No. _____

In the Supreme Court of the United States

LYDELL CHESTNUT, Deputy Warden of Broad River Road Correctional Secure Facility,
Petitioner,

v.

QUINCY J. ALLEN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General
State of South Carolina

DONALD J. ZELENKA
Deputy Attorney General

*MELODY J. BROWN
Senior Assistant Deputy
Attorney General

Office of the Attorney General
State of South Carolina
Capital Litigation Section
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305
mbrown@scag.gov

**Counsel of Record*

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

** CAPITAL CASE **
QUESTION PRESENTED

In February 2005, Respondent Quincy J. Allen pled guilty to two murders in South Carolina. The following month a bench trial for capital sentencing began and spanned 10 days. Allen presented mental health evidence that included a diagnosis of schizophrenia and an eating disorder by history. Allen's counsel argued the judge should consider that Allen was mentally ill at the time of the crime and less culpable. South Carolina does not require reported findings for statutory or non-statutory mitigation. But, during sentencing, the judge confirmed that he had considered the mental health evidence – the testimony and reports – and even named the experts. The judge sentenced Allen to death. Allen's sentence withstood detailed review until a divided panel of the Fourth Circuit found in 2022 that, though the sentencing judge mentioned the schizophrenia evidence, he failed to mention the eating disorder; thus, he failed to give "meaningful consideration and effect" to Allen's evidence and it was unreasonable for the state post-conviction court to find otherwise. The question presented is:

Did the Fourth Circuit violate 28 U.S.C. § 2254(d) limitations and needlessly overturn a state death sentence on an insubstantial premise that Allen's mental health evidence was not afforded "meaningful consideration and effect" when the judge stated at sentencing that he had considered all the mental health evidence but did not explicitly reference Allen's eating disorder?

STATEMENT OF RELATED PROCEEDINGS

Allen v. Stephan, No. 20-6, United States Court of Appeals for the Fourth Circuit (July 26, 2022 Opinion, reversing district court and remanding with instructions to grant the writ if South Carolina does not provide resentencing).

Allen v. Stephan, C/A 0:18-cv-01544-DCC, United States District Court, District of South Carolina (March 25, 2020 Order, granting Warden's motion for summary judgment, dismissing amended petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 and granting a partial certificate of appealability).

Allen v. State of South Carolina, Appellate Case No. 2016-000722, Supreme Court of South Carolina (April 19, 2018 Order denying petition for writ of certiorari)(post-conviction relief action appeal).

Allen v. State of South Carolina, C/A No. 2010-CP-40-03644, Circuit Court of South Carolina, Fifth Judicial Circuit (December 8, 2015 filed Order, denying post-conviction relief) (post-conviction relief action).

Allen v. South Carolina, 560 U.S. 929 (2010), Supreme Court of the United States (May 24, 2010 Order, denying petition for writ of certiorari to the Supreme Court of South Carolina) (direct appeal)

State v. Allen, Opinion No. 26743, Supreme Court of South Carolina (December 17, 2009 Order, denying rehearing; November 16, 2009 Opinion, affirming sentence) (direct appeal)

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

PETITION FOR WRIT OF CERTIORARI

The State of South Carolina, through Deputy Warden Lydell Chestnut, respectfully petitions for a writ of certiorari to review the Fourth Circuit Court of Appeals' decision ordering new sentencing in this state capital case.

OPINIONS BELOW

The opinion of the Fourth Circuit reversing the district court is reported at 42 F.4th 223 (4th Cir. 2022), and provided in the Appendix. (App. 1-87). The district court's unreported Order denying relief is available at 2020 WL 1446717 (D.S.C. Mar. 25, 2020), and provided in the Appendix. (App. 88-204). The order by the state post-conviction relief court denying relief is not reported, but is provided in the Appendix. (App. 224-311).

JURISDICTIONAL STATEMENT

The Fourth Circuit filed its opinion reversing the district court's denial of habeas relief on July 26, 2022. (App.1). On August 23, 2022, the Fourth Circuit denied the State's timely petition for rehearing en banc. (App. 205). The State invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 2254(d) which provides a federal court "shall not" grant habeas relief on a state-adjudicated claim except where the state's disposition:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

And also, 28 U.S.C. 2254(e)(1), which provides:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

This case also involves the state capital sentencing statute, S.C. Code Ann. § 16-3-20(C), which provides in relevant part:

> … In nonjury cases the judge shall make the designation of the statutory aggravating circumstance or circumstances. Unless at least one of the statutory aggravating circumstances

> enumerated in this section is found, the death penalty must not be imposed.

STATEMENT OF THE CASE

A. Statement of Facts.

In the summer of 2002, Respondent Quincy Allen had aspirations of being a mafia hitman, or a serial killer. He acquired a shotgun, but, being unfamiliar with its use, he practiced on a homeless man who, remarkably, survived the shots. *State v. Allen*, 687 S.E.2d 21, 22 (S.C. 2009). Allen then progressed to two murders and multiple other crimes in South Carolina. *Id.* He would go on to murder two men in North Carolina before being apprehended in Texas. *Id.* His death sentence for the South Carolina murders is at issue here.

The Supreme Court of South Carolina set out a concise summary of the circumstances and specifics of his capital crimes in the direct appeal:

> …on July 10, 2002, Allen met a prostitute named Dale Hall on Two Notch Road in Columbia; he took her to an isolated dead end cul-de-sac near I–77 where he shot her three times with a 12 gauge shotgun, placing the shotgun in her mouth as she pleaded for her life. After shooting her, Allen left to purchase a can of gasoline, and came back to douse Hall's body and set her on fire. He then went back to work at his

> job at the Texas Roadhouse Grill restaurant on Two Notch Road.
>
> Several weeks later, on August 8, 2002, while working at the restaurant, Allen got into an argument with two sisters, Taneal and Tiffany Todd; he threatened Tiffany, who was then 12 weeks pregnant, that he was going to slap her so hard her baby would have a mark on it. Tiffany's boyfriend Brian Marquis came to the restaurant, accompanied by his friend Jedediah Harr. After a confrontation, Allen fired his shotgun into Harr's car, attempting to shoot Marquis; however, Allen missed Marquis and instead hit Harr in the right side of the head. As the car rolled downhill, Marquis jumped out and ran into a nearby convenience store, where he was hidden in the cooler by an employee. Allen left the convenience store, and went and set fire to the front porch of Marquis' home. A few hours later Allen set fire to the car of Sarah Barnes, another Texas Roadhouse employee. Harr died of the shotgun blast to his head.

Allen, 687 S.E.2d at 22. Additionally, providing further insight into the man's character, one of Allen's own mental health experts, Dr. Pamela Crawford, testified at sentencing that Allen "enjoy[ed]" being "a serial killer," (J.A. 772); that he "enjoy[ed]" speaking with another individual about

his victims, (J.A. 879-80); that he admitted "a hunger to kill," (J.A. 922); that "[h]e said it made him feel better once he'd heard that Jedidiah was dead," (J.A. 922), and was "proud" of killing Dale Hall, (J.A. 926); that he would just "hang out … look[ing] for somebody to kill," (J.A. 922 and 924); and, when returning from Texas, looked for a newspaper to see if his crimes were reported because he "liked to read about himself," (J.A. 925-26); that he "saw himself as a serial killer and wanted to keep records," that he did keep a record of his kills, and had a "hit list" of people to kill, (J.A. 927-28); that he admitted another woman escaped being shot by him, (J.A. 930); and that he simply "very much wanted" in Crawford's understanding, "to be known as a serial killer who killed a lot of people." (J.A. 926-27).

B. State Procedural History.

1. Indictment and Trial.

In 2002, Allen was indicted for the murders of Dale Hall and Jedediah Harr and a series of other crimes, including: assault and battery with intent to kill (James White); arson in the second degree (Marquis home); arson in the third degree (Barnes vehicle); another arson in the third degree (Bundrick vehicle); and pointing and presenting a firearm (Bucky Mishon). Prosecutors filed a notice to seek the death penalty on April 5, 2004 for the murders of Dale Hall and Jedediah Harr. On February 28, 2005, Allen, represented by four attorneys, pled guilty to

all charges. (J.A. 120). The Honorable G. Thomas Cooper heard and accepted the plea.[1]

On March 7, 2005, the sentencing proceeding began. On March 18, 2005, after a 10 day, heavily litigated and zealously argued case, Judge Cooper announced the sentence. (App. 208).[2] Judge Cooper first acknowledged the "mental health implications" in sentencing. (J.A. 1599). He commented that:

> In considering the outcome of this sentencing hearing I have tried to

---

[1] Prior to his guilty plea in South Carolina, Allen pled guilty and received a life sentence in North Carolina. *Allen*, 687 S.E.2d at 22 n. 2.

[2] Under South Carolina law, the sentencer must find at least one statutory aggravating circumstance. Once found, then all evidence is considered collectively without reported findings as to mitigation evidence. *See State v. Plath*, 313 S.E.2d 619, 629 (S.C. 1984); *State v. Bellamy*, 359 S.E.2d 63 (S.C. 1987). Judge Cooper found the State proved, beyond a reasonable doubt, these aggravating circumstances:

> Victim Dale Hall: [1] Kidnapping, [2] Larceny with use of a deadly weapon, [3] Physical torture, [4] murder committed by person with prior conviction for murder
>
> Victim Jedediah Harr: [1] Murder committed by person with prior conviction for murder, [2] knowingly creating a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to more than one person.

Allen, 687 S.E.2d at 25.

> understand the unique forces and events which have put Mr. Allen in the situation in which he finds himself today. I have considered his upbringing so masterfully chronicled by Debra Grey. I've considered his list of mental illness as described by Dr. Pam Crawford.

(App. 209; *see also* App. 211, "I have listened to and read the accounts of all of the psychiatrists and psychologists in this case: Doctors Hilkey, Gupta, Lavin, DeBeck, Hattem, Crawford, Mirza, Tezza, Corvin and Schwartz-Watts"). Judge Cooper also referenced, as part of his consideration for the appropriate sentence, the facts and circumstances of the crimes, and the impact on the victims' families and "the effect of this trial on Quincy Allen's two younger brothers who have sat through the majority of this trial." (App. 209).

Judge Cooper referenced how the mental illness issue was only summarily addressed in the North Carolina proceedings but expansively in the proceeding before him, (App. 209-210), and recognized that Allen's position in the South Carolina sentencing was that his mental illness was a basis to avoid the death penalty. (App. 210). Allen's South Carolina counsel had argued to the judge:

> …The one disputed issue is whether or not [Allen] was mentally ill in the summer of 2002, whether or not he is mentally ill now as he has been in this courtroom for the last year and the last

> two weeks, whether or not Quincy is mentally ill. And I want to talk to you about that because I do think that that matters for what sentence he gets.
>
> The question is: Was he impaired at the time? Was he mentally ill? …

(J.A. 1562-1563). Answering the argument, the judge found that "if indeed he had schizophrenia, it was not evident and the disease did not control his mind to such a degree as to exonerate or lessen the culpability of his actions." (App. 211). The judge found no *"convincing evidence* that Mr. Allen had a major mental illness at the time of the crimes in 2002." (App. 210) (emphasis added).

Judge Cooper acknowledged the evidence of early mental health issues pre-dating the murders, including "a series of short-stay hospitalizations from 1997, 1998 and 1999," noting that none required treatment plans, but resolved "if [Allen] had a major mental illness at that time in 2002, no one, not even his psychiatrists, were aware of it." (App. 210-11).

Judge Cooper also acknowledged the brutality of the crimes, and that Allen had "told many people that he has had desires to kill human beings, that he would kill again if given the opportunity." (App. 218-20). Judge Cooper repeatedly referenced and balanced the evidence presented throughout his sentencing comments (again, no reported findings regarding mitigation are required), then resolved a

death sentence was warranted. (App. 222).[3] Allen appealed.

2. Direct Appeal.

On February 6, 2008, prior to merits briefing, appellate counsel filed a "Motion to Vacate Guilty Plea Or Remand For A Hearing On Voluntariness of Appellant's Guilty Plea" in the Supreme Court of South Carolina. (J.A. 2014-22). Appellate counsel argued the plea should be vacated because it was not voluntary, but made in return for a promise of a life sentence. (J.A. 2014). The State opposed the motion, and included in its response an affidavit from Judge Cooper addressing certain allegations made by defense counsel in their own affidavits regarding the claim of an unfulfilled promise of a life sentence. (J.A. 2046 and 2074-77). On March 5, 2008, the Supreme Court of South Carolina issued a letter order summarily denying the motion. (J.A. 2107).

Counsel for Allen thereafter briefed three issues on appeal challenging (1) the judge's reference to a possible "deterrent effect … on abusive mothers"; (2) the manner of designating the statutory aggravating circumstances; and (3) the process of mandatory sentencing by the judge as a result of the plea. *Allen,* 687 S.E.2d at 23. Though no issue on the mental health evidence was raised, the Supreme Court of South Carolina notably found: "It is clear from reading the entirety of the trial court's

---

[3] Judge Cooper also sentenced Allen to imprisonment for 20 years for assault and battery with intent to kill; 25 for arson, second degree; 10 on each arson, third degree, and 5 on the firearm conviction. (App. 221-22).

sentencing order, along with the written sentencing report, that the death sentence was based upon the characteristics of Allen and the circumstances of the crime, such that the penalty is warranted…." *Id.,* 687 S.E.2d at 24. It also conducted a proportionality review and affirmed. *Id.*, 687 S.E.2d at 26. This Court subsequently denied Allen's Petition for Writ of Certiorari. *Allen v. South Carolina,* 560 U.S. 929 (2010).

3. State Post-Conviction Proceedings.

Allen filed an application for state post-conviction relief (PCR) on June 2, 2010. He was appointed counsel under South Carolina's heightened appointment standards for representation of death-sentenced applicants. Counsel filed a final amended application on November 12, 2014, and raised, in relevant part, an allegation of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) for:

> (vii) Failing to object to the trial court judge's confusing the competency to be executed standard with the standard for finding applicant to be mentally ill.

(J.A. 2209; see also 2542-43).

Prior to the beginning of the evidentiary hearings, Allen suggested he would like to waive his remedies and be executed, which prompted an evaluation. A hearing was held January 15, 2014, and results were received. (*See* J.A. 4125-79; 2186-

99). The Honorable R. Ferrell Cothran, Jr., (the PCR judge) presided. As part of the competency examination, forensic psychiatrist Dr. Richard Frierson acknowledged Allen's prior diagnosis of rumination, explaining Allen "regurgitate[d] food … rechew it and reswallow it … a way individuals can sometimes comfort themselves," but observed "that was successfully treated with medications many, many years ago." (J.A. 2194). As to schizophrenia, Dr. Frierson rejected that diagnosis observing Allen had "gone for over 6 years in the Department of Corrections … without any psychiatric medications" or "description of psychotic symptoms or symptoms of major mental illness" which "really would not be consistent with someone who has schizophrenia." (J.A. 2196). He noted no major mental illness that would affect competency; however, Allen had indicated to the doctor that he had changed his mind and wanted to continue the action, (J.A. 2186, 2196, 2199), which Allen confirmed to the court, (J.A. 2202), and the PCR judge found the action should continue.[4]

---

[4] Allen reportedly later made a suicide attempt. At PCR counsel's request, the PCR judge appointed a guardian. (J.A. 2207). In December 2014, Allen requested an impartial guardian and later explained he had a concern that his guardian's anti-death penalty position resulted in her "going along with" PCR counsel's claims. (J.A. 2465-67). Allen was at odds with his PCR counsel for pressing a claim his plea was not voluntary based on a purported promise from Judge Cooper for a life sentence. Allen's own testimony that counsel never stated to him there was a promise, and that he did not rely on such a promise, with other consistent evidence supporting his

After completing the evidentiary hearing, the PCR judge denied relief by written order dated December 1, 2015. (J.A. 2531-89). In the Order, he resolved that sentencing counsel was not ineffective in not objecting to the sentencing judge's alleged confusion concerning the mental health evidence. (App. 301-302). The PCR judge found Allen's position was "not persuasive" in that the reference to the competency to be executed standard did "not indicate that Judge Cooper declined to consider the mitigation evidence as presented." (App. 301). He resolved that Allen's complaint was really one that Judge Cooper did not assign *the weight* to the mental health evidence that Allen desired, but "consideration of the evidence was properly given." (App. 301). The PCR judge reasoned that Judge Cooper's comments were

> … more fairly read to reflect a global assessment of the facts and circumstances before the sentencing judge, which he considered, weighed and narrowed, until arriving at his sentencing conclusion.

(App. 301). He concluded Allen had not carried his burden of proving *Strickland* deficiency and prejudice. (App. 302). After the PCR judge denied Allen's petition for rehearing, Allen appealed the denial of relief.

---

testimony as credible, was the basis for denying the PCR claim that the plea was involuntary. (J.A. 2533-35; 2582-85).

4. State Post-Conviction Relief Action Appeal.

PCR counsel continued to represent Allen on appeal and filed a petition for writ of certiorari in the Supreme Court of South Carolina on June 7, 2017. Counsel asked for review of the following issue relevant to this petition:

> VI. Did trial counsel render ineffective assistance of counsel, in violation of Allen's rights under the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 3 and 14 of the South Carolina Constitution, when they failed to object to the trial judge's confusing the competency to be executed standard with the standard for finding Allen to be mentally ill?

(J.A. 18).

The court denied the petition on April 19, 2018. (J.A. 2642). Allen then turned to the federal courts.

C. Federal Habeas Corpus.

1. District Court 28 U.S.C. § 2254 Proceedings.

After Allen filed a final amended petition on May 15, 2019, the warden moved for summary judgment. On March 25, 2020, the Honorable Donald C. Coggins, Jr., issued an order granting summary

judgment in the warden's favor. (App. 88). The district court found Allen raised his challenge to the consideration of his mental health evidence in state court as an ineffective assistance claim and the PCR court had resolved that Allen failed to show counsel was deficient in representation by not objecting, thus Allen failed to carry his *Strickland* burden of proof. (App. 125-126). Allen argued to the district court

> … because he presented a large amount of mitigating evidence, much of which was uncontested, and Judge Cooper failed to find the existence of any mitigating circumstances, Judge Cooper could not have possibly considered, weighed, or given effect to all of the relevant mitigating evidence as required by *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978); and *Eddings v. Oklahoma*, 455 U.S. 104 (1981). ECF No. 63 at 34. Thus, Petitioner asserts the PCR court's contrary conclusion is based on an unreasonable determination of the facts and represents an unreasonable application of *Woodson*, *Lockett*, and *Eddings*. *Id.*

(App. 126). The district court rejected Allen's argument as resting on an incorrect legal premise. The district court found *Woodson, Lockett,* and *Eddings* stand for the proposition that a sentencer may not be "precluded" from considering evidence *offered* in mitigation, but these federal cases do not guarantee a "finding." (App. 126).

Further, the district court found the state court record demonstrated that "Judge Cooper explicitly stated he considered the evidence of [Allen]'s abusive childhood and alleged mental illness in reaching his decision." (App. 127). The district court, finding ample record support for the PCR court's decision, concluded that the state court did not unreasonably apply federal law or make an unreasonable determination of facts. (App. 127). The district court granted a certificate of appealability on the allegations concerning the circumstances of the plea, but not on the ineffective assistance claim related to the mental health evidence. (App. 204). Allen appealed to the Fourth Circuit.

2. Fourth Circuit Appeal.

The Fourth Circuit expanded the certificate with three additional issues, including whether "the trial court unconstitutionally failed to consider and give effect to mitigating evidence and counsel ineffectively failed to object." (App. 207). After briefing and argument, the Fourth Circuit granted relief in a divided panel opinion.

a. The Majority Opinion.

The panel majority found the PCR court's fact-finding was unreasonable, "and its conclusion that the sentencing judge gave 'proper' consideration was contrary to clearly established federal law." (App. 3). The majority described the issue as trial court error by not finding mitigating circumstances and using an incorrect standard to determine mental illness. (App. 3). The majority then expounded upon the Eighth

Amendment generally; found capital defendants must have "meaningful consideration and effect" of evidence offered in mitigation; and underscored reliability in imposition of the penalty, leaning heavily on references to a "moral response." (App. 44-49).[5] The majority focused its inquiry on whether Judge Cooper gave "effect" to the evidence offered in mitigation in the absence of specific findings, and by his "requiring proof of insanity or incompetence" in the mental health evidence presented. (App. 49).

The majority acknowledged the PCR court's analysis and its conclusion that Judge Cooper had considered the evidence, but chastised that "the analysis is not as simple as" that; "rather, the inquiry must be whether the state court record "shows clearly and convincingly that" Judge Cooper "g[a]ve effect to *all* of Allen's mitigating evidence" offered at sentencing. (App. 49) (emphasis in original). If not, the finding was unreasonable, and contrary to federal law. (App. 50). It determined the PCR court's finding "was in error." (App. 50).

The majority then explained that Judge Cooper's post-sentencing (direct appeal level) affidavit reflected his opinion that the evidence at sentencing did not "conclusively" show Allen was

---

[5] To be clear, a "moral" response ties to "assessing *a defendant's moral culpability*." *Wiggins v. Smith,* 539 U.S. 510, 512–13 (2003). Sentencing focus always remains on the defendant's character and crime. *See, e.g., United States v. Tsarnaev*, 595 U.S. ___, ___, 142 S. Ct. 1024, 1043 (2022) (citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion)).

mentally ill, thus, "Allen's conclusively diagnosed rumination disorder was excluded." (App. 51-52). It also noted that Judge Cooper's post-sentencing report reflected "[no] evidence of mitigating circumstances found supported by the evidence." (App. 52). But the majority countered that "there *was* evidence of mitigating circumstances supported by the evidence: Allen suffered from rumination and anti-social personality disorder and endured persistent childhood abuse," and posited, "[a]ren't these circumstances potentially mitigating as a matter of law?" (App. 52-53).

The majority acknowledged the State's argument that sentencers "are required to memorialize only aggravating—not mitigating—circumstances found to exist," but found the report should reflect evidence, not "mitigators." (App. 53-54). It reasoned, then, that because "the sentencing judge left … three lines" empty on the form under the psychiatric evaluation performed/character or behavior disorders found section, and failed to note rumination, it "suggests that [Judge Cooper] did not consider this disorder when making the sentencing decision." (App. 54).

As to the actual sentencing record, the majority "acknowledge[d]" Judge Cooper expressly "state[d] that he 'considered [Allen's] list of mental illness [sic] as described by Dr. [] Crawford,' " but he specifically referenced only schizophrenia. (App. 54-55). It also took issue with Judge Cooper's wording indicating a "claim" of mitigating circumstances finding "Allen did not merely *claim* to have mitigating circumstances," his rumination, antisocial

personality disorder and childhood abuse evidence was not "disputed… [s]o, these mitigators existed just as much as the aggravators did." (App. 55). The majority concluded that Allen showed an "unreasonable determination of facts" under Section 2254(d)(2), finding "it is clear" Judge Cooper only considered the contested schizophrenia evidence. (App. 56).

The majority also criticized the PCR court for not accepting or considering Judge Cooper's affidavit as offered in the direct appeal filing. (App. 56-59). The majority concluded that it could not "defer to the state court's ultimate ruling on Allen's Eighth Amendment claim" in light of the unreasonable fact-finding, thus, would review the claim *de novo*, and found the failure to "consider" the evidence "violate[d] established federal law." (App. 59-60).

The majority acknowledged that "a sentencer may consider mitigating evidence and decide that none of that evidence is worthy of weight," and speculated that perhaps Judge Cooper was distracted, or used the "wrong legal standard," or "place[d] an unconstitutional nexus requirement on the mitigating evidence," but "[w]hatever the reason for assigning the mitigating evidence no weight," Judge Cooper was wrong. (App. 60-68).

The majority then turned to the "substantial and injurious effect or influence" analysis pursuant to *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). The majority resolved it had concern that the error had "substantial and injurious effect" given Judge Cooper did not consider Allen's "conclusively

diagnosed" rumination, and "[t]he sentencing decision likely would be different if the sentencing judge had not excluded, ignored, or overlooked this disorder." (App. 68-69). Further, the majority was concerned Judge Cooper failed to afford "proper consideration of Allen's thorough case of an abusive and unstable childhood," which also "may very well have" resulted in a different sentence. (App. 69-70).

b. The Dissenting Opinion.

The Honorable Allison Jones Rushing dissented finding that the majority failed to adhere to limitations in 28 U.S.C. § 2254. Judge Rushing echoed this Court's strong mandate that "federal courts are not to run roughshod over the considered findings and judgments of the state court." (App. 73) (citations omitted). Judge Rushing underscored that disagreement with state fact findings is not sufficient, and 28 U.S.C. § 2254(e)(1) commanded that "factual determinations are 'presumed to be correct,' and the petitioner must rebut this presumption by 'clear and convincing evidence.'" (App. 74). The dissent found that "[b]ecause fairminded jurists could agree with the PCR court's decision" no relief was due. (App. 75).

Judge Rushing set out that "the Constitution does not *require* a sentencer to conclude that any evidence mitigates a defendant's culpability or otherwise warrants a sentence of life instead of death." (App. 76). She found that Judge Cooper had expressly confirmed that he considered the evidence, and even quoted from the sentencing comments where Judge Cooper listed mitigation evidence and

Allen's experts by name. (App. 77). Judge Rushing resolved that "[a] reasonable jurist could credit the judge's statement when announcing sentence." (App. 78).

While the majority viewed the sentencing comments on the mental health evidence evaluation as excluding other evidence, Judge Rushing found those comments to be evidence of assessment of the evidence the "defense pressed the most vigorously." (App. 78). The post-sentencing report required no different view in the dissent's eyes. Judge Cooper noted "several statutory mitigating circumstances, including the presence of a mental disturbance, were 'in evidence' but none were 'found supported by the evidence,' " which acknowledged consideration and supported that "the judge ultimately did not find the evidence to be mitigating, a decision that South Carolina law entrusted to him alone." (App. 79).

The dissent found no error in the state PCR court's finding that Judge Cooper had properly considered the evidence; no error in the district court's resolution; and noted Allen did not carry his burden to "rebut the record's clear indication that [the sentencing judge] did in fact, consider" Allen's evidence. (App. 78-81).

Judge Rushing explained that "[t]he majority conflates two uses of the term 'mitigating'," confusing noun and verb usage. (App. 80). There is no right under this Court's precedent that mitigation evidence be given effect. (App. 80). Further, the record portions the majority references are just as susceptible to supporting "that the judge did not find

that evidence mitigating *in Allen's case*." (App. 80-81) (emphasis added). At bottom, Judge Rushing found, "a reasonable jurist could understand that the sentencing judge considered this potentially mitigating evidence—as he said he did, *see* J.A. 1600—and was not persuaded that it in fact mitigated Allen's culpability or punishment." (App. 81).

As to the majority's reference to Allen's eating disorder, Judge Rushing notes that not even Allen argued that as a basis for error in his Fourth Circuit brief. (App. 82). Further, though rumination is a defined "psychiatric illness," Allen's experts "referred to rumination as an 'eating disorder'" and defense counsel relied most heavily on their evidence of schizophrenia. (App. 82-83).

As to the judge's affidavit, Judge Rushing concluded the assertion "that Allen was not 'conclusively diagnosed to be mentally ill,' " in light of the defense's great reliance on their evidence of schizophrenia, "naturally refers to the schizophrenia that Allen argued controlled his actions. It blinks reality to read the judge's comment as asserting that Allen never suffered from rumination." (App. 82-83). Further, Judge Rushing noted, Allen did not offer the affidavit in support of this claim in PCR which was an *ineffective assistance of counsel claim for failing to object at sentencing*, consequently, the "affidavit … written months after the sentencing hearing … could not possibly be relevant to the PCR court's assessment of Allen's claim" (App. 83 at n. 2).

As to the majority's reliance on the post-sentencing report where the judge wrote only "schizophrenia" for Dr. Crawford's evaluation, Judge Rushing found that was a correct reflection of Dr. Crawford's testimony, (App. 83, quoting J.A. 757 ("My diagnosis of him is schizophrenia")), pointed out that "[i]n hundreds of pages of testimony, Dr. Crawford mentioned rumination only in passing," and also noted that the doctor testified Allen was diagnosed as a child. (App. 84). Judge Rushing concluded: "I cannot go along with the majority's retelling or its disregard of the 'settled rules that limit [our] role and authority.'" (App. 86-87).[6]

The Fourth Circuit denied the State's motion for rehearing en banc and a motion to stay the mandate in order to seek review from this Court. The District Court subsequently ordered that the State of South Carolina must begin new capital sentencing proceedings within 180 days.

REASONS FOR GRANTING THE PETITION

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), as reflected in 28 U.S.C. § 2254, places clear and substantial limitations on the authority of federal courts to grant relief from state criminal judgments. A federal court may only intervene if it finds the state's disposition of a claim was unreasonable in determination of fact or unreasonable in the application of "clearly

---

[6] Though undecided by the majority, Judge Rushing also rejected Allen's suggestion the judge used the "wrong legal standard" for evaluating the mental health evidence. (App. 84-86).

established Federal law." 28 U.S.C. § 2254(d). The Fourth Circuit exceeded its authority under AEDPA and its intrusion into this state matter is unwarranted.

As to the facts: It is neither reasonable nor logical to conclude that a state court judge failed to consider evidence that he admitted during a fiercely litigated 10 day capital sentencing hearing. But the Fourth Circuit reasoned that must be the case here because Allen's sentencing judge, though he said he considered all of Allen's mental health evidence, did not expressly mention Allen's prior diagnosed eating disorder in sentencing him to death. Could it not reasonably be that the eating disorder carried little weight with the sentencing judge? Further, the Fourth Circuit failed to apply the "presumption of correctness" due state court factual findings as established in 28 U.S.C. § 2254(e)(1), and relieved Allen of the burden assigned to him to show "by clear and convincing evidence" cause to overcome the presumption. Instead, it relied upon its own new interpretation of an affidavit that Allen never offered in support of the PCR claim.

As to the application of law: Adding to the first error, the majority misconstrued relevant federal law regarding mitigation evidence. This Court's decisions instruct that the sentencer's *ability* to find evidence properly admitted has a mitigating effect must be protected, but not, as the Fourth Circuit erroneously found, that there is a right to mitigating *effect*. The majority's legal premise for finding error in the state court adjudication is plainly incorrect.

In this case, the state PCR court found the sentencing judge gave proper consideration of the admitted mental health evidence and credited the judge's statement at sentencing that he considered the evidence presented. This was a reasonable finding of fact in light of the record, and also a reasonable application of "clearly established Federal law," when this Court's precedent is correctly considered. Being reasonable, the federal courts were bound to deny relief under 28 U.S.C. § 2254(d).

The Fourth Circuit failed to honor the limitations imposed upon it by Congress and has now upset a state sentence of death that has been in place, and withstood multiple, heavily litigated challenges, since 2005. This Court's intervention is warranted to prevent this erroneous intrusion into the State of South Carolina's criminal process. *See Virginia v. LeBlanc*, 582 U.S. 91, ___, 137 S. Ct. 1726, 1729 (2017) ("proper respect for AEDPA's high bar for habeas relief avoids unnecessarily 'disturb[ing] the State's significant interest in repose for concluded litigation, den[ying] society the right to punish some admitted offenders, and intrud[ing] on state sovereignty' ") (quoting *Richter,* 562 U.S. at 103, (internal quotation marks omitted)).

I. The Fourth Circuit violated 28 U.S.C. § 2254(d) limitations and needlessly overturned a state death sentence on the insubstantial premise that Allen's mental health evidence was not afforded "meaningful consideration and effect" when the judge stated at sentencing that he had considered all the mental health evidence but did not explicitly reference Allen's eating disorder.

This Court has repeatedly cautioned the lower federal courts that the restrictions and limits 28 U.S.C. § 2254 places on their authority to disturb a state court judgment must be honored. Section 2254(d) "stops short of imposing a complete bar on federal-court relitigation" on claims adjudicated by a state court, but restricts the "authority to issue the writ" to only matters where "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). It is a standard purposefully constructed to be "difficult to meet." *Id.* The restrictions assure that "state courts play the leading role in assessing challenges to state sentences based on federal law." *Shinn v. Kayer*, 592 U.S. ___, 141 S. Ct. 517, 526 (2020) (*per curiam).* To that end, "the only question that matters" is whether there is "any possibility for fairminded disagreement" in the state's disposition. *Id.*, *quoting Richter* (*cleaned up*). That question did not control the majority's opinion here. Therefore, the grant of relief must be reversed.

This Court has not hesitated recently to reverse this type of plain defiance of AEDPA restraint in capital cases. *See, e.g.*, *Dunn v. Reeves*, 594 U.S. ___, 141 S. Ct. 2405 (2021)(*per curiam)*; *Mayes v. Hines*, 141 S. Ct. 1145 (2021) (*per curiam)*; *Shinn v. Kayer, supra.* There is no exception for capital cases in AEDPA's structure. To the contrary, "Congress enacted AEDPA 'to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases'." *Shoop v. Twyford*, 596 U.S. ___, 142 S. Ct. 2037, 2043 (2022) (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)). This Court should summarily reverse the Fourth Circuit's defiance of AEDPA as it has in other circuits as, capital case or not, federal courts *must* honor AEDPA and this Court's precedent. *See Brown v. Davenport*, 596 U.S. ___,142 S. Ct. 1510, 1520 (2022) ("When Congress supplies a constitutionally valid rule of decision" such as AEDPA, "federal courts must follow it."); *Hutto v. Davis*, 454 U.S. 370, 374–75 (1982) (reversal warranted where the Fourth Circuit "could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress" by refusing to apply this Court's precedent).

A. The Fourth Circuit majority failed to honor AEDPA limitations by not giving deference to the state PCR judge's finding that there was no error by the sentencing judge to warrant an objection by counsel.

Allen claimed that his counsel failed to object to Judge Cooper's treatment of his mental health evidence at sentencing. The crux of Allen's complaint was that Judge Cooper did not properly consider *and give effect to* the evidence; therefore, counsel should have objected. The problem for Allen was twofold: (1) Judge Cooper properly admitted and confirmed that he did in fact consider all the mental health evidence; and (2) contrary to Allen's interpretation of this Court's precedent, he was entitled to no more. The majority in finding to the contrary made multiple errors.

1. The majority directly violated 2254(e)(1) by shifting the burden to the State to show evidence in the record to convince a federal court that its fact finding is reasonable.

The ultimate test for the state court adjudication is reasonableness. 28 U.S.C. § 2254(d)(1). Essentially, the federal courts must determine if the state judge "managed to blunder so badly that every fairminded jurist would disagree" with his decision. *Hines,* 141 S. Ct. at 1149. In making this analysis, the relevant state findings must be afforded a "presumption of correctness." 28

U.S.C. § 2254(e)(1). Further, "the applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." *Id.* The majority did not adhere to these clear provisions.

Instead, the majority wrote these new and stricter standards for reviewing the state adjudication and record in this case:

> If the record before the state court shows clearly and convincingly that the trial court did not consider and give effect to *all* of Allen's mitigation evidence, the state court's conclusion that the trial court 'consider[ed] the mitigation evidence as presented' constitutes an unreasonable determination of the facts and its conclusion that such consideration was 'proper' would contravene clearly established federal law."

(App. 49-50; *see also* App. 59-60). The majority does not apply the presumption and does not hold Allen to the burden that is assigned to him.

In further defiance, the majority relied upon an affidavit from Judge Cooper (offered in response to Allen's counsel accusing him of making a promise to sentence Allen to life) that Allen did not offer in support of this claim. Yet, the majority describes this affidavit as "the most probative piece of evidence of how the sentencing judge analyzed the mitigating evidence," and faults the PCR court for not considering it. (App. 56-59). Essentially, the majority

rested on rejected evidence Allen never relied upon, and, under *Strickland*, could not have relied upon. 466 U.S. at 689 (review to be made "from counsel's perspective at the time"). If the majority intended to keep the burden on Allen, it failed to do so. Further, the majority's new argument premised on the affidavit is factually strained.

As the dissent correctly pointed out, read most "naturally," and in context, the affidavit assertion that "Allen was NOT conclusively diagnosed to be mentally ill," refers to the heavily litigated and contested defense evidence of schizophrenia. (App. 82-83 and 51). At any rate, the best evidence should be the sentencing record, and the fact the judge acknowledged, on the record, that he had considered Allen's mental health testimony and reports, but the majority rejected it.[7]

At bottom, in failing to apply 2254(e)(1), the majority has authored an opinion based on a new reading of new evidence for the claim that was not considered by the state PCR court,[8] and did so in

---

[7] Moreover, it is questionable whether the majority's attempts to discern the judge's mental process outside the sentencing record is appropriate. Judge Cooper's sentencing process is protected as any other fact-finder's process would be. *See, e.g., Pena-Rodriguez v. Colorado*, 580 U.S. 206 (2017) (evidence from deliberations generally not admissible to impeach verdict). The PCR claim was actually on whether Judge Cooper misconstrued a legal standard, not the weight.

[8] In addition to offending *Strickland's* contemporaneous review mandate, (see App. 83 at n. 2), it is also questionable that the majority's review process was even proper under *Cullen v. Pinholster*, 563 U.S. 170, 180 (2011) which provides "review is

context of an incorrect reading of controlling federal law.

2. The majority, in failing to adhere to AEDPA's mandate to review the state decision for reasonableness, failed to apply the principle that state court judges are presumed to know and follow federal law.

Judge Rushing, in dissent, deftly summarized this error: "The majority opinion paints a picture of a South Carolina judge who presided over a ten-day capital sentencing trial and then, when imposing sentence on the final day, either forgot or deliberately ignored all of the defendant's evidence except his contested schizophrenia diagnosis." (App. 72). That is not only "not accurate," as Judge Rushing points out, it is "not the only reasonable way to read the record," (App. 72), which restrains the federal court from upending the state judgment.

This Court has instructed that federal courts must honor the principle that their state court equals "know and follow the law." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). Here, the majority presumes the state court judge either forgot the evidence he admitted existed or forgot to consider the evidence (that he said he did). "This argument reflects a profound lack of respect for the acumen of the trial

---

limited to the record that was before the state court that adjudicated the claim on the merits." The affidavit, which was offered by the State in support of a separate claim, was rejected by the PCR court. (App. 303-304).

judge" that this Court does not easily countenance. *Williams v. Illinois*, 567 U.S. 50, 73-74 (2012) ("it is extraordinarily unlikely that any trial judge would be confused in the way" that would misapply basic legal requirements).

Again, the correct inquiry by a federal habeas court reviewing a state judgment must be "whether a fairminded jurist could take a different view." *Kayer*, 141 S. Ct. at 525. Here, there is no evidence of a gross "blunder" by the state PCR court in rejecting Allen's claim. *Hines,* 141 S. Ct. at 1149. The sentencing record reasonably shows that Judge Cooper understood he was to consider the mental health evidence presented: after all, he said he had considered it. *Parker v. Dugger,* 498 U.S. 308, 314 (1991)("We must assume that the trial judge considered all this evidence before passing sentence. For one thing, he said he did."). Line-by-line itemization is not required to pass 28 U.S.C. § 2254(d) review. *See Early v. Packer*, 537 U.S. 3, 9 (2002)("Ninth Circuit may be of the view that the [state court] did not give certain facts and circumstances adequate weight (and hence adequate discussion); but to say that it did not *consider* them is an exaggeration"); *see also Visciotti*, 537 U.S. at 24 ("readiness to attribute error is inconsistent with the presumption that state courts know and follow the law"). Consequently, because it is reasonable to credit Judge Cooper's statements, the majority erred in not doing so.

3. The majority misunderstood this Court's precedent on mitigation rendering its finding that the state court unreasonably applied federal law legally unsustainable.

The majority demonstrates a basic misunderstanding of this Court's precedent regarding mitigation. The majority considered this Court's precedent to guarantee "effect" of evidence offered in mitigation. (App. 55 and 67-68). That is not correct.

The majority observed that the robust mitigation case was in large part "uncontested," then concluded there could be no other action allowed but acceptance of the evidence as, *in effect*, mitigating. The majority oversteps the limits this Court has supplied. There is no support that *offered* mitigation evidence must be accepted as *actually mitigating*. The majority relies upon *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 263–64 (2007), (App. 47), but badly misconstrues the holding. It correctly quotes from the case that "[s]entencers 'must be able to give meaningful consideration and effect to all mitigating evidence'" properly admitted. (App. 47). But it lost its way interpreting *Abdul-Kabir*. Instead of understanding this Court was ensuring the *ability* to find evidence *actually mitigating* (*i.e.,* "to be able"), the majority construed the sentence as a guarantee that evidence admitted must be given mitigating *effect*.

As the dissent, the district court, and the state court all correctly observed, the Constitution guarantees, as this Court has found, that the ability to have relevant evidence *offered* in mitigation to be *considered* by the sentencer, unmarred by ruling or statutory restraint, but there simply is *no* guarantee *as to any particular weight*. (App. 76 and 80); *Harris v. Alabama,* 513 U.S. 504, 512 (1995) ("the Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer"); *see also Eddings v. Oklahoma,* 455 U.S. 104, 114 (1982) (error to "exclude" the possibility of assigning weight).

The majority's conclusion that since rumination was not contested then *it had to be mitigating in effect,* (see App. 51-52, 61 and 65), flows from legal error and is equally wrong. No *weight* is ever necessary—that is for the sentencer to determine. But the majority also erred in not understanding as a matter of state law that "no findings" regarding mitigation, in a South Carolina capital case, cannot be indicative of failure to consider.

4. The majority failed to recognize South Carolina does not require reported mitigation "findings" for purposes of sentence selection which makes an emphasis on a "failure to find" meaningless.

The majority essentially faults Judge Cooper because South Carolina capital procedure does not require reported "findings" for mitigation evidence. S.C. Code Ann. § 16-3-20(C); *see also State v. Bellamy*, 359 S.E.2d 63, 65 (S.C. 1987) (jurors "consider" rather than "weigh"). It is error to fault the judge for simply following state law.

The majority understood that findings are required on *at least one statutory aggravating circumstance* in order for the sentencer to consider death (*i.e.,* eligibility), but stopped short of admitting *no* reported findings on mitigation are required. (App. 20 n. 4 and 60-61). In essence, South Carolina does not "weigh" evidence in a specific structure; rather, sentencers are instructed to "consider" the evidence. *Bellamy, supra.* That states differ in their structure is not a basis for finding error. *See Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988) ("we have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required); *Lockett v. Ohio,* 438 U.S. 586, 605 (1978) ("There is no perfect procedure for deciding in which cases governmental authority should be used to impose death.").

The majority noted not only that the North Carolina court that sentenced Allen found "convincing" that Allen "was mentally ill," but also set out a "listing of mitigating factors found by the North Carolina trial court." (App. 16-17 and n. 3). That has no relevance whatsoever to the South Carolina sentencing. Apart from the fact the States are separate sovereigns, North Carolina requires reported findings in felony sentencing, thus the North Carolina court made finding consistent with their state law.[9] (See J.A. 101-103). *See generally* N.C. Gen. Stat. Ann. § 15A-1340.16. Moreover, Judge Cooper had "considered the North Carolina proceedings" but found them "not in the least comparable to the one we have experienced in the last two weeks." (App. 209-210). Judge Cooper was right in fact and law. Attempts to compare the two necessarily fail.

5. The majority incorrectly read the state court record which lends an erroneous appearance of elevated importance to Allen's eating disorder.

In further error, the majority misreads the record. It asserts Allen's expert, Dr. Crawford, diagnosed Allen with "schizophrenia and rumination disorder." (App. 20-21). Dr. Crawford actually testified her diagnosis was "schizophrenia" and

---

[9] In referencing mental illness evidence, the North Carolina judge did not list the eating disorder either. (J.A. 115-116).

acknowledged Allen's "eating disorder" by history, and referenced rumination as "such an unusual symptom." (J.A. 757-60; see also App. 83). The majority continued the error with its description of testimony from another defense doctor, Dr. Schwartz-Watts, (App. 23), when again, the testimony differs. The doctor testified that her diagnosis was schizophrenia but acknowledged a history of rumination, and, further that she had witnessed him "ruminating," *i.e.,* regurgitating and swallowing. (J.A. 1022-23). A misreading of the record cannot support an inference of elevated importance to the defense case that simply does not exist.

Additionally, the misreading of Dr. Crawford's testimony led to further misunderstanding of the post-trial sentencing report.[10] The majority relied upon question 8 of the report which includes a subpart on whether "character or behavior disorders" were "found." (J.A. 1936). However, that subpart is under the question of whether a psychiatric evaluation was performed, which was answered "yes," and specifically "by whom" which was answered, "Dr. Pam Crawford." Her diagnosis was schizophrenia, so, as the dissent observed, it was

---

[10] *See* S.C. Code Ann. § 16-3-25(A) (providing that after a death sentence is final, in anticipation of review by the state supreme court "a report prepared by the trial judge… in the form of a standard questionnaire prepared and supplied by the Supreme Court of South Carolina" shall be completed and forwarded by the clerk). Because the report is mandatory even in jury cases, it cannot be an accurate reflection of "findings." The majority seems to acknowledge this later when it notes that it normally would not have information on selection. (App. 71).

correct to enter that information, not an indication of failing to consider the past diagnosed eating disorder.

Even so, absent from the majority's review is any indication of whether rumination, the eating disorder, *affects* mental health such that it could complement the focus of defense counsel's argument, or whether it was a "symptom" as Dr. Crawford testified.

Moreover, the majority not only erroneously relies on Judge Cooper's assertions in the affidavit, as asserted above, but also, as the dissent pointed out, if read in context, the comment on lack of proof most logically goes to the highly contested evidence of schizophrenia, not the eating disorder. (App. 78 and 82). As a point of consideration—if looking at post-sentencing evidence, one could mention Dr. Frierson's opinion where he also *rejected* a diagnosis of schizophrenia, acknowledged the past diagnosis of rumination, but concluded there was no major mental illness that would affect competency. (J.A. 2194-96). Judge Cooper's comments appear neither unreasonable in context nor an outlier in comparison.

B. Even if this Court should not find the Fourth Circuit majority erred as set out above, its opinion should still be vacated because it failed to conduct a proper analysis of whether the error is non-prejudicial or otherwise harmless.

1. The majority improperly resolved the issue should be evaluated as an Eighth Amendment claim as opposed to an ineffective assistance of counsel claim.

Allen argued to the Fourth Circuit that the state court erred and counsel was ineffective in failing to object. (*See* COA4, Doc. 24-1 at 53 (Petitioner's Brief)). The district court acknowledged the claim was one of ineffective assistance. (App. 125-26). The Fourth Circuit granted a certificate on whether it was error *and* counsel erred in not objecting. (App. 207). This was a *Strickland* claim.

The majority, though, upon resolving that the basis for not finding deficient representation was unreasonable, skipped past *Strickland* prejudice and did not evaluate whether the lack of objection led to error such that a reasonable probability of a different sentencing result was demonstrated. *Strickland*, 466 U.S. at 687. A *Strickland* prejudice analysis requires consideration of the "omitted" mitigation evidence alongside the case in aggravation. *Wong v. Belmontes,* 558 U.S. 15, 20 (2009). The majority's failure to apply a *Strickland* analysis improperly

relieved Allen of demonstrating *Strickland* prejudice. Given the massive weight of aggravating facts in this case, whether adding consideration of an eating disorder or enhancing consideration of an eating disorder, Allen would have a difficult time in showing prejudice. Even so, it was error not to require him to do so.

2. Should the Court find that the error may be assessed under the *Brecht* standard alone, the majority erred in failing to consider the entirety of the record.

In conducting their *Brecht* harmless error analysis, the majority referenced that a sentencer must consider "all the aggravators and all the mitigators," (App. 71), but the majority did not consider *any* evidence in aggravation. Rather, it briefly mentioned that Judge Cooper in the post-trial affidavit indicated that he was looking for evidence that Allen was "seriously mental ill" and speculated "rumination may have fit the 'seriously mentally ill' bill" just as well as schizophrenia. (App. 69). It also briefly mentioned that even in light of Judge Cooper noting the "depravity of Allen's crimes," he also indicated in the affidavit that life may be appropriate if there was evidence of "serious[] mental[] illness." (App. 69-70).[11] Consequently, the majority dismissed

---

[11] Actually, Judge Cooper asserted in the post-sentencing affidavit that he did not promise a sentence, and, contrary to the majority's reference to the known "depravity," that he did not know the extent and savagery of the crimes, Allen's

the overwhelming evidence of aggravation with little more than a flicker of consideration. To not consider the rest of the case is error.

For error to have a "substantial and injurious effect or influence," in light of "the record of the trial," it must have "affected the verdict." *O'Neal v. McAninch,* 513 U.S. 432, 436 (1995); *Allen v. Lee,* 366 F.3d 319, 336 (4th Cir. 2004) (looking to record to determine whether "instruction had a substantial and injurious effect or influence on the verdict of death") (Traxler, J., concurring); *Sansing v. Ryan,* 41 F.4th 1039, 1063 (9th Cir. 2022) ("We see nothing in the record remotely suggesting that the Arizona Supreme Court would have reached a different conclusion had it … accorded Sansing's difficult family background minimal weight rather than no weight"); *Duckett v. Mullin*, 306 F.3d 982, 1002 (10th Cir. 2002) (reviewing "in light of the entire record"). Simply, it would strain logic to conclude that if only Allen's eating disorder had been (more) thoroughly considered, there is a reasonable probability that a confessed killer of at least three men and one woman, who intimidated, threatened and harmed several others over his summer months crime spree in 2002, and who embraced and cherished his identity as a murderer, would have been sentenced to life instead of death. But the majority did not reach the tremendous bulk of evidence in aggravation at all which was error.

---

expressed "desire to kill," or the extent of the actual pain Allen actually inflicted until sentencing. (J.A. 2076).

The State maintains there is no error to prompt a harmless error analysis. But if conducted, such analysis should consider the entirety of the record.

CONCLUSION

For all the foregoing reasons, this Court should summarily reverse, or grant the petition for additional briefing and reversal.

Respectfully submitted,

ALAN WILSON
Attorney General
State of South Carolina

DONALD J. ZELENKA
Deputy Attorney General

*MELODY J. BROWN
Senior Assistant Deputy
Attorney General

Office of the Attorney General
State of South Carolina
Capital Litigation Section
Post Office Box 11549
Columbia, South Carolina
29211
(803) 734-6305
mbrown@scag.gov

**Counsel of Record*