STATE OF SOUTH CAROLINA
In the Supreme Court

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

Kamell D. Evans, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

Appellate Case No: 2011-188687

PETITIONER/RESPONDENT'S BRIEF OF RESPONDENT

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ISSUES PRESENTED BY RESPONDENT/PETITIONER

1. Defense counsel failed to adequately investigate, develop, and present available, relevant and admissible mitigating evidence. There is a reasonable probability that, but for counsel's failure, at least one juror would have sentenced Mr. Evans to life without the possibility of parole – not death.

2. Defense counsel were ineffective for failing to object to the charge that this case involved the murder of a law enforcement officer "during or because of the performance of his official duties" under S.C. Code Ann. § 16-3-20(C)(a)(7).

3. Defense counsel was ineffective in allowing general prison condition evidence and argument to be presented to the jury, which injected irrelevant and arbitrary information into the proceedings in violation of state and federal law.

4. Defense counsel were ineffective for failing to object to and counter the evidence in aggravation presented by witness Lewis O'Cain and the solicitor's inflammatory rhetoric extrapolating from that testimony in the sentencing summation.

5. Defense counsel failed to seek a change of venue based on the "extraordinary circumstances" of this trial, which was conducted in the courthouse that was a victim's workplace. Counsel's failure to address the inevitable sympathy and potential intimidations that jurors would experience was deficient and prejudicial.

6. Defense counsel failed to challenge victim impact testimony that violated state and federal law. But for counsel's deficient performance, there is a reasonable probability that the outcome of Mr. Evans' sentencing trial would have been different.

7. The sentencing summation was designed to arouse the passion and prejudice of jurors. The solicitor asserted personal opinions as law, diminished the jurors' sense of individual responsibility for the verdict, misrepresented the proper scope of mitigating evidence, made unreasonable inferences, and misrepresented the nature of alternative punishments.

(Brief of Petitioner, p. x – xi).

STATEMENT OF THE CASE

This matter is before the Court by way of an appeal from a decision in a capital post-conviction relief ("PCR") proceeding. On February 24, 2011, the Honorable D. Garrison Hill found "a new sentencing hearing is required due to the law set forth by the decision of our supreme court in Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 4 (2009)." (App. p. 4384). Judge Hill rejected all other issues presented. (See App. p. 4500). The State appealed and Petitioner cross-appealed.

On July 14, 2011, the State filed a Petition for Writ of Certiorari. Respondent/Petitioner ("Evans") filed a return to the petition on November 18, 2011. The State made a reply on December 12, 2011.

Evans also filed his Petition for Writ of Certiorari with the return to the State's petition on November 18, 2011. The State filed its return on March 12, 2012, and Evans made a reply on April 20, 2012.

On April 16, 2014, this Court granted the petitions and directed additional briefing pursuant to Rule 243(j), SCACR. Respondent/Petitioner filed his Brief of Respondent/Petitioner on June 3, 2014. This Brief of Respondent follows.

Prior Procedural History of the Case

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

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

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

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

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

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

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

(App. p. 1795).

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

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

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

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

(App. p. 1824).

The State filed its final brief on July 25, 2006. (App. pp. 1836-1857). The case was called for oral argument on October 3, 2006. On November 6, 2006, this Court affirmed the convictions and death sentence in *State v. Evans*, Opinion No. 26220 (S.C.Sup.Ct. filed November 6, 2006).[1] (App. pp. 1858-1863). The Court subsequently issued the remittitur on November 22, 2006. (App. p. 1864). Evans did not seek review from the United States Supreme Court.

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

[1] Reported at 371 S.C. 27, 637 S.E.2d 313 (2006).

Ehlies, Esq., counsel for Evans. On June 23, 2008, the judge additionally appointed Christopher Seeds, Esq.

An evidentiary hearing began June 1-5, 2009, and concluded October 12-14, 2009. Mr. Nettles, Mr. Ehlies and Mr. Seeds represented Evans. Senior Assistant Attorney General Melody J. Brown and Assistant Attorney General Anthony Mabry represented the State. Evans raised multiple issues. (App. pp. 4387-4395). On August 31, 2009, before reconvening for the remainder of the PCR evidentiary hearing October 12, 2009, Evans offered an amendment to the application to include an allegation to challenge the charge issue in light of this Court's ruling in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 4 (2009). (App. pp. 2915-2926). Respondent did not object to the amendment as it was based on new law not previously available to Evans, but noted its futility as raised as an ineffective assistance of counsel claim. (App. pp. 3280-3282). The Court took the motion under advisement and later granted the motion to amend in the Order granting relief. (App. p. 4395).

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

Upon receipt of the transcripts for both parts of the hearing, Judge Hill established a briefing schedule for post-hearing briefs. Evans' brief was submitted on October 4, 2009. (App. p. 3906). The State submitted its post-hearing brief on November 10, 2010. (App. p. 4104). Evans submitted a reply on November 19, 2010. (App. p. 4217). On December 9, 2010, the PCR judge called for additional briefing of the *Rosemond* jury charge issue, and the State submitted its second post-hearing brief on the issue on December 14, 2010. (App. p. 4238). Evans submitted his second post-hearing brief on December 16, 2010. (App. p. 4245). The State and Evans both submitted proposed

orders on January 19, 2011. On February 24, 2011, Judge Hill issued an Order denying relief on all grounds except the *Rosemond* jury charge issue. (App. p. 4254). On that issue, Judge Hill found deficient performance, presumed prejudice, and granted a new sentencing proceeding. The State filed a motion to alter or amend on March 9, 2011, (App. p. 4501), which was denied on March 10, 2011 (App. p. 4515). This appeal followed.

PETITIONER/RESPONDENT'S STATEMENT OF FACTS

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

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

in the house with her grandson. (App. p. 1431). Evans and the Deputy together called Christina. (App. pp. 1429-1430). Evans testified he placed Deputy Sapinoso's gun on the coffee table in the living, and he only fired when he "perceived Joe going to the gun," and Mr. Sapinoso "standing up." (App. p. 1432).

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

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

thought the conversation "went real well." (App. p. 1124, line 19 - p. 1126, line 8). After Evans spoke with Christina, Lee spoke to Evans "a couple of more times" and continued negotiations. Evans told Lee he thought Lee was "cool" and said he was going to discuss the matter with the Deputy and would call back later. (App. p. 1126, lines 11-24). Minutes later, Lee heard multiple shots. (App. p. 1126, line 25 - p. 1127, line 7).

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

Investigators at the scene recovered three guns, a 9mm, a .38, and a Glock that was the Deputy's service weapon. (App. p. 1288, lines 2-6; p. 1312, lines 20-24). Investigators also recovered a black nylon bag in the entryway that held 140 rounds of

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

ARGUEMENT

"On certiorari in a PCR action, the Court applies the 'any evidence' standard of review." *Terry v. State*, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011) (quoting *Cherry v. State,* 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This "Court will affirm if any evidence of probative value in the record exists to support the findings of the PCR court." *Id.* See also *Holden v. State*, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011) ("In reviewing the PCR judge's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision."). It is well established that this "Court gives great deference to the PCR court's findings of fact and conclusions of law." *Simpson v. Moore*, 367 S.C. 587, 595, 627 S.E.2d 701, 705 (2006).

To establish that counsel was ineffective, a PCR applicant must show that counsel's representation fell below an objective standard of reasonableness ("deficient performance"), and but for counsel's error(s), there is a reasonable probability that the outcome of the trial would have been different ("prejudice"). *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052 (1984); *Simpson v. Moore*, 367 S.C. 587, 595-96, 627 S.E.2d 701, 706 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland*, 466 U.S. at 694. See also *Franklin v. Catoe*, 346 S.C. 563, 571, 552 S.E.2d 718, 723 (2001).

In order to prove deficient performance, the applicant must "show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *Harrington v. Richter*, ___ U.S. ___, ___, 131 S.Ct. 770, 787 (2011) (quoting *Strickland*, 466 U.S. at 687). After making this initial showing, the applicant for relief "must [then] demonstrate that [counsel's] deficiency

prejudiced him to the point that he was deprived for a fair trial whose result is reliable." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2001).

"The standard for judging counsel's representation is a most deferential one." *Harrington*, 131 S.Ct. at 788. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance...." *Strickland*, 466 U.S. at 689. Further, "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Butler v. State*, 286 S.C. 441, 445, 334 S.E.2d 813, 815 (1985) (quoting *Strickland*, [466 U.S. at 690]). "An attorney is not required to anticipate potential changes in the law, which are not in existence at the time of the conviction." *Patterson v. State*, 359 S.C. 115, 118, 597 S.E.2d 150, 151 (2004). See also *Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995) ("the case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law").

In order to prove "prejudice" in regard to sentencing phase error, an applicant must show "there is a reasonable probability that, absent [counsel's] errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998) (quoting *Strickland*, 466 U.S. at 695). See also *Sigmon v. State*, 403 S.C. 120, 127, 747 S.E.2d 394, 398 (2013) (same). Further, prejudice is evaluated by consideration of the trial evidence of mitigation, along with the PCR evidence, compared to the aggravating

circumstance evidence. *Wong v. Belmontes*, 558 U.S. 15, 26, 130 S.Ct. 383, 389-390 (2009). "The likelihood of a different result must be substantial, not just conceivable." *Harrington*, 131 S.Ct. at 792 (citing *Strickland*, 466 U.S. at 693).

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

When the questions presented in the petition are analyzed within this legal framework, and in light of the record before the PCR court, the record well supports relief was not warranted. Petitioner shows neither an error of law nor an absence of probative facts. This Court should affirm the denial of post-conviction relief.

1.

Allegation Trial Counsel Failed to Adequately Investigate, Develop, And Present Available, Relevant and Admissible Mitigating Evidence

Respondent/Petitioner complains the PCR judge made three erroneous factual findings: 1) that Dr. Evans relied upon a report of lead exposure where medical records regarding lead exposure were not received until after trial; 2) that the PCR judge failed to accept the case for brain damage as presented in PCR, and, 3) that defense counsel at trial did not engage in a "team approach." (Brief of Petitioner, pp. 20-21). The record, however, fully and fairly supports the PCR judge's findings. Further, Respondent/Petitioner complains the PCR judge made two errors of law in regard to the resolution of this error: 1) failing to consider that reasonable strategic decisions may only be made upon sufficient investigation; and, 2) prejudice must be considered in a

cumulative fashion. (Brief of Petitioner, p. 20). Respondent/Petitioner's arguments, however, must similarly be rejected as the legal analysis and supporting law show no such errors occurred.

Assertions of Lack of Factual Basis

To reach his first purported factual error, Respondent/Petitioner engages in a grammatical manipulation of the word "report" in regard to the defense team's knowledge of the exposure to lead. The record shows that a *medical report* of lead exposure was not received until after trial; however, defense counsel and experts were aware of Respondent/Petitioner's *self-report* and *his family's report* of lead exposure. Respondent/Petitioner argues: "it would have been important, indeed, if Dr. Evans [the neuropsychologist who tested Respondent/Petitioner and testified for the defense at trial, see App. pp. 1679-1680] had factored the report into his analysis. But Dr. Evans had never seen a report and he therefore could *not* factor it into his analysis." (Brief of Petitioner, p. 21)(emphasis in original). The finding at issue, and in context, is as follows:

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

(App. p. 4470). [2]

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

Dr. Evans testified at trial that his "synopsis would be that very likely due to lead poisoning when he was early, in his early ages, I am not sure when that occurred, age four, I believe, he had some brain dysfunction. School learning problems were definite ...." (App. p. 1697). On cross-examination, Dr. Evans candidly responded that he did not have medical reports but relied upon reports of lead poisoning from the Respondent/Petitioner and his family. (App. p. 1702). Consequently, the record fully supports the PCR judge's factual findings regarding same. And, the record shows the PCR judge fairly considered the facts in context of the whole proceeding. There is no error.

Respondent/Petitioner next asserts a lack of factual support, essentially, because the PCR judge found his evidence of brain damage unpersuasive. (See Brief of Petitioner, pp. 22-24). He argues that the experts at trial, Dr. Bachman (for Evans) and Dr. Spicer (for the State), agreed that Dr. Gur's "volumetric quantitative analysis" was the approach that should serve as a "'tie breaker" regarding the differing opinions on possible damage, and that Dr. Gur's analysis "resolved any dispute generated by differing interpretations gleaned from the less sensitive readings of the MRI by Dr. Bachman, Dr. Spicer, and MUSC radiologists." (Brief of Petitioner, p. 22). Respondent/Petitioner's assertion of

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> As to lead poisoning and learning disability, Evans could have offered this testimony, but the defense team was focused on the results and his life in South Carolina. In South Carolina, especially with the help of his step-mother, Evans remained an average student, and even went to college. Moreover, Dr. Evans knew about reports of lead poisoning reports, and factored them [in] his analysis. Moreover, the fact that family reported exposure was information that Dr. Evans mentioned, though he did not have a record to show testing. ...
>
> (App. p. 4474).

"agreement" in regard to the acceptance and applicability of Dr. Gur's analysis in this context is contrary to the facts of record.

Dr. Spicer, an expert in diagnostic radiology, (App. pp. 3205-3207), testified repeatedly that Dr. Gur's analysis method was not one "incorporated in ... clinical practice" and should not be considered. (See App. p. 3228; p. 3246; p. 3248; p. 3252-3253). In fact, the PCR judge specifically questioned Dr. Spicer if he was aware of any "literature or any other source, of a quantitative analysis for volume loss that's reliable in the field" where there was a subtle loss, and he did not, and he confirmed the absence of such a diagnostic criteria in "the American College of Radiology's and American Society of Neuroradiology's standards ...." (See App. pp. 3253). [3] Dr. Spicer testified that "mild diffuse volume loss is a very difficult thing to assess," and a finding of mild volume loss by Dr. Gur, even if accepted, simply would not change Dr. Spicer's opinion that the image was within the normal range. (App. pp. 3246-3247; p. 3251). Respondent/Petitioner did ask Dr. Spicer about a "tie breaker" for subtle loss disagreements, and he responded: "If you thought there was a quantitative analysis that

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[3] The State objected to Dr. Gur's testimony. The PCR judge did not resolve the objection having found the evidence not sufficient to afford relief. (App. p. 4462 n. 18). However, the PCR court acknowledged that Respondent argued "the method for diagnosing dysfunction based on MRI films alone was not reliable, and the professor had been found not qualified in at least one other case, *United States v. Lisa M. Montgomery*, PACER available, C/A 05-6002-0 I-CR-SJ-GAF, Motion of the United States, Document 273 at pp. 1-2 (referencing September 5, 2007 notice from the Court of the Court's intention to exclude this testimony)." The PCR judge only admitted the testimony for limited purposes: "This Court finds it is questionable whether Dr. Gur's testimony would be admissible as Evans has failed to show that brain volume analysis is an accepted diagnostic tool for either dysfunction or damage. This Court makes no specific finding as to possible admissibility of the evidence at the trial as it resolves the issue on lack of prejudice having considered the evidence of brain damage as a whole." (App. pp. 4462-4463 n. 18).

would be valuable and help you in that, certainly. We'd check the literature and see *if, you know, this is a valid criteria to utilize.*" (App. p. 3239). (emphasis added).[4]

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

> ... according to the evidence submitted at the PCR hearing, only by relying on a volume analysis that is not an accepted diagnostic tool, and a healthy dose of subjectivity, can one divine any type of diffused volume loss. In other words, the loss must be so minor that subjectivity can be a factor. This hardly makes for definitive, crucial evidence. Where the experts agree, however, is that there was dysfunction, and Dr. Jim Evans testified to this at trial.
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> Though [Respondent/Petitioner] notes two reports of lead exposure and presented information on lead poisoning, that does not change the results of the two MRI reports that came back normal. Moreover, trial counsel was faced with the fact that [Respondent/Petitioner] was an average student with an average IQ who had attended college Additionally, the lead paint exposure/brain damage did not figure into the "one bad day, one bad decision" theme. (June PCR Tr. p. 329). Counsel wanted to maintain credibility with the jury, and not try to "blame something from 10, 12 years before this," to shift responsibility. (June PCR Tr. p. 427). Again, the client embraced the strategy and addressed the jury in support of same. (R. pp. 1772-1776). ...

(App. p. 4473).[5]

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[4] Respondent/Petitioner's position that a "tie breaker" was even necessary highlights the narrow margin of even possible abnormality.

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

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

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[5] Dr. Bachman testified that he was only retained in the collateral proceedings for the purposes of the legal proceedings, not for treatment, and he designated the case a "legal case." (See App. pp. 3111- 3112; pp. 3114- 3116). Respondent/Petitioner's protest of the use of this term, (see Brief of Petitioner, p. 24 n.11), comes a little late and essentially complains of his own witness's characterization.

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

(App. p. 4474).[6] Accord *Com. v. Ballard*, 80 A.3d 380, 397 (2013)(finding cross-examination of Dr. Gur on his "disregard[ing]" of "the radiologist's conclusion in the Report that appellant's MRI was 'unremarkable,'" allowable as it "properly calls into question Dr. Gur's conclusion that appellant suffered from brain damage.").

As to the last assertion -no factual basis for the PCR judge to have found a "team approach" to the defense, (Brief of Petitioner, p. 22), (See also App. pp. 4466-4467) – the record shows defense counsel repeatedly admitted a team approach was used, and produced contemporaneous notes and memoranda supporting same. (See App. pp. 2215-2216; p. 2272; pp. 2371-2400).[7] Though Respondent/Petitioner is attempting to cast this

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

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

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

[7] Respondent/Petitioner also complains of the timeframe going into trial and a "rushed preparation for trial." (Brief of Petitioner, pp. 7-9). The PCR judge noted similar allegations below, which he dismissed, in footnote 19. (See App. p. 4467). The PCR judge found that "trial counsel spent hundreds of hours to prepare" and acknowledged Respondent's assertion that the social worker who testified at the PCR hearing required only two months to prepare. Id. (See also App. p. 3048). The PCR judge found: "Even so, here, the reviewing court is concerned with actual error, and abstract time arguments are merely a distraction. See generally *Simpson v. Moore*, 367 S.C. 587, 589 n. 2, 627 S.E.2d 701, 707 n. 2 (2006), quoting *Jones v. State*, 322 S.C. 329, 339, 504 S.E.2d 822,

matter as one of sufficient investigation and missed lines of mitigation evidence, (Breif of Petitioner, pp. 25-26), this simply is not such a case. Could their mitigation specialist have been sent to Cleveland before trial? (See Brief of Petitioner, p. 26). (See also App. p. 2413, counsel testifying possibility of travel to Cleveland discussed in team approach). Possibly, but that misses the point. What matters is the fact that in PCR, Respondent/Petitioner presented nothing that would create a reasonable probability of a different result had his additional evidence been presented. For instance, his learning disability shared history with parental involvement and his "substantial improvement" and benefit from specialized programs.[8] (See App. p. 4:459). (See also App. pp. 2021-2023; p. 2027; p. 3058). Respondent/Petitioner's school records not only show improvement, but also that he eventually went to college, and has a tested IQ of 94. (See App. p. 4460). (See also App. p. 1682; p. 3058-3059; pp. 2823- 2825). These are things that the PCR judge appropriately considered in finding Respondent/Petitioner simply did not carry his burden of proof of deficient performance and resulting prejudice.

Allegations of Error of Law

The record likewise rebuts Respondent/Petitioner's contention the PCR judge incorrectly applied controlling legal precedent. To the extent he simply argues the "factual errors" asserted above misguided the *Strickland* analysis, (see Brief of Petitioner, p. 20), his argument fails as he has failed to show factual error. To the extent he claims the PCR judge did not appreciate that trial counsel's strategy decision must be evaluated

827 (1998)(an applicant 'may not simply posit suppositions and speculations in an attempt to establish that counsel was ineffective')." (App. p. 4467 n. 19).

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

in light of the sufficiency of the investigation, (see Brief of Petitioner, p. 20), he is incorrect. Not only did the PCR judge note that consideration in finding valid strategic reasoning, (see App. p. 4456-4457),[9] he specifically considered whether there was a reasonable probability that presentation of additional matters would have affected the result in light of the full record, thus, correctly applied the proper concept of review dictated by the precedent:

> Mr. Evans' trial counsel was not ineffective within the meaning of the Sixth Amendment in their investigation or presentation of mitigating evidence at the penalty phase. The decision not to present evidence of childhood abuse was a largely strategic one, and was not unreasonable. *See Harrington v. Richter*, 562 U.S. _ (2011)(slip op., at 17) ("Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies."). The evidence concerning lead poisoning and resulting brain damage may well have enhanced the mitigation case, but not to such a degree sufficient to meet *Strickland's* prejudice prong. The sentencing jury heard testimony about Mr. Evans' diminished cognitive skills and expert opinion about his mental condition. The additional mitigation on these issues adduced at the PCR hearing would not have changed the outcome at trial. The failure to further develop or ensure a pristine consistency of the mental condition issue does not undermine confidence in the result.

(App. p. 4457).

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

> ... the evidence of abuse against the mother could only be shown by calling individuals who would demonstrate a rift in the family, and by a witness who was uncooperative with the defense team. Again, this would detract rather than enhance the defense. Moreover, the evidence of abuse against Evans, i.e. use of force in discipline, was contested. Further,

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

> attacking the father would only lead to unraveling a carefully crafted defense theme and making his testimony in support of his son less credible.
>
> Additionally, to consider all the evidence together, ... , the evidence would confuse and dilute the clear theory that this event was a critical break from his normal behavior. This was the very theme that Evans presented to the jury himself. (R. p. 1774, "That wasn't me that night. It's not the person I am. ... Twenty-seven years before though, that wasn't me. That's not the person I am.").
>
> Lastly, on the other side of the scale, there is the fact of the a horrible, planned hostage taking ending in two murders, one of a law enforcement officer kidnapped from his car before he could end his shift and reach the safety of his home; a forced entry into the home and a night of terror for the Sapinoso family. Moreover, to offer evidence of neglect, with the concomitant evidence of "running the streets," would support that there were not "two Kamell Evans," but one - one who spurned real family life and actively sought gang life, who resolved his issues with escalating violence.
>
> Evans has failed to demonstrate deficient performance and prejudice, and is not entitled to any relief.

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

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

Lastly, Respondent/Petitioner asserts "the court's application was flawed because it did not consider prejudice cumulatively as United States Supreme Court precedent demands." (Brief of Petitioner, p. 20). Respondent submits a view of the all the evidence is consistent with well-established federal law. *Strickland*, 466 U.S. at 695. See also *Wong v. Belmontes*, 558 U.S. 15, 26, 130.S. Ct. 383, 390 (2009) ("the reviewing court must consider all the evidence - the good and the bad - when evaluating prejudice").[10] Respondent/Petitioner has failed to show error in applying this standard test.

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[10] The Fourth Circuit does not recognize the cumulative error doctrine to find error where individual errors are not proven; rather, the Fourth Circuit has instructed that each claim is analyzed individually under the appropriate constitutional framework. *Fisher v. Angelone*, 163 F.3d 835, 852-853 (4th Cir. 1998). See also *Causey v. McCall*, 2014 WL 130447, *16 (D.S.C. 2014) ("Petitioner argues that the cumulative effect [of] the errors raised was in violation of his rights to due process and warrants relief. Having found that none of the issues raised by Petitioner amounted to error, he cannot aggregate them to form a constitutional violation."); *Basham v. United States*, 2013 WL 2446104, *105 (D.S.C. 2013) ("this case is not one where there were a number of constitutional errors or numerous instances of ineffective assistance of counsel. Accordingly, the cumulative error doctrine does not afford any relief to Basham.").

Respondent acknowledges, however, that this Court has held that whether cumulative error may be applied in this jurisdiction remains an "unsettled" question. See *Lorenzen v. State*, 376 S.C. 521, 535, 657 S.E.2d 771, 779 n.3 (2008). Yet, we are not without guidance in this matter. Here, the PCR judge only found one error, and granted relief on that error. Thus, cumulative error analysis, if available, would not be applicable in the instant case. See *Simpson v. Moore*, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006)

In essence, though, Respondent/Petitioner's claim of error in the application of the correct test stems mainly from vastly overstating what Respondent/Petitioner was able to show in PCR. He makes the bold assertion: "The post-conviction evidence in Mr. Evans's case was qualitatively different [than a "fancier" mitigation case]: it resolutely shows brain damage, its location, its severity and lead poisoning as a cause." (Brief of Petitioner, p. 29). In clear contradiction to this assertion, the record reflects there was actual agreement that there was no test that could confirm such a claim. (See, for example, p. App. p. 3104, Respondent/Petitioner's expert, Dr. Bachman, testified "there's no actual definitive way to prove that that's the cause of the cognitive dysfunction"). (See also App. p. 2821, Respondent/Petitioner's expert, Dr. Canfield, testifying cannot state dysfunction due to lead exposure; pp. 3117-3188, Dr. Bachman, recognizing different causes for damage and/or dysfunction). Critically, Respondent/Petitioner, if able to

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("Because the PCR court found that only one of Simpson's allegations had merit, there was no need to conduct a cumulative-error analysis. The record simply did not contain 'several errors' for the judge to cumulatively assess. We hold, therefore, that the PCR court did not err in failing to conduct such an analysis."). Even the most generous reading of *Strickland* would not support combination of non-errors to reach precedent:

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

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

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

present the Gur evidence to a jury, would still have to address the two reports reflecting a normal MRI and testimony that his evidence of damage from Dr. Gur is challenged in its lack of acceptance in the medical community.

Further, Respondent/Petitioner continues to overstate his evidence when turning to evidence of abuse (which counsel actually knew and investigation as noted above). He posits that "his experience with abuse and the matter in which the jury could have factor it in to deliberating the tragic crimes is much the same" as the omission failure to present evidence in *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447 (2009). (Brief of Petitioner, 30). It is simply impossible to fairly equate the performance at issue here to that in *Porter*. The Supreme Court in *Porter* characterized the situation there as follows:

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

130 S. Ct. at 453 (emphasis added). The Court further noted: "The sum total of the mitigating evidence was inconsistent testimony about Porter's behavior when intoxicated and testimony that Porter had a good relationship with his son. Although his lawyer told the jury that Porter 'has other handicaps that weren't apparent during the trial' and Porter was not 'mentally healthy,' he did not put on any evidence related to Porter's mental health." 130 S.Ct. at, 449. In stark contrast, counsel in the instant case investigated mental health, and presented mental health experts, in addition to family and friends for a personal view of the defendant.

Respondent/Petitioner's reliance on *Sears v. Upton*, 561 U.S. 945, 130 S. Ct. 3259 (2010), is similarly misplaced. The Court in *Sears* referenced possible evidence that could have been discovered and admitted, such as possible abuse, but the Court zeroed in on more significant medical evidence that was not developed at all:

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

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

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

In particular, and vastly different from the investigation and presentation in either *Porter* or *Sears*, Dr. James Evans gave a battery of tests and testified not only as to the specifics of testing but also to Respondent/Petitioner's cognitive dysfunction. Moreover, Respondent/Petitioner's experts in PCR did not disagree with the testing, results or testimony. Dr. Gur agreed with Dr. Evans and testified, "I thought he did a thorough evaluation and reported it in a fairly straight forward fashion, fairly standard" and that his

findings were consistent with Dr. Evan's findings. (App.p. 2684; p. 2680). (See also App. p. 3081, Dr. Bachman referencing he checked Dr. Evans' findings making no revisions).

Again, this case bears little resemblance, certainly not in any meaningful way, to the deficiencies in *Porter* and *Sears*. This is more the task of weighing the "fancier case," or what if any impact has the additional witnesses who would certainly add number but nothing of significant substance. Respondent/Petitioner failed to carry his burden of proof in show deficient performance or prejudice. See *Wong v. Belmontes*, 558 U.S. 15, 28, 130 S. Ct. 383, 391 (2009)("Schick's mitigation strategy failed, but the notion that the result could have been different if only Schick had put on more than the nine witnesses he did, or called expert witnesses to bolster his case, is fanciful."); *Byram v. Ozmint*, 339 F.3d 203, 210 (4th Cir. 2003) ("Despite this thorough investigation, Byram faults trial counsel for failing to obtain his adoption records, which might have provided more evidence that he suffered from FAS and more evidence of early childhood trauma. A failure to obtain available records, however, does not show that counsel's investigation was inadequate.").

In sum, the record shows a reasonable application of law on facts well supported by the record. Respondent/Petitioner is not entitled to any relief.

2.

Allegation that Trial Counsel Failed to Object to Submitting the Law Enforcement Aggravating Circumstance

Respondent/Petitioner contends the evidence did not support the S.C. Code § 16-3-20(C)(a)(7) aggravating circumstance: "murder of a law enforcement officer during or because of the performance of his official duties." This is a simple issue - whether the facts supported the charge (which they did). Indeed, that is the way the PCR judge resolved the issue. (See App. p. 4425-4432).[11]

Without a doubt, there is evidence of record supporting that the deputy was still on duty when kidnapped *and* that Respondent/Petitioner knew his victim was a law enforcement officer in his work-issued vehicle attempting to go home to end his work day when kidnapped from his vehicle. As with the above issue, the "factual basis" for Respondent/Petitioner's argument the circumstance was not applicable fails to take into account all the evidence presented.

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[11] Respondent/Petitioner also attacks the PCR judge's order for resolving the issue of whether objection should have been made on the grounds of state law, *i.e.* a sufficiency of the evidence issue as to whether there was evidence to support to the charge, rather than federal law. (Brief of Petitioner, p. 40). In other words, the PCR judge resolved the issue on applicability of the statutory circumstance to the facts presented, not upon a broader argument of unconstitutionality of the statute in general (a difficult argument indeed where Respondent/Petitioner concedes the applicability of the aggravating circumstance in multiple scenarios showing law enforcement officers in varying capacities, see Brief of Petitioner, pp. 35-37). Thus, Respondent/Petitioner is quite correct that federal law in general is not implicated in the argued basis for objection in support of his argument on the deficiency prong. However, Respondent/Petitioner failed to seek modification or specific ruling by filing a Rule 59 motion on same. See *Marlar v. State*, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) ("Because respondent did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review ..."). Thus, his present argue on same is not preserve for review. At any rate, his position is without merit. The factual basis presented at trial supports the charge so his condition precedent for claiming error fails.

The PCR judge – addressing Respondent/Petitioner's argument in his post-hearing brief that "the evidence submitted in support of the aggravator was insufficient as a matter of law," (see App. p. 4424, pp. 399-4002), (see also App. p. 4227, "Contrary to Respondent's argument, Mr. Evans does not assert, and this court need not decide, whether the statute applies only to facts matching these previous South Carolina cases. Evans's argument is that the statute does not apply in the circumstances of his case...) – rejected Respondent/Petitioner's attempt to read the statute as requiring an officer to be not only on duty, but also actively engaged in a law enforcement action for two discrete reasons: first, as contrary to the plain language of the statute, *i.e.* "during *or* because of the performance of his official duties," (emphasis added),[12] and, second, persuasive precedent from other jurisdictions evaluating such interpretation in light of similar provisions, which sided against such an artificial and, indeed, awkward, interpretation as that suggested by Respondent/Petitioner. (App. pp. 4425-4426). In particular, the PCR

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[12] Respondent/Petitioner's tepid argument by footnote indicating that the Legislature, by the 1976 amendment changing the aggravator from "while acting in the line of duty" to "during or because of the performance of his duties," intended "to tighten the nexus between law enforcement work and the murder," (Brief of Petitioner, p. 35 n.14), remains merely an unsupported assumption or opinion of legislative intent, unmoored to any specific history or interpretive precedent. The wording of the amendment is just as easily read to shift emphasis from only "law enforcement work" to encompass both law enforcement work *and* a law enforcement individual, which is actually more consistent with interpretations of similar aggravators in other states. See, for example, *White v. Com,* supra; *Malone v. State*, 168 P.3d 185, 216 (Okla.Crim.App. 2007) (noting difference between who was kill, and why the individual was killed). For instance, if the officer is selected to be killed for a variety of reasons, if just one of those reasons is because he is a law enforcement officer, then the aggravator is applicable. That is the case here. At any rate, there is no need to attempt to ascertain intent where the language is clear and unambiguous. See, e.g., *South Carolina Ambulatory Surgery Center Ass'n v. South Carolina Workers' Compensation Com'n*, 389 S.C. 380, 389, 699 S.E.2d 146, 151 (2010) (*citing Miller v. Doe*, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994) ("If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation...").

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

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

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

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

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

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

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

The PCR judge properly concluded "whether the deputy was 'on duty' at the time of ambush and kidnapping was properly submitted to the jury after receipt of the two lines of evidence properly admitted." (App. p. 4428). Of note is the PCR judge's rejection of Respondent/Petitioner's challenge to the sheriff's testimony that the deputy was still technically on duty. The PCR judge noted Respondent/Petitioner's statement the sheriff's testimony was offered "despite his being home well after the conclusion of his regular workday ...." (App. p. 4429). (See also App. p. 3999). The PCR judge chided[13]

[13] While Petitioner has objected to Respondent's use of the work "chided" in other filings, such is simply descriptive of addressing the argument. One should not be

Respondent/Petitioner with the reminder that kidnapping "is a continuing offense," and "[t]here was evidence that Evans had ambushed the deputy, taken him from his duty car, and held him hostage," noting that the jury had convicted of kidnapping and Respondent/Petitioner had not challenged the sufficiency of the evidence in support of the kidnapping conviction. (App. p. 4429).[14] Further, the sheriff s policy delineated that

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distracted by either use of this particular verb (it certainly is not used to offend), nor a complaint concerning its use. "Chided" is a verb often used in Supreme Court precedent. See, for example, *Michigan v. Bay Mills Indian Community*, ___ U.S. ___, ___ 134 S.Ct. 2024, 2040 (2014) (J.Sotomayor, concurring) ("the principal dissent chides the Court"); *City of Arlington, Tex. v. F.C.C.*, ___ U.S. ___, 133 S.Ct. 1863, 1871 (2013) ("We not only deferred under *Chevron* to the Commission's 'eminently reasonable ... interpretation of the statute it is entrusted to administer,' but also chided the Court of Appeals for declining to afford deference because of the putatively ' "statutory interpretation-jurisdictional" nature of the question at issue.'"); *Sears v. Upton*, 561 U.S. 945, 130 S.Ct. 3259, 3265 (2010) ("Justice SCALIA chides the Court for concluding that the trial court assumed, rather than found, that counsel's mitigation theory was a reasonable one."); *Presley v. Georgia*, 558 U.S. 209, 218, 130 S.Ct. 721, 727 (2010)(J.Thomas, dissenting) ("The Court chides the Supreme Court of Georgia..."); *District of Columbia v. Heller*, 554 U.S. 570, 635, 128 S.Ct. 2783, 2821 (2008) ("Justice BREYER chides us for leaving so many applications of the right to keep and bear arms in doubt..."); *Hamdan v. Rumsfeld*, 548 U.S. 557, 588, 126 S.Ct. 2749, 2771 n.19 (2006) ("Justice SCALIA chides us for failing to include the D.C. Circuit's review powers under the DTA in our description of the review mechanism..."). Such argument referencing "chided," or any other argument in this brief, is based on the parties' positions, and facts of record. It is neither actually, nor meant to be, uncivil or disrespectful to an attorney, the lower court nor this Court. Compare *United States v. Venable*, 666 F. 3d 893 n. 4 (4th Cir. 2012)("we feel compelled to note that advocates, including government lawyers, do themselves a disservice when their briefs contain disrespectful or uncivil language directed against the district court, the reviewing court, opposing counsel, parties, or witnesses."). Both parties should be able to zealously and fairly advocate their positions without fear of such challenges. In deference to objections, Respondent has attempted to make unmistakably clear the arguments in questions go to other arguments in the appeal alone.

[14] Respondent/Petitioner again attempts to rely on inadmissible hearsay to attack the interpretation of the evidence and the facts of that night by relying on media reports. (See Brief of Petitioner, p. 43, n. 19). The PCR judge rejected the reliance on media reports that suggested the officer was off-duty and at home – none of the reports were even mentioned in the PCR hearing. (App. p. 4431). Moreover, he noted the dangers associated with reliance on media reports as reports other than those suggested by Respondent/Petitioner in his brief reported the "ambush" of the deputy. (See App. p. 4431).

an officer was on duty while operating his vehicle. (App. pp. 4429-4430).[15] Also, other evidence, including Respondent/Petitioner's own testimony, indicated the officer victim was abducted from his county issued vehicle. (See App. pp. 4430-31). Further, the PCR judge noted Respondent/Petitioner's argument was myopic in scope: "Evans has not addressed the facts that are soundly against him, or offered, by competent evidence, other facts that challenge the facts of record." (App. p. 4431). Respondent/Petitioner continues that deficiency here. His argument is skewed and shaped by steadfast adherence to only one set of inferences from certain cherry-picked facts. Simply, as the PCR judge found, the record contains much more evidence than Respondent/Petitioner describes.[16]

Essentially, rather than demonstrating a case that actually does fall outside the statutory aggravating circumstance, for example, an off-duty officer killed on vacation while not performing any law related duty, or known to be a law enforcement officer, Respondent/Petitioner relies on his structured view of the evidence – a "domestic shooting," (see Brief of Petitioner, p. 37 and p. 41) – while other evidence of record does

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[15] Respondent/Petitioner's academic ponderings concerning possible positions in or round the vehicle as affecting application of the aggravating circumstance are of no moment. (See Brief of Petitioner, p. 41). It is true that defense counsel, after research and inquiry, believed the abduction from the car to be fatal to a legitimate argument that the officer victim was not still on duty. However, the fact is *in this case and on these facts* the officer victim was not yet in his home and he was taken from his car. Each case will necessarily turn on its own facts. What could be different facts in a different case is not relevant to the evaluation of facts here and the applicability of the aggravating circumstances in these discrete facts.

[16] This is especially clear on p. 42 of the Brief of Petitioner where he argues that the murder would have occurred even if the deputy had not been a law enforcement officer; however, Respondent/Petitioner's surety of this fact does not allow for the evidence that the murder and the events leading up to the deputy's shooting, though perhaps entwined with his personal relationship, was, in Respondent/Petitioner's own words, "bigger than that." (App. p. 1129, lines 15-25; p. 1134, lines 8-18). It does not explain the wealth of ammunition, the multiple blue bandanas taken to the scene, and the ties to a gang that values killing police officers in assessing rank. This evidence may not be omitted in fair analysis of the applicability of the aggravating circumstance.

support the kidnapping and shooting of a law enforcement office (albeit one that Respondent/Petitioner knew) for a myriad of purposes including enhancement in gang standing.[17] It is rather curious, though, that after this one-sided view of the evidence, Respondent/Petitioner then complains that the county issued car driven by the deputy was "plain, unmarked ... with no indicia of law enforcement, no visible blue lights, and no law enforcement communication radio." (Brief of Petitioner, p. 38, n. 18). The evidence clearly shows Respondent/Petitioner knew his victim and that his victim was a law enforcement officer, driving a county issued vehicle, on his way home from work. The evidence also shows he failed to ever complete his duty, and reach his home safely, before being kidnapped by Respondent/Petitioner.

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

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

Further still, the PCR judge rejected Respondent/Petitioner's argument that submission of the circumstance somehow allowed the admission of unfairly prejudicial testimony.[18] The PCR judge found:

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

(App. pp. 4432-4433).

Respondent/Petitioner has failed to show any error in the PCR judge's ruling – either a lack of factual basis or a lack of legal support. Respondent/Petitioner failed in his burden of proof to demonstrate counsel performed deficiently and he was prejudiced. He is not entitled to any relief.

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[18] This was merely one of four circumstances in aggravation found by the jury. (See App. pp. 1794- 1795). The death sentence may be affirmed even if there was error in submitting this particular circumstance. See *Stringer v. Black,* 503 U.S. 222 (1992). However, based on the facts of record, there is no error.

3.

Allegation Trial Counsel was Ineffective in Failing to Object to "General" Prison Conditions Evidence and Argument.

Respondent/Petitioner complains that counsel failed to object to evidence of prison conditions within Mr. O'Cain's testimony. (Brief of Petitioner, pp. 49-51). He also complains the State referenced prison conditions in closing argument. (Brief of Petitioner, p. 50). First, this issue is not preserved for review as it was not properly raised below, and was rejected on a procedural basis by the PCR judge after careful review of the pleadings and argument raised in the post-hearing briefs:

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

(App. pp. 4440-4441).

Respondent/Petitioner fails to make any argument as to why this unnoticed claim not properly raised to the PCR judge for adjudication on the merits, and having no adjudication on the merits – should be reached here. Instead, he relies on the same allegations the PCR judge reviewed in detail and found to be insufficient to allege a general prison conditions claim. (See Brief of Petitioner, p. 46). (See also App.p. 4440).[19]

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

> Evans responded in reply that the issue was fairly raised by his allegations, "(1) that trial counsel was ineffective for failing to object to the testimony of Lewis O'Cain, and (2) that trial counsel

The PCR judge also found that "the argument in Post-Hearing Brief going to ineffective assistance in the presentation of the defense witness was not raised, and no notice was given on such a claim." (App. p. 4440). Again, Respondent/Petitioner makes no argument as to why this Court should consider an issue and argument not properly presented below. The only portion of this argument preserved for review here is whether the prison conditions testimony was admissible in Mr. O'Cain's testimony given as expert in "gang activity and gang experience within the Department of Corrections." (App. p. 1590). (See App. p. 4434). Specifically, Mr. O'Cain's testimony centered on how Respondent/Petitioner would be treated or revered because of the gang overtones in the

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> was ineffective for failing to object to the Solicitor's use of that improper testimony during closing argument," and relied upon, specifically, his allegations IO(b)(4)(d) ("Counsel failed to object to the testimony of the State witness Lewis Edward O'Cain, which was unreliable, unscientific, exceeded the scope of the witness's expertise, and irrelevant, *see* 9(g) and IO(g), *infra,* for reasons including... (d) the witness was wrongfully allowed to testify as to the appropriate sentence, that being "death"; 10(d)(4)("Evans's death sentence was obtained in part as a result of the State's inflammatory, irrelevant and improper statements in closing argument. ... Such statements included, but are not limited to, arguments designed to arouse the passion and prejudice of jurors, assertions substituting his personal opinions as law, statements diminishing the jury's sense of responsibility for their verdict, misrepresenting the proper scope of mitigating evidence, arguments that were not reasonable inferences from the record, and misrepresentations of the nature of alternative punishments."); and 10(g)("O'Cain provided testimony that was inadmissible for reasons including, but not limited to, that the testimony was unreliable, exceeded the scope of the witness's expertise, and irrelevant").
>
> (App. p. 4440).

murder of Deputy Sapinoso.[20] The PCR judge considered Mr.O'Cain's testimony and opinion. (App. p. 4437). The judge noted, that Mr. O'Cain "opined, based on his experience, that he would assess Evans as a possible 'hard core gang member' who 'could take over a leadership role inside the Department of Corrections real quick' though he would have to have 24 hour monitoring for gang activity before he could segregate him. (R. p. 1590; p. 1596)." (App. p. 4438). The PCR judge noted that Mr. O'Cain "further opined that Evans's violence toward a law enforcement officer would make him particularly attractive as a possible leader. (R. p. 1597)." (App. p. 4438). The PCR judge found this testimony relevant and admissible in the penalty because: "1) the evidence supports the inference that the victim was chosen, in part, for enhancement of gang standing; and 2) the evidence supports that Evans's gang standing, particularly an enhanced gang standing as a result of his murder of a police officer, is probative of his future dangerousness." (App. p. 4438). Of particular note is the evidence relied upon by the trial judge in assessing the gang tie or overtone to the murder, and the admissibility of the gang-related evidence:

> It is undisputed that Evans bears tattoos that make reference to the "Crips," and that he expressed to defense experts who evaluated or met with him prior to trial that he was a member of a gang. (See R. p. 1633, lines 13-22 (Mr. Martin); p. 1703, line 19 - p. 1704, line 13 (Dr. Evans); p. 1727, line 6 - p. 1728 , line 14 (Dr. Berg); p. 1633, lines 13-22 (Mr. Martin). (See also, for example, State's Triple K, Quadruple J, Triple X, Triple W, Triple Y, Quadruple L) (photographs of tattoos).Defense counsel repeatedly testified at the PCR hearing that Evans admitted his gang membership. (See, e.g. June PCR Trans., p. 216; p. 261; p. 401). In his initial meeting with defense counsel Sumner, Evans informed counsel:
>
> > No bad trouble, no jail but brushes with the law. Defendant decided himself to move down with his dad. In gang in

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

> Cleveland the Crips, Crips neighborhood' [sic] cousins and uncles in the Crips... from 11, 12 years old through 17 years old at Greer High School, summers in Cleveland, spring break, Christmas, ran with the Crips. Defendant was a leader, "he worked his way up the ranks." Sold crack, coke and weed, never got caught. No "Crip" involvement in Greer. Sold crack, coke and week in Greer, never caught. Got caught in Greenville, quarter of a pound, Dick Warder got him probation.

(June PCR Tr. p. 401; Respondent's Exhibit 1). Evans was caught in the Greenville County Detention Center with a necklace that indicated Crip membership. (R. p. 1621). And he was known to socialize with other "known"[21]20 gang members, specifically Christina Rodriguez. (October PCR Tr. p. 72;109). Further, Evans specifically forbade counsel to meaningfully challenge his gang membership even in the face of advice that it could and would be used against him in the penalty phase. (See, e.g. June PCR Trans., pp. 216-218; p. 250; p. 260; p. p. 401). The defense team corrections expert, Mr. Martin, advised counsel that the "tattoos would make it more difficult for him to denounce gang membership," (June PCR Tr. p. 301), and that he would "have to be treated like the real thing for a long time," if he was a wannabe, (June PCR Tr. p. 301). In fact, he would later use that in his testimony to show that life without parole would not be an easy sentence for Evans specifically because of his gang-related affect or membership, and contest that he would get any "benefit" from gang membership. (June PCR Tr. p. 301; R. p. 1635 - p. 1636). Mr. Martin agreed with Mr. O'Cain that SCDC identifies "security threat group" members by two basic factors - self-admission and tattoos. (R. p. 1633). Evans would be identified as same because of his continued self-admission and tattoos. (R. p. 1633). In fact, immediately after trial, at reception in SCDC, Evans admitted membership. (October PCR Tr. p. 272). Moreover, even though he is on death row, away from general population and the concerns of gang membership in general population, Evans has never renounced membership. (October PCR Tr. p. 272; p. 274).

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

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

PCR Tr. pp. 260-261). The multiple tattoos are permanent, large and visible. (June PCR Tr. p. 252).

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

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

(App. pp. 4433-4436).

In sum, the gang evidence was clearly related not simply to future dangerousness in general, but to the crime, Respondent/Petitioner's known and admitted gang-related activity, and the way Respondent/Petitioner would be treated specifically because of his expression of inclusion in a gang. Gang membership here was specifically linked to criminal, dangerous, activity – activity that Respondent/Petitioner clearly and repeatedly embraced, which is not just a membership in a club, but a dedication to do violence,

especially in SCDC among other readily identifiable gang members. As the PCR judge noted, gang membership has been deemed evidence of future dangerousness, citing *Fuller v. Johnson*, 114 F.3d 491, 498 (5th Cir. 1997) ("A reasonable juror could conclude that membership in such a gang is relevant to future dangerousness"). (App. p. 56). Yet here, he considered the issue "more narrow still" in that:

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

(App. p. 4439).

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

- Petitioner sought relief under S.C. § 16-3-20, which reference review on direct appeal, and such review could not be resuscitated in collateral review;
- "As a factual matter, no simply 'general' prison conditions were offered, by either side, merely to argue harshness in sentencing;
- Respondent/Petitioner offered his own expert to fairly respond to properly admitted gang membership related conditions and benefits or harshness factors of gang membership within SCDC;

- And, at the time of the 2004 trial, even general prison condition evidence was being offered by both side and Strickland prejudice, under those circumstances, it would be highly unlikely to show unreasonable performance under then prevailing norms.

(App. pp. 4441-4442).

The PCR judge also found that both experts consistently tied the conditions testimony to Respondent/Petitioner's own gang affiliation or desired affiliation. (See App. p. 4443). While Respondent/Petitioner quotes in his brief what he considers "general prison conditions testimony" in attempted support for his argument, (see Brief of Petitioner, pp. 49-50, citing App. pp. 1601-1602), he can only do so by taking part of the testimony out of context. Consider the following passage, with only that portion quoted by Respondent/Petitioner in his petition in italics here, to see the difference context makes:

> Q: After reviewing these photographs and also these posters that you talked about, if Mr. Evans came to the Department of Corrections under a life sentence would he present a problem to you in relation to being a potential member or in a gang leadership?
>
> A: Yes, sir.
>
> With what I'm seeing here he is going to be someone that I'm going to have to monitor a lot with the tattoos, with the poster, with his violence from the street. He's somebody that I am going to try when he comes through our R&E Center to recommend that he go to an institution where I have the capabilities of monitoring him.
>
> *He, of course, will be able to - - he will get visits. He will be able to use the phones. He will be able to communicate by letters.*
>
> *Him* [sic] *from having life will not stop him from having a normal life inside prison such as he will be in an institution, will be in a dorm situation, two or three or four hundred inmates.* He's got the capacity once they've identified him and he's proven himself, I feel, depending on what I'm seeing here, that he would be capable of running something inside, which means he could create a lots of problems for us from the standpoint of robberies, burglaries, assaults on officers or staff.

> The drug industry inside would be something that he probably could jump into and be making money, not necessarily inside but money that's being passed on the streets.

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

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

> The argument at issue is confined to a few sentences in the transcript of record, (R. p. 1758, line 22 -p. 1759, line 5). The Solicitor's argument did reference conditions, but this Court discerns no comparison to death row conditions and life sentence conditions. Moreover, the Solicitor returned to the fact that a life sentence for him in the Department of Corrections would be different because of his gang affiliation. Again, this is the very reason the limited conditions reference was admissible here. The argument did not exceed the necessity of fair response. It was based on the record and reasonable inferences, and the entire argument on mere conditions was extraordinarily brief (merely 9 lines of the transcript), and did not create a danger of "infecting" the proceedings "with unfairness." *See, e.g., State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007), *citing Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct.1868, 40 L.Ed.2d 431 (1974) ("The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.") This is especially so in light of the conditions testimony that was properly admitted as related to Evans's treatment due to gang affiliation concerns.

(App. p. 4444).

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

In sum, not only was a "general conditions" issue was not properly before the PCR court and not heard on the merits, but also, if it had been properly raised, there could

be no meritorious argument where the testimony at issue is not mere "general conditions" testimony. Respondent/Petitioner is not entitled to any relief.

4.

Allegation Trial Counsel was Ineffective "For Failing to Object to and Counter the Evidence in Aggravation Presented by Witness Lewis O'Cain and the Solicitor's Inflammatory Rhetoric Extrapolating from that Testimony in the Sentencing Summation."

Respondent/Petitioner essentially disagrees that any gang information or argument should have been made. (See Brief of Petitioner, p. 57). Again, his major flaw is structuring a view from only a part of the evidence, while ignoring remaining evidence quite detrimental to his theory.

Respondent/Petitioner argues: "Counsel failed to challenge unreliable and irrelevant testimony from a State's witness on gangs, and the State's sentencing summation characterizing what was a domestic tragedy as a gang related execution style cop killing." (Brief of Petitioner, p. 57). The trouble with Respondent/Petitioner's oft repeated position is that the evidence supports either or both of those scenarios.

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

While Respondent/Petitioner does take time to criticize counsel for not "investigating" Mr. O'Cain or obtaining a report, (see Brief of Petitioner, p. 59), he forgets that he himself directed counsel not to challenge his gang membership, admitted his gang membership, and admitted his drug business. (See App. pp. 4433-4436). Counsel did not rest on these assertions, though. Counsel had a former corrections official interview Respondent/Petitioner, and he called Respondent/Petitioner's expressed participation in gangs "textbook" and gave the advice pre-trial that whether Respondent/Petitioner was actually in a gang or not, he would be treated as such within SCDC. (See App. p. 4434; p. 2272; p. 2384; p. 3775). Respondent/Petitioner's present assertion of error is too little, too late.[22]

As to his challenge to methodology, the PCR judge properly found "[t]here is no requirement that all expert testimony be 'scientific' in nature." (App. p. 4437, citing Rule 702, SCRE). Moreover, defense counsel's expert acknowledged the SCDC policy. (See App. p. 1633; p. 2272). Further, he forgets his own expert's testimony in PCR, that membership is often suspected by tattoos and admissions. (See App. p. 3033; p. 3044). As to his argument the evidence merely goes to general "beliefs and associations" and counsel should have objected, (Brief of Petitioner, p. 61),[23] again, he forgets that he

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

[23] His assertion that the "only purported evidence of gang membership is this case is Evans's tattoos and two homemade posters," (Brief of Petitioner, p. 61), is plainly inaccurate. In rebuttal, Petitioner/Respondent relies on the review of evidence on gang involvement, admission of gang involvement, directions to counsel not to challenge gang involvement, evidence of a planned ambush of the deputy, and multiple blue bandanas, indicative of gang involvement and left at the scene, along with appropriate citations to record, on pages 37-39 in this brief. Petitioner also offers "recent case finding gang-

himself made the gang connection to the murder, and, in turn, to future dangerousness in prison. Compare *Dawson v. Delaware*, 503 U.S. 159, 166, 112 S.Ct. 1093, 1098 (1992) ("abstract" beliefs and/or associations not admissible but "associational evidence might serve a legitimate purpose in showing that a defendant represents a future danger to society. A defendant's membership in an organization that endorses the killing of any identifiable group, for example, might be relevant to a jury's inquiry into whether the defendant will be dangerous in the future. Other evidence concerning a defendant's associations might be relevant in proving other aggravating circumstances."). One should consider specifically the testimony on the fear of crime and violence directed toward correctional officers or staff in light of the gang's reverence for killing officers. (See App. p. 1597; pp. 1601-1602).

To the extent Respondent/Petitioner argues the State presented "misleading" evidence on gang activity, (Brief of Petitioner, p. 62), that issue was separately raised in the PCR action, and denied. (See App. pp. 4496-4497). Respondent/Petitioner has failed to separately raise the issue here. At any rate, for all the same reasons, most specifically Respondent/Petitioner's own repeated admissions of gang membership and criminality, specifically drug trade, (see pp. 38-40, infra), the record cannot support Respondent/Petitioner's complaint of error. Respondent/Petitioner's additional assertion that the "only purported evidence of gang membership is this case is Evans's tattoos and two homemade posters," (Brief of Petitioner, p. 61), similar to his reference to the facts of the reason for the murders, is inaccurate. In rebuttal, Petitioner/Respondent relies on

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related evidence erroneously admitted," citing *State v. Hinton*, 738 S.E.2d 241, 246-47 (NC.App. 2013). Again, Respondent/Petitioner finds no support in the offered case law as his gang membership was tied to the crime. See *State v. Jackson*, ___ S.E.2d ___, 2014 WL 3823715 (N.C.App. 2014)(distinguishing *Hinton* by finding gang reference necessary for explanation of relevant note written by defendant in Crip code).

the review of evidence on gang involvement, admission of gang involvement, directions to counsel not to challenge gang involvement, evidence of a planned ambush of the deputy, and multiple blue bandanas, indicative of gang involvement and left at the scene, along with appropriate citations to record, on pages 38-40 in this brief.

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

Again, Respondent/Petitioner simply does not fairly address the facts of record in their totality in his argument; rather, he attempts to create a basis for finding prejudice in the sentencing phase by simply denying the applicability of the law enforcement aggravator, and ignoring the evidence of the crime in its totality, and evidence of his own characteristics and background. (See Brief of Petitioner, p. 63).[24] These are all supported,

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[24] Respondent/Petitioner has complained in the prior briefing of Petitioner/Respondent's repeated references to omissions in the facts; however, the omission of facts is a common thread throughout Respondent/Petitioner's briefing that, if left unaddressed, would result in a quintessential example of unfairness. If either party is prevail, it must be on the facts of the case and the fair application of the law, not reliance on a parsed record. Accord *State v. Funchess*, 267 S.C. 427, 430, 229 S.E.2d 331, 332 (1976) ("the presence of evidence to sustain the crime of a lesser degree determines

however, by legitimate evidence and necessary to make an individual determination of his moral culpability, which the jury is charged with making. See *Tison v. Arizona*, 481 U.S. 137, 149 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."); *State v. Byram*, 326 S.C. 107, 118, 485 S.E.2d 360, 366 (1997) (noting jury tasked with "assessing [the defendant's] moral culpability and blameworthiness"); *State v. Bell*, 305 S.C. 11, 20, 406 S.E.2d 165, 170 (1991), quoting *South Carolina v. Gathers*, 490 U.S. 805, 812, 109 S.Ct. 2207, 2211 (1989) ("Evidence relating to the circumstances of the crime is relevant in a capital sentencing proceeding if it provides 'information relevant to the defendant's moral culpability.'"). Cf. *State v. George*, 323 S.C. 496, 514, 476 S.E.2d 903, 914 (1996) ("Mitigating circumstances are details specific to the character of the defendant on trial and/or the circumstances of the crime he committed which are considered in order to reduce the degree of his moral culpability or guilt.").

As the PCR judge properly found, the evidence in this case was fairly presented. Respondent/Petitioner is not entitled to any relief.

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whether it should be submitted to the jury and the 'mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice.'").

5.

Allegation Trial Counsel Failed to Seek a Change of Venue Based on "Extraordinary Circumstances" of Trial "Conducted in the Courthouse that was a Victim's Workplace."

Respondent/Petitioner concedes trial counsel moved for change of venue based on pre-trial publicity, but argues counsel failed to ask any questions about whether the fact the victim had worked in the courthouse would create undue sympathy. (Brief of Petitioner, p. 65). Factually, he is not quite right - the deputy victim did not work at the courthouse, but, he had, nevertheless, worked courtroom security before and that would be referenced in the trial. (See App. p. 1531). At any rate, the PCR judge noted the "careful questioning by trial counsel and the trial judge to determine any bias due to media coverage," (App. p. 4422), and found "the denial of the motion was fully and fairly supported by the jurors responses, which the trial judge relied upon in denying the motion, finding no evidence of such 'fixed opinions.'" (App. p. 4422). Respondent/Petitioner apparently does not contest the findings and ruling on the more general issue. Yet, implicit in the rejection of error based on the media coverage is the fact that the jurors had no preconceived and fixed notions on guilt or responsibility, which would include opinions on the identity of the victims. Even so, the PCR judge considered whether "the process was incomplete as the trial was held in the victim's workplace and the jurors were not questioned or the trial moved." (App. p. 4423). He found the record supported neither deficient performance or prejudice in this regard. (pp. p. 4424).

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

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

(App. p. 4423).

In his argument below, Respondent/Petitioner relied upon an Eastern District of New York case, (see App. pp. 4423-4424), which he has apparently abandoned here for a more general argument on appeal. (See Petition, pp. 63-65; Brief of Petitioner, pp. 66-67). However, the distinguishing factors listed by the PCR judge have applicability in assessing this assertion of error.

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

> ... The case involved an assault on a federal officer, an Assistant United States Attorney. A change of venue was not necessary by law, but was granted. However, that case does no translate well to the instant situation for several reasons.
>
> First, the employee at issue in Wright was an active employee whose "name was posted like any other on our courthouse directory." 603 F.Supp.2d at 508. Second, the assault took place in the courthouse. Id. Third, there was no substitution of local counsel or local judges (as there was here) to ensure bias (or even the appearance of impropriety) was not an issue in the general proceedings. Fourth, the court did not find per se error. In fact, the change of venue was granted with the consent of the government.
>
> Here, the court system worked well to find non-biased participants - judges and counsel. Further, there is a remoteness here that was not present in the New York case. The deputy was regrettably not able to be

> present, was not a witness, the crime did not occur in the courthouse, and the deputy had even transferred to another location at the time he was murdered. Even if the logic was applicable, the case is still distinguishable factually. Moreover, to request *voir dire* on the subject would likely highlight to jurors a connection that was not otherwise developed until the penalty phase, where individualization of the victim is wholly proper.

(App. pp. 4423-4424).

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

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

(App. p. 4424).

The PCR judge reasonably concluded same based on the absence of any evidence to support the speculation of unfair prejudice. Moreover, even Respondent/Petitioner's factual basis for an argued "presumption of prejudice" would rest on a more direct connection than is evident here. (See, for example, Brief of Petitioner, p. 67, suggesting that the victim in the case works in the courthouse). Yet, even that factual basis for presumption of prejudice and necessity of a change of venue lacks support. See *United States v. Walker*, 665 F.3d 212, 223 (1st Cir. 2011) ("The mere fact that the victim of the crime is a court employee in the district is not, in and of itself, a reason sufficient to compel a transfer of venue."). But again, the jurors were thoroughly questioned about pre-trial publicity, and no response indicated any basis for finding bias or prejudice. Respondent/Petitioner failed to show deficient performance or resulting prejudice. Respondent/Petitioner's is not entitled to any relief.

6.

Allegation Trial Counsel Failed to Object to Victim Impact Testimony.

Respondent/Petitioner first argues that counsel failed to object to victim-impact evidence from Sheriff Loftis and Deputy Tripp - the only two witnesses to testify as to loss from the perspective of both law enforcement and a personal level. (Brief of Petitioner, pp. 67-68). He argues they were allowed to testify to more than the "brief glimpse" into the victim's life pursuant to *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597 (1991), because their testimony was moving and underscored they knew him in the immediate surroundings, and thought of him in the immediate surroundings, *i.e.* the courtroom. (Brief of Petitioner, p. 68). He then argues their testimony was incomplete because they centered on personal loss instead of "the chilling effect on law enforcement work, following the death of an officer in the line of duty, due to concerns about officer safety." (Brief of Petitioner, p. 69). In effect, he argues both that there was too much and too little. Within that conflicted position is the actual fact that the State offered a reserved presentation from these two witnesses, Sheriff Loftis and Deputy Tripp. To the extent Respondent/Petitioner contends because the State offered a reserved presentation of available *Payne* evidence, that is somehow supportive of his position that the separate facts of the crime constitute a "domestic tragedy" as opposed to the officer being killed "during or because of the performance of his official duties," (Brief of Petitioner, p. Petition, p. 69), that is, to say the least, a confused position (and one based, again, on a parsed and incomplete view of the whole of the evidence). Even so, and once again, Respondent/Petitioner admitted ambushing the officer at his car before the officer could reach the safety of his home. Because the State did not seek additional, less personal

evidence from these two officers does not diminish the existing evidence that well supports the law enforcement aggravating circumstance submitted. As to the *Payne* evidence submitted, the PCR judge correctly found no error.

"[A] State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." *Payne v. Tennessee*, 501 U.S. 808, 825, 111 S.Ct. 2597, 2608 (1991). This Court has approved of limited victim-impact evidence showing "'traditional trappings of a law enforcement officer's funeral, demonstrating the general loss suffered by society." *State v. Bixby*, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010), *cert. denied*, 131 S. Ct. 2154 (2011). The evidence here was much more personal, much less demonstrative of overt emotion, and equally brief. As the PCR judge found:

> ... The testimony was tailored specifically to the impact the deputy's murder had on them specifically, and the local force, who personally knew him. Evans's argument in regard to "additional prejudice" due to Deputy Tripp's reference of the victim having at one point worked in the courtroom also fails. This evidence does nothing more than individualize the murdered deputy - the very essence of what victim impact evidence should do, to properly demonstrate the loss from the convicted defendant's act. *Payne, supra*. Lastly, Evans's oft repeated argument that the law enforcement aggravator was not properly submitted has been rejected for all the reasons discussed elsewhere in this order. Thus, Evans' s argument in regard to "additional prejudice" due to this particular victim impact evidence is also rejected.

(App. p. 4446).

Secondly, Respondent/Petitioner complains that counsel was ineffective for attempting to limit the victim-impact evidence from Marcia Sapinoso. (Brief of Petitioner, p. 70). He argues basically it was just too much, and too moving. (Brief of Petitioner, p. 71). Respondent/Petitioner failed to argue a specific error below regarding

Ms. Sapinoso's testimony concerning the crime as she experienced it or the impact on her based upon the loss of her son and husband. Further, such an issue is not addressed in the Order. It is barred from review. *Marlar, supra*. Even so, the issue is clearly without merit.

Respondent/Petitioner argues that her testimony as to "her experience of the crime - including her effort to work a gun with the 911 operator's help -was harrowing," and simply too much. (Brief of Petitioner, 70). The argument concedes the relevance of that particular testimony as Ms. Sapinoso recounted her actual experiences - her reaction to statements and sounds - during the extended period Respondent/Petitioner terrorized the victims. (See App. pp. 1549-1553). This particular testimony falls more to circumstances of the crime than pure victim impact evidence. At any rate, the record shows no overt or excessive emotion, though she stopped briefly to compose herself when describing that the SWAT team, while rescuing her and her grandson, would not allow her look "to see if Joey and my husband was okay." (App. p. 1553). In short, the record does not show error. Respondent/Petitioner cannot show deficiency or any resulting prejudice in regard in counsel's treatment of the testimony.

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

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

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

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

The PCR judge reasonably, and quite logically, found the testimony Respondent/Petitioner contests was similarly offered as evidence of the child's fear as a result of his experiences, not for the truth of the matter asserted. For instance, one of the statements at issue related that the child did not want to go trial, nor have his mother go, for fear of his mother being killed. That was not offered or accepted for the purpose of establishing his mother might get killed, but to show the great fear of loss following the murder of his uncle and grandfather. This is precisely the kind of evidence *Kelly* described as admissible.

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

quality of victim impact evidence. (See n. 10, supra, discussion on evaluating prejudice and the cumulative error doctrine).

Lastly, his reliance on *United States v. Johnson*, 713 F. Supp. 2d 595 (E.D. La. 2010), (see Brief of Petitioner, p. 71), is misplaced. The federal District Court in Louisiana did not challenge or deny the general admissibility of *Payne* evidence. The court, while finding as a "fundamental fact that permissible victim impact evidence is inherently emotional," also acknowledged that that alone does not create an "unduly prejudicial" atmosphere supportive of finding the sentencing proceeding was "fundamentally unfair." 713 F. Supp. 2d 5 at 624, quoting *Payne*, 501 U.S. at 825.[25] -23. This Court, in essence, gave a similar acknowledgment in its ruling in *Bixby*.

As referenced above, the evidence at issue in *Bixby* was a funeral videotape which did show, briefly, "the folding of an American flag over the closed coffin; the playing of 'Taps' on a trumpet; footage of mourners; and a recording of a fictional 911 call in which Deputy Wilson is given permission to 'return home,' a tradition at law enforcement funerals." 338 S.C. at 554-555, 698 S.E.2d at 586. This Court firmly set out that "[u]nder the law, simply saying that evidence such as this was 'moving' is not enough to require reversal of a capital sentence." 338 S.C. at 556-557, 698 S.E.2d at 587. There will

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

necessarily be some emotion in a capital sentencing proceeding. This is so whether the emotion at issue is for the State or the Defendant, as emotion will flow from the evidence or witnesses for each depending on the evidence submitted. Again, here, there is no indication of improper evidence and/or uncontrolled emotion. There is no basis for finding error in counsel's performance (especially here where Respondent/Petitioner challenges the failure to "limit" the evidence in pre-trial - the emotion he references could surface independent of a limitation on evidence).

The PCR judge reasonably rejected Respondent/Petitioner's assertion of deficient performance. Respondent/Petitioner is not entitled to any relief.

7.

Allegation Trial Counsel Failed to Object to Closing Argument.

Finally, Respondent/Petitioner argues counsel should have objected to the solicitor's closing argument that was unsupported on the record[26] and "strayed from the fair and appealed to jurors' personal biases." (Brief of Petitioner, p. 71). He claims the solicitor's argument contained "insertion of his personal opinions and judgment about the appropriate sentence, and the authority of the state judicial process," called Respondent/Petitioner "evil" and "mean," and improperly commented on the evidence supporting the death penalty. (Brief of Petitioner, p. 72). The PCR judge found that a review of the record dispelled the notion of error.

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

> Evans complains the argument infers the state is already decided that a death sentence is the appropriate punishment and wrongly absolved the jury of responsibility. (Evans's Post-Hearing Brief, p. 168, referencing argument on R. p. 1747). However, nothing in the argument suggested "the solicitor attempted to minimize the jurors' own sense of responsibility for appellant's fate by stressing that he had himself already made the same decision that he was now asking them to make." *State v. Woomer*, 277 S.C. 170, 175, 284 S.E.2d 357, 359-360 (1981). Mere mention of the solicitor's involvement in the process to seek the death penalty is not improper. *See State v. Bell*, 302 S.C. 18, 34, 393 S.E.2d 364, 373 (1990). There is no specific absolution decree. The specific passage referenced is an introduction to the system, and the Solicitor noted that "you are the citizens that the legislature has designated to carry out this function," thus

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[26] Respondent/Petitioner mentions summarily his disagreement with the solicitor's comments making any reference to prison conditions or the theory that the crime was a "gang crime" and not a "domestic shooting." (Brief of Petitioner, p. 71). The first matter references the procedurally barred issued discussed in response to Issue 3, and to, an extent, the gang evidence discussed in response to Issue 4, argued above. The responsive argument presented above is incorporated by reference as if repeated verbatim. Further, as to the solicitor's comments going to the "gang crime," as the evidence of record supports the theory. Petitioner/Respondent incorporates the multiple comments herein regarding same.

> placed emphasis on the role of the jury. (R. pp. 1747-1748). Additionally, the solicitor requested the death sentence based on the evidence, (see R. p. 1759), and specifically reminded the jury it was their decision and theirs alone (see R. pp. 1759-1760). There was no improper personal opinion (i.e. lessening the duty or responsibility of the jury) or demand for a sentence. The focus firmly remained on the defendant, his acts, and his appropriate punishment to be determined by the jury. *See Smart v. State*, 278 S.C. 515, 526, 299 S.E.2d 686, 692-693 (1982) (cautioning such comments must be case specific and defendant specific). Applicant has failed to show an improper argument was made to which defense counsel should object.

(App. pp. 4448-4449).

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

> Evans also complains about the solicitor's reference to "mean evil people." (Evans's Post-Hearing Brief, p. 169). The comment referencing "mean evil people" and the death penalty goes to the jury's process of determining the appropriate sentence, and it was directly tied to same in the solicitor's argument. (R. pp. 1750-1751). He never usurped the jury's decision, but remained steadfast that it was the jury's determination based on the evidence presented. *See generally Kinder v. Bowersox*, 272 F.3d 532, 552 (8th Cir. 2001) (finding no unreasonable application of federal law where state supreme court did not reverse on the following argument, "Evil stares at you in the courtroom... We don't want to share our streets one day with evil. We cannot risk one day sharing our lives and our world with evil" but found "the statements were proper argument because they addressed [the individual defendant's] character and the appropriate punishment for his crime.") (emphasis in original).

(App. p. 4449).

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

> ... though Evans complains of the "graphic language" in the argument, the Solicitor fairly referenced the horrendous circumstances of the crime which the jury heard. (Evans's Post-Hearing Brief, p. 1751). Descriptions

> of execution-style shootings can be graphic, but here the description is not inflammatory or otherwise improper. (See, for example, R. p. 1759, describing circumstances as "that sound of bullets piercing the head of a human being and seeing the blood and continuing execution style to shoot these people."). *Compare State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (solicitor's statement in child murder case that there would be an "open season on babies in Lexington County" if death sentence was not recommended was improper as "[t]he sole purpose of this statement was to inflame the jury"). (App. pp. 4449-4450).

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

> As to Evans's complaint the Solicitor instructed the jury to disregard mitigation, (Evans's Post-Hearing Brief, p. 172) Evans has shown nothing more than a comment on the weight of the evidence, (see R. pp. 1753-1754), which the solicitor is allowed to do. *Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010) ("The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence" and the comment on weight to be credited). Moreover, the trial judge specifically instructed the jury they shall consider the statutory mitigating circumstances submitted, (R. p. 1783); that they "should consider any nonstatutory mitigating circumstances that have been shown to exist by the evidence," (R. p. 1783), and, even if the jury found no mitigating circumstance to exist but at least one aggravating circumstance, they could still recommend life, (R. p. 1785).

(App. p. 4449).

This Court has recently affirmed again the importance of reviewing jury arguments as a whole. *Sigmon v. State*, 403 S.C. 120, 129, 742 S.E.2d 394, 399 (2013) ("Although within this portion of the closing the solicitor appears to be asking the jurors to accord some weight to his determination of the appropriateness of the death penalty, we do not believe the statements are objectionable within the context of his entire argument.").

Moreover, the PCR judge reasoned if any of the limited comments could possibly be construed as error, such error could only be harmless "in light of the tremendous evidence in aggravation." (App. p. 4450). His findings and conclusions are well supported. However, he also reasonably found no error based upon his detailed review of the comments in context of the facts and circumstances in the record. His decision is well supported by the record, which he cites repeatedly in confirmation of his detailed evaluation of the actual arguments. Moreover, his findings are supported by existing state precedent, as cited in the Order. Respondent/Petitioner failed to carry his burden of proof. He is not entitled to any relief.

CONCLUSION

For all the foregoing reasons, Petitioner/Respondent, the State, submits that this Court should deny relief. There is probative evidence in the record supporting each of the factual findings set out by the PCR judge, and his ruling constitutes a fair and reasonable application of the prevailing law. Thus, his ruling on the issues presented in Respondent/Petitioner's appeal should be affirmed. *See Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) ("On appeal, the PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record."). Respondent/Petitioner is not entitled to any relief.

Respectfully submitted,

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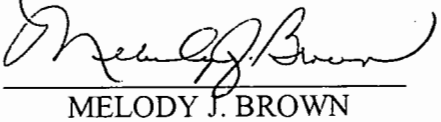
By: 
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ATTORNEYS FOR PETITIONER/ RESPONDENT

August 21, 2014.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
In The Supreme Court

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

Kamell D. Evans, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

Appellate Case No: 2011-188687

PROOF OF SERVICE

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

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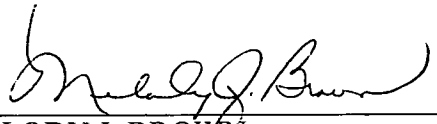
This 21st day of August, 2014.



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