

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

NOV - 6 2013

APPEAL FROM GREENVILLE COUNTY **S.C. Supreme Court**
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 09-CP-23-0741

FREDDIE EUGENE OWENS Petitioner,

v.

STATE OF SOUTH CAROLINA Respondent.

APPENDIX
VOLUME VIII OF VIII

EMILY C. PAAVOLA

Death Penalty Resource & Defense Center
900 Elmwood Ave., Suite 101
Columbia, SC 29201
(803)765-1044

KEIR M. WEYBLE

Cornell Law School
112 Myron Taylor Hall
Ithaca, New York 14853
(607)255-1030

Counsel for Petitioner

J. ANTHONY MABRY

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-4037

Counsel for Respondent

INDEX

INDEX	i
RECORD ON APPEAL	1
FINAL BRIEF OF APPELLANT	1685
BRIEF OF RESPONDENT	1716
SOUTH CAROLINA SUPREME COURT OPINION	1780
PETITION FOR REHEARING	1785
ORDER DENYING PETITION FOR REHEARING	1787
PETITION FOR WRIT OF CERTIORARI	1788
BRIEF IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI	1812
LETTER FROM THE COURT DENYING PETITION FOR WRIT OF CERTIORARI ...	1863
APPLICATION FOR POST CONVICTION RELIEF	1864
FIRST AMENDED APPLICATION FOR POST CONVICTION RELIEF	1869
SECOND AMENDED APPLICATION FOR POST CONVICTION RELIEF	1876
RESPONDENT'S RETURN AND MOTION TO DISMISS	1884
POST CONVICTION RELIEF HEARING TRANSCRIPT	1946
POST CONVICTION RELIEF HEARING EXHIBITS	2313
APPLICANT'S POST TRIAL BRIEF	3205
RESPONDENT'S POST TRIAL BRIEF	3299
REPLY TO RESPONDENT'S POST TRIAL BRIEF	3531
MEMORANDUM REGARDING RESPONDENT'S REVISED PROPOSED ORDER ...	3562
ORDER OF DISMISSAL	3566

MOTION TO ALTER OR AMEND JUDGMENT	3598
ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT	3607

At Owens' 3rd sentencing proceeding, Ms. Hammock testified Owens' biological father abandoned Owens. (R. p. 1464). Ms. Hammock testified Owens had very little contact with his biological father growing up. (R. p. 1465).

Ms. Hammock testified that Owens was born to a mother who was only eighteen (18) years old at the time of his birth. (R. p. 1459). Ms. Hammock also testified when Owens was born, his eighteen (18) year old mother already had one (1) child, which necessarily means Owens' mother's first child was born when she was at most seventeen (17) years old, possibly younger. (R. p. 1459). Ms. Hammock testified that when Owens was born his mother had very limited resources and had difficulty caring for Owens and the older child because of those limited resources. (R. p. 1459).

At Owens' 3rd sentencing proceeding, Ms. Hammock testified before the jury that Owens grew up in a violent neighborhood. (R. p. 1459). Ms. Hammock testified Owens was exposed to violence both in his home and in his neighborhood. (R. p. 1459). The jury was aware through Ms. Hammock's testimony Owens witnessed family members who were engaged in using violence to settle problems. (R. p. 1461). Ms. Hammock testified Owens suffered abuse and neglect at home. (R. p. 1459). Doctor Schwartz-Watts also testified Owens suffered a lot of physical abuse as a child, and she was able to confirm many of those instances. (R. p. 1518). Doctor Schwartz-Watts also testified Owens witnessed physical abuse as a child. (R. p. 1518). Doctor Schwartz-Watts testified Owens witnessed his step-father take a machete to his mother and chase her through the home. (R. p. 1519).

Ms. Hammock testified Owens' father was a very violent or extremely violent man. (R. p. 1459, 1465). Ms. Hammock also testified Owens' step-father was a very violent man. (R. p. 1459). Owens' school teacher also testified Owens lived in a violent neighborhood, and he was chased and

picked on by violent boys in the neighborhood. She also testified when Owens was frightened, his step-father would lock Owens out of the house, and make him fight. (R. p. 1469-1470). Ms Hammock testified Owens' biological father and step-father abused his mother. (R. p. 1459, 1464). Dr. Schwartz-Watts also testified Owens' mother was physically abused, though not while pregnant with Owens. (R. p. 1517). Doctor Schwartz-Watts testified Owens would remain home from school in an attempt to protect his mother from his step-father, and Owens' school attendance fell off as a result of the abuse of his mother by the step-father, and Owens would stay home for days out of fear or in an attempt to protect his mother. (R. p. 1519). Ms. Hammock testified Owens' step-father forced Owens to learn to fight and to resolve disputes with violence. (R. p. 1460). The jury knew Owens' step-father taught him to be "violent and vigilant at all times" to protect himself. (R. p. 1464). Doctor Schwartz-Watts also testified Owens witnessed "a lot of physical abuse as a child." (R. p. 1518).

Ms. Hammock also testified there was a considerable amount of incarceration of Owens' family which included his brothers and his uncle. (R. p. 1461). The jury was also aware that at the time of Owens 3rd sentencing proceeding, two (2) of Owens' brothers were incarcerated. (R. p. 1463). The jury was also aware through Ms. Hammock's testimony that Owens' grandmother had been incarcerated for assault. (R. p. 1463). The jury was aware Owens' grandmother was incarcerated for shooting someone. (R. p. 1465). The jury was aware that Owens was present, as a small child, and witnessed his grandmother shoot this person. (R. p. 1518). The jury was aware Owens was very close to his grandmother, and he lost her companionship because of her incarceration. (R. p. 1465). Ms. Hammock also testified Owens' biological father had been incarcerated. (R. p. 1464). The jury also knew there was considerable strife and violence in Owens' maternal grandmother's family. (R. p.

1463). Doctor Cobb also testified most, if not all, of Owens' family was incarcerated. (R. p. 1495). Ms. Hammock testified there were a total of five (5) members of Owens' family who had been incarcerated. (R. p. 1464).⁵⁵

The jury was also aware through Ms. Hammock's testimony that Owens' other brother, Lorenzo, was mentally disabled. (R. p. 1463). The jury was also aware that Owens' uncle David is a disabled person and lives with Owens' mother and lived with her when Owens was born. (R. p. 1463). Owens school teacher also testified that Owens home was crowded, and he shared his family home with a lot of people. (R. p. 1469).

The jury was aware through Ms. Hammock's testimony that because of abuse and neglect when Owens was approximately four (4) years old he and his siblings were removed from the home and placed in foster care. (R. p. 1459, 1464). As a result of being removed from his home at such a young age, Owens experienced separation and foster care. (R., p. 1461). The jury new that some of that neglect continued because of the family's marginal existence even after Owens was returned to his mother's home. (R. p. 1459). The jury was aware Owens and his family had to move several times, and as a result, Owens was always considered an outsider and having to prove himself and defend himself in a new neighborhood or school. (R. p. 1496).

The jury was also aware that Owens' family had a very marginal financial and economic existence throughout Owens' life as a young child. (R. p. 1461, 1465). One of Owens' school

⁵⁵In his post-trial brief, Owens cites two incidents that occurred in Greenville that led to his whole family being arrested. These incidents are noted in Ms. Glass file; however, Owens did not witness either of these events. He was incarcerated outside Greenville County at the time this occurred. His mother was arrested on some fraudulent checks, and his siblings were arrested for interfering with the arrest of their mother.

teachers also testified that Owens' home life was sparse, and there were times there was no food in the home. (R. p. 1469). She testified she was not aware if Owens ever got anything for Christmas, and she and others would take him a turkey at Christmas or provide him with a coat or other clothing when needed. (R. p. 1471). The jury was aware Owens' family had limited resources and skills that would enable them to provide for Owens or his brothers and sister with a healthy, stable existence. (R. p. 1465). The jury was also aware that Owens' family perceived themselves as being on the outside of society because they didn't have the kind of resources that they needed to have. (R. p. 1465). Doctor Schwartz-Watts also testified to Owens' major depression while at DJJ as a result of his family's financial situation. (R. pp. 1513-1514, 1520-1524).

The jury was also aware through Ms. Hammock's testimony that drug use and alcohol use ran throughout Owens' family. (R. p. 1464). Dr. Schwartz-Watts also testified records indicated Owens used marijuana and alcohol during his teenage years. (R. p. 1523). Schwartz-Watts testified Owens may have also experimented with cocaine, although he denied it to her. (R. p. 1523).

Ms. Hammock also testified to Owens' difficulties in school. (R. pp. 1455-56, 1460). Hammock testified to Owens' fairly significant learning disabilities that were made even worse by the limitations in the home which could not support him and his educational deficits. (R. p. 1460). Owens' teacher, Ms. Maag, also testified to Owens' learning disabilities. (R. p. 1469). She testified Owens had tremendous trouble trying to read and his social skills were lacking. (R. p. 1469). Ms. Maag also testified Owens was picked on in school because of his small size. (R. p. 1469). Ms. Maag testified Owens received help from a resource teacher to improve his reading skills. (R. p. 1470). Ms. Maag testified Owens went to resource classes one (1) hour a day during the school year she taught him. (R. p. 1470). Ms. Maag testified that Owens tried very hard in school, but he did not

have the skills that he needed to do what was expected of him. (R. p. 1472). Ms. Maag testified the only time Owens' name was called out for doing anything special in school was for his athletic ability, and that was because he had learned to run so well escaping from being picked on by other boys at school and at home. (R. pp. 1471-72). Doctor Brawley also testified to Owens' diagnosis of a learning disability and various other problems in the classroom. (R. pp. 1481). Doctor Brawley testified Owens had a documented learning disability and poor attention. (R. p. 1481). Dr. Brawley also testified Owens had significant difficulties with attention and focusing according to his school records and an interview with one of his teachers. (R. p. 1482). Doctor Brawley also testified Owens' I.Q. was much lower in school, in the 80s, than it is today. Doctor Schwartz-Watts also testified to Owens hyperactivity as a child and in school and her diagnosis of attention deficit disorder. (R. p. 1517, 1532). Doctor Schwartz-Watts testified when Owens was in the 6th grade he was referred for testing for hyperactivity. (R. p. 1517). Dr. Schwartz-Watts testified this assessment process was stopped, and he never had a complete assessment to see if he needed to be placed on medication to treat the problem. (R. p. 1516-17). Doctor Schwartz-Watts testified Owens' attention deficit disorder goes back to his childhood. (R. p. 1533). Doctor Schwartz-Watts also testified to Owens' truancy from school to protect his mother. (R. p. 1518). Dr. Brawley testified Owens' learning problems were documented in the school records as early as elementary school. (R. p. 1482). Dr. Brawley also testified Owens has a lifelong problem with brain function and may have been suffering from depression even as an elementary school child. (R. pp. 1484-85, 1482-83). Ms. Hammock testified school failure was part of Owens' existence as well as that of his family. (R. p. 1460).

Ms. Maag testified she never had a conference with Owens' mother the entire time she taught

him. (R. p. 1470). Ms. Hammock testified Owens' family had very little formal education and very few of the family members had even completed high school. (R. p. 1464).

Hammock testified Owens' learning difficulties and disabilities compromised Owens' ability to really develop skills and the competence to feel good about himself and succeed in life. (R. p. 1460). Ms Hammock also testified this school failure and lack of skills did not help Owens to regard himself as a competent human being. (R. p. 1460).

Ms. Hammock testified Owens' existence was one of a history of losses, violence, and a great deal of instability. (R. p. 1465). Doctor Cobb also testified that Owens had a very rough childhood. (R. p. 1495, ll. 3-4). Ms. Hammock also testified all of the factors listed above demonstrated that Owens was a young man who did not have the interventions that he needed, and it made it difficult for him to compensate for all of these losses. (R. pp. 1460-61). As a result, Owens developed the kind of coping strategies you find in the histories of children who are typically neglected and abused. (R. p. 1461). Ms. Hammock testified Owens witnessed a lot of violence, and as a result he acted out on that violence and ended up in juvenile and adult criminal activity. (R. p. 1461). Ms. Hammock also testified that in her forty-seven (47) years of experience she found a correlation between this type of family circumstance and a person committing violence. (R. p. 1465, ll. 7-10). Ms. Hammock testified that in both the literature and in her observation, there was a correlation between limited resources, considerable violence and neglect as a child, abuse in the environment, and later criminal behavior. (R. p. 1465, ll. 7-14). The State did not contest Ms. Hammock's testimony.

This Court has before it a copy of Ms. Glass' mitigation file that was in possession of trial counsel and Ms. Hammock. The great majority of the file contains information regarding Owens'

father, step-father, grandmother, and siblings that was related to the 3rd sentencing jury as set forth above. The jury knew Owens family was violent and most of his family had been incarcerated. None of this information was contested by the State. Additionally, information contained within Ms. Glass' file regarding the domestic abuse of Owens's mother was also testified to before the jury by several mitigation witnesses and not contested by the State. Furthermore, information in Ms. Glass' file regarding Owens being taken into foster care at a young age and suffering neglect and abuse was also testified to before the 3rd sentencing phase jury and not contested. The mitigation witnesses also testified to Owens being a victim of abuse, witnessing violent acts, and school failure. Comparing the information in Ms. Glass' file, with the mitigation evidence that was presented, Owens has failed to show deficient performance.⁵⁶

Lack of Prejudice

When determining if want of mitigation evidence resulted in prejudice, the Court must determine whether the "mitigation evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [the defendant's] culpability." Rosemond v. Catoe, quoting Wiggins v. Smith, 539 U.S. at 538, quoting Williams v. Taylor, 529 U.S. at 398; see also Rompilla v. Beard, 545 U.S. at 393. In this regard, the United States Supreme Court held, "the likelihood of a different result if the

⁵⁶Additionally, portions of the Ms. Glass' file do not portray Owens' home in as bad a light as counsel was able to portray it before the sentencing jury. There are several records within the file that indicate Owens' family enjoyed playing cards together or board games. There are records that indicate the family would go to movies together or the park. There are records that indicate Owens' mother was very good to Owens and his brothers and sisters, and the children looked up to her. There are records that indicate the Owens' home was a place where local children or teenagers congregated to play video-games. There are also records in Ms. Glass' file that indicate Owens' mother and even the step-father did not physically discipline the children, but used restrictions and curfews to control teenage behavior, and the Owens' family attended church. (See Drucy Glass' file/Applicant's Exhibits). Introduction of the records themselves would have undercut counsel's presentation of a uniquely bad home environment.

[mitigation] evidence had gone in is 'sufficient to undermine confidence in the outcome' actually reached at sentencing." Rompilla, 545 U.S. at 393, (quoting Strickland, 466 U.S. at 694). Accordingly, if counsel's failure to present mitigation evidence undermines confidence in the outcome, then the applicant suffered prejudice. Rosemond v. Catoe, *supra* (finding counsel's complete failure to present mitigation evidence undermined confidence in the outcome where the jury deliberated over two days before reaching a death sentence).

The mitigation evidence applicant Owens alleges counsel did not present from Ms. Glass' file does not undermine confidence in the outcome of Owens' 3rd penalty phase proceeding. *Id.* In fact, counsel's presentation of mitigation evidence in Owens' 3rd sentencing proceeding was the polar opposite of counsel's actions in cases such as Rosemond v. Catoe, *supra* (failure to present any mental health mitigation), Council v. State, 380 S.C. at 181, 670 S.E.2d at 368 (2008)(failure to present mental health mitigation or social worker), and Gray v. Branker, 529 F.3d at 238 (4th Cir. 2008)(failure to present any mental health mitigation) where the South Carolina Supreme Court and the Fourth Circuit Court of Appeals found counsel's performance was deficient and the applicant was prejudiced.

In the present case, counsel presented the testimony of Owens' forensic social worker Marjorie Hammock again. Ms. Hammock testified to Owens' deprived life, violent upbringing, violent family, and school failure. Counsel also introduced through other witnesses in addition to Ms. Hammock that Owens grew up in a violent neighborhood, witnessed violence, suffered abuse and neglect, and most of his family was incarcerated. The evidence in Ms. Glass' file is largely cumulative to that introduced through the mitigation witnesses. Considering the mitigation evidence, taken as a whole, Owens has not shown that the jury might well have been influenced in the appraisal of his culpability

and there is the likelihood of a different result, had all of the mitigation evidence gone in from Ms. Glass' file, sufficient to undermine confidence in the outcome. Rosemond v. Catoe; Rompilla.

The United States Supreme Court made clear in its recent decision in Wong v. Belmontes, *supra* that the burden *is not* on the State to show the lack of prejudice, but the burden is on the applicant to show prejudice. *Id.* To establish prejudice, applicant "must show 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.*, quoting Strickland, 466 U.S. at 694. That showing requires applicant "to establish 'a reasonable probability that a competent attorney aware of the [available mitigating evidence], would have introduced it at sentencing," and "that had the jury been confronted with this . . . mitigating evidence, there is a reasonable probability that it would have returned with a different sentence.'" *Id.*, quoting Wiggins v. Smith, 539 U.S. 510, 535, 536, (2003). "In evaluating that question, it is necessary to consider *all* the relevant evidence that the jury would have had before it" if applicant "had pursued the different path - not just the mitigation evidence" applicant could have presented, but also" the aggravating evidence "that almost certainly would have come in with it." *Id.*, referencing Strickland, at 695-696, 700 (emphasis in original). "Thus, to establish prejudice," applicant "must show a reasonable probability that the jury would have rejected a capital sentence after it weighed the entire body of mitigating evidence" (including the additional testimony applicant could have presented) against the entire body of aggravating evidence (including any additional aggravating evidence likely to have come in). *Id.*; See also Porter v. McCollum. Applicant has not met this burden. Plath v. Moore, 130 F.3d at 602 (holding that, considering the sheer magnitude of the aggravating evidence, the defendant failed to show prejudice from trial counsel's failure to present certain mitigating evidence). See also Simpson v. Moore. Owens has not met this standard.

In addition to the extensive mitigation evidence presented by counsel at the 3rd sentencing proceeding, the jury was also aware of the overwhelming evidence in aggravation against Owens. Sears; Wong. The jury was aware Owens had been convicted of the murder of Irene Graves. They were instructed of the same by the trial judge at the beginning of the trial. The jury was aware Owens had admitted to his girlfriend and a co-defendant that he shot Ms. Graves because she would not open the safe. The jury was also aware that Ms. Graves, being a store clerk, could not open the safe.

By viewing the crime-scene videotape, the jury was aware Ms. Graves was murdered during the commission of an armed robbery and during the commission of a larceny with the use of a deadly weapon. The jury found the existence of two (2) aggravating circumstances beyond a reasonable doubt.

The jury was aware that Owens referred to Ms. Graves as a "bitch" and a "whore." The jury was also aware that Owens had murdered his cell-mate Christopher Lee in the Greenville County Detention Facility. The jury was aware that Owens tortured Christopher Lee in addition to murdering him. The jury was also aware that Owens went to sleep after murdering Christopher Lee.

The jury was also aware Owens had been adjudicated delinquent of AWIK, possession of a pistol, and Burglary (2 counts) before murdering Ms. Graves or Mr. Lee. The jury was also aware Owens had actually shot at some other juveniles in the AWIK incident.

The jury was also aware that Owens had assaulted other inmates, assaulted prison staff, and made shanks illegally while in the Department of Corrections. The jury was aware Owens had accumulated fifty-six (56) disciplinary violations while in the adult department of corrections. The jury was aware that because of Owens' terrible prison behavior Owens had to be kept in a cage inside a cell. The jury was aware that even though Owens was kept inside a cell inside a cage he continued

to make weapons and continued to be assaultive. The jury was also aware that Owens was considered the worst inmate in the maximum security section of Leiber Correctional Facility.

Given this record, Owens cannot establish prejudice. Wong v. Belmontes; Jones v. State. See Plath v. Moore, (holding that, considering the sheer magnitude of the aggravating evidence, the defendant failed to show prejudice from trial counsel's failure to present certain mitigating evidence). Owens has failed to establish that had counsel had Hammock testify to all the details in Drucy Glass' file there is a reasonable probability the result of the sentencing proceeding would have been different. Id. Therefore, this ground must be dismissed with prejudice.

The New Mitigation Evidence or Allegations

At the PCR Merits hearing, Owens introduced new allegations of mitigation evidence regarding his life history that were **not introduced** at the first two (2) sentencing proceedings and **not contained in** Drucy Glass' mitigation file. It appears Owens is now alleging Ms. Hammock should have testified to these new details of Owens' life. However, Owens introduced no documents, notes, records, etc. to substantiate that this new evidence had been developed at Owens' 1st or 2nd sentencing proceeding as alleged above, or was available to counsel in the 3rd sentencing proceeding. Owens introduced this testimony at PCR through an expert witness, James Garbarino, a psychologist who first talked with Owens in 2010.⁵⁷ (PCR Tr., Garbarino testimony).

Respondent's Objections

Respondent objected to Garbarino's testimony on several grounds. Respondent objected at

⁵⁷Garbarino testified to various *alleged* incidents in Owens' life including; a neighbor stabbing his pet rabbit to death, Owens witnessing someone being shot in the head inside a car, Owens witnessing a gang rape of a woman, Owens having sex with thirty (30) year old women in exchange for drugs he was selling; Owens being whipped with electrical cords; Owens being sexually assaulted at DJJ, and Owens witnessing sexual assaults at DJJ. This is all new evidence.

the PCR hearing to any testimony that went outside the allegations of the application. Respondent also objected on the ground that Garbarino, an expert, could not merely serve as a conduit for hearsay, which he repeatedly did during his PCR testimony. Respondent also moved to strike the testimony of Mr. Garbarino on this basis.

The allegations of this ground, as stated in the Final Amended Application, are as follows:

Counsel failed to present readily available mitigating evidence that had already been developed at Applicant's *previous trial* and *first re-sentencing proceeding*. Ms. Marjorie Hammock previously testified in much greater detail to Applicant's life history and background. Further, Dr. Jim Evans previously testified that Applicant had brain dysfunction and difficulties with attention and impulse control. Counsel failed to have Ms. Hammock testify to all of the details that were available concerning Applicant's life history, and counsel failed to call Dr. Evans to testify at all.

(Final Application, emphasis added).

Prior to the hearing in this matter, Respondent requested the Court enter in its Scheduling Order that all allegations of the application be filed within ninety (90) days of the merits hearing so Respondent could adequately investigate, respond to, and defend the allegations of this capital PCR Application. Collateral counsel objected to this request stating thirty (30) days was sufficient time for Respondent to investigate and defend the allegations. This Court agreed with collateral counsel and entered a Scheduling Order requiring collateral counsel to assert all grounds within thirty (30) days of the merits hearing. Applicant filed his Final Amended Application thirty (30) days before the trial of this case alleging **the above ground**. Applicant did not allege counsel or their investigators failed to investigate, develop, or extract additional mitigation evidence from Owens and present the same. Furthermore, applicant Owens did not move to amend his application at the merits hearing. *See Rule 15, SCRCP.*

Dr. Garbarino's testimony of new mitigation evidence is not relevant to this ground. Dr.

Garbarino's testimony regarding new alleged instances of violence witnessed by Owens when he was a child or as a teenager has nothing to do with the allegation as pled above. It has nothing to do with information developed at Owens' two previous trials, and it has nothing to do with Ms. Glass' file. This testimony should be stricken with regard to this ground.

Furthermore, applicant did not prove any of this new information had been developed at Owens' prior trial or sentencing proceedings or was contained within Drucy Glass' file or that Owens informed anyone of this new information prior to 2010. This testimony should be struck. It is irrelevant to this ground.

Furthermore, Owens did not allege in this ground that counsel failed to call an expert to relate his "childhood experiences" to his later adult conduct. That is found nowhere in his application.⁵⁸ Applicant Owens could have done so, but chose not to. Owens went completely outside the allegations of his complaint, never moved to amend his PCR application, and is attempting to raise a completely new ground through Garbarino's testimony. This portion of this claim should be struck.⁵⁹

⁵⁸In his final application, in a different ground, Owens only alleged counsel failed to investigate, discover, and present mitigation evidence regarding *Owens' experiences at DJJ* and the effect *those experiences* had on his life. (See Ground 10(b)/11(b)(6). This ground, 10(b)/11(b)(5) deals only with alleged details of Owens' life *Ms. Hammock* did not testify to that had already been developed at his 1st trial and sentencing proceeding and at his 2nd sentencing proceeding and/or were available to counsel. The wording of this ground is clear and unambiguous.

⁵⁹In his post-trial brief, Owens lumps both this ground and the following ground together in an attempt to make Dr. Garbarino's testimony somehow relevant to this ground. However, if one looks at both grounds separately, as they were pled, Dr. Garbarino's testimony has no relevance to this ground.

The Lack of Merit of this Ground

A PCR applicant has the burden of proof to show both deficient performance and prejudice. Caprood v. State. Owens has failed to meet his burden of proof to show this new information, i.e. new facts and details of Owens life, was developed at Owens 1st trial and sentencing proceeding or at Owens 2nd trial or sentencing proceeding and/or available to 3rd sentencing phase counsel. (See ground above).

It is clear Dr. Garbarino did not get this new information from Ms. Hammock. There was no testimony by Ms. Hammock in any of the three (3) sentencing proceedings regarding Owens witnessing a gang rape, being present when a fellow car passenger was shot in the head, or finding two (2) bodies as a the result of a murder suicide. Nor was there any testimony from Ms. Hammock in any of the three (3) sentencing proceedings that Owens had sex with women over the age of thirty (30) when he was twelve (12) years old or witnessed his neighbor kill his pet rabbit with a knife. Nor was there any testimony from Ms. Hammock that Owens witnessed sexual assaults, violence, or was sexually abused at DJJ. (**R., Macaulay Vol. 7, R., Kittredge Vol. 2, and R. Patterson, Vol. 7**).⁶⁰

Collateral counsel had access to trial counsel's file, which would necessarily include Ms. Hammock's file. See S.C. Code Ann. Section 17-27-130. Applicant Owens did not introduce at the PCR merits hearing any record, note, or report of Ms. Hammock that Owens ever related any of this new information to Ms. Hammock prior to any of his three (3) sentencing proceedings.

It is also clear Garbarino did not get this information from Drucy Glass' mitigation file. (See

⁶⁰In fact, Ms. Hammock testified she had reviewed Owens DJJ and DOC records, interviewed Owens, and interviewed staff who knew Owens while he was at DJJ. (**R. pp. 1455-1458**). She did not testify in any of Owens' three sentencing proceedings that Owens was sexually abused, assaulted, or witnessed sexual abuse or assaults while at DJJ. (**R., Macaulay, R. Kittredge, R. Patterson**).

Defendant's Exhibits 1-19). A careful review of the records introduced by Owens at PCR shows there is no mention in Ms. Glass' file materials of Owens witnessing a gang-rape or of Owens being in a car when another passenger was shot. There is no mention in any of her file materials of Owens discovering two (2) bodies which were the result of a murder suicide. There is no mention in her file material of Owens engaging in sex with women over the age of thirty (30) years old or witnessing a neighbor stab his pet rabbit to death. There is no mention in her file material of Owens witnessing sexual assaults, violence, or being sexually abused at DJJ. This is totally new mitigation information that applicant Owens has failed to prove had already been developed at Owens 1st trial and sentencing proceeding or at Owens 2nd sentencing proceeding and/or was available to 3rd sentencing phase counsel. (See Ground above).

The record shows Owens was interviewed numerous times by six (6) different attorneys, two (2) mitigation investigators, (1) private investigator, and numerous psychological or psychiatric experts. With regard to these new alleged factual details of Owens' life, Owens has failed to prove these were ever communicated by Owens to any of the individuals appointed to represent his interests prior to 2009/2010. This is new mitigation evidence Owens has failed to show had been developed at his previous sentencing proceedings and/or was available to trial counsel at his 3rd sentencing proceeding. DeCastro v. Branker, 642 F.3d 442 (4th Cir. 2011)(State court did not act unreasonably in refusing Petitioner's attempt to upend his conviction and death sentence based on information he failed to provide to counsel until after his conviction and sentence); Holladay v. Haley, 2000 W.L. 430047 (11th Cir. 2000)(trial counsel not ineffective for failing to discover mental health records of client where client did not inform counsel of this history and client's behavior did not indicate mental illness); Collins v. Francis, 728 F.2d 1322 (11th Cir. 1984)(counsel was not ineffective for failing to

investigate witnesses about whom the defendant did not tell him); Primeaux v. Leapley, 502 N.W.2d 265, 268 (S.D. 1993) (“Where [Defendant] did not give information to counsel, counsel could neither investigate it or pass it on to the expert.”).

Additionally, this new allegation has no merit for another reason. With regard to this ground, that Ms. Hammock did not testify to additional details of Owens’ life, Garbarino’s testimony was clearly not admissible. Doe v. Jones, 372 S.C. 93, 640 S.E.2d 514 (Ct. App. 2006), *rehearing denied*, *cert. denied*. Doctor Garbarino’s testimony regarding Owens’ alleged childhood or teenage experiences is simply not admissible to prove this ground because it is hearsay. High v. High, 389 S.C. 226, 697 S.E.2d 690 (Ct. App. 2010). Doctor Garbarino, a psychologist, may not serve as a conduit for inadmissible hearsay. Wright v. Heister Construction Co., Inc., 389 S.C. 504, 698 S.E.2d 822 (2010). Doctor Garbarino testified to numerous alleged incidents where Owens *allegedly* witnessed violence, was a victim of abuse, or where Owens had sex with older women that Doctor Garbarino has no first hand knowledge of. He admitted he received this information from other sources. While a psychologist may rely on certain materials in forming his opinion, “[t]he rule does not allow for the unqualified admission of hearsay evidence merely because an expert has used it in forming an opinion.” Id. Such testimony is inadmissible in proving this ground, where Owens alleges Ms. Hammock should have testified to these facts or details. Id. Under this ground, Owens is attempting to use patent hearsay to prove the truth of the matter asserted, and not for the basis which such testimony can be admitted. See Wright; High; Doe. This ground must be dismissed with prejudice. See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998)(state’s failure to object to hearsay testimony as to what another witness’s testimony might have been does not relieve applicant of burden of producing admissible testimony in accordance with the rules of evidence); Bassette v.

Thompson, 915 F.2d 932 (4th Cir. 1990), *cert. denied*, 499 U.S. 982 (1991)(prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witness does not testify at post-conviction relief.); Beaver v. Thompson, 93 F.3d 1186, 1995 (4th Cir. 1996)(rejecting claim that counsel was ineffective for failing to present mitigation evidence family members, where there was no proffer of this testimony); Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3d Cir. 1991)(applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense," rather, facts must be presented). See also Moss v. Hofbauer, 286 F.3d 851, 864-65 (6th Cir. 2002)(speculation as to possible lines of cross-examination insufficient where no evidence presented how witness would have testified had the cross-examination been pursued).

Furthermore, Dr. Garbarino could not verify where he received this new information. It is clear most, if not all, of this new information came from Owens in 2010. (See PCR Tr. pp. 227, 228-229, 230-232, 234-235, 241, 246-248). In fact, Garbarino admitted Owens' claim of sexual abuse by older women came from Owens. (PCR Tr. p. 230). The incident where Owens claimed he witnessed a gang rape came from Owens. (PCR Tr. p. 231-232). It appears from the record Owens claim that he discovered two dead bodies, witnessed a murder in an automobile, and was whipped with cords came from Owens. (PCR Tr. pp. 230-232, 246-248). The claims of witnessing sexual assaults, violence, and being sexually assaulted at DJJ came from Owens in 2010. (PCR Tr. p. 234-235). In fact, Dr. Garbarino testified he believed there were other things Owens has not even disclosed yet. (PCR Tr. p. 241).

Applicant failed to prove where Dr. Garbarino got this new information, except from applicant Owens in 2010. Counsel could not have been deficient for failing to have Ms. Hammock present

details of Owens' life that Owens did not tell them about and told no one about until 2009/2010.

DeCastro v. Branker; Holladay v. Haley; Collins v. Francis; Primeaux v. Leapley.

This begs the question why Owens did not disclose this information to any of his prior six (6) trial attorneys, neither of his two (2) prior mitigation investigators, his private investigator, or any of his psychological or psychiatric experts in three (3) sentencing proceedings. With regard to the claims of sexual abuse at DJJ, Garbarino admitted at PCR that Owens had never related this information to any of Owens' six (6) prior attorneys, two (2) mitigation investigators, one (1) private detective, or any of his psychological or psychiatric experts from his three (3) sentencing proceedings. (PCR Tr. pp. 286-287). Applicant's PCR expert indicated that the first (1st) time Owens told anyone this information was in 2009 when he related the information to his *collateral PCR counsel*, Emily Paavola. Ms. Paavola did not testify at the merits hearing and explain the circumstances surrounding how she was able to get Owens to come forward with this *new information*. Applicant's PCR expert further explained that the reason Owens did not tell any of attorneys prior to 2009/2010 was because he did not trust any of his six (6) prior trial attorneys. (PCR Tr. pp. 286-287, 294-295). Owens expert further explained that his trust of Ms. Paavola may have been because she was a woman and had built a special report with Owens. (R. pp. 247-248). The claim is simply not credible and must be rejected.

The record shows applicant was interviewed by Dr. Donna Schwartz-Watts, Doctor Tora Brawley, and mitigation investigator Drucy Glass, who are all females. Applicant was specifically asked by Dr. Schwartz-Watts and Dr. Brawley whether he had ever been sexually abused, and he denied he had ever been sexually abused. Ms. Glass also testified she would have asked Owens the same question, and if he had told her he had been sexually abused she would have noted it in her

records or informed previous trial counsel. Previous trial counsel testified they had never been informed of any such alleged abuse. Applicant Owens introduced no record of Ms. Glass indicating he informed her he had been sexually abused. It is clear counsel was not deficient in failing to have Ms. Hammock testify to this detail because Owens never told anyone he had been sexually abused at DJJ, and in fact denied it. (PCR Tr. pp. 335-336, 354-355, 310-311, 316-317, 323).⁶¹ Applicant did not introduce any documents, notes, etc. to show any of this other *new information* had been disclosed by Owens before.

Additionally, this Court had the opportunity to view Garbarino, listen to his testimony, and judge his credibility accordingly. Garbarino's testimony is not credible in several respects. Garbarino assumes everything Owens told him regarding his past is true, even though Owens has been diagnosed with Anti-social Personality Disorder, and Owens never related these details to anyone before 2009/2010. Furthermore, Garbarino ignores the fact that Owens is a convicted murderer and armed robber under a death sentence, and has a motive to fabricate information to assist in his challenge to his death sentence.

Garbarino also testified Owens grew up in a war zone similar to Bosnia or other war zones on the planet Earth. Dr. Garbarino admitted he had not toured or seen any of the areas where Owens grew up. Garbarino was forced to admit that Owens moved four (4) or five (5) times during his childhood and teenage years. Owens had lived in Mauldin, S.C. and on the eastside of Greenville. Ms. Glass' file materials also show Owens lived for a time in Gray Court, S.C. (See DSS Records,

⁶¹The record also shows Owens was asked on more than one occasion in intake interviews to the South Carolina Department of Corrections whether he had ever been sexually abused, and he denied that he had. (PCR Tr. pp. 271-273). And, there was no indication in any of Owens' DJJ records that he was ever sexually assaulted or complained of any sexual abuse. (PCR Tr. pp. 270-273).

Applicant's Exhibits). Garbarino had not toured or seen any of these areas so he could not verify they were "war zones." This Court is familiar with these areas. They are not foreign war zones or even war zones. The sentencing jury would likewise have rejected the analogy.

Finally, applicant has failed to prove deficient performance under this ground, because most of Garbarino's testimony regarding Owens' life was cumulative to that of Ms. Hammock and the other mitigation witnesses at the 3rd sentencing proceeding. As previously set forth in extensive detail above, the jury in the 3rd sentencing proceeding knew Owens father and step-father were extremely violent men. The jury knew Owens had been abused as a child and witnessed physical abuse. The jury knew Owens had been taught by his step-father to resolve conflict through violence and to be violent and vigilant at all times. The jury also knew Owens grew up in a violent neighborhood. The jury knew that most of Owens' family had been incarcerated or were incarcerated at the time of trial. The jury knew Owens mother had been abused by Owens father and step-father, and Owens would stay home from school to protect his mother. The jury also knew Owens had witnessed a lot of violence in his life, including his step-father chasing his mother with a machete and witnessing his grandmother shoot another individual. Each of these facts was effectively communicated to the jury through several witnesses and not contested by the State. Applicant has failed to show deficient performance in this regard. Strickland; Premo; Harrington. See Simpson v. Moore, 367 S.C. 587, 605-07, 627 S.E.2d 701, 711-12 (2006)(reversing PCR Court's conclusion that capital defendant suffered prejudice from counsel's failure to offer sufficient social history evidence in mitigation case where record showed counsel did in fact to adequate investigation and presented similar mitigation evidence)

To the extent applicant is raising the DJJ class action records with regard to this ground, and

not with regard to Ground 10(b)11(b)(6), this claim would have no merit for several reasons. Counsel testified at the PCR hearing that he was fully aware of the class action lawsuit regarding the conditions of confinement at DJJ. Counsel testified he was on the board of directors of the Protection and Advocacy Center while the class action lawsuit was ongoing. He also served as general counsel for the Advocacy Center. He was familiar with the allegations of the lawsuit and even toured the DJJ facilities. He was aware of the conditions of confinement there. Counsel testified he had consulted with Gaston Fairey, the attorney who filed the class-action lawsuit against DJJ. (PCR Tr. pp. 152-153).

Counsel testified he considered offering testimony of these conditions of confinement at DJJ during the 3rd sentencing proceeding, because Owens was there for a period of time, however, he made a strategic decision not to offer this evidence because it was a double-edged sword. (PCR Tr. pp. 152-156). Counsel testified offering this evidence would have opened the door to extensive testimony about Owens' behavior at DJJ. (PCR Tr. pp. 152-156). Trial counsel testified Owens' behavior at DJJ was horrible. (PCR Tr. pp. 152-156). Counsel testified the State did not offer any evidence of Owens' behavior at DJJ in its case in chief, and only limited testimony of his behavior there was brought out on examination of Dr. Schwartz-Watts to corroborate Owens' diagnosis of impulsive behavior, mitigation evidence. (PCR Tr. p. 155). Counsel testified he did not offer conditions of confinement at DJJ for an additional reason; he did not like the reason applicant Owens was confined at DJJ, for assault with intent to kill (AWIK) and a gun charge, and did not want to dwell on or highlight that fact. (PCR Tr. pp. 152-157). The victim in this case, Irene Graves, was killed with a gun. (PCR Tr. pp. 154, ll. 19-22, R., pp. 1165).

This was clearly an objectively reasonable trial strategy decision and is not subject to a claim

of ineffective assistance of counsel. Strickland; Council. If counsel had attempted to argue general conditions of confinement at DJJ contributed to Owens' adult behavior, the State would have responded with evidence of Owens' horrible behavior at DJJ. as the State did at PCR. Wong v. Belmontes. At PCR, Owens' expert, James Garbarino, was thoroughly cross-examined and impeached with Owens' disciplinary history while confined in the Department of Juvenile Justice as the Solicitor would have done with Ms. Hammock at trial. (PCR Tr. pp. 266-287, 296). See Reed v. Florida Department of Corrections, 393 F.3d 1217 (11th Cir. 2010)(attorneys were not ineffective in failing to call family members who would have opened the door to bad things about defendant's past); Rutherford v. Crosby, 385 F.3d 1300 (11th Cir. 2000)(trial attorneys' strategic decision not to call witnesses on alcoholism of defendant was objectively reasonable where it would have opened the door to prior violent behavior of the defendant that the jury had not heard). See also Bell v. Kelly, 260 Fed. App. 599 (4th Cir. 2008)(*Unpublished Opinion*)(finding state court's determination petitioner had failed to prove prejudice was not unreasonable where petitioner alleged counsel was ineffective for failing to investigate and present family members mitigation evidence where family members could have been cross-examined about the defendant's prior bad conduct such as infidelity, abandonment of his children, wife, and girlfriend, domestic abuse, and failure to provide child support), citing Barnes v. Thompson, 58 F.3d 571 (1995)(upholding in a federal habeas setting district court's determination that trial counsel was not ineffective in state death penalty case in failing to offer family members who constituted "cross-purpose evidence."); Moody v. Polk, 408 F.3d 141, 154 (4th Cir. 2005)(to the extent affidavits presented new information, they were "double edged.")

Upon his initial commitment to DJJ, Owens told the Reception and Evaluation counselor that he learned how to fight when he was young. He also told the counselor he liked to fight, and he

wasn't afraid of being hit. Approximately two (2) weeks after being committed to DJJ, Owens assaulted another inmate by kicking him in the head, and then kicking him two (2) or three (3) times on the floor. The inmate Owens assaulted had to be treated at the hospital and received fourteen (14) stitches. Owens also admitted to the R&E counselor he had confronted a boy back home for assaulting his brother; the boy denied it, and Owens ended up breaking the boy's nose. Owens was also adjudicated delinquent for breaking into a store and stealing items. The DJJ records show Owens learned how to assault others and steal before being committed to DJJ. (PCR Tr. p. 276-282).

The R&E report also indicated Owens had been taught by his family that violence and intimidation are appropriate manners of resolving conflict. The report also indicated that when Owens arrived at DJJ he reacted impulsively and without regard for the consequences of his actions. Owens was diagnosed with conduct disorder. The R&E report also showed Owens lacked any remorse for the crimes he had committed prior to being committed to R&E. (PCR Tr. pp. 276-282). The record shows Owens had problems with aggression before being admitted to DJJ. (PCR Tr. p. 283).

At the PCR merits hearing, Owens' expert was cross-examined or impeached by the Attorney General as Ms. Hammock would have been at trial by the Solicitor. Wong v. Belmontes. Owens' PCR expert was forced to admit Owens was aggressive before being admitted to DJJ. He admitted Owens learned to assault and steal from others before being admitted to DJJ. And, Owens suffered from conduct disorder prior to being committed to DJJ. Owens expert admitted Owens threatened DJJ staff on several occasions while he was there. He admitted there were incidents where Owens was sent to the maximum-security unit because of his bad behavior. He also admitted Owens was kicked out of the ROTC program, and Owens incited other inmates not to do their work. Owens

expert also admitted Owens refused to comply with discipline, and Owens was written up for numerous violations while at DJJ. He also agreed with Dr. Schwartz-Watts' assessment that Owens behavior at DJJ was horrible. (PCR Tr. pp. 276-284).

Owens' expert was also forced to admit that Owens was treated for depression at DJJ; however, Owens did not report any abuse, assaults, or the conditions of confinement as a cause for that depression. In fact, Owens' expert admitted the records showed Owens' was depressed about his family back home in Greenville, S.C. and the financial situation they were in. (PCR Tr. pp. 286-287).

Owens' PCR expert was also cross-examined or impeached extensively about Owens' crimes before being committed to DJJ and how they related or were similar to the murder of Ms. Graves and the murder of Christopher Lee. The similarities are uncanny.

Owens' expert admitted Owens shot at some boys with a pistol because they made a smart remark or disrespected him. Owens expert admitted Owens killed Ms. Graves after she made some type of remark to him at the store safe, which could have been interpreted as disrespectful. Owens' expert admitted Owens shot Ms. Graves with a pistol just as he had shot at the boys with a pistol before he was committed to DJJ. Owens expert also admitted Owens killed Christopher Lee after Lee made a remark at the jail that Owens considered disrespectful. Owens expert admitted that Owens has a chronic pattern of responding to disrespect. (PCR Tr. pp. 268-269). The record shows, and applicant Owens' expert helped prove and highlight, that Owens has a chronic pattern of responding to perceived disrespect with deadly violence, and this pattern was in place before Owens was committed to DJJ. (PCR Tr. pp. 268-284, ROA, pp. 1547).

Similarly, the record shows Owens had a chronic pattern of being disrespectful to teachers or

those in authority, before he was committed to DJJ, which only continued after he was there. (PCR Tr. pp. 274-275). Owens expert helped highlight this fact on cross-examination as well. (PCR Tr. pp. 274-275).

Additionally, trial counsel testified that without tying the specific conditions of confinement from the class action records to Owens, they would not have been particularly helpful. Counsel is correct. General conditions of confinement at DJJ or what happened to other inmates while there would not have been admissible during applicant Owens' sentencing proceeding. Cf State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007)(testimony of defense expert on general conditions of confinement are improper, evidence must be tailored to particular defendant); State v. Burkhardt, 371 S.C. 482, 640 S.E.2d 450 (2007)(admission of general conditions of confinement are improper); State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005)(similar). This evidence would not have been relevant. Furthermore, what occurred at DJJ prior to Owens' admission or in some other dorm or institution would not have been admissible in Owens 3rd sentencing proceeding. Counsel was not deficient for failing to offer such evidence since it would not have been relevant or admissible. Counsel testified they attempted to tie the general conditions of confinement at DJJ to Owens but they were unable to do so. In summary, Owens has failed to show counsel was deficient in having Ms. Hammock testify to the general conditions of confinement at DJJ.

To the extent that applicant is now attempting to allege under this ground that counsel should have had Ms. Hammock testify to risk factors Owens was exposed to and their ultimate effect, this claim was not raised in this ground, and applicant did not move to amend his PCR application. This ground alleges counsel did not have Ms. Hammock testify in as much detail as she testified in the first two sentencing proceedings, and she did not testify to *all of the details* of Owens' life history in the

3rd sentencing proceeding. (See ground above). This new claim, if raised, should be dismissed.

Additionally, counsel testified he made an objectively reasonable strategic decision not to offer the same mitigation defense that was presented in the first two (2) sentencing proceedings and was not successful. In the first two sentencing proceedings, Ms. Hammock testified to the risk factors Owens was exposed to, and the increasing probability that his exposure to these risk factors would result in juvenile or adult criminal behavior. (See R. Macaulay, pp. 235-263 & R. Kittredge, pp. 445-473, especially pp. 471-473). Two different sentencing bodies after hearing this same evidence, still imposed death sentences. To the extent counsel did not present this same evidence, this was an objectively reasonable strategic decision and cannot be the basis of a claim of ineffective assistance of counsel. Strickland; Council. However, the record shows Ms. Hammock did testify to the risk factors Owens was exposed to and did offer similar testimony at the conclusion of her testimony in the 3rd sentencing phase that there was an association between these factors and later criminal behavior. (R., pp. 1466). To the extent Owens is raising this issue here, he has failed to show deficient performance.

Lack of Prejudice

Nor can Owens demonstrate prejudice from counsel's alleged failure to have Ms. Hammock testify to all the details of Owens' life that were recounted by Dr. Garbarino. Wong v. Belmontes; Jones v. State. Owens cannot show on this record that had this testimony also been before the jury, there is a reasonable likelihood the jury would have returned with a different sentence. Id.

Again, the 3rd sentencing jury already knew Owens grew up in a home where his mother was physically abused by both his father and step-father. The jury knew Owens father abandoned him at a young age. The jury knew Owens father and step-father were extremely violent men. The jury

knew Owens witnessed abuse and was himself abused. The jury knew Owens witnessed a lot of violence and was taught to be violent and vigilant at all times and to resolve conflict with violence. The jury knew of some of the specific incidents of violence that Owens witnessed. The sentencing jury knew Owens' home was crowded and there was a lack of resources. The jury knew Owens and his siblings were removed from the home because of neglect by their mother. The jury knew Owens had to endure foster care for a period of time and separation from his mother. The jury knew Owens' had learning disabilities and did poorly in school. The jury knew most of Owens' family was incarcerated or had been incarcerated. The jury knew Owens grew up in a violent neighborhood. The jury knew Owens life was one of deprivation and loss. These facts were established by the testimony of several witnesses, and they were not contested by the State.

This Court cannot ignore that two (2) previous sentencing bodies heard Ms. Hammock's testimony regarding the risk factors Owens had been exposed to and the increased probability that he would engage in criminal conduct and still sentenced Owens to death. (**R. Macaulay & R. Kittredge**). The 3rd sentencing jury also heard there was an association between limited resources, abuse, neglect, exposure to violence, and later criminal behavior and still sentenced Owens to death. (**R. Patterson**). Even adding additional factual details of incidents Owens allegedly witnessed, that were testified to by Dr. Garbarino, does not change the sentencing equation. Sears; Wong.⁶²

After viewing the crime scene videotape and hearing the testimony from the Speedway store

⁶²Dr. Garbarino's testimony regarding exposure to risk factors and resulting behavior has no relevance to this ground, because this ground alleges Ms. Hammock should have testified to more details. In any event, Garbarino's testimony flies in the face of free will and free choice, and it is difficult to imagine a Greenville County jury would have agreed that Owens' background caused him to shoot Ms. Graves in the head and to brutally torture and murder Christopher Lee after he had knocked him unconscious.

personnel, there would have been no question in the 3rd sentencing jury's mind that Ms. Graves was murdered during the commission of an armed robbery and during the commission of a larceny with a deadly weapon. (PCR Tr. pp. 134-35). The two (2) aggravating circumstances alleged by the State were proven beyond any doubt. Therefore, the 3rd sentencing jury was left with two (2) choices and only two (2) choices; whether to sentence Owens to life in prison or to put him to death.

The sentencing jury was already aware that Owens had committed a murder in civilian society. They were instructed at the beginning of the trial that a previous jury had already found Owens guilty of the murder of Irene Graves. The jury also heard the testimony of Nikko Vance that Owens admitted to Vance just moments after the robbery that he shot and killed Ms. Graves because she would not open the store safe. The jury also heard the testimony of Aisha Austin, Owens' girlfriend, and how Owens admitted to her the morning after the murder that he killed Ms. Graves because she would not open the store safe.

The 3rd sentencing jury was then confronted with what trial counsel correctly referred to as "the elephant in the courtroom," the murder of Christopher Lee in the Greenville County Detention Center. The sentencing jury became acutely aware that Owens had also murdered someone while he was confined. Owens' confession to the murder of Christopher Lee was read to the jury:

At eleven p.m. on 2-15-99, myself and other inmates in my cell block watched the news and saw that I was found guilty. I then worked out and took a shower. I went to bed and woke up whenever they came to get one of the other inmates to take him to Perry. This was around 3:00 a.m.

While they were getting the guy ready to go to Perry, Christopher Lee said, "You won't be the only one because [appellant's] coming down there with you." I told him to 'shut the fuck up.' He told me his cousin was on the jury. I asked him if he knew that they convicted me. He said quote 'f— you. I know because my cousin was on the jury.' unquote.

I then walked into his cell and hit him in the eye. He fell down on his back. I got on top and

started hitting him mostly in the face and throat. I took a pen from his right hand with my right hand and stabbed him in the right eye. I then tried to stab him in his chest, but the pen would not go in. Then I stabbed him in his throat. I don't know if the pen went into his throat or not. He started bleeding out of his mouth.

There was a sheet tied into a snare laying on his bed. I reached and got it and put it over his head onto his neck. I wrapped it around my left hand and pulled it tight. I started hitting him in the face with my right hand. Then I started choking him with my right hand and pounding his head against the floor.

He never fought back after the first punch, he was out of it. He was still breathing and the stuff coming out of his mouth stunk so I stood up and stomped his head and body with my feet. I saw a black and blue lighter under the bunk. I grabbed it and burned him around the eye and on the left side of his hair. I rammed his head into the wall. He was still moaning and breathing. I walked out of the cell to leave him alone. I heard the crazy moaning again so I grabbed the pen off the floor where I had thrown it and went back into his cell. I got back over him and rammed the pen up his right nostril. I closed his left nostril with my left hand and started choking him with my right hand. The sheet was still around his neck. I was choking him above the sheet. Throughout all of the above he was moaning and breathing.

I kept checking him to see if he was dead. I would check his pulse on his wrist and I put my ear beside his neck and chest to hear if he was breathing. I wanted him to be dead at that time. I finally thought he was dead so I threw him on his bunk and covered him up. The first time I put him on the bunk he fell off. I then packed my stuff and put my mattress on the table and went to sleep.

While I packed my stuff the black guy that had been on the top bunk of Christopher's cell the whole time this went on got down and put his mattress on the other table and sit [sic] down. Everyone in the cell block was awake when I left Christopher.

I woke up when Hefner opened the door to bring in breakfast and I got into line. I was third in line. Sergeant McNeil walked by and I told him to cuff me. He said he would not and I told him he would if he would go into Christopher's cell. He looked into the cell and Hefner went into the cell. Sergeant McNeil told Hefner to cuff me, which he did. Sergeant McNeil then called someone on the radio.

I really did it because I was wrongly convicted of murder.

(R. pp. 188-1391). See also Owens, 346 S.C. at 655-57 (*Owens I*). The 3rd sentencing jury also heard the testimony of the pathologist who performed the autopsy of Christopher Lee and how Owens' confession was corroborated by the autopsy findings. (R. pp. 1393-1405). It was therefore clear that

Owens had not only killed someone on the outside (Ms. Graves), but also murdered someone on the inside of a prison or jail facility (Mr. Lee). Additionally, the jury knew that this murder, the Lee murder, was a torture murder.

If there was any question in the sentencing jury's mind whether Owens could be safely housed within the S.C. Department of Corrections after this testimony, it was eliminated by the testimony of 'Owens' behavior in prison since Lee's torture murder. The State introduced the following prison disciplinary summary before the jury:

April 13, 2001, breaks toilet, sink and sprinkler.

May 26, 2001, throws hot water on another inmate.

May 27, 2001, had a six and a half inch shank made from fencing and toothbrush.

June 14, 2001, spat on a correctional officer.

February 8, 2002, a 14 inch solid brass shank.

March 29, 2002, stabs correctional officer Smith in the face with shank.

June 12, 2002, stabs Undra Golden in the shower.

June 15, 2002, kicks an inmate who is restrained in a restraint chair.

August 5, 2002, slaps a male nurse in the face.

August 17, 2002, throws a food tray and hits officer Guess in the head.

August 23, 2002, struck an officer in the face with his fist.

October 23, 2002, hits officer Eaton in the face with the fist.

October 23, 2002, sets fire to cell.

December 22, 2002, shank made from fencing.

December 30, 2002, a ten inch made from a push rod of the sink.

July 17, 2005, spits in the face of officer Jones.

August 26, 2005, slaps officer Henley in the face.

August 31, 2005, sets fire to cell.

September 11, 2005, threatens officer Jones.

January 1, 2006, a 12 inch homemade knife.

January 3, 2006, breaks cell door window with broom stick.

January 13, 2006, throws feces on officer Williams hitting him in the face.

February 3, 2006, spits in the face of another inmate.

February 4, 2006, orally threatens officer Jones.

February 28, 2006, a 12 inch weapon hidden between the mattresses.

April 4, 2006, an eight an a half inch shank made from flat metal sharpened at the edge and wrapped with ace bandage.

May 1, 2006, sets fire to his mattress.

May 20, 2006, throws coffee on officer Smith.

(R. 1441-43, Tr. p. 1389-1391). Then Major Theiry Nettles, who houses problem inmates in the South Carolina Department of Corrections, testified that Owens was housed in a restrictive environment and even in that restrictive environment he had incurred all of these disciplinary violations, and Owens was by far the worst inmate that he deals with in that particular housing unit. (R. pp. 1439-1444). And, the jury heard that because of his behavior, Owens was kept different than other prisoner's in the maximum security housing unit; Owens was kept in a cell inside a cage. (R. pp. 1489-1494). Furthermore, the jury heard from Doctor David Brunetti, Owens' expert in a previous proceeding, that in 1999 Brunetti believed Owens would need to be housed in almost total

solitary confinement due to his being a danger to the safety of others. (R. p. 1350). After reviewing Owens' list of disciplinary violations since 1999, Dr. Brunetti's opinion changed. At the time of Owens 3rd sentencing proceeding, Dr. Brunetti testified it was his opinion that even in maximum solitary confinement Owens continues to harm others. (R. p. 1351). The record conclusively established that Owens was a future danger to guards, inmates, and even medical personnel.

Added to this was evidence Owens had no regard for Ms. Graves' life or that of Christopher Lee. He referred to Ms. Graves as the "bitch" and "the whore." And, after murdering Lee, Owens laid down and went to sleep in his cell.

Furthermore, by Owens own words his future dangerousness was established. Owens told Aisha Austin that he wanted to go down in history for committing the most murders in Greenville County without getting caught. (R. p. 1167). Similarly, Owens told Investigator Wood: "Yeah, I want to be remembered as the one who killed the most people in Greenville. I'm a real menace." (R. p. 1144, ll. 12-13).

Finally, Owens showed a complete disregard for incarceration as a form of punishment. Owens told Investigator Wood: "If I go to jail. I go to jail. I don't give a shit." (R. pp. 1143-1144).

It was therefore clear to the 3rd sentencing jury that the only appropriate sentence was death. Owens had previously served time in juvenile and adult prison and had not been rehabilitated or changed his behavior. Upon his release from adult prison at 19, Owens almost immediately incurred additional charges of armed robbery and assault. Owens then committed the senseless murder of a single mother of two (2) small children. The jury was well aware Ms. Graves was not murdered because Owens witnessed violence or because he was allegedly sexually assaulted, but she was murdered because she would not open a safe during an armed robbery of a convenience store. Owens

then murdered his cell-mate in an aggravated manner with his bare hands. The jury was fully aware Christopher Lee was not a threat to Owens and did not attempt to sexually assault Owens, but was murdered because he made a remark to Owens that Owens considered disrespectful. And, while being kept in a maximum security environment, Owens made weapons and assaulted guards, inmates, and even medical staff, running up a total of fifty-six (56) disciplinary violations. These facts are firmly established in the record. The State conclusively established the horrific circumstances of the crime, Owens bad character, and his future dangerousness. Given this record, there was only one sentence the jury could return with, the same sentence previously imposed by another jury and circuit judge in separate proceedings.

Owens cannot show that had counsel introduced more details of his life, there is a reasonable probability the result of the sentencing proceeding would have been different. Wong; Jones. Most of Garbarino's testimony dealt with *alleged* specific incidents of violence Owens had witnessed. The jury already knew Owens grew up in a violent neighborhood and violent home and witnessed a lot of violence. Specific incidents of violence Owens witnessed were testified to before the jury. More uncorroborated or corroborated incidents would not have changed the sentencing equation. Furthermore, this Court cannot divorce from its analysis the aggravating evidence that would have almost certainly have come in with any claim by Owens that DJJ and his experiences there had any profound impact on Owens' development and later conduct. Wong v. Belmontes. With this evidence, would have come overwhelming aggravating evidence that Owens was violent, had been taught violence, and committed violent acts before he was committed to DJJ, and this conduct only continued almost immediately upon his entry to the Reception and Evaluation Center, along with specific incidents of Owens' conduct in the Department of Juvenile Justice including assaulting and

injuring other inmates, threatening DJJ staff, disrupting classrooms, refusing to be disciplined, and encouraging other inmates not to do their assigned work. Id. This would not have helped the defense attempt to present mitigating evidence because it would have shown Owens was one of the predators who were attacking other inmates in the Department of Juvenile Justice. Furthermore, any late claim of alleged sexual abuse at DJJ would have been impeached by the fact Owens never reported any sexual abuse until 2009/2010, there is no indication in any record of DJJ or the S.C. Dept. of Corrections that Owens had been sexually abused or complained of such, and Owens specifically denied any sexual abuse in intake interviews in the South Carolina Department of Corrections. This ground must be dismissed with prejudice.

Ground 10(b)/11(b)(6)

10 (b): Applicant was denied the right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 3 and 14 of the South Carolina Constitution, during his 2006 capital sentencing proceeding.

11 (b): Supporting Facts: Trial counsel's performance during the sentencing phase was both deficient and prejudicial. See Strickland v. Washington, 466 U.S. 668 (1984). Counsel's acts or omissions included the following:

(6) Counsel failed to investigate and present mitigating evidence of Applicant's experiences while incarcerated in the Department of Juvenile Justice, and the impact of those experiences upon his character, conduct, and psychological condition.

A. Description of Underlying Facts

In this ground, Owens alleges counsel failed to investigate and present mitigating evidence of his experiences while incarcerated in the Department of Juvenile Justice ("DJJ"), and the impact of those experiences upon his character, conduct, and psychological condition. Specifically, in section I(3)(b) of Owens' post-trial brief, Owens, through the testimony of Doctor James Garbarino, tells that

there were numerous incidences of abuse, both sexual and physical at the time Owens' was incarcerated at DJJ, and had counsel presented such evidence during Owens' re-sentencing, there is a reasonable likelihood the result of the re-sentencing would have been different.

The State submits these allegations lack merit as counsel was well aware of the conditions at DJJ at the time of Owens' incarceration, as well as Owens' particular experience at DJJ, but made a reasonable strategic decision in declining to present such evidence. Specifically, based upon counsel's extensive mitigation investigation, and the mitigation team's repeated questioning concerning Owens' DJJ experience, especially with regard to allegations of sexual assault and physical violence, counsel believed that any potential mitigating evidence stemming from Owens' DJJ experience would be outweighed by character evidence related to Owens' conduct while incarcerated at DJJ. Additionally, even assuming counsel's strategic decision in failing to present evidence of Owens' DJJ experience, constituted deficient performance, the State submits such performance was not prejudicial under Strickland in light of the mountain of evidence supporting the statutory aggravators and Owens' deplorable character.

1. Background Information Regarding Owens' Incarceration at DJJ

Owens was incarcerated in the Department of Juvenile Justice for approximately two years between 1995 and 1997 for Assault and Battery with Intent to Kill ("AWIK"), burglary, and possession of a pistol. (Applicant's Ex. 2, p. 13). There are no records from DJJ indicating that Owens was ever sexually assaulted or sexually abused while at DJJ, or that he was traumatized as a result of physical abuse endured during his time at DJJ. (PCR Tr. pp. 270-271, 349-350). Similarly, none of the records submitted by Owens from the class action mention him as being the victim of any sexual abuse or that he was specifically traumatized as a result of physical abuse endured during his

time at DJJ. (**Applicant's Ex. 6-8**). Additionally, despite Owens' submitting, for the first time, uncorroborated, hearsay testimony through Doctor James Garbarino regarding specific incidences of "trauma" regarding Owens abuse while in DJJ's custody, it is undisputed that Owens' failed to inform any of his previous attorneys or members of their respective mitigation teams, about such "trauma." (**PCR Tr. pp. 81-82, 156-157, 284-287, 310-311, 316-317, 322-323, 335-336, 348, 354-355**). Likewise, at the evidentiary hearing, Owens was unable to corroborate any of the stories mentioned in Doctor Garbarino's testimony. (**PCR Tr. pp. 270-274**). Specifically, Owens did not offer the sworn testimony or an affidavit of any guard or former inmate of DJJ indicating they witnessed Owens being sexually abused or that Owens appeared traumatized as a result of physical abuse endured at DJJ. (**PCR Tr. pp. 270-274**). In that same vein, Owens failed to offer any evidence from a family member, friend, or acquaintance of Owens showing Owens reported any sexual abuse to them after the fact or that he was traumatized by his time at DJJ. (**PCR Tr. pp. 270-274**). Rather, Owens, despite having the opportunity to provide sworn testimony regarding these alleged incidents and whether he informed previous counsel or members of the mitigation team regarding these incidents, elected not to testify at the PCR hearing.

2. The Mitigation Team

The record shows counsel in the present case conducted an extensive investigation into mitigation evidence in this case and presented the same to the jury in Owens' third sentencing proceeding. (**R. pp. 1449-1547**). In fact, counsel, in addition to his individual efforts to familiarize himself with the mitigation evidence, retained a variety of experts to investigate potential mitigating evidence from Owens' past including his time at DJJ. (**Applicant's Ex. 1**).

Specifically, counsel retained Marjorie Hammock, a forensic social worker to investigate,

develop, and present mitigating evidence from Owens' entire life history to the jury, a job she had previously done in Owens' prior proceedings. Ms. Hammock, in addition to her own materials, had a copy of Drucy Glass' file, the mitigation investigator from Owens' first two proceedings. (PCR Tr. pp. 303, 304, 306-307). Additionally, trial counsel retained Page Tarr Haas, a mitigation investigator, to further investigate and develop mitigation evidence from Owens' entire life history. (PCR Tr. 110, 111-112). Similarly, trial counsel hired a private investigator, Carolyn Graham, to assist Ms. Haas in her mitigation investigation. (PCR Tr. pp. 108, 120-122, R. pp. 1507-1547). Counsel also retained Doctor Donna Schwartz-Watts, a forensic psychiatrist, and at Schwartz-Watts' recommendation, hired Doctor Tora Brawley, a neuropsychologist, both of whom interviewed Owens about his life experiences including his time at DJJ. (PCR Tr. pp. 108-110 & R. pp. 1475-1487). Finally, counsel interviewed, and took testimony from, Doctor Thomas Cobb, Owens' treating psychiatrist at Lieber Correctional Facility. (PCR Tr. pp. 116-117, 144, R. pp. 1487-1507).

3. The Investigation of Owens' Incarceration at DJJ

Counsel's Investigation into Owens' DJJ Experience

In preparing the mitigation for Owens' re-sentencing, counsel obtained prior counsel's entire file, containing all of the mitigation evidence obtained and presented by Owens in his two previous sentencing proceedings, including the work done by Ms. Glass, the mitigation investigator in those proceedings. (PCR Tr. pp. 320-325, 303-311, 314-319). Trial counsel also reviewed the transcript of Owens two prior proceedings, wherein the respective mitigation teams, including Ms. Hammock, presented such evidence. (PCR Tr. pp. 112-113). There was no evidence contained within trial counsel's file or in the previous transcripts which would indicate Owens was either sexually abused or traumatized as a result of physical abuse endured during his time at DJJ. (PCR Tr. pp. 81-82, 156-

157, 284-287, 310-311, 316-317, 322-323, 335-336, 348, 354-355).

Counsel was also aware of the general conditions Owens' faced during his DJJ incarceration. (PCR Tr. pp. 152-153). In fact, counsel testified he was on the board of directors of the Protection and Advocacy Center while the class action lawsuit was pending and served as general counsel for the Protection and Advocacy Center. (PCR Tr. pp. 152-153). Counsel further explained he was familiar with the allegations of the lawsuit and was aware of the conditions of confinement at DJJ as he had previously toured the facility. (PCR Tr. pp. 152-153). Counsel added he had consulted with Gaston Faurey, the attorney who filed the class-action lawsuit against DJJ. (PCR Tr. pp. 152-153).

Counsel also reviewed Owens' DJJ file. (PCR Tr. p. 117, 119). Owens' DJJ file indicated that he was incarcerated at DJJ for Assault With Intent to Kill ("AWIK"). (PCR Tr. Pp. 118-120). Similarly, Owens' DJJ file indicated Owens had a propensity for violence even prior to his commitment to DJJ and established that he frequently assaulted fellow juveniles and even threatened DJJ staff. (PCR Tr. pp. 118-120). In fact, Owens behavior while incarcerated at DJJ was described as "horrible." (PCR Tr. p. 277 & R. pp. 1523). Moreover, Owens' DJJ records established that in addition to assaulting fellow juveniles, Owens was disrespectful to teachers and staff, refused to comply with any discipline, and incited others not to do their work. (PCR Tr. pp. 273-283). In fact, because of his behavior at DJJ, Owens had to be incarcerated several times in its maximum security unit. (PCR Tr. p. 283).

Counsel also knew that Owens was violent well before his incarceration at DJJ. (PCR. Tr. pp. 117, 119). Specifically, Owens' DJJ records reflect that after his initial commitment to DJJ, he told the Reception and Evaluation ("R&E") counselor that he learned how to fight when he was young, he liked to fight, and he was not afraid of being hit. (PCR Tr. p. 276). In fact, Owens

statements to the R&E counselor proved to be prophetic when, two weeks into his commitment, according to Owens' DJJ file, Owens assaulted another juvenile by kicking him in the head multiple times resulting in the victim's hospitalization. (PCR Tr. p. 155). The R&E report contained in Owens' DJJ file also indicated Owens had been taught by his family that violence and intimidation were appropriate manners of resolving conflict. (PCR Tr. p. 278). The report highlighted that when Owens arrived at DJJ, he reacted impulsively and without regard for the consequences of his actions leading to a diagnosis of conduct disorder—the precursor for a diagnosis of anti-social personality disorder. (PCR Tr. pp. 278-279). Indeed, DJJ records, specifically the R&E report, informed counsel that Owens lacked any remorse for the crimes he had committed prior to his commitment to DJJ. (PCR Tr. p. 279). Thus, counsel's investigation clearly showed Owens was violent, was taught violence, learned violence and lacked remorse for committing violent acts long before his arrival at DJJ. (PCR Tr. pp. 266-284).

The Mitigation Teams' Investigation into Owens' DJJ Experience

Doctor Schwartz-Watts, Owens' third sentencing phase psychiatric expert, also testified at the PCR hearing concerning her investigation into Owens' DJJ experience. (PCR Tr. pp. 331-351). Doctor Schwartz-Watts testified that she interviewed Owens about his time at DJJ, and Owens told her he actually enjoyed his time there, especially in the ROTC program, where he excelled for a period of time. (PCR Tr. p. 336). Owens also told Doctor Schwartz-Watts that he and another cadet were the only two to make the cadet challenge. (PCR Tr. p. 336). Schwartz-Watts explained Owens became very attached to Sergeant Major Berry, who wanted Owens to go into the military. (PCR Tr. p. 336). Doctor Schwartz-Watts further testified that while Owens was at DJJ, he worked in the Office of the Director of DJJ, Flora Brooks. (PCR Tr. p. 336).

In addition to Doctor Schwartz-Watts' interview of Owens, Doctor Schwartz-Watts also reviewed Owens' DJJ files. (PCR Tr. pp. 336, 344, 348). While Owens records did reveal he was treated for depression at DJJ, the records further identified the source of Owens' depression was related to his family's financial conditions, rather than physical or sexual abuse. (PCR Tr. pp. 331-349). As part of the mitigation investigation, Doctor Schwartz-Watts also interviewed Doctor Lilian Tidler, a psychiatrist, who was working at DJJ during Owens incarceration. (PCR Tr. p. 342). At no point during Schwartz-Watts' interview with Owens, her review of Owens' DJJ file, or in the course of her interview with Tidler, was there any evidence uncovered which would have suggested Owens was either sexually abused or traumatized by physical abuse endured during his time at DJJ. (PCR Tr. p. 348).

Doctor Tora Brawley also interviewed Owens prior to the third sentencing hearing. (PCR Tr. pp. 351-356). Doctor Brawley, much like Doctor Schwartz-Watts, inquired into whether Owens had been sexually abused, and consistent with his previous answers, informed Doctor Brawley that he had not been sexually abused. (PCR. Tr. pp. 354-355). Similarly, Owens was interviewed by the previous mitigation investigator Drucy Glass, and by Ms. Hammock. (PCR Tr. pp. 304, 306, 112-113). Neither woman indicated that Owens had revealed he was sexually abused at DJJ. (PCR Tr. pp. 285-287, 309-311). Indeed, Ms. Glass testified that she had no records indicating Owens had been sexually abused, and added that if Owens would have told her of such an incident she would have noted it in her records or reported it to counsel. (PCR Tr. pp. 309-311). Likewise, neither Doctor Brawley, Ms. Hammock, or Ms. Glass came to any conclusion as to whether Owens was traumatized due to his exposure to physical abuse while in DJJ custody.

4. Counsel's Strategic Decision Not to Offer Testimony Concerning Owens' time at DJJ

Counsel testified he considered offering testimony concerning Owens' DJJ experience during the third sentencing proceeding, but made a strategic decision not to offer this evidence because it was a double-edged sword. (PCR Tr. pp. 152-156). Counsel testified offering this evidence would have opened the door to extensive testimony about Owens' behavior at DJJ. (PCR Tr. pp. 152-156). Trial counsel testified Owens' behavior at DJJ was horrible. (PCR Tr. pp. 152-156). Counsel testified the State did not offer any evidence of Owens' behavior at DJJ in its case in chief, and only limited testimony of Owens' behavior was brought out on examination of Doctor Schwartz-Watts. (PCR Tr. pp. 79-80). This limited testimony was elicited only to corroborate Doctor Schwartz-Watts statements regarding Owens' impulsive behavior, which was mitigation evidence related to Owens' mental health. (PCR Tr. p. 155).

Counsel further testified he did not offer conditions of confinement at DJJ for an additional reason, that he did not like the reason applicant Owens was confined at DJJ—AWIK and a gun charge—and did not want to dwell on such a fact considering the similarity between the juvenile incident and the murder of Ms. Graves. (PCR Tr. pp. 152-157). Indeed, Ms. Graves, similar to the victim in the juvenile incident, was killed with a gun, allegedly after making some sort of remark towards Owens. (PCR Tr. pp. 154, ll. 19-22, R., pp. 1165).

Similarly, after reviewing Owens' DJJ files and the previous mitigation evidence, counsel was obviously aware that Owens' DJJ experience did not shape his cavalier attitudes towards inflicting violence upon others. (PCR Tr. pp. 116-119). In fact, Ms. Hammock's previous work and testimony in the prior sentencing proceedings reinforced this. (R. pp. 1453-1467). Specifically, Ms. Hammock, an expert in conducting psycho-social assessments and presenting findings and conclusions from the

assessments to the court, testified Owens had a violent upbringing, was taught violence at home, and explained there was an association between these factors and criminal behavior. (R. 1453-1467). Ms. Hammock further concluded that Owens was a victim of abuse and neglect, at home, and he saw a lot of violence in his home and his home environment, and he acted on that violence, and as a result, ended up engaging in juvenile and adult criminal activity. (R. pp. 1453-1467). Thus, counsel clearly realized that using Owens' DJJ experience as an explanation for his violent behavior was a non-starter in light of the variety of evidence which would undermine such a point and highlight Owens' potential for future dangerousness as well as his inability to adapt to prison life.

B. Counsel's Performance was Objectively Reasonable under Prevailing Professional Norms as Counsel made a Reasonable Strategic Decision, after Conducting an Extensive Investigation into Owens' DJJ Experience, that any Potential Mitigating Evidence Related to Owens' DJJ Experience would be Outweighed by the Introduction of Potentially Damaging Character Evidence Related to Future Dangerousness and Prison Adaptability

As detailed above, after: (1) reviewing the entirety of the mitigation evidence from the first two proceedings; (2) reviewing previous counsel's files and; (3) conducting an investigation both through his own efforts and the mitigation team's collective efforts into Owens' time at DJJ, counsel determined that the potential risk of eliciting damaging evidence concerning future dangerousness and prison adaptability outweighed the potential benefit of offering mitigating evidence concerning Owens' DJJ experience. Quite simply, the State submits counsel's calculated tactic represents an objectively reasonable strategic decision which was made after a thorough and complete investigation into the facts, and therefore, does not render counsel's performance deficient.

"Convicted defendant[s] making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Strickland v. Washington, 466 U.S. 668, 690 (1984). Thus, to in order to prove a claim of ineffective

assistance of counsel, one seeking relief must show that: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, 466 U.S. at 688.

Furthermore, when reviewing ineffective assistance of counsel claims, courts must "eliminate the distorting effects of hindsight" and attempt "to reconstruct the circumstances of counsel's challenged conduct, and . . . evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689; Butler v. State, 286 S.C. 444-45, 334 S.E.2d 815 (1985). Indeed, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment[.]" Strickland, 466 U.S. at 690; Butler, 286 S.C. at 455, 334 S.E.2d at 815-16. In fact, "[t]here are countless ways to provide effective assistance in any given case," and the simple fact that counsel's strategy was ultimately unsuccessful does not render counsel's assistance constitutionally ineffective. Strickland, 466 U.S. at 689; Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995). Accordingly, where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel, assuming the decision to employ such a strategy was objective reasonable. Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006), *citing* Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992); Strickland, 466 U.S. at 689; Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008), *quoting* Ingle v. State, 384 S.C. 467, 470, 560 S.E.2d 401, 402 (2002).

Here, counsel clearly made an informed strategic decision not to introduce evidence related to Owens' DJJ experience after conducting an extensive mitigation investigation. As such, the State submits that counsel's strategic decision was objectively reasonable and based upon a reasonable investigation making counsel's representation reasonable under prevailing professional norms as

Strickland so requires.

1. Counsel's Investigation was Reasonable

The record reflects trial counsel conducted not only a reasonable mitigation investigation, but an extensive mitigation investigation. As explained in section A(3), above, counsel was acutely aware of possible mitigating evidence regarding both the general conditions of Owens' confinement at DJJ, as well as Owens' specific DJJ experience. In fact counsel, in addition to employing an entire team of experts dedicated to exploring potential mitigating evidence, personally reviewed the entirety of the mitigation evidence related to Owens' DJJ incarceration. Furthermore, counsel was keenly aware of the general issues regarding overcrowding, violence and abuse, as he was closely connected to DJJ and had in fact toured the DJJ facilities near the time of Owens' incarceration.

Initially, the State notes Owens' claim of sexual abuse, over thirteen (13) years after the fact, is dubious at best and is not credible evidence. Of particular note is the fact that Owens did not testify at the PCR hearing despite having the burden of proof, and as discussed in section A(1) above, failed to offer any sworn testimony corroborating his claims on this issue. Specifically, Owens failed to offer sworn testimony from anyone who witnessed the alleged abuse, or was informed of the alleged abuse. Indeed, even Doctor Garbarino admitted there was nothing in Owens DJJ records which demonstrated Owens was a victim of any type of abuse. Likewise, Doctor Garbarino admitted there was no record of Owens reporting such abuse to any SCDC personnel following his incarceration at DJJ. In the same vein, Doctor Garbarino acknowledged that there was no record in the Greenville County Detention Center's records indicating Owens reported prior sexual abuse at DJJ. In fact, Doctor Garbarino admitted that even though Owens has been incarcerated in the Department of Corrections for approximately twelve (12) years and been interviewed during intake assessments regarding previous

sexual abuse, Owens had specifically denied any sort of abuse. (R. pp. 271-273). The State further highlights that despite being interviewed numerous times over the past thirteen (13) years by attorneys, psychologists, psychiatrists, social workers, and mitigation investigators, and being asked this specific question multiple times, Owens failed to report this allegation until after the filing of his PCR application and not long before this PCR hearing.

Nevertheless, in regards to allegations of sexual abuse and trauma as a result of experiencing physical abuse while in DJJ custody, the State submits that even assuming such evidence is in fact true, counsel had no reason to know about such information. In particular, Owens informed multiple attorneys, psychologists, psychiatrists, social workers and mitigation investigators that he had never been sexually abused. Similarly, Owens repeatedly failed to mention that he was traumatized as a result of experiencing physical abuse while at DJJ instead telling at least one member of the mitigation team that he enjoyed his time at DJJ.

Moreover, the evidence unearthed pursuant to the mitigation investigation failed to indicate that Owens was being anything less than truthful when he denied that he was sexually abused. In fact, as detailed above, there is no credible evidence Owens told anyone about the purported sexual abuse at DJJ until after his current PCR was filed. Likewise, there was nothing indicating Owens was actually traumatized as a result of experiencing physical abuse while in DJJ custody. In fact, Owens told at least one member of the mitigation team he enjoyed his time in DJJ. Indeed, as highlighted in section A(1) above, there are no records of any kind corroborating Owens' current claims of sexual abuse and trauma as a result of experiencing physical abuse while in DJJ custody. Rather, the entire record points to the same inevitable fact, that counsel and the respective mitigation teams had every reason to believe Owens was being truthful when he informed them that he was never sexually

abused. (PCR Tr. pp. 270-271, 349-350). In fact, Owens' PCR exhibits reflect this proposition as none of the records submitted by Owens from the class action mention him as being the victim of any sexual abuse or determine that he was specifically traumatized as a result of physical abuse endured during his time at DJJ. (See Applicant's Exhibits). Additionally, despite Owens' submitting, for the first time, uncorroborated, hearsay testimony through Doctor James Garbarino regarding specific incidences of "trauma" regarding Owens abuse while in DJJ's custody, it is undisputed that Owens' failed to inform any of his previous attorneys or members of their respective mitigation teams, about such "trauma."

In light of these facts, the State maintains counsel's extensive mitigation investigation was reasonable. Clearly, counsel and his mitigation team, along with each previous attorney and members of their respective mitigation teams, conducted a thorough investigation. Trial counsel's mitigation team repeatedly asked Owens about his DJJ experience including questions of sexual abuse, and only failed to discover such evidence as a result of Owens' failure to inform counsel and his mitigation team of such abuse and trauma. Furthermore, there is simply no evidence either from the class action documents or within any of Owens files which would have lead counsel or other members of the mitigation team to believe Owens was withholding any potential mitigating evidence related to abuse and trauma while he was in DJJ custody. Accordingly, as Owens, despite being repeatedly questioned regarding his DJJ experience and being specifically asked to disclose information of abuse multiple times, deliberately withheld such information and the information could not reasonably be obtained through reviewing collateral sources, relief must be denied. See DeCastro v. Branker, 642 F.3d 442 (4th Cir. 2011) (concluding a state court did not act unreasonably in refusing petitioner's attempt to upend his conviction and death sentence based upon information he failed to provide to counsel until

after his conviction and sentence were final); Holladay v. Haley, 2000 W.L. 430047 (11th Cir. 2000) (explaining trial counsel was not ineffective for failing to discover mental health records of his client where trial counsel's client declined to inform counsel of such a history and the client's behavior did not indicate mental illness); Collins v. Francis, 728 F.2d 1322 (11th Cir. 1984) (holding counsel was not ineffective for failing to investigate witnesses where the defendant failed to inform counsel of the witness' existence); Primeaux v. Leapley, 502 N.W.2d 265, 268 (S.D. 1993) ("Where [Defendant] did not give information to counsel, counsel could neither investigate it or pass it on to the expert.").

2. Counsel's Strategic Decision Not to Introduce Owens' DJJ Experience was Reasonable

As highlighted above, in section A(3) and A(4), Counsel's strategic decision not to introduce evidence of Owens' DJJ experience was objectively reasonable as counsel was clearly informed of the sum of the potential beneficial mitigating evidence via his investigation, but determined that the introduction of such testimony would have opened the door for the State to elicit testimony regarding Owens' character as it relates to future dangerousness and inability to adapt to prison life.

While counsel's strategic decision not to present evidence of Owens' experience in DJJ did come at some cost, namely that the jury did not hear of the general conditions of confinement at DJJ during a portion of Owens' time there, counsel correctly determined the costs of eliciting such testimony was outweighed by its potential pitfalls.⁶³ Indeed, even assuming that documentation

⁶³The State questions whether evidence of general conditions of confinement is admissible. See State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007) (testimony of defense expert on general conditions of confinement are improper, evidence must be tailored to particular defendant); State v. Burkhardt, 371 S.C. 482, 640 S.E.2d 450 (2007) (admission of general conditions of confinement are improper); State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005) (similar). Indeed, much of this evidence would arguably be irrelevant to Owens unless counsel could show that Owens was actually subject to the specific conditions of confinement at DJJ as described in the class action materials. Regardless, in the present case, Owens clearly failed to establish that he was subject to the conditions of confinement detailed in the class action

demonstrating general conditions of confinement is both relevant and admissible, a review of the records offered by Owens regarding the class action lawsuit, indicate Owens was never mentioned as a victim in any capacity. Owens DJJ records corroborate this fact, insofar as they fail to indicate he was the victim of any abuse. Nevertheless, what counsel did discover was that while Owens DJJ records failed to show he was either the victim of sexual abuse or traumatized as a result of physical abuse while in DJJ custody, his records conclusively demonstrated that Owens was a violent, predatory, and disruptive prisoner during his time at DJJ.

To this end, the State submits that any admissible evidence related to Owens' DJJ experience would have come at the expense of allowing extensive testimony regarding Owens' bad behavior while in DJJ custody, including evidence of future dangerousness and inability to adapt to prison life as detailed in section A(3) above. In particular, the sentencing jury would have heard that Owens assaulted another juvenile almost immediately upon his entry to R&E requiring the inmate to be hospitalized and receive fourteen (14) stitches in his head. The sentencing jury also would have heard damning character evidence indicating Owens, upon his commitment to DJJ, had no remorse for shooting at another human being—the crime which sent him to DJJ. Likewise, the jury would have heard that Owens admitted to breaking another juvenile's nose before his commitment to DJJ. Additionally, the jury would have heard that Owens assaulted other inmates throughout his incarceration at DJJ, threatened DJJ staff and refused to be disciplined for his misconduct over the course of his time at DJJ. Furthermore, the jury would have heard of Owens generally disruptive

documents. Specifically, there was no testimony linking the general conditions as detailed in the class action lawsuit to Owens specific DJJ experience outside of that which was testified to by Doctor Garbarino. Thus, the State question which evidence, if any regarding conditions of confinement, would have been admissible during Owens' sentencing proceeding.

character in the classroom, that he incited other inmates not to do their work, and that he had to be confined in maximum security units because of his disciplinary violations. Finally, the jury would have heard, via the R&E report, that routine violence was a part of Owens life long before he was committed to the custody of DJJ, and that Owens actually enjoyed engaging in violence.

Accordingly, the State submits that this ground for relief must be denied. In particular, counsel's strategic decision not to present the mitigating evidence he had available was based upon a reasonable investigation and, when viewed against the potential evidence regarding Owens' future dangerousness and inability to adapt to prison life, represented a reasonable strategic decision. As such, counsel's performance as to this ground for relief, was not deficient under prevailing professional norms.

C. Even Assuming Counsel's Performance was Somehow Deficient, Owens' Cannot show Strickland Prejudice as the Underlying Allegations Lack Credibility, the Admission of Owens' DJJ Experience would have Opened the Door for the State to Expose Owens' as a Consistently Violent Criminal; and there was Overwhelming Evidence Supporting Owens' Death Sentence

Even assuming counsel's performance was somehow deficient, Owens has failed to establish prejudice under Strickland. Specifically, if this Court were to determine that further investigation would have revealed that Owens was allegedly both sexually abused and traumatized as result of physical abuse endured while he was in DJJ, eliciting such evidence would have come at a great cost. First, any testimony regarding Owens' DJJ experience would be cast against a mountain of testimony on cross-examination suggesting that Owens failed to report any instances of such abuse until he was facing a death sentence. Additionally, it is clear that the admission of Owens DJJ experience would have opened the door for the prosecution to expose Owens as a violent criminal who enjoyed hurting others and did so without remorse, as reflected in section A(3) and (B)(2) above. Finally, there is

simply no doubt that there was overwhelming evidence supporting Owens' death sentence.

In the context of a capital sentencing proceeding, one seeking post-conviction relief must prove, in the context of prejudice, "there is a reasonable probability that ... the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695; see also Wiggins v. Smith, 539 U.S. 510, 537 (2003); Jones v. State, 332 S.C. 329, 344-45, 504 S.E.2d 822, 829-30 (1998). A reasonable probability is described as a probability sufficient to undermine confidence in the outcome. Jones, 332 S.C. at 333, 504 S.E.2d at 823-824. Recently, the United States Supreme Court reiterated, in Wong v. Belmontes, ___ U.S. ___, 2009 WL 3805746 (2009) that the burden to demonstrate Strickland prejudice lies not with the State, but with the petitioner. Id.

Thus, in order to establish Strickland prejudice in his current ground for relief, Owens must demonstrate that had counsel successfully introduced the evidence of Owens' DJJ experience, such evidence, when cast against the other evidence that would have come in as a result of its admission and when reviewed against the statutory aggravators, would create a reasonable probability that the jury would have returned with a different sentence. Moreover, the State submits that such a showing "requires a substantial, not just conceivable, likelihood of a different result." Cullen v. Pinholster, ___ U.S. ___, 131 S.Ct. 1388, 1403 (2011) (internal quotations omitted), citing Harrington v. Richter, ___ U.S. ___, 131 S.Ct. 770, 791 (2011). Here, the State contends Owens would be unable to demonstrate Strickland prejudice for the following reasons: (1) Owens' assertions of sexual abuse and trauma related to physical abuse suffered while in DJJ custody lack credibility; (2) the admission of Owens' DJJ experience would have opened the door for the prosecution to expose Owens as a career

criminal who enjoyed inflicting violence upon others and did so without remorse; and (3) none of the evidence related to Owens' DJJ experience would have undermined the overwhelming evidence supporting Owens' death sentence.

1. Owens Claims of Sexual Abuse Clearly Lack Credibility

As detailed extensively in section A(1) and B(1), Owens uncorroborated claims of sexual abuse and trauma as a result of physical abuse while in DJJ custody are simply not credible. First, the State notes the jury would certainly be aware of the fact that the alleged abuse came to light for the first time approximately thirteen (13) years after it allegedly took place. Similarly, the jury would likely hear the context in which the allegations first arose, during a proceeding related to whether Owens' should receive relief from his death sentence.

Furthermore, if Owens' expert's testimony had been presented to his third sentencing jury, the jury would have realized Owens' claims were completely uncorroborated. Specifically, there is no sworn testimony from any DJJ guard, staff, or former inmate corroborating this claim. Similarly, there are no records from DJJ corroborating Owens allegations. In fact, in his SCDC intake records, Owens expressly denied being sexually abused. Indeed, Owens first reported these allegations in 2010 to collateral counsel after filing a post-conviction relief action seeking relief from his death sentence. Moreover, Owens failed to report any alleged abuse to any of his six previous trial attorneys, or members of their respective mitigation teams. Likewise, Owens did not report this abuse to any family, friends, doctors, counselors or social workers who have treated him since his incarceration at SCDC.

2. The Admission of Owens DJJ Experiences would have Opened the Door for the State to Expose Owens as a Consistently Violent Criminal who Enjoyed Inflicting Harm upon Others

As detailed in sections A(3) and B(2) above, the admission of Owens DJJ experience would have opened the door for the prosecution to expose Owens as a violent criminal who enjoyed inflicting harm upon others and did so without remorse. This evidence would have been admissible as evidence of both future dangerousness and inability to adapt to prison life. Specifically, the jury would have been confronted with the fact that Owens was violent before his commitment to DJJ. In fact, jurors would have found the details of why Owens was committed to DJJ, that he was charged with AWIK—after shooting at someone who made a smart remark—similar to the murder of Ms. Graves. Additionally, evidence of Owens' past DJJ experiences would have allowed the sentencing jury to hear that Owens assaulted another juvenile before his commitment to DJJ and was an adjudicated delinquent for two counts of burglary and possession of a pistol prior to his time at DJJ.

Yet perhaps the most damning evidence undermining a finding of Strickland prejudice would have come in the form of Owens' R&E report. Indeed, if evidence of Owens' DJJ experiences would have come in, the jury would have heard that Owens, upon his admission to DJJ, told a counselor that he learned how to fight when he was young, he liked to fight, and he wasn't afraid of being hit. Likewise, the jury would discover that Owens had been taught by his family that violence and intimidation were appropriate manners of resolving conflict. They would have also heard that upon his arrival at DJJ, Owens reacted impulsively and without regard for the consequences of his actions leading to a diagnosis of conduct disorder—the precursor for a diagnosis of anti-social personality disorder. Also, the R&E report would have informed the jury that Owens lacked any remorse for the crimes he had committed prior to his commitment to DJJ. (PCR Tr. pp. 276-282). Thus, counsel's

investigation clearly showed Owens was violent, was taught violence, learned violence and lacked remorse for committing violent acts long before his arrival at DJJ. (PCR Tr. pp. 266-284).

Furthermore, this additional evidence of Owens' DJJ experience would have been at odds with Ms. Hammocks's mitigation testimony and would have essentially undermined the entire focus of counsel's narrative—that Owens' family failed him, taught him to be a violent person, and despite this Owens, while he was on death row, reached out to Doctor Cobb and asked for help. Specifically, the record reflects that Ms. Hammock had testified in each of Owens' prior trials that Owens was taught violence from a young age, and as a result of his home environment, Owens engaged in criminal activities as a juvenile and as an adult. Thus, were the jury to hear the additional evidence of Owens' purported DJJ experiences such evidence would have been more likely to confuse the jury and undermine counsel's mitigation story than produce a different result.

Likewise, evidence concerning Owens DJJ experiences would have highlighted that Owens had always been a disrespectful and violent person rather than provide mitigation evidence. Specifically, Owens school records reflected that Owens talked back to teachers and indicated there were numerous incidences of suspensions and disciplinary problems in school prior to Owens commitment to DJJ. In particular, Owens' former teacher testified in his sentencing proceeding that he came to school the first day of class, threw a desk across the room and stated, "now what you going to do about that." In fact, the record reflects Owens had to go to an alternative school due to his behavioral problems. Thus, the State submits that had counsel introduced evidence concerning Owens' DJJ experience thereby opening the door for the State to exploit Owens' disciplinary record while in DJJ, the State could have created a complete history of violence and disrespect for the rights of others. In other words, the State could have shown that Owens had always been dangerous, was

taught to fight at an early age, enjoyed fighting, did it often, had no respect for others, felt no remorse for hurting others, and his previous incarceration failed to change him. Accordingly, the State submits that even if telling the story of Owens incarceration at DJJ would have possessed some value as evidence in mitigation, Owens could not establish Strickland prejudice as the value of such evidence would have been clearly outweighed by the potential damaging character evidence the State would have elicited as a result of Owens' counsel opening the door. Indeed, had counsel chosen to introduce evidence related to Owens' experience at DJJ, there is simply no likelihood, much less a substantial likelihood that the jury would have arrived at a different sentence.

3. There was Overwhelming Evidence Supporting Owens' Death Sentence

Finally, Owens cannot show Strickland prejudice because the evidence of his DJJ experience in no way undermines the overwhelming evidence supporting his death sentence. Specifically, with regard to the statutory aggravators, the jury determined, beyond a reasonable doubt that: (1) Ms. Graves murder occurred during the commission of a robbery while armed with a deadly weapon; and (2) Ms. Graves murder occurred during the commission of larceny with the use of a deadly weapon. Quite simply, these aggravators have been consistently proven throughout each sentencing proceeding and even if the jury had heard of Owens' DJJ experiences there is no plausible argument which would suggest that the jury would have come to a different conclusion. The jury saw the crime-scene videotape which clearly depicted that Ms. Graves was murdered during the commission of an armed robbery and larceny with a deadly weapon. Similarly, the jury was aware that Owens was involved in either the planning or commission of other armed robberies during the evening preceding Ms Graves' murder. As was the case in the robbery of the Speedway, Owens wore a mask and carried a handgun during one of these robberies.

The jury also heard a variety of evidence related to Owens character, namely that he was a violent criminal who was taught to harm others, repeatedly did harm to others and seemed to enjoy doing so. The jury was also aware that this behavior had manifested itself from a young age and additional evidence regarding Owens' DJJ experiences would not have changed this. The sentencing jury was aware of Owens' complete disregard for the value of Ms. Graves' life, including his statements that he "shot the bitch" and that he wanted to be remembered as the person who committed the most murders in Greenville County and got away with it. Indeed, the record reflects that Graves was not murdered because Owens was allegedly abused and subject to physical abuse while in DJJ's custody, but because Graves simply failed to open a safe.

The jury also heard Owens' confession to the brutal torture murder of his cell-mate Christopher Lee in the Greenville County Detention Facility. Owens' confession to Lee's murder was recited in our Supreme Court's decision in Owens' first appeal State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001):

At eleven p.m. on 2-15-99, myself and other inmates in my cell block watched the news and saw that I was found guilty. I then worked out and took a shower. I went to bed and woke up whenever they came to get one of the other inmates to take him to Perry. This was around 3:00 a.m.

While they were getting the guy ready to go to Perry, Christopher Lee said, "You won't be the only one because [appellant's] coming down there with you." I told him to 'shut the fuck up.' He told me his cousin was on the jury. I asked him if he knew that they convicted me. He said quote 'f— you. I know because my cousin was on the jury.' unquote.

I then walked into his cell and hit him in the eye. He fell down on his back. I got on top and started hitting him mostly in the face and throat. I took a pen from his right hand with my right hand and stabbed him in the right eye. I then tried to stab him in his chest, but the pen would not go in. Then I stabbed him in his throat. I don't know if the pen went into his throat or not. He started bleeding out of his mouth.

There was a sheet tied into a snare laying on his bed. I reached and got it and put it over his head onto his neck. I wrapped it around my left hand and pulled it tight. I started hitting him in the face with my right hand. Then I started choking him with my right hand and pounding his head against the floor.

He never fought back after the first punch, he was out of it. He was still breathing and the stuff coming out of his mouth stunk so I stood up and stomped his head and body with my feet. I saw a black and blue lighter under the bunk. I grabbed it and burned him around the eye and on the left side of his hair. I rammed his head into the wall. He was still moaning and breathing. I walked out of the cell to leave him alone. I heard the crazy moaning again so I grabbed the pen off the floor where I had thrown it and went back into his cell. I got back over him and rammed the pen up his right nostril. I closed his left nostril with my left hand and started choking him with my right hand. The sheet was still around his neck. I was choking him above the sheet. Throughout all of the above he was moaning and breathing.

I kept checking him to see if he was dead. I would check his pulse on his wrist and I put my ear beside his neck and chest to hear if he was breathing. I wanted him to be dead at that time. I finally thought he was dead so I threw him on his bunk and covered him up. The first time I put him on the bunk he fell off. I then packed my stuff and put my mattress on the table and went to sleep.

While I packed my stuff the black guy that had been on the top bunk of Christopher's cell the whole time this went on got down and put his mattress on the other table and sit [sic] down. Everyone in the cell block was awake when I left Christopher.

I woke up when Hefner opened the door to bring in breakfast and I got into line. I was third in line. Sergeant McNeil walked by and I told him to cuff me. He said he would not and I told him he would if he would go into Christopher's cell. He looked into the cell and Hefner went into the cell. Sergeant McNeil told Hefner to cuff me, which he did. Sergeant McNeil then called someone on the radio.

I really did it because I was wrongly convicted of murder.

Owens, 346 S.C. at 655-57 (*Owens I*). The jury heard the pathologist describe the injuries to Mr. Lee and which corroborated the details of Owens' confession. The jury also knew Owens did not torture and murder Christopher Lee because of anything related to Owens' previous DJJ experiences. Rather, Owens killed Lee because he made a comment about Owens' conviction for Ms. Graves' murder.

The jury also heard that Owens had accumulated fifty-six (56) disciplinary violations since

being arrested for Ms. Graves' murder. It further learned about the substance of twenty-eight (28) of those disciplinary violations. The jury was aware that because of his assaultive behavior in prison, Owens was kept in a cell inside a cage, and was considered one of the worst inmates in SCDC custody. Additionally, the jury was told that while he was contained within a maximum security cell inside a cage, Owens continued to engage in assaultive behavior and make weapons. Specifically, the jury was aware that Owens had continually assaulted fellow inmates, including his former co-defendant Stephen "Andre" Golden, corrections officers, and a male nurse while in prison. As was the case with both Ms. Graves and Mr. Lee, there was no evidence linking these assaults to Owens' previous DJJ experiences.

In light of the aforementioned facts, the State submits there is overwhelming evidence supporting Owens' death sentence. Accordingly, the State maintains that even assuming counsel's performance was deficient, Owens cannot demonstrate Strickland prejudice as he cannot show that there is a reasonable probability that had the jury heard testimony regarding Owens' DJJ experiences, he would have received a different sentence. As such, this Court must deny Owens relief on this ground.

Ground 10(b)/11(b)(7)

10 (b): Applicant was denied the right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 3 and 14 of the South Carolina Constitution, during his 2006 capital sentencing proceeding.

11(b): Supporting Facts: Trial counsel's performance during the sentencing phase was both deficient and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included the following:

- (7) Counsel failed to ensure that jurors did not see applicant in restraints.

As previously set forth, Owens withdrew, waived and abandoned this ground at the PCR.

merits hearing. (PCR Tr. p. 16). Additionally, Owens offered no evidence to support this ground. (PCR Tr. pp. 1-365). Therefore, applicant failed to meet his burden of proof with regard to this ground, and it must be dismissed with prejudice. Butler v. State, (applicant bears the burden of proof at PCR to prove both deficient performance and prejudice).⁶⁴

Ground 10(b)/11(b)(8)

10 (b): Applicant was denied the right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 3 and 14 of the South Carolina Constitution, during his 2006 capital sentencing proceeding.

11 (b): Supporting Facts: Trial counsel's performance during the sentencing phase was both deficient and prejudicial. See Strickland v. Washington, 466 U.S. 668 (1984). Counsel's acts or omissions included the following:

8) Counsel failed to object to the solicitor's improper and prejudicial closing argument. For example, counsel failed to object to the solicitor's statements that the prosecution seeks death only rarely, even in eligible cases, and this case was one of those rare cases: "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 seek the death penalty." 2006 Tr. at 1552; see also, 2006 Tr. at 1555 ("There are mean and evil people in the 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 only in a few, but the circumstances where we seek it is available to mean and evil people who commit atrocious acts of murder; the worst of the worst. That is what the death penalty is reserved for. Those whose behavior sets them apart even from the criminal world, and that is Freddie Owens, and this murder and his behavior are one of those cases"). Counsel further failed to object when the solicitor argued that the jury should sentence Applicant to death because his life would be easy in prison. See e.g., 2006 Tr. at 1561 ("[b]ig prison is like a little city. In prison he will have all the necessities in life. He will have clothing that they provide, and he will have contact with his family, 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"). Counsel also failed to object when the solicitor told the jury that he personally wanted the death penalty and would not be "satisfied with a life sentence." 2006 Tr. at 1555. Counsel thus failed to preserve for appeal whether the improper arguments violated the Sixth, Eighth and Fourteenth Amendments and the corresponding provisions of the South Carolina Constitution

⁶⁴Applicant had also filed a Motion for Summary Judgment with regard to this ground and the State had filed a Response. At the PCR hearing, applicant Owens in addition to withdrawing this ground, withdrew his Motion for Summary Judgment. (PCR Tr. p. 16).

and South Carolina law, including S.C. Code Ann. Section 16-3-25(C)(2003).

The First Allegation of this Ground

Owens alleges in this ground of his Final Application that counsel was ineffective in failing to object to portions of the Solicitor's closing argument.⁶⁵ First, Owens alleges counsel should have objected to portions of the Solicitor's closing argument where the Solicitor briefly referenced the decision to seek the death penalty. This ground has no merit and must be dismissed with prejudice.

Standard of Review/Propriety of Closing Arguments

A trial judge is vested with broad discretion in dealing with the range of propriety of closing argument, and ordinarily his rulings on such matters will not be disturbed. State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986). The Court must review the argument in the context of the entire record. State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). Owens has the burden of showing that any alleged error in argument deprived him of a fair trial. Id.

The Lack of Merit of this Allegation

Despite applicant Owens' allegation, these challenged passages and the entire closing argument of the Solicitor shows, however, that the Solicitor clearly *requested* the death penalty, and did not suggest he had already made such a decision for the jury. (See R. pp. 1600-1617). Even so, applicant argues that the argument was improper and should have been objected to. Applicant misapprehends the comments.

The first challenged comment was made in anticipation of defense counsel's closing argument

⁶⁵In his brief, applicant also challenges comments made by the Solicitor during voir dire; however, this ground did not raise any challenge to voir dire questions by the Solicitor. The State repeatedly objected to trying any issues not raised in the application, and the State refused to try any new issues by consent. These new challenges are irrelevant. Additionally, applicant did not move to amend his application.

that the State wanted the jury to kill Owens. Defense counsel made this very argument. (R. pp. 1624, ln. 23 - 1625, ln. 5 & 1626, ll. 17-20). The following is the context in which the Solicitor's argument was made:

But let me -- because I am required under the law to make the first argument, let me anticipate a couple of things that you may hear and respond to those now in anticipation that it may occur.

The first thing is that the defense may suggest to you that this process that we are going through is really killing someone and that the word killing of the defendant may be used in argument. If it is, I want you to put it in context, and let's talk about what this process is. The State is entitled under the law, to ask for the death penalty. It is an approved punishment in this state by our legislature. 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 seek the death penalty.

This is a legal process. It is a process -- it is a function of government. It is a process established by our legislature and has been approved by our courts as the manner in which a sentence will be passed in a case of this nature. It is a function of you, as citizens, acting and carrying out a process of government. The legislature has designated you in this particular case to carry out a function of government, to pass a sentence in criminal case. So it is a lawful process, and you are shaping a lawful punishment for an unlawful act. You are serving the function of a judge. It's a responsibility given to you by both our legislature and our courts to carry out fairly, and there is nothing wrong with what you are doing. It is a legal process, and your verdict, if it is the death penalty, is not killing someone. Is the passing of legal punishment under our law.

(R. p. 1605-06). It is clear from the context in which this reference was made that the Solicitor was anticipating the defense' argument that the State wants you, the jury, to kill Owens. The Solicitor was

explaining to the jury that in passing a sentence, including a death sentence, it was not doing anything illegal or immoral, i.e. killing someone, but acting pursuant to a lawful and legal process and acting as a judge would in any criminal case. This argument was not improper and not objectionable. Mere mention of the solicitor's involvement in the process to seek the death penalty is not improper. See State v. Bell, 302 S.C. 18, 34, 393 S.E.2d 364, 373 (1990).

The second challenged reference involved the Solicitor arguing that Owens should be sentenced to death because of what he, Owens, had done. The challenged comment in the context that it was made is as follows:

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 is what the death penalty is reserved for. Those whose behavior sets them apart even from the criminal world, and that is Freddie Owens, and this murder and his behavior are one of those cases.

Punishment and the death penalty are about accountability and responsibility for choices made. I told you earlier we are here because Freddie Owens acted the way he did. He is responsible for bringing us here. Now is the time to talk about accountability.

Freddie Owens had a choice on November 1st, 1997. He had a choice before him to kill or let Irene Graves live. He made the choice, so we are here because Freddie Owens made a terrible choice, a terrible choice. It was an intentional and willful choice to kill her. He made the intentional and calculated choice to kill and his punishment should reflect the degree and the magnitude of that choice. Bad decisions and bad judgment have consequences, but intentional and premeditated acts of violence

carries severe consequences. We must hold people accountable for their acts to the most severe punishment when their acts are so atrocious as to justify that severe punishment.

Freddie Owens had the ability to make choices. He knew right from wrong. He could conform his behavior to the law. Instead he chose evil. He chose brutality. He chose unnecessary killing and the punishment should reflect accountability for that choice

We must measure the extent of the culpability and determine the proper punishment. The greater extent of the culpability, the more severe the punishment. Remember, the worst of the worst.

(R. pp. 1609-1611). After a short paragraph explaining the alternatives of life and death once an aggravating circumstances was found, the Solicitor argued for the remainder of his argument that the death penalty was appropriate and not a life sentence because of what Owens had done and his degree of culpability. (R. pp. 1611-1617). At no time during his closing argument did the Solicitor suggest or argue to the jury that he had already made the decision for them, or attempt to lessen or reduce their responsibility in determining the sentence. (R. pp. 1600-1617). This argument was not improper.

Comments reflecting the solicitor's specific decision to seek a death sentence in a given case in an attempt to lessen the jury's responsibility or role are improper. State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007). See also Smart v. State, 278 S.C. 515, 526, 299 S.E.2d 686, 692-693 (1982). Here, however, the comments at issue do not suggest "the solicitor attempted to minimize the jurors' own sense of responsibility for appellant's fate by stressing that he had himself already made the same decision that he was now asking them to make." State v. Woomer, 277 S.C. 170, 175, 284 S.E.2d 357, 359 - 360 (1981). Mere mention of the solicitor's involvement in the process to seek the death penalty is not improper. See State v. Bell, 302 S.C. 18, 34, 393 S.E.2d 364,

373 (1990). Further, the arguments here are clearly tailored to the specific crime and to applicant himself, and again, are not improper on the face of the record. See Smart, 278 S.C. at 526, 299 S.E.2d at 692-693 (cautioning such comments must be case specific and defendant specific). Applicant also complains of the Solicitor's argument that he was mean and evil and could not live safely with the rest of society. This argument is supported by the record and is not improper in the penalty phase of a capital trial. See Kinder v. Bowersox, 272 F.3d 532, 552 (8th Cir. 2001)(finding no unreasonable application of federal law where state supreme court did not reverse on the following argument, "*Evil stares at you in the courtroom... We don't want to share our streets one day with evil. We cannot risk one day sharing our lives and our world with evil*" but found "the statements were proper argument because they addressed [the individual defendant's] character and the appropriate punishment for his crime.")(emphasis in original). And, of course, "[g]eneral deterrence arguments are admissible in the penalty phase of a capital trial." See State v. Shuler, 353 S.C. 176, 189, 577 S.E.2d 438, 444 (2003). Again, here, the Solicitor clearly *requested* the penalty, and did not assume the penalty or lessen the authority or responsibility of the jury in any way. (**R. Patterson, p. 1609**).

The Solicitor did not argue or attempt to lessen the jury's responsibility for determining the sentence. The Solicitor did not argue or imply that another court or judge would review their sentence determination. The Solicitor did not argue that they should sentence applicant Owens to death because he, the Solicitor, had decided to seek the death penalty against Owens. The Solicitor argued in this portion of his fifteen (15) page argument that the jury should sentence Owens to death because his, Owens' conduct had demonstrated that he was the worst of the worst, and he was an evil individual who could not live peacefully with the law abiding citizens of the community. (**R. Patterson, pp. 1600-1617**). The record clearly supports this argument. Counsel could not be

ineffective in failing to object because the argument, as made, was not improper.

Applicant also challenges another statement by the Solicitor. Again, applicant takes this statement out of context. The following is the context in which this statement was made:

It is a legal process, and your verdict, if it is the death penalty, is not killing someone. It is the passing of legal punishment under the law.

Now, that's a tough decision. We all know it's a tough decision. You talked about it, some of you in voir dire, how tough it would be, and we recognize it's a tough decision. It's a tough decision for me to ask you to do it when we seek the death penalty, but responsible people make tough decisions all the time. We make those decisions in our marriages. We make them in regard to our families. We make them in regard to our children, our jobs. Every day people, responsible people, make tough decisions. So this process makes you responsible for a tough decision, but we can't run and hide from that responsibility. It is a responsibility that's placed on you as a part of our governmental function.

But it means that we approach the decision the same as you do any other tough decision that you make. You consider the facts. You consider the evidence. You consider the alternatives available and the solutions, and you choose the most appropriate. You simply need to follow the process and imagine yourself making a tough decision for your family and handle it in the same way. And if you do, we trust that you will - - if you use that approach, you will reach the right result.

(R. p. 16006-07). It is clear the comment here referencing the decision to seek the death penalty did not lessen the jury's responsibility to make the determination of the appropriate penalty. In fact, this argument concedes to the jury that *they* are going to have to make a difficult decision. The argument concedes it is the jury's decision to make the sentence determination, and they should do so based on the evidence in the record and the available alternatives as they would in their normal lives. And, the argument concedes it is for the jury to determine the appropriate sentence.

Lack of Prejudice

Alternatively, if the Court should find error in failing to object, the record would not support a finding of prejudice, given the wealth of evidence in aggravation, including the absolutely overwhelming (and admitted) evidence of guilt of the brutal murder of Irene Graves, the torture murder of his cell-mate Christopher Lee, and applicant's repeated assaults on inmates, guards, and medical personnel while housed in the Department of Corrections. *See Von Dohlen v. State*, 360 S.C. 598, 613-614, 602 S.E.2d 738, 746 (2004) ("comment, although improper, did not so infect the trial with unfairness as to make the resulting conviction a denial of due process). *Cf. State v. Gaskins*, 284 S.C. 105, 119, 326 S.E.2d 132, 141 (1985) (solicitor's comment during closing argument in capital case that certain evidence was undisputed because of defendant's failure to testify was harmless error beyond a reasonable doubt in context of entire record and in light of overwhelming evidence of guilt), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)". Given the overwhelming evidence of guilt, the circumstances of the crime, and applicant's bad character, there is no reasonable probability of a different result had counsel objected and the objection been sustained. *Strickland; Wong; Jones*. Furthermore, the trial court instructed the jury that they did not have to return a death sentence. The trial court also instructed the jury that it was their decision to make, whether Owens was sentenced to death or sentenced to life. (**R. pp. 1632-1657**). Jurors are presumed to follow a trial court's instructions. *See CSX Transp., Inc. V. Hensley*, 129 S.Ct. 2139, 2141 (2009); *United States v. Olano*, 507 U.S. 725, 740 (1993); *Penry v. Johnson*, 532 U.S. 782, 789 (2001); *Greer v. Miller*, 483 U.S. 756, 766 n. 8 (1987); *State v. Northcutt*, 372 S.C. 207, 228, 641 S.E.2d 873 (2007) ("Our jurisprudence unwaveringly provides that we are to presume juries follow their instructions . . .") (Toal, C.J., dissenting). Applicant Owens cannot show deficient performance

and prejudice.

The Second Allegation of this Ground

Additionally, Owens alleged in his direct appeal that the trial court erred in allowing portions of the Solicitor's closing argument because the Solicitor was *allegedly* arguing general conditions of confinement. The Supreme Court found this issue was not preserved for appellate review. Owens now alleges trial counsel was ineffective in failing to object to the same language challenged on direct appeal. Owens is wrong.

Trial counsel could not have been ineffective for failing to object to the Solicitor's closing argument because the closing argument of the Solicitor was entirely proper given the evidence introduced in this case regarding *Owens' incarceration, his conditions of confinement, and his behavior therein.*

The argument was not improper, because the Solicitor's closing argument was tied directly to applicant, Freddie Eugene Owens. Additionally, the matters discussed in this portion of the Solicitor's closing argument were tied to the record and the reasonable inferences from the record.

The central theme and focus of the Solicitor's closing argument was that the death penalty was the appropriate punishment for Owens, not life in prison, because of the heinousness of the murder of Irene Graves, the evidence of Owens bad character, and his assaultive conduct while incarcerated. (See R. 1600-1617). The following is the portion of the Solicitor's argument Owens alleges was improper (*in italics*) in the context that it was made:⁶⁶

Even in that environment of the cell inside a cage his assaultive

⁶⁶In his direct appeal brief, Owens only presented the portion of the argument to which he now objects, and did not present the Supreme Court with the context in which the argument was made.

behavior still exists. Dr. Cobb told you yesterday, and I don't know if you caught this, but he said "when I talked to him, I go inside the cage. When I talk to him through the window." He doesn't even go inside the cell with Freddie Owens.

He is still planning. He is still making shanks. He is still planning for assaultive behavior. He has those shanks under his mattress and he has them in his possession after he's been on medication.

But what we really have, Freddie Owens is playing a game. Halloween night was a game. Ride around and rob and then kill Irene Graves, because she wouldn't open the safe or cash register fast enough, because it was in grocery order mode. He has no respect for life. His statement was "I shot the bitch. I shot the whore." The mother of three children working three jobs, he called her a bitch. He has no respect for life. He has no respect for other people. In fact, 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. And that's the reason, because Freddie is a unique person. He killed Irene Graves and he went home and went to bed. He killed Christopher Lee. Hands on, horrific predator killing; beat him the whole time he was unconscious; rammed his head into the floor; kicked him; stomped his chest; twisted his neck until he ripped the skin off of him, broke two ribs; rammed the pen up his nose to make him stop moaning; kicked him; burned him. Then he threw his lifeless body up on a bunk like a sack of potatoes and went to sleep. He could care less. He's cold. He's unfeeling. And in the Department of Corrections he continues to manifest that: Cold; assaultive; planning for assaults; shanks; stabbing. He continues as a predator.

Freddie wanted to be a person in Greenville who killed the most people and got by with it. He said it best what he is when he told Joe Wood "I'm a real menace." And Major Nettles summed it up for you when he said "he's still at this date my most problematic inmate in the population of the worst of the worst inmates in this state."

The greater the extent of his culpability, the greater the punishment. So what is the appropriate sentence to fit this crime and hold him responsible for his actions? Life imprisonment is not appropriate. You can't put him in prison for life and expect him to suffer, because he has to think about it everyday? He's not going to give another

thought for Irene Graves. He's not going to give another thought for her two children. He's not going to give another thought for Christopher Lee. He's not going to give another thought to any of those correctional officer's that he assaults. Nobody is going to be there to talk to him and say "do you remember the murder you did?" So he's not going to suffer with any memory in prison. He will go on with his self teaching and making himself better and reading his books, learning languages and doing things that he's doing. There is nobody going to be there to remind him.

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 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 for him. Remember 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, 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.

Remember, Irene Graves was a living, breathing human being, who had a right to continue to live. She had never harmed a soul. A good sweet person. She loved her children and she deserved to live, but he invaded her workplace and he took her life. And when you consider the punishment, want you to consider the extent of the crime and extent of his culpability. Killing Ms. Graves was a horrible crime and it deserves the most severe punishment. It was a senseless crime. Killing Christopher Lee was the same. Senseless, unnecessary, brutal predator. His behavior in prison has been the same. Correctional officers don't deserve the continuing abuse of Freddie Owens.

He should be held accountable.

(R. 1612-16). Given the record in this case, and the context that the argument was made, it was not improper, but entirely proper.

In keeping with the South Carolina Supreme Court's previous decision in State v. Bowman, 366 S.C. 485, 623 S.E.3d 328 (2005), the State did not offer an expert witness or testimony regarding general conditions of confinement.⁶⁷ Testimony regarding how *Freddie Eugene Owens* was confined, and how he behaved in those conditions, came from his own psychologist and psychiatrists and the state's custodian of records who testified to Owens' record of disciplinary infractions and from the officer's own personal experience with Mr. Owens. See State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007)(how inmates other than the defendant at trial are treated in prison is inappropriate, evidence should be connected to particular defendant)(citation omitted). The record reflects that the Solicitor's comments were not only *not* improper, but also were *entirely proper*.

Standard of Review/Arguments of Counsel

Our appellate courts review an argument in the context of the entire record. State v. Patterson, 324 S.C. 5, 482 S.E.2d (1997); State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007), *citing Patterson*.⁶⁸ Considerable latitude is generally allowed in matters of drawing and arguing inferences and deductions from evidence. Johnson v. Life Ins. Co. of Ga., 227 S.C. 351, 88 S.E.2d 260 (1955). A lapse of good taste will rarely constitute prejudicial error nor will robust language introduce an

⁶⁷The Solicitor also complied with this Court's subsequent decision in State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007) decided approximately two (2) months after this sentencing proceeding.

⁶⁸By engaging in this analysis, Respondent does not concede the Solicitor's comments were improper. Instead, the record reflects they were proper given the testimony introduced in the case by both the State and the defense.

arbitrary factor. State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984). Arguments must be confined to the evidence in the record and reasonable inferences therefrom, although failure to do so will not automatically result in reversal. State v. Huggins, 325 S.C. 103, 481 S.E.2d 114 (1997). A new trial will not be granted unless the comments so infected the trial with unfairness so as to make the resulting conviction [or death sentence] a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868 (1974); State v. Bennett, 369 S.C. 219, 632 S.E.2d 281 (2006); State v. Patterson, 324 S.C. 5, 482 S.E.2d (1997). "[W]hether or not the particular arguments are so prejudicial as to constitute reversible error depends upon the nature of the utterances and the circumstances under which they were made." Bennett, supra, quoting South Carolina State Highway Dep't v. Nasim, 255 S.C. 406, 179 S.E.2d 211 (1971).

The Lack of Merit of this Allegation

Doctor Schwartz-Watts, applicant Owens' witness, testified to the following before the jury regarding Owens:

He reads. He - - is fluent. He has taught himself Arabic. He has taught himself Swahili. He is studying French. He reads. He reads scholars. He won't read any books unless it's a scholar that's published for 15 years. He reports he has taught other inmates how to read. He teaches them to read using the book Alexander the Great, because he doesn't want them reading books that aren't well written. So he's able to focus his attention.

(R. 1532, ll. 9-17). "I also discovered that he's fluent in sign language, which I didn't know. I saw him sign in court. So he's taught himself many things." (R. 1532, ll. 21-23). Actions Doctor Tora Brawley, another *defense witness*, described as Owens "...bettering himself.." (R. 1480, l. 21).

Additionally, in Owens' confession to the murder of Christopher Lee, Owens refers to he and other cellmates in his cell block watching the news on *television*. (R. 1388, ll. 24-25). Owens then

states in his confession: "I then *worked out and took a shower*." (R. 1389, l. 1). Owens talks about *sleeping in his bed*. (R. 1389, ll. 1-2). Owens talks about being brought *breakfast* the morning after he killed Lee. (R. 1340, ll. 22-23). The prison disciplinary records admitted in evidence also reveal that Owens was allowed to *shower*, was *given food*, and *coffee* and had a *mattress* to sleep on. (R. 1442-43). Albeit, Owens abused all these privileges.⁶⁹ The record is clear Freddie Owens had these privileges. And, a shank found in his cell was manufactured from fencing *on the recreation yard*. (R. 1442, 1443). In fact, most of the shanks found in Owens' cell were made from fencing material. (R. 1445, l. 13). If there was any question regarding Owens being allowed to have recreation it was cleared up by Doctor Cobb who stated he actually witnessed Owens being taken to the *recreation yard*. (R. 1494, ll. 6-8). The record also reflects that Owens received *visitors* while in prison and received *letters* from a friend. (R. 1473, ll. 7-13). Additionally, Freddie Owens has been *treated by doctors & a nurse* while in prison.⁷⁰ (R. 1487-1547, 1442). And there is a psychiatrist currently working at Owens' facility under Dr. Cobb's direction. (R. 1501, ll. 9-14). The Solicitor's comments were based in the record and the inferences therefrom. See Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004).

The record also shows that Owens had been incarcerated during his teenage years and almost all of his adult life. (R. 1458, ll. 7-8, 12-5). Life in prison would not be much more than a change of address for Freddie Owens. Owens also told investigators after the murder "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." (R. 1143, ll. 10-12).

⁶⁹Owens stabbed an inmate in the *shower*, threw the *food* tray and *coffee* on a guard and set fire to his *mattress*.

⁷⁰He slapped the nurse in the face.

He also told the detectives: "If I go to jail, I go to jail, I don't give a shit." (R. 1143-44). The Solicitor's comments were appropriate given this record. If Owens' own comments are to be believed, *life in prison doesn't mean anything to Freddy Owens*. Just more of the same. The Solicitor's comments were based in the record. A solicitor has a right to state his version of the testimony and comment on the weight to be given such testimony. Smith v. State, Shearhouse Advance Sheets, Opinion No. 26405, (filed December 10, 2007) *quoting* Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004) *citing* State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999).

The challenged portion of the argument can now be viewed in light of the entire record:

Sure, you and I may think going to prison would be a serious thing and it would be, but what about Freddie Owens? (Tr. p. 1405, ll. 7-8, 12-15, p. 1092, ll. 10-12, p. 1092, l. 23-p. 1093, l. 1). Big prison is like a little city. In prison he will have all the necessities of life. Sure, he will be in solitary, (Tr. p. 1441, ll. 9-13) but he will still have food to eat. (Tr. p. 1338, ll. 22-23, p. 1390-1391, p. 1092, ll. 10-12). They will provide him with clothes. He will have books to read. (Tr. p. 1479, ll. 9-17). He will be able to recreate and exercise. (Tr. p. 1390, l. 1 & 18, p. 1391, ll. 19-22, p. 1393, ll. 13-14, p. 1441, l. 8). He will have doctors to take care of him. (Tr. p. 1390, l. 10, p. 1434, l. 17-p. 1494, l. 18). He will have the clothing they provide, and he will have contact with his family and loved ones (Tr. p. 1420, ll. 7-13) and TV at times (Tr. p. 1336, ll. 24-25) and he will have family business. (Tr. p. 1411, ll. 5-10, p. 1405, ll. 5-7). Not much more than a change of address for Freddie Owens. (Tr. p. 1405, ll. 7-8, 12-15). So don't think putting Freddie Owens in prison for life is going to be a significant punishment for him. (Tr. p. 1092, ll. 10-12, p. 1092, l. 23-p. 1093, l. 1).

The death penalty is the appropriate punishment for him. (Tr., p. 1181, ll. 18-25, p. 1114, ll. 23-25, p. 1092, ll. 10-12, p. 1092, l. 23-p. 1093, l. 1, p. 1093, ll. 12-13). Remember that Freddie could have made something of himself. He had...

Or stated another way:⁷¹

So he's not going to suffer with any memory in prison. He will go on with his self teaching and making himself better and reading his books, learning languages and doing things that he's doing. (Tr. p. 1479, ll. 9-23 & 1427, l. 21). There is nobody going to be there to remind him.

Sure, you and I may think going to prison would be a serious thing and it would be, but what about Freddie Owens? *I spoke to staff at DJJ who had known him when he was incarcerated there. / ..I have read the records of his school records, SCDC records, and his Department of Corrections records. / He said "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." / "He said "if my mom says anything, tell her I said adios, to kiss her ass too. She can kiss my ass too. Tell Ian and the rest of them assholes to fuck themselves. If I go to jail, I go to jail. I don't give a shit."* Big prison is like a little city. In prison he will have all of the necessities of life. Sure, he will be in solitary. *Freddie was in a cell, which was also inside a cage, which is a little bit different than all the other cells on the cell block.* But he will still have food to eat. *I woke up when Hefner opened the door to bring in breakfast. / August 17, 2002, throws a food tray and hits officer Guess in the head. / January 13, 2006 throws feces on officer Williams hitting him in the face. / May 20, 2006 throws coffee on officer Smith. / "[T]he only thing I'm here for is to eat, sleep, shit and piss."* They will provide him with clothes. He will have books to read. *He reads. He—he is fluent. He has taught himself Arabic. He has taught himself Swahili. He is studying French. He reads. He reads scholars. He won't read any books unless it's a scholar that's been published for 15 years. He reports he has taught other inmates how to read. He teaches them to read using the book Alexander the Great, because he doesn't want them reading the books that aren't well written.* He will be able to recreate and exercise. *May 27, 2001, had a six and a half inch shank made from fencing and toothbrush. / December 22, 2002, shank made from fencing. / A shank is a homemade weapon within the penitentiary. The two that -- say push rod actually comes out of the cell. The rest are predominantly made from fencing material off the rec field. / Did you ever witness any incidents or treatment of Freddie by the*

⁷¹Bold type entries are from the record cites in the preceding paragraph. A / indicates a break in testimony.

correctional staff? Not other than transporting him to the recreation yard. He will have doctors to take care of him.⁷² August 5, 2002 slaps a male nurse in the face. / He seemed to enjoy my counseling and talking about his difficulties he was having... / I diagnosed Freddie with impulse control disorder, not otherwise specified; and anxiety disorder, not otherwise specified. / Did you prescribe medication for him? Yes, I did. / Has Freddie been compliant with your treatment plan? Yes, he has. / Now, Dr. Cobb, even though you are not going to Leiber presently, is there a psychiatrist going to Leiber? Yes there is. And is that psychiatrist actually working under your control? Yes, he is. / Actually, I may be mistaken, but I think he's been - - he was under the care of Dr. Cusack, who is a psychiatrist there for a number of years, even before Dr. Cobb came.⁷³ He will have the clothing that they provide, and he will have contact with his family and loved ones. And have you continued to keep up with Freddie over the years? I have. My husband and I visited him when he was - - I can't think of the name of the prison down in Summerville. I'm sorry, I can't think of name of it. We did visit him. And then after my husband died in 2002, I did not correspond with Freddie any more. And T.V. at times. At eleven p.m., on 2-15-99, myself and other inmates in my cell block watched the news and saw that I was found guilty. And he will have family business. Freddie, I'm sorry, Masey, was - - is Freddie Owen's dad had very, very little contact with the family. ... Freddie has had very little contact with him when he was growing up. There has been subsequent contact in recent years.⁷⁴ / I interviewed the client, Freddie Owens. I interviewed his mother, his - - both of his sisters. I interviewed one of his brothers. I had the chance to talk to his

⁷²Defense counsel asked a defense witness the following: "Well, if Freddie were to get a life sentence, where could he be housed in the Department of Corrections that would take care of his mental health treatment?" The witness spent a page of the transcript answering this question. (R. 1535-36, Tr. p. 1482-1483). The Solicitor's comments were tied to the record and the reasonable inferences therefrom.

⁷³Respondent has not set forth all of the testimony referenced in the record regarding Owens being treated by doctors, just a select portion. The testimony is too lengthy to include here. (R. 1487-1547, Tr. p. 1434, l. 17 - p. 1494, l. 19).

⁷⁴Owens has been incarcerated since 1997. This testimony was received in 2006. It is certainly a reasonable inference that Owens has had contact with his father in the last several years while incarcerated.

*stepfather, who was then stepfather.*⁷⁵ Not much more than a change of address for Freddie Owens. *I spoke to staff at DJJ who had known him when he was incarcerated there. / ..I have read the records of his school records, his SCDC records, and his Department of Corrections records. / He was in Burchwood Dorm, which is one of the more -- as Dr. Cobb was mentioning earlier, that was one of the dorms where juveniles were older and had more serious charges. So certainly he was in an environment that was more -- where the juveniles were considered maybe more dangerous than others, compared to other campuses. While in the Department of Corrections, I think it's been very fair to say that he's had a lot of write ups, even compared to other inmates. He's had, I believe I counted, about 56 write-ups over the years. Those write-ups have ranged from some things that are assaultive, to again, him still in his late twenties, now being disruptive at times, being very impulsive, but its certainly been characterized as a long disciplinary history. So don't think putting Freddie Owens in prison for life is going to be a significant punishment for him. He said "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." / He said "if my mom says anything, tell her I said adios, to kiss her ass too. She can kiss my ass too. Tell Ian and the rest of them assholes to fuck themselves. If I go to jail, I go to jail. I don't give a shit."*

The death penalty is the appropriate punishment for him. *"I don't give a shit. I was born to be in jail." / "If I go to jail, I go to jail. I don't give a shit." / "She kept throwing up her hands and said she couldn't open the safe, so he just said 'I just shot the bitch.'" / "[S]he wasn't opening the safe, so he shot the whore." / Yeah, I want to be remembered as the one who killed the most people in Greenville. I'm a real menace.* Remember Freddie could have made something of himself. He had a mother who did the best she could for him. That's

⁷⁵Given the testimony that Owens has had visitors and corresponded with them while in prison, the jury could certainly infer that he could do the same with his family. Doctor Schwartz-Watts also testified "I think it's very fair to say he's attached to his mother. He's certainly attached to his teacher. And I think he's been attached to any -- Dr. Cobb, as well, any person that's provided help to him. And I think that's very fair to say. He's very attached to his family members, but overall, he's had very little chance for a relationship." (R. 1528, ll. 4-9). The jury could reasonably infer their was contact with his family and Owens was aware of family issues. (See also R. 1495, ll. 3-7). This referenced conversation took place sometime after 2005. (R. 1492).

The Solicitor's closing argument was tied to the record and the reasonable inferences therefrom. The Solicitor's closing argument focused on Owen's character, his background, and the nature of the crime. See Bennett, supra; State v. Reed, 293 S.C. 515, 519, 362 S.E.2d 13, 15 (1987)(*overruled on other grounds by State v. Torrence*, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991)). Wide latitude and freedom of counsel in arguments to the jury are allowed so long as the arguments are based on facts in the record or inferences from those facts. Edwards v. Lawton, 244 S.C. 276, 136 S.E.2d 708 (1964).

The challenged portion of the argument must be reviewed in the context of the entire record and the entire closing argument. Patterson, supra. In essence, the Solicitor was arguing Owens should be put to death for the brutal murder of Irene Graves, given the circumstances of the crime, evidence of his character, inability to adapt to prison life, and future dangerousness. Owens should not be allowed the privilege of living, eating, sleeping, and breathing which a life sentence for Owens would entail. Those privileges that normally come with the privilege of being alive.

Given the evidence, life in prison is not a significant punishment for Owens. He's been in jail before, look how he acted. His statements admitted during the trial indicate that prison means nothing to him. Our Supreme Court has never prevented the Solicitor from making such a contrast in the appropriateness of punishment given the evidence in the case, as long as the evidence deals with a particular defendant. See Burkhart, supra; Bowman, supra. As this Court stated in Burkhart:

We are aware of the tension between evidence regarding the defendant's adaptability to prison life, which is clearly admissible, and this restriction on the admission of evidence regarding prison life *in general*. We note, however, that evidence of defendant's characteristics may include prison conditions if narrowly tailored to demonstrate the defendant's personal behavior in those conditions.

Id. at 488 (*italics in original*). Likewise, in Bowman, *supra*, this Court stated:

We emphasize that how inmates, other than the defendant at trial, are treated in prison; and whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial. We admonish both the State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that *particular defendant*.

Id., at 488-499 (*emphasis added*).

The State did not introduce any evidence regarding whether other inmates had escaped or attempted to escape from prison. The State did not introduce any evidence of how other inmates are treated in prison other than Owens. Owens mistakenly alleges the State violated this Court's holdings in Burkhart and Bowman. Owens is wrong. The State followed those holdings by tying its closing argument directly to Freddie Eugene Owens, his behavior while incarcerated, and whether life in prison was the appropriate punishment for him.

Likewise, the Solicitor in his closing argument, only referred to how Freddie Eugene Owens would be confined and treated if the jury chose to sentence him to life and whether that was an appropriate punishment, or whether in contrast the death penalty was the more appropriate punishment for the murder of Irene Graves, given the circumstances of the crime, the evidence of Owens' character, and his actions in jail. See Reed, *supra* (argument must be confined to the record and its reasonable inferences and center on the characteristics of the defendant and nature of the crime). This case is not Burkhart or Bowman.

There was no testimony regarding conditions of prison life *in general*. The conditions of Owens' confinement and how he behaved in them were testified to in the record over and over and were all that was offered. Owens concedes in his direct appeal brief there was no testimony of

general prison conditions. (See BOA, p. 21, the Honorable Larry Patterson). Instead, Owens argues the Solicitor's closing argument was one of general prison conditions. This reasoning is incorrect as pointed out above. While admitting there was no testimony regarding general conditions of confinement, in his argument on this issue Owens failed to mention or discuss *at all* the extensive evidence admitted without objection regarding his own personal conditions of confinement and behavior therein. (BOA. pp. 21-23, the Honorable Larry R. Patterson). This omission was necessary, because discussing this evidence would be an admission that the Solicitor's argument was *supported by the record and the reasonable inferences therefrom*.

Owens boasted that prison life meant nothing to him. Prison was no punishment at all; he was born to be in jail. The Solicitor's statements were reasonable given Owens' callous disregard for law and order, and incarceration as a form of punishment.

The Solicitor's argument was one of retribution and punishment. The central theme of the argument was that Owens deserved the death penalty because of the heinousness of this murder and the evidence of Owens' character and future dangerousness. As shown above, the Solicitor's argument was tied to evidence in the record that was admitted without objection or admitted through defense witnesses. The South Carolina Supreme Court has never held that a Solicitor cannot argue that the death penalty is a more appropriate punishment for the defendant than life in prison. The Solicitor argued Owens should be put to death, not allowed to live under the *conditions he, Freddie Owens, was now confined under*. Owens would also have this Court and every other trial court limit the Solicitor from arguing in favor of the death penalty by contrasting death with the privileges of life itself, waking, sleeping, breathing, eating, etc. This would be a ridiculous result. Irene Graves and Christopher Lee no longer enjoy these privileges. This was a proper retributive argument given

Owens' crimes, his actions inside jail, and his statements to police that prison meant nothing to him. The closing argument was tied to Freddie Owens, his crimes, the conditions of Freddie Owen's confinement, his actions in those conditions, and the evidence in the record, not general conditions of confinement. Freddie Owens' actions and conduct and what punishment he deserved for those actions and conduct was the central focus of the Solicitor's closing argument. The argument was not improper. The argument was not calculated to arouse the juror's passions or prejudices, and its content stayed within the record and the reasonable inferences therefrom. See Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). It did not introduce an arbitrary factor into the jury's deliberations. Counsel was not deficient in failing to object to this argument given this record. Nor can Owens demonstrate prejudice because an objection along the lines Owens suggests would have been overruled by the trial judge given the argument and the abundant evidence in the record of Owens conditions of confinement and his behavior therein.

Additionally, this ground is without merit for a different reason. Counsel testified he did not object to Solicitor Ariail's argument in this regard for a strategic reason. Counsel testified he thought, based on the testimony before the jury regarding Owens being housed inside a cell inside a cage, that Solicitor Ariail lost credibility with the jury by making this argument. (PCR Tr. pp. 100, ll. 22-25). Counsel testified he believed Solicitor Ariail was clearly overreaching with this argument, given the testimony in the record before the jury regarding Owens' conditions of confinement. (PCR Tr. p. 100, 1n 22- p. 101, ln. 7). Counsel testified that based on the record of Owens' harsh conditions of confinement before the jury, it appeared the Solicitor was lying to the jury and lost credibility with the jury by making this argument. (PCR Tr. pp. 159-160). This was an objectively reasonable trial strategy decision given the testimony in the record in this case. It cannot be the basis for a finding

of ineffective assistance of counsel. Strickland v. Washington; Council v. State.

Lack of Prejudice

Even assuming *arguendo* that the Solicitor's comments were inappropriate, they were harmless beyond a reasonable doubt; therefore, Owens cannot show prejudice. See Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992)(acknowledging appropriateness of harmless error analysis in capital cases where constitutional rights are violated); See also State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985)(finding harmless error in admission during penalty phase of defendant's confession to other crimes). They did not so infect the trial with unfairness as to make the resulting death sentence a denial of due process. State v. McClure, 342 S.C. 403, 537 S.E.2d 273 (2000); State v. Davis, 309 S.C. 326, 422 S.E.2d 133, 146 (1992); State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). Even noting the evaluation of the consequences of an error in the sentencing phase of a capital case are more difficult because of the discretion that is given to the sentencing jury, the challenged portions of the argument alleged to be erroneous were not prejudicial. State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990); State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979); State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (1998). The currently challenged portions of the Solicitor's argument only took up a small portion of an argument that took up fifteen (15) pages of trial transcript. See Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2003)(objected to argument only took up ten lines in transcript); State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996)(challenged comment allegedly necessitating mistrial was one isolated event in whole argument) citing State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984)("momentary lapse of good taste will rarely constitute prejudicial error"), *overruled on other grounds* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). The small portions of a lengthy argument in no way approaches the "overly zealous" argument disapproved of

in State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007)(holding solicitor sought to inflame passions of jury with argument, improperly injected his own personal beliefs into the case, and staged a funeral procession before the jury).

Given the overwhelming evidence the death penalty was appropriate, including Owens' senseless murder of Irene Graves because she could not open the store safe, his brutal torture and murder of Christopher Lee while in jail, his cavalier attitude toward prison life, and his assaultive behavior against guards, inmates, and medical personnel even in the most secure of prison environments, this challenged portion of the argument was harmless. See Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2005)(applicant failed to show result of sentencing proceeding would have been different where challenged comment of solicitor did not so infect the trial with unfairness as to make the result a denial of due process); Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002) (death sentence affirmed where solicitor's closing argument in penalty phase did not prejudice petitioner); State v. Tubbs, 333 S.C. 316, 509 S.E.2d (1999)(solicitor's isolated references to defendant as Cobra were harmless where they did not infect entire trial with unfairness) citing Arnold v. Evatt, 113 F.3d 1352 (4th Cir. 1997)(solicitor's occasional use of nickname "Mad Dog," during guilt and re-sentencing proceedings did not deny defendant due process of law).

Owens cannot show prejudice from these limited comments. Owens cannot show that but for counsel's failure to object to this small portion of the closing argument, "there is a reasonable probability that, absent [counsel's] errors, the sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Jones. Again, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." Jones, 504 S.E.2d at 823-824.

Owens cannot show that but for counsel's failure to object there is a reasonable probability the jury would have returned with a different sentence. Wong v. Belmontes. Not given this record.

Especially where Owens was convicted of the murder of Irene Graves, admitted to others that he murdered the victim Irene Graves, murdered her because she could not open the safe, talked about the victim in a derogatory manner, admitted he murdered his cell-mate during his first trial, and had a lengthy history of assaultive behavior in the department of corrections. And, especially where evidence of Owens' conditions of confinement was testified to repeatedly in the 3rd sentencing proceeding. Even assuming *arguendo* that the challenged comments were inappropriate, given this record and all the evidence of aggravation admitted against Owens, applicant cannot establish prejudice under Strickland; Wong; and Jones.

The Third Allegation

Owens also alleges counsel should have objected to the portion of the Solicitor's closing argument where he referred to not being satisfied with a life sentence and that he was asking for the death penalty. Owens has not informed this Court of the context of these closing remarks, and for good reason. Counsel could not have been ineffective in failing to object to this portion of the Solicitor's closing argument because the comments were not improper as alleged and given the entire closing argument.

Standard of Review

A trial judge is vested with broad discretion in dealing with the range of propriety of closing argument, and ordinarily his rulings on such matters will not be disturbed. State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986). The Court must review the argument in the context of the entire record. State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). Owens has the burden of showing that any

alleged error in argument deprived him of a fair trial. Id.

The Lack of Merit of this Allegation

The Solicitor's comments were as follows:

It is his responsibility. He wrecked all these peoples 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 change in life and get a minimal sentence. Surely, there is more than [sic] punishment in a case like this.

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? ...

(R. p. 1609). The Solicitor then goes on to argue why the death penalty is appropriate under the facts of this case. (R. pp. 1609-1617)

These comments are not improper. In the context of the entire closing argument, the comments were not improper. See Williams v. Ozmint, 380 S.C. 473, 671 S.E.2d 600 (2008)(distinguishing *the Solicitor's comments* that he was asking for the death penalty, seeking the death penalty, and expecting the death penalty, *from those in State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007) where the Solicitor stated not only that he "expected" the death penalty, but also declared it would be "open season on babies" if the jury did not return the death penalty, and staged a funeral procession with a black shroud draped over the victim's crib."). Williams at fn. 3. The Court in Williams also pointed out that the case reached them on habeas review, which involved a different standard of review and although the solicitor stated he "expected the death penalty," the totality of his argument did not "minimize the juror's own sense of responsibility for [Petitioner's] fate." Williams, *supra*, quoting State v. Woomer, 277 S.C. 170, 175, 284 S.E.2d 357, 359

(1981)(holding that solicitor's attempt to minimize the jury's responsibility was improper). *See also* State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990)(finding Solicitor's comments that "if this [wasn't] a case in which the State should seek the death penalty and expect the death penalty, then there is none" did not inject Solicitor's personal opinion into the case). *Compare* State v. Butler, 277 S.C. 543, 290 S.E.2d 420 (1982); State v. Woomer, 277 S.C. 170, 284 S.E.2d 357 (1981). Here the Solicitor did not state he expected the death penalty.

The quoted language speaks for itself. The Solicitor stated he, the Solicitor, was not satisfied with a life sentence in this case, and he was *asking* for the death penalty. That was obvious from the fact that he was seeking the death penalty, which was a matter of public record and of which the jury was informed on more than one occasion. (**R., Patterson, p. 93, general voir dire, p. 167, panel voir dire, p. 1633, jury charge**). It is clear from reviewing the entire closing argument, that the jury understood the Solicitor was seeking and asking for the death penalty *because of the facts and evidence in the case*. (**R. Patterson, pp. 1600-1617**). The Solicitor stated that was why he *asked* for the death penalty to be imposed, and he wanted Owens to be sentenced to death, because of the facts in this case. These are facts the jury was well aware of as well. These comments are simply not improper in context of the entire record and the entire closing argument.

Solicitor Ariail did not demand that the jury return a sentence of death. He clearly informed the jury of his position as Solicitor, that he was *asking* that Freddie Owens be sentenced to death based on the facts developed in the case. (**See R., Patterson, pp. 1600-1617**). The jury was well aware that the prosecution was seeking the death penalty, which would necessarily mean they were not satisfied with a life sentence in this case. (**R. Patterson, p. 93**). It would naturally follow that the jury understood the prosecution would want the death penalty to be imposed in this case, and the

Solicitor was asking for the death penalty to be imposed.

The sentencing jury knew they were there to decide only two (2) issues, had the State proven the existence of an aggravating circumstance, and should Owens be sentenced to life or death. (*R. Patterson*, p. 157). The jury also knew that if an aggravating circumstance was proven that the only two (2) alternatives were life in prison without parole or the death penalty. (*R. p. 157*). The jury also knew what two (2) aggravating circumstances the State was alleging; (1) the murder occurred during the commission of an armed robbery, and (2) the murder occurred during the commission of a larceny with a deadly weapon. (*R. p. 167*). The jury knew a previous jury had already found Owens guilty of Ms. Graves' murder. And, this jury had seen the surveillance video that clearly depicted Ms. Graves being killed during an armed robbery by masked gunmen and heard the testimony that she was murdered during an armed robbery and money was taken from the store. It was therefore clear to the sentencing jury that the Solicitor *was not satisfied with a life sentence* from the fact that he was seeking the death penalty in a case where an armed robbery had been proven and a larceny with a deadly weapon had been proven in this proceeding, and the only two (2) alternatives were life without parole and death. The jury also understood the defense wanted them to return a sentence of life.

Furthermore, the totality of the Solicitor's argument did not minimize the juror's own sense of responsibility for Owens' fate. *Williams, supra*. The Solicitor clearly stated that he was *asking* for the death penalty. *State v. Bell*, 302 S.C. 18, 393 S.E.2d 364 (1990)(finding statement by prosecutor that if this was not a case where the State should seek and expect the death penalty did not inject his personal feelings in the proceeding); *compare Woomer*, 277 S.C. at 175, 284 S.E.2d at 359 (holding solicitor's attempt to minimize jury's responsibility was improper). Moreover, the trial judge gave thorough instructions to the jury regarding the fact that they were not required to return a sentence of

death. (R. pp. 1633-1656). Jurors are presumed to follow the trial court's instructions. See CSX Transp., Inc. v. Hensley, 129 S.Ct. 2139, 2141 (2009); United States v. Olano, 507 U.S. 725, 740 (1993); Penry v. Johnson, 532 U.S. 782, 789 (2001); Greer v. Miller, 483 U.S. 756, 766 n. 8 (1987); State v. Northcutt, 372 S.C. 207, 228, 641 S.E.2d 873 (2007) ("Our jurisprudence unwaveringly provides that we are to presume juries follow their instructions . . .") (Toal, C.J., dissenting). Given the entire closing argument in this case, the context in which the challenged statements were made, and the court's instructions to the sentencing jury, there is no merit to this allegation.

Lack of Prejudice

Furthermore, Owens cannot demonstrate prejudice. Strickland; Wong; Jones. Given the overwhelming evidence of aggravation in this case, Owens cannot show "there is a reasonable probability that, absent [counsel's] errors, the sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Jones. Again, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." Jones, 504 S.E.2d at 823-824. Owens cannot show that but for counsel's alleged deficient performance, there is a reasonable probability the jury would have returned with a different sentence. Wong v. Belmontes. Not on this record. This ground must be dismissed with prejudice.

New Allegations

In his brief, Owens also argues the following portion of the Solicitor's closing argument was improper:

Now, as I said earlier, its not enjoyable for me to ask you to impose the death penalty, but its necessary. We don't want to hurt his family. We don't want to hurt

anybody's family, but you have got to remember we are here because of the acts of Freddie Owens. He brought all of us here to this courtroom today. It is his responsibility. He wrecked all these peoples 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.* Surely there is more than [sic] [to] punishment in a case like this.

(R. pp. 1608-09). There was nothing improper about this argument.

The Solicitor was arguing on behalf of the State of South Carolina that the aggravating circumstances, both statutory and non-statutory, outweighed the mitigation evidence in this case. The Solicitor was arguing on behalf of the State that the jury should return a death sentence because Owens was accountable for the decisions he made and his actions despite what had occurred in his life. The Solicitor did not tell the jury they could not or should not consider the mitigation evidence, but in making their ultimate determination of the appropriate sentence personal accountability should be the overriding factor because Owens made personal decisions regarding how to act, that ultimately led to proceeding now before the jury. The Solicitor can argue the evidence in the record and the reasonable inferences therefrom.

Furthermore, Owens cannot show prejudice from the failure to object to this argument. The trial court instructed the jury that they were to follow the law as he explained it to them. (R. p. 1635). He also instructed the jury that they were not to follow the law as explained to them by the attorneys; but by the court (R. p. 1635). The trial judge also charged the jury that they could consider any statutory or non-statutory mitigating circumstances they found in the record. (R. pp. 1645-1646). The jury was also instructed that it must consider mitigating circumstances to make an individualized

assessment of this particular defendant, which the law required them to do, and evidence of Owens' background and character was relevant. (R. pp. 1647, ll. 11-16). The jury was also instructed in this regard that they did not have to find the existence of mitigating circumstances unanimously in order to impose a life sentence. (R. pp. 1647, ll. 17-23). The jury was instructed by the trial court that Owens had no burden of proof to prove any mitigating circumstance whether statutory or non-statutory. (R. pp. 1647-48). And, the jury was instructed that they could return a life sentence regardless of whether they found any mitigating circumstances. (R. p. 1648). Finally, the jury was charged by the trial judge that they could sentence Owens to life "for any reason, or no reason at all, or simply as an act of mercy." (R. p. 1648, ll. 6-8). Jurors are presumed to follow the law and follow a trial judge's instructions on the law. See CSX Transp., Inc. v. Hensley, 129 S.Ct. 2139, 2141 (2009); United States v. Olano, 507 U.S. 725, 740 (1993); Penry v. Johnson, 532 U.S. 782, 789 (2001); Greer v. Miller, 483 U.S. 756, 766 n. 8 (1987); State v. Northcutt, 372 S.C. 207, 228, 641 S.E.2d 873 (2007) ("Our jurisprudence unwaveringly provides that we are to presume juries follow their instructions . . .") (Toal, C.J., dissenting). Therefore, Owens cannot show prejudice from a failure to object to this argument.

In his brief, Owens also argues the Solicitor made a burden shifting argument. Owens is incorrect. Again, the Solicitor was anticipating the defense argument for mercy. (R. pp. 1605-08). And, that very argument was made by defense counsel. (R. p. 1619, ll. 11-15 & pp. 1619-27). The following is the portion of the Solicitor's argument in the context that it was made:

But let me -- because I am required under the law to make the first argument, let me anticipate a couple of things that you may hear and respond to those now in anticipation that it may occur. (R. p. 1605, ll. 20-23).

Also in this case you may hear the term mercy. Mercy is a term that is talked

about in death penalty cases, and the defense may suggest to you that mercy is something that you should give and impose a life sentence as an act of mercy, and its natural. It's natural that they want to have mercy. It's natural to want to have mercy on a living human being that's standing in front of you. That's human nature, but mercy is not automatic. Otherwise, we would never have the death penalty. Mercy is something that you receive, but you do not deserve.

I would prefer to focus on justice. This process is about justice which is receiving what you do deserve. Justice is what this process should be about.

What punishment does this defendant deserve? If you want to give mercy, that's your right, but Irene Graves deserves justice. This is her day in court too. Just because she's not here doesn't mean that it's not her day in court. Her life was senselessly cut short and justice is what she deserves for that. Don't forget her just because she's not here. What is justice for the bullet that Freddie Owens put in her brain and that split second of fear when she knew death was on her?

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. (R. pp. 1607-08).

There is nothing improper about this argument. It is not burden shifting.

The Solicitor's argument was that the jury should focus on justice and not mercy. The Solicitor's argument was one that the jury should return a verdict that was a just sentence, not necessarily a merciful one. The argument was made in anticipation of the defense' *argument* for mercy, and the defense introduced evidence in the penalty phase of this case. The Solicitor merely argued that the jury should consider in listening to the defense argument for mercy whether there was any evidence that Owens deserved mercy more than he deserved justice under the facts of this case. This is not an improper argument. A Solicitor may argue the evidence and the reasonable inferences therefrom.

Additionally, under South Carolina's capital sentencing scheme, once the aggravating

circumstance is proven beyond a reasonable doubt, there is no burden of proof with regard to the appropriate sentencing decision. S.C. Code Ann. Section 16-3-20. Nor is there any burden of proof with regard to disproving mercy by the State or by the defendant to prove mercy; therefore, the Solicitor's argument could not have been burden shifting.

Furthermore, Owens cannot demonstrate prejudice from the failure to object to this argument. The trial court instructed the jury that they were to follow the law as he explained it to them. (R. p. 1635). He also instructed the jury that they were not to follow the law as explained to them by the attorneys; but by the court (R. p. 1635). The trial judge also charged the jury that they could consider any statutory or non-statutory mitigating circumstances they found in the record. (R. pp. 1645-1646). The jury was also instructed that it must consider mitigating circumstances to make an individualized assessment of this particular defendant, which the law required them to do, and evidence of Owens' background and character was relevant. (R. pp. 1647, ll. 11-16). The jury was also instructed in this regard that they did not have to find the existence of mitigating circumstances unanimously in order to impose a life sentence. (R. pp. 1647, ll. 17-23). The jury was instructed by the trial court that Owens had no burden of proof to prove any mitigating circumstance whether statutory or non-statutory. (R. pp. 1647-48). And, the jury was instructed that they could return a life sentence regardless of whether they found any mitigating circumstances. (R. p. 1648). Finally, the jury was charged by the trial judge that they could sentence Owens to life "for any reason, or no reason at all, or simply as an act of mercy." (R. p. 1648, ll. 6-8). Jurors are presumed to follow the law and follow a trial judge's instructions on the law. See CSX Transp., Inc. V. Hensley, 129 S.Ct. 2139, 2141 (2009); United States v. Olano, 507 U.S. 725, 740 (1993); Penry v. Johnson, 532 U.S. 782, 789 (2001); Greer v. Miller, 483 U.S. 756, 766 n. 8 (1987); State v. Northcutt, 372 S.C. 207, 228, 641

S.E.2d 873 (2007)(“Our jurisprudence unwaveringly provides that we are to presume juries follow their instructions . . .”)(Toal, C.J., dissenting). Therefore, Owens cannot show prejudice from a failure to object to this argument.

Additionally, Owens argues in his brief for the first time that trial counsel should have objected to the Solicitor’s reference to life being a minimal sentence. First, no evidence was introduced regarding this new claim at PCR. Owens has not met his burden of proof. Second, there is no merit to this claim as Owens now alleges.

Owens takes this argument out context. The following is the context in which this argument was made:

After you have found the aggravating circumstances in this case and proceed to sentencing, there are only two, and you know that. Life imprisonment then becomes the minimum penalty for this crime. Does this case deserve the minimum penalty?

(R. p. 1611, ll. 4-8). The Solicitor then goes on to argue why Owens should be given the maximum penalty for this aggravated murder, death. (R. pp. 1611-1617). The Solicitor argues over next eight (8) pages that Owens should be sentenced to the maximum penalty allowed by law, death, because of the heinous murder of Irene Graves, and because of his character and characteristics reflected in his murder of Christopher Lee, and his assaults on guards, inmates and other prison personnel, and the Solicitor argued that a life sentence would not be appropriate given all of the facts and circumstances of the case, including Owens behavior in prison and future dangerousness. (R. pp. 1611-1617). The fact remains that once the jury found an aggravating circumstance, and those were proven beyond any doubt, life in prison was the minimum sentence for this crime and death was the

maximum penalty allowed by law. S.C. Code Ann. Section 16-3-20. Again, the Solicitor can argue that the death penalty is more appropriate than life in prison given the facts and circumstances of the crime and the character of the accused. Furthermore, Owens cannot show any prejudice in this regard because the jury was instructed by Judge Patterson that once they found an aggravating circumstance, they could impose only one of two sentences, life without parole or death. (R. pp. 1632-1657). This new claim must be dismissed with prejudice.

In his brief, Owens also argues counsel should have objected to the Solicitor's "ring like a bell" argument. There was nothing inappropriate regarding this argument. In State v. South, 285 S.C. 529, 331 S.E.2d 775 (1985), our Supreme Court held that it was not error for the prosecutor to argue to the jury that the jury's verdict would send a message to the people of the county and the State of South Carolina. The same result was reached in State v. Cain, 297 S.C. 497, 377 S.E.2d 562 (1988), where our Supreme Court held the Solicitor's argument that a sentence of death would "send a message" that you do not commit murder in Chesterfield County, did not rise to the level of arousing the jury's passion or prejudice. Furthermore, the Solicitor can make a general deterrence argument to the jury in a capital case. State v. Shuler, 353 S.C. 176, 577 S.E.2d 438 (2003); State v. Shafer, 340 S.C. 291, 531 S.E.2d 534 (2000), *remanded*, Shafer v. South Carolina, 532 U.S. 36 (2000), *on remand sentence was reversed and case remanded for resentencing on other grounds*, State v. Shafer, 352 S.C. 191, 573 S.E.2d 796 (2002); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996). This new claim has no merit and must be dismissed with prejudice.

Furthermore, Owens cannot show any prejudice from the failure to object. If counsel had objected, the objection would have been overruled by the trial judge based on the authority above. Additionally, the trial judge charged the jury that their decision was not to be effected by passion,

prejudice, or any other arbitrary factor. The jury was also instructed that they were to make their decision without any bias toward or any prejudice toward any party. And, the jury was instructed that they were not to be governed by passion or sympathy. The jurors were instructed to honor their oaths and in that regard consider all the evidence in the case and follow the law as the judge had explained it to them. (R. p. 1648, ll. 17-25). The jurors were also instructed that they had no friends to reward and no enemies to punish. They were instructed their verdict should speak the truth, based on the law and evidence. (R. p. 1639, ll. 18-21). Given this entire record, Owens cannot show any prejudice or his due process rights were violated by any argument of the Solicitor. Donnelly v. DeChristoforo, 416 U.S. 637 (1974). See also CSX Transp., Inc. V. Hensley, 129 S.Ct. 2139, 2141 (2009); United States v. Olano, 507 U.S. 725, 740 (1993); Penry v. Johnson, 532 U.S. 782, 789 (2001); Greer v. Miller, 483 U.S. 756, 766 n. 8 (1987); State v. Northcutt, 372 S.C. 207, 228, 641 S.E.2d 873 (2007) (“Our jurisprudence unwaveringly provides that we are to presume juries follow their instructions . . .”)(Toal, C.J., dissenting).

Ground 10(c)/11(c)

10(c): Applicant’s death sentence was obtained in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of South Carolina law, because the jurors saw Applicant in restraints.

11(c): The above ground states the relevant facts.

At the merits hearing, Owens waived, abandoned, and withdrew this ground. (PCR Tr. pp. 16).⁷⁶ This Court should find Owens voluntarily, knowingly, and intelligently waived and abandoned

⁷⁶Applicant had also previously filed a Motion for Summary Judgment with regard to this ground to which the State filed a Response. At the PCR merits hearing, in addition to withdrawing this ground Owens also withdrew the Motion for Summary Judgment. (PCR Tr. p. 16).

this ground, and dismiss this ground with prejudice. Furthermore, applicant Owens offered no evidence at the PCR hearing in support of this claim. (PCR Tr. pp. 1-365). Therefore, the Court should find applicant Owens failed to meet his burden of proof with regard to this allegation. Butler v. State. As a result, this ground must be dismissed with prejudice.⁷⁷

Ground 10(d)/11(d)

10(d): Applicant was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 3 and 14 of the South Carolina Constitution, during the appellate phase of his 2006 re-sentencing proceeding.

11(d) Supporting facts: Appellate counsel's performance on appeal was both deficient and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Evitts v. Lucey*, 469 U.S. 387 (1985). Appellate counsel failed to assert that it was error for the trial court to deny Applicant's request to ask potential jurors if they would have a bias in favor of police officers because of their previous work in that field.

In this ground, Owens alleges his appellate counsel was ineffective in failing to assert on appeal it was error for the trial court to deny applicant's request to ask potential jurors if they would have a bias in favor of police officers because of their previous work experience. This sole ground of ineffective assistance of appellate counsel has no merit.

⁷⁷ Additionally, this ground raises a claim of trial court error, and a direct appeal issue that is not cognizable on post conviction relief. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted) ("Allegations of trial court error are not cognizable on PCR. In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel."); Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993), citing S.C. Code Ann. Section 17-27-20(b) (1985); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Peeler v. State, 277 S.C. 70, 283 S.E.2d 826 (1981) ; Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975), also referencing Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973); Sellers v. Boone, 261 S.C. 462, 200 S.E.2d 686 (1973). This ground would have to be dismissed even if Owens had not waived and abandoned this ground.

Ineffective Assistance of Appellate Counsel

(Standard of Review)

A PCR applicant, whether capital or not, has the burden of proving appellate counsel's performance was deficient. Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). Appellate counsel is not required to raise every non-frivolous issue that is presented by the record, Tisdale v. State, 357 S.C. 474, 594 S.E.2d 166 (2004), as "[t]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." Jones v. Barnes, 463 U.S. 745, 752 (1983). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. Id.

To obtain relief a PCR applicant must show that appellate counsel's performance was (1) deficient; and (2) prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). In other words, the applicant is required to demonstrate "that his counsel was objectively unreasonable in failing" to identify, argue and present significant and obvious issues on appeal, and "a reasonable probability that, but for his counsel's unreasonable failure ..., he would have prevailed on his appeal." Smith v. Robbins, 528 U.S. 259, 285 (2000) (citation omitted).⁷⁸ Although recognizing that "[n]otwithstanding Barnes, it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim" on direct appeal, the Supreme Court has recently reiterated that "it [will be] difficult to demonstrate that counsel was incompetent." Robbins, 528 U.S. at 288. " 'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.' " Id., quoting Gray, 800 F.2d at 646.

⁷⁸ See also Smith v. South Carolina, 882 F.2d 895, 899 (4th Cir.1989) (counsel's failure to raise a weak constitutional claim may constitute an acceptable strategic decision designed "to avoid diverting the appellate court's attention from what [counsel] felt were stronger claims").

See also Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir.2000) (en banc). Applicant has failed to make this difficult showing. This ground must be dismissed with prejudice.

It is clear that appellate counsel is not ineffective for failing to file a "kitchen sink" brief. *Smith v. Stewart*, 140 F.3d 1267, 1274, n. 4 (9th Cir. 1988); *See also Thrift v. State*, 302 S.C. 535, 397 S.E.2d 523 (1990); *See also Jones v. Barnes*, 463 U.S. 745, 751 (1983) (appellate counsel may make a reasonable strategic decision not to appeal every non-frivolous argument requested by the defendant, and noting the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible"). It is clear appellate counsel's representation will not be deemed ineffective if he makes an informed decision based on reasonable professional judgment not to pursue a particular issue on appeal. *Griffin v. Aiken*, 775 F.2d 1226 (4th Cir. 1985). Further, under the two part test of *Strickland, supra*, a defendant must show not only that counsel's performance was deficient, but that this deficiency prejudiced defendant. Applicant Owens has failed to show his appellate attorney's performance was deficient or that he was prejudiced in any way by his appellate attorney's performance.

After the statutory questions have been asked and answered, any further examination of a juror on voir dire must be left to the discretion of the trial judge, which is subject to review only for abuse thereof. *State v. Bethune*, 93 S.C. 195, 75 S.E. 282 (1912). The question of impartiality of the juror is addressed to the discretion of the trial judge; and the scope of inquiry on voir dire is within the sound discretion of the circuit judge. *State v. Young*, 238 S.C. 115, 119 S.E.2d 504 (1961). A trial judge has the exclusive power to determine the competency of a juror and a finding on such is not reviewable except for error of law. *State v. Faries*, 125 S.C. 281, 118 S.E.620 (1923). If the question of the indifference of a juror is a mere question of fact, it is not reviewable on appeal, unless the

conclusion of the trial judge is wholly unsupported by the evidence. If there is evidence however, tending to support the finding of the juror's competency, there is no error of law. Young, 238 S.C. at 119-120, 119 S.E.2d at 506. The method and scope of voir dire are matters within the discretion of the trial court. State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997); State v. Mathews, 291 S.C. 339, 353 S.E.2d 444 91986); State v. Smart, 278 S.C. 515, 299 S.E.2d 686 (1982).

Absent special circumstances, the requirement of "bias or prejudice" is met through general voir dire as to bias and prejudice. State v. Gibbs, 267 S.C. 365 228 S.E.2d 104 (1976). *See also* State v. Grant, 275 S.C. 404, 272 S.E.2d 169 (1980)(trial judge did not err in refusing to ask each juror on voir dire: "Have any of your close friends or relatives been victims of a crime in the last three years.").

Judge Patterson correctly ruled that the question now proposed was improper. State v. Adams, 279 S.C. 238, 306 S.E.2d 308 (1983). In Adams, the appellant argued a juror should have been excused for cause because the juror testified he would believe a police officer is more reliable than a private citizen. Our Supreme Court held that the underlying question was improper under voir dire examination as permitted by S.C. Code Ann. Section 16-3-20(D) because it called upon the juror to make a determination in his own mind as to whether one class of persons is more credible than another. The Court stated: "A juror should not, prior to trial, be required to assert which witnesses he will believe nor what type of witnesses he will believe. This is true because a juror should believe those witnesses whose credibility appeal to him after he has heard all of the testimony. The question invades the province of the jury to determine individual credibility in the context of the entire case. *Cf Cox v. State*, 248 Ga. 713, 285 S.E.2d 687 (1982)." Id.

Subsequently, in State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), *overruled on other grounds*, Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999), and State v. Southerland, 316

S.C. 377, 447 S.E.2d 862 (1994), *overruled on other grounds* State v. Chapman, 317 S.C. 302, 454 S.E.2d 317 (1995), the South Carolina Supreme Court reaffirmed its decision in State v. Adams. The Court again stated that voir dire on the question of what weight a juror may give an officer's testimony is improper. Given these three (3) holdings, this issue of ineffective assistance of appellate counsel has no merit. The trial judge did not err in refusing to allow voir dire on the question of what weight a juror may give to an officer's testimony. As a result, there could have been no ineffective assistance of appellate counsel in failing to raise this issue on appeal.

On appeal, appellate counsel would have been confronted with three (3) separate holdings of the South Carolina Supreme Court that this type of question was improper. Appellate counsel was neither deficient in failing to raise this issue, nor can applicant Owens establish prejudice, that if counsel had raised this issue on appeal, it is reasonably probable he would have prevailed on appeal.

Furthermore, even assuming *arguendo* this issue was non-frivolous, appellate counsel can make objectively reasonable strategic decisions not to raise every non-frivolous issue on appeal. The record shows based on investigation, and the standard of review and current precedent, appellate counsel made an objectively reasonable strategic decision not to raise this issue on appeal. This Court had the opportunity to view the witnesses in this case, including appellate counsel, and judge his credibility accordingly. This Court should find the testimony of appellate counsel to be credible on this issue. The issue applicant Owens now raises is not clearly more meritorious than the issues that were raised on appeal. Therefore, this ground of ineffective assistance of appellate counsel has no merit.

CONCLUSION

Wherefore, Respondent requests that this Court issue an Order denying with prejudice each

and every allegation of the Final Application for Post-Conviction Relief.

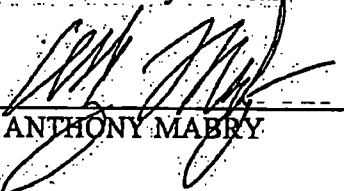
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

J. ANTHONY MABRY
Assistant Attorney General

By: 

ANTHONY MABRY

BRENDAN J. McDONALD
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT

October 17, 2011

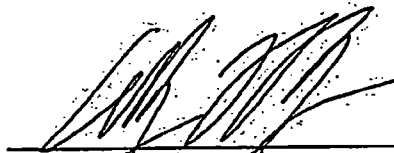
CERTIFICATE OF SERVICE

I, **Anthony Mabry**, hereby certify that I have served the *Respondent's Post-Trial Brief* in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

Emily C. Paavola, Esquire
P. O. Box 11311
Columbia, SC 29211

Keir M. Weyble, Esquire
P. O. Box 11744
Columbia, SC 29211

This 17th day of October, 2011.



ANTHONY MABRY
Assistant Attorney General

STATE OF SOUTH CAROLINA)
)
County of Greenville)
)
Freddie Eugene Owens, #5065,)
)
Applicant,)
)
vs.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS

Case No.: 09-CP-23-07417

REPLY TO RESPONDENT'S
POST-TRIAL BRIEF

FILED
NOV 3 2009
AM 8:53

Applicant, Freddie Eugene Owens ("Owens"), by and through undersigned counsel, hereby files his Reply to Respondent's Post-Trial Brief (hereafter, "Respondent's Brief"). This Reply first addresses several overarching errors that occur throughout Respondent's Brief, followed by specific responses to Respondent's legal arguments, where relevant.

I. RESPONDENT'S PERVASIVE ERRORS.

A. RESPONDENT MISCHARACTERIZES OWENS' CLAIMS.

Owens objects to Respondent's numerous attempts to re-characterize and/or subdivide his claims. As the Applicant in this proceeding, Owens bears the burden of proof and his allegations and evidence set the scope of the claims before this Court. Respondent – as a defendant in a civil action – has no authority to modify Owens' theories or allegations to suit its own preferences. For example:

- Respondent repeatedly mischaracterizes Owens' claim regarding the crime scene video and wastes over thirty pages of its brief addressing arguments that Owens has not raised. *See Respondent's Brief at pp.21-52.* In its zealous effort to knock down the straw men it created, Respondent fails to address the only argument that Owens actually did make about the crime scene video. *See, infra, Section II.A.*

- Respondent ignores this Court's previous ruling regarding the scope of Owens' mitigation claim, *see PCR Tr. pp.20, 313, 362*, and continues desperately in its attempt to convince this Court that "Owens does not allege a failure to investigate and develop mitigation evidence under this ground, but the failure to present mitigation that was already developed and available at the previous proceedings." *Respondent's Brief at p.106, n.48; see also, id. at pp.118-166*. Respondent does so by reading Owens' allegations too narrowly, as this Court has already found, and therefore spends an inordinate amount of time addressing irrelevant matters. *See, e.g., Respondent's Brief at pp.118-147*.
- Respondent also attempts to mislead this Court in its analysis by breaking Owens' mitigation and closing argument claims into several separate sub-parts. *See Respondent's Brief at pp.106-225*. This Court's analysis, however, must be dictated by the requirements of the law and not Respondent's preferences. The law is clear with respect to both claims. In its analysis of Owens' mitigation claim, this Court must "consider the *totality* of the available mitigating evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding – and reweigh it against the evidence in aggravation." *Sears v. Upton*, 130 S.Ct. 3259, 3266 (2010) (citing *Porter v. McCollum*, 130 S.Ct. 447, 453-454 (2009) (emphasis added)). Similarly, to determine whether a solicitor's closing 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 v. DeChristoforo*, 416 U.S. 637, 643 (1974); *see also, Darden v. Wainwright*, 477 U.S. 168, 179 (1986) (entirety of remarks must be read "in context").

In other instances, Respondent correctly identifies Owens' claim, but nonetheless makes lengthy irrelevant arguments. For example, Respondent observes, "Owens contends counsel should have objected to the admissibility of [prison disciplinary records] on the grounds their admission violated the Confrontation Clause and violated due process." *Respondent's Brief at p.74*. And yet, Respondent spends thirteen (13) pages arguing that the records were admissible under state evidentiary rules. *See id. at pp.76-89*. As Owens has already explained in his brief, the United States Supreme Court unequivocally held in *Crawford v. Washington*, 541 U.S. 36 (2004), that the Framers of the Constitution did not intend "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*. Thus, whether admission of the prison records satisfied state evidentiary rules is irrelevant to this claim.¹

Respondent is free to carry on about irrelevant matters and invented arguments that Owens has not raised, but this Court should not be distracted by those efforts. The grounds for relief at issue in this case are those that Owens has alleged in his Application and framed in his Post-Hearing Memorandum of Law (hereafter "Post-Hearing Memo"). This Court is required to apply the law and the facts to those grounds and nothing more.

B. ONLY THE 2006 SENTENCING PROCEEDING IS AT ISSUE.

Owens exclusively raises claims that relate to his 2006 death sentence. Thus, the question before this Court is the reliability of the 2006 sentencing verdict, which can only be

¹ Respondent's Brief is further bloated with arguments about entire grounds that Owens has not pursued. *See Respondent's Brief at pp.21-33, 189-90, 225-230*.

properly assessed by an objective evaluation of the evidence actually offered before the 2006 jury. Respondent's recitation of the facts of this case contains many state-favorable inferences that are unsupported by the record. For example, there is no evidence to support Respondent's suggestion that Owens planned and executed the murder of Ms. Graves by himself. See *Respondent's Brief* at p.9. Moreover, Respondent claims that the findings of Christopher Lee's autopsy were entirely consistent with Owens' written statement. *Id.* at p.11. However, Respondent fails to mention several inconsistencies, including that the pathologist found no evidence of burning around Lee's eye (2006 Tr. p.1352); there was no damage to the right eye at all (*id.* at p.1353); and that a different inmate, Fred Walker, Jr., was charged with Lee's murder. *Id.* at pp.1302-1303. Finally, Respondent claims that "Owens eventually admitted to police he shot Ms. Graves." *Respondent's Brief* at p.10. No such evidence was ever offered before the 2006 sentencing jury.² The same is true with respect to the prior testimony of Steven Golden and the State's claim that Owens' mother provided a written statement that she denied making. See

²To support this assertion, Respondent relies on the South Carolina Supreme Court's recitation of the facts in its opinion following Owens' first trial in which the Court stated that Owens made this admission to Detective Wood and Investigator Willis. See *State v. Owens*, 346 S.C. 637, 647, 552 S.E.2d 745, 750 (2001) (*Owens I*). A careful review of the record from Owens' 1999 trial, however, demonstrates that this finding is tenuous at best. Detective Wood testified during the guilt-or-innocence phase and again in the sentencing phase. See *1999 Transcript* at pp.2522-2593; 3049-3062. At no time did Detective Wood claim that Owens admitted to being the shooter. Instead, Detective Wood claimed that Owens "said he would like to take the blame for all this, but he wasn't going to take it all himself." *Id.* at p.2541. Investigator Willis testified that Owens gave a written statement denying involvement, but also made non-recorded oral statements that "he knew who did the crime, but he didn't want to be a snitch." *Id.* at p.2799. After this statement, Willis claimed that Owens said "I shot the lady, but if I tell you I'm dead." *Id.* However, Willis admitted that he had no written notes to support this claim. *Id.* at p.2809. Willis also testified that he prepared a written report dated November 10, 1997, stating that a confidential informant told him that Steven Golden was the shooter in the Speedway case. *Id.* at p. 2819. Willis later claimed at trial that the informant also said Owens was involved, but his written report did not support that assertion. *Id.* at pp.2819-2820. Willis could not explain why his written report only indicated that the informant said Golden was the shooter and not Owens. *Id.* at p.2819, 2822.

Respondent's Brief at p.10, n.5 (referencing these prior items of evidence). This Court must evaluate Owens' claims in light of the totality of evidence that was *actually offered* to the 2006 jury – not the best case that Respondent can cobble together by cherry-picking from two prior proceedings that are not at issue here and the results of which have already been overturned as unreliable.

C. RESPONDENT MISUNDERSTANDS THE PREJUDICE ANALYSIS FOR *STRICKLAND* CLAIMS.

Throughout its brief, Respondent's discussion of the prejudice analysis for ineffective assistance of counsel claims reflects several fundamental misconceptions about *Strickland v. Washington*, 466 U.S. 668 (1984), and basic capital sentencing law. Because Respondent's contentions that Owens has not demonstrated prejudice sufficient to warrant post-conviction relief were conceived and formulated using a clearly erroneous legal standard, they should carry no weight in this Court's analysis. This Reply discusses each of Respondent's errors below.

1. THE TEST IS NOT OUTCOME- DETERMINATIVE.

First, Respondent mistakenly believes that the *Strickland* prejudice inquiry is outcome-determinative and argues that Owens cannot show prejudice because the State presented "overwhelming" aggravating evidence. *See, e.g., Respondent's Brief at pp.51-52* (arguing Owens cannot establish prejudice because the jury was aware of aggravating evidence); *id. at p.59* ("Owens cannot show prejudice given the extensive record of aggravation in this case"); *id. at p.73* (Owens cannot show prejudice because "the evidence in aggravation presented by the State was overwhelming"); *id. at pp.142-143* (same); *id. at pp.159-166* (same); *id. at p.218* (same). Respondent is clearly wrong.

A PCR applicant establishes prejudice under *Strickland* by demonstrating a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

been different.” *Strickland*, 466 U.S. at 695. A reasonable probability is a probability “sufficient to undermine confidence in the outcome” of the proceeding. *Id.* This is *not* an outcome-determinative test. *See id.* at 693-94 (explicitly rejecting outcome-determinative test in favor of lower standard). Rather, the “reasonable likelihood” standard requires a showing by *less than* a preponderance of the evidence. *Williams v. Taylor*, 529 U.S. 362, 405 (2000) (“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,’ ‘opposition in character or nature,’ and ‘mutually opposed,’ to our clearly established precedent”).

In other words, the test is not whether a defendant would have received a life sentence absent counsel’s deficient performance. *Porter*, 130 S.Ct. at 455-456 (“We do not require a defendant to show ‘that counsel’s conduct more likely than not altered the outcome’ of his penalty proceeding, but rather that he establish ‘a probability sufficient to undermine confidence in [that] outcome.’”) (citing *Strickland*, 466 U.S. at 693-694)); *see also*, *Porter*, 130 S.Ct. at 451 (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, the question is whether “the undiscovered 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). Prejudice is established if “there is a reasonable probability that at least one juror would have struck a different balance.” *Wiggins*, 539 U.S. 510,

536 (2003); *see also*, *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2005) (same).³

2. PREJUDICE MUST BE ASSESSED CUMULATIVELY.

Respondent incorrectly argues that the harm flowing from the errors identified in Owens' submissions should be assessed one at a time. *See Respondent's Brief at p.57* ("Owens cannot show that but for this one (1) comment, either in the testimony or argument, there is a reasonable probability the jury would have returned with a different sentence."); *id. at pp.106-189* (breaking Owens' mitigation claim into several separate sub-parts and arguing that each individual sub-part was not prejudicial); *id. at pp.190-225* (arguing that each of the solicitor's improper arguments was not prejudicial standing on its own).

On the contrary, both the United States Supreme Court and the South Carolina Supreme 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., Strickland*, 466 U.S. at 695 ("In making this [prejudice] determination, a court hearing an ineffectiveness claim must consider the *totality* of the evidence before the judge or jury") (emphasis added); *Williams*, 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. . ."); *Porter*, 130 S.Ct. at 453-454 (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

³ In applying this standard, this Court must remain mindful that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.).

proceeding – and reweigh it against the evidence in aggravation.”) (citing *Strickland*); *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”).⁴

That is, when determining whether its confidence in the outcome of Owens’ 2006 sentencing trial is undermined, this Court must consider the simultaneous, cumulative impact of 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.

3. THE TEST IS NOT WHETHER TRIAL COUNSEL PRESENTED SOME MITIGATION EVIDENCE.

Respondent argues that Owens cannot show prejudice simply because his trial counsel presented *some* mitigation evidence. *See Respondent’s Brief at pp.114-115* (arguing that Owens

⁴*See 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 (2d 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 accrued to the petitioner, courts ‘look to the cumulative effect of all of counsel’s unprofessional errors.’”); *accord, 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.”).

cannot show prejudice because his counsel's mitigation presentation was "the polar opposite" of cases in which counsel failed to present any mental health mitigation at all); *id. at p.126* (same); *id. at p.140* (same). Respondent is most assuredly wrong. As the Supreme Court recently explained in *Sears v. Upton*, 130 S.Ct. 3266 (2010), "[w]e have never limited the prejudice inquiry under *Strickland* to cases in which there was only 'little or no mitigation evidence' presented." That some courts may have considered cases involving such circumstances does not dictate the test itself. 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 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*, 130 S.Ct. at 453-454 (2009) (same).

4. THE TEST DOES NOT TURN ON DEATH-ELIGIBILITY.

Finally, Respondent plainly misapprehends the ways in which a defendant can be prejudiced at the sentencing phase of a capital trial. Respondent suggests that because one or both of the statutory aggravating factors in Owens' case remain valid, it is impossible for him to establish a reasonable probability of a different result at the sentencing phase. *See Respondent's Brief at p.49* (arguing Owens cannot show prejudice with regard to the crime scene video because he would be death-eligible under *Tison v. Arizona*, 481 U.S. 137 (1987), even if he was not the shooter); *id. at p.197* (arguing Owens cannot show prejudice because of "the absolutely overwhelming (and admitted) evidence of guilt"); *id. at p.186* (arguing "Owens cannot show

Strickland prejudice because the evidence of his DJJ experience in no way undermines the overwhelming evidence supporting his death sentence"). As discussed below, however, this is incorrect as a matter of basic capital sentencing law.

The sentencing phase of a capital trial involves two distinct stages: the eligibility stage, and the selection stage. *See, e.g., Buchanan v. Angelone*, 522 U.S. 269, 275 (1998); *Tuilaepa v. California*, 512 U.S. 967, 971 (1994). "In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances. . . . In the selection phase, the jury determines whether to impose a death sentence on an eligible defendant." *Buchanan*, 522 U.S. at 275 (citations omitted).

In South Carolina, the eligibility determination is made by reference to statutory aggravating factors; if the jury finds one or more such factors beyond a reasonable doubt, then the defendant is deemed to be a member of the class of defendants *eligible* for a death sentence. *See* S.C. Code §16-3-20. Importantly – and contrary to Respondent's arguments – this eligibility determination is only the *beginning* of the sentencing decision. Once a defendant is found eligible, the jury must proceed to the entirely distinct *selection* stage, at which, pursuant to South Carolina law, it must choose between life or death after considering the aggravating and mitigating evidence. *See id.* It bears emphasis that, under this scheme, a finding of eligibility does *not* automatically result in a sentence of death, but merely makes death a legally available alternative in the event the jury is persuaded through all of the mitigating and aggravating evidence that a less severe sentence is not appropriate. *See Tuilaepa*, 512 U.S. at 973 ("The selection decision . . . requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant's culpability"); *Jones v. United States*, 527 U.S. 373, 378 (1999) ("Once petitioner became death-

eligible, the jury had to decide whether he should receive a death sentence. In making the selection decision, . . . the sentencing jury [was required to] consider all of the aggravating and mitigating factors and determine [petitioner's sentence]").

Thus, in a case such as this one involving errors relating to the development and/or presentation of mitigating or aggravating evidence, the mere possibility that those errors did not undermine the defendant's *eligibility* for death in no way lessens the possibility of prejudice in the *selection* stage significant enough to warrant the grant of relief. *See, e.g., Williams*, 529 U.S. at 398 ("Mitigating evidence unrelated to dangerousness [(a statutory aggravating factor in the state which sentenced petitioner to death)] *may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case*") (emphasis added).

Both the United States Supreme Court and the South Carolina Supreme Court have illustrated this point repeatedly in cases where eligibility was uncontested and the state's aggravating evidence was easily as powerful as it was in this case. For example, Terry Williams confessed in detail to beating Harris Stone to death with a mattock while he lay sleeping in his bed because Stone had refused to lend Williams "a couple of dollars." *Williams v. Taylor*, 529 U.S. 362, 367-368 (2000). Williams obtained three dollars as a result of his crime. *Id.* at 368 n.1. At Williams' sentencing hearing, the prosecution proved "two separate violent assaults on elderly victims perpetrated after the Stone murder." *Id.* at 368. In the first incident, Williams' started a fire outside his elderly victim's residence and then attacked and robbed him. *Id.* Second, Williams "brutally assaulted an elderly woman" leaving her "in a 'vegetative state' [from which she was] not expected to recover." *Id.* While awaiting trial, Williams was convicted of arson for setting the jail on fire. *Id.* "Two expert witnesses employed by the State testified that there was a 'high probability' that Williams would pose a serious continuing threat

to society.” *Id.* at 368-369. Despite the breadth and force of this aggravating evidence, the Supreme Court reversed Williams’ death sentence, finding that he was prejudiced by his trial counsel’s failure “to conduct an investigation that would have uncovered extensive records graphically describing Williams’ nightmarish childhood.”⁵ *Id.* at 395. Williams suffered prejudice because this evidence “might well have influenced the jury’s appraisal of his moral culpability.”⁶ *Id.* at p.398.

Respondent’s concentration on the contention that Owens has not undermined the validity of the aggravating factors found by the jury, and its concomitant failure to offer any substantive argument with respect to the effects the errors identified by Owens had on the selection stage of his trial, render its arguments that Owens has not shown prejudice meaningless

⁵ These documents included juvenile records describing Williams’ childhood home as “a complete wreck” where “the children were all dirty” and the kitchen was scattered with dirty dishes and trash. *Id.* at p.395, n.19. Had trial counsel conducted an adequate investigation, the jury would have learned that Williams’ parents were neglectful and abusive, and that Williams and his siblings were committed to the custody of the social services bureau for two years. *Id.* at p.395.

⁶ See also, *Porter*, 130 S.Ct. 447 (finding prejudice from trial counsel’s failure to uncover and present mitigating evidence regarding Porter’s mental health, family background and military service where Porter stalked and killed two people and the jury found all four aggravating factors alleged by the State); *Rompilla v. Beard*, 545 U.S. 374 (2005) (finding prejudice from trial counsel’s failure to examine readily available social history files where Rompilla stabbed his victim repeatedly and then set him on fire and the jury found all three alleged aggravating factors, including physical torture and that Rompilla had a significant history of violence); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2009) (trial counsel’s failure to investigate and present information about Council’s life and background was prejudicial where the jury found that Council “hogtied” a seventy-two-year-old woman, ripped her clothing, cut out the crotch of her underwear, forced her to ingest various cleaning fluids, and then brutally raped her “as evidenced by a gaping laceration extending from her vagina into the rectal area”); *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007) (finding solicitor’s improper closing argument was prejudicial, and warranted reversal of the death sentence, where Northcutt slapped, punched, bit, strangled and beat his own four-month old infant daughter to death and broke her back over the railing of her crib).

and inconsequential. In short, Respondent has offered nothing to rebut Owens' showing of prejudice entitling him to post-conviction relief.

II. ARGUMENTS REGARDING SPECIFIC GROUNDS.

A. TRIAL COUNSEL'S FAILURES REGARDING THE CRIME SCENE VIDEO.

As explained above, Respondent addresses a myriad of arguments that Owens has not made about the crime scene video and fails to address the one argument that Owens did raise. In particular, Owens does not argue that: (a) "the [crime scene] tape definitively shows the perpetrator in front of the counter was the trigger-man," *Respondent's Brief at p.34*; (b) "[trial] counsel should have requested, and Judge Patterson would have been required to instruct the jury as to *who was in the videotape* based on testimony from Owens' first trial," *id. at pp.38-39* (emphasis added); (c) the crime scene tape was *per se* inadmissible, *id. at pp.35-38, 40-41, 43-44*; or, (d) defense counsel could have forced the State to call additional witnesses and/or should have called their own witnesses to address the issue of who was the trigger man. *Id. at pp.46-49*.

Instead, Owens asserted that trial counsel should have objected and/or requested further instructions where the State "told the jury that Owens had already been convicted of the murder of Ms. Graves," *Post-Hearing Memo at p.68*, and then played the crime scene video "[w]ithout further explanation." *Id. at p.10*. Trial counsel did not object or request further instructions under circumstances where:

(a) no one told the jury that the identities of the men in the video had never been conclusively determined; (b) Owens' co-defendant, Steven Golden, had previously testified that he – not Owens – was the primary figure in the video; and, (c) the jury in 1999 was given an instruction on accomplice liability under which they could find Owens guilty of murder without ever determining whether or not he actually pulled the trigger.

Id. at pp.68-69. As Owens explained in his Post-Hearing Memo, only one perpetrator is visible for the overwhelming duration of the video – and only that person is visible when Ms. Graves is shot. The jury would have naturally assumed that this person, who appears to be the shooter, was Owens under the circumstances and without further instruction. Respondent's claim that the jurors would have more likely determined that an unseen person standing off-camera was the shooter is absurd. *Respondent's Brief* at p.43. Thus, 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. 578, 590 (1988) (the Eighth Amendment prohibits imposition of a death sentence on the basis of information that is "materially inaccurate"). Owens agrees with Respondent that "neither [Judge Patterson] nor anyone else, except the jury that convicted Owens, knows whether the [1999] jury determined who was in the video-tape." *Respondent's Brief* at p.44. That is precisely the point. It was therefore unreasonable and prejudicial for trial counsel to allow the 2006 sentencing jury to operate under a false impression that another jury *had* already made that determination for them.

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

Officer Wood's testimony that Owens "was one of two people out of probably 25 years in homicide that I have interviewed that actually gave me cold chills," injected an arbitrary, irrelevant, inflammatory and prejudicial factor into the jury's sentencing consideration. *See Post-Hearing Memo* at pp.70-71. Respondent opposes this ground on the basis that "Officer Wood did not give opinion testimony," but rather, "described his emotional and actual physical reaction to Owens' statements to him." *Respondent's Brief* at p.53, 56. But whether Respondent prefers to label Wood's testimony a description of his "emotional and actual physical reaction,"

rather than “opinion,” does not relate in any way to the admissibility or propriety of this testimony. There is no legal theory under which Woods’ testimony was relevant and admissible. It does not relate to Owens’ character or future dangerousness, as Respondent claims. *Respondent’s Brief at p.56*. In fact, Woods’ testimony was not about Owens at all. Wood’s subjective “emotional reaction” – and his comparison of that reaction to other interviews in his own particular twenty-five-year career – did not properly contribute to the jury’s duty to make their own, individualized sentencing determination in this case.

C. TRIAL COUNSEL’S FAILURE TO OBJECT TO IMPROPER VICTIM IMPACT TESTIMONY.

Owens alleges that trial counsel should have objected to testimony from Ms. Juliana Christy, the victims’ advocate and an employee of the Greenville County Sheriff’s Department, about the impact that Ms. Graves’ death had on her own life and fifteen-year career. *See Post-Hearing Memo at pp.85*. Respondent’s argument on this ground boils down to its claim that Ms. Christy’s testimony was proper because it was not about herself. Rather, Respondent argues that her testimony was about “how profound, traumatic, and significant this notification was *to the children.*” *Respondent’s Brief at p.71* (emphasis in original). This argument suspends reason. Ms. Christy’s testimony speaks for itself:

Q: Now, Ms. Christy, how long have you been the 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.

2006 Transcript at p.1274.⁷

D. TRIAL COUNSEL'S FAILURE TO OBJECT TO PRISON DISCIPLINARY RECORDS ON FEDERAL CONSTITUTIONAL GROUNDS.

As explained above, Respondent's arguments that Owens' prison disciplinary records were admissible as a matter of state law are irrelevant to this ground because the admission of any out-of-court testimonial statement, without an opportunity for cross-examination, violates a criminal defendant's Sixth Amendment right to confrontation, regardless of state or federal evidentiary rules. *Crawford*, 541 U.S. at 61. Respondent first asserts that the contents of business records are exempt from a Confrontation Clause challenge, *Respondent's Brief* at p.89, but then quickly retreats from that position and acknowledges that this claim is false. *Id.* at p.90. Respondent is right to make this acknowledgement, since the Supreme Court has clearly held – in *Crawford* itself, 541 U.S. at 61, and subsequently – that all testimonial statements must be subject to the crucible of cross-examination, regardless of their label as a business record or any other form. See, e.g., *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2538 (2009) (holding certificates by state laboratory analysts were subject to the requirements of the Confrontation Clause and that they were not admissible without confrontation on the theory that they qualified as business records because “even if they did, their authors would be subject to confrontation nonetheless.”) (emphasis added); *Hammon v. Indiana*, 547 U.S. 813, 829-830 (2006) (holding

⁷ Respondent characterizes Ms. Christy's testimony as minimal because it “consists of only seven (7) pages of the sentencing phase transcript.” *Respondent's Brief* at p.60. This assertion is curious given that Respondent argues, elsewhere in its brief, that Marjorie Hammock's eight (8) pages of social history testimony was extensive. *Id.* at pp.118-125, 140, 158-159. Apparently, Respondent believes that the line between minimal and extensive is at approximately 7 ½ pages.

victim's written statements given to a police officer were testimonial, and therefore subject to the Confrontation Clause, despite the officer's duty to take a written statement).

At bottom, Respondent's argument on this ground is two-fold: (1) Respondent argues that the prison disciplinary records admitted here are not testimonial because they "were required by South Carolina statutory law for the administration of prison affairs," *Respondent's Brief at p.90*; and, (2) even if the records are testimonial, Respondent claims that "it is far from clear whether the Confrontation Clause even applies at sentencing or capital sentencing proceedings." *Id. at p.92*. Neither assertion is supported by the law. Owens has already explained the testimonial nature of the statements contained in the disciplinary records admitted at his 2006 sentencing trial, and he will not rehash all of those points here. *See Post-Hearing Memo at pp.75-77*. Respondent's argument that the prison employees had a duty to maintain the records as a matter of state law in no way undermines the testimonial nature of the statements they contain. *See Hammon*, 547 U.S. at 832 n.6 ("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). Moreover, Respondent's claim that the Confrontation Clause does not apply at capital sentencing proceedings is flatly contradicted by precedent from the United States Supreme Court holding that the Sixth Amendment *does* apply to capital sentencing proceedings. *See, e.g., Ring v. Arizona*, 536 U.S. 584 (2002); *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003).

In essence, Respondent is asking this Court to deny relief on this ground by going way out on a limb – first by determining that the prison records are not testimonial merely because they were required to be produced by state statute, and then further by finding that the Sixth

Amendment does not apply to capital sentencing proceedings despite clear law to the contrary from the Supreme Court on both points.

E. TRIAL COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT ALL AVAILABLE MITIGATING INFORMATION ABOUT OWENS' LIFE HISTORY, INCLUDING HIS TIME AT DJJ.

1. RESPONDENT'S MOTIONS TO STRIKE ARE WITHOUT MERIT.

Owens alleges that his trial counsel failed to investigate and present all of the mitigating details that were available regarding his life history (Ground 10 & 11(b)(5)), including his experiences in the custody of the Department of Juvenile Justice (Ground 10 & 11(b)(6)).⁸ Owens' Post-Hearing Memo describes the detailed mitigating life history that trial counsel could have presented had they fulfilled their constitutional obligations to conduct an adequate investigation and present all of the relevant mitigating information available to them. *See Post-Hearing Memo at pp.30-58.* Respondent seeks to distract this Court's attention from that extensive evidence by rehashing arguments on which this Court has already ruled. Respondent reads the word "available" to mean only the evidence that was actually presented at Owens' two prior proceedings, and continues to complain about this Court's determination that Respondent's reading is "too narrow." *PCR Tr. p.20.* Respondent also criticizes Owens for not seeking "to amend his application at the merits hearing," *Respondent's Brief at p.144*, and moves to strike any evidence about the file of Ms. Drucy Glass and testimony from Dr. James Garbarino on the basis of its overly narrow reading of the allegations. *Id. at p.130, 145.*

⁸ Respondent complains about Owens' decision to brief these two grounds together, but given this Court's obligation to "consider the totality of the available mitigating evidence," *Porter*, 130 S.Ct. at 453, Owens' presentation is the most sensible approach.

This Court has already correctly ruled that the term “available” is not limited to the unreasonably slender construction Respondent seeks to impose upon it. There was no basis for Owens to seek to amend his allegations, because the Court ruled against Respondent on this point before the evidentiary hearing even began and adhered to its ruling throughout the proceeding. *PCR Tr. pp.20, 313, 362*. Owens properly relied on this Court’s decision, and Respondent’s motions are without merit.

2. WHETHER TRIAL COUNSEL HAD MS. GLASS’ FILE MAKES NO DIFFERENCE.

Respondent argues that Owens cannot show that trial counsel did not have Ms. Glass’ file. At the evidentiary hearing, Owens offered proof that strongly suggests they did not. Bill Godfrey personally delivered his file to the office of undersigned counsel. *PCR Tr. p.164*. Godfrey testified that this was his entire file, and that it contained everything he and Gibson had received from all four previous trial attorneys. *Id. at p.115*. Ms. Jill Rider testified that she also received a box of records from Ms. Glass. *Id. at p.165*. She inventoried both files and testified that Godfrey’s file did not contain the records from Ms. Glass’ file. *Id. at pp.166-167; see also, Applicant’s PCR Exhibits 10-18*.

Despite this evidence, even if trial counsel *did* somehow have Ms. Glass’ file in their possession at the time of Owens’ 2006 sentencing proceeding, it makes no difference with regard to Owens’ mitigation claim. Owens alleges that trial counsel’s performance was deficient because they did not present the mitigating evidence *available* to them. The information in Ms. Glass’ file is part of the overall mitigation story that was available. Whether trial counsel failed to present this information because they did not have it, or because of sheer neglect, makes no difference – trial counsel’s conduct was deficient and prejudicial either way. *See, e.g., Williams*, 529 U.S. at 393 (“it 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.*”); *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.*”). The bottom line is that an overwhelming amount of mitigating information was available – much of which had already been collected by others – and trial counsel simply failed to put that information to use. Trial counsel testified at the PCR hearing that their intended strategy was to present the fullest possible picture of Owens’ life history. *PCR Tr. pp.59-60, 131.* Thus, they had no strategic reason not to include this information in their presentation, and their failure to do so was unreasonable.

3. TRIAL COUNSEL’S PERFORMANCE WAS DEFICIENT.

Respondent attempts to convince this Court that trial counsel’s performance was adequate by baldly asserting that their investigation was thorough, extensive, and complete. *Respondent’s Brief at pp.168-179.* Respondent even goes so far as to claim that the trial team “repeated[ly]” questioned Owens about his DJJ experience “especially with regard to allegations of sexual assault and physical violence.” *Id. at p.167.* This claim is astonishing, as it is not only without support – it is plainly false. With regard to trial counsel’s preparations, the established facts are as follows:

- Trial counsel did not even introduce themselves to Owens until over five months after their appointment. *PCR Tr. pp.50, 104-105.*
- Trial counsel conducted no mitigation investigation of their own. *Id. at pp.54, 113.* Instead, they relied on a defense team that was not assembled until less than two months before trial. *Id. at p.107-108; Applicant’s PCR Exhibit 1, at p.2.*
- The defense team included two investigators – one of whom was unable to carry out her duties because of personal problems – who did not even begin meeting with Owens until five weeks before trial. *PCR Tr. p.111, 126; Applicant’s PCR Exhibit 1, at p.3.*

- Trial counsel relied entirely on Ms. Marjorie Hammock to be the primary vehicle through which they intended to convey Owens' life history, *PCR Tr. pp.56, 123-24, 129-130*, despite the fact that trial counsel and other team members observed that: (a) "she loses items given to her"; (b) there was reason to doubt whether she was "truly on board and ready to go"; (c) she had a bad attitude regarding trial preparations; (d) she was "moving slowly"; and, (e) team members were "not all that enthusiastic about Marjorie's level of preparation and interest." *Applicant's PCR Exhibit 4*.
- Kenneth Gibson took responsibility for preparing Ms. Hammock's testimony only days before jury selection began. *PCR Tr. pp.54-55*. Prior to that, he knew nothing of the extensive mitigating evidence in Owens' life history. *Id. at p.57*.
- Gibson relied on Ms. Hammock to tell him what she thought was important. *Id. at p.58*. Throughout his representation of Owens, Gibson never read any of Owens' social history records, he did not interview any mitigation witnesses, and he spent a total of five hours with Owens himself. *Id. at p.52, 57*.
- Neither Gibson nor Godfrey ever asked Owens about his experiences in DJJ. Nor did they ever ask Owens if he had ever been sexually abused. *Id. at pp.81, 120*.

Specifically, Ken Gibson testified about trial counsel's investigation and trial preparations as follows:

Q: [P]rior to the time you agreed to handle these two [mitigation] witnesses [Ms. Hammock and Dr. Brawley] which occurred around mid-to-late October, I guess?

A: Yeah.

Q: Had you been focusing on the subjects that they were going to testify about or were you sort of generally aware of them because of your overall involvement in the case?

A: I was more focused on the guilt issues.

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

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.

Q: If additional information had been available that could have been used to present a fuller picture of Mr. Owens' background, would you have used it?

A: Yes.

Q: If it had been possible for you to present a fuller picture of Mr. Owens' experiences in the Department of Juvenile Justice and the effects that had on him, would you have used that information?

A: Yes.

Q: To the extent that something less than a full account of Mr. Owens' background from his earliest days to his time at DJJ did not come out at trial, was that because you or the defense team as a whole had made a strategic decision not to present what was available?

A: We did not make any kind of strategic decision to not present the full and complete picture of his background.

PCR Transcript at pp.57-60. Bill Godfrey similarly testified that he never spoke to Owens about his experiences in DJJ, *id. at p.120*; he wanted to present a complete picture of Owens' life history in great detail, *id. at pp.116, 129*; he would have wanted to present any additional information about Owens' background, but he was not aware of any additional information that

was available, *id. at p.131*; and, he did not have any information about Owens' personal experiences at DJJ apart from what was recorded in his DJJ records, *id. at pp.131-132*.

Respondent is also incorrect in its claim that Dr. Donna Schwartz-Watts, Dr. Tora Brawley and Drucy Glass all asked Owens if he had been sexually abused. *Respondent's Brief at p.150*. Dr. Schwartz-Watts was the only defense team member who testified that she asked Owens about sexual abuse. *PCR Tr. p.339*. She also testified that she only spent ten total hours with Owens, much of which was focused on other topics. *Id. at p.340*. She further explained that it is "quite common" for a young man to be initially reluctant to reveal that he has been a victim of sexual abuse, and that she was working with Owens under a compressed time period. *Id. at pp.339-340*. She did not know if Owens might have been willing to disclose sexual abuse to her after she had had a longer period of time to develop a relationship of trust. *Id. at p.340*.

Moreover, Drucy Glass was not a participant on the 2006 defense team. Respondent is misguided in its efforts to pin trial counsel's deficient performance in 2006 on trial attorneys who served before them in cases that have already been overturned. *Respondent's Brief at p.147, 150*. Trial counsel had a duty to conduct their own, independent investigation into Owens' life and background. Owens is not required to prove that two prior sets of trial counsel were also deficient to establish his claim.

As a result of trial counsel's deficient trial preparations, their mitigation presentation was likewise deficient. Ms. Hammock testified to a handful of naked facts stated in a conclusory manner. Her testimony was not the detailed life history that trial counsel had promised.⁹ Instead, Ms. Hammock testified that:

⁹ Trial counsel told the jurors at Owens' 2006 sentencing proceeding that they would hear "where Freddie came from and everything he went through," and he claimed that the mitigation evidence would show "how it is that Freddie grew up; how he really didn't have a home on a

- Owens' mother was only 18 when he was born. *2006 Trial Tr. at p.1406.*
- His father and stepfather were described as violent people. *Id.*
- Owens' family had limited resources and a marginal existence. *Id.*
- Owens was once placed in foster care for a "relatively short period of time." *Id.*
- Owens was taught at an early age that he had to fight. *Id. at p.1407.*
- Owens experienced learning difficulties in school. *Id.*
- In sum, "a history of losses, some violence, a great deal of instability, and that's it." *Id. at p.1412.*

Dr. Donna Schwartz-Watts added to this meager list that Owens experienced some physical abuse and the he saw some family violence. *Id. at pp.1465-66.*

The evidence of Owens' life history adduced in post-conviction, and set forth collectively in Owens Post-Hearing Memo, *see pp.30-58*, is both qualitatively and quantitatively different from the skeletal presentation offered at trial. This evidence would have dramatically altered the sentencing profile, and it is in no way "cumulative" to the evidence trial counsel 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."); *Lewis v. Dretke*, 355 F.3d 364, 367-69 (5th Cir. 2003) (holding that although trial counsel did present evidence of child abuse through petitioner's grandmother, "her conclusory testimony contained none of the details provided by Lewis's siblings at the habeas hearing, which could have been truly

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." *2006 Tr. at pp.1047-1048.*

beneficial. [The grandmother's] skeletal testimony concerning the abuse of her grandson was wholly inadequate to present to the jury a true picture of the tortured childhood experienced by Lewis."); *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 . . . petitioner's background, history, and character for mitigation purposes"); *Cargle v. Mullin*, 317 F.3d 1196, 1222 (10th Cir. 2003) ("as 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.").

4. DR. GARBARINO'S TESTIMONY WAS ADMISSIBLE AND CREDIBLE.

Respondent seems to argue that information about a defendant's history, background and character may not be admitted at a capital sentencing proceeding unless it stems from a primary source. *Respondent's Brief at pp.148-149* (arguing that Dr. Garbarino's PCR hearing testimony was "inadmissible hearsay"). This argument flies in the face of virtually every capital case ever

tried in this country in the post-*Gregg* era. See *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (“a State cannot bar the consideration of evidence if the sentence could reasonably find that it warrants a sentence less than death”) (internal quotation omitted); see also, *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (requiring that the sentencing authority be provided with all information relevant to the imposition of sentence and provided with appropriate standards to guide its use of that information). There is no legal support for Respondent’s position, and there is a vast body of jurisprudence to the contrary. See e.g., *Sears*, 130 S.Ct. at 3265 (holding “the fact that some [mitigating] evidence may have been ‘hearsay’ does not necessarily undermine its value or its admissibility – for penalty phase purposes”); *Wiggins*, 539 U.S. at 534 (relying on social history information taken from a social worker’s written report that he prepared “based on conversations with Wiggins and members of his family”); *Green v. Georgia*, 442 U.S. 94, 97 (1979) (“Regardless of whether the proffered testimony comes within Georgia’s hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause. . . . The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial”); see also, *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (“In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice”).

Respondent errs in its claims that Dr. Garbarino could not verify where he received the information on which he relied and that he simply assumed everything Owens told him was true. Dr. Garbarino testified in detail about the sources of the information on which he relied. *PCR Tr. pp.198-200*. Owens’ Post-Hearing Memo further cites corroborating documents for the overwhelming majority of Dr. Garbarino’s findings. See generally, *Post-Hearing Memo at pp.30-58*. Dr. Garbarino likewise testified that much of what Owens conveyed to him was

corroborated by documentary evidence and other interviews. *PCR Tr. at p.225, p.234, p.239, p.288-289.*

Respondent also errs in its argument that Owens' claims of sexual abuse cannot be credible because there are no documents corroborating any instances of sexual abuse perpetrated against him. Dr. Garbarino testified that the lack of documentary evidence was not surprising, that a person of Owens' family life and background would be reluctant to disclose sexual abuse, and it takes a carefully crafted relationship of trust to provide an environment in which such a person would be able to disclose this evidence. *PCR Tr. at pp.246-248.* To find otherwise defies common sense and Dr. Garbarino's accumulated knowledge and extensive experience.

5. TRIAL COUNSEL HAD NO STRATEGIC REASON FOR NOT PRESENTING INFORMATION ABOUT OWENS' EXPERIENCES IN DJJ.

Respondent's argument that trial counsel made a strategic decision not to present any information about Owens' experiences in DJJ stems from its demonstrably false claim that trial counsel actually investigated Owens' experiences in DJJ. As explained above, trial counsel specifically testified that they did not investigate any of Owens' DJJ experiences. *PCR Tr. pp.57-60, 120, 131-132.* Because trial counsel's investigation was constitutionally deficient, any alleged strategic decisions were likewise unreasonable. *See, e.g., Sears*, 130 S.Ct. at 3265 (2010) (trial counsel's actions cannot be "justified by a tactical decision when counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"). Trial counsel could not have made an informed strategic decision not to present information about Owens' time in DJJ, because *they did not know what that information was.* *PCR Tr. pp.57-60, 120, 131-132.*

Respondent's efforts to fabricate a valid strategic decision are tied to Bill Godfrey's post-hoc rationalizations, which he offered *after* he had first admitted his failure to investigate.

Moreover, even Godfrey's alleged strategic reasons are without merit. The jury was already aware, through the testimony Dr. Schwartz-Watts, of the reasons that Owens was first placed in DJJ and the fact that his behavior there was "horrible," and included "a lot of write-ups" for things like fighting, disrupting school, and being disrespectful. *2006 Trial Tr. p.1470, 1494.* Trial counsel already knew that this information would come out through the testimony of Dr. Schwartz-Watts because she reviewed Owens' DJJ records containing this information in preparation for her testimony. Thus, these supposed "costs" did not render the introduction of any mitigating information about Owens' time in DJJ "a double-edged sword," as Respondent suggests. *Respondent's Brief at pp.173-174, 179-181.*

Moreover, "the fact that along with this new mitigation evidence there was also some adverse evidence is unsurprising." *Sears*, 130 S.Ct. at 3264; *see also, Porter*, 130 S.Ct. at 451 (find that the trial court erred in "discounting" Porter's mitigating evidence adduced in state habeas proceedings because it also included negative information about Porter). A post-hoc allegation that the unknown mitigating evidence would have come with a "cost" does not somehow transform trial counsel's uninformed actions into valid, informed, strategic decisions. Finally, as Owens has already explained in greater detail, a complete mitigation story of his life history would have both humanized him in the jury's eyes and neutralized much of the accompanying negative information, by explaining Owens' behavior through the lens of his past experiences and the developmental adjustments he had to make to deal with those experiences. *See Post-Hearing Memo at pp.63-67.*

F. TRIAL COUNSEL'S FAILURE TO OBJECT TO IMPROPER CLOSING ARGUMENTS.

Respondent breaks each of the solicitor's improper statements during closing argument into a separate sub-category, expresses its own personal opinion that the individual statement

was not improper in the context in which it was made, and then argues that the statement was not prejudicial standing on its own. *See Respondent's Brief at pp.190-225*. As Owens has already explained, Respondent's method of analysis is inaccurate and devoid of support in the law. *See, supra, Sections I.A and I.C.2*. Owens' Post-Hearing Memo sets forth the legal support for his position that the solicitor's multiple improper comments, viewed in the context of the entire proceedings, "so infected [his] trial with unfairness as to make the resulting [sentence] a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *see Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994). Respondent offers nothing to refute these points.

CONCLUSION

For all of the reasons discussed in Owens' Post-Hearing Memo, and in this Reply, Owens is entitled to relief on his Second Amended Application for Post-Conviction Relief. This Court should issue an order vacating the death sentence and granting him a new sentencing proceeding.

Respectfully submitted,

KEIR M. WEYBLE
Cornell Law School
Myron Taylor Hall
Ithaca, NY 14853-4901
Keir@blumelaw.com
(607) 255-3805

EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
Post Office Box 11311
Emily@deathpenaltyresource.org
Columbia, SC 29211
(803) 765-1044

By: Erin C. Pasicka
Counsel for Applicant

October 28, 2011

STATE OF SOUTH CAROLINA

County of Greenville

Freddie Eugene Owens, #5065,
Applicant,

vs.

State of South Carolina,
Respondent.

FILED - CLERK OF COURT
GREENVILLE CO. S.C.
WICKENSIMMER

2012 DEC - 7

IN THE COURT OF COMMON PLEAS

FILED - CLERK OF COURT
GREENVILLE CO. S.C.
WICKENSIMMER

2012 DEC - 7 P 3:42

Case No.: 09-CP-23-0741

**MEMORANDUM REGARDING
RESPONDENT'S REVISED
"PROPOSED ORDER"**

Applicant, Freddie Eugene Owens ("Owens"), by and through undersigned counsel, submits this memorandum in response to the revised "Proposed Order" recently submitted by respondent.

On November 11, 2011, this Court instructed counsel for respondent to draft a proposed order denying the application for post-conviction relief. Applicant objected to proceeding in that manner, citing, *inter alia*, *Hall v. Catoe*, 360 S.C. 353, 601 S.E.2d 335, 341 (2004), and S.C. Code §§ 17-27-80 and 17-27-160(D). In response to that objection, this Court added that applicant would be afforded ten (10) days to make any objections or corrections to the proposed order. On February 16, 2012, respondent submitted a proposed order that was two-hundred and seventy (270) pages long. Applicant moved to strike that document on the ground that it was excessively and inappropriately long, and noted that it would not be possible for applicant to adequately review and respond to such a lengthy proposed order in the ten day period previously prescribed by the Court. On February 22, 2012, this Court granted applicant's motion to strike and instructed respondent to submit a revised proposed order limited to seventy-five (75) pages.

On November 30, 2012, respondent sent an email, with a revised "proposed order" attached, to the Court and undersigned counsel. In its email, respondent made clear that although

it was furnishing a “proposed order,” it is opposed to the actual *adoption* of the document as the order of the Court:

As the Court is aware, this is simply a proposed Order, and the *Court should make its own findings of fact and conclusions of law and write its own Order* pursuant to *Hall v. Cato* [sic], 360 S.C. 353, 601 S.E.2d 335 (2004) and similar decisions. Additionally, pursuant to *Jefferson v. Upton*, 130 S.Ct. 2217 (2010), the *Court should draft its own Order*, making its own findings of fact and conclusions of law, *and not simply adopt the State’s Order* in total

Email from Anthony Mabry to Judge Miller, Nov. 29, 2012 (emphasis added). Applicant agrees, and hereby joins respondent in opposing the adoption of a proposed order and requesting that the Court instead formulate its own findings of fact and conclusions of law, and reduce them to writing in an order of the Court’s own creation.

Rejection of respondent’s “proposed order” is necessary not only for the reasons set forth in Mr. Mabry’s Nov. 29, 2012 email, but also because the document delivered with that email falls far short of curing the problems originally identified in applicant’s motion to strike. Although respondent purports to have reduced the original proposed order from 270 to 112 pages, it has done so primarily by changing the page margins from one inch to 0.2 inches, reducing the line spacing from 2.0 to 1.5, and transferring substantial portions of the text from the body of the document to footnotes. If one restores the original formatting, however, the document is not substantially different from the original in substance or length, and therefore presents the very same problems that led to the filing – and granting – of applicant’s motion to strike in the first place.

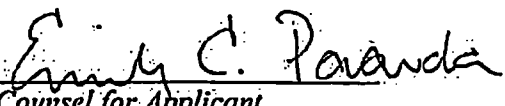
Given that both parties agree that this Court should prepare its own order, undersigned counsel are uncertain whether this Court desires any additional comments from applicant at this time. Further, given that respondent’s revised submission remains excessively, unworkably long, applicant is unable to adequately review and respond to its contents within a ten day period.

Applicant thus joins respondent in urging the Court to prepare its own order resolving this case, and awaits any further guidance from the Court.

Respectfully submitted,

KEIR M. WEYBLE
Cornell Law School
158-B Myron Taylor Hall
Ithaca, NY 14853-4901
keir@blumelaw.com
(607) 255-3805

EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Emily@deathpenaltyresource.org
Columbia, SC 29201
(803) 765-1044

By: 
Counsel for Applicant

December 5, 2012.

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

FREDDIE EUGENE OWENS, SK5065

Applicant,

v.

THE STATE OF SOUTH CAROLINA.

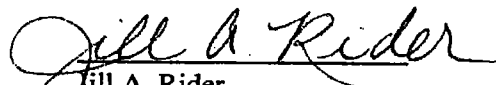
Respondent.

CLERK OF COURT
GREENVILLE CO. S.C.
WICKENSIMER
IN THE COURT OF COMMON PLEAS
CA No. 09-CP-23-0741
3:42
2012 DEC 5
NOTED

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Applicant's Memorandum Regarding Respondent's "Proposed Order" was served by first class United States mail, postage prepaid, this 5th day of December, 2012, upon the following:

J. Anthony Mabry
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


Jill A. Rider

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2009CP2300741

15 PM 2:36

Freddie Eugene Owens vs. South Carolina Stat Of

CHECK ONE:

- ☐ **JURY VERDICT:** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):**
SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Rule 12(b), SCRCP; ☐ Rule 41(a),
☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):**
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court;
Dated at Greenville, South Carolina, this 15th day of February, 2013.

Court Reporter:

PRESIDING JUDGE - Edward W Miller

This judgment was entered on the 13th day of February, 2013, and a copy mailed first class this 15th day of February, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Keir M. Weyble 900 Elmwood Ave Suite 101
Columbia, SC 29201
Emily C Paavola 900 Elmwood Avenue, Ste 101
Columbia, SC 29201

J. Anthony Mabry PO Box 11549 S.C. Attorney
General's Office Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

Freddie Eugene Owens, #5065,

2013 DEC 13 P 12:10

Applicant,

C/A No. 2009-CP-23-0741

v;

State of South Carolina,

ORDER OF DISMISSAL

Respondent.

This is a capital post-conviction relief (PCR) case. The South Carolina Supreme Court assigned jurisdiction over this matter to this Court. For the reasons stated herein, and after careful consideration of the evidence, testimony, record, arguments, and briefs, this Court denies the relief which is sought and dismisses this application with prejudice.

I.

FACTS

On November 1, 1997, Freddie Owens murdered Irene Graves at the Speedway convenience store, formerly located at I-85 and Laurens Road in Greenville South Carolina. At the time of her death, Graves was a single mother of one adult and two minor children. She worked three jobs to support her family, including her position at the Speedway.

On Halloween afternoon, Owens and his three co-defendants prepared for a crime spree, casing several stores. Eventually, the group robbed the Prestige Cleaners on Laurens Road and the Conoco Hot Spot on Augusta Road before turning their efforts to the Speedway. After midnight on November 1, Owens and one of his co-defendants, Stephen Andre Golden, entered the Speedway with disguises over their faces.

Graves and another employee were the only individuals working at the Safeway that night. At the time that Owens and Golden entered the store, however, the other employee had left the store to get ice for the drink machine, leaving Graves alone in the store. Owens and Golden accosted Graves and removed cash from one of the registers. They then took Graves at gunpoint to the store's safe, demanding that she open the safe. When Graves told them that she was unable to do so because cashiers were not given the safe's combination, Owens shot Graves in the right side of the head with a .32 caliber pistol. The bullet went through Graves' brain and ricocheted back off of the inside of her skull to the other side of her head.

After shooting Graves, Owens and Golden left the store with \$37.29. When they got back into the car, Owens told co-defendant Nikko Vance that he shot Graves because she would not open the safe. He then repeated that explanation to his girlfriend, Aisha Austin, the next morning. Eventually, Owens admitted to police that he had shot Graves.

The Greenville County Grand Jury indicted Owens during the October 20, 1998 term of the Court of General Sessions for the crimes of murder, armed robbery, conspiracy to commit armed robbery, and possession of a weapon during a violent crime. The State, through Solicitor Robert M. Ariail, served Owens with a Notice of Intent to Seek the Death Penalty. John M. Rollins and Karl B. Allen were appointed to represent Owens on these charges. The State presented its case through Solicitor Ariail and Deputy Solicitor Betty Strom.

The Trial and First Sentencing Proceeding

A jury tried Owens for the indicted charges from February 11, 1999 to February 15, 2009 before the Honorable Alexander Macaulay, Circuit Court Judge. The jury found Owens guilty of all charges.

During the statutorily-required 24-hour waiting period between the penalty and guilt

phases of his trial, Owens murdered his cell-mate, Christopher Lee, at the Greenville County Detention Center. When SLED agents questioned him, Owens confessed to killing Lee by beating, strangling, slamming, and kicking Lee, stabbing him with a ballpoint pen, stuffing the pen up his nose, and burning him with a cigarette lighter after beating him unconscious.

The sentencing phase began and ended the following day, February 17, 1999. The jury found that the State had proved the following aggravating circumstances beyond a reasonable doubt: (1) the murder was committed during the commission of an armed robbery; and, (2) the murder was committed during the commission of an armed larceny. In light of these aggravating factors, the jury recommended a sentence of death. Judge Macaulay followed that recommendation, sentencing Owens to death for Graves' murder, as well as 30 years for armed robbery, five years for conspiracy to commit armed robbery, and five years for possession of a weapon during a violent crime.

The First Appeal

Following his trial, Owens appealed his convictions and sentences to the South Carolina Supreme Court. Joseph Savitz, Chief Appellate Defender, and Katherine Carruth Link, Assistant Appellate Defender, represented Owens on his appeal. Assistant Attorney General Tracey Colton Green represented the State. On appeal, Owens raised eight grounds. The South Carolina Supreme Court affirmed Owens' convictions, but reversed his death sentence on the basis of one of those grounds – that defense counsel did not have sufficient time to investigate Owens' confession to Lee's murder. The Court remanded the case to the circuit court for resentencing.

The Second Sentencing Hearing

On remand, Owens was represented by Steve Sumner and Alex Kinlaw in a proceeding

presided over by the Honorable John Kittredge, Circuit Court Judge. In this proceeding, Owens waived his right to have a jury determine his sentence, instead opting for Kittredge to sentence him himself. Following a proceeding that lasted from February 10, 2003 to February 14, 2003, Kittredge found beyond a reasonable doubt that Owens murdered Graves during the commission of an armed robbery and sentenced Owens to death.

The Second Appeal

After his resentencing hearing, Owens again appealed his death sentence to the South Carolina Supreme Court. Savtiz represented Owens again, while Assistant Attorney General Derrick McFarland represented the State. In this appeal, Owens raised only one ground for relief: that the judge erred during the jury waiver colloquy by informing Owens that his best chance for a life sentence may be in the form of jurors who claim to support the death penalty in order to be selected as part of a capital jury but who actually are opposed to the death penalty and will refuse to impose the penalty during sentencing. The South Carolina Supreme Court found that this constituted reversible error, again vacated Owens' death sentence and remanded the case to the circuit court for another resentencing proceeding.

The Third Sentencing Proceeding

Represented by E.P. "Bill" Godfrey and Kenneth Gibson on remand, Owens chose to have the jury determine his sentence. During this proceeding, the State introduced evidence of Lee's murder, as well as a sampling of Owens' lengthy record of violent prison disciplinary infractions.

At this proceeding, the jury recommended death after finding proof of two aggravating factors beyond a reasonable doubt: (1) murder during the commission of armed robbery; and, (2) murder during the commission of an armed larceny. The Honorable Larry Patterson, Circuit

Court Judge, followed the jury's recommendation, sentencing Owens to death.

The Third Appeal and Subsequent Petitions for a Stay of Execution

Represented by Savitz and Assistant Appellate Defender LaNelle DuRant, Owens appealed this third death sentence. Assistant Attorney General Anthony Mabry represented the State. Owens raised three grounds for relief, all of which were denied. The South Carolina Supreme Court affirmed Owens' third death sentence on July 14, 2008 and denied his petition for rehearing on August 8, 2008.

Owens, through John Blume and Keir Weyble, made a Motion for a Stay of Execution on August 12, 2008, seeking time to appeal to the United States Supreme Court. The South Carolina Supreme Court denied this motion after finding that the issues that Owens wished to raise on appeal to the United States Supreme Court had not been preserved for review. Owens then petitioned the United States Supreme Court for a stay of execution. Chief Justice John Roberts granted that stay on September 20, 2008, pending the timely filing and disposition of a petition for certiorari. Owens filed a Petition for Writ of Certiorari, which the United States Supreme Court denied on January 21, 2009.

Owens next filed a Petition for a Stay of Execution to pursue potential post-conviction relief remedies, which the South Carolina Supreme Court granted on March 5, 2009. Through counsel Emily Paavola and Keir Weyble, Owens filed his final amended application for post-conviction relief on June 15, 2010. It is that application which currently is before this Court.

II.

THE PCR HEARING

In his final amended application, Owens alleged numerous instances of ineffective assistance of counsel and due process violations. This Court conducted an evidentiary merits

hearing on July 19 and July 20, 2010 to address the issues raised by Owens. At that hearing, Emily Paavola and Keir Weyble represented Owens, while Assistant Attorney Generals Anthony Mabry and Brendan MacDonald represented the State.

At the beginning of the hearing, Owens requested to waive and abandon Grounds 10(b), 11(b)7, 10(c), and 11(c), which alleged ineffective assistance of counsel for trial counsel's failure to object to Owens being seen by the jury in restraints during his trial. The Court granted that request, dismissing those grounds with prejudice. Owens then presented testimony from witnesses Joseph Savitz, Bill Godfrey, Kenneth Gibson, Jill Rider, James Garbarino, and Drucy Glass. Owens himself did not testify. The State presented testimony from witnesses John Rollins, Steve Sumner, Robert Ariail, Donna Schwartz-Watts, and Tora Brawley. In addition to the above-referenced testimony, this Court also has before it for consideration the Record on Appeal of Owens' trial and sentencing proceedings, the records of Owens' convictions and sentences, the evidence introduced in Owens' trial and sentencing proceedings, the appellate briefs and decisions of the South Carolina Supreme Court regarding Owens' trial and sentencing, the briefs and orders of the United States Supreme Court regarding Owens' Petition for Writ of Certiorari, the PCR applications, the PCR transcript, and the evidence and exhibits introduced at the PCR merits hearing.

After reviewing the entirety of the materials listed above, this Court finds that the application for post-conviction relief is without merit and dismisses the application with prejudice.

III

STANDARD OF REVIEW – INEFFECTIVE ASSISTANCE OF COUNSEL

In a PCR proceeding, the applicant bears the burden of proving that he is entitled to

relief. *Brown v. State*, 383 S.C. 506, 680 S.E.2d 909 (2009); *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). In order to establish ineffective assistance of counsel, the applicant must prove that: (1) counsel's performance was deficient; and, (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Id* citing *Strickland v. Washington*, 466 U.S. 668 (1984). This test requires that the applicant prove that the representation that he received fell below an objective standard of reasonableness and that he was prejudiced by this ineffective representation. *Id*; *Simpson v. Moore*, 367 S.C. 587, 595-96, 627 S.E.2d 700, 706 (2006).

In order to satisfy the first prong of this test -- deficient performance -- an applicant may not generally aver ineffective assistance but must identify specific acts or omissions that are unreasonable under prevailing professional norms. *Strickland v. Washington*, 466 U.S. at 690 (1984). This is a difficult burden for an applicant to satisfy, as there is a strong presumption that counsel provided effective assistance and used "reasonable professional judgment." *Id*. It is made more difficult still by the latitude which courts must give to attorneys when evaluating the strategies that they used to try their cases: "Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Watson v. State*, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006) citing *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Thus, in order to establish that the quality of his representation was so poor as to be ineffective, an applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 696.

Satisfying the second prong of the *Strickland* test is equally challenging. Even after establishing that the quality of his representation failed to meet an objective standard of

reasonable professional judgment, an applicant must prove that he was prejudiced by that ineffective assistance. In capital cases, the standard for proving prejudice differs in the guilt and penalty phases of the trial. In the guilt phase, an applicant is prejudiced if, absent counsel's errors, there is a reasonable probability that the defendant would have been found not guilty. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). In the penalty phase, prejudice occurs if "there is a reasonable probability that the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. As it applies to both phases, a "reasonable probability" is a probability that is sufficient to undermine confidence in the outcome of the proceeding. *Jones v. State*, 332 S.C. 329, 344-45, 504 S.E.2d 822, 829-30 (1998).

In order for an applicant to prevail on a claim of ineffective assistance of counsel, he must satisfy both prongs of the *Strickland* analysis: "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Pelzer v. State*, 381 S.C. 217, 672 S.E.2d 790 (2009).

IV.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Ground 10(a)/11(a)(1)

In his PCR motion, Owens alleges in Ground 10(a) – supported by facts in Ground 11(a) – that his trial counsel was ineffective during jury selection for his 2006 resentencing proceeding for failing to object to statements by the solicitor and the trial court that the State may only seek the death penalty if aggravating circumstances are present. Such statements, according to Owens, improperly suggested to potential jurors that aggravating circumstances had already been

found. Because these challenged statements were not improper, Owens is unable to prove that his trial counsel was ineffective for failing to object to them.

While both the solicitor and the trial judge commented upon the necessity of proving aggravating circumstances in order to impose a death verdict, neither the solicitor nor the trial judge made any improper suggestions that aggravating circumstances had already been proved. The challenged comments were explanatory in nature, designed to instruct the jury of the differences between capital and non-capital cases, specifically that a jury may not impose a sentence of death unless the State has proved at least one aggravating factor beyond a reasonable doubt. As counsel testified at the PCR hearing, these remarks were not objectionable because they did not suggest to the jury that aggravating circumstances had already been proved. Because these comments were not objectionable, Owens cannot show that his trial counsel was deficient for failing to object to them at trial.

Owens is also unable to prove prejudice. As the record makes clear, the trial judge explained to the jury several times that the State is required to prove aggravating factors alleged beyond a reasonable doubt. He explained further that, absent such proof, a jury cannot impose a sentence of death. As trial counsel testified at the PCR hearing, it is common in a capital case for the court to explain the difference between capital and non-capital murder to the jury. Trial counsel also testified at the PCR hearing that the court instructed the jury numerous times that the State must prove aggravating circumstances beyond a reasonable doubt. These instructions, taken together with the jury's unanimous finding of aggravating factors and unanimous recommendation of a death sentence, illustrate that the jury determined independently that the State proved its case beyond a reasonable doubt. As a result, Owens is unable to establish prejudice and cannot obtain relief on the basis of this ground.

Ground 10(a)/11(a)(2)

In Ground 10(a) – as supported by Ground 11(a)(2) – Owens alleges that his trial counsel was ineffective during jury selection for his 2006 sentencing proceeding for failing to object when the trial judge disqualified a potential juror, Sonya Ables, solely because she approached her pastor and spoke with him about the death penalty. Because the trial court properly disqualified Ables, Owens is unable to prove that his trial counsel was ineffective for failing to object to her disqualification.

In a capital case, it is the trial judge's duty to ensure that an unbiased, fair, and impartial jury is impaneled. *State v. Matthews*, 291 S.C. 339, 353 S.E.2d 444 (1986). The trial judge has sole discretion to determine whether a juror is qualified to serve, and his decision will be overturned on appeal only if wholly unsupported by the evidence. *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2009) *citing* *State v. Green*, 301 S.C. 347, 392 S.E.2d 157 (1990); *State v. Plemmons*, 286 S.C. 78, 332 S.E.2d 765 (1985). If a defendant appeals a prospective juror's disqualification, then the appellate court must review the voir dire examination of that juror in its entirety and may overturn the verdict only if there is no reasonable basis for which the trial court could have disqualified the juror. *State v. Evins*, 373 S.C. 404, 645 S.E.2d 904 (2007).

In this case, the trial judge properly disqualified Ables. Under South Carolina law, a trial judge may disqualify a prospective juror who, despite the court's instructions to the contrary, seeks advice about implementing the death penalty from a religious advisor. *State v. Gilbert*, 277 S.C. 53, 283 S.E.2d 179 (1982) (trial judge properly excused prospective juror who, despite the court's contrary instructions, met with her priest, told him that she might serve on a capital jury, and asked him about the church's stance on capital punishment). When the trial judge removed Ables, he was acting in accordance with South Carolina law. As a result, Ables'

disqualification was proper and trial counsel was not deficient for failing to object to it. Because Owens can prove neither deficient performance nor prejudice, he is unable to prevail upon this ground of his ineffective assistance of counsel claim.

Ground 10(b)/11(b)(1)

In Ground 10(a) – as supported by Ground 11(a)(2) – Owens alleges that his trial counsel was ineffective during his 2006 sentencing proceeding for failing to object when the State instructed the jury that Owens had been found guilty of murder, played the surveillance video that displayed Graves' murder, and did not tell the jury which of the two men captured in the video was the triggerman. Owens argues that by playing the video without offering Golden's testimony from previous proceedings – that he was the man visible behind the counter and that Owens, standing off camera, shot Graves – the State misled the jury into believing that Owens was the man visible behind the counter and that he was the triggerman. This, according to Owens, falsely led the jury to consider the video as conclusive video footage of Owens as the triggerman, foreclosing the possibility of Owens presenting a minor participant theory in his mitigation case. After a careful review of the evidence and Owens' allegations, it is clear that Owens is not entitled to relief on this ground.

Owens cannot establish that his trial counsel was deficient for failing to object to the State's playing of the video or for failing to request a jury instruction explaining the contents of the video. First, there was nothing improper about the State's publication of the crime scene video to the jury. *See State v. Powers*, 331 S.C. 37, 501 S.E.2d 116 (1998) (videotape of crime scene admissible to prove circumstances of crime and character of accused); *State v. Jones*, 343 S.C.562, 541 S.E.2d 813 (2001) (videotape of crime scene admissible in sentencing phase of capital trial). The video was relevant to the aggravating factors alleged by the State, the

circumstances of the crime, and the character of the defendant, all of which are proper factors for a sentencing jury in a capital trial to consider. *State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001). The authenticity of the video was not in question, there was no evidence that the video had been tampered with or manufactured, and there were no issues regarding the video's chain of custody. Because there was no reasonable basis for an objection to the publication of the video to the jury, trial counsel was not deficient for failing to object.

Second, any jury instruction that the court could have given regarding the contents of the video would have required the court to comment upon the facts of the case, which would have been improper. Under South Carolina law, judges are precluded from commenting upon the facts of a case and from charging juries as to matters of fact. S.C. Const. Art. V. Section 21; *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009); *State v. Smalls*, 98 S.C. 297, 82 S.E. 421 (1914). Any instruction that the trial judge could have given as to the crime scene video would have required him to comment upon the facts of the case, in violation of Article V, Section 21 of the South Carolina Constitution. At 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.

Owens also is unable to prove that he was prejudiced by his trial counsel's failure to object to the State's playing of the crime scene video to the jury and failure to request a jury instruction as to what the video depicted. As the sole decider of the facts of the case, the jury had to determine whether Owens was involved in Graves' murder and what role he played in that crime. Throughout the course of the sentencing proceeding, the third sentencing jury heard testimony that Owens was the triggerman, that he shot Graves while standing behind the counter and near the safe, and that he shot Graves because she would not open the safe. It was the jury's

role to determine if any or all of the State's evidence – including the testimony and the video – was credible and how much weight, if any, to afford to that evidence. In light of all of the evidence presented at the third resentencing hearing, Owens is unable to prove that there is a reasonable probability that the jury would have returned a life sentence if the State had not played the crime scene video or if the judge had instructed the jury as to its contents. Because Owens can prove neither deficient performance nor prejudice, he is unable to prevail on his ineffective assistance of counsel claim as it relates to the crime scene video.

Ground 10(b)/11(b)(2)

In Ground 10(b) – as supported by Ground 11(b)(2) – Owens alleges that his trial counsel was ineffective during his 2006 sentencing proceeding for failing to object to Officer Wood's testimony that Owens gave him "cold chills" and the State's reliance upon that testimony in its closing argument. Because Owens is unable to prove deficient performance and prejudice, he is unable to obtain relief upon the basis of this ground.

During the penalty phase of a capital trial, a jury must weigh evidence of mitigation and evidence of aggravation. Because the character of the defendant and the circumstances of the crime are important factors in the jury's sentencing determination, a trial judge may allow the admission of evidence that bears on either of those issues to aid the jury in its deliberations. *State v. Kornahrens*, 290 S.C. 281, 350 S.E.2d 180 (1986); *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979), *overruled on other grounds*, 305 S.C. 45, 406 S.E. 315 (1991).

In this proceeding, the State offered Woods' testimony as evidence of character and of future dangerousness. Woods testified as to several statements that Owens made to him, including Owens' remarks that he wants "to be remembered as the one who killed the most people in Greenville" and that he considers himself to be "a real menace." Woods also testified

that Owens had a "cocky" demeanor and a "don't care attitude" during their meetings. In response to the State's question of how Owens made him feel, Woods testified that Owens was one of only two people who ever had given Woods "cold chills" during his 25 years of experience as a law enforcement officer.

As character evidence introduced during the penalty phase of the trial to prove the aggravating character of future dangerousness, Investigator Woods' testimony was admissible in its entirety. *See* State v. Howard, 295 S.C. 462, 369 S.E.2d 132 (1988); State v. Torrence, 305 S.E. 45, 406 S.E.2d 315 (1991). Additionally, the State's reliance upon that testimony during closing arguments was proper. *Randall v. State*, 356 S.C. 639, 591 S.E.2d 608 (2004) *citing* State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999); *Edwards v. Lawton*, 244 S.C. 276, 136 S.E.2d 708 (1964) (counsel has wide latitude in closing arguments to juries so long as the arguments are based upon facts properly within evidence or inferences drawn from those facts). In this case, the Solicitor's closing argument focused upon Owens' character and background as well as the circumstances of the crime. All references made to Woods' testimony were based upon statements properly within evidence and reasonable inferences drawn therefrom. *See* Vaughn v. Staet, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004). Because both Woods testimony and the State's reliance upon that testimony in closing arguments were proper, trial counsel was not deficient for failing to object to their admission.

Even if Owens were able to prove deficiency, he is unable to prove prejudice. *See* Von Dohlen v. State, 313-14, 602 S.W.2d 738, 746 (2004) (holding that failure to object to improper closing argument in the penalty phase was not prejudicial to applicant) and *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). Based upon the entirety of the aggravating evidence presented by the State at this third sentencing proceeding – including Graves' and Lee's

murders and Owens' lengthy prison record – Owens is unable to prove that, had his counsel objected to the admission of Woods' testimony or the State's argument from that testimony, the jury would have recommended a sentence of life. As a result, he is unable to obtain relief on this ground.

Ground 10(b)/11(b)(3)

In Ground 10(b) – as supported by Ground 11(b)(3) – Owens alleges that his trial counsel was ineffective during his 2006 sentencing proceeding for failing to object to victim impact testimony concerning the effect that the victim's death had upon the victim outreach coordinator and the statements made by the victim's children to the victim outreach coordinator after the victim's death. Because this testimony was admitted properly into evidence, Owens cannot prove that his counsel was ineffective for failing to object to it.

The State may introduce victim impact testimony if it shows the specific harm committed by the defendant in murdering the victim and is relevant to the jury's determination of the defendant's moral culpability and blameworthiness. *Payne v. Tennessee*, 111 S.Ct. 259 (1991); *State v. Bixby*, 388 S.C. 528, 698 S.E.2d 572 (2010). In this case, the State chose to call as a victim impact witness Juliana Christy, the Sheriff's Office's victim/witness coordinator, rather than Graves' two minor children. Because Christy's testimony was offered to prove the specific harm committed by Owens in murdering Graves and was relevant to the jury's determination of Owens' moral culpability in Graves' death, her testimony was admissible.

At trial, Christy testified as to the Graves' children's reactions to hearing of their mother's death as well as to her own feelings concerning their emotional responses. Christy testified that she went to the Graves' house on November 1 to inform Insley and James of their mother's death. When she arrived and knocked on the door Insley – who was waiting for a ride

from her friend's mother to go to cheerleading camp – opened the door and immediately asked “where is my mommy,” a phrase that she continued to repeat throughout Christy's visit. Christy testified that, upon hearing of her mother's injuries and death, Insley began to scream and to cry, ran into her mother's room, put on her mother's coat, and wrapped it around her so that she could smell her mother's scent on the coat. Jeremy sat very still and was silent for several minutes before beginning to cry and running into Christy's arms. When the children's grandparents came to pick them up, Jeremy packed a family photograph to take with them.

After describing that day's events, Christy was asked how she would describe that day. In response to that question, Christy testified that this was the most difficult case that she had worked on in her fifteen years of experience and out of thousands of cases. She further explained that this was the only death notification that she had ever done and that this case had affected her deeply. Because Christy's descriptions of the events constituted proper victim impact evidence, her testimony was admissible in its entirety. As a result, Owens' trial counsel was not deficient for failing to object to its admission into evidence.

First, none of Christy's testimony – including her recollections of statements made by the children on that day – constituted hearsay. The statements were not offered to prove the truth of the matter asserted, but to show the children's state of mind after hearing that their mother had been killed. Rule 801(c), SCRE, *State v. Kelly*, 343 S.C. 350, 340 S.E.2d 851 (2001) (testimony by witness as to victim's child's statement was not hearsay because the statement was not offered for the truth of the matter asserted but to show the impact of the murder upon the child). Even if the children's statements constituted hearsay, they would fall under the excited utterance exception to the hearsay rule. The children's comments resulted directly from a startling event, were made while the children were still under the stress of the event, and were related to the

event. Collins, Danny R., South Carolina Evidence, Second Edition, 577-582, S.C. Bar (2000).

Second, Christy's testimony, even if hearsay, did not violate the Confrontation Clause of either the United States or the South Carolina Constitution because the statements were non-testimonial in nature. *State v. Davis*, 371 S.C. 170, 178, 638 S.E.2d 57, 61; *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Christy went to the Graves' home in order to inform the children of their mother's death, not to gather evidence. The children's statements were made during the death notification process. As a result, the statements were non-testimonial in nature and did not violate the Confrontation Clause. *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 266 (2006); *Hammond v. Indiana*, 547 U.S. 813, 126 S.Ct. 266 (2006).

Finally, the testimony was admissible under Rule 403, SCRE because the probative value of the evidence was not substantially outweighed by a danger of unfair prejudice. *State v. Bixby*, 388 S.C. at 556-57, 698 S.E.2d at 572. During a capital sentencing proceeding, victim impact testimony is probative of "the loss to the victim's family and to society which resulted from the homicide" and is relevant "to show the uniqueness of the victim, the harm committed by Appellant, and the impact of the victim's death." *Payne v. Tennessee*, 501 U.S. 808, 822, 111 S.Ct. 2597, 2606 (1991). Christy's victim impact testimony was admissible for those reasons, and Owens cannot prove deficient performance for his trial counsel's failure to object to its admission.

Owens is also unable to prove prejudice from the admission of Christy's testimony into evidence. Even if Christy had not testified, the State would have been able to present evidence that Owens' murdered a mother with two small children who depended upon her for support, nurture, and love. *State v. Southerland*, 316 S.C. 377, 447 S.E.2d 862 (1994). The State would have presented evidence of the effect of Graves' murder upon her children, including their

emotional reactions and physical actions after they were notified. Christy's testimony as to the children's reactions and statements was cumulative of other testimony already in evidence. *State v. Bell*, 302 S.C. 18, 393 S.E.2d 364 (1990) (admission of alleged improper hearsay in penalty phase of capital trial was harmless where the evidence was cumulative of other evidence); *State v. Blackburn*, 271 S.C. 324, 247 S.E.2d 334 (1978) (admission of improper evidence is harmless if it is merely cumulative of other evidence). Owens can neither establish prejudice nor prove ineffective assistance of counsel, and he is unable to obtain relief on the basis of this ground.

Ground 10(b)/11(b)(4)

In Ground 10(b) – as supported by Ground 11(b)(4) – Owens alleges that his trial counsel was ineffective during his 2006 sentencing proceeding for failing to preserve for review Confrontation Clause and due process objections to the admission of Owens' prison disciplinary infractions record. Of Owens' 56 disciplinary infractions, the State introduced at trial a summary of 28 of those incidents. Because Owens cannot establish deficient performance and prejudice, he is unable to obtain relief upon the basis this ground.

First, Owens is unable to establish deficient performance because the records were relevant and properly admissible under the business records exception to the hearsay rule. In the sentencing phase of a capital trial, a defendant's prison disciplinary infractions record is relevant and admissible as evidence of both the defendant's character and of the aggravating factor of future dangerousness. *State v. Shuler*, 353 S.C. 176, 577 S.E.2d 438 (2003); *State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1999) (evidence of a defendant's behavior in prison is admissible in capital sentencing because it bears on his character and future dangerousness). The records are not hearsay because they fall within both the business records exception to the hearsay rule. Under this exception, a report is admissible and does not constitute hearsay if the report was

prepared at or near the time of the event recorded, by or from information by a person with knowledge of the event, during the regular course of business, is identified on the record by a qualified witness, and is deemed trustworthy by the court. Rule 803(6)(c), SCRE.

In *State v. Owens*, 378 S.C. 636, 664 S.E.2d 80 (2008), the South Carolina Supreme Court unanimously rejected Owens' contention that the prison disciplinary records summary admitted in previous proceedings – and at issue here – was not admissible under the business records exception after finding that the summary satisfies each requirement of the business records exception. The underlying disciplinary reports were made at the time of the incident by correctional officers with knowledge of the incidents and were prepared during the regular course of business in accordance with South Carolina law requiring prison records to be maintained. The custodian of records at the South Carolina Department of Corrections, Major Theirry Nettles, presented and identified the records at trial. Finally, the trial court found these prison records admissible during an in camera hearing before allowing them into evidence at trial.

Owens' trial counsel was not deficient for failing to make a Confrontation Clause objection to the introduction of this summary into evidence because non-testimonial business records do not implicate the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004) (business records are not testimonial in nature and, therefore, do not implicate the Confrontation Clause); *State v. Holmes*, 361 S.C. 333, 605 S.E.2d 19 (2004) ("properly administered, the business and public records exceptions are among the safest against a Confrontation Clause challenge of the hearsay exception"). The business records in issue in this case are non-testimonial in nature because they were not prepared in anticipation of producing testimony at trial, but rather in accordance with South Carolina statutory law for the

administration of prison affairs. See S.C. Code Ann. §§ 24-1-130; 24-1-140; 24-21-60; 24-21-70; *Rayfield v. South Carolina Dep't. of Corrections*, 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988) (state statute requires prison and parole officers to keep records of prisoners' habits and deportment and to prepare adequate reports). Owens' prison disciplinary infractions record was admitted properly and did not violate the Confrontation Clause, and Owens cannot prove that his trial counsel was deficient for failing to object to its admission.

Similarly, Owens' trial counsel was not deficient for failing to raise a due process objection because the admission of the records into evidence did not violate Owens' right to due process. From a review of Owens' PCR Application, it is not clear what due process violation Owens is alleging. However, to the extent that Owens is raising the same procedural due process claim that he raised on direct appeal from his third sentencing proceeding, this claim is without merit. Procedural due process requires notice, an opportunity to be heard, judicial review, and such procedural protections as demanded by the particular situation. *Stono River Envtl. Prot. Ass'n v. S.C. Dep't of Health and Envtl. Control*, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991); *Kurschnew v. City of Camden Planning Comm'n*, 376 S.C. 135, 172, 656 S.E.2d 346, 350 (2008). Owens received all procedural protections required by due process. He was on notice that his prison misconduct would be introduced in this penalty phase resentencing hearing because the State provided trial counsel with the disciplinary records, a summary of the disciplinary violations, a Notice of Aggravating Circumstances, and a Notice of Evidence in Aggravation before trial. Owens also had an opportunity to be heard and judicial review by the trial court and the South Carolina Supreme Court. Finally, Owens' due process rights under *Gardner v. Florida*, 430 U.S., 349 (1977) were not violated because he was given an opportunity to deny and explain the prison disciplinary infractions but chose not to.

Just as Owens is unable to prove deficient performance, so is he unable to prove prejudice from trial counsel's failure to object to the introduction of his prison disciplinary infractions. The records were admitted properly into evidence, and any objection that Owens' trial counsel had made could have been properly overruled. Even if trial counsel should have objected to the evidence, their error in failing to object would have been harmless because this evidence was cumulative proof of aggravating factors. *See State v. Bell*, 302 S.C. 18, 393 S.E.2d 362 (1990). In this sentencing proceeding, the State introduced overwhelming evidence of Owens' future dangerousness, bad character, and inability to adapt to prison life. Many of the witnesses that testified to Owens' future dangerousness relied upon these prison records to testify to Owen's history of violent behavior and possession of illegal weapons while incarcerated. As a result, the evidence of Owens' prison infractions was before the jury through other witnesses, making the introduction of the summary of the records cumulative and any failure to object to its admission harmless error. Owens is unable to prove deficient performance and prejudice, and he is unable to obtain relief upon the basis of this ground.

Ground 10(b)/11(b)(5)

In Ground 10(b) – as supported by Ground 11(b)(5) – Owens alleges that his trial counsel was ineffective during his 2006 sentencing proceeding for failing to present mitigation evidence that previously had been presented at Owens' first two sentencing proceedings. Specifically, Owens objects to trial counsel's failure to present evidence in greater detail of his life history and background, brain dysfunction, and difficulties with attention and impulse control. Because he cannot establish deficient performance and prejudice, Owens is unable to prevail on this ground.

The South Carolina Supreme Court analyzes claims of failures to investigate, discover, and present mitigating evidence under the United States Supreme Court's holding in *Wiggins v.*

Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003), and its progeny. Under this line of cases, trial counsel in a capital case must conduct a reasonable and thorough investigation into mitigation evidence and present favorable mitigation evidence during the sentencing phase of trial. *Id.* In this case, Owens' trial counsel properly conducted a thorough investigation into potential mitigating evidence and chose to present evidence that it thought would favor Owens at trial. Owens' trial counsel complied with Wiggins' requirements, and, as a result, Owens is unable to establish ineffective assistance of counsel.

Owens claims that his trial counsel was deficient for failing to call Dr. Jim Evans to testify to Owens' brain dysfunction and difficulties with attention and impulse control and for failing to have Marjorie Hammock testify in extensive detail about Owens' life history. As to Dr. Evans, trial counsel made a strategic decision not to have him testify at the third sentencing hearing after reviewing the testimony that he gave at the second sentencing hearing. At Owens' second sentencing hearing, Dr. Evans, a neuro-psychologist, based his testimony, in part, on the results of a quantitative EEG (QEEG) – a controversial test that has been attacked successfully as invalid in some jurisdictions – that was analyzed in California. Trial counsel decided not to use Evans because they questioned his credibility, as well as the credibility of the QEEG upon which he based his analysis. Trial counsel also decided that it may be prudent to use different experts at Owens' third sentencing proceeding, as the experts used at Owens' first two sentencing proceedings did not obtain a life sentence for Owens. Trial counsel called several different experts – Dr. Schwartz-Watts, Dr. Thomas Cobb, and Dr. Tora Brawley – instead of Evans, and those experts offered substantively the same testimony.

As to Hammock, the main reason that her testimony in the third sentencing proceeding was less substantial than in previous proceedings was that the State decided not to cross-examine

Hammock as they had in the previous proceedings. Additionally, much of Hammock's testimony at the first two proceedings dealt with how Owens would adjust to incarceration, a topic that became irrelevant after Owens had been imprisoned for several years and had a lengthy prison disciplinary infraction record. Owens' trial counsel made the strategic decision not to elicit testimony from Hammock that was no longer relevant.

Owens was not prejudiced by trial counsel's decision not to have Evans testify. When determining whether an absence of certain mitigation evidence resulted in prejudice, the reviewing court must determine whether "the mitigation evidence, taken as a whole, 'might well have influenced the jury's appraisal' of the defendant's culpability." *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009) *quoting* *Wiggins v. Smith*, 539 U.S. 510, 538, 123 S.Ct. 2527 (2003). In reaching that determination, the reviewing court must consider whether "had the jury been able to place [the new mitigation evidence] on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Gray v. Branker*, 529 F.3d 220, 238 (4th Cir. 2008). Thus, a defendant seeking to establish prejudice "must show a reasonable probability that the jury would have rejected a capital sentence after it weighted the entire body of mitigating evidence (including the additional testimony applicant could have presented) against the entire body of aggravating evidence (including any additional aggravating evidence likely to have come in)." *Wong v. Belmontes*, 558 U.S. 15, 130 S.Ct. 383 (2009) *citing* *Strickland* at 695-96, 700.

In this case, Owens cannot prove that he suffered prejudice from trial counsel's decision not to have Evans testify because the substance of Evans' testimony was presented to the sentencing jury through the testimony of expert Doctors Cobb, Brawley, and Schwartz-Watts. Through their testimony, the jury learned that Owens had an anxiety disorder; was on psychiatric

medications; had problems with attention and impulsivity; had a history of depression that could manifest itself as aggression, impulsivity, and resistance; had select areas of deficit in his brain; and suffered from difficulties in school because of learning disabilities and poor social skills. The testimony that Evans could have offered would have been cumulative of the above-described evidence testified to by the experts that replaced him.

Owens also was not prejudiced by his trial counsel's decision not to elicit more detailed testimony from Hammock. Although her testimony was more limited in the third sentencing proceeding than in the first two, Hammock nevertheless offered substantially the same testimony, including that Owens frequently was exposed to violence in his home and neighborhood; suffered from physical abuse; witnessed physical abuse, including one incident during which his step-father chased his mother around the house with a machete; had five family members who had been incarcerated; and, was in and out of foster care for portions of his childhood. Hammock further testified as to the strong correlation between the type of childhood that Owens had and a future history of violence. The topics that she failed to cover were addressed by the other mitigation witnesses at the third sentencing proceeding, specifically Schwartz-Watts, Cobb, Brawley, and Owens' teacher, Ms. Maag.

During his PCR hearing, Owens raised an additional basis for relief under this ground that he did not present in his PCR application, and it too is without merit. Owens argued that this ground extends to cover his trial counsel's failure to present mitigation evidence contained in mitigation investigator Drucy Glass' file. However, despite Owens' claims that his trial counsel did not have access to the information contained within Glass' file during this proceeding, there is no evidence that information was not available to counsel at the time of this proceeding. Glass testified that she turned the file over to Owens' counsel at each proceeding, and Owens' trial

counsel testified that they reviewed the evidence found in that file in advance of trial. If trial counsel made a strategic decision not to present the evidence present in that file, then such a decision does not constitute ineffective assistance of counsel. Trial counsel presented a cogent mitigation case through the testimony of Hammock, Schwartz-Watts, Cobb, Brawley, and Maag. As a result, the absence of some evidence present in Glass' file from the mitigation case presented at trial does not undermine confidence in the outcome of this penalty proceeding.

Ground 10(b)/11(b)(6)

In Ground 10(b) – as supported by Ground 11(b)(6) – Owens alleges that his trial counsel was ineffective during his 2006 sentencing proceeding for failing to present mitigation evidence of Owens' experiences while incarcerated in the Department of Juvenile Justice and the impact of those experiences upon his character, conduct, and psychological condition. Specifically, Owens argues that his trial counsel was ineffective for failing to introduce the testimony of Dr. James Garbarino that Owens experienced and witnessed physical and sexual abuse while incarcerated at DJJ. Because Owens is unable to prove deficient performance or prejudice, he is unable to obtain relief upon the basis of this ground.

Owens cannot prove that his trial counsel was deficient for failing to present the substance of Garbarino's testimony at Owens' third resentencing proceeding because trial counsel made a reasonable strategic decision not to present this evidence. First, Owens' claims of abuse were not corroborated. Although Owens met with six defense attorneys, two mitigation investigators, one private investigator, and a number of mental health experts before meeting with Garbarino in 2009, he failed to inform any of these individuals of this alleged abuse. He could not produce any records indicating reports of sexual assault or sexual abuse from DJJ during the time of his incarceration. Similarly, he failed to offer testimony from any guard or

former inmate of DJJ that witnessed any sexual or physical abuse or from any of his friends or family members to whom he had relayed accounts of this alleged abuse.

Second, it is clear from the record that Owens' trial counsel conducted an extensive and thorough investigation into potential mitigation evidence and made a conscious decision not to present Garbarino's testimony at trial. Trial counsel retained for investigative purposes a forensic social worker, a mitigation investigator, a private investigator, a forensic psychiatrist, a neuro-psychologist, and Owens' treating psychiatrist. Trial counsel also reviewed the mitigation evidence collected for Owens' first two sentencing proceedings and the transcripts of those proceedings. In none of these records were there any allegations of physical or sexual abuse during Owens incarceration at DJJ.

Third, trial counsel decided that it would be in Owens' best interest not to present this mitigation evidence because of the circumstances surrounding Owens' incarceration in DJJ as well as his behavior while there. Owens was incarcerated at DJJ for assault with the intent to kill. While there, he displayed a propensity for violence, frequently assaulted other inmates, threatened DJJ staff, refused to comply with disciplinary rules, and incited other inmates not to do their work. His poor behavior at DJJ caused Owens to be confined to a maximum security unit on several occasions. Because the State did not introduce Owens' behavior while at DJJ, trial counsel thought it best not to open the door to admitting potentially damaging information into evidence during its mitigation presentation. Specifically, trial counsel did not want the sentencing jury to focus upon the similarity of the assault for which Owens was incarcerated and his behavior while at DJJ and his murders of Graves and Lee. By allowing in evidence of Owens' behavior while at DJJ and leading up to his incarceration there, trial counsel would have risked letting in evidence regarding Owens' bad character, future dangerousness, and inability to

adapt to life in prison. *See Burger v. Kemp*, 483 U.S. 776, 793, 107 S.Ct. 3114 (1987) (when a defendant's background is "by no means uniformly helpful" and "suggest[s] violent tendencies," it is reasonable to choose not to present it).

Owens also is unable to prove prejudice for his trial counsel's failure to present Garbarino's testimony at his third resentencing proceeding. Even if the jury believed Garbarino's uncorroborated testimony that Owens was physically and sexually abused while incarcerated at DJJ, the defense's eliciting of that testimony would have come at the great cost of opening the door for the State to introduce evidence that would characterize Owens as a consistently violent criminal who would be a future danger to society and who would not adapt well to prison. As a result, it was a reasonable strategic decision for Owens' trial counsel to choose not to call Garbarino in an attempt to keep Owen's DJJ record out of his sentencing proceeding.

Ground 10(b)/11(b)(7)

In Ground 10(b) – as supported by Ground 11(b)(8) – Owens alleges that his trial counsel was ineffective during his 2006 sentencing proceeding for failing to object to statements that the solicitor made during closing arguments that the State chooses to seek the death penalty only rarely, that the jury should choose death because prison would give Owens an easy life, and that the solicitor himself wanted the death penalty imposed. Owens argues that, by not objecting, his trial counsel failed to preserve for review constitutional violations. Because Owens is unable to establish deficient performance and prejudice, he is unable to prevail on this ground.

Owens is unable to prove deficient performance because the Solicitor's comments during closing argument, even if improper, are not sufficient to have Owens' death sentence overturned on appeal. When considering whether a solicitor's arguments were improper, a reviewing court

must examine the comments in light of the entire record, including whether there were curative instructions given or overwhelming evidence of the defendant's guilt. *Vasquez v. State*, 388 S.C. 447, 698 S.E.2d 561 (2010); *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). A solicitor's comments are only grounds for reversal if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). In this case, the solicitor's comments are not grounds for reversal.

Owens objects specifically to three comments made during the State's closing argument. The first of these comments – that the State chooses to pursue a death sentence only rarely – was not improper. Mere mention of the solicitor's involvement in the State's decision to seek the death penalty is not improper. *State v. Bell*, 302 S.C. 18, 34, 393 S.E.2d 364, 373 (1990). Here, the solicitor simply was explaining that the State does not choose to pursue the death penalty for every charge of capital murder. Such a comment, without more, is proper.

The second of these comments – that the jury should impose a death sentence because imposing a life sentence would give Owens too easy of a life – also was not improper. The solicitor argued in favor of a death sentence because of the atrocity of the crimes that Owens committed. These arguments were tailored to the specific crimes that Owens committed and to Owens himself. *Smart v. State*, 278 S.C. 515, 526, 299 S.E.2d 686, 692-93 (1982) (solicitor's comments in favor of death sentence must be case specific and defendant specific). While the solicitor requested the death penalty, he did not attempt "to minimize the jurors' own sense of responsibility for appellant's fate by stressing that he himself already made the same decision that he was asking them to make." *State v. Woomer*, 277 S.C. 170, 175, 284 S.E.2d 357, 359-60 (1981).

Additionally, given the evidence, it was appropriate for the solicitor to argue that life in prison would not be a significant punishment for Owens. The record shows that Owens was incarcerated during his teenage years and most of his adult life. During meeting with investigators following Graves' murder, Owens admitted that the idea of prison was not a threat to him and told investigators that he "was born to be in jail." He further explained to investigators, "If I go to jail, I go to jail, I don't give a shit."

Finally, the third of these comments – that the solicitor wanted the death penalty imposed himself – also was not improper when examined in the context in which it was made. Taken in context, the solicitor simply stated that he was seeking the death penalty because that punishment was appropriate under the facts of the case. 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. *See Williams v. Ozmint*, 380 S.C. 473, 671 S.E.2d 600 (2008) (although the solicitor stated that he "expected the death penalty," he did not commit reversible error because he did not attempt to minimize the jurors' own sense of responsibility). Such comments do not insert the solicitor's personal opinion into the case but simply explain the state's position. *State v. Woomey*, 277 S.C. 170, 175, 284 S.E.2d 357, 359 (1981).

Even if Owens were able to establish deficient performance, he would not be able to prove prejudice. The challenged comments made in the solicitor's argument comprised only a small portion of a lengthy closing argument. *See State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996) (challenged comment was one isolated event in an entire lengthy argument); *State v. Chaffee*, 285 S.C. 21, 328 S.E.2d 464 (1984) ("momentary lapse of good taste will rarely constitute prejudicial error"). Additionally, the trial court instructed the jury that they were to decide what verdict to return and that they were not required to return a death sentence. Under

South Carolina law, jurors are presumed to follow a trial court's instructions. *See State v. Northcutt*, 372 S.C. 207, 228, 641 S.E.2d 873 (2007). Given the admitted evidence of guilt, the circumstances of the crime, the curative jury instruction, and the great amount of evidence in aggravation, Owens is unable to prove that there is reasonable probability that the jury would have returned a life verdict had the solicitor not made these comments.

Ground 10(c)/11(c)

In Ground 10(c) – as supported by Ground 11(c) – Owens alleges that his appellate counsel was ineffective during the appeal from his 2006 sentencing proceeding for failing to assert that his trial court erred by denying Owens' request to ask potential jurors if they were biased in favor of police officers because of their previous work in law enforcement. This ground is without merit.

A PCR applicant has the burden of proving that his appellate counsel was deficient. *Anderson v. State*, 354 S.C. 431, 581 S.E.2d 834 (2003). Appellate counsel is not required to raise every non-frivolous issue that is presented from a review of the record, but rather has the duty to choose among potential issues according to their merit. *Tisdale v. State*, 357 S.C. 474, 594 S.E.2d 166 (2004); *Jones v. Barnes*, 463 U.S. 745, 752 (1983). In order to prove that appellate counsel was ineffective, a PCR applicant must show that his appellate counsel was objectively unreasonable in failing to identify, argue, and present significant and obvious issues on appeal and that, but for appellate counsel's errors, the applicant would have prevailed on appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Bell v. Jarvis*, 236 F.3d 149, 164 (4th Cir. 2000). This is a difficult burden for an applicant to meet, as it requires a showing that "the ignored issues are clearly stronger than those presented" during the appeal. *Id.*

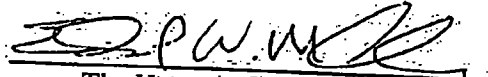
In this case, Owens is unable to meet that burden. Owens' appellate counsel was not

required to make every non-frivolous argument requested by Owens, but rather was free to make a reasonable strategic decision not to appeal certain issues. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). It was reasonable for Owens' appellate counsel to decide that it was in Owens' best interest not to raise this issue on appeal because it was meritless. During voir dire, any examination beyond the statutorily required questions is within the trial judge's discretion. *State v. Bethune*, 93 S.C. 195, 75 S.E. 282 (1912). This includes any proposed questions as to the prospective jurors' ability to remain impartial. *State v. Young*, 238 S.C. 115, 119 S.E.2d 504 (1961). Judge Patterson's decision not to question prospective jurors as to their potential bias in favor of law enforcement officials was well within his discretion. This issue is not clearly more meritorious than the issues that appellate counsel raised on appeal, and Owens is unable to prove that his appellate counsel was ineffective for failing to raise it.

CONCLUSION

As a result of all of the above, this Court finds the allegations raised by Owens in his Final Amended Application for Post-Conviction Relief to be without merit and dismisses this application with prejudice. Applicant is remanded to the custody of the South Carolina Department of Corrections for the purpose of carrying out his sentence.

2/13/13


The Honorable Edward W. Miller
Circuit Court Judge
13th Judicial Circuit

STATE OF SOUTH CAROLINA

County of Greenville

Freddie Eugene Owens, #5065,
Applicant,

vs.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS

Case No.: 09-CP-23-0741

**MOTION TO ALTER
OR AMEND THE JUDGMENT**

Applicant, Freddie Eugene Owens ("Owens"), by and through undersigned counsel, hereby moves to alter or amend the judgment issued by this Court on February 13, 2013. Applicant received written notice of the Order on Thursday, February 21, 2013. In support of this motion, Applicant submits the following.

First, the Order is replete with factual findings and legal conclusions that are not supported by the record, and have the effect of distorting the Court's resolution of Applicant's claims for post-conviction relief. For example:

- There is no support in the PCR record for the Court's finding that "[d]uring his PCR hearing, Owens raised an additional basis for relief under [ground 10(b)/11(b)(5)] that he did not present in his PCR application." On the contrary, this Court specifically ruled that Respondent's reading of the Application was "too narrow," and found that Applicant's allegations were sufficiently broad to include his claim that trial counsel failed to investigate and present all available mitigating details regarding his life history. PCR Tr. pp. 11-16, 19-20.
- Trial counsel did not testify at the PCR hearing "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." Rather, both attorneys testified that they never even considered raising an objection or requesting instructions. PCR Tr. pp.40-41, 93.
- The Order incorrectly finds that Ms. Juliana Christy's trial testimony was "cumulative of other testimony already in evidence," when, in fact, no other victim impact evidence apart from Ms. Christy's testimony was offered at trial. Likewise, the Order erroneously concludes that information from Applicant's prison records was cumulative to other

evidence when, again, there is no support for such a finding in the record below. The State relied on the records themselves and no other witnesses testified to knowledge of the events that the records purported to document.

- There is no evidence to support the Court's conclusion that trial counsel made "the strategic decision" not to elicit testimony from Ms. Marjorie Hammock about Applicant's ability to adjust to incarceration during the third sentencing proceeding. Trial counsel was not asked about why Ms. Hammock did not testify about prison adjustment, and they offered no testimony that would support a finding of a strategic decision on this issue.
- Moreover, the Order mischaracterizes Ms. Hammock's trial testimony by finding that she testified to "[a] strong correlation between the type of childhood that [Applicant] had and a future history of violence." The Court equally errs in finding that any topics Ms. Hammock failed to cover "were addressed by the other mitigation witnesses at the third sentencing proceeding." Very simply, neither factual statement is accurate. At the PCR hearing, through witnesses and exhibits, Applicant offered extensive mitigating evidence that was never presented at trial. *See* Applicant's Post-Hearing Memorandum of Law at pp.30-55. The details of this life history were not testified to by Ms. Hammock or by any other witness. *See id.* at pp.63-67. At the PCR hearing, Applicant also offered expert testimony explaining the results of the lifelong trauma and abuse he experienced as a child. *See id.* at pp.55-57. Ms. 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 Applicant's childhood (which was not presented to the sentencing jury in any detail) and a future history of violence. ROA p.1413.
- The Order erroneously finds that there is no evidence that Ms. Drucy Glass' file was not available to trial counsel at the time of his sentencing proceeding. On the contrary, Applicant offered evidence that strongly suggests that trial counsel did not have the file. Bill Godfrey personally delivered his file to the office of undersigned counsel. *PCR Tr. p.164*. Godfrey testified that this was his entire file, and that it contained everything he and Gibson had received from all four previous trial attorneys. *Id. at p.115*. Ms. Jill Rider testified that she also received a box of records from Ms. Glass. *Id. at p.165*. She inventoried both files and testified that Godfrey's file did not contain the records from Ms. Glass' file. *Id. at pp.166-167*; *see also, Applicant's PCR Exhibits 10-18*.
- Further, even if Ms. Glass' file was available to trial counsel, the record wholly contradicts the Court's conclusion that trial counsel "made a strategic decision not to present the evidence present in that file." Neither trial attorney testified to any such strategic decision. Nor is there any evidence to support the Court's conclusion that "trial counsel testified that they reviewed the evidence found in that file in advance of trial." Trial counsel testified at the PCR hearing that their intended strategy was to present the fullest possible picture of Owens' life history and they had no strategic reason for omitting any available details of that history. *See, e.g., PCR Tr. pp.59-60, 131*; *see also, ROA pp.1047-48*. Trial counsel intended for Ms. Hammock to serve as the "primary" witness through whom they hoped to tell Applicant's life story. *PCR Tr. pp.56, 123-24*,

129-30. And yet, Ken Gibson, who was responsible for presenting Applicant's life story through Ms. Hammock, testified without contradiction at the PCR hearing that, at the time of Ms. Hammock's testimony, he: (a) had spent only five hours with Applicant discussing non-mitigation issues; (b) had not read any of Applicant's social history records; (c) had not interviewed any of Applicant's family members or acquaintances; and, (d) relied on Ms. Hammock to tell him what she thought was important for her testimony. PCR Tr. pp.52-58.

- Similarly, the record does not support the Court's findings that "trial counsel conducted an extensive and thorough investigation into potential mitigation evidence" or that trial counsel made a "conscious decision" not to present the evidence that Applicant offered at the PCR hearing through the testimony of Dr. James Garbarino. Once again, the record reflects that trial counsel testified: (a) they wanted to present a complete picture of Applicant's life history in the greatest detail possible; (b) they would have wanted to present any additional mitigating information about Applicant's background if they had been aware of it; and, (c) they "did not make any kind of strategic decision to not present the full and complete picture of [Applicant's] background." PCR Tr. pp.60, 116, 129, 131. The un-contradicted record also establishes that trial counsel: (a) did not even introduce themselves to Applicant until over five months after their appointment; (b) conducted no mitigation investigation of their own; (c) relied, instead, on a defense team that was not assembled until less than two months before trial; (d) hired two investigators (one who was unable to carry out her duties because of personal problems) who did not even begin meeting with Applicant until five weeks before trial; and, (e) relied on Ms. Hammock to tell them what was important about Applicant's life history even though trial counsel and other team members observed that she was unreliable, forgetful, ill-prepared and not "on board and ready to go." *See, e.g.*, PCR Tr. pp.50, 54, 57-58, 104-05, 107-08, 111, 113, 126; Applicant's PCR Exhibit 1 at pp.2-3; Applicant's PCR Exhibit 4.
- There is also no support in the record for the Court's finding that "trial counsel decided that it would be in [Applicant's] best interest not to present [evidence of his DJJ experiences] because of the circumstances surrounding [Applicant's] incarceration in DJJ as well as his behavior while there." On the contrary, trial counsel testified that they never investigated Applicant's experiences in DJJ, they never asked him 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. PCR Tr. pp.57-60, 81, 120, 131-32. 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 v. Upton*, --- U.S. ---, 130 S.Ct. 3259, 3265 (2010); *Porter v. McCollum*, --- U.S. ---, 130 S.Ct. 447, 453 (2009). It constitutes reversible error for a court to "merely assume that the investigation was adequate." *Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003); *see also, Williams v. Taylor*, 529 U.S. 362, 396 (2000). Further, even if counsel had investigated Applicant's experiences at DJJ and their impact on him, the "strategic" decision attributed to them in the Court's order would still be unreasonable. Trial counsel were already aware that the circumstances surrounding Applicant's incarceration in DJJ and his behavior while there would come into evidence, and there

was nothing they could do to stop it. In fact, trial counsel offered much of this evidence at trial through their own witness. ROA pp.1470, 1494.

Second, in multiple instances throughout the Order, the Court misapplies *Strickland v. Washington*, 466 U.S. 668 (1984), 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, *see* Applicant's Post-Hearing Memorandum of Law at pp.30-67, 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." That declaration not only lacks support in the record, it also lacks anything approaching the legally dispositive power attributed to it by the 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 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*, 130 S.Ct. at 453-54.

The Order also consistently misapplies *Strickland* by finding that trial counsel made a series of valid strategic decisions notwithstanding their failure to conduct a constitutionally adequate investigation.¹ *See, e.g., Porter*, 130 S.Ct. at 453 (2009); *Wiggins*, 539 U.S. at 526-27; *Williams*, 529 U.S. at 396. Additionally, the Court misapplies relevant law by rejecting Dr. Garbarino's testimony because Applicant's DJJ records do not contain any reports of sexual abuse. This kind of credibility determination is not appropriate for a post-conviction court to make at this stage. *See Porter*, 130 S.Ct. at 455 (holding – where Porter's expert testimony was

¹ Moreover, as explained above, these findings have no factual support in the record.

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 simply is not this Court’s role when conducting the *Strickland* prejudice inquiry to speculate as to whether or not a jury would have credited available mitigating evidence that trial counsel unreasonably failed to present. It is also error for this Court to “discount” mitigating information, such as Applicant’s experiences in DJJ, on the basis that it might have come at some cost. *Porter*, 130 S.Ct. at 451; *see also, Sears*, 130 S.Ct. at 3264.

Third, the Order mischaracterizes several of Applicant’s claims and fails to address the arguments that Applicant advanced in support of those claims. Applicant has not argued that the crime scene video was *per se* inadmissible, that the video was irrelevant or that its authenticity was in question. Rather, Applicant asserts that trial counsel should have requested an instruction informing the sentencing jury that no specific finding as to the shooter’s identity had previously been made. Such an instruction would not have been a comment on the facts any more than it was a comment on the facts for the trial court to inform the sentencing jury that Applicant had already been convicted of the murder of Ms. Graves. The Order addresses a number of arguments that Applicant did not make about the crime scene video, but fails to address the argument that Applicant actually raised.

The Order also fails to specifically address Applicant’s argument that it was improper for Ms. Juliana Christy to testify about the impact that the victim’s death had on her own life and career. In particular, Ms. Christy testified as follows:

Q: Now, Ms. Christy, how long have you been the 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.

ROA p.1274. The Order does not explain – or even address – how this testimony was relevant or admissible victim impact evidence. Similarly, the Order finds in conclusory fashion that Officer Wood’s “cold chills” testimony was admissible, non-opinion evidence regarding Applicant’s character, but does not explain how this testimony constituted non-opinion evidence or somehow reflected Applicant’s character.

With regard to the summary of Applicant’s prison disciplinary records, the Order finds that its admission at trial did not violate the Confrontation Clause because the records were non-testimonial. However, the Order does not address Applicant’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 v. Washington*, 547 U.S. 813, 822 (2006); (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,’” *United States v. Mills*, 446 F.Supp.2d 1115, 1137 (C.D. Cal. 2006) (quoting *Crawford v. Washington*, 541 U.S. 36, 52 (2004)); *see also*, *Bracey v. Herring*, 466 F.2d 702, 704 (7th Cir. 1972); (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 v. State*, 171 S.W.3d 871, 881 (Tex. Crim. App. 2005); 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*, 129 S.Ct. at 2532 (quoting *Crawford*, 541 U.S. at 41; *Davis*, 547 U.S. at 830). The Order also notes that prison records are required to be produced by state statute but fails to address Applicant'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).

Finally, the Order fails to address Applicant's argument that the solicitor's improper statements in closing argument violated S.C. Code Ann. § 16-3-25(C)(1). The Order also mischaracterizes the holding of *Williams v. Ozmint*, 380 S.C. 473, 671 S.E.2d 600 (2008). 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." 380 S.C. at 477, 671 S.E.2d at 602. As a result, Williams bore "a much higher burden" than Applicant bears here. It was "against this backdrop" that the South Carolina Supreme 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, the Court noted that the solicitor's comments in *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007), "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.

For all of the reasons discussed above, Applicant respectfully requests that the Court vacate its February 13, 2013 Order, re-examine the issues in light of the totality of the record evidence and governing law, and prepare a new order addressing the merits of Applicant's claims, and granting post-conviction relief.

Respectfully submitted,

KEIR M. WEYBLE

Cornell Law School
Myron Taylor Hall
Ithaca, NY 14853-4901
keir@blumelaw.com
(607) 255-3805

EMILY C. PAAVOLA

Death Penalty Resource & Defense Center
900 Elmwood Ave., Suite 101
Columbia, SC 29201
Emily@deathpenaltyresource.org
(803) 765-1044

By: 
Counsel for Applicant

February 27, 2013.

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

FREDDIE EUGENE OWENS, SK5065
Applicant,

v.

THE STATE OF SOUTH CAROLINA.
Respondent.

IN THE COURT OF COMMON PLEAS
CA No. 09-CP-23-0741

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Applicant's Motion to Alter or Amend the Judgment was served by first class United States mail, postage prepaid, this 27th day of February, 2013, upon the following:

J. Anthony Mabry
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


Jill A. Rider

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2009CP230741
2013 APR 10 PM 4:36

Freddie Eugene Owens	State of South Carolina GREENVILLE CO SC DAVID J. WITTENBERG
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant
---------------	---

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☒ Statement of Judgment by the Court:

Applicant's Motion to Alter or Amend the Judgment is Denied.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

201 W. Wick
Circuit Court Judge

2130
Judge Code

4/10/13
Date

For Clerk of Court Office Use Only

4-10-13 This judgment was entered on, and a copy mailed first class or placed in the appropriate attorney's box on, to attorneys of record or to parties (when appearing pro se) as follows:

Emily Paavola 900 Elmwood Ave., Suite 101 Columbia, SC 29201

J. Anthony Mabry P.O. Box 11549 Columbia, SC 29211

Keir M. Weyble Cornell Law School, Myron Taylor Hall, Ithaca, NY 14853

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer

Paul B. Wickensimer Greenville County Clerk Of Court - Clerk of Court

Court Reporter