

STATE OF SOUTH CAROLINA  
In the Supreme Court

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**S.C. Supreme Court**

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas  
Capital PCR 06-CP-23-7719  
The Honorable D. Garrison Hill, Circuit Court Judge

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Kamell Delshawn Evans,

Respondent/Petitioner,

-vs-

State of South Carolina,

Petitioner/Respondent.

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**RESPONDENT/PETITIONER'S  
PETITION FOR WRIT OF CERTIORARI**

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WILLIAM HARRY EHLIES, II  
Building A, Suite 201  
310 Mills Avenue  
Greenville, South Carolina 29605  
864-232-3503  
[hank@ehlieslaw.com](mailto:hank@ehlieslaw.com)

CHRISTOPHER WARREN SEEDS  
Post Office Box 3931  
Ithaca, New York 14852

ATTORNEYS FOR RESPONDENT/  
PETITIONER

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## STATEMENT OF THE CASE

This is a capital murder post-conviction relief action filed by Respondent-Petitioner Kamell Evans after he was convicted of two counts of murder and sentenced to death. App. 1802-13.<sup>1</sup> The shooting arose out of a domestic dispute between Mr. Evans and his girlfriend Christina Rodriguez; the victims were the brother and father of Rodriguez. App. 1420-32.

Mr. Evans was indicted for the murders of Antonio L. Sapinosa and his son Antonio J. Sapinosa (App. 1802-13), which occurred inside the Sapinosa home. The State filed a Notice of Intent to Seek the Death Penalty (App. 1814), alleging three aggravators as applied to Antonio L. Sapinosa and the same three factors as to Antonio J. Sapinosa, with the additional aggravator that the killing of Antonio J. Sapinosa was during or because of the performance of his official duties as a law enforcement officer. The jury found all aggravating circumstances beyond a reasonable doubt and returned a verdict of death. App. 1794-95. The trial judge found and certified in writing that the sentencing proceeding and jury findings were not a result of prejudice, passion or any other arbitrary factor. App. 1799.

On direct appeal the issue raised was whether the trial judge committed reversible error by not charging S.C. Code Ann. § 16-3-20(C)(b)(6), a statutory mitigating circumstance: “The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.” This issue was framed by this Court as follows: “Is Appellant entitled to a new sentencing proceeding because the trial judge failed to *sua sponte* charge the jury on a statutory mitigating

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<sup>1</sup> Mr. Evans, Respondent-Petitioner, cites the Appellate Appendix (“App.”), the Supplemental Appellate Appendix (“Supp. App.”), and the State’s Petition for Writ of Certiorari (“State’s Petition”).

circumstance?” The conviction and sentence were affirmed on November 6, 2006. *State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006). See App. 1858-63.

Mr. Evans filed a Petition for Stay of Execution on November 13, 2006 and subsequently an application for postconviction relief (App. 1856). See App. 1896 (first amended petition); App. 1903 (second amended petition). On December 6, 2006 this Court granted the stay and designated the Honorable D. Garrison Hill to conduct the proceedings. App. 1865. Thereafter, Mr. Evans served and filed an Initial Trial Brief (Supp. App. 1), and an evidentiary hearing commenced June 1 through 5, 2009, and concluded from October 12 through 14, 2009. At the conclusion of the evidentiary hearing, Judge Hill issued a briefing order, and post-hearing briefs were filed by Mr. Evans on October 4, 2010 (App. 3906), by the State on November 10, 2010 (App. 4104), and Evans’s Reply was filed on November 19, 2010 (App. 4217). On December 9, 2010, Judge Hill requested additional briefing regarding trial counsel’s ineffectiveness with respect to the prejudice prong of the *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 4 (2009), jury charge question. On the issue of whether counsel’s failure to object to the erroneous charge was prejudicial, the court asked the parties to brief the following questions:

- (a) Whether the improper charge requires *per se* reversal, or whether the defense of “harmless error” can apply. See *Lowry v. State*, 376 S.C. 499, 657 S.E.2d 760 (2008).
- (b) Whether the analysis of *Boyde v. California*, 494 U.S. 370 (1990), applies to Mr. Evans’ ineffectiveness and 8<sup>th</sup> amendment and 14<sup>th</sup> amendment claims related to the erroneous jury instruction on mercy.

The State submitted its brief on December 14, 2010 (App. 4238) and Mr. Evans submitted his on December 16, 2010 (App. 4245).

On February 24, 2011, Judge Hill issued a final order granting Mr. Evans a new sentencing trial, finding that Mr. Evans was denied effective assistance of counsel as a consequence of counsel's failure to object to the erroneous jury charge instructing jurors that a life sentence could not be returned as an act of mercy. App. 4254. The relief was granted in part on the authority of *Rosemond v Catoe*. On April 1, 2011, the State filed its Notice of Appeal. Thereafter, Mr. Evans filed a cross appeal pursuant to S.C.R.A.P. Rule 203(c) and, by subsequent order of this Court, was designated the Respondent-Petitioner. Mr. Evans opposes the State's Petition for a Writ of Certiorari,<sup>2</sup> and seeks to have this Court grant his Petition for a Writ of Certiorari on specific grounds set forth herein.

**RESPONDENT/PETITIONER'S  
PETITION FOR WRIT OF CERTIORARI**

The PCR court wrongly decided matters that are grouped into seven issues (or Points), some of which are subject to recur at a new sentencing trial: (1) Trial counsel were ineffective to the prejudice of Mr. Evans by failing to pursue and investigate substantial and significant mitigation of which they were or should have been aware, including evidence of brain damage and abuse. (2) Trial counsel were ineffective in failing to object to the aggravating factor S.C. Code Ann. § 16-3-20(C)(a)(7) as applied to the victim Antonio J. Sapinoso, when no evidence supported the suggestion that the offense occurred "during or because of the performance of his official duties." (3) Trial counsel were ineffective to the prejudice of Mr. Evans by failing to object to the testimony of Lewis O'Cain, who compared

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<sup>2</sup> Kamell Evans's Brief in Opposition to the State's Petition for a Writ of Certiorari—filed contemporaneously to the present Petition—argues that the PCR judge correctly found a violation of *Strickland v. Washington*, 466 U.S. 688 (1984). The jury charge given in this case, "[Y]ou may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy" (App. 1785) contradicts long-standing State precedent and statutory authority as well as the Federal Constitution. Counsel's failure to object to the charge constituted deficient performance under *Strickland*, and was also prejudicial under *Strickland*, especially so since the crux of the defense at sentencing was mercy.

general living conditions of those sentenced to life without parole to those sentenced to death, and in failing to object to the Solicitor's argument on the same. (4) Trial counsel were ineffective to the prejudice of Mr. Evans by failing to object to the testimony of Mr. O'Cain regarding alleged gang affiliation of Mr. Evans based solely upon Mr. Evans's tattoos and a homemade poster, and the Solicitor's highly inflammatory and ungrounded summation, which characterized this domestic incident as the shooting of a law enforcement officer for the purpose of gang status. (5) Trial counsel were ineffective to the prejudice of Mr. Evans for failing to make a motion to change the venue of the trial where one of the victims served as a security officer in the courthouse where the trial was held. (6) Trial counsel were ineffective to the prejudice of Mr. Evans by failing to object to victim impact testimony. (7) Trial counsel were ineffective to the prejudice of Mr. Evans for failing to object to the Solicitor's summation, which exceeded the bounds of fair testimony in multiple respects. App. 1756-1757.

The facts relevant to each argument are set out in each of the Points.

1.

**DEFENSE COUNSEL FAILED TO ADEQUATELY INVESTIGATE, DEVELOP, AND PRESENT AVAILABLE, RELEVANT, AND ADMISSIBLE MITIGATING EVIDENCE. THERE IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S FAILURE, AT LEAST ONE JUROR WOULD HAVE SENTENCED MR. EVANS TO LIFE WITHOUT THE POSSIBILITY OF PAROLE—NOT DEATH.**

This Court will reverse the decision of a postconviction court if there is no probative evidence in the record to support its findings or the if the rulings are controlled by an error of law. *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984). The PCR court's order on sentencing ineffectiveness for failure to investigate and present mitigating evidence in this

case lacks evidentiary support and is controlled by errors of law. The PCR court misinterpreted significant parts of the evidence presented at the postconviction hearing. Those skewed factual findings in turn rendered the court's application of law to the facts unreliable. In addition, the PCR court misconstrued the law of *Strickland v. Washington* and related precedent on sentencing ineffectiveness in capital cases, disregarding the bedrock principle that investigation and diligence must undergird reasonable strategic decisionmaking under the *Strickland* test's first prong.<sup>3</sup> The PCR court's assessment of prejudice is marred by the court's erroneous findings of fact and by its failure to consider the prejudice from this ineffectiveness claim *alongside* the prejudice arising from counsel's substantial other failures, as *Strickland* demands.

As the United States Supreme Court precedent emphasizes, ineffectiveness in capital sentencing proceedings can occur even where counsel presents some evidence in mitigation. In contrast to a case like *State v. Jones*, where the post-conviction evidence merely presented a "fancier mitigation case" and "the 'new' evidence [wa]s the same as the 'old' evidence," 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998), here the post-conviction evidence bears on topics that were not (or at best, indirectly) offered to the jury and introduces information that counsel, although alerted to its existence, did not investigate or obtain prior to trial. In contrast to *Jones*, here "there is a reasonable probability at least one

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<sup>3</sup> The ineffective assistance of counsel standard established in *Strickland v. Washington*, 466 U.S. 688 (1984), requires a showing that an attorney's representation "fell below an objective standard of reasonableness," *id.* at 688, and 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 *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000)); see also *Harrington v. Richter*, 131 S.Ct. 770 (2010); *Sears v. Upton*, 130 S.Ct. 3259 (2010); *Porter v. McCollum*, 130 S.Ct. 447 (2010); *Wong v. Belmontes*, 130 S.Ct. 383 (2009); *Bobby v. Van Hook*, 130 S.Ct. 13 (2009)). This Court has applied that precedent repeatedly. See, e.g., *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008); *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004)).

juror would have struck a different balance and returned with a different sentence had the jury been confronted with the considerable mitigating evidence.” *Von Dohlen*, 360 S.C. at 607, 602 S.E.2d at 743.

This Court should grant certiorari to consider the PCR court’s misapplication of *Strickland* and this Court’s precedent to counsel’s failure to investigate, develop and present available and relevant mitigating evidence.

**A. The Case Presented at the Sentencing Trial.**

As set out *supra* at 7-9, trial counsel’s mitigation presentation at trial consisted primarily of short testimony from family members, coaches, and friends, all offered to show, counsel told the jury, “[t]here will be no abuse excuse . . . this man comes from a good family[;] he has a good background; he’s got a good education.” App. 1526. Evans’s sister and father provided the climax to this testimony, emphasizing their love for Evans and the meaning he continued to give to their lives. Evans’s sister said that Evans was a father figure to her children, even in prison. App. 1672. Evans’s father spoke of Evans’s positive attributes. He stated that, while Evans’s actions caused the family pain, “he is still my friend, he will always be my friend.” App. 1669.

Counsel also called two witnesses who testified that Evans would adjust positively in prison, see App. 1624 (corrections expert George Martin); App. 1615 (Greenville County Detention Center corrections officer John Merkle), and two mental health experts. First, Dr. James Evans, a neuropsychologist who administered a test battery and conducted an QEEG of Mr. Evans, testified that the results were “indicative of mild brain dysfunction,” “some malfunctioning in the brain.” App. 1696. Dr. Evans suggested that the results indicating brain dysfunction were “very likely due to lead poisoning,” App. 1697, but on cross-

examination acknowledged that he had no actual knowledge of this. App. 1702. Dr. Evans further conceded that he had identified dysfunction, but had not seen brain damage. To know whether Evans suffered from brain damage, he explained, more testing and brain imaging would be needed. App. 1701-02; see App. 1684 (“[N]o one . . . knows that someone has brain damage unless they can see it on a CAT scan or MRI or during neurosurgery.”). The defense’s last witness, Dr. Elin Berg, a psychiatrist, offered a different view. Dr. Berg testified that Evans, though suffering cognitive dysfunction from major depression on the day of the shootings, App. 1719, maintained the capacity to conform his conduct to the requirements of the law. App. 1729. This was not consistent with the position of Dr. Evans, who found diminished capacity in this regard. App. 1699. Dr. Berg also refuted Dr. Evans’s call for additional testing for brain damage, stating that she did not see symptoms that would call for further study of brain abnormality.

In closing, defense counsel asked the jury for “mercy.” App. 1770. The prosecutor echoed this, telling the jurors “[t]he defense evidence was not mitigation[,] [i]t didn’t mitigate anything. It was designed to make you feel sorry for him and create sympathy.” App. 1754. Defense counsel’s explanation was simply this:

There are two Kamell Evanses. There’s the Kamell Evans that we saw up there, gangster, guns; and there’s this Kamell Evans. There are two Kamell Evanses. That’s the only way you can explain it.”

App. 1769.

## **B. Facts Presented During the Postconviction Hearing.<sup>4</sup>**

1. Counsel’s rushed preparation for trial.

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<sup>4</sup> The evidence presented in the post-conviction evidentiary hearing on this issue was taken over a period of eight court days. A detailed discussion of the testimony, as well as a discussion of the issue of sentencing ineffectiveness under *Strickland*, is set forth in Mr. Evans’s post-hearing brief, which is incorporated herein. See App. 3930-3989.

a. A one-year false start.

Evans went to trial on September 13, 2004. Steve Sumner was appointed less than three months before, on July 3. The mitigation investigation did not begin until two weeks later, in late July. In fact, Mr. Sumner was the fourth attorney appointed to represent Mr. Evans. The first, Chief Public Defender of Greenville County, John Mauldin, withdrew after the State served Notice of Intent to Seek the Death Penalty. Mr. Mauldin's basis for withdrawing was his working relationship with victim Joseph Sapinoso, who worked security at the Greenville County Courthouse, which also houses the Public Defender's office. App. 2149, 2150-2155; App. 3410. The second and third counsel for Mr. Evans were James L. Goldsmith, a lawyer with a primary office in North Carolina, and Rodney Richey. It was Richey's first capital case; it was the first capital case Goldsmith handled in South Carolina and the first capital case he took to trial. App. 2168, 2213-2214. The two held the case for over a year. During that time, Goldsmith testified, they "worked pretty much exclusively on the guilt phase." App. 2172-2173; see App. 2216. Both agreed, however, that "the guilt phase wasn't the meat and potatoes" in this case. App. 2043. When Richey moved to be relieved on grounds similar to those Mauldin stated a year earlier, counsel had conducted no mitigation investigation and retained no experts. App. 2038; see App. 2039, 2170, 2173, 2235. They had no strategic reason for this. App. 2050.

b. A sprint to trial.

Mr. Sumner, Evans's fourth attorney, was appointed to replace Richey on July 6, 2004, approximately nine weeks before the trial date. When Sumner visited Richey's office to pick up the case file, it consisted solely of the discovery provided to Richey by the State. App. 2036, 2234-2235; see App. 3364. According to Sumner, he and Goldsmith divided the

work. Sumner would “get experts,” “file motions,” “pick[] investigators,” and research the “insanity defense,” while Goldsmith was placed in charge of preparing “mitigation” and interviewing family and character witnesses. App. 3776. The first step they took toward mitigation was Sumner’s meeting with veteran mitigation specialist Dale Davis, on July 21. App. 2378, 2385-2386; see App. 3565 (C.V. of Dale Davis).

After Davis’s first meeting with Evans, she highlighted two points. First, that Evans may have lead poisoning from ingesting paint as a child. App. 2248-2250 (publishing App. 3425); see App. 2522-2523. Second, that Evans’s “father was abusive to both [Kamell] and other children” and beat the mom and would turn on the kids when they intervened. App. 2502. Investigating these leads would take time, Davis urged, and she withdrew after Sumner informed her that he would not seek a continuance of the scheduled September 13, 2004 trial date.<sup>5</sup> Davis nevertheless identified avenues for counsel to investigate, including physical and psychological abuse, substance abuse, and lead poisoning. App. 2522; see App. 3488 (articles and information on lead poisoning, which Davis provided to Sumner); see App. 3776. Thereafter counsel hired a former police investigator, Lenora Topp, who immediately urged a similar course of action to investigate lead poisoning and abuse. App. 2259, 2534, 2541, 2556; see App. 3429. She received the same response: Sumner told her there was no reason. App. 2255, 2543, 2545, 2570, 2573. Topp wrote to one hospital for medical records, but used the wrong address, then wrote again the week before trial. App. 2571; App. 3842; see App. 2512. She received the medical records two weeks *after* the

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<sup>5</sup> Eventually counsel did ask for a continuance, but transparently, as Sumner conceded to the court on the opening day of trial: “As an officer of the Court, I cannot tell you that I’m not ready to proceed. I cannot tell you that Mr. Goldsmith would say that either. I did file the [continuance] motion and I did want to bring it to the Court’s attention. Mr. Evans did ask if I filed it and I did.” App. 2252. The court asked, “[You’re] representing to the Court that you have done all the preliminary investigation and preparation that you need to do and you are prepared?” Sumner answered, “Yes, sir.” See App. 2254. The court then denied the motion.

trial. They showed that as an infant and toddler Evans had ingested levels of lead that were well into a range considered poisonous. App. 2572.

## 2. Mitigating Evidence Presented in Post-conviction

### a. Cleveland: lead poisoning, learning disability, violence, and neglect

The testimony at PCR provided a picture of life in Cleveland much more complex than the one-dimensional “lived a very good middle-class life” picture that defense counsel manufactured at trial. In reality, Evans grew up in East Cleveland in a physically violent and psychologically violent home, tempered only by a supportive community of sports mentors. Evans also suffered from brain damage caused in part by toxic exposure to lead.

#### i. Family violence and neglect

Witnesses at the PCR hearing gave voice to the incidents of violence and abuse. Renee Evans, Evans’s mother, who did not testify at trial, gave a first-person account of her victimization at the hands of Evans’s father Barry. Renee’s sister, Virginia Golden, provided a corroborating account. Barry Evans, Kamell’s father, and Shatima Evans, Kamell’s sister, also testified. In contrast to their brief trial testimony, which was limited to their love for Kamell, their sorrow for the Sapinosos, and Evans’s positive attributes, they now divulged a tumultuous and traumatic family history, which Barry left Ohio to escape. App. 2606-2608.

Barry’s abuse of Renee preceded Kamell’s birth, see App. 2837-2840, and did not stop once he was born. The presence of Kamell and his sister during Barry’s attacks upon Renee only escalated the violence:

When they tried to stop their dad, the anger he turned and he would throw them across the room, and then he would tell them to get out of there, but they were children. Kamell would withdraw and my daughter, she tries to do

a little bit more and then she tries to protect him while they're trying to protect me.

App. 2841; see App. 2112, 2114, 2955, 2960. A cycle of violent argument would ensue, during which Renee repeatedly moved out of the home with the kids, only to return and have it happen again. See App. 2957-2960. On occasion this involved Barry firing a gun in the house; on another, Barry tore hair from Renee's head while beating her on the kitchen floor as the children watched. Shatima saw welts and bruises on Kamell after a whipping by his father, who beat Kamell for trivial reasons like "not eating his eggs" for breakfast or not knowing his spelling words. App. 2951-2952. The whipping instrument was "a black belt . . . with holes in it." App. 2953.

ii. Lead poisoning

Evans's sister Shatima recalled seeing Evans eating lead paint in the family's rented apartment not long after Evans was born. App. 2941-2944. At the post-conviction hearing, Dr. Richard Canfield, a Ph.D. in Developmental Psychology and a Professor at Cornell University, who specializes in childhood lead exposure and its effects on later intellectual and neuropsychological function, testified regarding the blood lead levels reported in Mr. Evans's childhood medical records. Evans was screened for lead poisoning at the age of one year and eleven months, and again when he was nearly five years old. On both occasions the blood lead levels were toxic—three times higher than what we consider safe today. App. 2804; see App. 3704 (slide 3).

Dr. Canfield observed that the first blood lead test level of 34 micrograms per deciliter was "off the charts." App. 2806; see App. 3612. The second, of 30 micrograms per deciliter was nearly as high. App. 3616. Canfield testified to a reasonable degree of medical certainty that these levels of lead exposure would have permanent and incurable

effects on Evans's development and functioning, including decreased mental flexibility (i.e. the ability to change response mode), difficulty in planning and problem solving, and impaired short-term memory. "[T]here would be damage, physical damage to areas especially in the frontal cortex in the brain and also disrupted neurotransmitter function." App. 2807, 2816. Dr. Canfield saw "evidence of disability th[at] doesn't speak to intelligence." App. 2811.

b. Brain damage

At the post-conviction hearing, Dr. Ruben Gur, a Ph.D. in psychology and specialist in neuroimaging, who focuses on the brain and behavior and neuropsychology, offered a detailed account of the atrophy in Mr. Evans's brain. App. 2633. During post-conviction proceedings, the defense retained neurologist David Bachman from the Medical University of South Carolina to conduct neurological testing of Mr. Evans. After conducting an examination, Dr. Bachman recommended a magnetic resonance image (MRI).<sup>6</sup> The MRI results, in Dr. Bachman's opinion, showed atrophy you would not expect from someone as young as Mr. Evans. The MRI was therefore sent to Dr. Gur for further study.

Using the MRI, Dr. Gur conducted a quantitative volumetric analysis. The quantitative analysis showed diffuse brain atrophy and "significant reduction" in the volume of the frontal lobe and the occipital lobe. There was volume loss more than two standard deviations greater than the mean in seven of the brain regions that have previously been linked to lead exposure. App. 2675-2676. Dr. Gur explained the day-to-day impact of

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<sup>6</sup> Magnetic resonance imaging uses a strong magnetic field to create resonance of molecules. A computer records the resonance and creates a series of readouts "of the signal intensity in each point of the brain." The greater the signal, the darker the three-dimensional pixels (voxels) on the computer readout, and the signal is different for the different types of matter in the brain: gray matter, white matter, myelinated fibers, fluid. App. 2664. Knowing the dimensions of the pixels allows calculation of the volume. App. 2662-2664.

frontal lobe damage is that one's ability to make rational decisions deteriorates: "People with frontal lobe damage will make bad decisions that are not in line with their own good, they're not in line with their own goals." App. 2677. Dr. Gur testified his findings were consistent with the dysfunction that Dr. James Evans reported at trial, but much more *specific* and *definitive*. App. 2677, 2685, 2686 ("Dysfunction means it's not working out, damage means that it is actually something broken."). Dr. Gur explained that the damage he found in certain areas was *more severe*. App. 2690.

Dr. Gur also reported that reduced volume in other brain regions (temporo-limbic regions, such as the cingulate, middle temporal and insula) would result in further deficits in processing of anxiety signals and emotion regulation. Emotion processing, coordination of sensory information, decision-making, the ability to adapt to changing circumstances—all of these, Dr. Gur testified, are functions of the type of brain damage that Mr. Evans has.<sup>7</sup>

At the post-conviction hearing, the State called Dr. Kenneth Spicer as an expert in diagnostic radiology, who "looked at the [MRI] images blind" and concluded "they were completely normal." App. 3209. Dr. Spicer, who like Dr. Gur performs quantitative analysis of MRI, recognized that there is a significant amount of subjectivity in mere visual analyses of MRI, particularly in cases, such as Evans's, of diffuse volume loss. App. 3250. Dr. Spicer testified that the first step to resolve such ambiguity is to assess the MRI in the context of other clinical findings and histories to reach a more complete diagnosis, App. 3255, but that the next and more definitive approach is a quantitative MRI analysis, App. 3238-3239, as Dr. Gur did. Dr. Spicer agreed with Dr. Gur that a quantitative MRI analysis

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<sup>7</sup> Another indicator of the damage to Mr. Evans's brain was the extent of fluctuation of damage within related hemispheres in his brain. For example, the left hemisphere of the superior frontal lobe is more than two standard deviations below the mean; but the right hemisphere is normal, which "doesn't happen in normal people." App. 2687; see App. 3683.

is a more sensitive approach and a valid “tie breaker” for *ruling in* brain volume loss. *Id.*; see App. 3143 (testimony of Dr. Bachman). Dr. Spicer did not testify about the results of Dr. Gur’s analysis of Mr. Evans’s MRI, as he was not provided with it and was not aware of Gur’s report regarding the quantitative analysis of Evans’s brain MRI. App. 3229, 3233, 3247-3248. Nor had Dr. Spicer seen Dr. James Evans’s report on Mr. Evans. App. 3243.

c. South Carolina

Trial counsel asked the family and friends of Mr. Evans called as defense witnesses at the sentencing trial to focus exclusively on positive aspects of Evans’s character and life in South Carolina. But Mr. Evans’s life in South Carolina was far from all positive. An ambivalent relationship with his father, continued learning difficulties, being a black athlete in a white environment, and a tragically toxic and volatile romantic relationship with Christina Rodriguez all posed intense struggles. Dr. Cooper Lewter, an M.S.W. and clinical practitioner in social work, who is a professor at the University of South Carolina, performed a social history assessment. See App. 3018-19. This he based on interviews with Mr. Evans (ten times for a total of approximately twenty-two hours (App. 3047), Evans’s immediate family, collateral family members and friends (all of whom testified at trial or in the PCR hearing), and review of medical, employment, police records, school records from Ohio (through the first half of seventh grade) and South Carolina (from the second half of seventh grade through community college), and media reports from crime scene. App. 3019-29; see App. 3020-21 (listing family members interviewed). Dr. Cooper-Lewter summarized his findings about Evans’s social functioning and behavior in social environments to a reasonable degree of certainty in the field of social work. App. 3015-16.

Dr. Cooper-Lewter linked many of the problems Evans experienced in South Carolina to his formative years. The “unpredictable, but not sporadic” abuse Evans suffered at the hands of his father left a formative impact. App. 3026; see App. 3043. As a child with low cognitive functioning, of which lead poisoning was a contributing cause, Evans needed additional supports. “For a period of time from about eight to fourteen he definitely did not get what he needed from a social worker perspective.” Prior to that “there was violence and unpredictable violence and consistent chaos.” While this was “mixed with some loving and caring and nurturing from his mother [and] his sister,” his father, while “a good provider,” was “emotionally [and physically] abusive.” App. 3032.

One type of support that Mr. Evans has demonstrated a need for throughout his life, Dr. Cooper-Lewter found, was the need to go to others to discuss things when he needed help. App. 3033. Mr. Evans was a leader on the field and a leader with children, but off the field and in his emotional life Evans had a very different dynamic. App. 3054. Evans, Dr. Cooper-Lewter explained, is a “concrete thinker”—a person “very child-like” in his thinking. Concrete thinkers “need very firm, consistent indicators for them to be able to not be confused.” App. 3042. Dr. Cooper-Lewter found pivotal an argument that Evans had with his father on Thanksgiving 2001. For more than eighteen months afterward—up to and including the day of the tragic shootings at the Sapinoso residence—Evans and his father did not speak to each other. App. 2967-68, 3063. It was also significant that this division coincided with other stressors in Evans’s life. Nicholas Wideman, a former college football teammate at North Greenville College, who Evans became reacquainted with when they played for the South Carolina Seminoles (App. 2583), testified that the relationship between Kamell and Christina Rodriguez was mired in “confusion” and “communication issues.”

App. 2584. A week before the crime, Wideman testified, the toll on Mr. Evans was apparent. He and Evans went to a party, but Evans “was really upset he had broken down and started crying” and threatened to shoot himself. App. 2586, 2588.

“Kamell had developed over the years [a] procedure,” Dr. Cooper-Lewter testified. “And that was to go to someone and ask them to help him when he couldn’t understand something.” From Dr. Cooper-Lewter’s perspective, Evans’s and Christina’s arguments over relationship issues affected Evans “in a very negative way.” App. 3038. Evans is a person who is not able to analyze certain factors very fast, and “who depends on people [] that he can trust to give him accurate feedback.” Involved in arguments with Rodriguez, and not on speaking terms with his father—at that time, from the key relationships in his life, Evans had none. App. 3038.

### 3. Trial Counsel’s Testimony about the Representation of Mr. Evans

During the PCR hearing, trial counsel Sumner and Goldsmith were asked why they did not pursue the investigative avenues into abuse and lead poisoning pointed out by their mitigation investigators. Sumner stated that he might have thought a trip to Evans’s childhood home of Cleveland was necessary “if I’d ha[d] any difficulty communicating with him or if I had been told, I guess, anything that I felt like was significant.” App. 2255. But Sumner had been informed by both mitigation investigators of a “mountain of research demonstrating...problems” derived from lead poisoning. Sumner also stated that because nobody on the defense team had a problem communicating with Kamell, he determined further investigation of lead poisoning wasn’t necessary. App. 2434; see App. 2433. Sumner did not pass the information he received on lead poisoning on to Goldsmith. App.

2449; see App. 2177. When Sumner was asked what he did to research lead poisoning, he responded:

Q: What did you do to familiarize yourself with the issue of lead poisoning in preparation for the trial of this case?

A: Nothing.

Q: Nothing.

A: Very minimal. If I had done anything, I don't have any recollection of it right now.

App. 2339.

As for the evidence of abuse, Sumner testified that he was aware of allegations of abuse, but found it "far removed" from the crime. Sumner possessed more than allegations, however. The file contained a divorce decree for Barry and Renee citing "extreme cruelty" as a ground with supporting evidence of violence. App. 3548. Goldsmith did not recall knowing anything of abuse and expressed his discomfort discussing the issue with Evans's father without "some indication there was a problem there." App. 2183. When shown interview notes with Barry Evans in which Topp had underlined "He will testify in court that there was physical violence between them [he and Renee]" (App. 2278; App. 3446), Goldsmith doubted that he had seen the document. App. 2220. No effort was made to interview the principal victim of the abuse, Renee, prior to trial. Sumner did not recall speaking to her during the course of the trial. Rather, based on conversations with Evans's father in which he did not acknowledge abuse (see App. 3454) counsel had already decided on the "strategy" they would employ. App. 2325. This is memorialized in a defense "Trial Strategy" memo, (App. 3454) that predates Topp's interview with Renee.

The "strategy" memorandum also lacked any mention of lead poisoning or brain damage. Asked about how lead poisoning or possible brain damage factored into counsel's strategy, Mr. Sumner responded:

A: It was not an issue. The reason it's not addressed in this memorandum because it was not a part of our trial strategy at all.

Q: In this as detailed a memorandum [as] you could put together, where did you document what would you do about brain damage?

A: The words 'brain damage,' are not in this memorandum. I was unaware of any brain damage issue.

App. 2300.

### C. *Strickland v. Washington* and the PCR Court's Ruling

The ineffective assistance of counsel standard established in *Strickland v. Washington*, 466 U.S. 688 (1984), requires a showing that an attorney's representation "fell below an objective standard of reasonableness," *id.* at 688, and "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694.<sup>8</sup> The key principles of *Strickland's* test for deficient performance include that counsel's performance must be assessed according to standards of performance that prevailed *at the time of the trial*. See *Van Hook*, 130 S.Ct. at 16-17; *Council*, 380 S.C. at 173, 670 S.E.2d at 363; see also *Gray v. Branker*, 529 F.3d 220, 229 (4<sup>th</sup> Cir. 2008) (citing *Strickland*, 466 U.S. at 690).<sup>9</sup> Also, counsel's tactical decisions are entitled to great deference—but only *if based on thorough and reasonable investigation*. As *Strickland* states, "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on

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<sup>8</sup> The principles set forth in this section apply to *all* claims that Mr. Evans's trial counsel provided ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law, *infra*.

<sup>9</sup> In this regard, professional norms such as the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 1023-26 (2003), are important guides, but nevertheless only guides. Recently, in both *Council* and *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (S.C. 2007), the South Carolina Supreme Court found ineffective assistance of counsel, and recognized and applied as guides the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” 466 U.S. 690-91. The Supreme Court recently clarified that even a decision to focus on a potentially reasonable strategy may be deficient if counsel failed to “conduct a thorough investigation of the defendant’s background.” *Sears*, 130 S.Ct. at 3295 (quoting *Williams*, 529 U.S. at 396)).

*Wiggins* and *Rompilla* emphasized that facts discovered during investigation pointing to significant mitigation cannot be forgotten or ignored in developing a mitigation theory. A failure to pursue “red flags,” in short, is inadequate, constitutionally deficient performance. Further, as *Williams* held in 2000, and *Sears* again in 2010, double-edged evidence—that which shares mitigating and aggravating potential—is a cornerstone of mitigation that defense counsel cannot ignore. This includes witnessing or experiencing physical and psychological abuse (see, e.g., *Sears*, *Porter*, *Rompilla*, *Wiggins*), as well as brain abnormality and impaired cognitive functioning, which the Court has identified as highly mitigating (see *Sears*, 130 S.Ct. at 3262-64; see also *Porter*, 130 S.Ct. at 453-54). Likewise, this Court has ruled that inadequate investigation can undermine the reliability of expert opinion and testimony. See *Council*, 380 S.C. at 172-74, 670 S.E.2d at 363; *Von Dohlen*, 360 S.C. at 608, 602 S.E.2d at 743.

In assessing prejudice under *Strickland*, the impact of all of counsel’s failures on the outcome must be considered *cumulatively* in the context of the totality of the circumstances. *Strickland*, 466 U.S. at 694-96; see *Porter*, 130 S.Ct. at 452; *Wiggins*, 539 U.S. at 534-38; *Williams*, 529 U.S. at 395-97; cf. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). And the impact of mitigating evidence that could have been investigated and presented must be

*balanced* against the aggravating evidence presented at trial and which would be brought out in conjunction with any mitigation with a double edge. See, e.g., *Belmontes*, 130 S.Ct. at 390-91; *Van Hook*, 130 S.Ct. at 20. Prejudice can exist, *even in cases where trial counsel presents a significant amount of mitigating evidence*. *Sears*, 130 S.Ct. at 3265-66; see *id.* at 3266 (citing *Porter*, 130 S.Ct. at 449; *Rompilla*, 545 U.S. at 378; *Williams*, 529 U.S. at 398). This is true where counsel completely overlooks important avenues of mitigation. But it also holds when new evidence on a subject, about which some evidence was presented at trial, adds significant and meaningful detail, as opposed to cumulative restatement.

1. The PCR Court's order

Although this Court will not reverse the order of a postconviction court when an evidentiary basis exists in the record to support the court's ruling, no such basis exists with respect to the PCR court's denial of Evans's claim of sentencing ineffectiveness for failure to investigate, develop and present mitigating evidence. The PCR court's denial of this claim is rooted in significant misstatements of fact and misinterpretations of the evidence. Furthermore, when the PCR court turned to deficient performance, it misapplied the fundamental principle that reasonable investigation must necessarily precede any reasonable tactical decisionmaking. The court's factual errors also undermined the prejudice analysis, leading the court to conflate the new facts with the old facts, when in actuality the evidence presented in postconviction is significantly different. Finally, the court's application was flawed because it did not consider prejudice cumulatively as United States Supreme Court precedent demands.

- a. Mistaken factual findings and misinterpretations of the record in the PCR Order.

The factual errors that contributed to the court's mistaken application of the rulings of the U.S. Supreme Court and this Court on ineffectiveness in capital sentencing proceedings fall in three areas: (a) erroneous fact finding about whether and to what extent defense counsel and defense experts knew of lead poisoning and factored it in their decision-making or diagnosis; (b) erroneous fact finding about, and misunderstanding of, the scientific evidence presented at the PCR hearing on brain damage and lead poisoning; and (c) erroneous fact finding about defense team agreement on tactical decisions.

(a) The testimony and evidence presented at postconviction showed, without contest, that the defense team had no more than a rumor that Evans suffered toxic lead exposure as a child. They received medical documentation of the existence and extent of the poisoning only *after* the conviction and *after* the death sentence. Dr. James Evans mentioned that Mr. Evans may have been exposed to lead, but his assertion was entirely discredited when the Solicitor asked him for proof and Dr. Evans conceded that he had none. The PCR court, however, found that it was enough that the defense team was *aware of* a report of lead exposure and that "while a medical record of exposure could have been obtained, the doctor noted its report and, importantly, factored the report in his analysis." App. 4470. It would have been important, indeed, if Dr. Evans had factored the report into his analysis. But Dr. Evans had never seen a report and he therefore could *not* factor it into his analysis. What the defense team had was a rumor. Further, Dr. Evans's testimony likely had exactly the opposite effect before the jury as what the PCR court suggests: (i) he lost credibility as he was exposed making an assertion about lead poisoning which he could not support and (ii) the assertion therefore appeared false. Yet, the extent of the lead poisoning in this case, as discussed above, was severe.

(b) The PCR court misconstrues the scientific testimony about brain damage. At the PCR hearing, Dr. Gur testified to the results of a quantitative volume analysis, using a peer-reviewed and accepted method of an MRI of Mr. Evans's brain. Dr. Gur's results showed diffuse brain atrophy, including atrophy more than two standard deviations from the mean in seven regions linked by previous studies to lead exposure, and "significant reduction" in volume in the frontal lobe and occipital lobe. App. 2675-2677. The other experts who testified regarding the MRI—Dr. Spicer, called by the State, and Dr. Bachman, testifying for the defense—concurred with Dr. Gur that volumetric quantitative analysis is a more sensitive approach that serves as a "tie breaker" between differing subjective "eyeball" accounts of an MRI because it can definitively identify brain volume loss. App. 3238-39, 3143, 3160. Dr. Gur's findings, therefore, resolved any dispute generated by differing interpretations gleaned from the less sensitive readings of the MRI by Dr. Bachman, Dr. Spicer, and MUSC radiologists. See App. 3963 n.17. The volumetric analysis, in other words, unequivocally "rule[d] in" brain damage. See App. 3958-63.

The PCR court, however, discounts the significance of Dr. Gur's testimony, and arrives at this decision only by way of misinterpretations of the evidence. There is no basis in the record for the court's fact determinations concerning the: (i) *existence*, (ii) *validity*, (iii) *sensitivity*, and (iv) *extent* of the evidence of brain damage.

- *Mistaken fact finding as to the existence of evidence of brain damage.* "As to evidence of brain damage," the PCR court concludes, "there was not evidence of brain damage that defense counsel ignored." App. 4470. The PCR court bases this finding on the trial testimony of psychologist Dr. Berg that MRI would not help in this case because she saw no evidence of brain dysfunction and on the "eyeball" interpretations of MUSC radiologists of the MRI as normal. See App. 4463, 4470. The PCR also misconstrues Dr. Gur's testimony, interpreting it to say, "MRI is not definitive in all cases even as to damage." App. 4462. Gur stated, however, that a volumetric analysis of an MRI "could miss certain types of damage, but if it sees []

damage, you know you have ruled it in.” App. 2652. As noted above, Drs. Gur, Spicer, and Bachman all agree that volumetric analysis is dispositive of the absence or presence of brain damage. The testimony of Dr. Berg at trial and the less sensitive readings of the MRI by MUSC radiologists do not change that. There is no basis in the record for the PCR court’s finding.

- *Mistaken fact finding as to the validity of volumetric analysis for establishing brain damage.* Citing the testimony of Dr. Spicer, the PCR court finds that “Dr. Gur’s volume analysis is controversial in the medical community as far as diagnosing brain damage” and the “volume analysis has not been accepted as a basis for diagnosing a patient.” App. 4473-4474. However, volumetric analysis was not applied in this case to diagnose and predict the progress of disease over time. Rather, it was applied to make associations and to show *actual* volume loss. Neither Dr. Spicer nor any other witness contested the validity of Dr. Gur’s method for showing actual volume loss and brain damage. Indeed, Dr. Gur’s tests on this subject have been published in multiple peer-reviewed journals.<sup>10</sup>
- *Mistaken fact finding about the sensitivity of volumetric analysis for establishing brain damage.* From the foregoing, the PCR extrapolates that “according to the evidence submitted at the PCR hearing, only by relying on a volume analysis that is not an accepted diagnostic tool, and a healthy dose of subjectivity, can one divine any type of diffused volume loss. In other words, the loss must be so minor that subjectivity can be a factor.” App. 4473. Again, this misconstrues the evidence. Drs. Spicer, Bachman, and Gur all agree that volumetric analysis is a “tie-breaker” because it *does not rely on subjective assessment*.
- *Mistaken fact finding about the extent of brain damage.* Contrary to the PCR court’s finding, the volume loss demonstrated by the analysis here is not “minor” at all. Rather, it exists in regions of the brain that control executive function and decision-making. In certain of those regions the atrophy is extreme, more than two standard deviations below the mean, showing substantial brain damage.<sup>11</sup>

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<sup>10</sup> Further, it is significant to note that the PCR court, to the extent it relied on Dr. Spicer, relied on a witness who did not know that Dr. Gur had performed volumetric testing in this case, and was entirely unfamiliar with that testing. App. 3230-3233.

<sup>11</sup> The PCR court also makes a *mistaken factual finding about neurologist Dr. Bachman’s review of the MRI*. The PCR court suggests that ordinarily, had this not been a legal case, Dr. Bachman would have been satisfied with the radiologists reading of the slides and gone no further. See App. 4460. This contradicts Dr. Bachman’s testimony, which stated that in a circumstance such as this where he was the treating physician he would *not* refer to the results of a neuroradiologist but rather interpret the MRI himself, given his greater knowledge of the patient. Here, after doing so, he determined to send the MRI slides to Dr. Gur for follow up. Contrary to the PCR court’s statement, Dr. Bachman did not treat the opinions of radiologists any differently in this “legal” case than he would have in any circumstance in which he was the treating physician.

(c) Finally, the testimony and evidence presented at the post-conviction hearing demonstrated that defense counsel ignored advice from its mitigation specialists to: (i) seek a continuance, (ii) go to Cleveland to investigate Mr. Evans's childhood, (iii) investigate and present evidence of Evans experiencing and witnessing abuse as a child, and (iv) investigate and present evidence of lead poisoning and its effects. The PCR court's statement that "[t]he decision to embrace [the] strategy was made with the investigation and advice of a team of experts," (App. 4476), is grossly misleading. There is no basis in the record for this finding. Rather, on multiple key avenues, the team of experts advised counsel to take routes that counsel rejected.

b. Misapplication of the deficient performance prong.

A fundamental principle, from *Strickland v. Washington*, through *Sears v. Upton*, to the present, is that strategic or tactical decisions by counsel are only reasonable and valid to the extent that they are supported by reasonable investigation. *Strickland*, 466 U.S. at 690-91; *Sears*, 130 S.Ct. at 3295; see App. 3969-71. Trial counsel's decisions about the content of the mitigation presentation in this case were not based on complete or adequate investigation. See App. 3932-48, 3971-80. Those decisions, although dubbed "strategy" by defense counsel in a pretrial memorandum, are therefore suspect, not reasonable, and not entitled to deference under *Strickland*. The PCR court finds otherwise only by misapplying *Strickland*.

First, the PCR court held that counsel's decision not to investigate or present evidence that Evans witnessed and experienced physical and verbal abuse was reasonable because it "would be at odds with counsel's focus on the good qualities, good character, loving family." App. 4467. Second, the court held counsel's failure to investigate and

present evidence of lead poisoning and brain damage was reasonable because that evidence “did not figure into the ‘one bad day, one bad decision’ theme.” App. 4473. Evans “could have offered this testimony,” the court finds, “but the defense team was focused on the results and his life in South Carolina.” App. 4474. “Consider[ing] all the evidence together,” the PCR court held, “the evidence [offered at PCR] would [have] confuse[d] and dilute[d] the clear theory that this event was a critical break from his normal behavior.” App. 4475. Each of these conclusions overlooks the fundamental principle of *Strickland*: reasonable trial theories *must be founded on reasonable investigation*.

Counsel could not have presented evidence of lead poisoning because they did not adequately investigate the evidence (in fact, they only received the evidence of lead poisoning two weeks *after* the trial). Counsel could not decide not to present evidence of brain damage because they had not pursued Dr. Evans’s advice to conduct further neurological examination on Kamell. Counsel could not reasonably decide to avoid evidence of abuse in the mitigation presentation because they did not know the scope and substance of the abuse.<sup>12</sup> At the postconviction hearing, counsel gave no valid reason for not investigating these “red flags.” Sumner stated that Evans seemed able to communicate with him and he therefore saw no reason to go to Cleveland. He offered the same explanation to defend his failure to aggressively seek evidence of lead poisoning: he would only seek out a complete set of health records if he had first “received an[] indication . . . that there were any issue in that area of mental or physical health.” App. 2239. When asked

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<sup>12</sup> The PCR court overreads *People v. Peebles*, 793 N.E.2d 641 (Ill. 2002), a case in which counsel’s tactical choices were *preceded by and based upon reasonable investigation*. In contrast to Evans, *Peebles*’s attorney did not ignore the defendant’s childhood and upbringing, he went to defendant’s home and investigated; rather than dismiss the defendant’s mother, *Peebles*’s counsel called her to testify about the abuse she experienced at the hands of the defendant’s father. See 793 N.E.2d at 652. See App. 3930-89.

what counsel did to familiarize themselves with lead poisoning in this case, Sumner answered straightforwardly: “Nothing.” Lead poisoning, he stated, was “not a part of our trial strategy at all.” App. 2339.

In *Gray v. Branker*, 529 F.3d 220 (4<sup>th</sup> Cir. 2008), counsel presenting evidence that a client was a good person with some evidence of extreme emotional disturbance was found ineffective because counsel failed to investigate apparent mental health issues, thereby making it “impossible for [counsel] to adopt a reasonably informed [mitigation] strategy.” *Id.* at 234. In *Council*, this Court found capital trial counsel performed deficiently by failing to obtain full background records on the client and his family, by failing to pursue red flags indicating avenues for mitigating evidence, and by failing to properly prepare witnesses. 380 S.C. at 172-78, 670 S.E.2d at 363-66; see also *Von Dohlen*. More recently, in *Sears*, the U.S. Supreme Court reversed a lower court for placing “undue reliance” on a mitigation theory that was not supported by reasonable investigation. 130 S.Ct. at 3265. And in *Porter*, the Supreme Court found deficient performance by *de novo* review where counsel “ignored pertinent avenues for investigation of which he should have been aware,” including issues of mental health, schooling, and abuse in the childhood home. 130 S.Ct. at 453-54. These cases hold that it is of no matter whether counsel’s strategy was “potentially reasonable” because it was not “‘justified by a tactical decision’ when ‘counsel did not fulfill their obligation to conduct a thorough investigation of the defendant’s background.’” *Sears*, 130 S.Ct. at 3295 (quoting *Williams*, 529 U.S. at 396). Mr. Evans’s counsel also failed to act while potentially powerful mitigating evidence stared them in the face. *Wiggins*, 539 U.S. at 534.

It is also significant that trial counsel presented incomplete and conflicting expert testimony. In *Von Dohlen*, the “absence of crucial medical records and related information which existed at the time [of] trial prevented [the expert] from conveying an accurate diagnosis and explanation of [p]etitioner's mental condition to the sentencing jury.” 360 S.C. at 608, 602 S.E.2d at 743. As in *Council*, defense counsel here undercut the testimony of its own experts by not providing them with information necessary for a thorough and reliable assessment. 380 S.C. at 172-74, 670 S.E.2d at 363. Dr. Evans could not say that Kamell had brain damage without an MRI, and he attributed a cause to lead poisoning while admitting he had no medical proof. See App. 1702. Moreover, the testimony of the defense’s medical experts conflicted: while Dr. Evans testified to neuropsychological symptoms, Dr. Berg testified that she saw none. Dr. Berg’s testimony undercut any persuasive power that Dr. Evans’s testimony may have had.

Finally, counsel performed deficiently in presenting a false picture of Mr. Evans to the jury. Counsel failed to adequately investigate Mr. Evans’s life in South Carolina. They failed to hire a social worker to explain how Evans’s life experience in Cleveland was formative background for the difficulties he experienced in South Carolina and to link it to the events leading up to the crime. As the United States Supreme Court noted in *Porter*, evidence of childhood abuse “may have particular salience for a jury” in cases that stem from a domestic dispute, such as the dispute between Mr. Evans as Christina Rodriguez in this case. 130 S.Ct. at 455. Here, trial counsel failed to reasonably investigate the applicant’s background of childhood abuse and mental impairment, resulting in a deficient presentation of mitigating evidence. See *Council*, 380 S.C. at 174-75, 670 S.E.2d at 364.

c. Misapplication of *Strickland*’s prejudice prong.

In the Supreme Court’s application of the *Strickland* doctrine to capital sentencing in *Sears v. Upton*, 130 S. Ct. 3259 (2010), the Court emphasized the importance of postconviction evidence of brain damage—specifically abnormalities of the frontal lobe. “Regardless of the cause of his brain damage,” the Court stated, Sears’s substantial cognitive deficits existed, “making him among the most impaired individuals in the population in terms of ability to suppress competing impulses and conform behavior only to relevant stimuli”; and “grossly impair[ing]” his “ability to organize his choices, assign them relative weight and select among them in a deliberate way.” *Id.* at 3262-63.

Here, the PCR court did not mention *Sears*, but relied on three reasons to dismiss the evidence presented by Dr. Gur showing that critical portions of Evans’s frontal lobe fall more than two standard deviations from the mean—that is, within the bottom two percent of the population. First, the court stated, “Gur’s volume analysis is controversial ... as far as diagnosing brain damage.” As discussed above, Gur’s findings were not controversial for *showing* brain damage; rather, they conclusively prove it. Second, the PCR court relied on the fact that the MRI was read as “normal” by MUSC radiologists. Also discussed above, the court misinterpreted the testimony of the experts, who agreed that quantitative analysis of MRI is dispositive. Third, the PCR court found the new evidence not substantially different from the old evidence. App. 4474 (citing *Jones v. State*, 332 S.C. at 339, 504 S.E.2d at 827). Yet there are significant differences between Mr. Evans’s case and *Jones*. In *Jones*, the post-conviction evidence merely restated the medical evidence presented at trial with no greater certainty; here, the post-conviction evidence was qualitatively different—confirming brain damage (not merely dysfunction), as well as its location, its severity, and its cause. Further, in *Jones*, a single expert testified to the presence of neuropsychological

factors indicating brain dysfunction; here, the trial evidence was conflicted and uncertain. For similar reasons, this case is distinguishable from *Simpson v. Moore*, in which this Court reversed a PCR court finding of sentencing ineffectiveness. There, “[t]he jury was aware of Simpson's troubled childhood, traumatic life experiences, and mental condition . . . [and] [a]ny additional investigation would have merely resulted in a ‘fancier’ mitigation case.” 367 S.C. 587, 607, 627 S.E.2d 701, 712 (2006). The post-conviction evidence in Mr. Evans’s case was qualitatively different: it resolutely shows brain damage, its location, and lead poisoning as a cause.

The PCR court’s reasons for dismissing the strength of the lead poisoning evidence are equally flawed. App. 4457. The court says the “defense team could have offered this testimony, but the defense team was focused on the results of his life in South Carolina” (App. 4474), and “Evans has not presented information that was not known in some fashion” (App. 4467). As discussed before, counsel didn’t have the records, so they couldn’t have offered anything. Dr. Evans’s unsupported allusion to lead poisoning was disastrous for his credibility. The evidence of lead poisoning presented in postconviction is substantially different and plainly more concrete than what counsel possessed and their witness alluded to at trial.

As to the evidence of abuse, the PCR court held that it would have “detract[ed] rather than enhance[d] the defense...attacking the father would only lead to unraveling the carefully crafted defense them of making his testimony in support of his son less credible.” App. 4475. This argument of inconsistency with the chosen strategy is unavailing because the strategy itself was not based on a thorough investigation and therefore was not reasonable. Further, the impact of evidence must be considered in light of the totality of the

circumstances, not straightjacketed into the mitigation themes chosen by inadequately prepared trial counsel. In *Porter*, the post-conviction evidence presented a portrait of Porter's early life that is not dissimilar from Evans:

Porter routinely witnessed his father beat his mother, one time so severely that she had to go to the hospital and lost a child. Porter's father was violent every weekend, and by his siblings' account, Porter was his father's favorite target, particularly when Porter tried to protect his mother. On one occasion Porter's father shot at him for coming home late, but missed and just beat Porter instead. According to his brother, Porter attended classes for slow learners and left school when he was 12 or 13.

*Id.* at 449. The Supreme Court held it "unreasonable to discount the relevance of the evidence of Porter's abusive childhood, especially when that kind of history may have particular salience for a jury evaluating Porter's behavior in his relationship with [the victim]." *Id.* at 455. While Evans has none of Porter's military history behind him, his experience with abuse and the manner in which the jury could have factored it in to deliberating the tragic crimes is much the same.

Significantly, the Court must consider in assessing prejudice the strength of the State's case in aggravation. *Van Hook*, 130 S.Ct. at 20; *Belmontes*, 130 S.Ct. at 390-91; see *Council*, 380 S.C. at 176, 670 S.E.2d at 365 (finding prejudice, despite six statutory aggravating circumstances). In doing so, trial counsel's failure to challenge the State's case is relevant. The impact of counsel's failures are even greater when the prejudice is considered—as it must be—with that stemming from counsel's failure to meaningfully challenge the State's case for a death sentence.

Finally, *Porter* and *Sears* emphasize another principle that is very important in Mr. Evans's case. Although counsel presented some mitigating evidence in each of those cases, the failure to present other evidence was prejudicial nevertheless. Prejudice applies in

circumstances in which counsel has presented some information on an aspect of mitigation, but has done so incompletely or incoherently, such that the picture portrayed to the jury is skewed or significantly diminished. That is the case here. Kamell's history of witnessing abuse and violence, his valued but also tortured relationship with his father, the fragility and uncertainty of his relationship with Christina Rodriguez, and his brain damage and lead poisoning may have led at least one juror to understand him, particularly when presented through the lens of a social worker qualified to evaluate his background, see *Council*, 380 S.C. at 173-74, 670 S.E.2d at 363, and especially in light of the positive attributes that trial counsel did present. Had the jury been able to place [this evidence] on the mitigating side of the scale, "there is a reasonable probability that at least one juror would have struck a different balance." *Von Dohlen*, 360 S.C. at 607, 602 S.E.2d at 743; see *Gray v. Branker*, 529 F.3d at 238 (quoting *Wiggins*, 539 U.S. at 537).

2.

**DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE AGGRAVATING FACTOR THAT THIS CASE INVOLVED THE MURDER OF A LAW ENFORCEMENT OFFICER "DURING OR BECAUSE OF THE PERFORMANCE OF HIS OFFICIAL DUTIES" UNDER S.C. CODE ANN. § 16-3-20(C)(a)(7).**

In Point III of the PCR Brief and paragraphs 9(b), 10(b)(2), and 9(d), 10(d)(1) of the amended application for postconviction relief (App. 1903-10; see App. 2916-25), incorporated by reference in this pleading, Mr. Evans alleged that trial counsel were ineffective for failing to object to the application of the statutory aggravating factor S.C. Code § 16-3-20(C)(a)(7), which charged that Evans would be death-eligible for killing a law enforcement officer "during or because of the performance of his official duties." Because the shooting of law enforcement officer Antonio J. ("Joseph") Sapinoso in this case did not

occur “during or because of the performance of his official duties,” and because there was no nexus between the offense of conviction and the legislative purpose expressed in the law enforcement aggravator, it was both error and prejudicial to charge that aggravator. Moreover, the charge permitted the solicitor to falsely characterize the case as a premeditated cop killing, when no evidence supported that position.

The previous applications of this statute, and the incidences to date in which prosecutors have sought a death sentence under this aggravating circumstance, show that the statute is meant to apply to a narrow set of circumstances that are markedly distinct from the facts, however troubling, presented here. The statute’s plain language, narrowly construed as the United States Constitution demands, makes manifest that the (C)(a)(7) aggravating factor does not apply to the death of Joseph Sapinosa in this domestic tragedy, just as it does not apply to the death of his father in the same tragic event. Counsel’s failure to object to the aggravating factor, evidence, argument and charge was deficient. And while three other aggravating factors were established—and thus the invalidity of one aggravator would not alone illegitimate a death sentence<sup>13</sup>—the fact that trial counsel allowed this factor to stand, under the totality of circumstances, undermined the reliability of the sentencing trial in multiple ways: in terms of the related victim impact evidence it sponsored; as a result of the symbolic weight it played in the courthouse where the victim had served as security; and by the boost it gave to the Solicitor’s inflammatory closing rhetoric. The PCR court’s ruling contradicts South Carolina and federal law. This Court should grant certiorari.

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<sup>13</sup> The Notice of Intent to Seek the Death Penalty alleged and the trial court charged four aggravating factors: (1) committed while in the commission of the crime or act of kidnapping; (2) committed while in the commission of the crime or act of burglary in the first degree; (3) two or more persons were murdered by the defendant pursuant to one act or one scheme or course of conduct; and (4) murder of a law enforcement officer during or because of the performance of his official duties. S.C. Code Ann. §§ 16-3-20(C)(a)(1)(b), (c); 16-3-20(C)(a)(7), (9). The fourth aggravator applied only to Joseph Sapinosa.

**A. Federal Constitutional Principles Require a Narrow Interpretation of All Statutory Aggravating Factors, Including Those Involving Law Enforcement.**

Under federal constitutional law, a fundamental principle of modern death penalty jurisprudence is that “[sentencing] juries be carefully and adequately guided in their deliberations.” *Gregg v. Georgia*, 428 U.S. 153, 193 (1976). “Where 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.” *Id.* at 189. Accordingly, the Constitution requires that States provide narrowing criteria for which murders qualify as death-eligible offenses. Such narrowing criteria—“aggravating circumstances” or “aggravating factors”—denote a fact or circumstance that tends to support the imposition of the death penalty, based on the nature of the crime and the conduct of the defendant.

Facially and as applied, statutory aggravating circumstances must guide the sentencer to make a “principled distinction between those who deserve the death penalty and those who do not.” *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990); see *Clemons v. Mississippi*, 494 U.S. 738, 758 (1990); *Maynard v. Cartwright*, 486 U.S. 356 (1988). Of course, States may choose the parameters of their aggravating factors and the statutory language. But once a state legislature identifies the parameters by setting the statutory language, a cardinal principle of Eighth Amendment jurisprudence—established in cases such as *Gregg, supra*, *Godfrey v. Georgia*, 446 U.S. 420 (1980), and more recently *Kennedy v. Louisiana*, 554 U.S. 407 (2008)—calls for States to give narrow and precise definition to the aggravating factors that can result in a capital sentence. See *Kennedy*, 554 U.S. at 549-51 (citing *Godfrey*, 446

U.S. at 428). On multiple occasions, the United States Supreme Court has required a gloss on the statutory language after the fact to ensure that a capital statute is narrowly tailored.

When it comes to aggravating factors that pertain to the killing of a peace officer, the Eighth Amendment narrowing requirements and the Equal Protection Clause demand that statutes not render the murder of an individual employed as a peace officer death-eligible based on that employment status alone. States must require something more. All state statutes with such aggravating factors, therefore, fall into two general categories: (1) those requiring a showing that the murder occurred *while the victim was performing official duties*, and (2) those requiring a showing that the murder occurred while the victim was performing official duties *and knowledge* by the defendant that victim was police officer engaged in official duties (see, e.g., Arizona statute, A.R.S. § 13-751(F)(10)). South Carolina falls in the former category. Section § 16-3-20(C)(a)(7), as amended in 1976 and at the time of Mr. Evans's trial, defines the murder of a law enforcement officer as death-eligible only when it occurs "*during or because of the performance of his official duties.*" S.C. Code Ann. § 16-3-20(C)(a)(7) (amend. 1976) (emphasis added).<sup>14</sup>

While no legislative history is available on the South Carolina statute, we can look for reference to this Court's application and interpretation of the statute in previous cases. In addition, this Court can look for persuasive authority to what other States have deemed a proper interpretation of similarly restrictive aggravating factors. Since 1976, many South Carolina capital cases have applied the (C)(a)(7) aggravating factor to crimes involving the

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<sup>14</sup> This section was part of South Carolina's original capital murder statute (see S.C. Code of Laws § 16-52 (1962)). In South Carolina's original capital sentencing statute, circumstance (3) read: "Murder of a law-enforcement officer or correctional officer while acting in the line of duty." S.C. Code Ann. § 16-52(3) (1962). With the 1976 amendment, the language "in the line of duty" was changed to "during or because of the performance of his official duties." S.C. Code Ann. § 16-3-20(C)(a)(7) (1976 as amended). The apparent legislative intent was to tighten the nexus between law enforcement work and the murder.

death of a peace officer. In these cases, each of which this Court has reviewed, the circumstances of the officer's death fell squarely within the plain meaning of the statutory language: the officer was killed while making an arrest, making a traffic arrest, while on patrol.<sup>15</sup>

Interpretations of similar statutes by other state courts are in accord. As the Nebraska Supreme Court has pointed out<sup>16</sup>:

[K]illing a law enforcement officer while the officer is lawfully performing an official duty is a fairly common subject for an aggravating circumstance in conjunction with imposition of the death penalty. An aggravating circumstance of such nature has an obvious purpose: 'There is a special interest in affording protection to [those] public servants who regularly must risk their lives in order to guard the safety of other persons and property.' *Roberts v. Louisiana*, 431 U.S. 633, 636 (1977). In other words, as a result of a law enforcement officer's service to the public, many states have determined that murder of a law enforcement officer during the officer's performance of an official duty is an aggravating circumstance in determining whether the death penalty should be imposed.

*State v. Reynolds*, 457 N.W.2d 405, 428 (Neb. 2004) (disapproved on other grounds by *State v. Messersmith*, 473 N.W.2d 83 (Neb. 1991)).<sup>17</sup> Were the aggravating factor read broadly to apply merely by function of the officer's status, the Nebraska court explained,

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<sup>15</sup> See, e.g., *State v. South*, 357 S.C. 646, 594 S.E.2d 462 (2004) (officer shot on duty in patrol car); *State v. Cottrell*, 376 S.C. 260, 657 S.E.2d 451 (2008) (on-duty officer killed while confronting defendant); *State v. Bryant*, 372 S.C. 395, 642 S.E.2d 582 (2007) (officer killed while making arrest); *State v. Wood*, 362 S.C. 135, 607 S.E.2d 57 (2004) (officer killed during traffic arrest); *Sheppard v. State*, 357 S.C. 646, 594 S.E.2d 462 (2004) (same); *Hudgins v. Moore*, 337 S.C. 333, 524 S.E.2d 105 (1999) (same); *Hughes v. State*, 367 S.C. 389, 626 S.E.2d 805 (2006) (same); *State v. Hill*, 331 S.C. 94, 501 S.E.2d 122 (1998) (same); *State v. Ivey*, 325 S.C. 137, 481 S.E.2d 125 (1997) (officer killed during questioning at mall); *State v. Forney*, 321 S.C. 353, 468 S.E.2d 641 (1996) (officer killed during traffic arrest); *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981) (on duty officer confronting defendant); *State v. Allen*, 266 S.C. 175, 222 S.E.2d 287 (1976) (shooting of two game wardens after stop). In each of these cases, charging Section (C)(a)(7) was consistent with the purpose of the statute: to protect law enforcement performing their job.

<sup>16</sup> The court was interpreting Neb.Rev.Stat. § 29-2523(1)(g) (2002), which provides: "The victim was a public servant having lawful custody of the offender or another in the lawful performance of his or her official duties and the offender knew or should have known that the victim was a public servant performing his or her official duties."

[T]his may raise serious constitutional issues regarding vagueness...or equal protection . . . inherent in the dichotomy of two homicide victims when one victim is a law enforcement officer who is not performing an official duty at the time of death, while the other victim is not a law enforcement officer. There is no legal distinction between the homicide victims reflected in the dichotomy. Yet, in the first part of the dichotomy, one is exposed to the death penalty . . . while in the second part of the dichotomy one is not exposed.

*Id.* at 426-27 (Neb. 2004).

The domestic shootings in this case—in which both Officer Joseph Sapinosa and his father, Antonio Sapinosa, died in circumstances stemming from a break-up between Christina Rodriguez (Officer Sapinosa’s sister) and Mr. Evans—raise this very concern. These are circumstances unlike any in which this Court has previously addressed whether Section (C)(a)(7) applies. Indeed, the issue that faced defense counsel here was whether (C)(a)(7) applies when a law enforcement officer is killed during a domestic incident in his home—a question that neither this Court nor any South Carolina court has ever considered.

Mr. Evans argues in postconviction, therefore, that the applicability of the (C)(a)(7) aggravating factor to this factual scenario was an open question that defense counsel should have challenged upon receiving the State’s Notice of Intent to Seek the Death Penalty and again at trial. In light of the novelty of these circumstances under South Carolina law, and given the aforementioned federal constitutional requirements, counsel’s testimony at the

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<sup>17</sup> In *Roberts v. Louisiana*, 431 U.S. 633 (1977), then-Justice Rehnquist explained the policy behind Louisiana’s law-enforcement aggravating factor, which prescribed death “[w]hen the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties.” 431 U.S. 633, 633 (1977) (discussing La. Rev.Stat. Ann. § 14:30(2)). “[T]here is a special interest in affording protection to [police officers],” Rehnquist explained. *Id.* at 636-37 n.3. “Policemen on the beat are exposed, in the service to society, to all the risks which the constant effort to prevent crime and apprehend criminals entails. Because these people are literally foot soldiers of society’s defense of ordered liberty, the State has an especial interest in their protection.” *Id.* at 646-47 (Rehnquist, J., dissenting). Expressed in these statements is the rationale that when police officers risk their lives to protect society, society should extend additional protections to these officers, and that enhancing a defendant’s sentencing exposure for murdering an officer defending society’s liberties provides this protection by creating a deterrent.

postconviction hearing that they had no “case law” for making an argument in opposition to the aggravator (App. 2210) is sorely mistaken. The aggravating factor, left standing, injected an arbitrary factor into the sentencing proceeding and allowed the admission of evidence that would otherwise have been inadmissible.

**B. The Testimony Offered to Support the Aggravating Factor, and Counsel’s Unavailing Explanation for Their Failure to Challenge the Aggravating Factor Either Prior to or During Trial.**

The proof offered by the State to support the (C)(a)(7) aggravating factor at sentencing here was the testimony of Sheriff Stephen Loftis (App. 1519), who stated that Joseph Sapinoso was “on duty,” pursuant to a Greenville County Sheriff’s Office policy that whenever a deputy operates a sheriff’s office vehicle that deputy is considered to be on-duty and available to respond to calls for service (App. 1529-1530).<sup>18</sup> Although Loftis asserted that “according to policy” whenever a Greenville County deputy sheriff operates an official sheriff’s office vehicle that officer is considered to be subject to on-duty call (App. 1530), the State never introduced this policy into evidence and neither the State nor defense counsel asked Loftis to expand on his one-sentence answer (see App. 1529-30). Sheriff Loftis also testified that he believed the victim’s family received federal benefits under the Public Safety Officer’s Benefits Act (PSOBA), designated for family members of police officers killed in the line of duty. App. 1531. While the PSOBA provides a monetary benefit to the survivors of public safety officers whose death occurs from injuries sustained in the line of duty, 42 U.S.C. § 3796(a), the PSOBA’s definition of “in the line of duty” is far more expansive than the definition contemplated by Section 16-3-20(C)(a)(7). And, of course, the definitions applied by benefits administrators to the phrase “in the line of duty,” are not

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<sup>18</sup> The vehicle that the victim was driving was a plain, unmarked Jeep with no indicia of law enforcement, no visible blue lights, and no law enforcement communication radio. App. 3556-58.

subject to the narrow reading that the Eighth Amendment requires of statutory aggravating factors. See App. 4000-01 (Evans’s PCR brief, discussing 42 U.S.C. § 3796(a) and 28 C.F.R. § 32.3)). Further, the burden of proof a plaintiff must satisfy to establish a valid PSOBA civil claim (“more likely than not”) is substantially lower than the beyond a reasonable doubt burden the State must satisfy to establish an aggravating circumstance in a capital case. See App. 4000-01. Defense counsel did not object to or seek to clarify the Sheriff’s testimony.

Both of these bases for application of the (C)(a)(7) factor—the sheriff’s *policy* and the filing for *benefits* under the lesser evidentiary standards of the PSOBA—were also new territory for the (C)(a)(7) aggravating factor. This Court has never addressed whether the scope of the statutory aggravating factor is tethered to Greenville County’s local law-enforcement policies and whether those policies would satisfy the requirements of the United States Constitution. Defense counsel, in effect, accepted the Sheriff’s allusion to county policy to justify the application of a capital aggravating circumstance for which the Constitution requires proof of beyond a reasonable doubt.

At the postconviction hearing, defense counsel were asked what they did to investigate and challenge the charging of Section (C)(a)(7). Goldsmith stated, “I would think the standard legal research. . . . and we found nothing.” App. 2210; accord App. 2224. Sumner explained that his research on the matter was “verbal,” by which he meant that he talked to his fact investigator and “four or five” deputies with the sheriff’s office. “[T]hat would be [the] extent of my research,” he said, “just asking people.” App. 2340. Goldsmith added that his understanding, which Sumner shared, was that a “Sheriff’s deputy is on duty 24/7.” App. 2210. Counsel also noted that Evans’s confession stated that he first

encountered Joseph Sapinosa as he was getting out of the car in the driveway of his home. App. 2225; see App. 2210 (“We felt like based on that that Mr. Sapinosa was still in uniform, was on his way home, had not reached his home, had been on duty.”); App. 2212-13. Mr. Evans’ statement was: “I drove over to her parents’ house and parked my truck up the street and walked to the house. Her brother, Joe, was getting out of his car in the driveway.” App. 1229.

**C. The PCR Court’s Ruling, on Deficient Performance with Regard to Counsel’s Failure to Challenge the (C)(a)(7) Factor, Unreasonably Applies the Law.**

A postconviction court will only be reversed where the decision is lacking in factual support or the application of law amounts to an abuse of discretion. *See Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007) (“In a post-conviction relief (PCR) proceeding, the burden is on the applicant to prove the allegations in his application. A reviewing court will uphold factual findings of the PCR court if there is any evidence of probative value to support them. The reviewing court will reverse the PCR court’s decision when it is controlled by an error of law.”). The PCR court’s ruling on the deficient performance prong of *Strickland* quite plainly meets this standard for reversal. To properly assess counsel’s failure to challenge the aggravating factor under *Strickland*, a court must consider the basis for objecting to the aggravating factor in light of the facts of the case and the constitutional law governing aggravating factors. One searches the PCR order in vain, however, for any mention of the federal Eighth and Fourteenth Amendment constitutional law that undergirds the proper application of aggravating factors. Rather, the PCR court adopts the sheriff’s “on-duty” policy and seeking of benefits as defining the statute’s scope: “There was evidence, both by

policy and benefits, that supported the deputy was still on duty at the time of the abduction. Thus, the aggravating factor was properly before the jury.” App. 4425.

The validity of the PCR court’s ruling on deficient performance dissolves as a result of its failure to apply the federal law that underlies the proper scope of statutory aggravating factors. But even if the PCR court had applied the correct underlying law, the court’s expansive reading of the “during or because of the performance of official duties” aggravating factor would be extremely problematic. As an initial matter, let it be clear that neither the State nor the PCR court advance the argument that Joseph Sapinoso was killed “*because of*” the exercise of his official duties. Rather, the shootings were the result of a tragic domestic incident that went terribly wrong. The state has never argued in postconviction proceedings and absolutely no evidence has been presented that Mr. Sapinoso was shot “because of official duties.” Compare *State v. Yager*, 85 P.3d 656, 665-66 (Idaho 2004) (interpreting I.C. § 18-4003(b)). The Solicitor’s argument to the contrary—that the shootings were motivated as an attempt to rise up the ranks of a gang by killing a police officer—is entirely unsupported by the evidence presented at trial (and at PCR).

Second, the argument that Joseph Sapinoso was killed *during the* exercise of official duties because he was operating *or* in possession of a state-issued vehicle when he first encountered Evans, has all the marks of an attempt to stretch the statute beyond what its language and purpose will bear. Drawing from the Sheriff’s testimony at trial, the PCR court holds that Joseph Sapinoso was shot during the exercise of official duties because he was exiting the state issued vehicle when the incident began and that this status continued throughout the four-hour standoff in the Sapinoso home because kidnapping constitutes an ongoing offense. The factual discrepancies regarding exactly where Joseph Sapinoso was in

relation to the vehicle when Evans encountered him, however, highlight the arbitrariness of this argument: it would have death-eligibility depend upon circumstances such as (a) whether an officer had parked in his driveway, shut the car door, and taken a step away from the car, or (b) whether the officer had parked and not finished shutting the car door. Allowing the applicability of Section (C)(a)(7) to turn on an officer's relationship to his car in his own driveway is clearly far astray from the statute's purpose—which is to protect the safety of law enforcement performing their duties, under which circumstances it does not matter whether the officer is in or out of his car; indeed, under such circumstances it doesn't matter whether the officer is in uniform or not. Moreover, if all that is required to satisfy the statute is that an officer be in possession of a state-issued vehicle at the time of his death, the officer could have died in his sleep during an arson and that would fall under the statute. This too, clearly, strays from the legislative intent, as it places the scope of the aggravating factor so broad as to render the “performance of official duties” clause meaningless.

Answering two simple questions demonstrates the inapplicability of the aggravator to either of the killings. First, would the murders have occurred had Joseph Sapinoso been unemployed? Unfortunately, the answer is unquestionably yes. Second, had some other law enforcement officer been walking up the entrance to the Sapinoso home would that person been a victim? The answer is no because that person would not have had any connection to Christina Rodriquez. The PCR court's ruling relies heavily on its interpretation of a North Carolina case, *State v. Gaines*, 421 S.E.2d 569 (N.C. 1992). See also State's Petition at 60-62. But as Evans discussed in his PCR briefing (App. 4426-28), the *Gaines* case is distinguishable. In *Gaines*, an officer who was working as a security guard on a second job and being paid for his work was fatally shot after he confronted several men. The North

Carolina Supreme Court found the officer was engaged in law enforcement-type activity and upheld the use of an aggravating factor similar to Section (C)(a)(7). *Gaines*, 421 S.E.2d at 576-77. In another distinguishable case, to which the PCR court cites, a sheriff was shot attending an outdoor event—the type of event at which he frequently acted in a law enforcement capacity. The Kentucky Supreme Court found that the sheriff, if not “actively engaged” in law enforcement duties, was “imminently available to carry out those tasks” and upheld use of the state’s similar aggravating factor. *White v. Commonwealth*, 178 S.W.3d 470, 479-81 (Ky. 2005); see App. 4006. By contrast, Joseph Sapinosa was at home, he was not working security for pay (as in *Gaines*) or attending a public event (as in *White*).

After one becomes familiar with the facts of the case, it is clear that Mr. Evans’s troubled romantic relationship with the victims’ sister brought him to the victims’ home on the evening of April 1, 2003 (see App. 1425-47) and that Joseph Sapinosa’s professional duties had no impact on this tragedy (see App. 1143-49).<sup>19</sup> The PCR court’s interpretation seems to demand that any law enforcement officer anywhere at any time is the subject of this aggravator. But the “during or because of” clause in the statute does not support an interpretation by which the statute applies anytime a person employed as a peace officer encounters trouble or even mortal risk. For the reasons explained by the Nebraska court, that would reduce the aggravator to a general status measure, violating Eighth Amendment and equal protection law.

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<sup>19</sup> The PCR court’s expansive view of Section (C)(a)(7)’s “during” requirement sits in stark contradiction to the Solicitor’s emphasis on the crime occurring in the victim’s “castle” (App. 1466-67) and to statements to the media in the days immediately after the shooting by law enforcement investigators: “He [Joseph Sapinosa] was just off duty, there at his parent’s house.” See “Suspect Could Face Death Penalty in Deputy Shooting,” April 4, 2003, at <http://www.wyff4.com/r/2084144/detail.html> (last visited October 1, 2010 (“Sapinosa was off-duty at the time of the shooting, investigators told News 4.”); see also “Other Upstate Officer Shooting Deaths,” at <http://www.wyff4.com/news/11130582/detail.html> (last visited October 1, 2010) (describing the shootings as occurring after the victim returned home at the conclusion of his shift).

In sum, the constitution demands a narrow construal of the terms to meaningfully apply to a limited selection of cases. The application of the (C)(a)(7) aggravator to these facts violates that well-known law. Defense counsel should have known this, and should have sought to strike the aggravator prior to trial and object to its charge at trial. Counsel's failure to do so was deficient performance. The PCR court's opinion, untethered from federal law and ignoring state legislative choice, stretches the plain language of South Carolina's statute—placing it in the realm of a status measure, which the language adopted by the legislature clearly sought to avoid and which a narrow interpretation of the statute under federal law prohibits.

**D. The PCR Court's Decision on Prejudice is Also Unreasonable in the Context of the Totality of the Circumstances.**

At first glance, it appears easy to dismiss prejudice on this issue because Evans was charged with three aggravating factors in addition to Section (C)(a)(7). Could counsel's failure to object to the aggravating factor have impacted the proceedings when, even if Section (C)(a)(7) wasn't charged, the jury found all the other aggravators proven beyond a reasonable doubt with respect to both victims?

In *Johnson v. Mississippi*, 486 U.S. 578 (1988), the United States Supreme Court vacated a death sentence based upon three aggravating factors, one of which was a prior-conviction aggravating factor that was invalid (based on a reversed out-of-state conviction). The Supreme Court noted that the prosecution had relied *heavily* on the invalid aggravating factor in its argument and that the evidence presented in support of the invalid aggravator was otherwise irrelevant. *Id.* at 586. More recently, the U.S. Supreme Court has instructed that the impact of invalid aggravating factors on a death sentencing proceeding must be framed by the extent to which the evidence admitted under the invalid aggravating factor

would have been fairly admitted by other means. *Brown v. Sanders*, 546 U.S. 212 (2006). *Brown* dissolves the distinction between what have been known as “weighing states,” such as Mississippi, and “nonweighing states” such as South Carolina (see *State v. Simmons*, 360 S.C. 33, 44, 599 S.E.2d 448, 453 (2004)), as it holds that the touchstone inquiry is whether the evidence admitted before the jury in support of the invalid aggravator would have been admissible otherwise to support a valid aggravating factor found by the jury beyond a reasonable doubt.

According to the PCR court, the evidence admitted under Section (C)(a)(7) is limited to Sheriff Loftis’s testimony regarding the Sheriff department’s policy and the efforts his office took to seek benefits under the PSOBA. This evidence would not have been admissible otherwise to support any of the other aggravating factors found by the jury beyond a reasonable doubt. Accordingly, under *Brown*, Evans’s death sentence must be reversed.

In addition, the erroneously charged aggravating factor had a greater evidentiary impact than to simply serve as a basis for Sheriff Loftis’ testimony regarding the Sheriff department’s policy and the efforts his office took to seek benefits under the PSOBA:

- (a) It operated as a gateway for highly charged statements presented to the jury—also without objection from counsel—under the rubric of *victim impact testimony* from Sheriff Loftis and Deputy Sheriff Tripp which explained the impact of Joseph Sapinosa’s death on the entire Sheriff’s department and throughout an extended law enforcement network.
- (b) These victim impact statements took on enormous symbolic resonance when, after defense counsel failed to object to the *venue* of the trial in the courthouse where Joseph Sapinosa was employed, the jurors learned via Deputy Sheriff Tripp and Sheriff Loftis that the victim formerly worked as a security officer in the very courtroom in which they were seated and in which the PCR hearing was being held, see App. 1571 (Deputy Sheriff Tripp); App. 1532 (Sheriff Loftis).

(c) It provided the Solicitor with a channel to harness in his *closing rhetoric* the emotional power associated with the killing of a law enforcement officer during or because of his or her duties—a status that was not relevant to the circumstances in this case. And extrapolating from the misapplied (C)(a)(7) factor, the Solicitor continued, without objection to recharacterize the domestic tragedy as a “gang” killing. App. 1756-57.

Because the *Strickland* prejudice is a cumulative measure, the impact of counsel’s failure to challenge the aggravating factor must be considered in light of the totality of the circumstances and therefore in conjunction with counsel’s other failures. The improper charge of the law enforcement aggravator, the venue of the trial being in the victim’s place of employment, the unbridled use of victim impact testimony, the Solicitor’s inflammatory rhetoric (none of which defense counsel objected to)—these errors operated together, each as a springboard for the other, to produce a verdict that so undermines confidence in the outcome that a new sentencing trial is the proper remedy.

The fact that three other statutory aggravating factors were charged, therefore, does not render the invalidity of the law-enforcement aggravating factor harmless. Nor does the fact that the law enforcement aggravator was not charged for the death of Antonio Sapinosa render the impact of the invalid aggravator moot with respect to that death sentence, for the same jury decided both sentences simultaneously. Consequently, defense counsel’s performance was deficient and prejudicial. This Court should grant certiorari to clarify the law on Section (C)(a)(7) and correct the PCR court’s erroneous ruling.

3.

**DEFENSE COUNSEL WAS INEFFECTIVE IN ALLOWING GENERAL PRISON CONDITION EVIDENCE AND ARGUMENT TO BE PRESENTED TO THE JURY, WHICH INJECTED IRRELEVANT AND ARBITRARY INFORMATION INTO THE PROCEEDINGS IN VIOLATION OF STATE AND FEDERAL LAW.**

In Points VIII of the PCR Brief and paragraphs 9(b) and 10(b)(4)(d), 10(b)(7), 9(d) and 10(d)(4), and 9(g) and 10(g) of the amended application for postconviction relief (App. 2917-23; see App. 1904-1909), Mr. Evans pled ineffective assistance of counsel based on trial counsel's failure to object to testimony about general prison conditions elicited from a state witness and counsel's related failure to object to the Solicitor's argument based upon that testimony.<sup>20</sup> Without objection by defense counsel, a security threat group coordinator at the Department of Corrections invited the jury to consider the privileges inmates enjoy while serving a custodial sentence in the general prison population. Also without objection, the witness was allowed to contrast the conditions in general population with those for inmates who receive a sentence of death. In failing to object to this testimony, trial counsel permitted the jury to consider evidence that this Court has long found both inadmissible and prejudicial. This Court should grant certiorari to consider the PCR court's error on this issue and the underlying violation of long-standing state law.

**A. South Carolina Has Long Prohibited Testimony about General Prison Conditions in Capital Sentencing Trials.**

South Carolina law prohibits testimony about general prison conditions during capital sentencing trials. This Court explained the rule nearly thirty years ago:

Such determination as the time, place, manner, and conditions of . . . incarceration . . . are reserved by a statute . . . to agencies other than the jury. As we have repeatedly stated, the sole function of the jury in a capital sentencing trial is the individualized selection of one or the other penalty,

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<sup>20</sup> These issues were also addressed in Evans's Initial Trial Brief, which was filed of record and served upon the State on May 29, 2009 before the PCR hearing. See Supp. App. 18-20, 30-32. On these pages, Mr. Evans argued the irrelevance of the general prison conditions testimony of Mr. O'Cain, and also argued that the general prison testimony and the Solicitor's argument on the same topic violated S.C. Code Ann. § 16-3-25(C)(1)(2000); *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984); *State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2005); and *State v. Burkhart*, 371 S.C. 482, 640 S.E.2d 450 (2007).

based upon the circumstances of the crime and the characteristics of the individual defendant.

*State v. Plath*, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984); see *State v. Atkinson*, 253 S.C. 531, 535, 172 S.E.2d 111, 112 (1970).<sup>21</sup> The reason for the rule is that conditions of incarceration reflect *neither* the circumstances of the crime *nor* the characteristics of the defendant—which are the only relevant considerations at sentencing. As *Plath* explained, “A jury does not need to know how often [the capital defendant] will take a shower or whether or not he will be lonely and withdrawn during his tenure [in prison].” 281 S.C. at 15, 313 S.E.2d at 627.

This Court reiterated the rule more recently. In *State v. Bowman* (2005), although the issue was not preserved for review, the Court took the opportunity to caution the State and the defense bar, and reaffirm that evidence presented in a penalty phase of a capital trial must be restricted to the individual defendant and the individual defendant’s actions, behavior, and character. 366 S.C. 485, 499, 623 S.E.2d 378, 385 (2005); see *State v. Burkhart*, 371 S.C. 482, 488, 640 S.E.2d 450, 453 (2007). “Generally,” the *Bowman* Court stated, “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.” *Id.* at 498, 623 S.E.2d at 385.

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<sup>21</sup> Fourteen years before *State v. Plath*, this Court recognized:

The Legislature committed to the jury the responsibility to determine in the first instance whether punishment should be life or death. It charged another agency with the responsibility of deciding how a life sentence shall be executed. The jurors perform their task completely when they decide the matter assigned to them upon the evidence before them. What happens thereafter is no concern of theirs.

*State v. Atkinson*, 253 S.C. 531, 535, 172 S.E.2d 111, 112 (1970) (quoting *State v. White*, 142 A.2d 65, 78 (N.J. 1958)). In *Atkinson*, this Court observed that the restriction prohibiting general prison condition testimony derives from Section 16-3-20, not from case law.

An objection to general prison conditions testimony was preserved in *State v. Burkhart* (2007), giving this Court the opportunity to apply the rule directly to a trial in which the State called the Director of Inmate Classification from the Department of Corrections to testify about the “privileges” or “benefits” available to an inmate sentenced to life imprisonment without the possibility of parole. A life without parole sentence, the classification director testified, included “access to the yard, work, education, meals, canteen, phone, library, recreation, mail, television, and outside visitors.” 371 S.C. at 487, 640 S.E.2d at 452-53. Also in *Burkhart*, “appellant presented evidence through his own witness that prison is a harsh environment with violent predators where one’s freedom is severely curtailed.” *Id.* This did not change the Court’s view of the error. Granting a new sentencing proceeding, the *Burkhart* Court reiterated that testimony about what a defendant can expect from life in prison is extremely prejudicial—whether offered by the State *or* by the defendant in response to State testimony. The error requires reversal because the “entire subject matter inject[s] an arbitrary factor into the jury’s sentencing considerations” in violation of S.C. Code Ann. § 16-3-25(C)(1). *Id.* at 488-89, 640 S.E.2d at 453. It also violates the Eighth Amendment cruel and unusual punishment clause when a death sentence is “predicated on mere ‘caprice’ or on ‘factors that are constitutionally impermissible or totally irrelevant to the sentencing process.’” *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 884-85, 887 n.24 (1983)); see *State v. Burkhart*, 371 S.C. at 492, 640 S.E.2d at 455 (Toal, J., dissenting).

**B. The Objectionable Testimony and Argument in Mr. Evans’s Sentencing Proceeding, and Trial Counsel’s Failure to Object.**

During Mr. Evans’s trial, the State followed the same pattern reversed in *Burkhart*. The State called a security threat group coordinator employed by the South Carolina

Department of Corrections as an expert on “gang activity and gang experience within the department of corrections.” App. 1582, 1590-91. The security threat group coordinator, Lewis O’Cain, testified that Mr. Evans, if given a sentence of life imprisonment without parole, would be subject to less security than if he received a death sentence. App. 1601. A life sentence, Mr. O’Cain testified, “would not stop [Evans] from having a normal life inside prison” (App. 1602):

He, of course, will be able to—he will get visits. He will be able to use the phones. He will be able to communicate by letters. [H]aving [a] life [sentence] will not stop him from having a normal life inside prison such as he will be in an institution, will be in a dorm situation, two or three or four hundred inmates.

App. 1601-02. On the other hand, Mr. O’Cain testified, “it would be less of a problem” if the jury sentenced Evans to death row:

Death row, it has a better population of officers who are monitoring what’s going on with them. He would be very limited to his visitation, to the phone calls. He would be limited to mail. A lot of things would be different than him being just inside for life. It would be less of a problem on my end because it is a lot easier to monitor, however many we have, 70 or 90, whatever we have on death row versus the other 24,000 inmates.

App. 1602. Asked if “Mr. Evans came to the DOC under a sentence of death would he present a problem for you in relation to gangs?,” O’Cain responded, “No, sir,” App. 1602.

In closing argument, the Solicitor extrapolated from Mr. O’Cain’s generalized testimony about life in the general prison population compared to death row. “Life in prison is not appropriate,” the Solicitor argued, because “[y]ou can’t put [Evans] in life in prison and expect him to suffer.” App. 1757. The conditions in general population, the Solicitor urged, were not harsh enough:

A big prison is like a little city. In prison he will have all the necessities of life – restaurants. They feed you; they clothe you, house you; doctors; hospitals; contact with family; T.V.; loved ones; freedom of movement in a

limited degree; a social structure; cards and games and watch the football game; go to work; got to school. Sure you don't have a car, but in most instances it's not much more than a chamber of trust.

App. 1758.<sup>22</sup>

Similar to *Burkhart*, trial counsel in this case responded with an expert of their own. Mr. Evans's trial counsel called George Martin, a veteran of the SCDC system and a former warden, as an expert in the field of corrections and prison administration. App. 1626-27. Mr. Martin concluded that Evans "would be locked up essentially 23 hours a day and allowed to exercise by himself" but eventually "would in all likelihood adjust well" to "a difficult, harsh and often very violent place." App. 1637. However, in contrast to *Burkhart*, Mr. Evans's counsel did not object to the State's testimony, and failed to preserve the issue for direct appeal.<sup>23</sup>

Defense counsel Steve Sumner was asked during the evidentiary hearing why he did not object to the State's testimony about general prison conditions, and he stated: "I thought that if we object to the State's witness wanting to talk about conditions in prison, then [I] don't think we would have been allowed to put up our witness about conditions in prison." App. 2349. Co-counsel, Skip Goldsmith, stated that he and Sumner intended to stress the strength of the prison facility's security as a means of responding evidence of gang affiliation, the admissibility of which they intended to concede. See App. 2200. Overall, the purpose of Mr. Martin's testimony, trial counsel said, was "basically to explain to the

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<sup>22</sup> The Solicitor also stressed how easy Evans's life would be in prison, describing a sentence of life imprisonment without parole as "the most lenient sentence" (App. 1749) and "the minimum." App. 1752 ("Does this case deserve the least and the minimum?").

<sup>23</sup> In the PCR hearing, Joseph Savitz of the Office of Appellate Defense, appellate counsel of record in *State v. Burkhart*, 371 S.C. 482, 640 S.E.2d 450 (2007), testified that if Mr. Evans's trial counsel *had* objected to the testimony on general prison conditions and thereby preserved the issue, he would have raised the issue on direct appeal. App. 2715. Mr. Savitz stated that while Mr. Evans's 2004 trial preceded *Burkhart*, he had been raising this issue on appeal well before then. App. 2714-15.

jury what life in prison means in South Carolina,” to convey “what type of environment he would be in, and, again to dispel overall the notion it would be an easy life.” App. 2403-04.

**C. The PCR Court’s Ruling on Deficient Performance Is Not Supported By Probative Evidence in the Record.**

The PCR court denied Evans’s ineffectiveness claim based on counsel’s failure to object to the general prison evidence and argument. The court offered several reasons for doing so, only one of which merits extended discussion.

(a) First, the PCR court held that Mr. Evans could not rely on the rule in *Burkhart* because Evans’s trial *preceded* this Court’s decisions in *Burkhart* and *Bowman*. At the time of Evans’s trial in 2004, the court noted, “general prison conditions evidence was being offered and admitted in capital trial penalty phases.” App. 4442. The rule applied in *Burkhart* and discussed in *Bowman* did not originate there. It derives from Section 16-3-20 and a long-standing line of precedent that predates *Bowman*’s dicta. See *Burkhart*, 371 S.C. at 488, 640 S.E.2d at 453 (“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.”). Indeed, the sentence that this Court reversed in *Burkhart* preceded *Bowman*, and the injection of general prison evidence was found reversible error nevertheless. This ruling is plainly erroneous, and equally unavailing with respect to *Strickland*’s prejudice prong.

(b) The PCR court’s second stated reason for denying the claim was equally erroneous. The PCR court held that because this Court reviewed Evans’s sentence on direct appeal and found no arbitrary factor under S.C. Code Ann. § 16-3-20, the issue is already adjudicated and provides no basis for postconviction relief. App. 4441. This ruling,

however, overlooks the fact that no challenge to the general prison evidence was preserved for direct appellate review in this case. Nor was any challenge made on direct appeal to counsel's failure to object to the evidence and argument or that, in the totality of circumstances, counsel's error contributed to undermining confidence in the sentencing trial—arguments traditionally germane to postconviction review (see *State v. Torrence*, 305 S.C. 45, 66, 406 S.E.2d 315, 326 (1991)). So this Court has never been presented with the *Strickland* issue that Mr. Evans now raises or with the underlying substantive error concerning testimony about general prison conditions, which was not preserved for direct appeal.<sup>24</sup>

(c) The PCR court's third reason for denying this ineffectiveness claim pertains to what could be referred to as the "*Burkhart* exception." In *Burkhart*, this Court clarified its ruling by offering a limited condition in which prison-condition evidence would be admissible:

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*.

371 S.C. at 488, 640 S.E.2d at 453 (latter emphasis added). *Burkhart* provided three examples of such "narrowly tailored" admissible evidence about prison: (1) evidence of

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<sup>24</sup> The PCR court also found that one aspect of Mr. Evans's claim—"the argument ... going to ineffective assistance in the *presentation* of the defense witness [Mr. Martin]." App. 4440; see App. 4439—was not preserved. Evans's claim pertains principally, however, to counsel's failure to object Mr. O'Cain's testimony and to the solicitor's summation building upon it. The PCR court found these challenges fully preserved. App. 4439-40. In any event, whereas in *Burkhart*, counsel first objected to the general prison condition testimony and then, once unsuccessful, attempted to counter that testimony by calling their own expert, here counsel made no effort to object. In contrast to *Burkhart*, counsel's decision to call their expert in Evans's was not borne of necessity, but of ignorance of the relevant law that provided a basis for precluding the State evidence.

good behavior in prison, admissible as mitigation relevant to future adaptability, (2) evidence of violent behavior in prison, relevant to future dangerousness, and (3) evidence of prior felony convictions, also relevant to future dangerousness. *Id.* at n.2 (citing *Skipper v. South Carolina*, 476 U.S. 1 (1986); *State v. Shafer*, 352 S.C. 191, 573 S.E.2d 796 (2002); and *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996)).

The PCR court invoked this exception, holding that “the [prison] conditions were referenced narrowly, and only to the extent to describe Evans’s treatment and dangerousness due to his gang affiliation.” App. 4441. The PCR court also held that the evidence the defense presented pertaining to prison conditions was similarly narrowly tailored “to combat treatment of Evans’s gang membership—real or imagined, because due to his representation of gang membership, he would be treated as a gang member, both by other gang members and SCDC.” App. 4443.

The PCR court’s application of the exception in this case is erroneous for two reasons: one, it does not accurately interpret the evidence and argument presented to the jury; two, it does not properly apply the limited scope that *Burkhart* recognized for the exception to the prohibition on general prison condition evidence. First, the testimony cited in the preceding pages by Mr. O’Cain, contrasting general population with death row, and the Solicitor’s summation building from that testimony both are *general statements about what prisoners receive* in terms of privileges or benefits in one environment versus another. Both are *general statements about the security capability* of general-population prisons versus death row. Neither of these subjects—prisoner privileges or security capability—has anything to do with Mr. Evans’s character or previous acts; rather, each is a matter of institutional policy and design. Death row is better equipped to deal with future

dangerousness concerns (and general prison less so) in *every* case. Even accepting merely for the sake of argument that the State could fairly argue that Mr. Evans's tattoos evidenced gang membership, not merely style and self-expression (this issue is discussed *infra* at 82-88), and further that this provided evidence of future dangerousness, it would not provide a narrowly tailored explanation for why a death sentence, given the stricter security and fewer privileges and benefits, would be a more appropriate sentence for Mr. Evans than a life sentence. Rather, this broad interpretation of the exceptions to the rule against prison condition testimony would essentially collapse the *Burkhart* prohibition on evidence and argument about the conditions and security capability of death row into a question of future dangerousness.<sup>25</sup>

Second, the PCR court's decision misunderstands the scope of the *Burkhart* exception. What the PCR court refers to as Mr. Evans's "representation of gang membership" falls into neither the category of *Skipper* (evidence of good *behavior* in prison) nor *Shafer* (evidence of bad *behavior* in prison) nor *Tucker* (evidence of prior *bad acts or felony convictions*). The evidence presented by Mr. O'Cain, from which the Solicitor extrapolated, concerns neither prior bad acts or felony convictions (as in *State v. Tucker*) nor violent gang-related behavior in prison (as in *State v. Shafer*) nor the circumstances of the crime. The extent to which tattoos may function as a classification factor once an inmate is in prison have no bearing on a life or death-sentence decision. The sentence of life or death, if it is to be individualized, must be based entirely on a person's character and acts, not on

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<sup>25</sup> The two, general prison conditions and future dangerousness, are distinct lines of inquiry. For example, defense witness George Martin did not need to delve into "general prison conditions" to opine that Evans can conform his behavior to the conditions of prison without becoming a risk to others. Further, raising an objection to the testimony on general prison conditions would not have shut the door to adaptability testimony, which cannot be excluded when offered by the defendant because it is constitutionally mandated.

arbitrary factors such as race or style—and equally not on the institutional capabilities or predilections of a given prison or prison system.

Trial counsel, ignorant of South Carolina law, allowed the security threat group coordinator's testimony and the Solicitor's inflammatory summation remarks to inject an arbitrary factor into the sentencing proceedings. The evidence and subsequent argument by the Solicitor violated both S.C. Code Ann. § 16-3-25(C)(1) and the Eighth and Fourteenth Amendments to the United States Constitution. Counsel's failure to object was deficient.

**D. The PCR Court's Ruling on Prejudice Is Not Supported by Probative Evidence in the Record: Counsel's Failure to Object to the General Prison Condition Evidence and Argument Undermines Confidence in the Result under *Strickland*.**

The PCR court offered several reasons for finding that, even if counsel performed deficiently on this issue, the error was not prejudicial. The court noted that defense counsel was able to respond with its own witness. App. 4442. But *Burkhart* shows that counsel's decision to call its own witness to mitigate the State testimony does not diminish the error. Both the prosecution and the defense presented testimony on general prison conditions in *Burkhart* and this Court recognized that defense counsel's response to the State's general prison testimony with additional general prison testimony only added to, and did nothing to ameliorate, the arbitrariness of the death sentence.

The PCR court also held that the general prison condition testimony, even as amplified by the Solicitor's summation, would have had little impact on the jury deliberation and verdict. App. 4444. But in fact the scope of the improper testimony in this case was greater than the testimony found to mandate reversal in *Burkhart*. Here, in addition to hearing testimony and argument regarding the conditions and capacities of the general

prison population, the jury *also* heard testimony about the conditions and capacity of *death row*. Mr. O’Cain opined that on “[d]eath row, [Evans] is constantly monitored,” “does not have one-on-one contact with the visitation,” and “it is a different situation.” App. 1603. Moreover, the PCR court substantially downplays the Solicitor’s summation rhetoric as a “mere[] nine lines of transcript,” a “brief response to the testimony that also indicated that the life sentence would be harsh based on the necessity of increased security stemming from his gang affiliation (or purported gang affiliation).” App. 4444. But the impact of an argument does not necessarily lie in the number of words it spends; indeed, less is often more. Given the overblown rhetoric the Solicitor invoked, that was surely the case here.

Justice Pleicones observed in *Burkhart* that this type of error is not subject to harmless error review because it is a statutory violation:

We are not required to determine if appellant’s cross-examination ... was able to remedy any error. Once improper evidence of any kind injects an arbitrary factor into the jury’s consideration, this Court cannot uphold the death sentence under § 16-3-25(C)(1). Moreover, a review for harmless error is unnecessary because by definition, evidence that implicates an arbitrary factor is prejudicial.

371 S.C. at 490, 604 S.E.2d at 454 (Pleicones, J., concurring). Whether or not a majority of this Court agrees with that view, considering the impact of the error under *Strickland*, the PCR court erred in failing to find that, but for counsel’s failure to object of the evidence and argument on general prison conditions, there is a reasonable probability that the outcome of the sentencing proceeding would have been different. Counsel’s failure to object was prejudicial. It rendered Mr. Evans’s death sentence unreliable, and the death sentence should be vacated.

**DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO AND COUNTER THE EVIDENCE IN AGGRAVATION PRESENTED BY WITNESS LEWIS O'CAIN AND THE SOLICITOR'S INFLAMMATORY RHETORIC EXTRAPOLATING FROM THAT TESTIMONY IN THE SENTENCING SUMMATION.**

Counsel failed to challenge unreliable and irrelevant testimony from a State's witness on gangs, and the State's sentencing summation re-characterized a domestic tragedy as a gang execution killing. There is a reasonable probability that, but for counsel's failure to object to and counter the aggravating evidence and argument, the outcome at sentencing would have been different. *Strickland v. Washington*, 466 U.S. 688 (1984).

**A. Relevant Facts in the Record on Appeal**

The State offered Lewis O'Cain, a security threat group coordinator employed by the South Carolina Department of Corrections, as an expert on "gang activity and gang experience within the department of corrections." App. 1582, 1590-91. Defense counsel did not object to his qualifications and the trial court did not ask Mr. O'Cain to discuss his background experience or training. App. 1591. Mr. O'Cain knew nothing about Kamell Evans and had no evidence of any incidents involving Mr. Evans; he based his testimony solely upon tattoos and posters in which Mr. Evans posed in the style of celebrity performer Tupac Shakur. App. 1590-1602. O'Cain opined without objection that Evans was a "hard-core gang member" with a reputation for street violence. App. 1590-96, 1601.<sup>26</sup>

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<sup>26</sup> Regarding Mr. Evans's tattoos, O'Cain stated:

The tattoos that he has would lead me to believe that he is a part of the Crip organization. To what extent, I wouldn't be sure until I could do some checking into other states, my counter parts, some data bases just to see if he shows up on anybody's intelligence.

App. 1595-1596. Finally, O'Cain examined two posters and made further remarks on Evans's gang membership. App. 1599. Based on the tattoos and the posters, O'Cain stated:

In summation, the Solicitor went further, arguing that the shootings of Antonio Sapinoso and Joseph Sapinoso were motivated by a strategy of gang action. Evans, the Solicitor argued, “planned this execution to the smallest minute gangland detail.” App. 1757. “[H]e was going to let the world know that night gang style, just like the pictures, gang style . . . . Crips deliver bodies, and he delivered you two.” App. 1756. “This [trial] is a game to [Evans] without consequence. It is a game of Crip mentality . . . and if he gets away from you he will go to prison and continue to be a gang . . . . He will move into a system and a position of structure, a cop killer, a king.” App. 1758. The Solicitor argued: “As Mr. OCain told you, he is *already* into gang activity at the jail.” App 1758 (emphasis added). Again, defense counsel did not object.

**B. The Evidence Presented at the Postconviction Hearing**

Trial counsel knew that the state would call Mr. O’Cain to testify but no one on the defense team attempted to speak with or obtain a report from O’Cain prior to trial. App. 2196-2197. When asked during the postconviction hearing how they could make a decision not to challenge O’Cain’s testimony, Goldsmith responded, “Well, we assume that he was the State’s witness how he would.” App. 2197. The common belief among members of the trial team, however, was that, contrary to the first impression given by the tattoos, Mr. Evans was *not* in a gang. App. 2189, 2345. Unequivocally, as documented in interview notes provided to counsel, witnesses rejected the notion that Evans could be in a gang. App. 2547, see App. Exh. 19A, App. Ex. 19B, 3430; App. 2549, see App. Exh. 24, 3444; App. 2548-

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He’s got the capacity once they’ve identified him and he’s proven himself, I feel, depending on what I’m seeing here, that he would be capable of running something inside, which means he could create a lots of problems for us from the standpoint of robberies, burglaries, assaults on officers or staff. The drug industry inside would be something that he probably could jump into and be making money, not necessarily inside but the money that’s being passed on the streets.

App. 1601-02; App. 1596-97.

2549. As one witness, a football coach, stated, “the tattoos and ‘gang member dress style’ was more of an image than anything and the image seemed to be portrayed by the black male students, not just by K. Evans.” App. Exh. 19B, 3432. The defense investigator summarized for counsel prior to trial:

In addition to his personality attributes, Kamell Evans was not known to associate with gang members. There’s no evidence to show he ever joined a gang. What a former coach and a current friend relayed to me that they felt some of Kamell’s actions indicated he just wanted to belong to an[d] fit in with ‘the crowd’, i.e., wearing gang style clothing while at college. The fact was most of the male African American students at N. Greenville College wore this style of clothing during this time.

App. 2269; App. Exh. 21, 3440.<sup>27</sup>

At the PCR hearing, Dr. Nicholas Cooper-Lewter testified to a reasonable degree of certainty in the field of social work that Mr. Evans was not in a gang and that there were reasons, based on Kamell’s background and character, he would “false flash.”

‘Who am I?’ is a big question for children . . . for adolescents . . . for most people. And so if there are any questions about whether or not who I might be is okay, then I’m going to look for things in and around me that would say ‘respect me.’ . . . And coming from Cleveland to South Carolina, Cleveland’s a big town. He came to a small town. It was very easy to build to have a ready-made identity attached to being – looking like you’re in a gang.

App. 3040. Asked whether it would impact his decision to know that Evans told his lawyers while awaiting trial in jail that he was in a gang, Dr. Cooper-Lewter responded: “That would not necessarily surprise me. One of the things that we deal with all the time is how do I remain safe in prison. And one of the ways that a lot of people do is affiliate themselves or at least act like they’re affiliated with a gang. . . . You might say you’re in a gang.” App. 3045; see also App. 2077.

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<sup>27</sup> Counsel ignored their investigator’s suggestion to interview the tattoo artist. App. 2269-2270; App. Exh. 21, 3440; App. Exh. 26, 3450. At the PCR hearing, the artist testified that to his knowledge Mr. Evans was not in a gang and that Mr. Evans’s interest in gang-themed tattoos was “childish, silly.” App. 2729.

**C. Deficient Performance under *Strickland v. Washington***

Counsel acknowledged that there would have been no downside to making a motion *in limine* to exclude O’Cain’s testimony. App. 2191-2193. Had counsel objected, there is a reasonable probability that the trial court would not have permitted the testimony or that a reviewing court would have found admission of the testimony error on appeal. The legal bases for the claims are set forth in Evans’s Trial Brief, filed prior to the first part of the PCR hearing in this case, which Evans incorporates by reference herein. Supp. App. 21-36. In short, counsel failed to move to limit or exclude O’Cain’s testimony on the basis that (a) it lacked reliable methodology under SCRE 702 and *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), and *State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120 (1979); see generally *Kumho Tire Co., Inc. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); that (b) it failed the reliability test for nonscientific expert testimony applied in cases such as *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), and *State v. Childs*, 299 S.C. 471, 385 S.E.2d 839 (1989); cf. S.C. Code Ann. § 16-8-230 (setting forth criteria for identifying gang members—tattoos is not a criterion); or (c) that O’Cain was not qualified to offer the testimony, see *State v. Tapp*, 387 S.C. 159, 691 S.E.2d 165 (S.C.App. 2010) (reversing and remanding for new trial where record was insufficient for appellate court to determine whether witness offered as expert in crime scene analysis and victimology was qualified).

Counsel also failed to move to limit or exclude O’Cain’s testimony on the basis that it was unsupported and irrelevant speculation under *Dawson v. Delaware*, 503 U.S. 159, 160 (1992). Under *Dawson*, evidence of beliefs and associations may be considered only if relevant to a statutory aggravating factor or to rebut mitigating evidence offered by the

defendant. *Id.* at 165. The testimony here fails to meet the *Dawson* requirements. See *U.S. v. Cisneros*, 363 F.Supp.2d 827, 841 (D.V.A. 2005); *U.S. v. Wilson*, 493 F.Supp.2d 491 (E.D.N.Y. 2007). O’Cain testified to the *general* existence of prison gangs inside the Department of Corrections and that such gangs engaged in a wide range of activities, including assaults, burglary, robbery, and extortions. App. 1584. But the only purported evidence of gang membership in this case is Evans’s tattoos and two homemade posters. In contrast to *Wilson*, where the government intended to prove the defendant’s future dangerousness using evidence of his *actual* behavior as a gang member, O’Cain’s testimony merely invites the inference that Evans is dangerous because Crips are.

Further, counsel failed to move to limit or exclude O’Cain’s testimony because the prejudice it injected into the sentencing trial substantially outweighed its probative value of future dangerousness. SCRE 403; see *United States v. Taveras*, 585 F.Supp.2d 327, 330 (E.D.N.Y. 2008) (applying 18 U.S.C. § 3593). Mr. O’Cain never interviewed Kamell Evans. He knew nothing about how, when, or why Mr. Evans got the tattoos. And there is no evidence that shows that the shootings of were gang-related or gang-motivated in any way. In sum, there are multiple factors to consider in assessing whether counsel performed inadequately in failing to challenge the testimony by O’Cain: what efforts they made *in limine* to limit or exclude the misleading testimony; what efforts they made to discuss the significance of this testimony with their client; what objections they made contemporaneously as the testimony was presented to the jury; what they offered in rebuttal. Across the board, counsel’s efforts on this front were nonexistent and deficient under *Strickland v. Washington*, 466 U.S. 668 (1984).

**D. Prejudice under *Strickland v. Washington***

Allowing the State to present misleading evidence asserting gang involvement injected arbitrary and highly prejudicial aggravating evidence into the capital sentencing proceedings, upon which the Solicitor's summation capitalized. Integrating the unchallenged testimony of the State pathologist, the Solicitor described the shootings as "execution style" and argued this was "significant" because the jurors had "heard a lot of talk about gangs." App. 1756. Mr. O'Cain testified that he would, in the future, get word from the "street" about Mr. Evans's exploits. The Solicitor stated that Evans was "already" into gang activity in jail. Yet, this was entirely based on speculation.

There was significant valid evidence in aggravation against Mr. Evans. There were two victims in this tragedy. The shootings occurred in the midst of a four-hour stand-off with Evans holding the victims in their home while law enforcement surrounded them outside, which supported charges of burglary and kidnapping. However, the Section (C)(a)(7) aggravating factor was invalid. And Mr. O'Cain's testimony and the Solicitor's argument animated an additional misleading aggravating factor: that Evans would be a future danger because he was a gang member. In allowing this misleading characterization, counsel capitulated to the Solicitor's reconstruction of a domestic dispute-turned-tragedy into a premeditated, gang-motivated, law-enforcement-officer execution. Rather than challenge the misleading characterization, as it could have been challenged, counsel accepted the prosecutor's references to Kamell as "evil" and as a member of a gang.

Contrast the recent appellate decision in *State v. Liverman*, 386 S.C. 223, 242-44, 687 S.E.2d 70, 80-81 (S.C. App. 2009), where the court found that inadmissible evidence by Mr. O'Cain regarding a defendant's tattoo was harmless error at a guilt-or-innocence trial, given substantial other evidence of Liverman's guilt and the cumulative testimony of

another officer. *Id.* at 79, 81. Here, unlike *Liverman*, the error was not harmless. There was no other evidence that Mr. Evans was in a gang and would therefore be a future danger. O’Cain’s testimony was not cumulative of the testimony of another witness who testified to a similar conclusion. Furthermore, the prejudicial testimony occurred in a capital sentencing trial, subject to heightened scrutiny for reliability, in which jurors decide not whether an event occurred but rather reason morally for life or death. Counsel’s failures were prejudicial under *Strickland*. This Court should grant certiorari.

5.

**DEFENSE COUNSEL FAILED TO SEEK A CHANGE OF VENUE BASED ON THE “EXTRAORDINARY CIRCUMSTANCES” OF THIS TRIAL, WHICH WAS CONDUCTED IN THE COURTHOUSE THAT WAS A VICTIM’S WORKPLACE. COUNSEL’S FAILURE TO ADDRESS THE INEVITABLE SYMPATHY AND POTENTIAL INTIMIDATION THAT JURORS WOULD EXPERIENCE WAS DEFICIENT AND PREJUDICIAL.**

The publicity and drama associated with this case was intensified as a result of the fact that a law enforcement officer was a hostage in what turned out to be a contemporaneously broadcasted, multi-hour attempt to step down the crisis. Yet there was another unique factor that gave rise to the need for a change of venue: the victim was an integral member of the courthouse law enforcement staff where the trial was conducted. During the trial of the case, the jurors were introduced to the victim’s courthouse team through the testimony of Sheriff Loftis and Deputy Sheriff Tripp, who described victim Joseph Sapinoso as he performed the job of shepherding jurors in and about the courthouse, and described how the team would stand watch within each courtroom to assure the personal convenience, comfort, and protection of all in the courtroom, including the jurors. See App. 1571-72.

The victim's strong link with the courthouse led the Chief Public Defender of Greenville County to resign due to a conflict based on the work relationship between Joseph Sapinoso and Public Defender's office, and led one of the first judges appointed on the case to step down as well. App. 2157. Nearly a year later, the third lawyer appointed to represent Mr. Evans was also relieved due to his courthouse relationship with the victim. See App. 2034-35.

Given that two counsel and a judge excused themselves due to conflict, a change of venue motion based on the unique relationship between Joseph Sapinoso and the courthouse should have been at the front and center of counsel's thoughts. Ten days prior to jury selection, counsel filed a pretrial motion seeking a change of venue. But that motion, with a number of news articles attached, focused on the routine cause for venue change: pretrial publicity. The motion also noted that the one of the victims was a law enforcement officer. But the motion did not address that the courthouse and courtrooms involved in this trial were Joseph Sapinoso's workplace; that the courthouse security officers in the trial were Mr. Sapinoso's coworkers; and that the other courthouse personnel were his peers. App. 1009-12; see PCR 368-371.

**B. Deficient Performance and Prejudice Under *Strickland v. Washington***

Venue, the place of trial, is a constitutional issue. S.C. Code Ann. § 17-21-80; see S.C. Const., Article I, §§ 11, 14; S.C. Const., Article V, § 23. A jury must be impartial and not subjected to extrajudicial influences that might, in the end and over time, erode that impartiality while they serve as jurors on the case. In *State v. Sheppard*, 357 S.C. 646, 655, 594 S.E.2d 462 (2004), it was argued that the nature of the crime involving the killing of a law enforcement officer *and* pretrial publicity warranted a venue change. This Court found

that given adequate *voir dire* the motion was properly denied. But *Sheppard* did not involve the death of an officer who worked in the courthouse where the defendant's guilt and sentence were tried.

There are two unique issues in this case: the "extraordinary circumstances" of a trial in the victim's workplace; and inadequate *voir dire* to assess the impartiality of the jurors given those circumstances. No questions were asked of jurors whether it mattered to them that victim worked in the same courthouse and courtroom where trial would be held. See App. 4021-33. This Court is left with no record upon which it can be certain that the defendant received a fair trial. Further, no South Carolina decision has examined what "extraordinary circumstances" might be beyond extreme pretrial publicity; and none has expressly dealt with the issue of venue change where the victim in the case works in the courthouse—indeed the very courtroom—in which the trial takes place, and whether these might constitute "extraordinary circumstances."<sup>28</sup> Evans's case presents the rare picture of prejudicial circumstances that are "extraordinary": a trial in the victim's workplace in which it is wrongly argued that the crime was a gang motivated killing of a law enforcement officer; in which the entire public defender's office and two other outside attorneys declined to represent the applicant because they knew the victim so well; and in which two officers testified under the rubric of victim impact. That no case in the history of South Carolina courts has produced a factual scenario like the one at hand is testament to the uniqueness of the circumstances here.

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<sup>28</sup> In *State v. Fowler*, 266 S.C. 203, 222 S.E.2d 497 (1976), this Court found no need for a venue change in the trial of a patrolman's murder in Lexington County. *Fowler* was the first case in South Carolina to use the language of "extraordinary circumstances," citing to *Wansley v. Slayton*, 487 F.2d 90 (4<sup>th</sup> Cir. 1973) (describing *Sheppard v. Maxwell* publicity and other events prior to trial as "extraordinary circumstances"); cf. *Stahl v. Ozmint*, 2007 WL 2964662 (D.S.C. 2007) (equating extraordinary circumstances allegation with presumption of prejudice due to pretrial publicity).

This Court should grant certiorari to consider whether trial counsel's failure to move for a venue change based on these extraordinary circumstances was deficient and prejudicial under *Strickland v. Washington*, 466 U.S. 688 (1984).

6.

**DEFENSE COUNSEL FAILED TO CHALLENGE VICTIM IMPACT TESTIMONY THAT VIOLATED STATE AND FEDERAL LAW. BUT FOR COUNSEL'S DEFICIENT PERFORMANCE, THERE IS A REASONABLE PROBABILITY THAT THE OUTCOME OF MR. EVANS'S SENTENCING TRIAL WOULD HAVE BEEN DIFFERENT.**

At the outset of Mr. Evans's trial, defense counsel presented four motions to preclude or limit the consideration of victim impact evidence pursuant to S.C. Code Ann. § 16-3-20. At a motions hearing after jury selection, defense counsel informed the court they would prefer to address the victim impact motions "later on." App. 991; see App. 1001-02. Yet, while trial counsel's opening statement recognized the danger of the testimony—"listen to the [victim impact evidence] [but] understand what is trying to be accomplished here . . . this evidence is geared to make you angry . . . angry enough that you will vote to kill" (App. 1524)—counsel never renewed the objections to victim impact evidence.

Solicitor Betty Strom promised the sentencing jury that they would hear how Evans's "actions have affected so many people." App. 1517. She explained:

It's not simply the murder. It's not simply the murders, plus the kidnapping, plus the burglary. It is how that spreads out to his family and his law enforcement community, because remember one of the victims, Joe Sapinoso, was a law enforcement officer at the time he was killed.

App. 1517. Sheriff Loftis, in uniform, testified about the "devastating effect" that Joseph Sapinoso's murder had had on regional law enforcement agencies and individual officers within the department. App. 1533-34. Loftis further implied that grief after Sapinoso's

murder had so impacted local law enforcement agencies that officers were not able to perform their policing duties adequately for a period following the murders. App. 1525-35. At the Solicitor's prompt, he noted, "Joe actually worked inside this particular courthouse and this particular courtroom." App. 1532. Deputy Sheriff Georgia Tripp also testified in uniform. Much of Ms. Tripp's testimony also located Joe "here" in the courtroom. App. 1571. She described Sapinoso's work and how personable he was doing his work as courtroom security. App. 1572. Like Sheriff Loftis, she pointed out the broad scope of grief caused by Sapinoso's death. "I've sat in the court day after day and listened to victims of crimes, and I've just seen how it snowballs. It is not just the family. It snowballs on down." App. 1576.

**A. Deficient Performance and Prejudice under *Strickland v. Washington***

Ruling in *Payne v. Tennessee*, 501 U.S. 808 (1991), that the Constitution does not categorically bar victim impact evidence during the sentencing phase of a death penalty trial, the U.S. Supreme Court nevertheless cautioned that victim impact evidence should only depict the victim's "uniqueness as a human being" and should merely provide a "quick glimpse of the life" the defendant took. *Id.* at 825, 827. The Due Process Clause continues to bar victim impact evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair." *Id.* at 825; see, e.g., *State v. Young*, 196 S.W.3d 85, 109 (Tenn. 2006) (finding that testimony of coworker, while probative, was outweighed by the danger of unfair prejudice and went beyond the scope of permissible victim impact evidence as it "laid the debilitating grief of over one hundred people at Defendant's feet").

The testimony of Sheriff Loftis and Deputy Sheriff Tripp provided more than a "brief glimpse" of the victim's life and inflamed the jury's passions. *Payne*, 501 U.S. at

825-27. Their testimony about the impact of Joseph Sapinoso's death on the law enforcement "family" had to do with the personal feelings and emotional impact *across an expansive law enforcement network*. By contrast, there is *no* statement in their testimony on a subject elsewhere found admissible—the chilling effect on law enforcement work, following the death of an officer in the line of duty, due to concerns about officer safety. Cf. *U.S. v. Battle*, 173 F.3d 1343 (11<sup>th</sup> Cir. 1999); *U.S. v. Wilson*, 493 F.Supp.2d 364 (E.D.N.Y. 2006). The lack of such testimony is not surprising here because Joseph Sapinoso's death occurred in a tragic domestic incident that had nothing to do with his duties as law enforcement. The sheriffs' testimony was so unduly prejudicial that it rendered the trial fundamentally unfair. Counsel's failure to object violated *Strickland v. Washington*.

Counsel was also deficient in failing to seek a proffer and court ruling regarding the testimony of Marcia Sapinoso to keep it within the bounds of *Payne*. Ms. Sapinoso's detailed testimony at the sentencing proceeding about her experience of the crime—including her effort to work a gun with the 911 operator's help—was harrowing. See App. 1549-54. No less provocative was her description of what her grandson ("Bebo") went through during the incident ("staring at the [closet] ceiling"), and what he has gone through since. She recounted what Bebo had told her about why he was not attending the trial:

I said you are going to come down on Friday, and he said why. He didn't want to come here. He said why. And I said because we have to be there in the trial. But he don't go to Court. Only your mommy will. And he got upset, very upset, and he said what for. And I said, you know, for the trial, for what happened to us. And he said I thought they taken care of that already. And I said no, we have to go to trial first. And he was so upset. He said I am not going, mommy is not going there, she might get killed and I would be an orphan.

App. 1548. She also recounted her daughter's description of what Bebo did and said: "[S]he said he's just staring at the ceiling. And he said is grandmother going to be okay."

App. 1549. These statements of hearsay, and statements of hearsay within hearsay, were inadmissible, inflammatory, and impressible. See *State v. Kelley*, 343 S.C. 350, 370-71, 540 S.E.2d 851, 861 (2001).

The victim impact testimony as a whole contributed to an atmosphere of overwhelming sympathy for the victim and victim's family that, in combination with a trial in the victim's workplace and the Solicitor's appeals to the passions of the jurors during summation violated fundamental fairness. Recently, in addressing an emotional appeal by a victim's wife in a Louisiana capital trial, the Eastern District of Louisiana recognized:

This Court is not suggesting that the *bona fide* victim impact evidence that was introduced in this case reached that level [of a constitutional violation under *Payne*], in and of itself. What the Court is saying, however, is that the highly charged emotional content of the victim impact testimony created an atmosphere of overwhelming sympathy for the victim and the victim's family, along with the attendant genuine danger that any other unharnessed appeal to passion, prejudice or sympathy was likely to tip the scales into a Due Process violation of fundamental fairness. This is what the Court firmly believes happened at this trial and it began with the prosecution's *Payne* violation.

*U.S. v. Johnson*, 713 F.Supp.2d 595, 624 (E.D. La. 2010); see *United States v. Johnson*, 362 F.Supp.2d 1043, 1107 (N.D. Iowa 2005). In Evans's trial, following Marcia Sapinoso's testimony, Ms. Tripp testified—in uniform and in the same courtroom where she worked with Joseph Sapinoso. App. 1571. Directly before Ms. Sapinoso, Sheriff Loftis, at the Solicitor's prompt, made the similar point that “Joe actually worked inside this particular courthouse and this particular courtroom.” App. 1532. By failing to object to this victim impact testimony trial counsel allowed inadmissible hearsay, perpetuated a due process violation and a violation of the Eighth Amendment, and thus provided ineffective assistance. This Court should grant certiorari.

**THE SENTENCING SUMMATION WAS DESIGNED TO AROUSE THE PASSION AND PREJUDICE OF JURORS. THE SOLICITOR ASSERTED PERSONAL OPINIONS AS LAW, DIMINISHED THE JURORS' SENSE OF INDIVIDUAL RESPONSIBILITY FOR THE VERDICT, MISREPRESENTED THE PROPER SCOPE OF MITIGATING EVIDENCE, MADE UNREASONABLE INFERENCES, AND MISREPRESENTED THE NATURE OF ALTERNATIVE PUNISHMENTS.**

The Solicitor's highly improper remarks about general prison conditions, comparing a "big prison" to a "little city . . . with all the necessities of life" have been addressed *infra* at 71-82. The Solicitor's unfounded and misleading depiction of the domestic shooting as a gang crime has been discussed *infra* at 82-88. Additional parts of the Solicitor's argument also strayed from the fair and appealed to jurors' personal biases.

First, counsel was deficient for not objecting to the prosecutor's insertion of his personal opinions and judgment about the appropriate sentence, and the authority of the state judicial process. The Solicitor impermissibly emphasized that the process of selecting cases for the death penalty in South Carolina practically ensures that, in the chosen cases, death is the proper punishment (App. 1747, 1751), and implied that imposing the death penalty is each juror's civic responsibility given that the state has already sanctioned the case as being worthy of a death sentence (App. 1747-48). He informed the jury "we seek [the death penalty] only in those cases that are most appropriate. But there are circumstances where it is available for mean and evil people . . . And I will tell you it is reserved in this circuit for only the worst of the worse [*sic*]." App. 1751. He referred to Mr. Evans as "evil" and "mean," and offered his personal opinion on how many shots qualify for a death penalty: "Maybe one shot he could say I deserve life; maybe two shots, I deserve life; but not three and not four and not five and not six and not seven." App. 1759.

The Solicitor's statements, beyond the inflammatory potential of their graphic language, communicated to the jury that the State had already approved a death sentence in Mr. Evans's case. The South Carolina Supreme Court has made it quite clear by now that it is improper—and prejudicial—for a solicitor to impose his personal beliefs upon the jurors. See *State v. Northcutt*, 372 S.C. 207, 223, 641 S.E.2d 873, 881 (2007) (citing *Thompson v. Aiken*, 281 S.C. 239, 315 S.E.2d 110 (1984)); *State v. Woomer*, 277 S.C. 170, 175, 284 S.E.2d 357, 359 (1981) (citing Section 16-3-25(C)(1)); see *State v. Butler*, 277 S.C. 543, 545-47, 290 S.E.2d 420, 421-22 (S.C. 1982) (reversing where prosecutor emphasized that he already made death sentence decision). And diminishing the jury's responsibility for the verdict violates the state and federal constitutions. *Caldwell v. Mississippi*, 472 U.S. 320, 328-30 (1985); *Gardner v. Florida*, 430 U.S. 349 (1977); see *Woomer*, 277 S.C. at 175, 284 S.E.2d at 359-60.

Second, jurors have individual votes that they may change on their own volitions. *State v. Pittman*, 373 S.C. 527, 555, 647 S.E.2d 144, 158 (S.C. 2007); see *Von Dohlen*, 360 S.C. at 613, 602 S.E.2d at 746. A prosecutor cannot instruct the jurors to consider the evidence presented from a perspective other than their own. The Solicitor early in his summation informed jurors' that their verdict was the product of "collective reasoning." App. 1745-46. The decision, he stated, was "not intended to be a unilateral decision by one or two jurors," App. 1746; rather, it is "a collective reasoning of 12 people from the community" in which the jurors are to hear "each and every one of [their] fellow jurors' opinions" and are then to reach a decision "based on the give-and-take." App. 1746. The message of the argument was that decisions to impose the death penalty are not individual decisions based purely on the facts and law, but are decisions that should succumb to

majority opinion. This diminished the jury's sense of responsibility for imposing the death sentence, in violation of the Eighth Amendment under *Caldwell*, 472 U.S. at 328-30. Counsel was also deficient for not objecting to the prosecutor's efforts to stress that it was the jurors' duty to the community in this case to return a death sentence. Near the end of closing argument, the Solicitor told the jury, "I can tell you that whatever decision you make is going to ring like a bell outside of this courthouse as to the standard of conduct in this community. It will ring for all who will listen and all of those who are listening." App. 1760.

Third, "[t]o argue that it would be unfair for the defendant to live while the victim is dead, 'creates a *super-aggravator* applicable in every death case. No amount of mitigating evidence can counter this argument, and if the jury agrees they may not even consider mitigating evidence.'" *U.S. v. Johnson*, 713 F.Supp.2d at 632, (quoting *Le v. Mullin*, 311 F.3d 1002, 1015 (10<sup>th</sup> Cir. 2002) (emphasis in original)). Here the Solicitor made such a plea. App. 1749. He then returned to focus on sympathy for the victims' family. App. 1754. The prosecutor's emotional portrayal strayed over the line. Counsel was deficient for failing to object.

Fourth, the prosecutor explicitly told the jury that Mr. Evans's evidence "was not mitigation." App. 1754. "It didn't mitigate anything," he claimed. "It was designed to make you feel sorry for him and create sympathy, but that's not the reason you decide the appropriate punishment." App. 1754. But the Eighth Amendment gives the accused the right to introduce any relevant mitigating evidence—regarding any circumstances of the offense—during the sentencing phase of a capital trial. See *Lockett v. Ohio*, 438 U.S. 586 (1978). The State may not use its closing argument to divert the jury's attention from that evidence; nor may the State pressure the jury to reject mitigating evidence. See *State v.*

*White*, 246 S.C. at 506, 144 S.E.2d at 482; see *State v. Linder*, 276 S.C. 304, 311, 278 S.E.2d 335, 339 (1981). Mr. Evans's evidence was appropriate mitigation. The prosecutor's statement misled the jury and undermined Mr. Evans's constitutionally protected right. Counsel was deficient for not objecting.

Overall, the Solicitor's summation injected passion, prejudice, and arbitrary factors into the sentencing proceedings, in violation of S.C. Code Ann. § 16-3-25(C) and state and federal law. Defense counsel's failure to object was prejudicial because the Solicitor's remarks, considered in the context of the entire proceedings, "so infected the trial with unfairness as to make the resulting conviction a denial of due process," *Vasquez v. State*, 2010 WL 3120221, \*6 (S.C. Aug. 9, 2009) (quoting *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002)); see *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007) (evaluating closing argument for the undue influence of passion, prejudice, or any other arbitrary factor under S.C. Code Ann. § 16-3-25(C)). See *Donnelly v. DeChristoforo*, 416 U.S. 637, 644-47 (1974); *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994) (applying *Donnelly* and *Darden* to the sentencing phase of a capital trial). The prejudice from the Solicitor's remarks was never ameliorated by defense counsel or cured by the court. See App. 1743-1760. There is a reasonable probability, consequently, that trial counsel's complete failure to object to the Solicitor's summation was prejudicial. *Strickland v. Washington*, 466 U.S. 688 (1984). This Court should grant certiorari.

## CONCLUSION

Mr. Evans's Cross Petition for Writ of Certiorari raises substantial, meritorious legal issues, some of which are subject to recur at a new sentencing trial. For the reasons stated above, Mr. Evans's Cross Petition for Writ of Certiorari should be granted, and the issues ruled upon by this Court.

November 18, 2011.

A handwritten signature in black ink, appearing to read "William Harry Ehlied, II". The signature is written in a cursive style with a horizontal line underneath it.

WILLIAM HARRY EHLIES, II  
CHRISTOPHER WARREN SEEDS  
ATTORNEYS FOR THE RESPONDENT/  
PETITIONER