THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Appeal From Lexington County
The Honorable John C. Few, Circuit Court Judge

GARY DUBOSE TERRY,

Petitioner,

vs.

THE STATE,

Respondent.

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Was Petitioner denied the effective assistance of counsel during trial due to (1) counsel's failure to object to exclusion of his inculpatory statement to police based on prosecutorial misconduct in "sandbagging"; and (2) counsel's failure to adjust their defense strategy in order to maintain credibility with the jury in sentencing?

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether Terry failed to preserve either of his arguments for appellate review because he did not raise either one as a specific allegation in "Applicant's Final Amendments," and thus he failed to give either the State or the PCR judge notice that he was pursuing these issues as grounds for relief? Ar both issues procedurally barred because Terry, instead, first raised them in his post-hearing memorandum; and he also admittedly failed to raise either argument in a Rule 59(e), SCRCP, motion, when the arguments were not addressed in the Order of Dismissal?

II. Whether his claim that counsel were ineffective for not arguing for introduction of his March 24, 1995 statement based upon prosecutorial misconduct should be rejected because there is no evidence of prosecutorial misconduct?

III. Whether Terry can show either deficient performance or prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), resulting from counsel's failure to alter their trial strategy of making the State prove its case beyond a reasonable doubt, without presenting defense witnesses, after the trial judge's ruling granting the State's motion *in limine* to prevent Terry from introducing any evidence concerning the statement unless he testified?

STATEMENT OF THE CASE

Petitioner, Gary Dubose Terry (Terry), is currently confined on death row at Lieber Correctional Institution, of the South Carolina Department of Corrections (S.C.D.C.), as the result of his Lexington County murder conviction and death sentence. The Lexington County Grand Jury indicted him at the July 1995 term of court for murder, burglary in the first degree, criminal sexual conduct in the first degree and malicious injury to telephone system. The State thereafter timely served a Notice of Intent to Seek the Death Penalty and a Notice of Evidence in Aggravation of Punishment. The Honorable Gary E. Clary Motions held hearings on May 28, August 22, September 3 and September 8, 1997. Terry then received a jury trial before Judge Clary on September 15-21, 1997. On September 18, 1997, the jury found him guilty of all charges.

Following Terry's exercise of his statutory right to a twenty-four hour waiting period, the sentencing phase was held on September 19-21, 1997. The trial judge charged the jury on the statutory mitigating circumstances found in § 16-3-20(C)(b)(2), (6) & (7).[1] The jury found the presence of both alleged statutory aggravating circumstances that the murder was committed while in the commission of burglary in any degree and criminal sexual conduct in any degree, *see* S.C. Code Ann. § 16-3-20(C)(a)(1)(a) & (c) (Supp. 2010), and it recommended a death sentence.

Judge Clary imposed the sentence of death for murder. He also sentenced Terry to consecutive sentences of life imprisonment for burglary in the first degree, thirty years imprisonment for criminal sexual conduct in the first degree and ten years imprisonment for malicious injury to a telephone system. **App. 2128-30**. Lexington County Public Defender

[1] In charging § 16-3-20(C)(b)(1)(c), the trial judge charged the jury on Terry's mentality but not on his age.

Elizabeth C. Fullwood and Isaac McDuffie Stone, III, Esquire, represented Terry at trial.

Terry served and filed a timely Notice of Appeal. Assistant Appellate Defender Robert M. Dudek, of the South Carolina Office of Appellate Defense, represented Terry throughout his direct appeal. His direct appeal was consolidated with the South Carolina Supreme Court's review of his sentence pursuant to S.C. Code Ann. § 16-3-25(c) (1985).

Terry filed a Final Brief of Appellant (**App. 2216-46**) and a Final Reply Brief of Appellant (**App. 2304-17**) on May 4, 1999. His "Statement of Issues on Appeal" included the following ground for relief:

1.

> Whether the judge denied Due Process, as guaranteed by the Fourteenth Amendment to the United States Constitution, by refusing to admit appellant's statement against interest into evidence during cross-examination pursuant to Rule 804(B)(3), SCRE, since its exclusion denied appellant the right to present a complete defense?

App. 2420.The State also filed a Final Brief of Respondent on May 4, 1999. **App. 2447-2303**. This Court affirmed his conviction and sentence in a published Opinion filed on March 13, 2000. *State v. Terry*, 339 S.C. 352, 529 S.E.2d 274 (2000), *cert denied*, 531 U.S. 882 (2000). **App. 2318-27**. The Court denied Terry's timely Petition for Rehearing (**App. 2328-32**) on April 19, 2000. **App. 2333-34**.

On June 28, 2000, Terry filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, in the United States Supreme Court. His certiorari petition presented the following question for relief:

> Did the exclusion of Petitioner's statement against penal interest, and cross-examination about it, violate due process where the court ruled it would not admit the statement unless Petitioner testified, and the State did not want the statement admitted until the penalty stage to prevent jury consideration of a lesser-included offense?

App. 2335-2410. The State filed a Brief in Opposition on July 31, 2000. **App. 2411-42**. The United States Supreme Court denied certiorari in an unpublished Order filed on October 2, 2000. **App. 2443**.

Through court-appointed counsel, H. Wayne Floyd and Melissa J. Kimbrough, Esquires, Terry filed a Post-Conviction Relief (PCR) Application on November 30, 2000. **App. 2444-56**. Of particular relevance to the two issues before this Court, he alleged the following :

> 9(g). *Applicant was denied effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel erroneously told the jury applicant "confessed" to the crimes charged when in fact applicant's alleged confession amounted, at most, to an admission of manslaughter.*
>
> 10(g). During his opening statement to the jury, trial counsel told the jury applicant had "confessed" to the victim's murder. However, because applicant's alleged confession amounted, at most, to manslaughter, this statement was neither a "confession" to the charges against him nor an admission against interest. State v. Terry, 2000 WL 282450. Consequently, when trial counsel sought to have this statement admitted, which would have allowed the jury to hear evidence applicant was guilty of manslaughter rather than murder, the trial court refused [to allow introduction of the statement]. Trial counsel's unreasonable action in informing the jury applicant "confessed" was extremely prejudicial, denied applicant the effective assistance of counsel, and entitles him to a new trial.

App. 2449-50. The State filed a Return and Motion to Dismiss on December 28, 2000. **App. 2457-80**.

The Honorable John C. Few held a hearing into the matter on July 10-12, 2006, at the Lexington County Courthouse. Terry was present at this hearing and Mr. Floyd and Ms.

Kimbrough represented him. Senior Assistant Attorney General William Edgar Salter, III, and Assistant Attorney General Melody J. Brown represented the State. At the hearing, Terry presented testimony from his trial attorneys, J. McDuffie Stone, III, Esquire, and Elizabeth C. Fullwood, Esquire. He also presented testimony from Francis A. Humphries, Esquire; Dr. John Carter; Steve Derrick; Nancy Skraba; Lilly S. Gallman; Diane Gibson Smith; Louanne R. Smith; and Patricia R. Terry. Respondent presented testimony from G. Thomas Chase, Esquire; Thomas J. Davis; and Scottie R. Frier.[2]

Terry amended his allegations during the PCR hearing on July 10-12, 2006. "Applicant's Final Amendments" were that:

[A.] Ineffective assistance of trial counsel:

1. Opening statement contained prejudicial error to the extent that the defense conceded guilt of murder, criminal sexual conduct and burglary, first-degree, based on applicant's statement that admitted neither burglary nor criminal sexual conduct, and contained a confession only as to manslaughter;

2. For failure to raise a Batson/J.E.B. challenge to the solicitors use of all strikes against all female and one black juror;

3. For failure to move to strike for cause juror Georgia Miller, whose statement that her punishment would be death for any intentional killing was a basis for disqualification;

4. For failure to object to the judge's jury charge on implied malice;

[2] In addition to the testimony of these witnesses, the exhibits introduced at trial and the exhibits introduced at the hearing, the PCR judge also had before him: (1) the Record on Appeal from the direct appeal; (2) the Final Brief of Appellant; (3) the Final Reply Brief of Appellant; (4) the Final Brief of Respondent; (5) the March 13, 2000 Opinion of the South Carolina Supreme Court from the direct appeal; (6) the Petition for Rehearing; (7) the Order filed on April 19, 2000 denying rehearing; (8) the Petition for Writ of Certiorari to the South Carolina Supreme Court; (9) the Brief in Opposition to the Petition for Writ of Certiorari to the South Carolina Supreme Court; and (10) the unpublished decision of the United States Supreme Court denying Certiorari. **Order, p. 1, App. p. 3014.**

5. For failure to object to the portion of the trial judge's jury charge on the facts surrounding the death of Ms. Jackson;

6. For failure to object to or move *in limine* [to] prevent the introduction of excessive and uncorroborated character evidence used by the state in the penalty phase;

7. For failure to object to hearsay evidence from Lt. Brown detailing the applicant's alleged theft of items from a construction site;

8. For failure to object to hearsay testimony by Officer Wilkerson regarding the statement of Ann Lomax, who was not present to testify;

9. For opening the door in cross-examination of Officer Wilkerson as to the statement of Ann Lomax who was not present to testify;

10. For failure to request a charge on provocation by the victim as a mitigating circumstances as set forth in l6-3-20[(C)(b)](8);

11. For failure to develop and present corroborating testimony that would have allowed introduction of defendant's statement during the guilt phase;

12. For failure to present any evidence or argument to the jury in support of defendant's statement that the killing was manslaughter rather than murder;

13. For failure to present any evidence or argument to the jury in support of defendant's statement that sex with the victim was consensual;

14. For failure to present any evidence or argument to the jury in support of defendant's statement that he did not burglarize the victim's residence;

15. For failure to make any argument at the directed verdict stage even though the evidence failed to establish criminal sexual conduct or burglary first-degree;

16. For failing to object to "character" evidence in the penalty stage that was far more prejudicial than probative;

17. In arguing to the jury during closing that defendant was a "rapist," "murderer," "invader of homes" and "thief;"

18. In failing to present evidence to the jury that defendant was left-handed even though the state's forensic evidence established that the killer was right-handed;.

19. For failure to object and move for a curative instruction when Louanne Terry testified Gary could get out in thirty years, and, in the alternative, for not advising this witness not to mention parole eligibility;

20. For failure to object to officer Phillips testimony that the defendant had an appointment with the Sheriffs Department, but failed to show up;

21. For failure to present any argument or evidence to the Court or the jury that the defendant was not guilty of tampering with the victim's telephone system and/or wiring when evidence was available that would have established that the defendant's fingerprint was placed on the victim's telephone box based on innocent conduct;

[B]. Ineffective assistance of appellate counsel.

22. For failing to argue that the trial court erred in denying defendant's motion for a directed verdict as to all charges.

[C. *Brady* violation.

23. The State failed to disclose photograph of Diane Gibson and Applicant].

App. 2481-82; 2513-15; 2736-38.[3] Thus, he did not raise either of the specific allegations that are now presented on certiorari and Respondent was not given notice that these claims were being asserted.

Terry filed a Post-Hearing Memorandum of Law In Support of His Application For Post

[3] He had previously notified the State of most of these allegations and Respondent did not object to most of the amendments. The Court overruled the objection to the allegation to which the State objected.

Conviction Relief on February 20, 2007. **App. 2804-74**. The State filed a Proposed Order of Dismissal on September 11, 2008. **App. 2875-2988**. Terry then filed objections to the proposed Order (**App. 2989-3013**); but Judge Few denied relief in an Order of Dismissal filed on February 18, 2009. **App. 3014-3125**. Terry filed Applicant's Motion for Reconsideration In Re: Final Order of Dismissal on March 11, 2009. **App. 3126**. Judge Few denied Terry's motion for reconsideration on March 12, 2009. **App. 3127**.

Terry served and filed a timely notice of appeal, and this Court later appointed Teresa L. Norris, Esquire, to represent him.

STATEMENT OF FACTS

In May, 1994, Urai Jackson lived alone at 3148 Buckeye Drive in West Columbia, South Carolina. She and her husband had divorced in 1974 and she was not romantically involved with anyone at the time of her demise. In fact, her daughter, Samantha A. Jackson, testified her mother was a loner who did not have any close acquaintances with which she kept in touch frequently. **App. 1526-1528; 1536**.

Samantha had maintained very frequent contact with her mother. She frequently assisted with her mother's finances and often did her laundry at her mother's house on the weekends. Samantha first met Terry in 1986 or 1987. He was dating her best friend at the time, Diane Gibson, who lived across the street from her mother. Terry lived with Diane for some period of time, but Samantha lost contact with Diane in 1993. He was not living across the street from Urai Jackson at the time of the murder. **App. 1528-30**.

On Saturday, May 29, 1994, Samantha called her mother and left a message on Urai's answering machine for Urai to call her back. However, Urai did not call her back. On Sunday,

Samantha called her mother several times. She did not get an answer and the answer machine did not pick up. Still, Samantha was not worried because it was the Memorial Day weekend and her mother frequently went to Lake Murray on holidays.[4] When Samantha could not reach her mother on Tuesday, May 31, 1994, she became concerned. She drove to her mother's house and noticed that the outdoor light was on even though it was the middle of the day. Samantha explained this was very odd because her mother was an early riser and would not have left the light on after she awakened. As she approached the house, Samantha noticed that the carport door was ajar and there was "glass everywhere." Inside, the kitchen was in disarray and there was garbage on the floor. Again, this was unusual. Samantha walked into the hall and living room area and saw her mother lying on the floor. She tried to call 911 but could not get a dial tone. Therefore, she immediately ran out of the house and called 911 from a neighbor's residence. Shortly thereafter, a Lexington County Deputy Sheriff arrived on the scene. **App. 1529-35.**

Officers responding to the scene indicated that one of the glass panes on the carport door window had been broken out from the exterior of the house. They corroborated that the kitchen area was in disarray but the rest of the house appeared to be reasonably neat. Also, the victim was lying in the area described by Samantha. She had either a T-shirt or gown across part of her body, but her breasts and her genitalia were exposed. Also, her legs were spread and her left leg was up at an angle with the bottom of her foot on the floor. **App. 1284-98; 1308-09; 1332-36; 1342-43; 1353-58; 1419-22.**

Samantha Jackson testified her mother kept a number of items around the house for

[4] She always went alone.

protection, including the bottom of a two-piece pool cue. While officers found the top portion of the pool cue, the bottom portion was never recovered. Outside the house, the officers discovered the telephone lines had been pulled from the telephone box. A latent fingerprint matching Terry's right ring finger was lifted from the telephone box. **App. 1309-12; 1330-32; 1336-37; 1343-44; 1356-57; 1430-37; 1534-35.**[5]

Dr. John Carter, the forensic pathologist who performed the autopsy on the victim, testified that he found at least four, and possibly more, blunt trauma wounds where a blunt, heavy, club-like object hit the victim just above and behind her right ear. These blows were struck with sufficient force to split the scalp and crush the skull bone, thereby exposing some brain tissue behind the right ear. These blows would have likely caused immediate unconsciousness and would have quickly resulted in death. Also, there were a number of superficial lacerations which may have occurred when she was falling. The appearance of the wounds he found indicated that she was struck from behind and possibly from above and behind with a blunt instrument. He also found two blunt trauma lacerations on the top of the victim's shoulder which appeared to have been caused by the same instrument. At least two "slap-type injuries" in different directions on the side of the victim's right upper arm were defensive wounds, as were the wounds to the left forearm. These wounds were consistent with State's Exhibit 13, but Carter opined that the head injuries were more likely caused by a heavier instrument, such as a club or a baseball bat which had a rounded end. Also, Dr. Carter explained that the victim's thumb was "almost smashed" and opined this could have been a

[5] A latent fingerprint from one of two beer cans found in the victim's sink did not match either the victim or Terry; but, it was impossible to determine when the print was left and it could have been left by anyone who handled the beer can. **App. 1442; 1460-61.**

defensive injury which could have been caused by the perpetrator stomping on her thumb. **App. 1464-70**.

Dr. Carter, who had visited the scene, opined that the position in which the victim's body was found was consistent with having been sexually assaulted. At autopsy, he took swabs from the posterior portion of the victim's mouth, the anus and the vaginal canal. Internally, he found a reasonable amount of mucoid fluid in the vaginal canal. **App. 1471-73; 1478-80**.

Subsequent testing by SLED's forensic serology and DNA laboratorian revealed the presence of semen in the vaginal wash and the rectum swab. A blood standard from Terry showed that he had ABO blood type "group A and the secreter status is non-secreter, Lewis A positive." **App. 1488-91**. Terry's DNA profile matched the DNA extracted from the semen found on the vaginal wash and the anal swab. "[T]he probability of selecting an unrelated individual at random from the population having a DNA profile matching [these items] . . . is approximately one in one hundred ten billion blacks and one in thirty-three billion Caucasian." **App. 1493-98**.

ARGUMENTS

I. Terry failed to preserve either of his arguments for appellate review because he did not raise either one as a specific allegation in "Applicant's Final Amendments" and, thus, he failed to give either the State or the PCR judge notice that he was pursuing these issues as grounds for relief. Instead, he first raised both claims in his post-hearing memorandum; and he also admittedly failed to raise either argument in a Rule 59(e), SCRCP, motion, when the arguments were not addressed in the Order of Dismissal.

Terry's first argument is that trial counsel were ineffective for failing to object to the exclusion of his March 24, 1995 statement based on prosecutorial misconduct and "detrimental

reliance." His second argument is that counsel was ineffective for not changing their trial strategy of making the State prove its case beyond a reasonable doubt, without presenting defense witnesses, after the trial judge's ruling that he could not introduce the statement without testifying. The State submits that he has failed to preserve either of his arguments for appellate review because he did not raise either one as a specific allegation in "Applicant's Final Amendments" and, thus, he failed to give either the State or the PCR judge notice that he was pursuing these issues as grounds for relief. Instead, he first raised both claims in his post-hearing memorandum; and he also admittedly failed to raise either argument in a Rule 59(e), SCRCP, motion, when the arguments were not addressed

in the Order of Dismissal.

As set forth in the "Statement of the Case," allegation 10(g) of his PCR Application alleged that trial counsel was ineffective for informing the guilt phase jury that Terry had given a "confession" to te victim's murder because his "confession amounted, at most, to manslaughter, this statement was neither a 'confession' to the charges against him nor an admission against interest." He further alleged that "counsel's unreasonable action in informing the jury [that Terry had] 'confessed' . . . entitles him to a new trial." **App. 2449-50**. In other words, counsel's ineffectiveness undermined the guilt phase of his trial.

He did not allege that counsel's decision to make the challenged remarks were the result of prosecutorial misconduct government trickery or "detrimental reliance." He also did not allege that counsel were ineffective for not changing their trial strategy of making the State prove its case beyond a reasonable doubt, without presenting defense witnesses, after the trial judge's ruling that he could not introduce the statement without testifying. **App. 2449-50**. When he

amended his allegations during the PCR hearing, he again failed to give either the State (as Respondent) or the PCR judge notice that he was pursuing the two allegations that are now before this Court. Indeed, he concedes that he failed to pursue a claim of prosecutorial conduct, but blames this on the ineffective assistance of his PCR counsel (**Brief of Petitioner, p. 32 n. 14**), even though ineffective assistance of PCR counsel generally cannot serve as a basis for PCR relief. *Aice v. State*, 305 S.C. 448, 450, 450-52, 409 S.E.2d 392, 394-95 (1991) (apart from the scenario covered by *Austin v. State*,[6] a successive PCR application is not allowed on the ground that first complete PCR application was insufficient due to ineffective PCR counsel).

Rather, Terry first argued in his February 20, 2007 Post-Hearing Memorandum of Law In Support of His Application For Post Conviction Relief that trial counsel were ineffective because they failed to object to prosecutorial misconduct in misleading the defense into believing that it planned to introduce Terry's March 24th statement in the guilt phase. **App. 2819-24**. He also argued that it was "nonsensical to attempt to curry credibility with the jury by at once saying that Mr. Terry confessed to the crime and then to challenge the State's evidence putting him at the scene." **App. 2817**.

The State filed a Proposed Order of Dismissal. **App. 2875-2988**. Terry filed objections to the proposed Order, arguing that the proposed Order "fails to address certain issues and/or sub issues raised by the applicant." He relied on his post-hearing memorandum, and he claimed that the Order failed to address his argument of "alleged prosecutorial misconduct due to the state's misrepresentation of its intentions insofar as the confession." **App. 2989 n.1** (citation omitted). However, he did not specifically reference the claim in **Argument III** that counsel unreasonably

[6] 305 S.C. 453, 409 S.E.2d 395 (1991).

failed to alter their original trial strategy after the trial judge's ruling granting the State's motion *in limine* to bar the defense from introducing Terry's statement.

In the subsequent Order of Dismissal, the PCR judge denied relief on Terry's claim that trial counsel was ineffective for telling the guilt phase jury that Terry had confessed to the victim's murder, in opening statement, because the statement was "at most, an admission of manslaughter" and the statement was never introduced into evidence. **App. 3026-43**. The PCR judge specifically found that "[t]he present allegation only involves counsel's performance in the guilt phase." **App. 3043 n. 14**. The Order did not address either of the arguments now raised by Terry. Terry's Motion for Reconsideration merely referenced his prior objections to the Order of Dismissal, and he did not specifically argue that the Order failed to address either of the arguments now raised. **App. 3126**.

The State submits that Terry's arguments are procedurally barred because, although addressed in his post-hearing memorandum, they were never raised as specific allegations in "Applicant's Final Amendments." **App. 2481-82**.

An issue must have been raised to and ruled upon by the PCR judge to be preserved for appellate review. *Plyler v. State*, 309 S.C. 408, 424 S.E.2d 477 (1992); *Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (petitioner failed to preserve for review on appeal claim that trial counsel was ineffective for failure to object that sentences constituted cruel and unusual punishment where point was not raised in PCR application or at hearing). *Cf. Hoffman v. Powell*, 298 S.C. 338, 380 S.E.2d 821 (1989). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724

(2000).

Here, Terry complains throughout the Brief of Petitioner about the prosecution's deception, trickery, "sandbagging," and "foul blow" in describing the prosecution's failure to apprise the defense that it did not intend to introduce Terry's statement in the guilt phase, where there was no duty to inform defense counsel of this strategic matter. Yet, the only sandbagging done in this case was by collateral counsel because Terry failed to give either the PCR judge or the State any notice to that the issues now raised were issues in the case, until his post-hearing pleading. The State submits that, other than in capital PCR cases, no Court would ever suggest that a plaintiff could prevail upon an allegation that he had lurking in the shadows but which he failed to specifically allege in his pleading or at least give the opposing party and the trial court notice that he was pursuing.

It is bad enough that PCR judges have routinely permitted inmates to amend their applications, in both non-capital and capital PCR cases, either shortly before or, as here, during the hearing. To permit the case to be tried with allegations up the sleeve of the applicant or lurking in the shadows, however, is even more unfair because it deprives the State of any fair opportunity to investigate the allegation and to thereafter elicit evidence to refute the allegations. *See Stein v. New York*, 346 U.S. 156, 197 (1953) ("The petitioners have had fair trial and fair review. The people of the State are also entitled to due process of law"). Such a practice also contravenes both Rules 8(a) and (f), SCRCP, the latter of which states that " [a]ll pleadings shall be so construed as to do substantial justice to *all parties*." (Emphasis added).

Also, Terry never obtained leave to amend from the PCR judge and he did not move to conform his pleadings to the proof supposedly presented under Rule 15, SCRCP. *See Arnold v.*

State, 309 S.C. 157, 172-74, 420 S.E.2d 834, 842-43 (1992). In *Arnold*, the PCR judge court issued his Order on May 5, 1989. Both petitioners then filed motions to amend their PCR Applications. They also filed a motion under Rule 59(e), SCRCP, to amend the judgment on May 12, 1989. The PCR judge held hearings on both petitioners' motions. He thereafter denied both petitioners' motion to amend as untimely. He also held that Rule 59(e), SCRCP, was not the proper vehicle to amend a PCR application to add additional grounds for relief. *Id* at 172, 420 S.E.2d at 842.

This Court upheld his ruling on certiorari. First, the Court recognized that Rule 71.1(a), SCRCP, "directs that the South Carolina Rules of Civil Procedure shall apply to post-conviction relief actions to the extent the rules are not inconsistent with the Uniform Post-Conviction Procedure Act." *Id.* Then, the Court held that:

> When a party wishes to amend a pleading after final judgment from a full trial on the merits, South Carolina Rule of Civil Procedure 15(b) applies. Amendments under South Carolina Rule of Civil Procedure 15(b) are allowed not to assert new claims, but rather to conform the pleadings to the evidence presented at trial. *See Baxley v. Rosenblum*, 303 S.C. 340, 400 S.E.2d 502 (Ct.App.1991). Thus, petitioners' motion to amend the post-conviction relief petition was properly denied by the circuit court.
>
> The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to "reconsider matters properly encompassed in a decision on the merits." *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 200, 108 S.Ct. 1717, 1720, 100 L.Ed.2d 178, 184 (1988) (citing *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 451, 102 S.Ct. 1162, 1166, L.Ed.2d 325, 330-31 (1982)). The petitioners, here, sought after full hearings and a decision on the merits to add new grounds and new claims for post-conviction relief. The trial judge was correct in denying their motions.
>
> The gravamen of petitioners' motions is a request for subsequent petitions for post-conviction relief. South Carolina Code Ann. Section 17-27-90 provides:
>
> All grounds for relief available to an applicant under this chapter must be raised in

> his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application. (Emphasis added.)
>
> "This statute forbids a successive PCR application unless an applicant can point to a 'sufficient reason' why the new grounds for relief he asserts were not raised, or were not raised properly." *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392, 393-94 (1991).
>
> Additionally, "[t]his Court has by promulgation of rule interpreted Section 17-27-90 and the phrase 'sufficient reason' very narrowly."*Id.* (Emphasis added.)

Id at 172-73, 420 S.E.2d at 842-43.

Finally, the Court in *Arnold* observed that then-Supreme Court Rule 50(3) provided that "Under Section 8 of the Act, successive applications for relief are not to be entertained, and the burden shall be on the applicant to establish that any new ground raised in a subsequent application could not have been raised by him in the previous application." *Id* at 173, 420 S.E.2d at 843 (emphasis in original). The Court found that the petitioners had "failed to present to the circuit court facts and circumstances to show why the new grounds were not and could not have been presented in the prior petitions nor have they presented any to this Court." *Id* at 173-74, 420 S.E.2d at 843 (footnote omitted). Therefore, the Court affirmed the PCR judge's ruling. *Id* at 174, 420 S.E.2d at 843.

Much as the petitioners in Arnold, Terry has not and cannot show why the new allegation could not have been raised by him in the original or amended applications. He therefore did not timely plead and present the allegation below. *Id. See also* Rules 15(a) and (b), SCRCP. *Cf.* Hunter v. State, 271 S.C. 48, 244 S.E.2d 530, 533 (1978) (successive application barred where

applicant was aware of claim at the time of the filing of prior applications but did not raise it); *Aice*, *supra*; *Land v. State*, 274 S.C. 243, 262 S.E.2d 735, 737 (1980) (applicant's conclusory assertion that PCR counsel was "inadequate" held not a "sufficient reason" warranting a successive application).

Nor were these allegations implicitly tried with the State's consent. While Terry did ask Mr. Stone four questions *on re-direct* about possible sandbagging (**App. 2582-83**), he admits that collateral counsel did not pursue this allegation in the PCR court. Further, he did not elicit any testimony about counsel's failure to change their trial strategy after the judge granted the State's *in limine* motion. **App. 2516-83; 2668-2705**. Also, these allegations could not have been tried with the State's consent, where the State did not have any notice thereof, and the State was not alerted, until well after the hearing had ended, that Terry claimed that counsel's error (1) was the result of prosecutorial misconduct and (2) necessitated a change in trial strategy. *Contra Simpson v. Moore*, 367 S.C. 587, 598-99, 627 S.E.2d 701, 707-08 (2006).

Even assuming that the issues were sufficiently raised by Terry's post-hearing memorandum, they are still not preserved for review because the issues are not addressed in the Order of Dismissal and Terry failed to specifically bring this omission to the PCR court's attention in his Motion for Reconsideration, even construing that pleading as a Rule 59(e), SCRCP, motion. *See Marlar v. State*, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007). Terry admits that he did not comply with this requirement, but he asks the Court not to apply the rule to him "because there was a breakdown in communication" between him and collateral counsel. **Brief of Petitioner, p. 32 n. 14**.

However, there is no right to hybrid representation in PCR, *Koon v. Clare*, 338 S.C. 423,

527 S.E.2d 357 (2000); the strategic decisions as to handling the case were counsel's and not Terry's, *see Florida v. Nixon*, 543 U.S. 175, 187 (2004) (while counsel "has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy, this "does not require counsel to obtain the defendant's consent to 'every tactical decision' "); *Jones v. State*, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002) ("counsel cannot serve as a mere conduit for *pro se* documents in an effort to avoid the prohibition against hybrid representation"); and a defendant is not entitled to effective assistance of PCR counsel. *Aice, supra.*

Terry's request for the Court to remand for further findings by the PCR court is equally unavailing. A remand would only reward him for not bringing his two present claims to the attention of the PCR judge and opposing counsel at the time of the hearing. This Court has made clear that "[e]ven after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by 17-27-80 and Rule 52(a), SCRCP." *Marlar*, 375 S.C. at 410, 653 S.E.2d at 267. He did not do this and should not be rewarded for his failure to do so. *Id.*

The State's position is consistent with other areas of civil practice. *See Kelly v. Logan, Jolley, & Smith, L.L.P.*, 383 S.C. 626, ___, 682 S.E.2d 1, 7 (Ct.App. 2009); *Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993) ("We have adhered to the rule that where an issue has not been ruled upon by the trial judge nor raised in a post-trial motion, such issue may not be considered on appeal"); *SSI Medical Services, Inc.*

v. Cox, 301 S.C. 493, 499, 392 S.E.2d 789, 793 (1990).[7] Granting him relief also would improperly allow him to evade the limited review accorded in PCR cases for the issues actually addressed in the Order, *see Binney v. State*, 384 S.C. 539, 543, 683 S.E.2d 478, 480 (2009) ("If the PCR court's findings are supported by any evidence of probative value in the record, they should be upheld"), which would be improper since the PCR court's rulings in the Order are not governed by errors of law and are factually supported. *Id.* As a result, his claims are not preserved for appellate review.

II. Alternatively, Terry's claim that counsel were ineffective for not arguing for introduction of his March 24, statement based upon prosecutorial misconduct should be rejected because there is no evidence of prosecutorial misconduct.

Alternatively, Terry's first claim must be denied because the record is devoid of any evidence of prosecutorial misconduct, and the statement was inadmissible despite counsel's assumption that led counsel to admit the existence of the statement in his opening comments.

A. Events at trial.

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[7] Further, the State would note that the Fourth Circuit Court of Appeals concluded in *Bostick v. Stevenson*, 589 F.3d 160, 162-65 (4th Cir. 2009) that the failure to raise an issue by a Rule 59(e), SCRCP, motion, when the issue was not addressed by the PCR court in the Order of Dismissal, was not an independent and adequate procedural bar to federal habeas review of Bostick's ineffectiveness claim because that Court found that "[i]t is quite clear to us that Rule 59(e) was not consistently applied by the South Carolina courts at the time of Bostick's PCR proceedings. Indeed, in 2001 we explicitly noted that Rule 59(e) was inconsistently applied and that it was inadequate to preclude federal review. *Pearson v. Harrison*, 9 Fed.Appx. 85, 87 (4th Cir.2001)." *Bostick*, 589 F.3d at 164 (footnote omitted). *Pearson*, in turn, found that this Court, relying upon § 17-27-80, "has consistently vacated and remanded PCR court judgments that do not contain findings on issues presented to the PCR court, *Bryson v. State*, 328 S.C. 236, 493 S.E.2d 500, 500 (S.C.1997); *McCullough v. State*, 320 S.C. 270, 464 S.E.2d 340, 340 (S.C.1995); *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (S.C.1992); *McCray v. State*, 305 S.C. 329, 408 S.E.2d 241 (S.C.1991), and has done so notwithstanding a PCR petitioner's failure to preserve an issue by filing a S.C.R.Civ.P. 59(e) motion." *Pearson*, 9 Fed.Appx. at 87.

Respondent would, therefore, urge this Court to strictly enforce the above-stated procedural requirements, so that the federal habeas corpus courts will respect this Court's reliance upon those procedural requirements in this and all other cases it decides.

At the State's request, the trial judge held a pre-trial *Jackson v. Denno*[8] hearing to determine the admissibility of Terry's January 17, 1995 non-custodial statement and his March 24, 1995 statement, which he gave after he was arrested for the victim's murder. At the conclusion of this hearing, the trial judge ruled that both statements were admissible. **App. 1133-95**. Terry's trial counsel specifically objected to introduction of his March 24, 1995 statement because the State had allegedly failed to prove a knowing and voluntary waiver of his *Miranda*[9] rights, since he was ill at the time he made the statement and he had been sick several days previously. **App. 1191-92**. The trial judge ruled that the March 24, 1995 statement was freely and voluntarily given after Terry had been advised of and made a knowing and intelligent waiver of his rights under the Fifth and Sixth Amendments, and his *Miranda* rights. He further found that the statement was admissible. **App. 1193-95**.

Mr. Stone began his opening statement as follows:

> Ladies and Gentlemen, Gary Terry over here told the police that he did it. He told the police that he had sexual intercourse with Urai Jackson. He told the police that he killed her, okay. It's called a confession and he made one. He told the police he did it. So what in the world are we doing here? Why are we even having one of these guilt phases?

App. 1281, II. 16-22.

Counsel answered this rhetorical question by explaining that there was a guilt phase because everyone was entitled to a fair trial, and the State had to prove Terry guilty beyond a reasonable doubt. He also emphasized that the jury would "hear evidence that doesn't talk about reasonable doubt, it doesn't talk about any of that." **App. 1281-83**.

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[8] *Jackson v. Denno*, 378 U.S. 368 (1964).

[9] *Miranda v. Arizona*, 384 U.S. 436 (1966).

He then urged jurors that:

> I would submit to you Ladies and Gentlemen, by the time you end up listening to everything that you will hear in this case... I will submit to you... that you will know two things.
>
> One is that Gary Terry told the police he did it. Also, you will know that Gary Terry tried to tell the police he committed another murder. Another murder that he's not charged with and he never will he prosecuted for.
>
> I would submit to you, Ladies and Gentlemen, that for whatever reason, if you ask Gary right, he will admit to just about anything. They have a confession. They have that statement. Parts of which they don't even believe. They're going to ask you to believe it. You may understand by the end of this case that Gary is different. That he is somebody that will confess to a crime that he didn't commit. But because somebody is different, Ladies and Gentlemen, doesn't make him guilty.

App. p. 1283, l. 23-p. 1284, I. 15. He concluded by asking the jurors to pay "very close attention"

to the evidence and to "come back with a verdict that speaks the truth." **App. p. 1284, II. 16-18**.

Inv. Scotty Frier, of the Lexington County Sheriff's Department, was one of the two officers to whom Terry had made the statements. Before he testified, the State informed the trial judge *in camera* that it had decided not to introduce Terry's March 24 statement. The State also moved *in limine* to prohibit Terry from introducing any evidence concerning the statement. **App. 1373-80**. The State explained that:

> The State's position is that [the statement] ... is inculpatory to a certain extent, [but] exculpatory in the grand scheme of things; that is, as to aggravating circumstances and actually attempts to move the charge of murder to voluntary manslaughter and no criminal sexual conduct and no burglary.
>
> We are not required to elicit it and they can't elicit it under the rules as they are now.

App. p. 1375, II. 10-17.

After a recess, Terry argued that the statement would be admissible under Rule 804(b)(3), SCRE, as a statement against his penal interest. He also claimed that the statement was admissible as a matter of due process and cited *Chambers v. Mississippi*, 410 U.S. 204 (I973) and *Green v. Georgia*, 442 U.S. 95 (1979). He further argued that the statement "contains sufficient indicia of reliability to take it outside of the hearsay exception...." **App. 1377-79**.

The State noted that Terry's opening statement suggested to the jury that he had given a false confession. However, the State had not elicited evidence of any statements. Specifically, it did not introduce evidence of the statement denying involvement out of fairness to Terry because "we didn't want to be in the position of appearing overbearing in regard to statements made by the defendant." The State argued that its trial strategy not to introduce Terry's statements did not affect his ability to assert a defense. **App. 1379-80**.

The trial judge took the matter under advisement overnight. **App. 1380-82**. The following morning, the trial judge ruled that the statement was inadmissible under Rule 804(b)(3) because, although Terry's assertion of his Fifth Amendment right not to testify may make him unavailable as a witness for the State,[10] this did not allow him to introduce a statement that the State did not introduce in its case-in-chief, in order to circumvent the requirement that he could not present his own statements unless he testified. **App. 1386-88**. This Court affirmed the trial judge's rulings on direct appeal. *Terry*, 339 S.C. at 355-58, 529 S.E.2d at 276-77.

B. The PCR proceedings.

Ms. Fullwood testified at the PCR hearing that she had been Lexington County Public

[10] The trial judge apparently agreed with the State's position (**App. 1373-74**) that any statement by Terry that it chose to admit was admissible under Rule 801(d)(2). *See* **App. 1386-87**.

Defender since 1991. In that capacity, she was appointed to represent Terry at trial.[11] She had handled a number of felony trials, "including at least two death penalty cases," at the time of her appointment. She and co-counsel divided their responsibilities based upon several considerations, including trying to make the workload even and assigning work based upon areas of experience or interest. **App. 2668-69; 2677-78.**

Ms Fullwood did not recall whether she and co-counsel discussed whether Terry's statement should be addressed in the opening statement but she acknowledged that "we probably did." Also, she expressly recalled the *Jackson v. Denno* hearing, and she testified that the State did not make any representation that it would present Terry's March 24, 1995 "confession" in the guilt phase. Rather, it was the defense's *assumption* that the statement would be introduced because it was a "confession" and the *Jackson v. Denno* hearing was held pretrial. The statement would not have been mentioned in the opening statement if the defense had known otherwise. **App. 2669-70; 2689-91.**

She also did not recall whether there had been a preliminary decision on whether or not Terry would testify. However, this is a matter that she would always discuss with a client well before trial, with the idea of maintaining some flexibility based on the events in the trial itself. Also, the trial judge's ruling on State's motion to bar the defense from introducing the March 24th statement would have been a factor discussed in connection with Terry's decision on whether or not to testify. Although she did not have any independent recollection, she felt "sure that our

[11] She was in private practice briefly before becoming the Public Defender; and she had previously worked for eight years, at the South Carolina Office of Appellate Defense. The Order addressed counsel's extensive pretrial investigation and efforts to corroborate the March 24 statement and Terry's other versions of what had occurred, including a purported alibi, in **Grounds 11-14**. The Court found that counsel's efforts satisfied *Strickland v. Washington*, 466 U.S. 668 (1984).

advice was not to testify" based on his criminal record and counsel's observations of him, his general demeanor and their assessment of how well he would "most likely stand up under cross-examination." **App. 2688-91**.

Mr. Stone testified that this was the first murder case had tried. However, by the time of this case, he had roughly seven years of felony trial experience.[12] **App. 2516-18; 2551-54**. In his opinion, the State had very good guilt case. Mr. Stone met with co-counsel "a number of times" to figure out the best way to approach the case. They wanted to maintain credibility with jurors in the guilt phase for when they reached the sentencing phase. They split their responsibilities in the guilt phase. He attacked the fingerprint evidence, and Ms Fullwood attacked the DNA evidence. The "confession" was a little more difficult. In the statement, Terry said that he had consensual sex with the victim. She thereafter got mad and a fight ensued. Mr. Stone felt that the statement raised issue of manslaughter and eliminated the statutory aggravator of burglary. **App. 2520-21**.

He testified that no one from the prosecution told him that the State planned to introduce Terry's statement in the guilt phase. However, he was under the *impression* that the State was going to introduce it because of the pretrial *Jackson v. Denno* hearing; and he operated under that assumption when he made his opening statement. He would not have made the remark that Terry had confessed if he had not thought that the State was going to introduce the March 24th statement in the guilt phase. **App. 2521-24; 2565-67; 2582-83**.

[12] He began working at the Fifth Circuit Solicitor's Office in 1989, where he tried "just about any type of case that came along" for roughly a year and one-half. Then, he became one of two drug prosecutors in the Office. His unit at that point handled "probably 35% of the whole docket." When he left the Solicitor's Office and went into private practice, he did both civil and criminal cases, including complex civil litigation. **App. 2516-18; 2551-54**.

"I did it because I was trying to be the first one to say it. I was again trying to buy credibility with the jury and I was also trying to call attention to the fact that he had confessed to another case that we knew for a fact and that law enforcement knew for a fact he didn't do." In what Mr. Stone testified was a "unique situation," there was evidence (ultimately presented in the sentencing phase) of a discussion between Terry and another inmate, wherein Terry agreed to take the blame for the crime that the other inmate had committed so that the other inmate could be freed. Counsel "were trying to bring that out as yeah, sure, he confessed to this case, but he also confessed to something else that everybody else knows that he didn't do." **App. 2521-24; 2565-67; 2582-83**.

The decision of whether or not Terry should testify was Terry's to make. However, Mr. Stone did not think that Terry should testify because he did not think that Terry would be a credible witness based, in large part, on his dealings with Terry. Also, the defense was going to present expert testimony, in the sentencing phase, that a SPEC scan showed that Terry was brain damaged. If Terry had testified, then he would not have come across as brain damaged, even if the jury found that he was credible, because he would have sounded clear. **App. 2567-69**.

Former-Eleventh Circuit Deputy Solicitor Francis A. Humphries testified that he thought that the defense had requested the *Jackson v. Denno* hearing, but he acknowledged the need for a hearing because the State intended to introduce the statement into the sentencing phase. The way cases were prepared in the Eleventh Circuit Solicitor's Office at the time of this trial, the lawyer sitting as second chair would prepare the case up to a point. Then, the Solicitor would come into the case. They would

later discuss specific trial strategies. **App. 2589-90; 2594-2600**.

In this case, the State strategically decided well before trial that it would only use Terry's statement in the penalty phase of the trial. It did not want to present Terry's self-serving statement in its guilt phase case-in-chief because it was contrary to what the State sought to prove, since the statement attempted to establish a defense to one or more charges and mitigate the murder to manslaughter. **App. 2589-90; 2594-2600**.

Thus, Terry would have to testify and subject himself to cross-examination, if he wanted to put his version of the incident before the jury in the guilt phase. Also, Terry had the right to testify. So, the State moved *in limine* to bar the defense from introducing it in the guilt phase. Mr. Humphries further testified that Mr. Stone independently reach a conclusion about the State's intention to introduce the March 24th statement in the guilt phase. The defense opening statement appeared to be strategic; and Terry could have testified, as the trial judge's ruling on the State's *in limine* motion made clear. **App. 2589-90; 2594-2600**.

Former-Eleventh Circuit Assistant Solicitor Thomas Chase, the other prosecutor in this case, testified that he and Mr. Humphries had discussed whether or not to present the March 24, 1995 statement in the guilt phase of Terry's trial. They made the strategic decision not to use it in the guilt phase, unless Terry testified. **App. 2770-72**.

"From a strategic standpoint, we did not need the statement to have Mr. Terry at the scene," since "very solid scientific evidence" established Terry's presence. Also, the statement was somewhat "exculpatory." Mr. Chase and Mr. Humphries decided that if they introduced the statement, "we would essentially be ...putting in self-serving hearsay that could benefit [Terry] potentially in the case." Therefore, they decided that they would not use the statement in the guilt

phase, unless Terry testified and could be cross-examined with it.[13] **App. 2770-72.**

However, the State felt it needed a pretrial ruling on the question of whether or not the statement was admissible, so that the prosecution could formulate its strategy for cross-examining Terry if he testified, and because the State planned to introduce the statement in the penalty phase, to show that he had denied committing the acts that the jury had convicted him of in the guilt phase. Therefore, they requested a pretrial *Jackson v. Denno* hearing. **App. 2770-75; 2777-78.**

Mr. Chase was not aware that Mr. Stone was going to make the comments he made in his opening statement, but the opening statement did not play any role in the State's decision to introduce the statement in its case-in-chief. Also, neither Mr. Chase nor Mr. Humphries told defense counsel either that the State was planning to introduce the statement in the guilt phase, or that their actual trial strategy was to not introduce the statement. In fact, Mr. Chase testified that he would not have disclosed the State's strategy to Mr. Stone even if asked. **App. 2770-75; 2777-78.**

C. Discussion.

To establish that he received ineffective assistance of counsel, an inmate must make a twofold showing. *See Wiggins v. Smith*, 539 U.S.510 (2003). First, he must demonstrate that his attorneys' "representation fell below an objective standard of reasonableness." *Strickland v. Washington,* 466 U.S. 668, 688 (1984). "Judicial scrutiny of counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the [challenged] conduct from counsel's perspective as the time."

[13] Thus, Terry would have to testify if he wished to put that version of the crime before the jury.

Id. at 689. "A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range" of reasonable professional assistance. *Id.*, at 689, 104 S.Ct. 2052. The challenger's burden is to show 'that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'' *Id.*, at 687, 104 S.Ct. 2052." *Harrington v. Richter*, 131 S.Ct. 770, 787 (2011) (quoting *Strickland*). *See also Yarborough v. Gentry*, 540 U.S. 1, 6 (2003).

The inmate must also demonstrate that he was prejudiced by his attorneys' ineffectiveness. *Strickland*, 466 U.S. at 691 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment"). In other words, he must prove "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. It is insufficient to prove "that the errors had some conceivable effect on the outcome of the proceeding." *Id* at 693. Rather, "[c]ounsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Richter*, 131 S.Ct. at 787 (quoting *Strickland*, 466 U.S. at 687). *See also Florida v. Nixon*, 543U.S.175 (2004); *Palacio v. State*, 333 S.C. 506, 511 S.E.2d 62 (1999).[14]

[14] Terry's assertion that he was only required to prove that "there is a reasonable probability that at least one juror would have struck a different balance" under *Wiggins*, 539 U.S. at 537, thus misstates the *Strickland* prejudice test for errors occurring in the guilt phase, such as the issue before this Court, since the failure to have a unanimous verdict as to guilt or innocence would result in a mistrial and subsequent retrial in this state. The *dicta* he cites relates to the penalty phase. The test for counsel's penalty phase errors is that "there is a reasonable probability that ... the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

The State does not dispute that "[a] prosecutor has special responsibilities to do justice and is held to the highest standards of professional ethics." *State v. Quattlebaum*, 338 S.C. 441, 449, 527 S.E.2d 105, 109 (2000). However, here, Terry cannot show either deficient performance or prejudice under *Strickland*, since there is absolutely no evidence in the record of prosecutorial misconduct as he now alleges.

"No right to discovery exists in a criminal case absent statute or court rule." *State v. Childs*, 299 S.C. 471, 474, 385 S.E.2d 839, 841 (1989); *State v. Smart*, 274 S.C. 303, 306, 262 S.E.2d 911, 913 (1980). The requirements of *Brady v. Maryland*, 373 U.S. 83 (1963) and Rule 5, SCRCrimP, are examples of statute or court rules. However, Terry has not argued and cannot demonstrate that the State violated either of these rules. *Brady* obviously does not apply, since the prosecution's trial strategy is not favorable evidence that is material either to the defendant's guilt or to punishment. *Cf. Strickler v. Greene*, 527 U.S. 263, 280-81 (1999) (discussing the duty to disclose under *Brady*).

Nor did the prosecutors violate Rule 5, SCRSrim.P, by failing to disclose their trial strategy to the defense. Rule 5 simply does not apply. To the contrary, Terry's current argument is contrary to Rule 5(a)(2), which provides that "[e]xcept as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal prosecution documents made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case. . . ." This provision would seem to exempt the prosecution's trial strategy to the defense. *See State v. Gill*, 319 S.C. 283, 293, 460 S.E.2d 412, 418 (Ct.App.1995) (summary report prepared by police

for solicitor's use in prosecuting case was an internal prosecution document and not subject to discovery under Rule 5(a)(2)), *aff'd as modified*, 327 S.C. 253, 489 S.E.2d 478 (2007). *Cf. United States v. Mormon*, 105 F.3d 656 (5th Cir. 1996) ("Rule 16, Fed.R.Crim.P., does not require that the prosecution disclose all the minutiae of its evidence, it does not require revelation of trial strategy; nor does the Rule require delineation of the government's case with total specificity"); *United States v. Anderson*, 481 F.2d 685 (4th Cir. 1973); *United States v. Elam*, 678 F.2d 1234, 1253 (5th Cir. 1982).

Further, there is no other legal or ethical requirement that either party in a criminal trial divulge its trial strategy to the opposing party, or that the State introduce all evidence in its possession to establish the guilt of the defendant, particularly where the evidence not presented attempts to ameliorate the charged offenses. Additionally, Terry's suggestion of misconduct is inconsistent with his position below that there were "numerous reasons available to counsel" that the State might not introduce the statement. *See* **App. 2819** (Applicant's Post Hearing Memorandum of Law). Worse, adopting his position would lead to the absurd result of permitting defense counsel to dictate how their client is tried. It would also allow him to create "misconduct" by the prosecution based solely upon counsel's misjudgment of how the State planned to try its case and without any affirmative misrepresentation on the part of the prosecutor(s).

Moreover, Terry assertion of prosecutorial deception, trickery and "sandbagging," by failing to apprise the defense that it did not intend to introduce Terry's statement in the guilt phase, is based upon a mis-characterization of the record before this Court. *The only evidence from all of the attorneys involved in the case*, as opposed to conjecture and unsupported

argument, *is that the prosecutors never told or otherwise affirmatively led trial counsel to believe that the State intended to introduce Terry's March 24, 1995 statement in the guilt phase*. **App. 2522-23; 2565-66; 2582-83; 2669-70; 2689-90; 2589-90; 2594-2600; 2770-75; 2777-78**. Also, the prosecution team had strategically decided, well before trial, to only use Terry's statement in the penalty phase of the trial or if he testified.

It did not need the statement to prove its case, and it did not want to present Terry's self-serving statement in its guilt phase case-in-chief because it was contrary to the State's proof, since it attempted to establish a defense to one or more charges and mitigate the murder to manslaughter. Thus, Terry would have to testify and subject himself to cross-examination, if he wanted to put his version of the incident before the jury in the guilt phase.

However, Terry's assertion that "[t]he prosecution engaged in 'gamesmanship' and not 'justice'" because it "litigated the admissibility of Terry's statements prior to trial knowing the entire time that the State had no intention of introducing the statement into evidence" (**Brief of Petitioner, p. 13**), again misstates the evidence. The *only evidence* is that the State needed a *Jackson v. Denno* hearing because the State intended to introduce the statement into the penalty phase to show that he had denied committing the acts that the jury had convicted him of in the guilt phase, and it needed a ruling to formulate cross-examination of Terry, if he testified. Further and despite contrary arguments from Terry's current lawyers, *the only evidence is that Mr. Stone's comments in opening were not a part of this calculus*. **App. 2589-90; 2594-2600; 2770-75; 2777-78**.

If Terry wanted to put the facts in his statement before the jury, he could have testified and done so. *See Fitzpatrick v. United States*, 178 U.S. 304, 315 (1990) ([w]hile no inference of guilt

can be drawn from [the defendant's] refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to cross-examination upon those facts").[15] Further, counsel's strategic decision to concede the existence of the statement in opening was objectively reasonable and non-prejudicial under *Strickland* for the reasons found by the PCR court, and any challenge thereto is completely based upon hindsight, which helps explain why Terry is not pursuing the claim actually litigated at the PCR hearing,[16] but the two issues that wee not litigated.

Moreover, this inadmissible evidence did not become admissible because of trial counsel's "detrimental reliance" on what it thought the State might do. Although this Court had not addressed whether a defendant who exercised his right to not testify was "unavailable" witness under Rule 804(a), SCRE (and his statement was therefore admissible under Rule 804(b), SCRE) before its decision in ths case, it had consistently held that a criminal defendant could not introduce out-of-court and self-serving hearsay statements which he may have made to others prior to enactment of the South Carolina Rules of Evidence. *E.g.*, *State v. Sweet*, 270 S.C. 97, 99-100, 240 S.E.2d 648, 649 (1978); *State v. Atchison*, 268 S.C. 588, 593-95, 235 S.E.2d 294, 296-297 (1977); *State v. Bottoms*, 260 S.C. 187, 195 S.E.2d 116 (1973). Although counsel's argument was quite clever and reasonable under *Strickland*, it was inconsistent with prior decisions by this Court and the Court of Appeals.

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[15] In this regard, the State would note that Terry did not allege a claim of ineffectiveness relating to his failure to testify. **App. 2481-82; 2513-15; 2736-38**. Also, his argument that "the solicitors wanted to force the defense to call Terry to testify, . . . and this possibility was obviously enhanced by tricking the defense into disclosing Terry's confession in the opening statements of the trial" **(Brief of Petitioner, p. 6)** ignores that he did not testify.

[16] *See* **Argument III**, *infra*.

Further, the State had not mentioned the statement in opening, it had not made any affirmative representation that it planned to introduce the statement in the guilt phase and Terry knew his statement was potentially ameliorating. Nor was it improper for the State to move *in limine* to bar counsel from eliciting the evidence about the statement or its contents. Because counsel had no obligation to inform the prosecution of its trial strategy, the State could not have learned of counsel's intent to admit existence of the statement until counsel's opening remarks. Also, the statement was inadmissible for the reasons found by the majority of this Court on appeal. *Terry*, 339 S.C. at 355-58, 529 S.E.2d at 276-77.[17]

While Chief Justice Finney found that the prosecution had "sandbagged" the defense, *Terry*, 339 S.C. at 361-62, 529 S.E.2d at 279-80 (Finney, C.J., dissenting), this conclusion was premature because there is no evidence to support it. Terry's *ad hominem* attack on Mr. Humphries because of Mr. Humphries's involvement in *Quattlebaum* conveniently ignores that Mr. Humphries' testimony is corroborated by Mr. Chase and both witnesses' testimony is consistent with that of Terry's lawyers. Terry cannot successfully assail the ethics of any of the other attorneys in the case. Further, the trial judge noted at the time of his ruling that "I've held [*Jackson v. Denno* hearings] numerous times when the statements did not come in and the reason that they are held is in the event that a statement is going to come in." **App. 1388**.

Terry also mistakenly relies on *Lankford v. Idaho*, 500 U.S. 110 (1981) and *State v. Jones*, 343 S.C. 562, 576-78, 541 S.E.2d 813, 820-22 (2001). Under Idaho law, the trial judge's power to impose a sentence that is authorized by statute is not limited by a prosecutor's recommendation.

[17] It should be noted that Terry had also given a January 17, 1995 statement denying involvement. The State did not introduce this statement in the guilt phase, either.

However, the Supreme Court in *Lankford* held that due process was violated by the trial court's imposition of a death sentence where, at the time of the sentencing hearing, the defendant and his counsel did not have adequate notice that judge might sentence defendant to death.

The Court noted that "the character of the sentencing proceeding did not provide petitioner with any indication that the trial judge contemplated death as a possible sentence," *id* at 119; and the Court found that nothing in the record after the State's response to the trial court's pre-sentencing order and before the judge's remarks at the end of the hearing indicated that the judge was contemplating death as a possible sentence or alerted the parties that the real issue they should have been debating at the hearing was the choice between life and death. Moreover, the Court concluded that the pre-sentencing order was comparable to a pretrial order limiting the issues to be tried, and it was thus reasonable for the defense to assume that there was no reason to present argument or evidence directed at whether the death penalty was either appropriate or permissible. *Id* at 120-22.

The Court further found that "[a]lthough the trial judge in this case did not rely on secret information, his silence following the State's response to the presentencing order had the practical effect of concealing from the parties the principal issue to be decided at the hearing. Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure. . . . Without such notice, the Court is denied the benefit of the adversary process." *Id* at 126-27 (footnote omitted).

Thus, the due process violation in *Lankford* stemmed form the lack of notice of the "to be resolved by the adversary process." *Id.* Terry clearly had more than adequate notice of the issues to be tried and he has never contended otherwise. Again, it was the State and the PCR judge who

were not given any notice that Terry was litigating the issues now before this Court.

This Court's decision in *Jones* is likewise distinguishable. In *Jones*, neither the State nor Jones objected to the trial judge's indication, at the charge conference before the guilt phase closing arguments, that he planned to give the reasonable doubt charge outlined in *State v. Manning*, 305 S.C. 413, 409 S.E.2d 372 (1991). After the defense had given a closing consistent with that definition, the State objected to inclusion of the "hesitate to act" language and the trial judge decided not to charge it. This Court held that the decision to alter the charge, after the argument, was fundamentally unfair and diminish the credibility of Jones's attorney before the jury.

Here, the State did not affirmatively mislead Terry, either about whether it planned to introduce Terry's March 24, 1995 statement in its case-in chief or whether it would object to his efforts to introduce the statement without subjecting himself to cross-examination. Rather, trial counsel Stone -who had years of experience as a former prosecutor - made a reasonable but incorrect assessment of how the State would present its case against Terry; and he attempted to take the sting out of some of the anticipated evidence by his opening remarks.

Further, Terry cannot show prejudice under *Strickland*. As the PCR court correctly found "[d]espite Terry's argument and trial counsel's testimony concerning the March 24th statement, . . . the statement does not support a jury instruction on voluntary manslaughter;" counsel's comments were emphasizing that Terry's March 24th statement was false; and "overwhelming and essentially un-controverted evidence at trial demonstrated that Terry was guilty of each of the crimes charged, and that he broke into Mrs. Jackson's home (after pulling her telephone line, so that she would be unable to call for assistance), sexually assaulted her and beat her to death with a heavy

blunt object." **App. 3043**.

Also, the PCR court correctly found that "the trial judge instructed the jury on the State's burden of proof; the presumption of innocence; and that Terry's right not to testify could not be considered in deliberations. He also instructed jurors that they had to base their verdict solely on the testimony and evidence presented at trial, and that the arguments of counsel were not evidence. R. pp. 192-95; 267-68; 1269-76;1562-84. These instructions were sufficient to preclude the guilt phase jury from relying upon either counsel's opening statement or the failure to present evidence of the statement in reaching its verdict." **App. 3043**.

On appeal in PCR cases, the PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Here, the finding that there was no prejudice is supported by the record. Further, for the reasons already discussed, the State submits that Terry mistakenly asserts he "was prejudiced by counsel's failure to assert this issue as there is a reasonable probability that the trial court would have granted a mistrial or admitted Terry's statements to level the playing field." **Brief of Petitioner, p. 18**. It is also wrong to assert that "there is a a reasonable probability that this Court would have vacated Terry's conviction on direct appeal had this issue been preserved as it was in *Jones*."

Therefore, Terry did not prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. His argument lacks merit.

III. Terry cannot show either deficient performance or prejudice under *Strickland*, resulting from counsel's failure to alter their trial strategy of making the State prove its case beyond a reasonable doubt, without presenting defense witnesses, after the trial judge's ruling granting the State's motion *in limine* to bar Terry from introducing the statement.

Terry also cannot meet his burden of proof on his challenge to counsel's failure to alter their original trial strategy after the trial judge's ruling granting the State's motion *in limine*. Here, the record supports the conclusion that Terry's counsel made an objectively reasonable strategic decision as to the best manner to try the guilt and sentencing phases of Terry's case under *Strickland*. The record likewise supports the PCR court's findings in **Grounds 11-14**, and **21(App. 3071-90)** that, although unsuccessful, counsel made a more than reasonable investigation for witnesses or other evidence to establish (1) a possible alibi, (2) the possibility that another person committed the crimes, and (3) support for the March 24th statement, based upon varying accounts that Terry provided to them. **App. 3071-90**[18]

It is not deficient performance *per se* for counsel to promise something in opening statement, but fail to deliver on that promise during the defense's case. *Turner v. Williams*, 35 F.3d 872, 903-04 (4th Cir.1994). *People v. Burnett*, 110 Cal.App.4th 868, 885 (Cal.App. 2003); *United States v. McGill*, 11 F.3d 223, 227-28 (1st Cir.1993) (failure to deliver on opening promise to put on expert witness was not ineffective assistance). "[A]ssuming that counsel does not know at the time of the opening statement that he will not produce the promised evidence, an informed change of strategy in the midst of trial is 'virtually unchallengeable.' " *Turner*, 35 F.3d at 904 (citation omitted).

[18] They had an investigator, a social worker and a former SLED agent with expertise in fingerprint identification and other areas of crime scene analysis to assist them. The PCR court also found that Terry did not prove prejudice from counsel's failure to present evidence that he is left-handed, which he claimed was inconsistent with the pathologist's testimony. **App. 3106-09**.

The PCR court found that the testimony of both trial counsel and both prosecutors was credible, and that "trial counsel made an objectively reasonable strategic decision to inform Terry's jury that he had given a statement[19] to police admitting both that he had sexual intercourse with the victim and that he had killed her. Counsel was trying to "buy credibility" with Terry's jury by being the first to acknowledge existence of the "confession," and to set the stage for pointing out, in the penalty phase, Terry's willingness to take responsibility for a crime that even law enforcement did not believe he had committed. [20] The PCR court also found that even when it became clear to counsel that the prosecution was not going to introduce Terry's statement in the guilt phase, counsel made reasonable arguments to convince the trial judge to deny the State's motion *in limine*; and that "[t]he only other way to present the guilt phase jury with the information in the March 24th statement was for Terry to testify and subject himself to cross-examination." However, he chose not to testify and he did not raise an allegation related to that decision. **App. 3036-39**. These findings are supported by "evidence of probative value in the record." *Binney* and *Cherry*, *supra*.

Moreover, Terry's contentions that counsel could not challenge the State's failure to meet its burden of proof while admitting to a confession and that the opening comments "demolished" the chosen defense strategy before a witness was called, ignore the PCR court's finding - again,

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[19] The PCR judge correctly found that the statement was not a confession because "Terry does not confess to murder in it. Rather, he presents a version of what occurred that is explains why his D.N.A. was found and why the victim was beaten so badly." However, his statement "does not explain his fingerprint on the telephone box or evidence showing that he broke into the victim's home." Nor does it "explain why the victim was found in a position suggesting that the sexual activity occurred where she was found." **App. 3039 n. 11**.

[20] The State introduced evidence of this plot with another murderer, Johnny Ray Brewer, in the sentencing phase. Mr. Stone established on cross-examination of Inv. Hite that Terry was never charged with the murder to which he had planned to admit, so that Brewer would be released from the Lexington County Detention Center. The plan was then for Brewer to break Terry out of jail. **App. 1727-37**.

supported by the record *see Binney*, *supra* - that "when counsel's remarks were placed in the context of his entire opening statement," counsel "was emphasizing that Terry's March 24th statement was false, and that law enforcement did not even believe that parts of it were truthful. Thus, even though he miscalculated whether the guilt phase jury would hear the statement, he was suggesting that it was a false confession, as opposed to credible evidence." **App. 3043**. By taking this course, counsel's opening statement was laying the foundation for the evidence presented in sentencing that Terry had an organic brain injury.

The State submits that it was not unreasonable for counsel to continue with their originally chosen strategy of attempting to "poke holes in the State's case" and putting the State to its burden of proof, even after the trial judge ruled that Terry would have to testify to provide his version of what occurred. Again, the defense was that the "confession" was given although untrue, and the jury later heard evidence of alleged brain damage.

Neither this Court nor the United States Supreme Court has ever suggested, much less held, that counsel is ineffective for holding the state to its burden of proof in the guilt phase of a capital trial. The fact that different attorneys might have chosen a different strategy and simply conceded guilt of one or more of the crimes charged, *e.g.*, *Nixon*, *supra* (counsel conceded guilt to maintain credibility at sentencing); *Young v. Catoe*, 205 F.3d 750 (4th Cir. 2000) (same); *Bell v. Evatt*, 72 F.3d 421, 427-30 (4th Cir. 1995) (conceding defendant's guilt to kidnapping charge and pursuing verdict of guilty but mentally ill for murder and kidnapping charges was rational trial strategy aimed at reducing defendant's chances of receiving death penalty, given overwhelming evidence of guilt, and was strategy to which defendant consented; thus, it fell within objective standards of reasonableness for counsel conduct and did not support ineffective assistance of

counsel claim), does not prove either deficient performance or prejudice under *Strickland*.[21] "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. *See also* **App. 2522, ll. 1-8**. Surely, Terry would have claimed ineffectiveness if counsel had chosen another strategy, such as not challenging Terry's guilt, at all, and focusing entirely upon the sentencing phase. *See Nixon Young*, and *Bell*, *supra*.

The PCR judge correctly reasoned that "the only way one can conclude that counsel's performance was deficient is to assess it with the benefit of hindsight, which is clearly contrary to *Strickland*[,] 466 U.S. at 689." **App. 3040**. Much of Terry's argument is predicated on law review articles, which he implicitly asserts establish the ineffectiveness of counsel's representation. However, his reliance is grossly misplaced. *Strickland* requires only that counsel make objectively reasonable decisions. *See Bobby v. Van Hook*, 130 S.Ct. 13, 17 (2009) (the court of appeals erroneously treated the ABA's 2003 Guidelines "as inexorable commands with which all capital defense counsel" 'must fully comply' " because these "are 'only guides' to what reasonableness means, not its definition;" and holding that " '[w]hile States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices'") (citations omitted). *See also id* at 20 (Alito, J., concurring).

Terry's biggest hurdle, however, is that he did not show prejudice from counsel's failure to depart from their original strategy: *i.e*, "that there is a reasonable probability that, but for counsel's

[21] In light of the vigorous manner in which Young and Bell pursued their ineffectiveness claims based upon counsel's concessions of guilt in their cases, both in state and federal court, Terry's present argument is, at best, disingenuous.

unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In addition to the overwhelming evidence of guilt and the reasons stated in **Argument II**, the State notes that while he repeatedly suggests that counsel' alleged deficiency in continuing to challenge the sufficiency of the State's proof without presenting any witnesses to dispute the State's case, he has not pointed to any witness(es) whom counsel failed to present that would have disputed the State's case, and Terry elected not to testify in PCR. *See Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1999) ("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice") (citing *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995)); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992).[22]

Likewise, his attack upon counsel Stone's penalty phase closing argument does not demonstrate prejudice from counsel's alleged error in adhering to their original guilt phase trial strategy. The PCR court expressly rejected Terry's claim that this argument was improper. **Ground 17, App. 3103-06.**

Counsel's penalty phase closing argument is not properly before this Court because Terry has not alleged ineffectiveness in the closing argument, *see* Rules 208(b)(1)(B) & 227(e), SCACR; *State v. Sullivan*, 277 S.C. 35, 281 S.E.2d 838 (1981). However, there is absolutely no reasonable probability that the jury would have imposed a life sentence but for these challenged

[22] *See also, e.g., Beaver v. Thompson*, 93 F.3d 1186, 1995 (4th Cir. 1996) (rejecting claim that counsel was ineffective for not presenting mitigation evidence from family members, where there was no proffer of this testimony); *Bassette v. Thompson*, 915 F.2d 932 (4th Cir. 1990) (allegation that attorney did ineffective investigation did not support relief absent proffer of the supposed witness's favorable testimony). As the PCR court's discussion of **Grounds 11-14, & 21 (App. 3071-90)**, it does not appear that any such credible witness exits. Obviously, counsel could not knowingly present perjured testimony, and their crime scene analyst and other defense experts did not provide any exculpatory information.

comments in closing argument. Counsel did not "deceptively shift positions" by making this argument or create "chaos" at sentencing.

Rather, Mr. Stone's argument was in keeping with his theory, as also testified to by Ms. Fullwood, to maintain credibility with the jury and not argue at sentencing with the guilty verdict *See* **Ground 10, App. 3068-71**. At the same time, however, Mr. Stone urged jurors to recognize that the evidence in mitigation had to be considered when they imposed their sentence. Further, his remarks also were in response to the prosecutor's argument. "Indeed, if counsel had not made remarks such as these, it might have insulted the jury or it might have appeared that counsel was arguing with the verdict" (**Order, App. 3105**), which neither attorney wished to do. *See* **App. 2576-77; 2581; 2674**.

Additionally, counsel's "remarks did not tell the jurors anything that they did not already know, since they had convicted Terry of murder, first-degree burglary and first-degree CSC. Further, there was overwhelming evidence of Terry's guilt of murder and both statutory aggravating circumstances." **App. 3105-06**. *See Smith v. Spisak*, 130 S.Ct. 676, 687 (2010) ("since the sentencing phase took place immediately following the conclusion of the guilt phase, the jurors had fresh in their minds the government's evidence regarding the killings").[23] Also, Terry's attack on counsel's sentencing phase closing argument clearly takes it out of context.

When properly viewed, counsel was urging that jurors did not have to rely merely upon sympathy because there was a medical explanation for what occurred: Terry suffered from brain

[23] Counsel's failure to alter their theory f defense after the trial judge's ruling on the admissibility of Terry's statement is no different from the failure of Spizak's attorney to change his theory of defense of trying to show that Spisak was not guilty by reason of insanity, after the trial judge ruled that he would not instruct the jury to consider that question and excluded expert testimony regarding Spisak's mental state. *Id* at 686-87.

damage. Terry's claims that Mr. Stone's argument failed to properly address possible mitigating circumstances and made no explicit request for the jury to return a verdict against death, ignore the remaining portions of the record. These assertions further ignore that the jury had freshly heard all of the defense's mitigating evidence and the closing argument of co-counsel, wherein counsel reviewed the mitigators presented and begged for a life sentence based upon mercy and the pain caused to the people who loved Terry. In addition to the authorities cited in the PCR court's Order, the State would note that the Supreme Court has rejected analogous attacks on a penalty phase closing argument, where counsel made overtly disparaging remarks about the client in *See Spisak*, 130 S.Ct. at 684-88.Thus, Terry has failed to prove that "there is a reasonable probability that ... the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695." *See also* **App. 3106**.

CONCLUSION

For the reasons stated above, Respondent submits that the Court should dismiss certiorari as improvidently granted or, in the alternative, affirm the judgment of the Post-Conviction Relief judge.

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April 6, 2011.

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Lexington County
The Honorable John C. Few, Circuit Court Judge

GARY DUBOSE TERRY,

Petitioner,

vs.

THE STATE,

Respondent.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Brief of Respondent on Petitioner by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorneys of record:

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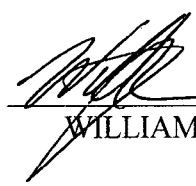
I further certify that all parties required by Rule to be served have been served.

This 6th day of April, 2011.



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