THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

John C. Few, Circuit Court Judge

Case No. 00-CP-32-3470

GARY DUBOSE TERRY ..... Petitioner,

v.

STATE OF SOUTH CAROLINA ..... Respondent.

BRIEF OF PETITIONER

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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?

Statement of the Case

Petitioner, Gary DuBose Terry, was convicted in Lexington County, South Carolina, of murder, burglary in the first degree, criminal sexual conduct in the first degree, and malicious injury to telephone system. On September 21, 1997, he was sentenced to death (murder), life imprisonment (burglary), 30 years (criminal sexual conduct), and 10 years (malicious injury), consecutively. This Court affirmed, Appendix (App.) 2318-27, and the United States Supreme Court denied a petition for writ of certiorari, App. 2443.

Terry, through court-appointed counsel H. Wayne Floyd and Melissa J. Kimbrough, filed an Application for Post-Conviction Relief (PCR) on November 30, 2000, App. 2444-56, which was amended during the evidentiary hearing held July 10-12, 2006. App. 2481-82, 2513-15, 2736-37. On February 20, 2007, Terry filed a Post-Hearing Memorandum of Law in Support of the Application for Post-Conviction Relief. App. 2804-74. Following submission of a Proposed Order of Dismissal by Respondent, App. 2875-2988, and Objections to the Proposed Order by Petitioner, App. 2989-3013, The Honorable John C. Few denied post-conviction relief on February 18, 2009, App. 3014-3125. Terry's Motion for Reconsideration was denied and a Notice of Appeal was timely filed with this Court.

The undersigned counsel was appointed to represent Terry before this Court on May 14, 2009. Following a timely filed petition for writ of certiorari, this Court granted the petition to review the question presented and discussed herein.

Terry, through the undersigned counsel, now requests that this Court vacate his convictions and death sentence and order a new trial.

Statement of Facts

On or about May 30, 1994, Urai Jackson, who lived alone, was killed in her home in West Columbia, South Carolina. App. 1527, 1531-32. The wires to the phone box on the exterior of the home had been pulled out, App. 1417, rendering the phones in the house inoperable, App. 1288. A glass pane that was next to the doorknob in the kitchen door had been broken from the outside. App. 1421-22. The bottom half of a pool cue that Jackson kept by her bed was missing and never found. App. 1534-35.

Jackson was found dead on the floor in the living room with dried blood about her head. App. 1306. Jackson had received at least four blows to the head by a rounded "strong heavy club-like object." App. 1468, 1470. The blows were delivered with "sufficient strength to cave in and crush the skill" and expose some brain tissue. App. 1468, 1470. Jackson's wounds and the blood spatter evidence at the crime scene revealed that Jackson was likely on her knees with her head on the floor or no more than nine inches from the floor when the blows were delivered to her head probably from behind and above her. App. 1428, 1468, 1834-35, 1839, 1843-44. The blows would have caused immediate unconsciousness. App. 1468.

Due to the amount of blood she lost and the blood on her face, the pathologist concluded that Jackson stayed face down for at least 15-30 seconds after receiving the blows to her head. She was then rolled over onto her back and, ultimately, left in a position consistent with sexual assault occurring after the beating and with Jackson unconscious or possibly even dead. App. 1846-47.

Specifically, she was on her back with only a "shirt draped . . . across her chest," such that her breasts and lower body were exposed. App. 1297. Her arms were spread out to the side. App. 1356. Her legs were apart with her left leg up with the bottom of her foot on the floor and her right leg extended. App. 1335. According to the pathologist, who viewed the body at the scene, she also had fluid on her pubic hairs that appeared to be semen. App. 1473.

Terry, who had previously lived across the street from Jackson, App. 1529, was questioned by law enforcement officers on January 17, 1995. He admitted that he had been inside her home before and that he had been in the neighborhood where Jackson lived around the time of her death, but he denied any knowledge of the circumstances of or responsibility for her death. App. 1813. He consented to a search of his person and provided a "suspect kit" of bodily fluids and hairs to law enforcement for testing. App. 1362-63.

Terry was again questioned on March 24, 1995. His statement was as follows:

> At the time this happened, I was living at the lake with Diane Gibson. While I was coming back from Tennessee, I went over to Ms. Jackson's house on Buckeye Drive. I used to live across the street. When I got over there, it was between midnight and the sun was coming up. It was either Friday or Saturday morning. I knocked on the front door first. I didn't get an answer. I went to the back door and I knocked on it. I didn't get an answer. I knocked on the window by John's room. I still didn't get an answer. I got into the

> house at the backdoor. I don't remember if I had to move a chain or a lock. I had to push the door open kind of hard. I went inside and called her. She answered me on about the third time. She was in her bedroom. I went in her bedroom after she got me a glass of ice water. We were just talking. We went to bed. I had sex with her. I got ready to leave. We started having words about me leaving. She wanted me to stay. The argument got pretty heated. I went to go out of the room and she grabbed me by the hair. I turned around and swung to get her off of me. I think I hit her and she went down to her knees. I, again, tried to walk out of the room. I got almost to the end of the hallway. She grabbed me from behind again. I then lost my temper. I swung back at her again. I then got something into my hand. It was just there in the hall. She could have brought it with her. I started hitting her with it. I lost my temper and I hit her several times. I have a bad temper. I then remembered leaving out of the same back door. I could have dusted a pane of glass on the door when I busted the door open. I don't remember pulling the phone lines. I don't remember what I did with the object I used to hit Ms. Jackson. I can't remember what it was. I remember that I could hold it in one hand and it wasn't as big as a baseball bat.

App. 1815-16. Following this statement, Terry was arrested.

Elizabeth Fullwood, the Lexington County Public Defender, was appointed to represent Terry. App. 2669. In April 1996, following the state's Notice of Intent to Seek the Death Penalty, I. McDuffie Stone, was appointed as co-counsel. App. 2550. Counsel were made aware of Terry's statements through discovery. Counsel were also informed through discovery related to the anticipated sentencing proceeding that Terry had been involved in a pretrial confinement scheme in which Terry was to confess to the murder that Inmate Johnny Brewer was charged with committing so that Brewer could get out of confinement and then assist Terry in escaping. App. 1727-37.[1]

Counsel were made aware that state experts identified Terry's DNA from seminal fluid swabbed from Jackson's vaginal area during autopsy and that Terry's fingerprint

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[1]*See generally State v. Brewer,* 328 S.C. 117, 492 S.E.2d 97 (1997).

matched a fingerprint lifted from the phone box attached to Jackson's home, App. 2519, 2672, which was the site where the phone line had been pulled out. Prior to trial, counsel moved–unsuccessfully–to suppress the DNA and fingerprint evidence. App. 1196-1268, 1313-16.

Counsel were also aware of the intended testimony of the pathologist and crime scene expert. App. 2703. Counsel retained their own crime scene and DNA experts, who did not testify because their testimony would not have contradicted the state experts or otherwise have been helpful to Terry. App. 2686-87. Counsel had also determined prior to trial that Terry should not testify and the defense had no other evidence related to the question of guilt or innocence. App. 2689-91. In short, counsel were aware that the state had "pretty strong evidence showing guilt" and was "going to get to the [death] penalty phase relatively easily." App. 2519-20. Faced with this situation, both counsel sought "to point out as many gaps and inconsistencies as we could in the state's case" in an attempt to create residual doubt of guilt in sentencing. App. 2565, 2689.

With this strategy in mind, counsel moved, prior to trial, to suppress Terry's March 24, 1995, statement to law enforcement. App. 1139-41. The motion to suppress was denied. App. 1193. Because the prosecutors, Eleventh Circuit Deputy Solicitor Fran Humphries and Assistant Solicitor Thomas Chase, never informed them otherwise and litigated to have the statements admitted, both counsel reasonably assumed the state would offer Terry's statements in evidence during the guilt-or-innocence phase of trial. App. 2522, 2670.

Humphries and Chase testified in PCR that they had decided early on, prior to the suppression hearing, that they would not offer Terry's statements during the trial. App. 2590.

They did not mention this, however, at the suppression hearing because they intended to offer the statement during the penalty phase as evidence of Terry's bad character. App. 2589, 2621, 2771-72. They also had determined that they would not disclose prior to trial that the statement would not be offered during the trial because it was a matter of "strategy." App. 2777. If the defense hoped to put Terry's version before the jury during trial, the solicitors wanted to force the defense to call Terry to testify, App. 2590, 2775, and this possibility was obviously enhanced by tricking the defense into disclosing Terry's confession in the opening statements of the trial.

The trial thus started with defense counsel assuming the state would offer Terry's statements during the trial and the solicitors knowing they would not and deliberately not disclosing that to the defense even during or after the suppression hearing when it was clear that the defense assumed the statement would be offered.

The state did not mention any statements by Terry in opening statements. Nonetheless, because defense counsel wanted "to be the first one to say it," and because counsel wanted to "bring that out, as, yeah, sure, he confessed to this case, but he also confessed to something else that everybody knows he didn't do," App. 2523,[2] Stone mentioned the "confession" in the opening statement. Indeed, counsel's opening statement began, as follows:

> Ladies and Gentlemen, Gary Terry over here told the police 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.

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[2]Stone was referring to the pretrial confinement scheme in which Terry was to confess to the murder that Inmate Johnny Brewer was charged with committing. App. 1727-37.

> 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. Counsel then briefly addressed the legal concept of a presumption of innocence until the State proves and the jury finds guilt beyond a reasonable doubt. App. 1282-83. Counsel concluded his opening statement, as follows:

> I would submit to you ladies and gentlemen, by the time you end up listening to everything that you will hear in this case whether that last twenty-four or forty-eight or seventy-two hours, I will submit to you, ladies and gentlemen, 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 be 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 who will confess to a crime that he didn't commit. But because somebody is different, ladies and gentlemen, doesn't make him guilty.
>
> The only thing I ask is that you pay very close attention to what you hear these next few days and then come back with a verdict that speaks the truth.

App. 1283-84.

In short, counsel informed the jury in the trial's opening statement that Terry had "confessed" to murder, burglary in the first degree, criminal sexual conduct, and malicious injury to the telephone system but that it was a "false confession."

Only after the State had litigated pretrial to admit the statement and defense counsel had mentioned Terry's "confession" in opening statements did the State litigate to exclude this evidence. Humphries raised the issue just before the witness who took the statement was

to testify. App. 1373. Humphries then deferred to Chase to argue the motion and he did so in a clearly prepared manner, followed by clearly prepared argument by Humphries.

Defense counsel was clearly caught off guard when asked if she wanted to be heard on the motion and could only say: "Yes, sir. Let's see. I'm thinking right here. Uh–." App. 1375. Because it was apparent to the court that counsel was completely unprepared, the trial court sua sponte took "a short break" to allow counsel "some time to address this issue." App. 1375. Following the recess, counsel acknowledged "we weren't anticipating this." App. 1377. She did, however, argue that the statement was admissible as a statement against penal interest under SCRE 804(b)(3). Additionally, she argued admissibility under the Due Process Clause citing *Chambers v. Mississippi*, 410 U.S. 204 (1973) and *Green v. Georgia,* 442 U.S. 95 (1979). After hearing these arguments, the trial court recessed for the evening so the court could "properly evaluate the issues that have been raised before me." App. 1382. After the overnight recess, the court excluded the statement and or any mention of it. App. 1386-87.[3] While counsel argued for admission of the statement, counsel did not object to exclusion on the basis of the prosecution's "sandbagging," which led counsel to mention "the confession" in opening.

The trial proceeded forward with defense counsel having told the jury that Terry had confessed to not just the crimes against Jackson, but had also confessed to another murder. Yet, the jury heard absolutely no evidence or testimony concerning these statements until after the jury had rendered guilty verdicts and evidence was being presented in sentencing.

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[3]This Court affirmed this ruling during direct appeal. App. 2319-22.

Nonetheless, counsel proceeded full-steam-ahead with their attempt at "punching holes" in the State's case. App. 2563. Counsel focused, in particular, on challenging the fingerprint evidence based on the number of identification points and challenging the DNA evidence as not being "definitive." App. 2520. In closing argument, Stone even argued that the fingerprint on the phone box was not Terry's print, App. 1559, and that the DNA evidence meant nothing. "We know that DNA is based on probability and guess what else is? The weather. And we certainly know the weatherman is never wrong." App. 1561. He even went so far as to argue in closing that there was "no evidence of rape" simply because there were "no cuts, no lacerations, nothing around the vaginal area," App. 1557, and that there was a reasonable doubt of guilt on all the charges, App. 1561.

In closing arguments in sentencing, however, Stone completely reversed course and made a damaging closing argument. He started:

> You may not expect this from a defense attorney. What you may hear from me is probably not going to be what you would expect to hear from me. It's certainly not what the solicitor told you you would hear from me. I'm not going to ask you to stop the killing and what I'm really not going to do is ask you to cry for Gary Terry, not for him, not for his family, not for his mother or his father or anybody else. . . .

App. 2097-98.[4] He continued:

> If the question is just is this a horrendous crime, there's no need for this hearing. This is a horrendous crime, ladies and gentlemen, and you decided that two days ago and you're right. You were right then and you're right now. Gary Terry is a rapist. He's a murderer. He's an invader of homes. All that is true. We are not going to sit here and ask you to ignore

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[4]This came immediately after Fullwood's closing argument–a significant portion of which asked the jury to impose a life sentence because "there are people who love Gary and will be affected by your verdict," referring specifically to Terry's parents' and childrens' "pain." App. 2095.

that. That would be lying to you and I'm not going to do it. . . . We have decided and you decided this two days ago that the crime itself was horrible and no matter how many pictures you see, nothing is going to take away from that.

Now, the determination is, folks, is there mitigation here, is there a reason to give Gary Terry life? The Solicitor spent his aggravation talking to you about the crime and we spent our mitigation talking about the criminal. We're in a sentencing phase where you determine whether or not there's a difference here. And, I would ask you, ladies and gentlemen not to shed a tear for Gary Terry. I'd ask you to draw a line. I want you to draw a line because, ladies and gentlemen, in a sentencing phase, there has got to be a difference between somebody who does this without brain damage and somebody who does this with brain damage.

App. 2099-2100. He repeated this again at the conclusion of his argument:

I'm not going to ask you to come up here and ignore the facts of this case. I'm not going to come up here and ask you to look at this and somehow say he's not blameworthy for this. He is. He is. And this [referring to a picture of a jail cell] is where he ought to be. Because, ladies and gentlemen, despite all of the stuff you've heard, you are in the sentencing phase for a good reason because there has to be the difference between somebody who has made every choice in their life and somebody that hasn't. His mother and father are not bad parents. It's not their fault.

What created the damage in Gary Terry's brain is beyond all of us. One day we may know, but we don't now. I'm not asking you to cry for him. I'm asking you to look at this and draw a line and separate somebody with brain damage from the people who do not and make every choice of their own.

App. 2102.

Additional relevant evidence will be discussed in the argument section.

Argument

Petitioner was 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.

In reviewing the Circuit Court's findings, this Court must reverse the PCR judge's decision when there is no evidence of probative value supporting it. *Palacio v. State*, 333 S.C. 506, 512, 511 S.E.2d 62, 65 (1999); *see also Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). The Court must also reverse the PCR judge's decision when it is controlled by an error of law. *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

1. Counsel's failure to object to exclusion of his inculpatory statement to police based on prosecutorial misconduct in "sandbagging."

The test for a Sixth Amendment claim of ineffective assistance of counsel requires a court to examine the facts of the case to determine "whether counsels' conduct so undermined the proper functioning of the adversarial process that one cannot rely upon the trial as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The *Strickland* standard is satisfied if a petitioner establishes both that his attorney's representation "fell below an objective standard of reasonableness" measured "under prevailing professional norms," *id.* at 688, and that the petitioner was "prejudiced" by his attorney's substandard performance, *id.* at 692. The focus is upon "reasonable probability," such that "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694. Specifically, Terry must show "there

is a reasonable probability that at least one juror would have struck a difference balance." *Wiggins v. Smith*, 539 U.S. 510, 537 (2003). *See also Rompilla v. Beard*, 545 U.S. 374 (2005); *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008); *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007).

Here, trial defense counsel sought admission during trial of Terry's statement admitting that he killed Jackson. Counsel failed, however, to object on the appropriate basis of state misconduct and counsel's detrimental reliance on the state's apparent intent to offer the statement in evidence. *See, e.g., State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001). Counsel's conduct was ineffective and prejudicial.

South Carolina has long recognized that the prosecutor has a special "quasi judicial" duty under the law to ensure "that no act on his part shall prevent the prisoner from having a fair and impartial trial." *State v. Bethune*, 104 S.C. 353, 89 S.E. 153, 154 (1916). Because of this special duty, "[A] solicitor must not, because of the high position he holds, say things, or do things, which would have any effect to prevent a citizen, however humble, from obtaining the fair and impartial trial he is entitled to under the law." *State v. Parris*, 163 S.C. 295, 161 S.E. 496, 498 (1931). In short, "[t]he solicitor should prosecute vigorously; he must prosecute fairly, for the concern of the state, whose representative he is, is not that a defendant shall be convicted, but that justice shall be done." *State v. Davis*, 239 S.C. 280, 122 S.E.2d 633, 635 (1961). *See also State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (quoting *State v. Linder,* 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)) ("While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done"); *State v. Rayfield*, 369 S.C. 106, 114, 631 S.E.2d 244, 248-49 (2006) (it is the

prosecutor's "duty to see that justice is done"); *State v. Bealin*, 201 S.C. 490, 23 S.E.2d 746, 758-59 (1943) (quoting 23 C.J.S. 519, § 1081(a)) (same). Thus, this Court has long cautioned prosecutors:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor–indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

State v. Dawkins, 297 S.C. 386, 388, 377 S.E.2d 298, 299 (1989) (quoting *Berger v. United States,* 295 U.S. 78, 88 (1935)). When the prosecutor violates his duty to seek justice impartially, the defendant's rights to a fair trial and to due process under the Sixth and Fourteenth Amendments are violated. *See, e.g., Banks v. Dretke*, 540 U.S. 668 (2004); *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959); *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006); *Gibson v. State*, 334 S.C. 515, 514 S.E.2d 320 (1999).

Here, the prosecution engaged in "gamesmanship" and not "justice" to Terry's detriment. The prosecution 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. Nonetheless, Humphries and Chase deliberately hid this fact from the court and

the defense as a matter of "strategy."[5] Specifically, Chase testified in response to questions directly from Judge Few in the PCR hearing:

> Q. Right. Okay. So if defense counsel had come to you before opening statements and said, "Can you tell me whether or not you plan to introduce the statement during the guilt phase of the trial?" what would–what would have been your answer? What would you have answered?
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> A. If–if they had come to us and asked that?
>
> Q. Informally.
>
> A. Informally, I personally probably would not have informed them what I was going to do because, as I said, that's our strategy in the presentation of the case. We had provided all the evidence.
>
> Q. Okay.
>
> A. But as to our strategy, I would not have disclosed that.

App. 2777-78.

The State's conduct was improper and amounted to a foul blow that violated both the Due Process Clause of the United States Constitution, as addressed by the United States Supreme Court, and the Due Process Clause of the South Carolina Constitution. *Berger,* 295 U.S. at 88; *Dawkins*, 297 S.C. at 388, 377 S.E.2d at 299. The State's conduct also violated the Rules of Professional Conduct.

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[5]It is also worthy of note that the chief prosecutor was Assistant Solicitor Fran Humphries, who was disciplined for his misconduct, *In re Humphries*, 354 S.C. 567, 582 S.E.2d 728 (2003), which led to reversal in *State v. Quattlebaum,* 338 S.C. 441, 527 S.E.2d 105 (2000). He was supervised at the time of this trial and Quattlebaum's by Solicitor Donald Myers, who has also been disciplined for unethical conduct in capital cases. *In re Myers*, 355 S.C. 1, 584 S.E.2d 357 (2003). Given this background, Humphries' PCR testimony claiming no intentional deception must be viewed with skepticism.

> A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice. . . .

Comment 1, Rule 3:8, RPC, Rule 407, SCACR.

Here, Terry was clearly not accorded "procedural justice" by the deliberate conduct of the prosecutors. As former Chief Justice Finney stated in his dissent from denial of relief during the direct appeal of this case:

> In my opinion, the solicitor's actions in this capital case constitute "sandbagging."[6] I would not condone this type of conduct, but would hold that under these circumstances the refusal to admit the statement was reversible error.

App. 2367.

Aside from whether the conduct of the solicitors was deliberate, due process is violated where the prosecutor acts in good faith but the defendant is misled to his detriment in a fundamentally unfair fashion. Specifically, in *Lankford v. Idaho,* 500 U.S. 110 (1991), the United States Supreme Court held that due process was violated, where at the time of the capital sentencing hearing, the prosecutor had advised the defendant and the court numerous times that the state would not be seeking the death penalty, but the trial court nonetheless sentenced the defendant to death, as was the court's power under Idaho law. Thus, the issue was "one of adequate procedure rather than of substantive power." *Id.* at 119. Focusing on "the importance that we attach to the concept of fair notice as the bedrock of any constitutionally fair procedure," *id.* at 121, the Court vacated the death sentence. The Court

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[6]"It was the uncorroborated fear of the use of this type of tactic by defense counsel that led a majority of this Court to abolish *in favorem vitae* review. *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (Toal, A.J., concurring)." App. 2367 n.5.

observed specifically that if defense counsel had been notified that the trial judge was contemplating a death sentence, counsel would have presented evidence and argument on that matter rather than relying simply on the prosecution's pretrial and trial statements, coupled with the prosecutor's presentation of no evidence in sentencing and recommendation of only an indeterminate life sentence. The Court noted that defense counsel had not addressed the question of the appropriateness of the death penalty because these arguments "were entirely inappropriate in a discussion about the length of petitioner's possible incarceration." *Id.* at 122. Thus, the Court clearly recognized that the Due Process Clause was violated, without any deliberate misconduct by the state or the court under the circumstances. The defense was misled simply by the trial court's silence on the matter, which "had the practical effect of concealing from the parties the principal issue to be decided." *Id.* at 126. The lack of notice to the defense "created an impermissible risk that the adversary process may have malfunctioned in this case." *Id.* at 127.

Similarly, this Court vacated the convictions and death sentence in *Jones* (also involving the Eleventh Circuit Solicitor's Office), due to reasonable reliance by the defense on the actions of the trial court and the prosecutor that led to fundamentally unfair detrimental results for the defense. In *Jones*, in a charge conference held prior to closing statements, the court informed the parties of its intent to instruct that "[a] reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act." Neither party objected. After defense counsel structured his closing argument around this anticipated charge and specifically told the jurors they would be given the "hesitate to act" instruction by the court, the State objected for the first time and the trial court declined to give this

charge. This Court held that it was "fundamentally unfair to alter the reasonable doubt charge after he structured and delivered his argument around the 'hesitate to act' language." 343 S.C. at 577, 541 S.E.2d at 821. The Court specifically noted that "[t]he effect of the judge's after the fact decision to excise the hesitate to act language from his charge was to diminish appellant's attorney's credibility in the eyes of the jury." *Id.* Likewise, this Court noted that the trial court had merely "acceded to the solicitor's demand" in altering the charge and reminded prosecutors in *Jones* that they are "ministers of justice and not mere advocates." *Id.*[7] *See also State v. Quattlebaum*, 338 S.C. at 449, 527 S.E.2d at 109 ("We will not tolerate deliberate prosecutorial misconduct which threatens rights fundamental to liberty and justice").

Counsel's conduct was deficient in failing to object to exclusion of the statement or to move for a mistrial on the basis of prosecutorial misconduct in sandbagging on this issue. Even if the State's silence were not deliberate, it misled the defense in a fundamentally unfair

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[7]The Mississippi Supreme Court also recently vacated a death sentence where the trial court abused its discretion in the capital sentencing hearing by precluding testimony of a licensed social worker in mitigation, based on the state's objections that she could not give expert opinions as only a social worker and the state's "unfounded" hearsay objections. *Fulgham v. State*, 46 So.3d 315, 335 (Miss. 2010). While the court did not reverse on the separate issue of prosecutorial sandbagging to the detriment of the defense, the court noted that the prejudice due to exclusion of the expert testimony "was compounded" and "exarcerbated" by the fact that the prosecution did not object to the testimony at any time prior to trial, despite ample evidence of the intended testimony. Instead, the state waited until after defense counsel informed the jury that it would hear testimony from the expert and the witness had been qualified as a "social worker" without objection by the state. *See also Ramchair v. Conway*, 601 F.3d 66 (2nd Cir. 2010)) (appellate counsel ineffective in robbery case in failing to adequately assert as error the trial court's denial of a motion for mistrial when the prosecution without notice pretrial or through two prior trials on the same charge, elicited evidence that defense counsel had been present at the line-up and failed to object, which cast the defense counsel as a witness against his client on the central issue in the case).

way. Here, the State's conduct was deliberate, however, and that was made clear by the timing of the State's motion and the arguments of Humphries at the time. Specifically, he argued:

> The State is just charged with presenting evidence sufficient to convict the defendant. . . . [W]e choose absolutely not to [present the statement]. . . . We are not required to elicit it and they can't elicit it under the rules as they are now.

App. 1374-75. In rebuttal, Humphries also explicitly argued:

> We have prohibited by virtue of our decision in regard to trial tactics we have prohibited the defendant from doing nothing in regard to asserting a defense.

App. 1380.

Aside from the clearly deliberate nature of the State's trial by ambush, defense counsel was aware that their strategy was to rely on a "reasonable doubt" defense during the trial in hopes of creating a reasonable doubt of Terry's guilt. Thus, counsel would never have mentioned the "confession" if they were not convinced the state would present it. App. 2523, 2566, 2670, 2700. This should have led reasonable counsel to object to the detrimental reliance argument as counsel in *Jones* made.

Terry 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. Even assuming that the trial court would have ruled against Terry, there is 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*. Given the deliberate nature of this conduct, it is reasonably probable that this Court would have required automatic

reversal as in *Quattlebaum*, "where a member of the prosecution team intentionally eavesdropped on a confidential defense conversation."

> We conclude, consistent with existing federal precedent, that a defendant must show either deliberate prosecutorial misconduct *or* prejudice to make out a violation of the Sixth Amendment [right to counsel], but not both. Deliberate prosecutorial misconduct raised an irrebuttable presumption of prejudice. . . . In cases involving unintentional [conduct] . . . , the defendant must make a prima facie showing of prejudice to shift the burden to the prosecution to prove the defendant was not prejudiced.

338 S.C. at 448-49, 527 S.E.2d at 109. While the facts of *Quattlebaum* are different than here, the same legal principle of the State's deliberate misconduct impacting the defendant's Sixth Amendment right to counsel is clearly applicable.

Even applying a requirement of a showing of prejudice, Terry was prejudiced during the trial because counsel was relying on a reasonable doubt defense. Nonetheless, by mentioning the "confession" in opening, defense counsel demolished the sole defense theory even before the first witness was called. The power of "confessions" is well-settled and beyond question. *Arizona v. Fulminante,* 499 U.S. 279, 296 (1991) ("A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him'"). Likewise, when counsel informed the jury of the "confession," counsel did so in the context of informing the jury of his "confession" to yet another murder. Thus, the jury was told that Terry confessed to this murder AND another murder, which all but destroyed any chance he had in the guilt-or-innocence phase. *Nance v. Ozmint*, 367 S.C. 547, 557, 626 S.E.2d 878, 883 (2006) (counsel ineffective where counsel "failed to act as an adversary to the prosecution, but instead helped to reinforce the case against his client"). The fact that it was the defense counsel that

informed the jury of the "confession" only heightened the damage because "it came as part of what was supposed to be petitioner's defense." *Ingle v. State*, 348 S.C. 467, 472, 560 S.E.2d 401, 403 (2002).

The harm was a foregone conclusion as it could not have escaped the jury's notice that counsel did not again mention Terry's "confession" in closing and instead argued simply that the State had failed to prove guilt beyond a reasonable doubt in the face of fingerprint, DNA, and other strong evidence presented by the state, which was not contradicted by a single defense witness. Indeed, the jury deliberated on guilt for less than two hours. App. 1587.

2. Counsel's failure to adjust their defense strategy in order to maintain credibility with the jury in sentencing.

Even without the deliberate misconduct of the State during the trial in sandbagging on the issue of admission of Terry's "confession," the wisdom of counsel's pretrial determination to rely on a "reasonable doubt" defense is questionable. Counsel was aware of the strength of the State's case, including that Jackson was likely sexually assaulted after she was unconscious or dead. *See* App. 2703. Counsel knew not only what the testimony of the State's DNA, fingerprint, crime scene, and pathology experts would be, but counsel also knew that their own crime scene and DNA experts agreed with the opinion of the state witnesses or at least that they would not be called to testify because their testimony would not have contradicted the state experts or otherwise have been helpful to Terry. App. 2686-87. In short, counsel were aware that the state had "pretty strong evidence showing guilt" and was "going to get to the [death] penalty phase relatively easily." App. 2519-20.

Given these facts alone, counsel's pretrial determination to assert a "reasonable doubt" defense is questionable. The United States Supreme Court long ago recognized in a noncapital trial:

> If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade. At the same time, even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to the heavy burden of proof beyond a reasonable doubt. And, of course, even when there is a bona fide defense, counsel may still advise his client to plead guilty if that advice falls within the range of reasonable competence under the circumstances.

United States v. Cronic, 466 U.S. 648, 656 n.19 (1984). Other courts have since recognized in the noncapital context that when counsel concedes a defendant's guilt as a "tactical decision, designed to lead the jury towards leniency on other charges and to provide a basis for a later argument . . . for a lighter sentence," such a "tactical retreat[]" is "deemed to be effective assistance." *United States v. Tabares*, 951 F.2d 405, 409 (1st Cir. 1991) (citation and internal quotation marks omitted). *See also Haynes v. Cain*, 298 F.3d 375, 380-82 (5th Cir. 2002); *Underwood v. Clark*, 939 F.2d 473 (7th Cir. 1991); *United States v. Holman*, 314 F.3d 837, 840 (7th Cir. 2002).[8]

This same principal has long been recognized by the courts in the context of capital cases when counsel acknowledges guilt in order to enhance the case for sparing the defendant's life in the sentencing phase. Indeed, this Court recognized more than 40 years ago, in a capital case, that it was reasonable for counsel "[c]onfronted with overwhelming proof of guilt" to advise the defendant to plead guilty in order to avoid a sentence of death

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[8]Indeed, "acceptance of responsibility" entitles a defendant to a decrease of offense level under the Federal Sentencing Guidelines. USSG, §3E1.1.

because "consideration of the penalties that might fall was naturally impelled." *Breland v. State*, 253 S.C. 187, 196, 169 S.E.2d 604, 608 (1969). Similarly, the United States Supreme Court held that counsel's conduct must be evaluated to determine whether reasonable or not even when counsel advised the defendant to plead guilty in a capital case when counsel had requested no mental health evaluations, had not sought out character witnesses beyond the defendant's mother and wife, and argued only that the defendant's "remorse and acceptance of responsibility justified sparing him from the death penalty." *Strickland*, 466 U.S. at 672-73.

Likewise, this Court recognized almost 50 years ago that it was acceptable in a capital case, even in the context of a not guilty plea to admit guilt in order to ask for a recommendation of mercy in order to save his client's life. *State v. Robinson*, 238 S.C. 140, 166, 119 S.E.2d 671, 684 (1961).

Similarly, the United States Supreme Court has held explicitly in a capital case that counsel's strategy in conceding guilt during trial, even in the context of a not guilty plea with a bifurcated sentencing proceeding, can be reasonable when counsel does so in an attempt to avoid a useless charade and in hopes of avoiding a death sentence.

> [T]he gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus. Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous. *See* Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 329 (1983). In such cases, "avoiding execution [may be] the best and only realistic result possible." ABA Guidelines for the Appointment and Performance of Defense Counsel in

Death Penalty Cases § 10.9.1, Commentary (rev. ed. 2003), reprinted in 31 Hofstra L.Rev. 913, 1040 (2003).

Florida v. Nixon, 543 U.S. 175, 190-91 (2004).[9] In circumstances where guilt is clear, counsel must "strive at the guilt phase to avoid a counterproductive course," *id.* at 191, such as presenting logically inconsistent strategies in the trial and sentencing. *Id.* (citing, *inter alia*, Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 Mercer L.Rev. 695, 708 (1991) ("It is not good to put on a 'he didn't do it' defense and a 'he is sorry he did it' mitigation. This just does not work. The jury will give the death penalty to the client and, in essence, the attorney.")). Thus, "[c]ounsel . . . may reasonably decide to focus on the trial's penalty phase," *Nixon*, 543 U.S. at 191, and "counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in 'a useless charade,'" *id.* at 192.

Experienced capital defense counsel have long recognized that "any capital trial must focus on how to save the client's life" by trying to "convince a jury full of people who think the death penalty is a good idea to make an exception in this particular case." Lyon, *supra*, at 696. Actually engaging in a useless charade in the trial may and likely will enhance the odds that the defendant will be sentenced to death when the charade is rejected by the jury. Goodpaster, *supra*, at 304 ("[C]ounsel in a capital case who presents a seemingly skilled, but unsuccessful, defense at the guilt phase may have tried and lost the issue of his client's

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[9] *See also Bell v. Evatt*, 72 F.3d 421 (4th Cir. 1995); *Lingar v. Bowersox*, 176 F.3d 453, 459 (8th Cir. 1999); *Anderson v. Calderon*, 232 F.3d 1053, 1087-90 (9th Cir. 2000); *Parker v. Hood*, 244 F.3d 831, 840-41 (11th Cir. 2001); *People v. Mayfield*, 852 P.2d 331, 343-44 (Cal. 1993); *State v. Abshier*, 28 P.3d 579, 594 (Okla. Crim. App. 2001); *Evans v. State*, 725 So. 2d 613 (Miss. 1997); *State v. Scott*, 800 N.E.2d 1133 (Ohio 2004).

worthiness to live before the penalty trial has even begun"); White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standards of Care*, 1993 U. Ill. L. Rev. 323, 357 (1993) ("By allowing the defendant to take contradictory positions at guilt and sentencing, the defense counsel loses credibility with the sentencer, thus reducing the defendant's chances for a life verdict").

> Just as it would be foolish to try a case with two conflicting defenses ("I wasn't there, but if I was, I was insane"),[10] it is *literally* deadly to fail to integrate the theory of the case with the theory of mitigation. If the jury perceives defense counsel as insincere or tricky because his theories conflict, a jury will undoubtedly take that out on the client.

Lyon, *supra*, at 708. Thus, in instances where counsel is clear that the State has overwhelming evidence of guilt and will "get to the [death] penalty phase relatively easily," App. 2519-20, as in this case, counsel must focus on the overriding goal of obtaining a life sentence and choose a trial strategy that is consistent with the sentencing strategy.

> Insuring that the trial will complement the overall strategy is critical. That is, if a life sentence is the goal toward which you are aiming, and the evidence of guilt is overwhelming and undeniable, then admit guilt, starting with voir dire and continuing through opening statement and closing argument. Disarm the prosecution by preparing the jury for the bad things to come. . . . In short, visualize the case as a play in which the trial is only one of many acts, and then be sure that your trial presentation is consistent with the entire production.

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[10] *See, e.g., Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1999) (counsel in capital trial and sentencing, but prejudiced only with respect to sentencing, due in part to counsel's presentation a weak alibi defense followed by counsel contradicting each other in the closing arguments with one arguing the alibi while the other essentially abandoned the alibi and challenged the defendant's confession as forged and argued that the state had not proven its case); *Ross v. Kemp*, 393 S.E.2d 244 (Ga. 1990) (capital trial counsel ineffective where appointed counsel cross-examined state's witnesses and argued a theory of mental illness and insufficiency of evidence while retained counsel presented unprepared testimony of defendant (which appointed counsel opposed) and argued an inconsistent alibi theory).

Id. at 353.

Here, counsel testified in PCR that, even prior to trial, they were "mindful of the need to stay credible to the jurors" for the sentencing phase, App. 2689, because of the difficulty of arguing innocence during the trial and then after conviction saying, "Okay. Well, he did it, but don't kill him," App. 2564. Nonetheless, counsel's chosen trial strategy was "to point out as many gaps and inconsistencies as we could in the state's case" in an attempt to create residual doubt of guilt in sentencing. App. 2689.

> Regardless of the potential loss of credibility for the – for the lawyers, we chose to do it that way because we felt like the best angle we might have, other than the organic brain damage, was that the jury would have some type of residual doubt [in sentencing].

App. 2565.[11]

The reasonableness of such a "residual doubt" strategy was questionable from the beginning as "residual doubts are not a mitigating factor in sentencing." *State v. Southerland*, 316 S.C. 377, 386, 447 S.E.2d 862, 868 (1994).

> Our edict that, in a capital case, "the sentencer . . . [may] not be precluded from considering, *as a mitigating factor* any aspect of a defendant's character or record or any circumstances of the offense" in no way mandates reconsideration by capital juries, in the sentencing phase, of their "residual doubts" over a defendant's guilt. Such lingering doubts are not over any

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[11]Fullwood testified in PCR in 2006 that "studies have shown that residual doubt is a factor that leads juries to recommend life sentences." App. 2701. It is unclear whether she was referring to studies prior to 1997 or simply studies prior to her PCR testimony. What is clear, however, is that while she was correct in the overall general belief, the capital jury studies actually show that residual doubt is a strong mitigating factor "*only in very limited and specific situations–cases in which the prosecution is relying on circumstantial evidence and the defendant is one of several criminal actors.* Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L. Rev. 1557, 1597-98 (Sep. 1998) (cited in *Florida v. Nixon*, 543 U.S. 175, 192 (2004)).

> aspect of petitioner's "character," "record," or a "circumstance of the offense."

Franklin v. Lynaugh, 487 U.S. 164, 174 (1988). *See also Oregon v. Guzek*, 546 U.S. 517 (2006) (in a capital resentencing, the State may limit the defendant's innocence-related evidence to the evidence introduced at the original trial).

Even assuming residual doubt arguments are permissible in capital sentencing, the reasonableness of pursuing a "reasonable doubt" trial strategy in hopes of "residual doubt" in sentencing *in this case*, even from the beginning, was doubtful. By counsel's own admissions, they began Terry's trial in the face of overwhelming evidence of guilt with a theory of "he didn't do it, but if he did, it was because he had organic brain damage." *See* App. 2565 ("[W]e chose to do it that way because we felt like the best angle we might have, other than the organic brain damage, was that the jury would have some type of residual doubt [in sentencing]").

It is also notable that counsel's after-the-fact recollection of their strategy "resembles more a *post-hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to [trial and] sentencing." *Wiggins*, 539 U.S. at 527-28. The trial record clearly reflects that counsel did not actually rely on any residual doubt argument in Terry's sentencing. Indeed, counsel explicitly attempted to distance themselves from their ill-fated trial efforts by arguing in sentencing that the jury was "right" in convicting Terry and that counsel "would be lying" to say otherwise. App. 2099. "Gary Terry is a rapist. He's a murderer. He's an invader of homes. All that is true." *Id.*

Regardless of whether counsel's strategy was reasonable at the beginning of trial, the strategy of continuing to assert Terry's innocence during the trial was clearly unreasonable after counsel's admission in opening statements that Terry had confessed not only to these crimes but to yet another murder. While counsel did so only because of the solicitors' misconduct in failing to reveal that they would not be offering Terry's statements into evidence, the fact remained that defense counsel told the jury in the trial's opening moments that Terry had confessed and then proceeded full-steam flailing against defense counsel's own admission. The harm resulting from this inconsistency cannot be overstated. This was a situation where literally "blindly relying on the presumption of innocence and putting the prosecution's evidence 'to the test,'" Sundby at 1598, after even telling the jury in opening statements that Terry "confessed," proved to be "fatal" for Terry in sentencing.

Specifically, Terry's chances of obtaining a life sentence were destroyed because defense counsel lost all credibility with the jury in informing the jury that he "confessed," when no such evidence was presented during the trial. Counsel's failure to adjust their strategy resulted in virtual chaos in sentencing because counsel lost all credibility with the jury. By the time of sentencing, it was clear that counsel had "engage[d] in 'a useless charade.'" *Florida v. Nixon*, 543 U.S. 175, 192 (2004). Indeed, counsel had flipped completely from the opening assertions of "reasonable doubt," which were destroyed by counsel's simultaneous admission of a "confession," to explicitly arguing in sentencing: "Gary Terry is a rapist. He's a murderer. He's an invader of homes. All that is true." App. 2099. Indeed, the jury deliberated barely over an hour in sentencing before rendering a death verdict. App. 2121, 2123.

Aside from the failure to assert prosecutorial misconduct, once counsel realized that Terry's statement would likely be excluded from evidence, they had an overnight recess, App. 1382, in which counsel had a duty to adjust their strategy in the event the statement was excluded, especially in light of the fact that counsel had already informed the jury of the "confession." If counsel had adequately and reasonably considered the matter in light of prevailing professional norms, counsel would not have pressed forward with the "reasonable doubt" defense in these circumstances.

Simply stated, how can one logically argue in an objectively reasonable manner that there is a "reasonable doubt" of guilt in the face of the state's strong case AND the jury's knowledge straight from defense counsel in opening statement that Terry had confessed? How could the jurors view the defense counsel as remotely credible in sentencing having performed in this fashion during the trial?

In addition, aside from simple logic, the information available from capital jury studies reveals that pursuit of a "reasonable doubt" defense in these circumstances was actually harmful to Terry. Specifically, by presenting a "denial defense," as opposed to an "admission defense" in which counsel conceded, as they had in opening anyway, that Terry confessed and was at least guilty to that extent, counsel increased the odds of a death sentence.

> [J]uries in denial defense cases imposed death sentences twice as often as they imposed life sentences, while juries in admission defense cases chose a life verdict over a death sentence by a three-to-two ratio.

Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L. Rev. 1557, 1574-75 (Sep. 1998). The only

exception to this rule is in the limited circumstances–inapplicable to Terry–in "cases that involve multiple criminal actors and only circumstantial evidence as to which of the participants acted as the ringleader." *Id.* at 1579.

A "denial defense," which includes a "reasonable doubt" defense without an affirmative offer of evidence by the defense, is harmful, such that "a defendant is essentially playing lottery odds by relying on an all-or-nothing guilt phase strategy that challenges the prosecution in the hope of producing a lingering doubt that will secure a life sentence." *Id.* at 1589. This is so for at least two reasons.

First and foremost, it requires counsel and the defendant to appear (and actually) "deceptively shift positions" from the trial to the sentencing, *id.* at 1587, as counsel did in this case. In essence, the jury will view the defendant and counsel as manipulative in sentencing. *Id.* at 1590.

Second, when the defendant has denied responsibility during the trial, the jury "view[s] cynically a case in mitigation that centers on influences beyond the defendant's control–such as child abuse–as nothing more than a final attempt to deny responsibility." *Id.* In this case specifically, Stone argued in the trial that the state's evidence, including fingerprint and DNA evidence, meant nothing; there was no rape; and there was reasonable doubt of Terry's guilt. Then, in sentencing, Stone conceded: "Gary Terry is a rapist. He's a murderer. He's an invader of homes. All that is true." App. 2099. He asked for nothing more than that the jury "draw a line" because of Terry's "brain damage," App. 2100, without ever even explicitly asking the jury for mercy and/or to impose a life sentence anywhere in

his closing argument, App. 2097-2101.[12] *See Nance*, 367 S.C. at 557, 626 S.E.2d at 883 (counsel ineffective, in part, because "during the closing argument, co-counsel failed to plead for Petitioner's life and referred to him as a 'sick' man").

The combination of the State's prosecutorial misconduct and counsel's failure to object to it or adequately adjust the defense trial strategy to level the playing field was deadly for Terry. Based on the deliberateness of the State's misconduct, Terry is entitled to a new trial. At minimum, due to the prejudice in sentencing, Terry's death sentence must be vacated.

3. The Proceedings Below.

Although the issue concerning counsel's ineffectiveness in failing to object to prosecutorial misconduct was addressed in the PCR hearing and Terry's Post-Hearing Memorandum of Law, App. 2819-24, the State failed to address this issue in its proposed Order of Dismissal. Terry's counsel pointed out this omission in Applicant's Objections to Respondent's Proposed Order of Dismissal. Specifically, counsel wrote:

> Respondent's proposed order fails to address certain issues and/or sub issues raised by the applicant. Therefore, applicant relies on his post-hearing memorandum of law in support of those issues unaddressed by the respondent. Specifically as to Ground 1, the confession issue, applicant alleged prosecutorial misconduct due to the state's misrepresentation of its intentions insofar as the confession.

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[12]Fullwood did request mercy and imposition of a life sentence in her argument, App. 2097, a significant portion of which asked the jury to impose a life sentence because "there are people who love Gary and will be affected by your verdict," referring specifically to Terry's parents' and children's "pain," App. 2095. Stone also contradicted Fullwood's argument by asserting: "I'm not going to ask you to stop the killing and what I'm really not going to do is ask you to cry for Gary Terry, not for him, not for his family, not for his mother or his father or anybody else." App. 2098. With defense counsel contradicting each other in closing arguments, the prejudice to Terry was only heightened.

App. 2989 n.1.[13] Nonetheless, the PCR court signed Respondent's proposed order and, thereby, failed to make specific findings of fact and conclusions of law with respect to this issue as required by S.C. Code § 17-27-80.

While the failure to point out the need for the PCR court to specifically address the issues in a Rule 59(e) motion generally waives the argument, *Marlar v. State*, 375 S.C. 407, 653 S.E.2d 266 (2007), counsel here had already pointed out the failure to address this specific error in the Applicant's Objections to the Respondent's Proposed Order. Thus, in a motion characterized simply as "Applicant's Motion for Reconsideration in Re: Final Order of Dismissal," counsel informed the Court that "[c]ounsel has found no additional basis for objection other than those previously set forth in Applicant's post-trial memorandum of law and objections to proposed order of dismissal." Thus, counsel "relie[d] on all of the arguments set forth in the prior specifically [addressed] and attached documents" in asking the court "to rescind its order of dismissal and grant [Applicant] a new trial and/or sentencing phase." App. 3126.

The PCR court issued an "Order Denying Motion for New Trial" the very next day clearly characterizing the motion as a Rule 59(e) motion to alter or amend the judgment." App. 3127. The court held:

> Based upon the Court's careful reconsideration of the all [sic] of the evidence presented in this case, and the arguments in both Applicant's post-trial memorandum of law and his objections to Respondent's proposed Order, the Court denies Applicant's motion.

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[13]While counsel characterized it in the Objections as simply "prosecutorial misconduct," counsel had actually asserted that "[c]ounsel erred when they failed to object to prosecutorial misconduct on the basis of the Due Process Clause to the Fourteenth Amendment." App. 2819.

App. 3127.

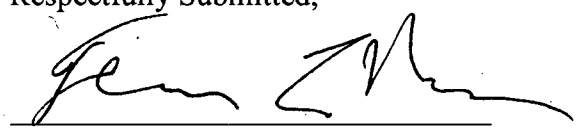
Because the PCR court failed to address this issue, despite being advised specifically of the failure to do so, Terry requests that this Court, at minimum, remand for a hearing, findings of fact, and conclusions of law solely on the question presented here, including counsel's failure to adequately adjust the defense strategy in order to maintain credibility with the jury in sentencing. *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992); *McCray v. State*, 305 S.C. 329, 408 S.E.2d 241 (1991); *Swilling v. McDougall*, 252 S.C. 571, 167 S.E.2d 432 (1969).[14]

[14]While counsel's ineffectiveness in failing to adjust their strategy following the prosecutorial misconduct was not asserted below, Terry previously informed this Court in his letter dated March 30, 2009, which was prior to appointment of the undersigned counsel to represent him, that there was a breakdown of communications between Terry and prior counsel. Terry also specifically complained that "[t]he Order [of Dismissal] failed to address numerous issues of my case." This complaint against PCR counsel and a conflict of interest for counsel at the South Carolina Commission on Indigent Defense, Division of Appellate Defense ultimately led to appointment of the undersigned counsel rather than prior counsel. In light of these circumstances, Terry requests that this Court consider this corollary issue or allow consideration of it during remand proceedings. *See, e.g., Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996); *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

Conclusion

Wherefore, for the foregoing reasons, Petitioner prays this Court will vacate his convictions and death sentence or, alternatively, remand the case back to the PCR court for additional proceedings.

Respectfully Submitted,



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January 5, 2011.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

John C. Few, Circuit Court Judge

Case No. 00-CP-32-3470

GARY DUBOSE TERRY ..... Petitioner,

v.

STATE OF SOUTH CAROLINA ..... Respondent.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Brief of Petitioner in the above entitled case has been served upon opposing counsel by first class mail, postage prepaid, this 5th day of January, 2011.

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