

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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Edward W. Miller, Circuit Court Judge

S.C. Supreme Court

CA No. 09-CP-23-0741

FREDDIE EUGENE OWENS. *Petitioner,*

v.

STATE OF SOUTH CAROLINA *Respondent.*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. WHETHER PETITIONER’S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED AS A RESULT OF TRIAL COUNSEL’S FAILURE TO INVESTIGATE AND PRESENT AVAILABLE AND COMPELLING MITIGATING EVIDENCE FROM PETITIONER’S ENTIRE LIFE HISTORY?**
- II. WHETHER PETITIONER’S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED AS A RESULT OF TRIAL COUNSEL’S FAILURE TO RAISE READILY AVAILABLE CHALLENGES TO A VARIETY OF EVIDENCE OFFERED BY THE PROSECUTION IN SUPPORT OF ITS CASE FOR A SENTENCE OF DEATH?**
- III. WHETHER PETITIONER’S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS AND S.C. CODE ANN. § 16-3-25(C)(1) WERE VIOLATED AS A RESULT OF THE PROSECUTION’S IMPROPER CLOSING ARGUMENT AND IMPROPER STATEMENTS DURING JURY SELECTION, AND WHETHER PETITIONER’S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED AS A RESULT OF TRIAL COUNSEL’S FAILURE TO OBJECT TO THE SAME?**
- IV. WHETHER PETITIONER WAS PREJUDICED AS A RESULT OF THE CUMULATIVE EFFECT OF TRIAL COUNSEL’S MULTIPLE DEFICIENT ACTS AND OMISSIONS?**

STATEMENT OF THE CASE

Petitioner, Freddie Eugene Owens, was nineteen years old when he participated in a November 1, 1997 armed-robbery that resulted in the death of a cashier at a Speedway convenience store in Greenville, South Carolina. He was originally tried, convicted, and sentenced to death on February 17, 1999. After this Court reversed the death sentence on two occasions, *see State v. Owens*, 362 S.C. 175, 607 S.E.2d 78 (2004); *State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001), the State initiated a third effort to obtain a death sentence. William Godfrey and Kenneth Gibson were assigned to serve as trial counsel at petitioner's 2006 re-sentencing proceeding. Following their appointment, Gibson and Godfrey waited over five months before even introducing themselves to petitioner. They conducted no mitigation investigation of their own, but relied, instead, on a dysfunctional defense team assembled less than two months before trial. Gibson was responsible for preparing the primary witness through whom the defense team planned to tell petitioner's life story – a role he assumed only days before jury selection began. At the time of trial, Gibson had never read any of petitioner's social history records; he had not interviewed any mitigation witnesses; and, he had spent a total of five hours with petitioner discussing non-mitigation topics.

Despite their opening statement promise to present a detailed account of petitioner's life history – one that would allow the sentencing jury to “come to know him as a person,” App. 1095, 1.6, – trial counsel ultimately presented nothing more than a handful of naked facts stated in a conclusory manner. Trial counsel's entire presentation of petitioner's background amounts to approximately eight pages of the trial transcript. And yet, there was indeed a rich, compelling and detailed mitigation story waiting to be told on petitioner's behalf. In post-conviction, petitioner presented extensive mitigating evidence, spanning the entire length of his life history,

that trial counsel failed to discover and/or present. During an evidentiary hearing before the Honorable Judge Edward W. Miller, both Gibson and Godfrey testified that: (1) they wanted to present a complete picture of petitioner's life history in the greatest possible detail; (2) they would have wanted to present any additional mitigating information about petitioner's background if they had been aware of it; and, (3) they "did not make any kind of strategic decision to not present the full and complete picture of [petitioner's] background." App. 2005, 11.2-4. Petitioner also raised multiple post-conviction claims that trial counsel was ineffective for failing to object to a variety of inadmissible evidence and improper arguments by the State.

Following post-hearing briefing, Judge Miller ordered, over petitioner's objection, that respondent should prepare an order of dismissal consistent with the State's post-hearing brief. App. 3562. Respondent submitted two proposed orders, both of which contained multiple legal and factual errors.¹ Judge Miller ultimately issued the final Order of Dismissal, which draws heavily from respondent's submissions and contains many of respondent's original defects. For example, the Order relies on numerous factual "findings" that plainly contradict the only relevant evidence in the record or purport to reflect evidence that simply does not exist. The Order repeatedly mischaracterizes petitioner's claims and fails to address facts, legal theories and arguments that were squarely presented for decision. As a result, the PCR Court's findings are not supported by probative evidence and its legal conclusions are controlled by multiple errors of law.

¹ Respondent's original proposed order was approximately 270 pages long. After petitioner objected to its excessive length, Judge Miller requested a shorter proposed order, and respondent submitted a "revised" order which was substantively identical but reduced to approximately 112 pages largely through changes in formatting, spacing and font size. App. 3563.

STANDARD OF REVIEW

This Court must reverse a PCR judge's findings if no evidence of probative value exists to support them. *See, e.g., Morris v. State*, 371 S.C. 278, 281-82, 639 S.E.2d 53, 55-56 (2006) (reversing Judge Miller's denial of PCR where there was no evidence to support his finding that "trial counsel 'tried to postpone the trial, via a Motion for Continuance, but that Motion was denied.'"). Furthermore, this Court must reverse the PCR judge's decision when it is controlled by an error of law. *See, e.g., Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008) (reversing Judge Miller's denial of PCR because his decision turned on an erroneous legal finding that no conflict of interest existed when petitioner's plea counsel simultaneously represented both petitioner and petitioner's husband during guilty pleas arising out of related offenses).

SUMMARY OF FACTS

I. INTRODUCTION.

Petitioner was originally tried, convicted, and sentenced to death on February 17, 1999, for his role in an armed-robbery shooting at a Speedway convenience store. He was charged along with three co-defendants, Steven Andre Golden, Nakeo Vance, and Lester Young. There was no objective proof of the shooter's identity. Instead, the State relied heavily on self-interested testimony from Golden and Vance to secure petitioner's conviction. After this Court reversed petitioner's death sentence on two occasions, *see Owens*, 362 S.C. 175, 607 S.E.2d 78; *Owens*, 346 S.C. 637, 552 S.E.2d 745, the State again sought death. On February 2, 2006, Judge Larry R. Patterson appointed Gibson and Godfrey to represent petitioner at his 2006 capital sentencing proceeding. App. 2028, 1.23 – 2029, 1.2. Godfrey was appointed as lead counsel. At the time of his appointment, Godfrey had previously served as second-chair in one capital trial. App. 2029, 11.15-20. He had also worked on a second capital case, but he was replaced as

counsel approximately one month before jury selection began. App. 2029, 1.20 – 2030, 1.4. Gibson had no prior capital experience. App. 1978, 11.16-18.

II. DEFENSE COUNSEL’S TRIAL PREPARATIONS.

Gibson and Godfrey did not meet with petitioner until nearly five months after their appointment. Their first meeting occurred at Lieber Correctional Institution on June 19, 2006. App. 1995, 11.10-22; 2049, 1.17 – 2050, 1.2. This meeting lasted approximately three hours. App. 1995, 1.23 – 1996, 1.9; 2313. Trial counsel met with petitioner a second time for approximately two hours on September 7, 2006, at Perry Correctional Institution. App. 1996, 11.19-25; 2051, 11.2-10; 2315. This constituted the entirety of Gibson’s substantive meetings with petitioner. App. 1997, 11.6-15. Trial counsel spoke to petitioner briefly in the holding cell “at the courthouse and stuff like that,” but, for Gibson, these two meetings “were the two times that basically I went, you know, for the purpose of seeing him.” App. 1997, 11.10-14. Godfrey met with petitioner a third time on October 2, 2006, which was the original trial date before the trial was continued. App. 2051, 11.16-22.

Early on in their case preparations, Godfrey and Gibson agreed to a division of labor under which “Godfrey was going to handle primarily the [m]itigation evidence” and Gibson “was going to primarily handle the evidence related to [the] crime and guilt issues.” App. 1980, 11.3-6; 1994, 11.4-12; 2031, 11.1-14. As both lead counsel and the person primarily responsible for preparing the mitigation case, it was Godfrey’s job to assemble a team of investigators and experts. Gibson was not involved in selecting the defense team members:

[Godfrey] told me who he knew because [he] had a lot more experience than I had. He said they were good people. I trusted [Godfrey] and that’s who we picked.

App. 1998, ll.21-23. Thus, Godfrey selected the investigators and experts who would investigate petitioner's life history, help identify mitigation issues, and then present a mitigation case on petitioner's behalf. The trial was originally scheduled to begin on October 2, 2006. App. 2051, ll.19-22. And yet, Godfrey did not even begin to contact potential defense team members until "about the middle of August." App. 2052, ll.13-14. He made a final decision about whom to hire at the end of August, leaving only one month before the scheduled trial for the team to prepare the case. App. p.2052, l.14 – 2053, l.1; 2315 (Godfrey's time sheet reflects entries on August 30th and August 31st that state, "interviewed possible death team members.").

For the defense team, Godfrey initially chose: (1) Dr. Donna Schwartz-Watts ("Dr. Watts"), a forensic psychiatrist; (2) Dr. Tora Brawley, a neuropsychologist; (3) Paige Tarr, a mitigation investigator; and, (4) Marjorie Hammock, a social worker. App. 2053, ll.2-9. Godfrey selected Dr. Brawley and Paige Tarr based on Dr. Watts' recommendation. App. 2054, ll.12-15; 2055, ll.9-16. He chose Marjorie Hammock because she had been involved in petitioner's previous two trials. App. 2055, l.22 – 2056, l.4. These team members were charged with conducting the mitigation investigation. Neither Godfrey nor Gibson personally conducted any mitigation investigation before the team was finally assembled, or after. App. 1999, ll.4-13; 2058, ll.2-20. Right away, however, in about "[e]arly to middle September," Godfrey realized that Paige Tarr was having some "personal problems [that] were having an impact on her ability to do her job." App. 2056, ll.18-22; 2071, ll.21-22. So, he decided to bring in another investigator, Carolyn Graham. App. 2056, ll.13-17. On September 15, 2006 – two weeks before the scheduled trial – Godfrey prepared letters of introduction for Paige Tarr and Carolyn Graham so that they could begin meeting with petitioner. App. 2315.

Five days later, Dr. Watts requested that Godfrey seek a continuance from the October 2, 2006 trial date. App. 2316 (“Dr. Watts needs more time – wants continuance. Discussion of why and how much time.”). Dr. Watts sent an email stating that although she had been given “short notice,” she was able to evaluate petitioner on one occasion during which she discovered that he was on several powerful psychiatric medications – a fact that “came as a surprise to all of us.” App. 2339. Dr. Watts then suggested what would ultimately become a defense mitigation theme at trial:

Even more surprising are the preliminary reports that show Mr. Owens [sic] disciplinarys have decreased substantially which may or may not coincide with these medications. At this point, although the SCDC [South Carolina Department of Corrections] records have been requested, we have yet to receive them.

Id. Dr. Watts urged Godfrey to get more time so that she could receive and review records, and further noted: “I also need to meet with your social worker, as I have no social history at all at this point.” *Id.* On September 27, 2006, Godfrey moved the trial court for a continuance. App. 2316. On October 2, 2006, the trial court granted a five-week continuance and rescheduled the trial for November 6, 2006. *Id.*

With less than four weeks left to prepare for trial, Godfrey identified problems with yet another defense team member – Marjorie Hammock. Hammock was the “primary” witness through whom the defense hoped to tell petitioner’s life story. App. 2068, 1.23 – 2069, 1.14; 2075, 11.19-24. She was supposed to “go over in great detail the family history of Freddie Owens and what happened to him,” App. 2074, 11.17-18, in order to “give the jury an understanding of his family background [and] things that had gone on in his life,” which had “led up to the events that caused this trial.” App. 2001, 11.18-22. But in mid-October, Godfrey expressed serious concerns about Hammock’s ability to handle that task. On October 11-12, 2006, Godfrey wrote

that Hammock “continues to worry me.” App. 2342. Godfrey noted that Hammock frequently “loses items given to her,” and stated uncertainty about whether Hammock was “truly on board and ready to go.” *Id.* Godfrey told defense team members that he “[did] not like [Hammock’s] attitude regarding preparation,” and he was considering replacing her. App. 2340 – 2341. Paige Tarr confirmed, “Marjorie is moving slowly,” and stated that she was “not all that enthusiastic about Marjorie’s level of preparation and interest.” App. 2340. Tarr and Dr. Watts discussed asking Godfrey to replace Hammock, “but with a few weeks to prepare, we thought it safer to just push Marjorie through.” *Id.*

So Godfrey continued on with Hammock on the team, but decided to alter his previous agreement with Gibson about their division of labor. Approximately two weeks before trial, in “mid-to-late October,” trial counsel decided that Gibson, not Godfrey, would handle the testimony of Marjorie Hammock and Dr. Brawley. App. 1999, 1.14 – 2000, 1.18. They reached this agreement because “we sort of realized that there was a whole lot more mitigation stuff [than] . . . guilt stuff.” App. 1994, 11.22-24. Gibson explained, “it just seemed, in order for me to pull my fair share, that I should take on more witnesses.” App. 1995, 11.2-4. So Gibson took responsibility for presenting Hammock’s testimony. Prior to this time, Gibson had not been “focusing on the subjects that [the mitigation witnesses] were going to testify to.” App. 2002, 11.5-9. In fact, Gibson *never* read any of the voluminous social history or institutional records that were in the case file – not *before* he was assigned to handle Hammock’s testimony *nor after* he agreed to take on that new role.² App. 2002, 11.10-24.

² Specifically, Gibson testified:

Q: Okay. Now, had you personally reviewed any of the – Mr. Owens’ social history or institutional records that were in the case file?

On or about November 3, 2006, the defense team met in Columbia, South Carolina, at the home of Dr. Watts. App. 2000, ll.5-9; 2068, ll.1-13. The meeting included Gibson, Godfrey, Dr. Watts, Dr. Brawley, Paige Tarr, Carolyn Graham, and Marjorie Hammock. App. 2068, ll.14-22. The purpose of this meeting was “to work on [a] unified theory of defense in [the] penalty phase.” App. 2317. At the meeting, Gibson prepared Hammock’s testimony as follows:

Uh, I sort of used her – when we met on that Saturday, we sat and we talked. We sort of went through what information she had, what information, you know, that she thought was important, what information – we talked about her earlier testimony, you know, what she thought had gone well, you know, whatever, what she thought hadn’t. And then based on that conversation, I basically formulated, you know, the questions to try to get it out of her. What I do is basically is also I say I’m going to ask you questions that are going to allow you to talk okay. That’s how I formulated it.

App. 2003, ll.2-13. As late as November 1, 2006, Godfrey reported that he was still “tr[ying] to find any other theory [the] defense could use in [the] penalty phase.” App. 2318.

A: I had reviewed the transcripts from the previous trial. So whatever is included in those previous trials, that is what I have gone over.

Q: Had you personally interviewed any members of Mr. Owens’ family?

A: No.

Q: Or acquaintances?

A: No.

Q: All right.

A: Never did. And did not throughout the trial other than the ones that we were planning on calling.

App. 2002, ll.10-24.

III. JURY SELECTION AND OPENING STATEMENTS.

On November 6, 2006, petitioner's capital sentencing trial began as scheduled before Judge Patterson. Gibson and Godfrey shared responsibilities for jury selection. Solicitors Robert Airail and Betty Strom represented the State. Early in the individual *voir dire* process, Solicitor Airail began previewing what would later become a theme in his closing argument by telling members of the jury panel that the State may only seek death in rare cases. For example, he repeatedly told potential jurors that "the State of South Carolina, represented by the solicitor, is not allowed to seek the death penalty, except in certain limited circumstances," App. 605, 11.13-15, which he characterized as "a very, very, very small group of cases." App. 582, 11.2-3. He stated that "[n]ormally in a criminal case when a defendant is convicted, the judge sentences. And that's 99.9 percent of the time." App. 357, 11.12-14; *see also, e.g.*, App. 489, 11.20-22 ("the State is allowed to seek the death penalty only in a very limited set of circumstances"); App. 581, 1.24 – 582, 1.1 ("Normally when a defendant goes to trial and is convicted, he would be sentenced by a judge, and that's the way it is in 99.9 percent of the cases."); App. 635, 11.18-24 ("[W]hen the State is allowed to seek the death penalty, which only occurs in very few cases, but it does occur in certain cases of murder . . . [and] this is one of those cases."). During individual *voir dire*, Solicitor Airail made these comments to seven of the jurors who were ultimately seated in petitioner's case. App. 195, 1.15 – 196, 1.2; 315, 11.10-14; 357, 11.12-14; 458, 11.8-21; 475, 11.21-25; 489, 11.20-22; 581, 1.24 – 582, 1.3; 605, 11.13-16.

During opening statements, Strom told the jury that "Freddie Owens has already been convicted of murder; he's already been found guilty of murder." App. 1088, 11.12-14. However, for purposes of the sentencing proceeding, the State planned to present "an overview of that murder, because you are going to need to know the facts and circumstances of the crime in order

to determine what punishment to impose.” *Id.* Strom told jurors they would actually observe the crime with their own eyes because the State would introduce a video that captured the shooting. App. 1091, ll.12-15. Finally, Strom stated that the jury would hear evidence of petitioner’s character, “[w]hat kind of person he is; what else he has done” App. 1092, ll.4-5, and “how he’s behaved while he’s been confined.” App. 1092, ll.18-19.

Bill Godfrey gave an opening statement for the defense. He promised the jury a two-part mitigation case. First, he explained that the jury would hear about petitioner’s life history and background:

What we believe the evidence in mitigation will show, and you will hear testimony from our witnesses that describe how it is that Freddie grew up; how he really didn’t have a home on a consistent basis; how he really didn’t have food on a consistent basis. You will hear evidence of the violence that he has lived through his entire life. And you will come to know him as a person, basically from the time he was a young boy up to where he is now.

App. 1094, l.35 – 1095, l.8. Godfrey claimed the social history evidence would detail “where Freddie came from and everything that he went through.” App. 1097, ll.3-4. He warned that this evidence was “not pretty,” and cautioned jurors that they would hear “things that happened here in Greenville to a family that should never happen.” App. 1097, ll.15-18. For part two of the presentation, Godfrey stated the defense would call Dr. Thomas Cobb, a psychiatrist who worked at the prison, to establish that petitioner had recently improved his behavior. App. 1095, ll.17-25. Through Dr. Cobb, the jury would hear that “within this past year while Freddie was in the Department of Corrections he kept asking for help.” App. 1095, ll.15-17. Dr. Cobb would explain that he was treating petitioner with medication, which “has helped him control his impulses.” App. 1095, l.25.

IV. THE STATE'S CASE FOR DEATH.

The State's presentation consisted of three main elements: (1) evidence about the crime; (2) evidence of petitioner's poor prison behavior; and, (3) victim impact testimony.

A. OVERVIEW OF THE CRIME.

The State offered evidence to establish that Ms. Irene Graves died from a single gunshot wound to the head in the early morning on November 1, 1997, while working at a Speedway gas station on Laurens Road in Greenville, South Carolina. Officer Larry Bellew testified that he responded to the scene and collected a videotape from the Speedway's security camera. App. 1121, ll.19-25. He introduced State's Exhibit 21 (a DVD copy of the videotape), App. 1123, ll.3-8, and explained that it shows two armed men wearing masks entering the store. App. 1124, ll.4-7. Bellew stated that the jurors would see Ms. Graves standing behind the counter "and then you see her get shot." App. 1124, ll.24-25. Without further explanation, the State then played the videotape for the jury. App. 1125, l.17.

The video does indeed show two masked men dressed in dark clothing entering the Speedway store. *See State's 2006 Trial Exhibit 21*. However, it is impossible to determine their identities. *Id.* After the two men enter the store, the video focuses primarily on a single man standing directly opposite Ms. Graves and pointing a gun at her head. *Id.* The second man is not visible for most of the remainder of the video. *Id.* The man opposite Ms. Graves continues pointing his gun at her head, and then Ms. Graves falls backwards to the floor and the two men run away. *Id.* Given that the jurors had already been told that petitioner was convicted of murder and that they would see video-graphic evidence, they most likely assumed that petitioner was the video's primary player – i.e., the man standing opposite Ms. Graves and pointing a gun at her head immediately before the video shows her falling to the floor. Petitioner's sentencing

jury was not told that the identities of the men in the video had never been conclusively determined. The convicting jury in 1999 was given an instruction on accomplice liability under which they could find petitioner guilty of murder without ever determining whether or not he actually pulled the trigger. 1999 ROA p.2979, l.5 – p.2980, l.3. And, in fact, petitioner’s co-defendant, Steven Andre Golden, testified in 1999 and again in 2003, that he – not petitioner – was the man standing opposite Ms. Graves for the duration of the video. 1999 ROA p.2306, l.25 – p.2307, l.4; 1999 ROA p.2309, ll.8-12; 2003 ROA p.161, l.7 – p.163, l.6. Trial counsel asked no questions of Officer Bellew. App. 1128, l.25.

Next, the State called Officer Joe Wood, who testified that petitioner was arrested for the crime after several days of investigation. During an interview with petitioner, Wood testified that petitioner responded, “the only thing I’m here for is to eat, sleep, shit and piss. I don’t give a shit. I was born to be in jail.” App. 1141, ll.10-12. Wood stated that petitioner made a number of similar statements and described petitioner as “cocky” with a “don’t care attitude.” App. 1142, l.16. Wood concluded by claiming that petitioner was “one of two people out of probably 25 years in homicide that I have interviewed that actually gave me cold chills.” App. 1142, ll.19-21. Trial counsel did not object, and did not question Officer Wood. App. 1143, l.15.

Finally, the State read the prior testimony of petitioner’s co-defendant, Nakeo Vance. App. 1192, ll.10-12.³ Vance testified that, at the time of the crime, he and the other two co-defendants were lifelong friends, but Vance had only known petitioner for about a year and a half. App. 1198, ll.9-19.⁴ Vance admitted that it was *his* gun, not petitioner’s, which was used

³ Vance testified at the original trial in 1999, but refused to testify in the 2006 proceeding. App. 1182, l.14 – 1188, l.8.

⁴ Vance did not explain how he came to know Owens. However, Owens was incarcerated in the Department of Juvenile Justice (“DJJ”) for over three and a half years prior to the crime. He was

to kill Ms. Graves, but Vance insisted that he did not go inside the Speedway. App. 1237, 1.7. Instead, although each of the four men had his own gun with him throughout the day, Vance claimed that he and petitioner switched guns immediately before the Speedway robbery and then switched back afterwards. App. 1227, 11.12-16; 1233, 11.7-14. After the shooting, Vance hid the gun in some bushes, and then threw it off a bridge into a river. App. 1233, 11.19-23; 1236, 11.11-25. Vance explained that he knew his gun was used in the shooting, and he “[d]idn’t want it to come up.” App. 1237, 11.6-11. Vance claimed that petitioner said he shot Ms. Graves because she would not open the safe.⁵ App. 1230, 11.24-25.

B. PETITIONER’S PRISON BEHAVIOR.

For part two of its presentation, the State pointed to petitioner’s history of violence and aggression in prison, starting with his confession to killing Christopher Lee, his cell-mate at the Greenville County Detention Center on February 16, 1999, during the twenty-four hour waiting period between petitioner’s conviction for the murder of Ms. Graves and his first sentencing proceeding. In a statement written by SLED Agent Gary Dean Brown, petitioner stated that Lee taunted him and claimed that Lee’s cousin was on the jury that had just convicted petitioner of murder. App. 1387, 11.4-9. Petitioner claimed he then attacked Lee, beating him to death. The next morning, as the inmates were lining up for breakfast, petitioner told an officer to “cuff” him, and advised the officer to go into Lee’s cell.⁶ App. 1388, 1.24 – 1389, 1.2.

released from DJJ on July 7, 1997, less than four months before the crime occurred. App. 2336. He was 19 years old. *Id.*

⁵ The State also called Aisha Austin, petitioner’s former girlfriend, to testify that petitioner admitted to shooting Ms. Graves. On cross-examination, Gibson suggested that Austin was angry at petitioner because he cheated on her, but Austin denied this. App. 1167, 11.19-22.

⁶ Despite petitioner’s account of Lee’s death, the State’s pathologist found several inconsistencies between petitioner’s description and the actual evidence, including no evidence

Second, the State attempted to introduce a set of records containing allegations of petitioner's bad behavior in prison. App. 1404, l.10 – 1405, l.12. After trial counsel objected that the records were hearsay, the trial court ruled that the state could introduce a summary of 28 specific incidents, which included allegations such as “throws hot water on another inmate,” “stabs Andre Golden in the shower,” “kicks an inmate who is restrained in a restraint chair,” “slaps a male nurse in the face,” and “sets fire to cell.” App. 1439, l.19 – 1441, l.13. Major Thierry Nettles, from Lieber Correctional Institution where petitioner was housed in 2006, testified that petitioner was “an ADD inmate. He’s assaultive, destructive, and damaging. He’s – he’s, within that housing unit, bar none, my most problematic inmate.” App. 1442, ll.18-20.

C. VICTIM IMPACT TESTIMONY.

Finally, the State offered two victim impact witnesses. Mary Hall, the victim's co-worker at the Speedway, testified that Irene Graves was a good worker who worked hard and sacrificed her own interests to support her three children. App. 1151, l.7 – 1155, l.20. Hall's testimony was followed by testimony from Juliana Christy, the victim's advocate for the Greenville County Sheriff's office. Christy testified that she had worked as the victim's advocate for fifteen and a half years. App. 1316, ll.14-24. She described how she went to Ms. Graves' home on the morning of November 1, 1997, to tell Graves' two small children about their mother's death. Christy concluded her testimony by describing the impact that these events had on her own fifteen-year career:

This was the hardest, hardest case I have ever had to work on. I have never had to do death notification before, or since, and this is definitely the hardest case I have. It affected me the most deeply, and still does.

of burning around Lee's eye, App. 1402, ll.22-24, and no damage to the right eye at all. App. 1403, ll.13-14. Moreover, a different inmate, Fred Walker, Jr., was later charged with Lee's murder. App. 1352, l.25 – 1353, l.7.

App. 1323, ll.9-12. Trial counsel did not object, and did not cross-examine Christy. App. 1324, l.14.

V. THE DEFENSE'S MITIGATION CASE.

A. PRESENTATION OF PETITIONER'S LIFE HISTORY.

Trial counsel began their presentation by calling Marjorie Hammock – their primary intended vehicle for conveying petitioner's life history. After qualifying Hammock as an expert, Gibson asked her to describe her findings regarding petitioner. Hammock testified:

[W]hat we concluded was that this was a young man who was born to a woman who was I think 18 at the time and had one child, who had very limited resources and had difficulty caring for her family because of those limited resources. For that reason there were factors in their childhood which prohibited him from getting the kind of normal, comfortable, supportive environment that they needed.

And it's also a great deal of violence in both the immediate experience that the client experienced, because he – his – both his stepfather and his father were described as very violent people, and his mother was a victim of that violence in many instances.

Again, because of the limited resources, the children of Ms. Mason [Owen's mother] were removed when Freddie was about four years old and taken into custody in foster care where they stayed for a relatively short period of time. She worked very hard to get them back. But, again, there were – there was evidence of abuse and neglect, which is why the children were removed. And some of that neglect, at least, continued because the existence of the family was pretty marginal.

The community also was one of considerable violence and concern on a regular basis. Freddie moved, and his family moved a number of times, and he also changed schools a number of times.

In this instance he was somewhat of an outsider, and so he was always having to prove himself and defend himself. He was taught at an early age that in order for him to survive, he had to fight his way to and from school almost on a daily basis. His stepfather told me that it was necessary for this gentleman – this young man to

learn how to take care of himself and to defend himself. So, in essence, what he was taught at a very early age is that he had to fight. And, so again, that kind of violence continued in his existence.

He also had what we found out some fairly significant learning disabilities, learning impairments, and that was made even worse by the limitations in the home, which could not support him, and his educational deficits like he needed to be. So school failure was a part, not only of his existence, but it was part of his family. And those learning difficulties and disabilities compromised Freddie's ability to really develop the skills and the competence that he needed in order to feel good about himself and to succeed. So, again, it didn't help him to regard himself as a competent human being.

All of these things put together provide a picture of a young man who did not have the interventions that he needed and it made him – it made it very difficult for him as a child to compensate for all of those losses. He developed the kind of coping strategies that made him always on the defensive, and those coping strategies you can find in the histories of children who are typically neglected and/or abused.

He saw a lot of violence and he acted out on that violence, and he ended up, as we know, in juvenile and adult criminal activity.

App. 1457, l.2 – 1459, l.9. Hammock then described a genogram depicting petitioner's family tree. App. 1461, l.1 – 1462, l.25. She noted that petitioner "experienced witnessing family members who were engaged in using violence to settle problems. There was a considerable amount of incarceration, that of his brothers and his uncle." App. 1459, ll.15-17. Hammock also mentioned that petitioner's grandmother "did time for assaulting, shooting a family member." App. 1463, ll.3-4. Then she concluded, "[s]o a history of losses, some violence, a great deal of instability, and this was Freddie's existence. I think that's it." App. 1463, ll.7-10.

In conclusion, Gibson asked Hammock a single question regarding the effect that petitioner's life history may have had on his actions:

Q: Now, in your years of experience have you noticed any correlation between this type of family circumstance and a person committing a crime or violence or anything like that?

A: Yes, I have. There is – there appears to be, both in the literature and then in casual observation, the kind of association with limited resources, considerable violence, neglect as a child, abuse in the environment and criminal behavior.

App. 1464, ll.7-14. The State did not question Hammock. Her entire account of petitioner's life history covers eight pages of the trial transcript.

Next, trial counsel called Fain Maag, petitioner's former third-grade teacher. She testified that on the first day of school, petitioner "threw a desk across the room and asked me what I was going to do about it." App. 1466, ll.21-23. She explained that petitioner had learning difficulties and his home environment was "sparse." App. 1467, ll.11-24. She described petitioner's talents. He was "one heck of a runner," App. 1469, l.25, and he "was a very good artist." App. 1470, ll.8-9. He was also able to "express himself beautifully" through poetry. App. 1471, ll.20-21. Maag was petitioner's teacher for only one year. App. 1470, ll.12-13.

B. EXPERT DIAGNOSES AND RECENT MENTAL HEALTH TREATMENT.

The defense concluded its case with testimony from three expert witnesses. First, Dr. Tora Brawley, a neuropsychologist, testified that the scope of her work on petitioner's case was "very limited," and that she was asked only "to look at his brain function." App. 1482, ll.21-23. With regard to that narrow inquiry, Dr. Brawley found "there were not big things wrong with [petitioner's] brain," and she agreed with the Solicitor's characterization of her findings as "not significant." App. 1484, ll.3-4; 1484, l.16.

Next, Dr. Thomas Cobb, a forensic psychiatrist, testified that he began treating petitioner at the prison in August of 2005, after petitioner requested treatment because "he had been getting

in a lot of trouble and wanted some help to stay out of trouble.” App. 1488, 11.4-8. Dr. Cobb prescribed some medications to help petitioner control his impulses and testified that he believed these medications were working because petitioner “has had a reduced number of incidents.” App. 1497, 1.25 – 1498, 1.1. On cross-examination, Dr. Cobb admitted that he had met with petitioner on “two or three” occasions for approximately 15 minutes each before prescribing the medication. App. 1501, 11.9-10. He further admitted that he had not reviewed any of petitioner’s social history or criminal records and that he based his belief that petitioner had recently improved on conversations with petitioner himself and with prison guards. App. 1502, 11.3-21. Cobb did not review petitioner’s SCDC records to confirm his belief. Instead, he stated, “I admit I heavily rely on the correctional officers there, as well as my frankly asking Freddie, because I didn’t have a list of all the disciplinary actions.” App. 1503, 1.24 – 1504, 1.1. Dr. Cobb speculated that the nature of petitioner’s disciplinary incidents may have improved, even if their quantity had not diminished, but without having reviewed the records, he could only speculate. App. 1503, 11.1-4.

Finally, Dr. Donna Schwartz-Watts, also a forensic psychiatrist, testified about her evaluation of petitioner. She explained that she “interviewed him three times,” and “spent about ten hours with [petitioner].” App. 1512, 11.9-11. When asked about any significant findings in petitioner’s developmental history, Dr. Watts noted that: (a) his mother was only 18 when he was born; (b) petitioner was more hyper than his siblings as a child, but his IQ was “a good bit higher” than theirs; (c) “he experienced a lot of physical abuse as a child;” and, (d) he witnessed an incident in which his grandmother “shot a family member” and another incident where his “stepfather took a machete to [petitioner’s mother] and chased her through the house.” App.

1514, l.21 – 1517, l.8. Dr. Watts concluded, “[s]o those were the significant things in his childhood.” App. 1517, ll.7-8.

Dr. Watts testified that petitioner was first treated for depression in 1997 in the Department of Juvenile Justice (“DJJ”), App. 1518, ll.13-14, but shortly after that, “he turned 18 and he had to be transferred to the Department of Corrections.” App. 1519, ll.22-23. She testified that petitioner exhibited “horrible behavior” in DJJ:

he had a lot of write-ups in the Department of Juvenile Justice; very disruptive. Write-ups for singing in class, disrupting school. Write-ups sometimes for fighting other juveniles. He had a number of write-ups there.

App. 1521, ll.19-23. After his transfer to the Department of Corrections, petitioner “asked for psychiatric help . . . but he received none.” App. 1519, l.24 – 1520, l.2.

On cross-examination, Dr. Watts agreed that “[m]edication ingestion is always voluntary,” and acknowledged that even within the one year that petitioner had been on Dr. Cobb’s prescribed regimen, he had “already attempted to wean himself off of his medications.” App. 1542, ll.20-25. She also testified that petitioner’s DJJ records indicated that he was sent there “for burglary, second degree, two counts; unlawful possession of a pistol; and assault with intent to kill [after he] shot a .38 in the direction of some other boys.” App. 1545, ll.3-17.

VI. THE STATE’S CLOSING ARGUMENT.

In his closing statement, Solicitor Ariail returned to the comments he made during jury selection by arguing that the jury should consider that the State only seeks the death penalty in a rare number of cases. He opened his argument by telling jurors that there are “thousands of cases that we have to handle in this court system every year.” App. 1599, ll.15-16. With regard to death penalty cases, he stated:

Only limited circumstances are allowed for us to seek the death penalty, and rarely do we seek the death penalty in all those cases that are eligible. In only certain cases do we choose to seek the death penalty. This is a legal process. It is a process – it is a function of government.

App. 1604, 11.6-11. Next, Ariail discussed his decision to seek death in petitioner's case. App. 1605, 11.4-6. ("It's a tough decision for me to ask you to do it when we seek the death penalty, but responsible people make responsible decisions all the time."). And, he stated his personal view on what petitioner's punishment should be:

They have said earlier that the solicitor is not satisfied with a life sentence, and I am not, and that's why we have asked for the death penalty. They told you that I was going to want the death penalty, and I do. Why is the death penalty the appropriate punishment? That's a fair question for you to ask, and that's a fair one for me to answer. And the answer is very simple. There are mean and evil people in this world who do not deserve to continue to live with the rest of us, regardless of how confined they may be. The law limits the right to seek the death penalty to a very select number of cases, very few, and we seek the death penalty in only a few, but the circumstances where we seek it is available for mean and evil people who commit atrocious acts of murder; the worst of the worst. That's what the death penalty is reserved for. Those whose behavior sets them apart even from the criminal world, and that is Freddie Owens.

App. 1607, 11.9-25. Ariail also reminded the jury of Officer Joe Wood's "cold chills" testimony as further support for his opinion that petitioner's was one of those rare cases:

[H]is disrespect is so apparent that it put chills on the neck of Joe Wood, who said he had been a detective for over 25 years, and he was only one of two people, Freddie Owens, who put chills on his neck. And that's the reason, because Freddie is a unique person. . . . He's cold. He's unfeeling.

App. 1611, 1.13 – 1612, 1.1.

Ariail argued that a life sentence would be an insignificant punishment – no more than "a change of address" for petitioner:

Sure, you and I may think going to prison would be a serious thing, and it would be, but what about Freddie Owens? Big prison is like a little city. In prison he will have all the necessities of life. Sure, he will be in solitary, but he will still have food to eat. They will provide him with clothes. He will have books to read. He will be able to recreate and exercise. He will have doctors to take care of him. He will have the clothing that they provide, and he will have contact with his family and loved ones, and TV at times, and he will have family business. Not much more than a change of address for Freddie Owens. So don't think putting Freddie Owens in prison for the rest of his life is going to be a significant punishment for him. The death penalty is the appropriate punishment.

App. 1613, ll.3-16; *see also* App. 1607, l.7 (referencing life as "a minimal sentence"); App. 1609, ll.7-8 ("Does this case deserve the minimum penalty?").

Ariail argued that the defense had failed to prove petitioner deserved life instead of a death sentence. App. 1606, ll.20-22 ("If they ask for mercy, ask them to show you one shred of evidence for any reason why he deserves mercy more than he deserves justice."). He disparaged petitioner's mitigation evidence. App. 1607, ll.3-7 ("He wrecked all of these people's lives and he can't just argue that he had a bad upbringing, or his parents didn't treat him right, or that he should have had a better chance in life and get a minimal sentence."). And, he characterized petitioner's history as one full of opportunities that petitioner simply refused to take:

Remember that Freddie could have made something of himself. He had a mother who did the best she could by him. That's what was testified by the psychiatrists. A teacher who cared about him, beyond normal expectations, gave him special help. He had average intelligence. In fact, his intelligence, IQ, has increased over the years. He was artistic. He was athletic, but he chose another route. He chose a route to be a predator and he chose a route to be a killer.

App. 1613, ll.17-25.

Finally, Ariail urged the jury to impose a death sentence for the greater good of the community and the State as a whole:

[A]s you speak for this community and make this decision, whatever decision that you will make, it will ring like a bell outside of this courthouse. It will ring like a bell to be heard by all who are listening and all who will listen. And I urge you on behalf of the State of South Carolina and this community to let that bell ring, to let people know that people who commit murders of this atrocity and have conduct of this type is something that we will not tolerate without the maximum punishment.

App. 1614, 1.19 – 1615, 1.3.

The jury returned a death verdict after one and a half hours of deliberation. App. 1658, 11.9-12.

VII. POST-TRIAL PROCEEDINGS.

Chief Appellate Defender Joseph Savitz represented petitioner on direct appeal. Savitz raised a single preserved issue – whether the trial judge erred in admitting the list of petitioner’s prison disciplinary actions. This Court ruled that trial counsel had not preserved a Confrontation Clause argument regarding these records, but had only preserved an objection based on state hearsay grounds. *State v. Owens*, 378 S.C. 636, 664 S.E.2d 80 (2008). The Court ruled that the records fell within the business records exception to South Carolina’s hearsay rule, and affirmed petitioner’s death sentence on July 14, 2008. *Id.* The Court denied rehearing on August 8, 2008. *Id.* The United States Supreme Court denied *certiorari* on January 21, 2009. *Owens v. South Carolina*, 555 U.S. 1141 (2009).

Petitioner filed an initial application for post-conviction relief *pro se* on January 29, 2009. App. 1864-68. Judge Miller appointed the undersigned counsel to represent petitioner on March 27, 2009. Through the assistance of counsel, petitioner amended his PCR Application on May 26, 2009, App. 1869-75, and again on June 15, 2010. App. 1876-83. The PCR Court held an evidentiary hearing in Greenville County on July 19-20, 2010, and denied post-conviction relief in an Order of Dismissal filed February 13, 2013.

RELEVANT LEGAL PRINCIPLES

The Sixth Amendment guarantees capital defendants the effective assistance of counsel during the penalty phase of trial.⁷ This right includes counsel’s “obligation to conduct a thorough investigation of the defendant’s background,” *Williams v. Taylor*, 529 U.S. 362, 396 (2000), so as to “uncover and present *all reasonably available* mitigating evidence” to the jury at sentencing. *Wiggins v. Smith*, 539 U.S. 510, 522 (2003) (emphasis in original). Where counsel fail in this obligation, they necessarily lack the information required to make strategic judgments concerning the selection and presentation of evidence, and deference to decisions made under such conditions is inappropriate. *See Sears v. Upton*, 130 S.Ct. 3259, 3265 (2010) (“We have rejected any suggestion that a decision to focus on one potentially reasonable trial strategy . . . can be justified by a tactical decision when counsel did not fulfill their obligation to conduct a thorough investigation of the defendant’s background.”).

Whether counsel’s errors resulted in prejudice turns on whether “the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury’s appraisal of [petitioner’s] culpability.” *Rompilla v. Beard*, 545 U.S. 374, 393 (2005) (quoting *Wiggins*, 539 U.S. at 538) (internal quotation marks omitted). A proper prejudice analysis requires a “probing inquiry” during which the reviewing court must “consider the totality of the available mitigating evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding – and reweig[h] it against the evidence in aggravation.” *Sears*, 130 S.Ct. at 3266 (quoting *Porter v. McCollum*, 558 U.S. 30,41 (2009)) (internal quotation marks omitted). A finding of prejudice is

⁷ “To establish a claim of ineffective assistance of counsel, [petitioner] must establish both that counsel’s representation fell below an objective standard of reasonableness and that but for counsel’s errors, there is a reasonable probability that the result of the trial would have been different.” *James v State*, 372 S.C. 287, 290, 641 S.E.2d 899, 901 (2007) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

not precluded merely because trial counsel presented *some* mitigation evidence at sentencing.

The Supreme Court has consistently made this clear:

We certainly have never held that counsel's effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. To the contrary, we have consistently explained that the *Strickland* inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below.

Sears, 130 S.Ct. at 3266 (emphasis in original); *see also Williams*, 529 U.S. at 397-398 (categorically rejecting this type of truncated prejudice inquiry); *Porter*, 558 U.S. at 37 (same).

Further, the prejudice test is not whether a defendant would have received a life sentence absent counsel's deficient performance. *Porter*, 558 U.S. at 37 (holding the state court conducted the wrong prejudice analysis by concluding "that even considering [the new mitigation evidence developed in post-conviction], the 'trial judge and jury still would have imposed death.'"). Rather, prejudice is established if "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. 536-37 (2003); *see also Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004) (same).

REASONS THE WRIT SHOULD BE GRANTED

I. TRIAL COUNSEL INEFFECTIVELY FAILED TO INVESTIGATE AND PRESENT AVAILABLE AND COMPELLING MITIGATING EVIDENCE.

A. RELEVANT FACTS.

At the PCR hearing, petitioner presented the testimony of Dr. James Garbarino, an expert in the psychological effects of trauma and violence on children, along with numerous records relevant to petitioner's life history.⁸ Based on his review of the available material, as well as his

⁸ Dr. Garbarino is a professor of psychology at Loyola University in Chicago. App. 2138, ll.21-22. He is "the author of more than 20 books and about 150 scholarly articles; [a]ll dealing in one

research and expertise in his field of child development and the effects of childhood trauma, Dr. Garbarino testified to a number of relevant conclusions.

First, Dr. Garbarino described the effects of trauma on children. Children are especially vulnerable to trauma because of their inability to generate a “fight or flight” response. App. 2152, ll.4-14. Instead, they are more likely to “dissociate,” or “to emotionally disconnect from the situation.” *Id.* This is “a very normal self-protective response, but it also carries with it the risk of causing other problems down the line.” App. 2152, l.25 – 2153, l.2. Chronic childhood exposure to trauma – *i.e.*, “where a trauma becomes a frequent occurrence, almost part of the fabric of daily life,” App.2149, ll.1-4, – produces

a developmental adjustment, where you begin to change your whole pattern of thinking and feeling and behaving to accommodate to this reality that you have been in jeopardy, are in jeopardy, [and] will probably continue to be in jeopardy. So it tends to have more effects on what you think about the world, how you see yourself, how you shape your personality, [and it has] much more far-reaching effects.

App. 2150, ll.7-14. Children who have hope for the future will learn to act according to that belief. But, Dr. Garbarino explained, “one of the effects of trauma, particularly repeated chronic trauma is to reduce the sense of future orientation,” and replace it with hopelessness, or “terminal thinking.” App. 2153, ll.18-24.

Childhood trauma is just one factor among many that have been shown to negatively impact child development and increase the likelihood that a child will later engage in violent crime. Dr. Garbarino identified a variety of risk factors, including: (a) poverty; (b) absence or abandonment by a parent, particularly fathers; (c) substance abuse of a parent; (d) low

way or another with child development, trauma, child abuse, [and] violence.” App. 2140, ll.12-15. He has been qualified as an expert to testify in court approximately 30 times. App. 2142, ll.12-14. For Dr. Garbarino’s complete CV, see App. 3170-3203.

educational attainment in a parent; (e) racism; (f) boys who must play the role of their mother's protector; and, (g) coming from a family with a history of violence. App. 2155, 1.13 – 2164, 1.6. Numerous studies have shown that it is not the impact of *a single risk factor* that disables a child, but rather, the *accumulation* of these factors – or the buildup of negative influences and the lack of compensatory positive influences over time – that does the damage.⁹ App. 2156, 1.6 – 2158, 1.4; 2164, 11.15-24. Dr. Garbarino testified that a young boy exposed to a high number of risk factors over time comes to understand how the world works through the lens of his own abuse and trauma. He undergoes a developmental adjustment and adopts a “code” of behavior, which is a new pattern of thinking and behaving designed to help him cope with his circumstances. App. 2165, 11.4-15. The “code” refers to a persona that the boy adopts to show he is “in control” and is “a strong, powerful person.” *Id.* According to the code, “negative feelings like sadness and fear need to be hidden and not displayed because they are viewed as signs of weakness.” *Id.* Dr. Garbarino explained that, for boys, “one of the ways this issue of the code is manifest” is through aggressive “masking” behavior:

males don't display symptoms of depression as easily because it's taken as a sign of weakness. They mask their feelings of sadness. They mask their feelings of fear. They mask their feelings of hopelessness and despair. . . . [T]he masking is this aggressive,

⁹ For example, Dr. Robert Zagar and his colleagues conducted a study finding that a boy's chances of committing murder are doubled if he has been exposed to four risk factors: “being an abused child, being in a family with family violence, being in a gang, [and] having substance abuse problems.” App. 2156, 1.25 – 2157, 1.15; see Robert Zagar, *et. al.*, *Adolescents Who Kill*, 46 JOURNAL OF CLINICAL PSYCHOLOGY 4, pp.472-485 (July 1990). Zagar later found that there were “four more factors that tripled the risk,” which included neurological problems, difficulties in school and poor attendance, exposure to weapons, and having a prior arrest. *Id.* Another study by the Search Institute in Minnesota looked at a list of 40 positive developmental assets. App. 2157, 1.16 – 2158, 1.4. Only six percent (6%) of children who had between 31 to 40 of those positive assets were involved in violent behavior, but sixty-one (61%) of children who had only 10 assets or less had engaged in violence. See, e.g., Research Institute, THE POWER OF ASSETS, available at <http://www.search-institute.org/research/assets/assetpower>.

tough persona that they present to the world. Often beneath that is someone who is very scared, very sad, very depressed.

App. 2166, ll.2-12.

1. PETITIONER'S LIFE-LONG EXPOSURE TO ACCUMULATED RISK FACTORS.

Based on his review of petitioner's life history, Dr. Garbarino concluded:

Freddie Owens had almost all of the risk factors that I've ever read about. I would be hard-pressed to think of any that he didn't have.

App. 2166, ll.21-23. Through PCR testimony and exhibits, petitioner offered the following evidence relevant to specific risk factors over the course of his life history.

EARLY CHILDHOOD EXPOSURE TO RISK FACTORS

PARENTAL ABANDONMENT AND NEGLECT

Petitioner's mother, Dora Diane Mason, had five children over a period of six years with Petitioner's father, Freddie Eugene Massey (hereafter, "F.E. Massey"). App. 2321. Dora was sixteen (16) years old and F.E. Massey was nineteen (19) when their first child, Marie Owens, was born in 1976. *Id.* Petitioner was their second child, born one and a half years after Marie. App. 2325. Four years later, Dora had also given birth to Petitioner's younger siblings: Donald Andrew Owens (b. 1979), Lorenzo Owens (b.1981), and Satail Owens (b.1982). App. 2320. "Dora continued to live at home with her mother, Mary Mingo, after the births of each of her five children." App. 2325. Petitioner's parents "never married," and F.E. Massey "refused to pay child support," even under court order to do so, and he "never supported Dora's five children." App. 2321. F.E. Massey was absent for the bulk of petitioner's childhood, spending his time in and out of prison for a variety of violent offenses. *Id.*

When petitioner was only one year old, the Department of Social Services ("DSS") began investigating claims of physical neglect against Dora Mason. App. 2457. The primary concern

at this time was “due to lack of finances.” *Id.* The Greenville hospital clinic reported that it “was concerned about Donald because of lack of weight gain.” *Id.* When petitioner was four years old, DSS received a second complaint “alleging educational and physical neglect.” *Id.* A social worker made a home visit on February 4, 1983, and found that Marie Owens was not properly enrolled in school. *Id.* Dora Mason was living with her mother, Mary Mingo, where “the apartment was very crowded.” *Id.* The social worker advised Dora that she “need[ed] to apply for AFDC [Assistance for Families with Dependent Children] and enroll Marie in school.” *Id.* The next month, the social worker returned for a follow-up visit, but found that Dora still “had not enrolled Marie in school,” nor had Marie received her vaccination shots. *Id.* Again, the social worker “stressed to [Dora] that Marie had to be enrolled in school no matter what the reason,” and advised her that “[t]he Health Department could get Marie’s shots up to date.” *Id.*

Two months later, DSS received a third complaint against Dora Mason, “alleging abuse, physical and educational neglect.” App. 2458. This time, the social worker’s home visit revealed that “the children had ticks” and “Marie was still not attending school.” *Id.* The social worker reported that Dora Mason, “as a parent, has a long history of marginal child rearing practices.” *Id.* The caseworker observed Dora “appears to be unable to care for [her children] properly,” and concluded that, “[f]ive children from ages seven to one year demand more time, money, energy and motivation than [Dora] has available to her.” *Id.*

Later that same year, on August 16, 1983, the Greenville Police Department received a call alleging that petitioner and his siblings had been left alone at home. App. 2460. Upon arrival, officers found all five children “unattended by an adult or other suitable baby sitter.” App. 2464. “A witness told the Officers that the mother had been gone for some time.” App. 2460. Inside the apartment, “the Officers found that the electrical power was disconnected, there

was no food in the house, [the] bathtub contained six inches of standing water, and pans with old food in them.” *Id.* Petitioner – then four years old – and his siblings were taken into emergency protective custody and transported to Pendleton Place. *Id.* “The staff at Pendleton Place noted, as did the police, that the children were filthy and hungry.” *Id.* DSS workers reported that Dora Mason had been previously known to the agency due to child neglect and that she “has not ceased her neglectful behavior in regard to her children.” App. 2461.

After a full hearing, the family court held that the allegations of neglect were substantiated. App. 2467-72. The court found that Dora Mason was “not employed,” and “has no income and lives in a residence at this time with no electricity.” App. 2469. The whereabouts of F.E. Massey were unknown. App. 2473. The court ordered that the children remain in protective custody, where they stayed for approximately one year. App. 2470; 2473-74. Documents attached to a November 15, 1985 family court order closing the DSS case noted their “father has had no contact with the children since 1983.” App. 2483.

Years later, petitioner’s former middle-school teacher, John Pressley, reported that, at age thirteen, petitioner did not have clean clothes to wear to school; he was “basically unkempt, basically wore the same thing, more or less two or three pants;” 1999 ROA p.3234-35, and, he had no one at home to support his educational development:

Maybe educational-wise they didn’t know how to support him. There was no coming to PTA meetings or open house, they were not in attendance there. No one was coming to sit down and have a conference to see what can we do to help Freddie improve his grades. Freddie was with the attitude, “there is no one there at home that cared about my grade, no one here that cares about my grades.”

Id. at p.3241.

TRAUMA

Dr. Garbarino labeled the area where petitioner grew up as “a war zone neighborhood,” which he described as:

the kind of neighborhood where community violence was very common. The police were often called or lots of incidents go unreported to police. Lots of exposure to traumatic violence. The kind of experience that many people would never encounter in their entire lives, children in these neighborhoods encounter it with some regularity and frequency.

App. 2168, ll.1-8. In this environment, petitioner witnessed and experienced trauma on a regular basis. His social history is replete with “evidence of traumatic exposure.” App. 2170, ll.3-6. Over his lifetime, petitioner witnessed “dead bodies, . . . acts of severe violence, people being hit in the head, people being shot, bodies that were shot, whippings with electrical cords, . . . the torture and rape of a young girl, a girl who stabbed to death his pet rabbit, [and] children being beaten because the perception was that they might be gay.” App. 2170, ll.6-13.

For example, when he was approximately 10 or 11 years old, petitioner was riding in a car when he witnessed another person in the car shoot someone “point-blank in the face.” App. 2177, ll.22-25. Petitioner recalled seeing the victim’s blood and bone fragments blow out and splatter onto his own face. *Id.* Around this same time, petitioner saw a young girl “being sodomized and raped by three men in the clearing of a path that he used to walk home by.” App. 2178, ll.1-5. He witnessed “the aftermath of that,” and recalled seeing the girl’s “bloody clothing” on the ground. App. 2170, ll.9-11. Petitioner was so terrified by this event that “[h]e didn’t go out of the house for weeks afterward.” App. 2178, ll.4-5. A couple of years later, petitioner found two dead bodies in a house in his neighborhood following a murder suicide. App. 2179, ll.8-12. One of the victims was “a member of his extended family.” *Id.*

These events are just a few examples of the traumatic violence that became part of the daily fabric of petitioner's childhood. He also experienced a vast amount of trauma and abuse in his own family, and he personally experienced physical and sexual abuse. *See, infra, FAMILY HISTORY OF CRIMINAL VIOLENCE AND PHYSICAL ABUSE; and, SEXUAL ABUSE.* In sum, Dr. Garbarino concluded that petitioner's life history contains "a whole list of traumatic events" which is "extensive and come[s] from so many different sources that I think it is extremely unlikely that all of these sources could be misrepresenting the nature of his experiences." App. 2170, ll.15-17.

FAMILY HISTORY OF CRIMINAL VIOLENCE AND PHYSICAL ABUSE

F.E. Massey

Petitioner was born into a family filled with violence, criminal behavior and abuse. His biological father, F.E. Massey, "was extremely violent and came from a violent family." App. 2321. In petitioner's family, "harsh beatings from [F.E. Massey] were frequent and common place." *Id.* At the time of petitioner's first trial in 1999, five relatives on his father's side were "in prison for murder." *Id.* Beginning at age seventeen, F.E. Massey has an extensive criminal history, including arrests for: (a) larceny; (b) auto tampering; (c) disorderly conduct; (d) multiple counts of trespassing; (e) failure to appear in court; (f) damage to private property; (g) multiple charges for driving under the influence; (h) no less than eight counts of assault and battery; (i) possession with intent to distribute crack cocaine; and, (j) unlawful possession of a firearm. App. 2325; 2327-31. On February 2, 2005, when petitioner was sixteen years old, F.E. Massey was arrested and charged with assault and battery of a high and aggravated nature after he "hit Viola Hill in the head with a beer bottle." App. 2333. Ms. Hill was "transported to the hospital and received stitches in her head." *Id.* Massey was incarcerated in SCDC for extended periods of time on at least four separate occasions. App. 2321; 2590-2775.

Alex Bernard Mason

When petitioner was approximately four years old, his mother, Dora, began a relationship with Alex Bernard Mason (hereafter, “Bernard”), who periodically played the role of step-father, when he was not imprisoned.¹⁰ App. 2321. “Bernard was also extremely violent and abusive.” Dora described their home life as filled with “chaos and confusion,” and reported that “[p]olice being called to the house was common in [her] relationships with both F.E. Massey and Bernard Mason.” *Id.*

Shortly after Dora’s relationship with Bernard began, he was arrested and charged with assault and battery with intent to kill for cutting Michael Lee Clark in the face with a knife at a local club. Clark received 32 stitches in his face. App. 2326. Bernard’s criminal history contains extensive arrests, including: (a) shoplifting; (b) disorderly conduct; (c) grand larceny; (d) multiple counts of assault and battery; (e) rape; (f) possession with intent to distribute crack cocaine; (g) multiple counts of criminal domestic violence for assaulting Dora Mason; (h) failure to appear in court; and, (i) receiving stolen goods. App. 2326-27; 2330-37. On November 26, 1994, when petitioner was sixteen years old, “Bernard Mason was involved in an altercation with Richard Carson. Mason cut Carson with a knife on his face and neck; Carson underwent surgery and was hospitalized.” App. 2332. Bernard was later charged and convicted. App. 2332-34. SCDC records document that Bernard had extensive prison disciplinary violations, a “history of assaultive behavior,” and “poor adjustment to the institution.” App. 2328; 2332; 2776-2961.

By his own admission, Bernard Mason is an “an extremely violent individual,” and “he does not like when someone crosses him.” App. 2322. Bernard was abusive towards petitioner’s

¹⁰ Bernard and Dora Mason married on September 19, 1989, when petitioner was eleven years old. App. 2488; 2330. They divorced four years later, but they remained together off and on throughout petitioner’s life. App. 2488-89.

mother, as well as the children. *Id.*; *see also* App. 2170, 1.9 (petitioner recalled receiving “whippings with electrical cords.”); App. 2171, 11.6-7 (Dr. Garbarino testified that “[t]here are multiple reports of extreme corporal punishment in the form of whippings”). Regarding his abuse of Dora, Bernard explained:

he would give [Dora] his paycheck to pay bills and then he would want portions of it back to go buy drugs and then more drugs – she would say ‘no’ or she would have already spent it and then he would get angry and beat her up – he says this story repeated itself over and over.

App. 2322. Multiple records corroborate this account. For example, on August 26, 1989, when petitioner was eleven years old, Dora Mason was seen at the emergency room after Bernard Mason assaulted her, striking her in the head and face with his fists, and breaking her nose. App. 2446; 2448-49; *see also* App. 2333 (Bernard Mason arrested for criminal domestic violence (“CDV”)); App. 2334 (arrested for CDV, 3rd offense; “Dora Mason reported that Bernard hit her in the mouth with a closed fist during an argument”); App. 2335 (Bernard arrested for CDV during an argument with Dora Mason; Dora told an arresting officer that she was afraid for her safety).

As his mother’s oldest son, petitioner tried to protect her and combat this abuse. Dr. Garbarino testified that petitioner “often slept on the floor in front of the door to his mother’s bedroom to try to protect her.” App. 2172, 11.3-5. School records document that petitioner “had trouble staying awake” in class and reported that “he could not sleep at night.” *Id.* Petitioner eventually obtained a gun at a young age (around 9 or 10 years old), after which he felt he was “able to be a more powerful, protective figure.” *Id.* Moreover, as the oldest boy in the family, it was also petitioner’s job to protect his younger siblings. App. 2338, 11.21-23. Dr. Garbarino noted “repeated instances” where petitioner and his siblings were “being bullied or attacked or

threatened and [petitioner] ultimately felt a responsibility to protect them.” App. 2238, 1.23 – 2239, 1.1. Dr. Garbarino testified

[i]t was very clear, given the message by his stepfather that anybody who disrespects you or infringes on you, you have to respond to that with violence and aggression. That was the message he was given very early on and learned, unfortunately, well.

App. 2239, 11.1-5.

Indeed, it was Bernard Mason who “claim[ed] to be the one who ‘had to teach Freddie how to fight and stand up for himself.’” App. 2323. Bernard reported that as a young boy, “Freddie was continually picked on in the neighborhood.” *Id.* “A gang of five would chase Freddie and his brother, [Donald] Andrew, home after they got off the bus.” *Id.* To deal with this problem, “Bernard instructed Dora to lock the boys out of the house in order ‘to make them learn how to fight.’” *Id.* According to Bernard, this “had to be done for Freddie’s own good.” *Id.*

Mary Mingo

The maternal side of petitioner’s family was equally violent. Petitioner was very close to his maternal grandmother, Mary Mingo, with whom his family often lived. App. 2321; 2323; 2329. When petitioner was seven years old, he witnessed a family friend, Jerome Smith, smash his grandfather over the head with a cinder block following an argument. App. 2178, 11.6-9. After this happened, Mary Mingo shot Jerome Smith in the left leg as he was sitting on the porch of her home. *Id.*; *see also* App. 2328. Ms. Mingo was arrested and charged with assault and battery with intent to kill. App. 2328.

Three years later, petitioner witnessed a second violent offense by his grandmother when she shot her son-in-law in the stomach with a .22 pistol. App. 2329. Ms. Mingo “was under the

influence at the time of her arrest.” *Id.* She told arresting officers that she shot her son-in-law because he had stabbed her daughter (petitioner’s maternal aunt) the night before and then came after Ms. Mingo with a knife. *Id.* “All of this happened in the street in front of their house,” where “Freddie was living with his grandmother at the time.” *Id.* Ms. Mingo was again charged with assault and battery with intent to kill, and was sentenced to six years in prison. *Id.* Two years after her release from prison, Ms. Mingo was arrested for being a felon in possession of a handgun and falsifying information during the handgun purchase. App. 2323; 2331. She was sentenced to one year in prison for that offense. App. 2321. She died of a heart attack three years later, when petitioner was sixteen years old. App. 2332.

Kathy Owens Walker

When petitioner was seventeen years old, nearly all of his immediate family members were arrested following an altercation during which his maternal aunt, Kathy Owens Walker, stabbed petitioner’s brother, Lorenzo Owens, in the abdomen. App. 2323-24; 2334. On December 31, 1995, Lorenzo Owens “intervened in [a] fight between his aunt, Kathy Walker, and his sister [Marie Owens].” App. 2334; 2324. As a result, Kathy stabbed Lorenzo in the stomach. He “was transported to the hospital and received 25 stitches in his side.” App. 2334.

Later that day:

Dora, Bernard, and all the children were at a party drinking [and] intoxicated. Dora and Bernard returned home first and began arguing and fighting. Dora called the police to have Bernard arrested. The police arrived and realized that Dora had several outstanding warrants for fraudulent checks. They arrested her. [Donald Andrew] (age 16) and Lorenzo (age 14), returned home to find their mother being arrested. They [were] each drunk and tried to intervene, a scuffle broke out, and they were also each arrested and charged with resisting arrest, interfering with a police officer and assault. During this scuffle, Lorenzo tore some stitches that he had received earlier in the day from the incident with his aunt. . . .

By the end of this say, Dora, her sister (Kathy Walker), and her two sons were all sitting in jail from two separate incidents.

Id.

Criminal histories of petitioner's siblings

Both of petitioner's brothers have criminal histories. Donald Andrew Owens has an arrest record beginning at age fourteen, which includes charges for: (a) shoplifting; (b) assault; (c) rape; (d) burglary; and, (e) violation of probation. App. 2321; 2333-34; 2336. He most recently served a 10-year sentence for committing a lewd act on a minor under the age of fourteen. Donald failed the 4th and 6th grades and had "high absenteeism" at school. App. 2324. He "dropped out of school at age 17 – reading at a 3rd grade level." *Id.* "He reported to DJJ that he always carried weapons in the neighborhood at age 17 (Colt .32 and box cutter)." *Id.* He began drinking at age 16. *Id.*

Lorenzo Owens also has a criminal history. He has been arrested for assault on at least two separate occasions. App. 2324; 2334; 2337. Lorenzo "was expelled from J.L. Mann High School in October 1997 after being charged with simple assault [when] he beat a kid up at the bus stop." App. 2324. He failed kindergarten and the 1st, 6th and 9th, grades. *Id.* He suffered from seizures as a child, had numerous broken bones throughout his childhood, was knocked unconscious at age 12 or 13, and receives social security disability benefits. *Id.*

Petitioner's youngest sister, Satail Owens, has "a history of school problems, truancy and inappropriate behavior in school." App. 2324-25. She was arrested on assault and battery charges for the same incident at the bus stop in 1997 that involved her brother, Lorenzo. App. 2324; 2337.

Marie Owens is the only sibling without a significant criminal history. However, Dr. Garbarino testified that she "left school at age 16 and has had a series of difficult relationships,"

as well as “mental health issues,” including depression. App. 2235, ll.6-9. Dr. Garbarino also explained that “boys are more vulnerable to these environments, particularly when it comes to criminal violence, than girls. That’s pretty well established.” App. 2207, ll.12-14. Moreover, Dr. Garbarino testified that the effect of traumatic environments “differs as a function of [the child’s] temperament as well as their actual life experience.” App. 2207, ll.15-18. He noted reports indicating that as a little child, petitioner was fearful and sensitive. App. 2184, ll.19-22; *see also*, App. 2186, l.1 (reporting that petitioner “cried a lot” as a child). Dr. Garbarino also noted that he had not reviewed Marie’s life experiences in detail, App. 2207, ll.18-19, but, with respect to petitioner, Garbarino found:

He has so many experiences that any one of them would have lead, I think, in a middle class well functioning family, to a kid going into therapy or counseling. Any one of these incidents would have been deemed significant enough to initiate that kind of mental health intervention. As best I could understand, there [was] no mental health intervention for any of these incidents.

App. 2178, ll.10-19.

SCHOOL DIFFICULTIES AND NEUROLOGICAL IMPAIRMENTS

Petitioner began the first grade at Cone Elementary School, but transferred to San Souci Elementary later that year. On January 24, 1985, petitioner’s teacher notified Dora Mason that he was failing the first grade and would have to be retained. He had been absent 20 days already during the first few months of school. During his second attempt at the first grade, petitioner’s teacher noted that his clothes were often dirty and he had excessive unexcused absences. He transferred to Pelham Road Elementary School in the third grade. He had difficulty mastering grade-level tasks. His teacher, Ms. Fain Maag, referred him for testing. Petitioner was tested and diagnosed with a learning disability in the fourth grade. He had difficulties with poor

impulse control, poor anger control, poor attention, poor intellectuality, poor academics and poor social conformity. He failed the fourth grade but was socially promoted.

Petitioner's absence from school continued throughout his educational history. In the fifth grade, the school officially notified Dora Mason and the Sheriff's Department that petitioner had excessive unexcused absences. In the sixth grade, petitioner was given a follow-up psychological evaluation. By this time, he had moved to Greenville Middle School. He was failing in every subject. Petitioner repeated the sixth grade the following year.

During his second attempt at the sixth grade, petitioner was sent to the Foothills Alternative School, where his grades improved and he was promoted. For the seventh grade, he returned to Greenville Middle School, but the next year he enrolled in yet another alternative program, where his performance again improved. In the ninth grade, petitioner enrolled at Eastside High School, where he attended for sixty days. He failed every class. He was committed to the Department of Juvenile Justice at age sixteen and never returned to school after that.

During petitioner's first re-sentencing proceeding in 2003, Dr. Jim Evans, a neuropsychologist, testified that petitioner suffers from brain dysfunction, which is not inconsistent with his past difficulties in school performance. 2003 ROA p.417. But, more significantly, Dr. Evans found that petitioner had dysfunction in "frontal lobe areas and certain right hemisphere areas, especially right temporal." *Id.* This particular type of brain dysfunction is likely to impact "emotional and behavioral responsivity" and would make it "difficult for [petitioner] to control impulsive behavior." *Id.*

DRUG AND ALCOHOL ABUSE

Petitioner was exposed to drug and alcohol abuse at a young age. Both of the male figures in his life – his biological father, F.E. Massey, and his stepfather, Bernard Mason – were crack addicts. App. 2322. His grandmother, Mary Mingo, was described as “the neighborhood bootlegger,” App. 2324, and “an alcohol dependent.” 1999 ROA p.3247. Numerous events over the course of petitioner’s childhood involved use and abuse of drugs or alcohol by various family members. Dr. Garbarino testified that it was clear petitioner grew up around “family drug use.” App. 2175, 1.6. Petitioner recalled an occasion where his stepfather requested that Dora Mason purchase cocaine for him for his birthday, and she complied. App. 2175, 11.7-9. Dr. Garbarino also testified that “Freddie was drawn into the drug culture at a very young age and was involved with those drugs and, to some degree, perhaps using drugs and alcohol.” App. 2175, 11.9-14. He explained that drug and alcohol use was “very common among traumatized children as self-medication.” *Id.*

RACISM

Dr. Garbarino testified that petitioner’s exposure to racism was a risk factor during his life. He stated that it was “an undeniable fact that racism exists in America and that, as an African-American child, [petitioner] would have encountered this growing up.” App. 2176, 11.5-7. As an example, he discussed a specific incident in foster care where petitioner and other black foster children were “forced to live in the basement in very substandard conditions [while] the white children were kept upstairs.” App. 2176, 11.1-4.

SEXUAL ABUSE

Dr. Garbarino testified that petitioner’s “first two sexual encounters at age 12 were with [a] 34-year-old woman [and] a 30-year-old woman.” App. 2177, 11.11-13; 2171, 11.16-19. One

of these women “was a crack addict who offered to have sex with him in exchange for drugs.” App. 2177, ll.13-15. “The other woman also drew him in when he was 12.” App. 2177, ll.15-16. Dr. Garbarino explained that these events constituted “statutory rape” and “classic sexual abuse.” *Id.* Petitioner also had “other sexual encounters before the age of 16 with older girls and women, many of whom were drug addicted people.” App. 2177, ll.19-21. Petitioner’s DJJ records report that he had gonorrhea before age 16. App. 2221, ll.6-13. Petitioner had no support system to teach him about appropriate and responsible sexual behavior. On the contrary, his family once “arrang[ed] for a prostitute to come as a birthday present for [petitioner’s] 12-year-old brother.” App. 2171, ll.13-16. Petitioner continued to experience and witness sexual abuse after he was incarcerated in DJJ. *See infra, DEPARTMENT OF JUVENILE JUSTICE EXPERIENCES.*

DEPARTMENT OF JUVENILE JUSTICE EXPERIENCES

Petitioner was sixteen-years-old when he was committed to the Reception and Evaluation Center at DJJ in December of 1994. App. 2333. He was then transferred to the Birchwood Dorm on March 29, 1995, for permanent placement. *Id.* Shortly after his nineteenth birthday, petitioner was transferred to SCDC to serve the remainder of his juvenile sentence in an adult prison at Turbeville Correctional Institution. App. 2335-36. He was released later that year on July 7, 1997. App. 2336. The murder of Ms. Irene Graves occurred approximately four months later, on November 1, 1997.

When petitioner entered DJJ, he encountered “a system in which the issues of violence, sexual and physical violence, continued, if not were magnified.” App. 2180, ll.11-13. Other inmates reported that petitioner would “cry a lot when he first came into DJJ.” App. 2186, ll.1-2, *see also* App. 2180, ll.19-21. Petitioner was forced to adapt to his new surroundings by

becoming “more and more violent and dangerous.” App. 2180, ll.15-19. For example, when petitioner was admitted to DJJ, “he was described as being sort of a skinny kid.” *Id.* “[H]e was about 147 pounds, 5 foot 10 when he entered.” *Id.* By the time petitioner left the DJJ system, he had “begun to exercise and lift weights and do pushups and built himself up physically to become more strong and intimidating.” App. 2180, l.22 – 2181, l.1.

The DJJ institution was overcrowded, understaffed, and filled with violent inmate-on-inmate attacks. *See, e.g.*, App. 2183, ll.6-9 (noting a “widespread pattern of . . . crowding, lack of supervision” and inappropriate conduct by staff members); App. 2413-29 (describing extensive inmate violence in South Carolina’s juvenile facilities at this time); App. 2434 (finding DJJ facilities to be at three times their maximum capacity in December of 1995). Petitioner had to fight back “as a necessary survival strategy.” App. 2240, ll.19-20. Dr. Garbarino explained that fighting

was also a way to send a message that you were not to be attacked and you were a strong person and that even if you . . . were defeated, you got more respect for fighting back. The worst possible thing was to be a passive victim. It was much better to fight, hurt other people, even hurt yourself in the course of these fights in order to establish your position and protect yourself.

App. 2240, l.20 – 2241, l.3. Petitioner’s former contemporaries corroborated this account, recounting “the frequency of assaults and fights and necessity of fighting.” App. 2182, ll.19-22. “Some of them spoke about initiation rituals where the new boys were told they had to fight their way out of rooms.” *Id.* Petitioner still has scars on his body from “various fights and assaults that took place” in DJJ. App. 2182, ll.16-17.

Petitioner also witnessed and experienced sexual abuse in DJJ. First, “there were numerous incidences” during which petitioner “observed threatened or actual sexual assault that occurred in his presence.” App. 2181, ll.1-3. “[H]e observed a younger boy being forced to

endure anal rape by an older [inmate] who threatened him with a pencil to his throat.” App. 2181, ll.14-16. Petitioner also witnessed “multiple anal rape of other boys on at least one occasion.” App. 2181, ll.16-18. “He observed boys being forced to perform oral sex on older boys on at least one occasion.” App. 2181, ll.18-19. Petitioner estimated that probably 6 or 7 out of every 10 boys in DJJ experienced some kind of sexual assault. App. 2181, ll.20-23. Dr. Garbarino testified, “I have no reason to doubt that given the reports that were available.” App. 2181, ll.23-24.

Petitioner personally experienced sexual abuse in DJJ. On multiple occasions, he was threatened with sexual assault. App. 2182, ll.6-12. On one specific occasion, petitioner “was sleeping in a cot near the guard station” when “another boy approached him and began to have oral sex with him within sight of at least one staff member.” App. 2237, ll.13-21. Petitioner tried to report the event, but the staff member only laughed at him and dismissed the incident. *Id.* In another episode, petitioner felt that “someone repeatedly tried to come at him sexually in the shower on several instances.” App. 2237, l.22 – 2238, l.1. At least one of these occasions was also known to a staff member who did not intervene. *Id.*

Court documents filed in a class-action lawsuit brought on behalf of all DJJ inmates in South Carolina during this time period further corroborate petitioner’s descriptions. On January 25, 1995, the United States District Court for the District of South Carolina entered an Order finding DJJ institutions were overcrowded and “routinely hold more than twice [their capacity].” App. 2354. The court noted that “[t]he Reception and Evaluation Center frequently experiences severe overcrowding.” App. 2363. DJJ acknowledged this fact and told the court it had plans to close the R&E facility. *Id.* The court also observed that the Birchwood campus “houses the oldest, most aggressive male residents.” App. 2364. The court found that DJJ’s own records

showed that its employees were using CS gas, “a potent form of tear gas,” excessively and inappropriately as a form of punishment. App. 2366. The court found this practice “teaches the victims to inflict pain as a method of controlling others and makes the juveniles more volatile, more aggressive, and less likely to respond properly to authority figures.” App. 2367.

The district court observed that “[i]n South Carolina, incarceration of juveniles is said to be for benefit rather than punitive purposes.” App. 2357 (citing S.C. Code Ann. § 20-7-20 (Law. Co-op. 1985 & Supp. 1993)). Throughout the class-action court proceedings, “virtually every witness who testified in the case asserted that appropriate programming can make a difference and substantially enhance the juveniles’ opportunity to succeed upon release from confinement.” App. 2375. However, the court found that “the rehabilitative efforts of DJJ are not working and juveniles are often returned to society more prone to commit crimes than they were before their incarceration.” App. 2355 (citing a study by one of the trial experts that “demonstrated juveniles had more hostility and more aggressive tendencies after their confinement at DJJ” than before they entered).

Under these conditions, the court stated that “the agency is simply warehousing juveniles and ignoring the statutory purpose of their confinement.” App. 2375. The court quoted journalist Howard James, who observed, “Too often all that society provides [for juveniles] is storage – like ripe peaches in a warm cellar.” App. 2375-76 (alterations in original). The court found this to be true in South Carolina, stating,

South Carolina juvenile correctional facilities produce graduates who later swell the populations of adult correctional facilities and figure prominently in the ranks of those who later commit violent offenses as adults. Although exact figures are difficult to obtain, the evidence indicates that between fifty-six and eighty-two percent of DJJ juveniles later commit crimes as adults and are sentenced to adult prisons.

App. 2356.

The district court ordered DJJ to remain under federal monitoring and to adopt a remedial plan to correct these problems, but later reports indicated that no major improvements had occurred and many conditions had actually worsened. In December 1995, the South Carolina Department of Health and Environmental Control published a report commissioned by the Governor's Office. App. 2416. The report found that 41.7% of DJJ inmates had a documented injury "resulting from another juvenile." App. 2419. The authors of the study acknowledged "these numbers may under-represent the number of injuries," since the agency "did not have any information on the number of injuries that were not seen by infirmary staff nor injuries that were not clearly recorded as juvenile-on-juvenile violence." App. 2420.

On February 16, 1996, the district court entered an interim order in the ongoing class-action after the plaintiffs filed an Emergency Motion for Temporary Relief. App. 2430. The order stated that conditions at DJJ had not improved. DJJ representatives conceded that the inmate population had recently risen to "over three times the 'rated capacity' of the dorms," which was "at least a forty percent (40%) increase over the population at the time of the original trial." App. 2434. Plaintiffs presented witnesses at the emergency hearing "who testified to unsafe conditions caused by lack of staffing." App. 2433. "These witnesses included a number of juveniles who testified to various altercations occurring on campus." *Id.* The court's monitor, a retired judge, reported "that the combination of overcrowded conditions and under-staffing caused him to fear for the safety of the juveniles." App. 2432. Even DJJ's own counsel sent a letter to the court stating, "DJJ continues to be hampered by overcrowding, reaching a record high of some 1000 juveniles at the three long-term institutions last week. The disturbing fact is that overcrowding is increasing rather than decreasing or staying level since the case was tried." App. 2433. The court ordered DJJ to modify their plan for improving conditions and to remain

under federal monitoring, including monthly reports to the court and plaintiff's counsel. App. 2437. The DJJ system remained under a federal monitoring plan until 2003. *See No More Federal Oversight: Now Maybe Juvenile Justice Department Can Get On Track*, The Charlotte Observer, Dec. 21, 2003, at 6-Y (reporting that the district court had recently lifted its 1995 order putting DJJ under federal oversight when "facilities were overcrowded, children routinely became victims of abuse, and the bureaucracy that ran the agency was embarrassingly inept and slow to fix the problems," making DJJ "one of South Carolina's worst public failures of the past decade").

Petitioner entered the DJJ system in December of 1994, and remained there until he was transferred to SCDC on March 21, 1997. App. 2333; 2336. Thus, the time he spent in DJJ corresponds directly with the period described in the class-action lawsuit. For petitioner, the years he spent in DJJ were a significant period in his life. Dr. Garbarino explained

[t]hese years of middle – adolescent years are generally recognized to be very important for correcting bad developmental patterns that he was developing or interventions to bring kids back to some social or positive development. All the evidence seems to be that all [his] many problems, mental health problems, behavioral problems that Freddie Owens brought to the institution were compounded and exacerbated by his experience there at a time when he needed very powerful positive interventions to recover.

App. 2183, ll.15-25. In sum, petitioner's experiences in DJJ did nothing to help him deal with the overwhelming difficulties he had already faced in his life, and, instead, merely taught him that survival requires even more aggression and violence.

2. RESULTS OF PETITIONER'S ACCUMULATED RISK FACTOR EXPOSURE.

When petitioner was released from prison in July 1997, he was nineteen years old. He was not yet "a fully mature adult," and he was exiting the DJJ environment he had experienced for the past three and a half years and returning to the same "war zone" environment into which

he was born. App. 2190, ll.1-24. Up to this point, his life had been one of “incredible accumulation of risk factors.” App. 2184, ll.9-10. Dr. Garbarino testified:

I think the overall story of [petitioner’s] life is the incredible accumulation of risk factors that undermined his mental health, his motivation for pro-social behavior, his capacity for pro-social behavior, his vocational success. Almost every domain of his development seems to have been impaired by this, by this cumulative effect of trauma and lack of positive intervention.

App. 2184, ll.9-16.

Dr. Garbarino stressed that petitioner “didn’t volunteer for this life that he started as an infant.” App. 2188, ll.13-14. Many of the events he experienced “would have been out of his control. Who his parents were, the quality of care he got, the neighborhood he lived in.” App. 2191, ll.12-17. “Certainly, once he was sentenced into the juvenile justice system, [he had] very little control over whether or not he would face the threat of assault and experience assault.” App. 2192, ll.3-6.

As a result of his life experiences, petitioner adopted virtually all of the coping strategies that Dr. Garbarino and others have noted in their work with traumatized youth. Garbarino testified that petitioner very clearly has adopted masking behaviors: “most people see his very, very aggressive, angry, rageful behavior and yet there are multiple evidence[s] of a sort of softer side that is kept private and it’s very, almost jealously guarded as a private thing because it’s such a sign of weakness and should not be revealed to those who might hurt him.” App. 2186, ll.4-10. Garbarino testified that nearly every report from petitioner’s childhood speaks about him having “a very high level of suspicion about disclosing feelings to anyone” and confirmed that, throughout his life, petitioner had received “a very strong message that only by being strong and aggressive will he be safe.” App. 2186, l.21 – 2187, l.3. Petitioner also has a documented history of depression – one of the most common symptoms of a traumatic childhood like the one

he experienced. App. 2185, ll.7-10; 2165, l.18 – 2166, l.12. Dr. Garbarino pointed to petitioner's post-arrest statements to Officer Joe Wood as another example of masking behavior. App. 1092, ll.10-12 (Petitioner stated, "I don't give a shit. I was born to be in jail"). He explained that statements like these are "part of this general masking, his general persona of aggressive violent behavior as a defensive, protective mechanism," and are also an example of "his terminal thinking." App. 2188, ll.5-9.

Dr. Garbarino concluded that "the cumulative effect" of petitioner's life experiences was "to inflict a high level of damage evidenced in his diagnosed depression, evidenced in his severe reaction to violence, to sexualized issues. On almost every domain of development." App. 2185, ll.7-12. By contrast, if petitioner had had a more positive environment or had been given access to intervention programs, Dr. Garbarino testified that "he certainly could have had a positive life." App. 2185, ll.2-7. But, petitioner simply never got these opportunities:

I think that if Freddie had been placed in a different family early on in life, he might well have turned out differently. If he had been placed in a different juvenile facility at 15, 16, he might well have turned out differently. There is evidence that violence reduction programs in teenagers can be effective if they simultaneously change their thinking and give them practice and alternatives to violent behavior. I don't see any evidence that these kinds of programs were available to him. I believe there's even a record of him requesting counseling at some point and none being offered.

App. 2192, ll.14-25.

Finally, Dr. Garbarino explained that a detailed life history accompanied by expert testimony would have benefitted petitioner's mitigation presentation in several major respects. First, without the assistance of expert analysis, most people who have not experienced trauma cannot even begin to comprehend it. Dr. Garbarino explained that jurors "have to be able to see, not only the 200-pound grown man that we're looking at in court, but understand there is an

untreated traumatized child inside.” App. 2195, ll.18-22. And, for people who have not had these same life experiences, “it’s hard for people to know what trauma is . . . unless you give them a lot of specific details about it.” App. 2199, ll.22-25. Those details fill “[t]hat gap between what people typically know and what trauma [actually] involves.” App. 2200, ll.6-8. When this gap is filled, jurors are able to “understand you are not talking about something very vague and small-scale, but something very profound.” App. 2200, ll.8-10. Second, expert testimony like Dr. Garbarino’s helps jurors to understand “this fundamental idea about accumulation of risk factors, that if enough risk factors accumulate, no one is immune.” App. 2196, ll.2-4. Finally, hearing that a person has been sexually abused is “a very high intensity issue for people,” and can have a major impact on a juror’s understanding “of how a person was developed and how a person was damaged.” App. 2199, ll.2-11.

B. RELEVANT LEGAL PRINCIPLES AND DISCUSSION.

1. TRIAL COUNSEL’S FAILURE TO TELL PETITIONER’S STORY WAS DEFICIENT PERFORMANCE.

Trial counsel’s failure to adequately investigate and present available mitigating evidence was objectively unreasonable under prevailing professional norms for capital sentencing proceedings in 2006. *See, e.g., Porter*, 558 U.S. at 39-40; *Wiggins*, 539 U.S. at 524-27; *Williams*, 529 U.S. at 396; *Council v. State*, 380 S.C. 159, 170, 172-75, 670 S.E.2d 356, 361, 363-64 (2008); *Von Dohlen*, 360 S.C. at 607-608, 602 S.E.2d at 742-743. Trial counsel: (a) failed to conduct even a basic, let alone thorough, investigation of petitioner’s life and background; (b) ignored information in their possession that should have alerted them to the need for further investigation; and, (c) failed even to present the mitigating evidence that they did have in their possession.

First, trial counsel's investigation and trial preparations were constitutionally inadequate. Trial counsel did not even meet with petitioner until nearly five months after their appointment, and, even then, spent such an inadequate amount of time with petitioner that they could not build a relationship of trust or collect even the basic details of his life history. Trial counsel did no independent investigation of their own, and instead relied on a haphazardly selected group of investigators and experts, assembled less than two months before trial. *See, e.g., Council*, 380 S.C. at 172-173, 670 S.E.2d at 363 (holding trial counsel was deficient in "not beginning his investigation into [defendant's] background once the State served its notice of intent to seek the death penalty;" not "request[ing] certain background records until the day of jury selection;" and, not "set[ting] up a meeting between [an expert] and [the defendant] until one month before trial"). This group was dysfunctional from the beginning. Mitigation investigator Paige Tarr was dealing with personal problems that interfered with her ability to do her work. Carolyn Graham came on board to supplement Tarr's efforts, but neither woman had adequate time to investigate, given that they did not begin meeting with petitioner until approximately five weeks before trial. Marjorie Hammock had worked on the case previously, but proved to be unresponsive and slow in her preparations. By the time trial counsel identified these problems, however, there was no time left to solve them.

Ken Gibson was responsible for presenting Ms. Hammock's testimony at trial. At the time of her testimony, however, Gibson had spent approximately five total hours meeting with petitioner; had not read any of petitioner's social history records; and had not interviewed any of petitioner's family members or acquaintances. Gibson did not even take responsibility for any mitigation witnesses until two weeks before the trial. Prior to that time, he had lacked even a passing acquaintance with the mitigation issues, and knew nothing of the extensive mitigating

evidence in petitioner's life history. Instead, he relied on Ms. Hammock to tell him what she thought was important. Gibson was unable to make informed strategic decisions about what evidence to include in Ms. Hammock's testimony, because he did not know the details of petitioner's life history at the time of their preparations. *See, e.g., Sears* 130 S.Ct. at 3265 (2010) (internal quotation marks omitted) (holding trial counsel's actions (or inaction) cannot be "justified by a tactical decision when counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"); *see also Rompilla*, 545 U.S. at 382-383 (trial counsel's conduct was deficient where they failed to review school records despite their knowledge that Rompilla left school after the ninth grade and failed to further investigate juvenile and adult incarcerations even though they were aware of their client's criminal record).

Recently, a federal district court in the Fourth Circuit held that trial counsel was deficient because he failed to read school, social service, or hospital records and instead forwarded the records to an expert and relied on the expert to tell him if they contained any useful information. *Winston v. Kelly*, 784 F. Supp. 2d 623, 632 (W.D. Va. 2011), *aff'd Winston v. Pearson*, 683 F.3d 489 (4th Cir. 2012). The court explained

[c]apital defense counsel must have a command of reasonably discoverable evidence that is material to the question of life and death. Though they often must necessarily rely on paralegals, investigators, experts, and other members of the defense team to gather essential evidence, they are responsible for having a command of that evidence. Their right to rely on the opinions of experts does not relieve them of the responsibility of familiarizing themselves with the evidence they have gathered. . . . Dr. Nelson was not responsible for telling counsel what they needed to know. Rather, they were responsible for knowing what evidence they had and for asking him searching questions raised by that evidence.

Id. (emphasis added).

Second, trial counsel ignored information that should have prompted them to investigate further. *See, e.g., Porter*, 558 U.S. at 40 (trial counsel “ignored pertinent avenues for investigation of which he should have been aware” since trial counsel knew that Porter attended few years of regular school, sustained injuries during military service, and had a father who “over-disciplined” him); *Wiggins*, 539 U.S. at 524 (counsel were deficient because they “abandoned their investigation of petitioner’s background after having acquired only rudimentary knowledge of his history from a narrow set of sources”); *Council*, 380 S.C. at 173, 670 S.E.2d at 363 (“Even the limited information obtained should have put counsel on notice that [defendant’s] background, with additional investigation, could potentially yield powerful mitigating evidence.”). Although Gibson admitted that he never read any of petitioner’s social history records, Godfrey did, at least, obtain and review the social history records he received from prior trial counsel’s files. Those files included a chronology prepared by Ms. Drucy Glass prior to petitioner’s first capital trial in 1999. App. 2256, ll.7-21. The chronology alone contains extensive mitigating evidence and should have alerted trial counsel to the need for additional investigation. App. 2320-2337. For example, the chronology should have notified trial counsel of their need to obtain and review DSS records, family arrest records, family medical records, and family incarceration records. *Id.* However, trial counsel never obtained these records. App. 2111, l.3 – 2112, l.15 (testimony of Ms. Jill Rider explaining that a complete copy of trial counsel’s files did not contain Applicant’s PCR Exhibits 10-18, including family medical records, arrest records, DSS records, and family incarceration records); *see also* App. 2061, ll.4-10 (Bill Godfrey testifying that if records were not in the copy of trial counsel’s files, that meant they had never been in the file and trial counsel did not have them).

Nor did trial counsel investigate additional details about petitioner's life and background outside of the information reported on the chronology. Trial counsel were generally aware that petitioner grew up in a poor family and lived in a violent neighborhood, but they failed to investigate any of those potential areas of mitigation. Trial counsel were also aware that petitioner spent a significant period in his life in DJJ, and attorney Godfrey had personal knowledge that conditions there were "particularly horrible." App. 2098, 1.16. Despite this knowledge, however, counsel made no effort to investigate the details of petitioner's time in this environment, and never even spoke to petitioner about "his experiences during that period when he was in DJJ" App. 2065, 11.5-8, or about whether he been sexually abused. App. 2026, 1.21 – 2027, 1.6.

Finally, trial counsel failed even to present the mitigating evidence that they did have in their possession. *See, e.g., Williams v. Taylor*, 529 U.S. at 393 ("[I]t is undisputed that Williams had a right – indeed, a constitutionally protected right – to provide the jury with the mitigating evidence that his trial counsel either failed to discover *or failed to offer*.") (emphasis added); *Council*, 380 S.C. at 172, 670 S.E.2d at 363 ("We believe it was unreasonable for trial counsel not to further investigate [defendant's] background and present even the minimal mitigating evidence that was obtained."). As explained above, the social history chronology prepared by Ms. Glass contains eighteen (18) pages of mitigating details from petitioner's life history. If trial counsel had simply asked Ms. Hammock to testify to these items alone, it would have been a far fuller and more powerful mitigation presentation than the one trial counsel put up. Trial counsel also had access to petitioner's school records and the testimony of mitigation witnesses from prior trials, but they failed to offer any of this evidence as well.

In sum, trial counsel admitted they had no actual strategy that called for such a weak presentation of petitioner's life history. App. 2004, 1.16 – 2005, 1.4; App. 2076, 11.10-16. In fact, they claimed a desire to present as much detail as possible and even told the jury to expect the same.¹¹ Even if trial counsel had attempted to justify their skeletal showing on “strategy” grounds, that claim would be unworthy of respect under *Strickland* because it was totally uninformed by a reasonable investigation. See, e.g., *Wiggins*, 539 U.S. at 523; *Counsel*, 380 S.C. at 175, 670 S.E.2d at 364.

2. TRIAL COUNSEL'S FAILURE RESULTED IN PREJUDICE.

Viewed as a whole, the evidence presented at trial left the jurors with a false and damaging picture that was artificially skewed toward aggravation. As a result of trial counsel's failures, petitioner's sentencing jury did not “come to know him as a person” or “hear everything that he went through,” as trial counsel had promised. App.1095, 11.1-8. Instead, the jurors saw a large, muscular, physically aggressive man who had killed two people and told officers, “I don't give a shit. I was born to be in jail.” App.1141, 11.10-12. The State presented petitioner as a rarity among thousands – the only one of two to ever give Officer Wood, a twenty-five year veteran, the “cold chills,” App. 1142, 11.19-21; the victim advocate's “hardest, hardest case” in a fifteen year career, App. 1324, 11.9-12; Major Nettles' “most problematic inmate – bar none,”

¹¹ In opening statements, trial counsel stated:

What we believe the evidence in mitigation will show, and you will hear testimony from our witnesses that describe how it is that Freddie grew up; how he really didn't have a home on a consistent basis; how he really didn't have food on a consistent basis. You will hear evidence of the violence that he has lived through his entire life. And you will come to know him as a person, basically from the time he was a young boy up to where he is now.

App. 1094, 1.25 – 1095, 1.8.

App. 1442, ll.19-20; and, a “unique,” “cold,” and “unfeeling” person whom the Solicitor had personally selected, under very narrow circumstances, as the worst of the worst. App. 1607, ll.9-25; 1611, l.13 – 1612, l.1. To combat the State’s evidence in aggravation, trial counsel presented a mitigation case that their own witnesses acknowledged to be unsupported and “not significant.” App. 1484, l.16; 1503, l.1 – 1504, l.1; 1542, ll.20-25. According to Hammock – trial counsel’s main source of mitigating information – petitioner’s life included “a history of losses, some violence, a great deal of instability, and that’s about it.” App. 1463, ll.7-9.

Petitioner’s sentencing jury heard almost nothing about his extensive history of neglect and physical abuse.¹² Hammock testified that, on one occasion, the Owens children were “taken into custody in foster care where they stayed for a relatively short period of time.” App. 1457, ll.17-18. But, the jury never heard about Dora Mason’s documented, “long history of marginal

¹² The fact that trial counsel presented some minimal mitigating evidence at trial does not mean that petitioner was not prejudiced by their deficient performance. *Sears*, 130 S.Ct. at 3266. The available mitigating evidence that trial counsel failed to present on petitioner’s behalf was both quantitatively and qualitatively different from the limited, generalized evidence they actually presented. *See, e.g., Outten v. Kearney*, 464 F.3d 401, 421 (3d Cir. 2006) (“Simply because some mitigating evidence regarding Outten’s abusive childhood was introduced to the jury . . . it does not follow that the jury was provided a comprehensive understanding of Outten’s abusive relationship with his father or other aspects of his troubled childhood.”); *Powell v. Collins*, 332 F.3d 376, 399 (6th Cir. 2003) (rejecting contention that post-conviction evidence was cumulative to trial evidence, finding trial counsel ineffective for presenting “vague references to [p]etitioner’s family history and background” through a witness who “was not able to fully describe . . . [p]etitioner’s background, history, and character for mitigation purposes”); *Cargle v. Mullin*, 317 F.3d 1196, 1222 (10th Cir. 2003) (“[A]s a result of counsel’s utter lack of preparation, the jury heard only brief, personally remote, and fairly generic testimony . . . [which did] not relate the individualized, humanizing facts that other potential witnesses could have provided.”); *Neal v. Puckett*, 286 F.3d 230, 238-240 (5th Cir. 2002) (*en banc*) (trial counsel ineffective where, “[a]lthough [the mitigation evidence presented at trial] seems to touch many relevant points, it was presented . . . in an abbreviated form with no elaboration”; “counsel never contacted any of the other people . . . who have provided the additional testimony we now have before us, and which would have added to and developed the skeletal evidence before the jury”); *Jermyn v. Horn*, 266 F.3d 257, 311 (3rd Cir. 2001) (“While the jury clearly was aware that [petitioner] claimed that he suffered from a mental illness, the lack of directed and specific testimony about [his] childhood and its impact on [his] mental illness left the jury’s awareness incomplete.”).

child rearing practices,” including her failure to feed her children adequately, her failure to comply with DSS instructions, or her lack of enough “time, money, energy and motivation” to care for five young children. *See supra PARENTAL ABANDONMENT AND NEGLECT*. They did not know that DSS workers found the Owens children covered in ticks, or that Ms. Mason left five children under the age of seven at home alone for an extended period of time in an apartment with no electricity, no food, and surrounded in filth. *Id.* The jury did not know that petitioner’s teachers noted his dirty clothing, or that his parents never cared about his educational development. *Id.* They did not know that petitioner’s father abandoned him at an early age and never supported any of his siblings. *Id.*

Hammock told the jury that petitioner’s stepfather and father “were described as very violent people” and that “the community also was one of considerable violence and concern on a regular basis,” but she gave the jury no details or examples of what she meant by this testimony. App. 1457, ll.12-13; 1457, ll.24-25. The jury did not hear that petitioner personally witnessed grotesque acts of violence at a very young age, including a shooting during which he was so close to the victim that blood and bone fragments splattered out onto his own face. *See supra TRAUMA*. They did not know that petitioner witnessed a violent rape in a clearing near his house at age ten or that he was so traumatized by this event that he was scared to go outside. *Id.* They did not know that petitioner’s stepfather beat him with electrical cords, punched his mother in the face on multiple occasions, broke her nose, and was repeatedly arrested on charges of criminal domestic violence. *See supra FAMILY HISTORY OF CRIMINAL VIOLENCE AND PHYSICAL ABUSE*. They never heard about how petitioner fell asleep at school because he was up all night guarding his mother’s bedroom door in an effort to protect her. *Id.*

Hammock testified that petitioner's family history included "a considerable amount of incarceration, that of his brothers and his uncle," but she gave no further details about the extensive violent criminal histories of petitioner's most influential family figures. App. 1459, ll.16-17. Hammock briefly mentioned an incident during which petitioner's grandmother "did time for assaulting, shooting a family member," App. 1463, ll.3-4, but failed to point out that petitioner actually *witnessed* this event, which was preceded by another violent act when the ultimate victim of this shooting smashed a cinder block over petitioner's grandfather's head. *See supra* FAMILY HISTORY OF CRIMINAL VIOLENCE AND PHYSICAL ABUSE. The jury also never heard that petitioner witnessed his grandmother shoot her son-in-law in the stomach after he had stabbed petitioner's aunt the day before. *Id.* The jury never heard that this same aunt later stabbed petitioner's brother, Lorenzo, in the stomach during a fight with petitioner's sister, Marie. *Id.* Nor did they hear that, on the very same day, the family later engaged in yet another drunken brawl at the conclusion of which three more family members were arrested. *Id.* Hammock told the jury nothing about the sexual abuse that petitioner experienced over his lifetime, nor did she touch on the nearly four years he spent in DJJ. The jury never heard about the formative period petitioner spent in an environment that was "ignor[ing] the statutory purpose" of juvenile confinement, warehousing violent juveniles under constitutionally inadequate conditions "like ripe peaches in a warm cellar," and, as a result, "produc[ing] graduates who later swell the populations of adult correctional facilities." *See supra* DEPARTMENT OF JUVENILE JUSTICE EXPERIENCES.

Moreover, trial counsel presented virtually no evidence about how petitioner's upbringing shaped his development as a child and made him into the person he was when the Speedway shooting occurred. Hammock vaguely referenced her own "casual observations" that

a difficult childhood might be associated with later criminal behavior. App. 1464, 1.11. But she gave no details to explain what such a difficult childhood might involve, cited no specific studies, and did not explain how petitioner's accumulation of risk factors had specifically and personally affected him. Hammock did not point out that petitioner lacked control over his exposure to risk factors, nor did she explain the fact that, if enough risk factors accumulate over time, "no one is immune." App. 2196, 11.3-4. In sum, trial counsel's presentation gave jurors no information from which they might come to see petitioner's "aggressive, tough persona" as a mask designed to protect "an untreated, traumatized child inside," App. 2195, 1.22, – one who is "very scared, very sad, very depressed." App. 2166, 1.12.

A complete mitigation story would have both humanized petitioner in the jury's eyes and neutralized much of the State's aggravating evidence by explaining petitioner's behavior through the lens of his past experiences and the developmental adjustments he had to make to deal with those experiences. In other words, a full account of petitioner's life history and its effects would have dramatically altered "the sentencing profile." *Strickland*, 466 U.S. at 699-700. Faced with the mitigating evidence that could have been presented on petitioner's behalf, "there is a reasonable probability [that] at least one juror would have struck a different balance and returned with a different sentence." *Von Dohlen*, 360 S.C. at 607, 602 S.E.2d at 743 (2004); *see also*, *e.g.*, *Porter*, 558 U.S. at 42 ("Had the judge and jury been able to place Porter's life history 'on the mitigating side of the scale,' and appropriately reduced the ballast on the aggravating side of the scale, there is clearly a reasonable probability that the advisory jury – and the sentencing judge – 'would have struck a different balance,' and it is unreasonable to conclude otherwise.") (citing *Wiggins*, 539 U.S. at 537).

3. THE PCR COURT ERRED IN DENYING THIS CLAIM.

Despite petitioner's repeated objections that the PCR Court must "consider the *totality* of the available mitigating evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding – and reweig[h] it against the evidence in aggravation," *Sears*, 130 S.Ct. at 3266 (citing *Porter*, 558 U.S. at 41 (emphasis added)), Judge Miller followed respondent's lead by breaking petitioner's claims into several separate sub-parts, and then disposing of each sub-part in turn.

First, Judge Miller noted that the 2006 mitigation presentation was not as detailed as it had been during petitioner's two previous trials. However, he attributed this largely to the fact that "Hammock's testimony at the first two proceedings dealt with how [petitioner] would adjust to incarceration, a topic that become irrelevant after [he] had been imprisoned for several years and had a lengthy prison disciplinary infraction record." App. 3589. Thus, Judge Miller concluded that Gibson and Godfrey "made the strategic decision not to elicit testimony from Hammock that was no longer relevant." *Id.* Moreover, Judge Miller found that petitioner "was not prejudiced by his trial counsel's decision not to elicit more detailed testimony from Hammock," because, although her testimony was less detailed than before, it was nonetheless "substantially the same testimony." App. 3590. Finally, Judge Miller concluded that any "topics that [Hammock] failed to cover were addressed by the other mitigation witnesses." *Id.*

Second, Judge Miller addressed the mitigation information contained in an investigative file put together for petitioner's first trial by Ms. Drucy Glass. Judge Miller concluded that trial counsel were not ineffective for failing to present this information because they reviewed the file and "made a strategic decision not to present the evidence present in that file." App. 3591. Judge Miller further suggested that counsel were not deficient and/or petitioner suffered no

prejudice because “[t]rial counsel presented a cogent mitigation case through the testimony of Hammock, Schwartz-Watts, Cobb, Brawley, and Maag.” *Id.*

Finally, Judge Miller addressed petitioner’s evidence of his time in DJJ, including evidence that he experienced physical and sexual abuse while in juvenile custody, and concluded that trial counsel was not deficient because they “conducted an extensive and thorough investigation into potential mitigation” and made a strategic decision “that it would be in [petitioner’s] best interest not to present this mitigation evidence.” App. 3592. Judge Miller found that petitioner’s claims of abuse were not credible because “he could not produce any records indicating reports of sexual assault or sexual abuse from DJJ.” *Id.* In addition, he concluded that petitioner was not prejudiced because “[e]ven if the jury believed [petitioner’s] uncorroborated” evidence of physical and sexual abuse at DJJ, offering it “would have come at the great cost of opening the door” to evidence about why petitioner was sent to DJJ and his poor behavior there. App. 3593.

The PCR Court’s decision to reject this claim turns on several errors of law and multiple factual findings that are not supported by the record. First, there is no evidence that trial counsel made a strategic decision not to elicit additional testimony from Hammock. Trial counsel never testified that they asked Hammock to alter her previous testimony because it was “no longer relevant.” Likewise, trial counsel never testified that they reviewed Ms. Glass’s file *at all*, much less that they made a strategic decision not to present the information it contained. On the contrary, trial counsel testified at the PCR hearing that their intended strategy was to present the fullest possible picture of petitioner’s life history and they had no strategic reason for omitting any available details of that history. Trial counsel intended for Hammock to serve as the “primary” witness through whom they hoped to tell petitioner’s life story. And yet, Gibson, who

was responsible for presenting petitioner's life story through Hammock, testified without contradiction at the PCR hearing that, at the time of trial, he: (a) had spent only five hours with petitioner discussing non-mitigation issues; (b) had not read any of petitioner's social history records; (c) had not interviewed any of petitioner's family members or acquaintances; and (d) relied on Hammock to tell him what she thought was important for her testimony.

There is also no support in the record for the PCR Court's finding that "trial counsel decided that it would be in [petitioner's] best interest not to present [evidence of his DJJ experiences] because of the circumstances surrounding [petitioner's] incarceration in DJJ as well as his behavior while there." App. 3592. In fact, trial counsel testified that they never investigated petitioner's experiences in DJJ, they never asked petitioner if he had been sexually abused, and they did not have any information about his personal experiences in DJJ apart from what was recorded in his DJJ records. App. 2004, 1.16 – 2005, 1.4; 2026, 1.21 – 2027, 1.6; 2065, 11.5-8; 2076, 11.10-16. Trial counsel cannot, as a matter of law, make an informed strategic decision about whether to present certain information when they do not know what that information is. *See, e.g., Sears*, 130 S.Ct. at 3265; *Porter*, 558 U.S. at 39-40. It constitutes reversible error for a court to "merely assume that the investigation was adequate." *Wiggins*, 539 U.S. at 526-27; *see also Williams*, 529 U.S. at 396.

Further, even if counsel *had* investigated petitioner's experiences at DJJ and their impact on him, the "strategic" decision attributed to them in the PCR Court's order would still be unreasonable. Trial counsel were already aware that the circumstances surrounding petitioner's incarceration in DJJ and information regarding his behavior while there was readily available in the DJJ records, and the State would likely offer it in aggravation. In fact, trial counsel offered much of this evidence through their *own* witnesses. App. 1521, 11.19-23; 1545, 11.14-17.

The PCR Court equally erred in finding that any topics Hammock failed to cover “were addressed by the other mitigation witnesses at the third sentencing proceeding.” App. 3590. Very simply, there is no support for this assertion. At the PCR hearing, through witnesses and exhibits, petitioner offered extensive mitigating evidence that was never presented at trial. The details of this life history were not testified to by Hammock or any other witness. At the PCR hearing, petitioner also offered expert testimony explaining the results of the lifelong trauma and abuse he experienced as a child. Hammock’s single, vague reference at trial to her own “casual observations” that a difficult childhood might be associated with later criminal behavior cannot fairly be characterized as a cogent explanation of a strong correlation between petitioner’s childhood (which was not presented to the sentencing jury in any detail) and a future history of violence.

Moreover, the PCR Court’s order turns on a misapplication of *Strickland* and other applicable law. For example, the Order entirely fails to acknowledge or account for the extensive available mitigating evidence that trial counsel failed to present, and rests instead on the conclusory declaration that “[t]rial counsel presented a cogent mitigation case through the testimony of Hammock, Schwartz-Watts, Cobb, Brawley, and Maag.” App. 3591. That declaration not only lacks support in the record, it also lacks anything approaching the legally dispositive power attributed to it by the PCR Court’s order. *Sears*, 130 S.Ct. at 3266 (“We certainly have never held that counsel’s effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. To the contrary, we have consistently explained that the *Strickland* inquiry requires precisely the type of probing and fact-specific analysis that the state trial court

failed to undertake below.”) (emphasis in original); *see also Williams*, 529 U.S. at 397-98; *Porter*, 558 U.S. at 39-41.

The PCR Court also consistently misapplied *Strickland* by finding that trial counsel made a series of valid strategic decisions notwithstanding their failure to conduct a constitutionally adequate investigation. *See, e.g., Porter*, 558 U.S. at 39-40; *Wiggins*, 539 U.S. at 526-27; *Williams*, 529 U.S. at 396. Additionally, the PCR Court misapplied relevant law by requiring petitioner to provide written documentation of his own sexual abuse at DJJ. *See Porter*, 558 U.S. at 43 (holding – where Porter’s expert testimony was challenged by the state as inconsistent, unsupported and unreliable – that it was nonetheless “not reasonable to discount entirely the effect that [this] testimony might have had on the jury or the sentencing judge.”). It was also error for the PCR Court to “discount” mitigating information, such as petitioner’s experiences in DJJ, on the basis that it might have come at some cost.¹³ *Id.* at 36-37; *see also Sears*, 130 S.Ct. at 3264.

In sum, petitioner’s trial counsel failed to investigate and present available mitigating evidence from petitioner’s entire life history, and they specifically and expressly disclaimed any strategic reason for these omissions in sworn testimony at the PCR hearing. Petitioner suffered prejudice because there is a reasonable probability that a full and complete presentation of his life and background, if placed on the mitigating side of the sentencing scale, would have caused at least one juror to strike a different balance and vote for a life sentence. The PCR Court’s

¹³ Moreover, as explained above, any claim that trial counsel decided not to present the DJJ evidence because it “would have come at the great cost of opening the door” to evidence about the reasons why petitioner went to DJJ and how he behaved while incarcerated there is unfounded given that: (a) trial counsel specifically denied making any strategic decision not to present the DJJ evidence; and, (b) trial counsel had already offered evidence about why petitioner went to DJJ and his behavior there through their own trial witnesses.

decision rejecting this claim rests on multiple errors of law and fact, and it is not supported by the record below. This Court should grant *certiorari* and reverse.

II. TRIAL COUNSEL INEFFECTIVELY FAILED TO CHALLENGE THE PROSECUTION’S CASE FOR DEATH.

Counsel’s duties in a capital sentencing proceeding include not only an obligation to discover and present available mitigating evidence, but also an obligation to raise any available challenges designed to “respond to [the State’s] case for aggravation.” *Rompilla*, 545 U.S. at 385. Petitioner’s trial counsel unreasonably failed to object to a variety of inadmissible evidence and improper arguments by the State, resulting in prejudice to petitioner.

A. TRIAL COUNSEL FAILED TO OBJECT AND/OR REQUEST PROPER INSTRUCTIONS FROM THE COURT REGARDING THE CRIME SCENE VIDEO.

1. TRIAL COUNSEL’S FAILURE WAS DEFICIENT AND PREJUDICIAL.

The United States Supreme Court has long held that “the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)). Thus, the Court has “insist[ed] that capital punishment be imposed fairly, and with reasonable consistency, or not at all.” *Id.* Among other things, this mandate prohibits imposition of a death sentence on the basis of information that is “materially inaccurate.” *Johnson v. Mississippi*, 486 U.S. 578, 590 (1988). But, of course, these principles are useless if defense counsel fails to protect them at trial. It is therefore trial counsel’s duty not only to investigate and present any mitigating circumstances regarding the defendant’s life and background, but also to ensure that the circumstances of the crime itself are not presented or argued in a way that

artificially or unfairly skews them toward aggravation. *See Rompilla*, 545 U.S. at 385-393 (counsel's performance was deficient and prejudicial where they failed to investigate and attempt to rebut evidence they knew that the State planned to offer as aggravation).

Here, the State told the jury that it would show a video of the crime because the jurors needed "to know the facts and circumstances of the crime in order to determine what punishment to impose." App. 1088, 11.21-23. The State also told the jury that petitioner had already been convicted of the murder of Ms. Graves. App. 1088, 11.12-14. But no one told the jury that: (a) the identities of the men in the video had never been conclusively determined; (b) petitioner's co-defendant, Steven Golden, had previously testified that *he* – not petitioner – was the primary figure in the video; or, (c) that the jury in 1999 was given an instruction on accomplice liability under which they could find petitioner guilty of murder without ever determining whether or not he actually pulled the trigger. Trial counsel did not object to the state showing the video under these circumstances, nor did they request, at a minimum, that the trial court issue proper instructions to the jury explaining that the identity of the men in the video had never been conclusively determined. As a result, trial counsel left the jury with a false impression that they were watching video documentation of a shooting that another jury had already determined to be perpetrated by petitioner.

Trial counsel's failure to object and/or request proper instructions was unreasonable. There was no strategic reason for this failure. Rather, both attorneys testified at the PCR hearing that they never even considered raising an objection or requesting instructions. App. 1985, 1.18 – 1986, 1.9; 2037, 1.21 – 2038, 1.10. Trial counsel's failure was prejudicial because it allowed jurors to make the false assumption that conclusive video-graphic evidence showed petitioner shooting Ms. Graves in the head. It has long been accepted that, in terms of culpability and

appropriate punishment, there is an important distinction between a triggerman and a non-triggerman. *See* S.C. Code Ann. § 16-3-20(C)(b)(4) (1976) (recognizing, as a statutory mitigating circumstance, that “the defendant was an accomplice in the murder committed by another person and his participation was relatively minor”); *State v. Peterson*, 287 S.C. 244, 248, 335 S.E.2d 800, 802 (1985) (holding “During the penalty phase of death penalty cases which involve conspiracy liability, the trial judge should charge that the death penalty cannot be imposed on an individual who aids and abets in a crime in the course of which a murder is committed by others, but who did not himself kill, attempt to kill, or intend that a killing take place or that lethal force be used.”), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). The video’s admission, under these particular circumstances and without further instruction, was misleading and prejudicial, and it undermined the jurors’ ability to meaningfully consider the minor participation mitigating factor. *See, e.g., Johnson v. Mississippi*, 486 U.S. at 590 (the Eighth Amendment prohibits imposition of a death sentence on the basis of information that is “materially inaccurate”).

Thus, if not for trial counsel’s error, there is a reasonable probability that at least one juror would have viewed petitioner’s role in the crime – or even the ambiguity over what that role was – “as a basis for a sentence less than death.” *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *see also Porter*, 558 U.S. at 42 (“the Constitution requires that ‘the sentencer in capital cases must be permitted to consider any relevant mitigating factor.’”) (quoting *Eddings*, 455 U.S. at 112).

2. THE PCR COURT ERRED IN DENYING THIS CLAIM.

The PCR Court rejected this claim by mischaracterizing petitioner’s argument as a claim that trial counsel should have requested that the Court “tell the jury which of the two men

captured in the video was the triggerman,” and that they should have “offer[ed] Golden’s testimony from previous proceedings.” App. 3577. Petitioner never made any such arguments. Further, the PCR Court found that trial counsel was not deficient in their handling of the crime scene video because “[a]t the PCR hearing, trial counsel testified that they knew that an instruction clarifying the content of the crime scene video would have violated South Carolina law and that a request for any such instruction would be denied.” App. 3578. Trial counsel testified to nothing of the sort. Rather, both attorneys testified that they never even considered raising an objection or requesting any instructions about the crime scene video.

Finally, the PCR Court concluded that petitioner could not show prejudice because the State offered other “testimony that [petitioner] was the triggerman.” App. 3578. Apart from the crime scene video, the State offered the prior self-interested testimony of Vance, petitioner’s co-defendant, who previously claimed that he and petitioner switched guns immediately before and after the shooting but then refused to testify at the 2006 sentencing proceeding, and Aisha Austin, petitioner’s jilted ex-girlfriend. This was hardly convincing proof of petitioner’s role in the crime. But, in any event, the *Strickland* prejudice test is not a sufficiency of the evidence inquiry. In other words, the PCR Court erred in concluding that petitioner could not prove prejudice because other evidence remained, apart from the video, from which the jury could have concluded he was the triggerman. Rather, the test is whether the challenged evidence, “taken as a whole, might well have influenced the jury’s appraisal of [petitioner’s] culpability.” *Rompilla*, 545 U.S. at 393. The crime scene video was powerful evidence which, when offered under circumstances where the jury had already been told that petitioner had been found guilty and that they would see video-graphic proof of his guilt, might well have influenced the jury’s appraisal

of petitioner's culpability by misleading jurors into believing that the State had conclusive proof that petitioner was the shooter.

B. TRIAL COUNSEL FAILED TO OBJECT TO OFFICER WOOD'S "COLD CHILLS" TESTIMONY.

1. TRIAL COUNSEL'S FAILURE WAS DEFICIENT AND PREJUDICIAL.

Trial counsel failed to object when Officer Joe Wood was asked, "[h]ow did [petitioner] make you feel?" App. 1142, 1.18. Wood responded: "He's one of two people out of probably 25 years in homicide that I have interviewed that actually gave me cold chills." *Id.* This testimony was irrelevant, inflammatory and prejudicial. Officer Wood's subjective propensity to "get the chills" bears no cogent relation to the jury's sentencing decision, which must be "based on an impartial, rational, and careful evaluation of all the facts and circumstances about the crime, the victim, and the defendant as presented at trial." *Von Dohlen*, 360 S.C. at 613, 602 S.E.2d at 746. The State's use of this testimony and later reliance on it in closing argument injected an arbitrary factor into the sentencing process. S.C. Code Ann. § 16-3-25(C)(1) (2003); *State v. Northcut*, 372 S.C. 207, 223, 641 S.E.2d 873, 882 (2007) (reversing death sentence because the Solicitor's closing argument injected an arbitrary factor and encouraged the jury to render a verdict under the influence of passion and prejudice); *State v. Burkhart*, 371 S.C. 482, 488-489, 640 S.E.2d 450, 453 (2007) ("A capital jury may not impose a death sentence under the influence of an arbitrary factor. When the jury is invited to speculate about irrelevant matters upon which a death sentence may be based, § 16-3-25(C)(1) is violated.").

Trial counsel's failure to object to this testimony was unreasonable. At the PCR hearing, Gibson admitted there was "no strategic reason or otherwise for us not to object to that." App. 1987, 11.14-15. Godfrey also admitted that he did not consider objecting to the question, but attributed his failure to object to the answer to his "surprise." App. 2038, 1.23 – 2039, 1.20

(“Now that I know Joe’s answer, I would have objected when I heard the question. I didn’t know where he was going with it.”). Godfrey’s claim of surprise, however, flies in the face of his testimony that he carefully reviewed the transcripts of the two prior proceedings in this case, App. 2058, ll.7-14, since Officer Wood made this exact same statement at both the 1999 and the 2003 trials in the same context as his testimony in 2006. 1999 ROA at p.3054; 2003 ROA at p.231.

Given that trial counsel were aware of Officer Wood’s testimony from two prior occasions, their failure to object to this statement cannot be attributed to surprise. Trial counsel performed deficiently by failing to object, and their failure prejudiced petitioner by allowing an arbitrary, speculative, inflammatory and irrelevant consideration into the jury’s sentencing decision. Moreover, counsel’s failure allowed the Solicitor to capitalize on Wood’s improper testimony by emphasizing it in his closing argument. Trial counsel further failed to object to the Solicitor’s improper arguments, including his references to Joe Wood’s “cold chills” testimony. *See, infra, section III*. Trial counsel’s failure resulted in prejudice because it allowed yet another improper, irrelevant and arbitrary factor to enter the jury’s decision-making process. Had trial counsel “appropriately reduced the ballast on the aggravating side of the scale, there is clearly a reasonable probability that the [jury] ‘would have struck a different balance.’” *Porter*, 558 U.S. at 42 (quoting *Wiggins*, 539 U.S. at 537).

2. THE PCR COURT ERRED IN DENYING THIS CLAIM.

The PCR Court rejected this claim on the basis that Wood’s testimony was admissible, non-opinion evidence regarding petitioner’s character. App. 3579-80. However, the PCR Court failed to explain how this testimony constituted non-opinion evidence or somehow reflected petitioner’s character. Further, the PCR Court refused to address petitioner’s argument that this

evidence violated S.C. Code Ann. § 16-3-25(C)(1) (2003). Finally, the PCR Court concluded that even if trial counsel's performance was deficient, petitioner was not prejudiced because "[b]ased upon the entirety of the aggravating evidence presented by the State . . . [petitioner] is unable to prove that, had his counsel objected to the admission of Wood's testimony or the State's argument from that testimony, the jury would have recommended a sentence of life." App. 3581. As the United States Supreme Court and this Court have repeatedly explained, this is not a correct application of the *Strickland* prejudice inquiry:

If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of the criminal proceeding would have been different, that decision would be 'diametrically different,' 'opposite in character or nature,' and 'mutually opposed,' to our clearly established precedent.

Williams v. Taylor, 529 U.S. at 405; *see also, e.g., Porter*, 558 U.S. at 44 (holding that the test is not whether a defendant would have received a life sentence absent counsel's deficient performance); *Wiggins*, 539 U.S. at 536 (same); *Von Dohlen*, 360 S.C. at 607, 602 S.E.2d at 743 (same).

C. TRIAL COUNSEL FAILED TO OBJECT TO THE LIST OF PRISON DISCIPLINARY INFRACTIONS ON CONFRONTATION CLAUSE AND DUE PROCESS GROUNDS.

1. RELEVANT LEGAL PRINCIPLES AND DISCUSSION.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. Amend. VI.¹⁴ In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court unequivocally

¹⁴ "In South Carolina, not only is this right applicable to state prosecutions under the Fourteenth Amendment, it is specifically mandated by the State Constitution." *State v. Mitchell*, 378 S.C. 305, 311, 662 S.E.2d 493,497 (2008) (citing *State v. Green*, 269 S.C. 657, 661, 239 S.E.2d 485, 487 (1997)); *see also* S.C. Const. Art. I, § 14. In addition, the right of confrontation is secured by statute in South Carolina. S.C. Code Ann. § 17-23-60.

held that the admission of testimonial hearsay violates the Confrontation Clause if the defendant has no opportunity to cross-examine the declarant. The Court stated that the Framers did not mean to “leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability.’” *Id.* at 61. Instead, “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” *Id.* at 68-69. Since *Crawford*, the Court has consistently held to this view. *See, e.g., Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309 (2009); *Giles v. California*, 554 U.S. 353, 357-58 (2008); *Danforth v. Minnesota*, 552 U.S. 264, 269 (2008); *Whorton v. Bockting*, 549 U.S. 406, 413-414 (2007); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006); *Davis v. Washington*, 547 U.S. 813, 821 (2006).

In *Crawford*, the Court declined to “spell out a comprehensive definition of ‘testimonial.’” 541 U.S. at 68. However, the majority approvingly cited one definition: “*ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.” *Id.* at 51 (emphasis added). Further, the Court specifically noted,

Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse – a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.

Id. at 56 n.7.

Since *Crawford*, the Court has decided a series of cases elaborating on the definition of “testimonial.” A statement is testimonial “when the circumstances objectively indicate that there

is no . . . ongoing emergency, and that the primary purpose of the [statement] is to establish or prove past events potentially relevant to later criminal prosecution.” *Davis*, 547 U.S. at 822. In other words, a testimonial statement is one which is made as “part of an investigation into possibly criminal past conduct.” *Id.* at 829 (emphasis added); *see also State v. Davis*, 371 S.C. 170, 178, 638 S.E.2d 57, 61 (2006) (statements made in “an investigatory or judicial context” are testimonial). The involvement of government officers, such as prison guards, also points to a statement’s testimonial character. *See Crawford*, 541 U.S. at 51 (“An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”). The Court has specifically held that a record “solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator . . . whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial.” *Davis*, 547 U.S. at 826.

The Court’s decision in *Melendez-Diaz* further confirms these legal principles. In *Melendez-Diaz*, the trial court—over defense counsel’s objection on confrontation grounds—admitted laboratory certificates attesting that a substance seized from a defendant contained cocaine. Before the Supreme Court, the State argued, *inter alia*, that the certificates were admissible without confrontation because they were “akin to the types of official and business records admissible at common law.” *Melendez-Diaz*, 557 U.S. at 321. The Court disagreed, finding that “the affidavits do not qualify as traditional official or business records, and even if they did, their authors would be subject to confrontation nonetheless.” *Id.* In finding that there was “little doubt” that the laboratory certificates “fall within the ‘core class of testimonial statements,’” the Court emphasized that they contained “the precise testimony the analysts would

be expected to provide if called at trial.” *Id.* at 310. The Court concluded, “[t]he ‘certificates’ are functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’” *Id.* at 310-11 (quoting *Davis*, 547 U.S. at 830).

Here, petitioner was not provided an opportunity to cross-examine the prison officials who purportedly witnessed the alleged misconduct he was accused of committing. The only remaining issue then, is whether the statements contained in the prison documents were “testimonial.” There are several reasons that prison records of the sort admitted at petitioner’s capital sentencing proceeding are testimonial.

Prison records, such as those at issue here, are plainly calculated to “establish or prove past events potentially relevant to later criminal prosecution.” *Davis*, 547 U.S. at 822. They are kept with the expectation that they will be used in future proceedings against the petitioner, either administrative or criminal.¹⁵ In *Russeau v. State*, 171 S.W.3d 871, 881 (Tex. Crim. App. 2005), the Texas Court of Criminal Appeals held that prison reports detailing disciplinary offenses “amounted to unsworn, *ex parte*, affidavits of government employees and were the very type of evidence the [Confrontation] Clause was intended to prohibit.” In *United States v. Mills*, 446 F. Supp. 2d 1115, 1137 (C.D. Cal. 2006) (quoting *Crawford*, 541 U.S. at 52), a federal

¹⁵ In addition to their role in disciplinary and criminal proceedings against the prisoner, such reports can (and indeed, must) be used in determining the length of time that prisoner will remain incarcerated. Under South Carolina law, the SCDC is required to “keep a record of the industry, habits, and deportment of the prisoner.” S.C. Code Ann. § 24-21-70. “One purpose for keeping records is to provide information to the Parole Board upon which it can make informed decisions about paroling prisoners.” *Rayfield v. Dep’t of Corr.*, 297 S.C. 95, 108, 374 S.E.2d 910, 917 (S.C. Ct. App. 1988). State law “specifically provides for the Board to consider the complete record of a prisoner and delegates to the Board the responsibility of determining if and when a prisoner meets the prerequisites of parole eligibility.” *State v. McKay*, 300 S.C. 113, 115, 386 S.E.2d 623, 623 (1989) (citing S.C. Code Ann. § 24-21-640); *see also* S.C. Code Ann. § 24-13-150(B) (If a prisoner confined in a facility of the department “commits an offense or violates one of the rules of the institution during his term of imprisonment, all or part of the credit he has earned may be forfeited in the discretion of the Director of the Department of Corrections.”).

district court barred the admission of prison discipline reports because they were “made ‘under circumstances which would lead an objective witness reasonably to believe that [they] would be available for use at a later trial.’” In addition, the Seventh Circuit has found that prison employees in some instances fill out incident reports with the intent of protecting themselves from civil liability. *Bracey v. Herring*, 466 F.2d 702, 704 (7th Cir. 1972).

In the case of a prison disciplinary record kept about a prisoner who is facing the death penalty and has an upcoming resentencing, there is another reason why records of this sort are testimonial. Solicitors in death penalty sentencing often argue that the defendant would be dangerous, even in confinement, and that therefore the death penalty is the only acceptable option. *See, e.g., Kelly v. South Carolina*, 534 U.S. 246 (2002). Prison officials in this case would have known that the records they were creating could be used as evidence in petitioner’s upcoming resentencing.

In this case, the prison guards—had they been available to testify—undoubtedly would have laid out petitioner’s alleged infractions in much the same way as they did when writing out the records in the first place: by giving the date of the incident as well as a brief synopsis. Thus, the summary of these records served as the functional equivalence of live testimony “doing ‘precisely what a witness does on direct examination.’” *Melendez-Diaz*, 557 U.S. at 311 (quoting *Davis*, 547 U.S. at 830). And yet, petitioner was denied an opportunity to challenge the reliability of these allegations by confronting the witnesses against him and testing their statements “in the crucible of cross-examination.” *Crawford*, 541 U.S. at 61.

2. COUNSEL’S FAILURE WAS DEFICIENT AND PREJUDICIAL.

Trial counsel had no strategic reason for their failure to object on constitutional grounds. App. 1990, ll.14-22. Trial counsel testified at the PCR hearing that they wanted to do whatever

they could to keep the disciplinary records out. App. 2042, 1.1 – 2043, 1.3. The unreasonableness of their failure to object was magnified in this case by the inadequate and cursory cross-examination that followed. After Major Nettles recited the summary of petitioner’s disciplinary records, trial counsel asked only six cross-examination questions, none of which addressed the accuracy or reliability of the records. App. 1443, 11.3-25. Instead, trial counsel effectively conceded that the summary accurately portrayed petitioner’s disciplinary history, and tried in vain to minimize its impact by pointing out that petitioner was not the only inmate in the state of South Carolina who had made shanks and gotten into fights. *Id.*

Petitioner suffered prejudice as a result of trial counsel’s failure because the jury was allowed to consider highly prejudicial evidence that he had no opportunity to subject to adversarial testing. Consequently, there exists a significant likelihood that petitioner’s “death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.” *Gardner v. Florida*, 430 U.S. 349, 362 (1977). Trial counsel’s failure to object deprived petitioner of his constitutionally-protected right to confrontation, a right that is “so important that the absence of confrontation at trial calls into question the ultimate integrity of the fact-finding process.” *State v. Williams*, 285 S.C. 544, 553, 331 S.E.2d 354, 359 (S.C. Ct. App. 1985) (internal quotation marks omitted). The summary of petitioner’s prison disciplinary records was a crucial part of the State’s case for death. The Solicitor used the records in his closing argument to rebut the defense’s contention that petitioner was mentally ill and would be able to control his behavior in prison with the help of medication. App. 1610, 11.9-18.¹⁶ The

¹⁶ The Solicitor argued, “The defense has presented you evidence that he [had] Attention Deficit Disorder, had depression, had Antisocial Personality Disorder. Could control his behavior from now on with medications, but that’s not so. *If you look at his record of disciplinary infractions* since he went on his medication, there is no significant difference than it was before. He has no mental illness. He knew right from wrong. He could assist in his own defense. He could not—but

untested evidence undermined the defense theory of the case, and supported the State's case for death.

3. THE PCR COURT ERRED IN DENYING THIS CLAIM.

The PCR Court rejected this claim based on its finding that admission of the prison disciplinary records did not violate the Confrontation Clause because the records were non-testimonial. App. 3585. However, the PCR Court did not address petitioner's arguments that prison records are testimonial because: (a) they are plainly calculated to "establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822; (b) prison records are "made 'under circumstances which would lead an objective witness reasonably to believe that [they] would be available for use at a later trial,'" *Mills*, 446 F. Supp. 2d at 1137 (quoting *Crawford*, 541 U.S. at 52); *see also Bracey*, 466 F.2d at 704; (c) prison records amount to "unsworn, ex parte, affidavits of government employees and [are] the very type of evidence the [Confrontation] Clause was intended to prohibit." *Rousseau*, 171 S.W.3d at 881; and, (d) thus, admission of the summary of Applicant's prison records at trial served as the functional equivalent of live testimony by "doing 'precisely what a witness does on direct examination.'" *Melendez-Diaz*, 557 U.S. at 311 (quoting *Davis*, 547 U.S. at 830).

The PCR Court also noted that prison records are required to be produced by state statute but failed to address petitioner's argument that this in no way undermines their testimonial nature. *Hammon v. Indiana*, 547 U.S. 813, 832 n.6 (2006) ("The Confrontation Clause in no way governs police conduct, because it is the trial *use* of, not the investigatory *collection* of, *ex parte* testimonial statements which offends that provision. But neither can police conduct govern the Confrontation Clause; testimonial statements are what they are.") (emphasis in original).

he can still not be allowed to be outside of solitary confinement." App. 1610, 11.9-18(emphasis added).

Finally, the PCR Court concluded that any error was harmless because this evidence was “cumulative.” App. 3587. Specifically, the PCR Court asserted that “[m]any of the witnesses that testified to [petitioner’s] future dangerousness relied upon these prison records to testify to [petitioner’s] history of violent behavior and possession of illegal weapons while incarcerated. As a result, the evidence of [petitioner’s] prison infractions was before the jury through other witnesses.” *Id.* There is simply not one ounce of probative evidence in the record to support this conclusion. No other witnesses testified to petitioner’s prison infractions. The State relied solely on the records to support its allegations, and no one testified to personal knowledge of the events that the prison records purported to document.

D. TRIAL COUNSEL FAILED TO OBJECT TO IMPROPER VICTIM IMPACT EVIDENCE.

1. TRIAL COUNSEL’S FAILURE WAS DEFICIENT AND PREJUDICIAL.

As part of its effort to offer victim impact evidence, the State called Ms. Juliana Christy, a victims’ advocate who had worked for the Greenville County Sheriff’s Department for over fifteen years. App. 1324, 1.3. Christy summarized her encounter with Ms. Graves’ children, and then concluded her testimony by describing the effect that Ms. Graves’ death had had on *herself*:

Q: Now, Ms. Christy, how long have you been a victim advocate?

A: 15 and a half years.

Q: And in that 15 years, how many cases have you been involved in in which you assisted victims or their families on crimes?

A: Thousands.

Q: And how would you describe this event in your career?

A: This was the hardest, hardest case I have ever had to work on. I have never had to do death notification before or

since, and this is definitely the hardest case I have. It affected me the most deeply, and still does.

App. 1324, ll.1-12.

Victim impact evidence is admissible only for the limited purposes of showing a “glimpse of the life” of the victim in order for the jury to see the victim as a “unique human being,” or a brief discussion of the “specific harm” to the victim's family. *Payne v. Tennessee*, 501 U.S. 808, 824, 825 (1991); *id.* at 831 (O'Connor, J., concurring); *State v. Rocheville*, 310 S.C. 20, 425 S.E.2d 32 (1993).¹⁷ Specifically, the United States Supreme Court stated in *Payne* that the jury may be presented with evidence in the sentencing phase “of the *specific harm* caused by the defendant” and evidence “about the victim and about the impact of the murder on the victim's family.” 501 U.S. at 825 (emphasis added); *accord Rocheville*, 310 S.C. at 27, 425 S.E.2d at 36 (finding permissible victim impact testimony showing the *specific harm* committed by defendant).

Similarly, when this Court has approved victim impact statements it has emphasized their limited nature and how they were confined to brief comments by or regarding the family of the victims. *See Riddle v. State*, 314 S.C. 1, 11-12, 443 S.E.2d 557, 564 (1994) (noting similarity to the limited victim impact statements in *Rocheville*), *superseded on other grounds by rule as stated in State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1998); *Lucas v. Evatt*, 308 S.C. 31, 33-34, 416 S.E.2d 646, 647-48 (1992) (approving solicitor's comments describing the immediate impact of crime on victim's family); *State v. Johnson*, 306 S.C.119, 410 S.E.2d 547 (1991) (approving a solicitor's brief comment about the victim's family made in response to statement

¹⁷*See also Payne*, 501 U.S. at 839 (Souter, J., concurring) (victim impact statements should be limited to the consequences of the defendant's acts that were “obviously foreseeable”); *accord State v. Bernard*, 608 So.2d 966 (La. 1992).

made by defendant's sister). Both *Payne* and decisions of the South Carolina Supreme Court acknowledge that victim impact evidence may deprive a defendant of due process under the Fourteenth Amendment. *Payne*, 501 U.S. at 825; *Riddle*, 314 S.C. at 11-12, 443 S.E.2d at 563; *Rocheville*, 310 S.C. at 27, 425 S.E.2d at 36; *Lucas*, 308 S.C. at 33, 416 S.E.2d at 647.

The Eighth Amendment requires that a defendant be treated as a "uniquely individual human being," *Woodson*, 428 U.S. at 304, and that the sentencing determination must be based on a consideration of the circumstances of the crime and the characteristics of the defendant. For this reason, *Payne* does not sanction the unlimited use of victim impact statements. Instead, it emphasizes the duty of state courts to avoid the risk that victim worth becomes "unduly prejudicial" so as to render the trial fundamentally unfair. *Payne*, 501 U.S. at 830 n.2 (limiting the holding to evidence other than "victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence"); *id.* at 833 (O'Connor, J., concurring); *id.* at 836 (Souter, J., concurring) ("Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation."); *accord Lucas*, 308 S.C. at 33, 416 S.E.2d at 647.¹⁸

Instead of focusing on the limited and permissible areas of inquiry for victim impact evidence, Christy's testimony relayed the impact that Ms. Graves' death had on *her own life and career*. However, Christy is not a member of the victim's family; rather, she is an officer of the state who has been employed in criminal casework for the past fifteen years. Christy did not

¹⁸ See also, *Kelly v. California*, 129 S.Ct. 564, 566 (2008) (stating that courts should restrict the use of victim impact evidence because it "puts a heavy thumb on the prosecutor's side of the scale in death cases") (Stevens, J., issuing statement respecting the denial of petitions for writs of certiorari).

know the victim personally at all; and she was therefore not within the narrow class of witnesses *Payne* permits to provide a quick glimpse of the victim's life. *See Payne*, 501 U.S. at 827 (holding testimony about the effect of the victim's death on her son was relevant); *State v. Johnson*, 306 S.C. 119, 132, 410 S.E.2d 547, 555 (1991) ("the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed" (quoting *Payne*, 501 U.S. at 827)); *Riddle*, 314 S.C. at 11-12, 443 S.E.2d at 564 (holding testimony from the victim's stepdaughter about the effect of the victim's death had on her and the victim's grandchildren was relevant). Her testimony on this topic was irrelevant.

Christy's testimony also exceeded the boundaries of relevant victim impact testimony because she provided an opinion, based on non-record evidence, that petitioner's case was comparably worse than the others she had handled during her career. *See Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566-67 (2010) (holding in the sentencing phase of a capital trial, it is improper for counsel to argue to the jury regarding anything that is not either evidence in the record, or a reasonable inference from the record). Christy testified that she has worked on "thousands" of cases, but that "[t]his was the hardest, hardest case I have ever had to work on. I have never had to death notification before or since." App. 1324, 11.1-12. The thousands of other cases Christy had handled were not relevant to the jury's individualized sentencing determination in petitioner's case, nor were they facts in evidence. Accordingly, this testimony was outside the scope of permissible victim impact evidence under *Payne*. Moreover, Ms. Christy's testimony was improper because it was more prejudicial than probative. *See, e.g., United States v. Glover*, 43 F. Supp. 2d 1217, 1235-36 (D. Kan. 1999) (holding that the prejudicial effect of victim impact evidence must be weighed against its probative value before it is admitted); *Cargle v. State*, 909 P.2d 806 (Okla. Crim. App.1996) (reversing a death sentence

because the victim impact statement was inflammatory and focused on irrelevant topics), *superseded on other grounds by statute as recognized in Coddington v. State*, 142 P.3d 437 (Okla. Crim. App. 2006); *State v. Muhammad*, 145 N.J. 23, 47 (1996) (holding “statements that are grossly inflammatory, unduly prejudicial, or extremely likely to divert the jury from its focus on the aggravating and mitigating factors should be excluded”).

This Court has also recognized that some victim impact evidence may be so prejudicial that it renders a trial fundamentally unfair. In *Hall v. Catoe*, 360 S.C. 353, 362, 364, 601 S.E.2d 335, 340 (2004), the court reversed a death sentence where the prosecutor’s closing argument impermissibly compared the worth of the victim’s life to the worth of the defendant’s life. The court objected to the comments made in *Hall* by explicitly stating that this type of comparison testimony is distinguishable from traditional impact evidence in that it was not actually offered to show the impact of the crime on the victim or the victim’s family. *Id.* at 364, 601 S.E.2d at 341. Therefore, *Hall* suggests that under South Carolina law, the court’s suspicion that victim impact testimony is unduly prejudicial is heightened when that testimony does not relate to a *Payne*-sanctioned topic for victim impact testimony, such as the uniqueness of the victim or the nature of the harm. Ms. Christy’s testimony was especially prejudicial because of the position she holds at the sheriff’s office. Furthermore, the Solicitor added to the prejudicial effect of her statements by commenting on them in closing argument and adding his own improper statements giving his view that petitioner’s case was particularly rare, and expressing his personal opinion that the appropriate sentence was death. App. 1607, 11.9-25.

Trial counsel’s failure to object to Ms. Christy’s testimony was deficient performance. Counsel had no strategic reason not to object. Rather, they mistakenly believed that the testimony was permissible. App. 1988, 1.1 – 1989, 1.3; 2041, 11.6-16. Their deficient

performance prejudiced petitioner because it allowed yet another piece of impermissible evidence to be added to the aggravating side of the scale, and wrongly tipped the balance in favor of death. If not for trial counsel's unprofessional errors, there is a reasonable probability that at least one juror would have struck a different balance and returned a different sentence. *See Porter*, 558 U.S. at 42 (citing *Wiggins*, 539 U.S. at 537).

2. THE PCR COURT ERRED IN DENYING THIS CLAIM.

The PCR Court concluded that trial counsel was not deficient in failing to object because Ms. Christy's testimony "was admissible in its entirety." App. 3582. However, the PCR Court never specifically addressed petitioner's argument that it was improper for Christy to testify about the impact that the victim's death had on her own life and career. The court did not explain – or even address – how this testimony was relevant or admissible victim impact evidence. Further, the PCR Court concluded that petitioner suffered no prejudice because Ms. Christy's testimony was "cumulative of other testimony already in evidence." App. 3584. Once again, there is no probative evidence to support the PCR Court's conclusion. The record is clear that the only other victim impact witness was Ms. Mary Hall, the victim's co-worker, who did not testify to any of the objectionable items that Ms. Christy recounted.

III. WHETHER PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS AND S.C. CODE ANN. § 16-3-25(C)(1) WERE VIOLATED AS A RESULT OF THE PROSECUTION'S IMPROPER CLOSING ARGUMENT AND IMPROPER STATEMENTS DURING JURY SELECTION, AND WHETHER PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED AS A RESULT OF TRIAL COUNSEL'S FAILURE TO OBJECT TO THE SAME?

In his closing argument, Solicitor Ariail made a series of impermissible statements, which can be roughly divided into four separate categories of impropriety: (1) Ariail emphasized his own decision to seek death against petitioner and expressed his personal opinion about what the jury's decision should be; (2) he argued that prison life is "easy" and that a life sentence is an

inadequate punishment for murder; (3) he misstated the law by arguing that petitioner was required to prove he deserved a life sentence and that jurors should not consider petitioner's mitigating evidence; and (4) he argued that the jurors were required to return a death sentence for the greater good of the community and the State as a whole. These lines of argument violated petitioner's rights under the Eighth and Fourteenth Amendments, and injected an arbitrary factor into the proceedings in violation of S.C. Code Ann. § 16-3-25(C)(1). Trial counsel did not object to any of these improper arguments.

A. RELEVANT LEGAL PRINCIPLES

The Eighth Amendment is violated when the decision to impose the death penalty is made in an arbitrary manner, or under the influence of a “whim, passion, prejudice, or mistake.” *Caldwell v. Mississippi*, 472 U.S. 320, 329 n.2 (1985) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring)). S.C. Code Ann. § 16-3-25(C)(1) similarly prohibits a death sentence from being imposed under the influence of passion and prejudice. *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007); *Burkhart*, 371 S.C. at 640 S.E.2d 450. This Court has repeatedly held that “evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime.” *Burkhart*, 371 S.C. at 488, 640 S.E.2d at 453; *see also State v. Bowman*, 366 S.C. 485, 498-499, 623 S.E.2d 378, 385 (2005), *abrogated on other grounds by State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006). Accordingly, evidence regarding general prison conditions “is not relevant to the question of whether a defendant should be sentenced to death or life imprisonment.” *Burkhart*, 371 S.C. at 488, 640 S.E.2d at 453 (describing the Court's holding in *Bowman*). Moreover, it is improper for a solicitor to inject his personal opinion regarding the jury's sentencing decision. *Northcutt*, 372 S.C. at 223, 641 S.E.2d at 881 (reversing a death sentence where the solicitor “ignored our

precedent which rebukes such an imposition of the solicitor's personal belief"); *Thompson v. Aiken*, 281 S.C. 239, 315 S.E.2d 110 (1984) (finding prejudicial error where solicitor's argument put his personal opinion before the jury regarding the death penalty); *State v. Smart*, 278 S.C. 515, 299 S.E.2d 686 (1982) (reversing a death sentence because the solicitor stated he expected the death penalty), *overruled on other grounds by Torrence*, 305 S.C. 45, 506 S.E.2d 315.

Violations of the Fourteenth Amendment occur when improper prosecutorial closing arguments "so infect[] the trial with unfairness as to make the resulting [sentence] a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *see also Romano v. Oklahoma*, 512 U.S. 1, 12 (1994); *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). To determine whether a solicitor's remarks so infected a proceeding with unfairness as to make the jury's verdict a violation of due process, "examination of the entire proceedings" is necessary. *Donnelly*, 416 U.S. at 643; *see also Darden*, 477 U.S. at 179 (remarks must be placed "in context"). The United States Supreme Court has made clear that within the universe of improper arguments, some are more likely to infect a proceeding with unfairness than others. One focus of concern is whether "the prosecutor's remarks so prejudiced a specific right . . . as to amount to a denial of that right." *Donnelly*, 416 U.S. at 643. In a parallel vein, the Court has warned against prosecutorial misconduct that "implicate[s] other specific [constitutional] rights of the accused." *Darden*, 477 U.S. at 182; *see also Donnelly*, 416 U.S. at 643 (noting that when specific guarantees are involved, the Court "has taken special care to assure that the prosecutorial conduct in no way impermissibly infringes on them").

In addition, frequency and repetition of comments are relevant considerations. Jurors are less likely to be improperly influenced by "isolated passages" than by repeated remarks or themes. *Donnelly*, 416 U.S. at 646. The length of remarks is relevant for the same reason. *Id.* at

647 (noting that impropriety, if any, was limited to “a few brief sentences”). Thus, remarks that are both extended and repeated are especially likely to produce fundamental unfairness.

Finally, whether the jury is “affirmatively misled” is also of importance. *See Romano*, 512 U.S. at 9. A jury may be misled “regarding its role in the sentencing process,” *id.*, or it may be misled when the solicitor “manipulate[s] or misstate[s] the evidence.” *Darden*, 477 U.S. at 182.

B. THE SOLICITOR’S ARGUMENTS VIOLATED PETITIONER’S STATE AND FEDERAL CONSTITUTIONAL RIGHTS AND S.C. CODE ANN. § 16-3-25(C)(1), AND TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT.

Solicitor Ariail’s arguments were riddled with improprieties that offend an array of interests protected by the Eighth and Fourteenth Amendments and S.C. Code Ann. § 16-3-25(c)(1). First, in keeping with the theme he started during individual *voir dire*,¹⁹ Ariail told the jury that the State is only allowed to seek death in limited circumstances, and further, the State rarely seeks the death penalty even within that limited pool of cases.²⁰ Ariail emphasized his position as the person who decides whether to seek death and made assertions in that capacity which suggested that the jurors should defer to his expertise in evaluating the gravity of petitioner’s crime relative to other murders.²¹ Ariail expressed his personal view that a death

¹⁹ Ariail repeatedly told potential jurors that “the State of South Carolina, represented by the solicitor, is not allowed to seek the death penalty, except in certain limited circumstances,” which are a “very, very, very small group of cases.” App. 605, ll.13-15; 582, ll.2-3; *see also*, *e.g.*, App. 357, ll.12-14; 489, ll.20-22; 581, l.24 – 582, l.1; 635 ll.18-24.

²⁰ He stated: “Only limited circumstances are allowed for us to seek the death penalty, and rarely do we seek the death penalty in all those cases that are eligible. In only certain cases do we choose to seek the death penalty. This is a legal process. It is a process – it is a function of government.” App. 1604, ll.6-9.

²¹ App. 1605, ll.4-6 (“It’s a tough decision for me to ask you to do it when we seek the death penalty, but responsible people make responsible decisions all the time.”).

sentence was the only appropriate punishment.²² And, he called on the previous testimony of Officer Joe Wood, Ms. Juliana Christy, and Major Thierry Nettles as further support for his own position that petitioner's place among "the worst of the worst" had already been determined by officials possessing knowledge and judgment ostensibly superior to the jurors' own.²³

These arguments undermined the concept of discretion afforded to a jury as required by the Eighth Amendment. *See Zant v. Stephens*, 462 U.S. 862, 879 (1983). They are inconsistent with the Court's mandate in *Caldwell* that the jury cannot be "led to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere." 472 U.S. at 328-29. By comparing the difficulty of the decision he had to make in seeking the death penalty to the difficulty of the decision the jury had to make, the solicitor impermissibly "attempted to minimize the jurors' own sense of responsibility for [petitioner's] fate." *State v. Woomey*, 277 S.C. 170, 175 (1981). Moreover, the solicitor's arguments violated this Court's well-established precedent that a solicitor may not inject his personal opinion into the jury's decision-making process. *Northcutt*, 372 S.C. at 223, 641 S.E.2d at 881; *Thompson*, 281 S.C. 239, 315 S.E.2d 110; *Smart*, 278 S.C. 515, 299 S.E.2d 686.

²² App. 1607, ll.9-25 ("They have said earlier that the solicitor is not satisfied with a life sentence, and I am not, and that's why we have asked for the death penalty. They told you that I was going to want the death penalty, and I do. Why is the death penalty the appropriate punishment? That's a fair question for you to ask, and that's a fair one for me to answer. And the answer is very simple. There are mean and evil people in this world who do not deserve to continue to live with the rest of us, regardless of how confined they may be. The law limits the right to seek the death penalty to a very select number of cases, very few, and we seek the death penalty in only a few, but the circumstances where we seek it is available for mean and evil people who commit atrocious acts of murder; the worst of the worst. That's what the death penalty is reserved for.").

²³ App. 1611, ll.13-17 ("his disrespect is so apparent that it put chills on the neck of Joe Wood, who said he had been a detective for over 25 years, and he was only one of two people, Freddie Owens, who put chills on his neck").

Second, Solicitor Ariail misled the jury into believing that a lifetime in prison would amount to a comfortable, easy life that would be “not much more than a change of address for Freddie Owens.” App. 1613, 1.13.²⁴ Ariail also repeatedly argued that life without parole was not a “serious” or “significant” sentence.²⁵ These arguments violated petitioner’s rights in several respects. First, they violated the Eighth Amendment right to be free from arbitrary sentencing by expanding the scope of the jury’s sentencing decision to include factors unrelated to “any arguably valid sentencing consideration.” *Caldwell*, 472 U.S. at 336; *see also Burkhart*, 371 S.C. at 488, 640 S.E.2d at 453; *Bowman*, 366 S.C. at 498-499, 623 S.E.2d at 385; *State v. Plath*, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984). Second, because prison conditions are beyond petitioner’s control, the solicitor’s argument heightened the risk of arbitrariness by encouraging the jury to act out of dissatisfaction with South Carolina’s penological policies. *See State v. Atkinson*, 253 S.C. 531, 534-35, 172 S.E.2d 111, 112 (1970), *overruled on other grounds by Torrence*, 305 S.C. 45, 406 S.E.2d 315. Third, the Solicitor’s contention violated due process by creating the risk that petitioner’s “death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.” *Gardner*, 430 U.S. at 362; *see*

²⁴ “Big prison is like a little city. In prison he will have all the necessities of life. Sure, he will be in solitary, but he will have food to eat. They will provide him with clothes. He will have books to read. He will be able to recreate and exercise. He will have doctors to take care of him. He will have the clothing that they provide, and he will have contact with his family and loved ones, and TV at times, and he will have family business. Not much more than a change of address for Freddie Owens. So don’t think putting Freddie Owens in prison for the rest of his life is going to be a significant punishment for him. The death penalty is the appropriate punishment.” App. 1613, 11.5-16.

²⁵ Ariail stated: “Sure you and I may think going to prison would be a serious thing, and it would be, but what about Freddie Owens? . . . [D]on’t think putting Freddie Owens in prison for the rest of his life is going to be a significant punishment for him. App. 1613, 11.14-15. Ariail also stated that life without parole would be “a minimal sentence” and asked, “[d]oes this case deserve the minimum penalty?” App. 1607, 1.7; 1609, 11.7-8.

also *State v. Woomer*, 278 S.C. 468, 473, 299 S.E.2d 317, 320 (1982). Finally, the Solicitor's denigration of life in prison as punishment violated due process by suggesting that anything less than death would allow petitioner to escape punishment. See *Beck v. Alabama*, 447 U.S. 625, 638 (1980).

Moreover, Ariail misstated the law by arguing that it was petitioner's burden to prove that he deserved a life sentence instead of the death penalty,²⁶ and he argued that the jury should not give meaningful consideration to petitioner's mitigation evidence.²⁷ These arguments "affirmatively misled" the jury "regarding its role in the sentencing process." *Romano*, 512 U.S. at 10. They also prejudiced petitioner's constitutional right to present mitigating evidence for the jury's meaningful consideration. *Eddings*, 455 U.S. 104.

Finally, Ariail urged the jury to impose a death sentence for the greater good of the community and the State as a whole by telling them that they would "speak for this community" and that their decision would "ring like a bell outside of this courthouse; it will ring like a bell to be heard by all." App. 1614, ll.19-23. Ariail concluded, "I urge you on behalf of the State of South Carolina and this community to let that bell ring, to let people know that people who commit murders of this atrocity and have conduct of this type is something that we will not tolerate without the maximum punishment." App. 1614, l.24 – 1615, l.3. These arguments cannot be reconciled with the Supreme Court's capital punishment jurisprudence recognizing that the jury's role at the sentencing phase is to make an "individualized assessment of the appropriateness of the death penalty." *California v. Brown*, 479 U.S. 538, 545 (1987)

²⁶ "If they ask for mercy, ask them to show you one shred of evidence for any reason why he deserves mercy more than he deserves justice." App. 1606, ll.20-22.

²⁷ "He wrecked all of these people's lives and he can't just argue that he had a bad upbringing, or his parents didn't treat him right, or that he should have had a better chance in life and get a minimal sentence." App. 1607, ll.4-7.

(O'Connor, J., concurring); *see also Penry v. Lynaugh*, 492 U.S. 302, 304 (1989) ("punishment should be directly related to the personal culpability of the defendant"), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *Eddings*, 455 U.S. at 105; *Lockett*, 438 U.S. at 606. Ariail's urgings for a death sentence "on behalf the State of South Carolina" also violate the Court's mandate that the jury's sense of responsibility – to make an individualized sentencing determination regarding a particular criminal defendant – may not be diminished by arguments that suggest "the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 472 U.S. at 328-29.

These numerous improper arguments violated petitioner's rights under the Eighth and Fourteenth Amendments and S.C. Code Ann. § 16-3-25(C)(1). Trial counsel's failure to object to these arguments was objectively unreasonable. *Strickland*, 466 U.S. at 694. They had no strategic reason for their failure to object. App. 1992, 1.20 – 1993, 1.25; 2044, 1.20 – 2045, 1.9. Whether considered alone or in combination with their other errors and omissions, trial counsel's failure to object to closing arguments calculated to distort the questions before the jury undermines confidence in the outcome of petitioner's trial. *Strickland*, 466 U.S. at 688.

C. THE PCR COURT ERRED IN DENYING THIS CLAIM.

Once again, the PCR Court refused to consider the cumulative impact of constitutional error and instead erroneously addressed each of the Solicitor's comments in turn. App. 3593-96. Similarly, the PCR Court misapplied *Strickland* by again misstating the proper prejudice test while simultaneously conflating the deficient performance and prejudice prongs. App. 3593 ("[petitioner] is unable to prove deficient performance because the Solicitor's comments during closing argument, even if improper, are not sufficient to have [petitioner's] death sentence overturned on appeal."). Moreover, the PCR Court again failed to address petitioner's argument

that the Solicitor's improper statements in closing argument violated S.C. Code Ann. § 16-3-25(C)(1).

Finally, the PCR Court relied on this Court's decision in *Williams v. Ozmint*, 380 S.C. 473, 671 S.E.2d 600 (2008), in support of the PCR Court's conclusion that "[a] solicitor does not commit reversible error when stating that he is asking for the death penalty, seeking the death penalty, or even expecting the death penalty." App. 3595. This conclusion, however, turns on a misapplication of *Williams*. After exhausting his all direct appeals and post-conviction remedies, Williams sought a writ of state habeas corpus – a form of relief "seldom used" and "reserved for the very gravest of constitutional violations." *Williams*, 380 S.C. at 477, 671 S.E.2d at 602. As a result, Williams bore "a much higher burden" than petitioner bears here. It was "against this backdrop" that this Court decided *Williams*. *Id.* at 478, 671 S.E.2d at 602. The Court held that the totality of the solicitor's comments, given the facts and circumstances of Williams' case, did not amount to a constitutional violation so "shocking to the universal sense of justice" as to warrant state habeas relief. *Id.* at 479, 671 S.E.2d at 603. By contrast, this Court found that the solicitor's comments in *Northcutt* "imposed the solicitor's personal beliefs upon the jury" and "infused the sentencing proceeding with 'passion and prejudice' in violation of S.C. Code § 16-3-25(c)(1)." *Id.* at 478, 671 S.E.2d at 602.

IV. WHETHER PETITIONER WAS PREJUDICED AS A RESULT OF THE CUMULATIVE EFFECT OF TRIAL COUNSEL'S MULTIPLE DEFICIENT ACTS AND OMISSIONS?

Both the United States Supreme Court and this Court have unequivocally held that it is the *cumulative* impact of constitutional error which must be considered when determining whether a prisoner has established prejudice, not merely whether each individual error, viewed in isolation, is sufficient to warrant relief. *See, e.g., Sears*, 130 S. Ct. at 3266 (a court applying the *Strickland* standard must "consider the totality of the available mitigating evidence – both that

adduced at trial, and the evidence adduced in the habeas proceeding – and reweigh[h] it against the evidence in aggravation.” (citing *Porter*, 558 U.S. at 41 (emphasis added)); *Williams*, 529 U.S. at 397 (in assessing prejudice flowing from deficient performance, reviewing court must consider “the totality of the mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceedings. . .”); *Strickland*, 466 U.S. at 695 (“In making this [prejudice] determination, a court hearing an ineffectiveness claim must consider the *totality* of the evidence before the judge or jury”) (emphasis added) ; *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (citations omitted) (“cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial”), *abrogated on other ground by In re Robert R.*, 340 S.C. 242, 531 S.E.2d 301 (2001).²⁸ That is, when determining whether its confidence in the outcome of petitioner’s 2006 sentencing trial is undermined, this Court must consider the simultaneous, cumulative impact of

²⁸See also, e.g., *Gersten v. Senkowski*, 426 F.3d 588, 611 (2d Cir. 2005) (“In evaluating prejudice, we look to the cumulative effect of all of counsel’s unprofessional errors.”); *Lindstadt v. Keane*, 239 F.3d 191 (2nd Cir. 2001) (habeas relief granted in non-capital case where petitioner was prejudiced by the “cumulative effect of four errors” committed by trial counsel); *Combs v. Coyle*, 205 F.3d 269 (6th Cir. 2000) (noting, in the course of granting relief, cumulative prejudice resulting from counsel’s numerous errors at petitioner’s capital trial); *Washington v. Smith*, 219 F.3d 620 (7th Cir. 2000) (affirming grant of habeas relief where cumulative prejudice resulting from trial counsel’s deficient performance denied petitioner a fair trial); *Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432 (9th Cir. 1995) (habeas corpus relief granted in capital case due to cumulative impact of trial counsel’s errors); *Jackson v. Conway*, 765 F. Supp. 2d 192, 266 (W.D.N.Y. 2011) (“When assessing the amount of prejudice that accrued to the petitioner, courts ‘look to the cumulative effect of all of counsel’s unprofessional errors.’”). Cf. *Cargle v. Mullin*, 317 F.3d 1196, 1212 (10th Cir. 2003) (“We conclude that prejudice may be cumulated among different kinds of constitutional error, such as ineffective assistance of counsel and prosecutorial misconduct. We further conclude that prejudice may be cumulated among such claims when those claims have been rejected individually for failure to satisfy a prejudice component incorporated in the substantive standard governing their constitutional assessment.”).

trial counsel's failure to adequately challenge the prosecution's case for death, as well as counsel's failure to affirmatively make their own case for life.

Petitioner had a rich, detailed and compelling mitigation story to tell. The mitigating evidence that was available to trial counsel, and that could have been presented on petitioner's behalf, bears no relation to the limited, generalized case that trial counsel actually put before the jury. *See Rompilla*, 545 U.S. at 393. "It goes without saying that the undiscovered [and un-presented] mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [petitioner's] culpability." *Id.* (citing *Wiggins*, 539 U.S. at 538). Moreover, trial counsel unreasonably failed to object to a myriad of evidence that was improperly offered in aggravation. The Solicitor seized on these circumstances by giving a closing argument riddled with improper and prejudicial statements that so infected the trial with unfairness as to make the resulting sentence a denial of due process. *Donnelly*, 416 U.S. at 643. To make matters worse, trial counsel unreasonably failed to object to these comments as well. If, instead: (a) the jury had been able to place petitioner's life history on the mitigating side of the scale; (b) trial counsel had appropriately reduced the ballast on the aggravating side of the scale; and (c) the Solicitor's improper and prejudicial arguments had been excluded, there is clearly a reasonable probability that the outcome of petitioner's trial could have been different.

CONCLUSION

For all of the reasons discussed above, petitioner is entitled to relief on his Second Amended Application for Post-Conviction Relief. This Court should grant the writ of *certiorari* and, ultimately, grant him a new sentencing proceeding.

Respectfully submitted,

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November 6, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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Edward W. Miller, Circuit Court Judge

S.C. Supreme Court

CA No. 09-CP-23-0741

FREDDIE EUGENE OWENS. *Petitioner,*

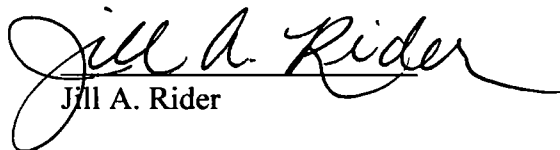
v.

STATE OF SOUTH CAROLINA *Respondent.*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Applicant's Petition for Writ of Certiorari and Appendix was served by first class United States mail, postage prepaid, this 6th day of November, 2013, upon the following:

J. Anthony Mabry
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Jill A. Rider