No._____

In the Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Petitioner,

vs.

KAMELL D. EVANS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE GREENVILLE COUNTY COURT OF COMMON PLEAS AFTER DISMISSAL OF CERTIORARI AS IMPROVIDENTLY GRANTED BY THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

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*** CAPITAL CASE ***

Over four years after Respondent's jury trial, the Supreme Court of South Carolina expressed concern – via *obiter dictum* in a published opinion in an unrelated case – that a certain phrase in a penalty phase jury instruction on mercy could be confusing. Prior to trial, the state court, also by published opinion, had found no error in the same charge language. In post-conviction relief, the state circuit court found ineffective assistance for failure to object to the charge language pursuant to the after-trial *dictum*, presumed prejudice, and granted a new sentencing proceeding. The State sought review in the Supreme Court of South Carolina. The State argued the PCR judge's ruling clearly violated the contemporaneous assessment rule of *Strickland v. Washington* and the required burden of showing prejudice. The state court originally granted certiorari then a slim majority dismissed as improvidently granted. This deprived the State of an opportunity for clear error correction. The State now presents the following four questions in the instant petition:

QUESTIONS PRESENTED

1. Whether the post-conviction relief judge erred in finding *Strickland v. Washington* deficient performance based upon trial counsel's not objecting to the phrasing of one jury instruction in the penalty phase regarding mercy when state law did not disapprove of the phrasing until an observation in *obiter dictum* in an opinion issued over four years after trial?

2. Whether the post-conviction relief judge erred in finding *per se* prejudicial error in the jury instruction regarding mercy thereby avoiding a proper *Strickland v. Washington* prejudice analysis?

3. Whether the post-conviction relief judge erred in finding a federal constitutional right to a mercy charge where federal precedent, without exception, does not support the existence of such a federal constitutional right?

4. Whether the post-conviction relief judge's factual finding that the jury charge disallowed the exercise of mercy is wholly without support in the record where no person ever testified that the charge was intended or heard to limit the exercise of mercy; trial counsel was focused on the request to exercise mercy in their sentencing phase presentation and closing; and, the jury instruction as whole allowed for the exercise of mercy?

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of the State of South Carolina respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Greenville County post-conviction relief ("PCR") judge. The grant of relief in this case – and two (2) other capital cases which are simultaneously presented with this petition – constitutes an unprecedented windfall to three (3) capital defendants. The legal error at issue is plain. Each case reflects the *Strickland v. Washington* error presented was based upon *obiter dictum* in an opinion issued years after each of the trials at issue that questioned the clarity of one sentence in a penalty phase instruction. This offends, without question, the contemporaneous evaluation this Court established in 1984 in *Strickland.* Further, the state circuit courts simply presumed prejudice for reversal. This again is unquestionably error under *Strickland.* Yet, the majority of the Supreme Court of South Carolina, in contravention of the state court's own rules, refused to issue opinions after granting certiorari review. In short, the State of South Carolina, having properly sought review on a procedurally sufficient issue was inexplicably denied review and fundamental error correction. The State now must seek review from this Court to avoid the windfall sanctioned by the Supreme Court of South Carolina's intentional inaction in these three (3) capital cases: *State of South Carolina v. Kamell D. Evans; State of South Carolina v. Jonathan Kyle Binney; State of South Carolina v. John Kennedy Hughey.*

CITATION TO OPINIONS BELOW

The decision of the PCR judge is not reported but is reproduced in the Petition Appendix at App. 2-172. The order of the Supreme Court of South Carolina that granted certiorari review is unpublished, as is the opinion dismissing certiorari as improvidently granted. The order and opinion are also reproduced in the Appendix at App. 173-174 and App. 175-189. Lastly, the order denying the timely petition for rehearing is unpublished and also reproduced in the Appendix at App. 190-191.

JURISDICTIONAL STATEMENT

The Supreme Court of South Carolina, over vigorous dissent, dismissed certiorari as improvidently granted on May 13, 2015 and denied rehearing on August 6, 2015. The Attorney General of the State of South Carolina sought and received one extension from the Chief Justice allowing this petition to be filed on or before January 3, 2016. The action is timely filed, and this Court has jurisdiction under 28 U.S.C. § 1257 (a).

Certiorari is properly directed to the Greenville County Court of Common Pleas as the majority opinion from the Supreme Court of South Carolina provides "positive assurance" that the dismissal was not a ruling on the merits but a

refusal to accept the matter for decision.[1] *See R.J. Reynolds Tobacco Co. v. Durham Cty., N.C.*, 479 U.S. 130, 138 (1986) ("In the absence of positive assurance to the contrary from the North Carolina Supreme Court, we consider that court's dismissal of Reynolds' appeal to be a decision on the merits....").[2]

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[1] In South Carolina, state court rules provide that orders from PCR cases "shall be reviewed by the Supreme Court upon petition of either party for a writ of certiorari, according to the procedure set forth in this Rule." Rule 243(a), *South Carolina Appellate Court Rules*. Only if two or more justices of the five member court agree to hear the matter will full briefing be initiated. Rule 243 (j), *South Carolina Appellate Court Rules*. The Supreme Court of South Carolina considers this initial question of whether to grant certiorari review in PCR appeals a matter of discretion and not a ruling on the merits. *See generally Haggins v. State*, 377 S.C. 135, 136, 659 S.E.2d 170 (2008) (in non-capital case review by court of appeals: "A decision by the Court of Appeals to grant or deny a writ of PCR certiorari is a matter committed to that court's discretion"); *Ellison v. State*, 382 S.C. 189, 676 S.E.2d 71 (2009) (*Haggins* logic applies to cases where grant of certiorari is later dismissed as improvidently granted). *Cf. State v. Rucker*, 321 S.C. 552, 553, 471 S.E.2d 145, 145 (1996) ("The denial of a petition for a writ of certiorari to the Court of Appeals does not dismiss or decide the underlying appeal; it simply determines that, as a matter of discretion, this Court does not desire to review the decision of the Court of Appeals.").

[2] This is also consistent with prior South Carolina capital cases requesting certiorari to the circuit court after denial of a petition for writ of certiorari from the Supreme Court of South Carolina in the context of a PCR appeal. *See Plath v. S. Carolina*, 484 U.S. 1022 (1988) ("judgment is vacated and the case is remanded to the Court of Common

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the right to counsel as secured by the Sixth Amendment to the United States Constitution: "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defence." U.S. Const. amend VI.

STATEMENT OF THE CASE

A. Facts of the Crime.

The dissent from the dismissal in the PCR appeal provides a succinct overview of the relevant facts:

> Evans was convicted of two counts of murder, two counts of possession of a weapon during the commission of a violent crime, two counts of kidnapping, and one count of first degree burglary for the events leading up to and death of Greenville County Sheriff's Deputy Antonio J. "Joe" Sapinoso and his father, Antonio L. "Tony" Sapinoso.
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> The material facts at trial were undisputed, and Evans admitted to killing the two victims—the father and

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Pleas of South Carolina, Beaufort County..."); *Arnold v. S. Carolina*, 484 U.S. 1022 (1988)(same).

brother of Evans's ex-girlfriend Christina Roderiguez. The evidence established that on April 1, 2003, Evans arrived at the Sapinoso home at nighttime, dressed in all-black clothing and wearing gang insignia, with three guns, over forty rounds of ammunition, and a knife. Evans parked his vehicle in an unoccupied neighboring lot, and hid in the woods while he waited for Joe to arrive home after his shift with the Sheriff's Department. Upon Joe's arrival, Evans held the still-uniformed officer at gunpoint, relieved him of his service weapon, and forced him into the home. A four-hour hostage situation ensued, during which Evans engaged in negotiations with a hostage negotiator from the local police department and heard pleas for the release of the victims by his friends and family. Marcia Sapinoso (Tony's wife and Joe's mother) and Christina's minor son were locked in a closet upstairs.

The situation ended tragically when Evans shot the two victims in the head—one of whom (Joe) was shot "execution style"—killing them. Forensic evidence established that Evans shot Joe four times in the back of the head at close range while Joe's head was on the floor. Further, Evans

> shot Tony twice in the head and once in the arm, which was considered a defensive wound. Evans testified that he shot Joe when he tried to reach for Evans's gun, and that he shot Tony because he stood up at the same time Joe reached for the gun.

(App. 177-178).[3]

B. Sentencing.

The dissent from dismissal in the PCR appeal also clearly summarizes the sentencing phase evidence and charge at issue:

> During the sentencing phase of Evans's trial, the State presented evidence of three aggravators with respect to the murder of Tony Sapinoso, and four aggravators with respect to the murder of Joe Sapinoso. Marcia Sapinoso, Cheri Jones (Joe's longtime girlfriend), and one of Joe's fellow police officers and friends provided victim impact testimony. The State sought to capitalize on evidence presented during trial that painted

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[3] Though generally correct in the recitation, Petitioner notes that the three guns referenced actually included the service weapon taken from the deputy. Evans took two guns to the home. Further, the jury heard he brought some *one hundred and* forty rounds to the home – 70 rounds for his 9mm and 70 rounds for his .38. (See PCR App. p. 1291).

Evans as a gang member, and presented testimony that he would likely pose a threat to the general prison population.

Likewise, Evans presented a full mitigation case, emphasizing his good character and his mental health issues. Various family members, friends, a coworker, and former coaches of Evans testified to his positive attributes as a leader on the football field, a loving brother and uncle, a friend and mentor to children in need, and a solid and dependable employee. Evans's trial counsel also presented expert testimony to refute the State's expert's testimony that Evans would likely perpetrate gang violence while in prison. Finally, Evans's defense counsel presented testimony by a neuropsychologist that Evans had certain cognitive deficiencies indicative of brain dysfunction that would have impaired his decision-making during the hostage situation, and a psychiatrist, who diagnosed Evans with "major depressive disorder, single episode." In sum, during the sentencing phase of the trial, Evans's trial counsel sought to capitalize on their guilt-phase strategy of emphasizing Evans's good qualities; portraying the killings as a

horrible, one-time mistake; and focusing on a theme of "no excuses."

By doing so, defense counsel hoped that the jury would show Evans mercy and spare him the death penalty by recommending a life sentence. After the trial judge explained mitigation and aggravation to the jury, Goldsmith then delivered his opening remarks during the sentencing phase:

> And part of what we are going to try to show you is that first and foremost, and this may seem simplistic, but ... Evans is a human being. And you are being asked whether you will kill or sentence to life imprisonment a fellow human being, granted a human being capable of great evil. And I'm not going to diminish that. But what we hope to show you also is a human being capable of some good, perhaps even great good, a human being who in one 10–second episode of his life made a horrible decision, a tragedy, and inflicted much pain on people during that ten seconds and afterwards.

Goldsmith reiterated:

> Even if the state proves every aggravating factor that they prove, that they present to you, even if you find aggravation, you still without question can sentence him to life imprisonment without the possibility of parole.
>
> You can, as I have always said, show mercy. You can always choose life.

Goldsmith again focused on mercy during his closing argument, stating:

> Ladies and gentlemen, we do not repay evil with evil. The solicitor is correct. I am going to ask for mercy for [Evans]. But I disagree with what the solicitor said is the definition of mercy. He said mercy is something that you deserve. I strenuously disagree, ladies and gentlemen.
>
> If we deserved it, if we could earn it, then we probably wouldn't need it. Mercy is unmerited favor. You can't earn it; you don't deserve it; but you give it to him anyway.... We don't

repay evil for evil. And mercy is appropriate in this case.

You can show mercy and you can choose life regardless of who deserves it and who does not. We all need mercy, but none of us have earned it and none of us deserve it.

The trial judge then delivered the following jury instruction:

Now, in making your determination as to which sentence to recommend in this case you should consider the statutory aggravating circumstances, the statutory mitigating circumstances and any nonstatutory mitigating circumstances in arriving at your decision.

....

The existence of any statutory or nonstatutory mitigating circumstance is not a bar to the recommendation of a death sentence so long as you have found the existence of at least one statutory aggravating circumstance beyond a reasonable doubt. Conversely,

> you may also recommend a sentence of life imprisonment even though you find at least one of the statutory aggravating circumstances beyond a reasonable doubt.
>
> Simply stated, *you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy.*

(Emphasis added [in original]). Trial counsel did not object.

The jury recommended Evans be sentenced to death for the murders, and the trial judge imposed the death sentence for both counts of murder, and lifetime imprisonment for the first degree burglary charge. This Court ultimately affirmed Evans's convictions and sentence on direct appeal. *See State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006).

(App. 178-182).

C. The PCR Action.

Again, the dissent fairly summarized how the issue arose in PCR and its treatment:

> ... Evans filed an application for PCR. Evans's PCR hearing was held on June 1–5, 2009. On June 25, 2009, this Court issued an opinion in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009), in which it admonished the bench that the specific phrasing of the same jury charge delivered in Evans's case not be used again. Evans subsequently moved to amend his application, arguing that his trial counsel was ineffective for failing to object to the condemned charge.
>
> At the PCR hearing, Evans's trial counsel maintained that they did not understand the instruction to preclude the jury's consideration of mercy. Instead, they claimed they did not object to the jury instruction because they believed the instruction emphasized to the jurors that they *could* consider mercy. Sumner testified he "liked" the charge because it was "brief," it "use [d] the word mercy," and it "seem[ed] to get across what [trial counsel] were trying to do." Goldsmith testified he thought the charge "pretty much tracked with what [trial counsel]

> thought should be charged," and he believed the charge "was sort of an expansive charge." Both testified that had they believed the charge limited the jury's "use of mercy," they would have objected because mercy was the "primary element," "key highlight," and the "major part" of their mitigation case, and because Goldsmith had "built [his] closing argument around mercy."
>
> The PCR court found that Evans was entitled to PCR on the sole basis that Evans's trial counsel failed to object to the trial court's jury instruction regarding mercy, and found that prejudice to Evans resulted. The PCR court rejected Evans's other arguments.

(App. 182-183) (emphasis in original).

In particular, as the dissent made reference to, the Order from the PCR judge reflects the judge considered, but discounted counsel's detailed testimony:

> At the evidentiary hearing, trial counsel testified that they did not object to the erroneous charge because they viewed it as helpful. Trial counsel Sumner claimed that he did not think the charge limited the jury's consideration of mercy; because "it

use[d] the word mercy," he believed the charge was actually preferable to a charge that simply tracked the words of the statute. PCR 338, see PCR 335. Trial counsel Goldsmith similarly testified that he thought this "an expansive charge" that allowed jurors to consider mercy. PCR 346-47. The charge, counsel say, told the jury to consider mercy, not abjure it.

This Court finds trial counsel's reasons for not objecting to the charge are unavailing. As the South Carolina Supreme Court recognized in *Rosemond*, the plain meaning of the words of the charge given is that mercy is precluded as a consideration for a sentence of life. The charge, by substituting the words "other than" for the word "including," in effect eviscerates the role of mercy in the jury's consideration of the sentencing options. As the Supreme Court understood, the last clause of the instruction plainly reads as a limitation on and qualification of the previous sentence, not a reiteration. The interpretation offered by trial counsel defies both the Supreme Court's determination in *Rosemond* and common sense.

(App. 139).

The PCR judge also acknowledged prior case law approving the charge, but found counsel should not have relied upon same:

> ... The fact that the *Hughey* decision, which *Rosemond* reversed, was "in effect" at the time of Mr. Evans' trial in 2004 does not ameliorate counsel's failure to object to the erroneous charge. It has been the rule for decades that mercy can be considered by a South Carolina Capital jury. ... South Carolina is a non-weighing state, meaning the jury can return a verdict of life for any reason "otherwise authorized or allowed by law." S.C. Code Ann. § 16-3-20(C). Objecting here did not impose a duty of clairvoyance on counsel, or force a lawyer to anticipate a change in the law. It is misleading to argue, as the State does, that the charge represented the correct law at the time of Evans' trial. ... As noted above, however, the court in *Hughey* interpreted the "other than as an act of mercy" phrase as precluding a jury from considering mercy. But the court did not consider the pivotal question of whether the preclusion violates the common law right to a mercy charge (as *Rosemond* found) or the constitutional right -- long recognized by *Lockett* and its progeny --

> to grant the jury the practical ability to give meaningful effect to all mitigation....

(App. 140-141).

In attempting to tie the state law issue to a federal basis, the PCR judge invoked the protections of *Lockett v. Ohio*:

> ... it is well established that the Eighth Amendment, under the *Lockett v. Ohio, 438* U.S. 586 (1978), line of cases, permits no restriction on a capital defendant's ability to present any relevant mitigating evidence. ... Subsequent decisions have made clear that a capital sentencing jury must be able to consider and give effect to mitigating evidence, for it is only when a jury is provided a vehicle for expressing its reasoned moral response to such evidence that "we can be sure the jury has treated the defendant as a 'uniquely individual human being' and has made a reliable determination that death is the appropriate sentence." *Penry v. Johnson,* 532 U.S. 782, 797 (2001) (internal citation omitted).
>
> ... Because *Hughey* neither addressed nor ruled upon the issue of whether precluding a capital jury from considering mercy comported with

> *Lockett* and its progeny, reasonable counsel would also have objected to the charge precluding mercy on that basis.

(App. 141-142).

As to *Strickland* prejudice, the PCR judge found:

> The trial court's erroneous charge restricting the jury's consideration of mercy as a basis for a life sentence requires *per se* reversal because it "deprived the jury of a vehicle for expressing its reasoned *moral* response to the defendant's background, character, and crime." *Nelson,* 472 F.3d at 314-15 (quotation and citation omitted). Accordingly, the "mercy" instruction was a structural defect to which harmless error analysis does not apply. *Id.* at 332.

(App. 147).

Further in the discussion of prejudice, after he rejected the application of harmless error and consideration of the charge as a whole, the PCR judge also wrote:

> The exclusion of mercy in a capital murder trial violates state law as well as federal law pursuant to *Lockett v. Ohio,* as it prevents the jury

from giving full effect to the mitigation evidence. Such an error is highly prejudicial in a South Carolina capital trial where jurors may impose a life sentence for any reason or no reason at all. Recently, a highly respected circuit judge granted postconviction relief to the defendant in *Hughey,* finding that the identical instruction given in *Rosemond* and *Hughey*-and the same provided at Mr. Evans' sentencing phase-was "so inimical to the laws of the State and the United States in capital cases as to entitle the applicant to a new trial." *Hughey v. State,* 2000-CP-O 1-0212, Abbeville County (Order Granting PCR Relief, May 14, 2010) (Macaulay, J.). The erroneous instruction precluding mercy was particularly prejudicial under the circumstances in Mr. Evans' case because counsel positioned mercy as the crux of the mitigation case against substantial aggravating evidence. Trial counsel's failure to object to the erroneous charge left the jury deliberating the case without being able to place the defendant's "primary element" on the scale. There is a reasonable probability that, but for counsel's failure to object to the unconstitutional charge, the outcome of the trial would have been different. *Strickland,* 466 U.S. at 694-96.

> In conclusion, the Court notes that, like *Rosemond* and *Hughey*, Mr. Evans' case belongs to a closed universe of cases in which an idiosyncratic charge was given on a critical issue. It would be fundamentally unfair to allow one defendant to live and a handful of others to die based only on the timing of their trial.

(App. 154-156).

D. The PCR Appeal.

On April 16, 2014, the Supreme Court of South Carolina granted certiorari to review the PCR judge's decision granting relief and for the issues of the cross-petition. (App. 173). On December 9, 2014, the Court heard oral argument.[4] No issue was raised as to procedural deficiency for the State's four issues – the same issues raised here – and none is apparent. However, contrary to the court's own rules, the Supreme Court of South Carolina refused to issue an opinion.[5] Rather, on May 13, 2015, three

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[4] Oral arguments in the Supreme Court of South Carolina are recorded. The referenced argument is archived and is available for review on the South Carolina Judicial website, listed in the Supreme Court Video Portal section. http://www.judicial.state.sc.us/SCvideo/termSearchVideo.

[5] In South Carolina, appeals from capital case proceedings are restricted to the Supreme Court of South

members of the five member Court dismissed certiorari as improvidently granted. (App. 175-176).

The dissent, written by the Chief Justice and joined by Justice Kittredge (the author of the *dictum* at issue in *Rosemond)*[6], found the relief granted was

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Carolina. Rule 203 (d)(A)(i), *South Carolina Appellate Court Rules*. In PCR matters, the Supreme Court of South Carolina will only review PCR decisions through a certiorari process. Rule 243 (a), *South Carolina Appellate Court Rules*. "Upon the concurrence of any two justices, the petition will be granted on any question presented." Rule 243(j), South Carolina Appellate Court Rules. The "Rule of Two" for certiorari is in direct tension with the three justice opinion dismissing as improvidently granted. Two justices remain in dissent which should require an opinion – for or against either party – but an opinion. *Cf. Donnelly v. DeChristoforo*, 416 U.S. 637, 648 (1974) (J. Stewart concurring) ("Rule of Four" dictates since "the votes of four Justices are enough to grant certiorari and bring a case before the Court for decision on the merits. If as many as four Justices remain so minded after oral argument, due adherence to that rule requires me to address the merits of a case, however strongly I may feel that it does not belong in this Court."). Further, Rule 220, *South Carolina Appellate Court Rules*, provides that reasons for the opinion must be set out. There is no provision in that rule to announce retreat to a discretionary decision where certiorari has already been granted by the appropriate number of justices.

Despite these clear rules, the Supreme Court of South Carolina failed to issue an opinion, and failed to give fair review to the people of South Carolina and the victims in these cases.

6 Justice Kittredge also authored the dissent in the two other cases presented with this petition, *Binney* and *Hughey*. Justice Kittredge incorporated the dissent in this appeal and added that the capital defendants could show neither

not warranted. The Chief Justice noted that counsel did not have the benefit of *Rosemond,* but resolved that – the question of deficient performance aside – there could be no *Strickland* prejudice:

> Here, Evans contests one sentence of a lengthy charge that instructed the jury to consider all statutory and non-statutory mitigating factors in arriving at their verdict. In my opinion, the rest of the instruction, the emphasis placed on mercy by both the State and the defense, the trial judge's general opening explanation of mitigation and aggravation to the jury, and the unremarkable position of the condemned instruction in the context of the overall charge, all combine to preclude a finding of prejudice. Under these facts, a reasonable juror unquestionably would have been aware that he or she could recommend life as an act of mercy. Thus, it is my opinion that Evans has not proven that he was prejudiced by the defective

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Strickland error nor prejudice. He instructed, as the author of the *Rosemond* dictum at issue, that it was clear the questioned phrase in *Rosemond* was not evaluated in context of the charge as a whole. Further, he observed that the court had "never sanctioned an analytical framework that focuses narrowly on disputed language in a jury charge to the exclusion of the charge as a whole." *Binney v. State of South Carolina,* 2015 WL 2230848, * 1 (SC 2015).

instruction; consequently, his *Strickland* argument must fail.

Accordingly, I would reverse this portion of the PCR court's decision.

(App. 187-188).[7]

REASONS CERTIORARI SHOULD BE GRANTED

"The people of the State are also entitled to due process of law." *Stein v. New York*, 346 U.S. 156, 197 (1953). As firmly pointed out in the dissenting

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[7] Justice Kittredge, in the dissent from dismissal of certiorari in *Binney*, observed that the transcript actually contained a comma after the phrase at issue which was entirely consistent with the State's interpretation that the PCR judge in Evans found "misleading." Justice Kittredge wrote the punctuation in the records reflected a "pause in the sentence," which "supports the construction of the sentence advanced by the State" and was "entirely consistent with the balance of the charge, which made it unmistakably clear that there was no limitation on the jury's ability to recommend a life sentence." 2015 WL 2230848, * n. 2 (Sup.Ct.S.C. 2015).

In *Hughey*, Justice Kittredge wrote of a uniquely troubling aspect of the strained construction argument at issue. He noted the comma was not in the transcript as it was in *Binney*, but even so, that "does not change my view that the jury charge, when considered in its entirety, conveyed to the jury that it could recommend a life sentence merely as an act of mercy." 2015 WL 2231252, * n. 2 (Sup.Ct.S.C. 2015). He noted: "It would be regrettable, indeed, if an otherwise error-free death penalty verdict is set aside due to sloppy transcription."

opinion in this case and the companion dissenting opinions in *Binney v. State of South Carolina*, 2015 WL 2230848 (SC May 13, 2015) and *Hughey v. State of South Carolina*, 2015 WL 2231252 (SC May 13, 2015), there is absolutely no error to correct; however, the circuit courts in South Carolina have ordered unnecessary and costly re-sentencing proceedings in these three (3) capital cases. Simply, new sentencing proceedings are not warranted by any fair reading of state or federal law.[8]

The federal error of law shared in these cases presents a compelling reason for a grant of certiorari – the decisions are in clear and direct conflict with the *Strickland v. Washington*, 466 U.S. 668 (1984) mandates (1) that a court view counsel's conduct in context of the time the case was tried, and (2) that prejudice be assessed on the trial record. The *Strickland* error found by the state lower courts is not only incorrect, but also costly – costly in judicial resources; costly in excessive time for resolution; and, most importantly, costly to the integrity of the judicial system and resolution on behalf of the victims.

Further, the unexplained avoidance of the error correction of the undisputed misapplication of

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[8] Justice Kittredge wrote in *Hughey*: "Given that the charge in this case was affirmed on direct review fifteen years ago, I cannot fathom how it is proper for this Court to uphold the post-conviction relief court's finding ... The finding of deficient representation is clear legal error." 2015 WL 2231252 at 1. The direct appeal ruling in *Hughey* was controlling at the time of Evans' trial.

this Court's *Strickland* decision is shocking. It is also an affront to the public sense of justice and the victims in these cases. The avoidance is particularly disturbing in these three difficult and compelling capital cases. The State was entitled to fair review and a proper application of federal law. *Cf. White v. Wheeler*, 577 U.S. ___, ___, 136 S.Ct. 456, ___ (2015) (reminding lower court standard of review under AEDPA does not change "even when reviewing a conviction and sentence imposing the death penalty."). It received neither. The Attorney General of the State of South Carolina seeks fair review in this Court.

I.

The PCR Judge Erred in Finding Deficient Performance Under *Strickland v. Washington* Based Upon *Rosemond v. Catoe* Which Was Decided Over Four Years After Trial.

This is not a matter of whether mercy may be requested and received in South Carolina capital cases. It can be. This is a matter of whether Evans could meet his burden of showing ineffective assistance of trial counsel for not objecting to construction of a charge that had been approved at the time of trial. He cannot.

The Supreme Court of South Carolina, in *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000), the direct appeal of the *Hughey* case also raised here, reviewed the very phrasing at issue. In the direct appeal, the state supreme court rejected

the argument that the charge was "confusing because it suggested that an act of mercy would have been an invalid reason for a life vote" as "without merit...." 339 S.C. at 460, 529 S.E.2d at 732. *Hughey* was decided on March 27, 2000. The jury was sworn and Evans' trial began on September 17, 2004. Consequently, *Hughey* was good law and controlling at the 2004 trial – a fact that the PCR judge was constrained to admit. (See App. 135).

In 2009, in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009), the Supreme Court of South Carolina noted in *obiter dictum* that though the instruction was found proper in *Hughey* the language could be confusing and should not be used. *Rosemond* overruled *Hughey* to this extent. In this case, the circuit court found that counsel should have objected to the charge – even though the charge was sanctioned by state law. This was clear error.

Counsel may logically rely on the law in existence at the time of trial to provide proper representation. To avoid this bar to finding deficient performance, the PCR judge relied upon a somewhat confused and internally conflicting interpretation of *Hughey*. But the confusion in interpretation of essentially state law preference in language is without moment here; there could be no deficient performance under *Strickland*. Consequently, Petitioner is not entitled to any relief under *Strickland*. *See, e.g., Maryland v. Kulbicki*, ___ U.S. ____, ____. 136 S. Ct. 2, 3 (2015) (summarily

reversing the Court of Appeals of Maryland for failing to view counsel's representation as of the time of trial); *Harrington v. Richter*, 562 U.S. 86, 107 (2011) (finding error where "the Court of Appeals failed to 'reconstruct the circumstances of counsel's challenged conduct" and "evaluate the conduct from counsel's perspective at the time.").

The *Kulbicki* case is particularly noteworthy here. In *Kulbicki*, the state appellate court found that trial counsel was constitutionally ineffective for failing to identify a "methodological flaw" in comparative bullet lead analysis ("CBLA") and mounted a challenge to the evidence presented at trial. However, "[a]t the time of Kulbicki's trial in 1995, the validity of CBLA was widely accepted, and courts regularly admitted CBLA evidence until 2003." *Id.*, at 4. Adhering to the *Strickland* test, this Court reversed the Maryland court finding no deficient performance. *Id.*, at 5. The same core error is apparently here.

Even more troubling, though, in this case is the additional fact the state court opinion relied upon for finding deficient performance and presuming prejudice *did not even grant relief and reverse on an incorrect instruction.* As the author of the opinion noted in the *Binney* dissent, the *dictum* was meant to alert the bench and bar of a possibility of confusion. When viewed in context, there was no error in use of the phrase and no reasonable probability of confusion in use of the phrase. 2015 WL 2230848 at 3. To allow re-sentencing in the complete absence of error is against the principles of

justice.

II.

The PCR Judge Erred In Finding *Per Se* Reversible Error Thereby Avoiding a Proper *Strickland v. Washington* Prejudice Analysis.

The PCR judge also incorrectly relieved Petitioner of the burden of showing prejudice. The judge found that he could not evaluate the effect the "erroneous mercy charge" would have had on the jury's determination. (App. 146, "It is impossible to estimate the impact of the charge eliminating mercy – an inscrutable concept that defies qualification – as a sentencing consideration on the jurors' reasoned moral response."). Though the PCR judge referenced the *Strickland* standard, the reasoning in the Order demonstrates that he "did not correctly conceptualize how that standard applies to the circumstances of this case." *Sears v. Upton*, 561 U.S. 945, 952 (2010).

First, "*Strickland* places the burden on the defendant ... to show a 'reasonable probability' that the result would have been different." *Wong v. Belmontes*, 558 U.S. 15, 27 (2009). Further, "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington*, 562 U.S at 112. The PCR judge's ruling on prejudice cannot be reconciled with this precedent.

Second, to tie unfettered emotion to the sentencing phase in such a broad manner would

make review of any finding of deficiency a guarantee of a new proceeding. There would be no limitation in finding a new sentencing proceeding as it could be said anything could have affected the exercise of mercy. Such reasoning mirrors the "nothing to lose" standard rejected in *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) as not established by United States Supreme Court precedent, and is equally disturbing in the foreshadowed breadth of relief.

Third, the PCR judge's ruling here, like his ruling on deficient performance, was also guided by his incorrect reasoning that *Rosemond* mandated relief. However, as the *Rosemond* author found, a reasonable juror would not have interpreted the instruction at issue as precluding consideration of the mitigation evidence in deciding whether to exercise mercy when the charge is properly reviewed as a whole. The trial judge emphasized the jury's duty to consider all statutory and non-statutory mitigating circumstances shown by the evidence, and emphasized the opportunity to exercise mercy:

> ... it is not necessary that you find the existence of such mitigating circumstance or circumstances beyond a reasonable doubt. You may recommend a sentence of life imprisonment whether or not you find the existence of a statutory or a nonstatutory mitigating circumstance.
>
> ...
>
> ... you may also recommend a

> sentence of life imprisonment even though you find at least one of the statutory aggravating circumstances beyond a reasonable doubt and you find no mitigating circumstances to exist.

(App. 206-209).

Thus, the charge when read as a whole, was not deficient as a matter of state law and allowed for the exercise of mercy in the penalty phase. *Accord State v. Hicks*, 330 S.C. 207, 218-219, 499 S.E.2d 209, 215 (1998)("the trial judge is not required to instruct the jury it could impose a life sentence 'for any reason or no reason at all' where the jury is informed, as it was here, it could consider any mitigating circumstance authorized by law and could impose a life sentence even if aggravating circumstances were found").

Additionally, though pointed out by the State, the PCR judge nonetheless eschewed *Boyde v. California*, 494 U.S. 370 (1990) as wholly inapplicable. The *Boyde* analysis is not strictly controlling because it is *Strickland* prejudice at issue. Even so, the *Boyde* analysis is persuasive. The *Boyde* test is proper in review of the instruction here as the instruction is not clearly erroneous as a whole, but contains a possibly erroneous phrase in one sentence that seemly could contradict the remaining clear and correct language. *Compare Stromberg v. California*, 283 U.S. 359 (1931) (reversing where charge included unconstitutional

ground for conviction). *See also Griffin v. United States*, 502 U.S. 46, 53 (1991) (describing *Stromberg* "...where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground."). *Boyde* sets out the test for evaluating such ambiguous instructions. *See also Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991) (applying *Boyde*). Thus, the proper question "is whether there is a reasonable likelihood the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380. Applied to the instant case, in considering the charge as a whole, a reasonable juror would not have thought he was precluded from considering any of the mitigation evidence presented in the instant case.

Lastly, in *Rosemond*, the court tied the propriety of the consideration of mercy to the receipt of "proper evidence of mercy." 680 S.E.2d at 10 (emphasis added). Thus, it may be fairly reasoned that it is consideration of mercy based on the evidence that makes the charge consistent with the instruction that "the jury should not be guided by sympathy, prejudice, passion, or public opinion." *Id.* In short, the state charge is not intended to promote unreasoned reaction. Rather, the charge is meant to preserve the exercise of mercy based on consideration of the evidence submitted. However, to tie the charge here to evidence in order to prompt federal constitutional protection is incorrect and another error in the PCR judge's ruling.

III.

The PCR Judge Erred In Finding A Federal Constitutional Right To A Mercy Charge Where Federal Precedent, Without Exception, Does Not Support Such A Federal Constitutional Right.

Mercy is an act – not evidence. See Black's Law Dictionary (9th ed. 2009) ("Compassionate treatment, as of criminal offenders or of those in distress; esp. imprisonment, rather than death, imposed as punishment for capital murder.") (emphasis added). *See also Lusk v. Singletary*, 976 F.2d 631, 632 (11th Cir. 1992) (rejecting appellant's argument that the judge evidenced a "refus[al] to consider and give effect to mitigating evidence" based on the "court's statement that '[t]he law of this State does not permit this Court to extend mercy to this Defendant or others convicted of a capital felony.'"). Evidence of mercy would be evidence of an act of the jury; thus, a charge regarding mercy does not impact on consideration of any sentencing phase evidence and does not implicate federal constitutional protections.

A capital defendant is allowed, pursuant to the Eighth and Fourteenth Amendments of the Constitution, to submit evidence in mitigation of "any aspect of [...his...] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" to enable the jury to make an "individualized decision" in sentencing. *Lockett v.*

Ohio, 438 U.S. 586, 604-605 (1978). In that same vein, this Court has determined that a state may not create "limitations" on the consideration of properly admitted mitigation evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 114-115 (1982). "These two cases place clear limits on the ability of the State to define the factual bases upon which the capital sentencing decision must be made." *Saffle v. Parks*, 494 U.S. 484, 490 (1990) (emphasis added). However, there is a difference between the presentation and consideration of evidence and the exercise of unfettered sympathy or mercy: "Whether a juror feels sympathy for a capital defendant is more likely to depend on that juror's own emotions than on the actual evidence regarding the crime and the defendant." *Id.* at 493. This Court has rejected challenges to instructions that the jury "'must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling,'" *California v. Brown*, 479 U.S. 538, 540 (1987), and emphasized that for a rational and reliable sentencing proceeding, the decision must be "rooted in the aggravating and mitigating evidence introduced during the penalty phase." *Id.* at 542. The following quote is instructive:

> Petitioner suggests that the jury must have freedom to decline to impose the death penalty even if the jury decides that the aggravating circumstances "outweigh" the mitigating circumstances. But there is no such constitutional requirement of unfettered sentencing discretion in the

jury...

Boyde, 494 U.S. at 377.

In South Carolina, "a capital defendant may present witnesses who know and care for him, and who are willing on that basis to plead with the jury for mercy on his behalf." *State v. Wise*, 359 S.C. 14, 27-28, 596 S.E.2d 475, 481 (2004). *See also State v. Dickerson*, 395 S.C. 101, 716 S.E.2d 895 (2012) (*citing Wise*). While not a constitutional right, a plea for mercy is uniformly accepted in South Carolina under our evidence rules. *Id. See also State v. Johnson*, 338 S.C. 114, 126-127, 525 S.E.2d 519, 525 (2000) (finding error in a limitation on questioning but no prejudice where "Johnson's sister was able to make a general plea for mercy on her brother's behalf."); *State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 319 (1991) (finding error in limitation on questioning but no prejudice where defendant's mother was allowed to make "a general plea for mercy for the life of her son"). Even so, this allowance is not without limitation.

A family member making a plea for mercy may not weigh in on what the appropriate sentence should be. *Dickerson, supra. See also State v. Johnson*, 338 S.C. at 126-127, 525 S.E.2d at 525 ("the defense did not seek to elicit the opinion of Johnson's sister about what verdict the jury 'ought' to reach. Defense counsel merely proposed to ask her whether she wanted Johnson to die" which "did not address the ultimate issue to be decided by the jury"). In sum, the basis for admissibility of the plea

for mercy is not mere mercy, but the plea's value as evidence of the shared bond which itself is a reflection of the defendant's character in that he is able to maintain that bond. Otherwise, there would be no reason to draw a distinction between 1) a plea for mercy and an opinion on which sentence is appropriate; and 2) allowing only "defense witnesses who know the defendant well" to so plead, not even a victim who would arguably have an interest in the disposition. *Dickerson, supra; Johnson, supra; Torrence, supra; Wise supra. Cf. People v. Ochoa,* 966 P.2d 442, 505-506 (Cal. 1998) ("A defendant may offer evidence that he or she is loved by family members or others, and that these individuals want him or her to live. But this evidence is relevant because it constitutes indirect evidence of the defendant's character").

Without question, mercy was a "primary element" of the defense argument in closing. (App. pp. 1760-1772; pp. 3258-3261; pp. 3271-3273; pp. 4478-4480). Here, however, there was no specific plea for mercy in the penalty phase, though friends and family did testify as to Evan's good qualities and their emotional bond to him. (See, for example, App. pp. 1677-1678). Nothing in the charge – even if parsed as Evans suggests – precluded the jury from consideration of this evidence. Thus, the charge, as a whole did not interfere with either the constitutional right to present mitigation evidence, or consideration of the evidence presented, *i.e.* the emotional bond to Evans. *See Boyde,* 494 U.S. at 380 (relevant question on constitutionally infirmity "is whether there is a reasonable likelihood that the

jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.").[9]

The PCR judge clearly erred in determining that mercy is a constitutionally protected sentencing consideration tied to evidence. (See App. 149-150). This Court has soundly rejected defense challenges to instructions that the jury "'must not be

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[9] There is also a distinct difference between evidence in mitigation and the response to evidence in mitigation. Federal law protects the defendant's right to present evidence in mitigation and have that evidence considered. It does not protect (address or require) a jury's exercise of mercy apart from evidence presented. *See Kansas v. Marsh*, 548 U.S. 163, 181 (2006) ("the Kansas capital sentencing system, which directs imposition of the death penalty when a jury finds that aggravating and mitigating circumstances are in equipoise, is constitutional").

Even so, the possibility of mercy in sentencing does not offend the constitutional approval of capital punishment. *Gregg v. Georgia*, 428 U.S. 153, 199 (1976) ("Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution"). The presentation of mitigation evidence, though, does not guarantee a lesser sentence. Defining "giving effect" as "securing a life sentence" reflects the conflation of an adversarial position with a legal structure. It is when evidence is excluded, either from sentencing or from consideration, that a legal flaw arises. *See, for example, Abdul-Kabir v. Quarterman*, 550 U.S. 233, 264 (2007) ("Our cases following *Lockett* have made clear that when the jury is not permitted to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence—because it is forbidden from doing so by statute or a judicial interpretation of a statute—the sentencing process is fatally flawed."). That does not exist here.

swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling,'" *California v. Brown*, 479 U.S. 538, 540 (1987), and emphasized that for a rational and reliable sentencing proceeding, the decision must be "rooted in the aggravating and mitigating evidence introduced during the penalty phase." *Id.* at 542. *See also Saffle*, 494 U.S. at 492-493 ("It is no doubt constitutionally permissible, if not constitutionally required, for the State to insist that 'the individualized assessment of the appropriateness of the death penalty [be] a moral inquiry into the culpability of the defendant, not an emotional response to the mitigating evidence.'") (internal citations omitted) (brackets in original); *Johnson v. Texas*, 509 U.S. 350, 371-72 (1993) ("we have not construed the *Lockett* line of cases to mean that a jury must be able to dispense mercy on the basis of a sympathetic response to the defendant"). This Court has been very definite in separating the consideration of evidence and a response to the evidence:

> We also reject Parks' contention that the antisympathy instruction runs afoul of *Lockett* and *Eddings* because jurors who react sympathetically to mitigating evidence may interpret the instruction as barring them from considering that evidence altogether. This argument misapprehends the distinction between allowing the jury to consider mitigation evidence and guiding their consideration.

Saffle, 494 U.S. at 492.

Further, in *Kansas v. Marsh* this Court held that "Kansas' death penalty statute, consistent with the Constitution, may direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the aggravating circumstances and mitigating circumstances are in equipoise." 548 U.S. 173. If there is no Eighth Amendment violation in requiring imposition of death where the jury unanimously finds circumstances in aggravation and the circumstances in aggravation and mitigation weighed equally, there could be no Eighth Amendment violation here based on the state charge regarding the exercise of mercy.

Consequently, the PCR judge also erred in finding counsel ineffective for failing to object to the charge on the basis of an Eighth Amendment violation in the "restriction on a capital defendant's ability to present any relevant mitigating evidence" and have such evidence considered. At any rate, the jury was instructed that it could return a life sentence for any reason. There could be no error.

IV.

The PCR Judge's Factual Finding That The Charge Regarding Mercy Disallowed The Exercise of Mercy Is Wholly Without Factual Support in The Record Where No Person Ever

Testified That The Charge Was Intended Or Heard To Limit The Exercise Of Mercy, And Trial Counsel Was Focused On The Exercise Of Mercy In Their Penalty Phase Presentation and Closing.

Again, mercy, by definition an act (not "evidence"), is always a possibility in sentencing – the State does not contend otherwise. The State maintains that the intent of the charge here was to allow the exercise of mercy and the PCR ruling was wrong in law and in fact.

It is uncontested that trial counsel presented a case in mitigation which included family and friends seeking mercy and that counsel requested the jury exercise mercy.

It is equally uncontested that the jury was instructed that they could return a life sentence *regardless of whether they accepted or rejected the mitigation evidence*, (see App. 207), and *regardless of whether circumstances of aggravation* were proven beyond a reasonable doubt, (see App. 200; 208-209), In short, there was no limitation on the expression of leniency in sentencing.

Consequently, having been adequately and properly instructed that they could return a life sentence whether they accepted *or rejected* any of the evidence offered in mitigation, the jury determined that the death sentence was appropriate based on the particulars of the defendant and his crime. *See Enmund v. Florida*,

458 U.S. 782, 801 (1982) ("punishment must be tailored to his personal responsibility and moral guilt.").

The reasoned moral assessment of defendant and his crime in his individualized sentencing proceeding was not restricted or limited regarding his mitigation evidence and his request for leniency. The jury was clearly instructed they could recommend a life sentence with or without findings regarding the mitigation and even with a finding statutory aggravating circumstances existed. This allowed – without objection or contest – even more discretion for leniency than required for the constitutional protections. *Enmund*, 458 U.S. at 801, 102 S.Ct. at 3378. *See also Kansas v. Marsh*, 548 U.S. at 171 ("the Constitution requires that a sentencing jury have discretion, it does not mandate that discretion be unfettered," however, "the States are free to determine the manner in which a jury may consider mitigating evidence."). The PCR judge erred in finding to the contrary.

CONCLUSION

Though relief was premised on after-trial *dictum*, the issue here is more than the state court's later disapproval of the phrasing of one part of one sentence in the charge. The issue here is whether the charge as a whole was sufficient, which, in turn, informs and affects the determination of *Strickland* prejudice. This record confirms the charge was sufficient, when properly viewed as a whole, and that defendant failed to show *Strickland* error and

prejudice – especially when the basis for relief was *dictum* in an opinion issued over four years after trial. The defendant was plainly not entitled to any relief.

Respectfully submitted,

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January 4, 2016.

APPENDIX

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE

Kamell Delshawn Evans, #6016,	)	C/A No. 2006-CP-23-7719
Evans,	)	(Capital PCR Action)
v.	)	
	)	ORDER
State of south Carolina	)	
Respondent.	)	

In this capital post conviction relief action, Kamell Delshawn Evans challenges his convictions for murder and sentence of death; possession of a weapon during the commission or attempted commission of a violent crime, burglary first degree, and kidnapping. The court, after careful consideration of all the evidence of record and the applicable law, affirms Evans' convictions, but finds a new sentencing hearing is required due to the law set forth by the decision of our supreme court in Rosemond v. Catoe, 383 S.C. 320, 680 S.E. 2d 4 (2009).

I.
PROCEDURAL HISTORY

In June 2003, a Greenville County Grand Jury indicted Evans on two (2) counts of murder;

two (2) counts of possession of a weapon during the commission or attempted commission of a violent crime; burglary, first degree; and two (2) counts of kidnapping. (R.p.1802-13). Evans shot and killed Antonio J. "Joe" Sapinoso, and his father, Antonio L. Sapinoso. The State filed and served a Notice of Intent to Seek the Death Penalty. (R. p. 1814). Steven W. Sumner, Esq., and James Lee "Skip" Goldsmith, Jr., Esq., represented Evans at the trial.

Jury qualification and selection for the trial on the charges began on September 13, 2004. The Honorable J. Derham Cole presided. The guilt phase began on September 17, 2004. On September 18, 2004, the jury convicted Evans on all counts. (R. p. 1502). On September 20, 2004, the trial court began the penalty phase. On September 21, 2004, the jury returned from deliberations, and advised the court that they had found the following statutory circumstances as to Joe Sapinoso:

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

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

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

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

(R. p. 1795). The jury found the same aggravating circumstances as to Antonio L. Sapinoso with the exception of the law enforcement aggravator. (R. p. 1794). The jury also recommended death. (R. pp. 1794-95).

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

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

> The judge erred at sentencing by failing to instruct the jury on the statutory mitigating circumstance provided by *S.C.Code Section 16-3-20*

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

(Final Brief of Appellant, p. 3).

The State filed its final brief on July 25, 2006. The case was called for oral argument before the Supreme Court of South Carolina on October 3, 2006. On November 6, 2006, the Court entered its opinion affirming Evans's death sentence. *State v. Evans,* Opinion No. 26220 (S.C. Sup. Ct. filed November 6, 2006). [FN 1] Evans did not seek review from the United States Supreme Court.

On November 13, 2006, Evans filed a Petition for Stay of Execution in the Supreme Court of South Carolina, expressing his desire to file an application for post-conviction relief. The Court granted the stay on December 6, 2006, and appointed the undersigned to hear the proposed PCR action. On

February 28, 2007, this Court held a hearing to determine if Evans wished to proceed and if he wished to have appointed counsel. Having determined Evans both wished to proceed and have counsel appointed, this Court appointed William Nettles, Esq., and Hank Ehlies, Esq., counsel for Evans. On June 23, 2008, Christopher Seeds Esq., joined counsel for Evans.

The evidentiary hearing in the above captioned capital PCR action began June 1-5, 2009, and concluded October 12-14, 2009. [FN 2] Mr. Nettles, Mr. Ehlies and Mr. Seeds represented Evans. Senior Assistant Attorney General Melody J. Brown and Assistant Attorney General Anthony Mabry represented the State. On March 18, 20 to, after the conclusion of the hearing, this Court relieved Mr. Nettles and Mr. Seeds was formally appointed second chair. [FN 3] Upon receipt of the transcripts [FN 4] for both parts of the hearing, this Court established a briefing schedule for post-hearing briefs. Petitioner's brief was submitted on October 4, 2010. Respondent submitted its post-hearing brief on November 10, 2010. Petitioner submitted a reply on November 19, 2010. On December 9, 2010, this Court called for additional briefing of the mercy charge issue. Respondent submitted its second post-hearing brief on the issue on December 14, 2010. Evans submitted his second post-hearing brief on December 16, 2010.

II.
ISSUES PRESENTED

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

> 9(a) Evans was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during the guilt or innocence phase of his capital trial.
>
> 10(a): Supporting facts: Trial counsel performance during the guilt-or-innocence phase was both unreasonable and prejudicial. *See Strickland v. Washington,* 466 U.S. 668 (1984); *Ard v. Catoe,* 642 S.E.2d 590 (S.C. 2007). Counsel's acts or omissions included, but are not limited to, the following:
>
> > 1. Counsel failed to conduct adequate voir dire. Counsel's failures include, but are not limited to, failing to ask

potential jurors whether they would automatically vote to impose death where a defendant had been found guilty of murder *(see Morgan v. Illinois,* 504 U.S. 719 (1992), failing to ask appropriate questions of jurors regarding their views on the death penalty thus making the record unclear as to whether the jurors were qualified, failing to voir dire for racial bias as guaranteed by *Turner v. Murray* in this case which involved an inter-racial murder, failing to object to the qualification of several jurors who gave disqualifying responses (e.g., Juror 145 (Eddie Harvey», and failing to exercise available peremptory strikes to dismiss jurors, ultimately seated, who gave disqualifying responses to voir dire questions (including Juror 258 (Elvis Mahaabwa), Juror 247 (Sandra Holcombe), Juror 118 (James Freeman), and Juror 281 (James Plumley)).

2. Counsel failed to adequately investigate, present evidence and challenge the State's evidence in the guilt-or-innocence phase.

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

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

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

and 14 of the South Carolina Constitution.

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

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

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

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

4. Counsel failed to object to the testimony of the State' witness Lewis Edward O'Cain, which was unreliable, unscientific, exceeded the scope of the witness's expertise, and irrelevant, *see* 9(g) and 10(g), *infra,* for reasons including, but not limited to, that: (a) there is no field of science for which this witness, who was allowed to render opinions concerning the Defendant's future dangerousness, qualified as an expert; (b) the witness was not qualified by education, training or experience to render classification testimony; (c) the witness had no scientific or factual basis for rendering the opinions to which he testified; (d) the witness was wrongfully allowed to testify as to the appropriate sentence, that being "death"; (e) the witness' testimony should have been

offered with a limiting instruction that the testimony was subject to the jury's discretion and could be disregarded in its entirety; (f) the witness' testimony should have been excluded after the witness testified that he had inadequate information concerning the defendant's history and prior criminal record to form an adequate opinion on future dangerousness; (g) the witness was
allowed to render an opinion regarding classification and future dangerousness utilizing the defendant's tattoos which was a violation of the defendant's rights pursuant to the First and Fourteenth Amendments to the United States Constitution and the Constitution of the State of South Carolina; and (h) counsel failed to conduct a reasonable cross-examination. [Parts of this ground are alleged in Interim Amendments to Original Application for Post-Conviction Relief as Paragraph 10(b)].

5. Counsel failed to object to victim impact testimony elicited

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

6. Counsel failed to object to hearsay testimony introduced during the testimony of Ms. Sapinoso. South Carolina Rules of Evidence, Rule 801(e) prohibits hearsay, which it defines as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

7. Counsel failed to object to inflammatory, irrelevant and improper statements made by the prosecution in closing argument. Such statements included, but are not limited to, arguments designed to arouse

the passion and prejudice of jurors, assertions substituting personal opinions as law, statements diminishing the jury's sense of responsibility for their verdict,statements misrepresenting the proper scope of mitigating evidence, arguments that were not reasonable inferences from the record, and misrepresentations of the nature of alternative punishments. *See also* 9(d), 10(d)(4), *infra.*

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

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

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

11. Counsel failed to investigate, develop, and present available, relevant, and admissible mitigating evidence. Counsel's failures in this regard include consenting to a trial date that was merely two months following counsel's appointment to represent Mr. Evans and before starting any mitigation investigation, failing to retain or present the testimony of a social work expert to explain information gathered regarding Mr. Evans's life history, failing to gather appropriate and

relevant social history records, failing to investigate and obtain expert services on lead poisoning and its impact on Mr. Evans's neurological, behavioral, and intellectual development even though counsel knew that Evans tested with high levels of lead poisoning as a toddler, and failing to provide necessary background information to expert witnesses including Dr. James Evans and Dr. Elin Berg.

9(c): Evans was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution - during the appellate phase of his trial.

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

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

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

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

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

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

2. The State suppressed evidence that was both favorable to Evans and material

to Evans's guilt or punishment. *See Banks v. Dretke*, 540 U.S. 668 (2004); *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Simpson v. Moore*, 627 S.E.2d 701 (S.C. 2006).

[Withdrawn by Evans as Discussed Below]

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

likelihood that the false or misleading testimony affected the judgment of the jury. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *Napue, supra.*

4. Evans's death sentence was obtained in part as a result of the State's inflammatory, irrelevant and improper statements in closing argument. *See, e.g., Darden v. Wainwright*, 477 U.S. 168 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); *State v. Copeland*, 468 S.E.2d 620 (S.C. 1996); *Thompson v. Aiken*, 315 S.E.2d 110 (S.C. 1984); *see also Weaver v. Bowersox*, 438 F.3d 832 (8th Cir. 2006), cert. dismissed, 127 S.Ct. 2022 (2007). Such statements included, but are not limited to, arguments designed to arouse the passion and prejudice of jurors, assertions substituting his personal opinions as law, statements diminishing the jury's sense of responsibility for their verdict, misrepresenting the proper scope of mitigating evidence, arguments that were not reasonable inferences from the record, and misrepresentations

of the nature of alternative punishments.

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

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

9(e): The trial court's erroneous qualification of jurors resulted in a jury uncommonly willing to impose death and deprived Mr. Evans of his right to trial by an impartial jury under the sixth and Fourteenth Amendments to the United States Constitution and South Carolina law.

10(e): Supporting facts: The Sixth Amendment guarantees a capital defendant the right to a fair trial before a panel of impartial and indifferent jurors. *See Morgan v. Illinois*, 504 U.S. 719, 728 (1992); *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988); *Duncan v. Louisiana*, 391 U.S. 145, 147-58 (1968); *Turner v. Louisiana*, 379 U.S. 466,471-73 (1965); *Irwin v. Dowd*, 366 U.S. 717,722-23 (1961). A "juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do." *Morgan*, 504 U.S. at 729. Further, "[a]ny juror to whom mitigating factors are ... irrelevant should be disqualified for cause, for [they have] formed an opinion concerning the merits of the case without basis in the evidence developed at trial." *Morgan*, 504 U.S. at 738-39. Therefore any juror whose

predispositions about the propriety of the death penalty – either generally or related to the specific case - are such that the juror's ability to follow the trial court's instruction that he or she consider the defendant's mitigating evidence is substantially impaired, is not qualified. Several jurors expressed such impairments during voir dire in this case. See 9(a) and 10(a), *supra.*

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

10(f): Supporting facts: Evidence of a defendant's political or religious or other associations or beliefs may be admitted only if it probatively relates to the murder, to aggravating factors such as future dangerousness, or to rebut a mitigating factor offered by the defense; otherwise, evidence of affiliation or belief, however unpalatable it may be to some, has no relevance in a capital trial, and its admission violates a defendant's First Amendment right to freedom of

association and freedom of speech. *Dawson v. Delaware,* 503 U.S. 159, 163-69 (1992). There is no evidence that Evans' crime was gang-motivated, no evidence that Evans engaged in gang-related activity in or out of prison, no evidence about Evans' behavior in prison linking him to a gang. The evidence lacks the necessary nexus between gang's beliefs or activities and Evans' behavior. Rather than assist the jury in making an individualized determination of whether Evans deserves the death penalty, the irrelevant and unsubstantiated matter injected an arbitrary and invalid sentencing factor into Mr. Evans' sentencing proceeding. *See Zant v. Stephens,* 462 U.S. 862 (1983).

9(g): The trial court erred, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law, in admitting testimony from State witness Lewis Edward O'Cain.

10(g): Supporting facts: O'Cain provided testimony that was inadmissible for reasons including, but not limited to, that the testimony was unreliable, exceeded the scope of the witness's expertise, and irrelevant. *See*

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

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

On August 31, 2009, Evans offered an amendment to the application to include the following allegation:

> 9(b), 10(b)(12) Counsel failed to object to the trial court's instruction to the jury not to recommend a sentence of life based on mercy. See *Rosemond v. Catoe,* 383 S.c. 320, 680 S.E.2d 5 (No. 6679)(June 29, 2009)(overruling *State v. Hughey,* 339 S.C. 439, 459, 529 S.E.2d 721, 731 (2000)). On June 29, 2009, the South Carolina Supreme Court ruled that a trial court's charge prohibiting the jury from considering mercy was error and that trial counsel performed deficiently in failing to object to the charge. The trial court in *Evans* (the same as in *Rosemond)* provided exactly the same charge that the South Carolina Supreme Court rejected in *Rosemond.* In *Rosemond,*

the judge instructed the jury: "[Y]ou may recommend a sentence of life imprisonment for any reason or for no reason at all *other than as an act of mercy.*" 680 S.E.2d at 10 (emphasis in original). The South Carolina Supreme Court explained that, contrary to the trial court's charge, the jurors were "entitled to consider [mercy]":

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

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

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

This Court grants the motion to amend, and the above issue challenging the mercy charge is addressed herein.

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

This Court accepts the withdrawal of the issue and that issue is dismissed.

III
DISPOSITION OF MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT AND TRIAL MOTIONS ON THE ALLEGATIONS

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

IV.
RELEVANT FACTS

In considering the allegations of the application, and the arguments of counsel, this Court is mindful of the following salient facts:

There is no question that Evans shot and killed Antonio L. Sapinoso and Deputy Antonio J. Sapinoso after having held them hostage for approximately five (5) hours in the Sapinoso home in Greenville County. Evans acknowledged this in his statement to the authorities, in his testimony during the guilt phase, and in his closing statement to the jury. (R. p. 1233; p. 1432; p. 1473).

At the PCR hearing, defense counsel testified that Evans repeatedly admitted the shooting, but maintained he wanted to pursue a manslaughter charge, i.e. he was provoked into shooting because Deputy Sapinoso reached for one of Evans's three guns. (See, e.g., R. p. 1445-1448; June PCR Tr. pp. 441-447; Respondent's Exhibit 23; Respondent's Exhibit 25, p. 2). Evans admitted shooting Deputy Sapinoso in the back of head. (Respondent's Exhibit 23, page 2; June PCR Tr. p. 7(5). Moreover, Evans admitted to his PCR counsel that he was actually trying to re-load his weapon(s) when he was taken down. (Respondent's Exhibit 25, p. 4).

At trial, Evans testified that he went to see the Sapinosos on the night of April 1, 2003 because his relationship with Christina Rodriquez, a sister to Deputy Sapinoso, had soured and Christina left him with financial difficulties. He asserted that he went to the Sapinoso home because they would "understand" his position of frustration, and "could put an end to everything." (R. p. 1425, line 11 - p. 1426, line 4). Evans conceded he parked his truck away from the home, and waited for Deputy

Sapinoso to return to the family home. (R. p. 1428). Evans testified he approached the Deputy when the Deputy drove up, and conceded he had a gun when he "asked" to speak with Deputy. According to Evans's trial testimony, the two sat on the porch until Evans began to cry and the Deputy suggested they go inside the home. (R. pp. 1428-1436). According to Evans, the Deputy's father was in the living room with them, while his mother remained upstairs in the house with her grandson. [FN 5] (R. p. 1431). According to Evans's testimony, "they" (he and the Deputy) together called Christina. (R. pp. 1429-1430). Evans testified he placed Deputy Sapinoso's gun on the coffee table in the living, and he only fired when he "perceived Joe going to the gun," and Mr. Sapinoso "standing up." (R. p. 1432).

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

Tony Lee, a negotiator with the Greenville County Sheriff's Office, conducted negotiations with Evans to surrender and leave the home. Officer Lee testified that he initially made contact through Evans's sister, Tina, who was also present outside the home, and Lee told Evans he could come out at anytime and he would not be harmed. (R. p. 1117, line 10-p. 1118, line 21). Through several hours of negotiations, in addition to speaking with Lee, Evans was also able to speak with family and

friends who encouraged him to come out. (R. p. 1119, lines 6-15; p. 1121, lines 1-24; p. 1127, line 14-p. 1128, line 4). Evans complained to Lee about his relationship with Christine, but also indicated the situation was not limited to that problem, but was "bigger than that" though Lee was never able to ascertain exactly what Evans was referencing. (R. p. 1129, lines 15-25; p. 1134, lines 8-18)(emphasis added). Evans remained "cordial and nice" to Lee throughout the negotiations, becoming agitated only when Lee asked to speak with Joe, or when Lee requested release of some of the hostages. (R. p. 1120, lines 2-10; p. 1122, line 3 - p. 1123, line 19; p. 1125, lines 11-15; p. 1128, line 9 - p. 1129, line 4). Lee eventually spoke with Joe and enlisted Joe's help in attempting to assure Evans of his safety and secure everyone's release. (R. p. 1123, line 20 - p. 1124, lines 18). Lee also arranged, at Evans's request, for Evans to speak with Christine. Lee listened to the conversation and thought the conversation "went real well." (R. p. 1124, line 19 - p. 1126, line 8). After Evans spoke with Christine, Lee spoke to Evans "a couple of more times" and continued negotiations. Evans told Lee he thought Lee was "cool" and said he was going to discuss the matter with Joe, and would call back later. (R. p. 1126, lines 11-24). Minutes later, Lee heard multiple shots. (R. p. 1126, line 25 - p. 1127, line 7).

The SWAT team, which was deployed, had not attempted any action prior to the shooting as they were informed negotiations were going well and Evans would be coming out on his own. (R. p. 1098, line 16 - p. 1102, line 7; p. 1108, lines 17-23;

p.1166, line 22 - p. 1167, line 2; p. 185, lines 5-13; p. 1186, lines 16-22). Officers stationed at the entries of the home first heard a series of shots, then a plea of "no, no, no" and another series of shots. (R. p. 1146, lines 2-25; p. 1167, line 13 - p. 1168, line 17; p. 1187, line 11 - p. 1188, line 14; p. 1199 line 18 - p. 1200, line 23). After gaining entry, the officers saw Deputy Joe Sapinoso face down on the floor with his arms folded underneath his body, with gunshots to the back of the head. His father's body was on the couch. (R. p. 1153, lines 1-9; p. 1174, lines 12-16; p. 1191, lines 3-8; p. 1202, lines 24-25). When the officers rushed Evans, he immediately said, "don't hurt me." (R. p. 1151, lines 6-14). The SWAT team also rescued Mrs. Sapinoso and Christina's son who remained hidden upstairs until the officers escorted them outside the home. (R. p. 1154, lines 1-17).

Investigators at the scene recovered three guns, a 9mm, a .38, and a Glock that was the Deputy's service weapon. (R. p. 1288, lines 2-6; p. 1312, lines 20-24). Investigators also recovered a black nylon bag in the entryway that held 140 rounds of ammunition in boxes plus several loose rounds, and an 8 inch knife. (R. p. 1291, lines 2-21). (See also June PCR Tr. pp. 783-784; Respondent's Exhibit 23-A). Additionally, investigators found Evans's hat in an abandoned house close to the Sapinoso home, where Evans waited for his victim, and Evans's car parked approximately a half of a mile away. (R. p. 1271; June PCR Tr. p. 779-780; State's Exhibit 40a; Respondent's Exhibit 24, p. 1). Evans was wearing all black at the time of murders,

and had, in addition to his own two guns, several blue bandanas, which were recovered from the scene. (R. p. 1298; June PCR Tr. p. 781; Respondent's Exhibit 23-A). According to the state's theory blue is the color associated with the gang featured in Evans's multiple, tattoos. (R. pp. 1589-1590; p. 1598; October PCR Tr. p. 72).

Forensic evidence, as presented through the State's expert at trial, showed that Deputy Sapinoso was shot in the back of the head, four times, at close range (within two to three feet), while his head was actually on the Boor. (R. p. 1392, line 16-p.1.395,line 25; p. 1398, line 15- p. 1403, line 14). Moreover, the shots "very likely occurred at a time when neither the shooter nor Mr. Joe Sapinoso were moving and occurred in a very rapid sequence to each other. They are all basically in the same part of Joe Sapinoso's head at very nearly the same distance." (R. p. 1407, lines 13-18). The father suffered three gunshot wounds to the head and one to the arm. The one to the arm was considered a defensive wound: ". .. two struck the head, and its consistent that his arm would have been raised in a defensive posture." (R. p. 1407, lines 6-8). Though in the PCR hearing Evans presented an expert to disagree with the State's expert on a portion of the findings, the expert agreed, without hesitation, that three of the four shots to Deputy Sapinoso's head were inflicted at close range while his head was on the floor. (June PCR App. p. 765).

V.
DISCUSSION

To establish that counsel was ineffective, Evans must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error(s), there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington,* 466 U.S. 668, 694, 104 S.Ct. 2052 (1984); *Simpson v. Moore,* 367 S.C. 587, 595-96. 627 S.E.2d 701. 706 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Id.*

"There are countless ways to provide effective assistance in any given case," and the simple fact that trial counsel's strategy was ultimately unsuccessful does not automatically render counsel's assistance constitutionally ineffective. *Strickland,* 466 U.S. at 689. *Bell v. Evatt,* 72 F.3d 421, 429 (4th Cir. 1995). "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland,* 466 U.S. at 688; *Drayton v. Evatt,* 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993). "We must always be mindful that the standard of prejudice set out in *Strickland* requires more than a mere possibility that the allegedly deficient performance may have prejudiced the defendant in any way." *Poyner v. Murray,* 964 F.2d 1404, 1420-21 (4th Cir. 1992).

The standard of "prejudice" differs depending upon whether it is related to guilt phase issues or penalty phase issues. In order to prove "prejudice"

in the guilt phase, Evans must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Johnson v. State,* 325 S.C. 182, 480 S.E.2d 733 (1997). In *Jones v. State,* 332 S.C. 329, 504 S.E.2d 822 (1998), the Supreme Court of South Carolina instructed that prejudice may be found in a capital sentencing proceeding when "there is a reasonable probability that, absent [counse's] errors, the sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Again, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Jones,* 504 S.E.2d at 823-824. Prejudice is evaluated by consideration of the trial evidence of mitigation, along with the PCR evidence, compared to the aggravating circumstance evidence. *Wong v. Belmontes,* __U.S.__,130 S.Ct. 383 (2009).

(9)(a)(l) Ineffective Assistance of Trial Counsel: Failure to Conduct Adequate Voir Dire (Guilt Phase)
(9)(b)(l) Ineffective Assistance of Trial Counsel: Failure to Conduct Adequate Voir Dire (Sentencing Phase)

"The scope of *voir dire* and the manner in which it is conducted are generally left to the sound discretion of the trial court." *State v. Stanko,* 376 S.C. 571, 575, 658 S.E.2d 94, 96 (2008); *State v. Bennett,* 369 S.C. 219, 226, 632 S.E.2d 281, 285 (2006); *State v. Hill,* 361 S.C. 297, 308, 604 S.E.2d

696, 702 (2004); *State v. Tucker,* 334 S.C. 1, 10, 512 S.E.2d 99, 103 (1999); *State v. Hill,* 331 S.C. 94,103,501 S.E.2d 122, 127 (1998). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *Stanko,* 376 S.C. at 575, 658 S.E.2d at 96, *citing State v. McDonald,* 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

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

"[W]hat is constitutionally mandated is the selection of a fair and impartial jury" and "[n]o particular formula of questions is mandated to achieve this goal." *State v. Bennett, 369* S.C. at 227, 632 S.E.2d at 285, *quoting State v. Hill,* 361 S.C. at 310, 604 S.E.2d at 702-703. "To be constitutionally compelled ... it is not enough that a question may be helpful. Rather, the trial court's failure to ask or allow a question must render the defendant's trial fundamentally unfair." *MuMin v. Virginia,* 500 U.S. 415, 425, 111 S.Ct. 1899 (1991). *See also State v. Wise,* 359 S.C. 14, 23-24, 596 S.E.2d 475, 479 (2004); *State v. Tucker,* 334 S.C. at 10, 512 S.E.2d at *103.* Of course, "' [i]t is well established that a trial

court has broad discretion in conducting the *voir dire* of the jury and particularly in phrasing the questions to be asked.'" *State v. Bixby,* 388 S.C. 528, 542, 698 S.E.2d 572, 579 (2010), *quoting United States v. Jones,* 608 F.2d 1004, 1009 (4th Cir. 1979). "When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged jurors must be examined in light of the entire *voir dire." State v. Bennett,* 328 S.C. at 257, 493 S.E.2d at 848.

Evans originally complained that counsel was ineffective in regard to five specific jurors or potential jurors - - Eddie Harvey, Elvis Mahaabwa, Sandra Holcombe, James Freeman, and James Plumley. (Amended Application, p, 2). Evans has abandoned the allegation of error in regard to Juror Harvey, referencing Juror Harvey's qualification only briefly, and by footnote. (Evans's Post-Hearing Brief, pp. 98-109 and n. 51). [FN 6] In regard to the remaining jurors, Evans argues three distinct issues which are addressed as follows.

A. Allegation Counsel Missed Arguments to Move to Disqualify Jurors on Statutory Disqualification Grounds and or Presumed Empathy Is Not Supported by Fact or Precedent.

1. Juror Mahaabwa.

The record shows that Juror Elvis Mahaahwa was questioned by the Court, by trial counsel, and by the solicitor. The juror's answers reflected that

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

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

S.C. Code § 14-7-820 sets out the following disqualification: "No clerk or deputy clerk of the court, constable, sheriff, probate judge, county commissioner, magistrate or other county officer or

any person employed within the walls of any courthouse shall be eligible as a juryman in any civil or criminal case." *Cooper* allowed the "sheriff" statutory disqualification to apply to highway patrol officers as the officers are vested by statute with similar powers as deputies, and bound, again by statute, to work with sheriffs. 291 S.C. at 335, 353 S.E.2d at 442. Conversely, the applicability of the disqualification to prison guards, "whose duties," as found by the Supreme Court of South Carolina, "do not involve enforcing the criminal laws of this State," has been soundly rejected. *State v. Hughey,* 339 S.C. 439, 450, 529 S.E.2d 721, 727 (2000). The suggestion that counsel was ineffective for failing to argue against precedent – on the same argument, with even less of a factual basis – is unpersuasive. *See, e.g. MuMin v. Virginia,* 500 U.S. at 425 ("To be constitutionally compelled ... it is not enough that a question may be helpful. Rather, the trial court's failure to ask or allow a question must render the defendant's trial fundamentally unfair."). Further, in this particular case, Evans acknowledged that many of the decisions would be made in defense counsel's professional judgment, and he made a knowing and intelligent waiver of his right to contest the manner in which counsel chose, in his professional opinion, to conduct *voir dire* and exercise jury strikes. [FN 7] (June PCR Tr. pp. 472-473). (Respondent Exhibits 22 and 32). It is clear that Evans had no complaints of the selected jury at the time the jury was selected. (Id). *See Bell v. Evatt,* 72 F.3d 421, 429 (4th Cir. 1995)("recogniz[ing] consent as probative of the

reasonableness of the chosen strategy and of trial counsel's performance").

Finally, Evans argues what Respondent has phrased, and which this Court adopts, a "general fear of possible empathy" from a shared chosen profession. (Evans's Post-Hearing Brief, p. 99). However, since the victim was not an officer, and not a prison guard as Evans argues, the argument is not relevant. Moreover, the suggestion "[t]his principle" of the necessity of excluding similarly situated individuals "has been widely recognized as necessary to protect the rights of defendant," is curiously only supported with a 1985 Eleventh Circuit non-murder case (where the actual equivocation by the juror was as important as her work bias), a 1968 D.C. Circuit murder case footnote (where the process of expanded capital *voir dire* was still being molded), and a Virginia state court of appeals non-capital case that was vacated on *en banc* rehearing. In fact, the Virginia court in vacating the opinion - recognizing "the only relationship between the victim and Juror ... is that they share the same occupation and the risk of suffering the same type of assault upon which this action was based" - specifically held that "the application of a *per se* rule is unwarranted, and that Juror Person's employment, without more, does not require that bias should be imputed." *Williams v. Comm.*, 466 S.E.2d 754, 756 (Va.Ct.App. 1996). Evans fails to support his suggestion. Additionally, he must expand the argument found in these isolated cases for the argument to apply here. He attempts to do so by use of a "sense of camaraderie"

argument. The offered argument to expand the possible empathy beyond its comfortable borders (i.e. directly shared professions) is unpersuasive. It is too broad a rule to apply effectively.

In sum, this Court finds there is no "same profession" analysis – for what it's worth – to be made here. Moreover, defense counsel Sumner testified that he was aware of the juror's background and made a decision that the juror would be helpful and understanding of the reality of prison life as harsh and dangerous, increasing the possibility of a life sentence. In particular, Sumner testified that the juror, from a position of real world experience, could support "George Martin's testimony that was coming in about SCDC conditions and can tell the jurors Martin is right, that's exactly the way that it's going to be...." (June PCR Tr. pp. 382-384). This was especially important where defense counsel placed great emphasis on the penalty phase, and where counsel offered prison conditions and or security measures due to expressed gang affiliation evidence for the specific (and admissible) purpose of combating the State's testimony of the advantages and heightened danger within prison due to his expressed gang affiliation. (See June PCR Tr. pp. 383-384; p. 433). This is an exercise of professional judgment of the sort necessary and recognized as particularly reserved to counsel. *See Palacio v. State,* 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999)(citing with approval multiple cases wherein "other courts have held jury selection is a process that inherently falls within the expertise and experience of trial counsel").

2. Alternate Juror .James Freeman.

As to Mr. James Freeman, the record shows that he was also questioned by the Court, by the solicitor, and by trial counsel, and his answers also reflected that he could be fair and impartial, could consider either sentence based on the circumstances presented, and could return either sentence based on the circumstances. (R. p. 677, line 19 - p. 693, line 22). He was qualified without exception. (R. p. 693, lines 23-25). However, though chosen as Alternate 1, he did not participate in the jury deliberations. [FN 8] (R. p. 1503, line 6 - p. 1508, line 10; R. p. 1796, line 1 - p. 1797, line 24). Thus, whatever complaints Evans may have of the juror's qualification, his qualification could have no bearing on the fundamental fairness of the deliberations. *Ross v. Oklahoma,* 487 U.S. 81, 86, 108 S.Ct. 2273 (1988)("Any claim that the jury was not impartial... must focus ... on the jurors who ultimately sat"). Evans can show no prejudice. *ld. See also-State v. Green,* 301 S.C. 347, 353, 392 S.E.2d 157, 160 (1990)(applying *Ross* in evaluating prejudice). However, the record supports there is no disqualifying response, and no cause to object.

Evans maintains that the juror, because his son was seeking a career in law enforcement, would show empathy toward the victim, much like the "shared profession" argument attempted with Juror Mahaabwa above. Not only is the connection even more remote, and the argument for some *per se* disqualification rule baseless, Evans only makes the

argument based on a parsing of the responses. 'When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged jurors must be examined in light of the entire *voir dire.' State* v. *Bennett,* 328 S.C. at 257, 493 S.E.2d at 848. The record reflects that Juror Freeman struggled with the questions regarding any bias toward law enforcement testimony. However, upon questioning by defense counsel, the juror explained, 'just because the officer would say X is true, I don't necessarily take that as gospel." (R. p. 691). He added that "[i]f all the circumstances were equal, probably, yes" that he would give the testimony greater weight than that of others. (R. p. 691). Moreover, just a connection with law enforcement is not a proper basis to remove the juror for cause. *Cf. State* v. *Kiser,* 284 S.W.3d 227, 271 (Tenn. 2009)(rejecting argument that failure to excuse jurors who, at one point, indicated favoring law enforcement, rendered sentence arbitrary; jurors had been rehabilitated, defense counsel had expressed approval of the jurors at trial, and fact that law enforcement aggravator was only aggravator did not enhance probability of error.) At any rate, as noted, the juror did not serve and no reversible error could therefore have occurred. *Ross, supra.*

B. Allegation That Counsel Failed to Strike Jurors Mahaabwa and Holcombe When Their Answers Indicated They Would Always Impose Death Depends On Untenable Parsing of the Responses. When Read As a Whole, the Responses Do Not

Establish an Automatic Death Penalty Response

Evans asserts the referenced jurors 'equated a guilty verdict with a death sentence,' and were "incapable of properly considering mitigating evidence." (Evans's Post-Hearing Brief, p. 104). When read in context, however, as they must be, *Bennett, supra,* the responses do not rise to the level of "automatic death" responses.

1. Juror Mahaahwa.

Evans takes issue with Juror Mahaabwa's response that, "if there hasn't been a crime which needs capital punishment, then they don't have to ask for it." (R. p. 181-182). Evans argues counsel should have asked for clarification. (Evans's Post-Hearing Brief, p. 105). Counsel did seek clarification. In fact, it was defense counsel who posed the question *due to the responses on the questionnaire* regarding whether the death penalty is sought "about the right amount of time," to ensure the juror *was not* an "automatic death" juror. (See R. p. 181-182). Further, the juror specifically clarified that his response had "nothing to do with [... the ...] three suggestions. Those are two different, separate questions there." (R. p. 182). In other words, by his own explanation, there was a difference in seeking the penalty and deserving the penalty. Evans simply does not discuss this juror's explanation. Again, one must look at the entire conversation to fairly analyze the responses. *Id.*

2. Juror Sandra Holcombe.

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

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

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

When read in context and its entirety, the responses of this juror do not show any "automatic death sentence" disqualifying response. Moreover, any suspect answers prompted additional clarifying questions by defense counsel. Evans has failed to show deficient performance and prejudice.

C. *Evans's Allegation That Voir Dire was Overall Cursory and Brief, Therefore There Must Be Error, Fails for Improper Presumption of Error.*

This Court has reviewed the record and finds there were no automatically disqualifying responses. Moreover, the record supports that the *voir dire* here was extensive, spanning not only the in-court questions, but also jury questionnaires. (See, for example, R. p. 173 (Juror Mahaabwa confirming the truthfulness of his answers to the questionnaire); R. p. 181 (Juror Mahaabwa explaining, upon defense inquiry, one response reflected on questionnaire going to fairness and impartiality)). (See also June PCR Tr. p. 387, Defense Counsel Sumner referencing both in court questions and questionnaires). There is no cause to find *voir dire* insufficient simply because the record indicates the procedure was "too short" or that another procedure could have been used. *See, for example, State v. Bixby,* 388 S.C. at 543, 698 S.E.2d at 580 ("the qualification of jurors was extensive and

defense counsel did not challenge the qualification of the impaneled jurors because he had sufficient information from both their answers to the detailed questionnaires and his questioning to determine that each was qualified"); *State v. Bryant,* 372 S.C. 305, 314, 642 S.E.2d 582,587 (2007)("Because the use of paper strikes did not deprive Bryant of a fair trial by an impartial jury, we hold that the trial court did not err in refusing to allow jurors to be present during jury selection."). There is no indication of real error - i.e. the selection of a constitutionally unqualified juror, or the omission of a necessary question, as determined by United States Supreme Court precedent in the juror selection process - in the selection of Evans's jury. *See Ross, supra; State v. Stanko,* 376 S.C. at 576, 658 S.E.2d at 96 ("To constitute reversible error, a limitation on questioning must render the trial fundamentally unfair."). Thus, Evans has failed to carry his burden of proof.

As to Evans's suggestion that defense counsel could have asked more questions, he has neither alleged nor shown a specific error. "[W]hat is constitutionally mandated is the selection of a fair and impartial jury" and "[n]o particular formula of questions is mandated to achieve this goal." *Bennett,* 369 S.C. at 227, 632 S.E.2d at 285. The Supreme Court of South Carolina has recently rejected a challenge to the sufficiency of *voir dire* where the trial judge disallowed defense counsel to instruct the jury on legal definitions. In essence, defense counsel argued that the jury must be instructed on the legal definition of murder (i.e. not self-defense,

etc), to "ascertain[] each potential juror's qualification with regard to their views on capital punishment." *Bixby,* 388 S.C. at 541-42, 698 S.E.2d at 579. Of course, "such information is disseminated to jurors by way of jury instructions, not questioning on voir dire." Id, 388 S.C. at 543, 698 S.E.2d at 580. But, at any rate, there was no error in disallowing the instruction as "the qualification of jurors was extensive and defense counsel did not challenge the qualification of the impaneled jurors because he had sufficient information from both their answers to the detailed questionnaires and his questioning to determine that each was qualified." *Id.* Likewise, here, the possibility of additional questions is limited only by the imagination of subsequent counsel. Another attorney can always think of some additional question. However, the process at issue here - which was personal, extensive, and supplemented by questionnaires - provided sufficient information to draw a proper jury. There is no error.

As to specific instances of deficient performance in questioning, Evans's argument and proof is sparse. Evans argues that counsel questioning of Juror Coker was "far too brief to uncover any potential biases." (Evans's Post-Hearing Brief, p. 107). He also presents the similar "too brief' argument in regard to Jurors Kirby, Mahaffey and McMutrey. (Evans's Post-Hearing Brief, p. 108). Evans did not even question defense counsel about the *voir dire* for these jurors. (See June PCR Tr. pp. 379-392). Evans has not presented any information that could have

been discovered if other questions were asked that would impugn the clear responses supporting qualification, or counsel's strategy in regard to questioning. For instance, while defense counsel's questions to Juror Mahaffey are reflected on two (2) pages in the record, (R. pp. 535-536), questions from the court, defense counsel, and the solicitor span thirteen (13) pages (R. pp. 528-540). This is in addition to the responses to the questionnaire, which all parties had. (See R. pp, 528-529; p. 535). Moreover, as to the verbal questions, a fair reading of the record reflects that the solicitor was much more concerned about bias against the State in regard to Juror Mahaffey due to involvement in a drug program, and possible connection to a defense expert, than the record reflects an indication of bias against the defense. (See R. pp. 536-538). In other words, the State may have had more to be concerned about than the defense. Merely citing a short verbal *voir dire* simply does not show error and prejudice for anyone particular juror.

The same is true for Evans's arguments based on concise verbal *voir dire* by defense counsel of Jurors Kirby and McMurtrey. (See R. pp. 498-511 (Juror Kirby); R. pp. 188-200 (Juror McMurtrey)). When viewed as a whole, the record reflects adequate information upon which to intelligently qualify and select the jury. And that is *just* the written record and the questionnaires. As defense counsel Sumner noted, many times defense counsel has non-verbal clues to a juror's attitude, bias, or belief. (June PCR Tr. pp. 386-387). Hearing and seeing the responses first hand cannot be

undervalued in assessing credibility issues and determining whether a juror should be struck. *Cf. Matthews v. Evatt,* 105 F.3d 907, 918 (4th Cir. 1997)("counsel must be entitled to make credibility determinations in exercising peremptory challenges"); *State v. Wilder,* 306 S.C. 535, 538, 413 S.E.2d 323, 325 (1991)(strikes may be exercised on the basis of the potential jurors' "demeanor and disposition").

As to Evans's argument that defense counsel had no verbal questions, at all, for Juror Sullivan, (Evans's Post-Hearing Brief, p. 108), Evans is correct that defense counsel had no questions, (R. p. 736). However, that was only *after* receiving a questionnaire, with responses, and *after* thorough questioning by the Court, reflected in some nine (9) pages of the record. It simply cannot be said that this juror was qualified absent any questions. Evans has failcd to argue that the questionnaire responses and the court's questions were inadequate in some way, and none is readily apparent in the record. There is no need to parrot empty questions simply to avoid a later issue in PCR. Again, Evans has failed to offcr a substantive issue for review, much less shown error.

Finally, as to Mr. James Plumley, the record shows that he was questioned by the Court, by trial counsel, and by the solicitor, and his answers reflected that he could be fair and impartial, and could consider either sentence based on the circumstances presented, and return either sentence based on the circumstances. (R. p. 482, line

25 - p. 496, line 24). (See, for example, R. p. 494, lines 3-4, in response to whether the death penalty is imposed too often or often enough or about right, the juror responded, "I think each case has to have its own merit..."). He was qualified without exception. (R. p. 497, lines 6-14). Evans argues that his responses at one point, indicated he might vote with the majority:

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

(R. p. 496).

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

> Appellant urges us to reconcile a perceived conflict between *Hill* and our opinion in Appellant's first appeal before this Court. As we stated in *Hill, Bennett* did not determine the appropriateness of the "go with the majority question." *Hill,* 361 S.C. at 309, 604 S.E.2d at 702. In fact, the only issue in *Bennett* was whether the questioned juror was "unbiased, impartial, and able to carry out the law as executed." *Id.* Although Appellant properly points out that the court

> might never have discovered the juror in his first trial without the "go with the majority" question, it is equally true that no amount of questioning can provide a clear picture of a juror's biases or tendencies. *Wainwright v. Witt,* 469 U.S. 412, 42425, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). "[T]hese veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings." *Id.* This position is strengthened by our previous recognition of the trial judge's duty to focus *voir dire* upon matters enumerated in the death penalty statutes and to eliminate excessive intrusions into the privacy of prospective jurors. *State v. Plath,* 281 S.C. 1, 7, 313 S.E.2d 619, 622 (1984) (*citing State v. Koon,* 278 S.C. 528, 532, 298 S.E.2d 769, 771 (1982)).

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

The record reflects the juror was properly and fully questioned, and further, supports the Juror qualification. Again, this Court concludes Evans has failed to establish deficient performance and prejudice.

D. Allegation Trial Judge Interfered with Challenge for Cause by Disqualifying

Jurors Before Hearing Objections is An Allegation of Trial Court Error Not Cognizable in this Action.

As to Evans's suggestion "the trial judge failed to respect Evans's right to challenge jurors for cause by repeatedly disqualifying jurors before hearing objections from either side," (Evans's Post-Hearing Brief, p. 107 n. 50), this an alleged trial court error, not alleged in the issue presented, and not cognizable in this action absent a claim of ineffective assistance.[FN 9]
Simmons, supra.

E. Allegation Counsel Erred in Not Injecting a Race Question on Voir Dire is Rejected as Counsel Testified that Race Was Not an Element or Issue in the Case.

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

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

9(a)(2) Ineffective Assistance of Counsel: Failure to Investigate Circumstances In Which Shots Were Fired And Challenge State's Witnesses Regarding the Cause and Manner of Death of the Two Victims (Guilt Phase)

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

Trial counsel was not ineffective in failing to object to, challenge or otherwise counter the forensic evidence regarding the manner in which the shootings occurred.

As noted above, forensic evidence, as presented by the State's expert, showed that Deputy Joe Sapinoso was shot in the back of the head, four times, at close range (within two to three feet), while the deputy's head was actually on the floor. (R. p. 1392, line 16-p.1395, line 25; p. 1398, line 15 - p. 1403, line 14). Moreover, the shots "very likely occurred at a time when neither the shooter nor Mr. Joe Sapinoso were moving and occurred in a very rapid sequence to each other. They are all basically in the same part of Joe Sapinoso's head at very nearly the same distance." (R. p. 1407, lines 13-18). The father suffered three gunshot wounds to the head and one to the arm. The one to the arm was considered a defensive wound: " ... two struck the head, and its consistent that his arm would have been raised in a defensive posture." (R. p. 1407, lines 6-8). Evans was cross-examined at trial about having shot Deputy Sapinoso in the back of the head four times. (R. p. 1443, line 13 - p. 1444, line 12). Evans never denied, or attempted to correct, the solicitor's reference to the facts as Evans having

shot "a uniformed deputy sheriff in the back of the head tour times while he is kneeling on the floor." (R. p. 1443, lines13-20).[FN 10] Even so, during the PCR hearing, Evans presented an expert to indicate that there may have been a basis to contest the shots to the deputy's head.

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

October PCR Tr. p. 263-268). Moreover, the demonstrative aids were approved by the medical examiner. (See October PCR Tr. p. 268).

At best, the offered evidence shows that only three of the four bullets were delivered as described, and the fourth, may have been or may not have been - it is a contest between experts as to one of the four shots to Deputy Sapinoso's head. Evans has failed to show Dr. Ward's opinion is medically or forensically incorrect, and even failed to call Dr. Ward to question whether his opinion would change in light of a challenge. Moreover, such divided testimony would not even obtain a manslaughter charge as the shots were clearly inflicted when a victim tried to free himself, *see State v. Shuler, supra;* would not explain any circumstance or fact as to why he had to shoot the deputy while the deputy's head was on the floor, (see Respondent's Exhibit 25, p. 3); and would likely alienate the jury by attempting to blame a faultless victim, *see generally Howell v. State,* 877 So.2d 697, 704 (Fla. 2004)("the tremendous potential for alienating the jury by blaming the trooper for his own death, fully justifies trial counsel's strategic decision to forego presentation of the alleged policy violation during the guilt phase"). Further, such possible "alternatives" would not change the remaining facts supporting a planned act of violence; would not change the testimony of officers that no sound was noted before the series of shots began, and would not change the location of the body, found on the floor, with his arms tucked under his body. As defense counsel Sumner testified, these are facts that would not be affected

at all by this "light-weight" challenge to one of the four deadly shots, and all the other information that supported a well thought out crime. (June PCR Tr. pp. 446-448; pp. 518-520). Even Dr. Arden admitted Evans's explanation could not be entirely truthful. (See, for example, June PCR Tr. p. 785, "He certainly brought with him a number of items that don't relate to talking."). As such, highlighting this unwinnable argument would only focus the jury more on the shooting itself, the violence itself. As counsel testified, they, with Evans's consent, made a conscious decision to move through the guilt phase as quickly as possible to avoid emphasis of these facts. (See, for example, June PCR Tr. p. 327; pp. 495-496).

Evans has failed to show deficient performance. Alternatively, if there was deficient performance, Evans has failed to show prejudice in light of the remaining evidence, particularly the unchallenged three shots to the back of the deputy's head, while the deputy's head was on the floor.

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

Trial counsel was not ineffective in failing to more aggressively pursue a change of venue. Trial counsel requested specific *voir dire* on this issue, and filed a pre-trial motion for change of venue based upon media coverage. After being allowed *voir dire* on the issue, and based on the responses received, trial counsel simply requested a ruling on the pre-filed motion without further argument. (See

R. p. 1008, line 3 - p. 1009, line 25). As counsel conceded in the motion hearing, and as the record shows, the jurors were questioned on pre-trial media coverage. This included not just in court *voir dire,* but also questionnaires sent out prior to qualification. (See for example, R. p. 179, line 24 - p. 180, line 21). [FN 11] Each and every juror seated was questioned about pre-trial publicity and whether, if they should know anything about the facts of the case, that would influence their decision. No seated juror expressed any such knowledge or bias. All thirteen of the jurors who eventually served answered that they were not familiar with any specific facts from pre-trial publicity, and there was no evidence of a preconceived opinion on same. (See R. p. 175, line 19 - p. 176, line 19 (Elvis Mahaabwa); p. 189, lines 21-24 (Daniel McMurtrey); p. 218, lines 9-15 (Kevin Colling); p. 230, line 15 - p. 231, line 3 (Dwayne Drake); p. 248, lines 1-3 and p. 257, line 23 - p. 258, line 5 (Sandra Holcombe); p. 289, lines 10-24 (Larry Coker); p. 469, line 20 - p. 470, line 8 (Mark Branyon); p. 484, lines 11-18 (James Plumley); p. 500, lines 7-12 (Margaret Kirby); p. 530, lines 4-10 (Toni Mahaffey); p. 564, lines 16-25, p. 570, lines 13-21, and p. 574, lines 14-25 (Bryan Megonigal); p. 578, lines 17-24 (Jacklynn Higgins); p. 727, line 23 - p. 728, line 5 (Marlon Sulliva)). While Dwayne Drake, Larry Coker and Mark Branyon all seemed to vaguely recall the fact of media coverage of the incident, each testified that they did not recall any specific details at all. (R. p. 230, line 15 - p. 231, line 3 (Drake); p. 289, lines 10-24 (Coker); p. 469, line 20 - p. 470, line 8 (Branyon)).

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

Here, the denial of the motion was fully and fairly supported by the jurors responses, which the trial judge relied upon in denying the motion, finding no evidence of such "fixed opinions." (R. p. 1010, line 20 - p. 1012, line 1). In sum, the record shows careful questioning by trial counsel and the trial judge to determine any bias due to media coverage, and expressly provides a record of trial counsel's efforts to request such specific questioning to ensure a fair trial. (See R. p. 1008, line 21 0 p. 1009, line 25). In the absence of any bias, or for that matter, any knowledge of the particular facts of the crime at all due to media coverage, no motion for

change of venue could be meritorious. *See State v. Evins,* 373 S.C. 404, 412, 645 S.E.2d 904, 908 (2007)("When a trial judge bases the denial of a motion for a change of venue because of pretrial publicity upon an adequate *voir dire* examination of the jurors, his decision will not be disturbed absent extraordinary circumstances").

Evans contends, however, that the process was incomplete as the trial was held in the victim's workplace and the jurors were not questioned or the trial moved. (Evans's Post-Hearing Brief, p. 115). That assertion, however, is not accurate as Deputy Sapinoso had moved on to be an investigator. (R. p. 1531). At any rate, he had worked in the courthouse and very many people knew him. In fact, Evans's list of individuals who knew him, and did not participate in the trial, (Post-Hearing Brief, p. 115), shows the opposite of prejudice - the system worked very well to identify and avoid conflict or bias. Even so, Evans relies on a 2009 Eastern District of New York case, *United States v. Wright,* 603 F.Supp.2d 506 (E.D.N.Y. 2009), to argue a change of venue was warranted. (Evans's Post-Hearing Brief, p. 116). The case involved an assault on a federal officer, an Assistant United States Attorney. A change of venue was not necessary by law, but was granted. However, that case does not translate well to the instant situation for several reasons.

First, the employee at issue in *Wright* was an active employee whose "name was posted like any other on our courthouse directory." 603 F.Supp. 2d at 508. Second, the assault took place in the

courthouse. Id. Third, there was no substitution of local counsel or local judges (as there was here) to ensure bias (or even the appearance of impropriety) was not an issue in the general proceedings. Fourth, the court did not find *per se* error. In fact, the change of venue was granted with the consent of the government.

Here, the court system worked well to find non-biased participants - judges and counsel. Further, there is a remoteness here that was not present in the New York case. The deputy was regrettably not able to be present, was not a witness, the crime did not occur in the courthouse, and the deputy had even transferred to another location at the time he was murdered. Even if the logic was applicable, the case is still distinguishable factually. Moreover, to request *voir dire* on the subject would likely highlight to jurors a connection that was not otherwise developed until the penalty phase, where individualization of the victim is wholly proper.

At any rate, Evans has failed to show bias. The additional assertion of error premised on some type of presumed bias or unfairness in the venue is not based on binding and relevant precedent or any indication that any juror was unfairly influenced. Evans's argument remains speculative. He has failed to show deficient performance and prejudice.

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

Trial counsel was not ineffective in their treatment of the 16-3-20(C)(a)(7) statutory aggravating factor, as to whether Mr. Joe Sapinoso was killed "during or because of the performance of his officials duties" was a factual issue properly presented to the jury.

Evans alleges that defense counsel was ineffective for failing to object to the submission of the law enforcement aggravator. He argues that the evidence submitted in support of the aggravator was insufficient as a matter of law. (Evans's Post-Hearing Brief, pp. 76-78). Consequently, he argues, counsel should have acted to prevent its submission to the jury. (Id.). The record reflects the evidence was sufficient to allow submission of the statutory aggravating circumstance to the jury. At any rate, even if Evans could show error, he could show no prejudice, as the jury found three (3) other statutory aggravating circumstances that support the sentence of death. Evans is not entitled to any relief.

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

Because of the Performance of His Official Duties."

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

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

1. *There was Evidence, both by Policy and Benefits, that Supported the Deputy Was Still On Duty At the Time of the Abduction. Thus, Aggravating Circumstance Was Properly Before the Jury.*

Evans begins his argument by noting other cases where the aggravator was charged while the officer victim was *actively* engaged in a focused law enforcement action. (Evans's Post-Hearing Brief, p. 73 n.35). Evans's argument must necessary rely on the conclusion that being on-duty without actively engaging in a focused law enforcement action - such as arresting, stopping, questioning or in some way confronting an individual does not support applicability of the aggravator. Evans's proposed new interpretation requires giving the statute a meaning not supported by its plain language. Evans's theory renders the "or" meaningless - a direct contravention of the express language of the statute. This Court finds persuasive the reasoning of the Supreme Court of North Carolina in a similar challenge to applicability of their law enforcement statutory aggravating circumstance [FN 12] in *State v. Gaines,* 421 S.E.2d 569 (N.C. 1992).

In *Gaines,* the police officer victim was working a second job as a security officer at a local motel. His second job was authorized by his police department's policy and he was allowed to wear his police department uniform. Further, he was required by department policy to "conform to the same standard of conduct as applies to their on-duty activities," i.e. "enforce the law" regardless of private employers' rules. 421 S.E.2d at 571. The officer victim had confronted three defendants in the motel. The three eventually left, but returned. Upon their return, Gaines shot the officer victim in the motel lobby. *Id* at 572. The state served notice

that it was relying on one aggravating circumstance in seeking the death penalty - the law enforcement aggravator. Gaines sought a pre-trial determination of whether the aggravator could apply given the officer victim was at his secondary employment at a private business. The superior court ordered the aggravator was not applicable. The Supreme Court of North Carolina reversed, rejecting Gaines' argument as a "strained interpretation" :

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

Id at 574.

Moreover, because the officer victim was obligated to enforce the law in his secondary job position in the same manner, and with the same authority, as he had while on a time-shift with the

police department, the "off duty" designation did not defeat the applicability of the aggravator:

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

Id at 576.

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

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

Like *Gaines,* the evidence of the death benefits here was relevant and supportive of the applicability of the statutory aggravating circumstance. Moreover, the case here is even stronger as to the on-duty evaluation because there is no allegation of secondary, private employment. Evans only mentions *Gaines* in passing and concedes the logic that applicability of the statutory aggravating circumstance generally depends upon a determination "on whether the officer was performing general or common law policing duties," (Evans's Post-Hearing Brief, p. 82). However, his entire argument in this regard balances precipitously on the definition of "performing" some duty - his definition, again, must unfairly constrain the circumstance only to an act of some sort, which is irreconcilable with our statute and the *Gaines* holding. *See also White v. Commonwealth,* 178 S.W.3d 470, 481 (Ky. 2006)("The statute is intended to allow a jury to find an aggravating factor when a law enforcement officer is murdered while engaged generally in carrying out his or her duties or, said another way, while performing law enforcement function. *This condition is not limited to the performance of specific tasks and duties; it also includes being imminently available to carry out those tasks.* ")(emphasis added).

The issue of whether the deputy was "on duty" at the time of ambush and kidnapping was properly submitted to the jury after receipt of the two lines of evidence properly admitted. *State v. Locklair,* 341 S.C. 352, 366, 535 S.E.2d 420, 427 (2000), *quoting State v. Smith,* 298 S.C. 482, 485, 381 S.E.2d 724, 726 (1989)("ln determining whether to submit an aggravating circumstances to the jury, the trial court is concerned with the existence of the evidence, not its weight. The trial judge should submit the aggravator the jury if supported by any evidence direct or circumstantial."). Whether the evidence offered by the State supported the aggravator was a matter for the jury. *Locklair.*

2. Evans's Argument that Application in this Case Results in an Unfair Expansion of the Statutory Aggravating Circumstance is Irreconcilable with the Evidence and Facts Where He Depends on the Abduction Relieving the Deputy of his On-Duty Status.

Evans asserted within his argument on this Issue that the sheriff "testified that Joe Sapinsoso was 'on duty,' despite his being home well after the conclusion of his regular workday, pursuant to a ... policy that whenever a deputy operates a sheriff's office vehicle that deputy is considered to be on-duty and available to response to calls." (Evans's Post-Hearing Brief, p. 76). Evans forgets that kidnapping is a continuing crime. *See State v.*

Tucker, 334 S.C. 1, 13-14, 512 S.E.2d 99, 105 (1999)("Kidnapping is a continuing offense. The offense commences when one is wrongfully deprived of freedom and continues until freedom is restored."). There was evidence that Evans had ambushed the deputy, taken him from his duty car, and held him hostage. The jury not only convicted Evans of kidnapping in the guilty phase, (R. p. 1502), but also found kidnapping as an aggravating circumstance of the murder, (R. p. 1795). There is no allegation that the kidnapping charge was somehow not supported by the evidence.

Further, the policy at issue specifically defined when the officer was "on-duty."[FN 13] Sheriff Loftis testified that Deputy Sapinoso was on-duty according to the Sheriff's Department policy:

> A Yes, sir, according to policy he was on duty that night.
>
> Q If you would, explain that to the jury.
>
> A *Any time that one of our deputies is operating a sheriff's office vehicle he or she is considered to be on duty and is expected to be available to respond to calls for service.*
>
> Q And was he so acting that evening *before he reached the inside of this residence?*
>
> A Yes, sir, he was.

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

A Yes, sir.

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

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

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

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

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

A Yes, sir, he was.

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

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

Q And did he qualify for those benefits?

A Yes, sir.

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

Additionally, other evidence showed that Deputy Sapinoso was abducted at his work vehicle *before* entering his home. (See, for example, R. p. 1428, lines 7-10; p. 1436, lines 15-25; p. 1309, line 4 - p. 1310, line 15, State Exhibit Triple A, Triple B, and Triple C (photograph of Detective Sapinoso's jeep with his bag on the ground by jeep's door). Moreover, Evans admitted this fact in his testimony, (R. p. 1428), in his statement to law enforcement that was also admitted at trial, (R. p. 1229), and also to defense counsel. (June PCR Tr. pp. 239-242; p. 254). Contrary to Evans's argument, (Evans's Post-Hearing Brief, p. 85), the deputy was not merely in possession of the car, he was abducted from the car.

Lastly, Evans attempts to rely on two media reports, never admitted in the record, for the truth of the matter asserted, i.e. that the Deputy was off-duty and at home. (Evans's Post Hearing Brief, p. 79, n.41; p. 85 (citing note)). This Court has not accepted the hearsay offered in support of this ground. It is inadmissible. This Court notes that defense counsel was not questioned on the existence of the report(s) at the PCR hearing, nor was testimony of any law enforcement personnel who made the statement (or made a statement taken out of context) presented, and the hearsay remains completely useless in attacking the evidence admitted at trial. Further, as Respondent argued in the post-hearing briefing, opening the door to media reports would likely not be a reasonable act on counsel's part, considering the media reports

reported the "ambush" of the Deputy; that the Deputy was "held at gunpoint for more than four hours," i.e. "'Greenville County Sheriffs deputy Joe Sapinoso has his gun taken away and is held hostage, along with his father, by a man who had been waiting outside his father's home," (See, for example, Motion for Change of Venue, Defendant's Motion No. 26, Attachments).

In sum, Evans has not addressed the facts that are soundly against him, or offered, by competent evidence, other facts that challenge the facts of record. The facts of record, fully and fairly supported by the evidence at trial, support the applicability of the aggravating circumstance for all the reasons cited above. Evans has failed to show deficient performance. Even so, if Evans could show deficient performance in regard to this ground, he is unable to show *Strickland* prejudice as there are three (3) other aggravating circumstances supporting the death sentence.

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

The jury found (4) independent aggravating circumstances as to Deputy Sapinoso's murder: 1) the murder was committed while in the commission of the crime or act of burglary in the first degree; 2) the murder was committed while in the commission of the crime or act of kidnapping; 3) two or more

persons were murdered by the defendant pursuant to one act or one scheme or course of conduct; and, 4) the murder was of a law enforcement officer during or because of the performance of his official duties. (R. p. 1794, line 24 - p. 1795, line 11). "In a nonweighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty." *Stringer v. Black,* 503 U.S. 222, 232, 112 S.Ct. 1130. (1992). South Carolina is, of course, a nonweighing state. *See, e.g., State v. Simmons,* 360 S.C. 33, 44-45, 599 S.E.2d 448, 453 (2004). Even if Evans could somehow show counsel was ineffective in failing to move to quash, and even if the aggravator is later found to be inapplicable, the jury here found three (3) other aggravating circumstances. (R. p. 1795). Given the presence of three additional circumstances, the failure of one would not have changed the outcome.

Moreover, in this particular case, should the aggravator be set aside, it is equally clear that no intlammatory or "unfairly" prejudicial evidence was admitted in support of this aggravator that even could have improperly swayed the jury. *See id.* Evans concedes two lines of evidence were submitted in support of the aggravator: 1) the Greenville County Sheriff's policy on "one-duty" designation; and 2) the sheriff's testimony on federal monetary death benefits to the family. (Evans's Post-Hearing Brief, p. 75). The jury would have known Deputy Sapinoso was a law enforcement officer anyway - he was killed wearing his deputy's

uniform, (R. p. 1316), after having his county issued gun taken from him, and having left his duty bag by the driver's side of the car when he was abducted from the car. The receipt of monetary death benefits to the deceased family is fairly common for officers, as Evans also concedes in his brief. (Evans's Post-Hearing Brief, p. 77). There is no particular inflammatory nature or expected emotional response simply upon hearing that his family received monetary death benefits. Evans presented nothing in PCR to show the evidence was incorrect.

In sum, there was competent evidence in the record to support the submission of the statutory aggravating circumstance. Further, the jury found three other circumstances that remain nchallenged. Evans has failed to show deficient performance and prejudice.

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

It is undisputed that Evans bears tattoos that make reference to the "Crips," and that he expressed to defense experts who evaluated or met with him prior to trial that he was a member of a gang. (See R. p. 1633, lines 13-22 (Mr. Martin); p. 1703, line 19 - p. 1704, line 13 (Dr. Evans); p. 1727, line 6 - p. 1728 , line 14 (Dr. Berg); p. 1633, lines 13-22 (Mr. Martin). (See also, for example, State's Triple K, Quadruple J, Triple X, Triple W, Triple Y, Quadruple L) (photographs of tattoos). Defense counsel repeatedly testified at the PCR hearing that Evans admitted his gang membership. (See, e.g.

June PCR Trans., p. 216; p. 261; p. 401). In his initial meeting with defense counsel Sumner, Evans informed counsel:

> No bad trouble, no jail but brushes with the law. Defendant decided himself to move down with his dad. In gang in Cleveland the Crips, Crips neighborhood'[sicl cousins and uncles in the Crips... from II, 12 years old through 17 years old at Greer High School, summers in Cleveland, spring break, Christmas, ran with the Crips. Defendant was a leader, "he worked his way up the ranks." Sold crack, coke and weed, never got caught. No "Crip" involvement in Greer. Sold crack, coke and week in Greer, never caught. Got caught in Greenville, quarter of a pound, Dick Warder got him probation.

(June PCR Tr. p. 401; Respondent's Exhibit 1). Evans was caught in the Greenville County Detention Center with a necklace that indicated Crip membership. (R. p. 1621). And he was known to socialize with other "known" [FN 14] gang members, specifically Christina Rodriguez. (October PCR Tr. p. 72;109). Further, Evans specifically forbade counsel to meaningfully challenge his gang membership even in the face of advice that it could and would be used against him in the penalty phase. (See, e.g. June PCR Trans., pp. 216-218; p. 250; p. 260; p. 401). The defense team corrections expert, Mr. Martin, advised counsel that the "tattoos would

make it more difficult for him to denounce gang membership," (June PCR Tr. p. 30 I), and that he would "have to be treated like the real thing tor a long time," if he was a wannabe, (June PCR Tr. p. 301). In fact, he would later use that in his testimony to show that life without parole would not be an easy sentence for Evans specifically because of his gang-related affect or membership, and contest that he would get any "benefit" from gang membership. (June PCR Tr. p. 301; R. p. 1635 - p. 1636). Mr. Martin agreed with Mr. O'Cain that SCDC identifies "security threat group" members by two basic factors - self-admission and tattoos. (R. p. 1633). Evans would be identified as same because of his continued self-admission and tattoos. (R. p. 1633). In fact, immediately after trial, at reception in SCDC, Evans admitted membership (Octobcr PCR Tr. p. 272). Moreover, even though he is on death row, away from general population and the concerns of gang membership in general population, Evans has never renounced membership. (October PCR Tr. p. 272; p. 274).

Evans presented testimony [FN 15] from his family and friends at the PCR hearing to the effect that he was not really in a gang. (See, e.g., October PCR Tr. p. 52 (Ms. Martin testifies "no gang activity," but see p. 72 admits he was on "gang sites" with Christina)). There is no known master list of Crips to check membership rolls. (June PCR Tr. pp. 260-261). The multiple tattoos arc permanent, large and visible. (June PCR Tr. p. 252).

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

There is no basis for a meritorious objection to this evidence admitted in the penalty phase where circumstances of the crime and the characteristics of the defendant are relevant and

necessary to make a personal determination of the appropriate sentence. *See generally State v. Locklair,* 341 S.C. at 370, 535 S.E.2d at 429 (2000)("The purpose of the sentencing phase in a capital trial is to direct the jury's attention to the specific circumstances of the crime and the characteristics of the offender.").

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

Trial counsel was not ineffective in failing to object to the testimony of State's witness Mr. O'Cain during the sentencing phase.

A. Qualification of Mr. O'Cain as an Expert and Admissibility of Gang Membership Related Testimony in the Penalty Phase.

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

Evans essentially argues that defense counsel was ineffective for failing to object to the

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

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

> training, experience, and personal knowledge).

203 F.3d at 1169. Moreover, at the time of Mr. Evans' trial, the standard for admissibility of non-scientific expert testimony was arguably much lower than that required since *State v. White,* 382 S.c. 265, 676 S.E.2d 684 (2009). Nevertheless, this court finds that any objection to Mr. O'Cain's qualification would have been futile as the record supports a determination that pursuant to *White* he was qualified, his opinions reliable, and his testimony assisted the jury.

Here, Mr. O'Cain gave a lengthy recitation of detailed gang study, including sharing of information with different agencies, and personal observations. (R. pp. 1587-1588). He indicated that "Blues" cover Crips, Gangster Disciples, and Black Gangster Disciples. (R. p. 1589). He opined, based on his experience, that he would assess Evans as a possible "hard core gang member" who "could take over a leadership role inside the Department of Corrections real quick" though he would have to have 24 hour monitoring for gang activity before he could segregate him. (R. p. 1590; p. 1596). He further opined that Evans's violence toward a law enforcement officer would make him particularly attractive as a possible leader. (R. p. 1597).

Because the representation of gang membership related to Evans's character - - his appearance and professed belief and aspiration if not achievement - - the testimony was relevant.

And, the evidence was relevant in the penalty phase for at least two reasons: 1) the evidence supports the inference that the victim was chosen, in part, for enhancement of gang standing; and 2) the evidence supports that Evans's gang standing, particularly an enhanced gang standing as a result of his murder of a police officer, is probative of his future dangerousness.

The fact of membership in the group is an element of future dangerousness well recognized with the Department of Corrections, specifically because members of organized gangs have created hostage situations and presented a recognized security threat. (R. pp. 1583-1585). This is relevant, and admissible, evidence in the penalty phase. *See Dawson v. Delaware,* 503 U.S. 159, 166, 112 S.Ct. 1093 (1992)(general "abstract" belief of associations not admissible but "associational evidence might serve a legitimate purpose in showing that a defendant represents a future danger to society. A defendant's membership in an organization that endorses the killing of any identifiable group, for example, might be relevant to a jury's inquiry into whether the defendant will be dangerous in the future. Other evidence concerning a defendant's associations might be relevant in proving other aggravating circumstances."); *See also Fuller v. Johnson,* 114 F.3d 491 (5th Cir. 1997)("A reasonable juror could conclude that membership in such a gang is relevant to future dangerousness"). However, the evidence at issue here is more narrow still. The evidence went to identification of gang membership for correctional purposes and what

Evans's tattoos and admissions would mean as far as correctional dangers. Again, Mr. O'Cain was duly qualified as an expert in SCDC security threat group gang identification, a fact confirmed by defense expert Mr. Martin. Thus, the "conditions" at issue apply directly to defendant and are not simply descriptions of "general" conditions.

Further, counsel did not turn a blind eye to the testimony. Even though their client instructed them not to contest his membership, they routinely offered opinions that he was a "wannabe" and presented their own witness to counter the dangerousness with the security and restraints he would have as a result of his membership or wannabe status. (See, for example, R. p. 1633 ("at least liking to *think* he's an active gang member")(emphasis added); p. 1766 (questioning gang membership where Evans moved to South Carolina at a young age).

However, Evans has failed to identify any basis for an objection. He has failed to show deficient performance and prejudice.

B. Failure to Object to Prison Conditions References In Mr. O'Cain's Testimony

Respondent has argued that the general prison conditions issue presented in the post-hearing brief was not raised in the application or proposed amendment regarding the mercy charge issue. (Respondent's Post-Hearing Brief, p. 110). Evans argued, as presented in "Issue VIII" of his

Post-Hearing Brief, that defense counsel was ineffective in not objecting to "general prison condition evidence" and in "inviting their own witness to testify on the issue." (Evans's Post-Hearing Brief, p. 145). Respondent argued that it had no notice whatsoever that Evans intended to pursue this issue, and both parts of the evidentiary hearing were conducted without any notification Evans would be pursuing the issue. (Respondent's Post-Hearing Brief, p. 110). Evans responded in reply that the issue was fairly raised by his allegations, "(1) that trial counsel was ineffective for failing to object to the testimony of Lewis O'Cain, and (2) that trial counsel was ineffective for failing to object to the Solicitors use of that improper testimony during closing argument," and relied upon, specifically, his allegations 10(b)(4)(d) ("Counsel failed to object to the testimony of the State witness Lewis Edward O'Cain, which was unreliable, unscientific, exceeded the scope of the witness's expertise, and irrelevant, *see* 9(g) and 10(g), *infra,* for reasons including... (d) the witness was wrongfully allowed to testify as to the appropriate sentence, that being "death"); 10(d)(4)("Evans's death sentence was obtained in part as a result of the State's inflammatory, irrelevant and improper statements in closing argument. ... Such statements included, but are not limited to, arguments designed to arouse the passion and prejudice of jurors, assertions substituting his personal opinions as law, statements diminishing the jury's sense of responsibility for their verdict, misrepresenting the

proper scope of mitigating evidence, arguments that were not reasonable inferences from the record, and misrepresentations of the nature of alternative punishments."); and 10(g)("O'Cain provided testimony that was inadmissible for reasons including, but not limited to, that the testimony was unreliable, exceeded the scope of the witness's expertise, and irrelevant"). (Evans's Post-Hearing Reply Brief, p. 14). This Court finds that a "general" prison conditions allegation was not raised, and no notice given on such a claim. Further this Court finds that the argument in the Post-Hearing Brief going to ineffective assistance in the presentation of the defense witness was not raised, and no notice was given on such a claim. However, Evans alleged error in regard to Mr. O'Cain's testimony, which fairly encompassed his testimony referencing some conditions. Thus, this narrow portion of the argument is properly before the Court, and was fully developed at the evidentiary hearing with notice to opposing counsel. However, this Court finds no deficiency. As the remaining argument on presentation of a defense witness who referenced prison conditions, this Court, finds that the issue is without merit.

Counsel was not ineffective in their handling of evidence concerning general prison conditions in Mr. O'Cain's testimony.

First, Evans is seeking review, and relief, under S.C. Code § 16-3-20, which is the statute for direct appeal review of the imposition of the death sentence. This direct appeal review would not be

appropriate in this post-conviction relief action. Moreover, the South Carolina Supreme Court has already reviewed the case on direct appeal under that provision and found the absence of an arbitrary factor. *State v. Evans,* 371 S.C. 27, 32, 637 S.E.2d 313, 316 (2006)("Appellant's death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the evidence supports the jury's findings of aggravation. *See* S.C.Code Ann. § 16-3-25(C)."). Evans is not entitled to relief on this direct appeal issue. *Simmons, supra.*

Second, the conditions referenced were referenced narrowly, and only to the extent to describe Evans's treatment and dangerousness due to his gang affiliation. As a factual matter, no simply "general" prison conditions were offered, by either side, merely to argue harshness in sentencing.

Third, in regard to presentation of his own witness, even if relying on the theory that he may be entitled to relief on direct appeal (had the issue been presented), here, he must show both deficient performance and prejudice. *See generally Franklin v. Catoe,* 346 S.C. 563, 571, 552 S.E.2d 718, 722 - 723 (2001)(acknowledging violation of statutory right to address jury in guilty phase would be reversible error if properly preserved and presented on direct appeal, but convicted defendant required to show *Strickland* prejudice in order to obtain relief on an ineffective assistance of counsel claim). This he cannot do. The major fault with his argument is the testimony at issue was presented to counter the

concept that Evans would benefit from his purported gang affiliation in prison. (See, for example, June PCR Tr. p. 301; pp. 377-378; pp. 412; pp. 429-433; pp. 507-508). As part of that explanation, Evans was also allowed to present evidence the conditions would be harsh - the difference here being the evidence was tied specifically to danger in SCDC because of his purported gang affiliation. *Burkhart* acknowledges that some conditions evidence, where necessary to show "personal behavior," may be admissible, and it is not clear that the evidence would not be admissible for this stated reason: "We are aware of the tension between evidence regarding the defendant's adaptability to prison life, which is clearly admissible, and this restriction on the admission of evidence regarding prison life *in general.* ... evidence of the defendant's characteristics may include prison conditions if narrowly tailored to demonstrate the defendant's personal behavior in those conditions." *State v. Burkhart,* 371 S.C. 482, 488, 640 S.E.2d 450,453 (2007). The evidence at issue falls under this exception.

A final reason that counsel should not be considered ineffective is that, at the time of the trial, in 2004, general prison conditions evidence was being offered and admitted in capital trial penalty phases. *See Burkhart,* 371 S.C at 488, 640 S.E.2d at 453 (2007)(noting that case was tried before *Bowman's* specific prohibition); *State v. Bowman,* 366 S.C 485, 498, 623 S.E.2d 378,385 (2005)("We take this opportunity, however, to caution the State

and the defense that the evidence presented in a penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character."). *See also State v. Bryant,* 372 S.C 305,317, 642 S.E.2d 582, 589 (2007)(defense counsel presented social worker who testified "on the dismal conditions of prison life in general" and complained on appeal that witness should have been allowed to opine that a death sentence was more merciful than a life sentence); *State v. Hill,* 361 S.C. 297, 307, 604 S.E.2d 696, 701 (2004)("Pinkney, a shift supervisor at Lee Correctional Institute, described prison conditions for inmates according to their classification"). Prior to this line of cases, the guidance from the Court was that "general conditions" were not relevant. If a defendant did admit such evidence, the State was entitled to respond. *State v. Plath,* 281 S.C. 1, 15-16,313 S.E.2d 619, 627-628 (1984)(emphasis added). However, again, these cases speak in terms of "general conditions" offered simply to show the horrors of prison life. Here, the defense evidence was to combat treatment of Evans's gang membership - real or imagined, because due to his representation of gang membership, he would be treated as a gang member, both by other gang members and SCDC. Even on cross-examination, Mr. Martin, the defense corrections expert, tied the conditions directly back to gang membership:

> ... once he completed the initial reception process, if he's not determined to be a real bona fide,

> talk-the-talk and walk-the-walk gang member, and I am not sure at all that he would be, but if that were not, and if that were not the case, there's a great likelihood that he would require protection for those who are.
>
> And my best guess would be that there would be serious consideration given to keeping him separated from that general population because of his own needs for protection.

(R. pp. 1639-1640).

As to Evans's allegation that the Solicitor's argument regarding conditions was unfair - i.e. alleging the argument "capitalized on the testimony elicited from Mr. O'Cain concerning the defendant's alleged gang involvement *and* regarding general prison conditions, contrasting general prison conditions for an individual sentenced to life without parole with those of an individual sentenced to death and dramatically misrepresenting the conditions of prison life," (See Evans's Post-Hearing Reply Brief, p. 14, n. II), the argument was a brief response to the testimony that also indicated that the life sentence would be harsh based on the necessity of increased security stemming from his gang affiliation (or purported gang affiliation). At any rate, Evans overstates the impact of the argument.

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

Evans has failed to show either deficient performance or prejudice.

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

Trial counsel was not ineffective in failing to challenge the victim impact testimony.

Evans complains that counsel should have objected to victim impact evidence offered from Sheriff Loftis and Deputy Tripp. (Evans's Post-Hearing Brief, pp. 90-94). It is not surprising to have two fellow officers testify about the effect of a fallen officer, their friend, on them personally. *See Payne v. Tennessee,* 501 U.S. 808,825,111 S.Ct. 2597 (1991)("a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant"). Because the victim here was a sheriff's deputy, evidence of the specific harm will logically be tied to his career, as a facet of his life. *See, State v. Byram, 326* S.C. 107, 117, 485 S.E.2d 360, 365 (1997)(noting testimony in regard to victim teacher, "the teacher's assistant, testified the victim was a wonderful teacher of emotionally handicapped children and the victim's students were devastated to learn of their teacher's death"). It is not *per se* a violation of *Payne* simply due to his law enforcement standing. For example, in *State v. Bixby,* 388 S.C. 528, 555-557, 698 S.E.2d 572, 586-587 (2010), the South Carolina Supreme Court held a video of the officer's funeral was properly admitted:

> We find the videotape at issue was victim impact evidence because it showed the traditional trappings of a law enforcement officer's funeral,

> demonstrating the general loss suffered by society. Additionally, the video showed footage of actual mourners, displaying for the jury the specific impact of the murder on particular members of society. Thus, we hold the video was victim impact evidence pursuant to *Payne*.

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

Moreover, the Court found that the evidence was not unfairly prejudicial based on a danger of evoking sympathy: "Under the law, simply saying that evidence such as this was 'moving' is not enough to require reversal of a capital sentence." *Id.* There will necessarily be *some* emotion in a capital sentencing proceeding. Yet, precedent requires such emotion be channeled into reasoned deliberation on the evidence. *Id.* This evidence complied and did not stray to impermissible bounds such as family members of the victim testifying on the proper penalty. *Payne,* 501 U.S. at 830, n. 2 (leaving untouched former precedent that held "a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment" as "No evidence of the latter sort was presented at the trial in this case."). The testimony was tailored specifically to the impact the deputy's murder had on them specifically, and the local force, who personally knew him. Evans's argument in regard to "additional prejudice" due to Deputy Tripp's reference of the victim having at one point worked in the courtroom also fails. This evidence does nothing more than individualize the murdered

deputy - the very essence of what victim impact evidence should do, to properly demonstrate the loss from the convicted defendant's act. *Payne, supra.* Lastly, Evans's oft repeated argument that the law enforcement aggravator was not properly submitted has been rejected for all the reasons discussed elsewhere in this order. Thus, Evans's argument in regard to "additional prejudice" due to this particular victim impact evidence is also rejected.

In sum, the evidence here was properly admitted under *Payne.* Consequently, Evans has failed to show deficient performance and prejudice.

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

Mrs. Sapinoso was allowed, during the penalty phase, to testify as to several of her grandson's statements. Evans complains that counsel should have objected to the testimony as inadmissible under the rule against hearsay. The statements, however, were not offered for the truth of the matter asserted, but as evidence of the individual's fear. Thus, by definition, they were not hearsay. See Rule 801 (c), SCRE ("Hearsay is as statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). Evans has failed to show a meritorious basis for an objection.

For example, the statement, "I am not going there, my mommy is not going there, she might get killed and I would be an orphan," (R. p. 1548), is not

offered for the truth of whether they were going to South Carolina, or possible death, but for its reflection of the child's fear. Moreover, his question "is grandmother going to be okay," (R. p. 1549), again reflects fear – a lasting impact from the night of the murder. *See State v. Kelly,* 343 S.C. 350, 370-371, 540 S.E.2d 851, 861 (2001), *overruled on other grounds,* 534 U.S. 246, 122 S.Ct. 726 (2002)(testimony relating child's statement "a bad man had killed his mommy" not hearsay, "the testimony clearly was offered to show the impact the murder had on Shealy's young child and the rest of her family" and was "properly ... victim impact evidence"). The statement relating "he's just staring at the ceiling," (R. p. 1549), could be offered as true, indicative of the fear, but more likely is just part of the narrative in explaining that he was not talking at that point to the grandmother. *See generally* Rule 803, SCRE (statements of "then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)" not excluded by hearsay rule). *See also United States v. Wills,* 346 F.3d 476, 490 (4th Cir. 2003)(witness statements made in conversation with defendant properly admitted to show context of incriminating admissions). At any rate, the evidence was offered to demonstrate the fear and impact the murders had on the young child. Because that concept was specifically conveyed otherwise, any minor error in the admission of one statement going to same would have been harmless. *State v. Haselden,* 353 S.C. 190, 577 S.E.2d 445 (2003) (improper evidence harmless where merely cumulative to other evidence); *State v. Evans,* 662

S.E.2d 489, 491 (Ct. App. 2008)(evidence "merely cumulative, insubstantial" did not affect the result of trial and considered harmless); *State v. Weaver,* 361 S.c. 73, 87, 602 S.E.2d 786, 793 (Ct. App. 2004)(even if contested testimony was hearsay, admission would be considered harmless where cumulative to other evidence in the record). Evans has failed to show deficient performance and prejudice, and is not entitled to any relief.

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

Trial counsel was not ineffective in failing to object to the State's closing argument in the sentencing phase. Given the entirety of the record, (R. p. 1743, line 19 - p. 1760, line 18), the argument presented does not appear either erroneous or prejudicial. *See generally Von Dohlen v. State,* 360 S.C. 598, 613-614, 602 S.E.2d 738, 746 (2004)("comment, although improper, did not so infect the trial with unfairness as to make the resulting conviction a denial of due process").

Evans complains the argument infers the state had already decided that a death sentence is the appropriate punishment and wrongly absolved the jury of responsibility. (Evans's Post-Hearing Brief, p. 168, referencing argument on R. p. 1747). However, nothing in the argument suggested "the solicitor attempted to minimize the jurors' own sense of responsibility for appellant's fate by stressing that he had himself already made the same decision that he was now asking them to

make." *State v. Woomer)* 277 S.C. 170, 175, 284 S.E.2d 357, 359-360 (1981). Mere mention of the solicitor's involvement in the process to seek the death penalty is not improper. *See State v. Bell,* 302 S.C. 18, 34, 393 S.E.2d 364, 373 (1990). There is no specific absolution decree. The specific passage referenced is an introduction to the system, and the Solicitor noted that "you are the citizens that the legislature has designated to carry out this function," thus placed emphasis on the role of the jury. (R. pp. 1747-1748). Additionally, the solicitor requested the death sentence be based on the evidence, (see R. p. 1759), and specifically reminded the jury it was their decision and theirs alone (see R. pp. 1759-1760). There was no improper personal opinion (i.e. lessening the duty or responsibility of the jury) or demand for a sentence. The focus firmly remained on the defendant, his acts, and his appropriate punishment to be determined by the jury. *See Smart v. State,* 278 S.C. 515, 526, 299 S.E.2d 686, 692-693 (1982) (cautioning such comments must be case specific and defendant specific). Evans has failed to show an improper argument was made to which defense counsel should have objected.

Evans also complains about the solicitor's reference to "mean evil people." (Evans's Post-Hearing Brief, p. 169). The comment referencing "mean evil people" and the death penalty goes to the jury's process of determining the appropriate sentence, and it was directly tied to same in the solicitor's argument. (R. pp. 1750-1751). He never usurped the jury's decision, but remained

steadfast that it was the jury's determination based on the evidence presented. *See generally Kinder v. Bowersox,* 272 F.3d 532, 552 (8th Cir. 2001)(finding no unreasonable application of federal law where state supreme court did not reverse on the following argument, *"Evil stares at you in the courtroom... We don't want to share our streets one day with evil. We cannot risk one day sharing our lives and our world with evil"* but found "the statements were proper argument because they addressed [the individual defendant's] character and the appropriate punishment for his crime.")(emphasis in original).

Further, though Evans complains of "graphic language" in the argument, the Solicitor fairly referenced the horrendous circumstances of the crime which the jury heard. (Evans's Post-Hearing Brief, p. 1751). Descriptions of execution-style shootings can be graphic, but here the description is not inflammatory or otherwise improper. (See, for example, R. p. 1759, describing circumstances as "that sound of bullets piercing the head of a human being and seeing the blood and continuing execution style to shoot these people."). *Compare State v. Northcutt,* 372 S.C. 207, 222, 641 S.E.2d 873, 881. (2007)(solicitor's statement in child murder case that there would be an "open season on babies in Lexington County" if death sentence was not recommended was improper as "[t]he sole purpose of this statement was to inflame the jury").

As to Evans's complaint the Solicitor instructed the jury to disregard mitigation, (Evans's

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

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

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

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

9(h)(10) Ineffective Assistance of Counsel: Failed to Request the Statutory Mitigator Related to Capacity

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

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

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

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

these shootings." (R. p. 1697, line 6 -p. 1698, line 6). He surmised:

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

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

On cross-examination, Dr. Evans testified his report reflected Evans suffered from "mild to

moderate problems" with "cognitive flexibility" and no "significant problems with response control." (R. p. 1704, line 14 - p. 1705, line 3).

The defense also presented testimony from Dr. Elin Berg, a psychiatrist. Dr. Berg testified that, based on Evans's reports of his mood at the time of the murders, she would diagnose him with "major depressive disorder, single episode" which would be considered a "mental or emotional disturbance." (R. p. 1719, lines 14-16; p. 1721, lines 9-13). Dr. Berg testified, however, that Evans had the capacity to conform his conduct to the requirements of law at the time of the murders; that he did not have any psychotic symptoms; that he showed no evidence of mental retardation; that he did not have any brain injury; and that he did not have any psycho-neurological symptoms. (R. p. 1729, lines 3 - p. 1730, line 13).

After the conclusion of the sentencing phase testimony, the trial judge recessed the proceedings and requested defense counsel provide, "those statutory and non statutory mitigating circumstances that the defense believes the jury should be able to consider. ..." (R. p. 1742, lines 10-20). The trial judge charged the jury to consider: (1) "no significant history of prior conviction involving violence against another person"; (2) "the murder was committed while the defendant was under the influence of mental or emotional disturbance"; and, (3) "the age or mentality of the defendant at the time of the crime." Further, he instructed the jury to "consider any nonstatutory

mitigating circumstances that have been shown to exist by the evidence in the case." (R. pp. 1783-1784). Defense counsel did not object or request additional instruction, (R. p. 1789, line 21-p. 1790, line 1). This did not constitute deficient performance, however, because the evidence did not support the additional instruction at issue. Moreover, defense counsel testified that he reviewed the statutory mitigating circumstance with his experts, Dr. Evans and Dr. Berg, and neither could give evidence to support the instruction. (June PCR Tr. pp.459-471). In fact, defense counsel testified that his contemporaneous notes reflected that Dr. Evans indicated that was "as far as he could go." (June PCR Tr. p. 471).

Where there is no evidence supporting the requested charge, there is no error in failing to give the requested charge. *State v. Hughey,* 339 S.C. 439, 454, 529 S.E.2d 721, 729 (2000). Dr. Berg, the defense psychiatrist, rejected any notion of impairment in regard to capacity to appreciate the criminality of the conduct, or appellant's ability to conform his conduct to law. (R. p. 1729, lines 3 - p. 1730, line 13). Dr. Evans, the defense psychologist, never testified that Evans's capacity to appreciate the criminality of his conduct was substantially impaired, nor did he testify that Evans's capacity to conform his conduct to the requirements of law was substantially impaired. Dr. Evans testimony simply stated Evans "was operating to some, with *some* impairment. He was *less able* to conform his behavior to the requirements of the law *than a person without such dysfunction* would have." (R. p.

1699, lines 8-11)(emphasis added). He testified that Evans was under an *emotional* disturbance during the murders. (R. p. 1699, lines 20-23). He also opined stress and pressure from facing police would affect anyone's judgment. (R. p. 1698, line 24 - p. 1699, line 3). He further explained his findings as Evans having a "mild to moderate" problem with "cognitive flexibility" and no "significant problems with response control." (R. p. 1704, line 14 - p. 1705, line 3; p. 1708, lines 3-7).

Dr. Evans' testimony fails to provide evidence of substantial impairment in capacity to understand and conform this is consistent with defense counsel's notes, (June PCR Tr. p. 471). The testimony referencing the "great pressure with the police and helicopters there" as affecting judgment, (R. p. 1708, lines 17-25), does not constitute evidence supportive of the specific charge at issue here. *Compare State v. Caldwell,* 300 S.C. 494, 388 S.E.2d 816 (1990)(mitigating charge required where defendant diagnosed with psychopathic personality affecting capacity to appreciate criminality of the conduct and ability to conform conduct to law). The mere mention of "some effect" on capacity simply does not necessitate a charge that contemplates substantial impairment. Thus, the evidence presented does not provide any support for the mitigator that references substantial impairment of the capacity to appreciate the criminality of the act, or to conform to the requirements of the law.

Moreover, the trial judge properly charged on the two mentality statutory mitigators that were

supported by the evidence. (R. p. 1783, lines 17-22). The fact and circumstances regarding Evans's mental condition were obviously and clearly before the jury such that, had counsel improperly failed to request the mitigator, there could be no prejudice. *Jones v. State,* 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998) (finding no prejudice by the absence of an additional statutory mitigating factor on mental state where the issue of defendants mental condition was clearly before the jury, the trial court charged several other mitigating factors relating to mental condition, and the jury found the existence of five aggravating factors). *See also State v. Stanko,* 376, S.C. 571; 578, 658 S.E.2d 94, 97-98 (2008)(though finding issue not preserved for review on direct appeal, the Court noted that no prejudice occurred when the jury heard the cited evidence, and was advised of other statutory mitigating factors regarding appellant's mental state).

Additionally, there is clearly overwhelming evidence of guilt. Evans even admitted his guilt., R. p. 1233, lines 3-12; p. 1432, lines 7-13; p. 1473, lines 16-19, of a particularly brutal and heinous double murder. There could be no reasonable probability that the omission of this one mental state related mitigating circumstance in the charge (especially where two others were charged) would have resulted in a different result. *Strickland, supra. See also Jones,* 332 S.C. at 339-340, 504 S.E.2d at 827 (jury "presented with overwhelming evidence of Jones's guilt and the callous and heinous way in which Jones calculated and executed the murder"

which argued against finding prejudice as there was "no reasonable probability the sentencer would have concluded the balance of aggravating and mitigating circumstances did not warrant death" even in light of purported error). The jury found murder, three aggravating circumstanses for the murder of Deputy Sapinoso's father, and four for the murder of Deputy Sapinoso. Even if the facts were to show deficient performance in regard to this issue, there could be no *Strickland* prejudice.

In sum, Evans failed to show deficient performance and prejudice, and is not entitled to any relief.

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

In regard to trial counsel's investigation, to show deficient performance, Evans must demonstrate not simply that more information was available (as there may always be one more witness who could have been contacted or one more piece of paper that could have been copied), *see generally Byram v. Ozmint,* 339 F.3d 203, 210 (4th Cir. 2003)(simple "failure to obtain available records... does not show that counsel's investigation was inadequate"); rather, Evans must show that counsel made an unreasonable decision not to investigate or cut off investigation prematurely. *Strickland v. Washington,* 466 U.S. 668, 691, 104 S.Ct. 2052 (1984).

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

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

Wiggins v. Smith, 539 U.S. 510, 533, 123 S.Ct. 2527 (2003). *See also Bobby v. Van Hook,* __U.S. __, 130 S.Ct. 13, 19 (2009)(finding no deficiency where counsel investigated and made a strategic, reasonable decision not to investigate certain lines of evidence further: "there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties.").

Moreover, "the reasonableness of an investigation, or a decision by counsel that forecloses the need for an investigation, must be considered in light of the scarcity of counsel's time and resources in preparing for a sentencing hearing *and the reality that counsel must concentrate his efforts on the strongest arguments in favor of*

mitigation." McWee v. Weldon, 283 F.3d 179, 188 (4th Cir. 2002)(emphasis added). *See also Byram v. Ozmint,* 339 F.3d at 210 (quoting same).

Evans's complaint regarding the failure to discover and present mitigation evidence breaks down into two distinct areas: 1) evidence of abuse and neglect in Evans's Cleveland area homes; and 2) evidence of lead poisoning and concomitant brain damage and learning disability. This Court finds Evans has failed to carry his burden of proof.

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

A. Abuse Evidence Presented in PCR

Evans called his mother and aunt to testify about his father abusing his mother in the family home(s) in the Cleveland area. Both were very passionate about the abuse against the mother and Barry Evans' fault. Barry Evans confirmed the abuse and stated the anger he felt in that relationship is what drove him to leave the home. (June PCR Tr. p. (33). In fact, he testified that he wanted to leave the volatile situation so that the children would have a better home environment, without seeing the violence. (Id). He denied any abuse toward Evans. (June PCR Tr. p. 639).

Shatima Martin, Evans's sister, confirmed the abuse between Rene Evans and Barry Evans, and that she and Evans had witnessed some incidents. (See, for example, October PCR Tr. pp. 20-23). She indicated Barry Evans had abused Evans by use of corporal punishment on several occasions. (October PCR Tr. p. 25). Ms. Martin testified, however, that both she and Evans moved to South Carolina to be near their father. (October PCR Tr. p. 38). Ms. Martin also testified Evans was not quite thirteen when he moved in with Mr. Evans. (October PCR Tr. p. 38). Evans moved away from Rene Evans' home, where he was a "latch key" kid, "running the streets." (June PCR Tr. p. 352; p. 401; pp. 639-640; October PCR Tr. p. 101). Ms. Martin testified that when Barry Evans married their stepmother, Robin, he was not abusive to anyone. (October PCR Tr. pp. 39-41; p. 69).

Dr. Cooper-Lewter, a social worker, testified that he completed a "social history assessment" to develop "factors [that] may have influenced who [Evans] is today and his behavior." (October PCR Tr. p. 90). He noted that split in background - the tumultuous years (birth to approximately 12)[FN 16] in Ohio, and the stable years (12 (or 14), all through high school and into college years). (October PCR Tr. pp. 105-106; pp. 109-110). He noted the stable home environment, his step-mother's devotion, his "very good role models [including] his coaches, who required that he do his work." (October PCR Tr. p. 110).

Dr. Cooper-Lewter testified that Evans's relationship with Christina Rodriguez [FN 17] was "toxic," and said, "Well, she had a fascination with gang activities, had a tattoo, I'm told, that was from the Folk Nation." (October PCR Tr. p. 107). He accepted the tattoo and the statement of membership as proof of her membership in a gang. (October PCR Tr. p. 107; p. 109).

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

that he leave her house. (October PCR Tr. pp. 45-48).

B. Learning Disability Evidence Presented in PCR

Evans presented two witnesses at the PCR hearing who described Evans's early childhood academic record. The records admitted reflect that Evans received assistance in school for a learning disability. (See June PCR Tr. p. 43). Evans was not extracted from the regular public school system; rather, he received additional assistance for his learning needs. (June PCR Tr. p. 53). The records reflected that with additional assistance, Evans showed "substantial improvement" and had "benefitted" from specialized programs. (June PCR Tr. p. 57). (See June PCR Tr. p. 98, the fact that Evans achieved better grades either meant that he "overcame" his disability, or that "he was able to achieve in spite of his disability"). In fact, Evans, with great assistance from his devoted step-mother, finished high school and attended North Greenville College. While Evans did not meet the academic standard sufficient to be admitted to some universities, he was able to be accepted and admitted to North Greenville. (See October PCR Tr. pp. 110-111). Moreover, Evans's IQ is 94, an indication of average intelligence. (R. p. 1682; June PCR Tr. p. 844)

C. *Brain Damage Evidence Presented in PCR*

Evans presented testimony from Dr. David Bachman, a neurologist, to establish a MRI would

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

A second MRI done to Professor Gur's specifications, was performed in November 2008. (October PCR Tr. p. 193). Dr. Argarwal, again interpreted the films, along with Dr. Spampinato, another neuroradiologist. Again, the doctors were provided with the background information "legal case" and "significant learning disability with known exposure to lead as a child." (October PCR Tr. p. (98). The report came back normal, for a second time. (October PCR. Tr. p. 197; Respondent's Exhibit 48). Dr. Bachman, nevertheless, and after

consultation with legal counsel, sent the information to Professor Gur. (October PCR Tr. p. 193).

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

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

(June PCR Tr. p. 711).

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

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

> may not be able to rule out all types of brain damage.

(June PCR Tr. p. 679; p. 712). Even so, Professor Gur opined that where there is dysfunction, a quantitative analysis would "confirm" the presence of the dysfunction. (June PCR Tr. p. 696). Yet, as Dr. Kenneth Spicer, an expert in diagnostic radiology, (October PCR Tr. p. 281), testified, the quantitative analysis is not recognized as a reliable science as far as diagnosing patients. (October PCR Tr. p. 320; pp. 326-327).[FN 18] Professor Gur agreed that his method cannot be used for a "clinical presentation." (June PCR Tr. p. 663; See also p. 668, "I didn't make a diagnosis. I reported the results of the analysis which indicated loss of brain tissue.").

Dr. Spicer testified that volume determination, when subtle, is subjective, (October PCR Tr. p. 297; pp. 312-313); however, there is no accepted, reliable method for determining volume loss by quantitative analysis accepted by either the American College of Radiology or American Society of Neuroradiology. (October PCR Tr. p. 320; pp. 326-327). Thus, even accepting the study Professor Gur conducted reflects volume loss, that information would not change his opinion that the MRI was within normal range. (October PCR Tr. p. 321).

As previously referenced, Dr. Berg, a psychiatrist, testified at trial. Neither Dr. Bachman nor Professor Gur are trained in the specialty of psychiatry. Dr. Berg was so qualified, (R. p. 1714),

and her analysis focused not just on neurological testing for dysfunction, but also evaluation for possible indications of delusions, "hearing voices or having hallucinations," i.e. psychotic symptoms. (R. p. 1729). As Dr. Bachman conceded, he neither considered nor did he know how these possibilities factored into Dr. Berg's decisions or opinion. (October PCR Tr. pp.227-228). Dr. Bachman further conceded that "an MRI scan sometimes help you, sometimes doesn't help you. You have to put it in the context of the whole clinical picture," (October PCR Tr. p. 224), but maintained Dr. Berg must have been in error as the MRI showed "some mild atrophy." (October PCR Tr. p. 225).

Dr. Bachman and Dr. Spicer agree, however, that atrophy of the brain can be caused by any number of events, including head trauma from sports, alcohol abuse and drug abuse. (October PCR Tr. p. 192; pp. 299-3(0). Also in regard to his findings, Professor Gur testified simply as to a "pattern of abnormality consistent with what you would expect from lead and other toxic exposures." (June PCR Tr. p. 668).

D. Lead Poison Evidence Presented in PCR

Evans presented Professor Richard Canfield of Cornell University as an expert on lead exposure in small children. Professor Canfield testified that in the mid-seventies, the "point of concern" for lead exposure was 40 micrograms per deciliter. (June PCR Tr. p. 824). By the late seventies, the point of concern reduced to 30, it having been established

that a level above 40 was "absolutely damaging," and not just an area of concern. (June PCR Tr. p. 825). Since 1991, that level has reduced again to 10. Id.

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

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

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

(June PCR Tr. p. 842).

Statistically speaking, one would lose, on average, 10 IQ points at the 30 micrograms per deciliter level, more or less. Id. Professor Canfield agreed that Evans's IQ, 94, is in the average range.

(June PCR Tr. p. 844). Further, Professor Canfield agreed he could not definitively link any dysfunction to lead exposure. (June PCR Tr. p. 846). Professor Canfield candidly admitted that his information was statistical and individuals varied. (June PCR Tr. p. 847; p. 852). Professor Canfield also admitted his research was based on a study of children 6 months to 6 years old, though he was familiar without other studies with longer ranges. (June PCR Tr. p. 841; p. 850). Professor Canfield agreed that Evans's school records show an increase in average grades from elementary school to high school. (June PCR Tr. pp. 848-849).

E. Trial Counsel's Strategy

Trial counsel investigated and presented a focused case in mitigation, calling family and friends, to demonstrate Evans's "redeemable" qualities and focused the jury's choice by reliance on "two Kamell Evans." (See, for example, Evans's Post-Hearing Brief, p. 9). This Court finds the strategy was reasonable and met professional norms. Evans contends the two distinct sides of Evans could be resolved by "understanding" of a difficult upbringing, running the streets at an early age, learning disabilities and dysfunction. (See, for example, Evans's Post-Hearing Brief, p. 57). However, by reliance on the "two Kamell Evans" theory, counsel made the choice more palatable for those jurors not so accepting of excuses - that to kill the individual who made the choices they did not like, was to kill the individual who made choices that were good and decent. This is a reasonable

strategy. In *People v. Peeples,* 793 N.E.2d 641 (Ill. 2002), a capital case from Illinois, defense counsel presented a similar argument:

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

793 N. E.2d at 679.

The Illinois Court also found "the fact that the sentencer did not accept defense counsel's

position does not mean that defense counsel was ineffective." *Id. See also Bell v. Evatt,* 72 F.3d 421, 429 (4th Cir. 1995)("unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel"). In fact, it was even more difficult to make the argument in that case than here because counsel had a disadvantaged background that did not show a clear "one night, one error" break in character, as the evidence in this case (including Evans's own statement to the jury) tended to reflect. (See R. p. 1773, Evans to Jury, "What they are judging me on is one bad night, on a bad night that I made happen, one bad decision that I made, a lot of bad decisions, one night, four hours and ten seconds.").

Moreover, the decision to embrace this strategy was made with the investigation and advice of a team of experts - Lenora Topp (an experienced mitigation specialist); George Martin (a former SCDC employee qualified as an expert in corrections and prison administration); Dr. James Evans (a neuropsychologist); Dr. Elin Berg (a psychiatrist); and M. Scott Peterman (former ATF agent). [FN 19] Importantly, Evans has not presented information that was not known in some fashion. Instead, he relies on the theory that the information at issue was not further explored, or not explored to the utmost minute detail. Evans has failed to show deficient performance.

F. Evans Fails to Show Deficient Performance ill Regard to Evidence of Abuse and Neglect in Ohio. Defense

Counsel Knew of the Evidence of Abuse and Neglect and Made a Reasonable Decision Not Present Testimony on Same as Such Would Be At Odds With the Defense Theme.

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

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

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

G. *Evans Fails to Show Deficient Performance in Regard to Evidence of the Learning Disability, Lead Poisoning and Purported Brain Damage. When Reviewed in the Scope Of the Entirety of the Evidence, the Mitigation Impact and Value is Greatly Reduced.*

Evidence of Evans overcoming his learning disability would not have been inconsistent with his defense, but it is of little weight in the theme at issue. Further, the evidence, as a whole, shows a relatively minor disability, and strong improvement. Consequently, outlining the possible

cause of the disability, i.e. lead exposure, is again, not inconsistent, but of little weight.

In the case of elementary school records, Evans alleges counsel was ineffective in failing to more fully investigate and present evidence regarding his early learning disability. Two significant facts rebut his contention. First, the defense team did request elementary school records, only to be told, by the school district, that the records had been destroyed. (June PCR Tr. pp. 56-57; p. 574). In fact, Mr. Bunkley, the Director of Pupil Personnel Services for East Cleveland City Schools District, (June PCR Tr. p. 7), who presented records during the PCR, hearing confirmed the letter appeared to be from the correct authorities, and of the kind and quality he would rely upon and would accept as a document from the school confirming contamination and unavailability. (June PCR Tr. p. 56-57; pp. 59-60). Moreover, the defense team requested copies of these early records from Evans's mother, Renee Evans. She, however, was uncooperative.[FN 20] (June PCR Tr. pp. 203-204; p. 346; pp. 348-349). The defense team mitigation specialist, Lenora Topp, testified that Evans's mother advised her she would help and that she did have some records, but she failed to provide copies to Ms. Topp. (June PCR Tr. p. 572; p. 593). Specifically, Ms. Topp recalled that Evans's mother suggested she had "medical records regarding the lead poisoning." (June PCR Tr. p. 594). Former defense mitigation specialist, Dale Davis, likewise testified that she had contacted Evans's mother and requested records, and the mother had initially agreed to help. (June PCR Tr. pp. 533-534). In PCR, both Evans's mother and his sister confirmed that the mother kept

elementary school records. (June PCR Tr. p. 877-878; October PCR Tr. p. 77). When Evans's mother came to South Carolina for the trial, though, the only document she provided Ms. Topp was a document reflecting how the abuse against her had affected her. (June PCR Tr. p. 594). She claimed no one asked for the records, but conceded that she had turned over such records to the PCR defense team. (June PCR Tr. pp. 878-879; p. 881; p. 885). She indicated she would have turned them over to trial counsel had 1) someone come by the house; or 2) called and asked her to provide them. (June PCR Tr. p. 882; p. 885). She also denied that prior mitigation investigator, Davis, contacted her about records. (June PCR Tr. p. 881). These inconsistencies weigh against this witness' credibility. However, counsel did have school records from Greer and those records reflected Evans was a good, though not stellar, student. Defense counsel would have to account for that in making any argument about learning disabilities and dysfunction. (See, for example, June PCR Tr. pp. 913-917).

As to lead poisoning, Evans produced reports that confirm that Evans was diagnosed with lead exposure as a child. (See June PCR Tr. pp. 827-828). In fact, defense team mitigation specialist Lenora Topp requested the records, but they did not arrive until two week after trial. (June PCR Tr. p. 574; p. 333). Even so, the defense team was aware of the report of lead exposure, (see, for example, June PCR Hearing, Tr. p. 203, and Dr. Evans was also aware and even factored in the report of lead exposure into

his analysis (R. p. 1702. Dr. Evans was asked whether he had a report supporting the exposure, which he did not, but he explained there were reports of lead poisoning from Evans and his family. (R. p. 1702). While a medical record of exposure could have been obtained, the doctor noted its report and, importantly, factored the report into his analysis.

As to evidence of brain damage, there was no evidence of brain damage that defense counsel ignored. (June PCR Tr. p. 329). Moreover, counsel had a right to rely on their experts - Dr. Evans, and psychiatrist, Dr. Berg - and they "very heavily" relied upon them. (June PCR Tr. p. 248). As noted, Dr. Berg testified that a MRI was not necessary. And, in fact, two MRIs conducted subsequent to the trial, came back normal. (October PCR Tr. p. 171; p. 189; p. 197; Respondent's Exhibits 47 and 48). There is an addendum to the second report. However, that does not erase the fact that two reports were issued with normal findings, or the fact that the addendum, at most, allows for the possibility of mild atrophy, but still shows an overarching normal range (October PCR Tr. p. 321). Further, the circumstances of the addendum negatively affect its value.

Dr. Bachman conceded that he did not request the reporting doctors reconsider their findings, either immediately after the September report was issued, or when the November report was issued. On the same day that the State's subpoena was issued requesting the original

reports, (May 27, 2009, before the June 1, 2009 Evidentiary Hearing), Dr. Bachman requested that Dr. Spampinato "re-review" her report. (October PCR Tr. pp. 202-203). Dr. Bachman testified that he was contacted by John Blume, a prominent capital litigation defense attorney, and Mr. Blume expressed to Dr. Bachman that he "was concerned about the fact that the MRI scan report had not been amended" and "asked [Dr. Bachman] to ask the radiologist to re-review the MRI scan again." (October PCR Tr. p. 204). Even so, the most the addendum adds is the possibility of "mild" (the least cognizable), diffused (whole brain as opposed to frontal lobe), volume loss. (October PCR Tr. pp. 324-325). Dr. Spicer maintained that the scan was within standard normal limits. (October PCR Tr. p. 297).

However, Dr. Bachman, like Dr. Jim Evans', opined "there's evidence of cognitive dysfunction." (October PCR Tr. p. 178; p. 228). He then added his opinion was "strengthened by the fact there's evidence of atrophy, there's shrinkage of the brain tissue to an abnormal degree, evidence both on MRI scan on quantitative testing" with the "likely cause" of "lead exposure as a child, although there's no actual definitive way to prove that that's the cause of the cognitive dysfunction, but it seems the most likely cause." (October PCR Tr. pp. 178-179). Even Dr. Bachman, who relied upon Dr. Gur's statistical evaluation to support his subjective theory of mild diffused atrophy could not identify this statistical evaluation as the premier or "most sensitive" test to determine loss of "neuron brain function." (October

PCR Tr. pp. 183-182). Dr. Spicer testified more specifically that the "most sensitive" test is a brain biopsy, but absent that extreme, a PET scan or some type of "metabolic imaging" or a spinal tap. (October PCR Tr. p. 300). As to the Gur's volume analysis, Dr. Spicer testified:

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

(October PCR Tr. p. 301).

Dr. Spicer recognized Professor Gur's work had been published for the purpose of making associations, but that the volume analysis has not been accepted as a basis for diagnosing a patient. (October PCR Tr. p. 302). Dr. Spicer testified that he would not rely on Professor Gur's volume analysis in making a diagnosis. (October PCR Tr. p. 302). Dr. Spicer explained:

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

(October PCR Tr. p. 3(2).

Therefore, according to the evidence submitted at the PCR hearing, only by relying on a volume analysis that is not an accepted diagnostic tool, and a healthy dose of subjectivity, can one

divine any type of diffused volume loss. In other words, the loss must be so minor that subjectivity can be a factor. This hardly makes for definitive, crucial evidence. Where the experts agree, however, is that there was dysfunction, and Dr. Jim Evans testified to this at trial.

Though Evans notes two reports of lead exposure and presented information on lead poisoning, that does not change the results of the two MRI reports that came back normal. Moreover, trial counsel was faced with the fact that Evans was an average student with an average IQ who had attended college Additionally, the lead paint exposure/brain damage did not figure into the "one bad day, one bad decision" theme. (June PCR Tr. p. 329). Counsel wanted to maintain credibility with the jury, and not try to "blame something from 10, 12 years before this," to shift responsibility. (June PCR Tr. p. 427). Again, the client embraced the strategy and addressed the jury in support of same. (R. pp. 1772-1776). His consent is probative of the reasonableness of the strategy. *Bell v. Evatt, supra.*

Evans has failed to show deficient performance.

H. Even if Evans Could Show Deficient Performance, Evans Cannot Show Prejudice as He Has Failed to Show a Reasonable Probability, But for the Purported Deficient Performance, the Jury Would Have Determined the

Circumstances Did Not Warrant Death.

As noted, relief will not be granted on showing of mere error or deficient performance. Prejudice must also he shown. *Strickland,* 466 U.S. at 687. When applying the "reasonable probability" standard here, *Jones, supra,* this Court finds Evans has failed to show prejudice.

The evidence of brain damage is not persuasive. Professor Gur's volume analysis is controversial in the medical community as far as diagnosing brain damage. Further, the reports of the MRI interpretation at MUSC reflected a brain within the normal limits. The addendum on the second report does no more than allow for the possibility of subjective interpretation. Nothing in the medical evidence regarding brain damage is particularly credible or persuasive to the extent its absence at trial could have affected the outcome.

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

As to lead poisoning and learning disability, Evans could have offered this testimony, but the defense team was focused on the results and his life in South Carolina. In South Carolina, especially with the help of his step-mother, Evans remained an average student, and even went to college. Moreover, Dr. Evans knew about reports of lead poisoning reports, and factored them his analysis. Moreover, the fact that family reported exposure was information that Dr. Evans mentioned, though he did not have a record to show testing. However, in the PCR, Evans went further and tied the lead poisoning to brain damage and loss of IQ. The brain damage evidence, as noted above, is not persuasive, and Evans's IQ is average. This is not to say the evidence could not have been presented, but the lack of proof of specific and significant effect would lessen its impact.

As to abuse and neglect, the evidence of abuse against the mother could only be shown by calling individuals who would demonstrate a rift in the family, and by a witness who was uncooperative with the defense team. Again, this would detract rather than enhance the defense. Moreover, the evidence of abuse against Evans, i.e. use of force in discipline, was contested. Further, attacking the father would only lead to unraveling the carefully crafted defense theme and making his testimony in support of his son less credible.

Additionally, to consider all the evidence together, *Wong, supra,* the evidence would confuse and dilute the clear theory that this event was a

critical break from his normal behavior. This was the very theme that Evans presented to the jury himself. (R. p. 1774, "That wasn't me that night. It's not the person I am.... Twenty-seven years before though, that wasn't me. That's not the person I am.").

Lastly, on the other side of the scale, there is the fact of a horrible, planned hostage taking ending in two murders, one of a law enforcement officer kidnapped from his car before he could end his shift and reach the safety of his home; a forced entry into the home and a night of terror for the Sapinoso family. Moreover, to offer evidence of neglect, with the concomitant evidence of "running the streets," would support that there were not "two Kamell Evans," but one – one who spurned real family life and actively sought gang life, who resolved his issues with escalating violence.

Evans has failed to demonstrate deficient performance and prejudice, and is not entitled to any relief.

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

Twenty-four days after the June 2009 portion of the evidentiary hearing, the South Carolina Supreme Court issued *Rosemond v. Catoe,* 383 S.C. 320, 680 S.E.2d 4 (2009). In light of the state supreme court's decision in *Rosemond,* Mr. Evans moved to amend his application for post-conviction relief to allege that trial counsel provided ineffective

assistance in failing to object to an instruction identical to that found erroneous in *Rosemond.* When the evidentiary hearing resumed on October 12 to 14, 2009, trial counsel testified with respect to the claim of error based on *Rosemond.*

I. The South Carolina Supreme Court's Decision in *Rosemond v. Catoe*

The South Carolina Supreme Court, while granting relief based on a finding of ineffective assistance due to counsel's failure to present evidence of the defendant's mental illness, chose nevertheless to address an additional issue. Rosemond claimed that trial counsel were also ineffective for failing to object to the trial court's instruction "not to recommend a sentence of life based on mercy: 'you may recommend a sentence of life imprisonment for any reason or for no reason at all *other than as an act of mercy.*'" *Id.* at 329, 680 S.E.2d at 10 (emphasis in original). The South Carolina Supreme Court found that the trial court's instruction prevented jurors from considering the defendant's evidence and argument for mercy. This, the Court emphasized, ran contrary to state law, under which a defendant is entitled to present evidence seeking mercy (see *State v. Torrence,* 305 S.C. 45, 51, 406 S.E.2d 315, 318-19 (1991)) and by which jurors must be instructed that they can return a life sentence "for any reason or no reason at all":

> It is proper to instruct a jury in a capital sentencing phase that it may

> recommend a life sentence for any reason or no reason at all, including as an act of mercy. A jury's consideration of mercy, if proper evidence of mercy is admitted, is well recognized in the sentencing phase of a capital case. Because a capital jury may consider properly admitted evidence of mercy in the sentencing phase, consideration of mercy is not inconsistent with the instruction that "the jury should not be guided by sympathy, prejudice, passion, or public opinion ... :" *State v. Singleton,* 284 S.C. 388, 393, 326 S.E.2d 153, 16 (1985) overruled on other grounds by *State v. Torrence,* 305 S.C 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991).

Rosemond, 383 S.C at 329, 680 S.E.2d at 10-11; see also *State v. White,* 246 S.C 502, 507, 144 S.E.2d 481, 483 (1965) (noting the "absolute discretion of the jury with regard to the issue of mercy"); cf. *Saffle v. Parks,* 494 U.S. 484 (1990).

Further, the Court recognized that the trial court's jury instruction in *Rosemond* mirrored the instruction found proper in *State v. Hughey,* 339 S.C 439, 459, 529 S.E.2d 721, 731 (2000). The Court therefore "overrule[d] *Hughey* to the extent it approved the instruction that precluded a capital jury's consideration of mercy evidence in the sentencing phase"—even as it granted relief on

another, independent ground. *Id.* at 329, 680 S.E.2d at 10-11.

Rosemond, as it addresses the mercy charge, does not constitute a "new rule" where it has been the rule for decades that mercy can be considered by a capital jury. A careful reading of *Hughey* reveals that at the time of Mr. Evans trial the supreme court was interpreting the challenged "mercy" language as precluding the jury from considering mercy. If this were not so, then the court's decision in *Hughey* would be nonsensical, as the court there upheld the charge on the ground that "a judge's charge that the jury should not be guided by sympathy, prejudice, passion or public opinion is not reversible error." *Hughey,* 339 S.E. at 460.

It is important to realize that *Hughey* did not discuss or decide the issue of whether the "other than an act of mercy" charge infringed on a capital defendant's constitutional right to present mitigating evidence. Instead, *Hughey* only went so far as to uphold the charge on the basis that it was consistent with the common law rule that a jury can properly be instructed that its verdict cannot be swayed by sympathy or prejudice. *Hughey* thus left undecided the issue of whether a charge that removes mercy as a sentencing consideration violates constitutional commands. Reasonable trial counsel would have understood that *Hughey* did not confront this lingering issue, rather than accepting on faith that *Hughey* insulated the "other than as an act of mercy" language from any challenge

The trial court in Mr. Evans' case provided the jury with a charge identical to the one that the South Carolina Supreme Court disapproved in *Rosemond v. Catoe.* Here, as in *Rosemond,* the trial judge instructed the jury: "[Y]ou may recommend a sentence of life imprisonment for any reason or for no reason at all *other than as an act of mercy."* (R. 1785) (emphasis added). For the reasons that follow, this Court finds that trial counsel's failure to object to the erroneous charge was both deficient and prejudicial.

II. Ineffective Assistance of Counsel

Applicant alleges, as Rosemond did, that trial counsel provided ineffective assistance of counsel in failing to object to the trial court's instruction precluding mercy.

A. Deficient performance

The "crux" of the mitigation case at Applicant's sentencing trial was mercy. Mercy, trial counsel testified during the evidentiary hearing, was the "primary element" of the mitigation plea. PCR 344. The mitigation evidence consisted primarily of testimony from family members, coaches, and friends. The presentation began with Mr. Evans' high school football coach (R. 1651-53), his high school basketball coach (R. 1645-47), his community college football coach (R. 1648-50), and the high school football team chaplain (R. 1642-44), who testified that Mr. Evans was respectful, courteous, and a team leader. A friend with whom

Mr. Evans coached little league football testified that Mr. Evans developed a positive relationship with he and his son. R. 1655-58. Another friend, who worked with Mr. Evans in a youth football and basketball association, testified that Evans had been a positive role model for his twenty-two year old son. R. 1660-62. A coworker testified that Mr. Evans was a hard worker, who had not been involved in problems on the job. R. 1664-65. Evans' sister said that Kamell was a father figure to her children, even in prison (R. 1672), and Kamell's father testified in two transcript pages, speaking of Kamell's positive attributes and stating that, while Kamell's actions caused the family pain, "he is still my friend, he will always be my friend." R. 1669. Counsel also called two witnesses who testified that Evans would adjust positively in prison (corrections expert George Martin and Greenville County Detention Center corrections officer John Merkle) and two mental health experts (a neuropsychologist, Dr. James Evans, and a psychiatrist, Dr. Elin Berg).

During the postconviction evidentiary hearing before this Court, trial counsel referred to mercy, by turns, as the "primary element" (PCR 344), the "key highlight" (PCR 345), and "a major part" (PCR 334) of the mitigation case. Trial counsel James Goldsmith testified that he "built [his] closing argument around [mercy]." PCR 344. In sentencing summation, Goldsmith told the jurors:

> I am going to ask for mercy for Kamell Evans.... Mercy is unmerited favor. You can't earn it; you don't deserve it;

> but you give it to him anyway.... We Don't repay evil for evil. And mercy is appropriate in this case.

R. 1770; PCR 344.

Both trial counsel testified that, given the centrality of mercy to the sentencing phase defense, they would have objected to any charge that suggested a limitation on the jury's consideration of mercy when deliberating on the sentence. PCR 335-36, 353. The trial judge reviewed the proposed jury charges verbally with counsel in chambers. PCR 332-35 (trial counsel Sumner), 345 (trial counsel Goldsmith). Yet neither counsel objected when the trial court proposed the instruction that eliminated the "primary element" of their argument." Trial counsel Goldsmith thought what the judge proposed during the conference "was appropriate." PCR 345. He testified that he knew the court would charge the jury "you may recommend a sentence of life imprisonment for any reason or tor no reason at all other than as an act of mercy" before he made his argument to the jury. PCR 346. Counsel submitted no proposed jury charges. PCR 338-39. Counsel made no attempt, alternatively, to change the argument to avoid a conflict between their argument and the judge's charge. PCR 351; see PCR 333-34, 344. And when the trial court issued the instruction to the jury, R. 1785, and later provided the same to the jury in writing pursuant to S.C. Code Ann. § 16-3-20(C), R. 1786, counsel made no objection.

At the evidentiary hearing, trial counsel testified that they did not object to the erroneous charge because they viewed it as helpful. Trial counsel Sumner claimed that he did not think the charge limited the jury's consideration of mercy; because "it use[d] the word mercy," he believed the charge was actually preferable to a charge that simply tracked the words of the statute. PCR 338, see PCR 335. Trial counsel Goldsmith similarly testified that he thought this "an expansive charge" that allowed jurors to consider mercy. PCR 346-47. The charge, counsel say, told the jury to consider mercy, not abjure it.

This Court finds trial counsel's reasons for not objecting to the charge are unavailing. As the South Carolina Supreme Court recognized in *Rosemond,* the plain meaning of the words of the charge given is that mercy is precluded as a consideration for a sentence of life. The charge, by substituting the words "other than" for the word "including," in effect eviscerates the role of mercy in the jury's consideration of the sentencing options. As the Supreme Court understood, the last clause of the instruction plainly reads as a limitation on and qualification of the previous sentence, not a reiteration. The interpretation offered by trial counsel defies both the Supreme Court's determination in *Rosemond* and common sense.

Trial counsel should have known that the charge was inconsistent with long-standing South Carolina law and the United States Constitution. The South Carolina Supreme Court's statement in

Rosemond is not a new rule. The fact that the *Hughey* decision, which *Rosemond* reversed, was "in effect" at the time of Mr. Evans' trial in 2004 does not ameliorate counsel's failure to object to the erroneous charge. It has been the rule for decades that mercy can be considered by a South Carolina capital jury. In South Carolina in the year 2000, as in 2004 at the time of Evans's trial, a defendant was entitled to offer at sentencing evidence asking "for mercy on his behalf." *State v. Torrence,* 305 S.C. 45, 51, 406 S.E.2d 315, 318 (1991); see *State v. Johnson,* 338 S.C. 114, 126, 525 S.E.2d 519, 525 (2000); *State v. Sapp,* 366 S.C. 283, 292-94, 621 S.E.2d 883, 887-88 (2005). It was proper for defense counsel to try to "appeal to the jury's sense of mercy." *Drayton v. Evatt,* 312 S.C. 4, 12, 430 S.E.2d 517, 522 (1993). It was proper for a defendant to address the jury and ask for mercy. See *State v. Moore,* 357 S.C. 458, 593 S.E.2d 608 (2004). Under S.C. Code Ann. § 16-3-20(C), "The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law..." Mercy is embraced within this statutory directive as a basis for returning a life sentence. This is also supported by the fact that the statute does not require that the jury "weigh" aggravating circumstances against mitigating circumstances; rather, South Carolina is a non-weighing state, meaning the jury can return a verdict of life for any reason "otherwise authorized or allowed by law." S.C. Code Ann. § 16-3-20(C).[FN 21] Objecting here did not impose a duty of clairvoyance on counsel, or force a lawyer to anticipate a change in the law. It is misleading to

argue, as the State does, that the charge represented the correct law at the time of Evans' trial. As previously noted the law has always been that a capital jury can consider mercy. Indeed, the law used to be that one convicted of murder was sentenced to death *unless* the jury recommended mercy.[FN 22] As noted above, however, the court in *Hughey* interpreted the "other than as an act of mercy" phrase as precluding a jury from considering mercy. But the court did not consider the pivotal question of whether the preclusion violates the common law right to a mercy charge (as *Rosemond* found) or the constitutional right-long recognized by *Lockett* and its progeny-- to grant the jury the practical ability to give meaningful effect to all mitigation. Reasonable trial counsel familiar with the common law mercy right, *Hughey* and *Lockett* would have objected to the charge and pressed this very point. Counsel performed deficiently in failing to object to the erroneous instruction.

Further, it is well established that the Eighth Amendment, under the *Lockett v. Ohio,* 438 U.S. 586 (1978), line of cases, permits no restriction on a capital defendant's ability to present any relevant mitigating evidence. See *Eddings v. Oklahoma,* 455 U.S. 104 (1982); *Skipper v. South Carolina, 476* U.S. 1 (1976); *Hitchcock v. Dugger,* 481 U.S. 393 (1987). Mitigating evidence has been defined as any evidence that might serve "as a basis for a sentence less than death.' *Lockett v. Ohio,* 438 U.S. 586, 604 (1978). In *Lockett,* the Court held that a statute that prevents the sentencer from giving effect to applicable mitigation "creates the risk that that the

death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eight and Fourteenth Amendments." 438 U.S. at 605. Subsequent decisions have made clear that a capital sentencing jury must be able to consider and give effect to mitigating evidence, for it is only when a jury is provided a vehicle for expressing its reasoned moral response to such evidence that "we can be sure the jury 'has treated the defendant as a 'uniquely individual human being' and has made a reliable determination that death is the appropriate sentence.'" *Penry v. Johnson,* 532 U.S. 782, 797 (2001) (internal citation omitted).

The South Carolina legislature has decided to allow mercy as a sentencing consideration, encompassed in the language "for any reason or no reason at all," and the South Carolina Supreme Court has so interpreted the statute. As such mercy is indisputably a valid basis for imposing a life sentence under state law. Because *Hughey* neither addressed nor ruled upon the issue of whether precluding a capital jury from considering mercy comported with *Lockett* and its progeny, reasonable counsel would also have objected to the charge precluding mercy on that basis.

Given this precedent, of which trial counsel should have been aware, it was not proper for the trial court in Mr. Evans's case to issue an instruction to the jury that it could not return a life sentence "as an act of mercy." Trial counsel's failure

to object to the charge was deficient. In failing to object to the instruction precluding the jury's consideration of mercy, counsel permitted a charge not only contrary to capital jurisprudence and the state statute as it existed at the time of trial, but contrary to the theory and thrust of the mitigation case counsel presented to the jury.

B. Prejudice

Having determined that trial counsel's failure to object to the instruction precluding mercy-the same charge found improper in *Rosemond* -- was deficient performance under *Strickland v. Washington,* 466 U.S. 668 (1986), this Court must consider whether counsel's failure to object to the erroneous charge was prejudicial to Mr. Evans such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. The South Carolina Supreme Court in *Rosemond,* reversing and remanding for a new sentencing proceeding on other grounds, did not address prejudice in the context of the charge precluding mercy. 383 S.C. at 329, 680 S.E.2d at 10. The Court, accordingly, did not address whether the improper charge requires *per se* reversal, or whether a "harmless error" analysis should apply. See *Lowry v. State,* 376 S.C. 499, 657 S.E.2d 760 (2008). And the Court did not address whether the *Boyde v. California,* 494 U.S. 370 (1990), analysis applies to ineffectiveness and 8th and 14th amendment claims related to the erroneous jury instruction on mercy.

This Court has considered the applicability of harmless error analysis and *Boyde* as a preliminary matter and, for the reasons that follow, determines that neither harmless error analysis nor the *Boyde* analysis apply here. The Court also determines that even if such analyses apply, the standards for each would be easily met under the circumstances of this case. Trial counsel's failure to object to the erroneous charge precluding consideration of mercy prejudiced Mr. Evans. Mr. Evans is, therefore, entitled to a new sentencing trial.

1. Harmless Error

a. Harmless Error Does Not Apply to the Instruction Precluding Mercy.

In *Lowry v. State,* the South Carolina Supreme Court recognized that "[c]ertain constitutional errors may be harmless in terms of their effect on the *fact-finding* process at trial." 376 S.C. at 507-08, 657 S.E.2d at 764 (citing *Sullivan v. Louisiana,* 508 U.S. 275, 79 (1993)(emphasis added)). "For this reason," *Lowry* stated, "an unconstitutional jury instruction will not require reversal of the conviction if the Court determines "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* (citing *Arnold v. Plath,* 309 S.C. at 165, 420 S.E.2d at 838 (quoting *Chapman v. California,* 386 U.S. 18 (1967))). *Lowry* involved a burden shifting instruction that left the jurors with the mistaken view that, if they found petitioner took part in the crime, malice should be presumed. After

considering the charge in the context of the entire jury instruction, the Court searched for harmless error by weighing the evidence the jury considered against the "probative force" of the mistaken instruction. *Id.* at 765. The reasoning behind the harmless-error analysis in *Lowry* is that a court should assess the "basis on which the jury actually rested its verdict" because an instructional error may be "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates v. Evatt,* 500 U.S. 391, 403 (1991).

The erroneous instruction in this case, which precluded consideration of mercy by the capital jury ("you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act or mercy"), stands on different footing. The instruction at hand did more than implicate jurors' fact-finding. Cf. *Neder v. United States,* 527 U.S. 1, 8-15 (1999)(applying harmless error where instruction omitted clement of offense); *Johnson v. United States,* 520 U.S. 461, 468-49 (1997) (same); *State v. Becher,* 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009)(finding erroneous malice charge not harmless). The instruction precluding mercy limited the sentencing jury's ability to give any effect to the defendant's mitigation. As such, the instruction "deprive[d] the jury of a 'vehicle for expressing its reasoned *moral* response to the defendant's background, character, and crime." *Nelson* v. *Quarterman,* 472 F.3d 287, 314-15 (5th Cir. 2006) (quoting *Penry* v. *Johnson,* 532 U.S. 782, 797 (2001)) (emphasis in original). In South Carolina,

the consideration of mercy is central to the capital jury's discretion. See *State* v. *Torrence,* 305 S.C. 45, 51, 406 S.E.2d 315, 318 (1991); *State* v. *Blakely,* 158 S.C. 304,155 S.E. 408, 409 (1930). It is impossible to estimate the impact of the charge eliminating mercy – an inscrutable concept that defies qualification— as a sentencing consideration on the jurors' reasoned moral response.

Addressing an instructional error that prevented a jury from giving full effect to mitigating evidence under *Penry* v. *Lynaugh* and its progeny, the Fifth Circuit in *Nelson* noted that "the Supreme Court has *never* applied a harmless-error analysis to a *Penry* claim or given any indication that harmless error might apply in its long line of post-*Furman* cases addressing the jury's ability to give full effect to a capital defendant's mitigating evidence." *Id. Quarterman,* 472 F.3d at 314-15 (5th Cir. 2006). Finding harmless error analysis incongruent in that similar circumstance, the Fifth Circuit explained:

> Given that the entire premise of the *Penry* line of cases rests on the possibility that the jury's reasoned moral response might have been different ... had it been able to fully consider and give effect to the defendant's mitigating evidence, it would be wholly inappropriate for an appellate court, in effect, to substitute its own moral judgment for the jury's in these cases.

Id. at 314-15 (other citations and quotations omitted); accord *Rivers v. Thaler,* 2010 WL 3058721 (5th Cir. 2010); *Aldridge v. Thaler,* 2010 WL 1050335 (S.D. Tex. 2010).

The trial court's erroneous charge restricting the jury's consideration of mercy as a basis for a life sentence requires *per se* reversal because it "deprived the jury of a vehicle for expressing its reasoned *moral* response to the defendant's background, character, and crime." *Nelson,* 472 F.3d at 314-15 (quotation and citation omitted). Accordingly, the "mercy" instruction was a structural defect to which harmless error analysis does not apply. *Id.* at 332.

There is another equally important reason why harmless error analysis is wholly incompatible with the instruction precluding mercy. Under South Carolina law, mercy is a factor that can play a dispositive role in a juror's decision to impose a life sentence, even after considering and giving weight to overwhelming evidence of guilt and substantial aggravating circumstances. S.C. Code § 16-3-20 provides that jurors may vote tor a life sentence "for any reason or no reason at all." This provides a direct option for jurors who, having considered all the evidence – even substantial aggravating evidence – reach a reasoned moral conclusion that a capital defendant should be sentenced to life imprisonment without parole. The type of evidence balancing applied in *Lowry,* consequently, is incongruous with a jury's consideration of mercy under South Carolina law, because under South

Carolina law mercy serves as a basis for a vote for life based on consideration of the evidence presented at sentencing, yet *despite* the weight of that evidence.

This is evident when considering the role mercy plays in a highly aggravated sentencing case. A strong case in aggravation renders many instructional errors moot. By contrast, the mercy option becomes *even more important* to a capital defendant's chance for a life sentence in a highly aggravated case. Acknowledging the weight of the aggravating evidence, Mr. Evans' trial counsel made mercy the central component — the "crux" – of the mitigation case. The United States Court of Appeals for the Eleventh Circuit recognized the same when it considered the role of mercy under Georgia's capital statute, which like South Carolina's statute also authorizes the jury to return a life verdict for any reason or no reason at all:

> Even if the Supreme Court precedent allowed us to consider harmless error as to guilt, *the absolute discretion of a Georgia jury to grant mercy for any reason would make it anomalous to apply the overwhelming evidence concept to the sentencing phase.*

Coleman v. Kemp, 778 F.2d 1487, 1541 (11th Cir. 1985)(quoting *Zant v. Stephens,* 297 S.E.2d 1 (1982)) (emphasis added). This Court finds that the Eleventh Circuit's reasoning is compelling.

Harmless error analysis does not apply to assessing the prejudice of the erroneous instruction on mercy.

b. Even If Harmless Error Analysis Applied, It Cannot Be Proven Beyond a Reasonable Doubt that the Erroneous "Mercy" Charge Did Not Contribute to the Death Verdict.

Even if harmless error analysis applied, the instruction would not be harmless. Given the substantial aggravating evidence against Mr. Evans –which included the murder of two innocent victims, one of who was a law enforcement officer—mercy is a factor that would have been highly significant to the capital sentencing jury. In addition, as trial counsel testified at the postconviction hearing, mercy played the central role in the defense of the death penalty and in the mitigation presentation. The trial court's erroneous instruction precluding mercy took that pivotal sentencing factor away from the jury. In these circumstances, it cannot be established "beyond a reasonable doubt that the [the erroneous instruction precluding mercy] did not contribute to the verdict obtained." *Lowry*, 376 S.C. at 507-08, 657 S.E.2d at 764. Accordingly, even if harmless error analysis applies, there is a reasonable probability that, but for counsel's failure to object to the unconstitutional charge, the outcome of the trial would have been different. *Strickland*, 460 U.S. at 694-96.

2. Boyde v. California

a. *Boyde v. California* Does Not Apply to the Instruction Precluding Mercy.

In *Boyde v. California,* the defendant argued that an ambiguous jury instruction prevented the jury from giving effect to the mitigating evidence. 494 U.S. 370, 378-381 (1990). The United States Supreme Court examined the objectionable language in the context of the entire charge and, applying a new standard, held there was not "a reasonable likelihood that the jury [] applied the instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380.

Boyde does not apply to the clearly erroneous instructional error in this case because *Boyde* supplies a standard for testing *ambiguous* jury instructions. *Boyde* does not apply to *clearly erroneous* jury instructions. In *Boyde,* the Court distinguished the ambiguous charge before it from the case of a "concededly erroneous" instruction, such as that in *Stromberg v. California,* 283 U.S. 359 (1931). *Boyde,* 494 U.S. at 380; see *Weeks v. Angelone,* 528 U.S. 225, 238 (2000) (Stevens, J., dissenting)(recognizing that *Boyde* dealt with an instruction that "though not erroneous, is sufficiently ambiguous to be subject to erroneous interpretation")(quotation omitted). In contrast to *Boyde,* the instruction at issue here involved precise language found contrary to South Carolina law. *Rosemond,* 383 S.C. at 330, 680 S.E.2d at 10-11. This distinguishes the present case from cases such as *State v. Sims,* 304 S.C. 409, 422, 405 S.E.2d 377, 384-85 (1991), and *State v. Bell,* 305 S.C. 11, 22, 406

S.E.2d 165, 171 (1991), which involved ambiguous (but not clearly erroneous) instructions alleged to have precluded jury consideration of evidence in mitigation. The instruction precluding mercy, delivered here and in *Rosemond,* is an anomaly, evidently delivered in only a handful of capital trials. Because the South Carolina Supreme Court's opinion in *Rosemond v. Catoe* establishes that the instruction, as given in Mr. Evans's case, is clearly erroneous, and it runs directly counter to long-standing South Carolina legal precedent and principle, 383 S.C. at 330, 680 S.E.2d at 11, this Court holds that *Boyde* analysis does not apply.

b. Even If *Boyde* Applied, the Reasonable Likelihood" Standard Would Be Easily Met.

Even if *Boyde* applied, this would be a straightforward case and the *Boyde* standard easily met. The impact of the erroneous instruction on jury deliberations must be assessed in the context of the jury charge as a whole. No language in the charge cured the instruction precluding mercy. In the entire sentencing charge, the word "mercy" appears only once, when it is excluded as a ground for a sentence of life. The remainder of the charge did not address mercy. The court's charge did inform the jurors that they should consider all aggravating and mitigating factors, statutory and non-statutory. And the trial court informed jurors "you may recommend a sentence of life imprisonment whether or not you find the existence of a statutory or a nonstatutory mitigating circumstance" and "you may also

recommend a sentence of life imprisonment even though you find at least one of the statutory aggravating circumstances beyond a reasonable doubt and you find no mitigating circumstances to exist." R. 1784-85. A reasonable juror, however, would not interpret these *general* instructions to override the *specific* and clearly erroneous instruction that he or she was not to consider mercy as a basis for a life sentence. As the South Carolina Supreme Court recognized in *Lowry:* "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." 376 S.C. at 507-08, 657 S.E.2d at 764 (citation omitted). Here, the trial court gave no clarifying explanation.

Moreover, the trial court told the jury repeatedly that it must follow the law as instructed. It is hard to imagine a more pointed way to inform the jury of its role than the way the trial court explained:

> You must ... under [y]our oath as a juror accept the law as I give it to you as being the law that is applicable in this particular case.
>
> You're not to concern yourself with what you thought the law was before you came to serve as a juror in this case. You must not concern yourself with what you think the law ought to be.
>
> You must simply accept the law as I give it to you as being the law that

> is applicable in this particular case, and then you simply take that law and you apply it to the facts ...

R. 1480-81. Later, the judge charged the jury that at the sentencing phase they would be given "certain applicable instructions as to the law which you are to apply." R. 1515, ll. 9-11. Prior to deliberating, the jury was instructed in part: "you will make your determination as to the appropriate sentence to be imposed for each of the murder convictions based upon your consideration of all the evidence presented in the case and my instruction as to the law that is applicable." R. 1777.

There is perhaps no more potent presumption in the law than the fundamental creed that jurors follow their instructions. *CSX Transp. , Inc. v. Hensley,* 129 S.Ct. 2139, 2141 (2009); *United States v. Olano,* 507 U.S. 725, 740 (1993); *Penry v. Johnson,* 532 U.S. 782, 789 (2001); *Greer v. Miller,* 483 U.S. 756, 766 n.8 (1987); *State v. Northcutt,* 372 S.C. 207, 228, 641 S.E.2d 873 (2007) ("Our jurisprudence unwaveringly provides that we are to presume juries follow their instructions ... ") (Toal, *C.J.,* dissenting).

Consequently, even if the *Boyde* analysis were applied to this case, there is a reasonable likelihood that the jury applied the instruction in a way that limited the jury's application of the mitigating evidence, obstructed its reasoned moral response to the evidence, and violated the Fifth,

Eighth and Fourteenth Amendments to the Constitution.

To find otherwise would be to conclude that the jury not only violated its oath and ignored the judge's flawed charge on mercy, but that they were coincidentally armed with such a workable understanding of *Lockett* and its accompanying constitutional jurisprudence that they unilaterally chose to consider Evans' plea for mercy.

Although it has reached discordant decisions on death penalty procedure over the last forty years, the United States Supreme Court has been consistent on one bedrock principle: guaranteeing that the ultimate sentence is rendered as the product of a reliable and fair procedure. It would mock this principle to indulge in the fiction that the jury considering Mr. Evans' fate purposely ignored the law it was sworn to uphold. It would offend fundamental notions of reason and fairness to conclude that allowing one sentencing jury to consider and give effect to mercy while forbidding another to do so has no impact on the reliability of capital verdicts.

3. There is a Reasonable Probability that, But For Counsel's Failure to Object to the Instruction Precluding Mercy, the Outcome of Applicant's Trial Would Have Been Different.

The exclusion of mercy in a capital murder trial violates state law as well as federal law

pursuant to *Lockett v. Ohio,* as it prevents the jury from giving full effect to the mitigation evidence. Such an error is highly prejudicial in a South Carolina capital trial where jurors may impose a life sentence for any reason or no reason at all. Recently, a highly respected circuit judge granted postconviction relief to the defendant in *Hughey,* finding that the identical instruction given in *Rosemond* and *Hughey – and* the same provided at Mr. Evans' sentencing phase-was "so inimical to the laws of the State and the United States in capital cases as to entitle the applicant to a new trial." *Hughey v. State,* 2000-CP-01-0212, Abbeville County (Order Granting PCR Relief, May 14, 2010) (Macaulay, J.), The erroneous instruction precluding mercy was particularly prejudicial under the circumstances in Mr. Evans' case because counsel positioned mercy as the crux of the mitigation case against substantial aggravating evidence. Trial counsel's failure to object to the erroneous charge left the jury deliberating the case without being able to place the defendant's "primary element" on the scale. There is a reasonable probability that, but for counsel's failure to object to the unconstitutional charge, the outcome of the trial would have been different. *Strickland,* 466 U.S. at 694-96.

In conclusion, the Court notes that, like *Rosemond* and *Hughey,* Mr. Evans' case belongs to a closed universe of cases in which an idiosyncratic charge was given on a critical issue. It

would be fundamentally unfair to allow one defendant to live and a handful of others to die based only on the timing of their trial.

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

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

Here, trial counsel requested a charge on voluntary manslaughter, based solely on his client's wishes, recognizing the lack of evidentiary support for finding sufficient legal provocation. (R. p. 1445, line 25 - p. 1447, line 2). Evans had testified that, at one point during the hours he held his victims hostage that he believed that one of his victims, Deputy Sapinoso, reached for a gun on a nearby coffee table and only then did Evans fire, first at Deputy Sapinoso (shooting him four times in the back of the head), then at the deputy's father (shooting him three times). (See R. p. 1443, line 13 - p. 1444, line 24).

It is well settled that "[a] victim's attempts to resist or defend himself from a crime cannot satisfy the sufficient legal provocation element of voluntary manslaughter." *State v. Shuler,* 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001). There was no evidence in the record demonstrating either adequate legal provocation or heat of passion. *State v. Smith,* 2011 WL 382561 (S.C. Sup. Ct. Feb. 7, 2011). Clearly, had appellate counsel raised the issue, it would not be meritorious. Evans has failed to show deficient performance.

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

For all the reasons referenced in the discussion of the ineffective assistance of counsel claim above, (9(a)(3)), Evans has failed to show deficient performance. None of the seated jurors were exposed to such an extent that they formed opinions. Further, Evans has shown no relevant precedent or possibility of error in regard to the courthouse argument. At any rate, the record shows no bias according to the *voir dire.* In fact, the three who recalled any media coverage at all did not recall any details. Again as noted above, while Dwayne Drake, Larry Coker and Mark Branyon all seemed to vaguely recall the fact of media coverage of the incident, each testified that they did not recall any specific details at all. (R. p. 230, line 15 - p. 231, line 3 (Drake); p. 289, lines 10-24 (Coker); p. 469, line 20 - p. 470, line 8 (Branyon)). There could be no meritorious issue in light of this record. *See State v.*

Evins, 373 S.C. 404, 412, 645 S.E.2d 904, 908 (2007)("When a trial judge bases the denial of a motion for a change of venue because of pretrial publicity upon an adequate *voir dire* examination of the jurors, his decision will not be disturbed absent extraordinary circumstances"). Thus, as to an allegation of ineffective of appellate counsel for not raising the issue, Evans cannot show deficient performance and prejudice.

The Constitution requires that a criminal defendant be afforded a trial by a "panel of impartial, indifferent jurors." *Irvin, supra.* "When a change of venue motion is predicated on pre-trial publicity, the relevant inquiry is whether potential jurors have 'such fixed opinions that they could not judge impartially the guilt of the defendant.'" *State v. Gardner,* 332 S.C. 389, 392, 505 S.E.2d 338, 339 (1998), *quoting State v. Manning,* 329 S.C. 1,495 S.E.2d 191 (1997). "The trial court's ruling on the venue motion will not be reversed on appeal absent an abuse of discretion." *Id.* Here, the denial of the motion was fully and fairly supported by the jurors' responses, which the trial judge relied upon in denying the motion. (R. p. 1010, line 20 - p. 1012, line 1). Had counsel raised the issue, it could not have been meritorious. *Id. See also State v. Evins, supra.*

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

This Court's jurisdiction is statutorily limited by S.C. Code § 17-27-20(b)(1985), which provides:

"This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." Beeause a PCR action is not a substitute for direct appeal, Evans cannot assert any issues in his PCR action that could have been raised at trial or on direct appeal. *Simmons, supra. See also Drayton v. Evatt,* 312 S.C. 4, 8-9,430 S.E.2d 517, 520 (1993)(same); *Hyman v. State,* 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983)(same). The Simmons Doctrine bars this claim as it is a free-standing claim of error.

Moreover, Evans admitted in the PCR hearing that these claims were simply claims "plead in the alternative," to the ineffective assistance of counsel claims above, and are "substantive bases for the ineffective assistance of counsel claims." (October PCR Tr. p. 260). This is a clear concession that the claim was improperly raised as free-standing claims of error, i.e. direct appeal claims. Evans is not allowed to present claims for "direct appeal" review and "collateral" review for a "double chance" of review. The time for presenting direct appeal claims has expired. Nothing in the statute allows Evans to resurrect this direct appeal claim. At any rate, the claim is without merit, for all the reasons presented in the ineffective assistance of counsel allegation 9(b)(2) above.

9(d)(2) Brady Claim

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

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

As discussed above, there is evidence of Evans's gang membership, not the least of which is his own admission of gang membership, his permanent tattoos reflecting gang allegiance, his conviction of a drug offense coupled with his admission that he sold drugs in connection with his gang membership, and his known association with other admitted gang members (i.e. Christina Rodriguez, under Evans's own theory, and according to his experts). Further, in a statement that was not admitted, Christina Rodriguez indicated that Evans "says he's a Crip from Cleveland." (June PCR Tr. p. 362). Further, in this same statement, Ms. Rodriguez confirmed he admitted selling drugs, and was "representing" as a Crip. (June PCR Tr. pp. 364-365). Evans has never personally denied gang membership in court or in SCDC. As Evans's own corrections expert at trial opined to defense counsel, Evans's admitted involvement was "textbook." (June PCR Tr. p. 412). Evans has utterly failed to make even the slightest credible argument as to the knowing presentation of false testimony. And, as noted above, if Christina was called, presumably to cast doubt on gang membership (a possibility that has not been established), it would likely open the door to testimony concerning Evans's violence on

and towards Christina, a risk defense counsel did not wish to take. (June PCR Tr. p. 484). Again, Evans has failed to carry his burden of proof.

Further, as to the evidence establishing the deputy victim "was in the line of official duty as a law enforcement officer at the time of death," Evans has failed to show what evidence he is referencing or what element of proof the evidence supports. The record shows two lines of evidence supported the aggravator in addition to the scene – that is the Greenville County Sheriff's Department's on-duty policy and the death benefits for line of duty death. As this Court found in (9)(b)(2) above, both are relevant and admissible evidence supporting the submission of the aggravator to the jury. Evans has failed in his burden of proof.

At any rate, the evidence presented at trial was sufficient to support the aggravating circumstance given, as more fully discussed in regard to the ineffective assistance allegation 9(b)(2) above.

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

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

9(d)(5) Improper Evidence: Victim Impact

Evidence Exceeding That Allowed Under Payne v. Tennessee

Again, error that could have been presented in the direct appeal and is barred pursuant to S.C. Code § 17-27-20(b)(1985) and the *Simmons* Doctrine. At any rate, Evans cannot prove error for all the reasons argued in Ground 9 (b)(5) above.

9(d)(6) Trial Court Error: Cumulative Impact

Again, error that could have been presented in the direct appeal is barred from presentation and consideration in a post-conviction relief action pursuant to S.C. Code § 17-27-20(b)(1985) and the *Simmons* Doctrine. Moreover, the Supreme Court of South Carolina has not fully embraced the Cumulative Error Doctrine. *Simpson v. Moore,* 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006)("Whether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina."); *Green v. State,* 351 S.C. 184, 197, 569 S.E.2d 318, 324 (2002)(same). If, however, Evans can pursue relief under this theory, he cannot show error and prejudice.

The Cumulative Error Doctrine requires an appellant to "demonstrate more than error in order to qualify for reversal on this ground. Instead, the errors must adversely affect his right to a fair trial." *State v. Johnson,* 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). An appellant, thus, must show

"prejudice warranting a new trial based on cumulative trial error." Id.

Evans cannot even show trial court error here as trial court error is not a cognizable claim and cannot be litigated in the instant post-conviction relief action. His one issue raised on direct appeal was found procedurally barred. There is no indication the Cumulative Error Doctrine would be applicable, even assuming the doctrine is available.

9(e)Trial Court Error: Trial Court Erred in Qualification of Jurors

Again, error that could have been presented in the direct appeal is barred pursuant to S.C. Code § 17-27-20(b)(1985) and the *Simmons* Doctrine. At any rate, Evans cannot prove error for all the reasons argued in Ground 9 (a)(l) and 9 (b)(l) above, most specifically that the record reflects a sufficient *voir dire,* and no error in qualification of any seated juror.

9(f) Evidence Error, Violation of Constitutional Rights: Gang Affiliation Linked to Future Dangerousness in Prison

Again, error that could have been presented in the direct appeal is barred pursuant to S.C. Code § 17-27-20(b)(1985) and the *Simmons* Doctrine. At any rate, Evans cannot prove error for all the reasons argued in Ground 9 (b)(3) and 9(b)(4) above.

9(g) Trial Court Error: Admission of Lewis Edward O'Cain Testimony

Evans apparently argues the trial court erred in qualifying Mr. O'Cain as an expert. Again, error that could have been presented in the direct appeal is barred pursuant to S.C. Code § 17-27-20(b)(1985) and the *Simmons* Doctrine. At any rate, Evans cannot prove error for all the reasons argued in Ground 9 (b)(3) and 9(b)(4) above.

VI.
CONCLUSION

Based on the foregoing, the application for post-conviction relief as to the guilt phase and Mr. Evan's convictions is denied. Evans has failed to show deficient performance, or if he established deficient performance, he failed to show prejudice such as would support the granting of either a new guilt proceeding. As to the sentencing phase, however, this court finds that faithful adherence to the decision of The South Carolina Supreme Court in Rosemond requires that Mr. Evans' sentence be vacated and a new sentencing hearing be held so that Evans' sentencing jury -- like all other capital sentencing juries in South Carolina history--can consider the issue of mercy. To find otherwise would undermine confidence in the result of Evans' sentence and, ultimately, the rule of law.

IT IS THEREFORE ORDERED THAT:

1. The post-conviction relief application as to Evans' convictions is **DENIED AND DISMISSED WITH PREJUDICE**; and

2. Evans' application as to his death sentence is granted, and a new sentencing hearing is ordered.

IS SO ORDERED this 24TH day of February, 2011.

/s/D. Garrison Hill
Circuit Judge

Greenville, South Carolina.

[FN1] Reported at 371 S.C. 27, 637 S.E.2d 313 (2006).

[FN2] The evidentiary hearing was continued by consent of the parties on numerous occasions. The delay was justifiably caused by serious illnesses of certain counsel and a member of one counsel's immediate family.

[FN3] Mr. Nettles was relieved as counsel due to his impending appointment as the United States Attorney for the District of South Carolina.

[FN4] For reasons unknown, it took more than one year for the full transcript of the June 2009 hearing to be delivered to the parties and the court.

[FN5] During the penalty phase, the jury would hear Mrs. Sapinoso's recounting of events, including the defendant blocking her from calling out for help,

and her attempts to shield her grandson, and survive the harrowing event herself. (R.pp. 1549-1554). Nothing in this testimony remotely supports a "family summit" situation downstairs to help Evans as Evans would have the jury and court believe. In fact, Evans later admitted to counsel that the deputy was actually handcuffed. (Respondent's Exhibit 25, p. 2). Even so, this Court recounts the testimony at trial.

[FN6] As to Mr. Eddie Harvey, even though Evans has abandoned an allegation of error, the record completely refutes his "noted" complaints. First, he complains that counsel should have "prevented" the juror's qualification. (Evans's Post-Hearing Brief, p. 109 n. 51). Defense counsel *did* object to the qualification. (R. p. 613, line 21 - p. 614, line 11). There could be no error in regard to this allegation. Moreover, while the juror was qualified over counsel's objection, (R. p. 614, line 12 - p. 615, line 15), his name was only called in selection of the first alternate, at which time counsel used an available strike. (R. p. 970, lines 1-7). The juror never served on the jury. There could be no prejudice. *Ross v. Oklahoma,* 487 U.S. 81, 86, 108 S.Ct. 2273 (1988)("Any claim that the jury was not impartial... must focus ... on the jurors who ultimately sat.").

[FN7] Even though Evans acknowledged his deference to defense counsel in this regard, defense counsel still included Evans in the process. (See June PCR Tr. pp. 472-473).

[FN8] During the twenty-four hour break in the proceedings, one of the seated jurors who had participated in the guilt deliberations, Larry Coker, lost his mother and was excused. Marlon Sullivan (selected as Alternate 2), replaced Mr. Coker on the jury and participated in the sentencing deliberations. (R. p. 1511, line 4 - p. 1513, line 1).

[FN9] Even so, the allegation is without merit. The final determination on qualification is in the discretion of the trial judge. *State v. Woods,* 382 S.C. 153, 161, 676 S.E.2d 128, 133 (2009). Moreover, that decision will not be reversed on appeal unless "wholly unsupported by the evidence." *Id, citing State v. Green, supra.* It is not necessary in all cases that defense counsel be allowed to question the juror at all: "When the record reveals a juror plainly is not qualified, after thorough examination by the trial judge, to serve and it does not reasonably appear further examination would likely reveal the juror could subordinate his views and apply the law of the state, a reasonable basis exists for excusal for cause of the juror without further examination by defense counsel." *State v. Wise,* 359 S.C. 14, 26, 596 S.E.2d 475, 481 (2004).

[FN10] The forensic pathologist and chief medical examiner, Dr. Michael Eugene Ward, testified that based on wounds and the "historical information given" that all four of the bullets were fired into the deputy's head while his head was on the floor, and "the muzzle of the gun was less than two to three feet from" his head. (R. p. 1402, line 24 - p. 1403, line14). Dr. Ward testified before Evans and

it appears Evans was present for the complete testimony. Therefore, the basis for the assertion by the solicitor was well supported by the record, and Evans was well aware of the facts presented to the jury before he testified.

[FN11] The individual juror questionnaires are held in the clerk's office. The forms reflect the follow questions:

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

_____

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

_____

[FN12] The aggravator reads, in relevant part, that the murder "was committed against a law enforcement officer... while engaged in the performance of his official duties or because of the exercise of his official duty," 421 S.E.2d at 465, which is substantially similar to the wording of our statute.

[FN13] Defense counsel testified they investigated whether the aggravator was appropriate. Counsel consulting with several

officers, and conducted legal research. (See June PCR Tr. p. 239; p. 241; p. 242; p. 368). In fact, counsel generally referenced finding a statutory provision that provided, essentially, that an officer was on duty at all times. *See generally* S.C. Code § 23-1370 (directing deputy shall remain on duty at night, shall always be on duty not less than ten hours a day). *See also Gaines,* 421 S.E.2d at 574 ("At common law, a law enforcement officer had the duty to keep the peace at all times."). The State's reliance only on the more restrictive Greenville County Sheriff Department's policy inured to Evans's benefit.

[FN14] Dr. Cooper-Lewter accepted tattoos and admissions as proof of membership to Christina. (October PCR Tr. p. 107). However, and somewhat curiously, Dr. Cooper-Lewter rejected Evans's tattoos and multiple self-admissions as proof of membership. (October PCR Tr. p. 119120).

[FN15] Evans also presented affidavits. (October PCR Tr. pp. 229-231). Respondent maintains an objection to the affidavits. This Court need not consider the affidavits. Evans has shown no necessity or need to present the affidavits. As Respondent referenced in argument, and as the most cursory review demonstrates, the "running theme" is that several friends and family members did not consider Evans to be a gang member. This theme has been fully presented by Evans through witnesses called at the evidentiary hearing and subject to cross-examination. Thus, the Court need not consider the affidavits or Respondent's request

to submit additional information affecting credibility of the affiants. *Cf Melendez-Diaz v. Massachusetts,* 129 S. Ct. 2527 (2009)(trial by affidavit is fundamentally at odds with our judicial process).

[FN16] This number appears to change, with Evans's sister recalling Evans coming to Greer, South Carolina before the age of thirteen, and Dr. Cooper-Lewter recalling age 14. School records, and testimony from a school friend, would tend to show he was actually 14 as Dr. Cooper-Lewter testified. (See, for example, June PCR Tr. p. 112).

[FN17] Defense counsel Sumner testified that calling Christina to even attempt to explore her belief as to whether or not Evans was a gang member could open the door to evidence Evans's abuse of her. (June PCR Tr. p. 487; p. 491; pp. 516-517). Not only would any evidence going to Christina's character not be relevant at trial, and constitute improper character evidence, this Court finds the strategy to avoid having Christina testify to be reasonable in light of the evidence.

[FN18] Respondent objected to Court's acceptance of the professor's testimony on the diagnostic level, noting the lack of reliability of Professor Gur's method for diagnostic purposes. (June PCR Tr. p. 647). Respondent noted that the method for diagnosing dysfunction based on MRI films alone was not reliable, and the professor had been found not qualified in at least one other case, *United States v. Lisa M. Montgomery,* PACER

available, *C/A* 05-6002-01-CR-SJ-GAF, Motion of the United States, Document 273 at pp. 1-2 (referencing September 5, 2007 notice from the Court of the Court's intention to exclude the testimony). This Court allowed Professor Gur to testify in the PCR. This Court finds it is questionable whether Dr. Gur's testimony would be admissible as Evans has failed to show that brain volume analysis is an accepted diagnostic tool for either dysfunction or damage. This Court makes no specific finding as to possible admissibility of the evidence at the trial as it resolves the issue on lack of prejudice having considered the evidence of brain damage as a whole.

[FN19] The record shows Evan's trial counsel spent hundreds of hours in preparation. (See, e.g., Respondent's Exhibits 12, 13, 14, 16, 17). Respondent notes that Evans's social worker, both interviewing and further interpreting, required only two months to prepare for the collateral proceeding beginning June 1,2009. (See October PCR Tr. p. 122). Even so, here, the reviewing court is concerned with actual error, and abstract time arguments are merely a distraction. *See generally, Simpson v. Moore,* 367 S.C. 587, 598 n.2, 627 S.E.2d 701, 707 n.2 (2006), *quoting Jones v. State,* 332 S.C. 329,339, 504 S.E.2d 822, 827 (1998)(an applicant "may not simply posit suppositions and speculations in an attempt to establish that counsel was ineffective").

[FN20] Several of the school records admitted noted the mother's concern over the disability, but also that she failed to attend school conferences

designed to help Evans. (June PCR Tr. p. 25; p. 90). This additional information supports the lack of "follow through" as noted by the defense team.

[FN21] Long-standing South Carolina law also holds that a trial court's instructions to the jury cannot impede "the right and duty of the jury to recommend the appellant to the mercy of the court, in the event the jury reach the conclusion that appellant was guilty of murder." *State v. Blakely,* 158 S.C. 304, 155 S.E. 408, 409 (1930).

[FN22] For example, S.C. Code Ann. § 16-52, as amended (1962) provided: "whoever [was] guilty of murder shall suffer the punishment of death; provided, however, that in any case in which the prisoner is found guilty of murder the jury may find a special verdict recommending him to the mercy of the court whereupon the punishment shall be reduced to imprisonment during the whole lifetime of the prisoner." See *State v Harper,* 251 S.C. 379, 162 S.E.2d 712 (1968).

THE SUPREME COURT OF SOUTH CAROLINA

Kamell D. Evans, Respondent/Petitioner

v.

State of South Carolina, Petitioner/Respondent

Appellate Case No. 2011-188687

ORDER

This matter is before the Court by way of cross-petitions for a writ of certiorari. The petitions for a writ of certiorari are both granted. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(j), SCACR.

/s/ Jean H. Toal C.J.
/s/ Costa Pleicones J.
/s/ Donald W. Beatty J.
/s/ John Kittredge J.
/s/ Kaye G. Hearn J.

Columbia, South Carolina

April 16, 2014

cc:
Melody Jane Brown, Esquire
William Harry Ehlies, II, Esquire
Alan McCrory Wilson, Esquire

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(D)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kamell D. Evans, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

Appellate Case No. 2011-188687

ON WRIT OF CERTIORARI

Appeal from Greenville County
The Honorable D. Garrison Hill, Circuit Court Judge

Memorandum Opinion No. 2015-MO-027
Heard December 9, 2014 - Filed May 13, 2015

CERTIORARI DISMISSED AS IMPROVIDENTLY GRANTED

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. Mcintosh, Senior Assistant Deputy Attorney General Donald J. Zelenka and Senior Assistant Attorney General Melody J. Brown, all of Columbia, for Petitioner/Respondent.

William H. Ehlies, II, of Greenville, and Christopher W. Seeds, of Ithaca, New York, for Respondent/Petitioner.

J. Christopher Mills, of Columbia, for Amicus Curiae, South Carolina Religious Leaders and Scholars.

PER CURIAM: After careful review of the record, appendix, and briefs, the writs of certiorari are dismissed as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

PLEICONES, BEATTY, and HEARN, JJ., concur. TOAL, C.J., dissenting in a separate opinion in which KITTREDGE, J., concurs.

CHIEF JUSTICE TOAL: I would reverse the post-conviction relief (PCR) court's finding that

Respondent-Petitioner Kamell D. Evans is entitled to a new sentencing hearing because his trial counsel [FN 1] failed to object to the trial court's erroneous jury instruction. [FN 2]

FACTUAL/PROCEDURAL HISTORY

Evans was convicted of two counts of murder, two counts of possession of a weapon during the commission of a violent crime, two counts of kidnapping, and one count of first degree burglary for the events leading up to and death of Greenville County Sheriff's Deputy Antonio J. "Joe" Sapinoso and his father, Antonio L. "Tony" Sapinoso.

The material facts at trial were undisputed, and Evans admitted to killing the two victims—the father and brother of Evans's ex-girlfriend Christina Roderiguez. The evidence established that on April 1, 2003, Evans arrived at the Sapinoso home at nighttime, dressed in all-black clothing and wearing gang insignia, with three guns, over forty rounds of ammunition, and a knife. Evans parked his vehicle in an unoccupied neighboring lot, and hid in the woods while he waited for Joe to arrive home after his shift with the Sheriff's Department. Upon Joe's arrival, Evans held the still-uniformed officer at gunpoint, relieved him of his service weapon, and forced him into the home. A four-hour hostage situation ensued, during which Evans engaged in negotiations with a hostage negotiator from the local police department and heard pleas for the release of the victims by his friends and family. Marcia Sapinoso (Tony's wife and Joe's mother) and

Christina's minor son were locked in a closet upstairs.

The situation ended tragically when Evans shot the two victims in the head—one of whom (Joe) was shot "execution style"—killing them. Forensic evidence established that Evans shot Joe four times in the back of the head at close range while Joe's head was on the floor. Further, Evans shot Tony twice in the head and once in the arm, which was considered a defensive wound. Evans testified that he shot Joe when he tried to reach for Evans's gun, and that he shot Tony because he stood up at the same time Joe reached for the gun.

During the sentencing phase of Evans's trial, the State presented evidence of three aggravators with respect to the murder of Tony Sapinoso, and four aggravators with respect to the murder of Joe Sapinoso.[FN 3] Marcia Sapinoso, Cheri Jones (Joe's longtime girlfriend), and one of Joe's fellow police officers and friends provided victim impact testimony. The State sought to capitalize on evidence presented during trial that painted Evans as a gang member, and presented testimony that he would likely pose a threat to the general prison population.

Likewise, Evans presented a full mitigation case, emphasizing his good character and his mental health issues. Various family members, friends, a co worker, and former coaches of Evans testified to his positive attributes as a leader on the football field, a loving brother and uncle, a friend and mentor to

children in need, and a solid and dependable employee. Evans's trial counsel also presented expert testimony to refute the State's expert's testimony that Evans would likely perpetrate gang violence while in prison. Finally, Evans's defense counsel presented testimony by a neuropsychologist that Evans had certain cognitive deficiencies indicative of brain dysfunction that would have impaired his decision making during the hostage situation, and a psychiatrist, who diagnosed Evans with "major depressive disorder, single episode." In sum, during the sentencing phase of the trial, Evans's trial counsel sought to capitalize on their guilt-phase strategy of emphasizing Evans's good qualities; portraying the killings as a horrible, one-time mistake; and focusing on a theme of "no excuses."

By doing so, defense counsel hoped that the jury would show Evans mercy and spare him the death penalty by recommending a life sentence. After the trial judge explained mitigation and aggravation to the jury, Goldsmith then delivered his opening remarks during the sentencing phase:

> And part of what we are going to try to show you is that first and foremost, and this may seem simplistic, but . . . Evans is a human being. And you are being asked whether you will kill or sentence to life imprisonment a fellow human being, granted a human being capable of great evil. And I'm not going to diminish that. But what we hope to

> show you also is a human being capable of some good, perhaps even great good, a human being who in one 10-second episode of his life made a horrible decision, a tragedy, and inflicted much pain on people during that ten seconds and afterwards.

Goldsmith reiterated:

> Even if the state proves every aggravating factor that they prove, that they present to you, even if you find aggravation, you still without question can sentence him to life imprisonment without the possibility of parole.
>
> You can, as I have always said, show mercy. You can always choose life.

Goldsmith again focused on mercy during his closing argument, stating:

> Ladies and gentlemen, we do not repay evil with evil. The solicitor is correct. I am going to ask for mercy for [Evans]. But I disagree with what the solicitor said is the definition of mercy. He said mercy is something that you deserve. I strenuously disagree, ladies and gentlemen.

> If we deserved it, if we could earn it, then we probably wouldn't need it. Mercy is unmerited favor. You can't earn it; you don't deserve it; but you give it to him anyway. ... We don't repay evil for evil. And mercy is appropriate in this case.
>
> You can show mercy and you can choose life regardless of who deserves it and who does not. We all need mercy, but none of us have earned it and none of us deserve it.[FN 4]

The trial judge then delivered the following jury instruction:

> Now, in making your determination as to which sentence to recommend in this case you should consider the statutory aggravating circumstances, the statutory mitigating circumstances and any nonstatutory mitigating circumstances in arriving at your decision.
>
> ...
>
> The existence of any statutory or nonstatutory mitigating circumstance is not a bar to the recommendation of a death sentence so long as you have found the existence of at least one statutory aggravating circumstance beyond a reasonable doubt.

> Conversely, you may also recommend a sentence of life imprisonment even though you find at least one of the statutory aggravating circumstances beyond a reasonable doubt.
>
> Simply stated, you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy.

(Emphasis added). Trial counsel did not object.

The jury recommended Evans be sentenced to death for the murders, and the trial judge imposed the death sentence for both counts of murder, and lifetime imprisonment for the first degree burglary charge. [FN5] This Court ultimately affirmed Evans's convictions and sentence on direct appeal. *See State v. Evans*, 371 S.C. 27, 637 S.E.2d313 (2006).

Subsequently, Evans filed an application for PCR. Evans's PCR hearing was held on June 1-5, 2009. On June 25, 2009, this Court issued an opinion in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009), in which it admonished the bench that the specific phrasing of the same jury charge delivered in Evans's case not be used again. Evans subsequently moved to amend his application, arguing that his trial counsel was ineffective for failing to object to the condemned charge.

At the PCR hearing, Evans's trial counsel maintained that they did not understand the instruction to preclude the jury's consideration of mercy. Instead, they claimed they did not object to the jury instruction because they believed the instruction emphasized to the jurors that they could consider mercy. Sumner testified he "liked" the charge because it was "brief," it "use[d] the word mercy," and it "seem[ed] to get across what [trial counsel] were trying to do." Goldsmith testified he thought the charge "pretty much tracked with what [trial counsel] thought should be charged," and he believed the charge "was sort of an expansive charge." Both testified that had they believed the charge limited the jury's "use of mercy," they would have objected because mercy was the "primary element," "key highlight," and the "major part" of their mitigation case, and because Goldsmith had "built [his] closing argument around mercy."

The PCR court found that Evans was entitled to PCR on the sole basis that Evans's trial counsel failed to object to the trial court's jury instruction regarding mercy, and found that prejudice to Evans resulted. The PGR court rejected Evans's other arguments.

The State petitioned this Court for a writ of certiorari, [FN 6] and we granted review pursuant to Rule 243, SCACR.

ANALYSIS

The State argues that the PCR court erred in finding Evans's trial counsel ineffective for failing to object to the trial court's jury instruction regarding mercy during the sentencing phase of Evans's trial. I agree and would reverse the PCR court's decision granting Evans relief on this basis.

On appeal in a PCR action, this Court applies an "any evidence" standard of review. *Cherry v. State*, 300 S.C. 1 15, 1 19, 386 S.E.2d 624, 626 (1989). In other words, the "PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) (citing *Cherry*, 300 S.C. at 119, 386 S.E.2d at 626).

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const, amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 686).

As such, courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. *Cherry*, 300 S.C. at 1 17, 386 S.E.2d at 625 (citing *Strickland*, 466 U.S. at 668). First, the applicant must demonstrate counsel's

representation was deficient, which is measured by an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 688).

Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

In *Rosemond*, we granted relief to the PCR applicant on the basis that he established his entitlement to a new sentencing hearing as a result of trial counsel's failure to present any mental health mitigation evidence in the sentencing phase. 383 S.C. at 330, 680 S.E.2d at 11. However, in dictum we said:

> We nevertheless elect to address [the applicant's] challenge to trial counsel's failure to object to the trial court instructing the jury not to recommend a sentence of life based on mercy: "you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy" (emphasis added). We agree

> with [the applicant] and hold that if a plea for mercy is admitted in evidence, then a jury should be entitled to consider it.

Id. at 329, 680 S.E.2d at 10. Further, we explained:

> It is proper to instruct a jury in a capital sentencing phase that it may recommend a life sentence for any reason or no reason at all, including as an act of mercy. A jury's consideration of mercy, if proper evidence of mercy is admitted, is well recognized in the sentencing phase of a capital case. Because a capital jury may consider properly admitted evidence of mercy in the sentencing phase, consideration of mercy is not inconsistent with the instruction that "the jury should not be guided by sympathy, prejudice, passion, or public opinion . . . ."

Id. at 330, 680 S.E.2d at 10-1 1 (quoting *State v. Singleton* , 284 S.C. 388, 393, 326 S.E.2d 153, 156 (1985), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)).

In *Rosemond*, we did not analyze the condemned jury instruction in the context of *Strickland;* instead, we alerted the bench and bar to the potential for confusion resulting from its continued use. Thus, in analyzing this same

instruction here, we must do so using the ineffectiveness paradigm.

Regardless of whether trial counsel was deficient in failing to object to the instruction here,[FN7] 1 would hold that Evans cannot satisfy the prejudice prong of Strickland. In that regard, the ultimate test to determine the propriety of the trial judge's charge is "what a reasonable juror would have understood the charge to mean" in the context of the entire jury instruction. *State v. Bell*, 305 S.C. 11, 16,406 S.E.2d 165, 168 (1991); *see also, e.g., State v. Hicks*, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998) ("A jury instruction must be viewed in the context of the overall charge.").

Here, Evans contests one sentence of a lengthy charge that instructed the jury to consider all statutory and non-statutory mitigating factors in arriving at their verdict. In my opinion, the rest of the instruction, the emphasis placed on mercy by both the State and the defense, the trial judge's general opening explanation of mitigation and aggravation to the jury, and the unremarkable position of the condemned instruction in the context of the overall charge, all combine to preclude a finding of prejudice. Under these facts, a reasonable juror unquestionably would have been aware that he or she could recommend life as an act of mercy. Thus, it is my opinion that Evans has not proven that he was prejudiced by the defective instruction; consequently, his Strickland argument must fail.

Accordingly, I would reverse this portion of the PGR court's decision.

KITTREDGE, J., concurs.

[FN1] At trial and during the subsequent capital sentencing hearing, Evans was represented by Steven W. Sumner and James Lee Goldsmith, Jr. (collectively, trial counsel).

[FN2] However, I agree that the remaining issues raised by Evans should be dismissed as improvidently granted.

[FN3] The following statutory aggravating circumstances were presented to the jury with respect to the murder of Joe Sapinoso: (1) the murder was committed during the commission of first degree burglary; (2) the murder was committed during the crime of kidnapping; (3) Evans murdered two or more persons pursuant to one course of conduct; and (4) Evans murdered a law enforcement officer during or because of the performance of his official duties. The same aggravating circumstances were presented to the jury with respect to Tony Sapinoso, with the exception of the law enforcement aggravator.

[FN4] On the other hand, the Solicitor told jurors not to "feel sorry" for Evans.

[FN5] The trial court declined to impose sentences for the kidnapping and weapon convictions pursuant to sections 16-3 -490(A) and -910 of the

South Carolina Code. *See* S.C. Code Ann. §§ 16-3-490(A), -910 (2003).

[FN6] Evans also appealed the PGR court's order. As stated, *supra*, I agree that those grounds for appeal should be dismissed as improvidently granted.

[FN7] I note that trial counsel did not have the benefit of the *Rosemond* ruling at the time of trial or even at the initial PCR hearing. *See Wilds v. State*, 407 S.C. 432, 442-43, 756 S.E.2d 387, 392 (Ct. App. 2014), *cert, granted*, Nov. 20, 2014 (finding that trial counsel was not deficient where the case on which the PCR applicant relied had not yet been decided by this Court).

THE SUPREME COURT OF SOUTH CAROLINA

Kamell D. Evans, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent

Appellate Case No. 2011-188687

ORDER

The Petition for Rehearing filed on behalf of the petitioner/respondent in the above entitled matter is denied.

/s/ Costa Pleicones J.
/s/ Donald W. Beatty J.
/s/ Kaye G. Hearn J.

I would grant the Petition for Rehearing.

/s/ Jean H. Toal C.J.
/s/ John Kittredge J.

Columbia, South Carolina
August 6, 2015

cc:

Melody Jane Brown, Esquire
William Harry Ehlies, II, Esquire
Donald J. Zelenka, Esquire
Christopher Seeds, Esquire
John Christopher Mills, Esquire

It now becomes your duty to decide what sentence shall

be imposed upon the defendant for having been found guilty

of those two counts of murder.

There are two possible verdicts that you will consider

as the sentence to be imposed as to each of the convictions

in this case. One is a sentence of life imprisonment; the

other is a sentence of death. You will make your

determination as to the appropriate sentence to be imposed

for each of the murder convictions based upon your

consideration of all of the evidence presented in the case

and my instruction as to the law that is applicable.

Now, while the sentence that you recommend is referred

to in the law as a recommendation, it is a recommendation

that must be followed by the Court; and therefore whatever

sentence that you recommend will be imposed by the Court

upon the defendant in this case.

There are certain forms which I have prepared and that

will be in the jury room with you to assist you as you

carry out your duties and follow the instructions given by

the Court.

Mr. Foreman, you will be required to complete the

appropriate forms depending upon you and your fellow

jurors' determination as to the appropriate sentence to be

imposed in the case.

Now, the first form is a recommendation of a sentence

of death. You may recommend that the defendant be sentenced to death under certain circumstances.

Please note that on that form immediately below the recommendation language there are 12 lines where each of you 12 jurors would be required to sign your names indicating your unanimous decision as to the imposition of the death sentence.

The law requires that a recommendation of the imposition of a death sentence be a unanimous recommendation, and each juror would be required to sign his or her name to that recommendation form.

Now, before you are permitted to return a recommendation of the imposition of a death sentence it

would be necessary that all 12 jurors have unanimously

found the existence of at least one statutory aggravating

circumstance beyond a reasonable doubt.

That statutory aggravating circumstance, or

circumstances where you find more than one should you do

you do so, would be written in the space provided on the

recommendation form located directly above the juror

signature line.

Now, as I have previously told you, in order for you

to recommend a sentence of death it would be necessary that

the jury has unanimously found the existence of at least

one statutory aggravating circumstance beyond a reasonable

doubt.

A statutory aggravating circumstance is a fact, an incident, a detail or an occurrence which the state legislature has declared by statute to be a circumstance which may make worse or aggravate the crime of murder when it accompanies the offense.

Sir, would you please leave that camera along while I am instructing this jury? Have a seat, please, sir.

It is something which may increase the enormity of or adds to the injurious consequences of the offense of murder and which may support the imposition of the death penalty as the more appropriate sentence.

As is reflected in the statutory instruction form which you will have in the jury room with you, in making your determination as to whether to recommend a sentence of death or to recommend a sentence of life imprisonment in the case of the murder of Antonio J. Sapinoso, you may consider the following statutory aggravating circumstances:

Number one, that the murder of Antonio J. Sapinoso was committed while in the commission of the crime or act of burglary in the first degree.

A second statutory aggravating circumstance is that the murder of Antonio J. Sapinoso was committed while in the commission of the crime or act of kidnapping.

A third statutory aggravating circumstance which may

be considered by the jury is that two or more persons were

murdered by the defendant by one act or pursuant to one

scheme or course of conduct.

And the fourth statutory aggravating circumstance

which may be considered is that the murder was of a law

enforcement officer during or because of the performance of

his official duties.

Now, in the case of the murder of Antonio L. Sapinoso

you may consider the following statutory aggravating

circumstances:

Number one, that the murder of Antonio L. Sapinoso was committed while in the commission of the crime or act of burglary in the first degree.

The second statutory aggravating circumstance which may be considered is that the murder of Antonio L. Sapinoso was committed while in the commission of the crime or act of kidnapping.

The third statutory aggravating circumstance which may be considered in that particular case is that two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

Now, I emphasize to you that you must find beyond a

reasonable doubt the existence of at least one of these

statutory aggravating circumstances before you are

permitted to recommend a sentence of death.

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Should you 12 jurors unanimously find the existence of

one or more of the statutory aggravating circumstances as

listed on the statutory instruction sheet beyond a

reasonable doubt, then you may, that is you are permitted,

to impose a sentence of death on the defendant.

As I have previously instructed you, a reasonable

doubt is the kind of doubt that would cause a reasonable

person to hesitate to act upon the information provided.

Now, the law does not require you to recommend the

imposition of a death sentence even if you do find one or

more of the statutory aggravating circumstances have been

proven beyond a reasonable doubt.

Should you find that the state has not proven to your

satisfaction beyond a reasonable doubt the existence of at

least one statutory aggravating circumstance, then you

would not be authorized nor permitted to return a

recommendation for the imposition of a death sentence.

Should you find beyond a reasonable doubt the

existence of one or more of the statutory aggravating

circumstances as listed on the statutory instruction form

accompanying the murder and should you further find that

the defendant should be sentenced to death after also

considering the evidence in favor of a recommendation of a

life sentence about which I will instruct you later, then

it would be your duty, Mr. Foreman, to write on the

recommendation-of-a-sentence-of-death form the statutory

aggravating circumstances which you and your fellow jurors

have found beyond a reasonable doubt.

Then, Mr. Foreman, you and each juror would be

required to sign your names in the spaces provided

indicating your unanimous recommendation as to the

imposition of a death sentence.

You will also have in the jury room with you a

recommendation-of-a-sentence-of-life-imprisonment form.

You may recommend that the defendant be sentenced to a term of life imprisonment. Life imprisonment means for the balance of the defendant's life without the possibility of parole or early release.

Please note that while a recommendation of a life sentence must also be a unanimous decision of the jury, only the foreman is required to sign his name to that particular sentencing recommendation form.

In arriving at your decision as to what the appropriate sentence should be in these cases you are instructed that you must also consider any statutory mitigating circumstances.

Now, a statutory mitigating circumstance is a fact or

an incident, a detail or an occurrence which the state

legislature has declared by statute to be a circumstance

which may be caused to lessen or to reduce the severity of

the crime of murder.

It is a circumstance which may be considered as

mitigating or extenuating the degree of moral culpability

for the commission of the offense of murder. A mitigating

circumstance is neither a justification for nor an excuse

for the crime of murder. It is simply something which may

lessen the degree of the defendant's responsibility or make

the defendant less blameworthy or less culpable than he might otherwise be found to be.

In making your determination as to whether or not to recommend a sentence of death or whether or not to recommend a sentence of life imprisonment you shall consider the following statutory mitigating circumstances:

Number one, that the defendant has no significant history of prior conviction involving violence against another person.

A second mitigating circumstance you are to consider is that the murder was committed while the defendant was under the influence of mental or emotional disturbance.

And the third statutory mitigating circumstance that you are to consider is the age or mentality of the defendant at the time of the crime.

Now, you should also consider any nonstatutory mitigating circumstances that have been shown to exist by the evidence in the case. A nonstatutory mitigating

circumstance is one which may serve the same purpose, that is to less or to reduce the degree of the defendant's responsibility in the commission of the crime of murder.

Now, while there must be some evidence which supports a finding by you of the existence of one or more statutory or nonstatutory mitigating circumstances, it is not

necessary that you find the existence of such mitigating

circumstance or circumstances beyond a reasonable doubt.

You may recommend a sentence of life imprisonment whether

or not you find the existence of a statutory or a

nonstatutory mitigating circumstance.

Now, in making your determination as to which sentence

to recommend in this case you should consider the statutory

aggravating circumstances, the statutory mitigating

circumstances and any nonstatutory mitigating circumstances

in arriving at your decision.

While you must find the exitance of at least one

statutory aggravating circumstance beyond a reasonable

doubt before you may consider recommending a sentence of

death, once such a finding is made you are permitted to

recommend a sentence of death even though you may also find

the existence of one or more statutory or nonstatutory

mitigating circumstance.

The existence of any statutory or nonstatutory

mitigating circumstance is not a bar to the recommendation

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of a death sentence so long as you have found the existence

of at least one statutory aggravating circumstance beyond a

reasonable doubt.

Conversely, you may also recommend a sentence of life

imprisonment even though you find at least one of the

statutory aggravating circumstances beyond a reasonable

doubt and you find no mitigating circumstances to exist.

Simply stated, you may recommend a sentence of life

imprisonment for any reason or for no reason at all other

than as an act of mercy. Whatever your decision may be

regarding a recommendation of sentence, the decision of the

jury must be unanimous. All 12 of you must be in agreement

in order to return any recommendation as to sentence. And

whatever your recommendation is, it must be found in the

absence of passion, prejudice or caprice and only after

considered judgment.

...

1785 [errors in original]