Volume 7 of 8

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The 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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black defendant and a black victim but that does not end the issue. At applicant's resentencing, the state spent a substantial amount of time detailing the assault of two white men in the parking lot of a Pizza Hut. The introduction of, and focus on, this crime placed applicant's case within the purview of *Turner* – the sentencer was provided substantial information about a crime that was interracial in nature in the context of a capital sentencing in which the jury had broad discretion in determining the appropriate sentence.

Trial counsel were fully aware of the potential for the race of applicant to play a role in the re-sentencing even before it began. *See* Return at 101. Therefore, despite the fact that the race of applicant and the victim of the crime at issue were the same, counsel were on notice of the assaults in the Pizza Hut parking lot and knew from the prior trial that the state would focus on that crime in the sentencing trial. Under these circumstances, it was professionally unreasonable for counsel to fail to question jurors to determine whether a potential juror harbored a racial prejudice that would affect their ability to be fair.

XI. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILURE TO RAISE THE ERROR THAT DEFENDANT WAS ALREADY ON DEATH ROW.

While it may be true that as a general matter a passing reference to a capital defendant already being on death row may not require reversal, *see Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998), here the reference was clear and prejudicial. On two separate occasions trial counsel referenced "death row" when questioning a prosecution witness. Tr. 1604-05. After realizing his mistake, counsel moved for a mistrial which was denied. Tr. 1607. The solicitor, in arguing that he should be allowed to go into the issue since the door had been opened, said it was clear that the references to death row related to applicant and not anyone else. Tr. 1608. The trial court similarly found that the references clearly indicated that applicant was already on death row. Tr. 1608-09. The court went on to find that "I don't know there's much reaction, to

be honest, that I can reduce the damage done at this point. . . . I imagine the Supreme Court will do something with it on a PCR in about three or four years." Tr. 1609. The same witness in answering a question posed by the solicitor in redirect examination stated that applicant was on death row. Tr. 1609. Subsequently, the trial court *sua sponte* gave the jury a curative instruction. Tr. 1609-10. Trial counsel objected to the instruction arguing that it had emphasized his mistake. Tr. 1611. In defending its instruction the court stated that it felt obligated to do something because the previous references were "very clear, there's no question that they pretty well let the cat out of the bag. . ." Tr. 1612. The trial court also found that trial counsel's reference to death row was unintentional and that "it just came out." Tr. 1614.

The facts of this case fall outside the scope of *Jones*. The references by defense counsel were unintentional as found by the trial court. According to the trial court the references by defense counsel and the witness indicated clearly that applicant was on death row. The trial judge implied that some "damage" had been done but did not know how to cure it. For these reasons appellate counsel's failure to raise this issue on direct appeal represent ineffective assistance of counsel.

Respectfully submitted,

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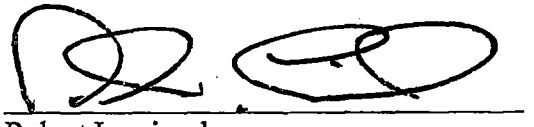


Counsel for Applicant

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON JOHNNY O. BENNETT, Applicant, v. STATE OF SOUTH CAROLINA, Respondent.	IN THE COURT OF COMMON PLEAS CA No. 2006-CP-32-3221 CERTIFICATE OF SERVICE

I do hereby certify that I have served upon the attorney for Respondent Applicant's Trial Brief, via US mail, first-class, postage pre-paid, at the following addresses:

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Robert Lominack

Columbia, South Carolina

This 19th day of May 2008

STATE OF SOUTH CAROLINA — COURT OF COMMON PLEAS

COUNTY OF RICHLAND — 2006-CP-40-5751

JOHNNY O. BENNETT :

:

-VS- : TRANSCRIPT OF RECORD

:

THE STATE OF SOUTH CAROLINA :

MAY 27, 2008
LEXINGTON, SOUTH CAROLINA

B E F O R E:

THE HONORABLE JAMES R. BARBER, III, JUDGE.

A P P E A R A N C E S:

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ATTORNEYS FOR THE APPLICANT

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CIRCUIT COURT REPORTER

I N D E X

WITNESS

ADAM HUMPHREY

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(THERE WERE NO EXHIBITS INTRODUCED.)

THE COURT: Y'ALL BE SEATED IF YOU WOULD.

MR. LOMINACK: GOOD MORNING, JUDGE.

THE COURT: HOW ARE Y'ALL THIS MORNING?

MR. LOMINACK: I'M DOING FINE. BEFORE WE GOT STARTED, I WAS GOING TO ASK IF YOU WOULD ALLOW THE S.C.D.C. PERSONNEL TO REMOVE THE BOX CUFFS FROM MR. BENNETT, ONE FOR COMFORT BUT, TWO, SO HE CAN WRITE AND PARTICIPATE TO THE EXTENT NECESSARY DURING THE HEARING. I DON'T THINK HE'S EVER CAUSED ANY PROBLEMS IN ANY COURTROOM.

THE COURT: HAVE Y'ALL GOT ANY PROBLEM WITH THAT?

OFFICER: IT'S YOUR CALL.

THE COURT: WELL, I MEAN, HAVE Y'ALL HAD ANY PROBLEMS WITH HIM?

OFFICER: NO, SIR.

THE COURT: ALL RIGHT. MR. BENNETT, WE'LL DO THAT. JUST DON'T CAUSE US ANY PROBLEMS. OKAY?

MR. BENNETT: YES, SIR.

MR. LOMINACK: THANK YOU, YOUR HONOR.

THE COURT: IS HE RIGHT-HANDED OR LEFT-HANDED?

MR. BENNETT: RIGHT-HANDED, YOUR HONOR.

THE COURT: IS THERE ANY WAY TO JUST DO THE -- KEEP THE RIGHT HAND FREE?

OFFICER: I CAN DO THAT.

THE COURT: ALL RIGHT. WE'RE HERE THIS MORNING IN THE MATTER OF JOHNNY O. BENNETT VERSUS THE STATE OF SOUTH

CAROLINA IN HIS APPLICATION FOR POST-CONVICTION RELIEF. MR. LOMINACK, Y'ALL READY TO GO?

MR. LOMINACK: WE ARE, YOUR HONOR.

THE COURT: ANYTHING WE NEED TO ADDRESS BEFORE WE GET STARTED?

MR. LOMINACK: NO, YOUR HONOR. I SPOKE WITH YOUR LAW CLERK BEFORE THE HEARING, AND IF WE COULD HAVE A COUPLE OF MINUTES TO TALK WITH YOU ABOUT SCHEDULING THE OTHER TWO WITNESSES AFTER WE'RE DONE TODAY, THAT WOULD BE GREAT.

THE COURT: ALL RIGHT.

MR. LOMINACK: THE OTHER MATTER, I THINK, IS THE FIRST WITNESS IS GOING TO BE JUROR ADAM HUMPHREY, AND MR. SALTER HAD INDICATED THAT THERE WAS A REQUEST THAT THAT BE DONE IN CAMERA. WE DON'T HAVE ANY OBJECTION.

MR. SALTER: YES, SIR, YOUR HONOR.

THE COURT: ALL RIGHT. WELL, WHO IS IN THE COURT -- WE OBVIOUSLY CAN'T -- WE'RE GOING TO HAVE TO DO IT IN THE CHAMBERS HERE, BUT DO WE HAVE ANYBODY IN THE COURTROOM THAT IS -- THAT WOULD NOT BE PERMITTED? I DON'T KNOW WHO IS HERE OTHER THAN THE CORRECTIONAL OFFICERS AND -- WHO ELSE HAVE WE GOT IN THE COURTROOM?

MR. LOMINACK: JUST AN EMPLOYEE OF MINE AND THE LAW CLERK WHO MAY TESTIFY DEPENDING ON WHAT THE TESTIMONY OF JUROR HUMPHREY...

THE COURT: ANYBODY ELSE THAT YOU WOULD WANT EXCLUDED

OUT?

MR. SALTER: YOUR HONOR, IF THE LAW CLERK IS A POTENTIAL WITNESS, I WOULD DEFINITELY ASK HER NOT TO BE IN HERE.

THE COURT: WHO IS THE LAW CLERK?

MR. LOMINACK: CARRIE BETTIS.

THE COURT: AND WHO IS THE EMPLOYEE OF YOURS?

MR. LOMINACK: ELIZABETH MCDONALD.

THE COURT: ALL RIGHT.

MR. LOMINACK: I DON'T MIND -- I MEAN, I DON'T MIND THEM BEING OUT OF THE COURTROOM. THAT'S FINE.

THE COURT: WELL, I DON'T HAVE A PROBLEM WITH YOUR EMPLOYEE BEING HERE. DO YOU HAVE A PROBLEM WITH THAT, MR. SALTER?

MR. SALTER: NO, SIR, YOUR HONOR.

THE COURT: AND, OF COURSE, WE'VE GOT THE CORRECTIONAL OFFICERS. WHO IS THE YOUNG LADY SEATED BACK -- NO, I KNOW YOU'RE THE LAW CLERK.

MS. BETTIS: YES, SIR.

THE COURT: WE'RE GOING TO LET YOU SIT OUTSIDE. WHO IS -- WHO IS BEHIND THIS CORRECTIONAL OFFICER, THIS CAPTAIN?

MR. LOMINACK: MRS. BENNETT. SHE'S JUST HERE TO WATCH. SHE'S NOT A POTENTIAL WITNESS.

THE COURT: ALL RIGHT. DO YOU WANT HER EXCUSED---

MR. SALTER: YES, SIR, YOUR HONOR.

THE COURT: ---MR. SALTER?

MR. SALTER: YES, SIR.

THE COURT: ALL RIGHT. WE'LL HAVE -- AND WHO IS THE GENTLEMAN SEATED IN THE BACK?

MR. LOMINACK: THAT'S THE JUROR.

THE COURT: ALL RIGHT. THAT'S THE JUROR.

MR. SALTER: YES, SIR.

THE COURT: ALL RIGHT. AND TELL ME YOUR NAME, PLEASE.

MS. WOFFORD: SANDY WOFFORD. I'M HIS...

THE COURT: ALL RIGHT. WELL, DO Y'ALL HAVE ANY PROBLEM WITH HER BEING HERE?

MR. SALTER: NO, SIR, YOUR HONOR. SHE WORKS IN MY OFFICE.

THE COURT: WELL, THAT MIGHT BE A PROBLEM THEN, HUH, MR. SALTER? ALL RIGHT. MS. BENNETT, WE'RE GOING TO LET YOU STEP OUT. IS THAT EVERYBODY NOW, MR. SALTER?

MR. SALTER: I BELIEVE SO, YOUR HONOR.

THE COURT: ALL RIGHT. ALL RIGHT. MR. LOMINACK?

MR. LOMINACK: THANK YOU, YOUR HONOR. THE APPLICANT CALLS ADAM HUMPHREY TO THE STAND.

ADAM HUMPHREY, AFTER BEING DULY SWORN, TESTIFIED AS FOLLOWS:

THE COURT: ALL RIGHT. IF YOU'LL TELL US YOUR FULL NAME AFTER YOU HAVE A SEAT IN THE WITNESS BOX, PLEASE, SIR.

COURT REPORTER: AND WILL YOU SPELL YOUR LAST NAME AS WELL?

THE WITNESS: ADAM HUMPHREY. H-U-M-P-H-R-E-Y.

DIRECT EXAMINATION

BY MR. LOMINACK:

Q. GOOD MORNING, MR. HUMPHREY.

A. GOOD MORNING.

Q. MY NAME IS ROBERT LOMINACK, AND OBVIOUSLY WE'VE MET BEFORE. AND I'M NOT PUTTING YOU ON TRIAL HERE, AND I'LL TRY TO DO THIS AS QUICKLY AS I CAN. HOW ARE YOU EMPLOYED RIGHT NOW?

A. SELF -- SELF-EMPLOYED.

Q. AND WHAT DO YOU DO?

A. CARPENTRY.

Q. AND IS THAT WHAT YOU WERE DOING BACK IN THE SUMMER OF 2000 AS WELL?

A. YES.

Q. ALL RIGHT. IF YOU COULD---

THE COURT: HOW OLD ARE YOU, MR. HUMPHREY?

THE WITNESS: 35.

BY MR. LOMINACK:

Q. AND YOU WERE A JUROR IN MR. BENNETT'S RESENTENCING. IS THAT RIGHT?

A. RIGHT.

Q. IN THE SUMMER OF 2000.

A. YES.

Q. YEAH, IF YOU COULD ANSWER---

A. OKAY.
Q. ---SO THE COURT REPORTER CAN GET DOWN YOUR RESPONSES. AND DO YOU RECALL MEETING WITH ME?
A. YES, I DO.
Q. AND THERE WAS A YOUNG WOMAN WITH ME?
A. UH-HUH. YES, SIR.
Q. OKAY. AND DID YOU RECOGNIZE THAT WOMAN WHO WAS IN THE COURTROOM EARLIER?
A. YES, I DID.
Q. OKAY. AND WOULD YOU AGREE THAT THAT WAS LAST SUMMER IN JULY?
A. RIGHT.
Q. OKAY. AND WE MET WITH YOU AT YOUR HOUSE; RIGHT?
A. CORRECT.
Q. AND WE ASKED YOU ABOUT YOUR EXPERIENCES AS A JUROR IN MR. BENNETT'S RESENTENCING CASE.
A. RIGHT.
Q. AND QUESTIONS ABOUT SEQUESTRATION; RIGHT?
A. RIGHT.
Q. AND YOUR THOUGHTS ON THE CASE.
A. YES.
Q. AND THE EVIDENCE.
A. RIGHT.
Q. OKAY. AND THE ATTORNEYS.
A. YES.

Q. ALL RIGHT. AND DO YOU RECALL ME ASKING YOU THE QUESTION, INDICATING THAT THIS WAS A STRANGE CRIME AND WHY DID YOU THINK THAT MR. BENNETT HAD KILLED THE VICTIM?

A. I DON'T RECOLLECT THE EXACT WORDS, BUT I REMEMBER, YES, I GUESS.

Q. OKAY. AND DO YOU RECALL ANSWERING THAT BY---

MR. SALTER: OBJECT -- I'M GOING TO FINALLY OBJECT NOW. HE'S LEADING THE WITNESS. I MEAN, FOR THE MOST PART IT'S NOT A BIG DEAL SINCE WE'RE SITTING NON-JURY.

THE COURT: ALL RIGHT. JUST DON'T LEAD HIM.

BY MR. LOMINACK:

Q. DO YOU RECALL WHAT YOUR ANSWER WAS?

A. YES.

Q. AND WHAT WAS YOUR ANSWER TO THAT QUESTION?

A. I DON'T -- I DON'T REALLY RECALL WHICH QUESTION THAT I ANSWERED WHAT YOU'RE GOING TO MAKE ME SAY BUT -- I DON'T RECALL.

Q. OKAY. DO YOU RECALL EVER SAYING, "BECAUSE HE WAS JUST A DUMB NIGGER"?

A. SOME WORDS LIKE THAT, YES.

Q. OKAY. OKAY. WOULD YOU LIKE TO CHANGE ANY OF THE WORDS THAT I JUST SAID?

A. YEAH. YOU KNOW, I APOLOGIZE FOR SAYING THAT ONE WORD, BUT AFTER GOING THROUGH THAT THING FOR AN ENTIRE WEEK AND ALL THE EVIDENCE PILING UP AGAINST HIM, THAT WAS JUST THE WAY I

FELT ABOUT IT.

Q. ALL RIGHT. AND I DON'T WANT TO PUT WORDS IN YOUR MOUTH. YOU'RE NOT -- I DIDN'T MISSTATE WHAT YOU SAID; RIGHT?

A. NO, I SAID THAT.

Q. YOU'RE NOT HAPPY THAT YOU SAID IT.

A. NO, I'M NOT.

MR. LOMINACK: OKAY. COURT'S INDULGENCE. NOTHING FURTHER FOR NOW, YOUR HONOR. THANK YOU, MR. HUMPHREY.

THE COURT: MR. SALTER, ANYTHING?

MR. SALTER: YES, SIR, JUST BRIEFLY.

CROSS-EXAMINATION

BY MR. SALTER:

Q. MR. HUMPHREY, YOU WERE APPROACHED BY MR. LOMINACK AND THIS WOMAN?

A. RIGHT.

Q. CORRECT? HOW DID THEY GO ABOUT IDENTIFYING THEMSELVES?

A. WELL, I WAS OUTSIDE WEED-EATING THE FRONT YARD AND, YOU KNOW, THEY WALKED UP WITH A BUNCH OF BOOKS AND THIS AND THAT, AND I REMEMBER HIM SAYING HIS NAME AND, YOU KNOW, HE WAS WITH AN ATTORNEY'S OFFICE AND, YOU KNOW -- AND IMMEDIATELY, YOU KNOW, THAT PERKED UP MY EARS BECAUSE, YOU KNOW, SOMEBODY SHOWING UP AT MY HOUSE---

Q. ALL RIGHT.

A. ---YOU KNOW, AND THAT'S ALL I CAN RECALL AS FAR AS IDENTIFYING HIM.

Q. DO YOU RECALL WHETHER OR NOT HE TOLD YOU HE WAS REPRESENTING MR. BENNETT?
A. I THINK THAT WAS ABOUT LATER ON IN THE CONVERSATION. I DON'T REMEMBER HIM SAYING THAT RIGHT UP FRONT. NOW, HE COULD HAVE. I DON'T REMEMBER. I DON'T RECALL THAT.
Q. OKAY. HE MAY HAVE, BUT YOU DON'T REMEMBER?
A. RIGHT.
Q. DID THEY EVER TELL YOU YOU DIDN'T HAVE TO TALK TO THEM, THAT YOU HAVE A STATUTORY RIGHT NOT TO TALK TO THEM?
A. I REALLY DON'T RECALL.
Q. OKAY.
A. I MEAN, THEY KIND OF CAUGHT ME OFF GUARD AND, YOU KNOW, THEM SAYING THEY WERE WITH THE ATTORNEY'S OFFICE AND I WAS LIKE OBLIGATED -- I FELT THAT I NEEDED TO TALK.
Q. OKAY. DID THEY EXPLAIN TO YOU WHAT THEIR PURPOSE WAS IN ASKING YOU QUESTIONS?
A. I REALLY DON'T RECALL. I MEAN, IT WAS A PRETTY LONG CONVERSATION SO...
Q. ALL RIGHT. WELL, HOW LONG WAS THE CONVERSATION?
A. I'D SAY PROBABLY 30 -- 30, 45 MINUTES.
Q. 30, 45-MINUTE CONVERSATION?
A. RIGHT.
Q. AND OBVIOUSLY NOT ONE THAT YOU WERE TOLD IN ADVANCE YOU WERE GOING TO HAVE; CORRECT?
A. RIGHT. NO, IT WAS OFF GUARD.

Q. ALL RIGHT. DO YOU RECALL WHAT KIND OF QUESTIONS YOU WERE ASKED BEFORE YOU WERE ASKED THE QUESTION THAT LED UP TO THE COMMENT THAT WE'RE ALL HERE FOR?

A. JUST -- I REMEMBER HIM SAYING JUST DIFFERENT THINGS ABOUT WHAT DID I FEEL ABOUT MR. BENNETT AND JUST -- I DON'T REALLY RECALL EXACTLY THE QUESTIONS THAT WERE ASKED BUT, YOU KNOW, JUST BASICALLY ABOUT WHAT HAPPENED, YOU KNOW, AS A JUROR...

Q. WHAT HAPPENED AS A JUROR?

A. RIGHT.

Q. LIKE HOW Y'ALL DELIBERATED AND THAT KIND OF THING?

A. RIGHT.

Q. OKAY. AND I BELIEVE YOU WERE ORIGINALLY AN ALTERNATE JUROR, WERE YOU NOT?

A. I THINK I WAS ORIGINALLY.

Q. ALL RIGHT. AND YOU HAD -- YOU WERE SELF-EMPLOYED AT THE TIME?

A. RIGHT.

Q. NOW, DO YOU REMEMBER WHEN THE JUDGE BROUGHT YOU OUT AND HE AND THE ATTORNEYS ASKED YOU QUESTIONS?

A. RIGHT, HE DID AND I -- YOU KNOW, I ASKED HIM -- I HAD JUST HIRED SOMEBODY AND I HAD A BIG JOB GOING ON AT THE ZOO, AND I HAD ASKED HIM IS THERE ANY WAY I COULD GET OUT OF IT BECAUSE I HAD JUST HIRED HIM AND I NEEDED TO TRAIN THE GUY. AND THEY SAID JOHNNY BENNETT'S NAME AND THEY SAID, "DO YOU

KNOW HIM?" AND I SAID, "I WENT TO SCHOOL WITH A GUY NAMED JOHNNY BENNETT." AND THEN HE STOOD UP AND I SAID, "NO, THAT'S NOT HIM." BUT JUDGE WESTBROOK WOULDN'T ALLOW ME TO BE DISMISSED. HE SAID THERE WAS NOTHING IN THE LAW SAYING THAT I COULD BE DISMISSED.

Q. BECAUSE OF YOUR BUSINESS?

A. CORRECT.

Q. ALL RIGHT. NOW, BEFORE YOU WERE APPROACHED BY MR. LOMINACK IN JULY OF LAST YEAR, SOME SEVEN YEARS AFTER THE RESENTENCING, HAD YOU EVER THOUGHT ABOUT WHY MR. BENNETT MAY HAVE COMMITTED THE MURDER?

A. I MEAN, I THINK ABOUT IT ALL THE TIME. AS FAR AS WHY HE DID IT, I DON'T KNOW. I THINK IT WAS JUST -- I DON'T KNOW. I DON'T KNOW WHY HE WOULD HAVE DONE IT, YOU KNOW -- BUT, YOU KNOW, AFTER GOING THROUGH IT, YOU KNOW, I'LL NEVER FORGET IT, YOU KNOW, AND THIS THROWS ANOTHER WRENCH IN IT. YOU KNOW, I THOUGHT I WAS DONE WITH IT, AND HERE I AM.

Q. ALL RIGHT. NOW, DURING THE -- LET ME TAKE YOU BACK TO WHEN YOU WERE SERVING AS A JUROR. DURING THE COURSE OF DELIBERATIONS, DID YOU EVER USE ANY KIND OF RACIAL EPITHET?

A. NO.

MR. LOMINACK: OBJECTION, YOUR HONOR. THIS ISN'T -- FIRST OF ALL, THIS IS NOT A JUROR MISCONDUCT CLAIM. THIS IS AN IMPARTIAL JUROR CLAIM. WE DON'T HAVE TO SHOW PREJUDICE, AND THERE'S NO WAY THAT ANYTHING THAT WENT ON IN THAT JURY

ROOM OR IS A PART OF THE DELIBERATIONS GETS PAST 606(B). THERE'S A PROHIBITION OF GOING INTO THAT AREA, AS MR. SALTER HAS ALREADY BRIEFED---

THE COURT: I'M GOING TO OVERRULE IT AND I'LL LET HIM EXPLORE THAT.

MR. SALTER: THANK YOU, YOUR HONOR.

BY MR. SALTER:

Q. DID YOU USE ANY KIND OF RACIAL EPITHET DURING THE---

A. NO. HUH-UH.

Q. DID OTHER JURORS USE THAT?

A. NO.

Q. DID ANYONE EVER EXPRESS, EITHER YOU OR ANY OTHER JUROR, EXPRESS THAT MR. BENNETT DESERVED DEATH BECAUSE HE WAS BLACK?

A. NO.

MR. LOMINACK: OBJECTION. CALLS FOR HEARSAY AND IT INVADES THE PROVINCE OF THE JURY.

THE COURT: OVERRULED.

MR. SALTER: THANK YOU, YOUR HONOR.

BY MR. SALTER:

Q. YOUR RESPONSE WAS?

A. NO, BUT I MEAN, IT WOULDN'T HAVE MATTERED WHAT COLOR THE PERSON WAS. THE CRIME, THE EVIDENCE, EVERYTHING WAS THERE, AND THE WAY WE ALL DECIDED WAS ON WHAT ALL WE HEARD AND THE EVIDENCE THAT WAS BEFORE US.

MR. LOMINACK: SAME OBJECTION, YOUR HONOR.

THE COURT: ALL RIGHT. OVERRULED.

BY MR. SALTER:

Q. DID THE FACT THAT MR. BENNETT IS BLACK PLAY ANY PART IN YOUR DECISION?

A. NO.

Q. ALL RIGHT, SIR. DO YOU THINK THAT BLACKS ARE MORALLY INFERIOR TO WHITES?

A. NO. I'M NOT PREJUDICED. YOU KNOW, LIKE I SAY, I SAID THE WRONG WORD. YOU KNOW, I SHOULDN'T HAVE SAID IT.

Q. ALL RIGHT. DO YOU THINK THAT A BLACK PERSON CHARGED WITH MURDER DESERVES TO BE PUNISHED MORE HARSHLY THAN---

A. NO. IT WOULDN'T HAVE MATTERED -- LIKE I SAY AGAIN, IT WOULDN'T MATTER---

MR. LOMINACK: OBJECTION, YOUR HONOR.

THE WITNESS: ---WHAT COLOR.

MR. LOMINACK: HE'S ASKING THE JUROR THE ULTIMATE QUESTION. THIS IS NO DIFFERENT THAN ME PUTTING UP AN ATTORNEY AS AN EXPERT IN CAPITAL CASES AND ASKING THEM WHETHER OR NOT TRIAL COUNSEL WAS INEFFECTIVE. HE'S ASKING THE JURY (SIC) TO DO WHAT THE COURT IS GOING TO HAVE TO DO.

THE COURT: WELL, YOU NEED TO LIMIT IT TO HIM.

MR. SALTER: ALL RIGHT, SIR. I DID, YOUR HONOR, I BELIEVE.

THE COURT: OH, I THOUGHT YOU SAID---

MR. SALTER: I ASKED HIM IF HE WAS PERSONALLY -- IF HE

PERSONALLY FELT...

THE COURT: OH, I THOUGHT YOU SAID THE JURY.

MR. SALTER: NO, SIR. I SAID HIM PERSONALLY.

THE COURT: ALL RIGHT. I'M GOING TO ALLOW HIM TO ANSWER.

MR. SALTER: BECAUSE I -- THANK YOU, YOUR HONOR. I BELIEVE HE'S ALREADY RESPONDED TO MY QUESTION. I DON'T BELIEVE I HAVE ANYTHING MORE.

THE COURT: ANYTHING, MR. LOMINACK?

MR. LOMINACK: COURT'S INDULGENCE. (PAUSE) BRIEFLY, YOUR HONOR.

REDIRECT EXAMINATION

BY MR. LOMINACK:

Q. MR. HUMPHREY, ON DIRECT - AND I WANT TO MAKE SURE I GET THIS RIGHT - YOU STATED WHEN I WAS ASKING YOU QUESTIONS THAT THIS IS HOW YOU FELT IN TERMS OF YOUR CHARACTERIZATION OF MR. BENNETT AT THE TIME OF THE RESENTENCING AFTER YOU HAD TO HEAR THE EVIDENCE; RIGHT?

A. WHAT -- FELT WHAT?

Q. THAT HE WAS JUST A DUMB NIGGER.

A. I MEAN, THAT STATEMENT IS JUST WRONG. YOU KNOW, I SAID IT. IT WAS A MISTAKE. YOU KNOW, I SHOULDN'T HAVE SAID THAT BUT, YOU KNOW, I -- TO ME HE WAS NOT A GOOD PERSON FOR WHAT HE DID WITH NO REMORSE, AND THAT'S HOW I FELT.

Q. ALL RIGHT. NOW, WHEN I MET WITH YOU, DO YOU EVER RECALL

ME TELLING YOU THAT YOU HAD TO SPEAK WITH ME?
A. I DON'T RECALL.
Q. DO YOU EVER RECALL INDICATING THAT YOU DIDN'T WANT TO SPEAK WITH US AND US FORCING YOU TO SPEAK WITH US?
A. NO, BUT, YOU KNOW, I FELT MORE OBLIGATED WHEN YOU SHOW UP AT MY HOUSE, YOU KNOW, OUT THERE WITH MY SHIRT OFF CUTTING GRASS AND YOU SHOW UP WITH THIS BOOK SAYING THAT YOU'RE FROM THE ATTORNEY'S OFFICE, AND I FELT OBLIGATED TO SPEAK WITH YOU AT THAT TIME. I MEAN, YOU COULD HAVE TOLD ME ANYTHING. IT WAS JUST OVERWHELMING. YOU KNOW, ALL THEM YEARS LATER YOU SHOW UP AT MY HOUSE ABOUT A CASE THAT, YOU KNOW -- YOU KNOW, I WAS THERE FOR A WEEK THAT I'LL NEVER FORGET.
Q. AND WHEN YOU SAY BOOK, YOU MEAN THIS?
A. I GUESS.
Q. OKAY. WHEN YOU SAID A BUNCH OF BOOKS, DID YOU MEAN THIS?
A. I DON'T RECALL. I JUST REMEMBER IT LOOKING REAL FORMAL AND YOU SAYING YOU'RE FROM THE ATTORNEY'S OFFICE, AND IMMEDIATELY I FELT OBLIGATED TO SPEAK WITH YOU.
Q. AND I GAVE YOU MY CARD.
THE COURT: LET ME -- LET ME -- FOR THE RECORD, WHEN YOU SAY THIS, DESCRIBE WHAT IT IS.
MR. LOMINACK: OH, SORRY. BLACK PAD-FOLIO WITH A NOTEBOOK PAPER---
THE COURT: A LEGAL PAD.

BY MR. LOMINACK:

Q. DID I GIVE YOU MY BUSINESS CARD?

A. YES, I THINK SO.

Q. WITH MY NAME ON IT?

A. I GUESS, YEAH.

Q. WITH MY PHONE NUMBER?

A. RIGHT.

Q. OKAY. AND DO YOU RECALL WHETHER I HAD WRITTEN "ATTORNEY FOR MR. BENNETT" ON THAT CARD?

A. I DON'T RECALL THAT, NO.

Q. OKAY. NOW, DO YOU RECALL WHERE WE MET IN YOUR HOUSE?

A. WELL, AT FIRST IT WAS IN THE FRONT YARD, AND THEN WE WENT ON MY BACK PORCH.

Q. AND THAT WAS THROUGH -- THROUGH YOUR HOUSE.

A. RIGHT, RIGHT THROUGH THE KITCHEN.

Q. AND YOU UNDERSTOOD WHO MYSELF AND THE YOUNG WOMAN, MS. BETTIS, WERE REPRESENTING.

A. AT THE TIME, NO.

Q. WHEN DID YOU COME TO UNDERSTAND THAT?

A. YOU KNOW, KIND OF MAYBE AFTER Y'ALL LEFT AFTER I GOT TO THINKING ABOUT IT AND I WAS LIKE, WELL, WHY WOULD I TELL THEM THAT, YOU KNOW, TO HELP THEM OUT? YOU KNOW, I DIDN'T -- IT WAS JUST KIND OF OVERWHELMING. YOU KNOW, YOU CAUGHT ME OFF GUARD. I'M OUT IN THE FRONT YARD, YOU KNOW, CUTTING GRASS AND, YOU KNOW, ALL OF A SUDDEN YOU SHOW UP SAYING YOU'RE FROM

THE ATTORNEY'S OFFICE. I FELT OBLIGATED TO SPEAK WITH YOU, ESPECIALLY AFTER GOING THROUGH WHAT I WENT THROUGH. I MEAN, THIS IS THE FIRST TIME I'VE EVER BEEN A JUROR, YOU KNOW, AND BACK THEN YOUNG, HAD, YOU KNOW, A ONE-YEAR-OLD DAUGHTER. I MEAN, IF I COULD HAVE GOT OUT OF IT, I WOULD HAVE TRIED TO GET OUT OF IT.

Q. AND SO AFTER THE FACT, YOU WERE CONCERNED ABOUT WHAT YOU HAD SAID TO US.

A. RIGHT. I FELT WRONG ABOUT SAYING THE N. WORD. I SHOULDN'T HAVE SAID THAT.

Q. BECAUSE IT MIGHT HELP MR. BENNETT OUT.

A. NO, I'M NOT SAYING HELPING OUT. HELP ME OUT. I SHOULDN'T HAVE SAID THE WORD.

Q. ALL RIGHT.

A. IT WAS A BAD CHOICE OF WORDS.

Q. NOW, THAT'S NOT THE FIRST TIME YOU HAVE EVER SAID THAT WORD IN YOUR LIFE; RIGHT?

A. NO.

Q. AND, IN FACT, YOU HAD USED THAT WORD BEFORE THAT DAY. RIGHT?

A. I ASSUME SO.

Q. WELL, HAD YOU USED THAT WORD TO DESCRIBE AN AFRICAN AMERICAN PERSON BEFORE THAT DATE?

A. I'VE USED IT TO DESCRIBE ONE OF MY BEST FRIENDS. IT'S JUST A WORD.

Q. HAD YOU USED THAT WORD TO DESCRIBE AN AFRICAN AMERICAN BEFORE THAT DATE?

A. YES.

Q. AND HAD YOU EVER ATTACHED THE WORD DUMB RIGHT NEXT TO IT TO DESCRIBE AN AFRICAN AMERICAN BEFORE THAT DATE?

A. YES.

Q. HUH?

A. PROBABLY SO, YEAH.

MR. LOMINACK: COURT'S INDULGENCE. NOTHING FURTHER, YOUR HONOR.

THE COURT: ALL RIGHT. ANYTHING?

MR. SALTER: NOTHING FURTHER, YOUR HONOR.

THE COURT: ALL RIGHT. THANK YOU. YOU MAY STEP DOWN.

MR. LOMINACK: YOUR HONOR, MAY MR. HUMPHREY BE EXCUSED?

THE COURT: DO Y'ALL HAVE ANY...

MR. SALTER: I HAVE HIM UNDER SUBPOENA, BUT I CERTAINLY HAVE NO OBJECTION WHATSOEVER.

THE COURT: ALL RIGHT. YOU ARE FREE TO LEAVE.

MR. SALTER: THANK YOU, SIR.

THE COURT: LET ME SAY THIS ABOUT THIS ISSUE. I KNOW IN YOUR BRIEFS Y'ALL HAVE CITED CASES, AND ANY CASES YOU WANT ME TO READ THAT YOU'RE RELYING ON, CAN YOU GET ME COPIES OF THEM?

MR. LOMINACK: ABSOLUTELY.

THE COURT: MR. SALTER AS WELL?

MR. SALTER: OH, CERTAINLY, YOUR HONOR. WOULD YOU LIKE COPIES OF ALL THE CASES I CITE IN MY -- I WAS GOING TO SAY BRIEF, BUT IT'S NOT -- IT'S ANYTHING BUT BRIEF.

THE COURT: WELL, IN THIS ISSUE -- BUT THIS ISSUE IN PARTICULAR.

MR. SALTER: ALL RIGHT.

THE COURT: IF THERE'S SOMETHING ELSE, I---

MR. SALTER: YES, SIR.

THE COURT: I MEAN, I WANT TO MAKE SURE I READ WHAT YOU SPECIFICALLY FEEL IS ESSENTIAL RELATING TO YOUR CLAIMS OR... ALL RIGHT. HOW ABOUT -- CAN WE OPEN THE COURTROOM BACK UP? ANYBODY HAVE---

OFFICER: YES, SIR.

MR. LOMINACK: I ASSUME THAT MR. FLOYD---

THE COURT: OR DO YOU -- DO YOU INTEND TO CALL ANYBODY ELSE WITH RESPECT TO THIS ISSUE?

MR. LOMINACK: NO, YOUR HONOR.

THE COURT: MR. SALTER, DO YOU INTEND TO CALL ANYBODY WITH RESPECT TO THIS ISSUE?

MR. SALTER: NO, YOUR HONOR.

THE COURT: ALL RIGHT. IF WE CAN OPEN THE...

MR. LOMINACK: YOUR HONOR, IF WE DO CALL THE LAW CLERK -- I DON'T THINK WE WILL, BUT IF WE DO, WE DON'T NEED TO CLOSE IT UP OR AT LEAST FROM OUR PERSPECTIVE OR SEND ANYBODY OUT.

THE COURT: IF YOU DO -- IF WE GET INTO THAT, WE'LL ADDRESS IT.

MR. LOMINACK: GIVEN THE TESTIMONY, I DON'T THINK WE WILL, BUT I MAY NEED JUST A COUPLE OF MINUTES. THE APPLICANT CALLS WAYNE FLOYD TO THE STAND, YOUR HONOR.

H. WAYNE FLOYD, AFTER BEING DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. LOMINACK:

Q. GOOD MORNING, MR. FLOYD.

A. GOOD MORNING.

Q. COULD YOU STATE YOUR NAME FOR THE RECORD?

A. HOWARD WAYNE FLOYD.

Q. YOU OBVIOUSLY KNOW WHY WE'RE HERE. IF YOU COULD, JUST EXPLAIN TO THE COURT HOW YOU FIRST BECAME INVOLVED WITH MR. BENNETT'S CASE.

A. ORIGINALLY WHEN THE STATE NOTICED HIM FOR THE DEATH PENALTY, I THINK THE CASE WAS A COUPLE OF YEARS OLD AT THAT POINT, TWO TO THREE, SOMETHING LIKE THAT.

Q. AND DO YOU RECALL WHAT YEAR THAT WAS?

A. NOT OFF THE TOP OF MY HEAD. I WOULD SAY '92, SOMETHING IN THAT RANGE, '93.

Q. AND WHO WAS YOUR CO-COUNSEL AT THE TIME?

A. ORIGINALLY IT WAS STEVE SOLTIS.

Q. AND DID HE REMAIN YOUR CO-COUNSEL?

A. NO. SHORTLY AFTER I CAME IN THE CASE, HE CAME OFF THE CASE AND PAT MCWHIRTER WAS APPOINTED CO-COUNSEL.
Q. ALL RIGHT. AND DO YOU RECALL WHAT YEAR THE FIRST TRIAL WAS?
A. '95 OR SO BECAUSE WE HAD A PRETRIAL MATTER THAT WENT UP ON APPEAL AS TO THE FUNDING BECAUSE IT WAS RIGHT AFTER THE CASE OUT OF AIKEN SAYING THE COUNTY HAD TO FUND, AND WHILE WE WERE ON APPEAL, THE INDIGENT DEFENSE COMMISSION GOT ESTABLISHED.
Q. ALL RIGHT. IN THAT FIRST TRIAL IN 1995, WAS MR. MCWHIRTER YOUR CO-COUNSEL DURING THE ACTUAL TRIAL?
A. YES, HE WAS.
Q. OKAY. AND WHAT HAPPENED AT THAT TRIAL? WHAT WAS THE SENTENCE THAT -- WHAT WAS THE GUILT VERDICT AND THE SENTENCE?
A. HE WAS FOUND GUILTY AND GIVEN A DEATH PENALTY.
Q. OKAY. AND AT A LATER DATE WAS HIS DEATH SENTENCE VACATED?
A. RIGHT, AND IT CAME BACK FOR TRIAL ON RESENTENCING.
Q. AND WERE YOU SUBSEQUENTLY INVOLVED IN THAT RESENTENCING TRIAL?
A. YES, I WAS.
Q. WHO WAS YOUR CO-COUNSEL?
A. HERVERY YOUNG WAS CO-COUNSEL AT THAT TIME.
Q. OKAY. AND WAS HE AT THE PUBLIC DEFENDER'S OFFICE AT THE TIME?

A. YES, HE WAS.
Q. WHO WAS LEAD COUNSEL BETWEEN YOU TWO?
A. I WAS.
Q. AND AS LEAD COUNSEL, COULD YOU DESCRIBE THE BREAKDOWN IN RESPONSIBILITIES BETWEEN YOU AND MR. YOUNG?
A. WELL, AT THAT TIME, OF COURSE, WE WERE JUST BACK FOR RESENTENCING, SO WE KIND OF SHARED A LOT OF RESPONSIBILITIES. MY ORIGINAL MAIN RESPONSIBILITY WAS THE GUILT PHASE AT THE ORIGINAL TRIAL. SO I -- WE HAD TO HANDLE ALL THOSE WITNESSES AGAIN ALSO, AND THEN WE SPLIT UP SOME OF THE OTHERS.
Q. AND YOU OBVIOUSLY HAD MORE EXPERIENCE WITH THE CASE SINCE YOU HAD GONE THROUGH THE FIRST TRIAL; RIGHT?
A. CORRECT.
Q. OKAY. AND YOU WERE AWARE OF SOME ISSUES THAT MIGHT CROP UP THE SECOND TIME AROUND THAT YOU WERE CONCERNED ABOUT FROM THE FIRST TRIAL?
A. CORRECT.
Q. IS THAT RIGHT? NOW, I'M GOING TO GO THROUGH AND -- BY THE WAY, HAVE I MET WITH YOU ABOUT YOUR TESTIMONY TODAY?
A. YES, YOU HAVE.
Q. AND WOULD YOU ARGUE WITH ME IF I TOLD YOU IT WAS LAST FRIDAY?
A. NO.
Q. AND HAVE YOU MET WITH MR. SALTER?
A. YES, LAST FRIDAY ALSO.

Q. BEFORE ME. IS THAT RIGHT?
A. RIGHT.
Q. OKAY. AND I'M GOING TO GO THROUGH WITH YOU THE SAME ISSUES THAT I'M SURE MR. SALTER AND I HAVE ALREADY TALKED WITH YOU ABOUT. AT THE RESENTENCING TRIAL, JUDGE WESTBROOK -- AND YOU TELL ME IF YOU WANT TO SEE THE TRANSCRIPT OR IF YOU DON'T RECALL THIS HAPPENING, BUT I DON'T EXPECT YOU TO OBVIOUSLY REMEMBER THE EXACT WORDS. JUDGE WESTBROOK INSTRUCTED THE JURY THAT HE WAS THE JUDGE OF THE FACTS -- I MEAN, HE WAS THE JUDGE OF THE LAW AND IF I'M WRONG, THERE'S A TIME AND PLACE FOR IT TO BE CORRECTED. I MEAN, HE SAID THAT TWICE. THE RECORD INDICATES NO OBJECTION TO THAT INSTRUCTION. DO YOU RECALL ANY STRATEGIC REASON FOR NOT OBJECTING TO THAT?
A. THERE WAS NO STRATEGIC REASON. IT'S JUST SOMETHING I DID NOT CATCH.
Q. OKAY. AND CAN YOU DESCRIBE THE ATMOSPHERE OF A DEATH PENALTY TRIAL GENERALLY?
A. WELL, IT'S VERY TENSE BECAUSE OF WHAT'S AT STAKE.
Q. A LOT OF WITNESSES INVOLVED IN A CAPITAL CASE?
A. YES.
Q. GENERALLY DOES A CAPITAL CASE TAKE LONGER THAN A NON-CAPITAL CASE?
A. IT GENERALLY DOES, OF COURSE, BECAUSE YOU HAVE SEVERAL DAYS OF JURY SELECTION ALSO.

Q. AND HAD YOU EVER HANDLED CAPITAL CASES BEFORE MR. BENNETT'S RESENTENCING?
A. HIS.
Q. OKAY. AND ANY BEFORE THAT?
A. NO.
Q. ANY OTHERS? BUT AT THE TIME OF HIS RESENTENCING, YOU WERE AWARE OF THE SPECIAL BODY OF LAW THAT GOES WITH CAPITAL CASES.
A. YES.
Q. IS IT FAIR TO SAY THAT A CAPITAL TRIAL INVOLVES A LOT OF BALLS IN THE AIR AT ONE TIME?
A. YES. YOU HAVE A LOT OF THINGS GOING ON WITH IT; THERE'S NO QUESTION.
Q. OKAY. HOW LONG HAVE YOU BEEN A TRIAL ATTORNEY?
A. THIRTY-FOUR YEARS.
Q. OKAY. THE STATE CALLED A WITNESS, JODY GALLMAN, FROM THE DEPARTMENT OF PROBATION, PAROLE, AND PARDON SERVICES, AND SHE INDICATED THAT WHEN MR. BENNETT COMMITTED THIS CRIME HE WAS ON PAROLE AND SHE HAD GONE OVER HIS CONDITIONS OF PAROLE. ONE OF THOSE CONDITIONS WAS NOT TO COMMIT A CRIME. DO YOU RECALL THAT TESTIMONY?
A. YES.
Q. DO YOU RECALL COMING UP WITH ANY STRATEGIC OR TACTICAL REASON FOR NOT OBJECTING TO HER TESTIMONY?
A. NO.

Q. OKAY. AT ONE POINT YOU WERE QUESTIONING I THINK SOME EMPLOYEES OF LIEBER CORRECTIONAL INSTITUTION AND YOU MENTIONED THE PHRASE DEATH ROW AS A PLACE WHERE JOHNNY WAS BEING HOUSED. WAS THAT INTENTIONAL?

A. NO, IT WASN'T.

Q. AND HAD THE COURT OR HAD YOU INSTRUCTED ANY OF THE WITNESSES TO MAKE CERTAIN THAT THEY DIDN'T SAY THE PHRASE DEATH ROW WHEN THEY TESTIFIED, IF YOU RECALL?

A. I THINK WE TOLD -- YOU KNOW, I MENTIONED THAT TO ALL THE GUARDS AND SO FORTH, YEAH.

Q. AND WHY IS IT THAT YOU DIDN'T WANT THE JURY TO KNOW THAT MR. BENNETT WAS ON DEATH ROW?

A. THAT COULD GIVE THE JURY THE IMPRESSION THAT HE HAD ALREADY BEEN TRIED AND SENTENCED TO DEATH.

Q. ALL RIGHT. AND DO YOU REMEMBER MAKING A MOTION AFTER RECOGNIZING THAT YOU YOURSELF HAD MENTIONED THAT PHRASE A COUPLE OF TIMES?

A. YES, BECAUSE I WAS CONCERNED ABOUT IT.

Q. AND WHAT WAS THE MOTION?

A. I THINK I MIGHT HAVE MOVED FOR A MISTRIAL.

Q. OKAY. AND WHY DID YOU MOVE FOR A MISTRIAL?

A. BECAUSE I FELT THAT THAT INFORMATION COULD PREJUDICE JOHNNY IN FRONT OF A NEW JURY.

Q. DID YOU HAVE ANY STRATEGIC OR TACTICAL REASON FOR INFORMING THE JURY THAT MR. BENNETT HAD BEEN ON DEATH ROW?

A. NO, IT WAS JUST SOMETHING THAT CAME OUT.
Q. OKAY. IN YOUR EXPERIENCE, DO -- IS THE IDEA OF PAROLE ELIGIBILITY AN IMPORTANT ISSUE WITH JURORS IN CAPITAL CASES?
A. OH, I THINK IT'S ONE OF THE PRIME ISSUES.
Q. AND IN THIS CASE DO YOU RECALL THAT THE JURY CAME BACK WITH A QUESTION AND ASKED, IN ESSENCE, WHETHER OR WHEN MR. BENNETT WOULD BE ELIGIBLE FOR PAROLE IF THEY SENTENCED HIM TO LIFE?
A. YES, I REMEMBER THAT.
Q. OKAY. AND IN YOUR EXPERIENCE WHAT IS THE TRIAL COURT SUPPOSED TO INSTRUCT THE JURY IN THAT CIRCUMSTANCE?
A. BASICALLY LIFE IN ITS ORDINARY MEANING IS KIND OF WHAT MY UNDERSTANDING IS.
Q. AND THAT'S BEFORE OBVIOUSLY THE STATUTE CHANGED TO MEAN LIFE WITHOUT PAROLE; RIGHT?
A. RIGHT.
Q. SO WE'RE TALKING ABOUT A CASE THAT PREDATED THAT STATUTORY CHANGE.
A. THAT'S CORRECT.
Q. AND IS THAT KNOWN AS THE NORRIS CHARGE OR THE PLAIN AND ORDINARY MEANING INSTRUCTION?
A. YES.
Q. AND DO YOU RECALL THAT BEFORE GIVING THAT INSTRUCTION JUDGE WESTBROOK PREFACED IT WITH THE FOLLOWING -- IT'S AT PAGE 2144. 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 I CAN'T GET INTO WITH YOU DIRECTLY. ALL I CAN DO IS BASICALLY GIVE TO YOU THE CHARGE THAT I GAVE YOU EARLIER. DO YOU REMEMBER THAT?

A. YES.

Q. AND DO YOU RECALL MAKING AN OBJECTION AFTER HE GAVE THAT INSTRUCTION?

A. YES, BECAUSE I THOUGHT THAT IMPLIED TO THE JURY THAT IT MAY BE A POSSIBILITY BECAUSE I THINK IT IMPLIED TO THE JURY THERE WERE DIFFERENT TYPES OF LIFE SENTENCES.

Q. OKAY. AND AT THE TIME YOU SPECIFICALLY OBJECTED YOU SAID TO THE USE OF THE WORD VARIETIES.

A. RIGHT.

Q. DO YOU RECALL THAT? NOW, YOU OBVIOUSLY DIDN'T HAVE A TRANSCRIPT THAT YOU WERE LOOKING AT WHEN YOU WERE MAKING THESE OBJECTIONS; RIGHT?

A. THAT'S CORRECT.

Q. DID YOU HAVE ANY STRATEGIC OR TACTICAL REASON FOR NOT SPECIFICALLY ALSO OBJECTING TO THE SENTENCE: "I CAN'T GET INTO WITH YOU DIRECTLY ABOUT THAT"?

A. NO.

Q. OKAY. NOW, DO YOU RECALL THE EVIDENCE ABOUT THE PIZZA HUT PARKING LOT ASSAULTS?

A. YES.

Q. AND WAS THAT EVIDENCE INTRODUCED AT THE FIRST TRIAL?
A. YES, IT WAS.
Q. AND SO YOU KNEW IT WAS COMING.
A. THAT'S CORRECT.
Q. AND YOU MADE A SUBSTANTIAL NUMBER OF OBJECTIONS TO VARIOUS PARTS OF THAT EVIDENCE.
A. THAT'S CORRECT.
Q. DO YOU EVER RECALL SPECIFICALLY MAKING AN OBJECTION BASED ON THE DUE PROCESS CLAUSE OF THE CONSTITUTION?
A. I DON'T RECALL USING THAT TERM.
Q. OKAY. AND DO YOU HAVE ANY STRATEGIC REASON FOR FAILING TO USE THE VERY PRECISE TERM OF DUE PROCESS CLAUSE OF THE CONSTITUTION WHEN MAKING SOME OF YOUR OBJECTIONS?
A. NO.
Q. OKAY. I'M GOING TO GO THROUGH WITH YOU A NUMBER OF COMMENTS THAT WERE MADE IN OPENING STATEMENT AND CLOSING ARGUMENT---
A. OKAY.
Q. ---AND ASK YOU ABOUT EACH ONE INDIVIDUALLY TO INSURE THAT THE RECORD IS CLEAR. DURING THE OPENING STATEMENT, THE PROSECUTION REFERRED TO MR. BENNETT AS BRUTAL MONSTER-SIZE AND BIG, OLD BRUTE JOHNNY BENNETT. DID YOU HAVE ANY STRATEGIC REASON FOR NOT OBJECTING TO THOSE COMMENTS?
A. NO.
Q. HE INDICATED THAT 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. DID YOU HAVE ANY STRATEGIC REASON FOR NOT OBJECTING TO THAT?

A. NO.

Q. AND HE INDICATED, "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," AS HE SPOKE TO THE JURY. DID YOU HAVE ANY STRATEGIC REASON FOR FAILING TO OBJECT TO THAT?

A. NO.

Q. ALL RIGHT. HE DESCRIBED MR. BENNETT AS A BIG, OLD BEAR OF A FELLOW WITH A BIG, OLD BEAR OF A FIST. DID YOU HAVE ANY REASON FOR NOT OBJECTING TO THOSE COMMENTS?

A. NO.

Q. HE INDICATED THAT, "HE WAS EVIL, MEAN, MANIPULATIVE, MALICIOUS. THAT'S WHAT WE'RE DEALING WITH FOLKS, AND YOU WILL FIND ENOUGH AGGRAVATION THAT WILL BE SPILLING OVER IN THIS JURY BOX. ALL WE ASK YOU IS TO RETURN THE PUNISHMENT THAT FITS THE CRIME FOR THIS EVIL, MANIPULATING, MALICIOUS, MURDERING DEFENDANT." DID YOU HAVE ANY STRATEGIC REASON FOR NOT OBJECTING TO THAT?

A. NO.

Q. ALL RIGHT. THEN IN THE CLOSING ARGUMENT MR. MYERS SAID, "IF YOU GIVE HIM LIFE, THE REAL JOHNNY WILL COME BACK. IF

YOU GIVE HIM LIFE, HE'LL COME BACK OUT." DO YOU RECALL MAKING AN OBJECTION, A CONTEMPORANEOUS OBJECTION, TO THAT COMMENT?

A. IF I DIDN'T, I SHOULD HAVE.

Q. SO IF YOU DIDN'T, THERE WAS NO STRATEGIC REASONS WHY---

A. RIGHT.

Q. ---FOR NOT OBJECTING TO THAT. HE ALSO SAID, "THERE AIN'T NO JOY IN HAPPY TOWN. HE TURNED IT INTO GRUESOMEVILLE. IT'S BOO HILL." DO YOU RECALL ANY STRATEGIC REASON FOR NOT OBJECTING TO THAT COMMENT?

A. NO.

Q. HE REFERRED TO MR. BENNETT AS A MOUNTAIN MAN. DO YOU RECALL ANY REASON FOR NOT OBJECTING TO THAT COMMENT?

A. NO.

Q. AND A TIGER. ANY REASON FOR NOT OBJECTING TO THAT COMMENT?

A. NO.

Q. AND A MONSTER. ANY REASON FOR NOT OBJECTING TO THAT COMMENT?

A. NO.

Q. AND LASTLY HE REFERRED TO HIM AS A BEAST OF BURDEN. WAS THERE ANY REASON FOR NOT OBJECTING TO THAT PHRASE?

A. NO. YOU KNOW, SOME -- THERE WERE TIMES YOU COULDN'T HEAR WHAT WAS BEING SAID. WHETHER THAT WAS DURING THOSE TIMES OR NOT, I COULDN'T TELL YOU.

Q. OKAY. SO DID THIS TRIAL TAKE PLACE IN THE OLD COURTROOM?
A. YES, IT DID.
Q. ALL RIGHT. AND IS IT SAFE TO SAY THAT IF ANYBODY MOVES AN INCH IN THAT OLD COURTROOM IT MAKES MORE NOISE THAN ANYTHING COMING FROM THE WITNESS STAND OR AN ATTORNEY ABOUT---
A. THE ACOUSTICS WERE VERY BAD IN THAT OLD COURTROOM.
Q. OKAY. AND SO THERE WERE TIMES WHEN YOU COULD NOT HEAR WHAT MR. MYERS WAS SAYING IN HIS CLOSING ARGUMENT.
A. THAT'S CORRECT.
Q. AND YOU DON'T RECALL SPECIFICALLY WHICH ONE OF THESE YOU MAY NOT HAVE HEARD.
A. NO, BUT I HAD NO STRATEGIC REASON, YOU KNOW, NOT TO OBJECT.
Q. OKAY. WHEN -- WHEN THE TRIAL COURT WAS INSTRUCTING THE JURY ABOUT CHARACTER EVIDENCE, IT DESCRIBED SUCH EVIDENCE ONLY IN TERMS OF AGGRAVATING EVIDENCE AND THEN FURTHER DEFINED IT AS RULES VIOLATIONS AND PRIOR BAD ACTS. OKAY? IF THE RECORD INDICATES THAT YOU DID NOT OBJECT TO THAT, DID YOU HAVE ANY STRATEGIC REASON FOR NOT OBJECTING TO THAT LIMITED DEFINITION OF CHARACTER EVIDENCE?
A. NO, I DIDN'T.
Q. AND WHAT WAS YOUR PRIMARY FOCUS AT THE RESENTENCING PHASE?

A. WELL, WE HAD A LOT OF WITNESSES TO SHOW JOHNNY'S CHARACTER NOW AND THE WAY HE WAS NOW, AND I THINK THAT WAS KIND OF OUR MAIN FOCUS IS TO SHOW THAT JOHNNY WAS A MAN OF COMPASSION, HAD TRIED TO HELP OTHERS, A MAN THAT GOT ALONG WELL WITH ALL THE PEOPLE IN THE PRISON SYSTEM, AND SO WE HAD MANY WITNESSES TO TALK ABOUT THE WAY JOHNNY TRIED TO HELP PEOPLE.

Q. DID YOU ALSO HAVE WITNESSES DESCRIBE HIS LACK OF BEING A FUTURE DANGER IN PRISON?

A. YES.

Q. ALL RIGHT. AND YOU JUST USED THE WORD CHARACTER. WAS A PRIMARY FOCUS OF THE SENTENCING PHASE, FROM THE DEFENSE PERSPECTIVE, HIS GOOD CHARACTER?

A. THAT'S CORRECT.

Q. OKAY. AND IF THE JURY WAS LED TO BELIEVE THAT CHARACTER EVIDENCE ONLY COULD PERTAIN TO RULES INFRACTIONS AND BAD PRIOR CONDUCT, THAT MAY HAVE LIMITED THEIR REVIEW OF YOUR EVIDENCE; RIGHT?

A. I THINK THAT'S POSSIBLE.

Q. NOW -- AND WE'LL OBVIOUSLY ASK MR. YOUNG ABOUT THIS MORE SPECIFICALLY, BUT HE WAS EXAMINING A WITNESS AND IN DOING SO REFERENCED SOME OF THE CONDITIONS OF CONFINEMENT ON DEATH ROW: A MICROWAVE, CANTEEN, AND A TELEVISION, THE USE OF A CANTEEN. DO YOU RECALL EVER HAVING A DISCUSSION WITH MR. YOUNG BEFORE HE DID THAT THAT WOULD INDICATE A PARTICULAR

STRATEGIC REASON FOR GOING INTO THE SPECIFICS OF THAT EVIDENCE?

A. NO.

Q. OKAY. MR. MYERS ARGUED AND THE JUDGE -- THE TRIAL COURT INSTRUCTED AT ONE POINT THAT THE COMMISSION OF TORTURE AND KIDNAPPING COULD OCCUR AFTER THE DEATH OF THE VICTIM. DO YOU RECALL ANY STRATEGIC REASON FOR NOT OBJECTING TO THAT INSTRUCTION AND THAT ARGUMENT?

A. NO.

Q. AND, LASTLY, WERE YOU CONCERNED ABOUT POTENTIAL RACIAL ISSUES IN THIS CASE?

A. YES.

Q. WHY IS THAT?

A. WELL, IT WAS LEXINGTON COUNTY. WE DID NOT HAVE ANY -- I DON'T BELIEVE WE ENDED UP WITH ANY BLACK PEOPLE ON OUR JURY. I KNOW WE HAD A COUPLE -- WELL, WE HAD ONE TO START WITH AND THEN HE GOT OFF THE CASE. WE HAD---

Q. WAS THAT THE JUROR THAT GOT OFF THE CASE RIGHT AT THE VERY BEGINNING BEFORE TESTIMONY BEGAN?

A. THAT'S CORRECT. WE HAD -- WE HAD ANOTHER POTENTIAL BLACK LADY THAT WE FOUGHT TO TRY TO KEEP IN THE PANEL, BUT THE SOLICITOR WAS ABLE TO GET HER -- WELL, HE STRUCK HER AND WAS ABLE TO SUSTAIN THE STRIKE TO OUR BATSON MOTION.

Q. DO YOU RECALL WHAT THE RACE OF THE VICTIMS OF THAT PIZZA HUT ASSAULT WERE?

A. THERE WAS -- THERE WAS SOME BLACK ON WHITE THERE.
Q. OKAY. AND WAS THAT A PASSING REFERENCE IN THE STATE'S CASE OR WOULD YOU CHARACTERIZE THAT AS SUBSTANTIALLY MORE THAN JUST A PASSING REFERENCE IN THEIR SENTENCING PHASE PRESENTATION?
A. WELL, THERE WERE A LOT OF ISSUES. THERE WERE A LOT OF ARGUMENT AND TESTIMONY THAT I THINK RAISED THE ISSUE, FROM THE TALKING ABOUT THE BLONDE GUARD THAT JOHNNY HAD A RELATIONSHIP WITH, TALKING ABOUT THE GUY FROM THE PIZZA HUT HAVING A DREAM ABOUT BLACK INDIANS CHASING HIM. YOU KNOW, I THINK IT WAS INTERJECTED MANY TIMES.
Q. AND DID YOU MAKE A REQUEST, BEFORE TESTIMONY BEGAN, TO BE ALLOWED TO QUESTION THE JURORS ABOUT POTENTIAL RACIAL PREJUDICES?
A. I BELIEVE WE DID.
Q. OKAY. AND DO YOU RECALL WHAT THE TRIAL COURT'S RULING ON THAT REQUEST WAS?
A. IT WAS DENIED.
Q. OKAY. AND COULD YOU HAVE MADE THAT REQUEST SOONER?
A. YES, BECAUSE I THINK I MADE IT AFTER WE HAD ALREADY SELECTED EITHER ALL OR MOST OF THE JURORS.
Q. ALL RIGHT. AND DID YOU HAVE ANY STRATEGIC REASON FOR NOT MAKING THAT REQUEST DURING THE REGULAR VOIR DIRE OF THE JURORS?
A. NO.

Q. OKAY. COURT'S INDULGENCE. JUST BRIEFLY, YOUR HONOR.
MR. FLOYD, ARE YOU -- DO YOU KNOW WHAT THE SEXUAL OFFENDER --
THE SEX OFFENDER REGISTRY IS?
A. YES, I DO.
Q. ALL RIGHT. AND DO YOU KNOW WHAT THE VARIOUS CONVICTIONS
ARE THAT REQUIRE REGISTRATION ON THAT REGISTRY?
A. YES.
Q. OKAY. AND HAS THAT LAW CHANGED IN TERMS OF WHAT
CONVICTIONS REQUIRE REGISTRATION?
A. YES. I THINK WHEN THE LAW WAS ORIGINALLY ENACTED,
KIDNAPPING WAS AUTOMATICALLY AN INCLUSION ON THE FORM, I MEAN
IN THE REGISTRY, AND NOW IT'S THE JUDGE'S DISCRETION.
Q. OKAY. AND SO NOW IF SOMEBODY IS CONVICTED OF
KIDNAPPING, THE JUDGE CAN MAKE A FACTUAL FINDING THAT THERE
WAS NOTHING OF A SEXUAL NATURE THAT WAS RELEVANT TO THAT
KIDNAPPING, AND THE PERSON WOULD NOT HAVE TO REGISTER. IS
THAT RIGHT?
A. THAT'S CORRECT.
Q. BUT THAT WAS NOT THE LAW AT THE TIME OF THE 1995 TRIAL.
A. THAT'S MY UNDERSTANDING.
Q. AT THE TIME OF THE 1995 TRIAL, WHAT YOU JUST SAID WAS
THE LAW; RIGHT? THAT IT WAS AUTOMATIC REGISTRATION.
A. CORRECT.
Q. SO THERE WAS NOTHING THAT YOU FELT YOU COULD DO IN 1995
TO ARGUE AGAINST THAT REGISTRATION. IS THAT RIGHT?

A. THAT'S CORRECT.

MR. LOMINACK: OKAY. NOTHING FURTHER, YOUR HONOR.

THE COURT: ALL RIGHT. MR. SALTER?

CROSS-EXAMINATION

BY MR. SALTER:

Q. MR. FLOYD, I'LL TRY TO BE AS BRIEF AS POSSIBLE---

A. OKAY.

Q. ---BUT I HAVE A FEELING I'M GOING TO TAKE AWHILE. BOTH YOU AND MR. YOUNG, PRIOR TO THE RESENTENCING IN THIS CASE, Y'ALL BOTH HAD FAIRLY EXTENSIVE TRIAL EXPERIENCE?

A. THAT'S CORRECT.

Q. YOU HAD 34 YEARS AS AN ATTORNEY?

A. AS OF TODAY.

Q. AS OF TODAY. OKAY. SO 34 MINUS SEVEN OR EIGHT. EXCUSE ME. WITH RESPECT TO THE MANNER IN WHICH Y'ALL HAD DECIDED TO DIVVY UP WITNESSES AND RESPONSIBILITIES, HOW DID YOU GO ABOUT DOING THAT?

A. WE JUST MET AND DISCUSSED IT, AND I THOUGHT HERVERY DID A VERY GOOD JOB OF -- ONE OF HIS MAIN THINGS WAS THE PRISON GUARDS, AND I THOUGHT HE DID A VERY GOOD JOB OF GATHERING THOSE TOGETHER.

Q. ALL RIGHT. NOW, YOU INDICATED YOUR ORIGINAL APPOINTMENT WAS EITHER IN '92 OR '93; CORRECT?

A. THAT'S CORRECT.

Q. AND MR. BENNETT'S CASE WAS THE FIRST CAPITAL CASE YOU

HANDLED.

A. THAT'S CORRECT.

Q. RIGHT? BUT BY THE TIME OF THE 2000 RESENTENCING, YOU HAD ALREADY OBVIOUSLY HANDLED THAT ONE CAPITAL CASE.

A. THAT'S CORRECT.

Q. ALL RIGHT, SIR. HOW MANY NON-CAPITAL MURDER CASES DO YOU THINK YOU HAD TRIED BY THEN?

A. BY THEN?

Q. YES, SIR.

A. I'M NOT SURE THE DATES ON THESE THINGS. I'VE HAD FOUR OR FIVE, AND I'M NOT SURE IF THEY PREDATED 2000.

Q. OKAY.

A. I'M NOT SURE.

Q. AND HAD YOU NOT ALSO HANDLED SEVERAL DEATH PENALTY POST-CONVICTION RELIEF CASES?

A. YES, I HAD.

Q. SPECIFICALLY, BO SUTHERLAND?

A. YES.

Q. HOW ABOUT THOMAS IVY?

A. YES.

Q. WERE THERE TWO IVY CASES?

A. THERE WERE TWO.

Q. SO IT'S FAIR TO SAY YOU WERE FAMILIAR WITH THE KIND OF ISSUES THAT CROP UP IN A CAPITAL CASE.

A. THAT'S CORRECT.

Q. ALL RIGHT. COULD YOU ESTIMATE THE NUMBER OF MAJOR FELONY CASES YOU HAD TRIED? DO YOU HAVE ANY IDEA?
A. SEVERAL HUNDRED.
Q. OKAY. NOW, IN PREPARING FOR THE RESENTENCING, DID YOU EITHER ALONE OR WITH CO-COUNSEL MEET WITH MR. BENNETT?
A. YES.
Q. DO YOU HAVE ANY IDEA HOW MANY TIMES?
A. NOT OFF THE TOP OF MY HEAD.
Q. WAS IT MORE THAN, SAY, ONCE OR TWICE?
A. YEAH, MORE THAN ONCE OR TWICE.
Q. WAS IT MORE THAN TEN TIMES?
A. OVER THE TIME I'VE REPRESENTED JOHNNY, I WOULD IMAGINE SO, YES.
Q. ALL RIGHT, SIR. IN YOUR VARIOUS MEETINGS WITH HIM, WAS HE COOPERATIVE?
A. YES.
Q. DO YOU FEEL LIKE YOU DEVELOPED A GOOD ATTORNEY/CLIENT RELATIONSHIP?
A. YES.
Q. SO YOU DIDN'T HAVE ANY PROBLEMS COMMUNICATING WITH HIM OR VICE VERSA.
A. NO. I THOUGHT WE -- WE ACTUALLY BECAME FRIENDS, I THINK.
Q. ALL RIGHT. DID HE SUGGEST ANY POSSIBLE MITIGATION WITNESSES OR WITNESSES THAT YOU COULD USE IN RESENTENCING?

MR. LOMINACK: OBJECTION. RELEVANCE, YOUR HONOR. THIS DOESN'T HAVE ANYTHING TO DO WITH ANY OF THE LEGAL-BASED CHALLENGES THAT WE'VE PRESENTED IN THE APPLICATION.

THE COURT: WHAT IS THE RELEVANCE OF THAT?

MR. SALTER: WELL, YOUR HONOR, I WAS KIND OF -- IT'S GOING TO BE MORE DIFFICULT TO SHOW SINCE THE OTHER ATTORNEY IS NOT GOING TO BE HERE, BUT THE GUARDS IS KIND OF WHAT I WAS GETTING AT BECAUSE THERE WERE A NUMBER OF GUARDS WHO TESTIFIED AS MITIGATION WITNESSES. THERE'S SOME ALLEGATION ABOUT THE HANDLING OF AT LEAST ONE GUARD, AND I THINK IT ACTUALLY OCCURRED ON SEVERAL OCCASIONS WHERE MR. YOUNG ASKED QUESTIONS---

THE COURT: WELL, WASN'T MR. YOUNG THE ONE THAT HANDLED THOSE WITNESSES?

MR. SALTER: YES, SIR, BUT MY POINT WAS JUST TO FIND OUT WHETHER OR NOT MR. BENNETT WAS THE SOURCE OF THE INFORMATION TO PROVIDE THE WITNESS IN THE FIRST PLACE.

THE COURT: ALL RIGHT. YOU CAN ASK THAT.

THE WITNESS: OKAY. WHAT WAS THE QUESTION AGAIN, ED?

BY MR. SALTER:

Q. COULD HE PROVIDE ANY POSSIBLE WITNESSES FOR THE RESENTENCING PROCEEDING?

A. OH, I'M SURE WE DISCUSSED THAT WITH HIM, YES.

Q. OKAY. NOW, DID YOU DISCUSS YOUR OVERALL STRATEGIC MATTERS WITH HIM?

A. WITH JOHNNY?
Q. YES. YES, SIR.
A. YES, WE DISCUSSED THINGS WITH HIM.
Q. ALL RIGHT. NOW, HAVING TRIED THE FIRST CASE, YOU HAD A TRANSCRIPT OF THAT.
A. YES, WE DID.
Q. ALL RIGHT. AND YOU HAD YOUR -- DID YOU MAKE RULE 5 OR DISCOVERY -- OTHER DISCOVERY MOTIONS, BRADY MOTIONS?
A. YES.
Q. YOU WOULD HAVE HAD THE RESULTS OF THOSE ALSO?
A. YES.
Q. OKAY. GOING INTO THE RESENTENCING PROCEEDING, WHAT DID YOU AND MR. YOUNG CONSIDER WAS THE BEST THEORY TO DEFEND -- OF DEFENDING YOUR CLIENT ON THE CHARGE?

MR. LOMINACK: OBJECTION, YOUR HONOR, AGAIN TO RELEVANCE.

THE COURT: I'M GOING TO LET HIM ANSWER. YOU KNOW, THIS IS NON-JURY AND IT'S...

BY MR. SALTER:

Q. ALL RIGHT.
A. WELL, WE FELT THAT OUR BEST APPROACH, TO MY MEMORY OF IT, IS THAT WE SHOWED THE JURY WHAT TYPE OF PERSON JOHNNY IS NOW OR WAS AT THE TIME OF THAT TRIAL, AND THE PEOPLE THAT WERE WITH HIM EVERY DAY WERE THE ONES WHO COULD TELL THE JURY THAT. AND THAT'S WHY WE CALLED IN ALL THE PEOPLE THAT HE

DEALT WITH ON A DAILY BASIS TO SHOW THE JURY HE WAS NOT A THREAT TO ANYONE, THAT HE HAD A GOOD HEART, THAT HE TRIED TO HELP PEOPLE, THAT HE COOPERATED IN THE SYSTEM AND WOULD NOT BE A DANGER TO ANYONE AND WOULD BE A GOOD MODEL PRISONER FOR AS LONG AS HE HAD TO BE THERE.

Q. ONE OF THE FIRST ALLEGATIONS THAT I'D LIKE TO SPECIFICALLY TALK TO YOU ABOUT IS YOUR FAILURE TO EARLY ON IN THE VOIR DIRE REQUEST THAT THE JUDGE ASK OR THAT YOU BE PERMITTED TO ASK QUESTIONS ABOUT JURORS' RACIAL VIEWS. DID YOU AND MR. YOUNG HAVE ANYONE TO ASSIST Y'ALL IN YOUR JURY SELECTION IN ANY MANNER?

A. YEAH, WE TRIED SOMETHING A LITTLE DIFFERENT. WE GOT 10 OR 15 MEMBERS OF THE COMMUNITY, JUST CITIZENS. WE HAD THEM SITTING IN THE COURTROOM LISTENING TO THE VOIR DIRE. WE GAVE THEM SHEETS TO GRADE THE POTENTIAL JURORS ON THEIR IMPRESSION OF THE JURORS' ATTITUDE TOWARD A DEATH PENALTY.

Q. ALL RIGHT. YOU INDICATED ON DIRECT EXAMINATION THAT YOU WERE CONCERNED ABOUT RACE AS AN ISSUE IN THE CASE, AND ONE OF THE REASONS YOU GAVE IS BECAUSE THE CASE WAS BEING TRIED IN LEXINGTON COUNTY.

A. UH-HUH.

Q. ALL RIGHT. AND YOU ALSO HAD THE EVIDENCE OF A -- YOU WERE AWARE OF THE PIZZA HUT INCIDENT THAT WAS GOING TO COME OUT; CORRECT?

A. THAT'S CORRECT.

Q. AND THERE WERE OTHER INCIDENTS ALSO, WERE THERE NOT, PARTICULARLY THOSE RELATED TO WHEN HE WAS CONFINED?
A. OH, YES.
Q. YOU WERE AWARE THAT THE STATE WAS PLANNING TO PRESENT THIS EVIDENCE.
A. YES.
Q. BUT BOTH MR. BENNETT AND BENTON SMITH, THE VICTIM IN THIS CASE, WERE BOTH BLACK; CORRECT?
A. THAT'S CORRECT.
Q. WERE YOU AWARE GOING INTO THE CASE THAT UNDER TURNER V. MURRAY YOU HAD A RIGHT TO REQUEST THAT THE JUDGE CHARGE -- INQUIRE ON VOIR DIRE AS TO JURORS' BELIEFS ON RACE---
A. YES.
Q. ---AND HOW THAT MIGHT IMPACT THEIR DECISION? YOU WERE AWARE YOU COULD ASK SUCH QUESTIONS AS WELL.
A. CORRECT.
Q. OF NECESSITY, WHENEVER YOU MAKE SUCH AN INQUIRY THOUGH, ISN'T IT -- ISN'T THAT KIND OF A DELICATE AREA?
A. YES, IT IS. YES, IT IS.
Q. ALL RIGHT. HOW SO?
A. WELL, FIRST OF ALL, I'M NOT SURE PEOPLE ARE ALWAYS HONEST ABOUT THAT QUESTION. YOU ALSO WOULD HAVE TO BE CAREFUL NOT TO OFFEND PEOPLE WITH THE QUESTION.
Q. ALL RIGHT.
A. AND YOU, OF COURSE, DON'T WANT TO INTERJECT IT IF IT'S

NOT PRESENT.
Q. OKAY. HOW DID YOU GO ABOUT FORMULATING A QUESTION OR QUESTIONS IN YOUR MIND TO ELICIT A RESPONSE SHOWING A JUROR'S ATTITUDES ABOUT RACE WITHOUT OFFENDING THEM?
A. WELL, I DON'T KNOW THAT YOU CAN NECESSARILY GUARANTEE THAT YOUR QUESTION WON'T OFFEND. YOU WOULD JUST HAVE TO, YOU KNOW, FRAME IT IN AS NEUTRAL A MANNER AS YOU COULD.
Q. CAN YOU THINK OF ANY CASE PRIOR TO THE CURRENT CASE WHICH WE'RE TALKING ABOUT WHERE YOU MADE AN INQUIRY ABOUT JURORS' ATTITUDES ON RACE AND BOTH THE VICTIM AND THE DEFENDANT WERE THE SAME RACE?
MR. LOMINACK: OBJECTION ONLY BECAUSE I THINK THE FACTS THAT HAVE BEEN PRESENTED SO FAR INDICATE THIS WAS HIS ONLY CAPITAL CASE AND, THEREFORE, THE ONLY CHANCE HE WOULD HAVE HAD TO...
THE COURT: WELL, I MEAN---
MR. LOMINACK: OKAY.
THE COURT: ---I DON'T KNOW. HE CAN -- IF HE KNOWS OF SOME CASE FOR SOME REASON, I'M GOING TO LET HIM -- HE MAY HAVE EXPERIENCES THAT DON'T DEAL JUST WITH THAT ONE PARTICULAR CASE.
THE WITNESS: NO.
MR. SALTER: ALL RIGHT. HOW ABOUT CASES -- NON-CAPITAL CASES WHERE THE JUDGE IS THE ONE MAKING THE VOIR DIRE? HAVE YOU -- CAN YOU THINK OF WHERE YOU'VE REQUESTED QUESTIONS OF

-- TURNER V. MURRAY TYPE QUESTIONS WHERE THE VICTIM AND THE DEFENDANT ARE THE SAME RACE?

MR. LOMINACK: OBJECTION. THAT MISSTATES THE LAW. THE LAW WOULD HAVE TO ALSO INCLUDE IN A NON-CAPITAL CASE IF THERE WAS A SPECIAL CIRCUMSTANCE. I THINK THE QUESTION HAS GOT TO BE: ARE YOU AWARE IN A, YOU KNOW, BLACK-ON-BLACK NON-CAPITAL CRIME THAT INVOLVES SOMETHING ELSE THAT TOOK IT TO THE LEVEL OF TURNER VERSUS MURRAY?

THE COURT: ALL RIGHT. REPHRASE IT.

BY MR. SALTER:

Q. LET ME REPHRASE MY QUESTION. ARE YOU AWARE OF ANY NON-CAPITAL CASE WHERE YOU ASKED THE JUDGE TO INQUIRE OF JURORS ABOUT THEIR VIEWS ON RACE WHERE BOTH THE VICTIM AND THE DEFENDANT WERE THE SAME RACE?

A. NO, NOT WHEN THEY BOTH WERE THE SAME RACE. I HAVE WHEN THE VICTIM AND THE DEFENDANT WERE DIFFERENT RACES.

Q. BECAUSE ISN'T THAT THE MAIN PROBLEM THAT YOU FACE AS A DEFENSE ATTORNEY?

A. GENERALLY.

Q. BECAUSE IT'S THE VICTIM AND THE DEFENDANT BEING A DIFFERENT RACE, THAT'S THE MAIN PROBLEM; CORRECT?

A. THAT'S CORRECT. OF COURSE, IN YOUR REGULAR -- IN YOUR NON-CAPITAL CASE, OTHER INCIDENTS INVOLVING THE DEFENDANT WOULD NOT COME BEFORE THE JURY.

Q. ALL RIGHT. TURNING NOW TO I BELIEVE IT'S GROUND 11(C)1,

THAT WAS THE ISSUE MR. LOMINACK ASKED YOU ABOUT, THE JUDGE'S INSTRUCTION THAT YOU MUST ACCEPT AS CORRECT THE LAW AS I GIVE IT TO YOU, AND IF I'M WRONG, THERE'S ANOTHER TIME AND PLACE FOR IT TO BE CORRECTED? YOU SAID -- I BELIEVE YOU SAID THAT THERE WAS NO STRATEGIC REASON NOT TO OBJECT TO THAT?

A. NO, THERE WASN'T ANY.

Q. ALL RIGHT.

A. IT JUST DIDN'T STRIKE ME AT THE TIME.

Q. IT DIDN'T STRIKE YOU. ISN'T IT FAIR TO SAY THAT THE JUDGE WAS MERELY TRYING TO EMPHASIZE THAT THE JURY HAD TO ACCEPT THE LAW AS HE CHARGED IT TO THEM?

A. WELL, LOOKING AT IT -- LOOKING AT IT, READING IT EMPHASIZES TO ME THAT THE JUDGE WAS KIND OF GIVING THEM AN OUT THAT IF THERE'S ANY KIND OF ERROR IT WOULD BE TAKEN CARE OF ON APPEAL WHICH I GUESS I DIDN'T PICK UP ON, HEARING IT SAID.

Q. ALL RIGHT. YOU WOULDN'T AGREE THAT HE WAS TRYING TO EMPHASIZE TO THEM THE IMPORTANCE OF THEM JUST LISTENING TO HIS INSTRUCTION ON THE LAW?

A. OH, I THINK THAT WAS THE INTENT OF THE INSTRUCTION.

Q. ALL RIGHT. DO YOU RECALL AFTER THE JURY HAD BEGUN DELIBERATING WHETHER OR NOT THEY SENT OUT A NOTE TO THE JUDGE WITH A QUESTION ABOUT APPEALS?

A. I THINK THEY DID.

Q. ALL RIGHT. DIDN'T THEY ASK IF THERE WAS AN APPEAL HOW

MANY APPEALS WOULD BE ALLOWED?

A. YEAH, I DON'T REMEMBER THE EXACT WORDING OF THE QUESTION.

MR. SALTER: MAY I APPROACH THE WITNESS, YOUR HONOR?

THE COURT: YOU MAY.

BY MR. SALTER:

Q. I DIRECT YOUR ATTENTION TO PAGE 2142, LINE -- I BELIEVE IT'S 23. IF YOU'D JUST READ THAT TO YOURSELF BEGINNING THERE AND GOING ON TO THE FOLLOWING PAGE. I BELIEVE IT'S LINE 3.

A. (THE WITNESS COMPLIES.) OKAY.

Q. I ASK YOU THE SAME QUESTION: DOES THAT REFRESH -- WELL, DOES THAT REFRESH YOUR RECOLLECTION AS TO WHAT HAPPENED?

A. YES.

Q. THE JURY DID COME BACK WITH A QUESTION, DID THEY NOT?

A. THEY DID.

Q. AND IN RESPONSE DIDN'T THE TRIAL JUDGE GIVE THEM AN INSTRUCTION -- I DIRECT YOU TO PAGE -- YOUR ATTENTION TO PAGE 2145 BEGINNING WITH LINE 17 AND GOING THROUGH 2156, LINE 3.

A. 45, LINE 17?

Q. YES, SIR, THROUGH PAGE 2156, LINE 3.

A. YES.

Q. ALL RIGHT. ALL RIGHT. HE GAVE THEM AN INSTRUCTION THAT THEY WERE NOT ALLOWED TO GO INTO THAT; CORRECT?

A. RIGHT. THE QUESTION ABOUT THE APPEALS, RIGHT.

Q. SO HE SPECIFICALLY TOLD THE JURORS THAT ANY APPELLATE REVIEW OR ANY REVIEW OF THEIR DECISION IS NOT SOMETHING THEY COULD DISCUSS; CORRECT?
A. THAT'S CORRECT.
Q. ALL RIGHT. NOW, WITH RESPECT TO THE NEXT GROUNDS, IT PERTAINS TO MS. GALLMAN, JODY GALLMAN. YOU INDICATED THERE WAS NO STRATEGIC REASON NOT TO OBJECT TO HER TESTIMONY?
A. CORRECT.
Q. ALL RIGHT. BUT WASN'T SHE A WITNESS THAT WAS ACTUALLY HANDLED BY MR. YOUNG?
A. THAT'S -- I COULDN'T TELL YOU THAT FOR SURE, ED -- MR. SALTER.
Q. THAT'S ALL RIGHT. ALL RIGHT. I DIRECT YOUR ATTENTION TO PAGE 1108, LINE 18.
A. (THE WITNESS LOOKS AT THE TRANSCRIPT.) OKAY. YOU'RE CORRECT.
Q. ALL RIGHT. SO MR. YOUNG, IN FACT, WAS THE ATTORNEY WHO HANDLED THAT WITNESS.
A. RIGHT.
Q. I'LL TAKE THAT. THANK YOU.
A. BUT I HAD NO STRATEGIC REASON TO NOT OBJECT EITHER OR TO OBJECT.
Q. ALL RIGHT. ARE YOU AWARE OF ANY UNITED STATES SUPREME COURT CASE OR ANY CASE FROM OUR STATE SUPREME COURT WHICH HOLDS THAT A JURY MAY NOT BE TOLD DURING A SENTENCING

PROCEEDING THAT THE DEFENDANT WAS ON PAROLE AT THE TIME OF THE MURDER?

A. NO, I DON'T.

Q. ALL RIGHT. NOW, THE JUDGE ALSO GAVE A LIMITING INSTRUCTION, DID HE NOT, ABOUT THE CONSIDERATION OF EVIDENCE OF BAD CHARACTER?

A. YES.

Q. ALL RIGHT. YOU INDICATED ON DIRECT EXAMINATION THAT YOU HAD UNINTENTIONALLY ELICITED FROM INVESTIGATOR GREEN THAT YOUR CLIENT WAS ON DEATH ROW.

A. THAT'S CORRECT.

Q. ALL RIGHT. YOU -- DO YOU RECALL WHETHER OR NOT THERE WAS -- WHETHER OR NOT THIS ISSUE WAS ADDRESSED IN CAMERA BEFORE THE STATE'S REDIRECT EXAMINATION?

A. YES, I MEAN, I -- I KNOW THERE WAS SOME DISCUSSION ABOUT IT AND, OF COURSE, I MADE A MOTION, AND THEN I THINK -- WAS THERE A CURATIVE INSTRUCTION ALSO GIVEN THAT MAYBE---

Q. THAT WAS MY NEXT---

A. ---I OBJECTED TO?

Q. THAT WAS MY NEXT QUESTION. DO YOU RECALL THE JUDGE GIVING A CURATIVE INSTRUCTION TO WHICH YOU OBJECTED?

A. YES.

Q. WHY DID YOU OBJECT TO HIS CURATIVE INSTRUCTION?

A. I THOUGHT IT JUST EMPHASIZED IT IN THE JURY'S MIND.

Q. YOU THOUGHT THAT THE CURATIVE INSTRUCTION, RATHER THAN

CURING THE PROBLEM, KIND OF EMPHASIZED THAT YOUR CLIENT WAS ON DEATH ROW.

A. CORRECT.

Q. ALL RIGHT. ARE YOU AWARE OF ANY DECISION BY OUR STATE SUPREME COURT THAT INDICATES THAT YOU CANNOT LET JURORS IN A RESENTENCING PROCEEDING KNOW THAT THERE IS A PRIOR DEATH SENTENCE?

A. WELL, I DON'T KNOW OF ANY CASE THAT DIRECTLY RULES ON THAT SPECIFIC POINT, BUT I THINK YOUR REGULAR CASE LAW WOULD GENERALLY GOVERN THAT THE JURY'S ONLY TO CONSIDER WHAT'S BEFORE THEM NOW. THEY'RE NOT TO CONSIDER, YOU KNOW, WHAT'S HAPPENED BEFORE THIS PARTICULAR TIME IN COURT. THEY'RE NOT REALLY SUPPOSED TO KNOW THAT THERE'S BEEN A PREVIOUS TRIAL. I COULDN'T TELL YOU THE CITE FOR THAT.

Q. BUT THE JURY IN THIS CASE WAS ALREADY AWARE THAT HE HAD PREVIOUSLY BEEN CONVICTED OF MURDER; CORRECT?

A. WELL, YEAH. IN THIS CASE THEY WOULD KNOW THERE'S ALREADY BEEN A CONVICTION; THAT'S CORRECT.

Q. AND THAT THEIR PURPOSE WAS JUST SIMPLY TO SENTENCE HIM ONE WAY OR THE OTHER TO EITHER LIFE OR DEATH.

A. THAT'S CORRECT.

Q. NOW, NO ONE EXPRESSLY TOLD JURORS OF THE ORIGINAL DEATH SENTENCE, DID THEY?

A. NO. IT SEEMED LIKE THE ISSUE CAME OUT AGAIN WHEN ANOTHER WITNESS WAS BEING EXAMINED, AT LEAST THE TERM DEATH

ROW OR BEING ON DEATH ROW. IT SEEMS LIKE ONE OF THE -- ONE OF THE WITNESSES VOLUNTEERED THAT INFORMATION AT ANOTHER TIME.

Q. ALL RIGHT. AND DID NOT THAT -- ARE YOU REFERRING TO MR. - I'M SORRY - REVEREND BROWN?

A. NO, I THOUGHT IT WAS ONE OF THE -- MAYBE I'M WRONG ON THAT. I THOUGHT ONE OF THE OTHER INVESTIGATORS OR GUARD OR SOMEBODY CAME OUT.

Q. DO YOU RECALL THE TESTIMONY -- THIS IS NOT A WITNESS THAT YOU HANDLED, BUT DO YOU RECALL THE TESTIMONY OF A GUARD BY THE NAME -- BY THE NAME OF SERGEANT -- I THINK IT'S MAZEEK? MAZEEK (DIFFERENT PRONUNCIATION) PERHAPS? M-A-Z-E-E-K.

A. NOT OFF THE TOP OF MY HEAD, NO.

Q. ALL RIGHT. IF I SHOW YOU PAGE 1790, BEGINNING WITH LINE 18, AND ASK YOU TO GO THROUGH LINE 23 -- SEE IF THAT REFRESHES YOUR RECOLLECTION AS TO WHAT SHE MAY HAVE TESTIFIED TO.

A. (THE WITNESS COMPLIES.) LET'S SEE. STARTING WHAT LINE, MR. SALTER?

Q. RIGHT HERE. STARTING WITH LINE 18.

A. (THE WITNESS LOOKS AT THE TRANSCRIPT.) THAT'S IT?

Q. THAT'S IT. YES, SIR.

A. OKAY.

Q. DID SHE NOT TESTIFY THAT HE WAS A SAFE KEEPER BACK IN

'95 AND '96?
A. YES.
Q. SO THE JURY WAS TOLD THAT HE WAS A SAFE KEEPER AT A TIME OR AT LEAST BEFORE -- ACTUALLY BEFORE THE TIME PERIOD COVERED BY INVESTIGATOR GREEN'S TESTIMONY; CORRECT?
A. CORRECT.
Q. NOW, MR. BENNETT WAS ELIGIBLE FOR PAROLE IF HE HAD BEEN SENTENCED TO LIFE IMPRISONMENT? CORRECT?
A. THAT'S MY UNDERSTANDING.
Q. YES. OKAY. AS A MATTER OF STATE LAW THEN, HE WAS NOT ENTITLED TO A PAROLE INELIGIBILITY INSTRUCTION, WAS HE?
A. I THINK THAT'S CORRECT. THAT WOULD HAVE BEEN MISLEADING.
Q. AND THE JUDGE IN THIS CASE GAVE A PLAIN AND ORDINARY MEANING INSTRUCTION, DID HE NOT?
A. I THINK HE DID. UH-HUH.
Q. ALL RIGHT. NOW, YOU OBJECTED TO THE SUPPLEMENTAL INSTRUCTION; CORRECT?
A. YES.
Q. THERE WAS -- THE PORTION OF IT THAT YOU OBJECTED TO WAS THAT THERE WERE ALL SORTS OF VARIETIES OF THIS THING?
A. YES. I THOUGHT THAT THAT INSTRUCTION OPENED IT UP IN THE JURY'S MIND THAT THEY COULD THINK THAT THERE WERE LIFE SENTENCES AND THEN THERE WERE LIFE SENTENCES. SO MAYBE THERE WAS SOME LIFE SENTENCES THAT YOU DID ALL LIFE AND SOME YOU

DIDN'T AND, THEREFORE, IT NEGATED THE LIFE-IN-ITS-ORDINARY-MEANING INSTRUCTION.

Q. OKAY. TURNING TO THE PIZZA HUT OFFENSES, YOU DID OBJECT STRENUOUSLY TO THIS EVIDENCE COMING IN. CORRECT?

A. CORRECT.

Q. AND I BELIEVE YOU CHARACTERIZED IT AS VICTIM IMPACT EVIDENCE?

A. CORRECT.

Q. BUT YOU HAD A SEPARATE OBJECTION FOR THE TESTIMONY BY SHANNON GILBERT, DID YOU NOT, CONCERNING THE DREAM?

A. YES. IT WAS IRRELEVANT. WAS THAT THE RELEVANCE?

Q. YES, SIR. DID YOU NOT OBJECT THAT THERE WAS NO RELEVANCE EXCEPT FOR TO INFLAME THE JURY?

A. RIGHT.

Q. AND DO YOU RECALL OBJECTING ALSO ON THE GROUND THAT THIS WAS A GROSS VIOLATION OF MR. BENNETT'S RIGHT TO HAVE A RACE MATTER INTERJECTED INTO THE CASE?

A. CORRECT.

Q. THE TRIAL JUDGE DENIED THE MOTION.

A. CORRECT.

Q. ARE YOU AWARE THAT THAT -- THE ADMISSIBILITY OF THIS EVIDENCE ALL WENT UP ON APPEAL?

A. RIGHT. CORRECT. WELL---

MR. LOMINACK: OBJECTION AS TO RELEVANCE AND IT MISSTATES THE LEGAL THEORY UPON WHICH IT WAS APPEALED. IT

WENT UP ON APPEAL, BUT -- FIRST OF ALL, I DON'T THINK IT'S RELEVANT, BUT IT WENT UP ON APPEAL ON A VERY NARROW GROUND.

THE COURT: WELL, HE DIDN'T STATE WHAT THE BASIS OF THE APPEAL WAS.

MR. LOMINACK: I OBJECT TO RELEVANCE ANYWAY SINCE HE DIDN'T HAVE ANYTHING TO DO WITH THE APPEAL.

THE COURT: WELL, I'M GOING TO LET HIM ASK HIM IF HE'S AWARE OF IT. HE CAN ASK HIM WHAT KNOWLEDGE HE HAS IF HE WANTS.

BY MR. SALTER:

Q. ARE YOU AWARE THAT IT WAS ADDRESSED ON APPEAL?

A. YES.

Q. OKAY. NOW, THE APPLICANT SUGGESTS THAT YOU SHOULD HAVE OBJECTED TO A NUMBER OF COMMENTS BY THE SOLICITOR BOTH IN OPENING AND CLOSING. NOW, YOU OBJECTED TO THE -- I'M SORRY. YOU DID NOT OBJECT TO THE CLOSING ARGUMENT, DID YOU NOT?

A. I DON'T THINK WE DID.

Q. ALL RIGHT.

A. I BELIEVE WE FILED A MOTION FOR -- WE INCLUDED SOME OBJECTION IN A MOTION FOR A NEW TRIAL.

Q. OKAY. AND YOU INDICATED, I BELIEVE, THAT YOU HAD NOT HEARD THE COMMENTS.

A. THAT'S CORRECT, SOME OF THEM.

Q. YOU DIDN'T MAKE ANY KIND OF OBJECTION OR MOTION DURING -- EITHER DURING THE SOLICITOR'S ARGUMENT OR IMMEDIATELY

THEREAFTER THAT YOU HAD NOT BEEN ABLE TO HEAR A PORTION OF -- ANY PORTION OF HIS ARGUMENT, DID YOU?

A. NO.

Q. OKAY. A NUMBER OF THE COMMENTS THAT YOU WERE ASKED ABOUT ON DIRECT EXAMINATION CONCERNED REFERENCES TO MR. BENNETT'S SIZE.

A. TRUE.

Q. HE'S A BIG MAN, ISN'T HE?

A. YES, HE IS.

Q. HOW BIG WOULD YOU APPROXIMATE HIS SIZE?

A. 6'5", 250?

Q. ALL RIGHT. IS HE BIGGER TODAY OR SMALLER TODAY THAN HE WAS AT THE TIME OF RESENTENCING?

A. WELL, I DON'T REALLY KNOW. I DON'T REALLY KNOW ON THAT POINT. HE'S SITTING DOWN OVER THERE. IT'S HARD TO SAY.

Q. ALL RIGHT. WAS THERE A DISPARITY IN THE SIZE BETWEEN MR. BENNETT AND BENTON SMITH?

A. YES.

Q. WOULD IT BE FAIR TO CHARACTERIZE BENTON SMITH AS RATHER SLIGHTLY BUILT?

A. YES.

Q. WITH RESPECT TO THE COMMENT THAT MR. BENNETT HAD A, QUOTE, BIG, OLD BEAR OF A FIST, END OF QUOTE, DIDN'T THE EVIDENCE SHOW THAT THE VICTIM HAD BEEN STRUCK AT LEAST THREE TIMES IN THE JAW?

A. I THINK THAT WAS THE STATE'S THEORY; YES, SIR.
Q. AND THE STATE'S THEORY WAS THAT HE STRUCK HIM WITH A FIST IN THE JAW, SO HARD ENOUGH TO WHERE HE DISLOCATED THE JAW.
A. YES.
Q. ALL RIGHT. THERE'S ALSO A COMMENT REFERENCING BOO HILL. I BELIEVE THAT'S A TYPO. IT SHOULD BE BOOT HILL. DO YOU RECALL WHETHER OR NOT THERE WAS A CEMETERY OUT NEAR MR. BENNETT'S SISTER'S RESIDENCE?
MR. LOMINACK: OBJECTION TO THE INDICATION THAT THAT WAS A TYPO. THE RECORD IS WHAT IT IS. IF THE A.G.'S OFFICE WANTS TO MOVE TO EXPAND THE RECORD AND HAVE THE COURT REPORTER CHANGE WHAT THEY THINK IS A TYPO -- I DON'T THINK IT WAS A TYPO, BUT THE RECORD SAYS BOO HILL AND I THINK THAT'S WHAT WE'RE TALKING ABOUT.
THE COURT: WELL, YEAH. I DON'T THINK THE ATTORNEY GENERAL CAN CHANGE WHAT'S IN THE TRANSCRIPT. YOU CAN ASK HIM IF -- WHAT HE BELIEVES IT TO MEAN.
BY MR. SALTER:
Q. LET ME JUST ASK YOU: WAS THERE EVIDENCE PRESENTED THAT THERE WAS A CEMETERY OUT NEAR THE RESIDENCE OF MR. BENNETT'S SISTER?
A. I MEAN, I KNOW THAT THERE IS FROM GOING OUT THERE AND LOOKING AROUND THE AREA AND ALL. I DON'T SPECIFICALLY RECALL IT COMING UP IN THE TRIAL.

Q. ALL RIGHT.
A. IT COULD HAVE, BUT I DON'T---
Q. AND THE VICTIM'S -- THE VICTIM'S BODY WAS FOUND IN RELATIVELY CLOSE PROXIMITY TO HER RESIDENCE; CORRECT?
A. THAT'S CORRECT.
Q. THERE WAS EVIDENCE PRESENTED, WAS THERE NOT, THAT ON AT LEAST TWO OCCASIONS YOUR CLIENT HAD ENGAGED IN A FIGHT IN WHICH HE DRUG SOMEONE BY THEIR HAIR, HAD HE NOT?
A. WELL, THAT WAS AN ALLEGATION AT THE PIZZA HUT INCIDENT.
Q. SO WAS THERE NOT ALSO ANOTHER INCIDENT OCCURRING IN PRISON WHERE HE DID THE SAME THING OR SOMETHING SIMILAR?
A. SIMILAR. I DO RECALL SOMETHING ABOUT SOMETHING SIMILAR.
Q. ALL RIGHT. AND THE STATE'S EVIDENCE WAS THAT HE BEAT THESE PEOPLE UNMERCIFULLY; CORRECT?
A. WELL, I DON'T RECALL THAT BEING THE TESTIMONY OF THE PRISON INCIDENT. THE PIZZA HUT INCIDENT, CORRECT.
Q. ALL RIGHT. NOW, I'M NOT ASKING WHETHER OR NOT YOU AGREE WITH THIS EVIDENCE OR NOT, BUT THE STATE PRESENTED SOME EVIDENCE SHOWING THAT YOUR CLIENT WAS MANIPULATIVE; CORRECT?
THE COURT: WAS WHAT?
MR. SALTER: MANIPULATIVE. I'M SORRY, YOUR HONOR.
THE WITNESS: YES.
BY MR. SALTER:
Q. AND THAT HE HAD A HABIT OF ENGAGING IN MANIPULATIVE BEHAVIOR; CORRECT?

A. WELL, THEY TRIED TO CHARACTERIZE HIM IN THAT FASHION, YES.
Q. THIS WOULD INCLUDE BOTH EVIDENCE FROM WHEN HE WAS IN SCHOOL AND EVIDENCE CONCERNING HIS STAY AT LEXINGTON COUNTY DETENTION CENTER?
A. YES.
Q. ALL RIGHT. AND OBVIOUSLY HE HAD BEEN CONVICTED OF MURDER; CORRECT?
A. THAT'S CORRECT.
Q. SO HE WAS A MURDERER. WITH RESPECT TO YOUR FAILURE TO OBJECT TO THE DEFINITION OF CHARACTER EVIDENCE, DO YOU RECALL WHETHER OR NOT Y'ALL REQUESTED THAT THE TRIAL JUDGE INSTRUCT THREE STATUTORY MITIGATING CIRCUMSTANCES?
A. I DON'T RECALL THAT OFF THE TOP OF MY HEAD.
Q. BUT IF THE RECORD REFLECTS IT, THEN YOU DID IT?
A. THAT'S CORRECT.
Q. ALL RIGHT. AND YOU LIKEWISE MADE A REQUEST FOR -- I BELIEVE IT WAS 14 DIFFERENT NONSTATUTORY MITIGATING CIRCUMSTANCES?
A. OH, YEAH. WE MADE A GOOD MANY REQUESTS IN THAT REGARD.
Q. NOW, THE NONSTATUTORY MITIGATING CIRCUMSTANCES HE WOULDN'T CHARGE; CORRECT?
A. THAT'S CORRECT.
Q. BUT YOU WERE FREE TO ARGUE THOSE.
A. CORRECT.

Q. NOW, GOING BACK TO THE -- ONE OF THE EARLIER ALLEGATIONS, YOU OBJECTED TO TESTIMONY ABOUT A QUOTE/UNQUOTE BLONDE GUARD; CORRECT?

A. THAT'S CORRECT.

Q. AND YOU MOVED FOR A MISTRIAL; CORRECT?

A. CORRECT.

Q. AND YOU OBJECTED TO THE TESTIMONY ABOUT THE BLACK INDIANS.

A. THAT'S CORRECT.

Q. ALL RIGHT. AND BOTH OF YOUR OBJECTIONS OR MOTIONS WERE OVERRULED.

A. THAT'S CORRECT.

Q. AND IT'S YOUR UNDERSTANDING THAT THE CRIME OF KIDNAPPING AUTOMATICALLY REQUIRED REGISTRATION ON THE SEX OFFENDER REGISTRY AT THE TIME OF THE CONVICTION?

A. THAT'S MY UNDERSTANDING. IF I'M WRONG, I'M WRONG, BUT THAT WAS MY UNDERSTANDING.

Q. ALL RIGHT. IT'S FAIR TO SAY THAT STATUTE HAS BEEN AMENDED A NUMBER OF TIMES, HASN'T IT?

A. THAT'S CORRECT.

Q. ALL RIGHT. NOW, MANY OF THE GUARDS WHO TESTIFIED WERE ACTUALLY QUESTIONED BY MR. YOUNG; CORRECT?

A. THAT'S CORRECT.

Q. AND YOU WERE ASKED A QUESTION ABOUT HIM ELICITING EVIDENCE OF -- CONCERNING THE CONDITIONS OF CONFINEMENT? DO

YOU RECALL WHETHER OR NOT THE QUESTION HE ASKED WAS DESIGNED TO SHOW THAT MR. BENNETT, RATHER THAN SIMPLY TAKING WHAT HE WANTS OR DOING WHAT HE WANTS, WOULD GO THROUGH PROPER CHANNELS?

A. I THINK THAT WAS THE INTENT OF THE QUESTION; YES, SIR.

MR. SALTER: OKAY. NOTHING FURTHER, YOUR HONOR.

THE COURT: ALL RIGHT. MR. LOMINACK?

MR. LOMINACK: BRIEFLY, YOUR HONOR.

REDIRECT EXAMINATION

BY MR. LOMINACK:

Q. MR. FLOYD, I THINK YOU MENTIONED THOMAS IVY AS A CAPITAL POST-CONVICTION RELIEF CASE YOU WORKED ON. DO YOU RECALL WHETHER YOU WERE APPOINTED TO THAT CASE BEFORE OR AFTER MR. BENNETT'S RESENTENCING?

A. I COULDN'T TELL YOU THAT OFF THE TOP OF MY HEAD.

Q. OKAY. AND IS THAT THE CASE YOU DID WITH MELISSA KIMBROUGH?

A. YES.

Q. MR. SALTER ASKED YOU ABOUT VOIR DIRE AND INQUIRING OF JURORS ABOUT POTENTIAL RACIAL PREJUDICE. WOULD YOU AGREE THAT A LOT OF THE QUESTIONS YOU HAVE TO ASK IN VOIR DIRE IN A CAPITAL CASE ARE -- CAN BE TOUCHY?

A. THAT'S CORRECT.

Q. AND MAYBE INVADE INTO THE PERSONAL LIVES OF THESE JURORS?

A. THAT'S CORRECT.
Q. BUT YOU DO IT; RIGHT?
A. UH-HUH.
Q. AND YOU WORK ON HOW TO ASK THE JURORS THESE PERSONAL QUESTIONS SO AS TO GET INFORMATION WITHOUT OFFENDING THEM; RIGHT?
A. CORRECT.
Q. NOW, HAVE YOU EVER HAD A NON-CAPITAL CASE WHERE AS DETAILED INFORMATION ABOUT A PRIOR CRIME CAME IN AS THAT WHICH CAME IN IN THIS CASE ABOUT THE PIZZA HUT ASSAULTS?
A. YOU SAID NON-CAPITAL CASE?
Q. YEAH. IN A NON-CAPITAL CASE DOES THE STATE USUALLY GET TO PRESENT INFORMATION ABOUT A PRIOR CRIME THAT WAS AS DETAILED AS IT WAS IN THIS SENTENCING?
A. NO. IT'S VERY RARE THAT YOU CAN GET IN EVIDENCE OF ANOTHER CRIME, MAYBE A LYLE-TYPE EVIDENCE, BUT IT'S ONLY TO WHERE THEY CAN'T GO INTO THE DETAILS.
Q. DO YOU RECALL HOW MANY WITNESSES TESTIFIED ABOUT THE PIZZA HUT INCIDENT?
A. SEEMED LIKE IT TOOK A LONG PORTION OF THE TRIAL TO ME, BUT IT WAS THREE OR FOUR WOULD BE MY GUESS.
Q. AND DO YOU RECALL WHETHER OR NOT THAT WAS PART OF MR. MYERS' CLOSING ARGUMENT?
A. YES, I THINK HE RELIED ON IT.
Q. AND THIS IS GOING TO SEEM LIKE A SILLY QUESTION AND

MAYBE OTHERS HAVE AS WELL, BUT ARE YOU AWARE OF RULE 403 OF THE SOUTH CAROLINA EVIDENTIARY RULES?

A. SURE.

Q. OKAY. AND IS THAT A RULE THAT YOU'VE RELIED ON TO MOVE TO EXCLUDE EVIDENCE IN THE PAST?

A. UH-HUH.

Q. AND DOES THAT RULE APPLY IN CAPITAL CASES AS WELL AS NON-CAPITAL CASES?

A. CERTAINLY DOES.

Q. NOW, REGARDING THE REFERENCE TO DEATH ROW, WAS THERE AN AGREEMENT BETWEEN THE PROSECUTORS, THE TRIAL COURT, AND DEFENSE COUNSEL THAT THAT PHRASE AND THAT INFORMATION WAS NOT GOING TO BE PROVIDED TO THE JURY?

A. YOU MEAN AN AGREEMENT ON THE RECORD SOMEWHERE?

Q. WELL, WHETHER ON THE RECORD OR OFF THE RECORD, DID Y'ALL TALK ABOUT IT AND MAKE SOME PROVISIONS THAT NOBODY WAS GOING TO BRING THAT UP IN FRONT OF THE JURY?

A. YEAH, I THINK IT WAS DISCUSSED. I DON'T REMEMBER US PUTTING ANYTHING ON THE RECORD ABOUT IT.

THE COURT: BRING UP WHAT, MR. LOMINACK?

MR. LOMINACK: THE REFERENCE TO DEATH ROW.

THE COURT: OH, OKAY.

BY MR. LOMINACK:

Q. BUT YOU -- DO YOU RECALL WHETHER OR NOT -- WELL, I'LL WITHDRAW THAT. DO YOU RECALL WHETHER OR NOT JUDGE WESTBROOK

WAS CONCERNED ABOUT YOUR REFERENCE TO DEATH ROW?

A. YES, I THINK HE WAS.

Q. OKAY. AND WERE YOU CONCERNED ABOUT IT?

A. YES. THAT'S WHY I MOVED FOR A MISTRIAL.

MR. LOMINACK: ALL RIGHT. COURT'S INDULGENCE. NO FURTHER QUESTIONS.

THE COURT: ANYTHING FURTHER, MR. SALTER?

MR. SALTER: NO, SIR, YOUR HONOR.

THE COURT: ALL RIGHT. MR. FLOYD, YOU MAY STEP DOWN.

THE WITNESS: THANK YOU, YOUR HONOR.

MR. LOMINACK: WE'D ASK THAT MR. FLOYD BE EXCUSED IF THERE'S NO OBJECTION.

MR. SALTER: WITHOUT OBJECTION.

THE WITNESS: THANK YOU.

MR. LOMINACK: I SUSPECT THAT THAT'S THE ONLY WITNESS THAT -- THE LAST WITNESS WE HAVE AVAILABLE TODAY. IF WE COULD HAVE FIVE MINUTES SO THAT MR. ENDERLIN AND MR. BENNETT AND I CAN DISCUSS THAT TO MAKE SURE, AND IF IT IS, WE COULD JUST COME BACK TO CHAMBERS AND INFORM YOU OF THAT AND ALSO TALK TO YOU ABOUT THE NEXT DATE FOR RECONVENING.

THE COURT: ALL RIGHT. WELL, WE'LL TAKE -- I DON'T HAVE A CHAMBERS. WHERE DO I -- IS THERE SOME PLACE DOWN HERE WE CAN WAIT?

LAW CLERK: THE JURY ROOM.

THE COURT: THE JURY ROOM? WE'LL JUST BE IN THE JURY

ROOM.

MR. LOMINACK: WE'LL LET YOU KNOW IN JUST A FEW MINUTES.

THE COURT: TAKE YOUR TIME.

MR. LOMINACK: THANK YOU, YOUR HONOR.

(WHEREUPON, A SHORT BREAK WAS TAKEN, AND THE PROCEEDINGS WERE CONCLUDED.)

I, THE UNDERSIGNED DAPHNE D. HELMS, OFFICIAL COURT REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR LEXINGTON COUNTY, SOUTH CAROLINA, ON THE 27TH OF MAY, 2008.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

AUGUST 25, 2008

Daphne D Helms

DAPHNE D. HELMS, COURT REPORTER

ORIGINAL

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	COURT OF COMMON PLEAS 2006-CP-08-2204
Johnny Bennett Applicant vs. State of South Carolina, Respondent.	)	TRANSCRIPT OF RECORD (Post Conviction Relief)

July 11, 2008
Columbia, South Carolina

BEFORE:

THE HONORABLE JAMES R. BARBER, JUDGE

APPEARANCES:

ROBERT E. LOMINACK, ATTORNEY AT LAW
DEREK ENDERLIN, ATTORNEY AT LAW
Attorneys for the Applicant

EDWARD SALTER, ASSISTANT ATTORNEY GENERAL
Attorney for the Respondent

JENNY H. WILLIAMS
Official Circuit Court Reporter
(803) 576-1743

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Friday, July 11, 2008

THE COURT: All right. This is a resuming of the hearing in the matter of Johnny Bennett in this PCR application that we started in Lexington but because of the unavailability of some potential witnesses, we recessed and continued the remaining portion or the next portion of the hearing until today. Now, Mr. Lominack, I understand a slight problem has arisen and you and the Attorney General have addressed that issue.

MR. LOMINACK: Yes, Your Honor. Through an administrative snafu, the South Carolina Department of Corrections did not receive an order to transport Mr. Bennett. And so Mr. Bennett is not here and there's no way of getting him here this morning. I have spoken with Mr. Bennett, and he is perfectly willing to waive his presence for the purposes of this hearing and the two witnesses who are going to testify.

And what I would suggest, and I have talked with Mr. Salter about this, is that once we receive the transcript we be allowed to show Mr. Bennett the transcript. And if there is a question that he thinks that we should have asked and we agree we should have asked but would not have known but for

his presence here, then we'd be allowed to in some way ask Mr. Dudek or Mr. Young that question.

I can say that Mr. Bennett is well informed of the claims. We have talked to him about our strategy and our questions and the claims. I'd be shocked frankly if we miss anything here this morning that he caught.

And in the past I have had to do this one other time in another capital post conviction hearing, and there was no need to reconvene in any manner. And I think this would be the best way to proceed since we've got everybody here. And I think the Attorney General's Office has no objection.

THE COURT: All right. Mr. Salter.

MR. SALTER: There is no objection, Your Honor. The administrative snafu apparently rests with me. I thought the transportation had been taken care of and it had not. So I apologize to everyone involved.

THE COURT: All right. But you have talked to Mr. Bennett and he is clearly aware of this situation?

MR. LOMINACK: Yes.

THE COURT: And then you all will -- any further inquiry that may need to be made of either other of these witnesses will be made either through

interrogatory or through deposition.

MR. LOMINACK: Right. I don't think there'd be any need to reconvene an actual hearing, given the -- there again, I can't imagine we'd need to at all. But if we did, it would be so limited, I'm not sure it would be worth coming back. And obviously, within a week of getting the transcript I'll make sure that we have touched base with Mr. Bennett so that that's taken care of.

THE COURT: All right.

MR. LOMINACK: And, Your Honor, the Applicant understands that Mr. Salter of the Attorney General's Office is going to call Mr. Dudek first and then Mr. Young. But the Applicant at this point rests its case.

THE COURT: Okay. All right, Mr. Salter.

MR. SALTER: Yes, sir. We call Mr. Dudek.

THE COURT: Is the clerk of court down there?

COURT REPORTER: No, sir.

THE COURT: All right, Mr. Dudek. Somewhere over there, there may be a Bible. If you'd locate it and place your left hand on the Bible.

WITNESS: Certainly.

ROBERT M. DUDEK, after being duly sworn, testifies as follows:

THE COURT: All right. If you'll tell us your full name, please, sir.

WITNESS: Robert M. Dudek, D-U-D-E-K.

THE COURT: Yes, sir. If you would.

MR. SALTER: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. SALTER

Q Mr. Dudek, could you give the Court the benefit of your educational and work experience as it pertains to the practice of law?

A Sure. I was a graduate of the University of South Carolina College of Journalism. I was a graduate of the University of South Carolina School of Law. I have been an assistant appellate defender since 1990, and I am presently the Deputy Chief Attorney for capital cases for the Office of Appellate Defense which is now a division of the Office of Indigent Defense.

Q Okay. At the time that you represented Mr. Bennett on direct appeal in this case, roughly how many appeals were you handling a year?

A Probably, as a guess obviously, probably around 100.

Q The records in this case reflect that you had filed a final brief in this case in I believe it was January, January 2006. Do you have any idea how many capital

cases you had handled on direct appeal prior to that time?

A 1996 --

Q No, sir. 2006.

A Oh, 2006. I don't know. Again, Mr. Salter, I'd just be guessing. I would say maybe 10, 15.

Q 10 or 15? When did you first start handling capital cases?

A I would estimate around 1994.

Q I'm going to ask you some names and see if any of these capital cases ring a bell with you.

A Sure.

Q State vs. Bowman?

A Yes. It's my case.

Q Okay. How about State vs. Wood?

A My case.

Q State vs. Laney?

A Yes, sir. Mine also.

Q All right. Downs? State vs. Downs?

A Yes, sir. Mine.

Q How about State vs. David Mark Hill?

A Yes, sir. Mine.

Q Kenneth Simmons?

A That was also mine.

Q Was state vs. James Brian a capital case?

A Yes, it was.
Q Haseldon?
A Right.
Q I believe it's Weik. W-I-E-K?
A Right.
Q State vs. Shuler?
A Calvin Shuler. Right. That was mine.
Q How about State vs. William Kelly?
A Yes. Yeah, that was mine. And later with David Bruck also.
Q How about Robert Lee Nance?
A That was mine on direct appeal.
Q All right. Bud VonDolen?
A I did that with Joseph Savitz. I was co-counsel. He was the lead attorney.
Q All right. State vs. McQueue?
A It was also mine.
Q Can you think of any others that I haven't discussed that you had done before 2006?
A I don't know. Charping. I did Michael -- I did Charping. I'm sure there's several others you've left off.
Q All right. Would you tell the Court how you go about preparing the issues that you raise on direct appeal?
A What I do is I read the transcript. In this case I

had co-counsel who was Eileen Clair. I read the transcript. I keep two sets of notes. One is a running list of the testimony of each witness and another legal pad is a running list of each objection. And I try and get a preliminary idea of whether I think the issue has some merit. And then those that I think strike me as having some merit, obviously I do further research and talk to other attorneys about it. That in a nutshell would be how I go about doing it.

Q All right. I'm going to now turn to some of these specific allegations. The first claim is that you were ineffective for failing to raise the trial judge's refusal to question potential jurors about their attitudes regarding race under the term of demurrer.

A Mm-hmm (affirmative).

Q Do you recall anything about that issue?

A My recollection, and also in talking with counsel for Mr. Bennett, I didn't have a clear recollection of the issue. And actually Eileen Clair under my supervision pretty much handled voir dire in this case. But from my memory being refreshed, it was not asked for at the outset. In other words, it wasn't said this is a capital case; we're entitled to voir

dire. As I understand it, it came up very late procedurally; as I understand it, even after the jury was selected. So it would have been too late for that really to have been an appellate issue, as I understand it.

Q Now, both the victim and the defendant in this case were African-American, correct?

A That's correct.

Q Were you aware of any case law at the time you represented Mr. Bennett holding that Turner v. Murray applies in a situation where both the defendant and the victim were the same race?

A No, I wasn't. I mean, my recollection of Turner vs. Murray was, you know, if there was an interracial -- if there was an interracial issue in a non-capital case, there had to be that and something more. And in a capital case, it -- you got that voir dire if there was an interracial issue. But again, you know, I don't recall ever giving that any thought, much less serious thought as an issue.

Q And that's because the merits issue was potentially raised after jury selection?

A Well, that's correct. And again, that is after discussing the issue with the attorneys for Mr. Bennett. And at the time I talked to them I had, you

know, no recollection really of the issue at all. And then the procedural posture that apparently it was raised in after jury selection, it would have been too late at that time to make it an issue in my humble opinion anyway.

Q Okay. Turning briefly to the second and third grounds concerning your representation, these grounds concerned the incident involving the Pizza Hut attacks?

A Right.

Q Do you recall whether or not you gave some consideration to arguing relevancy of the evidence concerning the Pizza Hut incident?

A Well, I mean, the court -- obviously the opinion speaks for itself. The court obviously took me to task on -- what I argued was that this was impermissible Victim impact evidence under Paine vs. Tennessee because the evidence involving the teen-aged boys working at the Pizza Hut, as I think I put in my brief if my memory is correct, this was every parents' might mare. They have teen-aged kids working to make a little spending money and they're, you know, beat up very badly while at work.

And my point was that this was impermissible victim impact evidence because Paine only allowed a

glimpse of the life that the defendant chose to extinguish. So where I say I think it was a semantic difference was that my argument was it was impermissible victim impact evidence for that reason. And the court said, well, it can't be victim impact evidence because it did not pertain to the person, the decedent, the man who was dead.

Now, the court clearly said the correct argument was relevance and Rule 403 as I recall the opinion. And I think they even, you know, put in there that, you know, if we're going to have a serious discussion of this issue, then it would have to be on those grounds.

So, in retrospect, in looking back, I and our office has never gotten anywhere with our court under any restrictions on victim impact evidence; and they said in no uncertain terms that I argued the issue under the wrong grounds.

Q The focusing on relevancy as opposed to your argument?

A Relevancy and 403 was my recollection of what the court said would have been the correct grounds to argue the issue under, not impermissible victim impact evidence.

Q Would your answers be the same with respect to

evidence concerning the -- I think it was Shawn Gilbert's testimony concerning the dreams or nightmares about a black Indian chasing him?

A It would.

Q Now, you testified about something I'd like you to expand for the court. You said your office had never gotten anywhere in trying to litigate restrictions in the penalty phase with respect to --

A On victim impact evidence.

Q Oh, okay. All right. What was your understanding of the right of the State to present evidence of other crimes or bad acts that the defendant may have committed in the past?

A The State has every right to introduce in penalty phase of a capital case other bad acts and crimes the defendant committed because penalty phase obviously is about the character of the defendant and the circumstances of the crime. So they were entitled to introduce the fact that these crimes occurred.

But when you get into introducing photographs of the young men in the hospital beds and the fact that he had dreams of black Indians chasing him and things like that, that was impermissible. And again, that was my argument. It was impermissible victim impact evidence. The court very clearly said, no, you're

wrong; that is the wrong grounds to argue this under. You should have argued it under relevance and Rule 403. But under either theory, the evidence was not admissible in my humble opinion.

Q All right. I know you weren't the attorney in the case, but are you familiar with the Gaskins opinion, State vs. Gaskins?

A Specifically, what in it?

Q The fact that the photographs of the murder victim, the prior murder victim was introduced?

A No, I'm not. I'm not familiar with that.

Q All right. How about State vs. -- I guess it's Ray vs. State. Excuse me. Instead of State vs. Ray. John V. Ray vs. State.

A Right.

Q Are you familiar with that case at all?

A If it says photographs of prior victims were admissible, no, I'm not.

Q Okay. I believe it's grounds 11(d)(4) that I'd like to turn your attention to, the allegation that you were ineffective for not raising the issue that counsel had presented the jury with evidence that he was housed on death row. Do you recall that testimony?

A I recall -- what my memory is is that it came out

that Johnny Bennett was on death row. Apparently it came out through both sides. Again, I don't recall giving any serious consideration to raising that as an issue. I mean, again, not to be flip about it, but you would think jurors when you're reconvening for a sentencing phase would be able to figure out what was going on.

Q All right. And the jury was aware, were it not, that they were there for purposes of re-sentencing?

A Again, that's my -- I am deducing that from the record, that the jurors would be able to figure it out. And my direct answer is I never gave serious thought to raising that as an issue. It really didn't stick -- I don't remember that really ever -- that issue hitting me. Whether it was procedurally flawed or it just didn't hit me, I did not seriously think of raising that because I did not think it would be a winning issue.

Q All right. With respect to evidence that's presented by defense counsel, what is your understanding as to how the state Supreme Court will treat errors that are generated by the defendant or his attorneys?

A I guess you're going to invited error, if that's where you're going. If the court would say, you know, if you raise the matter first that, you know,

they'd say anything the State did was cumulative or invited error. I assume that's where you're going.

Q All right. Do you recall in the record where the trial judge gave a supplementary plain and ordinary meaning instruction?

A That was brought to my attention, yeah, that he did -- that I guess the jury came back asking about parole. And at that time, as I recall, that was the law. He just told them plain and ordinary meaning, I guess, you know, under Bo, Sutherland, those lines of cases.

Q Do you have your handwritten notes?

A Yes, I do. I have my --

Q From the running notes?

A Right. Yeah, I do. Yes, sir, I do.

Q Will you turn to page 3 of those notes?

A Of the objections list or --

Q Yes, sir.

A Okay.

Q The very bottom of that page.

A I have that this is -- okay. I have this as page 2. What page are you talking about?

Q I'm sorry. It's the very bottom of the page. It says it's page number 2146.

A Right. I see that.

Q All right, sir. What does it say? What do your notes reflect?

A It has 2146, Simmons underlined, 21 -- I guess page 2138, 1995, 1996 Act, 83, Section 10, effective January 1st, 1996.

Q But immediately prior to Simmons being underlined, what is before that?

A My bad handwriting. It says "lots of" something or other there.

Q But that indicates, does it not, that you at least looked at that objection?

A Well, yes. It does.

Q Okay. What was your opinion of it in terms of its merits as an issue on appeal?

A Well, I mean, I didn't -- the only way I can answer that as an appellate attorney is I didn't raise it, so I didn't think it was a winning issue. There can -- you know, as Dan Stacy, our former boss, always says, you can't have a strategic reason to waive a winning issue. So what I thought about it, you know, very respectfully, you know, I don't think makes a whole lot of difference. I chose not to raise it, so I didn't think it was going to go anywhere as an issue and certainly wasn't going to win the case.

Q All right. I don't believe I have anything further.

THE COURT: All right.

MR. LOMINACK: Court's indulgence.

THE COURT: Before you start, the court reporter wants your full name for the record, please.

MR. ENDERLIN: I'm sorry. Derek Enderlin, E-N-D-E-R-L-I-N.

CROSS EXAMINATION

BY MR. ENDERLIN

Q Mr. Dudek, you were asked about some of the notes you wrote on there. Those handwritten notes, could that be "lots of varieties"?

A That's certainly a fair I guess interpretation. I apologize for not even being able to read my own handwriting.

Q And I'm going to show you part of the transcript if that's okay. May I approach the witness, Your Honor?

THE COURT: Sure.

Q This is page 2146.

A Okay.

Q It starts at line 10. It's Mr. Floyd's objection.

A Okay.

Q Does that refresh your recollection of maybe where you came up with that note?

A Yeah. I guess so.

Q Well, can you explain that?
A Well, I mean, I don't quite frankly understand the nature I guess of the objection. He said, "I forgot the exact wording. Something. There are a lot of varieties of this." I guess that's where you're going with what I wrote down. "We don't know whether it was cleared up with life in its ordinary meaning or death in its ordinary meaning. That would be the only objection we would have to it. Whether or not that might confuse them". Now, you know, unless -- and, Mr. Enderlin, you can correct me. You know, unless he asks for some other relief, I don't know what I could do with that.
Q Okay.
A And if he did, if you can help me out with that, I'd be glad to respond.
Q So, procedurally, did you feel like you could not raise the issue?
A From what you just showed me, I couldn't see where I could raise anything from that unless he, you know, very clearly made a clear objection to it or asked for some other relief.

MR. ENDERLIN: Judge, I think we'd like to introduce a copy of the notes.

MR. SALTER: I don't have a problem with the

copy, Your Honor.

THE COURT: All right.

MR. SALTER: Mr. Lominack has indicated to me that he did make a marking on the document. So we may have to get a clean copy of the same document. But I do not have a problem with that.

THE COURT: Has that been marked up?

MR. ENDERLIN: He circled "lots of varieties" on here, Your Honor. So I think if you want, we could -- I assume you want to hold onto your originals, don't you?

WITNESS: You know, whatever the Court wants.

THE COURT: How many copies have you got that you're going to want to make?

MR. ENDERLIN: We just need one page.

THE COURT: We'll make a copy at the end of the hearing back in my office. You all remember. And we'll just substitute that. Is that okay, Mr. Salter?

MR. SALTER: Oh. Yes, sir, Your Honor. That's fine.

THE COURT: All right. This will be admitted. Do you remember what -- do you know what the number -- did you all have any other exhibits at the prior hearing?

MR. LOMINACK: I don't think we had any.

THE COURT: So this would be the Applicant's No. 1 as far as we know.

Q Did you say you think it's page 2 of your notes?

A Just looking at -- well, --

Q Well, I guess the page number doesn't matter. Just so I can describe it for the record, Mr. Dudek, at the bottom --

A At the bottom it's the very last objection noted. I have it as page 2. I have a loose page here that I'm not sure whether it goes with the running objection or the trial testimony. But it's the very last trial objection noted.

Q All right. And just for the record, it starts off with 2146 dash, then "lots of varieties", and then you have Simmons?

A That's correct.

MR. ENDERLIN: That's all I have, Your Honor.

THE COURT: All right. Anything further, Mr. Salter, from Mr. Dudek?

MR. SALTER: No, sir, Your Honor. We'd ask that Mr. Dudek be excused.

MR. ENDERLIN: No objection.

THE COURT: All right. Thank you, sir. Thank you for coming. You're welcome to leave or you're

free to stay.

WITNESS: Okay. Thank you very much, Your Honor.

THE COURT: Have a nice weekend.

MR. SALTER: Your Honor, we call Mr. Young.

THE COURT: All right.

HERVERY YOUNG, after being duly sworn, testifies as follows:

THE COURT: All right. If you'll have a seat and tell us your full name, please.

WITNESS: Hervery Young. That's H-E-R-V-E-R-Y.

THE COURT: All right. Mr. Salter.

MR. SALTER: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. SALTER

Q Good morning, Mr. Young. I believe you were appointed second chair in this case?

A That's correct.

Q Mr. Floyd was lead counsel?

A Correct.

Q Could you give the court the benefit of your educational background and work history as pertains to the practice of law?

A An undergraduate at Johnson C. Smith University, law school at the University of South Carolina School of

Law, worked my first year in private practice in Rock Hill. Then I began working at the Lexington County Public Defender's Office. And in 2001 I began working as a federal public defender, and I am currently the federal public defender in Scranton, Pennsylvania.

Q All right. When did you graduate from law school?

A 1994.

Q Okay. And when did you begin working with the Public Defender's Office in Lexington County?

A 1995.

Q Had you had -- let me go back. Before you were appointed in this case, did you have any experience in handling capital cases?

A Yes. I worked on probably about six or seven death penalty cases that were in the office.

Q Now, which cases were those?

A Oh, wow. Michael Charping, B. J. Quattlebaum for a little while. Geoffrey Jones. Billy Kelly. Gosh. I can't remember all of them. Pretty much any of them that were in the office that Cathy Evet or either Beth Floyd were handling I worked on with them.

Q All right, sir. Had you had occasion to handle any other major felony cases prior to your representation

of Mr. Bennett?

A Yes.

Q How many?

A It's hard to tell. In nineteen-ninety -- I guess it was around '98, in 1998 I became the Deputy Public Defender in Lexington. And Beth Fullwood and myself were pretty much the main trial attorneys in the office. We did most of the violent felonies, the more serious drug offenses and things of that nature. And we had about three other assistants that helped out with juvenile crimes and minor CDV's and things of that nature.

Q Do you recall when you were appointed in this case?

A It was shortly after the case was sent back for re-sentencing. The case was -- it was initially tried by Wayne Floyd and Pat McWhirter. And Pat McWhirter was not willing to continue with the retrial, with the re-sentencing portion of it. So it came back to the Public Defender's Office. And Beth asked me to work with Wayne on preparing it for the re-sentencing.

Q All right. Now, how did you and Mr. Floyd go about dividing up your responsibilities in the case?

A We had a meeting over at Wayne's office and pretty much walked through the first trial utilizing the

transcript. And because Wayne was familiar with the case already, he was able to kind of tell me a summary of what the various persons testified to. And we just -- based on that meeting, we just divided up who was going to handle what witnesses and which issues we were going to focus on.

Q All right. Did you wind up handling a number of the witnesses that Mr. McWhirter had originally handled?

A I think most of the witnesses that I had were the ones that Mr. McWhirter had initially.

Q What about if one of the two of you, either you or Mr. Floyd, felt uncomfortable with a witness? How would you all go about dealing with that?

A Well, I think Wayne and I had a pretty good and open, you know, relationship as far as communication is concerned. If there were any witnesses that Wayne felt uncomfortable with, I didn't know any of the witnesses enough to be uncomfortable with any of them really. But if there were any that Wayne felt uncomfortable based on his first experience with them, then he shared with me, you know, what discomfort he had and asked me if I would handle it. And I had no problems with that.

Q In the course of preparing for the re-sentencing proceeding, do you recall whether or not you ever met

with Mr. Bennett?

A Yes. We met with Mr. Bennett a number of times.

Q All right. Do you have any idea roughly how many times?

A Wayne and myself met with him; if I had to guess, I would say anywhere from five to seven, five to ten times. And then I met with him. And then myself and one of the paralegals from the office met with him. And we had frequent telephone conversations with him, although most of the telephone conversation was he was able to make it back to Wayne's office.

Q Okay. Would you characterize him as being cooperative with your efforts to represent him?

A Mr. Bennett's?

Q Yes, sir.

A Yes.

Q Did you and Mr. Floyd have anyone to assist you in preparing for the case?

A Well, we had a young lady out of his office who assisted with some of the administrative stuff. We had two paralegals out of my office who assisted. And I believe at one point in time Wayne reached out to an investigator to do some work as well. I think she was either an investigator or a social historian.

Q You mentioned earlier you had a transcript of the

original proceedings?

A That's correct.

Q What did you and Mr. Floyd conclude was the best way to defend your client in the re-sentencing proceeding?

A Well, we were -- the crux was to show his acclimation to prison life versus the need for him to receive the death penalty. So we wanted to focus on as much positive things that occurs in his -- have occurred in his life as well as those changes that he had made during the period of time that he was incarcerated. And we wanted to try to minimize those things that were presented in aggravation initially.

Q When you talk about minimizing those things that were initially in aggravation, what things are we talking about?

A Well, there were a couple of incidents where, if I recall correctly, there was the Pizza Hut incident where Johnny was alleged to have been violent towards someone. There was a couple of incidents in the county jail where he was disobedient to whatever demands was given to him while he was there to the point that I believe they tasered him. And then there were certain incidents during the course of his time at school that the prosecutor kind of hung his

hat on.

Q All right. With respect to the Pizza Hut incident, how did you all feel you could mitigate that or lessen the impact of that evidence?

A That was an incident that Wayne kind of took the lead on and was going to handle that. I don't recall us specifically sitting down and strategizing specifically on that incident. I do recall that that was one incident that because it had been dealt with in the first trial that, and I think Wayne may have been the person who addressed it in the first trial, I mean, handled the cross and everything on that in the first trial, that he wanted to address, deal with that issue in the re-sentencing hearing also. But the gist of it was to try to water it down as much as we possibly can to take the focus off of that incident and focus more so on his adaptability.

Q All right, sir. Is it fair to say that you deferred to Mr. Floyd? Since he had handled the issue the first time around, you deferred it?

A On that issue?

Q Yes, sir.

A Yes.

Q Okay. Thank you. I'd like to talk to you about your voir dire and venire in this case. Do you recall

whether or not anyone assisted you all in jury selection?

A By way of a jury selection expert?

Q Or otherwise.

A I don't recall us hiring anyone to specifically help us select the jury. I remember at least on one occasion us having a conversation with Jeff Blume in talking with him about jury selection. But I don't think we retained his services, as he normally makes himself available. But that's my recollection.

Q Did you all do any investigation into jurors' backgrounds?

A To the extent that we could. I mean, we obtained criminal histories that were provided to us. There were a number of different attorneys that we forwarded the jury list to as well as other persons that Wayne knew to see if people were familiar with members who were selected to be on the overall jury venire in order to try to get whatever information we could about any of those persons.

Q Do you recall whether or not you and Mr. Floyd ever had any discussions about asking the judge for permission to question jurors about their attitudes concerning race?

A I do not recall us having a conversation about that.

prior to jury selection.
Q All right. Do you recall whether or not prior to jury selection you're aware that such an inquiry could be requested of the trial judge?
A Well, I was aware that it could be, that we could make inquiry. I just don't recall us specifically talking about it. Me personally, I didn't make it a priority because of the fact that we had a case that had a black victim and a black defendant. The concern did come up to me, and I honestly don't know if I ever voiced it to Wayne, was the concern that the fact that I had a black defendant and a black victim in Lexington County. So I don't know if I ever specifically sat down and had a discussion with Wayne about, you know, we need to voir dire, you know, everyone that comes up about their position on racial issues.
Q Okay. What concern did you have? I'm sorry. I was a little unclear?
A As far as -- well, the fact that at that time there was a representation, if no other way to describe it, of Lexington County being a little bit harsh on defendants of color. Given the fact that we had a black defendant and a black victim, I didn't know if those sentiments or that reputation would play a part

in the jury's selection. Plus, at the time there were a number of African-Americans in the venire that we had to choose from. So I don't know if I, you know, made it an issue enough to say, hey, we need to really delve into this, as we have in the past when we had a black defendant and a white victim --

Q Right.

A -- when race was so obvious.

Q In addition to having both the victim and defendant of the same race, weren't a number of the witnesses, both the prosecution and defense, also black?

A Yeah.

Q Okay. So in light of what you had, you didn't feel that the concerns were as great in your case as it may have been in other cases where there was cross-racial crime?

A Well, at the time I didn't think it was something that I would want to put on the top of my list. Whether it should be something that we should have asked or not, I don't know if it shouldn't be asked every single time in Lexington, given the history and the reputation that jurors and the system have over in Lexington County.

Q Now, when the jury was originally struck, there was an African-American on the jury, correct?

A That's correct.
Q All right. Now, he was later taken off the jury, correct?
A That's correct.
Q Do you recall any discussions you may have had with Mr. Floyd after that occurred as to what you all need to do or should do?
A I believe we had a -- and all of this happened in a short period of time. But I believe Wayne and I did have a discussion at that point in time about the need to raise the issue of race because now we had a situation where we had a totally white jury making a decision on an African-American male. So at that point in time I believe Wayne may have in the course of his objections or dealing with the issue of that juror who was excused asked the Court to allow us to voir dire those jurors who were still on the panel about their views as far as race is concerned to determine whether or not we needed to move to start this whole game all over.
Q All right. Now, going into the jury selection, since we've already discussed it, you were aware of the Pizza Hut incident, correct?
A Yes.
Q You've also touched upon this earlier also. You're

aware of misconduct that occurred while he was incarcerated?

A Yes.

Q And some of these incidents involved white people as victims, supposedly his victims?

A That's correct.

Q All right. Would you agree or disagree that questioning jurors about their views concerning race can be kind of a tricky proposition?

A Well, I don't know if it's so much tricky as sensitive. It is one of those topics that if the environment isn't right, you may get a totally different response. At the same time, if it's a situation where no one is really thinking about race and you throw the -- it's the lit match you're throwing on dry grass. So it's really a sensitive issue to deal with.

Q Turning now to one of the first allegations, do you recall the judge's opening instructions to jurors where he told them that if he made a mistake -- I'm sorry. He said, quote, "If I'm wrong, there is another time and place for it to be corrected." Do you recall that at all?

A Not specifically. But I'm familiar enough with Judge Westbrook's instructions to know that he always makes

such a comment.

Q Would you find such a comment objectionable?

A In hindsight, yes. At the time I don't know if I did or not.

Q Okay. Now, turning to the second ground which concerns the testimony of Jody Gallman from the Department of Probation, Parole and Pardon Services. You handled this witness, correct?

A I believe so.

Q All right. Do you recall whether or not you had considered raising an objection to her testimony on any grounds?

A I don't recall raising -- I mean, needing to make any objections to her testimony as a whole. No.

Q Why was that?

A I can't answer that. I mean, I don't know.

Q Now, I believe her testimony was limited, was it not, to the date of his release from incarceration and introduction of evidence concerning the conditions of his release?

A I believe so. Yes.

Q Were you aware at the time you represented Mr. Bennett of any decision from either our state Supreme Court or the U.S. Supreme Court holding that evidence if a defendant was on parole at the time he committed

a murder was inadmissible?

A I can't say at the time I was representing him that I was familiar with particular case law or not. I don't know. I usually maintain a research file as part of my filing cases. And if there were any decisions that I would have read pertaining to any such issues, it would be contained in there. But I don't have that file with me today.

Q Turning now to a witness you examined by the name of Reverend Brown, do you recall him?

A I do. I think he was the chaplain within the Department of Corrections.

Q Do you recall whether or not you interviewed Reverend Brown prior to the re-sentencing proceeding?

A I did.

Q Okay. What did you all talk about?

A In general, he was -- well, if I recall correctly, Johnny in one of our visits with him and Wayne informed us of this chaplain who was familiar with him, and I got the impression that there was some bond or friendship or something that had formed between the two of them.

So we located Reverend Brown in order to find out, you know, what he thought of Johnny, what type of person he was, you know, the typical mitigating

type information that we were seeking. And that's what we basically talked about, is, you know, what he knew of Johnny as a person, what he had came to learn about him and things of that nature during the course of his knowing Johnny.

Q All right. Through your discussions with him or otherwise, were you aware that Reverend Brown had come into contact with Mr. Bennett while Mr. Bennett was a safekeeper on death row?

A I don't remember at what point in time he came in contact with Mr. Brown, I mean, with Mr. Bennett. But I know it was sometime while he was at the Department of Corrections. I don't remember whether or not it was while he was in safekeeping or whether or not it was after he was initially convicted and sentenced.

Q Do you recall whether or not you would have given Reverend Brown any instructions in terms of like how to relate his testimony to the sentencing jury?

A I remember sitting in his office, and this was on a second meeting with him, and going through with him the questions that I would ask him on the stand. I didn't specifically tell him, you know, what to say or how to deliver it or anything like that, but we did go over the questions that I would ask and in a

kind of question and response type so that he would feel comfortable when he got into the courtroom of actually sitting in the stand as if he was testifying. Because if I recall correctly, I tried to arrange for him to come up to Lexington to actually sit in the witness stand and get an idea of what was going to occur when he testified.

Q Did he appear to understand your conversations with him and your work with him?

A Reverend Brown?

Q Yes, sir.

A I had no reason to believe that he didn't understand.

Q Were you aware that he was going to inform the sentencing jury that Mr. Bennett was on death low at the time that they met?

A No. No. Because when we sat down and was going over our questioning, we never mentioned anything about his particular location. I don't even recall we mentioned anything about the particular facility that he was at. I remember when we were in the hearing and Reverend Brown made mention in one of his responses about death row, I kind of was standing there as if somebody had just thrown a brick at me.

Q You immediately asked him a follow-up question, did you not?

A I believe I did.
Q And that would be that safekeepers are also housed on death row?
A Yes. I believe I asked something to try to get around that word.
Q Okay. Now, was Mr. Bennett's jury aware that he had previously been convicted of murder and, therefore, it was their purpose to re-sentence him or to sentence him for the crime of murder?
A I never take jurors for granted. I don't think at any point in time either the Court, prosecution or the defense specifically said during voir dire or during opening statements that this is a re-sentence of somebody who has already been convicted or anything along those lines.

But if I recall vaguely Judge Westbrook's opening statement to the jury panel, I was convinced that they figured out that they were here for a re-sentencing and that this person had already been sentenced before because of the fact that they were not dealing with the issue of whether or not he's guilty or not guilty.

And given the number of television shows on TV about, you know, courtroom proceedings and stuff, I just assumed that that was something that the jury

pretty much figured out. But at the same time, for instance, the Reverend Brown incident, it wasn't something that I wanted to put on the table.

Q Well, did either Reverend Brown or any other witness ever expressly mention the prior death sentence?

A I believe there may have been one witness for the State that may have mentioned death penalty or previous sentence or -- but I'm just remembering that vaguely. I don't recall whether or not Reverend Brown was the first witness to say it.

Q Okay. Do you recall a mitigation witness from Edisto Unit named Major Sheila, I believe it's Mazeek, M-A-Z-E-E-K?

A Vaguely. Vaguely.

MR. SALTER: Your Honor, may I approach the witness?

THE COURT: Sir?

MR. SALTER: May I approach the witness?

THE COURT: Sure.

MR. SALTER: Thank you, sir.

Q I show you transcript page 1790 and direct your attention to lines 20 -- I believe it's 21 through 25. Or 24.

A Okay.

Q Does that refresh your recollection at all in terms

of who Major Mazeek was?
A I remember the name. The conversation here is familiar, but I can't put a name with the face to coordinate it.
Q Could you tell the Court whether or not the Major testified that Mr. Bennett was being housed as a safekeeper in the Edisto Unit?
A She did.
Q And do you recall what the timeframe was that she mentioned?
A I don't think she mentioned here. I think she said in 1995 she was able to supervise him.
Q So there was already information that -- there was other information that your client was a safekeeper back at the time that Reverend Brown would have had his conversations with your client?
A Again, I just don't remember exactly when Reverend Brown first came in contact with Mr. Bennett.
Q Thank you. Mr. Young, one of the allegations that's raised -- and, Your Honor, it's ground 11(c)(7) -- is that counsel should have objected to closing arguments of the prosecutor in the penalty phase. Do you recall making a post-trial motion for a new trial?
A Yes. I believe we did make a motion for a new trial.

Q All right. And do you recall what, if anything, your reasoning was why you were entitled to a new trial based on the closing arguments?

A I don't remember the motion specifically, but I know part of it dealt with some of the remarks of Mr. Myers during his closing statements referring to Mr. Bennett or comparing Mr. Bennett to King Kong. And I believe he also had a blowup picture or a life-sized picture of Mr. Bennett. And if I recall correctly, I think he was in prison clothes. But that may be vague. And he also had a life-sized picture of the victim in the case and when he was making his references to Mr. Bennett being the likeness of King Kong.

Q All right. The record reflects there was no objection made at the time of the closing argument. Do you recall why?

A I don't recall why. If anything, it was probably because we were shocked, sitting there trying to figure out did we hear what we just heard.

Q Would you agree or disagree that there was a great deal of disparity in size of Mr. Bennett when compared to the victim in this case?

A Sure.

Q Do you recall whether or not there was evidence

presented by the prosecution that your client had drug at least one or more of his victims by the hair during the course of physical confrontation with the person?

A I don't specifically remember that. But that may be related to the Pizza Hut incident. Or that might be one of the occasions in the jail.

Q Now, the State also presented evidence, did they not, that your client was manipulative?

A That he what now?

Q I'm sorry. Was manipulative.

A I believe they may have presented something to that effect.

Q One of the last things I want to ask you about concerns the allegation that you were ineffective for presenting evidence concerning the conditions of your client's confinement?

A Mm-hmm (affirmative).

Q You briefly mentioned earlier one of the things you all wanted to show was his adaptability?

A Mm-hmm (affirmative).

Q And the specific allegation pertains to your cross examination of Mr. Weldon. Do you recall that?

A I do recall some of it, yes.

Q Okay. Do you recall what you were trying to

establish through your cross examination of Mr. Weldon?

A If I recall correctly, he was called by the prosecution to show that Mr. Bennett had broken some of the rules of the facility. And my cross examination was to counter that and show that he complied with rules and procedures of the facility by going through the proper steps in making requests and things of that nature. And again, that kind of opened that door for unwanted information to come in.

Q But you thought it was important that you present this information, correct?

A Well, yes; because it goes towards his ability to comply with the terms of the facility and adapt to prison life as opposed to being the type of menace to society that only death can save society from.

Q Now, your questioning of this witness was limited to the conditions he was actually incarcerated under, correct?

A I believe so.

Q Okay. Do you recall a defense witness by the name of James Aiken?

A Yes.

Q What was the purpose in calling Mr. Aiken?

A Mr. Aiken, he was what I would consider to be our

prison life expert. He had served as a warden at a number of different prison facilities, including serving within the South Carolina Department of Corrections at some point in time, and he had been involved with the management and organization of some prison system operational guides. So we basically utilized him to try to explain to the jury the significance of a life sentence and how a person -- they're not -- for lack of a better description, they're not getting away with anything by getting a life sentence versus you having to execute them.

Q Do you recall whether or not Mr. Aiken's opinion of adaptability was largely predicated upon records generated by SCDC in the Lexington jail?

A Well, I can't really say what he based his opinion on at this point.

Q Right.

A I know that we provided him with records from the Department of Corrections. We provided him with records from incidents from the Lexington County Detention Center. We provided school records. And I think he may have made at least one visit or one consultation with Johnny himself. I remember that that was trying to be arranged. So I don't know if he based his information on one thing or whether or

not he based his opinion on, you know, the totality of everything.

Q I'm going to take you back even further in your representation, back to June 30th of I believe 2000. Do you recall a pre-trial motions hearing in front of Judge Westbrook?

A Not specifically. But if you say it was held, it was held.

Q Okay. Specifically, do you recall whether or not you made a motion to have the jury view a general population prison setting and be able to compare that to a view of death row?

A I vaguely remember making that motion, yes.

Q Okay. Do you recall why you would have made the motion?

A Honestly, I think that the take I was going on it was hopefully to try to establish that general population was worse than being on death row. Even though the end results were different, based on my experience and tours of the prisons and stuff, the cells and the environment in a general population compared to the cells that are on death row, there was a substantial difference in them. And hopefully the jury would see that the person would be punished more by being given a life sentence and put in general population more so

than they would have been in a death row environment, which was actually a larger cell and had a lot of their personal things to them that in general population I believe they would have had to share.

Q Your motion was denied, correct?

A That's correct.

MR. SALTER: I don't believe I have anything further at this time, Your Honor.

THE COURT: All right.

CROSS EXAMINATION

BY MR. ENDERLIN

Q Mr. Young, you had mentioned some other capital cases. Now, was this the first case you had gone to trial on as a capital case?

A No.

Q How many more had you actually gone to trial on a capital case?

A All of them went to trial. The only ones that --

Q I'm sorry. Were you second chair on those?

A No. I was like third or fourth chair --

Q Okay.

A -- on those. I was working on those to get experience and exposure.

Q So is this the first one you were second chair on that actually went to trial?

A That's correct.
Q Okay. The Attorney General mentioned something about the closing argument objections. Wayne actually did the closing, did he not?
A That's correct.
Q He would have been the one to make objections I would assume?
A That's correct.
Q And you mentioned something about Jim Aiken. He is a prison adaptability specialist, is he not?
A That is correct.
Q So normally his purpose is to show that the client is adaptable to the prison setting?
A That is correct.
Q Is that what you all used him for?
A Yes.
Q There was some talk about Jody Gallman. And she also testified that the defendant was on parole when he committed these crimes. Is that correct?
A Yes.
Q And did you see any reason that you did or did not want the jury to know he was on parole during the commission of these crimes?
A There was -- not that I can recall sitting here today. And another thing is, I'm not sure if the

same information was not introduced in the first trial and I just kind of accepted that it was admissible and, you know, just prepared to cross it.

Q All right. Did you have any tactical reason not to object to letting the jury know that he was on parole?

A No.

Q Now, we also talked about your cross examination of Mr. Weldon. He was I believe the warden?

A Of who?

Q Mr. Weldon. A warden of Lieber?

A Mm-hmm (affirmative).

Q At some part of your testimony that you elicited from him, I think you mentioned or brought out that he had -- the defendant had submitted certain forms to get I think television knobs, canteen privileges and a microwave. Do you remember that?

A Yes.

Q Do you feel like you could have brought out the fact that he could have submitted forms and followed the rules without submitting the information that he had access to a television and canteen and microwave?

A I probably could have.

Q Did you have any tactical reason to bring up those specific items that he had use of?

A No. If I recall correctly, it probably was because I was looking at the form.
Q Okay.
A And I probably was like asking him questions reading from the form or something.
Q You also mentioned that voir dire is sensitive. And a lot of voir dire is sensitive, is it not?
A Yes.
Q But you also said that you had asked questions about race before during voir dire?
A We did. In previous capital cases, we did.
Q So even though it's sensitive, you've seen it done before, you've done it before or have been involved in it before?
A Yes.
Q And you knew about the Pizza Hut incident by reading the prior transcript, right?
A Correct.
Q And you knew Mr. Floyd was concerned that Mr. Myers was going to bring race into the trial?
A Most definitely. Yes. And I think that's a general concern overall in most Lexington County cases.
Q And did you have any reason, tactical reason, not to voir dire at the beginning on race?
A No.

MR. ENDERLIN: I don't have anything else. Thank you, Your Honor.

THE COURT: All right. Anything, Mr. Salter?

MR. SALTER: Nothing further, Your Honor. We'd ask the witness be excused.

MR. ENDERLIN: No objection, Your Honor.

WITNESS: Thank you, Your Honor.

THE COURT: All right. Where are we going to go from here? Other than you all are going to request a transcript. Have you all requested a transcript from the first day of the hearing?

MR. LOMINACK: I had not. I thought we were going to have the same court reporter here today. But --

THE COURT: Well, we had asked. And somehow that had gotten changed. It gets out of my hands.

MR. LOMINACK: Well, no. I understand. That's why I had not, as I was going to do it today. I assumed it was all going to be done in one transcript. But we obviously will. Next week I'll contact that court reporter. I can't remember her name. Do you recall it, Judge?

COURT REPORTER: Daphne Helms.

MR. SALTER: For the record, Your Honor, the State would rest.

THE COURT: Oh, I'm sorry.

MR. SALTER: That's quite all right, Judge. I just wanted to make sure the record was clear.

MR. LOMINACK: And we have no reply.

THE COURT: All right. Well, you're going to need to get this transcript because of, you want it to be shown to Mr. Bennett.

MR. LOMINACK: Yes. I mean, I think I would ask that we do -- once, both the day -- from the day that both transcripts have been provided to us, that both sides have 30 days to submit a simultaneous brief to the Court on all the issues. And then we'll have oral argument if the Court wishes after reading the briefs.

MR. SALTER: I would oppose simultaneous briefs but would not oppose a 30-day request. The reason I do that is, the one time I've had an experience of doing a simultaneous briefing, I wound up submitting a proposed order that was almost 400 pages long. But my opponent had a more -- although there were any number of issues, they focused on a number of issues in their pleading.

THE COURT: So what is it you're asking?

MR. SALTER: Just that I have 30 days from the time he submits his pleading to respond.

THE COURT: Well, you know, what I was sort of thinking of is you both submit proposed orders, and they would probably be pretty similar to whatever your briefs would be. Because if I do that, you write briefs, you're probably going to submit your proposed orders along the lines of your briefs. But I'll do what you all want on the thing. I mean, if you -- so you want him to submit his brief and then you submit --

MR. SALTER: Or, yes, sir. I have no problem with doing a proposed order. If Your Honor prefers proposed orders, that's fine.

THE COURT: Well, I don't care. It just seems to me it would save you all one step. And we can come argue it if you want along the lines of the proposed orders.

MR. LOMINACK: That's fine, Your Honor.

THE COURT: I'll do it any way you all want to do it and any time you want to do it.

MR. SALTER: All right, sir. That will be fine. Proposed orders will be fine.

MR. LOMINACK: That's fine with us.

THE COURT: All right. So why don't we do this. Once you get your transcripts, how much time do you want to have to get Mr. Bennett time to look? Does

he need 30 days do you think?

MR. LOMINACK: He doesn't need 30 days. Within a week of getting the transcript, I can have it to him and have discussed with him.

THE COURT: And then you will get back in touch with us. We can have a conference call or something you can say. Or if there's nothing further, you can just write me a letter.

MR. LOMINACK: Right.

THE COURT: If there's something -- and copy the A.G. If there's something that we need to discuss, get them on the telephone and let him figure out, hey, we need to reconvene or we need to -- you're going to submit written interrogatories and let's figure out a timeframe to try and get that resolved or you want to take some additional depositions. And I guess with Mr. Young, if he's in Scranton, you all can depose him by phone.

MR. LOMINACK: Sure. And, again, I doubt that we'll have to do any of that.

THE COURT: Oh, I understand.

MR. LOMINACK: But if we do, we'll do something along those lines so that we don't have to gather again.

THE COURT: All right. Why don't we do that.

And then if you all don't have anything further, you all can -- from the time that you notify me, we'll give you all -- how much time do you want to submit a proposed order?

MR. LOMINACK: I was going to say 30 days, and I'm getting a little bit of flack.

THE COURT: Somebody is real anxious there? Fidgety?

MR. LOMINACK: If we --

THE COURT: I mean, I don't care.

MR. LOMINACK: I'll compromise and do 45 days. That would be great.

THE COURT: 45 days. How about that, Mr. Salter?

MR. SALTER: 45 days will be fine, Your Honor.

THE COURT: All right. Well, that would be good.

MR. LOMINACK: Thanks for accommodating us this morning.

THE COURT: Oh, I appreciate you.

COURT REPORTER: We did have an Applicant's Exhibit. Excuse me, Your Honor. Just as a reminder.

THE COURT: Yeah. We need to do that. Would one of you all write me a letter and set out what we just said what we would do?

MR. LOMINACK: Okay.

THE COURT: The schedule. Because I'm going to change clerks in the time that this happens. And so if you'll give me whatever we may need to copy or you all come on back.

(WHEREUPON, Applicant's Exhibit No. 1 is marked for identification and received in evidence.)

(Whereupon, the proceedings are concluded)

CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

I, Jenny H. Williams, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the continued PCR Hearing of the captioned case, relative to appeal, in the Court of Common Pleas for Richland County, South Carolina, on the 11th day of July, 2008.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

August 19, 2008

Jenny H. Williams, Court Reporter

1328- statement's cont. vid - State's #26 37
1332, 1372, 1509, 1514
1600 - investigation - sex - vs for - 1604
1608 - D on Death row (opened door) 1611/1610
1615 - statement by Green - No Jackson v. Denno
1614
1650 - Mistrial - Wayne Floyd & Hinder - 1659
1668 - State's #72-73-74 - 1682 - Rob. Yo
1683 - State's #75-82 (state's 5 of 7 package).
1765 - Notions - Quarels excused - Juror Guyton
Juror Porter - Juror Hackel - Juror Padgett
Juror Outlaw (Batson on Juror Scud).
1771 - DV - aggravator - larceny - 1778
1773 - stopped - based on state's conduct - viv. D -
sex w/ state official - 1776 - 1777
1774 - discredit counsel - 1778
Byrom 1806-1810 - others 911 involved evidence - 1811 - 1823 - 1827 Counts #3
1823 - wants investigation of 911 Tape - 1827,
1946 - Can't Compare several portions to
Death row
1971 - sentence of Tegue
1975-1980 - mistrial - blonde lady - 2005
2012-2013, 2015-2037, 2047
2044 - Nonstatutory aggravating circumstance - 2047
2096 - sustained as to Life sentence if I don't sign
2146 - "Act of Martin" Simmons (2138)
1995-1996 (Act #3310 - eff. Jan 1, 1996

STATE OF SOUTH CAROLINA — COURT OF COMMON PLEAS

COUNTY OF LEXINGTON — 2006-CP-32-3221

JOHNNY BENNETT :

:

-VS- : TRANSCRIPT OF RECORD

:

THE STATE OF SOUTH CAROLINA :

FEBRUARY 17, 2009
COLUMBIA, SOUTH CAROLINA

B E F O R E:

THE HONORABLE JAMES R. BARBER, III, JUDGE.

A P P E A R A N C E S:

DEREK J. ENDERLIN, ESQUIRE
ROBERT LOMINACK, ESQUIRE
ATTORNEYS FOR THE PLAINTIFF

W. EDGAR SALTER, III, ESQUIRE
AL SIMON, ESQUIRE
ATTORNEYS FOR THE STATE

DAPHNE D. HELMS
CIRCUIT COURT REPORTER

MR. LOMINACK: JUDGE, MR. BENNETT'S SUPPOSED TO BE HERE. I WAS JUST GETTING READY TO CHECK ON HIM. I KNOW MR. SALTER REQUESTED THAT HE BE TRANSPORTED. I DON'T KNOW WHY HE'S NOT IN HERE ALREADY. I DON'T KNOW IF THERE'S A WAY FOR ME TO CALL DOWN THERE.

THE COURT: DOWN TO -- DOWNSTAIRS?

MR. LOMINACK: YES, SIR.

THE COURT: THERE IS, BUT I DON'T KNOW WHAT IT IS.

(PAUSE IN PROCEEDINGS.)

THE COURT: THEY'RE BRINGING HIM UP.

MR. LOMINACK: THANKS, JUDGE.

THE COURT: MR. SALTER?

MR. SALTER: YES, SIR, YOUR HONOR.

THE COURT: READING YOUR ORDER, THAT'S THE LONGEST ORDER I'VE EVER READ IN MY LIFE.

MR. SALTER: WELL, I APOLOGIZE, YOUR HONOR, BUT I'VE WRITTEN ONE THAT'S MUCH LONGER.

THE COURT: GOOD GOD. AT PAGE 70 I STARTED WRITING DOWN THE TYPOS.

MR. SALTER: THAT'S A GOOD THING, YOUR HONOR. I SAW MANY OF THEM LAST NIGHT OR YESTERDAY WHEN I WAS LOOKING THROUGH IT MYSELF.

THE COURT: YOU GOT ONE ON 70, 81, 91, 111, AND YOU HAD THEM BEFORE THEN AND I DIDN'T WRITE THEM DOWN.

MR. SALTER: I CAUGHT A NUMBER OF THEM YESTERDAY, YOUR

HONOR, GOING BACK THROUGH IT AND I APOLOGIZE, BUT MOST OF THAT'S TYPED BY MYSELF. SO THAT'S WHERE THE ERROR---

THE COURT: I'M NOT -- I'M NOT BEING CRITICAL. I JUST...

MR. SALTER: GO BACK AND CORRECT THEM.

THE COURT: IF YOUR ORDER IS EVER SIGNED...

MR. SALTER: YES, SIR, YOUR HONOR, I...

THE COURT: YOU WANT IT TO BE CORRECT, AND MR. LOMINACK'S IS NICE AND NEAT AND MUCH SHORTER.

MR. LOMINACK: AND READY TO BE SIGNED---

THE COURT: HUH?

MR. LOMINACK: ---I SHOULD SAY.

THE COURT: WELL, YOU DIDN'T SUBMIT ME AN ORDER, DID YOU?

MR. LOMINACK: WELL, I DIDN'T. IT MAY HAVE BEEN MY MISUNDERSTANDING. I THOUGHT I---

THE COURT: YOU SUBMITTED ME A MEMORANDUM.

MR. LOMINACK: WELL, IT IS AND I---

THE COURT: WHICH I ASSUME YOU CAN CONVERT TO AN ORDER QUICKLY.

MR. LOMINACK: I CAN CONVERT IT TO AN ORDER QUICKLY AND SUPPLY IT IN DIGITAL FORMAT OR ANY FORMAT THAT SUITS, BUT I MISUNDERSTOOD AND THOUGHT AT THE HEARING WE WERE SUBMITTING PROPOSED, I MEAN---

THE COURT: WELL, IT DOESN'T MATTER. DID I TELL YOU

THEY'RE BRINGING HIM UP?

MR. LOMINACK: YES, YOUR HONOR.

MR. ENDERLIN: JUDGE, I HOPE YOU DON'T MIND. I'VE GOT A SORE THROAT. I'VE BEEN GETTING SOME LOZENGES. I HOPE THAT DOESN'T UPSET YOU OR ANYTHING.

THE COURT: WE CAN SURVIVE THAT.

MR. ENDERLIN: I DON'T WANT YOU TO THINK I HAVE CANDY IN MY MOUTH OR ANYTHING.

THE COURT: THAT'S NO PROBLEM.

(PAUSE IN PROCEEDINGS. MR. BENNETT ENTERS THE COURTROOM.)

MR. LOMINACK: AS I DID LAST TIME, I REQUESTED THE HANDCUFFS BE REMOVED JUST BECAUSE THEY'RE SO UNCOMFORTABLE AND HE CAN'T USE HIS HANDS. HE WAS FINE IN THE COURTROOM LAST TIME AND HAS BEEN.

THE COURT: WELL, I'LL LET THEM REMOVE HIS RIGHT HAND OR WHATEVER ONE HE WRITES WITH.

MR. LOMINACK: OKAY.

THE COURT: AND HIS HAT.

MR. ENDERLIN: TAKE HIS HAT OFF.

THE COURT: IF Y'ALL NEED TO BE OVER HERE OR ANYTHING, Y'ALL ARE WELCOME...

MR. LOMINACK: YOUR HONOR, WE'RE WAITING TO HEAR FROM YOU, I GUESS---

THE COURT: YOU CAN REMOVE -- IF HE WANTS TO BE ABLE TO

WRITE -- I DON'T KNOW WHAT HAND HE WRITES WITH, HIS LEFT OR HIS RIGHT. WHICH ONE DO YOU WRITE WITH, MR. BENNETT?

MR. BENNETT: RIGHT HAND, YOUR HONOR.

THE COURT: I'LL LET THEM REMOVE HIS RIGHT HAND. ALL RIGHT. WHILE THEY'RE DOING THAT, NOW WE'RE HERE TODAY AT THE REQUEST OF MR. LOMINACK WHO HAD -- FOLLOWING THE LAST HEARING WE HAD, THE PARTIES WERE EITHER GOING TO SUBMIT A PROPOSED ORDER OR A MEMORANDUM IN SUPPORT OF THEIR RESPECTIVE POSITIONS. AFTER -- THERE WAS SOME DELAY BY THE STATE BY VIRTUE OF MR. SALTER'S SCHEDULE THAT -- BUT AFTER MR. SALTER HAD SUBMITTED HIS PROPOSED ORDER, MR. LOMINACK ASKED IF HE COULD HAVE AN OPPORTUNITY TO RESPOND AND I GUESS ALSO TO GIVE MR. SALTER AN OPPORTUNITY TO RESPOND TO ANYTHING MR. LOMINACK WANTS TO SAY OR ANYTHING ELSE HE WANTS TO SAY.

NOW, WE SCHEDULED A HEARING FOR THIS MORNING. ONE THING WE NEED TO DO -- THIS, OF COURSE, IS A LEXINGTON COUNTY CASE, AND I ASSUME NOBODY HAS ANY OBJECTION TO HAVING THE MATTER HEARD HERE IN RICHLAND COUNTY BECAUSE IT'S A CHAMBERS WEEK, AND THIS IS WHERE I AM AS THE ADMINISTRATIVE JUDGE THIS WEEK. MR. LOMINACK, YOU OR YOUR CLIENT HAVE ANY PROBLEM WITH THAT?

MR. LOMINACK: NO, YOUR HONOR.

THE COURT: MR. BENNETT, DO YOU HAVE ANY PROBLEM WITH HAVING THE MATTER HEARD OVER HERE TODAY AS OPPOSED TO LEXINGTON COUNTY?

MR. BENNETT: NO, SIR.

THE COURT: ALL RIGHT. MR. SALTER, DO YOU HAVE ANY OBJECTION?

MR. SALTER: NO, SIR, YOUR HONOR. IN FACT, I BELIEVE THE ORDER APPOINTING ME GAVE STATEWIDE JURISDICTION.

THE COURT: WELL, LEXINGTON... I LIKE... ALL RIGHT. MR. LOMINACK, IF YOU WOULD?

MR. LOMINACK: YOUR HONOR, BEFORE I BEGIN, JUST TO GIVE YOU AN IDEA OF WHAT WE INTEND TO DISCUSS AND OBVIOUSLY WE'LL TAKE QUESTIONS ABOUT ANY OF THE ISSUES BRIEFED IN OUR POST-HEARING MEMORANDUM, BUT FOR THE MOST PART WE FEEL LIKE WE SET THEM OUT SUFFICIENTLY AND DON'T NEED TO RESPOND TO THE STATE'S PROPOSED ORDER. BUT WE DO FEEL LIKE A RESPONSE IS REQUIRED TO A FEW ISSUES, AND THAT IS THE SIXTH AMENDMENT JUROR CLAIM REGARDING MR. HUMPHREY, THE OPENING STATEMENT/ CLOSING ARGUMENT CLAIM REGARDING MR. MYERS' LANGUAGE AND SOME OF HIS ARGUMENTS, AND THEN MR. ENDERLIN IS GOING TO ADDRESS THE EVIDENCE RELATING TO THE ASSAULT IN THE PARKING LOT OF THE PIZZA HUT RESTAURANT, AND IN THE PLAIN AND ORDINARY MEANING CHARGE/INSTRUCTION THAT WAS PROVIDED BY THE TRIAL COURT, AND THAT'S WHAT WE'LL ADDRESS IN THAT ORDER.

BEFORE I GET TO THE -- SPECIFICALLY ADDRESS THE JUROR CLAIM, I THINK WE'VE GOT TO PUT THAT CLAIM INTO CONTEXT AND NOT LOSE SIGHT OF THE FOREST FOR THE TREES. THIS TRIAL WAS REMARKABLY PERVADED BY THE THEME OF RACE AND EVEN RACIAL TENSION BETWEEN WHITE PEOPLE AND BLACK PEOPLE, AND MR. MYERS

BEGAN DEHUMANIZING MR. BENNETT IN HIS OPENING STATEMENT WHEN HE SAID HE WAS BRUTAL MONSTER SIZE, THAT HE HAD DISRESPECT FOR GOOD OLD HUMAN NATURE. HE CALLED HIM A BEAR TWO DIFFERENT TIMES, AND THEN HE IMPLIED TO THE JURY THAT THEY SHOULD BE AFRAID OF BEING IN THE SAME COURTROOM AS MR. BENNETT.

AND THEN IN HIS CLOSING ARGUMENT MR. MYERS TOOK IT UP A NOTCH, AND IN ADDITION TO USING THE INFLAMMATORY LANGUAGE OF HIS OPENING STATEMENT AND THE DEHUMANIZING LANGUAGE, HE BEGAN TO USE SOME REFERENCES THAT WERE TINGED WITH RACIAL CONNOTATIONS: MOUNTAIN MAN, TIGER, CAVEMAN, MONSTER, KING KONG AND I THINK MOST EGREGIOUSLY BEAST OF BURDEN. AND THE EVIDENCE BETWEEN THAT OPENING STATEMENT AND THAT CLOSING ARGUMENT WAS FILLED WITH CONSTANT AND CONSISTENT REFERENCES TO RACE.

WE HAVE JAMES HARRIS WHO IS A LEXINGTON COUNTY JAILER WHO TESTIFIED THAT WHEN A WHITE -- A NEWCOMER, A WHITE INMATE, CAME INTO THE LEXINGTON COUNTY, IF HE USED THE RACIAL EPITHET TOWARDS A BLACK FEMALE OFFICER, THAT WHITE INMATE WAS PLACED IN THE CELL WITH MR. BENNETT, AND THOSE OFFICERS EXPECTED MR. BENNETT TO STRAIGHTEN THAT INMATE OUT. AND THEN YOU HAVE THE TESTIMONY OF SANDRA KEY WHO WAS A SOUTH CAROLINA DEPARTMENT OF CORRECTIONS OFFICER, AND SHE WAS TESTIFYING ABOUT AN INCIDENT IN WHICH SHE ALLEGED MR. BENNETT AND SOME OTHER INMATES INTERFERED WITH HER ABILITY TO CONDUCT HER

ROUTINE CHECKS ON ALL THE INMATES. SHE SAID THAT SHE LATER INVESTIGATED AND FOUND THAT THERE WAS A FIGHT BETWEEN BLACK INMATES AND WHITE INMATES.

AT THIS POINT TRIAL COUNSEL OBJECTED, AS THEY HAD BEFORE AND AS THEY DID AFTER, TO THE CONSTANT REFERENCE TO RACE. AND ON THE NEXT VERY QUESTION OR SO MS. KEY, OFFICER KEY, SAID, "I KNOW HE DOESN'T WANT ME TO SAY WHITE, BUT THE INMATE WITH BRUISES ON HIS FACE WAS WHITE."

AND THEN MOST SPECIFICALLY WE HAVE THE EVIDENCE OF THE ASSAULT IN THE PARKING LOT OF THE PIZZA HUT RESTAURANT, AND, OF COURSE, THAT INCIDENT INVOLVED MR. BENNETT, A BLACK MALE, AND THE TWO VICTIMS WERE BOTH WHITE. THAT POINT WAS BROUGHT OUT NUMEROUS TIMES AS SET OUT IN OUR POST-HEARING MEMORANDUM BY THE WITNESSES WHO JUST SIMPLY REFERRED TO MR. BENNETT AS THE BLACK MALE AND THE TWO VICTIMS AS WHITE MALES.

AND THEN IN ADDITION TO THAT, MR. MYERS THE SECOND TIME AT THE SECOND TRIAL SPECIFICALLY ELICITED FROM SHANNON GILBERT, ONE OF THE VICTIMS OF THAT ASSAULT -- SPECIFICALLY ELICITED TESTIMONY ABOUT A DREAM HE HAD IN THE HOSPITAL, AND IN THIS DREAM HE SAID HE WAS BEING CHASED BY INDIANS. MR. GILBERT THEN SAID, "BUT IT WAS STRANGE BECAUSE IT WAS BLACK INDIANS, AND I THOUGHT IT MIGHT HAVE SOMETHING TO DO WITH THIS INCIDENT."

AND THIS ISSUE OF RACE PERVADING THIS TRIAL IS NOT THE RESULT OF THE 20/20 HINDSIGHT THAT POST-CONVICTION COUNSEL IS

SOMETIMES ACCUSED OF WALTZING INTO THE COURTROOM WITH. MR. FLOYD AND MR. YOUNG AT THE TIME OF THE TRIAL WERE CONCERNED ABOUT IT, AND, IN FACT, MR. FLOYD WAS SO CONCERNED ABOUT IT BEFORE OPENING STATEMENTS THAT HE ASKED FOR PERMISSION PURSUANT TO TURNER VERSUS MURRAY TO QUESTION THE JURORS, TO UNCOVER OR EXPOSE ANY POTENTIAL RACIAL BIAS, AND THE STATE OBJECTED AND THE JUDGE DENIED THAT REQUEST. BUT THEY WERE BOTH CONCERNED ABOUT IT AND OBJECTED THROUGHOUT THE TRIAL. SO THIS ISN'T SOMETHING THAT WE'VE MADE UP BY PIECING TOGETHER OUT-OF-CONTEXT COMMENTS OR ARGUMENTS FROM THE TRANSCRIPT.

AND UNFORTUNATELY FOR MR. BENNETT, THERE WAS A RECEPTIVE AUDIENCE MEMBER TO THIS THEME OF RACE AND THE ARGUMENTS OF MR. MYERS, AND THAT WAS ADAM HUMPHREY, THE JUROR, AND WE'VE GOT TWO ISSUES: THE FACTUAL ISSUE AND THE LEGAL ISSUE. AND THE FACTUAL ISSUE IS: WAS HE BIASED AT THE TIME OF THE RESENTENCING? AND I HAVE TO SAY THAT I WAS NOT EXPECTING THE ARGUMENT FROM THE STATE THAT HE WAS NOT BIASED AT THE TIME OF THE RESENTENCING BECAUSE I THINK BY THE TIME WE LEFT THAT HEARING IT WAS CLEAR THAT HE WAS BIASED AT THE TIME HE WAS ON THE JURY.

BUT BEFORE WE GET TO THE ACTUAL QUESTION I POSED ON HIS SCREEN PORCH IN 2007 AND HIS ANSWER, WE'VE GOT TO PUT THAT QUESTION INTO CONTEXT. I WAS ONLY ASKING HIM ABOUT HIS EXPERIENCES AS A JUROR BECAUSE MR. SALTER AND I COULD

PROBABLY AGREE THAT WHAT HE THINKS SEVEN, FIVE, EIGHT, NINE YEARS LATER IS PROBABLY NOT ALL THAT RELEVANT. THAT'S WHY I WASN'T ASKING HIM WHAT HE THOUGHT IN 2007. THAT'S WHY I WAS ASKING HIM WHAT HE THOUGHT AS A JUROR, AND WE KNOW THAT BECAUSE HE SAID THAT THE TYPES OF QUESTIONS I ASKED HIM WERE ABOUT HIS, QUOTE, EXPERIENCES AS A JUROR ON PAGE 8 OF HIS TESTIMONY. AND ON THEN ON PAGE 12 WHEN MR. SALTER WAS CROSS-EXAMINING HIM ABOUT THE TYPES OF QUESTIONS I WAS ASKING HIM, HE SAID, QUOTE, "JUST BASICALLY WHAT HAPPENED, YOU KNOW, AS A JUROR." AND THEN HE AGREED WITH MR. SALTER'S CHARACTERIZATION THAT I WAS ASKING HIM, QUOTE, "LIKE HOW Y'ALL DELIBERATED AND THAT KIND OF THING."

SO THAT PUTS INTO CONTEXT THE ACTUAL QUESTION THAT I ASKED HIM, AND IF THERE'S ANY AMBIGUITY, IT'S BECAUSE WE WERE TALKING IN 2008 AND NOW IN 2009 ABOUT WHAT I ASKED HIM IN 2007, BUT WE HAVE TO PUT OURSELVES ON THAT SCREEN PORCH IN 2007. AND I SAID, "WHY DID YOU THINK THAT MR. BENNETT HAD KILLED THE VICTIM?" NOT, "WHY DO YOU THINK?" "WHY DID YOU THINK?" AND HIS ANSWER WAS, "BECAUSE HE WAS JUST A DUMB NIGGER."

NOW, IF THAT WASN'T CLEAR ENOUGH, MR. HUMPHREY CLARIFIED HIS REMARKS ON PAGES 9 AND 10 OF HIS TESTIMONY WHEN HE SAID, "AFTER GOING THROUGH THAT THING FOR AN ENTIRE WEEK," MEANING THE TRIAL, "AND ALL THE EVIDENCE PILING UP AGAINST HIM, THAT WAS JUST THE WAY I FELT ABOUT IT." THAT'S CLEARLY TYING HIS

RACIALLY-PREJUDICED VIEW OF MR. BENNETT TO THE TIME HE WAS SITTING ON THE JURY.

HE USED THE WORD PILING. THAT -- THE TENSE OF THAT VERB IS TAKING HIM BACK TO THE TIME WHEN HE WAS SITTING ON THE JURY. HE DIDN'T SAY, "AFTER SITTING THROUGH THAT CASE FOR A WEEK AND AFTER ALL THE EVIDENCE HAD PILED UP AGAINST HIM AND THEN AFTER SEVEN YEARS OF THINKING ABOUT IT EVERY DAY AND ALL OF A SUDDEN MAINTAINING RACIALLY-PREJUDICED VIEWS, NOW THAT'S THE WAY I THINK ABOUT IT IN 2007 BUT NOT THE WAY I THOUGHT ABOUT IT IN 2000 WHEN I WAS ON THE JURY."

AND THEN ON PAGE 16 OF HIS TESTIMONY, I SPECIFICALLY SAID TO HIM, "NOW, WE'RE TALKING ABOUT THIS CHARACTERIZATION OF MR. BENNETT AT THE TIME OF THE RESENTENCING," AND HE HEMMED AND HAWED FOR A MINUTE BECAUSE HE WAS APOLOGIZING FOR USING THE N. WORD, FOR SAYING IT, NOT FOR BELIEVING IT BUT FOR SAYING IT. AND THEN HE SAID, "BUT THAT'S JUST THE WAY I FELT ABOUT IT."

MR. HUMPHREY HAD EVERY OPPORTUNITY TO SAY, "WAIT A MINUTE. I DIDN'T THINK THAT THEN. I JUST THINK THAT NOW BECAUSE AFTER THE TRIAL I BEGAN TO USE THIS WORD AND BEGAN TO BELIEVE THAT BLACK PEOPLE WERE LESS FOR SOME REASON." HE HAD AMPLE OPPORTUNITY, AND, IN FACT, MR. HUMPHREY KNEW WHAT HE HAD SAID TO ME WAS A PROBLEM BECAUSE IF YOU RECALL IN HIS TESTIMONY HE SAID THAT THE LIGHT BULB WENT OFF AFTER I LEFT, AND HE ALL OF A SUDDEN PUT IT TOGETHER WHO I WAS AND WHAT I

WAS DOING AFTER WE'D HAD A 30 OR 45-MINUTE CONVERSATION, AND HE WISHED THAT HE HADN'T SAID IT. HE NEVER SAID, "I WISH I HADN'T BELIEVED IT OR THOUGHT IT," BUT HE WISHED HE HADN'T SAID IT BECAUSE EVEN THEN MR. HUMPHREY RECOGNIZED THAT IT WAS UNFAIR FOR HIM TO BE ON THAT JURY BELIEVING WHAT HE DID ABOUT MR. BENNETT.

THE JUROR NEVER INDICATED THAT HIS RACIALLY-BIASED VIEW OF MR. BENNETT WAS OF RECENT VINTAGE. EVERYTHING HE SAID INDICATED THAT HE BELIEVED IT AT THE TIME HE WAS ON THE JURY. AND SO THEN WE GET TO THE LEGAL ISSUE AND THAT IS: SO WHAT? ALL RIGHT. WHAT DO WE DO? WHAT'S THE STANDARD? AND THE UNITED STATES SUPREME COURT IN GRAY AND IN ROSE VERSUS CLARKE, GRAY VERSUS MISSISSIPPI HAVE MADE IT CLEAR. IN GRAY VERSUS MISSISSIPPI THEY SAY THE ERROR -- BECAUSE THE IMPARTIALITY OF THE ADJUDICATOR GOES TO THE VERY INTEGRITY OF THE LEGAL SYSTEM, HARMLESS ERROR CANNOT APPLY.

WHAT THE COURT IS SAYING THAT THE RIGHT TO AN IMPARTIAL JURY IS SO FUNDAMENTAL THAT YOU CAN'T HAVE A PARTIAL JUROR BUT THEN SAY THERE'S A LOT OF EVIDENCE AND, THEREFORE, IT WAS HARMLESS. IT'S TOO IMPORTANT AND TOO FUNDAMENTAL A RIGHT TO APPLY THE HARMLESS ERROR ANALYSIS. AND IN THE STATE CASES WE CITED, THEY'VE DECIDED THE SAME THING. STATE VERSUS PHILLIPS, A COPY OF WHICH WE BROUGHT IN FOR THE COURT, STATE VERSUS SANTIAGO, AND NEW MEXICO VERSUS MANN HAVE ALL SAID THE SAME THING, AND THAT IS: RACIAL PREJUDICE ON THE PART OF A

JUROR IS THE PREJUDICE ITSELF. THAT IS ALL THAT MUST BE ESTABLISHED TO WARRANT RELIEF.

AND IN STATE VERSUS PHILLIPS WHAT HAPPENED IS THAT A JUROR USED A RACIAL EPITHET OR SOMEHOW DEMONSTRATED HIMSELF TO BE RACIALLY BIASED IN THE JURY ROOM, AND SO THE COURT THEN HAD A HEARING AND THE COURT FOUND IT TO BE CREDIBLE THAT THAT JUROR WAS RACIALLY BIASED BUT THEN FOUND THAT THE EVIDENCE DIDN'T SHOW THAT THAT RACIAL BIAS IMPACTED THE VERDICT. AND WHAT THE COURT OF APPEALS SAID IN STATE VERSUS PHILLIPS IS: WHOA. YOU STOP AFTER YOU FIND THAT A JUROR MAINTAINS A RACIALLY-BIASED VIEW. YOU DO NOT THEN ASSESS THE DAMAGE ON THE VERDICT OF THAT VIEW, AND THEY SAY IT FOR TWO REASONS: ONE, RULE 606(B) WHICH PROHIBITS A COURT FROM DELVING INTO THE DELIBERATIVE PROCESS OF THE JURY, AND IT PREVENTS PARTIES FROM IMPEACHING A JURY'S VERDICT WITH THAT DELIBERATIVE PROCESS.

BUT, TWO, AND MORE FUNDAMENTALLY, THE COURT SAID WHAT WE ALL KNOW TO BE TRUE AND THAT IS: TO RELY ON A JUROR'S SELF-ASSESSMENT ABOUT WHETHER HIS OR HER RACIAL PREJUDICE IMPACTED THE VERDICT IS JUST NOT TRUSTWORTHY, AND UNITED STATES VERSUS HILLER OUT OF THE ELEVENTH CIRCUIT I THINK SAID IT WELL. "A RACIALLY OR RELIGIOUSLY-BIASED INDIVIDUAL HARBORS CERTAIN NEGATIVE STEREOTYPES WHICH, DESPITE HIS PROTESTATIONS TO THE CONTRARY, MAY WELL PREVENT HIM OR HER FROM MAKING DECISIONS BASED SOLELY ON THE FACTS AND THE LAW THAT OUR JURY SYSTEM

REQUIRES."

AND THEN A HUNDRED YEARS AGO THE UNITED STATES SUPREME COURT RECOGNIZED THIS AS WELL: BIAS OR PREJUDICE IS SUCH AN ELUSIVE CONDITION OF THE MIND, AND IT MIGHT EXIST IN THE MIND OF ONE WHO IS QUITE POSITIVE THAT HE HAD NO BIAS AND SAID THAT HE WAS PERFECTLY ABLE TO DECIDE A QUESTION WHOLLY UNINFLUENCED BY ANYTHING BUT THE EVIDENCE. AND THAT IS WHY IT'S NOT GOOD ENOUGH FOR MR. HUMPHREY TO HARBOR THIS RACIALLY-PREJUDICED VIEW BUT THEN COME INTO THIS COURTROOM AND SAY: IT DIDN'T MATTER; IT DIDN'T AFFECT MY DECISION. THAT DEFIES COMMON SENSE, AND IT DEFIES THE LAW.

NOW, THE ONLY STATE COURT CASE I COULD FIND THAT WAS REMOTELY SIMILAR - AND IT'S NOT ALL THAT SIMILAR, BUT WHAT THE COURT SAID WAS INSTRUCTIVE - WAS STATE VERSUS HUNTER, AND I BELIEVE IT'S A NON-CAPITAL CASE. AND THERE WHAT HAPPENED IS A JUROR WAS IN THE ROOM AND THEY WERE DELIBERATING AND TALKING ABOUT THE EVIDENCE, AND A WITNESS HAD SAID SOMETHING LIKE, "THE BLACK BOYS DIDN'T GET BACK TO WORK." WHEN THIS JUROR WAS RECOUNTING THAT TESTIMONY, RATHER THAN USING BLACK BOYS, SHE SAID -- USED THE N. WORD AND IMMEDIATELY SAID, "OOPS." THEY WENT ON AND FINISHED DELIBERATING, AND THEN LATER ANOTHER JUROR WHO WAS UNHAPPY WITH THAT RACIAL EPITHET BROUGHT IT TO LIGHT.

AND WHAT THE SUPREME COURT SAID -- IT DIDN'T REVERSE THE CONVICTION. THEY DIDN'T GRANT RELIEF. THEY NOTED THAT IT

WAS OBVIOUSLY HIGHLY IMPROPER FOR THE JUROR TO USE THAT REFERENCE, BUT IT SAID THE JUROR WAS NOT REFERRING TO THE DEFENDANT. NOW, THE IMPLICATION IS THAT HAD THE JUROR BEEN REFERRING TO THE DEFENDANT, THE OUTCOME OF THAT APPEAL WOULD HAVE BEEN DIFFERENT. SO WE PROVIDED TO THE COURT THE FACTUAL BASIS FOR FINDING THAT MR. HUMPHREY WAS BIASED AT THE TIME HE WAS ON THE JURY, AND THEN WE PROVIDED THE LEGAL CASES AND THE LEGAL SUPPORT THAT QUITE FRANKLY DEMAND RELIEF, DON'T JUST TELL THIS COURT THAT IT SHOULD GRANT RELIEF.

AND THEN LET'S LOOK AT WHAT THE STATE HAS OFFERED THE COURT IN ITS PROPOSED ORDER. FIRST, THE STATE STARTS OFF WITH THREE PAGES OF A LEGAL DISCUSSION AND AN ARGUMENT THAT WE DIDN'T ESTABLISH THAT MR. HUMPHREY LIED DURING VOIR DIRE. WELL, OF COURSE, WE DIDN'T ESTABLISH THAT; HE WASN'T ASKED ANY QUESTIONS. THE DEFENSE ATTORNEY TRIED TO ASK QUESTIONS AND THE STATE OBJECTED, AND THE JUDGE DENIED THE REQUEST. SO OF COURSE HE DIDN'T LIE TO VOIR DIRE, BUT MORE IMPORTANTLY THAT'S A COMPLETELY IRRELEVANT LEGAL ARGUMENT THAT AFTER THREE PAGES OF SETTING IT OUT EVEN THE STATE THEN GOES ON TO SAY: BUT THAT'S NOT THE ONLY WAY TO ASSESS A SIXTH AMENDMENT JUROR CLAIM. SO WE CAN PUT THE FIRST ARGUMENT THAT THE STATE INCLUDED IN ITS PROPOSED ORDER TO THE SIDE.

THEN -- ALL RIGHT. NOW, THIS IS A SIXTH AMENDMENT CLAIM. THE STATE, I THINK, HAS PROVIDED THE COURT WITH ONE SIXTH AMENDMENT CASE, AND THAT'S STATE VERSUS BRYANT WHICH IS

A STATE CAPITAL CASE. IT HAS ABSOLUTELY NO RELEVANCE TO THE FACTS OF THIS CASE, BUT THE SUPREME COURT DID GRANT RELIEF AND FIND THAT LAW ENFORCEMENT PERSONNEL HAD ATTEMPTED TO INTIMIDATE JUROR MEMBERS BY CONTACTING THEIR FAMILIES, AND IT VACATED THE DEATH SENTENCE, BUT BEYOND THAT, IT HAS I DON'T THINK ANY RELEVANCE.

BUT THE STATE RELIES ON TWO CASES PREDOMINANTLY, AND THAT'S ROWER VERSUS STATE WHICH IS A GEORGIA STATE CASE AND DOBBS VERSUS ZANT WHICH IS AN ELEVENTH CIRCUIT CASE. AND I HAVE TO SAY THAT THE TYPOS IN THE STATE'S PROPOSED ORDER - AND THIS IS AN ORDER THAT THE STATE EXPECTED THIS COURT TO SIGN - THAT THE TYPOS ARE THE LEAST OF THE PROBLEMS. WHAT THE STATE LEFT OUT WHEN IT DISCUSSED THESE TWO CASES I THINK DEMONSTRATES THE TROUBLE THEY HAD IN FINDING CASES THAT SUPPORT THEIR LEGAL ARGUMENT.

IN ROWER VERSUS STATE THE JUROR HAD INDICATED ON HIS QUESTIONNAIRE THAT HE WAS TOO RACIALLY BIASED TO BE ON THE JURY; HE COULDN'T BE FAIR. WELL, WHEN HE WAS WANTED FOR VOIR DIRE, HE ADMITTED THAT HE HAD EXAGGERATED BECAUSE HE WAS TRYING TO GET OFF THE JURY, BUT HE DID SAY -- HE DID PROVIDE EVIDENCE THAT HE BELIEVED IN SOME RACIAL STEREOTYPES. BUT WHAT THE STATE LEFT OUT ABOUT THIS IS, FIRST OF ALL, IT WAS A NON-CAPITAL CASE. SECOND OF ALL, THAT OPINION IS CONSTRUING A STATE JUROR QUALIFICATION STATUTE, BUT THIRD AND MOST IMPORTANTLY, THAT JUROR DID NOT SIT ON THE JURY, AND BECAUSE

THE JUROR DIDN'T SIT ON THE JURY, THE COURT COULDN'T REVIEW THE SIXTH -- A SIXTH AMENDMENT CLAIM. HE WAS STRUCK. AND SO THEY WERE SIMPLY CONSTRUING THE STATE JUROR QUALIFICATION STATUTE.

AND THEN IN DOBBS VERSUS ZANT THIS IS A CASE THAT THE STATE LAYS OUT IN SOME LENGTH AND DETAILS THE FACTS. THEY LEAVE OUT THAT IT WAS, FIRST OF ALL, A FEDERAL HABEAS CASE. THE STANDARD OF REVIEW IS VERY RESTRICTIVE AND MUCH MORE LIMITED THAN THIS COURT IS FACED WITH. BUT, AGAIN, MOST IMPORTANTLY, IT WAS AN EIGHTH AMENDMENT CLAIM, NOT A SIXTH AMENDMENT CLAIM. AND WHY DOES THAT MATTER? WELL, HERE'S WHAT THE CLAIM WAS, AND THE COURT SAID IT. IN DOBBS VERSUS ZANT, HERE'S HOW THE COURT CHARACTERIZES THE DEFENDANT'S CLAIM: "HIS RACIAL PREJUDICE CLAIM ARISES FROM THE FACT THAT HE IS BLACK AND THE VICTIM WAS WHITE." THAT IS THE CLAIM.

DOBBS VERSUS ZANT IS SIMPLY A POST-MCCLESKEY CLAIM. AFTER THE DEATH PENALTY WAS REINSTATED IN GEORGIA, THERE WAS A SLEW OF CHALLENGES TO THE CONSTITUTIONALITY OF THE DEATH PENALTY BECAUSE THEY ARGUED THAT IT OPERATED IN A RACIALLY-DISCRIMINATORY MANNER. AND WHAT MCCLESKEY SAID IS YOU CAN'T JUST USE STATISTICS FROM OTHER CASES TO PROVE THAT IN YOUR CASE THE DEATH PENALTY IS OPERATING THAT WAY. SO ALL MR. DOBBS TRIED TO DO IS BRING GENERAL AND VAGUE EVIDENCE OF RACIAL PREJUDICE TO SHOW THAT THE STATISTICS WERE TRUE FOR HIS CASE AS WELL, AND SO MR. DOBBS, AS SET OUT IN THE STATE'S

BRIEF, TRIED TO SHOW THAT THE JUDGE WAS RACIALLY PREJUDICED BECAUSE HE HAD GROWN UP IN A SEGREGATED WORLD, TRIED TO SHOW THAT THE TRIAL ATTORNEYS WERE RACIALLY PREJUDICED AND THAT THE GENERAL COMMUNITY WAS BIASED.

AND THEN THERE WAS A FOOTNOTE OR A REFERENCE TO SOME DEPOSITIONS OF THE JURORS WHERE IT SAID THAT THEY DEMONSTRATED SOME VAGUE RACIAL PREJUDICE. IT DOESN'T EVEN SET OUT WHAT THEY WERE, BUT THAT'S THE EXTENT OF THE CLAIM. IT'S SIMPLY THAT THE DEATH PENALTY WAS SOUGHT AND IMPOSED ON BLACK DEFENDANTS WHO KILLED WHITE VICTIMS AT A RATE OF TWELVE TIMES OR SOMETHING LIKE THAT MORE THAN THE OPPOSITE. THAT IS A VERY DIFFERENT CLAIM THAN WHAT WE HAVE HERE WHERE AN ACTUAL JUROR WHO SAT ON THE CASE HAD A RACIAL -- RACIALLY-BIASED VIEW AGAINST THE VERY DEFENDANT WHOM THAT JUROR WAS CHARGED WITH SENTENCING.

AND SO, AGAIN, TO RELY ON THAT CASE AND TO GIVE THIS COURT THAT CASE AS SUPPORT FOR ITS LEGAL ARGUMENT I THINK DEMONSTRATES HOW TOUGH IT WAS FOR THE STATE TO COME UP WITH LEGAL CASES THAT SUPPORTED THE PROPOSITION THAT EVEN THOUGH A JUROR CAN HAVE RACIALLY-BIASED VIEWS AGAINST THE CAPITAL DEFENDANT, IT SOMEHOW DOESN'T WARRANT RELIEF. AND, LASTLY, I JUST WANT TO POINT OUT THAT THIS CASE IS WORSE THAN DOBBS VERSUS ZANT. IT'S WORSE THAN ROWER VERSUS STATE, AND IT'S WORSE THAN MOST OF THE CASES FRANKLY THAT WE CITED BECAUSE IN THIS CASE, FIRST OF ALL, IT'S A CAPITAL CASE, AND SO THE

JURORS' DISCRETION IS ALMOST UNFETTERED AFTER THEY FIND THE STATUTORY AGGRAVATING CIRCUMSTANCE WHICH IS DIFFERENT THAN IN THE SETTING OF THE NON-CAPITAL CASE WHERE THEIR DISCRETION IS MUCH MORE GUIDED AND LIMITED, BUT SECONDLY, THE RACIAL BIAS OF MR. HUMPHREY WAS DIRECTED RIGHT AT MR. BENNETT, AND IT WAS THE REASON FOR THE CRIME.

REMEMBER, THE QUESTION WAS, "WHY DID YOU THINK HE KILLED THE VICTIM?" AND HIS ANSWER WAS, "HE WAS JUST A DUMB N. WORD." IT'S IMPOSSIBLE FOR A JUROR THAT HOLDS THAT BELIEF TO THEN SIT AT THE TRIAL AND LISTEN AND CONSIDER AND GIVE WEIGHT TO MITIGATING EVIDENCE THAT MAY EXPLAIN WHY THE MURDER HAPPENED. BUT, LASTLY AND I THINK MOST IMPORTANTLY, IS THAT THE STATE HAS ARGUED THAT WE'VE BEEN UNABLE TO PROVE THAT MR. HUMPHREY BELIEVED THAT MR. BENNETT WAS MORALLY INFERIOR TO WHITE PEOPLE. OF COURSE, NONE OF THOSE CASES THAT WE'VE CITED SET THAT OUT AS A STANDARD. BUT JUST TO BE CLEAR: I AGREE THAT MR. HUMPHREY DID NOT USE THE WORDS MORALLY INFERIOR, BUT LET'S NOT GET TOO FOCUSED ON THE RACIAL EPITHET AND LOSE SIGHT OF WHAT HE SAID BEFORE THAT. HE SAID, "JUST A DUMB."

THE USE OF THE WORD "JUST" EVINCES A BELIEF IN MR. HUMPHREY'S MIND THAT MR. BENNETT IS SOMEHOW LOWER ON THE HUMAN TOTEM POLE THAN OTHER PEOPLE BECAUSE OF HIS RACE, AND THE SIXTH AMENDMENT DOES NOT COUNT WHEN IT'S A JUROR LIKE THAT SENTENCING SOMEONE TO DEATH. AND SO I THINK WE'VE

PROVIDED WITH THE LEGAL AND THE FACTUAL SUPPORT THAT QUITE FRANKLY REQUIRES RELIEF IN THIS CASE, AND I'M HAPPY TO GO ON TO THE NEXT TOPIC. IT MAY BE EASIER FOR MR. SALTER TO RESPOND ONE AT A TIME.

THE COURT: ALL RIGHT. WELL, WE'RE GOING TO BE HERE A LOT LONGER THAN I ANTICIPATED. ANYTHING YOU WANT TO SAY?

MR. SALTER: YOUR HONOR, ASSISTANT ATTORNEY AL SIMON IS GOING TO RESPOND TO THAT ARGUMENT---

THE COURT: ALL RIGHT.

MR. SALTER: ---SINCE HE WROTE THAT PORTION OF THE ORDER, AND THAT ONE DIDN'T HAVE THE TYPOS TO WHICH YOUR HONOR REFERRED.

THE COURT: ALL RIGHT.

MR. SIMON: MAY IT PLEASE THE COURT?

THE COURT: YES, SIR.

MR. SIMON: YOUR HONOR, WE BELIEVE THAT THIS CLAIM BASICALLY FOCUSES ON ONE PRIMARY ISSUE: WHETHER OR NOT THE APPLICANT PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH THAT JUROR HUMPHREY WAS PARTIAL, AND I BRIEFLY OUTLINED, AS THE NOTE REFERRED, WE FIRST GO THROUGH -- I GUESS IF YOU JUST GO TO PAGE 4, STARTING OUT -- STARTING WITH DEALING WITH THE ISSUE OF WHETHER -- OF WHAT YOU LOOK FOR IN TRYING TO DETERMINE IF THERE'S A BIASED JUROR. AND IN FRANKLIN V. ANDERSON THE COURT STATED THAT A BIASED JUROR IN THE USUAL SENSE IS ONE WHO IS PREDISPOSED---

THE COURT: WHAT PAGE ARE YOU ON?

MR. SIMON: WELL, ACTUALLY I MAY HAVE MIS-CITED WHICH PAGE IN THE...

THE COURT: YOU SAID PAGE 4.

MR. SIMON: IT'S PAGE 4 WITH WHAT I HAVE, BUT I'M... I APOLOGIZE, YOUR HONOR.

MR. LOMINACK: JUDGE, WHILE HE'S LOOKING FOR THAT, JUST SO YOU KNOW, THAT IS BY FAR THE LONGEST PRESENTATION THAT WE WILL GIVE, AND THAT WAS IN PART BECAUSE OF THE INTRODUCTION, BUT MY NEXT ARGUMENT IS MUCH SHORTER.

MR. SIMON: I APOLOGIZE, YOUR HONOR. IT'S PAGE 38.

THE COURT: ALL RIGHT.

MR. SIMON: BASICALLY THE STATE SUBMITS THEY HAVE TO PROVE THAT JUROR HUMPHREY WAS BIASED AT THE TIME OF THE TRIAL. THE TESTIMONY THAT HE GAVE AT THE HEARING BACK IN MAY OF LAST YEAR, HE STATED THAT WHEN HE MET WITH MR. LOMINACK AND HIS LAW CLERK THAT HE USED THE N. WORD IN DESCRIBING MR. BENNETT. WE ASSERT THAT THAT IS -- IN AND OF ITSELF IS NOT ENOUGH TO ESTABLISH THAT JUROR HUMPHREY IS BIASED.

IN SUPPORT OF THAT, WE CITE TO ROWER V. STATE, THE GEORGIA COURT OF APPEALS CASE. NOW, THE PROCEDURAL POSITIONING IN THAT CASE WAS DEALING WITH -- THE COURT WAS REVIEWING WHETHER OR NOT THE TRIAL COURT WAS CORRECT IN DENYING THE -- BASICALLY THE DEFENSE WANTED TO MOVE TO STRIKE THE JUROR FOR CAUSE, AND THE TRIAL JUDGE SAID THAT THE JUROR

SHOULD NOT BE STRUCK FOR CAUSE. AND IN DOING SO, IN SAYING THAT THE COURT WAS PROPER IN FINDING THAT THAT JUROR COULDN'T BE STRUCK FOR CAUSE, IF YOU LOOK ON PAGE 40, THE GEORGIA COURT OF APPEALS BASICALLY OUTLINES THE FACT THAT SOMEBODY HAS USED A RACIAL EPITHET IN THE PAST IS NOT IN AND OF ITSELF ENOUGH TO SHOW THAT THAT PERSON SHOULD BE -- IS BIASED AND SHOULD BE DISQUALIFIED. AND ESSENTIALLY IF IT -- IF IT CAN BE FOUND THROUGH FURTHER QUESTIONING THAT THAT PERSON DID NOT HAVE ANY PARTICULAR BIAS THAT THAT WOULD BE SUFFICIENT TO ALLOW THAT PERSON TO SERVE ON THE JURY.

REALLY THIS BOILS DOWN TO WHETHER OR NOT YOU BELIEVE JUROR HUMPHREY WAS BIASED AT THE TIME OF THE RESENTENCING TRIAL, AND ALL THEY'VE PRESENTED IS THE FACT THAT HE USED THE N. WORD ONE TIME IN DESCRIBING HOW HE FELT AT SOME OTHER TIME. THAT'S IT. THERE IS NOTHING THAT THEY'VE -- THEY'VE PRESENTED NOTHING THAT SHOWS THAT HE HAS ACTED IN ANY WAY TOWARDS AFRICAN AMERICANS THAT SHOWS THAT HE BELIEVES THAT THEY ARE INFERIOR TO WHITES, AND THEY HAVEN'T PRESENTED ANY OTHER EVIDENCE. ALL THEY SHOWED IS THAT HE USED THE WORD. WE BELIEVE THAT'S NOT ENOUGH. THAT'S THE CRUX OF OUR ARGUMENT.

THE COURT: ALL RIGHT. ALL RIGHT. MR. LOMINACK, WHAT'S NEXT?

MR. LOMINACK: YOUR HONOR, WE'VE IN OUR POST-HEARING MEMORANDUM PRESENTED A CLAIM ABOUT MR. MYERS' OPENING

STATEMENT AND CLOSING ARGUMENT, AND I THINK FOR THE MOST PART OUR POST MEMORANDUM COVERS IT, ESPECIALLY REGARDING THE INFLAMMATORY LANGUAGE THAT HE USED. I DO WANT TO RESPOND TO ONE ARGUMENT THAT WAS INCLUDED IN THE PROPOSED ORDER, AND THAT IS BASICALLY THE STATE SUPREME COURT DEALT WITH MR. MYERS' USE OF THE WORD KING KONG AND CAVEMAN AND, THEREFORE, THE IMPLICATION IS IT'S KIND OF DEALT WITH THIS ISSUE AS A WHOLE.

I WANT TO POINT OUT TWO THINGS. FIRST OF ALL, THE STATE SUPREME COURT WASN'T PRESENTED WITH THE REST OF THE LANGUAGE: THE MONSTER, TIGER, MOUNTAIN MAN, AND BEAST OF BURDEN. BUT, SECONDLY, THE STATE SUPREME COURT RECOGNIZED THAT THE WORDS COULD HAVE RACIAL CONNOTATIONS BUT SAID THAT THEY WERE OKAY ONLY BECAUSE THEY SPECIFICALLY REFERENCED EVIDENCE AT THE TRIAL. CAVEMAN RESPONDED TO A WITNESS'S DESCRIPTION OF WHAT MR. BENNETT DID IN THAT PARKING LOT. KING KONG WAS SPECIFICALLY REFERRING TO SOMETHING A DEFENSE WITNESS HAD SAID.

SO THEN THE INSTRUCTION FROM THE COURT BASICALLY IS THAT IF IT DOESN'T SPECIFICALLY REFER TO EVIDENCE AT THE TRIAL BUT IS INFLAMMATORY AND HAS RACIAL CONNOTATIONS, THEN YOU'VE GOT A PROBLEM. WELL, THE STATE HAS NOT MADE ANY ARGUMENT ABOUT WHAT EVIDENCE THE WORD BEAST OF BURDEN REFERRED TO.

THE COURT: WELL, MR. LOMINACK, WHAT IS IT THAT'S SUPPOSED TO MAKE ME THINK THAT BEAST OF BURDEN REFERS TO

SOMETHING RACIAL?

MR. LOMINACK: WELL, THE CASES THAT I CITED IN THE POST-HEARING MEMORANDUM BRING OUT THE FACT THAT BEASTS OF BURDENS WERE WHAT SLAVES ARE ASSOCIATED WITH USING AS FARMERS BUT ALSO THAT WHEN THERE WAS A RANKING OF SOCIETY -- ONE OF THOSE CASES GIVES OF RANKING OF SOCIETY, AND SLAVES WERE RIGHT ABOVE BEASTS OF BURDEN, AND BEASTS OF BURDEN WERE CONSIDERED PROPERTY JUST LIKE SLAVES. BUT EVEN IF YOU PUT THAT TO THE SIDE, BEAST OF BURDEN IS A DEHUMANIZING, ANNALISTIC REFERENCE THAT REFERRED TO NO EVIDENCE AT ALL. BEASTS OF BURDENS ARE LOAD-BEARING ANIMALS THAT WERE USED FOR---

THE COURT: IT DOESN'T NECESSARILY HAVE TO BE RACIAL.

MR. LOMINACK: WELL---

THE COURT: I MEAN, YOU KNOW, UNFORTUNATELY IN MANY ARGUMENTS BEFORE JURIES, SOLICITORS AND SOMETIMES DEFENSE ATTORNEYS REFER TO NOT COMPLIMENTARY TERMS IN SPEAKING OF PARTIES. I MEAN, THEY'RE JUST NOT NICE THINGS TO SAY, BUT THAT DOESN'T MAKE THEM RACIAL.

MR. LOMINACK: WELL -- AND THAT'S WHY I DIDN'T SAY IT ABOUT THE OPENING STATEMENT. I MEAN, I THINK THE THINGS THAT HE SAID IN THE OPENING STATEMENT WERE NOT TINGED WITH RACIAL CONNOTATIONS. I WAS CAREFUL NOT TO SAY IT ABOUT THE OPENING STATEMENT, BUT I THINK ONCE YOU GET TO KING KONG AND BEAST OF BURDEN I THINK YOU ARE RUNNING UP AGAINST THE LINE. HE ISN'T GOING TO COME OUT AND SAY THE WORD THAT MR. HUMPHREY SAID.

THE COURT: WELL, I UNDERSTAND THAT. I MEAN...

MR. LOMINACK: AND SO I THINK -- BUT I ALSO WANT TO POINT OUT AND I'M GOING TO HAND UP TO THE COURT -- I THINK -- I HOPE THE COURT WAS PROVIDED WITH THE TRANSCRIPT OF THE FIRST TRIAL WHEN THESE PROCEEDINGS BEGAN, I THINK IT WAS.

THE COURT: I WAS.

MR. LOMINACK: BUT RATHER THAN THE COURT HAVING TO SIFT THROUGH IT TO FIND IT, I GOT THE OPENING STATEMENT AND THE CLOSING ARGUMENT FROM THE FIRST TRIAL. ONE OF THE THINGS I REALIZED: THAT THE FIRST TRIAL WAS NOT AN ALL-WHITE JURY, AND THE SECOND TRIAL WAS NOT AN ALL-WHITE JURY UNTIL THE AFRICAN AMERICAN JUROR HAD BELATEDLY RECOGNIZED A PARTICIPANT. AND THAT'S WHEN MR. FLOYD RECOGNIZED THAT HE WAS REALLY CONCERNED.

WELL, I HAVE TO SAY WHEN I WAS READING THAT, THEN WHY DIDN'T HE JUST ASK, YOU KNOW, IN THE NORMAL COURSE OF VOIR DIRE, OF JURY SELECTION? WELL, AS IT TURNS OUT, WHETHER YOU HAVE AN ALL-WHITE JURY OR NOT SEEMS TO AFFECT WHAT YOU SAY TO THAT JURY, AND I'LL GIVE TO THE COURT THE OPENING STATEMENT AND CLOSING ARGUMENT OF MR. MYERS AT THAT FIRST TRIAL. THERE IS NOT ONE SINGLE - AND I MEAN NOT ONE SINGLE - REFERENCE TO AN ANIMAL---

THE COURT: WELL---

MR. LOMINACK: ---OR ANYTHING ELSE IN THAT FIRST TRIAL.

THE COURT: I MEAN, I DON'T NEED TO HEAR MUCH ON THIS.

I'M MUCH MORE CONCERNED ABOUT YOUR FIRST ARGUMENT.

MR. LOMINACK: ALL RIGHT. I DO WANT TO TOUCH ON ONE PART OF MR. MYERS' CLOSING ARGUMENT THAT'S UNRELATED TO THAT, AND THAT WAS HIS INSINUATION OF HIS PERSONAL OPINION AS TO THE APPROPRIATENESS OF THE DEATH PENALTY. HE SAID, "NOW YOU SEE -- NOW YOU SEE WHY I'M SEEKING THE DEATH PENALTY. IT'S WARRANTED; IT'S APPROPRIATED." AS THE STATE CONCEDED ON PAGE 114 OF THEIR BRIEF, THAT ARGUMENT IS SIMILAR TO THE EXACT ARGUMENT THAT THE STATE SUPREME COURT TWO YEARS FOUND WARRANTED REVERSAL IN STATE VERSUS NORTHCUTT. AND THE STATE CONCEDES THAT BY SAYING THE COURT IN NORTHCUTT PLAINLY STATED THAT THE SIMILAR ARGUMENT WAS AMONG THE THREE ERRORS FOUND AND THAT ANYONE OF THESE MISCUES REQUIRES REVERSAL. THAT FRANKLY SHOULD END THE MATTER ON THAT ARGUMENT.

NOW, THIS IS AN ARGUMENT THAT MR. MYERS HAS BEEN MAKING FOR NOW TWO DECADES, TWO AND HALF DECADES, AND IN STATE VERSUS SMART THE SUPREME COURT REVERSED MR. MYERS FOR A SIMILAR ARGUMENT AND SAID WE'VE ALREADY -- WE'VE ALREADY DISCUSSED THIS ISSUE IN STATE VERSUS WOOMER, BUT THAT CASE WAS DECIDED AFTER YOUR TRIAL IN STATE VERSUS SMART. WE DON'T THINK THAT WE'RE GOING TO HAVE TO DEAL WITH THIS AGAIN, AND THEY REALLY DID SAY THAT IN STATE VERSUS SMART.

WELL, THEY HAVE HAD TO DEAL WITH IT AGAIN, AND THEY DEALT WITH IT AGAIN IN STATE VERSUS NORTHCUTT AND REVERSED OR VACATED THE DEATH SENTENCE. SO AFTER CONCEDING THAT IT'S A

SIMILAR ARGUMENT THAT WARRANTED REVERSAL IN STATE VERSUS NORTHCUTT, WHAT DOES THE STATE THEN DO? THEY SAY THAT WHAT THE NORTHCUTT COURT SAID WAS, QUOTE, UNQUESTIONABLY DICTA. THAT'S THE PRIMARY BASIS THEY PUT IN THE PROPOSED ORDER THEY EXPECTED THIS COURT TO SIGN FOR DENYING THIS RELIEF.

IN STATE VERSUS NORTHCUTT THE COURT HELD THAT THAT CLOSING ARGUMENT WARRANTED REVERSAL. THE STATE'S MISCONCEPTION APPEARS TO BEGIN ON PAGE 112 OF THEIR BRIEF, AND THEY SAY, "IN NORTHCUTT THE STATE REVERSED ON A PLETHORA OF INSTRUCTIONAL AND LEGAL ERRORS." AND THEN THE STATE GOES ON TO SAY: BECAUSE THEY REVERSED ON SO MANY ERRORS, WHAT THEY SAID ABOUT THE CLOSING ARGUMENT WAS DICTA.

THAT'S A REMARKABLE ARGUMENT FOR A NUMBER OF REASONS. ONE, IT'S FACTUALLY NOT TRUE. STATE VERSUS NORTHCUTT DID NOT REVERSE ON A PLETHORA OF ISSUES, AND IT DIDN'T REVERSE ON ANY INSTRUCTIONAL ISSUES. IT REVERSED ON TWO. AND THE CONCLUSION OF STATE VERSUS NORTHCUTT MAKES IT VERY CLEAR AND I QUOTE: "BECAUSE OF THE SOLICITOR'S PREJUDICIAL CLOSING ARGUMENT AND THE INCLUSION OF EVIDENCE OF THE CHILD'S PRIOR LEG INJURY, WE REVERSE APPELLANT'S DEATH SENTENCE." NOW, I'M NOT SURE HOW MUCH CLEARER THE STATE SUPREME COURT COULD HAVE BEEN WHEN THEY ISSUED THAT HOLDING.

BUT, JUDGE, IF THERE WAS ANY DOUBT ABOUT WHETHER WHAT THE NORTHCUTT SAID WAS A HOLDING, IT WAS CLEARED UP IN DECEMBER OF 2008 IN A CASE THAT THE STATE KNOWS ABOUT BECAUSE

THEY RELIED ON IT IN THEIR BRIEF. AND IN WILLIAMS VERSUS OZMINT THE COURT SAID, "IN NORTHCUTT THIS COURT HELD THAT THE SOLICITOR'S INTERJECTION OF EXPECTING THE DEATH PENALTY REQUIRED REVERSAL BECAUSE SUCH COMMENTS IMPOSED THE SOLICITOR'S PERSONAL BELIEFS UPON THE JURY." SO WE KNOW IT WAS A HOLDING, AND FRANKLY FOR THE STATE TO PUT INTO A PROPOSED ORDER THAT THAT WAS, QUOTE, UNQUESTIONABLY DICTA IS REMARKABLE.

IN THE END, THE STATE THEN, AFTER USING THAT LEGAL SLIGHT OF HAND, ASKED THE COURT TO RELY ON WILLIAMS VERSUS OZMINT WHICH WAS DECIDED IN DECEMBER, AND IF YOU LOOK AT WILLIAMS VERSUS OZMINT AND YOU LOOK AT NORTHCUTT THEY DO SAY SOME DIFFERENT THINGS BUT -- BUT WHY? WELL, BECAUSE THE OPINION IN WILLIAMS VERSUS OZMINT WAS DECIDED IN THE STATE SUPREME COURT'S ORIGINAL HABEAS JURISDICTION AND IN NORTHCUTT ON DIRECT APPEAL, AND IN THE OPINION THE COURT GOES OUT OF ITS WAY TO SAY WHAT A HIGH STANDARD A DEFENDANT BEARS IN THE ORIGINAL HABEAS JURISDICTION, AND IT SAYS, "NOTWITHSTANDING THE EXHAUSTION OF APPELLATE REVIEW, HABEAS CORPUS RELIEF REMAINS AVAILABLE, BUT IT IS SELDOM USED AND ACTS AS AN ULTIMATE INSURER OF FUNDAMENTAL CONSTITUTIONAL RIGHTS, AND FOR THESE REASONS A DEFENDANT BEARS A MUCH HIGHER BURDEN IN A HABEAS PROCEEDING."

SO YOU CAN'T JUST SAY THAT THE NORTHCUTT COURT DIDN'T SAY WHAT THEY SAID AND THEN SAY THAT THE COURT SHOULD RELY ON

WILLIAMS VERSUS OZMINT WHICH WAS DECIDED IN A COMPLETELY DIFFERENT CONTEXT. THAT'S WHY I WAS SAYING EARLIER ABOUT DOBBS VERSUS ZANT AND ROWER VERSUS STATE. IT REALLY DOES MATTER WHAT THE CONTEXT OF THE OPINION IS WHEN WE LOOK TO SEE WHAT GUIDES THE DECISION IN THIS CASE.

THE ONLY OTHER ARGUMENT -- AFTER TRYING TO CONVINCE THIS COURT THAT NORTHCUTT WAS JUST DICTA, THE ONLY OTHER ARGUMENT THE STATE MAKES REGARDING THIS ARGUMENT OF MR. MYERS IS THERE WAS NO PREJUDICE BECAUSE THE JUDGE GAVE INSTRUCTIONS AND SO ON. WELL, IN NORTHCUTT THE SAME JUDGE GAVE THE SAME INSTRUCTIONS, AND IN NORTHCUTT AFTER THE STATE CONCEDED THE IMPROPRIETY OF MR. MYERS' CLOSING ARGUMENT, THEY NEVERTHELESS ARGUED THERE WAS NO PREJUDICE BECAUSE THAT CASE INVOLVED THE VIOLENT KILLING OF A FOUR-MONTH-OLD BABY AND A DEFENDANT WHO GOT UP AND ASKED THE JURY TO GIVE HIM THE DEATH PENALTY. AND SO THE STATE SAID: WELL, YOU CAN'T SHOW PREJUDICE; THE DEFENDANT ASKED FOR THE DEATH PENALTY. THE STATE SUPREME COURT SAID, WELL, THERE WAS PREJUDICE.

SO AS TRAGIC AS THIS CASE WAS, I DON'T THINK YOU CAN HOLD IT UP AGAINST NORTHCUTT AND SAY THERE WAS PREJUDICE IN NORTHCUTT BUT NOT IN THIS CASE REGARDING THAT ARGUMENT, THE NORTHCUTT CASE IN ITS HOLDING MADE CLEAR THAT WHILE IT FOUND A LOT OF WHAT MR. MYERS DID TO BE IMPROPER, ANY ONE OF THEM REQUIRED REVERSAL. SO I THINK ON THAT CLAIM AS WELL THE APPLICANT HAS MET ITS BURDEN.

THE COURT: ALL RIGHT. MR. SALTER?

MR. SALTER: YOUR HONOR, I'D LIKE TO PASS UP, IF I MIGHT, SEVERAL CASES THAT WERE NOT CITED IN THE PROPOSED ORDER BUT WHICH WERE CITED IN MY BRIEF OF APPELLANT -- RESPONDENT. EXCUSE ME, JUDGE. THESE ALL GO TO COMMENTS SIMILAR TO THOSE MADE BY THE SOLICITOR IN CLOSING ARGUMENT. I'VE PASSED A COPY TO MR. LOMINACK.

THE COURT: WHICH COMMENTS ARE YOU TALKING ABOUT NOW?

MR. SALTER: IN THOSE CASES -- FOR THE RECORD, THEY ARE -- THOSE CASES ARE CLONTS, C-L-O-N-T-S---

THE COURT: WHAT COMMENTS ARE YOU---

MR. SALTER: ABOUT BEAST, BEING A BEAST OF BURDEN.

THE COURT: I DON'T -- I'M REALLY NOT -- THAT TO ME IS NOT AN ISSUE THAT...

MR. SALTER: ALL RIGHT.

THE COURT: THERE ARE MUCH GREATER ISSUES HERE THAT I WANT TO HEAR FROM YOU ABOUT.

MR. SALTER: YES, SIR, YOUR HONOR.

THE COURT: I WANT TO HEAR ABOUT THE -- WHAT YOU SAY ABOUT THE WILLIAMS AND NORTHCUTT.

MR. SALTER: ALL RIGHT. WELL, IT IS OUR POSITION THAT THEY EXPECT -- THAT THE LANGUAGE FROM THE SUPREME COURT'S DECISION IN NORTHCUTT THAT IT EXPECTS THE DEATH PENALTY OR COMMENTS STANDING ALONE REQUIRED REVERSAL WAS DICTA, AND THAT WAS MADE CLEAR I THINK IN THE WILLIAMS CASE. THEY SAID THAT

-- THESE ARE THE REASONS WHY WE REVERSED. THAT'S WHAT THEY DID. BUT THERE WERE ALL SORTS OF OTHER REASONS FOR REVERSAL OTHER THAN THIS ONE COMMENT. IN THE WILLIAMS CASE -- NOW, MR. WILLIAMS IS CURRENTLY SCHEDULED FOR EXECUTION ON FRIDAY. SO, I MEAN, THE SAME SOLICITOR MADE THE SAME ARGUMENT. THE SAME SOLICITOR MADE THE SAME ARGUMENT IN STATE VERSUS LARRY GENE BELL IN 1990 IN THE LARRY GENE BELL CASE.

SIMILAR ARGUMENTS HAVE BEEN APPROVED IN STATE VERSUS PLATH IN 1979 - I'M SORRY - IN 1979 I BELIEVE IT WAS OR '80, STATE VERSUS PLATH. IT'S 313 SOUTHEAST SECOND AT PAGE 628, AND STATE VERSUS ELMORE FROM 1989. IT IS OUR POSITION THAT UNLIKE THE SITUATION IN NORTHCUTT, HERE THE CASE IS COLLATERAL PROCEEDINGS MUCH LIKE IN WILLIAMS. GRANTED, WILLIAMS WAS IN THE STATE SUPREME COURT'S ORIGINAL JURISDICTION. HOWEVER, THE DEFENDANT - I'M SORRY - THE INMATE IN THE CONTEXT OF A P.C.R. CASE LIKEWISE BEARS THE BURDEN OF PROOF, AND THE STANDARD THAT HE MUST MEET IS A MUCH HIGHER STANDARD THAN THAT FOR REVERSAL ON DIRECT APPEAL WHICH IS THE CONTEXT IN WHICH NORTHCUTT WAS DECIDED.

IN NORTHCUTT ALSO WE HAVE OTHER FACTS THAT AREN'T PRESENT IN THIS CASE. FOR INSTANCE, IT'S DISCUSSED IN THE FOOTNOTE IN THE WILLIAMS OPINION THAT IN NORTHCUTT THE SOLICITOR ENGAGED IN A FUNERAL PROCESSION WITH A BLACK SHROUD OVER THE -- OVER THE VICTIM'S CASKET. THAT DIDN'T HAPPEN HERE. WHEN TAKEN -- PUTTING THE TOTALITY IN CONTEXT, THE

TOTALITY OF HIS ARGUMENT DID NOT MINIMIZE THE JURORS' SENSE OF RESPONSIBILITY FOR THE APPLICANT'S FATE, AND I THINK THAT'S THE SAME AS IT IS IN WILLIAMS.

THE SOLICITOR TOLD JURORS THAT IF THEY DIDN'T FIND THAT THEY HAD PROVED A STATUTORY AGGRAVATING CIRCUMSTANCE THEN TO DISREGARD THE EXISTENCE THEREOF. HE LIKEWISE TOLD JURORS THAT THE TRIAL JUDGE WOULD INSTRUCT THEM, AND THE TRIAL JUDGE SUBSEQUENTLY INSTRUCTED THE JURORS THAT THEY COULD GIVE A MERCY VERDICT.

AGAIN, THE STATE SUPREME COURT HAS UPHELD SIMILAR ARGUMENTS IN OTHER CASES. IS THIS LANGUAGE THE SAME AS IT IS IN NORTHCUTT? YES, BUT IT'S THE SAME AS IT WAS IN THOSE OTHER CASES. THE SAME SOLICITOR IN BELL MAKING THE SAME ARGUMENT. I DON'T HAVE ANYTHING ELSE TO ADD ON THAT PARTICULAR ARGUMENT.

THE COURT: ALL RIGHT.

MR. SALTER: BUT GOING BACK JUST VERY BRIEFLY, ONE THING THAT MR. SIMON DID NOT COMMENT UPON IS IN MR. HUMPHREY'S TESTIMONY MR. HUMPHREY TESTIFIED WHEN ASKED WHETHER OR NOT RACE PLAYED A FACTOR IN HIS -- EITHER IN HIS DELIBERATIONS OR IN HIS DECISION, HE SAID, "NO," AND I THINK THAT'S THE KEY. AGAIN, AS MR. SIMON SAID, THEY JUST CANNOT MEET THEIR BURDEN OF PROOF. WHAT THEY'RE TRYING TO DO IS COME -- THEY'RE TRYING TO TAKE A 2007 CONVERSATION AND BOOTSTRAP THAT INTO HOW HE FELT AT THE TIME OF THE TRIAL IN 2000. THANK YOU.

THE COURT: ALL RIGHT. NEXT.

MR. LOMINACK: YOUR HONOR, CAN I JUST GIVE THE COURT -- I HAD BROUGHT THESE AND JUST DIDN'T GIVE IT TO YOU. THIS IS A COPY OF THE STATE VERSUS NORTHCUTT AND WILLIAMS. YOU DON'T HAVE TO PRINT IT OUT YOURSELF. I THINK WHEN YOU READ THOSE IT WILL BECOME CLEAR THAT THE NORTHCUTT OPINION WAS A HOLDING.

JUST TO THE POINT THAT MR. SALTER JUST MADE, WE DID OBJECT AT THE HEARING TO MR. HUMPHREY PROVIDING THAT SELF-ASSESSMENT FOR THE REASONS THAT I STATED EARLIER BECAUSE I DON'T THINK THAT IT'S RELIABLE TO LET THIS WITNESS TELL THE COURT WHETHER IT IMPACTED HIS DECISION, AND, IN FACT, IF YOU'LL RECALL, THIS WITNESS, AFTER USING THIS EPITHET AND AFTER SAYING HE USED AT OTHER TIMES, TOO, SAID THAT HE WAS ALSO NOT RACIALLY BIASED, AND I THINK THAT GOES TO EXACTLY WHAT THE SUPREME COURT SAID IN CRAWFORD VERSUS UNITED STATES THAT WE CITED IN THE MEMORANDUM.

AND I THINK MR. -- THE STATE HAS SAID IT WELL WHEN THEY SAID: ALL WE'VE PROVEN IS THAT MR. HUMPHREY USED THE N. WORD IN 2007 TO DESCRIBE HOW HE FELT IN 2000. THAT MAY HAVE BEEN A FREUDIAN SLIP, BUT I THINK THAT'S EXACTLY WHAT MR. HUMPHREY WAS DOING IS USING THE N. WORD TO DESCRIBE IN 2007 EXACTLY WHAT HE FELT AND THOUGHT IN 2000. AND THAT'S WHY HE SAID, "AFTER SITTING THROUGH THAT THING FOR THE ENTIRE WEEK AND THE EVIDENCE PILING UP AGAINST HIM, THAT WAS JUST THE WAY I FELT

ABOUT IT."

THE COURT: ALL RIGHT.

MR. ENDERLIN: WHEN DID YOU WANT TO END TOMORROW, JUDGE? I'M JUST KIDDING.

THE COURT: Y'ALL MIGHT END TOMORROW.

MR. ENDERLIN: I MEAN, I DON'T THINK I'LL BE LONG.

THE COURT: GOOD.

MR. ENDERLIN: BUT I PUT A BUNCH OF CASES AND EXHIBITS TOGETHER FOR A COUPLE OF REASONS. ONE, JUST FOR YOUR TOTAL CONVENIENCE BUT TWO---

THE COURT: I MEAN, I JUST -- I REALLY DON'T NEED ARGUMENTS ON EVERYTHING. WHAT I ANTICIPATED HERE WAS EACH OF YOU HAVE AN OPPORTUNITY TO COMMENT ON WHAT THE OTHER ONE HAD TO SAY IN THEIR -- RATHER THAN Y'ALL WRITING REPLY BRIEFS OR REPLY ORDERS OR WHATEVER. I DON'T -- YOU JUST POINT OUT TO ME WHATEVER IT IS YOU WANT ME TO LOOK AT---

MR. ENDERLIN: ALL RIGHT.

THE COURT: ---AND YOU THINK THAT THEY'RE IN ERROR.

MR. ENDERLIN: WELL, AND THE OTHER REASON I PUT THAT TOGETHER IS I WAS KIND OF AFRAID I WAS GOING TO LOSE MY VOICE TODAY, AND I'M JUST NOT FEELING VERY WELL. SO I WAS GOING TO TALK ABOUT TWO QUICK THINGS, AND THAT WAS THE PIZZA HUT BLACK INDIAN COMMENTS OR EVIDENCE THAT WAS DISCUSSED IN THE BENNETT OPINION AND THEN ALSO THE PLAIN-AND-ORDINARY-MEANING INSTRUCTION THAT THE JUDGE GAVE AND THEN THE COMMENTS THAT HE

MADE ON IT, AND THEN WE'LL BE FINISHED. AND I'VE GOT MY OUTLINE OF MY ORAL ARGUMENT IN THERE IN THE BINDER, AND THEN I'VE GOT SEVERAL EXHIBITS THAT I'VE TABBED.

BUT OBVIOUSLY IN THAT PIZZA HUT AND BLACK INDIAN EVIDENCE THERE WERE SEVERAL COMMENTS ON -- WHITE MALES WAS MENTIONED 17 TIMES, BLACK MALES 13 TIMES. THE MOTHERS TESTIFIED ABOUT THESE LATE-NIGHT PHONE CALLS THAT THEY GOT IN DESCRIBING IN GREAT DETAIL THE SONS' TREATMENTS, AND THEN, OF COURSE, THE VICTIM TESTIFIED TO THE DREAMS ABOUT BLACK INDIANS. I WOULD POINT OUT ON EXHIBIT A. THE JUDGE ACTUALLY MADE A FINDING THAT SOLICITOR MYERS DID NOT BRING THAT COMMENT OUT INTENTIONALLY, BUT EXHIBIT B. CLEARLY SHOWS WHERE SOLICITOR MYERS IS SAYING HE'LL BRING OUT THE RELEVANCE AND HE, IN FACT, ASKED HIM DO YOU HAVE ANY DREAMS OR DID YOU HAVE ANY DREAMS. SO IT'S CLEAR HE BROUGHT THAT OUT SPECIFICALLY.

THEN EXHIBIT C. IS SIMPLY STATE VERSUS BENNETT, JUST FOR YOUR CONVENIENCE, BUT IT GOES INTO SEVERAL DETAILED -- AND I THINK THIS IS AGREED UPON, HOW THE SUPREME COURT SPECIFICALLY SAID: THESE ISSUES WERE SIMPLY NOT ARGUED TO US. SO THE 403 ANALYSIS SPECIFICALLY IS BEFORE YOU TO DECIDE BECAUSE IT WAS NOT ARGUED TO THE SUPREME COURT, AND I THINK ARGUABLY THE JUDGE REALLY DIDN'T MAKE A 403 ANALYSIS.

I'VE GOT EXHIBIT D. WHERE HE ACTUALLY TALKS TO THE TRIAL COUNSEL ABOUT THE OBJECTIONS, AND IT'S CLEAR HE'S TALKING ABOUT RELEVANCE, AND THEN YOU CAN GO BACK TO EXHIBIT A. WHICH

IS THE CAPTIONS FROM THE ORDER WHERE HE ACTUALLY MADE HIS ORDER, AND AGAIN HE TALKS ABOUT RELEVANCE. HE NEVER SEEMS TO WEIGH THE PROBATIVE NATURE OF THE BLACK INDIAN COMMENTS AND ALL THE MOTHERS' TESTIMONY AND EVERYTHING ELSE COMPARED TO THE PREJUDICIAL NATURE OF THAT WHICH IT SEEMS CLEAR -- OBVIOUSLY JUSTICE PLEICONES DID. HE WAS CONCERNED WITH THE OVERWHELMING AMOUNT OF THE BRUTALITY AND EVERYTHING ELSE.

NOW, IT SEEMED THAT -- AND PART OF THAT BASIS IS THIS UNFAIR PREJUDICE. DOES IT MEAN THAT THERE'S GOING TO BE AN UNDUE TENDENCY TO SUGGEST A DECISION ON AN IMPROPER BASIS? AND IT'S COMMONLY, THOUGH NOT NECESSARILY, AN EMOTIONAL ONE. I THINK THAT'S OUR MAIN ARGUMENT ON THE 403 ANALYSIS, THAT THE JURY IS GOING TO UNFORTUNATELY LOOK AT THIS CRIME THAT HE COMMITTED IN THE PAST THAT IT SEEMS LIKE HE WASN'T PUNISHED FOR VERY MUCH AND POTENTIALLY GIVE HIM THE DEATH PENALTY FOR THAT CRIME AS OPPOSED TO THE CRIME HE'S ACTUALLY CHARGED -- THAT, YEAH, HE'S ACTUALLY CHARGED WITH.

SO YOU TALKED ABOUT WHAT THE STATE ALLEGED, AND I HAVE IN THERE A COUPLE OF THINGS. NUMBER ONE, THE STATE ARGUED THAT THE ABHAN CONVICTIONS HAD TO BE PROVEN BEYOND A REASONABLE DOUBT. I ACTUALLY MADE A COPY OF THAT. THAT'S PAGE 96 OF THEIR BRIEF. IT'S EXHIBIT E. AND THEY RELIED ON STATE VERSUS RIDDLE FOR THAT ANALYSIS. CLEARLY CHARACTER EVIDENCE IN SENTENCING CRIMES DOES NOT HAVE TO BE PROVEN BEYOND A REASONABLE DOUBT.

I ACTUALLY HAVE ANOTHER DEATH PENALTY CASE WHERE PART OF THE A.G.'S ARGUMENT IS IS THAT BECAUSE THE AGGRAVATORS WERE STIPULATED THAT THERE WAS NO NEED TO PROVE THAT. SO IT'S KIND OF INTERESTING WHEN YOU COMPARE RIDDLE WHICH THEY CITED WHICH WAS PROVING ACTUAL AGGRAVATING CRIMES. IN OTHER WORDS, IT WAS PROVING THE BURGLARY THAT THEY USED AS AN AGGRAVATOR, THE RAPE THAT THEY USED AS AN AGGRAVATOR COMPARED TO THE CHARACTER EVIDENCE WHICH THIS SUPPOSEDLY WAS.

THIS DOESN'T HAVE TO BE PROVED BEYOND A REASONABLE DOUBT. IN FACT, IN STATE VERSUS MIDDLETON WHICH I'VE ATTACHED AS EXHIBIT F. THE SUPREME COURT DENIES THE DEFENSE COUNSEL'S REQUEST TO INSTRUCT THE JURY THAT THIS CHARACTER EVIDENCE SHOULD BE PROVED CLEAR AND -- BY CLEAR AND CONVINCING EVIDENCE. SO THERE'S NO AUTHORITY THAT SAYS YOU HAVE TO PROVE BEYOND A REASONABLE DOUBT CHARACTER EVIDENCE. THERE'S NO AUTHORITY EVEN THAT YOU HAVE TO PROVE IT BY CLEAR AND CONVINCING EVIDENCE. IT'S WIDE OPEN, AND THAT'S NOT -- THAT'S JUST SIMPLY NOT THE CASE. THERE WAS ALSO AN ALLEGATION BY THE STATE, AND I'VE INCLUDED THIS AS EXHIBIT G. WHICH IS---

MR. SALTER: YOUR HONOR, AT THIS TIME I'VE NOT SEEN ANY OF THESE EXHIBITS. I DON'T KNOW WHAT...

MR. ENDERLIN: IT'S RIGHT HERE.

MR. SALTER: THANK YOU. I APOLOGIZE, YOUR HONOR. APPARENTLY WE'VE BEEN PROVIDED, AND I WASN'T AWARE OF IT.

MR. ENDERLIN: SORRY. SO I INCLUDED THIS EXHIBIT G. AS STATE'S PAGE 95, AND THE STATE ALLEGED THAT SHANNON - THAT'S THE VICTIM IN THE PIZZA HUT INCIDENCE - TESTIMONY CONSTITUTED SOME PROOF OF THE IDENTITY OF HIS ATTACKER WHILE IN REALITY SOLICITOR MYERS ASKED HIM, "DO YOU REMEMBER HIM FROM THE NIGHT AT THE PIZZA HUT?" AND THE ANSWER WAS, "NO," AND I INCLUDED THE TRANSCRIPT THERE. SO IT'S OBVIOUSLY, TOO -- THE VICTIM DIDN'T EVEN KNOW WHO THE GUY WAS, SO IT WASN'T FOR IDENTITY PURPOSES.

THE COURT: TALK TO ME ABOUT THE CHARGE ON THE---

MR. ENDERLIN: PLAIN AND ORDINARY MEANING?

THE COURT: PLAIN AND ORDINARY.

MR. ENDERLIN: I JUST TURNED MY PAGE FROM -- SO THAT'S WHERE I WAS GOING. FIRST OF ALL, WE POINT OUT THAT THERE WERE A COUPLE OF THINGS. JODY GALLMAN WAS A PAROLE AGENT TALKING ABOUT -- SO PAROLE WAS OBVIOUSLY IN THE MIND OF THESE JURORS. NOW, THE JUDGE GAVE THE PLAIN-AND-ORDINARY-MEANING CHARGE IN THE REGULAR INSTRUCTION. I HAVE THAT INCLUDED AS EXHIBIT J. SO HE GAVE THE MEANING, BUT STILL THEY CAME BACK WITH THE QUESTION, AND THE QUESTION WAS: IF WE DECIDE LIFE IMPRISONMENT, DOES THIS MEAN LIFE WITHOUT PAROLE? AND THE REST OF THE QUESTION. AND THEN OBVIOUSLY THE JUDGE GAVE THAT INSTRUCTION, AND ACTUALLY SPECIFICALLY MR. FLOYD SAID, "ALL I WANT IS THE NORRIS CHARGE."

WELL, THE A.G. ARGUED IN GREAT DETAIL HOW MR. BENNETT

WAS NOT ENTITLED TO A PAROLE ELIGIBILITY INSTRUCTION, AND I BELIEVE THEY CITED A NUMBER OF CASES, BUT REGARDLESS, THE STATE IS ABSOLUTELY RIGHT: HE IS NOT ENTITLED TO A PAROLE ELIGIBILITY CHARGE. MR. FLOYD DIDN'T WANT THE PAROLE ELIGIBILITY CHARGE.

OUR SUPREME COURT HAS BEEN ADAMANT ABOUT THE FACT THAT THE JURY IS NOT TO CONSIDER PAROLE, BUT MORE IMPORTANTLY, YOU JUST DON'T GET A PAROLE ELIGIBILITY INSTRUCTION. MR. FLOYD KNEW THAT. HE DIDN'T WANT ONE. HE JUST WANTED THAT PLAIN-AND-ORDINARY-MEANING ISSUE.

THE COURT: ALL RIGHT. YOU'RE CONCERNED ABOUT OR WITH THE OTHER COMMENTS THAT HE MADE WHEN HE WAS GIVING HIS PLAIN AND -- ABOUT THERE ARE OTHER FACTORS.

MR. ENDERLIN: ABSOLUTELY, AND I'VE INCLUDED THAT AS EXHIBIT K., THE TRANSCRIPT, IN WHICH HE SAYS, "LET ME TELL YOU THAT THE ONLY THING I'M ALLOWED TO COMMENT ON THAT," WHICH OBVIOUSLY HE'S SETTING UP HIS COMMENTS TO THE JURY THAT HE'S NOT ALLOWED TO COMMENT TO MUCH, "AND YOU UNDERSTAND THAT THERE ARE ALL SORTS OF VARIETIES IN THIS THING," AND, JUDGE, WHEN YOU LOOK AT VARIETIES, YOU KNOW, VARIETIES OF WHAT? VARIETIES OF---

THE COURT: WELL, I UNDERSTAND.

MR. ENDERLIN: I MEAN, SO OBVIOUSLY HE'S TALKING ABOUT PAROLE.

THE COURT: I NEVER DID FIGURE OUT WHY HE EVEN WENT INTO

THAT.

MR. ENDERLIN: WELL, AND SO I DON'T -- WE DON'T UNDERSTAND EITHER, BUT IT'S OBVIOUSLY PUTTING PAROLE -- THE IDEA OF PAROLE OUT THERE TO THE JURY. NOW, THE STATE SAID FOR ONE THING, TOO, ON PAGE 71 OF THEIR BRIEF -- I'VE INCLUDED THAT AS EXHIBIT M.C. THEY SEEM TO MAKE THE ARGUMENT CITING DRAYTON AND HYMAN THAT THIS ISSUE IS BARRED IN P.C.R., BUT OBVIOUSLY - AND I THOUGHT THIS WAS ASSUMED - THAT INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL, WHICH WE ALSO ALLEGE, IS FAIR GAME IN P.C.R. THAT'S WHAT WE'RE ALLEGING HERE, THAT EITHER HE COULD HAVE OBJECTED TO THAT -- AND I'M NOT SO SURE IT EVEN GOES THAT FAR BECAUSE I THINK ONCE THIS LANGUAGE IS OUT, MR. FLOYD PROBABLY NEEDED TO ASK FOR A MISTRIAL.

I DON'T SEE HOW THE JUDGE COULD GO BACK AND SAY, "WELL, I KNOW I TOLD YOU THERE ARE VARIETIES OF PAROLE, BUT YOU CAN'T CONSIDER PAROLE." IT SEEMS CLEAR HE'S PUTTING THAT OUT THERE, BUT REGARDLESS, WE THINK THAT CLEARLY IT WAS A MISTAKEN COMMENT BUT ALSO THAT IT'S PROTECTED AND THAT WE CAN ARGUE THESE ISSUES.

THE STATE ALSO MENTIONED ON PAGE 69 OF THEIR PROPOSED ORDER - I HAVE THAT AS EXHIBIT O. - THE PART WHERE SOLICITOR MYERS SAYS, "THE JURY WAS SHAKING THEIR HEADS, SO THEY OBVIOUSLY UNDERSTOOD YOU." WELL, FIRST OF ALL, I THINK IT'S A -- I JUST DON'T THINK WE CAN GO TO THE POINT WHERE

ATTORNEYS CAN GIVE THE OPINION OF WHAT JURIES THOUGHT AFTER AN INSTRUCTION. THE JUDGE MADE SOME COMMENTS ON THAT, TOO. I THINK THAT'S A VERY DANGEROUS AREA. BUT, NUMBER TWO, THEY WERE SHAKING THEIR HEADS WHEN THE JUDGE -- WHAT HE WAS EXPLAINING WAS ABOUT THE SECOND QUESTION, ABOUT APPELLATE ISSUES THAT THEY CAN'T UNDERSTAND THAT. UNFORTUNATELY IN THIS CASE, THE JUDGE NEVER INSTRUCTED THEM THAT YOU CANNOT CONSIDER PAROLE. HE SAID THERE ARE VARIETIES OF IT. I CAN'T REALLY GET INTO IT DIRECTLY. I KNOW THIS PLAIN AND ORDINARY MEANING IS GENERAL, BUT YOU HAVE TO SORT OF TAKE IT INTO ACCOUNT, AND THEN HE GAVE THEM THE PLAIN AND ORDINARY MEANING. SO HE NEVER TOLD THEM: YOU CANNOT CONSIDER PAROLE.

AND THEN I BELIEVE THE STATE CITED ONE OTHER CASE THAT WAS IN THAT WAY WHICH I THINK DIFFERENTIATES THAT, THAT IF THE -- IF THE JUDGE WOULD HAVE SAID AFTER THAT, "YOU CAN'T CONSIDER PAROLE," THAT MAY HAVE HELPED LESSEN THE CHARGE. I DON'T KNOW. WE THINK IT'S PRETTY BAD ANYWAY, BUT OBVIOUSLY THE PLAIN AND ORDINARY MEANING COULDN'T DO ENOUGH. HE'D ALREADY TOLD THE JURY THAT VARIETIES ARE OUT THERE. HE DIDN'T TELL THEM THEY COULDN'T CONSIDER IT. HE JUST TOLD THEM THE PLAIN-AND-ORDINARY-MEANING INSTRUCTION WAS GENERAL, BUT YOU HAVE TO SORT OF TAKE IT INTO ACCOUNT. WE FEEL LIKE THAT'S NOT ENOUGH. DID THAT ANSWER YOUR QUESTIONS OR...

THE COURT: YOU DID. ALL RIGHT. Y'ALL GIVE ME ABOUT TWO MINUTES. I NEED TO SPEAK TO JUDGE COOPER ABOUT

SOMETHING.

(PAUSE IN PROCEEDINGS.)

THE COURT: SORRY ABOUT THAT. Y'ALL KEEP YOUR SEATS. ALL RIGHT. MR. SALTER?

MR. SALTER: THANK YOU, YOUR HONOR. JUST FOR THE RECORD, THE PORTION OF THE TRIAL JUDGE'S PLAIN-AND-ORDINARY-MEANING INSTRUCTION WAS CHALLENGED ON APPEAL IN COLLATERAL PROCEEDINGS AS SET FORTH ON PAGES 2144 THROUGH 2145, FOR THE RECORD. THE TRIAL JUDGE DID BEGIN BY SAYING, "LET ME TELL YOU THAT THE ONLY THING I'M ALLOWED TO COMMENT ON AND YOU UNDERSTAND 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 HE GOES ON AND HE GIVES THE PLAIN-AND-ORDINARY-MEANING INSTRUCTION.

THEN ON PAGE 2147 THERE'S A DISCUSSION BETWEEN THE TRIAL JUDGE AND THE STATE, AND IT IS OUR CONSTRUCTION OF THE RECORD THAT THE TRIAL JUDGE MADE A FINDING THAT THE JURY HAD, IN FACT, UNDERSTOOD HIS INSTRUCTION WHICH WAS SIMILAR TO THE PLAIN-AND-ORDINARY-MEANING INSTRUCTION WHICH HE HAD PREVIOUSLY GIVEN. WE TAKE THE POSITION THAT COUNSEL'S OBJECTION TO THE VARIETIES OF THE PAROLE WAS SUFFICIENT TO PRESERVE AN -- PRESERVE THE MATTER FOR REVIEW ON APPEAL, BUT NEITHER TRIAL COUNSEL NOR APPELLATE COUNSEL WERE EITHER DEFICIENT OR THE DEFENDANT PREJUDICED BY COUNSEL'S

PERFORMANCE BECAUSE THE CHARGE GIVEN WAS APPROPRIATE.

THE BOTTOM LINE IS: OUR POSITION IS THAT THE REMARKS AT ISSUE WERE PRECATORY. IT WAS OBVIOUS THE JURY WAS SPECULATING, AND THE JUDGE WANTED TO STOP THAT SPECULATION. HE SAID, "ALL RIGHT. OKAY. SO, FINE. YOU HAVE SPECULATION, BUT HERE'S WHAT YOU MUST FOLLOW." THE JURY HAD PREVIOUSLY BEEN INSTRUCTED THAT THEY -- TO FOLLOW THE LAW, AND THEY'D ALL AGREED THAT THEY COULD FOLLOW THE LAW AS CHARGED BY THE JUDGE AND DISREGARD ANY VIEW THAT THEY MAY HAVE TO THE CONTRARY WHAT THE LAW SHOULD BE. WE SUBMIT THAT'S SUFFICIENT WHEN VIEWED AS A WHOLE AND, THEREFORE, THE APPLICANT'S CLAIM FAILS ON THE MERITS.

THE CHARGE THAT WAS GIVEN DID NOT CONTAIN THE PORTION OF THE CHARGE THAT WAS IN SIMMONS THAT WAS ATTACKED IN SIMMONS BY JUSTICE BLACKMUN THAT PAROLE IS NOT FOR THEIR CONSIDERATION. IT WAS JUSTICE BLACKMUN'S OPINION THAT THAT PORTION OF THE CHARGE INVITED SPECULATION, AND I THINK THAT THE PLAIN-AND-ORDINARY-MEANING INSTRUCTION WAS SUFFICIENT HERE AND THAT THERE WAS -- THERE WAS NO ERROR.

NOW, WITH RESPECT TO THE SOLICITOR'S -- I'M SORRY. WITH RESPECT TO THE PIZZA HUT EVIDENCE, IT IS OUR POSITION THAT THE STATE LAW HAS LONG RECOGNIZED THAT SIMILAR INFORMATION CAN COME IN. IN FACT, THE COURT HAS CONSISTENTLY HELD THAT EVIDENCE OF OTHER CRIMES IS ADMISSIBLE AT A SENTENCING PHASE IN A CAPITAL TRIAL, INCLUDING PHOTOGRAPHS OF THE VICTIM. ONE

OF THE CASES I CITE IS STATE VERSUS RAY. NOW, IN RAY THE EVIDENCE OF THE OTHER CRIMES INCLUDE GORY PHOTOGRAPHS OF THE VICTIM. THE COURT SAID IT WAS ADMISSIBLE AT SENTENCING. WELL, I'M NOT SURE IF IT COMES THROUGH IN THE OPINION IN RAY, BUT AS AN OFFICER OF THE COURT, I CAN TELL YOU SINCE I REPRESENTED THE STATE ON APPEAL THAT WHAT HAPPENED WAS THERE WAS A PRIOR ASSAULT AND BATTERY WITH INTENT TO KILL AND THERE WAS AN ARMED ROBBERY INVOLVING THE SAME PERSON.

THAT PERSON WAS BEATEN. HIS EAR WAS BITTEN OFF. THERE WAS -- THIS DOES COME OUT IN THE OPINION. THE DEFENDANT BIT THE EAR OFF AND KEPT PART OF THE EAR AS A TROPHY. THOSE PHOTOGRAPHS OF THAT VICTIM WERE INTRODUCED IN THE PENALTY PHASE OF RAY.

SIMILAR EVIDENCE WAS INTRODUCED IN THE GASKINS CASE WHERE EVIDENCE OF THE PRIOR MURDERS CAME IN AS WELL AS THE PHOTOGRAPHS OF THOSE PRIOR MURDERS, AND AGAIN IN STATE VERSUS BELL SIMILAR EVIDENCE WAS INTRODUCED IN THE SENTENCING PHASE. WE WOULD SUBMIT THAT THE EVIDENCE OF THE ABHANS WAS, THEREFORE, ADMISSIBLE UNDER THIS PRIOR PRECEDENT OF SIMILAR CRIMES FOR THAT WHICH HE IS ON TRIAL BECAUSE IT SHOWS A PREDISPOSITION TO COMMIT THOSE KIND OF CRIMES.

ALSO, THIS EVIDENCE, ALONG WITH EVIDENCE WHILE HE'S INCARCERATED, SHOWED HIS EXTREMELY VIOLENT NATURE AND FUTURE DANGEROUSNESS. THERE WAS A LIMITING INSTRUCTION ON PAGES 2123 THROUGH 2124 WHERE THE JURY WAS REQUIRED TO FIND THAT

THE STATE HAD PROVED THE EXISTENCE OF THIS EVIDENCE OF BAD CHARACTER BEYOND A REASONABLE DOUBT BEFORE IT COULD BE CONSIDERED. THE JURY -- THE INSTRUCTION ALSO PRECLUDED JURORS FROM RELYING ON THE EVIDENCE OF THESE OTHER CRIMES TO PROVE THE STATUTORY AGGRAVATING CIRCUMSTANCES, AND THEY WERE TOLD THEY COULD GIVE WHATEVER WEIGHT THEY WANTED TO TO THAT EVIDENCE.

THE EVIDENCE OF SHANNON'S TESTIMONY WAS EVIDENCE OF SHOWING SOME CULPABILITY ON THE PART OF THE DEFENDANT WHEN PUT TOGETHER WITH EVIDENCE OF THE EYEWITNESSES WHO WERE THERE. THE FACT THAT THE VICTIMS WERE WHITE IN THIS CASE DOESN'T MAKE THIS A DUE PROCESS VIOLATION. IF YOU FOLLOW THE REASONING THAT'S MADE BY -- MADE BY THE APPLICANT'S COUNSEL, WE COULD NEVER PROSECUTE HATE CRIMES. WE DO THAT -- AND WE DO THAT ALL THE TIME AND RIGHTFULLY SO.

THE EVIDENCE -- THIS EVIDENCE IS HIGHLY PROBATIVE OF MALICE ON THE PART OF THE DEFENDANT. IT SHOWS HIS FUTURE DANGEROUSNESS AND HIS VIOLENT CHARACTER. AND THE TRUE PREJUDICIAL NATURE OF THE EVIDENCE WASN'T THAT THE VICTIMS WERE WHITE. IT WAS THAT THE BRUTALLY -- THAT THIS WAS SUCH A BRUTAL ATTACK; IT WAS APPARENTLY UNPROVOKED.

FURTHERMORE, THERE WAS NO PREJUDICE FROM THE FAILURE TO ARGUE EITHER THE DUE PROCESS OR A 403 OR RELEVANCY. A JUDGE WOULDN'T HAVE HAD TO GIVE A 403 -- PERFORM A 403 ANALYSIS UPON OBJECTION, BUT EVEN UNDER A 403 ANALYSIS, THE EVIDENCE

STILL SHOULD COME IN. A LIMITING INSTRUCTION AGAIN PRECLUDED RELIANCE UPON THIS EVIDENCE AS PROOF OF THE AGGRAVATING CIRCUMSTANCE.

SECONDLY, THE PROBATIVE VALUE IN THE PENALTY PHASE OF A CAPITAL TRIAL -- THAT THAT SCOPE IS FAR GREATER THAN WHAT IT IS IN A NON-CAPITAL TRIAL. SECOND, THE STATE WAS OBLIGATED TO PROVE THESE CRIMES BEYOND A REASONABLE DOUBT. THIRD, THE TESTIMONY OF THE MOTHERS IS LARGELY CUMULATIVE TO SHANNON'S TESTIMONY, AND THE ONLY PORTION OF SHANNON GILBERT'S TESTIMONY THAT'S CONTESTED IS HIS TESTIMONY ABOUT THE DREAM. HOWEVER, THIS WAS NOT A RACIAL REFERENCE. IT WAS MERELY HIS INTERPRETATION OF HIS OWN DREAM. ALSO, ALL THE TESTIMONY CONCERNING THE ABHANS PALES IN COMPARISON TO WHAT HAPPENED TO BENTON SMITH AT THE TIME OF THE MURDER AS WELL AS THE TESTIMONY OF THE TWO EYEWITNESSES, WILLIAMS MARK DUBOSE AND RHONDA SMITH.

HIS CLAIM THAT THE PRESENTATION OF THE PIZZA HUT EVIDENCE SHIFTED THE FOCUS AWAY FROM THE MURDER OF BENTON SMITH IGNORES HIS ARGUMENTS RELATED TO THE CLOSING ARGUMENT OF THE SOLICITOR. HE ALSO IGNORES THAT MS. DUBOSE, LIKE MANY OF THE WITNESSES, WAS HERSELF BLACK. SO IF SHE MAKES A COMMENT ABOUT THE RACE OF THE PARTICIPANTS, IT'S MERELY DESCRIPTIVE. I DON'T SEE HOW THAT INJECTS RACE IMPROPERLY. FINALLY, THERE CAN'T BE ANY PREJUDICE IN LIGHT OF THE PROOF OF OVER -- OVERWHELMING PROOF OF THE AGGRAVATING

CIRCUMSTANCES AND THE MURDER ITSELF.

THE COURT: ALL RIGHT. ANYTHING ELSE?

MR. SALTER: NO, SIR, YOUR HONOR.

THE COURT: ANYTHING FURTHER FROM Y'ALL?

MR. ENDERLIN: JUDGE, JUST REAL QUICK A COUPLE OF THINGS HE SAID HERE. THE PRECATORY LANGUAGE, I MEAN, YOU KNOW, I HAD TO LOOK UP "BLACK'S LAW" ON PRECATORY BECAUSE IT'S BEEN AWHILE. BUT THAT'S LANGUAGE THAT'S SET OUT USUALLY IN A WILL OF WISHES OF WHAT SOMEBODY WANTS TO DO. WELL, I GUESS IF IT WAS A PRECATORY LANGUAGE TO SORT OF CONSIDER THE PLAIN AND ORDINARY MEANING IN GENERAL AND SORT OF TAKE IT INTO ACCOUNT, MAYBE THE JURY FOLLOWED THOSE WISHES AND JUST SAID, "WELL, WE'LL SORT OF TAKE THAT INTO ACCOUNT."

THE JURORS' UNDERSTANDING AGAIN, THAT'S JUST A BAD PRECEDENT, AND I DON'T THINK WE CAN GO. HE MENTIONED TWO THINGS, CHARGE -- YOU CONSIDER THE CHARGE AS A WHOLE. I INCLUDED STATE VERSUS BLASSINGAME AS EXHIBIT L., THAT WHEN THE JURORS ASK A SPECIFIC QUESTION, THAT'S THE TIME TO LOOK AT THAT AND THEY WOULD GIVE IT SPECIAL CONSIDERATION. SO EVEN IF YOU CONSIDER THIS CHARGE AS A WHOLE, IT DOESN'T MEAN ENOUGH, AND THEN I ALSO ADDRESSED SIMMONS. BUT, VERY QUICKLY, THIS IS NOT A SIMMONS CASE. THIS IS A NORRIS CASE. HE WAS ENTITLED TO A NORRIS CHARGE. I'LL ANSWER ANYTHING ELSE, BUT THAT'S ALL I'D SAY.

THE COURT: ANYTHING YOU WANT TO SAY?

MR. SALTER: NO, YOUR HONOR.

THE COURT: ALL RIGHT. HERE'S WHAT I WANT YOU TO DO. IF Y'ALL WANT TO SUBMIT ANY -- I DON'T NEED YOUR ARGUMENTS AGAIN. IF YOU WANT TO SUBMIT ANYTHING THAT YOU THINK IN FAIRLY CAPSULATED FORM THAT YOU WANT ME TO CONSIDER AND I'M GOING TO HAVE TO TAKE THE TIME TO REVIEW WHAT Y'ALL HAVE GIVEN ME BEFORE, I WILL INVITE YOU TO DO SO. YOU'VE GOT ABOUT A WEEK TO DO IT. AND CAN Y'ALL DO THAT? I MEAN, IF... LETTER FORM WOULD BE FINE.

IF THERE'S SOMETHING THAT YOU WANT TO EMPHASIZE, I'LL BE FRANK ABOUT IT. I MEAN, I DON'T SEE THE RACIAL ASPECTS OF THIS THAT Y'ALL DO. I DO HAVE SOME CONCERNS ABOUT OBVIOUSLY THE JUROR SITUATION, AND OBVIOUSLY THE CHARGE AT THE END CONCERNS ME. BUT I DON'T SEE THE -- YOU KNOW, THE FACT THAT A BLACK INDIAN -- THAT THAT IS SOMETHING THAT IS SUCH OF A RACIAL BIAS THAT IT'S GOING TO MEET WHAT BURDEN THAT YOU HAVE IN THIS CASE. BUT ANYTHING YOU WANT TO SUBMIT TO ME THAT YOU THINK IS A SPECIAL RESPONSE, I MEAN, I WILL READ IT AND I WILL CONSIDER WHAT Y'ALL HAVE TOLD ME BUT I...

MR. LOMINACK: WELL, WE'VE SAID A LOT TODAY, AND WE SUBMITTED THE PRIOR POST-HEARING MEMORANDUM. I'M NOT SURE THAT WE HAVE A LOT TO ADD TO IT---

THE COURT: ALL RIGHT. WELL, YOU DON'T HAVE TO.

MR. LOMINACK: THERE'S CERTAINLY THAT ISSUE.

THE COURT: I CAN TELL Y'ALL: GO BACK AND CORRECT YOUR

BRIEF -- I MEAN YOUR ORDERS.

MR. SALTER: THAT WAS THE ONLY THING---

THE COURT: IF I DETERMINE THAT I'M GOING TO SIGN SOMETHING OF THAT NATURE OR WHATEVER, I DON'T WANT TO LOOK LIKE AN IDIOT.

MR. SALTER: NO, SIR, YOUR HONOR. AGAIN, I APOLOGIZE. I CAUGHT WHERE THERE WAS A PARAGRAPH THAT WAS ACTUALLY DUPLICATED TWICE, AND AGAIN THE PROBLEM WAS I PERSONALLY WAS TYPING THE DOCUMENT AND I DO APOLOGIZE.

THE COURT: ALL RIGHT. IF YOU WANT TO SUBMIT YOURS IN ORDER FORM.

MR. LOMINACK: I'LL DO THAT.

THE COURT: AND IF Y'ALL CAN DO THAT, I WOULD APPRECIATE IT.

MR. LOMINACK: IT WILL BE OBVIOUSLY SUBSTANTIALLY SIMILAR, BUT I---

THE COURT: OH, I UNDERSTAND THAT.

MR. LOMINACK: WE CAN GET THAT DONE PRETTY QUICKLY BECAUSE OF THAT.

THE COURT: I MEAN, I KNEW WHAT YOU---

MR. LOMINACK: RIGHT.

THE COURT: ---THE WHOLE PURPOSE BECAUSE I THINK WE TALKED ABOUT THAT LAST TIME---

MR. LOMINACK: RIGHT.

THE COURT: ---WHETHER YOU SUBMIT IT IN ORDER FORM OR IN

MEMORANDUM.

MR. LOMINACK: RIGHT.

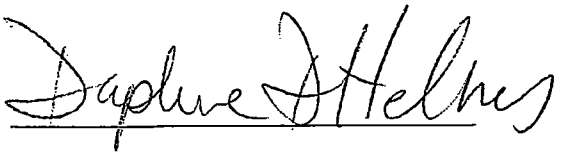
THE COURT: ALL RIGHT. WELL, I APPRECIATE IT, AND WE'LL BE IN TOUCH.

(WHEREUPON, THE PROCEEDINGS WERE CONCLUDED. THERE WERE NO EXHIBITS INTRODUCED DURING THE HEARING.)

I, THE UNDERSIGNED DAPHNE D. HELMS, OFFICIAL COURT REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR LEXINGTON COUNTY, SOUTH CAROLINA, ON THE 17TH OF FEBRUARY, 2009.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

MARCH 27, 2010



DAPHNE D. HELMS, COURT REPORTER

3161

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Case No. 2006-CP-32-3221
COUNTY OF LEXINGTON	)	
Johnny Bennett	)	
Applicant,	)	
v.	)	**APPLICANT'S POST-HEARING MEMORANDUM**
State of South Carolina,	)	
Respondent.	)	

PROCEDURAL HISTORY

In March 1991, applicant was indicted by a Lexington County grand jury for the November 1990 murder of Benton Smith. Applicant was also indicted for kidnapping, armed robbery and grand larceny. In March 1993, the state provided its Notice of Intent to seek the death penalty. The Honorable Ralph King Anderson presided over applicant's first trial in October 1995. The jury convicted applicant of murder as well as other charges and sentenced him to death based on four aggravating circumstances: armed robbery, larceny while armed with a deadly weapon, kidnapping and physical torture. S.C. Code §16-3-20(C)(a)(1)(b), (d), (e), and (h). After a timely appeal the South Carolina Supreme Court affirmed his convictions but reversed applicant's death sentence. *State v. Bennett*, 328 S.C. 251, 493 S.E.2d 845 (1997).

In July 2000, the Honorable Marc H. Westbrook presided over applicant's re-sentencing trial. Applicant was represented by Wayne Floyd (Floyd) and Hervery Young (Young). The state relied upon the same statutory aggravating circumstances. After finding the existence of each aggravating factor, the jury sentenced applicant to death. On July 26, 2000, applicant filed a motion for a new trial which was denied on September 4, 2003. The South Carolina Supreme Court affirmed the sentence. *State v. Bennett (Bennett II)*, 369 S.C. 219, 632 S.E.2d 281 (2006).

STATEMENT OF THE FACTS[1]

I. TRIAL PROCEEDINGS

Applicant is an African-American as was the victim. During jury selection, the prosecution struck one of two black jurors resulting in one black juror, Thomas Brown, being seated. Tr. 846. However, before the jury was sworn, Brown belatedly realized that he knew the victim's family. Tr. 867. The trial court granted the state's motion to remove Juror Brown despite defense counsel's expressed concern about the racial composition of the jury. Tr. 879. Juror Brown was replaced with the first alternate juror, Adam Humphrey. Tr. 883. Ultimately, all twelve jurors at applicant's re-sentencing trial were white. Tr. 880.

After Juror Brown was removed, Floyd, requested additional *voir dire* to explore potential racial bias. Tr. 882-883. Floyd explained the reason for this last minute request – he had assumed that at least one black juror would be seated and, therefore, had not explored the juror's potential prejudices in the normal course of *voir dire*. Tr. 880. Indeed, at applicant's first trial, minority jurors were seated. Tr. 1040. Floyd indicated a specific concern about "some other evidence that I think Your Honor knows that may come out in this case that may even have greater impact concerning the racial attitudes of the jury." Tr. 880.[2] The state argued that because the murder victim was black, there was no legal basis to question the jurors about potential racial prejudices. Tr. 882. The motion to inquire about the racial attitudes of the seated jurors was denied. Tr. 883.

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[1] The facts presented here relate primarily to applicant's claims regarding the issue of race and its impact on his trial. Additional facts relevant to the remaining claims are set out at the beginning of the discussion of each claim.

[2] Floyd was referencing an assault by applicant in the parking lot of a Pizza Hut restaurant. The two victims of this assault were both white. This prior crime figured prominently in the state's case for the death penalty and the facts are detailed *infra*.

In its opening statement, the prosecution described applicant using terminology suggesting that he was less than human. Tr. 907 ("brutal monster size"), 908 ("disrespect for good old human nature"), Tr. 909 ("big old bear of a fellow"), Tr. 914 ("big old bear of a fist"). The prosecution also referenced the Pizza Hut assault involving two white victims discussed *infra*. Tr. 908. In its case-in-chief the prosecution called several teachers and school officials who detailed applicant's misbehavior during his school aged-years, Tr. 920-986, and then began to focus on the Pizza Hut incident. The first witness, Williams "Mark" Dubose, testified that he drove by the Pizza Hut and noticed "two white males" lying in the parking lot. Tr. 989. He saw a "black male" standing over them stomping one of the victim's head. Tr. 989. Dubose testified that the "white males" were lying motionless with blood around both of them. Tr. 990. During his testimony this witness referred to the victims as "white males" four times and applicant as a "black male" seven times. Tr. 986-993. Similarly, another prosecution witness, Rhonda Smith, testified that she saw a "black male dragging a white male." Tr. 998. During her direct examination, Smith referred to the victims as "white males" thirteen times and applicant as a "black male" six times. Tr. 998-1003.

The prosecution also called the mothers of each of the victims. Each mother testified about getting the late night phone calls telling them that their sons were in the hospital. One mother, Sharon Brady, described her son's injuries and identified photos of him in the hospital. Tr. 1013-1020. The other mother, Helen McGough, similarly described seeing her son shortly after the assault and detailed his injuries and recovery. Tr. 1036-1037. Finally, the prosecution presented the testimony of one of the victims, Shannon Gilbert. He did not recall much about the night of the incident though he remembered seeing a "black man" standing near a payphone outside the Pizza Hut. Tr. 1021. Repeating this answer, Myers then asked, "Other than seeing a

black man by the phone there by you, do you remember anything else?" Tr. 1022. Gilbert did not. Myers went on to ask, "Do you have any consciousness about being in a hospital; do you know of any dreams or anything?" Tr. 1027. Floyd objected arguing that evidence of a dream was irrelevant. Myers responded that, "[the witness will] bring out the relevance." Tr. 1027. The trial court overruled the objection and Gilbert described the dream:

> I remember the dream. I woke up and I remember being really afraid. And, of course, there were several [people] 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 that 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.

Tr. 1028. Floyd renewed his objection to this testimony and requested that it be stricken. The trial court denied the motion. Tr. 1028. Floyd also renewed his motion regarding the composition of the jury. Tr. 1040.

The prosecution presented the testimony of additional prison guards who generally described applicant as a troublemaker who was manipulative and domineering. Specifically, one prosecution witness, Sandra Key, who had been a South Carolina Department of Corrections employee when applicant was serving a Youthful Offender Act sentence testified about a fight after which applicant attempted to obstruct the officer from her rounds. Tr. 1077. She testified that after an investigation was conducted, the prison officials determined that "a group of black inmates and white inmates had been fighting." Tr. 1077. Applicant's counsel, Hervery Young, objected "to the use of the specific races of the inmates," on the ground that such information was irrelevant. Tr. 1077. Key went on to describe finding an injured white inmate in the bathroom and testified, "Well, [attorney Young] don't want me to say white, but the particular inmate

that had the bruises was white. He had a cut over his left eye, if I'm not mistaken." Tr. 1079. Floyd objected and argued that the prosecution was "once more, inserting race into this case, and race is not relevant." Tr. 1079. The state also presented evidence that Lexington County jailors used applicant to physically assault newly-arriving inmates who "would call the black female correctional officer niggers . . ." Tr. 1515. "[The guards] would take the inmate up on the floor where Mr. Bennett was and they look at him and wink at him, give him a sign, and Mr. Bennett would straighten the inmate up." Tr. 1515.

The defense, in an attempt to rebut the prosecution evidence of misconduct at the jail, presented the testimony of numerous guards from Lieber Correctional Institution where applicant had been housed since his initial conviction and sentence. These guards testified that applicant was a model inmate, assisted with jobs, and never caused any real problems. Tr. 1796-1801, 1867, 1873. One officer specifically recalled that applicant assisted in explaining policy changes to the other inmates, Tr. 1877, and that applicant was a mediator with other inmates. Tr. 1893-1894. Defense counsel also hired a prison classification and risk assessment expert who concluded that the South Carolina Department of Corrections could safely house applicant if he was sentenced to life imprisonment. Tr. 2002.

One of the defense witnesses was a former Lexington County inmate whom applicant had saved during a suicide attempt. When cross-examining this witness, Myers asked about a white female Lexington County Detention Center employee with whom applicant had a sexual relationship while in jail. While the relationship had been disclosed to the jury, the woman's race had not been.

> 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?

Tr. 1979-1980. Defense counsel objected and moved for a mistrial. Tr. 1980. The trial court denied the motion but stated, "I know why you're making the motion. We'll put it on the record during the next break." Tr. 1980, 2012-2015.

In his closing, Myers continued to use the dehumanizing language from his opening but also used language which contained racial overtones. Myers mentioned this woman several times during his closing argument and mockingly argued that applicant was having sex with the female guard "at the Department of Corrections, where you can't even get near people, can't touch them." Tr. 2077, 2080. He also referred to applicant as a "mountain man" twice (Tr. 2056, 2070), "caveman," (Tr. 2062), "tiger," (Tr. 2066), "monster," (Tr. 2068), "King Kong," (Tr. 2079), and a "beast of burden." Tr. 2079.

II. MOTION FOR A NEW TRIAL

On July 26, 2000, applicant filed a Motion for a New Trial. Tr. 2363. The trial court held a hearing on the motion on October 26, 2000. Tr. 2164. Primarily, defense counsel argued that the state's "blatant use of race throughout the trial . . . prejudiced [applicant] and deprived him of a fair trial and violated the constitutional concept of fundamental fairness." Tr. 2165. *Inter alia*, trial counsel argued that the state consistently injected race into the trial through:

- the testimony of Sandra Key who referred to the prison fight between the black and white inmates, Tr. 2167,
- the testimony of one of the Pizza Hut victims who described his dream of being chased by "black Indians," Tr. 2167.
- Myers' attempt to have a defense witness describe the jailor with whom applicant had a relationship as white by asking him if she was "blond headed," Tr. 2168-2169, and
- the comparison of applicant to "King Kong" in the state's closing argument. Tr. 2169-2170.

Almost three years after it was filed, the trial court denied the Motion for New Trial on September 4, 2003. Tr. 2407. Generally, the court found that the evidence regarding the assault in the Pizza Hut parking lot was relevant to applicant's character. Tr. 2415. Specifically, the trial court found that the testimony of the "black Indian" dream was relevant to applicant's character and was not a "blatant racial reference." Tr. 2415. Despite the fact that this testimony was specifically elicited by the prosecution on direct examination, the trial court also found that this evidence was not brought out by the state. Tr. 2415. Similarly, the court found that Sandra Key's testimony during which she described groups of "white" and "black" inmates was not elicited by the state. Tr. 2416. Finally, without discussion the court found that Myers' reference to the white jail employee with whom applicant had a relationship as "blond headed" "did not improperly inject race into the trial." Tr. 2417.

III. POST-CONVICTION PROCEEDINGS

As part of the post-conviction investigation undersigned counsel and a law clerk met with Juror Humphrey[3] at his house. PCR Tr. 8 (May 27, 2008). During this meeting, counsel asked Humphrey about his thoughts of the case in general, the evidence and the trial attorneys. PCR Tr. 8 (May 27. 2008). Counsel also asked Humphrey to describe whether at the time of the trial he had thought about the reason that applicant had killed the victim. PCR Tr. 9 (May 27, 2008). To this question Humphrey replied, "because he was just a dumb nigger."

At the post-conviction evidentiary hearing, Humphrey admitted to calling applicant "just a dumb nigger." PCR Tr. 9 (May 27. 2008). Indeed, despite being given the opportunity to correct any misstatement on counsel's part, Humphrey declined and candidly admitted again that he had used this derogatory phrase to describe applicant. PCR Tr. 10. Moreover, Humphrey testi-

[3] Humphrey was originally an alternate juror but was seated before opening statements to replace juror Thomas Brown. See *supra* at 2.

fied that this was not the first or only time he had used the phrase, "dumb nigger," to describe African Americans. PCR Tr. 20 (May 27, 2008). Humphrey made clear that his derogatory reference to applicant represented his feeling at the time of the trial. "I apologize for saying that one word, but after going through [the trial] for an entire week and all the evidence piling up against him, that was just the way I felt about it." PCR Tr. 9-10 (May 27, 2008); *see also* PCR Tr. 16 (May 27, 2008) (Humphrey again ties his characterization of applicant to the time of the trial).

To be sure, Humphrey also testified that he used a "bad choice of words" to describe applicant. PCR Tr. 19 (May 27, 2008). However, he also implied that the real source of his concern arose from the fact that he had told applicant's lawyers about his feelings: "You know, kind of maybe after [applicant's counsel] left after I got to thinking about it and I was like, well, why would I tell them that, you know, to help them out?" PCR Tr. 18 (May 27, 2008). Humphrey did say that he had not used this racial epithet in the jury room and he offered the assessment that his decision to sentence applicant to death was not based on his race. PCR Tr. 14 (May 27, 2008).

ARGUMENT

Applicant's trial is remarkable for the pervasive role of race throughout the prosecution's presentation of evidence. Despite trial counsel's rather persistent attempts to have the trial court intervene and put a stop to the subtle use of applicant's race as a non-statutory aggravating factor, the court, did not intervene. Unfortunately, the prosecution took advantage of the trial court's hands off approach and at every opportunity made certain to remind the all-white jury that the defendant before them was black and to conjure up images that seemed designed to stoke racial stereotypes or prejudices.

As it turns out, the prosecution's use of race throughout the trial had a receptive audience in at least one juror, Adam Humphrey. The evidence has now established that this juror, after sitting through the re-sentencing proceeding, thought of applicant as "just a dumb nigger." Without repeating the facts and arguments below, suffice it to say that such clear bias on the part of a juror in a capital sentencing proceeding requires that the sentence be vacated.

Because some of applicant's claims are based on the failure of trial or appellate counsel to fulfill their constitutional obligation to provide effective assistance of counsel, applicant provides a brief discussion of the standard governing these claims. "An ineffective assistance claim has two components: A[n applicant] must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "To establish deficient performance, a[n applicant] must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'" *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 687). An applicant establishes prejudice by demonstrating a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 695. This standard requires a showing by less than a preponderance, and is satisfied where "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537. "[T]he question is whether '[counsel's deficient performance] could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Strickler v. Greene*, 527 U.S. 263, 290 (1999) (quoting *Kyles*, 514 U.S. at 435).[4]

[4] While all the individual errors were prejudicial and require reversal, this Court must also consider the cumulative prejudice from all of counsel's errors. *Kyles*, 514 U.S. at 436 (the prejudice must be "considered collectively, not item-by-item"); *Strickland*, 466 U.S. at 695 ("In making this [prejudice] determination, a court hearing an ineffectiveness claim must consider the *totality* of the evidence before the judge or jury") (emphasis added); *Williams v. Taylor*, 529 U.S. at 397

I. APPLICANT'S RIGHT TO AN IMPARTIAL JURY GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS WAS DENIED BY THE SEATING OF A JUROR WHO HELD A RACIST VIEW OF APPLICANT.

"A fair trial in a fair tribunal is a basic requirement of due process." *In Re Murchison*, 349 U.S. 133, 136 (1955). "The constitutional standard of fairness requires that a defendant have 'a panel of impartial, "indifferent" jurors.'" *Murphy v. Florida*, 421 U.S. 794, 799 (1975) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *see also Reynolds v. United States*, 98 U.S. 145, 146 (1878). The error resulting from the seating of a juror who is not impartial cannot be harmless. *See, e.g., Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (other citations omitted) ("because the impartiality of the adjudicator goes to the very integrity of the legal system, . . . harmless-error analysis cannot apply"); *Rose v. Clark*, 478 U.S. 570, 578 (1986); *Tumey v. Ohio*, 273 U.S. 510 (1927); *Arizona v. Fulminante*, 499 U.S. 279, 307-310 (1991).

"Allegations of racial bias on the part of jury members strike at the heart of [the] right [to an impartial jury], and therefore, evidence of racial bias is "ipso facto" prejudicial. *State v. Phillips*, 927 A.2d 931 (Conn. App. 2007); *see also New Mexico v. Mann*, 39 P.3d 124, 131 (New Mex. 2002) ("If a juror is biased, then the defendant, by definition suffers prejudice. One juror's bias, even if it does not influence other jurors, jeopardizes the defendant's right to an impartial jury."); *United States ex rel. Haynes v. McKendrick*, 481 F.2d 152, 157 (1973) ("Racial prejudice can violently affect a juror's impartiality. . ."). In *Phillips*, the trial court was faced with allegations that a juror made comments indicating that he held racist views. The trial court held a hear-

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(prejudice must be determined based on the "totality" of the evidence); *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (citations omitted) ("cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial").

ing on the matter and questioned a number of jurors whom it found credible. After determining that there was nothing to suggest that the verdict was affected by anything other than the evidence and the law, the trial court found that there was no prejudice. The Court of Appeals reversed this finding. In so doing, it recognized that there is a qualitative difference between most forms of juror misconduct and the racial bias of a juror. *Id.* at 936. While it might be appropriate to explore the issue of prejudice in a misconduct scenario, such an inquiry is inappropriate when a juror maintains racist views. Once racial bias is established, that is the end of the matter and a new trial must be granted. *Id.* at 934.[5] Put another way, a defendant has established prejudice once he has demonstrated "the actual existence of such an opinion in the mind of the juror . . ." *Callins v. Collins*, 998 F.2d 269, 277 (5th Cir. 1993) (citation omitted); *see also State v. Santiago*, 715 A.2d 1, 20 (Conn. 1998) (Recognizing that "[a]llegations of racial bias on the part of a juror are fundamentally different from other types of juror misconduct because such conduct is, ipso facto, prejudicial.").

There can be no doubt that Juror Humphrey was a biased juror believing as he did that applicant was "just a dumb nigger." Indeed, modifying the racist epithet with the phrase, "just a dumb," evidences a belief in a racist stereotype that applicant was inferior and less than human because of his race. Moreover, Juror Humphrey's view in this regard is not of recent vintage but existed at the very time that he was responsible for deciding applicant's fate. PCR Tr. 9-10, 16

[5] There is one South Carolina reported decision that dealt with a juror who made an inappropriate remark. *State v. Hunter*, 320 S.C. 85, 463 S.E.2d 314 (1995). In that case after the trial had concluded, the sole African-American juror accused another juror of using the word "nigger" while misquoting a witness' testimony. 320 S.C. at 87, 463 S.E.2d at 315. Apparently, right after uttering the word, the juror caught herself and said "oops." *Id.* The Court found that the remark was "highly improper" but noted that the juror caught herself and the juror was not referring to the defendant. 320 S.C. at 89, 463 S.E.2d at 316. *Hunter* is of little help here since Humphrey's racism was directed at applicant and *Hunter* did not involve the level of discretion given Juror Humphrey at applicant's re-sentencing trial.

(May 27, 2008). Prior to Humphrey's revealing PCR testimony, respondent argued that there was no evidence that Juror Humphrey held this obviously racist view during the trial. Return at 35.[6] Of course, respondent's only substantive defense has now been refuted by Humphrey who made clear that he held his racist view of applicant while he was serving as a juror at the re-sentencing trial.

Applicant expects respondent to pivot to Humphrey's self-serving and incredible conclusion that despite his racist view of applicant, his sentencing decision was based only on the evidence presented in the courtroom.[7] PCR Tr. 14-15 (May 27, 2008). Crediting a juror's self-assessment and claim of impartiality, especially in the case of a juror who has expressed racist views, is inappropriate, because "a racially or religiously biased individual harbors certain negative stereotypes which, despite his protestations to the contrary, may well prevent him or her from making decisions based solely on the facts and law that our jury system requires." *United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986); *see also Crawford v. United States*, 212 U.S. 183, 196 (1909) ("Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one . . . who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence."); *United States v. Henley*, 238 F.3d 1111 (9th Cir. 2001) ("[T]he bias of a juror will rarely be admitted by the juror himself,

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[6] In its Return, respondent also objected to the use of an affidavit. Respondent demanded an opportunity to cross-examine Humphrey. Obviously, respondent has now had such an opportunity and its previous objection in this regard is moot.

[7] Applicant objected to this testimony because it is irrelevant to the claim that Humphrey was a biased juror. PCR Tr. 13-15 (May 27, 2008). Furthermore, applicant objected to this testimony as inadmissible pursuant to Rule 606(b), SCRE. PCR Tr. 13-15 (May 27 2008). Rule 606(b) prohibits a party from inquiring about "the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent or dissent from the verdict. . ." Rule 606(b), SCRE.

partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it . . ."). Such a common sense rule is especially true here, where Humphrey indicated that his real regret was that he informed applicant's counsel of his racist perspective, apparently recognizing that it may undermine applicant's sentence.

In the end, this case is noteworthy for the certainty of Humphrey's bias. This is not an instance involving an allegation by one juror about another juror's potential bias; Humphrey admitted that he viewed applicant in a racist way during the trial. Further, this case also does not involve a juror making an inappropriate but ambiguous statement that may or may not evidence a prejudiced view of a defendant; here Humphrey admitted to a *belief* about applicant while the trial was ongoing. Here there is simply no question that during applicant's re-sentencing trial Humphrey was prejudiced against him because of his race. Such clear bias in the context of a capital sentencing proceeding and the almost unfettered discretion it provides to jurors requires that applicant's death sentence be vacated.

II. APPLICANT WAS DENIED DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SOUTH CAROLINA LAW BY THE PROSECUTION'S REPEATED AND PREJUDICIAL INJECTION OF RACE THROUGHOUT THE TRIAL.[8]

"To raise the issue of race is to draw the jury's attention to a characteristic that the Constitution generally commands us to ignore. Even a reference that is not derogatory may carry impermissible connotations, or may trigger prejudiced responses in the listeners that the speaker might neither have predicted or intended." *State v. Varner*, 643 N.W.2d 298, 304 (Minn. 2002)

[8] To the extent that respondent argues and this Court agrees that this due process claim is procedurally defaulted based on trial or appellate counsels' failures, then this Court should simply decide the issue under the rubric of *Strickland v. Washington*, 466 U.S. 668 (1984). Clearly, trial counsel should have objected, and consistently did object, to this evidence. Similarly, appellate counsel should have raised this due process violation on direct appeal. *Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991) (appellate counsel ineffective for failing to raise reversible error on appeal).

(quoting *McFarland v. Smith*, 611 F.2d 414 (2d 1979). "Above all, demeaning references to racial groups compromise the right to a fair trial by inviting jurors to view a defendant as coming from a different community than themselves." *Id.* While it is true that in most cases, an analysis of a due process violation includes a prejudice assessment, "there are circumstances which create 'such a probability that prejudice will result that [the trial] is deemed inherently lacking in due process.'" *People v. Jones*, 475 N.E.2d 832, 836 (Ill. 1985) (quoting *Estes v. Texas*, 381 U.S. 532, 542-43 (1965).

At applicant's trial, the prosecution cast race in a prominent role from the beginning to the end of the trial:

- The prosecution introduced exhaustive evidence regarding a prior conviction for assault which occurred in the parking lot of a Pizza Hut restaurant. This evidence included the frequent reference to applicant as a "black male" and the victims as "white males."
- The prosecution introduced testimony of a dream that one of the victims of the Pizza Hut incident claimed to have had while recovering in the hospital. This dream included the white victim being chased by a "black Indian."
- One prosecution witness described an incident involving "a group of black inmates and white inmates . . . fighting." The race of the inmates who were fighting was irrelevant to this witness's testimony.
- The state presented evidence that employees of the Lexington County jail used applicant to punish arriving black *and white* inmates who used racial epithets to address black female correctional officers.
- The prosecution ensured that the jury knew that applicant was previously involved in an interracial sexual relationship by referring to the female in question as the "blond headed lady." The jury had not been previously told, and indeed had no need to know, that this woman was white.
- In his closing, the prosecutor implied that if sentenced to life, applicant might be able to continue to have sex with the "blonde lady."
- Moreover, the prosecutor in his closing argument referred to applicant using terms certain to focus the jury's attention on race. Those terms included: "mountain man," "caveman," "tiger," "monster," "King Kong," and "beast of burden."

The cumulative effect of the state's continued focus on race cannot be ignored. While the state supreme court found that the "blond lady" and "King Kong" references did not require reversal, it did acknowledge their potential "racial connotations." *Bennett II*, 369 S.C. at 231, 632 S.E.2d at 288; *see also United States v. Grey*, 422 F.2d 1043, 1044-45 (6th Cir. 1970) (After prosecution asked a character witness if he knew the black defendant was seeing a white go-go dancer, the Court of Appeals found that "[a]t best, the entire question was a magnificent irrelevance . . . At worst, the gratuitous reference to the race of the go-go dancer may be read as a deliberate attempt to employ racial prejudice. . ."). Moreover, the Court found that the "King Kong" reference specifically responded to evidence presented at trial and that neither of these references were used to "inflame the passions or prejudices" of the jury. *Id.*

Since appellate counsel did not raise on direct appeal the other instances in which the prosecution injected the issue of race, the state supreme court viewed these comments in isolation. When viewed in the context of the entire trial, these comments are the culmination of a prosecution in which race played a prominent role and "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Bennett II*, 369 S.C. at 232, 632 S.E.2d at 288 (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *see also 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 citations omitted). For example, the prosecution witness's repeated but unnecessary references to the race of the Pizza Hut victims and others were irrelevant. *See Pickens v. Lockhart*, 4 F.3d 1446, 1453 (11th Cir. 1993) (prosecution's description of victims by age, race and sex was "improper and inflammatory.").

III. APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SOUTH CAROLINA LAW BY TRIAL AND APPELLATE COUNSELS' FAILURES TO PRESERVE AND PRESENT THE ERRONEOUS ADMISSION OF IRRELEVANT AND PREJUDICIAL EVIDENCE.

A. Additional Relevant Facts

As described in detail *supra*, the prosecution called to the stand five witnesses who testified about applicant's assault on the "two white males" in the parking lot of the Pizza Hut restaurant. While trial counsel objected to the admission of this evidence as improper victim impact evidence, he also objected on the grounds that the evidence was not relevant and, even if relevant, was substantially more prejudicial than probative. *See Bennett II*, 369 S.C. at 234-235, 632 S.E.2d at 289-290 (Pleicones, J. summarizes trial counsel's objections to the Pizza Hut evidence).[9] Nevertheless, appellate counsel failed to argue the issue of the relevancy of this evidence on appeal. PCR Tr. 12-13 (July 11, 2008); *see also Bennett II*, 369 S.C. at 229, 632 S.E.2d at 287 (majority opinion acknowledges that despite trial counsel's objections grounded in the issue of relevance, appellate counsel did not raise that issue before the South Carolina Supreme Court). Appellate counsel did not have a strategic reason for failing to raise on direct appeal the claim that the trial court erroneously admitted evidence which was irrelevant or substantially more prejudicial than probative. PCR Tr. 11-14 (July 11, 2008).

[9] To the extent that Respondent attempts to argue that trial counsel did not appropriately object to every bit of the testimony relating to the Pizza Hut incident, such a failure represents ineffective assistance of trial counsel and relief is warranted on that basis. PCR Tr. 30 (May 27, 2008) (Floyd testified that he had no strategic reason for failing to object based on due process grounds). However, because he agrees with Justice Pleicones that trial counsel did sufficiently object to this evidence, applicant focuses his argument in this section on the failure of appellate counsel to appropriately present the issue on direct appeal.

B. Legal Discussion and Analysis

While a capital sentencing phase is broad in scope, it is not a free-for-all and the trial court must ensure that the jury's focus is properly limited. "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Therefore, evidence introduced in the sentencing phase of a capital trial must be relevant to an "*individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879 (1993) (emphasis in original); *see also State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001), *overruled on other grounds*, *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). Indeed, even "relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." *Owens*, 346 S.C. at 665-666, 552 S.E.2d at 760 (Court cites to Rule 403, SCRE).

To be sure, evidence of a capital defendant's prior crimes is generally admissible as relevant to his character, but the trial court must ensure that the sentencing phase does not turn into a "referendum on all of the defendant's prior crimes." *Bennett II*, 369 S.C. at 230, 632 S.E.2d at 287; *see also State v. Comeaux*, 699 So.2d 16, 23 (La. 1997) (The trial court "should cautiously consider the quantum of evidence necessary to convey the message to the jury that a defendant has engaged in other serious criminal conduct . . . without shifting the jury's focus from its function of determining the appropriate sentence in the capital case to a focus on the defendant's involvement in other unrelated criminal conduct."). Ultimately, the introduction of irrelevant evidence can render the trial so unfair as to violate due process. *Bennett II*, 369 S.C. at 230, 632 S.E.2d at 287.

At applicant's trial, the prosecution presented the testimony of five witnesses to recount a single, albeit violent, assault in a restaurant parking lot two years prior to the crime for which he was being sentenced. Tr. 987-1040. Two eyewitnesses presented graphic details of the assault, describing the victims as "motionless, apparently unconscious" and lying in blood. Tr. 990. The witnesses described applicant stomping on the head of one of the victims. Tr. 987-1002. Then both of the victims' mothers testified about receiving the late night 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, and the time spent in the hospital and the recovery time and rehabilitation efforts. Tr. 1016, 1031. The prosecution admitted photographs of both victims taken days after the assaults. Tr. 1015, 1035. Moreover, one mother described her son's two-and-a-half-month rehabilitation at a trauma center which charged $30,000 per month. Tr. 1019. Finally, one of the victims, Shannon Gilbert, also testified. Since he had no memory of the event, he virtually repeated his mother's testimony describing his injuries, recovery and rehabilitation. Tr. 1021-1027. In recounting his stay in the hospital, Gilbert was allowed to describe his dream of being chased by "black Indians." See *supra* at 4.

The remarkable focus on this prior crime and the exhaustive presentation of evidence about it, took the focus away from applicant's character and the crime for which he was being sentenced. Indeed, this is no post-trial afterthought; trial counsel recognized this at the time and lodged numerous objections to the admission of this evidence. With each cumulative witness, the probative nature of the evidence decreased while the prejudice to applicant increased. Even putting the "black Indian" dream to the side for a moment, "the extensive testimony admitted here, from eyewitnesses, victims, and relatives of the victims of offenses wholly unrelated to the

capital offense" was not relevant to applicant's character. *Bennett II*, 369 S.C. at 235, 632 S.E.2d at 290 (Pleicones, J., dissenting). In other words, the repetitious and detailed testimony of five witnesses recounting one incident went well beyond what was relevant to applicant's character.

Then, there is the testimony of the "black Indian" dream. Again, despite clear objections concerning this specific testimony and its lack of relevance to any issue at trial, appellate counsel did not argue on direct appeal that this testimony was improperly admitted as irrelevant or substantially more prejudicial than probative. Therefore, the state supreme court refused to reach the issue. Nevertheless, Justice Pleicones in dissent found that the evidence of 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, citing *Zant v. Stephens*, 462 U.S. 862, 879 (1983).

Standing alone, the admission of this evidence, which the state insisted on introducing, warranted reversal; however, when viewed in the context of the prosecution's other statements which played on the theme of race, this evidence was that much more prejudicial and certainly not isolated. Appellate counsel's failure to raise these issues on direct appeal represented ineffective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668 (1986); *Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991) (appellate counsel ineffective for failing to raise reversible error on appeal).

IV. APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SOUTH CAROLINA LAW BY TRIAL COUNSEL'S FAILURE TO OBJECT TO THE IMPROPER ARGUMENTS OF THE PROSECUTION.

A. Relevant Facts

During his opening statement, the solicitor made numerous remarks that dehumanized applicant:

- The prosecution described applicant as "brutal monster size," Tr. 908, "big old brute, Johnny Bennett," Tr. 907, "big old bear of a fellow, Johnny Bennett," Tr. 914, "big old bear of a fist," Tr. 915.
- Applicant's "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.

The prosecution continued to use inflammatory and racially loaded language in its 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.
- Repeated references to the "blonde lady" with whom applicant had a sexual relationship. Tr. 2077.
- The prosecutor referred to applicant as a "mountain man," twice Tr. 2056, 2070, "caveman," Tr. 2062, "Tiger," Tr. 2066, "monster," Tr. 2068, "King Kong," Tr. 2079, and "beast of burden." Tr. 2079.
- "Now you see. Now you see why I'm asking for the death penalty. It's warranted. It's appropriate. It's the punishment that fits this crime and that callous murder." Tr. 2081.

Trial counsel objected to just two of these comments, "King Kong" and "caveman." Trial counsel did not have a strategic reason for his failure to object to the comments noted *su-*

pra, though he did indicate that he had some difficulty hearing Myers during his opening statement and closing argument. PCR Tr. 30-33 (May 27, 2008). Of course, counsel conceded that his inability to hear the prosecutor did not qualify as a strategic reason not to lodge an appropriate objection. PCR Tr. 33 (May 27, 2008).

B. Legal Discussion and Analysis

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. *State v. Copeland*, 321 S.C. 318, 468 S.E.2d 620 (1996); *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). The arguments in the instant case were improper because they did both.

The pervasiveness of the inflammatory comments made by the solicitor at applicant's trial is remarkable. Generally, the solicitor's comments fall into three categories: inflammatory, demeaning, and racially loaded. 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. For example, many of the comments sug-

gested 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, the repeated use of animalistic language at applicant's trial was improper. Other jurisdictions faced with arguments not nearly as egregious as those 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).

One of the prosecution arguments implied that applicant was so evil and dangerous that the jury should be afraid to be in the same courtroom with him. When the solicitor told the jury that he hoped they "never have to live through this after this week, being that close to a murderer," Tr. 909, he turned applicant's very presence in the courtroom into an aggravator by sug-

gesting that simply being in the same room with applicant represented a danger. Of course, this argument was nothing more than an appeal to the jury's emotions. *See State v. Payne*, 402 S.E.2d 582, 599 (N.C. 1991) ("Juries should be urged to convict on the basis of the evidence tending to show guilt, not on the basis of emotional appeals to jurors' fears."); *State v. Heinrich*, 492 S.W.2d 109, 114 (1973) (The prosecutor may not "seek by inflammatory appeals to arouse in the jurors personal hostility toward or personal fear of the defendant."); *Com. v. Harvell*, 327 A.2d 27, 30 (1974) (Jury's determination must "not be the product of fear or vengeance but rather intellectually compelled after a disinterested, impartial and fair assessment of the testimony that has been presented."). It was improper for the prosecutor to instill a sense of hostility towards or fear of applicant simply based on the exercise of his constitutional right to be present at his trial.

Some of the terms used by the prosecutor raised racial connotations. The state supreme court ruled on two references by the prosecution. While the court found that the use of "King Kong" could have a racial overtone, it did not find its use improper in this case because it was a specific response to something a defense witness said. *Bennett II*, 369 S.C. at 231, 632 S.E.2d at 288. Similarly, calling applicant a "caveman" was not improper because it described his actions during the assault in the Pizza Hut parking lot. *Bennett II*, 369 S.C. at 233, 632 S.E.2d at 290. However, the court was not presented with and, therefore did not address the solicitor's other references, including "mountain man," "tiger," "monster," "beast of burden," and the reference to "boo hill." None of these comments referenced or rebutted testimony presented at the sentencing trial. Moreover, the cumulative effect of these inflammatory references deprived applicant of a fair trial and warranted an objection by trial counsel.

The prosecution's description of applicant as a "beast of burden" was particularly egregious. A "beast of burden," an animal such as a donkey or mule used for carrying heavy loads, is a racially loaded reference that was used to describe slaves or the animals used to carry out work for their masters. *See Third Nat. Bank v. Poe*, 62 S.E. 826, 828 (Ga. App. 1908) (describing the ascent of a married woman in social standing, the court noted the following order: beast of burden, domestic animal, slave, and servant.); *Sumner v. Bell*, 44 S.E. 973 (1903) (references beast of burden as property); *see also Penny v. Southeastern Express Co.*, 35 S.W.2d 940, 941 (Mo. App. 1931) (The court references "beasts of burden of vicious characteristics furnished by the master for use of the servant in carrying out his employment. . ."). The prosecution's reference to applicant as a beast of burden was inflammatory, dehumanizing, and racially loaded. In the context of the evidence and argument already presented, the implication was surely not lost on the jury. Similarly, the comment referencing "boo hill" is racially loaded. The term "boo" is a shortened form of the disparaging slang term, "jigaboo," used to refer to an Afriacn-American person. *See Cass v. American Properties Inc.*, 1995 WL 132166, *2 (N.D. Ill. 1995), *not reported in F.Supp.* (in a racial discrimination case the defendant had referred to African-Americans as "boos."); *see also* http://dictionary.reference.com/search?q=jigaboo, basing definition on *Random House Unabridged Dictionary 2006.*

In a similar vein, Myers' repeated reference to the blond-headed woman with whom applicant had sex while in jail was a racially loaded time bomb for any juror uncomfortable with the idea of interracial relationships. The interjection of the irrelevant fact of applicant's interracial relationship represented a base attempt to curry to a racial bias on the part of a juror. Indeed, while the trial court did not ultimately grant relief, it immediately recognized the potential prob-

lem with such a remark. For its part, the supreme court acknowledged that the remark could have been inflammatory but was an isolated comment which did not prejudice applicant.

Finally, Myers injected his personal opinion about the appropriate sentence. "Now you see. Now you see why I'm asking for the death penalty. It's warranted. It's appropriate." Tr. 2081. This is almost the precise argument that the South Carolina Supreme Court recently found improper in *State v. Northcutt*, 372 S.C. 207, 223, 641 S.E.2d 873, 881 (2007) and previously in *State v. Smart*, 278 S.C. 515, 299 S.E.2d 686 (1982) (reversing a death sentence because of the same error by the same prosecutor), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *see also State v. Koon*, 278 S.C. 528, 298 S.E.2d 769 (1982); *Thompson v. Aiken*, 281 S.C. 239, 315 S.E.2d 110 (1984); *State v. Sloan*, 278 S.C. 435, 298 S.E.2d 92 (1982). Reversing the death sentence in *Smart*, the Court "admonished bench and bar . . . to maintain strict focus upon the particular circumstances of the specific crime and the unique attributes of the defendant," and that "[j]urors are simply not to consider the opinions of neighbors, officials or even other juries." 278 S.C. at 526, 299 S.E.2d at 692. As made clear by the *Northcutt* Court, this argument by itself warrants reversal. *Northcutt*, 372 S.C. at 223, 641 S.E.2d at 881. Indeed, the state admitted that the argument was error. *Id.* Given the state supreme court's clear rejection of this type of argument, it was ineffective for trial counsel to fail to object.

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) *see also Northcutt*, 372 S.C. at 223, 641 S.E.2d at 881 (in vacating death sentence, Court noted that given the "absolute discretion" of the jury, it was impossible to determine whether the improper argument had a prejudicial effect on the verdict).

V. APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SOUTH CAROLINA LAW BY TRIAL COUNSEL'S FAILURE TO QUESTION POTENTIAL JURORS ABOUT RACIAL ANIMUS AND APPELLATE COUNSEL'S FAILURE TO RAISE ON APPEAL TRIAL COUNSEL'S POST-VOIR DIRE REQUEST IN THIS REGARD.

A. Relevant Facts

As detailed *supra*, the trial court refused to inquire about any potential racial biases of the jurors after jury selection had been completed. Trial counsel was concerned that the state's evidence would "impact . . . the racial attitudes of the [all-white] jury." Tr. 880. The trial court denied the request after the prosecution argued that since the defendant and victim were both black, there was no need to inquire about racial bias. Tr. 882-883.

Trial counsel was aware that he had a right under *Turner v. Murray* to ask questions about race. PCR Tr. 44 (May 27, 2008). Moreover, Floyd did not have a strategic reason for not questioning jurors during *voir dire* about potential racial bias. PCR Tr. 36 (May 27, 2008). He conceded that he could have made his request to question jurors about racial attitudes sooner. PCR Tr. 36 (May 27, 2008). For his part, appellate counsel failed to raise the issue on direct appeal because he believed that trial counsel's request had come too late. PCR Tr. 9-10 (July 11, 2008).

B. Legal Analysis and Discussion

Applicant will not separate the claims of trial and appellate ineffective assistance of counsel regarding this issue. Suffice it to say that, in this case, trial counsel should have been permitted to question potential jurors about possible racial biases. Either trial counsel should have made his request sooner or appellate counsel should have raised on direct appeal the denial of trial counsel's timely request. Whether the fault lies with trial or appellate counsel, the analysis and outcome are the same.

"Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. *Turner v. Murray*, 476 U.S. 28, 35 (1986); *see also Ham v. South Carolina*, 409 U.S. 524 (1973) (based on trial court's refusal to question jurors about possible racial prejudice, Supreme Court reversed the conviction of a black defendant and civil rights participant charged with possession of marijuana). Whenever a jury is exposed to an interracial crime of violence, "there is some risk of racial prejudice" influencing its decision. *Turner*, 476 U.S. at 36, n. 8. Therefore, the South Carolina Supreme Court held that "in order to protect the capital defendant's right to an impartial jury, he is entitled to have prospective jurors informed of the race of the defendant and questioned on their racial biases." *State v. Green*, 301 S.C. 347, 352, 392 S.E.2d 157, 159 (1990).

Applicant had a constitutional right to ensure, through appropriate *voir dire* questions, that the jurors deciding his fate were not racially biased despite the fact that the victim of the murder was black. First of all, the state supreme court in *State v. Green* did not limit its holding to cases that involved interracial crimes even though that case did involve such a crime. Second, the prosecution's intense focus on the Pizza Hut assault as relevant to applicant's character ensured that any racial prejudices of the jury would be inflamed. To make matters worse, the prosecution then elicited, over objection, one of the victim's dreams of being chased by a "black Indian." Trial counsel knew that the Pizza Hut evidence was going to be admitted based on applicant's first trial. In fact, it was the anticipated admission of this evidence which undoubtedly concerned trial counsel when he requested that the jurors be questioned about possible racial bias.

When this evidence is considered along with the insinuations of the solicitor about the "blonde lady," the dehumanizing and racial comments made in closing, the evidence that appli-

cant was responsible for assaulting white inmates who used racial epithets against officers, and the allegations that applicant was part of a group of black men assaulting white men in prison, it is clear that defense counsel were entitled to *voir dire* the jurors to ensure that racial animus would play no part in their decision. Indeed, had the jurors been questioned about potential racial prejudices and stereotypes, Juror Humphrey would likely not have been seated as he is precisely the type of juror *Turner* questions are meant to expose.

Under these circumstances, it was professionally unreasonable to fail to make a timely request for *voir dire* of jurors concerning their racial biases and it was similarly professionally unreasonable for appellate counsel to fail to raise on direct appeal the trial court's refusal to question the jurors in this regard. *Strickland v. Washington,* 466 U.S. 668 (1984); *Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991) (appellate counsel ineffective for failing to raise reversible error on appeal).

VI. APPLICANT WAS DENIED 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.

A. Relevant Facts

During the sentencing phase, the state called a parole agent, Jody Gallman, 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). It is true that the solicitor referenced the guards shortly after this statement and that they should be ready for applicant, however, the jury could far too easily take this statement as meaning the applicant would eventually come back out of prison. Before the jury began deliberations, the judge gave the plain and ordinary meaning instruction which informed the jurors that they

were to understand the terms "death sentence" and "life imprisonment" in their plain and ordinary meaning. *State v. Norris,* 285 S.C. 86, 95, 328 S.E.2d 339, 344 (1985).

After beginning its deliberations and despite this charge, the jury asked whether or when applicant would be paroled: "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?" Tr. 2144. Having received this jury question, the trial court convened counsel and stated correctly, "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." Tr. 2143. Defense counsel responded, "Yes, Your Honor, as long as it's the **brief form that you use in your original charge.**" Tr. 2143 (emphasis added). Instead of giving its original brief charge, the court informed the jury as follows:

> 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. 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.[10]

[10] Respondent has conceded 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. However,

B. Legal Analysis and Discussion

"[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, 3328 S.E.2d 339, 344 (1985). Indeed, the Court has been so concerned with ensuring that parole eligibility of a capital defendant not play a role in the jury's sentencing decision that it has 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).

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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 below, 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, this failure represents ineffective assistance of trial counsel.

This charge not only suggested the possibility of parole but also informed the jury that the court could not be honest about this situation thereby ensuring that the plain and ordinary meaning instruction was neither plain nor ordinary. 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 jurors 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*. *See supra*. The judge, albeit unintentionally, invited the jury to speculate about parole.

This was extremely prejudicial considering the fact that the jury must have already been debating parole eligibility as evidence by their question to the court. The Supreme Court has noted that a jury will give special consideration to a judge's responsive instructions:

> The erroneous instruction given by the trial judge was an inadvertence, and the correct definition of manslaughter was given elsewhere in his charge. The State argues that when the charge is considered in its entirety, it was not misleading or prejudicial. We do not agree. It is reasonable to assume that the jury had, at this point, focused critical attention on the meaning of these two offenses and was in the process of deciding upon its verdict based upon one or the other, but wanted to be readvised of the definitions of each. The additional words which the trial judge would relay to the jury would be given special consideration by the jury since they were in response to its own inquiry. Under these circumstances the charge of the trial judge constituted prejudicial error requiring a new trial.

State v. Blassingame, 271 S.C. 44, 46, 244 S.E.2d 528, 530 (1978).

Clearly the jury was considering parole eligibility and the judge's acknowledgment that there were all "sorts of varieties" but they had to "take this into account", allowed them to consider parole inappropriately. Trial counsel's failure to object to this prejudicial instruction represented ineffective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668 (1984).

VII. APPLICANT WAS DENIED 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.

A. Relevant Facts

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. Defense counsel conceded that it was unnecessary to elicit the type of information that the state supreme court has found inadmissible. PCR Tr. 48 (July 11, 2008).

B. Legal Analysis and Discussion

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).

The holding announced in *Burkhart* was not new. The state Supreme Court in *Burkhart* relied on *State v. Plath (Plath II)* which was decided in 1984. "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 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 454 (Toal, C.J. dissenting) ("nothing in [Bowman] indicated a departure from the general rules governing appeals involving the admission of evidence or constitutional issues") and at 456 ("Our pronouncement disfavoring this evidence [of conditions of confinement] in *Bowman* was nothing new.") (citations omitted).

In the end, applicant's counsel put before the jury irrelevant and prejudicial information which was not necessary to prove the larger point that applicant followed the rules in prison. Such evidence was clearly inadmissible and it was no less prejudicial simply because it was elicited by defense counsel rather than the prosecution. Trial counsel's admission of evidence that the state supreme court has held inadmissible and prejudicial to a defendant's right to a fair trial represents ineffective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668 (1984).

VIII. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO INSTRUCTIONS WHICH TENDED TO LESSEN THE JURY'S RESPONSIBILITY FOR ITS SENTENCE.

A. Relevant Facts

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 an-

other time and place for it to be corrected." Tr. 2112. Trial counsel did not lodge an objection in either instance. PCR Tr. 25 (May 27, 2008); PCR Tr. 33 (July 11, 2008).

B. Legal Analysis and Discussion

A jury in a death penalty case has a great deal of discretion which cannot be skewed by the belief 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).

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 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. *Strickland v. Washington*, 466 U.S. 668 (1984).

IX. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO EVIDENCE WHICH RAISED THE ISSUE OF PAROLE IN THE MINDS OF THE JURORS.

A. Relevant Facts

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. Trial counsel did not object and testified that they had no strategic reason for this failure. PCR Tr. 47 (July 11, 2008).

B. Legal Analysis and Discussion

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.

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. *Strickland v. Washington*, 466 U.S. 668 (1984).

X. 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.

A. Relevant Facts

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 circum-

> stances, 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. Trial counsel did not have a strategic reason for the failure to object to this instruction. PCR Tr. 33 (May 27, 2008).

B. Legal Analysis and Discussion

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.

The instruction given at applicant's trial misconstrued 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).

XI. 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.

A. Relevant Facts

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. Trial counsel testified that they had no strategic reason for failing to object to this evidence or the charge. PCR Tr. 35 (May 27, 2008).

B. Legal Analysis and Discussion

Two of the statutory aggravating circumstances under South Carolina's death penalty scheme are torture and 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). Our Supreme Court has similarly never held that a kidnapping could occur after a murder. Indeed, in *State v. Ray* the court used the language "ongoing and current" as a description:

> The record unambiguously shows an independent, felonious kidnapping, not incidental to the murder, and that the kidnapping was ongoing and current when the murder occurred. *Cf. State v. Owens,* 291 S.C. 116, 352 S.E. (2d) 474 (1987); *State v. Plath,* 281 S.C. 1, 313 S.E. (2d) 619 (1984). There is conflicting evidence as to the exact point in time appellant decided to kill the victim. It is abundantly clear that she left the site of the initial shooting to go to the hospital, that she was conscious and resisted the abduction, and that she was murdered in the process of being kidnapped and deprived of her freedom. We conclude that the trial judge's finding that the murder was committed during the commission of a kidnapping is supported by evidence in the record.

State v. Ray, 310 S.C. 431, 427 S.E. (2d) 171 (1993).

The trial court's instruction in the instant case cannot be reconciled with the cases cited *supra.* To be sure, the judge subsequently 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).

XII. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ERROR THAT DEFENDANT WAS ALREADY ON DEATH ROW.

A. Relevant Facts

When cross examining a prosecution witness about applicant's prison behavior, Floyd twice accidentally stated that the applicant was on death row. Tr. 1604-1605. After realizing his mistake, counsel moved for a mistrial which was denied. Tr. 1607. However, the trial court did find Floyd's mention of death row to be unintentional. "And let me note for the record, I was observing you, Mr. Floyd, when you did it and it was obvious you didn't do it intentional [sic], because you were just doing it within the regular flow of question. So certainly, it wasn't done intentionally, I understand that, it just came out. Sometimes things like that just happen." Tr. 1614. For his part, the solicitor stated that Floyd's references to death row clearly related to applicant and not anyone else. Tr. 1608. The trial court similarly found that the references clearly indicated that applicant was already on death row. Tr. 1608-09.

The court went on to find that "I don't know there's much reaction, to be honest, that I can reduce the damage done at this point. . . . I imagine the Supreme Court will do something with it on a PCR in about three or four years." Tr. 1609. The same witness in answering a question posed by the solicitor in redirect examination stated that applicant was on death row. Tr. 1609. Subsequently, the trial court *sua sponte* gave the jury a curative instruction. Tr. 1609-10. Trial counsel objected to the instruction, arguing that it had emphasized his mistake. Tr. 1611. In defending its instruction the court stated that it felt obligated to do something because the previous references were "very clear, there's no question that they pretty well let the cat out of the bag. . ." Tr. 1612. Trial counsel's accidental reference to death row and the denial of the mistrial motion was not raised on direct appeal. Appellate counsel "never gave serious thought to raising [the references to death row] as an issue" and generally did not believe it to be a

raising [the references to death row] as an issue" and generally did not believe it to be a "winning issue." PCR Tr. 15 (July 11, 2008).

B. Legal Analysis and Discussion

As a general matter, a passing reference to a capital defendant already being on death row may not require reversal. *See Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998). However, this case is unique because of the trial court's factual finding that applicant was prejudiced by these comments. The trial court made several factual findings that only it could make: the references by defense counsel were unintentional, the references clearly indicated that applicant was on death row, and the trial judge indicated that some "damage" had been done but did not know how to cure it. For these reasons the facts of this case are not controlled by *Jones* and appellate counsel's failure to raise this issue on direct appeal represent ineffective assistance of counsel.

XIII. APPLICANT IS ENTITLED TO A FINDING THAT HIS KIDNAPPING CONVICTION DID NOT INVOLVE SEXUAL MISCONDUCT AND THEREFORE APPLICANT SHOULD NOT HAVE TO REGISTER AS A SEX OFFENDER OR BE CLASSIFIED AS A SEX OFFENDER UNDER SOUTH CAROLINA CODE ANN. SECTION 23-30-40 (SUPP. 2007).

Due to applicant's original 1995 kidnapping conviction and the requirement that he register as a sex offender upon release, the South Carolina Department of Corrections has refused to let him visit with young relatives. However, because of changes in the statute governing sex offender registration and because his kidnapping crime did not involve a sexual offense, applicant does not fall within the purview of the sex offender statute.

In 1995 when applicant was convicted of kidnapping, S.C. Code §23-3-430 automatically required sex offender registration upon a conviction for kidnapping. Therefore, when applicant was convicted in 1995 his attorneys could not argue against registration and the judge had no authority to visit the issue. However, in 1998, §23-3-430 was amended to include an exception to the general rule of automatic registration. If the state court finds that the kidnapping offense

did not include a criminal sexual offense, then registration is not required. §23-3-430(C)(15). And it is this current law which must apply to applicant now as opposed to the law at the time of his conviction. *See Hazel v. State*, 377 S.C. 60, 659 S.E.2d 137 (2008) (Court found that statute in operation at time of release rather than conviction applied to the inmate since he would not be affected by the statute until his release from prison). In *Hazel*, the Court was faced with a similar circumstance – at the time of the defendant's conviction for kidnapping the law required registration and, therefore, the trial court had not made a finding that the kidnapping did not include a criminal sexual offense. The Court after holding that the law at the time of conviction was inapplicable went on to find that it was appropriate for a Common Pleas court to make the factual determination required to meet the statutory exception to registration. So, in the instant case the 1995 version of the statute does not control; rather the current statute with the kidnapping exception, applies.

The record is clear that no sexual misconduct was involved in this kidnapping and this court should conclude that applicant should not have to register as a sex offender and furthermore that the department of corrections should not classify him as one. Indeed, respondent in its Return did not argue with this factual point. Instead, respondent remarkably argued that this Court does not have the authority to address the issue because it cannot alter his sentence. *See* Return at 109. First, the sexual offender registration requirement is not part of the sentence and, therefore, this Court is not altering applicant's sentence. Second, and more importantly, respondent seems to have ignored what the *Hazel* Court specifically held: "[W]e approve the procedure utilized by the Court of Common Pleas and find that court has the power to make the determination that a prior kidnapping offense did not involve sexual misconduct." *Hazel*, 377 S.C. at 65, 659 S.E.2d at 140.

CONCLUSION

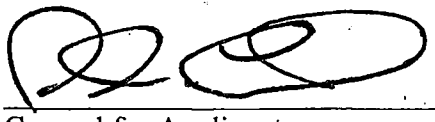
Based on the claims presented in the Second Amended Application for Post-Conviction Relief, this Court should vacate applicant's death sentence and order a new sentencing trial.

Respectfully submitted,

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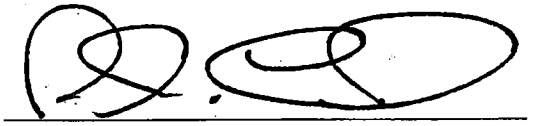


Counsel for Applicant

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON JOHNNY O. BENNETT, Applicant, v. STATE OF SOUTH CAROLINA, Respondent.	IN THE COURT OF COMMON PLEAS CA No. 2006-CP-32-3221 CERTIFICATE OF SERVICE

I do hereby certify that I have served upon the attorney for Respondent Applicant's Post-Hearing Memorandum, 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 27th day of October 2008

3205

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.	)	ORDER
State of South Carolina, Respondent.	)	

This matter is before the Court pursuant to an Application for Post-Conviction Relief (PCR) filed on September 7, 2006, as amended. Respondent submitted its original Return on October 19, 2006.

The Court held evidentiary hearings into the matter on May 27 and July 11, 2008.[1] Robert E. Lominack and Derek J. Enderlin, Esquires, represented Applicant. Senior Assistant Attorney General William Edgar Salter, III, and Assistant Attorney General Al Simon represented the State. Applicant was present at the May 27th hearing. Although he was not present at the July 11th hearing, counsel conditionally waived his presence.[2]

Applicant presented testimony from Adam Humphrey and lead trial counsel, H. Wayne Floyd, Esquire. Respondent presented testimony from appellate counsel, Robert M. Dudek, Esquire, and co-counsel at trial, Hervery Young Esquire. Applicant submitted a Post-Hearing memorandum dated October 27, 2008. Respondent then submitted a proposed Order dated January 2, 2009. In

[1] The May 27th hearing was held at the Lexington County Courthouse in Lexington, South Carolina. The July 11th hearing was held at the Richland County Courthouse in Columbia, South Carolina.

[2] This waiver was subject to reconvening if Applicant felt, within a week of counsel obtaining a transcript of the hearing that additional evidence should be presented. Counsel thereafter timely notified the Court, after such review, that Applicant did not request additional evidence be taken. The Court finds that Applicant made a knowing and intelligent waiver of any right he may have had to be present at the hearing.

addition to the pleadings of the parties in this action, as well as the testimony and exhibit introduced at the evidentiary hearings, the Court also 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.

After considering the entire record and the pleadings submitted by the parties, the Court denies relief for the following reasons:

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, 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 Applicant to death for murder. Judge Westbrook imposed concurrent sentences for armed robbery and five years for grand larceny of a motor vehicle; and the sentence for kidnapping was subsumed by the murder conviction. **R. pp. 2148-49; 2157-58.**[3] Wayne Floyd and Hervery B.O. Young

[3] The citations to the Record in this document reference the Record on Appeal from the second appeal.

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.

Petitioner timely served and filed a Notice of Appeal. 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 in 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.

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 233, 632 S.E.2d at 289. Justice Pleicones dissented in a separate Opinion. *Id* at 234-36, 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 lieu of a 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*, 549 U.S. 1061 (2006). Applicant also filed an Application for Post-Conviction Relief (PCR) filed on September 7, 2006. He raised the following grounds for relief in his PCR Application:

1. Ineffective assistance of trial counsel.

2. Ineffective assistance of appellate counsel.

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 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 ***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 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, 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.

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 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.

Applicant thereafter filed his Second Amended Application for Post-Conviction Relief (PCR) dated April 4, 2008, and Respondent made a Return thereto.

II. STATEMENT OF FACTS

The Court finds that the direct and circumstantial evidence presented in the guilt phase of Applicant's trial, viewed in the light most favorable to the prosecution, 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.[4] 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,[5] 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.**

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[4] This is in Lexington County.

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

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 someone had accompanied Benton. 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 they 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 was 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 the family retrieved it. **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 on that Tuesday afternoon, however, Applicant came to Pamela's apartment looking for Bonita. He was alone and he was driving Benton's blue Toyota. Pamela 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 a while. 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 she also left. **R. pp. 1196-97.** Applicant returned to Bonita's residence sometime later and took her 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,[6] 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

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

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.[7] 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 a life-long friend of Applicant,[8] and he was Benton's cousin and friend. 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

[7] The cane was not broken at that time.
[8] Robinson testified that Applicant was approximately 6'5" or 6'6" tall and weighed roughly 300 pounds. **R. p. 1266.**

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 gave her. 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 that Benton had allowed him to use the car, he became upset when she 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."[9] **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

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

family members. Det. 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**).[10] **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*[11] 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

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

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

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 him. Applicant told the officers he would help them locate some people who may possibly know Benton's whereabouts: Isadore Mack, Tommy Furtick 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.[12] Det. Hamer then told Applicant that Mack had not provided him with any information. Det. Hamer also told Applicant that the officers knew that Benton was dead; and they explained that 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 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.**

[12] 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.**

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. His sister 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 that Applicant had provided to them, the officers located and arrested Haskins on an outstanding narcotics warrant.[13] The officers 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 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

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

on December 2, 1990, and processed it. The prosecution published to the jury the photographs that the officers took of the grave, as they 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.**[14]

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

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

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 all right. 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 all right. 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.[15] 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 that 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 kill someone because he had thought about killing a family member. **R. pp. 1324; 1364-65.**[16] 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

[15] When asked how many times he stabbed Benton, Applicant replied, "I'd say around thirty times." **States Ex. 34.**
[16] On December 4, Applicant received a copy of the transcribed statement. **R. p. 1323.**

playground near Bonita Gonsalves' apartment, in an unsuccessful effort to find Benton's wallet.[17] **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[18] 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. 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 pre-mortem and had bruising underneath them. There was also subarachnoid hemorrhaging on the surface of the brain associated with these wounds.[19] Further, 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

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

[18] 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.

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

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 still 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 Benton'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 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.**

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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 that have more precise movement contain more "pain receptors" than other parts of the body.

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 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 that 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 it did not penetrate the brain, Dr. Sexton opined that 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 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 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 ***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

Based upon the testimony of trial counsel, the Court finds that Mr. Floyd first became involved in the case shortly after the State served notice of intent to seek the death penalty in March 1993 Steven Saltis, Esquire, was originally co-counsel, but he was removed shortly after Mr. Floyd's appointment and Pat McWhirter, Esquire, was co-counsel for the original trial in *Bennett I, supra.* After the Supreme Court reversed Applicant's death sentence on direct appeal, the case came back for resentencing and Mr. Young was appointed as co-counsel. Mr. Floyd was lead counsel in the subsequent resentencing. **5/27/08 Tr. pp. 22-24; 7/11/08 Tr. pp. 22; 24.**

Although counsel shared many of their responsibilities, Mr. Floyd had been primarily responsible for handling the guilt phase witnesses in *Bennett I.* So, he handled most of these witnesses. Counsel also had the assistance of an employee from Mr. Floyd's office, two paralegals from the Public Defender's office and they contracted either an investigator or social worker. Although Mr. Floyd's only previous death penalty trial was Applicant's original trial, he had handled three or four non-capital murder cases. He also handled a number of major felonies, and he had represented applicants in capital PCR cases. Therefore, he had experience in death penalty cases. Mr. Young had provided assistance in several death penalty cases, which he characterized as third or fourth chair. Mr. Young also had extensive experience in handling major felony cases through his employment as Deputy Public Defender at the Lexington County

Public Defender's Office.[22] Counsel had a transcript from the first trial and they were aware of many of the issues that could arise. They agreed that their best defense in the resentencing was to show jurors that Bennett was adaptable to prison; and that, today, he tried to help people; he "had a good heart;" and that he would not be a danger in the future. **5/27/08 Tr. pp. 42-43; 7/11/08 Tr. p. 27**. The Court finds that this was a reasonable and sound, albeit ultimately unsuccessful, trial strategy at resentencing.

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. The Court finds that these allegations are procedurally barred because they either were or could have been raised at trial and on direct appeal.

S.C. Code Ann. § 17-27-20(b) (1986) specifically provides that the remedy of Post-Conviction Relief "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,

[22] The trial judge found that he was qualified to serve as lead counsel under South Carolina law. The Court finds that Applicant has not challenged counsel's qualifications. Nor has he challenged counsel's pretrial preparation or investigation.

260 S.E.2d 187 (1979). Therefore, the Court finds that Applicant's **Grounds 11(a)(1)-(7)** are not appropriate in PCR.[23]

GROUNDS 11(a)(1),(3) and (6)-(7)

Alternatively, the Court rejects the allegations in **Grounds 11(a)(1), (3) and (6)-(7)** for several other reasons. Applicant's **Ground 11(a)(1)** was expressly raised to and rejected by the South Carolina Supreme Court on direct appeal. In this allegation, 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)

[23] For the reasons stated in connection with the Court's rejection of the ineffectiveness claim based upon trial counsel's failure to contemporaneously object to the Solicitor's opening comments and his closing argument, the Court rejects Bennett's contention that the Solicitor made "demeaning references" to Bennett's race. Rather, the challenged remarks generally were proper in light of the resentencing phase evidence of the crime for which he was being sentenced and evidence of his prior, violent criminal history. None of the challenged remarks were such that they rendered his sentencing proceeding fundamentally unfair.

Applicant further contends that his right to an impartial jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, was violated by the seating of a juror who supposedly held racist views. The Court finds that this claim is without merit and that his right to a trial by an impartial jury was not violated.

In support of this claim, Applicant presented the testimony of Adam T. Humphrey, the juror in question. At the PCR hearing, Mr. Humphrey testified about a conversation he had with Applicant's counsel in July 2007, seven years after Applicant's re-sentencing trial. **5/27/2008 PCR Tr. p. 8-20**. Mr. Humphrey testified that they met at his house. He agreed with counsel that they discussed his thoughts on the case, the sequestration of the jury, the evidence, and the attorneys involved. **5/27/2008 PCR Tr. p. 8.**

Mr. Humphrey admitted that, during the conversation with Applicant's counsel, he stated that Applicant may have killed the victim "because he was just a dumb nigger." **5/27/2008 PCR Tr. p. 9**. Applicant now claims that he is entitled to relief because Mr. Humphrey's statement indicates that he was racist at the time of trial; thus, he was not impartial. This claim lacks merit. In reviewing the testimony of the juror, the Court finds that there is insufficient evidence to support Applicant's contention that Juror Humphrey was actually biased against Applicant in the re-sentencing trial.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant a trial by an impartial jury. *Morgan v. Illinois*, 504 U.S. 719, 726-27 (1992). "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). The presence of even a single biased juror deprives a defendant of his right to an impartial jury. *See Morgan*, 504 U.S. at 729;

Williams v. Bagley, 380 F.3d 932, 943-34 (6th Cir.2004), *cert. denied*, 544 U.S. 1003 (2005). Voir dire protects the right to an impartial jury "by exposing possible biases, both known and unknown, on the part of potential jurors." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984). Thus, it is necessary for prospective jurors to provide truthful answers. *Id.* To be entitled to a new trial, Applicant "must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *McDonough*, 464 U.S. at 556; *see Conaway v. Polk*, 453 F.3d 567, 584-85 (4th Cir. 2006).

Applicant has failed to establish that Juror Humphrey failed to honestly answer a material question on voir dire. During voir dire, Mr. Humphrey testified that he understood that Applicant was convicted of murder. **R. p. 642.** He further indicated that he understood that the State had to prove an aggravating circumstance beyond a reasonable doubt. **R. p. 642.** He indicated that he understood that the jury would determine if the State proved any aggravating circumstance beyond a reasonable doubt, and that the jury would hear mitigating circumstances in Applicant's case. **R. pp. 642-43.** He stated that he understood that the judge would tell the jury the law in the case, and the jury would apply the law to the facts and decide on a sentence. **R. p. 643.** Mr. Humphrey further stated that he was the type of juror who would not have made up his mind as to the punishment of a defendant based upon the fact that he was convicted of killing someone maliciously; that he would want to hear all of the aggravating and mitigating circumstances; that he would want to hear the law from the judge; and that only then he would be ready to decide the appropriate sentence. **R. pp. 643-44.** Further, he agreed that if the facts justified a life sentence, he could give a life sentence, and if they justified a death sentence, he

could give a death sentence. **R. p. 644.** He also stated that he believed he could give both sides a fair trial. **R. p. 647.**

When questioned by the Solicitor, Mr. Humphrey clearly reiterated that he would listen to all of the testimony and follow the law as explained by the judge. **R. pp. 646-50.** When questioned by Applicant's trial counsel, Mr. Humphrey noted that the fact that Applicant was convicted of murder did not bring forth any feelings as to what the appropriate punishment should be. **R. p. 652.** He also indicated that he understood that he could return a verdict for life even if he finds sufficient evidence of an aggravating circumstance. **R. pp. 652-53.** He also reaffirmed that he would have to hear all of the evidence before he could make a decision on what the appropriate punishment would be. **R. p. 655.**

Applicant has not presented any evidence that Juror Humphrey failed to answer honestly any question during voir dire. In his testimony at the PCR hearing, Mr. Humphrey clearly asserted that his decision was based upon the evidence and testimony at trial. **(5/27/2008 PCR Tr. p. 14).** Applicant has not alleged that Juror Humphrey concealed material information in his answers during voir dire. Juror Humphrey's testimony does not support a finding that he concealed material information. The Court finds that Applicant failed to establish that there would have been a valid reason to strike Juror Humphrey for cause. Thus, to the extent that Applicant seeks relief under a claim of juror misconduct, Applicant has failed to meet its burden of proof. His claim for relief is dismissed.

McDonough "is not the exclusive test for determining whether a new trial is warranted: a showing that juror was actually biased, regardless of whether the juror was truthful or deceitful, can also entitle a defendant to a new trial." *Jones v. Cooper*, 311 F.3d 306, 310 (4th Cir.2002).

In other words, " *McDonough* does not entirely foreclose a party from seeking a new trial on the basis of a prospective juror's honest, though mistaken, response." *Zerka v. Green*, 49 F.3d 1181, 1186 n. 7 (6th Cir.1995) (citing *Amirault v. Fair*, 968 F.2d 1404, 1405-06 (1st Cir.1992)). However, "[i]n the absence of intentional concealment, only extreme circumstances justify a new trial," and the petitioner must prove "actual juror bias." *Id.*

Jurors are presumed to be impartial, absent indications to the contrary. *Wells v. Murray*, 831 F.2d 468, 472 (4th Cir. 1987); *see Irvin v. Dowd*, 366 U.S. at 723. "[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation.... Due process means a jury capable and willing to decide the case solely on the evidence before it ...." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). A juror must be able to "lay aside his [or her] impression or opinion and render a verdict based on the evidence presented in court." *Irvin*, 366 U .S. at 723.

A biased juror, in the usual sense, "is one who has a predisposition against or in favor of the defendant. In a more limited sense, a biased juror is one who cannot 'conscientiously apply the law and find the facts.' " *Franklin v. Anderson*, 434 F.3d 412, 422 (6th Cir.2006) (quoting *Wainwright v. Witt*, 469 U.S. 412, 423 (1985)). "If an impaneled juror was actually biased, the conviction must be set aside." *Hughes v. United States*, 258 F.3d 453, 463 (6th Cir.2001). "[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." *Palacio v. State*, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999). "[I]n order to fully safeguard this protection, it is required that the jury render its verdict free from outside influences of whatever kind and nature." *State v. Bryant*, 354 S.C. 390, 395, 581 S.E.2d 157, 160 (2003) (quoting *State v. Cameron*, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct.

App. 1993)). In cases where a juror's partiality is questioned after trial, it is appropriate to conduct a hearing in which the defendant has the opportunity to prove actual juror bias. *Bryant*, 354 S.C. at 395, 581 S.E.2d at 160 (citing *Smith v. Phillips*, 455 U.S. 209 (1982) and *Remmer v. United States*, 347 U.S. 227 (1954)). At a hearing on the juror's partiality, the defendant bears the burden of proving the juror was actually biased. *Bryant*, 354 S.C. at 395.

The Court finds that Applicant has failed to establish that Juror Humphrey was actually biased when he was a member of the jury in Applicant's case in 2000. At the PCR hearing, Juror Humphrey was asked by Applicant's counsel about a conversation they had at Humphrey's home in June 2007. **5/27/2008 PCR Tr. pp. 8-9**. Specifically, Mr. Humphrey was asked if he recalled his answer to the question, "[w]hy did you think that Mr. Bennett had killed the victim?" **5/27/2008 PCR Tr. p. 9**. Humphrey admitted that he recalled the answer. *Id.* When asked if he recalled saying "because he was just a dumb nigger," Humphrey admitted that he used some words like that. **5/27/2008 PCR Tr. p. 9**.

Mr. Humphrey's answer to that question, while deplorable and racially insensitive, is not sufficient evidence to establish that he was actually biased against Applicant during the re-sentencing hearing some seven years earlier. His testimony establishes only how Juror Humphrey felt about the Applicant's conduct when asked in June 2007. Nothing in Juror Humphrey's testimony at the PCR hearing establishes that he was biased against Applicant at the time of trial because of Applicant's race. Contrary to Applicant's assertions, it is unclear from Humphrey's testimony when he came to the conclusion that Applicant was a racial epithet. When asked by Applicant's counsel if he wanted to change any of the words said, Juror Humphrey's testimony indicates that in reflecting upon the week of the trial and the evidence

presented, this was how he felt about Applicant. **5/27/2008 PCR Tr. p. 9-10.** It appears that his reflection was how he felt at the time he was speaking with Applicant's counsel in 2007, not at the time of the sentencing trial in 2000. Juror Humphrey's testimony on redirect was similarly vague in regards to the timing of his characterization of Applicant. When asked if that was how Humphrey felt at the time of the re-sentencing trial, Humphrey responded that it was wrong for him to make the statement. **5/27/2008 PCR Tr. p. 16.** He further testified that Applicant "was not a good person for what he did, with no remorse, and that's how I felt." **5/27/2008 PCR Tr. p. 16.** Again, it appears that Juror Humphrey is discussing his thoughts at the time the statement was made in 2007, not his thoughts during the re-sentencing trial.

Applicant offers no other probative evidence to establish that Juror Humphrey was racially biased at the time of trial.[24] He relies solely on the fact that the juror used a racial epithet in 2007 to establish that the juror was racially biased in 2000. This is insufficient evidence to establish Juror Humphrey was actually racially biased at the time of the re-sentencing trial.

> The mere fact that a person admits having used a racial epithet at some time, or exhibits a preference for his religion and views other ethnic groups with suspicion does not render him incapable as a matter of law of impartially considering the criminal responsibility of a person of another race, religion, gender or ethnic group. Unfortunate though it is, ethnocentricity is a norm in all human behavior; even people of the race slandered in this case, including appellant, used that epithet amongst themselves. If such human failings demanded disqualification of a juror for cause as a matter of law, the right to a jury of one's peers would be denied altogether. Where on reflection and deeper questioning, a person who has candidly admitted to such failings concludes nevertheless that he can consider the evidence in a fair and impartial manner, the best view taken of this juror is from the trial court's bench.

Rower v. State, 219 Ga.App. 865, 868, 466 S.E.2d 897, 900 (Ga. Ct. App. 1995).

[24]Juror Humphrey did testify that he had used the racial epithet before the day he met with Applicant's counsel. **5/27/2008 PCR Tr. p. 19.** However, it was not clear from the testimony when he had previously used the word.

During the voir dire before trial, Juror Humphrey clearly stated that he would consider all of the evidence in a fair and impartial manner. **R. pp. 642-44, 646-50, 655.** He testified at the PCR hearing that his decision was based solely upon the evidence presented at trial. **(5/27/2008 PCR Tr. p. 14,** *see* **5/27/2008 PCR Tr. pp. 9, 16).** He further testified that race had nothing to do with his decision. **(5/27/2008 PCR pp. Tr. 14, 15).** Humphrey asserted that he did not believe that Blacks are inferior to Whites. **(5/27/2008 PCR Tr. p. 15).** This Court finds that the testimony of Juror Humphrey is credible. Humphrey admitted that he made the statement alleged by Applicant. He clearly acknowledged that it was a poor choice of words, and he expressed that it was not reflective of his views on race or the Applicant. Applicant offers no probative evidence to establish that Humphrey's testimony was untrue. There was no testimony or probative evidence presented that established Humphrey viewed African-Americans as inferior to Whites, or that Humphrey did not properly consider and weigh all of the evidence presented at Applicant's trial in making his finding as a juror. Further, there was no probative evidence that Juror Humphrey engaged in acts reflecting a racial bias prior to Applicant's trial. Thus, Applicant has failed to show that Juror Humphrey was partial as the result of an actual bias against Applicant. This claim for relief is dismissed.

The decision by the Eleventh Circuit Court of Appeals in *Dobbs v. Zant* supports this finding. 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. [25]

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. 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

[25] 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).

> 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' equal protection argument:

> In 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 Humphrey uttered the racial epithet in reference to Applicant some seven years after the sentencing proceeding, Applicant did not show that racial prejudice actually affected the jury's decision because even if Juror Humphrey possessed some racial prejudice, he cannot show that Humphrey was influenced by prejudices that would make him 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.

This is not a case of juror misconduct. Applicant has submitted that *State v. Phillips*, 917 A.2d 931 (Conn. App. 2007) provides some guidance into this matter. In *Phillips*, the Connecticut Court of Appeals outlined the procedure a court should follow in a jury misconduct case in which allegations of juror racial bias are alleged. The Court of Appeals reviewed the trial court's ruling on a motion for a new trial. The defendant had asserted a jury misconduct claim based upon allegations of possible juror racial bias, among other claims. *Phillips*, 917 A.2d at 935. The trial court held an evidentiary hearing on the juror racial bias issue. *Id.* The juror accused of making the racist remarks and four jurors who allegedly heard the remarks were questioned during the hearing. *Id.* During the hearing, the trial court asked the jurors whether their decisions were impacted by the racial remarks made by one juror. *Id.* at 936. In its memorandum of decision, the trial court noted that the decision of the jury was not impacted by the racial remarks made by the juror, and that the opinion of the jury was the result of only the facts of the case and law presented to the jury. *Id.* at 936. The Connecticut Court of Appeals reversed the denial of the motion for a new trial and remanded the case back to the trial court. The Court of Appeals held that the legal standard used by the trial court was improper. *Id.* at 937.

> We conclude that the court should have restricted its inquiry of the jury to a solicitation of objective facts relating to the allegations, including statements heard and conduct observed, and should not have inquired into the effect of those facts on each juror's deliberations. The court should then have made an independent determination as to whether the evidence before it revealed racial bias on the part of a juror.

Id. at 940.

Applicant did not raise his claim under Ground 11(b) as a juror misconduct claim. Juror Humphrey testified that neither he nor any other juror used any racial epithets or expressed any

racially derogatory views during the jury deliberations. **(5/27/2008 PCR Tr. p. 14).** Thus, the claim before this Court is clearly distinct from the claim raised in *Phillips*. However, even if this Court applies the same standard expressed by the appellate court in *Phillips,* the result would remain the same. The only objective facts that Applicant has submitted in support of this claim is a statement made by Juror Humphrey seven years after the re-sentencing trial. There is no probative evidence that suggests Juror Humphrey was racially biased at the time of the re-sentencing trial. There is no probative evidence that Juror Humphrey was predisposed to sentence Applicant to death as a result of some racial bias. Juror Humphrey's testimony was credible. He testified that he did not take Applicant's race into account in his deliberations at the re-sentencing trial. Applicant's claim is therefore dismissed.

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.**

Both attorneys testified that there was not a strategic reason for failing to object to these comments. Mr. Floyd testified that "[i]t just didn't strike me at the time." **5/27/08 Tr. pp. 25; 47; 7/11/08 Tr. pp. 33-34.** Mr. Floyd also acknowledged that, in response to a question from the jury inquiring about the appeals process, after deliberation had begun, the trial judge gave a curative instruction that instructed them that this was not a matter for their consideration. Likeise, it appeared to Mr. Floyd that the trial judge's intention was to explain that jurors could

not speculate about the appellate process. **5/27/08 Tr. pp. 47-48.** The Court finds that Applicant cannot show either deficient performance or resulting prejudice.

To establish that he received ineffective assistance of counsel, an inmate must make a two-fold 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).

The Court finds that these comments are clearly distinguishable from the reversible comments in the cases upon which Applicant 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 your 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 that 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 331-33.

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 that:

> 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 659, 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 that 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*, 273 S.C. at 660, 258 S.E.2d at 566 (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.*

This Court finds that the trial judge's comments in the present case do not approach the direct statements of unfettered appellate review found within the prosecutors' remarks in *Caldwell, Tyner*, or *Gilbert*. When viewed as a whole, the Court finds that there is simply no reasonable likelihood that 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 the trial judge 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.**[26]

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 judge'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). For these reasons, the Court finds that counsel were not deficient in failing to object to the trial judge's comments, since an objection would not have been meritorious and would not have been successful. See *Werts v. Vaughn*, 228 F.3d. 178, 203 (3d Cir. 2000) ("counsel cannot be ineffective for failing to raise a meritless claim"); *Clarke v. Grosse*, 16 F. 3d 960, 963-64 (8th Cir. 1994) (Because there was no basis for counsel to object to evidence admitted at trial, counsel's failure to object was not deficient performance); *Cedillos v. State*, 250 S.W. 3d 145,

[26] 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.**

154 (Tex. App. 2008) (counsel cannot be found ineffective for failing to make an objection unless the record establishes that an objection would have been successful); *Jones v. Stotts*, 59 F. 3d 143, 146 (10th Cir. 1995) (counsel's failure to make an *in limine* motion was not ineffective because an *in limine* motion is inherently a strategic part of trial strategy). *Cf. United States ex rel., Link v. Lane*, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding no prejudice from failure to object where objection would not have been successful).

Even assuming the comments were objectionable and counsel were 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 the jury 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.**[27]

Based upon this subsequent charge, the Court finds that Bennett has failed to prove "a reasonable probability that. . . the [jury]. . . 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. Applicant also cannot show prejudice because the overwhelming evidence of aggravating factors, discussed *supra*, renders any speculative prejudice from the trial judge's remarks harmless and non-prejudicial. There is simply no reasonable likelihood that the jury

[27] 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.**

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 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, the Court finds that Applicant cannot show either deficient performance or resulting prejudice.

At the time of sentencing, Ms. Gallman was 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. Applicant'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 pursue gainful employment unless engaged in some other program approved by my supervisor." Moreover, she explained to him that he was subject to any sanction that 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. Applicant did not object to her testimony or cross-examine the witness. **R. pp. 1107-08.**

Mr. Floyd testified at the PCR hearing that he did not have a strategic reason for failing to object to her testimony. However, he acknowledged that Mr. Young was responsible for examining Ms. Gallman. **5/27/08 Tr. pp. 26; 49.**

Mr. Young testified that he did not recall "needing to make any objections to testimony as a whole." While he did not have a strategic reason for wanting the jury to know that Bennett was on parole at the time of the murder, he agreed that her testimony was primarily limited to the date of Applicant's release from incarceration and evidence concerning the conditions of his parole from the earlier offense. Although he normally maintains a research file that would have contained any relevant cases, he could not recall any decision by either the United States Supreme Court or the South Carolina Supreme Court that had held the prosecution could not introduce evidence that the defendant was on parole at the time he committed the murder for which he was being sentenced, in the penalty phase of a capital trial. **7/11/08, Tr. pp. 34-35; 47-48.**

Notwithstanding Applicant's contrary position, the Court finds that Ms. Gallman's testimony was clearly 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, Applicant has not provided any authority holding that the State may not present evidence that the accused was on parole for an unrelated offense, when he committed the murder for which he is being sentenced.

Further, there is no merit to Applicant's contention that this evidence "was substantially more prejudicial than probative." The Court recognizes 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). Applying a Rule 403 analysis, the Court finds that the probative value of Agent Gallman's testimony was not substantially outweighed by its prejudicial effect, and it was, thus, admissible. The Court specifically notes that similar evidence was introduced in the penalty phase of capital trials in *State v. Stone*, 350 S.C. 442, 450-52, 567 S.E. 2d 244, 248-49 (2002) (reversed because of trial court's failure to give parole ineligibility charge); and *State v. Atkins*, 293 S.C. 294, 296, 360 S.E. 2d 302, 303 (1987) ("At the time this incident occurred, appellant was on lifetime parole for a 1970 murder conviction").

The State's evidence also included other crimes and acts of violence by Applicant. The Court finds that the State's closing argument makes clear the importance of evidence that

Applicant was on parole when he murdered Benton Smith was that it demonstrated his refusal 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 the 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). Because the evidence was admissible, trial counsel was not deficient in failing to object with it. See *Werts,* 228 F. 3d at 203 ("counsel cannot be ineffective for failing to raise a meritless claim"); *Clarke*, 16 F. 3d at 963-64 (counsel's failure to object not deficient where there was no basis to object to evidence introduced); *Cedillos*, 250 S.W. 3d at 154 (counsel cannot be found ineffective for failing to make an objection unless the record establishes that an objection would have been successful). *Cf. United States ex rel., Link v. Lane*, 811 F.2d at 1170 (finding no prejudice from failure to object where objection would not have been successful).

The Court further finds that Applicant has failed to prove prejudice. 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 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). 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 Applicant's bad character beyond a reasonable doubt before considering it. The Court finds that this instruction 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 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).** Moreover, the Court finds that the prosecution presented overwhelming evidence that proved beyond a reasonable doubt that Applicant committed the murder while in the commission of each of the alleged statutory aggravating circumstances. For the foregoing reasons, the Court finds that Applicant has failed to prove that there is "a reasonable probability that, absent the errors, the [jury]. . .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)(3)

Applicant further alleges that counsel improperly informed the resentencing jury that he was already on death row. The Court finds that Applicant has knowingly and voluntarily waived **Ground 11(c)(3)** by failing to address it in his Post-Hearing Memorandum. *See* **Post-Hearing Memorandum, pp. 40-41** (challenging ineffective assistance of appellate counsel). *See also* **Post-Hearing Memorandum, pp. 1-64.** Alternatively, the Court finds that Bennett has not established deficient performance or 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 on Mr. Floyd's cross-examination of prosecution witness James Green **(R. p. 1604)**, and alleged ineffective assistance of counsel arising from Mr. Young's direct examination of defense witness, Reverend James Brown **(R. p. 2070)**.

A. Proceedings in the trial court.

Mr. Green testified that he is a criminal investigator with S.C.D.C.'s internal affairs branch. SCDC investigators conducted a 1997 investigation 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. Applicant 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 that she 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.** [28]

It was against this backdrop that trial counsel Floyd engaged in the following colloquy:

> 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?

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

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.

R. pp. 1604-05.

After Mr. Floyd had conducted his cross-examination, the jury was excused. The Solicitor noted that Applicant's statement to Inv. Green had referenced that he was housed as a safekeeper and that he was on death row. The Solicitor stated "I expressly told the witness Mr. Green not to mention the defendant being on death row, and we put in [the statement] in place of on death row we put at S.C.D.C. . . . Now, twice Mr. Floyd on cross-examination asked him about death row." So, the Solicitor argued that he should have the right to ask whether Applicant's sexual intercourse with Hardee occurred on death row. **R. pp. 1606-07.**

Mr. Floyd admitted that he made "an error" and argued that the error should not be compounded by repeating it. He also moved for a mistrial because his error prejudiced Applicant. **R. p. 1607.**

The Solicitor correctly argued that Bennett was not entitled to a mistrial based on error by his own counsel, and he argued that defense counsel had opened the door for the proposed re-direct. **R. pp. 1607-08.** However, Mr. Floyd argued that the State's proposed further examination "would be highly prejudicial and would outweigh any probative value to allow that to proceed." **R. p. 1608.**

The trial judge ruled that he would allow the State's proposed redirect because counsel had made two references to death row. He also denied the motion for a mistrial because he could not grant a mistrial based on a question asked by defense counsel. **R. pp. 1608-09.**

On redirect examination, the State elicited that Applicant was having sexual relations with Hardee in "the most secure" facility in SCDC, death row. **R.p. 1609.** After the State had concluded redirect examination, the trial judge gave the following curative instruction:

> THE COURT: Ladies and gentlemen of the jury, let me be sure to give you an instruction. The fact that the witness has testified [events] occurred on death row should not have anything to do with the issues here. Remember, you are basing the issues here, and the sentence that you give in this matter is going to be issued only on the evidence that you hear and only on those aggravating circumstances and mitigating circumstances. Be sure to remember that.

R. pp. 1609-10.

Trial counsel then requested and was allowed to make an *in camera* objection. Mr. Floyd argued that, while the defense appreciated the trial judge's effort to assist in the matter, the defense did not request a curative instruction. He further argued that the curative instruction, by

informing jurors not to use the statement in any fashion, "may have cleared up something that the jury might not have realized:" that Applicant had previously been sentenced to death. **App. 1610-11.**

The trial judge observed that the State had redacted Applicant's statement to eliminate any reference to death row. Counsel "let the cat out of the bag" by twice referring to death row in his examination of the witness. The trial judge explained that he gave the curative instruction "obviously not to confirm that with the jury but to ease that problem with the jury and [to] make sure they understood not to consider that in any way." He also felt that "once the witness said death row that's when I felt like I needed to give the curative instruction." **R. pp. 1612-14.** The trial judge also observed that counsel had objected to introduction of the redacted statement given by Applicant to Investigator Green. **R. pp. 1614-15.**

Rev. Brown later 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 Applicant for "two years, plus." Then, he testified in detail about Applicant's involvement in church activities while incarcerated. Rev. Brown sees Applicant six or seven hours a week and considers Applicant to be his best friend. Applicant had never been aggressive, violent or disrespectful to Rev. Brown, and he believed Applicant 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 [e]ffect 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 [in] 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.**

B. PCR Testimony.

Mr. Floyd testified at the PCR hearing that he had told "all the guards and so forth" not to mention death row in their testimony because this might give jurors "the impression that he had already been tried and sentenced to death." Mr. Floyd, however, mentioned this, himself, in the course of cross-examing Inv. Green. He moved for a mistrial because of the prejudicial effect of this information. He did not have a strategic reason for eliciting that Applicant was housed on death row. Mr. Floyd objected to this curative instruction because he thought that it emphasized

in juror's minds that the sexual relationship with Hardee occurred on death row. However, he admitted that the jury knew of the murder conviction in *Bennett I*, and that the jury was there for resentencing. **5/27/08 Tr. pp. 27-28; 50-53.**

Mr. Young testified that Applicant had informed counsel about Rev. Brown in one of their conversations with him; and Mr. Young "got the impression that there was some sort of bond or friendship;" Mr. Young interviewed him before the resentencing proceeding to determine what, if any, mitigating evidence Rev. Brown had. Mr. Young knew Applicant met Rev. Brown while he was incarcerated, but Mr. Young did not know where Applicant was incarcerated at the time they met. **7/11/08 Tr. pp. 35-36.**

Mr. Young met with Rev. Brown and explained the questions that he would ask at the trial, and Rev. Brown answered the questions. Rev. Brown appeared to understand Mr. Young's conversations with him. They did not discuss where Applicant was incarcerated at that time. However, Rev. Brown mentioned "death row" at the resentencing; and Mr. Young immediately asked a follow-up question in which he elicited that safekeepers were housed on death row in order "to try to get around the word". It was Mr. Young's recollection that the jury would have understood that Applicant was housed there, based upon the instruction that Applicant had been convicted by another jury of murder and the jury in this case was there to resentence him, but Mr. Young did not want "to put [this information] on the table." **7/11/08 Tr. pp. 36-38.**

In support of his argument, Applicant relies upon *Caldwell, supra*. This Court finds that his 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". 472 U.S. 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. 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, 302 S.C. at 24-25, 393 S.E.2d 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 Applicant's claim for relief. *Id.*

Further, during the resentencing hearing in *Jones v. State,* 332 S.C. 329, 504 S.E.2d 822 (1998), *cert. denied*, 526 U.S. 1021 (1999), *reh. den.*, 526 U.S. 1128 (1999), a defense witness testified on direct examination 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." *Id.* at 341, 504 S.E.2d at 828. 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.*

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 (1995), *overruled in part on other grounds, 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 in *Jones* found 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 affirmatively misled the jury regarding its role in the sentencing process so as to diminish its sense of responsibility." *Jones*, 332 S.C. at 342, 504 S.E.2d at 828 (quoting *Romano*, 512 U.S. at 10). The Court stated that Jones failed to establish "how this passing reference to death row has misled the jury regarding its role in the sentencing process or diminished its sense of responsibility." *Id.*

In the present case, the Court finds that it is unnecessary for the Court to determine the first prong under *Strickland*[29] because Applicant clearly failed to demonstrate any prejudice from counsel's performance. First, his jury had already been presented with damaging evidence that he 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 much more prejudicial than information that he was kept on death row or that he had sex there. 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.

[29] Particularly where the State had already presented evidence that Applicant engaged in bad acts while housed as a safekeeper on death row, Applicant has not shown how counsel's actions were deficient.

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.* The Court specifically finds that neither the defense nor the prosecution informed the jury that he was housed on death row because of his prior death sentence. Rather, the only evidence presented was that he was there as a safekeeper before either Inv. Green's investigation or Applicant's contact with Rev. Brown. *See Jones, supra. See* **R. p.** 1790. 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.

Additionally, the Court finds that whatever *de minimus* prejudice that might otherwise exist was cured by the curative instruction given by the trial judge. **R. pp. 1609-10.** The

> "[g]ranting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way. Generally, a curative instruction to disregard the testimony is deemed to have cured any alleged error." *State v. Edwards*, 373 S.C. 230, 236, 644 S.E. 2d 66, 69 (Ct. App. 2007). *See also State v. Kelsey*, 331 S.C. 50, 70, 502 S.E. 2d at 63, 73 (1998) (instruction to disregard inadmissible evidence is usually viewed as having corrected the error in its admission); *State v. Ferguson*, 376 S.C. 615, 619, 658 S.E. 2d 101, 103 (2008); *State v. Patterson*, 337 S.C. 215, 227-28, 522 S.E. 2d 845, 851 (Ct. App. 1999) (holding the trial court did not err in denying Paterson's motion for mistrial because an extensive curative instruction "cured any possible error and eliminated any conceivable prejudice").

Even assuming that trial counsel did preserve a challenge to the sufficiency of the curative instruction, *cf. State v. Frazier*, 375 S.C. 575, 654 S.E. 2d 280 (2007) (in order to preserve an issue for review where a curative instruction was offered, an appellant must make a contemporaneous objection to the sufficiency of the instruction or make a motion for mistrial), the Court expressly rejects the contention that the curative charge emphasized that Applicant was on death row. Instead, the Court finds that it ensured that they jury could not allow evidence he had been housed on death row to impact their sentencing determination.

Moreover, trial counsel's cross-examination of Inv. Green very effectively downplayed the significance of Applicant's offenses while on death row and it emphasized that others were also involved. On the other hand, Rev. Brown offered mitigating testimony of a type often presented in death penalty cases. The Court finds that his testimony was important in this case where there was extensive prosecutional evidence of Applicant's future dangerousness. Further, Applicant cannot show prejudice under *Strickland* because, in light of the overwhelming evidence of aggravating factors, discussed *supra*, there is simply no likelihood that, absent trial counsel's errors, the jury "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)

Applicant further 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, the Court finds that 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 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.

The jury got the case and began deliberations at 4:53 p.m. The trial judge then 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 we [impose 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 plain and ordinary meaning 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.**

Mr. Floyd testified at the PCR hearing that his understanding of the law was that Applicant would have been parole eligible if the jury had sentenced him to life imprisonment, and that Applicant was not entitled to an instruction on his parole eligibility. Rather, he was entitled to a plain and ordinary meaning instruction. Mr. Floyd explained that he objected to the supplemental jury instruction because he thought that "it implied to the jury the different types of life sentences" were available. He was concerned that jurors might think that "there [are] some life sentences that you [do] all life and some you didn't and, therefore, it negated the life-in-its-ordinary-meaning instruction." **5/27/08 Tr. pp. 28-29; 53-54.**

The Court finds that Applicant has failed to prove either deficient performances or resulting prejudice. Initially, the Court finds that counsel's objection was sufficient to preserve, for appellate review, the trial judge's reference to the "varieties" of life sentences. 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 because counsel's performance clearly was not deficient, since counsel preserved an objection to this portion of the supplemental charge; and Applicant cannot show Sixth Amendment prejudice. Although trial counsel did not make a specific objection to the trial judge's comments that parole was "something that I can't get into with you directly," **R. p. 2145**, the Court finds that counsel's failure to make such an objection was not deficient performance.

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 instructed on the defendant's parole eligibility. *Simmons*, 512 U.S. at 176-77. *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. Also, South Carolina cases uniformly recognize that 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.[30]

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.

[30] 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) (the trial judge properly denied appellant's request to charge the jury that, 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). Here, the charge as a whole accurately states the appropriate law. 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 was not a proper issue for their 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").

The Court likewise rejects Applicant's contention **(Applicant's Post-Hearing Memorandum, pp. 29-31)** that the trial judge's remark to the effect that he could not discuss parole eligibility with the jury implied that he could not be honest in responding to the jury's inquiry. This remark merely prefaced the supplemental instruction; and the remark was consistent with his instructions that the terms "life imprisonment" and "death penalty" were to be

understood in their plain and ordinary meaning. Applicant's contrary position is based upon parsing this comment from the trial judge's charge as a whole, which is improper.

Nor was the charge given in this case "far worse than the wording of the instructions in [*State v. Johnson*, 293 S.C. 321, 360 S.E. 2d 317 (1987)] and [*State v. Plemmons*, 296 S.C. 76, 370 S.E. 2d 891 (1988)]." **Applicant's Post-Hearing Memorandum, p. 31.** The error in *Plemmons* was that the trial judge merely charged jurors, in response to a question about the defendant's parole eligibility, that:

> It is my understanding from the cases that I have read that you are not to concern yourself with that. The question that goes to you as a jury is, what is your recommendation to this Court, is it the death penalty or is it life imprisonment?"

296 S.C. at 78, 370 S.E. 2d at 872.

On appeal, the Court held that the defendant was entitled to a full *"Norris* charge"; and that the trial judge should have instructed jurors "(1) not to consider parole; and (2) the terms 'life' and 'death' are to be understood in their plain and ordinary meaning." *Plemmons*, 296 S.C. at 79, 370 S.E. 2d at 872. Similarly, the jury in *Johnson* returned to the courtroom during penalty phase deliberations and asked whether it was possible to recommend a sentence of life without parole. *Johnson*, 293 S.C. at 327, 360 S.E. 2d at 327. Again, the trial judge did not give a plain and ordinary meaning charge. Rather, he merely told jurors that they should not consider the possibility of parole and that it was not a concern for them. The Court found, on appeal, that this was an error, because the instructions did not include the plain and ordinary meaning charge. *Id.*

In the present case, however, this Court finds that the trial judge did give a plain and ordinary meaning charge that, when taken as a whole, complied with State law under *Davis*. The

Court further finds that this instruction also did not contain the portion of the *Norris* charge admonishing jurors not to speculate about parole, which Justice Blackmun opinion in *Simmons* criticized as improperly inviting speculation of parole eligibility into jury deliberations. Thus, the Court finds that *Plemmons* and *Johnson* are distinguishable.

Therefore, Court finds that when the trial judge's charge is considered as a whole, there is simply no reasonable likelihood that the jury would have understood these remarks as permitting speculation about parole or that the judge's charge was otherwise considered in unconstitutional manner. *See 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 finds, based upon the representations of Bennett's collateral counsel, that he has voluntarily and knowingly abandoned this allegation.

GROUND 11(c)(6)

Applicant further alleges that trial counsel was ineffective for failing to properly object to evidence of a prior ABHAN victim because this evidence improperly injected the arbitrary and irrelevant consideration of race into his resentencing proceeding. Specifically he complains about testimony from one of the ABHAN victims concerning the recurring dream he has

experienced following the attack, the testimony from the victims' mothers concerning the extent of the injuries inflicted, and photographs depicting the injuries inflicted. The Court finds that these allegations lack merit; and that Applicant has not meet his burden of proof on either prong of *Strickland, supra.*

In connection with his claim that the State violated due process by impermissibly injecting race into the sentencing proceeding, he also claims in his Post-Hearing Memorandum that several prosecution witnesses testified to Applicant's misconduct while incarcerated at various facilities that also impermissibly injected race (**Applicant's Post-Hearing Memorandum, pp. 13-15;Grounds 11 (a)(4)-(7)**); and he contends that "[t]o the extent that respondent argues and this Court agrees that this due process claim is procedurally defaulted based upon trial or appellate counsel's failures, then this Court should simply decide the issue under the rubric of [*Strickland*]." **Applicant's Post-Hearing Memorandum, pp. 13 n. 8.** The Court rejects this allegation because not alleged in his Application.[31]

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[31] As discussed, the Court has already found that his due process allegation is not properly before the Court in PCR. *See* § 17-27-20(b); *Drayton*, 312 S.C. at 8-9, 430 S.E.2d at 520. Further, Applicant has not alleged in his Second Amended Application that counsel were ineffective in failing to object to this evidence or that appellate counsel was ineffective for failing to raise this on appeal. Because he did not raise any allegation of ineffective assistance of trial or appellate counsel on this basis in his Second Amended Application, the Court finds that no such claim is properly before the Court. The Court finds that it would be an abuse of discretion to permit an untimely amendment under Rule 15(a), SCRCP. Nor can the allegation reasonably have been viewed as "tried by the express or implied consent of the parties, since Respondent was not given any notice that this was an ineffective assistance of counsel claim, and the evidence elicited concerning the evidence concerning his misconduct in prison was relevant to the alleged due process violation, even if the allegation was procedurally defaulted. *Cf. Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992).

The Court alternatively finds that **Grounds 11(a)(3) and (6)-(7)** were expressly considered and rejected on the merits by the South Carolina Supreme Court. 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 resulting from their intoduction. 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"). The Court does not find that trial counsel or appellate counsel were deficient with respect to their handling of this evidence. However, because introduction of this evidence did not violate due process, the Court finds that Bennett cannot show any prejudice resulting from any supposed deficient performance by either trial or appellate counsel. *See Strickland,* " 466 U.S. at

A. Events at trial.

1. The Pizza Hut evidence.

As part of its case in resentencing, the State introduced Applicant's two September 14, 1988 convictions for A.B.H.A.N. and his Youthful Offender Act sentence.[32] 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 who 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 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

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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"). The Court further finds that the remaining portions of the due process claim, **Grounds 11(a)(4)-(5)**, did not impermissibly inject race; and that Bennett has not shown deficiency or prejudice in trial or appellate counsel's performance for the reasons discussed, *infra*.

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

let go of the fist full 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.[33] After he stomped him for the last time, he jumped into a truck that had pulled up (driven by a white male), 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 lying on the ground in the back of the Pizza Hut. **R. pp. 998-1003; 1006-09.**

Mr. Floyd 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 had 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 Memorial Hospital because of head trauma. When she arrived at the hospital, he was unconscious. Also, she had a hard time identifying him because of the bruises, cuts and swelling

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

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 that they had to personally hire a tutor because they did not meet the time requirements for the State to provide one. Shannon needed a speech therapist. Also, 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 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. 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 conscious recollection about being in the hospital or any dreams that he could remember from being in the hospital, Shannon Gilbert testified that "I did have a dream in the hospital. It's the only one I remember, of course." Trial counsel 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 Shannon and Aaron McGough; but Shannon 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 might 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.**[34]

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

[34] 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 rejected his arguments (**R. pp. 867-85**) and Applicant did not raise any issue on direct appeal concerning this ruling.

ambulance arrived and the door was opened, 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 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 very 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 fairly depicted how Aaron looked at the time the photos were taken. 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." 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.**

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.** Counsel renewed his objection to Shannon's testimony in support of his motion for a new trial. **R. pp. 2363-80.** The State responded thereto. **R. p. 2381-2406.** He thereafter argued his objection to this testimony at the hearing on the motion for a new trial. **R. pp. 2207-08.** 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 (**R. pp. 2415-16**), 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."

2. Evidence related to Applicant's misconduct in prison.

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 he began bullying and trying to intimidate others with his physical size beginning in the fifth grade and that he 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)**, and when he was later incarcerated within SCDC and the Lexington County Jail.

On various occasions in his incarceration, Bennett 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.[35] 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 about how he 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)**, Applicant 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

[35] 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.**

McChesney attempted to give medication to Dougins. Applicant picked up the 5' 4" McChesney, moved her out of the way. Applicant then dragged Dougins out of his cell by his hair, threw Dougins on the cement floor and pounded Dougins' head into the floor.[36] When an inmate Glover made a comment to him that he was going to kill Dougins, Applicant turned and 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.**

Correctional Officer Sandra Key was one of the prosecution witnesses who testified as to Bennett's violent behavior in prison. She was a dorm officer at the Aiken Youth Correctional Center, while Bennett was incarcerated there in December 1988. There were ninety-six inmates under her supervision at the time. The inmates were housed in two equally divided dorms, with a

[36] 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. Further, Officer McChesney's efforts to physically stop him did not work. **R. pp. 1532-33.**

bathroom area between them. She was required to check on inmates every thirty minutes. On December 10, 1988, Applicant and several other inmates "interfered with my duties to keep me from making my checks." Specifically, when she tried to go through the rest room to get to one of the dorms, there were several inmates in there, including Applicant. He physically blocked her path and asked her for Tylenols, which prevented her from making her rounds. **R. pp. 1076-79.**

Of importance to Applicant's current allegation, trial counsel Young objected to her testimony that "after an investigation, it was determined that a group of black inmates and white inmates had been fighting." Counsel argued that the inmates' races were irrelevant. The trial judge overruled the relevancy objection. **R. pp. 1077-78.** When asked whether she had noticed any cuts, bruises or marks on an inmate, she testified that:

> Well, he's don't want me to say white, but the particular inmate that had the bruises was white. He had a cut over his left eye.

R. p. 1079. Trial counsel Floyd objected to her reply, and he argued that the Solicitor's Office was "inserting race into this case, and race is not relevant." Again, the trial judge overruled the objection. **R. p. 1079.** As the result of the investigation, Applicant was charged with assault and battery, inciting and creating a disturbance and interfering with the duties of an officer. **R. pp. 1079-80.**

James Earl Harris was a detective with the Lexington County Sheriff's Department in June 1992. He conducted an investigation at that time concerning contraband, cigarettes, being brought into the jail. During the investigation, Applicant sent for an investigator to come speak with him. In their interview, Applicant admitted that he was paying certain guards $ 150.00 for a

carton of cigarettes, and he would sell each cigarette to other inmates for $ 2.00. **R. pp. 1506-12.**[37]

In the interview, Applicant also told Det. Harris that he was purchasing marijuana and crack cocaine from guards, for his personal use. "He said [he had purchased] average all together at least a pound" of marijuana, and he had purchased "at least three or four ounces" of crack. He likewise provided the guards' names. **1512-15.**

Det. Harris then testified that:

> [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.

R. pp. 1515-16. The record does not reflect a contemporaneous objection to this testimony.

B. Applicant's direct appeal.

Applicant's first three issues on direct appeal challenged the trial judge's ruling with respect to the Pizza Hut evidence. **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

[37] He was making several hundred dollars per carton.

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 228-30, 632 S.E.2d at 286-87.[38]

Mr. Floyd testified at the PCR hearing that he was aware that the State had intended to introduce evidence concerning the Pizza Hut assaults and evidence of Bennett's misconduct in prison because it had introduced in the first trial. He was concerned that race would be injected into the case, and he made several objections to the introduction of this testimony. However, he did not raise a due process objection to evidence of the Pizza Hut assaults, and he did not have a strategic reason for not doing so. **5/27/08 Tr. pp. 30-31; 35; 36; 43-44; 54.**

When asked about the defense's strategy for the resentencing hearing, Mr. Floyd explained that the defense had a number of witnesses who could show that Applicant was not a future danger in prison and that he could adapt to prison. Also, these witnesses could testify that

[38] Justice Pleicones dissented and would have held that admission of this evidence was reversible error. *Id* at 234-36, 632 S.E.2d at 290-91. (Pleicones, J., dissenting).

Applicant helped others and got along well with others in the prison system. Many of these witnesses worked in facilities where Applicant had been incarcerated and they were with him daily. **5/27/08 Tr. pp. 33-34; 38; 42-44.**

Mr. Young testified that the defense's theory was "to show his acclimation to prison life versus the need for him to receive the death penalty." In support of this strategy, counsel sought to focus on the positive things that "have occurred in his life as well a those changes that he had made during the period of time that he was incarcerated." Also, the defense wanted to minimize the State's evidence of bad conduct. Because Mr. Floyd handled those witnesses who testified concerning the Pizza Hut incident and had done so in the original trial, Mr. Young did not recall any strategic discussions related to that evidence. **7/11/08 Tr. pp. 26-28.6**

Mr. Young testified that he had a concern, which he might not have voiced to co-counsel, about race being an issue in the case because Lexington County had a "representation" (sic) of "being a little bit harsh on defendants of color." However, he did not consider race a priority because both the victim and Applicant were black, and a number of witnesses from both sides were black. **7/11/08 Tr. pp. 29-31.**

C. Discussion.

1. The Pizza Hut Evidence.

The Court finds that Applicant cannot satisfy either requirement of the *Strickland* test. In particular, he cannot show deficient performance from trial counsel's failure to better articulate objections to the admissibility of this evidence.[39] Although trial counsel did preserve a relevancy objection; a general objection such as relevancy is generally insufficient to preserve an issue for review of appeal. *See State v. Taylor*, 333 S.C. 159, 508 S.E. 2d 870 (1998); *State v. Varvil*, 338

[39] The performance of appellate counsel as addressed, *infra.*

S.C. 335, 340, 526, S.E. 2d 248 (Ct. App. 2000). More importantly, the Court finds that this evidence was both relevant and admissible, and that its admission did not violate due process.

The evidence concerning the Pizza Hut assaults was proof of the extent of the actual injuries inflicted upon victims of the Pizza Hut attacks and was proof of the ABHANs. The Court finds 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, although the majority on direct appeal in *Bennett II* refused to address whether the evidence was irrelevant or should be excluded under a Rule 403 analysis, since it found that 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 23 n. 2, 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 in the 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 Court finds that the Pizza Hut evidence concerned two crimes (A.B.H.A.N.) that were similar 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, 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 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 Applicant's culpability. As such, it was properly admissible. *See Ray* and *Gaskins*, *supra*; *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).[40] The Court finds that very similar testimony was presented in the penalty phase in *Bell*, *supra*.

Nor does the fact that the victims in the Pizza Hut case were white make introduction of the challenged evidence a violation of due process. The Court finds that this evidence was properly admitted as evidence of his malicious, violent and bullying character; and that it was extremely probative of these matters. The Court further finds that Applicant misunderstands that the truly prejudicial nature of the Pizza Hut evidence. Like the evidence relating to the guards discussed *infra*, this evidence was not more prejudicial because the victims were white. Rather, prejudicial aspect of this evidence is that the brutally malicious nature of the attacks

[40] 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).

demonstrated Applicant's true character, as opposed to the picture of a "Gentle Giant" presented by the defense's evidence in mitigation.

The Court further finds that there was no prejudice resulting from the failure to argue due process and lack of relevancy objections, 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). Applying in Rule 403 analysis,[41] this Court rejects Bennett's arguments. 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, except as pertains to his dream. 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 the Court find that it cannot fairly be characterized as prejudicial.

Additionally, his challenged testimony about the dream "was not a blatant racial reference." **Order, R. pp. 2415.** It was merely Shannon's impression of *his* 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

[41] Again, there is an expanded scope of probative value in the penalty phase of a capital trial, and this Court has applied an expanded scope to its analysis.

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). Based on these factors, the Court finds that the probative value of the Pizza Hut evidence was not substantially outweighed byits prejudicial effect under Rule 403.

The Court expressly rejects Bennett's claim that the presentation of the Pizza Hut evidence shifted the focus of the sentencing proceeding away from the murder of Benton Smith. The Court finds that his argument in this regard is inconsistent with his attack on the Solicitor's opening comments and closing argument. Additionally, the Court finds that he ignores that Ms. Smith, like many witnesses for both parties, was black. Thus, his reliance upon her description of him as black and the victim's as white does not prove improper introduction of race.

As with the other witnesses, the testimony about the races of the participants may have been merely for purposes of identifying the person involved. Moreover, the Pizza Hut evidence was extremely probative of Bennett's violent, bullying character and his future dangerousness. Finally, the Court finds that there cannot be any prejudice from introduction of the evidence because of the overwhelming proof of the statutory aggravating circumstances *i.e.*, Bennett has failed to prove "a reasonable probability that, absent [counsel's] errors, the [jury] . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death under *Strickland*." *See* 466 U.S. at 695.

2. Applicant's misconduct in prison.

With regard to this evidence, the Court finds that trial counsel did preserve an objection to introduction of the race of the participants in the fight while Applicant was incarcerated, as well as the race of the victim in the fight. The Court finds that counsel did not object to Detective Harris' testimony. The Court further finds that Applicant has failed to establish either deficient performance or resulting prejudice for many of the same reasons discussed in the preceding section.

The Court finds that this evidence was relevant and that it was admissible as a matter of South Carolina law. The Court further finds that the fact the State presented evidence that the victims were white does not result in a due process violation. If the Court accepted Bennett's argument in this regard and followed it to its logical conclusion, then hate crimes could never be punished.[42] Nor is the evidence subject to exclusion under a Rule 403 analysis. The Court expressly finds that this evidence was highly probative of Bennett's violent, malicious and bullying character, and his future dangerousness if sentenced to prison. It was also probative of his manipulative nature, since his custodians turned to him, an inmate over whom they had custody, for discipline and control over other inmates. Thus, the evidence was extremely probative on his future dangerousness.

The Court further finds that Applicant's focus on race is again misplaced, especially with respect to the incidents occurring in the Lexington County jail. The State did not introduce the evidence to inflame the sentencing jury with evidence of interracial crimes. Rather, it was merely establishing how Bennett will bully those who are weaker than him and he will be violent and disruptive in a prison, if put in general population. Indeed, the other details in Applicant's statement to Detective Harris show how he was able to virtually run the jail while incarcerated

[42] It is impossible to determine, from the record, the races of the correctional officers or other SCDC witnesses at issue.

there: guards were freely smuggling cigarettes, marijuana and crack cocaine in to him, and they relied upon him to control portions of the inmate population.

Again, the trial judge gave a limiting instruction regarding the jury's consideration of this evidence. The limiting instruction 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, 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 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; *Stewart, supra.*

The Court further finds that Applicant was not prejudiced by introduction of the challenged evidence. First, it was cumulative to both the Pizza Hut evidence and the other evidence of his violent and manipulative conduct while in and out of prison. Because the evidence at issue was cumulative, there was no prejudice, whatsoever, from its introduction. Moreover, it was not an attempt by the State to improperly inject race. Rather, it was simply evidence detailing Applicant's prior criminal behavior. Finally, in light of the overwhelming proof of the murder and the alleged statutory aggravating circumstances, the Court find that there is no "reasonable probability that, absent [counsel's] errors, the [jury] . . . would have concluded that the balance a aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

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 claims deprived him of due process. The Court finds 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, which reviewed the Solicitor's comments in light of the record as a whole. Further, Applicant cannot show any prejudice under *Strickland* from counsel's failure to object for this same reason.[43]

"[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*, 333 S.C. 316, 321, 509 S.E.2d 815, 818 (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

[43] Both Mr. Floyd and Mr. Young indicated that they did not have a strategic reason for not objecting to the State's arguments. Mr. Floyd explained that he did not hear the comments and thereafter raised a challenge to some of the remarks in his new trial motion. **5/27/08 Tr. pp. 30-34; 53-54; 7/11/08 Tr. pp. 40-42.**

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 and emphasis added).

Applying these standards to the comments at issue here, the Court finds that the 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 prove that Applicant began bullying and trying to intimidate others with his physical size beginning in the fifth grade and that he 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 A.B.H.A.N. **R. pp. 1093-01.**

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 dragged 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 the State's showing of future dangerousness and his violent character, it 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 times 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. **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 that he 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.**

The testimony of Sharon McChesney about the July 23, 1993 incident that involved inmate Dougins (*See* **R. pp. 1526-37**); the testimony of Captain Adrian Bost, the jail administrator in 1990-93" **(R. pp. 1548-49; 1570 l. 14 - 1571 l. 5)**; and the testimony of Lieber Correctional Institution Warden Willie Weldon **(R. pp. 1644-45)**, is discussed, *supra.*

Applicant's witnesses, quite obviously, painted a different story. Aside from fellow inmate Byron Collins' testimony that all the guards at LCDC loved Applicant **(R. p. 1979)**, Applicant presented expert and lay testimony that he could adapt to prison life; 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 in light of this evidence that the Solicitor made his comments that are presently complained of and some of which were expressly challenged on direct appeal. While summarizing Applicant's violent behavior at the Pizza Hut and the incident that involved 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 the Solicitor focused upon Applicant's 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 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.

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> 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 231-33, 632 S.E.2d at 288-89. (footnote omitted).

Because many of the prosecutorial comments were presented to and rejected by the South Carolina Supreme Court on direct appeal in *Bennett II*, and the Court made its determination after considering the eevidence addressed and the arguments of opposing counsel, this Court finds that 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. The Court finds that Applicant cannot show any conceivable prejudice resulting from trial counsel's 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.

Furthermore, the Court finds that Bennett cannot show that any of the Solicitor's comments in his opening statement or his closing argument so infected the trial with unfairness as to deprive Bennett of a fair trial. *Darden*, 477 U.S. at 181; *Bennett II, supra.* First, with

respect to the Solicitor's comments referring to Applicant as a murderer, Applicant cannot show any conceivable impropriety in this remark because he was and is a murderer: the jury in *Bennett I* convicted him of murder and the purpose of the resentencing proceeding was not to retry any question as to his guilty or innocence. Rather, the purpose of the resentencing was solely to determine the appropriate sentence. *See State v. Southerland*, 316, S.C. 377, 447 S.E. 2d 862 (1994) (residual doubts of guilt are not a mitigating factor in sentencing).

The Court further finds that the Solicitor's various comments about Bennett's "brute monster size" **(Rp. 908)**, the reference to his being a "bear of a fellow" **(R.p. 914)** and having a "big old bear of a fist." **(R.p. 908)** in opening statement were fair comments in light of the evidence presented. The Court finds that the same is true of the Solicitor's references to Bennett in closing argument as a "mountain man" **(R.pp. 2056, 2070)**, "Tiger" **(R.p. 2066)**, "monster" **(Rp. 2068)** and "beast of burden" **(R.p. 2079)**. Under the prosecution's theory and consistent with the testimony of the pathologist, the facts surrounding the murder demonstrated that the victim was struck several times with either a fist or a hard object, so hard that it dislocated his jaw and that these blows would have rendered him unconscious. *See* **R.pp. 1692-97; 1701-02.**

Also, the more severe injuries were a series of sixty-four stabs wounds to the victim's head, neck, shoulders, upper chest and left hand. **R. pp. 1679-81; 1697-1722.** These injuries supported the submission of the statutory aggravating circumstance that the murder was committed while in the commission of physical torture. *See* Section16-3-20(c)(a)(1)(h). Much like the reference to "King Kong" that was considered on direct appeal, the comments now at issue were not "an appeal to the passions of the jury." The comment[s] referred to "Applicant's immense size, strength and the destructiveness of his previous crimes," *Bennett II*, 369 S.C. at 232, 632 S. E. 2d at 288, as well as the murder itself.

The Court further finds that the defense made extensive efforts to show both Bennett's adaptability in prison and his non-violent behavior therein, in an effort to demonstrate that he would not be a danger in the future. Particularly in light of the defense's showing in support of its position that Applicant was adaptable to prison, as well as the prosecution's evidence as to the vicious and malicious nature of the murder and the violent, vicious attacks in which Bennett has engaged in on previous occasions, this Court expressly rejects Applicant's contention that the Solicitor's comments were designed to improperly demean or denigrate him or to inject race into the jury's deliberations.

The Court further finds that none of these comments deprived Bennett of a fundamentally fair trial, *Darden; Bennett II;* and that these comments were not calculated to produce a sentence based on passion or prejudice. The Court finds that Bennett's contrary position ignores the United States Supreme 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 [arguments], will draw that meaning from the plethora of less damaging interpretations." 466 U.S. at 647.

Moreover, the Court finds that the Solicitor's comments that "[t]here ain't no joy in Happy Town. He turned it into gruesomeville. It's boo [(sic)] hill. That's Johnny Bennett for you" **(R. p. 2071)**, were not improper attempts to inject race into the case. Bennett's contrary argument assigns a more damaging meaning than the comments warrant, which again, is contrary to *Donnelly*. His suggestion that this injects race ignores that Benton Smith, the murder victim, lived in Happy Town and he was murdered in that area. Further, the evidence presented at trial was that Applicant buried Benton's body in a shallow grave near the residence of

Applicant's sister, which is also in Happy Town. **R. p. 1290-1300; 1349-50.** Moreover, there is a cemetery near his sister's residence. **R. pp. 1297-98.**

Given the evidence and the evidence concerning the condition of the victim's body when it was discovered (specifically, that animals had damaged the body after it was buried), the Court finds that "gruesomeville" was a fair comment by the prosecutor. The Court also expressly rejects Applicant's contention that the reference to "boo hill" was an implied racially disparaging reference. A much more reasonable interpretation is that the Solicitor simply misspoke and intended to reference notorious cemeteries in the American West, such as the Boot Hill graveyard in Tombstone, Arizona, which was made famous by the gunfight at the O.K. Coral.[44] Once again, this Court should not infer a damaging meaning; such as that advocated by Applicant, where a less damaging meaning is present. *Darden.*

Additionally, the Court finds that Applicant's reliance on the South Carolina Supreme Court's Decision in *State v. Northcutt*, 372 S.C. 207, 641 S.E. 2d 893 (2007), is misplaced. At the very end of the Solicitor's closing argument, he stated:

> Now you see. Now you see why I'm asking for the death penalty. It's warranted. It's appropriate. It's the punishment that fits this crime and that callous murder.

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[44] *See* w.w.w.boothill.org/exhibitcemetery.html. The cemetery "became known as Boot Hill due to the fact that most of the people buried there still had [their] boots on their feet." *See also* www.clantongang.com/oldwest/boothill.html; *Billings v. Concordia Heritage Ass'n, Inc.*, 960 S.W. 2d 688, 689 (Tex. App. 1997) ("The record in the instant case, as supported by various historical accounts, reflects that John Wesley Hardin, coincidently a practicing attorney, relocated to the far west Texas town of El Paso upon release from prison. John Wesley Hardin died with his boots on in August 1895 when he was unexpectedly shot in the back of the head by John Selman, an El Paso County Constable. At the time of his death, Hardin was patronizing the Acme Saloon. He was buried the following day in 'boothill', located in El Paso, Texas, in a coffin adorned with a brass plaque that reads: 'At Rest.' Today, "boothill", *i.e.*, Concordia Cemetery, is said to contain some 65,000 graves, many of which were purportedly stacked one upon the other. Numerous graves at Concordia Cemetery remain unmarked and as a consequence, contain anonymous occupant").

R. p. 2081, ll. 8-10. *See also* **R. p. 2054.** Applicant asserts that counsel was deficient in failing to object to this comment, and that he was prejudiced by the error because the comment warranted reversal. The Court disagrees.

In *Northcutt*, the Court granted a new sentencing proceeding based upon a plethora of issues related to evidentiary and instructional matters. As to the closing argument claims, the Court stated as follows:

> **VI. Closing Argument**
>
> Appellant argues the solicitor's sentencing-phase closing argument so infected the jury's sentencing determination with passion and prejudice that it requires reversal of Appellant's death sentence. We agree.
>
> A trial judge is vested with broad discretion in dealing with the range of propriety of closing argument, and ordinarily his rulings on such matters will not be disturbed. *State v. Patterson,* 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997). We must review the argument in the context of the entire record. *Id.* The appellant has the burden of showing that any alleged error in argument deprived him of a fair trial. *State v. Bell,* 302 S.C. 18, 393 S.E.2d 364 (1990). The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Donnelly v. DeChristoforo,* 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). Solicitors are bound to rules of fairness in their closing arguments as we explained in *State v. Linder,* 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981):
>
> While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based upon this principle. 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.
>
> We evaluate the closing argument in light of S.C.Code Ann. § 16-3-25(C)(1) (2003) to determine "whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." Appellant argues the solicitor violated this well-established rule by (1) crying numerous times throughout the argument; (2) telling the jury "we will kick the baby some more" if they returned a life sentence; (3) dehumanizing Appellant ("I don't even call him a person"); (4) threatening the jury ("it will be on your heads if he kills someone else [during his life sentence in prison]"); (5) declaring an "open season on babies;" (6) telling the jury he "expects" the death penalty; and

(7) enacting a funeral procession complete with a black shroud covering the baby's crib.

Three of the solicitor's arguments require reversal of the sentence.[FN6] First, the solicitor suggested declaring an "open season on babies in Lexington County" if the death penalty was not returned. The sole purpose of this statement was to inflame the jury. The solicitor also repeatedly told the jury he "expects" the death penalty and, in doing so, ignored our precedent which rebukes such an imposition of the solicitor's personal belief.[FN7] Finally, he concluded his argument by producing a large black shroud and draping it over the baby's crib. He wheeled the crib from the courtroom in a staged funeral procession.

> FN6. The first four alleged mistakes are permissible arguments because they were based on the record and reasonable inferences from it. *See State v. Copeland,* 321 S.C. 318, 468 S.E.2d 620 (1996) ("A solicitor's closing argument ... should stay within the record and reasonable inferences to it.").
>
> FN7. *See State v. Smart,* 278 S.C. 515, 299 S.E.2d 686 (1982) (reversing a death sentence because of the same error by the same solicitor), *overruled on other grounds by State v. Torrence,* 305 S.C. 45, 406 S.E.2d 315 (1991); *Thompson v. Aiken,* 281 S.C. 239, 315 S.E.2d 110 (1984) (finding prejudicial error where prosecutor's argument put his personal opinion before the jury regarding the death penalty in murder cases and requiring a new sentencing proceeding).

Any one of these three miscues requires reversal of Appellant's sentence. The State admits the solicitor's comments constituted error, but contends the brutality of the crime and the fact Appellant himself asked for the death penalty require this Court uphold the sentence.[FN8] While it is difficult to determine the impact of the evidence on the jury and the Appellant's own request for a death sentence, it is clear the solicitor was overly zealous in his argument. *State v. White,* 246 S.C. 502, 507, 144 S.E.2d 481, 483 (1965) ("In view of the absolute discretion of the jury with regard to the issue of mercy, it is impossible to determine whether the argument actually had a prejudicial effect upon the verdict."). We conclude the solicitor's closing argument requires reversal of Appellant's death sentence because the sentence was imposed under the influence of passion and prejudice in violation of S.C.Code Ann. § 16-3-25(c).

Northcutt, 372 S.C. at 221-23, 641 S.E.2d at 881-82.

Although the Court in *Northcutt* plainly stated that the similar argument was among the three errors found and that "any one of the miscues requires reversal," this Court finds that vacation of Bennett's death sentence is not required here. First, in the context of the Supreme

Court's decision in *Northcutt*, the statement that the "expects the death penalty" comment, standing alone, required reversal is unquestionably *dicta*, since the Court had already found that other errors required reversal. Indeed, the South Carolina Supreme Court recently denied a petition for writ of habeas corpus in its original jurisdiction, where a capital inmate raised an ineffectiveness claim predicated on counsel's failure to object to similar arguments by the same Solicitor in the penalty phase of his capital trial. *See Williams v. Ozmint*, 380 S.C. 473, 671 S.E.2d 600 (2008).

In doing so, the Court distinguished *Northcutt* and it explained that: "*Northcutt* is inapposite. The Court did not hold that the solicitor's comments regarding 'expecting' the death penalty constituted a denial of fundamental fairness shocking to the universal sense of justice. Rather, we held that *the solicitor's closing argument as a whole* infused the sentencing proceeding with 'passion and prejudice' in violation of S.C. Code § 16-3-25(C)(1) (2003)." *Williams*, 380 S.C. at ___, 671 S.E.2d at 602 (citing *Northcutt* 372 S.C. at 222, 641 S.E.2d at 881) (emphasis added).[45]

Second, the Court again finds that the challenged argument 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. *Darden*, *supra*; *Williams*, *supra*; *Patterson*, 324 S.C. at 17, 482 S.E.2d at 766. The Court finds that Applicant has not met this burden. Unlike the direct appeal in *Northcutt*, the issue here is whether Bennett was prejudiced under *Strickland* by trial counsel's failing to object to the "expects the death penalty " argument. While his burden of proof in the present case is different from the standard for state habeas corpus relief, the Court finds that his burden to show prejudice under *Strickland* is a

[45] To the extent Applicant maintains that this was the holding in Northcutt, the Court finds that his position is refuted by the Supreme Court's discussion of *Northcutt* in *Williams*.

heavier burden than Northcutt faced in direct appellate review. *Cf. Williams*, 380 S.C. at ___, 671 S.E.2d at 602.

Third, and again unlike *Northcutt*, the Solicitor's comment was not surrounded by reversible error. Contrary to Applicant's claim, the Court finds that the Solicitor's limited comments in this case squarely addressed the fact that the decision still rested with the jury and that it had not been made for them, which distinguished the comments from those where the entire process of prior decision-making was described. While the Solicitor stated that he "expected" the death penalty, "the totality of his argument did not 'minimize the juror's own sense of responsibility for [Applicant's] fate.'" *Williams*, 380 S.C. at ___, 671 S.E.2d at 602-03 (citing *State v. Woomer*, 277 S.C. 170, 175, 284 S.E.2d 357, 359 (1981) (Solicitor improperly attempted to minimize jury's responsibility by referencing his own determination that the death penalty was the appropriate sentence)).

Specifically, the Solicitor told jurors to disregard an alleged statutory aggravating circumstance if it found that the State had not proved any of the four he urged existed, and he reminded jurors "that's your decision." **R. pp. 2056-57**. He also generally referenced the jurors' promise to base their verdict on the testimony and the exhibits and the law presented (**R. pp. 2053-81**); and he told the jury that the evidence proved that death was the appropriate sentence and that "the punishment that fits the crime." **R. p. 2081**. He likewise told jurors that the trial judge would instruct them that "[you can consider anything in favor of [Applicant], ... [and] ... you can give [Applicant] life for any reason or no reason at all." **R. p. 2059**.

In addition to the previously-stated reasons, the Court finds that *Northcutt* is further distinguishable because the Solicitor in that case, involving an infant homicide, "not only stated that he 'expected' the death penalty, but also declared that it would be 'open season on babies' if

the jury did not return the death penalty and staged a funeral procession with a black shroud draped over the victim's crib." *Williams*, 380 S.C. at ___ n. 3, 671 S.E.2d at 602 n. 3. The Court finds that there were not any analogous remarks in Applicant's case.

Moreover, the trial judge gave thorough instructions to the jury, including a charge that "you are never required to recommend the death penalty." He further charged 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." **R. p. 2130, ll. 18-22.** Furthermore, the Supreme Court has upheld almost identical comments to the remarks in this case on numerous occasions. *See e.g., Id* at ___ n. 3, 671 S.E.2d at 602-03; *State v. Johnson*, 306 S.C. at 133, 410 S.E.2d at 555 (solicitor's comment that "Ya'll do what's right . . . a verdict of death by electrocution."); *State v. Plath*, 281 S.C. at 17, 313 S.E.2d at 628 (not improper for solicitor to tell jurors to have the "guts to do your job."); *see also State v. Elmore*, 300 S.C. 130, 386 S.E.2d 769 (1989).

In fact, the Supreme Court has previously upheld an identical argument by the same Solicitor in *State v. Bell*, 302 S.C. at 33-34, 293 S.E.2d at 372-73. In *Bell*, the Solicitor argued in closing that if "'this [wasn't] a case in which a jury should impose the death penalty, if this [wasn't] the type of case in which the State should seek the death penalty and expect the death penalty, then there is none.' The Solicitor also implored the jury 'to do what's right.' He stated that if 'it was not right in this case, it was never right.'" *Id.* On direct appeal, the Supreme Court found that these comments were distinguishable from those in *Woomer*, *supra*, and *State v. Butler*, 277 S.C. 543, 290 S.E.2d 420 (1982). The Court concluded that the Solicitor's argument in Bell's case had not injected his personal opinion concerning the death penalty into the

proceedings; and that he had not "comment[ed] on his involvement in deciding whether or not to prosecute for the death penalty." *Bell*, 302 S.C. at 34, 393 S.E.2d at 373. The Court held that "[t]he Solicitor's comments did not diminish the role of the jury to decide Bell's fate, thus, we hold that the argument was proper." *Id.*

The Court also rejects Applicant's contention that these comments are indistinguishable from other decisions of the Supreme Court that found error in arguments where the prosecution had minimized the jury's sense of responsibility in deciding the appropriate punishment. The Court finds that the cases relied upon by Applicant are readily distinguishable. In *State v. Butler*, 277 S.C. 543, 290 S.E.2d 420 (1982), the Court reversed the penalty phase based on the prosecutor's argument about his private decision making process to prosecute and seek death to minimize the jury's sense of responsibility.

In *State v. Sloan*, 278 S.C. 435, 298 S.E.2d 92 (1982), the Court found error in similar penalty phase comment about the process of making the decision to seek the death penalty and that others had already made the decision including the legislature, officers, governor, grand jury, the solicitor on signing notice of intent and "would you do like others and sign your name." Similarly, the Court found error in the extensive discussion in *Woomer*, *supra*. *Accord Thompson v. Aiken*, 281 S.C. 239, 315 S.E.2d 110 (1984); *State v. Koon*, 278 S.C. 528, 298 S.E.2d 769 (1982) (argument that he had to make the decision to seek death and that he had made the decision and that if he could do it, the jurors could do it was error). In each of those cases, however, the prosecution went extensively over the death penalty decision-making process and who had to make the decisions. Such review did not occur here. Instead, it was the prosecutor, as an advocate, urging a result of death - something that he is authorized to do under *Donnelly* and *Durden*.

Other state courts have similar determined that an argument about expecting the death penalty is not "fundamental error." *E.g.*, *State v. Gilmore*, 681 S.W.2d 934, 944 (Mo. 1984) (during the sentencing phase of the trial, the prosecutor requested the jury to return the death penalty since the public would *expect* such punishment if given the opportunity to review the evidence and the defendant's prior conviction record); *Sneed v. State*, 2007 WL 4463873 (Ala.Crim.App. 2007) (prosecutor's closing argument at penalty phase of capital murder trial, that "[t]here will never be a case more fitting for capital punishment than this case," was a proper argument against the jury recommending a sentence of imprisonment for life without the possibility of parole); *People v. Stevens*, 158 P.3d 763 (Cal. 2007) (prosecutor did not commit misconduct during closing argument of penalty phase of capital homicide prosecution, when prosecutor made statements regarding the jury's "internal fortitude" to impose the death penalty; prosecutor's argument merely acknowledged the inherent difficulty in sentencing to death a person sitting in front of the jury).

Based upon these findings, the Court finds that the Solicitor's opening statement and closing argument did not improperly inject race into the case, did not demean Applicant and did not otherwise suggest that the jury should return a death sentence on an improper basis. Further, considering the overwhelming evidence presented that established Applicant's guilt of the four statutory aggravating circumstances beyond a reasonable doubt, the Court finds that Applicant failed to prove that he was prejudiced by any of the Solicitor's comments in his opening statement or closing argument.

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 "tended to inform the jurors that they could

only consider Applicant's character in the context of aggravating evidence rather than mitigating evidence" (citing **R. p. 2113**). The Court disagrees and finds 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 argument 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 Applicant now contends was improper:

> 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 charge.

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 the term "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 a 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.**

The trial judge also instructed jurors on the relevant 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.

The trial judge further 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." 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.**

This Court does not question 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), the

Court finds 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 that 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 bad character was limited to consideration of his bad 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).

Moreover, the charge provided that, even if it found a statutory aggravating circumstance, the jury could impose a life sentence, and 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 in a number of other South Carolina cases. *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, the Court finds that Applicant cannot show either deficient performance or resulting prejudice under *Strickland* from counsel's failure to object to this instruction.

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 television knobs, the use of the microwave, and the use of the canteen. Tr. 1636-38." This allegation is 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). Once again, the Court finds that Applicant is not entitled to relief.

A. Events at trial.

The State called Willie Weldon, the Warden at Lieber Correctional Institution, to establish that Applicant had made a written request on April 14, 1999, to have the visitation privileges reinstated for Judie Hardee, the Lexington County jail correctional officer with whom he had sexual relations while housed in the Lexington County jail and when housed in SCDC as a safekeeper. **R.pp. 1130-34.** On cross-examination, Mr. Young elicited that Warden Weldon had supervised Applicant for roughly three years, and that the written request introduced by the State was made "approximately two years after the sex incident" in SCDC. Applicant was

merely asking if there was anything that could be done to get Hardee's visitation privileges reinstated; and he did not deny that the events had taken place. **R. pp. 1634-36.**

Mr. Young then engaged in the inquiry of which Applicant now complains. Specifically, Mr. Young elicited that Applicant had previously made other requests, and that he would submit a form if he had a concern or question. Some of these requests were to get "knobs for a television." Applicant did not simply "take it upon himself to have someone bring any knobs [into the prison]." Further, Mr. Young elicited that the inmates at Lieber Correctional Institution had canteen privileges. Among other items available at the canteen were toiletries, cigarettes, canned goods, pastries and popcorn. Some of the available items may be heated in a microwave oven. Applicant did not demand to be allowed to use the microwave and he did not take it upon himself to use it without permission. Instead, he made a written request for permission to use it. **R. pp. 1636-38.**

B. Evidence at PCR hearing.

As discussed elsewhere, both attorneys testified before this Court that they wanted to present the resentencing jury with evidence of Applicant's adaptability to prison. With respect to the current allegation, Mr. Young's recollection was that the State had called Warden Weldon "to show that Mr. Bennett had broken some of the rules of the facility." Mr. Young explained that:

> my cross examination was to counter that and show that he complied with rules and procedures of the facility by going through the proper steps in making requests and things of that nature. And again, that kind of opened that door for unwanted information to come in.

7/11/08 Tr. p. 43. However, he felt that it was important to present the information elicited from Warden Weldon,

> because it goes toward his ability to comply with the terms of the facility and adopt to prison life as opposed to being the type of menace to society that only death can save society from.

7/11/08 Tr. p. 43.

Further, he agreed that he had limited his cross-examination to the conditions that Applicant had actually faced. Also, he explained that the defense had called former SCDC Warden, James Aiken as an expert in "prison life." The defense "basically utilized him to try to explain to the jury the significance of a life sentence;" and that someone who received a life sentence was "not getting away with anything when they avoided a death sentence." **7/11/08 Tr. pp. 43-44.**[46] (Mr. Aiken's testimony is set forth at **R. pp. 1981-2003**).

C. Discussion.

In *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984), the Court addressed the state's cross-examination of a professor who generally testified that life imprisonment was a punishment superior to the death penalty. During his direct examination, the professor testified about conditions of life imprisonment at CCI, and called life imprisonment "a form of slavery" - which the South Carolina Supreme Court concluded was "to demonstrate the permanence and deprivation entailed in life imprisonment." On cross-examination, the State asked about another inmate's escape, which the court ultimately held was permissible:

> Since the witness claimed an intimate knowledge of CCI, and based his testimony upon that knowledge, it was not amiss for the State to pursue his claim more closely.

Plath, 281 S.C. at 12, 313 S.E.2d at 626.

After also rejecting a claim that the State was improperly was allowed to cross-examine a prison social worker on a complaint letter she wrote about an inmate's freedom of movement, the

[46] Mr. Young had also filed a pretrial motion to have the jury view a general population setting and death row in order to show jurors that the actual conditions in the general population were as bad or worse then on death row. **7/11/08 Tr. pp. 45-46.** *See also* **R. p. 2337, l. 21–p. 2338, l. 11.**

Court very strongly rebuked sentencing phase defenses which "sought to portray life imprisonment as preferable to capital punishment as a matter of social policy", or "drew a picture of life imprisonment as slavery, a condition of irretrievable loss". *Plath*, 281 S.C. at 14, 313 S.E.2d at 626-27. The Court stated that such defenses improperly "invite[d] the jury to intrude upon the strictly legislative function of determining the nature of crime and punishment," and the Court concluded that:

> In the sentencing phase of a capital case, the function of the jury is not to legislate a plan of punishment but to make the "either/or" selection . . . . Such determinations as the time, place, manner, and conditions of execution or incarceration, as well as the matter of parole are reserved by statute and our cases to agencies other than the jury.

Plath, 281 S.C. at 14-15, 313 S.E.2d at 627.

The *Plath* Court went on to note that while psychiatric testimony of future dangerousness was permissible, it had held that future adaptability to prison evidence was not – a conclusion subsequently overruled by the United States Supreme Court in *Skipper v. South Carolina*, 476 U.S. 1 (1986). Only in the context of justifying this distinction, *Plath* stated that:

> A jury needs to know how a given defendant came to commit a given aggravated murder, to include aspects of his background, his character and the setting of the crime itself which may explain or even mitigate the conduct of which he has been found guilty. A jury does not need to know how often he will take a shower or whether or not he will be lonely and withdrawn during his tenure at CCI.

Plath, 281 S.C. at 15, 313 S.E.2d at 627.

Despite these admonitions, the *Plath* Court returned to how the State's challenged questioning was only proper in response to what that Court considered, at the time, to be improper sentencing phase defenses on the utility of capital punishment or the conditions of capital punishment:

> In the case before us, defendants elected to enter the forbidden field of social policy and penology. It is neither surprising nor can it be deemed prejudicial that

> the State responded in kind, attempting to show through defendants' own witnesses that life imprisonment was not the total abyss which they portrayed it to be. . . . [The solicitor's] references [were] . . . merely reminders to the jury that life imprisonment was by no means as hopeless as defendants would have it believed. *The State was entitled to make this response.*

Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28 (emphasis added). *See also State v. Woomer*, 278 S.C. 468, 299 S.E.2d 317 (1982) (evidence of defendant's prior escape was proper reply to defense evidence of good conduct while in prison).

Two decades later, the state supreme court decided *State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2005). There, the defendant contended that the Solicitor's questioning about movies, television, and books was irrelevant under the South Carolina Supreme Court's decision in *Plath*, and that it violated the constitutional due process mandate in *Gardner v. Florida*, 430 U.S. 349 (1977), that a death sentence cannot be based "on information the defendant had no opportunity to deny or explain." The State argued, *inter alia*, that the issue was not preserved for review, since the arguments made on appeal were not made to the trial court. The Court agreed that the defendant had not preserved the issue for appellate review, but it added a cautionary instruction to both sides that evidentiary presentations along these lines are improper in South Carolina:

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

State v. Bowman, 366 S.C. 485, 498-99, 623 S.E.2d 378, 384 (2005).

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

Justice Moore, who was joined by Justice Waller, wrote the Opinion of the Court in *Burkhart*. Justice Moore cited *Plath* and other cases from the 1980s and 1990s for the proposition that evidence outside of the circumstances of the crime and the characteristics of the defendant was inadmissible in a sentencing phase. This included conditions of incarceration, the process of execution, or the deterrent effect of capital punishment. *Burkhart*, 371 S.C. at 487-88, 640 S.E.2d at 453. Justice Moore noted that while the case at issue was tried before the decision in *Bowman*, its result was consistent with the "long-standing rule that evidence in the sentencing phase of a capital trial . . . be relevant to the character of the defendant or the circumstances of the crime". *Id.* Thus, Justice Moore concluded that reversible error had occurred, since the evidence of conditions of confinement "invited the jury to speculate about irrelevant matters" and injected an arbitrary factor in the proceedings in violation of S.C. Code Ann. § 16-3-25(C)(1) (2003). *Burkhart*, 371 S.C. at 488-89, 640 S.E.2d at 453.

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

In dissent, Chief Justice Toal, joined by Justice Burnett, applied the normal rule that the introduction of evidence will not result in reversal unless it prejudiced the defendant.[47] The dissent concluded that the issue was fully joined by both sides and that the defendant had used it to his advantage. Finally, the dissent noted that the standard in § 16-3-25(C)(1) was merely a recitation of the Eighth Amendment requirements[48] and coextensive with the Eighth Amendment, which is subject to a harmless error analysis. *Burkhart*, 371 S.C. at 493-95, 640 S.E.2d at 454-57 (Toal, C.J., dissenting).

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

The Court finds 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 (4th Cir. 1995) ("*Skipper* was on appeal to the Supreme Court at the time of Kornahrens's trial, and [counsel] testified that he was aware of

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

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

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 mandates 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 addressing the merits of this allegation, the Court finds that Applicant cannot show either deficient performance or prejudice resulting from counsel's alleged error. First, the Court finds that trial counsel's strategy was objectively reasonable and sound under *Strickland*. The record clearly demonstrates that the State had presented an extensive amount of evidence concerning Applicant's misconduct in prison. The Court further finds that the evidence concerning his sexual activities with Hardee represented very severe breaches in prison security

and reflected extremely negatively on his character, since it constituted part of a showing that an inmate was able to virtually run the facility in which he was confined.

Faced with this evidence, it was quite reasonable under *Strickland* for counsel to present evidence demonstrating Bennett's willingness to comply with rules and regulations, rather than try to manipulate or bully the prison's staff. In addition to the evidence discussed, *supra*, that supports counsel's position, the Court finds that counsel also elicited from Warden Weldon that Warden Weldon had never received any information that (1) Applicant posed any type of disciplinary problem; (2) Applicant had been a threat to anyone; and (3) Applicant had been disrespectful to prison staff. Further, Warden Weldon had personal contact with Applicant and would not classify him as a safety threat to the guards, and Applicant had not engaged in inappropriate behavior. **R. pp. 1638-39**. The Court finds that this evidence helped support the defense theory that Applicant was adaptable to prison; and that presenting evidence of his adaptability was a sound trial strategy under *Strickland*.

Nor does *Burkhart* require a different result. 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* 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, absent [counsel's] errors, the sentencer - - including an appellate court, to the extent it independently reweighs the evidence - - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *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 challenged in this allegation was brief (and Applicant only references two pages of testimony); 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. Given this evidence, he has failed to establish that he wasprejudiced by counsel's performance. *Strickland*, 466 U.S. at 695.

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 allegations raised by Applicant, he 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*, the relevant inquiry is whether there is reasonable likelihood that jury applied the trial judge's charge in an unconstitutional manner. 494 U.S. at 381. 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 the statutory aggravators of kidnapping, physical torture, armed robbery and larceny while armed with a deadly weapon were consistent with the applicable South Carolina law. His charge on the crime of kidnapping **(R. pp. 2118–20)** comports with S.C. Code Ann. § 16-3-910 (Supp. 2000) and the cases 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 that 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 kidapping 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 trial judge's definition of physical torture **(R. pp. 2121-22)** is consistent with *State v. Johnson*, 338 S.C. 114, 127-128, 525 S.E.2d 519, 525-26 (2000); *Bennett I, supra*; *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*, ... 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.

338 S.C. at 127-128, 525 S.E.2d at 125-26.

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, the Court finds that, when viewed as a whole, the trial judge's instructions correctly stated South Carolina law. Bennett's contrary position ignores that an attempt to commit an offense listed under § 16-3-20(C)(a)(1) satisfies the while in the commission of requirement.[49] "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).

[49] Also, the Court finds that 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. The Court further finds that the State's evidence supports that conclusion. *See* **part II**, *supra*; *Bennett I*, *supra*.

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 and remanded on other grounds*, 476 U.S. 1102 (1986). *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 statutory aggravating circumstances of armed robbery or larceny, the trial judge would have given a charge on the facts if he had failed to give the charge he did.

Further, the Court finds that Applicant only complains of how the "while in the commission of" definition impacted upon the statutory aggravating circumstances of kidnapping and physical torture. However, his argument 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, the Court finds that Applicant cannot show deficient performance or, most importantly, prejudice because the charge given was appropriate. *See e.g., Werts*, 228 F.3d at 203; *Clarke*, 16 F.3d at 963-64.

GROUND 11(c)(11)

Applicant further alleges that trial counsel were ineffective because they failed to voir dire veniremen on potential racial prejudice during jury selection. The Court finds that Applicant's allegation is without merit. In particular, he cannot present any credible evidence of prejudice resulting from counsel's performance.

Mr. Floyd testified that counsel were aware that the State planned to introduce evidence of the Pizza Hut attacks and other incidents occurring which Applicant was incarcerated, where the victims were white, because it had been introduced in the first trial. Because of this evidence and because the case was being tried in Lexington County, he was concerned about potential

racial issues in the case. On direct examination, he testified that he only made the request to voir dire jurors about their views on race after a previously seated African-American petit juror was removed because he knew a member of the victim's family. Mr. Floyd claimed that he did not have a strategic reason for failing to make the request sooner. **5/29/08 Tr. pp. 29-30; 35-36; 42-44.**

However, he testified on cross-examination that he was aware of *Turner*, and he knew that he could request to voir dire jurors on their views of race. He acknowledged that both Applicant and the victim are African-American; and the problem of racial bias generally presents itself where the victim and the defendant are of different races. Moreover, any inquiry into juror's racial beliefs has several problems because it is a sensitive area; the lawyer runs the risk of offending a potential juror by making the inquiry; and the juror(s) might not be honest in responding to the inquiry. Additionally, Mr. Floyd would not "want to interject it if it's not present." **5/27/08 Tr. pp. 44-46; 61-62.**

Mr. Young testified that counsel spoke with an attorney, Jeff Bloom, Esquire, about jury selection; but they did not retain Mr. Bloom as a jury selection expert. Also, counsel obtained the "criminal histories that were provided to us;" and counsel forwarded the list of veniremen to a number of different attorneys "as well as other persons that [Mr. Floyd] knew to see if the people were familiar with members who were . . .[in] the jury venire in order to try to get whatever information we could get about any of these persons." He did not recall any pretrial conversations with counsel about asking the judge for permission to question about race. **7/11/08 Tr. pp. 29-30.**

Mr. Young knew that counsel had the right to make such an inquiry on his client's behalf. He was likewise aware of the State's evidence concerning the interracial violence, such as the

Pizza Hut attacks. Also, he was aware that Lexington County had a reputation at the time of "being a little bit harsh on defendants of color." Because both Applicant and the victim were African-American, as were a number of witnesses for both parties, "I didn't know if sentiments or that reputation would play a part on the jury's selection." Further, there were some African-Americans in the venire. So, he did not put questioning jurors about their racial belief "on the top of my list." **7/11/08 Tr. pp. 29-31.**

Originally, there was an African-American seated on the petit jury. However, he was removed. At that point, counsel had a discussion about asking the trial judge for permission to question jurors about their views on race. So, Mr. Floyd made a motion to be allowed to so question the remaining petit jurors. **7/11/08 Tr. pp. 31-33.** Mr. Young also testified that questioning jurors about their views on race is sensitive. In his review, "[i]t is one of those topics that if the environment isn't right, you may get a totally different response. At the same time, if it's a situation where no one is really thinking about race . . . it's the lit match you're throwing on dry grass." **7/11/08 Tr. p. 33.**

Initially, the Court finds that Applicant cannot show deficient performance. *Strickland*'s "objective standard of reasonableness" performance prong, and its prejudice prong, have been previously stated. Effective assistance of counsel is required during the voir dire process. *Brown v. Jones*, 255 F.3d 1273, 1279-80 (11th Cir.2001); *Hughes v. United States*, 258 F.3d 453, 456 (6th Cir.2001). However, the Court finds that the conducting of voir dire is particularly within the control of counsel and that voir dire techniques are vastly different. Therefore, the review of counsel's performance in voir dire is "highly deferential;" and any error in conducting it must be egregious and obvious. *See, e.g., Yeatts v. Angelone*, 166 F.3d 255, 265 (4th Cir. 1999) (citing *Strickland*, 466 U.S. at 689); *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir.1995) (a

petitioner claiming ineffective assistance of counsel during voir dire must show that trial counsel's actions were "so ill chosen that it permeates the entire trial with obvious unfairness"); *DeLong v. Thompson*, 790 F. Supp. 594, 603 (E.D. Va. 1991), *aff'd*, 985 F.2d 553 (4th Cir. 1993) (unpublished); *Beintema v. State*, 936 P.2d 1221, 1227 (Wyo. 1997); *Arner v. State*, 872 P.2d 100 (Wyo. 1994).[50] A challenged action is ineffective assistance if it cannot be considered sound trial strategy under the wide range of reasonable professional conduct. *Arnold v. Evatt*, 113 F.3d 1352 (4th Cir. 1997).

The Court finds that a review of the record and counsel's PCR testimony demonstrates counsel's awareness of the potential for racial prejudice, in spite of testimony from counsel that there was no strategic reason for not seeking permission to *voir dire* on potential racial prejudice during jury selection. At a June 30, 2000 pretrial motions hearing, trial counsel Floyd objected to a question on the jury questionnaire that asked jurors if they had ever lived outside of 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

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[50] In *Arner*, which is one of the few cases addressing claims of ineffective voir dire in depth, the Supreme Court of Wyoming made a very persuasive argument for the standard in reviewing these *Strickland* claims:

> Voir dire and the exercise of challenging jurors is trial strategy. *Stover v. State*, 674 P.2d 566, 568 (Okla. Cr. App. 1984) (citing *Walter*, 386 F. Supp. 309). In *Jahnke v. State*, 682 P.2d 991 (Wyo.1984), while addressing the process and purpose of voir dire, we quoted the United States Supreme Court:
>
> > "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.'" *Dennis v. United States*, 339 U.S. [162] at 172 [(1950)], *quoting from United States v. Wood*, 299 U.S. 123, 145-146 (1936).
>
> *Jahnke*, 682 P.2d at 999. *Because voir dire questioning techniques are diverse, any alleged voir dire error must be egregious and obvious in order to fall below the line of competence.*

Arner, 872 P.2d at 105 (emphasis added).

his familiarity with the victim's family. Applicant's counsel suggested that he should be allowed to remain as a juror so Applicant would not be tried by an all-white jury. The trial judge, however, rejected his arguments. **R. pp. 867-85.**[51]

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. Further, the present case did not present the typical situation where questions about jurors' views on race are asked because Applicant, the victim and almost half of the witnesses were African-American.

Nor has Bennett presented this Court with authority requiring a trial judge to permit such inquiry where the victim and the defendant are of the same race. *See Goins v. Angelone*, 226 F. 3d 312, 323 (4th Cir. 2000) (*See* also discussion in following allegation). Therefore, the Court finds that trial counsel's performance was not deficient. As the Fourth Circuit Court of Appeals explained in *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 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.

[51] Applicant did not raise any issue on direct appeal concerning this ruling.

See also Spencer, 18 F.3d at 234 & n. 6 (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, the Court finds that counsel's performance was not prejudicial under *Strickland* and that Applicant did not present any credible evidence to support this allegation. The Court has rejected his claim that juror Humphrey's decision was governed by considerations of race; and Applicant has not presented any other evidence that an inquiry on the juror's views on race would have resulted in discovery of a racially prejudiced juror. The Court further finds that there is no prejudice for the reasons set forth in connection with **Ground 11(d)(1)**.

CUMULATIVE EFFECT OF COUNSEL'S ERRORS

Applicant's remaining allegation related to his ineffective assistance of counsel claims is that this Court should grant relief based on "the cumulative prejudice from all of counsel's errors." **Applicant's Post-Hearing Memorandum, p. 9 n. 4**. However, Applicant has not alleged that he is entitled to relief on this basis in his in his Second Amended Application. Rather, he alleged that he was entitled to relief based upon twelve separate allegations of individual allegations of counsel. Because he did not raise any allegation of ineffective assistance of trial or appellate counsel on this basis in his Second Amended Application, the Court finds that no such claim is properly before the Court.

The Court finds that it would be an abuse of discretion to permit an untimely amendment under Rule 15(a), SCRCP. Nor can the allegation reasonably have been viewed as "tried by the express or implied consent of the parties," since Respondent was not given any notice that this

was an ineffective assistance of counsel claim, and the evidence elicited concerning the evidence concerning his misconduct in prison was relevant to the alleged due process violation, even if the allegation was procedurally defaulted. *Cf. Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992).

The Court alternatively rejects Applicant's argument that this Court should employ a cumulative prejudice analysis to ineffectiveness claims, such as employed in *Brady* cases. *See Kyles v. Wheatly*, 514 U.S. 419 (1985). In *Green v. State*, 351 S.C. 184, 196-97, 569 S.E.2d 318, 324-25 (2002), the Court expressly declined to address whether a PCR applicant is entitled to relief based upon the supposed cumulative effect of trial counsel's alleged errors. *See also Simpson*, 367 S.C. at 604, 627 S.E.2d at 710 (recognizing that "[w]hether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina" and holding that "[b]ecause the PCR court found that only one of Simpson's allegations had merit, there was no need to conduct a cumulative-error analysis"). This Court finds that such an analysis is not constitutionally required and declines to employ that analysis.

Before an alleged error may be considered as a factor contributing to cumulative prejudice, a court first must find that the alleged error is, in fact, constitutional error. Only then can the cumulative prejudice arising from the error be considered. To hold otherwise is to conclude that even non-deficient performance might result in reversal of a conviction. Such a conclusion is manifestly contrary to the analysis set forth in *Strickland v. Washington*. *See* 466 U.S. at 687 ("Unless a defendant makes both showings [*i.e.*, deficient performance and prejudice] it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable").

Even in the absence of a cumulative prejudice analysis, a reviewing court, quite properly, analyzes the same class of errors together, such as the failure to present adequate evidence of mitigation. Yet, it is inappropriate to consider the cumulative prejudice from various alleged errors that are not related, such as the failure to request a jury charge and the failure to introduce certain testimony. This is especially true where, as in this case, counsel's performance was determined not to be deficient on most of the individual claims that Petitioner wishes to aggregate, and there was no prejudice on any Ground.[52]

A number of other jurisdictions, including the Fourth Circuit Court of Appeals, have held a cumulative effect analysis is inappropriate and that the appropriate analysis focuses upon each individual allegation of ineffective assistance. *See Fisher v. Angelone*, 163 F.3d 835, 852-53 (4th Cir. 1998); *Wainwright v. Lockhart*, 80 F.3d 1226 (8th Cir. 1996); *Jones v. Sotts*, 59 F.3d 143, 147 (10th Cir. 1995). As the Fourth Circuit Court of Appeals explained in *Fisher v. Angelone*, 163 F.3d 835, 852-53 (4th Cir. 1998):

> Next, Fisher argues that the cumulative effect of his trial counsel's individual actions deprived him of a fair trial. We disagree. Having just determined that none of counsel's actions could be considered constitutional error, *see Lockhart v. Fretwell*, 506 U.S. 364, 369 n. 2, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993) ("[U]nder *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates (1) deficient performance *and* (2) prejudice.' (emphasis added)), it

[52] While it is perfectly logical to consider the cumulative effect of failing to disclose evidence under *Brady*, since the determination to be made is whether non-disclosure of evidence deprived the defendant of due process, *see Kyles v. Wheatly*, 514 U.S. 419 (1985), the Court finds that the same is not true when focusing upon whether trial counsel rendered ineffective assistance of counsel. For example, counsel's performance in *voir dire* is not connected in any manner with any other allegation except Ground 11(b). The Court finds that alleged errors, which are not unconstitutional individually, simply cannot be added together to create a constitutional violation. *See United States v. Stewart*, 20 F.3d 911, 917-18 (8th Cir.1994). Following Applicant's position would permit a PCR applicant to obtain relief, even though no one alleged constitutional violation was prejudicial to him, simply by raising a vast number of allegations. This is a ludicrous result that is not mandated by *Strickland* or any decision of the South Carolina Supreme Court or Court of Appeals. Indeed, it appears to be contrary to *Florida v. Nixon*, 534 U.S. 175 (2004) and *Bell v. Cone*, 535 U.S. 685, 696-97 (2002), both of which clearly require inmates to meet both prongs under *Srickland*.

> would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived Fisher of a fair trial. Not surprisingly, it has long been the practice of this Court individually to assess claims under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See, e.g., Hoots v. Allsbrook*, 785 F.2d 1214, 1219 (4th Cir. 1986) (considering ineffective assistance claims individually rather than considering their cumulative impact). In fact, in *Arnold v. Evatt*, 113 F.3d 1352 (4th Cir 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 715, 139 L. Ed. 2d 655 (1998), this Court recently rejected a similar request to review the alleged errors of a trial court cumulatively rather than individually. See id. at 1364 ("Based on the findings of this court concerning the individual claims of error, we reject this claim.').
>
> To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now. In so holding, we are in agreement with the majority of our sister circuits that have considered the issue.

Id. (footnote omitted). *See also Meuller v. Angelone*, 181 F.3d 557, 586n.22 (4th Cir. 1999) ("Petitioner also urges us to consider the cumulative effect of his ineffective assistance of counsel claims rather than whether each claim, considered alone, establishes a constitutional violation. This argument is squarely foreclosed by our recent decision in *Fisher v. Angelone*, 163 F.3d [...at] 852-53 [...]"). Therefore, the Court finds that prejudice must be considered on an individual, not a collective basis. *Fisher*, 163 F.3d at 852.

Further, and analyzing the various allegations raised by Applicant cumulatively, the Court finds that it is clear that he is not entitled to relief because the record does not support a finding that he was prejudiced by any or all of the alleged errors. *See Westley v. Johnson*, 83 F.3d 714, 726 (5th Cir.1996) (claims that are not prejudicial cannot be cumulated, regardless of the number raised). Therefore, the Court denies relief on this allegation as well.

GROUND 11(d)(1)

Applicant 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 under *Turner v. Murray, supra*, which counsel requested after jury section. The Court finds 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, supra.* 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).[53]

[53] *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

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).

Mr. Dudek testified that his co-counsel actually handled issues related to voir dire on direct appeal. However, the request to voir dire jurors in this case was raised after the jury was selected and, in his estimation, it was not preserved for appellate review because "it would have been too late." So, he did not recall giving this issue much thought. **7/11/08 Tr. pp. 9-10.**

The Court finds 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 or at any time before the completion of voir dire. **R. pp. 53-788.** Because the motion was never argued in the trial court before jury selection, the Court agrees with Mr. Dudek's understanding. The request for voir dire came too late, and it was not preserved for appellate 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").

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constitute an acceptable strategic decision designed "to avoid diverting the appellate court's attention from what [counsel] felt were stronger claims").

Further, Applicant cannot show any conceivable prejudice resulting from appellate 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* that he is entitled to have prospective jurors informed of the race of the defendant and questioned on their racial biases.[54] 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 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. 2008) provides, 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

[54] 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.

> 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) ("*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 proceeding, the present case simply did not involve special circumstance requiring specific voir dire questions designed to reveal racial prejudices on the part of the veniremen, 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 Order, both the victim and Applicant were black and many, 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 Floyd had presented the jury with evidence that Applicant was housed on death row, on his cross-examination of Investigator Green. The Court finds that this allegation lacks merit.

Appellate counsel, Mr. Dudek, testified that he had handled between ten and fifteen direct appeals in capital cases before he worked on Applicant's appeal in *Bennett II*. **7/11/08 Tr. pp. 7-8.** He prepares a brief on appeal by reading the transcript of the proceedings. He keeps two sets of notes while reading. The first set of notes "is a running list of the testimony of each witness and another legal pad is a running list of each objection." From this process, he attempts to develop "a preliminary idea" of whether the objection(s) have some merit. If an issue appears meritorious, Mr. Dudek researches it further and talks to other attorneys about the issue. **7/11/08 Tr. pp. 8-9.**

Mr. Dudek's recollection of the current allegation was that "it came out that. . . Bennett was on death row;" and apparently "both sides" presented this evidence. He did not "recall giving any serious consideration to raising that as an issue [on appeal]." He felt that jurors who were convening for a resentencing proceeding "would be able to figure out what was going on." (Sic). **7/11/08 Tr. pp. 14-15.** Further, it was his understanding that if defense counsel presented the evidence first, the Supreme Court would apply the invited error doctrine to otherwise inadmissible evidence presented by the State, or the Court would consider the State's evidence cumulative.

Initially, the Court finds that Applicant 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, the Court finds that 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)**, evidence he was housed on death row 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 "[a]ppellate 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)(3)** that "[a]ppellate 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 "[a]ppellate counsel failed to raise on direct appeal the pervasive injection of race throughout the trial despite trial counsels' objections."

Also, in connection with his claim that the State violated due process by impermissibly injecting race into the sentencing proceeding, he claims that several prosecution witnesses testified to Applicant's misconduct while incarcerated at various facilities that also impermissibly injected race. **Grounds 11 (a)(4)-(7).** As discussed, the Court has already found that this due process allegation is not properly before the Court in PCR. *See* § 17-27-20(b); *Drayton*, 312 S.C. at 8-9, 430 S.E.2d at 520. He argues in his Post-Hearing Memorandum that "[t]o the extent that respondent argues and this Court agrees that this due process claim is procedurally defaulted based upon trial or appellate counsel's failures, then this Court should simply decide the issue under the rubric of [*Strickland*]." **Applicant's Post-Hearing Memorandum, pp. 13 n. 8.** However, Applicant has not alleged in his Second Amended Application that his attorneys were ineffective in failing to object to this evidence or that appellate counsel was ineffective for failing to raise this on appeal. Because he did not raise any

allegation of ineffective assistance of trial or appellate counsel on this basis in his Second Amended Application, the Court finds that no such claim is properly before the Court.

The Court finds that it would be an abuse of discretion to permit an untimely amendment under Rule 15(a), SCRCP. Nor can the allegation reasonably have been viewed as "tried by the express or implied consent of the parties," since Respondent was not given any notice that this was an ineffective assistance of counsel claim, and the evidence elicited concerning the evidence concerning his misconduct in prison was relevant to the alleged due process violation, even if the allegation was procedurally defaulted. *Cf. Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992).

The Court alternatively finds that to the extent his **Ground 11(d)(5)** alleges error in the handling of evidence as set forth in **Grounds 11(a)(3) and (6)-(7)**, it is not properly before this Court because these challenges were expressly considered and rejected on the merits by the South Carolina Supreme Court in *Bennett II*, 369 S.C. at 228-33, 632 S.E.2d at 286-89. As a result, the law of the case is that there was not a due process violation resulting from their introduction. 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").

The Court does not find that trial counsel or appellate counsel were deficient with respect to their handling of this evidence. However, because introduction of this evidence did not violate due process, the Court finds that Bennett cannot show any prejudice resulting from any supposed deficient performance by either trial or appellate counsel. *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"). The Court further finds that the remaining portions of

Applicant's due process claim, **Grounds 11(a)(4)-(5)**, did not impermissibly inject race or violate due process, and that it was properly admitted for the reasons stated in connection with **Ground 11(c)(6)**. Thus, the Court finds that Bennett has not shown prejudice in appellate counsel's performance.[55]

GROUND 11(d)(6)

Further, Applicant cannot establish either deficient performance or 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)**, the Court finds that a specific objection was not made to the trial judge's comments that he could not discuss parole eligibility with the jury. Thus, that portion of Applicant's current challenge was not preserved for appellate review, and appellate counsel could not have successfully raised it on appeal. *State v. Sullivan*, 277 S.C. 35, 281 S.E.2d 838 (1981). More importantly, the Court finds that the charge was appropriate, as given, and that there was no prejudice.

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).[56] The Court denies his request.

As the Court explained in *Hazel v. State*, 377 S.C. 60, 63, 659 S.E.2d 137, 139 (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

[55] The Court finds that appellate counsel was not deficient in failing to raise those matters that were not preserved by contemporaneous objection or motion, as discussed *supra*, including a due process claim in connection with the evidence at issue and the allegation that trial counsel should have objected to the evidence under Rule 403, SCRE, since these alleged errors were not preserved for appellate review.

[56] 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.

> 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*, 377 S.C. at 63-64, 659 S.E.2d at 139.

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 that 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). Alternatively, the Court finds that the determination that he shall be referred to as a sex offender consistent with the mandatory requirement of § 23-3-430(8) that was in effect at the time Applicant was sentenced. *See Hazel*. Therefore, the Court finds that he was properly sentenced as a sex offender; and that 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). *Cf. Hazel.*

IT IS, THEREFORE, ORDERED:

1. That the Application for Post-Conviction Relief in this matter is dismissed with prejudice; and

2. That Applicant is remanded to the custody of Respondent.

AND, IT IS SO ORDERED this ____ day of _____, 2009.

_____
JAMES R. BARBER, III
Presiding Judge, Eleventh Judicial Circuit

_____, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS
Johnny O. Bennett, #5023,	)	C. A. No. 06-CP-32-3221
Applicant,	)	
v.	)	AMENDED ORDER
State of South Carolina,	)	
Respondent.	)	

This matter is before the Court pursuant to an Application for Post-Conviction Relief (PCR) filed on September 7, 2006, as amended. Respondent submitted its original Return on October 19, 2006.

The Court held evidentiary hearings into the matter on May 27 and July 11, 2008.[1] Robert E. Lominack and Derek J. Enderlin, Esquires, represented Applicant. Senior Assistant Attorney General William Edgar Salter, III, and Assistant Attorney General Al Simon represented the State. Applicant was present at the May 27th hearing. Although he was not present at the July 11th hearing, counsel conditionally waived his presence.[2]

Applicant presented testimony from Adam Humphrey and lead trial counsel, H. Wayne Floyd, Esquire. Respondent presented testimony from appellate counsel, Robert M. Dudek, Esquire, and co-counsel at trial, Hervery Young Esquire. Applicant submitted a Post-

[1] The May 27th hearing was held at the Lexington County Courthouse in Lexington, South Carolina. The July 11th hearing was held at the Richland County Courthouse in Columbia, South Carolina.

[2] This waiver was subject to reconvening if Applicant felt, within a week of counsel obtaining a transcript of the hearing that additional evidence should be presented. Counsel thereafter timely notified the Court, after such review, that Applicant did not request additional evidence be taken. The Court finds that Applicant made a knowing and intelligent waiver of any right he may have had to be present at the hearing.

Hearing memorandum dated October 27, 2008. Respondent then submitted a proposed Order dated January 2, 2009. Respondent then submitted a proposed Order dated January 2, 2009.

The Court held a hearing at the Richland County Courthouse, on February 17, 2009.[3] The Court further finds that, in accordance with the Court's stated request for proposed Orders, Applicant thereafter served his 32 page "Applicant's Proposed Order," which he served upon Respondent on February 24, 2009, and Respondent submitted a corrected proposed Order at the Court's direction.

In addition to the pleadings of the parties in this action, as well as the testimony and exhibit introduced at the evidentiary hearings, the Court also 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*;

[3] Messrs. Lominack and Enderlin represented Applicant at the hearing and waived his presence. Messrs. Salter and Simon represented the State.

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.

After considering the entire record and the pleadings submitted by the parties, the Court denies relief for the following reasons:

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, 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 Applicant to death for murder. Judge Westbrook imposed concurrent sentences for armed robbery and five years for grand larceny of a motor vehicle; and the sentence for kidnapping was subsumed by the murder conviction. **R. pp. 2148-49; 2157-58.**[4] 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.

Applicant timely served and filed a Notice of Appeal. 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 in 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

[4] The citations to the Record in this document reference the Record on Appeal from the second appeal.

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 233, 632 S.E.2d at 289. Justice Pleicones dissented in a separate Opinion. *Id* at 234-36, 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 lieu of a 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*, 549 U.S. 1061 (2006). Applicant also filed an Application for Post-Conviction Relief (PCR) filed on September 7, 2006. He raised the following grounds for relief in his PCR Application:

1. Ineffective assistance of trial counsel.

2. Ineffective assistance of appellate counsel.

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 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 ***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 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, 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.

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 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.

Applicant thereafter filed his Second Amended Application for Post-Conviction Relief (PCR) dated April 4, 2008, and Respondent made a Return thereto.

II. STATEMENT OF FACTS

The Court finds that the direct and circumstantial evidence presented in the guilt phase of Applicant's trial, viewed in the light most favorable to the prosecution, 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.[5] 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

[5] This is in Lexington County.

belongings that he kept in it,[6] 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 someone had accompanied Benton. 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 they 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

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

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 was 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 the family retrieved it. **R. pp. 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 on that Tuesday afternoon, however, Applicant came to Pamela's apartment looking for Bonita. He was alone and he was driving Benton's blue Toyota. Pamela 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 a while. 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 she also left. **R. pp. 1196-97.** Applicant returned to Bonita's residence sometime later and took her 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,[7] 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.[8] 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

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

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

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 a life-long friend of Applicant,[9] and he was Benton's cousin and friend. 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 gave her. 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 that Benton had allowed him to use the car, he became upset when she 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

[9] Robinson testified that Applicant was approximately 6'5" or 6'6" tall and weighed roughly 300 pounds. **R. p. 1266.**

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."[10] **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. Det. 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**).[11] **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*[12] 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

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[10] Mr. Harrison testified that Applicant said, "I haven't seen him and, frankly I don't give a damn where he is."
[11] Mr. Thomas Stillinger, the owner of the business, testified that he saw Applicant steal gas on October 23, 1990. **R. pp. 1109-14.**

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

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 him. Applicant told the officers he would help them locate some people who may possibly know Benton's whereabouts: Isadore Mack, Tommy Furtick 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.[13] Det. Hamer then told Applicant that Mack had not provided him with any information. Det. Hamer also told Applicant that the officers knew that Benton was dead; and they explained that 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 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. His sister 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 that Applicant had provided to them, the officers located and arrested Haskins on an outstanding narcotics warrant.[14] The officers 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

[13] 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.**

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

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 it. The prosecution published to the jury the photographs that the officers took of the grave, as they 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.**[15]

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 all right. 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 all right. This

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

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.[16] 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.

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

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 that 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 kill someone because he had thought about killing a family member. **R. pp. 1324; 1364-65.**[17] 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.[18] **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[19] 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

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

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

[19] 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.

presence of some postmortem animal destruction. 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 pre-mortem and had bruising underneath them. There was also subarachnoid hemorrhaging on the surface of the brain associated with these wounds.[20] Further, 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 still 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 Benton'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.[21] 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

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

[21] 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.

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.[22] **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 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 that 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 it did not penetrate the brain, Dr. Sexton opined that 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

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

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 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 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 ***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

Based upon the testimony of trial counsel, the Court finds that Mr. Floyd first became involved in the case shortly after the State served notice of intent to seek the death penalty in March 1993 Steven Saltis, Esquire, was originally co-counsel, but he was removed shortly after Mr. Floyd's appointment and Pat McWhirter, Esquire, was co-counsel for the original trial in *Bennett I, supra.* After the Supreme Court reversed Applicant's death sentence on direct appeal, the case came back for resentencing and Mr. Young was appointed as co-counsel. Mr. Floyd was lead counsel in the subsequent resentencing. **5/27/08 Tr. pp. 22-24; 7/11/08 Tr. pp. 22; 24.**

Although counsel shared many of their responsibilities, Mr. Floyd had been primarily responsible for handling the guilt phase witnesses in *Bennett I.* So, he handled most of these witnesses. Counsel also had the assistance of an employee from Mr. Floyd's office, two paralegals from the Public Defender's office and they contracted either an investigator or social worker. Although Mr. Floyd's only previous death penalty trial was Applicant's original trial, he had handled three or four non-capital murder cases. He also handled a number of major felonies, and he had represented applicants in capital PCR cases. Therefore, he had experience in death penalty cases. Mr. Young had provided assistance in several death penalty cases, which he characterized as third or fourth chair. Mr. Young also had extensive experience in handling major felony cases through his employment as Deputy Public Defender at the Lexington County Public Defender's Office.[23] Counsel had a transcript from the first trial and they were aware of many of the issues that could arise. They agreed that their best defense in the resentencing was to show jurors that Bennett was adaptable to prison; and that, today, he tried to help people; he "had a good heart;" and that he would not be a danger in the future. **5/27/08 Tr. pp. 42-43; 7/11/08 Tr. p. 27.** The Court finds that this was a reasonable and sound, albeit ultimately unsuccessful, trial strategy at resentencing.

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. The Court finds that these

[23] The trial judge found that he was qualified to serve as lead counsel under South Carolina law. The Court finds that Applicant has not challenged counsel's qualifications. Nor has he challenged counsel's pretrial preparation or investigation.

allegations are procedurally barred because they either were or could have been raised at trial and on direct appeal.

S.C. Code Ann. § 17-27-20(b) (1986) specifically provides that the remedy of Post-Conviction Relief "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). Therefore, the Court finds that Applicant's **Grounds 11(a)(1)-(7)** are not appropriate in PCR.[24]

GROUNDS 11(a)(1),(3) and (6)-(7)

Alternatively, the Court rejects the allegations in **Grounds 11(a)(1), (3) and (6)-(7)** for several other reasons. Applicant's **Ground 11(a)(1)** was expressly raised to and rejected by the South Carolina Supreme Court on direct appeal. In this allegation, 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

[24] For the reasons stated in connection with the Court's rejection of the ineffectiveness claim based upon trial counsel's failure to contemporaneously object to the Solicitor's opening comments and his closing argument, the Court rejects Bennett's contention that the Solicitor made "demeaning references" to Bennett's race. Rather, the challenged remarks generally were proper in light of the resentencing phase evidence of the crime for which he was being sentenced and evidence of his prior, violent criminal history. None of the challenged remarks were such that they rendered his sentencing proceeding fundamentally unfair.

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, was violated by the seating of a juror who supposedly held racist views. The Court finds that this claim is without merit and that his right to a trial by an impartial jury was not violated.

In support of this claim, Applicant presented the testimony of Adam T. Humphrey, the juror in question. At the PCR hearing, Mr. Humphrey testified about a conversation he had with Applicant's counsel in July 2007, seven years after Applicant's re-sentencing trial. **5/27/2008 PCR Tr. p. 8-20**. Mr. Humphrey testified that they met at his house. He agreed with counsel that they discussed his thoughts on the case, the sequestration of the jury, the evidence, and the attorneys involved. **5/27/2008 PCR Tr. p. 8**.

Mr. Humphrey admitted that, during the conversation with Applicant's counsel, he stated that Applicant may have killed the victim "because he was just a dumb nigger." **5/27/2008 PCR Tr. p. 9**. Applicant now claims that he is entitled to relief because Mr. Humphrey's statement

indicates that he was racist at the time of trial; thus, he was not impartial. This claim lacks merit. In reviewing the testimony of the juror, the Court finds that there is insufficient evidence to support Applicant's contention that Juror Humphrey was actually biased against Applicant in the re-sentencing trial.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant a trial by an impartial jury. *Morgan v. Illinois*, 504 U.S. 719, 726-27 (1992). "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). The presence of even a single biased juror deprives a defendant of his right to an impartial jury. *See Morgan*, 504 U.S. at 729; *Williams v. Bagley*, 380 F.3d 932, 943-34 (6th Cir.2004), *cert. denied*, 544 U.S. 1003 (2005). Voir dire protects the right to an impartial jury "by exposing possible biases, both known and unknown, on the part of potential jurors." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984). Thus, it is necessary for prospective jurors to provide truthful answers. *Id.* To be entitled to a new trial, Applicant "must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *McDonough*, 464 U.S. at 556; *see Conaway v. Polk*, 453 F.3d 567, 584-85 (4th Cir. 2006).

Applicant has failed to establish that Juror Humphrey failed to honestly answer a material question on voir dire. During voir dire, Mr. Humphrey testified that he understood that Applicant was convicted of murder. **R. p. 642.** He further indicated that he understood that the State had to prove an aggravating circumstance beyond a reasonable doubt. **R. p. 642.** He indicated that he understood that the jury would determine if the State proved any aggravating

circumstance beyond a reasonable doubt, and that the jury would hear mitigating circumstances in Applicant's case. **R. pp. 642-43.** He stated that he understood that the judge would tell the jury the law in the case, and the jury would apply the law to the facts and decide on a sentence. **R. p. 643.** Mr. Humphrey further stated that he was the type of juror who would not have made up his mind as to the punishment of a defendant based upon the fact that he was convicted of killing someone maliciously; that he would want to hear all of the aggravating and mitigating circumstances; that he would want to hear the law from the judge; and that only then he would be ready to decide the appropriate sentence. **R. pp. 643-44.** Further, he agreed that if the facts justified a life sentence, he could give a life sentence, and if they justified a death sentence, he could give a death sentence. **R. p. 644.** He also stated that he believed he could give both sides a fair trial. **R. p. 647.**

When questioned by the Solicitor, Mr. Humphrey clearly reiterated that he would listen to all of the testimony and follow the law as explained by the judge. **R. pp. 646-50.** When questioned by Applicant's trial counsel, Mr. Humphrey noted that the fact that Applicant was convicted of murder did not bring forth any feelings as to what the appropriate punishment should be. **R. p. 652.** He also indicated that he understood that he could return a verdict for life even if he finds sufficient evidence of an aggravating circumstance. **R. pp. 652-53.** He also reaffirmed that he would have to hear all of the evidence before he could make a decision on what the appropriate punishment would be. **R. p. 655.**

Applicant has not presented any evidence that Juror Humphrey failed to answer honestly any question during voir dire. In his testimony at the PCR hearing, Mr. Humphrey clearly asserted that his decision was based upon the evidence and testimony at trial. **5/27/2008 PCR**

Tr. p. 14. Applicant has not alleged that Juror Humphrey concealed material information in his answers during voir dire. Juror Humphrey's testimony does not support a finding that he concealed material information. The Court finds that Applicant failed to establish that there would have been a valid reason to strike Juror Humphrey for cause. Thus, to the extent that Applicant seeks relief under a claim of juror misconduct, Applicant has failed to meet its burden of proof. His claim for relief is dismissed.

McDonough "is not the exclusive test for determining whether a new trial is warranted: a showing that juror was actually biased, regardless of whether the juror was truthful or deceitful, can also entitle a defendant to a new trial." *Jones v. Cooper*, 311 F.3d 306, 310 (4th Cir. 2002). In other words, " *McDonough* does not entirely foreclose a party from seeking a new trial on the basis of a prospective juror's honest, though mistaken, response." *Zerka v. Green*, 49 F.3d 1181, 1186 n. 7 (6th Cir. 1995) (citing *Amirault v. Fair*, 968 F.2d 1404, 1405-06 (1st Cir. 1992)). However, "[i]n the absence of intentional concealment, only extreme circumstances justify a new trial," and the petitioner must prove "actual juror bias." *Id.*

Jurors are presumed to be impartial, absent indications to the contrary. *Wells v. Murray*, 831 F.2d 468, 472 (4th Cir. 1987); *see Irvin v. Dowd*, 366 U.S. at 723. "[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation.... Due process means a jury capable and willing to decide the case solely on the evidence before it ...." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). A juror must be able to "lay aside his [or her] impression or opinion and render a verdict based on the evidence presented in court." *Irvin*, 366 U .S. at 723.

A biased juror, in the usual sense, "is one who has a predisposition against or in favor of the defendant. In a more limited sense, a biased juror is one who cannot 'conscientiously apply the law and find the facts.' " *Franklin v. Anderson*, 434 F.3d 412, 422 (6th Cir. 2006) (quoting *Wainwright v. Witt*, 469 U.S. 412, 423 (1985)). "If an impaneled juror was actually biased, the conviction must be set aside." *Hughes v. United States*, 258 F.3d 453, 463 (6th Cir. 2001). "[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." *Palacio v. State*, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999). "[I]n order to fully safeguard this protection, it is required that the jury render its verdict free from outside influences of whatever kind and nature." *State v. Bryant*, 354 S.C. 390, 395, 581 S.E.2d 157, 160 (2003) (quoting *State v. Cameron*, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct. App. 1993)). In cases where a juror's partiality is questioned after trial, it is appropriate to conduct a hearing in which the defendant has the opportunity to prove actual juror bias. *Bryant*, 354 S.C. at 395, 581 S.E.2d at 160 (citing *Smith v. Phillips*, 455 U.S. 209 (1982) and *Remmer v. United States*, 347 U.S. 227 (1954)). At a hearing on the juror's partiality, the defendant bears the burden of proving the juror was actually biased. *Bryant*, 354 S.C. at 395. To be entitled to post-conviction relief upon this claim, Applicant had to prove this by a preponderance of the evidence. Rule 71.1(e), SCRCP. *Cf. Hall*, 360 S.C. at 358, 601 S.E.2d at 338 (applying preponderance standard to applicant's claim that he was incompetent to stand trial). He did not meet his burden of proof.

The Court finds that Applicant has failed to establish that Juror Humphrey was actually biased when he was a member of the jury in Applicant's case in 2000. At the PCR hearing, Juror Humphrey was asked by Applicant's counsel about a conversation they had at Humphrey's home

in June 2007. **5/27/2008 PCR Tr. pp. 8-9**. Specifically, Mr. Humphrey was asked if he recalled his answer to the question, "[w]hy did you think that Mr. Bennett had killed the victim?" **5/27/2008 PCR Tr. p. 9**. Humphrey admitted that he recalled the answer. *Id.* When asked if he recalled saying "because he was just a dumb nigger," Humphrey admitted that he used some words like that. **5/27/08 PCR Tr. p. 9**.

Mr. Humphrey's answer to that question, while deplorable and racially insensitive, is not sufficient evidence to establish that he was actually biased against Applicant during the re-sentencing hearing some seven years earlier. His testimony establishes only how Juror Humphrey felt about the Applicant's conduct when asked in June 2007. Nothing in Juror Humphrey's testimony at the PCR hearing establishes that he was biased against Applicant at the time of trial because of Applicant's race. Contrary to Applicant's assertions, it is unclear from Humphrey's testimony when he came to the conclusion that Applicant was a racial epithet. When asked by Applicant's counsel if he wanted to change any of the words said, Juror Humphrey's testimony indicates that in reflecting upon the week of the trial and the evidence presented, this was how he felt about Applicant. **5/27/08 PCR Tr. p. 9-10**. It appears that his reflection was how he felt at the time he was speaking with Applicant's counsel in 2007, not at the time of the sentencing trial in 2000. Juror Humphrey's testimony on redirect was similarly vague in regards to the timing of his characterization of Applicant. When asked if that was how Humphrey felt at the time of the re-sentencing trial, Humphrey responded that it was wrong for him to make the statement. **5/27/08 PCR Tr. p. 16**. He further testified that Applicant "was not a good person for what he did, with no remorse, and that's how I felt." **5/27/08 PCR Tr. p. 16**.

Again, it appears that Juror Humphrey is discussing his thoughts at the time the statement was made in 2007, not his thoughts during the re-sentencing trial.

Applicant offers no other probative evidence to establish that Juror Humphrey was racially biased at the time of trial.[25] He relies solely on the fact that the juror used a racial epithet in 2007 to establish that the juror was racially biased in 2000. This is insufficient evidence to establish Juror Humphrey was actually racially biased at the time of the re-sentencing trial.

> The mere fact that a person admits having used a racial epithet at some time, or exhibits a preference for his religion and views other ethnic groups with suspicion does not render him incapable as a matter of law of impartially considering the criminal responsibility of a person of another race, religion, gender or ethnic group. Unfortunate though it is, ethnocentricity is a norm in all human behavior; even people of the race slandered in this case, including appellant, used that epithet amongst themselves. If such human failings demanded disqualification of a juror for cause as a matter of law, the right to a jury of one's peers would be denied altogether. Where on reflection and deeper questioning, a person who has candidly admitted to such failings concludes nevertheless that he can consider the evidence in a fair and impartial manner, the best view taken of this juror is from the trial court's bench.

Rower v. State, 219 Ga.App. 865, 868, 466 S.E.2d 897, 900 (Ga. Ct. App. 1995).

During the voir dire before trial, Juror Humphrey clearly stated that he would consider all of the evidence in a fair and impartial manner. **R. pp. 642-44, 646-50, 655**. He testified at the PCR hearing that his decision was based solely upon the evidence presented at trial. **5/27/08 PCR Tr. p. 14,** *see* **5/27/08 PCR Tr. pp. 9, 16.** He further testified that race had nothing to do with his decision. **5/27/08 PCR pp. Tr. 14, 15.** Humphrey asserted that he did not believe that Blacks are inferior to Whites. **5/27/08 PCR Tr. p. 15**. This Court finds that the testimony of Juror Humphrey is credible. Humphrey admitted that he made the statement alleged by Applicant. He clearly acknowledged that it was a poor choice of words, and he expressed that it

[25]Juror Humphrey did testify that he had used the racial epithet before the day he met with Applicant's counsel. **5/27/2008 PCR Tr. p. 19.** However, it was not clear from the testimony when he had previously used the word.

was not reflective of his views on race or the Applicant. Applicant offers no probative evidence to establish that Humphrey's testimony was untrue. There was no testimony or probative evidence presented that established Humphrey viewed African-Americans as inferior to Whites, or that Humphrey did not properly consider and weigh all of the evidence presented at Applicant's trial in making his finding as a juror. Further, there was no probative evidence that Juror Humphrey engaged in acts reflecting a racial bias prior to Applicant's trial. Thus, Applicant has failed to show that Juror Humphrey was partial as the result of an actual bias against Applicant. This claim for relief is dismissed.

The decision by the Eleventh Circuit Court of Appeals in *Dobbs v. Zant*, 963 F.2d 1403 (11th Cir. 1991) supports this finding. 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. [26]

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. 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' equal protection argument:

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[26] 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).

> In 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 Humphrey uttered the racial epithet in reference to Applicant some seven years after the sentencing proceeding, Applicant did not show that racial prejudice actually affected the jury's decision because even if Juror Humphrey possessed some racial prejudice, he cannot show that Humphrey was influenced by prejudices that would make him favor the death penalty for a black person who murdered another black person or that he would favor the death penalty for a black person charged with murder. This allegation lacks merit.

This is not a case of juror misconduct. Applicant has submitted that *State v. Phillips*, 917 A.2d 931 (Conn. App. 2007) provides some guidance into this matter. In *Phillips*, the Connecticut Court of Appeals outlined the procedure a court should follow in a jury misconduct case in which allegations of juror racial bias are alleged. The Court of Appeals reviewed the trial court's ruling on a motion for a new trial. The defendant had asserted a jury misconduct claim based upon allegations of possible juror racial bias, among other claims. *Phillips*, 917 A.2d at 935. The trial court held an evidentiary hearing on the juror racial bias issue. *Id.* The juror accused of making the racist remarks and four jurors who allegedly heard the remarks were questioned during the hearing. *Id.* During the hearing, the trial court asked the jurors whether

their decisions were impacted by the racial remarks made by one juror. *Id.* at 936. In its memorandum of decision, the trial court noted that the decision of the jury was not impacted by the racial remarks made by the juror, and that the opinion of the jury was the result of only the facts of the case and law presented to the jury. *Id.* at 936. The Connecticut Court of Appeals reversed the denial of the motion for a new trial and remanded the case back to the trial court. The Court of Appeals held that the legal standard used by the trial court was improper. *Id.* at 937.

> We conclude that the court should have restricted its inquiry of the jury to a solicitation of objective facts relating to the allegations, including statements heard and conduct observed, and should not have inquired into the effect of those facts on each juror's deliberations. The court should then have made an independent determination as to whether the evidence before it revealed racial bias on the part of a juror.

Id. at 940.

Applicant did not raise his claim under Ground 11(b) as a juror misconduct claim. Juror Humphrey testified that neither he nor any other juror used any racial epithets or expressed any racially derogatory views during the jury deliberations. **5/27/08 PCR Tr. p. 14.** Thus, the claim before this Court is clearly distinct from the claim raised in *Phillips*. However, even if this Court applies the same standard expressed by the appellate court in *Phillips,* the result would remain the same. The only objective fact that Applicant has submitted in support of this claim is a statement made by Juror Humphrey seven years after the re-sentencing trial. There is no probative evidence that suggests Juror Humphrey was racially biased at the time of the re-sentencing trial. There is no probative evidence that Juror Humphrey was predisposed to sentence Applicant to death as a result of some racial bias. Juror Humphrey's testimony was credible. He testified that he did not take Applicant's race into account in his deliberations at the

re-sentencing trial. Applicant's claim is therefore dismissed.

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.**

Both attorneys testified that there was not a strategic reason for failing to object to these comments. Mr. Floyd testified that "[i]t just didn't strike me at the time." **5/27/08 Tr. pp. 25; 47; 7/11/08 Tr. pp. 33-34.** Mr. Floyd also acknowledged that, in response to a question from the jury inquiring about the appeals process, after deliberation had begun, the trial judge gave a curative instruction that instructed them that this was not a matter for their consideration. Likeise, it appeared to Mr. Floyd that the trial judge's intention was to explain that jurors could not speculate about the appellate process. **5/27/08 Tr. pp. 47-48.** The Court finds that Applicant cannot show either deficient performance or resulting prejudice.

To establish that he received ineffective assistance of counsel, an inmate must make a two-fold 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).

The Court finds that these comments are clearly distinguishable from the reversible comments in the cases upon which Applicant 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 your 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 that 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 331-33.

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 that:

> 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 659, 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 that 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*, 273 S.C. at 660, 258 S.E.2d at 566 (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.*

This Court finds that the trial judge's comments in the present case do not approach the direct statements of unfettered appellate review found within the prosecutors' remarks in *Caldwell, Tyner*, or *Gilbert.* When viewed as a whole, the Court finds that there is simply no reasonable likelihood that 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 the trial judge 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.**[27]

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 judge'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). For these reasons, the Court finds that counsel were not deficient in failing to object to the trial judge's comments, since an objection would not have been meritorious and would not have been successful. See *Werts v. Vaughn*, 228 F.3d. 178, 203 (3d Cir. 2000) ("counsel cannot be ineffective for failing to raise a meritless claim"); *Clarke v. Grosse*, 16 F. 3d 960, 963-64 (8th Cir. 1994) (Because there was no basis for counsel to object to evidence admitted at trial, counsel's failure to object was not deficient performance); *Cedillos v. State*, 250 S.W. 3d 145, 154 (Tex. App. 2008) (counsel cannot be found ineffective for failing to make an objection unless the record establishes that an objection would have been successful); *Jones v. Stotts*, 59 F. 3d 143, 146 (10th Cir. 1995) (counsel's failure to make an *in limine* motion was not ineffective because an *in limine* motion is inherently a strategic part of trial strategy). *Cf. United States ex rel., Link v. Lane*, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding no prejudice from failure to object where objection would not have been successful).

Even assuming the comments were objectionable and counsel were 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

[27] 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.**

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 the jury 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.**[28]

Based upon this subsequent charge, the Court finds that Bennett has failed to prove "a reasonable probability that. . . the [jury]. . . 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. Applicant also cannot show prejudice because the overwhelming evidence of aggravating factors, discussed *supra*, renders any speculative prejudice from the trial judge's remarks harmless and non-prejudicial. There is simply no reasonable likelihood that 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 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

[28] 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.**

more prejudicial than probative." Again, the Court finds that Applicant cannot show either deficient performance or resulting prejudice.

At the time of sentencing, Ms. Gallman was 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. Applicant'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 pursue gainful employment unless engaged in some other program approved by my supervisor." Moreover, she explained to him that he was subject to any sanction that 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. Applicant did not object to her testimony or cross-examine the witness. **R. pp. 1107-08.**

Mr. Floyd testified at the PCR hearing that he did not have a strategic reason for failing to object to her testimony. However, he acknowledged that Mr. Young was responsible for examining Ms. Gallman. **5/27/08 Tr. pp. 26; 49.**

Mr. Young testified that he did not recall "needing to make any objections to testimony as a whole." While he did not have a strategic reason for wanting the jury to know that Bennett

Notwithstanding Applicant's contrary position, the Court finds that Ms. Gallman's testimony was clearly 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, Applicant has not provided any authority holding that the State may not present evidence that the accused was on parole for an unrelated offense, when he committed the murder for which he is being sentenced.

Further, there is no merit to Applicant's contention that this evidence "was substantially more prejudicial than probative." The Court recognizes 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). Applying a Rule 403 analysis, the Court finds that the probative value of Agent Gallman's testimony was not substantially outweighed by its prejudicial effect, and it was, thus, admissible. The Court specifically notes that similar evidence was introduced in the penalty phase of capital trials in *State v. Stone*, 350 S.C. 442, 450-52, 567 S.E. 2d 244, 248-49 (2002) (reversed because of trial court's failure to give parole ineligibility

charge); and *State v. Atkins*, 293 S.C. 294, 296, 360 S.E. 2d 302, 303 (1987) ("At the time this incident occurred, appellant was on lifetime parole for a 1970 murder conviction").

The State's evidence also included other crimes and acts of violence by Applicant. The Court finds that the State's closing argument makes clear the importance of evidence that Applicant was on parole when he murdered Benton Smith. The argument demonstrated Applicant's refusal to comply with the conditions of his parole. Instead of maintaining gainful employment and refraining from criminal activity, he made no effort to be employed. More importantly, he was stealing and murdering within months after his release. R. pp. 2064-65.

Unquestionably, evidence of other crimes is admissible at the 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). And because the evidence was admissible, trial counsel was not deficient in failing to object with it. See *Werts*, 228 F. 3d at 203 ("counsel cannot be ineffective for failing to raise a meritless claim"); *Clarke*, 16 F. 3d at 963-64 (counsel's failure to object not deficient where there was no basis to object to evidence introduced); *Cedillos*, 250 S.W. 3d at 154 (counsel cannot be found ineffective for failing to make an objection unless the record establishes that an objection would have been successful). *Cf. United States ex rel., Link v. Lane*,

(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). Because the evidence was admissible, trial counsel was not deficient in failing to object with it. See *Werts*, 228 F. 3d at 203 ("counsel cannot be ineffective for failing to raise a meritless claim"); *Clarke*, 16 F. 3d at 963-64 (counsel's failure to object not deficient where there was no basis to object to evidence introduced); *Cedillos*, 250 S.W. 3d at 154 (counsel cannot be found ineffective for failing to make an objection unless the record establishes that an objection would have been successful). *Cf. United States ex rel., Link v. Lane*, 811 F.2d at 1170 (finding no prejudice from failure to object where objection would not have been successful).

The Court further finds that Applicant has failed to prove prejudice. 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 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). 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 Applicant's bad character beyond a reasonable doubt before considering it. The Court finds that this instruction 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 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).** Moreover, the Court finds that the prosecution presented overwhelming evidence that proved beyond a reasonable doubt that Applicant committed the murder while in the commission of each of the alleged statutory aggravating circumstances. For the foregoing reasons, the Court finds that Applicant has failed to prove that there is "a reasonable probability that, absent the errors, the [jury]. . .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)(3)

Applicant further alleges that counsel improperly informed the resentencing jury that he was already on death row. The Court finds that Applicant has knowingly and voluntarily waived **Ground 11(c)(3)** by failing to address it in his Post-Hearing Memorandum. *See* **Post-Hearing Memorandum, pp. 40-41** (challenging ineffective assistance of appellate counsel). *See also* **Post-Hearing Memorandum, pp. 1-64**. Alternatively, the Court finds that Bennett has not established deficient performance or 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 on Mr. Floyd's cross-examination of prosecution witness James Green **(R. p. 1604)**, and alleged ineffective assistance of counsel arising from Mr. Young's direct examination of defense witness, Reverend James Brown **(R. p. 2070)**.

A. Proceedings in the trial court.

Mr. Green testified that he is a criminal investigator with S.C.D.C.'s internal affairs branch. SCDC investigators conducted a 1997 investigation 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. Applicant 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 that she 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.** [29]

It was against this backdrop that trial counsel Floyd engaged in the following colloquy:

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?

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

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.

R. pp. 1604-05.

After Mr. Floyd had conducted his cross-examination, the jury was excused. The Solicitor noted that Applicant's statement to Inv. Green had referenced that he was housed as a safekeeper and that he was on death row. The Solicitor stated "I expressly told the witness Mr. Green not to mention the defendant being on death row, and we put in [the statement] in place of on death row we put at S.C.D.C. . . . Now, twice Mr. Floyd on cross-examination asked him about death row." So, the Solicitor argued that he should have the right to ask whether Applicant's sexual intercourse with Hardee occurred on death row. **R. pp. 1606-07.**

Mr. Floyd admitted that he made "an error" and argued that the error should not be compounded by repeating it. He also moved for a mistrial because his error prejudiced Applicant. **R. p. 1607.**

The Solicitor correctly argued that Bennett was not entitled to a mistrial based on error by his own counsel, and he argued that defense counsel had opened the door for the proposed re-direct. **R. pp. 1607-08.** However, Mr. Floyd argued that the State's proposed further examination "would be highly prejudicial and would outweigh any probative value to allow that to proceed." **R. p. 1608.**

The trial judge ruled that he would allow the State's proposed redirect because counsel had made two references to death row. He also denied the motion for a mistrial because he could not grant a mistrial based on a question asked by defense counsel. **R. pp. 1608-09.**

On redirect examination, the State elicited that Applicant was having sexual relations with Hardee in "the most secure" facility in SCDC, death row. **R. p. 1609**. After the State had concluded redirect examination, the trial judge gave the following curative instruction:

> THE COURT: Ladies and gentlemen of the jury, let me be sure to give you an instruction. The fact that the witness has testified [events] occurred on death row should not have anything to do with the issues here. Remember, you are basing the issues here, and the sentence that you give in this matter is going to be issued only on the evidence that you hear and only on those aggravating circumstances and mitigating circumstances. Be sure to remember that.

R. pp. 1609-10.

Trial counsel then requested and was allowed to make an *in camera* objection. Mr. Floyd argued that, while the defense appreciated the trial judge's effort to assist in the matter, the defense did not request a curative instruction. He further argued that the curative instruction, by informing jurors not to use the statement in any fashion, "may have cleared up something that the jury might not have realized:" that Applicant had previously been sentenced to death. **App. 1610-11.**

The trial judge observed that the State had redacted Applicant's statement to eliminate any reference to death row. Counsel "let the cat out of the bag" by twice referring to death row in his examination of the witness. The trial judge explained that he gave the curative instruction "obviously not to confirm that with the jury but to ease that problem with the jury and [to] make sure they understood not to consider that in any way." He also felt that "once the witness said

death row that's when I felt like I needed to give the curative instruction." **R. pp. 1612-14.** The trial judge also observed that counsel had objected to introduction of the redacted statement given by Applicant to Investigator Green. **R. pp. 1614-15.**

Rev. Brown later 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 Applicant for "two years, plus." Then, he testified in detail about Applicant's involvement in church activities while incarcerated. Rev. Brown sees Applicant six or seven hours a week and considers Applicant to be his best friend. Applicant had never been aggressive, violent or disrespectful to Rev. Brown, and he believed Applicant 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 [e]ffect 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 [in] 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.**

B. PCR Testimony.

Mr. Floyd testified at the PCR hearing that he had told "all the guards and so forth" not to mention death row in their testimony because this might give jurors "the impression that he had already been tried and sentenced to death." Mr. Floyd, however, mentioned this, himself, in the course of cross-examing Inv. Green. He moved for a mistrial because of the prejudicial effect of this information. He did not have a strategic reason for eliciting that Applicant was housed on death row. Mr. Floyd objected to this curative instruction because he thought that it emphasized in juror's minds that the sexual relationship with Hardee occurred on death row. However, he admitted that the jury knew of the murder conviction in *Bennett I*, and that the jury was there for resentencing. **5/27/08 Tr. pp. 27-28; 50-53.**

Mr. Young testified that Applicant had informed counsel about Rev. Brown in one of their conversations with him; and Mr. Young "got the impression that there was some sort of bond or friendship;" Mr. Young interviewed him before the resentencing proceeding to determine what, if any, mitigating evidence Rev. Brown had. Mr. Young knew Applicant met Rev. Brown while he was incarcerated, but Mr. Young did not know where Applicant was incarcerated at the time they met. **7/11/08 Tr. pp. 35-36.**

Mr. Young met with Rev. Brown and explained the questions that he would ask at the trial, and Rev. Brown answered the questions. Rev. Brown appeared to understand Mr. Young's conversations with him. They did not discuss where Applicant was incarcerated at that time. However, Rev. Brown mentioned "death row" at the resentencing; and Mr. Young immediately asked a follow-up question in which he elicited that safekeepers were housed on death row in order "to try to get around the word". It was Mr. Young's recollection that the jury would have understood that Applicant was housed there, based upon the instruction that Applicant had been convicted by another jury of murder and the jury in this case was there to resentence him, but Mr. Young did not want "to put [this information] on the table." **7/11/08 Tr. pp. 36-38.**

In support of his argument, Applicant relies upon *Caldwell, supra.* This Court finds that his 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". 472 U.S. 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. 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.

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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, 302 S.C. at 24-25, 393 S.E.2d 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 Applicant's claim for relief. *Id.*

Further, during the resentencing hearing in *Jones v. State,* 332 S.C. 329, 504 S.E.2d 822 (1998), *cert. denied*, 526 U.S. 1021 (1999), *reh. den.*, 526 U.S. 1128 (1999), a defense witness testified on direct examination 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." *Id.* at 341, 504 S.E.2d at 828. 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.*

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 (1995), *overruled in part on other grounds*, *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 in *Jones* found 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 affirmatively misled the jury regarding its role in the sentencing process so as to diminish its sense of responsibility." *Jones*, 332 S.C. at 342, 504 S.E.2d at 828 (quoting *Romano*, 512 U.S. at 10). The Court stated that Jones failed to establish "how this passing reference to death row has misled the jury regarding its role in the sentencing process or diminished its sense of responsibility." *Id.*

In the present case, the Court finds that it is unnecessary for the Court to determine the first prong under *Strickland*[30] because Applicant clearly failed to demonstrate any prejudice from counsel's performance. First, his jury had already been presented with damaging evidence that he 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 much more prejudicial than information that he was kept on death row or that he had sex there. 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 resentencing 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] Particularly where the State had already presented evidence that Applicant engaged in bad acts while housed as a safekeeper on death row, Applicant has not shown how counsel's actions were deficient.

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.* The Court specifically finds that neither the defense nor the prosecution informed the jury that he was housed on death row because of his prior death sentence. Rather, the only evidence presented was that he was there as a safekeeper before either Inv. Green's investigation or Applicant's contact with Rev. Brown. *See Jones, supra. See* **R. p.** 1790. 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.

Additionally, the Court finds that whatever *de minimus* prejudice that might otherwise exist was cured by the curative instruction given by the trial judge. **R. pp. 1609-10**. The

> "[g]ranting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way. Generally, a curative instruction to disregard the testimony is deemed to have cured any alleged error." *State v. Edwards*, 373 S.C. 230, 236, 644 S.E. 2d 66, 69 (Ct. App. 2007). *See also State v. Kelsey*, 331 S.C. 50, 70, 502 S.E. 2d at 63, 73 (1998) (instruction to disregard inadmissible evidence is usually viewed as having corrected the error in its admission); *State v. Ferguson*, 376 S.C. 615, 619, 658 S.E. 2d 101, 103 (2008); *State v. Patterson*, 337 S.C. 215, 227-28, 522 S.E. 2d 845, 851 (Ct. App. 1999) (holding the trial court did not err in denying Paterson's motion for mistrial because an extensive curative instruction "cured any possible error and eliminated any conceivable prejudice").

Even assuming that trial counsel did preserve a challenge to the sufficiency of the curative instruction, *cf. State v. Frazier*, 375 S.C. 575, 654 S.E. 2d 280 (2007) (in order to preserve an issue for review where a curative instruction was offered, an appellant must make a

contemporaneous objection to the sufficiency of the instruction or make a motion for mistrial), the Court expressly rejects the contention that the curative charge emphasized that Applicant was on death row. Instead, the Court finds that it ensured that they jury could not allow evidence that he had been housed on death row to impact their sentencing determination.

Moreover, trial counsel's cross-examination of Inv. Green very effectively downplayed the significance of Applicant's offenses while on death row and it emphasized that others were also involved. On the other hand, Rev. Brown offered mitigating testimony of a type often presented in death penalty cases. The Court finds that his testimony was important in this case where there was extensive prosecutional evidence of Applicant's future dangerousness. Further, Applicant cannot show prejudice under *Strickland* because, in light of the overwhelming evidence of aggravating factors, discussed *supra*, there is simply no likelihood that, absent trial counsel's errors, the jury "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)

Applicant further 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, the Court finds that 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 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.

The jury got the case and began deliberations at 4:53 p.m. The trial judge then 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 we [impose 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 plain and ordinary meaning 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.**

Mr. Floyd testified at the PCR hearing that his understanding of the law was that Applicant would have been parole eligible if the jury had sentenced him to life imprisonment, and that Applicant was not entitled to an instruction on his parole eligibility. Rather, he was entitled to a plain and ordinary meaning instruction. Mr. Floyd explained that he objected to the

supplemental jury instruction because he thought that "it implied to the jury the different types of life sentences" were available. He was concerned that jurors might think that "there [are] some life sentences that you [do] all life and some you didn't and, therefore, it negated the life-in-its-ordinary-meaning instruction." **5/27/08 Tr. pp. 28-29; 53-54.**

The Court finds that Applicant has failed to prove either deficient performances or resulting prejudice. Initially, the Court finds that counsel's objection was sufficient to preserve, for appellate review, the trial judge's reference to the "varieties" of life sentences. 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 because counsel's performance clearly was not deficient, since counsel preserved an objection to this portion of the supplemental charge; and Applicant cannot show Sixth Amendment prejudice. Although trial counsel did not make a specific objection to the trial judge's comments that parole was "something that I can't get into with you directly," **R. p. 2145**, the Court finds that counsel's failure to make such an objection was not deficient performance.

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 instructed on the defendant's parole eligibility. *Simmons*, 512 U.S. at 176-77. *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. Also, South Carolina cases uniformly recognize that 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.[31]

[31] 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.

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. 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) (the trial judge properly denied appellant's request to charge the jury that, 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). Here,

the charge as a whole accurately states the appropriate law. 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 was not a proper issue for their 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").

The Court likewise rejects Applicant's contention (**Applicant's Post-Hearing Memorandum, pp. 29-31**) that the trial judge's remark to the effect that he could not discuss parole eligibility with the jury implied that he could not be honest in responding to the jury's inquiry. This remark merely prefaced the supplemental instruction; and the remark was consistent with his instructions that the terms "life imprisonment" and "death penalty" were to be understood in their plain and ordinary meaning. Applicant's contrary position is based upon parsing this comment from the trial judge's charge as a whole, which is improper.

Nor was the charge given in this case "far worse than the wording of the instructions in [*State v. Johnson*, 293 S.C. 321, 360 S.E. 2d 317 (1987)] and [*State v. Plemmons*, 296 S.C. 76, 370 S.E. 2d 891 (1988)]." **Applicant's Post-Hearing Memorandum, p. 31.** The error in *Plemmons* was that the trial judge merely charged jurors, in response to a question about the defendant's parole eligibility, that:

> It is my understanding from the cases that I have read that you are not to concern yourself with that. The question that goes to you as a jury is, what is your recommendation to this Court, is it the death penalty or is it life imprisonment?"

296 S.C. at 78, 370 S.E. 2d at 872.

On appeal, the Court held that the defendant was entitled to a full *"Norris* charge"; and that the trial judge should have instructed jurors "(1) not to consider parole; and (2) the terms 'life' and 'death' are to be understood in their plain and ordinary meaning." *Plemmons*, 296 S.C. at 79, 370 S.E. 2d at 872. Similarly, the jury in *Johnson* returned to the courtroom during penalty phase deliberations and asked whether it was possible to recommend a sentence of life without parole. *Johnson*, 293 S.C. at 327, 360 S.E. 2d at 327. Again, the trial judge did not give a plain and ordinary meaning charge. Rather, he merely told jurors that they should not consider the possibility of parole and that it was not a concern for them. The Court found, on appeal, that this was an error, because the instructions did not include the plain and ordinary meaning charge. *Id.*

In the present case, however, this Court finds that the trial judge did give a plain and ordinary meaning charge that, when taken as a whole, complied with State law under *Davis*. The Court further finds that this instruction also did not contain the portion of the *Norris* charge admonishing jurors not to speculate about parole, which Justice Blackmun opinion in *Simmons* criticized as improperly inviting speculation of parole eligibility into jury deliberations. Thus, the Court finds that *Plemmons* and *Johnson* are distinguishable.

Therefore, Court finds that when the trial judge's charge is considered as a whole, there is simply no reasonable likelihood that the jury would have understood these remarks as permitting speculation about parole or that the judge's charge was otherwise considered in unconstitutional manner. *See 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 finds, based upon the representations of Bennett's collateral counsel, that he has voluntarily and knowingly abandoned this allegation.

GROUND 11(c)(6)

Applicant further alleges that trial counsel was ineffective for failing to properly object to evidence of a prior ABHAN victim because this evidence improperly injected the arbitrary and irrelevant consideration of race into his resentencing proceeding. Specifically he complains about testimony from one of the ABHAN victims concerning the recurring dream he has experienced following the attack, the testimony from the victims' mothers concerning the extent of the injuries inflicted, and photographs depicting the injuries inflicted. The Court finds that these allegations lack merit; and that Applicant has not meet his burden of proof on either prong of *Strickland, supra.*

In connection with his claim that the State violated due process by impermissibly injecting race into the sentencing proceeding, he also claims in his Post-Hearing Memorandum that several prosecution witnesses testified to Applicant's misconduct while incarcerated at various facilities that also impermissibly injected race (**Applicant's Post-Hearing Memorandum, pp. 13-15;Grounds 11 (a)(4)-(7)**); and he contends that "[t]o the extent that respondent argues and this Court agrees that this due process claim is procedurally defaulted based upon trial or appellate counsel's failures, then this Court should simply decide the issue under the rubric of

[*Strickland*]." **Applicant's Post-Hearing Memorandum, pp. 13 n. 8.** The Court rejects this allegation because not alleged in his Application.[32]

A. Events at trial.

1. The Pizza Hut evidence.

As part of its case in resentencing, the State introduced Applicant's two September 14, 1988 convictions for A.B.H.A.N. and his Youthful Offender Act sentence.[33] 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 who 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

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[32] As discussed, the Court has already found that his due process allegation is not properly before the Court in PCR. *See* § 17-27-20(b); *Drayton*, 312 S.C. at 8-9, 430 S.E.2d at 520 Further, Applicant has not alleged in his Second Amended Application that trial counsel were ineffective in failing to object to this evidence. Because he did not raise any allegation of ineffective assistance of trial counsel on this basis in his Second Amended Application, the Court finds that no such claim is properly before the Court. The Court finds that it would be an abuse of discretion to permit an untimely amendment under Rule 15(a), SCRCP. Nor can the allegation reasonably have been viewed as "tried by the express or implied consent of the parties," since Respondent was not given any notice that this was an ineffective assistance of counsel claim, and the evidence elicited concerning the evidence concerning his misconduct in prison was relevant to the alleged due process violation, even if the allegation was procedurally defaulted. *Cf. Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992).

The Court alternatively finds that **Grounds 11(a)(3) and (6)-(7)** were expressly considered and rejected on the merits by the South Carolina Supreme Court. 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 resulting from their introduction. 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"). The Court does not find that trial counsel or appellate counsel were deficient with respect to their handling of this evidence. However, because introduction of this evidence did not violate due process, the Court finds that Bennett cannot show any prejudice resulting from any supposed deficient performance by either trial or appellate counsel. *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"). The Court further finds that the remaining portions of the due process claim, **Grounds 11(a)(4)-(5)**, did not impermissibly inject race; and that Bennett has not shown deficiency or prejudice in trial or appellate counsel's performance for the reasons discussed, *infra*.

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

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 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 fist full 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.[34] After he stomped him for the last time, he jumped into a truck that had pulled up (driven by a white male), 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 lying on the ground in the back of the Pizza Hut. **R. pp. 998-1003; 1006-09.**

Mr. Floyd 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

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

had 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 Memorial Hospital because of head trauma. When she arrived at the hospital, he was unconscious. Also, 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 that they had to personally hire a tutor because they did not meet the time requirements for the State to provide one. Shannon needed a speech therapist. Also, 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 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. 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 conscious recollection about being in the hospital or any dreams that he could remember from being in the hospital, Shannon Gilbert testified that "I did have a dream in the hospital. It's the only one I remember, of course." Trial counsel 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 Shannon and Aaron McGough; but Shannon 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 might 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.**[35]

[35] 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 rejected his arguments (**R. pp. 867-85**) and Applicant did not raise any issue on direct appeal concerning this ruling.

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 the door was opened, 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 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 very 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 fairly depicted how Aaron looked at the time the photos were taken. 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." 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.**

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.** Counsel renewed his objection to Shannon's testimony in support of his motion for a new trial. **R. pp. 2363-80.** The State responded thereto. **R. p. 2381-2406.** He thereafter argued his objection to this testimony at the hearing on the motion for a new trial. **R. pp. 2207-08.** 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 (**R. pp. 2415-16**), 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."

2. Evidence related to Applicant's misconduct in prison.

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 he began bullying and trying to intimidate others with his physical size beginning in the fifth grade and that he 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**), and when he was later incarcerated within SCDC and the Lexington County Jail.

On various occasions in his incarceration, Bennett 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.[36] 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 about how he 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

[36] 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.**

jail and beating up inmates there (**R. pp. 1515-17**), Applicant 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. Applicant then dragged Dougins out of his cell by his hair, threw Dougins on the cement floor and pounded Dougins' head into the floor.[37] When an inmate Glover made a comment to him that he was going to kill Dougins, Applicant turned and 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 Bost 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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[37] 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. Further, Officer McChesney's efforts to physically stop him did not work. **R. pp. 1532-33.**

Correctional Officer Sandra Key was one of the prosecution witnesses who testified as to Bennett's violent behavior in prison. She was a dorm officer at the Aiken Youth Correctional Center, while Bennett was incarcerated there in December 1988. There were ninety-six inmates under her supervision at the time. The inmates were housed in two equally divided dorms, with a bathroom area between them. She was required to check on inmates every thirty minutes. On December 10, 1988, Applicant and several other inmates "interfered with my duties to keep me from making my checks." Specifically, when she tried to go through the rest room to get to one of the dorms, there were several inmates in there, including Applicant. He physically blocked her path and asked her for Tylenols, which prevented her from making her rounds. **R. pp. 1076-79.**

Of importance to Applicant's current allegation, trial counsel Young objected to her testimony that "after an investigation, it was determined that a group of black inmates and white inmates had been fighting." Counsel argued that the inmates' races were irrelevant. The trial judge overruled the relevancy objection. **R. pp. 1077-78.** When asked whether she had noticed any cuts, bruises or marks on an inmate, she testified that:

> Well, he's don't want me to say white, but the particular inmate that had the bruises was white. He had a cut over his left eye.

R. p. 1079. Trial counsel Floyd objected to her reply, and he argued that the Solicitor's Office was "inserting race into this case, and race is not relevant." Again, the trial judge overruled the objection. **R. p. 1079.** As the result of the investigation, Applicant was charged with assault and battery, inciting and creating a disturbance and interfering with the duties of an officer. **R. pp. 1079-80.**

James Earl Harris was a detective with the Lexington County Sheriff's Department in June 1992. He conducted an investigation at that time concerning contraband, cigarettes, being

brought into the jail. During the investigation, Applicant sent for an investigator to come speak with him. In their interview, Applicant admitted that he was paying certain guards $ 150.00 for a carton of cigarettes, and he would sell each cigarette to other inmates for $ 2.00. **R. pp. 1506-12.**[38]

In the interview, Applicant also told Det. Harris that he was purchasing marijuana and crack cocaine from guards, for his personal use. "He said [he had purchased] average all together at least a pound" of marijuana, and he had purchased "at least three or four ounces" of crack. He likewise provided the guards' names. **1512-15.**

Det. Harris then testified that:

> [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.

R. pp. 1515-16. The record does not reflect a contemporaneous objection to this testimony.

B. Applicant's direct appeal.

Applicant's first three issues on direct appeal challenged the trial judge's ruling with respect to the Pizza Hut evidence. **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.

[38] He was making several hundred dollars per carton.

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 228-30, 632 S.E.2d at 286-87.[39]

Mr. Floyd testified at the PCR hearing that he was aware that the State had intended to introduce evidence concerning the Pizza Hut assaults and evidence of Bennett's misconduct in prison because it had introduced in the first trial. He was concerned that race would be injected into the case, and he made several objections to the introduction of this testimony. However, he did not raise a due process objection to evidence of the Pizza Hut assaults, and he did not have a strategic reason for not doing so. **5/27/08 Tr. pp. 30-31; 35; 36; 43-44; 54.**

When asked about the defense's strategy for the resentencing hearing, Mr. Floyd explained that the defense had a number of witnesses who could show that Applicant was not a future danger in prison and that he could adapt to prison. Also, these witnesses could testify that

[39] Justice Pleicones dissented and would have held that admission of this evidence was reversible error. *Id* at 234-36, 632 S.E.2d at 290-91. (Pleicones, J., dissenting).

Applicant helped others and got along well with others in the prison system. Many of these witnesses worked in facilities where Applicant had been incarcerated and they were with him daily. **5/27/08 Tr. pp. 33-34; 38; 42-44.**

Mr. Young testified that the defense's theory was "to show his acclimation to prison life versus the need for him to receive the death penalty." In support of this strategy, counsel sought to focus on the positive things that "have occurred in his life as well a those changes that he had made during the period of time that he was incarcerated." Also, the defense wanted to minimize the State's evidence of bad conduct. Because Mr. Floyd handled those witnesses who testified concerning the Pizza Hut incident and had done so in the original trial, Mr. Young did not recall any strategic discussions related to that evidence. **7/11/08 Tr. pp. 26-28.6**

Mr. Young testified that he had a concern, which he might not have voiced to co-counsel, about race being an issue in the case because Lexington County had a "representation" (sic) of "being a little bit harsh on defendants of color." However, he did not consider race a priority because both the victim and Applicant were black, and a number of witnesses from both sides were black. **7/11/08 Tr. pp. 29-31.**

C. Discussion.

1. The Pizza Hut Evidence.

The Court finds that Applicant cannot satisfy either requirement of the *Strickland* test. In particular, he cannot show deficient performance from trial counsel's failure to better articulate objections to the admissibility of this evidence.[40] Although trial counsel did preserve a relevancy objection; a general objection such as relevancy is generally insufficient to preserve an issue for review of appeal. *See State v. Taylor*, 333 S.C. 159, 508 S.E. 2d 870 (1998); *State v. Varvil*, 338

[40] The performance of appellate counsel as addressed, *infra.*

S.C. 335, 340, 526, S.E. 2d 248 (Ct. App. 2000). More importantly, the Court finds that this evidence was both relevant and admissible, and that its admission did not violate due process.

The evidence concerning the Pizza Hut assaults was proof of the extent of the actual injuries inflicted upon victims of the Pizza Hut attacks and was proof of the ABHANs. The Court finds 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, although the majority on direct appeal in *Bennett II* refused to address whether the evidence was irrelevant or should be excluded under a Rule 403 analysis, since it found that 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 23 n. 2, 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 in the 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 Court finds that the Pizza Hut evidence concerned two crimes (A.B.H.A.N.) that were similar 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, 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 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 Applicant's culpability. As such, it was properly admissible. *See Ray* and *Gaskins*, *supra*; *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).[41] The Court finds that very similar testimony was presented in the penalty phase in *Bell*, *supra*.

Nor does the fact that the victims in the Pizza Hut case were white make introduction of the challenged evidence a violation of due process. The Court finds that this evidence was properly admitted as evidence of his malicious, violent and bullying character; and that it was extremely probative of these matters. The Court further finds that Applicant misunderstands that the truly prejudicial nature of the Pizza Hut evidence. Like the evidence relating to the guards discussed *infra*, this evidence was not more prejudicial because the victims were white. Rather, prejudicial aspect of this evidence is that the brutally malicious nature of the attacks demonstrated Applicant's true character, as opposed to the picture of a "Gentle Giant" presented by the defense's evidence in mitigation.

[41] 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).

The Court further finds that there was no prejudice resulting from the failure to argue due process and lack of relevancy objections, 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). Applying in Rule 403 analysis,[42] this Court rejects Bennett's arguments. 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, except as pertains to his dream. 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 the Court find that it cannot fairly be characterized as prejudicial.

Additionally, his challenged testimony about the dream "was not a blatant racial reference." **Order, R. pp. 2415**. It was merely Shannon's impression of *his* 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

[42] Again, there is an expanded scope of probative value in the penalty phase of a capital trial, and this Court has applied an expanded scope to its analysis.

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). Based on these factors, the Court finds that the probative value of the Pizza Hut evidence was not substantially outweighed by its prejudicial effect under Rule 403.

The Court expressly rejects Bennett's claim that the presentation of the Pizza Hut evidence shifted the focus of the sentencing proceeding away from the murder of Benton Smith. The Court finds that his argument in this regard is inconsistent with his attack on the Solicitor's opening comments and closing argument. Additionally, the Court finds that he ignores that Ms. Smith, like many witnesses for both parties, was black. Thus, his reliance upon her description of him as black and the victim's as white does not prove improper introduction of race.

As with the other witnesses, the testimony about the races of the participants may have been merely for purposes of identifying the person involved. Moreover, the Pizza Hut evidence was extremely probative of Bennett's violent, bullying character and his future dangerousness. Finally, the Court finds that there cannot be any prejudice from introduction of the evidence because of the overwhelming proof of the statutory aggravating circumstances *i.e.*, Bennett has failed to prove "a reasonable probability that, absent [counsel's] errors, the [jury] . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death under *Strickland*." *See* 466 U.S. at 695.

2. Applicant's misconduct in prison.

With regard to this evidence, the Court finds that trial counsel did preserve an objection to introduction of the race of the participants in the fight while Applicant was incarcerated, as well as the race of the victim in the fight. The Court finds that counsel did not object to Detective Harris' testimony. The Court further finds that Applicant has failed to establish either

deficient performance or resulting prejudice for many of the same reasons discussed in the preceding section.

The Court finds that this evidence was relevant and that it was admissible as a matter of South Carolina law. The Court further finds that the fact the State presented evidence that the victims were white does not result in a due process violation. If the Court accepted Bennett's argument in this regard and followed it to its logical conclusion, then hate crimes could never be punished.[43] Nor is the evidence subject to exclusion under a Rule 403 analysis. The Court expressly finds that this evidence was highly probative of Bennett's violent, malicious and bullying character, and his future dangerousness if sentenced to prison. It was also probative of his manipulative nature, since his custodians turned to him, an inmate over whom they had custody, for discipline and control over other inmates. Thus, the evidence was extremely probative on his future dangerousness.

The Court further finds that Applicant's focus on race is again misplaced, especially with respect to the incidents occurring in the Lexington County jail. The State did not introduce the evidence to inflame the sentencing jury with evidence of interracial crimes. Rather, it was merely establishing how Bennett will bully those who are weaker than him and he will be violent and disruptive in a prison, if put in general population. Indeed, the other details in Applicant's statement to Detective Harris show how he was able to virtually run the jail while incarcerated there: guards were freely smuggling cigarettes, marijuana and crack cocaine in to him, and they relied upon him to control portions of the inmate population.

Again, the trial judge gave a limiting instruction regarding the jury's consideration of this evidence. The limiting instruction required the jury to find that the State had proved the

[43] It is impossible to determine, from the record, the races of the correctional officers or other SCDC witnesses at issue.

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, 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 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; *Stewart*, *supra.*

The Court further finds that Applicant was not prejudiced by introduction of the challenged evidence. First, it was cumulative to both the Pizza Hut evidence and the other evidence of his violent and manipulative conduct while in and out of prison. Because the evidence at issue was cumulative, there was no prejudice, whatsoever, from its introduction. Moreover, it was not an attempt by the State to improperly inject race. Rather, it was simply evidence detailing Applicant's prior criminal behavior. Finally, in light of the overwhelming proof of the murder and the alleged statutory aggravating circumstances, the Court find that there is no "reasonable probability that, absent [counsel's] errors, the [jury] . . . would have concluded that the balance a aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

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 claims deprived him of due process. The Court finds 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, which reviewed the Solicitor's comments in light of the record as a whole. Further, Applicant cannot show any prejudice under *Strickland* from counsel's failure to object for this same reason.[44]

"[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*, 333 S.C. 316, 321, 509 S.E.2d 815, 818 (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:

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[44] Both Mr. Floyd and Mr. Young indicated that they did not have a strategic reason for not objecting to the State's arguments. Mr. Floyd explained that he did not hear the comments and thereafter raised a challenge to some of the remarks in his new trial motion. **5/27/08 Tr. pp. 30-34; 53-54; 7/11/08 Tr. pp. 40-42.**

> '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 and emphasis added).

Applying these standards to the comments at issue here, the Court finds that the 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 prove that Applicant began bullying and trying to intimidate others with his physical size beginning in the fifth grade and that he 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 A.B.H.A.N. **R. pp. 1093-01.**

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 dragged 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 the State's showing of future dangerousness and his violent character, it 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 times 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. **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 that he 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.**

The testimony of Sharon McChesney about the July 23, 1993 incident that involved inmate Dougins (*See* **R. pp. 1526-37**); the testimony of Captain Adrian Bost, the jail administrator in 1990-93" (**R. pp. 1548-49; 1570 l. 14 - 1571 l. 5**); and the testimony of Lieber Correctional Institution Warden Willie Weldon (**R. pp. 1644-45**), is discussed, *supra*.

Applicant's witnesses, quite obviously, painted a different story. Aside from fellow inmate Byron Collins' testimony that all the guards at LCDC loved Applicant (**R. p. 1979**), Applicant presented expert and lay testimony that he could adapt to prison life; 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 in light of this evidence that the Solicitor made his comments that are presently complained of and some of which were expressly challenged on direct appeal. While summarizing Applicant's violent behavior at the Pizza Hut and the incident that involved 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 the Solicitor focused upon Applicant's 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 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 231-33, 632 S.E.2d at 288-89. (footnote omitted).

Because many of the prosecutorial comments were presented to and rejected by the South Carolina Supreme Court on direct appeal in *Bennett II*, and the Court made its determination after considering the evidence addressed and the arguments of opposing counsel, this Court finds that 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. The Court finds that Applicant cannot show any conceivable prejudice resulting from trial counsel's 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.

Furthermore, the Court finds that Bennett cannot show that any of the Solicitor's comments in his opening statement or his closing argument so infected the trial with unfairness as to deprive Bennett of a fair trial. *Darden*, 477 U.S. at 181; *Bennett II, supra.* First, with respect to the Solicitor's comments referring to Applicant as a murderer, Applicant cannot show any conceivable impropriety in this remark because he was and is a murderer: the jury in *Bennett I* convicted him of murder and the purpose of the resentencing proceeding was not to retry any question as to his guilty or innocence. Rather, the purpose of the resentencing was solely to determine the appropriate sentence. *See State v. Southerland*, 316, S.C. 377, 447 S.E. 2d 862 (1994) (residual doubts of guilt are not a mitigating factor in sentencing).

The Court further finds that the Solicitor's various comments about Bennett's "brute monster size" **(R. p. 908)**, the reference to his being a "bear of a fellow" **(R. p. 914)** and having a

"big old bear of a fist." **(R. p. 908)** in opening statement were fair comments in light of the evidence presented. The Court finds that the same is true of the Solicitor's references to Bennett in closing argument as a "mountain man" **(R. pp. 2056, 2070)**, "Tiger" **(R. p. 2066)**, "monster" **(R. p. 2068)** and "beast of burden" **(R. p. 2079)**. Under the prosecution's theory and consistent with the testimony of the pathologist, the facts surrounding the murder demonstrated that the victim was struck several times with either a fist or a hard object, so hard that it dislocated his jaw and that these blows would have rendered him unconscious. *See* **R. pp. 1692-97; 1701-02.**

Also, the more severe injuries were a series of sixty-four stabs wounds to the victim's head, neck, shoulders, upper chest and left hand. **R. pp. 1679-81; 1697-1722.** These injuries supported the submission of the statutory aggravating circumstance that the murder was committed while in the commission of physical torture. *See* Section16-3-20(c)(a)(1)(h). Much like the reference to "King Kong" that was considered on direct appeal, the comments now at issue were not "an appeal to the passions of the jury." The comment[s] referred to "Applicant's immense size, strength and the destructiveness of his previous crimes," *Bennett II*, 369 S.C. at 232, 632 S. E. 2d at 288, as well as the murder itself.

The Court further finds that the defense made extensive efforts to show both Bennett's adaptability in prison and his non-violent behavior therein, in an effort to demonstrate that he would not be a danger in the future. Particularly in light of the defense's showing in support of its position that Applicant was adaptable to prison, as well as the prosecution's evidence as to the vicious and malicious nature of the murder and the violent, vicious attacks in which Bennett has engaged in on previous occasions, this Court expressly rejects Applicant's contention that the Solicitor's comments were designed to improperly demean or denigrate him or to inject race into the jury's deliberations.

The Court further finds that none of these comments deprived Bennett of a fundamentally fair trial, *Darden; Bennett II;* and that these comments were not calculated to produce a sentence based on passion or prejudice. The Court finds that Bennett's contrary position ignores the United States Supreme 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 [arguments], will draw that meaning from the plethora of less damaging interpretations." 466 U.S. at 647.

Moreover, the Court finds that the Solicitor's comments that "[t]here ain't no joy in Happy Town. He turned it into gruesomeville. It's boo [(sic)] hill. That's Johnny Bennett for you" **(R. p. 2071)**, were not improper attempts to inject race into the case. Bennett's contrary argument assigns a more damaging meaning than the comments warrant, which again, is contrary to *Donnelly*. His suggestion that this injects race ignores that Benton Smith, the murder victim, lived in Happy Town and he was murdered in that area. Further, the evidence presented at trial was that Applicant buried Benton's body in a shallow grave near the residence of Applicant's sister, which is also in Happy Town. **R. p. 1290-1300; 1349-50**. Moreover, there is a cemetery near his sister's residence. **R. pp. 1297-98.**

Given the evidence and the evidence concerning the condition of the victim's body when it was discovered (specifically, that animals had damaged the body after it was buried), the Court finds that "gruesomeville" was a fair comment by the prosecutor. The Court also expressly rejects Applicant's contention that the reference to "boo hill" was an implied racially disparaging reference. A much more reasonable interpretation is that the Solicitor simply misspoke and intended to reference notorious cemeteries in the American West, such as the Boot Hill

graveyard in Tombstone, Arizona, which was made famous by the gunfight at the O.K. Coral.[45] Once again, this Court should not infer a damaging meaning; such as that advocated by Applicant, where a less damaging meaning is present. *Darden.*

Additionally, the Court finds that Applicant's reliance on the South Carolina Supreme Court's Decision in *State v. Northcutt*, 372 S.C. 207, 641 S.E. 2d 893 (2007), is misplaced. At the very end of the Solicitor's closing argument, he stated:

> Now you see. Now you see why I'm asking for the death penalty. It's warranted. It's appropriate. It's the punishment that fits this crime and that callous murder.

R. p. 2081, ll. 8-10. *See also* **R. p. 2054.** Applicant asserts that counsel was deficient in failing to object to this comment, and that he was prejudiced by the error because the comment warranted reversal. The Court disagrees.

In *Northcutt*, the Court granted a new sentencing proceeding based upon a plethora of issues related to evidentiary and instructional matters. As to the closing argument claims, the Court stated as follows:

VI. Closing Argument

> Appellant argues the solicitor's sentencing-phase closing argument so infected the jury's sentencing determination with passion and prejudice that it requires reversal of Appellant's death sentence. We agree.
>
> A trial judge is vested with broad discretion in dealing with the range of propriety

[45] *See* w.w.w.boothill.org/exhibitcemetery.html. The cemetery "became known as Boot Hill due to the fact that most of the people buried there still had [their] boots on their feet." *See also* www.clantongang.com/oldwest/boothill.html; *Billings v. Concordia Heritage Ass'n, Inc.*, 960 S.W. 2d 688, 689 (Tex. App. 1997) ("The record in the instant case, as supported by various historical accounts, reflects that John Wesley Hardin, coincidently a practicing attorney, relocated to the far west Texas town of El Paso upon release from prison. John Wesley Hardin died with his boots on in August 1895 when he was unexpectedly shot in the back of the head by John Selman, an El Paso County Constable. At the time of his death, Hardin was patronizing the Acme Saloon. He was buried the following day in 'boothill', located in El Paso, Texas, in a coffin adorned with a brass plaque that reads: 'At Rest.' Today, "boothill", *i.e.*, Concordia Cemetery, is said to contain some 65,000 graves, many of which were purportedly stacked one upon the other. Numerous graves at Concordia Cemetery remain unmarked and as a consequence, contain anonymous occupant").

of closing argument, and ordinarily his rulings on such matters will not be disturbed. *State v. Patterson,* 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997). We must review the argument in the context of the entire record. *Id.* The appellant has the burden of showing that any alleged error in argument deprived him of a fair trial. *State v. Bell,* 302 S.C. 18, 393 S.E.2d 364 (1990). The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Donnelly v. DeChristoforo,* 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). Solicitors are bound to rules of fairness in their closing arguments as we explained in *State v. Linder,* 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981):

While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based upon this principle. 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.

We evaluate the closing argument in light of S.C.Code Ann. § 16-3-25(C)(1) (2003) to determine "whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." Appellant argues the solicitor violated this well-established rule by (1) crying numerous times throughout the argument; (2) telling the jury "we will kick the baby some more" if they returned a life sentence; (3) dehumanizing Appellant ("I don't even call him a person"); (4) threatening the jury ("it will be on your heads if he kills someone else [during his life sentence in prison]"); (5) declaring an "open season on babies;" (6) telling the jury he "expects" the death penalty; and (7) enacting a funeral procession complete with a black shroud covering the baby's crib.

Three of the solicitor's arguments require reversal of the sentence.[FN6] First, the solicitor suggested declaring an "open season on babies in Lexington County" if the death penalty was not returned. The sole purpose of this statement was to inflame the jury. The solicitor also repeatedly told the jury he "expects" the death penalty and, in doing so, ignored our precedent which rebukes such an imposition of the solicitor's personal belief.[FN7] Finally, he concluded his argument by producing a large black shroud and draping it over the baby's crib. He wheeled the crib from the courtroom in a staged funeral procession.

FN6. The first four alleged mistakes are permissible arguments because they were based on the record and reasonable inferences from it. *See State v. Copeland,* 321 S.C. 318, 468 S.E.2d 620 (1996) ("A solicitor's closing argument ... should stay within the record and reasonable inferences to it.").

FN7. *See State v. Smart,* 278 S.C. 515, 299 S.E.2d 686 (1982) (reversing a death sentence because of the same error by the same

> solicitor), *overruled on other grounds by State v. Torrence,* 305 S.C. 45, 406 S.E.2d 315 (1991); *Thompson v. Aiken,* 281 S.C. 239, 315 S.E.2d 110 (1984) (finding prejudicial error where prosecutor's argument put his personal opinion before the jury regarding the death penalty in murder cases and requiring a new sentencing proceeding).
>
> Any one of these three miscues requires reversal of Appellant's sentence. The State admits the solicitor's comments constituted error, but contends the brutality of the crime and the fact Appellant himself asked for the death penalty require this Court uphold the sentence.[FN8] While it is difficult to determine the impact of the evidence on the jury and the Appellant's own request for a death sentence, it is clear the solicitor was overly zealous in his argument. *State v. White,* 246 S.C. 502, 507, 144 S.E.2d 481, 483 (1965) ("In view of the absolute discretion of the jury with regard to the issue of mercy, it is impossible to determine whether the argument actually had a prejudicial effect upon the verdict."). We conclude the solicitor's closing argument requires reversal of Appellant's death sentence because the sentence was imposed under the influence of passion and prejudice in violation of S.C.Code Ann. § 16-3-25(c).

Northcutt, 372 S.C. at 221-23, 641 S.E.2d at 881-82.

Although the Court in *Northcutt* plainly stated that the similar argument was among the three errors found and that "any one of the miscues requires reversal," this Court finds that vacation of Bennett's death sentence is not required here. First, in the context of the Supreme Court's decision in *Northcutt*, the statement that the "expects the death penalty" comment, standing alone, required reversal is unquestionably *dicta*, since the Court had already found that other errors required reversal. Indeed, the South Carolina Supreme Court recently denied a petition for writ of habeas corpus in its original jurisdiction, where a capital inmate raised an ineffectiveness claim predicated on counsel's failure to object to similar arguments by the same Solicitor in the penalty phase of his capital trial. *See Williams v. Ozmint*, 380 S.C. 473, 671 S.E.2d 600 (2008).

In doing so, the Court distinguished *Northcutt* and it explained that: "*Northcutt* is inapposite. The Court did not hold that the solicitor's comments regarding 'expecting' the death penalty constituted a denial of fundamental fairness shocking to the universal sense of justice.

Rather, we held that *the solicitor's closing argument as a whole* infused the sentencing proceeding with 'passion and prejudice' in violation of S.C. Code § 16-3-25(C)(1) (2003)." *Williams*, 380 S.C. at ___, 671 S.E.2d at 602 (citing *Northcutt* 372 S.C. at 222, 641 S.E.2d at 881) (emphasis added).[46]

Second, the Court again finds that the challenged argument 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. *Darden*, *supra*; *Williams*, *supra*; *Patterson*, 324 S.C. at 17, 482 S.E.2d at 766. The Court finds that Applicant has not met this burden. Unlike the direct appeal in *Northcutt*, the issue here is whether Bennett was prejudiced under *Strickland* by trial counsel's failing to object to the "expects the death penalty " argument. While his burden of proof in the present case is different from the standard for state habeas corpus relief, the Court finds that his burden to show prejudice under *Strickland* is a heavier burden than Northcutt faced in direct appellate review. *Cf. Williams*, 380 S.C. at ___, 671 S.E.2d at 602.

Third, and again unlike *Northcutt*, the Solicitor's comment was not surrounded by reversible error. Contrary to Applicant's claim, the Court finds that the Solicitor's limited comments in this case squarely addressed the fact that the decision still rested with the jury and that it had not been made for them, which distinguished the comments from those where the entire process of prior decision-making was described. While the Solicitor stated that he "expected" the death penalty, "the totality of his argument did not 'minimize the juror's own sense of responsibility for [Applicant's] fate.'" *Williams*, 380 S.C. at ___, 671 S.E.2d at 602-03 (citing *State v. Woomer*, 277 S.C. 170, 175, 284 S.E.2d 357, 359 (1981) (Solicitor improperly

[46] To the extent Applicant maintains that this was the holding in Northcutt, the Court finds that his position is refuted by the Supreme Court's discussion of *Northcutt* in *Williams*.

attempted to minimize jury's responsibility by referencing his own determination that the death penalty was the appropriate sentence)).

Specifically, the Solicitor told jurors to disregard an alleged statutory aggravating circumstance if it found that the State had not proved any of the four he urged existed, and he reminded jurors "that's your decision." **R. pp. 2056-57**. He also generally referenced the jurors' promise to base their verdict on the testimony and the exhibits and the law presented (**R. pp. 2053-81**); and he told the jury that the evidence proved that death was the appropriate sentence and that "the punishment that fits the crime." **R. p. 2081**. He likewise told jurors that the trial judge would instruct them that "[you can consider anything in favor of [Applicant], ... [and] ... you can give [Applicant] life for any reason or no reason at all." **R. p. 2059**.

In addition to the previously-stated reasons, the Court finds that *Northcutt* is further distinguishable because the Solicitor in that case, involving an infant homicide, "not only stated that he 'expected' the death penalty, but also declared that it would be 'open season on babies' if the jury did not return the death penalty and staged a funeral procession with a black shroud draped over the victim's crib." *Williams*, 380 S.C. at ___ n. 3, 671 S.E.2d at 602 n. 3. The Court finds that there were not any analogous remarks in Applicant's case.

Moreover, the trial judge gave thorough instructions to the jury, including a charge that "you are never required to recommend the death penalty." He further charged 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." **R. p. 2130, ll. 18-22**. Furthermore, the Supreme Court has upheld almost identical comments to the remarks in this case on numerous occasions. *See e.g., Id* at ___ n. 3, 671 S.E.2d at 602-03; *State v. Johnson*, 306 S.C. at 133, 410

S.E.2d at 555 (solicitor's comment that "Ya'll do what's right . . . a verdict of death by electrocution."); *State v. Plath*, 281 S.C. at 17, 313 S.E.2d at 628 (not improper for solicitor to tell jurors to have the "guts to do your job."); *see also State v. Elmore*, 300 S.C. 130, 386 S.E.2d 769 (1989).

In fact, the Supreme Court has previously upheld an identical argument by the same Solicitor in *State v. Bell*, 302 S.C. at 33-34, 293 S.E.2d at 372-73. In *Bell*, the Solicitor argued in closing that if "'this [wasn't] a case in which a jury should impose the death penalty, if this [wasn't] the type of case in which the State should seek the death penalty and expect the death penalty, then there is none.' The Solicitor also implored the jury 'to do what's right.' He stated that if 'it was not right in this case, it was never right.'" *Id.* On direct appeal, the Supreme Court found that these comments were distinguishable from those in *Woomer*, *supra*, and *State v. Butler*, 277 S.C. 543, 290 S.E.2d 420 (1982). The Court concluded that the Solicitor's argument in Bell's case had not injected his personal opinion concerning the death penalty into the proceedings; and that he had not "comment[ed] on his involvement in deciding whether or not to prosecute for the death penalty." *Bell*, 302 S.C. at 34, 393 S.E.2d at 373. The Court held that "[t]he Solicitor's comments did not diminish the role of the jury to decide Bell's fate, thus, we hold that the argument was proper." *Id.*

The Court also rejects Applicant's contention that these comments are indistinguishable from other decisions of the Supreme Court that found error in arguments where the prosecution had minimized the jury's sense of responsibility in deciding the appropriate punishment. The Court finds that the cases relied upon by Applicant are readily distinguishable. In *State v. Butler*, 277 S.C. 543, 290 S.E.2d 420 (1982), the Court reversed the penalty phase based on the

prosecutor's argument about his private decision making process to prosecute and seek death to minimize the jury's sense of responsibility.

In *State v. Sloan*, 278 S.C. 435, 298 S.E.2d 92 (1982), the Court found error in similar penalty phase comment about the process of making the decision to seek the death penalty and that others had already made the decision including the legislature, officers, governor, grand jury, the solicitor on signing notice of intent and "would you do like others and sign your name." Similarly, the Court found error in the extensive discussion in *Woomer, supra. Accord Thompson v. Aiken*, 281 S.C. 239, 315 S.E.2d 110 (1984); *State v. Koon*, 278 S.C. 528, 298 S.E.2d 769 (1982) (argument that he had to make the decision to seek death and that he had made the decision and that if he could do it, the jurors could do it was error). In each of those cases, however, the prosecution went extensively over the death penalty decision-making process and who had to make the decisions. Such review did not occur here. Instead, it was the prosecutor, as an advocate, urging a result of death - something that he is authorized to do under *Donnelly* and *Durden*.

Other state courts have similar determined that an argument about expecting the death penalty is not "fundamental error." *E.g.*, *State v. Gilmore*, 681 S.W.2d 934, 944 (Mo. 1984) (during the sentencing phase of the trial, the prosecutor requested the jury to return the death penalty since the public would *expect* such punishment if given the opportunity to review the evidence and the defendant's prior conviction record); *Sneed v. State*, 2007 WL 4463873 (Ala.Crim.App. 2007) (prosecutor's closing argument at penalty phase of capital murder trial, that "[t]here will never be a case more fitting for capital punishment than this case," was a proper argument against the jury recommending a sentence of imprisonment for life without the possibility of parole); *People v. Stevens*, 158 P.3d 763 (Cal. 2007) (prosecutor did not commit

misconduct during closing argument of penalty phase of capital homicide prosecution, when prosecutor made statements regarding the jury's "internal fortitude" to impose the death penalty; prosecutor's argument merely acknowledged the inherent difficulty in sentencing to death a person sitting in front of the jury).

Based upon these findings, the Court finds that the Solicitor's opening statement and closing argument did not improperly inject race into the case, did not demean Applicant and did not otherwise suggest that the jury should return a death sentence on an improper basis. Further, considering the overwhelming evidence presented that established Applicant's guilt of the four statutory aggravating circumstances beyond a reasonable doubt, the Court finds that Applicant failed to prove that he was prejudiced by any of the Solicitor's comments in his opening statement or closing argument.

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 "tended to inform the jurors that they could only consider Applicant's character in the context of aggravating evidence rather than mitigating evidence" (citing **R. p. 2113**). The Court disagrees and finds 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 argument 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 Applicant now contends was improper:

> 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 charge.

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 the term "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 a 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**.

The trial judge also instructed jurors on the relevant 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.