No. 08-1237

In The
SUPREME COURT OF THE UNITED STATES

October Term, 2008

State of South Carolina,

Petitioner,

v.

Donney S. Council,

Respondent.

Brief in Opposition
To Petition for a Writ of Certiorari
to the Supreme Court of South Carolina

CAPITAL CASE

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CAPITAL CASE

Question Presented

Whether the Supreme Court of South Carolina properly applied the standard in *Strickland v. Washington*[1] when it found ineffectiveness of defense counsel in the capital sentencing phase of trial?

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[1] 466 U.S. 668 (1984).

Table of Contents

Question Presented i

Table of Authorities iii

Statement of the Case 1

Reasons for Denying the Writ 2

A. The state court properly applied the *Strickland* standard. 3

B. In applying the *Strickland* standards, the state court properly found that "there was very strong mitigating evidence" that defense counsel could have–but unreasonably did not--present to the jury, opting instead to present an unreasonable all-or-nothing defense of innocence of murder, resulting in prejudice to Council. 8

Conclusion 14

Table of Authorities

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Petitioner, the State of South Carolina (hereafter "the State") has filed a petition for *certiorari* seeking review of the decision of the South Carolina Supreme Court ordering a new capital sentencing hearing for Respondent, Donney S. Council (hereafter "Council"), who has been adjudicated as incompetent, due to schizophrenia, since July 31, 2001. South Carolina Supreme Court Appendix (hereafter "State App.") at 3799-3818; *Council v. Catoe*, 597 S.E.2d 782 (S.C. 2004).

Statement of the Case

The South Carolina Supreme Court affirmed the post-conviction relief (hereafter "PCR") court's ruling that Council was deprived of effective assistance of counsel in the penalty phase of his trial for murder and related crimes.[2] The state court held that the PCR judge "properly found trial counsel's conduct was deficient," and that "Respondent was prejudiced by counsel's deficient performance." App. A at 20; *Council*, 670 S.E.2d at 365. The State claims in its Petition to this Court that the state court employed its own, erroneous standard for judging whether Council was prejudiced by trial counsel's conduct of the defense. In affirming the PCR judge's finding that Council was deprived of his rights under the Sixth Amendment of the United States Constitution, the South Carolina Supreme Court properly utilized the standard enunciated in *Strickland v. Washington*, 466 U.S.668 (1984).

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[2]Council's claim that he was denied the effective assistance of counsel due to counsel's failure to investigate Council's mental state at the time of the crime remains pending, following the state court's reversal of and remand to the PCR court on this claim. Appendix A to the Petition for Writ of Certiorari ("hereinafter App. A) at 24-26; *Council v. State*, 670 S.E.2d 356, 367-368 (S.C. 2008).

Reasons for Denying the Writ

"[T]he *Strickland* test of necessity requires a case-by-case examination of the evidence. *Williams v. Taylor,* 529 U.S. 362, 391 (2000) (quotations omitted). "And, because the *Strickland* standard is a general standard, a state court has . . . latitude to reasonably determine whether a defendant has [or has not] satisfied that standard." *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1420 (2009).

The State's entire argument for *certiorari* depends on reading the South Carolina Supreme Court's decision as one that "abandoned the *Strickland* standard" in finding ineffective assistance of counsel. Petition at 5. This reading is manifestly wrong.

The South Carolina Supreme Court below held–and so explicitly as to make any other reading a plain distortion of both text and law–that it was applying the standard set forth in *Strickland*, as it has consistently in its opinions between 1985 and the present. *See, e.g., Butler v. State*, 334 S.E.2d 813, 814 (S.C. 1985); *Battle v. State*, ___ S.E.2d ___, 2009 WL 282263, *3 (S.C. Apr. 13, 2009).

The state court's analysis of the ineffective assistance claim began with a proper statement of the applicable standards.

> In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. *Caprood v. State,* 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). In order to prove that counsel was ineffective, the PCR applicant must show that: (1) counsels performance was deficient; and (2) there is a reasonable probability that, but for counsels errors, the result of the trial would have been different. *Id.* (citing *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). We will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR

> court when it is controlled by an error of law. *Suber v. State,* 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

App. A at 11-12; *Council*, 670 S.E.2d at 361. After finding counsel's conduct to be deficient, the court stated the applicable standard for determining prejudice, as follows:

> "When a defendant challenges a death sentence, prejudice is established when 'there is a reasonable probability that, absent [counsel's] errors, the sentencer-including an appellate court, to the extent it independently reweighs the evidence-would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Jones v. State,* 332 S.C. 329, 333, 504 S.E.2d 822, 823 (1998) (quoting *Strickland v. Washington,* 466 U.S. 668, 695, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). This Court explained, "[t]he bottom line is that we must determine whether or not [Respondent] has met his burden of showing that it is reasonably likely that the jury's death sentence would have been different if counsel had presented additional information about [Respondent's] mental condition. In making this determination, we must consider the totality of the evidence before the jury." *Jones,* 332 S.C. at 333, 504 S.E.2d at 824.

App. A at 20; *Council*, 670 S.E.2d at 365.

A. The state court properly applied the *Strickland* standard.

In holding that "the PCR judge correctly determined that trial counsel was ineffective in failing to adequately investigate and present mitigating evidence," App. A at 12; *Council*, 670 S.E.2d at 361, and that counsel's conduct was prejudicial to Council's Sixth Amendment rights, the court below employed the *Strickland* standard throughout its opinion. "In light of Respondent's burden and this Court's standard of review, we agree with the PCR judge that counsel's deficient performance prejudiced Respondent…." App. A at 21; *Council*, 670 S.E.2d at 365.

In its Petition to this Court, at p. 5, the State complains that the lower court "abandoned the constitutional test [in *Strickland*], and allowed relief in the instant case. The misuse is evident in the plain wording of the erroneous opinion." The Petition then misquotes the opinion, stating: "[t]he analysis veered into '*may have influenced* the jury's assessment.' (Appendix A. p. 21)." Petition at 5 (emphasis in original). The correct quotation is: "[w]e believe, as did the PCR judge, this evidence may well have influenced the jury's assessment of Respondent's culpability." App. A, at 21, *Council*, 670 S.E.2d at 365. By deleting the word "well," the State turns the correct and appropriate statement of the court into a questionable version of the *Strickland* standard. Correctly quoted, however, the court's statement is virtually the same as that of this Court: "[i]t goes without saying that the undiscovered 'mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [Respondent's] culpability.'" App. A at 21, Council, 670 S.E.2d at 365 (quoting *Rompilla v. Beard*, 545 U.S. 374, 393 (2005) (quoting *Wiggins v. Smith*, 539 U.S. 510, 538 (2003)). *See also Williams,* 529 U.S. at 398 ("the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability").[3]

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[3]This "may" or "might" "well have influenced" language has been incorporated, cited, or quoted by numerous federal and state courts in granting relief on ineffective assistance of counsel claims. *See, e.g.*, *Jermyn v. Horn*, 266 F.3d 257, 310 (3rd Cir. 2001); *Van Hook v. Anderson*, 560 F.3d 523, 530 (6th Cir. 2009); *Caro v. Woodford*, 280 F.3d 1247, 1256 (9th Cir. 2002); *Smith v. Mullin*, 379 F.3d 919, 944 (10th Cir. 2004); *Williams v. Allen*, 542 F.3d 1326, 1344 (11th Cir. 2008) (Petition for Writ of Certiorari Filed, 77 U.S.L.W. 3488 (Feb 11, 2009) (No. 08-1032)); *English v. Romanowski*, 589 F. Supp. 2d 893, 903

(continued...)

In addition to misquoting and, thereby, distorting the state court's language to assert application of a "may have influenced" standard, the State also asserts that the state court substituted "harmless error" or "nothing to lose" standards in place of the *Strickland* standard. Again, these assertions are clearly erroneous.

For example, the State relies on language not even included in the lower court's final decision in this case to assert that the state court applied a "harmless error" analysis. Specifically, the State's Petition at 10, refers to a portion of a footnote which the state court *withdrew* from its initial opinion to assert application of a "harmless error" analysis. In addition to the absence of any "harmless error" language in the re-filed opinion, it is patently clear, contrary to the State's argument, that the court did not place a burden on the State to show that counsel's errors and overall deficiency was "harmless." All that the court referred to in footnote 7 is its deferential review of the findings of fact and conclusions of law of the PCR court. *See, e.g., Simpson v. Moore*, 627 S.E.2d 701, 705 (S.C. 2006) ("This Court gives great deference to the PCR court's findings of fact and conclusions of law"). The court made this point when it stated, "[w]e are, nevertheless, bound by a standard of review which mandates our affirmance of the PCR judge's decision if there is any probative evidence to support it." App. A at 29 n.7; App. B at 59 n.7; 670 S.E.2d at 366 n.7.

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[3](...continued)
(E.D. Mich. 2008); *Thomas v. Beard*, 388 F. Supp. 2d 489, 510 (E.D. Pa. 2005); *Pursell v. Horn*, 187 F. Supp. 2d 260, 386 (W.D. Pa. 2002); *King v. Bell*, 392 F. Supp. 2d 964, 990 (M.D. Tenn. 2005); *Sanford v. State*, 25 S.W.3d 414, 420 (Ark. 2000); *In re Lucas*, 94 P.3d 477, 511 (Cal. 2004); *Thompson v. Commonwealth*, 177 S.W.3d 782, 787 (Ky. 2005); *Ex parte Gonzales*, 204 S.W.3d 391, 399 (Tex. Crim. App. 2006).

Although the September 8, 2008 withdrawn opinion, at fn. 7, did refer to "harmless error;" that language was deleted from the re-filed opinion dated December 29, 2008. On the same date, the State's request for rehearing was denied. The denial, coupled with the re-filing, confirms that the court simply recognized that the earlier language was misleading. There was no need for a "reconsideration of the logic and reasoning," as suggested by the State. Finally, the State's reference to a supposed "harmless error" analysis at "App. P. 19" (Petition at 12) is incomprehensible, as that page (App. A, p. 19) contains no such mention. Nor is there any "harmless" analysis anywhere else in the opinion. If the State is referring again to footnote 7, it is totally off-base. Neither case cited there supports the State's position. *Plath v. Moore,* 130 F.3d 595 (4th Cir. 1997) (Ineffective assistance of counsel claims were denied in state and federal court proceedings); *Arnold v. State/Plath v. State*, 420 S.E.2d 834 (S.C. 1992) (No ineffective assistance claim was considered in this opinion involving the constitutional validity of a jury instruction concerning an issue of malice, where the harmless error rule did apply).

Likewise, there is no basis in the state court's opinion for the State's assertion that "[t]he majority applied a 'nothing to lose' standard in evaluation of the claim. (Appendix, p. 20)." Petition at 13. Here, the State seeks to utilize a recent decision of this Court–*Knowles v. Mirzayance*, 129 S. Ct. 1411 (2009)–despite the lack of even a colorable basis for its assertion. The phrase "nothing to lose" appears once in the state court's opinion–in its discussion of factors that may influence penalty phase trial strategy. App. A at 20; *Council*, 670 S.E.2d at 364. The court stated that the

presentation of evidence pertaining to Council's mental condition and difficult childhood and adolescence was not explained by alleged strategy because "it is not inconsistent to present the accomplice theory during the guilt phase but mitigation evidence in the penalty phase." App. A at 20; *Council*, 670 S.E.2d at 364 (citing *Wiggins*, 539 U.S. at 535).[4] Thus, the court stated:

> given the State had already presented damaging evidence, we do not believe Council's character could have been damaged any further by the presentation of additional mitigating evidence. Trial counsel essentially would have had "nothing to lose" and "everything to gain" by presenting this evidence.

App. A at 20; *Council*, 670 S.E.2d at 364-365 (quotation marks in original).[5]

There is no basis in the opinion for the State to argue that the court below utilized a "nothing to lose" standard for deciding whether trial counsel was ineffective because his overall conduct was constitutionally deficient and prejudicial. *See, .e.g.*, *Holland*

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[4]While this Court did not use the phrase "nothing to lose" in finding counsel ineffective in *Wiggins*, the concept of "nothing to lose" was clearly considered by the Court in its reasoning. For example, the Court stated:

> [G]iven the strength of the available evidence, a reasonable attorney may well have chosen to prioritize the mitigation case over the direct responsibility challenge, particularly given that Wiggins' history contained little of the double edge we have found to justify limited investigations in other cases.

539 U.S. at 535.

[5]The phrase "nothing to lose" has been similarly used by numerous other courts in describing counsel's deficient conduct and granting relief on the basis of ineffective assistance of counsel. *See, e.g.*, *Frazier v. Huffman*, 343 F.3d 780, 796, *supplemented on denial of rehearing*, 348 F.3d 174 (6th Cir. 2003); *Douglas v. Woodford*, 316 F.3d 1079, 1091 (9th Cir. 2003); *Esslinger v. Davis*, 44 F.3d 1515, 1530 (11th Cir. 1995); *Schulz v. Marshall*, 528 F. Supp. 2d 77, 96 (E.D.N.Y. 2007); *Peterkin v. Horn*, 176 F. Supp. 2d 342, 379 (E.D. Pa. 2001), *amended on reconsideration*, 179 F. Supp. 2d 518 (E.D. Pa. 2002); *Freeman v. Class*, 911 F. Supp. 402, 407 (D.S.D. 1995), *aff'd*, 95 F.3d 639 (8th Cir. 1996); *Williams v. State*, 987 So. 2d 1, 13 (Fla. 2008); *State v. Kougl*, 97 P.3d 1095, 1099 (Mont. 2004); *Goad v. State*, 938 S.W.2d 363, 371 (Tenn. 1996); *Storr v. State*, 126 S.W.3d 647, 654 (Tex. Ct. App. 2004).

v. Jackson, 542 U.S. 649, 654 (2004) (state court did not misapply *Strickland* standard); *Woodford v. Visciotti*, 537 U.S. 19, 22-24 (2002) (same).

B. In applying the *Strickland* standards, the state court properly found that "there was very strong mitigating evidence"[6] that defense counsel could have–but unreasonably did not--present to the jury, opting instead to present an unreasonable all-or-nothing defense of innocence of murder,[7] resulting in prejudice to Council.

The PCR court found and the South Carolina Supreme Court confirmed that counsel could have presented very strong mitigating evidence which counsel failed to present because he conducted an inadequate investigation and focused on an unreasonable, hopeless theme that Council was innocent of murder. The state court confirmed the PCR court's finding that counsel's investigation was inadequate to develop the wealth of mitigating evidence that was present in Council's background. "[N]ot only did counsel delay in investigating Council's background, he failed to conduct an adequate investigation." App. A at 17; *Council*, 670 S.E.2d at 363. The court faulted counsel for failing to hire a forensic social worker for whom funding was available while employing investigators who were "unqualified" to make assessments of Council's background. *Id.* Counsel hired a former policeman to investigate; he was not involved in interviewing family members or gathering records regarding Council's

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[6]App. A at 21; *Council*, 670 S.E.2d at 365.

[7]Counsel testified at the PCR hearing, "[o]ur focus consistently was that he didn't do it, that Frank Douglas did." State App. at 4465. Douglas was the man whom Council claimed murdered the victim. Two semen stains and one pubic hair found at the victim's home were tested. One semen stain and the mitochondrial DNA evidence from a pubic hair were consistent with Council's DNA but excluded Frank Douglas, and a second semen stain was inconsistent with both Council and Frank Douglas. State App. 1613-14, 1683-84, 1694, 2092-93, 2097, 2242-44, 2273, 4286, 4315. The State carefully avoids pointing out that all three items of DNA evidence excluded Frank Douglas. Petition at 14 and 16.

background. State App. 4357. Counsel's investigator did not list mitigation investigation as an expertise; indeed counsel testified that his investigator "would not have been involved" in obtaining family background information. *Id.* Nor was counsel's wife (and law partner) involved in interviewing people, just in getting records. State App. 4358. Counsel testified, "I didn't see the role of a social historian as a – as rendering an opinion…. I thought that was my job." State App. 4446.

At the PCR hearing, Marjorie Hammock, M.S.W., a licensed forensic social worker, Tora Brawley, Ph.D. (neuropsychologist), and Donna Schwartz-Watts, M.D. (a forensic psychiatrist) testified. There was a great deal of child abuse and neglect in the homes in which Council grew up. State App. 4115-16. Council grew up in an atmosphere where continual violence was the way members of the family solved problems; and chaos, mental illness and low intellectual functioning affected everyone in the family. State App. 4135-38. Council is a "a product of extreme poverty" and a "product of his environment." State App. 4121, 4125. Council's early childhood was "a very chaotic and violent period in his life," a period of "a great deal of abuse of the children and of the mother." State's App. 4101-02. There were many moves of the family (seven in all) due to the violent behavior of Council's father (who, for example, assaulted his wife's brother with a pipe and gun). State App. 4103. The father struck Council's mother while she was pregnant with Council and some of her other pregnancies were stillbirths because of her husband's violence. State App. 4135-36. The violence came from not only the father but from Council's siblings as well. State App. 4136. As Ms. Hammock testified, the impact of all the risk factors "would be more

severe [for Council than for a normal child] because the resources were not there, would not be there to help him . . . to manage the day-to-day." State App. 4124. "As the youngest child, he received probably more intensely the negative influences and there were–there were absolutely at that point no resources for him internally and that's inside the family." *Id.* Council burned himself severely at age 7 when he was trying to cook for himself. As the PCR court noted, Dr. Schwartz-Watts testified that a trauma of this nature could itself cause an anxiety disorder in a child. State App. 4167.

Council's siblings and nephews had been diagnosed with major mental illnesses such as schizophrenia, bipolar, borderline personality disorder and depression. State App. 4123-24, 4129-30, 4139-43. Two children of Council's siblings were removed from the home due to abuse and neglect. There was sexual abuse as well as physical abuse; two of Council's older sisters were convicted of child abuse, and two of the children in the house were diagnosed with gonorrhea, including a six year old girl. State App. 4115-16, 4137.

Records show that between the ages of six and ten, Council injured his head in a fall and he also suffered a striking of his head by a brother. State App. 4132, 4105. Whether due to trauma or mental illness, Council's IQ plummeted from 106 at age 7 to 83 at age 10 and it remained there. State App. 4076-77. This drop in IQ, being in excess of 15 points is considered "significant." State App. 4083. Dr. Brawley opined, "I think it's highly likely that, as I mentioned, there was something psychiatrically going on." State App. 4076. Council was seeing and hearing things and had difficulty

sleeping. State App. 4109. Dr. Ray Vaughters noted that Council, at age 12, evinced "psychotic behavior," State App. 3379, 4107, and had trouble sleeping, hearing things, seeing things in the dark, sleepwalking and having nightmares. State App. 4105-10.

Council was diagnosed with Adjustment Disorder of Adolescence and continued at the Aiken Mental Health Center until February, 1978, when the case was closed because he would not cooperate with counselors. State App. 4109. Council's DJJ and mental health records show that he complained of bizarre dreams about mutilation, where someone was "cutting off his arms;" and the records also show him as "not being present," "not functioning," "spacey," walking around "in a daze," and "volatile." State App. 3242, 3283, 4112, 5512. He experienced "mood swings that range from one end of the spectrum to the other," along with bizarre dreams and fantasies. State App. 4711-12, 4113, 5512.

A court-ordered evaluation and a limited psychological battery of tests done in November, 1992, revealed potential "indications for frontal lobe dysfunction." State App. 4069, 5514. Dr. Brawley stated that frontal lobe dysfunction causes problems with good judgment and behavior. "People with frontal lobe problems are more impulsive. They can't monitor themselves as well. They don't think through the consequences of their actions." State App. 4077. Dr. Brawley believed that there were "potential neuropsychological issues" with Council and "learning disabilities." State App. 4070. Therefore, what was needed, according to Dr. Brawley, was "further testing and further records." State App. 4071. Additional testing was done in 1999, and revealed "more evidence of brain dysfunction, particularly in the frontal lobe." State

App. 4072. Based on the school records, testing, and other history, Dr. Brawley concluded this dysfunction was "in all probability . . . there at the time of the crimes." State App. 4078-79.

Dr. Schwartz-Watts testified that Council's schizophrenia started "probably [in] early adolescence, perhaps even childhood." State App. 4163. Dr. Schwartz-Watts explained why she thought Council was mentally ill since adolescence when other evaluators later found no illness. She pointed out that Drs. Frierson and Kuglar did not have "those records of early reports of those psychotic symptoms. . . . so, first of all, they didn't have access to those earlier records.[8] Secondly, they did not have an awareness of the family history that exists.[9] Thirdly, schizophrenia is a disease . . . . symptoms wax and wane." App. 3244-45, 4171. While Dr. Schwartz-Watts said that Council's present condition makes it impossible for her to determine whether mental illness played a role in the crimes, she could say "with a reasonable degree of medical

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[8]The PCR court found that "[t]he defense expert [Dr. Kuglar] was also clearly focused on the issue of competence since he was not asked to examine the Applicant until shortly before trial [record citation omitted] and he was not provided with any background records other than the reports of the court-appointed examiners and Applicant's records from high school. State App. 5524. The PCR Court did not credit counsel's assertion that he had asked Dr. Kuglar to "focus on any mental health issues that would help us." State App. 4379. The PCR court found the timing of Dr. Kuglar's evaluation of Council–just before the trial began–to be corroborative of the psychiatrist's testimony that he was to look only at Council's "competence and capacity." State App. 5505.

[9]The State's Petition at p. 19 states that "counsel was fully aware of Council's family situation." This is not so. Despite three or four inches of Social Services records concerning Council's family, counsel regarded them as irrelevant. "I thought the information related directly to him was what was important. I did not think about getting social history on siblings…." State App. 4448. "I would not have had anything other than what related to him [Council]." State App. 4369. Indeed, counsel testified that he did not seek or see the relevance of any records pertaining to any other person in Council's family. Of such records, counsel stated, "I would not have viewed those as important." State App. 4378; PCR Order at State App. 5500-02.

certainty" that Council "had a psychiatric diagnosis and he was deemed psychotic at age 10 or 11 . . . . I think it's clear he had an illness before, but for that actual time, that time of that crime, I can't do it. He is too ill to be able to assist me in any way in reconstructing any kind of history." App. 4177, 5525. Dr. Schwartz-Watts found additional indications of Council's mental illness in his bizarre conduct, including his wearing clothes backwards and wearing a hood in hot weather. App. pp. 1811, 1813, 4173-75, 4205, 4213-14. "[I]t can be the actual brain structures involved in schizophrenia that someone who has schizophrenia – their temperature or their ability to feel the temperature is somewhat different. In psychiatry we believe it's because of some of the chemical abnormalities in the brain that you see with schizophrenia but it affects their temperature sensation." App. 4175.

In short, the evidence adduced at the PCR hearing disclosed that Council suffered greatly from a childhood and family life that was deficient and brutal. Council's childhood history is a powerful but missing mitigator, which amply supports the determinations of the PCR court, affirmed by the South Carolina Supreme Court, that Council's counsel's failure to develop this evidence resulted in ineffective assistance of counsel under the Sixth Amendment of the United States Constitution and *Strickland v. Washington*.

Conclusion

The State has shown no reason for this Court to intervene in this case or to further elaborate on the standard set out in *Strickland* and reiterated in *Wiggins, Williams and Rompilla.* The Supreme Court of South Carolina followed this Court's guidelines in affirming the grant of a new sentencing trial for Council and the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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May ___, 2009.

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Certificate of Compliance

As required by Supreme Court Rule 33.1(h), I certify that the document contains 4138 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May __, 2009.

____

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CERTIFICATE OF SERVICE

I certify that I have served upon the attorney for the Petitioner a copy of the Brief in Opposition to the Petition for Writ of Certiorari and a copy of the Motion for Leave to Proceed In Forma Pauperis in this action. Service was made by U.S. mail, first class, postage prepaid, to Melody J. Brown, Esq., Assistant Attorney General of South Carolina, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29211.

Executed on May __, 2009.

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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent, Donney S. Council, through the undersigned counsel, asks leave to proceed *in forma pauperis*.

Council was declared indigent prior to his trial in 1996. He has remained indigent and represented by court-appointed counsel since that time. He was previously granted leave to proceed *in forma pauperis* before this Court following affirmance of his convictions and death sentence by the South Carolina Supreme Court. *Council v. South Carolina*, 528 U.S. 1050 (1999). Because appellate counsel believed Council was incompetent, documentation from mental health experts (attached) was submitted to this Court in support of the Motion to Proceed *In Forma Pauperis* in lieu of an affidavit from Council.

In state post-conviction relief (hereafter "PCR") proceedings, without opposition by the State, the PCR judge appointed a Guardian Ad Litem, John F. Hardaway.[10] Council was ultimately determined to be incompetent, due to schizophrenia, on July 31, 2001. South Carolina Supreme Court Appendix (hereafter "State App.") at 3799-3818; Council remains incompetent. *Council v. State*, 670 S.E.2d 356 (S.C. 2008); *Council v. Catoe*, 597 S.E.2d 782 (S.C. 2004).

Because of Council's poverty, he is unable to pay the costs of these proceedings or give security therefor.

Executed on May __, 2009.

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[10]Mr. Hardaway died in January 2009.