No. ____

In The
Supreme Court of the United States

The State of South Carolina,

Petitioner,

vs.

Donney S. Council, a/k/a
Donnie S. Council,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court of South Carolina

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CAPITAL CASE
QUESTIONS PRESENTED

I.

Whether the Supreme Court of South Carolina abandoned the *Strickland*[1] prejudice test in favor of a mere "influence" test in direct contravention of this Court's precedent, *Strickland v. Washington.*

II.

Whether the Supreme Court of South Carolina abandoned the *Strickland* prejudice test by improperly shifting the constitutional burden to the State to show harmless error which is patent error under this Court's precedent, *Brecht v. Abrahamson.*[2]

III.

Whether the Supreme Court of South Carolina abandoned the *Strickland* test as a whole and improperly applied a "nothing to lose" standard to determine error and prejudice in direct convention of this Court's precedent, *Strickland v. Washington*, and *Knowles v. Mirzayance.*[3]

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[1] *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

[2] *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710 (1993).

[3] *Knowles v. Mirzayance*, 2009 WL 746274, 7 (U.S. 2009).

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INTRODUCTION TO THE PETITION

Petitioner, the State of South Carolina, through the Attorney General of South Carolina, hereby petitions the Court for a Writ of Certiorari to review the decision of the Supreme Court of South Carolina which affirmed a grant of a new capital sentencing proceeding by way of collateral review. The Supreme Court of South Carolina concluded relief was warranted as trial counsel rendered deficient representation in the investigation and presentation of mitigation evidence in the instant case. Petitioner asserts the state court misapplied *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), in its evaluation of error and prejudice. .

CITATION TO OPINION BELOW

The December 29, 2008 re-filed decision of the Supreme Court of South Carolina affirming the grant of state post-conviction relief is attached to the Petition as **Appendix A**. The opinion has been published as *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008). The original opinion, filed September 8, 2008, is attached to the Petitioner as **Appendix B**. For the convenience of the reader, Petitioner will refer to the attached copy of the opinion when referencing the state court's opinion.

JURISDICTION

The Supreme Court of South Carolina entered its original opinion on September 8, 2008. Petitioner filed a Petition for Rehearing on September 23, 2008. The Supreme Court of South Carolina denied the petition within the re-filed opinion issued December 29, 2008. Pursuant to Rule 13, Rules of the Supreme Court of the

United States, this petition has been timely filed. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISION INVOLVED

This matter involves the Sixth Amendment to the United States Constitution which provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defence."

STATEMENT OF THE CASE

Respondent is presently under a death sentence. Respondent was found guilty, after a trial by jury of murder; kidnapping; administering poison; grand larceny of a vehicle; burglary; larceny; and two (2) counts of criminal sexual conduct in the first degree. After the sentencing phase, the jury found the existence of the following statutory aggravating circumstances: (1) murder was committed while in the commission of criminal sexual conduct in any degree; (2) murder was committed while in the commission of kidnapping; (3) murder was committed while in the commission of burglary in any degree; (4) murder was committed while in the commission of a larceny with the use of a deadly weapon; (5) murder was committed while in the commission of killing by poison; and (6) murder was committed while in the commission of physical torture. (App. p. 2608). The Supreme Court of South Carolina affirmed the convictions and death sentence on direct appeal. *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999). This Court denied Respondent's petition from review from his direct appeal. Respondent thereafter

pursued a collateral action in post-conviction relief ("PCR"). The PCR judge vacated the death sentence and ordered a new sentencing proceeding, on Respondent's allegation that counsel was ineffective, by "failing to obtain a mitigation investigator or to otherwise adequately prepare and present powerful mitigation evidence." (App. pp. 5493-5517). Petitioner, the State, appealed the grant of relief, arguing the PCR judge erred in finding error and prejudice sufficient to support relief:

> The PCR judge erred in finding counsel was ineffective in failing to investigate and present mitigation evidence. Counsel made significant investigation into Council's social and mental health history. Simply, upon consultation with his retained forensic psychiatrist, and with his client, and upon review of the available guilt, innocence, and mitigation evidence, counsel made an informed strategic decision to present limited mitigation through Council's mother, and rely on an emphasized and consistent law-based bar to the death sentence

(Petition for Writ of Certiorari, Argument I).

The Supreme Court of South Carolina affirmed the PCR judge's grant of relief on this issue, finding that even though the evidence adduced in the collateral proceeding "may not have risen to the level of 'abuse, neglect, and predator and prey situations found in other cases,' as the State contends, it nevertheless may have swayed the jury as in Wiggins." (Appendix A, p. 18).

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The Supreme Court of South Carolina abandoned the *Strickland* standard, and committed gross error under this Court's precedent in three distinct ways. The state court, though identifying the correct "reasonable probability" test for prejudice, actually applied a mere "influence test," through the misuse of *Wiggins*' [4] "influence" language. Second, the state court clearly improperly shifted the burden of proof to the State to show harmless error. Third, the state court adopted a "nothing to lose" standard for evaluating constitutional error. The correct stand for evaluating ineffective assistance claims remains *Strickland v. Washington* error and prejudice.

The Supreme Court of South Carolina abandoned the Strickland prejudice test in favor of a mere "influence" test in direct contravention of this Court's precedent, Strickland v. Washington

Misuse of Wiggins Language

Wiggins did not change the *Strickland* standard; rather, *Wiggins* embraced and applied the *Strickland* standard. *See Wiggins v. Smith,* 539 U.S. at 534, 123 S.Ct. 2527 ("In *Strickland,* we made clear that, to establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). Specifically, in reviewing

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[4] *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527 (2003).

sentencing phase issues in capital cases, "the question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052. *Stickland* remains the standard for reviewing virtually all ineffective assistance of counsel claims. *Williams v. Taylor*, 529 U.S. 362, 391, 120 S.Ct. 1495 (2000) (stating that "the Strickland test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims").

The state court here, however, extracted and misused the phrase "might well have influenced the jury's appraisal of [Respondent's] culpability" assessment," in *Wiggins*, 539 U.S. at 538, 123 S.Ct. 2527, which is not incorrect when taken in context[5], to unburden the applicant of his required showing of a reasonable probability that the result would have been different in order to receive relief. (Appendix A, p. 21). *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). In doing so, the Supreme Court of South Carolina abandoned the constitutional test, and allowed relief in the instant case. The misuse is evident in the plain wording of the erroneous opinion. The analysis veered into "*may have influenced* the jury's assessment," (Appendix A, p. 21),

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[5] Before the quoted sentence, the Court noted "As the Federal District Court found, the mitigating evidence in this case is stronger, and the State's evidence in support of the death penalty far weaker, than in *Williams*, where we found prejudice as the result of counsel's failure to investigate and present mitigating evidence." *Wiggins*, 539 U.S. at 538, 123 S.Ct. at 2544.

and could not discount that the collateral action evidence, had it been heard at sentencing, may have "*influenced* at least one juror," (Appendix A, p. 24, n.7). The majority clearly relied on an erroneous standard. Moreover, the weighty finding of not one circumstance in aggravation qualifying the conviction for a death sentence[6], not two circumstances in aggravation, but *six* aggravating circumstances, was only mentioned in sterile recognition. (Appendix A, p. 21). The *six* aggravating circumstances found are:

> (1) murder was committed while in the commission of criminal sexual conduct;
> (2) murder was committed while in the commission of kidnapping;
> (3) murder was committed while in the commission of burglary;
> (4) murder was committed while in the commission of a larceny with the use of a deadly weapon;
> (5) murder was committed while in the commission of killing by poison; and
> (6) murder was committed while in the commission of physical torture.

State v. Council, 335 S.C. 1, n. 1 6, 515 S.E.2d 508, 510 n.1 (1999).

Further, and only by footnote, did the majority even reference (briefly) the "brutality" of the crime.

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[6] Under state law, there need be only one to qualify for a death sentence: "... if *a* statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment." S.C. Code Ann. § 16-3-20 (B)(emphasis added).

(Appendix A, p. 24, n. 7).[7] The state supreme court, on direct appeal, described the crime as follows:

> Late Thursday afternoon, October 8, 1992, Evelyn Helminiak visited with her neighbor Elizabeth Gatti, a seventy-two year old widow. Mrs. Gatti was preparing dinner when Mrs. Helminiak arrived. The next day, another neighbor, Charles Fields, became concerned about Mrs. Gatti because her morning newspaper was still in the driveway and her car was gone. Mr. Fields testified Mrs. Gatti was a creature of habit who retrieved her newspaper every morning at 4:30 a.m., read the paper, and threw it over to Mr. Fields' driveway by 8:00 a.m. so he could read it. When the newspaper was still in the driveway and the car was still gone on Friday evening, Mr. Fields called emergency services.
>
> When the authorities entered Mrs. Gatti's house, perishable food items were found on the kitchen counter. Several of the

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[7] The majority also referenced "overwhelming evidence of guilt" found in the direct appeal. (App. pp. 17). In yet another example of the majority's misinterpretation of this Court's precedent, the majority often confuses overwhelming evidence of guilt from the guilt phase with a forgone conclusion of a finding of actual or major participation in the murder. *See Tison v. Arizona*, 481 U.S. 137, 158, 107 S.Ct. 1676 (1987)(to received a death sentenced, the jury must find major participation and reckless indifference to human life to impose death on one who did not actually commit the crime). This additional misinterpretation is addressed more fully *infra*.

> rooms in Mrs. Gatti's house had been ransacked. Mrs. Gatti's body was discovered underneath a bedspread in her basement. She had been hogtied with a white cord and layers of duct tape were wrapped around her entire head. Her clothes had been ripped, and the crotch of her underwear had been cut out. Surrounding her body were various bottles of cleaning fluids. Mrs. Gatti had been sexually assaulted.
>
> Dr. Nichols, the pathologist who performed the autopsy on Mrs. Gatti, testified her body was covered with numerous lacerations and bruises, and someone had attempted to manually strangle her. Further, a gaping laceration extending from her vagina into the rectal area indicated penetration by a very stiff foreign object. Dr. Nichols testified the cause of death was asphyxiation due to mechanical suffocation as a result of the duct tape, and contributory to the cause of death was the ingestion and aspiration of cleaning fluids and the binding ligatures on the wrists. Dr. Nichols testified the aspiration indicated Mrs. Gatti was forced to drink the cleaning fluids. According to Dr. Nichols, Mrs. Gatti lived 2-4 hours after the vaginal/rectal injury occurred.

State v. Council, 335 S.C. at 7, 515 S.E.2d at 511.

The majority, even while acknowledging the lesser value of the collateral action evidence in this case as

compared to that elicited in *Wiggins*, in evaluating the case in light of the above referenced improper (and clearly less difficult to meet) standard, concluded:

> Although this mitigating evidence may not have risen to the level of "abuse, neglect, and predator prey situations found in other cases," as the State contends, *it nevertheless may have swayed the jury* as in Wiggins.

(App. p.18)(emphasis added).

In other words, the state supreme court's evaluation was premised upon mere speculation of an undetermined "influence" on the sentencing process, which prevented fair evaluation of the evidence by abandonment of the correct "reasonable probability" prejudice test.[8] Respondent does not suggest that all evidence must be as "powerful" as that demonstrated in *Wiggins*, rather, that the mitigation evidence elicited in collateral proceedings must be considered in light of the evidence of record and in terms of the correct burden of proof - a reasonable probability that the sentencer may have returned a life sentence. *Strickland.*

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[8] Even in the opinion from the appeal from collateral proceedings, the state court still references that counsel should have been on notice that further investigation "*could* potentially yield powerful mitigating evidence." (Appendix A, p. 16)(emphasis added). If the evidence adduced in collateral proceedings does not yet constitute "powerful mitigating evidence," as conceded by the majority, (Appendix A, p. 21), one wonders when a convicted defendant is not entitled to a presumption that more evidence may be found in yet another proceeding.

The state court's opinion is a gross misapplication of this Court's *Strickland* precedent. Moreover, the state court clearly applied yet another wrong standard - - the harmless error standard.

The Supreme Court of South Carolina abandoned the Strickland prejudice test by improperly shifting the constitutional burden to the State to show harmless error which is patent error under this Court's precedent, Brecht v. Abrahamson

The state supreme court acknowledged but rejected consideration of the overwhelming evidence of heinous nature of the crime and the multiple aggravating circumstances, finding instead that the State had not shown the error was harmless. This is a test specifically not applicable to a *Strickland* claim. *Brecht v. Abrahamson*, 507 U.S. 619, 629-630, 113 S.Ct. 1710, 1717 (1993). In footnote 7 of the first opinion, subsequently withdrawn, the majority incorrectly, but clearly, made a harmless error analysis part of their consideration:

> In no way should our decision be construed as minimizing the brutality of the victim's murder. We 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. Moreover, *we are cognizant of appellate decisions in this state which determined that counsel's deficient performance in a death penalty case did not warrant reversal where, beyond a reasonable doubt, the error did not contribute to the verdict. See Plath v. Moore,* 130 F.3d 595, 601-02 (4th Cir.1997) (finding

> trial counsel's alleged failure to present additional mitigating evidence in sentencing phase of capital trial did not warrant habeas relief for petitioner; stating "in weighing the omitted evidence against that actually used to convict and sentence Plath, the mitigating evidence seems insufficient to shift the balance in Plath's favor"); *Arnold v. State/Plath v. State,* 309 S.C. 157, 420 S.E.2d 834 (1992) (finding, in capital case, trial counsel's failure to object to unconstitutional malice charge was harmless where, beyond a reasonable doubt, the error did not contribute to the verdict in light of the overwhelming evidence of malice). *We cannot say beyond a reasonable doubt that the undiscovered mitigating evidence, taken as a whole, would not have influenced at least one juror to recommend a life sentence for Respondent. Thus, we are unable to find trial counsel's deficient performance constituted harmless error.*

(Appendix B, p. 60, n. 7)(emphasis added).

Strickland prejudice is based on reasonable probability defined as "a probability sufficient to undermine confidence in the outcome" of the trial, or in this case, the sentence, *Strickland,* 466 U.S. at 694-695. The burden is on the applicant. *Id. See also Williams*, 529 U.S. at 294, 120 S.Ct. 1495; *Rompilla v. Beard*, 545 U.S. 374, 390, 125 S.Ct. 2456 (2005)(applying *Strickland* error and prejudice, noting the burden was on the petitioner to show prejudice). Moreover, the reviewing court reweighs the whole of the evidence in determining whether there is a "reasonable probability" that the

sentence would have given a life sentence. *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052. Harmless error is not applicable in this setting. *Brecht*. Yet, the State's petition for rehearing was denied. (Appendix A, p. 2). According to the state court, no reconsideration of the logic and reasoning, as would normally warrant the grant of rehearing, was made. Rule 221(a), *South Carolina Appellate Court Rules* ("A petition for rehearing... shall state with particularity the points supposed to have been overlooked or misapprehended by the Court."). *See also* Am.Jur. Appellate § 824 ("Generally, because rehearing is a method of correcting a significant flaw in the original proceeding, a rehearing will normally not be granted unless the court's earlier decision was manifestly erroneous); 5 C.J.S. Appeal and Error § 690 ("As a general rule... material alterations in the original judgment must ordinarily be reserved for the rehearing proper and cannot be allowed on the hearing of the petition."). Moreover, though the original opinion was withdrawn, it is evident that only the phrasing of footnote seven was reworked, in essence, the extraction of "reasonable doubt" and the substitution of "prejudice." This is merely additional proof the flawed analysis, intact and unchanged, remains. The majority even continued to cite the exact same precedent that relied on a harmless error analysis on collateral review of a trial court error. i.e. a *Chapman*[9] harmless error analysis. (See App. p. 19). In fact, the state court deleted references to "reasonable doubt" and substituted "prejudice." In other words, the state court used the wrong standard to decide the case, and merely substituted correct words when

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[9] *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824 (1967)(considering whether trial error was harmless beyond a reasonable doubt).

error was pointed out. The incorrect analysis, however, remained.

The constitutional standard places the burden upon the defendant to prove a reasonable probability that the sentence would be life. The state supreme court's erroneous analysis inverted the burden in contravention of the proper federal constitutional standard under *Stickland*, *Wiggins*, and *Rompilla*.

The Supreme Court of South Carolina abandoned the Strickland test as a whole and improperly applied a "nothing to lose" standard to determine error and prejudice in direct convention of this Court's precedent, Strickland v. Washington, and Knowles v. Mirzayance

A "Nothing to Lose" Standard is Contrary to Strickland and Unfairly Skews Evaluation of Counsel Strategy

The majority applied a "nothing to lose" standard in evaluation of the claim. (Appendix, p. 20). As this Court has most recently written, "[t]his Court has never established anything akin to the Court of Appeals' 'nothing to lose' standard for evaluating *Strickland* claims." *Knowles v. Mirzayance*, 2009 WL 746274, 7 (U.S. 2009). Simply, the state court (again) applied the wrong standard. Moreover, with the improper "nothing to lose" standard as a crutch, the majority entered into dissection of a valid strategy favoring a *post hoc* determination that the strategy was not ultimately successful.

For instance, the majority reasoned that, by sentencing, defense "counsel was already aware the jury had rejected the defense theory that Respondent was not

the actual perpetrator but was merely present." (Appendix 19). This conclusion reflects that the majority ignored a *Tison v. Arizona* based legal bar to imposition of the death penalty in an attempt to pigeonhole the theory into one of residual doubt. This was not a residual doubt theory. This is a case were the client admitted one part of the crime in another part of the victim's home, a sexual assault in a bedroom that was supported by DNA evidence found in that room that was consistent with the defendant's DNA, and the murder scene, in another part of the home, yielded a DNA sample that was not consistent with the defendant. Under hand of one, hand of all, the defendant could be guilty of the home invasion and all crimes therein, but, to be sentenced to death, the jury had to find, in addition, major participation and reckless indifference to human life to impose death on one who did not actually commit the crime. *See Tison v. Arizona*, 481 U.S. 137, 158 (1987). The majority totally discounted this distinction made and authorized by United States Supreme Court precedent.

Further, the state supreme court then essentially concluded that it is never reasonable not to present whatever scrap of mitigation evidence may be found.[10]

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[10] In yet another error in the majority opinion, the majority found: "Clearly, trial counsel could have argued to the jury that even if Respondent was the actual perpetrator he suffered from these mental deficiencies and mental illness at the time of the crime." (Appendix A, p. 20). There was no mental illness diagnosis revealed relating to the crime or the time of the crime. The clinical psychologist hired in the collateral action testified that "in all probability" there were "some issues" at the time of crime. (App. p. 4078, lines 11- p. 4079, line 1). The forensic psychiatrist hired in the collateral action, when asked about the diagnosis of a delusional disorder approximately six weeks after Respondent's death sentence was imposed, the doctor

Defense counsel's strategy to depend almost exclusively on this "legal bar to the death penalty" concept, though perhaps bold, was not founded on a dereliction of duty to investigate, or a misunderstanding of the law.[11] He

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opined:

> It's very significant for a number of reasons. Number one, psychoses usually won't develop quite that quickly. You have to go back in time. We even - - we do kind of have the luxury in psychiatry of hindsight. You can go back oftentimes and reconstruct some idea of the onset of illness, and it's very seldom that someone will present that acutely psychotic *unless it's their first break which it could be.*

(App. p. 4195, lines 7-19)(emphasis added).

In trial preparation, however, defense counsel relied on a forensic psychiatrist who had aided in the preparation of two other capital trials. Defense counsel asked the doctor to "make sure this man was competent and that he didn't have any significant mental illness." (App. p. 5285, line 23- p. 5286, line1). The doctor ultimately discovered "no really diagnosable mental illnesses." (App. p. 5286, lines 5-13).

[11] Moreover, the consist reference to a co-defendant yield some success, as defense counsel noted in testimony in the collateral proceedings:

> ... I thought it's consistent with him saying he was there. What does it - - how does it help you make the decision? And then I moved that away, leaving the only thing that was - - that was - - that the State had not offered that was consistent with that being the D.N.A. evidence of the sample that was left on the sheet on the lady. And I don't - - obviously you can judge effectiveness by results. They didn't believe that, but that was where I was

headed.

> You can believe everything the State says except he didn't commit the offense. He was there and, of course, there's liability by association and by the fact that he allegedly conspired with him and they had a common understanding and all of that sort of thing. But even in closing I kept making reference to the co-defendant, and *the State made reference to the co-defendant and there wasn't a co-defendant that was indicted....*

(App. p. 4327, line 22 - p. 4328, line 12)(emphasis added). Moreover, the stance was consistent with the direction of the client, (App. p. 4283 and 4316), and the client's remarks to the jury. Respondent addressed the jury in the guilt phase and admitted his presence at the victim's home during the crime, but flatly denied participation in the murder. He admitted selling drugs, and even that he occasionally used marijuana, but insisted that he used nothing stronger. He maintained that a drug buyer led him to the victim's home. (App. pp. 2288-93). In closing, counsel echoed the theme, and reminded the jury that the semen found on tissue in victim's bedroom was not specifically identified as Respondent's and that the semen on the material found next to the body in the basement definitely was not Respondent's. (App. pp. 2310-11). During the penalty phase Respondent again denied guilt. (App. p. 2570, lines 8-15). Defense counsel argued, in part:

> ... I don't know what your decision was with regard to Mr. Council's specific participation, or what his specific mental intent was when he actually entered into the dwelling. I don't know that and I can't ask you that. You had the right to return a verdict based upon different views of the facts. I can't ask you what your views were.
>
> But I can tell you something else that the judge is going to charge you. This is the most important piece of the law that you will hear. The death penalty cannot be imposed who aids and abets

simply chose to focus the jury's attention on this clear legal principle. Further, he selected, from a range of witnesses, (PCR App. pp. 4453-54), the witness he considered most sympathetic and best choice, the defendant's mother, to place a personal touch on the mitigation case. This strategic choice was not a result of counsel's omission or error, but a well-reasoned strategy chosen by qualified, experienced counsel. Defense counsel testified that he was aware that he could offer mitigation evidence, but testified the lack of illness, but real possibility of negative character evidence, would not aid in the "not the trigger man" strategy. (PCR App. p. 4302, lines 1-19). In fact, the social worker's testimony concerning the environment driving Petitioner to crime and violence is indicative of the double-edged sword often associated with this type of testimony - he was destined to become the killer he became, (App. p. 4145, lines 2-6), thus inherently dangerous. *See generally Wiggins,* 539 U.S. at 535(acknowledging cases where "double edge" evidence was justifiably shunned). Further, counsel considered but rejected the presentation of additional evidence[12] of drug use in that he considered such evidence would not be helpful. (App. p. 4326; p. 4435; p. 4456).

> in a crime in the course in which a murder is committed by others, but who did not, himself, kill, attempt to kill or intend to kill, or intend that a killing take place, or that lethal force be used. You've got to make that decision.

(App. p. 2574, line 19 - p. 2575, line 10).

[12] In addition to the State's evidence of a prior record, Respondent admitted occasional marijuana use to the jury. (App. pp. 2288-2293).

See Clisby v. Alabama, 26 F.3d 1054 (11th Cir. 1994)("Precedents show that many lawyers justifiably fear introducing evidence of alcohol and drug use"); *Rogers v. Zant*, 13 F.3d 384, 388 (11th Cir. 1994)(reasonable for counsel to conclude that drug use would have "drawn attention away from other kinds of evidence and argument that the lawyers thought might be better received."). Defense counsel did offer the mother's testimony as some evidence of mitigation based on his evaluation of there being a number of females on the jury that may have related to Ms. Council's testimony. (App. pp. 4323-24). Defense counsel also testified that he had other witnesses that may have been able to present background or character mitigation evidence, but ultimately determined the individuals could not or would not help - - either claiming illness, or just refusing to give any helpful testimony. (App. pp. 4453-54). *See Laws v. Armontrout*, 863 F.2d 1377, 1391 (8th Cir. 1988)("counsel could have reasonably determined that calling Laws' relatives to the stand, after what they had told him of their feelings for Laws, would have been destructive to Laws' defense.").

It is clear that counsel carefully crafted his argument to appeal to the jury he was facing. In fact, defense counsel testified that he additionally chose to present religious arguments against imposition of the death penalty given the specific juror information he received on the actual seated jurors on "church affiliation" and indications that his jurors were "people of faith" who may respond well to such argument. (App. p. 4437, lines 20-25). This again demonstrates the careful, thoughtful, and thorough presentation of evidence and argument in the penalty phase.

In short, counsel was fully aware of Respondent's family situation - - the disadvantages, criminal background, school disabilities, and drug use - - and he considered presentation of this evidence against the available position of reliance on a legal based bar to imposition of the death penalty, and decided that consistency would present the most forceful argument. This strategic choice was made with the consent of his client, and largely based on the information concerning the crime as supplied by his client. *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant."). Such position is best shown in the following passage from the PCR hearing:

> Q. ... based upon the jury instructions that had been given, you would not have been aware as to whether they found him culpable as being the actual perpetrator or assisting in that perpetration. Isn't that correct?
>
> A. They weren't required to make that determination in their verdict.
>
> Q. Okay, yet did you realize that there was a risk that they had already made that determination?
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> A. Certainly.
>
> Q. And with that potential that that determination had already been

made, did you understand or did you recognize that other than the mother's emotional testimony that they would be left without virtually much, if any, understanding of his background?

A. Well, you were in a situation where what I depended upon was that he was not the actual participant. Obviously they returned a verdict which could have meant that they believed he was or he wasn't; I didn't know. And in closing that was what I argued in my closing on the sentencing.

Q. Okay. Did you think that - - that in some manner the problems with the education background, some dysfunction within the family would hurt your client if it was presented rather than help him?

A. No, I can't honestly say that. I don't think the educational situation would have hurt him. It was still - - I wanted to be consistent. If I'm saying that he did not perpetrate the crime, then some of those issues would have been irrelevant. The point I wanted to make was that: Go after the triggerman. Don't go after him.

Q. Okay. And you wanted to narrow the jury's focus on that point and not

minimize that argument in light of the presentation in this other case?

A. Yes.

Q. So it was basically an all-or-nothing approach then, wasn't it?

A. Yes.

Q. Did your client understand it is going to be that type of approach in his discussion with you?

A. Yes. Our focus consistently was that he didn't do it, that Frank Douglas did.

(App. p. 4463, line 21 - p. 4465, line 12).

That was a sound exercise of strategy.

It becomes apparent, though, in reviewing the record, and clearly from review of the state court opinion, that this case is not truly about a challenge to quality of investigation; rather, this case squarely poses the question whether counsel can ever be allowed to choose not to present any and all evidence in mitigation no matter what his opinion on the quality or impact of the evidence on the jury or his preferred strategy. (See App. p. 15, "Even if trial counsel's investigation could be deemed sufficient or adequate, we believe trial counsel also failed to present any significant mitigating evidence."; See also App. p. 16, " ... given the State had already presented damaging character evidence, we do not believe Respondent's character could have been damaged any further... Trial counsel essentially would have had 'nothing to lose'"). Even *Wiggins*, the case so relied upon by the state supreme court and Respondent, does not require presentation of any or all evidence.

Wiggins, 539 U.S. at 522-523, 123 S.Ct. 2527 ("our principal concern in deciding whether Schlaich and Nethercott exercised 'reasonable professional judgmen [t],' is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself reasonable.*")(internal citation omitted). Even so, in regard to the investigation, the quality of the investigation in this matter completely distinguishes this case from that in *Wiggins*. There is no like circumstance. The majority's opinion clearly does not follow federal precedent and the majority has improperly allowed relief.

Proper Prejudice Test Demonstrates Petitioner is Not Entitled to Relief

The majority clearly did not agree with the counsel's strategy to present limited mitigation evidence.[13] The dissent resolved the issue on the absence

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[13] For example, the majority apparently found error in counsel's failure to immediately investigate when the case was assigned, even though the collateral proceedings revealed numerous hours of detailed research, investigation, and preparation (Appendix A, p. 16); found fault with defense counsel's decision to hire a private investigator and also rely on his law partner to collect background information instead of a certified "social history investigator," finding, inexplicable, that neither was "qualified... to evaluate the information to assess Respondent's background" (leaving undefined this "assessing" background theory), again ignoring the detailed research, investigation, and preparation made (Appendix A, p. 17); and also found fault in failing to obtain and review "family records" (App. pp. 17-18). Petitioner again submits, as it did below, that several of the entries on the documents admitted in the state collateral proceedings post-date the sentencing on October 23, 1996, and should not have been considered in regard to assessing information available to counsel before the 1996 trial. (App. p.

of prejudice, but only by using the incorrect standards as listed above. The dissent was correct that Petitioner failed to carry his burden of proving prejudice.

Again, it is proper to return to *Strickland.* To be entitled to relief the party seek relief "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result in the proceeding would have been different. A reasonable probability is a probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068. In regard to sentencing, "the question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695, 104 S.Ct. at 2069. This Court has presumed that evaluation is made in the stance of a reasonable sentencing actor. *Id.* at 695, 104 S.Ct. at 2068 ("[T]he idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency[,] .... are irrelevant to the prejudice inquiry."). Review is also made based on the whole of the

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5408). Moreover, the pre-trial records included extended family members medical records, and living conditions of family members not even shown to be shared by or known to Respondent. (See, for example, App. p. 4137, line 21 - p. 4138, line 1, where social worker testified that one child in Respondent's family's household contracted gonorrhea, but admitted Respondent was not in the household at the time. Though the evidence would certainly draw an emotional response, the evidence is in no way related to Respondent, either as perpetrator or former victim). At any rate, the majority conceded that defense counsel did, in fact, interview family members (multiple times) as did others on the defense team, including the defense expert, Dr. Kuglar. (Appendix A, pp. 8-9). Therefore, counsel (and his defense team) was well aware of the defendant's background and character through these interviews.

evidence, and accepting the truism that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696, 104 S.Ct. at 2069. *See also Wiggins,* 539 U.S. at 538, 123 S.Ct. 2527(finding prejudice where state's evidence in support of death penalty was "far weaker" than in prior case).

The majority in the state court opinion at issue here acknowledged that the additional mitigation evidence Respondent presented in the collateral proceedings - - even after exhaustive investigation in post-conviction relief, with abundant time, well acknowledged resources, and reference to even the most tangentially related records and the most marginally mitigating circumstances to make a case for error - - simply does not show "the level of 'abuse, neglect, and predator and prey situations found in other cases,'" (Appendix A, p. 22); however, the majority nonetheless found the evidence "*may have swayed* the jury as in Wiggins." (Appendix A, p. 22)(emphasis added). The majority committed no error in comparing the mitigation cases in assessing prejudice; however, the majority erred in abandoning a full assessment of the less than "powerful mitigation" evidence gathered in collateral proceedings against the tremendous amount of solid evidence in aggravation:

> The question a reviewing court must answer in determining whether a petitioner was prejudiced by a failure to present such evidence, then, is not whether the evidence was as "powerful" as the mitigation evidence in *other* cases, *but rather whether the evidence was "powerful" enough to offset the aggravating evidence and demonstrate a*

reasonable probability of a different result in the petitioner's case.

Yarbrough v. Johnson, 520 F.3d 329, 342 (4th Cir. 2008)(emphasis added).

Here, where the evidence supported the finding beyond a reasonable doubt of six circumstances in aggravation, and where the evidence weighty evidence of Respondent's actual participation in the crimes, including evidence of his admitted sexual assault of the victim in the upstairs of the home, had the evidence offered in state collateral proceedings been heard at sentencing, it simply cannot be said that it is reasonably likely that the jury would have returned a different sentence. The state court, as clearly reflected in their "nothing to lose" standard, simply found the possibility of "some influence" on the jury was enough. Yet, the proper weighing of the evidence as a whole is essential to the fair determination of prejudice. South Carolina, however, is not alone in abandonment of precedent in favor of some lesser burden.

For example, in *Hawkins v. Coyle*, 547 F.3d 540 (6th Cir. 2008), the Sixth Circuit Court of Appeals recently reversed a grant of relief in the District Court finding that the record did not support a finding of prejudice. To show prejudice, Hawkins relied upon "affidavits submitted by nine of his family members during state post-conviction proceedings" that revealed a family alcohol abuse, discord in his parents relationship including physical assault, favoritism among siblings, depression as to a sister's death and suicide attempts at a young age. 547 F.3d at 550. The Circuit Court citing *Wiggins*, and several circuit court cases reviewing alleged deficiencies in mitigation investigation and presentation, cautioned that "such a finding of prejudice is not made lightly, especially where the petitioner was not a victim

of abuse and did not suffer from any mental disorders or difficulties." *Id.* "The district court held that this was sufficient to establish prejudice stating only that there 'is a reasonable probability that at least one juror would have found Hawkins to be less morally culpable in some way based on the fact that he had a troubled upbringing marked by depression and two attempts at suicide." Id. The Circuit Court concluded that the district erred in finding prejudice as "[t]hese affidavits describe a markedly less traumatic and abuse childhood and adolescence whose cases we have found the failure to investigate was prejudicial." 547 F.3d at 551. *See also Williams v. Allen*, 542 F.3d 1326, 1343 (11th Cir. 2008)(reversing denial for relief, finding, in part, "Further supporting a finding of prejudice is the fact that this case is not highly aggravated... Here, the trial court imposed the death penalty on the basis of a single statutory aggravating circumstance-one that is an element of the underlying capital murder charge").

Further, in another striking example, in *Pinholster v. Ayers*, 525 F.3d 742, 766 -767 (9th Cir. 2008), a panel of the Ninth Circuit Court of Appeals reversed the District Court's grant of relief regarding the evaluation of the "new" mitigation evidence, consistently going back to consideration of the whole of the evidence. The concurring opinion in *Pinholster* demonstrates the struggle with adherence to the *Strickland* standard in light of *Wiggins* and *Rompilla*:

> I join Judge Tallman's opinion in full, but I do have one misgiving: I'm not sure whether *Rompilla v. Beard*, 545 U.S. 374, 393, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), still allows us to "reweigh the evidence in aggravation against the totality of available

> mitigating evidence," *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), when counsel fails to uncover mitigating evidence. After all, counsel failed to uncover mitigating evidence in *Rompilla*, and the Supreme court didn't seem to address the aggravating evidence in assessing prejudice. *See Rompilla*, 545 U.S. at 393, 125 S.Ct. 2456. Still I have a hard time believing that *Rompilla* overruled a recent case like *Wiggins* without bother to say so.

Pinholster, 525 F.3d at 773 (C.J. Kozinski, concurring).

Respondents note that *en banc* rehearing has been granted in the *Pinholster* case. The Ninth Circuit, by order dated March 20, 2009, has instructed that "[t]he three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit." *Pinholster v. Ayers*, 2009 WL 764671 (9th Cir. 2009). Thus, it appears the struggle over proper evaluation of new mitigation evidence and prejudice is not yet complete in the referenced case.

A similar struggle over the impact of new mitigation evidence may be found in state opinions, as well, often highlighted in dissents to the majority opinion, as is in the instant case. For instance in *Hannon v. State*, 941 So.2d 1109 (2006), the Florida Supreme Court criticized the dissenting opinion's " very one-sided presentation of postconviction witness testimony which creates a distorted view of Hannon's home life in an effort to bolster its assertion that trial counsel was ineffective for failing to conduct further investigation into mitigation" and noted that "in sentencing Hannon to death, the trial judge found substantial aggravation in

this case." 941 So.2d 1136. The dissent, however, relied on *Strickland* language that the result need not be different:

> To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. *The defendant is not required to show that the deficient performance "more likely than not altered the outcome in the case." Id.* at 693, 104 S.Ct. 2052. He must only show that unpresented available evidence "might well have influenced the jury's appraisal of [the defendant's] moral culpability" or "may alter the jury's selection of penalty." *Williams,* 529 U.S. at 398, 120 S.Ct. 1495; *see also Asay v. State,* 769 So.2d 974, 985 (Fla.2000) ("When evaluating claims that counsel was ineffective for failing to present mitigating evidence, this Court has phrased the defendant's burden as showing that counsel's ineffectiveness 'deprived the defendant of a reliable penalty phase proceeding.' ").

Hannon, 941 So.2d at 1168 (Anstead, J. dissent)(emphasis added).

Again, this reasoning veers from the clear and precise language governing ineffective assistance of counsel claims in capital sentencing proceedings:

> The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. *When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the 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.*

Strickland, 466 U.S. at 695, 104 S.Ct. 2052 (emphasis added).

This Court should grant certiorari to again clarify the applicability of the *Strickland* standard in review of ineffective assistance of counsel sentencing phase issues.

CONCLUSION

In sum, there appears to be a number of courts that are struggling with applying the *Strickland* standard to capital sentencing ineffective assistance of counsel claims in light of *Williams, Wiggins* and *Rompilla.* Petitioner urges the Court to grant certiorari, affirm the *Strickland* standard, and reverse the state supreme court's decision that abandoned same in clarification of the applicability of this Court's precedent which remains

the final, binding authority on ineffective assistance of counsel claims in capital sentencing proceedings.

Respectfully submitted,

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