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[PP. 4001-4500]

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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 Delshawn Evans, #6016,

Respondent/Petitioner,

v.

State of South Carolina,

Petitioner/Respondent.

APPENDIX

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ascertaining the meaning of (C)(a)(7); nor, of course, are they subject to the narrow reading that the Eighth Amendment requires of statutory aggravating factors.

Further, the burden of proof a plaintiff must satisfy to establish a valid PSOBA civil claim is substantially lower than the burden the State must satisfy to establish an aggravating circumstance in a capital case. The PSOBA is thought to be a remedial statute, and as such the PSOBA "should be construed liberally to avoid frustration of its beneficial purpose." *Bice v. United States*, 72 Fed. Cl. 432, 441 (2006). For this reason, the PSOBA requires any question arising from the circumstances of the officer's death be resolved in favor of payment of the death benefit. See *id.* at 450; 28 C.F.R. § 32.4. The claimant need only satisfy a "more likely than not" standard. 28 C.F.R. § 32.5. The PSOBA's leniency with regard to determining whether an officer's death occurred during the line of duty stands in stark contrast to Section 16-3-20(C)(a)(7)'s exacting requirements. Thus, that an officer's death may have satisfied the PSOBA's "in the line of duty" requirement does not indicate whether that same officer's death satisfies Section 16-3-20(C)(a)(7)'s "during or because of the performance of his official duties" requirement. Finally, the PSOBA benefits process is not adversarial; the Sheriff is free to advance any theory he might decide upon without the safeguards associated with the adversarial process.

Even if the Sheriff Department's protocol was the equivalent of the statutory standard, it is questionable whether that would have been met here beyond a reasonable doubt. Assuming Greenville deputy sheriffs are subject to call while driving their vehicles during off-duty times, it seems doubtful that under this policy a deputy sheriff remains "on-duty" while inside his home, after his workday has concluded, some four hours after having parked his department vehicle. Further, even if the court takes an expansive view of Section

(C)(a)(7)'s "during" requirement to include events preceding the shootings, the State's attempt to employ the statute sits in stark contradiction to the Solicitor's argument that the crime occurred within the victim's "castle."[41] R. 1466-67. In fact, the only evidence that involves Joe's vehicle in this case is Kamell's statement that "I drove over to her parents' house and parked my truck up the street and walked to the house. Her brother, Joe, was getting out of his car in the driveway." R. 1229.

After one becomes familiar with the facts of the case, it is clear that the tragedy was an outgrowth of a very troubled romantic relationship between the victims' daughter and sister and Mr. Evans. No one would argue the aggravator was relevant to the killing of Mr. Sapinoso, Sr., who was not employed as a law enforcement officer. Answering two simple questions demonstrates the inapplicability of the aggravator to either of the killings. First, would the murders have occurred had Joe Sapinoso been unemployed? Unfortunately, the answer is unquestionably yes. Second, had some other law enforcement officer been walking up the entrance to the Sapinoso home would that person been a victim? The answer is no because that person would not have had any connection to Christina Rodriquez. These answers are the logical outgrowth of understanding that the murders were in fact domestic violence and the nexus of the crime is not to law enforcement but to Christina Rodriguez and her relationship to Mr. Evans and the victims.

2. Trial counsel was deficient for failing to object that under the facts of this case statutory aggravating factor (C)(a)(7) constituted an arbitrary and unnarrowed application of the state's death penalty law, violating Article I section 15 of

[41] This characterization is consistent with law enforcement's pretrial account of the events. In statements to the media in the days immediately after the shooting, investigators described the victim as being "off-duty": "He was just off duty, there at his parent's house." See "Suspect Could Face Death Penalty in Deputy Shooting," April 4, 2003, at http://www.wyff4.com/r/2084144/detail.html (last visited October 1, 2010 ("Sapinoso was off-duty at the time of the shooting, investigators told News 4."); see also "Other Upstate Officer Shooting Deaths," at http://www.wyff4.com/news/11130582/detail.html (last visited October 1, 2010) (describing the shootings as occurring after the victim returned home at the conclusion of his shift).

> the Constitution of South Carolina, S.C. Code Ann. § 16-3-20(C),[42] and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

A cardinal principle of Eighth amendment jurisprudence—established in cases such as *Gregg v. Georgia*, 428 U.S. 153 (1976), *Godfrey v. Georgia*, 446 U.S. 420 (1980), and more recently *Kennedy v. Louisiana*, 128 S.Ct. 2641 (2008), is that states must give narrow and precise definition to the aggravating factors that can result in a capital sentence. See *Kennedy*, 128 S.Ct. at 2659 (citing *Godfrey*, 446 U.S. at 428); *id.* at 2659 (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)). The statutory language of Section 16-3-20(C)(a)(7), which establishes as an aggravating factor "[t]he murder of a . . . local law enforcement officer . . . *during or because of the performance of his official duties*," therefore, must be read narrowly. In South Carolina, the Supreme Court has interpreted the statute accordingly to apply in cases where law enforcement officers are killed in relation to their job. See *supra* at 73, n.36.

Other state courts interpreting similar statutory provisions have narrowly interpreted the statute to reach the conclusion that the victim's status as a member of the law enforcement community by itself is insufficient to satisfy this aggravating circumstance. As the Nebraska Supreme Court cautioned when interpreting its state's similar aggravating circumstance, this is particularly troublesome in circumstances such as those at issue in Mr. Evans's case:

> If the State's interpretation prevails, then killing at any time any person who happens to be a law enforcement officer justifies the application of [the] aggravating statute for imposition of the death penalty. . . . [T]his may raise serious constitutional issues . . . inherent in the dichotomy of two homicide victims when one victim is a law enforcement officer who is not performing an official duty at the time of death, while the other victim is not a law enforcement officer. There is no legal distinction between the homicide victims reflected in the dichotomy. Yet, in the first part of the dichotomy, one is exposed to the death penalty . . . while in the second part of the dichotomy one is not exposed.

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[42] S.C. Code Ann. § 16-3-20(C) states, in part: "The trial judge, before imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor."

State v. Reynolds, 457 N.W.2d 405, 426-27 (Neb. 2004) (disapproved on other grounds by *State v. Messersmith*, 473 N.W.2d 83 (Neb. 1991))[43]; see also, e.g., *White v. Commonwealth*, 178 S.W.3d 470, 480 (Ky. 2005) ("We cannot read the statute so broadly as to reduce this requirement to such an extent that an aggravating factor instruction is allowed whenever an offender kills a sheriff or other law enforcement officer."); *State v. Yager*, 85 P.3d 656, 667 (Idaho 2004) ("Trooper Huff's mere status as a police officer . . . is thus insufficient to support a conclusion that the aggravating factor . . . was proven beyond a reasonable doubt."); *Mease v. State*, 539 So.2d 1324, 1329 (Miss. 1989) (holding that victim "was a peace officer does not render his death capital murder per se.").

a. The circumstances of this case do not meet a narrowed definition of "*because* of exercise of official duties."

In *State v. Yager*, the Idaho Supreme Court considered whether the killing of a police officer while she was on-duty (walking toward her official police vehicle parked in the department's parking lot) fell within the state's aggravating circumstance. I.C. § 18-4003(b). Idaho's capital statute requires that a peace officer be killed "*because of* the exercise of official duty." *Id.* at 666 (emphasis added). The state contended that since the officer was in uniform and on-duty the aggravating circumstance statute was satisfied. *Id.* at 665. The defendant argued that the purpose of an aggravating circumstance in a capital trial is to narrow the class of offenders for which the death penalty is appropriate; therefore, the defendant reasoned, the statute should be read to sanction the death penalty only when an officer is killed *because of* some act that police officer did in an attempt to enforce the law. *Id.* The court compared Idaho's definition of first-degree murder ("any murder of any peace

[43] Neb.Rev.Stat. § 29-2523(1)(g) (2002): "The victim was a public servant having lawful custody of the offender or another in the lawful performance of his or her official duties and the offender knew or should have known that the victim was a public servant performing his or her official duties."

officer . . . who was acting in the lawful discharge of an official duty") with the language of the aggravating circumstance ("a murder committed against a . . . police officer . . . because of the exercise of official duty"), determining that the aggravating circumstance was reserved for a narrower class of individuals than those who kill officers exercising any official duty. See *id.* at 666-67. Since the state failed to establish the victim was killed because of an exercise of her official duties, Idaho's Supreme Court affirmed the lower court's determination that the state could not pursue a capital sentence against the defendant. *Id.* at 667.

The "narrow and precise" definition given to the aggravating factor in *Yager* is consistent with the United States Supreme Court's instructions regarding how state courts are to read capital aggravating circumstances statutes, and it does not encompass the circumstances here. It was Evans's troubled romantic relationship with the victim's sister that brought Evans to the victims' home on the evening of April 1, 2003. R. 1425-47. Joe Sapinoso's professional duties had no impact on this tragedy. R. 1143-49.

b. The circumstances of this case do not meet a narrowed definition of "*during* the . . . exercise of official duties."

South Carolina courts have yet to examine if and when the killing of an officer, who is not working as a law enforcement officer at the time of his death, could fall within the scope of Section 16-3-20(C)(a)(7). Courts in jurisdictions with similar capital aggravating circumstance statutes, however, have considered the question. Their decisions as to when law enforcement officers command the protection thought to be afforded by such statutes often turn on whether the officer was performing general or common law policing duties at the time of their killing (see, e.g., *State v. Gaines*, 332 N.C. 461, 464-65 (N.C. 1992)), and often rest on the policy rationales underlying such aggravating circumstances, as articulated by the United States Supreme Court in *Roberts v. Louisiana*, 431 U.S. 633 (1977).

In *Roberts*, the U.S. Supreme Court examined a Louisiana capital aggravating circumstance similar to South Carolina's Section 16-3-20(C)(a)(7). The Court's well-known *per curiam* decision found Louisiana's statute unconstitutional because it mandated a death sentence for defendants convicted of murdering peace officers engaged in their lawful duties. *Id.* at 634, 638. The heated disagreement between the majority opinion and the dissenting opinion in *Roberts* illuminates the rationale supporting aggravating circumstances such as Section 16-3-20(C)(a)(7). In the absence of legislative history pertaining to Section 16-3-20(C)(a)(7), the United States Supreme Court's expressions on the subject may help reveal the intent of South Carolina's statute.

The *Roberts* majority took note of an F.B.I. report indicating a substantial increase in the number of police officers killed while enforcing the law in the years prior to the decision when it recognized that "there is a special interest in affording protection to [police officers]." *Id.* at 636-37 n.3. The dissent, authored by then Justice Rehnquist, further expanded on the justification supporting Louisiana's statute: "Policemen on the beat are exposed, in the service to society, to all the risks which the constant effort to prevent crime and apprehend criminals entails. Because these people are literally foot soldiers of society's defense of ordered liberty, the State has an especial interest in their protection." *Id.* at 646-47 (Rehnquist, J., dissenting). Implicit in these statements is the rationale that when police officers risk their lives to protect society, society should extend additional protections to these officers, and that enhancing a defendant's sentencing exposure for murdering an officer defending society's liberties provides this protection by creating a deterrent.[44]

[44] The need to protect those that risk their safety to guard the public's ordered liberty explains why state courts have sometimes permitted the killing of an off-duty police officer to satisfy the state's capital aggravating circumstance. See, e.g., *White v. Commonwealth*, 178 S.W. 3d 470 (Ky. 2006) (holding an off-duty uniformed sheriff attending a neighborhood fish fry when fatally shot was "engaged at the time of the act in the lawful

Compare the case of a police officer who was the victim of a fatal gunshot in *Sockwell v. State*, 675 So.2d 4 (Ala. 1994), yet the defendant's capital murder charge was not prosecuted under Alabama's statutory provision (Ala. Code § 13A-5-40(a)(5)), which makes a capital offense the "murder of any police officer . . . while such officer is on duty . . . or because of an official or job-related act. *Id.* at 28. The victim was an off-duty police officer driving to work when a sniper shot him. The evidence at trial established that the killing was the work of a gunman who had an agreement with the officer's wife to collect on the officer's insurance policy. *Id.* at 12-13. The defendant was charged capitally with a single aggravating circumstance of pecuniary gain. As in South Carolina, Alabama's death penalty jurisprudence permitted the death of a law enforcement officer killed during or because of the performance of official duties as an aggravating factor justifying the imposition of a capital sentence. Yet in *Sockwell*, the victim's status as an off-duty law enforcement officer did not increase the defendant's sentencing exposure. Though an instance of prosecutorial discretion, it is likely that the aggravating circumstance was not employed because the statute's underlying rationale, as articulated in *Roberts*, was not implicated. The officer did not place himself at a greater risk in order to protect the public's overall safety. The victim in *Sockwell* was not a foot soldier in service to society, but instead a man involved in a deadly domestic affair who picked a dangerous route to work. Since society had no special interest in protecting this victim as opposed to any other, the aggravating circumstance was not applied.

The State's reliance on Section 16-3-20(C)(a)(7) in this case is problematic for a number of reasons. First, the State never argued, nor did it present any evidence at trial, that Joe Sapinoso was performing a general law enforcement duty during his encounter with

performance of his duties." *Id.* at 474, 479 (applying KRS § 532.025(2)(a)(7)). Finding that a sheriff in uniform at a public event creates a law enforcement presence, the court held the sheriff was engaged in general law enforcement duties at the time of his death. *Id.* at 481.

Evans. Any attempt to argue this proposition suffers from a lack of evidence. Furthermore, statements made by officers present at the crime scene suggest that the victim performed *no* police duties during the hours leading up to his fatal shooting. See *supra* at 79 n.42 (media statements by officers noting Sapinoso was not on duty at the time); see also Andy Paras, "Deputy, Father Killed," *Greenville News*, April 3, 2003 at 2B1 (includes interview with Sheriff Loftis suggesting the Sheriff did not think Joe Sapinoso attempted to engage in any policing activity during the incident).

Finally, the policy articulated in *Roberts* is not at all implicated by the events presented in this case. The victim had not exposed himself to greater risks while performing a service for the benefit of the general public; the victim had returned home from work and was walking from a car parked in his driveway when his path crossed Evans's. Rather than a foot solider walking the beat; the officer, to borrow the Solicitor's terms, was a citizen returning to the relative safety of his "castle" at the end of a typical workday. R. 1466-67. The victim was not in service to society at the time of the evening's tragic events, and therefore society need not cloak the victim in any protections beyond those it affords its general citizenry. The protections of Section 16-3-20(C)(a)(7) do not apply to this case.

The State may contend that Joe Sapinoso was shot "during the . . . exercise of official duties" because he was in possession of a state issued vehicle. By this reasoning, he could have died in his sleep during an arson and would fall under the statute. Clearly, that is not the legislative intent for it places the scope of the aggravating factor so broad that it renders the performance of the duties clause meaningless. The State may also contend that the victim was shot during the exercise of official duties because he was exiting the state issued vehicle when the incident began. This line-drawing, too, leads to absurd results, as it would

distinguish the death-eligibility depending upon whether an officer parked in his driveway at home and had shut the car door and taken one step, or had not finished shutting the car door. This distinction of an officer's relationship to his car in his own driveway is clearly missing the statutory purpose—which is to protect the safety of law enforcement performing their duties, and under which circumstances it doesn't matter whether the officer is in or out of his car. Indeed, it doesn't matter whether the officer is in uniform or not.

D. The Invalid (C)(a)(7) Aggravating Circumstance Inserted an Arbitrary and Irrelevant Factor that Undermined the Reliability of the Death Sentences and Violated State and Federal Law. But For Counsel's Failure to Challenge the Invalid and Irrelevant Circumstance, There is a Reasonable Probability that the Outcome of the Sentencing Proceeding Would Have Been Different.

In *Johnson v. Mississippi*, 486 U.S. 578 (1988), the United States Supreme Court vacated a death sentence that was based upon three aggravating factors, one of which was a prior-conviction aggravating factor that was invalid (it was based on a reversed out-of-state conviction). The Supreme Court noted that the prosecution had relied heavily on the invalid aggravating factor in its argument and that the evidence presented in support of the invalid aggravator was otherwise irrelevant. *Id.* at 586. More recently, in an opinion dissolving the distinction between what have been known as "weighing states," such as Mississippi, and "nonweighing states" such as South Carolina (see *State v. Simmons*, 360 S.C. 33, 44, 599 S.E.2d 448, 453 (2004)), the U.S. Supreme Court held that the touchstone inquiry is whether the evidence admitted before the jury in support of the invalid aggravator would have been admissible otherwise to support a valid aggravating factor found by the jury beyond a reasonable doubt. *Brown v. Sanders*, 546 U.S. 212 (2006).

The fact that three other statutory aggravating factors were charged, therefore, does not render the invalidity of the law-enforcement aggravating factor harmless for Joe Sapinoso.

Nor does the fact that the law enforcement aggravator was not charged for Antonio Sapinoso render the impact of the invalid aggravator moot with respect to that death sentence, for the same jury decided both sentences simultaneously.

The law enforcement testimony and the victim's law enforcement vocation were not relevant to establish any valid statutory aggravating factor. This was not an aggravating factor supported by otherwise admissible evidence. As in *Johnson*, the law-enforcement aggravating factor was the centerpiece of the State's case in aggravation. And as in *Johnson* the testimony presented to support the invalid aggravating factor was irrelevant to the other statutory aggravating factors. Accordingly, the jury's reliance on the invalid aggravating factor violates the Eighth and Fourteenth Amendments and demands reversal—and defense counsel's acquiescence in the invalid factor is thus prejudicial.

The only possible relevance that the testimony of Sheriff Loftis and Deputy Sheriff Tripp might have had would have been as victim impact evidence. But, for reasons discussed in the following point, their testimony also exceeded the bounds of *Payne* and therefore violated the Eighth and Fourteenth Amendments, and defense counsel's failure to challenge the testimony was deficient. Evans submits that counsel's failure to challenge the invalid Section (C)(a)(7) aggravating factor alone is sufficient to warrant reversal. But regardless, because the *Strickland* prejudice is a cumulative measure, the impact of counsel's failure to challenge the aggravating factor must be considered in conjunction with counsel's other failures, including the failure to object to the sheriffs' testimony as improper victim impact evidence, and in light of the totality of the circumstances.

IV. 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'S SENTENCING TRIAL WOULD HAVE BEEN DIFFERENT.

A. Relevant Facts in the Record on Appeal

At the outset of Evans's trial, defense counsel moved to preclude or limit the consideration of victim impact evidence pursuant to S.C. Code Ann. § 16-3-20. Defendant's Motion No. 3A sought to preclude the consideration of victim impact evidence; Motion 13 asked for pretrial judicial review of all victim impact evidence); Motion 17 sought to bar the admission of victim impact evidence as fundamentally unfair and violative of due process; Motion 18 was to preclude the introduction of victim impact evidence pertaining to the background and life history of the victim; and Motion 19 sought to limit the introduction of live victim impact testimony to a single representative of each victim.

At a motions hearing after jury selection, the court addressed the motions, and the State directed the court to *Payne v. Tennessee*, 501 U.S. 808 (1991). Defense counsel, however, informed the court they would prefer to address the victim impact motions "later on":

> Court: Now, Mr. Sumner, if you have objection to any specific impact evidence that is to be offered, we can address that presently or we can address it at the time that it may be introduced should that time come.
>
> Mr. Sumner: Your Honor, I would probably prefer to wait and see exactly maybe. I think there is a motion later that I'm going to bring to the Court for a review of impact evidence in–camera, which the state intends to offer should the case proceed to the sentencing phase. I believe I will address that later on, but I believe that's what we would like to do.
>
> Court: All right, sir.

R. 991; see R. 1001-02.

Trial counsel, however, never renewed the objections to victim impact evidence. Although defense counsel claimed in Motion 19, "the presentation of two or more representatives of the victims is unduly prejudicial and inflammatory so as to render the sentencing proceedings fundamentally unfair," they raised no objection as the State called four victim impact witnesses, two of which were law enforcement officers. Nor did they object to *any* of the testimony given by these witnesses. Yet, Goldsmith's opening statement recognized the danger of the testimony: "[L]isten to the [victim impact evidence]," he said, but "understand what is trying to be accomplished here . . . . this evidence is geared to make you angry . . . angry enough that you will vote to kill []." R. 1524.

Solicitor Betty Strom promised the jury in her opening statement at sentencing that they would hear how Evans's "actions have affected so many people." R. 1517. She explained:

> It's not simply the murder. It's not simply the murders, plus the kidnapping, plus the burglary. It is how that spreads out to his family and his law enforcement community, because remember one of the victims, Joe Sapinoso, was a law enforcement officer at the time he was killed.

R. 1517. The sheriffs' testimony did not disappoint. Sheriff Loftis, in uniform, testified about the "devastating effect" that Joe Sapinoso's murder had had on regional law enforcement agencies and individual officers within the department. R. 1533-34. Loftis further implied that grief after Joe Sapinoso's murder had so impacted local law enforcement agencies that officers were not able to perform their policing duties adequately for a period following the murders. R. 1525-35. At the Solicitor's prompt, he noted, "Joe actually worked inside this particular courthouse and this particular courtroom." R. 1532. Following testimony by Marcia Sapinoso, the mother of Joe Sapinoso and wife of Antonio Sapinoso, and

Cheri Jones, Joe Sapinoso's girlfriend, Deputy Sheriff Georgia Tripp testified, also in uniform. She stated that Joe's death had "ruined her life" and that she would "never be the same again." R. 1575. Much of Ms. Tripp's testimony located Joe "here" in the courtroom. R. 1571. She described Joe's work and how personable he was doing his work as courtroom security. R. 1572. Like Sheriff Loftis, she pointed out the broad scope of grief caused by Joe Sapinoso's death. "I've sat in the court day after day and listened to victims of crimes, and I've just seen how it snowballs. It is not just the family. It snowballs on down." R. 1576.[45]

B. Deficient Performance and Prejudice

The victim impact evidence error combines with other errors, including counsel's failure to challenge the law enforcement aggravator and failure to change the venue of the trial, to undermine confidence in the resulting sentence of death. Although the prejudicial effect of each error is patent, the momentum of the combined effects enhances their power.

1. The testimony of Sheriff Loftis and Deputy Sheriff Tripp provided more than a "brief glimpse" of the victim's life and inflamed the jury's passions.

Ruling in *Payne v. Tennessee,* 501 U.S. 808 (1991), that the Constitution does not categorically bar victim impact evidence during the sentencing phase of a death penalty trial, the *Payne* Court nevertheless cautioned that victim impact evidence has a limited role. Although victim impact evidence allows the jury to assess the blameworthiness of the

[45] In addition, Marcia Sapinoso, the wife of victim Antonio Sapinoso and mother of victim Joe Sapinoso, and Cheri Jones, the girlfriend of Joe Sapinoso testified. R. 1537-64. Marcia Sapinoso testified about how she and Antonio Sapinoso met, about their early life together, and about how they came to the United States from the Philippines. She further testified that the family had moved to Greenville after Antonio Sapinoso had "tired of the cold and windy city and traveling snow" and that Antonio Sapinoso had intended to retire the year that he was killed. R. 1537-1543. She also testified in detail about Joe and Christina's childhood in Chicago and Joe's early career as a police officer in the Libertyville Police Department. She further testified about Joe's move to Greenville and his law enforcement career in Greenville. R. 1544-47. Cheri Jones testified about the history of her relationship with Joe Sapinoso, from their meeting at a tae-kwon-do tournament to their several trips to visit mutual friends and family throughout the years they dated. She also testified about the Sapinosos' family traditions. R. 1556-64. During this testimony, counsel allowed, without objection, the admission of sixteen photographs of family, dating, and work experiences. See R. 1540-41, 1561.

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defendant and thus is relevant to the jury's decision of whether to impose death, the Court made clear that victim impact evidence should only depict the victim's "uniqueness as a human being" and should merely provide a "quick glimpse of the life" the defendant took. See *id.* at 825, 827.

Payne left intact the Eighth Amendment prohibition on "family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence. See *Ivey v. Catoe,* 36 Fed.Appx. 718, 726 (4th Cir. 2002) (citing *Payne*, 501 U.S. at 827, 830 (overruling *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989)). And, the Court stated, the Due Process Clause continues to bar victim impact evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair." *Payne*, 501 U.S. at 825. While *Payne* clearly recognizes that the emotional aspect of a victim's death is relevant and admissible, the Court warned that a capital sentence should be imposed as a "reasoned moral response," and therefore courts have employed greater scrutiny to evidence admitted for emotional impact because of the danger that the prejudicial nature of such evidence will outweigh its probativeness. See *Payne,* 501 U.S. at 836 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987)).[46]

In light of *Payne*'s prohibition against unduly prejudicial victim impact testimony, state courts have barred victim impact testimony where its probative value is outweighed by the danger of unfair prejudice. For example, the decision in *State v. Young*, 196 S.W.3d 85, 109 (Tenn. 2006), resonates here. The court in *Young* determined that the victim impact testimony of a coworker of the victim, who had been employed as a teaching assistant at the

[46] Following *Payne*, courts in other jurisdictions have observed that "the more a jury is exposed to the emotional aspects of a victim's death, the less likely their verdict will be a 'reasoned moral response' to the question whether a defendant deserves to die; and the greater the risk a defendant will be deprived of Due Process." *See Conover v. State*, 933 P.2d 904, 921 (Okla.Crim.App.1997).

University of Memphis, while probative, was outweighed by the danger of unfair prejudice and therefore went beyond the scope of permissible victim impact evidence. *Id.* The coworker testified about the victim's duties and activities while a student and teaching assistant at the University. *Id.* Further, however, the coworker spoke of the effect of the victim's death on everyone in his department, noting that the department had "ground to a halt" as students were unable to study and professors were unable to teach. *Id.* Lastly, the coworker testified that the murder had threatened the career aspirations of some of students. *Id.*

The *Young* court noted that the coworker's testimony about the victim's duties and activities at the University was proper, and that his additional testimony was indeed probative, as it depicted the rippling effects a single murder can have and how tied one life is to others. *Id.* at 110. However, despite its probativeness, the Court ruled that such testimony was not limited to a "brief glimpse" of the victim's life, and instead "laid the debilitating grief of over one hundred people at Defendant's feet." *Id.* The court ruled that "the risk of inflaming a jury's passions with such testimony is simply too great to allow its admission." *Id.*

The testimony of Sheriff Loftis and Deputy Sheriff Tripp, as the Solicitor had promised in her opening statement, provided much more than a "brief glimpse" of the victim's life, and instead "laid the debilitating grief" of the Sheriff's department, the community, and the law enforcement nation at the applicant's feet. *Id.* Assuming for the sake of argument that, as in *Young*, Sheriff Loftis's testimony concerning the victim's duties and activities as a deputy sheriff was unobjectionable (the probative value of the testimony is directly correlated with the validity of the Section (C)(a)(7) aggravating factor, see Point III), his testimony concerning the grief at the sheriff's department and the outpouring of local and national mourning went beyond the bounds of victim-impact testimony contemplated by

Payne. Like the coworker's testimony that the victim's death had caused the Philosophy department to "gr[i]nd to a halt," *Young*, 196 S.W.3d at 109, the State sought testimony from Loftis that relayed the "devastating effect" that Joe Sapinoso's murder had on the "law enforcement family."

Moreover, Sheriff Loftis's testimony was bolstered by Ms. Tripp's victim impact testimony. Ms. Tripp, a fellow deputy sheriff, testified that Joe's death had "ruined her life" and that she would "never be the same again." Relaying the pain of countless others, Ms. Tripp stated, "I have sat in the court day after day and listed to victims of crimes, and it just seen how it snowballs." R. 1576. Ms. Tripp's statement regarding her experience as a sheriff's deputy listening to the testimony of victims of *other* crimes committed by *other* individuals was irrelevant to Evans's sentencing and unduly prejudicial and inflammatory. Such testimony was irrelevant to the defendant's moral culpability and violative of *Payne* because it did not depict the specific harm caused by the defendant. *Payne*, 501 U.S. at 825-27.

It is important to distinguish the law enforcement victim impact testimony in this case from another type. The testimony given by Sheriff Loftis and Deputy Sheriff Tripp about the impact of Joe's death on the law enforcement "family" had to do with the personal feelings and emotional impact across a law enforcement network. There is *no* statement in their testimony on a subject elsewhere found admissible—the chilling effect on law enforcement work, following the death of an officer in the line of duty, due to concerns about officer safety. Cf. *U.S. v. Battle*, 173 F.3d 1343 (11th Cir. 1999); *U.S. v. Wilson*, 493 F.Supp.2d 364 (E.D.N.Y. 2006).

The lack of such testimony is not surprising here because Joe's death occurred in a tragic domestic incident that had nothing to do with his duties as law enforcement. In this

light, counsel's failure to object to the improperly charged "official duties" aggravating factor is revealed as all the more deficient and prejudicial. The sheriffs' testimony is outside the bounds of *Payne*. Counsel's failure to object violated *Strickland*: as recognized in *Young*, even accepting for the sake of argument that the testimony was admissible, it was so unduly prejudicial that it rendered the trial fundamentally unfair.

2. Counsel was deficient in failing to seek a proffer and court ruling regarding the testimony of Marcia Sapinoso to keep it within the bounds of *Payne*.

Loftis and Tripp were not the only victim impact witnesses for the State. Marcia Sapinoso and Cheri Jones also testified. Ms. Sapinoso was present in the house during the four-hour drama, in an upstairs closet with her grandson (Christina's son) Sergio, affectionately known as "Bebo." Her detailed testimony at the sentencing proceeding about her experience of the crime—including her effort to work a gun with the 911 operator's help—was harrowing, as was her tragic nostalgia for the lost plans she had for the future with Mr. Sapinoso. See R. 1549-54. No less provocative was her description of what Bebo went through during the incident ("staring at the [closet] ceiling"), and what he has gone through since. She recounted what Bebo had told her about why he was not attending the trial:

> I said you are going to come down on Friday, and he said why. He didn't want to come here. He said why. And I said because we have to be there in the trial. But he don't go to Court. Only your mommy will. And he got upset, very upset, and he said what for. And I said, you know, for the trial, for what happened to us. And he said I thought they taken care of that already. And I said no, we have to go to trial first. And he was so upset. He said I am not going, mommy is not going there, she might get killed and I would be an orphan.

R. 1548. And she recounted her daughter Christina's description of what Bebo had done and said: "[S]he said he's just staring at the ceiling. And he said is grandmother going to be okay." R. 1549.

These statements of hearsay, and statements of hearsay within hearsay, were inadmissible, inflammatory, and impressible. See *State v. Kelley*, 343 S.C. 350, 370-71, 540 S.E.2d 851, 861 (2001). In *Kelley*, the defendant argued that during the penalty phase of his capital trial the court had erroneously admitted hearsay victim impact testimony from the victim's sister. *Id.* There, the solicitor asked the victim's sister if the victim's son had talked about his mother's murder. *Id.* The victim's sister responded "[h]e told everybody the-at [sic] the wedding that a bad man killed his mommy." *Id.* Although the Supreme Court of South Carolina determined on appeal that the disputed testimony was not hearsay because it was not offered to prove the truth of the matter asserted (that a "bad man killed his mommy"), the Court made clear that hearsay testimony is *per se* inadmissible during the state's presentation of victim-impact evidence as the South Carolina Rules of Evidence apply to the sentencing phase of a capital trial.[47] *Id.*

Mr. Evans's counsel should have asked to view the testimony beforehand and asked the court to tailor the testimony so that it was not inflammatory and violative of the Due Process clause. Ms. Sapinoso's testimony should have been tailored in a pretrial showing; her testimony proffered so that the trial court could define the appropriate limit. Trial counsel did not even try to do that.

> 3. The victim impact testimony as a whole contributed to an atmosphere of overwhelming sympathy for the victim and victim's family that, in combination with a trial in the victim's workplace and the Solicitor's appeals to the passions of the jurors during summation violated fundamental fairness.

[47] Victim impact testimony presented during the penalty face of a capital trial is subject to the South Carolina Rules of Evidence. *State v. Mercer*, 381 S.C. 149, 672 S.E.2d 556 (2009). South Carolina Rule of Evidence 801(c) prohibits and defines 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." *See* SCRE 801(c).

Even if acceptable under *Payne*, Ms. Sapinoso's testimony was undeniably devastating. Recently, in addressing an emotional appeal by a victim's wife in a Louisiana capital trial, the Eastern District of Louisiana recognized:

> This Court is not suggesting that the *bona fide* victim impact evidence that was introduced in this case reached that level [of a constitutional violation under *Payne*], in and of itself. What the Court is saying, however, is that the highly charged emotional content of the victim impact testimony created an atmosphere of overwhelming sympathy for the victim and the victim's family, along with the attendant genuine danger that any other unharnessed appeal to passion, prejudice or sympathy was likely to tip the scales into a Due Process violation of fundamental fairness. This is what the Court firmly believes happened at this trial and it began with the prosecution's *Payne* violation.

U.S. v. Johnson, __ F.Supp.2d __, 2010 WL 2010476, *20 (E.D. La. 2010).[48]

In Evans's trial, it was following Marcia Sapinoso's (and Cheri Jones's) testimony that Ms. Tripp testified—in uniform and in the same courtroom where she worked with Joe Sapinoso. It was in this context that the Solicitor asked Ms. Tripp to discuss Joe's work "here." R. 1571. Directly before Ms. Sapinoso testified, Sheriff Loftis, at the Solicitor's prompt, had made the similar point that "Joe actually worked inside this particular courthouse and this particular courtroom." R. 1532. By failing to object to the victim impact testimony trial counsel allowed inadmissible hearsay, perpetuated a due process violation and a violation of the Eighth Amendment, and thus provided ineffective assistance.

[48] The *Johnson* court also drew on the perceptions of another district court judge from the Northern District of Iowa who recognized that even victim impact evidence admissible under *Payne*, see 2010 WL 2010476 at *20, that "such potent emotional evidence is a quintessential example of information likely to cause a jury to make a determination . . . on the improper basis of inflamed emotion and bias-sympathetic or antipathetic, depending on whether one is considering the defendant or the victims' families . . . ." *United States v. Johnson*, 362 F.Supp.2d 1043, 1107 (N.D. Iowa 2005).

V. TRIAL COUNSEL FAILED TO CONDUCT AN ADEQUATE *VOIR DIRE* OF POTENTIAL JURORS. COUNSEL DID NOT REMOVE JURORS WHO SHARED PERSONAL AND PROFESSIONAL EXPERIENCES WITH THE VICTIMS OF THE CRIME. COUNSEL FAILED TO CHALLENGE OR STRIKE JURORS WHOSE ANSWERS TO *VOIR DIRE* QUESTIONS INDICATED THAT THEY WOULD ALWAYS, FOLLOWING A CONVICTION, VOTE TO IMPOSE A DEATH SENTENCE. WHEN JURORS' ANSWERS TO *VOIR DIRE* QUESTIONS INDICATED THE POSSIBILITY OF BIAS, COUNSEL FAILED TO PROBE THE JURORS' BELIEFS.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee a capital defendant the right to a trial before an impartial and indifferent jury. *Morgan v. Illinois*, 504 U.S. 719 (1992); *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988); *Duncan v. Louisiana*, 391 U.S. 154, 147-58 (1968); *Turner v. Louisiana*, 379 U.S. 466, 471-73 (1965); *Irwin v. Dowd*, 366 U.S. 717, 722-23 (1961). Likewise, the Supreme Court of South Carolina has repeatedly held that a capital defendant is entitled to a trial before a panel of jurors whose ability to properly interpret and apply the law will not be affected by their personal opinions about the death penalty. See, e.g., *State v. George*, 323 S.C. 496, 501, 476 S.E.2d 903, 907 (1996); *State v. Davis*, 309 S.C. 326, 335, 422 S.E.2d 133, 140 (1990).

In *Morgan v. Illinois*, the Supreme Court confirmed that, in order to protect this right it is necessary to remove capital jurors who would "automatically vote for the death penalty in every case." 504 U.S. at 729; see also *Ross*, 487 U.S. at 85. Thus, the trial court must "life qualify" the jury by removing "automatic death penalty" ("ADP") jurors prior to trial. *Morgan*, 504 U.S. at 736. Further, "[a]ny juror to whom mitigating factors are . . . irrelevant should be disqualified for cause, for [they have] formed an opinion concerning the merits of the case without basis in the evidence developed at trial." *Id.* at 738-39. Thus, any juror who would fail to properly consider the defendant's mitigating evidence, even if they would not necessarily vote for death in every case, must be excluded. The inclusion of even one juror

who cannot properly consider mitigating evidence violates a capital defendant's right to a fair trial before an impartial jury. *Id.* at 735 n.8.

The Supreme Court of South Carolina also has repeatedly affirmed a capital defendant's right to a trial before a panel composed entirely of jurors capable of properly considering mitigating evidence. "[T]he ability to merely 'consider'" a life sentence or a death sentence is insufficient to qualify a juror for service on a capital jury. *State v. Plath*, 281 S.C. 1, 5, 313 S.E.2d 619, 622 (1984). In *State v. Bennett*, for example, the Court held that a trial judge should exclude a juror if he would follow the majority of the jury rather than make a personal sentencing decision. 328 S.C. 257, 493 S.E.2d 845, 848 (1997).

Evans's counsel failed to protect his right to a trial before an impartial jury by failing to conduct an adequate *voir dire* in three categories. First, counsel failed to remove jurors whose personal and professional experiences led them to empathize with the crime's victims. Second, counsel failed to strike jurors whose *voir dire* answers indicate that they would always vote to impose a death sentence. Finally, counsel's generally cursory *voir dire* did not effectively root out potential biases in many of the remaining veniremen.

A. Evans Was Denied the Right to a Trial Before an Impartial Jury by the Presence of Two Jurors Who Empathized with the Crime's Victims.

1. Juror Mahaabwa

Counsel's failure to object to or strike Juror 258, Elvis Mahaabwa is sufficient to invalidate Evans's death sentence. Juror Mahaabwa is a prison guard, uniquely sensitive to both the underlying crime Evans was tried for and the aggravating evidence the state

offered.[49] In addition, however, the juror's responses in *voir dire* indicated that he was probably an ADP juror and is thus ineligible to serve.

Jurors who have close relationships to the crime tried before them are not qualified to serve. "Impartiality is not a technical conception. It is a state of mind." *Dennis v. United States*, 339 U.S. 162, 172 (1950) (quoting *United States v. Wood*, 299 U.S. 123, 145-146 (1936)). When a juror is closely related to the victim of an offense, it raises a significant possibility that the juror will be unable to be impartial. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (the *Witherspoon* standard "does not require that a juror's bias be proved with 'unmistakable clarity'"). Thus, it is proper to exclude jurors who are similarly situated to the victims of the crimes being tried before them because this sensitivity will render them unable to impartially evaluate the evidence presented at trial.

This principle has been widely recognized as necessary to protect the rights of defendants. See *United States v. Martin*, 749 F.2d 1514, 1517 (11th Cir. 1985) (bank teller who was equivocal about whether she could put aside her experiences should be excluded from a bank robbery trial); *Sims v. United States*, 405 F.2d 1381, 1384 n.5 (D.C. Cir. 1968) (a taxi cab driver should be excluded from a jury in a trial for the murder of a taxi cab driver); *Williams v. Virginia*, 453 S.E.2d 575, 577 (Va. App. Ct. 1995) (prison guard excluded from trial for assault of a prison guard). And South Carolina has adopted this principle. A juror may not serve on a jury if "his opinions would prevent or substantially impair the performance of his duties as a juror in accordance with his oath and instructions." *State v. Green*, 301 S.C. 347, 352, 392 S.E.2d 157, 159 (1990) (citing *Witt*, 469 U.S. 412). For example, although a prison guard is not automatically disqualified from jury service, it may

[49] The juror should have been challenged for cause pursuant to S.C. Code Ann. § 14-7-820 and *State v. Cooper*, 291 S.C. 332, 353 S.E.2d 441 (1986). The touchstone is whether the individual is vested with traditional law enforcement function.

be proper to disqualify such juror if his occupation affects his ability to impartially follow the law. See *Hughey*. 339 S.C. at 450, 529 S.E.2d at 727.

After verifying that he worked at a penitentiary, defense counsel asked Juror Mahaabwa whether his employment would affect his deliberations. The juror responded "[n]ot necessarily, no." R. 179. But rather than asking the juror to clarify this answer, the court suggested a response, "[n]ot at all?" *id.*, which the juror repeated. See PCR 380. This was ineffective for two reasons. First, Evans was charged with the murder of a law enforcement officer. As a prison guard, Juror Mahaabwa could quite understandably feel some sense of camaraderie with the victim of this crime. This is why courts typically excuse potential jurors from service in cases where they are likely to personally identify with the victim of the offense. Furthermore, Evans's counsel, in light of these responses, had a duty to at least inquire further about whether the juror's occupation would affect his deliberations.

Second, much of the state's evidence of aggravating factors centered on the contention that Evans would be prone to violence while in prison if given a life sentence. See R. 1582-1602. Thus, even if Juror Mahaabwa didn't personally identify with the victim of the crime tried before him, he would certainly identify with the potential victims of the crimes the state alleged Evans would commit if sentenced to life in prison. For Juror Mahaabwa, sentencing Evans to life was not an abstract decision; if Evans received a life sentence, other prison guards would supervise him, and Juror Mahaabwa would have understandably empathized with those guards. *See Williams*, 453 S.E.2d at 577. Sumner's suggestion during the postconviction hearing, that he and Goldsmith may have been satisfied with Mahaabwa based on the answers given because "people that are prison guards . . . sometimes they do not have similar outlook a[s] law enforcement," PCR 382, is insufficient in this regard. The other

reason that Sumner gave for not striking Mahaabwa was that he "was somebody who would know what life in prison would be like" and could tell the other jurors that it would be a "rough place." PCR 383-84. Defense counsel should have recognized that Juror Mahaabwa's employment might make him uniquely sensitive to this portion of the state's aggravating evidence. At minimum, counsel should have questioned him about this possibility. The presence of even one impartiality-impaired juror denies the right to a fair trial, *Morgan*, 504 U.S. at 735 n.8, and counsel's failure to question or strike Juror Mahaabwa did so here.

The effect of Juror Mahaabwa's empathy with law enforcement was exacerbated by the State's reliance on victim impact testimony from several police officers, such as Sheriff Loftis's testimony about how the loss had harmed the "law enforcement family." R. 1533-34. As a correctional officer, Juror Mahaabwa may consider himself a member of the "law enforcement family." This creates an unjustifiable risk that he may overvalue the victim impact testimony of police officers. The combined effect of Juror Mahaabwa's status as a correctional officer and the State's reliance on police officer testimony rendered the juror unable to properly weigh mitigating and aggravating evidence. Including this constitutionally defective juror on the panel that sentenced Evans requires that his sentence be vacated.

2. Juror Freeman

The presence of Juror Number 118, James Freeman as an alternate juror on the jury that sentenced Evans is objectionable for many of the same reasons. Juror Freeman stated that his son is in the process of becoming a law enforcement officer. R. 679. This is problematic for three reasons. First, Juror Freeman admitted that his relationship to an aspiring police officer made him sensitive to the fact that the victim in this case was a law enforcement officer. R. 679-80. Second, the juror acknowledged that he would give the

testimony of a police officer more weight than the testimony of other witnesses. R. 680. Third, because the State relied on police officer testimony during the sentencing phase of Evans's trial, R. 1532-35, 1568-76, Juror Freeman was not able to properly consider both mitigating and aggravating evidence.

As discussed above, when a juror identifies with the victim of a crime, he is not qualified to serve on a criminal jury. See, e.g., *Martin*, 749 F.2d at 1517. For the same reason, jurors related to someone situated similarly to the victim of the crime should also be excused. *Sims*, 405 F.2d at 1384 n.5. Just as a juror who is himself similar to the victim of a crime will be unable to remain impartial, someone closely related to a person similar to the victim will be unable to remain unbiased. If a juror has a commonality with the victim of the crime, then it is reasonable to presume that he may be biased.

Trial counsel did not need to rely on this presumption to conclude that Juror Freeman was biased, however. During *voir dire*, the judge informed Juror Freeman that many of the witnesses and one of the victims in the case would be police officers. After hearing this, the juror indicated that he might favor the state because of this relationship:

> Judge: Are you saying that because your son wants to be a police officer that you might have a tendency to side, to take the side of the police over the defendant because your son might be a police officer some day?
>
> Freeman: I will weigh. I will weigh their comments. I will be influenced by their direct comments. I sure will be.

R. 680. Because this testimony indicated that Juror Freeman's relationship with his son would impair his ability to remain impartial, counsel should have challenged him for cause or removed him with a preemptory strike.

Further, although the Supreme Court of South Carolina has recognized that a trial court may limit counsel's inquiries into whether a juror is likely to place more weight in the testimony of one type of juror than another, *Davis*, 309 S.C. at 335, 422 S.E.2d at 139 (citing *State v. Adams*, 279 S.C. 228, 306 S.E.2d 208 (1983)), the presence of numerous police officers in this case should have given counsel cause for concern. Trial counsel and Juror Freeman had the following exchange:

> Sumner: Do you, do you believe you would have a tendency to assign more credibility to the testimony of a law enforcement officer than you would to just an average citizen?
>
> Freeman: All things considered, probably, yes, at this point, probably, yes. If you had asked me back 30 years ago, it probably would be a different answer, but yes.
>
> Sumner: So you tend to believe that law enforcement officers are more credible and more trustworthy and deserve more credit than an average citizen in their testimony.
>
> Freeman: [Y]es, I would hold a trained, appropriately experienced, qualified law enforcement officer, I would take his or her testimony at some weight, sure.
>
> Sumner: At a higher level than someone who has not had that training?
>
> Freeman: If all of the circumstances were equal, probably, yes.

R. 691. The juror was likely to give more credibility to the state's witnesses than to the defense's witnesses. This would impair his ability to properly consider mitigating evidence and constitutes grounds for reversal.

Third, these comments reflect the juror's inability to properly weigh both aggravating and mitigating evidence. During *voir dire*, Juror Freeman noted that after learning that one of the victims was a law enforcement officer, "[he] started thinking about relating that to [his] son who is not a law enforcement officer, but he has applied in several places including

Greenville County and the city and also the highway patrol." R. 679. The fact that Juror Freeman immediately related the victim of the crime with his son significantly impairs his ability to properly consider mitigating evidence. If Juror Freeman became concerned for the safety of his son during trial, it would naturally render him unable to evaluate impartially the aggravating and mitigating evidence presented during the sentencing phase of Evans's trial.

The combination of these factors indicates a significant risk that Juror Freeman would overvalue the testimony of law enforcement officers. Asked during the postconviction hearing why he did not move to strike the juror, Sumner did not recall, but acknowledged that there would have been no harm in raising an objection. PCR 388. In fact, Sumner "d[id]n't have any specific recollection at all," but offered as a possibility that during *voir dire* "you have to weigh [the jurors] who [are] still sitting out there." PCR 387. Evans's trial counsel was deficient for failing to exercise a strike to remove Juror Freeman from the jury. By allowing Juror Freeman to remain on the jury despite a clear risk that he would give improper weight the testimony of officers, trial counsel's performance fell below acceptable standards.

B. Evans Was Denied the Right to a Fair and Impartial Jury by the Presence of at Least Two ADP Jurors.

At least two of the jurors who ultimately served on the jury that sentenced Evans were ADP jurors. Specifically, Juror Mahaabwa and Juror Holcombe's *voir dire* answers indicate that they equated a guilty verdict with a death sentence. Thus, they were incapable of properly considering mitigating evidence, and *Morgan* mandates reversal of Evans's sentence.

1. Juror Mahaabwa

Juror Number 258, Elvis Mahaabwa's voir dire answers reveal that he is an ADP juror. During *voir dire*, defense counsel asked Juror Mahaabwa if he felt the death penalty was imposed with appropriate frequency. The juror replied, "[I]f there hasn't been a crime

which needs capital punishment, *then they don't have to ask for it.*" R. 181-82 (emphasis added). Juror Mahaabwa was aware that the state need not seek the death penalty in every case; his statement indicates that he believes that if the state seeks death in a particular case, then the case is one where that punishment is warranted. Thus, because Juror Mahaabwa was serving on a jury in a case where the state had chosen to seek death, he would automatically vote to impose a capital sentence if he found Evans guilty. This "belief that death should be imposed *ipso facto* upon conviction of a capital offense reflects directly on that individual's inability to follow the law," *Morgan*, 504 U.S. at 735. Counsel, however, did not ask Mahaabwa to clarify the meaning of his statement, and when asked during postconviction proceedings counsel had no "specific recollection" why. PCR 382; see PCR 380-81. For not following up on the juror's starkly "ADP" statement, Sumner offered only: "Well, this potential juror at this point [ha]s not heard the testimony or heard the case." PCR 384. But that misses the point, which was that Juror Mahaabwa indicated that he would give a death sentence without listening to the sentencing testimony.

2. Juror Holcombe

Likewise, Juror Number 247, Sandra L. Holcombe, demonstrated a belief that a death sentence should follow directly from a conviction in a capital case. One portion of Juror Holcombe's *voir dire* was particularly illuminating, and demonstrated her belief that a death sentence follows directly from a murder conviction.

> Ariail: [W]hen the state is standing before you at the end of the penalty phase . . . you would be able to give [the death sentence] full fair consideration, not just consideration but meaningful consideration. Would you be able to do that?
>
> Holcombe: If the evidence really convinced me—
>
> Ariail: All right.

Holcombe: —you know, beyond a shadow of a doubt that he is guilty.

Ariail: And that the appropriate penalty would be death.

R. 254-55. Like Juror Mahaabwa, Juror Holcombe's answers indicate that, in her mind, a death sentence should follow directly from a murder conviction. Of course, by the time the trial has reached the sentencing phase, Juror Holcombe will already have proof "beyond a shadow of a doubt" that the defendant is *guilty*. Because Juror Holcombe equates the standard of proof for a guilty verdict with that for a death sentence, she is unable to consider mitigating evidence.

Juror Holcombe's responses to defense counsel's *voir dire* reinforce the conclusion that she is an ADP juror. She stated that the death penalty is "not [imposed] enough in most cases that I've heard." R. 258. This alone should have alarmed defense counsel. Compounding the error, defense counsel later asked the juror whether she would always vote for the death penalty. She began her answer "I could do the death. It just all depends on the evidence and—" before defense counsel ended the *voir dire*. R. 260. Even if abstract questions regarding a juror's ability to consider both a life sentence and a death sentence are held to satisfy *Morgan*, see, e.g., *Oken v. Corcoran*, 220 F.3d 259, 265-66 (4th Cir. 2000), that does not account for the circumstances here, in which defense counsel failed to probe this view during his *voir dire*. Defense counsel's total failure to ferret out Juror Holcombe's views on the death sentence deprived Evans of his constitutional right to an impartial jury.

The presence of Jurors Mahaabwa and Holcombe on the jury invalidates the death sentence because both were incapable of properly considering mitigating evidence.

C. Trial Counsel Denied Evans the Right to a Trial by a Fair and Impartial Jury by Failing to Adequately *Voir Dire* Potential Jury Members. This Resulted in the Probable Inclusion of Several Additional ADP Jurors.

Finally, in a *voir dire* that was overall cursory and brief, counsel conducted no *voir dire* at all of two of the jurors who ultimately served on the panel: Juror Number 161, Jacklynn Higgins, R. 590, and Juror Number 247, Bryan Megonigal, R. 571. Counsel also failed to voir dire two of the alternate jurors, Juror Number 149, Broadus Hawkins, R. 757, and Juror Number 354, Marlon Sullivan, R. 736. All told, defense counsel failed to conduct any *voir dire* of fifteen potential jurors. R. 333, 432, 439, 552, 563, 571, 590, 677, 736, 766, 815, 838, 889, 901, 952. Finally, counsel failed to utilize Evans's right to inform potential jurors of his race. *Turner v. Murray*, 504 U.S. 719 (1992).

Additionally, Evans's counsel made no attempt to question seven potential jurors who were dismissed after expressing reservations about the death penalty. R. 439, 552, 56, 677, 815, 889, 952. Counsel's omission, in effect, made it much less likely that jurors with any reservations about the death penalty would serve on the jury that sentenced Evans. This therefore increased the chance that the jurors who did serve would have pro-death biases. Thus, counsel's failure to conduct an adequate *voir dire* deprived Evans of his right to a trial before an impartial jury by slanting the jury pool in favor of death.[50]

Even when defense counsel did question jurors, the questioning was often far too brief to uncover any potential biases. For example, counsel's entire *voir dire* of Juror Number 63, Larry Coker, is reprinted below:

> Sumner: Do you understand that if you were picked for the jury that you could bring back a sentence of life in prison or the death penalty, whichever one you feel like would be appropriate?

[50] Additionally, the trial judge failed to respect the Evans's right to challenge jurors for cause by repeatedly qualifying jurors before hearing objections from either side. R. 333, 511, 540, 563, 670, 693, 707, 725, 738, 785, 801, 830, 838, 850, 864, 877, 901-01. Counsel made no attempt to preserve his right to object to jurors. This functionally reduced Evans's access to challenges for cause, and thus reduced the overall fairness of the jury selection process.

Coker: Yes sir.

Sumner: And you understand, as Judge Cole mentioned earlier in his comments to you, that even if the state presented evidence of what's called and aggravating circumstance of the murder that you could still vote for a life-without-parole sentence if you felt that was appropriate?

Coker: Yes.

Sumner: Do you understand that, sir?

Coker: Yes, sir.

R. 301. Sumner's remarks were largely explanatory. He *informed* Juror Coker of his constitutional obligation to properly consider both a death and life sentence. However, he failed to conduct any questioning which would have uncovered the juror's biases. His failure to properly inquire about potential bias constitutes reversible error. Counsel conducted similarly deficient *voir dire* of Juror Number 194, Margaret Kirby (R. 510-11); Juror Number 528, Toni W. Mahaffey (R. 536); and Juror Number 243, Daniel L. McMurtrey (R. 197-98).

Counsel's deficient performance continued when jurors made statements indicating they might harbor ADP tendencies. For example, during *voir dire* Juror 354, Marlon Sullivan, who served as an alternate, twice hesitated when asked by the court if he would consider imposing a life sentence. R. 732-33, 734. Asked if he could think of a reason he could not be fair to both sides, he responded "[w]ell, not really, not, no, no," R. 734, and "[n]o. Well, I could be fair, yeah, I could be fair, yeah." R. 735. Despite the juror's obvious hesitation, trial counsel conducted no *voir dire* at all. R. 736. The judge then compounded the error by qualifying Sullivan without asking if either side had cause to object. R. 738.

Defense counsel also failed to remove Juror Number 281, James C. Plumley, whose responses to *voir dire* questions indicated he might vote with the majority of the jury pool.

Specifically, Juror Plumley stated that he would vote for the death penalty if "that's what the evidence showed and 11 other people agreed with me." R. 496. The Supreme Court of South Carolina held in *State v. Bennett*, 328 S.C. 251, 493 S.E.2d 845 (1997), that jurors who would follow the majority and impose the death penalty are not qualified to serve on capitals juries. Juror Plumley's statement at least raises the specter that he will vote with a majority of jurors to impose death. Thus, counsel's failure to determine whether Juror Plumley was capable of individually considering mitigating evidence denied Evans his constitutional rights.[51]

* * *

Trial counsel's numerous errors deprived Evans of his constitutional right to a trial before a fair and impartial jury. Counsel failed to remove those jurors that sympathized with the crime's victims. Counsel did not strike jurors whose *voir dire* answers indicated that they would automatically impose the death penalty if Evans was found guilty. Finally, counsel's cursory *voir dire* failed to properly screen jurors for potential biases. There is a reasonable probability that, but for these constitutional deficiencies, the outcome of Mr. Evans's sentencing trial would have been different.

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[51] Finally, and jarringly, defense counsel failed to secure a strike of Juror Number 145, Eddie Harvey. Juror Harvey admitted to harboring prejudices against young black men. He stated that he "[didn't] appreciate the lack of dignity, humanity, somebody won't hold a door open for you and smack you in the face, or baggy jeans, not wanting to get ahead." R. 606. When counsel asked Juror Harvey if he would be able to put aside, his bias, he responded "I don't know that anyone could" and "[t]o be honest, I would try, but I don't know I could." R. 608. The state attempted to rehabilitate the juror. During further questioning, Juror Harvey indicated that he was not biased only against blacks, but also against whites who act in a stereotypically black way. R. 609.

Bias based on racial stereotyping disqualifies a juror from service on a capital jury. Indeed, "[i]f a juror is shown through voir dire to exhibit [racial] bias, the trial judge must exercise his discretion by disqualifying such a juror." *State v. Green*, 301 S.C. 347, 352, 392 S.E.2d 157, 159 (1990). Defense counsel asked that the judge strike the juror for cause, R. 613, but counsel's questioning failed to provide the court with sufficient testimony to make an informed decision, and the trial court overruled the objection, finding that Harvey's prejudice "had more to do with his general view about young black people not being achievers and dressing sloppily and not being courteous" than it did with race. R. 614. This conclusion is not obvious, however, and it is possible that further questioning would have clarified Harvey's views and showed he was unqualified to serve. Additional questioning, either during the initial *voir dire* or in response to the state's questions, could have been sufficient to demonstrate to the trial judge that Juror Harvey exhibited racial bias and should be disqualified under *Green*.

VI. 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 EMPATHY AND POTENTIAL INTIMIDATION THAT JURORS WOULD EXPERIENCE WAS DEFICIENT AND PREJUDICIAL.

The publicity and drama associated with this case was intensified as a result of the fact that a law enforcement officer was a hostage in what turned out to be a contemporaneously broadcasted, multi-hour attempt to step down the crisis. Yet there was yet another unique factor that gave rise to the need for a change of venue: the victim was an integral member of the courthouse law enforcement staff where the trial was conducted. As the prospective jurors entered the courthouse for service in this case, a team of uniformed deputy sheriffs, who were there to secure the building and to protect the occupants, greeted them. Thus started the process of each juror becoming introduced to, and by extension a part of, the courthouse "family."[52] That extrajudicial and intuitive message of family unity could have chilled and intimidated any juror who was considering a sentence of life without parole.

During the trial of the case, the petit jurors were introduced to the victim's courthouse team through the testimony of Sheriff Loftis and Deputy Sheriff Tripp, who described victim Joseph Sapinoso as he performed the job of shepherding jurors in and about the courthouse, and described how the team would stand watch within each courtroom to assure the personal convenience, comfort, and protection of all in the courtroom, including the jurors.

This courthouse "family" relationship extended to the attorney first appointed to represent Mr. Evans, John Mauldin. Mr. Mauldin knew of the strength of this tie and, promptly after being appointed, asked to be relieved. Mauldin testified, "I thought not only

[52] See R. 1517 (Deputy Solicitor Strom stated, "He has a greater family, a larger family than just his immediate family, and that's his law enforcement family . . . "). See *supra* at 73 n.37.

was there an appearance of impropriety, but there was impropriety." PCR 187. Mr. Mauldin also felt a motion to change venue was required. This sentiment reflected the power of the courthouse family mystique, the prejudicial impact of which merely selecting a jury from another county would not have cured. The trial should have been moved to another county.

A. Relevant Facts in the Record on Appeal and Postconviction Proceedings

John Mauldin, the Chief Public Defender of Greenville County, was appointed to represent Kamell Evans on the day after the incident, April 3, 2003. Immediately, he recognized a conflict that involved not only him, but also his entire office. Joe Sapinoso worked as a security officer at the Greenville County Courthouse; the office of the Greenville County Public Defender resides inside the Greenville County Courthouse. On June 6, 2003, by Mauldin's motion, the court relieved the Public Defender's Office, finding "the unique relationship between one of the named victims and the Public Defender's office warrants substitution of counsel." Shortly thereafter, the Honorable Edward Miller, the judge appointed to the case, removed himself for similar reasons. And nearly a year later, in July of 2004, Rodney Richey, appointed with James Goldsmith to represent Kamell in June of 2003, was also relieved due to his Greenville County Courthouse relationship with Joe Sapinoso.

Given that two counsel and a judge had excused themselves due to conflict, a change of venue motion based on the unique relationship between Joe Sapinoso and the courthouse should have been at the front and center of counsel's thoughts. Ten days prior to jury selection, counsel filed a pretrial motion seeking a change of venue, however, that did not include any suggestion that the physical location of the trial should be changed. The motion, with a number of news articles attached, focused principally on the routine cause for venue change: pretrial publicity. The motion also pointed to Joe Sapinoso's status as a law

enforcement officer—specifically, the motion asked that "[d]ue to the extensive media coverage and the fact that the deceased was a Greenville County law enforcement officer . . . the jury pool for this case be drawn from a county in the state where media coverage of this event would have been minimized." But the motion did not address the unique circumstances of the case: that the courthouse and courtrooms involved in this trial were Joe's workplace; that the courthouse security officers in the trial were Joe's coworkers; and that the other courthouse personnel were Joe's peers. See PCR 368-371.

As an alternative to a venue change, the defense motion proposed "extensive *voir dire*" of all prospective jurors regarding their exposure to pre-trial publicity. Yet counsel selected one juror who was a law enforcement officer—on corrections staff—and one with strong and unwavering law-enforcement sympathies. See Point VI, *infra*. Further, one searches the record in vain for *voir dire* questioning on whether jurors could remain impartial given the victim's relationship with the venue.[53]

Following jury selection, the court received argument on the motion. Counsel stated, "there has been extensive *voir dire* of the panel members regarding pretrial publicity," R. 1008-09, after which Joe Sapinoso's status as an officer was essentially dropped:

> Court: And the basis for the motion is simply that there appears to have been extensive coverage of this case by the news media in the past?
>
> Counsel: That would be the primary basis, your Honor, and some jurors did refer to having heard about the case.

[53] As discussed in Point VI, Evans's counsel failed to protect his right to a trial before an impartial jury in several important ways: counsel failed to remove jurors whose personal and professional experiences led them to empathize with the crime's victims; counsel failed to strike jurors whose *voir dire* answers indicate that they would always vote to impose a death sentence; and counsel's generally cursory *voir dire* did not effectively root out potential biases in many of the remaining veniremen. But as significant is a fourth deficiency: counsel's failure to ask jurors if they could remain impartial while hearing this trial in one of the victims' workplace.

R. 1009. Denying the motion, the trial court found that the pretrial publicity was not extensive and regardless that the jury venire was not substantially affected. R. 1009-12.

B. Deficient Performance and Prejudice

Venue, the place of trial, is a constitutional issue.[54] A jury must be impartial and not subjected to extrajudicial influences that might, in the end and over time, erode that impartiality while they serve as jurors on the case.[55] In recognition that circumstances might arise where changing the location of the trial would be necessary to maintain the integrity of the jury and the defendant's right to a fair trial, a constitutional provision was included for change of venue.[56] To enable these constitutional provisions, the General Assembly passed S.C. Code Ann. § 17-21-80, which provides that venue may be changed on application of a party supported by affidavit that "a fair and impartial *trial* cannot be had in the county where such action or prosecution was commenced."[57] The statute does not condition the change of venue on a showing that an impartial jury cannot be drawn, but rather on a showing that an impartial trial cannot be had.

While an impartial trial is the touchstone of venue, the appropriateness of venue in most cases is tied to *voir dire*. If *voir dire* is adequate, then a trial court's denial of a motion for change of venue will not be disturbed absent extraordinary circumstances. See *State v. Manning*, 329 S.C. 1, 495 S.E.2d 191 (1997) (finding court abused discretion by granting

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[54] S.C. Const., Article I, § 11.

[55] S.C. Const., Article I, § 14.

[56] S.C. Const., Article V, § 23.

[57] (Emphasis added). The civil component to Section 17-21-80 states the ground more succinctly, declaring that the court may change "the place of trial" when there is "a reason to believe that a fair and impartial trial cannot be had therein." S.C. Code Ann. § 15-7-10. The civil criteria for changing venue cannot be broader than what is available to a defendant whose life is in the balance and dependent upon obtaining, and maintaining, a jury that remains free from irrelevant influence such as that present in this unique case. Certainly the knowledge that the jury would be seated to hear a murder case in the very workroom of the victim and to hear from coworkers who were actively serving the personal needs of that jury while it was sitting to determine the sentence of the defendant constitutes "reason to believe" that the location of the trial should be changed.

State's venue motion based on pretrial publicity where no evidence supported finding of juror prejudice toward State); *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990). In *State v. Sheppard*, 357 S.C. 646, 655, 594 S.E.2d 462 (2004), for example, it was argued that the nature of the crime involving the killing of a law enforcement officer *and* pretrial publicity warranted a venue change. The South Carolina Supreme Court found that, given adequate *voir dire*, the motion was properly denied. But Sheppard did not involve the death of an officer who worked in the courthouse where the defendant's guilt and sentence were tried.

There are two unique issues in this case: the "extraordinary circumstances" of a trial in the victim's workplace; and inadequate *voir dire* to assess the impartiality of the jurors given those circumstances.

1. Counsel's *voir dire* was inadequate to assess whether jurors could remain impartial under the unique circumstances of this case.

The focus on adequate *voir dire* in the precedent shows how crucial that is to safekeeping regarding venue prejudice. The pretrial publicity cases find it essential to ensuring due process that, during *voir dire*, questions were asked to ascertain whether pretrial publicity would affect the jurors and that jurors whom it would affect are not seated. In this case, trial counsel's *voir dire* utterly failed to take into account the potential prejudice that might accrue from the a trial in the courtroom where the defendant worked. No questions were asked about whether it mattered to them that victim worked in the same courthouse and courtroom where trial would be held. Trial counsel should have moved for a venue change on that basis at the outset, or at least should have moved to *voir dire* on the issue and then carefully conducted *voir dire* on the issue to assess whether a motion to change venue was necessary. Here, counsel did none of this. This Court therefore is left with no record upon which it can be certain that the defendant received a fair trial.

2. This case presents unique and extraordinary circumstances that warranted a venue change.

No South Carolina decision has examined what "extraordinary circumstances" might be beyond extreme pretrial publicity. And none has expressly dealt with the issue of venue change where the victim in the case works in the courthouse—indeed the very courtroom—in which the trial takes place, and whether these might constitute "extraordinary circumstances."[58] Evans submits that extraordinary circumstances exist in this case:

- Victim Joe Sapinoso was not only a Sheriff's Deputy, but a Sheriff's Deputy who worked in the Greenville County Courthouse.
- The Greenville County Public Defender's Office is located in the Greenville County Courthouse. It is because Joe Sapinoso worked in the same courthouse that the entire Public Defender's Office was relieved from the duty to represent Kamell Evans.
- The Honorable Edward Miller, who also works in the Greenville County Courthouse, was initially assigned jurisdiction over Kamell's case, but was replaced as a result of his relationship with Joe Sapinoso.
- Judge Miller's replacement, Judge Cole, was brought in from another county to preside over this case.
- Rodney Richey was relieved from representation more than one year after his appointment due in part to his relationship with Joe Sapinoso.
- Kamell Evans's trial was held in the very same courtroom where Joe Sapinoso worked as a Sheriff's Deputy.
- Whether the incident occurred during or because of Joe Sapinoso's law enforcement duties was, at best, debatable. Yet the Section (C)(a)(7) aggravating factor was charged against Mr. Evans (see Point III) and stood as a basis for victim impact testimony by the Sheriff and a Sheriff's Deputy who worked in the same courtroom with Mr. Sapinoso (see Point IV).

[58] In *State v. Fowler*, 266 S.C. 203, 222 S.E.2d 497 (1976), the Supreme Court found no need for a venue change in the trial of a patrolman's murder in Lexington County. *Fowler* was the first case in South Carolina to use the language of "extraordinary circumstances," citing to *Wansley v. Slayton*, 487 F.2d 90 (4th Cir. 1973) (describing *Sheppard v. Maxwell* publicity and other events prior to trial as "extraordinary circumstances"); cf. *Stahl v. Ozmint*, 2007 WL 2964662 (D.S.C. 2007) (equating extraordinary circumstances allegation with presumption of prejudice in community due to pretrial publicity).

In these circumstances, with the trial literally set in a victim's "home court," *U.S. v. Wright*, 603 F.Supp.2d 506, 508 (E.D.N.Y. 2009) (granting venue change to avoid the appearance of impropriety where trial based on the assault of Assistant U.S. Attorney would otherwise have been held "literally in the victim's 'home court'"), the failure to move for a venue change was deficient and prejudicial. Even if it is determined that the trial judge properly exercised his discretion in denying the motion for change of venue based on pretrial publicity according to the laws of South Carolina, the extraordinary circumstances involved in this case permit this Court to make its own decision. Judge Cole never had the opportunity to explore these issues.

* * *

Evans's case presents a rare picture of prejudicial circumstances that are "extraordinary": a trial in the victim's workplace in which it is wrongly argued that the crime was a gang motivated killing of a law enforcement officer; in which the entire public defender's office and two other outside attorneys declined to represent the applicant because they knew the victim so well; and in which two officers testified under the rubric of victim impact. One might argue that the prejudice would not have been so great had the officer testimony at sentencing simply not occurred. One might argue that the prejudice would not have been so great had one of the witnesses not emphasized that she worked in that courtroom with the victim. Part of the reason the venue rule requires extraordinary circumstances is that justice could hardly proceed if routine or even occasional factual scenarios were sufficient to change venue. That no case in the history of South Carolina courts has produced a factual scenario like the one at hand is testament to the uniqueness of the circumstances here.

PART C

The prejudice from (a) counsel's failure to investigate and present evidence in mitigation and failure to object to a charge that eliminated mercy—the crux of their sentencing case—from jury consideration (Part A), and (b) counsel's failure to object to the Section (C)(a)(7) aggravating factor and concurrent failures to take any action to prevent or ameliorate the prejudice of conducting the trial in the victim's workplace (Part B) must be considered cumulatively with another aspect of counsel's failure to represent Mr. Evans: counsel's failure to challenge the State's case. Counsel failed to challenge (a) unreliable and irrelevant testimony from a State's witness on gangs and general prison conditions (Points VII and VIII); (b) the description of the cause and manner of death presented in the guilt-or-innocence trial (Point IX); and (c) the State's sentencing summation (Point X), which drew all of this together. In failing to object to and counter the aggravating evidence and argument, counsel allowed the prosecution to recharacterize a domestic tragedy as a gang execution killing. There is a reasonable probability that, but for counsel's failures, the outcome of the sentencing proceeding would have been different.

VII. DEFENSE COUNSEL FAILED TO OBJECT TO AND COUNTER THE STATE'S EVIDENCE IN AGGRAVATION PRESENTED BY WITNESS LEWIS O'CAIN. THERE IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S FAILURE TO CHALLENGE THE TESTIMONY AND THE SOLICITOR'S EMPHASIS ON IT IN SUMMATION, THE OUTCOME OF THE SENTENCING PROCEEDING WOULD HAVE BEEN DIFFERENT.

A. Relevant Facts in the Record on Appeal

1. The Testimony of Mr. O'Cain

Undisputed evidence at trial concerning Kamell Evans's and Christina Rodriguez's relationship showed that this was a domestic tragedy. But at sentencing the prosecution

portrayed the shooting as a gang-motivated killing. See R. 1757 (arguing that Evans "planned this execution to the smallest minute gangland detail"). Kamell Evans, the Solicitor argued, was a "hard core gang member" and the shootings a gang member's expression of power—a statement killing. See R. 1756 ("[H]e was going to let the world know that night gang style, just like the pictures, gang style . . . . Crips deliver bodies, and he delivered you two.").

To buttress this theory, the prosecution relied principally upon the testimony of Lewis O'Cain.[59] The State offered Mr. O'Cain, a security threat group coordinator employed by the South Carolina Department of Corrections, as an expert on "gang activity and gang experience within the department of corrections." R. 1582, 1590-91. The State used O'Cain's testimony to argue that Evans would pose a security threat to other individuals if sentenced to life without parole, and thus should receive the death penalty.

O'Cain had been an employee of the South Carolina Department of Corrections since 1996 and a security threat group coordinator since 1997. R. 1583. Security threat group coordinators monitor security threat groups, the prison analog to street gangs. O'Cain based his testimony solely on his "experience and the length of time and service in this department within the Department of Corrections." R. 1590. Defense counsel did not object to his qualifications as an expert on the subject, and the trial court did not ask Mr. O'Cain to discuss his background experience or training. R. 1591.

O'Cain described generally how gangs operate in the DOC and the measures that he and his staff take to offset that. R. 1584-89. While O'Cain knew nothing about Kamell

[59] The argument advanced by the prosecutor in summation also relied on the guilt-or-innocence phase testimony of the state's pathologist, Dr. Ward, whom defense counsel failed to cross-examine or rebut. The prosecutor used this unchallenged testimony to argue that the shots were fired by Mr. Evans "intentionally, willfully and maliciously after full planning," R. 1753, and dubbed the shootings "execution style," R. 1756. While this error by counsel occurred during the guilt-or-innocence phase, the prejudice from the error spilled over, and likely had a greater adverse impact, at sentencing. See Point IX, *infra*.

Evans, had no evidence of any incidents involving Mr. Evans, and had no prison misbehavior upon which to base his testimony, he testified that Kamell would be a gang leader in prison based upon tattoos and posters in which Mr. Evans posed, in the style of Tupac Shakur. R. 1590-1602. Testifying to possible interpretations of several of Evans's photographed tattoos, he opined that Evans was a "hard-core gang member" with a reputation for street violence. R. 1590-96, 1601.[60]

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[60] O'Cain was shown photographs of tattoos, and two posters taken from Evans's home. A tattoo reading "Smile now, cry later" (Tr. Exh. KKK), O'Cain stated "are tattoos that we see on a lot of individuals who we find are gang related." R. 1591. A tattoo that said "For life" (Tr. Exh. JJJJ), O'Cain testified, was "a reference to the gang mentality. Once you are in, you are there for life." R. 1591-1592. Tattoos of a gun and a knife, O'Cain said "is reflective of a lot of the gangster mentality of violence." A tattoo of a bulldog, O'Cain said, "is representative of a lot of the gangs, depending on the set. They may have that on there representing their set. It may be a representation of the violence. It's very tough to understand what the bulldog means sometimes because it also is something that is used by nongang members." R. 1592. Examining another photograph of a bulldog tattoo (Tr. Exh. ZZZ), O'Cain stated, "If that's all we are seeing on an individual, then we go further to see if there is a gang involvement or whether it's just a person who's having, who likes bulldogs." R. 1592. O'Cain was then shown a photograph featuring a tattoo that read "Crip" (Tr. Exh. XXX). He said, "That is a very pronounced – appears to be covering up most of his arm. To me an individual that's put a tattoo that big on him, he is very hard core because he wants a lot of people to see that he's a part of something." R. 1593. Then O'Cain looked at a Tr. Exh. YYY:

> This is a tattoo, and I believe it's on the back of the neck. This is representing the 120th Gang, specifically Crips, which is underneath it. I haven't seen that much information on them here in this state, but there is a lot of references to 120th Street throughout the country. Depending on what part of the country he may have joined, it could be Chicago, could be any place in the country that had a 120th Street. The information I'm getting throughout when we are dealing with things like this, questions I have asked about 120th Street, it's a very violent group that has been in business. A lot of groups now are trying to copy that, whether it's, like I said, out of Chicago or L.A. or wherever it may be coming from.

R. 1593-1594. O'Cain then explained a final photograph, which showed "Crip" tattooed on the top of one hand and the word "world" tattooed on the other (Tr. Exh. YYY):

> The tattoos that he has would lead me to believe that he is a part of the Crip organization. To what extent, I wouldn't be sure until I could do some checking into other states, my counter parts, some data bases just to see if he shows up on anybody's intelligence.

R. 1595-1596. Finally, O'Cain examined two posters and made further remarks on Evans's gang membership. R. 1599. Based on the tattoos and the posters, O'Cain stated:

> 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 the money that's being passed on the streets.

R. 1601-1602; R. 1596-1597.

O'Cain went on to testify that a sentence of life imprisonment without parole sentence "would not stop [Evans] from having a normal life inside prison," and that "it would be less of a problem" to send him to death row. R. 1602. When asked if "Mr. Evans came to the DOC under a sentence of death would he present a problem for you in relation to gangs?," O'Cain replied, "No, sir," R. 1602, and concluded that death row would be better for Evans. R. 1603. (See Point VIII.) Defense counsel did not object.

2. The Solicitor's summation

In summation, the Solicitor argued that this was a planned gang killing. Evans, the solicitor argued, "planned this execution to the smallest minute gangland detail." R. 1757. He argued that Evans's actions were motivated by a strategy of gang action. "[H]e was going to let the world know that night gang style, just like the pictures, gang style . . . . Crips deliver bodies, and he delivered you two." R. 1756. Referring to Evans as a potential gang leader in prison, the Solicitor followed O'Cain's testimony, asserting that life in prison would do nothing for Evans "except give him a place to exercise his leadership abilities." R. 1758. "This [trial] is a game to [Evans] without consequence. It is a game of Crip mentality . . . and if he gets away from you he will go to prison and continue to be a gang . . . . He will move into a system and a position of structure, a cop killer, a king." R. 1758. The Solicitor argued: "As Mr. OCain told you, he is *already* into gang activity at the jail." R 1758 (emphasis added). Again, defense counsel did not object.

B. The Evidence Presented at the Postconviction Hearing

1. Counsel acquiesced in Mr. O'Cain's testimony

Trial counsel knew that the state would call Mr. O'Cain to testify. No one on the defense team, however, spoke with O'Cain prior to trial; nor had they received any report

from him; no testimony was proffered. PCR 225-26. When asked during the postconviction hearing how they could make a decision not to challenge O'Cain's testimony, Goldsmith responded, "Well, we assume that he was the State's witness how he would." PCR 226. Counsel was resigned to the fact that the testimony they expected was coming from O'Cain—finding Kamell in a gang based on tattoos, and that Kamell would be classified as such and consequently kept under close supervision in prison—was going to be admitted at trial. Counsel stated they "knew it was coming in" and "needed to deal with it . . . rather than hope and pray." PCR 220. Yet, trial counsel raised no objection. As the following paragraphs set out, despite the common belief among members of the trial team that Kamell was not in a gang in South Carolina, they did nothing to challenge O'Cain's testimony to the contrary.

2. A statement that none believed or sought to explain

Kamell told members of the defense team that he was a member of a gang. Dale Davis (PCR 555) vaguely recalled him telling her that he was involved in "gang things." Lenora Topp said Kamell told her that he was a gang member; he mentioned Crips and showed her tattoos. PCR 595, 597. "He volunteered gang membership and I knew that would be something I would look into and see," she said, "but I could find no substance of gang activity from any of his friends, family members, people who would know." "He gave no names of any gang members or where they met, so there wasn't any indication that there was any gang activity other than Kamell saying so." PCR 595. He told Sumner he was in a gang in Cleveland, but not South Carolina. Sumner documented, "No crip involvement in Greer." PCR 401; Resp. Exh. 1.[61]

[61] Regarding the note "[N]o Crip involvement in Greer," Sumner was asked at the postconviction hearing, "What did you take 'no Crip involvement in Greer" to mean?" He responded: "I took it to mean, looking back at it, that he was either a member of the Crips and did not exhibit his affiliation while living in Greer and only

Across the board, no one on the defense thought Kamell was in a gang. PCR 218, 375. No witnesses did either. Lenora Topp interviewed several close friends of Kamell's that had testified at the trial about his positive character. In every interview but two Topp asked about gang membership. PCR 580. Unequivocally, as documented in interview notes that Topp provided to Sumner, the witnesses rejected the notion that Kamell could be in a gang. PCR 575, see App. Exh. 19A (interview with Ron Platt); App. Ex. 19B (interview with Scott Parker); PCR 577, see App. Exh. 24 (interview with Benjamin Young); PCR 576-77 (discussing interview with Terry Peden). As Topp described, Scott Parker, the North Greenville College football coach, "thought the tattoos and 'gang member dress style' was more of an image than anything and the image seemed to be portrayed by the black male students, not just by K. Evans." App. Exh. 19B. This view was echoed in interviews with Evans' father (PCR 578; see App. Exh. 25 (noting Kamell's "false bravado" around "his peers" and that Kamell "only tried to portray the gangster image")), and Kamell's sister (PCR 579, PCR II 74; App. Exh. 26 (noting Kamell's need "to be seen as a 'big person'").

Topp summarized her findings in a letter denoting "common threads" of her investigation:

> In addition to his personality attributes, Kamell Evans was not known to associate with gang members. There's no evidence to show he ever joined a gang. What a former coach and a current friend relayed to me that they felt some of Kamell's actions indicated he just wanted to belong to an[d] fit in with 'the crowd', i.e., wearing gang style clothing while at college. The fact was most of the male African American students at N. Greenville College wore this style of clothing during this time.

PCR 298; App. Exh. 21.

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exhibited his affiliation while he was living in Cleveland on those breaks, or that he had dissociated himself from the Crips entirely." PCR 499.

Topp also provided Sumner with the address and phone number of the tattoo artist who drew Kamell's tattoos: "Jay McKee, 515 North Lafayette, in Shelby North Carolina 704-481-0082." She asked, "Would it be prudent to send [the investigator] to talk to McKee? He might have some helpful knowledge regarding any association Kamell might have had with gangs." PCR 298-99; App. Exh. 21; App. Exh. 26. No one followed up.

3. More and more evidence weighing against gang involvement

a. Testimony about Kamell in Cleveland

Bruce Coffee was Kamell's football coach at the beginning of seventh grade. He also worked security at Kirk Middle School. Coffee said that while there is gang activity in the middle school today, he was not aware of any when he was working security in the early 1990's when Kamell attended. PCR 99. While Coffee, who met Kamell through his nephew (Kevin Coffee), who also played for Kirk (PCR 102), didn't spend every hour of the day mentoring Kamell, from August to November during football season he supervised him in practice until 7 p.m. every weeknight. PCR 109. Asked if Kamell could have been in a gang in Cleveland, Coffee said: "All I can say is he didn't have time." PCR 104. Coffee explained that gangs and team sports do not mix: "You can't afford to do them both." Sports has "a large effect on gang membership." Sports gives kids "a sense of accomplishment, something that they can prove they can do. . . It dominates what goes on on Friday nights." "It would be a conflict of interest if they tried to do them both because they can't do them both." PCR 108.

Robert Nance, Kamell's uncle and godfather, runs a basketball academy in inner city Cleveland. He met Kamell after Barry separated from the family, and partially filled a void. PCR 114, 118. He had frequent contact with Kamell during this period, as he described: "Kamell was with me all the time because I worked in Cleveland Heights where he stayed and

I used to go by after he get out of school and check on him." PCR 119. Kamell was involved with Nance's basketball camp, and spent a lot of free time with Nance from 1986 until he moved to South Carolina: "I usually get off around 3:00, 3:30 and I go by and see him and I make sure he done his homework . . . pick him up or stay in the yard, dribble with him, play catch with him." PCR 120. Nance's experience as an inner city basketball instructor led him to reach the same conclusions as Coffee about the poor mix between gangs and sports—and Kamell's involvement in the latter, not the former. Of kids who get involved in gangs as they become adults, Nance said, "skills just drop. To be a high intense player . . . you couldn't be in [] other kind of activities." PCR 121. Kamell, he said, "wasn't in no gang." PCR 121.

John Landingham, a neighbor and close friend of Kamell's during the year before Kamell moved to South Carolina, was in the ninth grade at Shaw High School when Kamell was in the seventh grade at Kirk Middle School. He noted that Kamell's mother worked full time, and after work on occasion would go out bowling. He and Kamell spent a lot of time together, as Landingham recalled: "I was mostly at his house after school." PCR 131, 134. Landingham, who knows people in gangs in Cleveland, testified that he was certain that when they lived next door to each other Kamell was not involved with a gang. PCR 131.[62]

b. Testimony about Kamell in South Carolina

If counsel had investigated further in South Carolina, they could have found even more witnesses—most significant, perhaps, Justin McKee, the former full time tattoo artist who did much of Kamell's ink. At the hearing, McKee was shown nine photos of tattoos that he did on Kamell. Some were tattoos that O'Cain suggested had gang bearing at trial—which

[62] At the end of the postconviction hearing, Applicant sought to introduce affidavits by additional witnesses—family, friends, and sports mentors—from Cleveland. The Court reserved ruling on the admissibility of the affidavits. PCR II 230-31. Should the Court find the affidavits admissible, the affidavits, too, provide additional evidence that trial counsel could have obtained from witnesses. All state that gangs were not a part of Kamell's life in the Cleveland area, while he was growing up or on return visits. App. Exh. 71.

McKee rejected, noting that he had done "a million" of that style. But McKee also did the tattoo on Kamell's forearm that says "crip" (App. Exh. 60) and the tattoo on the other forearm that says "4 life." (App. Exh. 61). He did the tattoo on the back of Kamell's neck that says "120th Crips," (App. Exh. 59), and he did the tattoos on Kamell's hands that say "Crip" and "World." (App. Exh. 62). PCR 153-54. McKee did not think that Kamell was in a gang, and other people without gang involvement—not only Kamell—have asked him to give them tattoos with a gang theme. PCR 756-57. Asked what he thought when Kamell requested the tattoos, McKee replied, "That it was childish, silly." PCR 756.

Nick Wideman, a longtime friend of Kamell's who played football with him at North Greenville College and again with the Seminoles during the 2001 season, recalled there was no gang presence at North Greenville College—it was a strict Baptist college—and saw no indication that Kamell was in a gang when they were in school together or on the Seminoles. PCR 608, 610. Kamell had tattoos at the time, but not "gang related tattoos." PCR 609.

Sarah English dated Kamell in 2002, when he was 26 years old. He was working two jobs and he was not playing football at the time. She recalled that Kamell had tattoos, but not gang tattoos. PCR 629. She testified that Kamell was not in a gang at that time "[b]ecause I pretty much saw him every day, talked to him every day. He was living with his sister. He hung out at his sister's house. I hung out at his sister's house. I never saw him with anyone that I would associate as a gang member." PCR 627.

Tyrone Johnson was the football coach for the semiprofessional team the South Carolina Seminoles. After Kamell and Johnson met, living in the same apartment complex, Kamell joined the team six weeks into the 2001 season and played throughout the season. PCR 166. The practice schedule, particularly for those working two jobs such as Kamell, was

rigorous. Johnson echoed the sentiments of Kamell's Cleveland mentors about the ability of an athlete to mix gang involvement with sports: "He couldn't have been a gang because he didn't have enough time to be in a gang, and no person would be allowed to play on our football team. We just wouldn't allow it." PCR 168.

Johnson, who remained close with Kamell after he left the team in the 2002 season, and was present outside the Sapinoso home on the night of the incident, made a character judgment about Kamell: "It wasn't him. He was not a gang person." PCR 168. Kamell, Johnson explained, idolized music rap artist Tupac Shakur. PCR 169. When shown the poster found in Kamell's apartment in which he poses with guns, Johnson immediately identified the style and pose with Tupac Shakur. PCR 173; see PCR 175. A statement to this effect was in the interview notes of SLED Agent Pam Crawford after she interviewed Johnson the day after the incident: she wrote "he is idol of Tupac . . . [a] pretty boy". Sumner had received these notes in discovery on August 4, 2004. App. Exh. 31.[63]

4. An expert's explanation of Kamell's tattoos and statements, consistent with Kamell's background and character

Dr. Nicholas Cooper-Lewter testified to a reasonable degree of certainty in the field of social work that Kamell was not in a gang and that there were reasons, based on Kamell's background and character, he would "false flash." Asked if he recognizes as a social worker that sometimes people say they're in a gang when they're not, Dr. Cooper-Lewter responded: "It's very common particularly in the African American community throughout this country. We call the people who say they're in gangs, 'wanna be's.' We have a term we call 'false

[63] Shatima Evans, Kamell's sister, also explained the poster. She saw Christina making it. PCR II 50. Nothing ever led her to believe that Kamell was in a gang. PCR II 84.

flashing' where one utilizes that so that they can be impressive, be safe." PCR II 113. He explained:

> 'Who am I?' is a big question for children . . . for adolescents . . . for most people. And so if there are any questions about whether or not who I might be is okay, then I'm going to look for things in and around me that would say 'respect me.' . . . And coming from Cleveland to South Carolina, Cleveland's a big town. He came to a small town. It was very easy to build to have a ready-made identity attached to being – looking like you're in a gang.

PCR II 114.

Dr. Cooper-Lewter was asked what Kamell told him about gangs and about his tattoos. Cooper-Lewter responded that Kamell told him "he wasn't in a gang." PCR II 118. "He put some of those on himself to please his girlfriend." "[O]thers he put on himself, for instance, like the ones of his dogs because he respected his dogs and his dogs were loyal and respective [sic] to him." "He also put a hundred and twentieth on his body to represent where he used to live in Cleveland." PCR II 118-19.

Asked whether it would impact his decision to know that Kamell told his lawyers while awaiting trial in jail that he was in a gang, Cooper-Lewter responded: "That would not necessarily surprise me. One of the things that we deal with all the time is how do I remain safe in prison. And one of the ways that a lot of people do is affiliate themselves or at least act like they're affiliated with a gang. . . . You might say you're in a gang." PCR II 119. Cooper-Lewter offered a range of reasons whey Kamell would tell an attorney shortly before trial and while incarcerated that he was in a gang: "Fear, confusion about the uncertainty of being in prison, going to prison, their own safety, a traumatic event particularly if you're dealing with someone who's dealt with a lot of trauma in their life." "I've worked with gangs," Cooper-Lewter concluded, "people say it . . . but it doesn't necessarily mean that they are." PCR II 139.

Finally, Cooper-Lewter stated his opinion about the mix of gang activities with sports: "Well, first of all, gangs demand loyalty. And they demand that you do what they want. And so I have found it extremely rare that gang membership and playing football on a state championship team go together. Someone who is seeking athletics and hoping to go to the NFL and that kind of thing, putting their effort together to do that would preclude hanging out, if you will, with those individuals who have plans like that." PCR II 140. Bruce Coffee, Kamell's seventh grade football coach and a veteran sports instructor at Cleveland schools explained the concept of "false flagging": "False flagging is claiming to be something that you're not. It could be a gang or it could be anything that you're not. You know, that's basically a term that's used in the inner city." "It means pretending to be in a gang." PCR 107. Asked why somebody would false flag, Coffee responded: "Survival. Kids want to survive. It's a rough neighborhood and it's only a little over three miles in diameter, but some kids have to walk through areas where they maybe are not familiar and sometimes that may occur." PCR 107.

5. Trial counsel's stated reasons for not challenging Mr. O'Cain's testimony

During the postconviction hearing, Sumner and Goldsmith alluded to several reasons they did nothing to object to the reliability of Mr. O'Cain's testimony or to disprove his portrayal of Kamell as a gang member. The first, and most often reiterated, reason for not challenging the testimony—at any point: before trial, during the testimony, or afterward—was that Kamell told them not to. Goldsmith testified that Kamell "insisted that he was a member of a gang and instructed us not to do anything that would counteract that." PCR 218. "[H]e had basically put us in a box." PCR 227; see PCR 250-51. In Sumner's words: "[Kamell] continued to tell us that he was a member of a gang. He did not want me to challenge, or Mr.

Goldsmith, to challenge his gang membership in any way, and that was what I understood to be a direct communication from him on repeated occasions in the trial preparations." PCR 373; cf. PCR 555 (Dale Davis, testifying that Kamell did not ask this of her).

Goldsmith suggested at one point that he thought Sumner had counseled Kamell about the ramifications of O'Cain's testimony, which would portray Kamell as a gang member. PCR 218. Sumner clarified, however, that neither he nor Goldsmith ever discussed with Kamell the possibility of challenging the admissibility of O'Cain's testimony: "Q: Did that discussion every take place? A: No." PCR 374. Counsel provided no evidence that Kamell would necessarily have rejected a challenge to O'Cain had they proposed and discussed such a challenge with him:

> Q: Did you ever have him fill out, write a little paragraph, and have him sign that he expressly did not want you to dispute that he was a member of a gang?
>
> A: No.
>
> Q: Is there anywhere in your notes where you reflect with him about Mr. O'Cain and his right to challenge the testimony of that?
>
> A: No.

PCR 502-03. Elsewhere, Goldsmith said he thought there was a pretrial motion to exclude assertions that Kamell was in a gang. He waffled on the value of such an objection, but eventually acknowledged there would have been no downside to making a motion to exclude such argument. PCR 221-22. No pretrial objection was made.

Further, no contemporaneous objection was made to the testimony, thus defaulting any pretrial motion had it existed. Asked why no objection, Goldsmith said he "didn't think it was particularly effective" because George Martin was a stronger witness. PCR 227. Sumner

echoed this sentiment and also noted that by objecting to O'Cain's testimony, they would have called attention to it. PCR 486.

Finally, Sumner testified about a transcribed statement that Christina Rodriguez gave to SLED officer Pam Crawford on April 3, 2003, within twenty-four hours of the incident. In the statement, Christina (a) mocks Kamell's gang pose and explains the origins of his gang-related tattoos; (b) states that he was not in a gang in South Carolina; and (c) expresses serious doubt as to whether he could have been in a gang in Cleveland when he was very young. App. Exh. 34 (transcribed interview by Pam Crawford with Christina Rodriguez); see PCR 484, 487. Sumner accurately recalled that in the interview Christina said Kamell's gang posing "was a front. That it was not real. That it was impersonated." PCR 366. But, he noted, Rodriguez's statement also alluded to stalking and threats. PCR 517; see PCR 478-79, 481, 487. No one on the defense team investigated Rodriguez's allegations, PCR 488-492. Regardless, there were many other sources showing that Kamell was not in a gang.

C. Deficient Performance

1. Counsel was deficient in failing to move pretrial to limit or exclude Mr. O'Cain's testimony, which counsel knew would be harmful aggravating evidence.

There were steps, with no negative ramifications, that counsel could have taken to address the issue of O'Cain's testimony prior to trial. Counsel took none. Counsel acknowledged that there would have been no downside to making a motion in limine to exclude O'Cain's testimony. PCR 221-22. Counsel could have sought, on multiple grounds, to limit or exclude entirely the testimony of Mr. O'Cain. There were numerous reasons—strong reasons—that O'Cain's testimony was inadmissible, and had counsel objected, there is a reasonable probability that the trial court would not have permitted the testimony or that a

reviewing court would have found admission of the testimony error on appeal. The legal bases for the claims are set forth in Evans's Trial Brief, filed prior to the first part of the postconviction hearing in this case, which Evans incorporates by reference herein,[64] and a brief description of each ground will be made here.

a. Counsel failed to move to limit or exclude O'Cain's testimony on the basis that it lacked reliable methodology.

Counsel was deficient in failing to object that O'Cain's testimony was inadmissible. It was inadmissible as scientific expert testimony under SCRE 702[65] and *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), and *State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120 (1979). See generally *Kumho Tire Co., Inc. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). O'Cain's testimony was subjective; did not follow a published or reviewed method; had no built-in quality control procedures to ensure reliability; and is not widely recognized as a field of expertise. Furthermore, there have been no critical studies on the use of prison gang experts in the penalty phase of a criminal prosecution. O'Cain did not mention whether the method of gang identification through tattoos and posters had been reviewed by others in the field of corrections. He did not testify on the prior application of this method in other cases and its results, if any. Nor did O'Cain provide evidence on whether this method was consistent with recognized procedures in the field of corrections.

Second, it also failed the reliability test for nonscientific expert testimony applied in cases such as *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), and *State v. Childs*, 299 S.C. 471, 385 S.E.2d 839 (1989). Examining S.C. Code Ann. § 16-8-230 in its entirety,

[64] Applicant's Trial Brief, pages 21 to 36 are referred to, and incorporated by reference, in this Point.

[65] SCRE 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

which contains the only criteria for a gang member identification found in the South Carolina state statutes, a method of identifying gang members through tattoos, symbols, and other paraphernalia is not mentioned at all. Also, the definition of a gang member as "an individual who is an active member of a criminal gang" and the statute's listing of fourteen different offenses shows that the South Carolina method for identifying gang members examines primarily a person's gang *activities*. O'Cain reached his conclusion that Evans is a gang member without any proof that Evans was an "active member of a criminal gang" and without any proof that he was involved in gang activities. Finally, the statute defines a "gang-related incident" based on knowledge provided by reliable informants; knowledge provided by unreliable, but corroborated informants; as well as knowledge that the participants are already known gang members. There is no reference to tattoos, symbols, and other paraphernalia. Compared to this statute, O'Cain's method appears highly dubious.

Further, O'Cain's qualifications as stated in the court record did not qualify him. O'Cain did not testify on whether his work experience gave him the ability to identify gang members based on tattoos and other paraphernalia; whether he personally, as opposed to his entire unit, had ever identified a single person as a gang member based on the tattoos on their body or other paraphernalia; whether he had received any training in recognizing the tattoos and paraphernalia of gang members; whether he had ever instructed others on the recognition of gang tattoos and paraphernalia; and whether he had ever testified on this subject matter as an expert witness in the past. See *State v. Tapp*, 387 S.C. 159, 691 S.E.2d 165 (S.C.App. 2010) (reversing and remanding for new trial where record was insufficient for appellate court to determine whether witness offered as expert in crime scene analysis and victimology was qualified); cf. *Garza v. State*, 2008 WL 5049910 *9-*11 (Tex.Crim.App. 2008) (unpublished)

(thorough evidentiary presentation offered to qualify expert on prison gangs under Rule 702); see Applicant's Trial Brief at 28-29.

b. Counsel failed to move to limit or exclude O'Cain's testimony on the basis that it was unsupported and irrelevant speculation under *Dawson v. Delaware*.

Counsel was deficient in failing to object that O'Cain's testimony violated the First Amendment because it was based on unsupported and irrelevant speculation about the defendant's associations under *Dawson v. Delaware*, 503 U.S. 159, 160 (1992). Under *Dawson*, evidence of beliefs and associations may be considered only if relevant to a statutory aggravating factor, or to rebut mitigating evidence offered by the defendant. *Id.* at 165.[66] O'Cain's testimony in this case fails to meet the *Dawson* requirements. In *U.S. v. Cisneros*, 363 F.Supp.2d 827, 841 (D.V.A. 2005), the district court struck an aggravating factor of gang membership where the State presented only generalized statements of gang activity and did not refer to defendant's own acts and intentions in joining the gang. In *U.S. v. Wilson*, 493 F.Supp.2d 491 (E.D.N.Y. 2007), the district court held that gang membership is relevant where the State offers evidence of defendant's actions as a gang member, and does not merely describe the conduct of other gang members. Here as in *Cisneros*, there was no link, no evidence of gang activity, and no evidence that this shooting was a gang crime. O'Cain testified to the *general* existence of prison gangs inside the Department of Corrections, and the fact that such gangs engaged in a wide range of activities, including assault on police officers and inmates, burglary, robbery, and extortions. R. 1584. He also testified to the

[66] Where gang membership is related to a statutory aggravating factor, or to a crime, it is proper for a court to consider the gang's beliefs and how they are linked to elements of the crime. *See Barclay v. Florida*, 463 U.S. 939, 942-944 (1983) (holding that a sentencing judge in a capital case may take into account the elements of racial hatred in a crime where defendant was a member of the Black Liberation Army and wanted to start a race war, and the victim was white). That was not the case here for this was not a gang-related crime and there was no evidence whatsoever of Evans engaging in activities involving a gang.

general benefits that a gang provides to its members and typical gang organizational structure. R. 1585. More specifically, O'Cain testified that the Crips were identified as security threat groups based on violent acts and that they were associated with the color Blue. R. 1589. From there, O'Cain concluded that, based on Evans's tattoos, he was a "hard core gang member," capable of becoming a gang leader.

The testimony violates *Dawson* because it conflates the defendant's actions with the general belief system of a gang and invites the inference that the defendant will act according to the gang's beliefs merely because he has tattoos associated with the gang. The only purported evidence of gang membership in this case is Evans's tattoos and two homemade posters. In contrast to *Wilson*, where the government intended to prove the defendant's future dangerousness using evidence of his *actual* behavior as a gang member, O'Cain's testimony merely invites the inference that Evans is dangerous because Crips are.

c. Counsel failed to move to limit or exclude O'Cain's testimony on the basis that it was more prejudicial than probative.

First Amendment arguments aside, O'Cain's testimony based on Kamell's tattoos never should have been admitted in a capital sentencing proceeding because the prejudice it injected into the sentencing trial substantially outweighed its probative value of future dangerousness. Counsel could have objected to the admissibility of the testimony under SCRE 403, which states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The hypothetical scenarios posed by O'Cain carried a threat of prejudice that substantially outweighed its probative value.

The district court's reasoning in *United States v. Taveras*, a federal capital trial, is pertinent here. The government sought to have the district court instruct the jury that the defendant was a member of the Trinitarios, a violent gang, which would support a finding of future dangerousness as a non-statutory aggravating factor at sentencing. 585 F.Supp.2d 327, 330 (E.D.N.Y. 2008) (see 18 U.S.C. § 3593). The government relied on the testimony of a fellow inmate of Taveras, who identified him as a member of the Trinitarios based on a dot tattoo on the defendant's neck, allegedly a code that identified members of the Trinitarios. 585 F.Supp.2d at 337. The inmate did not know when or why the defendant got the tattoo. Assessing whether the probative value of the evidence "outweighed" its prejudicial effect in a murder trial under Section 3593(c), the district court noted found that the inmate's testimony "offered no clear evidence that the dot indicates gang membership." "Evidence that the defendant's dot tattoo indicates his affiliation in the Trinitarios or any other prison gang lacks sufficient reliability and probative force to allow a capital sentencing phase jury to consider it as evidence of gang membership." *Id.*[67]

While the standard applied in this proceeding is Rule of Evidence 403, which prevents the admission of evidence where the prejudice "substantially outweighed" the probative value (in contrast to the "outweighed" standard of the federal rule), the lack of probative value of the tattoo evidence presented in *Tavares*, like the tattoo testimony given by O'Cain in this case, is clear. O'Cain never interviewed Kamell Evans. He knew nothing about how, when, or why Evans got those tattoos. And there is no evidence that shows that the shootings of Joe and Antonio Sapinoso were gang-related or gang-motivated in any way. While the

[67] The inmate also testified that when he asked the defendant if he was a "son of Duarte" (a possible reference to the founder of the Dominican Republic, Juan Pablo Duarte) after seeing the defendant's tattoo, the defendant replied "yes." *Id.* The district court considered this evidence lacking in probative value because the question could have been taken as asking whether the defendant was Dominican, which he was. *Id.* at 337.

"substantially outweighed" standard would have applied in Evans's capital trial rather than the more lenient federal rule, this was still a capital trial. There was strong reason to exclude O'Cain's testimony on the ground that it lacked sufficient reliability to be admitted.

Since the testimony in support of future dangerousness is an opinion; an opinion that attempts to predict future events; an opinion that attempts to predict future events in a very specific and controlled environment; the court has a significant gate keeping function to safeguard against the introduction of arbitrary yet prejudicial information into the sentencing phase of the trial. Here, there was a substantial reason to limit or exclude altogether O'Cain's testimony. Because there is no reliable evidence linking this defendant to violence other than the offense of conviction, placing highly prejudicial speculative evidence of future violence into the equation introduced an impermissible arbitrary factor into the sentencing proceeding. Yet counsel did not make any effort to speak with O'Cain prior to trial; nor had they received any report from him; and no testimony was proffered from him. PCR 225-26. Counsel simply "assumed" and acquiesced that the testimony would be admitted.

2. Counsel was deficient in failing to investigate the presence or absence of evidence of gang involvement to rebut the State's case.

At multiple points during the postconviction hearing, Sumner and Goldsmith asserted that they did nothing to challenge the aggravating factor of future dangerousness evidence in O'Cain's testimony or actively pursue an investigation of the presence of absence of evidence of gang involvement because Kamell "instructed us not to do anything that would counteract that." PCR 218 (Goldsmith).

The client's alleged instruction might have diminished counsel's duty to investigate—and the prejudice resultant from the failure to investigate—had it concerned counsel's forays into mitigation. In *Schriro v. Landrigan*, the United States Supreme Court ruled that a capital

defendant could not claim prejudice based on counsel's failure to present mitigating evidence where the defendant explicitly directed them not to. 550 U.S. 465 (2007); cf. *Rompilla v. Beard*, 545 U.S. 374 (2005) (finding client's reticence did not relieve counsel of duty to investigate mitigation); *Gray v. Branker*, 529 F.3d 220 (4th Cir. 2008) (finding client's pretrial disinterest in hiring psychiatrist did not relieve counsel of duty to investigate mitigation). For significant reasons, that is distinct from the circumstances here, where the client allegedly directed counsel not to rebut the state's aggravating evidence of future dangerousness. The *Landrigan* decision took competing principles from *Strickland*—the principle of full investigation of mitigating evidence and the principle that counsel's representation may be deterred by the client's directives—and, in that context, privileged the latter principle over the former. *Landrigan* bears out a relationship within the context of the right to present mitigating evidence under *Lockett v. Ohio* and *Woodson v. North Carolina* addressed in the Sixth Amendment context in cases like *Wiggins v. Smith*, 539 U.S. 510 (2003).

The instruction that Evans is said to have made here is of a different sort. The principle competing here with the influence of a client directive is not *Lockett*'s or *Woodson*'s, but counsel's duty to fully investigate the state's case. The Supreme Court has never applied the *Landrigan* ruling in this context, and no case to applicant's knowledge has done so. In this circumstance the balance is different. If the state will present aggravating evidence—here, of alleged gang involvement—it is counsel's duty to investigate the evidence they expect the state to present, and counter it. Cf. *Rompilla*, 545 U.S. at 383-89 (finding counsel's failure to investigate State's case was egregious, and in turn led to counsel's failure to find mitigating evidence). In contrast to a mitigation presentation where a subject matter will not come up at trial if defense counsel fails to investigate it, the aggravating evidence will

come up despite counsel's avoidance and it will be harmful. The issue is not simply that reliable information may be withheld from the jury; rather, it is possible that unreliable aggravating evidence will be set before the jury. In this case, it was. This raises due process concerns over the injection of arbitrary and irrelevant aggravating factors in the sentencing proceeding, see *Johnson v. Mississippi*, 486 U.S. 578 (1988), that simply would not be present in the failure-to-investigate-mitigation scenario that *Landrigan* addressed.

Counsel possessed numerous statements that Kamell was not in a gang from friends, family, and even Christina Rodriguez. In addition, Sumner's notes indicate that Kamell told them he was not involved in gang activity in Greer, South Carolina. Counsel did not follow up on this information and was therefore deficient in failing to investigate the presence or absence of gang involvement. Kamell's assertion that he was involved in a gang in Cleveland, however unbelievable, also required further investigation. Counsel ignored this as well.

That failure is compounded by counsel's failure to discuss the matter with Kamell. If Kamell told counsel not to "challenge his gang membership in any way," this was a subject matter so crucially damaging at the sentencing proceeding that it should have been discussed with the client, and not simply handled through acquiescence. Sumner testified that neither he nor Goldsmith ever discussed with Kamell the possibility of challenging the admissibility of O'Cain's testimony. PCR 374. Accordingly, counsel had no idea whether Kamell would have rejected a challenge to O'Cain's testimony if they had proposed and discussed it with him.[68] Even in *Landrigan*, which involves circumstances different than this case (see above),

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[68] Despite trial counsel's apparent efforts to have Mr. Evans sign off on their trial tactics, as reflected in Sumner's notes, there is no indication that counsel ever discussed O'Cain's testimony with Kamell:

> Q: Did you ever have him fill out . . . and have him sign that he expressly did not want you to dispute that he was a member of a gang?
> A: No.

trial counsel carefully explained the importance of the evidence at issue—there, mitigating evidence—to the client; and the court there engaged in a colloquy to ascertain the defendant's interest in waiving his right to present mitigation. Here, in circumstances involving counsel's duty to challenge the state's case, such checks would seem even more important.

If counsel, after a thorough investigation, had discussed with Kamell the potential impact of O'Cain's testimony on the jury's life-or-death decision, he may have given them an explicit nod to go forward and challenge the testimony. Or he may have refused—and if he had, then counsel's performance might be less open to question. But that is not the case here.

3. Counsel's other reasons for not challenging the O'Cain testimony are not reasonable.

Counsel offered other reasons for not objecting or challenging Mr. O'Cain's testimony. Asked why no objection to O'Cain, Goldsmith said he "didn't think it was particularly effective" because Martin was a stronger witness. PCR 227. Sumner added that by objecting to O'Cain's testimony, they would have called attention to it. PCR 486. Counsel thought their "prison expert," George Martin, was a stronger witness. This rationale is flawed for several reasons, not the least of which is that a significant part of O'Cain's testimony, which counsel sought to use Martin to rebut, was inadmissible and irrelevant under South Carolina law. See Point VIII, *infra*. Further, counsel's lack of investigation into Kamell's background, and concomitant lack of attempt to identify O'Cain's testimony prior to trial shows that they could not reasonably have known whether Martin would adequately counter O'Cain. Third, the great damage of O'Cain's testimony (in addition to the general prison

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Q: Is there anywhere in your notes where you reflect with him about Mr. O'Cain and his right to challenge the testimony of that?
A: No.

PCR 502-03.

testimony (see Point VIII)) was that it was based on tattoos. Having done no investigation on the matter, counsel had no evidence to answer O'Cain's assessment, and Martin, by extension, did not either.

Counsel's explanation that they avoided the interview statements that Christina Rodriguez made to SLED Agent Pam Crawford because parts of Rodriguez's statement were potentially damaging is also unavailing. First, counsel did "nothing" to investigate the veracity of allegations, so this basis is unreasonable. Further, it is a poor explanation for not challenging O'Cain's testimony in any event. While Rodriguez's mocking statements about Kamell's purported gang involvement were probative (she—who made the poster of Kamell in the Tupac Shakur pose, who bought the guns with him, and so on—likely knew better than anyone that Kamell was not in a gang), there were nevertheless *many* other available witnesses who *also* said that Kamell was not in any gang, some who Topp interviewed and many more whom she did not interview that testified in PCR. And, the scope, methodology and qualification underlying O'Cain's testimony were all unreliable in their own right.

Counsel's failure to dispute the aggravating allegations of gang involvement appears even more unreasonable in light of PCR testimony showing that to do so would have been consistent with their mitigation theory. A focal point of trial counsel's mitigation presentation was that Kamell was a good guy and a great athlete. The postconviction testimony of Dr. Cooper-Lewter and coaches Bruce Coffee, Bob Nance and Tyrone Johnson all explain that organized sports and gangs do not mix. Counsel could have kept the positive theory about sports and used it to disprove the gang allegations.

The consequence of counsel's failures was that they allowed inadmissible expert testimony to be admitted against their client. They allowed testimony that violated the First

Amendment precedent of *Dawson v. Delaware*. Even worse, the testimony they allowed to go unchallenged was not accurate and counsel knew that it was misleading. Kamell's statement to Sumner that he was in a gang in Cleveland but "not in Greer" speaks volumes about the nostalgic style in which he wore his tattoos. It suggests that the tattoos were, as Dr. Cooper-Lewter's testimony states, a false-flashing nod to his hometown.

In sum, there are multiple factors to consider in assessing whether counsel performed inadequately in failing to challenge the gang-involvement testimony by O'Cain: what efforts they made *in limine* to limit or exclude the misleading testimony; what efforts they made to discuss the significance of this testimony with their client; what objections they made contemporaneously as the testimony was presented to the jury; what they offered in rebuttal. Across the board, counsel's efforts on this front were nonexistent.

D. Prejudice

Allowing the state to present misleading evidence asserting gang involvement injected arbitrary and highly prejudicial aggravating evidence into the capital sentencing proceedings, upon which the prosecutor's summation capitalized. Integrating the unchallenged testimony of the State pathologist, Mr. Ariail described the shootings as "execution style" and argued this was "significant" because the jurors had "heard a lot of talk about gangs." R. 1756. Mr. O'Cain testified that he would, in the future, get word from the "street" about Mr. Evans's exploits. The Solicitor stated that Evans was "already" into gang activity in jail. Yet, this was entirely based on speculation.

There was significant valid evidence in aggravation against Mr. Evans. There were two victims in this tragedy. The shootings occurred in the midst of a four-hour stand-off with Evans holding the victims in their home while law enforcement surrounded them outside,

which supported charges of burglary and kidnapping. However, the Section (C)(a)(7) "law enforcement duty" aggravating factor (see Point III) was invalid. And Mr. O'Cain's testimony and the Solicitor's argument animated an additional misleading aggravating factor: that Evans would be a future danger because he was a gang member. In choosing to allow this misleading characterization, defense counsel capitulated to the Solicitor's reconstruction of a domestic dispute-turned-tragedy into a premeditated, gang-motivated, law-enforcement-officer execution. Rather than challenge the State's misleading characterization, as it could have been challenged, counsel accepted the prosecutor's references to Kamell as "evil" and as a member of a gang, and presented their sentencing evidence alongside this, providing jurors with the "two Kamell's" theory: a chasm between an "evil" Kamell and a "good" Kamell with no explanation for the divide.

The State may argue that the Solicitor in fact offered the jury an alternative view. The Solicitor presented to the jury that this was a gang killing, but at points hedged that, if not, Evans still had the attitude of a gang member. This alternative argument—that if Kamell isn't really in a gang, he's acts like it—does not diminish the prejudice. For one thing, the hedge shows how significant a clear statement of non-gang membership could have been for jurors. The prosecution opened the door to that possibility, but counsel did not take the opportunity. Counsel's failure to challenge O'Cain's uncorroborated testimony that Kamell was in a gang and that he would perpetuate future violence in a prison gang that much more convincing.

Further, the importance to the prosecution of the tattoos and the posters is that they portrayed to the jury a character—the character of a "five popping, six dropping" gangster. Therefore, the prosecution could offer that Kamell might not even be in a gang but that he still had the mentality—the mentality of an executioner and a gang "king." By failing to counter

O'Cain's testimony, defense counsel left the character completely intact. They hoped to sidestep it by presenting a different character of a good Kamell and then argue that as their basis for a life sentence, begging for mercy, asking the jury not to kill both. Counsel accepted the prosecution's character—and by accepting the forensic pathology testimony (Point VIII), they accepted the prosecution's account of the incident. That counsel presented a weak alternate vision of their client for the jury hardly compensates for the power of the prosecution's image.

Contrast the recent appellate decision in *State v. Liverman*, 386 S.C. 223, 242-44, 687 S.E.2d 70, 80-81 (S.C. App. 2009), where the court found that inadmissible evidence by Mr. O'Cain regarding a defendant's tattoo was harmless error at a guilt-or-innocence trial, given substantial other evidence of Liverman's guilt and the cumulative testimony of another officer. *Id.* at 79, 81. Here, unlike *Liverman*, the error was not harmless. There was no other evidence that Kamell was in a gang and would therefore be a future danger. O'Cain's testimony was not cumulative of the testimony of another witness who testified to a similar conclusion. Furthermore, the prejudicial testimony occurred in a capital sentencing trial, subject to heightened scrutiny for reliability, in which jurors decide not whether an event occurred but rather reason morally for life or death.

Nor do the offhand remarks by defense witnesses Dr. Berg and George Martin to the effect that they didn't think Kamell in gang significantly diminish the prejudice. The manner in which each suggested they did not think Kamell was a gang member was far from assertive. George Martin's opinion in this regard, given his experience in corrections, might carry more weight than Dr. Berg's, but both opinions were—like the testimony of O'Cain—entirely speculative. Their remarks lack the strength of the testimony presented in the

postconviction hearing by (a) family and friends who knew Kamell for years in Cleveland; (b) family and friends who knew Kamell for years and up to the incident in South Carolina; (c) the tattoo artist who did Kamell's tattoos; and (d) a social worker with experience working with gang members who explained why someone with Kamell's background and experiences and mental impairment might adopt a gang style and even, inadvisably, such tattoos. In conjunction with the mitigation evidence discussed in Part A of this brief, the evidence disproving gang membership presented in postconviction could have served to rebut the prosecution's attack on Kamell's character in a way that the offhand comments by Martin and Berg and the defense strategy of simply calling Kamell a good guy did not.

VIII. DEFENSE COUNSEL WERE INEFFECTIVE BY ALLOWING GENERAL PRISON CONDITION EVIDENCE TO BE PRESENTED TO THE JURY WITHOUT OBJECTION AND SUBSEQUENTLY INVITING THEIR OWN WITNESS TO TESTIFY ON THE ISSUE. THE TESTIMONY INJECTED AN IRRELEVANT AND ARBITRARY FACTOR INTO THE PROCEEDINGS, IN VIOLATION OF S.C. CODE ANN. § 16-3-20, AND THE ERROR WAS EXACERBATED BY THE SOLICITOR'S FOCUS ON IT IN SUMMATION, WHICH COUNSEL ALSO FAILED TO CHALLENGE.

The State offered testimony from SCDC employee Lewis Edward O'Cain whose job was to classify incoming inmates to determine what prison facility best suited the state's and inmate's needs. His testimony invited the jury to consider the privileges an inmate enjoyed while serving a custodial sentence in the general prison population, thereby injecting arbitrary and prejudicial information into the jury deliberation process. In addition, without objection, the witness was allowed to contrast a sentence of life imprisonment and the conditions in general population with those for inmates who receive a sentence of death. Counsel offered as a strategy for not objecting that they believed that if they objected, they would not be able to use their witness George M. Martin to testify concerning adaptability. This demonstrated a lack of understanding concerning the irrelevance of—and South Carolina's strict prohibition on—testimony about general prison conditions. By failing to object to Mr. O'Cain's testimony, trial counsel allowed evidence that the South Carolina Supreme Court has held is both inadmissible and prejudicial; and they did so in order to assure the admission of testimony that the Constitution guarantees.

A. Relevant Facts in the Record on Appeal

1. Testimony of Mr. O'Cain

During the trial, Lewis O'Cain, a security threat group coordinator employed by the South Carolina Department of Corrections, was qualified as an expert on "gang activity and

gang experience within the department of corrections." R. 1582, 1590-91. The State used Mr. O'Cain's testimony to argue that Evans would pose a security threat to other individuals if sentenced to life without parole, and thus should receive the death penalty. O'Cain knew nothing about Kamell Evans, had no evidence of any incidents involving Mr. Evans, and had no prison misbehavior upon which to base his testimony. R. 1590-1602.

O'Cain went on to testify that if given a sentence of life imprisonment without parole, Evans would present a greater problem than if given a death sentence. R. 1601. A life sentence, he testified, "would not stop [Evans] from having a normal life inside prison" (R. 1602): "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. [H]aving [a] life [sentence] will not stop him form 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." R. 1601-02. On the other hand, if on death row:

> With his sentence if it were to be death he would go to Lieber Correctional Institution down in the southern part of the state. Death row, it has a better population of officers who are monitoring what's going on with them. He would be very limited to his visitation, to the phone calls. He would be limited to mail. A lot of things would be different than him being just inside for life. It would be less of a problem on my end because it is a lot easier to monitor, however many we have, 70 or 90, whatever we have on death row versus the other 24,000 inmates.

R. 1602. The Solicitor then asked, if Evans were on death row, how much time he would be allowed to spend outside his cell. O'Cain responded that he was "not sure of the exact perimeters [sic] of death row. I don't have time to deal with it that often." R. 1603. Nevertheless, he offered:

> Death row, he is constantly monitored. He does not have one-on-one contact with the visitation. It's through windows and things like that, where with life he

> has one-on-one visitation in the cafeteria area where they can sit at tables and talk to each other, and it is a different situation.

R. 1603. Defense counsel did not object.

On cross-examination, defense counsel took the awkward and extremely high-risk position of asking Mr. O'Cain whether because of Evans's tattoos: "[t]here is no question . . . he'd already be identified as a security threat group member, wouldn't he?" R. 1605. Because Evans did not "keep[] that [gang] identity to [him]self," defense counsel continued—"I mean, you know, right up front," counsel said, "this person is identified with this Crip organization" (R. 1606)—he would be kept under closer watch and greater security. R. 1606-07. This angle failed in its apparent goal of getting O'Cain to back off from the stark distinction he had drawn between general population and death row. Moreover, it fully accepted the gang member characterization along with its implicit dangerousness and moral decrepitude. Shortly thereafter O'Cain admitted that he really didn't know much about the day-to-day classification in general population and that it exceeded his expertise. R. 1609-10.

2. Testimony of George Martin

George Martin, a veteran of the SCDC system and former warden, was qualified as an expert in the field of corrections and prison administration. R. 1626-27. Counsel asked him about how classification at a high security prison generally works. R. 1629-30. Martin explained this for several transcript pages, "You know, they make license tags; they cook; and they clean up and that sort of thing. But they are still inside of a very overwhelming perimeter security." R. 1630; see R. 1629-32. Eventually, Martin discussed Evans's potential for adjustment to long-term imprisonment. Martin testified, regarding adaptability, that "if [Evans] had a real habitual propensity for bad behavior and violent and assaultive behavior" he would have shown that during his time in jail, and he had not. R. 1634-35. He concluded

that Evans "would be locked up essentially 23 hours a day and allowed to exercise by himself" but eventually "would in all likelihood adjust well" to "a difficult, harsh and often very violent place." R. 1637.

3. The Solicitor's summation

In summation, the Solicitor extrapolated from O'Cain's generalized testimony about life in the general prison population compared to death row. "Life in prison is not appropriate," he argued, "[y]ou can't put him in life in prison and expect him to suffer" (R. 1757):

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

R. 1758.[69]

B. The Evidence Presented at the Postconviction Hearing

In the postconviction hearing, attorney Sumner described that the purpose of Martin's testimony "would have been basically to explain to the jury what life in prison means in South Carolina," "what type of environment he would be in, and, again to dispel overall the notion it would be an easy life." PCR 431-32. Sumner testified that they didn't object to O'Cain's testimony about general prison conditions because George Martin was going to testify as their expert: "I thought that if we object to the State's witness wanting to talk about conditions in prison, then [I] don't think we would have been allowed to put up our witness about conditions in prison." PCR 377; see PCR 223. Goldsmith's recollection of Martin's

[69] The Solicitor's argument is also objectionable because it misrepresented the nature of alternative punishments. The prosecutor stressed how easy the defendant's life would be in prison. He described a sentence of life imprisonment without parole as "the most lenient sentence" R. 1749, and "the minimum." R. 1752. "Does this case deserve the least and the minimum?" he asked. R. 1752.

testimony was that it would concede gang membership but stress the strength of the prison facility to overcome it: "He may have been in a member of a gang, but due to the severity of his punishment in the lockup, he wouldn't be able to exercise that." PCR 229.

Joseph Savitz of the office of Appellate Defense, testified that if trial counsel had objected to the testimony on general prison conditions, he would have raised the issue on direct appeal. Savitz, who handled *State v. Burkhart*, 371 S.C. 482, 640 S.E.2d 450 (2007)—in which the South Carolina Supreme Court vacated a death sentence based on testimony by prosecution and defense witnesses on general prison conditions—explained the argument in that case: "You can send a defendant to Hawaii if he gets life and that's stuff that the State controls. That doesn't reflect upon the defendant's character or the circumstances of the crime. That's a decision the Department of Corrections makes, the Legislature makes. So we kept arguing that they should not be able to portray life in prison as basically a vacation, a holiday." PCR 740. Savitz agreed that the Solicitor's argument in this case about "a big prison" being "like a little city" was the type of testimony at issue in *Burkhart*. R. 742. Savitz noted that, while Mr. Evans's trial preceded *Burkhart*, he had been raising the issue on appeal contemporaneously with Evans's trial in 2004. R. 741-42. Savitz also noted an unusual lack of objections in the trial record of Mr. Evans's case. R. 742. He predicted that if trial counsel had preserved the issue, and if he had then raised it on appeal to the Supreme Court, he "would have won." PCR 742; see PCR 746.

C. Deficient Performance and Prejudice

1. A long-standing rule

The South Carolina Supreme Court recognized over twenty years ago:

> Such determination as the time, place, manner, and conditions of . . . incarceration . . . are reserved by a statute . . . to agencies others than the jury.

> As we have repeatedly stated, the sole function of the jury in a capital sentencing trial is the individualized selection of one or the other penalty, based upon the circumstances of the crime and the characteristics of the individual defendant.

State v. Plath, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984).[70] The conditions of incarceration do not reflect the circumstances of the crime or the characteristics of the defendant. As the court said in *Plath*, "A jury does not need to know how often [the capital defendant] will take a shower or whether or not he will be lonely and withdrawn during his tenure [in prison]." 281 S.C. at 15, 313 S.E.2d at 627.

In *State v. Bowman*, the South Carolina Supreme Court explained this in more detail:

> The evidence presented in a penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character. Generally, questions regarding escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole.

State v. Bowman, 366 S.C. 485, 498, 623 S.E.2d 378, 385 (2005). Thus, it is error to elicit testimony about the "privileges" or "benefits" of an inmate given a life without parole sentence, such as "access to the yard, work, education, meals, canteen, phone, library, recreation, mail, television, and outside visitors." *State v. Burkhart*, 371 S.C. 482, 487, 640 S.E.2d 450, 452-53 (2007). Furthermore, this type of evidence is extremely prejudicial and requires reversal because "this entire subject matter inject[s] an arbitrary factor into the jury's sentencing considerations" in violation of S.C. Code Ann. § 16-3-25(C)(1). *Id.* at 488-89, 640

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[70] As early as 1970, the South Carolina Supreme Court had recognized:

> The Legislature committed to the jury the responsibility to determine in the first instance whether punishment should be life or death. It charged another agency with the responsibility of deciding how a life sentence shall be executed. The jurors perform their task completely when they decide the matter assigned to them upon the evidence before them. What happens thereafter is no concern of theirs.

State v. Atkinson, 253 S.C. 531, 535, 172 S.E.2d 111, 112 (1970) (quoting *State v. White*, 142 A.2d 65, 78 (N.J. 1958)).

S.E.2d at 453. It also violates the Eighth Amendment's prohibition against cruel and unusual punishment when a death sentence is "predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'" *Johnson v. Mississippi,* 486 U.S. 578, 585 (1988) (quoting *Zant v. Stephens,* 462 U.S. 862, 884-85, 887 n.24 (1983)).

In *Burkhart*, the South Carolina Supreme Court applied *Bowman*'s holding, although Burkhart's case was tried before the Court's decision, "because it is consistent with our long-standing rule that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime." 371 S.C. at 488, 640 S.E.2d at 453. The long-standing rule supports application here as well. While Evans's case was tried in 2004 (before *Bowman* or *Burkhart*), Evans's counsel either ignored or was ignorant of the constitutionally-mandated and "long-standing" rule—evinced as far back as *Plath* (1984) and *Atkinson* (1970)—that "evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime," *Burkhart*, 371 S.C. at 488, 604 S.E.2d at 453.

In addition, as Justice Pleicones observed in *Burkhart*, the violation is not subject to harmless error review because it is a statutory violation: "We are not required to determine if appellant's cross-examination . . . was able to remedy any error. Once improper evidence of any kind injects an arbitrary factor into the jury's consideration, this Court cannot uphold the death sentence under § 16-3-25(C)(1). Moreover, a review for harmless error is unnecessary because by definition, evidence that implicates an arbitrary factor is prejudicial." 371 S.C. at 490, 604 S.E.2d at 454.

2. Counsel's failure to object was deficient and prejudicial because the evidence, and argument by the Solicitor, violated both S.C. Code Ann.

16-3-25(C)(1) and the Eighth and Fourteenth Amendments to the United States Constitution.

Trial counsel offered as their strategy for not objecting to the prejudicial and arbitrary general prison condition testimony of O'Cain and argument of the solicitor that had they done so they would not have been able to get their adaptability witness George Martin's testimony before the jury. PCR 376-77, 507-10. The South Carolina Supreme Court, reversing in *Burkhart*, acknowledged that there is a "tension between evidence regarding the defendant's adaptability to prison life, which is clearly admissible, and this restriction on the admission of evidence regarding prison life *in general*." 371 S.C. at 488, 604 S.E.2d at 453 (citing *Skipper v. South Carolina*, 476 U.S. 1 (1986); *State v. Shafer*, 573 S.E.2d 796 (2002); and *State v. Tucker*, 478 S.E.2d 260 (1996) (emphasis in original)).[71] But the Supreme Court explained, "evidence of the defendant's characteristics may include prison conditions if narrowly tailored to demonstrate the defendant's personal behavior in those conditions." *Id.* Mr. O'Cain's testimony, as discussed previously, had nothing to say about Evans's "personal behavior in those conditions." He had never met Evans. His testimony was based on no information about Evans's actions. It was based solely on Evans's tattoos, not his behavior.

Because neither O'Cain's testimony nor the Solicitor's remarks on summation were narrowly tailored to Evans's personal behavior in prison, see *id.* (noting "evidence of the defendant's characteristics may include prison conditions if narrowly tailored to demonstrate the defendant's personal behavior in those conditions"), this injected an arbitrary factor into the sentencing proceedings in violation of South Carolina law and the state. Had trial counsel

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[71] These are distinct lines of inquiry. Martin did not need to delve into "general prison conditions" to opine that Evans can conform his behavior to the conditions of prison without becoming a risk to others. Further, objecting to the State's testimony on general prison conditions would not have shut the door to adaptability testimony, which cannot be excluded when offered by the defendant because it is constitutionally mandated.

preserved the error for appeal, reversal would have been warranted under state and federal law. See *Burkhart*, 371 S.C. at 489, 604 S.E.2d at 453.

3. Counsel's unreasonable decision to call its own expert to testify on general prison conditions does not reduce the error or diminish its prejudicial impact.

Further, counsel's decision to call Martin to mitigate O'Cain's testimony does not diminish the error. In fact, the relationship between O'Cain's testimony and George Martin's testimony mirrors the prosecution and defense testimony presented in *Burkhart*.[72] There, the South Carolina Supreme Court held that "[a]lthough appellant attempted to counter the testimony of the State's witness with evidence regarding the harshness of prison life, this entire subject matter injected an arbitrary factor into the jury's sentencing considerations." *Id.* at 488. The Court recognized that defense counsel's response to general prison testimony with additional prison testimony only adds to the arbitrariness of sentence. "A capital jury may not impose a death sentence under the influence of any arbitrary factor. S.C. Code Ann. § 16-3-25(C)(1) (2003). When the jury is invited to speculate about irrelevant matters upon which a death sentence may be based, 16-3-25(C)(1) is violated." *Id.* at 488-489 (citing *State v. Sloan*, 278 S.C. 435, 298 S.E.2d 92 (1982)). That was the case here.

4. The prejudice in this case was greater than in *Burkhart* or *Bowman* because the State's testimony also addressed the general conditions of death row.

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[72] As the *Burkhart* court described,

> During the sentencing phase of trial, appellant objected to testimony by State's witness James Sligh, Director of Inmate Classification for the Department of Corrections, regarding the privileges available to an inmate who receives a sentence of life without parole. These privileges include access to the yard, work, education, meals, canteen, phone, library, recreation, mail, television, and outside visitors. On cross-examination, Sligh acknowledged that prison life is "very regimented" and "is not a country club." Further, appellant presented evidence through his own witness that prison is a harsh environment with violent predators where one's freedom is severely curtailed.

371 S.C. at 487, 640 S.E.2d at 452-53.

Finally, the scope of the improper testimony was even greater in this case than the general prison testimony to which the South Carolina Supreme Court objected in *Burkhart* and *Bowman*. Here, in addition to hearing testimony and argument regarding the conditions in the general prison population, and whether they are lenient (State's position) or harsh (defense's position), the jury in this case *also* heard testimony from State's witness O'Cain about the general conditions of death row—harsher and more secure. O'Cain opined that on "[d]eath row, [Evans] is constantly monitored," "does not have one-on-one contact with the visitation," and "it is a different situation." R. 1603.

Counsel's failure to object was deficient and prejudicial. Mr. Evans's death sentence is unreliable and should be vacated.

IX. DEFENSE COUNSEL FAILED TO EXAMINE THE STATE'S FORENSIC EVIDENCE, FAILED TO CHALLENGE THE STATE PATHOLOGIST'S TESTIMONY, AND ACQUIESCED IN THE STATE'S DESCRIPTION OF THE SHOOTINGS AS EXECUTION-STYLE. THIS WAS DEFICIENT AND PREJUDICIAL BECAUSE THE EVIDENCE SUPPORTED A LESS INFLAMMATORY EXPLANATION THAT WAS CONSISTENT WITH THEIR CLIENT'S STATEMENT.

A. Relevant Facts in the Record on Appeal

After a nearly four-hour stand-off at the Sapinoso residence, Kamell Evans had decided to go outside. Evans's statement explains that Joe Sapinoso said he would walk out with him. So Evans put Joe's gun "on the coffee table in the living room." Evans put the 9mm and .380 pistols in his sweatshirt. As Evans was about to walk out, he saw Joe turn to the side and thought he was going for his gun, and Evans shot him once with the 9mm, then "two or three more times." Evans shot Mr. Sapinoso with the .380, and then twice more. Evans stated that immediately afterward "I thought about killing myself, but then I decided to let the police come in and shoot me. " "Everything was under control," Evans said, "if I just kept all the guns on me." At the police station, Evans also drew a diagram of the house and of the room in which the shootings occurred. R. Exh. 43A. The drawing showed the position of the gun that Evans set on the coffee table, Joe, Joe's father, and Evans. R. Exh. 43A.

Dr. Michael Eugene Ward, the Greenville Chief Medical Examiner, testified about the autopsies of Joe Sapinoso and Antonio Sapinoso, Sr.. He stated that Antonio Sr. died of two gunshot wounds to the head, both fatal, from a distance of greater than two to three feet based on the lack of gunpowder or stippling. R. 1389-90. He was also shot once in the arm from the same distance, which was not fatal. R. 1391. Dr. Ward testified that based upon the shoring of exit wounds and impact points that Joe Sapinoso's head was "right side down and against the floor at the time he received these three gunshot wounds." R. 1402. He testified

that the gunshot wound he labeled number four "almost certainly occurred at the same time as number three that they are almost in essentially the same location with the same sort of stippling pattern present around the left ear indicating that they occurred very nearly the same time." R. 1402. The prosecutor then asked, "So in your opinion all four shots were fired while . . . Joe Sapinoso's head was down on the concrete?" R. 1402. Dr. Ward answered that "from both the autopsy findings and the historical information given, that would be correct." R. 1403. Later Dr. Ward said, "With Joe Sapinoso being on the floor, he [Evans] is certainly above." R. 1405-06. He testified that the distance of the gun would be less than two to three feet for all four shots.[73] Dr. Ward also testified that the evidence was consistent with Mr. Sapinoso's arm being raised in a defensive posture. R. 1407. Trial counsel did not cross-examine Dr. Ward; nor did they object during his testimony.

In summation at the guilt-innocence phase, the Solicitor argued that Evans's account and hand-drawn diagram did not match the evidence. R. 1458-59. It was not a spontaneous reaction, the prosecutor argued, but a planned, "marksman"-like, killing. R. 1459-62. In summation at the sentencing phase, the Solicitor argued this was a deliberate, premeditated, gang-motivated killing. Evans, the Solicitor argued, "planned this execution to the smallest minute gangland detail." R. 1757; see R. 1753. The "execution style" shootings, R. 1756, the Solicitor's argued, were motivated by a strategy of gang action. "[H]e was going to let the world know that night gang style, just like the pictures, gang style . . . . Crips deliver bodies, and he delivered you two." Tr. 1756.

B. The Evidence Presented in Postconviction Proceedings

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[73] To demonstrate, a Styrofoam head was placed on a table in the coutroom, in the position of Sapinoso's head allegedly was on the floor at the time of the shooting. R. 1403-04 He concluded that "practicality and experience indicate that these [four shots] very likely occurred at a time when neither the shooter nor Joe Sapinoso were moving . . . ." R. 1407. The gun was then pointed at the Styrofoam head.

1. Counsel offered no strategic reason for failing to investigate or challenge the State pathologist's conclusions.

James Goldsmith was asked during the postconviction hearing what he and Steve Sumner did to challenge the State pathologist's testimony. "I don't believe we did anything to challenge the pathologist," he responded. PCR 237-38. Counsel did not hire an expert to review the autopsy report. PCR 238-39, 323. The pathologist's report, Goldsmith recalled as "[n]othing out of the ordinary, basically cause of death, angle of the wound, position of the body, those sort of things":

> Q: Those sort[s] of things, angle of wound, were those things used to buttress or refute Kamell's account of what happened?
>
> A: I'm not sure that either to be honest with you. It came in. Kamell had basically said that he had done it and there was no self-defense in that area.

PCR 238. Sumner's recollection was similar—they didn't challenge the forensic evidence because Kamell had told him, "There's no issue, I shot him."

> Q: Would it have helped your case if there had been – if a pathologist would have come in and sa[id], you know what, I'm a trained pathologist and this statement that was given by this defendant is consistent with the forensic evidence? . . . .
>
> A: No. . . . . Because guilt was never an issue in this case, in my opinion, and it's memorialized in this trial strategy memo. The strategy was laid out to try to get through the guilt phase as quickly as we could in order to get to the mitigation phase because I didn't feel like it was an issue and the client has numerously said to me on various occasions that guilt was not an issue.

PCR 325.

Counsel, however, did not consider the impact that the State's account of the cause and manner of death would have at sentencing. Yet, Sumner acknowledged during the postconviction hearing that the state's portrayal at trial of the shootings as a "gang-style

execution" differed from Evans's statements of what transpired in the house, in which Kamell said that he thought one of the victims was reaching for a gun. PCR 327. In fact, Sumner said, "There is one thing I want to make clear and you said one thing. I don't recall Kamell Evans ever being in complete total agreement regarding all of the forensic evidence . . ." PCR 446. Asked if retaining a pathologist could have helped in the sentencing phase, Sumner responded, "Yes, I think it would have given some help." PCR 328.

2. Evans's account is consistent with the forensic evidence.

Johnathan Arden, a former Chief Medical Examiner for Washington, D.C., and former first chief medical examiner in New York City, testified as a forensic pathologist for applicant in postconviction. PCR 761. Evans's postconviction counsel provided him with discovery materials, including the autopsy reports of Antonio and Joseph Sapinoso and and the forensic and crime scene documents, autopsy and crime scene photographs, as well as police reports and Evans's statement. In addition, he reviewed the trial transcript of Dr. Ward, and handwritten notes of trial counsel. PCR 763.

Dr. Arden testified to a reasonable degree of medical certainty that the account Evans gave of the events of April 2 were consistent with the forensic evidence. "My opinion is the account that he gave in that statement in large part is, in fact, consistent with the forensic evidence that I reviewed." PCR 764. Specifically, Dr. Arden testified that there was an alternative and equally reasonable explanation to that presented by Dr. Ward at trial. PCR 764; see PCR 805. Dr. Arden testified that three shots did "indeed fit the interpretation that Dr. Ward offered" (PCR 765; see PCR 768)—Ward testified that Joe Sapinoso's head was on the floor at the time that all four shots were fired. "Dr. Ward said that all four of them fit that pattern and there is actual evidence that contradicts that part of his opinion." PCR 765-66. It

was Dr. Arden's opinion, to a reasonable degree of medical certainty, that one shot was not fired while Joe Sapinoso's head was on the floor. PCR 805-06.

Referring to App. Exh. 63, Dr. Arden explained that one gunshot had "a decidedly different trajectory" compared with the other three (PCR 766), which "tells [] that the angulation of the gun at the time the gun was fired" for the single shot "was significantly—markedly different" than for the other three, which are similar. See PCR 767 (noting the difference in trajectory "reflect[s] the relative [] positioning of the gun to the target"). (Dr. Ward labeled this single shot that Dr. Arden notes has a different trajectory as No. 4 and labeled the three similar shots Nos. 1, 2, and 3.) Further, the single shot with a different trajectory is the "only shot with no exit wound," and "there is no evidence by which to say that this is also a wound that happened when [the victim's] head was down on the carpet." PCR 770. The proximity of the entrance wound of the single shot to that of one of the other shots was what led Dr. Ward to conclude that the shots he labeled No. 3 and No. 4 were fired rapidly in succession. But Dr. Arden testified that "the fact that the No. 4 trajectory is so markedly different from No. 3 . . . tells me that the gun had to be oriented substantially differently," such that rapid fire succession could not have occurred. PCR 771 ("There isn't enough time for the head to turn or move substantially between one and the next"). If shown the State's exhibit from trial, Arden would have reached the same conclusion. PCR 777.

Dr. Ward also based his opinion on what he regarded as similar stippling patterns. Dr. Arden testified that the stippling did not allow anything more than "a general estimate about range of fire." PCR 771. More significant, given the proximity of what Dr. Ward labeled No. 3 and No. 4 (PCR 799), there is "no way to distinguish [at autopsy]" whether the stippling came from one shot, a subsequent shot, or both. PCR 772-73. Consequently, the single shot

with different trajectory could have been fired from a distance greater than the others—and "the absence of stippling associated with [the single shot] would be concealed with the presence of stippling associated with [what Ward referred to as No. 3]." PCR 773; see PCR 795 (noting there wouldn't be stippling for shot fired from coffee table to far end of couch).

Dr. Arden also testified to a reasonable degree of medical certainty that he disagreed with Dr. Ward's description regarding Mr. Sapinoso. Dr. Ward testified that the wound on the right back of Mr. Sapinoso's arm was consistent with a defensive wound. R. 1407. Dr. Arden testified that, while not eliminating the "physical possibility" that the wound was defensive, "there is absolutely nothing about that particular gunshot wound that particular[ly] suggests a defense posture." PCR 776. Arden testified that based on the forensic evidence, he found Evans's account of how Mr. Sapinoso was shot to be credible. PCR 812.

3. The computer generated diagrams, used as demonstrative aids by the State at trial, were inaccurate and misleading.

An additional concern with the state pathologist's testimony at trial came out during the cross-examination of Dr. Arden during the postconviction hearing. The computer generated diagrams used by Dr. Ward as a demonstrative aid for the jury are not accurate. Dr. Arden testified referred to a slide from the State's trial exhibit depicting a rear view of Joe Sapinoso's head: "[t]he gunshot wounds in this diagram do not reflect what is in the autopsy report. . . . In fact, they're decidedly to the back of the head . . . but the autopsy report and the autopsy photographs don't agree with that." PCR 801. Shown a slide from the State's demonstrative trial aid, numbered App. Exh. 65 at the PCR hearing, Arden testified that the location of the gunshot wounds depicted in the computer-generated diagram were, to a significant degree, not consistent with the autopsy report. PCR 807-08. The entrance wound had been moved from the left side of the head to the center of the back of the head. PCR 808.

This was also true with the slides of the other wounds. PCR 809-10 (discussing Resp. Exhs. 43 and 44). Dr. Arden specified that the computer-generated diagrams lack a measuring scale and are not necessarily anatomically accurate. In sum, Dr. Arden concluded, the computer generated diagrams are "inaccurate and they misrepresent the evidence." PCR 811.

The graphic designer who made the diagrams was called by the State to testify at the PCR hearing. He explained that the uses a "3D program that has a generic head model built into it, just basically a head that can be rotated around." PCR II 262, 267. As the designer explained, "by looking at the autopsy photography I was able to take and try to pinpoint where at least it lined up on the head model. Like I say, it's not a completely accurate—it's meant to be a generic model just for a visualization purpose." PCR II 263. "It was meant to be a visualization. It was never meant to be a scientific—a scientific product." PCR II 268.

C. Deficient Performance and Prejudice

1. Counsel were deficient in failing to seek an independent expert prior to trial to corroborate Kamell's account of the incident; in failing to examine the government's forensic evidence; and in failing to challenge Dr. Ward's testimony—by cross-examination or rebuttal witness—at trial.

Courts will find counsel's performance deficient if, at the time of trial, counsel's "representation fell below an objective standard of reasonable" that is measured by "prevailing professional norms." *Strickland*, 466 U.S. at 688. When a court is determining whether counsel's conduct was reasonable, it "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id.* at 690. As the South Carolina Supreme Court recognized in *Ard v. Catoe*, "[c]ounsel at every stage have an obligation to conduct thorough *and independent* investigations relating to the issues of both guilt and penalty." 642 S.E.2d at 597 (internal

quotations omitted) (citations omitted); see *id.* (noting the ABA directs that "[w]ith the assistance of appropriate experts, counsel should . . . aggressively re-examine all of the government's forensic evidence" (internal quotations and citations omitted)).

During the postconviction hearing, trial counsel admitted frankly that they had done nothing to investigate or prepare a challenge to the pathologist's testimony. From their perspective, Kamell "said he did it," it was not a self-defense case, and therefore there was no need to look into the forensics. As far as guilt-or-innocence was concerned, that may have been true. But as counsel acknowledged, the State's account was not consistent with Kamell's account, and thus more was at stake than who did it. The prosecution made this clear during the sentencing summation, describing as an execution what Kamell had said consistently began not as an intentional cold-blooded killing, but as a reactive, tragic mistake.

At the PCR hearing, Sumner acknowledged the oversight. Asked if retaining a pathologist could have helped in the mitigation phase, Sumner responded, "Yes, I think it would have given some help." PCR 328. As it stood, Kamell's word was pitted against the expert testimony of Dr. Ward, who opined that all four gunshot wounds were fired when Joe was on his knees and when Joe's head was down on the concrete (R. 1402-03), from above and behind, with the weapon two to three feet away. R. 1405-06. Counsel gave no strategic reason for failing to challenge the pathologist's testimony. Indeed, given their choice to argue that Evans was under the influence of an extreme emotional disturbance, at both guilt and penalty, there could be none. As counsel acknowledged, the State's portrayal of an execution style killing (R. 1755-57) refuted Kamell's account, who testified that he shot Joe because he thought Joe was reaching for his gun when Joe turned to the side and that he shot Antonio because Antonio had stood up at the same time Joe reached for the gun. R. 1436.

Counsel also failed to cross-examine Dr. Ward's very confident testimony that the shootings were planned and deliberate and not just a terribly flawed reaction to the circumstances. Moreover, counsel failed to call another forensic pathologist that would refute Dr. Ward's testimony while concurrently substantiating Kamell's testimony that he was in front of the fireplace in the living room when he shot Joe and Antonio, and that he shot Joe, who was sitting on a couch, because he thought Joe was reaching for the gun when he turned to the side, and that he shot Antonio, who was sitting on a love seat, because he stood up at the same time Joe moved. R. 1233, 1239.

Even more, counsel failed to object to the state's demonstrative aid, a computer generated diagram done by a graphic designed with no forensic training that was only meant to be a loose approximation of the autopsy evidence, not a scientific reproduction. As Dr. Arden explained at the PCR hearing, the demonstrative aid in fact misrepresented the evidence, presenting shots as entering directly behind Joe's head that actually came from the side. This assisted the Dr. Ward's account of the shots as coming from upward and behind and Joe was on his knees with his head down—but in an inaccurate and misleading way.

In *Draughon v. Dretke*, 427 F.3d 286, 297 (5th Cir. 2005), the Fifth Circuit found counsel deficient for failing to investigate and retain expert testimony to support the defendant's account of a shooting and rebut the state's account. The court found that counsel's "failure to investigate the forensics of the fatal bullet deprived Draughon of a substantial argument, and set up an unchallenged factual predicate for the State's main argument that Draughon intended to kill. It left little with which to persuade the jury that [the state expert's] statement of distance was faulty." *Id.* at 296. Draughon, the court observed, "became the sole source of evidence available to counter the prosecution's theory." *Id.*

Here, in failing to consult with a forensic pathologist, counsel "failed to conduct the rudimentary investigation necessary in order to (1) decide upon the nature of the defense to be presented, (2) determine before trial what evidence he should offer, (3) prepare in advance how to counter damaging expert testimony that might be introduced by the prosecution, and (4) effectively cross-examine and rebut the prosecution's expert witnesses once they did testify during the course of the trial." *Richter v. Harrington*, 578 F.3d 944, 946 (9th Cir. 2009), cert. granted on other grounds, *Harrington v. Richter*, 130 S.Ct. 1506 (2010). There was no reasonable basis for counsel's failure to investigate the availability of and manner in which forensic evidence might have corroborated Evans's account of how the shooting began.

2. Counsel's failure allowed the Solicitor to present the tragedy as a meticulously planned execution and Evans as a liar, despite the consistency of the forensic evidence with Evans's account.

Dr. Arden's testimony shows that had counsel subjected the government's forensic evidence to thorough inspection, they could have supported their client's version of the events of the incident—thus resisting the State's implicit attempt to paint him as untruthful and an opportunistic liar. In addition, they could have refuted the prosecution's account that this was an execution and the State's character portrayal of Evans as a cold-blooded executioner.[74]

In *Draughon*, with respect to *Strickland* prejudice, the court found that if trial counsel had obtained the forensic evidence that Draughon developed in federal habeas, a different outcome was reasonably probable. *Id.* at 297. The court reasoned that the "absence of forensic

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[74] There were multiple grounds on which Dr. Ward's testimony was subject to challenge:

- Grouping what Dr. Ward identified as shot number 4 with the other three shots is speculative—it is one of other possible inferences supported by the evidence.
- It is impossible to tell what order the gunshot wounds occurred in. What Dr. Ward identified as No. 4 could have been the first shot.
- The conclusion that Joe Sapinoso was not moving was speculative.
- Reliance on the "same sort of stippling pattern" to link the four shots in time and placement was not a strong basis.
- Nothing specifically suggests that Mr. Sapinoso was in a defensive posture.

evidence facilitated the State's deft portrait of [Draughon as] a violent young man"—a cruel and ruthless person who engaged in a reckless robbing spree. *Id.* Here, too, the absence of forensic evidence facilitated the State's portrayal as Kamell as an evil, violent gang member. *Draughon* is a capital-case decision granting relief based on counsel's failure to challenge forensics at both the guilt and punishment stages. The evidence of Kamell's guilt was stronger than Draughon's, but the forensic testimony's impact at sentencing is very much the same.

In summation, the Solicitor argued that Evans "proceeded to shoot Joe while he was lying on the floor four times in the back of the head. And then he killed Mr. Sapinoso after he made him watch the execution of his son. An execution style with four shots in the back of the head is significant in this case because you heard a lot about gangs." In fact, those were inferences, but, as Dr. Arden's testimony shows, surely not the only or most reasonable ones that could be drawn from the evidence. Significantly, as Arden testified, the forensic evidence was consistent with Evans's account that the shooting began as a split-second reaction. This is significant because it undercuts the government's argument that the incident was planned. And it gives new voice to other evidence in the trial record that cut against the State's presentation but was silenced when counsel failed to challenge it, such as the fact that this occurred very suddenly after a four-hour stand-off, at a point when all law enforcement involved thought the negotiations were going well and that Kamell was going to exit the house. See R. 1101, 1108, 1134, 1166, 1186.

Under *Strickland*, the prejudice of all of counsel's errors must be considered cumulatively: the prejudice from this error must be considered, among other errors, with counsel's failure to present evidence of lead poisoning and brain damage. As Dr. Gur established, Evans's frontal lobe, the part of the brain that controls the coordination of sensory

information, decision-making, the ability to adapt to changing circumstances, and emotion processing, is atrophied by more than two to two and half standard deviations below the mean for an adult man. See PCR 702-09. Evans also has reduced volume in the insula, which means deficits in the ability to interpret anxiety and threat, and in other occipital areas that affect visual processing. PCR 707. Dr. Gur and Dr. Canfield both explained that this type of frontal lobe atrophy from lead exposure results in decreased ability to change response mode (perseveration), difficulty in problem solving, and impaired short-term memory. PCR 709; PCR 833-34.

This stands on its own as mitigating evidence of Evans's background. But it is also consistent with Kamell's account of the shootings. Kamell's account, which questions why he reacted as he did, is consistent with the acts of someone who suffers from these behavioral impairments. Dr. James Evans suggested as much at trial, but without background records and further imaging he could not state this definitively; further, Dr. Evans's finding of neuropsychological symptoms was contradicted by Dr. Berg. Challenging Dr. Ward's testimony would not have made Kamell any less guilty of these tragic crimes.[75] But it would have provided the jury with an alternative account—and given the misleading nature of Dr. Ward's demonstrative aid—a more accurate account, to which Evans's behavioral impairments due to brain damage may have been probative.

[75] In *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006), the South Carolina Supreme Court's denied an ineffectiveness claim based on counsel's failure to challenge the State pathologist's testimony as to how the shooting began. Simpson claimed counsel was deficient only with respect to the guilt phase, however, and the Court held that the alternate account would have made little difference to guilt. Further, Simpson's three experts at PCR presented partially inconsistent accounts, which ultimately "added little either factually or theoretically." 367 S.C. at 597, 627 S.E.2d at 706. The great prejudice in Mr. Evans's case was at the sentencing phase.

X. THE SENTENCING SUMMATION UTILIZED ARGUMENTS DESIGNED TO AROUSE THE PASSION AND PREJUDICE OF JURORS, ASSERTIONS SUBSTITUTING PERSONAL OPINIONS AS LAW, STATEMENTS DIMINISHING THE JURORS' SENSE OF INDIVIDUAL RESPONSIBILITY FOR THE VERDICT, STATEMENTS MISREPRESENTING THE PROPER SCOPE OF MITIGATING EVIDENCE, ARGUMENTS THAT WERE NOT REASONABLE INFERENCES FROM THE RECORD, AND MISREPRESENTATIONS OF THE NATURE OF ALTERNATIVE PUNISHMENTS.

Improper aspects of Solicitor Robert Ariail's sentencing summation, such as his completely unfounded statement that Evans was "already" involved in gang activity in the jail and the misleading depiction of the crime as a gang crime have been discussed in Points VII and IX. Point VIII has addressed the Solicitor's highly improper remarks about general prison conditions, comparing a "big prison" to a "little city . . . with all the necessities of life." Other parts of the Solicitor's argument also strayed from the fair and appealed to the personal biases of the jurors. A host of arbitrary factors coalesced in the Solicitor's sentencing summation, see *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007) (evaluating closing argument for the undue influence of passion, prejudice, or any other arbitrary factor under S.C. Code Ann. § 16-3-25(C)), and, considered in the context of the entire proceedings, "so infected the trial with unfairness as to make the resulting conviction a denial of due process," *Vasquez v. State*, 2010 WL 3120221, *6 (S.C. Aug. 9, 2009) (quoting *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002).[76] There is a reasonable probability, consequently, that trial counsel's complete failure to object to the Solicitor's summation was prejudicial.

[76] See *Donnelly v. DeChristoforo*, 416 U.S. 637, 644-47 (1974) (looking to the level of ambiguity, frequency and length of the prosecutor's statements; the prosecutor's intentionality and forethought in making the statements; and the extent to which the statements mislead the jury about their responsibility, about the law, or about the facts of the case); see also *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994) (applying *Donnelly* and *Darden* to the sentencing phase of a capital trial).

A. Counsel Was Deficient For Not Objecting to the Prosecutor's Insertion of His Personal Opinions and Judgment about the Appropriate Sentence, as Well as the Authority of the State Judicial Process, Both of Which Minimized the Jurors' Responsibility for the Sentencing Decision.

The South Carolina Supreme Court has made it quite clear by now that it is improper—and prejudicial—for a solicitor to impose his personal beliefs upon the jurors. See *Northcutt*, 372 S.C. at 223, 641 S.E.2d at 881 (citing *Thompson v. Aiken*, 281 S.C. 239, 315 S.E.2d 110 (1984)). A prosecutor may not inject his personal opinion into jury deliberations "as though it were itself evidence justifying sentence of death." *State v. Woomer*, 277 S.C. 170, 175, 284 S.E.2d 357, 359 (1981) (citing Section 16-3-25(C)(1)) and *Gardner v. Florida*, 430 U.S. 349 (1977); see *State v. Butler*, 277 S.C. 543, 545-47, 290 S.E.2d 420, 421-22 (S.C. 1982) (reversing where prosecutor emphasized that he already made death sentence decision).

Here, the Solicitor emphasized that the process of selecting cases for the death penalty in South Carolina practically ensures that, in the chosen cases, death is the proper punishment. R. 1747, 1751. The State legislature, Mr. Ariail stated, "in its wisdom" rarely seeks the death penalty, seeking it "in only very limited circumstances" and in only those murders "that have aggravating circumstances." R. 1747. He emphasized that the process is state-sanctioned, "approved by our courts" and "our legislature." R. 1747. This message implied that in select cases, such as Evans's, the state has already decided that a death sentence is the appropriate punishment. As a result, the jurors' own sense of responsibility in deciding the punishment is reduced. This is constitutionally impermissible. *Caldwell v. Mississippi*, 472 U.S. 320, 328-30 (1985); see *Woomer*, 277 S.C. at 175, 284 S.E.2d at 359-60 (holding solicitor's attempt to minimize jury's responsibility improper).[77]

[77] Mr. Ariail also implied that imposing the death penalty is each juror's civic responsibility given that the state has already sanctioned the case as being worthy of a death sentence. Imposing the death penalty in select cases is a "legal process" and a "function of government to be carried out by its citizens," Ariail told the jurors. R. 1747.

Ariail amplified the same message when he informed the jury "we seek [the death penalty] only in those cases that are most appropriate. But there are circumstances where it is available for mean and evil people . . . And I will tell you it is reserved in this circuit for only the worst of the worse [*sic*]." R. 1751. Ariail referred to Evans as "evil" and "mean," and then offered his personal opinion on how many shots qualify for a death penalty: "Maybe one shot he could say I deserve life; maybe two shots, I deserve life; but not three and not four and not five and not six and not seven. The extent of the culpability was too much—hearing that sound of bullets piercing the head of a human being and seeing the blood and continuing execution style to shoot these people." R. 1759. The Solicitor's statements, beyond the inflammatory potential of their graphic language, communicated to the jury that the State had already approved a death sentence in Mr. Evans's case. Defense counsel's failure to object deprived the trial court of an opportunity to correct the error and demands reversal.

B. Counsel Was Deficient For Not Objecting to the Prosecutor's Efforts to Mislead the Jurors' about Their *Individual* Responsibility to Decide Sentence.

The twelve individuals on Evans's jury were presumably chosen for their impartiality—not for their agreement with community standards or majority opinion—and it is with such impartiality that they should have decided Evans's punishment. Yet the Solicitor early in his summation informed jurors' that their verdict was the product of "collective

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Subsequently, he said:

> [Y]ou are the citizens that the legislature has designated to carry out this function. . . .So you are shaping a lawful punishment to an unlawful act, and you are carrying out the function of government that the legislature has instructed you to do. There is nothing wrong with what you are doing. You are not killing anyone. You are apportioning a punishment. It is a tough decision; it is a tough decision. . . . But responsible people make tough decisions every day. You make tough decisions in your life . . . . And the process that we are in makes you responsible for making that tough decision.

R. 1747-48. This implication further minimizes the jurors' roles and sense of responsibility in violation of federal and state law. See *Woomer*, 277 S.C. at 175, 284 S.E.2d at 359-60.

reasoning." R. 1745-46. The decision, he stated, was "not intended to be a unilateral decision by one or two jurors," R. 1746; rather, it is "a collective reasoning of 12 people from the community" in which the jurors are to hear "each and every one of [their] fellow jurors' opinions" and are then to reach a decision "based on the give-and-take." R. 1746. These statements suggest that, regardless of each individual juror's decision as to punishment, the final decision of either life imprisonment or death is group decision requiring a compromise among all individual jurors.

Jurors have individual votes that they may change on their own volitions. See *State v. Pittman*, 373 S.C. 527, 555, 647 S.E.2d 144, 158 (S.C. 2007). In deciding whether to recommend a death sentence, jurors should rely only on "an impartial, rational, and careful evaluation of all the facts and circumstances about the crime, the victim, and the defendant as presented at trial." *Von Dohlen*, 360 S.C. at 613, 602 S.E.2d at 746. A prosecutor cannot, therefore, instruct the jurors to consider the evidence presented from a perspective other than their own. The message of the argument was that decisions to impose the death penalty are not individual decisions based purely on the facts and law, but are decisions that should succomb to majority opinion. Implicitly, Mr. Ariail told the jurors that what matters is what the jury *as a whole* believes the appropriate punishment to be.

This was not merely an attempt to quash dissent within the jury, but to convince jurors that the decision of whether to impose a death sentence was out of their hands. They could not blame themselves, the prosecutor implied, because the "collective" would make the ultimate decision. These misstatements may have helped him condemn Mr. Evans to death, but also deprived Mr. Evans of his well-settled right to individualized sentencing in a capital trial. The

prosecutor's false claims diminished the jury's sense of responsibility for imposing the death sentence, in clear violation of the Eighth Amendment under *Caldwell*, 472 U.S. at 328-30.[78]

C. Counsel Was Deficient For Not Objecting to the Prosecutor's Arguments for the Death Penalty Out of Sympathy for the Victim.

"To argue that it would be unfair for the defendant to live while the victim is dead, 'creates a *super-aggravator* applicable in every death case. No amount of mitigating evidence can counter this argument, and if the jury agrees they may not even consider mitigating evidence." *U.S. v. Johnson*, __ F.Supp.2d __, 2010 WL 2010476, *28 (quoting *Le v. Mullin*, 311 F.3d 1002, 1015 (10th Cir. 2002) (emphasis in original)). Here, Mr. Ariail, anticipating the defense summation, made such a plea:

> [T]he defendant is still alive. He is in front of you. He is a person. He is living and he is breathing. None of us are interested in death, but the law says that mercy, and I say that mercy belongs only to those who deserve it. So when you hear a call for mercy I want you to ask what mercy did this defendant show to Joe Sapinoso. What mercy did he show to Mr. Sapinoso when he shot them seven times and continued pumping bullets into their heads?

R. 1749. He then returned to focus on sympathy for the victims family, noting that "you have to feel sorry for Ms. Sapinoso," which introduced this incredibly passion-provoking, gut-wrenching statement: "And the horror she went through, a life-changing experience to lose her husband who was on the verge of retirement. They were going to enjoy those golden years of retirement and relaxation and move half the time to the Philippines where they had come from. It was going to be a wonderful time." R. 1754. Of course, the victims deserved the jurors' sympathy, but the prosecutor's emotional portrayal strayed over the line.

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[78] Counsel was also deficient for not objecting to the prosecutor's efforts to stress that it was the jurors' duty to the community in this case to return a death sentence. Near the end of the State's closing argument, Mr. Ariail told the jury, "I can tell you that whatever decision you make is going to ring like a bell outside of this courthouse as to the standard of conduct in this community. It will ring for all who will listen and all of those who are listening." R. 1760.

D. Counsel Was Deficient For Not Objecting to the Prosecutor's Misrepresentation of the Proper Scope of Mitigating Evidence.

The Eighth Amendment gives the accused the right to introduce any relevant mitigating evidence—regarding any circumstances of the offense—during the sentencing phase of a capital trial. See *Lockett v. Ohio*, 438 U.S. 586 (1978). The State may not use its closing argument to divert the jury's attention from that evidence. Nor may the State pressure the jury to reject mitigating evidence. *See State v. White*, 246 S.C. at 506, 144 S.E.2d at 482. The burden is on the jury in capital cases to consider mitigating evidence and the weight accorded it. *State v. Linder*, 276 S.C. 304, 311, 278 S.E.2d 335, 339 (1981). Here, the prosecutor explicitly told the jury that Mr. Evans's evidence "was not mitigation." R. 1754. "It didn't mitigate anything," he claimed. "It was designed to make you feel sorry for him and create sympathy, but that's not the reason you decide the appropriate punishment." R. 1754. The problem with that statement, however, is that Mr. Evans's evidence *was* appropriate mitigating evidence. Indeed, the Eighth and Fourteenth Amendments "require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 587. The prosecutor's statement misled the jury and undermined Mr. Evans's constitutionally protected right.

E. The Prejudice from the Solicitor's Remarks Was Not Ameliorated by Defense Counsel or Cured by the Court.

Defense counsel in summation told the jury that the "responsibility is to decide life or death of Kamell Evans, and "[i]t is yours alone," "[t]he choice is yours." R. 1770, 1771, 1772. But these statements do little to offset the Solicitor's message that the verdict is a collective

decision subject to the majority (and community) opinion, and one that he believes is right in this case and which the State has, in effect, authorized. Further, defense counsel did nothing to dissuade the jurors of the mistaken view that mercy is not legitimate mitigation. Because counsel did not object to any portion of the closing argument, the trial court gave no curative instructions regarding any of Ariail's improper statements. See R. 1743-1760. Indeed, the instruction the trial court delivered informing the jurors that mercy was not a relevant consideration likely seemed consistent with the Solicitor's argument that the defense sentencing case was not mitigation.

The Solicitor's summation injected passion, prejudice, and arbitrary factors into the sentencing proceedings, in violation of S.C. Code Ann. § 16-3-25(C) and state and federal law. Defense counsel's failure to object was prejudicial because the Solicitor's remarks, considered in the context of the entire proceedings, so infected the trial with unfairness as to make the resulting conviction a denial of due process. *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873.

XI. APPLICANT WAS DENIED DUE PROCESS OF LAW, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CONSTITUTION AND LAW OF SOUTH CAROLINA BY THE PROSECUTION'S PRESENTATION OF MISLEADING EVIDENCE.

The facts relevant to this claim are set forth in detail in Point VII (addressing counsel's failure to challenge the testimony of Mr. O'Cain) and Point X (addressing the Solicitor's sentencing summation). The facts most important to the claim are these. Prior to trial, Evans's counsel received from the State, in discovery, the transcription and handwritten notes of interviews conducted the day after the incident by SLED Agent Pam Crawford. In Agent Crawford's interview with Christina Rodriguez, Rodriguez (a) mocks Kamell's gang pose and explains the origins of his gang-related tattoos; (b) states that he was not in a gang in South Carolina; and (c) expresses serious doubt as to whether he could have been in a gang in Cleveland when he was very young. See App. Exh. 34; PCR 366 (Sumner recalling that Christina said Kamell's gang posing "was a front," "not real," and "impersonated."). Agent Crawford's handwritten notes from an interview with Tyrone Johnson on the day after the incident, state, "[H]e is idol of Tupac . . . [a] pretty boy". Sumner received these materials in discovery from the State on August 4, 2004. App. Exh. 31.

At trial, however, Mr. O'Cain, relying solely upon Evans's tattoos and homemade posters, testified that Evans was a "hard-core gang member" with a reputation for street violence. R. 1590-96, 1601. The Solicitor argued at sentencing that "[a]s Mr. OCain told you, [Evans] is *already* into gang activity at the jail." R. 1758 (emphasis added). Point VII, *supra.*

A prosecutor has an affirmative duty not to present evidence that he knows or reasonably should know is false, and has a corresponding duty to correct false evidence, even if unsolicited, "when it appears." *Washington v. State*, 324 S.C. 232, 235, 478 S.E.2d 833,

835 (1996). *See Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264, 279 (1959); *State v. Fullwood*, 274 S.C. 60, 61, 262 S.E.2d 10, 11 (1979) (improper for prosecutor to argue evidence refuted defendant's claim that victim had knife, when prosecutor knew that law enforcement took a knife from the belongings of the deceased). Whether or not the misleading and false testimony is by design or results from a mistake, the prosecutor bears responsibility. *Giglio*, 405 U.S. at 154. Because SLED is a state agency, Agent Crawford's knowledge is imputed to the prosecution. The Solicitor should have known that Agent Crawford's interviews stated that Mr. Evans was not in a gang and, without proof beyond Mr. O'Cain's subjective interpretation of Evans's tattoos, should have known he was presenting misleading, if not false, evidence.

Mr. Evans is entitled to relief if "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Kyles v. Whitley*, 514 U.S. 419, 433 n.7 (1995) (quoting *United States v. Agurs*, 427 U.S. 97 (1976)). Without question, Mr. O'Cain's testimony and the Solicitor's misleading summation were prejudicial. The prosecutor's passionate closing remarks spun the circumstances of the domestic tragedy into a gang shooting. Because O'Cain's testimony was never challenged and the Solicitor's summation not objected to by the defense at trial, there is a reasonable likelihood that the false testimony could have affected the judgment of the jury. The sentencing verdict merits no confidence and must be set aside. U.S. Const. amend. V, VIII, XIV; S.C. Const. art. I, 3, 14, 15.

XII. APPLICANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY APPELLATE COUNSEL'S FAILURE TO CHALLENGE THE TRIAL COURT'S DENIAL OF A MOTION FOR A CHANGE OF VENUE.

Point VI of this brief argues that trial counsel performed deficiently and prejudiced Evans by failing to seek to move the trial to a different county. Trial counsel sought a change of venue based on pretrial publicity and the status of the victim as a law enforcement officer. Following jury selection, the trial court denied the motion. While a challenge to venue on those grounds was preserved, appellate counsel did not raise the issue on appeal. The only issue that counsel raised was an unpreserved issue—that the trial court should have charged the jury on a statutory mitigating factor *sua sponte*. See *supra* at 55, n.24.

During the postconviction hearing, Joseph Savitz, who handled the direct appeal in Mr. Evans's case, was asked about trial counsel's venue motion. He did not remember the basis for the motion, but recalled "one of the victims was well-known in the area and may have worked in the courthouse in some kind of law enforcement capacity." PCR 733-34. Asked if he considered raising a venue issue on appeal, Mr. Savitz responded: "You know I don't remember that I did. I consider pretty much everything. There wasn't a lot [to] raise in this case. There weren't a lot of objections. It wasn't like I was overwhelmed with issues in the case that I could have raised. . . . [I]f I thought it was a winning issue I would have raised it as opposed to raising an issue that was not preserved." PCR 735.

Mr. Savitz testified that he did not consider seeking a change of venue based on circumstances beyond pretrial publicity (PCR 736-37), such as the extraordinarily unique circumstances that victim Joe Sapinoso worked in the Greenville County Courthouse and that the jury would have been surrounded by personnel who worked with the victim (Point VI). Cf. *U.S. v. Wright*, 603 F.Supp.2d 506, 508 (E.D.N.Y. 2009) (granting venue change to avoid

the appearance of impropriety where a trial for the assault of a Assistant U.S. Attorney would have been held "literally in the victim's 'home court'").

Trial counsel failed to challenge venue on the ground that the Greenville County Courthouse was Joe Sapisono's workplace, and only preserved objection to a venue challenge based on pretrial publicity and, in that regard, the victim's status as a law enforcement officer. But if the Court finds (contrary to Point VI) that a venue challenge based on a trial "literally" in the victim's "home court," *Wright*, 603 F.Supp.2d at 508, *was* raised by trial counsel, then Evans submits that appellate counsel was ineffective for failing to raise that issue on appeal.

Under *Strickland v. Washington,* 466 U.S. 688 (1984), Evans must establish that his attorney's representation "fell below an objective standard of reasonableness," *id.* at 688, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. The same standards apply to reviewing appellate counsel's performance. *Evitts v. Lucey*, 469 U.S. 387 (1985); *State v. Southerland*, 337 S.C. 610, 524 S.E.2d 823 (1999). But for appellate counsel's failure to challenge the "home court" advantage with respect to venue in this case, there is a reasonable probability that Evans would have prevailed on appeal. *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003) (citations omitted).

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Evans a new sentencing hearing.

Respectfully submitted,

By: _____

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October 4, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

Kamell Delshawn Evans,

Applicant,

-vs-

CA No. 06-CP-23-7719

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

This is to certify that the undersigned did cause the following documents to be served upon the person designated herein by mailing first class mail, postage pre-paid to the following:

Melody Jane Brown
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DOCUMENT(S) SERVED: Applicant's Post Merits Hearing Brief

DATE SERVED: October 3, 2010

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STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)	
Kamell Delshawn Evans, #6016,)	
)	C/A No.: 2006-CP-23-7719
Applicant,)	(Capital PCR Action)
v.)	
)	**RESPONDENT'S POST-HEARING BRIEF**
State of South Carolina,)	
)	
Respondent.)	

The evidentiary hearing in the above captioned capital PCR action began June 1-5, 2009, and concluded October 12-14, 2009. Upon receipt of the transcripts for both parts of the hearing, this Court established a briefing schedule for post-hearing briefs. Petitioner's brief was submitted on October 4, 2009. Respondent now submits its post-hearing brief.

I.
ISSUES PRESENTED

Applicant filed his initial PCR application on December 4, 2006, alleging ineffective assistance of trial counsel in failing to request the statutory mitigator in S.C. Code § 16-3-20(b)(6). (December 4, 2006 PCR Application, pp. 2-3). Applicant amended his application on November 16, 2007, and again on January 28, 2009. Pursuant to the January 28, 2009 amendment, the following issues were before the Court at the beginning of the evidentiary hearing:

> 9(a) Applicant was denied the right to effective assistance of counsel– guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during the guilt or innocence phase of his capital trial.
>
> 10(a): Supporting facts: Trial counsel performance during the guilt-or-innocence phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Ard v. Catoe*, 642 S.E.2d 590 (S.C. 2007). Counsel's acts or omissions included, but are not limited to, the following:

1. Counsel failed to conduct adequate voir dire. Counsel's failures include, but are not limited to, failing to ask potential jurors whether they would automatically vote to impose death where a defendant had been found guilty of murder (*see Morgan v. Illinois*, 504 U.S. 719 (1992), failing to ask appropriate questions of jurors regarding their views on the death penalty thus making the record unclear as to whether the jurors were qualified, failing to voir dire for racial bias as guaranteed by *Turner v. Murray* in this case which involved an inter-racial murder, failing to object to the qualification of several jurors who gave disqualifying responses (e.g., Juror 145 (Eddie Harvey)), and failing to exercise available peremptory strikes to dismiss jurors, ultimately seated, who gave disqualifying responses to voir dire questions (including Juror 258 (Elvis Mahaabwa), Juror 247 (Sandra Holcombe), Juror 118 (James Freeman), and Juror 281 (James Plumley)).

2. Counsel failed to adequately investigate, present evidence and challenge the State's evidence in the guilt-or-innocence phase. Counsel's failures include failing to adequately investigate and present evidence concerning the circumstances in which the shots were fired at the scene and failing to challenge the testimony of the State's witnesses regarding the cause and manner of death of the two victims. For example, trial counsel failed to retain a pathologist prior to trial and did not cross-examine or otherwise challenge the explanation of the State's forensic pathologist. Forensic evidence suggests a different scenario from the one described by the State regarding the circumstances in which the shots were fired.

3. Counsel failed to effectively move for a change of venue as regards to both jury selection and the physical location of the trial.

9(b): Applicant was denied the right to effective assistance of counsel during the sentencing phase of his capital trial, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution.

10(b): Supporting Facts: Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. *See Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984); *Von Dohlen v. State*, 602 S.E.738 (S.C. 2005). Counsel's acts or omissions included, but are not limited to the following:

1. Counsel failed to conduct adequate voir dire. *See* 9(a), 10(a)(1), *supra*.

2. Counsel failed to move to quash the § 16-3-20(C)(a)(7) aggravating

circumstance, which authorizes a capital sentence for '[t]he murder of a ... local law enforcement officer... during or because of the performance of his official duties." S.C. Code § 16-3-20(C)(a)(7). The evidence presented at trial did not establish the aggravating factor. *See* 9(d), 10(d)(1), *infra*.

3. Counsel failed to object to irrelevant, unsubstantiated, and inflammatory testimony on the subject of Mr. Evans' gang affiliation (*see* 9(f) and 10(f), *infra*), and failed to provide evidence clarifying the matter.

4. 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 10(g), *infra*, for reasons including, but not limited to, that: (a) there is no field of science for which this witness, who was allowed to render opinions concerning the defendant's future dangerousness, qualified as an expert; (b) the witness was not qualified by education, training or experience to render classification testimony; (c) the witness had no scientific or factual basis for rendering the opinions to which he testified; (d) the witness was wrongfully allowed to testify as to the appropriate sentence, that being "death"; (e) the witness' testimony should have been offered with a limiting instruction that the testimony was subject to the jury's discretion and could be disregarded in its entirety; (f) the witness' testimony should have been excluded after the witness testified that he had inadequate information concerning the defendant's history and prior criminal record to form an adequate opinion on future dangerousness; (g) the witness was allowed to render an opinion regarding classification and future dangerousness utilizing the defendant's tattoos which was a violation of the defendant's rights pursuant to the First and Fourteenth Amendments to the United States Constitution and the Constitution of the State of South Carolina; and (h) counsel failed to conduct a reasonable cross-examination. [Parts of this ground are alleged in Interim Amendments to Original Application for Post-Conviction Relief as Paragraph 10(b)].

5. Counsel failed to object to victim impact testimony elicited during the sentencing proceeding that exceeded the scope permitted by *Payne v. Tennessee*, 501 U.S. 808 (1991), in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution. *See* 9(d), 10(d)(5), *infra*.

6. Counsel failed to object to hearsay testimony introduced during the testimony of Ms. Sapinoso. South Carolina Rules of Evidence, Rule 801(c) prohibits hearsay, which it defines 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."

7. Counsel failed to object to inflammatory, irrelevant and improper statements made by the prosecution in closing argument. Such statements included, but are not limited to, arguments designed to arouse the passion and prejudice of jurors, assertions substituting personal opinions as law, statements diminishing the jury's sense of responsibility for their verdict, statements misrepresenting the proper scope of mitigating evidence, arguments that were not reasonable inferences from the record, and misrepresentations of the nature of alternative punishments. *See also* 9(d), 10(d)(4), *infra*.

8. Counsel failed to object that applicant's prosecution violated constraints imposed by the Equal Protection components of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and South Carolina law.

9. Counsel failed to adequately investigate, present evidence and challenge the testimony of State witnesses regarding the circumstances of the shooting and the cause and manner of death of the two victims. *See* 9(a), 10(a)(2), *supra*.

10. Counsel failed to request the statutory mitigator relating to capacity, S.C. Code § 16-3-20(C)(b)(6). On direct appeal, the South Carolina Supreme Court held that "by failing to make a contemporaneous objection of request for the capacity mitigator, appellant did not properly preserve the issue for our review." *State v. Evans*, 637 S.E.2d 313, 315 (Nov. 6, 2006). [This ground is alleged in Application for Post-Conviction Relief (Dec. 4, 2006) as Paragraph 10(a)]

11. Counsel failed to investigate, develop, and present available, relevant, and admissible mitigating evidence. Counsel's failures in this regard include consenting to a trial date that was merely two months following counsel's appointment to represent Mr. Evans and before starting any mitigation investigation, failing to retain or present the testimony of a social work expert to explain information gathered regarding Mr. Evans's life history, failing to gather appropriate and relevant social history records, failing to investigate and obtain expert services on lead poisoning and its impact on Mr. Evans's neurological, behavioral, and intellectual development even though counsel knew that Applicant tested with high levels of lead poisoning as a toddler, and failing to provide necessary background information to expert witnesses including Dr. James Evans and Dr. Elin Berg.

9(c): Applicant was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by

Article I, §§ 3 and 14 of the South Carolina Constitution – during the appellate phase of his trial.

10(c): Supporting facts: Counsel's performance on direct appeal was unreasonable and prejudicial. *See Evitts v. Lucey*, 469 U.S. 387 (1985); *Strickland v. Washington*, 466 U.S. 668 (1984); *Southerland v. State*, 524 S.E.2d 833 (S.C. 1999). Counsel's acts or omissions included, but are not limited to, the following:

1. Appellate counsel failed to challenge the trial court's denial of trial counsel's request to charge the jury on voluntary manslaughter. *Hopper v. Evans*, 456 U.S. 605, 611 (1982); *Beck v. Alabama*, 447 U.S. 625, 638 (1980). "Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon a sufficient legal provocation." *State v. Ivey*, 325 S.C. 137, 142, 482 S.E.2d 125 (1997); *see State v. Lowry*, 315 S.C. 396, 434 S.E.2d 272, 274 (1993). The testimony at trial established the factual basis for this charge.

2. Counsel failed to challenge the trial court's denial of Applicant's motion for a change of venue, where one of the victims was a law enforcement officer who worked regularly as security at the courthouse in which Applicant's trial was held.

9(d): Applicant's conviction and death sentence were obtained in violation of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and South Carolina law.

10(d): Supporting facts: Errors at trial violated the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and South Carolina law. Those errors include, but are not necessarily limited to, the following:

1. The jury was instructed on an aggravating factor (§ 16-3-20(C)(a)(7)) that, narrowly interpreted as the Eighth Amendment requires (*see Roper v. Simmons*, 543 U.S. 551 (2005);*Godfrey v. Georgia*, 446 U.S. 420 (1980)), was not established by the State's evidence and therefore invalid. Because the presence of the invalid sentencing factor allowed the sentencing jury to consider evidence that would not otherwise have been before it, reversal of the death sentence is mandated. *See Brown v. Sanders*, 546 U.S. 212 (2006); *Zant v. Stephens*, 462 U.S. 862 (1983).

2. The State suppressed evidence that was both favorable to Applicant and material to Applicant's guilt or punishment. *See Banks v. Dretke*, 540 U.S. 668 (2004); *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Simpson v. Moore*,

627 S.E.2d 701 (S.C. 2006).

3. The state presented testimony that it knew or should have reasonably known was false or misleading, including but not limited to testimony that Applicant was a member of a gang and evidence regarding whether one of the victims was in the line of official duty as a law enforcement officer at the time of his death. *See Washington v. State*, 324 S.C. 232, 235, 478 S.E.2d 833, 835 (1996). *See Napue v. Illinois*, 360 U.S. 264, 279 (1959); *State v. Fullwood*, 274 S.C. 60, 61, 262 S.E.2d 10, 11 (1979)(improper for prosecutor to argue that evidence refuted defendant's claim that victim had knife, when prosecutor knew that law enforcement took a knife from the belongings of the deceased). There is a reasonable likelihood that the false or misleading testimony affected the judgment of the jury. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *Napue, supra*.

4. Applicant's death sentence was obtained in part as a result of the State's inflammatory, irrelevant and improper statements in closing argument. *See, e.g., Darden v. Wainwright*, 477 U.S. 168 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); *State v. Copeland*, 468 S.E.2d 620 (S.C. 1996); *Thompson v. Aiken*, 315 S.E.2d 110 (S.C. 1984); *see also Weaver v. Bowersox*, 438 F.3d 832 (8th Cir. 2006), cert. dismissed, 127 S.Ct. 2022 (2007). 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.

5. Victim impact testimony elicited during the sentencing proceeding exceeded the scope permitted by *Payne v. Tennessee*, 501 U.S. 808 (1991), in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution.

6. The cumulative prejudicial impact of all errors during the guilt-innocence and sentencing trials resulted in a fundamentally unfair sentencing proceeding, in violation of the Due Process Clause of the Fourteenth Amendment. *See Taylor v. Kentucky*, 436 U.S. 478, 487 n.15 (1978)(concluding that "the cumulative effect" of "damaging circumstances" of case "violated the due process guarantee of fundamental fairness").

9(e): The trial court's erroneous qualification of jurors resulted in a jury uncommonly willing to impose death and deprived Mr. Evans of his right to trial by an impartial

jury under the sixth and Fourteenth Amendments to the United States Constitution and South Carolina law.

10(e): Supporting facts: The Sixth Amendment guarantees a capital defendant the right to a fair trial before a panel of impartial and indifferent jurors. *See Morgan v. Illinois*, 504 U.S. 719, 728 (1992); *Ross v. Oklahoma,* 487 U.S. 81, 85 (1988); *Duncan v. Louisiana*, 391 U.S. 145, 147-58 (1968); *Turner v. Louisiana*, 379 U.S. 466, 471-73 (1965); *Irwin v. Dowd*, 366 U.S. 717, 722-23 (1961). A "juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do." *Morgan*, 504 U.S. at 729. Further, "[a]ny juror to whom mitigating factors are ... irrelevant should be disqualified for cause, for [they have] formed an opinion concerning the merits of the case without basis in the evidence developed at trial." *Morgan*, 504 U.S. at 738-39. Therefore any juror whose predispositions about the propriety of the death penalty - either generally or related to the specific case - are such that the juror's ability to follow the trial court's instruction that he or she consider the defendant's mitigating evidence is substantially impaired, is not qualified. Several jurors expressed such impairments during voir dire in this case. *See* 9(a) and 10(a), *supra.*

9(f): Applicant's death sentence was obtained in violation of the First, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law by unsubstantiated and irrelevant testimony that Mr. Evans had a gang affiliation and would therefore be a further danger in prison.

10(f): Supporting facts: Evidence of a defendant's political or religious or other associations or beliefs may be admitted *only* if it probatively relates to the murder, to aggravating factors such as future dangerousness, or to rebut a mitigating factor offered by the defense; otherwise, evidence of affiliation or belief, however unpalatable it may be to some, has no relevance in a capital trial, and its admission violates a defendant's First Amendment right to freedom of association and freedom of speech. *Dawson v. Delaware*, 503 U.S. 159, 163-69 (1992). There is no evidence that Evans' crime was gang-motivated, no evidence that Evans engaged in gang-related activity in or out of prison, no evidence about Evans' behavior in prison linking him to a gang. The evidence lacks the necessary nexus between gang's beliefs or activities and Evans' behavior. Rather than assist the jury in making an individualized determination of whether Evans deserves the death penalty, the irrelevant and unsubstantiated matter injected an arbitrary and invalid sentencing factor into Mr. Evans' sentencing proceeding. *See Zant v. Stephens*, 462 U.S. 862 (1983).

9(g): The trial court erred, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law, in admitting

testimony from State witness Lewis Edward O'Cain.

10(g): Supporting facts: 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. *See State v. Council*, 515 S.E.2d 508 (S.C. 1999); *State v. Jones*, 259 S.E.2d 120 (S.C. 1979); South Carolina Rules of Evidence, Rules 403, 702. *See generally Kumho Tire co., Inc. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). See 9(b) and 10(b)(4), *supra.*

(January 28, 2009 Amended Application, pp. 2-7).

On August 31, 2009, before this Court reconvened for the remainder of the PCR evidentiary hearing October 12, 2009, Applicant offered an amendment to the application to include the following allegation:

9(b), 10(b)(12) Counsel failed to object to the trial court's instruction to the jury not to recommend a sentence of life based on mercy. See *Rosemond v. Catoe*, ___ S.C. ___, 680 S.E.2d 5 (No. 26679)(June 29, 2009)(overruling *State v. Hughey*, 339 S.C. 439, 459, 529 S.E.2d 721, 731 (2000)). On June 29, 2009, the South Carolina Supreme Court ruled that a trial court's charge prohibiting the jury from considering mercy was error and that trial counsel performed deficiently in failing to object to the charge. The trial court in *Evans* (the same as in *Rosemond*) provided exactly the same charge that the South Carolina Supreme Court rejected in *Rosemond*. In *Rosemond*, the judge instructed the jury: "[Y]ou may recommend a sentence of life imprisonment for any reason or for no reason at all *other than as an act of mercy*." 680 S.E.2d at 10 (emphasis in original). The South Carolina Supreme Court explained that, contrary to the trial court's charge, the jurors were "entitled to consider [mercy]":

> It is proper to instruct a jury in a capital sentencing phase that it may recommend a life sentence for any reason or no reason at all, including as an act of mercy. A jury's consideration of mercy, if proper evidence of mercy is admitted, is well recognized in the sentencing phase of a capital case. Because a capital jury may consider properly admitted evidence of mercy in the sentencing phase, consideration of mercy is no inconsistent with the instruction that, "the jury should not be guided by sympathy, prejudice, passion, or public opinion...." *State v. Singleton*, 284 S.C. 388, 393, 326 S.E.2d 153, 156 (1985) overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991).

> *Rosemond*, 680 S.E.2d at 10-11. Here, as in *Rosemond*, the trial court also instructed the jury, "[Y]ou may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy." (R. 1785.) Defense counsel's summation emphasized mercy: "I am going to ask for mercy for Kamell Evans... Mercy is unmerited favor. You can't earn it; you don't deserve it; but you give it to him anyway.... We don't repay evil for evil. And mercy is appropriate in this case." (R. 1770.) For the reasons set forth in *Rosemond*, the identical charge in Mr. Evans's [sic] violates South Carolina law and counsel's failure to object to the charge (see R. 1789), rejected in *Rosemond* and at odds with their defense, was deficient and prejudicial.

(August 28, 2009 Amended Application, pp. 4-5).

The amendment has not yet been accepted. At the October portion of the evidentiary hearing, Applicant brought the pending amendment to the attention of the court. (October PCR Tr. p. 355). Respondent acknowledged that the amendment was based on new law, not available at the time of the final amendment or at the prior portion of the evidentiary hearing having been decided June 29, 2009, and having overruled existing precedent; however, Respondent asked the Court to consider rejecting the amendment on the ground of futility. (October PCR Tr. pp. 355-356). The allegation reflects a claim of ineffective assistance of counsel. As such, counsel's representation is evaluated under the standards and precedent at the time of trial. Respondent submitted that the charge at issue had been upheld in 2000 in *State v. Hughey* (indeed as referenced, and proven, in the very passage of *Rosemond* offered in the amendment), and was good law at the time of the 2004 trial. Respondent argued that Applicant cannot, under such circumstances, prove an ineffective assistance of counsel claim; thus, the claim was futile. (Id). As noted above, the amendment has not yet been accepted. Respondent maintains the amendment should be rejected on this basis. Respondent will present further argument on the issue in the discussion to follow.

II.
MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

On May 22, 2009, Respondent made an amended return and moved for summary judgment on claims Allegations 9(d)(1), 9(d)(3-6), 9(e), 9(f) and 9(g), based on the argument Applicant's claims are not cognizable in post-conviction relief as freestanding claims of error, i.e. Applicant raises claims that could have been raised on direct appeal. *See, e.g., Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975)("[e]rrors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings."). (Amended Return and Motion, pp. 8-10). At the beginning of the June evidentiary hearing, this Court denied Respondent's motion. (June PCR Tr. p. 3). Respondent also moved for a directed verdict on those claims, on the same ground, which was also denied. (October PCR Tr. pp. 255-262).

As to Allegation 9(d)(2), [the *Brady* allegation] Respondent also moved for summary judgment and presented an affidavit in support of dismissal. (Amended Return and Motion, p. 10 and attached affidavit). That portion of the motion for summary judgment was also denied at the beginning of the June evidentiary hearing. (June PCR Tr. p. 3). Respondent moved for a directed verdict on this allegation, as well. (October PCR Tr. pp. 255-262). The motion was moot upon concession of lack of proof and withdrawal of the allegation. (October PCR Tr. pp. 258, 260 and 262).

IV.
WITHDRAWAL OF CLAIM

Applicant conceded during his response to Respondent's motion for a directed verdict that there was no evidence of a *Brady* violation as alleged in 9(d)(2). Applicant withdrew the allegation at the hearing. (October PCR Tr. pp. 258, 260 and 262).

V.
DISCUSSION

Applicant's allegations continue to fall into two general categories: Ineffective Assistance of Counsel and Trial Court Error. Respondent maintains that the trial court error allegations are not cognizable in PCR as they could have been raised on direct appeal. *Simmons, supra.* As to the ineffective assistance of counsel claims, Applicant has failed to carry his burden of showing error. Applicant is not entitled to any relief. Respondent will address each claim as raised in the amended application.

General Law on Ineffective Assistance of Counsel

Applicant has failed to show he is entitled to any relief. To establish that counsel was ineffective, a PCR applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error(s), there is a reasonable probability that the outcome of the trial would have been different. *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. *Id.*

"There are countless ways to provide effective assistance in any given case," and the simple fact that trial counsel's strategy was ultimately unsuccessful does not automatically render counsel's assistance constitutionally ineffective. *Strickland*, 466 U.S. at 689. *Bell v. Evatt*, 72 F.3d 421, 429

(4th Cir. 1995). "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688; *Drayton v. Evatt*, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993). Here, the record of the trial, and the record developed at the PCR hearing, together show no constitutional infirmity in counsel's representation.

(9)(a)(1) Ineffective Assistance of Trial Counsel: Failure to Conduct Adequate Voir Dire

"The scope of *voir dire* and the manner in which it is conducted are generally left to the sound discretion of the trial court." *State v. Stanko*, 376 S.C. 571, 575, 658 S.E.2d 94, 96 (2008); *State v. Bennett*, 369 S.C. 219, 226, 632 S.E.2d 281, 285 (2006); *State v. Hill*, 361 S.C. 297, 308, 604 S.E.2d 696, 702 (2004); *State v. Tucker*, 334 S.C. 1, 10, 512 S.E.2d 99, 103 (1999); *State v. Hill*, 331 S.C. 94, 103, 501 S.E.2d 122, 127 (1998). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *Stanko*, 376 S.C. at 575, 658 S.E.2d at 96, *citing* State *v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

"[A] prospective juror may be excluded for cause when his views on capital punishment are such as would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *State v. Sapp*, 366 S.C. 283, 290-291, 621 S.E.2d 883, 886, *citing Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844 (1985). "The ultimate consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him." *Sapp*, 366 S.C. at 291, 621 S.E.2d at 887.

"[W]hat is constitutionally mandated is the selection of a fair and impartial jury" and "[n]o particular formula of questions is mandated to achieve this goal." *State v. Bennett*, 369 S.C. at 227, 632 S.E.2d at 285, *quoting State v. Hill*, 361 S.C. at 310, 604 S.E.2d at 702-703. "To be constitutionally compelled, ... it is not enough that a question may be helpful. Rather, the trial court's

failure to ask or allow a question must render the defendant's trial fundamentally unfair." *MuMin v. Virginia*, 500 U.S. 415, 425, 111 S.Ct. 1899 (1991). *See also State v. Wise*, 359 S.C. 14, 23-24, 596 S.E.2d 475, 479 (2004); *State v. Tucker*, 334 S.C. at 10, 512 S.E.2d at 103. Of course, "'[i]t is well established that a trial court has broad discretion in conducting the *voir dire* of the jury and particularly in phrasing the questions to be asked.'" *State v. Bixby,* 388 S.C. 528, 542, 698 S.E.2d 572, 579 (2010), *quoting United States v. Jones,* 608 F.2d 1004, 1009 (4th Cir. 1979).

Applicant originally complained that counsel was ineffective in regard to five specific jurors or potential jurors - - Eddie Harvey, Elvis Mahaabwa, Sandra Holcombe, James Freeman, and James Plumley. (Amended Application, p. 2). Applicant has abandoned the allegation of error in regard to Juror Harvey, referencing Juror Harvey's qualification only briefly, and by footnote. (Applicant's Post-Hearing Brief, pp. 98-109 and n. 51).[1] In regard to the remaining jurors, Applicant argues three distinct issues which are addressed as follows.

A. Applicant's Argument That Counsel Failed to Remove Jurors Whose Personal and Professional Experiences Led Them To Empathize with the Victims - Juror Mahaabwa and Alternate Freeman – Lacks Support in the Record.

The record shows that Juror Elvis Mahaabwa was questioned by the Court, by trial counsel, and by the solicitor, and his answers reflected that he could be fair and impartial, could consider

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[1] As to Mr. Eddie Harvey, even though it appears that Applicant has abandoned an allegation of error, the record completely refutes his "noted"complaints. First, he complains that counsel should have "prevented" the juror's qualification. (Applicant's Post-Hearing Brief, p. 109 n. 51). Defense counsel apparently would agree as defense counsel objected to the qualification. (R. p. 613, line 21 - p. 614, line 11). There could be no error in regard to this allegation. Moreover, while the juror was qualified over counsel's objection, (R. p. 614, line 12 - p. 615, line 15), his name was only called in selection of the first alternate, at which time counsel used an available strike. (R. p. 970, lines 1-7). The juror never served on the jury. There could be no error or prejudice. *Ross v. Oklahoma*, 487 U.S. 81, 86, 108 S.Ct. 2273 (1988)("Any claim that the jury was not impartial... must focus ... on the jurors who ultimately sat.").

either sentence based on the circumstances presented, and return either sentence based on the circumstances and or mercy. (R. p. 172, line 14 - p. 186, line 10). He was qualified without exception. (R. p. 186, lines 17-21). The record supports there is no disqualifying response, and no cause to object. In fact, Applicant does not appear to rest his main argument on the actual responses; rather, Applicant argues an issue with the juror's employment, urging a *per se* disqualification rule. Applicant's argument lacks support in both fact and law.

Applicant argues the juror was " a prison guard, uniquely sensitive to both the underlying crime ... and the aggravating circumstance." (Applicant's Post-hearing brief, p. 98). Applicant is incorrect. The juror, under direct questioning from defense counsel Goldsmith, clarified that he was not a prison guard, but had administrative duties "assigning inmates their jobs and reviewing how they do on their jobs." (R. pp. 178-179). Moreover, Applicant is constrained to admit that there is no automatic disqualifying employment here. (Applicant's Post-Hearing Brief, p. 99). While he makes a weak argument, by footnote, that counsel should have made a motion to disqualify the juror pursuant to S.C. Code 14-7-820, and *State v. Cooper*, 291 S.C. 332, 353 S.E.2d 441 (1986), (Applicant's Post-Hearing Brief, p. 99 n. 49), the suggestion lacks merits.

S.C. Code § 14-7-820 sets out the following disqualification: "No clerk or deputy clerk of the court, constable, sheriff, probate judge, county commissioner, magistrate or other county officer or any person employed within the walls of any courthouse shall be eligible as a juryman in any civil or criminal case." *Cooper* allowed the "sheriff" statutory disqualification to apply to highway patrol officers as the officers are vested by statute with similar powers as deputies, and bound, again by statute, to work with sheriffs. 291 S.C. at 335, 353 S.E.2d at 442. Conversely, the applicability of the disqualification to prison guards, "whose duties," as found by the Supreme Court of South

Carolina,"do not involve enforcing the criminal laws of this State," has been soundly rejected. *State v. Hughey*, 339 S.C. 439, 450, 529 S.E.2d 721, 727 (2000). The suggestion that counsel was ineffective for failing to argue against precedent, on the same argument, with even less of a factual basis, is unpersuasive to say the least. However, it is indicative of the gist of the entire argument on *voir dire* – counsel could have done more, could have asked one more question, could have tried one more argument. Of course, that is not the *Strickland* test, nor is it a recognized as a requirement to ensure the selection of a fair jury. *See, e.g. MuMin v. Virginia*, 500 U.S. at 425 ("To be constitutionally compelled, ... it is not enough that a question may be helpful. Rather, the trial court's failure to ask or allow a question must render the defendant's trial fundamentally unfair."). Further, in this particular case, Applicant acknowledged that many of the decisions would be made in defense counsel's professional judgment, and he nonetheless made a knowing and intelligent waiver of his right to contest the manner in which counsel chose, in his professional opinion, to conduct *voir dire* and exercise jury strikes.[2] (June PCR Tr. pp. 472-473). (Respondent Exhibits 22 and 32). It is clear that Applicant had no complaints of the selected jury at the time the jury was selected. (Id). *See Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995)("recogniz[ing] consent as probative of the reasonableness of the chosen strategy and of trial counsel's performance").

Finally, Applicant argues what may be termed a "general fear of possible empathy" from a shared chosen profession. (Applicant's Post-Hearing Brief, p. 99). However, since the victim was not an officer, and not a prison guard as Applicant argues, the argument is not relevant. Moreover, the suggestion "[t]his principle" of the necessity of excluding similarly situated individuals "has been

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[2] Even though Applicant acknowledged his deference to defense counsel in this regard, defense counsel still included Applicant in the process. (See June PCR Tr. pp. 472-473).

widely recognized as necessary to protect the rights of defendant," is curiously only supported with a 1985 Eleventh Circuit non-murder case (where the actual equivocation by the juror was as important as her work bias), a 1968 D.C. Circuit murder case footnote (where the process of expanded capital *voir dire* was still being molded),[3] and a Virginia state court of appeals non-capital case that was vacated on *en banc* rehearing. In fact, the Virginia court in vacating the opinion – recognizing "the only relationship between the victim and Juror ... is that they share the same occupation and the risk of suffering the same type of assault upon which this action was based" – specifically held that "the application of a *per se* rule is unwarranted, and that Juror Person's employment, without more, does not require that bias should be imputed." *Williams v. Comm.*, 466 S.E.2d 754, 756 (Va.Ct.App. 1996). Applicant fails to support his suggestion. Additionally, he must expand the argument found in these isolated cases for the argument to apply here. He attempts to do so by use of a "sense of camaraderie" argument. The offered argument to expand the possible empathy beyond its comfortable borders (i.e. directly shared professions) reflects an unpersuasive "forced-fit" argument. Moreover, it so loosely draped as to encompass most any suggested shared trait, which may (but not necessarily) reflect a basis for empathy. In sum, it is too broad a rule to apply effectively. At bottom, there is no "same profession" analysis – for what it's worth – to be made here. Moreover, defense counsel Sumner testified that he was aware of the juror's background and made a decision that the juror would be helpful and understanding of the reality of prison life

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[3] Not only is the D.C. case cited not persuasive because the principle at issue is *dicta* in that case, from another jurisdiction, contained merely in a footnote, but also because of the age of the case, which pre-dates a great wealth of case law further defining capital *voir dire*. Respondent notes that the Circuit Court appears to have been attempting to educate the lower court on the then new principles from the 1968 case *Witherspoon v. Illinois*, illustrating that the expansion in *voir dire* process was not as well defined and extensive and it is today.

as harsh and dangerous, increasing the possibility of a life sentence. In particular, Sumner testified that the juror, from a position of real world experience, could support "George Martin's testimony that was coming in about SCDC conditions and can tell the jurors Martin is right, that's exactly the way that it's going to be...." (June PCR Tr. pp. 382-384). This was especially important where defense counsel placed great emphasis on the penalty phase, and where counsel offered prison conditions and or security measures due to expressed gang affiliation evidence for the specific (and admissible)[4] purpose of combating the State's testimony of the advantages and heightened danger within prison due to his expressed gang affiliation. (See June PCR Tr. pp. 383-384; p. 433). This is an exercise of professional judgment of the sort necessary and recognized as particularly reserved to counsel. *See Palacio v. State*, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999)(citing with approval multiple cases wherein "other courts have held jury selection is a process that inherently falls within the expertise and experience of trial counsel").

As to Mr. James Freeman, the record shows that he was also questioned by the Court, by the solicitor, and by trial counsel, and his answers reflected that he could be fair and impartial, could consider either sentence based on the circumstances presented, and could return either sentence based on the circumstances. (R. p. 677, line 19 - p. 693, line 22). He was qualified without exception. (R. p. 693, lines 23-25). However, though chosen as Alternate 1, he did not participate

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[4] Applicant has not alleged counsel was ineffective for presenting prison conditions evidence through Mr. Martin's testimony. At any rate, the evidence was presented, not just for its worth in establishing a harsh environment, but also for showing that Applicant's admitted gang affiliation would have penalties in the prison system – a response to the State's evidence of the benefits of the crime in Applicant's admitted desire to increase his leadership in the Crips, and to express the disadvantages due to his expressed gang affiliation, tattoos and specific crime. (See June PCR Tr. p. 301; pp. 377-378; p. 433; p. 517).

in the jury deliberations.[5] (R. p. 1503, line 6 - p. 1508, line 10; R. p. 1796, line 1 - p. 1797, line 24). Thus, whatever complaints Applicant may have of his qualification, there could be no effect on the fundamental fairness of the deliberations. *Ross v. Oklahoma*, 487 U.S. 81, 86, 108 S.Ct. 2273 (1988)("Any claim that the jury was not impartial... must focus... on the jurors who ultimately sat."). However, the record supports there is no disqualifying response, and no cause to object. Applicant maintains that the juror, because his son was seeking a career in law enforcement, that he would show empathy toward the victim, much like the argument "shared profession" argument attempted with Juror Mahaabwa above. Not only is the connection even more remote, and the argument for some *per se* disqualification rule baseless, Applicant only makes the argument based on a parsing of the responses. "When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged jurors must be examined in light of the entire *voir dire*." *State v. Bennett*, 328 S.C. at 257, 493 S.E.2d at 848. The record reflects that Juror Freeman struggled with the questions regarding any bias toward law enforcement testimony. However, upon questioning by defense counsel, the juror explained, "just because the office would say X is true, I don't necessarily take that as gospel." (R. p. 691). He added that "[i]f all the circumstances were equal, probably, yes" that he would accept the testimony of greater weight than others. (R. p. 691). There is also, curiously, a sidebar noted immediately after that questioning by defense counsel. That sidebar was not required or recapped at the conclusion of the questioning. Even so, the record does

[5] During the twenty-four hour break in the proceedings, one of the seated jurors who had participated in the guilt deliberations, Larry Coker, lost his mother and was excused. The trial judge placed the names of the three selected alternate jurors, (James Freeman, Marlon Sullivan, and Broadus Hawkins), in an envelope and the clerk drew one of the names. Marlon Sullivan (selected as Alternate 2), replaced Mr. Coker on the jury and participated in the sentencing deliberations. (R. p. 1511, line 4 - p. 1513, line 1).

not reflect an unthinking, accepting of all information, slant to the juror's perception. Moreover, just a connection with law enforcement is not a proper basis to remove the juror cause. *Cf. State v. Kiser*, 284 S.W.3d 227, 271 (Tenn. 2009)(rejecting argument that failure to excuse jurors who, at one point, indicated favoring law enforcement, rendered sentence arbitrary; jurors had been rehabilitated, defense counsel had expressed approval of the jurors at trial, and fact that law enforcement aggravator was only aggravator did not enhance probability of error as the Eighth Amendment is not so broad as to support that a "juror having a sympathetic relationship with someone similar to the victim of a capital murder" allows for *per se* disqualification). At any rate, as noted, the juror did not serve and no reversible error could have occurred. *Ross, supra.*

Applicant's argument to the contrary, for all the reasons argued above, should be rejected.

B. Applicant's Allegation That Counsel Failed to Strike Jurors Whose Answers Indicated They Would Always Impose Death - Jurors Mahaabwa and Holcombe – Depends On Untenable Parsing of the Responses. When Read As a Whole, the Responses Do Not Establish an Automatic Death Penalty Response.

As with Mr. Freeman's responses, Applicant parses the responses in *voir dire* to find the slim support for his assertion the jurors "equated a guilty verdict with a death sentence,' and were "incapable of properly considering mitigating evidence." (Applicant's Post-Hearing Brief, p. 104). When read in context, however, as it must be, *Bennett, supra*, the responses are decidedly not indicative of "automatic death" responses. For instance, in regard to Juror Mahaabwa, Applicant argues his statement, "if there hasn't been a crime which needs capital punishment, then they don't have to ask for it." (R. p. 181-182). Applicant argues counsel should have asked for clarification. (Applicant's Post-Hearing Brief, p. 105). Counsel would likely agree, as counsel did seek clarification. In fact, it was defense counsel who posed the question *due to the responses on the*

questionnaire regarding whether the death penalty is sought "about the right amount of time," to ensure the juror *was not* an "automatic death" juror. (See R. p. 181-182). Further, the juror specifically clarified that his response had "nothing to do with [... the...] three suggestions. Those are two different, separate questions there." (R. p. 182). In other words, by his own explanation, there was a difference in seeking the penalty and deserving the penalty. Applicant simply does not discuss this juror's explanation. Again, one must look at the entire conversation to fairly analyze the responses. *Bennett, supra.*

As to Ms. Sandra Holcombe, the record also shows that she was similarly questioned by the Court, by the solicitor, and by trial counsel, and her answers reflected that she could be fair and impartial, and could consider either sentenced based on the circumstances presented. (R. p. 260, line 12). (See, for example, R. p. 252, line 1, "It really depends on the evidence" and R. p. 259, lines 21-25, "I could do either one. It just depends on what the evidence is brought to me, and I guess what's in my heart... which one I would think would be more appropriate."). She was qualified without exception. (R. p. 260, lines 15-22). The record supports there is no disqualifying response, and no cause to object. Applicant, however, argues counsel was ineffective for not identifying suspect responses during the solicitor's questioning of the juror, (Applicant's Post-Hearing Brief, pp. 105-106, citing R. p. 254-255), or exploring answers to defense counsel's questioning, (Applicant's Post-Hearing Brief, p. 106, citing R. p. 258). While the juror did say, she did not believe the death penalty was imposed "not enough in most cases that I've heard," but, *upon additional probing by defense counsel*, explained:

> To me there is some cases that deserve the death penalty, and there's others that don't. But, then again, I don't serve on the jury, so I don't hear all of the evidence, and so that's that's the reason why. I just depends on the case and the evidence brought to me.

(R. p. 258). (See also R. pp. 259-260, affirming sentence would "depends on ... the evidence").

C. *Applicant's Allegation That Voir Dire was Overall Cursory and Brief, Therefore There Must Be Error, Fails for Improper Presumption of Error; Fails to Show Necessary Questions Were Not Asked; Fails to Give Proper Consideration of Information from the Jury Questionnaire, All Verbal Questions, and Non-Verbal Cues.*

As demonstrated above, and contrary to Applicant's allegations, there were no automatically disqualifying responses. Moreover, the record supports that the *voir dire* here was extensive, spanning not only the in court questions, but also jury questionnaires. (See, for example, R. p. 173 (Juror Mahaabwa confirming the truthfulness of his answers to the questionnaire; R. p. 181 (Juror Mahaabwa explaining, upon defense inquiry, one response reflected on questionnaire going to fairness and impartiality)). (See also June PCR Tr. p. 387, Defense Counsel Sumner referencing both in court questions and questionnaires). There is no cause to find *voir dire* insufficient simply because the record indicates the procedure was "too short" or that another procedure could have been used. *See, for example, State v. Bixby*, 388 S.C. at 543, 698 S.E.2d at 580 ("the qualification of jurors was extensive and defense counsel did not challenge the qualification of the impaneled jurors because he had sufficient information from both their answers to the detailed questionnaires and his questioning to determine that each was qualified"); *State v. Bryant*, 372 S.C. 305, 314, 642 S.E.2d 582, 587 (2007)("Because the use of paper strikes did not deprive Bryant of a fair trial by an impartial jury, we hold that the trial court did not err in refusing to allow jurors to be present during jury selection."). This Court is focused on whether real error occurred. *Strickland, supra, Ross,*

supra. There is no indication of real error – i.e. the selection of a constitutionally unqualified juror, or the omission of a necessary question, as determined by United States Supreme Court precedent in the juror selection process – in the selection of Applicant's jury. *See Ross, supra; State v. Stanko*, 376 S.C. at 576, 658 S.E.2d at 96 ("To constitute reversible error, a limitation on questioning must render the trial fundamentally unfair."). Thus, Applicant has failed to carry his burden of proof.

As to Applicant's suggestion "the trial judge failed to respect Evans's right to challenge jurors for cause by repeatedly disqualifying jurors before hearing objections from either side," (Applicant's Post-Hearing Brief, p. 107 n. 50), this a trial court error, not alleged in the issue presented, and not cognizable in this action absent a claim of ineffective assistance. *Simmons, supra*. Even so, the allegation is without merit. The final determination on qualification is in the discretion of the trial judge. *State v. Woods*, 382 S.C. 153, 161, 676 S.E.2d 128, 133 (2009). Moreover, that decision will not be reversed on appeal unless "wholly unsupported by the evidence." *Id, citing State v. Green, supra.* It is not necessary in all cases that defense counsel be allowed to question the juror at all: "When the record reveals a juror plainly is not qualified, after thorough examination by the trial judge, to serve and it does not reasonably appear further examination would likely reveal the juror could subordinate his views and apply the law of the state, a reasonable basis exists for excusal for cause of the juror without further examination by defense counsel." *State v. Wise*, 359 S.C. 14, 26, 596 S.E.2d 475, 481 (2004). In sum, Applicant has failed to show any real error. His assertions rest merely on speculation. Thus, he cannot meet his *Strickland* burden of proof.

As to Applicant's suggestion that defense counsel could have asked more questions, this is an old saw. "[W]hat is constitutionally mandated is the selection of a fair and impartial jury" and "[n]o particular formula of questions is mandated to achieve this goal." *Bennett*, 369 S.C. at 227,

632 S.E.2d at 285. The Supreme Court of South Carolina has recently rejected a challenge to the sufficiency of *voir dire* where the trial judge disallowed defense counsel to instruct the jury on legal definitions. In essence, defense counsel argued that the jury must be instructed on the legal definition of murder (i.e. not self-defense, etc), to "ascertain[] each potential juror's qualification with regard to their views on capital punishment." *Bixby*, 388 S.C. at 541-42, 698 S.E.2d at 579. Of course, "such information is disseminated to jurors by way of jury instructions, not questioning on voir dire." Id, 388 S.C. at 543, 698 S.E.2d at 580. But, at any rate, there was no error in disallowing the instruction as "the qualification of jurors was extensive and defense counsel did not challenge the qualification of the impaneled jurors because he had sufficient information from both their answers to the detailed questionnaires and his questioning to determine that each was qualified." *Id.* Likewise, here, the possibility of additional questions is limited only by the imagination of collateral counsel as another attorney can always think of some additional question. However, the process at issue here – which was personal, extensive, and supplemented by questionnaires – provided sufficient information to draw a proper jury. There is no error.

As to Applicant's assertion of counsel error based on the failure to request *voir dire* on racial bias given the difference in races of the victims and Applicant, (Amended Application, p. 2), Applicant has not shown deficient performance. At the PCR hearing, defense counsel Sumner testified that he perceived no racial issue, (June PCR Tr. p. 475), and none is readily apparent. Applicant has offered none. In fact, his brief has merely one sentence referencing race in *voir dire*: "Finally, counsel failed to utilize Evans's right to inform potential jurors of his race." (Applicant's Post-Hearing Brief, p. 107). The import of the assertion is as mysterious as the argument is short. The cite to *Turner v. Murray*, 504 U.S. 719 (1992), is of no help in interpretation. In *Turner*, the

United States Supreme Court acknowledged the possibility in *voir dire* of revealing the race of the *victim* in interracial capital cases. *Turner v. Murray*, 476 U.S. 28, 36-37, 106 S.Ct. 1683 (1986)("We hold that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias" but noting that counsel may decide such inquiry is not advisable or warranted). Moreover, the Court recognized great latitude in counsel's decision on whether to pose such questions at all. *Id.* *See also Sexton v. French*, 163 F.3d 874, 886-887 (4th Cir. 1998)(finding on habeas review that the state court did not unreasonably apply federal law in concluding counsel was not ineffective in failing to ask questions on racial bias in part on counsel stated belief that "under the facts of the case, the case was not particularly racially charged"). The record here fully supports that nothing indicates a racially motivated crime, or some other incident, phrase or reason one could extrapolate from the evidence that race would be considered a factor. Moreover, arbitrarily injecting race would run the risk of raising the specter of racial motivation, or influence or bias, into the potential juror's minds where it otherwise would not exist. At any rate, Applicant has failed to show error.

As to specific instances of deficient performance in questioning, Applicant's argument is sparse. Applicant argues that counsel questioning of Juror Coker was "far too brief to uncover any potential biases." (Applicant's Post-Hearing Brief, p. 107). He also present the similar "too brief" argument in regard to Jurors Kirby, Mahaffey and McMutrey. (Applicant's Post-Hearing Brief, p. 108). Applicant did not even question defense counsel about the *voir dire* for these jurors. (See June PCR Tr. pp. 379-392). Applicant has not presented any information that could have been discovered if other questions were asked, that would impugn the clear responses supporting qualification, or counsel's strategy in regard to questioning. For instance, while defense counsel' s questions to Juror

Mahaffey are reflected on two (2) pages in the record, (R. pp. 535-536), questions from the court, defense counsel, and the solicitor spans thirteen (13) pages, (R. pp. 528-540). This is in addition to the responses to the questionnaire, which all parties had. (See R. po, 528-529; p. 535). Moreover, as to the verbal questions, a fair reading of the record reflects that the solicitor was much more concerned about bias against the state in regard to Juror Mahaffey due to involvement in a drug program, and possible connection to a defense expert, than the record reflects an indication of bias against the defense. (See R. pp. 536-538). In other words, the state may have had more to be concerned about than the defense. Merely citing a short verbal *voir dire* simply does not show error and prejudice for any one particular juror. The same is true for Applicant's arguments based on concise verbal *voir dire* by defense counsel of Jurors Kirby and McMurtrey. (See R. pp. 498-511 (Juror Kirby); R. pp. 188-200 (Juror McMurtrey)). When viewed as a whole, the record reflects ample information upon which to intelligently qualify and select the jury. And that is *just* the written record and the questionnaires. As defense counsel Sumner noted, many times defense counsel has non-verbal clues to a juror's attitude, bias, or belief. (June PCR Tr. pp. 386-387). Hearing and seeing the responses first hand cannot be undervalued in assessing credibility issues and determining whether a juror should be struck. *Cf. Matthews v. Evatt*, 105 F.3d 907, 918 (4th Cir. 1997)("counsel must be entitled to make credibility determinations in exercising peremptory challenges"); *State v. Wilder*, 306 S.C. 535, 538, 413 S.E.2d 323, 325 (1991)(strikes may be exercised on the basis of the potential jurors' "demeanor and disposition"). As to Applicant's argument that defense counsel had no verbal questions, at all, for Juror Sullivan, (Applicant's Post-Hearing Brief, p. 108), Applicant is correct that defense counsel had no questions, (R. p. 736). However, that was only *after* receiving a questionnaire, with responses, and *after* thorough questioning by the Court, reflected in some nine

(9) pages of the record. It simply cannot be said that this juror was qualified absent any questions. Applicant has failed to argue that the questionnaire responses and the court's questions were inadequate in some way, and none is readily apparent in the record. There is no need to parrot empty questions simply to avoid a later issue in PCR. Again, Applicant has failed to offer a substantive issue for review, much less shown error.

Finally, as to Mr. James Plumley, the record shows that he was questioned by the Court, by trial counsel, and by the solicitor, and his answers reflected that he could be fair and impartial, and could consider either sentence based on the circumstances presented, and return either sentence based on the circumstances. (R. p. 482, line 25 - p. 496, line 24). (See, for example, R. p. 494, lines 3-4, in response to whether the death penalty is imposed too often or often enough or about right, the juror responded, "I think each case has to have its own merit..."). He was qualified without exception. (R. p. 497, lines 6-14). Applicant argues that his responses at one point, indicated he might vote with the majority:

> A I would have - - if the evidence proved that that was the punishment deemed necessary, I have no problem with that. I should have said yes. I meant I think so in a positive way.
>
> Q In other words, it depends on the evidence.
>
> A Yes, I wouldn't, I wouldn't have no problem, I mean there would be, I 'm not just, wouldn't be free.
>
> Q I understand that. Right.
>
> A But if the evidence, that's what the evidence showed and 11 other people agreed with me, I would have not problem signing the paper and having that be the verdict.

(R. p. 496).

Applicant's is a very loose interpretation of the response. In context, the juror, *after* his questionnaire responses, *after* questioning by the judge, and *after* questioning by defense counsel,

and upon questioning by the solicitor, simply said he could following the procedure. There is nothing in that passage that reflects he would not follow the law as given to him. To the extent Applicant relies on *State v. Bennett,* 328 S.C. 251, 493 S.E.2d 845 (1997), as requiring a specific question on whether the juror would follow the majority, (See Applicant's Post-Hearing Brief, p. 109), Applicant incorrectly interprets the precedent. The Supreme Court of South Carolina has twice held that such a question is *not* mandated. *State v. Bennett*, 369 S.C. 219, 226-227, 632 S.E.2d 281, 285-286 (2006)(*Bennett II*); *State v. Hill,* 361 S.C. 297, 308, 604 S.E.2d 696, 702 (2004). In fact, in *Bennett II*, when asked to "reconcile" the first decision with the subsequent *Hill* case, the Supreme Court of South Carolina explained:

> Appellant urges us to reconcile a perceived conflict between *Hill* and our opinion in Appellant's first appeal before this Court. As we stated in *Hill, Bennett* did not determine the appropriateness of the "go with the majority question." *Hill,* 361 S.C. at 309, 604 S.E.2d at 702. In fact, the only issue in *Bennett* was whether the questioned juror was "unbiased, impartial, and able to carry out the law as executed." *Id.* Although Appellant properly points out that the court might never have discovered the juror in his first trial without the "go with the majority" question, it is equally true that no amount of questioning can provide a clear picture of a juror's biases or tendencies. *Wainwright v. Witt,* 469 U.S. 412, 424-25, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). "[T]hese veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings." *Id.* This position is strengthened by our previous recognition of the trial judge's duty to focus *voir dire* upon matters enumerated in the death penalty statutes and to eliminate excessive intrusions into the privacy of prospective jurors. *State v. Plath,* 281 S.C. 1, 7, 313 S.E.2d 619, 622 (1984) (*citing State v. Koon,* 278 S.C. 528, 532, 298 S.E.2d 769, 771 (1982)).

369 S.C. at 227, 632 S.E.2d at 286 n. 1.

In sum, the very question Applicant seeks to fault counsel for not asking, is one not allowed by our jurisprudence. Moreover, the record reflects the juror was properly and fully questioned, and further, supports the juror qualification. There is no error.

Applicant's argument to the contrary should be rejected.

9(a)(2) Ineffective Assistance of Counsel: Failure to Investigate

It is Applicant's burden to prove ineffective assistance of counsel. *Strickland, supra.* As far as trial counsel's investigation is concerned, to show error, an applicant must demonstrate not simply that more information was available (as there may always be one more witness who could have been contacted or one more piece of paper that could have been copied), *see generally Byram v. Ozmint,* 339 F.3d 203, 210 (4th Cir. 2003)(simple "failure to obtain available records... does not show that counsel's investigation was inadequate"); rather, Applicant must show that counsel made an unreasonable decision not to investigate or cut off investigation prematurely and unreasonably:

> ...strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052 (1984).

The United States Supreme Court has consistently affirmed this test in regard to investigation by trial counsel:

> ...*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*...

Wiggins v. Smith, 539 U.S. 510, 533, 123 S.Ct. 2527 (2003). *See also Bobby v. Van Hook*, __ U.S. ___, 130 S.Ct. 2052 (2009)(find no deficiency where counsel investigated and made a strategic, reasonable decision not to investigate certain lines of evidence further).

Moreover, 'the reasonableness of an investigation, or a decision by counsel that forecloses the need for an investigation, must be considered in light of the scarcity of counsel's time and resources in preparing for a sentencing hearing *and the reality that counsel must concentrate his efforts on the strongest arguments in favor of mitigation*." *McWee v. Weldon*, 283 F.3d 179, 188 (4th Cir. 2002)(emphasis added). *See also Byram v. Ozmint,* 339 F.3d at 210 (quoting same).

Applicant's complaints break down into two distinct areas: 1) evidence of lead poisoning, purportedly resulting in brain damage and learning disability; and 2) evidence of abuse and neglect in Applicant's Cleveland area homes. He alleges counsel was ineffective in the investigation and presentation of evidence in regard to these areas, in the following specific:

a. Counsel was deficient in agreeing to a trial date before conducting any mitigation investigation;

b. Counsel was deficient in ignoring and choosing not pursue "red flags," and in deciding on litigation strategy before thoroughly investigating. The trial strategy, therefore, like the investigation, was not reasonable;

c. Counsel was deficient in presenting incomplete and conflicting expert testimony, which was also not backed by adequate investigation;

d. Counsel was deficient in presenting a false picture of Kamell to the jury, in failing to adequately investigate Kamell's life in South Carolina, and in failing to retain a social worker to explain how Kamell's life experiences in Cleveland was formative background for difficulties he experienced in South Carolina.

(Applicant's Post-Hearing Brief, pp. 49-56). Applicant also asserts he was prejudiced by counsel's purported deficiencies in representation. (Applicant's Post-Hearing Brief, pp. 57-66). Before turning to each area, Respondent submits the following facts to place these complaints, and the evidence presented at the PCR hearing, in context.

Relevant Factual Background

There was no question that Applicant shot and killed Antonio L. Sapinoso ("the father") and Deputy Antonio J. Sapinoso ("the son" a/k/a "Joe") after having held the father and son hostage for approximately five (5) hours in the Sapinoso home in Greenville County. Applicant acknowledged same in his statement to the authorities, in his testimony during the guilt phase, and in his closing statement to the jury. (R. p. 1233; p. 1432; p. 1473).

At the PCR hearing, defense counsel testified that Applicant repeatedly admitted the shooting, but maintained he wanted to pursue a manslaughter angle, i.e. he was provoked[6] into shooting because Deputy Sapinoso reached for one of Applicant's three guns. (See, e.g., June PCR Tr. pp. 441-447; Respondent's Exhibit 23; Respondent's Exhibit 25, p. 2). Applicant continued to attempt to blame his victims, and, at trial, directed counsel to request a voluntary manslaughter charge. (Respondent's Exhibit 25, p. 6; R. p. 1445-1448). Applicant never denied shooting the

[6] Defense counsel advised his client to stay away from attempting to blame the victim. (Respondent's Exhibit 23, p. 3). The attempt to shift blame would be inconsequential legally, *see State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001)("[a] victim's attempts to resist or defend himself from a crime cannot satisfy the sufficient legal provocation element of voluntary manslaughter."), would not explain any circumstance or fact as to why he had to shoot the Deputy while the Deputy's head was on the floor, (see Respondent's Exhibit 25, p. 3), and would likely alienate the jury by attempting to blame a faultless victim. *See generally Howell v. State*, 877 So.2d 697, 704 (Fla. 2004)("the tremendous potential for alienating the jury by blaming the trooper for his own death, fully justifies trial counsel's strategic decision to forego presentation of the alleged policy violation during the guilt phase").

victims, and specifically admitted shooting Deputy Sapinoso in the back of head, though, contrary to the evidence, only once while his head is on the floor. (Respondent's Exhibit 23, page 2; June PCR Tr. p. 765 (Applicant's PCR Forensic Expert (Dr. Arden) testified that "[t]he evidence does indeed indicate that Joe Sapinoso's head was dead for the three gunshot wounds that were labeled Nos. 1, 2 and 3....")). Moreover, Applicant admitted to his PCR counsel that he was actually trying to re-load his weapons when he was taken down. (Respondent's Exhibit 25, p. 4).

At trial, Applicant testified that he went to see the Sapinosos on the night of April 1, 2003 because his relationship with Christina Rodriquez -- a daughter to the father, sister to the son -- had soured and that Christina 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." (R. p. 1425, line 11 – p. 1426, line 4). Applicant conceded he parked his truck away from the home, and waited for Deputy Sapinoso to return to the family home. (R. p. 1428). Applicant 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 Applicant's trial testimony, the two sat on the porch until Applicant began to cry and the Deputy suggested they go inside the home. (R. pp. 1428-1436). According to Applicant, the Deputy's father was in the living room with them, while his mother remained upstairs in the house with her grandson. [7] (R. p. 1431). According to Applicant's testimony, "they" (he and the Deputy) together called Christina. (R. pp. 1429-1430). Applicant

[7] During the penalty phase, the jury would hear Mrs. Sapinoso's recounting of events, including the defendant blocking her from calling out for help, and her attempts to shield her grandson, and survive the harrowing event herself. (R. pp. 1549-1554). Nothing in this testimony remotely supports a "family summit" situation downstairs to help Applicant as Applicant would have the jury and court believe. In fact, Applicant later admitted to counsel that the Deputy was actually handcuffed. (Respondent's Exhibit 25, p. 2).

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." (R. 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, Applicant planned to kill her family. (R. pp. 1089-1091). Tony Lee, a negotiator with the Greenville County Sheriff's Office, conducted negotiations with Applicant to surrender and leave the home. Officer Lee testified that he initially made contact through Applicant's sister, Tina, who was also present outside the home, and Lee told Applicant he could come out at anytime and he would not be harmed. (R. p. 1117, line 10-p. 1118, line 21). Through several hours of negotiations, in addition to speaking with Lee, Applicant was also able to speak with family and friends who encouraged him to come out. (R. p. 1119, lines 6-15; p. 1121, lines 1-24; p. 1127, line 14- p. 1128, line 4). Applicant complained to Lee about his relationship with Christine, *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 Applicant was referencing.[8] (R. p. 1129,

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[8] Applicant apparently now attempts to divorce himself from this contemporaneous confession. At multiple times in his brief, he refers to his murdering of the Sapinosos as a "domestic tragedy," (as if that somehow would ameliorate the harm), (See, for example, Post-Hearing Brief, p. 117), and even goes so far as to make a highly inappropriate assertion that no other officer would have been killed, (Post-Hearing Brief, p. 79). Contrary to his attempt to paint a picture of a "domestic" incident gone awry, this was not an episode of "simple" criminal domestic violence (if there is such a thing). The record reflects a thought-out, firm decision to kidnap, hold hostage, then kill a police officer and his father – even when Applicant had every opportunity to change his mind and de-escalate the situation. This is not to say that there is no domestic tie in – in fact, knowing his victim may have made access easier. At any rate, his reliance on the domestic tag fails to lessens the responsibility, and, as a practical matter, fails to show an accepted reason not to impose a death sentence. *See, e.g., State v. Lindsey*, 372 S.C. 185, 188, 642 S.E.2d 557, 558 (2007)(affirming death sentence where "Appellant killed his estranged wife, Ruby Nell Lindsey (Victim), on September 18, 2002, in the parking lot of the Inman City Police Department"); *State*

lines 15-25; p. 1134, lines 8-18)(emphasis added). Applicant remained "cordial and nice" to Lee throughout the negotiations, becoming agitated only when Lee asked to speak with Joe, or when Lee requested release of some of the hostages. (R. 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 eventually spoke with Joe and enlisted Joe's help in attempting to assure Applicant of his safety and secure everyone's release. (R. p. 1123, line 20 - p. 1124, lines 18). Lee also arranged, at Applicant's request, for Applicant to speak with Christine. Lee listened to the conversation and thought the conversation "went real well." (R. p. 1124, line 19 - p. 1126, line 8). After Applicant spoke with Christine, Lee spoke to Applicant "a couple of more times" and continued negotiations. Applicant told Lee he thought Lee was "cool" and said he was going to discuss the matter with Joe, and would call back later. (R. p. 1126, lines 11-24). Minutes later, Lee heard multiple shots. (R. p. 1126, line 25 - p. 1127, line 7).

The SWAT team, which was deployed, had not attempted any action prior to the shooting as they were informed negotiations were going well and Applicant would be coming out on his own. (R. 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. (R. 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

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v. Shuler, 353 S.C. 176, 180, 577 S.E.2d 438, 440 (2003)(affirming death sentence where defendant murder former girlfriend, her mother, and girlfriend's thirteen year old daughter). *Cf. Harrington v. State*, 858 So.2d 278, 297 (Ala.Crim.App. 2003)(noting "recent proliferation of domestic-violence cases" and "[i]n this Court alone in the last few years we have considered several murder and capital murder cases involving former or estranged spouses. Moreover, we have seen an upsurge in local and national news reports regarding murders and murder-suicides involving spouses and former spouses... domestic violence often escalates to deadly levels.")(internal citations omitted).

gaining entry, the officers saw Deputy Joe Sapinoso face down on the floor with his arms folded underneath his body, with gunshots to the back of the head. His father's body was on the couch. (R. p. 1153, lines 1-9; p. 1174, lines 12-16; p. 1191, lines 3-8; p. 1202, lines 24-25). When the officers rushed Applicant, he immediately said, "don't hurt me." (R. p. 1151, lines 6-14). As the officers attempted to restrain Applicant, Applicant kept trying to turn his head to see the Deputy's body. (R. 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. (R. 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. (R. 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*. (R. p. 1291, lines 2-21). (See also June PCR Tr. pp. 783-784; Respondent's Exhibit 23-A). Investigators also found Applicant's hat in an abandoned house close to the Sapinoso home, where Applicant waited for his victim, and Applicant's car parked significantly, a half of mile so away. (R. p. 1271; June PCR Tr. p. 779-780; State's Exhibit 40a; Respondent's Exhibit 24, p. 1). Applicant was wearing all black at the time of murders, and had, in addition to his own two guns, several blue bandanas, which were recovered from the scene. (R. p. 1298; June PCR Tr. p. 781; Respondent's Exhibit 23-A). Blue is the color associated with the gang in Applicant's multiple, highly visible, tattoos. (R. pp. 1589-1590; p. 1598; October PCR Tr. p. 72).

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 actually on the floor. (R. p. 1392, line 16-p.1395, line 25; p. 1398, line 15 – p. 1403, line 14). 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." (R. p. 1407, lines 13-18). The father suffered three gunshot wounds to the head and one to the arm. The one to the arm was considered a defensive wound: "... two struck the head, and its consistent that his arm would have been raised in a defensive posture." (R. p. 1407, lines 6-8). Though in the PCR hearing Applicant presented an expert to disagree with the State's expert on a portion of the findings. Applicant's expert agreed, however, without hesitation, that three of the four shots to Deputy Sapinoso's head were inflicted at close range while his head was on the floor. (June PCR App. p. 765).

PCR Evidence of Learning Disabilities, Purported Brain Damage and Lead Poisoning

Applicant presented two witnesses at the PCR hearing who described Applicant's early childhood academic record. The records admitted reflect that Applicant received assistance in school for a learning disability. (See June PCR Tr. p. 43). Applicant was not extracted from the regular public school system; rather, he received additional assistance for his learning needs. (June PCR Tr. p. 53). The records reflected that with additional assistance, Applicant showed "substantial improvement" and had "benefitted" from specialized programs. (June PCR Tr. p. 57). In sum, he was better able to meet his academic requirements as a result of the assistance. (See June PCR Tr. p. 98, the fact that Applicant achieved better grades either meant that he "overcame" his disability, or that "he was able to achieve in spite of his disability"). In fact, Applicant, with great assistance from his devoted step-mother, finished high school and attended North Greenville College. While

true Applicant did meet the academic standard sufficient to be admitted to some universities, he was able to be accepted and admitted to North Greenville. (See October PCR Tr. pp. 110-111). Moreover, Applicant's IQ is 94, an indication of average intelligence. (R. p. 1682; June PCR Tr. p. 844).

Applicant also presented testimony from Dr. David Bachman, a neurologist, to establish a MRI would have shown brain damage. Dr. Bachman, like Dr. James Evans had before him, found evidence of dysfunction. He then ordered a MRI in September 2008. (October PCR Tr. p. 155; p. 187). By notation submitted with the request, he informed Dr. Turk and Dr. Agarwal, interventional neuroradiologists who would interpret the films, that this was a "legal case" and the individual had a history of "significant learning disability with known exposure to lead." (October PCR Tr. p. 188). The report came back normal. (October PCR Tr. p. 189; Respondent's Exhibit 47). As far as treatment, Dr. Bachman would as a general matter refer individuals to these interventional neuroradiologists. (October PCR Tr. p. 186-187). However, Dr. Bachman treated this matter as a legal case,[9] (October PCR Tr. pp. 186-187; p. 188), and determined, with the aid of counsel, that he would send the films to Professor Rubin Gur at the University of Pennsylvania who has a protocol for evaluating brain volume from images alone. (October PCR Tr. p. 195; June PCR Tr. p. 659; p. 663).

A second MRI, done to Professor Gur's specifications, was performed in November 2008. (October PCR Tr. p. 193). Dr. Argarwal, again interpreted the films, along with Dr. Spampinato, another neruoradiologist. Again, the doctors were provided with the background information "legal

[9] Dr. Bachman admitted that he had testified in "probably a dozen" capital cases, but never for the Attorney General's Office. (October PCR Tr. pp. 181-182).

case" and "significant learning disability with known exposure to lead as a child." (October PCR Tr. p. 198). The report came back normal, for a second time. (October PCR Tr. p. 197; Respondent's Exhibit 48). Dr. Bachman, nevertheless, and after consultation with legal counsel, sent the information to Professor Gur. (October PCR Tr. p. 193).

Professor Gur testified that Applicant had "reduced volume" which he equates with brain damage. (June PCR Tr. p. 675; p. 713). He testified, however, that brain damage, even as noted on an MRI film, does not equate with dysfunction. (June PCR Tr. p. 663; pp. 721-722). Professor Gur testified that the image analysis in this case demonstrated "both frontal lobes left and right and the right orbital lobe are below normal, are 1 ½ approaching 2 " standard deviations. (June PCR Tr. p. 701; pp. 716-717). He explained, "if any of your cognitive abilities is 1 standard deviation below your average, then you are classified as having mild cognitive impairment... So 1 standard deviation below normal is clinically significant in this situation and in most medical situations." (June PCR Tr. p. 702). However, he conceded the rule was "a little arbitrary" when accessing less than 2 standard deviations, by his definition. (June PCR Tr. p. 716). He also conceded that brain volumes fluctuate with individuals. (June PCR Tr. p. 713). Further, he opined these statistics on volume would merely "likely relate to behavior deficits," (June PCR Tr. pp. 722-723), *if* neuro psychological assessment indicated dysfunction. (June PCR Tr. pp. 721-722). Thus, he testified, his finding were wholly consistent with Dr. Jim Evans' findings. (June PCR Tr. p. 707). The professor testified, not only did he agree with Dr. Evans' findings:

> ... I though he did a thorough evaluation and reported it in a fairly straight forward fashion, fairly standard.

(June PCR Tr. p. 711).

Moreover, Professor Gur conceded that dysfunction could "ameliorate" if one had, for instance, received aid in overcoming a minor learning disability: "Oh, yeah, the whole field of neuro rehabilitation is focused on trying to ameliorate the dysfunction...." (June PCR Tr. p. 719). Professor Gur repudiated his report conclusion to the extent it reflects "diminished capacity." (June PCR Tr. p. 723). Professor Gur also addressed Dr. Berg's conclusion, as reflected in her trial testimony, that an MRI was not necessary because it would not necessarily rule in or rule out dysfunction. (R. p. 1730). As noted, the professor testified that brain damage alone as shown by MRI film does not necessarily equate with dysfunction. (June PCR Tr. pp. 721-722). He also testified that the MRI is not definitive in all cases even as to damage:

> Because MRI is the standard method the rule out or rule in front lobe damage or damage anywhere else in the brain. Sometimes you can get a normal MRI even when there is damage. The method is not perfect and it could miss certain types of damage, but if it sees a damage, you know you have ruled it in. If you don't see, at least you have ruled out major types of brain damage. You may not be able to rule out all types of brain damage.

(June PCR Tr. p. 679; p. 712). Even so, Professor Gur opined that where there is dysfunction, a *quantitative analysis*, not just the image itself from an MRI scan, would "confirm" the presence of the dysfunction. (June PCR Tr. p. 696). Yet, as Dr. Kenneth Spicer, an expert in diagnostic radiology, (October PCR Tr. p. 281), testified, the quantitative analysis is not recognized as a reliable science as far as diagnosing patients. (October PCR Tr. p. 320; pp. 326-327).[10]

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[10] Respondent objected to Court's acceptance of the professor's testimony on the diagnostic level, noting the lack of reliability of Professor Gur's method for diagnostic purposes. (June PCR Tr. p. 647). Respondent noted that 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 05-6002-01-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 the testimony).

Moreover, neither Dr. Bachman nor Dr. Evans, nor Professor Gur are trained in the speciality of psychiatry. Dr. Berg was so qualified, (R. p. 1714), and her analysis was more comprehensive – focusing not just neurological testing for dysfunction, but also evaluation for possible indications of delusions, "hearing voices or having hallucinations," i.e. psychotic symptoms. (R. p. 1729). As Dr. Bachman conceded, he neither considered nor did he know how these possibilities factored into Dr. Berg's decisions and or opinion. (October PCR Tr. pp. 227-228). Dr. Bachman further conceded that "an MRI scan sometimes help you, sometimes doesn't help you. You have to put it in the context of the whole clinical picture," (October PCR Tr. p. 224), but maintained Dr. Berg must have been in error as the MRI showed "some mild atrophy." (October PCR Tr. p. 225). The major problem with his logic is neither report supported this position. Both reports from MUSC radiology showed a normal image. (October PCR Tr. p. 171; p. 189; p. 197; Respondent's Exhibits 47 and 48). Respondent agrees there is presently an addendum to the second report. However, that does not erase the fact that two reports were issued with normal findings, or the fact that the addendum, at most, allows for the possibility of mild atrophy, but still shows an overarching normal range, (October PCR Tr. p. 321). Further, the circumstances of the addendum negatively affect its value.

Dr. Bachman conceded that he did not request the reporting doctors reconsider their findings, either immediately after the September report was issued, or the November report was issued. On the same day that the State's subpoena was issued requesting the original reports, (May 27, 2009, before the June 1, 2009 Evidentiary Hearing), Dr. Bachman requested that Dr. Spampinato "re-review" her report. (October PCR Tr. pp. 202-203). Dr. Bachman testified that he was contacted

by John Blume, Esq., (a known capital litigation defense attorney not assigned to this case), and Mr. Blume expressed to Dr. Bachman that he "was concerned about the fact that the MRI scan report had not been amended"[11] and "asked [Dr. Bachman] to ask the radiologist to re-review the MRI scan again." (October PCR Tr. p. 204). Even so, the most the addendum adds is the possibility of "mild" (the least cognizable), diffused (whole brain as opposed to frontal lobe), volume loss. (October PCR Tr. pp. 324-325). Dr. Spicer maintained that the scan was within standard normal limits. (October PCR Tr. p. 297). Dr. Spicer noted that volume determination, when subtle, is subjective, (October PCR Tr. p. 297; pp. 312-313); however, there is no accepted, reliable method for determining volume loss by quantitative analysis accepted by either the American College of Radiology or American Society of Neuroradiology. (October PCR Tr. p. 320; pp. 326-327). Thus, even accepting the study Professor Gur conducted reflects volume loss, that information would not change his opinion that the MRI was within normal range. (October PCR Tr. p. 321).

However, Dr. Bachman, like Dr. Jim Evans', opined "there's evidence of cognitive dysfunction." (October PCR Tr. p. 178; p. 228). He then added his opinion was "strengthened by the fact there's evidence of atrophy, there's shrinkage of the brain, tissue to an abnormal degree,

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[11] Dr. Bachman testified he though it would be amended because in his opinion it showed atrophy. He maintained he spoke with another doctor, Dr. Rumboldt, and as a result, though that the report would be amended. Applicant did not present Dr. Rumboldt and Dr. Bachman was not allowed to testify to this conversation. (October PCR Tr. pp. 174-175). Dr. Rumboldt was also consulted by the State's witness, but, again, the witness was not allowed to testify as to his conversation. (October Tr. pp. 295-296). Curiously, Dr. Bachman did not request the reading physician to re-read the film after the first abnormal scan or after the second normal scan results were received. Also curious is that Dr. Spicer noted that Dr. Rumboldt has the authority to have added an addendum, (though professionally frowned upon), but did not. (October Tr. p. 292). It is only on the eve of trial that Dr. Bachman takes any steps to ameliorate this clear deficiency in the case.

evidence both on MRI scan on quantitative testing" with the "likely cause" of "lead exposure 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." (October PCR Tr. pp. 178-179). But, again, Professor Gur's statistical evaluation of brain volume is not a recognized diagnostic criteria for either dysfunction or damage. (June PCR Tr. p. 663; pp. 721-722; October PCR Tr. p. 320; pp. 326-327). Even Dr. Bachman, who relied upon the statistical evaluation to support his subjective theory of mild diffused atrophy could not identify this statistical evaluation as the premier or "most sensitive" test to determine loss of "neuron brain function." (October PCT Tr. pp. 183-182). Dr. Spicer testified more specifically that the "most sensitive" test is a brain biopsy, but absent that extreme, a PET scan or some type of "metabolic imaging" or a spinal tap. (October PCR Tr. p. 300). As to the professor's volume analysis, Dr. Spicer testified:

> ... I'm not aware that Dr. Gur's work has gained clinical acceptance to where it's a standard practice or any of the observations are utilized for standard practice. They're still in the research realm.
>
> .... I'd be very impressed if volume measurements turned out to be relatively sensitive. I have sen some of his work in the area of dementias looking for the ability to predict in patients with very mild changes in brain function whether they would become demented in a few years such as mild cognitive impairment patients that are eventually going to become Alzheimer's disease patients.
>
> And in those cases the volumetric analyses failed to help predict early changes as going on to later changes, whereas metabolic imaging has done very well in that regard and continues to progress...

(October PCR Tr. p. 301).

Dr. Spicer recognized Professor Gur's work had been published for the purpose of making associations, but that the volume analysis has not been accepted as a basis for diagnosing a patient.

(October PCR Tr. p. 302). Dr. Spicer testified that he would not rely on Professor Gur's volume analysis in making a diagnosis. (October PCR Tr. p. 302). Dr. Spicer explained:

> ... He has had scientific observations, but not as in clinical trial saying, you know, make this volume and this allows you to predict that this person will have this disease or it'll progress in such a manner.
>
> So in terms of making associations between specific entities, disease entities and volume changes, his work has been published. In terms of utilizing that in the clinical – in the day-to-day clinical practice there are no clinical trials that have shown, that I'm aware of, that his observations are beneficial as we diagnose disease and evaluate change in the patients.

(October PCR Tr. p. 302).

Professor Gur also concurs his method cannot be used for a "clinical presentation." (June PCR Tr. p. 663; See also p. 668, "I didn't make a diagnosis. I reported the results of the analysis which indicated loss of brain tissue.").

Dr. Bachman and Dr. Spicer agree, however, that atrophy of the brain can be caused by any number of events, including head trauma from sports, alcohol abuse and drug abuse. (October PCR Tr. p. 192; pp. 299-300). Professor Gur similarly only merely a "pattern of abnormality consistent with what you would expect from lead and other toxic exposures." (June PCR Tr. p. 668). Applicant did not show a definitive link, and, frankly, based on the medical testimony, one cannot show a definitive link with other possible causes present. Applicant did produce reports that confirm that Applicant 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 after trial. (June PCR Tr. p. 574; p. 333). However, 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 questioned whether he had a report supporting the exposure, which he did not, but he explained there were reports of lead poisoning from Applicant and his family. (R. p. 1702).

Applicant presented Professor Richard Canfield of Cornell University as an expert on lead exposure in small children. Professor Canfield testified that in the mid-seventies, the point of concern was 40 micrograms per deciliter. (June PCR Tr. p. 824). By the late seventies, the point of concern reduced to 30, having established that above 40 was "absolutely damaging," and not just an area of concern. (June PCR Tr. p. 825). Since 1991, that level has reduced again to 10. Id.

As to Applicant, Professor Canfield testified that Applicant tested at 34 in 1978, (June PCR Tr. p. 827), and 30 micrograms per deciliter in 1981, (June PCR Tr. p. 828).

Professor Canfield further testified that lead exposure affects cognitive functions, (June PCR Tr. p. 832), and, specifically, reduced IQ, (June PCR Tr. p. 834). He explained, however, that the great reach is actually at the lower exposure, and the increased exposure does not continue in great numbers:

> ... We found something that was counter intuitive in our study which is it took very little lead to cause initial significant damage. That is if you had a lead level as low as 10, you, as our statistical average you would lose about 7.4 points in IQ and it was a very rapid decline. You continued to lose IQ points as you increased in lead but just a slower rate.

(June PCR Tr. p. 842).

Statistically speaking, one would lose, on average 10 IQ points at the 30 micrograms per deciliter level, more or less. Id. Professor Canfield agreed that Applicant's IQ, 94, is in the average range. (June PCR Tr. p. 844). Further, Professor Canfield agreed he could not definitively link any

dysfunction to lead exposure. (June PCR Tr. p. 846). Professor Canfield candidly admitted that his information was statistical and individuals varied. (June PCR Tr. p. 847; p. 852). Professor Canfield also candidly admitted his research was based on a study of children 6 months to 6 years old, though he was familiar without other studies with longer ranges. (June PCR Tr. p. 841; p. 850). Professor Canfield agreed that Applicant's school records show an increase in average grades from elementary school to high school. (June PCR Tr. pp. 848-849).

Finally, Applicant called his mother and aunt to testify about his father abusing his mother in the family home(s) in the Cleveland area. Both were very passionate about the abuse and Barry Evans' fault. Barry Evans confirmed the abuse and stated the anger he felt in that relationship is what drove him to leave the home. (June PCR Tr. p. 633). In fact, he testified that he wanted to leave the volatile situation so that the children would have a better home environment, without seeing the violence. (Id). He denied any abuse toward Applicant. (June PCR Tr. p. 639). Shatima Martin, Applicant's sister, confirmed the abuse between Rene Evans and Barry Evans, and that she and Applicant had witnessed some incidents. (See, for example, October PCR Tr. pp. 20-23). She indicated Barry Evans had abused Applicant by use of corporal punishment on several occasions. (October PCR Tr. p. 25). Ms. Martin testified that both she and Applicant moved to South Carolina to be near their father. (October PCR Tr. p. 38). Ms. Martin also testified Applicant was not quite thirteen when he moved in with Mr. Evans. (October PCR Tr. p. 38). Applicant moved away from Rene Evans' home, where he was a "latch key" kid, "running the streets." (June PCR Tr. p. 352; p. 401; pp. 639-640; October PCR Tr. p. 101). Ms. Martin testified that when Barry Evans married their stepmother, Robin, he was not abusive to any one. (October PCR Tr. pp. 39-41; p. 69).

Dr. Cooper-Lewter, a social worker, testified that he completed a "social history assessment"

to develop "factors [that] may have influenced who he is today and his behavior." (October PCR Tr. p. 90). He noted that split in background – the tumultuous years (birth to approximately 12)[12] in Ohio, and the stable years (12 (or 14), all through high school and into college years). (October PCR Tr. pp. 105-106; pp. 109-110). He noted the stable home environment, his step-mother's devotion, his "very good role models [including] his coaches, who required that he do his work." (October PCR Tr. p. 110).

Dr. Cooper-Lewter testified that Applicant's relationship with Christina Rodriguez[13] was "toxic," and said, "Well, she had a fascination with gang activities, had a tattoo, I'm told, that was from the Folk Nation." (October PCR Tr. p. 107). He accepted the tattoo and the statement of membership as proof of her membership in a gang. (October PCR Tr. p. 107; p. 109).

Dr. Cooper-Lewter testified that Applicant did not do well at North Greenville because of "they had a lot of rules" and "it wasn't a good fit for him." (October PCR Tr. pp. 115-116). Ms. Martin, Applicant's sister, testified that he does not do well when there is a lack of rules. (October PCR Tr. p. 43). In fact, Ms. Martin stated it was lack of conforming to basic rules – such as staying

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[12] Curiously, this number appears to change, with Applicant's sister recalling Applicant coming to Greer, South Carolina before the age of thirteen, and Dr. Cooper-Lewter recalling age 14. School records, and testimony from a school friend, would tend to show he was actually 14 as Dr. Cooper-Lewter testified. (See, for example, June PCR Tr. p. 112).

[13] This Court previously ruled that evidence attacking Christina character was not to be admitted, though Applicant hovered near same several times, often attempting to paint Christina as being at fault in the incident. (See October PCR Tr. pp. 57-58; pp. 107-108). Christina was not a part of the hostage taking and murder. Moreover, Christina had been a victim of Applicant's abuse previously. (See June PCR Tr. p. 478; p. 481; pp. 514-516). Defense counsel Sumner testified that calling Christina to even attempt to explore her belief as to whether or not he was a gang member could open the door to evidence of that abuse. (June PCR Tr. p. 487; p. 491; pp. 516-517).

away from guns, and staying away from gang materials – that led to her request that he leave her house. (October PCR Tr. pp. 45-48).

Applicant concedes defense counsel investigated and presented a focused case in mitigation, calling family and friends, to demonstrate Applicant's "redeemable" qualities and focused the jury's choice by reliance on "two Kamell Evans." (See, for example, Applicant's Post-Hearing Brief, p. 9). Applicant, however, misconstrues the import of this statement. He contends the two distinct sides of Evans could be resolved by "understanding" of a difficult upbringing, running the streets at an early age, learning disabilities and dysfunction. Counsel made the choice more palatable for those jurors not so accepting of excuses – that to kill individual who made the choices they did not like, was to kill the individual who made choices that were good and decent. This a reasonable strategy. In *People v. Peeples*, 793 N.E.2d 641 (Ill. 2002), a capital case from Illinois, defense counsel presented a similar argument:

> ... despite experiencing a very troubled childhood, and despite facing adversity while growing up, defendant possessed "the strength and inner goodness to become what we consider a good son, a good brother, good uncle, and a father figure to his sister." The record shows that defense counsel made a strategic choice to argue that there were "two William Peeples. The William Peeples that family and friends knew and the William Peeples that the jury convicted of murder." In pursuing this mitigation strategy, defense counsel focused on the redeeming qualities possessed by defendant and asked the judge to view defendant as a person whose life was worth saving and who was worthy of mercy. Counsel focused upon defendant's "love of his family, his taking care of his family," and stated this defendant's being alive "even if it is in prison, sustains and supports his mother and sister, and his niece."

793 at 679.

The Court also found "the fact that the sentencer did not accept defense counsel's position does not mean that defense counsel was ineffective." *Id. See also Bell v. Evatt*, 72 F.3d 421, 429

(4th Cir. 1995)("unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel"). In fact, it was even more difficult to make the argument in that case than here because counsel had a disadvantaged background that did not show a clear "one night, one error" break in character, as the evidence in this case. (See R. p. 1773, Applicant to Jury, "What they are judging me on is one bad night, on bad night that I made happen, one bad decision that I made, a lot of bad decisions, one night, four hours and ten seconds.").

Moreover, the decision to embrace this strategy was made with the investigation and advice of a team of experts – Lenora Topp (a well-respected and experienced mitigation specialist); George Martin (a former SCDC employee qualified as an expert in corrections and prison administration); Dr. James Evans (a neuropsychologist); Dr. Elin Berg (a psychiatrist); and M. Scott Peterman (former FBI investigator).[14] Importantly, Applicant has not presented information that was not known in some fashion. Instead, he relies on the theory that the information at issue was not further explored, or not explored to the utmost minute detail. Even then, Applicant has failed to show deficient performance.

A. Applicant Fails to Show Error and or Prejudice in Regard to Evidence of Abuse and Neglect in Ohio. Defense Counsel Knew of the Evidence of Abuse and Neglect and Made a Reasonable Decision Not Present Testimony on Same as Such Would Be At Odds With the Defense Theme.

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[14] Applicant's assertion on "lack of time to prepare" are simply unfounded. The record shows literally hundreds of hours spent in preparation. (See, e.g., Respondent's Exhibits 12, 13, 14, 16, 17). Respondent notes that Applicant's social worker, both interviewing and further interpreting, required only two months to prepare for the collateral proceeding beginning June 1, 2009. (See October PCR Tr. p. 122). 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, 598 n.2, 627 S.E.2d 701, 707 n.2 (2006), *quoting Jones v. State*, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998)(an applicant "may not simply posit suppositions and speculations in an attempt to establish that counsel was ineffective").

Evidence of abuse and neglect, which also lead to evidence that Applicant was "running the streets," would be at odds with counsel's focus on the good qualities, good character, loving family. Moreover, the evidence Applicant proposed should have been admitted comes from his mother and aunt. The mother was uncooperative with trial counsel. Further, she impressed the defense as self-centered, finding it "very had to keep on track and talk about Kamell. (June PCR Tr. pp. 340-341). It is clear from the testimony in PCR that the testimony was decidedly centered on the mother – her perceptions, her anger at Barry Evans. (See, for example, June PCR Tr. p. 880, "He's never been in a good light."). There was a express, and reasonable, concern the mother would talk about herself more than focus on the events that Applicant was exposed to, that weighed into counsel's consideration of the evidence. (June PCR Tr. pp. 348-350). *See United States v. Snyder*, 787 F.2d 1429, 1432 (10th Cir. 1986)("to call a particular witness is a tactical decision and, thus, a matter of discretion for trial counsel"). Counsel will not be held ineffective when he articulates a valid reason for using a certain strategy in regards to his witness. *Simpson v. Moore*, 367 S.C. 587, 603, 627 S.E.2d 701, 710 (2006), *citing Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002).

As far as abuse directed toward Applicant, Applicant advised counsel he did not believe his father's discipline to be abuse, though admitted "a stern disciplinary atmosphere," and there was the fact that he decided to move to South Carolina to live with his father, and had a happy home as a result. (June PCR Tr. p. 308; p. 310; p. 426). Moreover, Barry Evans, the father who raised him and to whom Applicant fled while in Middle School, would testify on Applicant's behalf. To allow attacks on him would greatly reduced the effectiveness of his testimony. (June PCR Tr. p. 256).

Counsel expressed clear and reasonable strategy in these matters. Applicant has failed to establish deficient performance.

B. Applicant Fails to Show Error and Prejudice in Regard to Evidence of the Learning Disability As the Evidence When Reviewed in Full Shows a Individual, of Average Intelligence, Who Achieved Despite a Minor Learning Disability, Graduated from High School and Attended College.

Evidence of Applicant overcoming his learning disability would not be inconsistent with the defense, but it is of little weight in the theme at issue. Further, the evidence, as a whole, shows a relatively minor disability, and strong improvement. Consequently, outlining the possible cause of the disability, i.e. lead exposure, is again, not inconsistent, but of little weight in the theme at issue.

In the case of elementary school records, Applicant alleges counsel was ineffective in failing to more fully investigate and present evidence regarding his early learning disability. Two significant facts rebut his contention. First, the defense team did request elementary school records, only to be told, by the school district, that the records had been destroyed. (June PCR Tr. pp. 56-57; p. 574). In fact, Mr. Bunkley, the Director of Pupil Personnel Services for East Cleveland City Schools District, (June PCR Tr. p. 7), who presented records during the collateral action, confirmed the letter appeared to be from the correct authorities, and of the kind and quality he would rely upon and would accept as a document from the school confirming contamination and unavailability. (June PCR Tr. p. 56-57; pp. 59-60). Moreover, the defense team requested copies of these early records from Applicant's mother, Renee Evans. She, however, was uncooperative.[15] (June PCR Tr. pp. 203-204; p. 346; pp. 348-349). The defense team mitigation specialist, Lenora Topp, testified that Applicant's mother advised her she would help and that she did have some records, but she failed

[15] Several of the school records admitted noted the mother's concern over the disability, but also that she failed to attend school conferences designed to help Applicant. (June PCR Tr. p. 25; p. 90). This additional information that supports the lack of "follow through" as noted by the defense team.

to provide copies to Ms. Topp. (June PCR Tr. p. 572; p. 593). Specifically, Ms. Topp recalled that Applicant's mother suggested she had "medical records regarding the lead poisoning." (June PCR Tr. p. 594). Former defense mitigation specialist, Dale Davis, likewise testified that she had contacted Applicant's mother and requested records, and the mother had initially agreed to help. (June PCR Tr. pp. 533-534). In PCR, both Applicant's mother and his sister confirmed that the mother kept elementary school records. (June PCR Tr. p. 877-878; October PCR Tr. p. 77). When Applicant's mother came to South Carolina for the trial, though, the only document she provided Ms. Topp was a document reflecting how abuse had affected her. (June PCR Tr. p. 594). She claimed no one asked for the records, but conceded that she had turned over such records to the PCR defense team. (June PCR Tr. pp. 878-879; p. 881; p. 885). She indicated she would have turned them over to trial counsel had either 1) someone had come by the house; or 2) that they call and asked her to provide them. (June PCR Tr. p. 882; p. 885). She also denied that prior mitigation investigator, Davis, contacted her about records. (June PCR Tr. p. 881). However, counsel did have school records from Greer and those records reflected a good, though not stellar, student. Defense counsel would have to account for that in making any argument on learning disabilities and dysfunction. (See, for example, June PCR Tr. pp. 913-917).

As to evidence of brain damage, there was no evidence of brain damage that defense counsel ignored. (June PCR Tr. p. 329). Moreover, counsel had a right to rely on their experts – Dr. Evans, and psychiatrist, Dr. Berg – and they "very heavily" relied upon them. (June PCR Tr. p. 248). As noted, Dr. Berg testified that a MRI was not necessary. And, in fact, there two MRI were conducted subsequent to the trial, both reports came back normal. Only by relying on a volume analysis that is not an accepted diagnostic tool, and 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 there was dysfunction, and Dr. Jim Evans appropriate testified on same at trial. Applicant notes two reports of lead exposure and information on lead poisoning; however, that does not change the results of the two MRI reports which came back normal. Moreover, Applicant was an average student with an average IQ. In sum, the lead paint exposure was not an issue and 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 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). His consent is probative of the reasonableness of the strategy. *Bell v. Evatt, supra.* Applicant has failed to show *Strickland* error.

C. *Even if Applicant Could Show Deficient Perfomance, Applicant Cannot Show Prejudice as He Has Failed to Show a Reasonable Probability, But for the Purported Deficient Performance, the Jury Would Determined the Circumstances Did Not Warrant Death.*

As noted, relief will not be granted on showing of mere error or deficient performance. Prejudice must also be shown. *Strickland*, 466 U.S. at 687. The standard of "prejudice" differs depending upon whether it is related to guilt phase issues or penalty phase issues. In order to prove "prejudice" in the guilt phase, an applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). In *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998), the Supreme Court of South Carolina instructed that prejudice may be found in a capital sentencing proceeding when "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." Again, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Jones*, 504 S.E.2d at 823-824.

Moreover, 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*, ___ U.S. ___, 130 S.Ct. 383 (2009). The United States Supreme Court has resisted all attempts to dilute the prejudice standard. *See Wiggins v. Smith*, 539 U.S. 510, 534-537, 123 S.Ct. 2527 (2003)("there is a reasonable probability that at least one juror would have struck a different balance" but clearly relying upon *Strickland*, and "reweigh[ing] the evidence in aggravation against the totality of available mitigating evidence"). In fact, the Court has repeatedly resisted attempts to shift the burden to the State and or reduce the test to a mere catch all that the defense had "nothing to lose" by offering evidence, or different argument, that *may* have made a difference. *Wong v. Belmontes*, ___ U.S. ___, 130 S.Ct. 383, 390-391 (2009)("While the Court of Appeals quoted the pertinent language from *Strickland,* that court elsewhere suggested it might have applied something different. In explaining its prejudice determination, the Ninth Circuit concluded that '[t]he aggravating evidence, even with the addition of evidence that Belmontes murdered Howard, is not strong enough, in light of the mitigating evidence that could have been adduced, to rule out a sentence of life in prison.' But *Strickland* does not require the State to 'rule out' a sentence of life in prison to prevail. Rather, *Strickland* places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different.")(internal citations omitted); *Knowles v. Mirzayance*, ____U.S.____, 129 S.Ct. 1411, 1419 (2009)(noting "no Supreme Court precedent

establishing a 'nothing to lose' standard for ineffective-assistance-of-counsel claims" and relying on the *Strickland* test). When applying the "reasonable probability" standard here, Applicant is not entitled to relief.

The evidence of brain damage is shaky at best. Professor Gur's volume analysis is not accepted in the medical community as far as diagnosing brain damage. Further, the reports of the MRI interpretation reflected a normal image. The addendum on the second report does no more than allow for the possibility of subjective interpretation. Nothing in the medical evidence as to damage is particularly credible and certainly not weighty.

As to dysfunction, experts agree on dysfunction. In fact Professor Gur, and Dr. Bachman, agree with Dr. Evans, who testified at trial. There is nothing new in regard to dysfunction, and Applicant cannot prove error or prejudice. *Jones v. State*, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998)("The 'new' evidence is the same as the 'old' evidence. At best, it is a fancier mitigation case. If the evidence was not persuasive in the first case, the defendant does not get a second chance. Otherwise, there would never be an end to litigation.").

As to lead poisoning and learning disability, Applicant 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, Applicant remained an average student, and even went to college. The lead poisoning was information that Dr. Evans mentioned, which was, admitted, questioned on cross-examination. However, Applicant tied the lead poisoning not to exposure, but brain damage, and loss of IQ. The brain damage evidence, as noted above, is not credible, and Applicant's IQ is average. This is not say the evidence could not have been presented, but the lack

of proof of specific effect would lessen the impact. Moreover, Applicant's expert based his study on small children, and admitted some "counter-intuitive" showings in the findings. Some jurors may rightly question whether the expert's primary source of information is too limited when evaluating a grown man, especially in light of an average showing in school and an average IQ.

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 Applicant, i.e. use of force in discipline, was contested. Further, attacking the father would only lead to unraveling the carefully crafted defense theme (that admitted was true in that he had a wholly different environment in South Carolina than in Ohio), and making his testimony in support of his son less credible.

Additionally, to consider all the evidence together, *Wong, supra*, the potential for demonstrating prejudice is even worse for Applicant for the simple fact that the evidence would confuse and dilute the clear theory that this event was a critical break from his norm. This was the very theme that Applicant 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 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 violence, escalating violence.

Applicant has failed to demonstrate prejudice.

9(a)(3) Ineffective Assistance of Counsel: Failed to Effectively Move for Change of Venue

Trial counsel requested specific *voir dire* on this issue, and filed a pre-trial motion for change of venue based upon media coverage. After being allowed *voir dire* on the issue, and based on the responses received, trial counsel simply requested a ruling on the pre-filed motion without further argument. (See R. p. 1008, line 3 - p. 1009, line 25). As counsel conceded in the motion hearing, and as the record shows, the jurors were questioned on pre-trial media coverage. This included not just in court *voir dire*, but also questionnaires sent out prior to qualification. (See for example, R. p. 179, line 24 - p. 180, line 21).[16] Each and every juror seated was questioned about pre-trial publicity and whether, if they should know anything about the facts of the case, that would influence their decision. No seated juror expressed any such knowledge or bias. All thirteen of the jurors who eventually served answered that they were not familiar with any specific facts from pre-trial publicity, and there was no evidence of a preconceived opinion on same. (See R. p. 175, line 19 -

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[16] The individual juror questionnaires are held in the clerk's office and not attached due to the references to personal information. However, the questions at issue on each of the questionnaires read:

22. Do you have any knowledge about the case of The State v. Kamel Delshawn Evans? ___ If so, have you already formed an opinion about the case such that it would affect your ability to be fair and impartial if you were selected as a juror in the case? _____

24. Do you know of any reason why you would not be able to be fair and impartial if you were selected to serve as a juror in this case? ____. If so, explain: _____

p. 176, line 19 (Elvis Mahaabwa); p. 189, lines 21-24 (Daniel McMurtrey); p. 218, lines 9-15 (Kevin Colling); p. 230, line 15 - p. 231, line 3 (Dwayne Drake); p. 248, lines 1-3 and p. 257, line 23 - p. 258, line 5 (Sandra Holcombe); p. 289, lines 10-24 (Larry Coker); p. 469, line 20 - p. 470, line 8 (Mark Branyon); p. 484, lines 11-18 (James Plumley); p. 500, lines 7-12 (Margaret Kirby); p. 530, lines 4-10 (Toni Mahaffey); p. 564, lines 16-25, p. 570, lines 13-21, and p. 574, lines 14-25 (Bryan Megonigal); p. 578, lines 17-24 (Jacklynn Higgins); p. 727, line 23 - p. 728, line 5 (Marlon Sullivan)). While Dwayne Drake, Larry Coker and Mark Branyon all seemed to vaguely recall the fact of media coverage of the incident, each testified that they did not recall any specific details at all. (R. p. 230, line 15 - p. 231, line 3 (Drake); p. 289, lines 10-24 (Coker); p. 469, line 20 - p. 470, line 8 (Branyon)).

The Constitution requires that a criminal defendant be afforded a trial by a "panel of impartial, indifferent jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 , 81 S.Ct. 1639 (1961). In *Dowd*, the United States Supreme Court noted that media coverage was a reality, and cautioned that "[i]t is not required ... that the jurors be totally ignorant of the facts and issues involved" for a defendant to obtain a fair trial. *Id.* What is of particular importance is the juror's ability to put aside any previously held opinions, and base his verdict on the evidence admitted at trial. *Id* at 723. Thus, "[w]hen a change of venue motion is predicated on pre-trial publicity, the relevant inquiry is whether potential jurors have 'such fixed opinions that they could not judge impartially the guilt of the defendant.'" *State v. Gardner*, 332 S.C. 389, 392, 505 S.E.2d 338, 339 (1998), *quoting State v. Manning*, 329 S.C. 1, 495 S.E.2d 191 (1997).

Here, 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." (R.

p. 1010, line 20 - p. 1012, line 1). In sum, the record shows careful questioning by trial counsel and the trial judge to determine any bias due to media coverage, and expressly provides a record of trial counsel's efforts to request such specific questioning to ensure a fair trial. (See R. p. 1008, line 21 0 p. 1009, line 25). In the absence of any bias, or for that matter, any knowledge of the particular facts of the crime at all due to media coverage, no motion for change of venue could be meritorious. *See State v. Evins*, 373 S.C. 404, 412, 645 S.E.2d 904, 908 (2007)("When a trial judge bases the denial of a motion for a change of venue because of pretrial publicity upon an adequate *voir dire* examination of the jurors, his decision will not be disturbed absent extraordinary circumstances").

Applicant contends, however, that the process was incomplete as the trial was held in the victim's workplace and the juror were not question and or the trial moved. (Applicant's Post-Hearing Brief, p. 115). That is not accurate as Deputy Sapinoso had moved on to be an investigator. (R. p. 1531). At any rate, he had worked in the courthouse and very many peopled knew him. In fact, Applicant'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 conflict or bias. At any rate, Applicant relies on a 2009 Eastern District of New York case, *United States v. Wright*, 603 F.Supp.2d 506 (E.D.N.Y. 2009). (Applicant's Post-Hearing Brief, p. 116). 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 not translate well to the instant situation for several reasons. A review of the salient fact in *Wright* is necessary.

First, the employee at issue in *Wright* was an active employee "name 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 counsel or judges, as there was here, to ensure

bias was not an issue in the general proceedings. Fourth, the court did not find *per se* error. In fact, the change of venue was only granted with the consent of the government.

Here, as Applicant admits, 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 moved up in law enforcement at the time he was murdered. Even the logic was applicable, there 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. *Wright* is simply not applicable.

At any rate, Applicant has failed to show bias. The additional assertion of error is not based on binding and relevant precedent or any indication that any juror was unfairly influenced. Applicant's argument remains speculative. He has failed to show deficient performance, or prejudice.

9(b)(2) Ineffective Assistance of Counsel:
Failed to Move to Quash Aggravating Circumstance

Applicant alleges that defense counsel was ineffective for failing to object to the submission of the law enforcement aggravator. He argues that the evidence submitted in support of the aggravator was insufficient as a matter of law. (Applicant's Post-Hearing Brief, pp. 76-78). Consequently, he argues, counsel should have acted to prevent its submission to the jury. (Id.). The record reflects the evidence was sufficient to allow submission of the statutory aggravating circumstance to the jury. Applicant has failed to demonstrate *Strickland* error. At any rate, even if

Applicant could show error, he could show no prejudice, as the jury found three (3) other statutory aggravating circumstances that support the sentence of death. Applicant is not entitled to any relief.

A. The Sheriff's Testimony Regarding On-Duty Police and Death Benefits Was Sufficient to Support the Law Enforcement Aggravating Circumstance Requirement 1) That Victim Was a Law Enforcement Officer, 2) That Victim was On-Duty According to Department Police When The Kidnapping Began; and 3) Given that Kidnapping is a Continuing Offense, That The Law Enforcement Officer Was Killed "During or Because of the Performance of His Official Duties.

The statutory aggravating circumstance at issue, reads in relevant part, that the death of the law enforcement officer be "during or because of the performance of his official duties." S.C. Code § 16-3-20 (C) (a)(7). The phrase is not otherwise explained or defined. Thus, the ordinary meaning is controlling. *See, e.g., State v. Locklair*, 341 S.C. 352, 366, 535 S.E.2d 420, 427 (2000)("In construing statutes, words must be given their plain and ordinary meaning without resort to subtle or forced construction in attempt to expand the statute.")

The crux of Applicant's argument is that evidence presented was insufficient to show that Applicant was killed while still on-duty, i.e. "during or because of the performance of his official duties." Applicant rests on two different arguments. The first is that because the Deputy was not actively involved in arrest or investigation, then the evidence he was on-duty is not sufficient to support the aggravator. The second is that because the Deputy was murdered hours after he was first abducted, he was no longer on-duty at the time of the murder. Both arguments fail as a matter of law and fact.

1. The Record Shows that Applicant Abducted the Deputy from the Deputy's Vehicle. According to Department Policy, The Deputy Was Required to Respond and Perform Law Enforcement Duties While In his Sheriff's Department Vehicle. Thus the Deputy Was On Duty.

Applicant begins his argument by noting other cases where the aggravator was charged while the officer victim was *actively* engaged in a focused law enforcement action. (Applicant's Post-Hearing Brief, p. 73 n.35). Applicant's argument must necessary rely on the conclusion that being on-duty without actively engaging in a focused law enforcement action – such as arresting, stopping, questioning or in some way confronting an individual – does not support applicability of the aggravator. Applicant's proposed new interpretation requires giving the statute a meaning not supported its plain language. Applicant's theory renders the "or" meaningless – a direct contravention of the express language of the statute.

The Supreme Court of North Carolina reviewed their state's law enforcement statutory aggravating circumstance[17] in a similar applicability challenge in *State v. Gaines*, 421 S.E.2d 569 (N.C. 1992), and its logic is instructive. In *Gaines*, the police officer victim was working a second job as a security officer at a local motel. His second job was authorized by his police department's policy and he was allowed to wear his police department uniform. Further, he was required by department policy to "conform to the same standard of conduct as applies to their on-duty activities," i.e. "enforce the law" regardless of private employers rules. 421 S.E.2d at 571. The officer victim had confronted three defendants in the motel. The three eventually left, but returned. Upon their return, Gaines shot the officer victim in the motel lobby. *Id* at 572. The state served notice that it was relying on one aggravating circumstance in seeking the death penalty – the law enforcement aggravator. Gaines sought a pre-trial determination of whether the aggravator could apply given the

[17] The aggravator reads, in relevant part, that the murder "was committed against a law-enforcement officer... while engaged in the performance of his official duties or because of the exercise of his official duty," 421 S.E.2d at 465, which is substantially similar to the wording of our statute.

officer victim was at his secondary employment at a private business. The superior court ordered the aggravator was not applicable. The Supreme Court of North Carolina reversed, rejecting Gaines' argument as a "strained interpretation" :

> Such an interpretation would seem to require that a law enforcement officer be actively and aggressively focused upon a particular criminal suspect, as in the case of actually drawing or firing his weapon or engaging in hot pursuit, in order for his public service to fall within the realm of "official duties." We find this to be an inordinately strained and unnatural application of this term as it is normally used with respect to the official duties of all law enforcement officers, which includes such duties as investigative work (including stakeouts), crowd or traffic control, and routine patrol by automobile.

Id at 574.

Moreover, because the officer victim was obligated to enforce the law in his secondary job position in the same manner, and with the same authority, as he had while on a time-shift with the police department, the "off duty" designation did not defeat the applicability of the aggravator:

> ... Officer Griffin was at all times, including specifically his "off duty" secondary employment, acting as a law enforcement officer under the full supervision and control of the Charlotte Police Department for the sole purpose of "enforcing the law." We thus hold that [the statutory law enforcement aggravator] appropriately includes duly sworn law enforcement officers in uniform when they are performing off-duty, secondary law enforcement related duties, when it is clear that such duties and the pay therefrom are incidental and supplemental to their primary duties of law enforcement on behalf of the general public.

Id at 576.

Further, the state court found as relevant that the victim officer qualified for, and received, death benefits. *Id* . Though recognizing the differences in standards of proof in civil and criminal forums, the court concluded "there is no rational basis to distinguish between the criminal and civil definition and usage of the essential and defining term and the issue involved in both of these action, i.e., whether the term 'official duties' includes enforcement activity of the type in which Officer

Griffin was engaged when he was murdered." *Id* at 577. *Cf. State v. Evans*, 756 N.W.2d 854 (Minn. 2008)(in non-capital murder first degree case requiring "on-duty" finding, court noted testimony that officer victim's "survivors were paid line-of-duty benefits after his death").

Like *Gaines*, the evidence of the death benefits qualified and received by Deputy Sapinosos' family, because he was killed in the line of duty, was relevant and supportive of the applicability of the statutory aggravating circumstance. Moreover, the case here is even stronger as to the on-duty evaluation because there is no allegation of secondary, private, employment. Applicant only mentions *Gaines* in passing and concedes the logic that applicability of the statutory aggravating circumstance generally depends upon a determination "on whether the officer was performing general or common law policing duties," (Applicant's Post-Hearing Brief, p. 82). However, his entire argument in this regard balances precipitously on the definition of "performing" some duty – his definition, again, must unfairly constrain the circumstance only to an act of some sort, which is irreconcilable with our statute and the *Gaines* holding.

The issue of whether the officer 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. *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 circumstances to the jury, the trial court is concerned with the existence of the evidence, not its weight. The trial judge should submit the aggravator the jury if supported by any evidence direct or circumstantial."). Whether the evidence offered by the State supported the aggravator was a matter for the jury. *Locklair*. There will always be situations were "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 is simply a situation that requires the jury consideration.

For instance, in *White v. Commonwealth*, 178 S.W.3d 470 (Ky. 2006), the Kentucky Supreme Court reviewed a direct appeal challenge to the applicability of their similar law enforcement aggravator.[18] The Kentucky Court noted that professors commenting on Kentucky law had opined there was no particular "guidance" on the application of the statutory circumstance, and observed that "probably none [was] needed." 178 S.W.3d at 479. The court noted that "the specific facts of this case demonstrate otherwise." *Id.* In other words, the court acknowledged that there was neither a *per se* applicability or inapplicability – a fact that supports the individualized and specific determinations oft cited as indispensable in capital sentencing procedures. *See, e.g., State v. Plath*, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984)("As we have repeatedly stated, the sole function of the jury in a capital sentencing trial is the individualized selection of one or the other penalty, based upon the circumstances of the crime and characteristics of the individual defendant"). Some factual scenarios simply require more detailed individual consideration to ensure a proper application, as may be seen by consideration of the relevant facts in *White*.

The evidence in *White* demonstrated that the sheriff victim had been at a local event – a volunteer fire department fish fry. A sniper shot the sheriff as the sheriff placed two cakes in his marked car. The sheriff was in uniform, was considered "always on call," and had acted in law enforcement capacity during other like events. 178 S.W.3d at 479. White argued that the aggravator

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[18] The statutory aggravating circumstance is phrased, in relevant part, : "...the victim was a state or local public official or police officer, sheriff, deputy sheriff engaged at the time of the act in the lawful performance of his duties...." 178 S.W.3d at 478.

should not have been submitted "because the prosecution had not proven that Sheriff Catron was *actively engaged* in the lawful performance of his duties when he was shot." *Id* (emphasis added). The Kentucky Supreme Court disagreed. The following passage is instructive:

> Though the... aggravating circumstance is certainly narrower and more specific than many others in out death penalty statute, the phrase 'lawful performance of his duties' encompasses more than just those specific law enforcement tasks required or allowed by law. The statute is intended to allow a 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.* A police officer's being "on duty" easily falls within this latter concept.

178 S.W.3d at 481 (emphasis added).

Applicant, however, misconstrues this precedent, contending the court held the officer was "off-duty." (Applicant's Post-Hearing Brief, p. 83 n.44). Again, this shows the unreasonable interpretation upon which Applicant's argument must depend in order to show error. In sum, the facts may show an officer "on-duty" and available for law enforcement (such as *White*), or "off-duty" but actively performing a duty of law enforcement (such as *Gaines*). These cases demonstrate the two distinct phrases supporting applicability reflected in the statute, "during ***or*** because of the performance of his official duties." Applicant's theory renders the "or" meaningless – a direct contravention of the express language of the statute.

Applicant'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 official duties," intended "to tighten the nexus between law enforcement work and the murder," (Applicant's Post-Hearing Brief, p. 72, n. 33), remains merely an unsupported

personal assessment of legislative intent. The amendment is just as easily read to shift emphasis from only "law enforcement *work*" to encompass both law enforcement *work* and law enforcement *individual*. In fact, this reading would be more consistent with interpretation of similar aggravators in other states. *See, for example, White v. Com, supra* (noting the circumstance "is not limited to the performance of specific tasks and duties; it also includes being imminently available to carry out those tasks"). *See also Malone v. State*, 168 P.3d 185, 216 (Okla.Crim.App. 2007)(rejecting a "double counting" challenge in a weighing state, explaining: "The avoid arrest aggravator focuses upon the reason *why* the victim was killed, based upon the idea that it is particularly wrongful to kill another person in an attempt to avoid being arrested or prosecuted for some other crime; while the "peace officer victim" aggravator focuses upon *who* was killed, based upon the idea that it is particularly wrongful to kill an on-duty law enforcement officer. While these aggravating circumstances will often be supported by the same or overlapping evidence, they are based upon different aspects of a defendant's crime. Thus, the are not unconstitutionally duplicative and do not skew the capital weighing process.")(emphasis in original). Even so, the wording of the statute is plain and clear, and the facts of the instant case fall comfortably in the statutory provision parameters.

2. *Applicant's Parade of Horribles Arguing that Application in this Case Results in an Unfair Expansion of the Statutory Aggravating Circumstance is Irreconcilable with the Evidence and Facts. It is Premised Mainly on the Contention that Applicant's Action in Kidnapping the Deputy Ended the Deputy's Duty Status.*

Applicant asserted within his argument on this issue that the sheriff "testified that Joe Sapinsoso was 'on duty,' despite his being home well after the conclusion of his regular workday,

pursuant to a ... policy that whenever a deputy operates a sheriff's office vehicle that deputy is considered to be on-duty and available to response to calls." (Applicant's Post-Hearing Brief, p. 76). Applicant forgets that kidnapping is a continuing crime. *See State v. Tucker*, 334 S.C. 1, 13-14, 512 S.E.2d 99, 105 (1999)("Kidnaping is a continuing offense. The offense commences when one is wrongfully deprived of freedom and continues until freedom is restored."). It is just incredible to argue the deputy was not on duty and in his home, thus Applicant is less culpable, when Applicant had ambushed the deputy, taken him from his duty car, and held hostage. The jury not only convicted Applicant of kidnapping in the guilty phase, (R. p. 1502), the jury also found kidnapping as an aggravating circumstance of the murder, (R. p. 1795). The is no separate allegation that the kidnapping charge was somehow not supported by the evidence.

Further, the policy at issue specifically defined when the officer was "on-duty."[19] Sheriff Loftis testified that Deputy Sapinoso was on-duty according to the Sheriff's Department policy:

A Yes, sir, according to policy he was on duty that night.

Q If you would, explain that to the jury.

A *Any time that one of our deputies is operating a sheriff's office vehicle he or she is considered to be on duty and is expected to be available to respond to calls for service.*

Q And was he so acting that evening *before he reached the inside of this residence*?

A Yes, sir, he was.

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[19] Defense counsel testified they investigated whether the aggravator was appropriate. Counsel consulting with several officers, and conducted legal research. (See June PCR Tr. p. 239; p. 241; p. 242; p. 368). In fact, counsel generally referenced finding a statutory provision that provided, essentially, that an officer was on duty at all times. *See generally* S.C. Code § 23-13-70 (directing deputy shall remain on duty at night, shall always be on duty not less then ten hours a day). *See also Gaines*, 421 S.E.2d at 574 ("At common law, a law enforcement officer had the duty to keep the peace at all times."). The State's reliance only on the more restrictive Greenville County Sheriff Department's policy enured to Applicant's benefit.

Q He had a sheriff's-office-issued vehicle?

A Yes, sir.

Q And where had he been that night? What duty was he performing?

A He had been working a special assignment at county square on one of the council meetings.

Q And at the time of his returning home in his sheriff's office vehicle was he also dressed in an appropriate sheriff's office uniform?

A Yes, sir, he was. He was dressed in uniform that night.

Q And at the time of his death was he so dressed?

A Yes, sir, he was.

Q In addition to that explanation has Joe received or his family received benefits on the basis of his being killed in the line of duty?

A Yes, sir, they have. There is a United States Department of Justice offer that deals strictly with line-of-duty deaths involving police officers.

Q And did he qualify for those benefits?

A Yes, sir.

(R. p. 1530, line 1 - p. 1531, line 6)(emphasis added).

Additionally, other evidence showed that Deputy Sapinoso was abducted at his work vehicle *before* entering his home. (See, for example, R. p. 1428, lines 7-10; p. 1436, lines 15-25; p. 1309, line 4 - p. 1310, line 15, State Exhibit Triple A, Triple B, and Triple C (photograph of Detective Sapinoso's jeep with his bag on the ground by jeep's door). Moreover, Applicant admitted this fact in his testimony, (R. p. 1428), and in his statement to law enforcement that was also admitted at trial, (R. p. 1229).[20] Applicant, however, misconstues the testimony. He argues being in mere possession of the car was enough. (Applicant's Post-Hearing Brief, p. 85). That assertion is divorced from the facts of this case. In fact, as a factual matter, Applicant's argument depends upon ignoring great

[20] Though not necessary to the resolution of this trial error allegation, Respondent additionally notes that Applicant admitted this fact to defense counsel. (June PCR Tr. pp. 239-242; p. 254).

portions of the record, and, occasionally relying on hearsay outside the record.

For example, Applicant holds fast to the suggestion that he merely requested Deputy Sapinoso speak with him, (Applicant's Post-Hearing Brief, p. 74); however, the evidence firmly demonstrates otherwise, as more fully noted above. Applicant simply never addresses the fact he was dressed in all black clothing, laying in wait, with multiple weapons, stores of ammunition, and multiple blue bandannas. The time to recast the tale has long passed – the evidence as a whole stands against him.

In another example, this time of unsupported argument, is the citing of record pages that wholly lack support for the assertion, that "the erroneous aggravator became very damaging when the jurors became aware that he victim, had he not been murdered, may have been the officer assigned to greet and screen each of them as they entered the courthouse or guard the courtroom in which they were serving during the trial." (Applicant's Post-Hearing Brief, p. 73). The record clearly shows (in fact, the pages cited by Applicant) that while Deputy Sapinoso was previously assigned to the courthouse security detail, he was working white collar crimes – the immediacy of the connection is simply not there. Further, the use of a presumed immediacy of connection to show some juror influence is a stretch by definition.

Perhaps most brazen, though, is that Applicant, instead of addressing the evidence against him, attempts to rely on two media reports, never admitted in the record, for the truth of the matter asserted, i.e. that the Deputy was off-duty and at home. (Applicant's Post-Hearing Brief, p. 79, n.41). He even goes so far as to footnote the website, then, circuitously, rely on his own footnote. (Id at 85). It is still hearsay, still not admissible for the truth of the matter, still not a part of the

record, defense counsel was still not questioned on the existence of the report at the PCR hearing because the report was not a part of the PCR hearing, nor any law enforcement personnel who made have made the statement (or made a statement taken out of context), and the hearsay remains completely useless in attacking the evidence admitted at trial. Respondent also notes that opening the door to media reports would likely not be a reasonable act on counsel's part, considering the media reports by vast numbers, reported the "ambush" of the Deputy, and that the Deputy was "held at gunpoint for more than four hours," i.e. "Greenville County Sheriff's deputy Joe Sapinoso has his gun taken away and is held hostage, along with his father, by a man who had been waiting outside his father's home," (See, for example, Motion for Change of Venue, Defendant's Motion No. 26, Attachments).

In sum, Applicant is attempting to re-try the case on different facts. However, the facts here, fully and fairly supported by the evidence at trial, support the applicability of the aggravating circumstance for all the reasons cited above. There is no error. Moreover, even if Applicant could establish *Strickland* error, he would be unable to establish *Strickland* prejudice as there are three (3) other aggravating circumstances supporting the death sentence.

B. If Applicant Could Establish Error, He Cannot Show Prejudice as There Are Three Other Aggravating Circumstances Supporting the Death Sentence.

The jury found (4) independent aggravating circumstances as to Deputy Sapinoso's murder: 1) the murder was committed while in the commission of the crime or act of burglary in the first degree; 2) the murder was committed while in the commission of the crime or act of kidnapping; 3) 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. (R. p. 1794, line 24 - p. 1795, line 11). "In a nonweighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty." *Stringer v. Black*, 503 U.S. 222, 232, 112 S.Ct. 1130 (Miss. 1992). South Carolina is, of course, a nonweighing state. *See, e.g., State v. Simmons*, 360 S.C. 33, 44-45, 599 S.E.2d 448, 453 (2004). Even if Applicant could somehow show counsel was ineffective in failing to move to quash,[21] and even if the aggravator is later found to be inapplicable, the jury here found three (3) other aggravating circumstances. (R. p. 1795). The presence of three additional circumstances, even if found deficient in some way, would not have changed the outcome.

Moreover, 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 that even could have improperly swayed the jury. *See id.* Applicant concedes two lines of evidence were submitted in support of the aggravator: 1) the Greenville County Sheriff's policy on "one-duty" designation; and 2) the sheriff's testimony on federal monetary death benefits to the family. (Applicant's Post-Hearing Brief, p. 75). 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

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[21] Though Applicant is not exceedingly clear on this point, one would assume that Applicant would argue that counsel should be able to win, not just make, a motion. While Applicant repeatedly argued at the PCR hearing that trial counsel "did not object," (See October PCR Tr. p. 244), Respondent does not contest that an objection or motion could have been made, there is simply no indication an objection or motion challenging the applicability of the aggravator in these circumstances would have been successful.

is fairly common for officers, as Applicant also concedes in his brief. (Applicant's Post-Hearing Brief, p. 77). There is no particular inflammatory nature or expected emotional response simply upon hearing that his family received monetary death benefits. Applicant presented nothing in PCR to show the evidence was incorrect. To the contrary, after confirmation of its written support of its existence, counsel for Applicant specifically abandoned his contest to the evidence and agreed not to contest the supporting documentation of the testimony, simply its relevance. Specifically, "... the only objection is that they didn't object. They didn't object." (October PCR Tr. pp. 244-254).[22]

In sum, even if the aggravator should be set aside, there is no cause to reverse the death sentence. And, though not necessary to the resolution, Respondent notes there was no inappropriate evidence submitted even if this Court should deem irrelevant was submitted. There is not possibility of prejudicial error, under any circumstance. However, there was evidence here to support the submission of the statutory aggravating circumstance. Applicant has failed to show counsel error.

9(b)(3) Ineffective Assistance: Failed to Object to Evidence of Gang Affiliation

It is undisputed that Applicant bears tattoos that make reference to the "Crips," and that he

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[22] To the extent Applicant's argument the assertions were not "proven" at trial, i.e., not specific written policy was produced, no specific written document reflected benefits, Respondent would note the following. First, the strained argument is a concession that evidence was offered through the Sheriff's testimony. Second, an inference that the written policy or approval of benefits actually did not exist would be patently misleading. The Court had before it two exhibits in response to the Applicant's motion to preclude the State from submitting additional evidence including proof of the existence of a written policy and benefits (though truly not relevant as the sheriff's testimony established the existence of a policy and the receipt of benefits – there is no necessity of a written policy or written receipt to be submitted as an exhibit). (October Tr., p. 254). Again, appellant has specifically waived the right to contest the truthfulness of the assertions in the testimony, (October Tr., p. 244), which could not be legitimately claimed, as demonstrated by the Court Exhibits 2 and 3.

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 Applicant admitted his gang membership. (See, e.g. June PCR Trans., p. 216; p. 261; p. 401). In his initial meeting with defense counsel Sumner, Applicant informed counsel:

> No bad trouble, no jail but brushes with the law. Defendant decided himself to move down with his dad. In gang in 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).

Applicant was caught in the Greenville County Detention Center with a necklace that indicated Crip membership. (R. p. 1621). And he was know to socialize with other "known"[23] gang members, specifically Christina Rodriguez. (October PCR Tr. p. 72;109). Further, Applicant 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 advised counsel that

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[23] As noted above, Dr. Cooper-Lewter accepted tattoos and admissions as proof of membership to Christina. (October PCR Tr. p. 107). Dr. Cooper-Lewter rejected Applicant's tattoos and self-admissions as proof of membership. (October PCR Tr. p. 119-120).

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 him or that he would get any benefit from gang membership. (June PCR Tr. p. 301; R. p. 1635 - p. 1636). He agreed with Mr. O'Caine that SCDC identifies "security threat group" members by two basic factors – self-admission and tattoos. (R. p. 1633). Applicant 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, Applicant admitted membership. (October PCR Tr. p. 272). In fact, even though he is on death row, away from general population and the concerns of gang membership in general population, Applicant has never renounced membership. (October PCR Tr. p. 272; p. 274)

Applicant presented testimony[24] from his family and friends at the PCR hearing to the effect that he was not really in a gang. (See, e.g., Ocober 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 PCR Tr. pp. 260-261). The multiple tattoos are permanent, large and visible. (June PCR Tr. p. 252).

It is undisputed that Petitioner, 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

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[24] Applicant also presented affidavits which have not yet been accepted. (October PCR Tr. pp. 229-231). Respondent maintains its objection to the affidavits as Respondent has had not opportunity to cross-examine the affiants, and the affidavits contain matters related to contest issues at trial. (See October PCR Tr. p. 229). Cf. Melendez, (trial by affidavit is fundamentally at odd with our judicial process).

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 Applicant availed himself of gang sayings and gang symbols. While he confessed to being a gang member, he denied that 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 on the scene tie the theory to the scene. 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. Is there a personal connection to the selection of the victims? Yes. But motive, like the individual who acts, may have many different facets. The inclusion of one does not result in the exclusion of another.

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.").

9(b)(4) Ineffective Assistance of Counsel: Failure to Object to Testimony of Eddie O'Cain

Mr. O'Cain was qualified narrowly as "an expert at this time to talk about gang activity and

gang experience *within the Department of Corrections*." (R. p. 1590, line 22 - p. 1591, line 8)(emphasis added). His background supports that qualification. (R. p. 1582, line 19 - p. 1590, line 4). Defense corrections expert, George Martin, also referenced SCDC's established procedure and agreed with Mr. O'Cain's testimony. (R. p. 1633, lines 1-22). The record supports there is no error in qualification.

Applicant essentially argues that the defense counsel was ineffective for failing to object to the qualification because there is no "science" involved. (Applicant's Post-Hearing Brief, p. 131). There is no requirement that all expert testimony be "scientific" in nature. Rule 702, SCRE (Testimony by Experts; referencing "scientific, technical, or other specialized knowledge"). Moreover, the following quotation from *United States v. Hankey*, 203 F.3d 1160 (9th Cir. 2000), is instructive:

> Given the type of expert testimony proffered by the government, it is difficult to imagine that the court could have been more diligent in assessing relevance and reliability. The *Daubert* factors (peer review, publication, potential error rate, etc.) simply are not applicable to this kind of testimony, whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it. *See Kumho Tire,* 119 S.Ct. at 1175 ("Engineering testimony rests upon scientific foundations, the reliability of which will be at issue in some cases.... In other cases, the relevant reliability concerns may focus upon personal knowledge or experience.") (internal citations omitted); *United States v. Plunk,* 153 F.3d 1011, 1017 (9th Cir.1998) (upholding admission of expert testimony from law enforcement officer regarding jargon of narcotics trade, on basis of expert's training, experience, and personal knowledge).

203 F.3d at 1169.

Here, Mr. O'Cain gave a lengthy recitation of detailed gang study, including sharing of information with different agencies, and personal observations. (R. pp. 1587-1588). He indicated that the "Blues" cover Crips, Gangster Disciples, and Black Gangster Disciples. (R. p. 1589). He

opined, based on his experience, that he would access Applicant 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). He further opined that Applicant's violence toward a law enforcement officer would make him particularly attractive as a possible leader. (R. p. 1597).

Because the representation of gang membership is part and parcel of Applicant's character - - his appearance and professed belief and or aspiration if not achievement - - the testimony was obviously relevant as to his characteristics. And, those characteristics are fully applicable and relevant in the penalty phase for at least two reasons: 1) the evidence supports the inference that the victim was chosen, in part, as an enhancement of gang standing; and 2) the evidence supports that Applicant's gang standing, particularly an enhanced gang standing as a result of his murder of a police officer, adds to the future dangerous issue in the penalty phase.[25] Moreover, the fact of membership in the group is an element of future dangerousness well recognized with the Department of Correction, specifically because members of organized gangs have created hostage situations and presented a recognized security threat. (R. pp. 1583-1585). This is relevant, and admissible evidence in the penalty phase. *See Dawson v. Delaware*, 503 U.S. 159, 166, 112 S.Ct. 1093 (1992)(general "abstract" belief of 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

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[25] The only time the gang membership evidence was expanded upon was in the penalty phase. The guilty phase evidence of same was not as pointed - for example, Applicant admitted his crimes were "something bigger" than his relationship with Christine, and, of course, his tattoos are evident at any time.

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."). *See also Fuller v. Johnson*, 114 F.3d 491 (5th Cir. 1997)("A reasonable juror could conclude that membership in such a gang is relevant to future dangerousness"). However, the evidence at issue here is more narrow still. The evidence went to identification of gang membership for correctional purposes and what Applicant's tattoos and admissions would mean as far as correctional dangers and disadvantages. 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. There is no error.

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).

However, as to this issue, Applicant has failed to identify any reason basis for objecting. He has failed to prove *Strickland* error.

9(b)(5) Ineffective Assistance of Counsel: Failed to Object to Victim Impact Testimony

Applicant complains that counsel should have objected to victim impact evidence offered from Sheriff Loftis and Deputy Tripp. (Applicant's Post-Hearing Brief, pp. 90-94). It is not surprising to have two fellow officers testify about the effect of a fallen officer, their friend, on them

personally. *See Payne v. Tennessee,* 501 U.S. 808, 825,111 S.Ct. 2597 (1991)("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"). Because the victim here was a sheriff's deputy, evidence of the specific harm will logically be tied to his career, as a facet of his life. *See, for example, State v. Byram*, 326 S.C. 107, 117, 485 S.E.2d 360, 365 (1997)(noting testimony in regard to victim teacher, "the teacher's assistant, testified the victim was a wonderful teacher of emotionally handicapped children and the victim's students were devastated to learn of their teacher's death"). It is not *per se* a violation of *Payne* simply due to his law enforcement standing. For example, in *State v. Bixby*, 388 S.C. 528, 555-557, 698 S.E.2d 572, 586-587 (2010), the South Carolina Supreme Court held a video of the officer's funeral was properly admitted:

> We find the videotape at issue was victim impact evidence because it showed the traditional trappings of a law enforcement officer's funeral, demonstrating the general loss suffered by society. Additionally, the video showed footage of actual mourners, displaying for the jury the specific impact of the murder on particular members of society. Thus, we hold the video was victim impact evidence pursuant to *Payne*.

338 S.C. at 556, 698 S.E.2d at 587.

Morever, the Court found that the evidence was not unfairly prejudice based on a danger of evoking sympathy: " Under the law, simply saying that evidence such as this was 'moving' is not enough to require reversal of a capital sentence." *Id.* Respondent notes that Applicant has offered an amendment to included an issue in this very action on whether a jury instruction would have precluded sympathy or mercy in the jury's deliberations. There will necessarily be emotion in a capital sentencing proceeding – precedent requires such motion be channeled into reason deliberation

on the evidence. *Id.* This evidence complied and did not stray to impermissible bounds such as family members of the victim testifying on the proper penalty. *Payne*, 501 U.S. at 830, n. 2 (leaving untouched former precedent that prevented "a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment" as "No evidence of the latter sort was presented at the trial in this case.").The testimony was tailored specifically to the impact the Deputy's murder had no them specifically, and the local force, who personally knew him. Applicant'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, Applicant's oft repeated argument that the law enforcement aggravator was not properly submitted has been disproved. Thus, his argument is ineffective in regard to "additional prejudice" due to this particular vicitim impact evidence

In sum, the evidence here was properly admitted under *Payne.* Consequently, Applicant has failed to show *Strickland* error and prejudice.

9(b)(6) Ineffective Assistance of Counsel: Failed to Object to Hearsay in Mrs. Sapinoso's Testimony

Applicant complains that defense counsel should have sought a pre-trial determination on the permissible scope of Mrs. Sapinoso's victim impact testimony. Apparently, Applicant argues that defense counsel should have objected (at some point). Applicant inconsistently argues in his brief that defense counsel should have sought to keep the testimony "within the bounds of *Payne*," (Applicant's Post-Hearing Brief, p. 94), but then merely argues an evidentiary issue, improperly admitted "hearsay," (Applicant's Post-Hearing Brief, p. 95).

To the extent he is attempting to argue that certain evidence exceeded the bounds of proper *Payne* evidence, he is, again, confused. First, he appears to complain that Mrs. Sapinoso was allowed to testify about her presence on the crime scene with grandson, "Bebo." (Applicant's Post-Hearing Brief, p. 94). This is not victim-impact evidence, but evidence of the circumstances of the crime. Second, he appears to complain about the testimony of Bebo's statements to his mother and grandmother demonstrating his fear of losing other family members. (Id.). Applicant does not attack these statements as improper victim impact evidence, but as inadmissible evidence under the rule against hearsay. The statements, however, were not offered for the truth of the matter asserted, but as evidence of the individual's fear, thus, by definition not hearsay. See Rule 801 (c), SCRE ("Hearsay is as 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."). The statement, "I am not going there, my mommy is not going there" is not offered for the truth of whether they were going to South Carolina, but reflecting fear. Moreover, his question "is grandmother going to be okay," is not a statement at all, but again reflects fear – a lasting impact from the night of the murder. *See State v. Kelly*, 343 S.C. 350, 370-371, 540 S.E.2d 851, 861 (2001), *overruled on other grounds*, 534 U.S. 246, 122 S.Ct. 726 (2002)(testimony relating child's statement "a bad man had killed his mommy" not hearsay, " the testimony clearly was offered to show the impact the murder had on Shealy's young child and the rest of her family" and was "properly ... victim impact evidence"). The statement relating "he's just staring at the ceiling," could be offered as true, indicative of the fear, but more likely is just part of the narrative in explaining that he was not talking at that point to the grandmother. *See generally* Rule 803, SCRE (statements of "then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily

healthy)" not excluded by hearsay rule). *See also United States v. Wills*, 346 F.3d 476, 490 (4th Cir. 2003)(witness statements made in conversation with defendant properly admitted to show context of incriminating admissions); *United States v. McDowell*, 918 F.2d 1004, 1007 (1st Cir. 1990)("McDowell's own statements could, of course, be used against him; his part of the conversations was plainly not hearsay. Nor can a defendant, having made admissions, keep from the jury other segments of the discussion reasonably required to place those admissions into context."). At any rate, the goal of the sentence would be to demonstrate the fear and impact the murders had on the young child. Because that concept was specifically conveyed otherwise, any minor error in the admission of one statement going to same would have been harmless. *State v. Haselden,* 353 S.C. 190, 577 S.E.2d 445 (2003) (improper evidence harmless where merely cumulative to other evidence); *State v. Evans*, 662 S.E.2d 489, 491 (Ct. App. 2008)(evidence "merely cumulative, insubstantial" did not affect the result of trial and considered harmless); *State v. Weaver*, 361 S.C. 73, 87, 602 S.E.2d 786, 793 (Ct. App. 2004)(even if contested testimony was hearsay, admission would be considered harmless where cumulative to other evidence in the record). However, Applicant has shown no *Strickland* error.

9(b)(7) Ineffective Assistance of Counsel: Failed to Object to Closing Argument

Respondent relies on the record which Respondent submits shows no infirmity in the argument that would warrant an objection much less support a meritorious objection. (R. p. 1743, line 19 - p. 1760, line 18). Given the entirety of the record, the argument presented is not erroneous and or not prejudicial. *See generally Von Dohlen v. State*, 360 S.C. 598, 613-614, 602 S.E.2d 738, 746 (2004)("comment, although improper, did not so infect the trial with unfairness as to make the

resulting conviction a denial of due process").

Applicant, parsing the record, complains the argument "the state is already decided that a death sentence is the appropriate punishment" and absolved the jury of responsibility. (Applicant's Post-Hearing Brief, p. 168). 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. And, to the contrary, 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 along, (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. *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 also complains about the solicitor's reference to "mean evil people." (Applicant'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).

Further, though Applicant complains of the "graphic language," he is referencing the horrendous circumstance of the crime which the jury heard. (Applicant's Post-Hearing Brief, p. 1751). Descriptions of execution-style shootings can be graphic, but here, the descriptions is not inflammatory or otherwise improper on their face. (See, for example, R. p. 1759, describing circumstances as "that sound of bullets piercing the head of a human being and seeing hte 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").

As to Applicant's complaint that argument on mitigation, (Applicant's Post-Hearing Brief, p. 172), Applicant has shown nothing more than a comment on the weight of the evidence, 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")

Lastly, even if the comments could possibly constitute error, the error would be harmless in light of the tremendous evidence in aggravation. *See Jones, supra.* However, the record shows no error. Applicant has failed to show defense counsel was deficient in failing to object.

9(b)(8) Ineffective Assistance of Counsel: Failed to Object to Prosecution on Equal Protection Ground

Applicant has failed to offer any specifics to the allegation, and has failed to argue error. Therefore, this allegation should be deemed abandoned. Alternatively, Applicant has failed to carry his burden of proof.

9(b)(9) Ineffective Assistance of Counsel: Failure to Adequately Investigate, Present Evidence and Challenge the Testimony Concerning the Circumstances of the Shooting and the Cause and Manner of Death of the Victims

Forensic evidence, as presented by the State's expert, showed that Joe was shot in the back of the head, four times, at close range (within two to three feet), while Joe's head was actually on the floor. (R. p. 1392, line 16-p.1395, line 25; p. 1398, line 15 – p. 1403, line 14). 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." (R. p. 1407, lines 13-18). The father suffered three gunshot wounds to the head and one to the arm. The one to the arm was considered a defensive wound: "... two struck the head, and its consistent that his arm would have been raised in a defensive posture." (R. p. 1407, lines 6-8).

Respondent again notes that Applicant was cross-examined at trial about having shot Deputy Sapinoso in the back of the head four times. (R. p. 1443, line 13 - p. 1444, line 12). Applicant never denied, or attempted to correct, the solicitor's reference to the facts as Applicant having shot "a uniformed deputy sheriff in the back of the head four times while he is kneeling on the floor." (R.

p. 1443, lines13-20).[26] Such a missed opportunity is curiously in light of the present allegation.

Even so, during the PCR hearing, Applicant presented an expert to indicate that there may have been a contest to all four shots.

As a first matter, Applciant's expert, Dr. Jonathan Arden, conceded that three shots could not be interpreted otherwise – specifically those shots to the back of the head, while the Officer's Sapinoso's head was on the floor. (June PCR App. p. 765 ("[t]he evidence does indeed indicate that Joe Sapinoso's head was dead for the three gunshot wounds that were labeled Nos. 1, 2 and 3....")). Moreover, the shots are issue were arbitrarily numbered. (Id). In sum, there is no way of determining which of the shots were fired first. At no point has Applicant been able to successfully challenge the three, without question, execution style shots. Moreover, Dr. Arden spoke in alternatives, not absolutes. (June PCR Tr. p. 765, "just as reasonable" as Dr. Ward's). This battle of expert simply does not show error by the State's witness. Moreover, Dr. Arden's testimony that the exhibits were false is strained, certainly an eye-catcher, but without substance. The demonstrative aids (which by definition are used in demonstration, and do not go back to the jury room), are simply that. It is an approximation based on photographs and a drawing (incidently a drawing used in virtually every autopsy, a standard form), and is meant to be an approximation. (See October PCR Tr. p. 263-268). Moreover, the demonstratives aids were approved by the medical examiner. (See October PCR Tr.

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[26] As noted in the initial return, the forensic pathologist and chief medical examiner, Dr. Michael Eugene Ward, testified that based on wounds and the "historical information given" that all four of the bullets were fired into the deputy's head while his head was on the floor, and "the muzzle of the gun was less than two to three feet from" his head. (Tr. p. 1402, line 24 - p. 1403, line14). Dr. Ward testified before Applicant and it appears Applicant was present for the complete testimony. Therefore, the basis for the assertion by the solicitor was well supported by the record, and Applicant was well aware of the facts presented to the jury before he testified.

p. 268). Again, this shows a strain to the argument that weighs against fully crediting and accepting the testimony.

And, if the collateral evidence is considered credible, of what use could it possible be in the defense? At best, it shows that only three of the four bullets were delivered as described, and the fourth, may have been or may not have been - it is a contest between experts as to one of the four shots to Officer Sapinoso's head. Applicant has failed to show Dr. Ward's opinion is medically or forensically incorrect, and even failed to call Dr. Ward to question whether his opinion would change in light of a challenge. Again, we simply have a contest of opinion on one of the four shots. Such divided testimony would not even obtain a manslaughter charge as the shots were clearly inflicted when a victim tried to free himself, *see State v. Shuler*, *supra*,; would not explain any circumstance or fact as to why he had to shoot the Deputy while the Deputy's head was on the floor, (see Respondent's Exhibit 25, p. 3); and would likely alienate the jury by attempting to blame a faultless victim, *see generally Howell v. State*, 877 So.2d 697, 704 (Fla. 2004)("the tremendous potential for alienating the jury by blaming the trooper for his own death, fully justifies trial counsel's strategic decision to forego presentation of the alleged policy violation during the guilt phase"). Further, such possible "alternatives" would not change the remaining facts supporting a planned act of violence; would not change the testimony of officers that no sound was noted before the series of shots began, and would not change the location of the body, found on the floor, with his arms tucked under his body. As defense counsel Sumner testified, these are facts that would not be affected at all by this "light-weight" challenge to one of the four deadly shots, and all the other information that supported a well thought out crime. (June PCR Tr. pp. 446-448; pp. 518-520). Even Dr. Arden admitted Applicant's explanation could not be entirely truthful. (See, for example, June PCR Tr. p. 785, "He

certainly brought with him a number of items that don't relate to talking."). As such, his suggestion that highlighting this unwinnable argument would only focus the jury more on the shooting itself, the violence itself. As counsel testified, they, with Applicant's consent, made a conscious decision to move through the guilt phase as quickly as possible to avoid emphasis of these facts. (See, for example, June PCR Tr. p. 327; pp. 495-496).

9(b)(10) Counsel failed to request the statutory mitigator related to capacity

To be entitled to relief on an ineffective assistance of counsel claim, must prove error and prejudice. *Strickland, supra.* Here, the record conclusively shows the mitigator at issue was not supported by the evidence at trial. Therefore, Applicant cannot show error and prejudice.

Trial counsel advised the jury in opening at the penalty phase, "... as I told you from the beginning, there's not going to be any excuses at all." (R. p. 1526, lines 11-13). Counsel also advised the defense would present testimony from "a couple of doctors" to show "what mentally goes on inside of somebody's head." (R. p. 1526, lines 18-21). Counsel continued:

> We're not saying he's insane. We're not saying he is mentally ill. But we are trying to offer you, as I said in my opening, reasons why this happened, not excuses but reasons, to convince you to consider as an appropriate sentence in this case life imprisonment without the possibility of parole...

(R. p. 1526, line 22 – p. 1527, line 2).

During mitigation, Applicant presented the testimony of psychologist Dr. James R. Evans regarding brain function. Dr. Evans' testing reflected appellant had an IQ of 94 which is "well within the average range" of intelligence. (R. p. 1682, lines 16-18). Dr. Evans opined, however, that appellant "had some brain dysfunction" and "learning problems" and that appellant was "under the

effects of a mental or emotional disturbance at the time of these shootings." (R. p. 1697, line 6 – p. 1698, line 6). He surmised:

> But when you get into circumstances like helicopters hovering and police surrounding you, the judgment is going to be bad in most people, for most people. It's going to be difficult to make a, let's say a, good, rational decision.
>
> But if you have the type of brain injury or head - - brain dysfunction that he has, it would be even more difficult, and your thinking could get very rigid and you might just not do what a rational person would do.
>
> So I think to that degree he was operating to some, with some impairment. He was less able to conform his behavior to the requirements of the law than a person without such dysfunction would have.
>
> ...
>
> ... I think he was under emotional disturbance at the time.

(R. p. 1698, line 24 – p. 1699, line 23).

On cross-examination, Dr. Evans testified his report reflected appellant suffered from "mild to moderate problems" with "cognitive flexibility" and no "significant problems with response control." (R. p. 1704, line 14 – p. 1705, line 3).

The defense also presented testimony from Dr. Elin Berg, a psychiatrist. Dr. Berg testified that, based on appellant's reports of his mood at the time of the murders, she would diagnose appellant with "major depressive disorder, single episode" which would be considered a "mental or emotional disturbance." (R. p. 1719, lines 14-16; p. 1721, lines 9-13). Dr. Berg testified, however, that Applicant had the capacity to conform his conduct to the requirements of law at the time of the

murders; that he did not have any psychotic symptoms; that he showed no evidence of mental retardation; that he did not have any brain injury; and that he did not have any psychoneurological symptoms. (R. p. 1729, lines 3 – p. 1730, line 13).

After the conclusion of the sentencing phase testimony, the trial judge recessed the proceedings and specifically requested defense counsel provide "those statutory and non statutory mitigating circumstances that the defense believes the jury should be able to consider...." (R. p. 1742, lines 10-20). The trial judge charged the jury to consider (1) "no significant history of prior conviction involving violence against another person"; (2)"the murder was committed while the defendant was under the influence of mental or emotional disturbance" and (3) "the age or mentality of the defendant at the time of the crime. Further, he instructed the jury to "consider any nonstatutory mitigating circumstances that have been shown to exist by the evidence in the case." (R. pp. 1783-1784). Defense counsel did not object or request additional instruction, (R. p. 1789, line 21– p. 1790, line 1), and rightfully so, because the evidence did not support the instruction. Moreover, defense counsel testified that he reviewed the statutory mitigating circumstance with his experts, Dr. Evans and Dr. Berg, and neither could give evidence to support the instruction. (June PCR Tr. pp. 459-471). In fact, defense counsel testified that his contemporaneous notes reflected that Dr. Evans indicated that was "as far as he could go." (June PCR Tr. p. 471).

Where there is no evidence supporting the requested charge, there is no error in failing to give the requested charge. *State v. Hughey*, 339 S.C. 439, 454, 529 S.E.2d 721, 729 (2000). Dr. Berg, the defense psychiatrist, rejected any notion of impairment in regard to capacity to appreciate the criminality of the conduct, or appellant's ability to conform his conduct to law. (R. p. 1729, lines

3 – p. 1730, line 13).[27] Dr. Evans, the defense psychologist, never testified that Applicant's capacity to appreciate the criminality of his conduct was substantially impaired, nor did he testify that Applicant's capacity to conform his conduct to the requirements of law was substantially impaired. Dr. Evans testimony simply stated Applicant "was operating to some, with *some* impairment. He was *less able* to conform his behavior to the requirements of the law *than a person without such dysfunction* would have." (R. p. 1699, lines 8-11)(emphasis added). He testified that Applicant was under an *emotional* disturbance during the murders. (R. p. 1699, lines 20-23). He also opined stress and pressure from facing police would affect anyone's judgment. (R. p. 1698, line 24 – p. 1699, line 3). He further explained his findings as Applicant having a "mild to moderate" problem with

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[27] As to her opinion in light of Dr. Evans' findings about possible frontal lobe issues, the following exchange occurred on the record:

Q Did you diagnose him with any brain injury?

A I did not. The one that's, that I consulted with, Dr. James Evans who testified yesterday, had some concern about frontal lobe functioning.

Q And as part of that concern did you order an M.R. I. or anything such as that to look into that?

A No, I did not because it will not necessarily rule in or rule out whether you have a frontal lobe dysfunction. It is not specific.

Q Would it assist you?

A If I had psycyoneurological [sic] symptoms in addition ot the cognitive dysfunction I would have done an M.R.I., otherwise I would perceive it as a waste of money.

Q And you didn't see any on that day.

A No. He had no psychoneurological symptoms.

(R. p. 1729, line 24 - p. 1730, line 13).

"cognitive flexibility" and no "significant problems with response control." (R. p. 1704, line 14 – p. 1705, line 3; p. 1708, lines 3-7). Simply, Dr. Evans testimony fails to provide evidence of substantial impairment in capacity to understand and conform – this is consistent with defense counsel's notes, (June PCR Tr. p. 471). Rather, his testimony is much like that given in *Hughey,* where Dr. Evans implied the defendant simply "could not deal with stress." 339 S.C. at 455, 529 S.E.2d at 730. Here, Dr. Evans essentially opined the same, even referencing the "great pressure with the police and helicopters there" affecting judgment. (R. p. 1708, lines 17-25).[28] That does not constitute evidence supportive of the specific charge at issue here. *Compare State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990)(mitigating charge required where defendant diagnosed with psychopathic personality affecting capacity to appreciate criminality of the conduct and ability to conform conduct to law). The mere mention of "some effect" on capacity simply does not necessitate a charge that contemplates substantial impairment. Thus, the evidence presented does not provide any support for the mitigator that references substantial impairment of the capacity to appreciate the criminality of the act, or to conform to the requirements of the law. Moreover, the trial judge properly charged on the two mentality statutory mitigators that were properly supported by the evidence, (R. p. 1783, lines 17-22), and the fact and circumstances regarding Applicant's mental condition were obviously and clearly before the jury such that, had counsel improperly failed to request the mitigator, there could be no prejudice. *Jones v. State,* 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998) (finding no prejudice by the absence of an additional statutory mitigating factor on

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[28] The record is clear that the responding officers were careful not to use emergency lights or sirens, or otherwise alarm Applicant, (See, for example, R. p. 1089, line 21 – p. 1092, line 3; 1104, lines 2-17), and there is no reference to helicopters hovering during negotiations. Even so, this assertion shows the doctor's dependence on stress in his evaluation.

mental state where the issue of defendants mental condition was clearly before the jury, the trial court charged several other mitigating factors relating to mental condition, and the jury found the existence of five aggravating factors). *See also State v. Stanko*, 376 S.C. 571, 578, 658 S.E.2d 94, 97- 98 (2008)(though finding issue not preserved for review on direct appeal, the Court noted that no prejudice occurred when the jury heard the cited evidence, and was advised of other statutory mitigating factors regarding appellant's mental state). Moreover, there is clearly overwhelming evidence of guilt (Applicant admits same and did so at the trial, R. p. 1233, lines 3-12; p. 1432, lines 7-13; p. 1473, lines 16-19), and of a particularly brutal and heinous double murder, not the least of which is the number of bullets fired into each victim, and the manner in which Deputy Sapinoso was shot. There could be no reasonable probability that the omission of this one mental state related mitigating circumstance in the charge (especially where two others were charged) would have resulted in a different result. *Strickland, supra. See also Jones*, 332 S.C. at 339-340, 504 S.E.2d at 827 (jury "presented with overwhelming evidence of Jones's guilt and the callous and heinous way in which Jones calculated and executed the murder" which argued against finding prejudice as there was "no reasonable probability the sentencer would have concluded the balance of aggravatingand mitigating circumstances did not warrant death" even in light of purported error). Lastly, it is inescapable to note that the jury found not just one aggravating circumstance for each murder, not just two aggravating circumstances, but three for the murder of Deputy Sapinoso's father, and four for the murder of Deputy Sapinoso. In light of this record, Applicant cannot show error and or prejudice, *Jones, supra*, and this issue should be summarily dismissed.

9(b)(11) Ineffective Assistance of Counsel: Failed to Investigate, Develop, and Present Available, Relevant, and Admissible Mitigating Evidence

This allegation is apparently a restatement of 9(a)(2); 9(b)(9); and 9(b)(11). The arguments in response to those cited grounds are incorporated as if repeated verbatim. Applicant has failed to show *Strickland* error and prejudice, and is not entitled to any relief.

Proposed Amended Claim

9(b)(12) Ineffective Assistance: Failure to Object to Charge Referencing Mercy

In South Carolina, "a capital defendant may present witnesses who know and care for him, and who are willing on that basis to plead with the jury for mercy on his behalf." *State v. Wise*, 359 S.C. 14, 27-28, 596 S.E.2d 475, 481 (2004). While not a constitutional right,[29] a plea for mercy is uniformly accepted in South Carolina under our evidence rules. *Id. See also State v. Johnson*, 338 S.C. 114, 126-127, 525 S.E.2d 519, 525 (2000)(finding error in a limitation on questioning but no prejudice where "Johnson's sister was able to make a general plea for mercy on her brother's behalf."); *State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 319 (1991)(finding error in limitation on questioning but no prejudice where defendant's mother was allowed to make "a general plea for mercy for the life of her son"). Without question, mercy was a "primary element" of the defense

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[29] The Supreme Court of the United States has reasoned that the suggestion of the necessity of a "sympathy"instruction would be contrary to precedent:

> It is no doubt constitutionally permissible, if not constitutionally required, for the State to insist that "the individualized assessment of the appropriateness of the death penalty [be] a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence." Whether a juror feels sympathy for a capital defendant is more likely to depend on that juror's own emotions than on the actual evidence regarding the crime and the defendant. It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities without our longstanding recognition, that, above all, capital sentencing must be reliable, accurate, and nonarbitrary."

Saffle v. Parks, 494 U.S. 484, 492-493, 110 S.Ct. 1257, 1262-1263 (1990)(internal citations omitted).

argument in closing. (October PCR Tr. pp. 344-345; R. pp. 1760-1772).[30] The question, should this amendment be accepted, is whether counsel should have objected to one phrase, in one line, in the jury charge that would have presumably contradicted his argument for mercy:

> Simply stated, you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy."

(R. p. 1785).

An amendment to add an issue that will simply be resolved by summary judgment should be rejected as futile. *Cf. Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct.App. 2010)(amendment properly rejected where amendment sought to add party who would be entitled to summary judgment). Here, to the add the issue would have the same result – Applicant cannot show ineffective assistance of counsel for failing to object to a charge that had been deemed proper at the time.

A. A Charge That the Jury May Return a Life Sentence "For Any Reason or No Reason at All" is Well Accepted as an Appropriate Charge. The Additional Phrase "Other Than As An Act of Mercy" Was Previously Authorized by the Supreme Court of

[30] Of course, it was not the only element. Defense counsel reminded the jury of the other significant punishment (life imprisonment without the possibility of parole); dramatized the reality of the death sentence is that the defendant will be killed; urging the jury not to "repay evil with evil"; emphasized the "mental or emotional defect" mitigator and reminding the jury of testimony from experts Dr. Evans and Dr. Berg; emphasized Applicant's adaptability to the structured environment of prison; downplayed gang membership (against his client's instruction), and reminded the jury of the testimony from prison officials that regardless of membership, Applicant would be kept under close watch thereby countering the suggestion of benefits from gang membership in prison; emphasized the emotion in Applicant's father's testimony to balance victim impact testimony with the crime's impact on the Applicant's family; and emphasized the redeemable qualities, good qualities, that existed in the Applicant who also committed two murders. (R. pp. 1760-1772). In addition to these arguments, counsel discussed mercy, and plainly asked for mercy: "I am going to ask for mercy for Kamell Evans." (R. p. 1770).

South Carolina and Only Recently Rejected. Moreover, the Phrase Was Rejected Only Partially, i.e. the Use of "Other Than."

It has long been accepted that the judge may charge a jury that it may return a life sentence "for any reason or no reason at all." *See, e.g., State v. Atkins*, 303 S.C. 214, 221, 399 S.E.2d 760, 764 (1990). In *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000), the Supreme Court of South Carolina, having reviewed this very phrasing of "any reason or for no reason at all other than as an act of mercy," found Hughey's argument that the charge was "confusing because it suggested that an act of mercy would have been an invalid reason for a life vote," was "without merit." 339 S.C. at 460, 529 S.E.2d at 732. The Court emphasized that the trial judge charged the jury to consider "mercy," resolved that the mercy charge was not incompatible with a charge "the jury should not be guided by sympathy, prejudice, passion, or public opinion," and resolved, when viewed as a whole, the charge was " not confusing because it advises the jurors to consider all mitigating circumstance in making their recommendation. The non-statutory circumstances are repeatedly emphasized by the trial judge and are adequately defined according to current South Carolina case law." 339 S.C. at 459-460, 529 S.E.2d at 732.

Hughey was decided on March 27, 2000. The jury was sworn and Applicant's trial began on September 17, 2004. (R. p. 1047). Consequently, *Hughey* was good law and controlling at the 2004 trial.

On June 29, 2009, the Supreme Court of South Carolina issued the decision in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). The Court reversed a lower court's denial of PCR relief, and granted a new sentencing proceeding, based on their finding of ineffective assistance of counsel (failure to present any evidence regarding mental health). 383 S.C. at 329, 680

S.E.2d at 10. In *obiter dicta*, the Court also elected to address Rosemond's challenge to the mercy instruction. The Court – notably writing that the instruction was found *proper* in *Hughey* – reversed itself. 383 S.C. at 330, 680 S.E.2d at 10. The change, however, appears to center on phrasing alone, as the Court advised: "It is proper to instruct a jury in a capital sentencing phase that it may recommend a life sentence for any reason or no reason at all, *including* as an act of mercy." *Id* (emphasis added). The *Rosemond* opinion resolves the issue. Applicant's reliance on *Rosemond* shows a failure to demonstrate ineffective assistance as the opinion supports *Hughey* was good law and controlling at the time of the 2004 trial at issue here.

B. *The Amendment Should Not Be Allowed as the Amendment Would Be Futile. Counsel Cannot be Ineffective for Failing to Object to the Mercy Charge Based Upon the Overruling of Precedent that Occurred Well Over Four Years After Trial. Alternatively, Applicant Fails to Demonstrate Ineffective Assistance of Counsel Where Precedent Supported the Charge and the Charge, When Read In Its Entirety, and In Consideration of the Individuals Who Heard the Charge, Does Not Preclude Consideration of Mercy.*

As a first matter, *Rosemond* cannot mandate post-conviction relief in this case as *Rosemond* clearly established a new rule of law. As a general rule, a new rule of law cannot be applied retroactively to cases on collateral review. *See State v. Jones*, 312 S.C. 100, 102, 439 S.E.2d 282, 282-283 (1994)("A new rule of criminal law which does not fall into one of those categories [lack or jurisdiction or conduct not subject to criminal sanction] should be applied retroactively, but only to those cases pending on direct review at the time the new decision is issued."). *See also Tally v. State*, 371 S.C. 535, 541, 640 S.E.2d 878, 881 (2007)("In determining whether Respondent was deprived of his federal constitutional right to counsel, we are required to follow the United States Supreme Court's decisions on retroactivity" i.e. with the rule is a new rule). *Cf. State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) (decision that jury charge on inference of malice from use of a

deadly weapon "represents a clear break from our modern precedent, today's ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved" and specifically providing "[o]ur ruling, however, will not apply to convictions challenged on post-conviction relief."). The application of retroactivity in this case would violate this principle. The retroactivity decisions in both *Talley* and *Belcher* were resolved by application of the definition of "new rule" in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989).

In *Teague*, the United State Supreme Court explained that old rules are those "dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301, 109 S.Ct. 1060. "[A] case announces a new rule when it breaks new ground or imposes new obligation on the States or the Federal Government. To put it different it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id* (internal citations omitted). As a general rule, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310, 109 S.Ct. 1060.

Without doubt, the Supreme Court of South Carolina had approved the use of the same phrasing in *Hughey*, and counsel did not err in relying on that approved charge. Moreover, the fact that the charge had been approved is a sound rebuttal to Applicant's allegation that there is "only one possible understanding" of the import of the charge. (Applicant's Post-Hearing Brief, p. 70). The Supreme Court of South Carolina had previously reviewed the charge and found that it did not preclude mercy, but simply precluded an arbitrary decision-making process.[31] Similarly, Applicant's

[31] There is tension in an act of mercy, and consideration of mitigation evidence offered to engender sympathy. The tension is not resolved by *Rosemond*; however, its presence is noted as

concession that defense counsel was focused on the charge for its benefit, (Applicant's Post-Hearing Brief, pp. 67-68), again undercuts a suggestion there is "only one possible understanding" of the import of the charge. It can hardly be logical to conclude that counsel would not have objected to a charge that undercut their theme of mercy and their request for mercy. Lastly, Applicant's suggestion to the Court that it "need not decide whether this error mandates reversal in every case;" (Applicant's Post-Hearing Brief, p. 71), is, at the least curious, where he contends that there is "only

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Rosemond ties the applicability of the charge to the evidence admitted in the penalty phase:

> A jury considerations of mercy, *if proper evidence of mercy is admitted,* is well recognized in the sentencing phase of a capital case. Because a capital jury may consider *proper admitted evidence of mercy* in the sentencing phase, consideration of mercy is not inconsistent with the instruction that "the jury should not be guided by sympathy, prejudice, passion, or public opinion...."

Rosemond, 383 S.C. at 330, 680 S.E.2d at 10 (emphasis added).

Mercy is defined as "compassionate treatment, esp. of those under one's power; clemency." *The American Heritage College Dictionary*, Third Edition 2000. In any sentencing phase, there could not be evidence of mercy as mercy had not yet been considered or dispensed by the jury. A plea for mercy is evidence to consider in dispensing mercy; however, in this case, there was no specific plea for mercy. Multiple witnesses testified for the defense concerning Applicant positive qualities, but there was no specific plea for mercy from the witnesses. Defense counsel in this case wisely concentrated on presenting evidence of a reason to exercise mercy, not just a plea, which fits more comfortably within the meaning of evidence of mitigation. A simple plea, though it may be effective by some measure, is not evidence of mercy. Thus, counsel in this case, while making the plea by argument, actually avoided an issue of whether there is "evidence of mercy." *See also California v. Brown*, 479 U.S. 538, 107 S.Ct. 837 (1987)(upholding charge that juror was "not to be swayed by 'mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling'" finding that "[a]n instruction prohibiting juries from basing their sentencing decisions on factors not presented at the trial, and irrelevant to the issues at trial, does not violate the United States Constitution. It serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors, which, we think, would be far more likely to turn the jury against a capital defendant than for him. And to the extent the instruction helps to limit the jury's consideration to matters introduced in evidence before it, it fosters the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.'").

one possible understanding" and the error is of constitutional proportion (a fact that cannot be reconciled with Supreme Court precedent, see n. 13, infra). In fact, to even make the argument that the sentence "precludes" the consideration of mercy, Applicant must depend upon a rather complex, multi-step process: isolate the sentence, isolate the last phrase, evaluating two subtle grammatical theories, reject standard rules of modifiers and assuming a misplaced modifier, evaluate two definitions based on adjective or adverb usage, and accept the least favorable interpretation. As an initial matter, to find a jury made such a strained analysis is questionable. *See California v. Brown*, 479 U.S. 538, 542, 107 S.Ct. 837 (1987)(eschewing a finding the jury interpreted the "sympathy" charge in a "hypertechnical manner" so as to preclude consideration of mitigation evidence). Respondent submits this process, and the resulting view the instruction precludes consideration of the "evidence of mercy," is untenable in light of our precedent, simple grammar, and the record as a whole.

It is well settled that the appropriate standard for reviewing any jury instruction is to consider the instructions as a whole. *See, e.g. State v. Mattison*, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010). When "[t]he charge, as a whole, is not misleading," an applicant's allegation of error challenging any one particular phrase must be rejected. *State v. Atkins*, 303 S.C. 214, 221, 399 S.E.2d 760, 764 (1990), *citing State v. Patterson,* 299 S.C. 280, 384 S.E.2d 699 (1989). *See also State v. Jackson*, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989)("Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error"). As an initial matter, Respondent notes we are totally without guidance as to whether the Supreme Court of South Carolina would find reversible error even in the *Rosemond* case had the charge been considered as a whole. The Court focused only

on the isolated phrase, not its relationship to the remaining charge, or the remaining charge itself absent the phrase.[32] In fact, it is not lost on Respondent that when the Supreme Court considered the charge as a whole in *Hughey*, the charge was found sufficient. Here, to determine prejudice, this Court would need to review the language as a whole (which allows the court to determine a reasonable juror would not have interpreted the isolated phrase as precluding mercy). *See Jackson*, 297 S.C. at 527, 377 S.E.2d at 572 ("the test is what a reasonable juror would have understood the charge as meaning" in light of the context in which it is given).

The instructions here show that, in addition to explaining statutory aggravating circumstances, the trial judge explained statutory mitigating circumstances, and non-statutory mitigating circumstances:

> Now, you should also consider any nonstatutory mitigating circumstances that have been shown to exist by the evidence in the case. A nonstatutory mitigating circumstance is one which may serve the same purpose, that is to lessen or to reduce the degree of the defendant's responsibility in the commission of the crime of murder.
>
> Now, while there must be some evidence which supports a finding by you of the existence of one or more statutory or nonstatutory mitigating circumstances, *it is not necessary that you find the existence of such mitigating circumstance or circumstances beyond a reasonable doubt. You may recommend a sentence of life imprisonment whether or not you find the existence of a statutory or a nonstatutory mitigating circumstance.*
>
> Now, in making your determination as to which sentence to recommend in this case you should consider the statutory mitigating circumstances, the statutory mitigating circumstances and any nonstatutory mitigating circumstances in arriving at your decision.

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[32] That is not to say the *dicta* reasoning is not helpful. In fact, it may well be argued that the reasoning allows the bench and bar to avoid the possibility of unfavorable hypertechnical interpretation, or simple misunderstanding, of the phrase, by substitution of "including" as opposed to the more controversial "other than."383 S.C. 330, 680 S.E.2d at 10.

> While you must find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt before you may consider recommending a sentence of death, once such a finding is made you are permitted to recommend a sentence of death even though you may also find the existence of one or more statutory or nonstatutory mitigating circumstance.
>
> The existence of any statutory or nonstatutory mitigating circumstance is not a bar to the recommendation of a death sentence so long as you have found the existence of at least one statutory aggravating circumstance beyond a reasonable doubt.
>
> *Conversely, you may also recommend a sentence of life imprisonment even though you find at least on of the statutory aggravating circumstances beyond a reasonable doubt and you find no mitigating circumstances to exist.*
>
> *Simply stated, you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy. ...*

(R. pp. 1784-1785).

Thus, the charge, in this instance, is undeniably tied to the prior sentence by the introductory phrase, "simply stated," and the prior sentence clearly instructs the jury they may recommend life even if they find no mitigating circumstance, i.e. as an act of mercy. Further, under normal grammar rules, the phrase "other than an act of mercy" modifies the phrase "for no reason at all," not the phrase "for any reason." See http://www.yourdictionary.com/grammar/grammar-rules-and-tips/misplaced-modifiers("According to grammar rules, modifiers should be placed as close as possible to the person or thing that they are modifying."). Consequently, the sentence is reasonably interpreted as the jury can return a recommendation of life 1) for any reason *or* 2) for no reason, just 3) as an act of mercy. As a matter of grammar, this would be a consistent application of "other than" as a preposition, which is its function, indicating "with the exception of, except for, besides," *Merriam-Webster Online Dictionary*, 2010, Merriam-Webster Online, 2 November 2010

(http://www.merriam-webster.com/dictionary/other than), differentiating "no reason" from "an act." While true that if one looks at the sentence as containing a misplaced modifier, one may read "for any reason" *except* mercy, that depends on *assuming* a grammatical error.

At any rate, the hoops Applicant must demonstrate the jurors went through to understand the instruction as precluding mercy are simply too numerous to accept his position – not just a grammatical error, but accepting that grammatical error as a reasonable interpretation in light of the fact that the remainder of the charge confirms that mercy was not precluded in any way, shape or form. Further, to establish counsel error, Applicant must show that counsel performed deficiently by not embracing the same grammatical error/hypertechnical evaluation, even though the judge's instruction was previously held proper as a mercy charge and, when read, to the jury, counsel heard the charge and found it favorable because it highlighted an act of mercy. *See California v. Brown*, 107 S.Ct. at 840, 107 S.Ct. 837 ("While strained in the abstract, respondent's interpretation is simply untenable when viewed in light of the surrounding circumstances," i.e. the jury had heard the mitigation evidence and would not reasonably have thought the evidence "a virtual charade," rather, more reasonably, when consider the admonition an instruction "to only ignore the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase."). A reasonable jury, under the circumstances cited herein, would not have interpreted the charge as precluding consideration of the mitigation evidence in deciding whether to exercise mercy. *Id. See also Jackson, supra; State v. Bookter*, 93 S.C. 97, 76 S.E. 110 (1912)("Considering the instruction in the immediate connection in which it was given, and in connection with the whole charge, we are satisfied it was not misleading"). Moreover, counsel would not be deficient assuming a deficiency. Consequently, there is no error in the instant charge, and certainly no deficient performance.

Even so, the allegation of ineffective assistance of counsel, under these circumstances, cannot be proven as it depends on a new rule established almost five years after trial. The amendment should be rejected. Alternatively, the issue must be denied.

9(c)(1) Ineffective Assistance of Appellate Counsel: Failed to Challenge the Trial Court's Denial of Trial Counsel's Request to Charge the Jury on Voluntary Manslaughter

"A defendant is constitutionally entitled to the effective assistance of appellate counsel." *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). The *Strickland* error and prejudice standard is applicable to claims involving ineffective assistance of appellate counsel. *Id.* To show prejudice to entitle him to relief, "the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal." *Id.*

Here, trial counsel requested a charge on voluntary manslaughter, based solely on his client's wishes, recognizing the lack of evidentiary support for finding sufficient legal provocation. (R. p. 1445, line 25 - p. 1447, line 2). Respondent had testified that, at one point during the hours he held his victims hostage and hostage negotiations with law enforcement, that he believed that one of his victims, Deputy Sapinoso, reached for a gun on a nearby coffee table and only then did he fire, first at Deputy Sapinoso (shooting him four times in the back of the head), then at the deputy's father (shooting him three times). (See R. p. 1443, line 13 - p. 1444, line 24). It is well settled that "[a] victim's attempts to resist or defend himself from a crime cannot satisfy the sufficient legal provocation element of voluntary manslaughter." *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001). Clearly, had appellate counsel raised the issue, it would not be meritorious. Therefore, on this record, Applicant cannot show error or prejudice, and this issue should be summarily dismissed.

9(c)(2) Ineffective Assistance of Appellate Counsel: Failed to Challenge the Trial Court's Denial of Applicant's Motion for A Change of Venue

Respondent noted that this allegation of counsel error is inconsistent with the allegation of 9(a)(3), alleging that trial counsel was ineffective in failing to "effectively move for a change of venue...." (Amended Application, p. 2). To the extent Applicant concedes the issue as presented in the record on appeal would have lacked merit, he concedes he may not prove error and prejudice in regard to this issue. The preserved issue would not afford relief on appeal even had the issue been raised. *Anderson, supra.* And, as demonstrated above in response to 9(a)(3), none of the seated jurors were exposed to such an extent that they formed opinions, and he has shown no relevant precedent or possibility of error in regard to the courthouse argument. At any rate, the record shows no bias from the necessary and proper *voir dire.* In fact, the three who recalled any media coverage at all did not recall any details. Again as noted above, while Dwayne Drake, Larry Coker and Mark Branyon all seemed to vaguely recall the fact of media coverage of the incident, each testified that they did not recall any specific details at all. (R. p. 230, line 15 - p. 231, line 3 (Drake); p. 289, lines 10-24 (Coker); p. 469, line 20 - p. 470, line 8 (Branyon)). There could be no meritorious issue in light of this record. *See State v. Evins*, 373 S.C. 404, 412, 645 S.E.2d 904, 908 (2007)("When a trial judge bases the denial of a motion for a change of venue because of pretrial publicity upon an adequate *voir dire* examination of the jurors, his decision will not be disturbed absent extraordinary circumstances"). Thus, as to an allegation of ineffective of appellate counsel for not raising the issue, Applicant cannot show error or prejudice.

The Constitution requires that a criminal defendant be afforded a trial by a "panel of impartial, indifferent jurors." *Irvin, supra.* "When a change of venue motion is predicated on pre-

trial publicity, the relevant inquiry is whether potential jurors have 'such fixed opinions that they could not judge impartially the guilt of the defendant.'" *State v. Gardner*, 332 S.C. 389, 392, 505 S.E.2d 338, 339 (1998).*quoting State v. Manning,* 329 S.C. 1, 495 S.E.2d 191 (1997). "The trial court's ruling on the venue motion will not be reversed on appeal absent an abuse of discretion." *Id.* Here, the denial of the motion was fully and fairly supported by the jurors responses, which the trial judge relied upon in denying the motion. (R. p. 1010, line 20 - p. 1012, line 1). Had counsel raised the issue, it could not have been meritorious. *Id. See also State v. Evins, supra.* In light of this record, Applicant cannot show error and prejudice, and this issue should be summarily dismissed.

9(d)(1) Trial Court Error: Instruction on Law Enforcement Statutory Aggravating Circumstance

Applicant presents a claim that is not cognizable. This Court's jurisdiction is statutorily limited by S.C. Code § 17-27-20(b)(1985), which provides: "This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." Because a PCR action is not a substitute for direct appeal, a PCR applicant cannot assert any issues in his PCR action that could have been raised at trial or on direct appeal. *Simmons, supra. See also Drayton v. Evatt*, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993)(same); *Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983)(same). The Simmons Doctrine bars this claim as it is a free-standing claim of error.

Moreover, Applicant admitted in the PCR hearing that these claims were simply claims "plead in the alternative," to the ineffective assistance of counsel claims above, and are "substantive bases for the ineffective assistance of counsel claims." (October PCR Tr. p. 260). This is a clear concession that the claim was improperly raised as free-standing claims of error, i.e. direct

appeal claims. Applicant is not allowed to present claims for "direct appeal" review and "collateral" review for a "double chance" of review. The time for presenting direct appeal claims has expired. Nothing in the statute allows Applicant to resurrect direct appeal claim.

At any rate, the claim is wholly without merit, for all the reasons presented in the ineffective assistance of counsel allegation above.

9(d)(2) Brady Claim

As noted above, this claim was withdrawn for lack of factual support.

9(d)(3) Evidentiary Error: State Presentation of "Testimony that it Knew or Should Have Reasonably Known Was False or Misleading" i.e. Evidence of Gang Membership and Evidence Regarding Whether Deputy Victim Was "in the Line of Official Duty as a Law Enforcement Officer At the Time of His Death"

Again, the issue is not cognizable as a free-standing claim of error as it is a contest to the evidence presented at trial. The contest to evidence could have been presented on direct appeal, and could have been heard on the merits had counsel lodged an objection to the evidence. The claim is not cognizable absent a claim of ineffective assistance of counsel. Curiously, at the PCR hearing, Applicant singled out this one free-stranding claim to argue that it was not a "record based," direct appeal issue; rather, one of what the State knew or should have known was false, based on evidence presented at the PCR hearing. (October PCR Tr. pp. 258-259). Then, in circular fashion, relies on evidence from defense counsel's file *admittedly received by defense counsel in discovery from the State*. (October PCR Tr. p. 259). (See also June Tr. p. 366). It would logically flow from Applicant's admission that the issue must be one of ineffective assistance of counsel, if any issue is available at all.

At any rate, the claim is wholly without merit. As discussed above, there is evidence of Applicant's gang membership, not the least of which is his own admission of gang membership, his permanent tattoos reflecting gang allegiance, his conviction of a drug offense coupled with his admission that he sold drugs in connection with his gang membership, and his known association with other admitted gang members (specifically Christina Rodriguez, a fact specifically supported by the very evidence Applicant's collateral counsel relies upon to argue the gang affiliation evidence was false – note Applicant has never personally denied gang membership in court or in SCDC).[33] As Applicant's own expert opined, his admitted involvement was "textbook." (June PCR Tr. p. 412). Applicant has utterly failed to make even the slightest credible argument as to admission of false testimony. And, as noted above, if called, it would likely open the door to testimony concerning Applicant's violence on and towards Christina, a risk defense counsel did not wish to take. (June PCR Tr. p. 484).

Further, as to the evidence establishing the deputy victim "was in the line of official duty as a law enforcement officer at the time of death," Applicant has failed to show what evidence he is referencing or what element of proof the evidence supports. This may, in part, be due to Applicant's misapprehension of the statutory aggravating circumstance. At any rate, the evidence presented at trial was sufficient to support the aggravating circumstance given, as more fully discussed in regard to the ineffective assistance allegation 9(b)(2) above, which Respondent incorporates by reference as if repeated verbatim.

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[33] Further, in this same statement, Christina Rodriguez admitted that Applicant "says he's a Crip from Cleveland." (June PCR Tr. p. 362). And further, Ms. Rodriguez confirmed he admitted selling drugs, and was "representing" as a Crip. (June PCR Tr. pp. 364-365).

In sum, should the allegation survive for consideration on the merits, Applicant has failed to carry his burden of demonstrating error. See generally Rule 71(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.").

9(d)(4) Closing Argument Error: State's Argument Improper

Again, error that could have been presented in the direct appeal and is barred pursuant to S.C. Code § 17-27-20(b)(1985) and the Simmons Doctrine. At any rate, Applicant cannot prove error for all the reasons argued in Ground 9 (b)(7) above, which is incorporated by reference as if repeated verbatim.

9(d)(5) Improper Evidence: Victim Impact Evidence Exceeding That Allowed Under Payne v. Tennessee

Again, error that could have been presented in the direct appeal and is barred pursuant to S.C. Code § 17-27-20(b)(1985) and the Simmons Doctrine. At any rate, Applicant cannot prove error for all the reasons argued in Ground 9 (b)(5 and 9(b)(6) above, which is incorporated by reference as if repeated verbatim.

9(d)(6) Attorney Error: Cumulative Impact

Again, error that could have been presented in the direct appeal and is barred pursuant to S.C. Code § 17-27-20(b)(1985) and the Simmons Doctrine. At any rate, Applicant cannot prove deficient performance, (or, if deficient performance, not error), for all the reasons argued above in regard to his ineffective assistance of counsel claims.

9(e)Trial Court Error: Trial Court Erred in Qualification of Jurors

Again, error that could have been presented in the direct appeal and is barred pursuant to S.C. Code § 17-27-20(b)(1985) and the Simmons Doctrine. At any rate, Applicant cannot prove error for all the reasons argued in Ground 9 (b)(1) above, which is incorporated by reference as if repeated verbatim. In sum, the record reflects a sufficient *voir dire,* and no error in qualification of any seated juror.

9(f)Evidence Error, Violation of Constitutional Rights: Gang Affiliation Linked to Future Dangerousness in Prison

Again, error that could have been presented in the direct appeal and is barred pursuant to S.C. Code § 17-27-20(b)(1985) and the Simmons Doctrine. At any rate, Applicant cannot prove error for all the reasons argued in Ground 9 (b)(3) and 9(b)(4) above, which is incorporated by reference as if repeated verbatim.

9(g)Trial Court Error: Admitted Testimony of Lewis Edward O'Cain

Applicant apparently argues the trial court erred in qualifying Mr. O'Caine as an expert. Again, error that could have been presented in the direct appeal and is barred pursuant to S.C. Code § 17-27-20(b)(1985) and the Simmons Doctrine. At any rate, Applicant cannot prove error for all the reasons argued in Ground 9 (b)(3) and 9(b)(4) above, which is incorporated by reference as if repeated verbatim.

VI.

ARGUMENT PRESENTED IN APPLICANT'S POST-TRIAL BRIEF ON ISSUE NOT RAISED IN THE APPLICATION OR PROPOSED AMENDMENT

Applicant's post-hearing brief presents an issue not raised in the application or the pending proposed amendment regarding prison conditions testimony. Applicant presents as "Issue VIII," that defense counsel was ineffective in not objecting to "general prison condition evidence" and in "inviting their own witness to testify on the issue." (Applicant's Post-Hearing Brief, p. 145). Respondent had no notice whatsoever that Applicant intended to pursue this issue, and both parts of the evidentiary hearing were conducted without any notification Applicant would be pursuing the issue. Should Applicant move to amend, Respondent objects as the issue has not been fairly anticipated, and, as such cannot be said to have been tried by mutual agreement, and stands in stark contrast to the proffered amendment on the mercy charge issue. That proposed amendment was at least provided before completion of the evidentiary hearing, and Respondent was able to recall counsel and elicit specific relevant testimony. At this point, to accept the amendment (if so offered) would work an injustice as unfair surprise to Respondent. Rule 15, SCRCP. *See also Simpson, supra.*

Alternatively, Respondent submits the argument is not cognizable as it presents an issue for direct appeal. *Simmons, supra.* Applicant seeks review under S.C. Code § 16-3-20, which is the statute for direct appeal review of the imposition of the death sentence. This would direct appeal review would not be appropriate in this forum. Moreover, the South Carolina Supreme Court has already reviewed the case, on direct appeal, under that provision and found the absence of an arbitrary factor. *State v. Evans*, 371 S.C. 27, 32, 637 S.E.2d 313, 316 (2006)("Appellant's death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the evidence supports the jury's findings of aggravation. *See* S.C.Code Ann. § 16-3-25(C)."). To the extent he seeks review of an ineffective assistance of counsel claim, he still must show *Strickland* error and

prejudice. *See generally Franklin v. Catoe,* 346 S.C. 563, 571, 552 S.E.2d 718, 722 - 723 (2001)(acknowledging violation of statutory right to address jury in guilty phase would be reversible error if properly preserved and presented on direct appeal, but convicted defendant required to show *Strickland* prejudice in order to obtain relief on an ineffective assistance of counsel claim).

As to the argument counsel was ineffective in presenting improper evidence, and not objecting to the State's witness's presentation of purported improper evidence of "general prison condition," (Applicant's Post-Hearing Brief, pp. 145-154), his argument is without merit for two distinct reasons. The major fault with his argument is the testimony at issue was presented to counter the concept that Applicant would benefit from his purported gang affiliation in prison. (See, for example, June PCR Tr. p. 301; pp. 377-378; pp. 412; pp. 429-433; pp. 507-508). As part of that explanation, Applicant was also allowed to present evidence the conditions would be harsh – the difference here being the evidence was tied specifically to benefits in and dangers in SCDC directly tied to his purported (and, indeed admitted) gang affiliation. *Burkhart* that some conditions evidence where necessary to show "personal behavior" and it is not clear that the evidence would not be admissible for this stated reason: "We are aware of the tension between evidence regarding the defendant's adaptability to prison life, which is clearly admissible, and this restriction on the admission of evidence regarding prison life *in general.* ... evidence of the defendant's characteristics may include prison conditions if narrowly tailored to demonstrate the defendant's personal behavior in those conditions." *State v. Burkhart*, 371 S.C. 482, 488, 640 S.E.2d 450, 453 (2007).

The second reason that counsel should be ineffective is that, at the time of the trial, in 2004, general prison conditions evidence was being offered and admitted in capital trial penalty phases. *See Burkhart*, 371 S.C. at 488, 640 S.E.2d at 453 (2007)(noting that case was tried before

Bowman's specific prohibition); *State v. Bowman,* 366 S.C. 485, 498, 623 S.E.2d 378, 385 (2005)("We take this opportunity, however, to caution the State and the defense that the evidence presented in a penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character."). *See also State v. Bryant,* 372 S.C. 305, 317, 642 S.E.2d 582, 589 (2007)(defense counsel presented social worker who testified "on the dismal conditions of prison life in general" and complained on appeal that witness should have been allowed to opine that a death sentence was more merciful than a life sentence); *State v. Hill,* 361 S.C. 297, 307, 604 S.E.2d 696, 701 (2004)("Pinkney, a shift supervisor at Lee Correctional Institute, described prison conditions for inmates according to their classification"). Prior to this line of cases, the guidance from the Court was that "general conditions" were not relevant. However, if a defendant did admit such evidence, the State was entitled to respond. *State v. Plath,* 281 S.C. 1, 15-16, 313 S.E.2d 619, 627-628 (1984)(emphasis added). Again, Plath speaks in terms of "general conditions," offered simply to show the horrors of prison life. Here, the evidence was to combat treatment of Applicant's admitted gang membership. Moreover, when appropriately admitted to address this specific circumstance, nothing prevents counsel for noting the harshness of same. (see R. p. 1637). Even on cross-examination, Mr. Martin, the corrections expert, tied the conditions directly back to gang membership:

> ... once he completed the initial reception process, if he's not determined to be a real bona fide, talk-the-talk and walk-the-walk gang member, and I am not sure at all that he would be, but if that were not, and if that were not the case, there's a great likelihood that he would require protection for those who are.
>
> And my best guess would be that there would be serious consideration given to keeping him separated from that general population because of his own needs for protection.

(R. pp. 1639-1640).

At any rate, the amendment should be accepted. If accepted, the record, as it stands, shows no ineffective assistance and no arbitrary factor was introduced. Applicant is not entitled to relief.

*****

Respectfully submitted,

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November 10, 2010.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

Kamell Delshawn Evans,

Applicant,

-vs-

CA No. 06-CP-23-7719

State of South Carolina,

Respondent.

APPLICANT'S REPLY TO
RESPONDENT'S POST-HEARING BRIEF

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ARGUMENT IN REPLY

Applicant, Kamell Evans, by and through counsel, submitted his post hearing brief on October 4, 2010. Applicant relies on the Points raised in the post-hearing brief, and offers the following argument in reply to the post hearing brief filed by the State of South Carolina, Respondent, on November 10, 2010. For the reasons set forth in Mr. Evans's post-hearing brief and in the argument that follows, Mr. Evans is entitled to a new sentencing trial.

A. Respondent's Attempt to Marginalize the South Carolina Supreme Court's Decision in *Rosemond* is Unavailing.

In *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009), the South Carolina Supreme Court overruled *State v. Hughey*, 339 S.C. 439, 459, 529 S.E.2d 721, 731 (2000), finding the trial court's instruction that "you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act or mercy" prevented jurors from considering the defendant's evidence and argument for mercy. The *Rosemond* Court found the *Hughey* error so compelling that it reversed the decision even though the Court granted relief to *Rosemond* on an independent ground.

The South Carolina Supreme Court issued its decision in *Rosemond* on June 29, 2009. This was twenty-four days after the first portion of the PCR hearing in Mr. Evans's case, which ended on June 5, 2009. Respondent argues that because the charge at issue "had been upheld in 2000 in *State v. Hughey* . . . and was good law at the time of [Mr. Evans's] 2004 trial" that Mr. Evans's ineffective assistance of counsel claim based on *Rosemond* is "futile." Resp. 9.[1] Respondent overlooks, however, that in South Carolina in the year 2000, as in 2004

[1] Applicant cites the Record on Appeal ("R."), and the transcript of the postconviction hearing, which took place before this Court on June 1 to 5, 2009 ("PCR") and October 12 to 14, 2009 ("PCR II"). Applicant also cites Applicant's Post Hearing Brief ("App.") and Respondent's Post Hearing Brief ("Resp.").

at the time of Evans's trial, a defendant was entitled to offer at sentencing evidence asking "for mercy on his behalf," *State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 318 (1991); see *State v. Johnson*, 338 S.C. 114, 126, 525 S.E.2d 519, 525 (2000); *State v. Sapp*, 366 S.C. 283, 292-94, 621 S.E.2d 883, 887-88 (2005). It was proper for defense counsel to try to "appeal to the jury's sense of mercy." *Drayton v. Evatt*, 312 S.C. 4, 12, 430 S.E.2d 517, 522 (1993). It was proper for a defendant to address the jury and ask for mercy. See *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004). Further, it was well established that the Eighth Amendment, under the *Lockett v. Ohio*, 438 U.S. 586 (1978), line of cases, permits no restriction on a capital defendant's ability to present any relevant mitigating evidence, which in South Carolina has long included (as at the time of Evans's trial) mercy.[2] Given this precedent, of which trial counsel should have been aware, it was not proper for the trial court in Mr. Evans's case to instruct the jury that it could not return a life sentence "as an act of mercy," and trial counsel's failure to object to the charge was deficient and prejudicial.[3]

This is evidenced further by the fact that the defendant in *Hughey* was recently granted a new sentencing trial in a postconviction relief action as a consequence of the South Carolina Supreme Court's ruling in *Rosemond*. The Honorable Alexander S. Macauley, applying the *Rosemond* holding, ruled that the "no mercy" charge given in *Rosemond* and *Hughey*—the same that was given at Mr. Evans's sentencing phase proceeding—was "so inimical to the laws of the State and the United States in capital cases as to entitle the applicant to a new

[2] Long-standing South Carolina law also holds that a trial court's instructions to the jury cannot impede "the right and duty of the jury to recommend the appellant to the mercy of the court, in the event the jury reach the conclusion that appellant was guilty of murder." *State v. Blakely*, 158 S.C. 304, 155 S.E. 408, 409 (1930).

[3] Indeed, in overruling *Hughey*, the *Rosemond* Court relied on *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315, a case from 1991.

trial." *Hughey v. State*, 2000-CP-01-0212, Abbeville County (Order Granting PCR Relief, May 14, 2010) (Macaulay, J.). Like *Rosemond* and *Hughey*, Mr. Evans's case is a member of a closed universe of cases, a limited set, in which one judge issued an idiosyncratic charge on a critical issue: it would be fundamentally unfair to allow one defendant to live and a handful of others to die based only on the timing of their trial.

Respondent also argues that Mr. Evans cannot demonstrate ineffective assistance because "the charge, read in its entirety, and in consideration of the individuals who heard the charge, does not preclude consideration of mercy." Resp. 96. The *Rosemond* Court, reversing on other grounds, did not consider whether the erroneous charge was *per se* reversible, but the Court's answer to the question of whether the prejudice from the charge could have been ameliorated by the instruction read as a whole is implicit in its ruling: the *Rosemond* Court evidently believed the charge in *Hughey* as a whole was grossly misleading—or it would not have overruled the decision on that ground. The jury instruction as a whole given in Mr. Evans's case is a near mirror image of the full charge delivered to the jury in *Hughey*. Compare R. 1784-85 with *Hughey*, 339 S.C. at 458-59, 529 S.E.2d at 731.

Respondent appears to brashly reject the *Rosemond* Court's interpretation of the language of the "no mercy" charge. "[T]o even make the argument that the sentence [the charge] 'precludes' the consideration of mercy," Respondent asserts, one must rely on a "rather complex, multi-step process," (Resp. 99), jump through "hoops" (Resp. 102), engage in "strained analysis" (Resp. 99) and apply a "hypertechnical evaluation" (Resp. 102). Apparently, in Respondent's view, this is what the South Carolina Supreme Court did in *Rosemond*. A "reasonable jury" on the other hand, Respondent argues, would not so interpret the charge. Quoting a broader swath of the charge given by Judge Cole in this case,

Respondent attempts to explain that the portion rejected in *Rosemond* "is undeniably tied to the prior sentence [in the charge] . . . and the prior sentence clearly instructs the jury they may recommend life even if they find no mitigating circumstances . . . ." Resp. 101. But that is only so if one interprets the unconstitutional charge as Respondent does and not as the South Carolina Supreme Court does. Interpreting the charge as the South Carolina Supreme Court did in *Rosemond*, the last sentence reads as a *limitation on and qualification of* the previous sentence, not (as Respondent would have it) a reiteration.

The erroneous charge removed from the jury a reason to sentence Mr. Evans to life imprisonment, in violation of South Carolina law and the Eighth Amendment to the United States Constitution under the line of cases stemming from *Lockett*. The impact of the error in this case was enormous, given that mercy was the "crux" of the defense. See App. 67-71. But for counsel's failure to object to the improper mercy instruction, there is a reasonable probability that the outcome of the sentencing proceedings would have been different.

B. Respondent Offers Misleading Representations of Mr. Evans's Arguments.

Respondent's brief asserts "Applicant concedes defense counsel investigated and presented a focused case in mitigation." Resp. 46. Yet nothing could be farther from the truth. Mr. Evans's claim in Point I of his post-hearing brief is precisely the contrary: trial counsel failed to adequately investigate Mr. Evans's background and character; counsel failed to adequately pursue red flags directing attention to areas that called for investigation (including abuse and lead poisoning); and counsel presented an incomplete and incoherent mitigation case—not a "focused" one—which included conflicting testimony by two of the defense's own experts on whether Evans had brain dysfunction.

A fundamental principle of *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny through *Sears v. Upton*, 130 S.Ct. 3259 (2010), is that strategic or tactical decisions by counsel are only reasonable and valid to the extent that they are supported by reasonable investigation. *Strickland*, 466 U.S. at 690-91; *Sears*, 130 S.Ct. at 3295; see App. 46-48. Trial counsel's decisions about the content of the mitigation presentation in this case were not based on complete or adequate investigation, see App. 9-25, 48-57, and counsel's "strategic" decisions therefore are suspect, not reasonable, and not entitled to deference under *Strickland*. Respondent, however, would dismiss the impact of evidence presented in the PCR hearing (for example, the evidence that Kamell witnessed and experienced physical and verbal abuse[4]) on the ground that it "would be at odds with counsel's focus on the good qualities, good character, loving family." Resp. 48. Respondent would dismiss evidence presented at the PCR hearing "for the simple fact that [if presented at trial] the evidence would [have] confuse[d] and dilute[d]" Respondent's "clear theory that this event was a critical break from the norm." Resp. 54; see Resp. 51. "As to lead poisoning and leaning disability," Respondent suggests, "Applicant could have offered this testimony, but the defense team was focused on the results and his life in South Carolina." Resp. 53. These assertions overlook the fundamental principle of *Strickland* that reasonable trial theories must be founded on reasonable investigation. Counsel could not have presented the evidence of lead poisoning or learning disability, for example, because they did not adequately investigate the evidence

[4] Respondent asserts that during the PCR hearing Barry Evans "denied any abuse toward Applicant." Resp. 44. Barry Evans, however, did not deny abusing Kamell, he testified that he did not recall: "I may have spanked Kamell. I don't remember abusing Kamell." PCR 639. Kamell's sister Shatima witnessed the abuse by Barry upon Kamell, and testified on the subject at the PCR hearing. PCR II 25-27; see App. 25-30.

(they received the evidence of lead poisoning two weeks *after* the trial).[5] Counsel's inadequate investigation provided no foundation for a reasonable theory.[6]

Respondent also mischaracterizes Mr. Evans's claim that trial counsel were ineffective for failing to challenge application of S.C. Code Ann. § 16-3-20(C)(a)(7), an aggravating factor that applies to an officer killed "during or because of the performance of his official duties." According to Respondent, Evans's claim "rests on two different arguments[:] The first is that because the Deputy was not actively involved in arrest or investigation, then the evidence he was on-duty is not sufficient to support the aggravator. The second is that because the Deputy was murdered hours after he was first abducted, he was no longer on-duty at the time of the murder." Resp. 59. Both characterizations are distortions. The latter, regarding a time lapse between the beginning and end of the incident, is not in Evans's brief.

Respondent seems to draw the former mischaracterization from the list of the South Carolina cases in which Section (C)(a)(7) has been applied, which is presented in Applicant's post hearing brief at page 73 n.35. These cases, without exception, involve factual

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[5] Respondent states that counsel's "strategy" "was made with the investigation and advice of a team of experts," including Lenora Topp. Resp. 47. In fact, trial counsel *ignored* Ms. Topp's recommendations for investigation in Cleveland and the presentation of evidence with respect to abuse. See App. 17-25.

[6] Respondent overreads *People v. Peeples*, 793 N.E.2d 641 (Ill. 2002). Respondent says the Illinois court found a mitigation argument, similar to that presented here, that there were "two" versions of the defendant ("two William Peeples"), was reasonable. Resp. 46. The Illinois court's decision, however, simply mentioned trial counsel's "two versions" argument in passing, and did not directly address it; rather, the court found no ineffectiveness because counsel's tactical choices were *preceded by and based upon reasonable investigation*. *Peeples*'s attorney did not ignore the defendant's childhood and upbringing, he went to defendant's home and investigated; rather than dismiss the defendant's mother, *Peeples*'s counsel called her to testify about the abuse she experienced at the hands of the defendant's father. See 793 N.E.2d at 652. The Illinois case offers no support for Respondent. As set forth in Point I of Applicant's post hearing brief, trial counsel's failures to investigate and present mitigation deprived Mr. Evans of a fair and reliable sentencing proceeding. See App. 7-66.

circumstances in which an officer was engaged in making an arrest or traffic stop or questioning or confronting a suspect. See *id.* 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*: Joseph Sapinoso was not killed "during or because of the performance of his official duties." The prior cases are very instructive, however, because they do show the factual circumstances in which South Carolina prosecutors have found it appropriate to charge the Section (C)(a)(7) factor, and in which South Carolina courts have upheld its use. Significantly, none of the circumstances remotely resemble those in Mr. Evans's case. The South Carolina precedent, evincing the State's interpretations to date of Section (C)(a)(7), highlight that this case is an outlier.[7]

At root, Respondent's interpretation of the statute errs by relying on a broadly applied sheriff's policy meaning of "on-duty" (see Resp. 66-67), rather than legislative intent. Respondent says that "[i]t is just incredible to argue that the deputy was not on duty and in his home . . . when Applicant had ambushed the deputy, taken him from his duty car, and held hostage." Resp. 66. But the "during or because of" clause in the statute does not support an interpretation by which the statute applies anytime a person employed as an officer encounters

[7] Out-of-state cases that Respondent describes—*State v. Gaines*, 421 S.E.2d 569 (N.C. 1992), and *White v. Commonwealth*, 178 S.W.3d 470 (Ky. 2006)—are distinguishable. In *Gaines*, an officer, who was working as a security guard on a second job and being paid for his work, was fatally shot after he confronted several men. The North Carolina Supreme Court found the officer was engaged in law enforcement-type activity and upheld the use of an aggravating factor similar to Section (C)(a)(7). 421 S.E.2d at 576-77; see App. 82. In *White*, a sheriff was shot attending an outdoor event—the type of event at which he had frequently acted in a law enforcement capacity. The Kentucky Supreme Court found that the sheriff, if not "actively engaged" in law enforcement duties, was "imminently available to carry out those tasks" and upheld use of a similar aggravating factor. 178 S.W.3d at 479-81; see App. 83 n.44. Joseph Sapinoso, by contrast, was at home, he was not working security for pay or attending a public event.

trouble or even mortal risk. That would reduce the aggravator to a general status measure based on employment, which it is not, and would render the "during or because of" clause meaningless. Further, aggravating factors are constitutionally required to narrow the circumstances in which death sentences are allowed (a point that Respondent never even mentions); the Constitution requires, therefore, that a court read the "during or because of" clause narrowly. See App. 79-86. South Carolina courts and most South Carolina prosecutors have done so, but not in Mr. Evans's case.

C. Respondent Misconstrues the Scientific Evidence.

At the PCR hearing, Dr. Ruben Gur testified to the results of a quantitative volume analysis, using a peer-reviewed and accepted method, of an MRI of Kamell Evans's brain. Dr. Gur's results showed diffuse brain atrophy, including atrophy more than two standard deviations from the mean in seven regions linked by previous studies to lead exposure, and "significant reduction" in the volume of the frontal lobe bilaterally and in the occipital lobe. PCR 702-03; see App. 35-40. Respondent argues that "normal" MRI readings by radiologists at the Medical University of South Carolina trump Dr. Gur's quantitative analysis. See Resp. 53. However, Respondent has it backward. In contrast to "blind" readings of the MRI, such as those by the radiologists at MUSC, which radiologist Dr. Spicer and neurologist Dr. Bachman testified involve a significant amount of subjectivity (see PCR II 234), quantitative analysis, Drs. Gur, Bachman and Spicer agreed, is a much more sensitive approach and a valid "tie breaker" between differing subjective accounts—it can definitively identify brain volume loss. PCR II 312-13; PCR II 217. Dr. Gur's findings resolve the different interpretations (gleaned from less sensitive readings of the MRI) by Dr. Bachman, Dr. Spicer,

and the MUSC radiologists, see App. 40 n.17, and unequivocally "rule in" brain damage, see App. 35-40, 54-55, 62-64.[8]

Respondent seems to argue that Dr. Gur's testimony would have been of little value at trial (see Resp. 53) because it would have been cumulative to the testimony of Dr. James Evans. The "new" evidence, however, is not the "old" evidence (cf. *Jones v. State*, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998)), for the reasons discussed and set forth in Applicant's post hearing brief. App. 57-66. Further, Respondent's failure to acknowledge the errors with respect to the expert testimony that trial counsel did present—which are discussed in Applicant's post hearing brief at pages 23-25 and 54-56—renders Respondent's discussion of deficient performance and of prejudice—whether there is a reasonable probability that but for trial counsel's failures "at least *one juror*" would have struck "a different balance" significantly incomplete. *Wiggins v. Smith*, 539 U.S. 510, 537 (2003) (emphasis added); see *Gray v. Branker*, 529 F.3d 220, 238 (4th Cir. 2008).

Respondent also misconstrues the testimony of Dr. Richard Canfield, whose testimony on lead poisoning concurred that the results of Dr. Gur's quantitative analysis showed volume loss in areas that correlated with toxic lead exposure. Respondent says Dr. Canfield's testimony would carry little weight before a jury because he "based his study on small children, and admitted some 'counter-intuitive' showings in the findings." Resp. 54. These

[8] Respondent mischaracterizes parts of Dr. Gur's testimony. Respondent says that Dr. Gur "conceded the rule [of standard deviations] was 'a little arbitrary' when assessing less than 2 standard deviations." Resp. 37 (citing PCR 716). The cited portion of Gur's testimony says, however, that while statistical rules about what constitutes a standard deviation may be "a little arbitrary," a volume loss of more than two standard deviations from the mean is "beyond an indicator" of brain damage, the "damage is there." PCR 716. Respondent also asserts that Dr. Gur "repudiated his report conclusion to the extent it reflects 'diminished capacity.'" Resp. 38 (citing PCR 723). That is not so. Dr. Gur did not repudiate any of his findings; rather, he merely clarified that he was not testifying to "diminished capacity" in the legal sense. PCR 723.

are severe misreadings of the testimony. Canfield relied on a body of peer reviewed research by multiple scientists "that has been replicated," not just a single study. PCR 845. Further, he used the term "counter-intuitive" to refer to the scientific finding that it takes "very little lead to cause initial significant damage." PCR 812. It is surprising (counter-intuitive) that a blood level of ten micrograms per deciliter causes so much initial damage. This does not lessen the validity of Dr. Canfield's findings. On the contrary, it shows that a significant amount of brain damage can result from levels of lead lower than those to which Mr. Evans was exposed.

D. Respondent Fails to Address the Cumulative Impact of Trial Counsel's Errors under *Strickland.*

Strickland prejudice is a cumulative measure of the impact of counsel's errors. *Strickland*, 466 U.S. at 694-96; *Porter v. McCollum*, 130 S.Ct. 447, 452 (2010); *Wiggins*, 539 U.S. at 534-38; *Williams v. Taylor*, 529 U.S. 362, 395-97 (2000). This is significant in Mr. Evans's case. While some of counsel's failures are grounds for a new sentencing proceeding independent of any other error, the interwoven prejudice of counsel's errors exponentially sabotaged the reliability of the sentencing trial. Counsel's acquiescence to a trial date two months ahead before having conducted any mitigation investigation, for example, set in motion a string of inadequate investigation and unreasonable tactical decisions that ultimately resulted in a sentencing presentation that was little more than plea for mercy. Yet, counsel's failure to object to Judge Cole's sentencing instruction, which told the jurors they "may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy" (R. 1785), *removed mercy* as a basis for a life sentence. Together, these

failures were devastating. Nowhere does Respondent address the composite effect of these errors.

Applicant's case also posed a combination of unique challenges with respect to the setting and staging of the trial because one of the victims had worked as a sheriff's deputy in the same courthouse and courtroom in which the jurors determined Mr. Evans's sentence. Trial counsel could have taken ameliorative steps by challenging venue on that ground, conducting careful *voir dire*, monitoring victim impact evidence, and seeking to eliminate the Section (C)(a)(7) aggravating factor which did not correspond to the facts of the crime. Yet counsel did none of this.

Respondent's brief does not address the composite effect of these unique challenges on the jury either. Rather, Respondent suggests that the prejudice is diluted because, although Deputy Sapinoso had worked in the courthouse and courtroom in which the trial was held, he "had moved on to be an investigator." Resp. 57 (citing R. 1531). That misses the point, which is that two uniformed coworkers of Joseph Sapinoso testified before the jurors that this was the courthouse and courtroom where Joseph Sapinoso had worked. R. 1525-35, R. 1571-76; see App. 88-95. Respondent's suggestion that Deputy Tripp's testimony that Mr. Sapinoso worked in that courtroom "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" (Resp. 79)—also misses the point. Regardless of whether that would be a true characterization of Ms. Tripp's testimony in another courthouse, in the courtroom where Joseph Sapinoso worked the unchallenged testimony of Deputy Sheriff Tripp and Sheriff Loftis was highly emotional, inflammatory and prejudicial. Adding to this devastatingly emotional environment was the victim-impact testimony of Marcia Sapinoso.

U.S. v. Johnson, 713 F.Supp.2d 595, 623-24, 2010 WL 2010476, *20 (E.D. La. 2010); see App. 96.[9] In these circumstances, to conclude that but for trial counsel's failures to respond to these circumstances one juror would have struck a different balance is not a "stretch" (Resp. 68).

Finally, on the subject of trial counsel's failure to challenge the state's case in aggravation at sentencing, Respondent addresses prejudice barely, if at all, and never cumulatively. Respondent makes no argument as to why, if counsel was deficient in failing to challenge Mr. O'Cain's testimony, see App. 117-54, counsel's failure was not prejudicial under *Strickland*. See Resp. 74, 77. Similarly, Respondent addresses counsel's failure to object to some of the errors in Solicitor Ariail's summation, Resp. 81-83, but fails to address the prejudice arising from counsel's failure to object to the prosecutor's damaging and skewed portrayal of the shootings as a gang-motivated and execution-style[10], and fails to address how

[9] Respondent says that "[Marcia Sapinoso's testimony] is not victim-impact evidence, but evidence of the circumstances of the crime." Resp. 80. The argument is specious. Ms. Sapinoso's testimony was not presented to establish guilt and it was not pertinent to the charged statutory aggravating factors. Its only relevant was to support the nonstatutory aggravating factor of victim impact. Further, Respondent mistakenly characterizes Evans's challenge to counsel's failure to object to Marcia Sapinoso's testimony as based only on hearsay. Resp. 80. Applicant's brief argues, to the contrary, that "counsel was deficient in failing to seek a proffer and court ruling regarding the testimony of Marcia Sapinoso and keep it within the bounds of *Payne* [*v. Tennessee*, 501 U.S. 808 (1991)]." App. 94.

[10] Respondent misstates Applicant's argument here as well. Respondent asserts "[i]t is undisputed that three of the four bullets to Officer Sapinoso's head were delivered execution style to the back of his head while he was on the floor." Resp. 74; see Resp. 85. On the contrary, Applicant has argued that trial counsel ineffectively failed to challenge such characterizations of the evidence. See App. 155-66. Respondent also mistakenly includes in "evidence admitted in the penalty phase" a "professed intent to work his way up in the Crips organization" and to "sell drugs." Resp. 74. Respondent cites to trial counsel's handwritten notes, which were not before the jury. Respondent also asserts "[i]t is undisputed" that Evans carried "140 rounds of ammunition" (Resp. 73) "in boxes" (Resp. 34) in a bag to the Sapinoso home. No direct evidence was presented at trial, however, that the bag or contents were carried to the house by Mr. Evans. See PCR 706-07; R. 1364-65.

the combination of the Solicitor's errors violated due process. See App. 141-44, 164-66. And, Respondent only considers the prejudice from trial counsel's failure to challenge the pathologist's testimony in the context of the guilt-or-innocence trial, Resp. 86, while the error was far more prejudicial to the sentencing proceedings. See App. 164-66.

Respondent's heated footnote, Resp. 32 n.8, faulting Applicant for calling the shootings a domestic tragedy that stemmed from a dissolved and troubled relationship between Mr. Evans and Christina Rodriguez—is completely off the mark. The argument presented by Mr. Evans is not that domestic murder situations are any less grave. The point of error is that the State's skewed presentation of this case as a gang-motivated exercise in killing a police officer was highly inflammatory and prejudicial—and something that reasonably performing defense counsel could have prevented. As the PCR evidence shows, there is a reasonable probability that the trial court would have limited or excluded Mr. O'Cain's testimony on gangs and the general conditions of imprisonment in general population and on death row, had defense counsel objected. App. 117-54. Had trial counsel investigated and challenged the state's evidence in aggravation, there is a reasonable probability that at least a single juror would have voted to sentence Mr. Evans to life imprisonment, not death. App. 117-73.

There is a reasonable probability that but for trial counsel's unprofessional errors—set forth in Points I through X of Applicant's post hearing brief—the result of Mr. Evans's sentencing proceeding would have been different.

E. The Claim that Trial Counsel Was Ineffective in Failing to Object to General Prison Conditions Evidence and Argument Is Fairly Stated, Briefed and Tried.

Respondent argues that the Court should not consider Applicant's ineffective assistance of counsel claims based on trial counsel's failure to object to the general prison conditions testimony elicited from Mr. O'Cain and the solicitor's argument based upon that testimony. Respondent argues that it "had no notice whatsoever that Applicant would be pursuing the issue." Resp. 110. There simply is no merit to Respondent's argument. South Carolina Rule of Civil Procedure Rule 8(a)(2) provides that the initial pleading in a civil case shall include "a short and plain statement of the facts showing that the pleader is entitled to relief." Further, Rule 8(f) states that all pleadings shall be so construed as to do substantial justice to all parties. The two general prison conditions issues are fairly stated, briefed, and tried.

In Mr. Evans's Amended Application for Postconviction Relief, the paragraphs 9(b) and 10(b)(4)(d), 10(b)(7), 9(d) and 10(d)(4), and 9(g) and 10(g) address two related issues: (1) that trial counsel was ineffective for failing to object to the testimony of Lewis O'Cain, and (2) that trial counsel was ineffective for failing to object to the Solicitor's use of that improper testimony during closing argument. In summation, the Solicitor capitalized on the testimony elicited from Mr. O'Cain concerning the defendant's alleged gang involvement *and* regarding general prison conditions, contrasting general prison conditions for an individual sentenced to life without parole with those of an individual sentenced to death, and dramatically misrepresenting the conditions of prison life. R. 1757-58; see App. at 145-54.[11] Defense counsel did not object.

[11] The Solicitor argued: "You can't put him in life in prison and expect him to suffer": "A big prison is like a little city. In prison he will have all the necessities of life—restaurants. They feed you; they clothe you; house you; doctors; hospitals; contact with family; TV; loved ones; freedom of movement in a limited degree; a social structure; cards and games and watch

These issues were thoroughly presented to the Court and Respondent in Applicant's Initial Trial Brief. The Initial Trial Brief was filed of record and served upon Respondent in advance of the merits hearing. On pages 18 through 20 of the Initial Trial Brief, and again on pages 30-32 of the same, Applicant argued the irrelevance of the general prison conditions testimony of Mr. O'Cain. Applicant specifically argued that the general prison testimony and the Solicitor's argument on the same topic violated S.C. Code Ann. § 16-3-25(C)(1)(2000); *State v Plath,* 281 S.C. 1, 313 S.E.2d 619 (1984); *State v Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2005); and *State v. Burkhart*, 371 S.C. 482, 640 S.E.2d 450 (2007).

During the post-conviction merits hearing, trial counsel were questioned repeatedly concerning why there was no objection to the general prison condition testimony. See, e.g., PCR 376-79 (testimony of Sumner); PCR 223, 229 (testimony of Goldsmith). The State was present during the questioning, had an opportunity to question trial counsel and appellate counsel on this issue, and did question trial counsel on this issue. See PCR 431-32. Also at the PCR hearing, appellate counsel Joseph Savitz was asked if trial counsel had objected to the general prison condition evidence and argument he would have raised the issue on appeal and he affirmed that he would have. R. 741-42; see App. at 149. The State was present during the questioning, had an opportunity to question appellate counsel on this issue, and did question appellate counsel on this issue. PCR 746-48.

Further, South Carolina Rule of Civil Procedure Rule 15(b) states, "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." If an allegedly prejudiced party "does not timely object to evidence of issues not raised in the pleadings, each is deemed

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the football game; go to work; go to school. Sure you don't have a car, but in most instances it's not much more than a chamber of trust." R. 1757-58.

impliedly to consent to the trial of those issues." *Crawford v Crawford*, 321 S.C. 511, 514, 469 S.E.2d 622, 624 n.1 (S.C. Ct. App. 1996).

The issue of ineffective assistance of counsel based on trial counsel's failure to object to the general prison conditions testimony and counsel's failure to object to the Solicitor's argument utilizing that testimony is fairly plead, briefed in advance of the merits hearing, and presented at trial without objection. The general prison conditions testimony and argument constituted an "arbitrary factor" introduced during the sentencing phase of Mr. Evans's trial. App. at 149-54. As Justice Pleicones stated in *State v Burkhart*, the introduction of an arbitrary factor into the sentencing phase of a capital murder trial is not subject to harmless error review under S.C. Code Ann. § 16-5-25(C)(1). 371 S.C. at 490, 604 S.E.2d at 454 (Pleicones, J., concurring). Applicant is entitled to a new sentencing trial on this issue alone.

CONCLUSION

For the reasons set forth in Applicant's Post Hearing Brief and those set forth above, this Court should grant Mr. Evans a new sentencing hearing.

Respectfully submitted,



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November 19, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

Kamell Delshawn Evans,

Applicant,

-vs-

CA No. 06-CP-23-7719

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

This is to certify that the undersigned did cause the following documents to be served upon the person designated herein by mailing first class mail, postage pre-paid to the following:

Melody Jane Brown
Assistant Deputy Attorney Ge neral
Post Office Box 11549
Columbia, South Carolina 29211

and by electronic mail to agmbrown@scag.gov
agmbrown@ag.state.sc.us

DOCUMENT(S) SERVED: Applicant's Reply to Respondent's Post-Hearing Brief

DATE SERVED: November 19, 2010

WILLIAM H. EHLIES
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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS
Kamell Delshawn Evans, #6016, Applicant, v. State of South Carolina, Respondent.	)	C/A No.: 2006-CP-23-7719 (Capital PCR Action) **RESPONDENT'S SECOND POST-HEARING BRIEF** (Mercy Charge Issue)

Respondent submits the instant brief in response to the Court's directive issued December 9, 2010. The Court found counsel rendered deficient performance in failing to object to the mercy charge. (December 9, 2010 Letter, p. 2). The Court directed the parties to brief the following issues:

(a) Whether the improper charge requires per se reversal, or whether the doctrine of "harmless error" can apply. See Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008).

(b) Whether the analysis of Boyde v. California, 494 U.S. 370 (1990) applies to Mr. Evans' ineffectiveness and 8th amendment and 14th amendment claims related to the erroneous jury instruction on mercy.

Id.

Respondent now submits this response to the Court's questions, and would respectfully show the Court:

1. Applicant has not raised an Eighth Amendment or Fourteenth Amendment claim in regard to this issue. (August 28, 2009 Amended Application, pp. 4-5). Consequently, only the ineffective assistance claim is properly before the Court and analysis is made pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984). *See also Lowry v. State*, 376 S.C. 499, 657 S.E.2d 760 (2008). Because the claim is one of ineffective assistance, the Court's questions, as listed above, are best answered in reverse. In short, *Boyde v. California* is applicable in deciding ineffective assistance claims based upon a failure to object to a purportedly constitutionally deficient jury instruction.

Lowry. Further, a harmless error analysis may be made if the reviewing court finds deficient performance, to assess whether *Strickland* prejudice has been sufficiently shown. *Id.* For all of the reasons to follow, Applicant can show neither a constitutionally deficient charge, nor prejudice.

2. In determining *deficient performance*, a reviewing court first looks to whether the charge based upon a constitutional provision was deficient, i.e. if "there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution." *Lowry*, 657 S.E.2d at 763, *citing Estelle v. McGuire*, 502 U.S. 62, 72 (1991). This requires review of the jury charge as a whole. *Id.* In determining whether there is a constitutional violation, it matters not that the charge may not conform to state law. *Estelle v. McGuire*, 502 U.S. at 71-72. In regard to a charge affecting the consideration of evidence, the relevant question "is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990). *See also Estelle* (applying *Boyde*); *State v. Sims*, 304 S.C. 409, 422, 405 S.E.2d 377, 384-385 (1991)(applying *Boyde* in direct appeal).

In *Boyde*, the Supreme Court considered a charge that the defense contended precluded consideration of mitigation evidence going to the defendant's background. The Supreme Court found the instruction to consider evidence in extenuation of the crime – which the Court found was logically understood to include background evidence which may support a showing of less culpability – was not constitutionally invalid. 494 U.S. at 381-382. The Court reasoned "there is *not a reasonable likelihood* that Boyde's jurors interpreted the trial court's instructions *to prevent consideration of mitigating evidence* of background and character." 494 U.S. at 381-382 (emphasis

added). Here, though one portion of the charge was incorrect as a matter of state law[1], the remainder of the charge instructed the jury it could return a life sentence for *any* reason, even if no circumstances in mitigation were found. (R. p. 1785). This could not *preclude* consideration of any mitigating evidence. Thus, there is no deficient performance in the failure to object to a constitutionally inadequate charge because the charge is not constitutionally inadequate. Consequently, a finding of *Strickland* error is not warranted on a constitutional basis. Moreover, a finding of *Strickland* prejudice is not warranted.

3. In determining *Strickland* prejudice, a reviewing court may consider whether even a constitutional error is harmless. *Lowry*, 657 S.E.2d at 764-765, *citing Arnold v. State/Plath v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). But again, this Court has found only one portion of the charge "precluded" the consideration of mercy (i.e. the phrase "other than an act of mercy"). The remaining charge clearly instructed the jury that it could return a life sentence for any reason or no reason at all: "You may recommend a sentence of life imprisonment whether or not you find the existence of a statutory or a nonstatutory mitigating circumstance" and "you may also recommend a sentence of life imprisonment even though you find at least one of the statutory aggravating circumstances beyond a reasonable doubt and you find no mitigating circumstances to exist." (R. pp. 1784-1785). Thus, the charge as a whole was not deficient as a matter of state law as it certainly allowed for the exercise of mercy in the penalty phase. *Accord State v. Hicks*, 330 S.C. 207, 218-219, 499 S.E.2d 209, 215 (1998)("the trial judge is not required to instruct the jury it could impose a life sentence 'for any reason or no reason at all' where the jury is informed, as it was here, it could consider any

[1] Respondent does not concede this point, or the ineffective assistance of counsel claim in regard to same, but is merely responding to the questions posed by the Court based on the Court's partial ruling reflected in the December 9, 2010 Letter.

mitigating circumstance authorized by law and could impose a life sentence even if aggravating circumstances were found"). Nothing in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009), prevents this finding as no analysis was made as to the charge as a whole.[2] Consequently, the incorrect phrase in one sentence of the charge, erroneous under state law, did not negatively contribute to the verdict as the charge as a whole was not incorrect. *See also State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000)("jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error"); *State v. Bell*, 305 S.C. 11, 21, 406 S.E.2d 165, 171 (1991)(applying *Boyde* in direct appeal review, and finding, after review of a no unfettered sympathy instruction, "from the context of the charge, there is no reasonable likelihood this charge prevented the jury from considering any mitigating evidence in fairness and mercy.").

4. Moreover, in *Rosemond*, the Supreme Court tied the propriety of the consideration of mercy to the receipt of "proper *evidence* of mercy." 680 S.E.2d at 10 (emphasis added). It is this consideration of mercy based on the evidence that makes the charge consistent with the instruction that "the jury should not be guided by sympathy, prejudice, passion, or public opinion." *Id.* Thus, according to *Rosemond*, the charging language *does not* support unfettered, unreasoned, emotional reaction; rather, the charge is meant to preserve the exercise of mercy *based on consideration of the evidence submitted.* To the extent this logic focuses on reasoned consideration of the evidence, it is consistent with United States Supreme Court precedent.

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[2] The Court in *Rosemond* did not grant relief on this issue at all, as previously pointed out in Respondent's first post-hearing brief; rather, the language addressing the one sentence is found in *dicta*. (See Respondent's Post-Hearing Brief, pp. 95-96).

5. A capital defendant is allowed, pursuant to the Eighth and Fourteenth Amendments of the Constitution, to submit evidence in mitigation of "any aspect of [...his...] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" to enable the jury to make an "individualized decision" in sentencing. *Lockett v. Ohio*, 438 U.S. 586, 604-605 (1978). In that same vein, the Court has determined that the State may not create "limitations" on the consideration of properly admitted mitigation evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 114-115 (1982). "These two cases place clear limits on the ability of the State to define the *factual bases* upon which the capital sentencing decision must be made." *Saffle v. Parks*, 494 U.S. 484, 490 (1990)(emphasis added). However, there is a difference between the presentation and consideration of evidence (i.e. *Lockett* and *Eddings*), and the exercise of unfettered sympathy or mercy: "Whether a juror feels sympathy for a capital defendant is more likely to depend on that juror's own emotions than on the actual evidence regarding the crime and the defendant." *Id* at 493. The Supreme Court has rejected challenges to instructions that the jury "'must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.'" *California v. Brown*, 479 U.S. 538, 540 (1987), and emphasized that for a rational and reliable sentencing proceeding, the decision must be "rooted in the aggravating and mitigating evidence introduced during the penalty phase." *Id* at 542.

6. As this Court has previously found, (see December 9, 2010 Letter), this State has long allowed a plea for mercy in the sentencing phase. *See, e.g., State v. Torrence*, 305 S.C. 45, 50-51, 406 S.E.2d 315, 318-319 (1991). However, according to modern jurisprudence, such a plea must be grounded in the emotional tie to the defendant, and not simply an opinion on the appropriate sentence. *State v. Wise*, 359 S.C. 14, 596 S.E.2d 475, 481-482 (2004). *See also State v. Sapp*, 366

S.C. 283, 292-294, 621 S.E.2d 883, 887-888 (2005). A family member making a plea for mercy may *not* weigh in on what the appropriate sentence should be. *State v. Johnson*, 338 S.C. 114, 126-127, 525 S.E.2d 519, 525 (2000)("the defense did not seek to elicit the opinion of Johnson's sister about what verdict the jury 'ought' to reach. Defense counsel merely proposed to ask her whether *she wanted* Johnson to die" which "did not address the ultimate issue to be decided by the jury"). In sum, the basis for admissibility of the plea is not mere mercy, but the plea's value as evidence of the shared bond which itself is a reflection of the defendant's character in that he is able to maintain that bond. Otherwise, there would be no reason to draw a distinction between 1) a plea for mercy and an opinion on which sentence is appropriate; and 2) allowing only family members to so plead, not even a victim who would arguably have an interest in the disposition. *Id. See also Torrence, supra, Wise supra.*

7. The only constitutional issue that could arise under these facts would be if the charge at issue *precluded* consideration of the *evidence* that the state allowed. *Eddings, supra*. Such an interpretation would not be reasonable based on this record. As set out above, the trial court appropriately charged that a life sentence could be returned based on the mitigation evidence or not based on the mitigation evidence – said differently, for any reason or no reason at all.[3] Again, the Supreme Court of South Carolina has previously held that even that charge ("any reason or no reason at all"), as phrased, is not required where the jury is charged that they can impose a life sentence even

[3] If the charge is read to encourage mere emotion, the charge may run contrary to the constitution: "The objectives of fairness and accuracy are more likely to be threatened than promoted by a rule allowing the sentence to turn not on whether the defendant, in the eyes of the community, is morally deserving of the death sentence, but on whether the defendant can strike an emotional chord in a juror." *Saffle v. Parks*, 494 U.S. at 495. See also *Boyde*, 494 U.S. at 377 ("there is no... constitutional requirement of unfettered sentencing discretion in the jury...."); *Johnson v. Texas*, 509 U.S. 350, 362 (1993)(same).

if they do not find mitigating circumstances. *State v. Hicks, supra.* If mercy is an act by the sentencer, (see Respondent's Post-Hearing Brief, p. 98 n. 31 (mercy is defined as "compassionate *treatment...*")) the ability to impose a life sentence whether mitigation evidence is accepted or not *is* the ability to exercise mercy. The jury here was so instructed. A finding of *Strickland* prejudice is not warranted.

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Respectfully submitted,

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December 14, 2010.
Columbia, South Carolina.

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

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)	Case No. 06-CP-23-7719
)	(Capital PCR)
Kamell Delshawn Evans,)	
Applicant,)	APPLICANT'S SECOND POST-HEARING BRIEF
-vs-)	
)	
State of South Carolina,)	
Respondent.)	

On December 9, 2010, this Court informed the parties by letter of its conclusion that trial counsel's failure to object to the trial judge's "mercy" charge—the same found improper in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009)—was not reasonable under *Strickland v. Washington*, 466 U.S. 688 (1986). On the issue of whether counsel's failure to object to the erroneous charge was prejudicial, the Court has asked the parties to brief the following questions:

(a) Whether the improper charge requires *per se* reversal, or whether the defense of "harmless error" can apply. See *Lowry v. State*, 376 S.C. 499, 657 S.E.2d 760 (2008).

(b) Whether the analysis of *Boyde v. California*, 494 U.S. 370 (1990), applies to Mr. Evans' ineffectiveness and 8th amendment and 14th amendment claims related to the erroneous jury instruction on mercy.

Applicant submits this response to the Court's questions. In short, as to the first question, harmless error analysis does not apply because the court's instruction deprived the jury of a vehicle to provide a reasoned moral response at sentencing, which is a structural error; even if harmless error analysis does apply, the instructional error was not harmless because it cannot be proven beyond a reasonable doubt under the circumstances of this case that the "mercy" instruction did not contribute to the verdict. As to the second question, the analysis of *Boyde v. California* also does not apply as the "mercy" instruction used the

precise language found contrary to South Carolina law in *Rosemond*; in any event, *Boyde*'s "reasonable likelihood" standard is easily met under the circumstances of this case. For these reasons, the Court should find that trial counsel's failure to object to the erroneous "mercy" charge prejudiced Mr. Evans. Mr. Evans is, therefore, entitled to a new sentencing trial.

A. "Harmless Error" Does Not Apply to the Improper "Mercy" Charge. Even If Harmless Error Analysis Does Apply, It Cannot Be Proven Beyond a Reasonable Doubt that the Erroneous "Mercy" Charge Did Not Contribute to the Death Verdict.

1. In *Lowry v. State*, the South Carolina Supreme Court recognized that "[c]ertain constitutional errors may be harmless in terms of their effect on the fact-finding process at trial." 376 S.C. at 507-08, 657 S.E.2d at 764 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 79 (1993)). "For this reason," *Lowry* stated, "an unconstitutional jury instruction will not require reversal of the conviction if the Court determines "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* (citing *Arnold v. Plath*, 309 S.C. at 165, 420 S.E.2d at 838 (quoting *Chapman v. California*, 386 U.S. 18 (1967))). *Lowry* involved a burden shifting instruction that left the jurors with the mistaken view that, if they found petitioner took part in the crime, malice should be presumed. After considering the charge in the context of the entire jury instruction, the Court searched for harmless error by weighing the evidence the jury considered against the "probative force" of the mistaken instruction. *Id.* at 765. The reasoning behind the harmless-error analysis in *Lowry* is that the court should assess the "basis on which the jury actually rested its verdict" because an instructional error may have been "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates v. Evatt*, 500 U.S. 391, 403 (1991).

2. The erroneous instruction in this case, however, which precluded consideration of mercy by the capital jury ("you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act or mercy"), stands on different footing. In contrast to *Lowry* and other South Carolina Supreme Court and United States Supreme Court cases that apply harmless-error analysis to instructional error (see, e.g., *Neder v. United States*, 527 U.S. 1, 8-15 (1999) (applying harmless error where instruction omitted element of offense); *Johnson v. United States*, 520 U.S. 461, 468-49 (same); *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) (finding erroneous malice charge not harmless)), the instruction at hand did more than implicate jurors' assessment of the facts. The "no mercy" instruction limited the sentencing jury's ability to give effect to the defendant's mitigation and, as such, "deprive[d] the jury of a 'vehicle for expressing its reasoned *moral* response to the defendant's background, character, and crime." *Nelson v. Quarterman*, 472 F.3d 287, 314-15 (5th Cir. 2006) (quoting *Penry v. Johnson*, 532 U.S. at 797) (emphasis in original). In South Carolina, the consideration of mercy is central to the capital jury's discretion. See *State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 318 (1991); *State v. Blakely*, 158 S.C. 304, 155 S.E. 408, 409 (1930). Mercy is an inscrutable concept that defies qualification. It is beyond the ability of an appellate or postconviction court to estimate the impact of the charge eliminating mercy as a sentencing consideration on the jurors' reasoned moral response.

The Fifth Circuit Court of Appeals has found harmless error analysis incongruent in similar circumstances. *Id.* Addressing an instructional error that prevented a jury from giving full effect to mitigating evidence under *Penry v. Lynaugh* and its progeny, the Fifth Circuit in *Nelson* noted that "the Supreme Court has *never* applied a harmless-error analysis

to a *Penry* claim or given any indication that harmless error might apply in its long line of post-*Furman* cases addressing the jury's ability to give full effect to a capital defendant's mitigating evidence." *Id.* There is good reason for this, as the Fifth Circuit explained:

> Given that the entire premise of the *Penry* line of cases rests on the possibility that the jury's reasoned moral response might have been different . . . had it been able to fully consider and give effect to the defendant's mitigating evidence, it would be wholly inappropriate for an appellate court, in effect, to substitute its own moral judgment for the jury's in these cases.

Id. at 314-15 (other citations and quotations omitted); accord *Rivers v. Thaler*, 2010 WL 3058721 (5th Cir. 2010); *Aldridge v. Thaler*, 2010 WL 1050335 (S.D. Tex. 2010).

In short, the trial court's erroneous charge restricting the jury's consideration of mercy as a basis for a life sentence requires *per se* reversal because it "deprived the jury of a vehicle for expressing its reasoned *moral* response to the defendant's background, character, and crime." *Nelson*, 472 F.3d at 314-15 (quotation and citation omitted). Accordingly, the "mercy" instruction was a structural defect to which harmless error analysis does not apply. *Id.* at 332.

3. There is another equally important reason why harmless error analysis is wholly incompatible with the "no mercy" charge. Under South Carolina law, mercy is a factor that can play a dispositive role in a juror's decision to impose a life sentence, even after considering and giving weight to overwhelming evidence of guilt and substantial aggravating circumstances. S.C. Code § 16-3-20 provides that jurors may vote for a life sentence "for any reason or no reason at all." This provides a direct option for jurors who, having considered all the evidence—even substantial aggravating evidence—reach a reasoned moral conclusion that a capital defendant deserves a life sentence. The type of evidence balancing applied in *Lowry*, consequently, is incongruous with a jury's

consideration of mercy under South Carolina law, because under South Carolina law mercy serves as a basis for a vote for life based on consideration of the evidence presented at sentencing, yet *despite* the weight of that evidence.

This is evident when considering the role mercy plays in a highly aggravated sentencing case. A strong case in aggravation renders many instructional errors moot. By contrast, the mercy option becomes *even more important* to a capital defendant's chance for a life sentence in a highly aggravated case. Acknowledging the weight of the aggravating evidence, Mr. Evans's trial counsel made mercy the central component—the "crux"—of the mitigation case. See App. 67-71. The Eleventh Circuit Court of Appeals recognized the same when it considered the role of mercy under Georgia's capital statute, which like South Carolina's statute also authorizes the jury to return a life verdict for any reason or no reason at all:

> Even if the Supreme Court precedent allowed us to consider harmless error as to guilt, *the absolute discretion of a Georgia jury to grant mercy for any reason would make it anomalous to apply the overwhelming evidence concept to the sentencing phase.*

Coleman v. Kemp, 778 F.2d 1487, 1541 (11th Cir. 1985) (quoting *Zant v. Stephens*, 297 S.E.2d 1 (1982)) (emphasis added). The Eleventh Circuit's reasoning applies here. Harmless error analysis does not apply to assessing the prejudice of the erroneous instruction on mercy.

4. Even if harmless error analysis applied to the "mercy" instruction, Mr. Evans would be entitled to relief. The instruction was not harmless. First, viewing the aggravating evidence against Mr. Evans, including the murder of two innocent victims, one of who was a law enforcement officer, helps to show that mercy is a factor that would have been highly significant to the jury. Second, as trial counsel testified at the postconviction hearing, mercy

played a central role in the defense of the death penalty and in the mitigation. See App. at 67-71. The trial court's erroneous instruction took that sentencing factor away from the jury. In this circumstance, it cannot be established "beyond a reasonable doubt that the [the erroneous "no mercy" instruction] did not contribute to the verdict obtained." *Lowry*, 376 S.C. at 507-08, 657 S.E.2d at 764. Accordingly, even if harmless error analysis applies, there is a reasonable probability that, but for counsel's failure to object to the unconstitutional charge, the outcome of the trial would have been different. *Strickland*, 466 U.S. at 694-96.

B. *Boyde v. California* Does Not Apply to the Ineffectiveness or Eighth Amendment and Fourteenth Amendment Claims Related to the Clearly Erroneous "Mercy" Instruction In This Case. Regardless, if *Boyde* Applied, the "Reasonable Likelihood" Standard Would Be Easily Met.

1. In *Boyde v. California*, the defendant argued that an ambiguous jury instruction did not permit the jury to give effect to the mitigating evidence. 494 U.S. 370, 378-381 (1990). Disagreeing with the claim, the United States Supreme Court examined the objectionable language in the context of the entire charge and, applying a new standard, held there was not "a reasonable likelihood that the jury [] applied the instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380.

2. *Boyde* does not apply to the instructional error in this case. *Boyde* supplies a standard for testing *ambiguous* jury instructions. *Boyde* does not apply to *clearly erroneous* charges. In *Boyde*, the Court distinguished the ambiguous charge before it from the case of a "concededly erroneous" instruction, such as that in *Stromberg v. California*, 283 U.S. 359 (1931). *Boyde*, 494 U.S. at 380; see *Weeks v. Angelone*, 528 U.S. 225, 238 (2000) (Stevens, J., dissenting) (recognizing that *Boyde* dealt with an instruction that "though not erroneous, is sufficiently ambiguous to be subject to erroneous interpretation") (quotation omitted).

Where jury instructions are clearly erroneous, there is no need for *Boyde* analysis. In contrast to *Boyde* and *Weeks*, the instruction at issue here involved precise language found contrary to South Carolina law. *Rosemond*, 383 S.C. at 330, 680 S.E.2d at 10-11. This distinguishes the present case from cases such as *State v. Sims*, 304 S.C. 409, 422, 405 S.E.2d 377, 384-85 (1991), and *State v. Bell*, 305 S.C. 11, 22, 406 S.E.2d 165, 171 (1991), which involved ambiguous (but not clearly erroneous) instructions alleged to have precluded jury consideration of evidence in mitigation. The "mercy" charge delivered here and in *Rosemond* is an anomaly, developed by a single circuit court judge, delivered in only a handful of capital trials. Because the South Carolina Supreme Court's opinion in *Rosemond v. Catoe* establishes that the instruction, as given in Mr. Evans's case, is clearly erroneous, and it runs directly counter to long-standing South Carolina legal precedent and principle, 383 S.C. at 330, 680 S.E.2d at 11, *Boyde* analysis does not apply.

3. Even if *Boyde* were found to apply, this would be a straightforward case and its standard easily met. In the context of the entire jury charge, there is no language that cures the invalid instruction ("you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy"). In the entire sentencing charge, the word "mercy" appears only once—when it is excluded as a ground for a sentence of life. The remainder of the charge does not address mercy. The court's charge did inform the jurors that they should consider all aggravating and mitigating factors, statutory and non-statutory. And the trial court informed jurors "you may recommend a sentence of life imprisonment whether or not you find the existence of a statutory or a nonstatutory mitigating circumstance" and "you may also recommend a sentence of life imprisonment even though you find at least one of the statutory aggravating circumstances

beyond a reasonable doubt and you find no mitigating circumstances to exist." R. 1784-85. But as *Lowry* affirms, a reasonable juror would not interpret these *general* instructions to override the *specific* and clearly erroneous instruction that he or she was not to consider mercy as a basis for a life sentence: "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." 376 S.C. at 507-08, 657 S.E.2d at 764 (citation omitted). Here, the trial court gave no clarifying explanation. Consequently, even if *Boyde* analysis were applied to this case, there is a reasonable likelihood that the jury applied the instruction in a way that limited the jury's application of the mitigating evidence, obstructed its reasoned moral response to the evidence, and violated the constitution. *Id.* at 380.

4. Accordingly, the instruction violated State law as well as federal law pursuant to the *Lockett v. Ohio*, 438 U.S. 586 (1978), line of cases, as it prevented the jury from giving full effect to Applicant's mitigation. Whether *Boyde* applies or not, there is a reasonable probability that, but for counsel's failure to object to the unconstitutional charge, the outcome of the trial would have been different. *Strickland*, 466 U.S. at 694-96. This Court should find that trial counsel's failure to object to the "mercy" instruction prejudiced Mr. Evans, and order a new sentencing trial.

Respectfully submitted,

December 16, 2010

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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

RECEIVED
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WICKENSIMER

Kamell Delshawn Evans,

Applicant,

-vs-

CA No. 06-CP-23-7719

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

This is to certify that the undersigned did cause the following documents to be served upon the person designated herein by mailing first class mail, postage pre-paid to the following:

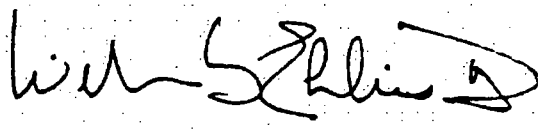
Melody Jane Brown
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DOCUMENT(S) SERVED: Applicant's Second Post-Hearing Brief

DATE SERVED: December 16, 2010



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DP

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Kamell Delshawn Evans, Applicant, -vs- State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS Case No. 06-CP-23-7719 (Capital PCR) ORDER GRANTING POSTCONVICTION RELIEF

This matter is before the Court pursuant to the amended application for post-conviction relief filed by Applicant, Kamell Evans. Mr. Evans was indicted for, *inter alia*, two counts of murder in Greenville County on June 24, 2003 (Indictment Nos. 2003-GS-23-4083, 2003-GS-23-4088). The state sought the death penalty pursuant to S.C. Code Ann. § 16-3-20, alleging four aggravating circumstances associated with the 2003-GS-23-4083 murder and three aggravating circumstances associated with the 2003-GS-23-4088 murder. The jury trial began on September 13, 2004, and Mr. Evans was convicted as charged. He was sentenced to death on September 21, 2004. On November 6, 2006, the South Carolina Supreme Court affirmed the convictions and death sentence. *State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (S.C. 2006) (No. 26220).

This court held an evidentiary hearing on Mr. Evans' claims for postconviction relief from June 1 to June 5, 2009, and from October 12 to October 14, 2009. Mr. Evans was present at both phases and represented at each by William N. Nettles, William H. Ehlies, and Christopher Seeds. Melody Brown and Anthony Mabry of the Office of the State Attorney General represented Respondent, the State of South Carolina.

Twenty-four days after the June 2009 portion of the evidentiary hearing, the South Carolina Supreme Court issued *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 4

(2009). In light of the state supreme court's decision in *Rosemond*, Mr. Evans moved to amend his application for post-conviction relief to allege that trial counsel provided ineffective assistance in failing to object to an instruction identical to that found erroneous in *Rosemond*. When the evidentiary hearing resumed on October 12 to 14, 2009, trial counsel testified with respect to the claim of error based on *Rosemond*.

This Court grants Mr. Evans' motion to amend the application for postconviction relief to include the allegation following *Rosemond*. For the reasons that follow, this Court has determined that trial counsel's failure to object to the erroneous charge on mercy constituted ineffective assistance of counsel. Accordingly, the Court finds that Mr. Evans is entitled to sentencing phase relief based on trial counsel's failure to object to the erroneous charge. The Application for postconviction relief from the death sentence is granted.

I. The South Carolina Supreme Court's Decision in *Rosemond v. Catoe*

On June 29, 2009, the South Carolina Supreme Court, while granting relief based on a finding of ineffective assistance due to counsel's failure to present evidence of the defendant's mental illness, chose nevertheless to address an additional issue. Rosemond claimed that trial counsel were also ineffective for failing to object to the trial court's instruction "not to recommend a sentence of life based on mercy: 'you may recommend a sentence of life imprisonment for any reason or for no reason at all *other than as an act of mercy*.'" *Id.* at 329, 680 S.E.2d at 10 (emphasis in original). The South Carolina Supreme Court found that the trial court's instruction prevented jurors from considering the defendant's evidence and argument for mercy. This, the Court emphasized, ran contrary to state law, under which a defendant is entitled to present evidence seeking

mercy (see *State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 318-19 (1991)) and by which jurors must be instructed that they can return a life sentence "for any reason or no reason at all":

> It is proper to instruct a jury in a capital sentencing phase that it may recommend a life sentence for any reason or no reason at all, including as an act of mercy. A jury's consideration of mercy, if proper evidence of mercy is admitted, is well recognized in the sentencing phase of a capital case. Because a capital jury may consider properly admitted evidence of mercy in the sentencing phase, consideration of mercy is not inconsistent with the instruction that "the jury should not be guided by sympathy, prejudice, passion, or public opinion . . . ." *State v. Singleton*, 284 S.C. 388, 393, 326 S.E.2d 153, 156 (1985) overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991).

Rosemond, 383 S.C. at 329, 680 S.E.2d at 10-11; see also *State v. White*, 246 S.C. 502, 507, 144 S.E.2d 481, 483 (1965) (noting the "absolute discretion of the jury with regard to the issue of mercy"); cf. *Saffle v. Parks*, 494 U.S. 484 (1990).

Further, the Court recognized that the trial court's jury instruction in *Rosemond* mirrored the instruction found proper in *State v. Hughey*, 339 S.C. 439, 459, 529 S.E.2d 721, 731 (2000). The Court therefore "overrule[d] *Hughey* to the extent it approved the instruction that precluded a capital jury's consideration of mercy evidence in the sentencing phase"—even as it granted relief on another, independent ground. *Id.* at 329, 680 S.E.2d at 10-11.

The trial court in Mr. Evans' case provided the jury with a charge identical to the one that the South Carolina Supreme Court disapproved in *Rosemond v. Catoe*. Here, as in *Rosemond*, the trial judge instructed the jury: "[Y]ou may recommend a sentence of life imprisonment for any reason or for no reason at all *other than as an act of mercy*."

(R. 1785) (emphasis added).[1] For the reasons that follow, this Court has determined that trial counsel's failure to object to the erroneous charge was both deficient and prejudicial.

II. Ineffective Assistance of Counsel

Applicant alleges, as Rosemond did, that trial counsel provided ineffective assistance of counsel in failing to object to the trial court's instruction precluding mercy. Ineffective assistance of counsel claims are governed by *Strickland v. Washington*, 466 U.S. 668 (1984). The standard established in *Strickland* requires a two-part showing: that an attorney's representation "fell below an objective standard of reasonableness," *id.* at 688, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. See *Council v. State*, 380 S.C. 159, 169, 670 S.E.2d 356, 361 (2008); see also *Gray v. Branker*, 529 F.3d 220, 228, 234 (4th Cir. 2008). In assessing prejudice, the impact of all of counsel's failures on the outcome must be considered together according to the totality of the circumstances. *Strickland*, 466 U.S. at 694-96; see *Porter v. McCollum*, 130 S.Ct. 447, 452 (2010); *Wiggins v. Smith*, 539 U.S. 510, 534-38 (2003); *Williams v. Taylor*, 529 U.S. 362, 395-97 (2000); cf. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Prejudice can exist even in cases where trial counsel presents significant mitigating evidence, and even in cases in which the aggravating evidence is strong. *Sears v. Upton*, 130 S.Ct. 3259, 3265-66 (2010); see *id.* at 3266 (citing *Porter*, 130 S.Ct. at 449; *Rompilla v. Beard*, 545 U.S. 374, 378 (2005); *Williams*, 529 U.S. at 398).

[1] The Court cites to the Record on Appeal ("R.") and the transcript of the postconviction hearing, which took place before this Court on June 1 to 5, 2009 ("PCR") and October 12 to 14, 2009 ("PCR II").

A. Deficient performance

The "crux" of the mitigation case at Applicant's sentencing trial was mercy. Mercy, trial counsel testified during the evidentiary hearing, was the "primary element" of the mitigation plea. PCR 344. The mitigation evidence consisted primarily of testimony from family members, coaches, and friends. The presentation began with Mr. Evans' high school football coach (R. 1651-53), his high school basketball coach (R. 1645-47), his community college football coach (R. 1648-50), and the high school football team chaplain (R. 1642-44), who testified, each for less than three transcript pages, that Mr. Evans was respectful, courteous, and a team leader. A friend with whom Mr. Evans coached little league football testified that Mr. Evans developed a positive relationship with he and his son. R. 1655-58. Another friend, who worked with Mr. Evans in a youth football and basketball association, testified that Evans had been a positive role model for his twenty-two year old son. R. 1660-62. A coworker testified briefly that Mr. Evans was a hard worker, who had not been involved in problems on the job. R. 1664-65. Evans' sister said that Kamell was a father figure to her children, even in prison (R. 1672), and Kamell's father testified in two transcript pages, speaking of Kamell's positive attributes and stating that, while Kamell's actions caused the family pain, "he is still my friend, he will always be my friend." R. 1669. Counsel also called two witnesses who testified that Evans would adjust positively in prison (corrections expert George Martin and Greenville County Detention Center corrections officer John Merkle) and two mental health experts (a neuropsychologist, Dr. James Evans, and a psychiatrist, Dr. Elin Berg).

During the postconviction evidentiary hearing before this Court, trial counsel referred to mercy, by turns, as the "primary element" (PCR 344), the "key highlight" (PCR 345), and "a major part" (PCR 334) of the mitigation case. Trial counsel James Goldsmith testified that he "built [his] closing argument around [mercy]." PCR 344. In sentencing summation, Goldsmith told the jurors:

> I am going to ask for mercy for Kamell Evans. . . . Mercy is unmerited favor. You can't earn it; you don't deserve it; but you give it to him anyway. . . . We don't repay evil for evil. And mercy is appropriate in this case.

R. 1770; PCR 344.

Both trial counsel testified that, given the centrality of mercy to the sentencing phase defense, they would have objected to any charge that suggested a limitation on the jury's consideration of mercy when deliberating on the sentence. PCR 335-36, 353. The trial judge reviewed the proposed jury charges verbally with counsel in chambers. PCR 332-35 (trial counsel Sumner), 345 (trial counsel Goldsmith). Yet neither counsel objected when the trial court proposed the instruction that eliminated the "primary element" of their argument."[2] Trial counsel Goldsmith thought what the judge proposed during the conference "was appropriate." PCR 345. He testified that he knew the court would charge the jury "you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy" before he made his argument to the jury. PCR 346. Counsel submitted no proposed jury charges. PCR 338-39. Counsel made no attempt, alternatively, to change the argument to avoid a conflict

[2] Counsel's failure to acquire and review a written copy of the judge's charge prior to opening statements was ineffective. S.C. Code § 16-3-20 requires that the judge's charge not only be read to the jury but that it be given to the jury in writing for its use during deliberation.

between their argument and the judge's charge. PCR 351; see PCR 333-34, 344. And when the trial court issued the instruction to the jury, R. 1785, and later provided the same to the jury in writing pursuant to S.C. Code Ann. § 16-3-20(C), R. 1786, counsel made no objection.

At the evidentiary hearing, trial counsel testified that they did not object to the erroneous charge because they found it helpful. Trial counsel Sumner claimed that he did not think the charge limited the jury's consideration of mercy; because "it use[d] the word mercy," he believed the charge was actually preferable to a charge that simply tracked the words of the statute. PCR 338, see PCR 335. Trial counsel Goldsmith similarly testified that he thought this "an expansive charge" that allowed jurors to consider mercy. PCR 346-47. The charge, counsel say, told the jury to consider mercy, not abjure it.

This Court finds trial counsel's proffered reasons for not objecting to the charge are unconvincing. As the South Carolina Supreme Court recognized in *Rosemond*, the plain meaning of the words of the charge given is that mercy is precluded as a consideration for a sentence of life. The charge, by substituting the words "other than" for the word "including," in effect eviscerates the role of mercy in the jury's consideration of the sentencing options. As the Supreme Court understood, the last clause of the instruction plainly reads as a limitation on and qualification of the previous sentence, not a reiteration. The interpretation offered by trial counsel defies both the Supreme Court's determination in *Rosemond* and common sense.

Trial counsel should have known that the charge was inconsistent with long-standing South Carolina law and the United States Constitution. The South Carolina

Supreme Court's statement in *Rosemond* is not a new rule. The fact that the *Hughey* decision—which *Rosemond* reversed, was "in effect" at the time of Mr. Evans' trial in 2004 does not ameliorate counsel's failure to object to the erroneous charge. It has been the rule for decades that mercy can be considered by a South Carolina capital jury. In South Carolina in the year 2000, as in 2004 at the time of Evans's trial, a defendant was entitled to offer at sentencing evidence asking "for mercy on his behalf," *State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 318 (1991); see *State v. Johnson*, 338 S.C. 114, 126, 525 S.E.2d 519, 525 (2000); *State v. Sapp*, 366 S.C. 283, 292-94, 621 S.E.2d 883, 887-88 (2005). It was proper for defense counsel to try to "appeal to the jury's sense of mercy." *Drayton v. Evatt*, 312 S.C. 4, 12, 430 S.E.2d 517, 522 (1993). It was proper for a defendant to address the jury and ask for mercy. See *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004). Under S.C. Code Ann. § 16-3-20(C), "The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law..." Mercy is embraced within this statutory directive as a basis for returning a life sentence. This is also supported by the fact that the statute does not require that the jury "weigh" aggravating circumstances against mitigating circumstances; rather, South Carolina is a non-weighing state, meaning the jury can return a verdict of life for any reason "otherwise authorized or allowed by law." S.C. Code Ann. § 16-3-20(C).[3] Objecting here did not impose a duty of clairvoyance on counsel, or force a lawyer to anticipate a change in the law, for as

[3] Long-standing South Carolina law also holds that a trial court's instructions to the jury cannot impede "the right and duty of the jury to recommend the appellant to the mercy of the court, in the event the jury reach the conclusion that appellant was guilty of murder." *State v. Blakely*, 158 S.C. 304, 155 S.E. 408, 409 (1930).

previously noted the law has always been that a capital jury can consider mercy. Indeed, the law used to be that one convicted of murder was sentenced to death *unless* the jury recommended mercy.[4] Counsel performed deficiently in failing to object to the erroneous instruction.

Further, it is well established that the Eighth Amendment, under the *Lockett v. Ohio*, 438 U.S. 586 (1978), line of cases, permits no restriction on a capital defendant's ability to present any relevant mitigating evidence. See *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Hitchcock v. Dugger*, 481 U.S. 393 (1987). The South Carolina legislature has decided to allow mercy as a sentencing consideration, encompassed in the language "for any reason or no reason at all," and the South Carolina Supreme Court has so interpreted the statute. As such mercy is indisputably a valid basis for imposing a life sentence under state law. Because the South Carolina Supreme Court's ruling in *Hughey* neither addressed nor ruled upon the issue of whether precluding a capital jury from considering mercy comported with *Lockett* and its progeny, reasonable counsel would also have objected to the charge precluding mercy on that basis.

Given this precedent, of which trial counsel should have been aware, it was not proper for the trial court in Mr. Evans's case to issue an instruction to the jury that it could not return a life sentence "as an act of mercy." Trial counsel's failure to object to the charge was deficient. In failing to object to the instruction precluding the jury's

[4] The punishment for murder has historically been set by statute. SC Code Ann § 16-52, as amended (1962) provided: "whoever [was] guilty of murder shall suffer the punishment of death; provided, however, that in any case in which the prisoner is found guilty of murder the jury may find a special verdict recommending him to the mercy of the court whereupon the punishment shall be reduced to imprisonment during the whole lifetime of the prisoner." See *State v Harper*, 251 SC 379, 162 SE2d 712 (1968).

consideration of mercy, counsel permitted a charge not only contrary to capital jurisprudence and the state statute as it existed at the time of trial, but contrary to the theory and thrust of the mitigation case counsel presented to the jury.

B. Prejudice

Having determined that trial counsel's failure to object to the instruction precluding mercy—the same charge found improper in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009)—was deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1986), this Court must consider whether counsel's failure to object to the erroneous charge was prejudicial to Mr. Evans such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. The South Carolina Supreme Court in *Rosemond*, reversing and remanding for a new sentencing proceeding on other grounds, did not address prejudice in the context of the charge precluding mercy. 383 S.C. at 329, 680 S.E.2d at 10. The Court, accordingly, did not address whether the improper charge requires *per se* reversal, or whether a "harmless error" analysis should apply. See *Lowry v. State*, 376 S.C. 499, 657 S.E.2d 760 (2008). And the Court did not address whether the *Boyde v. California*, 494 U.S. 370 (1990), analysis applies to ineffectiveness and 8th and 14th amendment claims related to the erroneous jury instruction on mercy.

This Court has considered the applicability of harmless error analysis and *Boyde* as a preliminary matter and, for the reasons that follow, determines that neither harmless error analysis nor the *Boyde* analysis apply here. The Court also determines that even if harmless error analysis and *Boyde* analysis apply, the standards for each would be easily met under the circumstances of this case. Trial counsel's failure to object to the

erroneous charge precluding consideration of mercy prejudiced Mr. Evans. Mr. Evans is, therefore, entitled to a new sentencing trial.

1. Harmless Error

a. Harmless Error Does Not Apply to the Instruction Precluding Mercy.

In *Lowry v. State*, the South Carolina Supreme Court recognized that "[c]ertain constitutional errors may be harmless in terms of their effect on the *fact-finding* process at trial." 376 S.C. at 507-08, 657 S.E.2d at 764 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 79 (1993) (emphasis added)). "For this reason," *Lowry* stated, "an unconstitutional jury instruction will not require reversal of the conviction if the Court determines "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* (citing *Arnold v. Plath*, 309 S.C. at 165, 420 S.E.2d at 838 (quoting *Chapman v. California*, 386 U.S. 18 (1967))). *Lowry* involved a burden shifting instruction that left the jurors with the mistaken view that, if they found petitioner took part in the crime, malice should be presumed. After considering the charge in the context of the entire jury instruction, the Court searched for harmless error by weighing the evidence the jury considered against the "probative force" of the mistaken instruction. *Id.* at 765. The reasoning behind the harmless-error analysis in *Lowry* is that a court should assess the "basis on which the jury actually rested its verdict" because an instructional error may be "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates v. Evatt*, 500 U.S. 391, 403 (1991).

The erroneous instruction in this case, which precluded consideration of mercy by the capital jury ("you may recommend a sentence of life imprisonment for any reason or

for no reason at all other than as an act or mercy"), stands on different footing. The instruction at hand did more than implicate jurors' fact-finding. Cf. *Neder v. United States*, 527 U.S. 1, 8-15 (1999) (applying harmless error where instruction omitted element of offense); *Johnson v. United States*, 520 U.S. 461, 468-49 (same); *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) (finding erroneous malice charge not harmless). The instruction precluding mercy limited the sentencing jury's ability to give any effect to the defendant's mitigation. As such, the instruction "deprive[d] the jury of a 'vehicle for expressing its reasoned *moral* response to the defendant's background, character, and crime." *Nelson v. Quarterman*, 472 F.3d 287, 314-15 (5th Cir. 2006) (quoting *Penry v. Johnson*, 532 U.S. at 797) (emphasis in original). In South Carolina, the consideration of mercy is central to the capital jury's discretion. See *State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 318 (1991); *State v. Blakely*, 158 S.C. 304, 155 S.E. 408, 409 (1930). It is beyond the ability of an appellate or postconviction court to estimate the impact of the charge eliminating mercy—an inscrutable concept that defies qualification—as a sentencing consideration on the jurors' reasoned moral response.

Addressing an instructional error that prevented a jury from giving full effect to mitigating evidence under *Penry v. Lynaugh* and its progeny, the Fifth Circuit in *Nelson* noted that "the Supreme Court has *never* applied a harmless-error analysis to a *Penry* claim or given any indication that harmless error might apply in its long line of post-*Furman* cases addressing the jury's ability to give full effect to a capital defendant's mitigating evidence." *Id.* Finding harmless error analysis incongruent in that similar circumstance, the Fifth Circuit explained:

> Given that the entire premise of the *Penry* line of cases rests on the possibility that the jury's reasoned moral response might have been different . . . had it been able to fully consider and give effect to the defendant's mitigating evidence, it would be wholly inappropriate for an appellate court, in effect, to substitute its own moral judgment for the jury's in these cases.

Id. at 314-15 (other citations and quotations omitted); accord *Rivers v. Thaler*, 2010 WL 3058721 (5th Cir. 2010); *Aldridge v. Thaler*, 2010 WL 1050335 (S.D. Tex. 2010).

The trial court's erroneous charge restricting the jury's consideration of mercy as a basis for a life sentence requires *per se* reversal because it "deprived the jury of a vehicle for expressing its reasoned *moral* response to the defendant's background, character, and crime." *Nelson*, 472 F.3d at 314-15 (quotation and citation omitted). Accordingly, the "mercy" instruction was a structural defect to which harmless error analysis does not apply. *Id.* at 332.

There is another equally important reason why harmless error analysis is wholly incompatible with the instruction precluding mercy. Under South Carolina law, mercy is a factor that can play a dispositive role in a juror's decision to impose a life sentence, even after considering and giving weight to overwhelming evidence of guilt and substantial aggravating circumstances. S.C. Code § 16-3-20 provides that jurors may vote for a life sentence "for any reason or no reason at all." This provides a direct option for jurors who, having considered all the evidence—even substantial aggravating evidence—reach a reasoned moral conclusion that a capital defendant should be sentenced to life imprisonment without parole. The type of evidence balancing applied in *Lowry*, consequently, is incongruous with a jury's consideration of mercy under South Carolina law, because under South Carolina law mercy serves as a basis for a vote for life

based on consideration of the evidence presented at sentencing, yet *despite* the weight of that evidence.

This is evident when considering the role mercy plays in a highly aggravated sentencing case. A strong case in aggravation renders many instructional errors moot. By contrast, the mercy option becomes *even more important* to a capital defendant's chance for a life sentence in a highly aggravated case. Acknowledging the weight of the aggravating evidence, Mr. Evans' trial counsel made mercy the central component—the "crux"—of the mitigation case. The Eleventh Circuit Court of Appeals recognized the same when it considered the role of mercy under Georgia's capital statute, which like South Carolina's statute also authorizes the jury to return a life verdict for any reason or no reason at all:

> Even if the Supreme Court precedent allowed us to consider harmless error as to guilt, *the absolute discretion of a Georgia jury to grant mercy for any reason would make it anomalous to apply the overwhelming evidence concept to the sentencing phase.*

Coleman v. Kemp, 778 F.2d 1487, 1541 (11th Cir. 1985) (quoting *Zant v. Stephens*, 297 S.E.2d 1 (1982)) (emphasis added). This Court finds that the Eleventh Circuit's reasoning is applicable here. Harmless error analysis does not apply to assessing the prejudice of the erroneous instruction on mercy.

b. Even If Harmless Error Analysis Applied, It Cannot Be Proven Beyond a Reasonable Doubt that the Erroneous "Mercy" Charge Did Not Contribute to the Death Verdict.

Even if harmless error analysis applied, the instruction would not be harmless. Given the substantial aggravating evidence against Mr. Evans—which included the murder of two innocent victims, one of who was a law enforcement officer—mercy is a

factor that would have been highly significant to the capital sentencing jury. In addition, as trial counsel testified at the postconviction hearing, mercy played the central role in the defense of the death penalty and in the mitigation presentation. The trial court's erroneous instruction precluding mercy took that pivotal sentencing factor away from the jury. In these circumstances, it cannot be established "beyond a reasonable doubt that the [the erroneous instruction precluding mercy] did not contribute to the verdict obtained." *Lowry*, 376 S.C. at 507-08, 657 S.E.2d at 764. Accordingly, even if harmless error analysis applies, there is a reasonable probability that, but for counsel's failure to object to the unconstitutional charge, the outcome of the trial would have been different. *Strickland*, 466 U.S. at 694-96.

2. *Boyde v. California*

a. *Boyde v. California* Does Not Apply to the Instruction Precluding Mercy.

In *Boyde v. California*, the defendant argued that an ambiguous jury instruction prevented the jury from giving effect to the mitigating evidence. 494 U.S. 370, 378-381 (1990). Disagreeing with the claim, the United States Supreme Court examined the objectionable language in the context of the entire charge and, applying a new standard, held there was not "a reasonable likelihood that the jury [] applied the instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380.

Boyde does not apply to the clearly erroneous instructional error in this case because *Boyde* supplies a standard for testing *ambiguous* jury instructions. *Boyde* does not apply to *clearly erroneous* jury instructions. In *Boyde*, the Court distinguished the ambiguous charge before it from the case of a "concededly erroneous" instruction, such as that in *Stromberg v. California*, 283 U.S. 359 (1931). *Boyde*, 494 U.S. at 380; see

Weeks v. Angelone, 528 U.S. 225, 238 (2000) (Stevens, J., dissenting) (recognizing that *Boyde* dealt with an instruction that "though not erroneous, is sufficiently ambiguous to be subject to erroneous interpretation") (quotation omitted). In contrast to *Boyde*, the instruction at issue here involved precise language found contrary to South Carolina law. *Rosemond*, 383 S.C. at 330, 680 S.E.2d at 10-11. This distinguishes the present case from cases such as *State v. Sims*, 304 S.C. 409, 422, 405 S.E.2d 377, 384-85 (1991), and *State v. Bell*, 305 S.C. 11, 22, 406 S.E.2d 165, 171 (1991), which involved ambiguous (but not clearly erroneous) instructions alleged to have precluded jury consideration of evidence in mitigation. The instruction precluding mercy, delivered here and in *Rosemond*, is an anomaly, developed by a single circuit court judge, delivered in only a handful of capital trials. Because the South Carolina Supreme Court's opinion in *Rosemond v. Catoe* establishes that the instruction, as given in Mr. Evans's case, is clearly erroneous, and it runs directly counter to long-standing South Carolina legal precedent and principle, 383 S.C. at 330, 680 S.E.2d at 11, this Court holds that *Boyde* analysis does not apply.

b. Even If *Boyde* Applied, the "Reasonable Likelihood" Standard Would Be Easily Met.

Even if *Boyde* applied, this would be a straightforward case and the *Boyde* standard easily met. The impact of the erroneous instruction on jury deliberations must be assessed in the context of the jury charge as a whole. No language in the charge cured the instruction precluding mercy. In the entire sentencing charge, the word "mercy" appears only once, when it is excluded as a ground for a sentence of life. The remainder of the charge did not address mercy. The court's charge did inform the jurors that they should consider all aggravating and mitigating factors, statutory and non-statutory. And

the trial court informed jurors "you may recommend a sentence of life imprisonment whether or not you find the existence of a statutory or a nonstatutory mitigating circumstance" and "you may also recommend a sentence of life imprisonment even though you find at least one of the statutory aggravating circumstances beyond a reasonable doubt and you find no mitigating circumstances to exist." R. 1784-85. A reasonable juror, however, would not interpret these *general* instructions to override the *specific* and clearly erroneous instruction that he or she was not to consider mercy as a basis for a life sentence. As the South Carolina Supreme Court recognized in *Lowry*: "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." 376 S.C. at 507-08, 657 S.E.2d at 764 (citation omitted). Here, the trial court gave no clarifying explanation.

Consequently, even if *Boyde* analysis were applied to this case, there is a reasonable likelihood that the jury applied the instruction in a way that limited the jury's application of the mitigating evidence, obstructed its reasoned moral response to the evidence, and violated the Fifth, Eighth and Fourteenth Amendments to the Constitution.

3. There is a Reasonable Probability that, But For Counsel's Failure to Object to the Instruction Precluding Mercy, the Outcome of Applicant's Trial Would Have Been Different.

The exclusion of mercy in a capital murder trial violates state law as well as federal law pursuant to *Lockett v. Ohio*, as it prevents the jury from giving full effect to the mitigation evidence. Such an error is highly prejudicial in a South Carolina capital trial where jurors may impose a life sentence for any reason or no reason at all. Recently, a circuit court granted postconviction relief to the defendant in *Hughey*, finding that the identical instruction given in *Rosemond* and *Hughey*—and the same provided at Mr.

Evans' sentencing phase—was "so inimical to the laws of the State and the United States in capital cases as to entitle the applicant to a new trial." *Hughey v. State*, 2000-CP-01-0212, Abbeville County (Order Granting PCR Relief, May 14, 2010) (Macaulay, J.). The erroneous instruction precluding mercy was particularly prejudicial under the circumstances in Mr. Evans' case because counsel positioned mercy as the crux of the mitigation case against substantial aggravating evidence. Trial counsel's failure to object to the erroneous charge left the jury deliberating the case without being able to place the defendant's "primary element" on the scale. There is a reasonable probability that, but for counsel's failure to object to the unconstitutional charge, the outcome of the trial would have been different. *Strickland*, 466 U.S. at 694-96.

In conclusion, the Court notes that, like *Rosemond* and *Hughey*, Mr. Evans' case belongs to a closed universe of cases in which an idiosyncratic charge was given on a critical issue. It would be fundamentally unfair to allow one defendant to live and a handful of others to die based only on the timing of their trial.

CONCLUSION AND JUDGMENT

Based on the foregoing, the Application for a new sentencing phase trial is granted.

IT IS SO ORDERED.

_____
The Honorable D. Garrison Hill

_____, 2011
Greenville, South Carolina

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January 19, 2011

Melody Jane Brown
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Re: State of SC vs. Kamell Delshawn Evans
C.A. No. 06-CP-23-7719

Dear Ms. Brown:

Enclosed please find our proposed Order Granting Post-Conviction Relief for the above matter.

Sincerely yours,

WILLIAM H. EHLIES, II
Email: hank@ehlieslaw.com

WHE/jmk

enclosure

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

Kamell Delshawn Evans,

Applicant,

-vs-

CA No. 06-CP-23-7719

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

This is to certify that the undersigned did cause the following documents to be served upon the person designated herein by mailing first class mail, postage pre-paid to the following:

Melody Jane Brown
Assistant Deputy Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

and by electronic mail to agmbrown@scag.gov
agmbrown@ag.state.sc.us

DOCUMENT(S) SERVED: Order Granting Post-Conviction Relief

DATE SERVED: January 19, 2011

WILLIAM H. EHLIES
ATTORNEY FOR THE PLAINTIFF
310 Mills Avenue, Suite 201
Greenville, South Carolina, 29605
(864) 232-3503

STATE OF SOUTH CAROLINA)) COUNTY OF GREENVILLE)	IN THE COURT OF COMMON PLEAS
Kamell Delshawn Evans, #6016,)) Applicant,) v.)) State of South Carolina,)) Respondent.)	C/A No.: 2006-CP-23-7719 (Capital PCR Action) **PROPOSED ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief, and subsequent amendments, filed by Applicant, Kamell Delshawn Evans. Applicant challenges his sentence of death and convictions of murder; possession of a weapon during the commission or the attempt to commit a violent crime; burglary first degree; and kidnapping. For all the reasons set forth in the instant order, this Court, after careful consideration of all the evidence and argument, denies relief, with prejudice, and dismisses the application

I.
PROCEDURAL HISTORY

In June 2003, a Greenville County Grand Jury indicted Applicant 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. (R. p.1802-13). Applicant shot and killed Greenville County Sheriff's Department 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. (R. p. 1814). Steven W. Sumner, Esq., and James Lee "Skip" Goldsmith, Jr., Esq., represented Applicant.

Jury qualification and selection for the trial on the charges 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 Applicant on all counts. (R. p. 1502). On September 20, 2004, the lower court began the penalty phase. On September 21, 2004, the jury returned from deliberations, and advised the court they found the following statutory circumstances as to Joe 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.

(R. p. 1795). The jury found the same aggravating circumstances as to Antonio L. Sapinoso with the exception of the law enforcement aggravator. (R. p. 1794). The jury also recommended death. (R. pp. 1794-95).

The trial judge found that the evidence warranted the sentence, and the sentence was not a result of "prejudice, passion or any other arbitrary factor," and sentenced Applicant to death. (R. pp. 1799-1800). The judge also imposed a life sentence for burglary. 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 Applicant on appeal. Appellate counsel filed a Final Brief of Appellant 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.

(Final Brief of Appellant, p. 3).

The State filed its final brief on July 25, 2006. The case was called for oral argument before the Supreme Court of South Carolina on October 3, 2006. On November 6, 2006, the Court entered its opinion affirming Applicant's death sentence. *State v. Evans*, Opinion No. 26220 (S.C.Sup.Ct. filed November 6, 2006).[1] Applicant did not seek review from the United States Supreme Court.

On November 13, 2006, Applicant filed a Petition for Stay of Execution in the Supreme Court of South Carolina, expressing his desire to file an application for post-conviction relief. The Court granted the stay on December 6, 2006, and appointed the undersigned to hear the proposed PCR action. On February 28, 2007, this Court held a hearing to determine if Applicant wished to proceed and if he wished to have appointed counsel. Having determined Applicant both wished to proceed and have counsel appointed, this Court appointed William Nettles, Esq.,

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

and Hank Ehlies, Esq., counsel for Applicant. On June 23, 2008, Christopher Seeds, Esq., joined counsel for Applicant.

The evidentiary hearing in the above captioned capital PCR action began June 1-5, 2009, and concluded October 12-14, 2009. Mr. Nettles, Mr. Ehlies and Mr. Seeds represented Applicant. Senior Assistant Attorney General Melody J. Brown and Assistant Attorney General Anthony Mabry represented the State. On March 18, 2010, after the conclusion of the hearing, this Court relieved Mr. Nettles and Mr. Seed was formally appointed second chair.

Upon receipt of the transcripts for both parts of the hearing, this Court established a briefing schedule for post-hearing briefs. Petitioner's brief was submitted on October 4, 2009. Respondent submitted its post-hearing brief on November 10, 2010. Petitioner submitted a reply on November 19, 2010. On December 9, 2010, this Court called for additional briefing of the mercy charge issue. Respondent submitted its second post-hearing brief on the issue on December 14, 2010. Applicant submitted his second post-hearing brief on December 16, 2010. After careful consideration of the record, the testimony from the PCR evidentiary hearing, and arguments of counsel, this Court finds Petitioner has failed to establish he is entitled to relief.

II.
ISSUES PRESENTED

Applicant filed his initial PCR application on December 4, 2006, alleging ineffective assistance of trial counsel in failing to request the statutory mitigating circumstance in S.C. Code § 16-3-20(b)(6). (December 4, 2006 PCR Application, pp. 2-3). Applicant amended his application on November 16, 2007, and again on January 28, 2009. Pursuant to the January 28, 2009 amendment, the following issues were before the Court at the beginning of the evidentiary hearing:

9(a) Applicant was denied the right to effective assistance of counsel– guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during the guilt or innocence phase of his capital trial.

10(a): Supporting facts: Trial counsel performance during the guilt-or-innocence phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Ard v. Catoe*, 642 S.E.2d 590 (S.C. 2007). Counsel's acts or omissions included, but are not limited to, the following:

1. Counsel failed to conduct adequate voir dire. Counsel's failures include, but are not limited to, failing to ask potential jurors whether they would automatically vote to impose death where a defendant had been found guilty of murder (*see Morgan v. Illinois*, 504 U.S. 719 (1992), failing to ask appropriate questions of jurors regarding their views on the death penalty thus making the record unclear as to whether the jurors were qualified, failing to voir dire for racial bias as guaranteed by *Turner v. Murray* in this case which involved an inter-racial murder, failing to object to the qualification of several jurors who gave disqualifying responses (e.g., Juror 145 (Eddie Harvey)), and failing to exercise available peremptory strikes to dismiss jurors, ultimately seated, who gave disqualifying responses to voir dire questions (including Juror 258 (Elvis Mahaabwa), Juror 247 (Sandra Holcombe), Juror 118 (James Freeman), and Juror 281 (James Plumley)).

2. Counsel failed to adequately investigate, present evidence and challenge the State's evidence in the guilt-or-innocence phase. Counsel's failures include failing to adequately investigate and present evidence concerning the circumstances in which the shots were fired at the scene and failing to challenge the testimony of the State's witnesses regarding the cause and manner of death of the two victims. For example, trial counsel failed to retain a pathologist prior to trial and did not cross-examine or otherwise challenge the explanation of the State's forensic pathologist. Forensic evidence suggests a different scenario from the one described by the State regarding the circumstances in which the shots were fired.

3. Counsel failed to effectively move for a change of venue as regards to both jury selection and the physical location of the trial.

9(b): Applicant was denied the right to effective assistance of counsel during the sentencing phase of his capital trial, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution.

10(b): Supporting Facts: Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. *See Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984); *Von Dohlen v. State*, 602 S.E.738 (S.C. 2005). Counsel's acts or omissions included, but are not limited to the following:

1. Counsel failed to conduct adequate voir dire. *See* 9(a), 10(a)(1), *supra*.

2. Counsel failed to move to quash the § 16-3-20(C)(a)(7) aggravating circumstance, which authorizes a capital sentence for '[t]he murder of a ... local law enforcement officer... during or because of the performance of his official duties." S.C. Code § 16-3-20(C)(a)(7). The evidence presented at trial did not establish the aggravating factor. *See* 9(d), 10(d)(1), *infra*.

3. Counsel failed to object to irrelevant, unsubstantiated, and inflammatory testimony on the subject of Mr. Evans' gang affiliation (*see* 9(f) and 10(f), *infra*), and failed to provide evidence clarifying the matter.

4. 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 10(g), *infra*, for reasons including, but not limited to, that: (a) there is no field of science for which this witness, who was allowed to render opinions concerning the defendant's future dangerousness, qualified as an expert; (b) the witness was not qualified by education, training or experience to render classification testimony; (c) the witness had no scientific or factual basis for rendering the opinions to which he testified; (d) the witness was wrongfully allowed to testify as to the appropriate sentence, that being "death"; (e) the witness' testimony should have been offered with a limiting instruction that the testimony was subject to the jury's discretion and could be disregarded in its entirety; (f) the witness' testimony should have been excluded after the witness testified that he had inadequate information concerning the defendant's history and prior criminal record to form an adequate opinion on future dangerousness; (g) the witness was allowed to render an opinion regarding classification and future dangerousness utilizing the defendant's tattoos which was a violation of the defendant's rights pursuant to the First and Fourteenth Amendments to the United States Constitution and the Constitution of the State of South Carolina; and (h) counsel failed to conduct a reasonable cross-examination. [Parts of this ground are alleged in Interim Amendments to Original Application for Post-Conviction Relief as Paragraph 10(b)].

5. Counsel failed to object to victim impact testimony elicited during the sentencing proceeding that exceeded the scope permitted by *Payne v. Tennessee*, 501 U.S. 808 (1991), in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution. *See* 9(d), 10(d)(5), *infra*.

6. Counsel failed to object to hearsay testimony introduced during the testimony of Ms. Sapinoso. South Carolina Rules of Evidence, Rule 801(c) prohibits hearsay, which it defines 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."

7. Counsel failed to object to inflammatory, irrelevant and improper statements made by the prosecution in closing argument. Such statements included, but are not limited to, arguments designed to arouse the passion and prejudice of jurors, assertions substituting personal opinions as law, statements diminishing the jury's sense of responsibility for their verdict, statements misrepresenting the proper scope of mitigating evidence, arguments that were not reasonable inferences from the record, and misrepresentations of the nature of alternative punishments. *See also* 9(d), 10(d)(4), *infra*.

8. Counsel failed to object that applicant's prosecution violated constraints imposed by the Equal Protection components of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and South Carolina law.

9. Counsel failed to adequately investigate, present evidence and challenge the testimony of State witnesses regarding the circumstances of the shooting and the cause and manner of death of the two victims. *See* 9(a), 10(a)(2), *supra*.

10. Counsel failed to request the statutory mitigator relating to capacity, S.C. Code § 16-3-20(C)(b)(6). On direct appeal, the South Carolina Supreme Court held that "by failing to make a contemporaneous objection of request for the capacity mitigator, appellant did not properly preserve the issue for our review." *State v. Evans*, 637 S.E.2d 313, 315 (Nov. 6, 2006). [This ground is alleged in Application for Post-Conviction Relief (Dec. 4, 2006) as Paragraph 10(a)]

11. Counsel failed to investigate, develop, and present available, relevant, and admissible mitigating evidence. Counsel's failures in this regard include consenting to a trial date that was merely two months following counsel's appointment to represent Mr. Evans and before starting any mitigation

investigation, failing to retain or present the testimony of a social work expert to explain information gathered regarding Mr. Evans's life history, failing to gather appropriate and relevant social history records, failing to investigate and obtain expert services on lead poisoning and its impact on Mr. Evans's neurological, behavioral, and intellectual development even though counsel knew that Applicant tested with high levels of lead poisoning as a toddler, and failing to provide necessary background information to expert witnesses including Dr. James Evans and Dr. Elin Berg.

9(c): Applicant was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during the appellate phase of his trial.

10(c): Supporting facts: Counsel's performance on direct appeal was unreasonable and prejudicial. *See Evitts v. Lucey*, 469 U.S. 387 (1985); *Strickland v. Washington*, 466 U.S. 668 (1984); *Southerland v. State*, 524 S.E.2d 833 (S.C. 1999). Counsel's acts or omissions included, but are not limited to, the following:

1. Appellate counsel failed to challenge the trial court's denial of trial counsel's request to charge the jury on voluntary manslaughter. *Hopper v. Evans*, 456 U.S. 605, 611 (1982); *Beck v. Alabama*, 447 U.S. 625, 638 (1980). "Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon a sufficient legal provocation." *State v. Ivey*, 325 S.C. 137, 142, 482 S.E.2d 125 (1997); *see State v. Lowry*, 315 S.C. 396, 434 S.E.2d 272, 274 (1993). The testimony at trial established the factual basis for this charge.

2. Counsel failed to challenge the trial court's denial of Applicant's motion for a change of venue, where one of the victims was a law enforcement officer who worked regularly as security at the courthouse in which Applicant's trial was held.

9(d): Applicant's conviction and death sentence were obtained in violation of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and South Carolina law.

10(d): Supporting facts: Errors at trial violated the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and South Carolina law. Those errors include, but are not necessarily limited to, the following:

1. The jury was instructed on an aggravating factor (§ 16-3-20(C)(a)(7)) that, narrowly interpreted as the Eighth Amendment requires (*see Roper v. Simmons*, 543 U.S. 551 (2005);*Godfrey v. Georgia*, 446 U.S. 420 (1980)), was not established by the State's evidence and therefore invalid. Because the presence of the invalid sentencing factor allowed the sentencing jury to consider evidence that would not otherwise have been before it, reversal of the death sentence is mandated. *See Brown v. Sanders*, 546 U.S. 212 (2006); *Zant v. Stephens*, 462 U.S. 862 (1983).

2. The State suppressed evidence that was both favorable to Applicant and material to Applicant's guilt or punishment. *See Banks v. Dretke*, 540 U.S. 668 (2004); *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Simpson v. Moore*, 627 S.E.2d 701 (S.C. 2006).

   [Withdrawn by Applicant as Discussed Below]

3. The state presented testimony that it knew or should have reasonably known was false or misleading, including but not limited to testimony that Applicant was a member of a gang and evidence regarding whether one of the victims was in the line of official duty as a law enforcement officer at the time of his death. *See Washington v. State*, 324 S.C. 232, 235, 478 S.E.2d 833, 835 (1996). *See Napue v. Illinois*, 360 U.S. 264, 279 (1959); *State v. Fullwood*, 274 S.C. 60, 61, 262 S.E.2d 10, 11 (1979)(improper for prosecutor to argue that evidence refuted defendant's claim that victim had knife, when prosecutor knew that law enforcement took a knife from the belongings of the deceased). There is a reasonable likelihood that the false or misleading testimony affected the judgment of the jury. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *Napue, supra.*

4. Applicant's death sentence was obtained in part as a result of the State's inflammatory, irrelevant and improper statements in closing argument. *See, e.g., Darden v. Wainwright*, 477 U.S. 168 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); *State v. Copeland*, 468 S.E.2d 620 (S.C. 1996); *Thompson v. Aiken*, 315 S.E.2d 110 (S.C. 1984); *see also Weaver v. Bowersox*, 438 F.3d 832 (8th Cir. 2006), cert. dismissed, 127 S.Ct. 2022 (2007). 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.

5. Victim impact testimony elicited during the sentencing proceeding exceeded the scope permitted by *Payne v. Tennessee*, 501 U.S. 808

(1991), in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution.

6. The cumulative prejudicial impact of all errors during the guilt-innocence and sentencing trials resulted in a fundamentally unfair sentencing proceeding, in violation of the Due Process Clause of the Fourteenth Amendment. *See Taylor v. Kentucky*, 436 U.S. 478, 487 n.15 (1978)(concluding that "the cumulative effect" of "damaging circumstances" of case "violated the due process guarantee of fundamental fairness").

9(e): The trial court's erroneous qualification of jurors resulted in a jury uncommonly willing to impose death and deprived Mr. Evans of his right to trial by an impartial jury under the sixth and Fourteenth Amendments to the United States Constitution and South Carolina law.

10(e): Supporting facts: The Sixth Amendment guarantees a capital defendant the right to a fair trial before a panel of impartial and indifferent jurors. *See Morgan v. Illinois*, 504 U.S. 719, 728 (1992); *Ross v. Oklahoma,* 487 U.S. 81, 85 (1988); *Duncan v. Louisiana*, 391 U.S. 145, 147-58 (1968); *Turner v. Louisiana*, 379 U.S. 466, 471-73 (1965); *Irwin v. Dowd*, 366 U.S. 717, 722-23 (1961). A "juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do." *Morgan*, 504 U.S. at 729. Further, "[a]ny juror to whom mitigating factors are ... irrelevant should be disqualified for cause, for [they have] formed an opinion concerning the merits of the case without basis in the evidence developed at trial." *Morgan*, 504 U.S. at 738-39. Therefore any juror whose predispositions about the propriety of the death penalty - either generally or related to the specific case - are such that the juror's ability to follow the trial court's instruction that he or she consider the defendant's mitigating evidence is substantially impaired, is not qualified. Several jurors expressed such impairments during voir dire in this case. *See* 9(a) and 10(a), *supra.*

9(f): Applicant's death sentence was obtained in violation of the First, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law by unsubstantiated and irrelevant testimony that Mr. Evans had a gang affiliation and would therefore be a further danger in prison.

10(f): Supporting facts: Evidence of a defendant's political or religious or other associations or beliefs may be admitted *only* if it probatively relates to the murder, to aggravating factors such as future dangerousness, or to rebut a mitigating factor offered by the defense; otherwise, evidence of affiliation or belief, however unpalatable it may be to some, has no relevance in a capital trial, and its

admission violates a defendant's First Amendment right to freedom of association and freedom of speech. *Dawson v. Delaware*, 503 U.S. 159, 163-69 (1992). There is no evidence that Evans' crime was gang-motivated, no evidence that Evans engaged in gang-related activity in or out of prison, no evidence about Evans' behavior in prison linking him to a gang. The evidence lacks the necessary nexus between gang's beliefs or activities and Evans' behavior. Rather than assist the jury in making an individualized determination of whether Evans deserves the death penalty, the irrelevant and unsubstantiated matter injected an arbitrary and invalid sentencing factor into Mr. Evans' sentencing proceeding. *See Zant v. Stephens*, 462 U.S. 862 (1983).

9(g): The trial court erred, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law, in admitting testimony from State witness Lewis Edward O'Cain.

10(g): Supporting facts: 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. *See State v. Council*, 515 S.E.2d 508 (S.C. 1999); *State v. Jones*, 259 S.E.2d 120 (S.C. 1979); South Carolina Rules of Evidence, Rules 403, 702. *See generally Kumho Tire co., Inc. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). See 9(b) and 10(b)(4), *supra.*

(January 28, 2009 Amended Application, pp. 2-7).

On August 31, 2009, before this Court reconvened for the remainder of the PCR evidentiary hearing October 12, 2009, Applicant offered an amendment to the application to include the following allegation:

9(b), 10(b)(12) Counsel failed to object to the trial court's instruction to the jury not to recommend a sentence of life based on mercy. See *Rosemond v. Catoe*, ___ S.C. ___, 680 S.E.2d 5 (No. 26679)(June 29, 2009)(overruling *State v. Hughey*, 339 S.C. 439, 459, 529 S.E.2d 721, 731 (2000)). On June 29, 2009, the South Carolina Supreme Court ruled that a trial court's charge prohibiting the jury from considering mercy was error and that trial counsel performed deficiently in failing to object to the charge. The trial court in *Evans* (the same as in *Rosemond*) provided exactly the same charge that the South Carolina Supreme Court rejected in *Rosemond*. In *Rosemond*, the judge instructed the jury: "[Y]ou may recommend a sentence of life imprisonment for any reason or for no reason at all *other than as an act of mercy*." 680 S.E.2d at 10 (emphasis in original). The South Carolina Supreme Court explained that, contrary to the trial court's charge, the jurors were "entitled to consider [mercy]":

> It is proper to instruct a jury in a capital sentencing phase that it may recommend a life sentence for any reason or no reason at all, including as an act of mercy. A jury's consideration of mercy, if proper evidence of mercy is admitted, is well recognized in the sentencing phase of a capital case. Because a capital jury may consider properly admitted evidence of mercy in the sentencing phase, consideration of mercy is no inconsistent with the instruction that, "the jury should not be guided by sympathy, prejudice, passion, or public opinion...." *State v. Singleton*, 284 S.C. 388, 393, 326 S.E.2d 153, 156 (1985) overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991).

Rosemond, 680 S.E.2d at 10-11. Here, as in *Rosemond*, the trial court also instructed the jury, "[Y]ou may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy." (R. 1785.) Defense counsel's summation emphasized mercy: "I am going to ask for mercy for Kamell Evans... Mercy is unmerited favor. You can't earn it; you don't deserve it; but you give it to him anyway.... We don't repay evil for evil. And mercy is appropriate in this case." (R. 1770.) For the reasons set forth in *Rosemond*, the identical charge in Mr. Evans's [sic] violates South Carolina law and counsel's failure to object to the charge (see R. 1789), rejected in *Rosemond* and at odds with their defense, was deficient and prejudicial.

(August 28, 2009 Amended Application, pp. 4-5).

This Court grants the motion to amend, and the above issue challenging the mercy charge is addressed herein.

Applicant conceded during his response to Respondent's motion for a directed verdict that there was no evidence of a *Brady* violation as alleged in 9(d)(2), and withdrew the allegation at the hearing. (October PCR Tr. pp. 258, 260 and 262). This Court accepts the withdrawal of the issue and the issue is dismissed.

III.
DISPOSITION OF MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT AND TRIAL MOTIONS ON THE ALLEGATIONS

On May 22, 2009, Respondent made an amended return and moved for summary judgment on claims Allegations 9(d)(1), 9(d)(3-6), 9(e), 9(f) and 9(g), based on the argument

Applicant's claims are not cognizable in post-conviction relief as freestanding claims of error, i.e. Applicant raises claims that could have been raised on direct appeal. *See, e.g., Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975)("[e]rrors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings."). (Amended Return and Motion, pp. 8-10). At the beginning of the June evidentiary hearing, this Court denied Respondent's motion. (June PCR Tr. p. 3). Respondent also moved for a directed verdict on those claims, on the same ground, which was also denied. (October PCR Tr. pp. 255-262).

As to Allegation 9(d)(2), [the *Brady* allegation] Respondent also moved for summary judgment and presented an affidavit in support of dismissal. (Amended Return and Motion, p. 10 and attached affidavit). That portion of the motion for summary judgment was also denied at the beginning of the June evidentiary hearing. (June PCR Tr. p. 3). Respondent moved for a directed verdict on this allegation, as well. (October PCR Tr. pp. 255-262). The motion was moot upon concession of lack of proof and withdrawal of the allegation. (October PCR Tr. pp. 258, 260 and 262).

IV.
RELEVANT FACTS

In considering the allegations of the application, and the arguments of counsel, this Court is mindful of the following salient facts:

There is no question that Applicant shot and killed Antonio L. Sapinoso and Deputy Antonio J. Sapinoso after having held them hostage for approximately five (5) hours in the Sapinoso home in Greenville County. Applicant acknowledged same in his statement to the

authorities, in his testimony during the guilt phase, and in his closing statement to the jury. (R. p. 1233; p. 1432; p. 1473).

At the PCR hearing, defense counsel testified that Applicant 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 Applicant's three guns. (See, e.g., R. p. 1445-1448; June PCR Tr. pp. 441-447; Respondent's Exhibit 23; Respondent's Exhibit 25, p. 2). Applicant admitted shooting Deputy Sapinoso in the back of head (though, contrary to the evidence, only once while his head was on the floor). (Respondent's Exhibit 23, page 2; June PCR Tr. p. 765). Moreover, Applicant admitted to his PCR counsel that he was actually trying to re-load his weapon(s) when he was taken down. (Respondent's Exhibit 25, p. 4).

At trial, Applicant 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 that Christina 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." (R. p. 1425, line 11 – p. 1426, line 4). Applicant conceded he parked his truck away from the home, and waited for Deputy Sapinoso to return to the family home. (R. p. 1428). Applicant 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 Applicant's trial testimony, the two sat on the porch until Applicant began to cry and the Deputy suggested they go inside the home. (R. pp. 1428-1436). According to Applicant, the Deputy's father was in the living room with

them, while his mother remained upstairs in the house with her grandson.[2] (R. p. 1431). According to Applicant's testimony, "they" (he and the Deputy) together called Christina. (R. pp. 1429-1430). Applicant 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." (R. 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, Applicant planned to kill her family. (R. pp. 1089-1091).

Tony Lee, a negotiator with the Greenville County Sheriff's Office, conducted negotiations with Applicant to surrender and leave the home. Officer Lee testified that he initially made contact through Applicant's sister, Tina, who was also present outside the home, and Lee told Applicant he could come out at anytime and he would not be harmed. (R. p. 1117, line 10-p. 1118, line 21). Through several hours of negotiations, in addition to speaking with Lee, Applicant was also able to speak with family and friends who encouraged him to come out. (R. p. 1119, lines 6-15; p. 1121, lines 1-24; p. 1127, line 14- p. 1128, line 4). Applicant complained to Lee about his relationship with Christine, but also indicated the situation was not limited to that problem, but was "bigger than that" though Lee was never able to ascertain

[2] During the penalty phase, the jury would hear Mrs. Sapinoso's recounting of events, including the defendant blocking her from calling out for help, and her attempts to shield her grandson, and survive the harrowing event herself. (R. pp. 1549-1554). Nothing in this testimony remotely supports a "family summit" situation downstairs to help Applicant as Applicant would have the jury and court believe. In fact, Applicant later admitted to counsel that the deputy was actually handcuffed. (Respondent's Exhibit 25, p. 2). Even so, this Court recounts the testimony at trial.

exactly what Applicant was referencing. (R. p. 1129, lines 15-25; p. 1134, lines 8-18)(emphasis added). Applicant remained "cordial and nice" to Lee throughout the negotiations, becoming agitated only when Lee asked to speak with Joe, or when Lee requested release of some of the hostages. (R. 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 eventually spoke with Joe and enlisted Joe's help in attempting to assure Applicant of his safety and secure everyone's release. (R. p. 1123, line 20 - p. 1124, lines 18). Lee also arranged, at Applicant's request, for Applicant to speak with Christine. Lee listened to the conversation and thought the conversation "went real well." (R. p. 1124, line 19 - p. 1126, line 8). After Applicant spoke with Christine, Lee spoke to Applicant "a couple of more times" and continued negotiations. Applicant told Lee he thought Lee was "cool" and said he was going to discuss the matter with Joe, and would call back later. (R. p. 1126, lines 11-24). Minutes later, Lee heard multiple shots. (R. p. 1126, line 25 - p. 1127, line 7).

The SWAT team, which was deployed, had not attempted any action prior to the shooting as they were informed negotiations were going well and Applicant would be coming out on his own. (R. 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. (R. 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 Joe Sapinoso face down on the floor with his arms folded underneath his body, with gunshots to the back of the head. His father's body was on the couch. (R. p. 1153, lines 1-9; p. 1174, lines 12-16; p. 1191, lines 3-8; p. 1202, lines 24-25). When the officers rushed Applicant, he immediately said, "don't hurt me." (R. p. 1151, lines 6-14). As the officers attempted to restrain Applicant, Applicant kept trying to turn his

head to see the Deputy's body. (R. 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. (R. 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. (R. 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. (R. p. 1291, lines 2-21). (See also June PCR Tr. pp. 783-784; Respondent's Exhibit 23-A). Additionally, investigators found Applicant's hat in an abandoned house close to the Sapinoso home, where Applicant waited for his victim, and Applicant's car parked significantly, a half of mile so, away. (R. p. 1271; June PCR Tr. p. 779-780; State's Exhibit 40a; Respondent's Exhibit 24, p. 1). Applicant was wearing all black at the time of murders, and had, in addition to his own two guns, several blue bandanas, which were recovered from the scene. (R. p. 1298; June PCR Tr. p. 781; Respondent's Exhibit 23-A). Blue is the color associated with the gang in Applicant's multiple, highly visible, tattoos. (R. pp. 1589-1590; p. 1598; October PCR Tr. p. 72).

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 actually on the floor. (R. p. 1392, line 16-p.1395, line 25; p. 1398, line 15 – p. 1403, line 14). 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." (R. p. 1407, lines 13-18). The father suffered three gunshot wounds to the head and one to the arm. The one to the arm was considered a defensive wound: "... two struck the head, and its

consistent that his arm would have been raised in a defensive posture." (R. p. 1407, lines 6-8). Though in the PCR hearing Applicant presented an expert to disagree with the State's expert on a portion of the findings, the expert agreed, without hesitation, that three of the four shots to Deputy Sapinoso's head were inflicted at close range while his head was on the floor. (June PCR App. p. 765).

V.
DISCUSSION

To establish that counsel was ineffective, a PCR applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error(s), there is a reasonable probability that the outcome of the trial would have been different. *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. *Id.*

"There are countless ways to provide effective assistance in any given case," and the simple fact that trial counsel's strategy was ultimately unsuccessful does not automatically render counsel's assistance constitutionally ineffective. *Strickland*, 466 U.S. at 689. *Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995). "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688; *Drayton v. Evatt*, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993). "We must always be mindful that the standard of prejudice set out in *Strickland* requires more than a mere possibility that the allegedly deficient performance may have prejudiced the defendant in any way." *Poyner v. Murray*, 964 F.2d 1404, 1420-21 (4th Cir. 1992).

The standard of "prejudice" differs depending upon whether it is related to guilt phase issues or penalty phase issues. In order to prove "prejudice" in the guilt phase, an applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). In *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998), the Supreme Court of South Carolina instructed that prejudice may be found in a capital sentencing proceeding when "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." Again, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Jones*, 504 S.E.2d at 823-824. 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*, ___ U.S. ___, 130 S.Ct. 383 (2009).

This Court has considered the following ineffective assistance of counsel allegations in light of the foregoing, and finds that Applicant has failed to show both deficient performance and prejudice.

(9)(a)(1) Ineffective Assistance of Trial Counsel: Failure to Conduct Adequate Voir Dire (Guilt Phase)
(9)(b)(1) Ineffective Assistance of Trial Counsel: Failure to Conduct Adequate Voir Dire (Sentencing Phase)

"The scope of *voir dire* and the manner in which it is conducted are generally left to the sound discretion of the trial court." *State v. Stanko*, 376 S.C. 571, 575, 658 S.E.2d 94, 96 (2008); *State v. Bennett*, 369 S.C. 219, 226, 632 S.E.2d 281, 285 (2006); *State v. Hill*, 361 S.C. 297, 308, 604 S.E.2d 696, 702 (2004); *State v. Tucker*, 334 S.C. 1, 10, 512 S.E.2d 99, 103 (1999); *State v.*

Hill, 331 S.C. 94, 103, 501 S.E.2d 122, 127 (1998). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *Stanko*, 376 S.C. at 575, 658 S.E.2d at 96, *citing* *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

"[A] prospective juror may be excluded for cause when his views on capital punishment are such as would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *State v. Sapp*, 366 S.C. 283, 290-291, 621 S.E.2d 883, 886, *citing Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844 (1985). "The ultimate consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him." *Sapp*, 366 S.C. at 291, 621 S.E.2d at 887.

"[W]hat is constitutionally mandated is the selection of a fair and impartial jury" and "[n]o particular formula of questions is mandated to achieve this goal." *State v. Bennett*, 369 S.C. at 227, 632 S.E.2d at 285, *quoting State v. Hill*, 361 S.C. at 310, 604 S.E.2d at 702-703. "To be constitutionally compelled .... it is not enough that a question may be helpful. Rather, the trial court's failure to ask or allow a question must render the defendant's trial fundamentally unfair." *MuMin v. Virginia*, 500 U.S. 415, 425, 111 S.Ct. 1899 (1991). *See also State v. Wise*, 359 S.C. 14, 23-24, 596 S.E.2d 475, 479 (2004); *State v. Tucker*, 334 S.C. at 10, 512 S.E.2d at 103. Of course, "'[i]t is well established that a trial court has broad discretion in conducting the *voir dire* of the jury and particularly in phrasing the questions to be asked.'" *State v. Bixby*, 388 S.C. 528, 542, 698 S.E.2d 572, 579 (2010), *quoting United States v. Jones*, 608 F.2d 1004, 1009 (4th Cir. 1979). "When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged jurors must be examined in light of the entire *voir dire*." *State v. Bennett*, 328 S.C. at 257, 493 S.E.2d at 848.

Applicant originally complained that counsel was ineffective in regard to five specific jurors or potential jurors - - Eddie Harvey, Elvis Mahaabwa, Sandra Holcombe, James Freeman, and James Plumley. (Amended Application, p. 2). Applicant has abandoned the allegation of error in regard to Juror Harvey, referencing Juror Harvey's qualification only briefly, and by footnote. (Applicant's Post-Hearing Brief, pp. 98-109 and n. 51). [3] In regard to the remaining jurors, Applicant argues three distinct issues which are addressed as follows.

A. Allegation Counsel Missed Arguments to Move to Disqualify Jurors on Statutory Disqualification Grounds and or Presumed Empathy Is Not Supported by Fact or Precedent.

1. Juror Mahaabwa.

The record shows that Juror Elvis Mahaabwa was questioned by the Court, by trial counsel, and by the solicitor. The juror's answers reflected that he could be fair and impartial, could consider either sentence based on the circumstances presented, and return either sentence based on the circumstances and or mercy. (R. p. 172, line 14 - p. 186, line 10). He was qualified without exception. (R. p. 186, lines 17-21). The record supports there is no disqualifying response, and no cause to object. In fact, Applicant does not appear to rest his main argument on the actual responses; rather, Applicant argues an issue with the juror's employment, urging a *per se* disqualification rule. Applicant's argument lacks support in both fact and law.

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[3] As to Mr. Eddie Harvey, even though Applicant has abandoned an allegation of error, the record completely refutes his "noted"complaints. First, he complains that counsel should have "prevented" the juror's qualification. (Applicant's Post-Hearing Brief, p. 109 n. 51). Defense counsel *did* object to the qualification. (R. p. 613, line 21 - p. 614, line 11). There could be no error in regard to this allegation. Moreover, while the juror was qualified over counsel's objection, (R. p. 614, line 12 - p. 615, line 15), his name was only called in selection of the first alternate, at which time counsel used an available strike. (R. p. 970, lines 1-7). The juror never served on the jury. There could be no prejudice. *Ross v. Oklahoma*, 487 U.S. 81, 86, 108 S.Ct. 2273 (1988)("Any claim that the jury was not impartial... must focus ... on the jurors who ultimately sat.").

Applicant argues the juror was " a prison guard, uniquely sensitive to both the underlying crime ... and the aggravating circumstance." (Applicant's Post-hearing brief, p. 98). Applicant is incorrect. The juror, under direct questioning from defense counsel Goldsmith, clarified that he was not a prison guard, but had administrative duties "assigning inmates their jobs and reviewing how they do on their jobs." (R. pp. 178-179). Moreover, Applicant is constrained to admit that there is no automatic disqualifying employment here. (Applicant's Post-Hearing Brief, p. 99). His suggestion that counsel should have made a motion to disqualify the juror pursuant to S.C. Code 14-7-820, and *State v. Cooper*, 291 S.C. 332, 353 S.E.2d 441 (1986), (Applicant's Post-Hearing Brief, p. 99 n. 49), lacks merits.

S.C. Code § 14-7-820 sets out the following disqualification: "No clerk or deputy clerk of the court, constable, sheriff, probate judge, county commissioner, magistrate or other county officer or any person employed within the walls of any courthouse shall be eligible as a juryman in any civil or criminal case." *Cooper* allowed the "sheriff" statutory disqualification to apply to highway patrol officers as the officers are vested by statute with similar powers as deputies, and bound, again by statute, to work with sheriffs. 291 S.C. at 335, 353 S.E.2d at 442. Conversely, the applicability of the disqualification to prison guards, "whose duties," as found by the Supreme Court of South Carolina,"do not involve enforcing the criminal laws of this State," has been soundly rejected. *State v. Hughey*, 339 S.C. 439, 450, 529 S.E.2d 721, 727 (2000). The suggestion that counsel was ineffective for failing to argue against precedent – on the same argument, with even less of a factual basis – is unpersuasive. However, it is indicative of the gist of the entire argument on *voir dire* – counsel could have done more, could have asked one more question, could have tried one more argument. Of course, that is not the *Strickland* test, nor is it a recognized as a requirement to ensure the selection of a fair jury. *See, e.g. MuMin v.*

Virginia, 500 U.S. at 425 ("To be constitutionally compelled ... it is not enough that a question may be helpful. Rather, the trial court's failure to ask or allow a question must render the defendant's trial fundamentally unfair."). Further, in this particular case, Applicant acknowledged that many of the decisions would be made in defense counsel's professional judgment, and he made a knowing and intelligent waiver of his right to contest the manner in which counsel chose, in his professional opinion, to conduct *voir dire* and exercise jury strikes.[4] (June PCR Tr. pp. 472-473). (Respondent Exhibits 22 and 32). It is clear that Applicant had no complaints of the selected jury at the time the jury was selected. (Id). *See Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995)("recogniz[ing] consent as probative of the reasonableness of the chosen strategy and of trial counsel's performance").

Finally, Applicant argues what Respondent has phrased, and which this Court adopts, a "general fear of possible empathy" from a shared chosen profession. (Applicant's Post-Hearing Brief, p. 99). However, since the victim was not an officer, and not a prison guard as Applicant argues, the argument is not relevant. Moreover, the suggestion "[t]his principle" of the necessity of excluding similarly situated individuals "has been widely recognized as necessary to protect the rights of defendant," is curiously only supported with a 1985 Eleventh Circuit non-murder case (where the actual equivocation by the juror was as important as her work bias), a 1968 D.C. Circuit murder case footnote (where the process of expanded capital *voir dire* was still being molded), and a Virginia state court of appeals non-capital case that was vacated on *en banc* rehearing. In fact, the Virginia court in vacating the opinion – recognizing "the only relationship between the victim and Juror ... is that they share the same occupation and the risk of suffering

[4] Even though Applicant acknowledged his deference to defense counsel in this regard, defense counsel still included Applicant in the process. (See June PCR Tr. pp. 472-473).

the same type of assault upon which this action was based" – specifically held that "the application of a *per se* rule is unwarranted, and that Juror Person's employment, without more, does not require that bias should be imputed." *Williams v. Comm.*, 466 S.E.2d 754, 756 (Va.Ct.App. 1996). Applicant fails to support his suggestion. Additionally, he must expand the argument found in these isolated cases for the argument to apply here. He attempts to do so by use of a "sense of camaraderie" argument. The offered argument to expand the possible empathy beyond its comfortable borders (i.e. directly shared professions) is unpersuasive. It is too broad a rule to apply effectively.

In sum, this Court finds there is no "same profession" analysis – for what it's worth – to be made here. Moreover, defense counsel Sumner testified that he was aware of the juror's background and made a decision that the juror would be helpful and understanding of the reality of prison life as harsh and dangerous, increasing the possibility of a life sentence. In particular, Sumner testified that the juror, from a position of real world experience, could support "George Martin's testimony that was coming in about SCDC conditions and can tell the jurors Martin is right, that's exactly the way that it's going to be...." (June PCR Tr. pp. 382-384). This was especially important where defense counsel placed great emphasis on the penalty phase, and where counsel offered prison conditions and or security measures due to expressed gang affiliation evidence for the specific (and admissible) purpose of combating the State's testimony of the advantages and heightened danger within prison due to his expressed gang affiliation. (See June PCR Tr. pp. 383-384; p. 433). This is an exercise of professional judgment of the sort necessary and recognized as particularly reserved to counsel. *See Palacio v. State*, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999)(citing with approval multiple cases wherein "other courts have

held jury selection is a process that inherently falls within the expertise and experience of trial counsel").

2. Alternate Juror James Freeman.

As to Mr. James Freeman, the record shows that he was also questioned by the Court, by the solicitor, and by trial counsel, and his answers also reflected that he could be fair and impartial, could consider either sentence based on the circumstances presented, and could return either sentence based on the circumstances. (R. p. 677, line 19 - p. 693, line 22). He was qualified without exception. (R. p. 693, lines 23-25). However, though chosen as Alternate 1, he did not participate in the jury deliberations.[5] (R. p. 1503, line 6 - p. 1508, line 10; R. p. 1796, line 1 - p. 1797, line 24). Thus, whatever complaints Applicant may have of the juror's qualification, his qualification could have no bearing on the fundamental fairness of the deliberations. *Ross v. Oklahoma*, 487 U.S. 81, 86, 108 S.Ct. 2273 (1988)("Any claim that the jury was not impartial... must focus ... on the jurors who ultimately sat."). Applicant can show no prejudice. *Id. See also_State v. Green*, 301 S.C. 347, 353, 392 S.E.2d 157, 160 (1990)(applying *Ross* in evaluating prejudice). However, the record supports there is no disqualifying response, and no cause to object.

Applicant maintains that the juror, because his son was seeking a career in law enforcement, that he would show empathy toward the victim, much like the argument "shared

[5] During the twenty-four hour break in the proceedings, one of the seated jurors who had participated in the guilt deliberations, Larry Coker, lost his mother and was excused. The trial judge placed the names of the three selected alternate jurors, (James Freeman, Marlon Sullivan, and Broadus Hawkins), in an envelope and the clerk drew one of the names. Marlon Sullivan (selected as Alternate 2), replaced Mr. Coker on the jury and participated in the sentencing deliberations. (R. p. 1511, line 4 - p. 1513, line 1).

profession" argument attempted with Juror Mahaabwa above. Not only is the connection even more remote, and the argument for some *per se* disqualification rule baseless, Applicant only makes the argument based on a parsing of the responses. "When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged jurors must be examined in light of the entire *voir dire*." *State v. Bennett*, 328 S.C. at 257, 493 S.E.2d at 848. The record reflects that Juror Freeman struggled with the questions regarding any bias toward law enforcement testimony. However, upon questioning by defense counsel, the juror explained, "just because the office would say X is true, I don't necessarily take that as gospel." (R. p. 691). He added that "[i]f all the circumstances were equal, probably, yes" that he would accept the testimony of greater weight than others. (R. p. 691). There is also, curiously, a sidebar noted immediately after that questioning by defense counsel. That sidebar was not required or recapped at the conclusion of the questioning. Even so, the record does not reflect an unthinking, accepting of all information, slant to the juror's perception. Moreover, just a connection with law enforcement is not a proper basis to remove the juror cause. *Cf. State v. Kiser*, 284 S.W.3d 227, 271 (Tenn. 2009)(rejecting argument that failure to excuse jurors who, at one point, indicated favoring law enforcement, rendered sentence arbitrary; jurors had been rehabilitated, defense counsel had expressed approval of the jurors at trial, and fact that law enforcement aggravator was only aggravator did not enhance probability of error as the Eighth Amendment is not so broad as to support that a "juror having a sympathetic relationship At any rate, as noted, the juror did not serve and no reversible error could have occurred. *Ross, supra.*

B. Allegation That Counsel Failed to Strike Jurors Mahaabwa and Holcombe When Their Answers Indicated They Would Always Impose Death Depends On Untenable Parsing of the Responses. When Read As a

Whole, the Responses Do Not Establish an Automatic Death Penalty Response.

Applicant asserts the referenced jurors "equated a guilty verdict with a death sentence,' and were "incapable of properly considering mitigating evidence." (Applicant's Post-Hearing Brief, p. 104). When read in context, however, as it must be, *Bennett*, *supra*, the responses are decidedly not indicative of "automatic death" responses.

1. Juror Mahaabwa.

Applicant takes issue with Juror Mahaabwa's response that, "if there hasn't been a crime which needs capital punishment, then they don't have to ask for it." (R. p. 181-182). Applicant argues counsel should have asked for clarification. (Applicant's Post-Hearing Brief, p. 105). Counsel did seek clarification. In fact, it was defense counsel who posed the question *due to the responses on the questionnaire* regarding whether the death penalty is sought "about the right amount of time," to ensure the juror *was not* an "automatic death" juror. (See R. p. 181-182). Further, the juror specifically clarified that his response had "nothing to do with [... the...] three suggestions. Those are two different, separate questions there." (R. p. 182). In other words, by his own explanation, there was a difference in seeking the penalty and deserving the penalty. Applicant simply does not discuss this juror's explanation. Again, one must look at the entire conversation to fairly analyze the responses. *Id.*

2. Juror Sandra Holcombe.

The record shows that Juror Holcombe was questioned by the Court, by the solicitor, and by trial counsel, and her answers reflected that she could be fair and impartial, and could consider either sentenced based on the circumstances presented. (R. p. 260, line 12). (See, for

example, R. p. 252, line 1, "It really depends on the evidence" and R. p. 259, lines 21-25, "I could do either one. It just depends on what the evidence is brought to me, and I guess what's in my heart... which one I would think would be more appropriate."). She was qualified without exception. (R. p. 260, lines 15-22). The record supports there is no disqualifying response, and no cause to object. Applicant, however, argues counsel was ineffective for not identifying suspect responses during the solicitor's questioning of the juror, (Applicant's Post-Hearing Brief, pp. 105-106, citing R. p. 254-255), or exploring answers to defense counsel's questioning, (Applicant's Post-Hearing Brief, p. 106, citing R. p. 258). While the juror did say she did not believe the death penalty was imposed "not enough in most cases that I've heard," *upon additional probing by defense counsel*, the juror explained:

> To me there is some cases that deserve the death penalty, and there's others that don't. But, then again, I don't serve on the jury, so I don't hear all of the evidence, and so that's that's the reason why. I just depends on the case and the evidence brought to me.

(R. p. 258). (See also R. pp. 259-260, affirming sentence would "depends on ... the evidence").

When read in context, and read in its entirety, the responses of this juror do not show any "automatic death sentence" disqualifying response. Moreover, any suspect answers prompted additional clarifying questions by defense counsel. Applicant has failed to show deficient performance and prejudice.

C. Applicant's Allegation That Voir Dire was Overall Cursory and Brief, Therefore There Must Be Error, Fails for Improper Presumption of Error.

Contrary to Applicant's allegations, this Court has reviewed the record and finds there were no automatically disqualifying responses. Moreover, the record supports that the *voir dire* here was extensive, spanning not only the in-court questions, but also jury questionnaires. (See,

for example, R. p. 173 (Juror Mahaabwa confirming the truthfulness of his answers to the questionnaire; R. p. 181 (Juror Mahaabwa explaining, upon defense inquiry, one response reflected on questionnaire going to fairness and impartiality)). (See also June PCR Tr. p. 387, Defense Counsel Sumner referencing both in court questions and questionnaires). There is no cause to find *voir dire* insufficient simply because the record indicates the procedure was "too short" or that another procedure could have been used. *See, for example, State v. Bixby*, 388 S.C. at 543, 698 S.E.2d at 580 ("the qualification of jurors was extensive and defense counsel did not challenge the qualification of the impaneled jurors because he had sufficient information from both their answers to the detailed questionnaires and his questioning to determine that each was qualified"); *State v. Bryant*, 372 S.C. 305, 314, 642 S.E.2d 582, 587 (2007)("Because the use of paper strikes did not deprive Bryant of a fair trial by an impartial jury, we hold that the trial court did not err in refusing to allow jurors to be present during jury selection."). There is no indication of real error – i.e. the selection of a constitutionally unqualified juror, or the omission of a necessary question, as determined by United States Supreme Court precedent in the juror selection process – in the selection of Applicant's jury. *See Ross, supra; State v. Stanko*, 376 S.C. at 576, 658 S.E.2d at 96 ("To constitute reversible error, a limitation on questioning must render the trial fundamentally unfair."). Thus, Applicant has failed to carry his burden of proof.

As to Applicant's suggestion that defense counsel could have asked more questions, he has neither alleged nor shown a specific error. "[W]hat is constitutionally mandated is the selection of a fair and impartial jury" and "[n]o particular formula of questions is mandated to achieve this goal." *Bennett*, 369 S.C. at 227, 632 S.E.2d at 285. The Supreme Court of South Carolina has recently rejected a challenge to the sufficiency of *voir dire* where the trial judge

disallowed defense counsel to instruct the jury on legal definitions. In essence, defense counsel argued that the jury must be instructed on the legal definition of murder (i.e. not self-defense, etc), to "ascertain[] each potential juror's qualification with regard to their views on capital punishment." *Bixby*, 388 S.C. at 541-42, 698 S.E.2d at 579. Of course, "such information is disseminated to jurors by way of jury instructions, not questioning on voir dire." Id, 388 S.C. at 543, 698 S.E.2d at 580. But, at any rate, there was no error in disallowing the instruction as "the qualification of jurors was extensive and defense counsel did not challenge the qualification of the impaneled jurors because he had sufficient information from both their answers to the detailed questionnaires and his questioning to determine that each was qualified." *Id.* Likewise, here, the possibility of additional questions is limited only by the imagination of subsequent counsel. Another attorney can always think of some additional question. However, the process at issue here – which was personal, extensive, and supplemented by questionnaires – provided sufficient information to draw a proper jury. There is no error.

As to specific instances of deficient performance in questioning, Applicant's argument and proof is sparse. Applicant argues that counsel questioning of Juror Coker was "far too brief to uncover any potential biases." (Applicant's Post-Hearing Brief, p. 107). He also presents the similar "too brief" argument in regard to Jurors Kirby, Mahaffey and McMutrey. (Applicant's Post-Hearing Brief, p. 108). Applicant did not even question defense counsel about the *voir dire* for these jurors. (See June PCR Tr. pp. 379-392). Applicant has not presented any information that could have been discovered if other questions were asked that would impugn the clear responses supporting qualification, or counsel's strategy in regard to questioning. For instance, while defense counsel' s questions to Juror Mahaffey are reflected on two (2) pages in the record, (R. pp. 535-536), questions from the court, defense counsel, and the solicitor spans

thirteen (13) pages, (R. pp. 528-540). This is in addition to the responses to the questionnaire, which all parties had. (See R. pp, 528-529; p. 535). Moreover, as to the verbal questions, a fair reading of the record reflects that the solicitor was much more concerned about bias against the state in regard to Juror Mahaffey due to involvement in a drug program, and possible connection to a defense expert, than the record reflects an indication of bias against the defense. (See R. pp. 536-538). In other words, the State may have had more to be concerned about than the defense. Merely citing a short verbal *voir dire* simply does not show error and prejudice for any one particular juror.

The same is true for Applicant's arguments based on concise verbal *voir dire* by defense counsel of Jurors Kirby and McMurtrey. (See R. pp. 498-511 (Juror Kirby); R. pp. 188-200 (Juror McMurtrey)). When viewed as a whole, the record reflects ample information upon which to intelligently qualify and select the jury. And that is *just* the written record and the questionnaires. As defense counsel Sumner noted, many times defense counsel has non-verbal clues to a juror's attitude, bias, or belief. (June PCR Tr. pp. 386-387). Hearing and seeing the responses first hand cannot be undervalued in assessing credibility issues and determining whether a juror should be struck. *Cf. Matthews v. Evatt*, 105 F.3d 907, 918 (4th Cir. 1997)("counsel must be entitled to make credibility determinations in exercising peremptory challenges"); *State v. Wilder*, 306 S.C. 535, 538, 413 S.E.2d 323, 325 (1991)(strikes may be exercised on the basis of the potential jurors' "demeanor and disposition").

As to Applicant's argument that defense counsel had no verbal questions, at all, for Juror Sullivan, (Applicant's Post-Hearing Brief, p. 108), Applicant is correct that defense counsel had no questions, (R. p. 736). However, that was only *after* receiving a questionnaire, with responses, and *after* thorough questioning by the Court, reflected in some nine (9) pages of the

record. It simply cannot be said that this juror was qualified absent any questions. Applicant has failed to argue that the questionnaire responses and the court's questions were inadequate in some way, and none is readily apparent in the record. There is no need to parrot empty questions simply to avoid a later issue in PCR. Again, Applicant has failed to offer a substantive issue for review, much less shown error.

Finally, as to Mr. James Plumley, the record shows that he was questioned by the Court, by trial counsel, and by the solicitor, and his answers reflected that he could be fair and impartial, and could consider either sentence based on the circumstances presented, and return either sentence based on the circumstances. (R. p. 482, line 25 - p. 496, line 24). (See, for example, R. p. 494, lines 3-4, in response to whether the death penalty is imposed too often or often enough or about right, the juror responded, "I think each case has to have its own merit..."). He was qualified without exception. (R. p. 497, lines 6-14). Applicant argues that his responses at one point, indicated he might vote with the majority:

> A I would have - - if the evidence proved that that was the punishment deemed necessary, I have no problem with that. I should have said yes. I meant I think so in a positive way.
>
> Q In other words, it depends on the evidence.
>
> A Yes, I wouldn't, I wouldn't have no problem, I mean there would be, I 'm not just, wouldn't be free.
>
> Q I understand that. Right.
>
> A But if the evidence, that's what the evidence showed and 11 other people agreed with me, I would have not problem signing the paper and having that be the verdict.

(R. p. 496).

This Court disagrees. In context, the juror, *after* his questionnaire responses, *after* questioning by the judge, and *after* questioning by defense counsel, and upon questioning by the

solicitor, simply said he could follow the procedure. There is nothing in that passage that reflects he would not follow the law as given to him. To the extent Applicant relies on *State v. Bennett,* 328 S.C. 251, 493 S.E.2d 845 (1997), as requiring a specific question on whether the juror would follow the majority, (See Applicant's Post-Hearing Brief, p. 109), Applicant incorrectly interprets the precedent. The Supreme Court of South Carolina has twice held that such a question is *not* mandated. *State v. Bennett*, 369 S.C. 219, 226-227, 632 S.E.2d 281, 285-286 (2006)(*Bennett II*); *State v. Hill,* 361 S.C. 297, 308, 604 S.E.2d 696, 702 (2004). In fact, in *Bennett II*, when asked to "reconcile" the first decision with the subsequent *Hill* case, the Supreme Court of South Carolina explained:

> Appellant urges us to reconcile a perceived conflict between *Hill* and our opinion in Appellant's first appeal before this Court. As we stated in *Hill, Bennett* did not determine the appropriateness of the "go with the majority question." *Hill,* 361 S.C. at 309, 604 S.E.2d at 702. In fact, the only issue in *Bennett* was whether the questioned juror was "unbiased, impartial, and able to carry out the law as executed." *Id.* Although Appellant properly points out that the court might never have discovered the juror in his first trial without the "go with the majority" question, it is equally true that no amount of questioning can provide a clear picture of a juror's biases or tendencies. *Wainwright v. Witt,* 469 U.S. 412, 424-25, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). "[T]hese veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings." *Id.* This position is strengthened by our previous recognition of the trial judge's duty to focus *voir dire* upon matters enumerated in the death penalty statutes and to eliminate excessive intrusions into the privacy of prospective jurors. *State v. Plath,* 281 S.C. 1, 7, 313 S.E.2d 619, 622 (1984) (*citing State v. Koon,* 278 S.C. 528, 532, 298 S.E.2d 769, 771 (1982)).

369 S.C. at 227, 632 S.E.2d at 286 n. 1.

In sum, the very question Applicant seeks to fault counsel for not asking, is one not allowed by our jurisprudence. Moreover, the record reflects the juror was properly and fully

questioned, and further, supports the juror qualification. Again, this Court concludes Applicant has failed to establish deficient performance and prejudice.

D. Allegation Trial Judge Interfered with Challenge for Cause by Disqualifying Jurors Before Hearing Objections is An Allegation of Trial Court Error Not Cognizable in this Action.

As to Applicant's suggestion "the trial judge failed to respect Evans's right to challenge jurors for cause by repeatedly disqualifying jurors before hearing objections from either side," (Applicant's Post-Hearing Brief, p. 107 n. 50), this a trial court error, not alleged in the issue presented, and not cognizable in this action absent a claim of ineffective assistance.[6] *Simmons, supra.*

E. Allegation Counsel Erred in Not Injecting a Race Question on Voir Dire is Rejected as Counsel Testified that Race Was Not an Element or Issue in the Case.

As to Applicant's assertion of counsel error based on the failure to request *voir dire* on racial bias given the difference in races of the victims and Applicant, (Amended Application, p. 2), Applicant has not shown deficient performance. At the PCR hearing, defense counsel Sumner testified that he perceived no racial issue. (June PCR Tr. p. 475). Applicant has offered none. In fact, his brief has merely one sentence simply generally referencing race in *voir dire*: "Finally, counsel failed to utilize Evans's right to inform potential jurors of his race."

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[6] Even so, the allegation is without merit. The final determination on qualification is in the discretion of the trial judge. *State v. Woods*, 382 S.C. 153, 161, 676 S.E.2d 128, 133 (2009). Moreover, that decision will not be reversed on appeal unless "wholly unsupported by the evidence." *Id, citing State v. Green, supra.* It is not necessary in all cases that defense counsel be allowed to question the juror at all: "When the record reveals a juror plainly is not qualified, after thorough examination by the trial judge, to serve and it does not reasonably appear further examination would likely reveal the juror could subordinate his views and apply the law of the state, a reasonable basis exists for excusal for cause of the juror without further examination by defense counsel." *State v. Wise*, 359 S.C. 14, 26, 596 S.E.2d 475, 481 (2004).

(Applicant's Post-Hearing Brief, p. 107). Applicant's citation to *Turner v. Murray*, 504 U.S. 719 (1992), is of no help in interpretation of the argument.

In *Turner*, the United States Supreme Court acknowledged the possibility in *voir dire* of revealing the race of the *victim* in interracial capital cases. *Turner v. Murray*, 476 U.S. 28, 36-37, 106 S.Ct. 1683 (1986)("We hold that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias" but noting that counsel may decide such inquiry is not advisable or warranted). Moreover, the Court recognized great latitude in counsel's decision on whether to pose such questions at all. *Id.* *See also Sexton v. French*, 163 F.3d 874, 886-887 (4th Cir. 1998)(finding on habeas review that the state court did not unreasonably apply federal law in concluding counsel was not ineffective in failing to ask questions on racial bias in part on counsel stated belief that "under the facts of the case, the case was not particularly racially charged"). The record here fully supports that nothing indicates a racially motivated crime, or some other incident, phrase or reason one could extrapolate from the evidence that race would be considered a factor. Moreover, arbitrarily injecting race would run the risk of raising the specter of racial motivation, or influence or bias, into the potential juror's minds where it otherwise would not exist. At any rate, Applicant has failed to show any deficient performance or prejudice.

9(a)(2) Ineffective Assistance of Counsel: Failure to Investigate Circumstances In Which Shots Were Fired And Challenge State's Witnesses Regarding the Cause and Manner of Death of the Two Victims (Guilt Phase)

9(b)(9) Ineffective Assistance of Counsel: Failure to Adequately Investigate, Present Evidence and Challenge the Testimony Concerning the Circumstances of the Shooting and the Cause and Manner of Death of the Victims (Sentencing Phase)

Trial counsel was not ineffective in failing to object to, challenge or otherwise counter the forensic evidence regarding the manner in which the shootings occurred.

As noted above, forensic evidence, as presented by the State's expert, showed that Deputy Joe Sapinoso was shot in the back of the head, four times, at close range (within two to three feet), while the deputy's head was actually on the floor. (R. p. 1392, line 16-p.1395, line 25; p. 1398, line 15 – p. 1403, line 14). 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." (R. p. 1407, lines 13-18). The father suffered three gunshot wounds to the head and one to the arm. The one to the arm was considered a defensive wound: "... two struck the head, and its consistent that his arm would have been raised in a defensive posture." (R. p. 1407, lines 6-8). Applicant was cross-examined at trial about having shot Deputy Sapinoso in the back of the head four times. (R. p. 1443, line 13 - p. 1444, line 12). Applicant never denied, or attempted to correct, the solicitor's reference to the facts as Applicant having shot "a uniformed deputy sheriff in the back of the head four times while he is kneeling on the floor." (R. p. 1443, lines13-20).[7] Even so, during the PCR hearing, Applicant presented an expert to indicate that there may have been a basis to contest the shots to the deputy's head.

[7] As noted in the initial return, the forensic pathologist and chief medical examiner, Dr. Michael Eugene Ward, testified that based on wounds and the "historical information given" that all four of the bullets were fired into the deputy's head while his head was on the floor, and "the muzzle of the gun was less than two to three feet from" his head. (R. p. 1402, line 24 - p. 1403, line14). Dr. Ward testified before Applicant and it appears Applicant was present for the complete testimony. Therefore, the basis for the assertion by the solicitor was well supported by the record, and Applicant was well aware of the facts presented to the jury before he testified.

As a first matter, Applicant's expert, Dr. Jonathan Arden, conceded that three shots could not be interpreted otherwise – specifically those shots to the back of the head, while the deputy's head was on the floor. (June PCR App. p. 765 ("[t]he evidence does indeed indicate that Joe Sapinoso's head was down for the three gunshot wounds that were labeled Nos. 1, 2 and 3...."). Moreover, the shots at issue were arbitrarily numbered. (Id). In sum, there is no way of determining which of the shots were fired first. At no point has Applicant been able to successfully challenge the three, without question, execution style shots. Moreover, Dr. Arden spoke in alternatives, not absolutes. (June PCR Tr. p. 765, "just as reasonable" as Dr. Ward's). This battle of experts simply does not show error by the State's witness or persuasive additional testimony, especially in light of the remaining unchallenged evidence. Moreover, Dr. Arden's testimony that the exhibits were false is strained, certainly an eye-catcher, but without substance. The demonstrative aids (which by definition are used in demonstration only, and do not go back to the jury room), are simply that – a demonstrative aid reflecting an approximation based on photographs and a drawing (incidentally a drawing used in virtually every autopsy, a standard form). (See October PCR Tr. p. 263-268). Moreover, the demonstratives aids were approved by the medical examiner. (See October PCR Tr. p. 268). However, such an assertion of "error" shows a strain to the testimony that weighs against fully crediting and accepting the testimony.

At best, the offered evidence shows that only three of the four bullets were delivered as described, and the fourth, may have been or may not have been - it is a contest between experts as to one of the four shots to Deputy Sapinoso's head. Applicant has failed to show Dr. Ward's opinion is medically or forensically incorrect, and even failed to call Dr. Ward to question whether his opinion would change in light of a challenge. Moreover, such divided testimony would not even obtain a manslaughter charge as the shots were clearly inflicted when a victim

tried to free himself, *see State v. Shuler*, *supra*; would not explain any circumstance or fact as to why he had to shoot the deputy while the deputy's head was on the floor, (see Respondent's Exhibit 25, p. 3); and would likely alienate the jury by attempting to blame a faultless victim, *see generally Howell v. State*, 877 So.2d 697, 704 (Fla. 2004)("the tremendous potential for alienating the jury by blaming the trooper for his own death, fully justifies trial counsel's strategic decision to forego presentation of the alleged policy violation during the guilt phase"). Further, such possible "alternatives" would not change the remaining facts supporting a planned act of violence; would not change the testimony of officers that no sound was noted before the series of shots began, and would not change the location of the body, found on the floor, with his arms tucked under his body. As defense counsel Sumner testified, these are facts that would not be affected at all by this "light-weight" challenge to one of the four deadly shots, and all the other information that supported a well thought out crime. (June PCR Tr. pp. 446-448; pp. 518-520). Even Dr. Arden admitted Applicant's explanation could not be entirely truthful. (See, for example, June PCR Tr. p. 785, "He certainly brought with him a number of items that don't relate to talking."). As such, highlighting this unwinnable argument would only focus the jury more on the shooting itself, the violence itself. As counsel testified, they, with Applicant's consent, made a conscious decision to move through the guilt phase as quickly as possible to avoid emphasis of these facts. (See, for example, June PCR Tr. p. 327; pp. 495-496).

Applicant has failed to show deficient performance. Alternatively, if there was deficient performance, Applicant has failed to show prejudice in light of the remaining evidence, particularly the unchallenged three shots to the back of the deputy's head, while the deputy's head was on the floor.

9(a)(3) Ineffective Assistance of Trial Counsel: Failed to Effectively Move for Change of Venue

Trial counsel was not ineffective in failing to more aggressively pursue a change of venue. Trial counsel requested specific *voir dire* on this issue, and filed a pre-trial motion for change of venue based upon media coverage. After being allowed *voir dire* on the issue, and based on the responses received, trial counsel simply requested a ruling on the pre-filed motion without further argument. (See R. p. 1008, line 3 - p. 1009, line 25). As counsel conceded in the motion hearing, and as the record shows, the jurors were questioned on pre-trial media coverage. This included not just in court *voir dire*, but also questionnaires sent out prior to qualification. (See for example, R. p. 179, line 24 - p. 180, line 21).[8] Each and every juror seated was questioned about pre-trial publicity and whether, if they should know anything about the facts of the case, that would influence their decision. No seated juror expressed any such knowledge or bias. All thirteen of the jurors who eventually served answered that they were not familiar with any specific facts from pre-trial publicity, and there was no evidence of a preconceived opinion on same. (See R. p. 175, line 19 - p. 176, line 19 (Elvis Mahaabwa); p. 189, lines 21-24 (Daniel McMurtrey); p. 218, lines 9-15 (Kevin Colling); p. 230, line 15 - p. 231, line 3 (Dwayne Drake); p. 248, lines 1-3 and p. 257, line 23 - p. 258, line 5 (Sandra Holcombe); p. 289, lines 10-24

[8] The individual juror questionnaires are held in the clerk's office. The forms reflect the follow questions:

22. Do you have any knowledge about the case of The State v. Kamel Delshawn Evans? ___ If so, have you already formed an opinion about the case such that it would affect your ability to be fair and impartial if you were selected as a juror in the case? _____

24. Do you know of any reason why you would not be able to be fair and impartial if you were selected to serve as a juror in this case? ____. If so, explain: _____

(Larry Coker); p. 469, line 20 - p. 470, line 8 (Mark Branyon); p. 484, lines 11-18 (James Plumley); p. 500, lines 7-12 (Margaret Kirby); p. 530, lines 4-10 (Toni Mahaffey); p. 564, lines 16-25, p. 570, lines 13-21, and p. 574, lines 14-25 (Bryan Megonigal); p. 578, lines 17-24 (Jacklynn Higgins); p. 727, line 23 - p. 728, line 5 (Marlon Sullivan)). While Dwayne Drake, Larry Coker and Mark Branyon all seemed to vaguely recall the fact of media coverage of the incident, each testified that they did not recall any specific details at all. (R. p. 230, line 15 - p. 231, line 3 (Drake); p. 289, lines 10-24 (Coker); p. 469, line 20 - p. 470, line 8 (Branyon)).

The Constitution requires that a criminal defendant be afforded a trial by a "panel of impartial, indifferent jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 , 81 S.Ct. 1639 (1961). In *Dowd*, the United States Supreme Court noted that media coverage was a reality, and cautioned that "[i]t is not required ... that the jurors be totally ignorant of the facts and issues involved" for a defendant to obtain a fair trial. *Id.* What is of particular importance is the juror's ability to put aside any previously held opinions, and base his verdict on the evidence admitted at trial. *Id* at 723. Thus, "[w]hen a change of venue motion is predicated on pre-trial publicity, the relevant inquiry is whether potential jurors have 'such fixed opinions that they could not judge impartially the guilt of the defendant.'" *State v. Gardner*, 332 S.C. 389, 392, 505 S.E.2d 338, 339 (1998), *quoting State v. Manning,* 329 S.C. 1, 495 S.E.2d 191 (1997).

Here, 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." (R. p. 1010, line 20 - p. 1012, line 1). In sum, the record shows careful questioning by trial counsel and the trial judge to determine any bias due to media coverage, and expressly provides a record of trial counsel's efforts to request such specific questioning to ensure a fair trial. (See R. p. 1008, line 21 0 p. 1009, line 25). In the absence of any bias, or for that matter,

any knowledge of the particular facts of the crime at all due to media coverage, no motion for change of venue could be meritorious. *See State v. Evins*, 373 S.C. 404, 412, 645 S.E.2d 904, 908 (2007)("When a trial judge bases the denial of a motion for a change of venue because of pretrial publicity upon an adequate *voir dire* examination of the jurors, his decision will not be disturbed absent extraordinary circumstances").

Applicant contends, however, that the process was incomplete as the trial was held in the victim's workplace and the juror were not question and or the trial moved. (Applicant's Post-Hearing Brief, p. 115). That assertion, however, is not accurate as Deputy Sapinoso had moved on to be an investigator. (R. p. 1531). At any rate, he had worked in the courthouse and very many peopled knew him. In fact, Applicant'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 conflict or bias. Even so, Applicant relies on a 2009 Eastern District of New York case, *United States v. Wright*, 603 F.Supp.2d 506 (E.D.N.Y. 2009), to argue a change of venue was warranted. (Applicant's Post-Hearing Brief, p. 116). 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 not translate well to the instant situation for several reasons.

First, the employee at issue in *Wright* was an active employee "name 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 moved up in law enforcement 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. *Wright* is simply not applicable.

At any rate, Applicant has failed to show bias. 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. Applicant's argument remains speculative. He has failed to show deficient performance and prejudice.

9(b)(2) Ineffective Assistance of Counsel:
Failed to Move to Quash Aggravating Circumstance

Trial counsel was not ineffective in their treatment of the 16-3-20(C)(a)(7) statutory aggravating factor, as whether Mr. Joe Sapinoso was killed "during or because of the performance of his officials duties" was a factual issue properly presented to the jury.

Applicant alleges that defense counsel was ineffective for failing to object to the submission of the law enforcement aggravator. He argues that the evidence submitted in support of the aggravator was insufficient as a matter of law. (Applicant's Post-Hearing Brief, pp. 76-78). Consequently, he argues, counsel should have acted to prevent its submission to the jury. (Id.). The record reflects the evidence was sufficient to allow submission of the statutory aggravating circumstance to the jury. At any rate, even if Applicant could show error, he could

show no prejudice, as the jury found three (3) other statutory aggravating circumstances that support the sentence of death. Applicant is not entitled to any relief.

A. The Sheriff's Testimony Regarding On-Duty Police and Death Benefits Was Sufficient to Support the Law Enforcement Aggravating Circumstance Requirement 1) That Victim Was a Law Enforcement Officer, 2) That Victim was On-Duty According to Department Police When The Kidnapping Began; and 3) Given that Kidnapping is a Continuing Offense, That The Law Enforcement Officer Was Killed "During or Because of the Performance of His Official Duties.

The statutory aggravating circumstance at issue, reads in relevant part, that the death of the law enforcement officer be "during or because of the performance of his official duties." S.C. Code § 16-3-20 (C)(a)(7). The phrase is not otherwise explained or defined. Thus, the ordinary meaning is controlling. *See, e.g., State v. Locklair*, 341 S.C. 352, 366, 535 S.E.2d 420, 427 (2000)("In construing statutes, words must be given their plain and ordinary meaning without resort to subtle or forced construction in attempt to expand the statute.")

The crux of Applicant's argument is that the evidence presented was insufficient to show that Applicant was killed while still on-duty, i.e. "during or because of the performance of his official duties." Applicant relies on two different theories. The first is that because the deputy was not actively involved in arrest or investigation, then the evidence he was on-duty is not sufficient to support the aggravator. The second is that because the deputy was murdered hours after he was first abducted, he was no longer on-duty at the time of the murder. Both arguments fail as a matter of law and fact.

1. There was Evidence, both by Policy and Benefits, that Supported the Deputy Was Still On Duty At the Time of the Abduction. Thus, Aggravating Circumstance Was Properly Before the Jury.

Applicant begins his argument by noting other cases where the aggravator was charged while the officer victim was *actively* engaged in a focused law enforcement action. (Applicant's Post-Hearing Brief, p. 73 n.35). Applicant's argument must necessary rely on the conclusion that being on-duty without actively engaging in a focused law enforcement action – such as arresting, stopping, questioning or in some way confronting an individual – does not support applicability of the aggravator. Applicant's proposed new interpretation requires giving the statute a meaning not supported its plain language. Applicant's theory renders the "or" meaningless – a direct contravention of the express language of the statute. This Court finds persuasive the reasoning of the Supreme Court of North Carolina in a similar challenge to applicability of their law enforcement statutory aggravating circumstance[9] in *State v. Gaines*, 421 S.E.2d 569 (N.C. 1992).

In *Gaines*, the police officer victim was working a second job as a security officer at a local motel. His second job was authorized by his police department's policy and he was allowed to wear his police department uniform. Further, he was required by department policy to "conform to the same standard of conduct as applies to their on-duty activities," i.e. "enforce the law" regardless of private employers rules. 421 S.E.2d at 571. The officer victim had confronted three defendants in the motel. The three eventually left, but returned. Upon their return, Gaines shot the officer victim in the motel lobby. *Id* at 572. The state served notice that it was relying on one aggravating circumstance in seeking the death penalty – the law enforcement aggravator. Gaines sought a pre-trial determination of whether the aggravator could

[9] The aggravator reads, in relevant part, that the murder "was committed against a law-enforcement officer... while engaged in the performance of his official duties or because of the exercise of his official duty," 421 S.E.2d at 465, which is substantially similar to the wording of our statute.

apply given the officer victim was at his secondary employment at a private business. The superior court ordered the aggravator was not applicable. The Supreme Court of North Carolina reversed, rejecting Gaines' argument as a "strained interpretation" :

> Such an interpretation would seem to require that a law enforcement officer be actively and aggressively focused upon a particular criminal suspect, as in the case of actually drawing or firing his weapon or engaging in hot pursuit, in order for his public service to fall within the realm of "official duties." We find this to be an inordinately strained and unnatural application of this term as it is normally used with respect to the official duties of all law enforcement officers, which includes such duties as investigative work (including stakeouts), crowd or traffic control, and routine patrol by automobile.

Id at 574.

Moreover, because the officer victim was obligated to enforce the law in his secondary job position in the same manner, and with the same authority, as he had while on a time-shift with the police department, the "off duty" designation did not defeat the applicability of the aggravator:

> ... Officer Griffin was at all times, including specifically his "off duty" secondary employment, acting as a law enforcement officer under the full supervision and control of the Charlotte Police Department for the sole purpose of "enforcing the law." We thus hold that [the statutory law enforcement aggravator] appropriately includes duly sworn law enforcement officers in uniform when they are performing off-duty, secondary law enforcement related duties, when it is clear that such duties and the pay therefrom are incidental and supplemental to their primary duties of law enforcement on behalf of the general public.

Id at 576.

Further, the state court found as relevant that the victim officer qualified for, and received, death benefits. *Id* . Though recognizing the differences in standards of proof in civil and criminal forums, the court concluded "there is no rational basis to distinguish between the criminal and civil definition and usage of the essential and defining term and the issue involved in both of these action, i.e., whether the term 'official duties' includes enforcement activity of the

type in which Officer Griffin was engaged when he was murdered." *Id* at 577. *Cf. State v. Evans*, 756 N.W.2d 854 (Minn. 2008)(in non-capital murder first degree case requiring "on-duty" finding, court noted testimony that officer victim's "survivors were paid line-of-duty benefits after his death").

Like *Gaines*, the evidence of the death benefits here was relevant and supportive of the applicability of the statutory aggravating circumstance. Moreover, the case here is even stronger as to the on-duty evaluation because there is no allegation of secondary, private employment. Applicant only mentions *Gaines* in passing and concedes the logic that applicability of the statutory aggravating circumstance generally depends upon a determination "on whether the officer was performing general or common law policing duties," (Applicant's Post-Hearing Brief, p. 82). However, his entire argument in this regard balances precipitously on the definition of "performing" some duty – his definition, again, must unfairly constrain the circumstance only to an act of some sort, which is irreconcilable with our statute and the *Gaines* holding. *See also White v. Commonwealth*, 178 S.W.3d 470, 481 (Ky. 2006)(" The statute is intended to allow a 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.*")(emphasis added).

The issue of 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. *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

circumstances to the jury, the trial court is concerned with the existence of the evidence, not its weight. The trial judge should submit the aggravator the jury if supported by any evidence direct or circumstantial."). Whether the evidence offered by the State supported the aggravator was a matter for the jury. *Locklair*.

2. *Applicant's Argument that Application in this Case Results in an Unfair Expansion of the Statutory Aggravating Circumstance is Irreconcilable with the Evidence and Facts Where He Depends on the Abduction Relieving the Deputy of his On-Duty Status.*

Applicant asserted within his argument on this issue that the sheriff "testified that Joe Sapinsoso was 'on duty,' despite his being home well after the conclusion of his regular workday, pursuant to a ... policy that whenever a deputy operates a sheriff's office vehicle that deputy is considered to be on-duty and available to response to calls." (Applicant's Post-Hearing Brief, p. 76). Applicant forgets that kidnapping is a continuing crime. *See State v. Tucker*, 334 S.C. 1, 13-14, 512 S.E.2d 99, 105 (1999)("Kidnaping is a continuing offense. The offense commences when one is wrongfully deprived of freedom and continues until freedom is restored."). It is just incredible to argue the deputy was not on duty and in his home, thus Applicant is less culpable, when Applicant had ambushed the deputy, taken him from his duty car, and held hostage. The jury not only convicted Applicant of kidnapping in the guilty phase, (R. p. 1502), the jury also found kidnapping as an aggravating circumstance of the murder, (R. p. 1795). There is no separate allegation that the kidnapping charge was somehow not supported by the evidence.

Further, the policy at issue specifically defined when the officer was "on-duty."[10] Sheriff Loftis testified that Deputy Sapinoso was on-duty according to the Sheriff's Department policy:

A Yes, sir, according to policy he was on duty that night.

Q If you would, explain that to the jury.

A *Any time that one of our deputies is operating a sheriff's office vehicle he or she is considered to be on duty and is expected to be available to respond to calls for service.*

Q And was he so acting that evening *before he reached the inside of this residence*?

A Yes, sir, he was.

Q He had a sheriff's-office-issued vehicle?

A Yes, sir.

Q And where had he been that night? What duty was he performing?

A He had been working a special assignment at county square on one of the council meetings.

Q And at the time of his returning home in his sheriff's office vehicle was he also dressed in an appropriate sheriff's office uniform?

A Yes, sir, he was. He was dressed in uniform that night.

Q And at the time of his death was he so dressed?

A Yes, sir, he was.

Q In addition to that explanation has Joe received or his family received benefits on the basis of his being killed in the line of duty?

A Yes, sir, they have. There is a United States Department of Justice offer that deals strictly with line-of-duty deaths involving police officers.

Q And did he qualify for those benefits?

A Yes, sir.

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[10] Defense counsel testified they investigated whether the aggravator was appropriate. Counsel consulting with several officers, and conducted legal research. (See June PCR Tr. p. 239; p. 241; p. 242; p. 368). In fact, counsel generally referenced finding a statutory provision that provided, essentially, that an officer was on duty at all times. *See generally* S.C. Code § 23-13-70 (directing deputy shall remain on duty at night, shall always be on duty not less than ten hours a day). *See also Gaines*, 421 S.E.2d at 574 ("At common law, a law enforcement officer had the duty to keep the peace at all times."). The State's reliance only on the more restrictive Greenville County Sheriff Department's policy inured to Applicant's benefit.

(R. p. 1530, line 1 - p. 1531, line 6)(emphasis added).

Additionally, other evidence showed that Deputy Sapinoso was abducted at his work vehicle *before* entering his home. (See, for example, R. p. 1428, lines 7-10; p. 1436, lines 15-25; p. 1309, line 4 - p. 1310, line 15, State Exhibit Triple A, Triple B, and Triple C (photograph of Detective Sapinoso's jeep with his bag on the ground by jeep's door). Moreover, Applicant admitted this fact in his testimony, (R. p. 1428), in his statement to law enforcement that was also admitted at trial, (R. p. 1229), and also to defense counsel. (June PCR Tr. pp. 239-242; p. 254). Contrary to Applicant's argument, (Applicant's Post-Hearing Brief, p. 85), the deputy was not merely in possession of the car, rather, he was abducted from the car.

Lastly, Applicant attempts to rely on two media reports, never admitted in the record, for the truth of the matter asserted, i.e. that the Deputy was off-duty and at home. (Applicant's Post-Hearing Brief, p. 79, n.41; p. 85 (citing note)). This Court has not accepted the hearsay offered in support of this ground. It is inadmissible. This Court notes that defense counsel was not questioned on the existence of the report(s) at the PCR hearing, nor any law enforcement personnel who made have made the statement (or made a statement taken out of context) presented, and the hearsay remains completely useless in attacking the evidence admitted at trial. Further, as Respondent argued in the post-hearing briefing, opening the door to media reports would likely not be a reasonable act on counsel's part, considering the media reports reported the "ambush" of the Deputy; that the Deputy was "held at gunpoint for more than four hours," i.e. "Greenville County Sheriff's deputy Joe Sapinoso has his gun taken away and is held hostage, along with his father, by a man who had been waiting outside his father's home," (See, for example, Motion for Change of Venue, Defendant's Motion No. 26, Attachments).

In sum, Applicant has not addressed the facts that are soundly against him, or offered, by competent evidence, other facts that challenge the facts of record. The facts of record, fully and fairly supported by the evidence at trial, support the applicability of the aggravating circumstance for all the reasons cited above. Applicant has failed to show deficient performance. Even so, if Applicant could show deficient performance in regard to this ground, he is unable to show *Strickland* prejudice as there are three (3) other aggravating circumstances supporting the death sentence.

B. If Applicant Could Establish Error, He Cannot Show Prejudice as There Are Three Other Aggravating Circumstances Supporting the Death Sentence.

The jury found (4) independent aggravating circumstances as to Deputy Sapinoso's murder: 1) the murder was committed while in the commission of the crime or act of burglary in the first degree; 2) the murder was committed while in the commission of the crime or act of kidnapping; 3) 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. (R. p. 1794, line 24 - p. 1795, line 11). "In a nonweighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty." *Stringer v. Black*, 503 U.S. 222, 232, 112 S.Ct. 1130 (Miss. 1992). South Carolina is, of course, a nonweighing state. *See, e.g., State v. Simmons*, 360 S.C. 33, 44-45, 599 S.E.2d 448, 453 (2004). Even if Applicant could somehow show counsel was ineffective in failing to move to quash, and even if the aggravator is later found to be inapplicable, the jury here found three (3) other aggravating circumstances. (R. p. 1795). Given

the presence of three additional circumstances, the failure of one would not have changed the outcome.

Moreover, 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 that even could have improperly swayed the jury. *See id.* Applicant concedes two lines of evidence were submitted in support of the aggravator: 1) the Greenville County Sheriff's policy on "one-duty" designation; and 2) the sheriff's testimony on federal monetary death benefits to the family. (Applicant's Post-Hearing Brief, p. 75). 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 Applicant also concedes in his brief. (Applicant's Post-Hearing Brief, p. 77). There is no particular inflammatory nature or expected emotional response simply upon hearing that his family received monetary death benefits. Applicant presented nothing in PCR to show the evidence was incorrect.

In sum, there was competent evidence in the record to support the submission of the statutory aggravating circumstance. Further, the jury found three other circumstances that remain unchallenged. Applicant has failed to show deficient performance and prejudice.

9(b)(3) Ineffective Assistance: Failed to Object to Evidence of Gang Affiliation

It is undisputed that Applicant 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 Applicant admitted his gang membership. (See, e.g. June PCR Trans., p. 216; p. 261; p. 401). In his initial meeting with defense counsel Sumner, Applicant informed counsel:

> No bad trouble, no jail but brushes with the law. Defendant decided himself to move down with his dad. In gang in 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). Applicant 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"[11] gang members, specifically Christina Rodriguez. (October PCR Tr. p. 72;109). Further, Applicant 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.

[11] 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 Applicant's tattoos and multiple self-admissions as proof of membership. (October PCR Tr. p. 119-120).

301). In fact, he would later use that in his testimony to show that life without parole would not be an easy sentence for Applicant 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). Applicant 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, Applicant 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, Applicant has never renounced membership. (October PCR Tr. p. 272; p. 274).

Applicant presented testimony[12] from his 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 PCR Tr. pp. 260-261). The multiple tattoos are permanent, large and visible. (June PCR Tr. p. 252).

It is undisputed that Applicant, 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

[12] Applicant also presented affidavits. (October PCR Tr. pp. 229-231). Respondent maintains an objection to the affidavits. This Court need not consider the affidavits. Applicant has shown no necessity or need to present the affidavits. As Respondent referenced in argument, and as the most cursory review demonstrates, the "running theme" is that several friends and family members did not consider Applicant to be a gang member. This theme has been fully presented by Applicant through witnesses called at the evidentiary hearing and subject to cross-examination. Thus, the Court need not consider the affidavits or Respondent's request to submit additional information affecting credibility of the affiants. *Cf. Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009)(trial by affidavit is fundamentally at odds with our judicial process).

Officer Sapinoso's head were delivered execution style to the back of his head while his head was on the floor. It is undisputed Applicant 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 Applicant 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 Applicant 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.").

9(b)(4) Ineffective Assistance of Counsel: Failure to Object to Testimony of Eddie O'Cain

Trial counsel was not ineffective in failing to object to the testimony of State's witness Mr. O'Cain during the sentencing phase.

A. Qualification of Mr. O'Cain as an Expert and Admissibility of Gang Membership Related Testimony in the Penalty Phase.

Mr. O'Cain was qualified narrowly as "an expert at this time to talk about gang activity and gang experience *within the Department of Corrections*." (R. p. 1590, line 22 - p. 1591, line 8)(emphasis added). His background supports that qualification. (R. p. 1582, line 19 - p. 1590, line 4). Defense corrections expert, George Martin, also referenced SCDC's established procedure and agreed with Mr. O'Cain's testimony. (R. p. 1633, lines 1-22). The record supports there is no error in qualification.

Applicant essentially argues that defense counsel was ineffective for failing to object to the qualification because there is no "science" involved. (Applicant's Post-Hearing Brief, p. 131). There is no requirement that all expert testimony be "scientific" in nature. Rule 702, SCRE (Testimony by Experts; referencing "scientific, technical, or other specialized knowledge"). Moreover, the following quotation from *United States v. Hankey*, 203 F.3d 1160 (9th Cir. 2000), is instructive:

> Given the type of expert testimony proffered by the government, it is difficult to imagine that the court could have been more diligent in assessing relevance and reliability. The *Daubert* factors (peer review, publication, potential error rate, etc.) simply are not applicable to this kind of testimony, whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it. *See Kumho Tire,* 119 S.Ct. at 1175 ("Engineering testimony rests upon scientific foundations, the reliability of which will be at issue in some cases.... In other cases, the relevant reliability concerns may focus upon personal knowledge or experience.") (internal citations omitted); *United States v. Plunk,* 153 F.3d 1011, 1017 (9th Cir.1998) (upholding admission of expert testimony from law enforcement officer regarding jargon of narcotics trade, on basis of expert's training, experience, and personal knowledge).

203 F.3d at 1169.

Here, Mr. O'Cain gave a lengthy recitation of detailed gang study, including sharing of information with different agencies, and personal observations. (R. pp. 1587-1588). He indicated that the "Blues" cover Crips, Gangster Disciples, and Black Gangster Disciples. (R. p. 1589). He opined, based on his experience, that he would access Applicant 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). He further opined that Applicant's violence toward a law enforcement officer would make him particularly attractive as a possible leader. (R. p. 1597).

Because the representation of gang membership is part and parcel of Applicant's character - - his appearance and professed belief and or aspiration if not achievement - - the testimony was obviously relevant as to his characteristics. And, those characteristics are fully applicable and relevant in the penalty phase for at least two reasons: 1) the evidence supports the inference that the victim was chosen, in part, for enhancement of gang standing; and 2) the evidence supports that Applicant's gang standing, particularly an enhanced gang standing as a result of his murder of a police officer, adds to his future dangerousness.

The fact of membership in the group is an element of future dangerousness well recognized with the Department of Correction, specifically because members of organized gangs have created hostage situations and presented a recognized security threat. (R. pp. 1583-1585). This is relevant, and admissible, evidence in the penalty phase. *See Dawson v. Delaware*, 503 U.S. 159, 166, 112 S.Ct. 1093 (1992)(general "abstract" belief of 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."). *See also Fuller v. Johnson*, 114 F.3d 491 (5th Cir. 1997)("A reasonable juror could conclude that membership in such a gang is relevant to future dangerousness"). However, the evidence at issue here is more narrow still. The evidence went to identification of gang membership for correctional purposes and what Applicant'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).

However, Applicant has failed to identify any basis for an objection. He has failed to show deficient performance and prejudice.

B. Failure to Object to Prison Conditions References In Mr. O'Cain's Testimony

Respondent has argued that the general prison conditions issue presented in the post-hearing brief was not raised in the application or proposed amendment regarding the mercy charge issue. (Respondent's Post-Hearing Brief, p. 110). Applicant argued, as presented in

"Issue VIII" of the Applicant's Post-Hearing Brief, that defense counsel was ineffective in not objecting to "general prison condition evidence" and in "inviting their own witness to testify on the issue." (Applicant's Post-Hearing Brief, p. 145). Respondent argued that it had no notice whatsoever that Applicant intended to pursue this issue, and both parts of the evidentiary hearing were conducted without any notification Applicant would be pursuing the issue. (Respondent's Post-Hearing Brief, p. 110). Applicant 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 was ineffective for failing to object to the Solicitor's use of that improper testimony during closing argument," and relied upon, specifically, his allegations 10(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 10(g), *infra*, for reasons including... (d) the witness was wrongfully allowed to testify as to the appropriate sentence, that being "death"); 10(d)(4)(" Applicant'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"). (Applicant's Post-Hearing Reply Brief, p. 14). This Court finds that a "general" prison conditions allegation was not raised, and no notice 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, Applicant 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. However, this Court finds no deficiency. As the remaining argument on presentation of a defense witness who referenced prison conditions, this Court disallows the argument for lack of notice, Rule 15(a), SCRCP[13], but finds that even if it had been allowed, the issue is without merit.

Counsel was not ineffective in their handling of evidence concerning general prison conditions in Mr. O'Cain's testimony.

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[13] *See also Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 21, 431 S.E.2d 587, 589 (1993)(upholding denial of amendment where "CSX had failed to show that the proposed amendment had substantial merit, had failed to justify its delay in moving to amend, and that CSX was seeking to prevent an adverse judgment through amendment of the pleadings"); *Collins Entertainment, Inc., v. White*, 363 S.C. 546, 562-563, 611 S.E.2d 262, 270 (Ct.App. 2006)("The prejudice that Rule 15 envisions is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it. ... Collins prepared to defend the breach of contract accompanied by a fraudulent act claim and not a claim of estoppel. Accordingly, Collins sufficiently demonstrated the prejudice envisioned by Rule 15, requiring the court to deny a motion to amend. Accordingly, we find the trial court properly denied Appellants' motion to amend the pleadings.")(internal citations omitted); *Armstrong v. Collins*, 366 S.C. 204, 228, 621 S.E.2d 368, 380 (Ct.App. 2005), *citing Dunbar v. Carlson*, 341 S.C. 261, 268, 533 S.E.2d 913, 917 (Ct.App. 2000)("implied consent will not be found if all the parties did not recognize it as an issue at trial, even if evidence in the record exists to support the amendment"). *Ball v. Canadian American Exp. Co., Inc.*, 314 S.C. 272, 275-276, 442 S.E.2d 620, 622- 623 (Ct. App. 1994)(finding amendment to include separate and distinct new ground improperly allowed where such resulted in prejudice to opposing party who had not had the opportunity to prepare a defense). *Cf. Sunvillas Homeowners Ass'n, Inc. v. Square D Co.*, 301 S.C. at 334-335, 391 S.E.2d at 871(upholding denial of amendment offered under Rule 15(b) where amendment would introduce new issue, not simply conform the pleadings to the evidence).

First, Applicant is seeking review, and relief, under S.C. Code § 16-3-20, which is the statute for direct appeal review of the imposition of the death sentence. This direct appeal review would not be appropriate in this post-conviction relief action. Moreover, the South Carolina Supreme Court has already reviewed the case on direct appeal under that provision and found the absence of an arbitrary factor. *State v. Evans*, 371 S.C. 27, 32, 637 S.E.2d 313, 316 (2006)("Appellant's death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the evidence supports the jury's findings of aggravation. *See* S.C.Code Ann. § 16-3-25(C)."). Applicant is not entitled to relief on this direct appeal issue. *Simmons, supra.*

Second, the conditions referenced were referenced narrowly, and only to the extent to describe Applicant's treatment and dangerousness due to his gang affiliation. As a factual matter, no simply "general" prison conditions were offered, by either side, merely to argue harshness in sentencing.

Third, in regard to presentation of his own witness, even if relying on the theory that he may be entitled to relief on direct appeal (had the issue been presented), here, he must show both deficient performance and prejudice. *See generally Franklin v. Catoe*, 346 S.C. 563, 571, 552 S.E.2d 718, 722 - 723 (2001)(acknowledging violation of statutory right to address jury in guilty phase would be reversible error if properly preserved and presented on direct appeal, but convicted defendant required to show *Strickland* prejudice in order to obtain relief on an ineffective assistance of counsel claim). This he cannot do. The major fault with his argument is the testimony at issue was presented to counter the concept that Applicant would benefit from his purported gang affiliation in prison. (See, for example, June PCR Tr. p. 301; pp. 377-378; pp. 412; pp. 429-433; pp. 507-508). As part of that explanation, Applicant was also allowed to present evidence the conditions would be harsh – the difference here being the evidence was tied

specifically to danger in SCDC because of his purported (and, indeed admitted) gang affiliation. *Burkhart* acknowledges that some conditions evidence, where necessary to show "personal behavior," may be admissible, and it is not clear that the evidence would not be admissible for this stated reason: "We are aware of the tension between evidence regarding the defendant's adaptability to prison life, which is clearly admissible, and this restriction on the admission of evidence regarding prison life *in general.* ... evidence of the defendant's characteristics may include prison conditions if narrowly tailored to demonstrate the defendant's personal behavior in those conditions." *State v. Burkhart*, 371 S.C. 482, 488, 640 S.E.2d 450, 453 (2007). The evidence at issue falls under this exception.

A final reason that counsel should not be considered ineffective is that, at the time of the trial, in 2004, general prison conditions evidence was being offered and admitted in capital trial penalty phases. *See Burkhart*, 371 S.C. at 488, 640 S.E.2d at 453 (2007)(noting that case was tried before *Bowman*'s specific prohibition); *State v. Bowman,* 366 S.C. 485, 498, 623 S.E.2d 378, 385 (2005)("We take this opportunity, however, to caution the State and the defense that the evidence presented in a penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character."). *See also State v. Bryant,* 372 S.C. 305, 317, 642 S.E.2d 582, 589 (2007)(defense counsel presented social worker who testified "on the dismal conditions of prison life in general" and complained on appeal that witness should have been allowed to opine that a death sentence was more merciful than a life sentence); *State v. Hill,* 361 S.C. 297, 307, 604 S.E.2d 696, 701 (2004)("Pinkney, a shift supervisor at Lee Correctional Institute, described prison conditions for inmates according to their classification"). Prior to this line of cases, the guidance from the Court was that "general conditions" were not relevant. If a defendant did admit such evidence, the State was entitled to

respond. *State v. Plath*, 281 S.C. 1, 15-16, 313 S.E.2d 619, 627-628 (1984)(emphasis added). However, again, these cases speak in terms of "general conditions" offered simply to show the horrors of prison life. Here, the defense evidence was to combat treatment of Applicant's gang membership – real or imagined, because due to his representation of gang membership, he would be treated as a gang member, both by other gang members and SCDC. Even on cross-examination, Mr. Martin, the defense corrections expert, tied the conditions directly back to gang membership:

> ... once he completed the initial reception process, if he's not determined to be a real bona fide, talk-the-talk and walk-the-walk gang member, and I am not sure at all that he would be, but if that were not, and if that were not the case, there's a great likelihood that he would require protection for those who are.
>
> And my best guess would be that there would be serious consideration given to keeping him separated from that general population because of his own needs for protection.

(R. pp. 1639-1640).

As to Applicant's allegation that the solicitor's argument regarding conditions was unfair – i.e. alleging the argument "capitalized on the testimony elicited from Mr. O'Cain concerning the defendant's alleged gang involvement *and* regarding general prison conditions, contrasting general prison conditions, contrasting general prison conditions for an individual sentenced to life without parole with those of an individual sentenced to death and dramatically misrepresenting the conditions of prison life," (See Applicant's Post-Hearing Reply Brief, p. 14, n. 11), the argument was a brief response to the testimony that also indicated that the life sentence would be harsh based on the necessity of increased security stemming from his gang

affiliation (or purported gang affiliation). At any rate, Applicant appears to overstate the impact of the argument.

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. To the extent that the argument would have exceeded the necessity of fair response, and argument based on the record and reasonable inferences, 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 Applicant's treatment due to gang affiliation concerns.

Applicant has failed to show either deficient performance or prejudice.

9(b)(5) Ineffective Assistance of Counsel: Failed to Object to Victim Impact Testimony

Trial counsel was not ineffective in failing to challenge the victim impact testimony.

Applicant complains that counsel should have objected to victim impact evidence offered from Sheriff Loftis and Deputy Tripp. (Applicant's Post-Hearing Brief, pp. 90-94). It is not surprising to have two fellow officers testify about the effect of a fallen officer, their friend,

on them personally. *See Payne v. Tennessee,* 501 U.S. 808, 825,111 S.Ct. 2597 (1991)("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"). Because the victim here was a sheriff's deputy, evidence of the specific harm will logically be tied to his career, as a facet of his life. *See, for example, State v. Byram*, 326 S.C. 107, 117, 485 S.E.2d 360, 365 (1997)(noting testimony in regard to victim teacher, "the teacher's assistant, testified the victim was a wonderful teacher of emotionally handicapped children and the victim's students were devastated to learn of their teacher's death"). It is not *per se* a violation of *Payne* simply due to his law enforcement standing. For example, in *State v. Bixby*, 388 S.C. 528, 555-557, 698 S.E.2d 572, 586-587 (2010), the South Carolina Supreme Court held a video of the officer's funeral was properly admitted:

> We find the videotape at issue was victim impact evidence because it showed the traditional trappings of a law enforcement officer's funeral, demonstrating the general loss suffered by society. Additionally, the video showed footage of actual mourners, displaying for the jury the specific impact of the murder on particular members of society. Thus, we hold the video was victim impact evidence pursuant to *Payne*.

338 S.C. at 556, 698 S.E.2d at 587.

Moreover, the Court found that the evidence was not unfairly prejudice based on a danger of evoking sympathy: " Under the law, simply saying that evidence such as this was 'moving' is not enough to require reversal of a capital sentence." *Id.* This Court recognizes that Applicant has alleged, in this very action, an error in the mercy charge; consequently, it is fair and reasonable to conclude that there will necessarily be *some* emotion in a capital sentencing proceeding. Yet, precedent requires such emotion be channeled into reason deliberation on the

evidence. *Id.* This evidence complied and did not stray to impermissible bounds such as family members of the victim testifying on the proper penalty. *Payne*, 501 U.S. at 830, n. 2 (leaving untouched former precedent that prevented "a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment" as "No evidence of the latter sort was presented at the trial in this case.").The testimony was tailored specifically to the impact the deputy's murder had on them specifically, and the local force, who personally knew him. Applicant'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, Applicant's oft repeated argument that the law enforcement aggravator was not properly submitted has been rejected for all the reasons setout above. Thus, Applicant's argument in regard to "additional prejudice" due to this particular victim impact evidence is also rejected.

In sum, the evidence here was properly admitted under *Payne*. Consequently, Applicant has failed to show deficient performance and prejudice.

9(b)(6) Ineffective Assistance of Counsel: Failed to Object to Hearsay in Mrs. Sapinoso's Testimony

Mrs. Sapinoso was allowed, during the penalty phase, to testify as to several of her grandson's statements. Applicant complains that counsel should have objected to the testimony as inadmissible under the rule against hearsay. The statements, however, were not offered for the truth of the matter asserted, but as evidence of the individual's fear, thus, by definition not hearsay. See Rule 801 (c), SCRE ("Hearsay is as 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."). Applicant has failed to show a meritorious basis for an objection.

For example, the statement, "I am not going there, my mommy is not going there, she might get killed and I would be an orphan," (R. p. 1548), is not offered for the truth of whether they were going to South Carolina, or possible death, but for its reflection of the child's fear. Moreover, his question "is grandmother going to be okay," (R. p. 1549), is not a statement at all, but again reflects fear – a lasting impact from the night of the murder. *See State v. Kelly*, 343 S.C. 350, 370-371, 540 S.E.2d 851, 861 (2001), *overruled on other grounds*, 534 U.S. 246, 122 S.Ct. 726 (2002)(testimony relating child's statement "a bad man had killed his mommy" not hearsay, " the testimony clearly was offered to show the impact the murder had on Shealy's young child and the rest of her family" and was "properly ... victim impact evidence"). The statement relating "he's just staring at the ceiling," (R. p. 1549), could be offered as true, indicative of the fear, but more likely is just part of the narrative in explaining that he was not talking at that point to the grandmother. *See generally* Rule 803, SCRE (statements of "then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily healthy)" not excluded by hearsay rule). *See also United States v. Wills*, 346 F.3d 476, 490 (4th Cir. 2003)(witness statements made in conversation with defendant properly admitted to show context of incriminating admissions); *United States v. McDowell*, 918 F.2d 1004, 1007 (1st Cir. 1990)("McDowell's own statements could, of course, be used against him; his part of the conversations was plainly not hearsay. Nor can a defendant, having made admissions, keep from the jury other segments of the discussion reasonably required to place those admissions into context."). At any rate, the goal of the sentence would be to demonstrate the fear and impact the murders had on the young child.

Because that concept was specifically conveyed otherwise, any minor error in the admission of one statement going to same would have been harmless. *State v. Haselden*, 353 S.C. 190, 577 S.E.2d 445 (2003) (improper evidence harmless where merely cumulative to other evidence); *State v. Evans*, 662 S.E.2d 489, 491 (Ct. App. 2008)(evidence "merely cumulative, insubstantial" did not affect the result of trial and considered harmless); *State v. Weaver*, 361 S.C. 73, 87, 602 S.E.2d 786, 793 (Ct. App. 2004)(even if contested testimony was hearsay, admission would be considered harmless where cumulative to other evidence in the record). However, this Court finds Applicant has failed to show deficient performance and prejudice, and is not entitled to any relief.

9(b)(7) Ineffective Assistance of Counsel: Failed to Object to Closing Argument

Trial counsel was not ineffective in failing to object to the state's closing argument in the sentencing phase. Given the entirety of the record, (R. p. 1743, line 19 – p. 1760, line 18), the argument presented does not appear either erroneous or prejudicial. *See generally Von Dohlen v. State*, 360 S.C. 598, 613-614, 602 S.E.2d 738, 746 (2004)("comment, although improper, did not so infect the trial with unfairness as to make the resulting conviction a denial of due process").

Applicant complains the argument infers "the state is already decided that a death sentence is the appropriate punishment" and wrongly absolved the jury of responsibility. (Applicant'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 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.

Applicant also complains about the solicitor's reference to "mean evil people." (Applicant'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).

Further, though Applicant complains of the "graphic language" in the argument, the Solicitor fairly referenced the horrendous circumstances of the crime which the jury heard. (Applicant'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").

As to Applicant's complaint the Solicitor instructed the jury to disregard mitigation, (Applicant's Post-Hearing Brief, p. 172), Applicant is incorrect. Applicant 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). The jury was well aware they were expected to consider any and all mitigations evidence.

Lastly, even if the comments could possibly constitute error, the error would be harmless in light of the tremendous evidence in aggravation. *See Jones, supra.* However, the record shows no error. Applicant has failed to show defense counsel was deficient in failing to object.

9(b)(8) Ineffective Assistance of Counsel: Failed to Object to Prosecution on Equal Protection Ground

Applicant has failed to offer any specifics to the allegation, and has failed to argue error. Therefore, this allegation should be deemed abandoned. Alternatively, Applicant has failed to carry his burden of proof.

9(b)(10) Ineffective Assistance of Counsel: Failed to Request the Statutory Mitigator Related to Capacity

Trial counsel advised the jury in opening at the penalty phase, "... as I told you from the beginning, there's not going to be any excuses at all." (R. p. 1526, lines 11-13). Counsel also advised the defense would present testimony from "a couple of doctors" to show "what mentally goes on inside of somebody's head." (R. p. 1526, lines 18-21). Counsel continued:

> We're not saying he's insane. We're not saying he is mentally ill. But we are trying to offer you, as I said in my opening, reasons why this happened, not excuses but reasons, to convince you to consider as an appropriate sentence in this case life imprisonment without the possibility of parole...

(R. p. 1526, line 22 – p. 1527, line 2).

During mitigation, Applicant presented the testimony of psychologist Dr. James R. Evans regarding brain function. Dr. Evans' testing reflected Applicant had an IQ of 94 which is "well within the average range" of intelligence. (R. p. 1682, lines 16-18). Dr. Evans opined, however, that he "had some brain dysfunction" and "learning problems" and that Applicant was "under the

effects of a mental or emotional disturbance at the time of these shootings." (R. p. 1697, line 6 – p. 1698, line 6). He surmised:

> But when you get into circumstances like helicopters hovering and police surrounding you, the judgment is going to be bad in most people, for most people. It's going to be difficult to make a, let's say a, good, rational decision.
>
> But if you have the type of brain injury or head - - brain dysfunction that he has, it would be even more difficult, and your thinking could get very rigid and you might just not do what a rational person would do.
>
> So I think to that degree he was operating to some, with some impairment. He was less able to conform his behavior to the requirements of the law than a person without such dysfunction would have.
>
> ...
>
> ... I think he was under emotional disturbance at the time.

(R. p. 1698, line 24 – p. 1699, line 23).

On cross-examination, Dr. Evans testified his report reflected Applicant suffered from "mild to moderate problems" with "cognitive flexibility" and no "significant problems with response control." (R. p. 1704, line 14 – p. 1705, line 3).

The defense also presented testimony from Dr. Elin Berg, a psychiatrist. Dr. Berg testified that, based on Applicant's reports of his mood at the time of the murders, she would diagnose him with "major depressive disorder, single episode" which would be considered a "mental or emotional disturbance." (R. p. 1719, lines 14-16; p. 1721, lines 9-13). Dr. Berg testified, however, that Applicant had the capacity to conform his conduct to the requirements of law at the time of the murders; that he did not have any psychotic symptoms; that he showed no

evidence of mental retardation; that he did not have any brain injury; and that he did not have any psycho-neurological symptoms. (R. p. 1729, lines 3 – p. 1730, line 13).

After the conclusion of the sentencing phase testimony, the trial judge recessed the proceedings and requested defense counsel provide, "those statutory and non statutory mitigating circumstances that the defense believes the jury should be able to consider...." (R. p. 1742, lines 10-20). The trial judge charged the jury to consider: (1) "no significant history of prior conviction involving violence against another person"; (2) "the murder was committed while the defendant was under the influence of mental or emotional disturbance"; and, (3) "the age or mentality of the defendant at the time of the crime. Further, he instructed the jury to "consider any nonstatutory mitigating circumstances that have been shown to exist by the evidence in the case." (R. pp. 1783-1784). Defense counsel did not object or request additional instruction, (R. p. 1789, line 21– p. 1790, line 1). This did not constitute deficient performance, however, because the evidence did not support the additional instruction at issue. Moreover, defense counsel testified that he reviewed the statutory mitigating circumstance with his experts, Dr. Evans and Dr. Berg, and neither could give evidence to support the instruction. (June PCR Tr. pp. 459-471). In fact, defense counsel testified that his contemporaneous notes reflected that Dr. Evans indicated that was "as far as he could go." (June PCR Tr. p. 471). There was no failure to consider, rather there was an absence of supporting evidence.

Where there is no evidence supporting the requested charge, there is no error in failing to give the requested charge. *State v. Hughey*, 339 S.C. 439, 454, 529 S.E.2d 721, 729 (2000). Dr. Berg, the defense psychiatrist, rejected any notion of impairment in regard to capacity to appreciate the criminality of the conduct, or appellant's ability to conform his conduct to law.

(R. p. 1729, lines 3 – p. 1730, line 13). Dr. Evans, the defense psychologist, never testified that Applicant's capacity to appreciate the criminality of his conduct was substantially impaired, nor did he testify that Applicant's capacity to conform his conduct to the requirements of law was substantially impaired. Dr. Evans testimony simply stated Applicant "was operating to some, with *some* impairment. He was *less able* to conform his behavior to the requirements of the law *than a person without such dysfunction* would have." (R. p. 1699, lines 8-11)(emphasis added). He testified that Applicant was under an *emotional* disturbance during the murders. (R. p. 1699, lines 20-23). He also opined stress and pressure from facing police would affect anyone's judgment. (R. p. 1698, line 24 – p. 1699, line 3). He further explained his findings as Applicant having a "mild to moderate" problem with "cognitive flexibility" and no "significant problems with response control." (R. p. 1704, line 14 – p. 1705, line 3; p. 1708, lines 3-7).

Simply, Dr. Evans testimony fails to provide evidence of substantial impairment in capacity to understand and conform – this is consistent with defense counsel's notes, (June PCR Tr. p. 471). The testimony referencing the "great pressure with the police and helicopters there" as affecting judgment, (R. p. 1708, lines 17-25), does not constitute evidence supportive of the specific charge at issue here. *Compare State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990)(mitigating charge required where defendant diagnosed with psychopathic personality affecting capacity to appreciate criminality of the conduct and ability to conform conduct to law). The mere mention of "some effect" on capacity simply does not necessitate a charge that contemplates substantial impairment. Thus, the evidence presented does not provide any support for the mitigator that references substantial impairment of the capacity to appreciate the criminality of the act, or to conform to the requirements of the law.

Moreover, the trial judge properly charged on the two mentality statutory mitigators that were supported by the evidence. (R. p. 1783, lines 17-22). The fact and circumstances regarding Applicant's mental condition were obviously and clearly before the jury such that, had counsel improperly failed to request the mitigator, there could be no prejudice. *Jones v. State,* 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998) (finding no prejudice by the absence of an additional statutory mitigating factor on mental state where the issue of defendants mental condition was clearly before the jury, the trial court charged several other mitigating factors relating to mental condition, and the jury found the existence of five aggravating factors). *See also State v. Stanko*, 376 S.C. 571, 578, 658 S.E.2d 94, 97- 98 (2008)(though finding issue not preserved for review on direct appeal, the Court noted that no prejudice occurred when the jury heard the cited evidence, and was advised of other statutory mitigating factors regarding appellant's mental state).

Additionally, there is clearly overwhelming evidence of guilt (Applicant admits same and did so at the trial, R. p. 1233, lines 3-12; p. 1432, lines 7-13; p. 1473, lines 16-19), and of a particularly brutal and heinous double murder, not the least of which is the number of bullets fired into each victim, and the manner in which Deputy Sapinoso was shot. There could be no reasonable probability that the omission of this one mental state related mitigating circumstance in the charge (especially where two others were charged) would have resulted in a different result. *Strickland, supra. See also Jones*, 332 S.C. at 339-340, 504 S.E.2d at 827 (jury "presented with overwhelming evidence of Jones's guilt and the callous and heinous way in which Jones calculated and executed the murder" which argued against finding prejudice as there was "no reasonable probability the sentencer would have concluded the balance of aggravating

and mitigating circumstances did not warrant death" even in light of purported error). It is of no little impact that the jury found not just one aggravating circumstance for each murder, not just two aggravating circumstances, but three for the murder of Deputy Sapinoso's father, and four for the murder of Deputy Sapinoso. Even if the facts were to show deficient performance in regard to this issue, there could be no *Strickland* prejudice.

In sum, Applicant failed to show deficient performance and prejudice, and is not entitled to any relief.

9(b)(11) Ineffective Assistance of Counsel: Failed to Investigate, Develop, and Present Available, Relevant, and Admissible Mitigating Evidence

In regard to trial counsel's investigation, to show deficient performance, an applicant must demonstrate not simply that more information was available (as there may always be one more witness who could have been contacted or one more piece of paper that could have been copied), *see generally Byram v. Ozmint,* 339 F.3d 203, 210 (4th Cir. 2003)(simple "failure to obtain available records... does not show that counsel's investigation was inadequate"); rather, an applicant must show that counsel made an unreasonable decision not to investigate or cut off investigation prematurely and unreasonably. *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052 (1984).

The United States Supreme Court has consistently affirmed this test in regard to investigation by trial counsel:

> ...*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*...

Wiggins v. Smith, 539 U.S. 510, 533, 123 S.Ct. 2527 (2003). *See also Bobby v. Van Hook*, __ U.S. ___, 130 S.Ct. 13, 19 (2009)(finding no deficiency where counsel investigated and made a strategic, reasonable decision not to investigate certain lines of evidence further: "there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties.").

Moreover, "the reasonableness of an investigation, or a decision by counsel that forecloses the need for an investigation, must be considered in light of the scarcity of counsel's time and resources in preparing for a sentencing hearing *and the reality that counsel must concentrate his efforts on the strongest arguments in favor of mitigation*." *McWee v. Weldon*, 283 F.3d 179, 188 (4th Cir. 2002)(emphasis added). *See also Byram v. Ozmint*, 339 F.3d at 210 (quoting same).

Applicant's complaint regarding the failure to discover and present mitigation evidence breaks down into two distinct areas: 1) evidence of abuse and neglect in Applicant's Cleveland area homes; and 2) evidence of lead poisoning and concomitant brain damage and learning disability. This Court finds Applicant has failed to carry his burden of proof.

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.

A. Abuse Evidence Presented in PCR

Applicant called his mother and aunt to testify about his father abusing his mother in the family home(s) in the Cleveland area. Both were very passionate about the abuse against the mother and Barry Evans' fault. Barry Evans confirmed the abuse and stated the anger he felt in that relationship is what drove him to leave the home. (June PCR Tr. p. 633). In fact, he testified that he wanted to leave the volatile situation so that the children would have a better home environment, without seeing the violence. (Id). He denied any abuse toward Applicant. (June PCR Tr. p. 639).

Shatima Martin, Applicant's sister, confirmed the abuse between Rene Evans and Barry Evans, and that she and Applicant had witnessed some incidents. (See, for example, October PCR Tr. pp. 20-23). She indicated Barry Evans had abused Applicant by use of corporal punishment on several occasions. (October PCR Tr. p. 25). Ms. Martin testified, however, that both she and Applicant moved to South Carolina to be near their father. (October PCR Tr. p. 38). Ms. Martin also testified Applicant was not quite thirteen when he moved in with Mr. Evans. (October PCR Tr. p. 38). Applicant moved away from Rene Evans' home, where he was a "latch key" kid, "running the streets." (June PCR Tr. p. 352; p. 401; pp. 639-640; October

PCR Tr. p. 101). Ms. Martin testified that when Barry Evans married their stepmother, Robin, he was not abusive to anyone. (October PCR Tr. pp. 39-41; p. 69).

Dr. Cooper-Lewter, a social worker, testified that he completed a "social history assessment" to develop "factors [that] may have influenced who [Applicant] is today and his behavior." (October PCR Tr. p. 90). He noted that split in background – the tumultuous years (birth to approximately 12)[14] in Ohio, and the stable years (12 (or 14), all through high school and into college years). (October PCR Tr. pp. 105-106; pp. 109-110). He noted the stable home environment, his step-mother's devotion, his "very good role models [including] his coaches, who required that he do his work." (October PCR Tr. p. 110).

Dr. Cooper-Lewter testified that Applicant's relationship with Christina Rodriguez[15] was "toxic," and said, "Well, she had a fascination with gang activities, had a tattoo, I'm told, that was from the Folk Nation." (October PCR Tr. p. 107). He accepted the tattoo and the statement of membership as proof of her membership in a gang. (October PCR Tr. p. 107; p. 109).

Dr. Cooper-Lewter testified that Applicant did not do well at North Greenville because of "they had a lot of rules" and "it wasn't a good fit for him." (October PCR Tr. pp. 115-116). Ms.

[14] This number appears to change, with Applicant's sister recalling Applicant coming to Greer, South Carolina before the age of thirteen, and Dr. Cooper-Lewter recalling age 14. School records, and testimony from a school friend, would tend to show he was actually 14 as Dr. Cooper-Lewter testified. (See, for example, June PCR Tr. p. 112).

[15] This Court previously ruled that evidence attacking Christina character was not to be admitted, though Applicant hovered near same several times, often attempting to paint Christina as being at fault in the incident. (See October PCR Tr. pp. 57-58; pp. 107-108). This Court affirms that ruling, and does not consider the character evidence submitted, especially in light of Respondent's continuing objection. Moreover, this Court notes that defense counsel Sumner testified that calling Christina to even attempt to explore her belief as to whether or not Applicant was a gang member could open the door to evidence Applicant's abuse of her. (June PCR Tr. p. 487; p. 491; pp. 516-517). Not only would any evidence going to Christina's character not be relevant at trial, and constitute improper character evidence, this Court finds the strategy to avoid having Christina testify to be reasonable in light of the evidence of abuse.

Martin, Applicant's sister, testified that he does not do well when there is a lack of rules. (October PCR Tr. p. 43). In fact, Ms. Martin stated it was lack of conforming to basic rules – such as staying away from guns, and staying away from gang materials – that led to her request that he leave her house. (October PCR Tr. pp. 45-48).

B. Learning Disability Evidence Presented in PCR

Applicant presented two witnesses at the PCR hearing who described Applicant's early childhood academic record. The records admitted reflect that Applicant received assistance in school for a learning disability. (See June PCR Tr. p. 43). Applicant was not extracted from the regular public school system; rather, he received additional assistance for his learning needs. (June PCR Tr. p. 53). The records reflected that with additional assistance, Applicant showed "substantial improvement" and had "benefitted" from specialized programs. (June PCR Tr. p. 57). (See June PCR Tr. p. 98, the fact that Applicant achieved better grades either meant that he "overcame" his disability, or that "he was able to achieve in spite of his disability"). In fact, Applicant, with great assistance from his devoted step-mother, finished high school and attended North Greenville College. While true Applicant did meet the academic standard sufficient to be admitted to some universities, he was able to be accepted and admitted to North Greenville. (See October PCR Tr. pp. 110-111). Moreover, Applicant's IQ is 94, an indication of average intelligence. (R. p. 1682; June PCR Tr. p. 844).

C. Brain Damage Evidence Presented in PCR

Applicant presented testimony from Dr. David Bachman, a neurologist, to establish a MRI would have shown brain damage. Dr. Bachman, like Dr. James Evans had before him, found evidence of dysfunction. He then ordered a MRI in September 2008. (October PCR Tr. p.

155; p. 187). By notation submitted with the request, he informed Dr. Turk and Dr. Agarwal, interventional neuroradiologists who would interpret the films, that this was a "legal case" and the individual had a history of "significant learning disability with known exposure to lead." (October PCR Tr. p. 188). The report came back normal. (October PCR Tr. p. 189; Respondent's Exhibit 47). As far as treatment, Dr. Bachman would as a general matter refer individuals to these interventional neuroradiologists. (October PCR Tr. p. 186-187). However, Dr. Bachman treated this matter as a legal case,[16](October PCR Tr. pp. 186-187; p. 188), and determined, with the aid of counsel, that he would send the films to Professor Ruben Gur at the University of Pennsylvania who has a protocol for evaluating brain volume from images alone. (October PCR Tr. p. 195; June PCR Tr. p. 659; p. 663).

A second MRI, done to Professor Gur's specifications, was performed in November 2008. (October PCR Tr. p. 193). Dr. Argarwal, again interpreted the films, along with Dr. Spampinato, another neruoradiologist. Again, the doctors were provided with the background information "legal case" and "significant learning disability with known exposure to lead as a child." (October PCR Tr. p. 198). The report came back normal, for a second time. (October PCR Tr. p. 197; Respondent's Exhibit 48). Dr. Bachman, nevertheless, and after consultation with legal counsel, sent the information to Professor Gur. (October PCR Tr. p. 193).

Professor Gur testified that Applicant had "reduced volume" which he equates with brain damage. (June PCR Tr. p. 675; p. 713). He testified, however, that brain damage, even as noted on an MRI film, does not equate with dysfunction. (June PCR Tr. p. 663; pp. 721-722). Professor Gur testified that the image analysis in this case demonstrated "both frontal lobes left

[16] Dr. Bachman admitted that he had testified in "probably a dozen" capital cases, but never for the Attorney General's Office. (October PCR Tr. pp. 181-182).

and right and the right orbital lobe are below normal, are 1 ½ approaching 2 " standard deviations. (June PCR Tr. p. 701; pp. 716-717). He explained, "if any of your cognitive abilities is 1 standard deviation below your average, then you are classified as having mild cognitive impairment... So 1 standard deviation below normal is clinically significant in this situation and in most medical situations." (June PCR Tr. p. 702). However, he conceded the rule was "a little arbitrary" when accessing less than 2 standard deviations, by his definition. (June PCR Tr. p. 716). He also conceded that brain volumes fluctuate with individuals. (June PCR Tr. p. 713). Further, he opined these statistics on volume would merely "likely relate to behavior deficits," (June PCR Tr. pp. 722-723), *if* neuro psychological assessment indicated dysfunction. (June PCR Tr. pp. 721-722). Thus, he testified, his findings were wholly consistent with Dr. Jim Evans' findings. (June PCR Tr. p. 707). The professor testified, not only did he agree with Dr. Evans' findings:

> ... I thought he did a thorough evaluation and reported it in a fairly straight forward fashion, fairly standard.

(June PCR Tr. p. 711).

Moreover, Professor Gur conceded that dysfunction could "ameliorate" if one had, for instance, received aid in overcoming a minor learning disability: "Oh, yeah, the whole field of neuro rehabilitation is focused on trying to ameliorate the dysfunction...." (June PCR Tr. p. 719). Professor Gur repudiated his report conclusion to the extent it reflects "diminished capacity." (June PCR Tr. p. 723).

Professor Gur also addressed Dr. Berg's conclusion, as reflected in her trial testimony, that an MRI was not necessary because it would not necessarily rule in or rule out dysfunction.

(R. p. 1730). As noted, the professor testified that brain damage alone as shown by MRI film does not necessarily equate with dysfunction. (June PCR Tr. pp. 721-722). He also testified that the MRI is not definitive in all cases even as to damage:

> Because MRI is the standard method the rule out or rule in front lobe damage or damage anywhere else in the brain. Sometimes you can get a normal MRI even when there is damage. The method is not perfect and it could miss certain types of damage, but if it sees a damage, you know you have ruled it in. If you don't see, at least you have ruled out major types of brain damage. You may not be able to rule out all types of brain damage.

(June PCR Tr. p. 679; p. 712). Even so, Professor Gur opined that where there is dysfunction, a quantitative analysis would "confirm" the presence of the dysfunction. (June PCR Tr. p. 696). Yet, as Dr. Kenneth Spicer, an expert in diagnostic radiology, (October PCR Tr. p. 281), testified, the quantitative analysis is not recognized as a reliable science as far as diagnosing patients. (October PCR Tr. p. 320; pp. 326-327).[17] Professor Gur agreed that his method cannot be used for a "clinical presentation." (June PCR Tr. p. 663; See also p. 668, "I didn't make a diagnosis. I reported the results of the analysis which indicated loss of brain tissue.").

Dr. Spicer testified that volume determination, when subtle, is subjective, (October PCR Tr. p. 297; pp. 312-313); however, there is no accepted, reliable method for determining volume

[17] Respondent objected to Court's acceptance of the professor's testimony on the diagnostic level, noting the lack of reliability of Professor Gur's method for diagnostic purposes. (June PCR Tr. p. 647). Respondent noted that 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 05-6002-01-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 the testimony). This Court allowed Professor Gur to testify in the PCR. This Court finds it is questionable whether Gr. Gur's testimony would be admissible as Applicant 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.

loss by quantitative analysis accepted by either the American College of Radiology or American Society of Neuroradiology. (October PCR Tr. p. 320; pp. 326-327). Thus, even accepting the study Professor Gur conducted reflects volume loss, that information would not change his opinion that the MRI was within normal range. (October PCR Tr. p. 321).

As previously referenced, Dr. Berg, a psychiatrist, testified at trial. Neither Dr. Bachman nor Professor Gur are trained in the specialty of psychiatry. Dr. Berg was so qualified, (R. p. 1714), and her analysis was more comprehensive – focusing not just on neurological testing for dysfunction, but also evaluation for possible indications of delusions, "hearing voices or having hallucinations," i.e. psychotic symptoms. (R. p. 1729). As Dr. Bachman conceded, he neither considered nor did he know how these possibilities factored into Dr. Berg's decisions and or opinion. (October PCR Tr. pp. 227-228). Dr. Bachman further conceded that "an MRI scan sometimes help you, sometimes doesn't help you. You have to put it in the context of the whole clinical picture," (October PCR Tr. p. 224), but maintained Dr. Berg must have been in error as the MRI showed "some mild atrophy." (October PCR Tr. p. 225).

Dr. Bachman and Dr. Spicer agree, however, that atrophy of the brain can be caused by any number of events, including head trauma from sports, alcohol abuse and drug abuse. (October PCR Tr. p. 192; pp. 299-300). Also in regard to his findings, Professor Gur testified simply as to a "pattern of abnormality consistent with what you would expect from lead and other toxic exposures." (June PCR Tr. p. 668).

D. Lead Poison Evidence Presented in PCR

Applicant presented Professor Richard Canfield of Cornell University as an expert on lead exposure in small children. Professor Canfield testified that in the mid-seventies, the point

of concern was 40 micrograms per deciliter. (June PCR Tr. p. 824). By the late seventies, the point of concern reduced to 30, having established that above 40 was "absolutely damaging," and not just an area of concern. (June PCR Tr. p. 825). Since 1991, that level has reduced again to 10. Id.

As to Applicant, Professor Canfield testified that Applicant tested at 34 in 1978, (June PCR Tr. p. 827), and 30 micrograms per deciliter in 1981, (June PCR Tr. p. 828).

Professor Canfield further testified that lead exposure affects cognitive functions, (June PCR Tr. p. 832), and, specifically, reduced IQ, (June PCR Tr. p. 834). He explained, however, that the great reach is actually at the lower exposure, and the increased exposure does not continue in great numbers:

> ... We found something that was counter intuitive in our study which is it took very little lead to cause initial significant damage. That is if you had a lead level as low as 10, you, as our statistical average you would lose about 7.4 points in IQ and it was a very rapid decline. You continued to lose IQ points as you increased in lead but just a slower rate.

(June PCR Tr. p. 842).

Statistically speaking, one would lose, on average, 10 IQ points at the 30 micrograms per deciliter level, more or less. Id. Professor Canfield agreed that Applicant's IQ, 94, is in the average range. (June PCR Tr. p. 844). Further, Professor Canfield agreed he could not definitively link any dysfunction to lead exposure. (June PCR Tr. p. 846). Professor Canfield candidly admitted that his information was statistical and individuals varied. (June PCR Tr. p. 847; p. 852). Professor Canfield also candidly admitted his research was based on a study of children 6 months to 6 years old, though he was familiar without other studies with longer ranges. (June PCR Tr. p. 841; p. 850). Professor Canfield agreed that Applicant's school

records show an increase in average grades from elementary school to high school. (June PCR Tr. pp. 848-849).

E. Trial Counsel's Strategy

Trial counsel investigated and presented a focused case in mitigation, calling family and friends, to demonstrate Applicant's "redeemable" qualities and focused the jury's choice by reliance on "two Kamell Evans." (See, for example, Applicant's Post-Hearing Brief, p. 9). This Court rejects Applicant's allegation that strategy was unreasonable. Applicant contends the two distinct sides of Evans could be resolved by "understanding" of a difficult upbringing, running the streets at an early age, learning disabilities and dysfunction. (See, for example, Applicant's Post-Hearing Brief, p. 57). However, by reliance on the "two Kamell Evans" theory, counsel made the choice more palatable for those jurors not so accepting of excuses – that to kill the individual who made the choices they did not like, was to kill the individual who made choices that were good and decent. This is a reasonable strategy. In *People v. Peeples*, 793 N.E.2d 641 (Ill. 2002), a capital case from Illinois, defense counsel presented a similar argument:

> ... despite experiencing a very troubled childhood, and despite facing adversity while growing up, defendant possessed "the strength and inner goodness to become what we consider a good son, a good brother, good uncle, and a father figure to his sister." The record shows that defense counsel made a strategic choice to argue that there were "two William Peeples. The William Peeples that family and friends knew and the William Peeples that the jury convicted of murder." In pursuing this mitigation strategy, defense counsel focused on the redeeming qualities possessed by defendant and asked the judge to view defendant as a person whose life was worth saving and who was worthy of mercy. Counsel focused upon defendant's "love of his family, his taking care of his family," and stated this defendant's being alive "even if it is in prison, sustains and supports his mother and sister, and his niece."

793 at 679.

The Illinois Court also found "the fact that the sentencer did not accept defense counsel's position does not mean that defense counsel was ineffective." *Id. See also Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995)("unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel"). In fact, it was even more difficult to make the argument in that case than here because counsel had a disadvantaged background that did not show a clear "one night, one error" break in character, as the evidence in this case (including Applicant's own statement to the jury) tended to reflect. (See R. p. 1773, Applicant to Jury, "What they are judging me on is one bad night, on bad night that I made happen, one bad decision that I made, a lot of bad decisions, one night, four hours and ten seconds.").

Moreover, the decision to embrace this strategy was made with the investigation and advice of a team of experts – Lenora Topp (a well-respected and experienced mitigation specialist); George Martin (a former SCDC employee qualified as an expert in corrections and prison administration); Dr. James Evans (a neuropsychologist); Dr. Elin Berg (a psychiatrist); and M. Scott Peterman (former FBI investigator).[18] Importantly, Applicant has not presented information that was not known in some fashion. Instead, he relies on the theory that the information at issue was not further explored, or not explored to the utmost minute detail. Applicant has failed to show deficient performance.

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[18] Applicant's assertion on "lack of time to prepare" are simply unfounded. The record shows literally hundreds of hours spent in preparation. (See, e.g., Respondent's Exhibits 12, 13, 14, 16, 17). Respondent notes that Applicant's social worker, both interviewing and further interpreting, required only two months to prepare for the collateral proceeding beginning June 1, 2009. (See October PCR Tr. p. 122). 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, 598 n.2, 627 S.E.2d 701, 707 n.2 (2006), *quoting Jones v. State*, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998)(an applicant "may not simply posit suppositions and speculations in an attempt to establish that counsel was ineffective").

F. Applicant Fails to Show Deficient Performance in Regard to Evidence of Abuse and Neglect in Ohio. Defense Counsel Knew of the Evidence of Abuse and Neglect and Made a Reasonable Decision Not Present Testimony on Same as Such Would Be At Odds With the Defense Theme.

Evidence of abuse and neglect, which also leads to evidence that Applicant was "running the streets," would be at odds with counsel's focus on the good qualities, good character, loving family. Moreover, the evidence Applicant proposed should have been admitted comes from his mother and aunt. The mother was uncooperative with trial counsel. Further, she impressed the defense as self-centered, finding it "very had to keep on track and talk about Kamell. (June PCR Tr. pp. 340-341). It is clear from the testimony in PCR that the testimony was decidedly centered on the mother – her perceptions, her anger at Barry Evans. (See, for example, June PCR Tr. p. 880, "He's never been in a good light."). There was an express, and reasonable, concern the mother would talk about herself more than focus on the events that Applicant was exposed to, that weighed into counsel's consideration of the evidence. (June PCR Tr. pp. 348-350). *See United States v. Snyder*, 787 F.2d 1429, 1432 (10th Cir. 1986)("to call a particular witness is a tactical decision and, thus, a matter of discretion for trial counsel"). Counsel will not be held ineffective when he articulates a valid reason for using a certain strategy in regards to his witness. *Simpson v. Moore*, 367 S.C. 587, 603, 627 S.E.2d 701, 710 (2006), *citing Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002).

As far as abuse directed toward Applicant, Applicant advised counsel he did not believe his father's discipline to be abuse, though he admitted "a stern disciplinary atmosphere," along with the fact that he decided to move to South Carolina to live with his father, and had a happy home as a result. (June PCR Tr. p. 308; p. 310; p. 426). Moreover, Barry Evans, the father who raised him and to whom Applicant fled while in Middle School, would testify on Applicant's

behalf. To allow attacks on him would have reduced the effectiveness of his testimony. (June PCR Tr. p. 256).

Counsel expressed clear and reasonable strategy in these matters. Applicant has failed to establish deficient performance.

G. Applicant Fails to Show Deficient Performance in Regard to Evidence of the Learning Disability, Lead Poisoning and Purported Brain Damage. When Reviewed in the Scope Of the Entirety of the Evidence, the Mitigation Impact and Value is Greatly Reduced.

Evidence of Applicant overcoming his learning disability would not be inconsistent with the defense, but it is of little weight in the theme at issue. Further, the evidence, as a whole, shows a relatively minor disability, and strong improvement. Consequently, outlining the possible cause of the disability, i.e. lead exposure, is again, not inconsistent, but of little weight.

In the case of elementary school records, Applicant alleges counsel was ineffective in failing to more fully investigate and present evidence regarding his early learning disability. Two significant facts rebut his contention. First, the defense team did request elementary school records, only to be told, by the school district, that the records had been destroyed. (June PCR Tr. pp. 56-57; p. 574). In fact, Mr. Bunkley, the Director of Pupil Personnel Services for East Cleveland City Schools District, (June PCR Tr. p. 7), who presented records during the collateral action, confirmed the letter appeared to be from the correct authorities, and of the kind and quality he would rely upon and would accept as a document from the school confirming contamination and unavailability. (June PCR Tr. p. 56-57; pp. 59-60). Moreover, the defense team requested copies of these early records from Applicant's mother, Renee Evans. She,

however, was uncooperative.[19] (June PCR Tr. pp. 203-204; p. 346; pp. 348-349). The defense team mitigation specialist, Lenora Topp, testified that Applicant's mother advised her she would help and that she did have some records, but she failed to provide copies to Ms. Topp. (June PCR Tr. p. 572; p. 593). Specifically, Ms. Topp recalled that Applicant's mother suggested she had "medical records regarding the lead poisoning." (June PCR Tr. p. 594). Former defense mitigation specialist, Dale Davis, likewise testified that she had contacted Applicant's mother and requested records, and the mother had initially agreed to help. (June PCR Tr. pp. 533-534). In PCR, both Applicant's mother and his sister confirmed that the mother kept elementary school records. (June PCR Tr. p. 877-878; October PCR Tr. p. 77). When Applicant's mother came to South Carolina for the trial, though, the only document she provided Ms. Topp was a document reflecting how the abuse against her had affected her. (June PCR Tr. p. 594). She claimed no one asked for the records, but conceded that she had turned over such records to the PCR defense team. (June PCR Tr. pp. 878-879; p. 881; p. 885). She indicated she would have turned them over to trial counsel had either 1) someone had come by the house; or 2) that they call and asked her to provide them. (June PCR Tr. p. 882; p. 885). She also denied that prior mitigation investigator, Davis, contacted her about records. (June PCR Tr. p. 881). These inconsistencies weigh against this witness' credibility. However, counsel did have school records from Greer and those records reflected a good, though not stellar, student. Defense counsel would have to account for that in making any argument on learning disabilities and dysfunction. (See, for example, June PCR Tr. pp. 913-917).

[19] Several of the school records admitted noted the mother's concern over the disability, but also that she failed to attend school conferences designed to help Applicant. (June PCR Tr. p. 25; p. 90). This additional information supports the lack of "follow through" as noted by the defense team.

As to lead poisoning, Applicant did not show a definitive link, and, based on the medical testimony, one cannot show a definitive link with other possible causes present. Applicant did, however, produce reports that confirm that Applicant 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 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 questioned whether he had a report supporting the exposure, which he did not, but he explained there were reports of lead poisoning from Applicant 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.

As to evidence of brain damage, there was no evidence of brain damage that defense counsel ignored. (June PCR Tr. p. 329). Moreover, counsel had a right to rely on their experts – Dr. Evans, and psychiatrist, Dr. Berg – and they "very heavily" relied upon them. (June PCR Tr. p. 248). As noted, Dr. Berg testified that a MRI was not necessary. And, in fact, there two MRI were conducted subsequent to the trial, both reports came back normal. (October PCR Tr. p. 171; p. 189; p. 197; Respondent's Exhibits 47 and 48). There is presently an addendum to the second report. However, that does not erase the fact that two reports were issued with normal findings, or the fact that the addendum, at most, allows for the possibility of mild atrophy, but still shows an overarching normal range, (October PCR Tr. p. 321). Further, the circumstances of the addendum negatively affect its value.

Dr. Bachman conceded that he did not request the reporting doctors reconsider their findings, either immediately after the September report was issued, or the November report was

issued. On the same day that the State's subpoena was issued requesting the original reports, (May 27, 2009, before the June 1, 2009 Evidentiary Hearing), Dr. Bachman requested that Dr. Spampinato "re-review" her report. (October PCR Tr. pp. 202-203). Dr. Bachman testified that he was contacted by John Blume, Esq., (a known capital litigation defense attorney not assigned to this case), and Mr. Blume expressed to Dr. Bachman that he "was concerned about the fact that the MRI scan report had not been amended" and "asked [Dr. Bachman] to ask the radiologist to re-review the MRI scan again." (October PCR Tr. p. 204). Even so, the most the addendum adds is the possibility of "mild" (the least cognizable), diffused (whole brain as opposed to frontal lobe), volume loss. (October PCR Tr. pp. 324-325). Dr. Spicer maintained that the scan was within standard normal limits. (October PCR Tr. p. 297).

However, Dr. Bachman, like Dr. Jim Evans', opined "there's evidence of cognitive dysfunction." (October PCR Tr. p. 178; p. 228). He then added his opinion was "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" with the "likely cause" of "lead exposure 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." (October PCR Tr. pp. 178-179). But, again, Professor Gur's statistical evaluation of brain volume is not a recognized diagnostic criteria for either dysfunction or damage. (June PCR Tr. p. 663; pp. 721-722; October PCR Tr. p. 320; pp. 326-327). Even Dr. Bachman, who relied upon the statistical evaluation to support his subjective theory of mild diffused atrophy could not identify this statistical evaluation as the premier or "most sensitive" test to determine loss of "neuron brain function." (October PCT Tr. pp. 183-182). Dr. Spicer testified more specifically that the "most sensitive" test is a brain

biopsy, but absent that extreme, a PET scan or some type of "metabolic imaging" or a spinal tap. (October PCR Tr. p. 300). As to the professor's volume analysis, Dr. Spicer testified:

> ... I'm not aware that Dr. Gur's work has gained clinical acceptance to where it's a standard practice or any of the observations are utilized for standard practice. They're still in the research realm.
>
> ... I'd be very impressed if volume measurements turned out to be relatively sensitive. I have seen some of his work in the area of dementias looking for the ability to predict in patients with very mild changes in brain function whether they would become demented in a few years such as mild cognitive impairment patients that are eventually going to become Alzheimer's disease patients.
>
> And in those cases the volumetric analyses failed to help predict early changes as going on to later changes, whereas metabolic imaging has done very well in that regard and continues to progress...

(October PCR Tr. p. 301).

Dr. Spicer recognized Professor Gur's work had been published for the purpose of making associations, but that the volume analysis has not been accepted as a basis for diagnosing a patient. (October PCR Tr. p. 302). Dr. Spicer testified that he would not rely on Professor Gur's volume analysis in making a diagnosis. (October PCR Tr. p. 302). Dr. Spicer explained:

> ... He has had scientific observations, but not as in clinical trial saying, you know, make this volume and this allows you to predict that this person will have this disease or it'll progress in such a manner.
>
> So in terms of making associations between specific entities, disease entities and volume changes, his work has been published. In terms of utilizing that in the clinical – in the day-to-day clinical practice there are no clinical trials that have shown, that I'm aware of, that his observations are beneficial as we diagnose disease and evaluate change in the patients.

(October PCR Tr. p. 302).

Therefore, 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 there was dysfunction, and Dr. Jim Evans appropriate testified on same at trial.

Though Applicant notes two reports of lead exposure and presented information on lead poisoning, that does not change the results of the two MRI reports which came back normal. Moreover, trial counsel was faced with the facts that Applicant was an average student with an average IQ. 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 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). His consent is probative of the reasonableness of the strategy. *Bell v. Evatt, supra.*

Applicant has failed to show deficient performance.

H. Even if Applicant Could Show Deficient Performance, Applicant Cannot Show Prejudice as He Has Failed to Show a Reasonable Probability, But for the Purported Deficient Performance, the Jury Would Have Determined the Circumstances Did Not Warrant Death.

As noted, relief will not be granted on showing of mere error or deficient performance. Prejudice must also be shown. *Strickland*, 466 U.S. at 687. When applying the "reasonable probability" standard here, *Jones, supra*, this Court finds Applicant has failed to show prejudice.

The evidence of brain damage is not persuasive. Professor Gur's volume analysis is not accepted 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 as to damage is particularly credible and certainly not weighty.

As to dysfunction, the experts agree on dysfunction. In fact Professor Gur, and Dr. Bachman, agree with Dr. Evans, who testified at trial. There is nothing new in regard to dysfunction, and Applicant cannot prove error or prejudice. *Jones v. State*, 332 S.C. at 339, 504 S.E.2d at 827 ("The 'new' evidence is the same as the 'old' evidence. At best, it is a fancier mitigation case. If the evidence was not persuasive in the first case, the defendant does not get a second chance. Otherwise, there would never be an end to litigation.").

As to lead poisoning and learning disability, Applicant 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, Applicant remained an average student, and even went to college. That information would have be addressed. Moreover, Dr. Evans knew about reports of lead poisoning reports, and factoring in same to 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. However, in the PCR, Applicant went further and tied the lead poisoning not simply to environmental exposure, but brain damage, and loss of IQ. The brain damage evidence, as noted above, is not credible, and Applicant's IQ is average. This is not to say the evidence could not have been presented, but the lack of proof of specific and significant effect would lessen the impact. Moreover, Applicant's expert based his study on small children, and admitted some "counter-intuitive" showings in the findings, which tends to lessen the

continuing impact on IQ when exposed to higher levels. Finally, some jurors may rightly question whether the expert's primary source of information (i.e. small children) is too limited when evaluating a grown man, especially in light of an average showing in school and an average IQ.

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 Applicant, i.e. use of force in discipline, was contested. Further, attacking the father would only lead to unraveling the carefully crafted defense theme (that admitted was true in that he had a wholly different environment in South Carolina than in Ohio), and making his testimony in support of his son less credible.

Additionally, to consider all the evidence together, *Wong, supra*, the potential for demonstrating prejudice is even worse for Applicant for the simple fact that the evidence would confuse and dilute the clear theory that this event was a critical break from his norm. This was the very theme that Applicant 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 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 violence, escalating violence. Applicant has failed to demonstrate *Strickland* prejudice.

Applicant has failed to demonstrate deficient performance and prejudice, and is not entitled to any relief.

9(b)(12) Ineffective Assistance: Failure to Object to Charge Referencing Mercy

This Court finds trial counsel was ineffective in failing to object to the charge. I find that *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009), as it addresses the mercy charge, does not constitute a "new rule" where it has been the rule for decades that mercy can be considered by a capital jury. A careful reading of *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000), referenced in *Rosemond*, reveals that at the time of Mr. Evans trial the supreme court was interpreting the challenge "mercy" language as precluding the jury from considering mercy. If this were not so, then the court's decision in *Hughey* would be non-sensical, as the court there upheld the charge on the ground that "a judge's charge that the jury should not be guided by sympathy, prejudice, passion or public opinion is not reversible error." *Hughey*, 339 S.E. at 460. Accordingly, trial counsel's proffered reasons for not objecting to the charge (i.e., that it was advantageous to the defense because it expressly mentioned "mercy") highlights their misunderstanding of *Hughey* and proves deficient performance. *Hughey* neither addressed nor ruled upon the specific issue of whether precluding a capital jury from considering mercy comported with *Lockett* and its progeny. Reasonable trial counsel would have therefore objected to the "mercy" charge. This does not impose a duty of clairvoyance on counsel, or force a lawyer to anticipate a *change* in the law, for as previously noted the law has always been that a capital jury can consider mercy. *Cf. Chalk v. State*, 313 S.C. 25, 437 S.E.2d 19 (1993). Indeed, the law

used to be that one convicted of murder was sentenced to death *unless* the jury recommended mercy. However, Applicant has failed to establish prejudice for two reasons: 1) the remainder of the charge cured any possible defect concerning when the jury could return a life sentence; and 2) there was no specific plea for mercy that could have been disregarded in light of the erroneous charge.

It is well settled that the appropriate standard for reviewing any jury instruction is to consider the instructions as a whole. *See, e.g. State v. Mattison*, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010). When "[t]he charge, as a whole, is not misleading," an applicant's allegation of error challenging any one particular phrase must be rejected. *State v. Atkins*, 303 S.C. 214, 221, 399 S.E.2d 760, 764 (1990), *citing State v. Patterson*, 299 S.C. 280, 384 S.E.2d 699 (1989). *See also State v. Jackson*, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989)("Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error").

As an initial matter, *Rosemond* does not address whether the remainder of the charge was sufficient to cure any deficiency. The Court focused only on the isolated phrase, not its relationship to the remaining charge, or the remaining charge itself absent the phrase. This Court finds, having reviewed the charge as a whole, that a reasonable juror would not have thought he was precluded from considering the mitigation evidence presented in the instant case. *See Jackson*, 297 S.C. at 527, 377 S.E.2d at 572 ("the test is what a reasonable juror would have understood the charge as meaning" in light of the context in which it is given).

The instructions here show that, in addition to explaining statutory aggravating circumstances, the trial judge explained statutory mitigating circumstances, and non-statutory mitigating circumstances:

> Now, you should also consider any nonstatutory mitigating circumstances that have been shown to exist by the evidence in the case. A nonstatutory mitigating circumstance is one which may serve the same purpose, that is to lessen or to reduce the degree of the defendant's responsibility in the commission of the crime of murder.
>
> Now, while there must be some evidence which supports a finding by you of the existence of one or more statutory or nonstatutory mitigating circumstances, *it is not necessary that you find the existence of such mitigating circumstance or circumstances beyond a reasonable doubt. You may recommend a sentence of life imprisonment whether or not you find the existence of a statutory or a nonstatutory mitigating circumstance.*
>
> Now, in making your determination as to which sentence to recommend in this case you should consider the statutory mitigating circumstances, the statutory mitigating circumstances and any nonstatutory mitigating circumstances in arriving at your decision.
>
> While you must find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt before you may consider recommending a sentence of death, once such a finding is made you are permitted to recommend a sentence of death even though you may also find the existence of one or more statutory or nonstatutory mitigating circumstance.
>
> The existence of any statutory or nonstatutory mitigating circumstance is not a bar to the recommendation of a death sentence so long as you have found the existence of at least one statutory aggravating circumstance beyond a reasonable doubt.
>
> *Conversely, you may also recommend a sentence of life imprisonment even though you find at least one of the statutory aggravating circumstances beyond a reasonable doubt and you find no mitigating circumstances to exist.*
>
> Simply stated, you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy. ...

(R. pp. 1784-1785)(emphasis added).

As noted, only one portion of the charge precluded the consideration of mercy (i.e. the phrase "other than an act of mercy"). The remaining charge clearly instructed the jury that it

could return a life sentence for any reason or no reason at all: "You may recommend a sentence of life imprisonment whether or not you find the existence of a statutory or a nonstatutory mitigating circumstance" and "you may also recommend a sentence of life imprisonment even though you find at least one of the statutory aggravating circumstances beyond a reasonable doubt and you find no mitigating circumstances to exist." (R. pp. 1784-1785). Thus, the charge as a whole was not deficient as a matter of state law as it certainly allowed for the exercise of mercy in the penalty phase. *Accord State v. Hicks*, 330 S.C. 207, 218-219, 499 S.E.2d 209, 215 (1998)("the trial judge is not required to instruct the jury it could impose a life sentence 'for any reason or no reason at all' where the jury is informed, as it was here, it could consider any mitigating circumstance authorized by law and could impose a life sentence even if aggravating circumstances were found"). Consequently, the incorrect phrase in one sentence of the charge, erroneous under state law, did not negatively contribute to the verdict as the charge as a whole was not incorrect. *See also State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000)("jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error"); *State v. Bell*, 305 S.C. 11, 21, 406 S.E.2d 165, 171 (1991)(finding, after review of a no unfettered sympathy instruction, "from the context of the charge, there is no reasonable likelihood this charge prevented the jury from considering any mitigating evidence in fairness and mercy.").

Moreover, in *Rosemond*, the Supreme Court tied the propriety of the consideration of mercy to the receipt of "proper *evidence* of mercy." 680 S.E.2d at 10 (emphasis added). It is this consideration of mercy based on the evidence that makes the charge consistent with the instruction that "the jury should not be guided by sympathy, prejudice, passion, or public opinion." *Id.* Thus, according to *Rosemond*, the charging language *does not* support unfettered,

unreasoned, emotional reaction; rather, the charge is meant to preserve the exercise of mercy *based on consideration of the evidence submitted.* To the extent this logic focuses on reasoned consideration of the evidence, it is consistent with United States Supreme Court precedent.

A capital defendant is allowed, pursuant to the Eighth and Fourteenth Amendments of the Constitution, to submit evidence in mitigation of "any aspect of [...his...] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" to enable the jury to make an "individualized decision" in sentencing. *Lockett v. Ohio*, 438 U.S. 586, 604-605 (1978). In that same vein, the Court has determined that the State may not create "limitations" on the consideration of properly admitted mitigation evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 114-115 (1982). "These two cases place clear limits on the ability of the State to define the *factual bases* upon which the capital sentencing decision must be made." *Saffle v. Parks*, 494 U.S. 484, 490 (1990)(emphasis added). However, there is a difference between the presentation and consideration of evidence (i.e. *Lockett* and *Eddings*), and the exercise of unfettered sympathy or mercy: "Whether a juror feels sympathy for a capital defendant is more likely to depend on that juror's own emotions than on the actual evidence regarding the crime and the defendant." *Id* at 493. The Supreme Court has rejected challenges to instructions that the jury "'must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling,'" *California v. Brown*, 479 U.S. 538, 540 (1987), and emphasized that for a rational and reliable sentencing proceeding, the decision must be "rooted in the aggravating and mitigating evidence introduced during the penalty phase." *Id* at 542. *See also Saffle*, 494 U.S. at 492-493 ("It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional

sensitivities without our longstanding recognition, that, above all, capital sentencing must be reliable, accurate, and nonarbitrary")(O'Connor, J. concurring).

In South Carolina, "a capital defendant may present witnesses who know and care for him, and who are willing on that basis to plead with the jury for mercy on his behalf." *State v. Wise*, 359 S.C. 14, 27-28, 596 S.E.2d 475, 481 (2004). While not a constitutional right, a plea for mercy is uniformly accepted in South Carolina under our evidence rules. *Id. See also State v. Johnson*, 338 S.C. 114, 126-127, 525 S.E.2d 519, 525 (2000)(finding error in a limitation on questioning but no prejudice where "Johnson's sister was able to make a general plea for mercy on her brother's behalf."); *State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 319 (1991)(finding error in limitation on questioning but no prejudice where defendant's mother was allowed to make "a general plea for mercy for the life of her son"). A family member making a plea for mercy may *not* weigh in on what the appropriate sentence should be. *State v. Johnson*, 338 S.C. 114, 126-127, 525 S.E.2d 519, 525 (2000)("the defense did not seek to elicit the opinion of Johnson's sister about what verdict the jury 'ought' to reach. Defense counsel merely proposed to ask her whether *she wanted* Johnson to die" which "did not address the ultimate issue to be decided by the jury"). In sum, the basis for admissibility of the plea is not mere mercy, but the plea's value as evidence of the shared bond which itself is a reflection of the defendant's character in that he is able to maintain that bond. Otherwise, there would be no reason to draw a distinction between 1) a plea for mercy and an opinion on which sentence is appropriate; and 2) allowing only family members to so plead, not even a victim who would arguably have an interest in the disposition. *Id. See also Torrence, supra, Wise supra. Cf. People v. Ochoa*, 966 P.2d 442, 505-506 (Cal. 1998)("what is ultimately relevant is a defendant's background and character-not the distress of his or her family. A defendant may offer evidence that he or she is

loved by family members or others, and that these individuals want him or her to live. But this evidence is relevant because it constitutes indirect evidence of the defendant's character").

Without question, mercy was a "primary element" of the defense argument in closing. (October PCR Tr. pp. 344-345; R. pp. 1760-1772).[20] Here, however, there was no specific plea for mercy in the penalty phase, but friends and family did testify as to Applicant's good qualities and their emotional bond to Applicant. (See, for example, pp. 1677-1678). Nothing in the charge precluded the jury from consideration of this evidence. Thus, the charge, as a whole did not interfere with either the constitutional right to present mitigation evidence, or consideration of the evidence presented, i.e. the emotional bond to the Applicant. *See Boyde v. California*, 494 U.S. 370, 380 (1990)(the relevant question on constitutionally infirmity "is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."); *State v. Sims*, 304 S.C. 409, 422, 405 S.E.2d 377, 384-385 (1991)(applying *Boyde* in direct appeal).

Again, here, though one portion of the charge was incorrect as a matter of state law, the remainder of the charge instructed the jury it could return a life sentence for *any* reason, even if

[20] Of course, it was not the only element. Defense counsel reminded the jury of the other significant punishment (life imprisonment without the possibility of parole); dramatized the reality of the death sentence is that the defendant will be killed; urging the jury not to "repay evil with evil"; emphasized the "mental or emotional defect" mitigator and reminding the jury of testimony from experts Dr. Evans and Dr. Berg; emphasized Applicant's adaptability to the structured environment of prison; downplayed gang membership (against his client's instruction), and reminded the jury of the testimony from prison officials that regardless of membership, Applicant would be kept under close watch thereby countering the suggestion of benefits from gang membership in prison; emphasized the emotion in Applicant's father's testimony to balance victim impact testimony with the crime's impact on the Applicant's family; and emphasized the redeemable qualities, good qualities, that existed in the Applicant who also committed two murders. (R. pp. 1760-1772). In addition to these arguments, counsel discussed mercy, and plainly asked for mercy: "I am going to ask for mercy for Kamell Evans." (R. p. 1770).

no circumstances in mitigation were found. (R. p. 1785). This could not preclude consideration of any mitigating evidence, and certainly not the evidence presented here.

In sum, though Applicant has shown deficient performance, he has failed to show prejudice and is not entitled to relief.

9(c)(1) Ineffective Assistance of Appellate Counsel: Failed to Challenge the Trial Court's Denial of Trial Counsel's Request to Charge the Jury on Voluntary Manslaughter

"A defendant is constitutionally entitled to the effective assistance of appellate counsel." *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). The *Strickland* error and prejudice standard is applicable to claims involving ineffective assistance of appellate counsel. *Id.* To show prejudice to entitle him to relief, "the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal." *Id.*

Here, trial counsel requested a charge on voluntary manslaughter, based solely on his client's wishes, recognizing the lack of evidentiary support for finding sufficient legal provocation. (R. p. 1445, line 25 - p. 1447, line 2). Applicant had testified that, at one point during the hours he held his victims hostage that he believed that one of his victims, Deputy Sapinoso, reached for a gun on a nearby coffee table and only then did Applicant fire, first at Deputy Sapinoso (shooting him four times in the back of the head), then at the deputy's father (shooting him three times). (See R. p. 1443, line 13 - p. 1444, line 24).

It is well settled that "[a] victim's attempts to resist or defend himself from a crime cannot satisfy the sufficient legal provocation element of voluntary manslaughter." *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001). Clearly, had appellate counsel raised the issue, it would not be meritorious. Applicant has failed to show deficient performance.

9(c)(2) Ineffective Assistance of Appellate Counsel: Failed to Challenge the Trial Court's Denial of Applicant's Motion for A Change of Venue

For all the reasons referenced in the discussion of the ineffective assistance of counsel claim above, (9(a)(3)), Applicant has failed to show deficient performance. None of the seated jurors were exposed to such an extent that they formed opinions. Further, Applicant has shown no relevant precedent or possibility of error in regard to the courthouse argument. At any rate, the record shows no bias according to the *voir dire*. In fact, the three who recalled any media coverage at all did not recall any details. Again as noted above, while Dwayne Drake, Larry Coker and Mark Branyon all seemed to vaguely recall the fact of media coverage of the incident, each testified that they did not recall any specific details at all. (R. p. 230, line 15 - p. 231, line 3 (Drake); p. 289, lines 10-24 (Coker); p. 469, line 20 - p. 470, line 8 (Branyon)). There could be no meritorious issue in light of this record. *See State v. Evins*, 373 S.C. 404, 412, 645 S.E.2d 904, 908 (2007)("When a trial judge bases the denial of a motion for a change of venue because of pretrial publicity upon an adequate *voir dire* examination of the jurors, his decision will not be disturbed absent extraordinary circumstances"). Thus, as to an allegation of ineffective of appellate counsel for not raising the issue, Applicant cannot show deficient performance and prejudice.

The Constitution requires that a criminal defendant be afforded a trial by a "panel of impartial, indifferent jurors." *Irvin, supra.* "When a change of venue motion is predicated on pre-trial publicity, the relevant inquiry is whether potential jurors have 'such fixed opinions that they could not judge impartially the guilt of the defendant.'" *State v. Gardner*, 332 S.C. 389, 392, 505 S.E.2d 338, 339 (1998), *quoting State v. Manning,* 329 S.C. 1, 495 S.E.2d 191 (1997). "The trial court's ruling on the venue motion will not be reversed on appeal absent an abuse of

discretion." *Id.* Here, the denial of the motion was fully and fairly supported by the jurors' responses, which the trial judge relied upon in denying the motion. (R. p. 1010, line 20 - p. 1012, line 1). Had counsel raised the issue, it could not have been meritorious. *Id. See also State v. Evins, supra.*

9(d)(1) Trial Court Error: Instruction on Law Enforcement Statutory Aggravating Circumstance

This Court's jurisdiction is statutorily limited by S.C. Code § 17-27-20(b)(1985), which provides: "This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." Because a PCR action is not a substitute for direct appeal, a PCR applicant cannot assert any issues in his PCR action that could have been raised at trial or on direct appeal. *Simmons, supra. See also Drayton v. Evatt*, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993)(same); *Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983)(same). The Simmons Doctrine bars this claim as it is a free-standing claim of error.

Moreover, Applicant admitted in the PCR hearing that these claims were simply claims "plead in the alternative," to the ineffective assistance of counsel claims above, and are "substantive bases for the ineffective assistance of counsel claims." (October PCR Tr. p. 260). This is a clear concession that the claim was improperly raised as free-standing claims of error, i.e. direct appeal claims. Applicant is not allowed to present claims for "direct appeal" review and "collateral" review for a "double chance" of review. The time for presenting direct appeal claims has expired. Nothing in the statute allows Applicant to resurrect this direct appeal claim. At any rate, the claim is without merit, for all the reasons presented in the ineffective assistance of counsel allegation 9(b)(2) above.

9(d)(2) Brady Claim

As noted above, this claim was withdrawn for lack of factual support.

9(d)(3) Evidentiary Error: State Presentation of "Testimony that it Knew or Should Have Reasonably Known Was False or Misleading" i.e. Evidence of Gang Membership and Evidence Regarding Whether Deputy Victim Was "in the Line of Official Duty as a Law Enforcement Officer At the Time of His Death"

As discussed above, there is evidence of Applicant's gang membership, not the least of which is his own admission of gang membership, his permanent tattoos reflecting gang allegiance, his conviction of a drug offense coupled with his admission that he sold drugs in connection with his gang membership, and his known association with other admitted gang members (i.e. Christina Rodriguez, under Applicant's own theory and according to his experts). Further, in a statement that was not admitted, Christina Christina Rodriguez indicated that Applicant "says he's a Crip from Cleveland." (June PCR Tr. p. 362). Further, in this same statement, Ms. Rodriguez confirmed he admitted selling drugs, and was "representing" as a Crip. (June PCR Tr. pp. 364-365). Applicant has never personally denied gang membership in court or in SCDC. As Applicant's own corrections expert at trial opined to defense counsel, Applicant's admitted involvement was "textbook." (June PCR Tr. p. 412). Applicant has utterly failed to make even the slightest credible argument as to the knowing presentation of false testimony. And, as noted above, if Christina was called, presumably to cast doubt on gang membership (a possibility that has not been established), it would likely open the door to testimony concerning Applicant's violence on and towards Christina, a risk defense counsel did not wish to take. (June PCR Tr. p. 484). Again, Applicant has failed to carry his burden of proof.

Further, as to the evidence establishing the deputy victim "was in the line of official duty as a law enforcement officer at the time of death," Applicant has failed to show what evidence he is referencing or what element of proof the evidence supports. The record shows two lines of evidence supported the aggravator in addition to the scene – that is the Greenville County Sheriff's Department's on-duty policy and the death benefits for line of duty death. As this Court found in (9)(b)(2) above, both are relevant and admissible evidence supporting the submission of the aggravator to the jury. Applicant has failed in his burden of proof.

At any rate, the evidence presented at trial was sufficient to support the aggravating circumstance given, as more fully discussed in regard to the ineffective assistance allegation 9(b)(2) above.

9(d)(4) Closing Argument Error: State's Argument Improper

Again, error that could have been presented in the direct appeal and is barred pursuant to S.C. Code § 17-27-20(b)(1985) and the *Simmons* Doctrine. At any rate, Applicant cannot prove error for all the reasons argued in Ground 9 (b)(7) above.

9(d)(5) Improper Evidence: Victim Impact Evidence Exceeding That Allowed Under Payne v. Tennessee

Again, error that could have been presented in the direct appeal and is barred pursuant to S.C. Code § 17-27-20(b)(1985) and the *Simmons* Doctrine. At any rate, Applicant cannot prove error for all the reasons argued in Ground 9 (b)(5) above.

9(d)(6)Trial Court Error: Cumulative Impact

Again, error that could have been presented in the direct appeal is barred from presentation and consideration in a post-conviction relief action pursuant to S.C. Code § 17-27-20(b)(1985)

and the *Simmons* Doctrine. Moreover, the Supreme Court of South Carolina has not fully embraced the Cumulative Error Doctrine. *Simpson v. Moore*, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006)("Whether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina."); *Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, 324 (2002)(same). If, however, Applicant can pursue relief under this theory, he cannot show error and prejudice.

The Cumulative Error Doctrine requires an appellant to "demonstrate more than error in order to qualify for reversal on this ground. Instead, the errors must adversely affect his right to a fair trial." *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). An appellant, thus, must show "prejudice warranting a new trial based on cumulative trial error." Id.

Applicant cannot even show trial court error here as trial court error is not a cognizable claim and cannot be litigated in the instant post-conviction relief action. His one issue raised on direct appeal was found procedurally barred. There is no indication the Cumulative Error Doctrine would be applicable, if the doctrine is available.

9(e)Trial Court Error: Trial Court Erred in Qualification of Jurors

Again, error that could have been presented in the direct appeal is barred pursuant to S.C. Code § 17-27-20(b)(1985) and the *Simmons* Doctrine. At any rate, Applicant cannot prove error for all the reasons argued in Ground 9 (a)(1) and 9 (b)(1) above, most specifically that the record reflects a sufficient *voir dire*, and no error in qualification of any seated juror.

9(f) Evidence Error, Violation of Constitutional Rights: Gang Affiliation Linked to Future Dangerousness in Prison

Again, error that could have been presented in the direct appeal is barred pursuant to S.C. Code § 17-27-20(b)(1985) and the *Simmons* Doctrine. At any rate, Applicant cannot prove error for all the reasons argued in Ground 9 (b)(3) and 9(b)(4) above.

9(g) Trial Court Error: Admission of Lewis Edward O'Cain Testimony

Applicant apparently argues the trial court erred in qualifying Mr. O'Cain as an expert. Again, error that could have been presented in the direct appeal is barred pursuant to S.C. Code § 17-27-20(b)(1985) and the *Simmons* Doctrine. At any rate, Applicant cannot prove error for all the reasons argued in Ground 9 (b)(3) and 9(b)(4) above.

VI.
CONCLUSION

Based on the foregoing, the application for post-conviction relief is denied in its entirety. Applicant has failed to show deficient performance, or if he established deficient performance, he failed to show prejudice such as would support the granting of either a new guilt proceeding, or a new sentencing proceeding. Further, as to his claim of presentation of false evidence, he has failed to show false evidence was presented. Again, he is not entitled to any relief.

IT IS THEREFORE ORDERED THAT:

1. The post-conviction relief application is **DENIED AND DISMISSED WITH PREJUDICE**; and

2. Applicant is to remain in Respondent's custody until such time as his sentence can be carried out.

IT IS SO ORDERED this _____ day of _____, 2011.

_____
The Honorable D. Garrison Hill
Thirteenth Judicial Circuit

_____, South Carolina.

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)	
)	
Kamell Delshawn Evans, #6016,)	
)	C/A No.: 2006-CP-23-7719
Evans,)	(Capital PCR Action)
v.)	
)	**ORDER**
State of South Carolina,)	
)	
Respondent.)	
)	

In this capital post conviction relief action, Kamell Delshawn Evans challenges his convictions for murder and sentence of death; possession of a weapon during the commission or attempted commission of a violent crime, burglary first degree, and kidnapping. The court, after careful consideration of all the evidence of record and the applicable law, affirms Evans' convictions, but finds 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).

I.
PROCEDURAL HISTORY

In June 2003, a Greenville County Grand Jury indicted Evans on two (2) counts of murder; two (2) counts of possession of a weapon during the commission or attempted commission of a violent crime; burglary, first degree; and two (2) counts of kidnapping. (R. p.1802-13). Evans shot and killed Antonio J. "Joe" Sapinoso, and his father, Antonio L. Sapinoso. The State filed and served a Notice of Intent to Seek the Death Penalty. (R. p. 1814). Steven W. Sumner, Esq., and James Lee "Skip" Goldsmith, Jr., Esq., represented Evans at the trial.

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Jury qualification and selection for the trial on the charges 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. (R. p. 1502). On September 20, 2004, the trial court began the penalty phase. On September 21, 2004, the jury returned from deliberations, and advised the court that they had found the following statutory circumstances as to Joe Sapinoso:

1) The murder was committed while in the commission of the crime or 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.

(R. p. 1795). The jury found the same aggravating circumstances as to Antonio L. Sapinoso with the exception of the law enforcement aggravator. (R. p. 1794). The jury also recommended death. (R. pp. 1794-95).

The trial judge found that the evidence warranted the sentence, and the sentence was not a result of "prejudice, passion or any other arbitrary factor," and sentenced Evans to death. (R. pp. 1799-1800). The judge also imposed a life sentence for burglary. 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).

H14

Joseph L. Savitz, III, Chief Attorney of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented Evans on appeal. Appellate counsel filed a Final Brief of Appellant 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.

(Final Brief of Appellant, p. 3).

The State filed its final brief on July 25, 2006. The case was called for oral argument before the Supreme Court of South Carolina on October 3, 2006. On November 6, 2006, the Court entered its opinion affirming Evans's death sentence. *State v. Evans*, Opinion No. 26220 (S.C. Sup. Ct. filed November 6, 2006).[1] Evans did not seek review from the United States Supreme Court.

On November 13, 2006, Evans filed a Petition for Stay of Execution in the Supreme Court of South Carolina, expressing his desire to file an application for post-conviction relief. The Court granted the stay on December 6, 2006, and appointed the undersigned to hear the proposed PCR action. On February 28, 2007, this Court held a hearing to determine if Evans wished to proceed and if he wished to have appointed counsel. Having determined Evans both wished to proceed and have counsel appointed, this Court appointed William Nettles, Esq., and

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

H.H.

Hank Ehlies, Esq., counsel for Evans. On June 23, 2008, Christopher Seeds Esq., joined counsel for Evans.

The evidentiary hearing in the above captioned capital PCR action began June 1-5, 2009, and concluded October 12-14, 2009.[2] 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. On March 18, 2010, after the conclusion of the hearing, this Court relieved Mr. Nettles and Mr. Seeds was formally appointed second chair.[3]

Upon receipt of the transcripts[4] for both parts of the hearing, this Court established a briefing schedule for post-hearing briefs. Petitioner's brief was submitted on October 4, 2010. Respondent submitted its post-hearing brief on November 10, 2010. Petitioner submitted a reply on November 19, 2010. On December 9, 2010, this Court called for additional briefing of the mercy charge issue. Respondent submitted its second post-hearing brief on the issue on December 14, 2010. Evans submitted his second post-hearing brief on December 16, 2010.

II.
ISSUES PRESENTED

Evans filed his initial PCR application on December 4, 2006, alleging ineffective assistance of trial counsel in failing to request the statutory mitigating circumstance in S.C. Code § 16-3-20(b)(6). (December 4, 2006 PCR Application, pp. 2-3). Evans amended his application on November 16, 2007, and again on January 28, 2009. Pursuant to the January 28, 2009

[2] The evidentiary hearing was continued by consent of the parties on numerous occasions. The delay was justifiably caused by serious illnesses of certain counsel and a member of one counsel's immediate family.
[3] Mr. Nettles was relieved as counsel due to his impending appointment as the United States Attorney for the District of South Carolina.
[4] For reasons unknown, it took more than one year for the full transcript of the June 2009 hearing to be delivered to the parties and the court.

amendment, the following issues were before the Court at the beginning of the evidentiary hearing:

> 9(a) Evans was denied the right to effective assistance of counsel– guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during the guilt or innocence phase of his capital trial.
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> 10(a): Supporting facts: Trial counsel performance during the guilt-or-innocence phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Ard v. Catoe*, 642 S.E.2d 590 (S.C. 2007). Counsel's acts or omissions included, but are not limited to, the following:
>
> 1. Counsel failed to conduct adequate voir dire. Counsel's failures include, but are not limited to, failing to ask potential jurors whether they would automatically vote to impose death where a defendant had been found guilty of murder (*see Morgan v. Illinois*, 504 U.S. 719 (1992), failing to ask appropriate questions of jurors regarding their views on the death penalty thus making the record unclear as to whether the jurors were qualified, failing to voir dire for racial bias as guaranteed by *Turner v. Murray* in this case which involved an inter-racial murder, failing to object to the qualification of several jurors who gave disqualifying responses (e.g., Juror 145 (Eddie Harvey)), and failing to exercise available peremptory strikes to dismiss jurors, ultimately seated, who gave disqualifying responses to voir dire questions (including Juror 258 (Elvis Mahaabwa), Juror 247 (Sandra Holcombe), Juror 118 (James Freeman), and Juror 281 (James Plumley)).
>
> 2. Counsel failed to adequately investigate, present evidence and challenge the State's evidence in the guilt-or-innocence phase. Counsel's failures include failing to adequately investigate and present evidence concerning the circumstances in which the shots were fired at the scene and failing to challenge the testimony of the State's witnesses regarding the cause and manner of death of the two victims. For example, trial counsel failed to retain a pathologist prior to trial and did not cross-examine or otherwise challenge the explanation of the State's forensic pathologist. Forensic evidence suggests a different scenario from the one described by the State regarding the circumstances in which the shots were fired.
>
> 3. Counsel failed to effectively move for a change of venue as regards to both jury selection and the physical location of the trial.
>
> 9(b): Evans was denied the right to effective assistance of counsel during the sentencing phase of his capital trial, in violation of the Sixth and Fourteenth

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Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution.

10(b): Supporting Facts: Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. *See Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984); *Von Dohlen v. State*, 602 S.E.738 (S.C. 2005). Counsel's acts or omissions included, but are not limited to the following:

1. Counsel failed to conduct adequate voir dire. *See* 9(a), 10(a)(1), *supra*.

2. Counsel failed to move to quash the § 16-3-20(C)(a)(7) aggravating circumstance, which authorizes a capital sentence for '[t]he murder of a ... local law enforcement officer... during or because of the performance of his official duties." S.C. Code § 16-3-20(C)(a)(7). The evidence presented at trial did not establish the aggravating factor. *See* 9(d), 10(d)(1), *infra*.

3. Counsel failed to object to irrelevant, unsubstantiated, and inflammatory testimony on the subject of Mr. Evans' gang affiliation (*see* 9(f) and 10(f), *infra*), and failed to provide evidence clarifying the matter.

4. 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 10(g), *infra*, for reasons including, but not limited to, that: (a) there is no field of science for which this witness, who was allowed to render opinions concerning the defendant's future dangerousness, qualified as an expert; (b) the witness was not qualified by education, training or experience to render classification testimony; (c) the witness had no scientific or factual basis for rendering the opinions to which he testified; (d) the witness was wrongfully allowed to testify as to the appropriate sentence, that being "death"; (e) the witness' testimony should have been offered with a limiting instruction that the testimony was subject to the jury's discretion and could be disregarded in its entirety; (f) the witness' testimony should have been excluded after the witness testified that he had inadequate information concerning the defendant's history and prior criminal record to form an adequate opinion on future dangerousness; (g) the witness was allowed to render an opinion regarding classification and future dangerousness utilizing the defendant's tattoos which was a violation of the defendant's rights pursuant to the First and Fourteenth Amendments to the United States Constitution and the Constitution of the State of South Carolina; and (h) counsel failed to conduct a reasonable cross-

examination. [Parts of this ground are alleged in Interim Amendments to Original Application for Post-Conviction Relief as Paragraph 10(b)].

5. Counsel failed to object to victim impact testimony elicited during the sentencing proceeding that exceeded the scope permitted by *Payne v. Tennessee*, 501 U.S. 808 (1991), in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution. *See* 9(d), 10(d)(5), *infra*.

6. Counsel failed to object to hearsay testimony introduced during the testimony of Ms. Sapinoso. South Carolina Rules of Evidence, Rule 801(c) prohibits hearsay, which it defines 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."

7. Counsel failed to object to inflammatory, irrelevant and improper statements made by the prosecution in closing argument. Such statements included, but are not limited to, arguments designed to arouse the passion and prejudice of jurors, assertions substituting personal opinions as law, statements diminishing the jury's sense of responsibility for their verdict, statements misrepresenting the proper scope of mitigating evidence, arguments that were not reasonable inferences from the record, and misrepresentations of the nature of alternative punishments. *See also* 9(d), 10(d)(4), *infra*.

8. Counsel failed to object that Evans's prosecution violated constraints imposed by the Equal Protection components of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and South Carolina law.

9. Counsel failed to adequately investigate, present evidence and challenge the testimony of State witnesses regarding the circumstances of the shooting and the cause and manner of death of the two victims. *See* 9(a), 10(a)(2), *supra*.

10. Counsel failed to request the statutory mitigator relating to capacity, S.C. Code § 16-3-20(C)(b)(6). On direct appeal, the South Carolina Supreme Court held that "by failing to make a contemporaneous objection of request for the capacity mitigator, appellant did not properly preserve the issue for our review." *State v. Evans*, 637 S.E.2d 313, 315 (Nov. 6, 2006). [This ground is alleged in Application for Post-Conviction Relief (Dec. 4, 2006) as Paragraph 10(a)]

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11. Counsel failed to investigate, develop, and present available, relevant, and admissible mitigating evidence. Counsel's failures in this regard include consenting to a trial date that was merely two months following counsel's appointment to represent Mr. Evans and before starting any mitigation investigation, failing to retain or present the testimony of a social work expert to explain information gathered regarding Mr. Evans's life history, failing to gather appropriate and relevant social history records, failing to investigate and obtain expert services on lead poisoning and its impact on Mr. Evans's neurological, behavioral, and intellectual development even though counsel knew that Evans tested with high levels of lead poisoning as a toddler, and failing to provide necessary background information to expert witnesses including Dr. James Evans and Dr. Elin Berg.

9(c): Evans was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during the appellate phase of his trial.

10(c): Supporting facts: Counsel's performance on direct appeal was unreasonable and prejudicial. *See Evitts v. Lucey*, 469 U.S. 387 (1985); *Strickland v. Washington*, 466 U.S. 668 (1984); *Southerland v. State*, 524 S.E.2d 833 (S.C. 1999). Counsel's acts or omissions included, but are not limited to, the following:

1. Appellate counsel failed to challenge the trial court's denial of trial counsel's request to charge the jury on voluntary manslaughter. *Hopper v. Evans*, 456 U.S. 605, 611 (1982); *Beck v. Alabama*, 447 U.S. 625, 638 (1980). "Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon a sufficient legal provocation." *State v. Ivey*, 325 S.C. 137, 142, 482 S.E.2d 125 (1997); *see State v. Lowry*, 315 S.C. 396, 434 S.E.2d 272, 274 (1993). The testimony at trial established the factual basis for this charge.

2. Counsel failed to challenge the trial court's denial of Evans's motion for a change of venue, where one of the victims was a law enforcement officer who worked regularly as security at the courthouse in which Evans's trial was held.

9(d): Evans's conviction and death sentence were obtained in violation of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and South Carolina law.

10(d): Supporting facts: Errors at trial violated the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States

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Constitution and South Carolina law. Those errors include, but are not necessarily limited to, the following:

1. The jury was instructed on an aggravating factor (§ 16-3-20(C)(a)(7)) that, narrowly interpreted as the Eighth Amendment requires (*see Roper v. Simmons*, 543 U.S. 551 (2005);*Godfrey v. Georgia*, 446 U.S. 420 (1980)), was not established by the State's evidence and therefore invalid. Because the presence of the invalid sentencing factor allowed the sentencing jury to consider evidence that would not otherwise have been before it, reversal of the death sentence is mandated. *See Brown v. Sanders*, 546 U.S. 212 (2006); *Zant v. Stephens*, 462 U.S. 862 (1983).

2. The State suppressed evidence that was both favorable to Evans and material to Evans's guilt or punishment. *See Banks v. Dretke*, 540 U.S. 668 (2004); *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Simpson v. Moore*, 627 S.E.2d 701 (S.C. 2006).

   [Withdrawn by Evans as Discussed Below]

3. The state presented testimony that it knew or should have reasonably known was false or misleading, including but not limited to testimony that Evans was a member of a gang and evidence regarding whether one of the victims was in the line of official duty as a law enforcement officer at the time of his death. *See Washington v. State*, 324 S.C. 232, 235, 478 S.E.2d 833, 835 (1996). *See Napue v. Illinois*, 360 U.S. 264, 279 (1959); *State v. Fullwood*, 274 S.C. 60, 61, 262 S.E.2d 10, 11 (1979)(improper for prosecutor to argue that evidence refuted defendant's claim that victim had knife, when prosecutor knew that law enforcement took a knife from the belongings of the deceased). There is a reasonable likelihood that the false or misleading testimony affected the judgment of the jury. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *Napue, supra*.

4. Evans's death sentence was obtained in part as a result of the State's inflammatory, irrelevant and improper statements in closing argument. *See, e.g., Darden v. Wainwright*, 477 U.S. 168 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); *State v. Copeland*, 468 S.E.2d 620 (S.C. 1996); *Thompson v. Aiken*, 315 S.E.2d 110 (S.C. 1984); *see also Weaver v. Bowersox*, 438 F.3d 832 (8th Cir. 2006), cert. dismissed, 127 S.Ct. 2022 (2007). 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.

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5. Victim impact testimony elicited during the sentencing proceeding exceeded the scope permitted by *Payne v. Tennessee*, 501 U.S. 808 (1991), in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution.

6. The cumulative prejudicial impact of all errors during the guilt-innocence and sentencing trials resulted in a fundamentally unfair sentencing proceeding, in violation of the Due Process Clause of the Fourteenth Amendment. *See Taylor v. Kentucky*, 436 U.S. 478, 487 n.15 (1978)(concluding that "the cumulative effect" of "damaging circumstances" of case "violated the due process guarantee of fundamental fairness").

9(e): The trial court's erroneous qualification of jurors resulted in a jury uncommonly willing to impose death and deprived Mr. Evans of his right to trial by an impartial jury under the sixth and Fourteenth Amendments to the United States Constitution and South Carolina law.

10(e): Supporting facts: The Sixth Amendment guarantees a capital defendant the right to a fair trial before a panel of impartial and indifferent jurors. *See Morgan v. Illinois*, 504 U.S. 719, 728 (1992); *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988); *Duncan v. Louisiana*, 391 U.S. 145, 147-58 (1968); *Turner v. Louisiana*, 379 U.S. 466, 471-73 (1965); *Irwin v. Dowd*, 366 U.S. 717, 722-23 (1961). A "juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do." *Morgan*, 504 U.S. at 729. Further, "[a]ny juror to whom mitigating factors are ... irrelevant should be disqualified for cause, for [they have] formed an opinion concerning the merits of the case without basis in the evidence developed at trial." *Morgan*, 504 U.S. at 738-39. Therefore any juror whose predispositions about the propriety of the death penalty - either generally or related to the specific case - are such that the juror's ability to follow the trial court's instruction that he or she consider the defendant's mitigating evidence is substantially impaired, is not qualified. Several jurors expressed such impairments during voir dire in this case. *See* 9(a) and 10(a), *supra.*

9(f): Evans's death sentence was obtained in violation of the First, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law by unsubstantiated and irrelevant testimony that Mr. Evans had a gang affiliation and would therefore be a further danger in prison.

10(f): Supporting facts: Evidence of a defendant's political or religious or other associations or beliefs may be admitted *only* if it probatively relates to the murder,

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to aggravating factors such as future dangerousness, or to rebut a mitigating factor offered by the defense; otherwise, evidence of affiliation or belief, however unpalatable it may be to some, has no relevance in a capital trial, and its admission violates a defendant's First Amendment right to freedom of association and freedom of speech. *Dawson v. Delaware*, 503 U.S. 159, 163-69 (1992). There is no evidence that Evans' crime was gang-motivated, no evidence that Evans engaged in gang-related activity in or out of prison, no evidence about Evans' behavior in prison linking him to a gang. The evidence lacks the necessary nexus between gang's beliefs or activities and Evans' behavior. Rather than assist the jury in making an individualized determination of whether Evans deserves the death penalty, the irrelevant and unsubstantiated matter injected an arbitrary and invalid sentencing factor into Mr. Evans' sentencing proceeding. *See Zant v. Stephens*, 462 U.S. 862 (1983).

9(g): The trial court erred, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law, in admitting testimony from State witness Lewis Edward O'Cain.

10(g): Supporting facts: 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. *See State v. Council*, 515 S.E.2d 508 (S.C. 1999); *State v. Jones*, 259 S.E.2d 120 (S.C. 1979); South Carolina Rules of Evidence, Rules 403, 702. *See generally Kumho Tire co., Inc. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). See 9(b) and 10(b)(4), *supra.*

(January 28, 2009 Amended Application, pp. 2-7).

On August 31, 2009, Evans offered an amendment to the application to include the following allegation:

9(b), 10(b)(12) Counsel failed to object to the trial court's instruction to the jury not to recommend a sentence of life based on mercy. See *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (No. 26679)(June 29, 2009)(overruling *State v. Hughey*, 339 S.C. 439, 459, 529 S.E.2d 721, 731 (2000)). On June 29, 2009, the South Carolina Supreme Court ruled that a trial court's charge prohibiting the jury from considering mercy was error and that trial counsel performed deficiently in failing to object to the charge. The trial court in *Evans* (the same as in *Rosemond*) provided exactly the same charge that the South Carolina Supreme Court rejected in *Rosemond*. In *Rosemond*, the judge instructed the jury: "[Y]ou may recommend a sentence of life imprisonment for any reason or for no reason at all *other than as an act of mercy*." 680 S.E.2d at 10 (emphasis in original). The South Carolina Supreme Court explained that, contrary to the trial court's charge, the jurors were "entitled to consider [mercy]":

> It is proper to instruct a jury in a capital sentencing phase that it may recommend a life sentence for any reason or no reason at all, including as an act of mercy. A jury's consideration of mercy, if proper evidence of mercy is admitted, is well recognized in the sentencing phase of a capital case. Because a capital jury may consider properly admitted evidence of mercy in the sentencing phase, consideration of mercy is no inconsistent with the instruction that, "the jury should not be guided by sympathy, prejudice, passion, or public opinion...." *State v. Singleton*, 284 S.C. 388, 393, 326 S.E.2d 153, 156 (1985) overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991).

Rosemond, 680 S.E.2d at 10-11. Here, as in *Rosemond*, the trial court also instructed the jury, "[Y]ou may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy." (R. 1785.) Defense counsel's summation emphasized mercy: "I am going to ask for mercy for Kamell Evans... Mercy is unmerited favor. You can't earn it; you don't deserve it; but you give it to him anyway.... We don't repay evil for evil. And mercy is appropriate in this case." (R. 1770.) For the reasons set forth in *Rosemond*, the identical charge in Mr. Evans's case violates South Carolina law and counsel's failure to object to the charge (see R. 1789), rejected in *Rosemond* and at odds with their defense, was deficient and prejudicial.

(August 28, 2009 Amended Application, pp. 4-5).

This Court grants the motion to amend, and the above issue challenging the mercy charge is addressed herein.

Evans conceded during his response to Respondent's motion for a directed verdict that there was no evidence of a *Brady* violation as alleged in 9(d)(2), and withdrew the allegation at the hearing. (October PCR Tr. pp. 258, 260 and 262). This Court accepts the withdrawal of the issue and that issue is dismissed.

III.
DISPOSITION OF MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT AND TRIAL MOTIONS ON THE ALLEGATIONS

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On May 22, 2009, Respondent made an amended return and moved for summary judgment on claims Allegations 9(d)(1), 9(d)(3-6), 9(e), 9(f) and 9(g), based on the argument Evans's claims are not cognizable in post-conviction relief as freestanding claims of error, i.e. Evans raises claims that could have been raised on direct appeal. *See, e.g., Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975)("[e]rrors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings."). (Amended Return and Motion, pp. 8-10). At the beginning of the June evidentiary hearing, this Court denied Respondent's motion. (June PCR Tr. p. 3). Respondent also moved for a directed verdict on those claims, on the same ground, which was also denied. (October PCR Tr. pp. 255-262).

IV.
RELEVANT FACTS

In considering the allegations of the application, and the arguments of counsel, this Court is mindful of the following salient facts:

There is no question that Evans shot and killed Antonio L. Sapinoso and Deputy Antonio J. Sapinoso after having held them hostage for approximately five (5) hours in the Sapinoso home in Greenville County. Evans acknowledged this in his statement to the authorities, in his testimony during the guilt phase, and in his closing statement to the jury. (R. 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 Evans's three guns. (See, e.g., R. p. 1445-1448; June PCR Tr. pp. 441-447; Respondent's Exhibit 23; Respondent's Exhibit 25, p. 2).

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Evans admitted shooting Deputy Sapinoso in the back of head. (Respondent's Exhibit 23, page 2; June PCR Tr. p. 765). Moreover, Evans admitted to his PCR counsel that he was actually trying to re-load his weapon(s) when he was taken down. (Respondent's Exhibit 25, p. 4).

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 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." (R. p. 1425, line 11 – p. 1426, line 4). Evans conceded he parked his truck away from the home, and waited for Deputy Sapinoso to return to the family home. (R. 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's trial testimony, the two sat on the porch until Evans began to cry and the Deputy suggested they go inside the home. (R. 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.[5] (R. p. 1431). According to Evans's testimony, "they" (he and the Deputy) together called Christina. (R. 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." (R. p. 1432).

[5] During the penalty phase, the jury would hear Mrs. Sapinoso's recounting of events, including the defendant blocking her from calling out for help, and her attempts to shield her grandson, and survive the harrowing event herself. (R. pp. 1549-1554). Nothing in this testimony remotely supports a "family summit" situation downstairs to help Evans as Evans would have the jury and court believe. In fact, Evans later admitted to counsel that the deputy was actually handcuffed. (Respondent's Exhibit 25, p. 2). Even so, this Court recounts the testimony at trial.

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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. (R. 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's sister, Tina, who was also present outside the home, and Lee told Evans he could come out at anytime and he would not be harmed. (R. 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. (R. 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 Christine, 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. (R. p. 1129, lines 15-25; p. 1134, lines 8-18)(emphasis added). Evans remained "cordial and nice" to Lee throughout the negotiations, becoming agitated only when Lee asked to speak with Joe, or when Lee requested release of some of the hostages. (R. 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 eventually spoke with Joe and enlisted Joe's help in attempting to assure Evans of his safety and secure everyone's release. (R. p. 1123, line 20 - p. 1124, lines 18). Lee also arranged, at Evans's request, for Evans to speak with Christine. Lee listened to the conversation and thought the conversation "went real well." (R. p. 1124, line 19 - p. 1126, line 8). After Evans spoke with Christine, Lee spoke to Evans "a couple of more times" and continued negotiations. Evans told

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Lee he thought Lee was "cool" and said he was going to discuss the matter with Joe, and would call back later. (R. p. 1126, lines 11-24). Minutes later, Lee heard multiple shots. (R. p. 1126, line 25 - p. 1127, line 7).

The SWAT team, which was deployed, had not attempted any action prior to the shooting as they were informed negotiations were going well and Evans would be coming out on his own. (R. 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. (R. 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 Joe Sapinoso face down on the floor with his arms folded underneath his body, with gunshots to the back of the head. His father's body was on the couch. (R. 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." (R. p. 1151, lines 6-14). The SWAT team also rescued Mrs. Sapinoso and Christina's son who remained hidden upstairs until the officers escorted them outside the home. (R. 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. (R. 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. (R. p. 1291, lines 2-21). (See also June PCR Tr. pp. 783-784; Respondent's Exhibit 23-A). Additionally, investigators found Evans's hat in an abandoned house close to the Sapinoso home, where Evans waited for his victim, and Evans's car parked approximately a half of a mile away. (R. p. 1271; June PCR Tr. p. 779-780; State's Exhibit 40a; Respondent's Exhibit 24, p. 1). Evans was wearing all black at the time of murders,

and had, in addition to his own two guns, several blue bandanas, which were recovered from the scene. (R. p. 1298; June PCR Tr. p. 781; Respondent's Exhibit 23-A). According to the state's theory blue is the color associated with the gang featured in Evans's multiple. tattoos. (R. pp. 1589-1590; p. 1598; October PCR Tr. p. 72).

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 actually on the floor. (R. p. 1392, line 16-p.1395, line 25; p. 1398, line 15 – p. 1403, line 14). 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." (R. p. 1407, lines 13-18). The father suffered three gunshot wounds to the head and one to the arm. The one to the arm was considered a defensive wound: "... two struck the head, and its consistent that his arm would have been raised in a defensive posture." (R. p. 1407, lines 6-8). Though in the PCR hearing Evans presented an expert to disagree with the State's expert on a portion of the findings, the expert agreed, without hesitation, that three of the four shots to Deputy Sapinoso's head were inflicted at close range while his head was on the floor. (June PCR App. p. 765).

V.
DISCUSSION

To establish that counsel was ineffective, Evans must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error(s), there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052 (1984); *Simpson v. Moore*, 367 S.C. 587, 595-

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96, 627 S.E.2d 701, 706 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Id.*

"There are countless ways to provide effective assistance in any given case," and the simple fact that trial counsel's strategy was ultimately unsuccessful does not automatically render counsel's assistance constitutionally ineffective. *Strickland*, 466 U.S. at 689. *Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995). "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688; *Drayton v. Evatt*, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993). "We must always be mindful that the standard of prejudice set out in *Strickland* requires more than a mere possibility that the allegedly deficient performance may have prejudiced the defendant in any way." *Poyner v. Murray*, 964 F.2d 1404, 1420-21 (4th Cir. 1992).

The standard of "prejudice" differs depending upon whether it is related to guilt phase issues or penalty phase issues. In order to prove "prejudice" in the guilt phase, Evans must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). In *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998), the Supreme Court of South Carolina instructed that prejudice may be found in a capital sentencing proceeding when "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." Again, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Jones*, 504 S.E.2d at 823-824. Prejudice is evaluated by consideration of the trial evidence of mitigation, along with the PCR

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evidence, compared to the aggravating circumstance evidence. *Wong v. Belmontes*, ___ U.S. ___, 130 S.Ct. 383 (2009).

(9)(a)(1) Ineffective Assistance of Trial Counsel: Failure to Conduct Adequate Voir Dire (Guilt Phase)
(9)(b)(1) Ineffective Assistance of Trial Counsel: Failure to Conduct Adequate Voir Dire (Sentencing Phase)

"The scope of *voir dire* and the manner in which it is conducted are generally left to the sound discretion of the trial court." *State v. Stanko*, 376 S.C. 571, 575, 658 S.E.2d 94, 96 (2008); *State v. Bennett*, 369 S.C. 219, 226, 632 S.E.2d 281, 285 (2006); *State v. Hill*, 361 S.C. 297, 308, 604 S.E.2d 696, 702 (2004); *State v. Tucker*, 334 S.C. 1, 10, 512 S.E.2d 99, 103 (1999); *State v. Hill*, 331 S.C. 94, 103, 501 S.E.2d 122, 127 (1998). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *Stanko*, 376 S.C. at 575, 658 S.E.2d at 96, *citing* *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

"[A] prospective juror may be excluded for cause when his views on capital punishment are such as would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *State v. Sapp*, 366 S.C. 283, 290-291, 621 S.E.2d 883, 886, *citing Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844 (1985). "The ultimate consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him." *Sapp*, 366 S.C. at 291, 621 S.E.2d at 887.

"[W]hat is constitutionally mandated is the selection of a fair and impartial jury" and "[n]o particular formula of questions is mandated to achieve this goal." *State v. Bennett*, 369 S.C. at 227, 632 S.E.2d at 285, *quoting State v. Hill*, 361 S.C. at 310, 604 S.E.2d at 702-703. "To be constitutionally compelled ... it is not enough that a question may be helpful. Rather, the trial court's failure to ask or allow a question must render the defendant's trial fundamentally unfair."

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MuMin v. Virginia, 500 U.S. 415, 425, 111 S.Ct. 1899 (1991). *See also State v. Wise*, 359 S.C. 14, 23-24, 596 S.E.2d 475, 479 (2004); *State v. Tucker*, 334 S.C. at 10, 512 S.E.2d at 103. Of course, "'[i]t is well established that a trial court has broad discretion in conducting the *voir dire* of the jury and particularly in phrasing the questions to be asked.'" *State v. Bixby*, 388 S.C. 528, 542, 698 S.E.2d 572, 579 (2010), *quoting United States v. Jones*, 608 F.2d 1004, 1009 (4th Cir. 1979). "When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged jurors must be examined in light of the entire *voir dire*." *State v. Bennett*, 328 S.C. at 257, 493 S.E.2d at 848.

Evans originally complained that counsel was ineffective in regard to five specific jurors or potential jurors - - Eddie Harvey, Elvis Mahaabwa, Sandra Holcombe, James Freeman, and James Plumley. (Amended Application, p. 2). Evans has abandoned the allegation of error in regard to Juror Harvey, referencing Juror Harvey's qualification only briefly, and by footnote. (Evans's Post-Hearing Brief, pp. 98-109 and n. 51). [6] In regard to the remaining jurors, Evans argues three distinct issues which are addressed as follows.

A. Allegation Counsel Missed Arguments to Move to Disqualify Jurors on Statutory Disqualification Grounds and or Presumed Empathy Is Not Supported by Fact or Precedent.

1. Juror Mahaabwa.

[6] As to Mr. Eddie Harvey, even though Evans has abandoned an allegation of error, the record completely refutes his "noted"complaints. First, he complains that counsel should have "prevented" the juror's qualification. (Evans's Post-Hearing Brief, p. 109 n. 51). Defense counsel *did* object to the qualification. (R. p. 613, line 21 - p. 614, line 11). There could be no error in regard to this allegation. Moreover, while the juror was qualified over counsel's objection, (R. p. 614, line 12 - p. 615, line 15), his name was only called in selection of the first alternate, at which time counsel used an available strike. (R. p. 970, lines 1-7). The juror never served on the jury. There could be no prejudice. *Ross v. Oklahoma*, 487 U.S. 81, 86, 108 S.Ct. 2273 (1988)("Any claim that the jury was not impartial... must focus ... on the jurors who ultimately sat.").

The record shows that Juror Elvis Mahaabwa was questioned by the Court, by trial counsel, and by the solicitor. The juror's answers reflected that he could be fair and impartial, could consider either sentence based on the circumstances presented, and return either sentence based on the circumstances and or mercy. (R. p. 172, line 14 - p. 186, line 10). He was qualified without exception. (R. p. 186, lines 17-21). The record supports there is no disqualifying response, and no cause to object. In fact, Evans does not appear to rest his main argument on the actual responses; rather, Evans argues an issue with the juror's employment, urging a *per se* disqualification rule. Evans's argument lacks support in both fact and law.

Evans argues the juror was " a prison guard, uniquely sensitive to both the underlying crime ... and the aggravating circumstance." (Evans's Post-hearing brief, p. 98). Evans is incorrect. The juror, under direct questioning from defense counsel Goldsmith, clarified that he was not a prison guard, but had administrative duties "assigning inmates their jobs and reviewing how they do on their jobs." (R. pp. 178-179). Moreover, Evans is constrained to admit that there is no automatic disqualifying employment here. (Evans's Post-Hearing Brief, p. 99). His suggestion that counsel should have made a motion to disqualify the juror pursuant to S.C. Code 14-7-820, and *State v. Cooper*, 291 S.C. 332, 353 S.E.2d 441 (1986), (Evans's Post-Hearing Brief, p. 99 n. 49), lacks merit.

S.C. Code § 14-7-820 sets out the following disqualification: "No clerk or deputy clerk of the court, constable, sheriff, probate judge, county commissioner, magistrate or other county officer or any person employed within the walls of any courthouse shall be eligible as a juryman in any civil or criminal case." *Cooper* allowed the "sheriff" statutory disqualification to apply to highway patrol officers as the officers are vested by statute with similar powers as deputies, and bound, again by statute, to work with sheriffs. 291 S.C. at 335, 353 S.E.2d at 442. Conversely,

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the applicability of the disqualification to prison guards, "whose duties," as found by the Supreme Court of South Carolina,"do not involve enforcing the criminal laws of this State," has been soundly rejected. *State v. Hughey*, 339 S.C. 439, 450, 529 S.E.2d 721, 727 (2000). The suggestion that counsel was ineffective for failing to argue against precedent – on the same argument, with even less of a factual basis – is unpersuasive. *See, e.g. MuMin v. Virginia*, 500 U.S. at 425 ("To be constitutionally compelled ... it is not enough that a question may be helpful. Rather, the trial court's failure to ask or allow a question must render the defendant's trial fundamentally unfair."). Further, in this particular case, Evans acknowledged that many of the decisions would be made in defense counsel's professional judgment, and he made a knowing and intelligent waiver of his right to contest the manner in which counsel chose, in his professional opinion, to conduct *voir dire* and exercise jury strikes.[7] (June PCR Tr. pp. 472-473). (Respondent Exhibits 22 and 32). It is clear that Evans had no complaints of the selected jury at the time the jury was selected. (Id). *See Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995)("recogniz[ing] consent as probative of the reasonableness of the chosen strategy and of trial counsel's performance").

Finally, Evans argues what Respondent has phrased, and which this Court adopts, a "general fear of possible empathy" from a shared chosen profession. (Evans's Post-Hearing Brief, p. 99). However, since the victim was not an officer, and not a prison guard as Evans argues, the argument is not relevant. Moreover, the suggestion "[t]his principle" of the necessity of excluding similarly situated individuals "has been widely recognized as necessary to protect the rights of defendant," is curiously only supported with a 1985 Eleventh Circuit non-murder

[7] Even though Evans acknowledged his deference to defense counsel in this regard, defense counsel still included Evans in the process. (See June PCR Tr. pp. 472-473).

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case (where the actual equivocation by the juror was as important as her work bias), a 1968 D.C. Circuit murder case footnote (where the process of expanded capital *voir dire* was still being molded), and a Virginia state court of appeals non-capital case that was vacated on *en banc* rehearing. In fact, the Virginia court in vacating the opinion – recognizing "the only relationship between the victim and Juror ... is that they share the same occupation and the risk of suffering the same type of assault upon which this action was based" – specifically held that "the application of a *per se* rule is unwarranted, and that Juror Person's employment, without more, does not require that bias should be imputed." *Williams v. Comm.*, 466 S.E.2d 754, 756 (Va.Ct.App. 1996). Evans fails to support his suggestion. Additionally, he must expand the argument found in these isolated cases for the argument to apply here. He attempts to do so by use of a "sense of camaraderie" argument. The offered argument to expand the possible empathy beyond its comfortable borders (i.e. directly shared professions) is unpersuasive. It is too broad a rule to apply effectively.

In sum, this Court finds there is no "same profession" analysis – for what it's worth – to be made here. Moreover, defense counsel Sumner testified that he was aware of the juror's background and made a decision that the juror would be helpful and understanding of the reality of prison life as harsh and dangerous, increasing the possibility of a life sentence. In particular, Sumner testified that the juror, from a position of real world experience, could support "George Martin's testimony that was coming in about SCDC conditions and can tell the jurors Martin is right, that's exactly the way that it's going to be...." (June PCR Tr. pp. 382-384). This was especially important where defense counsel placed great emphasis on the penalty phase, and where counsel offered prison conditions and or security measures due to expressed gang affiliation evidence for the specific (and admissible) purpose of combating the State's testimony

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of the advantages and heightened danger within prison due to his expressed gang affiliation. (See June PCR Tr. pp. 383-384; p. 433). This is an exercise of professional judgment of the sort necessary and recognized as particularly reserved to counsel. *See Palacio v. State*, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999)(citing with approval multiple cases wherein "other courts have held jury selection is a process that inherently falls within the expertise and experience of trial counsel").

2. *Alternate Juror James Freeman.*

As to Mr. James Freeman, the record shows that he was also questioned by the Court, by the solicitor, and by trial counsel, and his answers also reflected that he could be fair and impartial, could consider either sentence based on the circumstances presented, and could return either sentence based on the circumstances. (R. p. 677, line 19 - p. 693, line 22). He was qualified without exception. (R. p. 693, lines 23-25). However, though chosen as Alternate 1, he did not participate in the jury deliberations.[8] (R. p. 1503, line 6 - p. 1508, line 10; R. p. 1796, line 1 - p. 1797, line 24). Thus, whatever complaints Evans may have of the juror's qualification, his qualification could have no bearing on the fundamental fairness of the deliberations. *Ross v. Oklahoma*, 487 U.S. 81, 86, 108 S.Ct. 2273 (1988)("Any claim that the jury was not impartial... must focus ... on the jurors who ultimately sat."). Evans can show no prejudice. *Id. See also State v. Green*, 301 S.C. 347, 353, 392 S.E.2d 157, 160 (1990)(applying

[8] During the twenty-four hour break in the proceedings, one of the seated jurors who had participated in the guilt deliberations, Larry Coker, lost his mother and was excused. Marlon Sullivan (selected as Alternate 2), replaced Mr. Coker on the jury and participated in the sentencing deliberations. (R. p. 1511, line 4 - p. 1513, line 1).

Ross in evaluating prejudice). However, the record supports there is no disqualifying response, and no cause to object.

Evans maintains that the juror, because his son was seeking a career in law enforcement, would show empathy toward the victim, much like the "shared profession" argument attempted with Juror Mahaabwa above. Not only is the connection even more remote, and the argument for some *per se* disqualification rule baseless, Evans only makes the argument based on a parsing of the responses. "When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged jurors must be examined in light of the entire *voir dire*." *State v. Bennett*, 328 S.C. at 257, 493 S.E.2d at 848. The record reflects that Juror Freeman struggled with the questions regarding any bias toward law enforcement testimony. However, upon questioning by defense counsel, the juror explained, "just because the officer would say X is true, I don't necessarily take that as gospel." (R. p. 691). He added that "[i]f all the circumstances were equal, probably, yes" that he would give the testimony greater weight than that of others. (R. p. 691). Moreover, just a connection with law enforcement is not a proper basis to remove the juror for cause. *Cf. State v. Kiser*, 284 S.W.3d 227, 271 (Tenn. 2009)(rejecting argument that failure to excuse jurors who, at one point, indicated favoring law enforcement, rendered sentence arbitrary; jurors had been rehabilitated, defense counsel had expressed approval of the jurors at trial, and fact that law enforcement aggravator was only aggravator did not enhance probability of error.) At any rate, as noted, the juror did not serve and no reversible error could therefore have occurred. *Ross, supra.*

B. Allegation That Counsel Failed to Strike Jurors Mahaabwa and Holcombe When Their Answers Indicated They Would Always Impose Death Depends On Untenable Parsing of the Responses. When Read As a

Whole, the Responses Do Not Establish an Automatic Death Penalty Response.

Evans asserts the referenced jurors "equated a guilty verdict with a death sentence,' and were "incapable of properly considering mitigating evidence." (Evans's Post-Hearing Brief, p. 104). When read in context, however, as they must be, *Bennett*, *supra*, the responses do not rise to the level of "automatic death" responses.

1. Juror Mahaabwa.

Evans takes issue with Juror Mahaabwa's response that, "if there hasn't been a crime which needs capital punishment, then they don't have to ask for it." (R. p. 181-182). Evans argues counsel should have asked for clarification. (Evans's Post-Hearing Brief, p. 105). Counsel did seek clarification. In fact, it was defense counsel who posed the question *due to the responses on the questionnaire* regarding whether the death penalty is sought "about the right amount of time," to ensure the juror *was not* an "automatic death" juror. (See R. p. 181-182). Further, the juror specifically clarified that his response had "nothing to do with [... the...] three suggestions. Those are two different, separate questions there." (R. p. 182). In other words, by his own explanation, there was a difference in seeking the penalty and deserving the penalty. Evans simply does not discuss this juror's explanation. Again, one must look at the entire conversation to fairly analyze the responses. *Id.*

2. Juror Sandra Holcombe.

The record shows that Juror Holcombe was questioned by the Court, by the solicitor, and by trial counsel, and her answers reflected that she could be fair and impartial, and could consider either sentence based on the circumstances presented. (R. p. 260, line 12). (See, for

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example, R. p. 252, line 1, "It really depends on the evidence" and R. p. 259, lines 21-25, "I could do either one. It just depends on what the evidence is brought to me, and I guess what's in my heart... which one I would think would be more appropriate."). She was qualified without exception. (R. p. 260, lines 15-22). The record supports there is no disqualifying response, and no cause to object. Evans, however, argues counsel was ineffective for not identifying suspect responses during the solicitor's questioning of the juror, (Evans's Post-Hearing Brief, pp. 105-106, citing R. p. 254-255), or exploring answers to defense counsel's questioning, (Evans's Post-Hearing Brief, p. 106, citing R. p. 258). While the juror did say she did not believe the death penalty was imposed "not enough in most cases that I've heard," *upon additional probing by defense counsel*, the juror explained:

> To me there is some cases that deserve the death penalty, and there's others that don't. But, then again, I don't serve on the jury, so I don't hear all of the evidence, and so that's that's the reason why. It just depends on the case and the evidence brought to me.

(R. p. 258). (See also R. pp. 259-260, affirming sentence would "depends on ... the evidence").

When read in context and its entirety, the responses of this juror do not show any "automatic death sentence" disqualifying response. Moreover, any suspect answers prompted additional clarifying questions by defense counsel. Evans has failed to show deficient performance and prejudice.

C. Evans's Allegation That Voir Dire was Overall Cursory and Brief. Therefore There Must Be Error, Fails for Improper Presumption of Error.

This Court has reviewed the record and finds there were no automatically disqualifying responses. Moreover, the record supports that the *voir dire* here was extensive, spanning not only the in-court questions, but also jury questionnaires. (See, for example, R. p. 173 (Juror

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Mahaabwa confirming the truthfulness of his answers to the questionnaire); R. p. 181 (Juror Mahaabwa explaining, upon defense inquiry, one response reflected on questionnaire going to fairness and impartiality)). (See also June PCR Tr. p. 387, Defense Counsel Sumner referencing both in court questions and questionnaires). There is no cause to find *voir dire* insufficient simply because the record indicates the procedure was "too short" or that another procedure could have been used. *See, for example, State v. Bixby*, 388 S.C. at 543, 698 S.E.2d at 580 ("the qualification of jurors was extensive and defense counsel did not challenge the qualification of the impaneled jurors because he had sufficient information from both their answers to the detailed questionnaires and his questioning to determine that each was qualified"); *State v. Bryant*, 372 S.C. 305, 314, 642 S.E.2d 582, 587 (2007)("Because the use of paper strikes did not deprive Bryant of a fair trial by an impartial jury, we hold that the trial court did not err in refusing to allow jurors to be present during jury selection."). There is no indication of real error – i.e. the selection of a constitutionally unqualified juror, or the omission of a necessary question, as determined by United States Supreme Court precedent in the juror selection process – in the selection of Evans's jury. *See Ross, supra; State v. Stanko*, 376 S.C. at 576, 658 S.E.2d at 96 ("To constitute reversible error, a limitation on questioning must render the trial fundamentally unfair."). Thus, Evans has failed to carry his burden of proof.

As to Evans's suggestion that defense counsel could have asked more questions, he has neither alleged nor shown a specific error. "[W]hat is constitutionally mandated is the selection of a fair and impartial jury" and "[n]o particular formula of questions is mandated to achieve this goal." *Bennett*, 369 S.C. at 227, 632 S.E.2d at 285. The Supreme Court of South Carolina has recently rejected a challenge to the sufficiency of *voir dire* where the trial judge disallowed

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defense counsel to instruct the jury on legal definitions. In essence, defense counsel argued that the jury must be instructed on the legal definition of murder (i.e. not self-defense, etc), to "ascertain[] each potential juror's qualification with regard to their views on capital punishment." *Bixby*, 388 S.C. at 541-42, 698 S.E.2d at 579. Of course, "such information is disseminated to jurors by way of jury instructions, not questioning on voir dire." Id, 388 S.C. at 543, 698 S.E.2d at 580. But, at any rate, there was no error in disallowing the instruction as "the qualification of jurors was extensive and defense counsel did not challenge the qualification of the impaneled jurors because he had sufficient information from both their answers to the detailed questionnaires and his questioning to determine that each was qualified." *Id.* Likewise, here, the possibility of additional questions is limited only by the imagination of subsequent counsel. Another attorney can always think of some additional question. However, the process at issue here – which was personal, extensive, and supplemented by questionnaires – provided sufficient information to draw a proper jury. There is no error.

As to specific instances of deficient performance in questioning, Evans's argument and proof is sparse. Evans argues that counsel questioning of Juror Coker was "far too brief to uncover any potential biases." (Evans's Post-Hearing Brief, p. 107). He also presents the similar "too brief" argument in regard to Jurors Kirby, Mahaffey and McMutrey. (Evans's Post-Hearing Brief, p. 108). Evans did not even question defense counsel about the *voir dire* for these jurors. (See June PCR Tr. pp. 379-392). Evans has not presented any information that could have been discovered if other questions were asked that would impugn the clear responses supporting qualification, or counsel's strategy in regard to questioning. For instance, while defense counsel's questions to Juror Mahaffey are reflected on two (2) pages in the record, (R. pp. 535-536), questions from the court, defense counsel, and the solicitor span thirteen (13)

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pages (R. pp. 528-540). This is in addition to the responses to the questionnaire, which all parties had. (See R. pp, 528-529; p. 535). Moreover, as to the verbal questions, a fair reading of the record reflects that the solicitor was much more concerned about bias against the State in regard to Juror Mahaffey due to involvement in a drug program, and possible connection to a defense expert, than the record reflects an indication of bias against the defense. (See R. pp. 536-538). In other words, the State may have had more to be concerned about than the defense. Merely citing a short verbal *voir dire* simply does not show error and prejudice for any one particular juror.

The same is true for Evans's arguments based on concise verbal *voir dire* by defense counsel of Jurors Kirby and McMurtrey. (See R. pp. 498-511 (Juror Kirby); R. pp. 188-200 (Juror McMurtrey)). When viewed as a whole, the record reflects adequate information upon which to intelligently qualify and select the jury. And that is *just* the written record and the questionnaires. As defense counsel Sumner noted, many times defense counsel has non-verbal clues to a juror's attitude, bias, or belief. (June PCR Tr. pp. 386-387). Hearing and seeing the responses first hand cannot be undervalued in assessing credibility issues and determining whether a juror should be struck. *Cf. Matthews v. Evatt*, 105 F.3d 907, 918 (4th Cir. 1997)("counsel must be entitled to make credibility determinations in exercising peremptory challenges"); *State v. Wilder*, 306 S.C. 535, 538, 413 S.E.2d 323, 325 (1991)(strikes may be exercised on the basis of the potential jurors' "demeanor and disposition").

As to Evans's argument that defense counsel had no verbal questions, at all, for Juror Sullivan, (Evans's Post-Hearing Brief, p. 108), Evans is correct that defense counsel had no questions, (R. p. 736). However, that was only *after* receiving a questionnaire, with responses, and *after* thorough questioning by the Court, reflected in some nine (9) pages of the record. It

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simply cannot be said that this juror was qualified absent any questions. Evans has failed to argue that the questionnaire responses and the court's questions were inadequate in some way, and none is readily apparent in the record. There is no need to parrot empty questions simply to avoid a later issue in PCR. Again, Evans has failed to offer a substantive issue for review, much less shown error.

Finally, as to Mr. James Plumley, the record shows that he was questioned by the Court, by trial counsel, and by the solicitor, and his answers reflected that he could be fair and impartial, and could consider either sentence based on the circumstances presented, and return either sentence based on the circumstances. (R. p. 482, line 25 - p. 496, line 24). (See, for example, R. p. 494, lines 3-4, in response to whether the death penalty is imposed too often or often enough or about right, the juror responded, "I think each case has to have its own merit..."). He was qualified without exception. (R. p. 497, lines 6-14). Evans argues that his responses at one point, indicated he might vote with the majority:

> A I would have - - if the evidence proved that that was the punishment deemed necessary, I have no problem with that. I should have said yes. I meant I think so in a positive way.
>
> Q In other words, it depends on the evidence.
>
> A Yes, I wouldn't, I wouldn't have no problem, I mean there would be, I 'm not just, wouldn't be free.
>
> Q I understand that. Right.
>
> A But if the evidence, that's what the evidence showed and 11 other people agreed with me, I would have no problem signing the paper and having that be the verdict.

(R. p. 496).

This Court disagrees. In context, the juror, *after* his questionnaire responses, *after* questioning by the judge, and *after* questioning by defense counsel, and upon questioning by the

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solicitor, simply said he could follow the procedure. There is nothing in that passage that reflects he would not follow the law as given to him. To the extent Evans relies on *State v. Bennett,* 328 S.C. 251, 493 S.E.2d 845 (1997), as requiring a specific question on whether the juror would follow the majority, (See Evans's Post-Hearing Brief, p. 109), Evans incorrectly interprets the precedent. The Supreme Court of South Carolina has twice held that such a question is *not* mandated. *State v. Bennett*, 369 S.C. 219, 226-227, 632 S.E.2d 281, 285-286 (2006)(*Bennett II*); *State v. Hill,* 361 S.C. 297, 308, 604 S.E.2d 696, 702 (2004). In fact, in *Bennett II*, when asked to "reconcile" the first decision with the subsequent *Hill* case, the Supreme Court of South Carolina explained:

> Appellant urges us to reconcile a perceived conflict between *Hill* and our opinion in Appellant's first appeal before this Court. As we stated in *Hill, Bennett* did not determine the appropriateness of the "go with the majority question." *Hill,* 361 S.C. at 309, 604 S.E.2d at 702. In fact, the only issue in *Bennett* was whether the questioned juror was "unbiased, impartial, and able to carry out the law as executed." *Id.* Although Appellant properly points out that the court might never have discovered the juror in his first trial without the "go with the majority" question, it is equally true that no amount of questioning can provide a clear picture of a juror's biases or tendencies. *Wainwright v. Witt,* 469 U.S. 412, 424-25, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). "[T]hese veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings." *Id.* This position is strengthened by our previous recognition of the trial judge's duty to focus *voir dire* upon matters enumerated in the death penalty statutes and to eliminate excessive intrusions into the privacy of prospective jurors. *State v. Plath,* 281 S.C. 1, 7, 313 S.E.2d 619, 622 (1984) (*citing State v. Koon,* 278 S.C. 528, 532, 298 S.E.2d 769, 771 (1982)).

369 S.C. at 227, 632 S.E.2d at 286 n. 1.

The record reflects the juror was properly and fully questioned, and further, supports the juror qualification. Again, this Court concludes Evans has failed to establish deficient performance and prejudice.

D. Allegation Trial Judge Interfered with Challenge for Cause by Disqualifying Jurors Before Hearing Objections is An Allegation of Trial Court Error Not Cognizable in this Action.

As to Evans's suggestion "the trial judge failed to respect Evans's right to challenge jurors for cause by repeatedly disqualifying jurors before hearing objections from either side," (Evans's Post-Hearing Brief, p. 107 n. 50), this an alleged trial court error, not alleged in the issue presented, and not cognizable in this action absent a claim of ineffective assistance.[9] *Simmons, supra.*

E. Allegation Counsel Erred in Not Injecting a Race Question on Voir Dire is Rejected as Counsel Testified that Race Was Not an Element or Issue in the Case.

As to Evans's assertion of counsel error based on the failure to request *voir dire* on racial bias given the difference in races of the victims and Evans, (Amended Application, p. 2), Evans has not shown deficient performance. At the PCR hearing, defense counsel Sumner testified that he perceived no racial issue. (June PCR Tr. p. 475). Evans has offered none. In fact, his brief has merely one sentence simply generally referencing race in *voir dire*: "Finally, counsel failed to utilize Evans's right to inform potential jurors of his race." (Evans's Post-Hearing Brief, p. 107). Evans's citation to *Turner v. Murray*, 504 U.S. 719 (1992), is of no help in interpretation of the argument.

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[9] Even so, the allegation is without merit. The final determination on qualification is in the discretion of the trial judge. *State v. Woods*, 382 S.C. 153, 161, 676 S.E.2d 128, 133 (2009). Moreover, that decision will not be reversed on appeal unless "wholly unsupported by the evidence." *Id, citing State v. Green, supra.* It is not necessary in all cases that defense counsel be allowed to question the juror at all: "When the record reveals a juror plainly is not qualified, after thorough examination by the trial judge, to serve and it does not reasonably appear further examination would likely reveal the juror could subordinate his views and apply the law of the state, a reasonable basis exists for excusal for cause of the juror without further examination by defense counsel." *State v. Wise*, 359 S.C. 14, 26, 596 S.E.2d 475, 481 (2004).

In *Turner*, the United States Supreme Court acknowledged the possibility in *voir dire* of revealing the race of the *victim* in interracial capital cases. *Turner v. Murray*, 476 U.S. 28, 36-37, 106 S.Ct. 1683 (1986)("We hold that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias" but noting that counsel may decide such inquiry is not advisable or warranted). Moreover, the Court recognized great latitude in counsel's decision on whether to pose such questions at all. *Id.* *See also Sexton v. French*, 163 F.3d 874, 886-887 (4th Cir. 1998)(finding on habeas review that the state court did not unreasonably apply federal law in concluding counsel was not ineffective in failing to ask questions on racial bias in part on counsel belief that "under the facts of the case, the case was not particularly racially charged"). The record here fully supports that nothing indicates a racially motivated crime, or some other incident, phrase or reason one could extrapolate from the evidence that race would be considered a factor. Moreover, arbitrarily injecting race would run the risk of raising the specter of racial motivation, or influence or bias, into the potential juror's minds where it otherwise would not exist. At any rate, Evans has failed to show any deficient performance or prejudice.

9(a)(2) Ineffective Assistance of Counsel: Failure to Investigate Circumstances In Which Shots Were Fired And Challenge State's Witnesses Regarding the Cause and Manner of Death of the Two Victims (Guilt Phase)

9(b)(9) Ineffective Assistance of Counsel: Failure to Adequately Investigate, Present Evidence and Challenge the Testimony Concerning the Circumstances of the Shooting and the Cause and Manner of Death of the Victims (Sentencing Phase)

Trial counsel was not ineffective in failing to object to, challenge or otherwise counter the forensic evidence regarding the manner in which the shootings occurred.

As noted above, forensic evidence, as presented by the State's expert, showed that Deputy Joe Sapinoso was shot in the back of the head, four times, at close range (within two to three feet), while the deputy's head was actually on the floor. (R. p. 1392, line 16-p.1395, line 25; p. 1398, line 15 – p. 1403, line 14). 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." (R. p. 1407, lines 13-18). The father suffered three gunshot wounds to the head and one to the arm. The one to the arm was considered a defensive wound: "... two struck the head, and its consistent that his arm would have been raised in a defensive posture." (R. p. 1407, lines 6-8). Evans was cross-examined at trial about having shot Deputy Sapinoso in the back of the head four times. (R. p. 1443, line 13 - p. 1444, line 12). Evans never denied, or attempted to correct, the solicitor's reference to the facts as Evans having shot "a uniformed deputy sheriff in the back of the head four times while he is kneeling on the floor." (R. p. 1443, lines13-20).[10] Even so, during the PCR hearing, Evans presented an expert to indicate that there may have been a basis to contest the shots to the deputy's head.

As a first matter, Evans's expert, Dr. Jonathan Arden, conceded that three shots could not be interpreted otherwise – specifically those shots to the back of the head, while the deputy's head was on the floor. (June PCR App. p. 765 ("[t]he evidence does indeed indicate that Joe

[10] The forensic pathologist and chief medical examiner, Dr. Michael Eugene Ward, testified that based on wounds and the "historical information given" that all four of the bullets were fired into the deputy's head while his head was on the floor, and "the muzzle of the gun was less than two to three feet from" his head. (R. p. 1402, line 24 - p. 1403, line14). Dr. Ward testified before Evans and it appears Evans was present for the complete testimony. Therefore, the basis for the assertion by the solicitor was well supported by the record, and Evans was well aware of the facts presented to the jury before he testified.

Sapinoso's head was down for the three gunshot wounds that were labeled Nos. 1, 2 and 3....")). Moreover, the shots at issue were arbitrarily numbered. (Id). In sum, there is no way of determining which of the shots were fired first. At no point has Evans been able to successfully challenge the three, without question, execution style shots. Moreover, Dr. Arden spoke in alternatives, not absolutes. (June PCR Tr. p. 765, "just as reasonable" as Dr. Ward's). This battle of experts simply does not show error by the State's witness or persuasive additional testimony, especially in light of the remaining unchallenged evidence. Moreover, Dr. Arden's testimony that the exhibits were false is strained, certainly an eye-catcher, but without substance. The demonstrative aids (which by definition are used in demonstration only, and do not go back to the jury room), are simply that – a demonstrative aid reflecting an approximation based on photographs and a drawing (incidentally a drawing used in virtually every autopsy, a standard form). (See October PCR Tr. p. 263-268). Moreover, the demonstrative aids were approved by the medical examiner. (See October PCR Tr. p. 268).

At best, the offered evidence shows that only three of the four bullets were delivered as described, and the fourth, may have been or may not have been - it is a contest between experts as to one of the four shots to Deputy Sapinoso's head. Evans has failed to show Dr. Ward's opinion is medically or forensically incorrect, and even failed to call Dr. Ward to question whether his opinion would change in light of a challenge. Moreover, such divided testimony would not even obtain a manslaughter charge as the shots were clearly inflicted when a victim tried to free himself, *see State v. Shuler*, *supra*; would not explain any circumstance or fact as to why he had to shoot the deputy while the deputy's head was on the floor, (see Respondent's Exhibit 25, p. 3); and would likely alienate the jury by attempting to blame a faultless victim, *see generally Howell v. State,* 877 So.2d 697, 704 (Fla. 2004)("the tremendous potential for

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alienating the jury by blaming the trooper for his own death, fully justifies trial counsel's strategic decision to forego presentation of the alleged policy violation during the guilt phase"). Further, such possible "alternatives" would not change the remaining facts supporting a planned act of violence; would not change the testimony of officers that no sound was noted before the series of shots began, and would not change the location of the body, found on the floor, with his arms tucked under his body. As defense counsel Sumner testified, these are facts that would not be affected at all by this "light-weight" challenge to one of the four deadly shots, and all the other information that supported a well thought out crime. (June PCR Tr. pp. 446-448; pp. 518-520). Even Dr. Arden admitted Evans's explanation could not be entirely truthful. (See, for example, June PCR Tr. p. 785, "He certainly brought with him a number of items that don't relate to talking."). As such, highlighting this unwinnable argument would only focus the jury more on the shooting itself, the violence itself. As counsel testified, they, with Evans's consent, made a conscious decision to move through the guilt phase as quickly as possible to avoid emphasis of these facts. (See, for example, June PCR Tr. p. 327; pp. 495-496).

Evans has failed to show deficient performance. Alternatively, if there was deficient performance, Evans has failed to show prejudice in light of the remaining evidence, particularly the unchallenged three shots to the back of the deputy's head, while the deputy's head was on the floor.

9(a)(3) Ineffective Assistance of Trial Counsel: Failed to Effectively Move for Change of Venue

Trial counsel was not ineffective in failing to more aggressively pursue a change of venue. Trial counsel requested specific *voir dire* on this issue, and filed a pre-trial motion for change of venue based upon media coverage. After being allowed *voir dire* on the issue, and

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based on the responses received, trial counsel simply requested a ruling on the pre-filed motion without further argument. (See R. p. 1008, line 3 - p. 1009, line 25). As counsel conceded in the motion hearing, and as the record shows, the jurors were questioned on pre-trial media coverage. This included not just in court *voir dire*, but also questionnaires sent out prior to qualification. (See for example, R. p. 179, line 24 - p. 180, line 21).[11] Each and every juror seated was questioned about pre-trial publicity and whether, if they should know anything about the facts of the case, that would influence their decision. No seated juror expressed any such knowledge or bias. All thirteen of the jurors who eventually served answered that they were not familiar with any specific facts from pre-trial publicity, and there was no evidence of a preconceived opinion on same. (See R. p. 175, line 19 - p. 176, line 19 (Elvis Mahaabwa); p. 189, lines 21-24 (Daniel McMurtrey); p. 218, lines 9-15 (Kevin Colling); p. 230, line 15 - p. 231, line 3 (Dwayne Drake); p. 248, lines 1-3 and p. 257, line 23 - p. 258, line 5 (Sandra Holcombe); p. 289, lines 10-24 (Larry Coker); p. 469, line 20 - p. 470, line 8 (Mark Branyon); p. 484, lines 11-18 (James Plumley); p. 500, lines 7-12 (Margaret Kirby); p. 530, lines 4-10 (Toni Mahaffey); p. 564, lines 16-25, p. 570, lines 13-21, and p. 574, lines 14-25 (Bryan Megonigal); p. 578, lines 17-24 (Jacklynn Higgins); p. 727, line 23 - p. 728, line 5 (Marlon Sullivan)). While Dwayne Drake,

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[11] The individual juror questionnaires are held in the clerk's office. The forms reflect the follow questions:

22. Do you have any knowledge about the case of The State v. Kamel Delshawn Evans? ___ If so, have you already formed an opinion about the case such that it would affect your ability to be fair and impartial if you were selected as a juror in the case? _____

24. Do you know of any reason why you would not be able to be fair and impartial if you were selected to serve as a juror in this case? ____. If so, explain: _____

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Larry Coker and Mark Branyon all seemed to vaguely recall the fact of media coverage of the incident, each testified that they did not recall any specific details at all. (R. p. 230, line 15 - p. 231, line 3 (Drake); p. 289, lines 10-24 (Coker); p. 469, line 20 - p. 470, line 8 (Branyon)).

The Constitution requires that a criminal defendant be afforded a trial by a "panel of impartial, indifferent jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 , 81 S.Ct. 1639 (1961). In *Dowd*, the United States Supreme Court noted that media coverage was a reality, and cautioned that "[i]t is not required ... that the jurors be totally ignorant of the facts and issues involved" for a defendant to obtain a fair trial. *Id.* What is of particular importance is the juror's ability to put aside any previously held opinions, and base his verdict on the evidence admitted at trial. *Id* at 723. Thus, "[w]hen a change of venue motion is predicated on pre-trial publicity, the relevant inquiry is whether potential jurors have 'such fixed opinions that they could not judge impartially the guilt of the defendant.'" *State v. Gardner*, 332 S.C. 389, 392, 505 S.E.2d 338, 339 (1998), *quoting State v. Manning*, 329 S.C. 1, 495 S.E.2d 191 (1997).

Here, 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." (R. p. 1010, line 20 - p. 1012, line 1). In sum, the record shows careful questioning by trial counsel and the trial judge to determine any bias due to media coverage, and expressly provides a record of trial counsel's efforts to request such specific questioning to ensure a fair trial. (See R. p. 1008, line 21 0 p. 1009, line 25). In the absence of any bias, or for that matter, any knowledge of the particular facts of the crime at all due to media coverage, no motion for change of venue could be meritorious. *See State v. Evins*, 373 S.C. 404, 412, 645 S.E.2d 904, 908 (2007)("When a trial judge bases the denial of a motion for a change of venue because of

pretrial publicity upon an adequate *voir dire* examination of the jurors, his decision will not be disturbed absent extraordinary circumstances").

Evans contends, however, that the process was incomplete as the trial was held in the victim's workplace and the jurors were not questioned or the trial moved. (Evans's Post-Hearing Brief, p. 115). That assertion, however, is not accurate as Deputy Sapinoso had moved on to be an investigator. (R. p. 1531). At any rate, 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 conflict or bias. Even so, Evans relies on a 2009 Eastern District of New York case, *United States v. Wright*, 603 F.Supp.2d 506 (E.D.N.Y. 2009), to argue a change of venue was warranted. (Evans's Post-Hearing Brief, p. 116). 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 not 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.

At any rate, Evans has failed to show bias. 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. He has failed to show deficient performance and prejudice.

9(b)(2) Ineffective Assistance of Counsel:
Failed to Move to Quash Aggravating Circumstance

Trial counsel was not ineffective in their treatment of the 16-3-20(C)(a)(7) statutory aggravating factor, as to whether Mr. Joe Sapinoso was killed "during or because of the performance of his officials duties" was a factual issue properly presented to the jury.

Evans alleges that defense counsel was ineffective for failing to object to the submission of the law enforcement aggravator. He argues that the evidence submitted in support of the aggravator was insufficient as a matter of law. (Evans's Post-Hearing Brief, pp. 76-78). Consequently, he argues, counsel should have acted to prevent its submission to the jury. (Id.). The record reflects the evidence was sufficient to allow submission of the statutory aggravating circumstance to the jury. At any rate, even if Evans could show error, he could show no prejudice, as the jury found three (3) other statutory aggravating circumstances that support the sentence of death. Evans is not entitled to any relief.

A. The Sheriff's Testimony Regarding On-Duty Police and Death Benefits Was Sufficient to Support the Law Enforcement

Aggravating Circumstance Requirement 1) That Victim Was a Law Enforcement Officer, 2) That Victim was On-Duty According to Department Police when The Kidnapping Began; and 3) Given that Kidnapping is a Continuing Offense, That The Law Enforcement Officer Was Killed "During or Because of the Performance of His Official Duties."

The statutory aggravating circumstance at issue reads in relevant part that the death of the law enforcement officer must have occurred "during or because of the performance of his official duties." S.C. Code § 16-3-20 (C)(a)(7). The phrase is not otherwise explained or defined. Thus, the ordinary meaning is controlling. *See, e.g., State v. Locklair*, 341 S.C. 352, 366, 535 S.E.2d 420, 427 (2000)("In construing statutes, words must be given their plain and ordinary meaning without resort to subtle or forced construction in attempt to expand the statute.")

The crux of Evans's argument is that the evidence presented was insufficient to show that Evans was killed while still on-duty, i.e. "during or because of the performance of his official duties." Evans relies on two different theories. The first is that because the deputy was not actively involved in arrest or investigation, then the evidence he was on-duty is not sufficient to support the aggravator. The second is that because the deputy was murdered hours after he was first abducted, he was no longer on-duty at the time of the murder. Both arguments fail as a matter of law and fact.

1. There was Evidence, both by Policy and Benefits, that Supported the Deputy Was Still On Duty At the Time of the Abduction. Thus, Aggravating Circumstance Was Properly Before the Jury.

Evans begins his argument by noting other cases where the aggravator was charged while the officer victim was *actively* engaged in a focused law enforcement action. (Evans's Post-Hearing Brief, p. 73 n.35). Evans's argument must necessary rely on the conclusion that being

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on-duty without actively engaging in a focused law enforcement action – such as arresting, stopping, questioning or in some way confronting an individual – does not support applicability of the aggravator. Evans's proposed new interpretation requires giving the statute a meaning not supported by its plain language. Evans's theory renders the "or" meaningless – a direct contravention of the express language of the statute. This Court finds persuasive the reasoning of the Supreme Court of North Carolina in a similar challenge to applicability of their law enforcement statutory aggravating circumstance[12] in *State v. Gaines*, 421 S.E.2d 569 (N.C. 1992).

In *Gaines*, the police officer victim was working a second job as a security officer at a local motel. His second job was authorized by his police department's policy and he was allowed to wear his police department uniform. Further, he was required by department policy to "conform to the same standard of conduct as applies to their on-duty activities," i.e. "enforce the law" regardless of private employers' rules. 421 S.E.2d at 571. The officer victim had confronted three defendants in the motel. The three eventually left, but returned. Upon their return, Gaines shot the officer victim in the motel lobby. *Id* at 572. The state served notice that it was relying on one aggravating circumstance in seeking the death penalty – the law enforcement aggravator. Gaines sought a pre-trial determination of whether the aggravator could apply given the officer victim was at his secondary employment at a private business. The superior court ordered the aggravator was not applicable. The Supreme Court of North Carolina reversed, rejecting Gaines' argument as a "strained interpretation" :

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[12] The aggravator reads, in relevant part, that the murder "was committed against a law-enforcement officer... while engaged in the performance of his official duties or because of the exercise of his official duty," 421 S.E.2d at 465, which is substantially similar to the wording of our statute.

> Such an interpretation would seem to require that a law enforcement officer be actively and aggressively focused upon a particular criminal suspect, as in the case of actually drawing or firing his weapon or engaging in hot pursuit, in order for his public service to fall within the realm of "official duties." We find this to be an inordinately strained and unnatural application of this term as it is normally used with respect to the official duties of all law enforcement officers, which includes such duties as investigative work (including stakeouts), crowd or traffic control, and routine patrol by automobile.

Id at 574.

Moreover, because the officer victim was obligated to enforce the law in his secondary job position in the same manner, and with the same authority, as he had while on a time-shift with the police department, the "off duty" designation did not defeat the applicability of the aggravator:

> ... Officer Griffin was at all times, including specifically his "off duty" secondary employment, acting as a law enforcement officer under the full supervision and control of the Charlotte Police Department for the sole purpose of "enforcing the law." We thus hold that [the statutory law enforcement aggravator] appropriately includes duly sworn law enforcement officers in uniform when they are performing off-duty, secondary law enforcement related duties, when it is clear that such duties and the pay therefrom are incidental and supplemental to their primary duties of law enforcement on behalf of the general public.

Id at 576.

Further, the state court found as relevant that the victim officer qualified for, and received, death benefits. *Id* . Though recognizing the differences in standards of proof in civil and criminal forums, the court concluded "there is no rational basis to distinguish between the criminal and civil definition and usage of the essential and defining term and the issue involved in both of these action, i.e., whether the term 'official duties' includes enforcement activity of the type in which Officer Griffin was engaged when he was murdered." *Id* at 577. *Cf. State v. Evans*, 756 N.W.2d 854 (Minn. 2008)(in non-capital murder first degree case requiring "on-

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duty" finding, court noted testimony that officer victim's "survivors were paid line-of-duty benefits after his death").

Like *Gaines*, the evidence of the death benefits here was relevant and supportive of the applicability of the statutory aggravating circumstance. Moreover, the case here is even stronger as to the on-duty evaluation because there is no allegation of secondary, private employment. Evans only mentions *Gaines* in passing and concedes the logic that applicability of the statutory aggravating circumstance generally depends upon a determination "on whether the officer was performing general or common law policing duties," (Evans's Post-Hearing Brief, p. 82). However, his entire argument in this regard balances precipitously on the definition of "performing" some duty – his definition, again, must unfairly constrain the circumstance only to an act of some sort, which is irreconcilable with our statute and the *Gaines* holding. *See also White v. Commonwealth*, 178 S.W.3d 470, 481 (Ky. 2006)(" The statute is intended to allow a 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.*")(emphasis added).

The issue of 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. *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 circumstances to the jury, the trial court is concerned with the existence of the evidence, not its weight. The trial judge should submit the aggravator the jury if supported by any evidence direct

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or circumstantial."). Whether the evidence offered by the State supported the aggravator was a matter for the jury. *Locklair*.

2. *Evans's Argument that Application in this Case Results in an Unfair Expansion of the Statutory Aggravating Circumstance is Irreconcilable with the Evidence and Facts Where He Depends on the Abduction Relieving the Deputy of his On-Duty Status.*

Evans asserted within his argument on this issue that the sheriff "testified that Joe Sapinsoso was 'on duty,' despite his being home well after the conclusion of his regular workday, pursuant to a ... policy that whenever a deputy operates a sheriff's office vehicle that deputy is considered to be on-duty and available to response to calls." (Evans's Post-Hearing Brief, p. 76). Evans forgets that kidnapping is a continuing crime. *See State v. Tucker*, 334 S.C. 1, 13-14, 512 S.E.2d 99, 105 (1999)("Kidnapping is a continuing offense. The offense commences when one is wrongfully deprived of freedom and continues until freedom is restored."). There was evidence that Evans had ambushed the deputy, taken him from his duty car, and held him hostage. The jury not only convicted Evans of kidnapping in the guilty phase, (R. p. 1502), but also found kidnapping as an aggravating circumstance of the murder, (R. p. 1795). There is no allegation that the kidnapping charge was somehow not supported by the evidence.

Further, the policy at issue specifically defined when the officer was "on-duty."[13] Sheriff Loftis testified that Deputy Sapinoso was on-duty according to the Sheriff's Department policy:

[13] Defense counsel testified they investigated whether the aggravator was appropriate. Counsel consulting with several officers, and conducted legal research. (See June PCR Tr. p. 239; p. 241; p. 242; p. 368). In fact, counsel generally referenced finding a statutory provision that provided, essentially, that an officer was on duty at all times. *See generally* S.C. Code § 23-13-70 (directing deputy shall remain on duty at night, shall always be on duty not less than ten hours

A Yes, sir, according to policy he was on duty that night.

Q If you would, explain that to the jury.

A *Any time that one of our deputies is operating a sheriff's office vehicle he or she is considered to be on duty and is expected to be available to respond to calls for service.*

Q And was he so acting that evening *before he reached the inside of this residence?*

A Yes, sir, he was.

Q He had a sheriff's-office-issued vehicle?

A Yes, sir.

Q And where had he been that night? What duty was he performing?

A He had been working a special assignment at county square on one of the council meetings.

Q And at the time of his returning home in his sheriff's office vehicle was he also dressed in an appropriate sheriff's office uniform?

A Yes, sir, he was. He was dressed in uniform that night.

Q And at the time of his death was he so dressed?

A Yes, sir, he was.

Q In addition to that explanation has Joe received or his family received benefits on the basis of his being killed in the line of duty?

A Yes, sir, they have. There is a United States Department of Justice offer that deals strictly with line-of-duty deaths involving police officers.

Q And did he qualify for those benefits?

A Yes, sir.

(R. p. 1530, line 1 - p. 1531, line 6)(emphasis added).

Additionally, other evidence showed that Deputy Sapinoso was abducted at his work vehicle *before* entering his home. (See, for example, R. p. 1428, lines 7-10; p. 1436, lines 15-25; p. 1309, line 4 - p. 1310, line 15, State Exhibit Triple A, Triple B, and Triple C (photograph of

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a day). *See also Gaines*, 421 S.E.2d at 574 ("At common law, a law enforcement officer had the duty to keep the peace at all times."). The State's reliance only on the more restrictive Greenville County Sheriff Department's policy inured to Evans's benefit.

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Detective Sapinoso's jeep with his bag on the ground by jeep's door). Moreover, Evans admitted this fact in his testimony, (R. p. 1428), in his statement to law enforcement that was also admitted at trial, (R. p. 1229), and also to defense counsel. (June PCR Tr. pp. 239-242; p. 254). Contrary to Evans's argument, (Evans's Post-Hearing Brief, p. 85), the deputy was not merely in possession of the car, he was abducted from the car.

Lastly, Evans attempts to rely on two media reports, never admitted in the record, for the truth of the matter asserted, i.e. that the Deputy was off-duty and at home. (Evans's Post-Hearing Brief, p. 79, n.41; p. 85 (citing note)). This Court has not accepted the hearsay offered in support of this ground. It is inadmissible. This Court notes that defense counsel was not questioned on the existence of the report(s) at the PCR hearing, nor was testimony of any law enforcement personnel who made the statement (or made a statement taken out of context) presented, and the hearsay remains completely useless in attacking the evidence admitted at trial. Further, as Respondent argued in the post-hearing briefing, opening the door to media reports would likely not be a reasonable act on counsel's part, considering the media reports reported the "ambush" of the Deputy; that the Deputy was "held at gunpoint for more than four hours," i.e. "Greenville County Sheriff's deputy Joe Sapinoso has his gun taken away and is held hostage, along with his father, by a man who had been waiting outside his father's home," (See, for example, Motion for Change of Venue, Defendant's Motion No. 26, Attachments).

In sum, Evans has not addressed the facts that are soundly against him, or offered, by competent evidence, other facts that challenge the facts of record. The facts of record, fully and fairly supported by the evidence at trial, support the applicability of the aggravating circumstance for all the reasons cited above. Evans has failed to show deficient performance. Even so, if

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Evans could show deficient performance in regard to this ground, he is unable to show *Strickland* prejudice as there are three (3) other aggravating circumstances supporting the death sentence.

B. If Evans Could Establish Error, He Cannot Show Prejudice as There Are Three Other Aggravating Circumstances Supporting the Death Sentence.

The jury found (4) independent aggravating circumstances as to Deputy Sapinoso's murder: 1) the murder was committed while in the commission of the crime or act of burglary in the first degree; 2) the murder was committed while in the commission of the crime or act of kidnapping; 3) 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. (R. p. 1794, line 24 - p. 1795, line 11). "In a nonweighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty." *Stringer v. Black*, 503 U.S. 222, 232, 112 S.Ct. 1130. (1992). South Carolina is, of course, a nonweighing state. *See, e.g., State v. Simmons*, 360 S.C. 33, 44-45, 599 S.E.2d 448, 453 (2004). Even if Evans could somehow show counsel was ineffective in failing to move to quash, and even if the aggravator is later found to be inapplicable, the jury here found three (3) other aggravating circumstances. (R. p. 1795). Given the presence of three additional circumstances, the failure of one would not have changed the outcome.

Moreover, 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 that even could have improperly swayed the jury. *See id.* Evans concedes two lines of

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evidence were submitted in support of the aggravator: 1) the Greenville County Sheriff's policy on "one-duty" designation; and 2) the sheriff's testimony on federal monetary death benefits to the family. (Evans's Post-Hearing Brief, p. 75). 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. (Evans's Post-Hearing Brief, p. 77). 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.

In sum, there was competent evidence in the record to support the submission of the statutory aggravating circumstance. Further, the jury found three other circumstances that remain unchallenged. Evans has failed to show deficient performance and prejudice.

9(b)(3) Ineffective Assistance: Failed to Object to Evidence of Gang Affiliation

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:

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> No bad trouble, no jail but brushes with the law. Defendant decided himself to move down with his dad. In gang in 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"[14] 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. 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,

[14] 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).

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[15] from his 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 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

[15] Evans also presented affidavits. (October PCR Tr. pp. 229-231). Respondent maintains an objection to the affidavits. This Court need not consider the affidavits. Evans has shown no necessity or need to present the affidavits. As Respondent referenced in argument, and as the most cursory review demonstrates, the "running theme" is that several friends and family members did not consider Evans to be a gang member. This theme has been fully presented by Evans through witnesses called at the evidentiary hearing and subject to cross-examination. Thus, the Court need not consider the affidavits or Respondent's request to submit additional information affecting credibility of the affiants. *Cf. Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009)(trial by affidavit is fundamentally at odds with our judicial process).

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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 (as he said he had in Cleveland), supported by his drug conviction, 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.").

9(b)(4) Ineffective Assistance of Counsel: Failure to Object to Testimony of Eddie O'Cain

Trial counsel was not ineffective in failing to object to the testimony of State's witness Mr. O'Cain during the sentencing phase.

A. Qualification of Mr. O'Cain as an Expert and Admissibility of Gang Membership Related Testimony in the Penalty Phase.

Mr. O'Cain was qualified narrowly as "an expert at this time to talk about gang activity and gang experience *within the Department of Corrections*." (R. p. 1590, line 22 - p. 1591, line 8)(emphasis added). His background supports that qualification. (R. p. 1582, line 19 - p. 1590, line 4). Defense corrections expert, George Martin, also referenced SCDC's established

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procedure and agreed with Mr. O'Cain's testimony. (R. p. 1633, lines 1-22). The record supports there is no error in qualification.

Evans essentially argues that defense counsel was ineffective for failing to object to the qualification because there is no "science" involved. (Evans's Post-Hearing Brief, p. 131). There is no requirement that all expert testimony be "scientific" in nature. Rule 702, SCRE (Testimony by Experts; referencing "scientific, technical, or other specialized knowledge"). Moreover, the following quotation from *United States v. Hankey*, 203 F.3d 1160 (9th Cir. 2000), is instructive:

> Given the type of expert testimony proffered by the government, it is difficult to imagine that the court could have been more diligent in assessing relevance and reliability. The *Daubert* factors (peer review, publication, potential error rate, etc.) simply are not applicable to this kind of testimony, whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it. *See Kumho Tire,* 119 S.Ct. at 1175 ("Engineering testimony rests upon scientific foundations, the reliability of which will be at issue in some cases.... In other cases, the relevant reliability concerns may focus upon personal knowledge or experience.") (internal citations omitted); *United States v. Plunk,* 153 F.3d 1011, 1017 (9th Cir.1998) (upholding admission of expert testimony from law enforcement officer regarding jargon of narcotics trade, on basis of expert's training, experience, and personal knowledge).

203 F.3d at 1169. Moreover, at the time of Mr. Evans' trial, the standard for admissibility of non-scientific expert testimony was arguably much lower than that required since *State v. White,* 382 S.C. 265, 676 S.E.2d 684 (2009). Nevertheless, this court finds that any objection to Mr. O'Cain's qualification would have been futile as the record supports a determination that pursuant to *White* he was qualified, his opinions reliable, and his testimony assisted the jury.

Here, Mr. O'Cain gave a lengthy recitation of detailed gang study, including sharing of information with different agencies, and personal observations. (R. pp. 1587-1588). He indicated that the "Blues" cover Crips, Gangster Disciples, and Black Gangster Disciples. (R. p.

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1589). He 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). He further opined that Evans's violence toward a law enforcement officer would make him particularly attractive as a possible leader. (R. p. 1597).

Because the representation of gang membership related to Evans's character - - his appearance and professed belief and aspiration if not achievement - - the testimony was relevant. And, the evidence was relevant in the penalty phase for at least two reasons: 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.

The fact of membership in the group is an element of future dangerousness well recognized with the Department of Corrections, specifically because members of organized gangs have created hostage situations and presented a recognized security threat. (R. pp. 1583-1585). This is relevant, and admissible, evidence in the penalty phase. *See Dawson v. Delaware*, 503 U.S. 159, 166, 112 S.Ct. 1093 (1992)(general "abstract" belief of 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."); *See also Fuller v. Johnson*, 114 F.3d 491 (5th Cir. 1997)("A reasonable juror could conclude that

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membership in such a gang is relevant to future dangerousness"). However, the evidence at issue here is more narrow still. The evidence went to identification of gang membership for correctional purposes and what Evans's tattoos and admissions would mean as far as correctional dangers. Again, Mr. O'Cain was duly qualified as an expert in SCDC 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 (questioning gang membership where Evans moved to South Carolina at a young age).

However, Evans has failed to identify any basis for an objection. He has failed to show deficient performance and prejudice.

B. Failure to Object to Prison Conditions References In Mr. O'Cain's Testimony

Respondent has argued that the general prison conditions issue presented in the post-hearing brief was not raised in the application or proposed amendment regarding the mercy charge issue. (Respondent's Post-Hearing Brief, p. 110). Evans argued, as presented in "Issue VIII" of his Post-Hearing Brief, that defense counsel was ineffective in not objecting to "general prison condition evidence" and in "inviting their own witness to testify on the issue." (Evans's Post-Hearing Brief, p. 145). Respondent argued that it had no notice whatsoever that Evans intended to pursue this issue, and both parts of the evidentiary hearing were conducted without

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any notification Evans would be pursuing the issue. (Respondent's Post-Hearing Brief, p. 110). 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 was ineffective for failing to object to the Solicitor's use of that improper testimony during closing argument," and relied upon, specifically, his allegations 10(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 10(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"). (Evans's Post-Hearing Reply Brief, p. 14). This Court finds that a "general" prison conditions allegation was not raised, and no notice 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

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at the evidentiary hearing with notice to opposing counsel. However, this Court finds no deficiency. As the remaining argument on presentation of a defense witness who referenced prison conditions, this Court, finds that the issue is without merit.

Counsel was not ineffective in their handling of evidence concerning general prison conditions in Mr. O'Cain's testimony.

First, Evans is seeking review, and relief, under S.C. Code § 16-3-20, which is the statute for direct appeal review of the imposition of the death sentence. This direct appeal review would not be appropriate in this post-conviction relief action. Moreover, the South Carolina Supreme Court has already reviewed the case on direct appeal under that provision and found the absence of an arbitrary factor. *State v. Evans*, 371 S.C. 27, 32, 637 S.E.2d 313, 316 (2006)("Appellant's death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the evidence supports the jury's findings of aggravation. *See* S.C.Code Ann. § 16-3-25(C)."). Evans is not entitled to relief on this direct appeal issue. *Simmons, supra.*

Second, the conditions referenced were referenced narrowly, and only to the extent to describe Evans's treatment and dangerousness due to his gang affiliation. As a factual matter, no simply "general" prison conditions were offered, by either side, merely to argue harshness in sentencing.

Third, in regard to presentation of his own witness, even if relying on the theory that he may be entitled to relief on direct appeal (had the issue been presented), here, he must show both deficient performance and prejudice. *See generally Franklin v. Catoe,* 346 S.C. 563, 571, 552 S.E.2d 718, 722 - 723 (2001)(acknowledging violation of statutory right to address jury in guilty phase would be reversible error if properly preserved and presented on direct appeal, but

convicted defendant required to show *Strickland* prejudice in order to obtain relief on an ineffective assistance of counsel claim). This he cannot do. The major fault with his argument is the testimony at issue was presented to counter the concept that Evans would benefit from his purported gang affiliation in prison. (See, for example, June PCR Tr. p. 301; pp. 377-378; pp. 412; pp. 429-433; pp. 507-508). As part of that explanation, Evans was also allowed to present evidence the conditions would be harsh – the difference here being the evidence was tied specifically to danger in SCDC because of his purported gang affiliation. *Burkhart* acknowledges that some conditions evidence, where necessary to show "personal behavior," may be admissible, and it is not clear that the evidence would not be admissible for this stated reason: "We are aware of the tension between evidence regarding the defendant's adaptability to prison life, which is clearly admissible, and this restriction on the admission of evidence regarding prison life *in general*. ... evidence of the defendant's characteristics may include prison conditions if narrowly tailored to demonstrate the defendant's personal behavior in those conditions." *State v. Burkhart*, 371 S.C. 482, 488, 640 S.E.2d 450, 453 (2007). The evidence at issue falls under this exception.

A final reason that counsel should not be considered ineffective is that, at the time of the trial, in 2004, general prison conditions evidence was being offered and admitted in capital trial penalty phases. *See Burkhart*, 371 S.C. at 488, 640 S.E.2d at 453 (2007)(noting that case was tried before *Bowman*'s specific prohibition); *State v. Bowman*, 366 S.C. 485, 498, 623 S.E.2d 378, 385 (2005)("We take this opportunity, however, to caution the State and the defense that the evidence presented in a penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character."). *See also State v. Bryant*, 372 S.C. 305, 317, 642 S.E.2d 582, 589 (2007)(defense counsel presented social worker

who testified "on the dismal conditions of prison life in general" and complained on appeal that witness should have been allowed to opine that a death sentence was more merciful than a life sentence); *State v. Hill,* 361 S.C. 297, 307, 604 S.E.2d 696, 701 (2004)("Pinkney, a shift supervisor at Lee Correctional Institute, described prison conditions for inmates according to their classification"). Prior to this line of cases, the guidance from the Court was that "general conditions" were not relevant. If a defendant did admit such evidence, the State was entitled to respond. *State v. Plath,* 281 S.C. 1, 15-16, 313 S.E.2d 619, 627-628 (1984)(emphasis added). However, again, these cases speak in terms of "general conditions" offered simply to show the horrors of prison life. Here, the defense evidence was to combat treatment of Evans's gang membership – real or imagined, because due to his representation of gang membership, he would be treated as a gang member, both by other gang members and SCDC. Even on cross-examination, Mr. Martin, the defense corrections expert, tied the conditions directly back to gang membership:

> ... once he completed the initial reception process, if he's not determined to be a real bona fide, talk-the-talk and walk-the-walk gang member, and I am not sure at all that he would be, but if that were not, and if that were not the case, there's a great likelihood that he would require protection for those who are.
>
> And my best guess would be that there would be serious consideration given to keeping him separated from that general population because of his own needs for protection.

(R. pp. 1639-1640).

As to Evans's allegation that the Solicitor's argument regarding conditions was unfair – i.e. alleging the argument "capitalized on the testimony elicited from Mr. O'Cain concerning the defendant's alleged gang involvement *and* regarding general prison conditions, contrasting

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general prison conditions for an individual sentenced to life without parole with those of an individual sentenced to death and dramatically misrepresenting the conditions of prison life." (See Evans's Post-Hearing Reply Brief, p. 14, n. 11), the argument was a brief response to the testimony that also indicated that the life sentence would be harsh based on the necessity of increased security stemming from his gang affiliation (or purported gang affiliation). At any rate, Evans overstates the impact of the argument.

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.

Evans has failed to show either deficient performance or prejudice.

9(b)(5) Ineffective Assistance of Counsel: Failed to Object to Victim Impact Testimony

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Trial counsel was not ineffective in failing to challenge the victim impact testimony.

Evans complains that counsel should have objected to victim impact evidence offered from Sheriff Loftis and Deputy Tripp. (Evans's Post-Hearing Brief, pp. 90-94). It is not surprising to have two fellow officers testify about the effect of a fallen officer, their friend, on them personally. *See Payne v. Tennessee,* 501 U.S. 808, 825,111 S.Ct. 2597 (1991)("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"). Because the victim here was a sheriff's deputy, evidence of the specific harm will logically be tied to his career, as a facet of his life. *See, State v. Byram*, 326 S.C. 107, 117, 485 S.E.2d 360, 365 (1997)(noting testimony in regard to victim teacher, "the teacher's assistant, testified the victim was a wonderful teacher of emotionally handicapped children and the victim's students were devastated to learn of their teacher's death"). It is not *per se* a violation of *Payne* simply due to his law enforcement standing. For example, in *State v. Bixby*, 388 S.C. 528, 555-557, 698 S.E.2d 572, 586-587 (2010), the South Carolina Supreme Court held a video of the officer's funeral was properly admitted:

> We find the videotape at issue was victim impact evidence because it showed the traditional trappings of a law enforcement officer's funeral, demonstrating the general loss suffered by society. Additionally, the video showed footage of actual mourners, displaying for the jury the specific impact of the murder on particular members of society. Thus, we hold the video was victim impact evidence pursuant to *Payne.*

338 S.C. at 556, 698 S.E.2d at 587.

Moreover, the Court found that the evidence was not unfairly prejudicial based on a danger of evoking sympathy: " Under the law, simply saying that evidence such as this was

'moving' is not enough to require reversal of a capital sentence." *Id.* There will necessarily be *some* emotion in a capital sentencing proceeding. Yet, precedent requires such emotion be channeled into reasoned deliberation on the evidence. *Id.* This evidence complied and did not stray to impermissible bounds such as family members of the victim testifying on the proper penalty. *Payne*, 501 U.S. at 830, n. 2 (leaving untouched former precedent that held "a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment" as "No evidence of the latter sort was presented at the trial in this case.").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.

In sum, the evidence here was properly admitted under *Payne*. Consequently, Evans has failed to show deficient performance and prejudice.

9(b)(6) Ineffective Assistance of Counsel: Failed to Object to Hearsay in Mrs. Sapinoso's Testimony

Mrs. Sapinoso was allowed, during the penalty phase, to testify as to several of her grandson's statements. Evans complains that counsel should have objected to the testimony as

inadmissible under the rule against hearsay. The statements, however, were not offered for the truth of the matter asserted, but as evidence of the individual's fear. Thus, by definition, they were not hearsay. See Rule 801 (c), SCRE ("Hearsay is as 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."). Evans has failed to show a meritorious basis for an objection.

For example, the statement, "I am not going there, my mommy is not going there, she might get killed and I would be an orphan," (R. p. 1548), is not offered for the truth of whether they were going to South Carolina, or possible death, but for its reflection of the child's fear. Moreover, his question "is grandmother going to be okay," (R. p. 1549), again reflects fear – a lasting impact from the night of the murder. *See State v. Kelly*, 343 S.C. 350, 370-371, 540 S.E.2d 851, 861 (2001), *overruled on other grounds*, 534 U.S. 246, 122 S.Ct. 726 (2002)(testimony relating child's statement "a bad man had killed his mommy" not hearsay, " the testimony clearly was offered to show the impact the murder had on Shealy's young child and the rest of her family" and was "properly ... victim impact evidence"). The statement relating "he's just staring at the ceiling," (R. p. 1549), could be offered as true, indicative of the fear, but more likely is just part of the narrative in explaining that he was not talking at that point to the grandmother. *See generally* Rule 803, SCRE (statements of "then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)" not excluded by hearsay rule). *See also United States v. Wills*, 346 F.3d 476, 490 (4th Cir. 2003)(witness statements made in conversation with defendant properly admitted to show context of incriminating admissions). At any rate, the evidence was offered to demonstrate the fear and impact the murders had on the young child. Because that concept was specifically conveyed otherwise, any minor error in the admission of one statement going to

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same would have been harmless. *State v. Haselden,* 353 S.C. 190, 577 S.E.2d 445 (2003) (improper evidence harmless where merely cumulative to other evidence); *State v. Evans*, 662 S.E.2d 489, 491 (Ct. App. 2008)(evidence "merely cumulative, insubstantial" did not affect the result of trial and considered harmless); *State v. Weaver*, 361 S.C. 73, 87, 602 S.E.2d 786, 793 (Ct. App. 2004)(even if contested testimony was hearsay, admission would be considered harmless where cumulative to other evidence in the record). Evans has failed to show deficient performance and prejudice, and is not entitled to any relief.

9(b)(7) Ineffective Assistance of Counsel: Failed to Object to Closing Argument

Trial counsel was not ineffective in failing to object to the State's closing argument in the sentencing phase. Given the entirety of the record, (R. p. 1743, line 19 – p. 1760, line 18), the argument presented does not appear either erroneous or prejudicial. *See generally Von Dohlen v. State*, 360 S.C. 598, 613-614, 602 S.E.2d 738, 746 (2004)("comment, although improper, did not so infect the trial with unfairness as to make the resulting conviction a denial of due process").

Evans complains the argument infers the state had 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 placed emphasis on the role of the jury. (R. pp. 1747-1748). Additionally, the solicitor requested the death sentence be 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). Evans has failed to show an improper argument was made to which defense counsel should have objected.

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).

Further, 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").

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).

Lastly, even if the comments could possibly constitute error, the error would be harmless in light of the tremendous evidence in aggravation. *See Jones, supra.* However, the record shows no error. Evans has failed to show defense counsel was deficient in failing to object.

9(b)(8) Ineffective Assistance of Counsel: Failed to Object to Prosecution on Equal Protection Ground

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Evans has failed to offer any specifics to the allegation, and has failed to argue error. Therefore, this allegation should be deemed abandoned. Alternatively, Evans has failed to carry his burden of proof.

9(b)(10) Ineffective Assistance of Counsel: Failed to Request the Statutory Mitigator Related to Capacity

Trial counsel advised the jury in opening at the penalty phase, "... as I told you from the beginning, there's not going to be any excuses at all." (R. p. 1526, lines 11-13). Counsel also advised the defense would present testimony from "a couple of doctors" to show "what mentally goes on inside of somebody's head." (R. p. 1526, lines 18-21). Counsel continued:

> We're not saying he's insane. We're not saying he is mentally ill. But we are trying to offer you, as I said in my opening, reasons why this happened, not excuses but reasons, to convince you to consider as an appropriate sentence in this case life imprisonment without the possibility of parole...

(R. p. 1526, line 22 – p. 1527, line 2).

During mitigation, Evans presented the testimony of psychologist Dr. James R. Evans regarding brain function. Dr. Evans' testing reflected Evans had an IQ of 94 which is "well within the average range" of intelligence. (R. p. 1682, lines 16-18). Dr. Evans opined, however, that he "had some brain dysfunction" and "learning problems" and that Evans was "under the effects of a mental or emotional disturbance at the time of these shootings." (R. p. 1697, line 6 – p. 1698, line 6). He surmised:

> But when you get into circumstances like helicopters hovering and police surrounding you, the judgment is going to be bad in most people, for most people. It's going to be difficult to make a, let's say a, good, rational decision.

> But if you have the type of brain injury or head - - brain dysfunction that he has, it would be even more difficult, and your thinking could get very rigid and you might just not do what a rational person would do.
>
> So I think to that degree he was operating to some, with some impairment. He was less able to conform his behavior to the requirements of the law than a person without such dysfunction would have.
>
> ...
>
> ... I think he was under emotional disturbance at the time.

(R. p. 1698, line 24 – p. 1699, line 23).

On cross-examination, Dr. Evans testified his report reflected Evans suffered from "mild to moderate problems" with "cognitive flexibility" and no "significant problems with response control." (R. p. 1704, line 14 – p. 1705, line 3).

The defense also presented testimony from Dr. Elin Berg, a psychiatrist. Dr. Berg testified that, based on Evans's reports of his mood at the time of the murders, she would diagnose him with "major depressive disorder, single episode" which would be considered a "mental or emotional disturbance." (R. p. 1719, lines 14-16; p. 1721, lines 9-13). Dr. Berg testified, however, that Evans had the capacity to conform his conduct to the requirements of law at the time of the murders; that he did not have any psychotic symptoms; that he showed no evidence of mental retardation; that he did not have any brain injury; and that he did not have any psycho-neurological symptoms. (R. p. 1729, lines 3 – p. 1730, line 13).

After the conclusion of the sentencing phase testimony, the trial judge recessed the proceedings and requested defense counsel provide, "those statutory and non statutory mitigating circumstances that the defense believes the jury should be able to consider...." (R. p. 1742, lines

10-20). The trial judge charged the jury to consider: (1) "no significant history of prior conviction involving violence against another person"; (2) "the murder was committed while the defendant was under the influence of mental or emotional disturbance"; and, (3) "the age or mentality of the defendant at the time of the crime." Further, he instructed the jury to "consider any nonstatutory mitigating circumstances that have been shown to exist by the evidence in the case." (R. pp. 1783-1784). Defense counsel did not object or request additional instruction, (R. p. 1789, line 21– p. 1790, line 1). This did not constitute deficient performance, however, because the evidence did not support the additional instruction at issue. Moreover, defense counsel testified that he reviewed the statutory mitigating circumstance with his experts, Dr. Evans and Dr. Berg, and neither could give evidence to support the instruction. (June PCR Tr. pp. 459-471). In fact, defense counsel testified that his contemporaneous notes reflected that Dr. Evans indicated that was "as far as he could go." (June PCR Tr. p. 471).

Where there is no evidence supporting the requested charge, there is no error in failing to give the requested charge. *State v. Hughey*, 339 S.C. 439, 454, 529 S.E.2d 721, 729 (2000). Dr. Berg, the defense psychiatrist, rejected any notion of impairment in regard to capacity to appreciate the criminality of the conduct, or appellant's ability to conform his conduct to law. (R. p. 1729, lines 3 – p. 1730, line 13). Dr. Evans, the defense psychologist, never testified that Evans's capacity to appreciate the criminality of his conduct was substantially impaired, nor did he testify that Evans's capacity to conform his conduct to the requirements of law was substantially impaired. Dr. Evans testimony simply stated Evans "was operating to some, with *some* impairment. He was *less able* to conform his behavior to the requirements of the law *than a person without such dysfunction* would have." (R. p. 1699, lines 8-11)(emphasis added). He

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testified that Evans was under an *emotional* disturbance during the murders. (R. p. 1699, lines 20-23). He also opined stress and pressure from facing police would affect anyone's judgment. (R. p. 1698, line 24 – p. 1699, line 3). He further explained his findings as Evans having a "mild to moderate" problem with "cognitive flexibility" and no "significant problems with response control." (R. p. 1704, line 14 – p. 1705, line 3; p. 1708, lines 3-7).

Dr. Evans' testimony fails to provide evidence of substantial impairment in capacity to understand and conform – this is consistent with defense counsel's notes, (June PCR Tr. p. 471). The testimony referencing the "great pressure with the police and helicopters there" as affecting judgment, (R. p. 1708, lines 17-25), does not constitute evidence supportive of the specific charge at issue here. *Compare State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990)(mitigating charge required where defendant diagnosed with psychopathic personality affecting capacity to appreciate criminality of the conduct and ability to conform conduct to law). The mere mention of "some effect" on capacity simply does not necessitate a charge that contemplates substantial impairment. Thus, the evidence presented does not provide any support for the mitigator that references substantial impairment of the capacity to appreciate the criminality of the act, or to conform to the requirements of the law.

Moreover, the trial judge properly charged on the two mentality statutory mitigators that were supported by the evidence. (R. p. 1783, lines 17-22). The fact and circumstances regarding Evans's mental condition were obviously and clearly before the jury such that, had counsel improperly failed to request the mitigator, there could be no prejudice. *Jones v. State,* 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998) (finding no prejudice by the absence of an additional statutory mitigating factor on mental state where the issue of defendants mental condition was clearly before the jury, the trial court charged several other mitigating factors relating to mental

condition, and the jury found the existence of five aggravating factors). *See also State v. Stanko*, 376 S.C. 571, 578, 658 S.E.2d 94, 97- 98 (2008)(though finding issue not preserved for review on direct appeal, the Court noted that no prejudice occurred when the jury heard the cited evidence, and was advised of other statutory mitigating factors regarding appellant's mental state).

Additionally, there is clearly overwhelming evidence of guilt. Evans even admitted his guilt., R. p. 1233, lines 3-12; p. 1432, lines 7-13; p. 1473, lines 16-19, of a particularly brutal and heinous double murder. There could be no reasonable probability that the omission of this one mental state related mitigating circumstance in the charge (especially where two others were charged) would have resulted in a different result. *Strickland, supra. See also Jones*, 332 S.C. at 339-340, 504 S.E.2d at 827 (jury "presented with overwhelming evidence of Jones's guilt and the callous and heinous way in which Jones calculated and executed the murder" which argued against finding prejudice as there was "no reasonable probability the sentencer would have concluded the balance of aggravating and mitigating circumstances did not warrant death" even in light of purported error). The jury found murder, three aggravating circumstanses for the murder of Deputy Sapinoso's father, and four for the murder of Deputy Sapinoso. Even if the facts were to show deficient performance in regard to this issue, there could be no *Strickland* prejudice.

In sum, Evans failed to show deficient performance and prejudice, and is not entitled to any relief.

9(b)(11) Ineffective Assistance of Counsel: Failed to Investigate, Develop, and Present Available, Relevant, and Admissible Mitigating Evidence

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In regard to trial counsel's investigation, to show deficient performance, Evans must demonstrate not simply that more information was available (as there may always be one more witness who could have been contacted or one more piece of paper that could have been copied), *see generally Byram v. Ozmint*, 339 F.3d 203, 210 (4th Cir. 2003)(simple "failure to obtain available records... does not show that counsel's investigation was inadequate"); rather, Evans must show that counsel made an unreasonable decision not to investigate or cut off investigation prematurely. *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052 (1984).

The United States Supreme Court has consistently affirmed this test in regard to investigation by trial counsel:

> ...*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*...

Wiggins v. Smith, 539 U.S. 510, 533, 123 S.Ct. 2527 (2003). *See also Bobby v. Van Hook*, __ U.S. ___, 130 S.Ct. 13, 19 (2009)(finding no deficiency where counsel investigated and made a strategic, reasonable decision not to investigate certain lines of evidence further: "there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties.").

Moreover, "the reasonableness of an investigation, or a decision by counsel that forecloses the need for an investigation, must be considered in light of the scarcity of counsel's time and resources in preparing for a sentencing hearing *and the reality that counsel must concentrate his efforts on the strongest arguments in favor of mitigation.*" *McWee v. Weldon*,

283 F.3d 179, 188 (4th Cir. 2002)(emphasis added). *See also Byram v. Ozmint*, 339 F.3d at 210 (quoting same).

Evans's complaint regarding the failure to discover and present mitigation evidence breaks down into two distinct areas: 1) evidence of abuse and neglect in Evans's Cleveland area homes; and 2) evidence of lead poisoning and concomitant brain damage and learning disability. This Court finds Evans has failed to carry his burden of proof.

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.

A. Abuse Evidence Presented in PCR

Evans called his mother and aunt to testify about his father abusing his mother in the family home(s) in the Cleveland area. Both were very passionate about the abuse against the mother and Barry Evans' fault. Barry Evans confirmed the abuse and stated the anger he felt in

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that relationship is what drove him to leave the home. (June PCR Tr. p. 633). In fact, he testified that he wanted to leave the volatile situation so that the children would have a better home environment, without seeing the violence. (Id). He denied any abuse toward Evans. (June PCR Tr. p. 639).

Shatima Martin, Evans's sister, confirmed the abuse between Rene Evans and Barry Evans, and that she and Evans had witnessed some incidents. (See, for example, October PCR Tr. pp. 20-23). She indicated Barry Evans had abused Evans by use of corporal punishment on several occasions. (October PCR Tr. p. 25). Ms. Martin testified, however, that both she and Evans moved to South Carolina to be near their father. (October PCR Tr. p. 38). Ms. Martin also testified Evans was not quite thirteen when he moved in with Mr. Evans. (October PCR Tr. p. 38). Evans moved away from Rene Evans' home, where he was a "latch key" kid, "running the streets." (June PCR Tr. p. 352; p. 401; pp. 639-640; October PCR Tr. p. 101). Ms. Martin testified that when Barry Evans married their stepmother, Robin, he was not abusive to anyone. (October PCR Tr. pp. 39-41; p. 69).

Dr. Cooper-Lewter, a social worker, testified that he completed a "social history assessment" to develop "factors [that] may have influenced who [Evans] is today and his behavior." (October PCR Tr. p. 90). He noted that split in background – the tumultuous years (birth to approximately 12)[16] in Ohio, and the stable years (12 (or 14), all through high school and into college years). (October PCR Tr. pp. 105-106; pp. 109-110). He noted the stable home

[16] This number appears to change, with Evans's sister recalling Evans coming to Greer, South Carolina before the age of thirteen, and Dr. Cooper-Lewter recalling age 14. School records, and testimony from a school friend, would tend to show he was actually 14 as Dr. Cooper-Lewter testified. (See, for example, June PCR Tr. p. 112).

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environment, his step-mother's devotion, his "very good role models [including] his coaches, who required that he do his work." (October PCR Tr. p. 110).

Dr. Cooper-Lewter testified that Evans's relationship with Christina Rodriguez[17] was "toxic," and said, "Well, she had a fascination with gang activities, had a tattoo, I'm told, that was from the Folk Nation." (October PCR Tr. p. 107). He accepted the tattoo and the statement of membership as proof of her membership in a gang. (October PCR Tr. p. 107; p. 109).

Dr. Cooper-Lewter testified that Evans did not do well at North Greenville because of "they had a lot of rules" and "it wasn't a good fit for him." (October PCR Tr. pp. 115-116). Ms. Martin, Evans's sister, testified that he does not do well when there is a lack of rules. (October PCR Tr. p. 43). In fact, Ms. Martin stated it was lack of conforming to basic rules – such as staying away from guns, and staying away from gang materials – that led to her request that he leave her house. (October PCR Tr. pp. 45-48).

B. Learning Disability Evidence Presented in PCR

Evans presented two witnesses at the PCR hearing who described Evans's early childhood academic record. The records admitted reflect that Evans received assistance in school for a learning disability. (See June PCR Tr. p. 43). Evans was not extracted from the regular public school system; rather, he received additional assistance for his learning needs. (June PCR Tr. p. 53). The records reflected that with additional assistance, Evans showed "substantial improvement" and had "benefitted" from specialized programs. (June PCR Tr. p.

[17] Defense counsel Sumner testified that calling Christina to even attempt to explore her belief as to whether or not Evans was a gang member could open the door to evidence Evans's abuse of her. (June PCR Tr. p. 487; p. 491; pp. 516-517). Not only would any evidence going to Christina's character not be relevant at trial, and constitute improper character evidence, this Court finds the strategy to avoid having Christina testify to be reasonable in light of the evidence.

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57). (See June PCR Tr. p. 98, the fact that Evans achieved better grades either meant that he "overcame" his disability, or that "he was able to achieve in spite of his disability"). In fact, Evans, with great assistance from his devoted step-mother, finished high school and attended North Greenville College. While Evans did not meet the academic standard sufficient to be admitted to some universities, he was able to be accepted and admitted to North Greenville. (See October PCR Tr. pp. 110-111). Moreover, Evans's IQ is 94, an indication of average intelligence. (R. p. 1682; June PCR Tr. p. 844).

C. Brain Damage Evidence Presented in PCR

Evans presented testimony from Dr. David Bachman, a neurologist, to establish a MRI would have shown brain damage. Dr. Bachman, like Dr. James Evans had before him, found evidence of dysfunction. He then ordered a MRI in September 2008. (October PCR Tr. p. 155; p. 187). By notation submitted with the request, he informed Dr. Turk and Dr. Agarwal, interventional neuroradiologists who would interpret the films, that this was a "legal case" and the individual had a history of "significant learning disability with known exposure to lead." (October PCR Tr. p. 188). The report came back normal. (October PCR Tr. p. 189; Respondent's Exhibit 47). As far as treatment, Dr. Bachman would as a general matter refer individuals to these interventional neuroradiologists. (October PCR Tr. p. 186-187). However, Dr. Bachman treated this matter as a legal case, (October PCR Tr. pp. 186-187; p. 188), and determined, with the aid of counsel, that he would send the films to Professor Ruben Gur at the University of Pennsylvania who has a protocol for evaluating brain volume from images alone. (October PCR Tr. p. 195; June PCR Tr. p. 659; p. 663).

A second MRI, done to Professor Gur's specifications, was performed in November 2008. (October PCR Tr. p. 193). Dr. Argarwal, again interpreted the films, along with Dr. Spampinato, another neruoradiologist. Again, the doctors were provided with the background information "legal case" and "significant learning disability with known exposure to lead as a child." (October PCR Tr. p. 198). The report came back normal, for a second time. (October PCR Tr. p. 197; Respondent's Exhibit 48). Dr. Bachman, nevertheless, and after consultation with legal counsel, sent the information to Professor Gur. (October PCR Tr. p. 193).

Professor Gur testified that Evans had "reduced volume" which he equates with brain damage. (June PCR Tr. p. 675; p. 713). He testified, however, that brain damage, even as noted on an MRI film, does not equate with dysfunction. (June PCR Tr. p. 663; pp. 721-722). Professor Gur testified that the image analysis in this case demonstrated "both frontal lobes left and right and the right orbital lobe are below normal, are 1 ½ approaching 2 " standard deviations. (June PCR Tr. p. 701; pp. 716-717). He explained, "if any of your cognitive abilities is 1 standard deviation below your average, then you are classified as having mild cognitive impairment... So 1 standard deviation below normal is clinically significant in this situation and in most medical situations." (June PCR Tr. p. 702). However, he conceded the rule was "a little arbitrary" when accessing less than 2 standard deviations, by his definition. (June PCR Tr. p. 716). He also conceded that brain volumes fluctuate with individuals. (June PCR Tr. p. 713). Further, he opined these statistics on volume would merely "likely relate to behavior deficits," (June PCR Tr. pp. 722-723), *if* neuro-psychological assessment indicated dysfunction. (June PCR Tr. pp. 721-722). Thus, he testified, his findings were wholly consistent with Dr. Evans' findings. (June PCR Tr. p. 707). The professor testified, that he agreed with Dr. Evans' findings:

> ... I thought he did a thorough evaluation and reported it in a fairly straight forward fashion, fairly standard.

(June PCR Tr. p. 711).

Moreover, Professor Gur conceded that dysfunction could "ameliorate" if one had, for instance, received aid in overcoming a minor learning disability: "Oh, yeah, the whole field of neuro rehabilitation is focused on trying to ameliorate the dysfunction...." (June PCR Tr. p. 719).

Professor Gur also addressed Dr. Berg's conclusion, as reflected in her trial testimony, that an MRI was not necessary because it would not necessarily rule in or rule out dysfunction. (R. p. 1730). As noted, the professor testified that brain damage alone as shown by MRI film does not necessarily equate with dysfunction. (June PCR Tr. pp. 721-722). He also testified that the MRI is not definitive in all cases even as to damage:

> Because MRI is the standard method to rule out or rule in front lobe damage or damage anywhere else in the brain. Sometimes you can get a normal MRI even when there is damage. The method is not perfect and it could miss certain types of damage, but if it sees a damage, you know you have ruled it in. If you don't see, at least you have ruled out major types of brain damage. You may not be able to rule out all types of brain damage.

(June PCR Tr. p. 679; p. 712). Even so, Professor Gur opined that where there is dysfunction, a quantitative analysis would "confirm" the presence of the dysfunction. (June PCR Tr. p. 696). Yet, as Dr. Kenneth Spicer, an expert in diagnostic radiology, (October PCR Tr. p. 281), testified, the quantitative analysis is not recognized as a reliable science as far as diagnosing patients. (October PCR Tr. p. 320; pp. 326-327).[18] Professor Gur agreed that his method cannot

[18] Respondent objected to Court's acceptance of the professor's testimony on the diagnostic level, noting the lack of reliability of Professor Gur's method for diagnostic purposes. (June PCR Tr. p. 647). Respondent noted that the method for diagnosing dysfunction based on MRI films alone

be used for a "clinical presentation." (June PCR Tr. p. 663; See also p. 668, "I didn't make a diagnosis. I reported the results of the analysis which indicated loss of brain tissue.").

Dr. Spicer testified that volume determination, when subtle, is subjective, (October PCR Tr. p. 297; pp. 312-313); however, there is no accepted, reliable method for determining volume loss by quantitative analysis accepted by either the American College of Radiology or American Society of Neuroradiology. (October PCR Tr. p. 320; pp. 326-327). Thus, even accepting the study Professor Gur conducted reflects volume loss, that information would not change his opinion that the MRI was within normal range. (October PCR Tr. p. 321).

As previously referenced, Dr. Berg, a psychiatrist, testified at trial. Neither Dr. Bachman nor Professor Gur are trained in the specialty of psychiatry. Dr. Berg was so qualified, (R. p. 1714), and her analysis focused not just on neurological testing for dysfunction, but also evaluation for possible indications of delusions, "hearing voices or having hallucinations," i.e. psychotic symptoms. (R. p. 1729). As Dr. Bachman conceded, he neither considered nor did he know how these possibilities factored into Dr. Berg's decisions or opinion. (October PCR Tr. pp. 227-228). Dr. Bachman further conceded that "an MRI scan sometimes help you, sometimes doesn't help you. You have to put it in the context of the whole clinical picture," (October PCR

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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 05-6002-01-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 the testimony). This Court allowed Professor Gur to testify in the PCR. 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.

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Tr. p. 224), but maintained Dr. Berg must have been in error as the MRI showed "some mild atrophy." (October PCR Tr. p. 225).

Dr. Bachman and Dr. Spicer agree, however, that atrophy of the brain can be caused by any number of events, including head trauma from sports, alcohol abuse and drug abuse. (October PCR Tr. p. 192; pp. 299-300). Also in regard to his findings, Professor Gur testified simply as to a "pattern of abnormality consistent with what you would expect from lead and other toxic exposures." (June PCR Tr. p. 668).

D. Lead Poison Evidence Presented in PCR

Evans presented Professor Richard Canfield of Cornell University as an expert on lead exposure in small children. Professor Canfield testified that in the mid-seventies, the "point of concern" for lead exposure was 40 micrograms per deciliter. (June PCR Tr. p. 824). By the late seventies, the point of concern reduced to 30, it having been established that a level above 40 was "absolutely damaging," and not just an area of concern. (June PCR Tr. p. 825). Since 1991, that level has reduced again to 10. Id.

Professor Canfield testified that Evans tested at 34 in 1978, (June PCR Tr. p. 827), and 30 micrograms per deciliter in 1981 (June PCR Tr. p. 828).

Professor Canfield further testified that lead exposure affects cognitive functions, (June PCR Tr. p. 832), and, specifically, reduced IQ (June PCR Tr. p. 834). He explained, however, that the greatest damage occurs at the lower exposure, and increased exposure does not continue in great numbers:

> ... We found something that was counter intuitive in our study which is it took very little lead to cause initial significant damage. That is if you had a lead level as low as 10, you, as our statistical average you would lose about 7.4 points in IQ

> and it was a very rapid decline. You continued to lose IQ points as you increased in lead but just a slower rate.

(June PCR Tr. p. 842).

Statistically speaking, one would lose, on average, 10 IQ points at the 30 micrograms per deciliter level, more or less. Id. Professor Canfield agreed that Evans's IQ, 94, is in the average range. (June PCR Tr. p. 844). Further, Professor Canfield agreed he could not definitively link any dysfunction to lead exposure. (June PCR Tr. p. 846). Professor Canfield candidly admitted that his information was statistical and individuals varied. (June PCR Tr. p. 847; p. 852). Professor Canfield also admitted his research was based on a study of children 6 months to 6 years old, though he was familiar without other studies with longer ranges. (June PCR Tr. p. 841; p. 850). Professor Canfield agreed that Evans's school records show an increase in average grades from elementary school to high school. (June PCR Tr. pp. 848-849).

E. Trial Counsel's Strategy

Trial counsel investigated and presented a focused case in mitigation, calling family and friends, to demonstrate Evans's "redeemable" qualities and focused the jury's choice by reliance on "two Kamell Evans." (See, for example, Evans's Post-Hearing Brief, p. 9). This Court finds the strategy was reasonable and met professional norms. Evans contends the two distinct sides of Evans could be resolved by "understanding" of a difficult upbringing, running the streets at an early age, learning disabilities and dysfunction. (See, for example, Evans's Post-Hearing Brief, p. 57). However, by reliance on the "two Kamell Evans" theory, counsel made the choice more palatable for those jurors not so accepting of excuses – that to kill the individual who made the choices they did not like, was to kill the individual who made choices that were good and decent.

This is a reasonable strategy. In *People v. Peeples*, 793 N.E.2d 641 (Ill. 2002), a capital case from Illinois, defense counsel presented a similar argument:

> ... despite experiencing a very troubled childhood, and despite facing adversity while growing up, defendant possessed "the strength and inner goodness to become what we consider a good son, a good brother, good uncle, and a father figure to his sister." The record shows that defense counsel made a strategic choice to argue that there were "two William Peeples. The William Peeples that family and friends knew and the William Peeples that the jury convicted of murder." In pursuing this mitigation strategy, defense counsel focused on the redeeming qualities possessed by defendant and asked the judge to view defendant as a person whose life was worth saving and who was worthy of mercy. Counsel focused upon defendant's "love of his family, his taking care of his family," and stated this defendant's being alive "even if it is in prison, sustains and supports his mother and sister, and his niece."

793 N.E.2d at 679.

The Illinois Court also found "the fact that the sentencer did not accept defense counsel's position does not mean that defense counsel was ineffective." *Id. See also Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995)("unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel"). In fact, it was even more difficult to make the argument in that case than here because counsel had a disadvantaged background that did not show a clear "one night, one error" break in character, as the evidence in this case (including Evans's own statement to the jury) tended to reflect. (See R. p. 1773, Evans to Jury, "What they are judging me on is one bad night, on a bad night that I made happen, one bad decision that I made, a lot of bad decisions, one night, four hours and ten seconds.").

Moreover, the decision to embrace this strategy was made with the investigation and advice of a team of experts – Lenora Topp (an experienced mitigation specialist); George Martin (a former SCDC employee qualified as an expert in corrections and prison administration); Dr.

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James Evans (a neuropsychologist); Dr. Elin Berg (a psychiatrist); and M. Scott Peterman (former ATF agent).[19] Importantly, Evans has not presented information that was not known in some fashion. Instead, he relies on the theory that the information at issue was not further explored, or not explored to the utmost minute detail. Evans has failed to show deficient performance.

F. Evans Fails to Show Deficient Performance in Regard to Evidence of Abuse and Neglect in Ohio. Defense Counsel Knew of the Evidence of Abuse and Neglect and Made a Reasonable Decision Not Present Testimony on Same as Such Would Be At Odds With the Defense Theme.

Evidence of abuse and neglect, which also leads to evidence that Evans was "running the streets," would be at odds with counsel's focus on Evans' good qualities, good character, and loving family. Moreover, the evidence Evans proposed should have been admitted comes from his mother and aunt. The mother was uncooperative with trial counsel. Further, she impressed the defense as self-centered, finding it "very had to keep on track and talk about Kamell." (June PCR Tr. pp. 340-341). It is clear from the testimony in PCR that the testimony was decidedly centered on the mother – her perceptions, her anger at Barry Evans. (See, for example, June PCR Tr. p. 880, "He's never been in a good light."). There was an express, and reasonable, concern the mother would talk about herself more than focus on the events that Evans was exposed to, that weighed into counsel's consideration of the evidence. (June PCR Tr. pp. 348-

[19] The record shows Evan's trial counsel spent hundreds of hours in preparation. (See, e.g., Respondent's Exhibits 12, 13, 14, 16, 17). Respondent notes that Evans's social worker, both interviewing and further interpreting, required only two months to prepare for the collateral proceeding beginning June 1, 2009. (See October PCR Tr. p. 122). 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, 598 n.2, 627 S.E.2d 701, 707 n.2 (2006), *quoting Jones v. State*, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998)(an applicant "may not simply posit suppositions and speculations in an attempt to establish that counsel was ineffective").

350). *See United States v. Snyder*, 787 F.2d 1429, 1432 (10th Cir. 1986)("to call a particular witness is a tactical decision and, thus, a matter of discretion for trial counsel"). Counsel will not be held ineffective when he articulates a valid reason for using a certain strategy in regards to his witness. *Simpson v. Moore*, 367 S.C. 587, 603, 627 S.E.2d 701, 710 (2006), *citing Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002).

As far as abuse directed toward Evans, Evans advised counsel he did not believe his father's discipline to be abuse, though he admitted "a stern disciplinary atmosphere," along with the fact that he decided to move to South Carolina to live with his father, and had a happy home as a result. (June PCR Tr. p. 308; p. 310; p. 426). Moreover, Barry Evans, the father who raised him and to whom Evans fled while in Middle School, would testify on Evans's behalf. To allow attacks on him would have reduced the effectiveness of his testimony. (June PCR Tr. p. 256).

Counsel expressed clear and reasonable strategy in these matters. Evans has failed to establish deficient performance.

G. Evans Fails to Show Deficient Performance in Regard to Evidence of the Learning Disability, Lead Poisoning and Purported Brain Damage. When Reviewed in the Scope Of the Entirety of the Evidence, the Mitigation Impact and Value is Greatly Reduced.

Evidence of Evans overcoming his learning disability would not have been inconsistent with his defense, but it is of little weight in the theme at issue. Further, the evidence, as a whole, shows a relatively minor disability, and strong improvement. Consequently, outlining the possible cause of the disability, i.e. lead exposure, is again, not inconsistent, but of little weight.

In the case of elementary school records, Evans alleges counsel was ineffective in failing to more fully investigate and present evidence regarding his early learning disability. Two significant facts rebut his contention. First, the defense team did request elementary school

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records, only to be told, by the school district, that the records had been destroyed. (June PCR Tr. pp. 56-57; p. 574). In fact, Mr. Bunkley, the Director of Pupil Personnel Services for East Cleveland City Schools District, (June PCR Tr. p. 7), who presented records during the PCR, hearing confirmed the letter appeared to be from the correct authorities, and of the kind and quality he would rely upon and would accept as a document from the school confirming contamination and unavailability. (June PCR Tr. p. 56-57; pp. 59-60). Moreover, the defense team requested copies of these early records from Evans's mother, Renee Evans. She, however, was uncooperative.[20] (June PCR Tr. pp. 203-204; p. 346; pp. 348-349). The defense team mitigation specialist, Lenora Topp, testified that Evans's mother advised her she would help and that she did have some records, but she failed to provide copies to Ms. Topp. (June PCR Tr. p. 572; p. 593). Specifically, Ms. Topp recalled that Evans's mother suggested she had "medical records regarding the lead poisoning." (June PCR Tr. p. 594). Former defense mitigation specialist, Dale Davis, likewise testified that she had contacted Evans's mother and requested records, and the mother had initially agreed to help. (June PCR Tr. pp. 533-534). In PCR, both Evans's mother and his sister confirmed that the mother kept elementary school records. (June PCR Tr. p. 877-878; October PCR Tr. p. 77). When Evans's mother came to South Carolina for the trial, though, the only document she provided Ms. Topp was a document reflecting how the abuse against her had affected her. (June PCR Tr. p. 594). She claimed no one asked for the records, but conceded that she had turned over such records to the PCR defense team. (June PCR Tr. pp. 878-879; p. 881; p. 885). She indicated she would have turned them over to trial counsel had 1) someone come by the house; or 2) called and asked her to provide them. (June PCR Tr. p.

[20] Several of the school records admitted noted the mother's concern over the disability, but also that she failed to attend school conferences designed to help Evans. (June PCR Tr. p. 25; p. 90). This additional information supports the lack of "follow through" as noted by the defense team.

882; p. 885). She also denied that prior mitigation investigator, Davis, contacted her about records. (June PCR Tr. p. 881). These inconsistencies weigh against this witness' credibility. However, counsel did have school records from Greer and those records reflected Evans was a good, though not stellar, student. Defense counsel would have to account for that in making any argument about learning disabilities and dysfunction. (See, for example, June PCR Tr. pp. 913-917).

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 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.

As to evidence of brain damage, there was no evidence of brain damage that defense counsel ignored. (June PCR Tr. p. 329). Moreover, counsel had a right to rely on their experts – Dr. Evans, and psychiatrist, Dr. Berg – and they "very heavily" relied upon them. (June PCR Tr. p. 248). As noted, Dr. Berg testified that a MRI was not necessary. And, in fact, two MRIs conducted subsequent to the trial, came back normal. (October PCR Tr. p. 171; p. 189; p. 197; Respondent's Exhibits 47 and 48). There is an addendum to the second report. However, that

does not erase the fact that two reports were issued with normal findings, or the fact that the addendum, at most, allows for the possibility of mild atrophy, but still shows an overarching normal range (October PCR Tr. p. 321). Further, the circumstances of the addendum negatively affect its value.

Dr. Bachman conceded that he did not request the reporting doctors reconsider their findings, either immediately after the September report was issued, or when the November report was issued. On the same day that the State's subpoena was issued requesting the original reports, (May 27, 2009, before the June 1, 2009 Evidentiary Hearing), Dr. Bachman requested that Dr. Spampinato "re-review" her report. (October PCR Tr. pp. 202-203). Dr. Bachman testified that he was contacted by John Blume, a prominent capital litigation defense attorney, and Mr. Blume expressed to Dr. Bachman that he "was concerned about the fact that the MRI scan report had not been amended" and "asked [Dr. Bachman] to ask the radiologist to re-review the MRI scan again." (October PCR Tr. p. 204). Even so, the most the addendum adds is the possibility of "mild" (the least cognizable), diffused (whole brain as opposed to frontal lobe), volume loss. (October PCR Tr. pp. 324-325). Dr. Spicer maintained that the scan was within standard normal limits. (October PCR Tr. p. 297).

However, Dr. Bachman, like Dr. Jim Evans', opined "there's evidence of cognitive dysfunction." (October PCR Tr. p. 178; p. 228). He then added his opinion was "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" with the "likely cause" of "lead exposure 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." (October PCR Tr. pp. 178-179). Even Dr. Bachman, who relied upon Dr. Gur's statistical evaluation to support his subjective

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theory of mild diffused atrophy could not identify this statistical evaluation as the premier or "most sensitive" test to determine loss of "neuron brain function." (October PCT Tr. pp. 183-182). Dr. Spicer testified more specifically that the "most sensitive" test is a brain biopsy, but absent that extreme, a PET scan or some type of "metabolic imaging" or a spinal tap. (October PCR Tr. p. 300). As to the Gur's volume analysis, Dr. Spicer testified:

> ... I'm not aware that Dr. Gur's work has gained clinical acceptance to where it's a standard practice or any of the observations are utilized for standard practice. They're still in the research realm.
>
> ... I'd be very impressed if volume measurements turned out to be relatively sensitive. I have seen some of his work in the area of dementias looking for the ability to predict in patients with very mild changes in brain function whether they would become demented in a few years such as mild cognitive impairment patients that are eventually going to become Alzheimer's disease patients.
>
> And in those cases the volumetric analyses failed to help predict early changes as going on to later changes, whereas metabolic imaging has done very well in that regard and continues to progress...

(October PCR Tr. p. 301).

Dr. Spicer recognized Professor Gur's work had been published for the purpose of making associations, but that the volume analysis has not been accepted as a basis for diagnosing a patient. (October PCR Tr. p. 302). Dr. Spicer testified that he would not rely on Professor Gur's volume analysis in making a diagnosis. (October PCR Tr. p. 302). Dr. Spicer explained:

> ... He has had scientific observations, but not as in clinical trial saying, you know, make this volume and this allows you to predict that this person will have this disease or it'll progress in such a manner.
>
> So in terms of making associations between specific entities, disease entities and volume changes, his work has been published. In terms of utilizing that in the clinical – in the day-to-day clinical practice there are no clinical trials that have

> shown, that I'm aware of, that his observations are beneficial as we diagnose disease and evaluate change in the patients.

(October PCR Tr. p. 302).

Therefore, 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.

Though Evans 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 Evans 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). His consent is probative of the reasonableness of the strategy. *Bell v. Evatt, supra.*

Evans has failed to show deficient performance.

H. Even if Evans Could Show Deficient Performance, Evans Cannot Show Prejudice as He Has Failed to Show a Reasonable Probability, But for the Purported Deficient Performance, the Jury Would Have Determined the Circumstances Did Not Warrant Death.

As noted, relief will not be granted on showing of mere error or deficient performance. Prejudice must also be shown. *Strickland*, 466 U.S. at 687. When applying the "reasonable probability" standard here, *Jones*, *supra*, this Court finds Evans has failed to show 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.

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 Evans cannot prove error or prejudice. *Jones v. State*, 332 S.C. at 339, 504 S.E.2d at 827 ("The 'new' evidence is the same as the 'old' evidence. At best, it is a fancier mitigation case. If the evidence was not persuasive in the first case, the defendant does not get a second chance. Otherwise, there would never be an end to litigation.").

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 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. However, in the PCR, Evans went further and tied the lead poisoning to brain damage and loss of IQ. The brain damage evidence, as noted above, is not persuasive, and Evans's IQ is average. This is not to say the evidence

could not have been presented, but the lack of proof of specific and significant effect would lessen its impact.

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, attacking the father would only lead to unraveling the carefully crafted defense theme and making his testimony in support of his son less credible.

Additionally, to consider all the evidence together, *Wong, supra*, 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 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.

9(b)(12) Ineffective Assistance: Failure to Object to Charge Referencing Mercy

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Twenty-four days after the June 2009 portion of the evidentiary hearing, the South Carolina Supreme Court issued *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 4 (2009). In light of the state supreme court's decision in *Rosemond*, Mr. Evans moved to amend his application for post-conviction relief to allege that trial counsel provided ineffective assistance in failing to object to an instruction identical to that found erroneous in *Rosemond*. When the evidentiary hearing resumed on October 12 to 14, 2009, trial counsel testified with respect to the claim of error based on *Rosemond*.

I. The South Carolina Supreme Court's Decision in *Rosemond v. Catoe*

The South Carolina Supreme Court, while granting relief based on a finding of ineffective assistance due to counsel's failure to present evidence of the defendant's mental illness, chose nevertheless to address an additional issue. Rosemond claimed that trial counsel were also ineffective for failing to object to the trial court's instruction "not to recommend a sentence of life based on mercy: 'you may recommend a sentence of life imprisonment for any reason or for no reason at all *other than as an act of mercy*.'" *Id.* at 329, 680 S.E.2d at 10 (emphasis in original). The South Carolina Supreme Court found that the trial court's instruction prevented jurors from considering the defendant's evidence and argument for mercy. This, the Court emphasized, ran contrary to state law, under which a defendant is entitled to present evidence seeking mercy (see *State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 318-19 (1991)) and by which jurors must be instructed that they can return a life sentence "for any reason or no reason at all":

> It is proper to instruct a jury in a capital sentencing phase that it may recommend a life sentence for any reason or no reason at all, including as an act of mercy. A jury's consideration of mercy, if proper evidence of mercy is admitted, is well recognized in the sentencing phase of a capital case. Because a capital jury may consider properly admitted evidence of mercy in the sentencing phase, consideration of mercy is not inconsistent with the instruction that "the jury should not be guided by sympathy, prejudice, passion, or public opinion . . . ." *State v. Singleton*, 284 S.C. 388, 393, 326 S.E.2d 153, 16 (1985) overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991).

Rosemond, 383 S.C. at 329, 680 S.E.2d at 10-11; see also *State v. White*, 246 S.C. 502, 507, 144 S.E.2d 481, 483 (1965) (noting the "absolute discretion of the jury with regard to the issue of mercy"); cf. *Saffle v. Parks*, 494 U.S. 484 (1990).

Further, the Court recognized that the trial court's jury instruction in *Rosemond* mirrored the instruction found proper in *State v. Hughey*, 339 S.C. 439, 459, 529 S.E.2d 721, 731 (2000). The Court therefore "overrule[d] *Hughey* to the extent it approved the instruction that precluded a capital jury's consideration of mercy evidence in the sentencing phase"—even as it granted relief on another, independent ground. *Id.* at 329, 680 S.E.2d at 10-11.

Rosemond, as it addresses the mercy charge, does not constitute a "new rule" where it has been the rule for decades that mercy can be considered by a capital jury. A careful reading of *Hughey* reveals that at the time of Mr. Evans trial the supreme court was interpreting the challenged "mercy" language as precluding the jury from considering mercy. If this were not so, then the court's decision in *Hughey* would be nonsensical, as the court there upheld the charge on the ground that "a judge's charge that the jury should not be guided by sympathy, prejudice, passion or public opinion is not reversible error." *Hughey*, 339 S.E. at 460.

It is important to realize that *Hughey* did not discuss or decide the issue of whether the "other than an act of mercy" charge infringed on a capital defendant's constitutional right to

present mitigating evidence. Instead, *Hughey* only went so far as to uphold the charge on the basis that it was consistent with the common law rule that a jury can properly be instructed that its verdict cannot be swayed by sympathy or prejudice. *Hughey* thus left undecided the issue of whether a charge that removes mercy as a sentencing consideration violates constitutional commands. Reasonable trial counsel would have understood that *Hughey* did not confront this lingering issue, rather than accepting on faith that *Hughey* insulated the "other than as an act of mercy" language from any challenge

The trial court in Mr. Evans' case provided the jury with a charge identical to the one that the South Carolina Supreme Court disapproved in *Rosemond v. Catoe*. Here, as in *Rosemond*, the trial judge instructed the jury: "[Y]ou may recommend a sentence of life imprisonment for any reason or for no reason at all *other than as an act of mercy*." (R. 1785) (emphasis added). For the reasons that follow, this Court finds that trial counsel's failure to object to the erroneous charge was both deficient and prejudicial.

II. Ineffective Assistance of Counsel

Applicant alleges, as Rosemond did, that trial counsel provided ineffective assistance of counsel in failing to object to the trial court's instruction precluding mercy.

A. Deficient performance

The "crux" of the mitigation case at Applicant's sentencing trial was mercy. Mercy, trial counsel testified during the evidentiary hearing, was the "primary element" of the mitigation

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plea. PCR 344. The mitigation evidence consisted primarily of testimony from family members, coaches, and friends. The presentation began with Mr. Evans' high school football coach (R. 1651-53), his high school basketball coach (R. 1645-47), his community college football coach (R. 1648-50), and the high school football team chaplain (R. 1642-44), who testified that Mr. Evans was respectful, courteous, and a team leader. A friend with whom Mr. Evans coached little league football testified that Mr. Evans developed a positive relationship with he and his son. R. 1655-58. Another friend, who worked with Mr. Evans in a youth football and basketball association, testified that Evans had been a positive role model for his twenty-two year old son. R. 1660-62. A coworker testified that Mr. Evans was a hard worker, who had not been involved in problems on the job. R. 1664-65. Evans' sister said that Kamell was a father figure to her children, even in prison (R. 1672), and Kamell's father testified in two transcript pages, speaking of Kamell's positive attributes and stating that, while Kamell's actions caused the family pain, "he is still my friend, he will always be my friend." R. 1669. Counsel also called two witnesses who testified that Evans would adjust positively in prison (corrections expert George Martin and Greenville County Detention Center corrections officer John Merkle) and two mental health experts (a neuropsychologist, Dr. James Evans, and a psychiatrist, Dr. Elin Berg).

During the postconviction evidentiary hearing before this Court, trial counsel referred to mercy, by turns, as the "primary element" (PCR 344), the "key highlight" (PCR 345), and "a major part" (PCR 334) of the mitigation case. Trial counsel James Goldsmith testified that he "built [his] closing argument around [mercy]." PCR 344. In sentencing summation, Goldsmith told the jurors:

> I am going to ask for mercy for Kamell Evans. . . . Mercy is unmerited favor. You can't earn it; you don't deserve it; but you give it to him anyway. . . . We don't repay evil for evil. And mercy is appropriate in this case.

R. 1770; PCR 344.

Both trial counsel testified that, given the centrality of mercy to the sentencing phase defense, they would have objected to any charge that suggested a limitation on the jury's consideration of mercy when deliberating on the sentence. PCR 335-36, 353. The trial judge reviewed the proposed jury charges verbally with counsel in chambers. PCR 332-35 (trial counsel Sumner), 345 (trial counsel Goldsmith). Yet neither counsel objected when the trial court proposed the instruction that eliminated the "primary element" of their argument." Trial counsel Goldsmith thought what the judge proposed during the conference "was appropriate." PCR 345. He testified that he knew the court would charge the jury "you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy" before he made his argument to the jury. PCR 346. Counsel submitted no proposed jury charges. PCR 338-39. Counsel made no attempt, alternatively, to change the argument to avoid a conflict between their argument and the judge's charge. PCR 351; see PCR 333-34, 344. And when the trial court issued the instruction to the jury, R. 1785, and later provided the same to the jury in writing pursuant to S.C. Code Ann. § 16-3-20(C), R. 1786, counsel made no objection.

At the evidentiary hearing, trial counsel testified that they did not object to the erroneous charge because they viewed it as helpful. Trial counsel Sumner claimed that he did not think the charge limited the jury's consideration of mercy; because "it use[d] the word mercy," he believed the charge was actually preferable to a charge that simply tracked the words of the statute. PCR 338, see PCR 335. Trial counsel Goldsmith similarly testified that he thought this "an expansive charge" that allowed jurors to consider mercy. PCR 346-47. The charge, counsel say, told the jury to consider mercy, not abjure it.

This Court finds trial counsel's reasons for not objecting to the charge are unavailing. As the South Carolina Supreme Court recognized in *Rosemond*, the plain meaning of the words of the charge given is that mercy is precluded as a consideration for a sentence of life. The charge, by substituting the words "other than" for the word "including," in effect eviscerates the role of mercy in the jury's consideration of the sentencing options. As the Supreme Court understood, the last clause of the instruction plainly reads as a limitation on and qualification of the previous sentence, not a reiteration. The interpretation offered by trial counsel defies both the Supreme Court's determination in *Rosemond* and common sense.

Trial counsel should have known that the charge was inconsistent with long-standing South Carolina law and the United States Constitution. The South Carolina Supreme Court's statement in *Rosemond* is not a new rule. The fact that the *Hughey* decision, which *Rosemond* reversed, was "in effect" at the time of Mr. Evans' trial in 2004 does not ameliorate counsel's failure to object to the erroneous charge. It has been the rule for decades that mercy can be considered by a South Carolina capital jury. In South Carolina in the year 2000, as in 2004 at the time of Evans's trial, a defendant was entitled to offer at sentencing evidence asking "for mercy on his behalf," *State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 318 (1991); see *State v. Johnson*, 338 S.C. 114, 126, 525 S.E.2d 519, 525 (2000); *State v. Sapp*, 366 S.C. 283, 292-94, 621 S.E.2d 883, 887-88 (2005). It was proper for defense counsel to try to "appeal to the jury's sense of mercy." *Drayton v. Evatt*, 312 S.C. 4, 12, 430 S.E.2d 517, 522 (1993). It was proper for a defendant to address the jury and ask for mercy. See *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004). Under S.C. Code Ann. § 16-3-20(C), "The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law..." Mercy is embraced within this statutory directive as a basis for

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returning a life sentence. This is also supported by the fact that the statute does not require that the jury "weigh" aggravating circumstances against mitigating circumstances; rather, South Carolina is a non-weighing state, meaning the jury can return a verdict of life for any reason "otherwise authorized or allowed by law." S.C. Code Ann. § 16-3-20(C).[21] Objecting here did not impose a duty of clairvoyance on counsel, or force a lawyer to anticipate a change in the law. It is misleading to argue, as the State does, that the charge represented the correct law at the time of Evans' trial. As previously noted the law has always been that a capital jury can consider mercy. Indeed, the law used to be that one convicted of murder was sentenced to death *unless* the jury recommended mercy.[22] As noted above, however, the court in *Hughey* interpreted the "other than as an act of mercy" phrase as precluding a jury from considering mercy. But the court did not consider the pivotal question of whether the preclusion violates the common law right to a mercy charge (as *Rosemond* found) or the constitutional right—long recognized by *Lockett* and its progeny-- to grant the jury the practical ability to give meaningful effect to all mitigation. Reasonable trial counsel familiar with the common law mercy right, *Hughey* and *Lockett* would have objected to the charge and pressed this very point. Counsel performed deficiently in failing to object to the erroneous instruction.

Further, it is well established that the Eighth Amendment, under the *Lockett v. Ohio*, 438 U.S. 586 (1978), line of cases, permits no restriction on a capital defendant's ability to present

[21] Long-standing South Carolina law also holds that a trial court's instructions to the jury cannot impede "the right and duty of the jury to recommend the appellant to the mercy of the court, in the event the jury reach the conclusion that appellant was guilty of murder." *State v. Blakely*, 158 S.C. 304, 155 S.E. 408, 409 (1930).

[22] For example, S.C. Code Ann. § 16-52, as amended (1962) provided: "whoever [was] guilty of murder shall suffer the punishment of death; provided, however, that in any case in which the prisoner is found guilty of murder the jury may find a special verdict recommending him to the mercy of the court whereupon the punishment shall be reduced to imprisonment during the whole lifetime of the prisoner." See *State v Harper*, 251 S.C. 379, 162 S.E.2d 712 (1968).

any relevant mitigating evidence. See *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Hitchcock v. Dugger*, 481 U.S. 393 (1987). Mitigating evidence has been defined as any evidence that might serve "as a basis for a sentence less than death." *Lockett v Ohio*, 438 U.S. 586, 604 (1978). In *Lockett*, the Court held that a statute that prevents the sentencer from giving effect to applicable mitigation "creates the risk that that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eight and Fourteenth Amendments." 438 U.S. at 605. Subsequent decisions have made clear that a capital sentencing jury must be able to consider and give effect to mitigating evidence, for it is only when a jury is provided a vehicle for expressing its reasoned moral response to such evidence that "we can be sure the jury 'has treated the defendant as a 'uniquely individual human being' and has made a reliable determination that death is the appropriate sentence.'" *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (internal citation omitted).

The South Carolina legislature has decided to allow mercy as a sentencing consideration, encompassed in the language "for any reason or no reason at all," and the South Carolina Supreme Court has so interpreted the statute. As such mercy is indisputably a valid basis for imposing a life sentence under state law. Because *Hughey* neither addressed nor ruled upon the issue of whether precluding a capital jury from considering mercy comported with *Lockett* and its progeny, reasonable counsel would also have objected to the charge precluding mercy on that basis.

Given this precedent, of which trial counsel should have been aware, it was not proper for the trial court in Mr. Evans's case to issue an instruction to the jury that it could not return a life sentence "as an act of mercy." Trial counsel's failure to object to the charge was deficient. In

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failing to object to the instruction precluding the jury's consideration of mercy, counsel permitted a charge not only contrary to capital jurisprudence and the state statute as it existed at the time of trial, but contrary to the theory and thrust of the mitigation case counsel presented to the jury.

B. Prejudice

Having determined that trial counsel's failure to object to the instruction precluding mercy—the same charge found improper in *Rosemond* —was deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1986), this Court must consider whether counsel's failure to object to the erroneous charge was prejudicial to Mr. Evans such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. The South Carolina Supreme Court in *Rosemond*, reversing and remanding for a new sentencing proceeding on other grounds, did not address prejudice in the context of the charge precluding mercy. 383 S.C. at 329, 680 S.E.2d at 10. The Court, accordingly, did not address whether the improper charge requires *per se* reversal, or whether a "harmless error" analysis should apply. See *Lowry v. State*, 376 S.C. 499, 657 S.E.2d 760 (2008). And the Court did not address whether the *Boyde v. California*, 494 U.S. 370 (1990), analysis applies to ineffectiveness and 8th and 14th amendment claims related to the erroneous jury instruction on mercy.

This Court has considered the applicability of harmless error analysis and *Boyde* as a preliminary matter and, for the reasons that follow, determines that neither harmless error analysis nor the *Boyde* analysis apply here. The Court also determines that even if such analyses apply, the standards for each would be easily met under the circumstances of this case. Trial

counsel's failure to object to the erroneous charge precluding consideration of mercy prejudiced Mr. Evans. Mr. Evans is, therefore, entitled to a new sentencing trial.

1. Harmless Error

a. Harmless Error Does Not Apply to the Instruction Precluding Mercy.

In *Lowry v. State*, the South Carolina Supreme Court recognized that "[c]ertain constitutional errors may be harmless in terms of their effect on the *fact-finding* process at trial." 376 S.C. at 507-08, 657 S.E.2d at 764 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 79 (1993) (emphasis added)). "For this reason," *Lowry* stated, "an unconstitutional jury instruction will not require reversal of the conviction if the Court determines "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* (citing *Arnold v. Plath*, 309 S.C. at 165, 420 S.E.2d at 838 (quoting *Chapman v. California*, 386 U.S. 18 (1967))). *Lowry* involved a burden shifting instruction that left the jurors with the mistaken view that, if they found petitioner took part in the crime, malice should be presumed. After considering the charge in the context of the entire jury instruction, the Court searched for harmless error by weighing the evidence the jury considered against the "probative force" of the mistaken instruction. *Id.* at 765. The reasoning behind the harmless-error analysis in *Lowry* is that a court should assess the "basis on which the jury actually rested its verdict" because an instructional error may be "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates v. Evatt*, 500 U.S. 391, 403 (1991).

The erroneous instruction in this case, which precluded consideration of mercy by the capital jury ("you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act or mercy"), stands on different footing. The instruction at hand

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did more than implicate jurors' fact-finding. Cf. *Neder v. United States*, 527 U.S. 1, 8-15 (1999) (applying harmless error where instruction omitted element of offense); *Johnson v. United States*, 520 U.S. 461, 468-49 (1997) (same); *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) (finding erroneous malice charge not harmless). The instruction precluding mercy limited the sentencing jury's ability to give any effect to the defendant's mitigation. As such, the instruction "deprive[d] the jury of a 'vehicle for expressing its reasoned *moral* response to the defendant's background, character, and crime." *Nelson v. Quarterman*, 472 F.3d 287, 314-15 (5th Cir. 2006) (quoting *Penry v. Johnson*, 532 U.S. 782, 797 (2001)) (emphasis in original). In South Carolina, the consideration of mercy is central to the capital jury's discretion. See *State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 318 (1991); *State v. Blakely*, 158 S.C. 304, 155 S.E. 408, 409 (1930). It is impossible to estimate the impact of the charge eliminating mercy—an inscrutable concept that defies qualification—as a sentencing consideration on the jurors' reasoned moral response.

Addressing an instructional error that prevented a jury from giving full effect to mitigating evidence under *Penry v. Lynaugh* and its progeny, the Fifth Circuit in *Nelson* noted that "the Supreme Court has *never* applied a harmless-error analysis to a *Penry* claim or given any indication that harmless error might apply in its long line of post-*Furman* cases addressing the jury's ability to give full effect to a capital defendant's mitigating evidence." *Id. Quarterman*, 472 F.3d at 314-15 (5th Cir. 2006). Finding harmless error analysis incongruent in that similar circumstance, the Fifth Circuit explained:

> Given that the entire premise of the *Penry* line of cases rests on the possibility that the jury's reasoned moral response might have been different . . . had it been able to fully consider and give effect to the defendant's mitigating evidence, it would be wholly inappropriate for an appellate court, in effect, to substitute its own moral judgment for the jury's in these cases.

Id. at 314-15 (other citations and quotations omitted); accord *Rivers v. Thaler*, 2010 WL 3058721 (5th Cir. 2010); *Aldridge v. Thaler*, 2010 WL 1050335 (S.D. Tex. 2010).

The trial court's erroneous charge restricting the jury's consideration of mercy as a basis for a life sentence requires *per se* reversal because it "deprived the jury of a vehicle for expressing its reasoned *moral* response to the defendant's background, character, and crime." *Nelson*, 472 F.3d at 314-15 (quotation and citation omitted). Accordingly, the "mercy" instruction was a structural defect to which harmless error analysis does not apply. *Id.* at 332.

There is another equally important reason why harmless error analysis is wholly incompatible with the instruction precluding mercy. Under South Carolina law, mercy is a factor that can play a dispositive role in a juror's decision to impose a life sentence, even after considering and giving weight to overwhelming evidence of guilt and substantial aggravating circumstances. S.C. Code § 16-3-20 provides that jurors may vote for a life sentence "for any reason or no reason at all." This provides a direct option for jurors who, having considered all the evidence—even substantial aggravating evidence—reach a reasoned moral conclusion that a capital defendant should be sentenced to life imprisonment without parole. The type of evidence balancing applied in *Lowry*, consequently, is incongruous with a jury's consideration of mercy under South Carolina law, because under South Carolina law mercy serves as a basis for a vote for life based on consideration of the evidence presented at sentencing, yet *despite* the weight of that evidence.

This is evident when considering the role mercy plays in a highly aggravated sentencing case. A strong case in aggravation renders many instructional errors moot. By contrast, the mercy option becomes *even more important* to a capital defendant's chance for a life sentence in

a highly aggravated case. Acknowledging the weight of the aggravating evidence, Mr. Evans' trial counsel made mercy the central component—the "crux"—of the mitigation case. The United States Court of Appeals for the Eleventh Circuit recognized the same when it considered the role of mercy under Georgia's capital statute, which like South Carolina's statute also authorizes the jury to return a life verdict for any reason or no reason at all:

> Even if the Supreme Court precedent allowed us to consider harmless error as to guilt, *the absolute discretion of a Georgia jury to grant mercy for any reason would make it anomalous to apply the overwhelming evidence concept to the sentencing phase.*

Coleman v. Kemp, 778 F.2d 1487, 1541 (11th Cir. 1985) (quoting *Zant v. Stephens*, 297 S.E.2d 1 (1982)) (emphasis added). This Court finds that the Eleventh Circuit's reasoning is compelling. Harmless error analysis does not apply to assessing the prejudice of the erroneous instruction on mercy.

b. Even If Harmless Error Analysis Applied, It Cannot Be Proven Beyond a Reasonable Doubt that the Erroneous "Mercy" Charge Did Not Contribute to the Death Verdict.

Even if harmless error analysis applied, the instruction would not be harmless. Given the substantial aggravating evidence against Mr. Evans—which included the murder of two innocent victims, one of who was a law enforcement officer—mercy is a factor that would have been highly significant to the capital sentencing jury. In addition, as trial counsel testified at the postconviction hearing, mercy played the central role in the defense of the death penalty and in the mitigation presentation. The trial court's erroneous instruction precluding mercy took that pivotal sentencing factor away from the jury. In these circumstances, it cannot be established "beyond a reasonable doubt that the [the erroneous instruction precluding mercy] did not contribute to the verdict obtained." *Lowry*, 376 S.C. at 507-08, 657 S.E.2d at 764. Accordingly,

even if harmless error analysis applies, there is a reasonable probability that, but for counsel's failure to object to the unconstitutional charge, the outcome of the trial would have been different. *Strickland*, 466 U.S. at 694-96.

2. *Boyde v. California*

a. *Boyde v. California* Does Not Apply to the Instruction Precluding Mercy.

In *Boyde v. California*, the defendant argued that an ambiguous jury instruction prevented the jury from giving effect to the mitigating evidence. 494 U.S. 370, 378-381 (1990). The United States Supreme Court examined the objectionable language in the context of the entire charge and, applying a new standard, held there was not "a reasonable likelihood that the jury [] applied the instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380.

Boyde does not apply to the clearly erroneous instructional error in this case because *Boyde* supplies a standard for testing *ambiguous* jury instructions. *Boyde* does not apply to *clearly erroneous* jury instructions. In *Boyde*, the Court distinguished the ambiguous charge before it from the case of a "concededly erroneous" instruction, such as that in *Stromberg v. California*, 283 U.S. 359 (1931). *Boyde*, 494 U.S. at 380; see *Weeks v. Angelone*, 528 U.S. 225, 238 (2000) (Stevens, J., dissenting) (recognizing that *Boyde* dealt with an instruction that "though not erroneous, is sufficiently ambiguous to be subject to erroneous interpretation") (quotation omitted). In contrast to *Boyde*, the instruction at issue here involved precise language found contrary to South Carolina law. *Rosemond*, 383 S.C. at 330, 680 S.E.2d at 10-11. This distinguishes the present case from cases such as *State v. Sims*, 304 S.C. 409, 422, 405 S.E.2d 377, 384-85 (1991), and *State v. Bell*, 305 S.C. 11, 22, 406 S.E.2d 165, 171 (1991), which

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involved ambiguous (but not clearly erroneous) instructions alleged to have precluded jury consideration of evidence in mitigation. The instruction precluding mercy, delivered here and in *Rosemond*, is an anomaly, evidently delivered in only a handful of capital trials. Because the South Carolina Supreme Court's opinion in *Rosemond v. Catoe* establishes that the instruction, as given in Mr. Evans's case, is clearly erroneous, and it runs directly counter to long-standing South Carolina legal precedent and principle, 383 S.C. at 330, 680 S.E.2d at 11, this Court holds that *Boyde* analysis does not apply.

b. Even If *Boyde* Applied, the "Reasonable Likelihood" Standard Would Be Easily Met.

Even if *Boyde* applied, this would be a straightforward case and the *Boyde* standard easily met. The impact of the erroneous instruction on jury deliberations must be assessed in the context of the jury charge as a whole. No language in the charge cured the instruction precluding mercy. In the entire sentencing charge, the word "mercy" appears only once, when it is excluded as a ground for a sentence of life. The remainder of the charge did not address mercy. The court's charge did inform the jurors that they should consider all aggravating and mitigating factors, statutory and non-statutory. And the trial court informed jurors "you may recommend a sentence of life imprisonment whether or not you find the existence of a statutory or a nonstatutory mitigating circumstance" and "you may also recommend a sentence of life imprisonment even though you find at least one of the statutory aggravating circumstances beyond a reasonable doubt and you find no mitigating circumstances to exist." R. 1784-85. A reasonable juror, however, would not interpret these *general* instructions to override the *specific* and clearly erroneous instruction that he or she was not to consider mercy as a basis for a life sentence. As the South Carolina Supreme Court recognized in *Lowry*: "Language that merely

contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." 376 S.C. at 507-08, 657 S.E.2d at 764 (citation omitted). Here, the trial court gave no clarifying explanation.

Moreover, the trial court told the jury repeatedly that it must follow the law as instructed. It is hard to imagine a more pointed way to inform the jury of its role than the way the trial court explained:

> You must ... under [y]our oath as a juror accept the law as I give it to you as being the law that is applicable in this particular case.
>
> You're not to concern yourself with what you thought the law was before you came to serve as a juror in this case. You must not concern yourself with what you think the law ought to be.
>
> You must simply accept the law as I give it to you as being the law that is applicable in this particular case, and then you simply take that law and you apply it to the facts ...

R. 1480-81. Later, the judge charged the jury that at the sentencing phase they would be given "certain applicable instructions as to the law which you are to apply." R. 1515, ll. 9-11. Prior to deliberating, the jury was instructed in part: "you will make your determination as to the appropriate sentence to be imposed for each of the murder convictions based upon your consideration of all the evidence presented in the case and my instruction as to the law that is applicable." R. 1777.

There is perhaps no more potent presumption in the law than the fundamental creed that jurors follow their instructions. *CSX Transp. , Inc. v. Hensley*, 129 S.Ct. 2139, 2141 (2009); *United States v. Olano*, 507 U.S. 725, 740 (1993); *Penry v. Johnson*, 532 U.S. 782, 789 (2001); *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987); *State v. Northcutt*, 372 S.C. 207, 228, 641 S.E.2d 873 (2007) ("Our jurisprudence unwaveringly provides that we are to presume juries follow their instructions ...") (Toal, C.J., dissenting).

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Consequently, even if the *Boyde* analysis were applied to this case, there is a reasonable likelihood that the jury applied the instruction in a way that limited the jury's application of the mitigating evidence, obstructed its reasoned moral response to the evidence, and violated the Fifth, Eighth and Fourteenth Amendments to the Constitution.

To find otherwise would be to conclude that the jury not only violated its oath and ignored the judge's flawed charge on mercy, but that they were coincidentally armed with such a workable understanding of *Lockett* and its accompanying constitutional jurisprudence that they unilaterally chose to consider Evans' plea for mercy.

Although it has reached discordant decisions on death penalty procedure over the last forty years, the United States Supreme Court has been consistent on one bedrock principle: guaranteeing that the ultimate sentence is rendered as the product of a reliable and fair procedure. It would mock this principle to indulge in the fiction that the jury considering Mr. Evans' fate purposely ignored the law it was sworn to uphold. It would offend fundamental notions of reason and fairness to conclude that allowing one sentencing jury to consider and give effect to mercy while forbidding another to do so has no impact on the reliability of capital verdicts.

3. There is a Reasonable Probability that, But For Counsel's Failure to Object to the Instruction Precluding Mercy, the Outcome of Applicant's Trial Would Have Been Different.

The exclusion of mercy in a capital murder trial violates state law as well as federal law pursuant to *Lockett v. Ohio*, as it prevents the jury from giving full effect to the mitigation evidence. Such an error is highly prejudicial in a South Carolina capital trial where jurors may impose a life sentence for any reason or no reason at all. Recently, a highly respected circuit judge granted postconviction relief to the defendant in *Hughey*, finding that the identical instruction given in *Rosemond* and *Hughey*—and the same provided at Mr. Evans' sentencing

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phase—was "so inimical to the laws of the State and the United States in capital cases as to entitle the applicant to a new trial." *Hughey v. State*, 2000-CP-01-0212, Abbeville County (Order Granting PCR Relief, May 14, 2010) (Macaulay, J.). The erroneous instruction precluding mercy was particularly prejudicial under the circumstances in Mr. Evans' case because counsel positioned mercy as the crux of the mitigation case against substantial aggravating evidence. Trial counsel's failure to object to the erroneous charge left the jury deliberating the case without being able to place the defendant's "primary element" on the scale. There is a reasonable probability that, but for counsel's failure to object to the unconstitutional charge, the outcome of the trial would have been different. *Strickland*, 466 U.S. at 694-96.

In conclusion, the Court notes that, like *Rosemond* and *Hughey*, Mr. Evans' case belongs to a closed universe of cases in which an idiosyncratic charge was given on a critical issue. It would be fundamentally unfair to allow one defendant to live and a handful of others to die based only on the timing of their trial.

9(c)(1) Ineffective Assistance of Appellate Counsel: Failed to Challenge the Trial Court's Denial of Trial Counsel's Request to Charge the Jury on Voluntary Manslaughter

"A defendant is constitutionally entitled to the effective assistance of appellate counsel." *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). The *Strickland* error and prejudice standard is applicable to claims involving ineffective assistance of appellate counsel. *Id.* To show prejudice to entitle him to relief, "the Evans must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal." *Id.*

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Here, trial counsel requested a charge on voluntary manslaughter, based solely on his client's wishes, recognizing the lack of evidentiary support for finding sufficient legal provocation. (R. p. 1445, line 25 - p. 1447, line 2). Evans had testified that, at one point during the hours he held his victims hostage that he believed that one of his victims, Deputy Sapinoso, reached for a gun on a nearby coffee table and only then did Evans fire, first at Deputy Sapinoso (shooting him four times in the back of the head), then at the deputy's father (shooting him three times). (See R. p. 1443, line 13 - p. 1444, line 24).

It is well settled that "[a] victim's attempts to resist or defend himself from a crime cannot satisfy the sufficient legal provocation element of voluntary manslaughter." *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001). There was no evidence in the record demonstrating either adequate legal provocation or heat of passion. *State v. Smith*, 2011 WL 382561 (S.C. Sup. Ct. Feb. 7, 2011). Clearly, had appellate counsel raised the issue, it would not be meritorious. Evans has failed to show deficient performance.

9(c)(2) Ineffective Assistance of Appellate Counsel: Failed to Challenge the Trial Court's Denial of Evans's Motion for A Change of Venue

For all the reasons referenced in the discussion of the ineffective assistance of counsel claim above, (9(a)(3)), Evans has failed to show deficient performance. None of the seated jurors were exposed to such an extent that they formed opinions. Further, Evans has shown no relevant precedent or possibility of error in regard to the courthouse argument. At any rate, the record shows no bias according to the *voir dire*. In fact, the three who recalled any media coverage at all did not recall any details. Again as noted above, while Dwayne Drake, Larry Coker and Mark Branyon all seemed to vaguely recall the fact of media coverage of the incident,

each testified that they did not recall any specific details at all. (R. p. 230, line 15 - p. 231, line 3 (Drake); p. 289, lines 10-24 (Coker); p. 469, line 20 - p. 470, line 8 (Branyon)). There could be no meritorious issue in light of this record. *See State v. Evins*, 373 S.C. 404, 412, 645 S.E.2d 904, 908 (2007)("When a trial judge bases the denial of a motion for a change of venue because of pretrial publicity upon an adequate *voir dire* examination of the jurors, his decision will not be disturbed absent extraordinary circumstances"). Thus, as to an allegation of ineffective of appellate counsel for not raising the issue, Evans cannot show deficient performance and prejudice.

The Constitution requires that a criminal defendant be afforded a trial by a "panel of impartial, indifferent jurors." *Irvin, supra*. "When a change of venue motion is predicated on pre-trial publicity, the relevant inquiry is whether potential jurors have 'such fixed opinions that they could not judge impartially the guilt of the defendant.'" *State v. Gardner*, 332 S.C. 389, 392, 505 S.E.2d 338, 339 (1998), *quoting State v. Manning*, 329 S.C. 1, 495 S.E.2d 191 (1997). "The trial court's ruling on the venue motion will not be reversed on appeal absent an abuse of discretion." *Id.* Here, the denial of the motion was fully and fairly supported by the jurors' responses, which the trial judge relied upon in denying the motion. (R. p. 1010, line 20 - p. 1012, line 1). Had counsel raised the issue, it could not have been meritorious. *Id. See also State v. Evins, supra.*

9(d)(1) Trial Court Error: Instruction on Law Enforcement Statutory Aggravating Circumstance

This Court's jurisdiction is statutorily limited by S.C. Code § 17-27-20(b)(1985), which provides: "This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." Because a PCR

action is not a substitute for direct appeal, Evans cannot assert any issues in his PCR action that could have been raised at trial or on direct appeal. *Simmons, supra. See also Drayton v. Evatt*, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993)(same); *Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983)(same). The Simmons Doctrine bars this claim as it is a free-standing claim of error.

Moreover, Evans admitted in the PCR hearing that these claims were simply claims "plead in the alternative," to the ineffective assistance of counsel claims above, and are "substantive bases for the ineffective assistance of counsel claims." (October PCR Tr. p. 260). This is a clear concession that the claim was improperly raised as free-standing claims of error, i.e. direct appeal claims. Evans is not allowed to present claims for "direct appeal" review and "collateral" review for a "double chance" of review. The time for presenting direct appeal claims has expired. Nothing in the statute allows Evans to resurrect this direct appeal claim. At any rate, the claim is without merit, for all the reasons presented in the ineffective assistance of counsel allegation 9(b)(2) above.

9(d)(2) Brady Claim

As noted above, this claim was withdrawn for lack of factual support.

9(d)(3) Evidentiary Error: State Presentation of "Testimony that it Knew or Should Have Reasonably Known Was False or Misleading" i.e. Evidence of Gang Membership and Evidence Regarding Whether Deputy Victim Was "in the Line of Official Duty as a Law Enforcement Officer At the Time of His Death"

As discussed above, there is evidence of Evans's gang membership, not the least of which is his own admission of gang membership, his permanent tattoos reflecting gang allegiance, his conviction of a drug offense coupled with his admission that he sold drugs in connection with his

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gang membership, and his known association with other admitted gang members (i.e. Christina Rodriguez, under Evans's own theory and according to his experts). Further, in a statement that was not admitted, Christina Rodriguez indicated that Evans "says he's a Crip from Cleveland." (June PCR Tr. p. 362). Further, in this same statement, Ms. Rodriguez confirmed he admitted selling drugs, and was "representing" as a Crip. (June PCR Tr. pp. 364-365). Evans has never personally denied gang membership in court or in SCDC. As Evans's own corrections expert at trial opined to defense counsel, Evans's admitted involvement was "textbook." (June PCR Tr. p. 412). Evans has utterly failed to make even the slightest credible argument as to the knowing presentation of false testimony. And, as noted above, if Christina was called, presumably to cast doubt on gang membership (a possibility that has not been established), it would likely open the door to testimony concerning Evans's violence on and towards Christina, a risk defense counsel did not wish to take. (June PCR Tr. p. 484). Again, Evans has failed to carry his burden of proof.

Further, as to the evidence establishing the deputy victim "was in the line of official duty as a law enforcement officer at the time of death," Evans has failed to show what evidence he is referencing or what element of proof the evidence supports. The record shows two lines of evidence supported the aggravator in addition to the scene – that is the Greenville County Sheriff's Department's on-duty policy and the death benefits for line of duty death. As this Court found in (9)(b)(2) above, both are relevant and admissible evidence supporting the submission of the aggravator to the jury. Evans has failed in his burden of proof.

At any rate, the evidence presented at trial was sufficient to support the aggravating circumstance given, as more fully discussed in regard to the ineffective assistance allegation 9(b)(2) above.

9(d)(4) Closing Argument Error: State's Argument Improper

Again, error that could have been presented in the direct appeal and is barred pursuant to S.C. Code § 17-27-20(b)(1985) and the *Simmons* Doctrine. At any rate, Evans cannot prove error for all the reasons argued in Ground 9 (b)(7) above.

9(d)(5) Improper Evidence: Victim Impact Evidence Exceeding That Allowed Under Payne v. Tennessee

Again, error that could have been presented in the direct appeal and is barred pursuant to S.C. Code § 17-27-20(b)(1985) and the *Simmons* Doctrine. At any rate, Evans cannot prove error for all the reasons argued in Ground 9 (b)(5) above.

9(d)(6)Trial Court Error: Cumulative Impact

Again, error that could have been presented in the direct appeal is barred from presentation and consideration in a post-conviction relief action pursuant to S.C. Code § 17-27-20(b)(1985) and the *Simmons* Doctrine. Moreover, the Supreme Court of South Carolina has not fully embraced the Cumulative Error Doctrine. *Simpson v. Moore*, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006)("Whether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina."); *Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, 324 (2002)(same). If, however, Evans can pursue relief under this theory, he cannot show error and prejudice.

The Cumulative Error Doctrine requires an appellant to "demonstrate more than error in order to qualify for reversal on this ground. Instead, the errors must adversely affect his right to a fair trial." *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). An appellant, thus, must show "prejudice warranting a new trial based on cumulative trial error." Id.

Evans cannot even show trial court error here as trial court error is not a cognizable claim and cannot be litigated in the instant post-conviction relief action. His one issue raised on direct appeal was found procedurally barred. There is no indication the Cumulative Error Doctrine would be applicable, even assuming the doctrine is available.

9(e)Trial Court Error: Trial Court Erred in Qualification of Jurors

Again, error that could have been presented in the direct appeal is barred pursuant to S.C. Code § 17-27-20(b)(1985) and the *Simmons* Doctrine. At any rate, Evans cannot prove error for all the reasons argued in Ground 9 (a)(1) and 9 (b)(1) above, most specifically that the record reflects a sufficient *voir dire,* and no error in qualification of any seated juror.

9(f) Evidence Error, Violation of Constitutional Rights: Gang Affiliation Linked to Future Dangerousness in Prison

Again, error that could have been presented in the direct appeal is barred pursuant to S.C. Code § 17-27-20(b)(1985) and the *Simmons* Doctrine. At any rate, Evans cannot prove error for all the reasons argued in Ground 9 (b)(3) and 9(b)(4) above.

9(g) Trial Court Error: Admission of Lewis Edward O'Cain Testimony

Evans apparently argues the trial court erred in qualifying Mr. O'Cain as an expert. Again, error that could have been presented in the direct appeal is barred pursuant to S.C. Code § 17-27-20(b)(1985) and the *Simmons* Doctrine. At any rate, Evans cannot prove error for all the reasons argued in Ground 9 (b)(3) and 9(b)(4) above.

VI.
CONCLUSION

Based on the foregoing, the application for post-conviction relief as to the guilt phase and Mr. Evan's convictions is denied. Evans has failed to show deficient performance, or if he established deficient performance, he failed to show prejudice such as would support the granting of either a new guilt proceeding. As to the sentencing phase, however, this court finds that faithful adherence to the decision of The South Carolina Supreme Court in Rosemond requires that Mr. Evans' sentence be vacated and a new sentencing hearing be held so that Evans' sentencing jury---like all other capital sentencing juries in South Carolina history--can consider the issue of mercy. To find otherwise would undermine confidence in the result of Evans' sentence and, ultimately, the rule of law.

IT IS THEREFORE ORDERED THAT:

1. The post-conviction relief application as to Evans' convictions is **DENIED AND DISMISSED WITH PREJUDICE**; and

2. Evans' application as to his death sentence is granted, and a new sentencing hearing is ordered.

IT IS SO ORDERED this 24th day of FEBRUARY, 2011.

D. Garrison Hill
Circuit Judge

Greenville, South Carolina.