

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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**S.C. SUPREME COURT**

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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CA No. 09-CP-23-0741

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FREDDIE EUGENE OWENS. .... *Petitioner,*

v.

STATE OF SOUTH CAROLINA ..... *Respondent.*

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**PETITIONER'S REPLY**

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Petitioner, Freddie Eugene Owens, submits this Reply to respondent's Return to the Petition for Writ of Certiorari. Many of respondent's contentions were anticipated and dealt with in the Petition itself, and petitioner will avoid rehashing them here. Instead, this Reply will concentrate on identifying and correcting some of the most egregious distortions proffered in the Return, and then present additional argument in support of several issues that are especially worthy of this Court's review.

**I. RESPONDENT'S RETURN FAILS TO CONFRONT THE PROOF OF PREJUDICIAL CONSTITUTIONAL ERROR PRESENTED TO THE PCR COURT, AND INSTEAD SEEKS TO MISLEAD THIS COURT WITH MISREPRESENTATIONS OF THE RECORD AND THE FINDINGS BELOW, AND MISCHARACTERIZATIONS OF PETITIONER'S ALLEGATIONS AND THEIR LEGAL IMPORT.**

Petitioner raises three (3) main arguments for relief from his 2006 death sentence. First, he contends his trial counsel, William "Bill" Godfrey and Kenneth Gibson, ineffectively failed to present strong, readily available, and non-cumulative mitigating evidence spanning his entire social history. Second, petitioner argues that trial counsel failed to object to a variety of evidence offered in aggravation by the State, including: (a) the crime scene video; (b) Officer Wood's testimony that petitioner was one of only two people in his twenty-five year career to give Wood the "cold chills," App. 1142, l.18; (c) a hearsay list of petitioner's disciplinary infractions in violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution; and, (d) testimony from the victims' advocate that in her fifteen-year career, petitioner's was "the hardest, hardest case I have ever had to work on. ... It affected me the most deeply, and still does." App. 1324, ll.1-12. Finally, petitioner argues that the solicitor's closing argument was filled with improper and prejudicial statements, and that trial counsel was ineffective in failing to object to the same.

Petitioner's claims are simple and straightforward. His allegations have been clear from the beginning and were briefed in full during a lengthy post-hearing briefing process.<sup>1</sup> Although the Petition for Writ of Certiorari is indeed long, spanning ninety-two (92) pages, most of it is devoted to describing both the extensive mitigating information from petitioner's life story that trial counsel claimed a desire to tell but made no effort to uncover or present, and a detailed account of counsel's inadequate trial preparations, resulting in their multiple failures. *See* Petition for Writ of Certiorari at pp. 3-63. Rather than addressing this information head-on, respondent instead offers a bloated mass of misrepresentations of the record, fabricated "findings" of law and fact, and rank mischaracterizations of petitioner's claims. Respondent falsely accuses petitioner of inventing new claims; attempts to break the analysis of each claim into tedious, irrelevant sub-categories; and repeatedly attributes "findings" to the lower court that were never made.

For example, respondent claims that the PCR court found that trial counsel was "acutely aware" of all possible mitigating evidence regarding the conditions of confinement at DJJ, including "the general issues regarding overcrowding, violence and abuse . . . near the time of [petitioner's] incarceration," and "keenly aware" of all relevant mitigating evidence regarding "[petitioner's] particular DJJ experience, *which [petitioner] related to the defense team as good.*" Return at p.24 (emphasis in original). There are no such findings in the PCR court's order. *See* App. 3591-93. Similarly, respondent falsely claims that both Dr. Schwartz-Watts [hereafter, "Dr. Watts"] and Dr. Brawley "interviewed [petitioner] about his life experiences including at DJJ," and that the PCR Court found petitioner's claims not credible because he denied sexual abuse

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<sup>1</sup> *See* App. 3205-3298 (Petitioner's Post-Hearing Memorandum of Law in Support of Second Amended Application for Post-Conviction Relief); App. 3531-3559 (Petitioner's Reply to Respondent's Post-Trial Brief); App. 3598-3605 (Petitioner's Motion to Alter or Amend the Judgment).

when he was “asked this specific question multiple times” during trial counsel’s preparations.

Return at 20, 25.

Respondent’s claims are a gross misrepresentation of the record. With regard to trial counsel's investigation, the established facts are as follows:

- Trial counsel did not even introduce themselves to petitioner until over five months after their appointment. App. 1995, 2049-50.
- Trial counsel conducted no mitigation investigation of their own. App. 1999, 2058. Instead, they relied on a dysfunctional defense team that was not assembled until less than two months before trial. App. 2052-53.
- 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 petitioner until five weeks before trial. App. 2056, 2315.
- Trial counsel relied entirely on Marjorie Hammock to be the primary vehicle through which they intended to convey petitioner’s life history, App. 2001, 2068-69, 2074-75, 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." App. 2340-42.
- Trial counsel Kenneth Gibson took responsibility for preparing Hammock's testimony only days before jury selection began. App. 1998-99. Prior to that, he knew nothing of the extensive mitigating evidence available from petitioner’s life history, and he remained ignorant of virtually all of the relevant details regarding that life history even after his acceptance of this responsibility. App. 2002.
- Gibson relied on Hammock to tell him what she thought was important. App. 2003. Throughout his representation of petitioner, Gibson never read any of petitioner’s social history records, he did not interview any mitigation witnesses, and he spent a total of five hours with petitioner discussing non-mitigation topics. App. 1997, 2002.
- Neither Gibson nor Godfrey ever asked petitioner about his experiences in DJJ, nor did they ever ask petitioner if he had ever been sexually abused. App. 2065.

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.<sup>2</sup>

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<sup>2</sup> Trial counsel called the following five witnesses: (1) Marjorie Hammock, who was the primary intended vehicle for conveying petitioner's life history; (2) Fain Maag, who was petitioner's elementary school teacher for one year; (3) Dr. Tora Brawley, a neuropsychologist who testified that the scope of her work was "very limited," that she was asked only "to look at his brain function," and that her findings were "not significant." App. 1482, 1484; (4) Dr. Thomas Cobb, a prison psychiatrist who had met with petitioner on "two or three" occasions for approximately 15 minutes each and claimed that petitioner's prison behavior had improved, although he had not reviewed any of petitioner's prison records; and, (5) Dr. Watts, who testified about why petitioner

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.

App. 2002-2005. Bill Godfrey similarly testified that he never spoke to petitioner about his experiences in DJJ, App. 2065; he wanted to present a complete picture of petitioner's life history in great detail, App. 2061, 2074; he would have wanted to present any additional information about petitioner's background, but he was not aware of any such information, App. 2076; and, he did not have any information about petitioner's personal experiences at DJJ apart from what was recorded in his DJJ records. App. 2076-77.

Respondent's claim that the defense team repeatedly asked petitioner about sexual abuse despite multiple denials is equally irreconcilable with the record. Dr. Watts was the only defense team member who testified that she even broached the subject of sexual abuse

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was first sent to DJJ, that his behavior there was "horrible," and that he was treated briefly for depression in DJJ but was shortly thereafter transferred to an adult facility where he asked for psychiatric help, but received none.

with petitioner. App. 2286. She also testified that she only spent ten total hours with petitioner, much of which was focused on other topics. App. 2287. Dr. Watts was brought onto the defense team in September of 2006, at a time when petitioner's trial was scheduled to begin on October 2nd, less than a month later. App. 2284. On September 27, 2006, trial counsel moved for a continuance at Dr. Watts' insistence because, after her initial meeting with petitioner, on "short notice," Dr. Watts discovered that he was on several powerful psychiatric medications (a fact she said "came as a surprise to all of us"), and she wanted to explore that issue further. App. 2316, 2339. Dr. Watts noted that she did not have petitioner's prison or juvenile records, and she had "no social history at all at this point." *Id.*

Moreover, Dr. Watts clearly explained that she was "not the person responsible for relating to the jury the details of [petitioner's] social history." App. 2285. Everyone on the defense team understood that role belonged to Marjorie Hammock. Dr. Watts 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, which is one of the "most difficult" issues to uncover, and that she was working with petitioner under a compressed time period. App. 2286-87. Although she may have touched briefly on the topic of sexual abuse during the normal course of her overall psychiatric evaluation, Dr. Watts did not know if petitioner 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.<sup>3</sup> App. 2287.

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<sup>3</sup> Respondent is equally 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 as unreliable. Trial counsel had a duty to conduct their own, independent investigation into petitioner's life and background. Petitioner is not required to prove that two prior sets of trial counsel were also deficient to establish his claim.

While petitioner could go on *ad nauseam* cataloging and debunking each of respondent's inaccuracies, he will not burden the Court with the many additional pages of discussion that would be required. The overriding objective of respondent's contentions is to distract this Court from the true legal and factual issues to be determined in this case, and to present the PCR Court's decision-making process as far more thorough and robust than the facts support. Neither is accurate.

The parties completed post-hearing briefing before the PCR Court in late October, 2011. App. 3560. Two weeks later, and over petitioner's objection, the PCR court ordered respondent to prepare an order of dismissal consistent with respondent's post-hearing brief.<sup>4</sup> App. 3562. On February 16, 2012, respondent submitted a proposed order that was two-hundred and seventy (270) pages long, and riddled with errors. The PCR court granted petitioner's motion to strike the first proposed order as excessively long, and instructed respondent to submit a revised order limited to seventy-five (75) pages. Nine months later, respondent sent a substantively identical "revised proposed order"<sup>5</sup> attached to an email stating that respondent also believed that the PCR court should write its own order. On December 5, 2012, petitioner filed a memorandum joining respondent's position and again requesting that the PCR court "formulate its own findings of fact and conclusions of law, and reduce them to writing in an order of the Court's own creation." App. 3562-63. Eight days later, on December 13, 2012, the PCR court issued a thirty-one (31) page order of dismissal, drawing heavily from respondent's submissions and containing many of respondent's original misrepresentations of the record and erroneous findings of law and fact.

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<sup>4</sup> Petitioner argued that the PCR court was required to make its own findings of facts and law, rather than adopt respondent's adversarial arguments as its own, 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).

<sup>5</sup> The revised order was reduced to approximately 112 pages through changes in formatting, spacing and font size, but was substantively identical to the original proposed order. App. 3563.

App. 3567-97. These facts do not support the kind of careful, probing analysis that respondent claims or that the law requires. *See, e.g., Sears v. Upton*, 130 S.Ct. 3259, 3266 (2010); *Porter v. McCollum*, 558 U.S. 30, 41 (2009), *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000).

In any event, this Court should not be distracted by respondent’s efforts to “muddy the waters.” The grounds for relief at issue in this case are those that petitioner has raised in his Petition for Writ of Certiorari (and briefed in full before the PCR court), and the erroneous findings of the PCR court are those that are actually contained in the PCR Court’s order of dismissal – not the ones respondent has invented for lengthy, irrelevant discussion. This Court is required to apply the law and the facts (based on the actual record below) to petitioner’s asserted grounds for relief and the PCR Court’s ultimate conclusions, and nothing more.

**II. TRIAL COUNSEL FAILED TO PRESENT READILY AVAILABLE MITIGATION EVIDENCE CONCERNING OWENS’ SOCIAL HISTORY.**

On the day of their appointment to represent petitioner in his 2006 re-sentencing proceeding, Gibson and Godfrey had only one fundamental task – to present as much mitigating information as possible to persuade at least one juror to vote for life. And, indeed, that is exactly what trial counsel claimed a desire to do and promised the sentencing jury it would hear.<sup>6</sup> There can be no genuine dispute that trial counsel failed at that task. The Petition for Writ of Certiorari

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<sup>6</sup> Trial counsel told the jurors in opening statements that they would hear “evidence of the violence that [petitioner] has lived through his entire life. And you will come to know him as a person, basically from the time he was a young boy up to where he is now.” App. 1094. Trial counsel claimed this evidence would be detailed, and would explain “where [petitioner] came from and everything that he went through.” App. 1097. In their PCR testimony, trial counsel reiterated that their strategy was to present as complete a picture as possible of petitioner’s life history in great detail. App. 2061 (“I think everybody on that team knew that I really wanted to beat to death the idea that [petitioner] had a very miserable family life which had a major impact upon him and his violence. I wanted to use that as much as I could.”); App. 2005 (“We did not make any kind of strategic decision to not present the full and complete picture of [petitioner’s] background.”).

sets forth a detailed narrative describing the physical abuse, sexual abuse, neglect, violence and trauma that petitioner experienced over the course of his life and the multiple, negative impacts that history had on his development. See Petition for Writ of Certiorari at pp.24-48. All of this information was available to trial counsel at the time of trial. That trial counsel failed to present this story, and instead offered only a meager handful of vague, naked facts without detail, simply speaks to their inattention, rather than any reasoned strategic judgment. See *Weik v. State*, No. 2007-060700, 2014 WL 3610954, at \*21 (S.C. July 23, 2014) (citing *Wood v. Allen*, 558 U.S. 290, 304 (2010), and *Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003)).<sup>7</sup>

Respondent implicitly acknowledges this fact by first trying desperately to convince this Court that petitioner never even raised a claim that trial counsel failed to develop and present mitigation evidence, claiming that petitioner's arguments are somehow "new,"<sup>8</sup> and criticizing petitioner for failing to move to amend the PCR application to conform to the evidence offered at the evidentiary hearing.<sup>9</sup> Respondent is just wrong.

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<sup>7</sup> The facts in *Weik* are notably similar to petitioner's case. In *Weik*, this Court found trial counsel ineffective for failing "to present readily available evidence concerning Weik's chaotic upbringing and dysfunctional family." *Id.* at 2. The Court noted that trial counsel presented only "limited and general" testimony regarding Weik's childhood and "offered no detail or insight" into Weik's true history of an abusive and dysfunctional childhood, "saturated with violence." *Id.* at 2, 23. The Court further noted that trial counsel failed to hire a mitigation investigator until a mere eleven weeks before trial, resulting in the "scant" social history presentation at trial. *Id.* at 4, 23. This Court rejected respondent's argument that the abundant social history evidence available to trial counsel would have merely provided a "fancier" mitigation case, insufficient to show prejudice. *Id.* at 18. Instead, the Court held that a complete and accurate presentation of Weik's social history established "a reasonable probability that at least one juror would have struck a different balance." *Id.* at 19 (quoting *Wiggins*, 539 U.S. at 537).

<sup>8</sup> See, e.g., Return at p.8 ("This is not the typical ground which asserts counsel failed to investigate, uncover, or develop mitigation evidence *and* present it."); p.30 ("Owens is attempting to raise a completely new ground that was not raised to the PCR court.").

<sup>9</sup> See, e.g., Return at p.4, n.9 ("In his Motion to Alter or Amend, Owens objected to the PCR court's failure to address grounds he did not raise in any of his PCR applications, including his final

In his PCR Application, petitioner alleged that trial counsel failed to present mitigating evidence, including “all of the details that were available concerning [his] life history,” as well as evidence of his “experiences incarcerated in the Department of Juvenile Justice.” App. 1879. At the beginning of the post-conviction hearing, respondent moved to limit petitioner’s testimony to respondent’s own narrow reading of the allegations, and the PCR court denied that motion. App. 1958-61; 1964-66. Following direct examination, respondent moved to strike the PCR testimony of Dr. James Garbarino for a variety of reasons, and the PCR court again denied the motion. App. 2201-04. In its post-hearing brief, respondent again asked the PCR court to strike Garbarino’s testimony as well as information offered from the files of Ms. Drucy Glass, noting that respondent disagreed with the PCR court’s previous ruling that respondent was reading petitioner’s grounds too strictly.<sup>10</sup> App. 3428, 3441-42. Once again, the PCR court did not grant respondent’s requests and instead ruled on the merits of petitioner’s claims.<sup>11</sup> There was simply no basis for petitioner to seek to amend his allegations because the PCR court ruled against respondent on this argument before the evidentiary hearing even began and adhered to that ruling throughout the PCR proceeding, and petitioner properly relied on those decisions.

Second, respondent argues that petitioner cannot show that trial counsel did not have

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application, which he did not make a motion to amend his PCR Application prior to the PCR hearing.”).

<sup>10</sup> Petitioner’s post-hearing briefing very clearly explained that “trial counsel failed to investigate and present *all* of the mitigating details that were available regarding his life history.” App. 3548, *see also*, App. 3234-3271.

<sup>11</sup> In its Return, respondent now asks this Court to strike the testimony of Dr. Garbarino and the investigative files of Ms. Glass. Return at p.31-32. This Court, of course, does not have the power to strike evidence from the record below, and respondent’s evidentiary objections have already been rejected multiple times by the PCR court.

the information contained in Ms. Glass' investigative file. This argument is a red herring. Even if trial counsel *did* have Ms. Glass' file in their possession at the time of petitioner's 2006 sentencing proceeding, it makes no difference with regard to his mitigation claim.<sup>12</sup> Petitioner 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.<sup>13</sup> 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 expressly claimed that their intended strategy was to present the fullest possible picture of petitioner's life history. App. 2004-05, 2061. Thus, they had no strategic reason not to include this information in their presentation, and their failure to do so was unreasonable.

Next, respondent makes several attempts to claim that the 2006 sentencing jury heard

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<sup>12</sup> At the evidentiary hearing, petitioner offered proof that strongly suggests that trial counsel did not have this file. Bill Godfrey personally delivered his file to the office of undersigned counsel. App. 2109. Godfrey testified that this was his entire file, and that it contained everything he and Gibson had received from all four previous trial attorneys. App. 2060. Ms. Jill Rider testified that she also received a box of records requested directly from Ms. Glass. App. 2110. She inventoried both files and testified that Godfrey's file did not contain the records from Ms. Glass' file. App. 2111-12; *see also* Applicant's PCR Exhibits 9-18, App. 2444-3169. Moreover, none of the social history files contained in Ms. Glass' file were offered as evidence at trial, and information contained in the file was never presented.

<sup>13</sup> *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 v. State*, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2009) ("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*").

everything there was to know about petitioner's life history, all of which are flatly contradicted by the record.<sup>14</sup> *See, e.g.*, Return at pp. 13, 16, 36. The evidence of petitioner's life history adduced in post-conviction is both qualitatively and quantitatively different from the skeletal presentation offered at trial.<sup>15</sup> In closing arguments, the solicitor characterized petitioner's history as one full of opportunities that petitioner simply refused to take:

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

App. 1613, ll.17-25. A complete and accurate presentation of petitioner's mitigating life history would have both humanized petitioner in the jury's eyes and neutralized much of the State's aggravating evidence by explaining petitioner's behavior through the lens of his past experiences and the developmental adjustments he had to make to deal with those experiences. This evidence would have dramatically altered the sentencing profile, and it is in no way "cumulative" to the evidence trial counsel actually presented.<sup>16</sup>

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<sup>14</sup> Ms. Hammock testified to a small number of general facts, including: (1) Owens' mother was only 18 when he was born; (2) his father and stepfather were described as violent people; (3) Owens' family had limited resources and a marginal existence; (4) Owens was once placed in foster care for a "relatively short period of time"; (5) Owens was taught at an early age that he had to fight; (6) Owens experienced learning difficulties in school; and (7) "a history of losses, some violence, a great deal of instability, and that's it," App. 1457-63. Dr. Donna Schwartz-Watts added to this meager list that Owens experienced some physical abuse and that he saw some family violence. App. 1516-17.

<sup>15</sup> *See* Petition for Writ of Certiorari at pp.27-48 and 53-57.

<sup>16</sup> *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

Next, 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 petitioner told him was true. Dr. Garbarino testified in detail about the sources of the information he relied upon. App. 2143-45. The Petition for Writ of Certiorari further cites corroborating documents for the overwhelming majority of Dr. Garbarino's findings. *See generally*, Petition for Writ of Certiorari at pp.30-58. Dr. Garbarino likewise testified that much of what petitioner conveyed to him was corroborated by documentary evidence and other interviews. App. 2170 (describing petitioner's life history as filled with "a whole list of traumatic events" which is so "extensive, and comes from so many different sources, that I think it is extremely unlikely that all of these sources could be misrepresenting the nature of his experiences"); *see also*, App. 2181, 2186, 2235-36.

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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 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 bane*) (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.").

Respondent also errs in claiming that petitioner's account of sexual abuse cannot be credible because there are no documents corroborating instances of sexual abuse perpetrated against him. Dr. Garbarino testified that a lack of documentary evidence was not surprising, that a person of petitioner's family life and background would be reluctant to disclose sexual abuse, and that it takes a carefully crafted relationship of trust to provide an environment in which such a person would be able to disclose this evidence. App. 2193-95.<sup>17</sup> To find otherwise defies common sense and Dr. Garbarino's accumulated, specialized knowledge and extensive experience.

Finally, Respondent's argument that trial counsel made a strategic decision not to present any information about petitioner's experiences in DJJ stems from its demonstrably false claim that trial counsel actually investigated petitioner's experiences in DJJ. As explained above, trial counsel specifically testified that they did *not* investigate any of petitioner's DJJ experiences. App. 2002-05, 2065, 2076-77. Because trial counsel's investigation was constitutionally deficient, any alleged strategic decisions were likewise unreasonable and command no respect under settled Sixth Amendment law. *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 petitioner's time in DJJ, because *they did not know what that information was*.

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<sup>17</sup> As for petitioner's experiences of sexual abuse while incarcerated in DJJ, the class action documents introduced in post-conviction specifically noted that one of DJJ's major shortcomings was the failure to properly document violent and abusive incidents, and other former DJJ inmates corroborated this fact. App. 2413-2443.

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 if credited, Godfrey's purported strategic reasons are without merit. The jury was already aware, through the testimony of Dr. Watts, of the reasons that petitioner 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. App. 1521, 1545. Trial counsel already knew that this information would come out through the testimony of Dr. Watts because she reviewed petitioner's DJJ records containing this information in preparation for her testimony. Thus, these supposed "costs" did not render the introduction of any mitigating information about petitioner's time in DJJ "a double-edged sword," as respondent suggests. 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 could have come with a "cost" does not somehow transform trial counsel's uninformed actions into valid, informed, strategic decisions.

### **III. TRIAL COUNSEL FAILED TO CHALLENGE THE PROSECUTION'S CASE FOR DEATH.**

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

Respondent's Return addresses a number of arguments that petitioner has not raised about the crime scene video. In particular, petitioner does not argue that: (a) the crime scene tape definitively shows the perpetrator in front of the counter was the trigger-man; (b) trial counsel should have requested, and Judge Patterson would have been required to give, a jury instruction on

who was in the videotape based on testimony from petitioner's first trial; (c) the crime scene tape was *per se* inadmissible; 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. Instead, petitioner argues that trial counsel should have objected and/or requested further instructions where the State told the jury that petitioner had already been convicted of the murder of Ms. Graves, and then played the crime scene video without further explanation. 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) petitioner's co-defendant, Steven Golden, had previously testified that he – not petitioner – 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 petitioner guilty of murder without ever determining whether or not he actually pulled the trigger.

As explained in the Petition for Writ of Certiorari, only one perpetrator is visible for the overwhelming duration of the video – and only that person is visible when Ms. Graves is shot. Under the circumstances and without further instruction, the jury would have naturally assumed that this person, who appears to be the shooter, was petitioner. Respondent's claim that the jurors would have more likely determined that an unseen person standing off-camera was the shooter is ridiculous. Return at p.63, 66. 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"). Petitioner agrees with respondent that "no one, except the members of the convicting jury, knows whether they

determined [petitioner] was the trigger-man or not.” Return at p.63. 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 petitioner "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. Respondent argues that "Officer Wood did not give opinion testimony," but instead "related to the jury his actual physical reaction to comments [petitioner] made to him.” Return at p.67. 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 Wood’s testimony was relevant and admissible. It does not relate to petitioner’s character or future dangerousness, as respondent claims. In fact, Wood’s testimony was not about petitioner 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 PRISON DISCIPLINARY RECORDS ON FEDERAL CONSTITUTIONAL GROUNDS.**

Respondent argues that the prison disciplinary records admitted at petitioner’s trial were not testimonial because they “were required by South Carolina statutory law for the administration of prison affairs,” and, even if the records are testimonial, respondent claims that “it is far from

clear whether the Confrontation Clause applies at sentencing or capital sentencing proceedings.” Return at p.72-74. Neither assertion is supported by the law. Petitioner 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* Petition for Writ of Certiorari at pp.69-76. 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.

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

Petitioner alleges that trial counsel should have objected to testimony from 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.

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 profoundly sorrowful it was to the children, not her." Return at p.85. This argument defies 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.

App. 1323.<sup>18</sup>

**IV. THE SOLICITOR'S CLOSING ARGUMENT WAS IMPROPER, AND TRIAL COUNSEL INEFFECTIVELY FAILED TO OBJECT.**

In closing argument, the solicitor used all of the evidence discussed in Section III, above, to argue, among other things, that petitioner was a rarity among thousands – the only one of two to ever give Officer Wood, a twenty-five year veteran, the “cold chills,” App. 1142; the victim advocate’s “hardest, hardest case” in a fifteen year career, App. 1324; SCDC’s “most problematic inmate – bar none,” App. 1442; and, a “unique,” “cold,” and “unfeeling” person whom the Solicitor

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<sup>18</sup> Respondent also suggests that Ms. Christy’s testimony was minimal because it “consists of only 7 pages of the transcript.” Return at p.81. This assertion is curious given that respondent argues, elsewhere in the Return, that Marjorie Hammock’s eight (8) pages of social history testimony was extensive and covered all of the details of petitioner’s life history that jurors might possibly have needed to know. Apparently, respondent believes that the line between minimal and extensive is situated at approximately 7 ½ pages.

had personally selected, under very narrow circumstances, as the worst of the worst. App. 1607, 1611-12.

Respondent breaks each of the solicitor's improper statements during closing argument into a separate sub-category, declares them all proper in the context in which they were made, and then argues that each statement was not prejudicial standing on its own. This Court's analysis, however, must be carried out according to the requirements of the law and not respondent's partisan preferences. The law is clear that when determining 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"). Petitioner has already explained how the solicitor's multiple improper arguments violated petitioner's rights under the Eighth and Fourteenth Amendments, and injected an arbitrary factor into the proceedings in violation of S.C. Code Ann. § 16-3-25(C)(1), and, accordingly, that trial counsel were ineffective for failing to object to any of these arguments. *See* Petition for Writ of Certiorari at pp.81-88. Respondent offers nothing to refute these points.<sup>19</sup>

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<sup>19</sup> Respondent also erroneously claims that petitioner never raised a ground challenging the solicitor's improper comments during *voir dire* that "the State of South Carolina, represented by the solicitor, is not allowed to seek the death penalty, except in certain limited circumstances," App. 605, which he characterized as "a very, very, very small group of cases." App. 582; *see also*, App. 357 ("Normally in a criminal case when a defendant is convicted, the judge sentences. And that's 99.9 percent of the time."); App 489 ("the State is allowed to seek the death penalty only in a very limited set of circumstances"); App. 635 ("[W]hen the State is allowed to seek the death penalty, which only occurs in very few cases, but it does occur in certain cases of murder . . . [and] this is one of those cases."). Respondent is mistaken. Petitioner clearly raised this claim in ground 10(a) of the PCR Application. App. 1878. Moreover, the solicitor's comments regarding the "very limited" nature of circumstances in which the State may seek a death sentence were untrue. South Carolina has twenty-one statutory aggravating circumstances, making nearly any murder a death-eligible crime in which the solicitor may decide to seek death.

Finally, respondent's reliance on this Court's recent decision in *Sigmon v. South Carolina*, 403 S.C. 120, 742 S.E.2d 394 (2013), is misplaced. In *Sigmon*, this Court held that trial counsel was not ineffective for failing to object to the solicitor's arguments that the death penalty was appropriate because "there are mean and evil people who . . . do not deserve to live in this world," and because it would "deter Brad Sigmon and send the message that this type of conduct will not be tolerated in Greenville County, or anywhere in this State." *Id.* at 399. This Court concluded that "[a]lthough the solicitor mentioned his own considerations, he did not go so far as to compare his undertaking in requesting the death penalty to the jury's decision to ultimately impose a death sentence." *Id.* In petitioner's case, however, the solicitor went that far and then some, telling the jury that "[o]nly limited circumstances are allowed for us to seek the death penalty, and rarely do we seek the death penalty in all those cases that are eligible. In only certain cases do we choose to seek the death penalty." App. 1604. The solicitor then repeatedly referenced his own decision to seek the death penalty, as well as the opinions of multiple other State witnesses that petitioner was a rarity among thousands whom everyone had already agreed was "the worst of the worst." See, e.g. App. 1605 ("It's a tough decision for me to ask you to do it when we seek the death penalty, but responsible people make responsible decisions all the time."); App. 1607 ("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.").<sup>20</sup> Moreover, the solicitor repeatedly argued that a life sentence would be an "insignificant," "easy," and "minimal" punishment; argued that the defense was required to prove petitioner deserved a life sentence

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<sup>20</sup> On the contrary, trial counsel never "said earlier" that the solicitor was not satisfied with a life sentence. Defense counsel's opening statement did not make any reference to this issue, nor did defense counsel's closing statement, which came after the solicitor's closing statement. App. 1094-98, 1615-30.

instead of death; and, urged the jury to impose death for the greater good of the community and State as a whole. App. 1609-1615. These comments, viewed in the context of the entire proceedings, “so infected [petitioner’s] trial with unfairness as to make the resulting [sentence] a denial of due process.” *Donnelly*, 416 U.S. at 643; *see also, Darden*, 477 U.S. at 181; *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994). They also injected an arbitrary factor and infused the sentencing proceeding with passion and prejudice in violation of S.C. Code § 16-3-25(c)(1). Trial counsel was ineffective in failing to object.

**CONCLUSION**

For all of the reasons above, as well as the reasons set forth in the Petition for Writ of Certiorari, this Court should grant the petition and, ultimately, grant petitioner a new sentencing proceeding.

Respectfully submitted,

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August 28 2014

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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CA No. 09-CP-23-0741

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FREDDIE EUGENE OWENS. .... *Petitioner,*

v.

STATE OF SOUTH CAROLINA ..... *Respondent.*

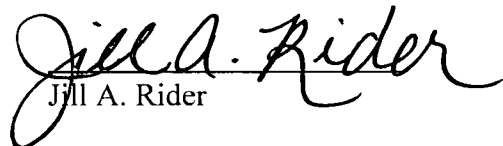
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**Certificate of Service**

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The undersigned hereby certifies that a copy of the Petitioner's Reply was served by first class United States mail, postage prepaid, this 28<sup>th</sup> day of August, 2014, upon the following:

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