No. 25-1176

IN THE

Supreme Court of the United States

MARION ALEXANDER LINDSEY,

Petitioner,

v.

SOUTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF IN OPPOSITION

ALAN WILSON
Attorney General of
South Carolina

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Counsel of Record
Senior Assistant Deputy
Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3742
mbrown@scag.gov

Attorneys for Respondent

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CAPITAL CASE

PETITIONER'S QUESTIONS PRESENTED

1. Whether courts evaluating ineffective-assistance-of-counsel-claims may evaluate only each error in isolation–or whether they are obligated to consider the prejudice resulting from the cumulative effect of counsel's deficiencies.

2. Whether a trial court's wholesale adoption in a capital case of the State's proposed order without providing any judicial guidance or substantive change violates the Due Process Clause or Eighth Amendment.

(Pet. i).

LIST OF PARTIES

The caption adequately reflects the parties to this action which stems from a state criminal conviction for murder and a sentence of death. The parties are Lindsey and the State of South Carolina.

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BRIEF IN OPPOSITION

Petitioner Marion Alexander Lindsey (Lindsey) is a death-sentenced South Carolina inmate seeking review of the state supreme court's order that affirmed the denial of post-conviction relief (PCR). Lindsey offers two questions; neither support cause for certiorari review. In the first, Lindsey suggests the state court wrongly applied the prejudice test from *Strickland v. Washington,* 466 U.S. 668 (1984), but he made no such claim in the state litigation and there is no ruling to review on the specific position he offers here. In the second, Lindsey merely asks for a modification of a state procedural rule to direct the state to exempt capital cases from its proposed order process; yet, the state has and enforces procedural safeguards, much like the federal district courts, to assure a fair and open process. In sum, even if Lindsey's questions spark theoretical interest, he has failed to prepare the case for meaningful review by this Court. The petition should be denied.

STATEMENT OF THE CASE

A. Introduction.

Lindsey maintains the state court failed to grant him relief when his offered PCR evidence, so he believes, warrants the grant of resentencing.[1] The specifics follow

1. Lindsey is not yet nearing exhaustion of his available remedies and is simultaneously seeking review through 28 U.S.C. § 2254 habeas corpus proceedings (though he is exhausting his one-year statute of limitations before substantive and responsive pleadings are filed). *See* C/A No.: 2:26-cv-00560-DCM-MGL (District of South Carolina).

below, but the State begins its statement of the case with the crime that supports Lindsey's death sentence:

1. Facts of the Crime:

As succinctly summarized in the direct appeal, Lindsey "killed his estranged wife, Ruby Nell Lindsey (Victim), on September 18, 2002, in the parking lot of the Inman City Police Department." *State v. Lindsey*, 642 S.E.2d 557, 558 (S.C. 2007). As is often the case, the record shows much more, specifically, much more malice than conveyed in that summary sentence.

After multiple instances of violence towards the victim, Nell left Lindsey and moved into her mother's home.[2] The day before the murder, Lindsey was arrested for criminal domestic violence for hitting Nell and ripping her jewelry from her, but he was released shortly thereafter on bond. On the night of the murder, Nell's friend, Celeste, gave Nell a ride from Nell's work to where she was staying with her mother. Nell was in the back of the car with Celeste's two children, ages four and nine. Lindsey, though he had been ordered by the magistrate to stay away from Nell, was waiting for her near her mother's home. Celeste, seeing Lindsey, turned the car around, and spoke to Lindsey from a distance, both in their respective cars. Lindsey wanted to know if Celeste had been in contact with Nell, but she deflected, knowing that Lindsey had threatened Nell. Lindsey became insistent. Even though

2. The jury only heard the extent of his violence toward Nell–which included hitting her for minor inconveniences such as "not coming to pick up milk from him," to nearly breaking her jaw for being late during a family vacation— during the penalty phase. (Pet. App. 6a).

one of the children, the four-year-old, leaned up from the back seat to say "hello" to him, Lindsey wanted to look in the back of Celeste's car. At that point, Celeste "sped off and headed to the Inman police station, running stop signs and stop lights along the way" but Lindsey kept up. Celeste and Nell were seeking protection by going to the police department and Nell called 911, but it was too late. Lindsey followed them into the station parking lot, then

> exited his car and demanded [Nell] get out of [Celeste's] car. When [Nell] refused, Lindsey fired a handgun four times through the tinted rear driver's side window, killing [Nell] and narrowly missing the children in the back seat. A police officer in the parking lot fired at Lindsey. Lindsey was treated and hospitalized for gunshot wounds, including one to the head, which Lindsey claims he inflicted in an attempt to kill himself.

(Pet. App. 4a-5a).[3]

Nell died in front of the police department. The small children beside her were spared death, but not the danger or fear from being in the line of fire. Nell's desperation to seek help was recorded in her 911 call, as were the children's screams and cries. (Pet. App. 155a-156a).

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3. Lindsey's self-inflicted shot missed his brain entirely, and the shots he sustained from police were not life-threatening, hitting his hip and legs. (Pet. App. 147a, 430a). Notably, Lindsey's trial mental health expert acknowledged a neurological examination from Dr. Absher revealed normal results. (Pet. App. 148a, 420a).

2. Trial Proceedings.

A Spartanburg County grand jury indicted Lindsey in October 2002 for Nell's murder. The State served its notice of intent to seek the death penalty prompting capital procedures that included the appointment of qualified counsel under S.C. Code Ann. § 16-3-26(B)(1). In capital cases, if the defendant is indigent, the state court must provide two attorneys and appointment must satisfy heightened qualifications: "One of the attorneys so appointed shall have at least five years' experience as a licensed attorney and at least three years' experience in the actual trial of felony cases, and only one of the attorneys so appointed shall be the Public Defender or a member of his staff." *Id.* Here, the state allowed the appointment of three attorneys, Spartanburg County Public Defender Michael Bartosh along with Doug Brennan, Esq., and Karen Quimby (Hatcher), Esq., to represent Lindsey. The Honorable John C. Few was vested with jurisdiction over all proceedings.

The case was called to trial on May 17, 2004, and, on May 21, 2004, the jury convicted as charged. On May 22, 2004, the penalty phase began. On May 24, 2004, the jury returned, reported finding the statutory aggravating circumstance[4] of "great risk of death to more than one

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4. Lindsey's petition reflects a profound misunderstanding of state law which in turn produces a misshapen argument regarding the state's case for sentencing. Lindsey posits the state's case for death rested merely "on a single aggravating factor" while, on the other side of coin, he had "amassed substantial mitigation evidence" in comparison. (Pet. 2; *see also* Pet. 5). That leans toward a dangerously misleading concept for review. As this Court has previously found, in South

person," then recommended a sentence of death.[5] Judge Few imposed the death sentence, as required by the jury's determination.

3. Direct Appeal.

After direct appeal review of the issues raised, and after a separate, statutorily required proportionality of the sentence review, the Supreme Court of South Carolina affirmed the conviction and sentence in *State v. Lindsey*, 642 S.E.2d 557 (S.C. 2007). This Court denied certiorari on October 1, 2007. *Lindsey v. South Carolina*, 552 U.S. 917 (2007). No issue was raised relevant to this appeal.[6]

Carolina, "the State's evidence in aggravation is not limited to evidence relating to statutory aggravating circumstances." *Simmons v. South Carolina*, 512 U.S. 154, 162 (1994). Statutory aggravating circumstances exist only for eligibility. *See Tuilaepa v. California,* 512 U.S. 967, 971 (1994) (recognizing "two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision"). To equate the statutory circumstances for eligibility with the *level* of egregiousness or aggravation assessed by the jury in sentencing is just plainly wrong.

5. Lindsey alleged as part of his PCR action that his defense counsel should have argued against the eligibility factor being applied to case. Specifically, counsel suggested the PCR judge should find: "Had this tragedy occurred in someone's private home, with the children sitting beside the deceased, the death penalty could not have been sought." (*See* PCR Supp. App.68; *see also* Pet.App.45a). Lindsey did not raise that issue in the PCR appeal. (*See* PCR Brief of Petitioner, p. 1).

6. The only issue previously raised to this Court centered on a challenge to a juror's disqualification. (*See* Pet. App. 124a-125a).

4. State Post-Conviction Relief Action.

On August 14, 2007, Lindsey filed an application for relief. The Honorable Paul M. Burch was vested with jurisdiction over all PCR proceedings. Judge Burch appointed Spartanburg attorneys Richard W. Vieth, Esq., and David M. Collins, Jr., Esq., to represent Lindsey. PCR counsel amended the application on August 6, 2009, and raised 6 allegations of ineffective assistance of counsel. (Pet. App. 131a-132a). Counsel later filed a post-hearing brief and expanded the claims to ten specific allegations. (Pet. App. 132a-136a).

After the evidentiary hearing, PCR counsel submitted a 61-page proposed order setting out suggested findings and conclusions that *each* of his ineffective assistance claims met both *Strickland* prongs. (PCR Supp. App. 9-69; *see also* PCR Supp. App. 20, suggesting conclusion that, "Applicant has met his burden of proof on all of the issues discussed below and *each of the instances of ineffective assistance* of counsel discussed below is *individually sufficient* to support the Court's decision. In each instance, Applicant was denied his Sixth Amendment right to effective assistance of counsel in these capital proceedings.") (emphasis added).

The original Order of Dismissal was signed on August 10, 2011. (Pet. App. 612a).[7] In the subsequent petition

7. Though Lindsey asserts in his petition, with emphasis, that "the state court denied post-conviction relief by signing – *without even reading* – the State's proposed order," (Pet. 3), that remains only Lindsey's speculation resting almost exclusively on typographical, spelling and grammar errors, (Pet. 10). To be sure, that was Lindsey's claim in the state litigation *after remand*

for reconsideration, Lindsey argued that the evidence supported that all claims *both* individually and collectively supported relief. (PCR App. 3728-3736). When denied, Lindsey timely appealed. After the initial appeal petition was filed, but before reaching a decision, the Supreme Court of South Carolina remanded the case to the circuit court for a new order based on "the frequency and severity of the drafting errors in the Order of Dismissal[.]" (Pet. App. 390a).

The PCR judge, after again receiving materials and involving both parties' counsel, signed an Amended Order of Dismissal on September 28, 2015, which had the same findings of facts and conclusions of law. (*See* Pet. App. 120a-338a). Lindsey filed a petition with the state supreme court insisting that the lower court was instructed to write his own order and, because the amended order was substantively the same, the PCR judge committed error. (PCR II Supp. App. 284-315). That petition was denied. Lindsey filed other requests for relief in the circuit court arguing not only that the judge was required to write his own order but also seeking to remove the judge and have a new hearing along with requesting reconsideration of the denial of relief. (*See* PCR II Supp. App. 317-334). As before, in seeking reconsideration, Lindsey again asserted briefly that all allegations of ineffective assistance "*were individually and collectively* sufficient to sustain a finding of ineffective assistance" but did not challenge the court's structure of the prejudice inquiry. (PCR II Supp. App. 320) (emphasis added).

(he made no objection to the proposed order practice when he was actively participating with review and his own proposed order) but there has never been any such finding.

On September 22, 2016, the PCR judge held a hearing on the various motions. The PCR judge explained that he remembered the hearing very well; remembered running late in that evening for some portions of the hearing; he admitted the he perhaps read too hastily and admitted he did not take the time to correct the drafting errors in the proposed order; but, importantly, emphasized that, " the base order was exactly as I, as I saw the case that was presented to me." (PCR II Supp. App. 406-407; *see also* Pet.App. 30a). The judge also acknowledged the attorneys "would never even imagine the number of hours" the judge and his clerk poured over the order in the remand proceedings. (PCR II Supp. App. 407; *see also* Pet.App. 30a). The judge stated he wanted everyone to be assured that he was personally "involved in redrafting the order[.]" (PCR II Supp. App. 407-408; *see also* Pet. App. 30a). By order dated July 8, 2019, the PCR judge denied the motions and reconsideration. Lindsey again appealed.

Lindsey raised only three issues in his initial petition, and the Supreme Court of South Carolina granted review on all three:

1.

> Whether the PCR court, in flagrant disregard of this Court's remand Order and Petitioner Lindsey's rights under the Fifth and Fourteenth Amendments to the United States Constitution and under state law, erred in twice adopting the Attorney General's proposed orders of dismissal under circumstances that show the PCR court failed to consider Lindsey's grounds for PCR and did not even read the proposed order before signing it?

2.

Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to conduct an adequate mitigation investigation and failing to prepare and present an adequate mitigation case at trial especially where counsel did not hire a social work expert who could testify regarding petitioner's miserable upbringing, where counsel hired an inexperienced forensic psychiatrist one month before trial, and then failed to prepare her to testify to petitioner's considerable prejudice?

3.

Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to hire a prison adaptability expert who would have rebutted the state's aggravation and future dangerousness evidence against petitioner by testifying petitioner did not pose an unreasonable risk of harm to prison staff, other inmates, or the community?

(PCR Brief of Petitioner, p. 1).

The Supreme Court of South Carolina combined the second and third issues and framed the questions as:

> 1. Did the PCR court disobey this Court's order and violate state law and Lindsey's constitutional rights by adopting the State's proposed order of dismissal "under circumstances showing the PCR court failed to consider Lindsey's grounds for PCR and did not even read the proposed order before signing it"?
>
> 2. Did trial counsel provide ineffective assistance by failing to properly investigate and present an adequate mitigation defense?

(Pet. App. 3a-4a).

In its November 5, 2025, opinion[8] issued by majority vote, the Supreme Court of South Carolina affirmed the PCR court's denial of relief with a modification. (Pet. App. 1-48a). While largely agreeing with the PCR judge, the court parted company with the PCR judge on the reason that Lindsey failed to show ineffective assistance in not calling a prison adaptability expert. The court rejected the PCR judge's determination that deceased counsel "exercised 'reasonable professional judgment' in not calling" the witness because there was not *direct* evidence, *i.e.*, the precise reason counsel would not have called the expert so the court could evaluate the strategy used. (Pet. App. 46a). The court concluded, though, that the PCR judge was correct that there could be no prejudice based on the record evidence. (Pet. App. 46a). With that modification, the denial of relief was affirmed.

As to the order issue, the state court found the proposed order process continues to be available as long

8. Published at 447 S.C. 93, 924 S.E.2d 104 (2025).

as state procedures set out to ensure fairness are followed, specifically that: "(1) the other parties are aware of the request for a proposed order and allowed to respond to the proposed order; and (2) the PCR court carefully reviews the order before signing it." (Pet. App. 34a). The court found no error in Lindsey's case because these procedural safeguards were present and Lindsey received "ample opportunity to respond to the State's proposed order." (Pet. App. 34a). Further, the court found that the PCR judge's remand statements were telling, particularly that the findings and conclusions in the order (which remained unchanged) were precisely how the judge "saw the case that was presented to" him. (Pet. App. 34a). The court also noted the PCR judge's acknowledgment of his additional review during the subsequent remand proceedings. (Pet. App. 354a-35a). Thus, the court concluded that Lindsey failed to show any violation of his "constitutional rights or South Carolina law" in the PCR judge's adoption of the proposed order. (Pet. App. 35a).

As to the ineffective assistance of counsel claim, the court first rejected Lindsey's continuing general argument based on practice suggestions from the non-mandatory ABA Guidelines for capital defense attorneys, including an allegation that the defense "waited too late" to prepare for sentencing mitigation. (Pet. App. 36a-40a). Then, in addressing the substantive mitigation investigation allegations, the court considered Lindsey's argument that the defense made a "'feeble' mitigation presentation" but found, as had the PCR court, that Lindsey did not show *Strickland* prejudice. (Pet. App. 40a). The court then considered the new evidence (both the potentially mitigating and potentially aggravating components of that new evidence) in context along with the trial level evidence. (*See* Pet. App. 47a).

As to Dr. Melikian's mental health assessment testimony, the court found Lindsey failed to establish prejudice given that Dr. Melikian's opinion did not change even considering the PCR case evidence.[9] Moreover, the court found that she "effectively provide[d] relevant opinions during the penalty phase" and "the damage to Lindsey's mitigation defense resulted from Lindsey's choice to fabricate Jimmy" – an imaginary friend/reported hallucination that was embraced before trial "at the behest of his fellow jail inmates" and in "attempt to avoid

9. Lindsey asserts in his petition that Dr. Melikian testified that considering the records and information from the PCR efforts that she '"would have changed' her diagnosis of petitioner." (Pet. 9). This is incorrect. *See* Rule 15.2, Supreme Court Rules (setting out a party's obligation in filing its brief in opposition to point out perceive misstatements of facts). This makes a difference to reviewing the state court's finding that her diagnostic conclusion remained the same, "major depressive disorder," though "her understanding of the depth of Lindsey's depression" would have shifted. (Pet. App. 40a). To be clear, Dr. Melikian admittedly did not offer a different diagnosis in her PCR testimony:

Q: Doctor Melikian, you said your diagnoses had changed from the clinical diagnosis you gave Mr. Linsey in 2002, is that correct?

A: In that I didn't understand the severity of his depression.

Q: Okay. But still Axis I, Axis II, Axis III, you're saying the same thing, aren't you?

A: Yes.

(PCR App. 2905).

responsibility for his actions" – not from Dr. Melikian's lack of knowledge or supposed unpreparedness." (Pet. App. 40a-41a).[10]

As to the mitigation social worker's presentation at the PCR, the court made a detailed analysis of the PCR testimony, concluding that "considered *in isolation or in conjunction* with other evidence," the PCR testimony was insufficient show deficiency. (Pet. App. 42a) (emphasis added). Simply, though "more detailed," the witness "provided information of the same substance as did Dr. Melikian and others during the penalty phase." (Pet. App. 42a).

The court also considered another family member's proposed testimony (Sims) offered at the PCR hearing which was cumulative to other family members testimony given at trial; and Lindsey's proposed testimony from his pre-murder former lawyer (Tullis) regarding additional depression evidence which was also considered merely cumulative, as were Linsdey's offered additional mercy pleas. (Pet. App. 43a-44a). One proposed witness, EMS worker Bell, would have added little to the distraught depression defense (another EMS worker testified at trial about the self-inflicted wound), and, dangerously, could have added Lindsey's statement that Lindsey shot Nell because Nell "was fooling around" on him – a direct contradiction to the "desperate and depressed father distraught over not being able to visit his children," that the defense presented. (Pet. App. 44a).

10. Dr. Melikian had testified at trial "that the first mention of Jimmy was on October 10, 2002, which was the same date that he was served with the notice to seek the death penalty." (Pet. App. 419a).

Lastly, the court found no prejudice in not presenting a prison adaptability expert considering the expert called in PCR concentrated mainly on *the department of corrections' ability* to contain Lindsey, and that he had conceded that Lindsey had a "prior conviction for ABWIK (assault and battery with intent to kill) after shooting Stanford Wilkins" and also that "Lindsey had been charged with domestic violence several times." Further, Lindsey had a history of "prison fights," and "a prison guard had been caught in the middle of one of the fights, and that Lindsey was gassed in order to break up one of the fights," all of which "severely contradicted" the PCR witness' opinion. (Pet.App. 46a-47a).

In conclusion, the majority found that Lindsey failed in his burden of proof – he failed to demonstrate "that counsel's errors, if any, were so serious so as to deprive him of a trial whose result was reliable." (Pet. App. 47a). The court continued in further explanation of its' ruling:

> Lindsey has not established "'there is a reasonable probability that, absent [counsel's] errors, the sentencer –including an appellate court, to the extent it independently reweights the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'"

(Pet. App. 47a) (citations omitted).

A dissent followed; however, the dissent took no exception whatsoever in resolution of the order question. (Pet. App. 49a). Rather, the dissent argued that trial counsel did not do enough to "humanize his client and furnish a coherent narrative about his life history" finding the presentation at Lindsey's trial to be "sterile and bland." (Pet. App. 59a, 62a). The dissent asserted "[t]he only way to counter the weight of" details about the murder "and other aggravating evidence on the State's side of the scales would be to present Lindsey's story by way of a narrative that could help the jury understand his conduct." (Pet. App. 62a). [11] Essentially, the dissent agreed with the majority that, as far as structure of the review is concerned, the appellate court reweighs evidence in considering prejudice; however, the dissent opted to view (though the State submits through a faulty lens, *see* n. 11, n. 12) the additional evidence as creating a reasonable probability that a juror would find Lindsey's actions "fueled by the unchecked passion of a deluded father," "compulsive … uncontrolled" and "erratic" such as to not find him on of "the worst of the worst." (Pet. App. 65a).[12]

11. Respectfully, at points, the dissent, in its discussion, confuses evaluation of the evidence for sentencing, the limited function of statutory aggravating circumstances, and even proportionality review which is not the function of a jury at all. (*See* Pet.App. 65a-66a). With legal lines so crossed and blurred, it is difficult to take away a viable alternative view of the case from its discussion.

12. The dissent's position was premised on whether additional details could have been elicited from mother, uncle, aunt, absent father, brother, former attorney, EMS worker Bell, a mental health professional Ann Howard, Drs. Melikian and Brawley, and finally the social worker, to create better support for the failed defense. (Pet. App. 67a-119a). There was no comprehensive consideration of the evidence of aggravation, or whether additional aggravation could also flow from the testimony. Recall that the majority correctly recognized that EMS worker Bell would have testified that Lindsey admitted shooting Nell because of jealousy which undermines the theory of depression and angst over estrangement from children. (Pet. App. 44a). Simply, Lindsey's (and the dissent's) preferred narrative does not match the facts and that will always be a problem for Lindsey.

Lindsey did not file a petition for rehearing, thus, raised no contest to any particular portion of the opinion.

REASONS WHY CERTIORARI SHOULD BE DENIED

Lindsey presents an extraordinarily poor vehicle for consideration of his questions presented. On the one hand, the case is undeveloped on the *Strickland* question, and on the other, the case is so well-developed on the proposed order issue that it demonstrates that further consideration of his complaints is factually and legally unwarranted. The petition should be denied in its entirety.

I.

Strickland v. Washington **sets the test for evaluating prejudice and that test was applied precisely as** ***Strickland*** **directs.**

As to the first question, Lindsey insists that the state court failed to use the proper structure to evaluate *Strickland* prejudice. The record shows his argument is wrong. The Supreme Court of South Carolina precisely followed the *Strickland* test as to prejudice and, in considering all the evidence in context, concluded that Lindsey failed to establish a reasonable probability of a different result. (*See* Pet. App. 47a). This is what *Strickland* and its progeny requires. *Id.*, at 695; *Wong v. Belmontes*, 558 U.S. 15, 25-26, (2009) (acknowledging a "more is better approach" is not the standard because negatives may attach to additional positives and "the reviewing court must consider all the evidence—the good and the bad—when evaluating prejudice"). Moreover, the faithful application of the test is not simply proven by its reference; it is demonstrated by the case specific, whole context consideration set out in the majority opinion. (Pet. App. 36a-47a). If the Court would evaluate this ordinary application of *Strickland* by undertaking an additional fact-intensive review (which it should not), the record well and fully supports the state court decision. However, Lindsey does not ask for that; rather, he asks this Court to find the state court failed to use the appropriate test, suggests that there is a circuit split on the matter, and that this Court should lay down the law. Two major problems arise for Lindsey. One, this Court already has instructed on the law, and two, Lindsey never asked the lower court to consider his present position. In essence, Lindsey seeks review of a decision never made on a ground never argued.

A. Lindsey did not raise a claim that the state court misapplied the *Strickland* prejudice test by failing to apply a cumulative error analysis, and there is no ruling to review.

Lindsey did not argue to the state court that the PCR judge failed to evaluate *Strickland* prejudice under a cumulative error theory; rather, Lindsey consistently argued that the PCR mitigation evidence would have made a difference, a fact argument. A petition for certiorari is not a place to raise an argument for the first time.

In general, a party is expected to frame its issue in the lower court and litigate the issue appropriately. New issues are seldom framed on appeal; yet that is the position Lindsey finds himself here. In the PCR appeal, Lindsey did argue the PCR judge misunderstood the *Strickland* test, but in a different way. Lindsey argued the PCR court "erred in its prejudice analysis" by "determine[ing] that because trial counsel presents some mitigating evidence, that *ipso facto* petitioner could not show prejudice." (PCR Brief of Petitioner, at 77). That is not a decision on cumulative error – a phrase, notably, that does not appear in the challenged opinion or in Lindsey's PCR Brief of Petitioner. In fact, because Lindsey cannot show a ruling on the questions for this Court to review, he fails to meet the jurisdictional provision he argues is available. 28 U.S.C. § 1257 provides for appellate review; not the filing of new actions. Again, Lindsey has not presented a case that calls for certiorari review.

B. The Supreme Court of South Carolina did err in applying *Strickland*, but not in a way that helps Lindsey; the court erred in failing to apply the presumption of reasonable representation that is commanded by *Strickland*.

Though Lindsey fails to recognize it, the state supreme court did commit error in applying *Strickland*, but it erred in reviewing the lower court's *rejection* of deficient performance in the first place. This is an additional sustaining ground as to the lack of prejudice regarding a prison adaptability expert because where there is no deficient performance, there is no possibility of resulting *Strickland* prejudice. The state court made an error of law in its view of (or failure to view) evidence on strategic decisions apart from direct explanation.

This Court has cautioned reviewing courts to refrain from '"*post hoc* rationalization'" when it "contradicts the available evidence of counsel's actions," but there is no command to have "counsel confirm every aspect of the strategic basis for his or her actions." *Harrington* *v. Richter*, 562 U.S. 86, 109 (2011) (quoting *Wiggins v. Smith*, 539 U.S. 510, 526-527 (2003)). "There is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.'" *Id.,* (quoting *Yarborough v. Gentry,* 540 U.S. 1, 8 (2003) *(per curiam))*. Failing to apply the presumption incorrectly reduced Lindsey's burden of proof. *Strickland,* 466 U.S., at 689 ("a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, ***the defendant must overcome*** the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy.") (emphasis added).

Here, lead counsel who steered the defense in the penalty phase was deceased at the time of the PCR hearing. But co-counsel was present and notes on the matter were referenced at the PCR hearing supporting that the line of mitigation was contemplated. (PCR II Supp. App. 190). Further, the defense file had SCDC records and "records from the Spartanburg Detention Center concerning his disciplinary history." (PCR II Supp. App. 190). Further still, the PCR court found persuasive that "counsel noted that evidence of prison adaptability could be introduced from a clinical psychologist," or others. (PCR II Supp. App. 190 and 185). In essence, there was evidence very supportive of a reasoned decision not to present prison adaptability evidence rather than failure to investigate, failure to recognize mitigation, or basic inattentiveness. *See Dunn v. Reeves*, 594 U.S. 731, 740 (2021) ("Counsel's initial enthusiasm to collect Reeves' records and obtain funding hardly indicates professional neglect and disinterest."). Consequently, that portion of the opinion could be set aside and the PCR finding that

Lindsey failed to show deficiency affirmed. With that finding affirmed, any prejudice analysis on the expert is out of the equation. *Strickland, supra.*

C. Lindsey's purported split in the circuit is mostly illusory given the context of the cases cited.

Lastly, in forwarding his undeveloped issue, Lindsey attempts to benefit from vague commonalities to attempt to show a circuit split. The argument is lacking.

Lindsey aims for *Strickland's* rule that a court need not decide the deficiency prong to advance to a prejudice analysis as mooring for his argument. (Pet. 16-17). From there, he insists that once a court "assumes error," there is no going back once prejudice is found rather than rejected. (Pet. 16). Lindsey gravely misinterprets the Court's observation.

This Court merely guided that a reviewing court can simply skip a step to dismiss a claim; "a court need not determine whether counsel's performance was deficient" observed that "[i]f it is easier to *dispose* of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." 466 U.S. at 697 (emphasis added). That reflects judicial economy, not defendant windfall. If prejudice does not lead to dismissal, the deficiency prong must be considered to satisfy *Strickland.* 466 U.S. at 697 ("unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable"). Try as he might, Lindsey cannot make this provision support that all he has to establish is prejudice. Neither does his listing of cases help him on this point.

In proffering his evidence for a circuit split, Lindsey cites first from the First Circuit, *United States v. Baptiste*, 8 F.4th 30 (1st Cir. 2021). (Pet. 17-18). That case plainly shows there was no contest to "a long list of failures" by defense counsel. *Id.*, at 35. That decisively cuts against Lindsey's theory. Next, Lindsey cites from the Second Circuit, *Lindstadt v. Keane*, 239 F.3d 191 (2d Cir. 2001). Similarly, the court there found error; it actually considered four "errors in the aggregate." *Id.*, at 199. The Seventh Circuit case cited likewise gives no aid. Linsdey cites *Washington v. Smith*, 219 F.3d 620 (7th Cir. 2000). (Pet. 18). That court, too, considered counsel's multiple failures in representation. *Id.*, at 635. Lindsey also cites *Bejarano v. Reubard*, 136 F.4th 873 (9th Cir. 2025). (Pet. 18). That one far outpaces the remainder in *not* supporting Lindsey. The court there denied federal habeas corpus relief finding even when lumping all purported errors together, no relief was due. *Id.*, at 892.

Moreover, Lindsey also misapprehends South Carolina's stance when he argues the matter is unsettled. Again, the differences are definitional. South Carolina has reversed without individual assessment, but not without error. In *Nance v. Ozmint*, the state supreme reversed not for assumed "deficiencies in counsel's representation," but on a multitude of identified deficiencies. 626 S.E.2d 878, 881 (S.C. 2006); *see also Lorenzen v. State*, 657 S.E.2d 771, 775 n. 2 (S.C. 2008) (explaining *Nance* simply found based on multiple instances of deficient performance prejudice could be "assumed" rather than depend on individual evaluation).

These differences, again, go back to definition. Is "error" constitutional error, i.e., prejudice, or is "error" counsel deficiency? It makes little sense to contend counsel was not deficient in representation, but a defendant has nonetheless been subject to constitutionally insufficient representation. Even so, in Lindsey's case, the Court need not decide. Not only is the matter wholly undeveloped, Lindsey's argument rests on an inaccurate interpretation of *Strickland.* Read carefully, Lindsey's argument fails to show any reason to grant the petition for review of his question one.

II.

Lindsey's argument that this Court should order modification to established state procedures for submission and acceptance of proposed orders to require the exemption of capital post-conviction relief orders is based on defense preference not due process.

As to Lindsey's second question, far from lodging a consistent objection to never participate, Lindsey engaged in the proposed order process –even submitted his own proposed order with suggested findings of facts and conclusions of law – and raised no objection to the process to the PCR judge *for the original* Order of Dismissal. That is a problem for Lindsey because a reversal of his position on the proposed order process here appears a reaction to loss, not a real objection to process. But even so, not even the dissent had any question on the propriety and completeness of the review process– an open process, with participation by the parties and opportunity to make objections—for proposed orders. In short, even should this Court wish to engage in review for error correction in this particular case, a rare basis on which to grant certiorari review, there is no error to correct.

A. Lindsey seeks a new procedural rule for state proceedings that is neither appropriate nor necessary.

As a factual matter, several glaring points of inequality are apparent in Lindsey's position that greatly undermine a claimed due process argument. Lindsey seeks a procedural restraint on proposed orders from the state so, presumably, one from the defense would not be questioned. And, why capital cases alone? At its core, due process guarantees the right to heard. To carve an exception for one type of case to a process that obviously meets constitutional protections in *all other cases* is certainly a difficult position to defend from a purely legal standpoint. Established jurisprudence does not square with this suggested one-side exemption. *See generally Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (extending *Batson v. Kentucky* protection to allow challenges to racial discriminatory strikes by criminal defendant). Even so, there is yet another legal obstacle for Lindsey.

State procedural rules are rarely a matter for this Court's review. *See, e.g., Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (recognizing general deference to state evidentiary rules); *Smith v. Robbins,* 528 U.S. 259, 273 (2000) ("allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to" craft procedural vehicles for adequate review under *Anders v. California,* 386 U.S. 738 (1967)). Further, "[t]his Court does 'not lightly "disregard state procedural rules that are substantially similar to those to which we give full force in our own courts." ' " *Johnson v. Lee*, 578 U.S. 605, 609 (2016) (quoting *Beard v. Kindler,* 558 U.S. 53, 62 (2009)). South Carolina's procedure is not an outlier. Consider that federal courts heed the same basic open process as the state requires. *See* U.S. District Court, Civ. Rule 7.10 (Draft Orders Submitted by Counsel). Lindsey fails to show any legal error that calls for corrective action. Nor does he show a factual one.

B. The record shows that an open, inclusive proposed order process as required under state procedure was followed which shows neither a basis for procedural nor substantive error.

The focus of Lindsey's complaint is on process not substance. Lindsey has neither claimed nor shown any unfairness in the presentation of evidence at the post-conviction relief hearing. Lindsey has neither claimed nor shown that he was prevented from expressing his views on the existence of evidence or weight to be afforded the evidence. Lindsey is forced to primarily base his fear on the presence of drafting errors, but that was addressed by the state court in the remand. Indeed, the remand allowed the PCR judge to test again his understanding of the case and whether his adoption of the proposed order was one made after careful thought, and he expressly stated from the first reading that the findings and conclusions were exactly how he "saw the case." (Pet. App. 30a).

Lindsey, though, has failed to afford any credit to the PCR judge's own statements that the order is his; that he personally reviewed every portion of the order; and, that he even took specific steps to assure any reader that it is his order issued after his independent review and decision. (Pet. App. 30a). To be sure, there were typographical and/or drafting errors in the first order (a lengthy document at 192 pages), and some are in the Amended Order (still a lengthy document at 187 pages); but, the question here is not whether relief is due based on unmatched brackets, an additional space in the text, or the lack of subject-verb agreement. Rather, the question is whether the PCR judge adhered to his sworn duty as a member of the judiciary in denying relief for the reasons expressed in the Amended Order. Any fair reading of the record shows the judge faithfully adhered to that duty.

Further, Lindsey's reliance on the problems in *Jefferson v. Upton*, 560 U.S. 284 (2010), highlight just how little he can show to support any error that warrants addressing. In that case, this Court recognized that "verbatim adoption" of a proposed order could prevent application of the deference normally afforded state court orders in federal habeas corpus review. 560 U.S., at 290. To determine if the order process was sufficiently fair, the Court ordered a remand. *Id.*, at 294. In the remand proceedings, the evidence revealed that, though each side had submitted post-hearing briefs, the process lost its balance thereafter, with *ex parte* communication for a proposed order, no direction, no evidence of judge participation (the judge had passed away and the law clerk did not recall discussions with the judge) among other things, but perhaps most egregious, the order referenced an affidavit that apparently was not presented in the case. *Jefferson v. GDCP Warden*, 941 F.3d 452, 463-65 (11th Cir. 2019). The district court concluded that the state order "invited the reasonable inferences that Judge Newton failed to review the proposed order submitted" by the state, "before executing the final order and failed to review the relevant evidence." *Id.*, at 474. Finding "no clear error in the district court's fact finding," the Eleventh Circuit resolved that the state order would not be afforded "a presumption of correctness." *Id.*

Apart from the fact that Jefferson concerned the level of deference afforded the order in federal review, greatly different here is that Lindsey had the type of remand suggested before the order was finally amended; concerns were set out; review was made in detail over ample time; and the PCR judge confirmed the order was the way he viewed the evidence presented. And it can't be denied that Lindsey, unlike Jefferson, makes no suggestion that evidence not a part of the proceeding was reference. While Lindsey disagrees with the denial of relief, the record evidence supports that the denial was the product of a thoughtful adjudication on the case presented and not judicial abandonment. There is neither error to correct in this process nor need to tinker with the state's procedural guidance.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

Alan Wilson
Attorney General of
South Carolina

Donald J. Zelenka
Deputy Attorney General

Melody J. Brown
Counsel of Record
Senior Assistant Deputy
Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3742
mbrown@scag.gov

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Attorneys for Respondent