUMENT
I.

The trial judge did not abuse his discretion by permitting the mothers of the two 1988 Pizza Hut A.B.I.K. victims to testify concerning the injuries Appellant inflicted on their sons because this evidence was relevant to Appellant's individual characteristics and his future dangerousness.

Appellant's first claim is that the mothers of the two 1988 Pizza Hut assault and battery with intent to kill (A.B.I.K.) victims should not have testified about the injuries Appellant inflicted on their sons. The State submits the evidence was properly submitted because it shows Appellant's individual characteristics and his future dangerousness. Also, Appellant cannot show any prejudice from the introduction of this evidence.

As part of its case in resentencing, the State introduced Appellant's two September 14, 1998 convictions for A.B.I.K. and his Youthful Offender Act sentence[26]. These convictions stemmed from him savagely beating two employees of the Pizza Hut in Lexington, on March 4, 1988. **R. p. 1029; State's Ex. 6.**

The State also presented several witnesses to testified concerning the attack itself and the injuries inflicted upon the two victims by Appellant. William Mark DuBose testified that he recalled seeing "a large black male" standing over one of two white males who were lying on the pavement when he pulled into the parking lot of the Pizza Hut on March 4, 1988. He described the two white males as "motionless, apparently unconscious. There was a good bit of blood lying around both of them. They were obviously injured and were not moving." However, the black man stomped one of the motionless victims approximately three or four times. The man then got into a truck with two white males and they left the scene. For his part, DuBose fled to a nearby parking lot out of fear of

[26] He was sentenced to an indeterminate period not to exceed six years.

his own safety. **R. pp. 986-94.**

Rhonda Smith testified that she and her boyfriend were at the Pizza Hut that same night. As they were sitting at a window booth, she saw "a black male dragging a white male from the back of the Pizza Hut ... by his hair. ... The white guy was like on his back, and he was just dragging him along the ground with no effort by the white individual at all, it was strictly by the black male." Once the black male had dragged his victim to the front door of the Pizza Hut, he let go of the fistfull of hair he had been pulling, "kneel[ed] down and beat him in the face with his fists and kicked him and stomp him." **R. pp. 996-98.**

The black male punched his defenseless victim at least five or six times in the face and kicked and stomped him with his feet three or four times in the head[27]. After he stomped him for the last time, he jumped into a truck (driven by a white male) that had pulled up, and the truck drove away from the scene. Ms. Smith stayed until the police and an ambulance had arrived. While there, she saw another person laying on the ground in the back of the Pizza Hut. **R. pp. 998-1003; 1006-09.**

Apparently, Appellant raised an objection to the testimony of Sharon Brady, the mother of Pizza Hut victim Shannon Gilbert at a bench conference. *See* **R. p. 1012, ll. 6-9.** The trial judge later noted that Appellant had argued that her testimony about the extent of her son's injuries and the reaction was irrelevant. The trial judge stated that he had overruled the objection because this Court had approved the admission of such testimony. Appellant added that he contended that this was "inappropriate, victim impact type of information" which had nothing to do with the crime for which he was on trial. **R. pp. 1038-39.** He also noted that he had the same objection before the testimony

[27] The white male never moved. **R. p. 1001.**

of Helen McGough, the mother of Pizza Hut victim Aaron McGough. This was likewise overruled. **R. pp. 1038-39.**

Mrs. Brady testified that her son, Shannon Gilbert, worked at the Pizza Hut on March 4, 1988. She received a call that night from the Pizza Hut that he had been taken to the Lexington County Hospital. She later received a second call notifying her that he had been taken to the Richland Memorial Hospital because of head trauma. When she arrived at the hospital, he was unconscious and she had a hard time identifying him because of the bruises, cuts and swelling on his face and head. He remained unconscious and in the intensive care unit (I.C.U.) for thirteen days. She photographed his injuries while he was in I.C.U[28]. Even after he regained consciousness and was taken out of I.C.U., he remained in the hospital for another eleven days. He finally could walk "some." He then remained at home for five days before being sent to the Rebound Head Trauma Center in Lancaster, South Carolina, for approximately two and a half months. **R. pp. 1012-18.**

Mrs. Brady also testified that he continued to have rehabilitation and therapy after the discharge from the trauma center and they had to personally hire a tutor as well because they did not meet the time requirements for the State to provide one. Shannon needed a speech therapist. Additionally, he needed a physical therapist to help him exercise his left leg and arm, which had been affected by a fracture behind his right ear. She stated that he had not completely recovered from the beating. **R. pp. 1018-20.**

Shannon Gilbert testified that he could not remember very much of what had happened on March 4, 1988. However, he remembered getting off work at approximately 10:00 or 10:30 p.m. and going to use the phone outside the front door. While he was talking to a girl, he asked a black

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[28] See **Argument II,** ***infra.***

man who was standing there if the man needed to use the phone. When the man indicated he did, he told his fried that he had to go and call her from inside the store. The next thing he remembered was waking up in the hospital about thirteen or fourteen days later. He then corroborated his mother's testimony about the extent of his injuries and the impact it had upon him: that he was unconscious for thirteen days; that he was unable to walk or talk when he first regained consciousness; that he stayed in the hospital approximately three and one-half weeks; that he had no coordination and no strength in his left hand and left leg even after his discharge; and that he was in the head trauma center for roughly two and one-half months, where he had both speech and physical therapy. Additionally, he provided details concerning the effects that lingered from the beating, such as the lack of coordination in his left hand and left leg and the problems caused by his impaired short-term memory. **R. pp. 1018-28.**

Ms. McGough testified that her seventeen year old son, Aaron, was working his first night at the Pizza Hut on March 4, 1998. He was supposed to leave work around 11:00 p.m. and she waited up for him to come home and discuss his first day at work. However, he did not come home as planned. Instead, she received a call at approximately 11:20 or 11:25 p.m. informing her that he had been taken to the Lexington Hospital. About five or ten minutes later she received a second call and, as a result, went to the Richland Memorial Hospital. When the ambulance arrived and opened the door, he resisted the efforts of emergency medical personnel to get him out of the ambulance. **R. pp. 1031-33.**

Ms. McGough tried to speak to her son but he did not respond. Also, she indicated that she would not have recognized him if she had not known it was him because his face "was all cut up. His eyes were just little slits. His nose and his mouth ... was just all one. His forehead was all cut up." (sic). He was immediately transported to the emergency room and was treated by a neurologist

and a plastic surgeon. She next saw him in intensive care but, again, he was unresponsive when she tried to talk to him. "[H]e was just very, very, still." **R. pp. 1033-34.** Aaron remained unconscious and in I.C.U. for four days. Ms. McGough took a picture of his injuries at that time[29]. She testified that Aaron had "[n]ot really" fully recovered from the beating he received that night, and that his personality had changed from someone who was "real easy-going" to someone who quickly becomes frustrated or angry. Also, he still "has short-term memory loss." Even after he was removed from I.C.U., he stayed in a hospital room for almost a week. At home, he still had to have someone with him at all times; and Ms. McGough stayed home with him for approximately six weeks. Additionally, he was real weak. **R. pp. 1034-37.**

Appellant later unsuccessfully renewed his objection to this evidence, as well as the photographs of the two Pizza Hut victims at the conclusion of the State's case. **R. pp. 1775-77.** He also argued his objection to this testimony in the motion for a new trial. **R. pp. 2207-08,** but the trial judge denied the motion in the August 24, 2003 Order. There was no error.

The conduct of a trial, including the admission and rejection of proffered evidence, is left largely to the sound discretion of the trial judge. His exercise of such will not be disturbed on appeal unless the appellant can demonstrate that there has been an abuse of discretion or commission of legal error in its exercise, and that the rights of the appellant have been prejudiced. *State v. Sullivan*, 277 S.C. 35, 282 S.E.2d 838 (1981). In the present case, Appellant cannot meet his burden of proving either prong.

To the contrary, the trial judge's ruling was correct. S.C. Code Ann. § 16-3-20(B) provides that during the sentencing phase, "the jury or judge shall hear additional evidence in extenuation,

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[29] See Argument II., *infra.*

mitigation or aggravation of the punishment." Before a death sentence is imposed, the sentencing jury's attention must be directed to the specific circumstances of the crime and the characteristics of the person who committed the crime. *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979).

Moreover, this Court has consistently held that evidence of other crimes is admissible at sentencing phase of capital trial, including photographs of a victim. *E.g., Ray v. State*, 330 S.C. 184, 498 S.E.2d 640 (1998) (evidence of other crimes, including "gory photos" of victim, is admissible at sentencing phase of capital trial); *State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (1985) (details of defendant's prior murder convictions, including photographs of prior murder victims, were properly allowed into evidence in sentencing phase); *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984) (information concerning the details of prior offenses can be introduced during the penalty phase); *State v. Skipper*, 285 S.C. 42, 328 S.E.2d 58 (1985). *Cf. State v. Bell*, 302 S.C. 18, 32, 393 S.E.2d 364, 371-72 (1990) Here, the evidence concerned two similar crimes (A.B.I.K.) to the murder conviction for which Bennett was being sentenced. "Admission of testimony that a defendant has attempted a similar crime or crimes to that for which he is on trial is proper because such testimony indicates a defendant's individual characteristics and predisposition to commit similar crimes." *State v. Green*, 301 S.C. 347, 358, 392 S.E.2d 157, 162-63 (1990) (citations omitted)[30].

Also, this evidence, along with other evidence of his behavior while incarcerated, showed Appellant's extremely violent nature and future dangerousness. Evidence of a defendant's future dangerousness is a legitimate interest at sentencing. *Dawson v. Delaware*, 503 U.S. 159 (1992). Moreover, the trial judge gave a limiting instruction that required the jury to find that the State had proved the evidence of Appellant's bad character beyond a reasonable doubt before considering it.

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[30] Reference to this well settled authority or any acknowledgment that his argument is squarely against precedent is conspicuously absent from Appellant's brief.

This instruction also precluded the jury from relying upon evidence of these crimes to prove statutory aggravating circumstances, but insured that the jury's consideration of these offenses was limited to proof of evidence of "[Appellant}'s character and characteristics as they may bear logical relevance to the crime." He further charged the jury that they could give this evidence "whatever weight you consider proper under the circumstances of this case." **R. p. 2123, l. 4 - p. 2124, l. 2.** *Cf. Green*, 301 S.C. at 358, 392 S.E.2d at 163; *State v. Stewart*, 283 S.C. 104, 320 S.E.2d 447 (1984).

Appellant's characterization of the challenged testimony as victim impact evidence is simply wrong. This was not evidence showing the full extent of the harm caused by the defendant's actions to the victim's family and society, by showing the consequences of these actions, as permitted by *Payne v. Tennessee*, 501 U.S. 808, 824-30 (1991). Instead, it was proof of the extent of the actual injuries inflicted upon victims of the Pizza Hut attacks and was proof of the A.B.I.K.s. It is the State's position that this is consistent with the Eighth Amendment and that Appellant's contrary position lacks merit. *E.g.*, *Ray* and *Green, supra. Cf. Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("[W]e believe that in capital cases ... *the Eighth Amendment ... requires consideration of the character and record of the individual offender ... as a constitutionally indispensable part of the process of inflicting the penalty of death*") (emphasis added). Therefore, the challenged evidence was properly admitted.

Further, Appellant cannot show any prejudice from its admission. First, the limiting charge prevented the jury from considering this evidence as proof of an aggravating circumstance(s). Second, the State was obligated to prove the A.B.I.K.s beyond a reasonable doubt, and this evidence (as well as the evidence at issue in **Arguments II-III**) helped meet that burden. *Cf. State v. Riddle*, 301 S.C. 68, 71, 389 S.E.2d 665, 667 (1990) (appellant's burglary and armed robbery convictions "had no legal efficacy" at the subsequent resentencing proceeding and were not binding upon the

resentencing jury).

Third, the testimony of the mothers is largely cumulative to the testimony of Shannon Gilbert **(R. pp. 1018-28)** and there is no challenge to his testimony in this regard. Fourth, the challenged testimony pales in comparison to testimony of the extent of the injuries he inflicted upon Benton during the commission of the murder **(see "Statement of Facts," *supra*)**, as well as the testimony from the two eyewitnesses to the Pizza Hut attacks, William Mark DuBose and Rhonda Smith. **R. pp. 986-1003; 1006-09.** Finally, there was overwhelming evidence establishing the statutory aggravating circumstances found by the jury *See State v. Gaskins*, 284 S.C. 105, 127, 326 S.E.2d 132, 145 (1985) (erroneous admission of evidence in sentencing phase reviewed for harmless error).

II.

The trial judge did not abuse his discretion by allowing the State to present photographs depicting the injuries of the two 1998 Pizza Hut victims because the photographs were relevant to Appellant's individual characteristics and his future dangerousness.

Appellant's second argument is that the trial judge erred by allowing the State to present photographs depicting the injuries of the two March 4, 1988 Pizza Hut victims, Shannon Gilbert and Aaron McGough, that were taken shortly after the crimes occurred and while both victims were in intensive care. The State disagrees and submits that the photographs were properly admitted because, like the testimony challenged in **Argument I**, in they were relevant to Appellant's individual characteristics and his future dangerousness.

As discussed, Sharon Brady testified that she photographed Shannon's injuries. The photograph was taken within the first several days after he was placed in I.C.U. and represented how he looked "a day or two" after the incident. **R. p. 1014, ll. 16-25.** Over Appellant's objection that the photograph "adds nothing" to her testimony about Shannon's injuries and was intended "to inflame the jury," the trial judge allowed the photograph into evidence as **State's Ex. 5.** He found

that it was "not overly graphic or inflammatory," and that it "fairly depicts and represents the testimony of the witness ...." **R. p. 1015, ll. 1-25.** Mrs. Brady then testified that Shannon's condition had not changed between the first time she saw him after the crime and when she took the photograph, except for "the apparatus added to him." **R. p. 1016, ll. 3-16.**

When the State asked Helen McGough whether she could identify a photograph, Appellant made an identical objection to the photographs of Aaron McGough. **R. p. 1035, ll. 11-16.** However, the trial judge found that these photographs were "not so graphic or inflammatory as to cause any problems" and that they appropriately depicted Mrs. McGrough's testimony. **R. p. 1035, ll. 18-20.** Mrs. McGrough then testified that the photos depicted Aaron. She had taken them after he had been in the hospital four days Although "A lot of the swelling had gone down and you could see his eyes again, he still had a lot of swelling. Also, the photos were a fair representation of how Aaron looked at the time the photos were taken. Therefore, the trial judge allowed these photos into evidence as **State's Ex. 7**, over Appellant's objection. **R. p. 1035, l. 24 - p. 1036, l. 14.** Appellant later unsuccessfully renewed his objection to the photographs at the conclusion of the State's case. **R. pp. 1769; 1776-77.**

Notwithstanding Appellant's argument to the contrary, the State submits that the photograph were admissible under *Ray*, *Plath* and *Gaskins*, *supra*,[31] and that Appellant was not prejudiced for the reasons stated in **Argument I.** Additionally, there cannot be any prejudice from introduction of the photos because they are merely cumulative to the testimony from each mother concerning the extent of her son's injuries and his appearance. Finally, Appellant's reliance upon the non-capital cases of *State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999) and *State v. Livingston*, 327 S.C. 17,

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[31] Once again, Appellant's brief does not make any reference, whatsoever, to this well settled authority or any acknowledgment that his argument is squarely against precedent.

488 S.E.2d 313 (1987) is misplaced.

Both of those cases involved the introduction of photographs of non-capital murder victims. There is no question that the photographs and other inadmissible testimony in both of those cases would have been admissible under *Payne* in the penalty phase of a capital trial. However, the photographs in this case were not offered as victim impact evidence of Shannon and Aaron. As explained in **Argument I**, they were part of the proof of the extent of the actual injuries inflicted upon victims of the Pizza Hut attacks and proof of the A.B.I.K.s. Again, they were properly admitted under State law and the Eighth Amendment.

III.

The trial judge did not abuse his discretion by allowing the State to present evidence that Pizza Hut victim Shannon Gilbert had a dream, while he was in the hospital after the attack by Appellant, of being chased by Indians he thought were black because this evidence was relevant to Appellant's individual characteristics and his future dangerousness.

Appellant's third argument is that the trial judge erred by permitting the State to present testimony that Pizza Hut victim Shannon Gilbert had a dream of being chased by Indians, he thought were black, while he was in the hospital after the attack by Appellant. The State submits that there was no abuse of discretion because this dream was relevant to Appellant's individual characteristics and his future dangerousness. Also, Appellant was not prejudiced by admission of this evidence.

When asked if he had any consciousness about being in the hospital or any dreams that he could remember from being in the hospital, Shannon Gilbert testified that "I had a dream. I did have a dream in the hospital. It's the only one I remember, of course."Appellant objected on the grounds that the testimony was irrelevant. Over his objection, Shannon was permitted to testify that "I remember the dream. I woke up and I remember being afraid. ... It was -- Indians were chasing me trying to kill me, and the thing that I thought was they were black. And later on -- or after years

have gone by I've maybe even though, well, there might have been a link. You know, that I was remembering something about trying to get away from someone." **R. p. 1027 l. 17 - p. 1028 l. 13.**

At this point, Appellant stated "I renew my motion. I move that it be stricken. That's irrelevant." The trial judge noted his motion, but denied it. **R. p. 1028 ll. 15-17.** On cross-examination, Appellant established that "[t]here were two other white guys involved" in addition to he and Aaron McGough; but, he did not remember the fight initially between the "white guys." **R. p. 1030 ll. 11-22.**

In an *in camera* hearing after Mrs. McGough's testimony, Appellant stated that he had objected to any testimony about the extent of the injuries suffered by the Pizza Hut victims as inappropriate victim impact evidence. He renewed this motion with respect to Shannon's testimony at issue in this argument. He also asserted that this motion supported his previous motion to have a black juror remain seated even though the individual had indicated he may not be fair and impartial. Appellant claimed that the testimony by Shannon had "no importance" and no relevance "except to inflame a white jury." He asserted this was a gross violation of his rights to interject race. The trial judge denied the motion and found that Shannon had "testified just to what his impressions were of the dream that he had." **R. pp. 1039-41.**[32]

Appellant renewed his objection at the close of the State's case and argued that Shannon's testimony improperly inserted race into the proceedings in light of the fact he had an all-white jury. **R. p. 1769 ll. 18-23.** The trial judge, again, denied his motion. **R. p. 1776 l. 21 - p. 1777 l. 13.**

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[32] This motion was predicated upon the trial judge's excusing for cause black male juror Thomas W. Brown (*see* **R. pp. 144-55; 820-24**) when he indicated, after jury selection, that he could not be fair and impartial because of his familiarity with the victim's family. Appellant suggested that he should be allowed to remain as a juror so that Appellant would not be tried by an all-white jury. The trial judge, however, rejected his arguments (**R. pp. 867-85**) and Appellant has not raised any issue on appeal concerning this ruling.

Appellant renewed his objection in support of his motion for a new trial. **R. pp. 2363-80.** The State responded thereto. **R. p. 2381-2406.** The trial judge denied the motion for a new trial and expressly rejected this argument in his August 24, 2003 Order. **R. pp. 2407-2435.** On pages 9-10 of his Order, the trial judge rejected Appellant's argument as follows:

> "The comment of "black indians" was not illicited by the State, was mentioned only once, was evidence of the Defendant's violent character and the impact of that violence on the victims, was not referred to thereafter by the State, was not a blatant racial reference, and did not prejudice the Defendant. I, therefore, find this isolated comment does not warrant a new trial."

Initially, the State submits that Shannon's testimony was properly admitted for the reasons set forth in **Arguments I - II,** ***supra.*** Instead of being victim impact evidence of other, unrelated prior offenses,[33] Shannon's testimony constituted some proof of the identity of his attacker and, more significantly, was admissible as a circumstance of the prior crime bearing on Appellant's culpability. As such, it was properly admissible. *See People v. Marks*, 72 P.2d 1222, 1241 (Cal.2003), *cert. denied*, 541 U.S. 1033 (2004) (agreeing with trial court's rejection of any distinction between an injury and the result of that injury, finding that there was a basis for introducing some videotaped evidence of unrelated gunshot victim's condition, and holding that any error in introduction of lengthy videotape was harmless); *People vs. Holloway*, 91 P. 3d 164, 195-96 (Cal. 2004) (concluding that testimony of prior, unrelated victim's emotional trauma years later, which resulted from the defendant's assault with a deadly weapon, was properly admitted because the link between the attack and the emotions and actions to which she testified was direct and foreseeable), cert. denied, 125

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[33]Appellant's characterization of the dream testimony as victim impact evidence is incorrect. This was not evidence showing the extent of the harm caused by the A.B.I.K. to Shannon's family or the community, such as that approved in *Payne* and this Court's decision adopting it as law of South Carolina. Rather, this is evidence of the injuries inflicted upon Shannon.

S.Ct. 1302 (2005)[34]. Moreover, the State submits that very similar testimony was presented in the penalty phase in *Bell, supra.* Even if the Court were to view it as victim impact evidence of unrelated offenses, this evidence was properly admitted. *Id. See also People v. Garceau,* 862 P. 2d 664 (Cal. 1993) (federal constitution does not bar introduction of evidence showing effect of prior violent criminal activity of victims); *People v. Mickle,* 814 P. 29 290, 316-17 (Cal. 1991) (In Banc) (admission of evidence concerning impact of defendant's prior sexual assaults on victims during penalty phase of capital murder trial did not violate the Eighth Amendment because the evidence concerned obvious emotional effect of defendant's prior sexual molestations on victims and were admissible as circumstances of the prior crimes bearing on the defendant's culpability)[35].

Even assuming *arguendo* that the Court finds that Shannon's testimony was improperly admitted, Appellant was not prejudiced by its introduction. To the contrary, the trial judge properly found that the challenged testimony was not prejudicial. First, the dream was only mentioned once by Shannon. It was never mentioned again by the State in closing argument. ***See* R. pp. 2053-81.** Thus, the challenged evidence only constituted thirteen lines of testimony in a transcript that was 2,159 pages long.

Second, the challenged testimony "was not a blatant racial reference." **Order, R. pp. 2415.** It was merely Shannon's impression of his own dream. Third, and as with the evidence at issue in **Arguments I - II,** the testimony concerning Shannon's dream is far less prejudicial than testimony about the extent of the injuries Appellant inflicted upon Benton during the commission of the murder

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[34] California's death penalty law permits evidence of prior violent offenses, much like South Carolina. *See* West's Ann. Cal. Penal Code §190.3(b).

[35] The Court in *Mickle* held that *Booth v. Maryland,* 42 US 496 (1987) was not implicated by evidence or argument mentioning the obvious emotional effect of the defendant's prior sexual molestations of the victims.

(See **"Statement of Facts,"** ***supra***), and the testimony from the two eye witnesses to the Pizza Hut attacks, Mr. DuBose and Ms. Smith. **R. pp. 986-1003; 1006-09.** Fourth, there was overwhelming evidence of the statutory aggravating circumstances, even though much of it was circumstantial. Finally, the limiting charge given by the trial judge precluded the jury from considering this evidence proof of an aggravating circumstance (in essence) and limited the jury's consideration of this evidence to Appellant's general character. **R. pp. 2123-24.** As a result, any error introducing this evidence is non-prejudicial to Appellant and he is not entitled to a reversal based thereon. *See State v. Gaskins*, 284 S.C. at 127, 326 S.E.2d at 145 (erroneous admission of evidence in sentencing phase reviewed for harmless error); *People v. Dunlap,* 975 P. 2d 723, 744-46 (Colo. 1999) (En Banc) (holding that erroneous admission of victim impact evidence concerning unrelated prior crimes was harmless beyond a reasonable doubt).

IV.

The trial judge did not err by denying Appellant's mistrial motion based upon the Solicitor's cross-examination of defense witness Byron Collins as to whether he remembered Appellant's lover, prison guard Judie Hardee, merely because the Solicitor referred to her as a "blonde haired lady" since this did not improperly inject the issue of race into the trial.

Appellant's fourth argument is that the trial judge improperly denied his motion for a mistrial based upon the Solicitor's cross-examination of inmate Byron Collins as to whether he remembered Appellant's lover, prison guard Judie Hardee, because the Solicitor referred to her as a "blonde haired lady." The State submits that the mistrial motion was properly denied since the issue of race was not improperly injected into the trial merely because the prosecution sought to establish whether Collins knew the guard.

As part of its case in the resentencing proceeding, the State presented extensive evidence of Appellant's violent and dangerous behavior while incarcerated (***See* Argument V, infra**) as well as

evidence that he was able to manipulate correctional officers and do as he pleased while he was incarcerated. For instance, he was suspended from school while serving his Youthful Offender Act sentence at the Broad River Correctional Institution on several occasions because he missed school.[36] On one occasion, he ostensibly left class to go to the library and get a book but, instead, went to the movie room. **R. pp. 1093-1101.** However, more serious infractions occurred while he was incarcerated in the Lexington County Detention Center and as a safekeeper within the Department of Corrections. This include being in possession of a cigarette, which was deemed contraband **(R. pp. 1499-1500)**; and admittedly conspiring with correctional officers to have cigarettes, marijuana and crack cocaine smuggled into LCDC.[37] **R. pp. 1506-15; 1511-12; 1522-23.** In the course of this investigation, he told investigators that guards were "getting him to take care of other inmates," such as white inmates who referred to black correctional officers in a racially pejorative manner. They would bring the offending inmate into Appellant's cell and Appellant would beat up the inmate. He was used in this role as a "enforcer" with both black and white inmates. **R. pp. 1515-17.**[38]

However, one of the most egregious violations he committed which did not involve either possession of a weapon or violent or disrespectful behavior, involved Ms. Hardee. James Edward

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[36] His sentence was extended for one month on two occasions, he was placed on "deadlock" for one weekend (meaning he could not leave his cell) and other disciplinary measures were taken.

[37] Appellant gave a statement to investigators in June 1992, in which he provided the names of different officers who were bringing cigarettes into the jail and explained that he was paying the officers approximately $150 for a carton of cigarettes. He would then turn around and sell each cigarette for $2.00 a piece to other inmates in the facility. He was thus making approximately $400 off of selling cigarettes. Appellant also provided investigators with information that a guard was bringing in marijuana which he would then sell to other inmates. He was also being provided with crack cocaine "for his own personal use." **R. pp. 1506-15; 1511-12; 1522-23.**

[38] As LCDC Correctional Officer Sharon McChesney testified, Appellant "liked to explain why it was not his fault," and he always managed to blame someone else. **R. p. 1545.**

Green is a criminal or with In a 1997 investigation by SCDC investigators into charges that Appellant had sex with a visitor while he was incarcerated as a safekeeper at SCDC, Appellant gave statements in March and April 1997 admitting that he and Judie Hardee had "intimate sexual relationships at L.C.D.C. and here at S.C.D.C.;" and that correctional officers had allowed this to occur. He also explained that Hardee "had been visiting me while I was a safekeeper since I've been at S.C.D.C." **R. pp. 1599-1602.**

Inv. Green testified that Hardee was a deputy at LCDC and visited Appellant while he was at SCDC. Her visitation privileges were suspended indefinitely after the investigation. He was able to have sex with her even though he was in the most secure facility in SCDC, death row. The investigation revealed that Appellant had made approximately four hundred telephone calls to her residence between the middle of December 1996 and early March 1997. Although Hardee was originally on his visitation list, her visitation privileges were indefinitely suspended in March 1997. **R. pp. 1602-03; 1609; 1617-21; 1626-29.**[39]

Appellant presented inmate Byron Collins as part of his case in mitigation[40]. Collins testified that he was incarcerated at LCDC in June 1991 and attempted to hang himself on June 14 because he was facing a possible death sentence or sentence of life imprisonment for murder in North Carolina. When he regained consciousness, Appellant was over him. After he returned to LCDC from the hospital, he was later placed in a cell with Appellant. He testified that Appellant was very instrumental in helping him recover from depression and encouraged him to read the Bible. **R. pp. 1974-78.** On re-direct examination, he testified that "all the guards and everybody in the prison

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[39] In 1999, Appellant wrote officials at Lieber Correctional Institution and sought to have her visitation privileges reinstated and they ultimately were on April 18, 2000. **R. pp. 1631-43.**

[40] Collins was incarcerated at the time of the resentencing. **R. pp. 1974-75.**

loved John Bennett." **R. p. 1979, ll. 15-15.**

On recross-examination, the following exchange occurred:

Q: There was one guard that loved Johnny Bennet and that was Judie Hardee, you remember her?
A: The real big lady?
Q: Judie Hardee, you remember her. The blonde-haired lady?
Mr. Floyd: Your Honor - -
A: She was a real big lady.
THE COURT: Wait a minute. Don't answer the question. If you know who she was, you can answer the question.
A: It's been a long time.
THE COURT: Listen to me. If you don't know you can say you don't know.
A: I don't remember.

R. pp. 1979 l. 22 - 1980 l. 10. At this point, Appellant moved for a mistrial based on prosecutorial misconduct, but the trial judge denied his motion. **R. p. 1980 ll. 11-13.**

Appellant later argued his mistrial motion *in camera*. He maintained that the State had attempted to inject race into the case on several occasions because there was an all-white jury and a black defendant. He asserted that this was another effort by the Solicitor to inject race and to inform the jury that Appellant had an interracial relationship. The Solicitor noted that a black female juror, Ms. Sands, had blonde hair when she testified during the *voire dire* and denied that he was attempting to inject race into the trial. "The only thing I referred to was blonde-headed." The trial judge denied the motion. He found that the witness had started off by indicating that he did not know who the guard was, and that the reference to blonde hair did not necessarily mean that Hardee was "a white woman." **R. pp. 2012-15.**

Appellant renewed his motion after the defense had rested, but the trial judge again denied the motion. **R. pp. 2037 ll. 13-22.** Appellant later included his mistrial motion as part of his motion for a new trial, which was briefed by both parties. **R. pp. 2363 -80.** However, the trial judge denied his motion in the August 24, 2003 Order. The trial judge specifically found that the Solicitor's

question did not improperly inject race into the trial of the case. **R. p. 2417.**

A trial judge's ruling on the proper scope of cross-examination will not be disturbed absent a manifested abuse of discretion. *State v. Mitchell,* 330 SC 189, 498 S.E.2d 642 (1998). Also, the granting of a motion for a mistrial is an extreme measure that should "only be granted when "absolutely necessary," and a defendant must show both error and resulting prejudice to be entitled to a mistrial." *State v. Stanley,* 365 SC 24, ___, 615 S.E.2d 455, 460 (2005). "Whether a mistrial is manifestly necessary is a fact specific inquiry." *State v. Rowlands,* 343 SC 454, 457, 539 S.E.2d 717, 719 (Ct App. 2000).

Here, the trial judge's ruling must be affirmed because the State did not impermissibly interject race into the case. There was absolutely no testimony, whatsoever, as to Ms. Hardee's race. Merely referring to her as a "blonde-haired lady" did not convey that she was whit or otherwise impermissibly interject race. As the Solicitor correctly noted, at least one black *venire* woman (Ms. Sands) had blonde hair. It is equally plausible that Ms. Hardee could be black or a member of some other ethnic group. To suggest otherwise ignores that it is extremely common today for women (and men) to color their hair.

Second, the Solicitor was engaged in a proper line of inquiry with the witness and was merely trying to establish whether or not the witness, who had previously testified that all the guards loved Appellant, remembered the one guard with whom Appellant was able to have sex, both at LCDC and while on death row. Indeed, Appellant's mistrial motion misunderstands the truly prejudicial nature of the relationship. The relationship isn't prejudicial because it is interracial. Rather, it is prejudicial to Appellant because it shows that he was so manipulative that he was able to have sex with a guard in the facility where he was incarcerated and continued to have sex with her *even after he was placed in the supposedly strict confines of death row*!

Moreover, Collins' reference to "a big lady" did not necessarily reflect that he recalled Hardee since a number of female officers could possibly fit that description. Even if the State's cross-examination did identify her as Caucasian, however, there still was no prejudice. Race simply did not factor into the case. The defendant is black as was the victim, his family and many of the officers involved in the investigation. Appellant's argument also ignores that the witness could have been asked to identify Hardee had she been present in the courtroom or she could have been presented as a hostile witness. Moreover, his motion presupposes racial prejudice on behalf of the jury where there is absolutely no evidence to support it. Worse, it further assumes that each juror lied on *voir dire* when he or she swore he or she could be fair and impartial to both parties.[41]

Finally, his argument presupposes that the jury ignored the trial judge's instructions that they could only impose the death penalty if they first found the existence of a statutory aggravating circumstance beyond a reasonable doubt and that

> "You have taken an oath and you have sworn to try this case fairly and impartially and to give both sides a fair and impartial trial. You must not base your verdict, your sentence on any form of caprice or prejudice for or against any party or any excessive emotions for or against any party.
>
> You must make a dispassionate analysis of the record, in other words, the evidence that you've received and based on that you must decide the sentence. You have no friend to reward, you have no enemies to punish. You must give both sides a fair trial in determining your sentence."

R. pp. 2106-40. R. p. 2139 l. 23 - p. 2140 l. 8. Because jurors are presumed to have followed their instructions, Appellant's argument must be rejected. *See Foye v. State,* 335 SC 586, 518 S.E.2d 365 (1999).

V.

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[41] ***See*** **R. pp. 85-90; 133-78; 186-97; 236-66; 323-35; 400-10; 425-36; 478-510; 531-45; 641-56; 694-705.**

Assuming *arguendo* that Appellant's argument is not procedurally barred by his failure to make a contemporaneous objection, the trial judge properly denied his motion for new trial based upon the State's closing argument because he cannot show how the challenged comments deprived him of a fundamentally fair trial.

Appellant next contends that the State's closing argument deprived him of a fundamentally fair trial because the Solicitor stated that Appellant had dragged one of the Pizza Hut victims by his hair "like an old cave man," and that a sentence of life imprisonment would cause Appellant to revert to his violent behavior and "[m]eeting him again will be like meeting King Kong on a bad day." **R. pp. 2062; 2079**. However, Appellant's argument is procedurally barred because he did not interpose any objection to the Solicitor's closing argument, whatsoever, until he made his motion for a new trial. Even assuming that his argument is not procedurally barred, he still cannot show how the State's closing argument deprived him of a fundamentally fair trial because the Solicitor's comments were a fair comment upon the evidence presented at trial as well as its reasonable inferences, were in anticipation of arguments by the defense and did not improperly interject race into the trial.

One of the key issues in the sentencing proceeding was whether or not Appellant would be a danger in the future if incarcerated. The State had presented a great deal of evidence reasonably tending to show that Appellant began bullying and trying to intimidate others with his physical size beginning in the fifth grade and continued in this type of behavior until he was finally expelled in the tenth grade. At some point, he began trying to intimidate teachers as well, and he developed a pattern of disrespecting authority and attempting to shift blame to others. **R. pp. 920-70; 970-86; 1069-75**. This continued even after he was incarcerated on the Youthful Offender Act sentence. **R. pp. 1093-1101.**

As discussed in **Arguments I - III**, both eyewitnesses to the March 4, 1998 attack at the Pizza Hut testified that they saw a black man attacking a white man, who was not defending himself,

in the parking lot. Ms. Smith testified that the black man (whom we now know to be Appellant) pulled this defenseless victim by the hair and drug him across the parking lot to the front door of the Pizza Hut. He then stomped and beat his defenseless victim. **R. pp. 986-1003; 1006-09.**

Obviously the jury could see Appellant's size. Further, the State presented testimony from a life-long friend that he was approximately 6' 5" or 6' 6" tall and weighed 300 pounds. **R. p. 1266 l. 13-16.** Other witnesses also described him as very big. On the other hand, Benton Smith (the victim) weighed a paltry 135 pounds and was approximately 5' 8" tall. Dr. Joel Sexton, the pathologist, described his as being of slender build. **R. pp. 1680-81.**

As part of its showing of future dangerousness and his violent character, the State also presented testimony from various employees within LCDC and SCDC concerning dangerous, violent, disrespectful or disruptive behavior in which he repeatedly engaged while in jail or prison. On various points in his incarceration, he was found in either immediate or constructive possession of a shank **(R. pp. 1482-83)**; a metal flap **(R. pp. 1488-89)**; a metal rod **(R. pp. 1504-05)**; a portion of a light fixture **(R. pp. 1483-84)** and clay. Clay is dangerous because it can be used to make a duplicate key or jam the locks to the cell. **R. pp. 1561; 1563-64.** On another occasion he was found in possession of a smoking pipe. **R. pp. 1552-53.**

He once flooded his cell and the wing in which it was located with water. **R. pp. 1493-96.** On yet another occasion, he sprayed shaving cream over surveillance cameras in the jail. **R. p. 1496.** There was also testimony concerning his repeated refusal to obey directions from officers or disrupting officers attempting to perform their duties. **R. pp. 1076-78; 1488-89; 1496-1500; 1526-41; 1544-45; 1547-71.** In addition to being an "enforcer" for certain officers at the jail and beating up inmates there **(R. pp. 1515-17)**, he was involved in at least four other fights with other inmates. **R. pp. 1076-81; 1086-90; 1489-93; 1526-41; 1565-68.**

Sharon McChesney, a correctional officer at LCDC in 1993, testified that on July 23, 1993, Appellant attempted to force his way into the cell of inmate Dougins when Officer McChesney attempted to give medication to Dougins. Appellant picked up the 5' 4" McChesney, moved her out of the way, dragged Dougins out of his cell by his hair, he threw Dougins on the cement floor and pounded Dougins' head into the floor.[42] When an inmate Glover made a comment to him that he was going to kill Dougins, Appellant turned as said "you better back the hell off." ***See*** **R. pp. 1526-37.**

Captain Adrian Bost, the jail administrator in 1990-93, testified that Appellant had seventy or more disciplinary violations while at LCDC. Captain Bose testified that in his career, Appellant was "one of the most intimidating, violent, disrespectful and disorderly inmates you would ever, ever want to deal with. [He] used his size to intimidate people ... ." Attempts to counsel him on this failed and "he always used his size to push [both officers and inmates] around." **R. pp. 1548-49; 1570 l. 14 - 1571 l. 5.** Warden Willie Weldon, warden of Lieber Correctional Institution, testified on cross-examination that he had not received information about Appellant disrespecting or having any disciplinary problems at his facility **(R. pp. 1638-39)** but stated on redirect that he received a request form from Appellant dated May 27, 1997 **(State's Ex. 66)**, in which Appellant acknowledged that "anything in my jacket could very well have an impact on me when I go back to Court." **R. pp. 1644-45.**

Appellant's witnesses, quite obviously, painted a different story. Aside from Collins' claim that all the guards loved him at LCDC **(R. p. 1979)**, Appellant presented expert and lay testimony

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[42] Officer McChesney described Dougins as a "little shorter" that Appellant but stated that he was "a skinny little thing. He ... was not a big man ... ." Also, Appellant prevented Officer McChesney from radioing for assistance every time she attempted to do so. **R. pp. 1532-33.** Also, Officer McChesney's efforts to physically stop him did not work.

that he could adapt to prison life and that SCDC could adequately and safely confine him; that he was no longer a violent, disrespectful or disruptive inmate; that he would follow the rules and orders; and that he was very involved in the prison ministry. **R. pp. 1789-1803; 1864-69; 1873-82; 1889-1903; 1910-34; 1980-2012.** The various lay witnesses, many of whom were correctional officers or otherwise came into contact with him while he was incarcerated at SCDC variously referred to him as "a model inmate" **(R. p. 1795)**; "very polite" and "easy-going" **(R. p. 1867)**; "[r]espectful" **(R. p. 1877)**; "a mediator" who explained rule changes to other inmates **(R. pp. 1893-94)**; someone who was "very compassionate for others" **(R. p. 1915)**; a "[b]ig teddy bear" **(R. p. 1921)**; someone who had a "very positive attitude toward everything" and was "more of a big brother type" **(R. p. 1927)**; and "a gentle giant." **R. p. 1929.**

It was against this backdrop of evidence that the Solicitor made his comments that are challenged on appeal. While summarizing Appellant's violent behavior at the Pizza Hut and the incident involving inmate Dougins, the Solicitor made the following comments:

> "I don't know whether it was the black lady that was inside eating with her boyfriend or the tall white boy that was outside that drove through, said that ... Johnny was even pulling one of them by the hair. Kind of like an old cave man, dragging him by the hair. Then the guy was motionless."
>
> "Same thing happened in jail over there to Mr. Dougins when he went in that cell moved that female guard out of the way and he dragged Mr. Dougins out by his hair."

R. pp. 1062 ll. 12-23.

The Solicitor pointed out, without objection, that, like much of Appellant's violent past, it supposedly was not Appellant's fault and focused upon his documented history of shifting blame to other people. Later, the Solicitor discussed the conflicting portraits presented to the jury as to Appellant's future dangerousness in prison. He reviewed the extensive showing by the State that

Appellant was a violent, disrespectful, disruptive and manipulative inmate; and he juxtaposed this against the showing made by the defense. He urged the jury to reject the defense's showing based upon Appellant's comment in May 1997 that "anything in my jacket could very well have an impact on me when I go back to court." **R. pp. 2074-78.**

He then made the following comments, again, without objection:

> "You give him life, the real Johnny will come back. You give him life and he will come back out. Meeting him again will be like meeting King Kong on a bad day. Vile Johnny. Mean Johnny. Manipulating Johnny. Murderous Johnny. You give him life, those guards better button up their vests because he's coming back out in force.
>
> Because he's got what he wants. He's got the people to testify, trying to pull the wool [] over his eyes, trying to pull the wool [] over your eyes. Being smart, being intelligent, being manipulative and being a con man, that's a dangerous combination. That's an explosive combination wrapped up in him, all six-foot-seven, 300 pounds of him. And that's for you to decide."

R. p. 2079 ll. 2-14.

Appellant did not object either at the conclusion of the State's argument **(R. pp. 2082)**, after the argument of Appellant and defense counsel **(R. pp. 2105)** or at any point thereafter even after the sentence had been imposed. ***See*** **R. pp. 2106-59.**

He first raised this in his post-trial motion for new trial. **R. p. 2363-80.** The State responded to his allegations as well. **R. p. 2381-91.** After holding a hearing on his new trial motion, the trial judge took the matter under advisement. **R. p. 2161- 2214.** Subsequently, the trial judge issued his Order denying Appellant's motion. The trial judge specifically relied upon Appellant's failure to contemporaneously object to either portion of the State's closing argument, in addition to making findings that the State's closing argument was proper and invited by the argument and evidence presented by the defense. **R. p. 2417-23.**

Initially, the State submits that Appellant's argument is procedurally barred because he did not make a contemporaneous objection. A party "may not take his chance of a favorable verdict and, after an unfavorable one, raise an objection that should have been made before the verdict was rendered. *State v. Mayfield,* 235 SC 11, ___, 109 S.E.2d 716, 724 (1959). Moreover, Appellant's failure to object contemporaneously cannot be bootstrapped by his subsequent motion for a mistrial. *State v. Lynn,* 277 SC 222, 226, 284 S.E.2d 786, 789 (1981). Appellant recognizes the absence of an objection but maintains, as he did in his motion for new trial, that counsel did not hear the comments because the challenged comments were made on the far side of the courtroom and in a hushed tone. However, the State submits that this excuse is not credible (both because the Court Reporter clearly heard it, and because it is impossible to believe that Appellant and both attorneys - not to mention any staff assisting with the defense - did not listen closely to every syllable of every word said by the Solicitor in light of the numerous times his death penalty closing arguments have been challenged on appeal) and, more importantly, should not excuse the failure to object.

Appellant also relies upon this Court's decision in *Toyota of Florence, Inc. v. Lynch,* 314 SC 257, 263-64, 442 S.E.2d 611, 615 (1994), where this Court held that a new trial should have been granted because "viscous comments, inflammatory argument result[ed] in clear prejudice." However, in *Dial v. Niggel Associates, Inc.,* 333 SC 253, 256-60, 509 S.E.2d 269, 271-72 (1999), this Court made it clear that, under *Toyota* and the line of cases preceding it, the failure to contemporaneously object is only excused where the challenged argument constitutes an abuse of a party or witness and was a surprise to the non-objecting party. The Court has also declined to apply *Toyota* in a criminal case. *See State v. Kennerly,* 337 SC 617, 524 S.E.2d 837 (1999). It is respectfully submitted that Appellant cannot show either surprise or an abuse of him by the State's argument and the absence of a contemporaneous objection bars this Court's review of his argument.

Even assuming *arguendo* that the issue is properly before the Court, there was no error. The propriety of a closing argument must be viewed in the context of the entire record. Once a trial judge allows an argument to stand, it is the defendant's burden to show that the argument deprived him of a fundamentally fair trial, viewed in the context of the entire record. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974). *See also Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *State v. Durden*, 264 SC 86, 96, 212 S.E.2d 587, 590 (1975); *State v. Shuler*, 353 S.C. 176, 577 S.E.2d 438 (2003). Applying this criteria to the case at bar, it is clear that Appellant did not meet his burden of proof.

First, there was no impropriety in the reference to "King Kong," and Appellant's contrary argument takes the comment out of context. It was simply not an appeal to racial prejudice.[43] From the State's opening statement throughout the trial and closing argument, the State repeatedly emphasized the disparity in the size of the mammoth Appellant and the slightly built victim, as well as Appellant's violent, manipulative and self-centered character. Without objection, the State used cardboard figures to emphasize the disparity in sizes. Obviously, the differences in size and strength are relevant to proof of the statutory aggravating circumstance, physical torture, as correctly found by the trial judge's Order. *See State v. Davis*, 309 SC 326, 349-50, 422 S.E.2d 133, 147-48 (1992) (disparity between the ages and physical condition of the parties is relevant to establishing an aggravated battery, an essential finding for the statutory aggravating circumstance of physical torture), *overruled on other grds.*, *Brightman v. State*, 336 SC 348, 520 S.E.2d 614 (1999).

As the trial judge correctly reasoned, the State did not compare Appellant, personally, to King Kong; but compared his size and his history of violent acts and destructiveness of King Kong. This

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[43] At least one defense attorney suggested that his black client, on trial for aggravated rape could have told officers "he was King Kong" when asked for his identity because he did not have any identification on him. *Watkins v. State*, 698 S.W.2d 698, 700-01 (Tex. Ct. App. 1985).

history includes repeated examples of his proclivity to viciously and savagely attack persons who are defenseless to someone of his size. To suggest otherwise, again, ignores the context in which the Solicitor's argument was made and flies in the face of the United States Supreme Court's admonition that "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *See Donnelly*, 416 U.S. at 647.

Further, the comment was only made once and there was no objection. Also, at the outset of the resentencing, the trial judge explained that jurors were to base the sentence imposed only on the "evidence" presented. He defined "evidence" as jurors "the testimony of the witnesses who come to testify plus any exhibits that come in through those witnesses. He further explained that the arguments of counsel were not evidence. **R. pp. 897-98**. He also later charged them that they had to render their verdict fairly and impartially, and that they "must not base your verdict, your sentence on any form of caprice or prejudice for or against any party or any excessive emotions for or against any party." **R. pp. 2106-40**. *See Darden*, 477 U.S. at 182-83.

Moreover, this comment was invited by Appellant's evidence and argument, including the references to him as "a gentle giant" and a "teddy bear", as well as the other references to his mild-mannered demeanor discussed, *supra*. Because the Solicitor was forced to anticipate the arguments of counsel, it cannot be shown how his comments deprive Appellant of a fundamentally fair trial under *Donnelly*, particularly where the defense did argue the evidence that had previously established in mitigation. *Id.* at 181-82. Thus, the challenged comment "properly described the circumstances surrounding the murder, the character and violent background of the Defendant, his disregard for prison and regulations, the actions of the Defendant if given a life sentence, to counteract defense evidence and argument, was an invited response, [and] emphasized the tremendous size and strength

of the Defendant... ." **R. p. 2419.**

Finally, the authority from outside this jurisdiction cited by Appellant does not have any application to the facts of this case. In particular, he relies upon *State v. Blanks*, 479 N.W.2d 601, 604-05 (Iowa Ct. App. 1992), a case involving the conviction of a black defendant for one count each of willful injury, assault with intent to commit serious injury, assault resulting in bodily injury, and simple assault. One of his victims was his former girlfriend, who was white. In closing argument, the prosecuting attorney cited to the movie "Gorillas in the Mist." The Iowa Court of Appeals found that this had deprived the defendant of a fair trial[44]. However, race did not play any part in the prosecution of this case despite Appellant's repeated efforts to inject it. The victim, his family, the three officers investigating the case and Appellant were all black, as were many witnesses. As the Solicitor observed at the hearing on Appellant's motion for a new trial, "over 55 percent" of the State's witnesses were black. **R. pp. 2172-73.**

Thus, even if the Court disapproves of the choice of the phrase "King Kong," the use of this expression did not deprive Appellant of a fair trial. *See Darden*, 477 U.S. at 181-84 (although prosecutor's characterization of habeas corpus petitioner as an "animal" in closing argument was improper, remark was not so prejudicial as to deprive the petitioner of a fair trial because the reference to the defendant as an "animal" was "invited by or was responsive to the opening summation of the defense [counsel]," who had used the term in his closing to characterize the

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[44] In "Gorillas in the Mist," the young white woman stands alone against black African hunters, who ultimately murder her. The Court reasoned that "In this case, likewise, there is a single white woman. She is allegedly attacked and beaten by a black man. In the end, the black men allegedly beat several others who attempted to come to her rescue. Given the parallels between the movie 'Gorillas in the Mist' and the present case, we believe the use of the movie to illustrate the prosecutor's point was prejudicial" because it "could have been interpreted by the jury as having racial overtones." The Court concluded that "[b]y his allusion, the prosecutor brought before the jurors a myriad of other factors not previously present. " *Id.*

allegedly unknown perpetrator of the crime; the prosecutor's argument "did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused;" the trial judge charged jurors that their decision was to be based only on the proof, and that arguments of counsel were not evidence. The Court also reasoned that the strength of the evidence against the petitioner made it less likely that the prosecutor's argument influenced the jury; and that defense counsel used the opportunity for rebuttal very effectively, placing the prosecutor's comments and actions in a light more likely to engender strong disapproval, than to inflame passions against petitioner). *Id* at 182-83[45].

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[45]Other Courts have found similar remarks to be proper based on the record or not so prejudicial as to require a new trial *See Clonts v. State*, 260 Ga. App. 143, 579 S.E.2d 1 (Ga. App. 2002) (statement by prosecutor during closing argument describing defendant as a "two hundred and forty pound goon, beast," did not warrant declaration of mistrial in sodomy prosecution; defining bounds of closing argument is within court's discretion); *Harris v State,* 537 So.2d 1325 (Miss 1989) (defendant was not entitled to a reversal of his rape conviction, although the prosecutor may have acted improperly by "apologizing" to the "animal kingdom" in closing argument for having called the defendant a "savage animal" in his opening statement, where evidence was introduced that the defendant broke into a home, raped two teenage sisters at gunpoint, beat one girl on the head with his pistol and stabbed her over 20 times with a barbecue fork, and beat the other girl in the head with the butt of a shotgun until it splintered into pieces); *State v. Wilson*, 269 A.2d 153 (N.J. 1970) (prosecutor did not commit reversible error when he referred to the murder defendant in closing argument as "this, the lion, or the wounded bear . . . whatever animal type he is partaking in now," where the remark was apparently made in response to defense counsel's preceding summation, in which he used numerous metaphorical references to animals to contrast the supposedly docile defendant with his alleged accomplice, who actually pulled the trigger. The Court reasoned that in view of the context in which the prosecutor's remarks were made, and defense counsel's failure to object thereto, it could not be said that the jury's ability to rationally evaluate the evidence was impaired). *See also People v Baker*, 207 Cal. App.2d 717, 24 Cal. Rptr. 691 (Cal. App. 1962) (prosecutor did not reversibly err in closing argument when he characterized the defendants as "animals," where the use of this term fell within the wide range of descriptive comment allowed to prosecuting attorneys when warranted by the evidence; and the term "animals" was used metaphorically in referring to the defendants' admitted ability to perform sexual acts before spectators and to portray them as appearing differently at trial than they did when they were in the "jungle," a term used by both sides to describe the part of the city in which the offense was committed); *People v Butler*, 78 Ill App.2d 479, 223 N.E.2d 431 (Ill App. 1967) (prosecutor's reference to the defendant in summation as a "beast," in a trial on rape charges, was not reversibly prejudicial).

Likewise, the reference to Appellant dragging one of the Pizza Hut victims by his hair like a cave man did not deprive him of a fair trial. Rather, it was a fair comment on testimony from Ms. Smith and did not interject race into the case. As found by the trial judge, the argument also supported the State's Notice of Evidence in Aggravation of the Punishment. ***See* R. pp. 2420-21.** Moreover, it negated the charged statutory mitigating circumstance that Appellant did not have a significant history or prior criminal convictions involving the use violence against another person. Finally, the trial judge properly found that the comment was an invited response to Appellant's evidence and argument that he had changed from a violent, disrespectful person to someone who was a gentle, model prisoner. Again, the challenged argument emphasized Appellant's use of his strength and size on defenseless victims, as well as his prior viscous criminal history. As such, it did not appeal to prejudice and did not deprive Appellant of a fundamentally fair trial. **R. pp. 2421.** *Donnelly, supra; State v. Patterson,* 324 SC 5, 482 S.E.2d 760 (1997); *State v. Singleton,* 284 SC 388, 326 S.E.2d 153 (1985).

VI.

The trial judge properly ruled that Appellant could not ask *veniremen* whether they would give up their vote in order to "go with the majority."

Appellant's final claim is that the trial judge erroneously refused to permit him to question jurors as to whether they would stick to their decision or go along with the majority, even if they thought a life sentence was appropriate but the other jurors wanted to impose the death penalty. The State disagrees and submits that there was no error.

During the first trial, Appellant was permitted to ask the following question, without objection: "Q: Now, if you had some reservations or doubt after hearing everything as to whether or not the defendant should get the death penalty and all eleven other jurors put their name on the

list, could you stand up to that and not put your name on the list?" *State v. Bennett*, 328 S.C. 251, 256, 493 S.E.2d 845, 847 (1997) (*Bennett I*). This Court held that, considering the *voir dire* as a whole, the juror was not impartial.[46] *Id.* In the present case, Appellant sought to ask the following question on *voir dire* examination of Juror 284 (Ashley Ray):

> Now, if you felt after discussing it with the other jurors that life imprisonment was the proper punishment but all the other jurors thought the death penalty was proper, what will you do then?

R. p. 176, ll. 4-7. The State objected because the question committed the juror to a future course of action, effectively "invading" the unanimous verdict. Appellant maintained that the question was proper in light of this Court's reversal of his prior death sentence in *Bennett I, supra.* The trial judge asked counsel to rephrase the question and the question was asked without suggesting the appropriate decision the juror would have reached. The juror responded that she would maintain her position, she was qualified without objection and she later sat on the petit juror. **R. pp. 177-78; 833.** On the subsequent examination of Juror 119 (Joan Fulmer), Appellant sought to ask the same question he had asked Juror Ray. This time the trial judge sustained the State's objection because the question improperly suggested the possibility of a hung jury and artificially pitted this juror against other jurors. **R. pp. 252-64.** There was no error.

"A capital defendant has the right to examine jurors through counsel pursuant to S.C. Code Ann. 16-3-20(D) (Supp.2003), but that statute does not enlarge the scope of *voir dire* permitted under Section 14-7-1020." *State v. Wise*, 359 S.C. 14, 23, 596 S.E.2d 475, 479 (2004). "The scope of *voir dire* and the manner in which it is conducted generally are left to the sound discretion of the trial judge." *Id*; *State v. Smart*, 278 S.C. 515, 299 S.E.2d 686 (1982); S.C. Code Ann. § 14-7-1020

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[46] The juror's response to the specific query was "A: I believe I would have to go with the majority of the jury." He had also given vacillating responses to earlier questions. *Id.*

(Supp.2005). To constitute reversible error, the judge's limitation on questioning must render the trial "fundamentally unfair." *Morgan v. Illinois*, 504 U.S. 719, 730 (1992). On review, a jurors responses must be examined in light of the entire *voir dire*, and the primary consideration is that the juror is unbiased, impartial, and capable of following instructions on the law. *State v. Hill*, 361 S.C. 297, 604 S.E.2d 696 *State v. Green*, 301 S.C. at 354, 392 S.E.2d at 161 (2004).

There was no error. The present issue has been previously rejected by this Court in *State v. Hill*:

> In *Bennett,* we found a juror unqualified who, when asked, stated he could not go against the majority of the eleven other jurors voted for death. We held that the juror's statement indicated he would not have been able to follow the law as explained to him and his earlier generalized statement that he could follow the law did not cure this deficiency. ... but *Bennett* does not determine whether it is appropriate, much less mandatory, for a defense counsel to ask the "go with the majority" question. In fact, the appropriateness of the question was not at issue in *Bennett,* instead, the ultimate inquiry in *Bennett* was whether the juror was "unbiased, impartial and able to carry out the law as explained to him. Considering the *voir dire* as a whole, we determine that the juror was not impartial.

Hill, 361 SC at 309, 604 S.E.2d at 702 (citations omitted).

The Court in *Hill* concluded that a review of the entire *voir dire* reflected that the defendant had an impartial jury and that there was no indication that the trial judge's limitation on questioning affected the selection of an impartial jury. As in *Hill,* a review of the present *voir dire* reflects that Appellant had an impartial jury. *Id* at 309-10, 604 S.E.2d at 702. Before qualification, the trial judge asked all the potential jurors to read summaries of three potential juror types: (1) one who would feel required to give the death penalty in every case where murder had been proved; (2) one who would not give the death penalty under any conceivable circumstance; and (3) one who would not have his or her mind made up in advance concerning the appropriate punishment, but would need to hear the facts and circumstances in aggravation and mitigation and would want to listen to and

follow the charges given by the trial judge before making a decision. *See* **R. pp. 30-35.** Again as in *Hill*, all qualified jurors indicated that they were the third type of juror - - the kind of juror who would listen to all of the circumstances and follow the trial judge's instruction on the law. Their understanding of this was insured by repeated questions from both the State and the defense as to whether they understood the nature of this category of potential jurors. *See* **R. pp. 85-98; 133-43; 144-78; 186-97; 238-66; 323-35; 400-410; 425-36; 464-76; 531-45; 641-56; 694-705.** *Id.*

Despite the trial judge's ruling, a question such as that as rephrased with Juror Ray was asked of seven petit jurors. *See* **R. pp. 143; 154-55; 176-77; 195; 332-33; 544-45.** Likewise, as in *Hill*, there was no indication, whatsoever, that the trial judge's limitation on questioning affected the selectioning of an impartial jury. Appellant cannot point to any single juror or petit juror whose response vacillated or suggested that the juror was incapable of hearing all of the evidence before making a decision. Further, the query at issue presupposes that life is the appropriate sentence for the juror to reach and that jurors should not deliberate with one another. This is contrary to the subsequent jury instructions. It therefore invades the deliberative process, as correctly noted by the Solicitor. As the Court explained in *Hill*:

> "[i]n the final analysis, what is constitutionally mandated is the selection of a fair and impartial jury. No particular formula of questions is mandated to achieve this goal. In our justice system, the trial judge has the discretion and the duty to monitor the *voir dire* so as to ensure that the jury selected measures up to the constitutional standard. The judge's ruling in this case, disallowing defense counsel to question jurors about their propensity to go with the majority, did not render the trial "fundamentally unfair.""

Id. at 310, 604 S.E.2d at 702-3. Therefore, this Court should affirm the trial judge's ruling. *Id.*

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the conviction and sentence imposed by the lower court be affirmed.

Respectfully submitted,

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January 10, 2006.

WES

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Lexington County
Honorable Marc H. Westbrook, Circuit Court Judge

THE STATE,

Respondent,

vs.

JOHNNY O'LANDIS BENNETT, JR.,

Appellant.

The undersigned hereby certifies that this Final Brief complies with SCACR 211(b).

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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Lexington County
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THE STATE,

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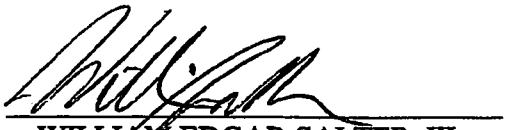
Appellant.

PROOF OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Counsel on Appellant by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Robert M. Dudek, Esquire, South Carolina Office of Appellate Defense, 1205 Pendleton Street, Suite 306, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 10th day of January, 2006.



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IN THE SUPREME COURT

Appeal from Lexington County

Marc H. Westbrook, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHNNY O. BENNETT, JR.

APPELLANT

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ARGUMENT IN REPLY

1.

Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597 (1991), did not authorize the admission of victim impact evidence for prior crimes totally unrelated to the murder for which the defendant was being tried. The state's argument that the objectionable testimony was not victim impact evidence of prior crimes cannot withstand scrutiny. (Issues 1 – 3).

It is undisputed that the state had the right to show the jury that appellant was convicted of two counts of ABHAN for the March 4, 1988 Pizza Hut incident.[1] The state did that, and it showed that Judge Baggett sentenced appellant to YOA indeterminate sentences not to exceed six years for those crimes R. p. 2029, ll. 16-25.

However, appellant submits it can hardly be argued that the objectionable testimony regarding this incident was not victim impact evidence. While there is not any need for appellant to reiterate the testimony listed in his brief of appellant, it is clear that Sharon Brady, the mother of the Shannon Gilbert, one of the two Pizza Hut victims, testified at length about his hospitalization, his stay in intensive care and his rehabilitation. Mrs. Brady also testified that her son had not completely recovered from the injuries he suffered that night and that "there's still traces from the beating." R. 1017, l. 20 – 1020, l. 17; R. 1038, l. 16 – 1040, l. 8.

Similarly, Helen McGough, the mother of Aaron McGough, the other Pizza Hut victim in March of 1998, testified about how her son's personality changed, and how he gets

[1] The solicitor referred to the convictions as "Assault and battery of a high and aggravated nature at the Pizza Hut parking lot." R. 1029, ll. 16-25.

frustrated easily and was now quick to anger. As a plumber, he forgets his tools, house keys, and other items. R. 1032, l. 9 – 1037, l. 17.

Shannon Gilbert also testified about his dreams of Indians chasing him following the crime. "Bad dreams" evidence is classic victim impact evidence.

Yet, the state writes that "appellant's characterization of the challenged testimony as victim impact evidence is simply wrong." The state argues, " this was not evidence showing the full extent of the harm caused by the defendant's actions to the victim's family and society . . . instead, it was proof of the extent of the actual injuries inflicted upon victims of the Pizza Hut attacks and was proof of the ABIK's." Respondent's Brief at 21.

Payne v. Tennessee only authorized victim impact evidence as it pertained to the life of the victim whose life "the defendant chose to extinguish." See Brief of Appellant at 10 – 13. Further, the trial judge's ruling here was based on the erroneous assumption that this Court or the United States Supreme Court had approved such evidence. R. 1039, l. 9 – 1048, l. 8.

Victim impact evidence is solely related to the murder victim, his family, friends, co-workers and others. Shannon Gilbert's dream of Indians chasing him was victim impact evidence, as was the testimony of the mothers of Pizza Hut victims about the change in the lives and personalities of the young men following the crime.

If such victim impact evidence about other prior crime victims were admissible under Payne, it would make a death penalty case in South Carolina unworkable. R. 1027, l. 9 – 1028, l. 23. Appellant's brief at 16 – 19. See State v. Johnson, 293 S.C. 321, 360 S.E.23d 317 (1987), (while a guilt phase issue, this Court noted that where prior bad acts or criminal behavior is admissible, a clear distinction still must be made between the amount of

proof required to adequately establish a material fact or element and where it becomes too prejudicial or unfair).

Further, the pre-Payne cases cited by the state to allegedly support its position are each factually distinguishable from the detailed victim impact evidence in this case. In Ray v. State, 330 S.C. 184, 498 S.E.2d 640 (1988), this Court considered a "crime spree, involving several fugitives," including Ray. The crime spree commenced when Ray and several other young men assault and rob Glen Sellars. This Court found no reversible error in admitting five photographs of Sellars. Sellars was part of the same crime spree that resulted in the murder victim's death.

Here, it is clear that the Pizza Hut crimes in 1988 were totally unrelated to the victim's murder in this case. The Pizza Hut victims were strangers, and the victim in this case knew appellant well, was a "friend" of appellant's as the state wrote. Further, there was clearly no evidence of a crime spree.

In State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984) this Court considered a challenge to the fact of the prior convictions themselves. The case was in an odd procedural posture, and Plath had opened the door to the other crime evidence anyway by placing evidence of his alleged rehabilitation following his prior crimes before the sentencing jury. Further, this Court noted that the sentencing body has traditionally considered a defendant's criminal record. This was an "early" death penalty case that involved evidence and argument much different than that before this Court in this case.

In State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985), this Court similarly heard arguments that Gaskins' confession to other murders should not be considered. The confession was obviously Gaskins' own version of the murders, and the solicitor read

excerpts of it to the jury. Importantly, this Court noted all of this evidence was properly admitted because it related to the aggravating circumstance of a previous murder conviction.

Respectfully, it is important to state what this case is not: It is not a challenge to other crime evidence being admissible during the penalty stage of a capital trial. It is a challenge to victim impact evidence about prior crime victims where those crimes were totally unrelated to the murder for which the defendant was on trial.

Other jurisdictions have held that victim impact evidence regarding the impact or later trauma suffered by a live victim of a prior crime is not a predictable matter, and that there is not any language in Payne authorizing such victim impact evidence as being relevant. See Appellant's Brief at 18-19.

Race was an impermissible factor throughout this trial in front of an all white jury. (Issues 4 and 5).

As seen, there was extensive victim impact evidence about the trauma suffered by the two white Pizza Hut victims in 1988. The testimony was extremely vivid and it involved every parent's nightmare about what could happen when their teenager was out at night or at work at night. The compelling testimony, as argued above, was clearly detailed victim impact evidence of prior crimes. Again, there is not any challenge in this case to the fact of the crimes themselves being heard by the jury.

Race again appeared during the trial when the solicitor made sure that the all white jury understood that Judie Hardee -- "the blond-haired lady" -- that appellant was having a continuous sexual relationship with while in jail and prison was white. Interracial sex can be a hot button issue, and this solicitor was pushing that button.

Further, the references to "King Kong" and "Caveman" were racially based. As appellant wrote in his brief, "King Kong is a monstrous black ape, brought to America from a wild jungle, who terrorizes the helpless, fragile, blond Faye Raye." See Universal Studio's Inc. v. Nintendo Company, 746 Fd.2d. 112 (2nd Cir. 1984).

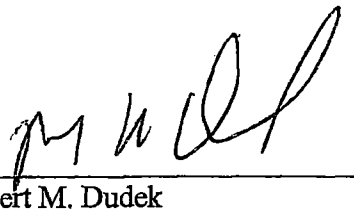
A Caveman is likewise a "preliterate, aggressive, sub-human primate - - not far removed from King Kong." Appellant's Brief at 32 *citing* State v. McGee, 517 S.2d 433 (Ct. App. LA. 1st Cir. 1987). See cases in Brief of Appellant at 31-33.

Race permeated this trial, and the references to appellant as "King Kong" and "Caveman" should not be tolerated under this Court's precedents. See Toyota of Florence, Inc. v. Lynch, 314 S.C. 247, 442 S.E.2d 611 (1994).

CONCLUSION

By reason of the arguments contained in the Brief of Appellant, and this Reply Brief of Appellant, a new sentencing hearing should be ordered.

Respectfully submitted,



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Assistant Appellate Defender

Aileen P. Clare
Assistant Appellate Defender

ATTORNEYS FOR APPELLANT.

January 30, 2006

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

January 30, 2006

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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

Marc H. Westbrook, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHNNY O. BENNETT, JR.

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon William Edgar Salter, III, Esquire, this 30th day of January, 2006.

Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 30th day of January, 2006.

(L.S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2008.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Johnny O'Landis Bennett, Jr., Appellant.

Appeal from Lexington County
Marc H. Westbrook, Circuit Court Judge

Opinion No. 26174
Heard April 4, 2006 – Filed June 26, 2006

AFFIRMED

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Attorney General Henry Dargan McMaster, Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General William Edgar Salter, III, all of Columbia, and Donald V. Myers, of Lexington, for Respondent.

CHIEF JUSTICE TOAL: This is an appeal from a capital sentencing proceeding. Appellant contends the trial court committed three errors warranting reversal. First, the trial court refused to allow defense counsel to ask jurors whether they would "stick with their vote or go with the majority" during *voir dire*. Second, the trial court determined that certain testimony and evidence about a prior offense was not inadmissible "victim impact" evidence. Third, the trial court ruled that remarks made by the Solicitor did not unfairly inject racial issues into the trial. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Appellant received several criminal convictions in connection with the murder of Benton Smith (Victim). The evidence established that Victim was last seen leaving his residence accompanied by Appellant. After police and family members searched for Victim for several days, Appellant led police to Victim's body which was buried under wood brush behind Appellant's sister's home. Victim had been stabbed approximately seventy (70) times with a Phillips head screwdriver and died as a result of internal bleeding. Appellant gave conflicting statements to police; first denying any knowledge of Victim's murder, then confessing to the murder, and finally recanting and maintaining his innocence. After a sentencing proceeding, the jury sentenced Appellant to death.

This Court affirmed Appellant's convictions but reversed his death sentence. *State v. Bennett*, 328 S.C. 251, 493 S.E.2d 845 (1997). During Appellant's second sentencing proceeding, he objected to (1) the trial court's decision to exclude a question from *voir dire*, (2) the introduction of testimony and evidence regarding a prior conviction for assault and battery of a high and aggravated nature (ABHAN), and (3) comments made by the Solicitor during cross-examination of a witness and during closing arguments.

Specifically, Appellant alleged the trial court improperly excluded the "will you go with the majority or hold to your decision" question from *voir dire*. The trial court found that the question tended to suggest the possibility of a hung jury and "the fact that [the juror] can hold things up." The court held that the defense could ask a juror "if they understand that by their oath

that [sic] they should make their own determinations of the facts . . . but certainly we cannot get into pitting them against the other jurors." *Id.*

Additionally, Appellant alleged that the trial court allowed the mothers of the two ABHAN victims to present impermissible "victim impact" testimony, that the trial court improperly admitted highly prejudicial hospital photographs of the two ABHAN victims, and that the trial court improperly allowed one of the ABHAN victims to testify about a dream he had in which "black Indians" were chasing him. The trial court determined that the testimony and photographs were relevant to Appellant's character and admissible as details of prior criminal convictions. Also, the trial court noted that the "black Indians" comment was mentioned only once, was not elicited by the State, and did not prejudice Appellant.

Furthermore, Appellant alleged that the Solicitor improperly injected racial issues into the sentencing proceeding by making inappropriate comments while questioning a witness. While cross-examining a witness about a former prison guard who had engaged in a sexual relationship with Appellant, the witness asked the Solicitor, "You mean the big girl?" The Solicitor responded, "You know, the blond lady?" The trial court found that this reference did not improperly inject race into the trial.

Finally, Appellant alleged that the Solicitor attempted to inject racial issues into the sentencing proceeding by making inappropriate remarks during the State's closing arguments. In his closing arguments, the Solicitor compared Appellant's size and violent acts to those of "King Kong" and a "Caveman." Appellant first objected to these comments in his motion for a new trial, and the trial court determined that these comments properly described the circumstances surrounding the murder, Appellant's character and violent background, his disregard for prison rules, his size, strength, and destructiveness, and were invited responses to Appellant's mitigating evidence and argument.

This appeal followed, and Appellant raises the following issues for review:

I. Did the trial court err in excluding the "will you go with the majority" question from *voir dire*?

II. Did the trial court err in admitting certain evidence regarding Appellant's prior ABHAN conviction?

III. Did the Solicitor's comments during cross-examination of a witness or during closing arguments improperly inject racial issues into the trial?

LAW/ANALYSIS

I. *Voir Dire*

Appellant argues that the trial court improperly excluded the "will you go with the majority" question from *voir dire*. We disagree.

In general, both the scope of *voir dire* and the manner in which it is conducted are within the sound discretion of the trial judge. *State v. Hill*, 361 S.C. 297, 308, 604 S.E.2d 696, 702 (2004). "To constitute reversible error, a limitation on questioning must render the trial 'fundamentally unfair.'" *Id.*

Our opinion in *State v. Hill* controls on this issue. In *Hill*, the trial court refused to allow the defense to ask jurors whether they would "give up their vote in order to go with the majority." *Id.* at 308, 604 S.E.2d at 702. Hill argued that this was improper because our opinion reversing Appellant's death sentence condoned the use of the "go with the majority" question. *Id.* Disagreeing, this court clarified that we reversed Appellant's death sentence because the trial court improperly qualified and seated a juror who answered that he would indeed "go with the majority" over his own determination. *Id.* at 309, 604 S.E.2d at 702. Ultimately, this Court held that a review of entire *voir dire* indicated that Hill's jurors were unbiased, impartial, and capable of following the instructions on the law. *Id.* at 310, 604 S.E.2d at 702. Relying on the highly deferential standard of review in *voir dire* cases, we stated:

> [W]hat is constitutionally mandated is the selection of a fair and impartial jury. No particular formula of questions is mandated to

> achieve this goal. In our justice system, the trial judge has the discretion and the duty to monitor the *voir dire* so as to ensure that the jury selected measures up to the constitutional standard. The judge's ruling in this case, disallowing defense counsel to question jurors about their propensity to go with the majority, did not render the trial "fundamentally unfair."

Id. at 310, 604 S.E.2d at 702-03.

Our review of the entire *voir dire* in this case reveals that Appellant had an impartial jury. As in *Hill*, the trial court extensively questioned each juror regarding the ability to be fair and impartial, and there is no evidence suggesting that any juror failed in these capacities. Because the evidence in the record supports only the conclusion that Appellant received a fair and impartial jury, and because there is no evidence suggesting that the trial court's *voir dire* limitation rendered Appellant's trial "fundamentally unfair," we affirm the trial court's decision.[1]

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[1] Appellant urges us to reconcile a perceived conflict between *Hill* and our opinion in Appellant's first appeal before this Court. As we stated in *Hill*, *Bennett* did not determine the appropriateness of the "go with the majority question." *Hill*, 361 S.C. at 309, 604 S.E.2d 702. In fact, the only issue in *Bennett* was whether the questioned juror was "unbiased, impartial, and able to carry out the law as executed." *Id.* Although Appellant properly points out that the court might never have discovered the juror in his first trial without the "go with the majority" question, it is equally true that no amount of questioning can provide a clear picture of a juror's biases or tendencies. *Wainwright v. Witt*, 469 U.S. 412, 424-25 (1985). "[T]hese veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings." *Id.* This position is strengthened by our previous recognition of the trial judge's duty to focus *voir dire* upon matters enumerated in the death penalty statutes and to eliminate excessive intrusions into the privacy of prospective jurors. *State v. Plath*, 281 S.C. 1, 7, 313 S.E.2d 619, 622 (1984) (*citing State v. Koon*, 278 S.C. 528, 532, 298 S.E.2d 769, 771 (1982)).

II. Evidence of Prior Convictions

Appellant argues that the trial court erred in admitting the ABHAN victims' mothers' testimonies, the hospital photographs, and the testimony about the victim's "black Indians" dream because this evidence was impermissible "victim impact" evidence of prior crimes. We disagree.

In *Payne v. Tennessee*, 501 U.S. 808 (1991), the United States Supreme Court held that the Eighth Amendment did not prohibit a jury from considering "victim impact" evidence at the sentencing phase of a capital trial. In *Payne*, a brutal double murder, the defendant challenged the admission of testimony that the child of one of the victims "missed his mother" and the State's remarks in closing arguments suggesting that the continuing effects of the crimes on the victims' family favored imposing the death penalty. *Id.* at 816. Drawing on historical arguments and reasons of fairness, the Supreme Court held that a state was not constitutionally prohibited from allowing a capital sentencing jury to consider "the specific harm caused by the defendant," including the impact of the murder on the victim's family and "a quick glimpse of the life which the defendant chose to extinguish." *Id.* at 822-26.

Contrary to Appellant's assertions, none of the testimony at issue in this case was "victim impact" evidence. First, the mothers' testimonies were limited to the circumstances surrounding the ABHAN and the extent of the injuries their sons suffered. This evidence was clearly not evidence of the character of the victims or the impact on their families, but rather, evidence of the physical injuries caused by Appellant. That the descriptions of the victims' injuries came from their mothers does not automatically convert factually descriptive testimony into impact testimony regarding the victims' character or the effect on the victims' families or community.

Similarly, there can be no question that the hospital photographs were introduced to describe the extent of the injuries the ABHAN victims suffered. These photographs are easily distinguished from cases where photographs have been deemed "victim impact" evidence. *See State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999) (photograph of murder victim in his high school

graduation regalia); *see also State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997) (photograph of victim and her husband taken shortly before victim was involved in fatal accident). Although, like in *Langley* and *Livingston*, the photographs in this case were certain to elicit an emotional response from the jury, these photographs were highly probative of the nature of Appellant's prior crime in that they provided the clearest picture of the aggravated nature of the assault and battery.

Finally, we hold the victim's testimony about his "black Indians" dream was not "victim impact" evidence. This testimony merely described the emotional injury to the ABHAN victim.

Though masquerading as a horse of the same color, the dissent decides an entirely different case from the one at bar. At the sentencing proceeding, Appellant argued the testimony about the ABHAN victims' injuries was "inappropriate victim impact type of information having nothing to do with the particular crime Mr. Bennett is on trial for now." Likewise, it appears Appellant's objection to the hospital photographs was based on Rule 403, SCRE (excluding relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice). Finally, Appellant objected to the introduction the victim's dream on the grounds of relevance. Before this Court, however, Appellant did not couch these objections in terms of relevance or a Rule 403 analysis. Instead, the *only* theory Appellant presented to this Court on this issue was that this evidence should have been excluded as impermissible victim impact evidence of prior crimes.

Because the evidence in this case was not victim impact evidence, Appellant's argument must fail. When asked to do so, we will consider arguments regarding the types of evidence of prior crimes that should and should not be admissible in a capital sentencing proceeding.[2] However, we

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[2] Academically, South Carolina has long recognized that information about prior convictions is admissible in a capital sentencing proceeding. *See State v. Gaskins*, 284 S.C. 105, 124, 326 S.E.2d 132, 143 (1985); *and State v. Plath*, 281 S.C. at 9, 313 S.E.2d at 623 (stating that this rule is so fundamental that it requires no citation of authority). This rule is derived from the principle that receiving evidence of prior crimes is probative of the

feel that the delicate task of balancing the duty to conduct a sentencing inquiry "broad in scope," *Dawson*, 503 U.S. at 164, against the need to protect a capital defendant from unfair prejudice and prevent a capital sentencing proceeding from transmuting into a sentencing referendum on all of the defendant's prior crimes is only properly performed when that case is presented. Such a case would no doubt involve considerations of when the introduction of evidence renders a proceeding so unfair as to violate due process, *see Payne*, 501 U.S. at 831, and also would implicate our rules of evidence; rules which, at the most basic level, allow proof of character by specific instances of conduct. *See* Rule 405, SCRE.

Instead of addressing any of these topics, which would be of paramount importance when considering clarifying our relevance rules, the briefs to this Court, like Appellant's argument, concerned only victim impact evidence. Under these circumstances, we feel the better course is to confine ourselves to a careful analysis of the arguments briefed and presented to us. *See State v. Torrence*, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991) (abolishing *in favorem vitae* review in capital cases). Although the dissent raises intriguing questions, we think it the better course to wait to decide such a case until we are asked. *See State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (appellate court will not consider issues not properly presented).

Based on the above reasoning, we hold that the testimony about the ABHAN victims' injuries and the corresponding photographs was not impermissible victim impact evidence relating to Appellant's prior crimes.

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character of the defendant and consistent with the sentencing authority's duty to "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *Dawson v. Delaware*, 503 U.S. 159, 164 (1992); *see also State v. Skipper*, 285 S.C. 42, 47, 328 S.E.2d 58, 61 (1985) (*overruled on other grounds* 476 U.S. 1 (1986)). Appellant has not challenged this rule, and indeed, Appellant has made no discussion of these authorities (upon which the trial court directly relied).

III. Alleged Inappropriate Remarks

Appellant argues that the Solicitor's comments during cross-examination of a witness and during closing arguments improperly injected racial issues into the trial. We disagree.

As a general rule, inflammatory remarks which are calculated to appeal to the passions or prejudices of a jury should be affirmatively condemned. *South Carolina State Highway Dep't. v. Nasim*, 255 S.C. 406, 411, 179 S.E.2d 211, 213 (1971). "[W]hether or not the particular arguments are so prejudicial as to constitute reversible error depends upon the nature of the utterances and the circumstances under which they were made." *Id.* Under certain circumstances, this Court will grant a new trial despite the aggrieved party's failure to contemporaneously object to the argument if the prejudice caused by the argument is clear. *Dial v. Niggel Assoc., Inc.*, 333 S.C. 253, 256, 509 S.E.2d 269, 271 (1998); *Toyota of Florence, Inc., v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994).

Additionally, a solicitor's closing arguments in a capital trial should focus on the defendant's character, his background, and the nature of the crime. *State v. Reed*, 293 S.C. 515, 519, 362 S.E.2d 13, 15 (1987) (*overruled on other grounds by State v. Torrence*, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991)). The arguments must be viewed in the context of the entire record, and the relevant question is whether the comments infected the trial with unfairness so as to make the resulting conviction a denial of due process. *State v. Patterson*, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997).

As a starting point, we recognize that the terms "blond lady" and "King Kong" could have racial connotations. However, this court's jurisprudence does not prohibit the use of terms with racial meanings, nor does our case law stand for the proposition that arguments or evidence in a case must be void of racial allusions. Instead, this court has recognized that it is impermissible to use race to "inflame the passions or prejudices" of the jury. Accordingly, our inquiry focuses on how these terms were used in Appellant's case.

In our view, the "blond lady" remark was not made to inflame the passions or prejudices of the jury. If the State had sought to make the race of Appellant's former lover an issue in this case, we believe they would have elicited evidence to this effect while examining their witness who testified extensively about the affair. Instead, this comment came while cross-examining a defense witness.

Furthermore, we find that even if this remark was inflammatory, it did not prejudice Appellant. This remark is a far cry from the outrageous and inflammatory evidence and arguments seen in *Nasim*, *Toyota*, *Dial*, and the cases cited by Appellant. The proper inquiry is not whether the Solicitor's remark was undesirable or condemnable, but whether the comment "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). In this case, the Solicitor made the "blond lady" comment only once and never referred to Appellant's lover's race again. Furthermore, this case involved a brutal murder, where guilt was clearly established. Accordingly, we find no evidence of prejudice from the "blond lady" remark.

Similarly, the Solicitor's use of the term "King Kong" was not an appeal to the passions or prejudices of the jury. The comment referred to Appellant's immense size, strength, and the destructiveness of his previous crimes. In this case, the trial court properly determined that Appellant's size and strength were probative of the aggravating circumstance of physical torture, which the court charged to the jury. In this regard, the Solicitor's use of the term "King Kong" was not suggestive of a giant black gorilla who abducts a white woman, but rather, descriptive of Appellant's size and strength as they related to his past crimes.

Also, Appellant's mitigation witnesses described him as "a gentle giant," "a big old teddy bear," "the Secretary of Defense," and "the Mediator." The defense used these terms to indicate Appellant was a changed man and not a threat to others. In this regard, the trial court correctly found that "King Kong" was an invited response to Appellant's mitigation evidence.

Finally, the Solicitor's "Caveman" comment was merely descriptive of two of Appellant's past violent incidents. A witness to Appellant's ABHAN testified that she saw Appellant dragging the motionless body of one of the victims across a parking lot by the hair. Additionally, a prison guard testified about an incident where Appellant reached into another inmate's cell and dragged the inmate out by the hair. The Solicitor made this comment while describing how Appellant dragged his victims during these incidents, and, in our view, the comment was not inflammatory.

Based on the above reasoning, we hold that the Solicitor's comments did not improperly inject racial issues into the trial.[3]

PROPORTIONALITY REVIEW

As required, we conduct a proportionality review of Appellant's death sentence. S.C. Code Ann. § 16-3-25(C) (2003). The United States Constitution prohibits the imposition of the death penalty when it is either excessive or disproportionate in light of the crime and the defendant. *State v. Copeland*, 278 S.C. 572, 590, 300 S.E.2d 63, 74 (1982). In conducting a proportionality review, we search for similar cases in which the death sentence has been upheld. *Id.*; S.C. Code Ann. § 16-3-25(E) (2003).

After reviewing the entire record, we conclude that the sentence in this case was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of similar prior cases illustrates that imposing the death sentence in this case would be neither excessive nor disproportionate in light of the crime and the defendant. *See State v. Huggins*, 336 S.C. 200, 205, 519 S.E.2d 574, 577 (1999) (holding that the death penalty was warranted where defendant robbed and shot the victim); *State v. Hicks*, 330 S.C. 207, 219, 499 S.E.2d 209, 216 (2998) (holding that the death penalty was proper where the defendant robbed the victim and stabbed him numerous times in the neck, chest, and abdomen); *and State v. Byram*, 326 S.C. 107, 120, 485 S.E.2d 360, 367 (1997) (holding that death sentence was proper

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[3] This conclusion makes an analysis of *Nasim*, *Toyota* and *Dial*'s exception to the contemporaneous objection rule unnecessary.

where the defendant entered the victim's home, stabbed her to death, and stole the victim's handbag and automobile).

CONCLUSION

For the foregoing reasons, we affirm.

MOORE, WALLER and BURNETT, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: In 1988, twelve years before he murdered Benton Smith, appellant brutally assaulted two young men in a parking lot. He pled guilty to two counts of assault and battery of a high and aggravated nature (ABHAN), and received a Youthful Offender Act sentence. During this capital resentencing proceeding, the State introduced, without objection, graphic testimony from two eyewitnesses to the assault of the second ABHAN victim,[4] including one witness who observed appellant stomping on the unconscious victim's head. The second witness testified he saw appellant drag the prostrate victim by the hair, then kneel to punch him five or six times, then rise and kick and stomp the unconscious victim.

The State then called one of the victims' mothers to testify, and appellant objected on the grounds of relevance at a sidebar.[5] The objection was overruled, and the mother testified to receiving the call telling her to come to the hospital and the injuries to her son that she observed when she arrived. Over another relevancy objection, the State was permitted to introduce a photo of the victim taken while he was in intensive care. The mother was permitted to testify extensively to the details of her son's time in the hospital, his subsequent stay in a head trauma rehabilitation facility, and the lingering effects of the beating.

This mother's testimony was followed by that of her son. Appellant's objection at a sidebar, again on the ground of relevancy, was overruled and the victim was permitted to relate a dream he had had while hospitalized about being chased by "Black Indians." The State then called, over another unsuccessful relevancy objection, the mother of the second victim. This woman testified, as had the first mother, to her observations of her son's injuries, recovery, rehabilitation, and residual problems.

I agree with the majority that evidence of a defendant's prior criminal record is admissible in a capital sentencing proceeding because it is relevant evidence of the defendant's character. The Constitution requires that the decision whether to impose a death sentence be "an *individualized*

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[4]Both victims were lying motionless in the parking lot, "obviously injured." The scene was quite bloody.

[5] The judge later put the grounds of the objection on the record.

determination [made] on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983) (italics in original). Further, I agree that, in furtherance of the jury's understanding of the defendant's character, the State should not be limited to merely presenting the fact of the prior conviction as it would be were the purpose to impeach the defendant's veracity. See State v. Gregg, 230 S.C. 222, 95 S.E.2d 255 (1956). I do not agree, however, that the extensive testimony admitted here, from eyewitnesses, victims, and relatives of the victims of offenses wholly unrelated to the capital offense, are relevant to the issue of the appellant's character. Nor can I agree that the dream of a victim of a prior crime is, under any stretch of the imagination, relevant to "the character of the individual or the circumstances of the [capital] crime." Zant, *supra.*

The Constitution permits the sentencing authority to consider "the specific harm caused by the crime in question" through the State's introduction of "evidence about the victim and about the impact of the murder on the victim's family" because such evidence is relevant to the "defendant's moral culpability and blameworthiness" as it relates to the capital murder. Payne v. Tennessee, 501 U.S. 808 (1991). In other words, this type of evidence is admissible because it is relevant to the circumstances of the crime, not because it is relevant to the defendant's character. Id.

I agree with the majority that the State's evidence in this case cannot be characterized as victim-impact evidence under Payne since it does not relate to the murder victim or his family. In fairness to appellant's attorneys, however, they concede that this evidence would have been admissible under Payne if related to the capital crime rather than to these unrelated prior offenses. Specifically, appellant's trial objection was to the evidence "as being inappropriate, victim impact type information and having nothing to do with the particular trial that [appellant] is on trial for now." Moreover, appellant's attorney in this appeal concedes this type of evidence may be admissible as it relates to the victim of the capital crime, but argues "[t]here is no language in Payne authorizing victim impact evidence on unrelated crimes ...." I agree with appellant that the trial court erred in admitting this irrelevant evidence.

The Constitution limits even valid victim-impact evidence where it is unduly inflammatory or renders the sentencing proceeding fundamentally unfair. Payne, *supra* (Justice O'Connor, concurring). Here, the capital sentencing jury was overwhelmed with evidence of appellant's "moral culpability and blameworthiness," not for the murder of Benton Smith, but for the brutal beatings of two young men.[6] In my opinion, the State's presentation of this evidence denied appellant a fair sentencing and encouraged the jury to impose a death sentence on an improper basis. Zant, *supra* (character of the defendant and circumstances of the capital crime are relevant to determining sentence).

I therefore dissent from the majority's decision to affirm appellant's sentence.

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[6] This evidence was exploited by the solicitor in his closing argument.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2006

No. 2006-_____

JOHNNY O'LANDIS BENNETT,

PETITIONER.

versus

STATE OF SOUTH CAROLINA,

RESPONDENT,

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

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Capital Case

QUESTIONS PRESENTED

1.

Whether the South Carolina Supreme Court erred by holding that the testimony of the victim of a prior unrelated aggravated assault and battery committed by Petitioner that he had dreams about black Indians chasing him as a result of the prior unrelated assault was not impermissible victim impact evidence under Payne v. Tennessee, 501 U.S. 808 (1991), since it did not involve the capital murder for which Petitioner was on trial, and it was emotional victim impact trauma evidence?

2.

Whether the South Carolina Supreme Court erred by holding that the testimony of the two mothers of the victims of a prior unrelated aggravated assault and battery committed by Petitioner was not impermissible victim impact evidence under Payne v. Tennessee, 501 U.S. 808 (1991), where the mother's testimony covered negative changes in personality, troubles their sons have had since the assault, and the time spent in the hospital and rehabilitation centers since this testimony did not involve the capital murder for which Petitioner was on trial, and it was emotional victim impact trauma evidence?

3.

Whether the South Carolina Supreme Court erred by holding that photographs of the two victims of a prior unrelated aggravated assault and battery committed by Petitioner lying in their hospital beds was not impermissible victim impact evidence under Payne v. Tennessee, 501 U.S. 808 (1991), since the emotional photographs did not involve the capital murder for which Petitioner was on trial, and they constituted emotional victim impact trauma evidence?

4.

Whether the South Carolina Supreme Court erred by holding the prosecutor did not impermissibly inject race into the case before an all-white jury by deliberately eliciting the irrelevant fact that the prison guard Petitioner had a sexual relationship with was a white woman, since this denied Petitioner his right to a fair trial, and due process?

5.

Whether the South Carolina Supreme Court erred by holding the prosecutor did not impermissibly inject race into the case before an all-white jury by comparing Petitioner to a King Kong and a Caveman during his closing argument, since this denied Petitioner his right to a fair trial, and it also introduced an arbitrary factor into the case in derogation of the Eighth Amendment by encouraging a death sentence based on the government's appeal to racial stereotypes and prejudice?

6.

Whether the South Carolina Supreme Court by holding that it was now permissible to prevent Petitioner from asking potential jurors during *voir dire* whether they would simply "vote with the majority," or whether they would attempt to be independent, since violated Petitioner's Due Process right under Morgan v. Illinois, 504 U.S. 719 (1992) to ensure an impartial jury was qualified in this capital case since general questions about fairness were not sufficient to detect whether the juror would simply vote with the majority or whether the juror was biased?

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Amend. XIV, United States Constitution 10

SUPREME COURT OF THE UNITED STATES

September Term, 2006

No. 20-_____

JOHNNY O'LANDIS BENNETT,

PETITIONER,

versus

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT

Johnny O'Landis Bennett asks this Court to issue a writ of certiorari to review the decision of the South Carolina Supreme Court in this case.

CITATION TO OPINION BELOW

The opinion of the South Carolina Supreme Court affirming Petitioner's conviction and death sentence is reported as State v. Bennett, 632 S.E.2d 281 (S.C. 2006).

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on June 26, 2006. This Court's jurisdiction is invoked pursuant to 28 U.S.C §1257(a), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part, "[N]or shall any state deprive any person of life . . . without due process of law . . . ."

2. It involves the Sixth Amendment to the Constitution of the United States, which provides that criminal defendants shall enjoy a "speedy and public trial, by an impartial jury of the State and j\district wherein the crime shall have been committed . . ."

3. It involves the Eighth Amendment to the Constitution of the United States, which provides that ". . . cruel and unusual punishment [shall not be] inflicted."

4. It also involves S.C. Code Ann. §§ 16-3-10 et seq. (2000 Cum. Supp.), governing capital trials and sentencing in South Carolina.

STATEMENT OF FACTS

Procedural history

Petitioner was indicted by the Lexington County Grand Jury for the offenses of murder, kidnapping, armed robbery and grand larceny of an acquaintance. R. 2449 - 2452. The South Carolina Supreme Court wrote: "The evidence established that Victim was last seen leaving his residence accompanied by Appellant. After police and family members searched for Victim for several days, Appellant led police to Victim's body which was buried under wood brush behind Appellant's sister's home." App. 2. The victim, Benton Smith, had been stabbed seventy times with a screwdriver strongly implicating a crime of rage against Petitioner's acquaintance. App. 2. The state sought the death penalty.

Petitioner's case originally came on for trial on October 9, 1995 before the Honorable Ralph King Anderson and a jury. Petitioner was convicted on all counts and was given death for murder at the penalty phase of the trial. The South Carolina Supreme Court affirmed the convictions, but reversed Petitioner's death sentence and ordered a new sentencing trial in State v. Bennett, 493 S.E.2d 845 (1997) on the grounds that a juror said during voir dire that he would simply vote with the majority. The South Carolina Supreme Court, citing Morgan v. Illinois, 504 U.S. 719, 729 (1992), therefore held the juror was not qualified to serve and that Petitioner was entitled to a new sentencing trial.

Petitioner's new sentencing trial began on July 10, 2000. At the conclusion of the sentencing trial the jury recommended a death sentence. R. 2149, ll. 1 – 11. Judge Westbrook then sentenced Petitioner to death for murder, thirty-years for kidnapping, thirty years for armed robbery and five years for grand larceny. R. 2157, l. 13 – 2158, l. 20.

On July 26, 2000, Petitioner filed a motion for a new trial, arguing, inter alia, "Payne never authorized victim impact evidence about the emotional harm done to victims of the defendant's lesser crimes for which he was not on trial." The motion also argued the objectionable testimony of the mothers of the victims of the lesser crimes also violated Payne and should not have been admitted. The motion further noted that the solicitor's appeals to racial bias began during *voir dire* where he secured an all-white jury, and continued to permeate throughout the trial ending in his closing argument which compared Petitioner to a "King Kong," and a "Caveman." R. 2363-2365.

A hearing on the motion for a new trial was held on October 26, 2000. R. 2161-2213. At the conclusion of the hearing Judge Westbrook took the matter under advisement. R. 2212, ll. 9-21.

On August 29, 2003, over three years after Petitioner was sentenced to death, and nearly

three years after the motion for a new trial was taken under advisement, Judge Westbrook issued an order denying the new trial motion. R. 2407-2435.

The South Carolina Supreme Court affirmed the sentences in State v. Bennett, 632 S.E.2d 281 (S.C. 2006). App. 1-12.

HOW THE FEDERAL ISSUE WAS RAISED BELOW

The sentencing trial – jury selection

During *voir dire* for the re-sentencing trial, defense counsel asked potential juror Stokes the following question:

> If you were in a position where you held a view one way or another, either for life or death, and it was different from the rest of the jurors and after deliberating on it and you still believed that that is your view, would you be able to hold fast to your view?

R. 110, l. 12-17.

Ms. Stokes answered in the affirmative and was qualified to serve without objection. Defense counsel asked a variation of the same question to potential jurors Sands, Garrett, and Brown. Each answered affirmatively and was qualified without objection. R. 131, ll 7-18; R. 142, ll. 7-14; R. 154, ll. 20-24. The state later used peremptory strikes to remove Ms. Stokes and Ms. Sands from the petit jury. R. 832, ll. 1-7. Petitioner entered an unsuccessful Batson v. Kentucky, 476 U.S. 79 (1986) challenge against Ms. Sands, a black female, being struck. The trial court accepted the solicitor's reasons that Sands reputation was that she "is difficult to get along with," "resents authority," and "didn't look straight forward during questioning" were racially neutral. R. 842, l. 5 – 852, l. 17. Petitioner then renewed his motions to the trial court excusing certain potential jurors and leaving others in the venire over objection. R. 855, l. 23 – 859, l. 17.

The only other black juror, Thomas Brown, a minister knew the victim's family. He was questioned by the trial court, defense counsel and the solicitor. When defense counsel asked Brown if he knew he was the only black juror remaining, the solicitor objected and the trial court sustained the objection. Brown said he would make every effort to be impartial despite knowing the victim's family. The defense wanted Brown on the jury despite the fact he knew the victim's family. The solicitor argued that if the trial court left Brown on the jury that some post-conviction relief lawyers in the future would assert that defense attorneys Floyd and Young "were ineffective by not moving to exclude a juror who told them that their relationship with the victim's family would prevent him from being a fair and impartial juror and that the death penalty should be overturned on PCR." Defense counsel responded that while a difficult judgment call, "we're faced with the prospect of this black man's life being determined by an all-white jury . . . we still feel that he would give this matter his heartfelt consideration . . . So we ask that he be retained." R. 867, l. 25 – 875, l. 19. The trial judge then said he appreciated Brown's candor, and that he knew "he struggled with this," but that he was excusing Brown from jury service. R. 875, l. 20 – 878, l. 18.

During *voir dire* of potential juror Ashley Ray, defense counsel asked the following question:

> Now, if you felt after discussing it with the other jurors that life imprisonment was the proper punishment but all the other jurors thought the death penalty was proper, what will you do then?

R. 176, ll. 4-7.

The state objected on the basis that the hypothetical question committed Ms. Ray to a future course of action, effectively "invading" the unanimous verdict. R. 176, ll. 16-21. Defense

counsel responded that he should be permitted to ask the question because the reversal of Petitioner's prior death sentence was based on a juror's answer to a similar question. R. 176, l. 23 - 177, l. 1. The court, acknowledging that the state Supreme Court "has said that certainly you want to be sure that each juror understands that they operate independently," asked counsel to rephrase the question, which he did:

> Ms. Ray, if after deliberating with the other jurors you felt that the proper punishment would be life in prison but the other 11 jurors felt that it would be the death penalty, could you stand up to what you felt was right or would you go along with the other 11?

R. 177, ll. 14-18.

Ms. Ray answered that she would maintain her position. She was qualified without objection and served on the petit jury. R.. 177, l. 19 - 178, l. 16; p. 833, ll. 11-18.

Defense counsel asked the following question of potential juror Locklair:

> In the event that you hold a position that is different than the rest of the jurors, for or against life or death, and you believe after deliberating that your position is the right position or the appropriate position as far as punishment would you be able to hold fast to your position?

R. 195, ll. 6-10.

The solicitor did not object. Ms. Locklair answered affirmatively, was qualified without objection, and served on the petit jury. R. 195, l. 25 - 196, l. 4; R. 833, ll. 18-24.

Defense counsel asked the following question of potential juror Porter:

> Now, if you were serving on this jury and all the other jurors wanted to vote for death and you wanted -- you thought life was the proper punishment, would you stick to your position?

R. 209, ll. 22-25.

The solicitor did not object. Ms. Porter answered affirmatively and was qualified without

objection. R. 219, ll. 1-11. Petitioner later exercised a peremptory strike to remove Ms. Porter from the petit jury. R. 834, ll. 2-6.

Defense counsel asked the following question of potential juror Harris, again without the solicitor's objection:

> If the situation comes that you hold a different opinion as to what the appropriate punishment is from the other jurors, whether it's life or death, and you believe after talking it over with the other jurors that your position is the right position or the appropriate punishment would you be able to hold fast to your position?

R. 231, ll. 14-19.

Ms. Harris answered affirmatively and was qualified. R. 233, ll. 3-13. The state later used a peremptory strike against her. R. 834, ll. 9-11.

Ms. Joan Follmer was the fifteenth potential juror presented during *vior dire*. Defense counsel asked her the following question:

> [I]f you were on the jury and you wanted to give -- you thought life was the proper punishment but all the other members of the jury felt that the death penalty was proper, would you stand up for your position or would you just go along with it?

R. 250, l. 22 - 251, l. 1.

The state objected to the question. *In camera*, the court noted that Bennett, supra, did not address whether the question before that court was proper, but only whether a juror's negative answer disqualified him.. The solicitor argued that Bennett did not address the question's overall propriety because it was not raised at trial. He stated that "since then, I have consistently objected."[1] R. 252, l. 8 - 252, l. 19. He argued that while this Court had not addressed the issue of whether jurors may be asked about the possibility of a deadlock, the "majority view" was that

[1] As shown by the *voir dire* of potential jurors Stokes, Sands, Garrett, Brown, Ray, Locklair,

such questions "could not reasonably be expected to result in an answer bearing upon a juror's qualification." R. 253, l. 3 - 255, l. 10.

Petitioner argued that his question was not intended to elicit jurors' attitudes regarding specific facts of the case, but only to ensure their independence. He asserted that to ask a juror if he could remain independent despite opposition was no more intrusive or fact-specific than to ask if the juror could objectively consider the evidence and follow the law as instructed. R. 255, l. 13 - 256, l. 13. He argued that, had the question been inappropriate, this Court would not have relied on it in reversing his death sentence. R. 257, l. 20 - 258, l. 1. The court sustained the state's objection on the basis that the question improperly suggested the possibility of a hung jury and artificially pitted the jurors against one another. R. 258, l. 18 - 264, l. 13.

The sentencing trial – Pizza Hut incident

The state presented the following evidence at Petitioner's re-sentencing trial. William Mark DuBose testified that on March 4, 1988 he witnessed an incident in the parking lot of the Pizza Hut in Lexington. The Pizza Hut incident was not connected to Petitioner's current charges. DuBose recalled seeing "a large black male" attacking one of the victims. R. 987, ll. 7 – 9. Rhonda Smith testified regarding this same incident. She was sitting at a booth in the restaurant, she testified, and observed a black male drag a white male by his hair, then kick and beat the victim. R. 998 , ll. 3 – 999, l. 1.

Victim impact evidence – how the federal issue was raised below

Sharon Brady, the mother of Shannon Gilbert, one of the two Pizza Hut victims, also testified regarding the unrelated 1988 incident. Defense counsel Floyd objected to Ms. Brady's testimony on basis that the nature and effect of her son's injuries was not relevant. Counsel argued

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Porter, and Harris, however, the solicitor had not, in fact, "consistently objected."

that this victim impact evidence had "nothing to do with the particular crime that Mr. Bennett is on trial for now." The objection was renewed against the testimony of Helen McGough, the mother of the other victim, Aaron, and the victim-impact evidence of another crime not being admissible argument continued throughout the trial, in the new trial motion, and on appeal to the South Carolina Supreme Court. R. 1038, l. 16 –1040, l. 8. The trial court overruled the objections and admitted the evidence as "appropriate" under "the Supreme Court rulings." R. 1039, l. 9 – 1040, l. 8.

Ms. Brady testified that she was called to the a hospital after her son, a Pizza Hut employee, was attacked at work. A second phone call stated that her son had been taken to Richland Memorial Hospital instead "because of the trauma - - because of head trauma." R. 1013, ll. 4 – 10. Shannon Gilbert was unconscious when Ms. Brady arrived at the hospital. Ms. Brady testified that she barely recognized her son "because of the beatings, the bruises, cuts on his face and head." R. 1013, ll. 22 – 24. She testified that he was unconscious for 13 days and required extensive life support. R. 1013, l. 25 – 1014, l. 8. She testified that he returned home for several days, then received treatment at a special head trauma center for several months. R. 1017, ll. 20 - 1018, l. 25. He required a speech therapist and physical therapist, and, Ms. Brady testified, had never fully recovered. R. 1019, ll. 19 - 1020, l. 17.

During Ms. Brady's testimony, the state introduced its exhibit 5, a photograph of Shannon's injuries. Defense counsel objected on the basis that the photograph was irrelevant and inflammatory. The judge overruled the objection and entered the photograph. R. 1015, ll. 10 – 23. Following her son's release from the Lancaster trauma center, "they set up a homebound rehabilitation therapy for him, and we also had to hire a tutor because he did not get home in time

enough to - - for the state to set up tutor for him for school." R. 1019, ll. 7 – 12.

Helen McGough, the mother of the second Pizza Hut victim, testified that her son Aaron also was attacked at work on March 4, 1998. As noted, defense counsel unsuccessfully objected to this testimony as inadmissible irrelevant victim-impact evidence. R. 1031, ll. 15 – 25. The defense also objected to photographs of Aaron in the hospital, state's exhibit 7, that were entered into evidence during Ms. McGough's testimony, on the same ground as the objection to Shannon's photographs. R. 1035, l. 6 – 1036, l. 14.

The state questioned Ms. McGough extensively regarding the circumstances and effects of her son's injuries. She testified that she arrived at the hospital before the ambulance carrying her son arrived. She called her son's name when the ambulance arrived, but was told, "he couldn't hear me." R. 1032, ll. 9 – 1033, l. 8. The state elicited detailed descriptions of Aaron's condition from Ms. McGough. She testified that he was so badly beaten that she did not have recognize his face. She described a large "U-shaped" injury on Aaron's forehead. He required immediate surgery and recovery in the intensive care unit. She attempted to speak to Aaron as he was taken into intensive care, but there was "no response at all." R. 1033, l. 17 – 1034, l. 23. She testified that, since the attack, Aaron's personality had changed from "easy-going" and "laid-back" to angry and quickly frustrated. The state introduced photographs of Aaron's injuries over defense objections. R. 1035, l. 3 – 1036, l. 25.

Shannon Gilbert testified he was working at the Pizza Hut on March 4, 1998, when he was attacked by a black man. The next thing he remembered was waking up in the hospital. R. 1021, l. 20 – 1022, l. 14. The state introduced Petitioner's convictions on September 14, 1988 for assault and battery of a high and aggravated nature for the March 4, 1988 Pizza Hut incident. R. 1029, ll.

16- 25. Shannon identified the picture of himself in the hospital bed, state's exhibit 5. R. 1027, ll. 9 – 16. The state elicited the following testimony from Shannon:

> Q. Do you have any consciousness about being in a hospital; do you know of any dreams or anything? Is that all you remember about the hospital?
>
> A. I had a dream. I did have a dream in the hospital. It's the only one I remember, of course. It was - - I remember waking up - -
> [defense objection overruled]
> . . . I woke up and I remember being really afraid. And, of course, there were several in the room. I'm not sure who it was, nurses, maybe my mother. I'm not sure who all was there, but to calm me down. And I remember telling them what it was about. It was - - Indians were chasing me trying to kill me, and the thing that I thought was they were black.

Shannon then identified Petitioner as the person who attacked him at the Pizza Hut in March 1988. R. 1027, l. 17 - 1028, l. 23.

In closing arguments, the state reminded the jury of the Pizza Hut evidence:: "Shannon Gilbert in a coma for thirteen days. Aaron McGough in a coma for four or five days, hanging on to life, boot print in one of them's [sic] head. You remember Ms. McGough said she went there and she didn't recognize her son because his face was so beaten up and had that round U-shape up there." Tr. 2061, l. 13 – 2062, l. 18.

As stated, Petitioner again raised the issue of unrelated victim-impact evidence in his motion for a new trial and on appeal. Acknowledging this Court's holding in Payne v. Tennessee, 501 U.S. 808 (1991) that victim impact evidence was not prohibited "at the sentencing phase of a capital trial," the South Carolina Supreme Court held that the testimony and photographs about the prior offense were not victim-impact evidence. It ruled that the mothers' testimony was limited to

"circumstances surrounding the [prior offense] and the extent of the injuries" suffered by their sons. The photographs and dream sequence, the Court held, merely illustrated the extent of the injuries without describing the "impact" on the victims. State v. Bennett, supra, at 632 S.E.2d 286-288; App. 6-8.

Race and the all-white jury – how the federal issue was raised below

Petitioner is an African-American. His jury was exclusively white. The solicitor made racial references throughout the trial. For example, the state offered evidence that Petitioner had broken certain rules while incarcerated. Corporal Johnny Ray testified that on April 3, 1995 Petitioner refused to go outside for recreation in violation of applicable jail rules. Ray also testified Petitioner cursed at him. R. 1594, l. 6 – 1595, l. 17. Investigators with the Department of Corrections testified that Petitioner had a sexual relationship with Judy Hardy, a visitor and correctional officer. R. 1599, l. 12 – 1601, ll. 1 – 17; 1617, l. 4 - 1621, l. 16. Ms. Hardee's visitor privileges were revoked, and she ultimately lost her job, because of her relationship with Petitioner. R. 1603, ll. 19 – 22; 1620, ll. 4-9; 1633, ll. 10-21. Over defense objection, Petitioner's admissions on this subject were read to the jury. R. 1601, l. 1 – 1602, l. 25.

Petitioner offered evidence, in mitigation, that he saved another inmate from committing suicide. Officer Kenneth Tager testified that in 1991, while confined in a county jail, Petitioner helped jail personnel save an inmate who had tried to hang himself. R. 1963, l. 13 – 1964, l. 23. The suicidal inmate, Byron Collins, testified on Petitioner's behalf. R. 1974, l. 10 – 1977, l. 24. The solicitor elicited the following testimony from Byron Collins on recross-examination by the solicitor:

> Q. There was one guard that loved Johnny Bennett and that was Judie Hardee, you remember her?

A. The real big lady?

Q. Judie Hardee, you remember her, *the blond-headed lady*?

[Defense Counsel] Mr. Floyd: Your Honor - -

A. She was a real big lady.

The Court: Wait a minute. Don't answer the question. If you know who she was, you can answer the question.

A. It's been a long time.

The Court: Listen to me. If you don't know, you can say you don't know.

A. I don't remember.

Mr. Floyd: Your Honor, we move for a mistrial on prosecutorial misconduct.

The Court: Denied.

R. 1979, l. 21 – 1980, l. 18. (emphasis added).

Defense counsel Floyd moved for a mistrial and for a dismissal based on prosecutorial misconduct. R. 2012, l. 21 – 2013, l. 7. Floyd argued that the solicitor's was "one of the most despicable performances I've ever seen where a solicitor inserted race into a case," by trying to force Mr. Collins to testify about Ms. Hardee's race. And, he argued, when the witness did not spontaneously describe Hardee as white, the solicitor tried to elicit that testimony by reference to her hair color. R. 2013, ll. 8 – 18. The solicitor denied he was injecting race into the case. R. 2013, l. 22 – 2014, l. 11. The following conversation appears on the record:

The Court: [W]hen somebody says blonde, I don't necessarily see a white woman. You know, that doesn't mean the jury's got the same standards I have, but either way, I just don't see that. I'm sorry.

Solicitor Myers: I think of Dennis Rodman.

> The Court: Well, I don't think of Dennis Rodman. But either way, I'm going to deny the motion, Counsel.

R. R. 2014, l. 19 – 2015, l. 9. Defense counsel timely renewed the motion for a mistrial, which was denied. R. 2037, ll. 13 – 20. The judge denied the motions. R. 2363; 2407.

Solicitor Myers made the following remarks during his closing argument:

> Do you remember this Mary Felder Rice, *that nice black lady* that testified? Johnny Bennett does what Johnny Bennett wants to do. And it's Shannon Gilbert's fault. He's in a coma for 13 days. It's Aaron McGough's fault because he's in a coma for four days when Johnny Bennett beats him to the ground and stomps him nearly to death. It ain't old Johnny's fault.
>
> And, you know, I don't know whether it was the young black lady that was inside eating with her boyfriend or the tall white boy that was outside that drove through, said that they looked out . . . Johnny was even pulling one of them by his hair. *Kind of like an old caveman, dragging him by his hair.*

R. 2062, ll. 5-18 (emphasis added).

He urged the jury to vote for a death sentence, as follows:

> You give him life, the real Johnny will come back. You give him life and he'll come back out. *Meeting him again will be like meeting King Kong on a bad day. Vile Johnny.* Mean Johnny. Murderous Johnny. You give him life, those guards better button up their vests because he's coming back in force.

R. 2079, ll. 2-7 (emphasis added).

At the post-trial hearing, defense counsel moved for a new trial on the basis that these comments were calculated to de-humanize Petitioner and inflame racial prejudice against him. R. 2169, l. 17 - 2171, l. 20; R. 2184, l. 15 - 2185, l. 25. As seen, the trial did not rule on this motion for years, and then suddenly denied Petitioner's motion. The trial court ruled that the "King Kong" comment was a legitimate reference to Petitioner's large physique and that it

logically responded to defense counsel's characterization of Petitioner as a "teddy bear." The court held that the "caveman" comment was racially neutral, that it referred only to the hair-pulling allegations of the past offense, and that it logically responded to defense counsel's portrayal of Petitioner as a model prisoner. R. 2418 - 2421.

Petitioner raised these issues on appeal. The South Carolina Supreme Court ruled the solicitor had not emphasized race, but had employed the terms "caveman" and "King Kong" as permissible, race-neutral character descriptions. It ruled that the solicitor did not intend to emphasize Ms. Hardee's race because it was mentioned on cross-examination of a defense witness, and not direct examination of state witnesses on the same subject. Bennett, supra, at 632 S.E.2d 288-289. App. 9-11.

WHY THE WRIT SHOULD BE GRANTED

Questions 1-3. The South Carolina Supreme Court's holding that the "black Indians dream" testimony pertaining to the prior crime, the prior crime victims mother's testimony about their son's injuries and its aftermath, and the hospital photographs of the prior crime victim's was not victim impact evidence far outside what this Court authorized or envisioned in Payne v. Tennessee is erroneous. Further, since there is a split of authority regarding this type of victim impact evidence of other crimes among the jurisdictions, this Court should resolve the matter by granting certiorari.

1. Shannon Gilbert's testimony about his "black Indian" dream, following Petitioner's prior unconnected offense, was impermissible victim impact evidence. The writ should be granted because the South Carolina Supreme Court, while acknowledging this Court's holding in *Payne*, nonetheless flouts the limitation of victim impact evidence in *Payne* to only victim impact evidence pertaining to the murdered victim by refusing to acknowledge that the objectionable evidence in this case was emotional victim impact

evidence involving a prior unrelated offense.

As discussed supra, Shannon Gilbert, a victim of Petitioner's prior unconnected offense, testified that he dreamed of being pursued by "black Indians" after that incident. The South Carolina Supreme Court ruled that this testimony was admissible during the sentencing phase of Petitioner's trial even though it involved an unrelated prior victim. This ruling contradicts the rulings of this Court and the majority of United States jurisdictions, and should be reversed.

In Payne v. Tennessee, 501 U.S. 808 (1991), this Court for the first time held that victim impact evidence was not *per se* inadmissible. This Court noted that Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 490 U.S. 805 (1989) were based upon the premise that evidence relating to the defendant's victim, and the harm he caused to the dead victim's family, did not reflect on the defendant's "blameworthiness." This Court reasoned that only evidence relating to blameworthiness was relevant during a capital sentencing trial.

On its rethinking of those holdings, this Court noted, "[T]he assessment of harm caused by the defendant as a result of the *crime charged* has understandably been an important concern of the criminal law, both in determining the elements of offense and in determining the appropriate punishment." Payne v. Tennessee, 501 U.S. at 819. (emphasis added).

This Court held in Payne that a state may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the juror's decision as to whether or not the death penalty should be imposed. Payne v. Tennessee, 501 U.S. at 827. It stated that the victim's death represented a unique loss to society and in particular to his family. Payne v. Tennessee, 501 U.S. at 825. In Justice O'Connor's concurring opinion, joined by Justice White and Justice Kennedy, she reasoned that before a convicted murderer is sentenced a state may

decide that the jury should see "a quick glimpse of the life [the capital defendant] petitioner chose to extinguish" *citing* Mills v. Maryland, 486 U.S. 367, 397 (1998) (Rehnquist, C.J., dissenting)." The concurring justices noted that this quick glimpse was needed to remind the jury that the person killed was a unique human being. Payne v. Tennessee, 501 U.S. at 830.

In State v. Stewart, 320 S.E.2d 447 (S.C. 1984), the South Carolina Supreme Court held that evidence of the defendant's prior crimes was admissible during the penalty phase of a capital trial. The court held that the jury must be instructed that these prior crimes may not be used as proof of a statutory aggravating circumstance, but were only to be considered as they reflected upon the defendant's character. See also Woodson v. North Carolina, 428 U.S, 280, 304 (1976); State v. Plath, 313 S.E.2d 619, 623 (1984).

It is clear the Court in Payne v. Tennessee only authorized victim impact evidence as it pertained to the life of the victim whose life "the defendant chose to extinguish." The rulings of the trial court in this case allowing the victim impact evidence regarding a prior unconnected offense was impermissible and unwarranted, and a highly radical departure from what this authorized in Payne after overruling Booth v. Maryland and South Carolina v. Gathers. There is no language in Payne authorizing victim impact evidence on unrelated crime victims, and, as shown above, clear language that victim impact evidence only pertains to the murder victim for which the defendant is on trial.

There appears to be a split of authority on this issue. The State of South Carolina has cited California precedent allowing unrelated victim-impact evidence in capital trials. See People v. Garceau, 862 P.2d 664 (Cal. 1993); People v. Mickle, 814 P.29 290 (Cal. 1991). However, the majority of jurisdictions that have considered the issue have properly found that victim impact

evidence of unrelated offenses is not proper. See People v. Hope, 702 N.E.2d 1282, 1287-89 (Ill. 1998) (there is not "any language in *Payne* which would suggest that victim impact evidence stemming from a defendant's other, unrelated crimes is admissible at his capital sentencing"); People v. Dunlap, 975 P.2d 723, 744-45 (Colo. 1999) ("evidence regarding the impact of a capital defendant's prior crimes on the victims of those crimes, is not admissible because it is not relevant to the actual harm caused by the defendant as a result of the homicide); Sherman v. State, 965 P.2d 903, 914 (Nev. 1998) ("we conclude that the impact of a prior murder is not relevant to the sentencing decision in a current case and is therefore inadmissible" although evidence of the existence of the prior murder would be admissible to prove an aggravating circumstance); Cantu v. State, 939 S.W.2d 627, 637 (Tex. Crim. App. 1997) ("the admission of such evidence would open the door to admission of victim impact evidence arising from *any* extraneous offense committed by a defendant . . . such evidence is irrelevant under Tex. R. Crim. Evid. 401."). The apparent disagreement between California and the majority of jurisdictions should be resolved by this Court in favor of what was authorized in Payne.

To allow victim impact evidence about prior crimes will make a capital trial practically unworkable. The state would be allowed to present unlimited impact evidence about prior crimes, and the defense would then have the opportunity to rebut that unrelated evidence. See Payne v. Tennessee, 501 U.S. at 824 – 825; State v. Southerland, 447 S.E.2d 862, 867 (1994). The result would be a virtual free-for-all of remote and irrelevant evidence that would pollute the entire proceeding.

Shannon Gilbert's testimony about his "black Indian" nightmare was not relevant in this case. He was the live victim of a prior crime, and not the relative of the deceased victim at issue.

The testimony should have been excluded. Its improper exposure to the jury injected an arbitrary factor into Petitioner's trial and deprived him of due process. He should receive a new trial. See Miller v. State, 977 P.2d 1099 (Okl.App. 1998) (mother's dream of dead son was improper victim impact evidence); See also People v. Hope, 702 N.E.2d 1282, 1287-89 (Ill. 1998); People v. Dunlap, 975 P.2d 723, 744-45, n. 14 (Colo. 1999); Sherman v. State, 965 P.2d 903, 914 (Nev. 1998).

Justice Pleicones, in his dissenting opinion below, wrote that he agreed with Petitioner that the trial court erred in admitting this irrelevant evidence. He further stated that he could not "agree that the dream of a victim of a prior crime is, under any stretch of the imagination, relevant to the 'character of the individual or the circumstances of the [capital] crime.'" The dissent further noted that victim impact evidence under Payne had to relate to the dead victim or his family, and he concluded:

> In fairness the appellant's attorneys, however, they concede that this evidence would have been admissible under Payne if related to the capital crime rather than to these unrelated prior offenses. Specifically, appellant's trial objection was to the evidence "as being inappropriate, victim impact type information and having nothing to do with the particular trial that [Petitioner] is on trial for now." Moreover, appellant's attorney in this appeal concedes this type of evidence may be admissible as it relates to the victim of the capital crime, but argues "[t]here is no language in Payne authorizing victim impact evidence on unrelated crimes . . . ." I agree with appellant that the trial court erred in admitting this irrelevant evidence.
>
> The Constitution limits even valid victim-impact evidence where it is unduly inflammatory or renders the sentencing proceeding fundamentally unfair. Payne, supra (Justice O'Connor, concurring). Here the capital sentencing jury was overwhelmed with evidence of appellant's "moral culpability and blameworthiness," not for the murder of Benton Smith, but for the brutal beatings of two young men [particularly when "exploited by the solicitor in his closing argument]. In my opinion, the State's presentation of this evidence denied appellant a fair sentencing and encouraged the jury to impose a death sentence on an improper basis.

Bennett, above, at 632 S.E.2d 289-290 (Pleicones, J., dissenting).

App. 13-15.

Petitioner urges that Justice Pleicones' reasoning on irrelevant victim impact evidence was correct. Justice Pleicones' only did not want the evidence characterized as irrelevant victim impact evidence under Payne because victim impact evidence under Payne can only relate to the dead victim or his family and seemingly the decedent's other friends. Yet that is Petitioner's precise point -- victim impact evidence during the penalty stage can only relate to the dead victim and his loved ones -- and it illustrates how far beyond the scope of what was authorized in Payne the South Carolina Supreme Court has allowed to stand in this case by approving of victim impact evidence relating to prior unrelated crimes. The Court should not be allowed to use semantics to avoid an issue an issue that was squarely raised throughout, and seemingly attempt to insulate itself from this Court's review by suggesting it might have reversed if only state law evidentiary arguments rather than Constitutional arguments were made before the state courts in this case. This evidence denied Petitioner his due process right to a fair sentencing trial. This Court should grant certiorari and address this serious issue.

2. The testimony of the mothers of the 1988 Pizza Hut victims was improper victim impact evidence. The testimony was irrelevant and inadmissible because it was victim impact evidence of another unrelated crime. The writ should be granted because the South Carolina Supreme Court, while acknowledging this Court's holding in *Payne*, nonetheless flouts the limitation of victim impact evidence in *Payne* to only victim impact evidence pertaining to the murdered victim by refusing to acknowledge that the objectionable evidence in this case was emotional victim impact evidence pertaining to a prior unrelated offense.

As noted supra, the state presented the testimony of the mothers of Petitioner's victims from an unrelated prior offense. The mothers testified extensively about their sons' physical conditions and states of mind following the unrelated offense. This included evidence regarding their extensive rehabilitation because of the prior crime, personality changes, and even employment day-to-day problems caused by the crime. Ms. McGough for example said her son now gets "frustrated real quick and he's quick to anger." "He's a plumber, he forgets his tools, forgets his house key, things that." R. 1032, l. 9 – 1039, l. 17.

Ms. Brady testified Shannon Gilbert spent was at a trauma center in Lancaster for two-and-a half-months, and then had homebound rehabilitation after the assault. He still has not, according to Ms. Brady, "completely" recovered from the assault. R. 1013, l. 25 – 1020, l. 17. The South Carolina Supreme Court ruled that this was not impermissible victim-impact evidence outside the scope of what was authorized in Payne v. Tennessee, but was admissible character evidence in a capital sentencing case. State v. Bennett, supra, at 632 S.E.2d 286-288; App. 6-8. This ruling is not supported by the record, the plain meaning of Payne or precedent and should be reversed.

Payne did not authorize the testimony of relatives of prior victims about the effect of prior crimes on living victims or their relatives. Yet, that is exactly the type of evidence offered by the state in this case. The extensive evidence about the two teenage boys working at the Pizza Hut was extremely emotional, and it was totally unrelated to the murder victim or his family in this case. The mothers' testimony portrayed every parent's worst fear of an unexpectedly absent child, and its effect was surely palpable. The prejudice was exacerbated when the solicitor stressed the prior victim's injuries in his closing argument, as described above. The evidence was improper and prejudicial and denied Petitioner due process. He should receive a new hearing.

3. The photographs of the victims of Petitioner's prior offense were not relevant because they were victim impact evidence of a prior unrelated crime and were intended to inflame the passions of the Petitioner's sentencing jury in this capital case. The writ should be granted because the South Carolina Supreme Court, while acknowledging this Court's holding in *Payne*, nonetheless flouts the limitation of victim impact evidence in *Payne* to only victim impact evidence pertaining to the murdered victim by refusing to acknowledge that the objectionable evidence in this case was emotional victim impact evidence pertaining to a prior unrelated offense.

In addition to the improper testimony described above, the trial court admitted photographs of the prior unrelated victims, showing their injuries, into evidence during the mothers' testimony. This evidence was irrelevant and highly prejudicial, and it should have been excluded. It injected an arbitrary factor into Petitioner's trial and denied him due process because it was intended to inflame the jury's passions.

As stated above, victim impact evidence is admissible under Payne v. Tennessee so that the jury can understand the murdered victim as something more than a faceless stranger. The rationale behind Payne v. Tennessee was that the defendant had the opportunity to introduce any and all mitigating evidence about the defendant, and in fairness the prosecution should be allowed to humanize the murdered victim. Payne, 501 U.S. at 822-825. However, as discussed at length above, this Court in Payne did not throw open the flood gates to allow highly emotional victim impact evidence regarding unrelated other bad acts or crimes evidence.

The South Carolina Supreme Court has held that photographs of the victims that are unrelated to the crime scene, and which are designed to elicit an emotional reaction are not relevant and are not admissible to prove guilt. See, State v. Langley, 515 S.E.2d 98 (1999) (photograph of

murder victim in his high school graduation garb was irrelevant and inadmissible; State v. Livingston, 488 S.E.2d 313 (1997) (photograph of the victim of a felony DUI causing death and her husband taken shortly before her death was irrelevant). See State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). The prejudice from such victim's photographs is obvious since the jury is inclined to lash out emotionally because a good person's life has been extinguished by the crime.

The photographs of the victims of this 1988 incident in their hospital beds were highly prejudicial. Having photographs of two teenage boys, working at night for spending money, lying in a hospital bed, badly beaten, is emotionally heart wrenching. Such victim impact evidence goes beyond anything contemplated in Payne as in fair response to the defendant's mitigating evidence, and intended to humanize the dead victim -- a unique human being. Certiorari should be granted.

WHY THE WRIT SHOULD BE GRANTED

Questions 4-5 The South Carolina Supreme Court committed fundamental error and deprived Petitioner of due process by ruling that the State's many racially-charged comments, such as describing Petitioner as "King Kong" and a "caveman," and remarking on the race of Petitioner's paramour, the "blonde lady," were permissible character evidence, and not overt appeals to the all-white jury's racial bias.

4. The writ should be granted because the South Carolina Supreme Court should have granted Petitioner a new trial after the solicitor, following a pattern of racial comments before the all-white jury, pointedly commented on Petitioner's interracial sexual relationship by referring to Petitioner's former paramour as the "big . . . blond haired lady." This evidence was intended to inflame the jury and it denied Petitioner due process of law.

Petitioner is African-American. His jury was exclusively white. As noted, the state presented evidence that Petitioner had engaged in a sexual relationship with a prison guard whom

the solicitor referred to as "the big . . . blond haired lady." These questions and comments were calculated to inflame the racial bias of the jurors and injected an arbitrary factor into Petitioner's trial.

The South Carolina Supreme Court conceded that the terms "blonde lady and "King Kong" could have racial connotations, but nonetheless held that "terms with racial meanings" are not prohibited unless they are intended to "inflame the passions and prejudices" of the jury. The Court then reasoned the solicitor could have broached the subject earlier if he intended to "make the race of [Petitioner's] lover an issue in this case." State v. Bennett, 632 S.E.2d at 288; App. 9-10. However, the record in this case, as seen above, shows the cross-examination of a man Petitioner saved from committing suicide in prison, presented the solicitor with another opportunity to inject race into the case.

This Court has long held that racial bias being used to prejudice a defendant, or even potential juror will not be allowed to stand. See Batson v. Kentucky, 476 U.S. 79 (1986); Vasquez v. Hillery, 474 U.S. 254 (1986). See, also, Gregg v. Georgia, 428 U.S.153, 182 (1976) (death penalty procedure must reflect "the basic concept of human dignity at the core of the [Eighth] Amendment."). The lower federal and state courts have generally been faithful to this Court's admonition that a conviction or sentence based on racial prejudice cannot stand. This case is an aberration.

The use of racial arguments to obtain a criminal conviction is improper and constitutes reversible error. Miller v. North Carolina, 583 F.2d 701, 706 (4th Cir. 1978). As the Florida Court of Appeals stated in Terrazas v. State, 696 So.2d 1309, 1310 (Fla 2d DCA 1997), attempts to attribute criminal conduct to people based on their race "have been uniformly condemned."

See State v. Rogan, 91 Hawaii 405, 984 P.2d 1231 (1999) (prosecutor's closing remarks that "every mother's nightmare" is to discover "some black . . . guy on top of your daughter" warranted mistrial and was sufficiently egregious to bar retrial).

Specifically, courts have disallowed the use of interracial relationships to "aggravate any lingering prejudice against interracial couples among the jurors." Bryant v. State, 25 S.W.3d 924, 926 (Tex. Ct. App. 2000); Rogan, supra. In Bryant, the black defendant was charged with battering his interracial child. During cross-examination, the prosecutor asked the defendant about a prior, unrelated sexual partner: "Did you get a white girl named Rebecca pregnant who had your baby in May of '99 whose daddy is Tim Lyons?" Id. at 25 S.W.3d 925. The Texas Court of Appeals granted a new trial, ruling that the question was irrelevant and racially inflammatory, and admonishing the state that "racially prejudicial remarks and appeals to racial prejudice have no place in a courtroom." Id. at 25 S.W.3d 926, citing Allison v. State, 157 Tex.Crim. 200, 248 S.W.2d 147, 148 (1952).

In Moore v. Morton, 255 F.3d 95 (3d Cir. 2001), the defendant, a black man married to a white woman, was accused of raping a white woman. Identity was the critical issue. The prosecutor asserted in closing argument that the defendant's "preference" for white women was evidence of his guilt, and that, because the defendant's wife had been ill, the defendant would "have his greatest need for sexual release" at the time of the assault. Id. at 255 F.3d 100-101. After the defendant unsuccessfully appealed his conviction in the New Jersey state courts, the Third Circuit issued a writ habeas corpus on the basis that these racially inflammatory comments, along with a third reference to the defendant's failure to testify, denied the defendant a fair trial. Id.

In United States v. Grey, 433 F.2d 1043 (6th Cir. 1970) cert. denied, 400 U.S. 967, 91 S.Ct. 380 (1970), the Sixth Circuit held that the prosecutor's comments on the black defendant's character witness "running around with a white go-go dancer" warranted a new trial. Similarly, the Supreme Court of Nevada, in Dawson v. State, 734 P.2d 221 (Nev.1987), granted a new trial on the basis that the prosecutor's closing remarks that defendant had a "preference for white women" and had had a "physical relationship" with a white woman were prejudicially improper.

Judie Hardee's race, hair color (or girth, for that matter) were completely irrelevant to any fact at issue in Petitioner's case. This evidence was presented for the sole purpose of arousing "lingering prejudice" against interracial relationships among the all white jury. In a case where the solicitor injected race at every available opportunity, his reference to Ms. Hardee's whiteness was fatally prejudicial. The reference was particularly inflammatory in light of the closing argument, discussed in issue 5, infra. Since the trial judge refused to grant a mistrial based upon the injection of race into this case through the *blonde* interracial sex statement, and the South Carolina Supreme Court refused to reverse the death sentence given the above, certiorari should be granted to allow full briefing on this issue. In the alternative, Petitioner respectfully submits that certiorari should be granted, the judgment below reversed, and this case remanded for a new sentencing trial.

5. Certiorari should be granted because the South Carolina Supreme Court affirmed Petitioner's death sentence where the solicitor compared him to King Kong and a caveman in closing arguments. This argument openly exploited racial stereotypes before the exclusively white jury that the prosecution had more subtly promoted throughout the trial.

After mentioning race at every available opportunity, the solicitor referred to Petitioner

as a "caveman" and "King Kong" during closing argument. The South Carolina Supreme Court ruled that these were not racial comments but permissible character evidence for a capital sentencing trial. Bennett, supra, at 632 S.E.2d 288-289; App. 9-10. This ruling is not supported by record or precedent, and it should be summarily reversed, or certiorari granted.

In the Batson v. Kentucky, 476 U.S. 79 (1986), context, this Court has condemned the use of racial stereotypes to justify peremptory strikes in *voir dire*. This Court has also held that the Fourteenth Amendment mandate that racial discrimination be eliminated from all official acts and proceedings of the State is most compelling in the judicial system. Powers v. Ohio, 499 U.S. 400, 415 (1991). See, also, Reno v. Arab-American Anti-Discrimination League, 521 U.S. 471 (1999) (Prosecutorial decisions may not be deliberately based on unjustifiable standards such as race). McCleskey v. Kemp, 481 U.S. 279, 332 (1987) (race based prosecutorial arguments are prohibited by the Constitution).

The South Carolina Supreme Court followed Batson's reasoning in State v. Tomlin, 384 S.E.2d 707 (1989), holding that the state's purported rationale for striking a black woman, that she "walked slow, talked low and might not be able to withstand the trial," or, as the trial court suggested, "had a lack of education, was extremely sluggish" and would be a "filler" if seated on the jury, along with the rationale for striking a black man in same case, that he "shucked and jived" as he walked, were based on impermissible racial stereotypes. Id. at 384 S.E.2d 709-710.

Petitioner submits the overwhelming consensus of jurisdictions in this country would condemn the "King Kong" and "Caveman" racially based argument. See Miller v. North Carolina, 583 F.2d 701 (4th Cir. 1978); State v. Belgarde, 755 P.2d 174 (Wash.1988) (in trial of Native American, prosecutor's unchallenged references to American Indian Movement as "deadly

group of madmen" and "butchers who kill indiscriminately" warranted mistrial because they were "so flagrant and ill-intentioned that no curative instruction could have obviated the prejudice").

The use of racial arguments to obtain a criminal conviction is improper and constitutes reversible error. Miller v. North Carolina, Terrazas v. State; State v. Rogan; all supra; See also Commonwealth v. Lara, 658 N.E.2d 692 (Mass. 1995) (prosecutor's repeated references to defendant's Dominican ethnicity warranted new trial); Jackson v. State, 772 A.2d 273 (Md.2001) (judge's remarks about others moving out of the city to escape "uncivilized" people like the defendant, who were like "animals" living in "ghettos" with "guns and drugs" warranted resentencing), citing Contee v. State, 165 A.2d 889, 894 (Md.1960) (a trial court "should not countenance or permit unwarranted and improper appeals to racial prejudice to be made or go unnoticed."); United States v. Cannon, 88 F.3d 1495 (8th Cir. 1996) (prosecutor's characterization of black defendants as "bad people" was appeal to juror bias); United States v. Doe, 903 F.2d 16 (D.C. Cir. 1991) (evidence presented by the state that local drug trade was controlled by persons of Jamaican extraction, as were defendants, was improper appeal to racial bias); United States ex rel. Haynes v. McKendrick, 481 F.2d 152, (2d Cir. 1973), cert. denied, (racial comments about "people of the colored race," including remarks about "their weaknesses and inability to do certain things that maybe are commonplace for the ordinary person to do" and their "custom and habit" of having "exotic hair dos" warranted new trial).

The state Supreme Court in Payton v. Kearse, 495 S.E.2d 205 (1998) correctly held that "redneck" is an impermissible racial stereotype in Batson context. However, "King Kong" and "caveman" are nothing if they not vicious and racially inflammatory. In the 1933 movie and various remakes of the same title, King Kong is a monstrous black ape, brought to America from

a wild jungle, who terrorizes the helpless, fragile, *blonde* Faye Raye. See Universal Studios, Inc. v. Nintendo Co., 746 F.2d 112 (2d Cir. 1984); "King Kong" at www.badmovieplanet.com/3btheater/tributes. Similarly, the common image of a caveman is of a preliterate, aggressive, sub-human primate -- not far removed from King Kong. See State v. Magee, 517 So.2d 433 (Ct.App.La. 1st Cir. 1987) (court correctly instructed witness not to refer to defendant as "caveman" even though that was the defendant's nickname); Leahey v. Leahy, 303 Pa.2d 952 (Or. Sup. Ct. 1956).

The state plainly intended Petitioner's jury to perceive him as a big, black, primitive monster. The solicitor's remarks not only slurred Petitioner's race but portrayed him as animalistic and sub-human -- a creature the jurors could destroy without reflection or remorse. See Gregg v. Georgia, 428 U.S.153 (1976) (death penalty procedure must reflect "the basic concept of human dignity."). Motion for a New Trial at 3 R. p. 2365; See also Bates v. Bell, No. 02-6436 (6th Cir., filed March 23, 2005) (references to defendant as "rabid dog" were dehumanizing and "patently improper"); Bonifay v. State, 680 So.2d 413, 418 (Fla. 1996) (use of "exterminate" or any similar term which tends to dehumanize a capital defendant is improper).

The Iowa Court of Appeals confronted a very similar problem in State v. Blanks, 479 NW.2d 601 (Iowa 1992), which involved the prosecution of a black man for assaulting a white woman. The prosecutor, in jury argument, referred to the movie "Gorillas in the Mist," which portrays field research on wild gorillas. The Iowa Court of Appeals granted a new trial, holding that "the comparison of a defendant to gorillas, apes, other animals or other demeaning descriptions by itself may constitute reversible error." Id. at 479 N.W.2d 603, citing Volmor v. United States, 13 F2d 594, 595 (6th Cir. 1926) (new trial granted where prosecutor referred to the

defendant as a "skunk", an "onion", a "weak-faced weasel", and a "cheap, scaly, slimy crook").

The solicitor's "King Kong" and "caveman" remarks bear no reasonable interpretation other than racial references purposely calculated to inject an arbitrary factor into Petitioner's trial, and they denied Petitioner due process and his right to a fair trial. The remarks were racially inflammatory, and purposely intended to diminish Petitioner's humanity in the eyes of the jury. The South Carolina Supreme Court also mentioned, while finding the King Kong and Caveman argument was not offensive, that the question was still whether the comment so infected the trial with unfairness as "to make the resulting conviction a denial of due process." App. 10. Petitioner submits that it did make the resulting death sentence a denial of due process, but it also injected an impermissible or arbitrary factor --race --into the sentencing trial in violation of the Eighth Amendment. "The injection into a trial of race, sex or creed bias must be deplored and condemned." Motion for a new trial at 3. R. 2365 *citing* State v. Blanks, 479 N.W.2d at 605.

The resulting death sentence following such calculated racial degradation should not stand. Certiorari should be granted to allow full briefing. In the alternative, certiorari should be granted, Petitioner's death sentence vacated, and this case remanded for a new sentencing trial.

WHY THE WRIT SHOULD BE GRANTED

Question 6 The holding of the South Carolina Supreme Court that it was permissible to systemically prevent Petitioner from being able to *voir dire* potential jurors on whether they would "just vote with the majority" or if they would exercise independent judgment in sentencing is contrary to this Court's holding in Morgan v. Illinois, 504 U.S. 719 (1992) since general questions on fairness are not always sufficient to identify partiality. Further, the South Carolina Supreme Court reversed Petitioner's prior death sentence because a juror was not qualified under Morgan who said he would simply vote with the majority. Refusing to now allow the "vote with the majority" question so that other disqualified jurors are identified still also violates Morgan.

As seen above, Petitioner was systemically denied the right to question potential jurors on whether they would simply vote with the majority or whether they would exercise independent judgment. Any fair reading of this record leads to the conclusion that the powerful solicitor selectively objected to this bedrock question depending on the juror until the trial court stopped allowing the question on *voir dire* altogether. For example, during *voir dire* for the re-sentencing trial, defense counsel asked potential juror Stokes the following question:

> If you were in a position where you held a view one way or another, either for life or death, and it was different from the rest of the jurors and after deliberating on it and you still believed that that is your view, would you be able to hold fast to your view?

R. 110, l. 12-17.

Ms. Stokes answered in the affirmative and was qualified to serve without objection. Defense counsel asked a variation of the same question to potential jurors Sands, Garrett, and Brown. Each answered affirmatively and was qualified without objection. R. 131, ll 7-18; R. 142, ll. 7-14; R. 154, ll. 20-24. The state later used peremptory strikes to remove Ms. Stokes and Ms. Sands from the petit jury. R. 832, ll. 1-7.

During *voir dire* of potential juror Ashley Ray, defense counsel asked the following question:

> Now, if you felt after discussing it with the other jurors that life imprisonment was the proper punishment but all the other jurors thought the death penalty was proper, what will you do then?

R. 176, ll. 4-7.

The state objected on the basis that the hypothetical question committed Ms. Ray to a future course of action, effectively "invading" the unanimous verdict. R. 176, ll. 16-21. Defense

counsel responded that he should be permitted to ask the question because the reversal of Petitioner's prior death sentence was based on a juror's answer to a similar question. R. 176, l. 23 - 177, l. 1. The court, acknowledging that the state Supreme Court "has said that certainly you want to be sure that each juror understands that they operate independently," and he asked counsel to rephrase the question, which he did:

> Ms. Ray, if after deliberating with the other jurors you felt that the proper punishment would be life in prison but the other 11 jurors felt that it would be the death penalty, could you stand up to what you felt was right or would you go along with the other 11?

R. 177, ll. 14-18.

Ms. Ray answered that she would maintain her position. She was qualified without objection and served on the petit jury. R.. 177, l. 19 - 178, l. 16; p. 833, ll. 11-18.

However, the matter came to an accelerated end with Juror Joan Follmer. Follmer was the fifteenth potential juror presented during *voir dire*. Defense counsel asked her the following question:

> [I]f you were on the jury and you wanted to give -- you thought life was the proper punishment but all the other members of the jury felt that the death penalty was proper, would you stand up for your position or would you just go along with it?

R. 250, l. 22 - 251, l. 1.

The state objected to the question. *In camera*, the court noted that Bennett, supra, did not address whether the question before that court was proper, but only whether a juror's negative answer disqualified him. The solicitor argued that Bennett did not address the question's overall propriety because it was not raised at trial. He stated that "since then, I have consistently objected," which -- as seen above – is simply not true. R. 252, l. 8 - 252, l. 19.

Petitioner argued that his question was not intended to elicit jurors' attitudes regarding specific facts of the case, but only to ensure their independence. He asserted that to ask a juror if he could remain independent despite opposition was no more intrusive or fact-specific than to ask if the juror could objectively consider the evidence and follow the law as instructed. R. 255, l. 13 - 256, l. 13. He argued that, had the question been inappropriate, the South Carolina Supreme Court would not have relied on it in reversing his death sentence. R. 257, l. 20 - 258, l. 1. The court sustained the state's objection on the basis that the question improperly suggested the possibility of a hung jury and artificially pitted the jurors against one another. R. 258, l. 18 - 264, l. 13.

This is a highly unusual case given that Petitioner was previously tried on the same indictment, convicted, and sentenced to death. The South Carolina Supreme Court reversed Petitioner's death sentence based on a juror's answer to the identical "vote with the majority" question now before this Court.

During *voir dire* at the first trial, defense counsel asked a particular juror if, having determined that a life sentence was appropriate, the juror would maintain his position against the majority of other jurors, if they disagreed, or would follow the majority. The juror answered that he "would have to go with the majority." State v. Bennett, 328 S.C. 251, 256, 493 S.E.2d 845, 847-848 (1997).

The trial court qualified the juror over defense counsel's objection. On appeal, the South Carolina Supreme Court ruled that the trial court abused its discretion. Id. Citing this Court's holding in Morgan v. Illinois, 504 U.S. 719, 729, (1992), the Court ruled that if "even one juror" who would vote for the death penalty in every case "is impaneled and the death sentence is

imposed, the State is disentitled to execute sentence." Bennett at 493 S.E.2d 848. The South Carolina Supreme Court, further, endorsed Morgan's reasoning that general questions about impartiality and fairness are not always sufficient to detect unqualified jurors in a capital case. Id., citing Morgan at 504 U.S. 735.

Between the South Carolina Supreme Court ordering a new sentencing trial for Petitioner, and the present re-sentencing trial now before this Court, that Court decided State v. Hill, 604 S.E.2d 696 (2004). Hill was a triple murder of Department of Social Services workers at their workplace while a molestation charge was being considered. It was argued before the Court that the "vote with the majority or would you be independent" question was the central question counsel wanted answered when selecting a capital jury. However, the South Carolina Supreme Court held in Hill that it was now only reversible error to refuse to allow the State v. Bennett, "would you just vote with the majority" question if it rendered the trial "fundamentally unfair." Id. 604 S.E.2d 696, 702.

This Court in Morgan v. Illinois, 504 U.S. 719 (1992) held the defendant was entitled to relief under the Due Process Clause of the Fourteenth Amendment because the *voir dire* restrictions placed on him at trial were insufficient to allow him to "exercise intelligently his complementary challenge for cause against those biased persons on the venire who as jurors would unwaveringly impose death after a finding of guilt. Morgan v. Illinois, 504 U.S. 719, 733 (1992). Here, Petitioner merely wanted to identify those jurors or that juror, who would, as in Petitioner's first sentencing trial, merely go along with the majority. This is a matter of no small moment since what may occur when there is the 9-3, 10-2 or 11-1 vote favoring death where only a unanimous verdict for death results in death in South Carolina is defense counsel's key

concern.

Wainwright v. Witt, 469 U.S. 412, 424 (1985) held that "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath," quoting Adams v. Texas, 488 U.S. 38, 45 (1980). Thus, it is of little comfort to Petitioner that a juror qualifies to serve under Witt – particularly a juror who leans towards death but honesty professes his ability to be fair – where that same juror will vote with the majority regardless.

The South Carolina Supreme Court was correct the first time in State v. Bennett, 328 S.C. 251, 256, 493 S.E.2d 845, 847-848 (1997) where the juror answered he would vote with the majority and Court held he was disqualified under Morgan v. Illinois. Refusing to allow the "vote with the majority" question so that other disqualified jurors are not identified in death penalty cases is, respectfully, not an acceptable remedy. Certiorari should be granted.

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should issue.

Respectfully submitted,

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By _____
ATTORNEYS FOR PETITIONER.

September 22, 2006

2633

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2006

No. 2006-_____

JOHNNY O. BENNETT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

I certify that copies of the petition for writ of certiorari, appendix, and the motion for leave to proceed in forma pauperis in this case have been served upon opposing counsel by mailing copies in envelopes properly addressed with postage prepaid on this 22nd day of September, 2006.

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By _____
ATTORNEYS FOR PETITIONER.

SUBSCRIBED AND SWORN TO before me
this 22nd day of September, 2006.

_____ (L.S.)
Notary Public for South Carolina
My Commission Expires: March 13, 2007.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2006

No. 2006 -

JOHNNY O. BENNETT,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

A P P E N D I X

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Johnny O'Landis Bennett, Jr., Appellant.

Appeal from Lexington County
Marc H. Westbrook, Circuit Court Judge

Opinion No. 26174
Heard April 4, 2006 – Filed June 26, 2006

AFFIRMED

Assistant Appellate Defender Robert M. Dudek and Assistant Appellate Defender Aileen P. Claire, both of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General William Edgar Salter, III, all of Columbia, and Donald V. Myers, of Lexington, for Respondent.

CHIEF JUSTICE TOAL: This is an appeal from a capital sentencing proceeding. Appellant contends the trial court committed three errors warranting reversal. First, the trial court refused to allow defense counsel to ask jurors whether they would "stick with their vote or go with the majority" during *voir dire*. Second, the trial court determined that certain testimony and evidence about a prior offense was not inadmissible "victim impact" evidence. Third, the trial court ruled that remarks made by the Solicitor did not unfairly inject racial issues into the trial. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Appellant received several criminal convictions in connection with the murder of Benton Smith (Victim). The evidence established that Victim was last seen leaving his residence accompanied by Appellant. After police and family members searched for Victim for several days, Appellant led police to Victim's body which was buried under wood brush behind Appellant's sister's home. Victim had been stabbed approximately seventy (70) times with a Phillips head screwdriver and died as a result of internal bleeding. Appellant gave conflicting statements to police; first denying any knowledge of Victim's murder, then confessing to the murder, and finally recanting and maintaining his innocence. After a sentencing proceeding, the jury sentenced Appellant to death.

This Court affirmed Appellant's convictions but reversed his death sentence. *State v. Bennett*, 328 S.C. 251, 493 S.E.2d 845 (1997). During Appellant's second sentencing proceeding, he objected to (1) the trial court's decision to exclude a question from *voir dire*, (2) the introduction of testimony and evidence regarding a prior conviction for assault and battery of a high and aggravated nature (ABHAN), and (3) comments made by the Solicitor during cross-examination of a witness and during closing arguments.

Specifically, Appellant alleged the trial court improperly excluded the "will you go with the majority or hold to your decision" question from *voir dire*. The trial court found that the question tended to suggest the possibility of a hung jury and "the fact that [the juror] can hold things up." The court held that the defense could ask a juror "if they understand that by their oath

that [sic] they should make their own determinations of the facts . . . but certainly we cannot get into pitting them against the other jurors." *Id.*

Additionally, Appellant alleged that the trial court allowed the mothers of the two ABHAN victims to present impermissible "victim impact" testimony, that the trial court improperly admitted highly prejudicial hospital photographs of the two ABHAN victims, and that the trial court improperly allowed one of the ABHAN victims to testify about a dream he had in which "black Indians" were chasing him. The trial court determined that the testimony and photographs were relevant to Appellant's character and admissible as details of prior criminal convictions. Also, the trial court noted that the "black Indians" comment was mentioned only once, was not elicited by the State, and did not prejudice Appellant.

Furthermore, Appellant alleged that the Solicitor improperly injected racial issues into the sentencing proceeding by making inappropriate comments while questioning a witness. While cross-examining a witness about a former prison guard who had engaged in a sexual relationship with Appellant, the witness asked the Solicitor, "You mean the big girl?" The Solicitor responded, "You know, the blond lady?" The trial court found that this reference did not improperly inject race into the trial.

Finally, Appellant alleged that the Solicitor attempted to inject racial issues into the sentencing proceeding by making inappropriate remarks during the State's closing arguments. In his closing arguments, the Solicitor compared Appellant's size and violent acts to those of "King Kong" and a "Caveman." Appellant first objected to these comments in his motion for a new trial, and the trial court determined that these comments properly described the circumstances surrounding the murder, Appellant's character and violent background, his disregard for prison rules, his size, strength, and destructiveness, and were invited responses to Appellant's mitigating evidence and argument.

This appeal followed, and Appellant raises the following issues for review:

I. Did the trial court err in excluding the "will you go with the majority" question from *voir dire*?

II. Did the trial court err in admitting certain evidence regarding Appellant's prior ABHAN conviction?

III. Did the Solicitor's comments during cross-examination of a witness or during closing arguments improperly inject racial issues into the trial?

LAW/ANALYSIS

I. *Voir Dire*

Appellant argues that the trial court improperly excluded the "will you go with the majority" question from *voir dire*. We disagree.

In general, both the scope of *voir dire* and the manner in which it is conducted are within the sound discretion of the trial judge. *State v. Hill*, 361 S.C. 297, 308, 604 S.E.2d 696, 702 (2004). "To constitute reversible error, a limitation on questioning must render the trial 'fundamentally unfair.'" *Id.*

Our opinion in *State v. Hill* controls on this issue. In *Hill*, the trial court refused to allow the defense to ask jurors whether they would "give up their vote in order to go with the majority." *Id.* at 308, 604 S.E.2d at 702. Hill argued that this was improper because our opinion reversing Appellant's death sentence condoned the use of the "go with the majority" question. *Id.* Disagreeing, this court clarified that we reversed Appellant's death sentence because the trial court improperly qualified and seated a juror who answered that he would indeed "go with the majority" over his own determination. *Id.* at 309, 604 S.E.2d at 702. Ultimately, this Court held that a review of entire *voir dire* indicated that Hill's jurors were unbiased, impartial, and capable of following the instructions on the law. *Id.* at 310, 604 S.E.2d at 702. Relying on the highly deferential standard of review in *voir dire* cases, we stated:

> [W]hat is constitutionally mandated is the selection of a fair and impartial jury. No particular formula of questions is mandated to

> achieve this goal. In our justice system, the trial judge has the discretion and the duty to monitor the *voir dire* so as to ensure that the jury selected measures up to the constitutional standard. The judge's ruling in this case, disallowing defense counsel to question jurors about their propensity to go with the majority, did not render the trial "fundamentally unfair."

Id. at 310, 604 S.E.2d at 702-03.

Our review of the entire *voir dire* in this case reveals that Appellant had an impartial jury. As in *Hill*, the trial court extensively questioned each juror regarding the ability to be fair and impartial, and there is no evidence suggesting that any juror failed in these capacities. Because the evidence in the record supports only the conclusion that Appellant received a fair and impartial jury, and because there is no evidence suggesting that the trial court's *voir dire* limitation rendered Appellant's trial "fundamentally unfair," we affirm the trial court's decision.[1]

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[1] Appellant urges us to reconcile a perceived conflict between *Hill* and our opinion in Appellant's first appeal before this Court. As we stated in *Hill*, *Bennett* did not determine the appropriateness of the "go with the majority question." *Hill*, 361 S.C. at 309, 604 S.E.2d 702. In fact, the only issue in *Bennett* was whether the questioned juror was "unbiased, impartial, and able to carry out the law as executed." *Id.* Although Appellant properly points out that the court might never have discovered the juror in his first trial without the "go with the majority" question, it is equally true that no amount of questioning can provide a clear picture of a juror's biases or tendencies. *Wainwright v. Witt*, 469 U.S. 412, 424-25 (1985). "[T]hese veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings." *Id.* This position is strengthened by our previous recognition of the trial judge's duty to focus *voir dire* upon matters enumerated in the death penalty statutes and to eliminate excessive intrusions into the privacy of prospective jurors. *State v. Plath*, 281 S.C. 1, 7, 313 S.E.2d 619, 622 (1984) (*citing State v. Koon*, 278 S.C. 528, 532, 298 S.E.2d 769, 771 (1982)).

II. Evidence of Prior Convictions

Appellant argues that the trial court erred in admitting the ABHAN victims' mothers' testimonies, the hospital photographs, and the testimony about the victim's "black Indians" dream because this evidence was impermissible "victim impact" evidence of prior crimes. We disagree.

In *Payne v. Tennessee*, 501 U.S. 808 (1991), the United States Supreme Court held that the Eighth Amendment did not prohibit a jury from considering "victim impact" evidence at the sentencing phase of a capital trial. In *Payne*, a brutal double murder, the defendant challenged the admission of testimony that the child of one of the victims "missed his mother" and the State's remarks in closing arguments suggesting that the continuing effects of the crimes on the victims' family favored imposing the death penalty. *Id.* at 816. Drawing on historical arguments and reasons of fairness, the Supreme Court held that a state was not constitutionally prohibited from allowing a capital sentencing jury to consider "the specific harm caused by the defendant," including the impact of the murder on the victim's family and "a quick glimpse of the life which the defendant chose to extinguish." *Id.* at 822-26.

Contrary to Appellant's assertions, none of the testimony at issue in this case was "victim impact" evidence. First, the mothers' testimonies were limited to the circumstances surrounding the ABHAN and the extent of the injuries their sons suffered. This evidence was clearly not evidence of the character of the victims or the impact on their families, but rather, evidence of the physical injuries caused by Appellant. That the descriptions of the victims' injuries came from their mothers does not automatically convert factually descriptive testimony into impact testimony regarding the victims' character or the effect on the victims' families or community.

Similarly, there can be no question that the hospital photographs were introduced to describe the extent of the injuries the ABHAN victims suffered. These photographs are easily distinguished from cases where photographs have been deemed "victim impact" evidence. *See State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999) (photograph of murder victim in his high school

graduation regalia); *see also State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997) (photograph of victim and her husband taken shortly before victim was involved in fatal accident). Although, like in *Langley* and *Livingston*, the photographs in this case were certain to elicit an emotional response from the jury, these photographs were highly probative of the nature of Appellant's prior crime in that they provided the clearest picture of the aggravated nature of the assault and battery.

Finally, we hold the victim's testimony about his "black Indians" dream was not "victim impact" evidence. This testimony merely described the emotional injury to the ABHAN victim.

Though masquerading as a horse of the same color, the dissent decides an entirely different case from the one at bar. At the sentencing proceeding, Appellant argued the testimony about the ABHAN victims' injuries was "inappropriate victim impact type of information having nothing to do with the particular crime Mr. Bennett is on trial for now." Likewise, it appears Appellant's objection to the hospital photographs was based on Rule 403, SCRE (excluding relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice). Finally, Appellant objected to the introduction the victim's dream on the grounds of relevance. Before this Court, however, Appellant did not couch these objections in terms of relevance or a Rule 403 analysis. Instead, the *only* theory Appellant presented to this Court on this issue was that this evidence should have been excluded as impermissible victim impact evidence of prior crimes.

Because the evidence in this case was not victim impact evidence, Appellant's argument must fail. When asked to do so, we will consider arguments regarding the types of evidence of prior crimes that should and should not be admissible in a capital sentencing proceeding.[2] However, we

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[2] Academically, South Carolina has long recognized that information about prior convictions is admissible in a capital sentencing proceeding. *See State v. Gaskins*, 284 S.C. 105, 124, 326 S.E.2d 132, 143 (1985); *and State v. Plath*, 281 S.C. at 9, 313 S.E.2d at 623 (stating that this rule is so fundamental that it requires no citation of authority). This rule is derived from the principle that receiving evidence of prior crimes is probative of the

feel that the delicate task of balancing the duty to conduct a sentencing inquiry "broad in scope," *Dawson*, 503 U.S. at 164, against the need to protect a capital defendant from unfair prejudice and prevent a capital sentencing proceeding from transmuting into a sentencing referendum on all of the defendant's prior crimes is only properly performed when that case is presented. Such a case would no doubt involve considerations of when the introduction of evidence renders a proceeding so unfair as to violate due process, *see Payne*, 501 U.S. at 831, and also would implicate our rules of evidence; rules which, at the most basic level, allow proof of character by specific instances of conduct. *See* Rule 405, SCRE.

Instead of addressing any of these topics, which would be of paramount importance when considering clarifying our relevance rules, the briefs to this Court, like Appellant's argument, concerned only victim impact evidence. Under these circumstances, we feel the better course is to confine ourselves to a careful analysis of the arguments briefed and presented to us. *See State v. Torrence*, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991) (abolishing *in favorem vitae* review in capital cases). Although the dissent raises intriguing questions, we think it the better course to wait to decide such a case until we are asked. *See State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (appellate court will not consider issues not properly presented).

Based on the above reasoning, we hold that the testimony about the ABHAN victims' injuries and the corresponding photographs was not impermissible victim impact evidence relating to Appellant's prior crimes.

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character of the defendant and consistent with the sentencing authority's duty to "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *Dawson v. Delaware*, 503 U.S. 159, 164 (1992); *see also State v. Skipper*, 285 S.C. 42, 47, 328 S.E.2d 58, 61 (1985) (*overruled on other grounds* 476 U.S. 1 (1986)). Appellant has not challenged this rule, and indeed, Appellant has made no discussion of these authorities (upon which the trial court directly relied).

III. Alleged Inappropriate Remarks

Appellant argues that the Solicitor's comments during cross-examination of a witness and during closing arguments improperly injected racial issues into the trial. We disagree.

As a general rule, inflammatory remarks which are calculated to appeal to the passions or prejudices of a jury should be affirmatively condemned. *South Carolina State Highway Dep't. v. Nasim*, 255 S.C. 406, 411, 179 S.E.2d 211, 213 (1971). "[W]hether or not the particular arguments are so prejudicial as to constitute reversible error depends upon the nature of the utterances and the circumstances under which they were made." *Id.* Under certain circumstances, this Court will grant a new trial despite the aggrieved party's failure to contemporaneously object to the argument if the prejudice caused by the argument is clear. *Dial v. Niggel Assoc., Inc.*, 333 S.C. 253, 256, 509 S.E.2d 269, 271 (1998); *Toyota of Florence, Inc., v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994).

Additionally, a solicitor's closing arguments in a capital trial should focus on the defendant's character, his background, and the nature of the crime. *State v. Reed*, 293 S.C. 515, 519, 362 S.E.2d 13, 15 (1987) (*overruled on other grounds by State v. Torrence*, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991)). The arguments must be viewed in the context of the entire record, and the relevant question is whether the comments infected the trial with unfairness so as to make the resulting conviction a denial of due process. *State v. Patterson*, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997).

As a starting point, we recognize that the terms "blond lady" and "King Kong" could have racial connotations. However, this court's jurisprudence does not prohibit the use of terms with racial meanings, nor does our case law stand for the proposition that arguments or evidence in a case must be void of racial allusions. Instead, this court has recognized that it is impermissible to use race to "inflame the passions or prejudices" of the jury. Accordingly, our inquiry focuses on how these terms were used in Appellant's case.

In our view, the "blond lady" remark was not made to inflame the passions or prejudices of the jury. If the State had sought to make the race of Appellant's former lover an issue in this case, we believe they would have elicited evidence to this effect while examining their witness who testified extensively about the affair. Instead, this comment came while cross-examining a defense witness.

Furthermore, we find that even if this remark was inflammatory, it did not prejudice Appellant. This remark is a far cry from the outrageous and inflammatory evidence and arguments seen in *Nasim*, *Toyota*, *Dial*, and the cases cited by Appellant. The proper inquiry is not whether the Solicitor's remark was undesirable or condemnable, but whether the comment "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). In this case, the Solicitor made the "blond lady" comment only once and never referred to Appellant's lover's race again. Furthermore, this case involved a brutal murder, where guilt was clearly established. Accordingly, we find no evidence of prejudice from the "blond lady" remark.

Similarly, the Solicitor's use of the term "King Kong" was not an appeal to the passions or prejudices of the jury. The comment referred to Appellant's immense size, strength, and the destructiveness of his previous crimes. In this case, the trial court properly determined that Appellant's size and strength were probative of the aggravating circumstance of physical torture, which the court charged to the jury. In this regard, the Solicitor's use of the term "King Kong" was not suggestive of a giant black gorilla who abducts a white woman, but rather, descriptive of Appellant's size and strength as they related to his past crimes.

Also, Appellant's mitigation witnesses described him as "a gentle giant," "a big old teddy bear," "the Secretary of Defense," and "the Mediator." The defense used these terms to indicate Appellant was a changed man and not a threat to others. In this regard, the trial court correctly found that "King Kong" was an invited response to Appellant's mitigation evidence.

Finally, the Solicitor's "Caveman" comment was merely descriptive of two of Appellant's past violent incidents. A witness to Appellant's ABHAN testified that she saw Appellant dragging the motionless body of one of the victims across a parking lot by the hair. Additionally, a prison guard testified about an incident where Appellant reached into another inmate's cell and dragged the inmate out by the hair. The Solicitor made this comment while describing how Appellant dragged his victims during these incidents, and, in our view, the comment was not inflammatory.

Based on the above reasoning, we hold that the Solicitor's comments did not improperly inject racial issues into the trial.[3]

PROPORTIONALITY REVIEW

As required, we conduct a proportionality review of Appellant's death sentence. S.C. Code Ann. § 16-3-25(C) (2003). The United States Constitution prohibits the imposition of the death penalty when it is either excessive or disproportionate in light of the crime and the defendant. *State v. Copeland*, 278 S.C. 572, 590, 300 S.E.2d 63, 74 (1982). In conducting a proportionality review, we search for similar cases in which the death sentence has been upheld. *Id.*; S.C. Code Ann. § 16-3-25(E) (2003).

After reviewing the entire record, we conclude that the sentence in this case was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of similar prior cases illustrates that imposing the death sentence in this case would be neither excessive nor disproportionate in light of the crime and the defendant. *See State v. Huggins*, 336 S.C. 200, 205, 519 S.E.2d 574, 577 (1999) (holding that the death penalty was warranted where defendant robbed and shot the victim); *State v. Hicks*, 330 S.C. 207, 219, 499 S.E.2d 209, 216 (2998) (holding that the death penalty was proper where the defendant robbed the victim and stabbed him numerous times in the neck, chest, and abdomen); *and State v. Byram*, 326 S.C. 107, 120, 485 S.E.2d 360, 367 (1997) (holding that death sentence was proper

[3] This conclusion makes an analysis of *Nasim*, *Toyota* and *Dial*'s exception to the contemporaneous objection rule unnecessary.

where the defendant entered the victim's home, stabbed her to death, and stole the victim's handbag and automobile).

CONCLUSION

For the foregoing reasons, we affirm.

MOORE, WALLER and BURNETT, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: In 1988, twelve years before he murdered Benton Smith, appellant brutally assaulted two young men in a parking lot. He pled guilty to two counts of assault and battery of a high and aggravated nature (ABHAN), and received a Youthful Offender Act sentence. During this capital resentencing proceeding, the State introduced, without objection, graphic testimony from two eyewitnesses to the assault of the second ABHAN victim,[4] including one witness who observed appellant stomping on the unconscious victim's head. The second witness testified he saw appellant drag the prostrate victim by the hair, then kneel to punch him five or six times, then rise and kick and stomp the unconscious victim.

The State then called one of the victims' mothers to testify, and appellant objected on the grounds of relevance at a sidebar.[5] The objection was overruled, and the mother testified to receiving the call telling her to come to the hospital and the injuries to her son that she observed when she arrived. Over another relevancy objection, the State was permitted to introduce a photo of the victim taken while he was in intensive care. The mother was permitted to testify extensively to the details of her son's time in the hospital, his subsequent stay in a head trauma rehabilitation facility, and the lingering effects of the beating.

This mother's testimony was followed by that of her son. Appellant's objection at a sidebar, again on the ground of relevancy, was overruled and the victim was permitted to relate a dream he had had while hospitalized about being chased by "Black Indians." The State then called, over another unsuccessful relevancy objection, the mother of the second victim. This woman testified, as had the first mother, to her observations of her son's injuries, recovery, rehabilitation, and residual problems.

I agree with the majority that evidence of a defendant's prior criminal record is admissible in a capital sentencing proceeding because it is relevant evidence of the defendant's character. The Constitution requires that the decision whether to impose a death sentence be "an *individualized*

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[4]Both victims were lying motionless in the parking lot, "obviously injured." The scene was quite bloody.

[5] The judge later put the grounds of the objection on the record.

determination [made] on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983) (italics in original). Further, I agree that, in furtherance of the jury's understanding of the defendant's character, the State should not be limited to merely presenting the fact of the prior conviction as it would be were the purpose to impeach the defendant's veracity. See State v. Gregg, 230 S.C. 222, 95 S.E.2d 255 (1956). I do not agree, however, that the extensive testimony admitted here, from eyewitnesses, victims, and relatives of the victims of offenses wholly unrelated to the capital offense, are relevant to the issue of the appellant's character. Nor can I agree that the dream of a victim of a prior crime is, under any stretch of the imagination, relevant to "the character of the individual or the circumstances of the [capital] crime." Zant, *supra.*

The Constitution permits the sentencing authority to consider "the specific harm caused by the crime in question" through the State's introduction of "evidence about the victim and about the impact of the murder on the victim's family" because such evidence is relevant to the "defendant's moral culpability and blameworthiness" as it relates to the capital murder. Payne v. Tennessee, 501 U.S. 808 (1991). In other words, this type of evidence is admissible because it is relevant to the circumstances of the crime, not because it is relevant to the defendant's character. Id.

I agree with the majority that the State's evidence in this case cannot be characterized as victim-impact evidence under Payne since it does not relate to the murder victim or his family. In fairness to appellant's attorneys, however, they concede that this evidence would have been admissible under Payne if related to the capital crime rather than to these unrelated prior offenses. Specifically, appellant's trial objection was to the evidence "as being inappropriate, victim impact type information and having nothing to do with the particular trial that [appellant] is on trial for now." Moreover, appellant's attorney in this appeal concedes this type of evidence may be admissible as it relates to the victim of the capital crime, but argues "[t]here is no language in Payne authorizing victim impact evidence on unrelated crimes ...." I agree with appellant that the trial court erred in admitting this irrelevant evidence.

The Constitution limits even valid victim-impact evidence where it is unduly inflammatory or renders the sentencing proceeding fundamentally unfair. Payne, *supra* (Justice O'Connor, concurring). Here, the capital sentencing jury was overwhelmed with evidence of appellant's "moral culpability and blameworthiness," not for the murder of Benton Smith, but for the brutal beatings of two young men.[6] In my opinion, the State's presentation of this evidence denied appellant a fair sentencing and encouraged the jury to impose a death sentence on an improper basis. Zant, *supra* (character of the defendant and circumstances of the capital crime are relevant to determining sentence).

I therefore dissent from the majority's decision to affirm appellant's sentence.

[6] This evidence was exploited by the solicitor in his closing argument.

The Supreme Court of South Carolina

The State, Respondent,

v.

Johnny O'Landis Bennett, Jr., Petitioner.

ORDER

Petitioner was convicted of murder, armed robbery and larceny and was sentenced to death. This Court recently affirmed petitioner's death sentence.[1] State v. Bennett, Op. No. 26174 (S.C. Sup. Ct. filed June 26, 2006). Although the remittitur has been sent in this case, a notice of execution has not been issued.

Petitioner now requests a ninety day stay of execution, from the date the opinion was issued, in which to file a petition for a writ of certiorari in the United States Supreme Court. The State has filed a return in which it maintains the majority of the claims petitioner plans to raise to the United

[1] The Court previously affirmed petitioner's convictions and the sentences imposed for armed robbery and larceny, but reversed the death sentence and remanded for a new sentencing proceeding. State v. Bennett, 328 S.C. 251, 493 S.E.2d 845 (1997). This appeal is from resentencing.

States Supreme Court are not preserved for review, but concedes that because it appears there is one federal question that is preserved, a stay is appropriate.

Because petitioner intends to raise to the United States Supreme Court a federal question that is preserved for review, we grant the petition for a stay of execution. In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996). The stay shall remain in effect to the extent provided by this Court in In re Stays of Execution in Capital Cases, supra.

IT IS SO ORDERED.

C. J.

J.

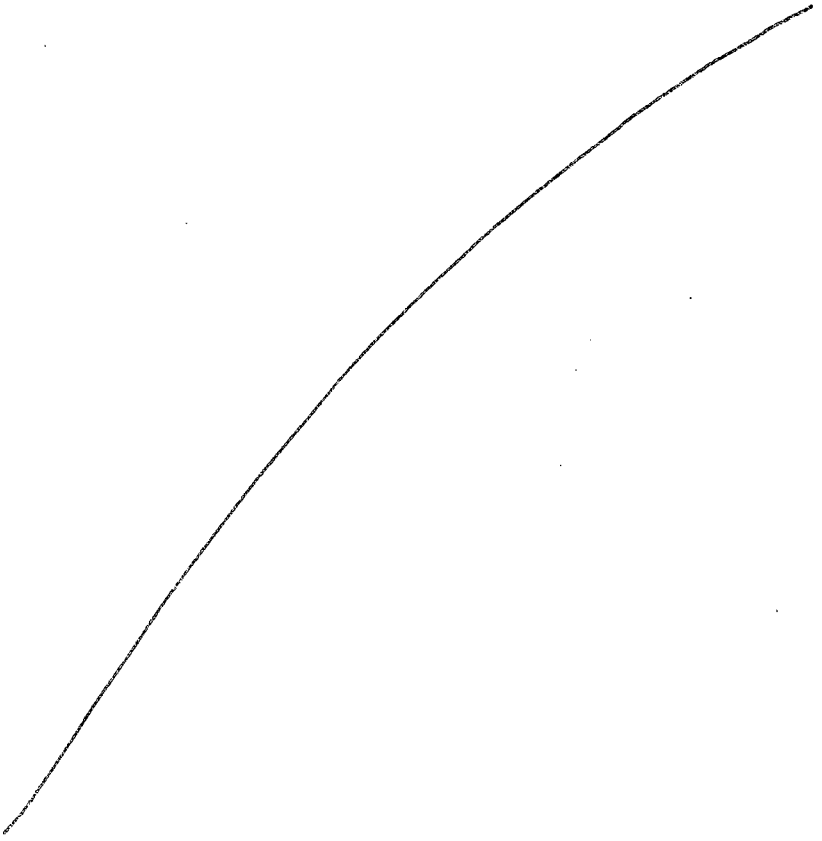
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Columbia, South Carolina

July 20, 2006



2653

No. 06-6780

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2006

JOHNNY O'LANDIS BENNETT,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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CAPITAL CASE

PETITIONER'S QUESTIONS PRESENTED.

1. Whether the South Carolina Supreme Court erred by holding that the testimony of the victim of a prior unrelated aggravated assault and battery committed by Petitioner that he had dreams about black Indians chasing him as a result of the prior unrelated assault that was not impermissible victim impact evidence under Payne v. Tennessee, 501 U.S. 808 (1991), since it did not involve the capital murder for which Petitioner was on trial, and it was emotional victim impact trauma evidence?

2. Whether the South Carolina Supreme Court erred by holding that the testimony of the two mothers of a prior unrelated aggravated assault and battery committed by Petitioner was not impermissible victim impact evidence under Payne v. Tennessee, 501 U.S. 808 (1991), where the mother's testimony covered negative changes in personality, troubles their sons have had since the assault, and the time spent in the hospital and rehabilitation centers since this testimony did not involve the capital murder for which Petitioner was on trial, and it was emotional victim impact trauma evidence?

3. Whether the South Carolina Supreme Court erred by holding that photographs of the two victims of a prior unrelated aggravated assault and battery committed by Petitioner lying in their hospital beds was not impermissible victim impact evidence under Payne v. Tennessee, 501 U.S. 808 (1991), since the emotional photographs did not involve the capital murder for which Petitioner was on trial, and they constituted emotional victim impact trauma evidence?

4. Whether the South Carolina Supreme Court erred by holding the prosecutor did not impermissibly inject race into the case before an all-white jury by deliberately eliciting the irrelevant fact that the prison guard Petitioner had a sexual relationship with was a white woman, since this denied Petitioner his right to a fair trial, and due process?

5. Whether the South Carolina Supreme Court erred by holding the prosecutor did not impermissibly inject race into the case before an all-white jury by comparing Petitioner to a King Kong and a Caveman during his closing argument, since this denied Petitioner his right to a fair trial, and it also introduced an arbitrary factor into the case in derogation of the Eighth Amendment by encouraging a death sentence based on the government's appeal to racial stereotypes and prejudice?

6. Whether the South Carolina Supreme Court erred by holding that it was now permissible to prevent Petitioner from asking potential jurors during *voir dire* whether they would simply "vote with the majority," or whether they would attempt

to be independent, since [this] violated Petitioner's Due Process right under Morgan v. Illinois, 504 U.S. 719 (1992) to ensure an impartial jury was qualified in this capital case since general questions about fairness were not sufficient to detect whether the juror would simply vote with the majority or whether the juror was biased?

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I. This Court lacks jurisdiction to grant certiorari to review the admissibility of testimony concerning a prior assault and battery of a high and aggravated nature in the penalty phase of Petitioner's trial - including testimony about and photographs of the victims' injuries and testimony that one victim had a dream of being chased by black Indians - because the issue as presented to the state supreme court did not involve any question of admissibility of evidence under the United States Constitution; rather, the issue in the lower court concerned the state law question of whether this was appropriate victim impact evidence. (Petitioner's Arguments 1-3). 5

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has defaulted on any possible Constitutional question 15

C. **Petitioner's argument does not involve a challenge to evidence that is inadmissible or prejudicial in the penalty phase of a capital trial.** 18

II. **This Court should deny certiorari because the state supreme court properly determined that the Solicitor's recross-examination of defense witness Byron Collins as to whether he remembered Petitioner's lover, prison guard Judie Hardee, did not deny Petitioner due process; and the Court lacks jurisdiction to grant certiorari to review the propriety of this query under the Eighth Amendment because the issue was addressed by the state supreme court as a due process question and Petitioner did not advance any Eighth Amendment argument for its exclusion. (Petitioner's Argument 4).** 23

III. **This Court should deny certiorari because the state supreme court properly determined that Petitioner did not demonstrate how Solicitor's challenged comments in his penalty phase closing argument deprived him of a fundamentally fair trial. (Petitioner's Argument 5).** 29

IV. **This Court should deny certiorari because the state supreme court properly determined that Petitioner received a fair and impartial jury and that the trial judge's ruling he could not ask veniremen whether they would "go along with the majority" did not render his trial fundamentally unfair. (Petitioner's Argument 6).** 36

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No. 06-6780

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2006

JOHNNY O'LANDIS BENNETT,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Respondent, through the Attorney General of South Carolina, hereby makes a Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of South Carolina filed on September 22, 2006 by Petitioner (Johnny O'Landis Bennett, #5023), who is currently confined under a sentence of death as the result of his Lexington County, South Carolina, murder conviction and death sentence. Respondent would respectfully make the following showing to the Court:

CITATIONS TO OPINIONS BELOW.

The June 26, 2006 decision of the South Carolina Supreme Court affirming Petitioner's death sentence is published as *State v. Bennett*, 369 S.C. 219, 632 S.E.2d 281 (2006) (*Bennett II*) and is

attached to the Petition at **Appendix, pp. A1-15.** The July 20, 2006 unpublished Order of the South Carolina Supreme Court granting Petitioner's request for a stay of execution so that he could file the current Petition for Writ of Certiorari is attached to Petition at **Appendix, pp. A16-17.**

JURISDICTION.

The judgment of the South Carolina Supreme Court was entered on June 26, 2006. Petitioner seeks to invoke the jurisdiction of this Court to review the judgment of the South Carolina Supreme Court under 28 U.S.C. § 1257(a), Petitioner allegedly having asserted below and asserting herein the deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED.

1. This case involves the Sixth Amendment to the United States Constitution, which provides, in pertinent part, that:

> In all criminal prosecutions, the accused shall enjoy the right to . . . counsel.

2. This case also involved the Eighth Amendment to the United States Constitution, which provides that "cruel and unusual punishment [shall not be] inflicted."

3. This case also involves the Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

> no[ ] . . . State [may] deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE.

A. Prior Procedural History

This capital case is on direct appeal. Petitioner, Johnny O'Landis Bennett ("Petitioner"), is under a death sentence for the November 1990 murder, kidnapping, armed robbery and grand larceny

of Benton Smith. The Lexington County Grand Jury originally indicted him at the March 1991 term of court. However, the State *nolle prossed* that indictment because of certain errors contained in it; and he was reindicted at the September 1993 term of court for murder, kidnapping, armed robbery and grand larceny (93-GS-32-2354). The State served its Notice of Intent to Seek the Death Penalty and Notice of Evidence in Aggravation in March 1993.

On October 9-18, 1995, Petitioner received a jury trial before the Honorable Ralph King Anderson, Jr. The jury convicted him on all charges and ultimately imposed the death penalty following a separate sentencing proceeding. A timely Notice of Appeal was served and filed. The South Carolina Supreme Court affirmed Petitioner's convictions, but reversed his death sentence and ordered a new sentencing trial in a published Opinion. *State v. Bennett,* 328 SC 251, 493 S.E.2d 845 (1997) (*Bennett I*).

Following motions hearings on June 30, 2000, Petitioner received a new sentencing proceeding before the Honorable Marc H. Westbrook and a jury on July 10 -16, 2000. The jury found the statutory aggravating circumstances that the murder was committed while in commission of a robbery while armed with a deadly weapon; that the murder was committed while in the commission of larceny while armed with a deadly weapon; that the murder was committed while in the commission of kidnapping; and that the murder was committed while in the commission of physical torture. S.C. Code Ann. §16-3-20(C)(a)(1)(b), (d), (e) & (h) (Supp. 2005). The jury recommended the death penalty and Judge Westbrook sentenced Petitioner to death for murder. Although the sentence for kidnapping was subsumed by the murder conviction, Judge Westbrook imposed concurrent sentences of thirty years for armed robbery and five years for grand larceny of a motor vehicle. **R. pp. 2148-49; 2157-58.**

On July 26, 2000, Petitioner filed a motion for a new trial. Judge Westbrook held a hearing on this motion on October 26, 2000. On August 29, 2003, he issued an Order denying the motion. Wayne Floyd, Esquire, and Hervery B.O. Young, Esquire, represented Petitioner in the trial court.

A timely Notice of Appeal was served and filed. Assistant Appellate Defenders Robert M. Dudek and Aileen P. Clare represented Petitioner before the South Carolina Supreme Court. After briefing by the parties and oral argument, the South Carolina Supreme Court affirmed Petitioner's death sentence in a published Opinion filed on June 26, 2006. *State v. Bennett*, 369 S.C. 219, 632 S.E.2d 281 (2006) (*Bennett II*). The Court also conducted the proportionality review required by S.C. Code Ann. § 16-3-25.(2003). *Id.* Justice Pleicones dissented in a separate Opinion. *Id* at ___, 632 S.E.2d at 289-91 (Pleicones, J., dissenting).

Petitioner then filed a Petition for Stay of Execution, pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), so that he could file a Petition for Writ of Certiorari in the United States Supreme Court. The State filed a July 11, 2006 letter Return to the Petition for Stay. The South Carolina Supreme Court sent the Remittitur to the Lexington County Clerk of Court on July 12, 2006; and, it granted a stay of execution in an unpublished Order filed on July 20, 2006.[1]

B. Statement of Facts.

The South Carolina Supreme Court's opinion on direct appeal adequately summarized the State's guilt phase testimony for purposes of this pleading:

> Appellant received several criminal convictions in connection with the murder of Benton Smith (Victim). The evidence established that Victim was last seen leaving

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[1] He also has filed a state Post-Conviction Relief Application in the Lexington County (South Carolina) Court of Common Pleas and that Application is pending.

> his residence accompanied by Appellant. After police and family members searched for Victim for several days, Appellant led police to Victim's body which was buried under wood brush behind Appellant's sister's home. Victim had been stabbed approximately seventy (70) times with a Phillips head screwdriver and died as a result of internal bleeding. Appellant gave conflicting statements to police; first denying any knowledge of Victim's murder, then confessing to the murder, and finally recanting and maintaining his innocence.

Bennett II, 632 S.E.2d at 284

REASONS WHY CERTIORARI SHOULD BE DENIED.

I. This Court lacks jurisdiction to grant certiorari to review the admissibility of testimony concerning a prior assault and battery of a high and aggravated nature in the penalty phase of Petitioner's trial - including testimony about and photographs of the victims' injuries and testimony that one victim had a dream of being chased by black Indians - because the issue as presented to the state supreme court did not involve any question of admissibility of evidence under the United States Constitution; rather, the issue in the lower court concerned the state law question of whether this was appropriate victim impact evidence. (Petitioner's Arguments 1-3).

Petitioner's first argument complains about the introduction of testimony from a victim of a prior assault and battery of a high and aggravated nature (A.B.H.A.N.) concerning a dream of being chased by black Indians. His second argument challenges the introduction of testimony from the mothers of both victims of that incident about the extent of the injuries inflicted, while his third argument challenges the introduction of photographs depicting those injuries. He characterizes all of this as improper victim impact evidence under *Payne v. Tennessee*, 501 U.S. 808 (1991). However, it is well settled that this Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496- 497 (1981).

Here, the Court lacks jurisdiction to grant certiorari because Petitioner's arguments before the state supreme court did not involve any question of admissibility of evidence under the United States Constitution. Rather, the issue in the lower court concerned the state law question of whether this

was appropriate victim impact evidence. Also, the state supreme court expressly relied upon an independent and adequate state procedural bar in refusing to address any issue other than the narrow question Petitioner argued on appeal.

As part of its case in resentencing, the State introduced Petitioner's two September 14, 1988 convictions for A.B.H.A.N. and his Youthful Offender Act sentence[2]. These convictions stemmed from him savagely beating two employees of the Pizza Hut in Lexington, on March 4, 1988. **R. p. 1029; State's Ex. 6.**

Several prosecution witnesses also testified concerning the attack itself and the injuries inflicted upon the two victims by Petitioner. William Mark DuBose recalled seeing "a large black male" (later identified as Petitioner) standing over one of two white males who were lying on the pavement when he pulled into the parking lot of the Pizza Hut on March 4, 1988. The two white males were "motionless, apparently unconscious. There was a good bit of blood lying around both of them. They were obviously injured and were not moving." However, the black man stomped one of the motionless victims approximately three or four times. The man then got into a truck with two white males and they left the scene. DuBose testified that he fled to a nearby parking lot out of fear of his own safety. **R. pp. 986-94.**

Rhonda Smith testified that she and her boyfriend were at the Pizza Hut that same night. As they were sitting at a window booth, she saw "a black male dragging a white male from the back of the Pizza Hut ... by his hair. ... The white guy was like on his back, and he was just dragging him along the ground with no effort by the white individual at all, it was strictly by the black male." Once the black male had dragged his victim to the front door of the Pizza Hut, he let go of the fistfull of

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[2] He was sentenced to an indeterminate period not to exceed six years.

hair he had been pulling, "kneel[ed] down and beat him in the face with his fists and kicked him and stomp him." **R. pp. 996-98.**

The black male punched his defenseless victim at least five or six times in the face and kicked and stomped him with his feet three or four times in the head[3]. After he stomped him for the last time, he jumped into a truck (driven by a white male) that had pulled up, and the truck drove away from the scene. Ms. Smith stayed until the police and an ambulance had arrived. While there, she saw another person laying on the ground in the back of the Pizza Hut. **R. pp. 998-1003; 1006-09.**

A. Presentation of argument in state court.

1. Testimony of the mothers of the Pizza Hut victims.

Apparently, Petitioner raised an objection to the testimony of Sharon Brady, the mother of Pizza Hut victim Shannon Gilbert at a bench conference. *See* **R. p. 1012, ll. 6-9.** The trial judge later placed on the record that Petitioner had argued that her testimony about the extent of her son's injuries and the reaction was irrelevant. The trial judge stated that he had overruled the objection because the state supreme court had approved the admission of such testimony. Petitioner added that he contended that this was "inappropriate, victim impact type of information" which had nothing to do with the crime for which he was on trial. **R. pp. 1038-39.** He also noted that he had the same objection before the testimony of Helen McGough, the mother of Pizza Hut victim Aaron McGough. This was likewise overruled. **R. pp. 1038-39.**

Mrs. Brady testified that her son, Shannon Gilbert, worked at the Pizza Hut on March 4, 1988. She received a call that night from the Pizza Hut that he had been taken to the Lexington County Hospital. She later received a second call notifying her that he had been taken to the Richland

[3] The white male never moved. **R. p. 1001.**

Memorial Hospital because of head trauma. When she arrived at the hospital, he was unconscious and she had a hard time identifying him because of the bruises, cuts and swelling on his face and head. He remained unconscious and in the intensive care unit (I.C.U.) for thirteen days. She photographed his injuries while he was in I.C.U. Even after he regained consciousness and was taken out of I.C.U., he remained in the hospital for another eleven days. He finally could walk "some." He then remained at home for five days before being sent to the Rebound Head Trauma Center in Lancaster, South Carolina, for approximately two and a half months. **R. pp. 1012-18.**

Mrs. Brady testified that he continued to have rehabilitation and therapy after his discharge from the trauma center and they had to personally hire a tutor because they did not meet the time requirements for the State to provide one. Shannon also needed a speech therapist; and he needed a physical therapist to help him exercise his left leg and arm, which had been affected by a fracture behind his right ear. She stated that he had not completely recovered from the beating. **R. pp. 1018-20.**

Shannon Gilbert testified that he could not remember very much of what had happened on March 4, 1988. He did remember getting off work at approximately 10:00 or 10:30 p.m. and going to use the phone outside the front door. While he was talking to a girl, he asked a black man who was standing there if the man needed to use the phone. When the man indicated he did, he told his fried that he had to go and call her from inside the store. The next thing he remembered was waking up in the hospital about thirteen or fourteen days later. He then corroborated his mother's testimony about the extent of his injuries and the impact it had upon him: that he was unconscious for thirteen days; that he was unable to walk or talk when he first regained consciousness; that he stayed in the hospital approximately three and one-half weeks; that he had no coordination and no strength in his

left hand and left leg even after his discharge; and that he was in the head trauma center for roughly two and one-half months, where he had both speech and physical therapy. Additionally, he provided details concerning the effects that lingered from the beating, such as the lack of coordination in his left hand and left leg and the problems caused by his impaired short-term memory. **R. pp. 1018-28.**

Ms. Helen McGough testified that her seventeen year old son, Aaron, was working his first night at the Pizza Hut on March 4, 1998. He was supposed to leave work around 11:00 p.m. and she waited up for him to come home and discuss his first day at work. However, he did not come home as planned. Instead, she received a call at approximately 11:20 or 11:25 p.m. informing her that he had been taken to the Lexington Hospital. About five or ten minutes later she received a second call and, as a result, went to the Richland Memorial Hospital. When the ambulance arrived and opened the door, he resisted the efforts of emergency medical personnel to get him out of the ambulance. **R. pp. 1031-33.**

Ms. McGough testified that she tried to speak to her son but he did not respond. Also, she would not have recognized him if she had not known it was him because his face "was all cut up. His eyes were just little slits. His nose and his mouth ... was just all one. His forehead was all cut up." (sic). He was immediately transported to the emergency room and was treated by a neurologist and a plastic surgeon. She next saw him in intensive care but, again, he was unresponsive when she tried to talk to him. "[H]e was just very, very, still." **R. pp. 1033-34.**

Aaron remained unconscious and in I.C.U. for four days. Ms. McGough took a picture of his injuries at that time. She testified that Aaron had "[n]ot really" fully recovered from the beating he received that night, and that his personality had changed from someone who was "real easy-going" to someone who quickly becomes frustrated or angry. Also, he still "has short-term memory loss."

Even after he was removed from I.C.U., he stayed in a hospital room for almost a week. At home, he still had to have someone with him at all times; and Ms. McGough stayed home with him for approximately six weeks. Additionally, he was real weak. **R. pp. 1034-37.**

2. Photographs of A.B.H.A.N. victims.

Sharon Brady testified that she photographed Shannon's injuries within the first several days after he was placed in I.C.U. The picture represented how he looked "a day or two" after the incident. **R. p. 1014, ll. 16-25.** Over Petitioner's objection that the photograph "adds nothing" to her testimony about Shannon's injuries and was intended "to inflame the jury," the trial judge allowed the photograph into evidence as **State's Ex. 5.** He found that it was "not overly graphic or inflammatory," and that it "fairly depicts and represents the testimony of the witness ...." **R. p. 1015, ll. 1-25.** Mrs. Brady then testified that Shannon's condition had not changed between the first time she saw him after the crime and when she took the photograph, except for "the apparatus added to him." **R. p. 1016, ll. 3-16.**

When the State asked Helen McGough whether she could identify a photograph, Petitioner made an identical objection to the photographs of Aaron McGough. **R. p. 1035, ll. 11-16.** However, the trial judge found that these photographs were "not so graphic or inflammatory as to cause any problems" and that they appropriately depicted Mrs. McGough's testimony. **R. p. 1035, ll. 18-20.** Mrs. McGough then testified that the photos depicted Aaron. She had taken them after he had been in the hospital four days. Although "A lot of the swelling had gone down and you could see his eyes again, he still had a lot of swelling. Also, the photos were a fair representation of how Aaron looked at the time the photos were taken. Therefore, the trial judge allowed these photos into evidence as **State's Ex. 7**, over Appellant's objection. **R. p. 1035, l. 24 - p. 1036, l. 14.**

3. Shannon Gilbert's testimony about a dream.

When asked if he had any consciousness about being in the hospital or any dreams that he could remember from being in the hospital, Shannon Gilbert testified that "I had a dream. I did have a dream in the hospital. It's the only one I remember, of course." Petitioner objected on the grounds that the testimony was irrelevant. Over this objection, Shannon was permitted to testify that "I remember the dream. I woke up and I remember being afraid. ... It was -- Indians were chasing me trying to kill me, and the thing that I thought was they were black. And later on -- or after years have gone by I've maybe even though, well, there might have been a link. You know, that I was remembering something about trying to get away from someone." **R. p. 1027 l. 17 - p. 1028 l. 13.**

At this point, Petitioner stated "I renew my motion. I move that it be stricken. That's irrelevant." The trial judge noted his motion, but denied it. **R. p. 1028 ll. 15-17.** On cross-examination, Petitioner established that "[t]here were two other white guys involved" in addition to he and Aaron McGough; but, he did not remember the fight initially between the "white guys." **R. p. 1030 ll. 11-22.**

In an *in camera* hearing after Mrs. McGough's testimony, Petitioner stated that he had objected to any testimony about the extent of the injuries suffered by the Pizza Hut victims as inappropriate victim impact evidence. He renewed this motion with respect to Shannon's testimony at issue in this argument.[4] Petitioner claimed that the testimony by Shannon had "no importance" and

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[4]This motion was predicated upon the trial judge's excusing for cause black male juror Thomas W. Brown (*see* **R. pp. 144-55; 820-24**) when he indicated, after jury selection, that he could not be fair and impartial because of his familiarity with the victim's family. Petitioner suggested that he should be allowed to remain as a juror so that he would not be tried by an all-white jury. The trial judge, however, rejected his arguments (**R. pp. 867-85**) and Petitioner has not raised any issue on appeal concerning this ruling.

no relevance "except to inflame a white jury." He asserted this was a gross violation of his rights for the State to interject race. The trial judge denied the motion and found that Shannon had "testified just to what his impressions were of the dream that he had." **R. pp. 1039-41.**

Petitioner later unsuccessfully renewed his objection to the photographs of the two Pizza Hut victims, and the "dream testimony" at the conclusion of the State's case. He argued that Shannon's testimony improperly inserted race into the proceedings in light of the fact he had an all-white jury, while the photographs were inflammatory and prejudicial. **R. p. 1769 ll. 10-14 & ll. 18-23.** The trial judge, again, denied his motion. **R. pp. 1776-77**. He also argued his objection to all of this testimony in the motion for a new trial, **R. pp. 2207-08; R. pp. 2363-80**; but the trial judge denied the motion in the August 24, 2003 Order. **R. pp. 2407-2435.** On pages 9-10 of his Order, the trial judge rejected Petitioner's argument as to the "dream testimony," as follows:

> "The comment of "black Indians" was not elicited by the State, was mentioned only once, was evidence of the Defendant's violent character and the impact of that violence on the victims, was not referred to thereafter by the State, was not a blatant racial reference, and did not prejudice the Defendant. I, therefore, find this isolated comment does not warrant a new trial."

Petitioner's first three issues on direct appeal challenged the trial judge's ruling on the admissibility of the above evidence concerning the A.B.H.A.N. victims' injuries. He argued that it was inadmissible victim impact evidence but did not include any Constitutional basis for exclusion of this evidence or even argue its relevance. **See Final Brief of Appellant, at pp. 4-19; Final Brief of Respondent, at pp. 15-28.** A majority of the state supreme court rejected his arguments, as follows:

> Appellant argues that the trial court erred in admitting the ABHAN victims' mothers' testimonies, the hospital photographs, and the

testimony about the victim's "black Indians" dream because this evidence was impermissible "victim impact" evidence of prior crimes. We disagree.

In *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the United States Supreme Court held that the Eighth Amendment did not prohibit a jury from considering "victim impact" evidence at the sentencing phase of a capital trial. In *Payne*, a brutal double murder, the defendant challenged the admission of testimony that the child of one of the victims "missed his mother" and the State's remarks in closing arguments suggesting that the continuing effects of the crimes on the victims' family favored imposing the death penalty. *Id.* at 816. Drawing on historical arguments and reasons of fairness, the Supreme Court held that a state was not constitutionally prohibited from allowing a capital sentencing jury to consider "the specific harm caused by the defendant," including the impact of the murder on the victim's family and "a quick glimpse of the life which the defendant chose to extinguish." *Id.* at 822-26, 111 S.Ct. 2597.

Contrary to Appellant's assertions, none of the testimony at issue in this case was "victim impact" evidence. First, the mothers' testimonies were limited to the circumstances surrounding the ABHAN and the extent of the injuries their sons suffered. This evidence was clearly not evidence of the character of the victims or the impact on their families, but rather, evidence of the physical injuries caused by Appellant. That the descriptions of the victims' injuries came from their mothers does not automatically convert factually descriptive testimony into impact testimony regarding the victims' character or the effect on the victims' families or community.

Similarly, there can be no question that the hospital photographs were introduced to describe the extent of the injuries the ABHAN victims suffered. These photographs are easily distinguished from cases where photographs have been deemed "victim impact" evidence. *See State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999) (photograph of murder victim in his high school graduation regalia); *see also State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997) (photograph of victim and her husband taken shortly before victim was involved in fatal accident). Although, like in *Langley* and *Livingston*, the photographs in this case were certain to elicit an emotional response from the jury, these photographs were highly probative of the nature of Appellant's prior crime in that they provided the clearest picture of the aggravated nature of the assault and battery.

Finally, we hold the victim's testimony about his "black Indians" dream was not "victim impact" evidence. This testimony merely described the emotional injury to the ABHAN victim.

Though masquerading as a horse of the same color, the dissent decides an entirely different case from the one at bar. At the sentencing proceeding, Appellant argued the testimony about the ABHAN victims' injuries was "inappropriate victim impact type of information having nothing to do with the particular crime Mr. Bennett is on trial for now." Likewise, it appears Appellant's objection to the hospital photographs was based on Rule 403, SCRE (excluding relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice). Finally, Appellant objected to the introduction the victim's dream on the grounds of relevance. Before this Court, however, Appellant did not couch these objections in terms of relevance or a Rule 403 analysis. Instead, the only theory Appellant presented to this Court on this issue was that this evidence should have been excluded as impermissible victim impact evidence of prior crimes.

Because the evidence in this case was not victim impact evidence, Appellant's argument must fail. When asked to do so, we will consider arguments regarding the types of evidence of prior crimes that should and should not be admissible in a capital sentencing proceeding.[FN2] However, we feel that the delicate task of balancing the duty to conduct a sentencing inquiry "broad in scope," *Dawson*, 503 U.S. at 164, 112 S.Ct. 1093, against the need to protect a capital defendant from unfair prejudice and prevent a capital sentencing proceeding from transmuting into a sentencing referendum on all of the defendant's prior crimes is only properly performed when that case is presented. Such a case would no doubt involve considerations of when the introduction of evidence renders a proceeding so unfair as to violate due process, *see Payne*, 501 U.S. at 831, 111 S.Ct. 2597 and also would implicate our rules of evidence; rules which, at the most basic level, allow proof of character by specific instances of conduct. See Rule 405, SCRE.

[FN2. Academically, South Carolina has long recognized that information about prior convictions is admissible in a capital sentencing proceeding. *See State v. Gaskins*, 284 S.C. 105, 124, 326 S.E.2d 132, 143 (1985); and *State v. Plath*, 281 S.C. at 9, 313 S.E.2d at 623 (stating that this rule is so fundamental that it requires no citation of authority). This rule is derived from the principle that receiving evidence of prior crimes is probative of the character of the

> defendant and consistent with the sentencing authority's duty to "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *Dawson v. Delaware*, 503 U.S. 159, 164, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992); *see also State v. Skipper*, 285 S.C. 42, 47, 328 S.E.2d 58, 61 (1985) (overruled on other grounds 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)). Appellant has not challenged this rule, and indeed, Appellant has made no discussion of these authorities (upon which the trial court directly relied).]
>
> Instead of addressing any of these topics, which would be of paramount importance when considering clarifying our relevance rules, the briefs to this Court, like Appellant's argument, concerned only victim impact evidence. Under these circumstances, we feel the better course is to confine ourselves to a careful analysis of the arguments briefed and presented to us. *See State v. Torrence*, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991) (abolishing *in favorem vitae* review in capital cases). Although the dissent raises intriguing questions, we think it the better course to wait to decide such a case until we are asked. *See State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (appellate court will not consider issues not properly presented).
>
> Based on the above reasoning, we hold that the testimony about the ABHAN victims' injuries and the corresponding photographs was not impermissible victim impact evidence relating to Appellant's prior crimes.

Bennett II, 632 S.E.2d at 286-87.[5]

B. Petitioner's arguments do not present a federal question and he has defaulted on any possible Constitutional question.

In *Payne*, this Court overruled *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), both of which had held that the Eighth Amendment barred the prosecution from introducing victim impact evidence or making victim impact argument in the penalty phase of a capital trial. The Court in *Payne* held that "a State *may properly conclude* that for

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[5] Justice Pleicones dissented and would have held that admission of this evidence was reversible error. *Id* at 290-91. (Pleicones, J., dissenting).

the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." 501 U.S. at 825 (emphasis added). Further, the Court in *Payne* observed that *Booth* "unfairly weighted the scales in a capital trial; while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering 'a glimpse of the life' which a defendant 'chose to extinguish,' " *id.* at 822 (quoting *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)), or "demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide." *Id.*

Therefore, the Court in *Payne* concluded that, "*if the State chooses to permit* the admission of *victim-impact evidence and prosecutorial argument* on that subject, the Eighth Amendment erects no *per se* bar." *Id.* at 827 (emphasis added); *see also Humphries v. Ozmint*, 397 F.3d 206 (4th Cir. 2005) (en banc).[6] The Court in *Payne* also stated that there was "no reason" to treat victim-impact evidence "differently than other relevant evidence." *Id.* at 827. Yet, the Court cautioned that, "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id.* at 825.

Thus, *Payne* unequivocally leaves the determination of whether victim impact evidence should be admissible to the individual states, and the question of the admissibility of such evidence is a matter of state law. *Id.* at 825, 827. In *State v. Johnson*, 410 S.E.2d 547, 555 (S.C. 1991) and *Lucas*

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[6]As the Fourth Circuit Court of Appeals observed in *Humphries*, 397 F.3d at 217, "the *Payne* Court did not alter *Booth*'s holding that admitting evidence of the victims' opinions of the crime and of the appropriate sentence for the defendant violates the Eighth Amendment; rather *Payne* only allows evidence of the victim's personal characteristics and the harm inflicted upon the victim's family and community. *Id.* at 829 n. 2.

v. Evatt, 416 S.E.2d 646, 647-48 (S.C. 1991), the state supreme court held that victim impact evidence and argument about the victim and about the impact of the murder on the victim's family is relevant, as a matter of state law, to the jury's decision as to whether or not the death penalty should be imposed. Thus, certiorari should be denied because Petitioner's first three arguments before the state supreme court merely involved the supposed inadmissibility of evidence, as a matter of state law and did not present a Constitutional basis for its exclusion;[7] and this state law ground is independent and adequate to support the judgment. *See Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); Justice Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 501 (1977).

The only exception to this being purely a question of state evidentiary law is if the evidence presented is so "unduly prejudicial that it renders the trial fundamentally unfair" that it is barred by the Due Process Clause of the Fourteenth Amendment. *Payne*, 501 U.S. at 825. However, Petitioner did not make any due process argument before the state supreme court with respect to his **Arguments I-III**, and that court expressly relied upon a state procedural bar in refusing to address any argument but the narrow question of whether the disputed evidence was inadmissible victim impact evidence. *Bennett II*, 632 S.E.2d at 287. Again, this independent and adequate state law ground is a jurisdictional bar to this Court's review of that issue on certiorari from direct appeal. *Fox Film Corp.*, *supra*; *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) ("In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this

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[7] Moreover, Petitioner's repeated references to *Payne*, without arguing a specific Constitutional challenge to the introduction of this evidence, was insufficient to preserve a Constitutional claim for appellate review under state court procedural rules. *E.g.*, *State v. Tyndall*, 518 S.E.2d 278, 282 (S.C. Ct. App. 1999).

Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory").

C. Petitioner's argument does not involve a challenge to evidence that is inadmissible or prejudicial in the penalty phase of a capital trial.

Another reason this Court should deny certiorari is that the state supreme court properly determined that the evidence of the nightmare, as well as the mothers' testimony and the photographs of both A.B.H.A.N. victims, was not victim impact evidence; and nothing in this Court's decision in *Payne* or other precedent from this Court makes evidence of other crimes inadmissible to show the defendant's character in the sentencing proceeding of a capital trial.

S.C. Code Ann. § 16-3-20(B) (Supp. 2006) provides that during the sentencing phase, "the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of the punishment." Before a death sentence is imposed, the sentencing jury's attention must be directed to the specific circumstances of the crime and the characteristics of the person who committed the crime. *State v. Shaw*, 255 S.E.2d 799 (S.C. 1979). The state supreme court has consistently held that evidence of other crimes is admissible at sentencing phase of capital trial, including photographs of a victim. *E.g.*, *Ray v. State*, 498 S.E.2d 640 (S.C. 1998) (evidence of other crimes, including "gory photos" of victim, is admissible at sentencing phase of capital trial); *State v. Gaskins*, 326 S.E.2d 132 (S.C. 1985) (details of defendant's prior murder convictions, including photographs of prior murder victims, were properly allowed into evidence in sentencing phase), *cert. denied*, 471 U.S. 1120 (1985); *State v. Plath*, 313 S.E.2d 619 (S.C. 1984) (information concerning the details of prior offenses can be introduced during the penalty phase), *cert. denied*, 467 U.S. 1265 (1984). *Cf. State v. Bell*, 393 S.E.2d 364, 371-72 (S.C. 1990), *cert. denied*, 507 U.S. 1022 (1993). As the state supreme

court correctly observed, "[t]his rule is derived from the principle that receiving evidence of prior crimes is probative of the character of the defendant and consistent with the sentencing authority's duty to 'conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.'" *Bennett II*, 632 S.E.2d at 287 n.2 (citing *Dawson v. Delaware*, 503 U.S. 159, 164 (1992)).

Here, the evidence concerned similar crimes (A.B.H.A.N.) to the murder conviction for which Bennett was being sentenced. "Admission of testimony that a defendant has attempted a similar crime or crimes to that for which he is on trial is proper because such testimony indicates a defendant's individual characteristics and predisposition to commit similar crimes." *State v. Green*, 392 S.E.2d 157, 162-63 (S.C. 1990) (citations omitted). Also, this evidence, along with other evidence of his behavior while incarcerated, showed Petitioner's extremely violent nature and future dangerousness. Evidence of a defendant's future dangerousness is a legitimate interest at sentencing. *Dawson*, *supra*.

Further, the trial judge gave a limiting instruction that required the jury to find that the State had proved the evidence of Petitioner's bad character beyond a reasonable doubt before considering it. This instruction also precluded the jury from relying upon evidence of these crimes to prove statutory aggravating circumstances, and it insured that the jury's consideration of these offenses was limited to proof of evidence of "[Petitioner]'s character and characteristics as they may bear logical relevance to the crime." He also charged the jury that they could give this evidence "whatever weight you consider proper under the circumstances of this case." **R. p. 2123, l. 4 - p. 2124, l. 2.** *Cf. Green*, 392 S.E.2d at 163; *State v. Stewart*, 320 S.E.2d 447 (S.C. 1984).

Respondents submit that this is consistent with the Eighth Amendment and that Petitioner's

contrary position lacks merit. *E.g.*, *Payne, Green, supra*. *Cf. Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("[W]e believe that in capital cases ... the Eighth Amendment ... requires consideration of the character and record of the individual offender ... as a constitutionally indispensable part of the process of inflicting the penalty of death"). Petitioner's characterization of the challenged testimony as victim impact evidence is simply wrong.

This was not evidence showing the extent of the harm caused by the by the A.B.H.A.N. to Shannon's family or the community, such as that approved in *Payne*, 501 U.S. at 824-30, and the state supreme court's decisions adopting it as law of South Carolina. Rather, this is evidence of the injuries inflicted upon Shannon. Instead of being victim impact evidence of other, unrelated prior offenses, Shannon's testimony constituted some proof of the identity of his attacker. Also, and more significantly, the dream testimony was admissible as a circumstance of aggravation of the prior crime, bearing on Petitioner's culpability, because it "merely described the emotional injury to the ABHAN victim." *Bennett II*, 632 S.E.2d at 287. Likewise, the mothers' testimony was "clearly not evidence of the character of the victims or the impact on their families, but rather, evidence of the physical injuries caused by [Petitioner]." *Id.* at 286.

Nor can there be any "question that the hospital photographs were introduced to describe the extent of the injuries the ABHAN victims suffered. These photographs are easily distinguished from cases where photographs have been deemed 'victim impact' evidence." *Id.* As such, the disputed evidence was properly admissible. *See People v. Marks*, 72 P.2d 1222, 1241 (Cal.2003), *cert. denied*, 541 U.S. 1033 (2004) (agreeing with trial court's rejection of any distinction between an injury and the result of that injury, finding that there was a basis for introducing some videotaped evidence of unrelated gunshot victim's condition, and holding that any error in introduction of lengthy videotape

was harmless); *People vs. Holloway*, 91 P. 3d 164, 195-96 (Cal. 2004) (concluding that testimony of prior, unrelated victim's emotional trauma years later, which resulted from the defendant's assault with a deadly weapon, was properly admitted because the link between the attack and the emotions and actions to which she testified was direct and foreseeable), *cert. denied*, 543 U.S. 1156 (2005)[8].

Even if the Court were to view this evidence as victim impact evidence of unrelated offenses, the evidence was still properly admitted. *Id. See also People v. Garceau*, 862 P. 2d 664 (Cal. 1993) (federal constitution does not bar introduction of evidence showing effect of prior violent criminal activity of victims); *People v. Mickle*, 814 P. 29 290, 316-17 (Cal. 1991) (In Banc) (admission of evidence concerning impact of defendant's prior sexual assaults on victims during penalty phase of capital murder trial did not violate the Eighth Amendment because the evidence concerned obvious emotional effect of defendant's prior sexual molestations on victims and were admissible as circumstances of the prior crimes bearing on the defendant's culpability).[9]

Petitioner's suggestion that certiorari should be granted to resolve a split of authority among the state courts regarding the admissibility of victim impact evidence of unrelated prior offenses, ignores - as it necessarily must - that this is a state law issue. However, this Court has consistently denied certiorari in cases where similar evidence was introduced as that now challenged, including *Bell*, *Gaskins* and *Plath*, *supra*. Additionally, this Court lacks jurisdiction to entertain Petitioner's due process and other remaining arguments, **see Petition, at pp. 26-28**, for the reasons stated, *supra*

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[8] California's death penalty law, much like South Carolina, permits evidence of prior violent offenses. *See* West's Ann. Cal. Penal Code §190.3(b).

[9] The Court in *Mickle* held that *Booth v. Maryland*, 482 US 496 (1987) was not implicated by evidence or argument mentioning the obvious emotional effect of the defendant's prior sexual molestations of the victims.

Finally, certiorari should be denied because Petitioner cannot show any prejudice from the admission of this evidence and any error is harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18, 24 (1967) (adopting "harmless beyond a reasonable doubt" standard for preserving, on direct review, conviction obtained in a trial where constitutional error occurred). A constitutional error is harmless when "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Neder v. United States*, 527 U.S. 1, 15, (1999) (quoting *Chapman*, 386 U.S. at 24). In the present case, the trial judge properly found that the challenged testimony was not prejudicial.

First, the dream was only mentioned once by Shannon. It was never mentioned again by the State in closing argument. ***See* R. pp. 2053-81.** Thus, the challenged evidence only constituted thirteen lines of testimony in a transcript that was 2,159 pages long. Second, the challenged testimony "was not a blatant racial reference." **Order, R. pp. 2415.** It was merely Shannon's impression of his own dream.[10] Third, and as with the evidence at issue in Petitioner's **Arguments II - III**, the testimony concerning Shannon's dream is far less prejudicial than testimony about the extent of the injuries Petitioner inflicted upon Benton during the commission of the murder and the testimony from the two eyewitnesses to the Pizza Hut attacks, Mr. DuBose and Ms. Smith. **R. pp. 986-1003; 1006-09.**

Fourth, there was overwhelming evidence of the statutory aggravating circumstances, even though much of it was circumstantial. Finally, the limiting charge given by the trial judge precluded the jury from considering this evidence proof of an aggravating circumstance (in essence) and limited

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[10] With respect to Petitioner's **Arguments II-III**, the testimony of the mothers is largely cumulative to the testimony of Shannon Gilbert (**R. pp. 1018-28**) and there is no challenge to his testimony in this regard. Likewise, the photographs are also cumulative.

the jury's consideration of this evidence to Petitioner's general character. **R. pp. 2123-24.** As a result, any error introducing this evidence is nonprejudicial to Petitioner under *Chapman* and he is not entitled to a relief based thereon. *See also State v. Gaskins*, 326 S.E.2d at 145 (erroneous admission of evidence in sentencing phase reviewed for harmless error); *People v. Dunlap*, 975 P. 2d 723, 744-46 (Colo. 1999) (En Banc) (holding that erroneous admission of victim impact evidence concerning unrelated prior crimes was harmless beyond a reasonable doubt).

II. This Court should deny certiorari because the state supreme court properly determined that the Solicitor's recross-examination of defense witness Byron Collins as to whether he remembered Petitioner's lover, prison guard Judie Hardee, did not deny Petitioner due process; and the Court lacks jurisdiction to grant certiorari to review the propriety of this query under the Eighth Amendment because the issue was addressed by the state supreme court as a due process question and Petitioner did not advance any Eighth Amendment argument for its exclusion. (Petitioner's Argument 4).

Bennett's fourth argument is that the trial judge improperly denied his motion for a mistrial based upon the Solicitor's recross-examination of inmate Byron Collins as to whether he remembered Petitioner's lover, prison guard Judie Hardee, because the Solicitor referred to her as a "blonde haired lady." He asserts that this question violated the Eighth Amendment because it prejudicially injected the irrelevant factor of her race. Unlike his argument before this Court, however, the issue as presented to the state supreme court merely concerned the state law question of whether this was appropriate and relevant cross-examination, and the state supreme court applied a due process analysis to the issue, without mentioning the Eighth Amendment. Therefore, this Court should deny certiorari because the state supreme court properly determined that Solicitor's recross-examination did not deny Petitioner due process; and the Court lacks jurisdiction to review the Eighth Amendment argument. *See Webb*, 451 U.S. at 496- 497.

Petitioner presented inmate Byron Collins as part of his case in mitigation, in an effort to rebut

the prosecution's showing of future dangerousness.[11] Collins testified that he was incarcerated at LCDC in June 1991 and attempted to hang himself on June 14 because he was facing a possible death sentence or sentence of life imprisonment for murder in North Carolina. When he regained consciousness, Petitioner was over him. After he returned to LCDC from the hospital, he was later placed in a cell with Petitioner. He testified that Petitioner was very instrumental in helping him recover from depression and encouraged him to read the Bible. **R. pp. 1974-78.** On re-direct examination, he testified that "all the guards and everybody in the prison loved John Bennett." **R. p. 1979, ll. 15-15.**

On recross-examination, the following exchange occurred:

Q: There was one guard that loved Johnny Bennet and that was Judie Hardee, you remember her?
A: The real big lady?
Q: Judie Hardee, you remember her. The blonde-haired lady?
Mr. Floyd: Your Honor - -
A: She was a real big lady.
THE COURT: Wait a minute. Don't answer the question. If you know who she was, you can answer the question.
A: It's been a long time.
THE COURT: Listen to me. If you don't know you can say you don't know.
A: I don't remember.

R. pp. 1979 l. 22 - 1980 l. 10.[12] At this point, Petitioner moved for a mistrial based on prosecutorial misconduct, but the trial judge denied his motion. **R. p. 1980 ll. 11-13.**

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[11] Collins was incarcerated at the time of the resentencing. **R. pp. 1974-75.**

[12]The basis for this inquiry was Petitioner's ongoing sexual relationship with Ms. Hardee, both while he was incarcerated at the Lexington County Detention Center (LCDC) where she was a correctional officer and after he was house as a safekeeper on death row in the South Carolina Department of Corrections. **R. pp. 1599-1603; 1609; 1617-21; 1626-43.** Obviously, this was one of the most egregious violations he committed while incarcerated, that did not involve either possession of a weapon or violent or disrespectful behavior.

Petitioner later argued his mistrial motion *in camera*. He maintained that the State had attempted to inject race into the case on several occasions because there was an all-white jury and a black defendant. He asserted that this was another effort by the Solicitor to inject race and to inform the jury that Petitioner had an interracial relationship. The Solicitor noted that a black female juror, Ms. Sands, had blonde hair when she testified during the *voire dire* and denied that he was attempting to inject race into the trial. "The only thing I referred to was blonde-headed." The trial judge denied the motion. He found that the witness had started off by indicating that he did not know who the guard was, and that the reference to blonde hair did not necessarily mean that Hardee was "a white woman." **R. pp. 2012-15.**

Petitioner renewed his motion after the defense had rested, but the trial judge again denied the motion. **R. pp. 2037 ll. 13-22.** Petitioner also included his mistrial motion as part of his motion for a new trial, which was briefed by both parties. **R. pp. 2363 -80.** However, the trial judge denied his motion in the August 24, 2003 Order. The trial judge specifically found that the Solicitor's question did not improperly inject race into the trial of the case. **R. p. 2417.**

On direct appeal, Petitioner argued that the challenged inquiry was inflammatory and prejudicial because it supposedly injected the irrelevant matter of Hardee's race. However, the issue as presented to the state supreme court by him (*see* **Final Brief of Appellant, at pp. 20-27**) merely concerned the state law question of whether this was appropriate and relevant cross-examination and Petitioner did not advance any basis for its exclusion under the United States Constitution.

The state supreme court applied a due process analysis in rejecting Petitioner's argument. It found that the reference to the "'blond lady' and 'King Kong' [in the State's closing argument] could have racial connotations." *Bennett II*, 632 S.E.2d at 288. However, the Court noted that its

"jurisprudence does not prohibit the use of terms with racial meanings, nor does our case law stand for the proposition that arguments or evidence in a case must be void of racial allusions. Instead, this court has recognized that it is impermissible to use race to 'inflame the passions or prejudices' of the jury."*Id.*

So, it focused upon on how these terms were used in [Petitioner's] case;" and it found that the reference to a " 'blond lady' ... was not made to inflame the passions or prejudices of the jury. If the State had sought to make the race of [Petitioner's] former lover an issue in this case, we believe they would have elicited evidence to this effect while examining their witness who testified extensively about the affair. Instead, this comment came while cross-examining a defense witness." *Id.* That Court further found that, even if prejudicial to Bennett, the remark did not so infect the trial with unfairness as to deny Petitioner due process under *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) because "the Solicitor made the 'blond lady' comment only once and never referred to [Petitioner's] lover's race again. Furthermore, this case involved a brutal murder, where guilt was clearly established. Accordingly, we find no evidence of prejudice from the 'blond lady' remark.." *Id.*

Respondent submits that this is a proper application of *Darden*. The State simply did not impermissibly interject race into the case. There was absolutely no testimony, whatsoever, as to Ms. Hardee's race. Merely referring to her as a "blonde-haired lady" did not convey that she was white or otherwise impermissibly interject race. As the Solicitor correctly noted, at least one black *venire* woman (Ms. Sands) had blonde hair. It is equally plausible that Ms. Hardee could be black or a member of some other ethnic group. To suggest otherwise ignores that it is extremely common today for women (and men) to color their hair. Moreover, Collins' reference to "a big lady" did not necessarily reflect that he recalled Hardee, since a number of female officers could possibly fit that

description; and he ultimately stated he did not recall her.

Second, the Solicitor was engaged in a proper line of inquiry with the witness and was merely trying to establish whether or not the witness, who had previously testified that all the guards loved Petitioner, remembered the one guard with whom Petitioner was able to have sex, both at LCDC and while on death row. Indeed, Petitioner's argument misunderstands the truly prejudicial nature of the relationship. The relationship isn't prejudicial because it is interracial. Rather, it is prejudicial because it shows that he was so manipulative that he was able to have sex with a guard in the facility where he was incarcerated and continued to have sex with her *even after he was placed in the supposedly strict confines of death row*!

Even if the State's cross-examination did identify her as Caucasian, however, there still was no prejudice. Race simply did not factor into the case. Petitioner is black, as was the victim, his family, many of the officers involved in the investigation and other witnesses. Petitioner's argument also ignores that the witness could have been asked to identify Hardee had she been present in the courtroom or she could have been presented as a hostile witness. And, his argument presupposes racial prejudice on behalf of the jury where there is absolutely no evidence to support it. Worse, it further assumes that each juror lied on *voir dire* when he or she swore he or she could be fair and impartial to both parties.[13] This argument further assumes that the jurors ignored the trial judge's instructions that they could only impose the death penalty if they first found the existence of a statutory aggravating circumstance beyond a reasonable doubt; that the jurors had "sworn to try this case fairly and impartially and to give both sides a fair and impartial trial;" and that

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[13] *See* **R. pp. 85-90; 133-78; 186-97; 236-66; 323-35; 400-10; 425-36; 478-510; 531-45; 641-56; 694-705.**

> You must not base your verdict, your sentence on any form of caprice or prejudice for or against any party or any excessive emotions for or against any party.
>
> You must make a dispassionate analysis of the record, in other words, the evidence that you've received and based on that you must decide the sentence. You have no friend to reward, you have no enemies to punish. You must give both sides a fair trial in determining your sentence."

R. pp. 2106-40. R. p. 2139 l. 23 - p. 2140 l. 8. Because jurors are presumed to have followed their instructions, *Francis v. Franklin*, 471 U.S. 307, 324 n. 9 (1985), the due process argument must be rejected.

Further, the Court lacks jurisdiction to entertain Petitioner's Eighth Amendment argument because he never properly presented it to the state supreme court. This Court has often held that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary." R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* 175 (8th ed. 2002). *E.g.*, *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549-50 (1987); *Street v. New York*, 394 U.S. 576, 582(1969); *Fuller v. Oregon*, 417 U.S. 40, 50 n. 11 (1974). As the state supreme court's discussion of the procedural barred relied upon with respect to Petitioner's first three arguments in this case makes clear, the state supreme court will only address those arguments actually presented to it by the appellant. *Bennett II*, 632 S.E.2d at 287. Because the Eighth Amendment argument was not argued in the trial court, was not included in the issues on appeal (see Rule 208 (b)(1)(D), SCACR) and was never argued by the parties,[14] it would not have been addressed by the lower court. *Commander Health Care Facilities, Inc. v. South Carolina Dept.*

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[14] ***See* Final Brief of Appellant, at pp. 20-27; Final Brief of Respondent, at pp. 28-33.**

of Health and Environmental Control, 634 S.E.2d 664, 667 n.2 (S.C. Ct. App. 2005) ("It is a well-settled principle of appellate advocacy that '[t]he losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred.'") (citation omitted). Finally, Respondent submits that there simply is nothing about the challenged inquiry which violates the Eighth Amendment.

III. This Court should deny certiorari because the state supreme court properly determined that Petitioner did not demonstrate how Solicitor's challenged comments in his penalty phase closing argument deprived him of a fundamentally fair trial. (Petitioner's Argument 5).

Petitioner asserts that the State's closing argument deprived him of a fundamentally fair trial because the Solicitor stated that he had dragged one of the Pizza Hut victims by his hair "like an old cave man;" and that a sentence of life imprisonment would cause Petitioner to revert to his manipulative and violent behavior, and "[m]eeting him again will be like meeting King Kong on a bad day." **R. pp. 2062; 2079.** Respondents submit that this Court should deny certiorari because the state supreme court properly applied *Darden, supra,* when it concluded that these comments had not deprived Petitioner of a fundamentally fair trial where the Solicitor's comments were a fair comment upon the evidence presented at trial as well as its reasonable inferences, were in anticipation of arguments by the defense and did not improperly interject race into the trial.

Although Petitioner did not contemporaneously object to the Solicitor's remarks and first challenged the argument in his motion for a new trial (See **R. p. 2363-91; 2161- 2223**), Petitioner argued on appeal that the issue was proper for appellate review under the state supreme court's decision in *Toyota of Florence, Inc. v. Lynch,* 442 S.E.2d 611, 615 (S.C. 1994) (holding that a new trial should have been granted because "viscous comments, inflammatory argument result[ed] in clear prejudice"). The state supreme court determined that its resolution of the merits of Petitioner's

argument made an analysis of *Toyota* and its progeny's "exception to the contemporaneous objection rule unnecessary." *Bennett II*, 632 S.E.2d at 289 n. 3.

Applying this Court's standard in *Darden*, 477 U.S. at 181, the state supreme court rejected Petitioner's argument. It first recognized that "King Kong" could have racial connotations. However, it is only impermissible to use race to "'inflame the passions or prejudices' of the jury." Thus, the Court focused on how this term was used in Petitioner's case, *Bennett II*, 632 S.E.2d at 288, and found as follows:

> [A] solicitor's closing arguments in a capital trial should focus on the defendant's character, his background, and the nature of the crime. *State v. Reed*, 293 S.C. 515, 519, 362 S.E.2d 13, 15 (1987) (overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991)). The arguments must be viewed in the context of the entire record, and the relevant question is whether the comments infected the trial with unfairness so as to make the resulting conviction a denial of due process. *State v. Patterson*, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997).
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> ... [T]he Solicitor's use of the term "King Kong" was not an appeal to the passions or prejudices of the jury. The comment referred to Appellant's immense size, strength, and the destructiveness of his previous crimes. In this case, the trial court properly determined that Appellant's size and strength were probative of the aggravating circumstance of physical torture, which the court charged to the jury. In this regard, the Solicitor's use of the term "King Kong" was not suggestive of a giant black gorilla who abducts a white woman, but rather, descriptive of Appellant's size and strength as they related to his past crimes.
>
> Also, Appellant's mitigation witnesses described him as "a gentle giant," "a big old teddy bear," "the Secretary of Defense," and "the Mediator." The defense used these terms to indicate Appellant was a changed man and not a threat to others. In this regard, the trial court correctly found that "King Kong" was an invited response to Appellant's mitigation evidence.
>
> Finally, the Solicitor's "Caveman" comment was merely descriptive of two of Appellant's past violent incidents. A witness to Appellant's

> ABHAN testified that she saw Appellant dragging the motionless body of one of the victims across a parking lot by the hair. Additionally, a prison guard testified about an incident where Appellant reached into another inmate's cell and dragged the inmate out by the hair. The Solicitor made this comment while describing how Appellant dragged his victims during these incidents, and, in our view, the comment was not inflammatory. Based on the above reasoning, we hold that the Solicitor's comments did not improperly inject racial issues into the trial.

Bennett II, 632 S.E.2d at 288-89. (footnote omitted).

There was no error. One of the key issues in the sentencing proceeding was whether or not Petitioner would be a danger in the future if incarcerated. The State had presented a great deal of evidence reasonably tending to show that he began bullying and trying to intimidate others with his physical size beginning in the fifth grade and continued in this type of behavior until he was finally expelled in the tenth grade. At some point, he began trying to intimidate teachers as well, and he developed a pattern of disrespecting authority and attempting to shift blame to others. **R. pp. 920-70; 970-86; 1069-75.** This continued even after he was incarcerated on the Youthful Offender Act sentence. **E.g., R. pp. 1076-90; 1093-1101; 1482-84; 1488-89; 1496-1500; 1504-05; 1526-71; 1644-45.**

As discussed in **Argument I**, both eyewitnesses to the March 4, 1998 attack at the Pizza Hut testified that they saw a black man attacking a white man, who was not defending himself, in the parking lot. Ms. Smith testified that the black man (whom we now know to be Bennett) pulled this defenseless victim by the hair and drug him across the parking lot to the front door of the Pizza Hut. He then stomped and beat his defenseless victim. **R. pp. 986-1003; 1006-09.** He was later involved in a disturbance on July 23, 1993, while incarcerated at the LCDC. On this occasion, he picked up the 5' 4" female correctional officer, moved her out of the way, dragged another inmate out of his cell

by his hair, threw the inmate on the cement floor and pounded the inmate's head into the floor.[15] *See* **R. pp. 1526-37.**

In response, Petitioner introduced expert and lay testimony that he could adapt to prison life and that SCDC could adequately and safely confine him; that he was no longer a violent, disrespectful or disruptive inmate; that he would follow the rules and orders; and that he was very involved in the prison ministry. **R. pp. 1789-1803; 1864-69; 1873-82; 1889-1903; 1910-34; 1980-2012.** The various lay witnesses, many of whom were correctional officers or otherwise came into contact with him while he was incarcerated at SCDC variously referred to him as "a model inmate" **(R. p. 1795)**; "very polite" and "easy-going" **(R. p. 1867)**; "[r]espectful" **(R. p. 1877)**; "a mediator" who explained rule changes to other inmates **(R. pp. 1893-94)**; someone who was "very compassionate for others" **(R. p. 1915)**; a "[b]ig teddy bear" **(R. p. 1921)**; someone who had a "very positive attitude toward everything" and was "more of a big brother type" **(R. p. 1927)**; and "a gentle giant." **R. p. 1929.**

It was against this backdrop of evidence that the Solicitor made he challenged remarks. There was no error because Petitioner cannot show, based upon the entire record, how the argument deprived him of a fundamentally fair trial. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974). *See also Darden*, 477 U.S. at 181. First, the caveman reference is clearly supported by the record. Second, there was no impropriety in the reference to "King Kong," and Bennett's contrary argument

---

[15] When another inmate, Glover, made a comment to him that he was going to kill the victim, Petitioner turned and said "you better back the hell off." The correctional officer described the victim as a "little shorter" than Petitioner but stated that he was "a skinny little thing. He ... was not a big man ... ." Also, Petitioner prevented the officer from radioing for assistance every time she attempted to do so. And, could not physically stop him. **R. pp. 1532-33.**

takes the comment out of context. It was simply not an appeal to racial prejudice.[16]

From the State's opening statement throughout the trial and closing argument, the State repeatedly emphasized the disparity in the size of the mammoth Petitioner and the slightly built victim,[17] as well as Petitioner's violent, manipulative and self-centered character. Without objection, the State used cardboard figures to emphasize the disparity in sizes. Obviously, the differences in size and strength are relevant to proof of the statutory aggravating circumstance, physical torture, as correctly found by the state supreme court.

Further, the State did not attempt to make a racial stereotype by suggesting Bennett, personally, was an ape. Rather, the argument compared his size and his history of violent acts and destructiveness of King Kong. This history includes repeated examples of his proclivity to viciously and savagely attack persons who are defenseless to someone of his size. To suggest otherwise, again, ignores the context in which the Solicitor's argument was made and flies in the face of this Court's admonition in *Donnelly* that "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." 416 U.S. at 647. The nonprejudicial nature of this comment is underscored by the fact it was only made once and without objection.

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[16] At least one defense attorney suggested that his black client, on trial for aggravated rape could have told officers "he was King Kong" when asked for his identity because he did not have any identification on him. *Watkins v. State,* 698 S.W.2d 698, 700-01 (Tex. Ct. App. 1985).

[17] Obviously the jury could see Petitioner's size. Further, the State presented testimony from a life-long friend that he was approximately 6' 5" or 6' 6" tall and weighed 300 pounds. **R. p. 1266 l. 13-16.** Other witnesses also described him as very big. On the other hand, Benton Smith (the victim) weighed a paltry 135 pounds and was approximately 5' 8" tall. The pathologist described him as having a slender build. **R. pp. 1680-81.**

Also, at the outset of the resentencing, the trial judge explained that jurors were to base the sentence imposed only on the "evidence" presented. He defined "evidence" as jurors "the testimony of the witnesses who come to testify plus any exhibits that come in through those witnesses. He further explained that the arguments of counsel were not evidence. **R. pp. 897-98.** He also later charged them that they had to render their verdict fairly and impartially, and that they "must not base your verdict, your sentence on any form of caprice or prejudice for or against any party or any excessive emotions for or against any party." **R. pp. 2106-40.** *See Darden*, 477 U.S. at 182-83.

Moreover, this comment was invited by Petitioner's evidence and argument, including the references to him as "a gentle giant" and a "teddy bear", as well as the other references to his mild-mannered demeanor discussed, *supra*. Because the Solicitor was forced to anticipate the arguments of counsel, it cannot be shown how his comments deprive Petitioner of a fundamentally fair trial, particularly where the defense did argue the evidence that had previously established in mitigation. *Id.* at 181-82. [18]

Finally, the authority from outside this jurisdiction cited by Petitioner does not have any application to the facts of this case. In particular, he relies upon *State v. Blanks*, 479 N.W.2d 601, 604-05 (Iowa Ct. App. 1992), a case involving the conviction of a black defendant for one count each of willful injury, assault with intent to commit serious injury, assault resulting in bodily injury, and simple assault. One of his victims was his former girlfriend, who was white. In closing argument, the prosecuting attorney cited to the movie "Gorillas in the Mist." The Iowa Court of Appeals found that

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[18]Thus, the challenged comment "properly described the circumstances surrounding the murder, the character and violent background of the Defendant, his disregard for prison and regulations, the actions of the Defendant if given a life sentence, to counteract defense evidence and argument, was an invited response, [and] emphasized the tremendous size and strength of the Defendant... ." **R. p. 2419.**

this had deprived the defendant of a fair trial[19]. However, race did not play any part in the prosecution of this case despite Petitioner's repeated efforts to inject it. The victim, his family, the three officers investigating the case and Petitioner were all black, as were many witnesses. **R. pp. 2172-73.**

Thus, use of the phrase "King Kong" did not deprive Bennett of a fair trial. *See Darden*, 477 U.S. at 181-84 (although prosecutor's characterization of habeas corpus petitioner as an "animal" in closing argument was improper, remark was not so prejudicial as to deprive the petitioner of a fair trial because the reference to the defendant as an "animal" was "invited by or was responsive to the opening summation of the defense [counsel]," who had used the term in his closing to characterize the allegedly unknown perpetrator of the crime; the prosecutor's argument "did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused;" the trial judge charged jurors that their decision was to be based only on the proof, and that arguments of counsel were not evidence. The Court also reasoned that the strength of the evidence against the petitioner made it less likely that the prosecutor's argument influenced the jury; and that defense counsel used the opportunity for rebuttal very effectively, placing the prosecutor's comments and actions in a light more likely to engender strong disapproval, than to inflame passions against petitioner). *Id* at 182-83.[20]

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[19] In "Gorillas in the Mist," the young white woman stands alone against black African hunters, who ultimately murder her. The Court reasoned that "In this case, likewise, there is a single white woman. She is allegedly attacked and beaten by a black man. In the end, the black men allegedly beat several others who attempted to come to her rescue. Given the parallels between the movie 'Gorillas in the Mist' and the present case, we believe the use of the movie to illustrate the prosecutor's point was prejudicial" because it "could have been interpreted by the jury as having racial overtones." The Court concluded that "[b]y his allusion, the prosecutor brought before the jurors a myriad of other factors not previously present. " *Id.*

[20]Other Courts have found similar remarks to be proper based on the record or not so prejudicial as to require a new trial *See Clonts v. State*, 579 S.E.2d 1 (Ga. App. 2002) (statement

IV. This Court should deny certiorari because the state supreme court properly determined that Petitioner received a fair and impartial jury and that the trial judge's ruling he could not ask veniremen whether they would "go along with the majority" did not render his trial fundamentally unfair. (Petitioner's Argument 6).

Petitioner was permitted to ask the following question, without objection during *voir dire* in his first trial,: "Q: Now, if you had some reservations or doubt after hearing everything as to whether or not the defendant should get the death penalty and all eleven other jurors put their name on the list, could you stand up to that and not put your name on the list?" *State v. Bennett*, 328 S.C. 251, 256, 493 S.E.2d 845, 847 (1997) (*Bennett I*). The state supreme court held that, considering the *voir dire* as a whole, the juror was not impartial. *Id.*[21] In the present case, Petitioner sought to ask the following question on *voir dire* examination of Juror 284 (Ashley Ray):

> Now, if you felt after discussing it with the other jurors that life imprisonment was the proper punishment but all the other jurors thought the death penalty was proper, what will you do then?

R. p. 176, ll. 4-7.

The State objected because the question committed the juror to a future course of action, effectively "invading" the unanimous verdict. Petitioner maintained that the question was proper in light of *Bennett I, supra.* The trial judge asked counsel to rephrase the question and the question was asked without suggesting the appropriate decision the juror would have reached. The juror responded

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by prosecutor during closing argument describing defendant as a "two hundred and forty pound goon, beast," did not warrant declaration of mistrial in sodomy prosecution; defining bounds of closing argument is within court's discretion); *Harris v State,* 537 So.2d 1325 (Miss 1989); *State v. Wilson*, 269 A.2d 153 (N.J. 1970). *See also People v Baker*, 207 Cal. App.2d 717, 24 Cal. Rptr. 691 (Cal. App. 1962); *People v Butler*, 223 N.E.2d 431 (Ill App. 1967).

[21] The juror's response to the specific query was "A: I believe I would have to go with the majority of the jury." He had also given vacillating responses to earlier questions. *Id.*

that she would maintain her position, she was qualified without objection and she later sat on the petit juror. **R. pp. 177-78; 833.** On the subsequent examination of Juror 119 (Joan Fulmer), Petitioner sought to ask the same question he had asked Juror Ray. This time the trial judge sustained the State's objection because the question improperly suggested the possibility of a hung jury and artificially pitted this juror against other jurors. **R. pp. 252-64.**

On appeal, the state supreme court held that petitioner's argument was controlled by *State v. Hill*, 604 S.E.2d 696, 702 (S.C. 2004), where the Court held that an inquiry such as that Petitioner wanted to make in the present case was not constitutionally required where there was no evidence the trial judge's limitation on *voir dire* rendered the capital defendant's trial fundamentally unfair. The Court further upheld the judge's ruling in this case because the record of the voir dire "supports only the conclusion that [Petitioner] received a fair and impartial jury, and because there is no evidence suggesting that the trial court's voir dire limitation rendered [his] trial 'fundamentally unfair.'" *Bennett II*, 632 S.E.2d at 285-86.[22]

There was no error. A capital defendant has the right to examine jurors through counsel pursuant to S.C. Code Ann. 16-3-20(D) (Supp.2006), but that statute does not enlarge the scope of *voir dire* permitted under Section 14-7-1020." *State v. Wise*, 596 S.E.2d 475, 479 (S.C. 2004). "The scope of *voir dire* and the manner in which it is conducted generally are left to the sound discretion of the trial judge." *Id*; S.C. Code Ann. § 14-7-1020 (Supp.2006). To constitute reversible error, a limitation on questioning must render the trial "fundamentally unfair." *Morgan v. Illinois*, 504 U.S. at 730. *See also Bennett II*, 632 S.E.2d at 285 (citing *Hill, supra*).

---

[22]It also determined that the ruling in *Bennett I* did not determine the appropriateness of the "go with the majority question," which was not at issue on appeal. *Bennett II*, 632 S.E.2d at 286 n.1.

Nor is this inquiry mandated by *Morgan* or the Due Process Clause of the Fourteenth Amendment. Further, the scope of *voir dire* permitted by the trial judge here adequately ensured that only jurors who would not automatically vote for the death penalty, who could consider aggravating and mitigating evidence presented and who would follow the trial judge's instructions were seated as petit jurors. The constitutional purpose of *voir dire*, as opposed to that of an advocate, is not to educate the *venire* about any particular facet of the case or to condition *veniremen* to embrace any theory which is not already established as a matter of law or to be established through presentation of witnesses. *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981); *United States v. Robinson*, 832 F.2d 366, 368 (7th Cir. 1987). Also, the trial judge has great latitude in ruling on the scope of *voir dire*. *Mu' Min v. Virginia*, 500 U.S. 415, 424 (1991). *Morgan* concerned "reverse *Witherspoon*"[23] or "life-qualifying" *voir dire* in a capital case.[24] Obviously, *Morgan* has no bearing on the question now before this Court.

Yet, even after *Morgan*, it is clear the conduct of *voir dire* is within the trial judge's sound discretion; and, "[t]he Constitution . . . does not dictate a catechism for *voir dire*, but only that the defendant be afforded an impartial jury." *Id.* at 729; *United States v. Tipton*, 90 F.3d 861, 878 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2414 (1997). A review of the present *voir dire* reflects that Bennett

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[23] *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

[24] Specifically, Morgan's counsel attempted to ask prospective jurors "if you found [the defendant] guilty, would you automatically vote to impose the death penalty, no matter what the facts are?" The only inquiry into this area were general questions by the trial judge, such as whether the jurors could be fair and impartial to both parties and whether jurors could follow the law as charged. Finding that a "juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as instructions require him to do," the Court held the trial judge's refusal to allow inquiry into this area violated the defendant's Fourteenth Amendment right to due process. *Id* at 728, 739.

had an impartial jury. *Id* at 309-10, 604 S.E.2d at 702. Before qualification, the trial judge asked all the potential jurors to read summaries of three potential juror types: (1) one who would feel required to give the death penalty in every case where murder had been proved; (2) one who would not give the death penalty under any conceivable circumstance; and (3) one who would not have his or her mind made up in advance concerning the appropriate punishment, but would need to hear the facts and circumstances in aggravation and mitigation and would want to listen to and follow the charges given by the trial judge before making a decision. *See* **R. pp. 30-35.**

All qualified jurors indicated that they were the third type of juror - - the kind of juror who would listen to all of the circumstances and follow the trial judge's instruction on the law. Their understanding of this was insured by repeated questions from both the State and the defense as to whether they understood the nature of this category of potential jurors. *See* **R. pp. 85-98; 133-43; 144-78; 186-97; 238-66; 323-35; 400-410; 425-36; 464-76; 531-45; 641-56; 694-705.** *Id.* Despite the trial judge's ruling, a question such as that as rephrased with Juror Ray was asked of seven petit jurors. *See* **R. pp. 143; 154-55; 176-77; 195; 332-33; 544-45.**

Likewise, as in *Hill* and unlike *Morgan,* there was no indication that the trial judge's limitation on questioning adversely affected the selection of an impartial jury. Petitioner cannot point to any single juror or petit juror whose response vacillated or suggested that the juror was incapable of hearing all of the evidence before making a decision. Further, the query at issue presupposes that life is the appropriate sentence for the juror to reach and that jurors with differing views as to the correct punishment should not deliberate with one another. This is clearly an effort to stake out jurors and is contrary to the subsequent jury instructions. It therefore invades the deliberative. As a result, this Court should deny certiorari.

CONCLUSION

Respondent respectfully requests this Court to deny the Petition for Writ of Certiorari for the reasons set forth above.

HENRY D. 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

South Carolina Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

By: _____
ATTORNEYS FOR RESPONDENT

October 27, 2006.

* Counsel of Record

No. 06-6780

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2006

JOHNNY O'LANDIS BENNETT,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

I, **Donald J. Zelenka**, a member of the Bar of this Court, hereby certify that on this 27th day of October, 2006, one copy of the **RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA** in the above-entitled case were sent via United States mail to the office of Robert M. Dudek, Esquire, and Aileen P. Clare, Esquire, South Carolina Office of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, South Carolina 29201, counsel of record. I further certify that all parties required to be served have been served.

DONALD J. ZELENKA
Assistant Deputy Attorney General

2703

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

November 27, 2006

Mr. Donald John Zelenka
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

Re: Johnny O. Bennett
v. South Carolina
No. 06-6780

Dear Mr. Zelenka:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

William K. Suter

William K. Suter, Clerk

COPY

FILED
2006 SEP -7 P 1:59
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

STATE OF SOUTH CAROLINA)
)
County of Lexington)

In the Court of Common Pleas

JOHNNY O. BENNETT. #5023)
Full name and prison number, if any, of applicant.)
)
v.)
)
THE STATE)
Name of Respondent)
)

APPLICATION FOR

POST-CONVICTION RELIEF

2006-CP32-3221

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly, handwritten, or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicant should, therefore, exercise care to assure that all answers are true and correct.

If the applicant is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

1. Place of detention Lieber Correctional Institution

2. Name and location of Court which imposed sentence Lexington County Court of General Sessions

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
   (a) 93-GS-32-2354
   (b)
   (c)

4. The date upon which sentence was imposed and the terms of the sentence:
   (a) October 15, 1995 – Death Sentence
   (b) July 10, 2000 – Death Sentence
   (c)

5. Check whether a finding of guilty was made

(a) after a plea of guilty _____

(b) after a plea of not guilty yes

(c) after a plea of nolo contendere _____

6. Did you appeal from the judgment of conviction or the imposition of sentence? Yes

_____

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

i. Supreme Court

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. Initially affirmed conviction but reversed death sentence and remanded for re-sentencing. *State v. Bennett*, 328 S.C. 251, 493 S.E.2d 845 (1997)

ii. Affirmed conviction and sentence after second death sentence

iii. _____

(c) the date of each such result:

i. December 1, 1997

ii. June 26, 2006

iii. _____

iv. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. *State v. Bennett*, 328 S.C. 251, 493 S.E.2d 845 (1997)

ii. *State v.* Bennett, 369 S.C. 219, 632 S.E.2d 281 (2006)

iii. _____

iv. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

(a) n/a

(b) _____

(c) _____

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
   (a) Ineffective assistance of trial counsel
   (b) Ineffective assistance of appellate counsel
   (c) _____

10. State concisely and in the same order the facts which support each of the grounds set out in (9)
   (a) Failure of trial counsel to object to the solicitor's closing argument wherein he compared me to a "Caveman" and "King Kong." Counsel was ineffective in derogation of the Sixth Amendment to the United States Constitution by failing to object to this racial charged derogatory argument before an all-white jury.
   (b) Failure of trial counsel to properly object to inadmissible victim impact evidence of a prior ABHAN including the "Indian dreams" evidence, the testimony of the mothers of the ABHAN victims and the hospital photographs of the ABHAN victims. This constituted ineffective assistance of counsel in derogation of the Sixth Amendment to the United States Constitution.
   (c) Ineffective assistance of appellate counsel for failure to properly present the improper sentencing phase evidence issues by arguing relevance and Rule 403, SCRE. This failure constituted ineffective assistance of counsel in derogation of the Sixth Amendment to the United States Constitution (SEE ATTACHED ALSO FOR MORE GROUNDS AND DETAIL)
   (d) _____

11. Prior to this application have you filed with respect to this conviction
   (a) any petition in a State Court under South Carolina Law ?
   None other than the mandatory appeals to the State Supreme Court
   (b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?
   No
   (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) No
   (d) any other petitions, motions or applications in this or any other Court?
   No

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:
   (a) the specific nature thereof: n/a

i. _____

ii. _____

(b) the name and location of the Court in which each was filed:

i. n/a

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. n/a

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. n/a

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. n/a

ii. _____

iii. _____

iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? No

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

i. n/a

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. n/a

ii. _____

iii. _____

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

(a) This is the first PCR

(b) _____

(c) _____

16. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? yes

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence?

Yes

(e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? Yes

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

i. Robert M. Dudek, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, PO Box 11589, Columbia, SC 29211 – 1589 & Daniel T. Stacey –retired

ii. Wayne Floyd, Esquire, PO Box 3972, West Columbia, SC 29171-3972

iii. Hervery B.O. Young, Office of the Federal Public Defender, 501 E. McBee Ave. Suite 202, Greenville, SC 29601

(b) the proceedings at which each such attorney represented you:

i. Both trials and both direct appeals

ii. _____

iii. _____

18. State clearly the relief you seek in filing this application.

New Trial

19. Are you now under sentence from any other court that you have not challenged?

No

2709

2006-CP32-3221

FILED

2006 SEP -7 P 1:59

BETTIA CARRIG
CLERK OF COURT
LEXINGTON SC

STATE OF SOUTH CAROLINA)
) VERIFICATION
COUNTY OF Lexington)

I, Johnny O. Bennett Jr., being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

X Johnny Bennett Jr

Sworn to and subscribed before me
This 7th day of Sept., 2006

Warren T. Jeffcoat L.S.
Notary Public for South Carolina
My Commission Expires Sept 22, 2008.

APPLICATION TO PROCEED WITHOUT PREPAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Johnny O. Bennett Jr, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty or perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor.

X Johnny Bennett Jr
Applicant

Sworn to and subscribed before me
This 7th day of Sept., 2006

Warren T. Jeffcoat L.S.
Notary Public for South Carolina
My Commission Expires: Sept. 22, 2008.

ATTACHMENT (10)

(a) Failure of trial counsel to object to the solicitor's closing argument where, inter alia, he compared me to a "Caveman" and "King Kong." Counsel was ineffective in derogation of the Sixth Amendment to the United States Constitution by failing to object to this racial charged derogatory argument before an all-white jury, as well as the solicitor's appeals for a death sentence based upon the passions and emotions of the jurors. The argument introduced an arbitrary factor into the sentencing phase. A proper objection on racial grounds and the appeals to the passions of the jurors would have squarely presented the issue to the Supreme Court, and likely may well have obtained a favorable ruling from the judge at trial.

(b) Failure of trial counsel to properly object to inadmissible victim impact evidence of a prior ABHAN victim including the "Indian dreams" evidence on the grounds that it was improper victim impact evidence in violation of Payne v. Tennessee and that it was irrelevant or barred by Rule 403, SCRE if it was relevant. This constituted ineffective assistance of counsel in derogation of the Sixth Amendment to the United States Constitution.

(c) Failure of trial counsel to properly object to inadmissible victim impact evidence regarding the prior ABHAN victims including the testimony of the mothers of the ABHAN victims on the grounds that it was improper victim impact evidence in violation of Payne v. Tennessee, and that it was irrelevant and barred by Rule 403 if it was relevant. This constituted ineffective assistance of counsel in derogation of the Sixth Amendment to the United States Constitution.

(d) Failure of trial counsel to properly object to inadmissible victim impact evidence in violation of Payne v. Tennessee of the prior ABHAN victims including the hospital

photographs of the ABHAN victims, or to argue that they were irrelevant or barred by Rule 403 if they were relevant. This constituted ineffective assistance of counsel in derogation of the Sixth Amendment to the United States Constitution.

(e) Ineffective assistance of trial counsel for failure to present available mitigating evidence under Wiggins, and by failing to rebut the positive victim impact evidence regarding the decedent since such evidence was also available if counsel had exercised due diligence. This failure constituted ineffective assistance of counsel in derogation of the Sixth Amendment to the United States Constitution.

(f) Ineffective assistance of trial counsel for failure to move for an order barring the death penalty on the grounds of prosecutorial misconduct or to continue to move for a mistrial on this ground where the state, from *voir dire* through penalty phase closing argument, continued to impermissible inject race into the case to obtain a death sentence. These failures constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution.

(g) Ineffective assistance of appellate counsel for failure to properly present the improper sentencing phase evidence issues above by arguing relevance and Rule 403, SCRE if the above objectionable matters were relevant. This failure constituted ineffective assistance of appellate counsel in derogation of the Sixth Amendment to the United States Constitution

I reserve the right to amend this application to add other grounds of ineffective assistance of counsel or after discovered evidence once death penalty qualified PCR counsel are appointed.

COPY

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS
Johnny O. Bennett, #5023, Applicant, v. State of South Carolina, Respondent.	)	C. A. No. 06-CP-32-3221 RETURN

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2006 OCT 20 PM 4:31
Beth A. Carrigg
Clerk of Court
Lexington, SC

Respondent hereby makes Return to the Application for Post-Conviction Relief (PCR) filed on September 7, 2006. Respondent would show this Court that:

I. PROCEDURAL HISTORY

The Lexington County Grand Jury originally indicted Applicant at the March 1991 term of court. However, the State *nolle prossed* that indictment because of certain errors contained in it and he was reindicted at the September 1993 term of court for murder, kidnapping, armed robbery and grand larceny (93-GS-32-2354). The State served its Notice of Intent to Seek the Death Penalty and Notice of Evidence in Aggravation in March 1993.

On October 9-18, 1995, Applicant received a jury trial before the Honorable Ralph King Anderson, Jr. The jury convicted him on all charges and ultimately imposed the death penalty following a separate sentencing proceeding. A timely Notice of Appeal was served and filed.

Chief Attorney Daniel T. Stacey, of the South Carolina Office of Appellate Defense represented Applicant in his first appeal. Senior Assistant Attorney General William Edgar Salter, III, represented the State. On August 4, 1997, Applicant filed his Final Brief of Appellant, in which he raised twelve issues:

1. Whether the court erred when it qualified juror Roy Roper, because his voir dire questions indicated that he would go with the jury rather than stand up and not give appellant the death penalty in violation of the Sixth Amendment right to a fair and impartial jury, the Eight[h] Amendment right against cruel and unusual punishment, [and] the Fourteenth Amendment right to due process of law?

2. Whether the court erred when it permitted a situation wherein defense counsel was advised by the victim's father, Mr. Smith, that the Solicitor had told him not to talk to defense counsel, resulting in a due process deprivation and hindering counsel's Sixth Amendment obligation to prepare properly for trial, where Mr. Smith was a key witness both at the guilt and the sentencing phases of the trial?

3. Whether the court erred when it permitted evidence that appellant was having another person sell drugs, improperly putting his character in evidence?

4. Whether the court erred when it instructed the jury, with respect to a potential verdict of armed robbery, that it could consider a hand or fist as a deadly object or weapon? This improperly stated the statutory requirement of some deadly weapon other than the human body. This violated the Fifth and Sixth Amendment right to have the jury properly charged on every element of the offense.

5. Whether the court erred and denied due process of law, when it did not direct a verdict on the kidnapping conviction and aggravating circumstance, because the state did not prove corpus delicti aliunde the extra-judicial statement of appellant?

6. Whether the court erred when it submitted the torture aggravating circumstance to the jury, because the evidence failed to support such a finding beyond a reasonable doubt?

7. Whether the admission of invalid aggravating circumstances was harmless error under Chapman v. California.

8. Whether the trial court erred when it admitted over objection at the penalty phase gruesome color photographs at the scene and at the autopsy, because they showed damage not inflicted by appellant, and their probative value was outweighed by their prejudicial and emotional effect?

9. Whether the Court erred when it denied appellant the ability to make a religious point in his sentencing argument to the jury, depriving him of his right to be fully heard and to make an argument under the death penalty statute?

10. Whether the court erred and violated both the Eighth Amendment and the Fourteenth Amendment to the United States Constitution when it refused appellant's request to

charge the jury that, should it find a life sentence without the existence of statutory aggravating circumstances, the defendant would have to serve a minimum of thirty years without parole?

11. Whether the court erred and denied the Sixth Amendment right to impeach and confront witnesses when it prevented defense access to potential impeachment or Brady material involving appellant's misconduct in jail?

12. Whether the court erred when it denied appellant's motion for a continuance upon the state's production of a potentially exculpatory "911" tape less than one week before the trial, where the state had possession of this tape for five years?

1997 Final Brief of Appellant at pp. vi-viii.

The State also filed the Final Brief of Respondent on August 4, 1997. Oral arguments were heard on October 7, 1997. The South Carolina Supreme Court affirmed Applicant's convictions, but reversed his death sentence and ordered a new sentencing trial in a published Opinion. *State v. Bennett,* 328 SC 251, 493 S.E.2d 845 (1997) (*Bennett I*).

Following motions hearings on June 30, 2000, Applicant received a new sentencing proceeding before the Honorable Marc H. Westbrook and a jury on July 10 -16. The jury found the statutory aggravating circumstances that the murder was committed while in commission of a robbery while armed with a deadly weapon; that the murder was committed while in the commission of larceny while armed with a deadly weapon; that the murder was committed while in the commission of kidnapping; and that the murder was committed while in the commission of physical torture. S.C. Code Ann. §16-3-20(C)(a)(1)(b), (d), (e) & (h) (Supp. 2005). The jury recommended the death penalty and Judge Westbrook sentenced Applicant to death for murder. Although the sentence for kidnapping was subsumed by the murder conviction, Judge Westbrook imposed concurrent sentences for armed robbery and five years for grand larceny of a motor vehicle. **R. pp. 2148-49; 2157-58.** Wayne Floyd and Hervery B.O. Young represented Applicant at trial. Eleventh

Circuit Solicitor Donald V. Myers, as well as Deputy Solicitor Dayton Riddle and Assistant Solicitor Shawn Graham prosecuted the case.

A timely Notice of Appeal was served and filed. Assistant Appellate Defender Robert M. Dudek represented Applicant before the South Carolina Supreme Court. On January 30, 2006, Applicant filed a Final Brief of Appellant, in which he presented six issues:

1. Whether the court erred by allowing the mothers of the 1988 Pizza Hut assault victims, Ms. Brady and Ms. McGough, to testify about the extent of their son's injuries and their effects since this constituted impermissible victim impact evidence that did not pertain to the crime for which appellant was on trial?

2. Whether the court erred by admitting photographs of the 1988 Pizza Hut incident victims, Shannon Gilbert and Aaron McGough, since the photographs were irrelevant, and they went beyond the permissible testimony about the fact of the crime itself, and they were intended to inflame the passions of the jury?

3. Whether the court erred by allowing Shannon Gilbert, a victim of the 1988 Pizza Hut assault, to testify that he had dreams as a result of the incident win which Indians, that he thought were black, attempted to kill him, since this evidence was irrelevant and highly prejudicial?

4. Whether the court erred by refusing to declare a mistrial where the solicitor asked inmate Byron Collins whether he remembered prison guard Judy Hardee, "the blond-haired lady," since the solicitor was impermissibly injecting race into the case before an all white jury by assuring that the jury understood appellant was having a continuous interracial sexual relationship with Hardee, a white prison guard?

5. Whether the court erred by refusing to grant a new trial where the solicitor in his closing argument compared appellant to King-Kong and a Caveman since the court erroneously ruled these were not impermissible and objectionable racial stereotypes that this Court ruled in Toyota of Florence, Inc. v. Lynch were unacceptable in the courts of this state?

6. Whether the court erred by refusing to allow defense counsel to ask the same "would you just vote with the majority" series of questions that resulted in the reversal of appellant's initial death sentence, since this was legitimate and valuable defense *voir dire*?

2006 Final Brief of Appellant at pp. 1-2.

The State filed the Final Brief of Respondent on January 10, 2006. Applicant also Filed a Final Reply Brief of Appellant on January 30, 2006. On March 20, 2006, Applicant - through Mr. Dudek - filed a Petition To Argue Against Or Modify The Precedent Of *State v. Hill*, which the Court granted in a March 22, 2006 Order.

Following oral arguments, the Court affirmed Applicant's death sentence in a published Opinion filed on June 26, 2006. *State v. Bennett*, 369 S.C. 219, 632 S.E.2d 281 (2006). The Court also conducted the proportionality review required by S.C. Code Ann. § 16-3-25 (2003) and concluded

> that the sentence in this case was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of similar prior cases illustrates that imposing the death sentence in this case would be neither excessive nor disproportionate in light of the crime and the defendant. *See State v. Huggins*, 336 S.C. 200, 205, 519 S.E.2d 574, 577 (1999) (holding that the death penalty was warranted where defendant robbed and shot the victim); *State v. Hicks*, 330 S.C. 207, 219, 499 S.E.2d 209, 216 (1998) (holding that the death penalty was proper where the defendant robbed the victim and stabbed him numerous times in the neck, chest, and abdomen); and *State v. Byram*, 326 S.C. 107, 120, 485 S.E.2d 360, 367 (1997) (holding that death sentence was proper where the defendant entered the victim's home, stabbed her to death, and stole the victim's handbag and automobile).

369 S.C. at ___, 632 S.E.2d at 289. Justice Pleicones dissented in a separate Opinion. *Id* at ___, 632 S.E.2d at 289-91 (Pleicones, J., dissenting).

Applicant then filed a Petition for Stay of Execution, pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), so that he could file a Petition for Writ of Certiorari in the United States Supreme Court. The State filed a July 11, 2006 letter in Return to the Petition for Stay. The Remittitur was sent to the Lexington County Clerk of Court on July 12, 2006; and the South Carolina Supreme Court granted a stay of execution in an Order filed on July 20, 2006.

Applicant filed a Petition for Writ of Certiorari on September 22, 2006. (Docket No. 06-6780), in which he raises the following issues:

1. Whether the South Carolina Supreme Court erred by holding that the testimony of the victim of a prior unrelated aggravated assault and battery committed by Petitioner that he had dreams about black Indians chasing him as a result of the prior unrelated assault that was not impermissible victim impact evidence under Payne v. Tennessee, 501 U.S. 808 (1991), since it did not involve the capital murder for which Petitioner was on trial, and it was emotional victim impact trauma evidence?

2. Whether the South Carolina Supreme Court erred by holding that the testimony of the two mothers of a prior unrelated aggravated assault and battery committed by Petitioner was not impermissible victim impact evidence under Payne v. Tennessee, 501 U.S. 808 (1991), where the mother's testimony covered negative changes in personality, troubles their sons have had since the assault, and the time spent in the hospital and rehabilitation centers since this testimony did not involve the capital murder for which Petitioner was on trial, and it was emotional victim impact trauma evidence?

3. Whether the South Carolina Supreme Court erred by holding that photographs of the two victims of a prior unrelated aggravated assault and battery committed by Petitioner lying in their hospital beds was not impermissible victim impact evidence under Payne v. Tennessee, 501 U.S. 808 (1991), since the emotional photographs did not involve the capital murder for which Petitioner was on trial, and they constituted emotional victim impact trauma evidence?

4. Whether the South Carolina Supreme Court erred by holding the prosecutor did not impermissibly inject race into the case before an all-white jury by deliberately eliciting the irrelevant fact that the prison guard Petitioner had a sexual relationship with was a white woman, since this denied Petitioner his right to a fair trial, and due process?

5. Whether the South Carolina Supreme Court erred by holding the prosecutor did not impermissibly inject race into the case before an all-white jury by comparing Petitioner to a King Kong and a Caveman during his closing argument, since this denied Petitioner his right to a fair trial, and it also introduced an arbitrary factor into the case in derogation of the Eighth Amendment by encouraging a death sentence based on the government's appeal to racial stereotypes and prejudice?

6. Whether the South Carolina Supreme Court erred by holding that it was now permissible to prevent Petitioner from asking potential jurors during *voir dire* whether they would simply "vote with the majority," or whether they would attempt

> to be independent, since [this] violated Petitioner's Due Process right under Morgan v. Illinois, 504 U.S. 719 (1992) to ensure an impartial jury was qualified in this capital case since general questions about fairness were not sufficient to detect whether the juror would simply vote with the majority or whether the juror was biased?

Petition for Writ of Certiorari at pp. 1-2.

The Brief in Opposition is due to be served and filed on October 26, 2006

On June 16, 2005, Applicant requested a Stay of Execution to file a Post Conviction Relief action. Respondent opposed the request, but the Supreme Court granted a stay pursuant to *In Re: Stays of Execution in Capital Cases*, in a July 7, 2005 Order. In the same Order, the Supreme Court appointed the Honorable John C. Few to preside over this case and directed Judge Few to hold a hearing to determine whether Mr. Robertson desired to have counsel appointed.

In accordance with *In Re: Stays of Execution*, the South Carolina Supreme Court's July 7, 2005 Order and S.C. Code Ann. § 17-27-160 (Supp. 2006), this Court held a hearing at the Greenville County Courthouse on September 23, 2005. Mr. Robertson was present at this hearing, as was Senior Assistant Attorney General Salter, who represented the State. This Court filed an Order Appointing Counsel For Post-Conviction Relief dated September 9, 2005, in which the Court appointed Michael Brown, Esquire, to represent Applicant. The PCR Application was filed on March 1, 2006.

Respondent incorporates the following documents by reference and will provide the Court with a copy of these documents at the time of any hearing:

1. The Record on Appeal from the first appeal;
2. The Record on Appeal from the second appeal;
4. The August 4, 1997 Final Brief of Appellant;

5. The August 4, 1997 Final Brief of Respondent;

6. The Opinion of the state supreme court (Opinion No. 24718, filed December 1, 1997);

7. The January 30, 2006 Final Brief of Appellant;

8. The January 10, 2006 Final Brief of Respondent;

9. The January 30, 2006 Final Reply Brief of Appellant;

10. The March 20, 20006 Petition to Argue Against or Modify the Precedent of *State v. Hill*;

11. The March 22, 2006, Order of the state supreme court granting the Petition to Argue Against or Modify the Precedent of *State v. Hill*;

12. The Opinion of the state supreme court (Opinion No. 26174, filed June 26, 2006);

13. The July 7, 2006 Petition for Stay of Execution;

14. The July 11,2006 letter return to the Petition for Stay of Execution;

15. The Order of the state supreme court granting the Stay of Execution;

16. The July 12, 2006, Remittitur; and

17. The September 22, 2006, Petition for Writ Of Certiorari to the Supreme Court of the South Carolina.

Respondent will serve Applicant's and future PCR counsel with documents 1-16 as soon as possible after the filing of this Return and will file a certificate of service with the Lexington County Clerk of Court.

II. STATEMENT OF FACTS

The direct and circumstantial evidence presented in the guilt phase if Applicant's trial,

viewed in the light most favorable to the State, reasonably tended to prove the following. In November 1990, twenty-four year old Benton Smith lived with his parents in the Happy Town area of Gaston, South Carolina.[1] Benton was the youngest of five children. He was a quiet person, who had always lived at home and had never stayed out late or caused his parents any problems. He was unemployed at the time and received an unemployment check each week in the mail. **R. pp. 1133-39; p. 1146-47; 1161-63; 1735-39; 1742-45; 1747.**

Benton was driving his mother's blue 1980 Toyota Corolla (**State's Ex. 14**) at the time of his murder. He never allowed other people to drive the car, and he was very possessive of the belongings that he kept in his car[2]. He had personalized floor mats in the car with his name on them (**State's Exs. 20-21**); 2 pillows with ducks on them (**State's Exs. 14-15**); 2 small wine glasses (**State's Exs. 17-18**); a pair of red "spy" glasses with lights on them (**State's Ex. 19**); a Polaroid camera (**State's Ex. 11**); a Bible; a walking cane with a gold duck head on it (**State's Ex. 23**);a pair of speakers; a radar detector; and a shaving kit in which he kept money. (**State's Ex. 22**). His brother-in-law, Melvin Harrison, testified that there was a "wad" of money in the kit and that Benton had planned to buy a car with it. **R. pp. 1136-48; 1162-63; 1735-40; 1742-43.**

Applicant also lived in the Happy Town community and was Benton's "friend." Benton received his unemployment check on Tuesday morning, November 27,1990. Both Benton's father, Paul Smith, and his sister, Cynthia Harrison, testified that Applicant went with Benton when he left the house. Unfortunately, this was the last time Mr. Smith and Benton's other family members saw him alive. **R. pp. 1146-48; 1165-66;1742-43; 1746-48.**

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[1] This is in Lexington County.

[2] He also did not allow anyone to smoke in it and had a "No Smoking" sign in the car.

At 11:56 a.m. on Tuesday, Benton cashed his $147.00 unemployment check at the Republic National Bank located on Highway 6, in Swansea. Pamela Herlong, the drive-in teller who handled the transaction, testified that Benton was accompanied by someone. She could not remember who was with him. However, a reasonable inference from the testimony that Mr. Smith and Mrs. Harrison saw Applicant leave the house with him is that Applicant was this other person. **R. pp. 1168-88.**

Benton' family became concerned when he did not return home Tuesday night and immediately began looking for him. They also called the Lexington County Sheriff's Department and reported him missing. Deputy Mark Jones began searching for Benton on Wednesday. He found Benton's blue Corolla parked behind Swansea High School between 10:30 and 11:00 p.m. on Wednesday[3]. The windows were rolled up and the car was locked. The only unusual thing Deputy Jones noticed in the car were some chicken boxes. Deputy Jones later had Benton's father confirm that the car was his son's. Deputy Jones allowed Mr. Smith, who did not have a key to the car, to take it home but instructed him not to open it until advised by law enforcement. Mr. Smith thereafter took the car home and did not open it. Melvin Harrison testified that none of Benton's belongings were in the car when it was retrieved by the family. **R. 1118-20; 1122-28; 1131; 1148-51; 1737-38.**

In late 1990, sisters Bonita and Pamela Gonsalves lived in Orangeburg. Bonita dated Applicant. Applicant often got a ride from someone or drove a friend's car to Orangeburg to see her. Neither woman had ever met Benton Smith, and Applicant had never driven Benton's car there before Tuesday, November 27, 1990. **R. pp. 1190-92; 1216-20.**

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[3] It was near the cafeteria area of the school. Applicant's mother worked in the cafeteria of Swansea Middle School **R. pp. 1123, ll. 2-13; 1125-26.**

Between 5:00 and 5:30 Tuesday afternoon, however, Applicant came to Pamela's apartment looking for Bonita. He was alone and was driving Benton's blue Toyota. Pamela testified that she saw a "No Smoking" sign that family members testified Benton kept in his car, the personalized floor mats, the two pillows with ducks on them and stereo speakers. When she asked Applicant who owned the car, he would not tell her. Eventually, he took Pamela to her sister's apartment and she stayed there for awhile. Both women testified Applicant had a bandage on his right eyebrow and a bandage around his left hand. When asked how he received these injuries, he told both women he received them in a fight with either his brother, Gucci. **R. pp. 1193-97; 1209-10; 1222-25; 1227; 1246-47.**

Applicant told Pamela that he was going to make telephone call and left. She got tired of waiting for him to return and also left. **R. pp. 1196-97.** Applicant returned to Bonita's residence sometime later and took Bonita to a pay phone, so that she could call her mother. While in the car, she also saw the "No Smoking" sign and the personalized floor mats. Applicant and Bonita had previously argued about money,[4] and Applicant left her Tuesday night because of another argument over money. **R. pp. 1220-22; 1224-27; 1246-47.**

Applicant, again, showed up at Pamela's apartment in Benton's car on Wednesday morning. As they were painting the apartment, Applicant took off his shirt and she saw scratches on his chest, which he said he got in a fight with his brother. Later that day, Applicant and Bonita returned to her residence in Benton's car. In the trunk of the car, Pamela saw two shot glasses. Also, the speakers were missing; and Bonita got Benton's cane[5] out of he back seat. Applicant tried to sell a radar

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[4] Bonita wanted to visit her mother for Thanksgiving, but could not afford to do so. Applicant had promised to get her the money but did not.

[5] The cane was not broken at that time.

detector to her. However, Bonita took it and gave it to her. **R. pp. 1197-1203; 1210-11.**

Bonita testified that Applicant returned to her house on Wednesday, and he took both her and her daughter to a shopping mall in the blue car. At the mall, he bought her daughter a doll and a fur coat. While they were in Orangeburg, he went to South Carolina State University and visited a friend who was on the basketball team. They later went to Pamela's house and he helped her paint. Bonita also saw the scratch marks on Applicant's chest. She testified that she gave her sister a radar detector that Applicant had given to her. Applicant gave Bonita the 2 pillows with ducks on them **(State's Exs. 15 and 16)**, the Polaroid camera **(State's Ex. 11)**, and 2 wine glasses. Also, she saw the victim's cane **(State's Ex. 23)**, which had been in the trunk. She said it was not broken. Finally, he gave her the shaving kit **(State's Ex. 22). R. pp. 1227-34.**

Jackie Robinson testified that he is originally from Swansea. He had been life-long friends with Applicant,[6] and he was a cousin and friend of Benton. He was attending South Carolina State in November 1990. Applicant came to the school one day, accompanied by a woman. They were in a small blue car. Robinson rode with them briefly and Applicant tried to sell Benton's Polaroid camera to him. When asked where he had gotten the camera, Applicant replied, "you don't need to know all of that." In the car, Robinson also saw Benton's unbroken cane. Applicant left after roughly 25 or 30 minutes. On Thursday or Friday, Robinson learned that Benton and Benton's car were missing. Because he knew that the car Applicant had been driving on Wednesday was Benton's, he went to law enforcement and told them what he knew. **R. pp. 1259-66.**

Based upon Mr. Smith's own investigation, he and Melvin Harrison went to Orangeburg very

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[6] Robinson testified that Applicant was approximately 6'5" or 6'6" tall and weighed roughly 300 pounds. **R. p. 1266.**

early Thursday morning, and he spoke with Pamela Gonsalves. Although she did not know Benton, she identified his car and some of Benton's possessions from the description Mr. Smith had given. She also told him what had happened the past two days. Mr. Smith then spoke with Bonita, and she gave him Benton's pillows. **R. pp. 1151-53; 1204-06; 1235-42; 1244; 1738-39.**

When Bonita saw Applicant later Thursday morning, she asked him why Mr. Smith had come to her house looking for Benton. He told her not to worry. He also assured her that the victim was okay and was in Swansea. Although he claimed Benton had allowed him to use the car, he became upset when asked about it. He asked her to go somewhere with him but she refused because "[s]omething just didn't feel right." Bonita later gave the shot glasses, the camera and the shaving kit to officers from the Lexington County Sheriff's Department **R. pp. 1204-06; 1235-42; 1244.**

After they came back from Orangeburg on Thursday, Mr. Smith and Mr. Harrison went to Stillinger's Gas Station, in Swansea. There, they saw Applicant, who was carrying Benton's cane. By then, part of the cane was missing. When Mr. Smith asked him where Benton was, Applicant said, "I don't know where he is and I don't give a damn where he is."[7] **R. pp. 1155-56; 1524-1528 1739.**

Det. Frederick R. Hamer, of the Lexington County Sheriff's Department, first became actively involved in this case on Thursday, November 29. He met with Mr. Smith and other family members. He also acquired a bench warrant that had been issued for Applicant's arrest based upon his failure to appear in court on charges that he had stolen gasoline from Stillinger's Gas Station, for which he

[7] Mr. Harrison testified that Applicant said, "I haven't seen him and, frankly I don't give a damn where he is."

was convicted and sentenced to thirty days or payment of a $ 237.00 fine. **(See State's Ex. 28)**[8]. Det. Hamer located Applicant at his home on Jasper Sutton Road and arrested him on Friday, November 30. Det. Hamer took Applicant to the Lexington County Sheriff's Department. After being advised of and waiving his *Miranda*[9] rights, Applicant agreed to discuss Benton's disappearance. **R. pp. 1269-77.**

On this occasion, Applicant admitted that he met Benton at the Smiths' Happy Town residence on Tuesday morning. They left somewhere around 11:00 or 11:30 a.m. and went to the bank in Swansea. Afterwards, they went job hunting in Columbia and West Columbia. They also stopped and ate. Then, they went to see some girls in Orangeburg and came back later that evening. Benton dropped Applicant off under a tree near Stillinger's and said that he was going back to Swansea. Applicant allegedly did not know what happened to Benton and suggested that he might have gone somewhere with the girls from Orangeburg. He also agreed to help get information regarding Benton's whereabouts. **R. pp. 1278-80.**

On Saturday, December 1, Det. Hamer and Det. Charlie Jones spoke with Applicant after he bonded out of jail on the Stillinger charges. Det. Hamer again advised Applicant of his *Miranda* rights. Applicant his rights and spoke to the officers. On this occasion, he claimed that he and Benton had gone back to Swansea after job hunting in Columbia, instead of going straight to Orangeburg. They then went to Orangeburg and met with the young ladies that Benton had met. When they returned to Swansea, Benton dropped Applicant off under the tree near Stillinger's. Applicant again promised to help the officers further. **R. pp. 1282-84.**

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[8] Mr. Thomas Stillinger, the owner of the business, testified that he saw Applicant steal gas on October 23, 1990. **R. pp. 1109-14.**

[9] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

Later that evening, Det. Hamer received a radio transmission that Applicant wished to speak with him. Therefore, he and Det. Jones went to Applicant's residence around 8:30 or 9:00 p.m. After Det. Hamer made sure that he still understood his *Miranda* rights, Applicant agreed to talk to the him. Applicant told the officers he would help them locate some people who may possibly know the victim's whereabouts: Isadore Mack, Tommy Ferlick and Andre Haskins. He said these people were "laying low" and "hiding out" at Theodore Reed's club because of a recent drug sweep in the area.. So, the officers took him there. **R. pp. 1286-88; 1343-44.**

They found Mack at the nightclub. The officers spoke to Mack after they got him outside[10]. Det. Hamer then told Applicant that Mack had not provided him with any information. Det. Hamer also told Applicant that the officers knew Benton was dead and explained they needed to find him because his family deserved to know and "put some things to rest." Applicant said, "... I know them pretty well, I know the way they think. ... Drive, let's go." **R. pp. 1288-90; 1343-46.**

He immediately directed the officers back to his sister's trailer in the Happy Town community. They arrived around 11:00 or 11:30 p.m. They exited the car and followed Applicant into some woods just beyond a firebreak near his sister's trailer. Soon, they found Benton's body buried underneath some limbs, leaves and other debris. (***See* State's Ex. 19**)[11]. Applicant acted as if he was going to be ill when he saw the body. Before they left, Det. Hamer showed Applicant's sister and brother-in-law where they had found the victim's body. She fainted when she saw what the officers had found. By the time the area was secured, it was Sunday morning, December 2. **R.**

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[10]Det. Jones' investigative report reflects that Applicant went inside and had a private conversation with Mack. After this conversation, Applicant said the three men had robbed Benton and placed the body in a wooded area off Happy Town Rd. **R. p. 1346.**

[11] Benton's body was only thirty or forty yard away from the trailer. **R. pp. 1348-50.**

pp. 1290-1300; 1348-50.

Based on information Applicant had provided to them, the officers located and arrested Haskins on an outstanding narcotics warrant[12]. They thereafter took both Haskins and Applicant back to the Lexington County Jail. After the officers obtained statements from Mack, Furtick and Haskins, they spoke with Applicant around 4:00 a.m. **R. pp. 1300-05 1350-53.**

Once again, Applicant was advised of and waived his *Miranda* rights before making the statement. ***See* State's Ex. 31.** In his taped statement **(State's Ex. 32)**, he gave a different account concerning his activities on the previous Tuesday and Wednesday. He suggested that Mack, Haskins and Furtick were involved in the murder, and that they had taken Benton around 6:55 p.m. from Stillinger's. Allegedly, Benton and Haskins had made a "big score" and each had about $1,000.00. He also claimed that the camera he had given to Bonita was his; and he denied going to Orangeburg on Tuesday night. Yet, he somehow got Benton's car and parked it at an old baseball field on Happy Town Rd. Officers arrested Applicant immediately after he gave this statement. **R. pp. 1305-12; 1354-55.** On the afternoon of December 2, Benton's car and its contents were processed for latent fingerprints. Two latent lifts from the rear view mirror matched Applicant's left thumb. Two more prints taken from a Kentucky Fried Chicken box found in the car matched his right middle finger. **R. pp. 1313-14; 1452-56.**

In November 1990, James Hickman was an Investigator and Identification Officer for the Lexington County Sheriff's Department. He and SLED Agent John Christy went to the crime scene early on December 2, 1990, and processed the scene. The prosecution published to the jury the

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[12] He was claiming that Mack, Haskins and Furtick were responsible for what occurred to Benton.

photographs that they took of the grave as officers found it and before any debris had been removed (**St.'s Exs. 40-41**), as well as photographs as the debris was removed (**State's Exs. 42; 72-74**). **R. pp. 1440-51; 1666-71.**

Initially, the only parts of Benton's body that were visible were one white tennis shoe and Benton's left arm, which had been damaged by animals. After the debris was removed, they saw that there was a tree between Benton's legs. When Inv. Hickman returned on December 5, he used a metal detector and found a wooden handled screwdriver (**State's Ex. 51**) near where Benton's waist had been laying. **R. pp. 1440-51; 1462-64; 1666-71.**

On Monday, December 3, Det.s Hamer and Jones went to Swansea and to Orangeburg, in an effort to check out the information which Applicant had given them. They spoke with Bonita Gonsalves, who also gave them the wine glasses, the Polaroid camera and the black shaving kit. They also spoke with Tommy Furtick. Later, they returned to the Sheriff's Department and spoke with Applicant. **R. pp. 1312-15.**

After he waived his *Miranda* rights, yet again, Applicant spoke to Dets. Hamer and Jones. Again he started blaming Mack, Haskins and Furtick. Det. Hamer immediately stopped Applicant and said he knew Applicant was lying. Applicant sat silently for several minutes. Then, he wrote a one sentence, signed statement in which he said, "I, Johnny Bennett need help!" (**State's Ex. 33**). **R. pp. 1315-1319; 1355-57**[13].

He subsequently gave another taped statement (**State's Ex. 35**). Before making the statement he *again* made both a written and verbal waiver of his *Miranda* rights. In this statement (a transcription of which was introduced as **State's Ex. 34**), he claimed he met Benton around 11:30

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[13] This was signed at 7:40 p.m. on December 3, 1990.

a.m. on Tuesday. First, they went to Republic National Bank, in Swansea; and Benton cashed his check. Afterwards, they went to Columbia and filled out job applications. As they were coming back through Swansea, Applicant told Benton he wanted to go to Orangeburg, and Benton allegedly agreed. So, Applicant drove to Bonita Gonsalves' apartment. However, he and Bonita got into a fight. So, he and Benton left Orangeburg and headed back towards Swansea. **State's Ex. 34, R. pp. 1321-23;1358; 1398-99.**

When Applicant was approximately seven miles from Swansea, he slammed on brakes. Benton asked if he was alright. Instead of replying, Applicant simply looked at him. So, Benton got out and walked to the driver's side. He again asked if Applicant was alright. This time, however, he touched Applicant. Applicant jumped out of the car and struck Benton in the jaw. This blow knocked Benton unconscious. Applicant picked up Benton and put him on the passenger's side of the car. After driving back to Swansea, Applicant drove to the old ball field in Happy Town and parked. He then got out of the car and sat on the hood. **(State's Ex. 34, R. pp. 1360-62; 1399; 1405).**

Roughly fifteen minutes later, Benton regained consciousness. According to Applicant, Benton got out of the car and started "chop-popping," or running his mouth:

> HAMER: And what did he say to you?
>
> BENNETT: I didn't um, he said ah, 'what happened? What did you do? Why [are] you doing this,' and all this and that ... So that time when he went ... to touch me again and I pushed him away and that's when he scratched me on the shoulder and that's when I snapped.

State's Ex. 34, R. pp. 1324; 1394-96; 1399-1400; 1405-07.

Applicant said he hit Benton again, and Benton fell to the ground. Applicant immediately

reached in the car, grabbed a Phillips head screwdriver and repeatedly stabbed Benton. [14] He described the screwdriver as rusty, about 3" or 4" long, with a brown handle; and he told the officers it should still be at the crime scene. He also admitted he picked up Benton's wallet when it fell out of Benton's pocket. However, he allegedly threw it back on the ground without checking to see if there was any money in it. **State's Ex. 34.**

After stabbing Benton, he picked up Benton's body and put it in the trunk of the car. He then drove to his sister's house and left the body in the woods. Sometime later, he went by and visited a friend. When he left his friend's residence, he drove to Orangeburg and picked up Pamela Gonsalves. They then drove to Bonita's residence, and he took Bonita "to use the phone." On the way home, however, they had another fight.

Applicant eventually drove back to his sister's house (after returning to the old ball field) and stayed there from approximately 7:50 to 10:15 p.m. Wednesday morning, he drove Benton's car to Orangeburg. When he returned Wednesday night, he parked the car behind the Swansea high school and got into another car with Mack, Haskins and Furtick. He claimed he left the keys in the car. Finally, he told the officers he was willing to take the officers to help find the wallet. **R. pp. 1324-25; 1400-03; 1405-07; 1419-20; State's Ex. 34.**

After the statement, he said that he knew that he would eventually would kill someone because he had thought about killing a family member. **R. pp. 1324; 1364-65.**[15] Dets. Hamer Jones, and Hickman along with other officers, picked him up at the Lexington County Jail on December 5. Following his directions, they went to an open field on Lewis Rast Road, where they found

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[14] When asked how many times he stabbed Benton, Applicant replied, "I'd say around thirty times." **States Ex. 34.**

[15] On December 4, Applicant received a copy of the transcribed statement. **R. p. 1323.**

Benton's eyeglasses and key case. They thereafter went to Orangeburg and searched a playground near Bonita Gonsalves' apartment, in an unsuccessful effort to find Benton's wallet[16]. **R. pp. 1324-28; 1420-21; 1426; 1456-61.**

As a result of a search initiated by phone calls from Applicant on December 10 and December 11 [17] and with his assistance, officers located the victim's floor mats in an area off of Huckabee Mill Road, between Swansea and Orangeburg on December 12. Finally, Applicant again led the officers in an unsuccessful effort to find the victim's wallet. **R. pp. 1328-31; 1434-35; 1465-69.**

Dr. Joel S. Sexton, a forensic pathologist, performed an autopsy on Benton's body. Benton was approximately 5'8" tall and only weighed about 135 pounds. Dr. Sexton noted the presence of some postmortem animal destruction[18]. However, he found much more serious injuries that were inflicted before death. First, he found three abrasions on the bottom of Benton's chin: two were on the bottom left side and one was on the bottom right side of the chin. There was even some laceration on the left side. These wounds were premortem and had bruising underneath them. There was also subarachnoid hemorrhaging on the surface of the brain associated with these wounds,[19] and Benton's jawbone was dislocated and easily movable. These findings indicated that these were very forceful injuries. **R. pp. 1676-81; 1688-97.**

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[16] Before they left, Applicant was again advised of and waived his *Miranda* rights.

[17] Applicant was being represented by counsel at the time, and the officers reminded him of this. However, he waived his right to counsel and his other *Miranda* rights when advised.

[18] The victim's entire right hand had been destroyed by animals, as had part of the inside surface of his left upper arm and his nose.

[19] The subarachnoid hemorrhaging on the surface of the brain is generally caused by a forceful impact on the jaw. **R. pp. 1694-95.**

The fact that three injuries were in the same area was consistent with the perpetrator hitting the victim repeatedly with a fist in this area but the injuries could have been caused by other objects hard enough to scrape the victim's skin on impact, such as the victim's head being repeatedly thrown against an object or the victim falling on his chin. The amount of subarachnoid hemorrhaging that Dr. Sexton found generally results in unconsciousness for some period of time and could possibly result in death. Also, they would cause a headache if the victim was conscious after the blow However, other injuries in this case would have caused a more rapid death. **R. pp. 1692-97; 1701-02.**

The most extensive injuries were caused by more than sixty-four individual stab wounds to the victim's head, neck, shoulders, upper chest and left hand. **R. pp. 1679-1681; pp. 1699-1722; State's Ex. 78.** Dr. Sexton found six defensive wounds on Benton's left hand and arm[20]. Although these wounds were superficial because they did not penetrate the hand, Dr. Sexton opined that (1) they were consistent with Benton using his arm and hand to protect himself from the other blows he received; (2) they would have been painful to a conscious person; and (3) Benton was conscious during the period he was attempting to shield his head[21]. **R. pp. 1697-1701; 1721-22.** The remaining wounds were primarily "on the back of the head, the left side of the head, the upper back, and the upper part of the chest, and the left shoulder. Only four of these wounds penetrated very deeply into the skin. Those wounds penetrated the lung and the vessels in the neck, and they caused internal bleeding in the chest cavity. Almost three pints of blood were in the chest. Most of the

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[20] At least two wounds were on the back of the forearm, and two were on the back of the wrist. The fifth wound was on the back of his hand; and a sixth wound was on the front, upper palm of Benton's left hand, just below the thumb.

[21] He agreed with the statement that the parts of the body which have more precise movement contain more "pain receptors" than other parts of the body.

wounds in these locations had a cross-type pattern on the surface, which Dr. Sexton opined was consistent with the Phillips head screwdriver recovered at the scene. **R. pp. 1697-1722.**

Dr. Sexton counted multiple stab holes on the back of the head which penetrated through the scalp and in some cases created a cross type of imprint or depression in the skull. Many actually stuck into the skull approximately a 1/8", but did not penetrate it. Most of these wounds had star or cross markings. He found similar wounds on the left side of the head and down the left side of Benton's neck. These wounds tended to have a mark which trailed off at the edge. Dr. Sexton opined this was consistent with movement between the time the stab wound occurred and the object was pulled away. **R. pp. 1697-1722.**

A stab wound above the left ear actually penetrated the skull approximately 1". Even though this wound did not have much hemorrhaging associated with it and did not penetrate the brain, Dr. Sexton opined it could have rendered Benton unconscious. Based upon the presence of so many wounds which did not cause severe injury to the brain and the degree of force necessary to inflict the wounds, Dr. Sexton opined Benton's head did not move much during the time they were inflicted. He further opined it would take a considerable amount of force for an object with a blunt tip, such as the Phillips head, to actually penetrate the skull. Also, the head was most probably against some surface at the time this blow was inflicted. Finally, Dr. Sexton gave detailed testimony concerning the force necessary for each of the wounds he found, the degree of pain the wounds would cause a conscious person and he opined that Benton was conscious for at least part of the attack based upon the defensive wounds and the fact all of the wounds were not in the same location. He listed the cause of death as internal bleeding or asphyxiation secondary to the stab wounds in the upper neck, chest and head. **R. pp. 1697-1722.**

III. ALLEGATIONS

Applicant raises the following grounds for relief in his PCR Application:

1. Ineffective assistance of trial counsel.

2. Ineffective assistance of appellate counsel.

IV. DISCUSSION

GROUND 10(a)

Applicant's first allegation is that trial counsel were ineffective for failing to object to the Solicitor's closing argument in the re-sentencing proceeding. He contends that the State's closing argument deprived him of a fundamentally fair trial because the Solicitor stated that Applicant had dragged one of the Pizza Hut victims by his hair "like an old cave man," and that a sentence of life imprisonment would cause Applicant to revert to his violent behavior and "[m]eeting him again will be like meeting King Kong on a bad day." **R. pp. 2062; 2079.** Respondent submits that this allegation is without merit.

In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in his application. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). To establish that he received ineffective assistance of counsel, an inmate must make a twofold showing. See *Wiggins v. Smith*, 539 U.S.510 (2003). First, he must demonstrate that his attorneys' "representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "Judicial scrutiny of counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the [challenged] conduct from counsel's perspective as the time." *Id.* at 689. *See also Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("[E]ven if an omission is inadvertent, relief is not automatic. The

Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight").

Second, the applicant must also demonstrate that he was prejudiced by his attorneys' ineffectiveness, *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); *Palacio v. State*, 511 S.E.2d 62 (S.C. 1999). 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*, 539 U.S. at 537; *Jones v. State*, 332 S.C. 329,344-45, 504 S.E.2d 822, 829-30 (1998) (petitioner did not meet burden).

One of the key issues in the sentencing proceeding was whether or not Applicant would be a danger in the future if incarcerated. The State had presented a great deal of evidence reasonably tending to show that Applicant began bullying and trying to intimidate others with his physical size beginning in the fifth grade and continued in this type of behavior until he was finally expelled in the tenth grade. At some point, he began trying to intimidate teachers as well, and he developed a pattern of disrespecting authority and attempting to shift blame to others. **R. pp. 920-70; 970-86; 1069-75.** This continued even after he was incarcerated on the Youthful Offender Act sentence for assault and battery of a high and aggravated nature (A.B.H.A.N.). **R. pp. 1093-1101.**

Both eyewitnesses to the March 4, 1998 attack at the Pizza Hut - William Mark DuBose and Rhonda Smith - testified that they saw a black man attacking a white man, who was not defending himself, in the parking lot. Ms. Smith testified that the black man (subsequently identified as

Applicant) pulled this defenseless victim by the hair and drug him across the parking lot to the front door of the Pizza Hut. He then stomped and beat his defenseless victim. **R. pp. 986-1003; 1006-09.**

Obviously the jury could see Applicant's size. Further, the State presented testimony from a life-long friend that he was approximately 6' 5" or 6' 6" tall and weighed 300 pounds. **R. p. 1266 l. 13-16.** Other witnesses also described him as very big. On the other hand, Benton Smith (the victim) weighed a paltry 135 pounds and was approximately 5' 8" tall. Dr. Joel Sexton, the pathologist, described his as being of slender build. **R. pp. 1680-81.**

As part of its showing of future dangerousness and his violent character, the State also presented testimony from various employees within LCDC and SCDC concerning dangerous, violent, disrespectful or disruptive behavior in which he repeatedly engaged while in jail or prison. On various points in his incarceration, he was found in either immediate or constructive possession of a shank **R. pp. 1482-83);** a metal flap **R. pp. 1488-89);** a metal rod **R. pp. 1504-05);** a portion of a light fixture **R. pp. 1483-84)** and clay. Clay is dangerous because it can be used to make a duplicate key or jam the locks to the cell. **R. pp. 1561; 1563-64.** On another occasion he was found in possession of a smoking pipe. **R. pp. 1552-53.**

He once flooded his cell and the wing in which it was located with water. **R. pp. 1493-96.** On yet another occasion, he sprayed shaving cream over surveillance cameras in the jail. **R. p. 1496.** There was also testimony concerning his repeated refusal to obey directions from officers or disrupting officers attempting to perform their duties. **R. pp. 1076-78; 1488-89; 1496-1500; 1526-41; 1544-45; 1547-71.** In addition to being an "enforcer" for certain officers at the jail and beating up inmates there **R. pp. 1515-17),** he was involved in at least four other fights with other inmates. **R. pp. 1076-81; 1086-90; 1489-93; 1526-41; 1565-68.**

Sharon McChesney, a correctional officer at LCDC in 1993, testified that on July 23, 1993, Applicant attempted to force his way into the cell of inmate Dougins when Officer McChesney attempted to give medication to Dougins. Applicant picked up the 5' 4" McChesney, moved her out of the way, dragged Dougins out of his cell by his hair, he threw Dougins on the cement floor and pounded Dougins' head into the floor.[22] When an inmate Glover made a comment to him that he was going to kill Dougins, Applicant turned as said "you better back the hell off." ***See*** **R. pp. 1526-37.**

Captain Adrian Bost, the jail administrator in 1990-93, testified that Applicant had seventy or more disciplinary violations while at LCDC. Captain Bose testified that in his career, Applicant was "one of the most intimidating, violent, disrespectful and disorderly inmates you would ever, ever want to deal with. [He] used his size to intimidate people ... ." Attempts to counsel him on this failed and "he always used his size to push [both officers and inmates] around." **R. pp. 1548-49; 1570 l. 14 - 1571 l. 5.**

Warden Willie Weldon, warden of Lieber Correctional Institution, testified on cross-examination that he had not received information about Applicant disrespecting or having any disciplinary problems at his facility **R. pp. 1638-39)** but stated on redirect that he received a request form from Applicant dated May 27, 1997 **(State's Ex. 66),** in which Applicant acknowledged that "anything in my jacket could very well have an impact on me when I go back to Court." **R. pp. 1644-45.**

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[22] Officer McChesney described Dougins as a "little shorter" that Applicant but stated that he was "a skinny little thing. He ... was not a big man ... ." Also, Applicant prevented Officer McChesney from radioing for assistance every time she attempted to do so. **R. pp. 1532-33.** Also, Officer McChesney's efforts to physically stop him did not work.

Applicant's witnesses, quite obviously, painted a different story. Aside from Collins' claim that all the guards loved him at LCDC **R. p. 1979)**, Applicant presented expert and lay testimony that he could adapt to prison life and that SCDC could adequately and safely confine him; that he was no longer a violent, disrespectful or disruptive inmate; that he would follow the rules and orders; and that he was very involved in the prison ministry. **R. pp. 1789-1803; 1864-69; 1873-82; 1889-1903; 1910-34; 1980-2012.** The various lay witnesses, many of whom were correctional officers or otherwise came into contact with him while he was incarcerated at SCDC variously referred to him as "a model inmate" **R. p. 1795)**; "very polite" and "easy-going" **R. p. 1867)**; "[r]espectful" **R. p. 1877)**; "a mediator" who explained rule changes to other inmates **R. pp. 1893-94)**; someone who was "very compassionate for others" **R. p. 1915)**; a "[b]ig teddy bear" **R. p. 1921)**; someone who had a "very positive attitude toward everything" and was "more of a big brother type" **R. p. 1927)**; and "a gentle giant." **R. p. 1929.**

It was against this backdrop of evidence that the Solicitor made his comments that are presently complained of and were challenged on direct appeal. While summarizing Applicant's violent behavior at the Pizza Hut and the incident involving inmate Dougins, the Solicitor made the following comments:

> "I don't know whether it was the black lady that was inside eating with her boyfriend or the tall white boy that was outside that drove through, said that ... Johnny was even pulling one of them by the hair. Kind of like an old cave man, dragging him by the hair. Then the guy was motionless."
>
> "Same thing happened in jail over there to Mr. Dougins when he went in that cell moved that female guard out of the way and he dragged Mr. Dougins out by his hair."

R. pp. 1062 ll. 12-23.

The Solicitor pointed out, without objection, that, like much of Applicant's violent past, it

supposedly was not Applicant's fault and focused upon his documented history of shifting blame to other people. Later, the Solicitor discussed the conflicting portraits presented to the jury as to Applicant's future dangerousness in prison. He reviewed the extensive showing by the State that Applicant was a violent, disrespectful, disruptive and manipulative inmate; and he juxtaposed this against the showing made by the defense. He urged the jury to reject the defense's showing based upon Applicant's comment in May 1997 that "anything in my jacket could very well have an impact on me when I go back to court." **R. pp. 2074-78.**

He then made the following comments, again, without objection:

> "You give him life, the real Johnny will come back. You give him life and he will come back out. Meeting him again will be like meeting King Kong on a bad day. Vile Johnny. Mean Johnny. Manipulating Johnny. Murderous Johnny. You give him life, those guards better button up their vests because he's coming back out in force.
>
> Because he's got what he wants. He's got the people to testify, trying to pull the wool [] over his eyes, trying to pull the wool [] over your eyes. Being smart, being intelligent, being manipulative and being a con man, that's a dangerous combination. That's an explosive combination wrapped up in him, all six-foot-seven, 300 pounds of him. And that's for you to decide."

R. p. 2079 ll. 2-14.

Trial counsel did not object either at the conclusion of the State's argument **R. pp. 2082),** after the argument of Applicant and defense counsel **R. pp. 2105)** or at any point thereafter even after the sentence had been imposed. ***See*** **R. pp. 2106-59.**

Trial counsel first raised this in a post-trial motion for new trial. **R. p. 2363-80.** The State responded to this, as well. **R. p. 2381-91.** After holding a hearing on the new trial motion, the trial judge took the matter under advisement. **R. p. 2161- 2214.** Subsequently, the trial judge issued his Order denying Applicant's motion. The trial judge specifically relied upon Applicant's failure to

contemporaneously object to either portion of the State's closing argument, in addition to making findings that the State's closing argument was proper and invited by the argument and evidence presented by the defense. **R. p. 2417-23.**

The challenge to the Solicitor's closing argument was raised as the fifth argument on direct appeal. **Final Brief of Appellant, at pp. 28-33; Final Brief of Respondent, at pp. 33-44.** The South Carolina Supreme Court rejected the argument, as well as the allegation that race was impermissibly injected into the case by the Solicitor's re-cross examination of a defense witness, as follows:

> Appellant argues that the Solicitor's comments during cross-examination of a witness and during closing arguments improperly injected racial issues into the trial. We disagree.
>
> As a general rule, inflammatory remarks which are calculated to appeal to the passions or prejudices of a jury should be affirmatively condemned. *South Carolina State Highway Dep't. v. Nasim*, 255 S.C. 406, 411, 179 S.E.2d 211, 213 (1971). "[W]hether or not the particular arguments are so prejudicial as to constitute reversible error depends upon the nature of the utterances and the circumstances under which they were made." *Id.* Under certain circumstances, this Court will grant a new trial despite the aggrieved party's failure to contemporaneously object to the argument if the prejudice caused by the argument is clear. *Dial v. Niggel Assoc., Inc.*, 333 S.C. 253, 256, 509 S.E.2d 269, 271 (1998); *Toyota of Florence, Inc., v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994).
>
> Additionally, a solicitor's closing arguments in a capital trial should focus on the defendant's character, his background, and the nature of the crime. *State v. Reed*, 293 S.C. 515, 519, 362 S.E.2d 13, 15 (1987) (overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991)). The arguments must be viewed in the context of the entire record, and the relevant question is whether the comments infected the trial with unfairness so as to make the resulting conviction a denial of due process. *State v. Patterson*, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997).
>
> As a starting point, we recognize that the terms "blond lady" and

"King Kong" could have racial connotations. However, this court's jurisprudence does not prohibit the use of terms with racial meanings, nor does our case law stand for the proposition that arguments or evidence in a case must be void of racial allusions. Instead, this court has recognized that it is impermissible to use race to "inflame the passions or prejudices" of the jury. Accordingly, our inquiry focuses on how these terms were used in Appellant's case.

In our view, the "blond lady" remark was not made to inflame the passions or prejudices of the jury. If the State had sought to make the race of Appellant's former lover an issue in this case, we believe they would have elicited evidence to this effect while examining their witness who testified extensively about the affair. Instead, this comment came while cross-examining a defense witness.

Furthermore, we find that even if this remark was inflammatory, it did not prejudice Appellant. This remark is a far cry from the outrageous and inflammatory evidence and arguments seen in *Nasim*, *Toyota*, *Dial*, and the cases cited by Appellant. The proper inquiry is not whether the Solicitor's remark was undesirable or condemnable, but whether the comment "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). In this case, the Solicitor made the "blond lady" comment only once and never referred to Appellant's lover's race again. Furthermore, this case involved a brutal murder, where guilt was clearly established. Accordingly, we find no evidence of prejudice from the "blond lady" remark..

Similarly, the Solicitor's use of the term "King Kong" was not an appeal to the passions or prejudices of the jury. The comment referred to Appellant's immense size, strength, and the destructiveness of his previous crimes. In this case, the trial court properly determined that Appellant's size and strength were probative of the aggravating circumstance of physical torture, which the court charged to the jury. In this regard, the Solicitor's use of the term "King Kong" was not suggestive of a giant black gorilla who abducts a white woman, but rather, descriptive of Appellant's size and strength as they related to his past crimes.

Also, Appellant's mitigation witnesses described him as "a gentle giant," "a big old teddy bear," "the Secretary of Defense," and "the Mediator." The defense used these terms to indicate Appellant was a changed man and not a threat to others. In this regard, the trial court

> correctly found that "King Kong" was an invited response to Appellant's mitigation evidence.
>
> Finally, the Solicitor's "Caveman" comment was merely descriptive of two of Appellant's past violent incidents. A witness to Appellant's ABHAN testified that she saw Appellant dragging the motionless body of one of the victims across a parking lot by the hair. Additionally, a prison guard testified about an incident where Appellant reached into another inmate's cell and dragged the inmate out by the hair. The Solicitor made this comment while describing how Appellant dragged his victims during these incidents, and, in our view, the comment was not inflammatory. Based on the above reasoning, we hold that the Solicitor's comments did not improperly inject racial issues into the trial.

Bennett II, 369 S.C. at ___, 632 S.E.2d at 288-89. (footnote omitted).

Respondent submits that this Court does not need to address whether or not trial counsel's performance was deficient because the 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. In the present case, Applicant cannot show any conceivable prejudice resulting from trial counsels performance: the South Carolina Supreme Court did not rely upon a procedural bar in rejecting his argument on direct appeal, although the trial judge relied upon the absence of a contemporaneous objection and the State argued this procedural bar. Indeed, the Court found that its "conclusion makes an analysis of *Nasim*, *Toyota* and *Dial*'s exception to the contemporaneous objection rule unnecessary." *Bennett II*, 369 S.C. at ___, 632 S.E.2d at 89 n. 3.

GROUNDS 10(b)-(d)

Applicant's next three allegations are that trial counsel was ineffective for failing to "properly object to inadmissible victim impact evidence of a prior ABHAN victim ... on the grounds that it was

improper victim impact evidence in violation of *Payne v. Tennessee*, and that it was irrelevant and barred by Rule 403 if it was relevant." Specifically he complains about testimony from one of the ABHAN victims concerning the recurring dream he has experienced following the attack (**Ground 10(b)**) the testimony from the victims' mothers concerning the extent of the injuries inflicted (**Ground 10©**) and photographs depicting the injuries inflicted (**Ground 10(d)**). Respondent again submits that these allegations lack merit. Applicant simply cannot meet his burden of proof on either prong of *Strickland, supra.*

As part of its case in re-sentencing, the State introduced Applicant's two September 14, 1988 convictions for A.B.H.A.N. and his Youthful Offender Act sentence[23]. These convictions stemmed from him savagely beating two employees of the Pizza Hut in Lexington, on March 4, 1988. **R. p. 1029; State's Ex. 6.**

The State also presented several witnesses to testified concerning the attack itself and the injuries inflicted upon the two victims by Applicant. William Mark DuBose testified that he recalled seeing "a large black male" standing over one of two white males who were lying on the pavement when he pulled into the parking lot of the Pizza Hut on March 4, 1988. He described the two white males as "motionless, apparently unconscious. There was a good bit of blood lying around both of them. They were obviously injured and were not moving." However, the black man stomped one of the motionless victims approximately three or four times. The man then got into a truck with two white males and they left the scene. For his part, DuBose fled to a nearby parking lot out of fear of his own safety. **R. pp. 986-94.**

Rhonda Smith testified that she and her boyfriend were at the Pizza Hut that same night. As

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[23] He was sentenced to an indeterminate period not to exceed six years.

they were sitting at a window booth, she saw "a black male dragging a white male from the back of the Pizza Hut ... by his hair. ... The white guy was like on his back, and he was just dragging him along the ground with no effort by the white individual at all, it was strictly by the black male." Once the black male had dragged his victim to the front door of the Pizza Hut, he let go of the fistfull of hair he had been pulling, "kneel[ed] down and beat him in the face with his fists and kicked him and stomp him." **R. pp. 996-98.**

The black male punched his defenseless victim at least five or six times in the face and kicked and stomped him with his feet three or four times in the head[24]. After he stomped him for the last time, he jumped into a truck (driven by a white male) that had pulled up, and the truck drove away from the scene. Ms. Smith stayed until the police and an ambulance had arrived. While there, she saw another person laying on the ground in the back of the Pizza Hut. **R. pp. 998-1003; 1006-09.**

Apparently, Applicant's trial counsel raised an objection to the testimony of Sharon Brady, the mother of Pizza Hut victim Shannon Gilbert at a bench conference. *See* **R. p. 1012, ll. 6-9.** The trial judge later noted that counsel had argued that her testimony about the extent of her son's injuries and the reaction was irrelevant. The trial judge stated that he had overruled the objection because the South Carolina Supreme Court had approved the admission of such testimony. Counsel added that he contended that this was "inappropriate, victim impact type of information" which had nothing to do with the crime for which he was on trial. **R. pp. 1038-39.** He also noted that he had the same objection before the testimony of Helen McGough, the mother of Pizza Hut victim Aaron McGough. This was likewise overruled. **R. pp. 1038-39.**

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[24] The white male never moved. **R. p. 1001.**

Mrs. Brady testified that her son, Shannon Gilbert, worked at the Pizza Hut on March 4, 1988. She received a call that night from the Pizza Hut that he had been taken to the Lexington County Hospital. She later received a second call notifying her that he had been taken to the Richland Memorial Hospital because of head trauma. When she arrived at the hospital, he was unconscious and she had a hard time identifying him because of the bruises, cuts and swelling on his face and head. He remained unconscious and in the intensive care unit (I.C.U.) for thirteen days. She photographed his injuries while he was in I.C.U.

The photograph was taken within the first several days after he was placed in I.C.U. and represented how he looked "a day or two" after the incident. **R. p. 1014, ll. 16-25.** Over trial counsel's objection that the photograph "adds nothing" to her testimony about Shannon's injuries and was intended "to inflame the jury," the trial judge allowed the photograph into evidence as **State's Ex. 5.** He found that it was "not overly graphic or inflammatory," and that it "fairly depicts and represents the testimony of the witness ...." **R. p. 1015, ll. 1-25.**

Mrs. Brady then testified that Shannon's condition had not changed between the first time she saw him after the crime and when she took the photograph, except for "the apparatus added to him." **R. p. 1016, ll. 3-16.** Even after he regained consciousness and was taken out of I.C.U., he remained in the hospital for another eleven days. He finally could walk "some." He then remained at home for five days before being sent to the Rebound Head Trauma Center in Lancaster, South Carolina, for approximately two and a half months. **R. pp. 1012-18.**

Mrs. Brady also testified that he continued to have rehabilitation and therapy after the discharge from the trauma center and they had to personally hire a tutor as well because they did not meet the time requirements for the State to provide one. Shannon needed a speech therapist.

Additionally, he needed a physical therapist to help him exercise his left leg and arm, which had been affected by a fracture behind his right ear. She stated that he had not completely recovered from the beating. **R. pp. 1018-20.**

Shannon Gilbert testified that he could not remember very much of what had happened on March 4, 1988. However, he remembered getting off work at approximately 10:00 or 10:30 p.m. and going to use the phone outside the front door. While he was talking to a girl, he asked a black man who was standing there if the man needed to use the phone. When the man indicated he did, he told his fried that he had to go and call her from inside the store. The next thing he remembered was waking up in the hospital about thirteen or fourteen days later. He then corroborated his mother's testimony about the extent of his injuries and the impact it had upon him: that he was unconscious for thirteen days; that he was unable to walk or talk when he first regained consciousness; that he stayed in the hospital approximately three and one-half weeks; that he had no coordination and no strength in his left hand and left leg even after his discharge; and that he was in the head trauma center for roughly two and one-half months, where he had both speech and physical therapy. Additionally, he provided details concerning the effects that lingered from the beating, such as the lack of coordination in his left hand and left leg and the problems caused by his impaired short-term memory. **R. pp. 1018-28.**

When asked if he had any consciousness about being in the hospital or any dreams that he could remember from being in the hospital, Shannon Gilbert testified that "I had a dream. I did have a dream in the hospital. It's the only one I remember, of course."Appellant objected on the grounds that the testimony was irrelevant. Over his objection, Shannon was permitted to testify that "I remember the dream. I woke up and I remember being afraid. ... It was -- Indians were chasing me

trying to kill me, and the thing that I thought was they were black. And later on -- or after years have gone by I've maybe even though, well, there might have been a link. You know, that I was remembering something about trying to get away from someone." **R. p. 1027 l. 17 - p. 1028 l. 13.**

At this point, Applicant's trial counsel stated, "I renew my motion. I move that it be stricken. That's irrelevant." The trial judge noted his motion, but denied it. **R. p. 1028 ll. 15-17.** On cross-examination, counsel established that "[t]here were two other white guys involved" in addition to he and Aaron McGough; but, he did not remember the fight initially between the "white guys." **R. p. 1030 ll. 11-22.**

In an *in camera* hearing after Mrs. McGough's testimony, trial counsel stated that he had objected to any testimony about the extent of the injuries suffered by the Pizza Hut victims as inappropriate victim impact evidence. He renewed this motion with respect to Shannon's testimony. He also asserted that this motion supported his previous motion to have a black juror remain seated even though the individual had indicated he may not be fair and impartial. Counsel claimed that the testimony by Shannon had "no importance" and no relevance "except to inflame a white jury." He asserted this was a gross violation of his rights to interject race. The trial judge denied the motion and found that Shannon had "testified just to what his impressions were of the dream that he had." **R. pp. 1039-41.**[25]

Ms. Helen McGough testified that her seventeen year old son, Aaron, was working his first

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[25] This motion was predicated upon the trial judge's excusing for cause black male juror Thomas W. Brown (*see* **R. pp. 144-55; 820-24**) when he indicated, after jury selection, that he could not be fair and impartial because of his familiarity with the victim's family. Applicant's counsel suggested that he should be allowed to remain as a juror so that Applicant would not be tried by an all-white jury. The trial judge, however, rejected his arguments (**R. pp. 867-85**) and Applicant did not raise any issue on direct appeal concerning this ruling.

night at the Pizza Hut on March 4, 1998. He was supposed to leave work around 11:00 p.m. and she waited up for him to come home and discuss his first day at work. However, he did not come home as planned. Instead, she received a call at approximately 11:20 or 11:25 p.m. informing her that he had been taken to the Lexington Hospital. About five or ten minutes later she received a second call and, as a result, went to the Richland Memorial Hospital. When the ambulance arrived and opened the door, he resisted the efforts of emergency medical personnel to get him out of the ambulance. **R. pp. 1031-33.**

Ms. McGough tried to speak to her son but he did not respond. Also, she indicated that she would not have recognized him if she had not known it was him because his face "was all cut up. His eyes were just little slits. His nose and his mouth ... was just all one. His forehead was all cut up." (sic). He was immediately transported to the emergency room and was treated by a neurologist and a plastic surgeon. She next saw him in intensive care but, again, he was unresponsive when she tried to talk to him. "[H]e was just very, very, still." **R. pp. 1033-34.** Aaron remained unconscious and in I.C.U. for four days. Ms. McGough took a picture of his injuries at that time. She testified that Aaron had "[n]ot really" fully recovered from the beating he received that night, and that his personality had changed from someone who was "real easy-going" to someone who quickly becomes frustrated or angry. Also, he still "has short-term memory loss." Even after he was removed from I.C.U., he stayed in a hospital room for almost a week. At home, he still had to have someone with him at all times; and Ms. McGough stayed home with him for approximately six weeks. Additionally, he was real weak. **R. pp. 1034-37.**

When the State asked Mrs. McGough whether she could identify a photograph, Applicant's counsel made an identical objection to the photographs of Aaron McGough. **R. p. 1035, ll. 11-16.**

However, the trial judge found that these photographs were "not so graphic or inflammatory as to cause any problems" and that they appropriately depicted Mrs. McGrough's testimony. **R. p. 1035, ll. 18-20.**

Mrs. McGrough then testified that the photos depicted Aaron. She had taken them after he had been in the hospital four days Although "A lot of the swelling had gone down and you could see his eyes again, he still had a lot of swelling. Also, the photos were a fair representation of how Aaron looked at the time the photos were taken. Therefore, the trial judge allowed these photos into evidence as **State's Ex. 7**, over trial counsel's objection. **R. p. 1035, l. 24 - p. 1036, l. 14.** Counsel later unsuccessfully renewed his objection to the photographs and the victim impact evidence at the conclusion of the State's case. **R. pp. 1769; 1775-77.**Counsel likewise renewed his objection concerning Shannon's "dream testimony" at the close of the State's case and argued that Shannon's testimony improperly inserted race into the proceedings in light of the fact he had an all-white jury. **R. p. 1769 ll. 18-23.** The trial judge, again, denied his motion. **R. p. 1776 l. 21 - p. 1777 l. 13.**

Counsel renewed his objection to Shannon's testimony in support of his motion for a new trial. **R. pp. 2363-80.** Trial counsel also unsuccessfully renewed his objection to the "victim impact evidence, as well as the photographs of the two Pizza Hut victims at the conclusion of the State's case. **R. pp. 1775-77.** He also argued his objection to this testimony in the motion for a new trial. **R. pp. 2207-08,** The State responded thereto. **R. p. 2381-2406.** The trial judge denied the motion for a new trial and expressly rejected this argument in his August 24, 2003 Order. **R. pp. 2407-2435.** On pages 9-10 of his Order, the trial judge rejected counsel's argument concerning Shannon's "dream testimony" as follows:

> "The comment of "black Indians" was not elicited by the State, was mentioned only once, was evidence of the Defendant's violent character and

> the impact of that violence on the victims, was not referred to thereafter by the State, was not a blatant racial reference, and did not prejudice the Defendant. I, therefore, find this isolated comment does not warrant a new trial."

Applicant's first three issues on direct appeal challenged the trial judge's ruling. **See Final Brief of Appellant, at pp. 4-19 Final Brief of Respondent, at pp. 15-28.** However, the South Carolina Supreme Court rejected his arguments as follows:

> Appellant argues that the trial court erred in admitting the ABHAN victims' mothers' testimonies, the hospital photographs, and the testimony about the victim's "black Indians" dream because this evidence was impermissible "victim impact" evidence of prior crimes. We disagree.
>
> In *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the United States Supreme Court held that the Eighth Amendment did not prohibit a jury from considering "victim impact" evidence at the sentencing phase of a capital trial. In *Payne*, a brutal double murder, the defendant challenged the admission of testimony that the child of one of the victims "missed his mother" and the State's remarks in closing arguments suggesting that the continuing effects of the crimes on the victims' family favored imposing the death penalty. *Id.* at 816. Drawing on historical arguments and reasons of fairness, the Supreme Court held that a state was not constitutionally prohibited from allowing a capital sentencing jury to consider "the specific harm caused by the defendant," including the impact of the murder on the victim's family and "a quick glimpse of the life which the defendant chose to extinguish." *Id.* at 822-26, 111 S.Ct. 2597.
>
> Contrary to Appellant's assertions, none of the testimony at issue in this case was "victim impact" evidence. First, the mothers' testimonies were limited to the circumstances surrounding the ABHAN and the extent of the injuries their sons suffered. This evidence was clearly not evidence of the character of the victims or the impact on their families, but rather, evidence of the physical injuries caused by Appellant. That the descriptions of the victims' injuries came from their mothers does not automatically convert factually descriptive testimony into impact testimony regarding the victims' character or the effect on the victims' families or community..
>
> Similarly, there can be no question that the hospital photographs were

introduced to describe the extent of the injuries the ABHAN victims suffered. These photographs are easily distinguished from cases where photographs have been deemed "victim impact" evidence. *See State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999) (photograph of murder victim in his high school graduation regalia); *see also State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997) (photograph of victim and her husband taken shortly before victim was involved in fatal accident). Although, like in *Langley* and *Livingston*, the photographs in this case were certain to elicit an emotional response from the jury, these photographs were highly probative of the nature of Appellant's prior crime in that they provided the clearest picture of the aggravated nature of the assault and battery.

Finally, we hold the victim's testimony about his "black Indians" dream was not "victim impact" evidence. This testimony merely described the emotional injury to the ABHAN victim.

Though masquerading as a horse of the same color, the dissent decides an entirely different case from the one at bar. At the sentencing proceeding, Appellant argued the testimony about the ABHAN victims' injuries was "inappropriate victim impact type of information having nothing to do with the particular crime Mr. Bennett is on trial for now." Likewise, it appears Appellant's objection to the hospital photographs was based on Rule 403, SCRE (excluding relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice). Finally, Appellant objected to the introduction the victim's dream on the grounds of relevance. Before this Court, however, Appellant did not couch these objections in terms of relevance or a Rule 403 analysis. Instead, the only theory Appellant presented to this Court on this issue was that this evidence should have been excluded as impermissible victim impact evidence of prior crimes.

Because the evidence in this case was not victim impact evidence, Appellant's argument must fail. When asked to do so, we will consider arguments regarding the types of evidence of prior crimes that should and should not be admissible in a capital sentencing proceeding.[FN2] However, we feel that the delicate task of balancing the duty to conduct a sentencing inquiry "broad in scope," *Dawson*, 503 U.S. at 164, 112 S.Ct. 1093, against the need to protect a capital defendant from unfair prejudice and prevent a capital sentencing proceeding from transmuting into a sentencing referendum on all of the defendant's prior crimes is only properly performed when that case is presented. Such a case would no doubt involve considerations

of when the introduction of evidence renders a proceeding so unfair as to violate due process, *see Payne*, 501 U.S. at 831, 111 S.Ct. 2597 and also would implicate our rules of evidence; rules which, at the most basic level, allow proof of character by specific instances of conduct. See Rule 405, SCRE.

[FN2. Academically, South Carolina has long recognized that information about prior convictions is admissible in a capital sentencing proceeding. *See State v. Gaskins*, 284 S.C. 105, 124, 326 S.E.2d 132, 143 (1985); and *State v. Plath*, 281 S.C. at 9, 313 S.E.2d at 623 (stating that this rule is so fundamental that it requires no citation of authority). This rule is derived from the principle that receiving evidence of prior crimes is probative of the character of the defendant and consistent with the sentencing authority's duty to "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *Dawson v. Delaware*, 503 U.S. 159, 164, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992); *see also State v. Skipper*, 285 S.C. 42, 47, 328 S.E.2d 58, 61 (1985) (overruled on other grounds 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)). Appellant has not challenged this rule, and indeed, Appellant has made no discussion of these authorities (upon which the trial court directly relied).]

Instead of addressing any of these topics, which would be of paramount importance when considering clarifying our relevance rules, the briefs to this Court, like Appellant's argument, concerned only victim impact evidence. Under these circumstances, we feel the better course is to confine ourselves to a careful analysis of the arguments briefed and presented to us. *See State v. Torrence*, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991) (abolishing *in favorem vitae* review in capital cases). Although the dissent raises intriguing questions, we think it the better course to wait to decide such a case until we are asked. *See State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (appellate court will not consider issues not properly presented)..

Based on the above reasoning, we hold that the testimony about the ABHAN victims' injuries and the corresponding photographs was not impermissible victim impact evidence relating to Appellant's prior crimes.

Bennett II, 369 S.C. at ___, 632 S.E.2d at 286-87.[26]

Respondents submit that Applicant cannot satisfy either requirement of the *Strickland* test. In particular, he cannot show deficient performance from the failure to better articulate the argument that the challenged evidence was impermissible victim impact evidence under *Payne* because the characterization of the disputed evidence as victim impact evidence is simply wrong. This was not evidence showing the full extent of the harm caused by the defendant's actions to the victim's family and society, by showing the consequences of these actions, as permitted by *Payne*, 501 U.S. at 824-30.

Instead, it was proof of the extent of the actual injuries inflicted upon victims of the Pizza Hut attacks and was proof of the A.B.H.A.N..s. It is the State's position that this is consistent with the Eighth Amendment and that Applicant's contrary position lacks merit. *E.g.*, *E.g.*, *Ray v. State*, 330 S.C. 184, 498 S.E.2d 640 (1998). *Cf. Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("[W]e believe that in capital cases ... the Eighth Amendment ... requires consideration of the character and record of the individual offender ... as a constitutionally indispensable part of the process of inflicting the penalty of death"). Further, the South Carolina Supreme Court has already rejected the same arguments and determined that the challenged evidence was not victim impact evidence.

Further, he cannot show deficiency or prejudice from the failure to argue relevancy and inadmissibility under a Rule 403, SCRE, analysis. Although the majority refused to address these matters because the argument advanced by the dissent was unpreserved, the majority correctly noted in footnote 2 that this State "has long recognized that information about prior convictions is

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[26] Justice Pleicones dissented and would have held that admission of this evidence was reversible error. *Id* at ___, 632 S.E.2d at 290-91. (Pleicones, J., dissenting).

admissible in a capital sentencing proceeding." *Bennett II*, 369 S.C. at ___, 632 S.E.2d at 287 n.2. S.C. Code Ann. § 16-3-20(B) provides that during the sentencing phase, "the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of the punishment." Before a death sentence is imposed, the sentencing jury's attention must be directed to the specific circumstances of the crime and the characteristics of the person who committed the crime. *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979).

Indeed, the Court has consistently held that evidence of other crimes is admissible at sentencing phase of capital trial, including photographs of a victim. *E.g.*, *Ray v. State*, *supra* (1998) (evidence of other crimes, including "gory photos" of victim, is admissible at sentencing phase of capital trial); *State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (1985) (details of defendant's prior murder convictions, including photographs of prior murder victims, were properly allowed into evidence in sentencing phase); *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984) (information concerning the details of prior offenses can be introduced during the penalty phase); *State v. Skipper*, 285 S.C. 42, 328 S.E.2d 58 (1985). *Cf. State v. Bell*, 302 S.C. 18, 32, 393 S.E.2d 364, 371-72 (1990).

Here, the evidence concerned two similar crimes (A.B.H.A.N.) to the murder conviction for which Bennett was being sentenced. "Admission of testimony that a defendant has attempted a similar crime or crimes to that for which he is on trial is proper because such testimony indicates a defendant's individual characteristics and predisposition to commit similar crimes." *State v. Green*, 301 S.C. 347, 358, 392 S.E.2d 157, 162-63 (1990) (citations omitted).

Also, this evidence, along with other evidence of his behavior while incarcerated, showed Applicant's extremely violent nature and future dangerousness. Evidence of a defendant's future dangerousness is a legitimate interest at sentencing. *Dawson v. Delaware*, 503 U.S. 159 (1992).

Moreover, the trial judge gave a limiting instruction that required the jury to find that the State had proved the evidence of his bad character beyond a reasonable doubt before considering it. This instruction also precluded the jury from relying upon evidence of these crimes to prove statutory aggravating circumstances, but insured that the jury's consideration of these offenses was limited to proof of evidence of "[Applicant}'s character and characteristics as they may bear logical relevance to the crime." He further charged the jury that they could give this evidence "whatever weight you consider proper under the circumstances of this case." **R. p. 2123, l. 4 - p. 2124, l. 2.** *Cf. Green*, 301 S.C. at 358, 392 S.E.2d at 163; *State v. Stewart*, 283 S.C. 104, 320 S.E.2d 447 (1984).

Further, Shannon's testimony constituted some proof of the identity of his attacker and, more significantly, was admissible as a circumstance of the prior crime bearing on Appellant's culpability. As such, it was properly admissible. *See People v. Marks*, 72 P.2d 1222, 1241 (Cal.2003), *cert. denied*, 541 U.S. 1033 (2004) (agreeing with trial court's rejection of any distinction between an injury and the result of that injury, finding that there was a basis for introducing some videotaped evidence of unrelated gunshot victim's condition, and holding that any error in introduction of lengthy videotape was harmless); *People vs. Holloway*, 91 P. 3d 164, 195-96 (Cal. 2004) (concluding that testimony of prior, unrelated victim's emotional trauma years later, which resulted from the defendant's assault with a deadly weapon, was properly admitted because the link between the attack and the emotions and actions to which she testified was direct and foreseeable), cert. denied, 125 S.Ct. 1302 (2005).[27] The State submits that very similar testimony was presented in the penalty phase in *Bell, supra.*

Even if the Court were to view it as victim impact evidence of unrelated offenses, this

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[27] California's death penalty law permits evidence of prior violent offenses, much like South Carolina. *See* West's Ann. Cal. Penal Code §190.3(b).

evidence was properly admitted. *Id. See also People v. Garceau,* 862 P. 2d 664 (Cal. 1993) (federal constitution does not bar introduction of evidence showing effect of prior violent criminal activity of victims); *People v. Mickle,* 814 P. 29 290, 316-17 (Cal. 1991) (In Banc) (admission of evidence concerning impact of defendant's prior sexual assaults on victims during penalty phase of capital murder trial did not violate the Eighth Amendment because the evidence concerned obvious emotional effect of defendant's prior sexual molestations on victims and were admissible as circumstances of the prior crimes bearing on the defendant's culpability).

Finally, Respondents submit that there was no prejudice resulting from the failure to argue lack of relevancy or that the evidence should have been excluded under a Rule 403 analysis (*i.e.*, that the probative value of this evidence was substantially outweighed by its prejudicial effect). First, the limiting charge prevented the jury from considering this evidence as proof of an aggravating circumstance(s). Second, the State was obligated to prove the A.B.H.A.N.s beyond a reasonable doubt, and this evidence helped meet that burden. *Cf. State v. Riddle,* 301 S.C. 68, 71, 389 S.E.2d 665, 667 (1990) (appellant's burglary and armed robbery convictions "had no legal efficacy" at the subsequent re-sentencing proceeding and were not binding upon the re-sentencing jury).

Third, the testimony of the mothers is largely cumulative to the testimony of Shannon Gilbert **R. pp. 1018-28)** and there is no challenge to his testimony in this regard. Fourth, the dream was only mentioned once by Shannon. It was never mentioned again by the State in closing argument. ***See* R. pp. 2053-81.** His testimony only constituted thirteen lines of testimony in a transcript that was 2,159 pages long and cannot fairly be characterized as prejudicial..

Additionally, his challenged testimony "was not a blatant racial reference." **Order, R. pp. 2415.** It was merely Shannon's impression of his own dream. Fifth, all of the challenged testimony

pales in comparison to testimony of the extent of the injuries he inflicted upon Benton during the commission of the murder, as well as the testimony from the two eyewitnesses to the Pizza Hut attacks, William Mark DuBose and Rhonda Smith. **R. pp. 986-1003; 1006-09.** Finally, there was overwhelming evidence establishing the statutory aggravating circumstances found by the jury *See State v. Gaskins*, 284 S.C. at 127, 326 S.E.2d at145 (erroneous admission of evidence in sentencing phase reviewed for harmless error).

However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Therefore, Respondent requests an evidentiary hearing to fully resolve this issue. *See Sharper v. State*, 279 S.C. 264, 305 S.E.2d 247 (1983).

GROUND 10(e)

Applicant further contends that trial counsel failed to present available mitigating evidence under *Wiggins v. Smith*, 539 U.S.510 (2003) and "positive victim impact evidence regarding the decedent since such evidence was also available if counsel had exercised due diligence."

It is trial counsel's responsibility adequately investigate and present evidence in mitigation of guilt. *Williams v. Taylor*, 529 U.S. 362, 395 (2000); *Byram*, 339 F.3d at 209. However, counsel is only required to make a reasonable investigation for possible mitigating evidence. *Matthews v. Evatt*, 105 F.3d 907, 919 (4th Cir.1997). As the Court emphasized in *Wiggins*:

> we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*, 466 U.S., at 689. *We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on*

> *investigation.*" *Id.*, at 690-691. A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances." Id., at 691.

Wiggins, 539 U.S. at 533 (emphasis added). *See also Lovitt v. True*, 403 F.3d 171, 179 (4th Cir. 2005); *Moody v. Polk*, 408 F.3d 141, 148 (4th Cir. 2005); *Id* at 157 (Traxler, J., concurring)(citing *Wiggins* and *Strickland*).

In the present case, Respondent submits that counsel's efforts were objective reasonable. Alternatively, Applicant cannot show prejudice. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Therefore, Respondent requests an evidentiary hearing to fully resolve this issue. *See Sharper v. State*, 279 S.C. 264, 305 S.E.2d 247 (1983).

With Respect to his claim that counsel failed to discover reasonably available "positive victim impact evidence" about Benton Smith, Respondent submits that there cannot be any prejudice from failing to present evidence that would show that more harm resulted from the victim's death than the prosecution's evidence tended to prove. If his claim is that counsel should have discovered evidence of that victim's bad character, his allegation apparently misunderstands what is admissible under *Payne*.

He certainly had a right, under the due process clause, to rebut the extremely limited victim impact evidence presented by the prosecution. However, evidence of the victim's bad character may not be introduced in mitigation of a defendant's sentence because "*Payne* prohibits this use of comparative character analysis." *State v. Southerland*, 316 S.C. 377, 385, 447 S.E.2d 862, 867 (S.C.1994) (In capital sentencing proceeding, defendant was not entitled to introduce evidence of victim's bad character, specifically her involvement with drugs and prostitution, as victim impact

evidence, since such use of comparative character analysis was not permissible, and state did not introduce any victim impact evidence), *overruled on other grounds*, State v. Chapman, 317 S.C. 302, 454 S.E.2d 317 (1995); *Alvarado v. State*, 912 S.W.2d 199, 217-18 (Tex. Cr. App. 1995) (citing *Southerland* and *Payne* in support of trial court's refusal to admit evidence of a victim's prior bad act because it was not relevant to defendant's "moral blameworthiness" in murdering the victim, the purpose for allowing victim impact evidence espoused in *Payne*). *See also Humphries v. State*, 351 S.C. 362, 570 S.E.2d 160 (2002).

However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Therefore, Respondent requests an evidentiary hearing to fully resolve this issue. *See Sharper v. State, supra.*

GROUND 10(f)

Applicant's **Ground 10(f)** is that trial counsel was ineffective for not moving "for an order barring the death penalty on the grounds of prosecutorial misconduct or to continue to move for a mistrial on this ground where the state, from *voir dire* through the penalty phase closing argument, continued to impermissibl[y] inject race into the case to obtain a death sentence. Respondent submits that this allegation lacks any plausible merit.

The genesis of this allegation was the trial judge's excusing for cause black male juror Thomas W. Brown (*see* **R. pp. 144-55; 820-24**) when he indicated, after jury selection, that he could not be fair and impartial because of his familiarity with the victim's family. Applicant's counsel suggested that he should be allowed to remain as a juror so that Applicant would not be tried by an all-white jury. The trial judge, however, rejected his arguments (**R. pp. 867-85**) and Applicant did not raise any issue on direct appeal concerning this ruling.

Thereafter, Applicant's counsel objected and/or moved for a mistrial on several occasions when counsel apparently felt that the prosecution attempted to impermissibly inject race into the sentencing phase. Most, if not all of these instances have been discussed, *supra*, including (1) the Solicitor's closing argument; (2) the recross-examination of a defense witness as to whether he remember a blonde haired lady; and (3) the presentation of Shannon's testimony of dreams about black Indians chasing him. For the reasons discussed in this pleading, the Final Brief of Respondent and the Court's Opinion in *Bennett II, supra*, Respondent submits that the sentence of death must stand and that, at worst, none of the instances complained of were prejudicial. Therefore, counsel's performance, at the very worst, was non prejudicial under *Strickland*.

However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Therefore, Respondent requests an evidentiary hearing to fully resolve this issue. *See Sharper v. State, supra.*

GROUND 10(g)

Applicant's final allegation is that appellate counsel failed to properly argue the issues discussed in **Grounds 10(b)-(d)**. Respondent submits that he cannot show deficient performance or resulting prejudice.

A defendant is constitutionally entitled to the effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985). Where ineffective assistance of appellate counsel is alleged, to get relief the PCR applicant must show that appellate counsel's performance was (1) deficient; and (2) prejudice from the appellate counsel's deficiency. *Southerland v. State,* 337 S.C. 610, 524 S.E.2d 833 (1999). Appellate counsel must give assistance of such quality as to make appellate proceedings fair. *Id.* Appellate counsel must provide effective assistance but need not raise every non-frivolous

issue presented by the record. *Id.*

Appellate counsel has a professional duty to choose among potential issues according to their merit. *Jones v. Barnes*, 463 U.S. 745 (1983). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. *Id.*

In the present case, Respondent submits that there was no deficient performance since appellate counsel raised the issues as argued in the lower court and any additional arguments were procedurally barred. *Bennett II, supra.* Nor can Applicant show any prejudice from counsel's performance for the reasons stated in **Grounds 10(b)-(d).**

However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Therefore, Respondent requests an evidentiary hearing to fully resolve this issue. *See Sharper v. State, supra.*

IV.

Respondent denies each allegation that is not expressly admitted, qualified or explained.

WHEREFORE, having made its Return, Respondent, therefore, requests a hearing only on the allegations in PCR Application as indicated *supra.*

Respectfully submitted,

HENRY D. MCMASTER
Attorney General

JOHN W. McINTOSH

COPY

2762

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS
Johnny O. Bennett, #5023, Applicant, v. State of South Carolina, Respondent.	)	C. A. No. 06-CP-32-3221 CERTIFICATE 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 Respondent's Return in the foregoing action on Applicant by depositing one copy of the same in the United States mail, first class postage prepaid, and addressed as follows:

Robert M. Dudek, Esquire
1330 Lady Street, Fourth Floor
Columbia, SC 29201

Johnny O. Bennett, #5023
Lieber Correctional Institution
Post Office Box 205
Ridgeville, SC 29472

This 19th day of October, 2006.

Filed
2006 OCT 20 PM 4:31
Beth A. Carrigg
Clerk of Court
Lexington, SC

WILLIAM EDGAR SALTER, III

2763

COPY

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS
Johnny O. Bennett, #5023, Applicant, v. State of South Carolina, Respondent.	)	C. A. No. 06-CP-32-3221 AMENDED RETURN

On October 19, 2006, Respondent made a Return to the Application for Post-Conviction Relief (PCR) filed on September 7, 2006. Respondent hereby make an Amended Return and would show this Court that:

I. PROCEDURAL HISTORY

Applicant is under a death sentence for the November 1990 murder, kidnapping, armed robbery and grand larceny of Benton Smith. The Lexington County Grand Jury originally indicted him at the March 1991 term of court. However, the State *nolle prossed* that indictment because of certain errors contained in it; and he was reindicted at the September 1993 term of court for murder, kidnapping, armed robbery and grand larceny (93-GS-32-2354). The State served its Notice of Intent to Seek the Death Penalty and Notice of Evidence in Aggravation in March 1993.

On October 9-18, 1995, Applicant received a jury trial before the Honorable Ralph King Anderson, Jr. The jury convicted him on all charges and ultimately imposed the death penalty following a separate sentencing proceeding. A timely Notice of Appeal was served and filed.

Chief Attorney Daniel T. Stacey, of the South Carolina Office of Appellate Defense

represented Applicant in his first appeal. Senior Assistant Attorney General William Edgar Salter, III, represented the State. On August 4, 1997, Applicant filed his Final Brief of Appellant, in which he raised twelve issues:

1. Whether the court erred when it qualified juror Roy Roper, because his voir dire questions indicated that he would go with the jury rather than stand up and not give appellant the death penalty in violation of the Sixth Amendment right to a fair and impartial jury, the Eight[h] Amendment right against cruel and unusual punishment, [and] the Fourteenth Amendment right to due process of law?

2. Whether the court erred when it permitted a situation wherein defense counsel was advised by the victim's father, Mr. Smith, that the Solicitor had told him not to talk to defense counsel, resulting in a due process deprivation and hindering counsel's Sixth Amendment obligation to prepare properly for trial, where Mr. Smith was a key witness both at the guilt and the sentencing phases of the trial?

3. Whether the court erred when it permitted evidence that appellant was having another person sell drugs, improperly putting his character in evidence?

4. Whether the court erred when it instructed the jury, with respect to a potential verdict of armed robbery, that it could consider a hand or fist as a deadly object or weapon? This improperly stated the statutory requirement of some deadly weapon other than the human body. This violated the Fifth and Sixth Amendment right to have the jury properly charged on every element of the offense.

5. Whether the court erred and denied due process of law, when it did not direct a verdict on the kidnapping conviction and aggravating circumstance, because the state did not prove corpus delicti aliunde the extra-judicial statement of appellant?

6. Whether the court erred when it submitted the torture aggravating circumstance to the jury, because the evidence failed to support such a finding beyond a reasonable doubt?

7. Whether the admission of invalid aggravating circumstances was harmless error under Chapman v. California.

8. Whether the trial court erred when it admitted over objection at the penalty phase gruesome color photographs at the scene and at the autopsy, because they showed damage not inflicted by appellant, and their probative value was outweighed by their prejudicial and emotional effect?

9. Whether the Court erred when it denied appellant the ability to make a religious point in his sentencing argument to the jury, depriving him of his right to be fully heard and to make an argument under the death penalty statute?

10. Whether the court erred and violated both the Eighth Amendment and the Fourteenth Amendment to the United States Constitution when it refused appellant's request to charge the jury that, should it find a life sentence without the existence of statutory aggravating circumstances, the defendant would have to serve a minimum of thirty years without parole?

11. Whether the court erred and denied the Sixth Amendment right to impeach and confront witnesses when it prevented defense access to potential impeachment or Brady material involving appellant's misconduct in jail?

12. Whether the court erred when it denied appellant's motion for a continuance upon the state's production of a potentially exculpatory "911" tape less than one week before the trial, where the state had possession of this tape for five years?

1997 Final Brief of Appellant at pp. vi-viii.

The State also filed the Final Brief of Respondent on August 4, 1997. Oral arguments were heard on October 7, 1997. The South Carolina Supreme Court affirmed Applicant's convictions, but reversed his death sentence and ordered a new sentencing trial in a published Opinion. *State v. Bennett,* 328 SC 251, 493 S.E.2d 845 (1997) (*Bennett I*).

Following motions hearings on June 30, 2000, Applicant received a new sentencing proceeding before the Honorable Marc H. Westbrook and a jury on July 10 -16. The jury found the statutory aggravating circumstances that the murder was committed while in commission of a robbery while armed with a deadly weapon; that the murder was committed while in the commission of larceny while armed with a deadly weapon; that the murder was committed while in the commission of kidnapping; and that the murder was committed while in the commission of physical torture. S.C. Code Ann. §16-3-20(C)(a)(1)(b), (d), (e) & (h) (Supp. 2005). The jury recommended the death penalty and Judge Westbrook sentenced Applicant to death for murder. Although the

sentence for kidnapping was subsumed by the murder conviction, Judge Westbrook imposed concurrent sentences for armed robbery and five years for grand larceny of a motor vehicle. **R.[1] pp. 2148-49; 2157-58.** Wayne Floyd and Hervery B.O. Young represented Applicant at trial. Eleventh Circuit Solicitor Donald V. Myers, as well as Deputy Solicitor Dayton Riddle and Assistant Solicitor Shawn Graham prosecuted the case.

A timely Notice of Appeal was served and filed. Assistant Appellate Defenders Robert M. Dudek and Aileen P. Clare represented Applicant before the South Carolina Supreme Court. On January 30, 2006, Applicant filed a Final Brief of Appellant, in which he presented six issues:

1. Whether the court erred by allowing the mothers of the 1988 Pizza Hut assault victims, Ms. Brady and Ms. McGough, to testify about the extent of their son's injuries and their effects since this constituted impermissible victim impact evidence that did not pertain to the crime for which appellant was on trial?

2. Whether the court erred by admitting photographs of the 1988 Pizza Hut incident victims, Shannon Gilbert and Aaron McGough, since the photographs were irrelevant, and they went beyond the permissible testimony about the fact of the crime itself, and they were intended to inflame the passions of the jury?

3. Whether the court erred by allowing Shannon Gilbert, a victim of the 1988 Pizza Hut assault, to testify that he had dreams as a result of the incident win which Indians, that he thought were black, attempted to kill him, since this evidence was irrelevant and highly prejudicial?

4. Whether the court erred by refusing to declare a mistrial where the solicitor asked inmate Byron Collins whether he remembered prison guard Judy Hardee, "the blond-haired lady," since the solicitor was impermissibly injecting race into the case before an all white jury by assuring that the jury understood appellant was having a continuous interracial sexual relationship with Hardee, a white prison guard?

5. Whether the court erred by refusing to grant a new trial where the solicitor in his closing argument compared appellant to King-Kong and a Caveman since the court erroneously ruled these were not impermissible and objectionable racial stereotypes

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[1] The citations to the Record in this document reference the Record on Appeal from the second appeal.

that this Court ruled in Toyota of Florence, Inc. v. Lynch were unacceptable in the courts of this state?

6. Whether the court erred by refusing to allow defense counsel to ask the same "would you just vote with the majority" series of questions that resulted in the reversal of appellant's initial death sentence, since this was legitimate and valuable defense *voir dire*?

2006 Final Brief of Appellant at pp. 1-2.

The State filed the Final Brief of Respondent on January 10, 2006. Applicant also Filed a Final Reply Brief of Appellant on January 30, 2006. On March 20, 2006, Applicant - through Mr. Dudek - filed a Petition To Argue Against Or Modify The Precedent Of *State v. Hill*, which the Court granted in a March 22, 2006 Order.

Following oral arguments, the Court affirmed Applicant's death sentence in a published Opinion filed on June 26, 2006. *State v. Bennett*, 369 S.C. 219, 632 S.E.2d 281 (2006). The Court also conducted the proportionality review required by S.C. Code Ann. § 16-3-25 (2003) and concluded

> that the sentence in this case was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of similar prior cases illustrates that imposing the death sentence in this case would be neither excessive nor disproportionate in light of the crime and the defendant. *See State v. Huggins*, 336 S.C. 200, 205, 519 S.E.2d 574, 577 (1999) (holding that the death penalty was warranted where defendant robbed and shot the victim); *State v. Hicks*, 330 S.C. 207, 219, 499 S.E.2d 209, 216 (1998) (holding that the death penalty was proper where the defendant robbed the victim and stabbed him numerous times in the neck, chest, and abdomen); and *State v. Byram*, 326 S.C. 107, 120, 485 S.E.2d 360, 367 (1997) (holding that death sentence was proper where the defendant entered the victim's home, stabbed her to death, and stole the victim's handbag and automobile).

369 S.C. at ___, 632 S.E.2d at 289. Justice Pleicones dissented in a separate Opinion. *Id* at ___, 632 S.E.2d at 289-91 (Pleicones, J., dissenting).

Applicant then filed a Petition for Stay of Execution, pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), so that he could file a Petition for Writ of Certiorari in the United States Supreme Court. The State filed a July 11, 2006 letter in Return to the Petition for Stay. The Remittitur was sent to the Lexington County Clerk of Court on July 12, 2006; and the South Carolina Supreme Court granted a stay of execution in an Order filed on July 20, 2006.

Applicant filed a Petition for Writ of Certiorari on September 22, 2006 (Docket No. 06-6780), in which he raised the following issues:

1. Whether the South Carolina Supreme Court erred by holding that the testimony of the victim of a prior unrelated aggravated assault and battery committed by Petitioner that he had dreams about black Indians chasing him as a result of the prior unrelated assault that was not impermissible victim impact evidence under Payne v. Tennessee, 501 U.S. 808 (1991), since it did not involve the capital murder for which Petitioner was on trial, and it was emotional victim impact trauma evidence?

2. Whether the South Carolina Supreme Court erred by holding that the testimony of the two mothers of a prior unrelated aggravated assault and battery committed by Petitioner was not impermissible victim impact evidence under Payne v. Tennessee, 501 U.S. 808 (1991), where the mother's testimony covered negative changes in personality, troubles their sons have had since the assault, and the time spent in the hospital and rehabilitation centers since this testimony did not involve the capital murder for which Petitioner was on trial, and it was emotional victim impact trauma evidence?

3. Whether the South Carolina Supreme Court erred by holding that photographs of the two victims of a prior unrelated aggravated assault and battery committed by Petitioner lying in their hospital beds was not impermissible victim impact evidence under Payne v. Tennessee, 501 U.S. 808 (1991), since the emotional photographs did not involve the capital murder for which Petitioner was on trial, and they constituted emotional victim impact trauma evidence?

4. Whether the South Carolina Supreme Court erred by holding the prosecutor did not impermissibly inject race into the case before an all-white jury by deliberately eliciting the irrelevant fact that the prison guard Petitioner had a sexual relationship with was a white woman, since this denied Petitioner his right to a fair trial, and due process?

5. Whether the South Carolina Supreme Court erred by holding the prosecutor did not impermissibly inject race into the case before an all-white jury by comparing Petitioner to a King Kong and a Caveman during his closing argument, since this denied Petitioner his right to a fair trial, and it also introduced an arbitrary factor into the case in derogation of the Eighth Amendment by encouraging a death sentence based on the government's appeal to racial stereotypes and prejudice?

6. Whether the South Carolina Supreme Court erred by holding that it was now permissible to prevent Petitioner from asking potential jurors during *voir dire* whether they would simply "vote with the majority," or whether they would attempt to be independent, since [this] violated Petitioner's Due Process right under Morgan v. Illinois, 504 U.S. 719 (1992) to ensure an impartial jury was qualified in this capital case since general questions about fairness were not sufficient to detect whether the juror would simply vote with the majority or whether the juror was biased?

Petition for Writ of Certiorari at pp. 1-2. Assistant Appellate Defenders Robert M. Dudek and Aileen P. Clare represent Applicant in the United States Supreme Court. Respondent filed its Brief in Opposition on October 27, 2006.

Respondent incorporates the following documents by reference, which are filed with the Clerk of Court and have been served upon Applicant, contemporaneously with this Amended Return:

1. The Record on Appeal from the first appeal;

2. The Record on Appeal from the second appeal;

4. The August 4, 1997 Final Brief of Appellant;

5. The August 4, 1997 Final Brief of Respondent;

6. The Opinion of the state supreme court (Opinion No. 24718, filed December 1, 1997);

7. The January 30, 2006 Final Brief of Appellant;

8. The January 10, 2006 Final Brief of Respondent;

9. The January 30, 2006 Final Reply Brief of Appellant;

10. The March 20, 20006 Petition to Argue Against or Modify the Precedent of *State v. Hill*;

11. The March 22, 2006, Order of the state supreme court granting the Petition to Argue Against or Modify the Precedent of *State v. Hill*;

12. The Opinion of the state supreme court (Opinion No. 26174, filed June 26, 2006);

13. The July 7, 2006 Petition for Stay of Execution;

14. The July 11, 2006 letter return to the Petition for Stay of Execution;

15. The Order of the state supreme court granting the Stay of Execution;

16. The July 12, 2006, Remittitur; and

17. The September 22, 2006, Petition for Writ Of Certiorari to the Supreme Court of the South Carolina.

Respondent will provide the Court with a copy of these documents prior to the time of any hearing.

II. STATEMENT OF FACTS

The direct and circumstantial evidence presented in the guilt phase of Applicant's trial, viewed in the light most favorable to the State, reasonably tended to prove the following. In November 1990, twenty-four year old Benton Smith lived with his parents in the Happy Town area of Gaston, South Carolina.[2] Benton was the youngest of five children. He was a quiet person, who had always lived at home and had never stayed out late or caused his parents any problems. He was unemployed at the time and received an unemployment check each week in the mail. **R. pp. 1133-**

[2] This is in Lexington County.

39; p. 1146-47; 1161-63; 1735-39; 1742-45; 1747.

Benton was driving his mother's blue 1980 Toyota Corolla (**State's Ex. 14**) at the time of his murder. He never allowed other people to drive the car, and he was very possessive of the belongings that he kept in it,[3] including: personalized floor mats with his name on them (**State's Exs. 20-21**); 2 pillows with ducks on them (**State's Exs. 14-15**); 2 small wine glasses (**State's Exs. 17-18**); a pair of red "spy" glasses with lights on them (**State's Ex. 19**); a Polaroid camera (**State's Ex. 11**); a Bible; a walking cane with a gold duck head on it (**State's Ex. 23**);a pair of speakers; a radar detector; and a shaving kit in which he kept money. (**State's Ex. 22**). His brother-in-law, Melvin Harrison, testified that Benton had a "wad" of money in the kit and that Benton had planned to buy a car with it. **R. pp. 1136-48; 1162-63; 1735-40; 1742-43.**

Applicant also lived in the Happy Town community and was Benton's "friend." Benton received his unemployment check on Tuesday morning, November 27, 1990. Benton's father, Paul Smith, and his sister, Cynthia Harrison, testified that Applicant went with Benton when he left the house. Unfortunately, this was the last time any of Benton's family members saw him alive. **R. pp. 1146-48; 1165-66;1742-43; 1746-48.**

At 11:56 a.m. on Tuesday, Benton cashed his $147.00 unemployment check at the Republic National Bank located on Highway 6, in Swansea. Pamela Herlong, the drive-in teller who handled the transaction, testified that Benton was accompanied by someone. She could not remember who was with him. However, a reasonable inference from Applicant's taped statement to authorities (**State's Ex. 35**), and testimony that Mr. Smith and Mrs. Harrison saw Applicant leave the house

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[3] He also did not allow anyone to smoke in it and had a "No Smoking" sign in the car.

with Benton, is that Applicant was this other person. **R. pp. 1168-88.**

Benton' family became concerned when he did not return home Tuesday night and immediately began looking for him. They also called the Lexington County Sheriff's Department and reported him missing. Deputy Mark Jones began searching for Benton on Wednesday. He found Benton's blue Corolla parked behind Swansea High School between 10:30 and 11:00 p.m. on Wednesday. It was near the cafeteria area of the school. Applicant's mother worked in the cafeteria of Swansea Middle School **R. pp. 1118-20; 1122-28.**

The windows were rolled up and the car was locked. The only unusual thing Deputy Jones noticed in the car were some chicken boxes. Deputy Jones later had Benton's father confirm that the car was his son's. Mr. Smith did not have a key to the car. Deputy Jones allowed him to take it home but instructed him not to open it until advised by law enforcement. Mr. Smith thereafter took the car home and did not open it. Melvin Harrison testified that none of Benton's belongings were in the car when it was retrieved by the family. **R. 1118-20; 1122-28; 1131; 1148-51; 1737-38.**

In late 1990, sisters Bonita and Pamela Gonsalves lived in Orangeburg. Bonita dated Applicant. Applicant often got a ride from someone or drove a friend's car to Orangeburg to see her. Neither woman had ever met Benton Smith, and Applicant had never driven Benton's car there before Tuesday, November 27, 1990. **R. pp. 1190-92; 1216-20.**

Between 5:00 and 5:30 Tuesday afternoon, however, Applicant came to Pamela's apartment looking for Bonita. He was alone and was driving Benton's blue Toyota. Pamela testified that she saw a "No Smoking" sign that family members testified Benton kept in his car, the personalized floor mats, the two pillows with ducks on them and stereo speakers. When she asked Applicant who owned the car, he would not tell her. Eventually, he took Pamela to her sister's apartment and she

stayed there for awhile. Both women testified that Applicant had a bandage on his right eyebrow and a bandage around his left hand. When asked how he received these injuries, he told the women that he received them in a fight with his brother, Gucci. **R. pp. 1193-97; 1209-10; 1222-25; 1227; 1246-47.**

Applicant told Pamela that he was going to make telephone call and left. She got tired of waiting for him to return and also left. **R. pp. 1196-97.** Applicant returned to Bonita's residence sometime later and took Bonita to a pay phone, so that she could call her mother. While in the car, she also saw the "No Smoking" sign and the personalized floor mats. Applicant and Bonita had previously argued about money,[4] and Applicant left her Tuesday night because of another argument over money. **R. pp. 1220-22; 1224-27; 1246-47.**

Applicant, again, showed up at Pamela's apartment in Benton's car on Wednesday morning. As they were painting the apartment, Applicant took off his shirt and she saw scratches on his chest, which he said he got in a fight with his brother. Later that day, Applicant and Bonita returned to her residence in Benton's car. In the trunk of the car, Pamela saw two shot glasses. Also, the speakers were missing; and Bonita got Benton's cane out of he back seat.[5] Applicant tried to sell a radar detector to Pamela, but Bonita took it and gave it to her. **R. pp. 1197-1203; 1210-11.**

Bonita testified that Applicant returned to her house on Wednesday. He took both her and her daughter to a shopping mall in the blue car, where he bought her daughter a doll and a fur coat. While they were in Orangeburg, he went to South Carolina State University and visited a friend who

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[4] Bonita wanted to visit her mother for Thanksgiving, but could not afford to do so. Applicant had promised to get her the money but did not.

[5] The cane was not broken at that time.

was on the basketball team. They later went to Pamela's house and he helped her paint. At that time, she saw the scratch marks on Applicant's chest. She testified that she gave her sister a radar detector that Applicant had given to her. Applicant also gave Bonita the 2 pillows with ducks on them (**State's Exs. 15 and 16**), the Polaroid camera (**State's Ex. 11**), and 2 wine glasses. Further, she saw the victim's cane (**State's Ex. 23**) that had been in the trunk and which was not broken. Finally, he gave her the shaving kit (**State's Ex. 22**). **R. pp. 1227-34.**

Jackie Robinson testified that he is originally from Swansea. He had been life-long friends with Applicant,[6] and he was a cousin and friend of Benton. He was attending South Carolina State in November 1990. Applicant came to the school one day, accompanied by a woman. They were in a small blue car. Robinson rode with them briefly and Applicant tried to sell Benton's Polaroid camera to him. When asked where he had gotten the camera, Applicant replied, "you don't need to know all of that." In the car, Robinson also saw Benton's unbroken cane. Applicant left after roughly 25 or 30 minutes. On Thursday or Friday, Robinson learned that Benton and Benton's car were missing. Because he knew that the car Applicant had been driving on Wednesday was Benton's, he went to law enforcement and told them what he knew. **R. pp. 1259-66.**

Based upon Mr. Smith's own investigation, he and Melvin Harrison went to Orangeburg very early Thursday morning, and he spoke with Pamela Gonsalves. Although she did not know Benton, she identified his car and some of Benton's possessions from the description Mr. Smith had given. She also told him what had happened the past two days. Mr. Smith then spoke with Bonita, and she gave him Benton's pillows. **R. pp. 1151-53; 1204-06; 1235-42; 1244; 1738-39.**

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[6] Robinson testified that Applicant was approximately 6'5" or 6'6" tall and weighed roughly 300 pounds. **R. p. 1266.**

When Bonita saw Applicant later Thursday morning, she asked him why Mr. Smith had come to her house looking for Benton. He told her not to worry. He also assured her that the victim was okay and was in Swansea. Although he claimed Benton had allowed him to use the car, he became upset when asked about it. He asked her to go somewhere with him but she refused because "[s]omething just didn't feel right." Bonita later gave the shot glasses, the camera and the shaving kit to officers from the Lexington County Sheriff's Department **R. pp. 1204-06; 1235-42; 1244.**

After they came back from Orangeburg on Thursday, Mr. Smith and Mr. Harrison went to Stillinger's Gas Station, in Swansea. There, they saw Applicant, who was carrying Benton's cane. By then, part of the cane was missing. When Mr. Smith asked him where Benton was, Applicant said, "I don't know where he is and I don't give a damn where he is."[7] **R. pp. 1155-56; 1524-1528 1739.**

Det. Frederick R. Hamer, of the Lexington County Sheriff's Department, first became actively involved in this case on Thursday, November 29. He met with Mr. Smith and other family members. Hamer also acquired a bench warrant that had been issued for Applicant's arrest based upon Applicant's failure to appear in court on charges that he had stolen gasoline from Stillinger's Gas Station, for which he had been convicted and sentenced to thirty days or payment of a $237.00 fine. **(See State's Ex. 28).**[8] **R. pp. 1269-77.**

Det. Hamer located Applicant at his home on Jasper Sutton Road on Friday, November 30 and arrested him. He thereafter took Applicant to the Lexington County Sheriff's Department. After

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[7] Mr. Harrison testified that Applicant said, "I haven't seen him and, frankly I don't give a damn where he is."

[8] Mr. Thomas Stillinger, the owner of the business, testified that he saw Applicant steal gas on October 23, 1990. **R. pp. 1109-14.**

being advised of and waiving his *Miranda*[9] rights, Applicant agreed to discuss Benton's disappearance. **R. pp. 1269-77.**

On this occasion, Applicant admitted that he met Benton at the Smiths' Happy Town residence on Tuesday morning. They left somewhere around 11:00 or 11:30 a.m. and went to the bank in Swansea. Afterwards, they went job hunting in Columbia and West Columbia. They also stopped and ate. Then, they went to see some girls in Orangeburg and came back later that evening. Benton dropped Applicant off under a tree near Stillinger's and said that he was going back to Swansea. Applicant allegedly did not know what happened to Benton and suggested that he might have gone somewhere with the girls from Orangeburg. He also agreed to help get information regarding Benton's whereabouts. **R. pp. 1278-80.**

On Saturday, December 1, Det. Hamer and Det. Charlie Jones spoke with Applicant after he bonded out of jail on the Stillinger charges. Det. Hamer again advised Applicant of his *Miranda* rights. Applicant again waived his rights and spoke to the officers. On this occasion, he claimed that, instead of going straight to Orangeburg, he and Benton had gone back to Swansea after job hunting in Columbia. They then went to Orangeburg and met with the young ladies that Benton had met. When they returned to Swansea, Benton dropped Applicant off under the tree near Stillinger's. Applicant again promised to help the officers further. **R. pp. 1282-84.**

Later that evening, Det. Hamer received a radio transmission that Applicant wished to speak with him. Therefore, he and Det. Jones went to Applicant's residence around 8:30 or 9:00 p.m. After Det. Hamer made sure that he still understood his *Miranda* rights, Applicant agreed to talk to the him. Applicant told the officers he would help them locate some people who may possibly know

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[9] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

Benton's whereabouts: Isadore Mack, Tommy Ferlick and Andre Haskins. He said these people were "laying low" and "hiding out" at Theodore Reed's club because of a recent drug sweep in the area. So, the officers took him there. **R. pp. 1286-88; 1343-44.**

They found Mack at the nightclub. The officers spoke to Mack after they got him outside.[10] Det. Hamer then told Applicant that Mack had not provided him with any information. Det. Hamer also told Applicant that the officers knew Benton was dead and explained they needed to find him because his family deserved to know and "put some things to rest." Applicant said, "... I know them pretty well, I know the way they think. ... Drive, let's go." **R. pp. 1288-90; 1343-46.**

He immediately directed the officers back to his sister's trailer in the Happy Town community. They arrived around 11:00 or 11:30 p.m. They got out of the car and followed Applicant into some woods just beyond a firebreak near his sister's trailer. Soon, they found Benton's body buried underneath some limbs, leaves and other debris. His body was only thirty or forty yard away from the trailer. (***See* State's Ex. 19). R. pp. 1290-1300; 1348-50.**

Applicant acted as if he was going to be ill when he saw the body. Before they left, Det. Hamer showed Applicant's sister and brother-in-law where they had found the victim's body. She fainted when she saw what the officers had found. By the time law enforcement had secured the area, it was Sunday morning, December 2. **R. pp. 1290-1300; 1348-50.**

Based on information Applicant had provided to them, the officers located and arrested

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[10]Det. Jones' investigative report reflects that Applicant went inside and had a private conversation with Mack. After this conversation, Applicant said the three men had robbed Benton and placed the body in a wooded area off Happy Town Rd. **R. p. 1346.**

Haskins on an outstanding narcotics warrant.[11] They thereafter took both Haskins and Applicant back to the Lexington County Jail. After the officers obtained statements from Mack, Furtick and Haskins, they spoke with Applicant around 4:00 a.m. **R. pp. 1300-05 1350-53.**

Once again, Applicant was advised of and waived his *Miranda* rights before making the statement. ***See*** **State's Ex. 31.** In his taped statement **(State's Ex. 32)**, he gave a different account concerning his activities on the previous Tuesday and Wednesday. He suggested that Mack, Haskins and Furtick were involved in the murder, and that they had taken Benton from Stillinger's around 6:55 p.m. He said that Benton and Haskins had made a "big score" and each had about $1,000.00. He also claimed that the camera he had given to Bonita was his; and he denied going to Orangeburg on Tuesday night. Yet, he somehow got Benton's car and parked it at an old baseball field on Happy Town Rd. Officers arrested him immediately after he gave this statement. **R. pp. 1305-12; 1354-55.** On the afternoon of December 2, Benton's car and its contents were processed for latent fingerprints. Two latent lifts from the rear view mirror matched Applicant's left thumb. Two more prints taken from a Kentucky Fried Chicken box found in the car matched his right middle finger. **R. pp. 1313-14; 1452-56.**

In 1990, James Hickman was an Investigator and Identification Officer for the Lexington County Sheriff's Department. He and SLED Agent John Christy went to the crime scene early on December 2, 1990, and processed the scene. The prosecution published to the jury the photographs that they took of the grave, as officers found it and before any debris had been removed **(St.'s Exs. 40-41)**, and photographs as the debris was removed **(State's Exs. 42; 72-74). R. pp. 1440-51; 1666-**

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[11] He was claiming that Mack, Haskins and Furtick were responsible for what occurred to Benton.

71.

Initially, the only parts of Benton's body that were visible were one white tennis shoe and Benton's left arm, which had been damaged by animals. After the debris was removed, they saw that there was a tree between Benton's legs. When Inv. Hickman returned on December 5, he used a metal detector and found a wooden handled screwdriver **(State's Ex. 51)** near where Benton's waist had been laying. **R. pp. 1440-51; 1462-64; 1666-71.**

On Monday, December 3, Det.s Hamer and Jones went to Swansea and to Orangeburg, in an effort to check out the information which Applicant had given them. They spoke with Bonita Gonsalves, who also gave them the wine glasses, the Polaroid camera and the black shaving kit. They also spoke with Tommy Furtick. Later, they returned to the Sheriff's Department and spoke with Applicant. **R. pp. 1312-15.**

After he waived his *Miranda* rights, yet again, Applicant spoke to them. Again, he began blaming Mack, Haskins and Furtick. Det. Hamer, however, immediately stopped Applicant and said he knew Applicant was lying. Applicant sat silently for several minutes. Then, he wrote a one sentence, signed statement in which he said, "I, Johnny Bennett need help!" **(State's Ex. 33). R. pp. 1315-1319; 1355-57.**[12]

He subsequently gave another taped statement **(State's Ex. 35)**. Before making the statement he *again* made both a written and verbal waiver of his *Miranda* rights. In this statement (a transcription of which was introduced as **State's Ex. 34)**, he claimed he met Benton around 11:30 a.m. on Tuesday. First, they went to Republic National Bank, in Swansea; and Benton cashed his

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[12] This was signed at 7:40 p.m. on December 3, 1990.

check. Afterwards, they went to Columbia and filled out job applications. As they were coming back through Swansea, Applicant told Benton he wanted to go to Orangeburg, and Benton allegedly agreed. So, Applicant drove to Bonita Gonsalves' apartment. However, he and Bonita got into a fight. So, he and Benton left Orangeburg and headed back towards Swansea. **State's Ex. 34, R. pp. 1321-23;1358; 1398-99.**

When Applicant was approximately seven miles from Swansea, he slammed on brakes. Benton asked if he was alright. Instead of replying, Applicant simply looked at him. So, Benton got out and walked to the driver's side. He again asked if Applicant was alright. This time, however, he touched Applicant. Applicant jumped out of the car and struck Benton in the jaw. This blow knocked Benton unconscious. Applicant picked up Benton and put him on the passenger's side of the car. After driving back to Swansea, Applicant drove to the old ball field in Happy Town and parked. He then got out of the car and sat on the hood. **(State's Ex. 34, R. pp. 1360-62; 1399; 1405).**

Roughly fifteen minutes later, Benton regained consciousness. According to Applicant, Benton got out of the car and started "chop-popping," or running his mouth:

> HAMER: And what did he say to you?
>
> BENNETT: I didn't um, he said ah, 'what happened? What did you do? Why [are] you doing this,' and all this and that ... So that time when he went ... to touch me again and I pushed him away and that's when he scratched me on the shoulder and that's when I snapped.

State's Ex. 34, R. pp. 1324; 1394-96; 1399-1400; 1405-07.

Applicant said he hit Benton again, and Benton fell to the ground. Applicant immediately

reached in the car, grabbed a Phillips head screwdriver and repeatedly stabbed Benton.[13] He described the screwdriver as rusty, about 3" or 4" long, with a brown handle; and he told the officers it should still be at the crime scene. He also admitted he picked up Benton's wallet when it fell out of Benton's pocket. However, he allegedly threw it back on the ground without checking to see if there was any money in it. **State's Ex. 34.**

After stabbing Benton, he picked up Benton's body and put it in the trunk of the car. He then drove to his sister's house and left the body in the woods. Sometime later, he went by and visited a friend. When he left his friend's residence, he drove to Orangeburg and picked up Pamela Gonsalves. They then drove to Bonita's residence, and he took Bonita "to use the phone." On the way home, however, they had another fight.

Applicant eventually drove back to his sister's house (after returning to the old ball field) and stayed there from approximately 7:50 to 10:15 p.m. Wednesday morning, he drove Benton's car to Orangeburg. When he returned Wednesday night, he parked the car behind the Swansea high school and got into another car with Mack, Haskins and Furtick. He claimed he left the keys in the car. Finally, he told the officers he was willing to take the officers to help find the wallet. **R. pp. 1324-25; 1400-03; 1405-07; 1419-20; State's Ex. 34.**

After the statement, he said that he knew that he would eventually would kill someone because he had thought about killing a family member. **R. pp. 1324; 1364-65.**[14] Dets. Hamer Jones, and Hickman along with other officers, picked him up at the Lexington County Jail on December

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[13] When asked how many times he stabbed Benton, Applicant replied, "I'd say around thirty times." **States Ex. 34.**

[14] On December 4, Applicant received a copy of the transcribed statement. **R. p. 1323.**

5. Following his directions, they went to an open field on Lewis Rast Road, where they found Benton's eyeglasses and key case. They thereafter went to Orangeburg and searched a playground near Bonita Gonsalves' apartment, in an unsuccessful effort to find Benton's wallet.[15] **R. pp. 1324-28; 1420-21; 1426; 1456-61.**

As a result of a search initiated by phone calls from Applicant on December 10 and December 11[16] and with his assistance, officers located the victim's floor mats in an area off of Huckabee Mill Road, between Swansea and Orangeburg on December 12. Finally, Applicant again led the officers in an unsuccessful effort to find the victim's wallet. **R. pp. 1328-31; 1434-35; 1465-69.**

Dr. Joel S. Sexton, a forensic pathologist, performed an autopsy on Benton's body. Benton was approximately 5'8" tall and only weighed about 135 pounds. Dr. Sexton noted the presence of some postmortem animal destruction.[17] However, he found much more serious injuries that were inflicted before death. First, he found three abrasions on the bottom of Benton's chin: two were on the bottom left side and one was on the bottom right side of the chin. There was even some laceration on the left side. These wounds were premortem and had bruising underneath them. There was also subarachnoid hemorrhaging on the surface of the brain associated with these wounds,[18] and

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[15] Before they left, Applicant was again advised of and waived his *Miranda* rights.

[16] Applicant was being represented by counsel at the time, and the officers reminded him of this. However, he waived his right to counsel and his other *Miranda* rights when advised.

[17] The victim's entire right hand had been destroyed by animals, as had part of the inside surface of his left upper arm and his nose.

[18] The subarachnoid hemorrhaging on the surface of the brain is generally caused by a forceful impact on the jaw. **R. pp. 1694-95.**

Benton's jawbone was dislocated and easily movable. These findings indicated that these were very forceful injuries. **R. pp. 1676-81; 1688-97.**

The fact that three injuries were in the same area was consistent with the perpetrator hitting the victim repeatedly with a fist in this area but the injuries could have been caused by other objects hard enough to scrape the victim's skin on impact, such as the victim's head being repeatedly thrown against an object or the victim falling on his chin. The amount of subarachnoid hemorrhaging that Dr. Sexton found generally results in unconsciousness for some period of time and could possibly result in death. Also, they would cause a headache if the victim was conscious after the blow However, other injuries in this case would have caused a more rapid death. **R. pp. 1692-97; 1701-02.**

The most extensive injuries were caused by more than sixty-four individual stab wounds to the victim's head, neck, shoulders, upper chest and left hand. **R. pp. 1679-1681; pp. 1699-1722; State's Ex. 78.** Dr. Sexton found six defensive wounds on Benton's left hand and arm.[19] Although these wounds were superficial because they did not penetrate the hand, Dr. Sexton opined that (1) they were consistent with Benton using his arm and hand to protect himself from the other blows he received; (2) they would have been painful to a conscious person; and (3) Benton was conscious during the period he was attempting to shield his head.[20] **R. pp. 1697-1701; 1721-22.**

The remaining wounds were primarily "on the back of the head, the left side of the head, the

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[19] At least two wounds were on the back of the forearm, and two were on the back of the wrist. The fifth wound was on the back of his hand; and a sixth wound was on the front, upper palm of Benton's left hand, just below the thumb.

[20] He agreed with the statement that the parts of the body which have more precise movement contain more "pain receptors" than other parts of the body.

upper back, and the upper part of the chest, and the left shoulder. Only four of these wounds penetrated very deeply into the skin. Those wounds penetrated the lung and the vessels in the neck, and they caused internal bleeding in the chest cavity. Almost three pints of blood were in the chest. Most of the wounds in these locations had a cross-type pattern on the surface, which Dr. Sexton opined was consistent with the Phillips head screwdriver recovered at the scene. **R. pp. 1697-1722.**

Dr. Sexton counted multiple stab holes on the back of the head which penetrated through the scalp and in some cases created a cross type of imprint or depression in the skull. Many actually stuck into the skull approximately a 1/8", but did not penetrate it. Most of these wounds had star or cross markings. He found similar wounds on the left side of the head and down the left side of Benton's neck. These wounds tended to have a mark which trailed off at the edge. Dr. Sexton opined this was consistent with movement between the time the stab wound occurred and the object was pulled away. **R. pp. 1697-1722.**

A stab wound above the left ear actually penetrated the skull approximately 1". Even though this wound did not have much hemorrhaging associated with it and did not penetrate the brain, Dr. Sexton opined it could have rendered Benton unconscious. Based upon the presence of so many wounds which did not cause severe injury to the brain and the degree of force necessary to inflict the wounds, Dr. Sexton opined Benton's head did not move much during the time they were inflicted. He further opined it would take a considerable amount of force for an object with a blunt tip, such as the Phillips head, to actually penetrate the skull. Also, the head was most probably against some surface at the time this blow was inflicted. Finally, Dr. Sexton gave detailed testimony concerning the force necessary for each of the wounds he found, the degree of pain the wounds would cause a conscious person and he opined that Benton was conscious for at least part of the attack based upon

the defensive wounds and the fact all of the wounds were not in the same location. He listed the cause of death as internal bleeding or asphyxiation secondary to the stab wounds in the upper neck, chest and head. **R. pp. 1697-1722.**

III. ALLEGATIONS

Applicant raises the following grounds for relief in his PCR Application:

1. Ineffective assistance of trial counsel.
2. Ineffective assistance of appellate counsel.

IV. DISCUSSION

GROUND 10(a)

Applicant's first allegation is that trial counsel were ineffective for failing to object to the Solicitor's closing argument in the re-sentencing proceeding. He contends that the State's closing argument deprived him of a fundamentally fair trial because the Solicitor stated that Applicant had dragged one of the Pizza Hut victims by his hair "like an old cave man," and that a sentence of life imprisonment would cause Applicant to revert to his violent behavior and "[m]eeting him again will be like meeting King Kong on a bad day." **R. pp. 2062; 2079.** Respondent submits that this allegation is without merit.

In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in his application. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). To establish that he received ineffective assistance of counsel, an inmate must make a twofold showing. See *Wiggins v. Smith*, 539 U.S.510 (2003). First, he must demonstrate that his attorneys' "representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "Judicial scrutiny of counsel's performance must be highly deferential,"

and "every effort [must] be made to eliminate the distorting effects of hindsight ... and to evaluate the [challenged] conduct from counsel's perspective as the time." *Id.* at 689. *See also Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight").

Second, the applicant must also demonstrate that he was prejudiced by his attorneys' ineffectiveness, *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); *Palacio v. State*, 511 S.E.2d 62 (S.C. 1999). 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*, 539 U.S. at 537; *Jones v. State*, 332 S.C. 329,344-45, 504 S.E.2d 822, 829-30 (1998) (petitioner did not meet burden).

One of the key issues in the sentencing proceeding was whether or not Applicant would be a danger in the future if incarcerated. The State presented a great deal of evidence reasonably tending to show that Applicant began bullying and trying to intimidate others with his physical size beginning in the fifth grade and continued in this type of behavior until he was finally expelled in the tenth grade. At some point, he began trying to intimidate teachers as well, and he developed a pattern of disrespecting authority and attempting to shift blame to others. **R. pp. 920-70; 970-86; 1069-75.** This continued even after he was incarcerated on the Youthful Offender Act sentence for assault and battery of a high and aggravated nature (A.B.H.A.N.). **R. pp. 1093-1101.**

Both eyewitnesses to the March 4, 1998 attack at the Pizza Hut - William Mark DuBose and Rhonda Smith - testified that they saw a black man attacking a white man, who was not defending himself, in the parking lot. Ms. Smith testified that the black man (subsequently identified as Applicant) pulled this defenseless victim by the hair and drug him across the parking lot to the front door of the Pizza Hut, where he then stomped and beat his defenseless victim. **R. pp. 986-1003; 1006-09.**

As part of its showing of future dangerousness and his violent character, the State also presented testimony from various employees within LCDC and SCDC concerning dangerous, violent, disrespectful or disruptive behavior in which he repeatedly engaged while in jail or prison. On various points in his incarceration, he was found in either immediate or constructive possession of a shank **(R. pp. 1482-83)**; a metal flap **(R. pp. 1488-89)**; a metal rod **(R. pp. 1504-05)**; a portion of a light fixture **(R. pp. 1483-84)** and clay. Clay is potentially dangerous because it can be used to make a duplicate key or jam the locks to the cell. **R. pp. 1561; 1563-64.** On another occasion he was found in possession of a smoking pipe. **R. pp. 1552-53.**

He once flooded his cell and the wing in which it was located with water. **R. pp. 1493-96.** On another occasion, he sprayed shaving cream over surveillance cameras in the jail. **R. p. 1496.** There was also testimony that he had repeatedly refused to obey directions from officers or disrupted officers attempting to perform their duties. **R. pp. 1076-78; 1488-89; 1496-1500; 1526-41; 1544-45; 1547-71.** In addition to being an "enforcer" for certain officers at the jail and beating up inmates there **(R. pp. 1515-17)**, he was involved in at least four other fights with other inmates. **R. pp. 1076-81; 1086-90; 1489-93; 1526-41; 1565-68.**

Sharon McChesney, a correctional officer at LCDC in 1993, testified that on July 23, 1993,

Applicant attempted to force his way into the cell of inmate Dougins when Officer McChesney attempted to give medication to Dougins. Applicant picked up the 5' 4" McChesney, moved her out of the way, dragged Dougins out of his cell by his hair, he threw Dougins on the cement floor and pounded Dougins' head into the floor. Also, Applicant prevented Officer McChesney from radioing for assistance every time she attempted to do so and her efforts to physically stop him did not work. When another inmate, Glover, made a comment to him that he was going to kill the victim, Applicant turned and said "you better back the hell off." ***See*** **R. pp. 1526-37.** Officer McChesney described Dougins as a "little shorter" than Applicant but stated that he was "a skinny little thing. He ... was not a big man ... ." **R. pp. 1532-33.**

Captain Adrian Bost, the jail administrator in 1990-93, testified that Applicant had seventy or more disciplinary violations while at LCDC. Captain Bose described Applicant as "one of the most intimidating, violent, disrespectful and disorderly inmates you would ever, ever want to deal with. [He] used his size to intimidate people ... ." Attempts to counsel him on this failed and "he always used his size to push [both officers and inmates] around." **R. pp. 1548-49; 1570 l. 14 - 1571 l. 5.**

Warden Willie Weldon, the warden of Lieber Correctional Institution, testified on cross-examination that he had not received information about Applicant disrespecting or having any disciplinary problems at his facility **(R. pp. 1638-39)** but stated on redirect that he received a request form from Applicant dated May 27, 1997 **(State's Ex. 66)**, in which Applicant acknowledged that "anything in my jacket could very well have an impact on me when I go back to Court." **R. pp. 1644-45.**

Obviously the jury could see Applicant's size. Also, the State presented testimony from a

life-long friend that he was approximately 6' 5" or 6' 6" tall and weighed 300 pounds. **R. p. 1266 l. 13-16.** Other witnesses also described him as very big. On the other hand, Benton Smith weighed a paltry 135 pounds and was approximately 5' 8" tall. Dr. Joel Sexton, the pathologist, described his as being of slender build. **R. pp. 1680-81.**

Applicant's witnesses, quite obviously, painted a different story. First, there was Collins' claim that all the guards loved him at LCDC. **R. p. 1979.** Also, Applicant presented expert and lay testimony that he could adapt to prison life and that SCDC could adequately and safely confine him; that he was no longer a violent, disrespectful or disruptive inmate; that he would follow the rules and orders; and that he was very involved in the prison ministry. **R. pp. 1789-1803; 1864-69; 1873-82; 1889-1903; 1910-34; 1980-2012.** The various lay witnesses, many of whom were correctional officers or otherwise came into contact with him while he was incarcerated at SCDC variously referred to him as "a model inmate" **(R. p. 1795)**; "very polite" and "easy-going" **(R. p. 1867)**; "[r]espectful" **(R. p. 1877)**; "a mediator" who explained rule changes to other inmates **(R. pp. 1893-94)**; someone who was "very compassionate for others" **(R. p. 1915)**; a "[b]ig teddy bear" **R. p. 1921)**; someone who had a "very positive attitude toward everything" and was "more of a big brother type" **R. p. 1927)**; and "a gentle giant." **R. p. 1929.**

It was against this backdrop of evidence that the Solicitor made his comments that are presently complained of and were challenged on direct appeal. While summarizing Applicant's violent behavior at the Pizza Hut and the incident involving inmate Dougins, the Solicitor made the following comments:

> "I don't know whether it was the black lady that was inside eating with her boyfriend or the tall white boy that was outside that drove through, said that ... Johnny was even pulling one of them by the hair. Kind of like an old cave

> man, dragging him by the hair. Then the guy was motionless."
>
> "Same thing happened in jail over there to Mr. Dougins when he went in that cell moved that female guard out of the way and he dragged Mr. Dougins out by his hair."

R. pp. 1062 ll. 12-23.

The Solicitor pointed out, without objection, that, like much of Applicant's violent past, it supposedly was not Applicant's fault and focused upon his documented history of shifting blame to other people. Later, the Solicitor discussed the conflicting portraits presented to the jury as to Applicant's future dangerousness in prison. He reviewed the extensive showing by the State that Applicant was a violent, disrespectful, disruptive and manipulative inmate; and he juxtaposed this against the showing made by the defense. He urged the jury to reject the defense's showing based upon Applicant's comment in May 1997 that "anything in my jacket could very well have an impact on me when I go back to court." **R. pp. 2074-78.**

He then made the following comments, again, without objection:

> "You give him life, the real Johnny will come back. You give him life and he will come back out. Meeting him again will be like meeting King Kong on a bad day. Vile Johnny. Mean Johnny. Manipulating Johnny. Murderous Johnny. You give him life, those guards better button up their vests because he's coming back out in force.
>
> Because he's got what he wants. He's got the people to testify, ... trying to pull the wool [] over your eyes. Being smart, being intelligent, being manipulative and being a con man, that's a dangerous combination. That's an explosive combination wrapped up in him, all six-foot-seven, 300 pounds of him. And that's for you to decide."

R. p. 2079 ll. 2-14.

Trial counsel did not object either at the conclusion of the State's argument **(R. pp. 2082)**, after the argument of Applicant and defense counsel **(R. pp. 2105)** or at any point thereafter even

after the sentence had been imposed. *See* **R. pp. 2106-59**. Rather, trial counsel first raised this in a post-trial motion for new trial. **R. p. 2363-80**. The State responded to this, as well. **R. p. 2381-91**.

After holding a hearing on the new trial motion, the trial judge took the matter under advisement. **R. p. 2161- 2214**. Subsequently, the trial judge issued his Order denying Applicant's motion. The Order specifically relied upon Applicant's failure to contemporaneously object to either portion of the State's closing argument and made findings that the State's closing argument was proper and invited by the argument and evidence presented by the defense. **R. p. 2417-23**.

Applicant's challenge to the Solicitor's closing argument was raised as the fifth argument on direct appeal. **Final Brief of Appellant, at pp. 28-33; Final Brief of Respondent, at pp. 33-44.** The South Carolina Supreme Court rejected the argument, as well as the allegation that race was impermissibly injected into the case by the Solicitor's recross-examination of defense witness Collins, as follows:

> Appellant argues that the Solicitor's comments during cross-examination of a witness and during closing arguments improperly injected racial issues into the trial. We disagree.
>
> As a general rule, inflammatory remarks which are calculated to appeal to the passions or prejudices of a jury should be affirmatively condemned. *South Carolina State Highway Dep't. v. Nasim*, 255 S.C. 406, 411, 179 S.E.2d 211, 213 (1971). "[W]hether or not the particular arguments are so prejudicial as to constitute reversible error depends upon the nature of the utterances and the circumstances under which they were made." *Id.* Under certain circumstances, this Court will grant a new trial despite the aggrieved party's failure to contemporaneously object to the argument if the prejudice caused by the argument is clear. *Dial v. Niggel Assoc., Inc.*, 333 S.C. 253, 256, 509 S.E.2d 269, 271 (1998); *Toyota of Florence, Inc., v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994).
>
> Additionally, a solicitor's closing arguments in a capital trial should focus on the defendant's character, his background, and the nature of

the crime. *State v. Reed*, 293 S.C. 515, 519, 362 S.E.2d 13, 15 (1987) (overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991)). The arguments must be viewed in the context of the entire record, and the relevant question is whether the comments infected the trial with unfairness so as to make the resulting conviction a denial of due process. *State v. Patterson*, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997).

As a starting point, we recognize that the terms "blond lady" and "King Kong" could have racial connotations. However, this court's jurisprudence does not prohibit the use of terms with racial meanings, nor does our case law stand for the proposition that arguments or evidence in a case must be void of racial allusions. Instead, this court has recognized that it is impermissible to use race to "inflame the passions or prejudices" of the jury. Accordingly, our inquiry focuses on how these terms were used in Appellant's case.

In our view, the "blond lady" remark was not made to inflame the passions or prejudices of the jury. If the State had sought to make the race of Appellant's former lover an issue in this case, we believe they would have elicited evidence to this effect while examining their witness who testified extensively about the affair. Instead, this comment came while cross-examining a defense witness.

Furthermore, we find that even if this remark was inflammatory, it did not prejudice Appellant. This remark is a far cry from the outrageous and inflammatory evidence and arguments seen in *Nasim*, *Toyota*, *Dial*, and the cases cited by Appellant. The proper inquiry is not whether the Solicitor's remark was undesirable or condemnable, but whether the comment "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). In this case, the Solicitor made the "blond lady" comment only once and never referred to Appellant's lover's race again. Furthermore, this case involved a brutal murder, where guilt was clearly established. Accordingly, we find no evidence of prejudice from the "blond lady" remark.

Similarly, the Solicitor's use of the term "King Kong" was not an appeal to the passions or prejudices of the jury. The comment referred to Appellant's immense size, strength, and the destructiveness of his previous crimes. In this case, the trial court properly determined that Appellant's size and strength were probative of the aggravating

> circumstance of physical torture, which the court charged to the jury. In this regard, the Solicitor's use of the term "King Kong" was not suggestive of a giant black gorilla who abducts a white woman, but rather, descriptive of Appellant's size and strength as they related to his past crimes.
>
> Also, Appellant's mitigation witnesses described him as "a gentle giant," "a big old teddy bear," "the Secretary of Defense," and "the Mediator." The defense used these terms to indicate Appellant was a changed man and not a threat to others. In this regard, the trial court correctly found that "King Kong" was an invited response to Appellant's mitigation evidence.
>
> Finally, the Solicitor's "Caveman" comment was merely descriptive of two of Appellant's past violent incidents. A witness to Appellant's ABHAN testified that she saw Appellant dragging the motionless body of one of the victims across a parking lot by the hair. Additionally, a prison guard testified about an incident where Appellant reached into another inmate's cell and dragged the inmate out by the hair. The Solicitor made this comment while describing how Appellant dragged his victims during these incidents, and, in our view, the comment was not inflammatory. Based on the above reasoning, we hold that the Solicitor's comments did not improperly inject racial issues into the trial.

Bennett II, 369 S.C. at ___, 632 S.E.2d at 288-89. (footnote omitted).

Respondent submits that this Court does not need to address whether or not trial counsel's performance was deficient because the 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. In the present case, Applicant cannot show any conceivable prejudice resulting from trial counsels' performance: the South Carolina Supreme Court did not rely upon a procedural bar in rejecting his argument on direct appeal, although the trial judge relied upon the absence of a

contemporaneous objection and the State argued this procedural bar. Indeed, the Court found that its "conclusion makes an analysis of *Nasim*, *Toyota* and *Dial*'s exception to the contemporaneous objection rule unnecessary." *Bennett II*, 369 S.C. at ___, 632 S.E.2d at 89 n. 3. Further, the Supreme Court has determined that the closing argument did not deprive him of a fundamentally fair trial, which is the law of the case unless and until the United States Supreme Court reaches a different conclusion.

GROUNDS 10(b)-(d)

Applicant's next three allegations are that trial counsel was ineffective for failing to "properly object to inadmissible victim impact evidence of a prior ABHAN victim ... on the grounds that it was improper victim impact evidence in violation of *Payne v. Tennessee*, and that it was irrelevant and barred by Rule 403 if it was relevant." Specifically he complains about testimony from one of the ABHAN victims concerning the dream he had experienced following the attack (**Ground 10(b)**) the testimony from the victims' mothers concerning the extent of the injuries inflicted (**Ground 10(c)**) and photographs depicting the injuries inflicted (**Ground 10(d)**). He characterizes all of this as improper victim impact evidence under *Payne v. Tennessee*, 501 U.S. 808 (1991). Respondent again submits that these allegations lack merit. Applicant simply cannot meet his burden of proof on either prong of *Strickland, supra.*

As part of its case in re-sentencing, the State introduced Applicant's two September 14, 1988 convictions for A.B.H.A.N. and his Youthful Offender Act sentence of an indeterminate period not to exceed six years. These convictions stemmed from him savagely beating two employees of the Pizza Hut in Lexington, on March 4, 1988. **R. p. 1029; State's Ex. 6.**

Several prosecution witnesses also testified concerning the attack itself and the injuries

inflicted upon the two victims by Applicant. William Mark DuBose recalled seeing "a large black male" (later identified as Applicant) standing over one of two white males who were lying on the pavement when he pulled into the parking lot of the Pizza Hut on March 4, 1988. The two white males were "motionless, apparently unconscious. There was a good bit of blood lying around both of them. They were obviously injured and were not moving." However, the black man stomped one of the motionless victims approximately three or four times. The man then got into a truck with two white males and they left the scene. DuBose testified that he fled to a nearby parking lot out of fear of his own safety. **R. pp. 986-94.**

Rhonda Smith testified that she and her boyfriend were at the Pizza Hut that same night. As they were sitting at a window booth, she saw "a black male dragging a white male from the back of the Pizza Hut ... by his hair. ... The white guy was like on his back, and he was just dragging him along the ground with no effort by the white individual at all, it was strictly by the black male." Once the black male had dragged his victim to the front door of the Pizza Hut, he let go of the fistfull of hair he had been pulling, "kneel[ed] down and beat him in the face with his fists and kicked him and stomp him." **R. pp. 996-98.**

The black male punched his defenseless victim at least five or six times in the face and kicked and stomped him with his feet three or four times in the head. The white male never moved. After he stomped him for the last time, he jumped into a truck (driven by a white male) that had pulled up, and the truck drove away from the scene. Ms. Smith stayed until the police and an ambulance had arrived. While there, she saw another person laying on the ground in the back of the Pizza Hut. **R. pp. 998-1003; 1006-09.**

A. Presentation of argument in state court.

1. Testimony of the mothers of the Pizza Hut victims.

Apparently, Applicant's trial counsel raised an objection to the testimony of Sharon Brady, the mother of Pizza Hut victim Shannon Gilbert at a bench conference. *See* **R. p. 1012, ll. 6-9**. The trial judge later placed on the record that counsel had argued that her testimony about the extent of her son's injuries and the reaction was irrelevant. The trial judge stated that he had overruled the objection because the state supreme court had approved the admission of such testimony. Counsel added that he contended that this was "inappropriate, victim impact type of information," which had nothing to do with the crime for which Applicant was on trial. **R. pp. 1038-39**. Counsel also noted that he had the same objection before the testimony of Helen McGough, the mother of Pizza Hut victim Aaron McGough. This was likewise overruled. **R. pp. 1038-39**.

Mrs. Brady testified that her son, Shannon Gilbert, worked at the Pizza Hut on March 4, 1988. She received a call that night from the Pizza Hut that he had been taken to the Lexington County Hospital. She later received a second call notifying her that he had been taken to the Richland Memorial Hospital because of head trauma. When she arrived at the hospital, he was unconscious and she had a hard time identifying him because of the bruises, cuts and swelling on his face and head. He remained unconscious and in the intensive care unit (I.C.U.) for thirteen days. She photographed his injuries while he was in I.C.U. Even after he regained consciousness and was taken out of I.C.U., he remained in the hospital for another eleven days. He finally could walk "some." He then remained at home for five days before being sent to the Rebound Head Trauma Center in Lancaster, South Carolina, for approximately two and a half months. **R. pp. 1012-18.**

Mrs. Brady testified that he continued to have rehabilitation and therapy after his discharge from the trauma center and they had to personally hire a tutor because they did not meet the time

requirements for the State to provide one. Shannon also needed a speech therapist; and he needed a physical therapist to help him exercise his left leg and arm, which had been affected by a fracture behind his right ear. She stated that he had not completely recovered from the beating. **R. pp. 1018-20.**

Shannon Gilbert testified that he could not remember very much of what had happened on March 4, 1988. He did remember getting off work at approximately 10:00 or 10:30 p.m. and going to use the phone outside the front door. While he was talking to a girl, he asked a black man who was standing there if the man needed to use the phone. When the man indicated he did, he told his friend that he had to go and call her from inside the store. The next thing he remembered was waking up in the hospital about thirteen or fourteen days later. **R. pp. 1018-28.**

He then corroborated his mother's testimony about the extent of his injuries and the impact it had upon him: that he was unconscious for thirteen days; that he was unable to walk or talk when he first regained consciousness; that he stayed in the hospital approximately three and one-half weeks; that he had no coordination and no strength in his left hand and left leg even after his discharge; and that he was in the head trauma center for roughly two and one-half months, where he had both speech and physical therapy. Additionally, he provided details concerning the effects that lingered from the beating, such as the lack of coordination in his left hand and left leg and the problems caused by his impaired short-term memory. **R. pp. 1018-28.**

Ms. Helen McGough testified that her seventeen year old son, Aaron, was working his first night at the Pizza Hut on March 4, 1998. He was supposed to leave work around 11:00 p.m. and she waited up for him to come home and discuss his first day at work. However, he did not come home as planned. Instead, she received a call at approximately 11:20 or 11:25 p.m. informing her that he

had been taken to the Lexington Hospital. She received a second call about five or ten minutes later and, as a result, went to the Richland Memorial Hospital. When the ambulance arrived and opened the door, Aaron resisted the efforts of emergency medical personnel to get him out of the ambulance. **R. pp. 1031-33.**

Ms. McGough tried to speak to Aaron, but he did not respond. Also, she would not have recognized him if she had not known it was him because his face "was all cut up. His eyes were just little slits. His nose and his mouth ... was just all one. His forehead was all cut up." (sic). He was immediately transported to the emergency room and was treated by a neurologist and a plastic surgeon. She next saw him in intensive care but, again, he was unresponsive when she tried to talk to him. "[H]e was just very, very, still." **R. pp. 1033-34.**

Aaron remained unconscious and in I.C.U. for four days. Ms. McGough took a picture of his injuries at that time. She testified that Aaron had "[n]ot really" fully recovered from the beating he received that night, and that his personality had changed from someone who was "real easy-going" to someone who quickly becomes frustrated or angry. Also, he still "has short-term memory loss." Even after he was removed from I.C.U., he stayed in a hospital room for almost a week. At home, he still had to have someone with him at all times; and Ms. McGough stayed home with him for approximately six weeks. Additionally, he was real weak. **R. pp. 1034-37.**

2. Photographs of A.B.H.A.N. victims.

Sharon Brady testified that she photographed Shannon's injuries within the first several days after he was placed in I.C.U. The picture represented how he looked "a day or two" after the incident. **R. p. 1014, ll. 16-25.** Over trial counsel's objection that the photograph "adds nothing" to her testimony about Shannon's injuries and was intended "to inflame the jury," the trial judge

allowed the photograph into evidence as **State's Ex. 5**. He found that it was "not overly graphic or inflammatory," and that it "fairly depicts and represents the testimony of the witness ...." **R. p. 1015, ll. 1-25**. Mrs. Brady then testified that Shannon's condition had not changed between the first time she saw him after the crime and when she took the photograph, except for "the apparatus added to him." **R. p. 1016, ll. 3-16.**

When the State asked Helen McGough whether she could identify a photograph, counsel made an identical objection to the photographs of Aaron McGough. **R. p. 1035, ll. 11-16**. Again, the trial judge found that these photographs were "not so graphic or inflammatory as to cause any problems" and that they appropriately depicted Mrs. McGough's testimony. **R. p. 1035, ll. 18-20.**

Mrs. McGough then testified that the photos depicted Aaron. She had taken them after he had been in the hospital four days. Although "A lot of the swelling had gone down and you could see his eyes again, he still had a lot of swelling. Also, the photos were a fair representation of how Aaron looked at the time the photos were taken. Therefore, the trial judge allowed these photos into evidence as **State's Ex. 7**, over Appellant's objection. **R. p. 1035, l. 24 - p. 1036, l. 14.**

3. Shannon Gilbert's testimony about a dream.

When asked if he had any consciousness about being in the hospital or any dreams that he could remember from being in the hospital, Shannon Gilbert testified that "I had a dream. I did have a dream in the hospital. It's the only one I remember, of course." Counsel objected on the grounds that the testimony was irrelevant. Over this objection, Shannon was permitted to testify that "I remember the dream. I woke up and I remember being afraid. ... It was -- Indians were chasing me trying to kill me, and the thing that I thought was they were black. And later on -- or after years have gone by I've maybe even though, well, there might have been a link. You know, that I was

remembering something about trying to get away from someone." **R. p. 1027 l. 17 - p. 1028 l. 13.**

At this point, trial counsel stated "I renew my motion. I move that it be stricken. That's irrelevant." The trial judge noted his motion, but denied it. **R. p. 1028 ll. 15-17.** On cross-examination, Applicant established that "[t]here were two other white guys involved" in addition to he and Aaron McGough; but, he did not remember the fight initially between the "white guys." **R. p. 1030 ll. 11-22.**

In an *in camera* hearing after Mrs. McGough's testimony, trial counsel stated that he had objected to any testimony about the extent of the injuries suffered by the Pizza Hut victims as inappropriate victim impact evidence. He renewed this motion with respect to Shannon's testimony at issue in this argument.[21] Counsel claimed that the testimony by Shannon had "no importance" and no relevance "except to inflame a white jury." He asserted this was a gross violation of Bennett's rights for the State to interject race. The trial judge denied the motion and found that Shannon had "testified just to what his impressions were of the dream that he had." **R. pp. 1039-41.**

Counsel later unsuccessfully renewed his objection to the photographs of the two Pizza Hut victims and the "dream testimony," at the conclusion of the State's case. He argued that Shannon's testimony improperly inserted race into the proceedings in light of the fact Applicant had an all-white jury, while the photographs were inflammatory and prejudicial. **R. p. 1769 ll. 10-14 & ll. 18-23.**

The trial judge, again, denied his motion. **R. pp. 1776-77.** Counsel also argued his objection

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[21]This motion was predicated upon the trial judge's excusing for cause black male juror Thomas W. Brown (*see* **R. pp. 144-55; 820-24**) when he indicated, after jury selection, that he could not be fair and impartial because of his familiarity with the victim's family. Applicant's counsel suggested that he should be allowed to remain as a juror so that Applicant would not be tried by an all-white jury. The trial judge, however, rejected his arguments (**R. pp. 867-85**) and Applicant did not raise any issue on direct appeal concerning this ruling.

to all of this testimony in the motion for a new trial, **R. pp. 2207-08; R. pp. 2363-80**; but the trial judge denied the motion in the August 24, 2003 Order. **R. pp. 2407-2435.**

On pages 9-10 of his Order, the trial judge rejected counsel's argument as to the "dream testimony," as follows:

> "The comment of "black Indians" was not elicited by the State, was mentioned only once, was evidence of the Defendant's violent character and the impact of that violence on the victims, was not referred to thereafter by the State, was not a blatant racial reference, and did not prejudice the Defendant. I, therefore, find this isolated comment does not warrant a new trial."

Applicant's first three issues on direct appeal challenged the trial judge's ruling on the admissibility of the above evidence concerning the A.B.H.A.N. victims' injuries. He argued that it was inadmissible victim impact evidence but did not include any Constitutional basis for exclusion of this evidence or even argue its relevance. **See Final Brief of Appellant, at pp. 4-19; Final Brief of Respondent, at pp. 15-28.** A majority of the state supreme court rejected his arguments, as follows:

> Appellant argues that the trial court erred in admitting the ABHAN victims' mothers' testimonies, the hospital photographs, and the testimony about the victim's "black Indians" dream because this evidence was impermissible "victim impact" evidence of prior crimes. We disagree.
>
> In *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the United States Supreme Court held that the Eighth Amendment did not prohibit a jury from considering "victim impact" evidence at the sentencing phase of a capital trial. In *Payne*, a brutal double murder, the defendant challenged the admission of testimony that the child of one of the victims "missed his mother" and the State's remarks in closing arguments suggesting that the continuing effects of the crimes on the victims' family favored imposing the death penalty. *Id.* at 816. Drawing on historical arguments and reasons of fairness, the Supreme Court held that a state was not constitutionally

prohibited from allowing a capital sentencing jury to consider "the specific harm caused by the defendant," including the impact of the murder on the victim's family and "a quick glimpse of the life which the defendant chose to extinguish." *Id.* at 822-26, 111 S.Ct. 2597.

Contrary to Appellant's assertions, none of the testimony at issue in this case was "victim impact" evidence. First, the mothers' testimonies were limited to the circumstances surrounding the ABHAN and the extent of the injuries their sons suffered. This evidence was clearly not evidence of the character of the victims or the impact on their families, but rather, evidence of the physical injuries caused by Appellant. That the descriptions of the victims' injuries came from their mothers does not automatically convert factually descriptive testimony into impact testimony regarding the victims' character or the effect on the victims' families or community.

Similarly, there can be no question that the hospital photographs were introduced to describe the extent of the injuries the ABHAN victims suffered. These photographs are easily distinguished from cases where photographs have been deemed "victim impact" evidence. *See State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999) (photograph of murder victim in his high school graduation regalia); *see also State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997) (photograph of victim and her husband taken shortly before victim was involved in fatal accident). Although, like in *Langley* and *Livingston*, the photographs in this case were certain to elicit an emotional response from the jury, these photographs were highly probative of the nature of Appellant's prior crime in that they provided the clearest picture of the aggravated nature of the assault and battery.

Finally, we hold the victim's testimony about his "black Indians" dream was not "victim impact" evidence. This testimony merely described the emotional injury to the ABHAN victim.

Though masquerading as a horse of the same color, the dissent decides an entirely different case from the one at bar. At the sentencing proceeding, Appellant argued the testimony about the ABHAN victims' injuries was "inappropriate victim impact type of information having nothing to do with the particular crime Mr. Bennett is on trial for now." Likewise, it appears Appellant's objection to the hospital photographs was based on Rule 403, SCRE (excluding relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice). Finally, Appellant

objected to the introduction the victim's dream on the grounds of relevance. Before this Court, however, Appellant did not couch these objections in terms of relevance or a Rule 403 analysis. Instead, the only theory Appellant presented to this Court on this issue was that this evidence should have been excluded as impermissible victim impact evidence of prior crimes.

Because the evidence in this case was not victim impact evidence, Appellant's argument must fail. When asked to do so, we will consider arguments regarding the types of evidence of prior crimes that should and should not be admissible in a capital sentencing proceeding. [FN2] However, we feel that the delicate task of balancing the duty to conduct a sentencing inquiry "broad in scope," *Dawson*, 503 U.S. at 164, 112 S.Ct. 1093, against the need to protect a capital defendant from unfair prejudice and prevent a capital sentencing proceeding from transmuting into a sentencing referendum on all of the defendant's prior crimes is only properly performed when that case is presented. Such a case would no doubt involve considerations of when the introduction of evidence renders a proceeding so unfair as to violate due process, *see Payne*, 501 U.S. at 831, 111 S.Ct. 2597 and also would implicate our rules of evidence; rules which, at the most basic level, allow proof of character by specific instances of conduct. See Rule 405, SCRE.

[FN2. Academically, South Carolina has long recognized that information about prior convictions is admissible in a capital sentencing proceeding. *See State v. Gaskins*, 284 S.C. 105, 124, 326 S.E.2d 132, 143 (1985); and *State v. Plath*, 281 S.C. at 9, 313 S.E.2d at 623 (stating that this rule is so fundamental that it requires no citation of authority). This rule is derived from the principle that receiving evidence of prior crimes is probative of the character of the defendant and consistent with the sentencing authority's duty to "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *Dawson v. Delaware*, 503 U.S. 159, 164, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992); *see also State v. Skipper*, 285 S.C. 42, 47, 328 S.E.2d 58, 61 (1985) (overruled on other grounds 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)). Appellant has not challenged this rule, and indeed, Appellant has made no discussion of these authorities (upon which the trial court directly relied).]

Instead of addressing any of these topics, which would be of paramount importance when considering clarifying our relevance

> rules, the briefs to this Court, like Appellant's argument, concerned only victim impact evidence. Under these circumstances, we feel the better course is to confine ourselves to a careful analysis of the arguments briefed and presented to us. *See State v. Torrence*, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991) (abolishing *in favorem vitae* review in capital cases). Although the dissent raises intriguing questions, we think it the better course to wait to decide such a case until we are asked. *See State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (appellate court will not consider issues not properly presented).
>
> Based on the above reasoning, we hold that the testimony about the ABHAN victims' injuries and the corresponding photographs was not impermissible victim impact evidence relating to Appellant's prior crimes.

Bennett II, 369 S.C. at ___, 632 S.E.2d at 286-87.[22]

Respondents submit that Applicant cannot satisfy either requirement of the *Strickland* test. In particular, he cannot show deficient performance from the failure to better articulate the argument that the challenged evidence was impermissible victim impact evidence under *Payne* because the characterization of the disputed evidence as victim impact evidence is simply wrong. In *Payne*, the United States Supreme Court overruled *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), both of which had held that the Eighth Amendment barred the prosecution from introducing victim impact evidence or making victim impact argument in the penalty phase of a capital trial.

The Court in *Payne* held that "a State *may properly conclude* that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." 501 U.S. at 825 (emphasis

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[22] Justice Pleicones dissented and would have held that admission of this evidence was reversible error. *Id* at ___, 632 S.E.2d at 290-91. (Pleicones, J., dissenting).

added). Further, the Court in *Payne* observed that *Booth* "unfairly weighted the scales in a capital trial; while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering 'a glimpse of the life' which a defendant 'chose to extinguish,' " *id.* at 822 (quoting *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)), or "demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide." *Id.*

Therefore, the Court in *Payne* concluded that, "*if the State chooses to permit* the admission of *victim-impact evidence and prosecutorial argument* on that subject, the Eighth Amendment erects no *per se* bar." *Id.* at 827 (emphasis added); *see also Humphries v. Ozmint*, 397 F.3d 206 (4th Cir. 2005) (en banc).[23] The Court in *Payne* also stated that there was "no reason" to treat victim-impact evidence "differently than other relevant evidence." *Id.* at 827. Yet, the Court cautioned that, "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id.* at 825. In *State v. Johnson*, 410 S.E.2d 547, 555 (S.C. 1991) and *Lucas v. Evatt*, 416 S.E.2d 646, 647-48 (S.C. 1991), the state supreme court held that victim impact evidence and argument about the victim and about the impact of the murder on the victim's family is relevant, as a matter of state law, to the jury's decision as to whether or not the death penalty should be imposed.

The challenged evidence was not evidence showing the full extent of the harm caused by the defendant's actions to the victim's family and society, by showing the consequences of these actions,

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[23]As the Fourth Circuit Court of Appeals observed in *Humphries*, 397 F.3d at 217, "the *Payne* Court did not alter *Booth*'s holding that admitting evidence of the victims' opinions of the crime and of the appropriate sentence for the defendant violates the Eighth Amendment; rather *Payne* only allows evidence of the victim's personal characteristics and the harm inflicted upon the victim's family and community. *Id.* at 829 n. 2.

as permitted by *Payne*, 501 U.S. at 824-30. Instead of victim impact evidence of the prior ABHANs, it was proof of the extent of the actual injuries inflicted upon victims of the Pizza Hut attacks and was proof of the ABHANs.

Applicant likewise cannot show deficiency or prejudice from the failure to argue relevancy and inadmissibility under a Rule 403, SCRE, analysis. Although the majority refused to address these matters because the argument advanced by the dissent was unpreserved, the majority correctly noted in footnote 2 that this State "has long recognized that information about prior convictions is admissible in a capital sentencing proceeding." *Bennett II*, 369 S.C. at ___, 632 S.E.2d at 287 n.2.

S.C. Code Ann. § 16-3-20(B) (Supp. 2006) provides that during the sentencing phase, "the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of the punishment." Before a death sentence is imposed, the sentencing jury's attention must be directed to the specific circumstances of the crime and the characteristics of the person who committed the crime. *State v. Shaw*, 255 S.E.2d 799 (S.C. 1979). The state supreme court has consistently held that evidence of other crimes is admissible at sentencing phase of capital trial, including photographs of a victim. *E.g.*, *Ray v. State*, 498 S.E.2d 640 (S.C. 1998) (evidence of other crimes, including "gory photos" of victim, is admissible at sentencing phase of capital trial); *State v. Gaskins*, 326 S.E.2d 132 (S.C. 1985) (details of defendant's prior murder convictions, including photographs of prior murder victims, were properly allowed into evidence in sentencing phase), *cert. denied*, 471 U.S. 1120 (1985); *State v. Plath*, 313 S.E.2d 619 (S.C. 1984) (information concerning the details of prior offenses can be introduced during the penalty phase), *cert. denied*, 467 U.S. 1265 (1984). *Cf. State v. Bell*, 393 S.E.2d 364, 371-72 (S.C. 1990), *cert. denied*, 507 U.S. 1022 (1993). As the state supreme court correctly observed, "[t]his rule is derived from the principle that receiving evidence

of prior crimes is probative of the character of the defendant and consistent with the sentencing authority's duty to 'conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.'" *Bennett II*, 632 S.E.2d at 287 n.2 (citing *Dawson v. Delaware*, 503 U.S. 159, 164 (1992)).

Here, the evidence concerned similar crimes (A.B.H.A.N.) to the murder conviction for which Bennett was being sentenced. "Admission of testimony that a defendant has attempted a similar crime or crimes to that for which he is on trial is proper because such testimony indicates a defendant's individual characteristics and predisposition to commit similar crimes." *State v. Green*, 392 S.E.2d 157, 162-63 (S.C. 1990) (citations omitted). Also, this evidence, along with other evidence of his behavior while incarcerated, showed Applicant's extremely violent nature and future dangerousness. Evidence of a defendant's future dangerousness is a legitimate interest at sentencing. *Dawson, supra.*

Further, the trial judge gave a limiting instruction that required the jury to find that the State had proved the evidence of Applicant's bad character beyond a reasonable doubt before considering it. This instruction also precluded the jury from relying upon evidence of these crimes to prove statutory aggravating circumstances, and it insured that the jury's consideration of these offenses was limited to proof of evidence of "[Applicant]'s character and characteristics as they may bear logical relevance to the crime." He also charged the jury that they could give this evidence "whatever weight you consider proper under the circumstances of this case." **R. p. 2123, l. 4 - p. 2124, l. 2.** *Cf. Green*, 301 S.C. at 358, 392 S.E.2d at 163; *State v. Stewart*, 283 S.C. 104, 320 S.E.2d 447 (1984).

It is the State's position that this is consistent with the Eighth Amendment and that

Applicant's contrary position lacks merit. *E.g., E.g., Ray v. State*, 330 S.C. 184, 498 S.E.2d 640 (1998). *Cf. Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("[W]e believe that in capital cases ... the Eighth Amendment ... requires consideration of the character and record of the individual offender ... as a constitutionally indispensable part of the process of inflicting the penalty of death"). Further, the South Carolina Supreme Court has already rejected the same arguments on direct appeal and determined that the challenged evidence was not victim impact evidence.

Shannon's testimony about his dream constituted some proof of the identity of his attacker. Also, and more significantly, the dream testimony was admissible as a circumstance of aggravation of the prior crime, bearing on Applicant's culpability, because it "merely described the emotional injury to the ABHAN victim." *Bennett II*, 632 S.E.2d at 287. Likewise, the mothers' testimony was "clearly not evidence of the character of the victims or the impact on their families, but rather, evidence of the physical injuries caused by [Applicant]." *Id.* at 286.

Nor can there be any "question that the hospital photographs were introduced to describe the extent of the injuries the ABHAN victims suffered. These photographs are easily distinguished from cases where photographs have been deemed 'victim impact' evidence." *Id.* As such, the disputed evidence was properly admissible. *See People v. Marks*, 72 P.2d 1222, 1241 (Cal.2003), *cert. denied*, 541 U.S. 1033 (2004) (agreeing with trial court's rejection of any distinction between an injury and the result of that injury, finding that there was a basis for introducing some videotaped evidence of unrelated gunshot victim's condition, and holding that any error in introduction of lengthy videotape was harmless); *People vs. Holloway*, 91 P. 3d 164, 195-96 (Cal. 2004) (concluding that testimony of prior, unrelated victim's emotional trauma years later, which resulted from the defendant's assault with a deadly weapon, was properly admitted because the link between the attack

and the emotions and actions to which she testified was direct and foreseeable), *cert. denied*, 543 U.S. 1156 (2005).[24]

The State submits that very similar testimony was presented in the penalty phase in *Bell*, *supra*. Even if the Court were to view this evidence as victim impact evidence of unrelated offenses, the evidence was still properly admitted. *Id. See also People v. Garceau,* 862 P. 2d 664 (Cal. 1993) (federal constitution does not bar introduction of evidence showing effect of prior violent criminal activity of victims); *People v. Mickle*, 814 P. 29 290, 316-17 (Cal. 1991) (In Banc) (admission of evidence concerning impact of defendant's prior sexual assaults on victims during penalty phase of capital murder trial did not violate the Eighth Amendment because the evidence concerned obvious emotional effect of defendant's prior sexual molestations on victims and were admissible as circumstances of the prior crimes bearing on the defendant's culpability).

Finally, Respondent submits that there was no prejudice resulting from the failure to argue lack of relevancy or that the evidence should have been excluded under a Rule 403 analysis (*i.e.*, that the probative value of this evidence was substantially outweighed by its prejudicial effect). In the present case, the trial judge properly found that the challenged testimony was not prejudicial.

First, the dream was only mentioned once by Shannon. It was never mentioned again by the State in closing argument. ***See* R. pp. 2053-81.** Thus, the challenged evidence only constituted thirteen lines of testimony in a transcript that was 2,159 pages long. Second, the challenged testimony "was not a blatant racial reference." **Order, R. pp. 2415**. It was merely Shannon's

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[24] California's death penalty law, much like South Carolina, permits evidence of prior violent offenses. *See* West's Ann. Cal. Penal Code §190.3(b).

impression of his own dream.[25]

Third, the State was obligated to prove the A.B.H.A.N.s beyond a reasonable doubt, and this evidence helped meet that burden. *Cf. State v. Riddle*, 301 S.C. 68, 71, 389 S.E.2d 665, 667 (1990) (appellant's burglary and armed robbery convictions "had no legal efficacy" at the subsequent re-sentencing proceeding and were not binding upon the re-sentencing jury). Fourth, and as with the mothers' testimony and photos of the ABHAN victims, the testimony concerning Shannon's dream is far less prejudicial than testimony about the extent of the injuries Petitioner inflicted upon Benton during the commission of the murder and the testimony from the two eyewitnesses to the Pizza Hut attacks, Mr. DuBose and Ms. Smith. **R. pp. 986-1003; 1006-09.**

Fifth, there was overwhelming evidence of the statutory aggravating circumstances, even though much of it was circumstantial. Finally, the limiting charge given by the trial judge precluded the jury from considering this evidence proof of an aggravating circumstance (in essence) and limited the jury's consideration of this evidence to Applicant's character. Under these circumstances there was no prejudice under Strickland because there is no reasonable probability of a different result but for counsel's failure to object. *Strickland*, 466 U.S. at 695; see also *Wiggins*, 539 U.S. at 537; *Jones v. State*, 332 S.C. 329,344-45, 504 S.E.2d 822, 829-30 (1998) (petitioner did not meet burden). *Cf. State v. Gaskins*, 284 S.C. at 127, 326 S.E.2d at145 (erroneous admission of evidence in sentencing phase reviewed for harmless error).

However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Therefore, Respondent requests an evidentiary

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[25] With respect to the testimony of the mothers, that testimony is largely cumulative to the testimony of Shannon Gilbert **(R. pp. 1018-28)** and there is no challenge to his testimony in this regard. Likewise, the photographs are also cumulative.

hearing to fully resolve this issue. *See Sharper v. State*, 279 S.C. 264, 305 S.E.2d 247 (1983).

GROUND 10(e)

Applicant further contends that trial counsel failed to present available mitigating evidence under *Wiggins v. Smith*, 539 U.S.510 (2003) and "positive victim impact evidence regarding the decedent since such evidence was also available if counsel had exercised due diligence."

It is trial counsel's responsibility adequately investigate and present evidence in mitigation of guilt. *Williams v. Taylor*, 529 U.S. 362, 395 (2000); *Byram*, 339 F.3d at 209. However, counsel is only required to make a reasonable investigation for possible mitigating evidence. *Matthews v. Evatt*, 105 F.3d 907, 919 (4th Cir.1997). As the Court emphasized in *Wiggins*:

> we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*, 466 U.S., at 689. *We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation."* *Id.*, at 690-691. A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances." Id., at 691.

Wiggins, 539 U.S. at 533 (emphasis added). *See also Lovitt v. True*, 403 F.3d 171, 179 (4th Cir. 2005); *Moody v. Polk*, 408 F.3d 141, 148 (4th Cir. 2005); *Id* at 157 (Traxler, J., concurring)(citing *Wiggins* and *Strickland*).

In the present case, Respondent submits that counsel's efforts were objective reasonable. Alternatively, Applicant cannot show prejudice. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record.

Therefore, Respondent requests an evidentiary hearing to fully resolve this issue. *See Sharper v. State*, 279 S.C. 264, 305 S.E.2d 247 (1983).

With Respect to his claim that counsel failed to discover reasonably available "positive victim impact evidence" about Benton Smith, Respondent submits that there cannot be any prejudice from failing to present evidence that would show that more harm resulted from the victim's death than the prosecution's evidence tended to prove. If his claim is that counsel should have discovered evidence of that victim's bad character, his allegation apparently misunderstands what is admissible under *Payne*.

He certainly had a right, under the due process clause, to rebut the extremely limited victim impact evidence presented by the prosecution. However, evidence of the victim's bad character may not be introduced in mitigation of a defendant's sentence because "*Payne* prohibits this use of comparative character analysis." *State v. Southerland*, 316 S.C. 377, 385, 447 S.E.2d 862, 867 (S.C.1994) (In capital sentencing proceeding, defendant was not entitled to introduce evidence of victim's bad character, specifically her involvement with drugs and prostitution, as victim impact evidence, since such use of comparative character analysis was not permissible, and state did not introduce any victim impact evidence), *overruled on other grounds*, State v. Chapman, 317 S.C. 302, 454 S.E.2d 317 (1995); *Alvarado v. State*, 912 S.W.2d 199, 217-18 (Tex. Cr. App. 1995) (citing *Southerland* and *Payne* in support of trial court's refusal to admit evidence of a victim's prior bad act because it was not relevant to defendant's "moral blameworthiness" in murdering the victim, the purpose for allowing victim impact evidence espoused in *Payne*). *See also Humphries v. State*, 351 S.C. 362, 570 S.E.2d 160 (2002).

However, the allegation of ineffective assistance of counsel probably raises questions of fact

that cannot be conclusively refuted by the record. Therefore, Respondent requests an evidentiary hearing to fully resolve this issue. *See Sharper v. State*, *supra*.

GROUND 10(f)

Applicant's **Ground 10(f)** is that trial counsel was ineffective for not moving "for an order barring the death penalty on the grounds of prosecutorial misconduct or to continue to move for a mistrial on this ground where the state, from *voir dire* through the penalty phase closing argument, continued to impermissibl[y] inject race into the case to obtain a death sentence. Respondent submits that this allegation lacks any plausible merit.

The genesis of this allegation was the trial judge's excusing for cause black male juror Thomas W. Brown (*see* **R. pp. 144-55; 820-24**) when he indicated, after jury selection, that he could not be fair and impartial because of his familiarity with the victim's family. Applicant's counsel suggested that he should be allowed to remain as a juror so that Applicant would not be tried by an all-white jury. The trial judge, however, rejected his arguments (**R. pp. 867-85**) and Applicant did not raise any issue on direct appeal concerning this ruling.

Thereafter, Applicant's counsel objected and/or moved for a mistrial on several occasions when counsel apparently felt that the prosecution attempted to impermissibly inject race into the sentencing phase. Most, if not all of these instances have been discussed, *supra*, including (1) the Solicitor's closing argument; (2) the recross-examination of a defense witness as to whether he remember a blonde haired lady; and (3) the presentation of Shannon's testimony of dreams about black Indians chasing him. For the reasons discussed in this pleading, the Final Brief of Respondent and the Court's Opinion in *Bennett II*, *supra*, Respondent submits that the sentence of death must stand and that, at worst, none of the instances complained of were prejudicial. Therefore, counsel's

performance, at the very worst, was non prejudicial under *Strickland.*

However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Therefore, Respondent requests an evidentiary hearing to fully resolve this issue. *See Sharper v. State, supra.*

GROUND 10(g)

Applicant's final allegation is that appellate counsel failed to properly argue the issues discussed in **Grounds 10(b)-(d).** Respondent submits that he cannot show deficient performance or resulting prejudice.

A defendant is constitutionally entitled to the effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985). A PCR applicant has the burden of proving appellate counsel's performance was deficient. *Anderson v. State*, 354 S.C. 431, 581 S.E.2d 834 (2003). Appellate counsel is not required to raise every non-frivolous issue that is presented by the record, *Tisdale v. State*, 357 S.C. 474, 594 S.E.2d 166 (2004), as "[t]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." *Jones v. Barnes*, 463 U.S. 745, 752 (1983). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. *Id.*

To obtain relief a PCR applicant must show that appellate counsel's performance was (1) deficient; and (2) prejudice from the appellate counsel's deficiency. *Southerland v. State,* 337 S.C. 610, 524 S.E.2d 833 (1999). In other words, the applicant is required to demonstrate "that his counsel was objectively unreasonable in failing" to identify and argue present significant and obvious issues on appeal, and "a reasonable probability that, but for his counsel's unreasonable failure ..., he would have prevailed on his appeal." *Smith v. Robbins*, 528 U.S. 259, 285 (2000)

(citation omitted).[26] Although recognizing that "[n]otwithstanding *Barnes*, it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim" on direct appeal, the Supreme Court has recently reiterated that "it [will be] difficult to demonstrate that counsel was incompetent." *Robbins*, 528 U.S. at 288. " 'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" *Id.* (*quoting Gray*, 800 F.2d at 646. *See also Bell v. Jarvis*, 236 F.3d 149, 164 (4th Cir.2000) (en banc).

In the present case, Respondent submits that there was no deficient performance since appellate counsel raised the issues as argued in the lower court and any additional arguments were procedurally barred. *Bennett II, supra.* Nor can Applicant show any prejudice from counsel's performance for the reasons stated in **Grounds 10(b)-(d).** However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Therefore, Respondent requests an evidentiary hearing to fully resolve this issue. *See Sharper v. State, supra.*

IV.

Respondent denies each allegation that is not expressly admitted, qualified or explained.

WHEREFORE, having made its Amended Return to the PCR Application, Respondent requests a hearing only on the allegations in PCR Application as indicated, *supra.*

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[26] *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986) (When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal"). Indeed, "'[w]innowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (quoting *Jones*, 463 U.S. at 751); *see also Smith v. South Carolina*, 882 F.2d 895, 899 (4th Cir.1989) (counsel's failure to raise a weak constitutional claim may constitute an acceptable strategic decision designed "to avoid diverting the appellate court's attention from what [counsel] felt were stronger claims").

Respectfully submitted,

HENRY D. 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 RESPONDENT

November 13, 2006.

2817

COPY

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS
Johnny O. Bennett, #5023, Applicant, v. State of South Carolina, Respondent.	C. A. No. 06-CP-32-3221 CERTIFICATE 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 Respondent's Amended Return (with attachments provided to Applicant) in the foregoing action on Applicant by depositing one copy of the same in the United States mail, first class postage prepaid, and addressed as follows:

Robert M. Dudek, Esquire
1330 Lady Street, Fourth Floor
Columbia, SC 29201

Johnny O. Bennett, #5023
Lieber Correctional Institution
Post Office Box 205
Ridgeville, SC 29472

Filed
2006 NOV 14 PM 4:23
Beth A. Carrigg
Clerk of Court
Lexington, SC

This 13th day of November, 2006.

WILLIAM EDGAR SALTER, III

COPY 2818

FILED
2008 APR 11 A 9:23
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Case No. 2006-CP-32-3221
COUNTY OF LEXINGTON	)	
Johnny O. Bennett,	)	
Applicant,	)	
v.	)	FIRST AMENDED APPLICATION FOR POST-CONVICTION RELIEF
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	

1. Place of Detention: Lieber Correctional Institution, Campbell Thickett Road, Ridgeville, South Carolina 29472.

2. Name and location of Court which imposed sentence: Lexington County Court of General Sessions.

3. Not applicable.

4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:

   (a) Murder: 93-GS-32-2354
   (b) Kidnapping: 93-GS-32-2354
   (c) Armed Robbery: 93-GS-32-2354
   (d) Larceny of Auto: 93-GS-32-2354

5. The date upon which sentence was imposed and the terms of the sentence:

   (a) Sentenced on July 10, 2000 as follows:

      (i) Murder: Death

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 Courts to which applicant appealed:
      (i) The South Carolina Supreme Court
      (ii) The South Carolina Supreme Court

(b) The result in each Court to which applicant appealed:
(i) Convictions affirmed; death sentence vacated
(ii) Death sentence affirmed

(c) The date of each result:
(i) Convictions affirmed and death sentence vacated on December 1, 1997
(ii) Death sentence affirmed on June 26, 2006

(d) Citations of any written opinion or orders entered pursuant to such results:
(i) *State v. Bennett*, 328 S.C. 251, 493 S.E.2d 845 (1997)
(ii) *State v. Bennett*, 369 S.C. 219, 632 S.E.2d 281 (2006)

9. Not applicable.

10 & 11. GROUNDS FOR RELIEF WITH SUPPORTING FACTS

10(a) *Applicant was denied due process under the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law by the repeated and prejudicial injection of race throughout the trial. Furthermore, these comments resulted in a decision that was based on passion, prejudice or caprice.*

11(a) *These include the following injections of race by the Solicitor*:

1. "You give him life, the real Johnny will come back. You give him life and he'll come back out. Meeting him again will be like meeting King Kong on a bad day." Tr. 2079. The Solicitor subsequently explained that the use of the term King Kong "wasn't an a [sic] ***purely*** racial statement." Tr. 2179 (emphasis added).

2. "That's Johnny Bennett for you, folks. That's what he thinks about another person, another human being. There ain't no joy in Happy Town. He turned it into gruesomeville. It's ***boo hill.*** Tr. 2071 (emphasis added).

3. The State introduced copious testimony concerning the defendant's assault on two white teenagers. During that testimony, the victim, Shannon Gilbert, was allowed to testify about a recurring dream he had in which "black indians" were chasing him and trying to kill him. Tr. 1027-28.

4. Testimony about the defendant's conduct in prison elicited the following statement from Sandra Key: "a group of black inmates and white inmates had been fighting." Tr. 1077. The witness continued after objection, "Well, he don't want me to say white, but the particular inmate that had the bruise was white." Tr. 1079.

5. Testimony of James Earl Harris: "He was – he [Bennett] told me that if an individual came in the jail, and depending on their demeanor or if it's a black female correctional officer and if it was a white inmate coming in, they would

call the black female correctional officers niggers, and they would take the inmate up on the floor where Mr. Bennett was and they would look at him and wink at him, give him a sign, and Mr. Bennett would straighten the inmate up. He would whoop up on the inmate, is what he was telling me." Tr. 1515.

6. In further direct to the above answer, the Solicitor again reiterated that white individuals would be assaulted by the defendant, "And this would happen to both black and white inmates." Tr. 1516.

7. The State introduced evidence that the defendant was having sex with Judie Hardee, a white woman and made sure the jury knew she was white with the following testimony: Q. There was one guard that loved Johnny Bennett and that was Judie Hardee, you remember her? A. The real big lady? Q. Judie Hardee, you remember her, the blonde-headed lady? A. She was a real big lady. Tr. 1979-80. In closing argument the Solicitor continued to remind the jury of this relationship. Tr. 2077, 2080.

10(b) *Applicant's right to an impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution were violated by the seating of a juror who held racist views.*

11(b) At least one juror who sat on the jury at applicant's resentencing trial harbored racist feelings towards applicant.

10(c) *Applicant was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law at the sentencing phase of his trial. Williams v. Taylor*, 592 U.S. 362 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984); *Jolly v. State*, 314 S.C. 17, 443 S.E.2d 566 (1994).

11(c) The facts supporting this claim are as follows:

1. Trial counsel failed to object to the trial court's instruction to the jurors that any mistakes he made would be corrected at the appropriate time. "Now, if I'm wrong there is a time and place for it to be corrected." Tr. 899. "You must accept as correct the laws as I give it to you. Now, if I'm wrong there is another time and place for it to be corrected." Tr. 2122.

2. Trial counsel failed to object to the testimony of Jody Gallman of the South Carolina Department of Probation, Parole and Pardon Services. The sole purpose of this witness' testimony was to establish that when applicant committed the crime for which he was being sentenced, he was on parole. This evidence, raising the specter of his being paroled again, was substantially more prejudicial than probative. Tr. 1105-1108.

3. Trial counsel brought to the jury's attention the fact that applicant was already on death row. Tr. 1604. Moreover, a defense witness while on direct examination, twice referenced "death row." Tr. 2048.

4. Trial counsel failed to object adequately to the trial court's instruction in response to the jury's question about the meaning of a life sentence. In response to a note asking whether life meant life without parole or with the possibility of parole the trial court stated the following: "Let me tell you that the only thing I'm allowed to comment on that – and you understand that there are all sorts of varieties in this thing and it's something that I can't get into with you directly. All I can do is basically give to you the charge that I gave you earlier." Tr. 2144-45.

5. Trial counsel failed to object to the use of both larceny and robbery as aggravating factors.

6. Trial counsel failed to investigate, develop and present evidence that applicant was abused as a child.

7. Trial counsel failed to object to the introduction of evidence regarding the prior crime involving an assault in the parking lot of a Pizza Hut restaurant on the basis that the admission of this evidence violated applicant's right to due process.

8. Trial counsel failed to object to prejudicial and improper statements by the prosecution during the opening statement and closing argument of the sentencing phase of applicant's trial. During the opening statement, the prosecution referred to applicant as "brutal monster size," (tr. 907); "big old brute, Johnny Bennett," (tr. 907); "But his disregard for a fellow human being, his disrespect for the law, his total disobedience and disrespect for good old human nature began way back, probably when he was born." (tr. 908); "And, folks, you know about 25 feet away from you in your presence is a murderer. I hope you never have to live through this after this week, being that close to a murderer." (tr. 909); "big old bear of a fellow, Johnny Bennett," (tr. 914); "big old bear of a fist," (tr. 915); "evil, mean, manipulative, malicious. That's what we're dealing with, folks. . . . you will find enough aggravation that will be spilling over this jury box. All we ask you is to return the punishment that fits the crime in this evil, manipulating, malicious murdering defendant." (tr. 915-16). During the closing argument the prosecutor stated that if "You give him life, the real Johnny will come back. You give him life and he'll come back out." (tr. 2079); "There ain't no joy in Happy Town. He turned it into gruesomeville. It's boo hill." (tr. 2071); argument that if not executed the applicant would be able to have sex with "the blonde lady." (tr. 2077); "if you [the jury] don't sign your name for Benton Smith his life would have been nothing." Tr. 2081. Trial counsel failed to object to the prosecutor's repeated reference to applicant using derogatory and racists terms: "mountain man," tr. 2056; "caveman," tr. 2062; "tiger," tr. 2066; "monster," tr. 2068; "King Kong," tr. 2079, "beast of burden." Tr. 2079.

9. Trial counsel failed to object to the trial court's instructions which tended to inform the jurors that they could only consider applicant's character in the context of aggravating evidence rather than mitigating evidence. Tr. 2113.

10. Trial counsel raised the issue of the conditions of imprisonment by bringing to the jury's attention applicant's request for television knobs, the use of the microwave, and the use of the canteen. Tr. 1636-38.

11. Trial counsel failed to object to the judge's instruction (tr. 2116) and the Solicitor's argument that torture and kidnapping could occur after the victim's death. "These can be committed after he murdered Benton Smith." Tr. 2057.

12. Trial counsel failed to *voir dire* on potential racial prejudice during jury selection.

10(d) *Applicant was denied his right to the effective assistance of appellate counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law.*

11(d) The grounds for this claim are as follows:

1. Appellate counsel failed to raise on direct appeal the trial court's refusal to question potential jurors about their attitudes regarding race. *Turner v. Murray*, 476 U.S. 28 (1986).

2. Appellate counsel failed to argue on direct appeal that the admission of evidence of the prior assault in the Pizza Hut parking lot was error because this evidence was irrelevant.

3. Appellate counsel failed to argue on direct appeal that the admission of the evidence about a prior victim's dream of "black Indians" was error because this evidence was irrelevant.

4. Appellate counsel failed to raise on direct appeal the error of informing the jury that applicant was already on death row and the trial court's instruction on the issue which made it more clear that applicant had already been sentenced to death.

5. Appellate counsel failed to raise on direct appeal the pervasive injection of race throughout the trial despite trial counsels' objections.

6. Appellate counsel failed to raise on appeal the trial court's improper version of the "plain and ordinary meaning" instruction. Tr. 2146.

10(e) *Applicant seeks a finding of fact that his kidnapping conviction did not involve sexual misconduct requiring sex offender registration pursuant to S.C. Code §23-3-430. See Hazel v. State*, __ S.E.2d __, 2008 WL 648513 (2008).

11(e) In 1998, §23-3-430 was amended to include an exception to the general rule that a kidnapping conviction automatically required sex offender registration. This exception applied if the state court made a finding that the kidnapping offense did not include a criminal sexual offense. §23-3-430(C)(15). Because applicant was convicted of kidnapping before this amendment, this exception was unavailable to him. The South Carolina Department of Corrections has prohibited applicant from visiting with young relatives because of the requirement that he register as a sex offender based on the 1995 kidnapping conviction.

12 & 13. Applicant appealed directly to the South Carolina Supreme Court. Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in state or federal court.

14. None of the grounds set forth in (10) has been previously presented to this or any other Court, State or Federal.

15. Not Applicable.

16. These grounds rely on additional facts outside the record which was before the previous courts.

17. Applicant was previously represented by counsel.

18. Applicant was represented at trial by Wayne Floyd, PO Box 3972, West Columbia, SC 29171 and by Hervery Young, 201 B.W. Butler Road, #159, Mauldin, SC 29664. On direct appeal applicant was represented by Joseph L. Savitz, III of the South Carolina Office of Appellate Defense, 1122 Lady Street, Columbia, South Carolina 29201.

19. Applicant seeks relief from his convictions and sentences.

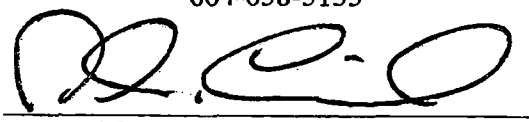
20. Applicant is not under sentence from any other court.

Respectfully submitted,

ROBERT LOMINACK
Law Offices of Robert E. Lominack, P.C.
Post Office Box 5508
Columbia, SC 29250
803-771-7271

DEREK ENDERLIN
Oconee County Public Defender
415 South Pine Street
Walhalla, SC 29691
864-638-3133

April 1, 2008



Counsel for Applicant

COPY 2824

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON) Case No. 2006-CP-32-3221

FILED
2008 APR -1 A 9:23
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

Johnny O. Bennett,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

VERIFICATION

I, Johnny Bennett, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Johnny Bennett

SWORN to and subscribed before me this 24th day of March, 2008.

Myrna Lubker
Notary Public

My Commission Expires: 4/4/2017

2825

COPY

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	Case No. 2006-CP-32-3221
COUNTY OF LEXINGTON)	
Johnny O. Bennett,)	
)	
Applicant,)	
)	
v.)	SECOND AMENDED APPLICATION
)	FOR POST-CONVICTION RELIEF
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Respondent.)	
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5. The date upon which sentence was imposed and the terms of the sentence:

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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 Courts to which applicant appealed:
      (i) The South Carolina Supreme Court
      (ii) The South Carolina Supreme Court

FILED
2008 APR -8 PM 1:38
Beth A. Carrigg
Clerk of Court
Lexington, SC

(b) The result in each Court to which applicant appealed:
(i) Convictions affirmed; death sentence vacated
(ii) Death sentence affirmed

(c) The date of each result:
(i) Convictions affirmed and death sentence vacated on December 1, 1997
(ii) Death sentence affirmed on June 26, 2006

(d) Citations of any written opinion or orders entered pursuant to such results:
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call the black female correctional officers niggers, and they would take the inmate up on the floor where Mr. Bennett was and they would look at him and wink at him, give him a sign, and Mr. Bennett would straighten the inmate up. He would whoop up on the inmate, is what he was telling me." Tr. 1515.

6. In further direct to the above answer, the Solicitor again reiterated that white individuals would be assaulted by the defendant, "And this would happen to both black and white inmates." Tr. 1516.

7. The State introduced evidence that the defendant was having sex with Judie Hardee, a white woman and made sure the jury knew she was white with the following testimony: Q. There was one guard that loved Johnny Bennett and that was Judie Hardee, you remember her? A. The real big lady? Q. Judie Hardee, you remember her, the blonde-headed lady? A. She was a real big lady. Tr. 1979-80. In closing argument the Solicitor continued to remind the jury of this relationship. Tr. 2077, 2080.

10(b) *Applicant's right to an impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution were violated by the seating of a juror who held racist views.*

11(b) At least one juror who sat on the jury at applicant's resentencing trial harbored racist feelings towards applicant.

10(c) *Applicant was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law at the sentencing phase of his trial. Williams v. Taylor*, 592 U.S. 362 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984); *Jolly v. State*, 314 S.C. 17, 443 S.E.2d 566 (1994).

11(c) The facts supporting this claim are as follows:

1. Trial counsel failed to object to the trial court's instruction to the jurors that any mistakes he made would be corrected at the appropriate time. "Now, if I'm wrong there is a time and place for it to be corrected." Tr. 899. "You must accept as correct the laws as I give it to you. Now, if I'm wrong there is another time and place for it to be corrected." Tr. 2122.

2. Trial counsel failed to object to the testimony of Jody Gallman of the South Carolina Department of Probation, Parole and Pardon Services. The sole purpose of this witness' testimony was to establish that when applicant committed the crime for which he was being sentenced, he was on parole. This evidence, raising the specter of his being paroled again, was substantially more prejudicial than probative. Tr. 1105-1108.

3. Trial counsel brought to the jury's attention the fact that applicant was already on death row. Tr. 1604. Moreover, a defense witness while on direct examination, twice referenced "death row." Tr. 2048.

4. Trial counsel failed to object adequately to the trial court's instruction in response to the jury's question about the meaning of a life sentence. In response to a note asking whether life meant life without parole or with the possibility of parole the trial court stated the following: "Let me tell you that the only thing I'm allowed to comment on that – and you understand that there are all sorts of varieties in this thing and it's something that I can't get into with you directly. All I can do is basically give to you the charge that I gave you earlier." Tr. 2144-45.

5. Trial counsel failed to object to the use of both larceny and robbery as aggravating factors.

6. Trial counsel failed to object to the introduction of evidence regarding the prior crime involving an assault in the parking lot of a Pizza Hut restaurant on the basis that the admission of this evidence violated applicant's right to due process.

7. Trial counsel failed to object to prejudicial and improper statements by the prosecution during the opening statement and closing argument of the sentencing phase of applicant's trial. During the opening statement, the prosecution referred to applicant as "brutal monster size," (tr. 907); "big old brute, Johnny Bennett," (tr. 907); "But his disregard for a fellow human being, his disrespect for the law, his total disobedience and disrespect for good old human nature began way back, probably when he was born." (tr. 908); "And, folks, you know about 25 feet away from you in your presence is a murderer. I hope you never have to live through this after this week, being that close to a murderer." (tr. 909); "big old bear of a fellow, Johnny Bennett," (tr. 914); "big old bear of a fist," (tr. 915); "evil, mean, manipulative, malicious. That's what we're dealing with, folks. . . . you will find enough aggravation that will be spilling over this jury box. All we ask you is to return the punishment that fits the crime in this evil, manipulating, malicious murdering defendant." (tr. 915-16). During the closing argument the prosecutor stated that if "You give him life, the real Johnny will come back. You give him life and he'll come back out." (tr. 2079); "There ain't no joy in Happy Town. He turned it into gruesomeville. It's boo hill." (tr. 2071); argument that if not executed the applicant would be able to have sex with "the blonde lady." (tr. 2077); "if you [the jury] don't sign your name for Benton Smith his life would have been nothing." Tr. 2081. Trial counsel failed to object to the prosecutor's repeated reference to applicant using derogatory and racists terms: "mountain man," tr. 2056; "caveman," tr. 2062; "tiger," tr. 2066; "monster," tr. 2068; "King Kong," tr. 2079, "beast of burden." Tr. 2079.

8. Trial counsel failed to object to the trial court's instructions which tended to inform the jurors that they could only consider applicant's character in

the context of aggravating evidence rather than mitigating evidence. Tr. 2113.

9. Trial counsel raised the issue of the conditions of imprisonment by bringing to the jury's attention applicant's request for television knobs, the use of the microwave, and the use of the canteen. Tr. 1636-38.

10. Trial counsel failed to object to the judge's instruction (tr. 2116) and the Solicitor's argument that torture and kidnapping could occur after the victim's death. "These can be committed after he murdered Benton Smith." Tr. 2057.

11. Trial counsel failed to *voir dire* on potential racial prejudice during jury selection.

10(d) *Applicant was denied his right to the effective assistance of appellate counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law.*

11(d) The grounds for this claim are as follows:

1. Appellate counsel failed to raise on direct appeal the trial court's refusal to question potential jurors about their attitudes regarding race. *Turner v. Murray*, 476 U.S. 28 (1986).

2. Appellate counsel failed to argue on direct appeal that the admission of evidence of the prior assault in the Pizza Hut parking lot was error because this evidence was irrelevant.

3. Appellate counsel failed to argue on direct appeal that the admission of the evidence about a prior victim's dream of "black Indians" was error because this evidence was irrelevant.

4. Appellate counsel failed to raise on direct appeal the error of informing the jury that applicant was already on death row and the trial court's instruction on the issue which made it more clear that applicant had already been sentenced to death.

5. Appellate counsel failed to raise on direct appeal the pervasive injection of race throughout the trial despite trial counsels' objections.

6. Appellate counsel failed to raise on appeal the trial court's improper version of the "plain and ordinary meaning" instruction. Tr. 2146.

10(e) *Applicant seeks a finding of fact that his kidnapping conviction did not involve sexual misconduct requiring sex offender registration pursuant to S.C. Code §23-*

3-430. See Hazel v. State, __ S.E.2d __, 2008 WL 648513 (2008).

11(e) In 1998, §23-3-430 was amended to include an exception to the general rule that a kidnapping conviction automatically required sex offender registration. This exception applied if the state court made a finding that the kidnapping offense did not include a criminal sexual offense. §23-3-430(C)(15). Because applicant was convicted of kidnapping before this amendment, this exception was unavailable to him. The South Carolina Department of Corrections has prohibited applicant from visiting with young relatives because of the requirement that he register as a sex offender based on the 1995 kidnapping conviction.

12 & 13. Applicant appealed directly to the South Carolina Supreme Court. Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in state or federal court.

14. None of the grounds set forth in (10) has been previously presented to this or any other Court, State or Federal.

15. Not Applicable.

16. These grounds rely on additional facts outside the record which was before the previous courts.

17. Applicant was previously represented by counsel.

18. Applicant was represented at trial by Wayne Floyd, PO Box 3972, West Columbia, SC 29171 and by Hervery Young, 201 B.W. Butler Road, #159, Mauldin, SC 29664. On direct appeal applicant was represented by Joseph L. Savitz, III of the South Carolina Office of Appellate Defense, 1122 Lady Street, Columbia, South Carolina 29201.

19. Applicant seeks relief from his convictions and sentences.

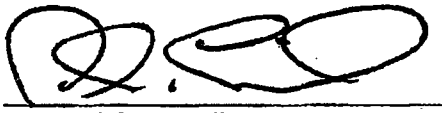
20. Applicant is not under sentence from any other court.

Respectfully submitted,

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April 4, 2008



Counsel for Applicant

2831

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS Case No. 2006-CP-32-3221
Johnny O. Bennett, Applicant, v. STATE OF SOUTH CAROLINA, Respondent.	)	VERIFICATION

I, Johnny Bennett, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Johnny Bennett

SWORN to and subscribed before me this 24th day of March, 2008.

Myra Lubker

Notary Public

My Commission Expires: 4/4/2017

Filed
2008 APR -8 PM 1:38
Beth A. Carrigg
Clerk of Court
Lexington, SC

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS
Johnny O. Bennett, #5023, Applicant,	)	C. A. No. 06-CP-32-3221
v.	)	RETURN TO SECOND AMENDED APPLICATION FOR POST-CONVICTION RELIEF
State of South Carolina, Respondent.	)	

Respondent hereby makes Return to the Second Amended Application for Post-Conviction Relief (PCR) dated April 4, 2008. Respondent would show this Court that:

I. PROCEDURAL HISTORY

Applicant is under a death sentence for the November 1990 murder, kidnapping, armed robbery and grand larceny of Benton Smith. The Lexington County Grand Jury originally indicted him at the March 1991 term of court. However, the State *nolle prossed* that indictment because of certain errors contained in it; and he was re-indicted at the September 1993 term of court for murder, kidnapping, armed robbery and grand larceny (93-GS-32-2354). The State served its Notice of Intent to Seek the Death Penalty and Notice of Evidence in Aggravation in March 1993.

On October 9-18, 1995, Applicant received a jury trial before the Honorable Ralph King Anderson, Jr. The jury convicted him on all charges and ultimately imposed the death penalty following a separate sentencing proceeding. A timely Notice of Appeal was served and filed.

Chief Attorney Daniel T. Stacey, of the South Carolina Office of Appellate Defense represented Applicant in his first appeal. Senior Assistant Attorney General William Edgar

Salter, III, represented the State. On August 4, 1997, Applicant filed his Final Brief of Appellant, in which he raised twelve issues:

1. Whether the court erred when it qualified juror Roy Roper, because his voir dire questions indicated that he would go with the jury rather than stand up and not give appellant the death penalty in violation of the Sixth Amendment right to a fair and impartial jury, the Eight[h] Amendment right against cruel and unusual punishment, [and] the Fourteenth Amendment right to due process of law?

2. Whether the court erred when it permitted a situation wherein defense counsel was advised by the victim's father, Mr. Smith, that the Solicitor had told him not to talk to defense counsel, resulting in a due process deprivation and hindering counsel's Sixth Amendment obligation to prepare properly for trial, where Mr. Smith was a key witness both at the guilt and the sentencing phases of the trial?

3. Whether the court erred when it permitted evidence that appellant was having another person sell drugs, improperly putting his character in evidence?

4. Whether the court erred when it instructed the jury, with respect to a potential verdict of armed robbery, that it could consider a hand or fist as a deadly object or weapon? This improperly stated the statutory requirement of some deadly weapon other than the human body. This violated the Fifth and Sixth Amendment right to have the jury properly charged on every element of the offense.

5. Whether the court erred and denied due process of law, when it did not direct a verdict on the kidnapping conviction and aggravating circumstance, because the state did not prove corpus delicti aliunde the extra-judicial statement of appellant?

6. Whether the court erred when it submitted the torture aggravating circumstance to the jury, because the evidence failed to support such a finding beyond a reasonable doubt?

7. Whether the admission of invalid aggravating circumstances was harmless error under Chapman v. California.

8. Whether the trial court erred when it admitted over objection at the penalty phase gruesome color photographs at the scene and at the

autopsy, because they showed damage not inflicted by appellant, and their probative value was outweighed by their prejudicial and emotional effect?

9. Whether the Court erred when it denied appellant the ability to make a religious point in his sentencing argument to the jury, depriving him of his right to be fully heard and to make an argument under the death penalty statute?

10. Whether the court erred and violated both the Eighth Amendment and the Fourteenth Amendment to the United States Constitution when it refused appellant's request to charge the jury that, should it find a life sentence without the existence of statutory aggravating circumstances, the defendant would have to serve a minimum of thirty years without parole?

11. Whether the court erred and denied the Sixth Amendment right to impeach and confront witnesses when it prevented defense access to potential impeachment or Brady material involving appellant's misconduct in jail?

12. Whether the court erred when it denied appellant's motion for a continuance upon the state's production of a potentially exculpatory "911" tape less than one week before the trial, where the state had possession of this tape for five years?

1997 Final Brief of Appellant at pp. vi-viii.

Respondent also filed the Final Brief of Respondent on August 4, 1997. Oral arguments were heard on October 7, 1997. The South Carolina Supreme Court affirmed Applicant's convictions, but reversed his death sentence and ordered a new sentencing trial in a published Opinion. *State v. Bennett,* 328 SC 251, 493 S.E.2d 845 (1997) (*Bennett I*).

Following motions hearings on June 30, 2000, Applicant received a new sentencing proceeding before the Honorable Marc H. Westbrook and a jury on July 10 -16. The jury found the statutory aggravating circumstances that the murder was committed while in commission of a

robbery while armed with a deadly weapon; that the murder was committed while in the commission of larceny while armed with a deadly weapon; that the murder was committed while in the commission of kidnapping; and that the murder was committed while in the commission of physical torture. S.C. Code Ann. §16-3-20(C)(a)(1)(b), (d), (e) & (h) (Supp. 2005). The jury recommended the death penalty and Judge Westbrook sentenced Applicant to death for murder. Although the sentence for kidnapping was subsumed by the murder conviction, Judge Westbrook imposed concurrent sentences for armed robbery and five years for grand larceny of a motor vehicle. **R.[1] pp. 2148-49; 2157-58.** Wayne Floyd and Hervery B.O. Young represented Applicant at trial. Eleventh Circuit Solicitor Donald V. Myers, as well as Deputy Solicitor Dayton Riddle and Assistant Solicitor Shawn Graham prosecuted the case.

A timely Notice of Appeal was served and filed. Assistant Appellate Defenders Robert M. Dudek and Aileen P. Clare represented Applicant before the South Carolina Supreme Court. On January 30, 2006, Applicant filed a Final Brief of Appellant, in which he presented six issues:

1. Whether the court erred by allowing the mothers of the 1988 Pizza Hut assault victims, Ms. Brady and Ms. McGough, to testify about the extent of their son's injuries and their effects since this constituted impermissible victim impact evidence that did not pertain to the crime for which appellant was on trial?

2. Whether the court erred by admitting photographs of the 1988 Pizza Hut incident victims, Shannon Gilbert and Aaron McGough, since the photographs were irrelevant, and they went beyond the permissible testimony about the fact of the crime itself, and they were intended to inflame the passions of the jury?

3. Whether the court erred by allowing Shannon Gilbert, a victim of the 1988 Pizza Hut assault, to testify that he had dreams as a result of the incident win which Indians, that he thought were black, attempted to kill him, since this evidence was irrelevant and highly prejudicial?

[1]The citations to the Record in this document reference the Record on Appeal from the second appeal.

4. Whether the court erred by refusing to declare a mistrial where the solicitor asked inmate Byron Collins whether he remembered prison guard Judy Hardee, "the blond-haired lady," since the solicitor was impermissibly injecting race into the case before an all white jury by assuring that the jury understood appellant was having a continuous interracial sexual relationship with Hardee, a white prison guard?

5. Whether the court erred by refusing to grant a new trial where the solicitor in his closing argument compared appellant to King-Kong and a Caveman since the court erroneously ruled these were not impermissible and objectionable racial stereotypes that this Court ruled in Toyota of Florence, Inc. v. Lynch were unacceptable in the courts of this state?

6. Whether the court erred by refusing to allow defense counsel to ask the same "would you just vote with the majority" series of questions that resulted in the reversal of appellant's initial death sentence, since this was legitimate and valuable defense *voir dire*?

2006 Final Brief of Appellant at pp. 1-2.

Respondent filed the Final Brief of Respondent on January 10, 2006. Applicant also Filed a Final Reply Brief of Appellant on January 30, 2006. On March 20, 2006, Applicant - through Mr. Dudek - filed a Petition To Argue Against Or Modify The Precedent Of *State v. Hill*, which the Court granted in a March 22, 2006 Order.

Following oral arguments, the Court affirmed Applicant's death sentence in a published Opinion filed on June 26, 2006. *State v. Bennett*, 369 S.C. 219, 632 S.E.2d 281 (2006). The Court also conducted the proportionality review required by S.C. Code Ann. § 16-3-25 (2003) and concluded that

> the sentence in this case was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of similar prior cases illustrates that imposing the death sentence in this case would be neither excessive nor disproportionate in light of the crime and the defendant. *See State v. Huggins*, 336 S.C. 200, 205, 519 S.E.2d 574, 577 (1999) (holding that the death penalty was warranted where defendant robbed and shot the victim); *State v. Hicks*, 330 S.C. 207, 219, 499 S.E.2d 209, 216 (1998) (holding that the death

> penalty was proper where the defendant robbed the victim and stabbed him numerous times in the neck, chest, and abdomen); and *State v. Byram*, 326 S.C. 107, 120, 485 S.E.2d 360, 367 (1997) (holding that death sentence was proper where the defendant entered the victim's home, stabbed her to death, and stole the victim's handbag and automobile).

369 S.C. at ___, 632 S.E.2d at 289. Justice Pleicones dissented in a separate Opinion. *Id* at ___, 632 S.E.2d at 289-91 (Pleicones, J., dissenting).

Applicant then filed a Petition for Stay of Execution, pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), so that he could file a Petition for Writ of Certiorari in the United States Supreme Court. Respondent filed a July 11, 2006 letter in Return to the Petition for Stay. The Remittitur was sent to the Lexington County Clerk of Court on July 12, 2006; and the South Carolina Supreme Court granted a stay of execution in an Order filed on July 20, 2006.

Applicant filed a Petition for Writ of Certiorari on September 22, 2006 (Docket No. 06-6780), in which he raised the following issues:

1. Whether the South Carolina Supreme Court erred by holding that the testimony of the victim of a prior unrelated aggravated assault and battery committed by Petitioner that he had dreams about black Indians chasing him as a result of the prior unrelated assault that was not impermissible victim impact evidence under Payne v. Tennessee, 501 U.S. 808 (1991), since it did not involve the capital murder for which Petitioner was on trial, and it was emotional victim impact trauma evidence?

2. Whether the South Carolina Supreme Court erred by holding that the testimony of the two mothers of a prior unrelated aggravated assault and battery committed by Petitioner was not impermissible victim impact evidence under Payne v. Tennessee, 501 U.S. 808 (1991), where the mother's testimony covered negative changes in personality, troubles their sons have had since the assault, and the time spent in the hospital and rehabilitation centers since this testimony did not involve the capital murder for which Petitioner was on trial, and it was emotional victim impact trauma evidence?

3. Whether the South Carolina Supreme Court erred by holding that photographs of the two victims of a prior unrelated aggravated assault and battery committed by Petitioner lying in their hospital beds was not impermissible victim impact evidence under Payne v. Tennessee, 501 U.S. 808 (1991), since the emotional photographs did not involve the capital murder for which Petitioner was on trial, and they constituted emotional victim impact trauma evidence?

4. Whether the South Carolina Supreme Court erred by holding the prosecutor did not impermissibly inject race into the case before an all-white jury by deliberately eliciting the irrelevant fact that the prison guard Petitioner had a sexual relationship with was a white woman, since this denied Petitioner his right to a fair trial, and due process?

5. Whether the South Carolina Supreme Court erred by holding the prosecutor did not impermissibly inject race into the case before an all-white jury by comparing Petitioner to a King Kong and a Caveman during his closing argument, since this denied Petitioner his right to a fair trial, and it also introduced an arbitrary factor into the case in derogation of the Eighth Amendment by encouraging a death sentence based on the government's appeal to racial stereotypes and prejudice?

6. Whether the South Carolina Supreme Court erred by holding that it was now permissible to prevent Petitioner from asking potential jurors during *voir dire* whether they would simply "vote with the majority," or whether they would attempt to be independent, since [this] violated Petitioner's Due Process right under Morgan v. Illinois, 504 U.S. 719 (1992) to ensure an impartial jury was qualified in this capital case since general questions about fairness were not sufficient to detect whether the juror would simply vote with the majority or whether the juror was biased?

Petition for Writ of Certiorari at pp. 1-2. Assistant Appellate Defenders Robert M. Dudek and Aileen P. Clare represented Applicant in the United States Supreme Court.

Respondent filed a Brief in Opposition on October 27, 2006. The United States Supreme Court denied certiorari on November 27, 2006. *Bennett v. South Carolina*, 127 S.Ct. 681 (2006).

On October 19, 2006, Respondent made a Return to the Application filed on September 7, 2006.

On April 1, 2008, Applicant filed his First Amended Application for Post-Conviction Relief, in which he raised the following grounds for relief:

> 10 (a). *Applicant was denied due process under the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law by the repeated and prejudicial injection of race throughout the trial. Furthermore, these comments resulted in a decision that was based on passion, prejudice or caprice.*
>
> 11(a). *These include the following injections of race by the Solicitor:*
>
> 1. "You give him life, the real Johnny will come back. You give him and he'll come back out. Meeting him again will be like meeting King Kong on a bad day." Tr. 2079. The Solicitor subsequently explained the use of the term King Kong "wasn't an a [sic] ***purely*** racial statement." Tr. 2179 (emphasis added).
>
> 2. "That's Johnny Bennet for you, folks. That's what he thinks about another person, another human being. There ain't no joy in Happy Town. He turned it into gruesomeville. It's ***boot hill***. Tr. 2071 (emphasis added).
>
> 3. The State introduced copious testimony concerning the defendant's assault on two white teenagers. During the testimony, the victim, Shannon Gilbert, was allowed to testify about a recurring dream he had in which "black indians" were chasing him and trying to kill him. Tr. 1027-28.
>
> 4. Testimony about the defendant's conduct in prison elicited the following statement from Sandra Key: "a group of black inmates and white inmates had been fighting" Tr. 1077. The witness continued after objection, "Well, he don't want me to say white, but the particular inmate that had the bruise was white." Tr. 1079.
>
> 5. Testimony of James Earl Harris: "He was-he [Bennett] told me that if an individual came in the jail, and depending on their demeanor or if it's a black female correctional officer and if it was a white inmate coming in, they would call the black female correctional officers niggers, and they would take the inmate up on the floor where Mr. Bennett was and they would look at him and wink at him, give him a sign, and Mr. Bennett would straighten the

inmate up. He would whoop up on the inmate, is what he was telling me." Tr. 1515.

6. In further direct to the above answer, the Solicitor again reiterated that white individuals would be assaulted by the defendant, "And this would happen to both black and white inmates." Tr. 1516.

7. The State introduced evidence that the defendant was having sex with Judie Hardee, a white woman and made sure the jury knew she was white with the following testimony: Q. There was one guard that loved Johnny Bennett and that was Judie Hardee, you remember her? A. The real big lady? Q. Judie Hardee, you remember her, the blonde-headed lady? A. She was a real big lady. Tr. 1979-80. In closing argument the Solicitor continued to remind the jury of this relationship. Tr. 2077, 2080.

10(b). *Applicant's right to an impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution were violated by the seating of a juror who held racist views.*

11(b). At least one juror who sat on the jury at the applicant's resentencing trial harbored racist feelings towards applicant.

10(c). *Applicant was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law at the sentencing phase of his trial. Williams v. Taylor,* 592 U.S. 362 (2000); *Strickland v. Washington,* 466 U.S. 668 (1984); *Jolly v. State,* 314 S.C. 17, 443 S.E.2d 566 (1994).

11(c)The facts supporting this claim are as follows:

1. Trial counsel failed to object to the trial court's instruction to the jurors that any mistakes he made would be corrected at the appropriate time. "Now, if I'm wrong there is a time and place for it to be corrected." Tr. 899. "You must accept as correct the laws as I give it to you. Now, if I'm wrong there is another time and place for it to be corrected." Tr. 2122.

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specter of his being paroled again, was substantially more prejudicial than probative. Tr. 1105-1108.

3. Trial counsel brought to the jury's attention the fact that applicant was already on death row. Tr. 1604. Moreover, a defense witness while on direct examination, twice referenced "death row." Tr. 2048.

4. Trial counsel failed to object adequately to the trial court's instruction in response to the jury's question about the meaning of a life sentence. In response to a note asking whether life meant life without parole or with the possibility of parole the trial court stated the following: "Let me tell you that the only thing I'm allowed to comment on that - and you understand that there are all sorts of varieties in this thing and it's something that I can't get into with you directly. All I can do is basically give to you the charge that I gave you earlier." Tr. 2144-45.

5. Trial counsel failed to object to the use of both larceny and robbery as aggravating factors.

6. Trial counsel failed to investigate, develop and present evidence that applicant was abused as a child.

7. Trial counsel failed to object to the introduction of evidence regarding the prior crime involving an assault in the parking lot of a Pizza Hut restaurant on the basis that the admission of this evidence violated applicant's right to due process.

8. Trial counsel failed to object to prejudicial and improper statements by the prosecution during the opening statement and closing argument of the sentencing phase of applicant's trial. During the opening statement, the prosecution referred to applicant as "brutal monster size," (tr. 907); "big old brute, Johnny Bennett," (tr. 907); "But his disregard for a fellow human being, his disrespect for the law, his total disobedience and disrespect for good old human nature began way back, probably when he was born." (tr. 908); "And, folks, you know about 25 feet away from you in your presence is a murder. I hope you never have to live through this after this week, being that close to a murderer." (tr. 909); "big old bear of a fellow, Johnny Bennett," (tr. 914); "big old bear of a fist," (tr. 915); "evil, mean, manipulative, malicious. That's what we're dealing with, folks.... you will find enough aggravation that will be spilling over this jury box. All we ask you is to return the punishment that fits the crime in this evil,

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5. Appellate counsel failed to raise on direct appeal the pervasive injection of race throughout the trial despite trial counsels' objections.

6. Appellate counsel failed to raise on appeal the trial court's improper version of the "plain and ordinary meaning" instruction. Tr. 2146.

10(e). *Applicant seeks a finding of fact that his kidnapping conviction did not involve sexual misconduct requiring sex offender registration pursuant to S.C. Code §23-3-430. See Hazel v. State,* ___S.E.2d___,2008 WL 648513 (2008).

11(e). In 1998, §23-3-430 was amended to include an exception to the general rule that a kidnapping conviction automatically required sex offender registration. This exception applied if the state court made a finding that the kidnapping offense did not include a criminal sexual offense. §23-3-430(C)(15). Because applicant was convicted of kidnapping before this amendment, this exception was unavailable to him. The South Carolina Department of Corrections has prohibited applicant from visiting with young relatives because of the requirement that he register as a sex offender based on the 1995 kidnapping conviction.

He thereafter filed his Second Amended Application for Post-Conviction Relief (PCR) dated April 4, 2008.

Respondent incorporates the following documents by reference and will provide the Court with a copy of these documents at the time of any hearing:

1. The Record on Appeal from the first appeal;

2. The Record on Appeal from the second appeal;

3. The August 4, 1997 Final Brief of Appellant;
4. The August 4, 1997 Final Brief of Respondent;

5. The Opinion of the state supreme court (Opinion No. 24718, filed December 1, 1997);

6. The January 30, 2006 Final Brief of Appellant;

7. The January 10, 2006 Final Brief of Respondent;

8. The January 30, 2006 Final Reply Brief of Appellant;

9. The March 20, 20006 Petition to Argue Against or Modify the Precedent of *State v. Hill*;

10. The March 22, 2006, Order of the state supreme court granting the Petition to Argue Against or Modify the Precedent of *State v. Hill*;

11. The Opinion of the state supreme court (Opinion No. 26174, filed June 26, 2006);

12. The July 7, 2006 Petition for Stay of Execution;

13. The July 11,2006 letter return to the Petition for Stay of Execution;

14. The Order of the state supreme court granting the Stay of Execution;

15. The July 12, 2006, Remittitur; and

16. The September 22, 2006, Petition for Writ Of Certiorari to the Supreme Court of the South Carolina.

Respondent will serve Applicant's and future PCR counsel with documents 1-16 as soon as possible after the filing of this Return and will file a certificate of service with the Lexington County Clerk of Court.

II. STATEMENT OF FACTS

The direct and circumstantial evidence presented in the guilt phase of Applicant's trial, viewed in the light most favorable to the State, reasonably tended to prove the following. In November 1990, twenty-four year old Benton Smith lived with his parents in the Happy Town area of Gaston, South Carolina.[2] Benton was the youngest of five children. He was a quiet person, who had always lived at home and had never stayed out late or caused his parents any problems. He was unemployed at the time and received an unemployment check each week in the mail. **R. pp. 1133-39; p. 1146-47; 1161-63; 1735-39; 1742-45; 1747.**

Benton was driving his mother's blue 1980 Toyota Corolla (**State's Ex. 14**) at the time of his murder. He never allowed other people to drive the car, and he was very possessive of the belongings that he kept in it,[3] including: personalized floor mats with his name on them (**State's Exs. 20-21**); 2 pillows with ducks on them (**State's Exs. 14-15**); 2 small wine glasses (**State's Exs. 17-18**); a pair of red "spy" glasses with lights on them (**State's Ex. 19**); a Polaroid camera (**State's Ex. 11**); a Bible; a walking cane with a gold duck head on it (**State's Ex. 23**);a pair of speakers; a radar detector; and a shaving kit in which he kept money. (**State's Ex. 22**). His brother-in-law, Melvin Harrison, testified that Benton had a "wad" of money in the kit and that Benton had planned to buy a car with it. **R. pp. 1136-48; 1162-63; 1735-40; 1742-43.**

Applicant also lived in the Happy Town community and was Benton's "friend." Benton received his unemployment check on Tuesday morning, November 27, 1990. Benton's father, Paul Smith, and his sister, Cynthia Harrison, testified that Applicant went with Benton when he left the house. Unfortunately, this was the last time any of Benton's family members saw him alive. **R. pp. 1146-48; 1165-66;1742-43; 1746-48.**

[2]This is in Lexington County.

[3]He also did not allow anyone to smoke in it and had a "No Smoking" sign in the car.

At 11:56 a.m. on Tuesday, Benton cashed his $147.00 unemployment check at the Republic National Bank located on Highway 6, in Swansea. Pamela Herlong, the drive-in teller who handled the transaction, testified that Benton was accompanied by someone. She could not remember who was with him. However, a reasonable inference from Applicant's taped statement to authorities (**State's Ex. 35**), and testimony that Mr. Smith and Mrs. Harrison saw Applicant leave the house with Benton, is that Applicant was this other person. **R. pp. 1168-88.**

Benton' family became concerned when he did not return home Tuesday night and immediately began looking for him. They also called the Lexington County Sheriff's Department and reported him missing. Deputy Mark Jones began searching for Benton on Wednesday. He found Benton's blue Corolla parked behind Swansea High School between 10:30 and 11:00 p.m. on Wednesday. It was near the cafeteria area of the school. Applicant's mother worked in the cafeteria of Swansea Middle School **R. pp. 1118-20; 1122-28.**

The windows were rolled up and the car was locked. The only unusual thing Deputy Jones noticed in the car were some chicken boxes. Deputy Jones later had Benton's father confirm that the car was his son's. Mr. Smith did not have a key to the car. Deputy Jones allowed him to take it home but instructed him not to open it until advised by law enforcement. Mr. Smith thereafter took the car home and did not open it. Melvin Harrison testified that none of Benton's belongings were in the car when it was retrieved by the family. **R. 1118-20; 1122-28; 1131; 1148-51; 1737-38.** In late 1990, sisters Bonita and Pamela Gonsalves lived in Orangeburg. Bonita dated Applicant. Applicant often got a ride from someone or drove a friend's car to Orangeburg to see her. Neither woman had ever met Benton Smith, and Applicant

had never driven Benton's car there before Tuesday, November 27, 1990. **R. pp. 1190-92; 1216-20.**

Between 5:00 and 5:30 Tuesday afternoon, however, Applicant came to Pamela's apartment looking for Bonita. He was alone and was driving Benton's blue Toyota. Pamela testified that she saw a "No Smoking" sign that family members testified Benton kept in his car, the personalized floor mats, the two pillows with ducks on them and stereo speakers. When she asked Applicant who owned the car, he would not tell her. Eventually, he took Pamela to her sister's apartment and she stayed there for awhile. Both women testified that Applicant had a bandage on his right eyebrow and a bandage around his left hand. When asked how he received these injuries, he told the women that he received them in a fight with his brother, Gucci. **R. pp. 1193-97; 1209-10; 1222-25; 1227; 1246-47.**

Applicant told Pamela that he was going to make telephone call and left. She got tired of waiting for him to return and also left. **R. pp. 1196-97.** Applicant returned to Bonita's residence sometime later and took Bonita to a pay phone, so that she could call her mother. While in the car, she also saw the "No Smoking" sign and the personalized floor mats. Applicant and Bonita had previously argued about money,[4] and Applicant left her Tuesday night because of another argument over money. **R. pp. 1220-22; 1224-27; 1246-47.**

Applicant, again, showed up at Pamela's apartment in Benton's car on Wednesday morning. As they were painting the apartment, Applicant took off his shirt and she saw scratches on his chest, which he said he got in a fight with his brother. Later that day, Applicant and Bonita returned to her residence in Benton's car. In the trunk of the car, Pamela saw two shot

[4]Bonita wanted to visit her mother for Thanksgiving, but could not afford to do so. Applicant had promised to get her the money but did not.

glasses. Also, the speakers were missing; and Bonita got Benton's cane out of he back seat.[5] Applicant tried to sell a radar detector to Pamela, but Bonita took it and gave it to her. **R. pp. 1197-1203; 1210-11.**

Bonita testified that Applicant returned to her house on Wednesday. He took both her and her daughter to a shopping mall in the blue car, where he bought her daughter a doll and a fur coat. While they were in Orangeburg, he went to South Carolina State University and visited a friend who was on the basketball team. They later went to Pamela's house and he helped her paint. At that time, she saw the scratch marks on Applicant's chest. She testified that she gave her sister a radar detector that Applicant had given to her. Applicant also gave Bonita the 2 pillows with ducks on them (**State's Exs. 15 and 16**), the Polaroid camera (**State's Ex. 11**), and 2 wine glasses. Further, she saw the victim's cane (**State's Ex. 23**) that had been in the trunk and which was not broken. Finally, he gave her the shaving kit (**State's Ex. 22**). **R. pp. 1227-34.**

Jackie Robinson testified that he is originally from Swansea. He had been life-long friends with Applicant,[6] and he was a cousin and friend of Benton. He was attending South Carolina State in November 1990. Applicant came to the school one day, accompanied by a woman. They were in a small blue car. Robinson rode with them briefly and Applicant tried to sell Benton's Polaroid camera to him. When asked where he had gotten the camera, Applicant replied, "you don't need to know all of that." In the car, Robinson also saw Benton's unbroken cane. Applicant left after roughly 25 or 30 minutes. On Thursday or Friday, Robinson learned that Benton and Benton's car were missing. Because he knew that the car Applicant had been

[5]The cane was not broken at that time.

[6]Robinson testified that Applicant was approximately 6'5" or 6'6" tall and weighed roughly 300 pounds. **R. p. 1266.**

driving on Wednesday was Benton's, he went to law enforcement and told them what he knew. **R. pp. 1259-66.**

Based upon Mr. Smith's own investigation, he and Melvin Harrison went to Orangeburg very early Thursday morning, and he spoke with Pamela Gonsalves. Although she did not know Benton, she identified his car and some of Benton's possessions from the description Mr. Smith had given. She also told him what had happened the past two days. Mr. Smith then spoke with Bonita, and she gave him Benton's pillows. **R. pp. 1151-53; 1204-06; 1235-42; 1244; 1738-39.**

When Bonita saw Applicant later Thursday morning, she asked him why Mr. Smith had come to her house looking for Benton. He told her not to worry. He also assured her that the victim was okay and was in Swansea. Although he claimed Benton had allowed him to use the car, he became upset when asked about it. He asked her to go somewhere with him but she refused because "[s]omething just didn't feel right." Bonita later gave the shot glasses, the camera and the shaving kit to officers from the Lexington County Sheriff's Department **R. pp. 1204-06; 1235-42; 1244.**

After they came back from Orangeburg on Thursday, Mr. Smith and Mr. Harrison went to Stillinger's Gas Station, in Swansea. There, they saw Applicant, who was carrying Benton's cane. By then, part of the cane was missing. When Mr. Smith asked him where Benton was, Applicant said, "I don't know where he is and I don't give a damn where he is."[7] **R. pp. 1155-56; 1524-1528 1739.**

Det. Frederick R. Hamer, of the Lexington County Sheriff's Department, first became actively involved in this case on Thursday, November 29. He met with Mr. Smith and other

[7]Mr. Harrison testified that Applicant said, "I haven't seen him and, frankly I don't give a damn where he is."

family members. Hamer also acquired a bench warrant that had been issued for Applicant's arrest based upon Applicant's failure to appear in court on charges that he had stolen gasoline from Stillinger's Gas Station, for which he had been convicted and sentenced to thirty days or payment of a $237.00 fine. **(See State's Ex. 28).**[8] **R. pp. 1269-77.**

Det. Hamer located Applicant at his home on Jasper Sutton Road on Friday, November 30 and arrested him. He thereafter took Applicant to the Lexington County Sheriff's Department. After being advised of and waiving his *Miranda*[9] rights, Applicant agreed to discuss Benton's disappearance. **R. pp. 1269-77.**

On this occasion, Applicant admitted that he met Benton at the Smiths' Happy Town residence on Tuesday morning. They left somewhere around 11:00 or 11:30 a.m. and went to the bank in Swansea. Afterwards, they went job hunting in Columbia and West Columbia. They also stopped and ate. Then, they went to see some girls in Orangeburg and came back later that evening. Benton dropped Applicant off under a tree near Stillinger's and said that he was going back to Swansea. Applicant allegedly did not know what happened to Benton and suggested that he might have gone somewhere with the girls from Orangeburg. He also agreed to help get information regarding Benton's whereabouts. **R. pp. 1278-80.**

On Saturday, December 1, Det. Hamer and Det. Charlie Jones spoke with Applicant after he bonded out of jail on the Stillinger charges. Det. Hamer again advised Applicant of his *Miranda* rights. Applicant again waived his rights and spoke to the officers. On this occasion, he claimed that, instead of going straight to Orangeburg, he and Benton had gone back to

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[8]Mr. Thomas Stillinger, the owner of the business, testified that he saw Applicant steal gas on October 23, 1990. **R. pp. 1109-14.**

[9]*See Miranda v. Arizona*, 384 U.S. 436 (1966).

Swansea after job hunting in Columbia. They then went to Orangeburg and met with the young ladies that Benton had met. When they returned to Swansea, Benton dropped Applicant off under the tree near Stillinger's. Applicant again promised to help the officers further. **R. pp. 1282-84.**

Later that evening, Det. Hamer received a radio transmission that Applicant wished to speak with him. Therefore, he and Det. Jones went to Applicant's residence around 8:30 or 9:00 p.m. After Det. Hamer made sure that he still understood his *Miranda* rights, Applicant agreed to talk to the him. Applicant told the officers he would help them locate some people who may possibly know Benton's whereabouts: Isadore Mack, Tommy Ferlick and Andre Haskins. He said these people were "laying low" and "hiding out" at Theodore Reed's club because of a recent drug sweep in the area. So, the officers took him there. **R. pp. 1286-88; 1343-44.**

They found Mack at the nightclub. The officers spoke to Mack after they got him outside.[10] Det. Hamer then told Applicant that Mack had not provided him with any information. Det. Hamer also told Applicant that the officers knew Benton was dead and explained they needed to find him because his family deserved to know and "put some things to rest." Applicant said, "... I know them pretty well, I know the way they think. ... Drive, let's go." **R. pp. 1288-90; 1343-46.**

He immediately directed the officers back to his sister's trailer in the Happy Town community. They arrived between 11:00 or 11:30 p.m. They got out of the car and followed Applicant into some woods just beyond a firebreak near his sister's trailer. Soon, they found

[10]Det. Jones' investigative report reflects that Applicant went inside and had a private conversation with Mack. After this conversation, Applicant said the three men had robbed Benton and placed the body in a wooded area off Happy Town Rd. **R. p. 1346.**

Benton's body buried underneath some limbs, leaves and other debris. His body was only thirty or forty yard away from the trailer. (*See* **State's Ex. 19). R. pp. 1290-1300; 1348-50.**

Applicant acted as if he was going to be ill when he saw the body. Before they left, Det. Hamer showed Applicant's sister and brother-in-law where they had found the victim's body. She fainted when she saw what the officers had found. By the time law enforcement had secured the area, it was Sunday morning, December 2. **R. pp. 1290-1300; 1348-50.**

Based on information Applicant had provided to them, the officers located and arrested Haskins on an outstanding narcotics warrant.[11] They later took both Haskins and Applicant back to the Lexington County Jail. After the officers obtained statements from Mack, Furtick and Haskins, they spoke with Applicant around 4:00 a.m. **R. pp. 1300-05 1350-53.**

Once again, Applicant was advised of and waived his *Miranda* rights before making the statement. *See* **State's Ex. 31.** In his taped statement (**State's Ex. 32**), he gave a different account concerning his activities on the previous Tuesday and Wednesday. He suggested that Mack, Haskins and Furtick were involved in the murder, and that they had taken Benton from Stillinger's around 6:55 p.m. He said that Benton and Haskins had made a "big score" and each had about $1,000.00. He also claimed that the camera he had given to Bonita was his; and he denied going to Orangeburg on Tuesday night. Yet, he somehow got Benton's car and parked it at an old baseball field on Happy Town Rd. Officers arrested him immediately after he gave this statement. **R. pp. 1305-12; 1354-55.** On the afternoon of December 2, Benton's car and its contents were processed for latent fingerprints. Two latent lifts from the rear view mirror

[11]He was claiming that Mack, Haskins and Furtick were responsible for what occurred to Benton.

matched Applicant's left thumb. Two more prints taken from a Kentucky Fried Chicken box found in the car matched his right middle finger. **R. pp. 1313-14; 1452-56.**

In 1990, James Hickman was an Investigator and Identification Officer for the Lexington County Sheriff's Department. He and SLED Agent John Christy went to the crime scene early on December 2, 1990, and processed the scene. The prosecution published to the jury the photographs that they took of the grave, as officers found it and before any debris had been removed (**St.'s Exs. 40-41**), and photographs as the debris was removed (**State's Exs. 42; 72-74**). **R. pp. 1440-51; 1666-71.**

Initially, the only parts of Benton's body that were visible were one white tennis shoe and Benton's left arm, which had been damaged by animals. After the debris was removed, they saw that there was a tree between Benton's legs. When Inv. Hickman returned on December 5, he used a metal detector and found a wooden handled screwdriver (**State's Ex. 51**) near where Benton's waist had been laying. **R. pp. 1440-51; 1462-64; 1666-71.**

On Monday, December 3, Det.s Hamer and Jones went to Swansea and to Orangeburg, in an effort to verify the information that Applicant had given them. They spoke with Bonita Gonsalves, who also gave them the wine glasses, the Polaroid camera and the black shaving kit. They also spoke with Tommy Furtick. Later, they returned to the Sheriff's Department and spoke with Applicant. **R. pp. 1312-15.**

After he waived his *Miranda* rights, yet again, Applicant spoke to them. Again, he began blaming Mack, Haskins and Furtick. Det. Hamer, however, immediately stopped Applicant and said he knew Applicant was lying. Applicant sat silently for several minutes. Then, he wrote a

one sentence, signed statement in which he said, "I, Johnny Bennett need help!" **(State's Ex. 33). R. pp. 1315-1319; 1355-57.**[12]

He subsequently gave another taped statement **(State's Ex. 35)**. Before making the statement he *again* made both a written and verbal waiver of his *Miranda* rights. In this statement (a transcription of which was introduced as **State's Ex. 34**), he claimed he met Benton around 11:30 a.m. on Tuesday. First, they went to Republic National Bank, in Swansea; and Benton cashed his check. Afterwards, they went to Columbia and filled out job applications. As they were coming back through Swansea, Applicant told Benton he wanted to go to Orangeburg, and Benton allegedly agreed. So, Applicant drove to Bonita Gonsalves' apartment. However, he and Bonita got into a fight. So, he and Benton left Orangeburg and headed back towards Swansea. **State's Ex. 34, R. pp. 1321-23;1358; 1398-99.**

When Applicant was approximately seven miles from Swansea, he slammed on brakes. Benton asked if he was alright. Instead of replying, Applicant simply looked at him. So, Benton got out and walked to the driver's side. He again asked if Applicant was alright. This time, however, he touched Applicant. Applicant jumped out of the car and struck Benton in the jaw. This blow knocked Benton unconscious. Applicant picked up Benton and put him on the passenger's side of the car. After driving back to Swansea, Applicant drove to the old ball field in Happy Town and parked. He then got out of the car and sat on the hood. **(State's Ex. 34, R. pp. 1360-62; 1399; 1405).**

Roughly fifteen minutes later, Benton regained consciousness. According to Applicant, Benton got out of the car and started "chop-popping," or running his mouth:

[12]This was signed at 7:40 p.m. on December 3, 1990.

> HAMER: And what did he say to you?
>
> BENNETT: I didn't um, he said ah, 'what happened? What did you do? Why [are] you doing this,' and all this and that ... So that time when he went ... to touch me again and I pushed him away and that's when he scratched me on the shoulder and that's when I snapped.

State's Ex. 34, R. pp. 1324; 1394-96; 1399-1400; 1405-07.

Applicant said he hit Benton again, and Benton fell to the ground. Applicant immediately reached in the car, grabbed a Phillips head screwdriver and repeatedly stabbed Benton.[13] He described the screwdriver as rusty, about 3" or 4" long, with a brown handle; and he told the officers it should still be at the crime scene. He also admitted he picked up Benton's wallet when it fell out of Benton's pocket. However, he allegedly threw it back on the ground without checking to see if there was any money in it. **State's Ex. 34.**

After stabbing Benton, he picked up Benton's body and put it in the trunk of the car. He then drove to his sister's house and left the body in the woods. Sometime later, he went by and visited a friend. When he left his friend's residence, he drove to Orangeburg and picked up Pamela Gonsalves. They then drove to Bonita's residence, and he took Bonita "to use the phone." On the way home, however, they had another fight.

Applicant eventually drove back to his sister's house (after returning to the old ball field) and stayed there from approximately 7:50 to 10:15 p.m. Wednesday morning, he drove Benton's car to Orangeburg. When he returned Wednesday night, he parked the car behind the Swansea high school and got into another car with Mack, Haskins and Furtick. He claimed he left the keys in the car. Finally, he told the officers he was willing to take the officers to help find the wallet. **R. pp. 1324-25; 1400-03; 1405-07; 1419-20; State's Ex. 34.**

[13]When asked how many times he stabbed Benton, Applicant replied, "I'd say around thirty times." **States Ex. 34.**

After the statement, he said that he knew that he would eventually kill someone because he had thought about killing a family member. **R. pp. 1324; 1364-65.**[14] Dets. Hamer Jones, and Hickman along with other officers, picked him up at the Lexington County Jail on December 5. Following his directions, they went to an open field on Lewis Rast Road, where they found Benton's eyeglasses and key case. They thereafter went to Orangeburg and searched a playground near Bonita Gonsalves' apartment, in an unsuccessful effort to find Benton's wallet.[15] **R. pp. 1324-28; 1420-21; 1426; 1456-61.**

As a result of a search initiated by phone calls from Applicant on December 10 and December 11[16] and with his assistance, officers located the victim's floor mats in an area off of Huckabee Mill Road, between Swansea and Orangeburg on December 12. Finally, Applicant again led the officers in an unsuccessful effort to find the victim's wallet. **R. pp. 1328-31; 1434-35; 1465-69.**

Dr. Joel S. Sexton, a forensic pathologist, performed an autopsy on Benton's body. Benton was approximately 5'8" tall and only weighed about 135 pounds. Dr. Sexton noted the presence of some postmortem animal destruction.[17] However, he found much more serious injuries that were inflicted before death. First, he found three abrasions on the bottom of Benton's chin: two were on the bottom left side and one was on the bottom right side of the chin. There was even some laceration on the left side. These wounds were premortem and had

[14]On December 4, Applicant received a copy of the transcribed statement. **R. p. 1323.**

[15]Before they left, Applicant was again advised of and waived his *Miranda* rights.

[16]Counsel represented Applicant at the time, and the officers reminded him of this. However, he waived his right to counsel and his other *Miranda* rights when advised.

[17]The victim's entire right hand had been destroyed by animals, as had part of the inside surface of his left upper arm and his nose.

bruising underneath them. There was also subarachnoid hemorrhaging on the surface of the brain associated with these wounds.[18] Also, Benton's jawbone was dislocated and easily movable. These findings indicated that these were very forceful injuries. **R. pp. 1676-81; 1688-97.**

The fact that three injuries were in the same area was consistent with the perpetrator hitting the victim repeatedly with a fist in this area but the injuries could have been caused by other objects hard enough to scrape the victim's skin on impact, such as the victim's head being repeatedly thrown against an object or the victim falling on his chin. The amount of subarachnoid hemorrhaging that Dr. Sexton found generally results in unconsciousness for some period of time and could possibly result in death. Also, they would cause a headache if the victim was conscious after the blow However, other injuries in this case would have caused a more rapid death. **R. pp. 1692-97; 1701-02.**

The most extensive injuries were caused by more than sixty-four individual stab wounds to the victim's head, neck, shoulders, upper chest and left hand. **R. pp. 1679-1681; pp. 1699-1722; State's Ex. 78.** Dr. Sexton found six defensive wounds on Benton's left hand and arm.[19] Although these wounds were superficial because they did not penetrate the hand, Dr. Sexton opined that (1) they were consistent with Benton using his arm and hand to protect himself from the other blows he received; (2) they would have been painful to a conscious person; and (3)

[18]The subarachnoid hemorrhaging on the surface of the brain is generally caused by a forceful impact on the jaw. **R. pp. 1694-95.**

[19]At least two wounds were on the back of the forearm, and two were on the back of the wrist. The fifth wound was on the back of his hand; and a sixth wound was on the front, upper palm of Benton's left hand, just below the thumb.

Benton was conscious during the period he was attempting to shield his head.[20] **R. pp. 1697-1701; 1721-22.**

The remaining wounds were primarily "on the back of the head, the left side of the head, the upper back, and the upper part of the chest, and the left shoulder. Only four of these wounds penetrated very deeply into the skin. Those wounds penetrated the lung and the vessels in the neck, and they caused internal bleeding in the chest cavity. Almost three pints of blood were in the chest. Most of the wounds in these locations had a cross-type pattern on the surface, which Dr. Sexton opined was consistent with the Phillips head screwdriver recovered at the scene. **R. pp. 1697-1722.**

Dr. Sexton counted multiple stab holes on the back of the head which penetrated through the scalp and in some cases created a cross type of imprint or depression in the skull. Many actually stuck into the skull approximately a 1/8", but did not penetrate it. Most of these wounds had star or cross markings. He found similar wounds on the left side of the head and down the left side of Benton's neck. These wounds tended to have a mark which trailed off at the edge. Dr. Sexton opined this was consistent with movement between the time the stab wound occurred and the object was pulled away. **R. pp. 1697-1722.**

A stab wound above the left ear actually penetrated the skull approximately 1". Even though this wound did not have much hemorrhaging associated with it and did not penetrate the brain, Dr. Sexton opined it could have rendered Benton unconscious. Based upon the presence of so many wounds that did not cause severe injury to the brain and the degree of force necessary to inflict the wounds, Dr. Sexton opined Benton's head did not move much during the time they

[20]He agreed with the statement that the parts of the body which have more precise movement contain more "pain receptors" than other parts of the body.

were inflicted. He further opined it would take a considerable amount of force for an object with a blunt tip, such as the Phillips head, to actually penetrate the skull. Also, the head was most probably against some surface at the time this blow was inflicted. Finally, Dr. Sexton gave detailed testimony concerning the force necessary for each of the wounds he found, the degree of pain the wounds would cause a conscious person and he opined that Benton was conscious for at least part of the attack based upon the defensive wounds and the fact all of the wounds were not in the same location. He listed the cause of death as internal bleeding or asphyxiation secondary to the stab wounds in the upper neck, chest and head. **R. pp. 1697-1722.**

III. ALLEGATIONS

Applicant raises the following grounds for relief in his Second Amended Application:

> 10 (a). *Applicant was denied due process under the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law by the repeated and prejudicial injection of race throughout the trial. Furthermore, these comments resulted in a decision that was based on passion, prejudice or caprice.*
>
> 11(a). *These include the following injections of race by the Solicitor:*
>
> 1. "You give him life, the real Johnny will come back. You give him and he'll come back out. Meeting him again will be like meeting King Kong on a bad day." Tr. 2079. The Solicitor subsequently explained the use of the term King Kong "wasn't an a [sic] ***purely*** racial statement." Tr. 2179 (emphasis added).
>
> 2. "That's Johnny Bennet for you, folks. That's what he thinks about another person, another human being. There ain't no joy in Happy Town. He turned it into gruesomeville. It's ***boot hill.*** Tr. 2071 (emphasis added).
>
> 3. The State introduced copious testimony concerning the defendant's assault on two white teenagers. During the testimony, the victim, Shannon Gilbert, was allowed to testify about a recurring dream he had in which "black indians" were chasing him and trying to kill him. Tr. 1027-28.

4. Testimony about the defendant's conduct in prison elicited the following statement from Sandra Key: "a group of black inmates and white inmates had been fighting" Tr. 1077. The witness continued after objection, "Well, he don't want me to say white, but the particular inmate that had the bruise was white." Tr. 1079.

5. Testimony of James Earl Harris: "He was-he [Bennett] told me that if an individual came in the jail, and depending on their demeanor or if it's a black female correctional officer and if it was a white inmate coming in, they would call the black female correctional officers niggers, and they would take the inmate up on the floor where Mr. Bennett was and they would look at him and wink at him, give him a sign, and Mr. Bennett would straighten the inmate up. He would whoop up on the inmate, is what he was telling me." Tr. 1515.

6. In further direct to the above answer, the Solicitor again reiterated that white individuals would be assaulted by the defendant, "And this would happen to both black and white inmates." Tr. 1516.

7. The State introduced evidence that the defendant was having sex with Judie Hardee, a white woman and made sure the jury knew she was white with the following testimony: Q. There was one guard that loved Johnny Bennett and that was Judie Hardee, you remember her? A. The real big lady? Q. Judie Hardee, you remember her, the blonde-headed lady? A. She was a real big lady. Tr. 1979-80. In closing argument the Solicitor continued to remind the jury of this relationship. Tr. 2077, 2080.

10(b). *Applicant's right to an impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution were violated by the seating of a juror who held racist views.*

11(b). At least one juror who sat on the jury at the applicant's resentencing trial harbored racist feelings towards applicant.

10(c). *Applicant was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law at the sentencing phase of his trial. Williams v. Taylor,* 592 U.S. 362 (2000); *Strickland v. Washington,* 466 U.S. 668 (1984); *Jolly v. State,* 314 S.C. 17, 443 S.E.2d 566 (1994).

11(c)The facts supporting this claim are as follows:

1. Trial counsel failed to object to the trial court's instruction to the jurors that any mistakes he made would be corrected at the appropriate time. "Now, if I'm wrong there is a time and place for it to be corrected." Tr. 899. "You must accept as correct the laws as I give it to you. Now, if I'm wrong there is another time and place for it to be corrected." Tr. 2122.

2. Trial counsel failed to object to the testimony of Jody Gallman of the South Carolina Department of Probation, Parole and Pardon Services. The sole purpose of this witness' testimony was to establish that when applicant committed the crime for which he was being sentenced, he was on parole. This evidence, raising the specter of his being paroled again, was substantially more prejudicial than probative. Tr. 1105-1108.

3. Trial counsel brought to the jury's attention the fact that applicant was already on death row. Tr. 1604. Moreover, a defense witness while on direct examination, twice referenced "death row." Tr. 2048.

4. Trial counsel failed to object adequately to the trial court's instruction in response to the jury's question about the meaning of a life sentence. In response to a note asking whether life meant life without parole or with the possibility of parole the trial court stated the following: "Let me tell you that the only thing I'm allowed to comment on that - and you understand that there are all sorts of varieties in this thing and it's something that I can't get into with you directly. All I can do is basically give to you the charge that I gave you earlier." Tr. 2144-45.

5. Trial counsel failed to object to the use of both larceny and robbery as aggravating factors.

6. Trial counsel failed to object to the introduction of evidence regarding the prior crime involving an assault in the parking lot of a Pizza Hut restaurant on the basis that the admission of this evidence violated applicant's right to due process.

7. Trial counsel failed to object to prejudicial and improper statements by the prosecution during the opening statement and closing argument of the sentencing phase of applicant's trial. During the opening statement, the prosecution referred to applicant as "brutal monster size," (tr. 907); "big old brute, Johnny Bennett," (tr. 907); "But his disregard for a fellow human being, his disrespect for the law, his total disobedience and disrespect for

good old human nature began way back, probably when he was born." (tr. 908); "And, folks, you know about 25 feet away from you in your presence is a murder. I hope you never have to live through this after this week, being that close to a murderer." (tr. 909); "big old bear of a fellow, Johnny Bennett," (tr. 914); "big old bear of a fist," (tr. 915); "evil, mean, manipulative, malicious. That's what we're dealing with, folks.... you will find enough aggravation that will be spilling over this jury box. All we ask you is to return the punishment that fits the crime in this evil, manipulating, malicious murdering defendant." (tr. 915-16). During the closing argument the prosecutor stated that if "You give life, the real Johnny will come back. You give him life and he'll come back out." (tr. 2079); "There ain't no joy in Happy Town. He turned it into gruesomeville. It's boo hill." (tr. 2071); argument that if not executed the applicant would be able to have sex with "the blonde lady." (tr. 2077); "if you [the jury] don't sign your name for Benton Smith his life would have been nothing." Tr. 2081. Trial counsel failed to object to the prosecutor's repeated reference to applicant using derogatory and racists terms: "mountain man," tr. 2056; "caveman," tr. 2062; "tiger," tr. 2066; "monster," tr. 2068; "King Kong," tr. 2079, "beast of burden." Tr. 2079.

8. Trial counsel failed to object to the trial court's instructions which tended to inform the jurors that they could only consider applicant's character in the context of aggravating evidence rather than mitigating evidence. Tr. 2113.

9. Trial counsel raised the issue of the conditions of imprisonment by bringing to the jury's attention applicant's request for televison knobs, the use of the microwave, and the use of the canteen. Tr. 1636-38.

10. Trial counsel failed to object to the judge's instruction (Tr. 2116) and the Solicitor's argument that torture and kidnapping could occur after the victim's death. "These can be committed after he murdered Benton Smith." Tr. 2057.

11. Trial counsel failed to *voir dire* on potential racial prejudice during jury selection.

10(d). *Applicant was denied his right to the effective assistance of appellate counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law.*

11(d). The grounds for this claim are as follows:

1. Appellate counsel failed to raise on direct appeal the trial court's refusal to question potential jurors about their attitudes regarding race. *Turner v. Murray,* 476 U.S. 28 (1986).

2. Appellate counsel failed to argue on direct appeal that the admission of evidence of the prior assault in the Pizza Hut parking lot was error because this evidence was irrelevant.

3. Appellate counsel failed to argue on direct appeal that the admission of the evidence about a prior victim's dream of "black Indians" was error because the evidence was irrelevant.

4. Appellate counsel failed to raise on direct appeal the error of informing the jury that applicant was already on death row. And the trial court's instruction on the issue which made it more clear that applicant had already been sentenced to death.

5. Appellate counsel failed to raise on direct appeal the pervasive injection of race throughout the trial despite trial counsels' objections.

6. Appellate counsel failed to raise on appeal the trial court's improper version of the "plain and ordinary meaning" instruction. Tr. 2146.

10(e). *Applicant seeks a finding of fact that his kidnapping conviction did not involve sexual misconduct requiring sex offender registration pursuant to S.C. Code §23-3-430. See Hazel v. State,* ___S.E.2d___,2008 WL 648513 (2008).

11(e). In 1998, §23-3-430 was amended to include an exception to the general rule that a kidnapping conviction automatically required sex offender registration. This exception applied if the state court made a finding that the kidnapping offense did not include a criminal sexual offense. §23-3-430(C)(15). Because applicant was convicted of kidnapping before this amendment, this exception was unavailable to him. The South Carolina Department of Corrections has prohibited applicant from visiting with young relatives because of the requirement that he register as a sex offender based on the 1995 kidnapping conviction.

IV. DISCUSSION

GROUND 10(a)

In **Ground 11(a)(1)-(7)**, Applicant contends that the State denied him due process under the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law by the repeated and prejudicial injection of race throughout the trial. Respondent submits that these allegations are procedurally barred because they either were or could have been raised at trial and on direct appeal.

Initially, the State submits that Applicant's **Ground 11(a)** is procedurally barred. S.C. Code Ann.§ 17-27-20(b) (1986) provides that "[t]his 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." The South Carolina Supreme Court has consistently and repeatedly held that issues that either were or could have been raised at trial and on direct appeal. may not be raised in PCR. *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); *Cummings v. State*, 274 S.C. 26, 260 S.E.2d 187 (1979). Thus, the allegations in **Ground 11(a)(1)-(7)** are not appropriate in PCR.

GROUNDS 11(a)(1),(3) and (6)-(7)

Indeed, the very first allegation, Applicant's **Ground 11(a)(1)**, was expressly raised to and rejected by the South Carolina Supreme Court on direct appeal. He alleges that the Solicitor's closing argument in the re-sentencing proceeding supposedly deprived him of a fundamentally fair trial, where the Solicitor stated that a sentence of life imprisonment would

cause Applicant to revert to his violent behavior and "[m]eeting him again will be like meeting King Kong on a bad day." **R. pp. 2062; 2079.** Likewise, **Grounds 11(a)(3) and (6)-(7)** were expressly considered by the South Carolina Supreme Court, which rejected them on the merits. Because these allegations were presented to and rejected by the South Carolina Supreme Court on direct appeal, *Bennett II*, 369 S.C. at 228-33, 632 S.E.2d at 286-89, the law of the case is that there was not a due process violation. See *Robert E. Lee & Co. v. Commission of Public Works*, 250 S.C. 394, 158 S.E.2d 185 (1967) (when a party makes the same argument it made in a former appeal, the decision in the former appeal is the law of the case); *Ackerman v. McMillan*, 324 S.C. 440, 443, 477 S.E.2d 267, 268 (Ct.App.1996) ("Matters decided by the appellate court cannot be reheard, reconsidered, or relitigated in the trial court, even under the guise of a different form").

GROUND 11(b)

Applicant further contends that his right to an impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution were violated by the seating of an, as of yet, unidentified juror who supposedly held racist views. This allegation is apparently predicated upon an interview with juror Adam Humphrey on July 13, 2007. In the interview, juror Humphrey supposedly used a racist epithet in reference to Applicant, There is no indication of when juror Humphrey allegedly arrived at the conclusion expressed in the affidavit or that the epithet was uttered during the deliberations in the case. There is likewise no indication that juror Humphrey supposedly had a racist belief at the time of the resentencing.

Applicant's collateral counsel knows full well that an affidavit containing hearsay within hearsay is inadmissible. However, he has conveniently furnished this Court with a copy of an

affidavit of a law clerk, employed by collateral counsel, in support of this allegation; and counsel has stated in an accompanying letter that he does not intend to call the juror or the law clerk as a witness, Respondent asks for a hearing on this allegation, but opposes Applicant's efforts to shield himself from his burden of proof. Respondent submits that he must call the juror and, if necessary, then call this clerk, so that Respondent will have the opportunity to cross-examine each witness. As Justice Jackson stated in *Stein v. New York*, 346 U.S. 156, 197 (1953), "[t]he [Applicant has] had fair trial and fair review. The people of the State are also entitled to due process of law." *See also State v. Stewart*, 283 S.C. 104, 110, 320 S.E.2d 447, 451 (1984) ("It would do well for defense counsel to remember that the people of the State as well as the defendant are entitled to a fair trial").

GROUND 11(c)(1)

Applicant next contends that trial counsel were ineffective because they failed to object to the trial court's comments to the jury that "if I'm wrong there is a time and place for it to be corrected," **(R. p. 899)**; and "[y]ou must accept as correct the laws as I give it to you. Now, if I'm wrong there is another time and place for it to be corrected." **R. p. 2122.** Respondent submits that Applicant cannot show either deficient performance or resulting prejudice.

To establish that he received ineffective assistance of counsel, an inmate must make a twofold showing. See *Wiggins v. Smith*, 539 U.S.510 (2003). First, he must demonstrate that his attorneys' "representation fell below an objective standard of reasonableness." *Strickland v. Washington,* 466 U.S. 668, 688 (1984). "Judicial scrutiny of counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the [challenged] conduct from counsel's perspective as the time."

Id. at 689. *See also Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight").

The inmate must also demonstrate that he was prejudiced by his attorneys' ineffectiveness, *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*, 543U.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*, 539 U.S. at 537; *Jones v. State*, 332 S.C. 329,344-45, 504 S.E.2d 822, 829-30 (1998) (petitioner did not meet burden).

These comments are clearly distinguishable from the reversible comments in the cases upon which Applicant obviously relies. *E.g.*, *Caldwell v. Mississippi*, 472 U.S. 320 (1985), *State v. Gilbert*, 273 S.C. 690, 258 S.E.2d 890 (1979), and *State v. Tyner*, 273 S.C. 646, 258 S.E.2d 559 (1979). In *Caldwell*, the prosecutor directly, and erroneously, told the jury that their decision to give death was not final:

> Now, [the defense lawyers] would have you believe that you're going to kill this man and they know – they know that your decision is not a final decision. My God, how unfair can you be? Your job is reviewable.
>
> * * *
>
> They said "Thou shalt not kill." If that applies to him, it applies to you, insinuating that you decision is the final decision and that they're gonna take [the defendant] out in the front of this Courthouse and string him up and that is terribly, terribly unfair.

> For they know, as I know, that the decision you render is automatically reviewable by the Supreme Court.

472 U.S. at 325-26.

Justice Marshall, delivering the opinion of the Court, opined that there would be an impermissible bias in favor of death sentences whenever the state suggested "that the sentencing jury may shift its responsibility to an appellate court." 472 U.S. at 330. Justice Marshall believed the main problem with such comments is that "jurors often might not understand . . . the institutional limits on what an appellate court can do," since "under [the] standards of appellate review mercy is irrelevant." Id. at 331. Justice Marshall also noted that jurors will probably realize that a life sentence could not be increased to a death sentence on appeal, so they will be inclined to vote for death in order to "delegate" the decision between life or death to the appellate court. Id. at 331-333.

In a concurring opinion, Justice O'Connor stated that while giving the jury an inaccurate and overly broad description of appellate review is impermissible, *it would be permissible to accurately instruct the jurors* on "the existence and limited nature of appellate review." 472 U.S. at 343-43 (emphasis added).

Similarly, the South Carolina Supreme Court in both *Tyner* and *Gilbert* reversed death sentences where the prosecutor's remarks unequivocally gave the jury an impression that the judges and justices along the appellate chain had unlimited discretion to revoke or accept the jury's sentencing determination. In both of those cases, the Solicitor argued as follows:

> There's an automatic review by the South Carolina Supreme Court, the five highest justices in this State. They will determine everything that has happened here since last Monday; **they will look at the evidence; they will look at your recommendation;** they will look at Judge Moore's rulings and findings; **and then they will see whether any error committed; whether it be**

> **factually or legally. They will determine whether your recommendation was right or not.** They, too, can reverse you and the Judge and give life imprisonment, or they, too, can affirm what you did, what Judge Moore did, and they can affirm the death penalty. But it doesn't stop with them. It can be appealed on to the United States Supreme Court in Washington, nine of the highest justices in the land. They look at everything the South Carolina Supreme Court did, everything Judge Moore did, **everything that you did,** everything that we did, **and determine whether the facts in the case warrant the death penalty.**

Tyner, 273 S.C. at __, 258 S.E.2d at 566 (emphasis added). *Cf. Gilbert*, 273 S.C. 690, 258 S.E.2d 890.

The South Carolina Supreme Court held it was improper for the Solicitor to make *"statements that a higher court has the power to review the finding of the jury on the weight of evidence."* *Tyner* (emphasis added). The Court concluded that the above comments "impermissibly suggested that the responsibility for appellant's sentence would rest with a higher tribunal." *Id. See also Gilbert.*

The trial judge's comments in the present case no where near approach the direct statements of unfettered appellate review found within the prosecutors' remarks in *Caldwell, Tyner*, or *Gilbert*. To the contrary, when viewed as a whole, there is simply no reasonable likelihood the jury would have understood these remarks as implying that the appellate court had unfettered review of the jury's verdict in either phase. *Boyde v. California*, 494 U.S. 370 (1990) (question is whether there is reasonable likelihood that the trial judge's charge would be considered by jury in an unconstitutional manner). To the contrary, the challenged comments initially occurred immediately after he explained his role as" the instructor of the law. The trial judge was merely emphasizing that the jury had to accept the law as he instructed to them,

regardless of whether any juror(s) disagreed with what he charged,. **R. p. 899, ll.6-20; 2112, l. 20-p. 2113, l.2.**[21]

Further, the trial court did **not** say anything that a juror could interpret as an instruction that an appellate court could factually review **the jury's** sentencing determination with unfettered discretion. Indeed, the trial court's comments were not an inaccurate statement of appellate review in South Carolina. *See Romano v. Oklahoma*, 512 U.S. 1 (1994) (*Caldwell* violation only exists if comments erroneously described role of jury according to state law).

Even assuming the comments were objectionable and counsel was deficient for failing to object, Applicant has not met his burden of proving prejudice. After deliberations began, the trial judge received a note from the jury (Court's Ex. 6), asking "if the jury imposed a death sentence, when would the sentence go into effect; "and if there were to be an appeal[,] how many appeals do they allow?" **R. p. 2142, ll. 17-25.**

In response, the trial judge instructed jurors that "this is a matter that a jury is not allowed to go into;" and that they were to decide the sentence "based only on the evidence that has come into the courtroom, and there's been nothing about this. So, be sure you stay within the record, ... within what was in the courtroom." He concluded by again charging them that "this is an area that you cannot go into." **R. p. 2145, l. 17-p. 2156, l. 3.**[22]

Applicant also cannot show prejudice because the overwhelming evidence of aggravating factors, discussed *supra*, renders any speculative prejudice from the trial judge's remarks

[21]In his opening remarks he contrasted the wide range of discretion that the jury had in determining facts in the case with the lack of discretion in whether or not to follow the law as he charged it. **R. p. 899, ll. 13-16.**

[22]The trial judge also made an express finding that the demeanor of the jurors was such that they had clearly understood his supplemental charge. **R. p. 2147, ll6-11.**

harmless and non-prejudicial. There is simply no reasonable likelihood the jury would have understood these remarks as implying that the appellate court had unfettered review of the jury's verdict in either phase. *Boyde.*

GROUND 11(c)(2)

Applicant further alleges that trial counsel were ineffective because they did not object to the testimony of Jody Gallman of the South Carolina Department of Probation, Parole and Pardon Services. **R. pp. 1105-08.** Applicant contends that "[t]he sole purpose of this witness' testimony was to establish that when applicant committed the crime for which he was being sentenced, he was on parole. This evidence, raising the specter of his being paroled again, was substantially more prejudicial than probative." Again, Respondent disagrees and submits that Applicant cannot show either deficient performance or resulting prejudice.

Ms. Gallman is currently a parole agent in charge of Richland County, South Carolina, for the South Carolina Department of Probation, Parole, and Pardon Services. In 1990, she was a Youthful Offender Act Agent. Her duties included visiting inmates in the South Carolina Department of Corrections (S.C.D.C.) and giving them parole instructions before they were released. Appellant's certificate of release **(State's Ex. 10)**, which is given to every inmate who has satisfied his sentence and is eligible for release, states that he was released on June 28, 1990. Ms. Gallman gave him parole instructions on June 22, 1990; and she explained the conditions of his probation at that time. **R. pp. 1105-07.**

These conditions included the requirement that Applicant "refrain from the violation of any federal, state, or municipal passed law." Another condition was that he " shall maintain or actively purse gainful employment unless engaged in some other program approved by my

supervisor." Moreover, she explained to him that he was subject to any sanction his agent deemed appropriate if he violated any of the twelve conditions governing his parole; and that he could be returned to S.C.D.C. Appellant did not object to her testimony or cross-examine the witness. **R. pp. 1107-08.**

Notwithstanding Applicant's contrary position, it is clear that Ms. Gallman's testimony was admissible in the sentencing phase of his trial. S.C. Code Ann. § 16-3-20(B) (Supp. 2007) provides, as it did at the time of Applicant's trial, that "the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of the punishment" during the sentencing phase of a capital trial. Before a death sentence is imposed, the sentencing jury's attention must be directed to the specific circumstances of the crime and the characteristics of the person who committed the crime. *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979).

Neither the United States Supreme Court nor the South Carolina Supreme Court has ever suggested, much less held, that the prosecution cannot introduce evidence in the sentencing phase of a capital trial that a defendant was on parole or probation as the result of another offense(s) at the time of the murder for which he was on trial. Also, there is no merit to Applicant's contention that this evidence "was substantially more prejudicial than probative." Respondent does not dispute that, upon objection, the trial judge would have conducted a Rule 403, SCRE, analysis. However, Applicant ignores that the scope of the probative value of evidence in the sentencing phase is much broader than at the guilt or innocence phase. *E.g.*, *State v. Rosemond*, 335 S.C. 593, 518 S.E.2d 588 (1999); *State v. Gardner*, 332 S.C. 389, 505 S.E.2d 338 (1998).

The State's evidence also included other crimes and acts of violence by Applicant. Indeed, the State's closing argument makes clear that the importance of the parole was that he refused to comply with the conditions of his release. Instead of maintaining gainful employment and refraining from criminal activity, he was made no effort to get a job. More importantly, he was stealing and murdering within months of his release. **R. pp. 2064-65.** Also, this was only a snippet from the State's argument regarding his violent character and lawless behavior both inside and outside prison or jail.

Unquestionably, evidence of other crimes is admissible at sentencing phase of capital trial, including photographs of a victim. *E.g.*, *Ray v. State*, 330 S.C. 184, 498 S.E.2d 640 (1998) (evidence of other crimes, including "gory photos" of victim, is admissible at sentencing phase of capital trial); *State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (1985) (details of defendant's prior murder convictions, including photographs of prior murder victims, were properly allowed into evidence in sentencing phase); *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984) (information concerning the details of prior offenses can be introduced during the penalty phase); *State v. Skipper*, 285 S.C. 42, 328 S.E.2d 58 (1985). *Cf. State v. Bell*, 302 S.C. 18, 32, 393 S.E.2d 364, 371-72 (1990).

Here, in addition to parole, the State's evidence included two similar crimes (A.B.I.K.) to the murder conviction for which Bennett was being sentenced. "Admission of testimony that a defendant has attempted a similar crime or crimes to that for which he is on trial is proper because such testimony indicates a defendant's individual characteristics and predisposition to commit similar crimes." *State v. Green*, 301 S.C. 347, 358, 392 S.E.2d 157, 162-63 (1990) (citations omitted).

Further, this evidence, along with other evidence of his behavior while incarcerated, showed Appellant's extremely violent nature and future dangerousness. Evidence of a defendant's future dangerousness is a legitimate interest at sentencing. *Dawson v. Delaware*, 503 U.S. 159 (1992). Nor did the State or trial counsel suggest, through evidence or argument, that Applicant could be released on parole if sentenced to life imprisonment.

Moreover, the trial judge gave a limiting instruction that required the jury to find that the State had proved the evidence of Appellant's bad character beyond a reasonable doubt before considering it. This instruction also precluded the jury from relying upon evidence of these crimes to prove statutory aggravating circumstances, but insured that the jury's consideration of these offenses was limited to proof of evidence of "[Applicant]'s character and characteristics as they may bear logical relevance to the crime." He further charged the jury that they could give this evidence "whatever weight you consider proper under the circumstances of this case." **R. p. 2123, l. 4- 2124, l. 2.** *Cf. Green*, 301 S.C. at 358, 392 S.E.2d at 163; *State v. Stewart*, 283 S.C. 104, 320 S.E.2d 447 (1984).

Finally, the trial judge instructed the jury that "the terms life imprisonment and death penalty should be understood in their ordinary and plain meaning by you. As I've said, you simply accept these two, life imprisonment and death penalty, and understand them in their plain and ordinary meaning." **R. p. 2138, ll. 10-14.** He gave a similar instruction in response to a jury question. **R. p. 2145.** *See* **Ground 11(c)(4).**

GROUND 11(c)(3)

Applicant further alleges that counsel improperly informed the resentencing jury that he was already on death row. However, the Court does not need to determine whether trial counsel

were deficient because Applicant cannot show any conceivable prejudice from counsel's performance. *See Strickland,* " 466 U.S. at 687 ("[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed").

This allegation centers around the cross- examination of prosecution witness James Green **(R. p. 1604)** and the direct examination of defense witness, Reverend James Brown **(R. p. 2070)**. Mr. Green testified that he is a criminal investigator with S.C.D.C.'s external affairs branch. In a 1997 investigation by SCDC investigators into charges that Applicant had sex with a visitor while he was incarcerated as a safekeeper at SCDC, Applicant gave statements in March and April 1997 admitting that he and Julie Hardee had "intimate sexual relationships at L.C.D.C. and here at S.C.D.C.;" and that correctional officers had allowed this to occur. He also explained that Hardee "had been visiting me while I was a safekeeper since I've been at S.C.D.C." **R. pp. 1599-1602.**

Inv. Green testified that Hardee was a deputy at LCDC and visited Applicant while he was at SCDC. Her visitation privileges were suspended indefinitely after the investigation. The investigation revealed that Applicant had made approximately four hundred telephone calls to her residence between the middle of December 1996 and early March 1997. Although Hardee was originally on his visitation list, her visitation privileges were indefinitely suspended in March 1997. **R. pp. 1602-03; 1609; 1617-21; 1626-29.** [23] It was against this backdrop that trial counsel Floyd engaged in the following colloquy:

[23] In 1999, Applicant wrote officials at Lieber Correctional Institution and sought to have her visitation privileges reinstated and they ultimately were on April 18, 2000. **R. pp. 1631-43.**

Q. Now, Mr. Green, your investigation wasn't just about Johnny Bennett in this matter, was it?

A. Him and some other inmates also.

Q. Pardon?

A. It was about other people, also.

Q. There were several inmates who were on death row at that time that the guards were allowing them to have conjugal visits?

A. That's correct.

Q. Now, the prison system used to allow conjugal visits years ago, didn't it?

A. In some places, years ago.

Q. But now death row, it's not where it was then; its not there now, is it?

A. No, it's not.

Q. Death row – when all this happened, where was death row then?

A. Death row was at Broad River Correctional, Broad River.

Q. Broad River Correctional?

A. Right.

Q. And how many of the inmates there were being – were involved in having sex with their visitors?
A. Well, at that particular time we were looking at I think three other inmates.

Q. And that's all it was, the guards were allowing them privacy and they were having intimate relations –

A. That's correct.

Q. – during the visits? That's all this was?

A. That's all we discovered.

Rev. Brown testified that he is a chaplain at Lieber Correctional Institution. He knew Applicant "through my two years that I was with him. I was primarily chaplain to the death row inmates." Immediately after he referred to death row, trial counsel Young established that "inmates who [are] awaiting trial" are also housed on death row. **R. p. 2020, ll 2-9.**

Rev. Brown reiterated that he had known Appellant for "two years, plus." Then he testified in detail about Appellant's involvement in church activities while incarcerated. Rev. Brown sees Appellant six or seven hours a week and considers Appellant to be his best friend. Appellant had never been aggressive, violent or disrespectful to Rev. Brown, and he believed Appellant could be managed by S.C.D.C. **R. pp. 2020-25.**

At the conclusion of the charge conference, the State addressed Rev. Brown's reference to death row. The State did not "ask any questions or follow [up on] that." **R. p. 2047, l. 23-p. 2048-, l. 9.** The trial judge noted that trial counsel Young "very adroitly followed that up with . . . a question to the affect that in addition to people being convicted there were also people there who had not been sentenced who were there for safekeeping." Therefore, he found that "the jury very clearly understands that while he may be under the area called death row that there are people there who are not convicted and such." **R. p. 2048, ll. 10-21.** Defense counsel did not request any relief at that point. **R. p. 2049, ll. 1-2.**

Applicant subsequently argued in his new trial motion that the jury was prejudiced by this information and that he was entitled to relief. **R. p. 2371.** The State filed a response opposing his motion. **R. pp. 2401-06** The trial judge subsequently denied relief on this claim. In doing so, he found that Applicant was barred from relief because of invited error, citing *State v.*

Washington, 315 S.C. 108, 110, 432 S.E.2d 448, 449 (1992) (defendant cannot complain on appeal of the admission of evidence elicited by his own counsel). **R. pp. 2426-30.**

In support of his argument, Applicant apparently relies upon *Caldwell, supra.* This reliance, however, is misplaced. In *Caldwell,* the United States Supreme Court held "that it is constitutionally impermissible to reset a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere". *Id* at 329. In the present case, the references that Applicant was on death row in no way led the jury to believe that the responsibility in sentencing him rested anywhere other than with them. *Caldwell* is inapplicable.

In capital cases, it is not error for the sentencing jury to know that the defendant is, or has been, on death row. In a resentencing proceeding, even if a juror states he was familiar with the previous trial and agreed with the original death sentence, the juror is nevertheless properly qualified to serve where he further states that he would make a decision based strictly upon the evidence at the retrial. *State v. Jones,* 298 S.C. 118, 378 S.E.2d 594 (1989). In the present case, all jurors stated they would base their verdict solely on the evidence and law in this trial.

Moreover, in *State v. Bell,* 302 S.C. 18, 393 S.E.2d 364 (1990), nine jurors were qualified even though they knew the defendant was on death row where the jurors stated they could render a verdict as to the sentence based only on the evidence presented in the courtroom. The Supreme Court unanimously affirmed the qualifications of these jurors. The Court stated that

> In so holding, we also reject Bell's argument that the juror's knowledge of the previous death sentence diminished their sense of responsibility in deciding what sentence to impose. Bell relies, by analogy, on the United States Supreme Court's decision in *Caldwell v. Mississippi,* 472 U.S. 320, 105, S.Ct. 2633, 86 L.E.2d 231 (1985). In *Caldwell,* the prosecutor urged the jury not to view itself as the final determiners of whether the petitioner would die,

> since a death sentence would be reviewed for correctness by the Mississippi Supreme Court. The Court concluded that this invitation to rely on the Mississippi Court's review would generate a bias towards returning a death sentence. *Caldwell,* 472 U.S. at 333, 105 S.Ct. at 2642.
>
> We find that the reasoning of *Caldwell* does not control the case at bar. The jurors here disavowed themselves prior to their qualification of any bias or prejudice against the appellant, specifically with respect to his previous sentence of death.

Bell at 368. Therefore, "the reasoning of *Caldwell* does not control" where jurors have knowledge that the defendant is on death row, and *Caldwell* does not support Appellant's claim for relief. *Id.*

Further, during a resentencing hearing in *Jones v. State,* 332 S.C. 329, 504 S.E.2d 822 (1998),[1] a defense witness on direct examination testified that the defendant "was supposed to be on death row, and inmates on lock-up and death row don't suppose to mingle together . . ." and that "death row inmates is up on the third-like a two story house." 332 S.C. 329, 504 S.E.2d 822, 828, (S.C. 1998) Like Applicant, Jones argued "that as a result of these references to death row, the reliability of the jury's verdict and sentence was diminished by the knowledge that another jury had sentenced Jones to die for the same offenses that were under consideration at the resentencing hearing." *Id.*

On certiorari following denial of PCR, the South Carolina Supreme Court concluded that Jones' argument lacked merit. First, the Court found that "there was no formal introduction of evidence of his previous death sentence. There was only passing reference to death row from which the jury may have inferred that Jones had been sentenced to death before." *Id.*

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[1] *Cert. denied, Jones v. South Carolina,* 526 U.S. 1021, 119 S. Ct. 1259 (1999), *reh. den.,* 526 U.S. 1128, 119 S.Ct. 1788 (1999).

Second, "the statement did not state that he was on death row for committing the crime against [the victim's of this case]. It may have been constructed by the jury as a death sentence for a previous crime." *Id. See also State v. Gaskins,* 326 S.E.2d 132, 284 S.C. 105 (S.C. 1995) (affirming death sentence where a former Solicitor testified regarding the reversal of a defendant's prior death sentence for a different murder and stating that "[n]othing in his testimony can be construed as an attempt to minimize the jury's responsibility in imposing a sentence") *cert.* den., 471 U.S. 1120, 105 S.Ct. 2368 (1995), *overruled in part on other grounds by State v. Torrence,* 305 S.C. 45, 406 S.E.2d 315 (1991); *Gaskins v. McKellar,* 916 F.2d 941, 953 (4th Cir. 1990) (stating that no *Caldwell* violation occurred and "[t]he most a reasonable jury could have made of this evidence was that the statute under which the jury was to sentence [the defendant] might conceivably be invalidated as unconstitutional at some future date).

Finally, the Court stated that Jones failed to satisfy the underlying rationale of *Romano v. Oklahoma,* 512 U.S. 1 (1994), where the United States Supreme Court stated, "[w]e do not believe that the admission of evidence regarding petitioner's prior death sentence [for another murder] affirmatively misled the jury regarding its role in the sentencing process so as to diminish its sense of responsibility." *Jones* at 828 (quoting *Romano* at 10). The South Carolina Supreme Court stated that Jones failed to establish "how this passing reference to death row has mislead the jury regarding its role in the sentencing process or diminished its sense of responsibility." *Id.*

In the present case, Respondent does not concede that trial counsel were deficient.[24] However, it is unnecessary for the Court to determine the first prong under *Strickland* because he clearly cannot demonstrate any prejudice from counsel's performance. First, Appellant's jury had already been presented with damaging evidence that Applicant had been able to have sex with a correctional officer at LCDC while he was housed there and that this sexual relationship continued even after he was housed in S.C.D.C. as a safekeeper or pretrial detainee. This information was, by far and way, much more prejudicial than information that he was kept on death row. Further, the trial judge correctly reasoned that jurors would understand from the testimony presented through defense counsel that some individuals are housed on death row even though they are not under a death sentence.

Second, the re-sentencing jury was aware that he had already been convicted of murder and that its role was to determine whether he should receive life imprisonment or death. **R. pp. 30-31; 895-96**. Therefore, it would not be surprising for jurors to hear that he had been housed in a secure facility, such as death row awaiting a sentencing trial. *See* Jones. Further, neither the State's evidence and argument nor the trial judge's jury instructions sought to lessen the jury's responsibility for imposing the appropriate sentence by referring to the earlier death sentence. *Contra Caldwel* and *Tyner, supra.* Also, every juror in the case testified that he or she would base the sentencing verdict solely on the evidence presented at trial and the law as charged by the trial judge.

Moreover, trial counsel's cross-examination of Inv. Green very effectively sought to downplay the significance of Applicant's offenses while on death row and emphasized that

[24]Particularly where the State had already presented evidence that Appellant engaged in bad acts while housed as a safekeeper on death row, Appellant cannot show how counsel's actions were deficient.

others were also involved. On the other hand, Rev. Brown offered mitigating testimony of a type often presented in death penalty cases. Further, Appellant cannot show prejudice under *Strickland* because, in light of the overwhelming evidence of aggravating factors, discussed *supra*, there is simply no likelihood that the sentence "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland,* 466. U.S. at 695; *Wiggins,* 539. U.S. at 537.

GROUND 11(c)(4)

Next, Applicant alleges that trial counsel were ineffective in failing to adequately object to the trial judge's instruction in response to the jury's question about whether a life sentence meant life without parole or with the possibility of parole. However, Applicant cannot show either deficient performance or prejudice under *Strickland* and its progeny because the trial judge's "plain and ordinary meaning instruction accurately stated South Carolina law and because Applicant was not entitled to have jurors instructed on parole eligibility.

As discussed, the trial judge gave the jury a "plain and ordinary meaning" instruction. Specifically, he instructed the jury:

> the terms life imprisonment and death penalty should be understood in their ordinary and plain meaning by you. As I've said, you simply accept these two, life imprisonment and death penalty, and understand them in their plain and ordinary meaning.

R. p. 2138, ll. 10-14.

The jury got the case and began deliberations at 4:53 p.m. The trial judge reconvened court at 6:15 p.m. Applicant and attorneys for both parties were present. The trial judge informed counsel for the parties that he had received a note from the jury asking two questions. The first question was "if we decide life imprisonment does this mean life without parole or life

with parole, or is the decision left up to the Judge?" The second question was, if the jury imposed a death sentence, when would the sentence go into effect; "and if there were to be an appeal[,] how many appeals do they allow?" **R. p. 2142, ll. 17-25.**

With respect to the jury's first question, the trial judge stated that " I would think the only possible thing I could do would be to give them the Norris charge again, because as you know, that's all that's allowed." **R. p. 2143, ll. 1-4.** The State noted that it did not object if Applicant requested it. **R. p. 2143, ll. 5-6.** Trial counsel Mr. Floyd, stated, "[y]es, as long as it's the brief form you use in your original charge. **R. p. 2143, ll. 8-9.**

Thereafter, the trial judge gave the following supplemental instruction in response to the first inquiry:

> Madam forelady, I have a note that I've received from you that involves two basic questions. First, says if we decide life imprisonment does that mean life without parole at any time or life with possible parole or is this decision left up to the Judge?
>
> Let me tell you that the only thing I'm allowed to comment on that - - and you understand that there are all sorts of varieties in this thing and it's something that I can't get into with you directly. All I can do is basically give you that charge again. And I know its kind of general, but you have to take this into account.
>
> The terms life imprisonment and death penalty should be understood in their ordinary and plain meaning. You simply accept these, life imprisonment and death penalty, and understand them in their plain and ordinary meaning. So when you make these determinations you have to consider life imprisonment - - the term life imprisonment and death penalty, you have to consider those in their plain and ordinary meaning.

R. p. 2144, l. 19-p. 2145, l. 13.

Trial counsel Floyd objected to the language "there are all sorts of varieties in this thing" because it might confuse the jury. However, he conceded that the plain and ordinary meaning instruction might have clarified this. **R. p. 2146, ll. 15-19.**

The trial judge stated that he was trying to emphasize that jurors did not need to be thinking about parole and

> they need[ed] to take in the plain [and] ordinary meaning. ... I told them probably two or three times plain and ordinary meaning. I think they got the message on that.

R. p. 2146, ll. 20-25. The State agreed with the trial judge and observed that most jurors were shaking their heads [affirmatively] when you told them that's not for their consideration" and gave the charge. The trial judge also noted that jurors nodded their heads, particularly after the second part of his charge, when "they reacted pretty clearly." He observed that the question might have been asked to pacify one or two jurors; and he felt that the jury had understood his charge. **R. p. 2147, ll. 2-12.** The jury note was marked **Court's Ex. 6.**

Initially, Respondent submits that the current allegation is not properly before this Court in PCR because trial counsel sufficiently preserved an objection to the portion of the trial judge's charge that stated that "there are sorts of varieties in this thing." Therefore, to the extent Applicant complains about the use of that language, then the challenge could have been raised on direct appeal and it is barred in PCR. *See Drayton* and *Hyman*, *supra.*

Alternatively, Applicant's ineffective assistance allegation fails on the merits. Despite Applicant's allegation to the contrary, counsel's performance clearly was not deficient; and Applicant cannot show Sixth Amendment prejudice.

The Supreme Court held in *Simmons v. South Carolina*,512 U.S. 154 (1994) that "[w]here the state puts the defendant's future dangerousness in issue, and the only available alternative to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury – by either argument or instruction – that he is parole ineligible." The *Simmons* Court specifically found that the *Norris* charge given in *Simmons* was insufficient to convey a defendant's parole ineligibility to the jury. However, in those situations where either the prosecution does not rely upon a defendant's future dangerousness or parole is available, the states remain free to determine whether or not a capital sentencing jury should be informed of the defendant's parole eligibility. 512 U.S. at ___, 114 S. Ct. at 2200. *See also* 512 U.S. at 168-69 (Opinion of Blackmun, J.).

In *Southerland v. State*, 337 S.C. 610, 613-15, 524 S.E.2d 833, 834-35 (1999), the South Carolina Supreme Court explained the plain and ordinary meaning instruction as follows:

> This Court first enunciated a "plain meaning" charge in *State v. Norris*, 285 S.C. 86, 328 S.E.2d 339, 344 (1985). In *Norris*, the jury in a capital case inquired whether the defendant would be eligible for parole if sentenced to life imprisonment. The trial court responded by charging the jury that if the defendant were sentenced to life, he would be eligible for parole in twenty years. This Court ruled such a charge violated prior precedent that a jury should be neither invited nor permitted to speculate upon the possible effects of parole upon a conviction. *See State v. Brooks*, 271 S.C. 355, 247 S.E.2d 436 (1978); *State v. Butler*, 277 S.C. 543, 290 S.E.2d 420 (1982). The Court held that "[w]hen the issue is raised, the Court should instruct the jury that it shall not consider parole eligibility in reaching its decision, and that the terms 'life imprisonment' and 'death sentence' should be understood in their ordinary and plain meaning." 285 S.C. at 95, 328 S.E.2d at 344. Accordingly, *Norris* established the law to be charged if the jury inquires about parole.
>
> Thereafter, however, in *State v. Atkins*, 293 S.C. 294, 360 S.E.2d 302 (1987), this Court held, without regard to a jury inquiry concerning parole, that, "[i]n all death penalty cases which proceed

to trial after this opinion is published, if requested by the defendant, the trial judge shall charge the jury that the term 'life imprisonment' is to be understood in its ordinary and plain meaning." 293 S.C. at 300, 360 S.E.2d at 305 (emphasis supplied). The *Atkins* Court went further to hold that, in all subsequent cases decided pursuant to the Omnibus Crime Control Act, where the defendant requested, he was entitled, in lieu of a plain meaning charge, to a charge concerning 20 or 30 year parole eligibility, depending upon the jury's finding of a statutory aggravating circumstance.

Four years later, a majority of this Court overruled *State v. Atkins* to the extent it permitted juries to be informed concerning a capital defendant's parole eligibility. *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (Chandler, A.J. concurring). Justice Chandler's concurrence reiterated that a State v. Norris (jury not to consider parole and are to understand life and death in their plain and ordinary meaning) charge was the proper response to any inquiry concerning parole eligibility. 305 S.C. at 57, 406 S.E.2d at 322.

Less than four months later, this Court clarified *Torrence*, stating "in eliminating the consideration of parole, *Torrence* leaves intact the defendant's right upon request for a plain meaning charge." *State v. Davis*, 306 S.C. 246, 251, 411 S.E.2d 220, 222 (1991). The argument in *Davis* was that, since the jury's consideration of parole was eliminated by *Torrence*, there was no longer any requirement of a "plain meaning" charge. The *Davis* Court disagreed, noting that the parole eligibility charge was an alternative to a plain meaning charge. The Court stated, " [s]ince *State v. Atkins*, 293 S.C. 294, 360 S.E.2d 302 (1987), this Court has held that where a capital defendant requests it, a charge must be given at the sentencing phase that the term life imprisonment is to be understood in its ordinary and plain meaning. It is reversible error to refuse such a request." 306 S.C. at 251, 411 S.E.2d at 222 (emphasis supplied). This holding has been repeatedly reaffirmed by this Court, most recently in *State v. Ard*, 332 S.C. 370, 505 S.E.2d 328 (1998). *See also State v. Simmons*, 310 S.C. 439, 427 S.E.2d 175 (1993) (defendant still entitled, upon request, to a plain meaning charge under *State v. Atkins*)[, *rev'd on other grounds, Simmons v. South Carolina*, 512 U.S. 154 (1994); *State v. Williams*, 321 S.C. 327, 468 S.E.2d 626 (1996) (if capital defendant requests it, charge must be given at sentencing phase that life imprisonment means imprisonment for life); *State v. Young*, 319 S.C. 33, 459 S.E.2d 84 (1995) (court properly refused

> defendant's request to charge 30 year parole eligibility in favor of plain meaning charge).

(Footnote omitted). The Court in *Southerland* further reasoned that "[a]lthough related to the idea of parole eligibility, a plain meaning charge is simply not synonymous. On the contrary, the cases uniformly recognize it is reversible error to refuse a plain meaning charge when requested by the defendant, without regard to the defendant's parole eligibility or ineligibility." *Southerland*, 337 S.C. at 615, 524 S.E.2d at 835.[25]

In the present case, the trial judge repeatedly gave a plain and ordinary meaning instruction. Moreover, Applicant was not entitled to have jurors instructed on his parole ineligibility because the South Carolina Supreme Court has repeatedly held that no such instruction is required where the defendant will be parole eligible if he receives a life sentence and that a plain and ordinary meaning instruction is sufficient. *E.g.*, *McWee v. State*, 357 S.C. 403, 406, 593 S.E.2d 456, 457 (2004) ("In his direct appeal, th[is] Court determined petitioner's failure to receive a parole eligibility charge was neither a violation of due process nor the Eighth Amendment. ... The Fourth Circuit Court of Appeals concurred in its denial of petitioner's federal habeas application.... No controlling constitutional law has since been created holding otherwise. ... There is simply no constitutional requirement that a parole eligible defendant receive a parole eligibility instruction") (citations omitted);.*State v. Simpson*, 325 S.C. 37, 45, 479 S.E.2d 57, 61 (1996) (where second prong of the *Simmons* test was not because the appellant was parole eligible, "the trial judge properly charged the terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning"); *State v. Byram*, 326 S.C.

[25]Because the issue had been preserved in the trial court, the Court concluded that appellate counsel was ineffective in failing to raise this issue on direct appeal and that Southerland was prejudiced thereby. *Id* at 615-17, 524 S.E.2d at 835-36.

107, 115, 485 S.E.2d 360, 364 (1997) ("Since appellant was eligible for parole if a life sentence was imposed, he was not entitled to a charge on parole eligibility"); *State v. Tucker*, 319 S.C. 425, 427, 462 S.E.2d 263, 264 (1995) (trial judge properly denied appellant's request to charge the jury if he were sentenced to life and an aggravating circumstance was found, he would not be eligible for parole for thirty years).

To the extent Applicant complains about the trial judge's comment that "there are sorts of varieties in this thing," he ignores that, when reviewing the trial judge's charge, the charge must be viewed as a whole. If the charge as a whole is substantially correct and adequately covers the law, then reversal is not necessary. *State v. Rabon*, 275 S.C. 759, 272 S.E.2d 634 (1980). Further, the trial judge's charge did not contain the language that Justice Blackmun's Opinion in *Simmons* found offensive because he did not charge jurors that parole "is not a proper issue for your consideration." *See Simmons*, 512 U.S. at 170 (Opinion of Blackmun, J.) ("It is true, as the State points out, that the trial court admonished the jury that "you are instructed not to consider parole" and that parole "is not a proper issue for your consideration." App. 146. Far from ensuring that the jury was not misled, however, this instruction actually suggested that parole was available but that the jury, for some unstated reason, should be blind to this fact").

Therefore, Respondent submits that when the trial judge's charge is considered as a whole, there is simply no reasonable likelihood the jury would have understood these remarks as permitting about parole or that the judge's charge was otherwise considered in unconstitutional manner. *Boyde v. California*, 494 U.S. 370 (1990) (question is whether there is reasonable likelihood that the trial judge's charge was considered in an unconstitutional manner). As a result, Applicant cannot prove either that trial counsel's performance was deficient or any

prejudice resulting from counsel's failure to object. This is particularly true in light of the overwhelming proof of the statutory aggravating circumstances.

GROUND 11(c)(5)

Applicant further alleges that trial counsel were ineffective for failing to object to the use of both larceny and robbery as aggravating factors. This Court does not need to determine whether trial counsel were deficient because Applicant cannot show any conceivable prejudice from counsel's performance. *See Strickland,* " 466 U.S. at 687 ("[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed").

Here, the trial judge did submit both armed robbery and larceny while armed with a deadly weapon, as statutory aggravating circumstances. **R. pp. 2120-23.** *See* S.C. Code Ann. § 16-3-20(C)(a)(1)(c)-(d). However, there was no error. A claim identical to Applicant's was rejected by the Court in *State v. Elkins*, 312 S.C. 541, 544, 436 S.E.2d 178, 180 (1993):

> Elkins asserts that submission of both (1) murder in the commission of armed robbery and (2) murder in the commission of larceny with a deadly weapon, impermissibly allowed the State to "stack" aggravating circumstances, in violation of the eighth amendment.
>
> This Court rejected the same contention in *State v. Woomer*, 277 S.C. 170, 173, 284 S.E.2d 357 (1981). *See also State v. Gilbert and Gleaton*, 277 S.C. 53, 283 S.E.2d 179 (1981) *cert. denied*, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 863 (1982) (death sentence upheld upon jury's finding aggravating circumstances of both "robbery while armed with a deadly weapon" and "larceny with the use of a deadly weapon.") We find no error.

Further and even assuming *arguendo* that the statutory aggravating circumstances of "murder during commission of armed robbery" and "murder during commission of larceny while

armed with a deadly weapon" are, under the facts presented, duplicitous, Applicant's death sentence does not require reversal. The jury was presented with and found four statutory aggravating factors: that the murder was committed while in commission of a robbery while armed with a deadly weapon; that the murder was committed while in the commission of larceny while armed with a deadly weapon; that the murder was committed while in the commission of kidnapping; and that the murder was committed while in the commission of physical torture. S.C. Code Ann. §16-3-20(C)(a)(1)(b), (d), (e) & (h). Under South Carolina's capital sentencing scheme, a jury does not "weigh" aggravating circumstances. *State v. Bellamy*, 293 S.C. 103, 359 S.E.2d 63 (1987); *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984). *See also Elkins, supra.*

Therefore, the finding of any one of these statutory aggravating factors was sufficient to satisfy *Furman v. Georgia*, 408 U.S. 238 (1972),'s narrowing requirement, and alone rendered Bellamy eligible for the death penalty. Moreover, the jury's consideration of the invalid eligibility factors in the weighing process did not produce constitutional error because all of the facts and circumstances admissible to establish the "murder during commission of larceny while armed with a deadly weapon" and armed robbery-murder eligibility factors were also properly adduced as aggravating facts bearing upon the kidnapping and physical torture sentencing factors. "They were properly considered whether or not they bore upon the invalidated eligibility factors." Therefore, any error would be harmless. *Brown v. Sanders*, 546 U.S. 212, 224 (2006). *See also Elkins, supra.* As a result, there cannot be any prejudice from counsel's failure to raise an objection.

GROUND 11(c)(6)

Applicant's next three allegations are that trial counsel was ineffective for failing to properly object to inadmissible victim impact evidence of a prior ABHAN victim. In his original Application, he argued that it was inadmissible "on the grounds that it was improper victim impact evidence in violation of *Payne v. Tennessee*, and that it was irrelevant and barred by Rule 403 if it was relevant." Specifically he complains about testimony from one of the ABHAN victims concerning the recurring dream he has experienced following the attack **(Ground 10(b))** the testimony from the victims' mothers concerning the extent of the injuries inflicted **(Ground 10©)** and photographs depicting the injuries inflicted **(Ground 10(d))**. Respondent again submits that these allegations lack merit. Applicant simply cannot meet his burden of proof on either prong of *Strickland, supra.*

As part of its case in re-sentencing, the State introduced Applicant's two September 14, 1988 convictions for A.B.H.A.N. and his Youthful Offender Act sentence[26]. These convictions stemmed from him savagely beating two employees of the Pizza Hut in Lexington, on March 4, 1988. **R. p. 1029; State's Ex. 6.**

The State also presented several witnesses to testified concerning the attack itself and the injuries inflicted upon the two victims by Applicant. William Mark DuBose testified that he recalled seeing "a large black male" standing over one of two white males who were lying on the pavement when he pulled into the parking lot of the Pizza Hut on March 4, 1988. He described the two white males as "motionless, apparently unconscious. There was a good bit of blood lying around both of them. They were obviously injured and were not moving." However, the black man stomped one of the motionless victims approximately three or four times. The man

[26]He was sentenced to an indeterminate period not to exceed six years.

then got into a truck with two white males and they left the scene. For his part, DuBose fled to a nearby parking lot out of fear of his own safety. **R. pp. 986-94.**

Rhonda Smith testified that she and her boyfriend were at the Pizza Hut that same night. As they were sitting at a window booth, she saw "a black male dragging a white male from the back of the Pizza Hut ... by his hair. ... The white guy was like on his back, and he was just dragging him along the ground with no effort by the white individual at all, it was strictly by the black male." Once the black male had dragged his victim to the front door of the Pizza Hut, he let go of the fistfull of hair he had been pulling, "kneel[ed] down and beat him in the face with his fists and kicked him and stomp him." **R. pp. 996-98.**

The black male punched his defenseless victim at least five or six times in the face and kicked and stomped him with his feet three or four times in the head[27]. After he stomped him for the last time, he jumped into a truck (driven by a white male) that had pulled up, and the truck drove away from the scene. Ms. Smith stayed until the police and an ambulance had arrived. While there, she saw another person laying on the ground in the back of the Pizza Hut. **R. pp. 998-1003; 1006-09.**

Apparently, Applicant's trial counsel raised an objection to the testimony of Sharon Brady, the mother of Pizza Hut victim Shannon Gilbert at a bench conference. *See* **R. p. 1012, ll. 6-9.** The trial judge later noted that counsel had argued that her testimony about the extent of her son's injuries and the reaction was irrelevant. The trial judge stated that he had overruled the objection because the South Carolina Supreme Court had approved the admission of such testimony. Counsel added that he contended that this was "inappropriate, victim impact type of information" which had nothing to do with the crime for which he was on trial. **R. pp. 1038-39.**

[27]The white male never moved. **R. p. 1001.**

He also noted that he had the same objection before the testimony of Helen McGough, the mother of Pizza Hut victim Aaron McGough. This was likewise overruled. **R. pp. 1038-39.**

Mrs. Brady testified that her son, Shannon Gilbert, worked at the Pizza Hut on March 4, 1988. She received a call that night from the Pizza Hut that he had been taken to the Lexington County Hospital. She later received a second call notifying her that he had been taken to the Richland Memorial Hospital because of head trauma. When she arrived at the hospital, he was unconscious and she had a hard time identifying him because of the bruises, cuts and swelling on his face and head. He remained unconscious and in the intensive care unit (I.C.U.) for thirteen days. She photographed his injuries while he was in I.C.U.

The photograph was taken within the first several days after he was placed in I.C.U. and represented how he looked "a day or two" after the incident. **R. p. 1014, ll. 16-25.** Over trial counsel's objection that the photograph "adds nothing" to her testimony about Shannon's injuries and was intended "to inflame the jury," the trial judge allowed the photograph into evidence as **State's Ex. 5.** He found that it was "not overly graphic or inflammatory," and that it "fairly depicts and represents the testimony of the witness ...." **R. p. 1015, ll. 1-25.**

Mrs. Brady then testified that Shannon's condition had not changed between the first time she saw him after the crime and when she took the photograph, except for "the apparatus added to him." **R. p. 1016, ll. 3-16.** Even after he regained consciousness and was taken out of I.C.U., he remained in the hospital for another eleven days. He finally could walk "some." He then remained at home for five days before being sent to the Rebound Head Trauma Center in Lancaster, South Carolina, for approximately two and a half months. **R. pp. 1012-18.**

Mrs. Brady also testified that he continued to have rehabilitation and therapy after the discharge from the trauma center and they had to personally hire a tutor as well because they did not meet the time requirements for the State to provide one. Shannon needed a speech therapist. Additionally, he needed a physical therapist to help him exercise his left leg and arm, which had been affected by a fracture behind his right ear. She stated that he had not completely recovered from the beating. **R. pp. 1018-20.**

Shannon Gilbert testified that he could not remember very much of what had happened on March 4, 1988. However, he remembered getting off work at approximately 10:00 or 10:30 p.m. and going to use the phone outside the front door. While he was talking to a girl, he asked a black man who was standing there if the man needed to use the phone. When the man indicated he did, he told his fried that he had to go and call her from inside the store. The next thing he remembered was waking up in the hospital about thirteen or fourteen days later. He then corroborated his mother's testimony about the extent of his injuries and the impact it had upon him: that he was unconscious for thirteen days; that he was unable to walk or talk when he first regained consciousness; that he stayed in the hospital approximately three and one-half weeks; that he had no coordination and no strength in his left hand and left leg even after his discharge; and that he was in the head trauma center for roughly two and one-half months, where he had both speech and physical therapy. Additionally, he provided details concerning the effects that lingered from the beating, such as the lack of coordination in his left hand and left leg and the problems caused by his impaired short-term memory. **R. pp. 1018-28.**

When asked if he had any consciousness about being in the hospital or any dreams that he could remember from being in the hospital, Shannon Gilbert testified that "I had a dream. I did

have a dream in the hospital. It's the only one I remember, of course."Appellant objected on the grounds that the testimony was irrelevant. Over his objection, Shannon was permitted to testify that "I remember the dream. I woke up and I remember being afraid. ... It was – – Indians were chasing me trying to kill me, and the thing that I thought was they were black. And later on – – or after years have gone by I've maybe even though, well, there might have been a link. You know, that I was remembering something about trying to get away from someone." **R. p. 1027 l. 17 - p. 1028 l. 13.**

At this point, Applicant's trial counsel stated, "I renew my motion. I move that it be stricken. That's irrelevant." The trial judge noted his motion, but denied it. **R. p. 1028 ll. 15-17.** On cross-examination, counsel established that "[t]here were two other white guys involved" in addition to he and Aaron McGough; but, he did not remember the fight initially between the "white guys." **R. p. 1030 ll. 11-22.**

In an *in camera* hearing after Mrs. McGough's testimony, trial counsel stated that he had objected to any testimony about the extent of the injuries suffered by the Pizza Hut victims as inappropriate victim impact evidence. He renewed this motion with respect to Shannon's testimony. He also asserted that this motion supported his previous motion to have a black juror remain seated even though the individual had indicated he may not be fair and impartial. Counsel claimed that the testimony by Shannon had "no importance" and no relevance "except to inflame a white jury." He asserted this was a gross violation of his rights to interject race. The trial judge denied the motion and found that Shannon had "testified just to what his impressions were of the dream that he had." **R. pp. 1039-41.**[28]

[28]This motion was predicated upon the trial judge's excusing for cause black male juror Thomas W. Brown (*see* **R. pp. 144-55; 820-24)** when he indicated, after jury selection, that he

Ms. Helen McGough testified that her seventeen year old son, Aaron, was working his first night at the Pizza Hut on March 4, 1998. He was supposed to leave work around 11:00 p.m. and she waited up for him to come home and discuss his first day at work. However, he did not come home as planned. Instead, she received a call at approximately 11:20 or 11:25 p.m. informing her that he had been taken to the Lexington Hospital. About five or ten minutes later she received a second call and, as a result, went to the Richland Memorial Hospital. When the ambulance arrived and opened the door, he resisted the efforts of emergency medical personnel to get him out of the ambulance. **R. pp. 1031-33.**

Ms. McGough tried to speak to her son but he did not respond. Also, she indicated that she would not have recognized him if she had not known it was him because his face "was all cut up. His eyes were just little slits. His nose and his mouth ... was just all one. His forehead was all cut up." (sic). He was immediately transported to the emergency room and was treated by a neurologist and a plastic surgeon. She next saw him in intensive care but, again, he was unresponsive when she tried to talk to him. "[H]e was just very, very, still." **R. pp. 1033-34.** Aaron remained unconscious and in I.C.U. for four days. Ms. McGough took a picture of his injuries at that time. She testified that Aaron had "[n]ot really" fully recovered from the beating he received that night, and that his personality had changed from someone who was "real easy-going" to someone who quickly becomes frustrated or angry. Also, he still "has short-term memory loss." Even after he was removed from I.C.U., he stayed in a hospital room for almost a

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could not be fair and impartial because of his familiarity with the victim's family. Applicant's counsel suggested that he should be allowed to remain as a juror so that Applicant would not be tried by an all-white jury. The trial judge, however, rejected his arguments (**R. pp. 867-85**) and Applicant did not raise any issue on direct appeal concerning this ruling.

week. At home, he still had to have someone with him at all times; and Ms. McGough stayed home with him for approximately six weeks. Additionally, he was real weak. **R. pp. 1034-37.**

When the State asked Mrs. McGough whether she could identify a photograph, Applicant's counsel made an identical objection to the photographs of Aaron McGough. **R. p. 1035, ll. 11-16.** However, the trial judge found that these photographs were "not so graphic or inflammatory as to cause any problems" and that they appropriately depicted Mrs. McGrough's testimony. **R. p. 1035, ll. 18-20.**

Mrs. McGrough then testified that the photos depicted Aaron. She had taken them after he had been in the hospital four days Although "A lot of the swelling had gone down and you could see his eyes again, he still had a lot of swelling. Also, the photos fairly represented how Aaron looked at the time the photos were taken. Therefore, the trial judge allowed these photos into evidence as **State's Ex. 7**, over trial counsel's objection. **R. p. 1035, l. 24 - p. 1036, l. 14.** Counsel later unsuccessfully renewed his objection to the photographs and the victim impact evidence at the conclusion of the State's case. **R. pp. 1769; 1775-77.**Counsel likewise renewed his objection concerning Shannon's "dream testimony" at the close of the State's case and argued that Shannon's testimony improperly inserted race into the proceedings in light of the fact he had an all-white jury. **R. p. 1769 ll. 18-23.** The trial judge, again, denied his motion. **R. p. 1776 l. 21 - p. 1777 l. 13.**

Counsel renewed his objection to Shannon's testimony in support of his motion for a new trial. **R. pp. 2363-80.** Trial counsel also unsuccessfully renewed his objection to the "victim impact evidence, as well as the photographs of the two Pizza Hut victims at the conclusion of the State's case. **R. pp. 1775-77.** He also argued his objection to this testimony in the motion for a

new trial. **R. pp. 2207-08,** The State responded thereto. **R. p. 2381-2406.** The trial judge denied the motion for a new trial and expressly rejected this argument in his August 24, 2003 Order. **R. pp. 2407-2435.** On pages 9-10 of his Order, the trial judge rejected counsel's argument concerning Shannon's "dream testimony" as follows:

> "The comment of "black Indians" was not elicited by the State, was mentioned only once, was evidence of the Defendant's violent character and the impact of that violence on the victims, was not referred to thereafter by the State, was not a blatant racial reference, and did not prejudice the Defendant. I, therefore, find this isolated comment does not warrant a new trial."

Applicant's first three issues on direct appeal challenged the trial judge's ruling. **See Final Brief of Appellant, at pp. 4-19; Final Brief of Respondent, at pp. 15-28.** However, the South Carolina Supreme Court rejected his arguments as follows:

> Appellant argues that the trial court erred in admitting the ABHAN victims' mothers' testimonies, the hospital photographs, and the testimony about the victim's "black Indians" dream because this evidence was impermissible "victim impact" evidence of prior crimes. We disagree.
>
> In *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the United States Supreme Court held that the Eighth Amendment did not prohibit a jury from considering "victim impact" evidence at the sentencing phase of a capital trial. In *Payne*, a brutal double murder, the defendant challenged the admission of testimony that the child of one of the victims "missed his mother" and the State's remarks in closing arguments suggesting that the continuing effects of the crimes on the victims' family favored imposing the death penalty. *Id.* at 816. Drawing on historical arguments and reasons of fairness, the Supreme Court held that a state was not constitutionally prohibited from allowing a capital sentencing jury to consider "the specific harm caused by the defendant," including the impact of the murder on the victim's family and "a quick glimpse of the life which the defendant chose to extinguish." *Id.* at 822-26, 111 S.Ct. 2597.
>
> Contrary to Appellant's assertions, none of the testimony at issue in this case was "victim impact" evidence. First, the mothers'

testimonies were limited to the circumstances surrounding the ABHAN and the extent of the injuries their sons suffered. This evidence was clearly not evidence of the character of the victims or the impact on their families, but rather, evidence of the physical injuries caused by Appellant. That the descriptions of the victims' injuries came from their mothers does not automatically convert factually descriptive testimony into impact testimony regarding the victims' character or the effect on the victims' families or community..

Similarly, there can be no question that the hospital photographs were introduced to describe the extent of the injuries the ABHAN victims suffered. These photographs are easily distinguished from cases where photographs have been deemed "victim impact" evidence. *See State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999) (photograph of murder victim in his high school graduation regalia); *see also State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997) (photograph of victim and her husband taken shortly before victim was involved in fatal accident). Although, like in *Langley* and *Livingston*, the photographs in this case were certain to elicit an emotional response from the jury, these photographs were highly probative of the nature of Appellant's prior crime in that they provided the clearest picture of the aggravated nature of the assault and battery.

Finally, we hold the victim's testimony about his "black Indians" dream was not "victim impact" evidence. This testimony merely described the emotional injury to the ABHAN victim.

Though masquerading as a horse of the same color, the dissent decides an entirely different case from the one at bar. At the sentencing proceeding, Appellant argued the testimony about the ABHAN victims' injuries was "inappropriate victim impact type of information having nothing to do with the particular crime Mr. Bennett is on trial for now." Likewise, it appears Appellant's objection to the hospital photographs was based on Rule 403, SCRE (excluding relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice). Finally, Appellant objected to the introduction the victim's dream on the grounds of relevance. Before this Court, however, Appellant did not couch these objections in terms of relevance or a Rule 403 analysis. Instead, the only theory Appellant presented to this Court on this issue was that this evidence should have been excluded as impermissible victim impact evidence of prior crimes.

Because the evidence in this case was not victim impact evidence, Appellant's argument must fail. When asked to do so, we will consider arguments regarding the types of evidence of prior crimes that should and should not be admissible in a capital sentencing proceeding.[FN2] However, we feel that the delicate task of balancing the duty to conduct a sentencing inquiry "broad in scope," *Dawson*, 503 U.S. at 164, 112 S.Ct. 1093, against the need to protect a capital defendant from unfair prejudice and prevent a capital sentencing proceeding from transmuting into a sentencing referendum on all of the defendant's prior crimes is only properly performed when that case is presented. Such a case would no doubt involve considerations of when the introduction of evidence renders a proceeding so unfair as to violate due process, *see Payne*, 501 U.S. at 831, 111 S.Ct. 2597 and also would implicate our rules of evidence; rules which, at the most basic level, allow proof of character by specific instances of conduct. See Rule 405, SCRE.

[FN2. Academically, South Carolina has long recognized that information about prior convictions is admissible in a capital sentencing proceeding. *See State v. Gaskins*, 284 S.C. 105, 124, 326 S.E.2d 132, 143 (1985); and *State v. Plath*, 281 S.C. at 9, 313 S.E.2d at 623 (stating that this rule is so fundamental that it requires no citation of authority). This rule is derived from the principle that receiving evidence of prior crimes is probative of the character of the defendant and consistent with the sentencing authority's duty to "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *Dawson v. Delaware*, 503 U.S. 159, 164, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992); *see also State v. Skipper*, 285 S.C. 42, 47, 328 S.E.2d 58, 61 (1985) (overruled on other grounds 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)). Appellant has not challenged this rule, and indeed, Appellant has made no discussion of these authorities (upon which the trial court directly relied).]

Instead of addressing any of these topics, which would be of paramount importance when considering clarifying our relevance rules, the briefs to this Court, like Appellant's argument, concerned only victim impact evidence. Under these circumstances, we feel the better course is to confine ourselves to a careful analysis of the arguments briefed and presented to us. *See State v. Torrence*, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991) (abolishing *in favorem vitae* review in capital cases). Although the dissent raises intriguing questions, we think it the better course to wait to decide such a case until we are asked. *See State v. Prioleau*, 345 S.C. 404,

> 411, 548 S.E.2d 213, 216 (2001) (appellate court will not consider issues not properly presented)..
>
> Based on the above reasoning, we hold that the testimony about the ABHAN victims' injuries and the corresponding photographs was not impermissible victim impact evidence relating to Appellant's prior crimes.

Bennett II, 369 S.C. at ___, 632 S.E.2d at 286-87.[29]

Respondent submits that Applicant cannot satisfy either requirement of the *Strickland* test. In particular, he cannot show deficient performance from the failure to better articulate the argument that the challenged evidence was impermissible victim impact evidence under *Payne* because the characterization of the disputed evidence as victim impact evidence is simply wrong. This was not evidence showing the full extent of the harm caused by the defendant's actions to the victim's family and society, by showing the consequences of these actions, as permitted by *Payne*, 501 U.S. at 824-30.

Instead, it was proof of the extent of the actual injuries inflicted upon victims of the Pizza Hut attacks and was proof of the A.B.H.A.N..s. It is the State's position that this is consistent with the Eighth Amendment and that Applicant's contrary position lacks merit. *E.g.*, *E.g.*, *Ray v. State*, 330 S.C. 184, 498 S.E.2d 640 (1998). *Cf. Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("[W]e believe that in capital cases ... the Eighth Amendment ... requires consideration of the character and record of the individual offender ... as a constitutionally indispensable part of the process of inflicting the penalty of death"). Further, the South Carolina Supreme Court has already rejected the same arguments and determined that the challenged evidence was not victim impact evidence. Because the South Carolina Supreme Court rejected Applicant's argument

[29]Justice Pleicones dissented and would have held that admission of this evidence was reversible error. *Id* at ___, 632 S.E.2d at 290-91. (Pleicones, J., dissenting).

pertaining to this evidence on direct appeal in *Bennett II*, the law of the case is that there was nor reversible error in its admission. See *Robert E. Lee & Co.*, *supra* (when a party makes the same argument it made in a former appeal, the decision in the former appeal is the law of the case); *Ackerman*, 324 S.C. at 443, 477 S.E.2d at 268 ("Matters decided by the appellate court cannot be reheard, reconsidered, or relitigated in the trial court, even under the guise of a different form").

Further, he cannot show deficiency or prejudice from the failure to argue relevancy and inadmissibility under a Rule 403, SCRE, analysis. Although the majority refused to address these matters because the argument advanced by the dissent was unpreserved, the majority correctly noted in footnote 2 that this State "has long recognized that information about prior convictions is admissible in a capital sentencing proceeding." *Bennett II*, 369 S.C. at ___, 632 S.E.2d at 287 n.2. S.C. Code Ann. § 16-3-20(B) provides that during the sentencing phase, "the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of the punishment." Before a death sentence is imposed, the sentencing jury's attention must be directed to the specific circumstances of the crime and the characteristics of the person who committed the crime. *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979).

Indeed, the Court has consistently held that evidence of other crimes is admissible at sentencing phase of capital trial, including photographs of a victim. *E.g.*, *Ray v. State*, *supra* (1998) (evidence of other crimes, including "gory photos" of victim, is admissible at sentencing phase of capital trial); *State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (1985) (details of defendant's prior murder convictions, including photographs of prior murder victims, were properly allowed into evidence in sentencing phase); *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984) (information concerning the details of prior offenses can be introduced during the penalty

phase); *State v. Skipper*, 285 S.C. 42, 328 S.E.2d 58 (1985). *Cf. State v. Bell*, 302 S.C. 18, 32, 393 S.E.2d 364, 371-72 (1990).

Here, the evidence concerned two similar crimes (A.B.H.A.N.) to the murder conviction for which Bennett was being sentenced. "Admission of testimony that a defendant has attempted a similar crime or crimes to that for which he is on trial is proper because such testimony indicates a defendant's individual characteristics and predisposition to commit similar crimes." *State v. Green*, 301 S.C. 347, 358, 392 S.E.2d 157, 162-63 (1990) (citations omitted).

Also, this evidence, along with other evidence of his behavior while incarcerated, showed Applicant's extremely violent nature and future dangerousness. Evidence of a defendant's future dangerousness is a legitimate interest at sentencing. *Dawson v. Delaware*, 503 U.S. 159 (1992).

Moreover, the trial judge gave a limiting instruction that required the jury to find that the State had proved the evidence of his bad character beyond a reasonable doubt before considering it. This instruction also precluded the jury from relying upon evidence of these crimes to prove statutory aggravating circumstances, but insured that the jury's consideration of these offenses was limited to proof of evidence of "[Applicant]'s character and characteristics as they may bear logical relevance to the crime." He further charged the jury that they could give this evidence "whatever weight you consider proper under the circumstances of this case." **R. p. 2123, l. 4 - p. 2124, l. 2.** *Cf. Green*, 301 S.C. at 358, 392 S.E.2d at 163; *State v. Stewart*, 283 S.C. 104, 320 S.E.2d 447 (1984).

Further, Shannon's testimony constituted some proof of the identity of his attacker and, more significantly, was admissible as a circumstance of the prior crime bearing on Appellant's culpability. As such, it was properly admissible. *See People v. Marks*, 72 P.2d 1222, 1241

(Cal.2003), *cert. denied*, 541 U.S. 1033 (2004) (agreeing with trial court's rejection of any distinction between an injury and the result of that injury, finding that there was a basis for introducing some videotaped evidence of unrelated gunshot victim's condition, and holding that any error in introduction of lengthy videotape was harmless); *People vs. Holloway*, 91 P. 3d 164, 195-96 (Cal. 2004) (concluding that testimony of prior, unrelated victim's emotional trauma years later, which resulted from the defendant's assault with a deadly weapon, was properly admitted because the link between the attack and the emotions and actions to which she testified was direct and foreseeable), cert. denied, 125 S.Ct. 1302 (2005).[30] Respondent submits that very similar testimony was presented in the penalty phase in *Bell*, *supra*.

Even if the Court were to view it as victim impact evidence of unrelated offenses, this evidence was properly admitted. *Id. See also People v. Garceau,* 862 P. 2d 664 (Cal. 1993) (federal constitution does not bar introduction of evidence showing effect of prior violent criminal activity of victims); *People v. Mickle*, 814 P. 29 290, 316-17 (Cal. 1991) (In Banc) (admission of evidence concerning impact of defendant's prior sexual assaults on victims during penalty phase of capital murder trial did not violate the Eighth Amendment because the evidence concerned obvious emotional effect of defendant's prior sexual molestations on victims and were admissible as circumstances of the prior crimes bearing on the defendant's culpability).

Finally, Respondent submits that there was no prejudice resulting from the failure to argue lack of relevancy or that the evidence should have been excluded under a Rule 403 analysis (*i.e.*, that the probative value of this evidence was substantially outweighed by its prejudicial effect). First, the limiting charge prevented the jury from considering this evidence as

[30]California's death penalty law permits evidence of prior violent offenses, much like South Carolina. *See* West's Ann. Cal. Penal Code §190.3(b).

proof of an aggravating circumstance(s). Second, the State was obligated to prove the A.B.H.A.N.s beyond a reasonable doubt, and this evidence helped meet that burden. *Cf. State v. Riddle*, 301 S.C. 68, 71, 389 S.E.2d 665, 667 (1990) (appellant's burglary and armed robbery convictions "had no legal efficacy" at the subsequent re-sentencing proceeding and were not binding upon the re-sentencing jury).

Third, the testimony of the mothers is largely cumulative to the testimony of Shannon Gilbert **R. pp. 1018-28)** and there is no challenge to his testimony in this regard. Fourth, Shannon only mentioned the dream once. Also, the State never mentioned it again in closing argument. ***See* R. pp. 2053-81.** His testimony only constituted thirteen lines of testimony in a transcript that was 2,159 pages long and cannot fairly be characterized as prejudicial..

Additionally, his challenged testimony "was not a blatant racial reference." **Order, R. pp. 2415.** It was merely Shannon's impression of his own dream. Fifth, all of the challenged testimony pales in comparison to testimony of the extent of the injuries he inflicted upon Benton during the commission of the murder, as well as the testimony from the two eyewitnesses to the Pizza Hut attacks, William Mark DuBose and Rhonda Smith. **R. pp. 986-1003; 1006-09.** Finally, there was overwhelming evidence establishing the statutory aggravating circumstances found by the jury. *See State v. Gaskins*, 284 S.C. at 127, 326 S.E.2d at145 (erroneous admission of evidence in sentencing phase reviewed for harmless error).

However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Therefore, Respondent requests an evidentiary hearing to fully resolve this issue. *See Sharper v. State*, 279 S.C. 264, 305 S.E.2d 247 (1983).

GROUND 11(c)(7)

Next, Applicant alleges that trial counsel were ineffective in failing to object to "prejudicial and improper statements by the prosecution during the opening statement and closing argument of the sentencing phase of applicant's trial" that he says deprived him of due process. Respondent submits that the law of the case is that the State's remarks did not deprive Applicant of a fundamentally fair trial because many of the comments at issue were challenged on direct appeal and then rejected by the South Carolina Supreme Court. Further, Applicant cannot show any prejudice under *Strickland* from counsel's failure to object for this same reason.

"[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (*citing United States v. Nobles*, 422 U.S. 225 (1975)). "To this end it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another." *United States v. Robinson*, 485 U.S. 25, 33 (1988). The United States Supreme Court has made clear, that a petitioner is not entitled to relief based upon the closing argument of a prosecutor, unless that argument so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). The standard in *Donnelly* is a very high standard for a defendant to meet. "'[I]t is not enough that the remarks were undesirable or even universally condemned.' *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)." *State v. Tubbs*, 509 S.E.2d 815, 818 (S.C. 1999). "In order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo." *United States v. Young*, 470 U.S. 1, 12 (1985). Furthermore, "a court should not lightly infer that a prosecutor

intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly*, 416 U.S. at 647.

In *State v. Durden*, 212 S.E.2d 587, 590 (S.C. 1975), the state supreme court set forth examples of permissible closing arguments by prosecutors:

> 'So long as he stays within the record and its reasonable inferences, *the prosecuting attorney may legitimately appeal to the jury to do their full duty in enforcing the law, or to return the verdict which he conceives it to be their duty to return under the evidence, and it may employ any legitimate means for impressing on them their true responsibility in this respect*, as by stating that a failure to enforce the law begets lawlessness. Thus, he may in effect tell them that the people look to them for protection against crime, and may illustrate the effect of their verdict on the community or society generally with respect to obedience to, and for enforcement of, the law; he has the right to dwell on the evil results of crime and to urge a fearless administration of the criminal law; *and he may ask for a conviction, or assert the jury's duty to convict.* He may argue with reference to any matter which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider.'

(Citation omitted) (emphasis added).

Applying these standards to the comments at issue here, Respondent submits that the Assistant Solicitor's comments did not so infect the trial with unfairness as to make the resulting conviction a denial of due process under *Donnelly*. One of the key issues in the sentencing proceeding was whether or not Applicant would be a danger in the future if incarcerated. The State had presented a great deal of evidence reasonably tending to show that Applicant began bullying and trying to intimidate others with his physical size beginning in the fifth grade and continued in this type of behavior until he was finally expelled in the tenth grade. At some point, he began trying to intimidate teachers as well, and he developed a pattern of disrespecting

authority and attempting to shift blame to others. **R. pp. 920-70; 970-86; 1069-75.** This continued even after he was incarcerated on the Youthful Offender Act sentence for assault and battery of a high and aggravated nature (A.B.H.A.N.). **R. pp. 1093-1101.**

Both eyewitnesses to the March 4, 1998 attack at the Pizza Hut - William Mark DuBose and Rhonda Smith - testified that they saw a black man attacking a white man, who was not defending himself, in the parking lot. Ms. Smith testified that the black man (subsequently identified as Applicant) pulled this defenseless victim by the hair and drug him across the parking lot to the front door of the Pizza Hut. He then stomped and beat his defenseless victim. **R. pp. 986-1003; 1006-09.**

Obviously the jury could see Applicant's size. Further, the State presented testimony from a life-long friend that he was approximately 6' 5" or 6' 6" tall and weighed 300 pounds. **R. p. 1266 l. 13-16.** Other witnesses also described him as very big. On the other hand, Benton Smith (the victim) weighed a paltry 135 pounds and was approximately 5' 8" tall. Dr. Joel Sexton, the pathologist, described his as being of slender build. **R. pp. 1680-81.**

As part of its showing of future dangerousness and his violent character, the State also presented testimony from various employees within LCDC and SCDC concerning dangerous, violent, disrespectful or disruptive behavior in which he repeatedly engaged while in jail or prison. On various points in his incarceration, he was found in either immediate or constructive possession of a shank **R. pp. 1482-83**); a metal flap **R. pp. 1488-89**); a metal rod **R. pp. 1504-05**); a portion of a light fixture **R. pp. 1483-84)** and clay. Clay is dangerous because it can be used to make a duplicate key or jam the locks to the cell. **R. pp. 1561; 1563-64.** On another occasion he was found in possession of a smoking pipe. **R. pp. 1552-53.**

He once flooded his cell and the wing in which it was located with water. **R. pp. 1493-96.** On yet another occasion, he sprayed shaving cream over surveillance cameras in the jail. **R. p. 1496.** There was also testimony concerning his repeated refusal to obey directions from officers or disrupting officers attempting to perform their duties. **R. pp. 1076-78; 1488-89; 1496-1500; 1526-41; 1544-45; 1547-71.** In addition to being an "enforcer" for certain officers at the jail and beating up inmates there **R. pp. 1515-17**), he was involved in at least four other fights with other inmates. **R. pp. 1076-81; 1086-90; 1489-93; 1526-41; 1565-68.**

Sharon McChesney, a correctional officer at LCDC in 1993, testified that on July 23, 1993, Applicant attempted to force his way into the cell of inmate Dougins when Officer McChesney attempted to give medication to Dougins. Applicant picked up the 5' 4" McChesney, moved her out of the way, dragged Dougins out of his cell by his hair, he threw Dougins on the cement floor and pounded Dougins' head into the floor.[31] When an inmate Glover made a comment to him that he was going to kill Dougins, Applicant turned as said "you better back the hell off." ***See* R. pp. 1526-37.**

Captain Adrian Bost, the jail administrator in 1990-93, testified that Applicant had seventy or more disciplinary violations while at LCDC. Captain Bose testified that in his career, Applicant was "one of the most intimidating, violent, disrespectful and disorderly inmates you would ever, ever want to deal with. [He] used his size to intimidate people ... ." Attempts to counsel him on this failed and "he always used his size to push [both officers and inmates] around." **R. pp. 1548-49; 1570 l. 14 - 1571 l. 5.**

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[31]Officer McChesney described Dougins as a "little shorter" that Applicant but stated that he was "a skinny little thing. He ... was not a big man ... ." Also, Applicant prevented Officer McChesney from radioing for assistance every time she attempted to do so. **R. pp. 1532-33.** Also, Officer McChesney's efforts to physically stop him did not work.

Warden Willie Weldon, warden of Lieber Correctional Institution, testified on cross-examination that he had not received information about Applicant disrespecting or having any disciplinary problems at his facility **R. pp. 1638-39)** but stated on redirect that he received a request form from Applicant dated May 27, 1997 **(State's Ex. 66)**, in which Applicant acknowledged that "anything in my jacket could very well have an impact on me when I go back to Court." **R. pp. 1644-45.**

Applicant's witnesses, quite obviously, painted a different story. Aside from Collins' claim that all the guards loved him at LCDC **R. p. 1979)**, Applicant presented expert and lay testimony that he could adapt to prison life and that SCDC could adequately and safely confine him; that he was no longer a violent, disrespectful or disruptive inmate; that he would follow the rules and orders; and that he was very involved in the prison ministry. **R. pp. 1789-1803; 1864-69; 1873-82; 1889-1903; 1910-34; 1980-2012.** The various lay witnesses, many of whom were correctional officers or otherwise came into contact with him while he was incarcerated at SCDC variously referred to him as "a model inmate" **R. p. 1795)**; "very polite" and "easy-going" **R. p. 1867)**; "[r]espectful" **R. p. 1877)**; "a mediator" who explained rule changes to other inmates **R. pp. 1893-94)**; someone who was "very compassionate for others" **R. p. 1915)**; a "[b]ig teddy bear" **R. p. 1921)**; someone who had a "very positive attitude toward everything" and was "more of a big brother type" **R. p. 1927)**; and "a gentle giant." **R. p. 1929.**

It was against this backdrop of evidence that the Solicitor made his comments that are presently complained of and were challenged on direct appeal. While summarizing Applicant's violent behavior at the Pizza Hut and the incident involving inmate Dougins, the Solicitor made the following comments:

> "I don't know whether it was the black lady that was inside eating with her boyfriend or the tall white boy that was outside that drove through, said that ... Johnny was even pulling one of them by the hair. Kind of like an old cave man, dragging him by the hair. Then the guy was motionless."
>
> "Same thing happened in jail over there to Mr. Dougins when he went in that cell moved that female guard out of the way and he dragged Mr. Dougins out by his hair."

R. pp. 1062 ll. 12-23.

The Solicitor pointed out, without objection, that, like much of Applicant's violent past, it supposedly was not Applicant's fault and focused upon his documented history of shifting blame to other people. Later, the Solicitor discussed the conflicting portraits presented to the jury as to Applicant's future dangerousness in prison. He reviewed the extensive showing by the State that Applicant was a violent, disrespectful, disruptive and manipulative inmate; and he juxtaposed this against the showing made by the defense. He urged the jury to reject the defense's showing based upon Applicant's comment in May 1997 that "anything in my jacket could very well have an impact on me when I go back to court." **R. pp. 2074-78.**

He then made the following comments, again, without objection:

> "You give him life, the real Johnny will come back. You give him life and he will come back out. Meeting him again will be like meeting King Kong on a bad day. Vile Johnny. Mean Johnny. Manipulating Johnny. Murderous Johnny. You give him life, those guards better button up their vests because he's coming back out in force.
>
> Because he's got what he wants. He's got the people to testify, trying to pull the wool [] over his eyes, trying to pull the wool [] over your eyes. Being smart, being intelligent, being manipulative and being a con man, that's a dangerous combination. That's an explosive combination wrapped up in him, all six-foot-seven, 300 pounds of him. And that's for you to decide."

R. p. 2079 ll. 2-14.

Trial counsel did not object either at the conclusion of the State's argument **R. pp. 2082),** after the argument of Applicant and defense counsel **R. pp. 2105)** or at any point thereafter even after the sentence had been imposed. ***See*** **R. pp. 2106-59.**

Trial counsel first raised this in a post-trial motion for new trial. **R. p. 2363-80.** The State responded to this, as well. **R. p. 2381-91.** After holding a hearing on the new trial motion, the trial judge took the matter under advisement. **R. p. 2161- 2214.** Subsequently, the trial judge issued his Order denying Applicant's motion. The trial judge specifically relied upon Applicant's failure to contemporaneously object to either portion of the State's closing argument, in addition to making findings that the State's closing argument was proper and invited by the argument and evidence presented by the defense. **R. p. 2417-23.**

The challenge to the Solicitor's closing argument was raised as the fifth argument on direct appeal. **Final Brief of Appellant, at pp. 28-33; Final Brief of Respondent, at pp. 33-44.** The South Carolina Supreme Court rejected the argument, as well as the allegation that race was impermissibly injected into the case by the Solicitor's re-cross examination of defense witness Byron Collins, as follows:

> Appellant argues that the Solicitor's comments during cross-examination of a witness and during closing arguments improperly injected racial issues into the trial. We disagree.
>
> As a general rule, inflammatory remarks which are calculated to appeal to the passions or prejudices of a jury should be affirmatively condemned. *South Carolina State Highway Dep't. v. Nasim*, 255 S.C. 406, 411, 179 S.E.2d 211, 213 (1971). "[W]hether or not the particular arguments are so prejudicial as to constitute reversible error depends upon the nature of the utterances and the circumstances under which they were made." *Id.* Under certain circumstances, this Court will grant a new trial despite the aggrieved party's failure to contemporaneously object to the argument if the prejudice caused by the argument is clear. *Dial v. Niggel Assoc., Inc.*, 333 S.C. 253, 256, 509 S.E.2d 269, 271

(1998); *Toyota of Florence, Inc., v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994).

Additionally, a solicitor's closing arguments in a capital trial should focus on the defendant's character, his background, and the nature of the crime. *State v. Reed*, 293 S.C. 515, 519, 362 S.E.2d 13, 15 (1987) (overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991)). The arguments must be viewed in the context of the entire record, and the relevant question is whether the comments infected the trial with unfairness so as to make the resulting conviction a denial of due process. *State v. Patterson*, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997).

As a starting point, we recognize that the terms "blond lady" and "King Kong" could have racial connotations. However, this court's jurisprudence does not prohibit the use of terms with racial meanings, nor does our case law stand for the proposition that arguments or evidence in a case must be void of racial allusions. Instead, this court has recognized that it is impermissible to use race to "inflame the passions or prejudices" of the jury. Accordingly, our inquiry focuses on how these terms were used in Appellant's case.

In our view, the "blond lady" remark was not made to inflame the passions or prejudices of the jury. If the State had sought to make the race of Appellant's former lover an issue in this case, we believe they would have elicited evidence to this effect while examining their witness who testified extensively about the affair. Instead, this comment came while cross-examining a defense witness.

Furthermore, we find that even if this remark was inflammatory, it did not prejudice Appellant. This remark is a far cry from the outrageous and inflammatory evidence and arguments seen in *Nasim*, *Toyota*, *Dial*, and the cases cited by Appellant. The proper inquiry is not whether the Solicitor's remark was undesirable or condemnable, but whether the comment "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). In this case, the Solicitor made the "blond lady" comment only once and never referred to Appellant's lover's race again. Furthermore, this case involved a brutal murder, where guilt was clearly established. Accordingly, we find no evidence of prejudice from the "blond lady" remark..

> Similarly, the Solicitor's use of the term "King Kong" was not an appeal to the passions or prejudices of the jury. The comment referred to Appellant's immense size, strength, and the destructiveness of his previous crimes. In this case, the trial court properly determined that Appellant's size and strength were probative of the aggravating circumstance of physical torture, which the court charged to the jury. In this regard, the Solicitor's use of the term "King Kong" was not suggestive of a giant black gorilla who abducts a white woman, but rather, descriptive of Appellant's size and strength as they related to his past crimes.
>
> Also, Appellant's mitigation witnesses described him as "a gentle giant," "a big old teddy bear," "the Secretary of Defense," and "the Mediator." The defense used these terms to indicate Appellant was a changed man and not a threat to others. In this regard, the trial court correctly found that "King Kong" was an invited response to Appellant's mitigation evidence.
>
> Finally, the Solicitor's "Caveman" comment was merely descriptive of two of Appellant's past violent incidents. A witness to Appellant's ABHAN testified that she saw Appellant dragging the motionless body of one of the victims across a parking lot by the hair. Additionally, a prison guard testified about an incident where Appellant reached into another inmate's cell and dragged the inmate out by the hair. The Solicitor made this comment while describing how Appellant dragged his victims during these incidents, and, in our view, the comment was not inflammatory. Based on the above reasoning, we hold that the Solicitor's comments did not improperly inject racial issues into the trial.

Bennett II, 369 S.C. at ___, 632 S.E.2d at 288-89. (footnote omitted).

Because most of the prosecutorial comments were presented to and rejected by the South Carolina Supreme Court on direct appeal in *Bennett II*, the law of the case is that the Solicitor's closing argument did not violate due process. See *Robert E. Lee & Co.*, *supra* (when a party makes the same argument it made in a former appeal, the decision in the former appeal is the law of the case); *Ackerman*, 324 S.C. at 443, 477 S.E.2d at 268 ("Matters decided by the appellate

court cannot be reheard, reconsidered, or relitigated in the trial court, even under the guise of a different form").

Even applying a *Strickland* analysis, this Court does not need to address whether or not trial counsel's performance was deficient because the 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. In the present case, Applicant cannot show any conceivable prejudice resulting from trial counsels performance: the South Carolina Supreme Court did not rely upon a procedural bar in rejecting his argument on direct appeal, although the trial judge relied upon the absence of a contemporaneous objection and the State argued this procedural bar. Indeed, the Court found that its "conclusion makes an analysis of *Nasim*, *Toyota* and *Dial*'s exception to the contemporaneous objection rule unnecessary." *Bennett II*, 369 S.C. at ___, 632 S.E.2d at 89 n. 3.

GROUND 11(c)(8)

Applicant alleges in **Ground 11(c)(8)** that trial counsel erroneously failed to object to the trial judge's jury instructions, which he maintains that those instructions "tended to inform the jurors that they could only consider applicant's character in the context of aggravating evidence rather than mitigating evidence." (citing Tr. p. 2113). Respondent disagrees and submits that he cannot show deficient performance or resulting prejudice.

During the charge conference, trial counsel Floyd asked the trial judge to charge the same statutory mitigating circumstances as charged in the original sentencing proceeding: (1) "that 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"; and (3) "the age or mental ability of the defendant at the time of the crime." *See* S.C. Code Ann. § 16-3-20(C)(b)(1)-(2) &(7) (Supp. 2000). The trial judge agreed to submit each of these statutory mitigating circumstances to the jury. He rejected counsel's request to charge jurors on fourteen nonstatutory mitigating circumstances, but he stated that counsel could argue them in closing to the jury. The trial judge explained that his standard procedure was to instruct jurors that they could consider any other mitigating circumstances that they deemed appropriate. **R. pp. 2043-45.**

In his subsequent jury instructions, the trial judge gave the following charge, which Appellant now complains:

> Now, as I told you a moment ago, you will consider at this time the appropriate sentence to give to the defendant. Now, in arriving at your sentence there are four classifications of evidence, and I mentioned this earlier, there are four classifications you will consider.
>
> Now, you may consider two types of evidence introduced by the State; statutory aggravating circumstances and character evidence. Now, these statutory and aggravating circumstances and character evidence must be proven by the State beyond a reasonable doubt. Secondly, you must consider the two types of evidence introduced by the defense, and those are statutory mitigating circumstances and any general mitigating circumstances of any nature whatsoever as shown by the evidence. **R. p. 2113.**

Applicant's current allegation, however, ignores the remaining portions of the trial judge's instructions.

For instance, he expressly instructed jurors that they could only consider those statutory aggravating circumstances that the State had proved beyond a reasonable doubt and he defined "statutory aggravating circumstances" for the jury. He also instructed jurors that they could not consider imposing the death penalty unless they first unanimously found beyond a reasonable doubt that at least one of the alleged statutory aggravating circumstances existed; he listed the four statutory aggravating circumstances relied upon by the State and he defined "while in the commission of" for the jury. **R. pp. 2113-16.** *See* **Ground 11(c)(10),** *infra.*

Later, the trial judge instructed jurors that:

> Now, in this case the State has also presented other aggravating circumstances. We've talked about statutory aggravating circumstances, but as I indicated, the State must also prove beyond a reasonable doubt any general aggravating circumstances. These are sometimes called character evidence. And, in essence, these are presented through evidence of crimes or bad acts or rules infractions.
>
> Now, you must understand this, and please understand this right away. Give me your close attention on this. These crimes or bad acts or rules infractions may not be used to prove a statutory aggravating circumstance. Again, these crimes or bad acts or rules infractions may not be used to prove a statutory aggravating circumstance.
>
> The evidence of other crimes or bad acts or rules infractions should be considered as evidence of an aggravating circumstance, but if you are convinced beyond a reasonable doubt that the defendant committed these other crimes or bad acts or rules infractions then you may consider them as evidence of the defendant's character and characteristics as they bear relevance to the crime. **R. p. 2123.**

Then, he charged jurors that they could consider this character evidence, along with the other evidence in the case and that they could give it whatever weight they felt was appropriate under the circumstance of the case. **R. pp. 2123-24.** Next, the trial judge explained that the statutory aggravating circumstances that the jury was allowed to consider had been typed on a sheet entitled statutory instructions, which the jury would have during deliberations. Again, he reiterated that the jury "would be authorized" but not "required" to impose the death penalty if the jury unanimously found that the State had established at least one statutory aggravating circumstance beyond a reasonable doubt. He also charged them that "you're never required to give the death penalty;" and that if the jury did not find beyond every reasonable doubt that an alleged statutory aggravating circumstance existed at the time the murder occurred, then jurors would not be authorized to impose a death sentence and their sentence must be life imprisonment. **R. pp. 2124-26.**

Next, the trial judge instructed jurors on statutory mitigating circumstances and any mitigating circumstances supported by the record, as follows:

> Now, in addition to considering – and I've discussed here statutory aggravating circumstances, you are also required by law, you must consider statutory mitigating circumstances. Well, what are statutory mitigating circumstances? A statutory mitigating circumstance is a fact, a detail, an incident or an occurrence which the general assembly of this State had said or declared would render the murder less severe. In other words, it would mitigate the offense of murder when the fact, detail, incident or occurrence accompanies the act of murder.
>
> Now, a statutory mitigating circumstance is one recognized by the statute and by the law as a circumstance which in fairness and mercy would be considered as extenuating or as reducing the degree of moral culpability for the commission of the act of murder.

Now, you must note, this does not constitute justification or excuse for the offense in question. It does not constitute justification or excuse for the offense in question, it simply lessens one's guilt. In other words, makes him less blameworthy or less culpable.

Now, you are required to consider any mitigating circumstance regardless of whether it is a statutory mitigating circumstance of any nature that is supported by the evidence in addition to the statutory mitigating circumstances.

In other words, there are statutory mitigating circumstances and general mitigating circumstances, which I will discuss in a moment, you are required by law to consider any of these. And by this, I mean that you, as the jury, are required to consider not only statutory mitigating circumstances but mitigating circumstances of any nature whatsoever supported by the evidence.

So what is a general mitigating circumstance, In other words, a nonstatutory mitigating circumstance? Well, it is a circumstance which is recognized as one which in fairness and in mercy may be considered to be extenuating. Again, as I told you, a mitigating circumstance is never considered to be justification or excuse for the murder. It similarly lessens the severity of its existence. And you are required to consider any circumstance of any nature whatsoever as a reason for not imposing the death penalty. Any factor may be taken into account as the reason for not imposing the death sentence.

Now, I charge you that you may not consider the statutory aggravating circumstance unless – as alleged by the State, unless all 12 of you found that a statutory aggravating circumstance has been proven beyond a reasonable doubt. Again, remember, if you do not find that it's been proven beyond a reasonable doubt you may not consider a statutory aggravating circumstance.

Now, listen to me on this. This is not true for a statutory mitigating circumstance or any mitigating circumstance. In the case of a mitigating circumstance you need not unanimously agree on the existence of any mitigating circumstance nor does the defendant have to prove any

mitigating circumstance to you in any way before you may consider it. Rather, each member of the jury may consider any mitigating circumstance which he or she feels is supported by the evidence.

Before you can impose a life sentence it is not necessary – I repeat, it is not necessary for you to find the existence of a statutory mitigating circumstance or any mitigating circumstance of any nature. There is no burden on the defendant to prove a mitigating circumstance. Rather, the burden is upon the State to prove aggravating circumstances.

The burden is upon you, as the jury, to consider the evidence submitted and determine whether any mitigating factor or factors exist, and if so, the significance and weight to be given to any mitigating circumstance. And, again, I will repeat for the sake of emphasis, there is no burden upon the defendant to prove a mitigating circumstance or any mitigating circumstances.

While it is necessary for you to find beyond every reasonable doubt the existence of a statutory aggravating circumstance before you can give a sentence to death it is not required that a mitigating or statutory mitigating circumstance be proven in order to decide that the defendant be given a sentence of life imprisonment. Now, I've instructed you that any finding that a statutory aggravating circumstance has been proven must be made unanimously and beyond a reasonable doubt. No such requirement exists for consideration of mitigating circumstances. Rather, in deciding the appropriate punishment in this case each individual juror must consider each mitigating circumstance which you find is supported by the evidence.

It is not necessary that the entire jury unanimously agree on the existence of any mitigating factor before you, as jurors, can consider it. Rather, the existence of mitigating circumstances and the weight to be given to them are matters which each juror must determine for himself or herself.

Now, as I told you a moment ago, it is not necessary for the existence of any mitigating circumstance to be proven beyond a reasonable doubt before you may consider it. The

> defendant has no burden of proof. He does not have to prove mitigating circumstances. Rather, you are to consider each and every mitigating circumstance in which you find to be supported by the evidence.

R. p. 2126, l. 20-p. 2130, l. 17.

Further the trial judge instructed jurors that "you may decide that the defendant receive a life sentence irrespective of whether you find in evidence, statutory or nonstatutory mitigating circumstance or not. In other words, you may choose to [impose] life imprisonment as an act of mercy." Tr. p. 2130, ll. 18-22. He then reiterated and defined the three statutory mitigators requested by trial counsel and reiterated many of the points covered elsewhere in his charge. **R. pp. 2130-33.**

Respondent recognizes that the sentencing jury in a capital case may not be precluded from considering as mitigating evidence any aspect of the defendant's character or record and any circumstances of the crime that may serve as a basis for a sentence less than death. *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *State v. Cooper*, 291 S.C. 332, 353 S.E.2d 441 (1986). However, considering the jury instructions as a whole, *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973) (jury instruction must be viewed in the context of the overall charge), Respondent submits that there is no reasonable likelihood that the jury would have understood the instructions as preventing jurors from considering any relevant aspect of Applicant's character in mitigation of his sentence. Boyde, 494 U.S. at 381 (question is whether there is reasonable likelihood that the trial judge's charge was considered in an unconstitutional manner).

The instructions specified the State had the overall burden of proof and that Applicant did not have any burden. The portion of the charge complained of by Applicant - referring to character evidence - merely sought to differentiate between evidence relating only to Applicant's

bad character, from evidence of a statutory aggravating circumstance(s). The jury instructions clearly prohibited the jury from imposing a death sentence, unless it first unanimously found that the State had established one statutory aggravating circumstance beyond a reasonable doubt. On the other hand, evidence of his character was limited to consideration of his character. This accurately stated South Carolina law. *See, e.g., State v. Matthews*, 296 S.C. 379, 373 S.E.2d 587 (1988); *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979).

Further, the charge provided that, even if it found a statutory aggravating circumstance, the jury could impose a life sentence. Moreover, the jury was properly charged on its consideration of statutory mitigating circumstances and other mitigating circumstances supported by the evidence. Similar instructions have been found adequate. *Eg., State v. Hicks*, 330 S.C. 207, 499 S.E.2d 209 (1998); *State v. Bell*, 305 S.C. 11, 21-22, 406 S.E.2d 165, 171(1991). *See also State v. Charping*,313 S.C. 147, 174-77, 437 S.E.2d 88, 103-05 (1993) (Goolsby, A.A.J., concurring in part and dissenting in part). Although not required by either the Eighth Amendment or State law, *see State v. Green*, 301 S.C. 347, 359, 392 S.E.2d 157, 163 (1990); *State v. Jones*, 298 S.C. 118, 378 S.E.2d 594 (1989) (concluding that the judge's instruction that the jury could consider any mitigating circumstance authorized by law and could impose a life sentence even if aggravating circumstances were found was adequate), the trial judge even went one step further and instructed the jury that it was authorized to impose a life sentence even if it did not find any mitigating circumstances, as an act of mercy. Based on the foregoing, Respondent submits that Applicant cannot show either deficient performance or resulting prejudice under *Strickland.*

GROUND 11(c)(9)

Applicant contends that trial counsel were ineffective for raising "the issue of the conditions of imprisonment by bringing to the jury's attention applicant's request for televison knobs, the use of the microwave, and the use of the canteen. Tr. 1636-38." First, this allegation is apparently based upon the January 8, 2007 decision of the South Carolina Supreme Court in *State v. Burkhart*, 371 S.C. 482, 487-88, 640 S.E.2d 450, 453 (2007) (testimony by state's witness regarding the privileges available to an inmate who receives a sentence of life without parole required reversal of defendant's death sentence). *See also State v. Bryant*, 372 S.C. 305, 642 S.E.2d 582, 589 (2007) ("We ... remain firm in our view that testimony seeking to portray life imprisonment as preferable to capital punishment is improper, particularly where, as here, the expert's testimony did not focus specifically on the defendant, but on prison conditions generally"). Respondent, however,

Litigation must end at some point. "[T]he principle of finality ... is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989). The South Carolina Supreme Court has forcefully emphasized this same sentiment in *Aice v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991): "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 also Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) ("No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail

today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation").

Respondent submits that *Burkhart* established a new rule of law that cannot be applied retroactively to this case because this case became final before that rule was announced. Retroactive application of *Burkhart* would, therefore, violate *Teague* and *State v. Jones*, 312 S.C. 100, 439 S.E.2d 282 (1994). *See also Talley v. State*, 371 S.C. 535, 541, 640 S.E.2d 878, 881 (2007) ("In determining whether Respondent was deprived of his federal constitutional right to counsel, we are required to follow the United States Supreme Court's decisions on retroactivity"). Old rules of constitutional law are those that were "dictated by precedent existing at the time the defendant's conviction became final." *See Teague*, 489 U.S. at 301. "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Id at 301 (internal citations omitted) (emphasis in original).

As the Court subsequently explained, a rule is not dictated by precedent - and is therefore a new rule of constitutional law - if, prior to its announcement, its existence was "susceptible to debate among reasonable minds." *See Butler v. McKellar*, 494 U.S. 407, 415 (1990). In other words, a rule is an old rule of constitutional law only if all reasonable jurists would have agreed that it existed prior to its announcement. This definition of a new rule is meant to "validate[ ] reasonable, good?faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997).

It cannot fairly be said that all reasonable jurists would have agreed that the rule set forth in *Burkhart* existed before it was decided. In *Burkhart*, the Court held for the first time since its decision in *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984), that the admission of evidence regarding general prison conditions constituted error, although *dicta* in *Bowman*, which also was not decided until this case was in collateral review, indicated that it was error. More importantly, the Court did not disturb the death sentences in either *State v. Gardner*,, 332 S.C. 389, 505 S.E.2d 338 (1998) or *Bowman*. Rather, the *Burkhart* decision is the first time the Court concluded that the State's examination of a witness about general prison conditions constituted reversible error.

Further, the result in *Plath* - that the defense could not present evidence of adaptability to life imprisonment - had been overruled by the United States Supreme Court's Opinion in *Skipper v. South Carolina*, 476 U.S. 1 (1986) (due process required admission of prison adaptability evidence) and the type of evidence found to be reversible in *Burkhart* was raised in at least three cases: *Wood*, *Bowman* and *Gardner*. Therefore, the rule in *Burkhart* was a new rule that cannot be applied retroactively under *Teague*.

Alternatively, Respondent submits that counsel was not ineffective for not anticipating a change in the law that did not occur until seven years after Bennett's 2000 resentencing proceeding. Again, *Burkhart* is inconsistent with the result reached in post-*Skipper* cases dealing with the current allegation. Applicant would hold trial counsel ineffective based upon counsel's failure to utilize a crystal ball or have Periclean foresight.

This type of standard, however, is inconsistent with *Strickland* because an attorney is never required to anticipate or discover changes in the law or facts that did not exist at the time of trial. *See 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"); *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) (finding counsel not ineffective for encouraging defendant to plead guilty although counsel never interviewed the victim because he had her written statement against defendant, even though victim changed her mind by the time of the PCR hearing and testified for 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) (holding that counsel cannot be considered ineffective for failing to anticipate changes in law).

Indeed, *Strickland* 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. Trial counsel in this case simply was not ineffective for failing to anticipate that the South Carolina Supreme Court would reach the result it did in *Burkhart*.

Moreover, and assuming *arguendo* that the Court decides to address the merits of this allegation, Respondent submits that Applicant cannot show either deficient performance or prejudice resulting from counsel's alleged error. The rule set forth in *Burkhart* simply does not prohibit evidence, such as that complained of here, concerning the prison conditions in the facility in which the accused is incarcerated. Rather, *Burkhart* - like *Bowman* before it - only

prohibits evidence of prison life in general. *See Burkhart*, 371 S.C. at 488, 640 S.E.2d at 453 ("We are aware of the tension between evidence regarding the defendant's adaptability to prison life, which is clearly admissible, ... and this restriction on the admission of evidence regarding prison life in general. We note, however, that evidence of the defendant's characteristics may include prison conditions if narrowly tailored to demonstrate the defendant's personal behavior in those conditions") (footnote omitted)

Nor can Applicant prove any prejudice under *Strickland* because he cannot 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*, 539 U.S. at 537; *Jones v. State*, 504 S.E.2d 822, 829-30 (S.C. 1998) (petitioner did not meet burden). He cannot meet his burden in this case because there was overwhelming evidence that he was guilty of each of the statutory aggravating circumstance; the testimony at issue in this allegation was brief (and Applicant only references one page of testimony, **R. p. 1636**); the challenged cross-examination was again designed to deflect the effect of the State's direct examination concerning Applicant's misbehavior while incarcerated; and the challenged evidence was not the basis for the State's argument that Applicant deserved the death penalty.

GROUND 11(c)(10)

Applicant further alleges that trial counsel were ineffective because they "failed to object to the judge's instruction (Tr. 2116) and the Solicitor's argument that torture and kidnapping could occur after the victim's death. 'These can be committed after he murdered Benton Smith.' Tr. 2057." As with most of the allegation in the Petition, Applicant cannot prove either deficient performance or resulting prejudice.

As discussed, *supra*, a reviewing Court must determine the sufficiency of the trial judge's jury instructions by looking at those instructions as a whole. *Cupp, supra.* Under *Boyde*, 494 U.S. at 381, the relevant inquiry is whether there is reasonable likelihood that the trial judge's charge was considered in an unconstitutional manner. In the present case, the answer is clearly no, Applicant's current allegation focuses upon the trial judge's definition of the "while in the commission of" requirement in § 16-3-20(C). In particular he claims the following instruction was improper:

> Now, aggravating circumstances are committed while in the commission of a capital murder when they are consummated in a continuous series of acts with the murder and at the same time [and] place and not separated by any substantial lapse of time. The fact that the crimes are committed after the murder does not invalidate them as statutory aggravating circumstances.

R. pp. 2115-16.

The trial judge's definitions of each of the statutory aggravators - kidnapping, physical torture, armed robbery and larceny while armed with a deadly weapon - was consistent with the applicable South Carolina statutory and case law. With respect to kidnapping, his instructions **(R. Pp. 2118–20)** comport with S.C. Code Ann. § 16-3-910 (Supp. 2000) and the caes construing it. *E.g., State v. Ray*, 310 S.C. 431, 438, 427 S.E.2d 171, 175 (1993) (holding that the objective language of Section 16-3-910 comports with an accused's Eighth and Fourteenth Amendments rights in that it sufficiently limits sentencing discretion and puts offenders on notice of the elements which constitute the aggravating circumstance of kidnapping); *see also Adams v. Aiken*, 41 F.3d 175 (4t Cir. 1994) (holding statute constitutional). As *Ray* makes clear, § 16-3-910 defines kidappins as "the unlawful seizure, confinement, inveigling, decoying, kidnapping, abducting or carrying away of any other person by any means whatsoever without authority of law," which is clearly consistent with the instructions in Applicant's case.

Likewise the rial judge's definition of physical torture (**R. pp2121-22**) is consistent with *State v. Johnson*, 338 S.C. 114, 127-128, 525 S.E.2d 519, 525-26 (2000); *State v. Davis*, 309 S.C. 326, 349-50, 422 S.E.2d 133, 147-48 (1991); and *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983). In *Johnson*, the Court held that:

> In *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), we adopted the Georgia Supreme Court's definition of torture. *See Hance v. State*, 245 Ga. 856, 268 S.E.2d 339, 345 (1980). Under this definition, torture occurs (1) when the victim is subjected to serious physical abuse before death; or (2) when the victim is subjected to an aggravated battery before death. **Elmore**, 279 S.C. at 422, 308 S.E.2d at 785. Johnson contends that conscious awareness of pain is a necessary component of physical torture. We disagree. Physical torture is not predicated upon the amount of pain suffered by a murder victim. Although conscious awareness of pain may buttress the conclusion that the victim was subjected to serious physical abuse before death, its absence does not foreclose a finding of physical torture; the abusive and depraved nature of the homicidal assault is not erased solely because the victim mercifully may have been rendered unconscious at the outset of the attack.

The trial judge's charge in the present case equated torture with an aggravated battery, and he defined that term for the jury. His definition also included the admonition that "physical torture is the intentional infliction of serious, vile, horrible or inhumane abuse upon the body of another *before* death. The instantaneous death of the victim does not constitute torture." **R. p. 2122, ll. 10-13.** This language is taken straight from the charge given in *Davis*. 309 S.C. at 349-50, 422 S.E.2d at 147-48.

Notwithstanding Applicant's contrary position, it is clear that, when viewed as a whole, the trial judge's instructions correctly stated South Carolina law. He ignores that an attempt to commit an offense listed under § 16-3-20(C)(a)(1) satisfies the while in the commission of

requirement.[1] "The phrase 'while in the commission of' implies acts that are concurrent with the murder. That the murder may occur before an armed robbery [or other aggravating circumstance] actually is completed does not mean that a robbery [or other offense] was not taking place." *State v. Humphries*, 325 S.C. 28, 33, 479 S.E.2d 52, 55 (1996). Long before the decision in *Humphries*, the Court had approved a definition similar to that given in the present case in *State v. Jones*, 288 S.C. 1, 340 S.E.2d 728 (1985), *vacated on other grounds*, 476 U.S. 1102, *cert. denied*, 110 S.Ct. 1534, *reh. den*, 495 U.S. 953. *See also* The Hon. Gary E. Clary and the Hon. Walter M. Bailey, *The South Carolina Capital Trial*, p. 51 (2001). In light of the two aggravators of armed robbery or larceny, the trial judge might have given a charge on the facts if he had failed to give the charge he did.

Further, Applicant only complains of how the "while the commission of" definition impacted upon the statutory aggravating circumstances of kidnapping and physical torture. However, this ignores that the asportation necessary for a completed armed robbery or larceny clearly could have occurred after the murder. Indeed, this is what the Solicitor argued to the jury in the portion of the argument complained of by Applicant. **R. p. 2057**. Based upon the foregoing, Applicant cannot show deficient performance or prejudice because the charge given was appropriate.

GROUND 11(c)(11)

Applicant's remaining argument with respect to trial counsel's representation is that trial counsel was ineffective because they failed to *voir dire* on potential racial prejudice during jury

[1]Further, the instructions as to torture and kidnapping were such that the jury could only find that the completed offenses occurred while the victim was alive and the State's evidence supports that conclusion. *See* **part II**, *supra*; *Bennett I, supra.*

selection. Respondent submits that Applicant's allegation is without merit. In particular, he cannot present any credible evidence of prejudice resulting from counsel's performance.

Initially, it is doubtful that Applicant can show deficient performance. A review of the record demonstrates counsel's awareness of the potential for racial prejudice. At a June 30, 2000 pretrial motions hearing, trial counsel Floyd objected to a question on the jury questionnaire that asked jurors if they lived outside the Southeastern United States. During the course of arguing this objection, counsel noted historical problems with racist attitudes in the Southeast. **R. pp. 2327-28.** In the subsequent resentencing trial, the trial judge excused for cause black male juror Thomas W. Brown (*see* **R. pp. 144-55; 820-24**) when he indicated, after jury selection, that he could not be fair and impartial because of his familiarity with the victim's family. Applicant's counsel suggested that he should be allowed to remain as a juror so that Applicant would not be tried by an all-white jury. The trial judge, however, rejected his arguments. **R. pp. 867-85.**[2]

Thereafter, Applicant's counsel objected and/or moved for a mistrial on several occasions when counsel apparently felt that the prosecution attempted to impermissibly inject race into the sentencing phase. Most, if not all of these instances have been discussed, *supra*, including (1) the Solicitor's closing argument; (2) the recross-examination of a defense witness as to whether he remember a blonde haired lady; and (3) the presentation of Shannon's testimony of dreams about black Indians chasing him. Therefore, it would appear that trial counsel's performance was not deficient. *See Sexton v. French*, 163 F.3d 874, 886 (4th Cir.1998) ("Although the Supreme Court held in *Turner v. Murray*, 476 U.S. 28 (1986), that 'a capital defendant accused of an interracial capital crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias,' *id.* at 36-37, 106 S.Ct. 1683, the Court noted

[2]Applicant did not raise any issue on direct appeal concerning this ruling.

that a defendant may not complain about the failure to question prospective jurors on racial bias unless he has specifically requested such an inquiry. *See id.* The Court made clear that the decision to question prospective jurors about racial bias is best left in the hands of trial counsel. *See id.*; *see also Spencer v. Murray*, 18 F.3d 229, 234 n. 6 (4th Cir.1994). In light of *Turner*, we believe that Sexton's trial counsels' decision not to question prospective jurors about racial bias was binding on Sexton and, therefore, trial counsel were not constitutionally ineffective for allegedly failing to secure Sexton's consent"); *Spencer v. Murray* (defense counsel's failure to conduct voir dire on issue of racial bias was strategy decision that did not deny defendant effective assistance of counsel in capital murder case; defense counsel had already obtained change of venire because of publicity from defendant's first trial, believed that race was not an issue because of change of venire, and decided not to ask any questions on voir dire that might have injected race into case).

At the very worst, Respondent submits, upon information and belief that counsel's performance was non prejudicial under *Strickland* and that Applicant will not be able to present any credible evidence to support this allegation. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Therefore, Respondent requests an evidentiary hearing to resolve this issue.

GROUND 11(d)(1)

Applicant first alleges that appellate counsel was ineffective because counsel failed to raise on direct appeal the trial court's refusal to question potential jurors about their attitudes regarding race. *Turner v. Murray,* 476 U.S. 28 (1986). Respondent submits that Applicant is not entitled to relief because he cannot show deficient performance or resulting prejudice for several reasons.

A defendant is constitutionally entitled to the effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985). A PCR applicant has the burden of proving appellate counsel's performance was deficient. *Anderson v. State*, 354 S.C. 431, 581 S.E.2d 834 (2003). Appellate counsel is not required to raise every non-frivolous issue that is presented by the record, *Tisdale v. State*, 357 S.C. 474, 594 S.E.2d 166 (2004), as "[t]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." *Jones v. Barnes*, 463 U.S. 745, 752 (1983). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. *Id.*

To obtain relief a PCR applicant must show that appellate counsel's performance was (1) deficient; and (2) prejudice from the appellate counsel's deficiency. *Southerland v. State,* 337 S.C. 610, 524 S.E.2d 833 (1999). In other words, the applicant is required to demonstrate "that his counsel was objectively unreasonable in failing" to identify and argue present significant and obvious issues on appeal, and "a reasonable probability that, but for his counsel's unreasonable failure ..., he would have prevailed on his appeal." *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (citation omitted).[3] Although recognizing that "[n]otwithstanding *Barnes*, it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim" on direct appeal, the Supreme Court has recently reiterated that "it [will be] difficult to demonstrate that counsel

[3] *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986) (When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal"). Indeed, "'[w]innowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (quoting *Jones*, 463 U.S. at 751); *see also Smith v. South Carolina*, 882 F.2d 895, 899 (4th Cir.1989) (counsel's failure to raise a weak constitutional claim may constitute an acceptable strategic decision designed "to avoid diverting the appellate court's attention from what [counsel] felt were stronger claims").

was incompetent." *Robbins*, 528 U.S. at 288. "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" *Id.* (*quoting Gray*, 800 F.2d at 646. *See also Bell v. Jarvis*, 236 F.3d 149, 164 (4th Cir.2000) (en banc).

In the present case, Respondent submits that there was no deficient performance since it does not appear that trial counsel argued this motion, either in the June 30, 2000 pretrial hearing (**R. pp. 2247-**) or at any time before the completion of voir dire. **R. pp. 53-788.** Because the motion was never argued in the trial court, it was not preserved for review by the South Carolina Supreme Court. "To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court" *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996). *See also Food Mart v. South Carolina Dep't of Health and Envtl. Control*, 322 S.C. 232, 471 S.E.2d 688 (1996) (matters not argued to or ruled on by the trial court are not preserved for appellate review); *State v. Newton*, 274 S.C. 287, 293, 262 S.E.2d 906, 910 (1980) ("Questions which are not presented to or passed upon by the trial judge cannot be raised for the first time on appeal and are consequently waived").

Moreover, Applicant cannot show any conceivable prejudice resulting from trial counsel's failure to raise such an issue on appeal. To protect a capital defendant's right to an impartial jury, the Court held in *Turner v. Murray*, 476 U.S. 28 (1986) that he is entitled to have prospective jurors informed of the race of the defendant and questioned on their racial biases.[4] If a juror is shown through voir dire to exhibit bias, the trial judge must exercise his discretion by disqualifying such a juror. A venireman must be excused if his opinions would prevent or

[4]A plurality of the Supreme Court, joined by Chief Justice Burger concurring in the result, held that the decision of the trial court created an unacceptable risk that racial prejudice would infect the sentencing proceeding but that the imperatives requiring intervention in the sentencing phase of the trial were not sufficiently involved in the guilt phase to require retrial of that issue.

substantially impair the performance of his duties as a juror in accordance with his oath and instructions. *Wainwright v. Witt*, 469 U.S. 412 (1985).

S.C. Code Ann. § 14-7-1020 (Supp. 2000) provided, in pertinent part, that:

> The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion, *or is sensible of any bias or prejudice* therein.... If it appears to the court that the juror is not indifferent in the cause, he must be placed aside as to the trial of that cause and another must be called.

The South Carolina Supreme Court explained in *State v. Cason*, 317 S.C. 430, 432, 454 S.E.2d 888, 889-90 (1995) that:

> The requirements of section 14-7-1020 are mandatory. *Robinson & Allen v. Howell*, 66 S.C. 326, 44 S.E. 931 (1903). A specific voir dire question designed to reveal racial prejudices on the part of the juror is required only when there exists "special circumstance." *See Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973). Absent special circumstances, the requirement of "bias or prejudice" is met through a general voir dire as to bias and prejudice. *See State v. Gibbs*, 267 S.C. 365, 228 S.E.2d 104 (1976)..
>
> A special circumstance exists when race is an integral part of the case. *See Id.* A special circumstance of constitutional proportion does not exist, however, when the only racial fact in the case is that the defendant and victim are of different races. *Ristaino v. Ross*, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976); *State v. Gibbs*, 267 S.C. 365, 228 S.E.2d 104 (1976). To rise to constitutional proportion, something beyond a difference in defendant's and victim's race is required. *See e.g., Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986) (death penalty is special circumstance); *Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973) (special circumstance existed when defendant claimed police framed him because of his civil rights activities); *Jordan v. Lippman*, 763 F.2d 1265 (11th Cir.1985) (special circumstance existed when defendant accused of killing prison guard during race riot).

However, this line of cases only applies where the defendant and victim are of different races. *See Goins v. Angelone*, 226 F.3d 312, 323 (4th Cir. 2000) ("the Supreme Court's decision in *Turner*-although based largely on the unique responsibilities of jurors in a death penalty case-is of little assistance to Goins. *Turner* was based on the confluence of three separate, but equally critical, factors: (1) the broad discretion given to capital sentencing jurors; (2) the serious risk of improper sentencing in a capital case; and (3) the charged offense involved interracial violence. 476 U.S. at 37, 106 S.Ct. 1683. The crucial factor absent from this case, of course, is an underlying interracial crime"). Indeed, the Supreme Court appears to have so limited *Ham* and *Turner*. *See, e.g., Rosales-Lopez v. United States*, 451 U.S. 182 (1981)

Further and despite Applicant's contrary position at trial, on appeal and in the current proceedings, the present case simply did not involve special circumstance requiring specific voir dire question designed to reveal racial prejudices on the part of the juror, either *sua sponte* or in response to a motion. Race simply was not an integral part of the case, despite the best efforts of Applicant's trial and appellate counsel to make it appear otherwise. As discussed earlier in the Return, both the victim and Applicant were black and man, if not most of the witnesses were also black.

Much like in *Cason*,

> [t]he facts in this case simply do not elevate race as an issue to the level of *Ham*, *supra*, or *Jordan*, *supra*. "Ham's defense was that he had been framed because of his civil rights activities." *Ristaino*, 424 U.S. at 596, 96 S.Ct. at 1021, 47 L.Ed.2d 258. Ham's defense also provided an explanation for the motivation of the authorities to prosecute him. Under those facts, race was "inextricably bound up with the conduct of the trial." *Id.* Likewise, in *Jordan*, *supra*, race was the motive for the crime. Jordan was accused of killing a prison guard during a race riot at the Reidsville, Georgia prison.

Here, the only facts interjecting race into this case was the testimony of witnesses already considered and rejected by the Court in *Bennett II*, as well as the portions of the Solicitor's closing argument that were also considered and rejected by the Court in *Bennett II*. Thus, Applicant cannot show any prejudice from the failure to raise a *Turner v. Murray* issue on appeal.

GROUND 11(d)(4)

Applicant's **Ground 11(d)(4)** alleges that appellate counsel was ineffective for not raising on direct appeal that trial counsel had presented the jury with evidence that he was housed on death row. This allegation lacks merit.

Initially, Respondent submits that he cannot show deficient performance because the issue was not preserved for appellate review. As noted in **Ground 11(c)(3)**, the trial judge denied relief, in part because Applicant's trial counsel introduced the alleged error. This was correct because a party "'cannot complain of an error which his own conduct has induced.'" *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984), citing *State v. Worthy*, 239 S.C. 449, 465, 123 S.E.2d 835, 843 (1962). *See also 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). Indeed, the concept that a party may not take advantage of "invited error" is well settled in both state and federal court. *Id. See also Miller v. City of Columbia*, 471 S.E.2d 683 (S.C. 1996); *Sullivan, supra*; *United States v. Wellons*, 32 F.3d 117 (4th Cir. 1994), *cert. denied*, 115 S.Ct. 1115 (1995); *Wilson v. Lindler*, 995 F.2d 1256 (4th Cir. 1993); *Drayton v. Evatt*, 312 S.C. 4, 10-11, 430 S.E.2d 517, 521 (1993). Thus, the issue was not preserved for appellate review.

Moreover, Applicant cannot show any prejudice from appellate counsel's failure to argue the issue on appeal, even assuming *arguendo* that the issue had been preserved for appellate review. As discussed in **Ground 11(c)(3)**, this was not prejudicial to Applicant. *See Bell* and *Jones, supra.* As a result, this allegation lacks merit.

GROUNDS 11(d)(2)-(3) & (5)

In **Ground 11(d)(2)**, Applicant argues that "Appellate counsel failed to argue on direct appeal that the admission of evidence of the prior assault in the Pizza Hut parking lot was error because this evidence was irrelevant." Similarly, he alleges in **Ground 11(d)(2)** that "Appellate counsel failed to argue on direct appeal that the admission of the evidence about a prior victim's dream of "black Indians" was error because the evidence was irrelevant." Finally, his **Ground 11(d)(5)** is that "Appellate counsel failed to raise on direct appeal the pervasive injection of race throughout the trial despite trial counsels' objections." With respect to these allegations, Respondent submits that Applicant cannot show any conceivable prejudice because, as discussed in Grounds **11(c)(6)-(7)**, appellate counsel did raise these allegations on direct appeal in *Bennett II* and they were rejected by the Court. Therefore, the law of the case is that there was no due process violation. *See Robert E. Lee & Co., supra* (when a party makes the same argument it made in a former appeal, the decision in the former appeal is the law of the case); *Ackerman*, 324 S.C. at 443, 477 S.E.2d at 268 ("Matters decided by the appellate court cannot be reheard, reconsidered, or relitigated in the trial court, even under the guise of a different form").[32]

GROUND 11(d)(6)

[32] To the extent that Applicant complains about matters not addressed above, then Respondent would move the Court for an Order requiring him to make the allegation more definite and certain.

Further, Applicant cannot establish any prejudice resulting from appellate counsel's failure to raise an issue challenging the trial judge's plain and ordinary meaning charge in his supplemental instructions. For the reasons set forth in **Ground 11(c)(4)**, Respondent submits that the charge was appropriate, as given.

GROUND 11(e)

Finally, Applicant asks the Court to make a finding that "*his kidnapping conviction did not involve sexual misconduct requiring sex offender registration*" in accordance with S.C. Code Ann. § 23-3-40 (Supp. 2007).[2] Respondent opposes the request.

As the Court explained in *Hazel v. State*, Op.No. 26448 (S.C.S.Ct., Mar. 10, 2008):

> Section 23-3-430 has been through many changes since its enactment in 1994. In the beginning, the statute provided that a person convicted of kidnapping shall be referred to as a sex offender. § 23-3-430(8) (Supp.1995). The statute was amended in 1996 and kidnapping was deleted from the listing of offenses that require one to register as a sex offender. § 23-3- 430(C) (Supp.1996). In 1998, the statute was again amended and kidnapping was re-added as one of the enumerated offenses. An exception was added to state that if the court makes a finding on the record that the offense did not include a criminal sexual offense, then a defendant convicted of kidnapping would not be required to register as a sex offender. § 23-3- 430(C)(15) (Supp.1998).

A 1999 amendment "rewrote the kidnapping subsection to state that a person convicted of kidnapping a person eighteen years of age or older would be required to register as a sex offender. The exception was again included and stated that no registration would be required if the court made a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense. § 23-3-430(C)(15) (Supp.1999)." *Hazel*.

---

[2] He asserts that he seeks this relief so that he can visit young relatives. However, his misdeeds with Hardee seem to undermine the veracity of this representation.

Unlike the situation before the Supreme Court in *Hazel* (where the statute did not exist at the time of the inmate was sentenced and the 1999 amendment was in effect at the time of the inmate's release), the 1995 version of § 23-3-430(8) (Supp.1995) was in effect at the time Applicant was sentenced. It unequivocally provided that a person convicted of kidnapping shall be referred to as a sex offender. Once the sentencing judge's order became final, neither he, nor this Court would be permitted to alter the sentence he had handed down. *See State v. Best*, 257 S.C. 361, 373-74, 186 S.E.2d 272, 277-78 (1972) (noting, the court lacks subject matter jurisdiction to modify, change, or amend a sentence after adjournment of the term of court at which the court imposed the sentence) Therefore, he was properly sentenced as such and this Court lacks authority to alter his sentence. *Id. See also State v. Davis*, 375 S.C. 12, 649 S.E.2d 178 (Ct.App. 2007). *Contra Hazel.*

IV.

Respondent denies each allegation that is not expressly admitted, qualified or explained.

WHEREFORE, having made its Return, Respondent, therefore, requests a hearing only on the allegations in PCR Application as indicated *supra.*

Respectfully submitted,

HENRY D. 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

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Columbia, South Carolina 29211
(803) 734-6305

By: 

ATTORNEYS FOR RESPONDENT

May 1, 2008

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS
Johnny O. Bennett, #5023, Applicant,	)	C. A. No. 06-CP-32-3221
v.	)	CERTIFICATE OF SERVICE
State of South Carolina, Respondent.	)	

I, William Edgar Salter, III, Senior Assistant Attorney General, Office of the Attorney General, do hereby certify that I have this date served Respondent's Return to Second Amended Application for Post-Conviction Relief in the foregoing action on Applicant by depositing one copy of the same in the United States mail, first class postage prepaid, and addressed as follows:

Mr. Robert E. Lominack, Esquire
Law Offices of Robert E. Lominack, P.C.
P.O. Box 5508
Columbia, SC 29250

Mr. Derek J. Enderlin, Esquire
Ross and Enderlin, PA
2435 East North St.
Mailbox 222
Greenville, SC 29615

This 1st day of May, 2008.

WILLIAM EDGAR SALTER, III

2943

COPY

FILED

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Case No. 2006-CP-32-3221
COUNTY OF LEXINGTON 2008 MAY 19 P 1:03	)	
	)	
Johnny O. Bennett,	)	
Applicant,	)	
	)	
v.	)	NOTICE OF FILING OF AFFIDAVITS
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

Applicant, through undersigned counsel, submits the attached affidavit in support of the claims in applicant's Second Amended Application for Post-Conviction Relief. This submission is made pursuant to S.C. Code §17-27-80 (1985) ("[t]he court may receive proof by affidavits, depositions, oral testimony, or other evidence. . .") and *Simpson v. Moore*, 367 S.C. 587, 607, 627 S.E.2d 701, 712 (2006) ("The State argues that the PCR court erred by considering numerous depositions and affidavits in lieu of live testimony. **We disagree.**") (emphasis added).

In its Return to Applicant's Second Amended Application for Post-Conviction Relief (hereinafter "Return"), respondent implies that counsel for applicant inappropriately provided this court with the affidavit of Carrie Betts. According to respondent, this affidavit is not admissible at the post-conviction hearing. Respondent supported this proposition with *dicta* from a United States Supreme Court opinion having absolutely no bearing on the issue at hand which is clearly governed by state law. Respondent ignores controlling case law. *See Simpson supra.*[1] Of course, respondent is certainly free to call whatever witnesses it believes necessary

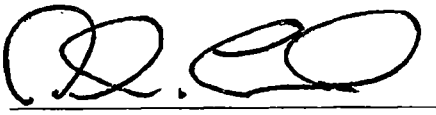
[1] Because the PCR statute clearly contemplates the use of depositions and affidavits and because the state supreme court has sanctioned the admission of such evidence at a post-conviction relief

and counsel for applicant will assist in locating any witness respondent would like to subpoena for the hearing.

Respectfully submitted,

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864-638-3133



Counsel for Applicant

May 19, 2008

evidentiary hearing, it is customary to rely on such evidence. Indeed, undersigned counsel have both submitted such evidence at a hearing without objection.

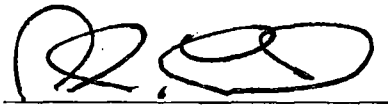
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2008 MAY 19 P 1:03
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	CA No. 2006-CP-32-3221
COUNTY OF LEXINGTON)	
)	
JOHNNY O. BENNETT,)	
)	
Applicant,)	
)	CERTIFICATE OF SERVICE
v.)	
)	
STATE OF SOUTH CAROLINA,)	
)	
Respondent.)	
)	

I do hereby certify that I have served upon the attorney for Respondent Applicant's Notice of Filing of Affidavits, via US mail, first-class, postage pre-paid, at the following addresses:

William Edgar Salter, III
Senior Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211



Robert Lominack

Columbia, South Carolina

This 19th day of May 2008

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON) Case No. 2006-CP-32-3221

FILED
2008 MAY 19 P 1:03
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

Johnny O. Bennett,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

AFFIDAVIT

Carrie A. Betts, who appeared personally before me, affirms and states the following:

1. I am a law clerk for the Center of Capital Litigation and was present for the entirety of the interview of Adam Humphrey on July 13, 2007.

2. When asked why he thought that Mr. Bennett had killed the victim, Mr. Humphrey stated that he was not really sure but thought that Mr. Bennett was "just a dumb nigger."

Carrie A. Betts

Sworn to and subscribed before me
this 25th day of March, 2008.

Notary Public for the State of South Carolina

My commission expires: My Commission Expires November 18, 2014

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS
Johnny O. Bennett, #5023, Applicant,	)	C. A. No. 06-CP-32-3221
v. State of South Carolina, Respondent.	)	SUPPPLEMENTAL RESPONSE TO GROUND 11(b)

Applicant further contends that his right to an impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution were violated by the seating of a juror who supposedly held racist views. This allegation is apparently predicated upon an interview with juror 177 on July 13, 2007. In the interview, juror 177 supposedly used a racist epithet in reference to Applicant,[1]

The first problem that Applicant faces with respect to his Ground 10(b) is that he seeks to premise this claim solely upon an affidavit of someone supposedly employed by the Center for Capital Litigation in July 2007, Carrie Betts. This affidavit contains hearsay within hearsay and relates solely to a conversation about Applicant that occurred some seven years after the sentencing proceeding. There are also no indicia of trustworthiness surrounding this affidavit. The affidavit does not list the time or place of the conversation or any of the questioning leading up to this statement by the juror. Indeed, the affidavit does not list the affiant's gender.

[1] Because of the nature of this allegation, the Court may wish to take any evidence pertaining thereto in chambers or *in camera*.

Applicant relies upon *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006). His reliance is misplaced. It is true that our PCR act generally provides: "The court *may* receive proof by affidavits, depositions, oral testimony, or other evidence and may order the applicant brought before it for hearing." S.C. Code Ann. § 17-27-80 (1985). Also, "[w]hether to admit such evidence is within the court's discretion. *Simpson*, 367 S.C. at 607, 627 S.E.2d at 712 (citing *Beckett v. State*, 278 S.C. 223, 224, 294 S.E.2d 46, 47 (1982)). However, *Simpson* does not stand for the proposition that a PCR applicant can effectively shield his or her case from cross-examination by the State.

In *Simpson*, the Court found that the PCR judge did not abuse his discretion by allowing Simpson to introduce over forty depositions and some twenty-two affidavits into evidence in lieu of live testimony. The Court found that this ruling did not prejudice the State because "[m]ost of the relevant witnesses testified at the PCR hearing and were cross-examined by the State. In addition, the court gave the State the opportunity to submit additional testimony and affidavits countering the evidence presented by Simpson" 367 S.C. at 607-08, 627 S.E.2d at 712. Applicant, however, seeks to bar cross-examination of his only witness on this allegation. He cannot meet his burden of proof in this manner. See *Stein v. New York*, 346 U.S. 156, 197 (1953) ("[t]he [Applicant has] had fair trial and fair review. The people of the State are also entitled to due process of law"). *See also State v. Stewart*, 283 S.C. 104, 110, 320 S.E.2d 447, 451 (1984) ("It would do well for defense counsel to remember that the people of the State as well as the defendant are entitled to a fair trial").

Moreover, and assuming he relies solely upon the affidavit of Betts, Applicant cannot meet his burden of proof because the affidavit is not relevant. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Even if relevant, evidence should still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; *State v. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003); *State v. Martin*, 347 S.C. 522, 533, 556 S.E.2d 706, 712 (Ct. App. 2001).

"Where the defendant seeks a new trial on the ground of impropriety involving the jury, he is required to prove both the alleged misconduct and the resulting prejudice." *State v. Covington,* 343 S.C. 157, 163, 539 S.E.2d 67, 70 (Ct.App.2000) *rehearing denied*, Jan. 8, 2001, *cert. denied*, June 21, 2001. *See also State v. Grovenstein,* 335 S.C. 347, 351-52, 517 S.E.2d 216, 218 (1999); *State v. Kelly,* 331 S.C. 132, 145-46, 502 S.E.2d 99, 106 (1998); *State v. Smith,* 338 S.C. 66, 72, 525 S.E.2d 263, 266 (Ct.App.1999) ("The general test for evaluating alleged juror misconduct is whether there in fact was misconduct and, if so, whether any harm resulted to the defendant as a consequence").

Initially, the Court must make a factual determination as to whether juror misconduct has occurred. *See Smith,* 338 S.C. at 71, 525 S.E.2d at 266; *see also State v. Aldret*, 333 S.C. 307, 315, 509 S.E.2d 811, 815 (1999) (holding that, where affidavits supporting juror misconduct are credible, the trial court must conduct an evidentiary hearing to determine if misconduct occurred). "Only if the ... [C]ourt finds a juror is guilty of misconduct must the judge determine whether the misconduct affected the verdict, warranting a new trial." *Covington*, 343 S.C. at 164, 539 S.E.2d at 70."Unless misconduct affects the jury's impartiality, such misconduct will not affect the verdict." *Kelly*, 331 S.C. at 143, 502 S.E.2d at 104. *See also Grovenstein*,

Here, Betts' affidavit does not meet the relevancy standard. There is no indication of when juror Humphrey allegedly arrived at the conclusion expressed in Betts affidavit or that the epithet was uttered during the deliberations in the case. There is likewise no indication that Juror 177 supposedly had a racist belief at the time of the resentencing or that it impacted his sentencing decision in any manner. All Betts' affidavit establishes is that juror 177 uttered an isolated racial epithet with respect to Applicant seven years after sentencing. Respondent submits that, standing alone, this is irrelevant, and that the only way for him to possibly meet his burden of proof is to present juror 177.

Even if Applicant presents Juror 177, he cannot meet his burden of proof. Rule 606(b), SCRE, altered the common law rule that juror testimony was generally inadmissible to impeach a jury verdict. Now, juror testimony regarding external prejudicial information or improper outside influence is permitted. Rule 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

The most fundamental analytical hurdle that Bennett's due process claim faces is the well-established principle that, absent a showing that an external or extraneous influence was brought to bear *on the jury's deliberations*, the testimony of a juror about that juror's personal thought process or the jury's discussions during deliberations is incompetent to impeach a

jury verdict. *Id.* Based upon information and belief, Respondent submits that he record contains no evidence that a hearing will produce testimony revealing the presence of any effect from the juror's statement some seven years after the sentencing proceeding. Applicant has not established that any testimony received at such a hearing would have resulted in a different sentence or disqualification of juror 177, and that the absence of such a hearing will result in prejudice to Applicant. Respondent, therefore, opposes any testimony on this allegation. *See Wright v. United States*, 559 F.Supp. 1139 (E.D.N.Y.1983) (concluding that an evidentiary hearing into possible juror bias was not warranted because the possibly prejudicial comment involved was an isolated racial epithet spoken outside of jury deliberations).

Alternatively and addressing the substance of Applicant's claim, Respondent submits that it lacks merit. In *State v. Hunter*, 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995), the South Carolina Supreme Court explained that:

> As a general rule, juror testimony may not be the basis for impeaching a jury verdict... Normally, courts should not intrude into the privacy of the jury room to scrutinize how jurors reached their verdict. However, other jurisdictions have made exceptions based on the nature of the alleged misconduct. When an extraneous influence is alleged, juror testimony can normally be used. If the alleged misconduct is internal, courts are more strict. ... Normally, juror testimony involving internal misconduct is competent only when necessary to ensure due process, *i.e.* fundamental fairness. *See McDonald v. Pless,* 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300 (1915); *Shillcutt v. Gagnon,* 827 F.2d 1155 (7th Cir.1987). *See also Long,* 93 S.C. at 510-15, 77 S.E. at 62-63; *Sheppard,* 2 Bail. at 578.
>
> We find allegations of racial prejudice involve principles of fundamental fairness. Accordingly, the trial judge was proper in considering Richardson's testimony. If a juror claims prejudice played a role *in determining the guilt or innocence of a defendant,* investigation into the matter is necessary. To hold

> otherwise would violate "the plainest principles of justice." *McDonald,* 238 U.S. at 269, 35 S.Ct. at 785, 59 L.Ed. at 1303.

(Footnotes omitted) (emphasis added).

The United States Supreme Court has previously dealt with both an Eighth Amendment and a Fourteenth Amendment challenge to the imposition of the death sentence based on alleged racial discrimination. *See McCleskey v. Kemp,* 481 U.S. 279 (1987) (statistics indicating that racial bias may affect Georgia's capital sentencing system are insufficient to establish that the imposition of the death penalty on a black defendant for the murder of a white victim violates the eighth or fourteenth amendment). Although the petitioner in *McCleskey* brought a statistical challenge to Georgia's death penalty and Applicant challenges the constitutionality of his death sentence in particular, the Court's analysis in *McCleskey* is relevant. *See Dobbs v. Zant,* 963 F.2d 1403, 1407 -1408 (11th Cir. 1991).

In evaluating the eighth amendment claim, the Court stated, "[t]here is, of course, some risk of racial prejudice influencing a jury's decision in a criminal case.... The question 'is at what point that risk becomes constitutionally unacceptable.' " *McCleskey,* 481 U.S. at 308-09 (quoting *Turner v. Murray,* 476 U.S. 28, 36 n. 8 (1986)). In *McCleskey,* the Court set out what is necessary to establish a ' McCleskey' equal protection claim. First, a defendant must establish "the existence of purposeful discrimination." *McCleskey,* 481 U.S. at 292. Second, a defendant must make a more particularized showing that "the decision makers in *his* case acted with discriminatory purpose." *Id.*

The decision by the Eleventh Circuit Court of Appeals in *Dobbs v. Zant* supports Respondent's position. In *Dobbs,* the petitioner was black and he was sentenced to death for

murdering his white victim. He cited excerpts from the depositions of the eleven trial jurors who were surviving at the time of the remand. Of these, only one juror was black. The Court of Appeals noted that "[a]lthough certain of the jurors' statements revealed racial prejudice, no juror stated that he or she viewed blacks as more prone to violence than whites, or as morally inferior to whites, and their comments do not reveal otherwise," 963 F.2d at 1407 (footnote omitted).

The Court in *Dobbs* also rejected the petitioner's reliance on the trial judge's background and conduct, as well of the conduct of his attorney, as evidence of racial prejudice affecting the jury's sentencing decision. *Id* at 1407-08. Further, the Court rejected the petitioner's argument that the facts and venue of his case contributed to the risk that racial prejudice influenced the sentencing decision. "Walker County, a small rural community, was at the time of the offense ninety-six percent white, all defendants were black, and the victims were white. Dobbs also introduced in the district court the testimony of a political scientist who stated the opinion that racial prejudice existed in Walker County and that race was a significant factor which affected its citizens' decisions. Such evidence, however, does not necessarily demonstrate that in Dobbs's case, a constitutionally unacceptable risk existed that racial prejudice affected the sentencing decision." *Id* at 1408. [2]

Moreover, the Court of Appeals rejected the petitioner's argument that district court erroneously required him to prove that racial considerations in fact affected the jurors' decision to impose the death penalty and that he could meet his burden under *Turner v.*

[2] The District Court had concluded that "[a]lthough the jurors possess some racial prejudices, and some more so than others, Dobbs has not shown that the jurors, either individually or as a whole, were influenced by prejudices that would make them favor the death penalty for a black person who murdered a white person." *Dobbs v. Zant*, 720 F.Supp. 1566, 1579 (N.D.Ga. 1989) (footnote omitted).

Murray, 476 U.S. 28 (1986), by establishing that "a constitutionally unacceptable risk existed by showing that racial prejudice might have influenced the sentencing determination." Specifically, the Court reasoned as follows:

> Dobbs's reliance on *Turner* is misplaced. The *Turner* Court focused on the issue of whether the trial court should have allowed questions during voir dire concerning the potential jurors' racial attitudes. The plurality opinion found that considering the ease with which the risk that the death penalty is imposed arbitrarily could have been minimized, the defendant had the right to ask the questions. In this case, however, at issue is not a prophylactic rule, but the jury's ultimate decision. Dobbs contends that the potential influence of racial prejudice upon the decision makers in his case violated his eighth amendment right. In such an instance, to show that the risk of racial prejudice influencing sentencing rose to a constitutionally unacceptable level, Dobbs must show that racial prejudice actually affected the jury's decision. After reviewing the record, we agree with the district court that Dobbs has failed to demonstrate that a constitutionally unacceptable risk existed that racial prejudice affected his sentencing.

963 F.2d at 1408.

Finally, the Court rejected Dobbs' allegation equal protection argument:

> DIn alleging an equal protection violation, Dobbs has the burden to "prove that the decision makers in *his* case acted with discriminatory purpose." *McCleskey,* 481 U.S. at 292 (emphasis in original). As noted above, Dobbs asserts only that based on the backgrounds and general racial attitudes of various participants in the trial, racial prejudice may have influenced his sentencing decision. The jurors denied that race had any effect on their decision, and nothing in the record indicates that the jurors acted with purposeful discrimination. Consequently, Dobbs's eighth and fourteenth amendment claims fails.

Id (footnote omitted). *See also Callins v. State*, 780 S.W.2d 176, 188 (Tex.Cr.App. 1986).

Likewise, in the present case, even if Applicant can show that juror 177 uttered the racial epithet in reference to Applicant some seven years after the sentencing proceeding,

Respondent submits upon information and belief that he cannot show that racial prejudice actually affected the jury's decision because even if juror 177 possesses some racial prejudice, he cannot show that the jurors, either individually or as a whole, were influenced by prejudices that would make them favor the death penalty for a black person who murdered another black person or that they would favor the death penalty for a black person charged with murder. This allegation lacks merit.

Respectfully submitted,

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By: _____
WILLIAM EDGAR SALTER, III.
ATTORNEYS FOR RESPONDENT

May 21, 2008

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS
Johnny O. Bennett, #5023, Applicant,	)	C. A. No. 06-CP-32-3221
v.	)	CERTIFICATE OF SERVICE
State of South Carolina, Respondent.	)	

I, William Edgar Salter, III, Senior Assistant Attorney General, Office of the Attorney General, do hereby certify that I have this date served Respondent's Supplemental Response to Ground 11 (b) in the foregoing action on Applicant by depositing one copy of the same in the United States mail, first class postage prepaid, and addressed as follows:

Mr. Robert E. Lominack, Esquire
Law Offices of Robert E. Lominack, P.C.
P.O. Box 5508
Columbia, SC 29250

Mr. Derek J. Enderlin, Esquire
Ross and Enderlin, PA
2435 East North St.
Mailbox 222
Greenville, SC 29615

This 21st day of May, 2008.

WILLIAM EDGAR SALTER, III.
ATTORNEY FOR RESPONDENT

2957

COPY

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS Case No. 2006-CP-32-3221
Johnny O. Bennett, Applicant, v. STATE OF SOUTH CAROLINA, Respondent.	)	NOTICE OF FILING OF AFFIDAVIT

Beth A. Carrigg
Clerk of Court
Lexington, SC

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2008 MAY 21 PM 3:21

Applicant, through undersigned counsel, submits the attached affidavit in support of the claims in applicant's Second Amended Application for Post-Conviction Relief. This submission is made pursuant to S.C. Code §17-27-80 (1985) ("[t]he court may receive proof by affidavits, depositions, oral testimony, or other evidence. . .") and *Simpson v. Moore*, 367 S.C. 587, 607, 627 S.E.2d 701, 712 (2006) ("The State argues that the PCR court erred by considering numerous depositions and affidavits in lieu of live testimony. **We disagree.**") (emphasis added).

Respectfully submitted,

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Counsel for Applicant

May 20, 2008

COPY 2958

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	CA No. 2006-CP-32-3221
COUNTY OF LEXINGTON)	
)	
JOHNNY O. BENNETT,)	
)	
Applicant,)	
)	CERTIFICATE OF SERVICE
v.)	
)	
STATE OF SOUTH CAROLINA,)	
)	
Respondent.)	
)	

I do hereby certify that I have served upon the attorney for Respondent Applicant's Notice of Filing of Affidavit, via US mail, first-class, postage pre-paid, at the following addresses:

William Edgar Salter, III
Senior Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211

Robert Lominack

Columbia, South Carolina

This 20th day of May 2008

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Beth A. Carrigg
Clerk of Court
Lexington, SC

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Beth A. Carrigg
Clerk of Court
Lexington, SC

STATE OF SOUTH CAROLINA)) COUNTY OF LEXINGTON)	IN THE COURT OF COMMON PLEAS
Johnny O. Bennett,)) Applicant,)) v.)) STATE OF SOUTH CAROLINA,)) Respondent.)	Case No. 2006-CP-32-3221 AFFIDAVIT OF HERVERY B. O. YOUNG

Personally appeared before me, Hervery Young, who being duly sworn states as follows:

1. I was admitted to practice law in the State of South Carolina in 1994 after graduating from the University of South Carolina School of Law in 1994.

2. I was appointed to represent Johnny Bennett at his capital re-sentencing trial which was held in 2000. Wayne Floyd acted as lead counsel. Prior to Mr. Bennett's 2000 capital re-sentencing, I had assisted as counsel in 4-5 other death penalty cases.

3. During the state's case-in-chief at the re-sentencing, witness Jody Gallman testified that when Mr. Bennett was placed on parole for a prior conviction, she had reviewed the conditions of parole with him. According to the transcript, she indicated that Mr. Bennett was directed to refrain from engaging in criminal activity. It is apparent that the sole purpose of Ms. Gallman's testimony was to establish that Mr. Bennett was on parole when he committed the crime for which he was found guilty and, therefore, had not abided by his parole conditions. At the time of Mr. Bennett's re-sentencing, I was aware that evidence was not admissible under Rule 403, SCRE, if its prejudicial value was substantially outweighed by its probative value. I

did not object to the testimony of Jody Gallman even though its substance was substantially more prejudicial than probative. My failure to object was not based on any strategic rationale.

4. The state alleged in support of its intention to seek the death penalty in Mr. Bennett's case several aggravating factors including that the crime occurred during the commission of a larceny and that the crime occurred during the commission of an armed robbery. The trial judge submitted both of these factors to the jury. I do not recall speaking with Mr. Floyd about the fact that larceny is a lesser included offense of armed robbery.

5. During its case-in-chief at the resentencing trial, the state introduced substantial evidence concerning a prior assault by Mr. Bennett which occurred in the parking lot of a Pizza Hut restaurant. Because Mr. Floyd had assumed responsibility for this evidence, I did not consider making any objections to the admission of this evidence. To the extent that any objections should have been made, my failure to do so was not based on any tactical reason.

6. During the resentencing the state called as a witness, Willie Weldon, the warden of Lieber Correctional Institution. The purpose of Mr. Weldon's testimony was to establish that Mr. Bennett had completed a request form in which he asked to be allowed to see a visitor whom SCDC had prohibited Mr. Bennett from seeing because of an inappropriate prior sexual relationship with Mr. Bennett. The state introduced the actual request form to establish that Mr. Bennett implied that the allegation of the improper relationship was not true. During my cross-examination of Mr. Weldon, I elicited testimony concerning inmate privileges including information about televisions, the ability to purchase items from the canteen (i.e. popcorn, canned goods, cigarettes), and the use of a microwave. My purpose was to demonstrate that Mr. Bennett followed the institutional procedure for making such requests. However, I realize that I could have established that factual point without informing the jury of the privileges an inmate

may have in prison. I recognize that bringing to the jury's attention information about the canteen and the fact that some prisoners have access to a television and a microwave could have been prejudicial to Mr. Bennett. I did not have a strategic reason for failing to elicit information in order to make the point that Mr. Bennett did not cause problems in prison without bringing out this damaging information.

7. Mr. Floyd and I did not request at the outset that we be allowed to question jurors about their racial attitudes during *voir dire*. After jury selection, Mr. Floyd did request that the jurors who had been chosen be questioned about their racial attitudes. We both recognized based on the evidence presented in the first trial that racial attitudes of the jurors were important. I also knew that we had a right to question the jurors in this regard. I do not recall any strategic reason for failing to ask jurors about their attitudes concerning race.

FURTHER AFFIANT SAYTH NOT.

Hervery B. O. Young

Hervery B. O. Young

Sworn to before me this
9th day of May, 2008.

Notary Public for South Carolina
My Commission Expires: 3/31/14

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2008 MAY 19 P 1:0
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Case No. 2006-CP-32-3221
COUNTY OF LEXINGTON	)	
Johnny O. Bennett,	)	
	)	
Applicant,	)	
	)	
v.	)	**APPLICANT'S TRIAL BRIEF**
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

This brief is filed to provide the Court with a short summary of both the evidence and the legal authority supporting the grounds alleged in applicant's Second Amended Application for Post-Conviction Relief.

INTRODUCTION[1]

Applicant was sentenced to death by an all-white jury. Both the victim, Benton Smith, and applicant were black. However, at the re-sentencing trial the state focused the jury's attention on a prior assault committed by applicant. Tr. 986-1037. The two victims of this crime were white. The evidence regarding this conviction was remarkable for its detail and its breadth. The prosecution called two eyewitnesses to this crime, one of the victims, and both mothers of the victims who described their injuries and the subsequent physical and emotional impact of the assaults. In short, this prior crime played a prominent, if not leading, role in the state's case.

[1] A detailed Statement of the Facts was presented in respondent's Return to Second Amended Application for Post-Conviction Relief (hereinafter "Return") at pages 14-28. Applicant does not restate the case here.

The quantity and quality of the evidence of this prior assault was such that it was unduly inflammatory and rendered the sentencing proceeding fundamentally unfair.

In addition to the focus on this interracial crime, witnesses consistently referenced race when describing various events and the solicitor employed language which was at best dehumanizing and derogatory and at worst racist. Some examples of the solicitor's references to applicant are: "King Kong,"[2] "beast of burden," "monster," "caveman," and "mountain man." Tr. 2056-2079. Additionally, the solicitor referred to a white female with whom the applicant had a romantic relationship as "the blonde headed lady," ensuring that the jury knew she was white.[3] Tr. 1979-80. One of the white victims of the prior assault testified that while in the hospital he had a dream in which "black Indians" were chasing and trying to kill him. Tr. 1028. The state also introduced evidence that officers from the Lexington County Detention Center would use applicant to beat up newcomers to the jail who used racially derogatory language towards officers. Tr. 1515.

Concerned that race would play a role at the trial, applicant's trial counsel requested, albeit belatedly, that the court allow counsel to question the jurors about potential racial bias. Tr. 882. This request was denied. Tr. 883. As it turns out, it is likely that *voir dire* on the issue of race would have uncovered at least one juror who harbored a racially prejudiced view of applicant. This juror referred to applicant as "just a dumb nigger" when explaining his thoughts as to why applicant had committed the crime.

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[2] While the South Carolina Supreme Court found on direct appeal that the use of this term "was not suggestive of a giant black guerrilla who abducts a white woman, but rather, descriptive of [applicant's] size and strength. . .", it also recognized that this term "could have racial connotations." *State v. Bennett*, 369 S.C. 219, 231-2, 632 S.E.2d 281, 288 (2006).

[3] As with the use of "King Kong" the state Supreme Court found that this reference could have a racial connotation but did not under the circumstances of this case. *Bennett*, 369 S.C. at 231-2, 632 S.E.2d 288.

Applicant's resentencing trial was remarkable for the amount of information that was placed before the jury that had nothing to do with applicant's character or the circumstances of the crime. Much of this information was tailored to appeal to the passions and prejudices of the jurors.

I. EXHAUSTIVE EVIDENCE OF THE DEFENDANT'S PRIOR CRIME OF ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED NATURE, INCLUDING GRAPHIC EYEWITNESS ACCOUNTS, TESTIMONY FROM MOTHERS OF THE VICTIMS AND TESTIMONY FROM A VICTIM, HIMSELF, VIOLATED THE DUE PROCESS CLAUSE, THE EIGHTH AMENDMENT, AND SOUTH CAROLINA RULES OF EVIDENCE.

In *State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001) the Supreme Court reiterated the two considerations in a capital sentencing:

> The purpose of the sentencing phase in a capital trial is to direct the jury's attention to the specific circumstances of the crime and the characteristics of the offender. *State v. Locklair,* 341 S.C. 352, 535 S.E.2d 420 (2000). . .
>
> **Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. Unfair prejudice means an undue tendency to suggest a decision on an improper basis. *State v. Dickerson,* 341 S.C. 391, 535 S.E.2d 119 (2000).**

State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001)(emphasis added). While it is true as a general matter that evidence of prior convictions is admissible in the sentencing phase, such license can be taken too far and turn the sentencing phase into a "referendum on all of the defendant's prior crimes". *State v. Bennett (Bennett II)*, 369 S.C. 219, 632 S.E.2d 281 (2006). That is exactly what happened in applicant's case.

During the trial, the State introduced evidence concerning a prior assault by the applicant. The applicant pled guilty to Assault and Battery of a High and Aggravated Nature and was given a Youthful Offender Sentence. The defense did not object to the submission of the sentence

sheet. Tr. 1029; States Exhibit 6 at Tr. 2453. The State called two eyewitnesses, both mothers of the victims, and one of the actual victims. Tr. 987-1040.

The eyewitnesses went into graphic detail of the assault by the defendant on these two young white males, describing how the victims were "motionless, apparently unconscious. There was a good bit of blood lying around both of them. They were obviously injured and were not moving." Tr. 990. This witness further described seeing applicant kick or stomp on the head of one of the victims. Tr. 987-1002. The mothers of the victims testified about receiving calls that their sons were injured and being taken to the hospital, tr. 1013, 1031, seeing their children in the hospital, tr. 1013, 1033, not being able to recognize them due to the injuries on their faces, tr. 1013, 1033, the time spent in the hospital and the recovery time and rehabilitation efforts. Tr. 1016, 1031. The State entered pictures of both victims taken days after the assaults showing extensive injuries to their faces. Tr. 1015, 1035. In addition, one of the mothers testified that her son was in a trauma center in Lancaster for two and a half months, which she said cost thirty thousand dollars per month. Tr. 1019. She also testified that after the rehabilitation her son could not finish the school year, had to have speech therapy, a tutor, and a physical therapist. Tr. 1019. She also testified to further complications with his arm and leg and the fact that he had still not fully recovered. Tr. 1020.

The victim then repeated almost the entire testimony of his mother, tr. 1021 – 1027, at which time the Solicitor elicited testimony about the victim's dream of being chased by "black Indians."[4] Helen McGough, mother of the other victim, Aaron McGough, also testified about

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[4] Respondent, in support of its argument that this extensive evidence was necessary, opines that "the State was obligated to prove the A.B.H.A.N.s beyond a reasonable doubt, and this evidence helped meet that burden." Return at 75. This is simply untrue. First of all, applicant had been convicted of the offense through a plea of guilty. Second, South Carolina does not provide an

receiving a call that her son was being taken to the hospital and when he arrived there, "They opened up the back doors and Aaron was in there, and they were trying to get him out but he was fighting and he was saying stop, no. And I called to him, and they told me he couldn't hear me." Tr. 1033. Detailing his injuries to his face she testified that "he had a big U-shape right here on his forehead that you can even see today." Tr. 1034. McGough went on to testify about seeing her son on his way to ICU and how he could not speak. She continued describing his injuries:

> His personality has changed. Aaron was a real easy-going kid. He was just real laid-back, nothing bothered him or anything. And now he's real – he gets frustrated real quick and he's quick to anger. It's just really changed his personality. He has short-term memory loss. I mean, lots of things that he'll forget. He's a plumber, he forgets his tools, forgets his house key, things like that.

Tr. 1036. McGough testified that her son was in the ICU for four days until he was moved to a regular room and discharged one week after that. After that, he was very weak and had some brain swelling so he had to be watched for 6 weeks for fear of seizures. Tr. 1037.

Trial counsel objected to most of the evidence of these prior assaults on the basis that the evidence was not relevant, that it was substantially more prejudicial than probative and that it represented improper victim impact evidence. On appeal, however, counsel for applicant only raised the latter of these arguments. The Supreme Court held in *Bennett II*, that the testimony objected to on appeal was not "victim impact" testimony.

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admissibility standard for prior bad acts introduced in the sentencing phase of a capital trial. "In *State v. Middleton,*(footnote omitted) we held that the jury is *not* required to find clear and convincing proof of other crimes when such are introduced to show character." *State v. George*, 323 S.C. 496, 476 S.E. (2d) 903.

Because of appellate counsel's failure to properly raise this issue on appeal the Supreme Court held that it was not preserved for review.[5] The Court specifically noted that relevancy and the boundaries of evidence of prior crimes and the need to "prevent a capital sentencing proceeding from transmuting into a sentencing referendum on all of the defendant's prior crimes" could not be addressed in applicant's case due to the failure of appellate counsel to raise these issues.[6]

The evidence of this prior crime went way beyond that which was relevant to applicant's character. This evidence took the focus away from applicant's character and the crime for which he was being sentenced and put him on trial for a prior conviction. The admission of this evidence violated the Eighth Amendment's requirement that the sentencing determination be individualized and based on the character of the defendant and the circumstances of the crime. Further, this evidence was sufficiently prejudicial as to render the proceeding so unfair as to violate the Due Process Clause. Lastly, the admission of this evidence violated South Carolina evidentiary rules.

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[5] To the extent that trial counsel failed to object adequately to some of the evidence presented, applicant will pursue that failure as an ineffective assistance of trial counsel claim. For the purposes of this pleading, however, applicant simply wanted to apprise the Court of the factual issues relevant to these claims and the general legal arguments pertinent to this evidence.

[6] Respondent arguing that the *Bennett II* Court already ruled on the issues raised here, misunderstands the ruling in *Bennett II*. The Court could not have been more clear:

> Instead of addressing any of these topics, which would be of paramount importance when considering clarifying our relevance rules, the briefs to this Court, like Appellant's argument, concerned only victim impact evidence. . . **Although the dissent raises intriguing questions, we think it the better course to wait to decide such a case until we are asked.** *See State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (appellate court will not consider issues not properly presented).

Bennett II, 369 S.C. at 230, 632 S.E.2d at 287.

II. TESTIMONY ABOUT DREAMS OF "BLACK INDIANS", WAS NOT ONLY IRRELEVANT IT WAS ALSO FAR MORE PREJUDICIAL THAN PROBATIVE.

As discussed *supra*, evidence presented at the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime. *See Zant v. Stephens*, 462 U.S. 862, 879 (1983). The failure to abide by this rule violates the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment as well as South Carolina Rules of Evidence. *See, e.g. Payne v. Tennessee*, 501 U.S. 808, 831 (1991).

At applicant's re-sentencing the state called one of the victims in the above mentioned ABHAN case, Shannon Gilbert, and elicited the following testimony:

> Mr. Myers: Do you have any consciousness about being in a hospital; do you know of any dreams or anything? Is that all you remember about the hospital?
>
> Mr. Gilbert: I had a dream. I did have a dream in the hospital. It's the only one I remember, of course. It was – I remember waking up –
>
> Mr. Floyd: Your Honor, I'm going to object to any dream. I don't see how that's relevant.
>
> Mr. Myers: He'll bring out the relevance.
>
> The Court: Overruled.
>
> Mr. Myers: Go ahead.
>
> Mr. Gilbert: I remember the dream. I woke up and I remember being really afraid. And, of course, there were several in the room. I'm not sure who it was, nurses, maybe my mother. I'm not sure who all was there, but to calm me down. And I remember telling them what it was about. It was – Indians were chasing me trying to kill me, and the thing that I thought was they were black. And later on – or after years have gone by I've maybe even thought, well, there might have been a link. You know, that I was remembering something about trying to get away from someone.
>
> Mr. Myers: Shannon, did you come in this courtroom –

> Mr. Floyd: Your Honor, I renew my motion. I move that it be stricken. That's irrelevant.
>
> The Court: I'll note the motion. Denied.

Tr. 1027-1028. Despite the trial attorney's objection, appellate counsel failed to claim on direct appeal that the admission of this testimony was irrelevant. *Bennett II*, 369 S.C. at 229, 632 S.E.2d at 287.

While the majority in *Bennett II* refused to address this error because it was not raised on direct appeal, Justice Pleicones was clear that this dream was not "under any stretch of the imagination, relevant to 'the character of the individual or the circumstances of the [capital] crime.'" *Bennett II*, 369 S.C. at 235, 632 S.E.2d at 290 (Pleicones, J., dissenting), citing *Zant v. Stephens*, 462 U.S. 862, 879 (1983). The details of a dream that a young white man had while in the hospital recovering from the injuries suffered at the hand of a black man were not relevant to any issue at applicant's re-sentencing trial. Furthermore, the details of this particular dream emphasized applicant's race in a demeaning and derogatory manner and appealed to racial bias rendering the trial so unfair as to violate applicant's right to due process. *See Dawson v. Delaware*, 503 U.S. 159, 179 (1992) (when a state court admits evidence that is "so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.") (quotations and citation omitted). Lastly, the admission of such evidence cannot withstand scrutiny under Rule 403, SCRE as the prejudicial value of such a race-laden testimony substantially outweighed any probative value.

Standing alone the admission of this evidence, which the state insisted on introducing, warranted reversal; however, when viewed in the context of the state's other statements which played on the theme of race, this evidence was that much more prejudicial. Appellate counsel's failure to raise these issues on direct appeal represented ineffective assistance of counsel.

III. APPLICANT WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF TRIAL COUNSEL'S FAILURE TO OBJECT TO PREJUDICIAL AND IMPROPER STATEMENTS MADE BY THE PROSECUTION DURING ITS OPENING STATEMENT AND CLOSING ARGUMENT.

Courts have made clear that prosecutors are "ministers of justice and not merely advocates." *State v. (Jeffrey) Jones*, 343 S.C. 562, 578 541 S.E.2d 813, 822 (2001), quoting *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000). For this reason, the job of the prosecutor is not to "win" a conviction; rather, the prosecutor's job is to see that justice is done. *See State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981); *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989). Prosecutors must refrain from engaging in "improper methods calculated to produce a wrongful conviction." *Dawkins*, 297 S.C. at 388, 377 S.E.2d at 299. As a corollary to this principle, it is well-established that the state's arguments should not appeal to the jurors' passions or prejudices nor should the argument be misleading. *State v. Copeland*, 321 S.C. 318, 468 S.E.2d 620 (1996). The arguments in the instant case were improper because they did both. *See also State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) ("The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice.") (quoting *State v. Linder*, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981).

In its opening statement and closing argument the prosecution made numerous prejudicial and improper statements to which no objection was made. For example, during its opening statement the prosecution referred to applicant as "brutal monster size," tr. 907; "big old brute, Johnny Bennett," tr. 907; "but his disregard for a fellow human being, his disrespect for the law, his total disobedience and disrespect for good old human nature began way back, probably when he was born." Tr. 908; "And, folks, you know about 25 feet away from you in your presence is a

murderer. I hope you never have to live through this after this week, being that close to a murderer." Tr. 909; "big old bear of a fellow, Johnny Bennett," tr. 914; "big old bear of a fist," tr. 915; "evil, mean, manipulative, malicious. That's what we're dealing with, folks. . . you will find enough aggravation that will be spilling over this jury box. All we ask you is to return the punishment fits the crime in this evil, manipulating, malicious murdering defendant." Tr. 915–16.[7]

These statements dehumanized applicant and were clearly designed to appeal to the passion and prejudice of the jurors. The solicitor continued to utilize such "argument" in his closing: "You give him life, the real Johnny will come back. You give him life and he'll come back out." tr. 2079; "there ain't no joy in Happy Town. He turned it into gruesomeville. It's boo hill." tr. 2071; if not executed the applicant would be able to have sex with the "blonde lady." tr. 2077; "if you [the jury] don't sign your name for Benton Smith his life would have been nothing." tr. 2081; the prosecutor referred to applicant as a "mountain man," (Tr. 2056); "caveman," tr. 2062; "Tiger," tr. 2066; "monster," tr. 2068; "King Kong," tr. 2079; and "beast of burden." Tr. 2079.[8]

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[7] In its Return respondent erroneously stated that these comments had already been raised and ruled upon by the state supreme court on direct appeal. *See* Return at 84. This is simply false. At trial there was no objection to these comments. These statements were not raised in applicant's motion for a new trial. Therefore, the statements could not have been and were not raised in applicant's brief to the state supreme court. Finally, the Court neither mentioned nor ruled on these improper statements.

[8] Respondent claims in its Return that these comments were raised and ruled on by the state supreme court during applicant's direct appeal fares only slightly better than such a claim relating to the comments during the prosecution's opening statement. In a motion for new trial applicant objected to the reference to him as a "caveman" and "King Kong." These two comments were raised on direct appeal. These are the only two comments that were placed before the supreme court. Again, while it is unclear on what basis respondent argues that most of these references have already been ruled upon, it is clear that such a statement is false.

The pervasiveness of the inflammatory comments made by the solicitor at applicant's trial is remarkable. Generally, the comments made by the solicitor at applicant's trial fall into three categories: inflammatory, demeaning, and racist. Applicant need not address each of the comments in this pleading; however, it is clear that each of these comments individually and certainly when taken as a whole were purposeful attempts to demean applicant in the eyes of the jurors and to play to the jurors' passion and emotion. By way of example, many of the comments suggested that applicant was less than human. Statements or arguments like this are inappropriate because their only purpose is to appeal to emotion, passion, or prejudice. In *State v. Hawkins*, 292 S.C. 418, 421, 357 S.E.2d 10, 12 (1980), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), the Court held that the repeated reference to the defendant as "Mad Dog" "denied the right to a fair trial and infected the sentencing proceedings with an arbitrary factor." In that case the defendant's nickname was "Mad Dog" and so the Court recognized that it was permissible for the solicitor to use the name to clarify the defendant's identity. *Id.* However, the Court held that the repeated use of this nickname was improper. Similarly, other jurisdictions faced with arguments not nearly as egregious as the one in applicant's case have found that derogatory arguments which compare a defendant to an animal are improper. *See Rosser v. Commonwealth of Virginia*, 482 S.E.2d 83, 87 (1997) (Error found when prosecutor argued that "I don't think I'm overstating this when I say [the defendant] is an animal."); *State v. Roache*, 595 S.E.2d 381 (N.C. 2004) (court found improper prosecution comparison of defendant to wild dogs "high on the taste of blood and power over their victims" because such statements led "the jury to base its decision not on the evidence relating to the issue submitted, but on misleading characterizations, crafted by counsel, that are intended to

undermine reason in favor of visceral appeal."); *State v. Barajas*, 177 P.3d 106, 114 (Wash. Ct. App. 2007) (court found comparison of defendant to "mongrel mutt" improper).

A death sentence cannot be carried out in light of such argument by the state. Many of the violations of principles which required reversal in other capital cases were replicated here, and considered in its entirety, the solicitor's opening statement and closing argument in this case reveals an unprecedented disregard of the strictures imposed by the state supreme court's cases, by the Eighth Amendment, and by the Due Process Clause of the Fourteenth Amendment. Trial counsel's failure to object to each of these statements represents deficient performance that resulted in prejudice to applicant. *See Strickland v. Washington*, 466 U.S. 668 (1984).

IV. APPLICANT WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL DUE TO TRIAL COUNSEL'S FAILURE TO OBJECT ADEQUATELY TO THE COURT'S INSTRUCTION REGARDING THE MEANING OF A LIFE SENTENCE.[9]

"[A] jury charged with the responsibility of assessing the penalty to be suffered by an accused should not be invited, by instruction or argument, to speculate on the possible effect of pardon or parole upon the execution of the sentence imposed." *State v. Atkinson*, 253 S.C. 531, 534, 172 S.E.2d 111, 112 (1970), *vacated in part*, 408 U.S. 936 (1972), *overruled in part on other grounds, State v. Torrence*, 315 S.C. 45, 406 S.E.2d 315 (1991). However, "[w]hen [the issue of parole] is raised, the Court should instruct the jury that it shall not consider parole eligibility in reaching its decision, and that, the terms 'life imprisonment' and 'death sentence' should be understood in their ordinary and plain meeting." *State v. Norris*, 285 S.C. 86, 95, 328 S.E.2d 339, 344 (1985). Indeed, the Court is so concerned with ensuring that the parole eligibility of a capital defendant not play a role in the jury's sentencing decision, that it has

[9] As discussed *infra*, applicant alleges ineffective assistance of appellate counsel to the extent that respondent argues that trial counsel did object adequately to any portion of the instruction at issue here.

scrutinized the wording of instructions and found reversible error when a court omits the "ordinary and plain meaning of life and death" instruction in response to a jury's inquiry about parole eligibility. *State v. Plemmons,* 296 S.C. 76, 370 S.E.2d 871 (1988); *see also State v. Johnson,* 293 S.C. 321, 360 S.E.2d 317 (1987).

At applicant's trial, after the judge had already provided the plain and ordinary meaning instruction and after the introduction of testimony about parole, the jury asked whether or when applicant would be paroled. It is not entirely surprising that the issue of parole entered the jurors' minds. The state called a parole agent as a witness to demonstrate that applicant violated a condition of parole when he killed the victim. Then, in its closing argument the state made the inflammatory comment that "[y]ou give him life, the real Johnny will come back. You give him life and **he will come back out.**" Tr. 2079 (emphasis added). The judge responded to the jury's question about parole by providing the following instruction:

> **Let me tell you that the only thing I'm allowed to comment on that – and you understand that there are all sorts of varieties in this thing and it's something that I can't get into with you directly. All I can do is basically give to you the charge that I gave you earlier.** And let me just give you that charge again. **And I know it's kind of general, but you have to take this into account.**
>
> The terms life imprisonment and death penalty should be understood in their ordinary and plain meaning. You simply accept these, life imprisonment and death penalty, and understand them in their ordinary meaning. So when you make these determinations you have to consider life imprisonment – the term imprisonment and death penalty, and you have to consider those in their plain and ordinary meaning.

Tr. 2144-45 (emphasis added). The preface of this instruction negated entirely the rest of the instruction that the judge was required by law to give. In fact, when the judge told the jury that there were all types of "varieties" and that he could not get into it with them "directly," the judge was explicitly telling the jury that he could not be upfront with them about the possibilities that

existed regarding the parole of applicant if sentenced to life imprisonment. Indeed, the instruction given here is far worse than the wording of the instructions in *Johnson* and *Plemmons*. The judge, albeit unintentionally, invited the jury to speculate about parole.

After this instruction was provided, trial counsel objected to that portion of the judge's response that used the word "varieties." Tr. 2146. Trial counsel did not specifically reference the court's statement that parole was "something that I can't get into with you directly." Tr. 2145. In its Return, respondent argues that trial counsel's objection regarding the use of the word "varieties" was sufficient to preserve that objection for appellate review. *See* Return at 54. Applicant accepts this concession and will only argue this point as it relates to the appellate ineffective assistance of counsel claim. However, respondent did not specifically concede that trial counsel's objection also covered the statement which implied that the trial court could not be straightforward with the jury. Therefore, applicant will argue that point as both a trial and appellate ineffective assistance of counsel claim. For the reasons stated above, the instruction was inappropriate. Trial counsel had a responsibility to lodge an objection and its basis to ensure that the issue could be raised on direct appeal. It is certainly arguable that the trial attorney in this case made an objection that was sufficient, since it is clear from the record that the prosecutor and the court understood the trial attorney's complaint. *See e.g., Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998) (to preserve adequately an issue for appeal a litigant must raise the issue with the lower court and must do so with sufficient specificity to put the lower court on notice of the precise nature of the argument). However, to the extent that this Court may find that the objection was not adequately preserved at trial for appellate counsel to raise it on appeal, then this failure represents ineffective assistance of counsel.

V. APPLICANT WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL BROUGHT TO THE

JURY'S ATTENTION APPLICANT'S IN-PRISON REQUEST FOR TELEVISION KNOBS, THE USE OF A MICROWAVE, AND THE USE OF CANTEEN.

Evidence relating to the conditions of confinement are inadmissible because such evidence is irrelevant to the "character of the defendant or the circumstances of the crime." *State v. Burkhart*, 371 S.C. 482, 487, 640 S.E.2d 450, 453 (2007) citing *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982). The conditions of prison are not matters over which the jury has any control, and such evidence is outside the jury's purview. "Such determinations as the time, place, manner, and conditions of execution *or incarceration* . . . are reserved . . . to agencies other than the jury." *Burkhart*, 371 S.C. at 487, 640 S.E.2d at 453 (emphasis included in original), quoting *State v. Plath (Plath II)*, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984).

While this case was tried before 2007, the *Burkhart* court made clear that its ruling was not based on a new rule.[10] "This case was tried before our decision in *Bowman*; however, we apply that reasoning here because it is consistent with our long-standing rule that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the

[10] Applicant will not fully address here respondent's claim that the *Burkhart* decision announced a new rule which can not be applied retroactively. However, it is worth pointing out that the state Supreme Court in *Burkhart* relied on *State v. Plath (Plath II)* which was decided in 1984, long before applicant's case became final. Furthermore, respondent argues that the South Carolina Supreme Court's retroactivity analysis is dictated by the United States Supreme Court. This view was specifically addressed and rejected by the Supreme Court this term. *See Danforth v. Minnesota*, __ S.Ct. __, 2008 WL 441059 (Feb. 20, 2008) (holding that *Teague* did not constrain state courts' authority to address broader range of constitutional violations than that provided for in federal habeas). Lastly, it is worth noting the extremely misleading citations to *State v. Gardner*, *State v. Bowman,* and *State v. Wood.* Respondent vaguely relies on these cases as standing for the proposition that the state Supreme Court has decided that *Burkhart* does not apply retroactively. *State v. Gardner* was a denial of a petition for writ of certiorari. Reliance on this for any legal proposition violates the most basic rules of legal citation. *State v. Wood* is still pending before Circuit Court Judge Patterson and thus has not been ruled on by the state supreme court. Finally, in *State v. Bowman*, this issue was not properly preserved at trial and, therefore, the state supreme court did not address it except to indicate its general disapproval of such evidence. However, it is a currently pending claim in the post-conviction relief proceeding in that case. These three cases are hardly authority on which to base the argument put forth in the Return.

circumstances of the crime." *Burkhart*, 371 S.C. at 488, 640 S.E.2d at 453; *see also Burkhart*, 371 S.C. at 494, 640 S.E.2d at 456 (Toal, C.J. dissenting) ("Our pronouncement disfavoring this evidence [of conditions of confinement] in *Bowman* was nothing new.") (citations omitted). The Court found that its prior cases regarding the scope of the jury's decision were clear and that such evidence was inadmissible because it injected an arbitrary factor into the jury's decision. *See* S.C. Code Ann. §16-3-25(C)(1).

At applicant's re-sentencing proceeding, trial counsel, in an attempt to demonstrate that applicant followed prison rules, introduced evidence establishing that applicant had access to a television, canteen, and a microwave. Tr. 1636-37. Indeed, trial counsel elicited evidence that applicant could purchase things like canned goods, cigarettes, pastries, and popcorn. *Id.* Apparently, trial counsel was trying to establish that when applicant needed something, he followed the rules and appropriately made such a request using the forms provided by the prison. Of course, defense counsel did not need to elicit the type of information that the state supreme court has found inadmissible. Rather, defense counsel could have established as a general matter that applicant followed the rules and made requests appropriately without delving into the specifics of each of the requests. Unnecessarily introducing evidence which the supreme court has found to be inadmissible represented deficient performance which prejudiced applicant. *See Strickland v. Washington*, 466 U.S. 668 (1984).

VI. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO JURY INSTRUCTIONS WHICH TENDED TO LESSEN THE JURY'S RESPONSIBILITY FOR ITS SENTENCE.

A jury in a death penalty case must use its sentencing discretion unhindered by the view that the ultimate responsibility for the decision rests with some other body or a higher court.

> [T]he uncorrected suggestion that the responsibility for an ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role. Indeed, one can easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

Caldwell v. Mississippi, 472 U.S. 320, 333 (1985); *see also State v. Davis*, 306 S.C. 246, 411 S.E.2d 220 (1991) (based on holding in *Caldwell* the Court found reversible error in trial judge's reference to the jury's sentencing as a "recommendation" which the Court held tended to lessen the responsibility of the jury).

At applicant's re-sentencing the court informed the jury on two separate occasions that if the court made a mistake, it would be corrected later. Prior to opening statements, the court stated, "My duty is to sit as the instructor of the law. . . Now, you must accept the law as I give it to you. You must accept it strictly and apply it to the facts as you find them . . . Now, if I'm wrong there is a time and place for it to be corrected. . ." Tr. 899. Then, in his jury charge at the conclusion of closing arguments the trial court instructed the jury as follows: "Now, the same constitution and laws which make you the finders of fact make me the judge or the instructor of the law. You must accept as correct the law as I give it to you. Now, if I'm wrong there is another time and place for it to be corrected." Tr. 2112.

The jury instruction in this case unnecessarily raised in the jurors' minds the idea of appellate review. There was nothing to be gained from informing the jury that the judge's decisions would be reviewed at a later time and it is hard to imagine that a juror would assume that there was oversight of the judge's decisions but not those of the jury. Indeed, the jury, having twice been informed of some unspecified oversight, sent a question to the court asking

about appellate review. "If we decide [sic] death penalty, when would it be put into effect, and if there were [sic] to be an appeal how many appeals do they allow?" Tr. 2142.

It was unnecessary and inappropriate for the court to suggest that there would be any review of the trial at all because of the risk that the jury would infer from that statement that there would be appellate review of the sentence. Indeed, that risk was realized in this case when the jury, taking the cue from the judge, inquired about the number of appeals applicant would have if sentenced to death. Trial counsel's failure to object to this instruction represented deficient performance which resulted in prejudice to applicant. *See Strickland v. Washington*, 466 U.S. 668 (1984).

VII. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO EVIDENCE WHICH RAISED THE SPECTER OF PAROLE IN THE MINDS OF THE JURORS.

South Carolina courts have gone to great lengths to shield capital juries from considerations of parole in a capital sentencing proceeding. *See e.g., State v. Norris*, 285 S.C. 86, 95, 328 S.E.2d 339, 344 (1985). The South Carolina Supreme Court has made clear that capital juries are not to give any weight to parole considerations when determining the proper sentence of a capital defendant. Furthermore, in South Carolina the rules of evidence apply in the sentencing phase of a capital case. Therefore, if the probative value of relevant testimony is substantially outweighed by its prejudicial impact, such evidence must be excluded. Rule 403, SCRE. Any evidence which tends to raise the issue of parole has to be evaluated within this evidentiary context.

At applicant's re-sentencing trial, the state called as a witness in its case-in-chief, Jody Gallman, an employee of the South Carolina Department of Probation, Parole and Pardon Services. Tr. 1105. Ms. Gallman testified that prior to applicant's parole from a Youthful

Offender Act sentence, she reviewed with applicant the conditions of his release which included, *inter alia*, that he not violate the law. Tr. 1107. Clearly, the primary purpose of calling this witness to the stand was to establish that applicant was on parole at the time of the instant crime. While it may be true that prior conduct and convictions are relevant and normally admissible, the admission of evidence raising the specter of parole is qualitatively different and extremely prejudicial. The only probative information which the state elicited through this witness was that when applicant committed murder he did so in violation of the rules of parole. This evidence added very little to the state's case, especially in light of applicant's murder conviction. On the other hand, this testimony raised the issue of parole in the minds of the jurors. Not surprisingly, after hearing the testimony of this witness and at the conclusion of the case, the jury sent out a note specifically asking whether applicant would be eligible for parole if sentenced to life imprisonment.

Given the necessity to shield capital jurors from considering the possibility of parole when determining the appropriate sentence, evidence that raises the issue of parole while only demonstrating the existence of a parole violation was substantially more prejudicial than probative. Trial counsel's failure to object to such evidence represented deficient performance that resulted in prejudice to applicant. *See Strickland v. Washington*, 466 U.S. 668 (1984).

VIII. APPLICANT WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF TRIAL COUNSEL'S FAILURE TO OBJECT TO THE JURY INSTRUCTION WHICH TENDED TO INFORM THE JURY THAT IT COULD ONLY CONSIDER APPLICANT'S CHARACTER IN THE CONTEXT OF AGGRAVATING EVIDENCE RATHER THAN MITIGATING EVIDENCE.

As respondent acknowledges, *see* Return at 91, a court cannot limit a jury's consideration of a capital defendant's character only to the context of aggravating evidence as opposed to mitigating evidence. "[W]e conclude that the Eight and Fourteenth Amendments require that the

sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character. . . as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (footnotes omitted) (emphasis added). Further emphasizing this point, the Court stated that "a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character. . . creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.* at 605.

However, at applicant's trial the court specifically instructed the jury that it could only consider applicant's character in the context of aggravating evidence. Indeed, the trial court went on to define and describe character evidence as being a type of aggravation.

> Now, in this case the State has also presented other aggravating circumstances. We've talked about statutory aggravating circumstances, but as I indicated, the State must also prove beyond a reasonable doubt any general aggravating circumstances. These are sometimes called character evidence. And, in essence, these are presented through evidence of crimes or bad acts or rules infractions.
>
> Now, you must understand this, and please understand this right away. Give me your close attention on this. These crimes or bad acts or rules infractions may not be used to prove a statutory aggravating circumstance. Again, these crimes or bad acts or rules infractions may not be used to prove a statutory aggravating circumstance.
>
> The evidence of other crimes or bad acts or rules infractions should be considered as evidence of an aggravating circumstance, but if you are convinced beyond a reasonable doubt that the defendant committed these other crimes or bad acts or rules infractions then you may consider them as evidence of the defendant's character and characteristics as they bear relevance to the crime.

Tr. 2123. This instruction misconstrues what character evidence is generally and informed the jurors that they could only consider applicant's character as aggravating evidence and in the

context of "bad acts or rules infractions." Had the trial judge simply mentioned character evidence when discussing aggravating circumstances generally, the error would have been less than clear. That is not what happened in applicant's case. In addition to suggesting that character evidence could only be considered in the context of aggravation the trial court reinforced this suggestion by defining character evidence in a very limited way that only applies to aggravating circumstances. In other words, the trial court's instruction left no room for applicant's jury to consider his character as a reason to sentence him to life imprisonment.

Trial counsel's failure to object to the trial court's erroneous statement of the law represented deficient performance which prejudiced applicant. *See Strickland v. Washington*, 466 U.S. 668 (1984).

IX. APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BASED ON TRIAL COUNSEL'S FAILURE TO OBJECT TO THE ERRONEOUS ARGUMENT AND THE JUDGE'S INSTRUCTIONS CONCERNING TORTURE AND KIDNAPPING.

Two of the statutory aggravating circumstances under South Carolina's death penalty scheme are torture and murder during the commission of the kidnapping. Torture occurs "(1) when the victim is subjected to serious physical abuse **before death**; or (2) when the victim is subjected to an aggravated battery **before death**." *State v. Johnson*, 338 S.C. 114, 127, 525 S.E.2d 519, 526 (2000) (emphasis added), citing *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983). Similarly, in *State v. Damon*, 285 S.C. 125, 328 S.E.2d 628 (1985) *overruled on other grounds State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), the Court made clear that the statute contains the clearest language regarding the existence of kidnapping during the murder by establishing that the murder must occur *during the commission* of the kidnapping. So, as with torture, it is clear that a defendant cannot kidnap someone who has already been killed.

However, at trial the solicitor argued to the jury that "aggravating circumstances can be committed after he murdered Benton Smith." Tr. 2057. Subsequently, the trial court instructed the jury that "[t]he fact that the crimes are committed after the murder does not invalidate them as statutory aggravating circumstances." Tr. 2116. Clearly, both the argument of the solicitor and the instruction by the judge were incorrect as a matter of law. It is also true as respondent argued in its Return that the judge later correctly charged that torture must occur before death. However, simply because the trial court got it right one time after instructing the jury incorrectly does not render the initial mistake meaningless. At the very least it rendered the instructions confusing and irreconcilable. This is especially important as to the torture aggravating circumstance which was hotly contested during trial. Trial counsel's failure to lodge an objection to the argument of the solicitor and the trial court's instruction represented deficient performance which prejudiced applicant. *See Strickland v. Washington*, 466 U.S. 668 (1984).

X. APPLICANT WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL DUE TO TRIAL COUNSEL'S FAILURE TO QUESTION POTENTIAL JURORS ABOUT RACIAL PREJUDICE.[11]

In *Turner v. Murray*, 476 U.S. 28 (1986), the Supreme Court established that in a capital trial involving an interracial crime, the defendant had a right to ask potential jurors questions to ensure that racial bias would not play a part in their sentencing decision. In other words, if the race of a capital defendant is different from the race of the victim, then the defendant is entitled to inquire of the jurors about possible racial prejudice. Obviously, applicant's trial involved a

[11] After the jury was chosen but before the trial had begun, a juror realized that he knew a potential witness and was excused. Tr. 868-867. This juror was the lone African-American juror and his removal resulted in an all white juror. At this point, trial counsel requested that they be permitted to question the jurors about their racial attitudes. Tr. 882. That request was denied. *Id.* To the extent that this late request was sufficient to preserve the issue for appellate review, applicant alleges that appellate counsel was ineffective for failing to raise on direct appeal the trial court's denial of this request.