ALAN WILSON
ATTORNEY GENERAL

RECEIVED
DEC 3 2014
S.C. Supreme Court

December 3, 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: *Kamell Evans v. State*: Appellate Case No. 2011-188687;
Jonathan Kyle Binney v. State: Appellate Case No. 2012-212107;
John Kennedy Hughey v. State: Appellate Case No. 2010-170387.

Dear Mr. Shearouse:

Enclosed for filing in the above referenced cases are the original and fourteen (14) copies (for each case) of the State's *Response Brief of State of South Carolina to Brief of South Carolina Religious Leaders and Scholars as Amicus Curiae.*

Sincerely,

Donald J. Zelenka
Senior Assistant Deputy Attorney General

cc: William H. Ehlies, II, Esquire
Christopher Seeds, Esquire
Emily C. Paavola, Esquire
John H. Blume, Esquire
E. Charles Grose, Esquire
Tara Schultz Waters, Esquire
John Christopher Mills, Esquire
Trisha Allen, Victim Services

The Supreme Court of South Carolina

Kamell D. Evans, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

Appellate Case No. 2011-188687

ORDER

The request for an extension to serve and file the reply to the amicus brief is granted and extended until December 3, 2014. Pursuant to the order of the Supreme Court of South Carolina dated March 18, 2009 (www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2009-03-18-01), any further extension request must be based on a showing of good cause.

FOR THE COURT

BY _____
CLERK

Columbia, South Carolina

December 2, 2014

cc:
Melody Jane Brown, Esquire
William Harry Ehlies, II, Esquire
Christopher Seeds, Esquire
John Christopher Mills, Esquire

ALAN WILSON
ATTORNEY GENERAL

December 1, 2014

RECEIVED
DEC 1 2014
S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: *Kamell Evans v. State*: Appellate Case No. 2011-188687;
Jonathan Kyle Binney v. State: Appellate Case No. 2012-212107;
John Kennedy Hughey v. State: Appellate Case No. 2010-170387.

Dear Mr. Shearouse:

The State, would respectfully request an additional three (3) days in which to file a reply to the Amicus Brief. On November 20, 2014, this Court granted leave to South Carolina Religious Leaders and Scholars to file its amicus brief in the above captioned capital PCR appeal actions, and allowed the State ten (10) days in which to file a reply. The reply is currently due to be filed today, Monday, December 1, 2014. Senior Assistant Deputy Attorney General Donald J. Zelenka has been preparing the reply for each of the cases. However, Mr. Zelenka is presently ill and has been unable to complete the brief for filing today. Cognizant, though, of the fact that Mr. Evans' case is scheduled for oral argument on Tuesday, December 9, 2014, Respondent is requesting only a brief extension up to and including Wednesday, December 3, 2014, to file the reply in each of the above listed cases.

Thank you for your consideration.

Sincerely,

Melody J. Brown
Senior Assistant Attorney General

/MJB
cc: William H. Ehlies, II, Esquire
Christopher Seeds, Esquire
Emily C. Paavola, Esquire
John H. Blume, Esquire
E. Charles Grose, Esquire
Tara Schultz Waters, Esquire
John Christopher Mills, Esquire
Trisha Allen, Victim Services

The Supreme Court of South Carolina

Kamell D. Evans, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

Appellate Case No. 2011-188687

ORDER

The Motion for Leave to File Brief of South Carolina Religious Leaders and Scholars as Amicus Curiae in Support of Respondent/Petitioner is granted. Any reply to the amicus curiae brief should be served and filed within ten (10) days of the date of this order.

C.J.

J.

J.

J.

J.

Columbia, South Carolina

November 20, 2014

cc:
Melody Jane Brown, Esquire
William Harry Ehlies, II, Esquire
Christopher Seeds, Esquire
John Christopher Mills, Esquire

Chris Mills Law

November 17, 2014

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED
NOV 17 2014
S.C. Supreme Court

Re: *Binney v. State*, No. 2012-212107
State v. Evans, No. 2011-188687
State v. Hughey, No. 2010-170387

Dear Mr. Shearouse,

Please find enclosed for filing, with proof of service, the Motion for Leave to File Brief of South Carolina Religious Leaders and Scholars as *Amicus Curiae* in support of Mr. Binney, Mr. Evans, and Mr. Hughey in their cases on appeal. Copies of the Brief of South Carolina Religious Leaders and Scholars as *Amicus Curiae* are also enclosed in accordance with the rules of court.

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

Sincerely,

J. Christopher Mills

cc: William Edgar Salter, III
John H. Blume
Emily C. Paavola
Melody Jane Brown
William Harry Ehlies, II
Christopher Seeds
Donald J. Zelenka
E. Charles Grose, Jr.
Tara Schultz Waters

2118 Lincoln Street
Columbia, South Carolina, 29201

p. 803.748.9533
f. 803.753.9123

Post Office Box 8475,
Columbia, South Carolina, 29202

RECEIVED

NOV 17 2014

S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Honorable D. Garrison Hill, Circuit Court Judge

CA No. 06-CP-23-7719
Appellate Case No. 2011-188687

KAMELL DELSHAWN EVANS .....*Respondent/Petitioner*,

v.

STATE OF SOUTH CAROLINA .....*Petitioner/Respondent.*

MOTION FOR LEAVE TO FILE BRIEF OF SOUTH CAROLINA RELIGIOUS LEADERS AND SCHOLARS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT/PETITIONER

J. CHRISTOPHER MILLS
SC Bar No. 9067
J. Christopher Mills, LLC
2118 Lincoln Street
Columbia, SC 29202
(803) 748-9533

Counsel for *Amicus Curiae*
South Carolina Religious Leaders and Scholar

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to Rule 213, SCACR, the undersigned amici respectfully move for leave to file a brief of amici curiae. The undersigned amici comprise a group of influential religious leaders and scholars of various faiths in South Carolina. Together, they collectively represent nearly every major religious group in this State. They offer a valuable perspective on the role of mercy in society in general, in their respective faith doctrines and traditions, and in American history and jurisprudence. Their interest in this case stems from their unified view that mercy plays an indispensable role in capital sentencing in South Carolina, and that jurors must be permitted to act mercifully, if they so choose, in response to the evidence presented. A brief from the undersigned amici is desirable because it represents the views of a large portion of this State's population and their unique perspective on the broader social and historical context in which this Court will consider whether to reaffirm its prior recognition of mercy as an appropriate consideration in the capital sentencing process.

WHEREFORE, the undersigned group of South Carolina Religious Leaders and Scholars respectfully moves the Court to accept and file in this cause the Brief of Amici Curiae, attached to this motion.

Respectfully submitted,

BY: _____

J. CHRISTOPHER MILLS
SC Bar No. 9067
J. Christopher Mills, LLC
2118 Lincoln Street
Columbia, SC 29202
(803) 748-9533

Counsel for *Amicus Curiae*
South Carolina Religious Leaders and Scholars

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211
1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

November 13, 2014

Melody Jane Brown, Esquire
PO Box 11549
Columbia SC 29211-1549

William Harry Ehlies, II, Esquire
310 Mills Ave., Ste. 201
Greenville SC 29605

Christopher Seeds, Esquire
P.O. Box 3931
Ithaca NY 14852

Re: Kamell D. Evans v. State
Appellate Case No. 2011-188687

Dear Counsel:

This case is scheduled for oral argument at 9:30 a.m. on Tuesday, December 9, 2014. The following oral argument times have been allocated:

Petitioner/Respondent	20 minutes
Respondent/Petitioner	20 minutes
Petitioner/Respondent in Reply	10 minutes

Very truly yours,

David E. Shearouse
85

CLERK

WILLIAM H. EHLIES, P.A.
ATTORNEY-AT-LAW
BUILDING A, SUITE 201
310 MILLS AVENUE
GREENVILLE, SOUTH CAROLINA 29605
864-232-3503
FACSIMILE NUMBER 864-232-4854
EIN: 57-0703576

RECEIVED
SEP 29 2014
S.C. SUPREME COURT

September 26, 2014

Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
PO Box 11330
Columbia, South Carolina 29211

Re: Kamell D. Evans v State of South Carolina
Appellate Case No. 2011-188687

Dear Mr. Shearouse:

Please be advised that Chris Seeds and I have no scheduling conflicts throughout the days of December 9th, 10th, and 11th.

Sincerely yours,



WILLIAM H. EHLIES, II
Email: hank@ehlieslaw.com

cc: Melody Jane Brown, Assistant Attorney General
Christopher Seeds, Attorney at Law

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211
1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

September 22, 2014

Melody Jane Brown, Esquire
PO Box 11549
Columbia SC 29211-1549

William Harry Ehlies, II, Esquire
310 Mills Ave., Ste. 201
Greenville SC 29605

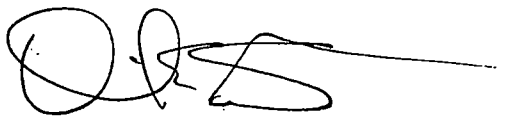
Christopher Seeds, Esquire
P.O. Box 3931
Ithaca NY 14852

Re: Kamell D. Evans v. State
Appellate Case No. 2011-188687

Dear Counsel:

This case will likely be considered during the December 2014 term of Court. The Court will hold arguments on December 9, 10 and 11. If you have a scheduling conflict with any of these dates, please advise the Court of the specific nature of that conflict no later than September 29, 2014.

Very truly yours,



CLERK

WILLIAM H. EHLIES, P.A.
ATTORNEY-AT-LAW
BUILDING A, SUITE 201
310 MILLS AVENUE
GREENVILLE, SOUTH CAROLINA 29605
864-232-3503
FACSIMILE NUMBER 864-232-4854
EIN: 57-0703576

September 12, 2014

RECEIVED
SEP 16 2014
S.C. Supreme Court

Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: *Kamell Evans v State of SC*
Case No. 2006-CP-23-7719
App C.A. No. 2011-188687

Dear Mr. Shearouse:

Enclosed please find an original and 14 copies of the Respondent/Petitioner's Reply Brief together with our Proof of Service. Please return our clocked copy in the envelope provided.

Should you require anything further, please do not hesitate to contact this office. Thank you.

Sincerely yours,



WILLIAM H. EHLIES, II
Email: hank@ehlieslaw.com

cc: Melody J. Brown, Assistant Attorney General
Christopher Warren Seeds, Attorney at Law

WILLIAM H. EHLIES, P.A.
ATTORNEY-AT-LAW
BUILDING A, SUITE 201
310 MILLS AVENUE
GREENVILLE, SOUTH CAROLINA 29605
864-232-3503
FACSIMILE NUMBER 864-232-4854
EIN: 57-0703576

September 11, 2014

RECEIVED
SEP 15 2014
S.C. SUPREME COURT

Attn: Debbie Hopkins
Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Kamell Evans v State of South Carolina
2011-188687

Dear Ms. Hopkins:

Enclosed please find the corrected Proof of Service for the above matter.

Sincerely yours,

WILLIAM H. EHLIES, P.A.

Jenny M. Knight
Legal Assistant
Email: jenny@ehlieslaw.com

/jmk

enclosures

cc: Melody Jane Brown, Assistant Attorney General

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Capital PCR: 06-CP-7719
Honorable D. Garrison Hill
Circuit Court Judge
2011-188687

Kamell Evans, Respondent/Petitioners,

-vs-

State of South Carolina, Respondents/Respondent.

PROOF OF SERVICE

I, Jenny M. Knight, Legal Assistant for William H. Ehlies, II hereby certify that I served the Amended Motion to Enlarge Time to File Respondent/Petitioner's Reply Brief by mailing US First Class mail to the following:

Melody Jane Brown
Assistant Attorney General
Post Office Box 11549
Columbia South Carolina 29211

On the 4th day of September 2014.



Jenny M. Knight, Legal Assistant
WILLIAM H. EHLIES, II
ATTORNEY FOR THE APPELLANT
Building A, Suite 201
310 Mills Avenue
Greenville, South Carolina 29605
1-864-232-3503
1-864-232-4854(f)
hank@ehlieslaw.com

WILLIAM H. EHLIES, P.A.
ATTORNEY-AT-LAW
BUILDING A, SUITE 201
310 MILLS AVENUE
GREENVILLE, SOUTH CAROLINA 29605
864-232-3503
FACSIMILE NUMBER 864-232-4854
EIN: 57-0703576

September 4, 2014

RECEIVED
SEP 5 2014
S.C. SUPREME COURT

Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Kamell Evans v State of SC
Capital PCR 06-CP-7719
Case No. 2011-188687

Dear Mr. Shearouse:

Enclosed please find an original plus 6 copies of our Amended Motion to Enlarge the Time to File Respondent's/Petitioner's Reply Brief together with Proof of Service for the above matter.

Should you require anything further, please do not hesitate to contact this office. Thank you.

Sincerely yours,



WILLIAM H. EHLIES, II
Email: hank@ehlieslaw.com

cc: Melody J. Brown, Assistant Attorney General
Chris Seeds, Attorney at Law

RECEIVED
SEP - 9 2014
S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Honorable D. Garrison Hill
Circuit Court Judge
2011-188687

Kamell Evans,

Respondent/Petitioner

-vs-

State of South Carolina,

Petitioner/Respondent.

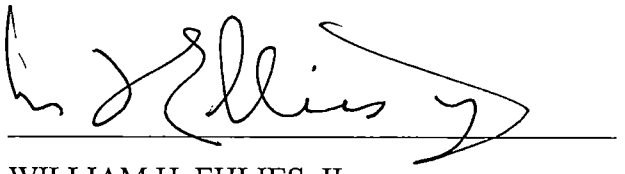
CAPITAL POST CONVICTION RELIEF CASE

-AMENDED-

MOTION TO ENLARGE TIME TO FILE REPLY BRIEF

The attorney for the Respondent/Petitioner hereby moves the Court for an Order granting an additional 10 days to file his Reply Brief. The attorney for the Repondent/Petitioner is involved in a case with the US District Court in the matter of Beatriz Torres Dennis as Personal Representative of the Estate of Andrew Orval Torres vs. City of Greenville, et al, 6:12-1762. Petitioner/Respondent's Reply Brief is dated August 21, 2014 and was received on August 25, 2014. The State's Attorney General assigned to the case, Melody Jane Brown, has no objection.

The Respondent/Petitioner has not sought any other extension for this filing. The extension makes Respondent/Petitioner's Reply Brief due on September 15, 2014.



WILLIAM H. EHLIES, II
CHRISTOPHER WARREN SEEDS
ATTORNEY FRO THE RESPONDENT/PETITIONER
Building A, Suite 201
310 Mills Avenue
Greenville, South Carolina 29605
Phone 864-232-3503
Fax 864-232-4854
hank@ehlieslaw.com

cc: Melody Jane Brown, Attorney at Law
Christopher Warren Seeds, Attorney at Law

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Capital PCR: 06-CP-7719
Honorable D. Garrison Hill
Circuit Court Judge
2011-188687

Kamell Evans, Respondent/Petitioners,

-vs-

State of South Carolina, Respondents/Respondent.

PROOF OF SERVICE

I, Jenny M. Knight, Legal Assistant for William H. Ehlies, II hereby certify that I served the Amended Motion to Enlarge Time to File Respondent/Petitioner's Reply Brief by mailing US First Class mail to the following:

Melody Jane Brown
Assistant Attorney General
Post Office Box 11549
Columbia South Carolina 29211

On the 4th day of August 2014.

Jenny M. Knight, Legal Assistant
WILLIAM H. EHLIES, II
ATTORNEY FOR THE APPELLANT
Building A, Suite 201
310 Mills Avenue
Greenville, South Carolina 29605
1-864-232-3503
1-864-232-4854(f)
hank@ehlieslaw.com

RECEIVED
SEP 09 2014
S.C. SUPREME COURT

The Supreme Court of South Carolina

Kamell D. Evans, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

Appellate Case No. 2011-188687

ORDER

The request for an extension to serve and file the reply brief on behalf of respondent/petitioner is granted and extended until September 12, 2014. Pursuant to the order of the Supreme Court of South Carolina dated March 18, 2009 (www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2009-03-18-01), any further extension request must be based on a showing of good cause.

FOR THE COURT

BY _____
CLERK

Columbia, South Carolina

September 5, 2014

cc:
Melody Jane Brown, Esquire
William Harry Ehlies, II, Esquire
Christopher Seeds, Esquire

WILLIAM H. EHLIES, P.A.
ATTORNEY-AT-LAW
BUILDING A, SUITE 201
310 MILLS AVENUE
GREENVILLE, SOUTH CAROLINA 29605
864-232-3503
FACSIMILE NUMBER 864-232-4854
EIN: 57-0703576

August 29, 2014

RECEIVED
SEP - 4 2014
S.C. Supreme Court

Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Kamell Evans v State of SC
Capital PCR 06-CP-7719
Case No. 2011-188687

Dear Mr. Shearouse:

Enclosed please find an original plus 6 copies of the following of Respondent/Petitioner's Motion to Enlarge the Time to File Respondent's/Petitioner's Return to State's Brief together with Proof of Service for the above matter.

Should you require anything further, please do not hesitate to contact this office. Thank you.

Sincerely yours,

WILLIAM H. EHLIES, II
Email: hank@ehlieslaw.com

cc: Melody J. Brown, Assistant Attorney General
Chris Seeds, Attorney at Law

RECEIVED
SEP - 4 2014
S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Honorable D. Garrison Hill
Circuit Court Judge
2011-188687

Kamell Evans,

Respondent/Petitioner,

-vs-

State of South Carolina

Petitioner/Respondent.

CAPITAL POST CONVICTION RELIEF CASE

MOTION TO ENLARGE TIME TO FILE
RESPONDENT/PETITIONER'S BRIEF OF PETITIONER

The attorney for the Respondent/Petitioner hereby moves the Court for an order granting an additional 10 days to file his Brief. The Attorney for Respondent/Petitioner is involved in a case t with the US District Court in the matter of Beatriz Torres Dennis as Personal Representative of the Estate of Andrew Orval Torres vs. City of Greenville et al, 6:12-1762. Petitioner/Respondent's Brief is dated August 21, 2014 and was received on August 25, 2014. The State's Attorney General assigned to the case, Melody Jane Brown, has no objection. The Respondent/Petitioner has not sought any prior extension for this filing. The responsive brief was received on August 25, 2014

and is due on or before September 3, 2014. The extension makes the pleading due on or before September 15, 2014.

August 29, 2014

WILLIAM H. EHLIES, II
CHRISTOPHER WARREN SEEDS
ATTORNEYS FOR THE RESPONDENT/
PETITIONER
Building A, Suite 201
310 Mills Avenue
Greenville, South Carolina 29605
864-232-3503
864-232-4854 (facsimile)
hank@ehlieslaw.com

cc: Melody Jane Brown, Esq.
Christopher Warren Seeds, Esq

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
SEP - 4 2014
S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Capital PCR: 06-CP-7719
Honorable D. Garrison Hill
Circuit Court Judge
2011-188687

Kamell Evans, Respondent/Petitioners,

-vs-

State of South Carolina, Respondents/Respondent.

PROOF OF SERVICE

I, Jenny M. Knight, Legal Assistant for William H. Ehlies, II hereby certify that I served the Motion to Enlarge Time to File Respondent/Petitioner's Return to State's Brief by mailing US First Class mail to the following:

Melody Jane Brown
Assistant Attorney General
Post Office Box 11549
Columbia South Carolina 29211

On the 29th day of August 2014.

Jenny M. Knight, Legal Assistant
WILLIAM H. EHLIES, II
ATTORNEY FOR THE APPELLANT
Building A, Suite 201
310 Mills Avenue
Greenville, South Carolina 29605
1-864-232-3503
1-864-232-4854(f)
hank@ehlieslaw.com

ALAN WILSON
ATTORNEY GENERAL

August 21, 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Kamel Evans v. The State of South Carolina
Appeal from Greenville County–Capital PCR
Appellate Case No. 2011-188687

Dear Mr. Shearouse:

Please find enclosed one (1) unbound and fourteen (14) bound copies of the Petitioner/Respondent's Brief of Respondent in the above-referenced action.

Thank you for your assistance. Please contact me if there are any questions or concerns.

Sincerely,

Melody J. Brown
Senior Assistant Attorney General

MJB/mv

cc: William H. Ehlies, II, Esquire (with enclosure)
Christopher Warren Seeds, Esquire (with enclosure)
Trisha Allen, Victim Services (with enclosure)

RECEIVED
AUG 27 2014
S.C. Supreme Court

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, SC 29211-1549 • TELEPHONE 803-734-3970 • FACSIMILE 803-253-6283

RECEIVED
AUG - 5 2014
S.C. Supreme Court

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
AUG 04 2014
SC Court of Appeals

August 4, 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Kamel Evans v. The State of South Carolina
Appeal from Greenville County–Capital PCR
Appellate Case No. 2011-188687

Dear Mr. Shearouse:

Please find enclosed one (1) unbound and fourteen (14) bound copies of the Petitioner/Respondent's Reply to Brief of Respondent on Behalf of Respondent/Petitioner in the above-referenced action.

Thank you for your assistance. Please contact me if there are any questions or concerns.

Sincerely,

Melody J. Brown
Senior Assistant Attorney General

MJB/mv

cc: William H. Ehlies, II, Esquire (with enclosure)
Christopher Warren Seeds, Esquire (with enclosure)
Trisha Allen, Victim Services (with enclosure)

The Supreme Court of South Carolina

Kamell D. Evans, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

Appellate Case No. 2011-188687

ORDER

For good cause shown, the request for an extension to serve and file the brief of respondent on behalf of petitioner/respondent is granted and extended until August 21, 2014. Pursuant to the order of the Supreme Court of South Carolina dated March 18, 2009 (www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2009-03-18-01), any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

FOR THE COURT

BY Brenda F. Shealy
CHIEF DEPUTY CLERK

Columbia, South Carolina

August 6, 2014

cc:
Melody Jane Brown, Esquire
William Harry Ehlies, II, Esquire
Christopher Seeds, Esquire

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
AUG - 5 2014
S.C. Supreme Court

August 5, 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Kamell D. Evans v. The State of South Carolina
Appeal from Greenville County–Capital PCR
Appellate Case No. 2011-188687

Dear Mr. Shearouse:

Enclosed please find the original plus six (6) copies of the Petition for Extension to file the Brief of Respondent on Behalf of Petitioner/Respondent dated today, together with proof of service, in the above mentioned matter.

Thank you for your consideration.

Sincerely,

Melody J. Brown
Senior Assistant Attorney General

MJB/mv

cc: William H. Ehlies, II, Esquire
Christopher Seeds, Esquire
Trisha Allen, Victim Services

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
(Capital PCR: 2006-CP-23-7719)
The Honorable D. Garrison Hill, Circuit Court Judge

RECEIVED
AUG - 5 2014
S.C. Supreme Court

Kamell D. Evans,

Respondent/Petitioner,

v.

State of South Carolina,

Petitioner/Respondent.

Appellate Case No. 2011-188687

PETITIONER/RESPONDENT'S MOTION FOR EXTENSION OF TIME TO FILE BRIEF OF RESPONDENT

Petitioner/Respondent, the State, moves this Court for an additional fifteen (15) days extension of time in which to file the Brief of Respondent on behalf of Petitioner/Respondent. This is the second request for an extension of time to file the State's brief of respondent in the cross-appeal. Undersigned counsel for the State has completed substantial work in preparation for the brief; however, counsel would respectfully request a brief fifteen (15) day extension to complete the brief. In support of this request, undersigned counsel would respectfully show the Court:

1. In the last thirty (30) days, undersigned counsel has been scheduled for a number of other state matters and federal matters in addition to work on the petition. These include, but are not limited to, the following: prepared for and attended a scheduling conference and status conference on July 7th, prepared for and presented argument at a motion hearing on July 15th and thereafter drafted and filed a proposed order, prepared and filed a reply in connection with a

separate motion, and participated in a telephone conference in a capital post-conviction relief action in state circuit court (*William Dickerson*); prepared and filed a petition for writ of certiorari in another capital post-conviction relief action on appeal in this Court (*Kenneth Simmons*); received and reviewed a substituted appellate opinion in a non-capital murder direct appeal in the South Carolina Court of Appeals (*Clarence Jenkins*); prepared and filed a response to motion to amend/motion to substitute counsel in another capital case in federal habeas (*Brad Sigmon*); participated in a telephone deposition in another capital post-conviction relief action still pending in the state circuit court after continuance of the evidentiary hearing (*Andres Torres*); prepared and filed a return to the petition for writ of certiorari in another capital post-conviction relief action on appeal in this Court (*Stephen Corey Bryant*); reviewed two Reports and Recommendations in two federal habeas actions (*Demetric Hardaway; Kendall Green*); completed and filed a reply brief in this same cross-appeal (*Kamell Evans*); and, reviewed and prepared for filing this week a final brief of respondent in a non-capital murder direct appeal in the South Carolina Court of Appeals (*Carvin Holman*). Additionally, counsel has been working on a return to petition in one of the capital cases listed above currently also on cross-appeal (*Kenneth Simmons*); and preparing for a motions hearing scheduled for August 12th in one of the above referenced capital cases (*William Dickerson*). Counsel also notes she has encountered technical difficulties resulting from a document management change and conversion process that has slowed the process of preparing the brief from the original return.

2. Due to this heavy case load, and technical difficulties, undersigned counsel for Petitioner has not been able to complete the brief. However, as noted, counsel has now completed substantial work in preparation for completion of the brief and requests only a brief extension of fifteen (15) days in which to finish, and have the document bound to serve and file. Counsel will continue to work diligently to complete the brief.

3. It is undersigned counsel understanding that opposing counsel, Mr. Ehlies, has no objection to this request for a fifteen (15) day extension of time in which to file the brief.

THEREFORE, undersigned counsel for Petitioner/Respondent, the State, for all the foregoing reasons, respectfully requests an additional extension of fifteen (15) days, up to and including August 21, 2014, to complete, serve and file the brief.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

MELODY J. BROWN
Senior Assistant Attorney General
S.C. Bar No.: 14244

BY: _____
MELODY J. BROWN

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 2921
(803) 734-6305

August 5, 2014.
Columbia, South Carolina.

ATTORNEYS FOR PETITIONER/RESPONDENT

I have reviewed and approve this request:

_____
DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
(Capital PCR: 2006-CP-23-7719)
The Honorable D. Garrison Hill, Circuit Court Judge

Kamell D. Evans, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

Appellate Case No: 2011-188687

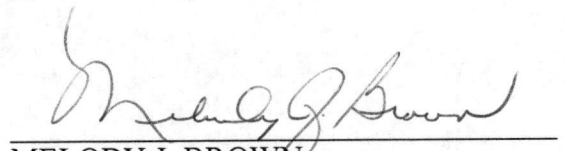
PROOF OF SERVICE

I, Melody J. Brown, hereby certify that the *Petitioner/Respondent's Motion for Extension of Time to File Brief of Respondent* has been served upon Respondent/Petitioner by depositing one copy in the United States mail, postage prepaid, to each of his attorneys of record, addressed as follows:

William H. Ehlies, II, Esquire
Building A, Suite 201
310 Mills Avenue
Greenville, SC 29605

Christopher Warren Seeds, Esquire
Post Office Box 3931
Ithaca, NY 14852

This 5th day of August, 2014.



MELODY J. BROWN
Senior Assistant Attorney General
S.C. Bar No. 14244

The Supreme Court of South Carolina

Kamell D. Evans, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

Appellate Case No. 2011-188687

ORDER

The request for an extension to serve and file the reply brief on behalf of petitioner/respondent is granted and extended until August 4, 2014. Pursuant to the order of the Supreme Court of South Carolina dated March 18, 2009 (www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2009-03-18-01), any further extension request must be based on a showing of good cause.

FOR THE COURT

BY _____
CLERK

Columbia, South Carolina

July 29, 2014

cc:
Melody Jane Brown, Esquire
William Harry Ehlies, II, Esquire
Christopher Seeds, Esquire

ALAN WILSON
ATTORNEY GENERAL

July 28, 2014

RECEIVED
JUL 28 2014
S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Kamell Evans v. The State of South Carolina
Appeal from Greenville County–Capital PCR
Appellate Case No. 2011-188687

Dear Mr. Shearouse:

The State's Reply brief to the Return of the Respondent/Petitioner's Brief in the above-referenced action is due to be filed and served today, July 28, 2014. Due to my heavy caseload, I have not been able to complete the reply. Therefore, I respectfully request an extension of five (5) days. This is the first extension request for this stage of the proceedings, and the undersigned will work diligently to complete the brief within the time requested and avoid any additional delay.

I have consulted with opposing counsel, Mr. Ehlies, and he has informed me that he has no objection to this request.

Thank you for your consideration.

Sincerely,

Melody J. Brown
Senior Assistant Attorney General

MJB/mv

cc: William H. Ehlies, II, Esquire
Christopher Seeds, Esquire
Trisha Allen, Victim Services

WILLIAM H. EHLIES, P.A.
ATTORNEY-AT-LAW
BUILDING A, SUITE 201
310 MILLS AVENUE
GREENVILLE, SOUTH CAROLINA 29605
864-232-3503
FACSIMILE NUMBER 864-232-4854
EIN: 57-0703576

RECEIVED
JUL 24 2014
S.C. Supreme Court

July 22, 2014

Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: *Kamell Evans v State of SC*
Case No. 2006-CP-23-7719
App C.A. No. 2011-188687

Dear Mr. Shearouse:

Enclosed please find an original and 14 copies of the Respondent's Brief on Behalf of Respondent/Petitioner. These are being filed to replace those filed on July 16, 2014 to correct the caption of the cover page. Please return a clocked copy in the envelope provided.

Should you require anything further, please do not hesitate to contact this office. Thank you.

Sincerely yours,

WILLIAM H. EHLIES, II
Email: hank@ehlieslaw.com

cc: Melody J. Brown, Assistant Attorney General
Christopher Warren Seeds, Attorney at Law

WILLIAM H. EHLIES, P.A.
ATTORNEY-AT-LAW
BUILDING A, SUITE 201
310 MILLS AVENUE
GREENVILLE, SOUTH CAROLINA 29605
864-232-3503
FACSIMILE NUMBER 864-232-4854
EIN: 57-0703576

RECEIVED
JUL 21 2014
S.C. Supreme Court

June 16, 2014

Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

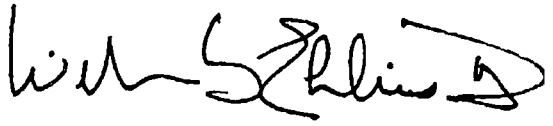
Re: *Kamell Evans v State of SC*
Case No. 2006-CP-23-7719
App C.A. No. 2011-188687

Dear Mr. Shearouse:

Enclosed please find an original and 14 copies of the Return of the Respondent/Petitioner along with Proof of Service. Please return a clocked copy in the envelope provided.

Should you require anything further, please do not hesitate to contact this office. Thank you.

Sincerely yours,



WILLIAM H. EHLIES, II
Email: hank@ehlieslaw.com

cc: Melody J. Brown, Assistant Attorney General
Christopher Warren Seeds, Attorney at Law

The Supreme Court of South Carolina

Kamell D. Evans, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

Appellate Case No. 2011-188687

ORDER

The request for an extension to serve and file the brief of respondent on behalf of petitioner/respondent is granted and extended until August 6, 2014. Pursuant to the order of the Supreme Court of South Carolina dated March 18, 2009 (www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2009-03-18-01), any further extension request must be based on a showing of good cause.

FOR THE COURT

BY _____
CLERK

Columbia, South Carolina

July 8, 2014

cc:
Melody Jane Brown, Esquire
William Harry Ehlies, II, Esquire
Christopher Seeds, Esquire

ALAN WILSON
ATTORNEY GENERAL

July 7, 2014

RECEIVED
JUL - 7 2014
S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: The State v. Kamell Evans
Appeal from Greenville County–Capital PCR
Appellate Case No. 2011-188687

Dear Mr. Shearouse:

The State's Return to Mr. Evans' Brief of Respondent/Petitioner in the above-referenced action is due to be filed and served today, July 7, 2014. Due to my heavy caseload, I have not been able to complete the return. Therefore, I respectfully request an extension of thirty (30) days. This is the first extension request for this stage of the proceedings, and the undersigned will work diligently to complete the brief within the time requested and avoid any additional delay.

I have consulted with opposing counsel, Mr. Ehlies, and he has informed me that he has no objection to this request.

Thank you for your consideration.

Sincerely,

Melody J. Brown
Senior Assistant Attorney General

MJB/mv

cc: William H. Ehlies, II, Esquire
Christopher Seeds, Esquire
Trisha Allen, Victim Services

The Supreme Court of South Carolina

Kamell D. Evans, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

Appellate Case No. 2011-188687

ORDER

The request for an extension to serve and file the brief of respondent on behalf of respondent/petitioner is granted and extended until July 16, 2014. Pursuant to the order of the Supreme Court of South Carolina dated March 18, 2009 (www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2009-03-18-01), any further extension request must be based on a showing of good cause.

FOR THE COURT

BY _____
CLERK

Columbia, South Carolina

June 16, 2014

cc:
Melody Jane Brown, Esquire
William Harry Ehlies, II, Esquire
Christopher Seeds, Esquire

WILLIAM H. EHLIES, P.A.
ATTORNEY-AT-LAW
BUILDING A, SUITE 201
310 MILLS AVENUE
GREENVILLE, SOUTH CAROLINA 29605
864-232-3503
FACSIMILE NUMBER 864-232-4854
EIN: 57-0703576

June 12, 2014

RECEIVED
JUN 16 2014
S.C. SUPREME COURT

Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Kamell Evans v State of SC
Capital PCR 06-CP-7719
Case No. 2011-188687

Dear Mr. Shearouse:

Enclosed please find an original plus 6 copies of the following of Respondent/Petitioner's Motion to Enlarge the Time to File Respondent's/Petitioner's Return to State's Brief together with Proof of Service for the above matter.

Should you require anything further, please do not hesitate to contact this office. Thank you.

Sincerely yours,



WILLIAM H. EHLIES, II
Email: hank@ehlieslaw.com

cc: Melody J. Brown, Assistant Attorney General
Chris Seeds, Attorney at Law

STATE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Capital PCR: 06-CP-7719
Honorable D. Garrison Hill
Circuit Court Judge
2011-188687

RECEIVED
JUN 16 2014
S.C. SUPREME COURT

Kamell Evans, Respondent/Petitioner,

-vs-

State of South Carolina, Petitioner/Respondent.

MOTION TO ENLARGE TIME TO FILE
RESPONDENT/PETITIONER'S RETURN TO STATE'S BRIEF

The attorney for the Respondent/Petitioner hereby moves the Court for an Order granting an additional 30 days in which to file his Return to the State's Brief. Counsel for the State, Melody Brown, has no objection to the enlargement of time. The Respondent/Petitioner has not requested an extension for the filing of the Return prior to this request. The Brief is due July 17, 2014.



WILLIAM H. EHLIES, II
CHRISTOPHER WARREN SEEDS
ATTORNEYS FOR THE RESPONDENT/
PETITIONER
Building A, Suite 201
310 Mills Avenue
Greenville, South Carolina 29605
Phone 864-232-3503/Fax 864-232-4854
hank@ehlieslaw.com

CC: Melody Jane Brown, Esq.
Christopher Warren Seeds, Esq

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Capital PCR: 06-CP-7719
Honorable D. Garrison Hill
Circuit Court Judge
2011-188687

RECEIVED
JUN 16 2014
S.C. SUPREME COURT

Kamell Evans, Respondent/Petitioners,

-vs-

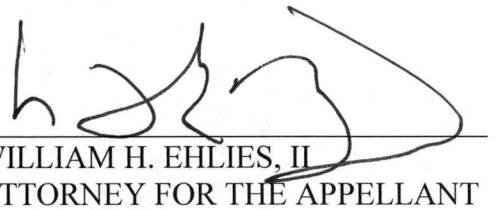
State of South Carolina, Respondents/Respondent.

PROOF OF SERVICE

I, William H. Ehlies, hereby certify that I served the Motion to Enlarge Time to File Respondent/Petitioner's Return to State's Brief by mailing US First Class mail to the following:

Melody Jane Brown
Assistant Attorney General
Post Office Box 11549
Columbia South Carolina 29211

On the 12th day of June 2014.



WILLIAM H. EHLIES, II
ATTORNEY FOR THE APPELLANT
Building A, Suite 201
310 Mills Avenue
Greenville, South Carolina 29605
1-864-232-3503
1-864-232-4854(f)
hank@ehlieslaw.com

WILLIAM H. EHLIES, P.A.
ATTORNEY-AT-LAW
BUILDING A, SUITE 201
310 MILLS AVENUE
GREENVILLE, SOUTH CAROLINA 29605
864-232-3503
FACSIMILE NUMBER 864-232-4854
EIN: 57-0703576

RECEIVED
JUN - 6 2014
S.C. Supreme Court

June 4, 2014

Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: *Kamell Evans v State of SC*
Case No. 2006-CP-23-7719
App C.A. No. 2011-188687

Dear Mr. Shearouse:

Enclosed please find an original and 14 copies of the Respondent/Petitioner's Brief along with Proof of Service. Please return a clocked copy in the envelope provided.

Should you require anything further, please do not hesitate to contact this office. Thank you.

Sincerely yours,



WILLIAM H. EHLIES, II
Email: hank@ehlieslaw.com

cc: Melody J. Brown, Assistant Attorney General
Christopher Warren Seeds, Attorney at Law

WILLIAM H. EHLIES, P.A.
ATTORNEY-AT-LAW
BUILDING A, SUITE 201
310 MILLS AVENUE
GREENVILLE, SOUTH CAROLINA 29605
864-232-3503
FACSIMILE NUMBER 864-232-4854
EIN: 57-0703576

May 19, 2014

RECEIVED
MAY 22 2014
S.C. Supreme Court

Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Kamell Evans v State of SC
Case No. 2011-188687

Dear Mr. Shearouse:

Enclosed please find an original plus 6 copies of the following of Respondent/Petitioner's Motion to Enlarge the Time to File Respondent's/Petitioner's Brief together with Proof of Service for the above matter.

Should you require anything further, please do not hesitate to contact this office. Thank you.

Sincerely yours,

WILLIAM H. EHLIES, II
Email: hank@ehlieslaw.com

cc: Melody J. Brown, Assistant Attorney General
Chris Seeds, Attorney at Law

RECEIVED
MAY 22 2014
S.C. SUPREME COURT

RECEIVED
MAY 22 2014
S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Honorable D. Garrison Hill
Circuit Court Judge
2011-188687

Kamell Evans,

Respondent/Petitioner,

-vs-

State of South Carolina

Petitioner/Respondent.

CAPITAL POST CONVICTION RELIEF CASE

MOTION TO ENLARGE TIME TO FILE RESPONDENT/PETITIONER'S BRIEF

The attorney for the Respondent/Petitioner hereby moves the Court for an order granting an additional 20 days to file his Brief. The Attorney commenced a merits hearing for a death sentenced individual (Andres Antonio Torres) on April 14, 2014 which continued for three weeks. The order setting the due date in this case of May 16, 2014 was signed on April 16, 2014 so that the Attorney has had a week to consider the matter on appeal. Respondent/Petitioner requests a 20 day enlargement of time. The State's Attorney General assigned to the case, Melody Jane Brown, has no objection. The Respondent/Petitioner has not sought any prior extension for this filing.

May 12, 2014

WILLIAM H. EHLIES, II
CHRISTOPHER WARREN SEEDS
ATTORNEYS FOR THE RESPONDENT/
PETITIONER
Building A, Suite 201
310 Mills Avenue
Greenville, South Carolina 29605
864-232-3503
864-232-4854 (facsimile)
hank@ehlieslaw.com

CC: Melody Jane Brown, Esq.
Christopher Warren Seeds, Esq

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Honorable D. Garrison Hill
Circuit Court Judge
2011-188687

Kamell Evans — Respondent/Petitioners,

-vs-

State of South Carolina

Respondents/Respondent.

PROOF OF SERVICE

I, William H. Ehlies, hereby certify that I served the Motion to Enlarge Time to File by mailing US First Class mail to the following:

Melody Jane Brown
Assistant Attorney General
Post Office Box 11549
Columbia South Carolina 29211

On the 19th day of May 2014



WILLIAM H. EHLIES, II
ATTORNEY FOR THE APPELLANT
Building A, Suite 201
310 Mills Avenue
Greenville, South Carolina 29605
1-864-232-3503
1-864-232-4854(f)
hank@ehlieslaw.com

RECEIVED

MAY 22 2014

S.C. SUPREME COURT

The Supreme Court of South Carolina

Kamell D. Evans, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

Appellate Case No. 2011-188687

ORDER

The request for an extension to serve and file the brief of petitioner on behalf of respondent/petitioner is granted and extended until June 5, 2014. Pursuant to the order of the Supreme Court of South Carolina dated March 18, 2009 (www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2009-03-18-01), any further extension request must be based on a showing of good cause.

FOR THE COURT

BY _____
CLERK

Columbia, South Carolina

May 20, 2014

cc:
Melody Jane Brown, Esquire
William Harry Ehlies, II, Esquire
Christopher Seeds, Esquire

RECEIVED
MAY 16 2014
S.C. Supreme Court

ALAN WILSON
ATTORNEY GENERAL

May 16, 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: The State v. Kamell Evans
Appeal from Greenville County–Capital PCR
Appellate Case No. 2011-188687

Dear Mr. Shearouse:

Please find enclosed one (1) unbound and fourteen (14) bound copies of the Brief of Petitioner/Respondent in the above captioned matter.

Thank you for your assistance.

Sincerely,

Melody J. Brown
Senior Assistant Attorney General

MJB/mv

cc: William H. Ehlies, II, Esquire (with enclosure)
Christopher Seeds, Esquire (with enclosure)
Sandi Wofford, Victim Services (with enclosure)

WILLIAM H. EHLIES, P.A.
ATTORNEY-AT-LAW
BUILDING A, SUITE 201
310 MILLS AVENUE
GREENVILLE, SOUTH CAROLINA 29605
864-232-3503
FACSIMILE NUMBER 864-232-4854
EIN: 57-0703576

May 13, 2014

Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RECEIVED
MAY 16 2014
S.C. SUPREME COURT

Re: Kamell Evans v State of SC
Case No. 2011-188687

Dear Mr. Shearouse:

Enclosed please find an original plus 6 copies of the following of Respondent/Petitioner's Motion to Enlarge the Time to File Respondent's/Petitioner's Brief together with Proof of Service for the above matter.

Should you require anything further, please do not hesitate to contact this office. Thank you.

Sincerely yours,



WILLIAM H. EHLIES, II
Email: hank@ehlieslaw.com

cc: Melody J. Brown, Assistant Attorney General
Chris Seeds, Attorney at Law

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

MAY 16 2014

S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Honorable D. Garrison Hill
Circuit Court Judge
2011-188687

Kamell Evans,

Respondent/Petitioner,

-vs-

State of South Carolina

Petitioner/Respondent.

CAPITAL POST CONVICTION RELIEF CASE

MOTION TO ENLARGE TIME TO FILE RESPONDENT/PETITIONER'S BRIEF

The attorney for the Respondent/Petitioner hereby moves the Court for an order granting an additional 30 days to file his Brief. The Attorney commenced a merits hearing for a death sentenced individual (Andres Antonio Torres) on April 14, 2014 which continued for three weeks. The order setting the due date in this case of May 16, 2014 was signed on April 16, 2014 so that the Attorney has had a week to consider the matter on appeal. Respondent/Petitioner requests a 20 day enlargement of time. The State's Attorney General assigned to the case, Melody Jane Brown, has no objection. The Respondent/Petitioner has not sought any prior extension for this filing.

May 12, 2014

WILLIAM H. EHLIES, II
CHRISTOPHER WARREN SEEDS
ATTORNEYS FOR THE RESPONDENT/
PETITIONER
Building A, Suite 201
310 Mills Avenue
Greenville, South Carolina 29605
864-232-3503
864-232-4854 (facsimile)
hank@ehlieslaw.com

CC: Melody Jane Brown, Esq.
Christopher Warren Seeds, Esq

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Honorable D. Garrison Hill
Circuit Court Judge
2011-188687

Kamell Evans — Respondent/Petitioners,

-vs-

State of South Carolina

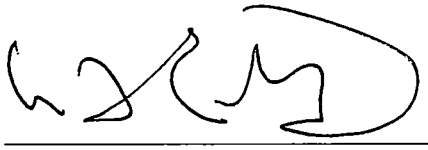
Respondents/Respondent.

PROOF OF SERVICE

I, William H. Ehlies, hereby certify that I served the Motion to Enlarge Time to File by mailing US First Class mail to the following:

Melody Jane Brown
Assistant Attorney General
Post Office Box 11549
Columbia South Carolina 29211

On the 13th day of May 2014



WILLIAM H. EHLIES, II
ATTORNEY FOR THE APPELLANT
Building A, Suite 201
310 Mills Avenue
Greenville, South Carolina 29605
1-864-232-3503
1-864-232-4854(f)
hank@ehlieslaw.com

RECEIVED

MAY 16 2014

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
MAY 13 2014
S.C. Supreme Court

May 13, 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: The State v. Kamell Evans
Appeal from Greenville County–Capital PCR
Appellate Case No. 2011-188687

Dear Mr. Shearouse:

Pursuant to the Order dated April 16, 2014 granting the cross-petitions for a writ of certiorari in the above listed case please find enclosed one (1) unbound and thirteen (13) bound copies of the Appendix and Supplemental Appendix.

Thank you for your assistance.

Sincerely,

Melody J. Brown
Senior Assistant Attorney General

MJB/mv

cc: William H. Ehlies, II, Esquire
Christopher Seeds, Esquire

The Supreme Court of South Carolina

Kamell D. Evans, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

Appellate Case No. 2011-188687

ORDER

This matter is before the Court by way of cross-petitions for a writ of certiorari. The petitions for a writ of certiorari are both granted. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(j), SCACR.

C.J.

J.

J.

J.

Columbia, South Carolina

April 16, 2014

cc:
Melody Jane Brown, Esquire
William Harry Ehlies, II, Esquire
Alan McCrory Wilson, Esquire

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
JUL 14 2011
S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
(Capital PCR: 2006-CP-23-7719)
The Honorable D. Garrison Hill, Circuit Court Judge

Kamell D. Evans,

Respondent/Petitioner,

v.

State of South Carolina,

Petitioner/Respondent.

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

MELODY J. BROWN
Senior Assistant Attorney General

ATTORNEYS FOR
PETITIONER/RESPONDENT

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QUESTIONS PRESENTED

I.

Whether the PCR judge erred in finding deficient performance under *Strickland v. Washington* for failing to object to the phrasing of the jury instruction regarding mercy where this Court did not disapprove of the phrasing until *Rosemond v. Catoe*, over four years after trial.

II.

Whether the PCR judge erred in finding *per se* error in the jury instruction regarding mercy, thereby avoiding a proper *Strickland v. Washington* prejudice analysis.

III.

Whether the PCR judge erred in finding a federal constitutional right to a mercy charge where federal precedent, without exception, does not support such a federal constitutional right.

IV.

Whether the PCR judge's factual finding that the charge at issue disallowed the exercise of mercy is wholly without factual support where no person ever testified that the charge was intended or heard to limit the exercise of mercy, and both trial counsel testified it was not heard as a charge that limited the exercise of mercy, and trial counsel was focused on an appeal to exercise mercy in their penalty phase presentation and closing.

STATEMENT OF THE CASE

This matter comes before the Court by way of the State's appeal from the grant of a new sentencing proceeding. The Honorable D. Garrison Hill found "a new sentencing hearing is required due to the law set forth by the decision of our supreme court in Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 4 (2009)." (App. p. 4186). Judge Hill rejected all other issues presented. The following history preceded the grant of relief.

A Greenville County Grand Jury indicted Respondent/Petitioner ("Evans") in June 2003 on two (2) counts of murder; two (2) counts of possession of a weapon during the commission or the attempt to commit a violent crime; burglary, first degree; and, two (2) counts of kidnapping. (App.p. 1802-13). Evans shot and killed Greenville County Sheriff's Deputy Antonio J. "Joe" Sapinoso, and his father, Antonio L. Sapinoso.[1] The

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[1] There is no dispute that Evans shot and killed both victims after having held them hostage for approximately five (5) hours in the Sapinoso home in Greenville County. Evans acknowledged same in his statement to the authorities, in his testimony during the guilt phase, and in his closing statement to the jury. (App. p. 1233; p. 1432; p. 1473). At the PCR hearing, defense counsel testified that Evans repeatedly admitted the shooting, but maintained he wanted to pursue a manslaughter charge, i.e. he was provoked into shooting because Deputy Sapinoso reached for one of Evan's three guns -- the Deputy's own weapon Evans had taken from him. (App. p. 1444; pp. 2417-2418; p. 3821). Evans also admitted shooting Deputy Sapinoso in the back of head. (App. pp. 3807). Evans further admitted to his counsel that he was actually trying to re-load his weapon(s) when he was taken down. (App. p. 3818).

At trial, Evans testified that he went to see the Sapinosos on the night of April 1, 2003, because his relationship with Christina Rodriquez, a sister to Deputy Sapinoso, had soured and Christina had left him with financial difficulties. He asserted that he went to the Sapinoso home because they would "understand" his position of frustration, and "could put an end to everything." (App. p. 1425, line 11–p. 1426, line 4). He conceded he parked his truck away from the home, and waited for Deputy Sapinoso to return to the family home. (App. p. 1428). Evans testified he approached the Deputy when the Deputy drove up, and conceded he had a gun when he "asked" to speak with Deputy. According to Evans' trial testimony, the two sat on the porch until Evans began to cry and the Deputy suggested they go inside the home. (App. pp. 1428-1436). According to Evans, the Deputy's father was in the living room with them, while his mother remained upstairs in the house with her grandson. (App. p. 1431). Evans and the Deputy together called

Christina. (App. pp. 1429-1430). Evans testified he placed Deputy Sapinoso's gun on the coffee table in the living, and he only fired when he "perceived Joe going to the gun," and Mr. Sapinoso "standing up." (App. p. 1432).

The State's evidence showed that Christina had called the sheriff's department and told them that her brother, a sheriff's deputy, and her father were being held hostage, along with her mother and son, and that if she did not go to her home, Evans planned to kill her family. (App. pp. 1089-1091).

Tony Lee, a negotiator with the Greenville County Sheriff's Office, conducted negotiations with Evans to surrender and leave the home. Officer Lee testified that he initially made contact through Evans' sister, Tina, who was also present outside the home, and Lee told Evans he could come out at anytime and he would not be harmed. (App. p. 1117, line 10-p. 1118, line 21). Through several hours of negotiations, in addition to speaking with Lee, Evans was also able to speak with family and friends who encouraged him to come out. (App. p. 1119, lines 6-15; p. 1121, lines 1-24; p. 1127, line 14- p. 1128, line 4). Evans complained to Lee about his relationship with Christina, but also indicated the situation was not limited to that problem, but was "bigger than that," though Lee was never able to ascertain exactly what Evans was referencing. (App. p. 1129, lines 15-25; p. 1134, lines 8-18). Evans remained "cordial and nice" throughout the negotiations, becoming agitated only when Lee asked to speak with the Deputy, or when Lee requested release of some of the hostages. (App. p. 1120, lines 2-10; p. 1122, line 3-p. 1123, line 19; p. 1125, lines 11-15; p. 1128, line 9-p. 1129, line 4). Lee arranged, at Evans' request, for Evans to speak with Christina. Lee listened to the conversation and thought the conversation "went real well." (App. p. 1124, line 19 - p. 1126, line 8). After Evans spoke with Christina, Lee spoke to Evans "a couple of more times" and continued negotiations. Evans told Lee he thought Lee was "cool" and said he was going to discuss the matter with the Deputy and would call back later. (App. p. 1126, lines 11-24). Minutes later, Lee heard multiple shots. (App. p. 1126, line 25 - p. 1127, line 7).

The deployed SWAT team had not attempted any action prior to the shooting as they were informed negotiations were going well and Evans would come out. (App. p. 1098, line 16 - p. 1102, line 7; p. 1108, lines 17-23; p.1166, line 22 – p. 1167, line 2; p. 185, lines 5-13; p. 1186, lines 16-22). Officers stationed at the entries of the home first heard a series of shots, then a plea of "no, no, no" and another series of shots. (App. p. 1146, lines 2-25; p. 1167, line 13 – p. 1168, line 17; p. 1187, line 11 – p. 1188, line 14; p. 1199 line 18 – p. 1200, line 23). After gaining entry, the officers saw Deputy Sapinoso face down on the floor with his arms folded underneath his body, with gunshots to the back of the head. His father's body was on the couch. (App. p. 1153, lines 1-9; p. 1174, lines 12-16; p. 1191, lines 3-8; p. 1202, lines 24-25). When the officers rushed Evans, he immediately said, "don't hurt me." (App. p. 1151, lines 6-14). As the officers restrained Evans, Evans kept trying to turn to see the Deputy's body. (App. p. 1178, lines 1-21). The SWAT team also rescued Mrs. Sapinoso and Christina's son who remained hidden upstairs until the officers escorted them outside the home. (App. p. 1154, lines 1-17).

State filed and served a Notice of Intent to Seek the Death Penalty. (App. p. 1814). Steven W. Sumner, Esq., and James Lee "Skip" Goldsmith, Jr., Esq., represented Evans.

Jury qualification and selection for the trial began on September 13, 2004. The Honorable J. Derham Cole presided. The guilt phase began on September 17, 2004. On September 18, 2004, the jury convicted Evans on all counts. (App. p. 1502). On September 20, 2004, the lower court began the penalty phase. On September 21, 2004, the jury found the following statutory circumstances as to Deputy Sapinoso:

1) The murder was committed while in the commission of the crime of act of burglary in the first degree;

2) The murder was committed while in the commission of the crime or act of kidnapping;

3) That two or more persons were murdered by the defendant pursuant to one act or one scheme or course of conduct; and

4) The murder was of a law enforcement officer during or because of the performance of his official duties.

Investigators at the scene recovered three guns, a 9mm, a .38, and a Glock that was the Deputy's service weapon. (App. p. 1288, lines 2-6; p. 1312, lines 20-24). Investigators also recovered a black nylon bag in the entryway that held 140 rounds of ammunition in boxes plus several loose rounds, and an 8 inch knife. (App. p. 1291, lines 2-21). (See also App. p. 2757-2758; pp. 3810-3813). Additionally, investigators found Evans' hat in an abandoned house close to the Sapinoso home, where Evans waited for his victim, and his car parked significantly, a half of mile so, away. (App. p. 1271; pp. 2753-2754; p. 3814). Evans was wearing all black at the time of murders, and had several blue bandanas, which were recovered from the scene. (App. p. 1298; p. 2755; p. 3811). Blue is the color associated with the gang in Evans' multiple, highly visible, tattoos. (App. pp. 1589-1590; p. 1598; p. 2998). Forensic evidence, as presented through the State's expert at trial, showed that Deputy Sapinoso was shot in the back of the head, four times, at close range (within two to three feet), while his head was on the floor. (App. p. 1392-p.1395; p.1398–p. 1403). Moreover, the shots "very likely occurred at a time when neither the shooter nor Mr. Joe Sapinoso were moving and occurred in a very rapid sequence to each other. They are all basically in the same part of Joe Sapinoso's head at very nearly the same distance." (App.p. 1407, lines 13-18). The father suffered three gunshot wounds – two to the head and one to the arm. The one to the arm was considered a defensive wound. (App. p. 1407). Evans' PCR expert agreed that three of the four shots to Deputy Sapinoso's head were inflicted at close range while his head was on the floor. (App. p. 2739).

(App. p. 1795). The jury found the same aggravating circumstances as to Antonio L. Sapinoso with the exception of the law enforcement aggravator. (App. p. 1794). The jury also recommended death. (App. pp. 1794-95).

The trial judge found that the evidence warranted the sentence, the sentence was not a result of "prejudice, passion or any other arbitrary factor," and, in accordance with the jury recommendation, sentenced Evans to death. (App. pp. 1799-1800). The judge also imposed a life sentence for burglary. (App. p. 1799). No sentences were necessary for the kidnapping and weapon convictions. *See* S.C. Code § 16-3-910 and § 16-23-490 (sentences not applicable where defendant sentenced to death pursuant to murder conviction).

Joseph L. Savitz, III, Chief Attorney of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented Evans on appeal. Appellate counsel filed a Final Brief of Appellant in this Court on July 25, 2006, and raised the following issue:

> The judge erred at sentencing by failing to instruct the jury on the statutory mitigating circumstance provided by *S.C. Code Section 16-3-20(C)(b)(6)*: "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." A charge on this mitigator was necessary because both the State (by introducing Evans' statement) and the defense (through Evans' own testimony and the testimony of expert witnesses) had introduced evidence that the killings were not premeditated, but had occurred when Evans snapped under the combined strain of extreme emotional turmoil and profound depression, among other factors.

(App. p. 1824).

The State filed its final brief on July 25, 2006. (App. pp. 1836-1857). The case was called for oral argument on October 3, 2006. On November 6, 2006, this Court

affirmed the death sentence in *State v. Evans*, Opinion No. 26220 (S.C.Sup.Ct. filed November 6, 2006), reported at 371 S.C. 27, 637 S.E.2d 313 (2006). (App. pp. 1858-1863). The court issued the remittitur on November 22, 2006. (App. p. 1864). Evans did not seek review from the United States Supreme Court.

On November 13, 2006, Evans filed a Petition for Stay of Execution expressing his desire to file a PCR application. On December 4, 2006, Evans filed an application for post-conviction relief ("PCR"). (App. p. 1866). This Court granted the stay on December 6, 2006 and appointed the Honorable D. Garrison Hill to hear the PCR action. (App. p. 1865). On February 28, 2007, Judge Hill appointed William Nettles, Esq., and Hank Ehlies, Esq., counsel for Evans. On June 23, 2008, the judge additionally appointed Christopher Seeds, Esq.

An evidentiary hearing began June 1-5, 2009, and concluded October 12-14, 2009. Mr. Nettles, Mr. Ehlies and Mr. Seeds represented Evans. Senior Assistant Attorney General Melody J. Brown and Assistant Attorney General Anthony Mabry represented the State. Evans raised multiple issues. (App. pp. 4387-4395). On August 31, 2009, before reconvening for the remainder of the PCR evidentiary hearing October 12, 2009, Evans offered an amendment to the application to include the following allegation:

> 9(b), 10(b)(12) Counsel failed to object to the trial court's instruction to the jury not to recommend a sentence of life based on mercy. See *Rosemond v. Catoe*, ___ S.C. ___, 680 S.E.2d 5 (No. 26679)(June 29, 2009)(overruling *State v. Hughey*, 339 S.C. 439, 459, 529 S.E.2d 721, 731 (2000)). On June 29, 2009, the South Carolina Supreme Court ruled that a trial court's charge prohibiting the jury from considering mercy was error and that trial counsel performed deficiently in failing to object to the charge. The trial court in *Evans* (the same as in *Rosemond*) provided exactly the same charge that the South Carolina Supreme Court rejected in *Rosemond*. In *Rosemond*, the judge instructed the jury: "[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*." 680 S.E.2d at 10 (emphasis in

original). The South Carolina Supreme Court explained that, contrary to the trial court's charge, the jurors were "entitled to consider [mercy]":

> It is proper to instruct a jury in a capital sentencing phase that it may recommend a life sentence for any reason or no reason at all, including as an act of mercy. A jury's consideration of mercy, if proper evidence of mercy is admitted, is well recognized in the sentencing phase of a capital case. Because a capital jury may consider properly admitted evidence of mercy in the sentencing phase, consideration of mercy is no inconsistent with the instruction that, "the jury should not be guided by sympathy, prejudice, passion, or public opinion...." *State v. Singleton*, 284 S.C. 388, 393, 326 S.E.2d 153, 156 (1985) overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991).

Rosemond, 680 S.E.2d at 10-11. Here, as in *Rosemond*, the trial court also instructed the jury, "[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." (R. 1785.) Defense counsel's summation emphasized mercy: "I am going to ask for mercy for Kamell Evans... Mercy is unmerited favor. You can't earn it; you don't deserve it; but you give it to him anyway.... We don't repay evil for evil. And mercy is appropriate in this case." (R. 1770.) For the reasons set forth in *Rosemond*, the identical charge in Mr. Evans's [sic] violates South Carolina law and counsel's failure to object to the charge (see R. 1789), rejected in *Rosemond* and at odds with their defense, was deficient and prejudicial.

(App. pp. 2915-2926).

Respondent did not object to the amendment as it was based on new law not previously available to Evans, but noted its futility as raised as an ineffective assistance of counsel claim. (App. pp. 3280-3282). The Court took the motion under advise and later granted the motion to amend in the Order granting relief. (App. p. 4395).

On March 18, 2010, after the conclusion of the hearing, Judge Hill relieved Mr. Nettles and Mr. Seeds was formally appointed second chair.

Upon receipt of the transcripts for both parts of the hearing, Judge Hill established a briefing schedule for post-hearing briefs. Evans' brief was submitted on October 4,

2009. (App. p. 3906). The State submitted its post-hearing brief on November 10, 2010. (App. p. 4104). Evans submitted a reply on November 19, 2010. (App. p. 4217). On December 9, 2010, the PCR judge called for additional briefing of the *Rosemond* jury charge issue, and the State submitted its second post-hearing brief on the issue on December 14, 2010. (App. p. 4238). Evans submitted his second post-hearing brief on December 16, 2010. (App. p. 4245). The State and Evans both submitted proposed orders on January 19, 2011. On February 24, 2011, Judge Hill issued an Order denying relief on all grounds except the *Rosemond* jury charge issue. (App. p. 4254). On that issue, Judge Hill found deficient performance, presumed prejudice, and granted a new sentencing proceeding. The State filed a motion to alter or amend on March 9, 2011, (App. p. 4501), which was denied on March 10, 2011 (App. p. 4515). This appeal follows.

ARGUMENT

This Court will not affirm a ruling that is "controlled by an error of law" or lacks factual support in the record. *Brown v. State*, 383 S.C. 506, 514-515, 680 S.E.2d 909, 914 (2009). Here, the PCR judge's decision is controlled by no less than three distinct errors of law, and lacks factual support in the record. Indeed, the PCR judge relied upon a mash of inconsistent theories and findings to cobble together a basis of relief that is not warranted on state law, federal law, or the facts.

The PCR judge denied relief on a variety of complex, detailed claims vetted over nearly two weeks of testimony and multiple rounds of briefing. He granted relief solely on an ineffective assistance of counsel claim based upon counsel not objecting to the following charge language: "You may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy." (App. p. 1785). As an initial matter, the PCR judge's errors may all be tracked to an erroneous belief that relief was mandated by this Court's ruling in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 4 (2009). (App. p. 4384, "... a new sentencing hearing is required due to the law set forth by the decision of our supreme court in Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 4 (2009)."). This Court in *Rosemond*, however, did not address whether a charge including the language at issue when reviewed as a whole would be incorrect or misleading – a fact recognized later in the Order but nonetheless wholly discounted. (App. p. 4484). This Court, overruling *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000) "to the extent it approved and sanctioned the charge," 383 S.C. at 330, 680 S.E.2d at 10, disapproved of the phrasing of one portion of this one sentence that may be read to restrict "consideration of evidence of mercy in the sentencing phase," 383 S.C. at 330, 680

S.E.2d at 11. There was no consideration of the sentence in context of the remainder of the charge. Indeed, relief was not granted in *Rosemond* on this issue, but the wording of the last phrase, and its applicability, was addressed in *obiter dicta*. Contrary to the PCR judge's opinion, there was no mandate for relief whenever this now disfavored wording is identified in a charge. Moreover, his legal analysis pursuant to *Strickland* was consistently flawed.

First, the PCR judge wholly erred in failing to apply the well-established *Strickland* standard to the facts of this case to determine error. It cannot be disputed the charge at issue was reviewed and approved in *State v. Hughey*. However, the PCR judge found error in the decision not to object to the charge because *Hughey* was, at best, incorrectly decided or misleading, and/or did not address the (non-existent) federal issue. (See App. pp. 4477-4478). In other words, counsel had no cause to rely on state law precedent regarding a state law issue, and/or should have attempted to argue federal law on a state law issue. Under any reading of *Strickland*, this finding and conclusion cannot stand. Counsel had the right to rely on then controlling state law on a state law issue.

Second, the PCR judge wholly erred in failing to apply the well-established *Strickland* prejudice standard to the facts of this case. Instead, the PCR judge found "per se reversal" and a "structural defect." (See App. pp. 4484-4493). Consequently, the PCR judge failed to properly evaluate the lack of impact on the sentencing phase. He failed to place the perceived error in perspective of the whole of the charge and all the evidence presented in sentencing, and he failed to make a considered ruling on whether Evans demonstrated it was reasonably probable that but for the deficient performance, the result would have been different. *See generally Sears v. Upton*, 130 S.Ct. 3259, 3264 -

3265 (2010)(reversing state supreme court opinion, finding "Although the court appears to have stated the proper prejudice standard, it did not correctly conceptualize how that standard applies to the circumstances of this case" where state court had determined, " 'it is impossible to know what effect [a different mitigation theory] would have had on [the jury].'"). The PCR judge here simply concluded, similarly to the rejected position in *Sears v. Upton*: "It is impossible to estimate the impact of the charge eliminating mercy – an inscrutable concept that defies qualification – as a sentencing consideration on the jurors' reasoned moral response." (App. p. 4486). He is similarly wrong.

Third, the PCR judge found the charge offended federal law as it prevented consideration of "evidence of mercy." (App. pp. 4486-4487; p. 4492). This is confused in several ways and is a recurring theme weaving error throughout this portion of the Order. Initially, the PCR judge confused "evidence" with "mercy," which is an act. Further, and as a result of the first, the PCR judge concluded the charge offended federal law. The State does not contest that state law allows the jury to return a verdict for any reason or no reason – the jury was, in fact, so charged in this very case. That is the essence of the *exercise* of mercy. But there is a distinct difference in federal precedent between the presentation and consideration of evidence which may prompt sympathy or mercy, and unfocused, unreasoned exercise of emotional whim. The exercise of unfettered emotion in sentencing is not required by the federal constitution, and is, in fact, the antithesis of the reasoned application of the death penalty anticipated in modern capital case jurisprudence. *See, for example, Saffle v. Parks,* 494 U.S. at 484, 492-493 (1990) ("It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding

recognition, that, above all, capital sentencing must be reliable, accurate, and nonarbitrary"). Further, the United States Supreme Court has upheld weighing state directions that the jury *must* (i.e. without discretion) return a death sentence where the aggravating circumstances outweigh the mitigating circumstances. *See, e.g., Kansas v. Marsh*, 548 U.S. 163, 173 (2006)("Kansas' death penalty statute, ***consistent with the Constitution***, may direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the aggravating circumstances and mitigating circumstances are in equipoise.")(emphasis added) . *Cf. Bobby v. Mitts*, 563 U.S. __, __ , 131 S.Ct. 1762, 1764 (2011)(reversing and rejecting lower court's determination that jury charges "required the jury to first decide whether to "acquit" Mitts of the death penalty before considering "mercy and some form of life imprisonment.'..."). Even so, at bottom, the instant charge does not in any way limit the *consideration of mitigation* ***evidence***, thus, does not offend federal law.

Lastly, the PCR judge's factual determination that the charge could only have been understood to exclude the exercise of mercy wholly lacks support. The only evidence in the record as to the understanding of the charge – which in isolation may be interpreted as misleading – was that counsel did not understand the charge to have prevented an act of mercy. (See App. p. 4480). (See also App. pp. 3258-3261; pp. 3271-3273; p. 3279). While this Court certainly has disapproved of the language, no witness in the instant matter testified that the instruction was meant to restrict the exercise of mercy in any way, much less was heard to restrict the exercise of mercy. Additionally, the record exclusively supports that the charge was intended to advise the jury that it may exercise mercy, with the jury repeatedly instructed that they could return a life sentence

regardless of the finding of aggravating circumstances. There is no factual support in the record for the PCR judge's findings.

In sum, the PCR judge's ruling should be reversed, and the death sentence upheld. Evans is not entitled to a new sentencing proceeding.

The Strickland v. Washington Test

To establish that counsel was ineffective, a PCR applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error(s), there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052 (1984); *Simpson v. Moore*, 367 S.C. 587, 595-96, 627 S.E.2d 701, 706 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Id.*

In order to prove deficient performance, the applicant must "show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *Harrington v. Richter*, ___ U.S. ___, ___, 131 S.Ct. 770, 787 (2011), *quoting Strickland*, 466 U.S. at 687. "The standard for judging counsel's representation is a most deferential one." *Id.* at 788. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Butler v. State*, 286 S.C. 441, 445, 334 S.E.2d 813, 815 (1985), *quoting Strickland*, [466 U.S. at 690]. "An attorney is not required to anticipate potential changes in the law, which are not in

existence at the time of the conviction."*Patterson v. State*, 359 S.C. 115, 118, 597 S.E.2d 150, 151 (2004).

In order to prove "prejudice" in regard to sentencing phase error, an applicant must show "there is a reasonable probability that, absent [counsel's] errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998). Further, prejudice is evaluated by consideration of the trial evidence of mitigation, along with the PCR evidence, compared to the aggravating circumstance evidence. *Wong v. Belmontes*, ___ U.S. ___, 130 S.Ct. 383 (2009). "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 131 S.Ct. at 792, *citing Strickland*, 466 U.S. at 693.

"[W]hile in some instances 'even an isolated error' can support an ineffective-assistance claim if it is 'sufficiently egregious and prejudicial,' *Murray v. Carrier,* 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Harrington v. Richter*, 131 S.Ct. at 791.

I.

The PCR Judge Erred in Finding Deficient Performance Under Strickland v. Washington Where Counsel Did Not Object to the Phrasing of the Jury Instruction Regarding Mercy When This Court Did Not Disapprove of the Phrasing Until Rosemond v. Catoe, Over Four Years After Trial.

It has long been accepted that the trial judge may charge a capital jury that it may return a life sentence "for any reason or no reason at all." *See, e.g., State v. Atkins*, 303

S.C. 214, 221, 399 S.E.2d 760, 764 (1990). The jury in the instant case was so charged. (App. p. 1785). At issue is the additional phrase "other than as an act of mercy."

In *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000), this Court, having reviewed the very phrasing at issue found Hughey's argument that the charge was "confusing because it suggested that an act of mercy would have been an invalid reason for a life vote," was "without merit...." 339 S.C. at 460, 529 S.E.2d at 732. *Hughey* was decided on March 27, 2000. The jury was sworn and Evans' trial began on September 17, 2004. (App. p. 1047). Consequently, *Hughey* was good law and controlling at the 2004 trial – a fact that the PCR judge was constrained to admit. (See App. p. 4481). Indeed, the issue of the propriety of the charge was not even raised in this PCR action until *after* the first portion of the evidentiary hearing was held, and *after* this Court's opinion in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). (See App. pp. 4476). (See also App. pp. 3280-3238)(State did not object to late amendment because precedent was unavailable at time of final amendment but noted futility of amendment as ineffective assistance of counsel claim). Indeed, the very fact the issue was a late amendment premised on *Rosemond* cuts against the finding by the PCR judge that reasonable counsel would have seen plain error in the charge. (See App. p. 4482; pp. 2915; pp. 2919-2920).

On June 29, 2009, this Court issued the decision in *Rosemond*. This Court did not grant relief on the charge issue in *Rosemond*, but elected to address the propriety of the charge. This Court – notably writing that the instruction was found *proper* in *Hughey* – reversed itself. 383 S.C. at 330, 680 S.E.2d at 10. This Court advised: "It is proper to instruct a jury in a capital sentencing phase that it may recommend a life sentence for any

reason or no reason at all, *including* as an act of mercy." *Id.* (emphasis added). Simply, *Rosemond* cannot mandate post-conviction relief on an ineffective assistance of counsel claim for a failure to object where *Rosemond* established a new rule four years after trial. As a general rule, a new rule of law cannot be applied retroactively to cases on collateral review. *See State v. Jones*, 312 S.C. 100, 102, 439 S.E.2d 282, 282-283 (1994)("A new rule of criminal law which does not fall into one of those categories [lack or jurisdiction or conduct not subject to criminal sanction] should be applied retroactively, but only to those cases pending on direct review at the time the new decision is issued."). *See also Tally v. State*, 371 S.C. 535, 541, 640 S.E.2d 878, 881 (2007)("In determining whether Respondent was deprived of his federal constitutional right to counsel, we are required to follow the United States Supreme Court's decisions on retroactivity" i.e. with the rule is a new rule). *Cf. State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) (decision that jury charge on inference of malice from use of a deadly weapon "represents a clear break from our modern precedent, today's ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved" and specifically providing "[o]ur ruling, however, will not apply to convictions challenged on post-conviction relief.").

Moreover, as noted above, counsel may logically rely on the law in existence at the time of trial to provide proper representation. *Butler, supra, Patterson, supra.* To avoid this bar to finding deficient performance, the PCR judge must rely upon a somewhat confused and internally conflicting interpretation of *Hughey*. For instance, the PCR judge agreed that in *Rosemond* this Court "overrule[d] Hughey to the extent it approved the instruction...." (App. pp. 4477). Yet, the PCR judge concluded,

essentially, that this Court *always* read the instant mercy charge as *precluding* mercy. (App. pp. 4477). His ruling creates a paradox.

If this Court always read the charge as precluding mercy, then *Hughey* changed the law of the state and approved a charge precluding mercy. As the charge there is the same here, there could be no deficient performance as a matter of state law on a matter of state law in this pre-*Rosemond* case. Consequently, Petitioner is not entitled to any relief under *Strickland.*

If this Court did not always read the charge as precluding mercy, then this Court interpreted the phrased charge in *Hughey* as allowing mercy, and found it was not inconsistent with the charge that the jury may not rely on mere unfettered emotion in sentencing. Again, Petitioner is not entitled to any relief. Moreover, this second interpretation bears the least strain to the fit in light of all circumstances, not the least of which is the *Hughey* opinion.

The *Hughey* opinion supports the alternative interpretation only if one parses the entirety of the ruling. Such a reading requires ending review too soon, before the ultimate conclusion. The following passage from the opinion controls:

> Hughey contends the jury instruction was confusing because it suggested that an act of mercy would have been an invalid reason for a life vote. The trial judge told the jurors "you may recommend a sentence of life imprisonment for any reason or no reason at all other than as an act of *mercy.*" (emphasis added). This argument is without merit because a judge's charge that the jury should not be guided by sympathy, prejudice, passion, or public opinion is not reversible error. *See Singleton,* 284 S.C. at 393, 326 S.E.2d at 156; *State v. Chaffee,* 285 S.C. 21, 328 S.E.2d 464 (1984).
>
> *The jury charge, reviewed in its entirety, is not confusing because it advises the jurors to consider all mitigating circumstance in making their recommendation. The non-statutory circumstances*

> *are repeatedly emphasized by the trial judge and are adequately defined according to current South Carolina case law.*

State v. Hughey, 339 S.C. 439, 460, 529 S.E.2d 721, 732 (2000) *overruled by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009)(emphasis added).

Thus, the *Hughey* jury was instructed to consider all statutory and non-statutory mitigation and there was no error. This rebuts a finding that the instruction allowed mitigation evidence to be disregarded, as the PCR judge here found. According to the opinion in *Hughey*, when the charge was reviewed it full, the record supported the jury was adequately charged, *and was not confusing. Id.*

In light of all the evidence – including the plain language in *Hughey*, the remainder of the charge and defense counsel's testimony at the PCR hearing that each, independently, believed the charge to allow the exercise of mercy, (See App. pp. 3260-3261; pp. 3272-3273), and that the judge never indicated an intention to limit mercy within the charge, (App. p. 3259; pp. 3271-3272; p. 3279) – it is most logical to consider the charge, though now disfavored and interpreted differently, was then considered to allow the return of a life sentence as an act of mercy. One must consider that this was a charge given in multiple cases without objection – in this case, in *Hughey*, and in *Rosemond* among others. In the PCR judge's reasoning, multiple well established and well qualified attorneys would have misinterpreted the phrasing and the intent of the charge in relation to the remainder of the charge (which, of course, begs the question of whether there could be deficient performance at all), all while being cognizant of the possibility of the jury to exercise mercy. Again, it cannot be ignored that, in the instant action, this issue was only raised in a *late* amendment *after* this Court issued *Rosemond*.

Further, it should be noted again that this Court in *Rosemond* only addressed the mercy charge issue in *dicta.* Respondent does not contend that this Court has not disapproved of the language -- it has -- but there has been no finding of reversible error. *Rosemond* is most fairly read as a guide to the bench and bar that the language at issue may be interpreted as precluding mercy and may not be used where there is "evidence of mercy" (not argument for mercy) that may be discarded from consideration.

Even so, neither interpretation (including or precluding the ***label*** of "mercy" on a juror's act) is inconsistent with this State's jurisprudence. This is so because whether tagged and identified as "mercy" or merely as a part of our broader allowance that a life sentence may be returned for any reason or no reason at all, we do not require a death sentence, even where a circumstance in aggravation is found. *See, for example, State v. Hicks*, 330 S.C. 207, 218-219, 499 S.E.2d 209, 215 (1998)("the trial judge is not required to instruct the jury it could impose a life sentence 'for any reason or no reason at all' where the jury is informed, as it was here, it could consider any mitigating circumstance authorized by law and could impose a life sentence even if aggravating circumstances were found"). In sum, we are a non-weighing state, but no particular tag must be assigned to the recommendation of life.

Lastly, the PCR judge incorrectly relied upon a reference to a long history of mercy in our State's jurisprudence. (See App. pp. 4481-4482). Respondent notes the State's jurisprudence does not show a pristine historical consistency for allowance of the complete disregard of the evidence in favor of an act of mercy. *See, for example, State v. Bethune*, 86 S.C. 143, 67 S.E. 466, 470 (1910)("we do not think that the Legislature meant that the power to recommend to mercy should be exercised arbitrarily or

capriciously, or without regard to some circumstance in the case"). That aside, the focus should be on the post-*Furman* statutes and cases – the statutes and cases that are relevant today. *See generally State v. Torrence*, 305 S.C. 45, 60, 406 S.E.2d 315, 324 (1991)(J.Toal, Concurring)(addressing dispensing with "the outdated doctrine of *in favorem vitae*" noting that "in light of advances in the quality of legal representation; in light of the many protections and avenues of relief available to criminal defendants; and in light of the modern day restricted use of capital punishment post *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the doctrine has become counterproductive to the administration of justice in some instances"). *Cf. Kansas v. Marsh*, 548 U.S. at 191 (J.Scalia, Concurring)("The legal community's general attitude toward criminal defendants, the legal protections States afford, the constitutional guarantees this Court enforces, and the scope of federal habeas review are all vastly different from what they were" in the pre-*Furman* era, such that these older cases fail to demonstrate "current relevance" and "cast no light upon the functioning of our current system of capital adjudication"). Focusing on modern cases, there is no deficiency.

Again, without doubt, the jury in Evan's trial was repeatedly instructed to consider the statutory and non-statutory mitigation evidence, and that a life sentence could be returned regardless of the presence of aggravating circumstances, and regardless of whether mitigating circumstances were proven. (See App. pp. 1784-1785). In short, life could be recommended for any reason or no reason. The record does not support a finding of deficient performance in failing to object to the mercy charge. However, if counsel were deficient, there was no prejudice, and Evans is still not entitled to any relief.

II.

The PCR Judge Erred In Finding Per Se Error In The Jury Instruction Regarding Mercy, Thereby Avoiding a Proper Strickland v. Washington Prejudice Analysis.

The PCR judge incorrectly relieved Petitioner of the burden of showing prejudice by finding that he cannot evaluate the effect the "erroneous mercy charge" would have had on the jury's determination. (App. pp. 4486, "It is impossible to estimate the impact of the charge eliminating mercy – an inscrutable concept that defies qualification – as a sentencing consideration on the jurors' reasoned moral response."). First, this is an incorrect application of *Strickland* as a matter of law. The United States Supreme Court has found: "...*Strickland* places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different." *Wong v. Belmontes*, 130 S. Ct. 383, 390-91(2009). Moreover, "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 131 S.Ct. at 792. The PCR judge's ruling on prejudice cannot be reconciled with this precedent. Second, to tie unfettered emotion to the sentencing phase in such a broad manner would make review of any finding of deficiency a guarantee of a new proceeding. For example, under the PCR judge's reasoning, because this State allows the jury to return a life sentence for any reason or no reason, the *Strickland* prejudice prong would always be met whenever any mitigation evidence was erroneously omitted, or evidence in aggravation erroneously admitted, because it may have affected the exercise of mercy. In other words, the ruling, if allowed to stand, would fundamentally alter post-conviction relief, not just for issues regarding the phrasing of the charge, but review of *all* sentencing phase error. Third, the PCR judge's ruling here, like his ruling on deficient performance, was also guided by his incorrect reasoning that *Rosemond* mandated relief. This Court did not provide guidance

as to possible reversible error. This Court focused only on the isolated phrase, not its relationship to the remaining charge, or the remaining charge itself absent the phrase.[2] What is still at issue is "what a reasonable juror would have understood the charge as meaning" in light of the context in which it is given. *See State v. Jackson*, 297 S.C. 523, 527, 377 S.E.2d 570, 572 (1989). Here, a reasonable juror would not have understood the charge as a whole to preclude the consideration of, or exercise of, mercy.

Of course, the PCR judge was constrained to admit that trial counsel testified that mercy was a major element in the presentation and argument, and neither understood the charge as precluding mercy. (App. pp. 4480). This is similar to the pending case *John Kennedy Hughey v. State of South Carolina*, (2000-CP-01-212), where trial counsel testified that they did not, at the time the charge was given, take the charge to mean the jury was precluded. (*Hughey v. State*, State's Petition for Writ of Certiorari, filed January 12, 2011, at pp. 24-25). Moreover, it is clear from the record that the trial judge – Judge Cole – did not intend the charge to prevent consideration the exercise of mercy. (*See also Hughey*, State's Petition, at p. 24, Judge Cole's response to request for charge being his charge covered the mercy charge request). Judge Cole's charge repeatedly explained the jury's right to return a life sentence regardless of the aggravating circumstance found and reject of mitigating circumstances. (App. pp. 1784-1785). Moreover, the charge, in this instance, is undeniably tied to the prior sentence by the introductory phrase, "simply stated," and the prior sentence clearly instructs the jury they may recommend life even if

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[2] That is not to say the *dicta* reasoning is not helpful. In fact, it may well be argued that the reasoning allows the bench and bar to avoid the possibility of unfavorable hyper-technical interpretation, or simple misunderstanding, of the phrase, by substitution of "including" as opposed to the more controversial "other than."383 S.C. 330, 680 S.E.2d at 10.

they find no mitigating circumstance, i.e. as an act of mercy. (App. p. 1785). Further, Judge Cole's charge can be reasonably interpreted as not precluding mercy.

Under normal grammar rules, the phrase "other than an act of mercy" should modify the phrase "for no reason at all," not the separate phrase "for any reason." See http://www.yourdictionary.com/grammar/grammar-rules-and-tips/misplaced-modifiers ("According to grammar rules, modifiers should be placed as close as possible to the person or thing that they are modifying."). Consequently, the sentence is reasonably interpreted as the jury can return a recommendation of life 1) for any reason *or* 2) for no reason, just 3) as an act of mercy (differentiating a reason from an act). Additionally, "other than" is defined as "with the exception of, except for, besides" *Merriam-Webster Online Dictionary*, 2010, 2 November 2010, (http://www.merriam-webster.com/dictionary/otherthan). While true that if one looks at the sentence as containing a misplaced modifier, and, in so doing, assigns an alternate meaning for "other than" in the sentence, one may read "for any reason" *except* for the *reason* of mercy (of course this leaves the dichotomy of act verses reason, and the question whether mercy can be a reason or an act based on the absence of a reason, but for the sake of argument, one may read the sentence presuming error). Further, because of the alternate readings, this Court may properly, and indeed has already addressed, any possible confusion from the phrase alone by directing the phrase "including as an act of mercy" be used and not "other than." *Rosemond*, 383 S.C. at 330, 680 S.E.2d at 10. But that clarification does not equate with a finding that the instant charge was intended to exclude an act of mercy, especially in light of the remaining charge. Further, that clarification does not equate with a finding that the jury misconstrued the charge.

To show the instruction as a whole was infirm, one would have to find the jury accepted the contrary interpretation as a reasonable interpretation in light of the fact that the remainder of the charge *confirms* that mercy was not precluded in any way, shape or form. That is not a finding supported by record. Further still, to establish counsel error, Evans had to show that counsel performed deficiently by not embracing the same grammatical rules or parsed evaluation, a disfavored presumption. *See California v. Brown*, 107 S.Ct. at 840, 107 S.Ct. 837 ("While strained in the abstract, respondent's interpretation is simply untenable when viewed in light of the surrounding circumstances," i.e. the jury had heard the mitigation evidence and would not reasonably have thought the evidence "a virtual charade," rather, more reasonably, when consider the admonition an instruction "to only ignore the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase."). A reasonable juror, under the circumstances cited herein, would not have interpreted the charge as precluding consideration of the mitigation evidence in deciding whether to exercise mercy. *Id. See also Jackson, supra; State v. Bookter*, 93 S.C. 97, 76 S.E. 110 (1912)("Considering the instruction in the immediate connection in which it was given, and in connection with the whole charge, we are satisfied it was not misleading"). Consequently, there is no error in the instant charge, and certainly no deficient performance.

The instructions here show that the PCR judge emphasized the jury's duty to consider all statutory and non-statutory mitigating circumstances shown by the evidence, and emphasized the opportunity to exercise mercy:

> *... it is not necessary that you find the existence of such mitigating circumstance or circumstances beyond a reasonable doubt. You may recommend a sentence of life imprisonment whether or not you find the existence of a statutory or a nonstatutory mitigating circumstance.*

...

... you may also recommend a sentence of life imprisonment even though you find at least one of the statutory aggravating circumstances beyond a reasonable doubt and you find no mitigating circumstances to exist.

(App. pp. 1784-1785).

As noted, only one portion of the charge could possibly preclude the consideration of mercy (i.e. the phrase "other than an act of mercy"), and that according to *Rosemond* decided four years after the trial. The remaining charge clearly instructed the jury that it could return a life sentence for any reason or no reason at all. Thus, the charge as a whole was not deficient as a matter of state law as it certainly allowed for the exercise of mercy in the penalty phase. *Accord State v. Hicks*, 330 S.C. 207, 218-219, 499 S.E.2d 209, 215 (1998)("the trial judge is not required to instruct the jury it could impose a life sentence 'for any reason or no reason at all' where the jury is informed, as it was here, it could consider any mitigating circumstance authorized by law and could impose a life sentence even if aggravating circumstances were found").

Consequently, the phrase at issue – though now clearly disfavored and barred from use by state law – did not negatively contribute to the verdict as the charge as a whole was not incorrect. *See also State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000)("jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error"); *State v. Bell*, 305 S.C. 11, 21, 406 S.E.2d 165, 171 (1991)(finding, after review of a no unfettered sympathy instruction, "from the context of the charge, there is no reasonable likelihood this charge prevented the jury from considering any mitigating evidence in fairness and mercy.").

Further, the PCR judge erred in discounting the *Boyd v. California*, 494 U.S. 370, (1990), analysis as the charge at issue was erroneous not ambiguous. (See App. pp. 4489). The *Boyd* analysis is not strictly controlling because it is *Strickland* prejudice at issue. Even so, the *Boyd* analysis is persuasive because no case, including *Rosemond*, has reviewed whether the instructions *as a whole* are sufficient. In other words, the *charge* may be considered ambiguous where a portion of the charge is infirm. The *Boyd* test is proper in review of the instruction here as the instruction is not clearly erroneous as a whole, but contains an erroneous phrase in one sentence that seemly could contradict the remaining clear and correct language. *Compare Stromberg v. California*, 283 U.S. 359 (1931)(reversing where charge included unconstitutional ground for conviction). *See also Griffin v. United States*, 502 U.S. 46, 53 (1991)("This language, and the holding of *Stromberg,* do not necessarily stand for anything more than the principle that, where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground."). *Boyd* sets out the test for evaluating such ambiguous instructions. *See also Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991)(applying *Boyd*). Thus, the proper question "is whether there is a reasonable likelihood the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyd*, 494 U.S. at 380.

When "[t]he charge, as a whole, is not misleading," an applicant's allegation of error challenging any one particular phrase must be rejected. *State v. Atkins*, 303 S.C. 214, 221, 399 S.E.2d 760, 764 (1990), *citing State v. Patterson*, 299 S.C. 280, 384 S.E.2d 699 (1989). When considering the charge as a whole, a reasonable juror would not have thought he was precluded from considering considered any of the mitigation evidence

presented in the instant case. *See Jackson*, 297 S.C. at 527, 377 S.E.2d at 572 ("the test is what a reasonable juror would have understood the charge as meaning" in light of the context in which it is given). Additionally, as noted above, as to the state law provision for the exercise of mercy, the charge as a whole was consistent with state law as the charge clearly allowed for same. Consequently, there could be no prejudice.

Additionally, in *Rosemond*, this Court tied the propriety of the consideration of mercy to the receipt of "proper *evidence* of mercy." 680 S.E.2d at 10 (emphasis added). Pursuant to *Rosemond*, it is the receipt of evidence *requesting* mercy, or perhaps arguably supportive of a request for mercy, that makes the charge relevant and consistent with the instruction that "the jury should not be guided by sympathy, prejudice, passion, or public opinion." *Id.* In short, the charge is not intended to promote unreasoned reaction. Rather, the charge is meant to preserve the exercise of mercy *based on consideration of the evidence submitted.* To the extent this logic focuses on reasoned and guided response to the evidence, not only is the instant charge as a whole free from error – given its uncontested direct instruction to consider *all* evidence of statutory and non-statutory mitigating circumstances – it is consistent with United States Supreme Court precedent. However, the PCR judge's ruling severs the directive of the charge from consideration of the evidence. Therefore, his finding of a federal constitutional right is incorrect.

III.

The PCR Judge Erred In Finding A Federal Constitutional Right To A Mercy Charge Where Federal Precedent, Without Exception, Does Not Support Such A Federal Constitutional Right.

Mercy is an act – not evidence. *See* Black's Law Dictionary (9th ed. 2009) ("Compassionate *treatment*, as of criminal offenders or of those in distress; esp.

imprisonment, rather than death, imposed as punishment for capital murder.")(emphasis added). *See also Lusk v. Singletary*, 976 F.2d 631, 632 (11th Cir. 1992)(rejecting appellant's argument that the judge evidenced a "refus[al] to consider and give effect to mitigating evidence" based on the "court's statement that '[t]he law of this State does not permit this Court to extend mercy to this Defendant or others convicted of a capital felony.'"). Evidence of mercy would be evidence of an act of the jury; thus, a charge regarding mercy does not impact on consideration of any sentencing phase evidence and does not implicate federal constitutional protections.

A capital defendant is allowed, pursuant to the Eighth and Fourteenth Amendments of the Constitution, to submit evidence in mitigation of "any aspect of [...his...] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" to enable the jury to make an "individualized decision" in sentencing. *Lockett v. Ohio*, 438 U.S. 586, 604-605 (1978). In that same vein, the Court has determined that the State may not create "limitations" on the consideration of properly admitted mitigation evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 114-115 (1982). "These two cases place clear limits on the ability of the State to define the *factual bases* upon which the capital sentencing decision must be made." *Saffle v. Parks*, 494 U.S. 484, 490 (1990)(emphasis added). However, there is a difference between the presentation and consideration of evidence (i.e. *Lockett* and *Eddings*), and the exercise of unfettered sympathy or mercy: "Whether a juror feels sympathy for a capital defendant is more likely to depend on that juror's own emotions than on the actual evidence regarding the crime and the defendant." *Id* at 493. The Supreme Court has rejected challenges to instructions that the jury "'must not be swayed

by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling,'" *California v. Brown*, 479 U.S. 538, 540 (1987), and emphasized that for a rational and reliable sentencing proceeding, the decision must be "rooted in the aggravating and mitigating evidence introduced during the penalty phase." *Id.* at 542. The following quote is instructive:

> Petitioner suggests that the jury must have freedom to decline to impose the death penalty even if the jury decides that the aggravating circumstances "outweigh" the mitigating circumstances. But there is no such constitutional requirement of unfettered sentencing discretion in the jury...

Boyde, 494 U.S. at 377.

In South Carolina, "a capital defendant may present witnesses who know and care for him, and who are willing on that basis to plead with the jury for mercy on his behalf." *State v. Wise*, 359 S.C. 14, 27-28, 596 S.E.2d 475, 481 (2004). While not a constitutional right, a plea for mercy is uniformly accepted in South Carolina under our evidence rules. *Id.* *See also State v. Johnson*, 338 S.C. 114, 126-127, 525 S.E.2d 519, 525 (2000)(finding error in a limitation on questioning but no prejudice where "Johnson's sister was able to make a general plea for mercy on her brother's behalf."); *State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 319 (1991)(finding error in limitation on questioning but no prejudice where defendant's mother was allowed to make "a general plea for mercy for the life of her son"). A family member making a plea for mercy may *not* weigh in on what the appropriate sentence should be. *State v. Johnson*, 338 S.C. 114, 126-127, 525 S.E.2d 519, 525 (2000)("the defense did not seek to elicit the opinion of Johnson's sister about what verdict the jury 'ought' to reach. Defense counsel merely proposed to ask her whether *she wanted* Johnson to die" which "did not address the ultimate issue to be decided by the jury"). In sum, the basis for admissibility of the plea

is not mere mercy, but the plea's value as evidence of the shared bond which itself is a reflection of the defendant's character in that he is able to maintain that bond. Otherwise, there would be no reason to draw a distinction between 1) a plea for mercy and an opinion on which sentence is appropriate; and 2) allowing only family members to so plead, not even a victim who would arguably have an interest in the disposition. *See Torrence, supra, Wise supra. Cf. People v. Ochoa*, 966 P.2d 442, 505-506 (Cal. 1998)("what is ultimately relevant is a defendant's background and character-not the distress of his or her family. A defendant may offer evidence that he or she is loved by family members or others, and that these individuals want him or her to live. But this evidence is relevant because it constitutes indirect evidence of the defendant's character").

Without question, mercy was a "primary element" of the defense argument in closing. (App. pp. 1760-1772; pp. 3258-3261; pp. 3271-3273; pp. 4478-4480).[2] Here, however, there was no specific plea for mercy in the penalty phase, though friends and family did testify as to Evan's good qualities and their emotional bond to him. (See, for example, App. pp. 1677-1678). Nothing in the charge precluded the jury from

[2] Of course, it was not the only element. Defense counsel reminded the jury of the other significant punishment (life imprisonment without the possibility of parole); dramatized the reality of the death sentence is that the defendant will be killed; urging the jury not to "repay evil with evil"; emphasized the "mental or emotional defect" mitigator and reminding the jury of testimony from experts Dr. Evans and Dr. Berg; emphasized Evans' adaptability to the structured environment of prison; downplayed gang membership (against his client's instruction), and reminded the jury of the testimony from prison officials that regardless of membership, the fact Evans would be kept under close watch thereby countering the suggestion of benefits from gang membership in prison; emphasized the emotion in Evans' father's testimony to balance the emotion associated with the victim impact testimony; and emphasized the redeemable qualities, good qualities, that existed in Evans who also committed two murders. (App. pp. 1760-1772). In addition to these arguments, counsel discussed mercy, and plainly asked for mercy: "I am going to ask for mercy for Kamell Evans." (App. p. 1770).

consideration of this evidence. Thus, the charge, as a whole did not interfere with either the constitutional right to present mitigation evidence, or consideration of the evidence presented, i.e. the emotional bond to Evans. *See Boyde*, 494 U.S. at 380 (relevant question on constitutionally infirmity "is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."); *State v. Sims*, 304 S.C. 409, 422, 405 S.E.2d 377, 384-385 (1991)(applying *Boyde* in direct appeal).

The PCR judge clearly erred in determining that mercy is a constitutionally protected sentencing consideration tied to evidence. (See App. p. 4481; pp. 4482-4483). The United States Supreme Court has soundly rejected defense challenges to instructions that the jury "'must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling,'" *California v. Brown*, 479 U.S. 538, 540 (1987), and emphasized that for a rational and reliable sentencing proceeding, the decision must be "rooted in the aggravating and mitigating evidence introduced during the penalty phase." *Id.* at 542. *See also Saffle*, 494 U.S. at 492-493 ("It is no doubt constitutionally permissible, if not constitutionally required, for the State to insist that 'the individualized assessment of the appropriateness of the death penalty [be] a moral inquiry into the culpability of the defendant, not an emotional response to the mitigating evidence.")(internal citations omitted)(brackets in original); *Johnson v. Texas*, 509 U.S. 350, 371-72 (1993)("There might have been a juror who, on the basis solely of sympathy or mercy, would have opted against the death penalty had there been a vehicle to do so under the Texas special issues scheme. But we have not construed the *Lockett* line of cases to mean that a jury must be able to dispense mercy on the basis of a sympathetic

response to the defendant. Indeed, we have said that '[i]t would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary.'"). The Court has been very definite in separating the consideration of evidence and a response to the evidence: "We also reject Parks' contention that the antisympathy instruction runs afoul of *Lockett* and *Eddings* because jurors who react sympathetically to mitigating evidence may interpret the instruction as barring them from considering that evidence altogether. This argument misapprehends the distinction between allowing the jury to consider mitigation evidence and guiding their consideration." *Saffle*, 494 U.S. at 492.

Further, as noted above, the Supreme Court held in *Kansas v. Marsh* that "Kansas' death penalty statute, ***consistent*** *with the Constitution, may direct imposition of the death penalty* when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the aggravating circumstances and mitigating circumstances are in equipoise." 548 U.S. 173 (emphasis added). If there is no Eighth Amendment violation in *requiring* imposition of death where the jury unanimously finds circumstances in aggravation and the circumstances in aggravation and mitigation weighed equally, there could be no Eighth Amendment violation here based on the state charge regarding the exercise of mercy.

Consequently, the PCR judge also erred in finding counsel was ineffective in failing to object to the charge on the basis of an Eighth Amendment violation in the "restriction on a capital defendant's ability to present any relevant mitigating evidence" and have such evidence considered. (App. pp.4482-4483). *Accord Saffle*, 494 U.S. at

493 ("Whether a juror feels sympathy for a capital defendant is more likely to depend on that juror's own emotions than on the actual evidence regarding the crime and the defendant.").

To the extent a plea for mercy may be considered mitigation evidence, there was no plea for mercy in this case, but there was general testimony from the defendant's family and friends. But, again, the trial judge specifically charged the jury to consider *all* mitigation -- a fact that the PCR judge found persuasive in another part of the Order regarding the solicitor's argument that Petitioner asserted "limited" consideration of mitigation evidence. (See App. p. 4450). While the PCR judge consistently returned concentration to the one phrase referencing the exercise of mercy, (see App. pp. 4483-4484; pp. 4486-4490), it is undisputed that the jury was clearly instructed to consider the statutory and non-statutory mitigating *evidence*. (App. p. 1783). Moreover, there was no limitation whatsoever on the jury's ability to return a life sentence for any reason, either based on mitigation evidence or not based on mitigation evidence. (See App. p. 1784-1785). There was, in short, no limitation on the jury's ability to consider the evidence or to *exercise* mercy, whether so referenced as "mercy" or not.

IV.

The PCR Judge's Factual Finding That The Charge Regarding Mercy Disallowed The Exercise of Mercy Is Wholly Without Factual Support Where No Person Ever Testified That The Charge Was Intended Or Heard To Limit The Exercise Of Mercy, And Trial Counsel Was Focused On The Exercise Of Mercy In Their Penalty Phase Presentation and Closing.

The PCR judge placed emphasis on, and was apparently guided by, the fact that another circuit court judge determined "prejudice" in regard to the mercy charge in *Hughey v. State*, 2000-CP-01-0212. (See App. pp. 4492-4493). First, *Hughey* is not

settled, and is in fact on appeal to this Court. Second, the *Hughey* circuit court decision reflects a ruling on a free-standing claim, not ineffective assistance of counsel. If one would compare this case to other circuit court rulings, this case would more closely align with the ineffective assistance of counsel claim as raised in *Binney v. State*, 2000-CP-06-11-223. The Honorable J. Michael Baxley has rejected such a claim that was based, as is the instant one, on the subsequent disapproval of the charging language in *Rosemond v. Catoe*, 383 S.C. 439, 529 S.E.2d 721 (2000). (Order Pending, Ruling by Letter dated July 6, 2010). This Court should not be led to believe that there is even an emerging consensus on the treatment of the issue. Rather, one may fairly take from the differing rulings thus far that *Rosemond* clearly does not dictate a particular result. That alone argues well for this Court to grant certiorari in this matter.

Even so, the logic remains that it is virtually inconceivable that defense counsel would argue for the exercise of mercy, the trial judge would allow argument on the exercise of mercy, but the trial judge would intend to instruct the jury that they were not allowed to return a verdict based on mercy. This is especially so when the remainder of his charge so clearly instructed the jury a life sentence may be imposed for based on the mitigation or not. (App. pp. 1784-1785). Without question, both trial counsel testified that they did not hear the charge as preventing the exercise of mercy. (See App. pp. 3258-3261; pp. 3271-3273; pp. 4479-4480).

Additionally, the facts in the instant case do not cleanly fit within the *Rosemond* dictates for prompting the charge, i.e. "evidence of mercy" having been submitted, if one considers "evidence of mercy" a plea for mercy from one or more family members or close friends. Mercy was a "primary element" of the defense argument in closing. (App.

p. 4478).(See also App. p. 3270). Here, however, there was no specific plea for mercy in the penalty phase, but friends and family did testify as to Evans' good qualities and their emotional bond. (See, for example, App. pp. 1677-1678). Nothing in the charge, though, precluded the jury from considering this evidence. Thus, the charge, as a whole did not interfere with either the constitutional right to present mitigation evidence, or consideration of the mitigation evidence presented. And, because no free-standing plea was admitted, *Rosemond* was not directly implicated.

Again, mercy, by definition an act (not "evidence"), is always a possibility in sentencing – the State does not contend otherwise. The State maintains that the intent of the charge here was to allow the exercise of mercy. The most that may be said is that the one phrase in the one sentence at issue is misleading *in isolation.* When viewed as a whole, however, the jury instructions correctly and plainly charged that the jury could return a life sentence for any reason, based on mitigation evidence or not, or for no reason at all, whether or not an actual plea for mercy was entered. Evans is not entitled to a new sentencing proceeding.

CONCLUSION

For all the foregoing reasons, the State submits that this Court should grant certiorari in this case on the issues presented by Petitioner/Respondent, the State.

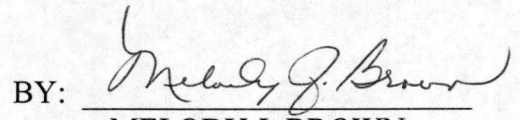
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

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Assistant Deputy Attorney General

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Senior Assistant Attorney General

BY: 
MELODY J. BROWN

Office of the Attorney General
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July 14, 2011.
Columbia, South Carolina.

ATTORNEYS FOR PETITIONER/RESPONDENT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas (PCR)
The Honorable D. Garrison Hill, Circuit Court Judge

Case No. 2006-CP-23-7719
(Capital PCR Action)

Kamell D. Evans,

Respondent/Petitioner,

v.

State of South Carolina,

Petitioner/Respondent.

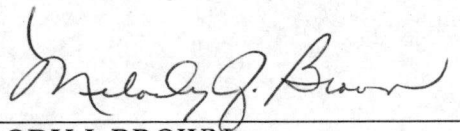
PROOF OF SERVICE

I, Melody J. Brown, hereby certify that the State's *Petition for Writ of Certiorari* and *Appendix* has been served upon Respondent/Petitioner by depositing one copy in the United States mail, postage prepaid, to each of his attorneys of record, addressed as follows:

William H. Ehlies, II, Esquire
Building A, Suite 201
310 Mills Avenue
Greenville, SC 29605

Christopher Seeds, Esquire
Cornell Death Penalty Project
112 Myron Taylor Hall
Ithaca, NY 14853

This 14th day of July, 2011.



MELODY J. BROWN
Senior Assistant Attorney General

ALAN WILSON
ATTORNEY GENERAL

June 13, 2012

RECEIVED
JUN 13 2012
S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: The State v. Kamell Evans
Appeal from Greenville County–Capital PCR

Dear Mr. Shearouse:

In the State's petition, p. 34, we referenced that in another capital PCR action, *Binney v. State*, the Honorable J. Michael Baxley had rejected an ineffective assistance of counsel claim concerning the charge issue regarding mercy and that receipt of an order was pending. Since that time, Judge Baxley issued an order denying relief, but then subsequently, on reconsideration, granted relief. (See Attached *Binney* Order). However, the State's argument that differing approaches have been taken (in the capital PCR cases of *Hughey, Evans* and *Binney*) is still correct as relief in *Hughey* was not premised on a finding of ineffective assistance. (See Attached *Hughey* Order, pp. 5-7). However, I write to let the Court know that relief was granted in *Binney* by order dated May 11, 2012, and filed May 21, 2012, based on a finding of ambiguity in the charging language, and a finding that counsel should have objected. (See Attached *Binney* Order, p. 6). I would also note that the State has filed and served a notice of cross-appeal in the *Binney* case.

Sincerely,

Melody J. Brown
Senior Assistant Attorney General

MJB/arb

cc: William H. Ehlies, II, Esquire
Christopher Seeds, Esquire

RECEIVED
JUN 13 2012
S.C. Supreme Court

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHEROKEE)	Case No. 2006-CP-11-223
)	
Jonathan K. Binney)	**ORDER GRANTING APPLICANT'S MOTION TO RECONSIDER THE DENIAL OF POST CONVICTION RELIEF AND GRANTING POST-CONVICTION RELIEF AS TO SENTENCING**
Applicant.)	
)	
v.)	
)	
State of South Carolina,)	
Respondent.)	
)	

FILED IN OFFICE OF CLERK OF COURT CHEROKEE COUNTY, S.C.
2012 MAY 21 AM 8 43
BRANDY W. MCBEE

This death penalty Post-Conviction Relief (PCR) action is before the Court pursuant to an April 7, 2006 application filed on behalf of Jonathan Kyle Binney, as amended. This Court held an evidentiary trial into the matter on May 29-June 1, 2007, at the Cherokee County Courthouse. Applicant was present at the trial, and John H. Blume, III, Sheri Lynn Johnson and Emily C. Paavola, Esquires, represented him. Senior Assistant Attorney General William Edgar Salter, III, and Assistant Attorney General Anthony Mabry represented the State. On September 8, 2011, this Court entered an Order denying post-conviction relief. The passage of time between the trial and the issuance of a final Order occurred in part because of an interlocutory appeal over issues of attorney/client privilege that arose during the pendency of the case. After the final judgment was issued by this Court denying PCR, Applicant moved the Court to alter or amend the judgment on September 16, 2011 (hereafter, "Motion to Alter"). On December 9, 2011, the Court held a telephonic hearing regarding the issues raised in Applicant's Motion to Alter. Applicant was represented during this hearing by Mr. Blume and Ms. Paavola. Mr. Salter and Mr. Mabry participated on behalf of the State.

After considering the arguments made by counsel for both parties, this Court determines that the facts as stated in its original Order, filed September 8, 2011, must be altered in two

instances. Moreover, the Court amends its original Order by granting a new sentencing hearing based on an ambiguous jury charge about mercy given by the trial judge. The reasons for these amendments are stated herein.

I. FACTUAL AMENDMENTS

The original Order found that Applicant's daughter, Mikayla Binney, was required to have a hysterectomy as a result of the sexual assault against her. *See* September 8th Order at p.7. Applicant has noted that this factual assertion is incorrect and that Dr. Mainman testified at trial that Mikayla suffered primarily internal injuries, her uterus was not damaged, and she was not expected to have any difficulties bearing children. Record on Appeal p.3193. After review of the record, this Court agrees that this factual finding was incorrect and hereby strikes this factual assertion from the original Order.

Second, in its September 8th Order, the Court found that Applicant's PCR witness, Ms. Tonya Brown, was biased against the Seventh Circuit Solicitor's Office and the Gaffney Police department because these entities were prosecuting her daughter. *See* September 8th Order at p.26, n.12. Applicant points out that Ms. Brown did not testify at the PCR hearing that her daughter was being prosecuted. Rather, she testified that her daughter had been molested by her landlord and the authorities told her that they could not do anything about this. Ms. Brown stated that she felt this was unfair, but that she did not "have anything against all them." PCR Hearing Transcript p.391. While the Court still finds Ms. Brown to be biased, the reason given was incorrect. Thus, the original Order is hereby altered in this regard. The Court denies the remainder of Applicant's allegations of factual error as either lacking merit or harmless.

II. AMENDMENT GRANTING POST-CONVICTION RELIEF

Applicant alleges that his trial counsel was ineffective in failing to object to the trial court's sentencing-phase instruction that the jury could not give life as an act of mercy. *See* PCR Application, Ground 10 & 11(b)(6). This instruction is identical to the one that the South Carolina Supreme Court found erroneous in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 4 (2009). In addition, two other circuit courts have recently granted post-conviction relief on the basis of this erroneous instruction. *Hughey v. South Carolina*, 2000-CP-01-0212, Order Granting Post-Conviction Relief dated May 14, 2010; *Evans v. South Carolina*, 2006-CP-23-7719, Order dated August 29, 2011. After full review, this Court determines that Applicant is likewise entitled to relief on this claim and orders that Applicant is, therefore, entitled to a new sentencing trial.

The South Carolina Supreme Court, while granting relief based on a finding of ineffective assistance due to counsel's failure to present evidence of the defendant's mental illness, chose nevertheless to address an additional issue. Rosemond claimed that trial counsel was also ineffective for failing to object to the trial court's instruction to jurors that, "you may recommend a sentence of life imprisonment for any reason or for no reason at all *other than as an act of mercy*." *Rosemond*, 383 S.C. at 329, 680 S.E.2d at 10 (emphasis in original). The Court found that the trial court's instruction prevented jurors from considering mercy as part of their sentencing decision. This, the Court emphasized, ran contrary to state law, under which a defendant is entitled to present evidence of mercy (see *State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 318-19 (1991)) and state law requiring that jurors be instructed that they can return a life sentence "for any reason or no reason at all." *Rosemond*, 383 S.C. at 329, 680 S.E.2d at 10;

see also, id. ("It is proper to instruct a jury in a capital sentencing phase that it may recommend a life sentence for any reason or no reason at all, including as an act of mercy.").

Here, as in *Rosemond*, the trial judge instructed Applicant's jury: "[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.*" (emphasis added). Trial counsel's failure to object to the erroneous charge was both deficient and prejudicial. Trial counsel should have known that the charge was inconsistent with long-standing South Carolina law and the United States Constitution. The South Carolina Supreme Court's statement in *Rosemond* is not a new rule. It has been the rule for decades that mercy can be considered by a South Carolina capital jury. *See, e.g., State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 318 (1991); *Drayton v. Evatt*, 312 S.c. 4, 12, 430 S.E.2d 517, 522 (1993); *State v. Johnson*, 339 S.C. 114, 126, 525 S.E.2d 519, 525 (2000); *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004); *State v. Sapp*, 366 S.C. 283, 292-94, 621 S.E.2d 883, 887-88 (2005). Under S.C. Code Ann. § 16-3-20(C), "[t]he judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law. . ." Mercy is embraced within this statutory directive as a basis for returning a life sentence. This is also supported by the fact that the statute does not require the jury to "weigh" aggravating circumstances against mitigating circumstances; rather, South Carolina is a non-weighing state, meaning the jury can return a verdict of life for any reason "otherwise authorized or allowed by law." S.C. Code Ann. § 16-3-20(C).

Given this precedent, of which trial counsel should have been aware, it was not proper for the trial court in Applicant's case to issue an instruction to the jury that it could not return a life sentence "as an act of mercy." Trial counsel's failure to object to the charge was deficient. Moreover, trial counsel's failure prejudiced Applicant because it permitted the jury to operate

under the false belief that they could not consider mercy as a reason to impose a life sentence when, in fact, it has long been the law in this State that a jury may properly consider mercy and may impose a life sentence for any reason or no reason at all. The improper instruction was inherently prejudicial because it prevented the jury from carrying out one of its core responsibilities, *i.e.*, to determine whether the defendant should be sentenced to life as an act of mercy. *See, e.g., State v. Blakely*, 158 S.C. 304, 304, 155 S.E. 408, 409 (1930) (holding a trial court's instructions cannot impede "the right and duty of the jury to recommend the appellant to the mercy of the court, in the event the jury reached the conclusion that the appellant was guilty of murder."); *State v. Chasteen*, 228 S.C. 88, 104, 88 S.E.2d 880, 887 (1955) ("The discretion of the jury as to recommending mercy is an unlimited one. . . . [A] recommendation to mercy does not have to be based on evidence; [rather], it [is] sufficient to simply inform the jury that they may recommend the defendant to mercy, the effect of which is to reduce the punishment to life imprisonment."); *State v. King*, 158 S.C. 251, 155 S.E. 409 (1930) (same); *State v. Jones*, 201 S.C. 403, 23 S.E.2d 387 (1942) (same); *State v. Tyner*, 273 S.C. 646, 660, 258 S.E.2d 559, 566 (1979) ("the trial judge failed to charge the jury that it could recommend life imprisonment even if it found the existence of one or more statutory aggravating circumstances beyond a reasonable doubt. The omission of this instruction to the jury was an "arbitrary factor," also requiring reversal of the death penalty") (citing S.C. Code § 16-3-25(C)). Applicant is, therefore, entitled to a new sentencing trial.

In making this decision, this Court is aware of Respondent's argument that this Court is misconstruing the words of the trial judge, and that the charge read in its entirety informed the jury that a life sentence can be given as an act of mercy. Moreover, Respondent argues that within the specific sentence from the charge of which Applicant complains, the phrase "other

than as an act of mercy," is not intended to limit the preceding phrase "for any reason, or for no reason at all," but to actually expand it. The language used is, at best, ambiguous, and certainly capable of being construed as a limitation; thus, trial counsel should have objected.

IT IS THEREFORE ORDERED:

1. That the Court's original Order is altered in two factual respects as stated above; and,

2. That Applicant is granted a new sentencing hearing based on the trial court's ambiguous jury charge regarding the jury's consideration of mercy.

IT IS SO ORDERED this 11th day of May, 2012.

J. MICHAEL BAXLEY
Presiding Circuit Court Judge

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2012 MAY 21 AM 8 43
BRANDY W. MCBEE

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE EIGHTH JUDICIAL CIRCUIT
COUNTY OF ABBEVILLE)	
)	
John Kennedy Hughey, #5055)	Case Number: 2000-CP-01-0212
)	
Applicant,)	
)	
v.)	
)	
The State of South Carolina,)	ORDER GRANTING POST-CONVICTION RELIEF
)	
Respondent.)	
)	

A TRUE COPY
BY _____
CLERK OF COURT

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
2010 MAY 14 AM 8 48
EMILY Y MCMAHAN
CLERK OF COURT

This matter comes before the Court pursuant to an amended application for post-conviction relief (PCR) filed by the Applicant dated December 15, 2007. On October 13-15, 2008, this case was called before the Court of Common Pleas. The Applicant was present and represented by his appointed counsel Charles Grose, Esquire, Tara Schultz, Esquire, and Teresa Norris, Esquire. The Respondent was represented by Donald J. Zelenka, Esquire, Office of the South Carolina Attorney General. At the hearing, testimony was received from Robert Tinsley, Sr., Esquire, Jeff Yungman, Julia Perlotte, Martha Ann Stewart, Billy Garrett, Esquire, Robert Dudek, Esquire, Paige (Tarr) Haas, and Dr. Donna Schwartz-Watts.

Following the hearing, this Court took the matter under advisement and requested Post-Hearing Briefs to be submitted by the parties. The Applicant, by and through his appointed counsel, submitted his post-hearing brief on June 8, 2009. On June 29, 2009, Applicant supplemented his post-hearing brief due to the South Carolina Supreme Court's decision overruling part of the opinion in the Applicant's direct appeal. *See Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 4 (2009). Thereafter, the Respondent served its post-hearing brief on August 31, 2009 and the Applicant then served his reply brief on December 11, 2009.

1,67

For the reasons stated more fully herein, Mr. Hughey's Application for Post-Conviction Relief regarding the guilt phase of the Applicant's trial is DENIED and DISMISSED, with prejudice, and the Application for a new sentencing phase of the trial is GRANTED.

TRIAL COUNSEL IS NOT INEFFECTIVE WHEN HE ARTICULATES A VALID REASON FOR EMPLOYING CERTAIN TRIAL STRATEGY (Issues I and II)

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court held that a convicted defendant's claim that counsel's assistance was so defective as to require a reversal of a conviction requires that the defendant show (1) that counsel's performance was deficient, and (2) that the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial. *Id.* at 687. To establish deficient performance under *Strickland*, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In order to establish prejudice, the applicant must show, "but for counsel's errors, there is a reasonable probability the result of the trial would have been different." *Id.* at 694; *see also Brown v. State*, 340 S.C. 590, 533 S.E.2d 308 (2000). Where counsel articulates a valid reason for employing certain strategy, the conduct will not be deemed ineffective. *Caprood v. State*, 338 S.C. 103, 525 S.E.2d 514 (2000).

A. The Presentation of Manslaughter and Applicant and Sister's Guilt Phase Testimony

The Applicant contends that his trial counsel erred in advising his sister and himself to testify in the guilt phase of the trial where "evidence was irrefutable to support convictions for murder." (Applicant's Post-Hearing Brief, P. 23). Based upon the argument presented at the hearing and Mr. Hughey's Post-Hearing Brief, the Applicant has failed to show either that there is a reasonable probability under *Strickland* that the result of the proceeding would have resulted in a different verdict, assuming that counsel did advise Applicant and his sister to testify. Nevertheless, the right to testify belongs to the Applicant and the trial court made a full inquiry

of whether the Applicant wanted to testify and was advised of his right to testify. The mere fact that trial counsel's strategy was unsuccessful does not render counsel's assistance unconstitutionally ineffective. *Strickland*, 466 U.S. at 689; *see also Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995).

In addition to asserting that trial counsel was ineffective for allowing the Applicant and his sister to testify during the guilt phase, Applicant contends that his attorneys were ineffective for pursuing a charge on the possible lesser included offense of voluntary manslaughter and transferred intent. Counsel's "strategic choices made after thorough investigation ... are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-691. In evaluating an ineffective assistance claim, a court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690.

Applicant's trial counsel testified at the PCR hearing that the trial strategy was to keep the case from being a death eligible case by presenting evidence that would entitle their client to an instruction on manslaughter. PCR 281, 1. 10-14. Trial counsel was effective in properly presenting evidence to support a charge of voluntary manslaughter and the trial judge properly gave the manslaughter instruction and specifically included the manslaughter –transferred intent charge. R. 3465-68. With the trial counsel's success in having the charge given, deficient performance under *Strickland* cannot be found merely because the result was rejected.

This Court finds that the Record from the Applicant's trial and sentencing hearing, as well as the PCR hearing, conclusively demonstrate that appointed counsel were not deficient in presenting manslaughter as a jury charge and allowing the Applicant and his sister to testify

during the guilt phase. In addition, the Applicant was not prejudiced in any way by trial counsel's performance.

B. The Failure to Properly Investigate and Present Available Mitigating Evidence.

In his second specification of ineffective assistance of counsel, the Applicant asserts that his counsel failed to investigate or present adequate mitigation evidence. In particular, he specifies adaptability to confinement and the capacity to appreciate the criminality of his conduct as two examples of this error. After considerable review of the record, this Court finds that the trial counsel investigated both the mental and family background of the Applicant and presented an appropriate case in mitigation.

Applicant contends that trial counsel failed to include any evidence of adaptability to prison life based upon his confinement history. At the PCR hearing, trial counsel testified that the mental health evidence revealed that the Applicant, in times of stress, would revert to his learned behavior of violence. In addition, trial counsel testified that they considered presenting the evidence, but because of previous negative experiences in capital murder trials on this very issue, they decided not to provide the testimony. Furthermore, trial counsel testified that they had met with the detention officers and learned that their testimony would not be of value to their case. This Court finds that was a strategic decision made by the counsel during the trial and concludes that the Applicant has failed to show the decision was based on neglect or ignorance. *Strickland*, 466 U.S. at 690-691. Furthermore, the Applicant has not demonstrated the prejudice that resulted by omitting this evidence required by *Strickland*, *supra*.

It is important to note that at trial the jury heard mitigation testimony from Ms. Anthony Wilson, Anthony Scott Harrison, Jessie Christopher Brown, Nancy Leigh Ramey, Rev. Wendall Cox, Gloria White Harrison, social worker Jeff Yungman, and Dr. James Evans, an expert in

neuro-psychology and psychology. In addition, trial counsel ensured that the jury instructions during the sentencing phase focused the jury on potential mitigation suggested by the evidence. Specifically, the jury was instructed to consider:

> 1. The Defendant has no significant history of prior criminal conviction involving the use of violence against another person.
> 2. The murder was committed while the Defendant was under the influence of mental or emotional disturbance.
> 3. The age or mentality of the Defendant at the time of the crime.

The record clearly reveals that counsel retained a number of experts who provided their opinions in the case as well as a series of lay witnesses to testify on Applicant's behalf in mitigation. The sentencing jury was readily aware of the dysfunctional family experience that the Applicant experienced. This Court finds that the appointed trial counsel for the Applicant put into evidence a thoughtful and thorough case in mitigation considering various themes and presentations. *Accord Tucker v. Ozmint*, 350 F.3d 433, 441-42 (4th Cir. 2003). Accordingly, Applicant's claim that trial counsel failed to properly investigate and present available mitigating evidence is denied.

THE JURY INSTRUCTION REGARDING MITIGATION THAT JURORS "MAY RECOMMEND A SENTENCE OF LIFE FOR ANY REASON OR NO REASON AT ALL OTHER THAN AS AN ACT OF *MERCY*," *STATE V. HUGHEY*, 339 S.C. 439, 460, 529 S.E.2D 721, 732 (2000) (EMPHASIS THAT OF THE COURT), IS SO INIMICAL TO THE LAWS OF THE STATE AND THE UNITED STATES IN CAPITAL CASES AS TO ENTITLE THE APPLICANT TO A NEW TRIAL. (Issues III, IV and V).

The jury was instructed on non-statutory mitigating circumstances, in pertinent part, as follows:

> Now while there must be some evidence which supports a finding by you of the existence of one or more statutory or non-statutory mitigating circumstances, it is not necessary that you find the existence or [sic] a circumstance or circumstances beyond a reasonable doubt. *And you may recommend a sentence of life imprisonment and [sic] whether or not you find the existence of a statutory or nonstatutory mitigating circumstance.*

* * *

> Simply stated, you may recommend a sentence of life imprisonment for *any reason or for no reason at all* other than as an act of mercy.

State v. Hughey, 339 S.C. 439, 458-459, 529 S.E.2d 721, 731 (2000) (emphasis that of the Court).

The Supreme Court noted: "Hughey contends the jury instruction was confusing because it suggested that an act of mercy would have been an invalid reason for a life vote." *Id.,* 339 S.C. at 460, 529 S.E.2d at 732. As for the Respondent's contention that the trial court's charge had become "the law of the case," (Issue V), obviously the Supreme Court recognized and addressed it as an issue on appeal. The Supreme Court went on to approve and sanction the jury charge given by the trial court.

Nevertheless, in a prior trial, *State v. Rosemond,* 335 S.C. 593, 598, 518 S.E.2d 588, 590 (1999), where "the trial court's jury instruction mirrored the instruction found proper . . . in *State v. Hughey,"* on a subsequent post-conviction relief application, the Supreme Court expressly held:

> We overrule *Hughey* to the extent it approved and sanctioned the charge given here.
>
> * * *
>
> It is proper to instruct a jury in a capital sentencing phase that it may recommend a life sentence for any reason or no reason at all, including as an act of mercy.

Rosemond v. Catoe, 383 S.C. 320, 330, 680 S.E.2d 5, 10 (2009).

It has long been the law of South Carolina "as to the right and duty of the jury to recommend the appellant to the mercy of the court, in the event the jury reached the conclusion that the appellant was guilty of murder." *State v. Blakely,* 158 S.C. 304, 155 S.E. 408, 409 (1930). Prior to the enactment of Act No. 530, 21 Stat. at L. 785 (1894), the punishment for the

crime of murder was death only. *See* Act No. 91, 14 Stat. at L. 175 (1869). The 1894 Act,[1] "gave to a petit jury the right, when it found a defendant guilty of murder, to recommend him to the mercy of the court, and that the effect of such recommendation will be to save the accused from death, and cause him to be sentenced for life imprisonment at hard labor. The presiding judge was in error in stating to the jury repeatedly that they had nothing to do with mercy, and he committed further error in telling the jury some of the instances in which they should recommend mercy." *State v. King*, 158 S.C. 251, 155 S.E. 409, 425-426 (1930).

Under our most recent case law applying S.C. Code Ann. § 16-3-20 (2003), it is now well established that: "It is proper to instruct a jury in a capital sentencing phase that it may recommend a life sentence for any reason or no reason at all, including as an act of mercy." *Rosemond v. Catoe, supra.* Because the jury was instructed that they "may recommend a sentence of life imprisonment for any reason or no reason at all ***other than as an act of mercy,"*** (emphasis supplied), the Applicant has established his entitlement to a new sentencing phase of his trial. *State v. Hughey, supra; Rosemond v. Catoe, supra.*

CONCLUSION AND JUDGMENT

Due to the overwhelming evidence of guilt and want of prejudice, the relief regarding the guilt phase of the Applicant's trial is DENIED and DISMISSED, with prejudice, and, based on the foregoing, the Application for a new sentencing phase of the trial is GRANTED.

AND, IT IS SO ORDERED.

ALEXANDER S. MACAULAY, Judge

May 7, 2010
Walhalla, South Carolina

[1] Section 109. (2454). Whoever is guilty of murder shall suffer the punishment of death: *Provided, however,* That in each case where the prisoner is found guilty of murder, the jury may find a special verdict recommending him to the mercy of the Court, whereupon the punishment shall be reduced to imprisonment in the Penitentiary with hard labor during the whole lifetime of the prisoner. 1894 (21) 785; § 16-52, S.C. Code (1962); 1868 (14) 175.

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

Kamell Delshawn Evans,

Respondent/Petitioner,

-vs-

State of South Carolina,

Petitioner/Respondent.

RESPONDENT/PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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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.[1] The shooting arose out of a domestic depute between Mr. Evans and his girlfriend Christina Rodriquez; the victims were the brother and father of Rodriquez. App. 1420-32.

Mr. Evans was indicted for the murders of Antonio L. Sapinoso and his son Antonio J. Sapinoso (App. 1802-13), which occurred inside the Sapinoso home. The State filed a Notice of Intent to Seek the Death Penalty (App. 1814), alleging three aggravators as applied to Antonio L. Sapinoso and the same three factors as to Antonio J. Sapinoso, with the additional aggravator that the killing of Antonio J. Sapinoso 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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[1] 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 8th amendment and 14th 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,[2] 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

[2] 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.[3] 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

[3] 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.[4]

1. Counsel's rushed preparation for trial.

[4] 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.[5] 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

[5] 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).[6] 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

[6] 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 (voxils) 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.[7]

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

[7] 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.[8] 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 (4th Cir. 2008) (citing *Strickland,* 466 U.S. at 690).[9] 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

[8] 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.*

[9] 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.[10]

- *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.[11]

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[10] 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.

[11] 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.[12] 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

[12] The PCR court overreads *People v. Peeples*, 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, *Peeples*'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, *Peeples*'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 (4th 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 Sapinoso 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[13]—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.

[13] 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 Sapinoso.

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).[14]

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

[14] 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.[15]

Interpretations of similar statutes by other state courts are in accord. As the Nebraska Supreme Court has pointed out[16]:

> [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)).[17] Were the aggravating factor read broadly to apply merely by function of the officer's status, the Nebraska court explained,

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[15] 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.

[16] 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 Sapinoso and his father, Antonio Sapinoso, died in circumstances stemming from a break-up between Christina Rodriguez (Officer Sapinoso'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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[17] 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).[18] 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

[18] 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 Sapinoso 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. Sapinoso 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 Sapinoso 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 Sapinoso's professional duties had no impact on this tragedy (see App. 1143-49).[19] 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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[19] 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 Sapinoso] 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 ("Sapinoso 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 Sapinoso'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 Sapinoso 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 Sapinoso 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.[20] 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,

[20] 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).[21] 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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[21] 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 form 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.[22]

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.[23]

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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[22] 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?").

[23] 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.[24]

(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

[24] 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.[25]

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

[25] 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.

4.

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.[26]

[26] 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.[27]

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.

[27] 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."[28] 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.

---

[28] 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 (4th 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 (11th 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.

7.

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 succomb 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 (10th 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.



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

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MAR 16 2012

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
(Capital PCR: 2006-CP-23-7719)
The Honorable D. Garrison Hill, Circuit Court Judge

Kamell D. Evans,

Respondent/Petitioner,

v.

State of South Carolina,

Petitioner/Respondent.

STATE'S RETURN TO RESPONDENT/PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This matter is before the Court on a cross-appeal by death-sentenced inmate Kamell Evans (Respondent/Petitioner) from the denial of claims in his post-conviction relief ("PCR") action.[1] On February 24, 2011, the Honorable D. Garrison Hill granted partial relief and ordered a new sentencing proceeding. Judge Hill found error in the trial judge's charge in the penalty phase – specifically, error in the phrasing of one sentence of the whole charge. (See App. pp. 4475-4484; p. 4500). The judge denied relief on all remaining issues. (App. p. 4500). The State filed a motion to alter or amend on March 9, 2011, (App. p. 4501), which was denied on March 10, 2011, (App. p. 4515). Both parties appealed.

The State, as Petitioner/Respondent, filed a petition for writ of certiorari on July 14, 2011. Respondent/Petitioner filed a return to the State's petition on November 18, 2011. Petitioner/Respondent filed its reply on December 12, 2011. Petitioner/Respondent's petition is currently pending.

Respondent/Petitioner also filed a separate petition for writ of certiorari on November 18, 2011, raising seven issues that were denied in the litigation below in Judge's Hill's detailed order of February 24, 2011. This return follows.

STATEMENT OF FACTS

The PCR judge was guided by the following salient facts,[2] supported by record and identified specifically by citation thereto:

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[1] A full statement of the case is already before the Court in the State's Petition and is not repeated here. The Statement, found on pp. 2-8 of the State's petition, is incorporated by reference.

[2] This refers to facts necessary to this appeal. The PCR court also considered evidence regarding the manner of the shooting and included forensic facts relevant to evaluating evidence as to whether all four shots to the deputy's head were directly to the back of the head while his head was on the floor, or whether three of the four shots were to the back of the head while the deputy's head was on the floor. The PCR

There is no question that Evans shot and killed Antonio L. Sapinoso and Deputy Antonio J. Sapinoso after having held them hostage for approximately five (5) hours in the Sapinoso home in Greenville County. Evans acknowledged same in his statement to the authorities, in his testimony during the guilt phase, and in his closing statement to the jury. (R. p. 1233; p. 1432; p. 1473).

...

At trial, Evans testified that he went to see the Sapinosos on the night of April 1, 2003 because his relationship with Christina Rodriquez, a sister to Deputy Sapinoso, had soured and that Christina left him with financial difficulties. He asserted that he went to the Sapinoso home because they would "understand" his position of frustration, and "could put an end to everything." (R. p. 1425, line 11 – p. 1426, line 4). Evans conceded he parked his truck away from the home, and waited for Deputy Sapinoso to return to the family home. (R. p. 1428). Evans testified he approached the Deputy when the Deputy drove up, and conceded he had a gun when he "asked" to speak with Deputy. According to Evans's trial testimony, the two sat on the porch until Evans began to cry and the Deputy suggested they go inside the home. (R. pp. 1428-1436). According to Evans, the Deputy's father was in the living room with them, while his mother remained upstairs in the house with her grandson.[3] (R. p. 1431). According to Evans's testimony, "they" (he and the Deputy) together called Christina. (R. pp. 1429-1430). Evans testified he placed Deputy Sapinoso's gun on the coffee table in the living [room], and he only fired when he "perceived Joe going to the gun," and Mr. Sapinoso "standing up." (R. p. 1432).

The State's evidence showed that Christina had called the sheriff's department and told them that her brother, a sheriff's deputy, and her father were being held hostage, along with her mother and son, and that if she did not go to her home, Evans planned to kill her family. (R. pp. 1089-1091).

Tony Lee, a negotiator with the Greenville County Sheriff's Office, conducted negotiations with Evans to surrender and leave the

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judge rejected ineffective assistance claims based on same. (See App. pp. 4417-4420). Those issues are not before this Court and facts referenced in the Order going to those issues are not included herein.

[3] The PCR judge also included in his footnote 5: "During the penalty phase, the jury would hear Mrs. Sapinoso's recounting of events, including the defendant blocking her from calling out for help, and her attempts to shield her grandson, and survive the harrowing event herself. (R. pp. 1549-1554). Nothing in this testimony remotely supports a "family summit" situation downstairs to help Evans as Evans would have the jury and court believe. In fact, Evans later admitted to counsel that the deputy was actually handcuffed. (Respondent's Exhibit 25, p. 2). Even so, this Court recounts the testimony at trial."

home. Officer Lee testified that he initially made contact through Evans's sister, Tina, who was also present outside the home, and Lee told Evans he could come out at anytime and he would not be harmed. (R. p. 1117, line 10-p. 1118, line 21). Through several hours of negotiations, in addition to speaking with Lee, Evans was also able to speak with family and friends who encouraged him to come out. (R. p. 1119, lines 6-15; p. 1121, lines 1-24; p. 1127, line 14- p. 1128, line 4). Evans complained to Lee about his relationship with Christine, but also indicated the situation was not limited to that problem, but was "bigger than that" though Lee was never able to ascertain exactly what Evans was referencing. (R. p. 1129, lines 15-25; p. 1134, lines 8-18)(emphasis added). Evans remained "cordial and nice" to Lee throughout the negotiations, becoming agitated only when Lee asked to speak with Joe, or when Lee requested release of some of the hostages. (R. p. 1120, lines 2-10; p. 1122, line 3 - p. 1123, line 19; p. 1125, lines 11-15; p. 1128, line 9 - p. 1129, line 4). Lee eventually spoke with Joe and enlisted Joe's help in attempting to assure Evans of his safety and secure everyone's release. (R. p. 1123, line 20 - p. 1124, lines 18). Lee also arranged, at Evans's request, for Evans to speak with Christine. Lee listened to the conversation and thought the conversation "went real well." (R. p. 1124, line 19 - p. 1126, line 8). After Evans spoke with Christine, Lee spoke to Evans "a couple of more times" and continued negotiations. Evans told Lee he thought Lee was "cool" and said he was going to discuss the matter with Joe, and would call back later. (R. p. 1126, lines 11-24). Minutes later, Lee heard multiple shots. (R. p. 1126, line 25 - p. 1127, line 7).

The SWAT team, which was deployed, had not attempted any action prior to the shooting as they were informed negotiations were going well and Evans would be coming out on his own. (R. p. 1098, line 16 - p. 1102, line 7; p. 1108, lines 17-23; p.1166, line 22 – p. 1167, line 2; p. 185, lines 5-13; p. 1186, lines 16-22). Officers stationed at the entries of the home first heard a series of shots, then a plea of "no, no, no" and another series of shots. (R. p. 1146, lines 2-25; p. 1167, line 13 – p. 1168, line 17; p. 1187, line 11 – p. 1188, line 14; p. 1199 line 18 – p. 1200, line 23). After gaining entry, the officers saw Deputy Joe Sapinoso face down on the floor with his arms folded underneath his body, with gunshots to the back of the head. His father's body was on the couch. (R. p. 1153, lines 1-9; p. 1174, lines 12-16; p. 1191, lines 3-8; p. 1202, lines 24-25). When the officers rushed Evans, he immediately said, "don't hurt me." (R. p. 1151, lines 6-14). The SWAT team also rescued Mrs. Sapinoso and Christina's son who remained hidden upstairs until the officers escorted them outside the home. (R. p. 1154, lines 1-17).

Investigators at the scene recovered three guns, a 9mm, a .38, and a Glock that was the Deputy's service weapon. (R. p. 1288, lines 2-6; p. 1312, lines 20-24). Investigators also recovered a black nylon bag in the

> entryway that held 140 rounds of ammunition in boxes plus several loose rounds, and an 8 inch knife. (R. p. 1291, lines 2-21). (See also June PCR Tr. pp. 783-784; Respondent's Exhibit 23-A). Additionally, investigators found Evans's hat in an abandoned house close to the Sapinoso home, where Evans waited for his victim, and Evans's car parked significantly, a half of mile so, away. (R. p. 1271; June PCR Tr. p. 779-780; State's Exhibit 40a; Respondent's Exhibit 24, p. 1). Evans was wearing all black at the time of murders, and had, in addition to his own two guns, several blue bandanas, which were recovered from the scene. (R. p. 1298; June PCR Tr. p. 781; Respondent's Exhibit 23-A). According to the state's theory blue is the color associated with the gang in Evans's multiple, tattoos. (R. pp. 1589-1590; p. 1598; October PCR Tr. p. 72). ...

(App. pp. 4396-4400).

DISCUSSION

It is well established that this "Court gives great deference to the PCR court's findings of fact and conclusions of law." *Simpson v. Moore*, 367 S.C. 587, 595, 627 S.E.2d 701, 705 (2006). It is equally well established that this "Court will sustain the PCR judge's findings regarding ineffective assistance of counsel if there is *any* probative evidence to support those findings." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) (emphasis added); *Franklin v. Catoe*, 346 S.C. 563, 568, 552 S.E.2d 718, 721 (2001). Here, there is ample support for the PCR judge's factual findings and his legal conclusions regarding each of the seven issues presented in Respondent/Petitioner's petition. There is no cause to grant certiorari on these clearly supported rulings.

To be entitled to relief on an ineffective assistance claim, Petitioner must show that (1) trial counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that but for counsel's error, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). *See also Franklin v. Catoe*, 346 S.C. at 571, 552 S.E.2d at 722-723. "The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application." *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

Respondent/Petitioner simply failed to carry his burden of proof to show *Strickland* error and prejudice. The record demonstrates as to these issues that the PCR judge identified and utilized the correct *Strickland* standard and grounded his decision on a fact intensive basis as reflected in the order of dismissal, and supported by the transcripts of record.

Respondent/Petitioner's arguments will be addressed separately but in consideration of these standards applicable to all the ineffective assistance of counsel claims currently before the court in his petition seeking certiorari review.

1.

Allegation that trial counsel failed to adequately investigate, develop, and present available, relevant, and admissible mitigating evidence.

Respondent/Petitioner complains the PCR judge made three erroneous factual findings – 1) finding that Dr. Evans relied upon a report of lead exposure where medical records regarding lead exposure were not received until after trial; 2) that the PCR judge simply failed to accept the case for brain damage, and 3) that the defense counsel at trial did not engage in a "team approach." (Petition, p. 21). These assertions find no basis in the record. Further, Respondent/Petitioner complains the PCR judge made two errors of law in regard to the resolution of this error – failing to consider that reasonable strategic decisions may only be made upon sufficient investigation; and, that prejudice must be considered in a cumulative fashion. (Petition, pp. 5 and 19). Petitioner/Respondent submits the record soundly rebuts Respondent/Petitioner's claims of factual error. Additionally, his claims of error in the legal analysis and application of the law to facts likewise find no support in the record, the Order, or in case law.

Assertions of Lack of Factual Basis

The record fully and fairly supports the PCR judge's findings – and those findings are detailed with citation and direct quotations from the transcript. Respondent/Petitioner's allegations of lack of factual basis are wholly without merit.

To reach his first purported factual error, Respondent/Petitioner engages in manipulation of the word "report" in connection with the defense team's knowledge of Respondent/Petitioner's exposure to lead as a child. The record shows that a medical report of lead exposure was not received until after trial; however, defense counsel and experts were aware of Respondent/Petitioner's self-report and his family's report of lead exposure. Respondent/Petitioner appears to "reason" in his petition that "it would have been important, indeed, if Dr. Evans [the neuropsychologist who tested Respondent/Petitioner and testified for the defense at trial, see App. pp. 1679-1680] 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." (Petition, p. 21). The finding at issue, and in context, is as follows:

> As to lead poisoning, Evans produced reports that confirm that Evans was diagnosed with lead exposure as a child. (See June PCR Tr. pp. 827-828). In fact, defense team mitigation specialist Lenora Topp requested the records, but they did not arrive until two week[s] after trial. (June PCR Tr. p. 574; p. 333). Even so, the defense team was aware of the report of lead exposure, (see, for example, June PCR Hearing, Tr. p. 203), and Dr. Evans was also aware and even factored in the report of lead exposure into his analysis (R. p. 1702). Dr. Evans was asked whether he had a report supporting the exposure, which he did not, but he explained there were reports of lead poisoning from Evans and his family. (R. p. 1702). While a medical record of exposure could have been obtained, the doctor noted its report and, importantly factored the report into his analysis.

(App. p. 4470). [4]

[4] The PCR judge similarly found in assessing the lack of prejudice:

Dr. Evans testified at trial that his "synopsis would be that very likely due to lead poisoning when he was early, in his early ages, I am not sure when that occurred, age four, I believe, he had some brain dysfunction. School learning problems were definite...." (App. p. 1697). On cross-examination, Dr. Evans candidly responded that he did not have medical reports but relied upon reports of lead poisoning from the Respondent/Petitioner and his family. (App. p. 1702).

Consequently, the record fully supports the PCR judge's findings regarding same. And, the record shows the PCR judge fairly considered the facts in context of the whole proceeding. Respondent/Petitioner's assertion of error is wholly without support.

Respondent/Petitioner next asserts a lack of factual support, essentially, because the PCR judge found his evidence of brain damage unpersuasive. (See Petition, p. 7). He argues that the experts at trial, Dr. Bachman (for Evans) and Dr. Spicer (for the State), agreed that Dr. Gur's "volumetric quantitative analysis" was the approach that should serve as a "tie breaker" regarding the differing opinions on possible damage, and that Dr. Gur's analysis "resolved any dispute generated by differing interpretations gleaned from the less sensitive readings of the MRI by Dr. Bachman, Dr. Spicer, and MUSC radiologists." (Petition, p. 22). This is as far from correct as it can be. As a first matter, Petitioner/Respondent submits Respondent/Petitioner's argument concedes the slight difference in imaging that Respondent/Petitioner is embracing as critical to his

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> As to lead poisoning and learning disability, Evans could have offered this testimony, but the defense team was focused on the results and his life in South Carolina. In South Carolina, especially with the help of his step-mother, Evans remained an average student, and even went to college. Moreover, Dr. Evans knew about reports of lead poisoning reports, and factored them [in] his analysis. Moreover, the fact that family reported exposure was information that Dr. Evans mentioned, though he did not have a record to show testing. ...

(App. p. 4474).

mitigation case. But, as a second matter, Respondent/Petitioner's assertion of "agreement" in regard to the acceptance and applicability of Dr. Gur's analysis in this context is contrary to the facts of record.

Dr. Spicer, an expert in diagnostic radiology, (App. pp. 3205-3207), testified repeatedly that Dr. Gur's analysis method was not one "incorporated in ...clinical practice" and should not be considered. (See App. p. 3228; p. 3246; p. 3248; p. 3252-3253). In fact, the PCR judge specifically questioned Dr. Spicer if he was aware of any "literature or any other source, of a quantitative analysis for volume loss that's reliable in the field" where there was a subtle loss, and he did not, and he confirmed the absence of such a diagnostic criteria in "the American College of Radiology's and American Society of Neuroradiology's standards...." (See App. pp. 3253). Dr. Spicer testified that "mild diffuse volume loss is a very difficult thing to assess," and a finding of mild volume loss by Dr. Gur, even if accepted, simply would not change Dr. Spicer's opinion that the image was within the normal range. (App. pp. 3246-3247; p. 3251). Respondent/Petitioner did ask Dr. Spicer about a "tie breaker" for subtle loss disagreements, and he asserted: "If you thought there was a quantitative analysis that would be valuable and help you in that, certainly. We'd check the literature and see *if, you know, this is a valid criteria to utilize.*" (App. p. 3239).[5] (emphasis added).

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[5] The State objected to Dr. Gur's testimony. The PCR judge did not resolve the objection having found the evidence not sufficient to afford relief. (App. p. 4462 n. 18). However, the PCR court acknowledged that Respondent argued "the method for diagnosing dysfunction based on MRI films alone was not reliable, and the professor had been found not qualified in at least one other case, United States v. Lisa M. Montgomery, PACER available, C/A 05-6002-01-CR-SJ-GAF, Motion of the United States, Document 273 at pp. 1-2 (referencing September 5, 2007 notice from the Court of the Court's intention to exclude this testimony)" and only admitted the testimony for limited purposes: "This Court finds it is questionable whether Dr. Gur's testimony would be admissible as Evans has failed to show that brain volume analysis is an accepted diagnostic tool for either dysfunction or damage. This Court makes no specific finding as to possible admissibility of the evidence at the trial as it resolves the issue on lack of prejudice having considered the evidence of brain damage as a whole." (App. pp. 4462-4463 n. 18).

Petitioner/Respondent notes that the record also showed that there were two medical reports issued that reflected "normal" images, and one addendum that reflected a possibility of mild atrophy, but "essentially, it was a normal scan as well." (See App. pp. 3208-3209). (See also App. pp. 3115; pp. 3123-3124; pp. 3873-3874; pp. 3883-3884). The addendum was not added until approximately one and half years later, and close to the start of the evidentiary hearing in June 2009. (App. p. 3217; pp. 3883-3884).[6] (See also App. pp. 3124-3129). Dr. Spicer testified that he agreed with the opinions that the scans were normal. (App. p. 3211). The PCR judge found:

> ... 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. This hardly makes for definitive, crucial evidence. Where the experts agree, however, is that there was dysfunction, and Dr. Jim Evans testified to this at trial.
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> Though [Respondent/Petitioner] notes two reports of lead exposure and presented information on lead poisoning, that does not change the

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6 Dr. Bachman testified that he was only retained in the collateral proceedings for the purposes of the legal proceedings, not for treatment, and he designated the case a "legal case." (See App. pp. 3111-3112; pp. 3114- 3116). Respondent/Petitioner's protest of the use of this term, (see Petition, p. 23 n.11), comes a little late and essentially complains of his own witness's characterization.

Dr. Bachman also testified that he only requested the addendum immediately before the start of the evidentiary hearing after a call from John Blume, Esq., (who was not assigned as counsel of record), in which Mr. Blume, being "concerned about the fact that the MRI scan report had not been amended," requested the doctor ask the radiologist to "re-review the MRI scan again." (App. pp. 3130-3131). The addendum only added "mild diffuse volume loss with prominent ventricles and CSF spaces," in light of Evans' age, and still contained the finding "unremarkable MRI of the brain." (App. pp. 3883-3884). It was added May 28, 2009 to a November 2008 report. (App. p. 3126; p. 3133-3134). The State's motion for records and subpoena to MUSC for the September and November 2008 reports issued on May 27, 2009. (App. p. 3128; pp. 3876-3882). (See also pp. 1969-1970 (May 28, 2009 Order for disclosure)). Dr. Bachman testified he requested the "re-review" on the same day. (App. p. 3129). (See also App. p. 3883). The PCR evidentiary hearing began Monday, June 1, 2009. (App. p. 1971; p. 3135). Dr. Bachman conceded that even the addendum merely reflected "findings [that] are consistent with *mild* atrophy, which was the only abnormality" he had ever suspected, and, further, apparently agreed the difference was so slight as to require some additional analysis (albeit not accepted in the medical community for diagnostic purposes), thus was in the range of subjective interpretation. (App.pp. 3101-3102; p. 3134; p. 31339; pp. 31342-3143).

> results of the two MRI reports that came back normal. Moreover, trial counsel was faced with the fact that [Respondent/Petitioner] was an average student with an average IQ who had attended college Additionally, the lead paint exposure/brain damage did not figure into the "one bad day, one bad decision" theme. (June PCR Tr. p. 329). Counsel wanted to maintain credibility with the jury, and not try to "blame something from 10, 12 years before this," to shift responsibility. (June PCR Tr. p. 427). Again, the client embraced the strategy and addressed the jury in support of same. (R. pp. 1772-1776). ...

(App. p. 4473).[7]

Further, the PCR judge concluded that even if deficient performance could be found, no relief was due where as could be no prejudice:

> The evidence of brain damage is not persuasive. Professor Gur's volume analysis is controversial in the medical community as far as diagnosing brain damage. Further, the reports of the MRI interpretation at MUSC reflected a brain within the normal limits. The addendum on the second report does no more than allow for the possibility of subjective interpretation. Nothing in the medical evidence regarding brain damage is particularly credible or persuasive to the extent its absence at trial could have affected the outcome.
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> As to dysfunction, the experts agree. In fact, Professor Gur and Dr. Bachman agree with Dr. Evans, who testified at trial. There is nothing new in regard to dysfunction and [Respondent/Petitioner] cannot prove error or prejudice....

(App. p. 4474).

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[7] Respondent/Petitioner relied in the PCR on Dr. Bachman's opinion, which is, in its entirety, as follows:

> Based on my examination, Dr. Evans' examination, there's evidence of cognitive dysfunction in Mr. Evans' mental abilities and that this is further strengthened by - - this opinion is further strengthened by the fact there's evidence of atrophy, there's shrinkage of the brain, tissue to an abnormal degree, evidence both on MRI scan on quantitative testing.
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> The most likely cause of that is exposure to lead as a child, although there's no actual definitive way to prove that that's the cause of the cognitive dysfunction, but it seems the most likely cause.

(App. pp. 3104-3105). The fact of the dysfunction and possibility it was caused by lead poisoning was before the jury. (App. pp. 1697-1699). (See also as to medical testimony, App. pp. 1719-1720, psychiatrist Dr. Elin Berg testifying at trial that Respondent/Petitioner suffered from "major depressive disorder, single episode).

Consequently, the record well supports the PCR judge's factual findings. And, the record shows the PCR judge fairly considered the facts in context of the whole proceeding. Respondent/Petitioner, again, is just wrong.

As to the last assertion – no factual basis for the PCR judge to have round a "team approach" to the defense, (Petition, p. 21), (See also App. pp. 4466-4467) – Respondent/Petitioner is again just wrong. Defense counsel repeatedly admitted a team approach, and produced contemporaneous notes and memoranda supporting same. (See App.pp. 2215-2216; p. 2272; pp. 2371-2400).[8] Though Respondent/Petition is attempting to cast this matter as one of insufficient investigation and missed lines of mitigation evidence, (Petitioner, p. 26), this simply is not such a case. Could their mitigation specialist have been sent to Cleveland before trial? (See Petition, p. 25). (See also App. p. 2413, counsel testifying possibility of travel to Cleveland discussed in team approach). Possibly, but that misses the point. What matters is the fact that in PCR, Respondent/Petitioner presented nothing that would create a reasonable probability of a different result had his additional evidence been presented. For instance, his learning disability shared history with parental involvement and his "substantial improvement" and benefit from specialized programs. (See App. p. 4459).

[8] Respondent/Petitioner also initially complains of the time frame going into trial and a "rushed preparation for trial." (Petition, p. 7). The PCR judge noted similar allegations below, which he dismissed, in footnote 19 (App. p. 4467). The PCR judge found that "trial counsel spent hundreds of hours to prepare" and acknowledged Respondent's assertion that the social worker who testified at the PCR hearing required only two months to prepare. Id. (See also App. p. 3048). The PCR judge found: "Even so, here, the reviewing court is concerned with actual error, and abstract time arguments are merely a distraction. *See generally Simpson v. Moore*, 367 S.C. 587, 589 n. 2, 627 S.E.2d 701, 707 n. 2 (2006), *quoting Jones v. State*, 322 S.C. 329, 339, 504 S.E.2d 822, 827 (1998)(an applicant "may not simply posit suppositions and speculations in an attempt to establish that counsel was ineffective").

(See also App. pp. 2021-2023; p. 2027; p. 3058).[9] Respondent/Petitioner's school records not only show improvement, but also that he eventually went to college, and has a tested IQ of 94. (See App. p. 4460). (See also App. p. 1682; p. 3058-3059; pp. 2823-2825). These are things that the PCR judge appropriately considered in finding Respondent/Petitioner simply did not carry his burden of proof of deficient performance and resulting prejudice.

Allegations of Error of Law

The record likewise rebuts Respondent/Petitioner's contention the PCR judge incorrectly applied controlling precedent. To the extent he simply argues the "factual errors" asserted above misguided the *Strickland* analysis, (see Petition, p. 20), his argument fails as he has failed to show factual error. To the extent he claims the PCR judge did not appreciate that trial counsel's strategy decision must be evaluated in light of the sufficiency of the investigation, (see Petition, p. 20), again, he is incorrect. Not only did the PCR judge note that consideration in finding valid strategic reasoning, (see App. p. 4456-4457)[10], he specifically considered whether there was a reasonable probability that presentation of additional matters would have affected the result in light of the full record, thus correctly applying the proper concept of review dictated by the precedent:

> Mr. Evans' trial counsel was not ineffective within the meaning of the Sixth Amendment in their investigation or presentation of mitigating evidence at the penalty phase. The decision not to present evidence of childhood abuse was a largely strategic one, and was not unreasonable. *See Harrington v. Richter*, 562 U.S. ___ (2011)(slip op., at 17) ("Counsel

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[9] Additionally, Respondent notes that Dr. Canfield, an expert who studies the effects of lead poisoning in children, (App. p. 2794), testified that improvement in grades and overcoming dysfunction "would not correspond to the research" regarding dysfunction as a result of lead exposure. (App. p. 2822).

[10] Specifically, the PCR judge focused upon case law that addressed evaluation of the decision to limit or end investigation into certain areas. *See, e.g., Wiggins v. Smith*, 539 U.S. 510 (2003).

was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies."). The evidence concerning lead poisoning and resulting brain damage may well have enhanced the mitigation case, but not to such a degree sufficient to meet *Strickland's* prejudice prong. The sentencing jury heard testimony about Mr. Evans' diminished cognitive skills and expert opinion about his mental condition. The additional mitigation on these issues adduced at the PCR hearing would not have changed the outcome at trial. The failure to further develop or ensure a pristine consistency of the mental condition issue does not undermine confidence in the result.

(App. p. 4457).

The PCR judge continued to review the record and address each of the items referenced at the evidentiary hearing, finding "[t]he evidence of brain damage is not persuasive," for specific reasons as quoted above, (App. pp. 4474), and also as to abuse and neglect:

> ... the evidence of abuse against the mother could only be shown by calling individuals who would demonstrate a rift in the family, and by a witness who was uncooperative with the defense team. Again, this would detract rather than enhance the defense. Moreover, the evidence of abuse against Evans, i.e. use of force in discipline, was contested. Further, attacking the father would only lead to unraveling a carefully crafted defense theme and making his testimony in support of his son less credible.
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> Additionally, to consider all the evidence together, ... , the evidence would confuse and dilute the clear theory that this event was a critical break from his normal behavior. This was the very theme that Evans presented to the jury himself. (R. p. 1774, "That wasn't me that night. It's not the person I am. ... Twenty-seven years before though, that wasn't me. That's not the person I am.").
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> Lastly, on the other side of the scale, there is the fact of the a horrible, planned hostage taking ending in two murders, one of a law enforcement officer kidnapped from his car before he could end his shift and reach the safety of his home; a forced entry into the home and a night of terror for the Sapinoso family. Moreover, to offer evidence of neglect, with the concomitant evidence of "running the streets," would support that there were not "two Kamell Evans," but one – one who spurned real

> family life and actively sought gang life, who resolved his issues with escalating violence.
>
> Evans has failed to demonstrate deficient performance and prejudice, and is not entitled to any relief.

(App. p. 4475). (See also App. p. 2175-2176; p. 2183-2184; p. 2186 (mother uncooperative with investigation); p. 2227 (trial counsel's testimony that abuse evidence would dilute impact of father's plea and/or affect credibility); p. 2324; p. 2373; pp. 2612-2613; p. 3027-30-28 ("running the streets" in Cleveland before coming to father's home in South Carolina); pp. 2615-2616 (indication to defense team that Respondent/Petitioner quit college to sell drugs; father and stepmother encouraged him to obtain education); p. 2367 and 2396-2400 (trial counsel's contemporaneous-to-trial memorandum and testimony discussing whether to present testimony, how testimony could be present, and risks associated with testimony); pp. 3058-3059 (PCR evidence Respondent/Petitioner enjoyed "a stable, middle class home" environment with father in South Carolina, was doing well in school with IQ in 90's, and was accepted by North Greenville College).

Contrary to Respondent/Petitioner's assertion, the PCR judge's analysis does not "conflate the new facts with the old facts," rather, the analysis reflects consideration of both which the Court is required to do, along with the evidence that would be presented in response (for instance the fact of one "volume analysis" not recognized in diagnostic standards, and the fact of two reports with normal results). Again, Respondent/Petitioner fails to show any legal error.

Lastly, Respondent/Petitioner asserts "the court's application was flawed because it did not consider prejudice cumulatively as United States Supreme Court precedent

demands." (Petition, p. 20). Not surprisingly, there are no citations for this assertion, and a review of federal precedent indicates a general reliance on an individual analysis but in context of the "totality of the circumstances" of record. *Strickland*, 466 U.S. at 695; *Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998) ("To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now. In so holding, we are in agreement with the majority of our sister circuits that have considered the issue."). [11] However, he argues only that all evidence – the defendant's, the state's, trial, and collateral proceeding - must be considered in accessing prejudice, which is much different. (See Petition, pp. 29-30). That is correct. *See Wong v. Belmontes*, 558 U.S. ___, ___, 130 S. Ct. 383, 390 (2009) ("the reviewing court must consider all the

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[11] Respondent acknowledges, however, that this Court has held that whether cumulative error may be applied in this jurisdiction remains an "unsettled"question. *See Lorenzen v. State*, 376 S.C. 521, 535, 657 S.E.2d 771, 779 n.3 (2008). However, we are not without guidance in this matter. Here, the PCR judge only found one error, and granted relief on that error. This is a much different posture, and cumulative error analysis, if available, would not be applicable. *See Simpson v. Moore*, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) ("Because the PCR court found that only one of Simpson's allegations had merit, there was no need to conduct a cumulative-error analysis. The record simply did not contain 'several errors' for the judge to cumulatively assess. We hold, therefore, that the PCR court did not err in failing to conduct such an analysis."). Even the most generous reading of *Strickland* would not support combination of non-errors to reach precedent:

> ... the defendant must show that counsel's performance was deficient. This requires showing that counsel made ***errors*** so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's ***errors*** were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687 (emphasis added).

It is of no little interest to note that while *Strickland* references plural errors, it has never been read or interpreted to prevent relief on the showing of one error. This would tend to place more significance on the totality of the circumstances than a cumulative view of various instances of deficient performance.

evidence-the good and the bad-when evaluating prejudice"). That is what the PCR judge did in the instant case.

In essence, though, Respondent/Petitioner's claim of error in the application of the correct test stems mainly from vastly overstating what Respondent/Petitioner was able to show in PCR. He makes the bold assertion: "The post-conviction evidence in Mr. Evans's case was qualitatively different [than a "fancier" mitigation case]: it resolutely shows brain damage, its location, and lead poisoning as a cause." (Petition, p. 29). There is not one expert who was able to give a conclusive opinion of brain damage with lead poisoning as the cause or even a confirmed cause – not one. To the contrary, there was actual agreement that there was no test that could confirm such a claim. (See, for example, p. App. p. 3104, Respondent/Petitioner's expert, Dr. Bachman, testified "there's no actual definitive way to prove that that's the cause of the cognitive dysfunction"). (See also App. p. 2821, Respondent/Petitioner's expert, Dr. Canfield, testifying cannot state dysfunction due to lead exposure; pp. 3117-3188, Dr. Bachman, recognizing different causes for damage and/or dysfunction). Further, Respondent/Petitioner fails to consider, address, or even mention that if he was able to present the Gur evidence to the jury, and present Dr. Bachman's testimony, he would still have to address the two reports reflecting a normal MRI. In short, Respondent/Petitioner fails to apply the correct legal standard.

Further, Respondent/Petitioner continues to overstate his evidence, turning to evidence of abuse (which counsel knew and investigation as noted above), and posits that "his experience with abuse and the matter in which the jury could have factor it in to deliberating the tragic crimes is much the same" as the omission failure to present

evidence in *Porter v. McCollum*, 558 U.S. ___, 130 S.Ct. 447, (2009). It is simply logically impossible to equate the performance at issue here to that in *Porter*. The Supreme Court in *Porter* characterized the situation there as follows:

> Although Porter had initially elected to represent himself, his standby counsel became his counsel for the penalty phase a little over a month prior to the sentencing proceeding before the jury. It was the first time this lawyer had represented a defendant during a penalty-phase proceeding. At the postconviction hearing, he testified that he had only one short meeting with Porter regarding the penalty phase. He did not obtain any of Porter's school, medical, or military service records or interview any members of Porter's family.

130 S. Ct. at 453.

The Court further noted: "The sum total of the mitigating evidence was inconsistent testimony about Porter's behavior when intoxicated and testimony that Porter had a good relationship with his son. Although his lawyer told the jury that Porter 'has other handicaps that weren't apparent during the trial' and Porter was not 'mentally healthy,' he did not put on any evidence related to Porter's mental health." 130 S. Ct. at, 449.

Respondent/Petitioner's reliance on *Sears v. Upton*, 561 U.S. ___, 130 S. Ct. 3259 (2010), is similarly misplaced. The Court in *Sears* referenced possible evidence that could have been discovered and admitted, such as possible abuse, but the Court zeroed in on more significant medical evidence that was not developed at all:

> ***Environmental factors aside, and more significantly***, evidence produced during the state postconviction relief process also revealed that Sears suffered "significant frontal lobe abnormalities." ... Two different psychological experts testified that ***Sears had substantial deficits in mental cognition and reasoning-i.e.,*** "problems with planning, sequencing and impulse control," ... as a result of several serious head injuries he suffered as a child, as well as drug and alcohol abuse. ... ***Regardless of the cause of his brain damage, his scores on at least two standardized assessment tests placed him at or below the first percentile in several categories of cognitive function***, "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." ... The assessment also revealed that Sears' "ability to organize his choices, assign them relative weight and select among them in a deliberate way is grossly impaired." ...

130 S. Ct. at 3262-63. (emphasis added).

Trial counsel here *investigated* ***and*** *presented* evidence of dysfunction ***and*** of good up-bringing, along with demonstration of close emotions bonds between Respondent/Petitioner and his family. Further, showing both complemented the "one bad decision" theme while highlighting both the loving family ties and mental deficiency evidence.

In particular, and vastly different from the investigation and presentation in either *Porter* or *Sears*, Dr. James Evans gave a battery of tests and testified not only as to testing but also to Respondent/Petitioner's cognitive dysfunction. Moreover, Respondent/Petitioner's experts in the PCR experts did not disagree with the testing, results or testimony. Dr. Gur agreed with Dr. Evans and testified, "I thought he did a thorough evaluation and reported it in a fairly straight forward fashion, fairly standard" and that his findings were consistent with Dr. Evan's findings. (App. p. 2684 and p. 2680). (See also App. p. 3081, Dr. Bachman referencing that he checked Dr. Evans findings and making no revisions).

Again, this case bears little resemblance, certainly not in any meaningful way, to the deficiencies in *Porter* and *Sears*. This is more the task of weighing the "fancier case," or what if any impact has the additional witnesses who would certainly add number but nothing of significant substance. Respondent/Petitioner failed to carry his burden of proof in show deficient performance or prejudice. *See Wong v. Belmontes*, 558

U.S. ___, 130 S. Ct. 383, 391 (2009)("Schick's mitigation strategy failed, but the notion that the result could have been different if only Schick had put on more than the nine witnesses he did, or called expert witnesses to bolster his case, is fanciful."); *Byram v. Ozmint*, 339 F.3d 203, 210 (4th Cir. 2003) ("Despite this thorough investigation, Byram faults trial counsel for failing to obtain his adoption records, which might have provided more evidence that he suffered from FAS and more evidence of early childhood trauma. A failure to obtain available records, however, does not show that counsel's investigation was inadequate."). In short, the record shows, in regard to this issue, a reasonable application of law on facts well supported by the record. Respondent/Petitioner's petition for writ of certiorari should be denied.

2.

Allegation that trial counsel failed to object to Aggravating Circumstance.

Respondent/Petitioner contends the evidence did not support the S.C. Code § 16-3-20(C)(a)(7) aggravating circumstance: "murder of a law enforcement officer during or because of the performance of his official duties." This is a simple issue – whether the facts supported the charge (which they did). And, that is the way the PCR judge resolved the issue. (See App. p. 4425-4432).[12] Without a doubt, there is evidence of record

[12] Respondent/Petitioner also attacks the PCR judge's order for resolving the issue of whether objection should have been made on the grounds of state law, i.e. a sufficiency of the evidence issue as to whether there was evidence to support to the charge, rather than federal law. (Petition, p. 39). In other words, the PCR judge resolved the issue on applicability of the statutory circumstance to the facts presented, not upon a broader argument of unconstitutionality of the statute in general (a difficult argument indeed where Respondent/Petitioner concedes the applicability of the aggravating circumstance in multiple scenarios showing law enforcement officers in varying capacities, see Petition, pp. 35-37). Thus, Respondent/Petitioner is quite correct that federal law in general is not implicated in the argued basis for objection in support of his argument on the deficiency prong. Further, he failed to seek modification or specific ruling by filing a Rule 59 motion on same. *See Marlar v. State*, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) ("Because respondent did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review..."). At any rate, his position is without merit. The factual basis present at trial supports the charge so his condition precedent for claiming error fails.

supporting that the deputy was still on duty when kidnapped, and that Respondent/Petitioner knew his victim was a law enforcement officer in his work issued vehicle attempting to go home to end his work day. As with the above issue, the "factual basis" for Respondent/Petitioner's argument the circumstance was not applicable fails to take into count all the evidence presented.

The PCR judge, addressing Respondent/Petitioner's argument in his post-hearing brief that "the evidence submitted in support of the aggravator was insufficient as a matter of law," (see App. p. 4424, pp. 399-4002), (see also App. p. 4227, "Contrary to Respondent's argument, Mr. Evans does not assert, and this court need not decide, whether the statute applies *only* to facts matching these previous South Carolina cases. Evans's argument is that the statute does not apply in the circumstances of *his case*..."), rejected Respondent/Petitioner's attempt to read the statute as requiring an officer to be not only on duty, but also actively engaged in a law enforcement action, first, as contrary to the plain language of the statute, i.e. "during ***or*** because of the performance of his official duties," (emphasis added),[13] and, second, persuasive precedent from other jurisdictions evaluating such interpretation in light of similar provisions, which sided against such an artificial and, indeed, awkward interpretation as that suggested by Respondent/Petitioner. (App. pp. 4425-4426). In particular, the PCR judge made a

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[13] Respondent/Petitioner's tepid argument by footnote indicating that the Legislature, by the 1976 amendment changing the aggravator from "while acting in the line of duty" to "during or because of the performance of his duties," intended "to tighten the nexus between law enforcement work and the murder," (Petition, p. 34 n.14), remains merely an unsupported personal assessment of legislative intent. The amendment is just as easily read to shift emphasis from only "law enforcement *work*" to encompass both law enforcement work and a law enforcement individual, which is actually more consistent with interpretations of similar aggravators in other states. *See, for example, White v. Com, supra*; *Malone v. State*, 168 P.3d 185, 216 (Okla.Crim.App. 2007) (noting difference between who was kill, and why the individual was killed). At any rate, he certainly fails to argue why he is turning to intent where the language is clear and unambiguous.

detailed analysis of the facts and resolution in the North Carolina case, *State v. Gaines*, 421 S.E.2d 569 (N.C. 1992). (App. pp. 4425-4428).

In *Gains,* a pre-trial challenge was made based on the assertion the officer was off-duty, on a second job. The court there rejected the argument, finding the circumstances presented (where victim was engaged in enforcing the law, in uniform, at his approved second job) supported submission of the aggravator. Further, the PCR judge noted with favor that in *Gains*, the reviewing court also relied upon receipt of line-of-duty death benefits, which was likewise received for the deputy's death here. (App. pp. 4427).

Likewise, here, the deputy, who was known to Respondent/Petitioner as an officer anyway, was actually wearing his uniform, armed with his county issued sidearm, abducted for his county issued car, and his family received death in the line of duty benefits. (App. p. 1288; p. 1312; pp. 1530-1531). These facts similarly support submission of the aggravator under the logic of *Gains*.

The PCR judge also relied upon *White v. Commonwealth*, 178 S.W.3d 470, 481 (Ky. 2006), and the following quotation from *White*: "The statue is intended to allow jury to find an aggravating factor when a law enforcement officer is murdered while engaged generally in carrying out his or her duties, or, said another way, while performing law enforcement function. *This condition is not limited to the performance of specific tasks and duties; it also includes being imminently available to carry out those tasks.*" (App. pp. 4426-4428) (emphasis added in PCR order). (App. p. 4428).

In *White*, the sheriff, in uniform, was shot by a sniper while attending a fish fry, but was "always on call," and had acted in law enforcement capacity during other like

events. 178 S.W.3d at 479. Similarly, and under the logic of both *Gains* and *White*, the evidence here raised an issue for the jury.

In short, evidence was admitted that supported the deputy was on-duty; thus, the aggravator was properly submitted to the jury. *State v. Locklair*, 341 S.C. 352, 366, 535 S.E.2d 420, 427 (2000), *quoting State v. Smith*, 298 S.C. 482, 485, 381 S.E.2d 724, 726 (1989) ("In determining whether to submit an aggravating circumstance to the jury, the trial court is concerned with the existence of the evidence, not its weight. The trial judge should submit the aggravator to the jury if supported by any evidence direct or circumstantial."). Whether the evidence offered by the State in total showed the aggravator circumstance beyond a reasonable doubt was for the jury. There will always be situations where "on-duty" must be determined ultimately by the jury – nothing is *per se* in a death penalty case, either for or against a relevant aggravator. Even where kidnapping or burglary first degree is found in the penalty phase, the aggravator is submitted for the jury to determine. This was simply a situation that required the jury consider the evidence.

The PCR judge properly concluded "whether the deputy was 'on duty' at the time of ambush and kidnapping was properly submitted to the jury after receipt of the two lines of evidence properly admitted." (App. p. 4428). Of note is the PCR judge's rejection of Respondent/Petitioner's challenge to the sheriff's testimony that the deputy was still technically on duty. The PCR judge noted Respondent/Petitioner's statement the sheriff's testimony was offered "despite his being home well after the conclusion of his regular workday...." (App. p. 4429). (See also App. p. 3999). The PCR judge chided Respondent/Petitioner with the reminder that kidnapping "is a continuing

offense," and "[t]her was evidence that Evans had ambushed the deputy, taken him from his duty car, and held him hostage," noting that the jury had convicted of kidnapping and Respondent/Petitioner had not challenged the sufficiency of the evidence in support of the kidnapping conviction. (App. p. 4429).[14] Further, the sheriff's policy delineated that an officer was on duty while operating his vehicle. (App. pp. 4429-4430).[15] Also, other evidence, including Respondent/Petitioner's own testimony, indicated the officer victim was abducted from his county issued vehicle. (See App. pp. 4430-31). Further, the PCR judge noted Respondent/Petitioner's argument was myopic in scope: "Evans has not addressed the facts that are soundly against him, or offered, by competent evidence, other facts that challenge the facts of record." (App. p. 4431). Respondent/Petitioner continues that deficiency here. His argument is skewed by an unrealistic and steadfast adherence to only one version of the facts (and cherry picked facts at that).

Rather than presenting a case that actually does fall outside the statutory aggravating circumstance, for example, an off-duty officer killed on vacation while not performing any law related duty, or known to be a law enforcement officer, Respondent/Petitioner relies on his structured view of the evidence -- a "domestic shooting" -- while other evidence of record does support the kidnapping and shooting of

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[14] Respondent/Petitioner again attempts to rely on hearsay to attack the interpretation of the evidence and the facts of that night by relying on media reports. (See Petition, p. 42, n. 19). The PCR judge rejected the reliance on media reports suggested the officer was off-duty and at home – none of the reports were even mentioned in the PCR hearing. (App. p. 4431). Moreover, he noted the dangers associated with reliance on media reports as reports other than those suggested by Respondent/Petitioner in his brief reported the "ambush" of the deputy. (See App. p. 4431).

[15] Respondent/Petitioner's academic ponderings concerning possible positions at the car is truly an obvious red herring. (Petition, p. 41). It is true that defense counsel, after research and inquiry, believed the abduction from the car to be fatal to a legitimate argument that the officer victim was not still on duty, the fact is *in this case and on these facts* the officer victim was not yet in his home and he was taken from his car.

a law enforcement office (albeit one that Respondent/Petitioner knew) for a myriad of purposed including enhancement in gang standing.[16] (See Petition, p. 36; p. 40). It is rather curious, though, that after this one-sided view of the evidence, Respondent/Petitioner then complains that the county issued car driven by the deputy was "plain, unmarked... with no indicia of law enforcement, no visible blue lights, and no law enforcement communication radio." (Petition, p. 37, n. 18). We have established Respondent/Petitioner knew his victim, thus, knew his victim was a law enforcement officer, driving a county issued vehicle, on his way home from work. The evidence also shows he failed to ever complete his duty, and reach his home safely, before being kidnapped by Respondent/Petitioner.

The insurmountable problem with Respondent/Petitioner's argument is that Respondent/Petitioner views the evidence as presenting mutually exclusive factual resolutions due to the fact that Respondent/Petitioner he knew his victim – nothing prevents the logical conclusion this officer victim was selected *because* Respondent/Petitioner knew the officer victim, and had access to the officer victim by virtue of the relationship with the officer victim's sister. Respondent/Petitioner cannot credibly argue that no facts support the aggravating circumstance, thus, he must argue instead that counsel should have argued, and the trial judge should have agreed, to disregard and/or weigh the evidence (siding with his theme, of course). This simply is not the law. *Locklair, supra.* Counsel's failure to make such an argument cannot reasonably be considered deficient, much less prejudicial.

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[16] The PCR judge acknowledged the evidence of record of this fact in denying Respondent/Petitioner's complaint that the solicitor should not have been allowed to argue same. (See App. pp. 4443-4444).

Further still, the PCR judge rejected Respondent/Petitioner's argument that submission of the circumstance somehow allowed the admission of unfairly prejudicial testimony.[17] The PCR judge found:

> ... in this particular case, should the aggravator be set aside, it is equally clear that no inflammatory or "unfairly" prejudicial evidence was admitted in support of this aggravator ... Evans concedes two lines of evidence were submitted in support of the aggravator: 1) the Greenville county Sheriff's policy on "on[]-duty" designation; and 2) the sheriff's testimony on federal monetary death benefits to the family. ... The jury would have known Deputy Sapinasos was a law enforcement officer anyway – he was killed wearing his deputy's uniform, (R. p. 1316), after having his county issued gun taken from him, and having left his duty bag by the driver's side of the car when he was abducted from the car. The receipt of monetary death benefits to the deceased family is fairly common for officers, as Evans also concedes in his brief. ... There is no particular inflammatory nature or expected emotional response simply upon hearing that his family received monetary death benefits. Evans presented nothing in PCR to show the evidence was incorrect.

(App. pp. 4432-4433).

Respondent/Petitioner has failed to show any error in the PCR judge's ruling – either a lack of factual basis or a lack of legal support. Respondent/Petitioner failed in his burden of proof to demonstrate counsel performed deficiently and he was prejudiced. Respondent/Petitioner's petition for writ of certiorari should be denied.

3.

Allegation trial counsel was ineffective in failing to object to "general" prison condition evidence and argument.

Respondent/Petitioner complains that counsel failed to object to evidence of prison conditions within Mr. O'Cain's testimony. (Petition, p. 49). He also complains the State referenced prison conditions in argument, and counsel should have objected.

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[17] This was merely one of four circumstances in aggravation found by the jury. (See App. pp. 1794-1795). The death sentence may be affirmed even if there was error in submitting this particular circumstance. *See Stringer v. Black*, 503 U.S. 222 (1992).

(Petition, p. 49-50). First, this argument is not preserved for review as it was not properly raised below, and was rejected on a procedural basis by the PCR judge after careful review of the pleadings and argument raised in the post-hearing briefs:

> This Court finds that a "general" prison conditions allegation was not raised, and no notice was given on such a claim. Further this Court finds that the argument in the Post-Hearing Brief going to ineffective assistance in the presentation of the defense witness was not raised, and no notice was given on such a claim. However, Evans alleged error in regard to Mr. O'Cain's testimony, which fairly encompassed his testimony referencing some conditions. Thus, this narrow portion of the argument is properly before the Court, and was fully developed at the evidentiary hearing with notice to opposing counsel.

(App. pp. 4440-4441).

Respondent/Petitioner fails to make any argument as to why this unnoticed claim -- not properly raised to the PCR judge for adjudication on the merits, and having no adjudication on the merits -- should be reached here. Instead, he relies on the same allegations the PCR judge reviewed in detail and found to be insufficient to allege a general prison conditions claim. (See Petition, p. 46). (See also App. p. 4440).[18] The

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[18] The PCR judge, in fact, listed the referenced allegations in detail, demonstrating the failure to allege a general prison conditions basis for objection:

> Evans responded in reply that the issue was fairly raised by his allegations, "(1) that trial counsel was ineffective for failing to object to the testimony of Lewis O'Cain, and (2) that trial counsel was ineffective for failing to object to the Solicitor's use of that improper testimony during closing argument," and relied upon, specifically, his allegations 10(b)(4)(d) ("Counsel failed to object to the testimony of the State witness Lewis Edward O'Cain, which was unreliable, unscientific, exceeded the scope of the witness's expertise, and irrelevant, *see* 9(g) and 10(g), *infra*, for reasons including... (d) the witness was wrongfully allowed to testify as to the appropriate sentence, that being "death"); 10(d)(4)("Evans's death sentence was obtained in part as a result of the State's inflammatory, irrelevant and improper statements in closing argument. ... Such statements included, but are not limited to, arguments designed to arouse the passion and prejudice of jurors, assertions substituting his personal opinions as law, statements diminishing the jury's sense of responsibility for their verdict, misrepresenting the proper scope of mitigating evidence, arguments that were not reasonable inferences from the record, and misrepresentations of the nature of alternative punishments."); and 10(g)("O'Cain provided testimony that was inadmissible for reasons including, but not limited to, that the testimony was unreliable, exceeded the scope of the witness's expertise, and irrelevant").

(App. p. 4440).

PCR judge also found that "the argument in Post-Hearing Brief going to ineffective assistance in the presentation of the defense witness was not raised, and no notice was given on such a claim." (App. p. 4440). Again, Respondent/Petitioner makes no argument as to why this Court should consider an issue and argument not properly presented below. The only portion of this argument preserved for review here is whether the prison conditions testimony was admissible in Mr. O'Cain's testimony given as expert in "gang activity and gang experience within the Department of Corrections." (App. p. 1590). (See App. p. 4434). Specifically, Mr. O'Cain's testimony centered on how Respondent/Petitioner would be treated or revered because of the gang overtones in the murder of Deputy Sapinoso.[19] The PCR judge consider Mr. O'Cain's testimony and opinion. (App. p. 4437). The judge noted, that Mr. O'Cain "opined, based on his experience, that he would assess Evans as a possible 'hard core gang member' who 'could take over a leadership role inside the Department of Corrections real quick' though he would have to have 24 hour monitoring for gang activity before he could segregate him. (R. p. 1590; p. 1596)." (App. p. 4438). The PCR judge noted that Mr. O'Cain "further opined that Evans's violence toward a law enforcement officer would make him particularly attractive as a possible leader. (R. p. 1597)." (App. p. 4438). The PCR judge found this testimony relevant and admissible in the penalty because: "1) the evidence supports the inference that the victim was chosen, in part, for enhancement of gang standing; and 2) the evidence supports that Evans's gang standing, particularly an enhanced gang standing as a result of his murder of a police officer, is probative of his future dangerousness." (App. p. 4438). Of particular

[19] Respondent/Petitioner's own corrections expert confirmed the specialty within SCDC, and agreed with the testimony from Mr. O'Cain regarding same. (See App. p. 4437; p. 1633).

note is the evidence relied upon by the trial judge in assessing the gang tie or overtone to the murder, and the admissibility of the gang-related evidence:

> It is undisputed that Evans bears tattoos that make reference to the "Crips," and that he expressed to defense experts who evaluated or met with him prior to trial that he was a member of a gang. (See R. p. 1633, lines 13-22 (Mr. Martin); p. 1703, line 19 - p. 1704, line 13 (Dr. Evans); p. 1727, line 6 - p. 1728 , line 14 (Dr. Berg); p. 1633, lines 13-22 (Mr. Martin). (See also, for example, State's Triple K, Quadruple J, Triple X, Triple W, Triple Y, Quadruple L) (photographs of tattoos). Defense counsel repeatedly testified at the PCR hearing that Evans admitted his gang membership. (See, e.g. June PCR Trans., p. 216; p. 261; p. 401). In his initial meeting with defense counsel Sumner, Evans informed counsel:
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> > No bad trouble, no jail but brushes with the law. Defendant decided himself to move down with his dad. In gang in Cleveland the Crips, Crips neighborhood'[sic] cousins and uncles in the Crips... from 11, 12 years old through 17 years old at Greer High School, summers in Cleveland, spring break, Christmas, ran with the Crips. Defendant was a leader, "he worked his way up the ranks." Sold crack, coke and weed, never got caught. No "Crip" involvement in Greer. Sold crack, coke and week in Greer, never caught. Got caught in Greenville, quarter of a pound, Dick Warder got him probation.
>
> (June PCR Tr. p. 401; Respondent's Exhibit 1). Evans was caught in the Greenville County Detention Center with a necklace that indicated Crip membership. (R. p. 1621). And he was known to socialize with other "known"[20] gang members, specifically Christina Rodriguez. (October PCR Tr. p. 72;109). Further, Evans specifically forbade counsel to meaningfully challenge his gang membership even in the face of advice that it could and would be used against him in the penalty phase. (See, e.g. June PCR Trans., pp. 216-218; p. 250; p. 260; p. p. 401). The defense team corrections expert, Mr. Martin, advised counsel that the "tattoos would make it more difficult for him to denounce gang membership," (June PCR Tr. p. 301), and that he would "have to be treated like the real thing for a long time," if he was a wannabe, (June PCR Tr. p. 301). In fact, he would later use that in his testimony to show that life without parole would not be an easy sentence for Evans specifically because of his

[20] The PCR judge, by his footnote 14, added: "Dr. Cooper-Lewter accepted tattoos and admissions as proof of membership to Christina. (October PCR Tr. p. 107). However, and somewhat curiously, Dr. Cooper-Lewter rejected Evans's tattoos and multiple self-admissions as proof of membership. (October PCR Tr. p. 119-120)."

gang-related affect or membership, and contest that he would get any "benefit" from gang membership. (June PCR Tr. p. 301; R. p. 1635 - p. 1636). Mr. Martin agreed with Mr. O'Cain that SCDC identifies "security threat group" members by two basic factors – self-admission and tattoos. (R. p. 1633). Evans would be identified as same because of his continued self-admission and tattoos. (R. p. 1633). In fact, immediately after trial, at reception in SCDC, Evans admitted membership. (October PCR Tr. p. 272). Moreover, even though he is on death row, away from general population and the concerns of gang membership in general population, Evans has never renounced membership. (October PCR Tr. p. 272; p. 274).

Evans presented testimony ... [footnote on affidavits omitted] from family and friends at the PCR hearing to the effect that he was not really in a gang. (See, e.g., October PCR Tr. p. 52 (Ms. Martin testifies "no gang activity," but see p. 72 admits he was on "gang sites" with Christina)). There is no known master list of Crips to check membership rolls. (June PCR Tr. pp. 260-261). The multiple tattoos are permanent, large and visible. (June PCR Tr. p. 252).

It is undisputed that Evans, under cover of darkness and dressed in black, hid in a nearby home to surprise Deputy Sapinoso. It is undisputed that he carried two guns, a knife, 140 rounds of ammunition, and blue bandanas. It is undisputed that three of the four bullets to Officer Sapinoso's head were delivered execution style to the back of his head while his head was on the floor. It is undisputed Evans availed himself of gang sayings and gang symbols. While he confessed to being a gang member, he denied that the murder was planned. (See Respondent Exhibit 1, p. 7). Of course, this cannot be dispositive. Other evidence, specifically shows planning - the 140 plus rounds of ammunition, multiple weapons, black clothing, the element of surprise, for example. But the planning can also be fairly linked to gang membership. The multiple bandanas worn by Evans and on the scene tie the theory to the scene. (June R. p. 1298; PCR Tr. p. 781; Respondent's Exhibit 23-A). Moreover, his own professed intent to work his way up in the Crips organization, (Respondent's Exhibit 1), his own professed intent to sell drugs he (as he said he had in Cleveland), supported by his drug conviction, (id), together, show a basis for finding actions motivated by gang membership or desire for membership. Both relate to future dangerousness. The fact that Evans also knew the deputy personally does not exclude the gang-related motivation.

There is no basis for a meritorious objection to this evidence admitted in the penalty phase where circumstances of the crime and the characteristics of the defendant are relevant and necessary to make a personal determination of the appropriate sentence. *See generally State v. Locklair*, 341 S.C. at 370, 535 S.E.2d at 429 (2000)("The purpose of the

> sentencing phase in a capital trial is to direct the jury's attention to the specific circumstances of the crime and the characteristics of the offender.").

(App. pp. 4433-4436).

In sum, the gang evidence was clearly related not simply to future dangerousness in general, but to the crime, Respondent/Petitioner's known and admitted gang-related activity, and the way Respondent/Petitioner would be treated specifically because of his expression of inclusion in a gang. Gang membership here was specifically linked to criminal, dangerous, activity -- activity that Respondent/Petitioner clearly and repeatedly embraced, which is not just a membership in a club, but a dedication to do violence, especially in SCDC among other readily identifiable gang members. As the PCR judge noted, gang membership has been deemed evidence of future dangerousness, *citing Fuller v. Johnson*, 114 F.3d 491, 498 (5th Cir. 1997) ("A reasonable juror could conclude that membership in such a gang is relevant to future dangerousness"). (App. p. 56). Yet here, he considered the issue "more narrow still" in that:

> ...The evidence went to identification of gang membership for correctional purposes and what Evan's tattoos and admissions would mean as far as correctional dangers. Again, Mr. O'Cain was duly qualified as an expert in SDCD security threat group gang identification, a fact confirmed by defense expert Mr. Martin. Thus, the "conditions" at issue apply directly to defendant and are not simply descriptions of "general" conditions.
>
> Further, counsel did not turn a blind eye to the testimony. Even though their client instructed them not to contest his membership, they routinely offered opinions that he was a "wannabe" and presented their own witness to counter the dangerousness with the security and restraints he would have as a result of his membership or wannabe status. (See, for example, R. p. 1633 ("at least liking to *think* he's an active gang member")(emphasis added); p. 1766 (questing gang membership where Applicant moved to South Carolina at a young age).

(App. p. 4439).

Again, Respondent/Petitioner failed to show deficient performance. Further, the PCR judge did consider the testimony as a whole, and determined, to the extent there were "general" conditions also reference in context of this evidence, Respondent/Petitioner was not entitled to any relief for the following multiple reasons:

- Petitioner sought relief under S.C. § 16-3-20, which reference review on direct appeal, and such review could not be resuscitated in collateral review;
- "As a factual matter, no simply 'general' prison conditions were offered, by either side, merely to argue harshness in sentencing;
- Respondent/Petitioner offered his own expert to fairly respond to properly admitted gang membership related conditions and benefits or harshness factors of gang membership within SCDC;
- And, at the time of the 2004 trial, even general prison condition evidence was being offered by both side and *Strickland* prejudice, under those circumstances, it would be highly unlikely to show unreasonable performance under then prevailing norms.

(App. pp. 4441-4442).

The PCR judge also found that *both* experts consistently tied the conditions testimony to Respondent/Petitioner's own gang affiliation or desired affiliation. (See App. p. 4443). While Respondent/Petitioner quotes in his petition what he considers "general prison conditions testimony" in attempted support for his argument, (see Petition, p. 49 citing App. pp. 1601-1602), he can only do so by taking part of the testimony out of context. Consider the following passage, with only that portion quoted by Respondent/Petitioner in his petition in italics here, to see the difference context makes:

> Q: After reviewing these photographs and also these posters that you talked about, if Mr. Evans came to the Department of Corrections under a life sentence would he present a problem to you in relation to being a potential member or in a gang leadership?

A: Yes, sir.

With what I'm seeing here he is going to be someone that I'm going to have to monitor a lot with the tattoos, with the poster, with his violence from the street. He's somebody that I am going to try when he comes through our R&E Center to recommend that he go to an institution where I have the capabilities of monitoring him.

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.

Him from having life 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. He's got the capacity once they've indentified 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 money that's being passed on the streets.

(App. pp. 1601-1602). Respondent/Petitioner's selective parsing does demonstrate general conditions but those conditions are qualified, and specifically related to future dangerousness based on Respondent/Petitioner's background and crime. He does not show error in the PCR judge's resolution of the issue presented below.

Further, the PCR judge considered whether the solicitor's argument prejudicially strayed from these narrow admissible grounds and found that it did not:

> The argument at issue is confined to a few sentences in the transcript of record, (R. p. 1758, line 22 – p. 1759, line 5). The Solicitor's argument did reference conditions, but this Court discerns no comparison to death row conditions and life sentence conditions. Moreover, the Solicitor returned to the fact that a life sentence for him in the Department of Corrections would be different because of his gang affiliation. Again, this is the very reason the limited conditions reference was admissible here. The argument did not exceed the necessity of fair response. It was based on the record and reasonable inferences, and the entire argument on mere conditions was extraordinarily brief (merely 9 lines of the transcript), and did not create a danger of "infecting" the proceedings "with unfairness." *See, e.g., State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d

> 873, 881 (2007), *citing Donnelly v. DeChristoforo,* 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) ("The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.") This is especially so in light of the conditions testimony that was properly admitted as related to Evans's treatment due to gang affiliation concerns.

(App. p. 4444).

This analysis is fair and well-reasoned. Respondent/Petitioner failed to show either deficient performance or prejudice in these discrete circumstances.

In sum, not only was a "general conditions" issue was not properly before the PCR court and not heard on the merits, but also, if it had been properly raised, there could be no meritorious argument where the testimony at issue is not mere "general conditions" testimony. Respondent/Petitioner's petition for writ of certiorari should be denied.

4.

Allegation trial 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."

Respondent/Petitioner essentially disagrees that any gang information or argument should have been made. (Petition, p. 57). Again, his major flaw is structuring a view from only a part of the evidence, while ignoring other parts.

Respondent/Petitioner argues: "Counsel failed to challenge unreliable and irrelevant testimony from a State's witness on gangs, and the State's sentencing summation re-characterizing a domestic tragedy as a gang execution killing." (Petition, p. 57). The trouble with Respondent/Petitioner's oft repeated position is that the evidence supports either or both of those scenarios, not one or the other.

As noted above, Respondent/Petitioner made gang activity a part of the hostage taking and murder; Respondent/Petitioner dropped blue bandanas at the scene; Respondent/Petitioner told hostage negotiator Lee that the situation was *not* simply about his relationship with Christina; Respondent/Petitioner embraced the gang life-style, rules and regulations; Respondent/Petitioner shot his officer victim multiple times in the back of the head, execution style; and Respondent/Petitioner never renounced his expressed gang membership. In short, and as more fully discussed, with appropriate reference to the record noted, in response to Respondent/Petitioner's argument in Issue 3 which is incorporated by reference herein, Respondent/Petitioner made the gang evidence relevant. Further, the limited argument from the solicitor was fairly based on the facts of record, and reasonable inferences therefrom. (App. p. 4444).

While Respondent/Petitioner does take time to criticize counsel for not "investigating" Mr. O'Cain or obtaining a report, (see Petition, p. 58), he forgets that he himself directed counsel not to challenge his gang membership, admitted his gang membership, and admitted his drug business. (See App. pp. 4433-4436). Counsel did not rest on these assertions, though. Counsel had a former corrections official interview Respondent/Petitioner, and he called Respondent/Petitioner's expressed participation in gangs "textbook" and gave the advice pre-trial that whether Respondent/Petitioner was actually in a gang or not, he would be treated as such within SCDC. (See App. p. 4434; p. 2272; p. 2384; p. 3775). Respondent/Petitioner's present assertion of error is too little, too late.[21]

[21] Petitioner/Respondent notes that even immediately after trial, Respondent/Petitioner admitted his Crips membership to SCDC officials. In fact, he had not renounced, even while still making similar arguments in the PCR hearing. (See App. p. 4435; pp. 3197-3198).

As to his challenge to methodology, the PCR judge properly found "[t]here is no requirement that all expert testimony be 'scientific' in nature." (App. p. 4437, citing Rule 702, SCRE). Moreover, defense counsel's expert acknowledged the SCDC policy. (See App. p. 1633; p. 2272). Further, he forgets his own expert's testimony in PCR, that membership is often suspected by tattoos and admissions. (See App. p. 3033; p. 3044).

As to his argument the evidence merely goes to general "beliefs and associations" and counsel should have objected, (Petition, pp. 60-61),[22] again, he forgets that he himself made the gang connection to the murder, and, in turn, to future dangerousness in prison. *Compare Dawson v. Delaware*, 503 U.S. 159, 166 (1992) ("abstract" beliefs and/or associations not admissible but "associational evidence might serve a legitimate purpose in showing that a defendant represents a future danger to society. A defendant's membership in an organization that endorses the killing of any identifiable group, for example, might be relevant to a jury's inquiry into whether the defendant will be dangerous in the future. Other evidence concerning a defendant's associations might be relevant in proving other aggravating circumstances."). Consider specifically the testimony on the fear of crime and violence directed toward correctional officers or staff in light of the gang's reverence for killing officers. (See App. p. 1597; pp. 1601-1602).

To the extent he argues the State presented "misleading" evidence on gang activity, (Petition, p. 62), that issue was separately raised in the PCR action, and denied. (See App. pp. 4496-4497). Respondent/Petitioner has failed to separately raise the issue here. At any rate, for all the same reasons, most specifically Respondent/Petitioner's

[22] His assertion that the "only purported evidence of gang membership is this case is Evans's tattoos and two homemade posters," (Petition, p. 61), like so many of his assertions on the facts, is inaccurate. In rebuttal, Petitioner/Respondent relies on the review of evidence on gang involvement, admission of gang involvement, directions to counsel not to challenge gang involvement, evidence of a planned ambush of the deputy, and multiple blue bandanas, indicative of gang involvement and left at the scene, along with appropriate citations to record, on pages 28, 29, and 30 in this return.

blameworthiness"); *State v. Bell*, 305 S.C. 11, 20, 406 S.E.2d 165, 170 (1991), *quoting South Carolina v. Gathers,* 490 U.S. 805, 812 (1989) ("Evidence relating to the circumstances of the crime is relevant in a capital sentencing proceeding if it provides 'information relevant to the defendant's moral culpability.'"). *Cf. State v. George*, 323 S.C. 496, 514, 476 S.E.2d 903, 914 (1996) ("Mitigating circumstances are details specific to the character of the defendant on trial and/or the circumstances of the crime he committed which are considered in order to reduce the degree of his moral culpability or guilt.").

As the PCR judge properly found, the evidence in this case was fairly presented. Respondent/Petitioner's petition for writ of certiorari should be denied.

5.

Allegation trial counsel failed to seek a change of venue based on "extraordinary circumstances" of this trial, which was conducted in the courthouse that was a victim's workplace."

Respondent/Petitioner concedes trial counsel moved for change of venue based on pre-trial publicity, but argues counsel failed to ask any questions about whether the fact the victim had worked in the courthouse would create undue sympathy. (Petition, p. 63). He is not quite right – the deputy victim did not work at the courthouse, but, he had, nevertheless, worked courtroom security before and that would be referenced. (See App. p. 1531). The PCR judge noted the "careful questioning by trial counsel and the trial judge to determine any bias due to media coverage," (App. p. 4422), and found "the denial of the motion was fully and fairly supported by the jurors responses, which the trial judge relied upon in denying the motion, finding no evidence of such 'fixed

own repeated admissions of gang membership and criminality, specifically drug trade, (See pp. 28-30, infra), the record cannot support Respondent/Petitioner's assertion.

Lastly, Respondent/Petitioner reliance on the recent case of *State v. Liverman*, 386 S.C. 223, 687 S.E.2d 70 (Ct.App. 2009), is greatly misplaced. That case was not a capital case, and the gang evidence at issue (specifically the meaning of certain tattoos received in prison as marks denoting murder or death) was discussed in relation to determination of guilt, not in sentencing. It is, however, replete with gang evidence testimony, including a reference to wearing certain color bandanas to crimes to signify gang affiliation during the act. 386 S.C. at 228, 687 S.E.2d at 72. Further, the case is silent as to qualification and admission of expert testimony. However, *three* experts were qualified and presented testimony on gang activity and identification. 386 S.C. at 240-241, 687 S.E.2d at 78-79. *Liverman* affords no measure of support for Respondent/Petitioner's argument.

Again, Respondent/Petitioner simply does not fairly address the facts of record in their totality. He attempts to create a basis for finding prejudice in the sentencing phase by simply denying the applicability of the law enforcement aggravator, (see Petition, p. 63), and ignoring the evidence of the crime in its totality, and his own characteristics and background. These are all supported, however, by legitimate evidence and necessary to make an individual determination of his moral culpability, which the jury is charged with making. *See Tison v. Arizona*, 481 U.S. 137, 149 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."); *State v. Byram*, 326 S.C. 107, 118, 485 S.E.2d 360, 366 (1997) (noting jury tasked with "assessing [the defendant's] moral culpability and

opinions.'" (App. p. 4422). Respondent/Petitioner apparently does not contest the findings and ruling on the more general issue. (See Petition, pp. 63-66). Implicit in the rejection of error based on the media coverage is the fact that the jurors had no preconceived and fixed notions on guilt or responsibility, which would include opinions on the identity of the victims. (See App. pp. 4421-4422). Even so, the PCR judge considered whether "the process was incomplete as the trial was held in the victim's workplace and the jurors were not questioned or the trial moved." (App. p. 4423). He found the record supported neither deficient performance or prejudice in this regard.

The PCR judge, first noting the inaccuracy in Respondent/Petitioner's argument as to the deputy then working in the courtroom, resolved that instead of prejudice, the record supports that every opportunity was made to avoid prejudice:

> ... he had worked in the courthouse and very many people knew him. In fact, Evans's list of individuals who knew him, and did not participate in the trial, (Post-Hearing Brief, p. 115), shows the opposite of prejudice – the system worked very well to identify and avoid conflicts or bias.

(App. p. 4423).

In his argument below, Respondent/Petitioner relied upon an Eastern District of New York case, (see App. pp. 4423-4424), which he has apparently abandoned here for a more general argument on appeal. (See Petition, pp. 63-65). However, the distinguishing factors listed by the PCR judge have applicability in assessing this assertion of error.

The case at issue was cited as *United States v. Wright*, 603 F.Supp.2d 506 (E.D.N.Y. 2009). The PCR judge made the following relevant observations on the facts and disposition in that case, compared to the facts here:

> ... The case involved an assault on a federal officer, an Assistant United States Attorney. A change of venue was not necessary by law, but was granted. However, that case does no translate well to the instant situation for several reasons.
>
> First, the employee at issue in Wright was an active employee whose "name was posted like any other on our courthouse directory." 603 F.Supp.2d at 508. Second, the assault took place in the courthouse. Id. Third, there was no substitution of local counsel or local judges (as there was here) to ensure bias (or even the appearance of impropriety) was not an issue in the general proceedings. Fourth, the court did not find *per se* error. In fact, the change of venue was granted with the consent of the government.
>
> Here, the court system worked well to find non-biased participants – judges and counsel. Further, there is a remoteness here that was not present in the New York case. The deputy was regrettably not able to be present, was not a witness, the crime did not occur in the courthouse, and the deputy had even transferred to another location at the time he was murdered. Even if the logic was applicable, the case is still distinguishable factually. Moreover, to request *voir dire* on the subject would likely highlight to jurors a connection that was not otherwise developed until the penalty phase, where individualization of the victim is wholly proper.

(App. pp. 4423-4424).

Moreover, the PCR judge found that Respondent/Petitioner failed to show any evidence of bias, and found he was rely on speculation:

> ... The additional assertion of error premised on some type of presumed bias or unfairness in the venue is not based on binding and relevant precedent or any indication that any juror was unfairly influenced. Evans's argument remains speculative....

(App. p. 4424).

The PCR judge reasonably concluded same based on the absence of any evidence to support the speculation of unfair prejudice. Moreover, even Respondent/Petitioner's factual basis for an argued "presumption of prejudice" would rest on a more direct connection than is evident here. (See, for example, Petition, p. 65, suggesting that the

victim in the case works in the courthouse). Yet, even that factual basis for presumption of prejudice and necessity of a change of venue lacks support. *See United States v. Walker*, 665 F.3d 212, 223 (1st Cir. 2011) ("The mere fact that the victim of the crime is a court employee in the district is not, in and of itself, a reason sufficient to compel a transfer of venue."). But again, the jurors were thoroughly questioned about pre-trial publicity, and no response indicated any basis for finding bias or prejudice. Respondent/Petitioner failed to show deficient performance or resulting prejudice. Respondent/Petitioner's petition for writ of certiorari should be denied.

6.

Allegation trial counsel failed to object to victim impact testimony.

Respondent/Petitioner first argues that counsel failed to object to victim-impact evidence from Sheriff Loftis and Deputy Tripp – the only two witnesses to testify as to loss from the perspective of both law enforcement and a personal level. (Petition, pp. 66-67). He argues they were allowed to testify to more than the "brief glimpse" into the victim's life pursuant to *Payne v. Tennessee*, 501 U.S. 808 (1991), because their testimony was moving and underscored they knew him in the immediate surroundings, and thought of him in the immediate surroundings, i.e. the courtroom. (Petition, p. 67). He then argues their testimony was incomplete because they centered on personal loss instead of "the chilling effect on law enforcement work, following the death of an officer in the line of duty, due to concerns about officer safety." (Petition, p. 68). In effect, he argues both that there was too much and too little. Within that conflicted position is the actual fact that the State offered a reserved presentation from these two witnesses, Sheriff Loftis and Deputy Tripp. To the extent Respondent/Petitioner contends because

the State offered a reserved presentation of available *Payne* evidence, that is somehow supportive of his position that the separate facts of the crime constitute a "domestic tragedy" as opposed to the officer being killed "during or because of the performance of his official duties," (Petition, p. 68), that is, to say the least, a confused position – and one not supported by the record or viable legal theory. Even so, and once again, Respondent/Petitioner admitted ambushing the officer at his car before the officer could reach the safety of his home. Because the State did not seek additional, less personal evidence from these two officers does not diminish the existing evidence that well supports the law enforcement aggravating circumstance submitted. As to the *Payne* evidence submitted, the PCR judge found no error.

"[A] State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). This Court has recently approved of limited victim-impact evidence showing "traditional trappings of a law enforcement officer's funeral, demonstrating the general loss suffered by society." *State v. Bixby*, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010), *cert. denied*, 131 S. Ct. 2154 (2011). The evidence here was much more personal, much less demonstrative of overt emotion, and equally brief. As the PCR judge found:

> ... The testimony was tailored specifically to the impact the deputy's murder had on them specifically, and the local force, who personally knew him. Evans's argument in regard to "additional prejudice" due to Deputy Tripp's reference of the victim having at one point worked in the courtroom also fails. This evidence does nothing more than individualize the murdered deputy – the very essence of what victim impact evidence should do, to properly demonstrate the loss from the convicted defendant's act. *Payne, supra.* Lastly, Evans's oft repeated argument that the law

> enforcement aggravator was not properly submitted has been rejected for all the reasons discussed elsewhere in this order. Thus, Evans's argument in regard to "additional prejudice" due to this particular victim impact evidence is also rejected.

(App. p. 4446).

Secondly, Respondent/Petitioner complains that counsel was ineffective for attempting to limit the victim-impact evidence from Marcia Sapinoso. (Petition, p. 68). He argues basically it was just too much, and too moving. (Petition, pp. 68-69). Respondent/Petitioner failed to argue a specific error below regarding Ms. Sapinoso's testimony concerning the crime as she experienced it or the impact on her based upon the loss of her son and husband. Further, such an issue is not addressed in the Order. It is barred from review. *Marlar, supra.* Even so, the issue is clearly without merit.

Respondent/Petitioner argues that her testimony as to "her experience of the crime – including her effort to work a gun with the 911 operator's help – was harrowing," and simply too much. (Petition, p. 68). The argument concedes the relevance of that particular testimony as Ms. Sapinoso recounted her actual experiences – her reaction to statements and sounds – during the extended period Respondent/Petitioner terrorized the victims. (See App. pp. 1549-1553). This particular testimony falls more to circumstances of the crime than pure victim impact evidence. At any rate, the record shows no overt or excessive emotion, though she stopped briefly to compose herself when describing that the SWAT team, while rescuing her and her grandson, would not allow her look "to see if Joey and my husband was okay." (App. p. 1553). In short, the record does not show error. Respondent/Petitioner cannot show deficiency or any resulting prejudice in regard in counsel's treatment of the testimony.

In addition to Ms. Sapinoso's own testimony about the same crime as she experienced it, Respondent/Petitioner also complains of her testimony concerning her grandson, who also experienced the crime firsthand. Respondent/Petitioner argues the statements attributed to the grandson were hearsay and inadmissible. However, the PCR judge made a detailed review of the statements, finding that many were simply part of the narrative, not hearsay, and specifically admissible pursuant to *State v. Kelly*, 343 S.C. 350, 540 S.E.2d 851(2001), *overruled on other grounds*, 534 U.S. 246 (2002). (See App. pp. 4446-4448).

In *Kelly*, this Court considered an objection to hearsay based on admission of a child's statement, related by another at sentencing, that, "a bad man had killed his mommy." This Court found as follows:

> The South Carolina Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. By that definition, we believe Slade's testimony was not hearsay because it was not offered to prove the truth of the matter asserted. That is, the evidence was not introduced to prove that a bad man killed Shealy. Instead, the testimony clearly was offered to show the impact the murder had on Shealy's young child and the rest of her family. As such, it was properly offered as victim impact evidence. *See, e.g., State v. Byram,* 326 S.C. 107, 485 S.E.2d 360 (1997) (victim's sister's testimony about the effect of the victim's death upon herself and the victim's three children was relevant for the jury to meaningfully assess appellant's moral culpability and blameworthiness).
>
> Accordingly, the trial court correctly allowed this evidence to be admitted.

343 S.C. at 370-71, 540 S.E.2d at 861.

The PCR judge reasonably, and quite logically, found the testimony Respondent/Petitioner contests was similarly offered as evidence of the child's fear as a result of his experiences, not for the truth of the matter asserted. For instance, one of the

statements at issue related that the child did not want to go trial, nor have his mother go, for fear of his mother being killed. That was not offered or accepted for the purpose of establishing his mother might get killed, but to show the great fear of loss following the murder of his uncle and grandfather. This is precisely the kind of evidence *Kelly* described as admissible.

To the extent that Respondent/Petitioner attempts to make a cumulative *Payne* evidence argument, such an argument, if available separately from a "totality of the evidence" review, would fail as he failed to show any error in the admission of type or quality of victim impact evidence. See n. 11, supra.

Lastly, his reliance on *United States v. Johnson*, 713 F. Supp. 2d 595 (E.D. La. 2010) is misplaced. The federal District Court in Louisiana did not challenge or deny the general admissibility of *Payne* evidence. The court, while finding as a "fundamental fact that permissible victim impact evidence is inherently emotional," also acknowledged that that alone does not create an "unduly prejudicial" atmosphere supportive of finding the sentencing proceeding was "fundamentally unfair." 713 F. Supp. 2d 5 at 624, *quoting Payne*, 501 U.S. at 825.[23] This Court, in essence, gave a similar acknowledgment in its ruling in *Bixby*. As referenced above, the evidence at issue in *Bixby* was a funeral video tape which did show, briefly, "the folding of an American flag over the closed coffin; the playing of 'Taps' on a trumpet; footage of mourners; and a recording of a fictional 911

[23] The case is also wholly distinguishable on a factual basis as well. First, the court found an error in the subject-matter of the evidence presented. 713 F.Supp.2d at 622-623. Then the court referenced the emotional atmosphere in which the improper evidence was received. The court wrote that the widow of one of the victims testified while "clutching a teddy bear in her arms which was dressed as a law enforcement officer" and that "[h]er emotional dependency upon her husband and her helplessness in the face of his loss was visually obvious and truly heart wrenching" and, further, that the witness sobbed "continuously" throughout the reading of a statement which included the improper assertions, and continued to hug the bear and cry "within feet of the visibly upset jurors" during a "nearly five minute" long side bar. *See* 713 F.Supp.2d at 624-625. No like circumstances can be shown here.

call in which Deputy Wilson is given permission to 'return home,' a tradition at law enforcement funerals." 338 S.C. at 554-555, 698 S.E.2d at 586. This Court firmly set out that "[u]nder the law, simply saying that evidence such as this was 'moving' is not enough to require reversal of a capital sentence." 338 S.C. at 556-557, 698 S.E.2d at 587. There will necessarily be some emotion in a capital sentencing proceeding. This is so whether the emotion at issue is for the State or the Defendant, as emotion will flow for each depending on the evidence submitted. Again, here, there is no indication of improper evidence and/or uncontrolled emotion. There is no basis for finding error in counsel's performance (especially here where Respondent/Petitioner challenges the failure to "limit" the evidence in pre-trial – the emotion he references could surface independent of a limitation on evidence).

The PCR judge reasonably rejected Respondent/Petitioner's assertion of deficient performance. Respondent/Petitioner's petition for writ of certiorari should be denied.

7.

Allegation trial counsel failed to object to closing argument.

Finally, Respondent/Petitioner argues counsel should have objected to the solicitor's closing argument that "strayed from the fair and appealed to jurors' personal biases." (Petition, p. 70).[24] He claims the solicitor's argument contained "insertion of his personal opinions and judgment about the appropriate sentence, and the authority of the state judicial process," called Respondent/Petitioner "evil" and "mean," and

[24] Respondent/Petitioner also mentions summarily his disagreement with the solicitor's comments making any reference to prison conditions or the theory that the crime was a "gang crime" and not a "domestic shooting." (Petition, p. 70). The first matter references the procedurally barred issued discussed in response to Issue 3, and to, an extent, the gang evidence discussed in response to Issue 4, at pages pp. 25-37 of this return. That portion of argument is incorporated by reference as if repeated verbatim. Further, as to the solicitor's comments going to the "gang crime," again, the evidence of record supports the theory. Petitioner/Respondent incorporates the multiple comments herein regarding same, in particular n. 22 infra and pages 28-30 of this return.

improperly commented on the evidence supporting the death penalty. (Petition, p. 70). The PCR judge found that a review of the record dispelled the notion of error.

As to the allegation regarding assertion of personal opinions on sentencing and on who has the burden of the decision, the PCR judge found as follows:

> Evans complains the argument infers the state is already decided that a death sentence is the appropriate punishment and wrongly absolved the jury of responsibility. (Evans's Post-Hearing Brief, p. 168, referencing argument on R. p. 1747). However, nothing in the argument suggested "the solicitor attempted to minimize the jurors' own sense of responsibility for appellant's fate by stressing that he had himself already made the same decision that he was now asking them to make." *State v. Woomer,* 277 S.C. 170, 175, 284 S.E.2d 357, 359-360 (1981). Mere mention of the solicitor's involvement in the process to seek the death penalty is not improper. *See State v. Bell*, 302 S.C. 18, 34, 393 S.E.2d 364, 373 (1990). There is no specific absolution decree. The specific passage referenced is an introduction to the system, and the Solicitor noted that "you are the citizens that the legislature has designated to carry out this function," thus placed emphasis on the role of the jury. (R. pp. 1747-1748). Additionally, the solicitor requested the death sentence based on the evidence, (see R. p. 1759), and specifically reminded the jury it was their decision and theirs alone (see R. pp. 1759-1760). There was no improper personal opinion (i.e. lessening the duty or responsibility of the jury) or demand for a sentence. The focus firmly remained on the defendant, his acts, and his appropriate punishment to be determined by the jury. *See Smart v. State*, 278 S.C. 515, 526, 299 S.E.2d 686, 692-693 (1982) (cautioning such comments must be case specific and defendant specific). Applicant has failed to show an improper argument was made to which defense counsel should object.

(App. pp. 4448-4449).

The PCR judge carefully evaluated each of Respondent/Petitioner's arguments in similar fashion, finding no error when read in context and in view of the entirety of the evidence submitted. As to Respondent/Petitioner's argument claiming improper use of the words "mean" and "evil," the PCR judge found:

> Evans also complains about the solicitor's reference to "mean evil people." (Evans's Post-Hearing Brief, p. 169). The comment referencing "mean evil people" and the death penalty goes to the jury's process of

> determining the appropriate sentence, and it was directly tied to same in the solicitor's argument. (R. pp. 1750-1751). He never usurped the jury's decision, but remained steadfast that it was the jury's determination based on the evidence presented. *See generally Kinder v. Bowersox*, 272 F.3d 532, 552 (8th Cir. 2001) (finding no unreasonable application of federal law where state supreme court did not reverse on the following argument, " *Evil stares at you in the courtroom... We don't want to share our streets one day with evil. We cannot risk one day sharing our lives and our world with evil*" but found "the statements were proper argument because they addressed [the individual defendant's] character and the appropriate punishment for his crime.") (emphasis in original).

(App. p. 4449).

As to Respondent/Petitioner's argument regarding the reference to the graphic nature of the crime, the PCR judge similarly rejected the argument for error:

> ... though Evans complains of the "graphic language" in the argument, the Solicitor fairly referenced the horrendous circumstances of the crime which the jury heard. (Evans's Post-Hearing Brief, p. 1751). Descriptions of execution-style shootings can be graphic, but here the description is not inflammatory or otherwise improper. (See, for example, R. p. 1759, describing circumstances as "that sound of bullets piercing the head of a human being and seeing the blood and continuing execution style to shoot these people."). *Compare State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (solicitor's statement in child murder case that there would be an "open season on babies in Lexington County" if death sentence was not recommended was improper as "[t]he sole purpose of this statement was to inflame the jury").

(App. pp. 4449-4450).

Finally, as to Respondent/Petitioner's argument that the solicitor's closing improperly referenced an improper standard for evaluation of mitigation evidence, the PCR judge found:

> As to Evans's complaint the Solicitor instructed the jury to disregard mitigation, (Evans's Post-Hearing Brief, p. 172) Evans has shown nothing more than a comment on the weight of the evidence, (see R. pp. 1753-1754), which the solicitor is allowed to do. *Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010) ("The State's closing

> arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence" and the comment on weight to be credited). Moreover, the trial judge specifically instructed the jury they *shall* consider the statutory mitigating circumstances submitted, (R. p. 1783); that they "should consider any nonstatutory mitigating circumstances that have been shown to exist by the evidence," (R. p. 1783), and, even if the jury found no mitigating circumstance to exist but at least one aggravating circumstance, they could still recommend life, (R. p. 1785).

(App. p. 4449).

Moreover, the PCR judge reasoned that if any of the limited comments could possibly be construed as error, such error could only be harmless "in light of the tremendous evidence in aggravation." (App. p. 4450). However, he reasonably found no error based upon his detailed review of the comments in context of the facts and circumstances in the record. His decision is well supported by the record, which he cites repeatedly in confirmation of his detailed evaluation of the actual arguments. Moreover, his findings are supported by existing state precedent, as cited in the Order. Respondent/Petitioner failed to carry his burden of proof. His petition for writ of certiorari should be denied.

CONCLUSION

For all the foregoing reasons, Petitioner/Respondent, the State, submits that this Court should deny Respondent/Petitioner Evans's petition for writ of certiorari.

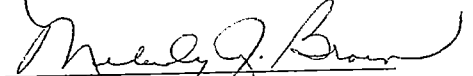
Respectfully submitted,

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March 12, 2012.
Columbia, South Carolina.

ATTORNEYS FOR PETITIONER/RESPONDENT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas (PCR)
The Honorable D. Garrison Hill, Circuit Court Judge

Case No. 2006-CP-23-7719
(Capital PCR Action)

Kamell D. Evans,

Respondent/Petitioner,

v.

State of South Carolina,

Petitioner/Respondent.

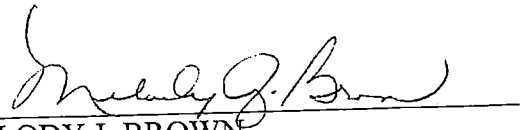
PROOF OF SERVICE

I, Melody J. Brown, hereby certify that the *State's Return to Respondent/Petitioner's Petition for Writ of Certiorari* has been served upon Respondent/Petitioner by depositing one copy in the United States mail, postage prepaid, to each of his attorneys of record, addressed as follows:

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This 12th day of March, 2012.



MELODY J. BROWN
Senior Assistant Attorney General

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
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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

Kamell Delshawn Evans,

Respondent/Petitioner,

-vs-

State of South Carolina,

Petitioner/Respondent.

RESPONDENT/PETITIONER'S RETURN TO THE STATE'S PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE PCR COURT PROPERLY APPLIED *STRICKLAND v. WASHINGTON* AND PROBATIVE EVIDENCE SUPPORTS THE JUDGE'S FINDING THAT TRIAL COUNSEL'S FAILURE TO OBJECT TO A CHARGE WHICH PRECLUDED THE JURY FROM UTILIZING MERCY AS A VEHICLE FOR EXPRESSING ITS MORALLY REASONED RESPONSE TO THE EVIDENCE WAS BOTH DEFICIENT AND PREJUDICIAL, IN VIOLATION OF STATE AND FEDERAL LAW, WHERE MERCY PLAYED THE CENTRAL ROLE IN THE DEFENSE SENTENCING CASE. 4

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.[1] The shooting arose out of a domestic depute between Mr. Evans and his girlfriend Christina Rodriquez; the victims were the brother and father of Rodriquez. App. 1420-32.

Mr. Evans was indicted for the murders of Antonio L. Sapinoso and his son Antonio J. Sapinoso (App. 1802-13), which occurred inside the Sapinoso home. The State filed a Notice of Intent to Seek the Death Penalty (App. 1814), alleging three aggravators as applied to Antonio L. Sapinoso and the same three factors as to Antonio J. Sapinoso, with the additional aggravator that the killing of Antonio J. Sapinoso 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

[1] 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 8th amendment and 14th 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. The State's Petition should be denied for the reasons set forth herein.

THE STATE'S PETITION FOR WRIT OF CERTIORARI AND KAMELL EVANS'S BRIEF IN OPPOSITION[2]

The grounds upon which the State seeks a Writ of Certiorari allege that the PCR judge erred by finding trial counsel ineffective for failing to object to the charge that a life sentence could not be returned as an act of mercy. Kamell Evans, in his Brief in Opposition, argues

[2] Mr. Evans has contemporaneously filed a Petition for Writ of Certiorari challenging the PCR court's erroneous decisions on seven issues, 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 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.

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.

I.

THE PCR COURT PROPERLY APPLIED *STRICKLAND v. WASHINGTON*, AND PROBATIVE EVIDENCE SUPPORTS THE COURT'S FINDING THAT TRIAL COUNSEL'S FAILURE TO OBJECT TO A CHARGE WHICH PRECLUDED THE JURY FROM UTILIZING MERCY AS A VEHICLE FOR EXPRESSING ITS MORALLY REASONED RESPONSE TO THE EVIDENCE WAS BOTH DEFICIENT AND PREJUDICIAL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SOUTH CAROLINA LAW.

Under state law in South Carolina, the ruling of a postconviction court is entitled to great deference. *See Burnett v. State*, 352 S.C. 589, 576 S.E.2d 144 (2003); *Caprood v. State*, 338 S.C. 103, 525 S.E.2d 514 (2000). The appellate court must uphold a postconviction ruling if supported by "any evidence of probative value" in the record. *Kolle v. State*, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010); *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984); *Caprood*, 338 S.C. at 110, 525 S.E.2d at 517. The appellate court will only reverse the postconviction determination when it is controlled by an error of law. *Kolle*, 386 S.C. at 589, 690 S.E.2d at 79; *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000).

The grant of sentencing relief in Mr. Evans's case is firmly grounded in the evidence in the record and in the law. Evans alleged that trial counsel provided ineffective assistance of counsel by failing to object to a sentencing charge that instructed the jury "you 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 (emphasis added). The same trial judge used an identical jury instruction in the case of *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009), and this Court found the charge contradicts state law because it informs the jury that a morally reasoned response to the evidence finding mercy as a basis for a sentence of life without parole is prohibited. *See id.* (overruling in part *State v. Hughey*, 339 S.C. 439, 459, 529 S.E.2d 721, 731 (2000)). In Mr. Evans's case, trial counsel testified during postconviction proceedings that mercy was the "primary element" of the mitigation plea. App. 3270. Accordingly, counsel stated, they would have objected to any charge that operated to limit the jury from utilizing mercy as a basis for returning a verdict of life imprisonment without parole. Yet counsel did not object when the charge cited above was read to them in chambers; nor did they object when the same charge was delivered to the jury, first orally and then in writing.

Like *Rosemond*, Mr. Evans's case is one of handful in which the trial court gave this erroneous instruction. See App. 1785; see also *Hughey, supra*; *Binney v. State*, 2000-CP-06-11-223, Cherokee County (PCR Order, Sept. 1, 2011) (Baxley, J.). The postconviction court (the "PCR court"), applying *Strickland v. Washington,* 466 U.S. 668 (1984), to the facts in the record, correctly found that counsel's failure to object to the charge was deficient performance: the instruction prevented the jury from using mercy as a moral perspective from which the jurors could individually and collectively view and evaluate the evidence

and express a morally reasoned sentencing decision. In doing so, the charge violated state law and federal law. Particularly given trial counsel's overriding focus on mercy in the mitigation case, counsel had no reasonable basis for not objecting to the charge that precluded mercy. Applying *Strickland*'s prejudice prong, the PCR court also determined that but for counsel's failure to object to the charge there was a reasonable probability that the outcome of the sentencing proceeding would have been different. For Mr. Evans, the impact of counsel's failure to object was that the jury deliberated on sentence without being able to use "mercy," the crux of the mitigation case, in making its decision.

The State has raised four questions in its petition: none merit granting certiorari. Question I and Question II unsuccessfully challenge the PCR court's careful application of the first and second prongs of *Strickland v. Washington*, respectively. Question III challenges one of the bases underlying the PCR court's finding of a *Strickland* violation—counsel's failure to recognize and object to the erroneous instruction on Eighth Amendment grounds. This argument lacks merit, as it misconstrues and misunderstands the federal law as well as the PCR court's decision. Finally, Question IV also lacks merit as it simply faults the PCR court for making a finding of fact with respect to the plain meaning of the erroneous instruction that flows directly from this Court's decision on the very same language in *Rosemond.*

A. Evidence Presented at the Sentencing Trial and Postconviction Proceedings

1. The Sentencing Trial

Trial counsel's mitigation presentation during the capital sentencing proceeding consisted principally of brief testimony from a series of family members, coaches, and friends. The presentation began with Mr. Evans's high school football coach (App. 1651-

53), his high school basketball coach (App. 1645-47), his community college football coach (App. 1648-50), and the high school football team chaplain (App. 1642-44), who testified, each for less than three transcript pages, that Evans was respectful, courteous, and a team leader. A friend with whom Mr. Evans coached little league football testified that Mr. Evans developed a positive relationship with he and his son. App. 1655-58. Another friend, who worked with Mr. Evans in a youth football and basketball association, testified that Evans had been a positive role model for his twenty-two year old son. App. 1660-62. A coworker testified briefly that Evans was a hard worker, who had not been involved in problems on the job. App. 1664-65. Evans's sister said that Kamell was a father figure to her children, even in prison (App. 1672), and Evans's father offered an emotional plea in two transcript pages, praising his son's positive attributes and stating that, while Kamell'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); App. 1615 (Greenville County Detention Center corrections officer). And counsel called two mental health experts: first, Dr. James Evans, a neuropsychologist who testified that the results of a test battery he conducted on Mr. Evans were "indicative of mild brain dysfunction" (App. 1696), but who conceded that he had not "actually seen the [brain] damage," for which more testing and brain imaging would be needed (App. 1701-02; see App. 1684); second, Dr. Elin Berg, a psychiatrist, who stressed that the relationship between Evans and Christina Rodriguez was the reason for the shootings (App. 1717-18), but who, contrary to Dr. Evans, testified that Kamell lacked any neuropsychological symptoms that would call for further study of brain abnormality.

Throughout the sentencing testimony, no allusion whatsoever was made to the difficulties in Mr. Evans's life, be it in Cleveland in his formative years or as a young adult and adult in South Carolina.

The prosecutor argued in closing argument that "[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 James Goldsmith in summation then asked: "How does someone from a good background for ten seconds of their life just blow it off . . . ?" App. 1526. His only answer was this: "There are two Kamell Evanses. That's the only way you can explain it." App. 1769. Ultimately, the defense case for a life sentence rested on mercy, as these words from Goldsmith's closing argument made clear:

> Ladies and gentlemen, we do not repay evil with evil. The solicitor is correct. I am going to ask for mercy for Kamell Evans. But I disagree with what the solicitor said is the definition of mercy. He said mercy is something that you deserve. I strenuously disagree, ladies and gentlemen. If we deserved it, if we could earn it, then we probably wouldn't need it.
>
> Mercy is unmerited favor. You can't earn it; you don't deserve it; but you give it to him anyway...We don't repay evil for evil. And mercy is appropriate in this case. You can show mercy and you can choose life regardless of who deserves it and who does not. We all need mercy, but none of us have earned it and none of us deserve it.

App. 1770.

2. The Postconviction Hearing

During the postconviction hearing (the "PCR hearing"), trial counsel Goldsmith and Sumner both explained that the "primary element" (App. 3270), the "key highlight" (App. 3271), a "major part" (App. 3259), of the mitigation case was mercy. Goldsmith testified that he "built" the closing argument "around" mercy. App. 3271. Counsel testified that they had hoped to convince the jury, in the face of substantial evidence presented by the State in

aggravation, that Evans was a good person who, as April 1 passed to April 2, 2003, had a very bad night. In counsel's view, mercy was the keystone of this approach.

In striking irony, however, despite having been present for the trial court's review of the jury instruction in chambers before it was charged to the jury, counsel allowed the court to charge the jury in a way that precluded jurors from giving effect to the keystone of the defense. The charge given on mercy was identical to that which this Court rejected in *Rosemond*: "you 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 (emphasis added). See *Rosemond*, 383 S.C. at 330, 680 S.E.2d at 10-11; see also *State v. White*, 246 S.C. 502, 507, 144 S.E.2d 481, 483 (1965) (noting the "absolute discretion of the jury with regard to the issue of mercy"). The same charge was provided to the jurors in writing during deliberations.

During the PCR hearing, trial counsel offered as a reason for failing to object that they thought the instruction emphasized to jurors that they should consider mercy. Attorney Goldsmith remembered the charge as "sort of an expansive charge." App. 3272. Attorney Sumner stated that because the instruction "use[d] the word mercy" it was preferable to a charge that merely tracked the statute's text. App. 3264; see App. 3261. Both testified that if they had thought the instruction limited or precluded mercy, they would have objected to it. App. 3262, 3279. The possibility that the instruction shut off the key avenue of reasoned moral response that their case depended on—or that the charge, in so doing, contravened state law as well as federal law—it seems, never crossed their minds.

B. Ineffective Assistance of Counsel under *Strickland v. Washington,* and the PCR Court's Order Granting Sentencing Relief

The ineffective assistance of counsel standard established in *Strickland v. Washington* requires a showing that an attorney's representation "fell below an objective

standard of reasonableness," 466 U.S. 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. *Strickland* itself was a capital case, and over the past twenty-five plus years the Court has developed a jurisprudence focused on representation in capital sentencing trials.[3] The Supreme Court follows a number of principles in applying *Strickland*'s two-prong test for deficient performance (the first prong) and prejudice (the second prong), which this Court has followed in its capital precedents (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)).

The principles that guide a court's consideration of the *deficient performance* prong include, significantly, the following:

- 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 (4th Cir. 2008) (citing *Strickland*, 466 U.S. at 690).[4]

- Counsel's tactical decisions are entitled to great deference—but only if based on thorough and reasonable investigation. As *Strickland* states, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 690-91.

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[3] 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 (2011); *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)).

[4] 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), this 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.

In assessing whether counsel's deficient performance *prejudiced* the defendant, the following principles are key:

- 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).

- Along the same lines, in determining whether a single juror could have been influenced by counsel's deficient performance, the impact of counsel's error must be considered in light of both the mitigating evidence that could have been investigated and presented as well as the aggravating evidence. See, e.g., *Belmontes*, 130 S.Ct. at 390-91; *Van Hook*, 130 S.Ct. at 20.

Applying the United States Supreme Court's ineffective assistance of counsel jurisprudence under *Strickland,* the PCR court held that trial counsel's failure to object to the challenged instruction fell below an objective standard of reasonableness. The PCR court also held there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. App. 4485-4493. Before turning to counsel's failure to object to the mercy instruction under *Strickland,* however, the PCR court began by addressing two prior cases in which this Court faced the very same jury instruction at issue here: *Rosemond v. Catoe* and *State v. Hughey*. Understanding what these cases did and did not hold is significant for interpreting the deficient performance and prejudice prongs in the current case.

1. *Rosemond v. Catoe* and *State v. Hughey*

The petitioner in *Rosemond* had argued that trial counsel were ineffective for failing to object to the "other than as an act of mercy" instruction because it precluded the jury from utilizing a sentencing factor authorized by State law. This Court agreed that the plain meaning of the charge told jurors that mercy was not a proper basis upon which to deliver a

life sentence and thus erroneously contravened long-standing South Carolina law. Granting relief on another ground, however, this Court did not address the prejudice from the erroneous instruction. *Rosemond*, 383 S.C. at 329, 680 S.E.2d at 10.

The *Rosemond* Court also revisited its prior decision in *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000), which indirectly addressed the same instruction nine years prior. The question presented to the Court in *Hughey* was whether a jury charge properly informed jurors that they were required to consider non-statutory as well as statutory mitigating factors. Hughey had also argued that, considering the jury charge as a whole, the instruction precluding mercy added to the confusion "because it suggested that an act of mercy would have been an invalid reason for a life vote." This Court held that the jury charge, in its entirety, was not confusing "because it advise[d] the jurors to consider all mitigating circumstances in making their recommendation." *Hughey*, 339 S.C. at 460, 529 S.E.2d at 732. The Court also dismissed the *Hughey* Court's criticism of the 'mercy' charge, which had found the argument "without merit because a judge's charge that the jury should not be guided by sympathy, prejudice, passion or public opinion is not reversible error." See *id.* In sum, *Hughey* concerned whether a jury instruction properly informed jurors that they could consider non-statutory mitigating evidence, and finding the instruction provided jurors with that information the court upheld it. In dicta, the court noted the mercy instruction was unobjectionable because it was consistent with the common law "no sympathy" rule affirmed in cases such as *State v. Singleton*, 284 S.C. 388, 326 S.E.2d 153 (1985), and *State v. Chaffee*, 285 S.C. 21, 328 S.E.2d 464 (1984). The *Hughey* decision, however, did not address the constitutionality of the mercy instruction under state or federal law.

In *Rosemond*, this Court recognized that what it stated in dicta in *Hughey* was wrong and "overrul[ed] *Hughey* to the extent it approved the instruction that precluded a capital jury's consideration of mercy evidence in the sentencing phase." 383 S.C. at 330, 680 S.E.2d at 11. The discussion in *Hughey* conflated (a) juror use of mercy as a reasoned moral response to the evidence presented with (b) sentencing verdicts unhinged from the evidence and motivated solely by sympathy, prejudice, or passion. The law of South Carolina has long championed the jury's ability to apply the former, while steadfastly precluding the latter.

As the PCR court's Order explains, "It is important to realize that *Hughey* did not discuss or decide the issue of whether the 'other than as an act of mercy' charge infringed on a capital defendant's constitutional right to present mitigating evidence. Instead, *Hughey* only went so far as to uphold the charge on the basis that it was consistent with the common law rule that a jury can properly be instructed that its verdict cannot be swayed by sympathy or prejudice." App. 4477-4478. The PCR court continued, therefore, that *Hughey* cannot be read to mean that this State's long-standing use of mercy as an instrumental basis for a reasoned moral decision suddenly disappeared. As the PCR court explained, *Hughey* "left undecided the issue of whether a charge that removes mercy as a sentencing consideration violates constitutional commands." App. 4478.

The relevance of this to the PCR court's evaluation of trail counsel's representation in Mr. Evans's case is two-fold. First, the PCR Court interpreted the "no mercy" instruction in *Hughey* to *preclude* mercy, as this Court did in *Rosemond*. So *Rosemond* does not present a new interpretation of the language of the instruction itself. Second, the *Hughey* Court's statement about the mercy component of the instruction was *in tension with, but did not*

change, existing law. The mercy instruction was therefore a proper and necessary ground for objection by trial counsel—particularly in a strongly aggravated penalty proceeding where counsel placed enormous weight on mercy as a basis for a life sentence.

2. Finding Deficient Performance

Turning to *Strickland*'s first prong, the PCR order found that counsel should have known that the charge—"you 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)—violated long-standing South Carolina law and the Eighth Amendment to the United States Constitution. Looking to *Rosemond*, the PCR court recognized that "the plain meaning of the words of the charge given is that mercy is precluded as a consideration for a sentence of life." App. 4481. The PCR court continued, "As the Supreme Court understood, the last clause of the instruction plainly reads as a limitation on and qualification of the previous sentence, not a reiteration." App. 4481.

The PCR court further recognized that the reason trial counsel offered for not objecting to the charge—that in their view it emphasized the jury's ability to grant a life sentence based on mercy—was not only inconsistent with *Rosemond*, but incongruous with common sense and, significantly, with long-standing South Carolina law. This Court's precedent has long held that a capital defendant is entitled to offer evidence asking "for mercy on his behalf," *State v. Torrence*; 305 S.C. 45, 51, 406 S.E.2d 315, 318 (1991); that defense counsel may properly "appeal to the jury's sense of mercy," *Drayton v. Evatt*, 312 S.C. 4, 12, 430 S.E.2d 517, 522 (1993); and that counsel may "address the jury and ask for mercy," PCR at 98 (citing *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004)). Moreover, mercy is "embraced" in the statutory directive of S.C. Code Ann. § 16-3-20(C) that "the

judge shall consider or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law." App. 4481. In addition, South Carolina does not require juries to weigh aggravating circumstances against mitigating circumstances: South Carolina is a non-weighing state, in which it has long been the rule that a jury may return a life sentence for any reason. See App. 4482. "[T]he law [of South Carolina]," the PCR court summarized, "has always been that a capital jury can consider mercy. Indeed the law used to be that one convicted of murder was sentenced to death *unless* the jury recommended mercy." App. 4482 (emphasis in original) (citing *State v. Harper*, 251 S.C. 379, 162 S.E.2d 712 (1968), and S.C. Code Ann. § 16-52). In light of this long-standing state law, and given that *Hughey* "left undecided... whether a charge that removes mercy as a sentencing decision violates constitutional commands," reasonable counsel would not have "accept[ed] on faith that *Hughey* insulated the 'other than as an act of mercy' language from any challenge." App. 4478. Rather, reasonable counsel would have raised an objection to the erroneous and damaging instruction based on state law.

Further, the PCR court held that counsel should have recognized that by contradicting state law, a charge precluding a morally reasoned response based on mercy in a capital sentencing proceeding also gave rise to a federal constitutional violation under well-established Eighth Amendment precedent. The Eighth Amendment doctrine following *Lockett v. Ohio*, 438 U.S. 586 (1978), demands that "a capital sentencing jury must be able to consider *and give effect* to mitigating evidence, for it is only when a jury is provided a vehicle for expressing its reasoned moral response to such evidence that 'we can be sure the jury...has made a reliable determination that death is the appropriate sentence.'" App. 4483 (emphasis in original) (quoting *Penry v. Johnson*, 532 U.S. 782, 797 (2001)); see generally

Lockett v. Ohio, 438 U.S. 586 (1978). Because "[t]he South Carolina legislature has decided to allow mercy as a sentencing consideration, encompassed in the language 'for any reason or no reason at all,' and the South Carolina Supreme Court has so interpreted the statute" (App. 4483), a capital jury must be able to utilize mercy as a response to the evidence under *Lockett*. "Because *Hughey* neither addressed nor ruled upon the issue of whether precluding a capital jury from considering mercy comported with *Lockett* and its progeny," the PCR court concluded that reasonable counsel would also have objected to the charge as a violation of federal law. App. 4483.

The PCR court found counsel's omission, in sum, "permitted a charge not only contrary to capital jurisprudence and the state statute as it existed at the time of [Evans's] trial, but contrary to the theory and thrust of the mitigation case counsel presented to the jury." App. 4484.

3. Finding Prejudice

Evaluating prejudice under *Strickland*, the PCR court first set out the *Strickland* standard for prejudice, by which it would consider whether counsel's failure to object to the "other than as an act of mercy" charge was prejudicial to Mr. Evans such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." App. 4484 (quoting *Strickland*, 466 U.S. at 694). The PCR court then noted that this Court in *Rosemond*, reversing and remanding for a new sentencing proceeding on other grounds, did not address prejudice in relation to the mercy charge. App. 4484 (citing *Rosemond*, 383 S.C. at 329, 680 S.E.2d at 10). The PCR court therefore noted that, "as a preliminary matter," it would consider whether (a) harmless error analysis such as this Court applied in *Lowry v. State*, 376 S.C. 499, 657 S.E.2d 760 (2008),

or (b) *Boyde v. California*, 494 U.S. 370 (1990), are part of the *Strickland* prejudice analysis. App. 4484.

The PCR court determined that harmless error analysis was incongruous in this circumstance because, like other errors that "deprive the jury of a 'vehicle for expressing its reasoned moral response to the defendant's background, character, and crime,'" App. 4486 (citing *Penry v. Lynaugh*, 492 U.S. 302 (1989)), the "other than as an act of mercy" charge eliminated a fundamental aspect of the jury's sentencing decision.

> The type of evidence balancing applied in *Lowry* ... is incongruous with a jury's consideration of mercy under South Carolina law, because under South Carolina law mercy serves as a basis for a vote for life based on consideration of the evidence presented at sentencing, yet despite the weight of that evidence. This is true when considering the role mercy plays in a highly aggravated sentencing case. A strong case in aggravation renders many instructional errors moot. By contrast, the mercy option becomes even more important to a capital defendant's chance for a life sentence in a highly aggravated case.

App. 4487-88.

Importantly, the PCR court *also* found that counsel's failure to object to the instruction precluding mercy was especially damaging under *Strickland* given the *particular circumstances of this case*. Even if harmless error analysis was instructive for *Strickland* prejudice, the challenged instruction was not harmless here because "as trial counsel testified at the postconviction hearing, mercy played the central role in the defense of the death penalty and in the mitigation presentation." App. 4488. "Even if harmless error applies," the PCR court held, "there is a reasonable probability that, but for counsel's failure to object to the unconstitutional charge, the outcome of the trial would have been different." App. 4489 (citing *Strickland*, 466 U.S. at 694-96).

The PCR court also determined that *Boyde v. California* contributed little under the circumstances because *Boyde* applies to ambiguous instructions, not clearly erroneous ones like the mercy charge. App. 4489. As *Rosemond* reiterated, there is nothing ambiguous about the instruction at issue; it is clearly wrong. App. 4489-90. Regardless, the PCR court carefully considered the impact of the erroneous charge in the context of the jury instruction as a whole. The court found the word "mercy" mentioned only once—that was in the erroneous charge. No other language in the overall instruction abated the error. While the trial court did instruct the jury to consider all nonstatutory or statutory mitigating circumstances, this Court's precedent holds that language that "does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." App. 4490-91 (quoting *Lowry*, 376 S.C. at 507-08, 657 S.E.2d at 764). The jury was told, orally and in writing, to follow the law as instructed by the judge, and that instruction told jurors not to utilize mercy in reaching a morally reasoned response. App. 4492. "To find otherwise," the PCR court held, "would be to conclude that the jury not only violated its oath and ignored the judge's flawed charge on mercy, but that they were coincidentally armed with such a workable understanding of *Lockett* and its accompanying constitutional jurisprudence that they unilaterally chose to consider Evans's plea for mercy." App. 4492.

Having found that prejudice from the erroneous instruction was not offset by the jury charge as a whole, and that the aggravating factors only served to enhance its impact, the Court held under *Strickland* that there was a reasonable probability that but for counsel's failure to object to the instruction the outcome of the sentencing trial would have been different. The violations of state and federal law wrought by the erroneous charge were highly prejudicial. App. 4492. Particularly so in Evans's case because mercy was "the crux

of the mitigation case" pitted "against substantial aggravating evidence." App. 4493. Under *Strickland*, because trial counsel's failure to object to the charge precluding consideration of mercy was prejudicial, Evans was entitled to a new sentencing trial.

C. The State's Petition Offers No Legitimate Basis for Certiorari and Should be Denied

The State's petition challenges the PCR Order for (a) misapplying *Strickland*'s first prong on deficient performance, (b) misapplying *Strickland*'s second prong on prejudice, (c) misconstruing the federal issue involved, and, finally, (d) making an erroneous factual finding with respect to the meaning of the language of the mercy charge. None of these questions have merit. There is probative evidence in the record to support the PCR court's finding of ineffective assistance of counsel on this issue. This Court must affirm the postconviction court's ruling. See *Kolle v. State*, 386 S.C. at 589, 690 S.E.2d at 79 (2010); *Caprood*, 338 S.C. at 110, 525 S.E.2d at 517.

1. Probative evidence in the record supports the finding of deficient performance under *Strickland*.

To establish ineffective assistance of counsel, a defendant must first demonstrate that his attorney's representation "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Counsel's representation must meet an objective standard of reasonableness, which is measured as "reasonableness under prevailing professional norms" taking into account "counsel's perspective at the time." *Id.* at 688, 689. As set forth, trial counsel testified during the postconviction hearing that they did not object to the "no mercy" instruction because they believed that the instruction emphasized mercy. The State has also offered an additional explanation for counsel's failure to object: although trial counsel never testified that they were aware of or considered this Court's decision in *Hughey*, the State

asserts that *Hughey* effected a change in law and provided a reasonable basis for counsel not objecting. Both the rationale offered by trial counsel at the PCR hearing and the rationale offered *post hoc* by the State in its briefing fail to establish adequate performance under *Strickland*, on several counts.

First, trial counsel's interpretation of the plain language of the "no mercy" charge is peculiar and untenable. This court has already stated in *Rosemond* that the "other than as an act of mercy" clause plainly informs jurors that they may not return a life sentence based on a morally reasoned response of mercy to the unique circumstances of the case. This Court stated with equal clarity that the terms of the directive run contrary to state law. The instruction, by its plain language, should have appeared objectionable to reasonable capital defense counsel—especially in circumstances, as here, where mercy was the crux of the sentencing case.[5]

Second, counsel's failure to object to the charge was not reasonable because the charge refuted long-standing state law that supports mercy as a basis for returning a life sentence. Counsel provided no testimony to the effect that they considered the *Hughey* decision. Regardless, as the PCR court set forth, *Hughey* did not effect a change in long-standing state law. If, as the State acknowledges, *Hughey* only addressed "the mercy charge issue in dicta" (State Petition at 19), how could it? Accordingly, reasonable counsel faced with the *Hughey* decision, and seeking to rely on mercy as Evans's counsel did, would have

[5] Contrary to the State's assertion, the fact that trial counsel or the trial court may have subjectively understood or intended the instruction differently (see State's Petition at 22) is of no matter. If the acts of all well-meaning actors were defined by good intentions—rather than by their real-world impact—then there may be no judicial errors or *Strickland* violations. As the United States Supreme Court recognized in *Harrington v. Richter*, *Strickland* "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." 131 S.Ct. at 790 (citing *Strickland*, 466 U.S. at 688). The only objectively reasonable interpretation of the charge given here, as this court recognized in *Rosemond*, is that it precludes mercy as a basis for a morally reasoned response to the sentencing evidence.

objected to the charge as an infringement of long-standing South Carolina precedent supporting mercy as a basis for a reasoned moral response to sentencing evidence. Likewise, after *Hughey*, a judge giving the charge would have reasonably believed that in doing so he or she was eliminating juror consideration of mercy. This court's decision in *Rosemond* is a resounding example in fact of just such recognition of error.

The third reason that counsel's failure to object to the charge was unreasonable is that the charge, by removing from the jury a basis for a life sentence authorized by the state legislature, also violated the Eighth Amendment to the United States Constitution, which demands that jurors not be precluded from considering and giving effect to mitigation. See App. 4482-83 (PCR Order, citing *Lockett v. Ohio*). The state's petition simply overlooks or ignores a significant part of the federal *Lockett* doctrine. According to the State, as long as jurors are instructed to consider all the evidence, that is sufficient. The State asserts: "Nothing in the charge precluded the jury from consideration of this evidence. Thus, the charge, as a whole did not interfere with either the constitutional right to present mitigation evidence, or consideration of the evidence presented..." State's Petition at 30-31. The circularity of the State's assertion notwithstanding, that is not what the United States Supreme Court's precedent says: jurors must not only consider but also *give effect* to mitigation. In a state that upholds mercy as a relevant basis for a life sentence, such as South Carolina, "giving effect" means being able to reach a morally reasoned response that mercy calls for a life sentence based on the evidence presented. The language of *Hughey* created a disconnect with well-established state law that implicated state law as well as the United States Constitution.[6] Reasonable capital counsel would have recognized this.

[6] The State misleadingly asserts, "The State's jurisprudence does not show a pristine historical consistency for allowance of the complete disregard of the evidence in favor of an act of mercy."

A word should also be said about the State's erroneous conflation of two legally distinct concepts: sympathy and mercy. Throughout its petition, the State mistakenly regards mercy as "unfettered emotion" and identifies mercy and sympathy as identical species. See, e.g., State's Petition at 11. The two are different, however, and the legal distinction is quite important. Under South Carolina law, mercy is a morally reasoned response to the evidence presented in a capital sentencing proceeding; it is authorized by state law. See *State v. Dickerson* (No. 27048), __ S.C. __, 2011 S.C. LEXIS 312 (Oct. 3, 2011) (distinguishing mercy, a proper aspect of capital jurors' reasoned *moral* response to the evidence, from an "unguided emotional response" such as that based, for example, on execution impact testimony). Sympathy, by contrast, is an unauthorized, emotional sentencing response that is not tethered to the evidence but rather motivated by whim, passion, or prejudice. See *Singleton*, *supra*; *Chaffee*, *supra*; see generally *Saffle v. Parks*, 494 U.S. 484 (1990); *California v. Brown*, 479 U.S. 538 (1987). The State's conflates these two distinct concepts, and this error skews its assessment of deficient performance and prejudice, just as it blindly drives the third Question Presented (State's Petition at 31-32).

For the reasons found by the PCR court and discussed above, under *Strickland* trial counsel had no reasonable basis for not challenging the instruction. The PCR court's finding of deficient performance is solidly grounded in the record, in the law of South Carolina, and in the federal constitution. Question I of the petition does not present an issue that merits this Court's review.

(State's Petition at 19; see id. at 20). Of course South Carolina has never allowed complete disregard of the evidence. But South Carolina has *always* held that mercy is legitimate—that a life sentence may be given for any reason or no reason at all—when that decision is a morally reasoned judgment and not one incited by prejudice and passion and sympathy. This is as true of cases before *Furman v. Georgia*, 408 U.S. 238 (1972) (cf. State's Petition at 20) as it is of cases since.

2. Probative evidence in the record supports the PCR court's finding of prejudice under *Strickland*, that but for counsel's error there is a reasonable probability that the outcome of the sentencing proceeding would have been different.

To show prejudice under *Strickland*, a party must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 446 U.S. at 694; *see Wiggins*, 539 U.S. at 534. A "reasonable probability" is one "sufficient to undermine confidence in the outcome." *Id.* at 694. In assessing *Strickland*'s second prong, the prejudice arising from all of defense counsel's errors is considered cumulatively in light of the totality of the evidence. *Id.* at 695.

The State's petition argues "the PCR judge erred in finding per se error in the jury instruction regarding mercy, thereby avoiding a proper *Strickland v. Washington* prejudice analysis." State's Petition at 21. In addition, the State's petition argues that the erroneous charge made little difference in Mr. Evans's case because, in the context of the instruction as a whole, any prejudice arising from it was cured, and its damage offset by substantial evidence in aggravation. See State's Petition at 26 (citing *Boyde v. California*). Accordingly, the State posits, there is no reasonable probability that counsel's error was prejudicial under *Strickland.*

The first assertion is a skewed reading of the PCR court's opinion, and the second assertion is refuted by the PCR court's analysis. The court's assessment of prejudice under *Strickland* was thorough. On the one hand, the court considered the impact of the erroneous charge in the context of the entire jury instruction and found that the remainder of the court's directions to the jury did not cure it. In doing so, the court noted that *Boyde v. California* offered little assistance in assessing prejudice because *Boyde* concerns ambiguous charges, not clearly erroneous charges. In any event, *Boyde* was easily met here

because nothing in the jury charge cured the mistaken instruction: under *Boyde* and under *Lowry*, inconsistent instructions don't cure erroneous ones.

On the other hand, the PCR court also considered the impact of the "other than as an act of mercy" charge in the context of the evidence before the jury and the totality of the circumstances under *Strickland*, and found a reasonable likelihood that but for counsel's failure to object to the charge there is a reasonable probability that the outcome would have been different. In doing so, the PCR court found that *Lowry*'s harmless error analysis did not apply and, alternatively, the error was not harmless. One reason for this, the court noted, was that the prejudice of the erroneous instruction affected the jury's ability to give effect to the mitigating evidence. Another reason was that telling jurors they cannot apply mercy as a reasoned moral response to evidence is an error that only gains in importance as the aggravating evidence grows stronger. Here, the aggravating evidence was substantial: two homicides accompanied by a finding of four aggravating factors for one victim and three aggravating factors for the other. In these circumstances, rather than offset the impact of counsel's failure to object, the weight of aggravating evidence only made the impact of counsel's failure worse. Under these circumstances, the PCR court concluded that the charge precluding mercy created a "structural error." But none of these findings dispensed with the *Strickland* evaluation; rather, they were integral to it.[7]

The entire prejudice discussion in which the PCR court engages is a *Strickland* analysis: simply because the court considers harmless error and *Boyde* does not mean that *Strickland* is not the overarching framework. If the PCR court had indeed applied a *per se* reversal test, rather than *Strickland*, as the State would have it, the court would have had

[7] Failure to object to even a structural error still demands *Strickland* prejudice review. See, e.g., *Purvis v. Crosby*, 451 F.3d 734, 740-43 (11th Cir. 2006) (noting prejudice must be shown under *Strickland* even where counsel's ineffectiveness results in a structural error).

little need to assess the impact of the erroneous charge in the context of the instruction as a whole, or to assess the prejudice arising from counsel's failure to object to the charge in the context of the totality of the aggravating and mitigating evidence and circumstances at trial. As such, the State's narrative that "the PCR judge's errors may all be tracked to an erroneous belief that relief was mandated by...*Rosemond*" (State's Petition at 9; see *id.* at 21-22), is fictitious. The PCR court knew well that *Rosemond* did not address prejudice. Further, the court did not presume that *Rosemond* mandated reversal, and that is precisely why the court requested specific briefing by the parties on the *Strickland* prejudice issue and emphasized the pivotal role of mercy *in this case*. See App. 4484, 4488-89, 4490-92, 4493.

The PCR court reached a determination on prejudice that differs from the State's view in large part because the PCR court followed this Court's interpretation of the mercy instruction in *Rosemond*; whereas the State remains attached to a conflicting interpretation of the charge. If the charge's plain meaning holds, as this Court read that plain meaning in *Rosemond*, the adverse impact of the charge on the jury is much greater than if one takes the State's alternative reading. See State's Petition at 23. The PCR court's *Strickland* prejudice determination was firmly grounded in the record. The fact that the State differs with this Court on its perspective of the plain meaning of the language at issue does not change that.

Here a keystone of South Carolina law was taken from a defendant in a case where the defendant and his counsel relied heavily upon it. Question II of the petition does not present an issue meriting this Court's review.

3. No Question Presented by the State Justifies a Grant of Certiorari.

For the reasons discussed in the previous sections, neither the State's challenge to the PCR court's ruling on deficient performance (Question #1) nor the State's challenge to the

PCR court's ruling on *Strickland* prejudice (Question #2) is availing. The latter two questions presented by the State—Question #3 and Question #4—fare no better.

Question 3 is rooted entirely in two misunderstandings of federal law, both of which have been discussed above to the extent that they skew the State's argument with respect to deficient performance and prejudice. First, the distinction between (i) a morally reasoned mercy response, which South Carolina demands a jury be able to do, and which the federal Constitution sanctions and supports via the Eighth and Fourteenth Amendments where states so choose, and (ii) a response based on emotional whim and sympathy, which the United States Supreme Court has held the Constitution prevents. Second, the distinction between (i) consideration and (ii) giving effect to mitigation under Eighth Amendment jurisprudence. With both misunderstandings clarified, Question #3 has no basis in law.

Question 4, to the extent it raises an issue not addressed in the other three questions, distills to an objection to this Court's decision in *Rosemond* with respect to the plain meaning of the mercy instruction. In finding as a matter of fact that the "other than as an act of mercy" phrase precluded the jury from utilizing mercy as a morally reasoned response, the PCR court in Mr. Evans's case did no more than apply this Court's precedent in *Rosemond.* Relying on *Rosemond*, the PCR court, had a firm basis for finding that the instruction precluded mercy. Question #4 has no merit.[8]

[8] The State argues that "the facts in the instant case do not cleanly fit within the *Rosemond* dictates for prompting the charge, i.e., 'evidence of mercy' having been submitted" because "there was no specific plea for mercy in the penalty phase, but friends and family did testify as to Evans's good qualities and their emotional bond." State's Petition at 34-35. "Nothing in the charge, though," the State continues, precluded the jury from considering this evidence." State's Petition at 35. Again, the State overlooks the fact that the great harm from the charge was that *it precluded jurors from making a reasoned moral determination that mercy supports a life sentence based on and by considering and giving effect to the evidence*, such as testimony of the character witnesses, including Evans's sister and Evans's father. Regardless, as another PCR court addressing the same instruction has recently noted, "as a matter of state law, [] the jury can consider a life sentence as an act of

4. The Small Universe of Cases Involving the Erroneous Instruction, and the Uniquely Prejudicial Impact of the Charge in this Case, Do Not Support a Grant of Certiorari.

As the PCR court recognized, Mr. Evans's case, like the cases of *Hughey* and *Rosemond*, is one of a small number of cases in which a particular judge provided the jury with a particular instruction that uniquely infringed upon the decisionmaking demanded of jurors by this State and the United States Constitution. Recently, another PCR court granted relief on the basis of the erroneous instruction on mercy. Looking to long-standing South Carolina and to this Court's *Rosemond* decision, the circuit judge handling Hughey's postconviction case held that the instruction was "so inimical to the laws of the state and the United States in capital cases as to entitle the applicant to a new trial." Assessing the erroneous instruction as a freestanding claim—not a claim of ineffective counsel—the *Hughey* PCR court held that the instruction itself warranted a new sentencing proceeding. *Hughey v. State*, 2000-CP-01-0212, Abbeville County (PCR Order, May 14, 2010) (Macaulay, J.).

Even more recently, rounding out the small universe of cases, a third PCR court denied relief on an ineffective assistance claim based on failure to object to the same mercy instruction at issue in *Hughey*, *Rosemond*, and Mr. Evans's case. *Binney v. State*, 2000-CP-06-11-223, Cherokee County (PCR Order, Sept. 1, 2011) (Baxley, J.). The *Binney* PCR court found no prejudice arising from counsel's failure to object to the instruction. The *Binney* court's assessment of the prejudice arising from the mercy instruction turns on an analysis of the instruction in light of the evidence presented and the entire charge given in that particular case, just as the question of whether there was a *Strickland* error in Mr.

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mercy, even if no plea from witnesses for mercy is given." *Binney v. State*, 2000-CP-06-11-223, Cherokee County (PCR Order, Sept. 1, 2011) (Baxley, J.) at 75.

Evans's case turns on an assessment of the instruction given the evidence presented, the entire charge given, and the totality of the circumstances presented in Mr. Evans's case. The PCR court in Mr. Evans's case made such an assessment and the fact that a different judge came to a different conclusion in a different case has no bearing on whether the PCR court in Mr. Evans's case was correct. The PCR order in Mr. Evans's case recognizes both the harm that the rare and idiosycratic instruction presents as a general matter under state and federal law *as well as* the unique harm that counsel's failure to object to the erroneous instruction wrought in Mr. Evans's sentencing proceeding, where mercy played the central and keystone role.

CONCLUSION

The PCR court's decision to grant a new sentencing trial on the basis of counsel's failure to object to the charge precluding mercy involves a straightforward application of *Strickland v. Washington*. The State's Petition asserts no more than what it erroneously deems to be misapplication of a properly stated rule of law and its objection to a finding of fact that faithfully tracked this Court's finding in *Rosemond v. Catoe*. For these reasons, and those set forth above, this Court should deny the State's Petition for Writ of Certiorari.

November 18, 2011.



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

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
NOV 21 2011
S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Please (PCR)
The Honorable D. Garrison Hill, Circuit Court Judge

Case No. 2006-CP-23-7719
(Capital Post Conviction Relief Action)

Kamell Delshawn Evans,

Respondent-Petitioner,

v.

State of South Carolina,

Petitioner-Respondent

PROOF OF SERVICE

I, William H. Ehlies, II hereby certify that a true copy of Respondent/Petitioner's Return to the State's Writ of Certiorari has been served upon opposing counsel by mailing first class mail, postage pre-paid to:

Melody Jane Brown
Assistant Attorney General
Post Office Box 11549
Columbia South Carolina 29211

This the 18 day of November, 2011

WILLIAM H. EHLIES II
ATTORNEY FOR THE RESPONDENT

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
DEC 12 2011
S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
(Capital PCR: 2006-CP-23-7719)
The Honorable D. Garrison Hill, Circuit Court Judge

Kamell D. Evans,

Respondent/Petitioner,

v.

State of South Carolina,

Petitioner/Respondent.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

Petitioner/Respondent, the State, began its petition with a succinct summary of the problems with the PCR order in the instant matter: "the PCR judge's decision is controlled by no less than three distinct errors of law, ... lacks factual support in the record" and rests on "a mash of inconsistent theories." (Petition, p. 9). The errors of law, the lack of factual support, and the "mash of inconsistent theories" are merely highlighted and perpetuated in Respondent/Petitioner Evans' return.

Several points must be clearly understood to fairly evaluate the divergent positions presented by the parties. First, the State does not assert that mercy is not available in capital proceedings in this jurisdiction. It may be requested. It may be received. It is not contested that Evans' trial counsel presented a case in mitigation which included family and friends seeking mercy for Evans, and that counsel requested the jury exercise mercy. (See Petition, p. 30; p. 35; Return, pp. 6-8). The jury was instructed – separate and apart from the portion of the sentence in the charge contested here – that they could return a life sentenced *regardless of whether they accepted or rejected the mitigation evidence.* (See App. pp. 1784-1785). Evans' jury could have exercised mercy. There was no limitation. (See Petition, pp. 30-31). Having been adequately and properly instructed that they could return a life sentence whether they accepted or rejected any of the evidence offered in mitigation, the jury determined that the death sentence was appropriate based on the particulars of this case. The jury was not precluded from the consideration of particular evidence presented or the exercise of mercy in reaching this decision.

Second, there is a difference between evidence in mitigation and the response to evidence in mitigation. Federal law protects the defendant's right to present evidence in mitigation and have that evidence considered. It does not protect (address or even mention) a jury's exercise of mercy apart from evidence presented. (See Petition, pp. 31-33). Indeed, this Court tied the propriety of the mercy charge in *Rosemond* to consideration of evidence, not simply the exercise of mercy. *Rosemond v. Catoe*, 383 S.C. 320, 330, 680 S.E.2d 5, 10 (2009). But, once again, this is not a case were the jury was prevented from considering evidence or prevented from exercising mercy.

Third, the issue here, at bottom, should be whether the jury instructions were sufficient when viewed as a whole. However, it is the effect of one phrase of one sentence of the jury charge repeatedly referenced in isolation that is the focus of the relief and the return. Both the State and Evans appear to agree that the lower courts are grappling with the analysis in the absence of this Court's direction on the matter. (See Petition, pp. 33-34; Return, pp. 27-28). Yet, when the proper analysis is applied, and the charge considered as a whole, the issue must be settled against Evans.

Critically, Evans never explains his position on a reasonable juror's understanding of the charge as a whole – specifically, in regard to the clear charge that the jury could return a life sentence even if all mitigation evidence presented was rejected. (See App. pp. 1784-1785). This is arguably greater protection for the exercise of mercy than Evans now argues for – he argues that a charge was necessary to allow a jury to *give effect to mitigation evidence*. (See Return, p. 21). When viewed as a whole the jury instructions correctly and plainly charged that the jury could return a life sentence for any reason,

based on mitigation evidence or not, even where the jury found the presence of a statutory aggravating circumstance. The jury was instructed it could exercise mercy.

In argument to the contrary, Evans is forced to recognize the wealth of un-contradicted evidence in the record that the charge as a whole was not heard to preclude mercy. (Return, pp. 8-9). This is not evidence of subjective intent as Evans would phrase it, (Return, p. 20 n. 5); rather, evidence of how the now disproved of single phrase would have been interpreted in light of the charge as whole. Moreover, Evans is also forced to implicitly concede that this charge issue at its core is an issue of state law, even while he urges the finding of federal law implications. (Return, p. 20). This is, indeed, a matter of state law and this Court has already spoken on the phrasing at issue. The one phrase at issue has already been disapproved of by this Court in *Rosemond.* That particular phrase may no longer be used, and need not be disapproved of once again for instruction to the bench and bar. However, the issue here is more comprehensive than the disapproval of the phrasing of one part of one sentence in the charge. The issue here is whether the charge as a whole was sufficient. This record confirms it was. Again, not to be lost in the minutia of Evans' phrase-focused argument is the fact that his mitigation evidence was before the jury and the jury was not precluded from exercising mercy.

The jury instructions, when viewed as a whole, are sufficient. Evans is not entitled to a new sentencing proceeding.

CONCLUSION

For all the foregoing reasons, and the reason presented in full in the petition for writ of certiorari, the State submits that this Court should grant certiorari in this case on the issues presented by Petitioner/Respondent, the State.

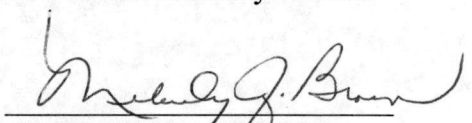
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In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
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Kamell D. Evans,

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v.

State of South Carolina,

Petitioner/Respondent.

PROOF OF SERVICE

I, Melody J. Brown, hereby certify that the State's *Reply to Return to Petition for Writ of Certiorari* was served upon on Respondent/Petitioner Evans on December 12, 2011, by depositing one copy in the United States mail, postage prepaid, to each of his attorneys of record, addressed as follows:

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This 12th day of December, 2011.

Melody J. Brown

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In the Supreme Court

RECEIVED
APR 24 2012
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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-vs-

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Petitioner/Respondent.

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CONCLUSION 12

STATEMENT IN REPLY

Mr. Evans's Cross Petition for Writ of Certiorari raises seven issues, and the law and relevant facts regarding the majority of those issues are sufficiently set out in the Cross Petition and in the PCR court briefing (see App. 3906-4103, App. 4217-4237, App. 4245-4253; Supp. App. 1-37.[1] The arguments the State raises in return are anticipated and addressed in the Cross Petition, as the State's arguments mirror, in large part, those set out in the PCR court's order denying postconviction relief on the seven issues. Mr. Evans, accordingly, maintains all arguments made in the Cross Petition and incorporates those arguments by reference herein. Mr. Evans has conformed his Cross Petition to meet the express purpose of SCACR Rule 243(e): the petition presents discrete questions with a "concise statement" of the case with facts material to consideration of the questions in issue. Nevertheless, some points of clarification are necessary in light of the statements made in the State's Return.

Earlier this year in *United States v. Venable*, the Fourth Circuit Court of Appeals, in a remark to bench and bar, was "compelled to note that advocates, including government lawyers, do themselves a disservice when their briefs contain disrespectful or uncivil language directed against the district court, the reviewing court, opposing counsel, parties, or witnesses." 666 F.3d 893, 904 n.4 (4th Cir. 2012). The court in *Venable* was distressed that disrespectful and uncivil language can, and in that case did, complicate and distort the process of understanding the issues and the facts. *Id.* Unfortunately, the State's Return is replete with a sarcastic and uncivil tone, including suggestions throughout that Respondent-Petitioner's claims are disingenuous, manipulative, or unfair.

[1] Mr. Evans, Respondent-Petitioner, cites the Appellate Appendix ("App."), the Supplemental Appellate Appendix ("Supp. App."), and the State's Return to Respondent-Petitioner's Petition for Writ of Certiorari ("Return").

To the contrary, Respondent-Petitioner and the State may read the record and the law differently, but as the Fourth Circuit emphasized in *Venable*, that professional difference of opinion does not warrant incivility.[2]

ARGUMENTS IN REPLY

A.

The Cross Petition for Certiorari argues that the PCR court abused its discretion in failing to grant relief under *Strickland v. Washington*, 466 U.S. 688 (1984), based on defense counsel's failure to object to the aggravating factor S.C. Code Ann. §16-3-20(C)(a)(7), which charged that Mr. Evans would be death-eligible for killing a law enforcement officer "during or because of the performance of his official duties." The State's Return mistakenly states that Evans challenges the statutory aggravating factor as *facially* unconstitutional—that he is raising, in the State's words, "a broader argument of the unconstitutionality of the statute in general" (Return at 19 n.12). That is not so. There is a fundamental difference between facial and as-applied challenges. Evans is claiming that counsel failed to challenge the *application of* section (C)(a)(7) to this case;

[2] The State's "chiding" tone is expressed, for example, in the following: "To reach his first purported [] error, Respondent/Petitioner engages in manipulation of the word 'report' in connection with the defense team's knowledge of Respondent/Petitioner's exposure to lead as a child." State's Return to Respondent/Petitioner's Petition for Writ of Certiorari (hereinafter "Return") at 6; "Respondent/Petitioner next asserts a lack of factual support, essentially, because the PCR judge found his evidence of brain damage unpersuasive." Return at 7; "Respondent/Petitioner's tepid argument...remains merely an unsupported personal assessment..." Return at 20 n.13; "The PCR judge chided Respondent/Petitioner with the reminder that kidnapping 'is a continuing offense...'" Return at 22; "Respondent/Petitioner's academic ponderings concerning possible positions at the car is truly an obvious red herring." Return at 23; "[A]gain, [Respondent/Petitioner] forgets that he himself made the gang connection to the murder..." Return at 35. The ultimate remark bears clarification: Mr. Evans made no connection between gang affiliation and the shootings of Antonio Sapinoso and Joseph Sapinoso. The speculative connection between them belongs entirely to the prosecution. As to the State's characterization that the PCR court "chided" Respondent-Petitioner (Return at 22), counsel for Respondent-Petitioner does not recall such conduct, and in counsel's experience has never known Judge Hill to "chide" a party to a legal action.

he is not claiming that counsel failed to challenge the *facial constitutionality* of the aggravator.

The State accordingly fails to address what the Constitution requires regarding the *application* of aggravating factors in capital sentencing proceedings. Relying solely on the Greenville County Sheriff's policy as a means of interpreting section (C)(a)(7), the State overlooks the narrowing requirements that the United States Constitution places on the interpretation of capital aggravating factors, and also fails to defer to the intent of the state legislators who enacted the South Carolina law. Throughout postconviction proceedings, the State has argued that trial counsel was not deficient in failing to challenge section (C)(a)(7) because, according to the policy of the Sheriff's Office as reported in the testimony of the Sheriff (also not challenged by defense counsel), Joseph Sapinoso was "on duty" at the time of the incident. The State's Return puts it thus: "In short, evidence was admitted that showed the deputy was on duty; thus, the aggravator was properly submitted to the jury" (Return at 22). The crux of the State's argument, in other words, is that Joseph Sapinoso was on duty—because (a) he was exiting an unmarked Sheriff's department jeep and (b) the department policy defines "on duty" as being in possession of or operating a department vehicle—when he encountered Mr. Evans at the Sapinoso home. But according to constitutional law, a sheriff's department itself can define neither the intended meaning of the statute (for that, one should look to the state legislature and this Court's interpretation of the law) nor its proper application (for which one must abide by the Eighth Amendment to the United States Constitution, which demands that States give narrow and precise definition to the aggravating factors

that can result in a capital sentence (see, e.g., *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Kennedy v. Louisiana*, 554 U.S. 407 (2008)).

This Court has never addressed whether the legislative intent of section (C)(a)(7) comports precisely with the Greenville County Sheriff's office local policy. Nor has this Court ever addressed whether the Sheriff's interpretation of the statutory language would meet the narrowing requirements of the Eighth Amendment. In fact, as Evans sets forth in his petition and argued before the PCR court, this Court's prior case law indicates that section (C)(a)(7) does *not* fit the facts of this case. First, it is certain that aggravating factor (C)(a)(7)—which allows death eligibility only when a law enforcement officer is killing (a) during or (b) because of official duties—does not apply by virtue of employment status alone. Second, in each of the cases this Court has reviewed in which section (C)(a)(7) was applied, the officer was killed while making an arrest, making a traffic stop, or while on patrol (see Cross Petition at n.15 and below[3]). The circumstances in Mr. Evans's case differ from the prior cases. Whether the law-enforcement aggravator applied to the factual scenario in Evans's case was an open question, which reasonable counsel should have challenged. Trial counsel, however, simply asked Sheriff's Office

[3] 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.

employees, during informal conversations, about their "on duty" policy, and took those employees' responses as definitive of the scope of the state statute.

The State's Return characterizes the applicability of section (C)(a)(7) to this case, and counsel's ineffectiveness for failure to challenge the same, as a "simple issue" (Return at 19). The PCR court, too, relying solely on the Sheriff's policy, did not take legislative intent or constitutional narrowing requirements into account in determining whether defense counsel was ineffective for failing to challenge the application of (C)(a)(7) to Mr. Evans's case (see App. 4424-4436). Yet, as explained fully in the Cross Petition (see pages 40-42), the State's argument itself shows why the Sheriff's policy is an unacceptable vehicle for interpreting the statute: it stretches the statute beyond what the statute's language and purpose will bear, past what the Constitution allows.

In sum, application of the section (C)(a)(7) aggravating factor in Mr. Evans's case does not comport and is in great tension with the prior applications of the aggravating factor in the cases reviewed by this Court. Application of section (C)(a)(7) here expands the scope of section (C)(a)(7) to encompass law enforcement status without more, despite the statute's much narrower language. Section (C)(a)(7) served as the basis for testimony and argument that undermined the reliability of the sentencing proceeding. Had Mr. Evans's counsel challenged the aggravating factor, there is a reasonable probability that the trial court would not have allowed the charge, and that without (a) the charge, (b) the evidence that was admitted under it, and (c) the inflammatory rhetoric that it provoked from Solicitor Ariail, the outcome of the proceedings would have been different.[4] If left

[4] Regarding prejudice, the State, in arguing that "the death sentence may be affirmed even if there was error in submitting this particular circumstance" (Return at 25 n.17), cites *Stringer v. Black*, 503 U.S. 222 (1992). The law has changed on this topic since *Stringer*. It is now a matter of whether evidence admitted under the invalid aggravating factor would have been admitted

unresolved by this Court, the issue is subject to recur at a new sentencing trial. This Court should grant certiorari.

B.

The South Carolina Supreme Court's law prohibiting testimony on general prison conditions is well-established: conditions of incarceration reflect *neither* the circumstances of the crime *nor* the characteristics of the defendant—which are the only relevant considerations at sentencing. See S.C. Code Ann. §16-3-20; *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984). The error generally 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. §16-3-20. See also *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988) (death sentence violates the Eighth Amendment to the United States Constitution when based on factors that are constitutionally impermissible or totally irrelevant to the sentencing process" (quotation omitted)). In this case, the testimony by Mr. O'Cain (App. 1601-1602; see Cross Petition at 48-50) and the related argument in summation by Solicitor Ariail involved *general statements about what prisoners receive* in terms of privileges or benefits in one environment versus another. Both Mr. O'Cain and Solicitor Ariail made *general statements about the security capability* of general-population prisons versus death row (see Cross Petition at 48-50). None more extravagant than this argument by Solicitor Ariail:

> 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; TV; loved ones; freedom of movement in a

---

otherwise (*Brown v. Sanders*, 546 U.S. 212 (2006)). See Respondent-Petitioner's Cross Petition at 43-45. The Cross Petition sets forth, at pages 44 and 45, how the aggravating factor led to the admission of testimony that *would not otherwise have been admissible* at the sentencing hearing and how this testimony intersected with other critical aspects of trial counsel's ineffectiveness resulting in prejudice under the totality of the circumstances according to *Strickland*.

> limited degree; a social structure; cards and games and watch the football game; go to work; go 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).

Neither of these subjects—(a) prisoner privileges or (b) 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 equipped—in *every* case. The issue is one of prison administration, and is off limits in an individualized capital sentencing trial.

Defense counsel failed to object to the general prison condition testimony and, as set out in the Cross Petition at page 50, had no legitimate strategic reason for the omission. As this court recognized in *State v. Plath*, general prison conditions testimony injects an arbitrary factor into proceedings no matter which party introduces it, and rebuttal of the general prison evidence with more only compounds rather than ameliorates the problem. As the Cross Petition sets forth, the PCR court's failure to grant sentencing relief on trial counsel's failure on this issue strays from this court's long-standing rule.

The State argues, however, that the entire issue is procedurally defaulted. To the contrary: (i) the issue was presented in the Amended Application[5]; (ii) the authority for the issue was fully set forth and the issue thoroughly presented in Mr. Evans's Initial

[5] In Mr. Evans's Amended Application for Post-Conviction Relief, paragraphs 10(b)(4)(d), 10(b)(7), 10(d)(4) and 10(g) address two related issues: first, that trial counsel was ineffective for failing to object to the testimony of Lewis O'Cain for reasons including irrelevance and, second, that trial counsel was ineffective for failing to object to the Solicitor's use of the improper testimony by Mr. O'Cain during closing argument. App.1896-1911; see also Applicant's Post-Trial Brief at pages 145-154 (App. 4075-4078) for further discussion. Respondent/Petitioner points out that as regards the initial pleading in a civil case, SCRCP Rule 8(a)(2) provides that the pleading shall include "a short and plain statement of the facts showing that the pleader is entitled to relief...." Further, Rule 8(f) states that all pleadings shall be so construed as to do substantial justice to all parties.

Trial Brief at pages 18-20 and 30-32 (Supp. App. 18-20, 30-32)[6]; (iii) the issue was ddressed with witnesses during the post-conviction hearing, including trial counsel, who were questioned repeatedly concerning why there was no objection to the general prison condition testimony (see App. 2348-2351, App. 2403-2404 (testimony of trial counsel Sumner); App. 2194-95, App. 2201 (testimony of trial counsel Goldsmith); see also App. 2712-2721 (testimony of appellate counsel Savitz)—the State was present during the testimony, did not object to the questioning, and had an opportunity to examine, and did examine, trial counsel on the issue; and (iv) the PCR court recognized as much and found the issue preserved. App. 4440-4441 (distinguishing alleged error in regard to Mr. O'Cain's testimony (preserved) from alleged error in regard to the presentation of a defense witness (unpreserved)).[7]

In sum, Mr. Evans's claim as to trial counsel's failure to challenge the general prison conditions testimony and the Solicitor's argument utilizing the testimony is fairly pled, briefed in advance of the merits hearing, presented at trial without objection, and addressed and ruled upon by the PCR court.

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[6] On pages 18 through 20 of the Initial Trial Brief, and again on pages 30 through 32 of the same (Supp. App.18-20; Supp. App.30-32, Mr. Evans argued the irrelevance of the general prison conditions testimony of Mr. O'Cain as it occurred during his future dangerousness testimony. Applicant specifically argued, in addition, that the general prison testimony and the Solicitor's argument on the same topic—the Solicitor's "misrepresentations about the nature of alternative punishments" (Amended Application for Post-Conviction Relief paragraph 10(b)(7))—violated S.C. Code Ann. §16-3-20(C) (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).

[7] SCRCP Rule 15(b) states, "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised by the pleadings." If an allegedly prejudiced party "does not timely object to evidence of issues not raised in the pleadings, each is deemed impliedly to consent to the trial of those issues." *Crawford v. Crawford*, 321 S.C. 511, 514 n.1, 469 S.E.2d 622, 624 n.1 (S.C. Ct. App. 1996). Therefore, even accepting merely for the sake of argument that the State was correct that the issue was not raised in the PCR Application or pre-hearing briefing, the presentation of and questioning on the issue at the hearing waived any deficiency, and preserved the issue.

The one exception to this involves the related claim that defense counsel was ineffective for calling its *own* witness on the general prison conditions issue (App. 4440-4441). However, the PCR court found that Evans's objection to trial counsel's failure to object to the *State's* general prison condition testimony was a preserved issue—and that is the claim that Evans currently pleads before this court. The State's argument that the PCR court found the allegations "insufficient" is—with the exception of the defense witness aspect—a misinterpretation of the PCR court's ruling. Aside from the one exception mentioned here, the general prison condition issue was preserved and, as the lengthy block quote the State inserts from the PCR Order (Return at 28-29) well shows, the PCR court addressed it as such.

In conclusion, the statements by Mr. O'Cain and Solicitor Ariail in predominant part were *not* about any comparative advantage that they speculated Mr. Evans would have in general population. Rather, they illustrated for jurors the conditions and security capabilities of the general prison setting and death row institutions themselves. Mr. O'Cain's testimony and Solicitor Ariail's argument explained why, based on institutional capacity, the prison system would be better suited if Evans were sentenced to death rather than life. The PCR court's ruling errs by conflating the prohibition against general prison conditions with sentencing testimony that might "include prison conditions if narrowly tailored to demonstrate the defendant's personal behavior in those conditions." *State v. Burkhart*, 371 S.C. 482, 488, 640 S.E.2d 450, 453 (2007). Since Mr. Evans has no period of incarceration to demonstrate any behavior in those conditions, the entire issue was irrelevant. The general prison conditions testimony and argument constitutes an "arbitrary factor" introduced during the sentencing phase of the trial. See S.C. Code Ann.

§16-3-20(C).[8] As stated by Justice Pleicones in *Burkhart*, *infra*, the introduction of an arbitrary factor into the sentencing phase of a capital murder trial is not subject to harmless error review under section 16-3-20(C), and therefore Mr. Evans is entitled to a new sentencing trial on this issue alone. 371 S.C. at 490, 604 S.E.2d at 454 (Pleicones, J., concurring). Regardless, under *Strickland*, but for trial counsel's failure to object to the deviation from this Court's law there is a reasonable probability that the outcome of the sentencing proceeding would have been different. The PCR court abused its discretion in finding otherwise. This court should therefore grant certiorari.

C.

In the Cross Petition, Mr. Evans challenges the PCR court's denial of relief on his claim of ineffective assistance based on counsel's failure to object, both in limine and during trial, to testimony by a SCDC employee who had never met Mr. Evans and knew nothing of his history. The SCDC employee, Mr. O'Cain, testified nonetheless that Mr. Evans would be a future danger in prison based on a speculative gang affiliation. As set forth in the Cross Petition, the defense team's unanimous belief that Evans was not in fact affiliated with gangs and that his interest in gang paraphernalia and imagery was merely stylistic (App. 2189, App. 2345, App. 2269; see App. 2547, App. Exh. 19A, App. Ex. 19B, 3430; App. 2549; App. Exh. 21, 3440; App. Exh. 24, 3444; App. 2548-2549) leaves counsel with no strategic explanation for failing to object to the testimony on the ground that it was more prejudicial than probative. It also leaves counsel without a strategic explanation for failing to object to the testimony on the ground that it violated *Dawson v. Delaware*, 503 U.S. 159 (1992), as the State failed to establish the necessary link between

[8] Respondent-Petitioner notes that in Mr. Evans's Reply to the State's Post-Trial Brief (see App. 4236), inadvertent reference was made to S.C. Code Ann. §16-3-25(C) instead of §16-3-20(C).

Evans's conduct and specific conduct by a gang—without establishing this link, the death sentence is an outgrowth of an individual's choice of affiliation, a protected and fundamental First Amendment right. See Cross Petition at 60-61.

At the PCR hearing, counsel stated they did not challenge the testimony because their client told them not to. But this does not absolve counsel of the duty to fully investigate. Unlike mitigation (see *Schriro v. Landrigan*, 550 U.S. 465 (2007)), this situation concerns a failure to investigate the State's case (see Evans's Post-Hearing Brief, App. 4060-63).[9] Nor does it absolve the need for counsel to object to an inflammatory summation by Solicitor Ariail, which recast a domestic and highly emotional four-hour standoff—evident from the multiple conversations between Mr. Evans, the SWAT negotiator, Evans's ex-girlfriend, and multiple friends and family throughout (see trial testimony at App. 1121-1134, App. 1231-1234; App. 1419-1430)—as a planned gang-motivated execution of a law enforcement officer. The Solicitor's arguments were fanciful and dramatic and sought to forge a non-existent connection between Evans's stylistic interest in gang paraphernalia and these tragic shootings (see App. 1756-1758).

Evans was not in a gang. He has no known connections to any prison gang activity. His assertions of gang activity were considered unbelievable by his defense team. Of the limited investigation counsel did into Evans's background, *all* evidence pointed against it. The shootings as they occurred were not premeditated. The stress on Mr. Evans, who suffers from significant frontal lobe damage—which affects emotion

[9] Further, the duty to investigate exists regardless of statements made by the client. ABA Standards for Criminal Justice, 4-4.1(a). Strategic and tactical decisions should be made by defense counsel. See Standards for Criminal Justice 4-5.5(b); *United States v Chapman,* 593 F.3d 365, 369 (4th Cir; 2010).

processing, coordination of sensory information, decision-making, and the ability to adapt to changing circumstances (see Cross Petition at 12 to 14)— is apparent in Evans's phone conversations with the SWAT negotiator and friends and family as he deteriorated over the course of the hostage standoff. And yet the Solicitor's summation made claims about Evans, without objection, such as the following:

- "[H]e 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 him 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.
- "As Mr. OCain told you, he is already into gang activity at the jail." App. 1758.

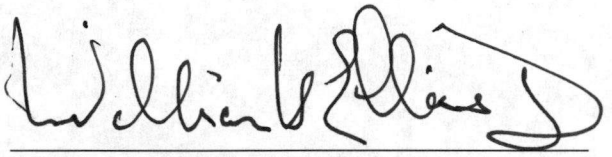
The Solicitor's rhetoric is precisely the type of highly prejudicial and speculative argument that *Dawson v. Delaware* and evidentiary Rule 403 exist to prevent. There was no strategic reason for not investigating or challenging testimony so prejudicial, especially since counsel fully anticipated the testimony. Trial counsel's failure to defend their client by objecting to the testimony and argument on these grounds was both deficient and prejudicial under *Strickland*, and the PCR court abused its discretion in finding otherwise.

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, and for the reasons state in the Petition itself, Mr. Evans's Cross Petition for Writ of Certiorari should be granted, and the issues ruled upon by this Court.

April 20, 2012



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STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
APR 24 2012
S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Please (PCR)
The Honorable D. Garrison Hill, Circuit Court Judge

Case No. 2006-CP-23-7719
(Capital Post Conviction Relief Action)

Kamell Delshawn Evans,

Respondent-Petitioner,

v.

State of South Carolina,

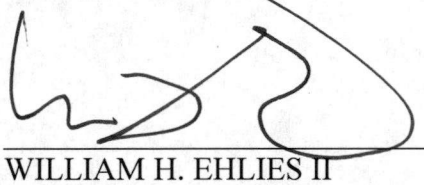
Petitioner-Respondent

PROOF OF SERVICE

I, William H. Ehlies, II hereby certify that a true copy of Respondent/Petitioner's Reply to the State's Return to the Cross Petition for a Writ of Certiorari served upon opposing counsel by mailing first class mail, postage pre-paid to:

Melody Jane Brown
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

This the April 23, 2012



WILLIAM H. EHLIES II
ATTORNEY FOR THE RESPONDENT

WILLIAM H. EHLIES, P.A.
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April 20, 2012

Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

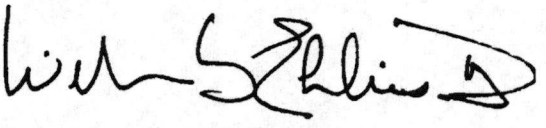
Re: *Kamell Evans v State of SC*
Case No. 2006-CP-23-7719

Dear Mr. Shearouse:

Enclosed please find an original and seven copies of the Respondent/Petitioner's Reply to the State's Return to the Cross Petition for a Writ of Certiorari together with Proof of Service for the Reply. Please return a clocked copy in the envelope provided.

Should you require anything further, please do not hesitate to contact this office. Thank you.

Sincerely yours,



WILLIAM H. EHLIES, II
Email: hank@ehlieslaw.com

RECEIVED
APR 24 2012
S.C. SUPREME COURT

cc: Melody J. Brown, Assistant Attorney General
Christopher Warren Seeds, Attorney at Law

The Supreme Court of South Carolina

Kamell D. Evans, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

The Honorable D. Garrison Hill
Greenville County
Trial Court Case No. 2006-CP-23-07719

ORDER

For good cause having been shown, the request for an extension to serve and file the Reply to the State's Return to Petition for a Writ of Certiorari is granted and extended until April 23, 2012.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY _____
CLERK

Columbia, South Carolina

April 17, 2012

cc: Christopher Seeds, Esquire
William H. Ehlies, II, Esquire
Senior Assistant Attorney General Melody J. Brown
Chief Appellate Defender Robert M. Dudek

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April 12, 2012

Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Kamell Evans v State of SC
Case No. 2006-CP-23-7719

Dear Mr. Shearouse:

Enclosed please find an original plus 6 copies of the following of Respondent/Petitioner's Third Motion to Enlarge the Time to File Respondent's/Petitioner's Reply to the State's Return to Petition for Certiorari together with Proof of Service for the above matter.

Should you require anything further, please do not hesitate to contact this office. Thank you.

Sincerely yours,



WILLIAM H. EHLIES, II
Email: hank@ehlieslaw.com

cc: Melody J. Brown, Assistant Attorney General
Chris Seeds, Attorney at Law

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APR 16 2012
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Honorable D. Garrison Hill
Circuit Court Judge
CA No. 2006-CP-23-7719

Kamell Delshawn Evans,

Respondent/Petitioner,

-vs-

State of South Carolina

Petitioner/Respondent.

CAPITAL POST CONVICTION RELIEF CASE

SECOND MOTION TO ENLARGE TIME TO FILE RESPONDENT/PETITIONER'S REPLY TO STATE'S RETURN TO PETITION CERTIORARI

The attorney for the Respondent/Petitioner hereby moves the Court for an order granting an additional 10 days to file his Reply to the State's Return to his Petitioner for a Writ of Certiorari. On March 12, 2012, the State filed a Motion to Exceed the Twenty-Five Page Limit on its Return to the Respondent/Petitioner's Petition for Writ of Certiorari. That motion was accompanied by the Return along with a proof of service of the Motion and the Return. The documents were received by the Respondent/Petitioner's attorney on March 14, 2012. On March 16, 2012 the Supreme Court granted the motion. The Respondent/Petitioner was to file his Reply to the Return within 10 days of the date

the Return was served. The Respondent/Petitioner had not had sufficient time to prepare its Reply to an enlarged Return which embraces seven issues and forty-nine pages. And therefore requested the Court grant an enlargement of time to file. The Court granted the request and extended the time to file until April 3, 2012. The Respondent/Petitioner made a second request for an additional 10 day enlargement of time or until April 13, 2012 to file the Reply. The State's Attorney General assigned to the case, Melody Jane Brown, has no objection.

The Respondent/Petitioner now makes a third request for an additional 10 day enlargement or until April 23, 2012 to file its Reply.. The State's Attorney General, Melody Jane Brown, has no objection.

April 12, 2012.

WILLIAM H. EHLIES, II
ATTORNEY FOR THE RESPONDENT/
PETITIONER
Building A, Suite 201
310 Mills Avenue
Greenville, South Carolina 29605
864-232-3503
864-232-4854 (facsimile)
hank@ehlieslaw.com

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Please (PCR)
The Honorable D. Garrison Hill, Circuit Court Judge

Case No. 2006-CP-23-7719
(Capital Post Conviction Relief Action)

Kamell Delshawn Evans,

Respondent-Petitioner,

v.

State of South Carolina,

Petitioner-Responent

PROOF OF SERVICE

I, William H. Ehlies, II hereby certify that a true copy of the Third Motion to Enlarge Time to File Respondent/Petitioner's Reply to State's Return to Petition Certiorari has been served upon opposing counsel by mailing first class mail, postage pre-paid to:

Melody Jane Brown
Assistant Attorney General
Post Office Box 11549
Columbia South Carolina 29211

RECEIVED
APR 16 2012
S.C. SUPREME COURT

This the 12th day of April 2012

Jenny M. Knight, Legal Assistant
WILLIAM H. EHLIES II
ATTORNEY FOR THE RESPONDENT/PETITIONER

The Supreme Court of South Carolina

Kamell D. Evans, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

The Honorable D. Garrison Hill
Greenville County
Trial Court Case No. 2006-CP-23-07719

ORDER

For good cause shown, the request for an extension to serve and file the Reply to the State's Return to Petition for a Writ of Certiorari is granted and extended until April 13, 2012.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY _____
CLERK

Columbia, South Carolina

April 3, 2012

cc: Christopher Seeds, Esquire
William H. Ehlies, II, Esquire
Senior Assistant Attorney General Melody J. Brown
Chief Appellate Defender Robert M. Dudek

WILLIAM H. EHLIES, P.A.
ATTORNEY-AT-LAW
BUILDING A, SUITE 201
310 MILLS AVENUE
GREENVILLE, SOUTH CAROLINA 29605
864-232-3503
FACSIMILE NUMBER 864-232-4854
EIN: 57-0703576

April 2, 2012

RECEIVED
APR - 3 2012
S.C. Supreme Court

Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Kamell Evans v State of SC
Case No. 2006-CP-23-7719

Dear Mr. Shearouse:

Enclosed please find an original plus 6 copies of the following of Respondent/Petitioner's Second Motion to Enlarge the Time to File Respondent's/Petitioner's Reply to the State's Return to Petition for Certiorari together with Proof of Service for the above matter.

Should you require anything further, please do not hesitate to contact this office. Thank you.

Sincerely yours,

WILLIAM H. EHLIES, II
Email: hank@ehlieslaw.com

cc: Melody J. Brown, Assistant Attorney General
Chris Seeds, Attorney at Law

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
APR - 3 2012
S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Honorable D. Garrison Hill
Circuit Court Judge
CA No. 2006-CP-23-7719

Kamell Delshawn Evans,

Respondent/Petitioner,

-vs-

State of South Carolina

Petitioner/Respondent.

CAPITAL POST CONVICTION RELIEF CASE

SECOND MOTION TO ENLARGE TIME TO FILE RESPONDENT/PETITIONER'S REPLY TO STATE'S RETURN TO PETITION CERTIORARI

The attorney for the Respondent/Petitioner hereby moves the Court for an order granting an additional 10 days to file his Reply to the State's Return to his Petitioner for a Writ of Certiorari. On March 12, 2012, the State filed a Motion to Exceed the Twenty-Five Page Limit on its Return to the Respondent/Petitioner's Petition for Writ of Certiorari. That motion was accompanied by the Return along with a proof of service of the Motion and the Return. The documents were received by the Respondent/Petitioner's attorney on March 14, 2012. On March 16, 2012 the Supreme Court granted the motion. The Respondent/Petitioner was to file his Reply to the Return within 10 days of the date

the Return was served. The Respondent/Petitioner had not had sufficient time to prepare its Reply to an enlarged Return which embraces seven issues and forty-nine pages. And therefore requested the Court grant an enlargement of time to file. The Court granted the request and extended the time to file until April 3, 2012.

The Respondent/Petitioner now makes a second request for an additional 10 day enlargement of time or until April 13, 2012 to file the Reply. The State's Attorney General assigned to the case, Melody Jane Brown, has no objection.

April 2, 2012.

WILLIAM H. EHLIES, II
ATTORNEY FOR THE RESPONDENT/
PETITIONER
Building A, Suite 201
310 Mills Avenue
Greenville, South Carolina 29605
864-232-3503
864-232-4854 (facsimile)
hank@ehlieslaw.com

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Please (PCR)
The Honorable D. Garrison Hill, Circuit Court Judge

Case No. 2006-CP-23-7719
(Capital Post Conviction Relief Action)

Kamell Delshawn Evans,

Respondent-Petitioner,

v.

State of South Carolina,

Petitioner-Responent

PROOF OF SERVICE

I, William H. Ehlies, II hereby certify that a true copy of the Second Motion to Enlarge Time to File Respondent/Petitioner's Reply to State's Return to Petition Certiorari has been served upon opposing counsel by mailing first class mail, postage pre-paid to:

Melody Jane Brown
Assistant Attorney General
Post Office Box 11549
Columbia South Carolina 29211

This the 2nd day of April 2012



Jenny M. Knight, Legal Assistant
WILLIAM H. EHLIES II
ATTORNEY FOR THE RESPONDENT/PETITIONER

The Supreme Court of South Carolina

Kamell D. Evans, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

The Honorable D. Garrison Hill
Greenville County
Trial Court Case No. 2006-CP-23-07719

ORDER

The request for an extension to serve and file the Reply to the State's Return to Petition for a Writ of Certiorari is granted and extended until April 3, 2012.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY _____
CLERK

Columbia, South Carolina

March 23, 2012

cc: Senior Assistant Attorney General Melody J. Brown
Chief Appellate Defender Robert M. Dudek
Christopher Seeds, Esquire
William H. Ehlies, II, Esquire

WILLIAM H. EHLIES, P.A.
ATTORNEY-AT-LAW
BUILDING A, SUITE 201
310 MILLS AVENUE
GREENVILLE, SOUTH CAROLINA 29605
864-232-3503
FACSIMILE NUMBER 864-232-4854
EIN: 57-0703576

March 21, 2012

Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RECEIVED
MAR 23 2012
S.C. SUPREME COURT

Re: Kamell Evans v State of SC
Case No. 2006-CP-23-7719

Dear Mr. Shearouse:

Enclosed please find an original plus 6 copies of the following of Respondent/Petitioner's Motion to Enlarge the Time to File Respondent's/Petitioner's Reply to the State's Return to Petition for Certiorari together with Proof of Service for the above matter.

Should you require anything further, please do not hesitate to contact this office. Thank you.

Sincerely yours,



WILLIAM H. EHLIES, II
Email: hank@ehlieslaw.com

cc: Melody J. Brown, Assistant Attorney General
Chris Seeds, Attorney at Law

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
MAR 23 2012
S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Honorable D. Garrison Hill
Circuit Court Judge
CA No. 2006-CP-23-7719

Kamell Delshawn Evans,

Respondent/Petitioner,

-vs-

State of South Carolina

Petitioner/Respondent.

CAPITAL POST CONVICTION RELIEF CASE

MOTION TO ENLARGE TIME TO FILE RESPONDENT/PETITIONER'S REPLY TO STATE'S RETURN TO PETITION CERTIORARI

The attorney for the Respondent/Petitioner hereby moves the Court for an order granting an additional 10 days to file his Reply to the State's Return to his Petitioner for a Writ of Certiorari. On March 12, 2012, the State filed a Motion to Exceed the Twenty-Five Page Limit on its Return to the Respondent/Petitioner's Petition for Writ of Certiorari. That motion was accompanied by the Return along with a proof of service of the Motion and the Return. The documents were received by the Respondent/Petitioner's attorney on March 14, 2012. On March 16, 2012 the Supreme Court granted the motion. The Respondent/Petitioner is to file his Reply to the Return within 10 days of the date the

Return was served. The Respondent/Petitioner has not had sufficient time to prepare its Reply to an enlarged Return which embraces seven issues and forty-nine pages. The Respondent/Petitioner requests that the time to file the Reply be enlarged until and including April 3, 2012. The State's Attorney General assigned to the case, Melody Jane Brown, has no objection.

March 21, 2012.

WILLIAM H. EHLIES, II
ATTORNEY FOR THE RESPONDENT/
PETITIONER
Building A, Suite 201
310 Mills Avenue
Greenville, South Carolina 29605
864-232-3503
864-232-4854 (facsimile)
hank@ehlieslaw.com

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Please (PCR)
The Honorable D. Garrison Hill, Circuit Court Judge

Case No. 2006-CP-23-7719
(Capital Post Conviction Relief Action)

Kamell Delshawn Evans,

Respondent-Petitioner,

v.

State of South Carolina,

Petitioner-Responent

PROOF OF SERVICE

I, William H. Ehlies, II hereby certify that a true copy of the Motion to Enlarge Time to File Respondent/Petitioner's Reply to State's Return to Petition Certiorari has been served upon opposing counsel by mailing first class mail, postage pre-paid to:

RECEIVED
MAR 23 2012
S.C. SUPREME COURT

Melody Jane Brown
Assistant Attorney General
Post Office Box 11549
Columbia South Carolina 29211

This the 21st day of March 2012

Jenny M. Knight, Legal Assistant
WILLIAM H. EHLIES II
ATTORNEY FOR THE RESPONDENT/PETITIONER

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

March 16, 2012

Senior Assistant Attorney General Melody J. Brown
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: Evans, Kamell D. v. State

Dear Counsel:

The following Order has been endorsed on your Motion to exceed twenty-five page limit for a Return to a Petition for Writ of Certiorari in the above entitled case on appeal.

"Granted.

s/ Costa M. Pleicones J.
For the Court

March 16, 2012."

Please be advised that by copy of this letter we are advising all interested parties of the action by the Court.

Very truly yours,
Daniel E. Shearouse
CLERK

DES/lda

cc: Chief Appellate Defender Robert M. Dudek
Christopher Seeds, Esquire
William H. Ehlies, II, Esquire

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
MAR 15 2012
S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
(Capital PCR: 2006-CP-23-7719)
The Honorable D. Garrison Hill, Circuit Court Judge

Kamell D. Evans, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent

MOTION TO EXCEED TWENTY-FIVE PAGE LIMIT FOR A RETURN TO A PETITION FOR WRIT OF CERTIORARI

Petitioner/Respondent, the State, respectfully moves for an order allowing the State to file a Return to Respondent/Petitioner's Petition for Writ of Certiorari in excess of the twenty-five (25) page limit imposed by Rule 243(g), SCACR. In support of this motion, counsel would respectfully show the Court:

1. The State's Return to Respondent/Petitioner's Petition for Writ of Certiorari is due to be served and filed in this Court, today, March 12, 2012. This is a capital post-conviction relief matter and the record, pleadings and final order are lengthy.

2. This Court has allowed the filing of Respondent/Petitioner's petition, which is seventy-four (74) pages in length and presents argument on seven (7) issues.

3. Undersigned counsel for Petitioner/Respondent, the State, has completed the Return to Respondent/Petitioner's Petition for Writ of Certiorari. To adequately address the issues, Petitioner/Respondent has prepared a forty-nine (49) page return. Petitioner/Respondent has

diligently attempted to trim the return, but finds it necessary to request the Court's permission to exceed the standard page limit.

3. Undersigned counsel will serve and conditionally submit the return today, pending resolution of this motion.

WHEREFORE, undersigned counsel for Petitioner/Respondent would respectfully request an order from this Court granting permission to exceed the twenty-five (25) page limit of Rule 243(g), SCACR, and accepting the conditionally filed Return.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

MELODY J. BROWN
Senior Assistant Attorney General

By: _____
MELODY J. BROWN

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

Granted
For the Court

March 12, 2012.
Columbia, South Carolina.

ATTORNEYS FOR PETITIONER/RESPONDENT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas (PCR)
The Honorable D. Garrison Hill, Circuit Court Judge

Case No. 2006-CP-23-7719
(Capital PCR Action)

Kamell D. Evans,

Respondent/Petitioner,

v.

State of South Carolina,

Petitioner/Respondent.

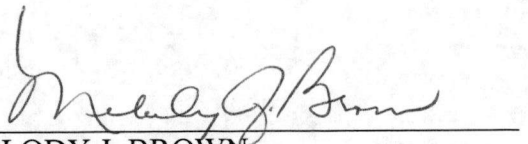
PROOF OF SERVICE

I, Melody J. Brown, hereby certify that the State's *Motion to Exceed Twenty-Five Page Limit for a Return to a Petition for Writ of Certiorari* has been served upon Respondent/Petitioner by depositing one copy in the United States mail, postage prepaid, to each of his attorneys of record, addressed as follows:

William H. Ehlies, II, Esquire
Building A, Suite 201
310 Mills Avenue
Greenville, SC 29605

Christopher Seeds, Esquire
Cornell Death Penalty Project
112 Myron Taylor Hall
Ithaca, NY 14853

This 12th day of March, 2012.



MELODY J. BROWN
Senior Assistant Attorney General