STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Capital PCR 06-CP-23-7719
The Honorable D. Garrison Hill, Circuit Court Judge
Appellate Case No. 2011-188687

Kamell Delshawn Evans,

Respondent/Petitioner,

-vs-

State of South Carolina,

Petitioner/Respondent.

RESPONDENT/PETITIONER'S REPLY BRIEF

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REPLY BRIEF

Mr. Evans's Cross Appeal challenges the PCR court's determinations denying relief on seven issues.[1] For the most part, the law and relevant facts regarding these issues are sufficiently set out in Respondent-Petitioner's Cross Appeal brief and in the PCR court briefing (see App. 3906-4103, App. 4217-4237, App. 4245-4253; and Supp. App. 1-37 (Initial Trial Brief)).[2] Mr. Evans maintains all arguments made in the Cross Appeal brief and incorporates them by reference herein. Nevertheless, several points of clarification are necessary in light of new precedent announced by this Court since Mr. Evans filed the Cross Appeal brief and in light of statements made in the State's Return.[3]

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[1] On February 24, 2011, Judge Hill issued a final order granting Mr. Evans a new sentencing trial, finding Mr. Evans was denied effective assistance of counsel as a consequence of counsel's failure to object to the erroneous jury charge instructing jurors that a life sentence could not be returned as an act of mercy (App. 4254).

[2] Mr. Evans, Respondent-Petitioner, cites the Appellate Appendix ("App."), the Supplemental Appellate Appendix ("Supp. App."), Respondent-Petitioner's Cross Appeal Brief ("Cross Appeal"), and the State's Return to Respondent-Petitioner's Cross Appeal ("State's Return").

[3] As in the State's brief on appeal, the statement of facts in the State's Return to Mr. Evans's Cross Appeal offers an account of the crime in some detail (State's Return at 7-10). Again, with respect to this statement of facts, it is important to recognize (i) that certain assertions the State presents as fact *have instead been contested throughout the proceedings and never established by evidence*. For instance, the State infers that a nylon bag holding ammunition and a knife found at the Sapinoso home belonged to Evans (State's Return at 9-10); however, Evans throughout has contested such an assertion and no evidence was presented at trial on this or to the effect that the bag or contents were carried to the house by Mr. Evans (App. 2779-2780; see App. 1364-66). It is also important to recognize (ii) that certain materials upon which the State relies in its account of the crime were *not before the jury*, and are instead based on attorney Sumner's recollection of privileged communications between he and Evans, presented as evidence during the postconviction hearing (these are labeled as 'File Notes' under "PCR Hearing Exhibits, Respondent's Exhibits" beginning at App. 3752 and continuing through App. 3841). For example, there was no testimony or evidence at trial that Mr. Evans was trying to reload a weapon when arrested (State's Return at 7). Further, it is important to recognize that the assertions with which the State concludes its statement of facts—the State's version of how the shootings occurred—was contested by expert testimony at the postconviction hearing (see App. 4079-90).

ARGUMENT IN REPLY

I. This Court's Recent Decision in *Weik v. State* Controls the *Strickland* Analysis in Evans's Case, Where Trial Counsel Failed to Investigate, Develop and Present Available, Relevant and Admissible Mitigating Evidence.

Point 1 in Mr. Evans's Cross Appeal challenges the PCR court's denial of relief on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 688 (1984), for failure to investigate, develop and present mitigating evidence. The State's Return, filed August 21, 2014, argues against such a finding, emphasizing that Evans's case compares unfavorably with two cases in which the United States Supreme Court found deficient performance and prejudice—*Porter v. McCollum*, 558 U.S. 30 (2009), and *Sears v. Upton*, 561 U.S. 945 (2010). The State's Return, however, fails to address and in fact fails to mention this Court's recent decision in *Weik v. State* (Op. No. 27421), 2014 S.C. Lexis 276, decided on July 23, 2014—after Mr. Evans filed the Cross Appeal, but nearly a month before the State filed its Return. The Court's decision in *Weik*, granting sentencing-phase relief and reversing a PCR order denying relief, bears directly on ineffectiveness for failure to investigate, develop, and present mitigating evidence, the subject of Point I of Mr. Evans's Cross Appeal.

At the capital sentencing hearing in *Weik*, counsel presented testimony from three experts as to Weik's 'mental status' (paranoid schizophrenia), but presented only one witness—Weik's youngest sister, Amy—to testify concerning 'social history mitigation evidence' (*Weik*, 2014 S.C. Lexis 276, at *2-*4). Amy met with counsel only once, two weeks before trial, and "she and counsel never discussed the questions she would be asked prior to her taking the stand" (id. at *14 n.12). Amy's brief testimony referred generally to abuse that Weik and his siblings suffered at the hands of Weik's father, who,

as Amy testified, suffered from 'military flashbacks' and was 'paranoid' (id. at *4 ("Something was wrong with him and I don't know exactly what it was.")). No other witnesses testified regarding Weik's family or upbringing: "[s]everal other members of Weik's family were present at trial and willing to testify but were never called by defense counsel" (id. at *4 n.3). This Court found that counsel failed to adequately investigate and present social history mitigation, and found itself "compel[led]...under controlling United States Supreme Court precedents, to grant Weik a new sentencing hearing" (id. at *2).

The decision in *Weik* is worth examining in some detail because there are many important similarities between counsel's deficient performance in *Weik* and counsel's performance in Mr. Evans's case. There are also important similarities with respect to the manner and extent to which counsel's errors impacted the outcome in both cases.

A. Comparing Deficient Performance in *Weik* and *Evans*

1. This Court's assessment of deficient performance in *Weik*

Weik's counsel, appointed in the summer of 1998 for a Spring 1999 trial, were inexperienced and showed a "troubling inattention towards preparing for the mitigation phase of trial, despite Petitioner's admission of guilt from the outset of the case" (id. at *5). The more experienced of Weik's attorneys had never handled a death case before and co-counsel, currently disbarred, reportedly had served as 'third chair' in a single capital case (id. at *6 n.4, n.5). Counsel divided the responsibilities, with one attorney primarily handling the guilt phase and the other the sentencing; the attorneys did not communicate regularly concerning the progress the other was making during preparation for trial (id. at *28-29).

Counsel hired their first mitigation investigator "a mere eleven weeks prior to trial" (id. at *5, 6). The investigator, Patti Rickborn, proceeded largely on her own initiative, conducting interviews with family members. She provided counsel with notes from "detailed investigative interviews with Weik's family members that revealed pervasive mental health issues throughout the Weik family and that Weik endured severe emotion, psychological, and physical abuse during his childhood" (id. at *7, 8). She wrote to counsel, urging they "take certain follow-up steps" (id. at *8 n.7), including to "try to obtain a court order for the client's medical records" which would, because "it was so late in the case ... expedite the collection of medical records" (id. at *9 n.8). She urged they do the same with respect to the father's psychiatric records in order to "substantiate the client's siblings' stories" (id.). But counsel never responded or followed up on Ms. Rickborn's recommendations, and she soon resigned (id. at *9 -*11).

One week after the first mitigation investigator's resignation, Weik's counsel hired a second investigator, who demanded an additional two months to prepare. At the investigator's suggestion, counsel moved for a continuance, but failed to support the motion with any clear reason for why it was needed, and the motion was denied (id. at 11-*13). Like the first investigator, the second interviewed immediate family members and provided reports of those interviews to counsel, but received little response.

Prior to the sentencing hearing, counsel spoke with all of Weik's siblings and with Weik's father, but decided to call only Amy as a witness because she appeared "'more stable' and could convey things better than others" (id. at *30). Counsel apparently never reviewed the investigatory reports submitted by either of the mitigation investigators or considered any of the suggested courses of action therein. Overall, this Court concluded

that counsel "failed to present even a skeletal version of [Weik's] social history even though there was abundant social history evidence available" (id. at *37):

> In short, some mitigating evidence of Weik's social history was developed and available to trial counsel for the sentencing phase. There is no evidence in the record to suggest trial counsel made any effort to obtain and review this mitigation evidence. What is clear is that the jury heard from only Petitioner's sister Amy, whose testimony revealed virtually nothing about Weik's abusive upbringing. (Id. at *14).

Importantly, the Court also held the PCR court erred "in finding counsel's failure to present this mitigating evidence was the product of a strategic decision" (id. at *38). Because counsel "did not interview, or even review the investigators' interviews of Weik's family members," counsel could not have made "reasoned, strategic choices regarding which witnesses would testify [regarding social history]" (id.). Citing abundant federal precedent interpreting *Strickland*, the Court emphasized "decisions made in ignorance of relevant, available information cannot be characterized as strategic" (id. at *39-*41).

2. Comparing *Evans* with *Weik*

Evans's case went to trial on September 13, 2004, approximately five years after Weik's trial. Lead counsel Steve Sumner was appointed approximately nine weeks before Evans's trial date. Counsel hired their first mitigation investigator, Dale Davis, two weeks later on July 21, just *seven* weeks before the trial date (App. 2378, 2385-2386). Like Ms. Rickborn (the investigator in *Weik*), Ms. Davis was a veteran mitigation investigator (App. 3565). She promptly identified leads for counsel to investigate, including physical and psychological abuse by Evans's father toward the children as well as toward the mother in the children's presence; substance abuse; and lead poisoning (App. 2522; see App. 3488 (articles and information on lead poisoning, which Davis

provided to Sumner)). Davis urged counsel to seek a continuance. When counsel showed no interest in following leads and refused to seek a continuance, she resigned. As in *Weik*, counsel subsequently did ask for a continuance, yet in the hearing on the motion represented to the trial court that they were prepared for trial (App. 2252-54).

After Davis resigned, as in *Weik*, counsel hired a second mitigation investigator, Lenora Topp. Topp also urged counsel to investigate lead poisoning and abuse, and to go to Cleveland to investigate Evans's childhood. She also urged counsel to seek a continuance. Again, counsel Sumner informed her there was no reason to (App. 2255, 2543, 2545, 2570, 2573). Topp, on her own volition, sought childhood medical records from Cleveland, which arrived too late for the trial.

When asked during the PCR hearing about what was done to follow up on the investigators' reports and investigate lead poisoning, counsel responded: "nothing" (App. 2339). As to the failure to pursue indications of household abuse during Evans's upbringing, particularly toward Evans's mother, counsel testified that it was "far removed" from the crime. No effort was made to interview Evans's mother until the sentencing hearing had already begun. Rather, counsel embarked on a sentencing 'strategy' (App. 3454) without having performed any follow-up investigation into Evans's upbringing in Cleveland, the related claims of abuse, or the claims of lead poisoning. At sentencing, counsel merely presented Evans as a good person who had a very bad day. On the one hand, counsel offered brief testimony limited to Evans's positive attributes from family members and friends in South Carolina, and, on the other hand, presented contradictory opinions of two experts on Evans's mental status (App. 1678-1710 (testimony of Dr. James R. Evans); App. 1711-1742 (testimony of Dr. Elin

Berg)), who differed on whether further testing might reveal brain abnormality (see *Von Dohlen v. State*, 360 S.C. 598, 608, 602 S.E.2d 738, 743 (2004), *Council v. State*, 380 S.C. 159, 172-74, 670 S.E.2d 356, 363 (2008)).

As recounted in detail in the Cross Appeal brief and in the PCR pleadings and record below, the consequences of ignoring these leads and failing to fully investigate Evans's social history included that: (i) counsel never knew of Evans's severe frontal lobe atrophy and functional impairment and atrophy in other important decision-making and emotion-processing areas of the brain; (ii) they never knew the specific detail of Evans's extreme, 'off the charts' level of toxic lead exposure and poisoning or the impact this had on his mental development and functioning—including decreased mental flexibility (i.e. the ability to change response mode), difficulty in planning and problem solving, and impaired short-term memory; (iii) they knew no details of the cycle of violent arguments that characterized Evans's childhood home in Cleveland; and (iv) they knew little of the extremely volatile relationship between Evans and Christina Rodriguez that was at the core of the tragic shootings of Rodriguez's brother and father.

Weik presents a more recent example of the *Strickland* principle this Court emphasized years ago in *Council*, 380 S.C. at 175-76, 670 S.E.2d at 364: simply identifying a trial strategy does not make that strategy reasonable. A reasonable strategy must be based on adequate investigation, and for capital sentencing this must include investigation of mental health issues and social history. *Weik*'s counsel ignored and failed to follow up on investigatory reports compiled prior to trial. The same is true here: *counsel failed to consider and to develop any information compiled by the defense investigators that pointed to ostensibly negative aspects of Evans's background.* As in

Weik and *Council*, counsel ignored important avenues of investigation that were available and of which they were aware.

The PCR court's determination that counsel's decisions on 'trial strategy' were based on the 'advice of a team of experts' (App. 4476) is entirely false—rather, counsel refuted the proffered advice. The PCR court's determination that counsel justifiably failed to investigate avenues because those avenues "would be at odds with counsel's focus on the good qualities, good character, loving family" (App. 4467) or "did not figure into the 'one bad day, one bad decision' theme" (App. 4473) is plainly contrary to *Strickland* and to this Court's holding on deficient performance in *Weik*—without pursuing those avenues counsel lacked adequate foundation to ascertain a reasonable trial strategy.

B. Comparing Prejudice in *Weik* and *Evans*

1. This Court's assessment of prejudice in *Weik*

In *Weik*, counsel's failure to present evidence of Weik's abusive upbringing allowed State experts to testify without contest that Weik emerged from an 'intact family' as a normal and average child without behavioral problems or substance abuse issues (*Weik*, 2014 S.C. Lexis 276, at *5). The jury knew, from Amy's testimony, of the mere fact of abuse and generally that Weik's father suffered from some kind of mental illness, but the jury was not aware of the "severity and pervasiveness" of that abuse or the "full extent" of the father's mental illness (id. at *37). In other words, if the jury knew the general outline, the jurors did not know the details of the father's unpredictable and often physically violent behavior, related to purported Vietnam flashbacks and CIA involvement and a fascination with military weapons and artillery (id. at *17-18, 23, 24-

28). Those details were conveyed in PCR by Weik's siblings and Weik's father. The PCR testimony also conveyed the extreme poverty in which Weik grew up (id. at *16-17); his learning difficulties, slow development, and enrollment in special education courses (id. at *17, 22); the physical as well as psychological abuse that Weik and his siblings suffered at the hands of their father (id. at *18-22); as well as his parents' record of mental health issues (id. at *31).

This Court identified several reasons in *Weik* that distinguished that case from one in which the PCR evidence was merely a 'fancier mitigation case' (see *Jones v. State*, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998)). First, "[o]n the whole, the testimony presented at the PCR hearing revealed *graphic and detailed accounts* of [Weik's] abusive and dysfunctional childhood, saturated with violence and military fantasies, which was not apparent from the scant testimony presented at trial" (*Weik*, 2014 S.C. Lexis 276, at *42-43, emphasis added). Second, the PCR testimony "demonstrated [Weik's] *genetic predisposition* to schizophrenia" (id. at *43, emphasis added). Third, it "[ii] helped explain his auditory and visual hallucinations"—in short, it helped explain *how the mental status affected him*—"at the time of the shooting" (id.). Noting these distinctions between the "extensive evidence" at PCR and the trial evidence, the Court found "a reasonable probability that the missing details regarding the degree of physical and emotional abuse suffered and the full extent of [his father's] mental illness and its impact on the Weik household might well have influenced the jury's determination" (id. at *44).

2. Comparing *Evans* with *Weik*

In *Weik*, this Court rejected the argument that the PCR evidence merely presented a 'fancier' mitigation case', where the evidence at the PCR hearing (i) 'revealed *graphic*

and detailed accounts' of subject matter only generally noted at trial, (ii) helped to demonstrate a "*predisposition*" on the part of the defendant to a mental status otherwise identified at trial, and also (iii) offered insight into the *impact the mental status had* during the time of the crime (id. at *42-*44). The testimony presented in Mr. Evans's PCR also presented detailed and specific accounts of themes that were offered in a far less specific—and, in this case, even contradictory—fashion at the sentencing. This included, more specifically, (a) the introduction in the PCR hearing of medical records showing frighteningly high levels of toxic lead exposure (App. 3612, 3616; see App. 2806), (b) the PCR testimony of Dr. James Canfield linking that exposure to "physical damage to areas especially in the frontal cortex in the brain and also disrupted neurotransmitter function" (App. 2807, 2816), and (c) PCR testimony from Dr. Ruben Gur showing brain atrophy and "significant reduction" in the volume of the frontal lobe and the occipital lobe of more than two standard deviations greater than the mean in seven brain regions previously linked to lead exposure (App. 2675-76). This evidence provided a very *concrete, specific and detailed* account of brain abnormality—to which Dr. Evans only alluded at trial, and which Dr. Berg's testimony ironically contradicted.

Further, as this Court found PCR evidence important in *Weik* because it demonstrated a genetic predisposition to schizophrenia, the PCR testimony in Mr. Evans's case concerning lead poisoning demonstrated a basis or *predisposition* for frontal lobe damage. And the testimony of Dr. Canfield and Dr. Gur also helped explain, much like the PCR evidence in *Weik*, how Mr. Evans's mental status—impaired rational decisionmaking, emotion processing, and ability to adapt to changing and stressful circumstances—could have affected Evans "at the time of the shooting" (*Weik*, *43).

Evidence of physical and psychological abuse in the home was not presented at trial. Dr. Cooper-Lewter found after conducting a full social history of Mr. Evans that the "unpredictable, but not sporadic" abuse Evans suffered at the hands of his father left a formative impact (App. 3026; see App. 3038, 3043). Moreover, counsel's failure to investigate Evans's social history also had a substantial impact on Mr. Evans's ability to contest the State's case. Even though no one on the defense team believed Evans was actually involved in a gang, because they failed to fully investigate this counsel had no evidence with which to challenge the State's case, which argued gang affiliation and activity; and counsel had no firm footing on which to counter the solicitor's highly inflammatory argument—to which counsel failed to object—that the tragic shootings were, rather than a domestic dispute, a premeditated killing of a law enforcement officer for the purpose of rising up the ranks of a gang.

The PCR court's ruling on prejudice for failure to investigate, develop, and present mitigation is curt—merely two pages (App. 4474-75)—and it relies on three bases. One of these is a factual error: as the Cross Appeal brief discusses in detail, the PCR court's reasoning for dismissing the evidence of brain atrophy and abnormality (App. 4474) is not supported by the record. The other two bases misapply *Strickland* and this Court's precedent interpreting *Strickland.* As noted, the PCR court's ruling that Evans simply presented a fancier mitigation case in PCR (App. 4474) goes against this Court's recent holding in *Weik* for the reasons discussed above. And the PCR court's prejudice determination is also fundamentally flawed because it is tethered to the argument that the PCR evidence ran counter to counsel's trial strategy (see App. 4475). It has already been established that counsel's strategy could not have been reasonable

because it was not based upon adequate investigation. But more, the issue with respect to *Strickland* prejudice is ultimately how a reasonable juror would have reacted to the evidence when deciding on a life or death sentence. This Court's decision in *Weik* helps to clarify a reasonable probability that the PCR evidence offered in Mr. Evans's case of "the missing details ... might well have influenced the jury's determination" (*Weik*, 2014 S.C. Lexis 276, at *44).

The prejudice with respect to counsel's failure to adequately investigate, develop, and present mitigation is only heightened when it is considered, as it must be under *Strickland*, in the context of counsel's other significant failures, which are set out in full in the Cross Appeal brief and the PCR briefing and referenced herein.

II. Law Enforcement Aggravator.

Point 2 in the Cross Appeal argues the PCR court abused its discretion in failing to grant relief under *Strickland v. Washington* based on defense counsel's failure to object to the applicability in Mr. Evans's case of aggravating factor S.C. Code Ann. §16-3-20(C)(a)(7)—which charged that Mr. Evans would be death-eligible for killing a law enforcement officer "during or because of the performance of his official duties". Contrary to the State's suggestion (see State's Return at 28 n.11), Evans has never challenged the statutory aggravating factor as *facially* unconstitutional. Rather, Evans's argument concerns trial counsel's failure to challenge the *application of* section (C)(a)(7) to this case.

As Evans sets forth in his petition and as he argued before the PCR court, this Court's prior case law indicates that section (C)(a)(7) does *not* fit the facts of this case. First, it is certain that aggravating factor (C)(a)(7)—which allows death eligibility only

when a law enforcement officer is killing (a) during or (b) because of official duties—does not apply by virtue of employment status alone. Second, in each of the cases this Court has reviewed in which section (C)(a)(7) was applied, the officer was killed while making an arrest, making a traffic stop, or while on patrol (see Cross Appeal at 35 n.15).

The State's Return characterizes the applicability of section (C)(a)(7) to this case, and counsel's ineffectiveness for failure to challenge the same, as a "simple issue" (State's Return at 28). Throughout, the State has argued that trial counsel was not deficient in failing to challenge section (C)(a)(7) because, according to the policy of the Sheriff's Office as reported in the testimony of the Sheriff (also not challenged by defense counsel), Joseph Sapinoso was 'on duty' at the time of the incident. The State's Return puts it thus: "In short, evidence was admitted that showed the deputy was on duty; thus, the aggravator was properly submitted to the jury" (State's Return at 31). The crux of the State's argument, in other words, is that Joseph Sapinoso was 'on duty' (because (a) he was exiting an unmarked Sheriff's department jeep and (b) the department policy defines 'on duty' as being in possession of or operating a department vehicle) when he encountered Mr. Evans at the Sapinoso home. This is also the position of the PCR court (App. 4425-31).

This Court has never addressed whether the legislative intent of section (C)(a)(7) comports precisely with the Greenville County Sheriff's Office local policy. Nor has this Court ever addressed whether the Sheriff's interpretation of the statutory language would meet the narrowing requirements of the Eighth Amendment. The circumstances in Mr. Evans's case differ from the prior cases. Whether the law-enforcement aggravator applied to the factual scenario in Evans's case was an open question, which reasonable counsel

should have challenged. Trial counsel, however, simply asked Sheriff's Office employees, during informal conversations, about their 'on duty' policy, and took those employees' responses as definitive of the scope of the state statute (App. 2210, 2224, 2340).

But according to constitutional law, a sheriff's department itself can define neither the intended meaning of the statute (for that, one should look to the state legislature and this Court's interpretation of the law) nor its proper application (for which one must abide by the Eighth Amendment to the United States Constitution, which demands that States give narrow and precise definition to the aggravating factors that can result in a capital sentence (see, e.g., *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Kennedy v. Louisiana*, 554 U.S. 407 (2008)). In short, by relying solely on the Greenville County Sheriff's policy as a means of interpreting section (C)(a)(7), the PCR court failed to defer to the intent of the state legislators who enacted the South Carolina law, and never reached the narrowing requirements that the United States Constitution places on the interpretation of capital aggravating factors (see App. 4424-4436). Yet, as explained fully in the Cross Appeal (see pages 41-43), the Sheriff's policy is an unacceptable vehicle for interpreting the statute, and it stretches the statute beyond what the statute's language and purpose will bear, past what the Constitution allows.

In sum, application of the section (C)(a)(7) aggravating factor in Mr. Evans's case does not comport and is in great tension with the prior applications of the aggravating factor in the cases reviewed by this Court. Application of section (C)(a)(7) here expands the scope of section (C)(a)(7) to encompass law enforcement *status* without more, despite the statute's much narrower language. Section (C)(a)(7) served as the basis for testimony

and argument that undermined the reliability of the sentencing proceeding. Had Mr. Evans's counsel challenged the aggravating factor, there is a reasonable probability that the trial court would not have allowed the charge. And there is a reasonable probability that (a) without the charge, (b) without the evidence that was admitted under it, and (c) without the inflammatory rhetoric that it provoked from Solicitor Ariail, to which counsel also failed to object, the outcome of the proceedings would have been different.[4]

III. Testimony and Argument on General Prison Conditions.

Point 3 of the Cross Appeal argues counsel was ineffective for failing to object to Mr. O'Cain's testimony concerning general prison conditions and to related argument by the solicitor. Two points demand clarification in reply to the State's Return. The first concerns preservation of the issue; the second concerns the merits of the claim.

A. Issue Preservation

The State argues the issue is "not preserved for review as it was not properly raised below, and was rejected on a procedural basis by the PCR judge" (State's Return at 36). To the contrary, (a) the issue is preserved for review and (b) the PCR court only rejected a small part of the claim on a procedural basis—a part of the claim that Respondent-Petitioner does not rely on in this appeal.

[4] Regarding prejudice, the State, in arguing that "the death sentence may be affirmed even if there was error in submitting this particular circumstance" (State's Return at 35 n.18), cites *Stringer v. Black*, 503 U.S. 222 (1992). The law has changed on this topic since *Stringer*. It is now a matter of whether evidence admitted under the invalid aggravating factor would have been admitted otherwise (*Brown v. Sanders*, 546 U.S. 212 (2006)). The Cross Appeal sets forth, at pages 41-46, how the aggravating factor led to the admission of testimony that *would not otherwise have been admissible* at the sentencing hearing and how this testimony intersected with other critical aspects of trial counsel's ineffectiveness resulting in prejudice under the totality of the circumstances according to *Strickland*.

Specifically, the claim that counsel was ineffective in failing to object to testimony by Mr. O'Cain and related argument by the solicitor concerning general prison conditions is preserved on the following basis: (i) Evans's Amended Application presented the issue[5]; (ii) authority for the issue was fully set forth and the issue thoroughly presented *prior to the post-conviction hearing in Mr. Evans's Initial Trial Brief* (Supp. App. 18-20, 30-32)[6]; (iii) the issue was raised during the post-conviction hearing with witnesses, including trial counsel, who were questioned repeatedly concerning why there was no objection to the general prison condition testimony (see App. 2348-2351, App. 2403-2404 (testimony of trial counsel Sumner); App. 2194-95, App. 2201 (testimony of trial counsel Goldsmith); see also App. 2712-2721 (testimony of appellate counsel Savitz)—the State was present during this testimony, did not object to the questioning, and had an opportunity to examine, and did examine, trial counsel on the issue; and (iv) the PCR court's order found the claim preserved in preponderant part and ruled on the claim (see App. 4440-4441 (distinguishing alleged error in regard to Mr.

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

[6] On pages 18 to 20 of the Initial Trial Brief, and again on pages 30 to 32 of the same (Supp. App.18-20; Supp. App.30-32, Mr. Evans argued the irrelevance of the general prison conditions testimony of Mr. O'Cain as it occurred during his future dangerousness testimony. Applicant specifically argued, in addition, that the general prison testimony and the Solicitor's argument on the same topic—the Solicitor's "misrepresentations about the nature of alternative punishments" (Amended Application for Post-Conviction Relief paragraph 10(b)(7))—violated S.C. Code Ann. §16-3-20(C) (2000), *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984); *State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2005); and *State v. Burkhart*, 371 S.C. 482, 640 S.E.2d 450 (2007).

O'Cain's testimony (preserved) from alleged error in regard to the presentation of a defense witness (unpreserved))).

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

The State's objection is rooted largely in a misinterpretation of the PCR court's ruling. The PCR court found that Evans's objection to trial counsel's failure to object to the *State's* testimony presented by Mr. O'Cain on prison conditions was preserved (App. 4440). The PCR court held, however, the claim that defense counsel was ineffective for calling its *own* witness on prison conditions was not preserved (App. 4440). The claim in the Cross Appeal only concerns counsel's failure to challenge Mr. O'Cain's testimony and improper argument that built upon that testimony in summation—an issue, to reiterate, which the PCR court found preserved and addressed as such.

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

B. The Merits

On the merits, the PCR court held: "[Prison] conditions were referenced narrowly, and only to the extent to describe Evans's treatment and dangerousness due to his gang affiliation. As a factual matter, no simply 'general' prison conditions were offered, by either side, merely to argue harshness in sentencing" (App. 4441). But as set forth fully in the Cross Appeal at pages 46-57, the record simply doesn't support this. Contrary to the PCR court's finding, the statements by Mr. O'Cain and arguments by Solicitor Ariail were, in significant part, *not* about any comparative advantage they speculated Mr. Evans would have in general population. Rather, significant parts of the testimony of Mr. O'Cain (App. 1601-1602; see Cross Appeal at 48-51) and the related argument in summation by Solicitor Ariail involved *general statements about what prisoners receive* in terms of privileges or benefits in one environment versus another and *general statements about the security capability* of general-population prisons versus death row (see Cross Appeal at 48-51). None more extravagant than this argument by Solicitor Ariail:

> A big prison is like a little city. In prison he will have all the necessities of life...restaurants. They feed you, they clothe you, house you; doctors; hospitals; contact with family; TV; loved ones; freedom of movement in a limited degree; a social structure; cards and games and watch the football game; go to work; go to school. Sure you don't have a car, but in most instances it's not much more than a chamber of trust (App. 1758).

This argument on prisoner privileges, like the testimony and argument about security capability, has nothing to do with Mr. Evans's character or previous acts. Rather, the issue is one of general prison administration, a subject that under this Court's precedent is off limits in an individualized capital sentencing trial. Prisoner privileges and security capability are matters of institutional policy and design: death row is better

equipped to deal with future dangerousness concerns—and general prison less equipped—in *every* case.

By any reasonable reading of the record, this was not an instance of testimony and argument "narrowly tailored to demonstrate the defendant's personal behavior in those conditions." *State v. Burkhart*, 371 S.C. 482, 488, 640 S.E.2d 450, 453 (2007). Some of the testimony was directed to problems that purported gang affiliation would cause in prison, for both Mr. Evans and for the institution (see also the testimony of George Martin, App. 1632-1533, App. 1635). But in significant part, Mr. O'Cain's testimony and Solicitor Arial's argument emphasized the relative benefits of life in general population versus death row. That general-prison-conditions testimony and argument constituted an "arbitrary factor." See S.C. Code Ann. §16-3-20(C).[7] The PCR court's failure to grant sentencing relief on trial counsel's failure on this issue strays from this Court's long-standing rule.

As stated by Justice Pleicones in *Burkhart*, *infra*, the introduction of an arbitrary factor into the sentencing phase of a capital murder trial is not subject to harmless error review under section 16-3-20(C), and therefore Mr. Evans is entitled to a new sentencing trial on this issue alone. 371 S.C. at 490, 604 S.E.2d at 454 (Pleicones, J., concurring). Regardless, under *Strickland*, but for trial counsel's failure to object to the deviation from this Court's law there is a reasonable probability that the outcome of the sentencing proceeding would have been different, and prejudice becomes particularly apparent when one also takes into account counsel's failure to object to unfounded but highly inflammatory evidence and rhetoric claiming that the crime was gang related.

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

IV. Testimony and Argument on Gangs.

Point 4 of the Cross Appeal challenges the PCR court's denial of relief on the claim of ineffective assistance based on counsel's failure to object, both *in limine* and during trial, to testimony by a SCDC employee, Mr. O'Cain, who had never met Mr. Evans and knew nothing of his history, but who testified nonetheless that Mr. Evans would be a future danger in prison based on a speculative gang affiliation. As set forth in the Cross Appeal, the defense team's unanimous belief that Evans was not in fact affiliated with gangs and that his interest in gang paraphernalia and imagery was merely stylistic (see App. 2189, App. 2345, App. 2269; see App. 2547, App. Exh. 19A, App. Ex. 19B, 3430; App. 2549; App. Exh. 21, 3440; App. Exh. 24, 3444; App. 2548-2549) undermines the possibility of a strategic explanation for counsel's failure to object to the testimony as more prejudicial than probative. It also leaves counsel without a strategic explanation for failing to object to the testimony on the ground that it violated *Dawson v. Delaware*, 503 U.S. 159 (1992), because the State never established the necessary link between Evans's conduct and specific conduct by a gang. See Cross Appeal at 60-62.

At the PCR hearing, counsel stated they did not challenge the testimony because their client told them not to. But this does not absolve counsel of the duty to fully investigate: unlike mitigation (and in contrast to *Schriro v. Landrigan*, 550 U.S. 465 (2007)), this situation concerns a failure to investigate the *State's* case (see Evans's Post-Trial Brief, App. 4060-63).[8] Nor does it absolve the need for counsel to object to an inflammatory summation by Solicitor Ariail, which recast a domestic and highly

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

emotional four-hour standoff—evident from the multiple conversations between Mr. Evans, the SWAT negotiator, Evans's ex-girlfriend, and multiple friends and family throughout (see trial testimony at App. 1121-1134, App. 1231-1234; App. 1419-1430)—as a planned gang-motivated execution of a law enforcement officer. The Solicitor's arguments were fanciful and dramatic and sought to forge a non-existent connection between Evans's stylistic interest in gang paraphernalia and these tragic shootings (see App. 1756-1758).

Evans has no known connections to any prison gang activity. His assertions of gang activity were considered unbelievable by his defense team. Of the limited investigation counsel did into Evans's background, *all* evidence pointed against it. The shootings as they occurred were not premeditated. The stress on Mr. Evans, who suffers from significant frontal lobe atrophy and impairment—which affects emotion processing, coordination of sensory information, decision-making, and the ability to adapt to changing circumstances (see Cross Appeal at 12-14)—is apparent in Evans's phone conversations with the SWAT negotiator and friends and family as he deteriorated over the course of the hostage standoff. And yet the Solicitor's summation made claims about Evans, without objection, such as the following:

- "[H]e planned this execution to the smallest minute gangland detail." (App. 1757).
- "[H]e was going to let the world know that night gang style, just like the pictures, gang style . . . . Crips deliver bodies, and he delivered you two." (App. 1756).
- "This [trial] is a game to him without consequence. It is a game of Crip mentality . . . and if he gets away from you he will go to prison and continue to be a gang . . . . He will move into a system and a position of structure, a cop killer, a king." (App. 1758).

- "As Mr. OCain told you, he is already into gang activity at the jail." (App. 1758).

The Solicitor's rhetoric is precisely the type of highly prejudicial and speculative argument that *Dawson v. Delaware* and evidentiary Rule 403 exist to prevent. There was no strategic reason for not investigating or challenging testimony so prejudicial, especially since counsel fully anticipated the testimony. Trial counsel's failure to defend their client by objecting to the testimony and argument on these grounds was both deficient and prejudicial under *Strickland*, and the PCR court abused its discretion in finding otherwise (see App. 4438).[9]

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[9] The State attempts to minimize counsel's failures, and to support the PCR court's finding of no ineffective assistance, by arguing that Evans "made the gang evidence relevant" (State's Return at 45). What the State appears to mean by this is that there are a number of evidentiary pieces, including actions and statements by Mr. Evans, that form a basis for a reasonable inference of gang membership. But much of the State's argument relies on privileged recollections that defense counsel Sumner chose to exhibit in PCR in defense of his decision-making at trial. These post hoc reflections of conversations with Mr. Evans by trial counsel Sumner, which the State's Return cites at length (State's Return at 38-39), were not in evidence before the jury; they were admitted as evidence in PCR and as relevant to the reasonableness of defense counsel's performance. They have no bearing on the relevance and admissibility of O'Cain's trial testimony about gangs. Rather, they simply offer a reason that defense counsel failed to object to that testimony—a reason, however, that does not excuse counsel of the need to investigate (see *infra* at page 20).

Further, the State wants to dismiss lower appellate court decisions in *State v. Liverman*, 386 S.C. 223, 687 S.E.2d 70 (S.C. App. 2009) (see State's Return at 48) and *State v. Jackson*, 2014 WL 3823715 (N.C. App. 2014) and *State v. Hinton*, 738 S.E.2d 241 (N.C. App. 2013) (see State's Return at 46-47 n.23), but those cases, if not controlling precedent, show something important about (i) just what sort of objection counsel should have made to Mr. O'Cain's testimony and the solicitor's argument in this case, and about (ii) how tenuous the inference is that the shootings in this case were gang related or that Evans is a gang member. The appellate courts in each of those cases stress that gang related testimony is highly prejudicial and only admissible if concretely relevant and even then only narrowly. In *Liverman*, for example, gang members testified about the defendant's involvement in the crime as a gang activity. The appellate court denied Liverman's challenge to O'Cain's speculative testimony on tattoos because it was harmless given this other evidence of gang involvement and other expert testimony. In Evans's case, however, there are no witnesses establishing the defendant's gang affiliation or establishing the crime as a gang action. Absent this link, as discussed in the Cross Appeal brief, the testimony was not merely more prejudicial than probative under Rule 403, it also violated *Dawson v. Delaware*, and counsel's failure to object was both deficient and prejudicial. The PCR court's finding to the contrary (App. 4436-39) is not supported by probative evidence in the record and must be reversed.

V. Cumulative Prejudice Under *Strickland.*

The ineffective assistance of counsel standard established in *Strickland v. Washington,* 466 U.S. 688 (1984), requires a showing that an attorney's representation "fell below an objective standard of reasonableness" as measured against prevailing professional norms, *id.*, and "a reasonable probability that, but for counsel's unprofessional *errors*, the result of the proceeding would have been different," *id.* at 694 (emphasis added). As this language indicates, prejudice under *Strickland* is a cumulative measure that takes into account the impact of *all* of counsel's failures, in conjunction, together as they would have affected the trial. *Strickland*, 466 U.S. at 694-96; see *Porter*, 558 U.S. at 38-39; *Wiggins v. Smith*, 539 U.S. 510, 534-38 (2003); *Williams v. Taylor*, 529 U.S. 362, 395-97 (2000); cf. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

The State does not contest this, but emphasizes, first, that prejudice may be established, and a grant of relief thus supported under *Strickland*, even where there is only one instance of deficient performance by counsel (see State's Return at 23 n.10). Further, echoing this Court's ruling in *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006), the State reiterates the point that prejudice from multiple deficient aspects of counsel's performance cannot exist when no more than a single deficient-performance error is established. It follows: if there are no deficient performances, there will be no prejudice to consider.

A point that Mr. Evans's Cross Appeal has tried to make clear, however, is that in this case there was *more than one* deficient aspect of counsel's performance. Each claim raised in the Cross Appeal points to an additional instance of deficient performance—in addition to counsel's failure to object to the instruction on mercy, which the PCR court

recognized as prejudicial in and of itself under *Strickland.* The Cross Appeal also argues that each of counsel's errors individually substantially undermines confidence in the sentence of death such that it must be set aside. But further—and of emphasis here—is that in the circumstances of this case *the combination* of counsel's failures and omissions skewed the sentencing case that the jury heard and utilized when deciding whether the appropriate sentence was life or death.

Assessing *Strickland* prejudice, then, this Court must consider the composite impact of counsel's errors, including the following:

- Counsel failed to adequately investigate and present a case in mitigation. This resulted in the presentation of a very incomplete view of their client to the jury. The jury did not know Evans suffered from lead poisoning so severe that it was 'off the charts'; they did not know his brain was atrophied significantly in areas of the frontal lobe in a manner known to correspond with lead poisoning and in areas that directly correspond to the ability to control one's actions under stress. Rather, per trial counsel's mitigation presentation, Evans was a good person who, leading up to the four-hour standoff and the tragic shootings, simply had a bad day.

- As trial counsel failed to fully investigate their own case, they also completely failed to respond to unique challenges this case posed with respect to the setting and staging of the trial. Specifically, counsel failed to challenge the State's assertion that this offense involved the shooting of a law enforcement officer "during or because of the performance of his official duties"; counsel also failed to object to the setting of trial in the courthouse where the officer worked; and counsel failed to seek to exclude or at least limit victim-impact evidence, including testimony by a deputy sheriff who worked with one of the victims in the very courthouse in which the jurors heard the case.

- And counsel also failed to adequately investigate and challenge aggravating evidence presented against Mr. Evans at sentencing. Counsel failed to object to unreliable and irrelevant testimony by Mr. O'Cain, a Security Threat Group coordinator on gangs, and to the solicitor's commentary on general prison conditions in summation. In failing to object to and counter the aggravating evidence and argument, counsel allowed the solicitor in summation, without contest, to recharacterize a tragic domestic shooting incident as a gang execution killing.

But for counsel's failures, this case would not have been presented as the gang-motivated killing of an officer (Cross Appeal, Points 2, 4, 6, 7); Mr. Evans's frailties would have been defined and explained, not ignored or offered in an incoherent and conflicting package (Point 1); the jury would not have been invited to speculate on general prison conditions (Points 3, 7); the jury would have been properly instructed on mercy; and all of this could have occurred under circumstances that accounted for the uniquely prejudicial nature of trying the case in one of the victims' workplaces, the Greenville County Courthouse (Points 5,6). Given the cumulative prejudice of the unique combination of counsel's errors in this case, there is a reasonable probability that, without those errors, the outcome of the sentencing proceeding would have been different.

CONCLUSION

Mr. Evans's Cross Appeal raises substantial, meritorious claims of ineffective assistance of counsel at sentencing. For the reasons stated above, and for the reasons stated in the Cross Appeal brief, this Court should reverse the PCR court's ruling that trial counsel was not ineffective to the prejudice of Mr. Evans on the issues raised in this Cross Appeal, and remand for a new sentencing trial.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Kamell Evans, Respondent/Petitioners,

-vs-

State of South Carolina, Respondents/Respondent.

PROOF OF SERVICE

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

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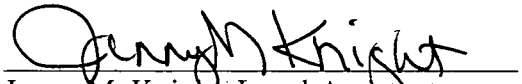

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