

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

Case No. 09-CP-32-5465

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S.C. Supreme Court

KEVIN MERCER, #6021 *Petitioner/Respondent,*

v.

STATE OF SOUTH CAROLINA, ... *Respondent/Petitioner.*

**RETURN TO RESPONDENT/PETITIONER'S
PETITION FOR WRIT OF CERTIORARI**

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RESPONDENT-PETITIONER'S QUESTION PRESENTED

Whether the PCR Court erred in granting relief upon Mercer's claim of ineffective assistance of counsel in failing to investigate and present evidence of mental retardation when the defense team engaged in a substantive investigation into Mercer's low intellectual functioning, and where the PCR Court's finding of prejudice is not supported by the record?

RESTATEMENT OF THE QUESTION PRESENTED

Whether, given this Court's "any evidence" standard of review, the PCR court erred in granting relief on Mercer's claim that trial counsel was ineffective for failing to investigate and present evidence of mental retardation where: (a) trial counsel "candidly admitted" that they made no effort to investigate the possibility of mental retardation, App. p.4273; and, (b) Mercer's evidence of prejudice was uncontested and the PCR court found that "[i]t is difficult to conceive of any failure more prejudicial than trial counsel's failure to discover and present evidence that their client may be categorically exempt from the death penalty." App. p.4292.

ADDITIONAL SUSTAINING GROUNDS

The PCR Court's order granting Mercer a new sentencing trial should be sustained on the following additional grounds:

I.

Mercer's rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the South Carolina Constitution, were violated when: (a) trial counsel failed to call an expert in eyewitness identification; (b) trial counsel failed to present available evidence that a second perpetrator was present at the scene of the crime when the shooting occurred; and, (c) the State's witness, Timothy Johnston, perjured himself at a hearing on Mercer's motion for a new trial by falsely testifying that petitioner's co-

defendant, Marcus Thompson, had never confessed to shooting the victim when, in fact, Thompson had stated that he was the shooter.

II.

Mercer's rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the South Carolina Constitution, were violated by the State's extensive presentation of victim impact evidence – which included: (a) testimony regarding the effect of the victim's death on the United States Army generally; (b) a memorial video set to music; and, (c) an army "roll call" that took place during the victim's funeral. Moreover, Mercer's rights were violated when the trial judge cried in front of the jury during this presentation and, further, by trial counsel's failure to object to any of these events.

STATEMENT OF THE CASE

I. TRIAL PROCEEDINGS.

A. THE PARTIES' COMPETING THEORIES OF THE CASE.

Kevin Mercer was charged with murder, armed robbery, and possession of a firearm in the commission of a violent crime in connection with the May 16, 2002 shooting death of Tracy Davis outside the Raintree Apartment Complex in Lexington County, South Carolina. Within twenty minutes after the shooting, Mercer and another man – Marcus Thompson – were stopped by police on interstate twenty and arrested. App. p.1455 – 1457. At the time of their arrest, Mercer was driving the victim's white, 1998 Lincoln Navigator and Thompson was sitting in the front passenger's seat. App. p.1458. Police recovered the murder weapon – a .357 caliber handgun – under the driver's seat inside the vehicle. App. p.1466-1467. At the time of his arrest, Thompson was in possession of a plastic bag containing fourteen .357 caliber bullets and two pairs of black, knit gloves. App. p.1465, l.3 – p.1466, l.5; App. p.1725, ll.1-25; App. p.1727, ll.13-22. Mercer's car was later recovered at the Economy Inn, not far from the Raintree Apartments. App. p.1682, l.18 – p.1683, l.10.

Mercer was represented at trial by Mr. Cameron Littlejohn and Ms. Melissa Kimbrough. Solicitors Donald Meyers and Samuel Hubbard represented the State. Throughout the trial, the State attempted to show that Mercer acted as the shooter. This theory largely hinged on testimony from Clifton Magwood, the victim's roommate. Magwood testified that he and Davis attended a softball game on the night of the shooting. App. p.1396, ll.5-9. After the game, Davis planned to make a trip to the store while Magwood returned home. App. p.1396, ll.10-16. Around 11:00 p.m., Magwood was lying in bed watching the movie "Full Metal Jacket," when

he heard a commotion outside. App. p.1402, ll.2-14. Magwood thought he heard Davis's voice say "All right. I'll give it to you," so he briefly peered out of the blinds from his upstairs bedroom window. App. p.1402, ll.15-18. He testified that it looked like Davis was being held up at gunpoint next to his white, Lincoln Navigator. App. p.1402, ll.19-20. Magwood was "very excited, adrenaline flowing, [and] very emotional." App. p.1404, ll.16-17. He went to get the cordless telephone and a handgun from Davis's bedroom and dialed 911. App. p.1402, l.22 – p.1403, l.5. As he was running down the stairs, Magwood heard a gunshot and then went outside to find Davis lying on the ground, shot once behind the ear. App. p.1403, ll.6-19.

Magwood never saw the perpetrator's face and "didn't have a clear vision of the person who was robbing [Davis]." App. p.1407, l.24 – p.1408, l.3. Moreover, Magwood did not see the shooting occur. App. p.1428, ll.17-19. He explained that he looked out of the window and down into the dimly-lit parking lot for only "a few seconds," App. p.1425, ll.7-9, where he saw a black male, "heavy set, anywhere from 5'11" to 6 feet tall" wearing dark pants and a dark top. App. p.1407, ll.5-6. The assailant was walking Davis to the back of the Navigator and the driver's side door was open. App. p.1421, ll.18-20. By the time Magwood reached the front door of his apartment, the Navigator was already leaving the parking area. App. p.1403, ll.6-19. He did not see the perpetrator again.

Mercer and Thompson are both black males of approximately the same height.¹ At the time of their arrest, Mercer was wearing denim shorts and a denim top; App. p.1486, l.21 – p.1487, l.1. Thompson was wearing a black tee-shirt and dark blue cotton pants. App. p.1487, ll.13-20. The primary physical distinction between the two is size of frame, as Mercer's build is

¹ Mercer's driver's license indicated that he is 5 feet, 10 inches tall, App. p.1460, l.19. Thompson was reportedly 5 feet, 8 inches tall. App. p.1757, l.14.

larger than Thompson's. During closing arguments, the State argued that Magwood's description conclusively pointed to Mercer. *See, e.g.*, App. p.1754, l.11 (arguing that Magwood "nailed it"); App. p.1760, ll.15-17 (arguing that it is clear Mercer shot the victim because of Magwood's description); App. p.1761, ll.4-5 (arguing "[Mercer] is the man Clifton Magwood saw; this large man."). The State also claimed that Magwood's description was particularly reliable because "[h]is senses were heightened. He looked out that window and fear locked that picture in his head." App. p.1754, ll.12-13. Magwood's observations, the State argued, were "forever sealed and seared into [his] memory. He will never forget what happened." App. p.1753, ll.20-22; *see also*, App. p.1656, ll.16-24 ("He has an image in his head, not a photograph, not a story given to him by a cop or someone else. The image is forever there. His senses were heightened. . . . It's forever in his mind.").

The defense countered by arguing that Thompson – not Mercer – was the shooter. In her opening statements, Lisa Kimbrough told the jury: "[s]uffice it to say, Marcus Thompson was in the Navigator and he's not here today, and we believe that Marcus Thompson, in fact, was the shooter. That's our theory. It's pretty simple." App. p.1360, ll.22-25. But the defense offered no evidence to support this theory. Thus, the jury had no information from which it could determine that Thompson fired the fatal shot. In the penalty phase, trial counsel presented expert testimony that Mercer suffers from post-traumatic stress disorder and possible brain damage, but the experts consistently testified that these factors had "nothing to do" with the events of the crime. App. p.2304, ll.7-13; p.2305, ll.22-23; p.2307, ll.1-8; p.2343, ll.7-20; p.2345, l.17 – p.2346, l.8. Trial counsel did not allege or offer any expert or lay opinion evidence that Mercer is a person with mental retardation.

B. VICTIM IMPACT EVIDENCE.

In support of its case for death, the State offered extensive victim impact evidence. The victim, Tracy Davis, was an active member of the United States Army and worked as a recruitment trainer at Fort Jackson. First, the State called Sergeant Robert Ames, a member of the Army for nearly twenty years. App. p.2190, ll.7-25. Ames testified that he met Davis in 1991, when they were stationed together at Fort Benning, Georgia. App. p.2191, ll.7-8. Davis became close with his Ames's family. Ames described an incident when Ames's younger son hit his older son above the eye with the claw of a hammer, and "without fail, [Davis] just scooped my son up and we ran out of the house and we went right to – right to the emergency room. And we sat there and he got sewn up, and it was just a small injury." App. p.2193, ll.19-22. Ames explained that his children always remembered this incident and then described how he had to tell his children about Davis's death and their reaction to that news. App. p.2193, l.23 – p.2194, l.4. Ames testified about a variety of charitable and religious activities that he and Davis participated in through their membership in the Masonic Order. App. p.2194, l.9 – p.2073, l.19. Ames attended a memorial service for Davis at Fort Jackson and served as a pallbearer at his funeral service in Miami, Florida. App. p.2197, ll.10-16.

Next, Command Sergeant Major Martin Wells, dressed in his Army uniform, App. p.2207, ll.2-7, testified that there is only one enlisted rank in the Army higher than his own, and only one person holds that rank, "[s]o for all intents and purposes, Command Sergeant Major is generally regarded as the highest enlisted rank in the Army." App. p.2077, ll.3-7. Wells testified that he knew Davis for approximately 10 months while they worked at Fort Jackson starting in

the summer of 2000. App. p.2077, ll.14-18. The solicitor asked Wells to “tell the jury . . . what kind of soldier was Tracy Davis?” App. p.2201, ll.1-2. Wells responded,

[w]e have a creed that all noncommissioned officers live by, and it’s quite detailed and quite lengthy. But if someone were to ask me to choose one person who personified the ideals captured in that creed, it would be Sergeant Davis. His leadership qualities, his character, were without a doubt worthy of emulation by anybody in his charge, by his peers, even those superior in rank. He taught me a lot, and I was his supervisor. . . . If I retired today and looked back on the 23 years that I served and were to think of maybe two or three people that I will never forget because of the way that they touched and affected my life and my family’s, he would definitely be within that few people, few number of people without a doubt.

App. p.2201, ll.3-17. Wells gave detailed descriptions of approximately twenty-eight (28) medals, ribbons, badges and awards that Davis had earned during his service in the Army and introduced photographic evidence of each award. App. p.2079, l.4 – p.2207, l.11.

Wells then told the jury that Davis called him “out of the blue” on the night of his death, just hours before the shooting occurred, to say that he was going to be promoted and relocated to Miami where he could be close to his daughter, and “that he wanted [Wells] to know that he had recently accepted Jesus Christ as his Lord and Savior.” App. p.2207, l.18 – p.2208, l.8. Wells also testified that Davis once gave him a large print with a picture of “a heavenly place setting with two hands signifying the hand of the Lord and a place setting that goes on just seemingly without end.” App. p.2208, ll.23-25. Wells described Davis as “on the fast track,” which he explained was “an unofficial term for someone who is progressing through the ranks at more than an average rate.” App. p.2209, ll.20-25. Wells claimed that at the time of the trial, if Davis had lived, he would undoubtedly have achieved the same rank as Wells. App. p.2210, ll.1-5. Finally, Wells testified that he participated in the memorial service for Davis at Fort Jackson

where Davis was posthumously promoted to Master Sergeant and given a merit award. App. p.2087, l.6 – p.2212, l.23. Wells showed the jury Davis’s certificate of promotion and read its inscription:

All true leaders are remembered by name.
Master Sergeant Tracy L. Davis will never be forgotten.
May 2002.

App. p.2212, ll.4-8. Wells concluded by testifying that “Sergeant Davis was someone who just exuded selfless service. He always thought of others before he thought of himself. . . . He was a very good mentor to soldiers in his charge.” App. p.2213, l.9 – p.2214, l.4. Davis was given a lot of responsibility in the Army “because of his leadership and management skills . . . [and] his proven performance.” App. p.2214, ll.4-7.

Third, the State recalled Davis’s roommate, Clifton Magwood, who worked with Davis in the Army recruitment training division. Magwood testified that being “an instructor at the recruiting and retention school is one of the elite positions in recruiting.” App. p.2216, ll.16-17. He described the lengthy process that he and Davis went through before they were selected to be part of a group of only eight people from a nationwide search. App. p.2216, l.18 – p.2095, l.9. Magwood and Davis were active with the Masons and in other community events. Magwood listed several causes that Davis advocated, including cancer awareness, research for women’s breast cancer, muscular dystrophy and the Special Olympics. App. p.2220, ll.15-23. Magwood testified that Davis was

the type of person that you wanted to embody his leadership style, his traits. He personified what it is to be a leader in the United States Army. Everything he did was strictly by the books: ethical, moral, legal. He was upright. Everything he did was the way it was supposed to be done, and he would take nothing short.

App. p.2221, ll.12-17. After Davis's death, Magwood and another member of the Army established a youth center in Davis's honor "because of his work in the community with the young groups, churches, civic organizations, mentoring young men and women to be positive in the community." App. p.2221, l.18 – p.2222, l.2. For Davis's memorial service at Fort Jackson, Magwood helped put together a video with pictures and music for people to take with them as "a tribute in his honor, sort of like a living memorial." App. p.2224, ll.2-10. Fort Jackson wanted to do that for Davis "because of the impact that he left." App. p.2224, ll.11-13. Magwood explained,

[l]osing a soldier like that, I mean – any life lost is a tragedy, but to lose a soldier that impacted the community as well as Fort Jackson and so many other soldiers from all over the continent who had been in recruiting was a big loss.

App. p.2224, ll.13-17.

Fourth, David O'Garro testified that he was a First Sergeant in the United States Army who had also worked with Davis as a recruitment trainer. O'Garro described how Davis helped his first group of students achieve 100% of their goals, which had never happened before, by spending extra time with students after class. App. p.2228, l.7 – p.2229, l.21. Davis and another Army friend, Eric Williams, started a youth mentoring program together for troubled teens who were at risk of dropping out of school. O'Garro described a coffee mug that Davis had about the youth program. It had a picture of the Bible on it and slogans that said "For the Souls of the People" and "I am reaching new heights." App. p.2330, l.5 – p.2331, l.11; App. p.2232, ll.6-15 Davis and his friends had plans to expand the youth program by opening several centers and starting summer camps and retreats. App. p.2331, l.15 – p.2232, l.5. O'Garro testified that they were trying to get young people "spiritually back into the Word, into the Bible, and trying to

curb their behavior.” App. p.2232, ll.21-23. After Davis was murdered, Williams, O’Garro and Magwood decided to name the youth center in Davis’s honor. App. p.2233, ll.7-18. They obtained a building to house the youth center, which needed new paint. Williams approached O’Garro and Magwood and said, “[t]he Lord told me that, hey, only you two can do this and no one else can.” App. p.2233, ll.19-23. So, Magwood and O’Garro painted the outside of the building and put up a sign in honor of Davis. App. p.2233, l.23 – p.2234, l.2. They held a ribbon cutting ceremony for the center and invited Davis’s ex-wife and daughter to attend.

O’Garro testified that the Army renamed an award in Davis’s honor after his death. They also renamed the whole wing where Davis was stationed at Fort Jackson after him and put a plaque with his picture and biography on it in every classroom. App. p.2239, ll.4-15. O’Garro explained that he and Davis were friends with another Army instructor, Reverend Ogden, who was also a minister. O’Garro stated that Reverend Ogden was a eulogizing speaker at Davis’s memorial service. O’Garro also testified that the Reverend told him “[e]verywhere I preach, you know, I’ll be preaching and I look up and I like, you know, look in the back and Tracy [will] be sitting there.” App. p.2240, ll.19-25. O’Garro responded, “[r]eally?,” and the Reverend said, “[y]eah, you know.” So, O’Garro concluded that “Tracy would follow him pretty much everywhere he preached.” App. p.2241, ll.1-2. O’Garro helped create Davis’s funeral video. He testified that he chose the song “Hero” for part of the presentation because that was what Davis was to him. App. p.2239, l.16 – p.2240, l.10. O’Garro described an Army roll call that took place during the memorial service for Davis. He stated that the roll call is done by “any squad or platoon that loses a member, in honor of that member or to show that that member is no longer with that group.” App. p.2241, ll.22-24. O’Garro explained that their division chief called the names of everyone in the group, and each person responded “here.” Davis’s name was the last to

be called. The division chief called Davis's name three times with no answer, and then his name was stricken from the rolls. App. p.2241, l.24 – p.2242, l.10. The State introduced a copy of the memorial service program and then played the funeral video on an enlarged screen before the jury. App. p.2240, ll.6-13; p.2242, ll.11-22. This presentation was so emotionally charged that the trial judge cried while viewing the video. App. p.3323, l.20 – p.3324, l.14; App. p.3388, ll.16-25; App. p.3767, ll.2-5; App. p.3783, l.21 – p.3784, l.4.

Finally, Davis's daughter and mother gave brief accounts of how his death had impacted them and their family. App. p.2244 – 2254. Defense counsel did not object to any of the State's victim impact evidence. In his closing argument, Solicitor Myers stressed Davis's role as a member of the United States Army and repeatedly referred to Davis as "the soldier," a "brave soldier," a "fine soldier," and "Master Sergeant Davis." App. p.2494, ll.23-25; p.2495, l.6; p.2509, ll.10-11; p.2513, l.24; p.2515, ll.24-25; p.2516, l.7. Myers highlighted Wells' testimony, stating:

Tracy Davis was on a fast track. What a man. Do you remember the Command Sergeant Major in his uniform the other day explaining the ribbons? There's one fellow, noncommissioned officer in the United States Army, that's higher than he is, and that's the Head Sergeant of the Army. One fellow higher than Mr. Wells. He said, 'If Tracy Davis were alive today, he'd have my rank, just like me and none higher.' Youth Centers. Helping People. Running for breast cancer, leukemia, all those things. [Mercer] doesn't care. It doesn't make any difference to Mercer. Makes no difference to him.

App. p.2510, ll.12-22. Myers also emphasized Sergeant O'Garro's testimony and concluded by using the Army roll call from Davis's memorial service as an analogy for the jury's role in the case:

O'Garro talked about all the things that Tracy had done and everybody he touched. And then right here they had a roll call.

Commander Sergeant Major Wells? Here. Magwood? Here. Sergeant O'Garro? Here. Sergeant Davis. No answer. Sergeant Davis. No answer. Master Sergeant Tracy L. Davis. He can't answer. Kevin Mercer has made sure of that. Stricken from the rolls.

You're going to have a roll call in a little while this afternoon, and it's going to be on this form. There's going to be 12 lines. A roll call for you. Will you speak up where Tracy Davis can't? If you don't, it will be a blight on this fine soldier's memory.

App. p.2515, l.21 – p.2516, l.7. The jury deliberated approximately two hours before sentencing Mercer to death on April 22, 2006.

C. MOTION FOR NEW TRIAL.

Eleven days after Mercer was sentenced to death, Kevin Fuller, a cellmate of Marcus Thompson's, wrote a letter to Solicitor Myers stating that Thompson was bragging that he had shot Tracy Davis but Mercer was getting the blame for it. App. p.2898. Six days later, on May 9, 2006, Fuller gave a written statement to the Lexington County Sheriff's Department in which he stated that Thompson told him Mercer was going to die for what Thompson did. App. p.2899. Thompson said that he and Mercer followed a guy into the Raintree Apartment complex. *Id.* At that time, Thompson put on his gloves inside out because he wanted to prevent powder marks on his hands. *Id.* After the guy parked, Mercer pulled open the door to the truck. Thompson stated that the guy was on the phone and he started to get out to defend himself, so that's when Thompson shot him behind the ear.² *Id.* Thompson said that Mercer jumped in the guy's 1998 Expedition or Escalade truck while Thompson jumped in Mercer's car. *Id.* They left and went back to the place where Mercer was staying and then Thompson jumped in the truck

² Davis's cell phone was recovered at the scene. App. p.3716 (Investigative Report stating that "[w]hen the roommate got to the parking lot he observed a Wal Mart bag and the victim's cell phone lieing [sic] in the parking lot next to where the victim's vehicle had been parked.").

with Mercer and they went out on the highway. *Id.* After they went “not too far down the road” they got pulled over. *Id.* The cop asked the driver, Mercer, to get out of the car. Thompson said it took the cop ten to twenty minutes before he finally told Thompson to get out of the car as well. *Id.* Before he got out of the truck, Thompson put the gun under Mercer’s seat. *Id.* After Mercer was sentenced to death, Thompson bragged about how the Lexington County Sheriff’s officers were “stupid” and they “didn’t put two-and-two together because [Thompson] had the bullets on him that went to the gun.” *Id.*

The solicitor disclosed Fuller’s statements to the defense on May 23, 2006. App. p.2985. Defense counsel promptly moved this Court to remand the case for a hearing on their motion for a new trial based on after-discovered evidence. App. pp.2844 – 2894. This Court granted the motion, and the trial court held a hearing on August 9, 2006. App. p.2734. At the hearing, Thompson testified that he was originally charged with murder and armed robbery, among other things, in connection with the murder of Tracy Davis. App. p.2750, ll.5-8. After Mercer’s trial concluded, the State dismissed the murder indictment against Thompson and allowed him to plead guilty to accessory before the fact of armed robbery and accessory after the fact of murder and armed robbery. Thompson pled guilty to those charges on June 20, 2006. App. pp. 2911-2912. Thompson testified that he did not shoot Tracy Davis and denied participating in any of the events that led to Davis’s death at the Raintree Apartments. App. p.2752, ll.9-24. Thompson admitted that he had previously given conflicting statements on this topic. App. p.2751, l.20 – p.2752, l.8. Moreover, Thompson denied ever telling Kevin Fuller anything about Davis’s murder. App. p.2753, l.23 – p.2754, l.24. On cross-examination by Solicitor Myers, Thompson stated that he actually talked with his other cellmate, Timothy (“Rocky”) Johnston, much more

frequently than Fuller. Thompson claimed that Johnston could verify his story. App. p.2767, ll.6-17.

Next, Kevin Fuller testified to essentially the same facts that he recounted in his May 9th written statement to police. Fuller said that Thompson told him he and Mercer were looking for a ride so that they could go to Atlanta for a party and they had been out all day shooting some kind of gun. App. p.2776, ll.18-21. They found a guy with “some kind of Escalade or Navigator” and they pulled in behind him in Mercer’s car. App. p.2776, ll.21-23. Mercer jumped out and opened the door. Thompson said that “they thought [the guy] had a gun on him, but he had a cell phone in his hand and Marcus Thompson shot the guy behind his ear.” App. p.2776, l.24 – p.2777, l.1. They went and parked Mercer’s car at a hotel somewhere and then Mercer was driving the truck when they got pulled over. App. p.2777, ll.10-14. Thompson said that “the officer told Kevin Mercer to step out of the vehicle, and as Kevin Mercer stepped out of the vehicle, Marcus Thompson took the gun and placed it over on Kevin Mercer’s side.” App. p.2777, ll.15-18.

To rebut Fuller’s testimony, the State called Timothy Johnston who testified that Thompson never admitted to shooting Davis. Johnston reported that Thompson had always stated that Mercer shot Davis while Thompson waited at a hotel in Mercer’s car. App. p.2839, ll.8-16; App. p.2840, ll.6-21. On cross-examination, Johnston testified that he was currently serving time for probation violation. App. p.2849, ll.10-11. He was also facing pending burglary charges and three counts of criminal domestic violence for which he could receive up to a life sentence. App. p.2848, l.17 – p.2849, l.9. Johnston claimed that all of his charges had previously been dismissed, but they were still showing as pending due to a clerical error. App. p. 2849, l.21 – p.2850, l.25. The Lexington County solicitor’s office was saying that the charges

were still pending, but Johnston hoped that they would correct the error “just as soon as they find the paperwork on them.” *Id.*

On September 25, 2006, the trial court issued an order denying Mercer’s motion for either a new trial or a new sentencing proceeding. App. pp.2910 – 2921. In order to obtain a new trial based on after-discovered evidence, Mercer was required to show that the evidence:

- (1) is such that it would probably change the result if a new trial were granted;
- (2) has been discovered since the trial;
- (3) could not in the exercise of due diligence have been discovered prior to the trial;
- (4) is material; and,
- (5) is not merely cumulative or impeaching.

State v. Spann, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999) (citing *State v. Prince*, 316 S.C. 57, 447 S.E.2d 177 (1993)); *see also*, *Johnson v. Catoe*, 345 S.C. 389, 548 S.E.2d 587 (2001).

The trial court found that the only disputed element was whether the after-discovered evidence “would probably change the result if a new trial were granted,” since “[t]he other four elements are clearly met.” App. p.2913. The trial court held that Fuller’s statements would not likely change the outcome of a new sentencing proceeding because Fuller was not believable. The court found that “neither Fuller nor Thompson has any real credibility about them,” App. p.2195, but determined that Johnston “is the one witness in this whole analysis of jailhouse confessions who does not have anything to gain from his testimony.” App. p.2198. The court “observed him to be straightforward” and found his testimony “believable.” *Id.* Based on this analysis, the trial court concluded that “there is essentially no chance the jury would believe Fuller’s testimony that Thompson confessed to shooting Sergeant Davis.” *Id.*

II. APPELLATE AND POST-CONVICTION PROCEEDINGS.

This Court affirmed Mercer's convictions and death sentence on direct appeal and held that the trial court did not abuse its discretion in denying the motion for a new trial. *State v. Mercer*, 381 S.C. 149, 672 S.E.2d 556 (2009). Mercer sought post-conviction relief and raised claims that: (a) he is ineligible for a death sentence because he is mentally retarded; (b) his trial counsel were ineffective for failing to investigate and present a mental retardation claim at trial; (c) trial counsel were ineffective for failing to offer available evidence to support their theory that Marcus Thompson was the shooter; (d) Mercer's constitutional rights were violated by Timothy Johnston's perjured testimony during the hearing on his motion for a new trial; and, (e) Mercer's rights were violated by the state's inflammatory and prejudicial presentation of victim impact evidence, the trial judge's response to that evidence, and trial counsel's failure to object to any of these events. Following an evidentiary hearing on January 31, February 1, and March 18, 2011, the PCR court issued an order granting Mercer a new sentencing proceeding on the ground that his trial counsel were ineffective for failing to investigate and present his mental retardation at trial and denying relief on all other grounds. App. pp.4249-4327.

REASONS WHY RESPONDENT'S PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I. THE PCR COURT CORRECTLY HELD THAT MERCER'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT AN *ATKINS* CLAIM AT TRIAL.

In order to establish a claim of ineffective assistance, a PCR applicant must show that: (1) counsel's performance was deficient; and, (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Council v. State*, 380 S.C. 159, 169, 670 S.E.2d 356, 361 (2009); *see also*, *Strickland v. Washington*, 466 U.S. 668, (1984). A PCR court's decision granting post-conviction relief must be upheld on appeal if there is any

probative evidence supporting the Court's findings of fact and conclusions of law. *Vasquez v. State*, 388 S.C. 447, 456, 698 S.E.2d 561, 565 (2010). Given the relevant standard of review, the weight of the evidence supporting Mercer's claim and respondent's failure to present even a shred of evidence that Mercer is not a person with mental retardation, the PCR Court's judgment that trial counsel was constitutionally ineffective must be sustained.

The PCR court's conclusions in this case are amply supported by the record. In the PCR hearing, both trial attorneys admitted that they failed to investigate and present the issue of Mercer's mental retardation. Specifically, trial counsel testified that:

- (1) they failed to obtain Mercer's special education records from the Philadelphia school system where he was in special education for over eleven years, App. p.3668, ll.16-20; App. p.3754, ll.12-24;
- (2) they failed to hire an expert in mental retardation, App. p.3669, ll.12-23; App. p.3770, ll.9-11;
- (3) they never raised the issue of Mercer's mental retardation at trial, App. p.3692, ll.3-6;
- (4) they had no strategic reason for these failures; App. p.3691, ll.13-22; and,
- (5) if they had known that Mercer suffers from mental retardation, they would have provided that information to their experts and raised an *Atkins* claim. App. p.3669, ll.7-10; App. p.3691, ll.13-22.

The PCR court correctly found that trial counsel "candidly admitted" their deficient performance, and that, "[e]ven if trial counsel had not admitted their performance was deficient, it is also apparent from their actions before trial." App. pp.4273-4274. Respondent-Petitioner [hereafter, "Respondent"] argues that Mercer refused to cooperate in a mental retardation investigation. Respondent's Petition for Writ of Certiorari at p. 15. This is incorrect. Trial

counsel testified that they were investigating the possibility that Mercer suffered from brain damage. App. p.3690, l.19 – p.3692, l.6. Dr. Schwartz-Watts requested that Dr. Tora Brawley complete some neuropsychological testing for that purpose. Dr. Watts later explained that this testing was not completed because Dr. Brawley felt that Mercer's efforts were "too variable" to produce valid results. Neither Dr. Schwartz-Watts nor Dr. Brawley are experts in mental retardation, nor were they asked to investigate Mercer's mental retardation. *See Applicant's PCR Exhibit 12, Affidavit of Dr. Donna Schwartz-Watts at ¶ 5* ("I am not an expert in mental retardation. I was not asked to evaluate Kevin Mercer to determine if he has mental retardation"). Mercer did not refuse to participate in an investigation of his mental retardation, nor could he have, since his trial counsel candidly admitted that they did not hire an expert in mental retardation nor did they make any other effort to investigate or pursue an *Atkins* claim.

As to the issue of prejudice, Mercer's evidence was uncontested. Mercer presented testimony from Dr. Brad Fisher, an expert in mental retardation who testified that Mercer is mentally retarded, as well as supporting evidence from Mercer's mother, father, ex-wife, high school football coach, two special education teachers, his cousin/former employer, and his social history records. App. pp.3314-3528; 3870-3875; 3889-4062; 4047-4102. Despite invitations from the PCR court to do so, Respondent offered no evidence to challenge Mercer's proof that he is mentally retarded.³ Thus, there can be no dispute that Mercer proved his mental retardation

³ Prior to the PCR hearing, Respondent notified post-conviction counsel of its intent to call an expert witness to testify about the mental retardation issue. Post-conviction counsel requested that Respondent produce a *curriculum vitae* and/or make its expert available for a pre-hearing interview. Respondent failed to produce a CV or to make its expert available and later withdrew its request to call an expert on this issue.

by a preponderance of the evidence offered in post-conviction and therefore established prejudice.

Respondent argues that the issue of Mercer's mental retardation was generally presented at trial, although it was not officially given the label of "mental retardation." Respondent's Petition for Writ of Certiorari at p.15. Even if this were true, Respondent's argument is legally irrelevant because, had trial counsel properly raised the issue of Mercer's mental retardation pre-trial, a sentencing proceeding would likely not have occurred at all. *Franklin v. Maynard*, 356 S.C. 276, 279, 588 S.E.2d 604, 606 (2003) ("If the judge finds the defendant to be mentally retarded by a preponderance of the evidence in the pre-trial hearing, the defendant will not be eligible for the death penalty."). Moreover, there is a fundamental difference between presenting a jury with information that a capital defendant had some difficulties in school and presenting a jury with information that that defendant is categorically excluded from a sentence of death. *Atkins v. Virginia*, 536 U.S. 304, 321 (holding that the Eighth Amendment to the United States Constitution prohibits the execution of persons with mental retardation); *see also, id.* at 318 ("by definition, [mentally retarded persons] have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."). Trial counsel failed to investigate and assert an *Atkins* claim and failed to call an expert to explain what mental retardation is and how Mercer meets that definition. Finally, even a cursory review of the record demonstrates that trial counsel did not present available evidence of Mercer's mental retardation.⁴ In sum, the record below conclusively supports the PCR court's conclusion that

⁴ For example, trial counsel did not present any evidence of the following facts:

trial counsel was ineffective, and there is no reason that this Court should grant Respondent's petition for a *writ of certiorari* on this issue.

II. THE PCR COURT'S ORDER GRANTING MERCER A NEW SENTENCING TRIAL SHOULD BE SUSTAINED ON ADDITIONAL GROUNDS.

In addition to the ground on which the PCR court granted relief, there are several other reasons that Mercer is entitled to a new sentencing proceeding. These additional grounds fall into two basic categories: (1) evidence that would have supported the defense theory that Marcus Thompson was the shooter; and, (2) the State's use of improper victim impact evidence and trial counsel's failure to object to that evidence.

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- Mercer failed kindergarten, second grade and ninth grade.
 - He was placed in special education in the second grade, where he remained for the rest of his schooling.
 - Mercer's teachers and school evaluators noted that he functioned "well within retarded expectation."
 - Mercer's school exams had to be administered to him orally because of his reading difficulties.
 - The Department of Disabilities and Special Needs found that Mercer could not tell time on an analog watch or perform basic money calculations.
 - The Department of Mental Health found that Mercer could not read the words "criminal" and "responsibility."
 - Mercer's mother had to repeat simple instructions to him, such as steps for making up a bed, while holding his head to face hers to make sure he heard.
 - As a child, Mercer had difficulty learning the alphabet and took several years to learn basic color differentiation. He was much slower than other children in learning to walk.
 - Mercer's football coach had to physically put his hands on Mercer's shoulders and move him to the spot on the field where he was supposed to stand as a defensive blocker and then point out the direction where the opposition would be coming.
 - The other players on the football team called Mercer "brain lock."
 - Mercer has never lived independently for any significant period of time. His mother and his wife managed his finances, filled out job applications for him, and took care of the cooking, laundry and shopping. His wife once sent him to the store with instructions to buy baby formula, and he not only failed to find the right formula, he also got lost on his way home.
 - As a child and young teen, Mercer's mother would send his brother along with him on errands to prevent him from getting lost.

A. EVIDENCE TO SUPPORT THE DEFENSE THEORY THAT THOMPSON WAS THE SHOOTER.

Trial counsel's theory of the case was that Marcus Thompson acted as the shooter. The problem with this theory was that Clifton Magwood described seeing only a single perpetrator whom he described as having a large build, like Mercer. But there was additional evidence that trial counsel could have offered to address this problem and support their theory of the case.

i. INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO CALL AN EXPERT IN EYEWITNESS IDENTIFICATION.

Trial counsel should have called an expert in eyewitness identification to challenge the reliability of Magwood's testimony. At the PCR hearing, Dr. Lori Van Wallendael, an expert in memory, cognition and eye witness reliability, explained that there are a number of variables that relate to the reliability of what a witness claims to recall, including things such as stress, distance, angle of view, exposure time, lighting conditions, and weapon focus. App. p.3582, 1.24 – p.3583, 1.4. These factors affect whether or not a witness is able to "get a good view of a person" and whether that witness is also able to reliably "put[] that view into memory." App. p.3583, 1.4-7.

Dr. Van Wallendael testified that "most lay persons have the idea that emotion or stress somehow enhances memory." App. p.3583, 1.23-24. But, in fact, "the research tends to suggest exactly the opposite, that severe stress impairs memory and that it impairs it quite severely."⁵ App. p.3584, 1.6-8. Dr. Van Wallendael described a field study in which only 32 or 33 percent

⁵ A witness's ability to accurately recall information decreases significantly when an event is violent or emotionally charged. ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY at 31-32 (Harvard University Press) (1979). "[T]he practical significance is clear: testimony about an emotionally loaded incident should be treated with greater caution than testimony about a less emotional incident." *Id.*

of participants could remember the faces of interrogators who questioned them during a forty-minute, high-stress interrogation. App. p.3584, l.15 – p.3585, l.23. “So basically, far less than half the time they could remember someone who was literally in their face for 40 minutes.” App. p.3585, ll.23-25. The stress factor is particularly relevant to Mercer’s case because of the related misconception that people with military training are better able to recall information in stressful situations than others. Dr. Van Wallendael explained that even researchers in her field originally thought that “people who were trained to deal with stress ought to be better eye witnesses than the rest of us.” App. p.3586, ll.7-13. After this hypothesis was tested, however, it was proven to be false. People such as military officers are no better than the average person at committing visual information to memory.⁶ “We’re dealing with the basic nature of the human body and the basic nature of the human brain that you really can’t change with training or experience very much.” App. p.3586, ll.18-20.

Next, Dr. Van Wallendael explained that when a witness believes that a gun is present at the scene, the witness tends to focus their attention on the weapon and away from other factors. This is called “weapon focus.” App. p.3588, l.15 – p.3589, l.1. Weapon focus impairs a witness’s memory in a variety of ways. It affects the witness’s “hearing, their ability to talk about what was said, their ability to recognize voices, all of that becomes impaired when you’re focused on a gun and wondering what’s that gun going to be used for next.” App. p.3589, ll.9-12.

⁶ Similarly, Dr. Van Wallendael testified that “witness confidence” bears no relation to the reliability of what a witness purports to recall. In other words, “confidence and accuracy are not really very strongly related.” App. p.3595, ll.7-8. “[T]here are often people who are relatively uncertain who turn out to be very correct and there are people who say they are a hundred percent sure who . . . turn out to be completely incorrect.” App. p.3595, ll.15-19.

Brief exposure time is another important factor because a person can only process “a handful of details” in the amount of time it takes to look out the window and see what the witness interprets to be a crime in progress. App. p.3592, l.20 – p.3593, l.19. After that, the witness goes into “action mode.” App. p.3592, l.22. Dr. Van Wallendael explained:

Your nervous system is right into that fight or flight mode and you want to do something and you want a phone but the phone is in another room, you run to the other room, you get on the phone, you run down the stairs. During the time that you glanced out the window, you know, you’re probably talking about maybe a second or less and in that amount of time, there’s a very limited amount that you can really take in.

App. p.3592, l.24 – p.3593, l.6. Further, Dr. Van Wallendael testified that there is a correlation between exposure time and “size estimation,” which “has to do with our ability to take in information about a person’s height and weight.” App. p.3593, ll.24-25. Research shows that, in general, “our abilities to estimate size are not especially good.”⁷ App. p.3594, ll.3-4. But, when a witness has only a short time to view a subject, size estimation is even less reliable. App. p.3594, ll.20-24. Finally, Dr. Van Wallendael explained that viewing conditions, such as seeing something from a strange angle or from a distance and in poor lighting conditions, are also reliability factors. She testified that “jurors tend to not know how to deal with this kind of information [in] terms of just the magnitude of an effect that it can have.” App. p.3597, ll.23-25. “[I]t [does] not just slightly impair your memory to be seeing something in dark conditions or

⁷ Height and weight estimates are the primary sources of error when eyewitnesses describe bodily features. See Malcolm D. MacLeod, Jason N. Frowley, and John W. Shepherd, *Whole Body Information: Its Relevance to Eyewitnesses*, in ADULT EYEWITNESS TESTIMONY 126 (1994). “Height, weight, and age estimations produced in traditional police interviews, for example, have been found to be highly error prone.” A. Daniel Yarmey & Meagan J. Yarmey, *Eyewitness Recall and Duration Estimates in Field Settings*, 27 J. Applied Social Psychol. 330, 331 (1997). Male witnesses in particular are more likely to inaccurately estimate height and weight. See *id.* at 331.

seeing something from above that's happening below." App. p.3598, ll.1-4. "[I]t can, in fact, have a pretty dramatic effect on what you can recall." *Id.*

Here, Magwood observed the events of the crime for only a few seconds when he peered through the blinds of his second story bedroom window and looked down into the dimly lit parking lot. He then went into "action mode" running from his bedroom to Davis's bedroom, locating a telephone and a handgun, and then running down the stairs. It is clear from the 911 tape that Magwood was under a lot of stress at the time of the call. By his own testimony, he was "very excited, adrenaline flowing, [and] very emotional." App. p.1404, ll.16-17. Although Magwood's written statement to police made no mention of seeing a handgun, App. pp.4103-4104, he later "added" this element during his testimony at trial.⁸ App. p. 1409, ll.15-17.

Courts have long recognized that "the vagaries of eyewitness identification are well known." *United States v. Wade*, 388 U.S. 218, 228 (1967). And yet, "despite its inherent unreliability, much eyewitness identification evidence has a powerful impact on juries." *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J. and Marshall, J., dissenting); *see also*, LOFTUS, *supra*, at 9 (surveying statistical and psychological evidence in support of her

⁸ Dr. Van Wallendael testified that this was a good example of the reconstructive nature of memory:

If you think about his initial statement, he talks about just seeing something going on outside the truck, hearing voices. There seemed to be an element of threat, but he doesn't mention the gun. But you hear the rest of his story and he calls 911, he hears a gunshot, he runs downstairs, he sees the victim of a gunshot wound on the ground. So in his mind, what's probably happening each time he talks about the event, each time he answers questions about it, or even just reviews it in his own head, he's filling in those missing pieces.

App. p.3591, ll.6-18.

conclusion that eyewitness identification evidence is “overwhelmingly influential.”). Without the assistance of an expert such as Dr. Van Wallendael, the jury very likely operated under the false assumption that Magwood’s description of the perpetrator was exceptionally reliable. The solicitor capitalized on this misconception by arguing that the jurors should consider Magwood’s description like a “picture” that “fear locked into his head,” and repeatedly claiming that Magwood’s “senses were heightened,” and that his observations were “forever sealed and seared into [his] memory.” App. p.1754, ll.12-13; App. p.1753, ll.20022; App. p.1565, ll.6-24.

Trial counsel’s strategy was simple – present a defense that Mercer was not the shooter. In order to accomplish that task, they needed to show that Magwood’s description was unreliable. And yet, trial counsel failed to present the expert testimony necessary to challenge the reliability of Magwood’s testimony. Trial counsel never even considered consulting with an expert in eyewitness identification. App. p.3683, ll.8-10; App. p.3758, l.12 – p.3759, l.15. The PCR court denied relief on this ground on the basis that the case did not involve a traditional line-up or a cross-racial identification. App. p4265. But, obviously, all of the factors that Dr. Van Wallendael described at the PCR hearing would have been relevant to the jury’s analysis of Magwood’s testimony even though he never personally identified Mercer. An expert in eyewitness identification could have educated the jury by “explain[ing] how certain aspects of every day experience shown by the record can affect human perception and memory, and through them, the accuracy of eyewitness identification.” *State v. Whaley*, 305 S.C. 138, 142, 406 S.E.2d 369, 371 (1991). Instead, trial counsel failed to challenge the State’s evidence and failed to support their own theory of the case. Counsel’s performance was deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984); *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007) (trial counsel’s failure to challenge the State’s evidence with expert testimony

was deficient and prejudicial); *see also*, *People v. Kindle*, 2002 WL 1554118 (Cal. App. Ct. 2002) (finding trial counsel ineffective for failing to call an expert in eyewitness identification).

ii. INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO PRESENT AVAILABLE EVIDENCE OF MORE THAN ONE PERPETRATOR.

The State's presentation of the case left the jury with the impression that only one perpetrator was present at the scene of the crime.⁹ Once the jury found Mercer guilty of murder in the first phase of the trial, the only way for defense counsel to argue, in the penalty phase, that Thompson acted as the shooter would be to show that Thompson was also present at the scene.¹⁰ And, in fact, there was extensive and reliable evidence that two black males were reported to be

⁹ Magwood testified that he saw only a single perpetrator at the scene of the crime. App. p.1409, ll.18-20. The only evidence to contradict this testimony was a statement from Terry Brown, who testified that Mercer confessed to Brown that he and Thompson participated together in the crime. App. p.1642, ll.14-23. But, there were several reasons for the jury to question Brown's credibility. First, he was a jailhouse snitch with prior convictions for burglary, possession of cocaine, failure to stop for a blue light, possession of crack, aggravated assault and robbery. App. p.1640, l.19 – p.1641, l.4. Second, Brown claimed that Mercer told him about the crime in December of 2003, but Brown did not tell anyone about it until more than two years later. App. p.1649, ll.6-25. Third, he did not take notes or have any written proof to support his claims. *Id.* And fourth, Brown had personal animosity against Mercer stemming from a physical altercation that occurred between them in the Lexington County Detention Center on January 14, 2004. App. p.2147, ll.22-25.

¹⁰ At the close of the guilt-or-innocence phase of the trial, the jurors were given a "hand of one, hand of all" instruction. App. p.1794, ll.3-12. In other words, they were told that Mercer could be found guilty of murder simply by being present and participating in the carjacking, even if he did not shoot Davis. *Id.* In the penalty phase, however, this principle did not apply. Prior to the start of the penalty phase, the trial judge indicated that he would instruct the jury that they could not sentence Mercer to death unless they first determined that he acted as the shooter. App. p.1817, l.5 – p.1818, l.17. The judge felt it was important for the parties to know this in advance because it might make a difference "in terms of how you all present evidence." App. p.1817, ll.13-14. And, indeed, the trial judge later charged the jurors "before you may consider imposing the death penalty, you must first find that the State has proven beyond a reasonable doubt that the defendant, Kevin J. Mercer, fired the shot that killed the victim." App. p.2538, ll.16-20.

at the scene. First, the victim's girlfriend, Neysa Williams, gave a written statement to police in which she stated that she was on the telephone with Davis when he arrived in the parking lot at the Raintree Apartments around 11:00 p.m. on the night of the crime. App. p.3710. Williams stated, "I could hear him getting out at his apartment. I then hear[d] someone approach him. I thought that I was hearing two different people talking to Tracy because I thought maybe it was his roommate and his next door neighbor." *Id.* After some conversation, Williams heard Davis say "Whatever man!" *Id.* Then, she "heard a loud noise and then the phone dropped."¹¹ *Id.*

Moreover, the 911 operator's report indicated that Magwood's call came in at 11:33 p.m. App. p.3708. Officers were dispatched to the scene one minute later. *Id.* At 11:46 p.m., the 911 operator reported that the suspects were two black males. *Id.* Mercer and Thompson were stopped on I-20 at 11:58 p.m. App. p.3709. This is consistent with several other police reports and witness statements. The coroner reported that the "[v]ictim pulled up into the parking lot and was held up in a carjacking by two suspects per victim's roommate." App. p.3707. "The two suspects fled the scene in victim's Lincoln Navigator." *Id.* Tracie Ondera, one of Davis's neighbors, recalled that he had just gone upstairs to bed at around 11:10 p.m. He "heard a gunshot and then heard two car doors shut." App. p.3711. Ondera "jumped up and looked out the window [and] saw a white Lincoln Navigator leaving the parking lot with its lights off." *Id.* Dennis Stazer, the officer who arrested Mercer and Thompson, issued a formal report in which he stated that he took up position on I-20 after "dispatch advised that a white in color Lincoln

¹¹ Williams' statement is consistent with Kevin Fuller's testimony that Marcus Thompson said "they thought the guy had a gun on him, but he had a cell phone in his hand and Marcus Thompson shot the guy behind his ear." App. p.2776, l.24 – p.2777, l.1. Davis's cell phone was recovered in the parking lot on the ground near where the Navigator had been parked. App. p.3716.

Navigator was taken by two black males.” App. p.3712. After Mercer and Thompson were arrested, the Lexington County Sheriff’s Department issued a press release stating that two minutes after the shooting, “dispatchers radioed a description of the stolen Lincoln Navigator . . . and advised that two men were riding in the vehicle.” App. p.3715; *see also*, App. p.3716 and p.3719.

It has long been accepted that, in terms of culpability and appropriate punishment, there is an important distinction between a triggerman and a non-triggerman. *See* S.C. Code Ann. § 16-3-20(C)(b)(4) (1976); *State v. Peterson*, 287 S.C. 244, 248, 335 S.E.2d 800, 802 (1985), overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Thus, trial counsel’s plan to show that Mercer was not the shooter was a sound trial strategy. But without any evidence to show that someone other than Mercer was present at the scene of the crime, the defense theory that Thompson acted as the triggerman was dead on arrival in the penalty phase. The jury had already determined that Mercer was present at the scene of the crime – if he was not present, then he could not be guilty of murder. Thus, the only way to show that Thompson could have acted as the shooter was to demonstrate that witnesses saw and heard a *second* perpetrator. There was substantial evidence that trial counsel could have used to make such a showing. Their failure to do so was deficient and prejudicial, since it undermined the entire defense theory of the case. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Baines*, 927 N.E.2d 158, 170 (Ill. App. 2010) (“it defies reason to believe that defense counsel would intentionally fail to bring out the very essence of the defense theory in the clearest possible manner.”); *People v. Bryant*, 907 N.E.2d 862, 874 (Ill. App. 2009) (“We cannot conclude that counsel’s failure to call any witnesses in support of the defense that he had both promised and adhered to throughout the defendant’s trial was a reasonable strategic decision.”).

iii. TIMOTHY JOHNSTON'S PERJURED TESTIMONY.

At the August 2006 hearing on Mercer's motion for a new trial, Timothy Johnston testified for the State that he had never heard Thompson admit to shooting Davis, and instead claimed that Thompson always said that Mercer was the shooter. The State offered Johnston's testimony to rebut Kevin Fuller's account that Thompson was boasting about how he was the one who shot Davis but Mercer was going to die for it instead. App. p.2898. The trial court credited Johnston's testimony over Fuller's and denied the motion for a new trial. Johnston's testimony was false. At the PCR hearing, Johnston admitted that he lied when he testified that Thompson never admitted to shooting Davis. App. p.3567, ll.2-25. Johnston explained that Thompson told several different versions of the events of the crime. In one of those accounts, Thompson said that Mercer dropped him off at an apartment complex where Thompson planned to steal a truck. App. p.3566, ll.22-25. Thompson said that he shot the victim of the robbery after they got into an altercation. App. p.3566, l.25 – p.3567, l.1. Johnston testified that he "failed to bring up" this version of the events when he spoke to the State because Thompson had threatened him and he was afraid. App. p.3567, ll.14 – p.3568, l.1.

The United States Supreme Court has long held that "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)). Thus, the Court has "insist[ed] that capital punishment be imposed fairly, and with reasonable consistency, or not at all." *Id.* Among other things, this mandate prohibits imposition

of a death sentence on the basis of information that is “materially inaccurate.” *Johnson v. Mississippi*, 486 U.S. 578, 590 (1988).

Here, Mercer’s motion for a new trial was denied based upon false testimony in violation of the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution. Johnston’s testimony at the hearing on the motion for new trial constituted perjury. *See, e.g.*, S.C. Code Ann. § 16-9-10 (“It is unlawful for a person to willfully give false, misleading, or incomplete testimony under oath in any court of record, judicial, administrative, or regulatory proceeding in this State.”). If the jury had been told that Thompson was bragging about his role as the triggerman, there is a reasonable probability that at least one juror would have viewed Mercer’s role in the crime – or even the ambiguity over what that role was – as “a basis for a sentence less than death.” *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *see also, Porter v. McCollum*, 130 S.Ct. 447, 454-455 (2009) (“the Constitution requires that ‘the sentencer in capital cases must be permitted to consider any relevant mitigating factor.’”) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982)).

B. IMPROPER VICTIM IMPACT EVIDENCE.

i. RELEVANT LEGAL PRINCIPLES.

In *Payne v. Tennessee*, 501 U.S. 808 (1991), the Supreme Court held that the Eighth Amendment did not erect a bar to the admission of victim impact evidence. Specifically, the Court stated that the jury may be presented with evidence “of the specific harm caused by the defendant” and evidence “about the victim and about the impact of the murder on the victim’s family.” *Id.* at 808; *see also, id.* at 840 (O’Connor, J., concurring) (“[a] State may decide . . . that the jury should see ‘a quick glimpse of the life petitioner chose to extinguish.’”) (emphasis

added) (quoting *Mills v. Maryland*, 48 U.S. 367 (1988)).¹² This Court has determined that victim impact evidence is generally admissible to demonstrate the “uniqueness” of the victim and the “specific harm caused by the defendant.” *State v. Hughey*, 339 S.C. 439, 457, 529 S.E.2d 721, 730 (2000), overruled on other grounds by *Rosemond v. Catoe*, 383 S.C. 320, 330, 680 S.E.2d 5, 10 (2009). The admission of such evidence, however, is not allowed if it is “so unduly prejudicial that it renders the trial fundamentally unfair and violates due process under the Fourteenth Amendment.” *Von Dohlen v. State*, 360 S.C. 598, 612, 602 S.E.2d 738, 745 (2004).

A capital defendant is entitled to an objective, individualized sentencing decision free from “the influence of passion, prejudice, or any other arbitrary factor.” S.C. Code Ann. § 16-3-25 (C)(1) (2003); *see also*, *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Gregg v. Georgia*, 428 U.S. 153 (1976). To ensure these protections, many courts have held that the scope of victim impact evidence must be carefully and narrowly tailored. For example, in *United States v. Fields*, 516 F.3d 923, 947-948 (10th Cir. 2008), the Tenth Circuit cautioned that “[i]ncluding the community in the victim-impact inquiry is fraught with complication. It would involve not just the incremental extension from family to friends (and even co-workers), but a radical change in perspective: replacing a close-in focus on persons closely or immediately connected to the victim with a wide view encompassing generalized notions of social value and loss.” *Id.* at 947.

Similarly, the Louisiana Supreme Court has concluded:

[i]ntroduction of detailed descriptions of the good qualities of the victim or particularized narrations of the emotional, psychological and economic sufferings of the victim’s survivors, which go beyond the purpose of showing the victim’s individual identity and verifying the existence of survivors reasonably expected to grieve

¹² *See also*, *id.* at 839 (Souter, J., concurring) (stating victim impact statements should be limited to the consequences of the defendant’s acts that were “obviously foreseeable”).

and suffer because of the murder, treads dangerously on the possibility of reversal because of the influence of arbitrary factors on the jury's sentencing decision.

State v. Bernard, 608 So.2d 966, 972 (1992); *see also*, *State v. Williams*, 550 A.2d 1172, 1202 (N.J. 1988) (“our law does not regard a crime committed against a particularly virtuous person as more heinous than the one committed against a victim whose moral qualities are perhaps less noteworthy or apparent. The law exists to protect all persons equally.”).¹³

ii. THE STATE’S VICTIM IMPACT EVIDENCE WAS IMPROPER.

Here, the State offered extensive and detailed evidence that improperly exceeded the scope of permissible victim impact evidence. Six victim impact witnesses testified at the penalty phase of Mercer’s trial. Two of these witnesses were Davis’s mother and his daughter. The remaining four were members of the U.S. Army who spoke at great length about Davis’s successful career in the armed forces and his involvement in religious and community activities. Command Sergeant Major Wells testified extensively about the various medals and honors Davis received throughout his military career. Following this testimony, visual evidence of each of these medals and awards was entered into evidence. Sergeant David O’Garro testified about the Army roll call that was performed at Davis’s memorial service at Fort Jackson. In total, the

¹³ In *Williams*, the New Jersey Supreme Court also noted that “[d]efendants may not assert as a defense that the victim was such a worthless human being that the latter’s murder was acceptable or at least no loss to the world.” *Id.* This Court has likewise held that “a criminal defendant’s reprehensibility was not mitigated by the fact that the victim was a murderer himself.” *Hall v. Catoe*, 360 S.C. 353, 362, 601 S.E.2d 335, 340 (2005) (explaining the holding in *State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (1985); *see also*, *State v. Southerland*, 316 S.C. 377, 447 S.E.2d 862 (1994) (holding that the defendant was not permitted to introduce evidence of the victim’s bad character). Similarly, this Court has held that victim impact evidence may not be used to make arguments that “encourage the jury to compare the worth of a defendant’s life with that of his victims.” *Hall*, 360 S.C. at 362, 601 S.E.2d at 340.

victim impact testimony occupies sixty-six pages of the trial transcript. In addition to this substantial testimony, the State showed the jury a video containing pictures and graphics set to music that was prepared for Davis's funeral. By all accounts, the video was emotionally moving and several people in the courtroom, including the trial judge himself, were brought to tears.

This evidence was unduly prejudicial, exceeded the scope of permissible victim impact evidence, and violated Mercer's rights under the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment to the United States Constitution. It also injected an arbitrary factor and created the risk of influencing the jury's sentencing decision with unfair passion and prejudice in violation of South Carolina law. S.C. Code Ann. § 16-3-25 (C)(1) (2003); *see also*, *Sapp v. The State of South Carolina*, 2006-CP-08-2204, attached as Exhibit A, at 45 (citing *Von Dohlen v. State*, 360 S.C. 598, 612(2004)). Judge James Williams's recent decision granting post-conviction relief in *Sapp*, a case involving similar victim impact testimony, is instructive on this issue.¹⁴ In *Sapp*, the PCR court found that introduction of an essay regarding the victim's death went beyond the scope of *Payne* because it impermissibly demonstrated the loss suffered by the community in general. *Id.* at 46-47. The essay centered on the victim's role as a police officer and the loss suffered by his colleagues and society because of his death. *Id.* at 46. The essay was written by one of the victim's co-workers and opened by telling the reader that the day the victim died, "we *all* lost a friend." *Id.* The PCR court held that this evidence was inadmissible under *Payne*. *Id.* at 46-47.

The victim impact evidence offered against Mercer had a similar impermissible focus. The overwhelming majority of the State's victim impact evidence was given by uniformed members of the United States Army and focused on Davis's career as a soldier. Both Wells and

¹⁴ This Court denied the State's petition for a *writ of certiorari* in the *Sapp* case.

Magwood testified that Davis “personified the ideals” of the military, App. p.2201, ll.3017, and “personified what it was to be a leader in the United States Army.” App. p.2221, ll.12-17.

Magwood further elaborated on the Army’s loss in general, saying:

[L]osing a soldier like that, I mean – any life lost is a tragedy, but to lose a soldier that impacted the community as well as Fort Jackson and so many other soldiers from all over the continent who had been in recruiting was a big loss.

App. p.2224, ll.13-17. Ames, Wells, Magwood and O’Garro all testified in detail about the posthumous awards, promotions, memorials and honors the Army awarded to Davis. App. p.2197, ll.10-16; App. p.2087, l.6 – p.2212, l.23; App. p.2212, ll.4-8; App. p.2224, ll.1-13; App. p.2239, ll.4-15. The State showed the jury Davis’s posthumous certificate of promotion and his Army memorial program. App. p.2212, ll.4-8; App. p.2240, ll.6-13. Finally, in his closing argument the solicitor highlighted the magnitude of the Army’s loss, repeatedly referring to Davis in military terms and presenting the jury with the scene of the crime as played out between Mercer and “a brave soldier.” *See, e.g.*, App. p.2494, l.22 – p.2495, l.1 (“I’m sure you never would have thought in your wildest dreams that a man would make a soldier get down on his knees¹⁵ after the soldier had said, ‘all right. I’ll give it to you. Take it;’ After the soldier had said, ‘here’s the keys.’”); App. p.2495, ll.4-6 (“And I bet you never thought that a man would stand back at least two feet away and pump a round into the brain of this soldier.”); App. p.2509, ll.8-13 (arguing that Terry Brown asked Mercer “After you had done all of this, after you put that soldier on the ground, after the soldier gave you the keys to his Navigator, after you shot him in the back of the head and the cop stopped you 17 minutes later, why didn’t you shoot the cop?”);

¹⁵ According to the State’s own expert witness, there was no evidence that Davis was shot while on his knees. App. p.1678, l.25 – p.1679, l.13.

App. p.2513, l.21 – p.2514, l.1 (showing a photo of Davis alive alongside a photo of Davis after his death and stating that Davis’s daughter was “[a] young girl with already nearly 30 college credits. [Davis] won’t be there for graduation. Won’t be there for college, marriage, kids, because this brave soldier – [the Army] named a building after him at Fort Jackson with his name in all the rooms. Awards. Kevin Mercer turns this into this.”). All of this evidence impermissibly focused on the general loss suffered by the United States Army and the entire community in general. Indeed, Magwood testified that Davis’s death was “a big loss” felt by “soldiers from all over the continent.” App. p.2224, ll.13-17.

Moreover, this evidence was improper because it was offered as if the Army itself was a victim of the crime. An entity such as the Army, however, does not qualify as a victim under South Carolina law. The South Carolina Constitution defines a victim “a person who suffers direct or threatened physical, psychological, or financial harm as the result of the commission or attempted commission of a crime against him.” S.C. CONST. ART. I, § 24(C)(2). It also considers as victims, “the person's spouse, parent, child, or [the] lawful representative of a crime victim who is deceased, who is a minor or who is incompetent or who was a homicide victim or who is physically or psychologically incapacitated.” *Id.* Under this definition, the Army is not a constitutionally recognized crime victim. The State’s victim impact evidence was improper because it emphasized the loss suffered by the Army in the same manner – and, in fact, more acutely – than the loss suffered by Davis’s family.¹⁶

¹⁶ Strict adherence to the definition of victim found in the South Carolina Constitution is necessary to prevent victim impact evidence from otherwise impairing the capital sentencing process. For example, if the State may present the Army as a victim because it has lost the service of a soldier, then the defense will be invited to rebut the value of the victim as a member of the armed forces. This would necessarily result in extensive discovery requests for the victim’s military records, his reviews by superiors, and other documents, culminating in an

After a lengthy and detailed presentation from members of the Army, the State then introduced Davis's funeral video and testimony about the Army roll call performed at Davis's memorial service at Fort Jackson. The video and roll call testimony were excessive, inflammatory and unduly prejudicial, particularly when viewed in light of the substantial victim impact evidence that had already been offered.¹⁷ These elements served primarily to appeal to

argument about the victim's worth as a soldier during the penalty phase of the trial. Additionally, allowing organizations such as the Army to play the role of a crime victim increases the risk that a defendant's constitutional rights will be violated. It creates a heightened risk that the jury will engage in an impermissible weighing of the worth of the life of the victim versus the worth of the life of the defendant or the worth of the entire armed forces. *See Hall v. Catoe*, 360 S.C. 353 (2005). It also invites the jury to impermissibly focus on tenuous and speculative far-reaching impacts of the victim's death, for example national security. Finally, inviting the jury to consider extraneous and impermissible evidence creates an opportunity for racial bias to come into play. Empirical studies show that when the defendant is a member of a disfavored minority, the likelihood of a death sentence increases when victim impact evidence is offered at sentencing. *See, e.g.,* Adalberto Aguirre, Jr., et al., *Sentencing Outcomes, Race and Victim Impact Evidence in California, A Pre and Post-Payne Comparison*, 11 *The Just. Prof'l* 297, 300-304 (1999). Studies also demonstrate that the presentation of victim impact evidence increases the likelihood of a death sentence when the victim and the defendant are members of the same race, as they were in Mercer's case. *Id.* The risk of racial discrimination was especially great in Mercer's case where he, an African American defendant, was sentenced by an all white jury.

¹⁷ Three United States Supreme Court Justices have expressed their desire to grant *certiorari* in a case addressing victim impact evidence similar to this case. In a statement in the denial of a petition for writ of *certiorari*, Justice Stevens stressed the need "to define or otherwise constrain the category of admissible victim impact evidence." *Kelly v. California*, 129 S.Ct. 564, 566 (2008) (Mem.) (Stevens, J., issuing statement respecting the denial of petitions for writs of *certiorari*). Justice Stevens stated that because the introduction of victim impact evidence "puts a heavy thumb on the prosecutor's side of the scale in death cases, the Court has a duty to consider what reasonable limits should be placed on its use." *Id.* at 567. Also, Justices Breyer and Souter dissented from the denial of *certiorari* in *Kelly*. *Id.* at 564, 568 (Breyer, J., dissenting from denial of petitions for writs of *certiorari*). Justice Breyer agreed with Justice Stevens' statement and similarly stressed the need to "draw[] a line between what is, and is not, constitutionally admissible in this area." *Id.* at 568. Justices Stevens and Breyer clearly indicated, at the very least, that the use of videos and picture montages of the victim, which were admitted by the lower court, should not be admissible as victim impact evidence. *See id.* at 567 ("[W]hen victim

the jurors' emotions and "played more towards sympathy than showing the true man." *Sapp*, at 46. Clearly, the video served that purpose as even the trial judge cried during its presentation. App. p.3323, l.20 – p.3324, l.14; App. p.3388, ll.16-25; App. p.3767, ll.2-5; App. p.3783, l.21 – p.3784, l.4. This evidence impermissibly detracted from the individualized sentencing to which Mercer was entitled. See *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Gregg v. Georgia*, 428 U.S. 153 (1976). Furthermore, any probative value of this evidence was substantially outweighed by the prejudice that surely flowed from its admission. How could jurors be expected to make a fair and impartial sentencing determination after watching *the trial judge* weep in the courtroom over the victim's death?

In addition to the inadmissible victim impact evidence, the State's presentation contained irrelevant information and extensive hearsay. For example, Command Sergeant Major Wells' testimony about his own rank and success in the Army was irrelevant to the jury's sentencing decision. The solicitor emphasized Wells' testimony before the jury, saying "Do you remember the Command Sergeant Major in his uniform the other day explaining the ribbons? There's one fellow, noncommissioned officer in the United States Army that's higher than he is, and that's the Head Sergeant of the Army. One fellow higher than Mr. Wells." App. p.2510, ll.12-17. Wells' personal military success did not relate to Mercer's characteristics, the nature of the crime, or Davis. It served only to suggest to the jury that Davis's life was of particular value because high-ranking military officials were there to speak for him.

Furthermore, the State offered a variety of religiously themed testimony. Wells testified

impact evidence is enhanced with music, photographs, or video footage, the risk of unfair prejudice quickly becomes overwhelming."); *id.* at 568 ("[M]inimal probity coupled with the video's *purely emotional* impact . . . may call due process protections into play.").

that Davis called him on the night of the crime and said “that he wanted [Wells] to know that he had recently accepted Jesus Christ as his Lord and Savior.” App. p.2207, l.18 – p.2208, l.8. Wells told the jury that Davis once gave him a picture of “a heavenly place setting with two hands signifying the hand of the Lord.” App. p.2208, ll.23-25. O’Garro described a coffee mug that Davis had with a picture of the Bible on it and a slogan saying, “For the Souls of the People.” App. p.2231, ll.5-7; App. p.2232, ll.6-15. O’Garro stated that Davis was working with youth and “trying to get them spiritually back into the Word, into the Bible.” App. p.2232, ll.21-23. O’Garro also claimed that another Army friend told him that “the Lord” commanded him that only O’Garro and Magwood could paint a youth center building in Davis’s honor. App. p.2233, ll.19-23. He also testified that another Army instructor, Reverend Ogden, told him that, after Davis’s death, Odgen would look up and see Davis sitting in the back of the room everywhere he preached. App. p.2240, ll.19-15. Much of this testimony was hearsay. Moreover, it suggested that jurors should be influenced by a “higher power” and that Davis’s life was more valuable than others because of his personal religious beliefs.

iii. TRIAL COUNSEL’S PERFORMANCE WAS DEFICIENT AND PREJUDICIAL.

Trial counsel’s failure to object to any of this evidence was unreasonable and prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1994); *Sapp*, at 47. Cameron Littlejohn testified that Lisa Kimbrough was generally responsible for the penalty phase of the case and any objections were her primary responsibility. App. p.3674, ll.11-17. He further testified that he did not review the funeral video before it was shown to the jury, but after seeing the video, he did believe that they should have raised an objection. App. p.3675, ll.3-4. Once the video started, however, Littlejohn stated that he “felt it was too late” to object. App. p.3675, ll.18-19. Littlejohn described the funeral video as “a tearjerker” and stated that the trial judge was

obviously “visibly taken” and “you could tell he had, he got emotional about it.” App. p.3767, ll.2-5. Littlejohn was afraid to object at that point and he simply hoped the jurors did not see the judge’s reaction. App. p.3676, ll.7-13. Kimbrough testified that she did not object to any of the victim impact evidence because she believed that, legally, the State could offer whatever it wanted in terms of victim impact evidence. App. p.3782, ll.2-11. She stated that if she had known that any of the evidence was legally improper, she would have objected to it. *Id.* She further testified that she felt she made a mistake by not objecting to the funeral video and the army roll call testimony. App. p.3782, ll.12-25. Kimbrough had no strategic reason for failing to object. *Id.* After the funeral video was played, Kimbrough was told by observers in the courtroom that the trial judge had cried on the bench while the jury was present.¹⁸ App. p.3783,

¹⁸ Diane Mercer and Naomi Stackhouse also testified to this fact. Diane Mercer stated:

Q: Do you recall seeing a video that was played for the jury from the victim’s funeral?

A: Yes.

Q: Were you able to view the trial judge when the video was played?

A: Yes.

Q: And what was his reaction?

A: He was crying.

...

Q: How did you know he was crying?

A: His eyes was red and they surely wasn’t red when we started out, but, you know, you could see the emotions. I mean, he looked down like this and you could -- you know, you knew he was crying. It wasn’t – you knew he was crying. It was just obvious.

App. p.3323, l.20 – p.3324, l.14. Naomi Stackhouse similarly testified:

Q: Were you present during the trial when the video from the victim’s funeral was played for the jury?

l.21 – p.3784, l.4.

Trial counsel has an obligation to determine what evidence the State intends to offer in aggravation and formulate an appropriate response. *See Rompilla v. Beard*, 545 U.S. 374 (2005). The American Bar Association recommends that counsel “should ascertain what, if any, victim-impact evidence the prosecution intends to introduce at the penalty phase, and evaluate all available strategies for contesting the admissibility of such evidence and minimizing its effect on the sentencer.” ABA Guidelines for the Appointment and Performance of Defense Council in Death Penalty Cases 113-114 (2003). Although the ABA guidelines do not necessarily define objective standards of reasonableness under *Strickland*, many courts including this Court and the United States Supreme Court have referenced them as relevant guidelines. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 396 (2000) (citing the ABA guidelines in holding that counsel’s performance fell below Strickland’s standard of reasonableness); *Council v. State*, 380 S.C. 159, 173, 670 S.E.2d 356, 363 (2008) (same). Trial counsel’s failure to thoroughly review the State’s proposed victim impact evidence and to formulate an appropriate legal strategy to attack that

A: Yes, I was.

Q: Were you able to see the judge at this time?

A: Yes, I was.

Q: What was his reaction during the video?

A: The judge was like this (indicating) and his head was down like this (indicating) and he was crying.

Q: Did you observe any of the jurors at that time?

A: There were two jurors who were crying.

App. p.3388, ll.16-25.

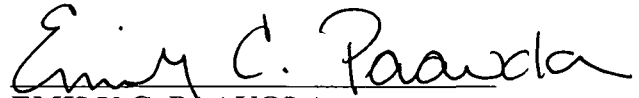
evidence was unreasonable. *Strickland*, 466 U.S. at 687; *Sapp*, at 47.

Prejudice is established when “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Porter*, 130 S.Ct. at 452 (citing *Strickland*, 466 U.S. at 694). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. The test is not whether a defendant would have received a life sentence absent counsel’s deficient performance. *Porter*, 130 S.Ct. at 455-456; *see also, id.* at 451 (holding the state court conducted the wrong prejudice analysis by concluding “that even considering [trial counsel’s error], the ‘trial judge and jury still would have imposed death.’”). Rather, the question is whether trial counsel’s error “might well have influenced the jury’s appraisal of [petitioner’s] culpability.” *Rompilla*, 545 U.S. at 393. Here, trial counsel’s failure to consider any legal challenges to the State’s victim impact presentation resulted in the admission of irrelevant, inflammatory, excessive and unduly prejudicial information that unfairly played to the jury’s emotions and tipped the balance in favor of death. Had trial counsel properly challenged the admission of this evidence, “there is a reasonable probability that at least one juror would have struck a different balance.” *Wiggins*, 539 U.S. at 536.

CONCLUSION

For all of the reasons stated above, this Court should deny Respondent’s Petition for Writ of Certiorari.

Respectfully submitted,

A handwritten signature in cursive script, reading "Emily C. Paavola".

EMILY C. PAAVOLA

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ATTORNEY FOR PETITIONER

April 9, 2012

Exhibit A

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

Case No. 2006-CP-08-2204

COUNTY OF BERKELEY)

Jesse Waylon Sapp,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

ORDER

2009 AUG 17 PM 1:45
CLERK OF COURT
BERKELEY COUNTY, SC

PROCEDURAL HISTORY

In the early morning hours of July 7, 2002, applicant was arrested and charged with the murder of South Carolina Trooper Jeff Johnson. The state contended that applicant shot Trooper Johnson to avoid arrest after being stopped at a license check point. While running away, applicant was shot several times and arrested a short distance from the truck in which he had been a passenger. Tr. 1203. In addition to eyewitness testimony, ballistics testing proved that the bullet which killed Trooper Johnson was fired from applicant's gun. Tr. 1426-28. Upon searching applicant's truck, SLED agents found Xanax, ecstasy, cocaine and other prescription drugs. Tr. 1289-92.

Applicant was indicted for murder as well as several drug offenses. Initially, applicant was provided two court-appointed lawyers, Glenn Churchill and Peter Beck; however, in December 2002, attorneys Paul Archer and Robert Johnston, both retained by applicant's family, entered their appearance as counsel for applicant. Jury selection began on May 9, 2003, and the jury found applicant guilty of murder and the drug offenses. The sentencing phase began on

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DATE 8/17/09
Mary P. Brown
CLERK OF COURT C.P. & G.S.
BERKELEY COUNTY SC

[Signature]

applicant's prior criminal history, primarily relating to drug and weapons offenses. The prosecution also presented four victim impact witnesses. For its part, the defense presented the testimony of a family physician, several family members and friends of applicant who generally described applicant as a nice person who had lived a tough life, including witnessing the death of his best friend. On May 19, 2003, the jury returned a unanimous sentence of death.

Applicant filed a timely appeal and the South Carolina Supreme Court affirmed his convictions and sentence on October 24, 2005. *State v. Supp*, 366 S.C. 283, 621 S.E.2d 883 (2005). Thereafter, applicant filed a timely application for post-conviction relief. On April 21-23, 2008, this Court presided over the post-conviction relief evidentiary hearing. The applicant was present at the hearing, represented by court-appointed counsel Robert Lominack and Daniel Prenner. The state was represented by Assistant Deputy Attorney General Donald Zelenka and Assistant Attorney General Melody Brown. Following the hearing, the Court and the parties received copies of the transcript of the proceedings and the parties each filed memoranda setting forth their factual and legal arguments. Having now carefully considered the entire record, the testimony and exhibits introduced at the evidentiary hearing, and the filings and arguments of the parties, the Court makes the following findings.

FINDINGS OF FACT AND CONCLUSIONS OF LAW¹

I. Involvement of Paul Archer and Robert Johnston

On September 12, 2002, two months after applicant was arrested, attorneys Paul Archer and Robert Johnston met with applicant at the Charleston County Detention Center. Petitioner's

¹ The Court finds it necessary to summarize the facts concerning the manner in which applicant's trial counsel became involved in the case as well as the trial and post-conviction proceedings before addressing the legal claims at issue.

Exhibit 20: PCR Tr. 550.² At this point, Judge Dennis had already appointed attorneys Glenn Churchill and Peter Beck to represent applicant. The meeting on September 12, 2002, took place without the knowledge or consent of Churchill or Beck. PCR Tr. 550. Some time before or after this meeting, Johnston drafted a "Criminal Fee Agreement" which outlined an agreement between applicant's grandmother and Archer and Johnston for legal representation. Petitioner's Exhibit 21. In this document Johnston indicated that he and Archer had already spent a "substantial amount of time" on applicant's case. Petitioner's Exhibit 21. Pursuant to the agreement applicant's family would pay a non-refundable sum of \$10,000 after which Archer and Johnston would file a motion to be substituted as counsel for applicant. Petitioner's Exhibit 21. Indeed, Johnston was unable to dispute that it is possible, consistent with a representation made by applicant's grandmother in a taped phone call to applicant while at the Charleston County Detention Center, that he and Archer were paid the \$10,000 on September 12, 2002, the same day that they met with applicant at the jail. PCR Tr. 556.

In late September, Johnston and Archer filed a motion to be appointed as counsel for applicant. A hearing on that motion was held on October 18, 2002. Johnston and Archer did not reveal their substantial contact with applicant nor the fact that they had entered into a fee agreement and had been paid.³ Ultimately, they withdrew the motion when Judge Dennis expressed a reluctance to compensate them for time traveling from their out-of-circuit office to Charleston. Tr. 19. Subsequently, on November 19, 2002, Archer was paid \$20,000 by applicant's family. PCR Tr. 604. Thereafter, Johnston and Archer entered their appearance on

² The Court will refer to the applicant's exhibits at the PCR hearing as "Petitioner's Exhibits" in keeping with the court reporter's reference. I reference the trial transcript and the PCR hearing transcript as "Tr." and "PCR Tr.," respectively.

³ They did not inform Judge Dennis that they had entered into a private agreement with applicant's family nor that they had accepted money from the family despite a direct question in

behalf of applicant.

Archer and Johnston had approximately five months to prepare for applicant's capital trial. Petitioner's Exhibit 14, ¶ 1 (indicating that as of December 12, 2002, Archer and the Johnston were "handling all of [applicant's] representation."). Archer was responsible for the guilt-or-innocence phase preparation and Johnston was responsible for the sentencing phase preparation. Petitioner's Exhibit 14, ¶ 2-3. The December 12, 2002, letter explaining this division of labor is consistent with Archer's testimony at the PCR hearing. PCR Tr. 590, 607 ("[I]n the sentencing phase there is a lot of paperwork, and I just don't do that."); 591 ("Yeah. I can try the penalty part in two seconds. Somebody who have [sic] to do the leg work for me . . ."); 609 ("Q: You did not help investigate in preparation for the sentencing phase? A: Correct.").

Despite having only a few months to prepare for a capital trial, Archer and Johnston did not hire a single expert or investigator to assist with the sentencing phase. There were two reasons for this failure. First, Archer and the Johnston mistakenly believed that since they were retained by applicant's family, they were not entitled to state funding for experts even though applicant was indigent and had previously been appointed counsel. PCR Tr. 452, 494. In fact, Johnston had never before utilized the services of an expert in a criminal case. PCR Tr. 452. Had either attorney contacted the South Carolina Office of Indigent Defense (now the South Carolina Commission on Indigent Defense), he would have learned that applicant was eligible to receive funds for investigative and expert assistance owing to his indigency and regardless of his family's ability to partially pay for legal representation. Petitioner's Exhibit 24 (Affidavit of Lisa Graves of SCCID).

this regard from Judge Dennis. Tr. 16-17.

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The second reason appears to be based on financial considerations. Archer and Johnston recognized that they needed experts. Indeed, Archer utilized the free services of a live-in girlfriend to assist in the interpretation of the autopsy report and some childhood psychiatric records. PCR Tr. 588, 594, 604-605. Archer's girlfriend was a family physician with no training or experience in forensic psychiatry. PCR Tr. 588, 606. Furthermore, Johnston recognized from reviewing applicant's school records that "something happened" around the sixth grade and that developing an understanding of what was going on in applicant's life during that time would have been useful. PCR Tr. 462, 496-497. However, given their misunderstanding about the availability of state funds for experts, Archer and Johnston could only hire experts by using the funds paid to them by applicant's family. In fact, Johnston told the family that he would "work with" them on his fees in light of expenses for experts. Petitioner's Exhibit 14, ¶ 6. In other words, it is apparent that the amount of money that Johnston would ultimately receive was dependent on whether he used any funds for experts or investigators. Archer and Johnston chose to forgo hiring any experts leaving Johnston to conduct the entire sentencing phase preparation himself. As a result, substantial information and documentation was never obtained, including *inter alia*, records and information surrounding applicant's pre-trial diagnosis of post-traumatic stress disorder, PCR Tr. 581; records documenting a family history of medical and mental illnesses, PCR Tr. 581, and; criminal records regarding applicant's mother and stepfather. PCR Tr. 581.

As of March 2003, Archer and Johnston were still preparing for the guilt-or-innocence phase of the trial. At a pre-trial hearing in March, Archer stated, "Well, first of all, I would like to say that we got involved in this a couple of months ago. We've had four months to prepare for a death penalty case. There was a comment in chambers that it is probably going to be 90

percent penalty and 10 percent guilt [sic]. The problem is, the more discovery that we receive, because we are still working on the guilt part . . ."). Tr. 1927; *see also* Respondent's Exhibit 4 (March 11, 2003 letter from Johnston to Archer listing tasks to be done in preparation for trial. Almost every task relates only to the guilt-or-innocence phase of the trial.). To be sure, Johnston testified that he began work on sentencing phase preparation at his first meeting with applicant by requesting that applicant write his "life story." PCR Tr. 448-449. It is unclear whether this occurred at the September meeting at which time Johnston was not applicant's attorney or after Johnston had entered his appearance in December 2002. Also, in mid-February 2003, three months before trial, Johnston mailed form letters to a variety of potential witnesses and family members. The letters requested that the recipients contact Johnston. Respondent's Exhibit 5. It is apparent from the letters that Johnston had not spoken to any of these people, including applicant's biological father.⁴ Respondent's Exhibit 5. In April, less than one month before trial, Johnston sent applicant a letter complaining that applicant had not yet compiled the witnesses to be called at trial. Johnston had formulated his own list. Respondent's Exhibit 6. For the most part this list of witnesses was the same group to whom Johnston mailed the form letters in February.⁵ PCR Tr. 483. Johnston was never able to locate a single document memorializing a conversation with any potential witness. Furthermore, Johnston could not say whether he and Archer had met with applicant more than two times.⁶ PCR Tr. 441. Johnston did elaborate that

⁴ The body of each letter, including the letter to applicant's father, began with the following: "I am one of the attorneys representing Jessie [sic] Sapp. Your name was provided to me by Mr. Sapp and his mother, Cathy Catchings."

⁵ It appears from this letter that Johnston did not realize that "Robert Sapp" and "Robert Sapp, Jr." were the same person, applicant's biological father. He placed Robert Sapp in the first list and then placed Robert Sapp, Jr. in the second list with a notation that he did not have his address. However, he did have the address and had previously mailed a form letter to applicant's father.

⁶ This is consistent with Johnston's pre-trial representation that he had met with applicant a

he and Archer had met with applicant "[a]s many times as we needed to. You know, there is a point in the representation when you don't need to meet with your client, it's kind of like a bell curve. You start out needing to meet with your client frequent [sic] at the beginning of the case to gather information and to formulate a direction for the case." PCR Tr. 441-442.

Johnston waited until April 16, 2003, a month before trial, to write an introductory letter to Dr. David Baggett, M.D., a family physician who had seen applicant as a patient. Petitioner's Exhibit 18. Eventually, the defense called Dr. Baggett as a witness in the sentencing phase of the trial. Johnston never discussed with Dr. Baggett the substance of his anticipated testimony. PCR Tr. 12. Dr. Gordon Kimbrell, a Charter Psychiatric Hospital psychologist who administered testing to applicant as a 14-year-old inpatient, recalled a similar experience. Dr. Kimbrell was subpoenaed as a witness for applicant and appeared in the courtroom in Berkeley County only to learn that he was not going to be called. Dr. Kimbrell did not recall having a single substantive conversation with Johnston or Archer about his potential testimony. Petitioner's Exhibit 25, ¶ 2-4. Dr. Kimbrell's recollection puts into context Johnston's testimony during the PCR hearing on this topic. At first Johnston thought that he had spoken with Dr. Kimbrell though he was not certain. PCR Tr. 526-527. He further believed that Dr. Kimbrell was not "receptive to cooperating whatsoever." PCR Tr. 530. Johnston could not recall precisely why he thought this but believed that Dr. Kimbrell had indicated that he did not even know what the trial was about. PCR Tr. 531-532. Johnston was unable to recall having a substantive conversation with Dr. Kimbrell but assumed he had "substantial contact" with him because he had written Dr. Kimbrell's home telephone number on a potential witness list. PCR Tr. 531-532. Johnston finally admitted that it was possible that he never had a substantive conversation with him about

"couple of times." Tr. 29.



his evaluation of applicant. PCR Tr. 534.

Likewise, Johnston waited until May 13, 2003, the week of trial, to subpoena Dr. Patrick McArthur, one of the evaluating psychiatrists at Charter Psychiatric Hospital. Petitioner's Exhibit 17; *see also* Petitioner's Exhibit 16. Dr. McArthur refused to comply with the subpoena because he had not been provided with a medical release of information and because he was given only 2-3 days' notice. Johnston initially testified at the PCR hearing that he was "95 percent sure" he spoke to Dr. McArthur. PCR Tr. 456. Later, on cross-examination, he could not recall if he spoke to Dr. McArthur. PCR Tr. 523, 525-526. There was also no documentation of any contact between Johnston and Dr. McArthur. PCR Tr. 536. Dr. McArthur's response to Johnston's subpoena indicate that they had never spoken about applicant since Dr. McArthur, even after being subpoenaed, had never been provided with a signed release of information form.

Sometime on or after May 7, 2003, Johnston faxed to applicant's mother a printout of a website regarding Axis IV psychosocial and environmental stressors.⁷ PCR Tr. 543-544; Petitioner's Exhibit 19. Johnston had placed x's next to a number of stressors he believed may have been present in applicant's life. PCR Tr. 544. Apparently, Johnston wanted applicant's mother to explain the stressors in applicant's life. PCR Tr. 543-544.

Despite the lack of investigation, Archer and Johnston were on notice of a significant amount of information. At Johnston's request, applicant provided a detailed, written "life story." PCR Tr. 545. The information provided to Johnston included, *inter alia*, the following:

- Applicant's mother suffered from mental illness. PCR Tr. 545.

⁷ This document was downloaded from the website http://ivy_league0.tripod.com/rhyme_of_the_ancient_wanderer. This website, still online today with the identical page printed out by Johnston, is administered by a 29-year-old satellite communications technician. *See* http://ivy_league0.tripod.com/rhyme_of_the_ancient_wanderer/id1.html.

- Applicant's mother abused drugs. PCR Tr. 545.
- Applicant's mother had been to jail. PCR Tr. 546.
- Applicant's stepfather abused drugs. PCR Tr. 546.
- Applicant's mother and grandmother attended drug and alcohol treatment at Fenwick Hall in Charleston, SC. PCR Tr. 547.
- Applicant's stepfather had been in jail. PCR Tr. 547.
- Applicant began to get sick because of fear for the safety of his mother and himself. PCR Tr. 547-548.
- Applicant suffered from depression when he was 12 or 13 years old. PCR Tr. 548.
- Applicant suffered from symptoms of anxiety and was home-bound. PCR Tr. 548.
- After applicant's friend killed himself, applicant drank every day and night until he passed out. PCR Tr. 548.

Nevertheless, counsel still did not think to hire any experts or to request a continuance to further develop these facts. Indeed, at a March 2003 pretrial motions hearing, Judge Dennis, having received a letter from applicant expressing concerns that Archer and Johnston were not going to be ready for trial, specifically invited defense counsel to move for a continuance and indicated that such a motion would be entertained. Tr. 1924, 1942. Archer refused to request a continuance and asked the court to disregard applicant's letter. Tr. 1958-1959.

II . Trial Proceedings

At trial, Archer and Johnson relied on the theory that the victim was shot by another state trooper and that several state troopers destroyed evidence and committed perjury to conceal this fact. Archer and Johnston continued to pursue this theory even in the sentencing phase of the trial. Indeed, Archer specifically tried to characterize the state troopers negatively in the hope that a juror already inclined to dislike law enforcement would sentence applicant to life. "So I



know for a fact that there are some people that basically don't like police officers, you know they get a speeding ticket and they don't like it and they just feel that, so." PCR Tr. 593. Archer's reliance on residual doubt in the sentencing phase did not get very far. The prosecution objected to Archer's opening statement when it became clear that he was arguing residual doubt. Tr. 1864. It is unclear whether Archer was aware that the South Carolina Supreme Court had ruled that residual doubt is not an appropriate consideration in the sentencing phase of a capital case. PCR Tr. 616.

Specifically, at trial Archer theorized that another trooper shot the victim while they were trying to shoot applicant as he was running away. Because the shooting occurred at a license checkpoint, there were numerous witnesses who indicated that applicant had shot in the direction of the victim. Furthermore, the ballistics testing clearly established that the bullet fired from applicant's gun killed the victim. Tr. 1430, 1433-1434. Indeed, as early as February 2003 Archer recognized that this ballistics evidence completely undermined the working defense theory that this shooting was the result of friendly fire. Petitioner's Exhibit 13 (February 6, 2003 letter from Archer in which he stated, "Tracing [applicant's] gun to the bullet, and the fact that the bullet entered the office [sic] at a 45 degree angle, just about shoots down any theory of another police officer shooting Johnson."). Johnston conceded that if the state's expert was to be believed, then the ballistics evidence did in fact remove any possibility that this was a friendly fire incident. PCR Tr. 512-513. Archer and Johnston did not hire an expert to refute this evidence. PCR Tr. 514. Ultimately, Johnston conceded that their defense could have alienated the jury. PCR Tr. 562.

As for the sentencing phase, Johnston candidly admitted that they did not have a theory. PCR Tr. 487. Indeed, in Johnston's opinion attorneys do not utilize a theory in the sentencing

phase of a capital case. Rather, he put up "adorable" and crying witnesses in the hope that they would "appeal" to one juror. PCR Tr. 487. When asked what he wanted the jury to understand about applicant, Johnston could not recall "anything specific." PCR Tr. 488. He did recall that applicant "started off as a normal kid" and he wanted to "paint that picture." PCR Tr. 488. Ultimately, however, it was Archer who conducted all the direct and cross-examinations as well as the closing argument in the sentencing phase. At the last minute Archer had to present the sentencing phase evidence because Johnston did not feel well. PCR Tr. 590. "[T]hey were really not my witnesses. [Johnston] didn't feel well and I said, just give me the file. And I just took over." PCR Tr. 590. Archer was not aware of the anticipated testimony of the sentencing phase witnesses. PCR Tr. 590-591. Further elaborating on this point Archer testified that "I didn't interview any of [the penalty phase witnesses]. I mean a file was shoved in front of me and I got up and I started to ask questions." PCR Tr. 597. Specifically, he explained that he had never spoken to Susan Lantz, applicant's aunt, or James Catchings, applicant's brother before they testified. PCR Tr. 599.

In the end, the sentencing phase presentation, occupying only 50 pages of the transcript, consisted primarily of several family members recounting portions of applicant's life. The mitigation case relied primarily on applicant's aunt, Susan Lantz, his seriously mentally ill mother, Cathy Catchings, and his younger brother, James to describe generally applicant's childhood and his family life.

III . Post-Conviction Relief Proceedings

The evidence case presented to this Court after an appropriate investigation revealed substantial mitigation the jury never heard. This evidence provided a complete social history documenting a childhood filled with abuse, mental health problems, and a chaotic and constantly

changing home environment. The witnesses were also able to explain the effect of applicant's genetics and his childhood on him and his actions leading up to and on July 7, 2002. The following represents a summary of the mitigation case presented at applicant's post-conviction hearing.

A. Applicant's Background

Applicant was born to a drug addicted mother named Cathy Catchings whose own history included reform school, foster care, custody of the Department of Social Services, juvenile detention and significant mental illness. PCR Tr. 54. By the time applicant's mother was 11 years old, she had already been diagnosed with depression. PCR Tr. 54. Around this age she also began to use alcohol and drugs and seemed "completely out of control." PCR Tr. 54. Applicant's mother also suffered from long-term symptoms of anxiety. Other members of applicant's maternal side of the family had substantial patterns of mental, emotional and behavioral impairments as well as pervasive substance abuse problems. PCR Tr. 37. Applicant's mother married his father when she was 18 years old. At this point, she was taking Prozac for depression. PCR Tr. 57. She soon became pregnant with applicant who was born in 1979. PCR Tr. 58. Cathy's erratic behavior worsened and she would leave for weeks at a time. PCR Tr. 59. Family members became concerned about her inability to nurture and care for applicant and began to take him for extended periods of time.

When applicant was two years old, his mother moved in with another man, Robert Catchings, who would later become applicant's stepfather. Robert Catchings physically abused applicant's mother. Cathy's unpredictable behavior continued and she would forget to pick up applicant from daycare. PCR Tr. 67. Applicant began demonstrating symptoms of stress including throwing up and not sleeping. PCR Tr. 68-69. When applicant was a toddler, Cathy

and Robert Catchings began to steal lawn mowers at night. Applicant was in the car with them during these crimes. PCR Tr. 69. Cathy and Robert were using drugs and Cathy was periodically in legal trouble. PCR Tr. 69. At this point Cathy and Robert began to teach applicant that the police were bad and that "they will come take your mother away." PCR Tr. 69.

The chaos of applicant's home life continued when he started school. When applicant began the first grade, his mother was in jail. They corresponded by mail and had an ongoing game of tic tac toe. PCR Tr. 72. When applicant began second grade, his mother and grandmother were admitted to Fenwick Hall in Charleston for drug and alcohol treatment. PCR Tr. 73. During this time applicant's stepfather, Robert Catchings, was serving 18 months in a Florida prison for burglary. PCR Tr. 73. Applicant was living with his father in Florida. After his mother left Fenwick Hall, she took applicant from Florida back to Charleston. PCR Tr. 73. Once Robert Catchings was released from prison he came to live with applicant and his mother and he began stealing again. Robert and applicant's mother continued to reinforce the idea that any knock at the door could be the police coming to take them away.⁸ PCR Tr. 74. Robert continued to physically abuse Cathy and applicant would frequently try to intervene. PCR Tr. 75. Applicant continued to become sick and throw up during this time. PCR Tr. 80. Applicant's father and stepmother noticed that whenever applicant returned to live with them, he was shaky, sweaty and would become withdrawn in the presence of a large number of people. PCR Tr. 80. However, after about a month applicant would generally return to normal and was a respectful and easy-to-manage child. PCR Tr. 82-83.

In the fourth-grade applicant was doing very well in school both academically and

⁸ In fact, this mis-socialization of applicant regarding law enforcement manifested itself in significant symptoms of anxiety when police officers came to applicant's school to visit the students. PCR Tr. 77-78.

socially. PCR Tr. 84; Petitioner's Exhibit 5. A teacher noted that applicant was a "super worker," a "very pleasant boy," and she was "looking for great things from [him] in the years to come!" PCR Tr. 85; Petitioner's Exhibit 5. The following school year saw a dramatic change in applicant's school progress. Applicant still maintained above average grades, but they had dropped from the previous year. The marks for social development, work habits, and effort, however, were significantly lower than the previous year. PCR Tr. 86; Petitioner's Exhibit 6. Indeed, applicant did not receive one satisfactory score in either social development or work habits.⁹ PCR Tr. 87.

During this time applicant was becoming increasingly worried about his mother's safety. There were substantial periods of time during which applicant could not locate her. PCR Tr. 88. Applicant also learned that his mother had married Robert Catchings. PCR Tr. 89. Applicant began to get in trouble at school and at home and was sent to live with his mother again. PCR Tr. 92. He started using alcohol around this time. PCR Tr. 92-93. Applicant also began to feel hopeless, so much so that his mother believed he needed professional help. PCR Tr. 96. At the age of 14 applicant was admitted to Charter Psychiatric Hospital. PCR Tr. 97. He was diagnosed with depression and prescribed Prozac. PCR Tr. 99. The psychiatrists also noted his anxiety symptoms, and his school records reflect that applicant had panic attacks. PCR Tr. 102. Back at home applicant engaged in "anticipatory behavior" which included playacting in front of a mirror in the morning in an attempt to anticipate the day's events. This behavior is consistent with the behavior of children living in unpredictable environments. PCR Tr. 136.

When applicant was 17 years old, he witnessed the suicide of his best friend. Applicant and several friends were at applicant's trailer drinking and smoking marijuana. PCR Tr. 103. At

⁹ It is this drastic change in school performance that Johnston noticed.

some point the others left leaving applicant and his best friend, Virgil. Applicant saw Virgil put a gun in his mouth and assumed he was joking. Applicant heard a "pop" and it took a few moments before he realized what had happened. PCR Tr. 211. When he recognized that blood was coming from his friend's mouth, he called 9-1-1. While he was on the phone with the 9-1-1 operator, he thought Virgil was trying to speak but he was unable to make out the words. PCR Tr. 212. Applicant could smell the blood and gunpowder while he was sitting with his friend and holding his head. PCR Tr. 212. Applicant still recalls the song which was playing while he was waiting for the ambulance to arrive. PCR Tr. 212. He was distraught after this episode and was subsequently diagnosed with post-traumatic stress disorder (PTSD). PCR Tr. 104. Consistent with people suffering from PTSD, applicant avoided the vicinity of the trailer where this happened and also suffered intrusive thoughts of the episode. PCR Tr. 227. He began to drink more heavily at this point. PCR Tr. 218.

Shortly after this event, Robert Catchings was sentenced to eight years in prison for drug trafficking. PCR Tr. 104. Applicant was now responsible for supporting his mother and little brother. Applicant accomplished this by selling drugs as his stepfather had taught him. PCR Tr. 105. For the first time, applicant began to garner the respect of his mother and stepfather. At one point, applicant came home and tossed a bag of money on the bed. His mother was on the phone with his stepfather who was still in prison. His mother looked at applicant and the money and said to his stepfather, "I feel like I'm looking at you." PCR Tr. 109. Applicant imagined that this feeling of recognition was similar to what high school students must feel at graduation. PCR Tr. 108. Despite engaging in this criminal conduct, applicant tried to be a father figure for his little brother, James. He taught him how to ride a bike and would use humor to help his brother deal with the stresses of their life. PCR Tr. 107. For example James was afraid to learn how to



ride his bicycle because they lived near a busy street. Applicant, therefore, brought James and the bicycle into their apartment which contained almost no furniture. Applicant rode the bike inside the house to help teach James and purposely crashed into the wall to make James laugh. PCR Tr. 106-107.

By this time applicant was using drugs and drinking heavily, and he was arrested for a variety of primarily drug-related offenses. PCR Tr. 111. In May of 2001, applicant was sentenced to jail but was allowed to leave during the day as part of a work release program. PCR Tr. 153. While in jail he learned that his girlfriend, Krista Lewandowski, had become pregnant but that the child would probably not survive long after birth due to medical complications. PCR Tr. 112. In July 2001, around the time that applicant learned of his girlfriend's medical issues, he left for work and did not return to jail. Several months later applicant went to the hospital to be with his girlfriend during the delivery. He was able to hold his daughter before she died several hours after birth. PCR Tr. 112.

B. Effects of Applicant's Background

Jan Vogelsang, the social worker who conducted the social history investigation as well as a biopsychosocial assessment of applicant concluded that there was an accumulation of factors in applicant's life that placed him at "a high risk to end up someday in very serious trouble." PCR Tr. 114. These factors included having a mother who was severely mentally ill, abused drugs, and failed to provide adult supervision and support when applicant was a young child; witnessing serious physical violence against his mother at the hands of his stepfather, Robert Catchings; and being taught to fear the police at an early age. PCR Tr. 115-116. Moreover, Ms. Vogelsang found that there was insufficient compensation in applicant's life to undo the negative consequences of growing up in the unstable, unsafe and always changing environment that was

his childhood. PCR Tr. 118.

1. Anxiety and Post-Traumatic Stress Disorder

The instability of his environment, the violence he witnessed, and his genetic predisposition resulted in applicant suffering from anxiety at an early age and increased the likelihood that he would later suffer from post-traumatic stress disorder. Dr. Rebekah Bradley, an Emory University professor who treats war veterans suffering from PTSD and conducts research in the area of PTSD and childhood abuse testified about the relationship of applicant's childhood to his anxiety and PTSD diagnosis. She noted that the history of psychiatric disorders, specifically anxiety disorders, found in applicant's family as well as the violence witnessed and suffered by applicant increased his likelihood of developing post-traumatic stress disorder. PCR Tr. 183, 185-186. Specifically, Dr. Bradley identified three types of childhood experiences that placed him at high-risk for developing PTSD: he was the victim of physical abuse; he witnessed the physical abuse of his mother, and; he witnessed the suicide of his best friend. PCR Tr. 188.

While there were numerous occasions during which applicant witnessed or was the victim of physical abuse, there was one particular instance of abuse that Dr. Bradley found especially significant. Applicant was nine or ten years old and living with his stepfather. PCR Tr. 189. He and a friend were pretending to draw a Playboy Magazine when applicant's stepfather arrived home. The stepfather was clearly angry and sent applicant's friend home; applicant became nauseous and sweaty. PCR Tr. 190. Applicant's stepfather yelled at applicant calling him "fucking ignorant" and then pushed him hard against a wall. He then dragged applicant to the bathroom and forced him to actually eat a bar of soap. PCR Tr. 190. During this time applicant was crying and felt ashamed and embarrassed. After eating the bar of soap, applicant was beaten with a cord. PCR Tr. 191.

1. *WVB*

Applicant also witnessed the frequent abuse of his mother. Dr. Bradley noted one particular example. Applicant was eight or nine years old. PCR Tr. 196. One evening he walked into the bathroom and saw his stepfather injecting his leg with something which applicant understood to be drugs. PCR Tr. 195. Soon thereafter he heard his stepfather and mother fighting. He became anxious, nauseous and distressed. His mother grabbed him and his half brother who was living with them at the time and took them to the car. At this point applicant's heart was racing and he was sweaty. PCR Tr. 195. After having some trouble getting the car started, applicant's mother began to drive down the driveway when the car stalled. At this point applicant felt "frozen." PCR Tr. 196.¹⁰ When he looked through the back windshield, he saw his stepfather coming towards them. Due to the dust and the red light from the brakes, this image reminded him of the devil. Applicant's stepfather got to the car and assaulted his mother. PCR Tr. 196.

According to Dr. Bradley prior to turning twelve, applicant was an anxious child who worried constantly and felt nauseous frequently. PCR Tr. 198. Applicant was also sad for long periods of time at this age. PCR Tr. 199. Dr. Bradley's observations were consistent with the psychiatric report from Charter Psychiatric Hospital when applicant was 14. At that time, his mother indicated that he had been depressed for 18 months beginning when applicant was 12 years old.¹¹ Petitioner's Exhibit 15 (report of psychiatric evaluation). Prior to his admission at Charter, applicant was experiencing what Dr. Bradley called common anxiety symptoms including decreased appetite, social withdrawal and feelings of hopelessness. PCR Tr. 200. He also experienced suicidal ideations and a "sadness within his heart." Petitioner's Exhibit 15.

¹⁰ Dr. Bradley testified that this "frozen" feeling described by applicant is called "dissociation" and is a common report from people, especially children, who are terrified. PCR Tr. 197.

Ultimately, applicant was diagnosed with panic disorder and depressive disorder. PCR Tr. 201. Dr. Bradley concluded that applicant's childhood left him anxious and distressed generally, and he was more likely to suffer from PTSD and other associated problems such as substance abuse. PCR Tr. 208.

Even before applicant witnessed the suicide of his friend, Dr. Bradley observed symptoms of post-traumatic stress disorder; however, she was not able to definitively conclude that applicant met the diagnosis for PTSD at this point in his life. After Applicant witnessed the suicide, however, Dr. Bradley found that he clearly was suffering from PTSD. PCR Tr. 214. Consistent with research and her clinical work, applicant's substance abuse increased significantly after the death of his friend. PCR Tr. 218. Indeed, self-medication frequently coexists with PTSD. While such self medication may mask some of the symptoms of PTSD, it generally does not "cure" the person and sometimes worsens the symptoms. PCR Tr. 219.¹² In fact, applicant's substance abuse of drugs leading up to and on July 6 and 7, 2002, prevented Dr. Bradley from being able to diagnose applicant with PTSD during a specific time frame. PCR Tr. 220. However, Dr. Bradley was able to determine that applicant was suffering from symptoms of PTSD on July 7, 2002. She further concluded that applicant was "under the influence of emotional or mental disturbance" when he shot Trooper Johnson and that his mood and anxiety symptoms combined with his substance abuse and traumatic experiences "clearly impacted his decision-making capacities" on the evening of the shooting. PCR Tr. 221. Finally, Dr. Bradley

¹¹ This is the same time period during which applicant's school performance deteriorated.

¹² Dr. Schwartz-Watts, a forensic psychiatrist who evaluated applicant and whose testimony is discussed in detail *infra*, also noted the episode during which applicant witnessed his best friend shoot himself. She indicated that the short-term treatment he received after his diagnosis of PTSD, while sufficient as "crisis intervention," did not provide the type of long-term treatment which was necessary, especially in light of his prior admission to Charter Psychiatric Hospital. PCR Tr. 281-282.

19 *PCW*

concluded that applicant was mentally ill when he shot Trooper Johnson. PCR Tr. 221.

Dr. Donna Schwartz-Watts, a forensic psychiatrist, also evaluated applicant. As with Ms. Vogelsang and Dr. Bradley, Dr. Schwartz-Watts noted the pervasiveness of mental health illness and substance abuse in applicant's maternal side of the family. PCR Tr. 249-250. Dr. Schwartz-Watts indicated that because of Cathy's criminal arrests and convictions, she was separated from applicant on three occasions before he was eight years old. PCR Tr. 252. During these periods, applicant was moved to different caretakers and changed schools and residences in a sudden, unplanned manner which was disruptive to his childhood development. PCR Tr. 253.

Dr. Schwartz-Watts found one particular childhood incident remarkable. When applicant was three or four years old, he witnessed his stepfather punch his hand through a window. Applicant vividly recalled blood dripping in the bathtub. PCR Tr. 254. Dr. Schwartz-Watts indicated that this incident, while not involving violence directed at applicant, was nevertheless terrifying to him as a child. PCR Tr. 255. Indeed, the fact that applicant reported this incident at all was significant to Dr. Schwartz-Watts, because he, like many child victims, under reported the violence he witnessed as a child. PCR Tr. 255-257.

Dr. Schwartz-Watts found it significant that at the age of 14 applicant was diagnosed with depression and panic disorder, both Axis I mental illnesses. PCR Tr. 263. Psychological testing administered at the time also indicated depression. PCR Tr. 270. Even having worked at the Department of Juvenile Justice for fifteen years, she stated that such a diagnosis at that age was uncommon and cause for concern. PCR Tr. 263. She also noted that the onset of the depression, dating back to when applicant was twelve years old, was noteworthy because it was consistent with the onset of depression in other members of his family, particularly his mother who was diagnosed with depression at the age of eleven. PCR Tr. 264.



As did Dr. Bradley, Dr. Schwartz-Watts noted that applicant was suffering from suicidal ideation, depressed mood, behavioral difficulties, and feelings of hopelessness. PCR Tr. 264. Additionally, applicant showed symptoms of anxiety: stomach problems, nervousness, shakiness, increased sweating, and an increased heart rate.¹³ PCR Tr. 265. Additionally, Dr. Schwartz-Watts noted applicant's global assessment of functioning score of 40 when he was at Charter Psychiatric Hospital. According to Dr. Schwartz-Watts such a low score is an indication of severe mental illness and would qualify someone for disability. PCR Tr. 276. Moreover, this score suggested a major impairment in several areas of functioning such as work, school, family relations, judgment, thinking or mood. PCR Tr. 278.

According to Dr. Schwartz-Watts, the constellation of applicant's mental illnesses are consistent with clinical practice and research. "[P]ost-traumatic stress disorder is associated with increased rates of . . . major depressive order, substance-related disorder, panic disorder, agoraphobia, obsessive-compulsive disorder, generalized anxiety disorder, social phobia, specific phobia and bipolar disorder." PCR Tr. 285; DMS-IV-TR.¹⁴ In other words, the types of illnesses from which applicant suffered as a child and young adult were related.

Dr. Schwartz-Watts concluded that applicant was demonstrating symptoms of his mental illness the day and night of the crime. He was extremely anxious during this time, was using a number of substances, and was not sleeping. PCR Tr. 295. On the night of the incident, he first went to his ex-girlfriend's house. There were other people at the house which made him

¹³ These anxiety symptoms were a constant feature of applicant's childhood and remained with him as he grew older. Indeed, in October 2000 Dr. Schwartz-Watts noted that applicant suffered an anxiety attack after being pulled over by police. He had to be taken by ambulance to the emergency room and was found to be tachycardic with an irregular EKG. PCR Tr. 288-290.

¹⁴ The Diagnostic and Statistical Manual of Mental Disorders is used by all psychiatrists when diagnosing a patient. PCR Tr. 272-273. This Court granted applicant's motion to consider the DSM-IV a "learned treatise." PCR Tr. 273.

uncomfortable, a symptom of PTSD according to Dr. Schwartz-Watts. PCR Tr. 296. Later, when applicant approached the license check point, he could not think clearly and was unable to understand what his ex-girlfriend was saying to him. PCR Tr. 297. He began to feel as if he were under water and overheated, common symptoms of anxiety. PCR Tr. 298.

Dr. Schwartz-Watts found that applicant's history and mental illness influenced his actions on the night he shot Trooper Johnson. Further, she testified that applicant's anxiety and substance abuse substantially impaired his ability to conform his conduct and that he was under the influence of an emotional or mental disturbance at the time of the crime. PCR Tr. 305. She also concluded that applicant was suffering from symptoms of PTSD. PCR Tr. 306-308.

2. Substance Abuse

Dr. Alex Morton, a psychopharmacologist and professor of pharmacy practice and psychiatry at the Medical University of South Carolina evaluated applicant and his history of substance abuse. Generally, Dr. Morton found a number of factors which contributed to applicant's substance abuse, including a genetic predisposition, environmental factors, psychiatric disorders, and trauma. PCR Tr. 356-360.

Dr. Morton noted that applicant's use of alcohol began early, around eleven years old. PCR Tr. 356. In addition to alcohol, applicant, at the suggestion of his stepfather, began to use marijuana when he was 12 or 13 years old. PCR Tr. 100. His stepfather recommended marijuana to relieve a headache. Applicant would later go on to use other drugs including cocaine, methamphetamine, hallucinogenic drugs, morphine, Percocet, Valium, and Xanax. PCR Tr. 368-369.

Dr. Morton concluded that applicant was primarily using drugs and alcohol to mitigate the symptoms of his anxiety disorder and his depression. PCR Tr. 349-350. Dr. Morton found



that applicant carefully chose drugs that had some effect on his psychiatric symptoms, mainly his anxiety symptoms. For example, applicant rarely used marijuana, because it would cause or exacerbate his panic attacks. PCR T. 374. Similarly, applicant rarely used cocaine alone because it increased his anxiety symptoms even while relieving depressive symptoms. PCR Tr. 352, 360. This self-medication, while temporarily alleviating the symptoms of his psychiatric disorders, worsened their progression, intensity and frequency over time. PCR Tr. 347.

Ultimately, applicant's long-term and consistent use of drugs to self-medicate his anxiety and depressive symptoms resulted in severe addiction. PCR Tr. 346. While the short-term effects of his substance abuse may have been positive in terms of mitigating the symptoms of his mental illnesses, this abuse produced very negative long-term effects. In addition to worsening his psychiatric symptoms, applicant's substance abuse resulted in a high level of impulsivity, irritability, and inability to think clearly. PCR Tr. 375.

Specifically, on July 6, 2001, applicant used morphine, Percocet tablets, cocaine, and alcohol. PCR Tr. 372. In addition to the negative effects of these drugs discussed *supra* Dr. Morton noted that applicant was also suffering withdrawal from some of the drugs by the time he was stopped at the license check point. PCR Tr. 375. For example, Dr. Morton concluded that applicant was suffering from withdrawal from morphine which he had not consumed for several hours before the shooting. PCR Tr. 375. Dr. Morton testified that withdrawal symptoms generally produce erratic and unpredictable behavior. PCR Tr. 376. Dr. Morton concluded that applicant's underlying psychiatric issues and his substance abuse, in addition to generally producing unpredictable behavior, made it difficult for him to think logically as he approached the license check point and throughout the traffic stop. PCR Tr. 396.



INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Most, though not all, of applicant's claims are based on the failure of trial counsel to fulfill their constitutional obligation to provide effective assistance of counsel. Because of the prevalence of this claim throughout applicant's post-conviction relief application, I will provide a general overview of the law in this area.

"An ineffective assistance claim has two components: A[n applicant] must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "To establish deficient performance, a[n applicant] must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'" *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 687). Under this standard, a reviewing court must "conduct an objective review of [counsel's] performance, measured for 'reasonableness under prevailing professional norms,' . . . which includes a context dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time[.]'" *Wiggins*, 539 U.S. at 523 (quoting *Strickland*, 466 U.S. at 688). And when counsel's challenged conduct is purportedly attributable to "tactical judgment," that judgment and the "investigations supporting" it must themselves be objectively reasonable. *Wiggins*, 539 U.S. 521.¹⁵

An applicant establishes prejudice by demonstrating a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 695. This standard requires a showing by less than a preponderance, and

¹⁵ As for applicant's claims that trial counsel failed to investigate, develop and present available mitigating evidence, Respondent has conceded that applicant's trial counsel performed deficiently. "Respondents [sic] acknowledge that the focus on these alleged deficiencies must be upon whether Sapp has proven the second prong under *Strickland*." Respondent's Post-Hearing Memorandum (hereinafter "RPHM") at 107.

is satisfied where "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537. "[T]he question is whether '[counsel's deficient performance] could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Strickler v. Greene*, 527 U.S. 263, 290 (1999) (quoting *Kyles*, 514 U.S. at 435).

I. Applicant was denied his right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina Law by trial counsel's failure to investigate, develop or present mitigating evidence.

A. Introduction

Trial counsel's performance in this case fell below the minimum standard of professionally reasonable representation. One of applicant's attorneys had a policy of not conducting the "leg work" of a capital case thus leaving all of the investigation for the sentencing phase of the trial to his co-counsel who had never tried a capital case and had never used an expert of any type in a criminal case. To make matters worse, based on a blatant misunderstanding of applicant's right to funds for expert and investigative services and a general lack of knowledge of the role of experts in capital cases, counsel did not hire a single investigator or expert to assist with the sentencing phase which began about five months after the attorneys became involved in the case. The performance of counsel at trial was no better. The attorney who had no role in preparing for the sentencing phase was actually the attorney who conducted every direct and cross-examination during this phase. Indeed, he candidly admitted having never seen a file on some of the witnesses he questioned and not knowing who some of them were, including applicant's aunt and brother. Based on the lackluster pre-trial investigation trial counsel were unable to protect their client, object appropriately, or present evidence in mitigation. The result was not surprising - the jury was provided a one-sided, at times

inaccurate, portrayal of applicant and did not hear substantial information that put into context his actions on July 7, 2002, and more generally would have provided support for a life sentence.

As discussed *supra*, to prevail on an ineffective assistance of counsel claim, applicant must demonstrate that trial counsel's deficient performance prejudiced him. It is unnecessary to repeat here the facts of Archer and Johnston's involvement in this case and the lack of pretrial investigation and preparation generally. However, there are several aspects of trial counsel's representation that are remarkable. First, trial counsel had under five months to prepare for a death penalty trial and despite this tight timeframe, they did not begin working on the sentencing phase in any real way until approximately two months before trial. Even experienced capital defense attorneys assisted by a team of mental health experts and investigators would find it difficult to prepare in such a short amount of time. Second, trial counsel were made aware of a significant amount of information about applicant's background that required further investigation and development. Not only did the necessary investigation not occur but trial counsel explicitly refused to request a continuance despite an invitation for such a motion from the trial court.

Because of trial counsel's failure to conduct an adequate investigation, they were unable to: make informed judgments about which witnesses to call at trial, rebut inaccurate characterizations of applicant, and provide the jury with information which was relevant to his actions on July 7, 2002. The jury was left to put together on its own bits and pieces of information about applicant which were unexplained and often only mentioned in passing by witnesses who had not been prepared to testify.

A comparison of trial counsel's performance in applicant's case with the performance of trial counsel deemed deficient in *Council v. State*, 670 S.E.2d 356 (2008) is instructive. In both



cases the mitigation investigation was begun late and was incomplete. At trial in both cases the jury was provided with only a cursory outline of the defendant's life history. In both cases, post-conviction investigation revealed that the defendants were mentally ill. Moreover, the social histories of both Council and applicant were remarkable for the prevalence of mental illness and criminal activity of immediate family members and a dysfunctional home life that included violence and constant moving. *See Council* at *3. Nevertheless, at both Council's and applicant's trials the jury heard only family members' general testimony which failed to provide medical evidence or describe the mental health issues. Moreover, the limited testimony at these trials omitted significant and mitigating information about the childhood and family history of Council and applicant. *Council* at *10. As in this case, defense counsel in *Council* ultimately chose to present an already rejected guilt-or-innocence phase defense theory that the defendant was not guilty of murder.

The state supreme court concluded that the representation in *Council* was constitutionally inadequate; I believe that the facts of this case call for the same result. If anything, the case for relief here is even stronger than in *Council*, since the gruesome facts of Council's crime - a ghastly torture-rape-murder of a 72-year-old victim of a residential burglary - were far more egregious than those involved here, and applicant's burden of showing prejudice from his lawyers' sentencing-phase errors is comparatively less.

B. Deficient Performance

Trial counsel failed to conduct a meaningful investigation into applicant's background which ultimately led to their inability to rebut aggravating evidence and offer powerful mitigation that a reasonable investigation would have uncovered. The duty of defense counsel to conduct a thorough mitigation investigation into the background of a capital client is well-

established. *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000). Such investigation is required not only to develop mitigating evidence, but also to test the prosecution's case for the death penalty. "The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecution.'" *Wiggins*, 539 U.S. at 524 (internal citation omitted) (emphasis in original); *see also Rompilla v. Beard*, 545 U.S. 374 (2005) (failure to review court file containing evidence relating to prior convictions was unreasonable when defense knew that prosecution intended to rely on it); *Council v. State*, 670 S.E.2d 356 (2008) (failure to conduct a meaningful investigation despite evidence suggesting its necessity was unreasonable). Moreover, the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (hereinafter ABA Guidelines) provide specific guidance concerning trial counsel's duties in a capital case.¹⁶ "[C]ounsel . . . have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation." ABA Guidelines 10.11.A (2003).

Decisions made to curtail a mitigation investigation are not entitled to deference if they were made on the basis of an incomplete investigation. In other words, a cursory investigation cannot justify a tactical decision regarding sentencing strategy. *Wiggins*, 539 U.S. at 527. While it is true that trial counsel need not undertake an investigation he reasonably believes, based on other information, will be fruitless, counsel cannot arbitrarily neglect to conduct an investigation - especially when, as in this case, the need for such an investigation is affirmatively shown by

¹⁶ The ABA Guidelines have been cited with approval by numerous federal and state courts, including the South Carolina Supreme Court. *See e.g., Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Council v. State*, 670 S.E.2d 356 (2008).

other information. Therefore, a court tasked with assessing the reasonableness of an investigation must consider whether the evidence known to the trial attorneys would lead a reasonable attorney to investigate further. "Even the limited information obtained should have put counsel on notice that [the defendant's] background, with additional investigation, could potentially yield powerful mitigating evidence." *Council* at *8. See also *Wiggins* 539 U.S. at 527; *Council v. State*, 670 S.E.2d 356 (2008) (strategic choices made by counsel after an incomplete investigation are reasonable "only to the extent that reasonable professional judgment supports the limitations on the investigation.") (quoting *McKnight v. State*, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008)) (quoting in turn *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004)).

Trial counsel's failure to conduct a thorough mitigation investigation could not have been, and in this case was not, based on a legitimate tactical decision to forego such an investigation. Here applicant's counsel had sufficient, indeed significant, information about applicant that further investigation by a trained expert was necessary. What information Johnston did know about applicant's background was primarily gleaned from a 16-page single spaced "life history" written by applicant at Johnston's request. PCR Tr. 545. This document detailed substantial information about applicant's psychiatric problems and substance abuse as well as his family's psychiatric and criminal histories. Moreover, the Axis IV stressors printout from the internet described *supra*, establishes that Johnston believed that the following psychosocial and environment stressors, *inter alia*, applied to applicant: housing problems, death of a family member, physical or mental illness of a family member, disruption of family by separation, divorce, or estrangement, sexual or physical abuse, neglect of child, personal physical illness, death of a friend. PCR Petitioner's Exhibit 19.

In addition, based on his review of applicant's school records, Johnston recognized that "something happened" around the sixth grade. PCR Tr. 462, 496. Johnston candidly admitted that based on the drastic change in school performance, he needed experts and investigators to assist in determining the cause of this change. PCR Tr. 496.¹⁷ Similarly, Johnston obtained applicant's Charter Psychiatric Records from his inpatient treatment at the age of 14. However, Johnston and Archer, without any assistance from a psychiatrist or other mental health expert, were unable to evaluate the records and understand their importance. PCR Tr. 520-521.¹⁸ These records indicated that when applicant was 14 years old he had been diagnosed with major depressive disorder, panic disorder, and that his global assessment of functioning was so low as to qualify someone for disability. Such important historical records would put any reasonable attorney on notice of the need for further investigation and expert assistance.

The overarching reason for trial counsel's failure was the erroneous belief that they were not entitled to funding.¹⁹ Therefore, trial counsel did not hire a single expert or investigator to assist with the sentencing phase investigation. Specifically, the failure to utilize the services of a qualified expert to compile a social history of applicant was simply unreasonable. *Wiggins*, 539

¹⁷ Ultimately, having no investigator or experts, Johnston decided that bringing the school records into evidence was "more trouble than it was worth." PCR Tr. 462.

¹⁸ Despite lacking an understanding of these medical records Johnston decided not to utilize them in any fashion because of some statements made by applicant which were "stuff we didn't want in court." PCR Tr. 460. However, Archer and Johnston had made sure that the state obtained their client's psychiatric records by having applicant sign a release of this information to the solicitor's office. Indeed, it was the prosecution who received these records first and provided them to the defense. Therefore, had the prosecution wanted to use the information in these records in its case-in-chief, it could have. In other words, Johnston's uninformed desire that he did not want this "stuff" in court had no bearing on whether the prosecution could present this evidence.

¹⁹ As discussed *supra* at 4, Archer and Johnston wrongly believed that since they had been retained by applicant's family, applicant was not entitled to state funding for experts and investigators despite his indigent status. Johnston conceded that had he simply contacted the South Carolina Commission on Indigent Defense, this misunderstanding would have been

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U.S. at 524 (counsel's decision not to commission a forensic social worker to put together a social history was unreasonable); *Council v. State*, 670 S.E.2d 356(2008) (despite the availability of funds, counsel did not hire a social history investigator but instead relied upon his law partner and an investigator neither of whom were trained to evaluate the information for its use at trial).

Without assistance from qualified investigators, trial counsel, like the defense attorneys in *Council*, were responsible for conducting the social history investigation. However, as the testimony at the PCR hearing made clear, only Johnston had any role in developing mitigation. PCR Tr. 589-590. As in *Council* Johnston had no training or experience in preparing a social history. Indeed, applicant's capital trial was Johnston's first. PCR Tr. 493. Johnston's lack of experience and training led to a number of serious errors resulting in his inability to gather information and properly evaluate what little information he did manage to obtain.

From the outset Johnston was operating with such a short amount of time that even an experienced capital defense attorney would have had difficulty being ready for trial. Johnston's sentencing phase preparation began less than three months before trial. *See Council v. State*, 670 S.E.2d 356 (2008) (duty to investigate begins at the outset of a capital case). In February 2003, he sent out form letters to applicant's family, including his biological father, and friends. These form letters failed to generate substantial information. Moreover, Johnston first made contact with applicant's treating family physician less than one month before trial and even then only by way of a letter of introduction indicating that Johnston planned to contact the doctor "in the near future." PCR Tr. 528-529; Petitioner's Exhibit 18. Similarly, Johnston first attempted to contact a treating psychiatrist, Dr. Patrick McArthur, from Charter Psychiatric Hospital after applicant's trial had already begun. Dr. McArthur received a subpoena from Johnston on May 13, 2003. He

resolved and experts and investigators would have been retained.

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had not previously spoken to Johnston, or anyone else representing applicant, and did not have a signed release of information from applicant; therefore, he refused to comply with the subpoena. Petitioner's Exhibit 17.

Without expert assistance, Johnston made a limited but failed effort to gather social history information. For example, just a week before trial Johnston, in an attempt to gather basic social history information, sent to applicant's mother a list of various Axis IV stressors. Johnston obtained this list from a website. *See supra*. Based on the information he had obtained up to that point, he had put "x's" next to various stressors and asked applicant's mother to "answer" them. PCR Tr. 543-544; Petitioner's Exhibit 19. Severely diminishing any chance of constructing a reliable social history, Johnston also failed to obtain, or even seek, numerous records pertaining to applicant's psychiatric and medical history as well as records regarding his family. *See supra* at 5 for partial list of documents; *see also Von Dohlen v. State*, 360 S.C. 598, 606, 602 S.E.2d 738, 742 (2004) (court found trial counsel ineffective for failing to provide expert with records that were available prior to trial and which would have allowed the expert to correctly diagnose the defendant).

C. Prejudice

As previously discussed, to establish a violation of applicant's Sixth Amendment right to the effective assistance of counsel, applicant must establish that counsels' errors, individually and cumulatively, affected the outcome of the sentencing proceeding such that absent these errors there is a reasonable probability that the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). This review is not a mathematical equation and must take into account the unfettered discretion of the jury to sentence a capital defendant to life. *See State v. McClure*, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000) (in reversing sentence the court

recognizes that "the evaluation of the consequences of an error in the sentencing phase of a capital case are more difficult because of the discretion that is given to the sentencing jury").

The requirement that applicant demonstrate prejudice does not mean that he must show that the jury heard no mitigating evidence. Indeed, in *Council* the jury heard from the defendant's mother who told the jury that her son had received mental health treatment as a young child, that he had been teased as a child and had suffered a severe burn in a cooking accident. *Council* at *2. Similarly, at applicant's trial the jury was informed in a general way about some of his childhood, including that he suffered from mild depression, that his mother abused alcohol, and he had emotional problems. Tr. 1820-1831. However, as in *Council*, this information, especially the information about applicant's psychiatric history and diagnosis at the time of the crime, went unexplained. In fact, Archer in his sentencing phase closing argument told the jury that applicant was not mentally ill, an assertion not based on evidence and, as it turns out, inaccurate. In the end, without an expert, and unbiased, explanation of the causes of applicant's mental illnesses and their impact on his actions on July 7, 2001, the jury was simply left to speculate.

When examining the facts of the crime to determine whether the mitigating information not presented at trial could have resulted in a different outcome, it is useful to review the underlying facts of *Council*, a case which was substantially more aggravated than the facts of applicant's trial. Council was convicted of an horrendous rape and murder of an elderly woman, the facts of which were summarized by the state supreme court:

On the evening of October 9, 1992, police discovered the body of seventy-two-year-old Elizabeth Gatti underneath a bedspread in her basement. She had been hogtied with a white cord and layers of duct tape were wrapped around her entire head. Her clothes had been ripped, and the crotch of her underwear had been cut out. Surrounding her body were various bottles of cleaning fluids which

she had been forced to ingest. Mrs. Gatti had been sexually assaulted. . .

Council at *1. On these facts Council was found guilty of six aggravating factors: criminal sexual conduct, kidnapping, burglary, larceny with the use of a deadly weapon, killing by poison, and physical torture. *Council* at *2. The facts of applicant's case, while certainly tragic, were not this aggravated and at trial the state relied upon only two statutory aggravating circumstances: knowingly created risk of death of more than one person and the murder of a state law enforcement officer. Tr. 1974.

In terms of prejudice review from the perspective of the effect of trial counsel's failures on the presentation of evidence, applicant's case falls squarely in line with cases in which courts have found prejudice. *See Rompilla*, 545 U.S. at 390-393 (defendant was prejudiced by trial counsel's failure to review prior conviction file which revealed information concerning defendant's mental health issues, troubled upbringing, and substance abuse); *Williams v. Taylor*, 529 U.S. 362, 397-398 (2000) (defendant was prejudiced by trial counsel's failure to investigate and present substantial mitigating information about his childhood and his borderline mental retardation); *Von Dohlen*, 360 S.C. at 608, 602 S.2d at 743 (defendant was prejudiced by trial counsel's failure to investigate and prepare adequately expert testimony concerning the defendant's mental health). Trial counsel's failures and the effects on applicant's case are not at all similar to the facts of cases in which the state supreme court has found no prejudice. *See Simpson v. Moore*, 367 S.C. 587, 605-07, 627 S.E.2d 701, 711-12 (2006) (no prejudice found for trial counsel's failure to offer sufficient social history information in a case where trial counsel had conducted numerous social history interviews, used an investigator to gather background information on the defendant, called three experts to testify about the defendant's troubled childhood, his low I.Q., substance abuse and mental illnesses including schizophrenia,



depression and PTSD); *Jones*, 332 S.C. at 336-39, 504 S.E.2d at 826-27 (no prejudice found where trial counsel presented six social history witnesses and a psychologist who testified that defendant was mentally retarded, had brain damage and acted impulsively).

D. Conclusion

Having found that trial counsel performed deficiently and having found that trial counsel's errors prejudiced applicant during the sentencing phase of his trial, I find that applicant's constitutional right to the effective assistance of counsel was violated and that his death sentence must be vacated.

II. Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated by trial counsel's failure to develop and present evidence regarding applicant's adaptability to prison.

A. Relevant Facts

At trial, the prosecution presented evidence that applicant had escaped from the Charleston County Detention Center when he shot Trooper Johnson. Tr. 1638-1639. The escape stemmed from applicant's failure to return to the jail from work release in July 2001. Tr. 1638-1639. He remained on escape status for a year.

For his part, Johnston who was in charge of preparing for the sentencing phase, PCR Tr. 590, did not present any evidence, lay or expert, regarding applicant's likely adaptability to prison. Indeed, counsel did not even consult with a prison adaptability expert to determine whether such testimony may have proven useful. As discussed in detail *supra*, counsel's failure to hire an expert stemmed from his erroneous belief that funding was not available. PCR Tr. 460. Moreover, Johnston had never used an expert in a criminal case and was generally unaware of the importance of experts in a capital trial. PCR Tr. 452, 493. Neither Johnston nor Archer



articulated a strategic reason for failing to introduce testimony that applicant would not pose a safety risk if sentenced to life in prison. However, Johnston did testify that they did not have a sentencing phase theory. PCR Tr. 487 ("I don't know that we had a theory [in the sentencing phase].").

As part of the post-conviction investigation, applicant retained James Aiken to conduct an assessment of his adaptability to prison. Mr. Aiken is a nationally recognized expert in inmate classification who began his career in South Carolina in 1971. PCR Tr. 408. He was the warden of the South Carolina women's correctional institution as well as the now defunct Central Correctional Institution. PCR Tr. 411. Mr. Aiken was then promoted to deputy regional administrator and subsequently moved to Indiana where he became the commissioner for the state's corrections department. PCR Tr. 412. The Department of Justice has frequently used Mr. Aiken as a consultant to train the wardens of federal correctional institutions, and he currently serves on a congressional commission which was established to address the problem of prison rape. PCR Tr. 413-414. Mr. Aiken estimated that he had classified thousands of inmates during his career and implemented classification systems in numerous institutions. PCR Tr. 416.

Mr. Aiken reviewed applicant's criminal history, materials regarding the shooting of Trooper Johnson as well as institutional records from the Charleston and Berkeley County jails at which applicant was detained for the year prior to his trial. PCR Tr. 420-421. He concluded that applicant could be managed by the South Carolina Department of Corrections without undue risk to staff, inmates or the general public.²⁰ PCR Tr. 423. Indeed, Mr. Aiken's only concern was that applicant would be harmed by other inmates or himself. PCR Tr. 423.

²⁰ Mr. Aiken noted that an inmate sentenced to life imprisonment is housed in the most secure institution and would never have an opportunity to leave the prison grounds for work release. PCR Tr. 418-419.

B. Legal Analysis and Conclusion

Trial counsel's failure to develop and present evidence regarding applicant's adaptability to prison represented deficient performance. A defendant's adaptability to prison, and the likelihood that he will not pose an undue risk of future violence in prison, is a category of mitigation that has been specifically recognized as constitutionally relevant by the United States Supreme Court. *Skipper v. South Carolina*, 476 U.S. 1 (1986). Moreover, the South Carolina Supreme Court found counsel ineffective based on their failure to develop and present such evidence. *Nance v. Ozmint*, 367 S.C. 547, 557, n.8, 626 S.E.2d 878, 883, n.8 (2006), *cert. denied*, 127 S.Ct. 131 (2006); *see also Williams v. Taylor*, 529 U.S. 362, 396 (2000) (granting habeas relief based in part on defense counsel's failure to present testimony concerning defendant's past and likely future good adjustment to prison).

Trial counsel's failure to present any evidence concerning applicant's prison adaptability was not based on a strategic reason nor supported by a reasonable investigation and, therefore, is not entitled to deference. Here, trial counsel's failure to present this evidence was not informed by strategy or investigation. Rather, they simply did not have funding for an expert, and generally did not recognize the importance of experts. Nevertheless, counsel had available to them applicant's pre-trial incarceration records from the Charleston and Berkeley County jails which established his good behavior for almost a year prior to trial. Applicant's lengthy pretrial detention during which he adjusted to incarceration would have provided a substantial basis for the jury to believe that applicant would not pose a risk if sentenced to life in prison. As Mr. Aiken put it, "institutional behavior is a better predictor [than community behavior] of future institutional behavior." PCR Tr. 421.

In addition, counsel knew, of course, that the prosecution would introduce evidence establishing that applicant had escaped from the jail while serving another sentence. While this "escape" was the result of applicant's failure to return from work release, it surely put the issue of applicant's future dangerousness in the jurors' minds. Mr. Aiken's expert opinion about applicant's likely prison adaptability as well as his specific testimony indicating that applicant would not be eligible for work release while serving a sentence of life imprisonment would have put to rest any concerns about his future dangerousness. In short, Mr. Aiken's testimony, or similar testimony from an expert or lay witnesses, would have provided a reason for the jury to sentence applicant to life. There is a reasonable probability that the failure of applicant's trial counsel to provide the jury with this crucial information affected the outcome of the sentencing phase. *See Strickland v. Washington*, 466 U.S. 668 (1984).

III . Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law by trial counsel's reliance on an unsupported theory at the guilt-or-innocence and sentencing phases of the trial.

A. Relevant Facts

At trial the prosecution case established the following: In the early morning hours of July 7, 2002, applicant and former girlfriend Kathryn Boles approached a license check point. Tr. 1080. Kathryn Boles was the driver. Tr. 1080. Ms. Boles pulled the car over as instructed. Tr. 1082. A trooper approached the passenger side of the car and saw a bottle of beer on the floorboard. Tr. 1083. The trooper requested applicant's driver's license and proceeded to the rear of the truck to speak with Ms. Boles. Tr. 1085. The trooper gave applicant's license to Trooper Johnson who walked to the passenger side to look for more open containers. Tr. 1087. While the precise sequence of events was somewhat unclear based on the witnesses who were at the scene, it is clear that applicant shot Trooper Johnson once he arrived at the passenger side

door. Vello Paavel, a firearm and tool mark examiner with the State Law Enforcement Division, testified that the bullet which killed Trooper Johnson was fired by applicant's gun. Tr. 1430, 1433-1434. Mr. Paavel's testimony was not contradicted by any evidence and was supported by eyewitness accounts.

Prior to trial, applicant's attorneys pursued a theory that Trooper Johnson was shot accidentally by one of the other troopers who was trying to shoot applicant as he was fleeing. The ballistics testing and the trajectory of Trooper Johnson's wound did not support this theory. Indeed, in February 2003 Archer and Johnston recognized that the results of the SLED ballistics testing "[shot] down" their theory that Trooper Johnson was killed by another trooper. PCR Tr. 512; PCR Petitioner's Exhibit 13. Nevertheless, the defense at trial consisted of this very theory. Furthermore, Archer suggested that a videotape recorded the shooting but had been erased to conceal the fact that Trooper Johnson was shot by another trooper.²¹ Tr. 1060. The defense did not present expert testimony to refute the opinion of Vello Paavel. Moreover, the defense did not offer any evidence to rebut the eyewitness accounts of that night.

B. Legal Analysis and Conclusion

Trial counsel's reliance on an unsupported theory destroyed their credibility in the eyes of the jury. "A cardinal tenet of successful advocacy is that the advocate be unquestionably credible. If the fact finder loses confidence in the credibility of the advocate, it loses confidence in the credibility of the advocate's cause." *State v. Moorman*, 358 S.E.2d 502, 510 (N.C. 1987); *see also State v. (Jeffrey) Jones*, 343 S.C. 562, 578, 541 S.E.2d 813 (2001) (court's decision to

²¹ There was a dashboard video camera that recorded Trooper Johnson approaching applicant who was sitting in the passenger side of the car. The video recording stopped moments before Trooper Johnson was shot. It turned out that a video camera in one of the trooper's cars had been turned on unintentionally. Tr. 1174. When the trooper got in his car and noticed that the camera was on, he turned it off. Tr. 1174.

excise "hesitate to act" phrase from reasonable doubt instruction diminished the defense attorney's credibility in the eyes of the jury since the defense attorney had relied on court's previous ruling that it would give such an instruction and had repeated this phrase throughout its closing argument); *State v. Pace*, 316 S.C. 71, 74, 447 S.E.2d 186 (1994) (impugning remarks by judge about defense counsel undermined counsel's effectiveness and prejudice is apparent because "[appellant's] attorney's credibility was crucial to his defense. . ."); *State v. Simmons*, 267 S.C. 479, 229 S.E.2d 597 (1976) (counsel's ability to provide effective representation was impaired by court's comments which diminished trial counsel in the eyes of the jury); *People v. Trait*, 572 N.Y.S.2d 920 (N.Y. 1988) (counsel who engage in excessive and purposeless cross-examination alienated the jury to such an extent that reversal was required). In fact, numerous courts have found it appropriate for attorneys to concede facts or forego arguing an unsubstantiated theory to avoid losing credibility. *See i.e., Wilson v. Butler*, 813 F.2d 664 (1987) (court found that it was reasonable for trial counsel to avoid arguing client's innocence because to do so in the face of overwhelming evidence would have alienated the jury); *Simms v. Cain*, Slip Copy 2008 WL 624073, *23 (E.D. La. 2008) (trial counsel not ineffective for failing to challenge the fact that defendant was the driver of the car in question. Due to the overwhelming evidence establishing this point, to do otherwise would have risked alienating the jury).

Here, applicant's trial counsel pursued a theory – that Trooper Johnson was shot by another trooper - which was objectively unreasonable and lacked a scintilla of evidence. Indeed, Archer and Johnston did not even have confidence in this theory. Apparently, this theory was borne from Archer's overall strategy that he would tap into the anti-law enforcement prejudices of some jurors. "So I know for a fact that there are some people that basically don't like police

officers. you know they get a speeding ticket and they don't like it and they just feel that, so." PCR Tr. 593 (testimony of Archer). It was professionally unreasonable for trial counsel to pursue an inflammatory theory at the guilt-or-innocence phase of the trial, especially given their own doubt in the theory and in light of the overwhelming evidence supporting applicant's guilt. "Counsel should seek a theory that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies." ABA Guidelines, 10.10.1.A.

The theory of the defense was simply incredible – to the prosecution, to the defense lawyers, and most importantly, to the jury. But Archer did not stop at simply relying on a baseless theory. He went on to suggest a concerted effort to cover up the truth on the part of the trooper and SLED investigators. He accused them of perjury and the destruction of evidence. Of course, the prosecution took advantage of this insulting and unfounded theory arguing in closing, "And for them, Mr. Archer, to accuse those men of destroying evidence is amazing. You saw them testify. You judge their credibility. . . . And to assail those men's credibility who serve every day of their lives protecting the citizens of Berkeley County is ridiculous." Tr. 1517.²² In his guilt-or-innocence phase closing argument Johnston belatedly expressed a concern that he may lose his credibility with the jury by suggesting that applicant shot his gun but did not hit Trooper Johnson. Tr. 1534 ("Now, again, I don't want to lose my credibility with you. I'm not saying – I'm not telling you that that's what happened."). Later, after the jury had convicted applicant Johnston asks the jury not to hold it against the defense that their theory was rejected. Tr. 1610. For his part Archer seemed to have forgotten what his theory was at the first

²² This Court had the opportunity to observe the demeanor of Archer and the manner in which he continues to accuse law enforcement of engaging in a cover up. His confidence in this theory is remarkable given its lack of evidentiary support. Indeed, during the PCR hearing, law enforcement personnel in the audience left the courtroom in the middle of Archer's testimony, obviously in disgust. The jury at applicant's trial surely had the same reaction.

phase of the trial. In his sentencing phase closing argument, he argued that some currently undiscovered science would demonstrate that applicant did not shoot Trooper Johnson. Tr. 1863. But then he contradictorily stated that "I'm not by any means saying that Jesse Sapp is innocent." Tr. 1863. He goes on to state that applicant "used [his] gun to kill Officer Johnson." Tr. 1865. Previously, in his sentencing phase opening statement, Archer attempted to argue residual doubt.

From the moment trial counsel put forth their defense theory, they began to lose credibility with the jury. This continued into the sentencing phase where Archer relied on a variety of inconsistent theories one of which was the guilt-or-innocence phase theory which had already been rejected by the jury. See ABA Guidelines 10.10.1.A ("Counsel should seek a theory that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies."). It was professionally unreasonable to rely on this highly inflammatory and groundless theory. Its use at the guilt-or-innocence phase and its continued use at the sentencing phase of applicant's trial so damaged the credibility of the defense that applicant was prejudiced.

IV . Applicant was denied the right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law by trial counsel's failure to object to the admission of prosecution exhibit 108.

At trial the prosecution introduced an entire issue of South Carolina Trooper Magazine. Defense counsel did not object to its admission. Applicant alleges two grounds for the exclusion of the magazine. First, according to applicant, portions of the magazine contained victim impact evidence which went beyond the boundaries set out by the Supreme Court for this type of evidence. Second, applicant contends that the contents of the magazine contained irrelevant and prejudicial information.



A. Relevant Facts

During the sentencing phase of the trial the prosecution admitted without objection an issue of the South Carolina Trooper Magazine as State's Exhibit 108. Tr. 1686. This exhibit was admitted through James Woods, a victim impact witness. The magazine contained two categories of information at issue here. First, it contained a photograph and writings about the victim in this case. Specifically, the cover of the magazine contained a photograph of Trooper Johnson as well as another trooper killed in an unrelated incident. Inside the magazine there were tributes to both of these officers. The "Tribute to Corporal Kenneth J. Johnson" is, as its title suggests, a tribute to and biography of the victim in the form of a two page essay written by another trooper. This article is accompanied by a poem entitled "Nicholas' Dad" which focuses on Trooper Johnson's young son's loss of a father.

Second, the magazine contains substantial information unrelated to applicant's case. In summary, the exhibit contained the following:

- ☐ The first non-advertisement page contains a letter from the widow of a state trooper who was killed in 1969. The letter begins, "In the early morning hours of January 29, 2002, and under the supervision of Cpl. Tom Velky, we left the Patrol office in Beaufort. Our destination was the Probation [sic], Pardon, and Parole Board in Columbia . . . Our mission was to oppose the parole of Forest Wade Phillips, who murdered Cpl. R. V. Woods in 1969 in Beaufort." After summarizing this man's criminal history the widow continued, "In 1985, he was retruned [sic] to our state and, after serving 8 yrs. 8 mos., became eligible for his first parole hearing. To date, he has come before the board six times asking for his freedom. . . . When I work to keep this man in prison, not only am I doing it for my family and myself, but for each one of you who risks your life every day." Petitioner's Exhibit 26, p. 5.
- ☐ A reference to the 9-11 attacks in New York and Washington, DC, along with the request that everyone "continue to support this state and country in our efforts to preserve our freedom and way of life." Petitioner's Exhibit 26, p. 8.
- ☐ "In Memoriam: IN memory OF state troopers who gave their lives in the line of duty." compiled a list of all the troopers who have died in the line of duty since 1932. Petitioner's Exhibit 26, p. 11.

- ☐ A tribute in memory of Trooper Michael Rao who was killed in an incident unrelated to applicant's case. Petitioner's Exhibit 26, pp. 15-16.
- ☐ An article on officer survival training which includes photographs of target practice, various weapons, and a description of the stereotypical "convicted cop killer[]." Petitioner's Exhibit 26, p. 26.
- ☐ An article describing the "peer support" which was provided by South Carolina troopers to the New York Police Department in the wake of the 9-11 terrorist attack. Petitioner's Exhibit 26, pp. 36-37.
- ☐ An article which describes, *inter alia*, high speed chases, a suspect shooting, and other dramatic arrests. This article also raises the specter of parole. ("[H]e is currently serving a lengthy jail sentence with no parole anywhere in his near future." "[T]he girlfriend was wanted for parole violations."). Petitioner's Exhibit 26, p. 40.
- ☐ An article, "Twice the Pain," details families of law enforcement officers who have lost two family members. In one of the scenarios presented in this article the killer of a state trooper received 8-12 years imprisonment. Moreover, a family member of this victim stated, "My father's murder seems to have had a great deal more impact on my family's life than it has had on [the defendant's]." Petitioner's Exhibit 26, pp. 60-61.

Attorney Johnston testified at the post-conviction hearing that he vaguely recalled being shown the magazine by either Mr. Hoisington or Mr. Jennings. PCR Tr. 558-559. However, Johnston and Archer were "preoccupied" with other issues. PCR Tr. 559. Johnston could not recall a strategic reason for failing to object to the introduction of the magazine. PCR Tr. 559. In retrospect Johnston felt that counsel should have asked that only the cover of the magazine be admitted into evidence. PCR Tr. 559. Archer testified that he had never seen the magazine. PCR Tr. 609. Similarly, he could not recall any strategic reason for failing to object to the admission of the magazine and believed he would have objected to its admission had he seen the magazine. PCR Tr. 610.

B. Victim impact evidence

Prosecution Exhibit 108 contained substantial information that exceeded the permissible scope of victim impact evidence. In *Payne v. Tennessee*, 501 U.S. 808 (1991) the Supreme

Court held that the Eighth Amendment did not erect a bar to the admission of victim impact evidence. Specifically, "[a] State may decide . . . that the jury should see 'a *quick glimpse* of the life petitioner chose to extinguish.'" *Id.* at 830 (O'Connor, J., concurring) (emphasis added) (quoting *Mills v. Maryland*, 48 U.S. 367 (1988)). The South Carolina Supreme Court has determined that victim impact evidence is generally admissible to demonstrate the "uniqueness" of the victim and the "specific harm caused by the defendant." *State v. Hughey*, 339 S.C. 439, 457, 529 S.E.2d 721, 730 (2000). The admission of such evidence, however, is not allowed if it is "so unduly prejudicial that it renders the trial fundamentally unfair and violates due process under the Fourteenth Amendment." *Von Dohlen v. State*, 360 S.C. 598, 612, 602 S.E.2d 738, 745 (2004).

When viewed in the context of the substantial victim impact testimony which had already been admitted through two motorists assisted by Trooper Johnson, Tr. 1616-1625: a coworker, Tr. 1679-1686, and; two family members, Tr. 1766-1782, the detailed essay and poem in memory of the victim went beyond the "brief glimpse" which the Supreme Court has found permissible. Located on the last page of the essay was a poem written by the same author. In heart wrenching fashion this poem described the process of informing the victim's son that his father had been killed. The poem went on to describe the son's great love for his father and then alluded to what was probably a scene from the funeral: "We all stood in formation in front of Nicolas. He looked as tears streamed down his face." When viewed in the context of the evidence which was presented by family members and coworkers, this essay and poem was excessive. Indeed, if the trial court had been made aware of the contents of this exhibit, it likely would have precluded its admission. Previously, when the state indicated its intention to introduce a videotape of the victim's funeral, including Taps, the trial court excluded this

evidence even though trial counsel did not object. "I believe Taps at this point would be playing more towards sympathy than showing the true man." Tr. 1774. Likewise, the poem which defense counsel had never reviewed prior to its admission was "playing more towards sympathy."

Moreover, this essay and poem went beyond the permissible scope of victim impact because it was focused not on the impact on the victim's family but rather the impact on the community as a whole. *See United States v. Fields*, 516 F.3d 923, 947-8 (10th Cir. 2008). "Including the community in the victim-impact inquiry is fraught with complication. It would involve not just the incremental extension from family to friends (and even to co-workers), but a radical change in perspective: replacing a close-in focus on persons closely or immediately connected to the victim with a wide view encompassing generalized notions of social value and loss." *Id.* at 947. Noting that the Supreme Court had not broadened the scope of *Payne* to include co-workers and the community, the Tenth Circuit Court of Appeals found such evidence to be outside the scope of admissible victim impact testimony. *Id.*

The "Tribute to Corporal Kenneth J. Johnson" focused on the loss to his coworkers and the community as a whole, the precise focus which the Tenth Circuit Court of Appeals found inappropriate. The essay is written from the perspective of a coworker and the majority of the essay comments on the victim as a coworker and the loss that will be felt by his colleagues. The most problematic portions of the essay, however, are those which discuss the loss to the community. For example, the essay begins, "On Sunday, July 7, 2002, South Carolina lost a state trooper; however, we *all* lost a friend." (emphasis in original). It goes on to describe the people lining the streets the day of his funeral as well as a sign held under an overpass which read, "Johnson, thank you for protecting us while you were here." The essay concludes by

reminding the reader that Trooper Johnson was the “44th SC State Trooper killed in the line of duty.” The invocation of the community’s loss was impermissible. And in this case the reminder of the deaths of 43 other state troopers took the focus away from the individual victim in this case and placed the burden of all South Carolina trooper deaths on applicant. Trial counsel did not review this exhibit prior to its admission and, therefore, were unable to articulate an appropriate objection. Counsels’ actions in this regard were unreasonable and not based on a strategic or tactical decision. *See Rompilla v. Beard*, 545 U.S. 374 (2005) (counsel has a duty to review prosecution evidence used in aggravation so that he may formulate a response). Indeed, given counsel’s ignorance of this exhibit’s substance, their failure to object was not a decision at all, and but for the introduction of this information there is a reasonable probability that the outcome of applicant’s sentencing trial would have been different.

C. Irrelevant and Prejudicial Information

In addition to the inadmissible victim impact evidence, state’s Exhibit 108 contained irrelevant and highly inflammatory information summarized *supra*. To begin, there were at least three references to parole in the magazine. First, there was the letter to the editor written by a widow of a slain state trooper who described having to attend six parole hearings to keep her husband’s killer behind bars. Another article called “Twice the Pain” indicated that a defendant received 8-12 years imprisonment for killing an officer. Finally, in an article detailing dramatic arrests, the author indicates that a defendant was serving a lengthy sentence with “no parole . . . in his future.” The inflammatory nature of these references is self-evident – it put into focus in the most dramatic way the fear among jurors that if they do not sentence the defendant to death, they risk that person being paroled and killing again. *See State v. Young*, 319 S.C. 33, 38-9, 459 S.E.2d 84, 87 (1995) (Court reiterated that parole eligibility is not a proper consideration and that

information about parole could push a jury into voting for death). But the letter from the widow also did more than merely mention parole in a way that put it in the minds of the jurors. Written from the perspective of a still-grieving widow who had endured six parole hearings, it portrayed the widow as a victim of the parole process. So, in addition to instilling fear that applicant would some day be released, the letter portrayed the process of parole, even if not granted, as additional victimization of the murder victim's family. It is difficult to imagine a more prejudicial piece of evidence.

In a similar instance in which the parole eligibility of a capital defendant was accidentally included on an exhibit, the PCR judge found that "[i]t is an affront to common sense to argue that a jury's decision on the death penalty would not be affected by misinformation that a murderer could be back on the streets within a few years." *Patterson v. State*, 98-CP-32-0097 at p. 5. Judge Keesley found this to be an "obvious conclusion without knowing what actually was said in the jury's deliberations." *Id.*

Other portions of the magazine contain irrelevant and prejudicial information. Some portions tended to garner sympathy generally for state troopers. Petitioner's Exhibit 26, p. 8 (reference to 9/11 attacks and request to support troopers' efforts to preserve freedom). Some portions placed before the jury the deaths of other state troopers. Petitioner's Exhibit 26, p. 11 (list of all state trooper killed in light of duty since 1932); Petitioner's Exhibit 26, pp. 15-16 (tribute to a trooper who was killed in an unrelated accident). Lastly, one portion of the magazine described the stereotypical "convicted cop killer[.]" All of this information detracted from the individualized sentencing to which applicant was entitled. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Gregg v. Georgia*, 428 U.S. 153 (1976). Furthermore, and more simply, the probative value of this evidence was substantially outweighed by the prejudice that surely

flowed from its admission.

The information detailed above was irrelevant to any aspect of the sentencing phase of applicant's trial and for that reason alone it should not have been admitted. Moreover, the information generally created a sense of the need to protect all law enforcement personnel, injected inflammatory information suggesting the possibility of parole, and implied that sentencing applicant to death would in some way be justice for all the terrible wrongs detailed in the article. Trial counsel's failure to review, and object to the admission of, this piece of evidence was unreasonable and but for its admission there is a reasonable likelihood that the outcome of applicant's sentencing proceeding would have been different.

V. Prosecution attempt to demonstrate the "relative freedom of life in prison."

At trial the prosecution admitted evidence that applicant was looking forward to prison because life in prison was no different than life outside of prison. Despite the fact that such evidence was inadmissible, defense counsel failed to lodge an objection. Exacerbating this error, trial counsel also failed to review and utilize evidence which would have directly rebutted this inaccurate portrayal of applicant's beliefs about incarceration. Trial counsel's failures form the basis of two related but separate legal claims: trial counsel was ineffective for failing to object to inadmissible evidence and trial counsel was ineffective for failing to rebut the prosecution's case.

A. Relevant Facts

Prior to applicant's trial the prosecution made a decision to establish that life in prison was "easy" and to demonstrate its "relative freedom." PCR Tr. 653-654. To this end, the state contacted Jimmy Sligh, the same South Carolina Department of Corrections employee at issue in *State v. Burkhardt*, *see infra*. In the end, however, the prosecution decided not to call Mr. Sligh as a witness due to a belief that the admission of his testimony might be error. PCR Tr. 653-654.

Instead, the prosecution admitted a portion of a recording of applicant speaking to a friend from jail. Applicant was held at the Charleston County Detention Center for most of his year-long pre-trial detention. Over 700 of his phone calls from the Charleston jail were recorded. PCR Tr. 469. The prosecution entered into evidence without objection the recording of one call from applicant to a friend, Charles Pascien. Tr. 1759. During a portion of the call applicant can be heard claiming, based on information from other inmates, that a prisoner could purchase a whole array of items including soft drinks, a cooler, ice, a jump rope, scissors, popcorn, and pizza. PCR Tr. 422.

Defense counsel, in an attempt to establish that applicant was joking when he made these statements, called Charles Pascien to the stand. Pascien testified that he believed applicant was nervous and scared when he spoke to him. Tr. 1807. He did not believe that applicant was bragging about going to prison. Tr. 1807. The prosecution countered with the following cross examination:

Q. Prison doesn't sound like a very bad place, does it?

A. Well, everybody knows prison isn't a good place.

Q. But a place where you can go and order a pizza?

A. Right.

Q. You have pizza at home?

A. Right, but I seriously doubt you can order pizza at prison.

Q. When you sit at your house and have pizza, will you sometimes have an ice cold Coke with it?

A. Yes, sir.

Q. And you sit down and watch TV maybe?

A. Yes, sir.

Q. So the place Jesse Sapp was describing doesn't sound a whole lot different than you sitting in your living room relaxing?

A. Right.

Tr. 1809. In its closing argument, the prosecution argued that applicant wanted to live in prison and that anything other than the death penalty was not a punishment. "[Applicant] wants you – through his lawyers, he will ask you to give him life in jail. He will tell you that that [sic] terrible punishment – let me tell you something, that's what he wants. Are hot pizzas and cold drinks, TV's and microwaves the punishment he deserves?" Tr. 1862. Defense counsel did not object to this argument.

The prosecution had provided to trial counsel copies of all the jail telephone recordings and Johnston had listened to the specific conversation at issue. PCR Tr. 467. Archer had not listened to these recordings. PCR Tr. 589.

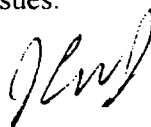
B. Applicant was denied his right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law by trial counsel's failure to object to prosecution evidence and argument regarding the conditions of confinement.

Evidence admitted in the sentencing phase of a capital trial must be relevant to the "character of the defendant or the circumstances of the crime." *State v. Burkhart*, 371 S.C. 482, 487, 640 S.E.2d 450, 453 (2007) citing *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982). Specifically, the conditions of confinement are not appropriate considerations in the sentencing phase: therefore, evidence regarding the manner of incarceration should not be admitted. "Such determinations as the time, place, manner, and conditions of execution *or incarceration* . . . are reserved . . . to agencies other than the jury." *Burkhart*, 371 S.C. at 487, 640 S.E.2d at 453 (emphasis included in original), quoting *State v. Plath (Plath II)*, 281 S.C. 1, 15, 313 S.E.2d 619,

627 (1984).

Here, the prosecution, through the admission of the taped phone call of applicant and the cross-examination of defense witness, Charles Pascien, ensured that the jury would consider the conditions of a life sentence.²³ Such evidence was clearly inadmissible and warranted an objection from defense counsel. In *Burkhart*, the state supreme court found that similar evidence injected an arbitrary factor into the jury's decision. See S.C. Code Ann. §16-3-25(C)(1). That is precisely what occurred here, albeit through a different witness. According to Jennings, the phone conversation at issue was relevant to show applicant's "callousness" though he never explained this characterization. PCR Tr. 643. In any event, Jennings candidly admitted that there were other calls which the state could have used to characterize applicant in this manner, other calls which did not raise the issue of the conditions of confinement. PCR Tr. 654. Yet, the state chose to use the one call that injected evidence about the conditions of confinement into the trial. The state's original intent to demonstrate that life in prison is "easy" and to inform the jury of the "relative freedom of life in prison." PCR Tr. 653-654, was more clearly evident in its cross examination of Charles Pascien. Instead of questioning Pascien about applicant, the prosecution chose to focus its inquiry on the substance of the phone call. In other words it chose again to focus the jury's attention on the conditions of confinement in a way that suggested that life in

²³ It is worth noting that the evidence indicating that applicant would be able to possess a long list of items including scissors and a microwave was inaccurate. PCR Tr. 422. Moreover, the state's suggestion that life in prison is no different than life outside of prison is similarly inaccurate. Applicant separately argued that the jury's consideration of this inaccurate evidence violated the Eighth Amendment to the United States Constitution and South Carolina law. *Johnson v. Mississippi*, 486 U.S. 578 (1988). Moreover, applicant contends that this evidence created a materially false impression of the facts in violation of applicant's right to due process of law as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and South Carolina law. *Mooney v. Holohan*, 294 U.S. 103 (1935); *Napue v. Illinois*, 360 U.S. 264 (1959). Having granted relief on the ineffective assistance of counsel claim, I do not address these separate but related issues.



prison was an easy sentence, indeed no different than "sitting in your living room relaxing." Tr. 1809.

In fact, the evidence presented at applicant's trial was more prejudicial than the erroneously admitted evidence in *Burkhart*. There, an employee of the South Carolina Department of Corrections, Jimmy Sligh, testified about the privileges an inmate would have but also acknowledged that prison was "not a country club." *Burkhart*, 371 S.C. at 487, 640 S.E.2d at 354. Moreover, the defense presented evidence which established prison as a "harsh environment with violent predators." *Id.* At applicant's trial, however, sitting in prison was characterized as just like sitting in one's living room. The prosecution also provided the jury with a list, albeit an inaccurate one, of items to which it suggested prisoners had access. Unlike in *Burkhart*, however, there was no rebuttal to this portrayal. Simply put, the jury was left to believe that prison was not different from the outside world, a place where inmates can freely order pizza and drink a Coke while watching a movie. This unchallenged characterization provided by a defense witness answering carefully crafted leading questions led directly to the prosecution's inflammatory rhetorical question posed to the jury in closing - did the jury believe that sitting around and watching movies while drinking a soda was the punishment that applicant deserved. Tr. 1862. This argument is precisely the reason that the state supreme court found evidence about the conditions of confinement to be inadmissible - the prosecution at applicant's trial asked the jury to disregard life in prison based on prison operations over which the jury had no control.

While this testimony only occupies a small portion of the trial transcript, its inflammatory nature cannot be over stated. The idea that prison is a country club provided the jury with no choice but to sentence applicant to death. This jury had already convicted applicant of the

murder of a state trooper and no doubt believed that he should be punished for this crime. The options as presented by the prosecution left the jury no choice. It could either sentence the applicant to death or send him to a place that, according to the state, was no different than being at home.

Trial counsel's failure to object to this inappropriate line of inquiry was unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Based on a long line of cases delineating the appropriate contours of sentencing phase evidence, this evidence was clearly inadmissible. Moreover, even had this evidence been relevant, it was substantially more prejudicial than probative and should have been excluded based on this rule of evidence. As it turns out, however, it is not surprising that trial counsel did not object to its admission. Archer, who actually handled the witnesses at the sentencing phase, had not listened to the audio tape prior to its introduction at trial, because it was not relevant to the guilt-or-innocence phase. PCR Tr. 589. Archer also did not have a strategic reason for failing to object to the cross-examination of Charles Pascien which focused on the conditions of confinement.²⁴ PCR Tr. 616-617. Archer had a duty to review this prosecution evidence before its admission so that he could be prepared to lodge appropriate objections and respond to the evidence. *Rompilla v. Beard*, 545 U.S. 374 (2005) (trial counsel who failed to review prosecution evidence in aggravation were ineffective because they were unable to respond or rebut this evidence).

C. Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law when trial counsel failed to rebut prosecution evidence.

1. Additional Relevant Facts

²⁴ For his part, Johnston also could not recall a strategic reason for their failure to object to the audio tape of the phone call. PCR Tr. 497-498. Nor could he recall a strategic reason for not objecting to the cross-examination of Charles Pascien. PCR Tr. 499-500; 564.

As described *supra*, counsel had been provided, and was aware of, the audio tape of applicant's telephone calls from the Charleston jail. Further, Johnston had listened to the particular call at issue here. Assistant Solicitor Jennings had also received a number of letters written by applicant to a former girlfriend, Krista Lewandowski. The prosecution informed defense counsel of the existence of these letters and made them available for inspection prior to trial. PCR Tr. 624. In fact, Assistant Solicitor Jennings specifically recalled a meeting with defense counsel at which he informed Archer and Johnston that the state had the letters but did not intend to use them at trial. He offered an opportunity for defense counsel to "take a look at them" in case they wanted to "use them for anything." PCR Tr. 628, 648. Johnston testified that he had never been shown the letters. PCR Tr. 564. Johnston's recollection, however, is inconsistent with Jennings' specific memory to the contrary. Furthermore, notations by defense counsel on a state's preliminary witness list indicate that trial counsel were aware of the letters. PCR Tr. 565; PCR Petitioner's Exhibit 10.²⁵

The letters written by applicant provided insight into his thoughts of incarceration. Below are relevant portions of the letters.

It is harder than I thought in here. I try to make jokes and kidd [sic] about how it's like a camp – high school kind of place. Truth is, it's not and I'm finding less and less to laugh at in here. It's like they designed this place to slowly detach people from the real world or something.

Petitioner's Exhibit 27 (emphasis in original).

[My] attorneys I have would have me to believe I'll never get to hug or hold anyone ever again. That sounds like tourcher [sic] though doesn't? [sic] Who on this earth could live like that?" "I wish I had some funny stuff to talk about. I wish I could rewind

²⁵ This Court agrees with applicant that the testimony at the PCR hearing clearly established that these letters were provided to the defense. Mr. Jennings' testimony was credible and supported by other evidence while Johnston's testimony generally was evasive and vague.

this life about 3 yrs. back and do it over.” “God I wish [sic] could have just slowed down for one second to see my choices were in front of me all the time. I try not to think about what I could or could not have done. But it’s so hard in here to keep your mind off that.

Petitioner’s Exhibit 28 (emphasis in original).

I wish you could come by for real though. The visits are good but the distance and seperation [sic] in that glass still hurts. I always say I [sic] alright but I’m not. Everyday I go threw [sic] the same situation – it never changes. It’s like ‘Ground Hog’s Day.’” ‘What does it really matter if your [sic] not depressed anymore but your [sic] still in jail?’” “I keep wanting to just detach myself from everyone and everything. It is so hard to see people and talk on the phone and all when your [sic] in here. Because everyone is trying to tell me about life that is going on and I can’t try to live out there along with you all when I [sic] not there – I’m here. When you say this happened or you saw that or what ever, it hurts me cause I don’t live in the same environment or world as the rest of you do.

Petitioner’s Exhibit 29.

2. Legal Analysis and Conclusion

Trial counsel failed to accomplish one of a defense lawyer’s primary obligations - review all discovery and be prepared to respond to the state’s case. “[A capital defendant’s] lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial.” *Rompilla v. Beard*, 545 U.S. 374, 377 (2005). In *Rompilla* trial counsel failed to review the file of a prior crime compromising their ability to anticipate the state’s case in aggravation and making it impossible to rebut any inaccuracy in the portrayal of the prior crime. *Id.* at 385-386. “The notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense.” *Id.* at 387. The American Bar Association’s Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, upon which the Supreme Court relied in *Rompilla*, emphasizes that “[c]ounsel at



all stages of the case should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading or not legally admissible.”

10.7 Investigation, Commentary: Counsel should secure information in the possession of the prosecution. 10.11.1.

In applicant's case the failure on the part of defense counsel was even more egregious than in *Rompilla*. All defense counsel had to do was take the prosecution up on its offer and review the letters written by their client to a former girlfriend. Clearly, the sentiments expressed in the letters directly contradict the portrayal offered by the prosecution. Applicant paints a picture of despair over the thought of spending his life in prison. Moreover, in one letter he indicates that he tried to make light of his situation even though he felt increasingly despondent. Petitioner's Exhibit 27. This particular letter would have gone a long way to putting into context the phone call with Charles Pascien. Cumulatively, excerpts from these three letters would have rebutted the state's evidence, based on one portion of a phone call to a friend, that applicant was looking forward to incarceration. *See State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007) (error for court to preclude defense from introducing portion of letter written by defendant which would have contradicted evidence that defendant was not remorseful). Such rebuttal would have headed off the state's argument in its closing that life in prison was not an option because that was exactly what applicant was looking forward to.

VI . Purported statement by applicant that he intended to shoot a police officer to escape apprehension.

As described *infra*, the prosecution admitted testimony that tended to establish that prior to his arrest applicant made statements suggesting an intent to shoot a police officer to escape

apprehension. Two separate but factually related claims arise out of the admission of this evidence. First, applicant contends that in violation of due process, the prosecution did not provide the defense with information which would have rebutted the prosecution portrayal. Second, applicant has alleged that defense counsel was ineffective for failing to impeach one of the witnesses who testified about this statement. After detailing the facts relevant to these two claims, counsel will discuss each separately.

A. Relevant Facts

At trial the prosecution portrayed the shooting of Trooper Johnson as the result of substantial planning. In support of this theory, the state introduced testimony that applicant had made statements implying that he would kill a police officer rather than risk going back to jail. The prosecution began to lay the groundwork for this evidence through the testimony of Officer Greg Friday of the City of Savannah Police Department. Tr. 1627. Corporal Friday arrested applicant in Savannah, Georgia in 1998. Ultimately, applicant was charged with reckless conduct, carrying a concealed weapon, and obstruction by fleeing. Tr. 1634. Officer Friday testified at applicant's trial that after he was arrested, applicant said, "'you got me this time, but I won't go back again.'" Tr. 1634. The prosecution then called Mark Boles as a witness.²⁶ Mr. Boles testified that on several occasions after applicant failed to return to the jail from work release applicant stated that "he wasn't going back" to jail. Tr. 1756. Boles elaborated that he "took it to mean that [applicant] would kill whoever [sic] tried to take him back to jail." Tr. 1756.

In its closing argument the prosecution used this testimony to argue that applicant had planned to kill a police officer. "[Applicant] told [Officer Friday], well, you got me this time,

²⁶ Mr. Boles was the father of Kathryn Boles, the woman who was driving the car the night

but I'm not going to be taken again. And that's a theme that's in his head and in his heart and caused him to take the actions that he took on July 7th of 2002." Tr. 1854. The solicitor continued to argue that applicant:

told Mark Boles . . . on three separate occasions that even though he was an escapee, even though he had walked away from the work release camp that he wasn't going to go back and he would kill anybody that tried to take him. How often, ladies and gentlemen, can you imagine a person telling others that they're going to do exactly the horrible crime that they did?

Tr. 1855.

Prior to the trial Mr. Jennings had provided to trial counsel an incident report authored by Officer Friday. In this report, written shortly after his arrest of applicant, Officer Friday did not mention the alleged statement made by applicant. Johnston testified that he was aware of Officer Friday and recalled being provided with his incident report. PCR Tr. 502-504, 569-570. Neither Johnston nor Archer made an attempt to contact Officer Friday prior to trial. PCR Tr. 502-504. Ultimately, it was Archer who cross-examined Officer Friday. Tr. 1634. For his part, Archer did not review the incident report prior to trial and had no recollection of ever seeing it. PCR Tr. 609. During cross-examination Archer did not question Officer Friday about the omission of applicant's statement in his description of his arrest. Tr. 1634-1635. Therefore, the jury was never informed that shortly after the arrest Officer Friday failed to note the statement about which he testified over five years later.

During the post-conviction hearing Assistant Solicitor Jennings testified that he had spoken to potential witnesses Kathryn Boles and Krista Lewandowski prior to trial. PCR Tr. 625, 655-658. He took notes during these interviews. Both of these potential witnesses discussed with Mr. Jennings statements made by applicant regarding his desire not to return to

of the incident. He also helped applicant sell drugs. Tr. 1746, 1752-1753.



jail. Kathryn Boles described a conversation with applicant during which he said that if stopped by the police, he planned to shoot up in the air in an effort to incite the police to kill him. PCR Tr. 657; Petitioner's Exhibit 23, p. 5. Mr. Jennings conceded that if she had stated in any way that applicant had previously indicated an intention to kill a law enforcement officer, he would have written that down. PCR Tr. 658. Similarly, Krista Lewandowski told Mr. Jennings of a conversation with applicant during which he said he would commit suicide before going back to jail. PCR Tr. 656; Petitioner's Exhibit 22, p.3. Again, Mr. Jennings admitted that had Ms. Lewandowski told him that applicant had indicated a previous intent to shoot an officer to avoid arrest, he would have written that down. PCR Tr. 657.

B. The prosecution's failure to provide material information which was favorable to applicant was a violation of due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law.

The prosecution failed to reveal favorable information which was material to applicant's sentencing. Suppression of evidence which is favorable to a defendant is a violation due process. *Brady v. Maryland*, 373 U.S. 83 (1963). Whether the prosecution withheld the evidence in good faith or bad faith is irrelevant. *Id.* at 87. In order to establish a *Brady* violation applicant must prove that the state withheld evidence which was material to the sentencing proceeding. Information is material if there is a reasonable probability of a different result due to the disclosure. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

Clearly, in this case the state's presentation of two witnesses who claimed that applicant made a not-so-veiled threat of doing harm to a police officer in the future was crucial. The state

used this evidence to show that applicant had intended to kill Trooper Johnson as soon as he was pulled over. The prosecutor referenced this plan twice in his closing argument. And the statements, had they really been made by applicant, would have proved substantial premeditation and as such would have served as a powerful aggravating circumstance.

However, it is clear now that the portrayal offered by the state was inaccurate. But, since the state failed to provide the defense with the evidence which would have undermined its presentation, the defense was unable to establish this inaccuracy. Indeed, the state believed that at least Kathryn Boles' version of applicant's statement was unhelpful to its case, because unlike Officer Friday and Mark Boles the prosecution did not ask her to relate to the jury her conversations with applicant about his intentions if he was stopped by police.

The clarity of Kathryn Boles' and Krista Lewandowski's statements to Mr. Jennings is striking, especially in contrast to the ambiguous interpretations of Officer Friday and Mark Boles.²⁷ The defense, had it been provided with this information, would have been able to put into context the testimony of both Officer Friday and Mark Boles in a way that would have neutralized the insinuation offered by the prosecution. The failure of the prosecution, even if unintentional, to provide this information to the defense violated applicant's due process rights and warrants relief from this Court.²⁸

²⁷ Parenthetically, it is worth noting here that the interpretation of applicant's statement by Mark Boles was entirely speculative and as such was substantially more prejudicial than probative. The "translation" of applicant's statement by Mark Boles was not admissible and defense counsel should have objected. The failure to appropriately object to this testimony represented ineffective assistance of counsel.

²⁸ Applicant alleged in his Second Amended Application for Post-Conviction Relief and continues to maintain that the jury's consideration of this inaccurate evidence violated the Eighth Amendment to the United States Constitution and South Carolina law. *Johnson v. Mississippi*, 486 U.S. 578 (1988). Moreover, this evidence created a materially false impression of the facts in violation of applicant's right to due process of law as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and South Carolina law. *Mooney*

C. Trial counsel was ineffective for failing to impeach Officer Friday.

Defense counsel's duty to protect his client and rebut the state's case is the foundation of effective representation. To this end counsel have a duty to obtain and review discovery and to undertake an independent investigation to ensure that the portrayal offered by the prosecution is accurate. See ABA Guidelines 10.7 Investigation, Commentary: *Inter alia*, counsel should secure information in the possession of the prosecution; ABA Guidelines 10.11.I, "Counsel at all stages of the case should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading or not legally admissible." Here, Archer who actually cross-examined Officer Friday had never reviewed or even seen the incident report of the arrest about which the officer testified. App. 609 ("I didn't see [Officer Friday's incident report] at any time. I have never seen it."). Moreover, neither Johnston nor Archer made an attempt to contact Officer Friday to discuss his recollection of this arrest even though they knew that the prosecution intended to call him as a witness. App. 502-504.

Applicant's case is sufficiently similar to *Rompilla v. Beard*, 545 U.S. 374 that an in-depth review of *Rompilla* is in order. In *Rompilla* the defense was put on notice that the government intended to introduce information about a prior crime through which the prosecution intended to prove the defendant's violent character. *Id.* at 383. The file of the prosecution was a public record to which defense counsel had access. Defense counsel never reviewed the entire file. *Id.* at 385. The Supreme Court held that defense counsel at the very least had an obligation to obtain and review the state's file on the prior conviction so that it could anticipate the state's evidence in aggravation and prepare a rebuttal if necessary. *Id.* "Without making reasonable efforts to review the file, defense counsel could have had no hope of knowing whether the

v. Holohan, 294 U.S. 103 (1935); *Napue v. Illinois*, 360 U.S. 264 (1959). Because I have

prosecution was quoting selectively from the transcript, or whether there were circumstances extenuating the behavior described by the victim." *Id.* at 386. The Court went on to observe that "the notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense." *Id.* at 387. The American Bar Association guidelines, according to the Court, also made clear defense counsel's obligation to obtain information in the possession of the prosecution including police reports. *Id.* at 387, n. 7.

Here, the trial attorney who conducted the cross-examination of Officer Friday had never reviewed the discovery provided by the prosecution. In other words, there is no real difference between the failure of trial counsel in *Rompilla* and that of trial counsel in this case. In both instances the attorneys responsible for lodging objections and questioning witnesses were unable to protect their client because they had not reviewed evidence in the possession of the prosecution and about which they were aware. In applicant's trial, Archer's failure to review Officer Friday's incident report meant that he could not impeach Friday for his failure to include a single mention of the purported threatening statement made by applicant during his arrest. This statement featured prominently in the prosecution argument and likely in the minds of the jurors as well. Trial counsel's failure to challenge the accuracy of the state's case on this point must have seemed like a tacit admission that the state's characterization was correct. Trial counsel was ineffective for failing to simply review and use at trial discovery which was provided by the prosecution. Further, had the jury known that this officer never documented this seemingly important fact after applicant's arrest some five years before this crime, there is a reasonable likelihood that it would not have sentenced applicant to death.

VII. Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South

granted relief on the *Brady* claim, it is not necessary to address these related issues.

Carolina law was violated by trial counsel's failure to object to improper comments made by the prosecution in opening statements.

A. Relevant Facts

During the opening statement of the sentencing phase of applicant's trial, the prosecutor made the following arguments:

- ☐ "We put the jurors on the stand and we question them under oath and we lock them up in a motel. But there's a point to that and that is to make sure that anybody charged with this type of offense, anybody facing this type of punishment gets as fair a trial as our country can give them." Tr. 1604-1605.
- ☐ "You may have noticed that when Mr. Sapp was convicted, he cried. Ladies and gentlemen, there are all types of tears in the world. Tears of compassion, there are tears of sorrow and there are tears of self-pity. I submit to you the ones you saw were self-pity . . . No sorrow, that's what that was." Tr. 1606-07.
- ☐ "[T]he person you see in court is not the person that was there that night. That is never the case. Courtrooms subdue people. Courtrooms make [defendants] meek." Tr. 1607.
- ☐ "We've got four types of poisonous snakes in South Carolina. The meekest, the coral snake, is actually the most poisonous, hides under rocks and only comes out at night." Tr. 1607.

Johnston gave the defense opening statement and, therefore, was responsible for lodging appropriate objections to the prosecution opening statement. He did not object to any of the statements detailed above. PCR Tr. 501-502. Furthermore, testifying at the PCR hearing he could not recall a strategic reason for his failure to object. PCR Tr. 501-502.

B. Legal Analysis and Conclusion

Trial counsel's failure to object to the prosecution statements detailed above represents another example of counsel's failure to protect his client. The comments were inappropriate and prejudicial. Courts have made clear that prosecutors are "ministers of justice and not merely advocates." *State v. (Jeffrey) Jones*, 343 S.C. 562, 578 541 S.E.2d 813, 822 (2001), quoting *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000). For this reason, the job of the

prosecutor is not to "win" a conviction; rather, the prosecutor's job is to see that justice is done. *See State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989); *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981). Prosecutors must refrain from engaging in "improper methods calculated to produce a wrongful conviction." *Dawkins*, 297 S.C. at 388, 377 S.E.2d at 299. As a corollary to this principle, it is well-established that the state's arguments should not appeal to the jurors' passions or prejudices nor should the argument be misleading. *State v. Copeland*, 321 S.C. 318, 468 S.E.2d 620 (1996). *See also State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) ("The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice.") (quoting *State v. Linder*, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)).

Each of these statements above was objectionable and will be addressed individually. The statement regarding sequestration improperly faulted applicant for this rather substantial inconvenience. First, the solicitor reminded the jurors of the negative aspects of jury service in a capital case: being put on the witness stand, being placed under oath, and being *locked* in a hotel room. Then the solicitor explained to the jury that all this trouble was to ensure that the *defendant* got a fair trial. Blaming sequestration on applicant was both inaccurate and improper. The rationale behind sequestration is not solely to provide the defendant with a fair trial. Indeed, many defendants have objected to sequestration on the grounds that the jury will do exactly what the solicitor did here – blame the defendant for the inconvenience. *See State v. Allen*, 373 A.2d 377, 381 (N.J. 1977) ("[M]any defendants are wary of jury sequestration for the reason that the jurors will resent it and hold a defendant responsible for the sequestration order and the resultant inconvenience and hardship to them."); *see also* IJA Report, Vol. 18, No. 1 (Fall 1985) ("sequestered jurors . . . may develop a high level of friction, frustration, anger and aggression

and direct such impulses toward the defendant"). Second, even if the solicitor's statement was accurate, it was not a proper argument because it was not relevant to the "character of the defendant or the circumstances of the crime." *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982). This line of argument was improper and trial counsel should have objected.

The second line of argument represented an improper comment on the applicant's failure to demonstrate remorse. The South Carolina Supreme Court has previously found similar arguments to be improper. "Comments by the prosecution upon an accused's failure to express remorse invite the jury to draw an adverse inference merely because the defendant did not appear penitent." *State v. Johnson*, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987); *see also State v. McClure*, 342 S.C. 403, 537 S.E.2d 273 (2000) (solicitor improperly focused attention on whether the defendant had shown remorse); *State v. Hawkins*, 292 S.C. 418, 357 S.E.2d 10, 13 (1987) (solicitor argued, "I ask you to consider all of the evidence. You have seen no remorse." The Court found error); *State v. Cockerham*, 294 S.C. 380, 365 S.E.2d 22, 23 (1988) (The state argued, "[D]oes he look sorry to you? . . . Have you seen any remorse?" The Court found error).

Here, the prosecution's comments were even more prejudicial. Not only did the prosecutor argue that applicant lacked remorse but he also argued that applicant's crying was really an indication of self-pity. In this way, the prosecutor turned applicant's appearance into a double aggravator: the only emotion applicant displayed was sadness for his own situation rather than remorse for his actions and their effects on the victim and his family. The remarks asking the jurors to speculate about applicant's remorse were improper and objectionable.

The third comment, suggesting that applicant was a different person in the courtroom than on the night of the incident was improper because it turned his mere presence in the courtroom into an aggravator and it constituted an inappropriate comment on the defendant's

non-testimonial demeanor. See *United States v. Mendoza*, 522 F.3d 482 (5th Cir. 2008) (“[C]ourtroom demeanor of a non-testifying criminal defendant is an improper subject for comment by a prosecuting attorney.”); *State v. John B.*, 925 A.2d 1235, 1243 (Conn. App. Ct. 2007) (same). The implication was that the applicant was trying to fool the jury or, at the very least, that the jury had to assume that the person before them was behaving appropriately only because he was in a courtroom. In short, such a statement punishes a defendant for demanding a trial and for acting appropriately during the trial. This comment violated applicant’s right to trial and as such was objectionable.

The fourth comment, and perhaps the most egregious, provided a detailed comparison of applicant to a coral snake. Arguments like this are inappropriate because their only purpose is to appeal to emotion, passion, or prejudice. In *State v. Hawkins*, 292 S.C. 418, 357 S.E.2d 10 (1980), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), the Court found error in the repeated reference to the defendant as “Mad Dog.” In that case the defendant’s nickname was “Mad Dog” and so the Court recognized that it was permissible for the solicitor to use the name to clarify the defendant’s identity. *Hawkins*, 292 S.C. at 421, 357 S.E.2d at 12. However, the Court held that the repeated use of this nickname “denied the right to a fair trial and infected the sentencing proceedings with an arbitrary factor.” *Id.* Similarly, other jurisdictions have found derogatory comparisons of a defendant to an animal improper. See *Rosser v. Commonwealth of Virginia*, 482 S.E.2d 83, 87 (1997) (Error found when prosecutor argued that “I don’t think I’m overstating this when I say [the defendant] is an animal.”); *State v. Roache*, 595 S.E.2d 381, 416 (N.C. 2004) (court found improper prosecution comparison of defendant to wild dogs, “high on the taste of blood and power over their victims” because such statements led “the jury to base its decision not on the evidence relating to the issue submitted.

but on misleading characterizations, crafted by counsel, that are intended to undermine reason in favor of visceral appeal.”); (quotations and citation omitted)); *State v. Barajas*, 177 P.3d 106, 114 (Wash. Ct. App. 2007) (court found comparison of defendant to “mongrel mutt” improper).

Like the comparisons to animals cited above, the prosecutor’s argument here was improper because its only purpose was to appeal to the jurors’ emotions. While the argument was concise, it was extremely powerful. The prosecutor described the snake as “meek” just as he had previously described applicant’s courtroom demeanor, a not-so-veiled suggestion that applicant, even as he sat in the courtroom, was not human. The prosecutor went on to metaphorically argue that applicant, just like the coral snake, only appeared at night and hid under rocks. This dehumanizing argument, in addition to playing on common fears of snakes in general, took the jurors’ attention away from the proper focus of a capital sentencing. Trial counsel should have objected to these improper comments and but for their failure to object, there is a reasonable likelihood that the outcome of the sentencing proceeding would have been different.

VIII. Applicant was denied his right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law by trial counsel's failure to object to the admission of improper victim impact testimony.

A. Relevant Facts

During the sentencing phase of applicant’s trial, the prosecution presented the victim impact testimony of Tim Johnson, the brother of Trooper Johnson. During his testimony Mr. Johnson addressed applicant personally and commented on applicant’s character. “And having to stand in that operating room with my beloved sister-in-law and say good-bye because someone like you killed him.” Tr. 1769. Later in his testimony, Mr. Johnson stated:

And Mr. Sapp, you said in your closing arguments to the jury that

you're not a monster. Well, let me tell you why that is not true. . . . So, Mr. Sapp, as you sit over there saying you're not a monster, all I will say to you is that my brother's children see you as a monster. Every night they go to bed crying and holding pictures of them and their dad together with tears running down their cheeks because you are the monster that shattered their lives into tiny pieces like broken glass.

Tr. 1770-1771. Trial counsel did not object to this testimony.

At the PCR hearing Johnston could not recall why he did not object to this testimony. PCR Tr. 490. However, Johnston did describe his general fear that lodging an objection to victim impact testimony could alienate jurors. PCR Tr. 490-491. Johnston had never considered requesting permission to approach the bench so that he could articulate an objection outside the presence of the jury. PCR Tr. 541-542. He added that this was the only opportunity that the victim's family had to "confront[] the person who has been convicted of killing a loved one," and he thought the jury would *sua sponte* filter out any prejudicial information. PCR Tr. 539. Johnston was unable to recall being involved in a case which included victim impact testimony. PCR Tr. 537. Johnston also could not recall whether he had ever read any United States Supreme Court case concerning victim impact evidence including *Payne v. Tennessee*. PCR Tr. 538, 542. Specifically, when asked why he did not object to Mr. Johnson's reference to applicant as a monster, Johnston stated that in addition to his general policy of not objecting to victim impact testimony, "that was his moment in court, let the jury listen to him." PCR Tr. 541.

B. Legal Analysis and Conclusion

In this case, trial counsel did not object to the admission of victim impact evidence that went beyond the scope of such evidence as set out by the United States Supreme Court. Victim impact evidence is generally admissible to demonstrate the "uniqueness" of the victim and the "specific harm caused by the defendant." *State v. Hughey*, 339 S.C. 439, 457, 529 S.E.2d 721.

730 (2000); *see also Payne v. Tennessee*, 501 U.S. 808 (1991) (Eighth Amendment did not erect a bar to the admission of victim impact evidence and a state may allow the jury to see "a *quick glimpse* of the life" of the victim." *Id.* at 830 (O'Connor, J., concurring (emphasis added)(quoting *Mills v. Maryland*, 486 U.S. 367 (1988)). However, in *Payne*, the Supreme Court did not alter its prior holding that "victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence, violates the Eighth Amendment." *Payne*, 501 U.S. at 830, n. 2; *see also Booth v. Maryland*, 482 U.S. 496, 508-509 (1987).

The testimony of Mr. Johnson went beyond simply describing the "uniqueness" of Trooper Johnson or the effect of his death on his family. Personally addressing applicant and referring to him as a monster overstepped the boundaries set out by *Payne* and *Booth* and "so infected the trial with unfairness as to make the resulting [sentence] a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Clearly, this testimony was objectionable. Indeed, Johnston's reasons for not objecting had nothing to do with the substance of this testimony; rather, his failure was based on a general policy of allowing family members of victims to "confront" the defendant and have their "moment in court." Of course, this policy is at odds with Supreme Court jurisprudence which has never approved victim impact testimony as an opportunity for a witness to "confront" a defendant. Indeed, the Supreme Court specifically prohibited victim impact witnesses from characterizing (i.e. confronting) a defendant. By his own account Johnston lacked an understanding of the confines of victim impact testimony. Indeed, he could not recall having reviewed a single case on this topic, and his general policy of not objecting suggested that he, in fact, was unaware of the legal bases for potential objections. Second, *assuming arguendo*, that Johnston was aware of the possible objections to this testimony

but did not raise them out of a concern that it would alienate the jury,²⁹ such a concern does not explain his failure to at least approach the bench so that he could protect his client without having to argue in the presence of the jury.³⁰ According to Johnston, this thought had never occurred to him. PCR Tr. 541. Johnston's willingness to sit by while a witness personally castigated his client in front of the jury was professionally unreasonable and prejudicial to applicant.

IX. Applicant was denied the effective assistance of appellate counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law by appellate counsel's failure to appeal the disqualification of Juror Massey.

A. Relevant Facts

During jury selection, the trial court disqualified Juror Massey based on its concerns that the juror had prejudged applicant's guilt. Tr. 669-670. This juror testified during *voir dire* that he was impartial and would need to hear the evidence before deciding between life imprisonment and the death penalty. Tr. 654-655. The juror did indicate that normally when he reads about an arrest in the newspaper, he assumes that the defendant is guilty. Tr. 658. However, the juror elaborated that he could be fair in applicant's case. Tr. 659-660, 662-663. Juror Massey also indicated a concern about being away from his business and home for ten days but also "[didn't] think anyone would want to be away from home for 10 days." Tr. 665. The prosecution objected to this juror's qualification on the basis that his concerns about being away from his

²⁹ Given trial counsels' decision to pursue a theory at trial that was not supported by evidence and destroyed the defense's credibility, his excuse for not objecting to this testimony - a fear of alienating the jury - is more convenient than it is convincing.

³⁰ Mr. Johnson, rather than testify in question/answer form, simply read from a letter which he, or someone, had previously written. While this form of victim impact testimony has been allowed, *see State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000), to the extent that it made it more difficult for trial counsel to object appropriately without alienating the jury, an objection should have been made by trial counsel.

work and home might "impact his ability to serve." Tr. 668. The trial court expressed concern about the juror's frustration at being away from work and home as well as his statements indicating an assumption that arrestees are guilty of the crime for which they were arrested. The court acknowledged that Juror Massey had testified that he could be fair and set aside any preconceptions, but, nevertheless, worried that the juror's frustration of being sequestered may cause him to revert back to this biased opinion. Tr. 669-670.

At the PCR hearing Mr. Savitz testified that he did not raise on direct appeal the issue of Juror Massey's disqualification. Specifically, Mr. Savitz testified that he did not believe the issue was "meritorious." PCR Tr. 401. Mr. Savitz did recall that the juror had indicated that he could be fair to the defendant but believed that the juror may have still been concerned about his business. PCR Tr. 401-402.

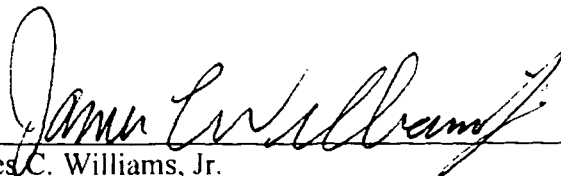
B. Legal Analysis and Conclusion

A juror must be impartial and must be able to set aside any previously formed opinion. It is not enough for a juror to simply have formed an opinion about a defendant's guilt. "The venireperson must not only have a formed opinion of the defendant's guilt, but also be unable to set that opinion aside to view the evidence with impartiality." *State v. Avery*, 374 S.C. 524, 533, 649 S.E.2d 102, 106 (Ct. App. 2007). Applying this standard, Juror Massey was a qualified juror. While at one time he implied that he may have prejudged applicant's case because of his general assumption that when defendants are arrested they are most probably guilty, he unequivocally and consistently indicated that he would be able to decide the case based on the evidence and would not assume applicant's guilt. As for his concern about work and family, Juror Massey even acknowledged that the inconvenience to him was probably felt by the other jurors as well. Tr. 665.

While certainly appellate counsel can prioritize issues and raise only those that he or she believes has merit, here counsel only raised four issues, one of which was obviously defaulted and could not be decided on direct appeal. So, any suggestion that Savitz "winnowed" down the issues in this case is belied by the facts. PCR Tr. 402. The trial court improperly disqualified Juror Massey, trial counsel appropriately objected, and appellate counsel's failure to raise this issue on direct appeal was professionally unreasonable. Had the issue been raised there is a reasonable likelihood that relief would have been granted.

CONCLUSION

For the foregoing reasons this Court vacates applicant's sentence and remands the case to the Berkeley County Court of General Sessions for a new sentencing trial.


James C. Williams, Jr.
Circuit Court Judge

Dated: Aug 11, 2009
Orangeburg, South Carolina



State of South Carolina
The Circuit Court of the First Judicial Circuit

James C. Williams, Jr.
Judge

Post Office Box 1949
190 Gibson Street, Suite 207
Orangeburg, SC 29116-1949
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jwilliamsj@sccourts.org

August 12, 2009

Berkeley Clerk of Court
P. O. Box 219
300 B. California Avenue
Moncks Corner, S. C. 29461

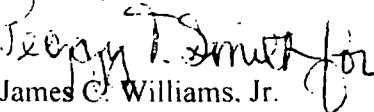
Re: Jesse Waylon Sapp v. State of South Carolina
2006-CP-08-2204

Dear Ms. Brown:

Please file the enclosed ORDER and send copies to Assistant Attorney General Don Zelenka and Attorney Robert Lominack, the attorneys of record in this case.

Thank you for your assistance in this matter.

Sincerely,


James C. Williams, Jr.

JCWjr:pts

Enclosure

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

CA No.09-CP-32-5465

RECEIVED

APR 13 2012

S.C. Supreme Court

KEVIN MERCER. *Petitioner/Respondent,*

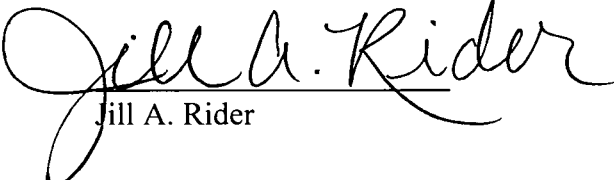
v.

STATE OF SOUTH CAROLINA *Respondent/Petitioner.*

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Petitioner/Respondent's Return to
Respondent/Petitioner's Petition for Writ of Certiorari was served today by first class United
States mail, postage prepaid, this 9th day of April, 2012, upon the following:

Alphonso Simon, Jr.
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


Jill A. Rider