NO. ____________

In The
Supreme Court of the United States

CAPITAL CASE*

WILLIAM O. DICKERSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF COMMON PLEAS FOR THE
NINTH JUDICIAL CIRCUIT OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

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****CAPITAL CASE****

QUESTIONS PRESENTED

In *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019), this Court affirmed that its "precedents allow criminal defendants…to present a variety of evidence to support a claim" pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), "that a prosecutor's peremptory strikes were made on the basis of race"—including "statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case…; relevant history of the State's peremptory strikes in past cases;" and "other relevant circumstances that bear upon the issue of racial discrimination." In the state post-conviction proceedings below, Mr. Dickerson presented statistical evidence establishing that the Solicitor in his South Carolina capital trial had used her strikes to exclude Black jurors both historically and in his case. He submitted trial records from cases illustrating the Solicitor's discrimination, and a "desktop guide" that gave prosecutors examples of ostensibly "race neutral" reasons that would insulate a strike from a *Batson* challenge—reasons that the Solicitor used in his and other cases. The state courts declined to consider this evidence.

The questions presented are:

1. Did the state postconviction court violate *Batson* and its progeny by refusing to consider evidence that this Court's precedent expressly permits?

2. Did the state postconviction court err in denying Mr. Dickerson's *Batson* challenge when the jurors' voir dire responses and a comparative juror analysis either fail to support, or expressly rebut, the Solicitor's proffered "race neutral" reasons?

3. Did Mr. Dickerson's trial counsel provide ineffective assistance in failing to subject the Solicitor's proffered "race neutral" reasons to the methodologies for identifying pretext recognized by this Court's precedent in, e.g., *Miller-El v. Dretke*, 545 U.S. 231 (2005)?

LIST OF PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

STATEMENT OF RELATED CASES

This petition arises from a habeas corpus proceeding in which Petitioner, William O. Dickerson, was the petitioner before the Court of Common Pleas for the Ninth Judicial Circuit of South Carolina and the Supreme Court of South Carolina. Respondent in the State of South Carolina, which was the respondent before the Court of Common Pleas for the Ninth Judicial Circuit of South Carolina and the Supreme Court of South Carolina. There are no additional parties to this litigation.

The following proceedings are directly related to the case before this Court.

- *State v. Dickerson*, Nos. 06-GS-10-3142, 06-GS-10-2981, 06-GS-10-8884, Circuit Court of Charleston County, South Carolina. Judgment entered on May 7, 2009.

- *State v. Dickerson*, No. 27048, Supreme Court of South Carolina. Judgment entered on October 3, 2011; rehearing denied November 17, 2011.

- *Dickerson v. South Carolina*, No. 11-8903, Supreme Court of the United States. Certiorari denied on April 23, 2012.

- *Dickerson v. South Carolina*, C/A No. 2012-CP-10-3216, Court of Common Pleas for the Ninth Judicial Circuit of South Carolina. Judgment entered June 27, 2018.

- *Dickerson v. South Carolina*, No. 18-001499, Supreme Court of South Carolina. Certiorari denied on August 6, 2021.

- *Dickerson v. Stirling, et al.*, Case No.: 9:21-00618-SAL-MHC, U.S. District Court for the District of South Carolina. Pending.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES TO THE PROCEEDING ii

STATEMENT OF RELATED CASES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. The *Batson* Inquiry at Mr. Dickerson's Trial 2

B. The Record Does Not Support the Reasons Given for the Solicitor's Strikes 4

1. Individual Voir Dire of Georana Gadsden 4

2. Individual Voir Dire of Melissa Fields-Copeland 6

C. Post-Conviction Review Proceedings 6

1. The Michigan State University Study 7

2. Prior Cases Where the Solicitor Made Race-Based Strikes 8

3. Prosecution Coordination Commission's Programs and Deskbook 10

D. Denial of Post-Conviction Relief 13

REASONS FOR GRANTING THE PETITION 15

I. *Flowers* Demonstrates the PCR Court's Error in Refusing to Consider Evidence of the Solicitor's Discrimination 16

II. Even Without the Evidence Improperly Rejected by the PCR Court, the Record Demonstrates That Mr. Dickerson Has Established That Solicitor Wilson Violated *Batson* 18

III. Trial Counsel Was Ineffective for Failing to Conduct a Comparative Juror Analysis and to Litigate Access to the Prior Arrests/Convictions of Prospective Jurors 25

CONCLUSION 27

APPENDIX:

Order of
The Supreme Court of South Carolina
Re: Denying Petition for Writ of Certiorari
entered August 6, 2021 ....Appx1

Order of
The State of South Carolina County of Charleston for
The Ninth Circuit Court of Common Pleas
Re: Denying Applicant's Motion to Alter or Amend Judgment
entered July 25, 2018 ....Appx2

Amended Order of
The State of South Carolina County of Charleston for
The Ninth Circuit Court of Common Pleas
Re: Denying Post-Conviction Relief
entered July 25, 2018 ....Appx5

Order of
The State of South Carolina County of Charleston for
The Ninth Circuit Court of Common Pleas
Re: Denying Post-Conviction Relief
entered June 27, 2018 ....Appx83

Order of
The Supreme Court of South Carolina
Re: Denying Petition for Rehearing
entered October 13, 2021 ....Appx162

TABLE OF AUTHORITIES

Page(s)

CASES

Addison v. State,
942 N.E.2d 925 (Ind. 2012) 20

Ake v. Oklahoma,
470 U.S. 68 (1985) 18

Ali v. Hickman,
571 F.3d 902 (9th Cir. 2009) 19

Ballard v. United States,
329 U.S. 187 (1946) 24

Batson v. Kentucky,
476 U.S. 79 (1986) .... *passim*

Bell v. Ozmint,
332 F.3d 229 (4th Cir. 2003) 25

Caldwell v. Maloney,
159 F.3d 639 (1st Cir. 1998) 20

Castellanos v. Small,
766 F.3d 1137 (9th Cir. 2014) 19

Ex parte Virginia,
100 U.S. 339 (1880) 24

Flowers v. Mississippi,
139 S. Ct. 2228 (2019) 14, 16, 17, 18

Floyd v. Alabama,
579 U.S. 916 (2016) 18

Foster v. Chatman,
578 U.S. 488 (2016) 16, 18

Green v. Lamarque,
532 F.3d 1028 (9th Cir. 2008) 23

Harris v. Hardy,
680 F.3d 942 (7th Cir. 2012) 20

Jones v. Ryan,
987 F.2d 960 (3rd Cir. 1993) 21

Jordan v. Lefevre,
206 F.3d 196 (2d Cir. 2000) 23

McClain v. Prunty,
217 F.3d 1209 (9th Cir. 2000) 20, 21, 23

Miller-El v. Cockrell,
537 U.S. 322 (2003) 18

Miller-El v. Dretke (Miller-El II),
545 U.S. 231 (2005) .... *passim*

Powers v. Ohio,
499 U.S. 400 (1991) 15, 24

Sanchez v. Roden,
753 F.3d 279 (1st Cir. 2014) 15

Snyder v. Louisiana,
552 U.S. 472 (2008) 16, 18

State v. Daise,
421 S.C. 442 (Ct. App. 2017) 13

Strauder v. West Virginia,
100 U.S. 303 (1880) 15, 24

Strickland v. Washington,
466 U.S. 668 (1984) 25, 26

Swain v. Alabama,
380 U.S. 202 (1965) 15

Thompson v. Aiken,
281 S.C. 239 (1984) 14

United States v. Atkins,
843 F.3d 625 (6th Cir. 2016) 22

United States v. Esparanza-Gonzalez,
422 F.3d 897 (9th Cir. 2005) 23

United States v. Tomlinson,
764 F.3d 535 (6th Cir. 2014) 15

Virginia v. Rives,
100 U.S. 313 (1880) 24

Weaver v. Massachusetts,
137 S. Ct. 1899 (2017) 26

Wiggins v. Smith,
539 U.S. 510 (2003) 25

Williams v. Louisiana,
579 U.S. 911 (2016) 18

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. VI 2

U.S. CONST. amend. XIV 2, 15

STATUTE

28 U.S.C. § 1257(a) 1

RULE

S.C. App. Ct. R. 243(j) 14

PETITION FOR A WRIT OF CERTIORARI

Petitioner William O. Dickerson ("Dickerson"), a death-sentenced prisoner, respectfully petitions this Court for a writ of certiorari to review the Supreme Court of South Carolina's denial of his petition for a writ of certiorari to appeal the denial of post-conviction relief by the Court of Common Pleas for the Ninth Judicial Circuit of South Carolina.

OPINIONS BELOW

The decision of the South Carolina Supreme Court denying Mr. Dickerson's petition for certiorari is unreported. Appx 1. The initial Order of the Court of Common Pleas for the Ninth Judicial Circuit denying his application for post-conviction review is unreported. Appx 83. The Amended Order of the Court of Common Pleas for the Ninth Judicial Circuit is likewise unreported. Appx 5.

STATEMENT OF JURISDICTION

The South Carolina Supreme Court denied Mr. Dickerson's petition for certiorari on August 6, 2021. A timely petition for rehearing was filed and denied on October 13, 2021. Appx 162. On January 10, 2022, Chief Justice Roberts extended the time for filing this petition for writ of certiorari through and until March 11, 2022. *See* No. 21A300. Mr. Dickerson invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ..."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. The *Batson* Inquiry at Mr. Dickerson's Trial

In 2009, William Dickerson was convicted of murder, kidnapping and first-degree criminal sexual conduct and sentenced to death by the Charleston County Court of General Sessions in Charleston, South Carolina. During jury selection for his trial, the Solicitor used three of four peremptory strikes to remove Black women – Ms. Georana Gadsden, Ms. Melissa Fields-Copeland, and Ms. Sallyisha Toomer – from the venire. Mr. Dickerson's trial counsel, Jeff Bloom, raised a *Batson* objection to the strikes of all three women. PC App. 2178.[1] Evidently finding a prima facie case of racial and gender discrimination, the trial court required the Solicitor, Scarlet Wilson, to provide "race-neutral or gender-neutral" reasons for their strikes. PC App. 2178. The Solicitor responded that Ms. Gadsden "was a CNA [certified nursing

[1]Petitioner will cite to the Joint Appendix prepared for the certiorari proceedings before the Supreme Court of South Carolina below using the following form: "PC App. [page number]."

assistant], as I recall, who worked from 11:00 to 7:00 and I recall that she had an issue if it would conflict with her employment. I had that concern." PC App. 2178-79. Solicitor Wilson added that Ms. Gadsden "is a single mother with two children and she would be missing work throughout the week." PC App. 2179. The Solicitor added, "I believe at one point she said that she would consider the death penalty but at another point she couldn't vote for it." *Id.*

When required to provide non-discriminatory reasons for striking Ms. Fields-Copeland, the Solicitor claimed that she had "a number of charges for prostitution, a charge for shoplifting, [and] a concealed weapon[.]" PC App. 2181. Trial counsel offered no rebuttal to the Solicitor's representations of the jurors' answers and characteristics. When the trial court asked if another juror "was a single mother or who worked as a CNA" (like Ms. Gadsden), trial counsel said no, and the Solicitor did not respond. PC App. 2179. When the trial court asked if "anyone else on the jury…has a prior arrest" (like Ms. Fields-Copeland), trial counsel said that he did not know of any, and the Solicitor did not respond, saying only that Ms. Fields-Copeland "had qualified convictions." PC App. 2180. When the trial court asked if any sitting juror "has *any* [criminal] record," the Solicitor said only "[n]ot that many or not for those things." *Id.* The trial court subsequently concluded that the strikes of Ms. Gadsden and Fields-Copeland were not pretextual and overruled the *Batson* objections. PC App. 2178 - 2181. Neither Ms. Gadsden nor Ms. Fields-Copeland sat on Mr. Dickerson's capital jury; nor, of course, did Ms. Toomer. Trial counsel did not appeal the trial court's ruling.

B. The Record Does Not Support the Reasons Given for the Solicitor's Strikes

The Solicitor's claimed reasons for striking both Black women are not borne out by the trial record. Additional evidence submitted in post-conviction proceedings further demonstrates a pattern of discrimination by the Solicitor over time.

1. Individual Voir Dire of Georana Gadsden

Ms. Gadsden is a Black woman who, at the time of trial, was a 36-year-old CNA. During individual voir dire, Ms. Gadsden told the trial court that she was a "number three" juror, PC App. 885—a reference to a sheet provided by the trial court that listed three "types" of jurors, with "Type 3…the one that…can consider both" a death sentence and a lesser sentence. PC App. 463; *see also* PC App. 885-86. Gadsden explained that she "just would need to know all the facts" before sentencing someone to death, but stated unequivocally that she could then impose a death sentence under certain circumstances—a sentiment that she twice reiterated. PC App. 887, 893, 897.

The Solicitor questioned Gadsden about her answer to question #47 on the jury questionnaire, which asked, "What is your opinion, if any, about the death penalty?" PC App. 898. Gadsden read her answer, which stated that she had not given much thought to the death penalty – and reiterated that she was a "type three" juror and "would have to know all the facts[.]". *Id.* The Solicitor next asked Gadsden about her work schedule, mentioning that she had heard that Gadsden had to work that very evening. *Id.* Gadsden explained that she worked nights and had scheduled overtime for the next few weeks, but that she could "let [her] supervisor know to reassign the schedule" and "get off of work for the next couple of weeks" so that she could serve on

the jury. PC App. 899. "So if the Judge told you that it wouldn't be appropriate for you to work after leaving after your [jury] service during the day," the Solicitor asked, "you would be able to have that rearranged?" PC App. 898-99. "Yes, I could," Ms. Gadsden responded. PC App. 899. The Solicitor asked Gadsden no further questions about her work schedule. The Solicitor asked no questions at all about Ms. Gadsden being a single mother, or about whether her jury service would cause a hardship for her childcare.

The Solicitor resumed questioning Gadsden about her thoughts on the death penalty. PC App. 900-901. Ms. Gadsden stated that it would be hard to sign a death verdict, but that she could set aside her personal feelings and impose a death sentence after looking at all aspects of the case. PC App. 902-903. The Solicitor persisted, asking Gadsden if she could "put a man to death." PC App. 903-905. When Gadsden answered "yes", the Solicitor asked her to detail specific situations where she could impose the death penalty. PC App. 905. Gadsden offered an example: "killing an innocent child and putting her in a suitcase is what I would think." PC App. 905. When the Solicitor continued to press Gadsden, the judge sustained an objection by the defense, remarking, "She's answered that question. She said she could." PC App. 906. Yet the Solicitor persisted, forcing the trial court to intervene: "I'm not going to allow you to go any further." *Id*. When the Solicitor immediately challenged Gadsden for cause based on her supposed "inconsistent answers," the trial court overruled the challenge. PC App. 908.[2] "She was wanting to be truthful and she answered, the

[2] Defense counsel asked no questions of Gadsden after the Solicitor completed her questioning.

question yes, there were circumstances where she could," the trial court stated. *Id.* "I think that makes her qualified. She certainly stated more than the ability to merely consider it. She said yes, I could and I could sign the death warrant." *Id.*

2. Individual Voir Dire of Melissa Fields-Copeland

Ms. Fields-Copeland is a Black woman who, like Gadsden, identified herself as a "number three" juror. PC App. 961. The trial court and both parties questioned Ms. Fields-Copeland about her ability to serve impartially and follow the trial court's instructions, and her views on the death penalty. PC App. 959-984. Ms. Fields-Copeland repeatedly affirmed that she would "have to hear all of the circumstances before [she] could make a determination," but that she "could consider both sentences as a possible sentence[.]" PC App. 971. Ms. Fields-Copeland received no questions about her personal life, prior arrests, or criminal history. At the conclusion of the examination, the Solicitor conceded that Ms. Fields-Copeland was "qualified." PC App. 984. The trial court then deemed Ms. Fields-Copeland "qualified to be a member of the panel from which we will select our jury." *Id.*

C. Post-Conviction Review Proceedings

In post-conviction review (PCR) proceedings, Mr. Dickerson argued, inter alia: (1) that Solicitor Wilson committed prosecutorial misconduct and violated his constitutional rights when she struck qualified Black jurors from his venire because of their race; and (2) that trial counsel was ineffective for failing to provide the comparative juror analysis necessary to demonstrate the Solicitor's discriminatory strikes were pretextual, to secure the criminal histories of prospective jurors, which

were in the possession of the Solicitor, or to litigate Mr. Dickerson's entitlement to that information.

In support of these *Batson*-related claims, Mr. Dickerson provided statistical evidence of the Solicitor's history of discriminatory strikes, including a Michigan State University study that reviewed the Solicitor's use of strikes in Dickerson's case and others and found a pattern of race discrimination. Dickerson provided trial records from cases in which the Solicitor had used peremptory strikes to exclude Black jurors. He also submitted "the Prosecution's Deskbook", an instruction manual provided to the Solicitor (and other prosecutors in South Carolina) which included directions on devising pretextual but "race-neutral" reasons to fend off *Batson* challenges to their strikes of otherwise qualified jurors. This evidence is discussed in more detail below:

1. The Michigan State University Study

On August 29, 2017, Michigan State University (MSU) Professors Barbara O'Brien and Catherine Grosso published their Second Amended Report on Jury Selection Study. PC App. 7362. The report evaluated 20 cases tried in Charleston County by the Solicitor in this matter from 2002 to 2013. Their findings were clear. "In every analysis that we performed," O'Brien and Grosso wrote, "race was a significant factor in prosecutorial decisions to exercise peremptory challenges in jury selection in these proceedings." PC App. 7369. "Regardless of how one looks at the data," they continued, "a robust and substantial disparity in the exercise of prosecutorial strikes against black venire members compared to others persists." *Id.*

The study documented "[a] statistically significant disparity [that] persists at a magnitude of *more than five to one* whether calculated by looking at all strike decisions pooled across cases (a disparity of 5.4 to 1, 37.8/7.0), or by comparing the mean strike rates for each case (a disparity of 5.6 to 1, 339/6.1)." PC App. 7369. The impact of race was not only statistically significant but was "a substantial factor in prosecutorial strike decisions in the 20 proceedings in Charleston County." *Id.*

In addition, O'Brien and Grosso testified that statistically race was a substantial factor in the Solicitor's use of peremptory challenges at Dickerson's trial. PC App. 6774-6775. Specifically, O'Brien testified that the racial disparity in his case was "11.1 to 1" which "means that black potential jurors were struck at 11.1 times the rate than white potential jurors were struck." PC App. 7326-7327. O'Brien reported that this was "an extremely large disparity by any standard" and supported an inference of intentional discrimination. PC App. 7326-7327, 7337.

2. Prior Cases Where the Solicitor Made Race-Based Strikes

Mr. Dickerson also presented transcripts and records in cases discussed within O'Brien and Grosso's report. In *State of South Carolina v. Colin Broughton*, No. 06-GS-08-2164, this same Solicitor struck 50% of qualified African-Americans from the venire. She struck only 14.8% of qualified white jurors. PC App. 7019. In particular, the Solicitor's strikes of jurors Alice Bowman and Alfreda Wilson, both Black women, demonstrate her misconduct.

The Solicitor claimed that she struck Bowman because (1) she was "torn between #1 and #3"[3], (2) she has a nephew in jail, (3) she's a "balancer", and (4) her conscience would bother her if a death verdict were rendered. PC App. 9231. However, the Solicitor asked very few questions of Bowman, and none related to her stated justifications for her strikes. The Solicitor did ask Bowman how motive would affect her decision, PC App. 7967—a question that concedes the context-specific deliberation of a "number three" juror and whether she could sign her name to the death verdict. PC App. 7968. Moreover, the Solicitor's reliance on Bowman's nephew being in jail cannot be reconciled with her decision not to strike Ronald K. Williams, Jr., who had been through pre-trial intervention (PTI) for his own possession with intent to distribute charge, had family members in jail or who had been through PTI, had an uncle who told him how terrible prison is, and who stated himself that life in prison would be worse than the death penalty. PC App. 7842-7846, 7857. Mr. Williams is white. At least two additional white jurors (including one alternate) had been arrested or had relatives currently facing criminal charges. Like Williams, the Solicitor did not strike them.

The Solicitor claimed that she struck juror Wilson, who self-identified as a "type three" juror, because she said, "the only thing that would affect her or that would move her towards the death penalty was future dangerousness." PC App. 8444, 9232-9233. That claim mischaracterized Wilson's response. The Solicitor asked: "What factors would make death appropriate for you?" Juror Wilson responded, "that

[3] The trial court explained that a #1 juror "could never give the death penalty" and a #3 juror "would consider all of the facts and circumstances before you made a decision." PC App. 7947.

maybe if there is any chance at all that this could happen again—or even if it could happen in prison, if this person is capable of ending somebody's life in prison then he shouldn't be there." PC App. 8454-8455. The Solicitor then moved on to a different line of questioning. The Solicitor did not ask whether that was the *only* factor that would justify a death sentence in Juror Wilson's mind. Nor did Juror Wilson's answer suggest that it was anything other than one example of such a factor—one, perhaps of many. The Solicitor's reliance upon this exchange as exhaustive is evidence of pretext.

In 2004, a state trial court judge concluded that the Solicitor violated *Batson* in *State v. Jalal Beyah*, 2001-GS-10-1736. PC App. 9632. Beyah's jury was selected from the first 29 prospective jurors, only 8 of whom were Black. The Solicitor used all 5 of her strikes to remove jurors who were Black. In other words, the state used 100% of its strikes to remove Black persons, who represented only 28% of the jury pool. PC App. 7019. The trial court found that the Solicitor had given a pretextual explanation for striking a Black female juror because she had a breach of trust conviction (for which she was pardoned) while not removing a white juror with convictions for DUI, shoplifting and larceny. PC App. 9632.

3. Prosecution Coordination Commission's Programs and Deskbook

Mr. Dickerson also introduced "The Prosecution Deskbook," an educational manual provided by the Prosecution Coordination Commission to solicitors across South Carolina, purportedly to provide educational and reference material. PC App. 7095-7118. The Solicitor testified at the PCR hearing that the Deskbook is on her

office's shared hard drive and was available at the time of Dickerson's trial. PC App. 6823-6824, 6828. Chapter 6 of the Deskbook gives solicitors a list of "sufficient reasons for" striking otherwise qualified jurors from criminal trial venires, some of which the Solicitor relied upon in this case: lack of employment or place or type of employment[4]; relationship with law enforcement[5]; past prosecution by the same solicitor's office; possible criminal record; recipient of prior strike in another trial; demeanor,[6] including apparent disinterest, appeared to be slow, appeared to be too intelligent, vacillated in response to questions, trouble with abstract reasoning, and lacking in understanding of court process; late for jury duty; general instability; youth; inappropriate dress[7]; residence in a high crime area or near the defendant; and that a family member has been arrested[8]. The manual teaches that a solicitor need only recite one of these "sufficient reasons" to survive a *Batson* challenge.[9] PC App. 7112-7114.

Other materials published by the Prosecution Coordination Committee instruct solicitors that while "Race or gender may be one consideration for wishing to

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[4] This Solicitor used "employment" in Dickerson's trial to remove Georona Gadsden and to remove two Black jurors in Beyah's trial.

[5] The Solicitor used "relationship with law enforcement" in Dickerson's trial to remove Melissa Fields-Copeland, in Broughton's trial, juror Bowman, and two Black jurors in Beyah's trial.

[6] The Solicitor used demeanor to remove a Black juror in Beyah's trial.

[7] The Solicitor used "general appearance" to remove a Black juror in Beyah's trial.

[8] The Solicitor used the fact that juror Bowman had a family member in jail, her nephew, to remove her in the Broughton trial.

[9] Since 2009, solicitors attending the yearly "Prosecution Bootcamp" have been provided with "Appendix C" which includes a list of 12 "Race-Neutral Reasons for Excluding a Juror" and "Appendix D," a jury strike sheet that indicates that solicitors should be tracking both the race and gender of potential jurors as they exercise peremptory challenges.

strike [a juror]...to prevent a *Batson* motion another valid reason must be evident." *See* 2001 TSRP Training Greenville—Jury Selection in DUI Cases (Weston).[10] They also provide solicitors with tips on how to take any aspect of the juror's manner or behavior and turn it into sufficient reason for a strike, as illustrated by the following passage:

> Visual clues provide helpful information. What is the juror wearing? Is he *underdressed* for a court of law, perhaps indicating a lack of respect for the court? Is he *overdressed* for the occasion? Watch for slogans on t-shirts, hats, etc. An attorney must carefully observe a prospective juror's body language. Certain visual clues may indicate anxiety or deception, such as wringing hands, *shifting* from side to side, and repetitive movements. *Rigid* body posture, folded arms, and crossed legs may suggest a rigid, determined personality. A juror's eyes can tell you much about him. Little eye contact and lots of blinking can indicate deception or hostility. Facial expressions such as frowns, skeptical looks, and detached or fixed smiles are clues to a prospective juror's attitude . . .
>
> Verbal clues also reveal information about a juror . . . Does he sound intelligent, sarcastic, etc.? *Does he choose words which distinguish and distance himself from certain ethnic or racial groups*?

2001 TSRP Training Greenville—Jury Selection in DUI Cases (emphases added).[11] In other words, solicitors in South Carolina are taught how to construct pretexts that allow them to strike jurors on the basis of race and gender while "prevent[ing] a *Batson* motion."

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[10]These materials were placed under seal in the PCR proceedings below and do not appear in the appendix.

[11]*See also* 2002 TSRP Training Florence—Jury Selection; 2002 TSRP Training Greenwood (District 2)—Jury Selection; 2003 TSRP Training Columbia—Jury Selection in DUI Cases; 2003 TSRP Training Greenville—Jury Selection in DUI Cases; 2003 TSRP Training Myrtle Beach—Jury Selection in DUI Cases; 2004 TSRP Training Charleston—Jury Selection in DUI Cases; 2004 TSRP Training Columbia HP—Jury Selection in DUI Cases; 2005 TSRP Training Charleston—Jury Selection Batson; 2005 TSRP Training Columbia—Jury Selection in DUI Cases. These materials were also placed under seal in the PCR proceedings below.

D. Denial of Post-Conviction Relief

In its order denying relief, the PCR court refused to consider the additional evidence presented by Mr. Dickerson in support of his *Batson*-based claims. The PCR court concluded that the only "relevant" evidence was the "testimony presented...to the extent it pertains to Applicant's trial counsel's performance, any alleged prejudice derived therefrom, and any evidence which was discoverable at or before the time of Applicant's May 2009 trial." Appx 28.

As to each category of evidence, the PCR court used a different rationale to justify its exclusion. First, the court determined that it could not consider the voir dire transcripts in *State v. Broughton* because that trial took place after Mr. Dickerson's trial. It held that it could not consider the 2004 voir dire transcript in *State v. Beyah* because discovery is not permitted in criminal proceedings and "[r]eliance on Belyah to establish some sort of pattern is suspect for its isolated nature." Appx 25. The PCR court rejected the use of voir dire transcripts from any other case, stating that "[a]ny reference to other unrelated cases will never affect, inform, or alter the record made at the 2009 trial as to the prosecution's reasons for the strikes." *Id*. Next, the PCR court held that it could not consider prosecutorial training materials because they were work product and "irrelevant to a *Batson* motion analysis". Appx 26-27 (citing *State v. Daise*, 421 S.C. 442, 461-463 (Ct. App. 2017)). Finally, the PCR court concluded that it could not consider the criminal histories of prospective jurors because Mr. Dickerson's lawyer would not have been able to access them at the time of trial—even though the Solicitor could. Appx 28.

Finally, the PCR court relied on a pre-*Batson* case, *Thompson v. Aiken*, 281 S. C. 239 (1984), to hold that the MSU study and statistics was not relevant to Dickerson's *Batson* claim. Appx 48-50.

Ultimately, in ruling on the merits of both Dickerson's *Batson* claim (despite claiming it was non-cognizable) and trial counsel's ineffectiveness relating to *Batson*, the PCR court held:

> Applicant was not denied equal protection as he was tried by a qualified jury and because the basis for the strikes exercised by the Solicitor befit the known Constitutional requirements of jury selection.
>
> The reasons for the Solicitor's strikes [of Gadsden and Fields-Copeland] have not been hidden nor are they suspect. The reasons for the strikes have been a matter of records since the 2009 trial. The selection shows careful consideration by both parties, strikes exercised by both parties, and a challenge to just three of the Solicitor's strikes. Those strikes were explained to the satisfaction of the trial judge and still remain fully and fairly supported by the trial record. Applicant has shown no deficient performance by defense counsel. Applicant is not entitled to relief on this issue.

Appx 54-55. Mr. Dickerson petitioned the Supreme Court of South Carolina for a writ of certiorari to review the denial of PCR relief. That Court denied his petition. Appx 1. Mr. Dickerson subsequently moved for reconsideration of his Batson related claims in light of this Court's intervening decision in *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), which was decided after Mr. Dickerson filed his petition for certiorari in the South Carolina Supreme Court, but before he filed his reply. Two justices of that Court[12] indicated that they would have granted the petition for rehearing as to the *Batson* issue. Appx 162.

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[12] Per South Carolina Appellate Court Rule 243(j), a petition for a writ of certiorari to review an action for post-conviction will be granted "[u]pon the concurrence of any two justices[.]"

REASONS FOR GRANTING THE PETITION

This Court has held for more than 140 years that excluding African Americans from jury service violates the Equal Protection Clause of the Fourteenth Amendment. *Strauder v. West Virginia*, 100 U.S. 303 (1880). Nearly 60 years ago, this Court established that a prosecutor's use of peremptory challenges to deny to African Americans "the same right and opportunity to participate in the administration of justice enjoyed by the white population" is unconstitutional. *Swain v. Alabama*, 380 U.S. 202, 224 (1965). In *Batson v. Kentucky*, 476 U.S. 79 (1986) and *Powers v. Ohio*, 499 U.S. 400 (1991), this Court established a three-part test to detect and prevent discrimination in the State's use of peremptory challenges in a particular case. *Batson* reiterated the harms from discrimination in jury selection, which violate the rights of the defendant and the jurors alike, and undermines not only the criminal trial process, but taints the community. *Id*. at 86, 87. As this Court explained in *Strauder*, "the central concern of the...Fourteenth Amendment was to put an end to governmental discrimination on account of race," and the "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Batson*, 476 U.S. at 85 (citing *Strauder*, 100 U.S. at 306-07). Accordingly, discrimination against African-Americans in the selection of a jury creates a structural error that requires reversal. *See e.g., United States v. Tomlinson*, 764 F.3d 535, 539 (6th Cir. 2014) ("*Batson* error is structural," reversing conviction and remanding for new trial); *Sanchez v. Roden*, 753 F.3d 279, 307 (1st Cir. 2014) (same; remanding for a hearing). This Court has not hesitated to grant

relief when concluding that the prosecution made "misrepresentations to the trial court" when providing "race-neutral" reasons for its strikes of Black prospective jurors and was in fact "motivated in substantial part by race when" striking them, as any number of "peremptory strikes on the basis of race [is]...more than the Constitution allows." *Foster v. Chatman*, 578 U.S. 488, 514 (2016).

I. *Flowers* Demonstrates the PCR Court's Error in Refusing to Consider Evidence of the Solicitor's Discrimination

In 2019, this Court again granted relief for a *Batson* violation in *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019). While *Flowers* "br[oke] no new legal ground" in "enforc[ing] and reinforc[ing] *Batson*," the decision affirmed that this Court's "precedents allow criminal defendants raising *Batson* challenges to present *a variety* of evidence to support a claim that a prosecutor's peremptory strikes were made on the basis of race," including, "[f]or example..., statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case…; relevant history of the State's peremptory strikes in past cases;" and "other relevant circumstances that bear upon the issue of racial discrimination." *Flowers*, 139 S. Ct. at 2235, 2243 (citing *Foster,* supra, *Snyder v. Louisiana*, 552 U.S. 472 (2008), *Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231 (2005), and *Batson*).

Such evidence is exactly what Mr. Dickerson presented to the PCR court below, and which it expressly refused to consider when denying his *Batson*-related claims:

- Statistical evidence, in the form of a Michigan State University study and testimony demonstrating significant racial disparity in the

Solicitor's striking of Black jurors throughout her career and in this case. Relevant history, in the records of the Solicitor's striking qualified Black jurors in the *Broughton* and *Beyah* cases, discussed *supra*.

- The Solicitor's misrepresentations of the record, in persistently mischaracterizing the responses of Jurors G and Wilson, as discussed *infra*.
- The Solicitor's use of similar excuses to justify the improper strikes of jurors Gadsden and Fields-Copeland– demeanor, general appearance, employment, and relationships with law enforcement – that she attempted in *Broughton* and *Beyah*.
- And the fact that the Solicitor's justifications are torn from the materials that the Prosecution Coordination Commission uses to help prosecutors avoid "being caught" when violating *Batson* – materials that the PCR court also refused to consider claiming that they were irrelevant and relying on a supposed "work product" privilege that is inapplicable when evaluating a *Batson* challenge. *Miller-el II*, 545 U.S. at 239-240 (a defendant may cast a "wide net" to gather evidence and may rely on "all relevant circumstances" in making a *Batson* challenge); *Batson*, 476 U.S. at 96-97.

The PCR court's refusal to consider this evidence specifically enumerated in *Flowers* as appropriate when evaluating *Batson* challenge violates both of those precedents and enabled discrimination that this Court has forbidden for more than a century-

and-a-half. The PCR court's decision cannot stand. This Court should grant certiorari, vacate the decision below, and remand for a complete and proper consideration of Mr. Dickerson's *Batson* claim. *See e.g., Flowers*, 139 S. Ct. 2228; *Foster*, 578 U.S. 488; *Flowers v. Mississippi*, 136 S. Ct. 2157 (2016) (granting certiorari, vacating the opinion below, and remanding for further proceedings in light of *Foster v. Chatman,* 578 U.S. 488 (2016)); *Floyd v. Alabama*, 579 U.S. 916 (2016) (same); *Williams v. Louisiana*, 579 U.S. 911 (2016) (same).

II. Even Without the Evidence Improperly Rejected by the PCR Court, the Record Demonstrates That Mr. Dickerson Has Established That Solicitor Wilson Violated *Batson*[13]

Under *Batson* and its progeny, a court must undertake a three-step analysis to determine whether a prosecutor's peremptory strikes were motivated by discriminatory intent. A defendant first makes a *prima facie* showing that the strike may have been racially motivated (step one); the prosecution then proffers a race-neutral explanation for the strike (step two), and "the question remaining is step three: whether [the defendant] has carried his burden of proving purposeful discrimination." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). *See also Batson*, 476 U.S. at 96-98; *Snyder*, 552 U.S. at 476-477.

[13] Despite claiming that the freestanding *Batson* issue was not cognizable, the PCR court decided the merits of Mr. Dickerson's *Batson* claim and as a result it is available for review by this Court. As this Court has held, "[w]hen application of a state law bar 'depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law[.]'" *Foster*, 136 S. Ct. at 1746 (quoting *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985)). That is true whether the state law determination is "entirely dependent on," "resting primarily on," or merely "influenced by" a question of federal law. *Foster*, 136 S. Ct. at 1747 n.4.

> The critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike.

Miller-El v. Cockrell, 537 U.S. at 338-339. "[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." *Miller-El II*, 545 U.S. at 252. "[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Miller-El v. Cockrell*, 537 U.S. at 339. When the evidence "casts the prosecution's reasons for striking [a juror] in an implausible light," that strike cannot be upheld. *Miller-El II*, 545 U.S. at 252.

Here, the evidence in the record does just that. A close reading of the transcript demonstrates that the Solicitor's reasons for striking jurors Gadsden and Fields-Copeland are implausible, if not wholly untrue, and support an inference of racial discrimination.

The Solicitor's claim that she struck juror Gadsden because she was a single mother who had a conflict with her work schedule is belied by Ms. Gadsden's unequivocal assurances to the Solicitor and the trial court that she could ask her boss to adjust her schedule to avoid any conflict with her jury service and that it would not be a hardship to do so. The Solicitor's claim that Gadsden had a conflict with her work schedule is simply untrue. *See Castellanos v. Small*, 766 F.3d 1137 (9th Cir. 2014) (granting habeas relief where prosecutor's factually erroneous reason could be construed as pretextual); *Ali v. Hickman*, 571 F.3d 902 (9th Cir. 2009) (court reversing and remanding case where state mischaracterized potential jurors' views);

McClain v. Prunty, 217 F.3d 1209, 1221 (9th Cir. 2000) ("Where the facts in the record are objectively contrary to the prosecutor's statements, serious questions about the legitimacy of a prosecutor's reasons for exercising peremptory challenges are raised." (citing *Caldwell v. Maloney*, 159 F.3d 639, 651 (1st Cir. 1998)); *Addison v. State*, 942 N.E.2d 925 (Ind. 2012) (noting that the state mischaracterized prospective juror's responses to questioning, and given the state was "concerned" about an issue, they conducted no further questioning on it).

The Solicitor's related reliance on Gadsden being a "single mother with two children" is undermined by the fact that the Solicitor never asked *a single question* of Gadsden about her children or the fact that she was a single mother. Given that the Solicitor "asked nothing further about" the subject she relied upon for her strike, and "probably would have if [that subject] had actually mattered," pretext is evident. *Cf. Miller-El II*, 545 U.S. at 246. And any assumptions by the Solicitor that Ms. Gadsden would have financial or logistical difficulties as a "single mother" is unsupported by her responses. *Harris v. Hardy*, 680 F.3d 942 (7th Cir. 2012) (raising "loss-of-income" reason for striking juror when juror never stated he was concerned about the loss of income contributed to finding that Government engaged in purposeful discrimination).

Finally, the Solicitor's claim that she was concerned about Gadsden's equivocation on the issue of whether she could impose the death penalty cannot be reconciled with the Solicitor's acceptance of other white jurors who expressed stronger reservations about imposing the death penalty than Gadsden. Juror #306,

Rebekah Zivak, stated on her questionnaire that she "would prefer that [the death penalty] was not an option but know that I cannot understand the emotions of people that are victims of horrible crimes." PC App. 4605. Juror #221, Susan Mullen, disclosed on her questionnaire that she did not believe in the death penalty: "I do not believe in the death penalty. Life in prison without parole is a better solution." PC App. 5048. These harsher responses by non-white jurors who were not struck by the Solicitor demonstrate that her claimed concern about Gadsden's equivocation was simply pretext. *See McClain*, 217 F.3d at 1224 (concluding that *Batson* was violated where two of the proffered race-neutral explanations were "pretextual based upon comparisons of voir dire responses by non-black jurors who were seated without objection by the prosecutor," and other four were contrary to the facts); *Jones v. Ryan*, 987 F.2d 960 (3rd Cir. 1993) (rejecting the prosecutor's proffered race-neutral reason for striking black jurors where the prosecutor did not apply the same rationale to similarly situated white jurors).

More than that, the Solicitor's areas of focus when questioning Ms. Gadsden appear calculated to elicit answers that could serve as a basis for her disqualification. The Solicitor repeatedly asked Ms. Gadsden about her work schedule, even though other jurors had professional obligations at least as onerous. Charles High, a white male, disclosed on his questionnaire that he held two jobs— he works in golf marketing at Charleston Golf, Inc. and holds a second job at the Governor's House Inn. High also noted that he is the primary wage earner for his family—a distinction that Ms. Gadsden did not claim. PC App. 4810-11. But the Solictor expressed no

concerns about Mr. High's heavy work schedule, and he was seated on the jury. Garrett Waterman, also a white male, worked as a manager of Andolini's Pizza, but the Solicitor expressed no concern that he, too, might work nighttime hours. PC App. 4945-52; *United States v. Atkins*, 843 F.3d 625, 637 (6th Cir. 2016) ("[A] comparative analysis shows that the government did not express concerns about the ability of similarly situated white jurors to focus throughout the trial despite their large number of children and inconsistent work.").

The Solicitor's intent to elicit some basis for removing Ms. Gadsden is nowhere more apparent than when she pointedly asked her, and her alone, whether she could "put a man to death." The dramatic framing of this question seems calculated to give Ms. Gadsden pause and "to prompt some expression of hesitation to consider the death penalty and thus to elicit plausibly neutral grounds for a peremptory strike of a potential juror subjected to it, if not a strike for cause" *See Miller-El II*, 545 U.S. at 255. This gambit failed, but its mere attempt demonstrates the Solicitor's intent, and the impropriety under *Batson* of striking Ms. Gadsden.

The Solicitor's proffered reasons for striking Melissa Fields-Copeland are similarly implausible. The Solicitor claimed that she struck Fields-Copeland because "she has a number of charges for prostitution..., for shoplifting, [and for] a concealed weapon[.]" But, once again, the Solicitor did not ask Fields-Copeland a single question about these convictions or arrests—the supposed reason for her strike. *See Miller-El II*, 545 U.S. at 246 ("The state's failure to engage in any meaningful voir dire examination on a subject the state alleges it is concerned about is evidence

suggesting that the explanation is a sham and a pretext for discrimination."); *United States v. Esparanza-Gonzalez*, 422 F.3d 897, 905 (9th Cir. 2005) ("Although the prosecutor has no obligation to question all potential jurors, his failure to do so [before] removing a juror of a cognizable group ... may contribute to a suspicion that this juror was removed on the basis of race."); *Green v. Lamarque*, 532 F.3d 1028 (9th Cir. 2008) (noting that the prosecutor's "concern" about a potential juror's five jobs was undermined by the fact that he did not ask her a single question about it.).

And, once again, the Solicitor did not remove other jurors who presented the same concern that supposedly motivated her strike. Three white males who ultimately served as jurors also had criminal convictions and arrests. Jurors Joshua Partee and Michael Page had convictions for DUI, while Juror Nathan Hood was arrested for Driving under Suspension and Failing to Appear for Uniform Traffic Citation. These three white men were allowed to serve on Mr. Dickerson's jury while Fields-Copeland was singled out for exclusion. *See McClain*, 217 F.3d at 1220 ("A prosecutor's motives may be revealed as pretextual where a given explanation is equally applicable to a juror of a different race who was not stricken by the exercise of a peremptory challenge."); *Jordan v. Lefevre*, 206 F.3d 196, 201 (2d Cir. 2000) ("Support for the notion that there was purposeful discrimination in the peremptory challenge may lie in the similarity between the characteristics of jurors struck and jurors accepted. Where the principal difference between them is race, the credibility

of the prosecutor's explanation is much weakened.").[14] The Solicitor's strike of Ms. Fields-Copeland was demonstrably improper under *Batson*.

In the 142 years since *Strauder*, this Court has never "questioned the premise that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts" and—through "the clarity of [its] commands" in *Strauder*, *Batson*, and their progeny—has sought "to eliminate the taint of racial discrimination in the administration of justice[.]" *Powers*, 499 U.S. at 402 (citing *Strauder*, *supra*; *Virginia v. Rives*, 100 U.S. 313 (1880); *Ex parte Virginia*, 100 U.S. 339 (1880)). This Court neither countenanced the prosecution's discrimination in *Flowers* nor admitted to any limitations in considering the evidence that corroborated that discrimination. It should not do so here. The Solicitor's exclusion of these prospective jurors denied them the "privilege of participating equally ... in the administration of justice[.]" *Strauder*, 100 U.S. at 308. It also inflicted a grave injury "to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard v. United States*, 329 U.S. 187, 195 (1946). This Court can redress those harms by granting certiorari, vacating the decision below, and remanding for proper consideration of Mr. Dickerson's *Batson* claim.

[14] When asked during voir dire if there were similarly situated jurors to Ms. Fields-Copeland, the Solicitor responded, "Not that many or not for those things." Especially given the other evidence of the Solicitor's pretext and discriminatory intent, this vague statement does not explain why the offenses committed by the three white jurors discussed herein were sufficiently different to negate the concerns that supposedly motivated her strike of Ms. Fields-Copeland.

III. Trial Counsel Was Ineffective for Failing to Conduct a Comparative Juror Analysis and to Litigate Access to the Prior Arrests/Convictions of Prospective Jurors

When objecting to the Solicitor's striking of Jurors Gadsden and Wilson, trial counsel neglected to conduct the adversarial testing of the Solicitor's proffered "race neutral" reasons on which *Batson* depends. Indeed, after making the *Batson* motion, counsel essentially fell silent. Counsel made no attempt to contradict the Solicitor's asserted grounds, even though, as discussed *supra*, those reasons were unsupported—and, at times, refuted—by the factual record. Counsel did not urge a comparative juror analysis, despite the number of jurors seated without objection who would have presented the same concerns cited by the Solicitor, were those concerns legitimate. Counsel's obligations under *Batson* had been established for decades. The inquiry into the record and comparative juror analysis required to reveal pretext had been explicated for years. *See, e.g.*, *Miller-El II*, *supra*; *Bell v. Ozmint*, 332 F.3d 229 (4th Cir. 2003) (comparative juror analysis relevant consideration for *Batson* analysis). Counsel's abdication of that responsibility, and the resulting prejudice to Mr. Dickerson, constitutes ineffective assistance per *Strickland v. Washington*, 466 U.S. 668 (1984).

In *Strickland*, this Court held that a claim of ineffective assistance of counsel has two components: "a petitioner must show (1) that counsel's performance was deficient, and (2) that the deficiency prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland*, 466 U.S. at 688). With respect to the first prong, Mr. Dickerson must show that counsel's performance "fell below an objective

standard of reasonableness," defined as "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. As for prong two, "[i]n the ordinary *Strickland* case, prejudice means 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017) (quoting *Strickland*, 466 U.S. at 694).

Trial counsel's deficiencies are evident. Trial counsel failed entirely to test assertions by the Solicitor that the methodologies identified by this Court would have exposed as pretext. In addition to those deficiencies detailed above, trial counsel also failed to check the Solicitor's claim that no other jurors had arrests or convictions similar to those of Ms. Fields-Copeland by seeking access to the jurors' criminal records, which were in the hands of the Solicitor. Without an opportunity to review those records, trial counsel could not possibly know whether the Solicitor was being accurate and truthful in that assessment. Trial counsel was obliged to do more than simply rely on the Solicitor's representations. There was no reason trial counsel could not undertake what PCR counsel did and request an order from the trial court judge to secure these records. Had he done so, he could have properly urged a comparative juror analysis with respect to Ms. Fields-Copeland because he would have had in hand the records of the other jurors who had criminal records. Respectfully, this Court should grant William Dickerson's petition for a writ of certiorari.

CONCLUSION

Petitioner William Dickerson requests this Court grant the petition for a writ of certiorari.

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APPENDIX

TABLE OF CONTENTS

Page

Order of
The Supreme Court of South Carolina
Re: Denying Petition for Writ of Certiorari
entered August 6, 2021 .... Appx1

Order of
The State of South Carolina County of Charleston for
The Ninth Circuit Court of Common Pleas
Re: Denying Applicant's Motion to Alter or Amend Judgment
entered July 25, 2018 .... Appx2

Amended Order of
The State of South Carolina County of Charleston for
The Ninth Circuit Court of Common Pleas
Re: Denying Post-Conviction Relief
entered July 25, 2018 .... Appx5

Order of
The State of South Carolina County of Charleston for
The Ninth Circuit Court of Common Pleas
Re: Denying Post-Conviction Relief
entered June 27, 2018 .... Appx83

Order of
The Supreme Court of South Carolina
Re: Denying Petition for Rehearing
entered October 13, 2021 .... Appx162

The Supreme Court of South Carolina

William O. Dickerson, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2018-001499

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is denied.

FOR THE COURT

BY Patricia A. Howard

CLERK

Columbia, South Carolina
August 6, 2021

cc:
Elizabeth Anne Franklin-Best, Esquire
Melody Jane Brown, Esquire
Alan McCrory Wilson, Esquire

State of South Carolina
The Circuit Court of the Fifth Judicial Circuit

G. Thomas Cooper, Jr.
Active/Retired Judge

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Phone: (803) 425-7182
gcooperj@sccourts.org

July 20, 2018

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad St., Suite 106
Charleston, South Carolina 29401

RE: William O. Dickerson #6030 v. State of South Carolina
C/A No.: 2012-CP-10-3216

Ms. Armstrong:

Enclosed please find the Amended Order Denying Post-Conviction Relief and the Order Denying Applicant's Motion to Alter or Amend in regards to the aforementioned case. Please file these Orders with the court. If you have any questions or concerns, please feel free to contact me.

Thank you,

Jamie Rutkoski
Law Clerk to the Honorable G. Thomas Cooper, Jr.

CC AG AT

FILED
2018 JUL 25 AM 11:35
JULIE J. ARMSTRONG
CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

FOR THE NINTH JUDICIAL CIRCUIT
IN THE COURT OF COMMON PLEAS

William O. Dickerson, #6030,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

C/A No. 2012-CP-10-3216
(Capital PCR)

ORDER DENYING APPLICANT'S MOTION TO ALTER OR AMEND

This matter comes before the Court on Applicant's Rule 59(e) Motion to Reconsider the Order of June 27, 2018, withdraw the Order of Dismissal, Grant Post-Conviction Relief, and Enter an Order vacating Mr. Dickerson's convictions and sentences. The Court denies this Motion for the following reasons.

As a threshold matter, this Court's Order of June 27, 2018 made "specific findings of fact, and stated expressly its conclusions of law, relating to each issue presented" pursuant to S.C. Code Ann. §17-27-90 (1976).

As to Applicant's claim that the Court delegated responsibility to the Attorney General's Office to prepare the Order, Applicant is incorrect. The Court requested Proposed Orders from both Applicant and Respondent. Applicant found the procedure objectionable and would only agree to the submission of Post-Hearing Briefs, to which Respondent and the Court agreed.

Although the Court inadvertently used the Attorney General's section heading indicating "Respondent's Position" on pages 3, 20, 57, 72, 78, and 84, the section headings are for the convenience of the reader, but should not have been titled as "Respondent's Position."

However, the claims that the Order is "taken from the State's brief" and "the Court adopt[ed] the State's Post Hearing Brief" is inaccurate. For example, the Order of Dismissal is

79 pages, Respondent's Brief is 91 pages. The Order of Dismissal is not "verbatim" and is not an "adoption of the State's Post Hearing Brief." The Court not only read and considered Applicant's Post Hearing Brief, but found it lacking the detail and coverage of issues required for an Order of Dismissal in a Death Penalty PCR.

Particularly, with regard to Respondent's Post Trial Brief, the Court Oder modified, deleted, or corrected numerous provisions.[1] In addition, Respondent's Post Hearing Brief contained a comprehensive Statement of Facts as adopted by the South Carolina Supreme Court, a procedural history of the PCR, and a list of PCR exhibits, none of which are available in Applicant's Post-Trial Brief.

After careful consideration of Applicant's Motion and the record in this case, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby DENIES Applicant's Motion pursuant to Rule 59(e) SCRCP to Alter or Amend Judgment of this Court's Order entered on or about June 27, 2018. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

Therefore, Applicant's Rule 59(e) SCRCP Motion to Reconsider is DENIED.

IT IS SO ORDERED.

G. Thomas Cooper, Jr.
Presiding Judge

July 20, 2018

[1] All trial transcript or hearing transcript citations; page 1, lines 4-8; page 7, footnote 4; page 9, footnote 8; page 21, lines 4-11; page 22, line 6; page 24, lines 1, 2, and 13, footnote 18; page 24-25, footnote 19; page 27, lines 6-10 of footnote 21; page 28, lines 8-18 and footnote 22; page 29, lines 1-5 and footnotes 23 and 24; page 26, line 15; page 50, last sentence; page 76, lines 18-22; page 77, lines 1-15; page 82, lines 14-21.

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

FOR THE NINTH JUDICIAL CIRCUIT
IN THE COURT OF COMMON PLEAS

FILED
2018 JUL 25 AM 11: 36
JULIE J. ARMSTRONG
CLERK OF COURT

William O. Dickerson, #6030,)
)
Applicant,)
v.)
)
)
State of South Carolina,)
)
Respondent.)
)

C/A No. 2012-CP-10-3216
(Capital PCR)

AMENDED ORDER DENYING POST-CONVICTION RELIEF

This matter comes before the Court by way of an Application for Post-Conviction Relief originally filed May 16, 2012, and amended March 5, 2015 and July 15, 2015. An evidentiary hearing was initially convened on December 7-8, 2015, with additional hearings held March 31, 2016; May 12-13, 2016; May 27, 2016; and, October 23, 2017.

A. <u>The Underlying Prosecution and Direct Appeal History</u>

Applicant William O. Dickerson (Applicant) was called to trial on April 23, 2009, in Charleston County on the charges of murder, criminal sexual conduct first degree, and kidnapping. The State sought the death penalty. The Honorable R. Markley Dennis presided over the jury trial. Applicant was represented by defense counsel Jeffrey Bloom, Esq., and Calvin Andrew (Drew) Carroll, Esq. The Ninth Circuit Solicitor, Scarlett Wilson, tried the case along with Chief Deputy Solicitor Bruce Durant and former Assistant Solicitor Rutledge Durant. On April 30, 2009, the jury convicted Applicant as charged. On May 4, 2009, the penalty phase began. On May 7, 2009, the jury found three aggravating circumstances: 1) criminal sexual conduct; 2) kidnapping; and 3) torture. The jury recommended death. The judge imposed a death sentence for murder, and thirty years on each of the other crimes. The judge also found "as an affirmative fact that the evidence

in the case warrants the imposition of a death penalty and its imposition is not the result of prejudice, passion or any other arbitrary factor."

Applicant appealed, filing his Final Brief of Appellant on March 17, 2011. Robert Dudek and Kathrine Hudgins, Esquires, from the South Carolina Commission on Indigent Defense appeared on brief as appellate counsel, as did trial counsel Bloom. *State v. Dickerson,* 395 S.C. 101, 716 S.E.2d 895 (2011). Applicant's appellate brief raised four issues, none of which overlap into the present proceeding, and each of which were addressed by the South Carolina Supreme Court:

> 1.
> Whether the court erred by refusing to allow defense counsel to cross examine the pathologist, Dr. Schandl, about the fact the decedent tested positive for cocaine in his urine, since the pathologist testified on direct examination that the decedent's blood tested negative for drugs and appellant had the right to correct the misleading perception the pathologist had given the jury and the omission in her testimony reflected on her credibility as a "neutral" expert witness?
>
> 2.
> Whether the court erred by refusing to charge the jury on the lesser offense of accessory after the fact of murder since there was evidence appellant was only guilty of that offense since appellant's brother admitted he beat the decedent inside decedent's apartment, his brother's wife decided the decedent should be killed, the decedent died inside his apartment, and appellant's brother testified appellant helped remove the body to a vacant apartment next door?
>
> 3.
> Whether the court erred by refusing to allow appellant's first cousin, Johnette Watson, to whom appellant was like a brother, to testify that appellant's execution would deeply hurt her, since appellant's ability to maintain this positive relationship was admissible character evidence during the penalty phase?
>
> 4.
> Whether the judge erred in qualifying a juror who would, if the state proved aggravating circumstances, automatically vote for the death penalty unless the defense presented evidence that convinced him that a death sentence was not warranted, improperly shifting the burden to the defendant to prove he should not be executed?

(Final Br. of Appellant, pp. 1-2); *Dickerson, supra* at 113-14, 716 S.E.2d at 902.

The court heard oral argument on May 24, 2011, and subsequently issued an opinion affirming the convictions and sentence. *State v. Dickerson*, Opinion No. 27048 (S.C. Sup. Ct. filed October 3, 2011), *reported at* 395 S.C. 101, 716 S.E.2d 895 (2011). Applicant pursued rehearing, which was denied. He next filed a petition for writ of certiorari in the Supreme Court of the United States on February 15, 2012, pursuing the fourth issue from the direct appeal. After the State filed a Brief in Opposition, the Supreme Court denied the petition on April 23, 2012.

B. Statement of Facts as Established at Trial

The facts concerning Dickerson's capital conviction are included herein as presented by the South Carolina Supreme Court in its opinion affirming Dickerson's conviction and sentence.

> Dickerson and Gerard Roper had been friends, even best friends, since childhood. On the morning of March 6, 2006, Roper went to his friend, Ben Drayton's, house to play video games. Around the same time, Dickerson went to his friend, Antonio Nelson's, house asking for a ride to his brother, Armon Dickerson's, house. Nelson was unable to give Dickerson a ride at that time and told him to come back later. When Dickerson returned later that afternoon, he was carrying a gun.
>
> En route to Armon's house, however, Dickerson began calling Roper from his cell phone. After receiving no answer, Dickerson asked if they could make a stop at Drayton's house so he could "get some money." When they arrived at Drayton's home, Dickerson entered brandishing his weapon and asking for money. Roper told Dickerson "I got your money," begging "don't shoot me" and "please don't kill me." Dickerson nevertheless fired a shot at Roper but missed. He then struck Roper in the head with the gun, dragged him out of the house, and forced him into Nelson's car. Dickerson then took Roper to Armon's house.[1]
>
> Armon and Dickerson brought Roper inside and systematically tortured him over approximately thirty-six hours. It started with Dickerson continuing to hit Roper with the gun, knocking out some of his teeth. Armon then left to retrieve

[1] After dropping Dickerson and Roper off, Nelson left and did not return. There is no suggestion he knew of Dickerson's plans beforehand or had any involvement in the subsequent events.

Dickerson's car and some drugs, and blood covered the inside of the house when he returned. Dickerson then called another friend of his, Rashid Malik, and threatened him with death if he did not come to Armon's house.[2] When Malik arrived, Roper was still conscious but clothed only in his T-shirt, and Armon was attempting to clean up the blood covering the house. Malik then joined Armon and Dickerson.

Although Dickerson, Armon, and Malik all tortured Roper to varying degrees, Dickerson appeared to be the primary actor.[3] Through this entire ordeal, Roper suffered the following at the hands of Dickerson alone: choking, being tied up and placed in a closet, being sodomized with a gun and a broomstick, having his scrotum burned, being hit with a heavy vase and a mirror, and generalized beating and cutting. At one point, Roper began asking that they just let him die.

All told, Roper received over 200 individual wounds to the outside of his body, including lacerations to his anus. He also received several internal injuries, including various broken bones in his face that caused it to appear misshapen, blunt force trauma to his neck resulting in the breaking of various structures, a broken tibia, broken fingers and wrist, brain swelling, and bleeding into the internal structures around his rectum as the result of objects being inserted into it. Although there is no definite timeline of events, Roper survived for eighteen to twenty-four hours after the sodomy occurred, and none of these wounds were inflicted post-mortem. No single wound was fatal. Instead, Roper died from the sum total of his injuries, apparently shortly after he was struck with the mirror and the vase on the morning of March 8.

As these events transpired, Dickerson made several phone calls to various people during which he discussed what he was doing to Roper. Many of them were to Dickerson's girlfriend, and she managed to record one of them containing his description of the sodomy and even Roper's own confirmation of what was happening. Dickerson also confirmed the sodomy, as well as the burning of Roper's scrotum, over the phone to another friend. In a later call to that same friend, he said

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[2] Malik attempted to bring Dickerson's mother to Armon's house to calm Dickerson down. When Dickerson learned of this, he threatened to kill Malik's mother and cut the baby out of Malik's pregnant girlfriend.

[3] Armon's girlfriend, Selena Rouse, was in and out of the house during that evening, along with her young son. At some point, Dickerson asked her whether he should let Roper live or die. However, there is no evidence that she actually participated in the torture.

> that Roper was "gone." However, he told a different friend that Roper was all right but that Dickerson needed to run.
>
> Dickerson and Armon wrapped Roper's semi-clothed body in a blanket and dumped it in the vacant townhouse next to Armon's. Dickerson then changed clothes and fled. Armon and Rouse attempted to clean Armon's house, but they abandoned it upon realizing their efforts would be futile. That same day, a woman who was planning to rent the vacant townhouse entered and discovered Roper's bloodied and mutilated body.

State v. Dickerson, *supra* at 107–09, 716 S.E.2d at 898–99 (footnotes in original).

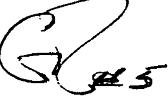
C. <u>PCR Procedural History</u>

Applicant filed his application for post-conviction relief (PCR), on May 16, 2012. By Order dated July 31, 2012, the Supreme Court of the South Carolina vested the Honorable Edgar W. Dickson with exclusive jurisdiction over this capital post-conviction relief action.

By Order dated August 20, 2012, Judge Dickson appointed counsel Elizabeth Franklin-Best, Esquire, and E. Charles Grose, Jr., Esquire (Applicant's counsel). Throughout the course of this litigation, Respondent has been represented by Senior Assistant Deputy Attorney General Melody Brown, with appearances also made by Deputy Attorney General Donald Zelenka, Senior Assistant Attorney General Anthony Mabry, and Assistant Attorneys General Caroline Scrantom and Brendan McDonald (Respondent's Counsel).

Applicant, through counsel and pursuant to the terms of a scheduling order issued by Judge Dickson, filed an amended application on October 18, 2012. To this application, Respondent filed a Return on November 19, 2012.

For reasons unrelated to the specific issues raised, Judge Dickson recused himself from further participation in this case by Order dated June 2, 2014. Thereafter, the Supreme Court of the South Carolina vested the undersigned with exclusive jurisdiction over the present action in an Order issued June 20, 2014. Applicant's counsel filed a second amended application nearly nine



months later on March 5, 2015. A third and final amended application followed, being served upon Respondent on July 13, 2015, and filed July 15, 2015.

Respondent moved to strike or, in the alternative, to dismiss claims within that application not cognizable in PCR. Specifically, Respondent postured that the claim styled as a denial of "due process and equal protection" alleging that the Solicitor "committed prosecutorial misconduct by improperly striking qualified African-Americans from the jury venire" was a freestanding claim which alleged a *Batson* violation that was appropriate at the time of trial and on direct appeal, but not under the Uniform Post-Conviction Relief Act. *See Simmons v. State,* 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975). Respondent filed this motion on October 1, 2015. Applicant responded in opposition and Respondent replied. In an order filed December 8, 2015, this Court denied Respondent's motion to strike or dismiss finding that "Petitioner is asserting his *Batson* claim as part of his ineffective assistance of counsel claim. Thus, Petitioner's *Batson* claim, in this Court's opinion, is not a freestanding claim and is a proper claim in this post-conviction relief matter."

The third amended application gives rise to the allegations pursued at the series of evidentiary hearings before this Court which have convened in both Charleston and Richland Counties: First, on December 7-8, 2015; Second, on March 31, 2016; Third, on May 12, 2016; Fourth, on May 27, 2016; Fifth, on October 23, 2017. Applicant has been present at each hearing and represented by Applicant's counsel.

During the course of these hearing installments, this Court received testimony from (in no particular order and in some cases on more than one occasion): developmental psychologist Dr. Richard Canfield, neuropsychologist Dr. Marlyne Israelian, Applicant's first chair trial counsel Jeffrey Bloom, Applicant's second chair trial counsel Drew Carroll, Applicant's appellate counsel Robert Dudek, law professor Barbara O'Brien from Michigan State University College of Law,

Ninth Circuit Solicitor Scarlett Wilson, and mathematics and statistics professor Dr. Robert Norton.

Following the fourth convening in May 2016, discovery recommenced with the issuance of a July 21, 2016, Order granting Applicant's mid-hearing Motion to Compel. Following this Order, the undersigned also formally ordered, at Respondent's request and without opposition by Applicant, that the evidentiary hearing be suspended until such time as both parties had a full and fair opportunity to complete the discovery ordered on July 21, 2016, and any additional discovery deemed necessary as a result.

During the suspension of the evidentiary hearing and while mid-hearing discovery was pursued by both parties, this Court reconvened on March 16, 2017, for a limited hearing on Respondent's Motion for Special Interrogatories and Concomitant Request to Produce regarding the jury selection claims. This Court denied Respondent's motion. Also at that hearing, Applicant moved to compel additional jury selection data from the *State v. Michael Slager*, C/A No. 2015-GS-10-03466 (Charleston County Court of General Sessions), which had been sealed by the Honorable Clifton Newman during the course of the *Slager* trial. Prior to the resolution of Applicant's related motion before Judge Newman to unseal the information sought by Applicant, this Court denied Applicant's Motion to Compel in an order issued June 1, 2017.

Applicant's 2017 discovery request[4] was also related to Applicant's two prior mid-hearing requests to supplement and amend the data counsel provided their expert witness, Barbara O'Brien

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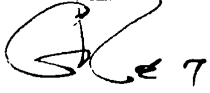
4 Discovery on this particular issue commenced when Applicant served a FOIA request and subpoena upon Ninth Circuit Solicitor Scarlett Wilson seeking:

> the incident report, complete and accurate copies of the jury list(s) prepared by the Clerk of Court, your juror strike sheet, all information created or assembled about all potential jurors (regardless of whether it was prepared by you or by someone else and given to you), and your notes



of the Michigan State University College of Law, in furtherance of Applicant's claim that the Ninth Circuit Solicitor impermissibly used race during capital jury selection ("the jury selection claims").[5]

In regard to the segmentation of the PCR evidentiary hearing, this was a result in almost exclusive part of matters related to the jury selection claims:

- Between the hearings on December 7-8, 2015, and March 31, 2016, Applicant was allowed time for its experts' completion of the statistical analysis intended for presentation in furtherance of the jury selection claims.[6]

- Applicant introduced expert Barbara O'Brien at the March 31, 2016, hearing. O'Brien presented a "Report on Jury Selection Study" in furtherance of the jury selection claims. The report was dated March 8, 2016. This hearing was suspended until May 12, 2016, at Applicant's request, to allow O'Brien time to amend her report to include raw data from public records (trial transcripts) presented by Respondent during its cross-examination of O'Brien.

> made during the roll call of jurors, juror qualification, voir dire, and jury selection

for a list of fourteen specific General Sessions cases. (Aug. 27, 2015, Ltr. from Charles Grose to Sol. Scarlett Wilson; see Exhibit A-4 from May 12-13, 2016 PCR Hearing). This is not the discovery process authorized by S.C. Code Ann. § 17-27-150(B), nor is the Solicitor a proper representative party to the action from which discovery may be directly pursued. See Rule 5(a), SCRCP; *Langford v. McLeod*, 269 S.C. 466, 238 S.E.2d 161 (1977). Applicant had previously deposed the Solicitor and had served discovery requests upon Respondent, but had not made any request for data specific to the study conducted.

5 Respondent has maintained throughout this proceeding that the evidence admitted should only concern claims within the PCR application pertaining to ineffective assistance in the jury selection challenge and procedures leading up to and during Applicant's 2009 trial. This Court has previously limited the presentation of evidence to this proposed time frame in regards to Applicant's Motion to Compel prosecution training materials and in numerous presentations where Applicant has attempted to exceed that limitations, (Respondent maintaining objection to post-2009-trial materials; Court limiting question to 2009 trial and before).

6 The December 7-8, 2015, hearing was limited to issues pertaining to ineffective assistance of counsel in regards to an underlying allegation of lead poisoning, and various other strategy and record based claims. Applicant was not ready to present his statistical theories at the December 2015 hearing.

- At the May 12, 2016, hearing Applicant re-called Barbara O'Brien via Skype. She presented an "Amended Report on Jury Selection Study" dated May 5, 2016. Applicant also called Ninth Circuit Solicitor Scarlett Wilson to testify in furtherance of these allegations.[7]

- The hearing was then suspended order for Applicant to depose Respondent's expert witness who was retained in rebuttal to Applicant's second presentation of the jury selection allegations. That hearing occurred on May 27, 2016, when the State presented Dr. Robert Norton, who offered a critique of the report presented by Applicant's expert. Doctor Norton did not conduct, and the State did not present, an independent study. The State then rested. At this juncture, Applicant indicated he would obtain another amended report from its experts for the purposes of presenting a case-in-reply.

The evidentiary hearing re-convened before this Court on October 23, 2017, in Richland County. Applicant once again presented Barbara O'Brien, who addressed her "Second Amended Report on Jury Selection Study." This report was provided to Respondent and this Court on August 30, 2017, and dated August 29, 2017.

D. List of PCR Exhibits

The following exhibits have been introduced at each hearing installment and are before this Court in relation to the allegations enumerated above.

Exhibits Entered at the December 7-8, 2015, hearing in Richland County:

- A-1 June 2, 1988 Lab Report analyzing lead in Applicant's blood at 9 micrograms per deciliter when Applicant was age 11 yrs 9 months 9 days
- A-2 2003 Research Article from *Public Health Reports* containing map of the Charleston Peninsula and designating addresses with confirmed cases of childhood lead levels at or above level 10
- A-3 Copy of Dr. Canfield's PowerPoint Presentation
- A-4 CV of Dr. Marlyne Israelian, expert in developmental neuropsychology

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7 Also at this hearing, Respondent called trial counsel Jeffrey Bloom in regards to the lead claims, as Mr. Bloom produced discoverable material to Respondent which was requested but not provided by Applicant during discovery.

- A-5 Map of Charleston Peninsula – Enlarged from Dr. Canfield's presentation which ID's houses with children who screened with lead levels above 10
- A-6 Street Map of Orrs Court – street where Dickerson lived for part of his youth
- A-7 May 12, 1988 MUSC Psychological Evaluation of Dickerson from Commitment
- A-8 Social History of William Dickerson Pertaining to Commitments
- A-9 Summary
- A-10 Dickerson's Blood Test Results from same date as lead screening on June 2, 1988
- A-11 Psychological Evaluation for William Dickerson
- A-12 IQ Testing Protocol for Tests Administered to Dickerson in 1990
- A-13 Social Worker's Report by Department of Youth Services (Type of Social History)
- A-14 Evaluation of Social Worker's Report by Department of Youth Services
- A-15 Post-Trial Letter by Jeffrey Bloom dated July 22, 2009 to Robert Lominack expressing list of hearings and of potential appellate issues
- A-16 A Law Review Article by John Blume dated April 1, 2010
- R-1 Medical Report Pertaining to Dickerson's Suffering a Gunshot Wound to the Head
- R-2 Collection of Letters from Dickerson
- R-3 *Jones v. Warden*, 753 F.3d 1171 (11th Cir. 2014)
- R-4 *K.C. v. Fulton Co. Sch. Dis.*, 2006 WL 1868348 (N.D. Ga. Atlantic Div. 2006)
- R-5 MUSC Psychological Evaluation for Dickerson
- R-6 WSH Hospital Records for Dickerson
- R-7 Trial Counsel's Motions Seeking the Death Penalty be Declared Unconstitutional
- R-8 Appellate Counsel's Notes Re: Formulating Appellate Issues

Exhibits Entered at the March 31, 2016, hearing in Richland County

- A-1 CV of Barbara O'Brien
- A-2 Michigan State University College of Law Report on Jury Selection Study
- A-3 Privileged Production Ordered 11/30/2015
- A-4 Privileged Production Ordered 12/10/2015
- A-5 Sealed Criminal History of Jurors from FBI

- A-6 Affidavit of Eddie Haselden from Charleston County Clerk's Office re: Destruction of Juror Lists
- A-7 Prosecution Coordination Commission Documents re: Trainings up to 2009; Additional Materials Proffered for Post-2009
- A-8 Deposition of Bruce DuRant
- A-9 (Proffer Only) Deposition of Scarlett Wilson
- A-10 (Proffer Only) Deposition of Bruce DuRant 3/26/2013
- A-11 (Proffer Only) Deposition of Rutledge DuRant 3/25/2013
- A-12 Transcript Excerpt Used in Respondent's Cross-Examination: Ronald Coulter
- A-13 Transcript Excerpt Used in Respondent's Cross-Examination: Jemol Brown
- A-14 Transcript Excerpt Used in Respondent's Cross-Examination: Ethan Mack
- A-15 Transcript Excerpt Used in Respondent's Cross-Examination: Michael Jeter
- A-16 Flash Drive Containing Underlying Data Utilized in (First) Jury Selection Study

<u>Exhibits Entered at the May 12-13, 2016, hearing in Charleston County</u>

- A-1 Michigan State University College of Law Report Amended Report on Jury Selection Study
- A-2 Standard Interrogatories Served January 2013 by Applicant Upon Respondent
- A-3 Request to Produce Served January 2013 by Applicant Upon Respondent
- A-4 Freedom of Information Act Request Sent to Ninth Circuit Solicitor
- A-5 Incident Report
- A-6 Incident Report
- A-7 Incident Report
- A-8 Incident Report
- A-9 Incident Report
- A-10 Incident Report
- A-11 Incident Report
- A-12 Incident Report
- A-13 Incident Report
- A-14 Incident Report

- A-15 Incident Report
- A-16 Incident Report
- A-17 SC Supreme Court Appendix to Review Assignment of PCR Judge
- A-18 Motion to Dismiss the Death Penalty Due to Unconstitutionality of State Proportionality Review Filed by Trial Counsel
- A-19 Motion to Bar Death Penalty Based on Race
- R-1 Data Compilation Utilized in Creation of Jury Selection Study
- R-2 Criminal Justice Information Services Security Policy Re: Inappropriate to Disseminate Rap Sheets and Criminal History of Jurors
- R-3 E-mails between Jeff Bloom and Dr. Herbert Needleman Re: Lead Poisoning Research and Pre-Trial Consult
- R-4 North Charleston Police Department Booking Report for Juror Stricken by State
- Court-1 Demonstrative Copies

Exhibits Entered at the May 27, 2016, hearing in Richland County

- R-1 CV of Dr. Robert Norton
- R-2 Emailed Opinion of Dr. Robert Norton
- R-3 Formal Critique by Dr. Robert Norton
- A-1 CV of Barbara O'Brien
- A-2 CV of Catherine Grosso
- A-3 (Proffer Only) Questions Applicant Sought Solicitor Wilson to Answer as Part of Applicant's Motion to Compel

Exhibits Entered at the October 23, 2017, hearing in Richland County

- A-1 Michigan State University College of Law Report Second Amended Report on Jury Selection Study
- A-2 Flash Drive Containing Underlying Data for Use in Preparation of A-1 above

Additional Documents Provided to Court Under Seal

Additional information may be sealed and/or before this Court for review, such as prosecution training materials provided under protective order by the South Carolina Commission

on Prosecution Coordination, whose motion to intervene was granted at one point in this proceeding.

E. Surviving PCR Allegations

In Applicant's Post-Hearing Brief of January 16, 2018, Applicant represented he would only proceed on the following allegations:

Concerning Jury Selection:

- 10/11(a)(2) Defense counsel rendered ineffective assistance of counsel by failing to advance a comparative juror analysis when he raised his Batson challenge.
- 10/11(a)(4) Defense counsel rendered ineffective assistance of counsel by failing to secure available criminal records of the jurors by requesting the trial court judge issue a subpoena to the FBI, Criminal Justice Information Services Division prior to the jury strike.
- 10/11(a)(5) Defense counsel rendered ineffective assistance of counsel by failing to litigate the issue of defense counsel's access to the same juror information as was in the possession of the prosecution prior to the jury strike.
- 10/11(f) Applicant was denied his rights to due process and equal protection under the laws in violation of the Fifth and Fourteenth Amendments to the United States Constitution [when] [t]he Ninth Circuit Solicitor's Office improperly struck qualified African-Americans from the jury venire

Concerning Ineffective Assistance Alleged During the Sentencing Phase:

- 10/11(b)(2) Trial counsel rendered ineffective assistance of counsel by failing to renew his objection when Cederick Davis, William Dickerson's former probation agent, testified that Mr. Dickerson stated he wished he had shot the cop.
- 10/11(b)(3) Trial counsel rendered ineffective assistance of counsel by failing to object to the State's closing argument that diluted the responsibility of the jurors in rendering a possible death verdict.
- 10/11/(b)(4) Trial counsel rendered ineffective assistance of counsel when they failed to uncover and present evidence of Applicant's significant neurological deficits and when that evidence would have been highly mitigating.[8]

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[8] This claim of "significant neurological deficits" rests on the allegations pertaining to lead exposure.

Concerning Ineffective Assistance of Appellate Counsel:

- 10/11(c)(5) Appellate counsel rendered ineffective assistance of counsel for failing to present, for appellate review, defense counsel's objections to the admission of photographs [State's Trial Exhibits] 141, 153, 160, 161, 162, 166, 171, 172, 173, 177, 178, 181, 184, 335, and 336.
- 10/11/(c)(7) Appellate counsel rendered ineffective assistance of counsel for failing to present, for appellate review, defense counsel's objection to the solicitor's questioning of Dr. Phillips about whether Mr. Dickerson "knew right from wrong" at the time of the killing.

Concerning Sentence Received:

- 10/11(e) Applicant was improperly sentenced to both murder and kidnapping in violation of S.C. Code Ann. § 16-3-910[9]

These were the only issues briefed by Applicant in any capacity throughout the course of the litigation.

F. Abandoned PCR Allegations

Applicant has abandoned a number of claims appearing in its third amended PCR application. This Court specifically finds those claims waived and abandoned on the basis that they have been expressly waived by Applicant either on the record or in its Post-Hearing Brief. *See generally* S.C. Code Ann. § 17-27-80 ("The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented."); *Marlar v. State,* 375 S.C. 407, 409, 653 S.E.2d 266, 266–67 (2007) (general language on failure to present evidence "should not be included in a PCR order unless there are allegations contained in the application and/or mentioned at the PCR hearing about which absolutely no evidence is presented"); *see also Suber*

9 Applicant is correct that the kidnapping sentence should be vacated if the murder sentence is left undisturbed. However, as argued in Respondent's return to the first amended application, the conviction remains.

v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) ("the applicant bears the burden of establishing that he is entitled to relief");

First, Applicant's counsel abandoned several allegations at the December 7-8, 2015, evidentiary hearing. Referencing the third amended PCR application, Applicant's counsel abandoned claims numbered 11(b)(1) and 11(b)(6)-(8) concerning the effective assistance of counsel during the sentencing phase of his capital trial. Applicant's counsel also abandoned claims 11(c)(4) and 11(c)(6) concerning the effective assistance of counsel on direct appeal.

Second, Applicant's counsel has abandoned the following claims alleged within its third amended PCR application and not included in the Post-Hearing Brief. Applicant has failed to present evidence and argument in furtherance of the following claims summarized below from the third amended application:

- 10/11(a)(1) Ineffective assistance of counsel during the guilt phase of trial: Counsel did not advance a consistent theory between the guilt-and-innocence and sentencing phases of trial

- 10/11(a)(3) Ineffective assistance of counsel during the guilt phase of trial: Counsel failed to secure jurors' criminal records from SLED prior to the jury strike[10]

- 10/11(c)(1) Ineffective assistance of counsel on appeal: Appellate counsel did not appeal the outcome of trial counsel's motion to dismiss the death penalty due to the unconstitutionality of South Carolina's proportionality review[11]

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10 Applicant has only pressed the issue as to FBI records, not SLED records. These are different reports and different databases. (See Order of March 3, 2015, allowing applicant to obtain a subpoena for FBI data bases, p. 2 (noting differences)). Thus, the actual claim differs.

11 Respondent notes that, as addressed in the return to the first amended application, the South Carolina Supreme Court expressly considered the proportionality of the sentence in its opinion affirming Applicant's convictions. *State v. Dickerson*, 395 S.C. 101, 123-24, 716 S.E.2d 895, 907 (2011).

- 10/11(c)(2) Appellate counsel did not appeal the outcome of trial counsel's motion to bar the death penalty based on race
- 10/11(c)(3) Appellate counsel did not appeal the outcome of trial counsel's *Batson* motion
- 10/11(d)(1-4) The death sentence was obtained in violation of the United States Constitution because South Carolina's capital sentencing scheme violates the mandates of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1972)[12]
  1. The statute does not perform the constitutionally mandated narrowing function
  2. South Carolina's sentencing system permits racial discrimination
  3. The State Supreme Court consistently fails to conduct meaningful proportionality review in capital cases
  4. The death penalty is unconstitutional because it is unreliable, arbitrary, and lacks penological purpose

G. General Standard of Review in PCR

The scope of this Court's jurisdiction in post-conviction relief matters is set out in S.C. Code Ann. § 17-27-20(a), which provides:

> Any person who has been convicted of, or sentenced for, a crime and who claims:
>
> (1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
>
> (2) That the court was without jurisdiction to impose sentence;
>
> (3) That the sentence exceeds the maximum authorized by law;

12 The South Carolina death penalty statute has long been held Constitutional and "indistinguishable from the statutory complex approved by the United States Supreme Court." *E.g. State v. Shaw*, 273 S.C. 194, 200-03, 255 S.E.2d 799, 802-04 (1979) (citing *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909 (1976)).

application for post-conviction relief absent a claim of ineffective assistance of counsel."); *see also Cummings v. State*, 274 S.C. 26, 28, 260 S.E.2d 187, 188 (1979) ("At trial, respondent failed to object to the imposition of the sentence and, therefore, waived the right to have that sentence reviewed on direct appeal, or to raise such issue on Post-Conviction absent an allegation of ineffective assistance of counsel."). Ineffective assistance of counsel claims constitute the general nature of issues appropriate for post-conviction relief actions. *See, e.g., Al-Shabazz v. State,* 338 S.C. 354, 367, 527 S.E.2d 742, 749 (2000) (discussing jurisdiction pursuant to S.C. Code § 17-27-20(a), and finding "A typical PCR claim of ineffective assistance of counsel falls into this category....").

To establish that Sixth Amendment counsel was ineffective, a PCR applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068 (1984); *Simpson v. Moore*, 367 S.C. 587, 595–96, 627 S.E.2d 701, 706 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland, supra.* Relief will not be granted on a showing of mere error—prejudice must also be shown. *Id.* The standard of "prejudice" differs depending upon whether it is related to guilt phase issues or penalty phase issues. In order to prove "prejudice" in the guilt phase, an applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). In *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998), the court instructed that prejudice may be found in a capital sentencing proceeding "when 'there is a reasonable probability that, absent [counsel's] errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded

that the balance of aggravating and mitigating circumstances did not warrant death.'" 332 S.C. at 333, 504 S.E.2d at 823 (quoting *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2068). Again, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694).

Further, a defendant is entitled to a due process right of effective assistance in his first appeal. *Evitts v. Lucey*, 469 U.S. 387 (1985). The *Strickland* deficient performance and prejudice test applies to determine the merits of any claims of ineffective assistance of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S.Ct. 726 (2000); *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). However, "it is difficult to demonstrate that counsel was incompetent" as for the most part, deficient performance may be shown "only when ignored issues are clearly stronger than those presented . . . ." *Smith v. Robbins*, 528 U.S. at 288, 120 S.Ct. at 765 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). "To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal." *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

In either case, to effect a fair review of counsel's performance, a reviewing court must "eliminate the distorting effects of hindsight" and attempt "to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Butler v. State*, 286 S.C. 444–45, 334 S.E.2d 815 (1985).

H. Ineffective Assistance in Jury Selection

Introductory Summary

Applicant has primarily presented argument challenging Solicitor Wilson's use of peremptory strikes during Applicant's jury selection. The transcript of record shows trial counsel challenged three of the prosecution's four strikes during a *Batson* motion at the 2009 trial.

Because a *Batson* motion was made at the 2009 trial, the precise and only claim available is one of ineffective assistance of counsel. Applicant asserts defense counsel was ineffective by:

- failing to advance a comparative juror analysis when he raised his *Batson* challenge;
- failing to secure available criminal records of the jurors by requesting the trial court judge issue a subpoena to the FBI, Criminal Justice Information Services Division prior to the jury strike;
- failing to litigate the issue of defense counsel's access to the same juror information as was in the possession of the prosecution prior to the jury strike.

Applicant's further allegation that he "was denied his rights to due process and equal protection under the laws in violation of the Fifth and Fourteenth Amendments to the United States Constitution [when] [t]he Ninth Circuit Solicitor's Office improperly struck qualified African-Americans from the jury venire," is not cognizable as that is a direct appeal issue. Review of that claim is barred by the *Simmons* rule.

1. Defining the Claims and Appropriate Standard of Review

At trial, counsel pursued a *Batson*[13] motion which is reflected on pages 2028 to 2031 of the Record on Appeal.As noted, Applicant makes three separate ineffective assistance of counsel

13 *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986) (hereinafter *Batson*).

claims pertaining to this motion: (A) that trial counsel failed to advance a comparative juror analysis in furtherance of his *Batson* motion; (B) trial counsel failed to subpoena to the FBI to secure the Criminal Justice Information Services Division (CJIS) records pertaining to the potential jurors; and (C) trial counsel failed to litigate that he did not have the same access to juror information, such as CJIS records, as the prosecution possessed prior to the jury strike. Applicant has also alleged a due process and equal protection violation premised on his assertion: "the Solicitor's Office committed prosecutorial misconduct by improperly striking qualified African-American jurors form the jury venire." This is not treated as freestanding claim based on this Court's previous ruling in regard to Respondent's motion to strike.

This Court denied Respondent's Motion to Strike the freestanding claim in its Order filed December 8, 2015, based on the fact that this Court construed the allegation as one of ineffective assistance of counsel: "Here, Petitioner is asserting his *Batson* claim as part of his ineffective assistance of counsel claim. Thus, Petitioner's *Batson* claim, in this Court's opinion, is not a free-standing claim and is a proper claim in this post-conviction relief matter." This affects the standard of review and this Court's review of the evidence. Respondent adheres to the Court's interpretation of the claim as one of ineffective assistance and will follow the review standards of ineffective assistance of counsel claims.

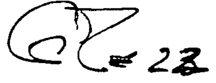
2. Defining the Available Evidence

This Court must examine what information was available to trial counsel at the time of Applicant's trial in order to make a determination on any ineffective assistance of counsel claim. *See, e.g., Strickland v. Washington*, 466 U.S. at 689, 104 S. Ct. at 2065 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the

conduct from counsel's perspective at the time."). Significant portions of the evidentiary basis argued in Applicant's Post-Hearing Brief are not proper for this Court's consideration as the information offered was not available to defense counsel at or before Applicant's trial – in particular evidence related to cases tried by the Ninth Circuit Solicitor *after* Applicant's May 2009 trial. To the extent Applicant expands the record to introduce argument concerning the use of preemptory strikes in *State v. Colin Broughton*, tried September 2009, and *State v. Ryan Deleston*, tried October 2013, that evidence will not be considered. Where the underlying occurrence of the evidence argued in favor of relief past Applicant's trial date, that evidence cannot be considered for the purpose of any post-conviction relief determination on the issue of ineffective assistance and its consideration is consequently improper. *Strickland, supra.* *See also* Rules 401 and 402, SCRE.

Further, Applicant's inclusion of a jury strike analysis in the 2004 *Jelal Beyah* trial, though prior to the 2009 trial, is still irrelevant to this Court's consideration of the claims before it for several reasons. Apart from the well-established fact that discovery is not allowed in criminal proceedings and Applicant has not shown how trial counsel should be criticized for failing to obtain the additional information about any of these unrelated cases, Applicant has attempted to thrust great weight on the fact that an adverse ruling was made in one case, *Beyah*, in regard to one strike. Reliance on *Beyah* to establish some sort of pattern is suspect for its isolated nature. There is only this one instance where a trial court found the prosecutor's explanation lacking. But the larger point is that the relevant consideration here is the *Batson* motion already in the record.

Trial counsel did pursue a *Batson* challenge and the solicitor's response was fully set out and is supported by the record. Any reference to other unrelated cases will never affect, inform, or alter the record made at the 2009 trial as to the prosecution's reasons for the strikes. Moreover,



Applicant's suggestion the responses were pretext is similarly moot, as the responses and consideration of the responses were made back in 2009. *Hernandez v. New York*, 500 U.S. 352, 359, 111 S.Ct. 1859 (1991) ("Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot."); *see also Juniper v. Zook*, 117 F. Supp. 3d 780, 799 and n.10 (E.D. Va. 2015), *motion for relief from judgment denied*, No. 3:11-CV-00746, 2016 WL 413099 (E.D. Va. Feb. 2, 2016) (statistics demonstrating "the prosecution struck black venire members at nearly three times the rate of white venire members," even if accepted, are irrelevant where reasons for strikes on the record given "statistical disparity between black and non-black jurors goes to the first step of *Batson*," and "not purposeful discrimination at the third step").

Applicant's Post-Hearing Brief addresses and includes information included only *in camera* and under seal by this Court. "The Prosecutor's Handbook" and other prosecutorial training materials have been ruled work-product not available for production and/or privileged and held under seal. These documents have already been found to be irrelevant to a *Batson* motion analysis. This past October, our Court of Appeals decided this very issue in *State v. Daise*, 421 S.C. 442, 461–63, 807 S.E.2d 710, 720–21 (Ct. App. 2017), *reh'g denied* (Dec. 14, 2017). The *Daise* opinion is directly on point and against Applicant's position.

Like Applicant, "Daise subpoenaed the records custodian of the South Carolina Commission on Prosecution Coordination (the Commission)[14] to provide '[a]ll documents regarding jury selection, including but not limited to training documents, training agendas,

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14 In Applicant's case, the Commission has been granted intervenor status as to this issue. (May 12-13, 2016, Tr. p. 146; *see id.* pp. 133-41).

manuals, policy statements or . . . advisements, correspondence with current or former prosecutors and circuit court judges.'" *Id.* Daise's capital counsel suggested the State had a "handbook on how to get around *Batson*" and supported his posture with pre-trial expert testimony from a statistician. The statistician testified that "in Beaufort County, African-American males were struck at a rate four and a half times higher than Caucasian males." *Id.* Our appellate court affirmed the circuit court's finding the materials at issue "did not 'include any abusive instructions or teaching materials, nor use of improper technique,'" and that the materials were "generally protected as work-product, as they were created and disseminated in a limited fashion with the purpose of assisting the State's preparations for trial.'" *Id.* at 462-63, 807 S.E.2d at 720 (citing *e.g., Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010) ("[A]ttorney work product doctrine protects from discovery documents prepared in anticipation of litigation, unless a substantial need can be shown by the requesting party."); *State v. Myers*, 359 S.C. 40, 49, 596 S.E.2d 488, 493 (2004) (noting Rule 5, SCRCrimP, exempts from discovery work product and internal prosecution documents which contain no impeachment or exculpatory evidence); Rule 5(a)(2), SCRCrimP ("Except as provided in [prior subsections], this rule does not authorize the discovery or inspection of reports, memoranda, or other internal prosecution documents made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case....")).[15] The Court of Appeals specifically found that

[15] Former defense counsel testified in these PCR proceedings that defense attorney presentations similarly have materials referencing case law that would outline holdings and what was acceptable or not acceptable – materials that are also similarly considered restricted and "property of the organization putting on the seminar…" (See May 12-13, 2016 PCR Hearing Tr. p. 153). Further, the concept of listing out cases and reviewing the explanation in given cases is fairly standard.

the circuit court did not err in quashing the subpoena for these documents after conducting an *in camera* review. *Id.* at 463, 807 S.E.2d at 721.

An additional limitation to the evidence presented to this Court in Applicant's Post-Hearing Brief pertains to the criminal histories subpoenaed and maintained under seal in this action. (Mar. 3, 2015, "Order Granting Applicant's Request for Access to Criminal Histories of Jurors"). As testified to by the Solicitor in this case, CJIS information is not for dissemination once received by the State. The State introduced as Respondent's Exhibit 2 to the May 12-13 hearing in this matter the security policy and information sheet directing that these criminal histories not be physically duplicated or disseminated. This policy additionally instructs on how to specifically destroy these rap sheets once the timeframe for using them expires. (Resp. Ex. 2, May 12-13, 2016, PCR Hearing). Even though similar documents may be produced (as by the subpoena issued for purposes of this action), Applicant could not have access to that information at the time of trial. And, to the extent access to similar information has been granted by this Court for purposes of this litigation, such is to remain under seal, with replication and dissemination to inappropriate parties forbidden in accord with FBI policies.

The evidence that is relevant to this Court's review remains in the form of testimony presented at each installment of the PCR hearing to the extent it pertains to Applicant's trial counsel's performance, any alleged prejudice derived therefrom, and any evidence which was discoverable at or before the time of Applicant's May 2009 trial.

3. <u>Defining the Specific Standard of Review</u>

The outcome as to each ineffective assistance of counsel claim pursued by Applicant in the Post-Hearing Brief is resolved by reference to the *Strickland* deficiency-and-prejudice standard.

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 2064 (1984). But it is not just a purported error that controls whether relief may be granted. Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, 466 U.S. at 694, 104 S. Ct. at 2068. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.*, 466 U.S. at 691, 104 S. Ct. at 2066.

Batson procedure is certainly relevant to this Court's determination of whether trial counsel rendered deficient performance and any prejudice derived therefrom. It is unconstitutional for either the prosecution or defense to strike a venire person on the basis of race or gender. *J.E.B. v. Alabama,* 511 U.S. 127, 114 S.Ct. 1419 (1994); *Georgia v. McCollum,* 505 U.S. 42, 112 S.Ct. 2348 (1992); *State v. Shuler,* 344 S.C. 604, 545 S.E.2d 805 (2001). This prohibition derives from the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Id.* Upon motion by either party, *Batson* provides a mechanism for the trial court to evaluate whether a party executed one or more of its peremptory challenges in a manner in violation of the Equal Protection Clause. "When one party strikes a member of a cognizable racial group or gender, the trial court must hold a *Batson* hearing if the opposing party requests one." *State v. Shuler*, 344 at 615, 545 S.E.2d at 810. South Carolina restated its application of *Batson's* three-prong test in *State v. Inman*:

> First, the [the party asserting the *Batson*] challenge must make a prima facie showing that the challenge was based on race [or gender]. If a sufficient showing is made, the trial court will move to the second step in the process, which requires the [party opposing the *Batson*] challenge to provide a race [or gender] neutral

> explanation for the challenge. If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the [party asserting] the challenge has proved purposeful discrimination.

409 S.C. 19, 25, 760 S.E.2d 105, 108 (2014) (alterations in original) (quoting *State v. Giles*, 407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014)).

In order to make the initial prima facie showing, a movant is required to note that the strikes' proponent exercised peremptory challenges to remove venire members of a particular race or gender. *Batson v. Kentucky,* 476 U.S. at 96, 106 S.Ct. at 1712. The movant "is entitled to rely on the fact, as to which there can be no dispute that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Id.* (quoting *Avery v. Georgia,* 345 U.S. 559, 563, 73 S.Ct. 891, 892 (1953)).The movant may point to particular circumstances in his opponent's jury strike which give rise to an inference of discrimination, such as demonstrating to the trial court that his opponent exercised a "pattern" of strikes against a particular race or gender. *Id.* at 96, 106 S. Ct. at 1723. The showing required in this jurisdiction is light: "...the trial judge must hold a *Batson* hearing when members of a cognizable racial group or gender are struck and the opposing party requests a hearing." *State v. Adams,* 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996), *overruled on other grounds by State v. Giles,* 407 S.C. 14, 754 S.E.2d 261 (2014).

Further, establishing a pattern of discrimination does not require a showing that every potential juror of a specific race or gender was struck by a party. In finding a prima facie case has been made, the relevant inquiry is not whether it is more likely than not that the peremptory challenges, if unexplained, were based on an impermissible bias. *Johnson v. California,* 545 U.S. 162, 164, 125 S.Ct. 2410, 2413-14 (2005). "[A] prima facie case of discrimination can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives 'rise to

an inference of discriminatory purpose.'" *Id.* at 169, 125 S.Ct. at 2416. "The [remainder of the] *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." *Id.* at 172, 125 S.Ct. at 2418. "In deciding whether the [movant] has made the requisite showing, the trial court should consider all relevant circumstances." *Batson* at 96, 106 S.Ct. at 1723.

The neutral reason the motion's opponent provides for each strike need not prove persuasive or plausible. *State v. Inman,* 409 S.C. at 26, 760 S.E.2d at 108 (citing *Purkett v. Elem,* 514 U.S. at 768, 115 S.Ct. at 1769). "The explanation must only be 'clear and reasonably specific such that the [party asserting the *Batson* challenge] has a full and fair opportunity to demonstrate pretext in the reason given." *Id.* (alterations in original). "In contrast, step three of the above analysis requires the court to carefully evaluate whether the party asserting the *Batson* challenge has proven racial discrimination by demonstrating that the proffered race-neutral reasons are mere pretext for a discriminatory intent." *Id.* at 27, 760 S.E.2d at 108.

Applicant argues the Solicitor engaged in prosecutorial misconduct when using peremptory strikes in Applicant's jury selection. However, "'[f]or more than a century, th[e Supreme] Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause.'" *Miller-El v. Dretke*, 545 U.S. 231, 239, 125 S.Ct. 2317, 2324 (2005) (quoting *Georgia v. McCollum*, 505 U.S. 42, 44, 111 S.Ct. 1364, 2348 (1991)).

The cognizable claim rests on the sufficiency of the *Batson* motion made at trial. Even if Applicant could show some error in counsel's representation at trial, he must show *Strickland* prejudice. In the *Batson* context, *Strickland* prejudice is often impossible to show due to the nature of the equal protection error. See, for example, *Young v. Bowersox,* 161 F.3d 1159, 1160 (8th Cir. 1998) (rejecting call to presume prejudice in *Batson* context); *Cabrera v. State,* 173 A.3d 1012,

1021–22 (Del. 2017) ("even if we assume a *Batson* violation, the Superior Court correctly held that Cabrera was not relieved of showing prejudice under *Strickland*.); see also *United States v. Lee,* 715 F.3d 215, 223 (8th Cir. 2013) ("Bias will not be presumed simply because some jurors were of a different race than the defendant."). *Cf. Weaver v. Massachusetts,* 137 S. Ct. 1899, 1913 (2017) (even if an actual "structural error is raised in the context of an ineffective-assistance claim ... petitioner must show prejudice in order to obtain a new trial.").

4. Even if Available for Review, the Freestanding Allegations Lack Merit Based on the Record

Applicant cannot succeed in demonstrating that he is entitled to relief based on an ineffective assistance of counsel claim. Applicant makes a number of allegations against the Solicitor and questions her integrity and character.[16] These accusations are unsupported by the record before this Court.

First, this Court must assign deference to the credibility determination which accompanies the trial court's ruling regarding the Solicitor's representations at the *Batson* hearing. "A trial court

16 Applicant asserts the Solicitor's reasons for striking potential jurors "smacks of racial pretext" and repeatedly assigns nefarious cause to particular portions of the voir dire record. (Applicant's Brief pp. 9-12 (Solicitor "just assumed" one juror "would have financial difficult given her status as a 'single mother' that is completely unsupported by the record.") ("questioning [of a juror] was calculated to produce answers to serve as a basis for her disqualification") ("Clearly this question was calculated to make [a juror] pause and generate equivocation that she then used to justify her strike of her.") ("since Solicitor Wilson did not ask a single juror about convictions, yet seated some with convictions, it is clear that Solicitor Wilson is using convictions as pretext")); (*see also id.* at 24 n.5 ("Why would number of children be relevant to a juror's qualification to sit on a jury except to provide some information a solicitor could use to make a gender based discriminatory strike?")).

Applicant deposed the Solicitor and called the Solicitor as a witness during the evidentiary hearing. Applicant had every opportunity to ask the Solicitor the basis for questions she asked during voir dire. Applicant likewise had every opportunity to ask the Solicitor the basis for her use of peremptory strikes at Applicant's trial and to call the jurors about potential undisclosed histories. Applicant chose not do so.

finding regarding the credibility of an attorney's explanation of the ground for a peremptory challenge is "entitled to 'great deference'" when reviewed. *Davis v. Ayala,* 135 S. Ct. 2187, 2199 (2015) (citing *Felkner v. Jackson*, 562 U.S. 594, 598, 131 S.Ct. 1305 (2011), quoting *Batson*, 476 U.S., at 98, n. 21, 106 S.Ct. 1712)); *see also Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S. Ct. 1203, 1208 (2008) (only in "exceptional circumstances" should a reviewing court overturn the trial court's "determinations of credibility and demeanor").

Second, Applicant fails to mention the Solicitor's own testimony offered at the PCR hearing. That testimony plainly contradicts the rank speculation appearing in Applicant's brief:

> Q. Have you ever trained any attorney to strike solely on the basis of race or gender?
>
> A. No. Not solely or not in any way.
>
> Q. And do you believe you should?
>
> A. No, I don't think you should.
>
> Q. And are you careful not to?
>
> A. I am careful not to.
>
> Q. Because it's not right?
>
> A. Because I don't think it's right. I don't think it's right for the defendant. I don't think it's right for the juror who has a right to be a part of our system.
>
> Q. It's not a legal maneuver, is it?
>
> A. It is not.

Further, the Solicitor testified she did not go to any educational materials in the office and did not need to go such materials:

A. … I knew that we didn't need to strike on the basis of race and we didn't need to strike on the basis of gender and we didn't. I didn't need to go to the desk book to learn that.

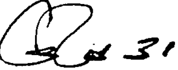
Q. Because that is actually a moral decision for you?

A. It is.

The credibility of that testimony is further corroborated by the trial record made at the time of the *Batson* motion and ruling finding the reasons for the strike were not race motivated. Applicant's speculation is also dispelled by defense counsel's responses at the original *Batson* hearing, and defense counsel's revisiting of the issue in light of the record as reflected in his PCR testimony. There is no cause to conclude the factually supported reasons were pretext.

Third, a comparative juror analysis does not demonstrate that the Solicitor acted in the manner speculated to in Applicant's brief. In particular, Applicant's allegation Juror 209 had a criminal history which was not disclosed for a proper comparative analysis does nothing to show a false statement was made during the *Batson* proceedings. The record[17] Applicant references shows Juror 209's name was used as an alias; there are different dates of birth between the record individual and Juror 209's information in the state court record; there are vastly different locations for a span of activity (Alaska rather than South Carolina); and, employee and residence information for Juror 209 obtained during the 2009 trial proceedings does not square with the Alaska entries. Further, this Court declines to assign an improper motive to a prosecutor based on reliance upon a report that is later determined to be incorrect or incomplete. This is not a matter of evolving reasons which smack of pretext. *See generally Foster v. Chatman,* 136 S. Ct. 1737, 1751 (2016) ("… the prosecution's principal reasons for the strike shifted over time, suggesting that those

[17] The face of the record cautions that the information, in addition to being restricted, is not conclusive: "… The FBI cannot guarantee that this record concerns the person in whom you are interested."



reasons may be pretextual"). The basis for the strikes have been a part of the public record since the 2009 trial. This is not a record showing the reasons at trial have been contradicted by the facts of trial. *Id.,* 136 S. Ct. at 1751 ("...in evaluating the strike of Garrett, we are not faced with a single isolated misrepresentation" but several instances where the reasons were in tension with the record of voir dire responses). The trial court ruling on this underlying issue is founded in fact and includes a finding of credibility equally supported in fact. Applicant wholly fails in his burden of proof.

Applicant has relied upon *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317 (2005), throughout this proceeding. That case examined a Texas prosecutor's use of ten peremptory strikes, all against African-Americans, resulting in exclusion of "91% of the eligible African-American venire members" for trial. *Id.,* at 241, 125 S.Ct. at 2325. The facts also showed the prosecution's use of "a procedure known in Texas as the jury shuffle" where either side could "literally reshuffle the cards bearing panel members'' names, thus rearranging the order in which members of a venire panel are seated and reached for questioning." *Id.* at 253, 125 S.Ct. at 2332-33. In that case, the prosecution repeatedly shuffled the cards each time a series of African-Americans were seated at the front-end of a venire panel. *Id.* at 254, 125 S.Ct. at 2333. No such practice exists in South Carolina. Thus, a key basis for the United States Supreme Court's in *Miller-El* is completely missing from the process in this State and this record. But even so, the case is critical for marginalizing bare statics – a key portion of Applicant's argument to this Court. The Supreme Court expressly rejected that the 91% statistic presented during the collateral proceeding held any significant weight and forwarded a comparison of juror to juror upon known facts. *Id.,* at 241, 125 S. Ct. at 2325 ("More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed

to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step.").

Applicant's counsel presented a statistical analysis in furtherance of this single claim: Solicitor Wilson engaged in misconduct by committing a *Batson* violation. The best evidence lies in the trial record. Solicitor Wilson placed her reasons for exercising each strike on the record. She also testified in the PCR proceedings that she believed in upholding the integrity of the judicial system and of her own moral code, and would not exercise peremptory strikes based on race or gender. And, as noted, Applicant failed to confront or challenge the Solicitor as to any purported inconsistency in her reasons, and none is readily apparent. The record reflects the actual reasons for her use of strikes, and they were:

First Challenged Strike

(1) Juror 10 for Selection Purposes (Juror #101): "a CNA" and single mother who would be missing work, or having work conflicts, by serving on the jury, and said at one point during *voir dire* that she couldn't vote for death.

Defense counsel's notes confirm the juror's information to the judge that she "need[ed] to be @ work 1pm" and also "backs up" when considering whether she could impose death.

Second Challenged Strike

(2) Juror 11 for Selection Purposes (Juror #92): "She has a number of charges for prostitution, a charge for shoplifting, a concealed weapon...." The trial judge inquired of the Solicitor whether another juror has any record, to which the Solicitor replied: "Not that many or not for those things."

The FBI records apparently did not return any convictions for Juror #92. However, Respondent introduced at the May 2016 hearing, certified copies of the arrests.

Third Challenged Strike

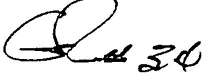
(3) Juror 16 for Selection Purposes (Juror #315): "... she first said that she could never give the death penalty, then she said that she could, she didn't answer the question on her questionnaire and she seemed to struggle with ..." The trial judge noted "I recall that she was inconsistent and I find that to be a race-neutral and gender-neutral reason."

"A trial court is best situated to evaluate both the words and the demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor who exercised those strikes." *Davis v. Ayala*, 135 S. Ct. at 2201. In addition to the trial court's conclusion, this Court also has defense counsel's testimony at the PCR hearing and the record in both proceedings – trial and PCR. There is no inconsistency or factual error to indicate pretext. Nevertheless, Applicant presses arguments that the reasons "smack[] of racial pretext." None of his arguments support that conclusion.

Arguments Made for the First Time in PCR

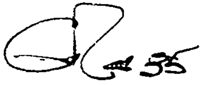
Initially, Respondent notes Applicant does not challenge the prosecution's strike of Juror #315. At the beginning of his argument, any "pattern" evidence within the strikes here is diminished. He does, however, make new arguments for comparative juror analysis regarding Juror # 101 and Juror #92. His arguments suffer from lack of evidence and lack of specificity in the analysis.

Applicant argues Juror #101 "was unequivocal in her responses that" work would pose no problem. He does not contest that defense counsel's note indicated at least one concern about being at work at a particular time, 1:00 pm. He does not contest that the juror's information



reflected she was single. He argues though, that Juror #101 was not asked questions about being a "single mother with two children and that she would be missing work throughout the week..." Applicant fails to consider the information in this pointed exchange:

> Q. I believe that you mentioned to one of the bailiffs that you have to work tonight?
>
> A. Yes, I do.
>
> Q. Do you always work nights?
>
> A. I do -- well, it just depends.
>
> Q. So for the next few weeks you aren't scheduled nights, or you are or ---
>
> A. I am scheduled for nights. In fact, I picked up overtime before knowing ---
>
> Q. What does that mean, you picked up overtime?
>
> A. I have, like for the next couple of weeks I'm going to be working and I think I only have one day off.
>
> Q. What are your hours for the next few weeks?
>
> A. All night shift.
>
> Q. Is that 5:00 to 5: 00 or 7:00 to 7:00?
>
> A. I work 7:00 p.m. to 7:00 a.m.
>
> Q. Okay. Do you think that would cause you a hardship, serving on the jury if after you got off work at 7:00 a.m. that you had to come into court at 9:00 or so and spend the day in court with us?
>
> A. It probably would as far as me getting sleep. I'd need to let my supervisor know to reassign the schedule.
>
> Q. So you could get off of work for the next couple of weeks
>
> A. Exactly.



Q. --- if need be?

A. Yes.

Q. Okay. So if the Judge told you that it wouldn't be appropriate for you to work after leaving after your service during the day, you would be able to have that rearranged?

A. Yes, I could.

Q. That would make for quite a long day if you had to go to work and then sit in here and do all this all day?

A. Yeah.

Without question, there was a concern that the juror would try to work, and, logically, if she was "picking up" overtime, there is a need for additional work. Applicant has shown no pretext.

Applicant next argues the "equivocation" the Solicitor cited was not more than expressed by accepted Jurors 306 and 221 he claims "expressed stronger reservations about imposing the death penalty than" Juror #101. The voir dire transcript demonstrates that the question was posed because the prosecutor "couldn't read [the] handwriting on the question number forty-seven" on the questionnaire which asks, "What is your opinion, if any, about the death penalty." The uncertainty is reflected in the record. Moreover, the juror did equivocate, saying both that she "could consider" but "wouldn't vote for" the death penalty. Applicant also includes Juror #92's answer without acknowledging she was struck. That could not be evidence of a similarly situated juror who was seated. Applicant's argument simply proves what the Supreme Court has recently again observed:

> In a capital case, it is not surprising for prospective jurors to express varying degrees of hesitancy about voting for a death verdict. Few are likely to have experienced a need to make a comparable decision at any prior time in their lives. As a result, both the prosecution and the defense may be required to make fine

> judgment calls about which jurors are more or less willing to vote for the ultimate punishment. These judgment calls may involve a comparison of responses that differ in only nuanced respects, as well as a sensitive assessment of jurors' demeanor. We have previously recognized that peremptory challenges "are often the subjects of instinct," *Miller–El v. Dretke,* 545 U.S. 231, 252, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (citing *Batson*, 476 U.S., at 106, 106 S.Ct. 1712 (Marshall, J., concurring)), and that "race-neutral reasons for peremptory challenges often invoke a juror's demeanor," *Snyder,* 552 U.S., at 477, 128 S.Ct. 1203. A trial court is best situated to evaluate both the words and the demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor who exercised those strikes. As we have said, "these determinations of credibility and demeanor lie peculiarly within a trial judge's province," and "in the absence of exceptional circumstances, we [will] defer to the trial court." *Ibid.* (alterations and internal quotation marks omitted). "Appellate judges cannot on the basis of a cold record easily second-guess a trial judge's decision about likely motivation." *Collins,* 546 U.S., at 343, 126 S.Ct. 969 (BREYER, J., concurring).

Davis v. Ayala, 135 S. Ct. at 2201.

He has not proven the trial judge was incorrect either in factual finding or legal conclusion.

Applicant next argues the Solicitor's questioning was "calculated to produce answers to serve as a basis for her disqualification." He takes exception to the Solicitor asking repeated questions concerning the juror's work schedule. However, this underscores the Solicitor's concern was the work schedule. It is evidence there was no improper motive. Applicant argues other jurors worked, but cites to no indication that any of the other jurors asked about having to leave court proceedings, or that others had expressed it would difficult for them to work at night and participate. They are not similarly situated. He also takes exception to the question posed to the jury about whether the juror could "put a man to death." It is an unsurprising question for voir dire in a death penalty case. It is also echoed in the other questions. [voir dire of Juror #209], "Could you also sign your name to the warrant or verdict commanding someone's death?").

As to Juror #92, Applicant argues the Solicitor's reasons (the listed crimes) "smack of racial pretext." He first argues the convictions did not concern the Solicitor because no questions were posed. However, the Solicitor was already aware of those convictions, and it is unclear as to what should be asked to explore the conviction in reference to the discretionary *voir dire* for discretionary strikes. And, as Applicant concedes, the prosecution did not ask any juror about his or her conviction. Thus, Juror #92 was not treated differently. His argument then progresses to a comparison with a seated juror, Juror #209. Applicant asserts this juror is Caucasian, had a record, the Solicitor knew she had a record, and she was not struck. The trial court record supports the juror is Caucasian, and was seated. Applicant's other assertions are without merit.

The FBI record obtained post-trial, which Applicant relies upon, shows Juror 209's name was used as an *alias*, not that the record reflects the juror's background. Moreover, there are significant differences in information: there are different dates of birth between the record of the individual who used the juror's name as an alias, and Juror 209's information in the state court record; there are vastly different locations for a span of activity (Alaska rather than South Carolina); the FBI record shows a 5'7" blond individual while defense counsel's notes reflect a petit dark haired individual presented at the 2009 trial; and, the employee and residence information for Juror 209 obtained during the 2009 trial proceedings does not square with the Alaska entries. Applicant failed to call the Juror during the PCR proceedings to clarify the discrepancies.

Applicant presented no evidence nor does he have a sound basis for asserting the Solicitor "knew" of a record in Alaska. To the exact contrary, there is no indication Juror #209 had worked or lived in Alaska. Her information reflected in the record on appeal shows she lived only in the Charleston and Berkeley areas for approximately 49 years. In fact, the defense asked the juror

about her work at MUSC in Charleston. Applicant has wholly failed in his burden of proof of even showing a conviction exists for Juror #209, much less that the Solicitor knowingly omitted the information. Applicant has not shown the juror was similarly situated.

Applicant further posits three white males had DUI and DUS convictions. He again does not show the jurors were similarly situated – he does not show multiple convictions, or a gun conviction in any of the records. The evidence is consistent with the Solicitor's truthful response that other jurors seated did not have the same type of history or quantity of convictions.

Applicant abandons any attempt to question the strike of Juror #315, and with good reason. The strike is well supported by the record. While defense counsel did not mark a score for that juror that is evidenced in the record, her hesitation is reflected in the record, as Judge Dennis noted at the time of the *Batson* motion. The pattern he attempts to show in regard to the three strikes is undermined by the record itself.

Applicant next argues other later cases that have no bearing on the reasons presented. That has been previously addressed above. The information is from after the 2009 trial and irrelevant to the *Strickland* analysis.

He next argues the Prosecution Commission programs suggest methods for hiding improper reasons for striking jurors. He omits entirely the evidence that the Solicitor did not even utilize or rely upon any such materials for the strikes. Further, under *Daise*, the information does not support his claim.

Lastly, Applicant turns to bare statistics. This is even further removed for the comparative juror analysis on the *Batson* step three analysis at issue. *Hernandez v. New York, supra; Juniper v. Zook, supra.* The study from the Michigan State College of Law, twice amended during these proceedings, falls outside the zone of relevancy. Bare statistics are not demonstrative of causation

for any disproportion in strikes and a jury venire's racial composition. The statistics submitted in this case are nothing more than the creation of a ratio between the number of Caucasians stricken versus the number of African-Americans stricken. They do not address even the mere existence of additional reasons for striking jurors; they do not address the entire practice of the Ninth Circuit Solicitor's Office; nor do they address the reasons that strikes were used in Applicant's case which were offered at trial and available in the record. To be sure, statistical studies – indeed, statistical studies undertaken by these same individuals– have been academically considered; however, their other studies are valued precisely because they have taken variables into account. See Ann M. Eisenberg, *Removal of Women and African Americans in Jury Selection in South Carolina Capital Cases,* 1997-2012, 9 Ne. U.L. Rev. 299, 322–23 (2017) (describing the North Carolina study by O'Brien and Grosso, "Their study used detailed, descriptive information about one sample of venire members in order to control for factors other than race that may have accounted for the decision to strike."). In a 2010 report, Professors O'Brien and Grosso wrote: "To account for other factors that might bear on the decision to strike, more detailed information about individual venire members must be considered." Barbara O'Brien & Catherine M. Grosso, *Report on Jury Selection Study*, 8 (2011), http://digitalcommons.law.msu.edu/facpubs/331/. Here, variables are sorely missing, yet Applicant still depends on the results. There has been no explanation as to why this bare study should be accepted in light of the author's own recognition that variables "must be considered." *Id.* See also David C. Baldus et. al., *Statistical Proof of Racial Discrimination in the Use of Peremptory Challenges: The Impact and Promise of the Miller-El Line of Cases As Reflected in the Experience of One Philadelphia Capital Case,* 97 Iowa L. Rev. 1425, 1454 (2012) ("An ideal model of proof is based on an analysis of valid data for all relevant variables.").

Respondent presented Dr. Robert Michael Norton, retired statistics and mathematics professor from College of Charleston. Dr. Norton critiqued the methodology used to create the MSU report and amended report: He had the following comments:

- He critiqued the report as being incomplete from a mathematical and statistical perspective because the sample used, the "universe of cases" was not a true "random sample" as is accepted in statistics;
- He criticized the report as incomplete and simple because it didn't speak to other factors that go into making a strike;
- He also critiqued the report as failing to show causation. He said it merely showed a correlation between strikes and race which he likened to a type of conclusion that is "over simplistic" for the proposition stated;
- He also testified it would not be sound practice to include the same case twice as was done in one instance (Beyah) because some variables going into the jury pool would overlap and by counting each of two strikes occurring in one case, you're counting data twice without qualifying it.

In particular, when asked, from a statistical perspective,[18] if a court should rely on the "study to determine whether the Ninth Circuit Solicitor's Office routinely excluded black juror in jury selection up to and including Mr. Dickerson's trial in May 2009," he responded:

> Not by itself. There needs to be - - some of the concerns that I have need to be aired including: correlating variables, the idea of selecting the populations, how you pick a sample.

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18 The professor testified that the studies referenced by Professors O'Brien and Grosso were not published in statistical venues.

This point is also underscored when reviewing the remainder of the process in this case. In the main jury of twelve, the State had available five strikes. The State exercised four strikes. The defense challenged only three of those strikes. The "study" does not reflect that. Moreover, three African-American jurors were presented and the State, with available strikes, did not exercise those strikes. The "study" does not reflect that. This Court also heard how the defense used all of its strikes – exhausted all 10 strikes – on Caucasian jurors; a rate of 100%. In fact, in subsequent testimony, defense counsel explained the basics of his strike system and explained, though the number rests at 100% for his strikes against Caucasians, the strikes were for specific reasons not pretext:

> So even though I acknowledge all 10 strikes were used on Caucasian jurors from their answers these were jurors we felt who would be very pro prosecution in the case, pro death penalty, not open to mitigation and that's why we used that rating system so hopefully it is gender and race neutral and then we can justify that if a motion is made.

Defense counsel also acknowledged that the Solicitor could certainly have made a motion based on the number of strikes against Caucasian jurors; but the individual reasons would have controlled why the jurors were struck.[19] Professor O'Brien did not "analyze defense strikes" in the "study," though she admitted defense strikes "shape the jury" as well as State strikes. Further, Professor O'Brien agreed the jury makeup "appears to be roughly proportional to the population according to the census," with three African American jurors seated and nine Caucasian jurors

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19 For clarity, Respondent reviewed with defense counsel during one of the PCR hearings a portion of the evidence of the rating system as reflected in the Record on Appeal filed previously in the direct appeal proceedings which reflected high ratings on the jurors struck. (See May 12-13, 2016 PCR Tr. p. 203, line 9 – p. 205, line 16). Defense counsel testified that when teaching on capital jury selection, he advises people "to put gender and race and ethnicity aside and really listen to their answers," and, based on his review of the materials, he "would have been able to respond" to any motion against his strikes based on individual ratings on the jurors. (May 12-13, 2016 PCR Tr. p. 206, lines 4-19).

seated. All of these factors shaped the jury selection in this case. Further, and important to the instant issue, the context sheds additional light on the weight that should be given any statistical study.

Nothing in the record undermines the factual basis put forth by the Solicitor for her use of peremptory strikes in this case. Nothing in the record undermines the ruling by Judge Dennis. Nothing in this record undermines the credibility assessment by Judge Dennis. Any evidence outside of the record included in Respondent's discussion is irrelevant.

The statistical study presented in this case failed to give any acknowledgment to the strikes that were considered on *Batson* motions, and were found not to be racially motivated. This is important because the specific strike at issue had already been given judicial, specific consideration. This is evidence of bias or result-focused presentation. It is akin to combining non-errors to obtain reversal which is not recognized. *See Moore v. Reynolds,* 153 F.3d 1086, 1113 (10th Cir. 1998) ("Cumulative error analysis applies where there are two or more actual errors; it does not apply to the cumulative effect of non-errors."); *see also United States v. Basham,* 561 F.3d 302, 330 (4th Cir. 2009) ("When 'none of [the] individual rulings work[ ] any cognizable harm, ... [i]t necessarily follows that the cumulative error doctrine finds no foothold.'") (alterations in original) (citation omitted). Additionally, the information known also shows the prosecutor routinely did not use all available strikes. Rather, the numbers are based on the simple strike ratio tied to race. Professor Grosso testified, when confronted with the fact that in one case in the original study that the Solicitor did not exercise any strikes:

> … what you're looking at is the pattern over time because in any one case, you might see a particular pattern that just has something to do with the particular jurors that came into the box that day. When you can look across a lot of cases and you see it's a consistent pattern, that doesn't necessarily mean you see it in every single case, but consistent pattern, that's where the -- - that's where the P value

is sort of a way of measuring whether or not you've actually like tapped into something real.

Q. Okay. Then it goes back to that more information is generally better; correct?

A. Yes.

Our appellate court has viewed with disfavor the use of gross figures, statistics, and probabilities in support of post-conviction relief allegations, particularly where "the petitioner has elected not to consider various intangible factors entering into prosecutorial decisions." *Thompson v. Aiken*, 281 S.C. 239, 241, 315 S.E.2d 110, 111 (1984).[20] In fact, the Thompson court analysis takes care to show the irrelevance of statistical patterns in post-conviction relief actions designed to focus on real errors and actual prejudice:

> The record before this Court includes the full transcript of the post-conviction proceedings. Therein we find much testimony designed to support questions which we have declined to hear on this appeal. Among these questions is petitioner's allegation and attempted showing of a racially discriminatory pattern in prosecutorial decisions to seek a sentence of death. The petitioner submitted to the post-conviction court a deposition taken of Professor Raymond Paternoster, University of South Carolina, bolstered by statistical data which he had compiled. We feel it necessary to comment upon this submission in light of our concern expressed in *State v. Truesdale,* 278 S.C. 368, 371, 296 S.E.2d 528, about "unwise depletion of the obviously limited public funds available for the defense of indigents." Because we are convinced that the issue which petitioner sought to raise is not appropriately framed for

20 In this respect, Respondent maintains its objection to the introduction of statistics in support of any allegations contained in the post-conviction relief application. Respondent also maintains its objection to the use of statistics upon the basis that statistics are not relevant to the third step of the recognized *Batson* analysis. That is, statistics may assist a movant in demonstrating a *prima facie* case for its *Batson* motion, but once the proponent of the strikes replies with its reasons for exercising its preemptory strikes, statistics no longer play a role. The outcome of the motion beyond the first step of the procedure is not aided by statistics because they do not explain why a party's enumerated reasons for striking jurors are, or are not, race and gender neutral. Statistics do substantively answer whether the proponent of the strikes indeed violated *Batson* by refusing to strike other similarly situated jurors.

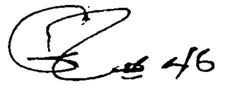
> resolution in the context of a capital case, we would recommend to the bench and bar that judicial resources be applied to more fruitful endeavors.
>
> In the record before us, the petitioner has made an elaborate presentation of testimony and data purporting to show that prosecutors in this State consciously and systematically choose to seek the death penalty in a racially discriminatory manner. As noted by the post-conviction court in its Order, the petitioner has relied upon gross statistics and probabilities. The petitioner has elected not to consider various intangible factors entering into prosecutorial decisions. The petitioner has provided no direct testimony to support his charge that impermissible influences routinely distort the application of capital punishment throughout this State.
>
> In the final analysis, the allegation of statewide "patterns" raised by a specific capital defendant has no real bearing upon his individual guilt or innocence nor upon the correctness of any sentence imposed in his particular case. The commission of an aggravated murder places every potential defendant at risk; he may indeed be ultimately sentenced to death. On the other hand, he may never be caught. He may never be tried, for any number of reasons. He may plead guilty or be tried on a lesser charge. A jury may, for reasons of its own, elect to acquit him or, in sentencing, elect to spare his life. Our role as an appellate court is not to base rulings upon such possibilities. Far less are we entitled to intrude upon the operations of executive officers when we have no more than general data comp[il]ed for academic purposes.

281 S.C. at 241–42, 315 S.E.2d at 111.

In short, the *Thompson* court rejected statistical studies that result in simple possibilities. The Court found and cautioned in other cases that such statistics should give way to consideration of "real and substantial issues in future capital cases." *Id.*

Though *Thompson* dealt with a determination of death penalty notices, the logic is applicable in this case. Peremptory strikes are by nature defined as subjective, nuanced and individual juror fact-driven. *See Davis v. Ayala, supra.* Moreover, *Batson* does not simply suggest but *requires* individual consideration over broad strokes of possibilities. *Johnson v. California,* 545 U.S. at 172, 125 S. Ct. at 2418 ("The *Batson* framework is designed to produce actual answers

to suspicions and inferences that discrimination may have infected the jury selection process."). Of further note, the issue here is the third step of the *Batson* analysis not general prima facie evidence. Raw statistics simply do not apply. *Juniper v. Zook,* 117 F. Supp. 3d 780, 799 and n.10 (E.D. Va. 2015), *motion for relief from judgment denied,* No. 3:11-CV-00746, 2016 WL 413099 (E.D. Va. Feb. 2, 2016) (statistics demonstrating "the prosecution struck black venire members at nearly three times the rate of white venire members," even if accepted, are irrelevant where reasons for strikes on the record given "statistical disparity between black and non-black jurors goes to the first step of Batson," and "not purposeful discrimination at the third step"); *see also State v. Jacobs,* 32 So. 3d 227, 236–37 (La. 2010) ("we have more than a bare statistical viewpoint to gauge the appropriateness of the peremptory challenges" and finding "after a comprehensive review of these issues, five of the seven state peremptory challenges of non-white prospective jurors did not evince a racially-discriminatory intent. Thus, the statistical argument fails to have merit upon further inquiry."); *State v. Benich,* No. 1 CA-CR 06-0901, 2008 WL 2641309, at *1 (Ariz. Ct. App. Jan. 10, 2008) ("[d]efendant cites no case ... in which a *Batson* challenge was granted based on statistics alone ... Although there might be a case in which the statistics alone would be sufficient, it is unlikely that in such a case there would not be other factors supporting the inference of intentional discrimination," citing *Miller-El*"); *Jackson v. State,* No. 2-09-023-CR, 2010 WL 1509692, at *8 (Tex. Ct. App. Apr. 15, 2010) ("Although the statistical analysis demonstrates that the State used a disproportionate number of peremptory strikes on African-Americans, our comparative analysis of venire member 3 demonstrates that the State's reason for striking her was not pretextual, and our analysis of the State's remaining strikes on African-American venire members does not demonstrate discriminatory intent.").

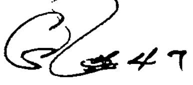


This position holds true to the Supreme Court's finding in *Miller-El.* After acknowledging statistics that calculated "prosecutor's used their peremptory strikes to exclude 91% of the eligible African-American venire members," the Court still considered the statistics "bare" statistics that did not prove the asserted motive: "More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." *Miller-El v. Dretke,* 545 U.S. 231, 241, 125 S. Ct. 2317, 2325 (2005). In short, the Supreme Court has instructed "that proper analysis of a *Batson* claim requires that a court engage in comparative juror analysis…." *United States v. Barnette,* 644 F.3d 192, 205 (4th Cir. 2011). Applicant's reliance on bare statistics is misplaced.

5. <u>The Ineffective Assistance of Counsel Allegations Lack Merit Based on the Record</u>

When the PCR claim is properly analyzed under *Strickland,* the evidence shows Applicant's trial counsel did not perform below the Constitutionally-mandated standard as alleged. The record indicates defense counsel did not have FBI criminal history information at trial, or the privileged prosecutorial training materials created for use by prosecutors in South Carolina. As noted above, training materials – both for the prosecution and defense – are generally considered protected. Moreover, our case law holds that a defendant is not entitled to the criminal history information.

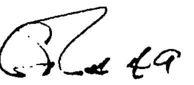
In *State v. Childs,* 299 S.C. 471, 474, 385 S.E.2d 839, 841 (1989), the Supreme Court of South Carolina held a defendant was not "entitled to criminal records checks or records of arrest" as "[n]o right to discovery exists in a criminal case absent statute or court rule" and there is no statute or court rule requiring a disclosure of this information...." This decision still holds true.



Rule 5 (a)(1), S.C.R.Crim.P., sets out the information subject to disclosure by the State, and does not include juror criminal histories run in preparation for jury selection. In fact, Rule 5 (a)(2), specifically reserves the protection of other documents "made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case...." *See also State v. Myers*, 359 S.C. 40, 49, 596 S.E.2d 488, 493 (2004) ("Rule 5(a)(2) SCRCrimP, exempts from discovery work product, or 'internal prosecution documents made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case....'"); *State v. Matthews,* 296 S.C. 379, 384, 373 S.E.2d 587, 591 (1988) (pre-Rule 5 case finding "[b]ackground information on the venire, if any, held by the solicitor here qualified as 'internal prosecution' matter connected with the prosecution of the case. As such it was not subject to disclosure."). *Accord Tobaccoville USA, Inc. v. McMaster,* 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010) (discussing "work product privilege" in civil case context: " in determining whether a document has been prepared 'in anticipation of litigation,' most courts look to whether or not the document was prepared because of the prospect of litigation.") (internal citations omitted). Other jurisdictions follow the logic specifically in regard to arrest records. *See, for example, Kelley v. State,* 602 So.2d 473, 478 (Ala. Crim. App. 1992) ("This court has held that arrest and conviction records of potential jurors do not qualify as the type of discoverable evidence that falls within the scope of *Brady* and that a trial court will not be held in error for denying an Petitioner's motion to discover such documents."); *State v. Weiland,* 540 So. 2d 1288, 1290 (La. App. 5 Cir. 1989) ("Weiland complains because his request for the rap sheets of prospective jurors was denied by the trial judge. A defendant is not entitled to this information.").

To the extent Applicant would allege the rap sheet was incorrect, that would prove nothing in support of the *Batson* motion as it is only discriminatory intent at issue, not correctness in the

record relied upon. Aside from the fact our jurisdiction would not support such a demand, it should be noted a pre-selection request would had to have been for all the potential jurors. This would have been overly broad. NCIC reports on all jurors, even those not selected for the petit jury, are unnecessary. *Cf. State v. Wright,* 803 So.2d 793, 794 (Fla.App. 4 Dist. 2001) (quashing order requiring State to disclose "criminal records of all 100 listed witnesses, notwithstanding the state's notification that it only intended to call 30 of those witnesses"). Such reports contain privileged information that should not be released to an unauthorized user, or may involve other privilege asserted by the database authority. *See generally United States Dept. of Justice v. Reporters Committee For Freedom of Press,* 489 U.S. 749, 765 and 780 (1989) (acknowledging "the web of federal statutory and regulatory provisions that limits the disclosure of rap-sheet information" and as to FOIA request, holding "a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted.'"); *State v. Wright,* 803 So.2d at 795 ("because the defendants/respondents offered no authority to refute the state's claim that it is prohibited from disseminating the NCIC information, we hold that the trial court cannot order the state to produce such information."). *See also State ex rel. Multimedia, Inc. v. Snowden,* 647 N.E.2d 1374, 1378 (Ohio 1995) (denying mandamus to compel release of "rap sheets" noting concession that "NCIC and RCIC [Regional Crime Information Center] 'rap sheets' generated in the investigation of police applicants are prohibited from being released by state and federal law"); *Commissioner of Public Safety v. Freedom of Information Com'n,* 76 A.3d 185, 189 (Conn. App. 2013) ("In Commissioner of Correction v. Freedom of Information Commission, 307 Conn. 53, 68–74, 52 A.3d 636 (2012), our Supreme Court determined that a copy of an NCIC



printout was exempt from disclosure under § 1–210(a) because disclosure was barred by 8 C.F.R. § 236.6 (2007). Although the court did not decide the issue of whether the disclosure of NCIC documents was barred by 28 U.S.C. § 534, Commissioner of Correction v. Freedom of Information Commission, supra, at 53, 52 A.3d 636 nonetheless is instructive. Copies of NCIC documents have been held to be exempt from disclosure under § 1–210(a) because our legislature authorized participation in the compact."). They are not the type of materials which defense counsel would have been granted access to pre-trial.

As to the prosecutorial training materials cited by Applicant, his argument on this issue ignores (1) precedent protecting these documents and (2) that the materials provided are based upon published case law pertaining to *Batson* motions. "The Prosecutor's Handbook" and other prosecutorial training materials were not privy to defense counsel in preparation for Applicant's trial, nor could they be produced pre-trial as a matter of law. As more fully addressed above, the Court of Appeals recent decision directly address this issue in *State v. Daise*, 421 S.C. 442, 461–63, 807 S.E.2d 710, 720–21 (Ct. App. 2017), *reh'g denied* (Dec. 14, 2017). This case, too, supports that even had defense counsel made a successful pre-trial request for the training materials, and utilized them in furtherance of his *Batson* motion, he would not have made a meritorious motion.

Akin to part of the ineffective assistance allegation before this Court, Daise argued "that the court's failure to require disclosure of the State's *Batson* 'handbook' prevented him from making a viable *Batson* challenge." *Id.* at 461-62, 807 S.E.2d at 720. Like Applicant, "Daise subpoenaed the records custodian of the South Carolina Commission on Prosecution Coordination (the Commission) to provide '[a]ll documents regarding jury selection, including but not limited to training documents, training agendas, manuals, policy statements or .

. . advisements, correspondence with current or former prosecutors and circuit court judges.'" *Id.* Daise's capital counsel suggested the State had a "handbook on how to get around *Batson*" and supported his posture with pre-trial expert testimony from a statistician. The statistician testified that "in Beaufort County, African-American males were struck at a rate four and a half times higher than Caucasian males." *Id.*

The appellate court affirmed the outcome of the circuit court's *in camera* review of the Commission's training materials, which found "they did not 'include any abusive instructions or teaching materials, nor use of improper technique,'" and found the materials "generally protected as work-product, as they were created and disseminated in a limited fashion with the purpose of assisting the State's preparations for trial.'" *Id.* at 462-63, 807 S.E.2d at 720. The Court of Appeals specifically found

> the approximately 1000 pages of Commission materials sealed for appellate review revealed nothing encouraging prosecutors to strike jurors for impermissible reasons—race-based or otherwise. The documents include outlines, slideshows, and handouts from various lectures and training sessions. Many discuss the *Batson* framework, and some do provide general advice on how to evaluate jurors. However, nothing in the submitted documents suggests an intent to help prosecutors racially discriminate. In fact, the materials contain statements such as "the critical question is whether or not a juror can give both the State and the defendant a fair trial" and the repeated caution: "DO NOT RELY ON STEREOTYPES & PREJUDICE."

Id. at 463, 807 S.E.2d at 720-21 (footnotes omitted).

The record supports defense counsel made the *Batson* motion in furtherance of his client's right equal protection simply not knowing the precise reason for the strikes. When the reasons were offered, he could determine, as is supported by the record, there was no argument for pretext to be made which is exactly what the trial record reflects.

Additionally, no prejudice flows from any juror-related claim. For all reasons discussed heretofore, Applicant was not denied equal protection as he was tried by a qualified jury and

because the basis for the strikes exercised by the Solicitor befit the known Constitutional requirements of jury selection.

The reasons for the Solicitor's strikes have not been hidden nor are they suspect. The reasons for the strikes have been a matter of records since the 2009 trial. The selection shows careful consideration by both parties, strikes exercised by both parties, and a challenge to just three of the Solicitor's strikes. Those strikes were explained to the satisfaction of the trial judge and still remain fully and fairly supported by the trial record. Applicant has shown no deficient performance by defense counsel. Applicant is not entitled to relief on this issue.

I. <u>The Lead Poisoning Claim</u>

The sentencing-phase ineffective assistance of counsel allegation most prominently pursued by Applicant during the course of this litigation pertains to the claim that trial counsel "failed to uncover and present evidence of Applicant's significant neurological deficits" in furtherance of mitigation. Specifically, Applicant alleges trial counsel "unreasonably limited the investigation into Mr. Dickerson's early childhood exposure to lead" by failing to follow up with a preeminent expert in the field, Dr. Herbert Needleman, and by failing to provide subtest results to a neuropsychologist for interpretation, thereby eliminating from the jury's consideration the scientific research demonstrating Applicant's blood lead level at earlier ages and any related neurotoxic effects. Applicant argues that the mitigation evidence it proffered at PCR compels this Court to find the mitigation case put forth at trial *Strickland* error and prejudice. Respondent submits the PCR presentation was largely cumulative to the substance of the mitigation presented at trial.

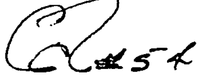
"When determining if want of mitigation evidence resulted in prejudice, we must determine whether the 'mitigating evidence, taken as a whole, might well have influenced the jury's appraisal

of [the defendant's] culpability.'" *Rosemond v. Catoe*, 383 S.C. 320, 326–27, 680 S.E.2d 5, 9 (2009) (citing *Wiggins v. Smith,* 539 U.S. 510, 538, 123 S.Ct. 2527 (2003)) (quoting *Williams v. Taylor,* 529 U.S. 362, 398, 120 S.Ct. 1495 (2000)). "[T]he likelihood of a different result if the [mitigation] evidence had gone in is 'sufficient to undermine confidence in the outcome' actually reached at sentencing." *Rompilla v. Beard,* 545 U.S. 374, 393, 125 S.Ct. 2456, 2468 (2005) (quoting *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052) (alteration in original). Prejudice is therefore determined to exist from the lack of proffered mitigation evidence if trial counsel's "complete failure to present mitigation evidence undermines confidence in the outcome." *Rosemond, supra.*; *see also Jones v. State,* 332 S.C. at 333, 504 S.E.2d at 824 ("The bottom line is that we must determine whether or not Jones has met his burden of showing that it is reasonably likely that the jury's death sentence would have been different if counsel had presented additional information about Jones's mental condition.").

The "error" prong of *Strickland* remains the same: did counsel utilize reasonable professional strategy in pursuing (or abandoning) a particular mitigation presentation. "During the sentencing phase of a death penalty trial, counsel is required to investigate and present meaningful mitigating evidence absent a reasonable strategic choice not to do so." *Weik v. State*, 409 S.C. 214, 234, 761 S.E.2d 757, 767 (2014) (citing *Rompilla v. Beard*, 545 U.S. at 390-93, 125 S.Ct. at 2467-68). As to Appellant's reliance on specific ABA Guidelines for Appointment and Performance of Counsel in Capital Cases, our courts have found they "may be useful or may offer assistance in the analysis of an issue" in certain instances, but have nonetheless regularly held "these standards are not controlling or dispositive." *State v. Blakely*, 402 S.C. 650, 664-65, 742 S.E.2d 29, 36-37 (Ct. App. 2013); *see also Council v. State*, 380 S.C. 159, 172–73, 670 S.E.2d 356, 363 (2009) (noting that trial counsel's conduct fell below the standards set by the ABA for

the appointment and performance of counsel in death penalty cases). South Carolina courts have "never adopted the ABA guidelines as the standard for prevailing professional norms in South Carolina," instead maintaining that reasonableness of counsel's actions "is best assessed in the broader context suggested by *Strickland.*" *Ard v. Catoe*, 372 S.C. 318, 338 n.19, 642 S.E.2d 590, 600 n.19 (2007) (Toal, C.J., dissenting and Burnett, J., concurring with dissent) (majority citing the ABA's standards for defense counsel's performance regarding investigation of a capital case in support of its decision to affirm the PCR court's finding of ineffective assistance of counsel). The United States Supreme Court has consistently maintained that the guidelines are "'only guides' to what reasonableness means, not its definition" nor "inexorable commands" defense counsel must follow. *Bobby v. Van Hook*, 558 U.S. 4, 8, 130 S.Ct. 13, 17 (2009) (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065).

Applicant's proffered mitigation presentation on lead neurotoxicity fails to meet the *Strickland* standard. At the initial installment of the evidentiary hearing, the Court heard from Applicant's experts in detail on lead levels and purported correlative damage to cognitive development (specifically hyperactivity and impulsivity), but the presentation put forth in furtherance of this claim ultimately replicated the mitigation evidence put forward during the sentencing phase of trial, with an added emphasis on lead exposure. Trial counsel added compelling testimony regarding the extent of his investigation into Applicant's known childhood exposure to lead. Defense counsel Jeffrey Bloom testified at two stages of the evidentiary hearing: on December 8, 2015, and on May 13, 2016. His testimony established that counsel investigated the scientific information proffered as mitigation at this PCR hearing. The totality of the testimony demonstrates that Bloom reasonably decided not to more heavily base his mitigation presentation on childhood exposure to lead because Bloom could not uncover or produce enough evidence to

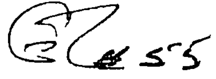


make a more persuasive presentation than was presented on this subject. Applicant fails to demonstrate prejudice flowing from the manner and extent to which his childhood exposure to lead was presented at trial. The mitigation evidence proffered at PCR does not make it more likely than not that the jury would have returned with a recommendation for a different sentence.

1. The Trial Evidence on Lead

Dr. Robert Phillips, a forensic psychiatrist, offered testimony pertaining to social factors and individual behaviors indicative of Applicant's emotional maturity at certain stages in his life. Regarding the earliest phase of Applicant's life, Phillips testified that he was affected by a number of psychosocial stressors, describing the environment Applicant grew up in as emotionally toxic. Ultimately, Phillips' presentation concluded with a professional opinion that throughout the timeframe of the crimes, Applicant "began to develop psychotic symptoms that culminate in what [he] would diagnose as a cocaine psychosis" onset by "heavy abuse of cocaine" and resulting in in a condition of delusions and/or paranoia and hallucinations. Phillips opined that as a result of a cocaine psychosis brought about by Applicant's escalating addiction, that during the timeframe of the murder (1) he was affected by a mental disturbance, (2) his capacity to conform his behaviors was substantially impaired, and (3) his mentality was impaired.

Dr. Mark Cunningham, a psychologist, offered testimony pertaining to a variety of risk factors identified by the Department of Justice as increasing a person's likelihood of delinquency and violence. He described these factors as they pertain to each stage of a person's life and explained why he identified a high concentration of these factors applying to Applicant. He stated that between the time when a person is conceived and when they reach six years of age, Applicant embodied five of a possible seven factors. At the outset, Cunningham stated Applicant's "exposure to lead in his childhood" was one contributing factor, but that "there is no testing that was done



that demonstrated brain damage, for example, in that earlier age." Later, he expounded upon why, stating "there is no safe lead level for a child to have. It is never a vitamin." Cunningham explained in common terms that the one known blood-lead level of 9 "doesn't mean that it wasn't higher or lower when he was [younger]." His testimony corresponded to a PowerPoint graph depicting how childhood blood-lead levels correspond to incidences of adult crime. He went on to note Armon's higher blood-lead levels "in the same household, around the same paint chips, around the same lead dust" and concluded: "So it raises the implication that the blood levels that William would have had at earlier points in his childhood might have been higher, and certainly gives some confirmation to the zone of risk that he [was] living in when we talk about lead."

Cunningham also stated on cross-examination that from the known blood-lead level he "may be able to infer to some extent" what Applicant's earlier lead levels were if certain testing was done looking at brain function, neuropsychological assessment "and that sort of thing." Cunningham stated he could have ordered a current lead level test for Applicant and did not. He later noted that Applicant's one test was not high enough to be flagged by the Center for Disease Control for additional testing. The State's cross-examination actually focused for a period of time on how children ingest lead, the dangers of lead poisoning and resulting lawsuits, and pointed out that the specific area where Applicant grew up had older low-income homes with a huge lead risk. Cunningham testified that the homes were likely not compliant with lead remediation standards.

Cunningham also agreed with Phillips' cocaine psychosis diagnosis and additionally independently opined that Applicant's capacity to conform and mental state were substantially impaired at the time of the murder, and that he was under the influence of a mental or emotional disturbance at that time.

Also at trial, Marjorie Hammock, a social worker, described the known extent of Applicant's lead exposure in her social history testimony presented at the sentencing phase. Specifically to the point of the PCR presentation, Bloom asked Hammock: "Why should we care if children are exposed to high levels of lead or if they eat . . . old lead paint chips . . . ?" Hammock responded:

> high level leads and children eating actual lead have a real hazardous effect on their development, both their emotional and physical development. It can cause brain damage and it can cause organic impairment . . . [b]rain development, brain functioning. . . . we know that [Applicant was placed in a leaden environment] but we don't know the result of that.

Defense counsel Bloom then extracted an agreement from Hammock that agencies have taken steps to try to reduce lead levels in certain housing projects. Hammock clarified on cross-examination an awareness that Applicant may have only been screened once for blood-lead levels, but it was known that he lived "in that environment where it was reported that typically had [lead-poisoning] sufferers."

2. Applicant Cannot Demonstrate *Strickland* Error

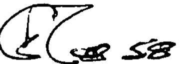
In December 2015, defense counsel Bloom established his familiarity with lead poisoning and its ability to be utilized as a capital defense—he had used it as a defense in *State v. LeVar Bryant* in Richland County. For Applicant's case, he set up a blood test but "knew that probably wouldn't show anything because of the passage of time." He also looked into conducting an x-ray fluorescence test. However, that test could not be accomplished because South Carolina lacked any medical facility that could administer it and because Applicant could not be transported to Boston. But defense counsel still pursued information in furtherance of a lead-based defense. He explained that his mitigation investigator Dale Davis collected a number of records from "Charleston County and other agencies regarding specific neighborhoods and houses that had had

lead paint problems over the decades." Defense counsel Bloom furthered the investigation by obtaining an order from the trial court directing DHEC to release records "regarding lead levels and specific records also on both William and his brother, Armon." Defense counsel then turned this information over to psychiatrist Dr. Robert Phillips as well as psychologist Dr. Mark Cunningham, who both testified at trial.

Defense counsel retained a neuropsychologist, Dr. Robert Deysach. Deysach consulted with defense counsel and, like Cunningham and Phillips, met with Applicant to assess him in preparation of a mitigation presentation. But Applicant did not cooperate with Deysach's testing. According to defense counsel Bloom, Applicant "wasn't really interested in helping us build a mitigation case." Second-chair trial counsel, Drew Carroll, corroborated defense counsel Bloom's recollection that Applicant would not cooperate with all the tests required to further the lead defense, believing Applicant "saw it as a stigma to even participate in them." Because Applicant would not complete the neurological testing, Deysach could not establish a score or opinion – let alone opine as to potential neurological deficits resulting from childhood exposure to lead.

The dearth of actual records pertaining to Applicant proved another weakness in the accumulation of evidence in furtherance of a lead-based mitigation presentation. The records defense counsel Bloom and his mitigation investigator were able to uncover largely only pertained to Applicant's little brother Armon. All defense counsel could obtain in regards to Applicant was a single lead test taken when he was nearly twelve years old.

This scarcity led to weakness in the defense's ability to further a lead-based mitigation: defense counsel Bloom testified he consulted with the preeminent expert in the field of lead neurotoxicity, Dr. Herbert Needleman, whom he had retained in the LeVar Bryant case, but learned that there was not enough information from which Needleman could testify about lead poisoning.



Defense counsel Bloom notably distinguished the evidence available in Bryant from that available in Applicant's: "We were never able to find the records on William other than what [appears] in the [trial] transcript." Bloom stated:

> I just didn't have enough to bring Dr. Needleman in to testify. As I said, I consulted with him via email. And we just weren't able to find the smoking gun, if I can use that phrase, for Dr. Needleman to be confident enough to have the, the documentation he needed to testify. . . . And I did not have a neuropsychological test.

Instead, he presented the extent of the information he could gather on lead poisoning through his psychologist and social worker

From his December 8, 2015, testimony, defense counsel Bloom established that he took reasonable steps to investigate the potential for a lead-based mitigation defense, and that he was familiar with that type of defense as he had pursued it in a previous case. Not only did the defense uncover records about the known lead in the residential area where Applicant grew up and Applicant's one known blood-lead level, but the defense hired a neuropsychologist to assist in developing and presenting a lead-based mitigation defense.

However, defense counsel Bloom had more testimony to offer on this point. His admitted consultation with Needleman prompted a late discovery disclosure and additional testimony on this issue in May 2016. Bloom produced for Respondent the emails he referenced in December. Testimony taken at the May 2016 installment of the evidentiary in this case indicates that the emails were previously made part of a privilege log by Applicant's Counsel. The emails themselves became part of this Record at that hearing and Bloom further testified to the extent of his investigation into the lead mitigation in his testimony taken that day:

> BLOOM: [Needleman's email] says, quote, Jeff: A blood level of eight UG/DL at age eight suggests that it was higher in infancy, but no certainty to this statement. Anymore info? End quote.

Q BY RESPONDENT: So you were, is it fair to say, looking not only at past records but what you could extrapolate from those records as well?

BLOOM: Yes.

Q BY RESPONDENT: And you were also looking at modern testing, you attempted to do that as well?

BLOOM: Yes.

Q BY RESPONDENT: And Dr. Needleman is a well-regarded expert in this field, correct?

BLOOM: He is. Dr. Herbert Needleman is an expert in blood levels, lead poisoning and the effects of lead poisoning on brain development, especially in children. He is a professor of psychiatry in pediatrics at the University of Pittsburgh School of Medicine in Pittsburgh, Pennsylvania, and I have a professional association with him in this regard. I don't know him personally.

This Court must consider whether defense counsel Bloom's testimony credibly indicates that a strategic decision was exercised to present evidence of Applicants' early childhood exposure to lead in the manner done at trial.

In considering strategic decisions, reviewing courts must take care to consider the decision in light of the circumstances at the time of trial: "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington*, 466 U.S. at 689, 104 S. Ct. at 2065. Reviewing courts also must consider "[t]here are countless ways to provide effective assistance in any given case." *Id.* The record here supports there was no deficient performance.

Defense counsel Bloom established the infeasibility of hiring an expert to address Applicant's exposure to lead at trial. Bloom consulted with a qualified expert – the same qualified expert, Dr. Needleman, that both of Applicant's PCR experts, Drs. Canfield and Israelian, testified

to as being an influential actor in achieving mainstream recognition of the dangers of lead poisoning as well as scientific change. The information the defense uncovered was not expansive enough to pinpoint a solid cause or existence of lead poisoning in Applicant. Moreover, unquestionably, Applicant impeded the defense team's ability to further explore any neuropsychological effects of the evidence of lead exposure that did exist because Applicant failed to fully cooperate with written tests from a neuropsychologist. And, as expounded upon within the remainder of the PCR testimony, Applicant's only known lead level was simply not medically or scientifically significant – Dr. Needleman indicated as much.

3. Applicant's Additional PCR Presentation on Lead

Dr. Richard Canfield, a developmental psychologist with specialties in early development and lead toxicity, testified that Applicant's *only known* lead level was 9 micrograms per deciliter. This level was taken on June 2, 1988, when Applicant was 11 years, 9 months, and 9 days of age. In 1988, the standard for lead poisoning was much higher than 9: it was 25 micrograms per deciliter. The 1990s witnessed that standard reduce to 10 micrograms per deciliter. And while some studies prior to 2009 indicated that 10 was too high a lead level, the standard has only been reduced to 5 micrograms per deciliter since 2012. Applicant's trial occurred in 2009.

Canfield's larger focus on concrete blood-lead levels and correlative evidence of neurotoxicity did not relate so much to Applicant as it did his younger brother Armon Dickerson, who was notably younger than Applicant during the time of testing and whose blood screens showed a significantly higher lead level requiring a number of follow-up tests. Accordingly, Armon—not Applicant—provided Canfield with data points to support his testimony.[21] Moreover,

21 Specifically, two-year-old Armon initially tested on November 16, 1982, at 70 micrograms per deciliter. A test conducted one week later on November 23, 1982 returned a level of 45 micrograms per deciliter. Testing continued on Armon until he reached age 5 with differing results.

to the extent Canfield plotted Applicant's blood-lead levels,[22] he testified he could "just make a guess that his lead level was 50% above at all ages" based off of the one number he had been provided with and a straight-line graph plotted for a study based on children from Cincinnati, Ohio. Canfield testified that the reason he used the Cincinnati Cohort for comparison was because it began in the late 1970s, which Canfield dictated was "very much the same time period as when William was growing up in Charleston." Without additional testimony to support his contention, he opined that "inner-city Cincinnati is very similar in terms of its housing stock, in terms of the population: largely African-American; largely impoverished; and, and housing of, of very fairly poor quality, meaning that there's a lot of lead paint hazard. So, Cincinnati will help us understand Charleston." He later testified that he relied upon Google Maps to determine the location and appearance of one address Applicant resided in at some point in his youth. In referencing known causes for these blood-lead levels, Canfield was unable to corroborate, when asked by the court, from where in the materials he determined that someone "tore all the walls out" of one of Applicant and Armon's childhood residences, or when that may have occurred in relation when Applicant may have lived there. Canfield continued to have difficulty tracing where Armon was living versus where Applicant was living during the timeframe in which Armon's blood-lead levels were being consistently screened.

Canfield's remaining testimony, therefore, does not provide a foundation for projecting Applicant's blood-lead levels. Canfield laid a comprehensive presentation regarding lead's

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22 Applicant's counsel failed to produce Canfield's graphs depicting specific plot points for Applicant in the ordinary course of discovery. Instead, a draft PowerPoint presentation was furnished to Respondent. The plot points or notations presented to this Court pertaining specifically to Applicant were not inserted and provided until their presentation in open court. Canfield's PowerPoint presentation became Applicant's Exhibit 3 at the December 7, 2015, evidentiary hearing over Respondent's objection to the discovery violation.

absorbency into young bones and the negative effects of lead absorption. But this presentation does not make it more likely than not that, had it been given at trial, Applicant's jury would have returned an alternative sentencing recommendation. Canfield's testimony lacked sufficient underlying facts to support his conclusion that Applicant's environment caused blood-lead levels were consistently 50% above a conservative average prior to the actual blood-lead level that was produced at Applicant's age 11 years and 9 months. Moreover, Canfield based his graph of Applicant's estimated blood-lead level upon a linear study conducted on children from Cincinnati, Ohio in the 1970s, and not concrete data from houses on the upper portion of the Charleston Peninsula in the late 1970s and 1980s.

In addition to Canfield, Applicant produced PCR testimony from developmental neuropsychologist Dr. Marlyne Israelian. Israelian reiterated Applicant's entire social history which was offered during the sentencing phase of Applicant's trial, but did so in correlation to purported childhood exposure to lead, as well as Applicant's reliance on cocaine and his maltreatment as a child. Israelian testified that demographically, Applicant fell at high risk for lead exposure as did other black males in urban centers and communities with antiquated, unrefurbished homes. She described that Applicant grew up in zip codes on the Charleston Peninsula where there were known cases of children with blood-lead levels higher than the threshold level of 10.

Israelian pointed out that Applicant underwent IQ testing in 1990 when he resided at Tara Hall, a group home for boys in Georgetown County, scoring 86 in nonverbal reasoning. Israelian defined his nonverbal score of 86 as below average, and his scoring 96 on verbal as average. Averaged, this IQ score placed him in the 50% percentile. Israelian testified that Applicant performed poorly on one subtest, the Object Assembly Test, which to her was significant because "lead affects selectively that area of the brain" that controls visuospatial functioning necessary for

completion of that test. Israelian juxtaposed this 1990 IQ test with a later test conducted by the Department of Youth Services wherein Applicant's scores dropped to a full scale IQ of 83, a verbal of 81 and a performance of 89. Youth Services administered the adult version of the test though Applicant was only sixteen and still eligible for the children's scaled test. Israelian characterized this reduced score as consistent with previously assessed deficiencies which could, according to Israelian, relate back to lead exposure.

Ultimately, Israelian described the results of her own neuropsychological assessment conducted with Applicant, including an IQ test wherein Applicant's full-scare score was 86. She opined that Applicant has executive frontal-lobe dysfunction. She additionally noted the impact of cocaine, a toxin, on Applicant's functioning. She testified that individuals with lead poisoning "are quite drawn to cocaine" and "are quite susceptible to cocaine" because it allows them to feel reward. "[L]ead exposure will predispose you to cocaine abuse."

Israelian also discussed Applicant's maltreatment as a child. She finally opined that Applicant suffered from a mental and emotional distress disorder at the time of the murder and that his poor executive functioning played a role in the crime because Applicant expresses an inability to regulate his emotions. She opined his capacity to conform was substantially impaired from (1) lead neurotoxicity, (2) childhood maltreatment, and (3) cocaine psychosis. Israelian did not, however, recommend Applicant undergo any medical tests such as an MRI to see if his brain was visually affected by lead. Nor did she order or recommend any new blood test be conducted for the presence of lead.

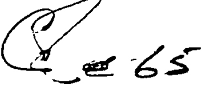
Israelian's testimony fails to demonstrate that Applicant suffered prejudice by the failure to have a neuropsychologist, or a developmental neuropsychologist, testify at trial. Bloom established at PCR that Applicant would not comply with the neuropsychological testing required

to garner this testimony. Without assistance by his client prior to trial, this type of testimony was not at Bloom's disposal. Moreover, Israelian's testimony does not identify neurotoxicity as a result of childhood exposure to lead to a degree which undermines confidence in the jury's sentencing recommendation. She largely reiterated other mitigation testimony offered at trial by way of outlining Applicant's childhood circumstances and cocaine addiction.

Israelians' testimony signifies a lack of prejudice flowing from the present PCR allegation. At trial, Bloom pursued and put forth a consistent sentencing-phase presentation that mentioned all of the same risk factors discussed by Israelian, including childhood exposure to lead. But the crux of Bloom's mitigation case lay in professional opinions that Applicant's capacity to conform was compromised due to a cocaine psychosis. Israelian did not deny that a cocaine psychosis and childhood maltreatment affected Applicant. She simply assigned an additional factor by a more scientific name, lead neurotoxicity, and compounded her analysis with additional scientific testimony pertaining to the effects of Applicant's known lead exposure. She opined at PCR that Applicant's cocaine usage contributed to his capacity to conform and led to substantial impairments at the time of the murder. Nothing she said excused or altered the cocaine psychosis theory presented at trial.

4. Applicant Fails in Showing Deficient Performance And Resulting Prejudice

What is clear from the aggregate of the PCR testimony is that trial counsel had access to the basis for the lead poisoning defense and investigated it. Most importantly, Bloom's PCR testimony and his correspondence with Dr. Herbert Needleman notes his awareness of Applicant's childhood lead exposure, the existence of lead in the area where Applicant grew up, and his investigation into the extent or certainty with which he could establish Applicant suffered a physiological deficiency as a result of that exposure. If this Court were to determine that Bloom



halted his investigation into the lead poisoning, it must be deemed reasonable based upon information counsel culled from notable experts in the field. Ultimately, the preeminent lead professional in the field at the time, Needleman interjected that he would need more information.

Applicant's PCR presentation has not compellingly proffered additional lead-based mitigation in a manner undermining confidence in the jury's sentencing recommendation. The only lead level screening conducted upon Applicant occurred when he was almost 12 years old, and the results, a lead level of 9 micrograms per deciliter, fell below the threshold level for concern applicable in 1988 and even in the 1990s. Key to this Court's analysis is that in 1988, and even through the 1990s, Applicant's only known lead level fell below the standard flagged by the medical community for follow-up. Also key to this Court's analysis is Applicant's lack of cooperation with neuropsychological testing in preparation for trial. Bloom did not abjectly fail to present subtests to a neuropsychologist for review as alleged.

Therefore, even if Bloom had presented the same testimony at trial as was presented at PCR, it fails to persuasively indicate that the jury would have returned an alternative sentencing recommendation. The evidence on this issue shows that Bloom, a seasoned capital trial attorney, exercised a strategic decision that the pursuit of additional lead neurotoxicity evidence was not a viable defense which could be supported by medical testimony at the time of trial. Instead, Bloom incorporated the known evidence of lead exposure through experts other than those presented at PCR. Given the totality of the foregoing, Applicant cannot meet his burden of showing error-and-prejudice in regards to counsel's investigation and presentation of a defense based on Dickerson's purported childhood exposure to lead.

J. Remaining Sentencing Phase Claims

Applicant pursues two additional claims of ineffective assistance of counsel during the sentencing phase of Applicant's trial.

Applicant alleges that trial counsel were ineffective in their sentencing-phase representation because, in addition to the claims discussed above, they (1) failed to preserve for the appellate record an objection to Applicant's former probation officer's testimony that Applicant repeatedly stated during a 1996 probation hearing he wished he had shot a police officer; and (2) failed to object to portions of State's closing argument that, according to Applicant, diluted the responsibility of the jurors in rendering a possible death verdict.

When "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). Pursuant to *Strickland*, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." 466 U.S. at 690, 104 S.Ct. at 2066. "However, counsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial." *Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). Therefore, ineffective assistance counsel claims "based on a failure to object are tied to the admissibility of the underlying evidence." *Hough v. Anderson*, 272 F.3d 878, 898 (7th Cir. 2001). "There can be no ineffective assistance of counsel for failing to raise a claim which is not legally viable." *Almon v. United States*, 302 F.Supp.2d 575, 586 (D.S.C. 2004); *see, e.g., Werts v. Vaughn,* 228 F.3d 178, 203 (3rd Cir. 2000) ("counsel cannot be ineffective for failing to raise a meritless claim"). Admissible but unobjected-to testimony fails both prongs of *Strickland* because "failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." *Hough, supra.*

1. Claim that Counsel Failed to Preserve Objection to Probation Officer's Testimony

During the sentencing phase, the State presented a former South Carolina Department of Probation, Pardon and Parole Officer who served as the presiding Administrative Officer over Applicant's 1996 parole hearing. This witness, Cededrick Davis, testified that during that hearing Applicant repeatedly stated he wished he shot the police officer(s) involved in the incident. Prior to this testimony, the trial court ruled it admissible over Bloom's objection, finding it more probative as to Applicant's character than prejudicial. The court finished: "your objection is noted and preserved."

At PCR, defense counsel Bloom was called upon to address the efficacy of this testimony and whether a proper contemporaneous objection was lodged. He explained that his objection at trial, which was handled *in limine* and included a proffer of Davis' testimony, was that Davis was being called to testify at Applicant's murder trial about a parole proceeding that occurred in 1996 in which Applicant was not represented by, nor had an automatic right to, counsel.[23] Defense counsel Bloom's basis for objection was that the Department kept the report a confidential part of the probation file; it was never objected to; nor could the report ever be challenged after the hearing. Thus, under his logic, its introduction at the 2009 death penalty trial constituted a due process violation. He also recognized that he received the report in discovery and had it well in

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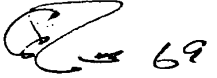
23 The *in limine* record includes testimony from Davis that at a parole hearing the defendant is "advised that it is a matter of evidence, and that they have the right to an attorney at that hearing, and whatever they say can be used against them at a future hearing." (R. p. 3745, lines 12-16). On cross-examination in front of the jury, defense counsel Bloom did not re-elicit this information, but rather pointed out that the Department maintained the report in a confidential file and that Applicant's statements about wanting to shoot the officers was not part of the revocation order issued as a result of that hearing. (R. p. 3774, line 4 – p. 3777, line 24).

advance of trial. Defense counsel Bloom stated that once admitted, he "could tell from the jury's reception of the evidence that it was . . . bad[.]"

The record on this PCR allegation bears out that counsel reasonably reacted to the trial court's notation that the issue was preserved following its *in limine* treatment and strategically decided not to object in front of the jury when the evidence came before it. Defense counsel Bloom testified that he believed he properly preserved the issue for appeal and that he later included it in a memorandum to appellate counsel suggesting the issue for appeal. He later stated he believed the objection was preserved because it was handled *in limine,* not in a pretrial hearing, and that "it was clear how the trial judge had ruled" in that the ruling did not leave Bloom feeling as though he needed to renew the objection in front of the jury. "You don't need have to keep objecting just because the jury is now in the courtroom."

But even assuming this issue were later raised on appeal and found unpreserved by our appellate court, Davis' testimony was ruled admissible and thus its admission cannot form a basis for post-conviction relief. Character evidence is admissible (and highly relevant) during the sentencing phase of a capital trial. *State v. George*, 323 S.C. 496, 511, 476 S.E.2d 903, 912 (1996); *see State v. Tucker*, 324 S.C. 155, 168, 478 S.E.2d 260, 267 (1996). "The purpose of the bifurcated proceeding in a capital case is to permit the introduction of evidence in the sentencing proceeding which ordinarily would be inadmissible in the guilt phase. In the sentencing proceeding, the trial court may permit the introduction of additional evidence in extenuation, mitigation *or aggravation*." *State v. Kornahrens*, 290 S.C. 281, 289, 350 S.E.2d 180, 185 (1986) (citing *State v. Shaw,* 273 S.C. 194, 255 S.E.2d 799 (1979)) (emphasis in original).

2. Claim that Counsel Failed to Object to State's Sentencing-Phase Closing Argument



Applicant next alleges that counsel failed to object to the portions of the State's closing argument which Applicant now identifies as having diluted the jurors' sense of responsibility in rendering a possible death verdict. Applicant has identified two portions of the closing argument in its post-trial brief in support of this allegation.

Any excerpt of the State's closing exists as "one moment in an extended trial." *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872 (1974). So, while the question before this Court is undoubtedly "whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process," *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166–67 (1998), a court must conduct an "examination of the entire proceedings." *Donnelly* at 643, 94 S.Ct. at 1871; *Northcutt, supra* ("We must review the [closing] argument in the context of the entire record."); *State v. Bell*, 302 S.C. 18, 35, 393 S.E.2d 364, 374 (1990).

"Solicitors are bound to rules of fairness in their closing arguments." *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007).

> While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based upon this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice.

State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981); S.C. Code Ann. § 16-3-25(C)(1) (capital sentence may not be "imposed under the influence of passion, prejudice, or any other arbitrary factor").

As to whether the State's sentencing-phase argument in this case crept outside the bounds of fairness and required an objection by Applicant's counsel, the record reflects a thirteen-page argument in adherence to the principles stated in *Linder, supra.* An examination of the passages cited by Appellant in the full context of the closing indicates that the State was arguing in favor of

a recommendation of death and asking the jury to reject the application of mercy. The State argued for the jury to discount the mitigation evidence put forward by Applicant and assign significance to evidence it put forward in aggravation. The State did not ask the jury to weigh aggravation against mitigation and come to a decision that way.

Testimony on this issue taken at Applicant's PCR hearing also supports a finding that the State's closing argument did not call for objection. Defense counsel Carroll testified at PCR that he believed they should have objected because the excerpts presented to him at the PCR hearing indicated that "the solicitor was clearly painting a picture of the absolute worst of the worst of inhumanity, and telling the jury that they should disregard all the mitigation that had been offered that was relevant to their decision about imposing this ultimate penalty." But defense counsel Carroll acknowledged in later testimony that it is permissible for a prosecutor to argue in favor of their position. Likewise, defense counsel Bloom testified at PCR that at the time the State delivered its closing, he did not view the excerpted portions as problematic but, in hindsight, "should have interposed an objection" and characterized the State's closing as asking the jury to weigh aggravation against mitigation. However, his cross-examination testimony highlights the alternative position, perhaps the one held at the time of trial, that the State's closing argument was indeed within the confines of argument allowed by South Carolina law and was not worthy of objection.

Accordingly, Applicant's allegation fails to meet *Strickland's* error-and-prejudice standard and does not warrant relief.

K. <u>Ineffective Assistance of Appellate Counsel Claims</u>

Applicant seeks post-conviction relief on two claims of ineffective assistance of appellate counsel. The test for reviewing such claims is the basic *Strickland* error-and-prejudice analysis

with little adjustment. To succeed, the applicant must demonstrate that appellate counsel was "objectively unreasonable in failing to find arguable issues to appeal." *Smith v. Robbins,* 528 U.S. 259, 285, 120 S.Ct. 726, 764 (2000). "To prove prejudice, the applicant must show that, but for counsel's error, there is a reasonable probability that he would have prevailed on appeal" on the issue proffered in the PCR application. *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). The *Smith* Court noted "it is difficult to demonstrate that counsel was incompetent" as for the most part, deficient performance may be shown "only when ignored issues are clearly stronger than those presented[.]" *Smith, supra* at 288, 120 S.Ct. at 766 (quoting *Gray v. Greer,* 800 F.2d 644, 646 (7th Cir. 1986)).

When reviewing appellate counsel's actions under *Strickland* as enunciated in *Smith* and *Anderson, supra,* no finding of deficient Sixth Amendment performance and prejudice is warranted within appellate counsel's selection and treatment of the issues pursued on direct appeal before the South Carolina Supreme Court. Specifically, Applicant alleges in claims 10/11(c)(5) and (7) that appellate counsel should have pursued on direct appeal (1) the objections lodged to a number of autopsy photographs introduced during sentencing[24]; and (2) the objection lodged to the State's questioning Dr. Phillips about whether Applicant "knew right from wrong" at the time of the murder.

Testimony taken at the December 8, 2015, and May 13, 2016, evidentiary hearings established that first-chair trial counsel Jeff Bloom, who was listed as appellate counsel on the final brief and participated in oral argument before the South Carolina Supreme Court, shared his suggestions for appellate issues in a memorandum to appellate counsel at the Commission on

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24 Specifically, State's Exhibits 141, 153, 160, 161, 162, 166, 171, 172, 173, 177, 178, 181, 184, 335, and 336, on file and available for review at the South Carolina Supreme Court.

Indigent Defense. Within that memorandum, he suggested both the photograph issue and the Dr. Phillips issue as potential appellate issues. Jeff Bloom's testimony demonstrated that he discussed potential appellate issues with appellate counsel and considered a range of issues that he believed should be raised on appeal. He also completed portions of oral argument before the Supreme Court. Bob Dudek, Chief Appellate Defender with the Commission on Indigent Defense, also testified about Bloom's memorandum and the proffered issues at the December 8, 2015, PCR hearing.

1. <u>Testimony in the Record Pertaining to the Photograph Allegation</u>

One of the aggravating factors before the jury during the sentencing phase of Appellant's trial was that the murder occurred during the commission of physical torture. During the sentencing–phase, the State re-called forensic pathologist Dr. Cynthia Schandl[25] to testify in regards to specific injuries recorded as part of the victim's autopsy. Over Applicant's objection, the trial court admitted the photographs subject to this allegation as probative of the aggravating factor of physical torture. Shandl's testimony was thereafter received and trial counsel did not cross-examine the pathologist.

First-chair trial counsel Jeff Bloom testified at PCR only briefly that he recalled preserving the objection to these photographs and agreed with Applicant's counsel that they "are what they are." At the first convening of the PCR evidentiary hearing, appellate counsel Dudek testified that which he did not recall the specific photographs in this case, that having worked on capital appeals before he was aware that "some horrible, horrible, horrible photographs" have been reviewed on

[25] During the guilt phase of the proceedings Dr. Schandl was qualified as an expert and testified in regards to the autopsy she conducted on the victim. (R. p. 2920-93).

appeal by our courts, but that the court has issued "kind of standard language [that] while not pleasant to look at . . . [it did not] think they denied the defendant a fair sentencing phase.

2. Testimony in the Record Pertaining to the Dr. Phillips Allegation

During the sentencing phase, Applicant's counsel put forth Dr. Robert Phillips who was qualified as an expert in psychiatry and forensic psychiatry. Phillips' testimony assigned behavioral significance to certain events in Applicant's life prior to the murder. At the conclusion of his direct examination, Phillips opined that (1) Applicant "was experiencing a cocaine psychosis and, as such, he was affected by a mental disturbance" at the time of the murder; (2) "that as a result of his cocaine psychosis that his capacity to conform his behaviors was substantially impaired" at the time of the murder; and (3) that as a result of cocaine psychosis, that his mentality was impaired" at the time of the murder.

On cross-examination, the State extracted testimony that Applicant does not suffer from any mental or emotional disorder that would impair his decision-making, day-to-day functioning, or require psychiatric treatment—and that he was competent to stand trial. Bloom lodged an objection raised during an off-record bench conference.[26] Following the conference, the State elicited a response from Phillips regarding whether Applicant's actions at the time of the murder were volitional. Phillips responded he believed Applicant was in a cocaine psychosis at the time

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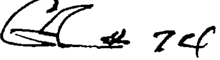
26 Q: That he was competent to stand trial?
A. Yes.
Q. That means that he basically knows what is going on here, who the lawyers are, who the judge is, the jury is, all that kind of stuff; is that correct?
A. That's correct.
Q. And that is does not meet the standard for ---
Mr. Bloom: Judge, I am going to object at this point. If we may approach?
[OFF RECORD BENCH CONFERENCE]

(R. p. 4242, line 2 – p. 4243, line 9).

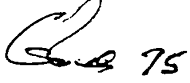


of the murder and therefore "his decision was not free," but that "he would have known what he was doing was wrong based on his behaviors after the event."

At PCR, defense counsel Bloom acknowledged that in his practice he consistently objects when the State cross-examines a mental health expert regarding whether the defendant knows right from wrong. He testified he believes that it confuses a jury to hear testimony that a defendant knows right from wrong, which pertains to an insanity defense, when insanity is not an issue in the trial, has not been presented during the guilt phase, and is likewise not part of the mitigation defense being presented. Defense counsel Bloom acknowledged that he included this issue in his memo to appellate counsel as a suggestion for the appeal. Appellate Counsel Dudek simply testified on this point that he did not raise that issue on appeal.

3. Argument in Opposition of Post-Conviction Relief

The above-cited issues would not have prevailed on appeal as argued by Applicant. Effective assistance of appellate counsel does not require that *all* issues that *may* have merit be pursued on direct appeal. *Bell v. Jarvis,* 236 F.3d 149, 164 (4th Cir. 2000) (*en banc*). "Appellate counsel accordingly enjoys a 'presumption that he decided which issues were most likely to afford relief on appeal,' a presumption that a defendant can rebut 'only when ignored issues are clearly stronger than those presented.'" *United States v. Baker*, 719 F.3d 313, 318 (4th Cir. 2013) (quoting *Bell v. Jarvis, supra*). Appellate counsel is given wide discretion in his professional decisions during representation. "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . . ." *Tisdale v. State*, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004), (quoting *Jones v. Barnes*, 463 U.S. 745, 754 (1983)).



Specifically in regards to the photographs, our Supreme Court has expressly upheld the introduction of autopsy photographs during the sentencing phase when the photographs corroborate witness testimony and illustrate the circumstances of the crime and the character of the defendant. *State v. Torres*, 390 S.C. 618, 623–24, 703 S.E.2d 226, 229 (2010) (citing *State v. Rosemond,* 335 S.C. 593, 597, 518 S.E.2d 588, 590 (1999); *State v. Burkhart,* 371 S.C. 482, 487, 640 S.E.2d 450, 453 (2007)). In Applicant's case, as in *Torres*, "[t]he doctor who performed the autopsy used the introduced photographs during h[er] testimony to illustrate the number of injuries, location of the injuries, and manner in which the injuries were committed." *Id.* Though graphic in nature, the photographs' "net effect" was to show what Applicant did to the victim, "which goes straight to the circumstances of the crime." *Id.* Photographs "are not inadmissible merely because they are gruesome, especially where, as here, the photos simply mirror the unfortunate reality of the case." *State v. Collins*, 409 S.C. 524, 535, 763 S.E.2d 22, 28 (2014) (no abuse of discretion in admission of pre-autopsy photographs of child victim mauled by dogs); *see also State v. Gray*, 408 S.C. 601, 759 S.E.2d 160 (Ct. App. 2014) (in prosecution for murder and lynching, gruesome autopsy photographs held more probative than prejudicial and relevant to issue of malice).

The photographs at issue depict the nature of the injuries established by the forensic pathologist as contributing to the victim's death. Given the status of South Carolina jurisprudence on this issue, any likelihood that Applicant would have prevailed on the proffered appellate issue is low. The photographs are relevant to the State's requirement to establish the aggravating factor that the murder occurred during the commission of physical torture. Thus, the photographs were directly linked to a question before the jury's consideration as part of the sentencing phase of trial. Dudek's testimony reflects that appellate counsel was aware of the status of the law on this issue

and intimates that the low likelihood of success caused him to make a strategic choice to forego the issue in Applicant's appeal. Accordingly, the failure to challenge the trial court's admission of those photographs on appeal is not a meritorious ineffective assistance of counsel claim.

Specifically in regards to Dr. Phillip's cross-examination testimony, assuming the off-record objection preserved the issue for appeal, the testimony received was not at all inconsistent with Applicant's mitigation-phase presentation. In fact, it was probative of the mitigating circumstances charged to the jury: that the murder was committed while the defendant was under the influence of mental or emotional disturbance; that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired; and the age or mentality of the defendant at the time of the crime. S.C. Code Ann. § 16-3-20(C)(b)(2), (6), and (7). At no point during his examination did Phillips obfuscate the elements of an insanity defense with his evaluation of facts probative of the mitigating factors named herein. Instead, the crux of his testimony on both direct and cross examination was that Applicant was subject to a state of cocaine psychosis at the time of the crime. To that end, Bloom's PCR testimony that he believed that type of evidence confused a jury and gave rise to his objection does not form a meritorious basis for appeal. Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues . . ."). Appellate counsel cannot be found ineffective for failing to raise an issue which, from the record, appears "far from 'apparent,' and may be nonexistent." *Lawrence v. Branker*, 517 F.3d 700, 711-12 (4th Cir. 2008) (finding state PCR court's denial a reasonable application of *Strickland, supra* and *Bell, supra*).

Applicant fails to demonstrate how either of the above-cited issues are stronger than those pursued on appeal, and this claim does not warrant the granting of post-conviction relief. *Hill v.*

State, 415 S.C. 421, 430-31, 782 S.E.2d 414, 419 (Ct. App. 2016) (counsel need not raise every nonfrivolous issue to be considered effective on appeal). The totality of the testimony put forward on the appellate counsel claims shows that in deciding which claims to raise on appeal, counsel considered the likelihood of success of those claims. Counsel does not have to file a "kitchen-sink brief" in order to be effective as "that is not necessary, and is not even particularly good appellate advocacy." *Smith v. Stewart*, 140 F.3d 1263, 1274 n.4 (9th Cir. 1998). Applicant has failed to show error and prejudice in regards to appellate counsel's performance and post-conviction relief is not warranted on either claim.

L. The Kidnapping Sentence

In addition to the death sentence received, Applicant was indeed sentenced by the trial court to a concurrent thirty years for kidnapping. This concurrent sentence is in violation of S.C. Code Ann. § 16-3-910. If a concurrent sentence is imposed as in this case, the sentence is considered "ineffective." *State v. Council*, 335 S.C. 1, 6, n.2, 515 S.E.2d 508, 510, n.2 (1999). "Generally, when a defendant is convicted for murder any sentence for the kidnapping of the victim would be vacated." *State v. Vazsquez*, 364 S.C. 293, 302, 613 S.E.2d 359, 363 (2005) (citing *Owens v. State*, 331 S.C. 582, 585, 503 S.E.2d 462, 463 (1998) (holding that a sentence for kidnapping should be vacated when the defendant received concurrent sentence under the murder statute). While Applicant's kidnapping sentence should be set aside, the kidnapping conviction shall remain. *Id.*; *Vasquez*, *supra* (affirming conviction but vacating sentence for kidnapping of murder victims).

M. Conclusion

Therefore, Applicant is not entitled to post-conviction relief on any surviving allegation. All allegations appearing in the third amended PCR application yet not presented in Applicant's

Post-Hearing Brief have been waived and abandoned. The totality of Applicant's claims shall be denied and dismissed in full as Applicant has failed to meet his burden on any claim herein—with the exception of the concurrent thirty-year sentence for kidnapping. That sentence, but not the conviction, is ordered vacated.

AND IT IS SO ORDERED.

G. Thomas Cooper, Jr.
Presiding Judge

July 20, 2018
Camden, South Carolina

STATE OF SOUTH CAROLINA	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS

William O. Dickerson, #6030,	)	**C/A No. 2012-CP-10-3216**
	)	**(Capital PCR)**
Applicant,	)	
v.	)	
	)	**ORDER DENYING POST-CONVICTION**
State of South Carolina,	)	**RELIEF**
	)	
Respondent.	)	
	)	

FILED 2018 JUN 27 PM 12: 20

This matter comes before the Court by way of an Application for Post-Conviction Relief originally filed May 16, 2012, and amended March 5, 2015 and July 15, 2015. An evidentiary hearing was initially convened on December 7-8, 2015, with additional hearings held March 31, 2016; May 12-13, 2016; May 27, 2016; and, October 23, 2017.

A. The Underlying Prosecution and Direct Appeal History

Applicant William O. Dickerson (Applicant) was called to trial on April 23, 2009, in Charleston County on the charges of murder, criminal sexual conduct first degree, and kidnapping. The State sought the death penalty. The Honorable R. Markley Dennis presided over the jury trial. Applicant was represented by defense counsel Jeffrey Bloom, Esq., and Calvin Andrew (Drew) Carroll, Esq. The Ninth Circuit Solicitor, Scarlett Wilson, tried the case along with Chief Deputy Solicitor Bruce Durant and former Assistant Solicitor Rutledge Durant. On April 30, 2009, the jury convicted Applicant as charged. On May 4, 2009, the penalty phase began. On May 7, 2009, the jury found three aggravating circumstances: 1) criminal sexual conduct; 2) kidnapping; and 3) torture. The jury recommended death. The judge imposed a death sentence for murder, and thirty years on each of the other crimes. The judge also found "as an affirmative fact that the evidence

in the case warrants the imposition of a death penalty and its imposition is not the result of prejudice, passion or any other arbitrary factor."

Applicant appealed, filing his Final Brief of Appellant on March 17, 2011. Robert Dudek and Kathrine Hudgins, Esquires, from the South Carolina Commission on Indigent Defense appeared on brief as appellate counsel, as did trial counsel Bloom. *State v. Dickerson,* 395 S.C. 101, 716 S.E.2d 895 (2011). Applicant's appellate brief raised four issues, none of which overlap into the present proceeding, and each of which were addressed by the South Carolina Supreme Court:

> 1.
>
> Whether the court erred by refusing to allow defense counsel to cross examine the pathologist, Dr. Schandl, about the fact the decedent tested positive for cocaine in his urine, since the pathologist testified on direct examination that the decedent's blood tested negative for drugs and appellant had the right to correct the misleading perception the pathologist had given the jury and the omission in her testimony reflected on her credibility as a "neutral" expert witness?
>
> 2.
>
> Whether the court erred by refusing to charge the jury on the lesser offense of accessory after the fact of murder since there was evidence appellant was only guilty of that offense since appellant's brother admitted he beat the decedent inside decedent's apartment, his brother's wife decided the decedent should be killed, the decedent died inside his apartment, and appellant's brother testified appellant helped remove the body to a vacant apartment next door?
>
> 3.
>
> Whether the court erred by refusing to allow appellant's first cousin, Johnette Watson, to whom appellant was like a brother, to testify that appellant's execution would deeply hurt her, since appellant's ability to maintain this positive relationship was admissible character evidence during the penalty phase?
>
> 4.
>
> Whether the judge erred in qualifying a juror who would, if the state proved aggravating circumstances, automatically vote for the death penalty unless the defense presented evidence that convinced him that a death sentence was not warranted, improperly shifting the burden to the defendant to prove he should not be executed?

(Final Br. of Appellant, pp. 1-2); *Dickerson, supra* at 113-14, 716 S.E.2d at 902.

The court heard oral argument on May 24, 2011, and subsequently issued an opinion affirming the convictions and sentence. *State v. Dickerson*, Opinion No. 27048 (S.C. Sup. Ct. filed October 3, 2011), *reported at* 395 S.C. 101, 716 S.E.2d 895 (2011). Applicant pursued rehearing, which was denied. He next filed a petition for writ of certiorari in the Supreme Court of the United States on February 15, 2012, pursuing the fourth issue from the direct appeal. After the State filed a Brief in Opposition, the Supreme Court denied the petition on April 23, 2012.

B. Respondent's Statement of Facts as Established at Trial

The facts concerning Dickerson's capital conviction are included herein as presented by the South Carolina Supreme Court in its opinion affirming Dickerson's conviction and sentence.

> Dickerson and Gerard Roper had been friends, even best friends, since childhood. On the morning of March 6, 2006, Roper went to his friend, Ben Drayton's, house to play video games. Around the same time, Dickerson went to his friend, Antonio Nelson's, house asking for a ride to his brother, Armon Dickerson's, house. Nelson was unable to give Dickerson a ride at that time and told him to come back later. When Dickerson returned later that afternoon, he was carrying a gun.
>
> En route to Armon's house, however, Dickerson began calling Roper from his cell phone. After receiving no answer, Dickerson asked if they could make a stop at Drayton's house so he could "get some money." When they arrived at Drayton's home, Dickerson entered brandishing his weapon and asking for money. Roper told Dickerson "I got your money," begging "don't shoot me" and "please don't kill me." Dickerson nevertheless fired a shot at Roper but missed. He then struck Roper in the head with the gun, dragged him out of the house, and forced him into Nelson's car. Dickerson then took Roper to Armon's house.[1]
>
> Armon and Dickerson brought Roper inside and systematically tortured him over approximately thirty-six hours. It started with Dickerson continuing to hit Roper with the gun, knocking out some of his teeth. Armon then left to retrieve

[1] After dropping Dickerson and Roper off, Nelson left and did not return. There is no suggestion he knew of Dickerson's plans beforehand or had any involvement in the subsequent events.

Dickerson's car and some drugs, and blood covered the inside of the house when he returned. Dickerson then called another friend of his, Rashid Malik, and threatened him with death if he did not come to Armon's house.[2] When Malik arrived, Roper was still conscious but clothed only in his T-shirt, and Armon was attempting to clean up the blood covering the house. Malik then joined Armon and Dickerson.

Although Dickerson, Armon, and Malik all tortured Roper to varying degrees, Dickerson appeared to be the primary actor.[3] Through this entire ordeal, Roper suffered the following at the hands of Dickerson alone: choking, being tied up and placed in a closet, being sodomized with a gun and a broomstick, having his scrotum burned, being hit with a heavy vase and a mirror, and generalized beating and cutting. At one point, Roper began asking that they just let him die.

All told, Roper received over 200 individual wounds to the outside of his body, including lacerations to his anus. He also received several internal injuries, including various broken bones in his face that caused it to appear misshapen, blunt force trauma to his neck resulting in the breaking of various structures, a broken tibia, broken fingers and wrist, brain swelling, and bleeding into the internal structures around his rectum as the result of objects being inserted into it. Although there is no definite timeline of events, Roper survived for eighteen to twenty-four hours after the sodomy occurred, and none of these wounds were inflicted post-mortem. No single wound was fatal. Instead, Roper died from the sum total of his injuries, apparently shortly after he was struck with the mirror and the vase on the morning of March 8.

As these events transpired, Dickerson made several phone calls to various people during which he discussed what he was doing to Roper. Many of them were to Dickerson's girlfriend, and she managed to record one of them containing his description of the sodomy and even Roper's own confirmation of what was happening. Dickerson also confirmed the sodomy, as well as the burning of Roper's scrotum, over the phone to another friend. In a later call to that same friend, he said

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[2] Malik attempted to bring Dickerson's mother to Armon's house to calm Dickerson down. When Dickerson learned of this, he threatened to kill Malik's mother and cut the baby out of Malik's pregnant girlfriend.

[3] Armon's girlfriend, Selena Rouse, was in and out of the house during that evening, along with her young son. At some point, Dickerson asked her whether he should let Roper live or die. However, there is no evidence that she actually participated in the torture.

> that Roper was "gone." However, he told a different friend that Roper was all right but that Dickerson needed to run.
>
> Dickerson and Armon wrapped Roper's semi-clothed body in a blanket and dumped it in the vacant townhouse next to Armon's. Dickerson then changed clothes and fled. Armon and Rouse attempted to clean Armon's house, but they abandoned it upon realizing their efforts would be futile. That same day, a woman who was planning to rent the vacant townhouse entered and discovered Roper's bloodied and mutilated body.

State v. Dickerson, supra at 107–09, 716 S.E.2d at 898–99 (footnotes in original).

C. PCR Procedural History

Applicant filed his application for post-conviction relief (PCR), on May 16, 2012. By Order dated July 31, 2012, the Supreme Court of the South Carolina vested the Honorable Edgar W. Dickson with exclusive jurisdiction over this capital post-conviction relief action.

By Order dated August 20, 2012, Judge Dickson appointed counsel Elizabeth Franklin-Best, Esquire, and E. Charles Grose, Jr., Esquire (Applicant's counsel). Throughout the course of this litigation, Respondent has been represented by Senior Assistant Deputy Attorney General Melody Brown, with appearances also made by Deputy Attorney General Donald Zelenka, Senior Assistant Attorney General Anthony Mabry, and Assistant Attorneys General Caroline Scrantom and Brendan McDonald (Respondent's Counsel).

Applicant, through counsel and pursuant to the terms of a scheduling order issued by Judge Dickson, filed an amended application on October 18, 2012. To this application, Respondent filed a Return on November 19, 2012.

For reasons unrelated to the specific issues raised, Judge Dickson recused himself from further participation in this case by Order dated June 2, 2014. Thereafter, the Supreme Court of the South Carolina vested the undersigned with exclusive jurisdiction over the present action in an Order issued June 20, 2014. Applicant's counsel filed a second amended application nearly nine

months later on March 5, 2015. A third and final amended application followed, being served upon Respondent on July 13, 2015, and filed July 15, 2015.

Respondent moved to strike or, in the alternative, to dismiss claims within that application not cognizable in PCR. Specifically, Respondent postured that the claim styled as a denial of "due process and equal protection" alleging that the Solicitor "committed prosecutorial misconduct by improperly striking qualified African-Americans from the jury venire" was a freestanding claim which alleged a *Batson* violation that was appropriate at the time of trial and on direct appeal, but not under the Uniform Post-Conviction Relief Act. *See Simmons v. State,* 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975). Respondent filed this motion on October 1, 2015. Applicant responded in opposition and Respondent replied. In an order filed December 8, 2015, this Court denied Respondent's motion to strike or dismiss finding that "Petitioner is asserting his *Batson* claim as part of his ineffective assistance of counsel claim. Thus, Petitioner's *Batson* claim, in this Court's opinion, is not a freestanding claim and is a proper claim in this post-conviction relief matter."

The third amended application gives rise to the allegations pursued at the series of evidentiary hearings before this Court which have convened in both Charleston and Richland Counties: First, on December 7-8, 2015; Second, on March 31, 2016; Third, on May 12, 2016; Fourth, on May 27, 2016; Fifth, on October 23, 2017. Applicant has been present at each hearing and represented by Applicant's counsel.

During the course of these hearing installments, this Court received testimony from (in no particular order and in some cases on more than one occasion): developmental psychologist Dr. Richard Canfield, neuropsychologist Dr. Marlyne Israelian, Applicant's first chair trial counsel Jeffrey Bloom, Applicant's second chair trial counsel Drew Carroll, Applicant's appellate counsel Robert Dudek, law professor Barbara O'Brien from Michigan State University College of Law,

Ninth Circuit Solicitor Scarlett Wilson, and mathematics and statistics professor Dr. Robert Norton.

Following the fourth convening in May 2016, discovery recommenced with the issuance of a July 21, 2016, Order granting Applicant's mid-hearing Motion to Compel. Following this Order, the undersigned also formally ordered, at Respondent's request and without opposition by Applicant, that the evidentiary hearing be suspended until such time as both parties had a full and fair opportunity to complete the discovery ordered on July 21, 2016, and any additional discovery deemed necessary as a result.

During the suspension of the evidentiary hearing and while mid-hearing discovery was pursued by both parties, this Court reconvened on March 16, 2017, for a limited hearing on Respondent's Motion for Special Interrogatories and Concomitant Request to Produce regarding the jury selection claims. This Court denied Respondent's motion. Also at that hearing, Applicant moved to compel additional jury selection data from the *State v. Michael Slager*, C/A No. 2015-GS-10-03466 (Charleston County Court of General Sessions), which had been sealed by the Honorable Clifton Newman during the course of the *Slager* trial. Prior to the resolution of Applicant's related motion before Judge Newman to unseal the information sought by Applicant, this Court denied Applicant's Motion to Compel in an order issued June 1, 2017.

Applicant's 2017 discovery request[4] was also related to Applicant's two prior mid-hearing requests to supplement and amend the data counsel provided their expert witness, Barbara O'Brien

[4] Discovery on this particular issue commenced when Applicant served a FOIA request and subpoena upon Ninth Circuit Solicitor Scarlett Wilson seeking:

> the incident report, complete and accurate copies of the jury list(s) prepared by the Clerk of Court, your juror strike sheet, all information created or assembled about all potential jurors (regardless of whether it was prepared by you or by someone else and given to you), and your notes

of the Michigan State University College of Law, in furtherance of Applicant's claim that the Ninth Circuit Solicitor impermissibly used race during capital jury selection ("the jury selection claims").[5]

In regard to the segmentation of the PCR evidentiary hearing, this was a result in almost exclusive part of matters related to the jury selection claims:

- Between the hearings on December 7-8, 2015, and March 31, 2016, Applicant was allowed time for its experts' completion of the statistical analysis intended for presentation in furtherance of the jury selection claims.[6]

- Applicant introduced expert Barbara O'Brien at the March 31, 2016, hearing. O'Brien presented a "Report on Jury Selection Study" in furtherance of the jury selection claims. The report was dated March 8, 2016. This hearing was suspended until May 12, 2016, at Applicant's request, to allow O'Brien time to amend her report to include raw data from public records (trial transcripts) presented by Respondent during its cross-examination of O'Brien.

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made during the roll call of jurors, juror qualification, voir dire, and jury selection

for a list of fourteen specific General Sessions cases. (Aug. 27, 2015, Ltr. from Charles Grose to Sol. Scarlett Wilson; see Exhibit A-4 from May 12-13, 2016 PCR Hearing). This is not the discovery process authorized by S.C. Code Ann. § 17-27-150(B), nor is the Solicitor a proper representative party to the action from which discovery may be directly pursued. See Rule 5(a), SCRCP; *Langford v. McLeod*, 269 S.C. 466, 238 S.E.2d 161 (1977). Applicant had previously deposed the Solicitor and had served discovery requests upon Respondent, but had not made any request for data specific to the study conducted.

5 Respondent has maintained throughout this proceeding that the evidence admitted should only concern claims within the PCR application pertaining to ineffective assistance in the jury selection challenge and procedures leading up to and during Applicant's 2009 trial. This Court has previously limited the presentation of evidence to this proposed time frame in regards to Applicant's Motion to Compel prosecution training materials and in numerous presentations where Applicant has attempted to exceed that limitations, (Respondent maintaining objection to post-2009-trial materials; Court limiting question to 2009 trial and before).

6 The December 7-8, 2015, hearing was limited to issues pertaining to ineffective assistance of counsel in regards to an underlying allegation of lead poisoning, and various other strategy and record based claims. Applicant was not ready to present his statistical theories at the December 2015 hearing.

- At the May 12, 2016, hearing Applicant re-called Barbara O'Brien via Skype. She presented an "Amended Report on Jury Selection Study" dated May 5, 2016. Applicant also called Ninth Circuit Solicitor Scarlett Wilson to testify in furtherance of these allegations.[7]

- The hearing was then suspended order for Applicant to depose Respondent's expert witness who was retained in rebuttal to Applicant's second presentation of the jury selection allegations. That hearing occurred on May 27, 2016, when the State presented Dr. Robert Norton, who offered a critique of the report presented by Applicant's expert. Doctor Norton did not conduct, and the State did not present, an independent study. The State then rested. At this juncture, Applicant indicated he would obtain another amended report from its experts for the purposes of presenting a case-in-reply.

The evidentiary hearing re-convened before this Court on October 23, 2017, in Richland County. Applicant once again presented Barbara O'Brien, who addressed her "Second Amended Report on Jury Selection Study." This report was provided to Respondent and this Court on August 30, 2017, and dated August 29, 2017.

D. <u>List of PCR Exhibits</u>

The following exhibits have been introduced at each hearing installment and are before this Court in relation to the allegations enumerated above.

<u>Exhibits Entered at the December 7-8, 2015, hearing in Richland County:</u>

- A-1 June 2, 1988 Lab Report analyzing lead in Applicant's blood at 9 micrograms per deciliter when Applicant was age 11 yrs 9 months 9 days
- A-2 2003 Research Article from *Public Health Reports* containing map of the Charleston Peninsula and designating addresses with confirmed cases of childhood lead levels at or above level 10
- A-3 Copy of Dr. Canfield's PowerPoint Presentation
- A-4 CV of Dr. Marlyne Israelian, expert in developmental neuropsychology

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7 Also at this hearing, Respondent called trial counsel Jeffrey Bloom in regards to the lead claims, as Mr. Bloom produced discoverable material to Respondent which was requested but not provided by Applicant during discovery.

- A-5 Map of Charleston Peninsula – Enlarged from Dr. Canfield's presentation which ID's houses with children who screened with lead levels above 10
- A-6 Street Map of Orrs Court – street where Dickerson lived for part of his youth
- A-7 May 12, 1988 MUSC Psychological Evaluation of Dickerson from Commitment
- A-8 Social History of William Dickerson Pertaining to Commitments
- A-9 Summary
- A-10 Dickerson's Blood Test Results from same date as lead screening on June 2, 1988
- A-11 Psychological Evaluation for William Dickerson
- A-12 IQ Testing Protocol for Tests Administered to Dickerson in 1990
- A-13 Social Worker's Report by Department of Youth Services (Type of Social History)
- A-14 Evaluation of Social Worker's Report by Department of Youth Services
- A-15 Post-Trial Letter by Jeffrey Bloom dated July 22, 2009 to Robert Lominack expressing list of hearings and of potential appellate issues
- A-16 A Law Review Article by John Blume dated April 1, 2010
- R-1 Medical Report Pertaining to Dickerson's Suffering a Gunshot Wound to the Head
- R-2 Collection of Letters from Dickerson
- R-3 *Jones v. Warden*, 753 F.3d 1171 (11th Cir. 2014)
- R-4 *K.C. v. Fulton Co. Sch. Dis.*, 2006 WL 1868348 (N.D. Ga. Atlantic Div. 2006)
- R-5 MUSC Psychological Evaluation for Dickerson
- R-6 WSH Hospital Records for Dickerson
- R-7 Trial Counsel's Motions Seeking the Death Penalty be Declared Unconstitutional
- R-8 Appellate Counsel's Notes Re: Formulating Appellate Issues

<u>Exhibits Entered at the March 31, 2016, hearing in Richland County</u>

- A-1 CV of Barbara O'Brien
- A-2 Michigan State University College of Law Report on Jury Selection Study
- A-3 Privileged Production Ordered 11/30/2015
- A-4 Privileged Production Ordered 12/10/2015
- A-5 Sealed Criminal History of Jurors from FBI

- A-6 Affidavit of Eddie Haselden from Charleston County Clerk's Office re: Destruction of Juror Lists
- A-7 Prosecution Coordination Commission Documents re: Trainings up to 2009; Additional Materials Proffered for Post-2009
- A-8 Deposition of Bruce DuRant
- A-9 (Proffer Only) Deposition of Scarlett Wilson
- A-10 (Proffer Only) Deposition of Bruce DuRant 3/26/2013
- A-11 (Proffer Only) Deposition of Rutledge DuRant 3/25/2013
- A-12 Transcript Excerpt Used in Respondent's Cross-Examination: Ronald Coulter
- A-13 Transcript Excerpt Used in Respondent's Cross-Examination: Jemol Brown
- A-14 Transcript Excerpt Used in Respondent's Cross-Examination: Ethan Mack
- A-15 Transcript Excerpt Used in Respondent's Cross-Examination: Michael Jeter
- A-16 Flash Drive Containing Underlying Data Utilized in (First) Jury Selection Study

<u>Exhibits Entered at the May 12-13, 2016, hearing in Charleston County</u>

- A-1 Michigan State University College of Law Report Amended Report on Jury Selection Study
- A-2 Standard Interrogatories Served January 2013 by Applicant Upon Respondent
- A-3 Request to Produce Served January 2013 by Applicant Upon Respondent
- A-4 Freedom of Information Act Request Sent to Ninth Circuit Solicitor
- A-5 Incident Report
- A-6 Incident Report
- A-7 Incident Report
- A-8 Incident Report
- A-9 Incident Report
- A-10 Incident Report
- A-11 Incident Report
- A-12 Incident Report
- A-13 Incident Report
- A-14 Incident Report

- A-15 Incident Report
- A-16 Incident Report
- A-17 SC Supreme Court Appendix to Review Assignment of PCR Judge
- A-18 Motion to Dismiss the Death Penalty Due to Unconstitutionality of State Proportionality Review Filed by Trial Counsel
- A-19 Motion to Bar Death Penalty Based on Race
- R-1 Data Compilation Utilized in Creation of Jury Selection Study
- R-2 Criminal Justice Information Services Security Policy Re: Inappropriate to Disseminate Rap Sheets and Criminal History of Jurors
- R-3 E-mails between Jeff Bloom and Dr. Herbert Needleman Re: Lead Poisoning Research and Pre-Trial Consult
- R-4 North Charleston Police Department Booking Report for Juror Stricken by State
- Court-1 Demonstrative Copies

Exhibits Entered at the May 27, 2016, hearing in Richland County

- R-1 CV of Dr. Robert Norton
- R-2 Emailed Opinion of Dr. Robert Norton
- R-3 Formal Critique by Dr. Robert Norton
- A-1 CV of Barbara O'Brien
- A-2 CV of Catherine Grosso
- A-3 (Proffer Only) Questions Applicant Sought Solicitor Wilson to Answer as Part of Applicant's Motion to Compel

Exhibits Entered at the October 23, 2017, hearing in Richland County

- A-1 Michigan State University College of Law Report Second Amended Report on Jury Selection Study
- A-2 Flash Drive Containing Underlying Data for Use in Preparation of A-1 above

Additional Documents Provided to Court Under Seal

Additional information may be sealed and/or before this Court for review, such as prosecution training materials provided under protective order by the South Carolina Commission

on Prosecution Coordination, whose motion to intervene was granted at one point in this proceeding.

E. Surviving PCR Allegations

In Applicant's Post-Hearing Brief of January 16, 2018, Applicant represented he would only proceed on the following allegations:

Concerning Jury Selection:

- 10/11(a)(2) Defense counsel rendered ineffective assistance of counsel by failing to advance a comparative juror analysis when he raised his Batson challenge.
- 10/11(a)(4) Defense counsel rendered ineffective assistance of counsel by failing to secure available criminal records of the jurors by requesting the trial court judge issue a subpoena to the FBI, Criminal Justice Information Services Division prior to the jury strike.
- 10/11(a)(5) Defense counsel rendered ineffective assistance of counsel by failing to litigate the issue of defense counsel's access to the same juror information as was in the possession of the prosecution prior to the jury strike.
- 10/11(f) Applicant was denied his rights to due process and equal protection under the laws in violation of the Fifth and Fourteenth Amendments to the United States Constitution [when] [t]he Ninth Circuit Solicitor's Office improperly struck qualified African-Americans from the jury venire

Concerning Ineffective Assistance Alleged During the Sentencing Phase:

- 10/11(b)(2) Trial counsel rendered ineffective assistance of counsel by failing to renew his objection when Cederick Davis, William Dickerson's former probation agent, testified that Mr. Dickerson stated he wished he had shot the cop.
- 10/11(b)(3) Trial counsel rendered ineffective assistance of counsel by failing to object to the State's closing argument that diluted the responsibility of the jurors in rendering a possible death verdict.
- 10/11/(b)(4) Trial counsel rendered ineffective assistance of counsel when they failed to uncover and present evidence of Applicant's significant neurological deficits and when that evidence would have been highly mitigating.[8]

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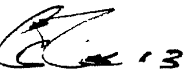
[8] This claim of "significant neurological deficits" rests on the allegations pertaining to lead exposure.



Concerning Ineffective Assistance of Appellate Counsel:

- 10/11(c)(5) Appellate counsel rendered ineffective assistance of counsel for failing to present, for appellate review, defense counsel's objections to the admission of photographs [State's Trial Exhibits] 141, 153, 160, 161, 162, 166, 171, 172, 173, 177, 178, 181, 184, 335, and 336.
- 10/11/(c)(7) Appellate counsel rendered ineffective assistance of counsel for failing to present, for appellate review, defense counsel's objection to the solicitor's questioning of Dr. Phillips about whether Mr. Dickerson "knew right from wrong" at the time of the killing.

Concerning Sentence Received:

- 10/11(e) Applicant was improperly sentenced to both murder and kidnapping in violation of S.C. Code Ann. § 16-3-910[9]

These were the only issues briefed by Applicant in any capacity throughout the course of the litigation.

F. Abandoned PCR Allegations

Applicant has abandoned a number of claims appearing in its third amended PCR application. This Court specifically finds those claims waived and abandoned on the basis that they have been expressly waived by Applicant either on the record or in its Post-Hearing Brief. *See generally* S.C. Code Ann. § 17-27-80 ("The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented."); *Marlar v. State,* 375 S.C. 407, 409, 653 S.E.2d 266, 266–67 (2007) (general language on failure to present evidence "should not be included in a PCR order unless there are allegations contained in the application and/or mentioned at the PCR hearing about which absolutely no evidence is presented"); *see also Suber*

9 Applicant is correct that the kidnapping sentence should be vacated if the murder sentence is left undisturbed. However, as argued in Respondent's return to the first amended application, the conviction remains.

v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) ("the applicant bears the burden of establishing that he is entitled to relief");

First, Applicant's counsel abandoned several allegations at the December 7-8, 2015, evidentiary hearing. Referencing the third amended PCR application, Applicant's counsel abandoned claims numbered 11(b)(1) and 11(b)(6)-(8) concerning the effective assistance of counsel during the sentencing phase of his capital trial. Applicant's counsel also abandoned claims 11(c)(4) and 11(c)(6) concerning the effective assistance of counsel on direct appeal.

Second, Applicant's counsel has abandoned the following claims alleged within its third amended PCR application and not included in the Post-Hearing Brief. Applicant has failed to present evidence and argument in furtherance of the following claims summarized below from the third amended application:

- 10/11(a)(1) Ineffective assistance of counsel during the guilt phase of trial: Counsel did not advance a consistent theory between the guilt-and-innocence and sentencing phases of trial

- 10/11(a)(3) Ineffective assistance of counsel during the guilt phase of trial: Counsel failed to secure jurors' criminal records from SLED prior to the jury strike[10]

- 10/11(c)(1) Ineffective assistance of counsel on appeal: Appellate counsel did not appeal the outcome of trial counsel's motion to dismiss the death penalty due to the unconstitutionality of South Carolina's proportionality review[11]

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10 Applicant has only pressed the issue as to FBI records, not SLED records. These are different reports and different databases. (See Order of March 3, 2015, allowing applicant to obtain a subpoena for FBI data bases, p. 2 (noting differences)). Thus, the actual claim differs.

11 Respondent notes that, as addressed in the return to the first amended application, the South Carolina Supreme Court expressly considered the proportionality of the sentence in its opinion affirming Applicant's convictions. *State v. Dickerson*, 395 S.C. 101, 123-24, 716 S.E.2d 895, 907 (2011).

- 10/11(c)(2) Appellate counsel did not appeal the outcome of trial counsel's motion to bar the death penalty based on race

- 10/11(c)(3) Appellate counsel did not appeal the outcome of trial counsel's *Batson* motion

- 10/11(d)(1-4) The death sentence was obtained in violation of the United States Constitution because South Carolina's capital sentencing scheme violates the mandates of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1972)[12]
  1. The statute does not perform the constitutionally mandated narrowing function
  2. South Carolina's sentencing system permits racial discrimination
  3. The State Supreme Court consistently fails to conduct meaningful proportionality review in capital cases
  4. The death penalty is unconstitutional because it is unreliable, arbitrary, and lacks penological purpose

G. <u>General Standard of Review in PCR</u>

The scope of this Court's jurisdiction in post-conviction relief matters is set out in S.C. Code Ann. § 17-27-20(a), which provides:

> Any person who has been convicted of, or sentenced for, a crime and who claims:
>
> (1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
>
> (2) That the court was without jurisdiction to impose sentence;
>
> (3) That the sentence exceeds the maximum authorized by law;

[12] The South Carolina death penalty statute has long been held Constitutional and "indistinguishable from the statutory complex approved by the United States Supreme Court." *E.g. State v. Shaw,* 273 S.C. 194, 200-03, 255 S.E.2d 799, 802-04 (1979) (citing *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909 (1976)).

(4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(5) That his sentence has expired, his probation, parole, or conditional release unlawfully revoked, or he is otherwise held unlawfully held in custody or other restraint; or

(6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

Section (b) further limits the jurisdiction of the PCR court as follows: "This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." S.C. Code Ann. § 17-27-20(b). Because a PCR action is not a substitute for those proceedings, a PCR applicant cannot assert any issues in his PCR action that could have been raised at trial and on direct appeal. This prohibition has long been recognized. *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings."); *see also Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("The Simmons rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.").

While previously heard or unheard freestanding trial or direct appeal issues are not cognizable, the general factual basis for the previously unheard issues may be reached by and through an allegation of ineffective assistance of counsel. *Drayton*, 312 S.C. at 9, 430 S.E.2d at 520 ("Issues that could have been raised at trial or on direct appeal cannot be asserted in an

application for post-conviction relief absent a claim of ineffective assistance of counsel."); *see also Cummings v. State*, 274 S.C. 26, 28, 260 S.E.2d 187, 188 (1979) ("At trial, respondent failed to object to the imposition of the sentence and, therefore, waived the right to have that sentence reviewed on direct appeal, or to raise such issue on Post-Conviction absent an allegation of ineffective assistance of counsel."). Ineffective assistance of counsel claims constitute the general nature of issues appropriate for post-conviction relief actions. *See, e.g., Al-Shabazz v. State,* 338 S.C. 354, 367, 527 S.E.2d 742, 749 (2000) (discussing jurisdiction pursuant to S.C. Code § 17-27-20(a), and finding "A typical PCR claim of ineffective assistance of counsel falls into this category....").

To establish that Sixth Amendment counsel was ineffective, a PCR applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068 (1984); *Simpson v. Moore*, 367 S.C. 587, 595–96, 627 S.E.2d 701, 706 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland*, *supra.* Relief will not be granted on a showing of mere error—prejudice must also be shown. *Id.* The standard of "prejudice" differs depending upon whether it is related to guilt phase issues or penalty phase issues. In order to prove "prejudice" in the guilt phase, an applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). In *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998), the court instructed that prejudice may be found in a capital sentencing proceeding "when 'there is a reasonable probability that, absent [counsel's] errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded

that the balance of aggravating and mitigating circumstances did not warrant death.'" 332 S.C. at 333, 504 S.E.2d at 823 (quoting *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2068). Again, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694).

Further, a defendant is entitled to a due process right of effective assistance in his first appeal. *Evitts v. Lucey*, 469 U.S. 387 (1985). The *Strickland* deficient performance and prejudice test applies to determine the merits of any claims of ineffective assistance of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S.Ct. 726 (2000); *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). However, "it is difficult to demonstrate that counsel was incompetent" as for the most part, deficient performance may be shown "only when ignored issues are clearly stronger than those presented . . . ." *Smith v. Robbins*, 528 U.S. at 288, 120 S.Ct. at 765 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). "To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal." *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

In either case, to effect a fair review of counsel's performance, a reviewing court must "eliminate the distorting effects of hindsight" and attempt "to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Butler v. State*, 286 S.C. 444–45, 334 S.E.2d 815 (1985).

H. Respondent's Position on the Merits: Ineffective Assistance in Jury Selection

Introductory Summary

Applicant has primarily presented argument challenging Solicitor Wilson's use of peremptory strikes during Applicant's jury selection. The transcript of record shows trial counsel challenged three of the prosecution's four strikes during a *Batson* motion at the 2009 trial.

Because a *Batson* motion was made at the 2009 trial, the precise and only claim available is one of ineffective assistance of counsel. Applicant asserts defense counsel was ineffective by:

- failing to advance a comparative juror analysis when he raised his *Batson* challenge;
- failing to secure available criminal records of the jurors by requesting the trial court judge issue a subpoena to the FBI, Criminal Justice Information Services Division prior to the jury strike;
- failing to litigate the issue of defense counsel's access to the same juror information as was in the possession of the prosecution prior to the jury strike.

Applicant's further allegation that he "was denied his rights to due process and equal protection under the laws in violation of the Fifth and Fourteenth Amendments to the United States Constitution [when] [t]he Ninth Circuit Solicitor's Office improperly struck qualified African-Americans from the jury venire," is not cognizable as that is a direct appeal issue. Review of that claim is barred by the *Simmons* rule.

1. Defining the Claims and Appropriate Standard of Review

At trial, counsel pursued a *Batson*[13] motion which is reflected on pages 2028 to 2031 of the Record on Appeal.As noted, Applicant makes three separate ineffective assistance of counsel

[13] *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986) (hereinafter *Batson*).

claims pertaining to this motion: (A) that trial counsel failed to advance a comparative juror analysis in furtherance of his *Batson* motion; (B) trial counsel failed to subpoena to the FBI to secure the Criminal Justice Information Services Division (CJIS) records pertaining to the potential jurors; and (C) trial counsel failed to litigate that he did not have the same access to juror information, such as CJIS records, as the prosecution possessed prior to the jury strike. Applicant has also alleged a due process and equal protection violation premised on his assertion: "the Solicitor's Office committed prosecutorial misconduct by improperly striking qualified African-American jurors form the jury venire." This is not treated as freestanding claim based on this Court's previous ruling in regard to Respondent's motion to strike.

This Court denied Respondent's Motion to Strike the freestanding claim in its Order filed December 8, 2015, based on the fact that this Court construed the allegation as one of ineffective assistance of counsel: "Here, Petitioner is asserting his *Batson* claim as part of his ineffective assistance of counsel claim. Thus, Petitioner's *Batson* claim, in this Court's opinion, is not a free-standing claim and is a proper claim in this post-conviction relief matter." This affects the standard of review and this Court's review of the evidence. Respondent adheres to the Court's interpretation of the claim as one of ineffective assistance and will follow the review standards of ineffective assistance of counsel claims.

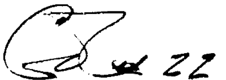
2. <u>Defining the Available Evidence</u>

This Court must examine what information was available to trial counsel at the time of Applicant's trial in order to make a determination on any ineffective assistance of counsel claim. *See, e.g., Strickland v. Washington*, 466 U.S. at 689, 104 S. Ct. at 2065 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the

conduct from counsel's perspective at the time."). Significant portions of the evidentiary basis argued in Applicant's Post-Hearing Brief are not proper for this Court's consideration as the information offered was not available to defense counsel at or before Applicant's trial – in particular evidence related to cases tried by the Ninth Circuit Solicitor *after* Applicant's May 2009 trial. To the extent Applicant expands the record to introduce argument concerning the use of preemptory strikes in *State v. Colin Broughton*, tried September 2009, and *State v. Ryan Deleston*, tried October 2013, that evidence will not be considered. Where the underlying occurrence of the evidence argued in favor of relief past Applicant's trial date, that evidence cannot be considered for the purpose of any post-conviction relief determination on the issue of ineffective assistance and its consideration is consequently improper. *Strickland, supra. See also* Rules 401 and 402, SCRE.

Further, Applicant's inclusion of a jury strike analysis in the 2004 *Jelal Beyah* trial, though prior to the 2009 trial, is still irrelevant to this Court's consideration of the claims before it for several reasons. Apart from the well-established fact that discovery is not allowed in criminal proceedings and Applicant has not shown how trial counsel should be criticized for failing to obtain the additional information about any of these unrelated cases, Applicant has attempted to thrust great weight on the fact that an adverse ruling was made in one case, *Beyah*, in regard to one strike. Reliance on *Beyah* to establish some sort of pattern is suspect for its isolated nature. There is only this one instance where a trial court found the prosecutor's explanation lacking. But the larger point is that the relevant consideration here is the *Batson* motion already in the record.

Trial counsel did pursue a *Batson* challenge and the solicitor's response was fully set out and is supported by the record. Any reference to other unrelated cases will never affect, inform, or alter the record made at the 2009 trial as to the prosecution's reasons for the strikes. Moreover,

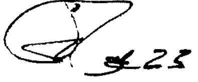


Applicant's suggestion the responses were pretext is similarly moot, as the responses and consideration of the responses were made back in 2009. *Hernandez v. New York,* 500 U.S. 352, 359, 111 S.Ct. 1859 (1991) ("Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot."); *see also Juniper v. Zook*, 117 F. Supp. 3d 780, 799 and n.10 (E.D. Va. 2015), *motion for relief from judgment denied,* No. 3:11-CV-00746, 2016 WL 413099 (E.D. Va. Feb. 2, 2016) (statistics demonstrating "the prosecution struck black venire members at nearly three times the rate of white venire members," even if accepted, are irrelevant where reasons for strikes on the record given "statistical disparity between black and non-black jurors goes to the first step of *Batson*," and "not purposeful discrimination at the third step").

Applicant's Post-Hearing Brief addresses and includes information included only *in camera* and under seal by this Court. "The Prosecutor's Handbook" and other prosecutorial training materials have been ruled work-product not available for production and/or privileged and held under seal. These documents have already been found to be irrelevant to a *Batson* motion analysis. This past October, our Court of Appeals decided this very issue in *State v. Daise*, 421 S.C. 442, 461–63, 807 S.E.2d 710, 720–21 (Ct. App. 2017), *reh'g denied* (Dec. 14, 2017). The *Daise* opinion is directly on point and against Applicant's position.

Like Applicant, "Daise subpoenaed the records custodian of the South Carolina Commission on Prosecution Coordination (the Commission)[14] to provide '[a]ll documents regarding jury selection, including but not limited to training documents, training agendas,

[14] In Applicant's case, the Commission has been granted intervenor status as to this issue. (May 12-13, 2016, Tr. p. 146; *see id.* pp. 133-41).



manuals, policy statements or . . . advisements, correspondence with current or former prosecutors and circuit court judges.'" *Id.* Daise's capital counsel suggested the State had a "handbook on how to get around *Batson*" and supported his posture with pre-trial expert testimony from a statistician. The statistician testified that "in Beaufort County, African-American males were struck at a rate four and a half times higher than Caucasian males." *Id.* Our appellate court affirmed the circuit court's finding the materials at issue "did not 'include any abusive instructions or teaching materials, nor use of improper technique,'" and that the materials were "generally protected as work-product, as they were created and disseminated in a limited fashion with the purpose of assisting the State's preparations for trial.'" *Id.* at 462-63, 807 S.E.2d at 720 (citing *e.g.*, *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010) ("[A]ttorney work product doctrine protects from discovery documents prepared in anticipation of litigation, unless a substantial need can be shown by the requesting party."); *State v. Myers*, 359 S.C. 40, 49, 596 S.E.2d 488, 493 (2004) (noting Rule 5, SCRCrimP, exempts from discovery work product and internal prosecution documents which contain no impeachment or exculpatory evidence); Rule 5(a)(2), SCRCrimP ("Except as provided in [prior subsections], this rule does not authorize the discovery or inspection of reports, memoranda, or other internal prosecution documents made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case....")).[15] The Court of Appeals specifically found that

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[15] Former defense counsel testified in these PCR proceedings that defense attorney presentations similarly have materials referencing case law that would outline holdings and what was acceptable or not acceptable – materials that are also similarly considered restricted and "property of the organization putting on the seminar…." (See May 12-13, 2016 PCR Hearing Tr. p. 153). Further, the concept of listing out cases and reviewing the explanation in given cases is fairly standard.

the circuit court did not err in quashing the subpoena for these documents after conducting an *in camera* review. *Id.* at 463, 807 S.E.2d at 721.

An additional limitation to the evidence presented to this Court in Applicant's Post-Hearing Brief pertains to the criminal histories subpoenaed and maintained under seal in this action. (Mar. 3, 2015, "Order Granting Applicant's Request for Access to Criminal Histories of Jurors"). As testified to by the Solicitor in this case, CJIS information is not for dissemination once received by the State. The State introduced as Respondent's Exhibit 2 to the May 12-13 hearing in this matter the security policy and information sheet directing that these criminal histories not be physically duplicated or disseminated. This policy additionally instructs on how to specifically destroy these rap sheets once the timeframe for using them expires. (Resp. Ex. 2, May 12-13, 2016, PCR Hearing). Even though similar documents may be produced (as by the subpoena issued for purposes of this action), Applicant could not have access to that information at the time of trial. And, to the extent access to similar information has been granted by this Court for purposes of this litigation, such is to remain under seal, with replication and dissemination to inappropriate parties forbidden in accord with FBI policies.

The evidence that is relevant to this Court's review remains in the form of testimony presented at each installment of the PCR hearing to the extent it pertains to Applicant's trial counsel's performance, any alleged prejudice derived therefrom, and any evidence which was discoverable at or before the time of Applicant's May 2009 trial.

3. Defining the Specific Standard of Review

The outcome as to each ineffective assistance of counsel claim pursued by Applicant in the Post-Hearing Brief is resolved by reference to the *Strickland* deficiency-and-prejudice standard.

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 2064 (1984). But it is not just a purported error that controls whether relief may be granted. Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, 466 U.S. at 694, 104 S. Ct. at 2068. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.*, 466 U.S. at 691, 104 S. Ct. at 2066.

Batson procedure is certainly relevant to this Court's determination of whether trial counsel rendered deficient performance and any prejudice derived therefrom. It is unconstitutional for either the prosecution or defense to strike a venire person on the basis of race or gender. *J.E.B. v. Alabama,* 511 U.S. 127, 114 S.Ct. 1419 (1994); *Georgia v. McCollum,* 505 U.S. 42, 112 S.Ct. 2348 (1992); *State v. Shuler,* 344 S.C. 604, 545 S.E.2d 805 (2001). This prohibition derives from the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Id.* Upon motion by either party, *Batson* provides a mechanism for the trial court to evaluate whether a party executed one or more of its peremptory challenges in a manner in violation of the Equal Protection Clause. "When one party strikes a member of a cognizable racial group or gender, the trial court must hold a *Batson* hearing if the opposing party requests one." *State v. Shuler*, 344 at 615, 545 S.E.2d at 810. South Carolina restated its application of *Batson's* three-prong test in *State v. Inman*:

> First, the [the party asserting the *Batson*] challenge must make a prima facie showing that the challenge was based on race [or gender]. If a sufficient showing is made, the trial court will move to the second step in the process, which requires the [party opposing the *Batson*] challenge to provide a race [or gender] neutral

> explanation for the challenge. If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the [party asserting] the challenge has proved purposeful discrimination.

409 S.C. 19, 25, 760 S.E.2d 105, 108 (2014) (alterations in original) (quoting *State v. Giles*, 407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014)).

In order to make the initial prima facie showing, a movant is required to note that the strikes' proponent exercised peremptory challenges to remove venire members of a particular race or gender. *Batson v. Kentucky,* 476 U.S. at 96, 106 S.Ct. at 1712. The movant "is entitled to rely on the fact, as to which there can be no dispute that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Id.* (quoting *Avery v. Georgia,* 345 U.S. 559, 563, 73 S.Ct. 891, 892 (1953)).The movant may point to particular circumstances in his opponent's jury strike which give rise to an inference of discrimination, such as demonstrating to the trial court that his opponent exercised a "pattern" of strikes against a particular race or gender. *Id.* at 96, 106 S. Ct. at 1723. The showing required in this jurisdiction is light: "...the trial judge must hold a *Batson* hearing when members of a cognizable racial group or gender are struck and the opposing party requests a hearing." *State v. Adams,* 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996), *overruled on other grounds by State v. Giles,* 407 S.C. 14, 754 S.E.2d 261 (2014).

Further, establishing a pattern of discrimination does not require a showing that every potential juror of a specific race or gender was struck by a party. In finding a prima facie case has been made, the relevant inquiry is not whether it is more likely than not that the peremptory challenges, if unexplained, were based on an impermissible bias. *Johnson v. California,* 545 U.S. 162, 164, 125 S.Ct. 2410, 2413-14 (2005). "[A] prima facie case of discrimination can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives 'rise to

an inference of discriminatory purpose.'" *Id.* at 169, 125 S.Ct. at 2416. "The [remainder of the] *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." *Id.* at 172, 125 S.Ct. at 2418. "In deciding whether the [movant] has made the requisite showing, the trial court should consider all relevant circumstances." *Batson* at 96, 106 S.Ct. at 1723.

The neutral reason the motion's opponent provides for each strike need not prove persuasive or plausible. *State v. Inman,* 409 S.C. at 26, 760 S.E.2d at 108 (citing *Purkett v. Elem,* 514 U.S. at 768, 115 S.Ct. at 1769). "The explanation must only be 'clear and reasonably specific such that the [party asserting the *Batson* challenge] has a full and fair opportunity to demonstrate pretext in the reason given." *Id.* (alterations in original). "In contrast, step three of the above analysis requires the court to carefully evaluate whether the party asserting the *Batson* challenge has proven racial discrimination by demonstrating that the proffered race-neutral reasons are mere pretext for a discriminatory intent." *Id.* at 27, 760 S.E.2d at 108.

Applicant argues the Solicitor engaged in prosecutorial misconduct when using peremptory strikes in Applicant's jury selection. However, "'[f]or more than a century, th[e Supreme] Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause.'" *Miller-El v. Dretke*, 545 U.S. 231, 239, 125 S.Ct. 2317, 2324 (2005) (quoting *Georgia v. McCollum*, 505 U.S. 42, 44, 111 S.Ct. 1364, 2348 (1991)).

The cognizable claim rests on the sufficiency of the *Batson* motion made at trial. Even if Applicant could show some error in counsel's representation at trial, he must show *Strickland* prejudice. In the *Batson* context, *Strickland* prejudice is often impossible to show due to the nature of the equal protection error. See, for example, *Young v. Bowersox,* 161 F.3d 1159, 1160 (8th Cir. 1998) (rejecting call to presume prejudice in *Batson* context); *Cabrera v. State,* 173 A.3d 1012,

1021–22 (Del. 2017) ("even if we assume a *Batson* violation, the Superior Court correctly held that Cabrera was not relieved of showing prejudice under *Strickland*.); see also *United States v. Lee*, 715 F.3d 215, 223 (8th Cir. 2013) ("Bias will not be presumed simply because some jurors were of a different race than the defendant."). *Cf. Weaver v. Massachusetts*, 137 S. Ct. 1899, 1913 (2017) (even if an actual "structural error is raised in the context of an ineffective-assistance claim … petitioner must show prejudice in order to obtain a new trial.").

4. Even if Available for Review, the Freestanding Allegations Lack Merit Based on the Record

Applicant cannot succeed in demonstrating that he is entitled to relief based on an ineffective assistance of counsel claim. Applicant makes a number of allegations against the Solicitor and questions her integrity and character.[16] These accusations are unsupported by the record before this Court.

First, this Court must assign deference to the credibility determination which accompanies the trial court's ruling regarding the Solicitor's representations at the *Batson* hearing. "A trial court

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[16] Applicant asserts the Solicitor's reasons for striking potential jurors "smacks of racial pretext" and repeatedly assigns nefarious cause to particular portions of the voir dire record. (Applicant's Brief pp. 9-12 (Solicitor "just assumed" one juror "would have financial difficult given her status as a 'single mother' that is completely unsupported by the record.") ("questioning [of a juror] was calculated to produce answers to serve as a basis for her disqualification") ("Clearly this question was calculated to make [a juror] pause and generate equivocation that she then used to justify her strike of her.") ("since Solicitor Wilson did not ask a single juror about convictions, yet seated some with convictions, it is clear that Solicitor Wilson is using convictions as pretext")); (*see also id.* at 24 n.5 ("Why would number of children be relevant to a juror's qualification to sit on a jury except to provide some information a solicitor could use to make a gender based discriminatory strike?")).

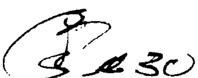
Applicant deposed the Solicitor and called the Solicitor as a witness during the evidentiary hearing. Applicant had every opportunity to ask the Solicitor the basis for questions she asked during voir dire. Applicant likewise had every opportunity to ask the Solicitor the basis for her use of peremptory strikes at Applicant's trial and to call the jurors about potential undisclosed histories. Applicant chose not do so.

finding regarding the credibility of an attorney's explanation of the ground for a peremptory challenge is "entitled to 'great deference'" when reviewed. *Davis v. Ayala,* 135 S. Ct. 2187, 2199 (2015) (citing *Felkner v. Jackson*, 562 U.S. 594, 598, 131 S.Ct. 1305 (2011), quoting *Batson*, 476 U.S., at 98, n. 21, 106 S.Ct. 1712)); *see also Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S. Ct. 1203, 1208 (2008) (only in "exceptional circumstances" should a reviewing court overturn the trial court's "determinations of credibility and demeanor").

Second, Applicant fails to mention the Solicitor's own testimony offered at the PCR hearing. That testimony plainly contradicts the rank speculation appearing in Applicant's brief:

> Q. Have you ever trained any attorney to strike solely on the basis of race or gender?
>
> A. No. Not solely or not in any way.
>
> Q. And do you believe you should?
>
> A. No, I don't think you should.
>
> Q. And are you careful not to?
>
> A. I am careful not to.
>
> Q. Because it's not right?
>
> A. Because I don't think it's right. I don't think it's right for the defendant. I don't think it's right for the juror who has a right to be a part of our system.
>
> Q. It's not a legal maneuver, is it?
>
> A. It is not.

Further, the Solicitor testified she did not go to any educational materials in the office and did not need to go such materials:



> A. … I knew that we didn't need to strike on the basis of race and we didn't need to strike on the basis of gender and we didn't. I didn't need to go to the desk book to learn that.
>
> Q. Because that is actually a moral decision for you?
>
> A. It is.

The credibility of that testimony is further corroborated by the trial record made at the time of the *Batson* motion and ruling finding the reasons for the strike were not race motivated. Applicant's speculation is also dispelled by defense counsel's responses at the original *Batson* hearing, and defense counsel's revisiting of the issue in light of the record as reflected in his PCR testimony. There is no cause to conclude the factually supported reasons were pretext.

Third, a comparative juror analysis does not demonstrate that the Solicitor acted in the manner speculated to in Applicant's brief. In particular, Applicant's allegation Juror 209 had a criminal history which was not disclosed for a proper comparative analysis does nothing to show a false statement was made during the *Batson* proceedings. The record[17] Applicant references shows Juror 209's name was used as an alias; there are different dates of birth between the record individual and Juror 209's information in the state court record; there are vastly different locations for a span of activity (Alaska rather than South Carolina); and, employee and residence information for Juror 209 obtained during the 2009 trial proceedings does not square with the Alaska entries. Further, this Court declines to assign an improper motive to a prosecutor based on reliance upon a report that is later determined to be incorrect or incomplete. This is not a matter of evolving reasons which smack of pretext. *See generally Foster v. Chatman,* 136 S. Ct. 1737, 1751 (2016) ("… the prosecution's principal reasons for the strike shifted over time, suggesting that those

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[17] The face of the record cautions that the information, in addition to being restricted, is not conclusive: "… The FBI cannot guarantee that this record concerns the person in whom you are interested."

reasons may be pretextual"). The basis for the strikes have been a part of the public record since the 2009 trial. This is not a record showing the reasons at trial have been contradicted by the facts of trial. *Id.,* 136 S. Ct. at 1751 ("...in evaluating the strike of Garrett, we are not faced with a single isolated misrepresentation" but several instances where the reasons were in tension with the record of voir dire responses). The trial court ruling on this underlying issue is founded in fact and includes a finding of credibility equally supported in fact. Applicant wholly fails in his burden of proof.

Applicant has relied upon *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317 (2005), throughout this proceeding. That case examined a Texas prosecutor's use of ten peremptory strikes, all against African-Americans, resulting in exclusion of "91% of the eligible African-American venire members" for trial. *Id.,* at 241, 125 S.Ct. at 2325. The facts also showed the prosecution's use of "a procedure known in Texas as the jury shuffle" where either side could "literally reshuffle the cards bearing panel members'' names, thus rearranging the order in which members of a venire panel are seated and reached for questioning." *Id.* at 253, 125 S.Ct. at 2332-33. In that case, the prosecution repeatedly shuffled the cards each time a series of African-Americans were seated at the front-end of a venire panel. *Id.* at 254, 125 S.Ct. at 2333. No such practice exists in South Carolina. Thus, a key basis for the United States Supreme Court's in *Miller-El* is completely missing from the process in this State and this record. But even so, the case is critical for marginalizing bare statics – a key portion of Applicant's argument to this Court. The Supreme Court expressly rejected that the 91% statistic presented during the collateral proceeding held any significant weight and forwarded a comparison of juror to juror upon known facts. *Id.,* at 241, 125 S. Ct. at 2325 ("More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed

to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step.").

Applicant's counsel presented a statistical analysis in furtherance of this single claim: Solicitor Wilson engaged in misconduct by committing a *Batson* violation. The best evidence lies in the trial record. Solicitor Wilson placed her reasons for exercising each strike on the record. She also testified in the PCR proceedings that she believed in upholding the integrity of the judicial system and of her own moral code, and would not exercise peremptory strikes based on race or gender. And, as noted, Applicant failed to confront or challenge the Solicitor as to any purported inconsistency in her reasons, and none is readily apparent. The record reflects the actual reasons for her use of strikes, and they were:

First Challenged Strike

(1) Juror 10 for Selection Purposes (Juror #101): "a CNA" and single mother who would be missing work, or having work conflicts, by serving on the jury, and said at one point during *voir dire* that she couldn't vote for death.

Defense counsel's notes confirm the juror's information to the judge that she "need[ed] to be @ work 1pm" and also "backs up" when considering whether she could impose death.

Second Challenged Strike

(2) Juror 11 for Selection Purposes (Juror #92): "She has a number of charges for prostitution, a charge for shoplifting, a concealed weapon...." The trial judge inquired of the Solicitor whether another juror has any record, to which the Solicitor replied: "Not that many or not for those things."

The FBI records apparently did not return any convictions for Juror #92. However, Respondent introduced at the May 2016 hearing, certified copies of the arrests.

Third Challenged Strike

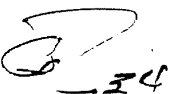
(3) Juror 16 for Selection Purposes (Juror #315): "... she first said that she could never give the death penalty, then she said that she could, she didn't answer the question on her questionnaire and she seemed to struggle with ..." The trial judge noted "I recall that she was inconsistent and I find that to be a race-neutral and gender-neutral reason."

"A trial court is best situated to evaluate both the words and the demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor who exercised those strikes." *Davis v. Ayala*, 135 S. Ct. at 2201. In addition to the trial court's conclusion, this Court also has defense counsel's testimony at the PCR hearing and the record in both proceedings – trial and PCR. There is no inconsistency or factual error to indicate pretext. Nevertheless, Applicant presses arguments that the reasons "smack[] of racial pretext." None of his arguments support that conclusion.

Arguments Made for the First Time in PCR

Initially, Respondent notes Applicant does not challenge the prosecution's strike of Juror #315. At the beginning of his argument, any "pattern" evidence within the strikes here is diminished. He does, however, make new arguments for comparative juror analysis regarding Juror # 101 and Juror #92. His arguments suffer from lack of evidence and lack of specificity in the analysis.

Applicant argues Juror #101 "was unequivocal in her responses that" work would pose no problem. He does not contest that defense counsel's note indicated at least one concern about being at work at a particular time, 1:00 pm. He does not contest that the juror's information



reflected she was single. He argues though, that Juror #101 was not asked questions about being a "single mother with two children and that she would be missing work throughout the week…" Applicant fails to consider the information in this pointed exchange:

> Q. I believe that you mentioned to one of the bailiffs that you have to work tonight?
>
> A. Yes, I do.
>
> Q. Do you always work nights?
>
> A. I do -- well, it just depends.
>
> Q. So for the next few weeks you aren't scheduled nights, or you are or ---
>
> A. I am scheduled for nights. In fact, I picked up overtime before knowing ---
>
> Q. What does that mean, you picked up overtime?
>
> A. I have, like for the next couple of weeks I'm going to be working and I think I only have one day off.
>
> Q. What are your hours for the next few weeks?
>
> A. All night shift.
>
> Q. Is that 5:00 to 5: 00 or 7:00 to 7:00?
>
> A. I work 7:00 p.m. to 7:00 a.m.
>
> Q. Okay. Do you think that would cause you a hardship, serving on the jury if after you got off work at 7:00 a.m. that you had to come into court at 9:00 or so and spend the day in court with us?
>
> A. It probably would as far as me getting sleep. I'd need to let my supervisor know to reassign the schedule.
>
> Q. So you could get off of work for the next couple of weeks
>
> A. Exactly.

Q. --- if need be?

A. Yes.

Q. Okay. So if the Judge told you that it wouldn't be appropriate for you to work after leaving after your service during the day, you would be able to have that rearranged?

A. Yes, I could.

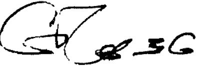
Q. That would make for quite a long day if you had to go to work and then sit in here and do all this all day?

A. Yeah.

Without question, there was a concern that the juror would try to work, and, logically, if she was "picking up" overtime, there is a need for additional work. Applicant has shown no pretext.

Applicant next argues the "equivocation" the Solicitor cited was not more than expressed by accepted Jurors 306 and 221 he claims "expressed stronger reservations about imposing the death penalty than" Juror #101. The voir dire transcript demonstrates that the question was posed because the prosecutor "couldn't read [the] handwriting on the question number forty-seven" on the questionnaire which asks, "What is your opinion, if any, about the death penalty." The uncertainty is reflected in the record. Moreover, the juror did equivocate, saying both that she "could consider" but "wouldn't vote for" the death penalty. Applicant also includes Juror #92's answer without acknowledging she was struck. That could not be evidence of a similarly situated juror who was seated. Applicant's argument simply proves what the Supreme Court has recently again observed:

> In a capital case, it is not surprising for prospective jurors to express varying degrees of hesitancy about voting for a death verdict. Few are likely to have experienced a need to make a comparable decision at any prior time in their lives. As a result, both the prosecution and the defense may be required to make fine



> judgment calls about which jurors are more or less willing to vote for the ultimate punishment. These judgment calls may involve a comparison of responses that differ in only nuanced respects, as well as a sensitive assessment of jurors' demeanor. We have previously recognized that peremptory challenges "are often the subjects of instinct," *Miller–El v. Dretke,* 545 U.S. 231, 252, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (citing *Batson,* 476 U.S., at 106, 106 S.Ct. 1712 (Marshall, J., concurring)), and that "race-neutral reasons for peremptory challenges often invoke a juror's demeanor," *Snyder,* 552 U.S., at 477, 128 S.Ct. 1203. A trial court is best situated to evaluate both the words and the demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor who exercised those strikes. As we have said, "these determinations of credibility and demeanor lie peculiarly within a trial judge's province," and "in the absence of exceptional circumstances, we [will] defer to the trial court." *Ibid.* (alterations and internal quotation marks omitted). "Appellate judges cannot on the basis of a cold record easily second-guess a trial judge's decision about likely motivation." *Collins,* 546 U.S., at 343, 126 S.Ct. 969 (BREYER, J., concurring).

Davis v. Ayala, 135 S. Ct. at 2201.

He has not proven the trial judge was incorrect either in factual finding or legal conclusion.

Applicant next argues the Solicitor's questioning was "calculated to produce answers to serve as a basis for her disqualification." He takes exception to the Solicitor asking repeated questions concerning the juror's work schedule. However, this underscores the Solicitor's concern was the work schedule. It is evidence there was no improper motive. Applicant argues other jurors worked, but cites to no indication that any of the other jurors asked about having to leave court proceedings, or that others had expressed it would difficult for them to work at night and participate. They are not similarly situated. He also takes exception to the question posed to the jury about whether the juror could "put a man to death." It is an unsurprising question for voir dire in a death penalty case. It is also echoed in the other questions. [voir dire of Juror #209], "Could you also sign your name to the warrant or verdict commanding someone's death?").

As to Juror #92, Applicant argues the Solicitor's reasons (the listed crimes) "smack of racial pretext." He first argues the convictions did not concern the Solicitor because no questions were posed. However, the Solicitor was already aware of those convictions, and it is unclear as to what should be asked to explore the conviction in reference to the discretionary *voir dire* for discretionary strikes. And, as Applicant concedes, the prosecution did not ask any juror about his or her conviction. Thus, Juror #92 was not treated differently. His argument then progresses to a comparison with a seated juror, Juror #209. Applicant asserts this juror is Caucasian, had a record, the Solicitor knew she had a record, and she was not struck. The trial court record supports the juror is Caucasian, and was seated. Applicant's other assertions are without merit.

The FBI record obtained post-trial, which Applicant relies upon, shows Juror 209's name was used as an *alias*, not that the record reflects the juror's background. Moreover, there are significant differences in information: there are different dates of birth between the record of the individual who used the juror's name as an alias, and Juror 209's information in the state court record; there are vastly different locations for a span of activity (Alaska rather than South Carolina); the FBI record shows a 5'7" blond individual while defense counsel's notes reflect a petit dark haired individual presented at the 2009 trial; and, the employee and residence information for Juror 209 obtained during the 2009 trial proceedings does not square with the Alaska entries. Applicant failed to call the Juror during the PCR proceedings to clarify the discrepancies.

Applicant presented no evidence nor does he have a sound basis for asserting the Solicitor "knew" of a record in Alaska. To the exact contrary, there is no indication Juror #209 had worked or lived in Alaska. Her information reflected in the record on appeal shows she lived only in the Charleston and Berkeley areas for approximately 49 years. In fact, the defense asked the juror

about her work at MUSC in Charleston. Applicant has wholly failed in his burden of proof of even showing a conviction exists for Juror #209, much less that the Solicitor knowingly omitted the information. Applicant has not shown the juror was similarly situated.

Applicant further posits three white males had DUI and DUS convictions. He again does not show the jurors were similarly situated – he does not show multiple convictions, or a gun conviction in any of the records. The evidence is consistent with the Solicitor's truthful response that other jurors seated did not have the same type of history or quantity of convictions.

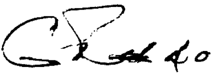
Applicant abandons any attempt to question the strike of Juror #315, and with good reason. The strike is well supported by the record. While defense counsel did not mark a score for that juror that is evidenced in the record, her hesitation is reflected in the record, as Judge Dennis noted at the time of the *Batson* motion. The pattern he attempts to show in regard to the three strikes is undermined by the record itself.

Applicant next argues other later cases that have no bearing on the reasons presented. That has been previously addressed above. The information is from after the 2009 trial and irrelevant to the *Strickland* analysis.

He next argues the Prosecution Commission programs suggest methods for hiding improper reasons for striking jurors. He omits entirely the evidence that the Solicitor did not even utilize or rely upon any such materials for the strikes. Further, under *Daise*, the information does not support his claim.

Lastly, Applicant turns to bare statistics. This is even further removed for the comparative juror analysis on the *Batson* step three analysis at issue. *Hernandez v. New York, supra; Juniper v. Zook, supra.* The study from the Michigan State College of Law, twice amended during these proceedings, falls outside the zone of relevancy. Bare statistics are not demonstrative of causation

for any disproportion in strikes and a jury venire's racial composition. The statistics submitted in this case are nothing more than the creation of a ratio between the number of Caucasians stricken versus the number of African-Americans stricken. They do not address even the mere existence of additional reasons for striking jurors; they do not address the entire practice of the Ninth Circuit Solicitor's Office; nor do they address the reasons that strikes were used in Applicant's case which were offered at trial and available in the record. To be sure, statistical studies – indeed, statistical studies undertaken by these same individuals– have been academically considered; however, their other studies are valued precisely because they have taken variables into account. See Ann M. Eisenberg, *Removal of Women and African Americans in Jury Selection in South Carolina Capital Cases,* 1997-2012, 9 Ne. U.L. Rev. 299, 322–23 (2017) (describing the North Carolina study by O'Brien and Grosso, "Their study used detailed, descriptive information about one sample of venire members in order to control for factors other than race that may have accounted for the decision to strike."). In a 2010 report, Professors O'Brien and Grosso wrote: "To account for other factors that might bear on the decision to strike, more detailed information about individual venire members must be considered." Barbara O'Brien & Catherine M. Grosso, *Report on Jury Selection Study*, 8 (2011), http://digitalcommons.law.msu.edu/facpubs/331/. Here, variables are sorely missing, yet Applicant still depends on the results. There has been no explanation as to why this bare study should be accepted in light of the author's own recognition that variables "must be considered." *Id.* See also David C. Baldus et. al., *Statistical Proof of Racial Discrimination in the Use of Peremptory Challenges: The Impact and Promise of the Miller-El Line of Cases As Reflected in the Experience of One Philadelphia Capital Case,* 97 Iowa L. Rev. 1425, 1454 (2012) ("An ideal model of proof is based on an analysis of valid data for all relevant variables.").



Respondent presented Dr. Robert Michael Norton, retired statistics and mathematics professor from College of Charleston. Dr. Norton critiqued the methodology used to create the MSU report and amended report: He had the following comments:

- He critiqued the report as being incomplete from a mathematical and statistical perspective because the sample used, the "universe of cases" was not a true "random sample" as is accepted in statistics;
- He criticized the report as incomplete and simple because it didn't speak to other factors that go into making a strike;
- He also critiqued the report as failing to show causation. He said it merely showed a correlation between strikes and race which he likened to a type of conclusion that is "over simplistic" for the proposition stated;
- He also testified it would not be sound practice to include the same case twice as was done in one instance (Beyah) because some variables going into the jury pool would overlap and by counting each of two strikes occurring in one case, you're counting data twice without qualifying it.

In particular, when asked, from a statistical perspective,[18] if a court should rely on the "study to determine whether the Ninth Circuit Solicitor's Office routinely excluded black juror in jury selection up to and including Mr. Dickerson's trial in May 2009," he responded:

> Not by itself. There needs to be - - some of the concerns that I have need to be aired including: correlating variables, the idea of selecting the populations, how you pick a sample.

[18] The professor testified that the studies referenced by Professors O'Brien and Grosso were not published in statistical venues.

This point is also underscored when reviewing the remainder of the process in this case. In the main jury of twelve, the State had available five strikes. The State exercised four strikes. The defense challenged only three of those strikes. The "study" does not reflect that. Moreover, three African-American jurors were presented and the State, with available strikes, did not exercise those strikes. The "study" does not reflect that. This Court also heard how the defense used all of its strikes – exhausted all 10 strikes – on Caucasian jurors; a rate of 100%. In fact, in subsequent testimony, defense counsel explained the basics of his strike system and explained, though the number rests at 100% for his strikes against Caucasians, the strikes were for specific reasons not pretext:

> So even though I acknowledge all 10 strikes were used on Caucasian jurors from their answers these were jurors we felt who would be very pro prosecution in the case, pro death penalty, not open to mitigation and that's why we used that rating system so hopefully it is gender and race neutral and then we can justify that if a motion is made.

Defense counsel also acknowledged that the Solicitor could certainly have made a motion based on the number of strikes against Caucasian jurors; but the individual reasons would have controlled why the jurors were struck.[19] Professor O'Brien did not "analyze defense strikes" in the "study," though she admitted defense strikes "shape the jury" as well as State strikes. Further, Professor O'Brien agreed the jury makeup "appears to be roughly proportional to the population according to the census," with three African American jurors seated and nine Caucasian jurors

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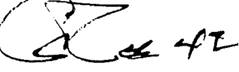
[19] For clarity, Respondent reviewed with defense counsel during one of the PCR hearings a portion of the evidence of the rating system as reflected in the Record on Appeal filed previously in the direct appeal proceedings which reflected high ratings on the jurors struck. (See May 12-13, 2016 PCR Tr. p. 203, line 9 – p. 205, line 16). Defense counsel testified that when teaching on capital jury selection, he advises people "to put gender and race and ethnicity aside and really listen to their answers," and, based on his review of the materials, he "would have been able to respond" to any motion against his strikes based on individual ratings on the jurors. (May 12-13, 2016 PCR Tr. p. 206, lines 4-19).



seated. All of these factors shaped the jury selection in this case. Further, and important to the instant issue, the context sheds additional light on the weight that should be given any statistical study.

Nothing in the record undermines the factual basis put forth by the Solicitor for her use of peremptory strikes in this case. Nothing in the record undermines the ruling by Judge Dennis. Nothing in this record undermines the credibility assessment by Judge Dennis. Any evidence outside of the record included in Respondent's discussion is irrelevant.

The statistical study presented in this case failed to give any acknowledgment to the strikes that were considered on *Batson* motions, and were found not to be racially motivated. This is important because the specific strike at issue had already been given judicial, specific consideration. This is evidence of bias or result-focused presentation. It is akin to combining non-errors to obtain reversal which is not recognized. *See Moore v. Reynolds,* 153 F.3d 1086, 1113 (10th Cir. 1998) ("Cumulative error analysis applies where there are two or more actual errors; it does not apply to the cumulative effect of non-errors."); *see also United States v. Basham,* 561 F.3d 302, 330 (4th Cir. 2009) ("When 'none of [the] individual rulings work[ ] any cognizable harm, ... [i]t necessarily follows that the cumulative error doctrine finds no foothold.'") (alterations in original) (citation omitted). Additionally, the information known also shows the prosecutor routinely did not use all available strikes. Rather, the numbers are based on the simple strike ratio tied to race. Professor Grosso testified, when confronted with the fact that in one case in the original study that the Solicitor did not exercise any strikes:

> ... what you're looking at is the pattern over time because in any one case, you might see a particular pattern that just has something to do with the particular jurors that came into the box that day. When you can look across a lot of cases and you see it's a consistent pattern, that doesn't necessarily mean you see it in every single case, but consistent pattern, that's where the -- - that's where the P value

> is sort of a way of measuring whether or not you've actually like tapped into something real.
>
> Q. Okay. Then it goes back to that more information is generally better; correct?
>
> A. Yes.

Our appellate court has viewed with disfavor the use of gross figures, statistics, and probabilities in support of post-conviction relief allegations, particularly where "the petitioner has elected not to consider various intangible factors entering into prosecutorial decisions." *Thompson v. Aiken*, 281 S.C. 239, 241, 315 S.E.2d 110, 111 (1984).[20] In fact, the Thompson court analysis takes care to show the irrelevance of statistical patterns in post-conviction relief actions designed to focus on real errors and actual prejudice:

> The record before this Court includes the full transcript of the post-conviction proceedings. Therein we find much testimony designed to support questions which we have declined to hear on this appeal. Among these questions is petitioner's allegation and attempted showing of a racially discriminatory pattern in prosecutorial decisions to seek a sentence of death. The petitioner submitted to the post-conviction court a deposition taken of Professor Raymond Paternoster, University of South Carolina, bolstered by statistical data which he had compiled. We feel it necessary to comment upon this submission in light of our concern expressed in *State v. Truesdale,* 278 S.C. 368, 371, 296 S.E.2d 528, about "unwise depletion of the obviously limited public funds available for the defense of indigents." Because we are convinced that the issue which petitioner sought to raise is not appropriately framed for

[20] In this respect, Respondent maintains its objection to the introduction of statistics in support of any allegations contained in the post-conviction relief application. Respondent also maintains its objection to the use of statistics upon the basis that statistics are not relevant to the third step of the recognized *Batson* analysis. That is, statistics may assist a movant in demonstrating a *prima facie* case for its *Batson* motion, but once the proponent of the strikes replies with its reasons for exercising its preemptory strikes, statistics no longer play a role. The outcome of the motion beyond the first step of the procedure is not aided by statistics because they do not explain why a party's enumerated reasons for striking jurors are, or are not, race and gender neutral. Statistics do substantively answer whether the proponent of the strikes indeed violated *Batson* by refusing to strike other similarly situated jurors.

> resolution in the context of a capital case, we would recommend to the bench and bar that judicial resources be applied to more fruitful endeavors.
>
> In the record before us, the petitioner has made an elaborate presentation of testimony and data purporting to show that prosecutors in this State consciously and systematically choose to seek the death penalty in a racially discriminatory manner. As noted by the post-conviction court in its Order, the petitioner has relied upon gross statistics and probabilities. The petitioner has elected not to consider various intangible factors entering into prosecutorial decisions. The petitioner has provided no direct testimony to support his charge that impermissible influences routinely distort the application of capital punishment throughout this State.
>
> In the final analysis, the allegation of statewide "patterns" raised by a specific capital defendant has no real bearing upon his individual guilt or innocence nor upon the correctness of any sentence imposed in his particular case. The commission of an aggravated murder places every potential defendant at risk; he may indeed be ultimately sentenced to death. On the other hand, he may never be caught. He may never be tried, for any number of reasons. He may plead guilty or be tried on a lesser charge. A jury may, for reasons of its own, elect to acquit him or, in sentencing, elect to spare his life. Our role as an appellate court is not to base rulings upon such possibilities. Far less are we entitled to intrude upon the operations of executive officers when we have no more than general data comp[il]ed for academic purposes.

281 S.C. at 241–42, 315 S.E.2d at 111.

In short, the *Thompson* court rejected statistical studies that result in simple possibilities. The Court found and cautioned in other cases that such statistics should give way to consideration of "real and substantial issues in future capital cases." *Id.*

Though *Thompson* dealt with a determination of death penalty notices, the logic is applicable in this case. Peremptory strikes are by nature defined as subjective, nuanced and individual juror fact-driven. *See Davis v. Ayala, supra.* Moreover, *Batson* does not simply suggest but *requires* individual consideration over broad strokes of possibilities. *Johnson v. California,* 545 U.S. at 172, 125 S. Ct. at 2418 ("The *Batson* framework is designed to produce actual answers

to suspicions and inferences that discrimination may have infected the jury selection process."). Of further note, the issue here is the third step of the *Batson* analysis not general prima facie evidence. Raw statistics simply do not apply. *Juniper v. Zook,* 117 F. Supp. 3d 780, 799 and n.10 (E.D. Va. 2015), *motion for relief from judgment denied,* No. 3:11-CV-00746, 2016 WL 413099 (E.D. Va. Feb. 2, 2016) (statistics demonstrating "the prosecution struck black venire members at nearly three times the rate of white venire members," even if accepted, are irrelevant where reasons for strikes on the record given "statistical disparity between black and non-black jurors goes to the first step of Batson," and "not purposeful discrimination at the third step"); *see also State v. Jacobs,* 32 So. 3d 227, 236–37 (La. 2010) ("we have more than a bare statistical viewpoint to gauge the appropriateness of the peremptory challenges" and finding "after a comprehensive review of these issues, five of the seven state peremptory challenges of non-white prospective jurors did not evince a racially-discriminatory intent. Thus, the statistical argument fails to have merit upon further inquiry."); *State v. Benich,* No. 1 CA-CR 06-0901, 2008 WL 2641309, at *1 (Ariz. Ct. App. Jan. 10, 2008) ("[d]efendant cites no case ... in which a *Batson* challenge was granted based on statistics alone ... Although there might be a case in which the statistics alone would be sufficient, it is unlikely that in such a case there would not be other factors supporting the inference of intentional discrimination," citing *Miller-El*"); *Jackson v. State,* No. 2-09-023-CR, 2010 WL 1509692, at *8 (Tex. Ct. App. Apr. 15, 2010) ("Although the statistical analysis demonstrates that the State used a disproportionate number of peremptory strikes on African-Americans, our comparative analysis of venire member 3 demonstrates that the State's reason for striking her was not pretextual, and our analysis of the State's remaining strikes on African-American venire members does not demonstrate discriminatory intent.").

This position holds true to the Supreme Court's finding in *Miller-El.* After acknowledging statistics that calculated "prosecutor's used their peremptory strikes to exclude 91% of the eligible African-American venire members," the Court still considered the statistics "bare" statistics that did not prove the asserted motive: "More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." *Miller-El v. Dretke,* 545 U.S. 231, 241, 125 S. Ct. 2317, 2325 (2005). In short, the Supreme Court has instructed "that proper analysis of a *Batson* claim requires that a court engage in comparative juror analysis…." *United States v. Barnette,* 644 F.3d 192, 205 (4th Cir. 2011). Applicant's reliance on bare statistics is misplaced.

5. The Ineffective Assistance of Counsel Allegations Lack Merit Based on the Record

When the PCR claim is properly analyzed under *Strickland*, the evidence shows Applicant's trial counsel did not perform below the Constitutionally-mandated standard as alleged. The record indicates defense counsel did not have FBI criminal history information at trial, or the privileged prosecutorial training materials created for use by prosecutors in South Carolina. As noted above, training materials – both for the prosecution and defense – are generally considered protected. Moreover, our case law holds that a defendant is not entitled to the criminal history information.

In *State v. Childs,* 299 S.C. 471, 474, 385 S.E.2d 839, 841 (1989), the Supreme Court of South Carolina held a defendant was not "entitled to criminal records checks or records of arrest" as "[n]o right to discovery exists in a criminal case absent statute or court rule" and there is no statute or court rule requiring a disclosure of this information...." This decision still holds true.

Rule 5 (a)(1), S.C.R.Crim.P., sets out the information subject to disclosure by the State, and does not include juror criminal histories run in preparation for jury selection. In fact, Rule 5 (a)(2), specifically reserves the protection of other documents "made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case...." *See also State v. Myers,* 359 S.C. 40, 49, 596 S.E.2d 488, 493 (2004) ("Rule 5(a)(2) SCRCrimP, exempts from discovery work product, or 'internal prosecution documents made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case....'"); *State v. Matthews,* 296 S.C. 379, 384, 373 S.E.2d 587, 591 (1988) (pre-Rule 5 case finding "[b]ackground information on the venire, if any, held by the solicitor here qualified as 'internal prosecution' matter connected with the prosecution of the case. As such it was not subject to disclosure."). *Accord Tobaccoville USA, Inc. v. McMaster,* 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010) (discussing "work product privilege" in civil case context: " in determining whether a document has been prepared 'in anticipation of litigation,' most courts look to whether or not the document was prepared because of the prospect of litigation.") (internal citations omitted). Other jurisdictions follow the logic specifically in regard to arrest records. *See, for example, Kelley v. State,* 602 So.2d 473, 478 (Ala. Crim. App. 1992) ("This court has held that arrest and conviction records of potential jurors do not qualify as the type of discoverable evidence that falls within the scope of *Brady* and that a trial court will not be held in error for denying an Petitioner's motion to discover such documents."); *State v. Weiland,* 540 So. 2d 1288, 1290 (La. App. 5 Cir. 1989) ("Weiland complains because his request for the rap sheets of prospective jurors was denied by the trial judge. A defendant is not entitled to this information.").

To the extent Applicant would allege the rap sheet was incorrect, that would prove nothing in support of the *Batson* motion as it is only discriminatory intent at issue, not correctness in the

record relied upon. Aside from the fact our jurisdiction would not support such a demand, it should be noted a pre-selection request would had to have been for all the potential jurors. This would have been overly broad. NCIC reports on all jurors, even those not selected for the petit jury, are unnecessary. *Cf. State v. Wright,* 803 So.2d 793, 794 (Fla.App. 4 Dist. 2001) (quashing order requiring State to disclose "criminal records of all 100 listed witnesses, notwithstanding the state's notification that it only intended to call 30 of those witnesses"). Such reports contain privileged information that should not be released to an unauthorized user, or may involve other privilege asserted by the database authority. *See generally United States Dept. of Justice v. Reporters Committee For Freedom of Press,* 489 U.S. 749, 765 and 780 (1989) (acknowledging "the web of federal statutory and regulatory provisions that limits the disclosure of rap-sheet information" and as to FOIA request, holding "a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted.'"); *State v. Wright,* 803 So.2d at 795 ("because the defendants/respondents offered no authority to refute the state's claim that it is prohibited from disseminating the NCIC information, we hold that the trial court cannot order the state to produce such information."). *See also State ex rel. Multimedia, Inc. v. Snowden,* 647 N.E.2d 1374, 1378 (Ohio 1995) (denying mandamus to compel release of "rap sheets" noting concession that "NCIC and RCIC [Regional Crime Information Center] 'rap sheets' generated in the investigation of police applicants are prohibited from being released by state and federal law"); *Commissioner of Public Safety v. Freedom of Information Com'n,* 76 A.3d 185, 189 (Conn. App. 2013) ("In Commissioner of Correction v. Freedom of Information Commission, 307 Conn. 53, 68–74, 52 A.3d 636 (2012), our Supreme Court determined that a copy of an NCIC

printout was exempt from disclosure under § 1–210(a) because disclosure was barred by 8 C.F.R. § 236.6 (2007). Although the court did not decide the issue of whether the disclosure of NCIC documents was barred by 28 U.S.C. § 534, Commissioner of Correction v. Freedom of Information Commission, supra, at 53, 52 A.3d 636 nonetheless is instructive. Copies of NCIC documents have been held to be exempt from disclosure under § 1–210(a) because our legislature authorized participation in the compact."). They are not the type of materials which defense counsel would have been granted access to pre-trial.

As to the prosecutorial training materials cited by Applicant, his argument on this issue ignores (1) precedent protecting these documents and (2) that the materials provided are based upon published case law pertaining to *Batson* motions. "The Prosecutor's Handbook" and other prosecutorial training materials were not privy to defense counsel in preparation for Applicant's trial, nor could they be produced pre-trial as a matter of law. As more fully addressed above, the Court of Appeals recent decision directly address this issue in *State v. Daise*, 421 S.C. 442, 461–63, 807 S.E.2d 710, 720–21 (Ct. App. 2017), *reh'g denied* (Dec. 14, 2017). This case, too, supports that even had defense counsel made a successful pre-trial request for the training materials, and utilized them in furtherance of his *Batson* motion, he would not have made a meritorious motion.

Akin to part of the ineffective assistance allegation before this Court, Daise argued "that the court's failure to require disclosure of the State's *Batson* 'handbook' prevented him from making a viable *Batson* challenge." *Id.* at 461-62, 807 S.E.2d at 720. Like Applicant, "Daise subpoenaed the records custodian of the South Carolina Commission on Prosecution Coordination (the Commission) to provide '[a]ll documents regarding jury selection, including but not limited to training documents, training agendas, manuals, policy statements or .

. . advisements, correspondence with current or former prosecutors and circuit court judges.'" *Id.* Daise's capital counsel suggested the State had a "handbook on how to get around *Batson*" and supported his posture with pre-trial expert testimony from a statistician. The statistician testified that "in Beaufort County, African-American males were struck at a rate four and a half times higher than Caucasian males." *Id.*

The appellate court affirmed the outcome of the circuit court's *in camera* review of the Commission's training materials, which found "they did not 'include any abusive instructions or teaching materials, nor use of improper technique,'" and found the materials "generally protected as work-product, as they were created and disseminated in a limited fashion with the purpose of assisting the State's preparations for trial.'" *Id.* at 462-63, 807 S.E.2d at 720. The Court of Appeals specifically found

> the approximately 1000 pages of Commission materials sealed for appellate review revealed nothing encouraging prosecutors to strike jurors for impermissible reasons—race-based or otherwise. The documents include outlines, slideshows, and handouts from various lectures and training sessions. Many discuss the *Batson* framework, and some do provide general advice on how to evaluate jurors. However, nothing in the submitted documents suggests an intent to help prosecutors racially discriminate. In fact, the materials contain statements such as "the critical question is whether or not a juror can give both the State and the defendant a fair trial" and the repeated caution: "DO NOT RELY ON STEREOTYPES & PREJUDICE."

Id. at 463, 807 S.E.2d at 720-21 (footnotes omitted).

The record supports defense counsel made the *Batson* motion in furtherance of his client's right equal protection simply not knowing the precise reason for the strikes. When the reasons were offered, he could determine, as is supported by the record, there was no argument for pretext to be made which is exactly what the trial record reflects.

Additionally, no prejudice flows from any juror-related claim. For all reasons discussed heretofore, Applicant was not denied equal protection as he was tried by a qualified jury and

because the basis for the strikes exercised by the Solicitor befit the known Constitutional requirements of jury selection.

The reasons for the Solicitor's strikes have not been hidden nor are they suspect. The reasons for the strikes have been a matter of records since the 2009 trial. The selection shows careful consideration by both parties, strikes exercised by both parties, and a challenge to just three of the Solicitor's strikes. Those strikes were explained to the satisfaction of the trial judge and still remain fully and fairly supported by the trial record. Applicant has shown no deficient performance by defense counsel. Applicant is not entitled to relief on this issue.

I. Respondent's Position on the Merits: The Lead Poisoning Claim

The sentencing-phase ineffective assistance of counsel allegation most prominently pursued by Applicant during the course of this litigation pertains to the claim that trial counsel "failed to uncover and present evidence of Applicant's significant neurological deficits" in furtherance of mitigation. Specifically, Applicant alleges trial counsel "unreasonably limited the investigation into Mr. Dickerson's early childhood exposure to lead" by failing to follow up with a preeminent expert in the field, Dr. Herbert Needleman, and by failing to provide subtest results to a neuropsychologist for interpretation, thereby eliminating from the jury's consideration the scientific research demonstrating Applicant's blood lead level at earlier ages and any related neurotoxic effects. Applicant argues that the mitigation evidence it proffered at PCR compels this Court to find the mitigation case put forth at trial *Strickland* error and prejudice. Respondent submits the PCR presentation was largely cumulative to the substance of the mitigation presented at trial.

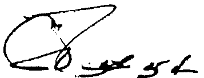
"When determining if want of mitigation evidence resulted in prejudice, we must determine whether the 'mitigating evidence, taken as a whole, might well have influenced the jury's appraisal

of [the defendant's] culpability.'" *Rosemond v. Catoe*, 383 S.C. 320, 326–27, 680 S.E.2d 5, 9 (2009) (citing *Wiggins v. Smith,* 539 U.S. 510, 538, 123 S.Ct. 2527 (2003)) (quoting *Williams v. Taylor,* 529 U.S. 362, 398, 120 S.Ct. 1495 (2000)). "[T]he likelihood of a different result if the [mitigation] evidence had gone in is 'sufficient to undermine confidence in the outcome' actually reached at sentencing." *Rompilla v. Beard,* 545 U.S. 374, 393, 125 S.Ct. 2456, 2468 (2005) (quoting *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052) (alteration in original). Prejudice is therefore determined to exist from the lack of proffered mitigation evidence if trial counsel's "complete failure to present mitigation evidence undermines confidence in the outcome." *Rosemond, supra.*; *see also Jones v. State,* 332 S.C. at 333, 504 S.E.2d at 824 ("The bottom line is that we must determine whether or not Jones has met his burden of showing that it is reasonably likely that the jury's death sentence would have been different if counsel had presented additional information about Jones's mental condition.").

The "error" prong of *Strickland* remains the same: did counsel utilize reasonable professional strategy in pursuing (or abandoning) a particular mitigation presentation. "During the sentencing phase of a death penalty trial, counsel is required to investigate and present meaningful mitigating evidence absent a reasonable strategic choice not to do so." *Weik v. State*, 409 S.C. 214, 234, 761 S.E.2d 757, 767 (2014) (citing *Rompilla v. Beard*, 545 U.S. at 390-93, 125 S.Ct. at 2467-68).. As to Appellant's reliance on specific ABA Guidelines for Appointment and Performance of Counsel in Capital Cases, our courts have found they "may be useful or may offer assistance in the analysis of an issue" in certain instances, but have nonetheless regularly held "these standards are not controlling or dispositive." *State v. Blakely*, 402 S.C. 650, 664-65, 742 S.E.2d 29, 36-37 (Ct. App. 2013); *see also Council v. State*, 380 S.C. 159, 172–73, 670 S.E.2d 356, 363 (2009) (noting that trial counsel's conduct fell below the standards set by the ABA for

the appointment and performance of counsel in death penalty cases). South Carolina courts have "never adopted the ABA guidelines as the standard for prevailing professional norms in South Carolina," instead maintaining that reasonableness of counsel's actions "is best assessed in the broader context suggested by *Strickland*." *Ard v. Catoe*, 372 S.C. 318, 338 n.19, 642 S.E.2d 590, 600 n.19 (2007) (Toal, C.J., dissenting and Burnett, J., concurring with dissent) (majority citing the ABA's standards for defense counsel's performance regarding investigation of a capital case in support of its decision to affirm the PCR court's finding of ineffective assistance of counsel). The United States Supreme Court has consistently maintained that the guidelines are "'only guides' to what reasonableness means, not its definition" nor "inexorable commands" defense counsel must follow. *Bobby v. Van Hook*, 558 U.S. 4, 8, 130 S.Ct. 13, 17 (2009) (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065).

Applicant's proffered mitigation presentation on lead neurotoxicity fails to meet the *Strickland* standard. At the initial installment of the evidentiary hearing, the Court heard from Applicant's experts in detail on lead levels and purported correlative damage to cognitive development (specifically hyperactivity and impulsivity), but the presentation put forth in furtherance of this claim ultimately replicated the mitigation evidence put forward during the sentencing phase of trial, with an added emphasis on lead exposure. Trial counsel added compelling testimony regarding the extent of his investigation into Applicant's known childhood exposure to lead. Defense counsel Jeffrey Bloom testified at two stages of the evidentiary hearing: on December 8, 2015, and on May 13, 2016. His testimony established that counsel investigated the scientific information proffered as mitigation at this PCR hearing. The totality of the testimony demonstrates that Bloom reasonably decided not to more heavily base his mitigation presentation on childhood exposure to lead because Bloom could not uncover or produce enough evidence to

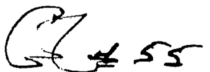


make a more persuasive presentation than was presented on this subject. Applicant fails to demonstrate prejudice flowing from the manner and extent to which his childhood exposure to lead was presented at trial. The mitigation evidence proffered at PCR does not make it more likely than not that the jury would have returned with a recommendation for a different sentence.

1. The Trial Evidence on Lead

Dr. Robert Phillips, a forensic psychiatrist, offered testimony pertaining to social factors and individual behaviors indicative of Applicant's emotional maturity at certain stages in his life. Regarding the earliest phase of Applicant's life, Phillips testified that he was affected by a number of psychosocial stressors, describing the environment Applicant grew up in as emotionally toxic. Ultimately, Phillips' presentation concluded with a professional opinion that throughout the timeframe of the crimes, Applicant "began to develop psychotic symptoms that culminate in what [he] would diagnose as a cocaine psychosis" onset by "heavy abuse of cocaine" and resulting in in a condition of delusions and/or paranoia and hallucinations. Phillips opined that as a result of a cocaine psychosis brought about by Applicant's escalating addiction, that during the timeframe of the murder (1) he was affected by a mental disturbance, (2) his capacity to conform his behaviors was substantially impaired, and (3) his mentality was impaired.

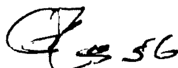
Dr. Mark Cunningham, a psychologist, offered testimony pertaining to a variety of risk factors identified by the Department of Justice as increasing a person's likelihood of delinquency and violence. He described these factors as they pertain to each stage of a person's life and explained why he identified a high concentration of these factors applying to Applicant. He stated that between the time when a person is conceived and when they reach six years of age, Applicant embodied five of a possible seven factors. At the outset, Cunningham stated Applicant's "exposure to lead in his childhood" was one contributing factor, but that "there is no testing that was done



that demonstrated brain damage, for example, in that earlier age." Later, he expounded upon why, stating "there is no safe lead level for a child to have. It is never a vitamin." Cunningham explained in common terms that the one known blood-lead level of 9 "doesn't mean that it wasn't higher or lower when he was [younger]." His testimony corresponded to a PowerPoint graph depicting how childhood blood-lead levels correspond to incidences of adult crime. He went on to note Armon's higher blood-lead levels "in the same household, around the same paint chips, around the same lead dust" and concluded: "So it raises the implication that the blood levels that William would have had at earlier points in his childhood might have been higher, and certainly gives some confirmation to the zone of risk that he [was] living in when we talk about lead."

Cunningham also stated on cross-examination that from the known blood-lead level he "may be able to infer to some extent" what Applicant's earlier lead levels were if certain testing was done looking at brain function, neuropsychological assessment "and that sort of thing." Cunningham stated he could have ordered a current lead level test for Applicant and did not. He later noted that Applicant's one test was not high enough to be flagged by the Center for Disease Control for additional testing. The State's cross-examination actually focused for a period of time on how children ingest lead, the dangers of lead poisoning and resulting lawsuits, and pointed out that the specific area where Applicant grew up had older low-income homes with a huge lead risk. Cunningham testified that the homes were likely not compliant with lead remediation standards.

Cunningham also agreed with Phillips' cocaine psychosis diagnosis and additionally independently opined that Applicant's capacity to conform and mental state were substantially impaired at the time of the murder, and that he was under the influence of a mental or emotional disturbance at that time.



Also at trial, Marjorie Hammock, a social worker, described the known extent of Applicant's lead exposure in her social history testimony presented at the sentencing phase. Specifically to the point of the PCR presentation, Bloom asked Hammock: "Why should we care if children are exposed to high levels of lead or if they eat . . . old lead paint chips . . . ?" Hammock responded:

> high level leads and children eating actual lead have a real hazardous effect on their development, both their emotional and physical development. It can cause brain damage and it can cause organic impairment . . . [b]rain development, brain functioning. . . . we know that [Applicant was placed in a leaden environment] but we don't know the result of that.

Defense counsel Bloom then extracted an agreement from Hammock that agencies have taken steps to try to reduce lead levels in certain housing projects. Hammock clarified on cross-examination an awareness that Applicant may have only been screened once for blood-lead levels, but it was known that he lived "in that environment where it was reported that typically had [lead-poisoning] sufferers."

2. <u>Applicant Cannot Demonstrate *Strickland* Error</u>

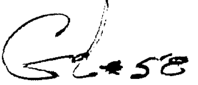
In December 2015, defense counsel Bloom established his familiarity with lead poisoning and its ability to be utilized as a capital defense—he had used it as a defense in *State v. LeVar Bryant* in Richland County. For Applicant's case, he set up a blood test but "knew that probably wouldn't show anything because of the passage of time." He also looked into conducting an x-ray fluorescence test. However, that test could not be accomplished because South Carolina lacked any medical facility that could administer it and because Applicant could not be transported to Boston. But defense counsel still pursued information in furtherance of a lead-based defense. He explained that his mitigation investigator Dale Davis collected a number of records from "Charleston County and other agencies regarding specific neighborhoods and houses that had had

lead paint problems over the decades." Defense counsel Bloom furthered the investigation by obtaining an order from the trial court directing DHEC to release records "regarding lead levels and specific records also on both William and his brother, Armon." Defense counsel then turned this information over to psychiatrist Dr. Robert Phillips as well as psychologist Dr. Mark Cunningham, who both testified at trial.

Defense counsel retained a neuropsychologist, Dr. Robert Deysach. Deysach consulted with defense counsel and, like Cunningham and Phillips, met with Applicant to assess him in preparation of a mitigation presentation. But Applicant did not cooperate with Deysach's testing. According to defense counsel Bloom, Applicant "wasn't really interested in helping us build a mitigation case." Second-chair trial counsel, Drew Carroll, corroborated defense counsel Bloom's recollection that Applicant would not cooperate with all the tests required to further the lead defense, believing Applicant "saw it as a stigma to even participate in them." Because Applicant would not complete the neurological testing, Deysach could not establish a score or opinion – let alone opine as to potential neurological deficits resulting from childhood exposure to lead.

The dearth of actual records pertaining to Applicant proved another weakness in the accumulation of evidence in furtherance of a lead-based mitigation presentation. The records defense counsel Bloom and his mitigation investigator were able to uncover largely only pertained to Applicant's little brother Armon. All defense counsel could obtain in regards to Applicant was a single lead test taken when he was nearly twelve years old.

This scarcity led to weakness in the defense's ability to further a lead-based mitigation: defense counsel Bloom testified he consulted with the preeminent expert in the field of lead neurotoxicity, Dr. Herbert Needleman, whom he had retained in the LeVar Bryant case, but learned that there was not enough information from which Needleman could testify about lead poisoning.



Defense counsel Bloom notably distinguished the evidence available in Bryant from that available in Applicant's: "We were never able to find the records on William other than what [appears] in the [trial] transcript." Bloom stated:

> I just didn't have enough to bring Dr. Needleman in to testify. As I said, I consulted with him via email. And we just weren't able to find the smoking gun, if I can use that phrase, for Dr. Needleman to be confident enough to have the, the documentation he needed to testify. . . . And I did not have a neuropsychological test.

Instead, he presented the extent of the information he could gather on lead poisoning through his psychologist and social worker

From his December 8, 2015, testimony, defense counsel Bloom established that he took reasonable steps to investigate the potential for a lead-based mitigation defense, and that he was familiar with that type of defense as he had pursued it in a previous case. Not only did the defense uncover records about the known lead in the residential area where Applicant grew up and Applicant's one known blood-lead level, but the defense hired a neuropsychologist to assist in developing and presenting a lead-based mitigation defense.

However, defense counsel Bloom had more testimony to offer on this point. His admitted consultation with Needleman prompted a late discovery disclosure and additional testimony on this issue in May 2016. Bloom produced for Respondent the emails he referenced in December. Testimony taken at the May 2016 installment of the evidentiary in this case indicates that the emails were previously made part of a privilege log by Applicant's Counsel. The emails themselves became part of this Record at that hearing and Bloom further testified to the extent of his investigation into the lead mitigation in his testimony taken that day:

> BLOOM: [Needleman's email] says, quote, Jeff: A blood level of eight UG/DL at age eight suggests that it was higher in infancy, but no certainty to this statement. Anymore info? End quote.

Q BY RESPONDENT: So you were, is it fair to say, looking not only at past records but what you could extrapolate from those records as well?

BLOOM: Yes.

Q BY RESPONDENT: And you were also looking at modern testing, you attempted to do that as well?

BLOOM: Yes.

Q BY RESPONDENT: And Dr. Needleman is a well-regarded expert in this field, correct?

BLOOM: He is. Dr. Herbert Needleman is an expert in blood levels, lead poisoning and the effects of lead poisoning on brain development, especially in children. He is a professor of psychiatry in pediatrics at the University of Pittsburgh School of Medicine in Pittsburgh, Pennsylvania, and I have a professional association with him in this regard. I don't know him personally.

This Court must consider whether defense counsel Bloom's testimony credibly indicates that a strategic decision was exercised to present evidence of Applicants' early childhood exposure to lead in the manner done at trial.

In considering strategic decisions, reviewing courts must take care to consider the decision in light of the circumstances at the time of trial: "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington*, 466 U.S. at 689, 104 S. Ct. at 2065. Reviewing courts also must consider "[t]here are countless ways to provide effective assistance in any given case." *Id.* The record here supports there was no deficient performance.

Defense counsel Bloom established the infeasibility of hiring an expert to address Applicant's exposure to lead at trial. Bloom consulted with a qualified expert – the same qualified expert, Dr. Needleman, that both of Applicant's PCR experts, Drs. Canfield and Israelian, testified

to as being an influential actor in achieving mainstream recognition of the dangers of lead poisoning as well as scientific change. The information the defense uncovered was not expansive enough to pinpoint a solid cause or existence of lead poisoning in Applicant. Moreover, unquestionably, Applicant impeded the defense team's ability to further explore any neuropsychological effects of the evidence of lead exposure that did exist because Applicant failed to fully cooperate with written tests from a neuropsychologist. And, as expounded upon within the remainder of the PCR testimony, Applicant's only known lead level was simply not medically or scientifically significant – Dr. Needleman indicated as much.

3. Applicant's Additional PCR Presentation on Lead

Dr. Richard Canfield, a developmental psychologist with specialties in early development and lead toxicity, testified that Applicant's *only known* lead level was 9 micrograms per deciliter. This level was taken on June 2, 1988, when Applicant was 11 years, 9 months, and 9 days of age. In 1988, the standard for lead poisoning was much higher than 9: it was 25 micrograms per deciliter. The 1990s witnessed that standard reduce to 10 micrograms per deciliter. And while some studies prior to 2009 indicated that 10 was too high a lead level, the standard has only been reduced to 5 micrograms per deciliter since 2012. Applicant's trial occurred in 2009.

Canfield's larger focus on concrete blood-lead levels and correlative evidence of neurotoxicity did not relate so much to Applicant as it did his younger brother Armon Dickerson, who was notably younger than Applicant during the time of testing and whose blood screens showed a significantly higher lead level requiring a number of follow-up tests. Accordingly, Armon—not Applicant—provided Canfield with data points to support his testimony.[21] Moreover,

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[21] Specifically, two-year-old Armon initially tested on November 16, 1982, at 70 micrograms per deciliter. A test conducted one week later on November 23, 1982 returned a level of 45 micrograms per deciliter. Testing continued on Armon until he reached age 5 with differing results.

to the extent Canfield plotted Applicant's blood-lead levels,[22] he testified he could "just make a guess that his lead level was 50% above at all ages" based off of the one number he had been provided with and a straight-line graph plotted for a study based on children from Cincinnati, Ohio. Canfield testified that the reason he used the Cincinnati Cohort for comparison was because it began in the late 1970s, which Canfield dictated was "very much the same time period as when William was growing up in Charleston." Without additional testimony to support his contention, he opined that "inner-city Cincinnati is very similar in terms of its housing stock, in terms of the population: largely African-American; largely impoverished; and, and housing of, of very fairly poor quality, meaning that there's a lot of lead paint hazard. So, Cincinnati will help us understand Charleston." He later testified that he relied upon Google Maps to determine the location and appearance of one address Applicant resided in at some point in his youth. In referencing known causes for these blood-lead levels, Canfield was unable to corroborate, when asked by the court, from where in the materials he determined that someone "tore all the walls out" of one of Applicant and Armon's childhood residences, or when that may have occurred in relation when Applicant may have lived there. Canfield continued to have difficulty tracing where Armon was living versus where Applicant was living during the timeframe in which Armon's blood-lead levels were being consistently screened.

Canfield's remaining testimony, therefore, does not provide a foundation for projecting Applicant's blood-lead levels. Canfield laid a comprehensive presentation regarding lead's

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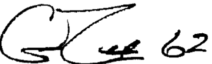
22 Applicant's counsel failed to produce Canfield's graphs depicting specific plot points for Applicant in the ordinary course of discovery. Instead, a draft PowerPoint presentation was furnished to Respondent. The plot points or notations presented to this Court pertaining specifically to Applicant were not inserted and provided until their presentation in open court. Canfield's PowerPoint presentation became Applicant's Exhibit 3 at the December 7, 2015, evidentiary hearing over Respondent's objection to the discovery violation.



absorbency into young bones and the negative effects of lead absorption. But this presentation does not make it more likely than not that, had it been given at trial, Applicant's jury would have returned an alternative sentencing recommendation. Canfield's testimony lacked sufficient underlying facts to support his conclusion that Applicant's environment caused blood-lead levels were consistently 50% above a conservative average prior to the actual blood-lead level that was produced at Applicant's age 11 years and 9 months. Moreover, Canfield based his graph of Applicant's estimated blood-lead level upon a linear study conducted on children from Cincinnati, Ohio in the 1970s, and not concrete data from houses on the upper portion of the Charleston Peninsula in the late 1970s and 1980s.

In addition to Canfield, Applicant produced PCR testimony from developmental neuropsychologist Dr. Marlyne Israelian. Israelian reiterated Applicant's entire social history which was offered during the sentencing phase of Applicant's trial, but did so in correlation to purported childhood exposure to lead, as well as Applicant's reliance on cocaine and his maltreatment as a child. Israelian testified that demographically, Applicant fell at high risk for lead exposure as did other black males in urban centers and communities with antiquated, unrefurbished homes. She described that Applicant grew up in zip codes on the Charleston Peninsula where there were known cases of children with blood-lead levels higher than the threshold level of 10.

Israelian pointed out that Applicant underwent IQ testing in 1990 when he resided at Tara Hall, a group home for boys in Georgetown County, scoring 86 in nonverbal reasoning. Israelian defined his nonverbal score of 86 as below average, and his scoring 96 on verbal as average. Averaged, this IQ score placed him in the 50% percentile. Israelian testified that Applicant performed poorly on one subtest, the Object Assembly Test, which to her was significant because "lead affects selectively that area of the brain" that controls visuospatial functioning necessary for

completion of that test. Israelian juxtaposed this 1990 IQ test with a later test conducted by the Department of Youth Services wherein Applicant's scores dropped to a full scale IQ of 83, a verbal of 81 and a performance of 89. Youth Services administered the adult version of the test though Applicant was only sixteen and still eligible for the children's scaled test. Israelian characterized this reduced score as consistent with previously assessed deficiencies which could, according to Israelian, relate back to lead exposure.

Ultimately, Israelian described the results of her own neuropsychological assessment conducted with Applicant, including an IQ test wherein Applicant's full-scare score was 86. She opined that Applicant has executive frontal-lobe dysfunction. She additionally noted the impact of cocaine, a toxin, on Applicant's functioning. She testified that individuals with lead poisoning "are quite drawn to cocaine" and "are quite susceptible to cocaine" because it allows them to feel reward. "[L]ead exposure will predispose you to cocaine abuse."

Israelian also discussed Applicant's maltreatment as a child. She finally opined that Applicant suffered from a mental and emotional distress disorder at the time of the murder and that his poor executive functioning played a role in the crime because Applicant expresses an inability to regulate his emotions. She opined his capacity to conform was substantially impaired from (1) lead neurotoxicity, (2) childhood maltreatment, and (3) cocaine psychosis. Israelian did not, however, recommend Applicant undergo any medical tests such as an MRI to see if his brain was visually affected by lead. Nor did she order or recommend any new blood test be conducted for the presence of lead.

Israelian's testimony fails to demonstrate that Applicant suffered prejudice by the failure to have a neuropsychologist, or a developmental neuropsychologist, testify at trial. Bloom established at PCR that Applicant would not comply with the neuropsychological testing required

to garner this testimony. Without assistance by his client prior to trial, this type of testimony was not at Bloom's disposal. Moreover, Israelian's testimony does not identify neurotoxicity as a result of childhood exposure to lead to a degree which undermines confidence in the jury's sentencing recommendation. She largely reiterated other mitigation testimony offered at trial by way of outlining Applicant's childhood circumstances and cocaine addiction.

Israelians' testimony signifies a lack of prejudice flowing from the present PCR allegation. At trial, Bloom pursued and put forth a consistent sentencing-phase presentation that mentioned all of the same risk factors discussed by Israelian, including childhood exposure to lead. But the crux of Bloom's mitigation case lay in professional opinions that Applicant's capacity to conform was compromised due to a cocaine psychosis. Israelian did not deny that a cocaine psychosis and childhood maltreatment affected Applicant. She simply assigned an additional factor by a more scientific name, lead neurotoxicity, and compounded her analysis with additional scientific testimony pertaining to the effects of Applicant's known lead exposure. She opined at PCR that Applicant's cocaine usage contributed to his capacity to conform and led to substantial impairments at the time of the murder. Nothing she said excused or altered the cocaine psychosis theory presented at trial.

4. Applicant Fails in Showing Deficient Performance And Resulting Prejudice

What is clear from the aggregate of the PCR testimony is that trial counsel had access to the basis for the lead poisoning defense and investigated it. Most importantly, Bloom's PCR testimony and his correspondence with Dr. Herbert Needleman notes his awareness of Applicant's childhood lead exposure, the existence of lead in the area where Applicant grew up, and his investigation into the extent or certainty with which he could establish Applicant suffered a physiological deficiency as a result of that exposure. If this Court were to determine that Bloom

halted his investigation into the lead poisoning, it must be deemed reasonable based upon information counsel culled from notable experts in the field. Ultimately, the preeminent lead professional in the field at the time, Needleman interjected that he would need more information.

Applicant's PCR presentation has not compellingly proffered additional lead-based mitigation in a manner undermining confidence in the jury's sentencing recommendation. The only lead level screening conducted upon Applicant occurred when he was almost 12 years old, and the results, a lead level of 9 micrograms per deciliter, fell below the threshold level for concern applicable in 1988 and even in the 1990s. Key to this Court's analysis is that in 1988, and even through the 1990s, Applicant's only known lead level fell below the standard flagged by the medical community for follow-up. Also key to this Court's analysis is Applicant's lack of cooperation with neuropsychological testing in preparation for trial. Bloom did not abjectly fail to present subtests to a neuropsychologist for review as alleged.

Therefore, even if Bloom had presented the same testimony at trial as was presented at PCR, it fails to persuasively indicate that the jury would have returned an alternative sentencing recommendation. The evidence on this issue shows that Bloom, a seasoned capital trial attorney, exercised a strategic decision that the pursuit of additional lead neurotoxicity evidence was not a viable defense which could be supported by medical testimony at the time of trial. Instead, Bloom incorporated the known evidence of lead exposure through experts other than those presented at PCR. Given the totality of the foregoing, Applicant cannot meet his burden of showing error-and-prejudice in regards to counsel's investigation and presentation of a defense based on Dickerson's purported childhood exposure to lead.

<u>J. Respondent's Position on the Merits: Remaining Sentencing Phase Claims</u>

Applicant pursues two additional claims of ineffective assistance of counsel during the sentencing phase of Applicant's trial.

Applicant alleges that trial counsel were ineffective in their sentencing-phase representation because, in addition to the claims discussed above, they (1) failed to preserve for the appellate record an objection to Applicant's former probation officer's testimony that Applicant repeatedly stated during a 1996 probation hearing he wished he had shot a police officer; and (2) failed to object to portions of State's closing argument that, according to Applicant, diluted the responsibility of the jurors in rendering a possible death verdict.

When "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). Pursuant to *Strickland*, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." 466 U.S. at 690, 104 S.Ct. at 2066. "However, counsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial." *Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). Therefore, ineffective assistance counsel claims "based on a failure to object are tied to the admissibility of the underlying evidence." *Hough v. Anderson*, 272 F.3d 878, 898 (7th Cir. 2001). "There can be no ineffective assistance of counsel for failing to raise a claim which is not legally viable." *Almon v. United States,* 302 F.Supp.2d 575, 586 (D.S.C. 2004); *see, e.g., Werts v. Vaughn,* 228 F.3d 178, 203 (3rd Cir. 2000) ("counsel cannot be ineffective for failing to raise a meritless claim"). Admissible but unobjected-to testimony fails both prongs of *Strickland* because "failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." *Hough, supra.*

1. Claim that Counsel Failed to Preserve Objection to Probation Officer's Testimony

During the sentencing phase, the State presented a former South Carolina Department of Probation, Pardon and Parole Officer who served as the presiding Administrative Officer over Applicant's 1996 parole hearing. This witness, Cededrick Davis, testified that during that hearing Applicant repeatedly stated he wished he shot the police officer(s) involved in the incident. Prior to this testimony, the trial court ruled it admissible over Bloom's objection, finding it more probative as to Applicant's character than prejudicial. The court finished: "your objection is noted and preserved."

At PCR, defense counsel Bloom was called upon to address the efficacy of this testimony and whether a proper contemporaneous objection was lodged. He explained that his objection at trial, which was handled *in limine* and included a proffer of Davis' testimony, was that Davis was being called to testify at Applicant's murder trial about a parole proceeding that occurred in 1996 in which Applicant was not represented by, nor had an automatic right to, counsel.[23] Defense counsel Bloom's basis for objection was that the Department kept the report a confidential part of the probation file; it was never objected to; nor could the report ever be challenged after the hearing. Thus, under his logic, its introduction at the 2009 death penalty trial constituted a due process violation. He also recognized that he received the report in discovery and had it well in

23 The *in limine* record includes testimony from Davis that at a parole hearing the defendant is "advised that it is a matter of evidence, and that they have the right to an attorney at that hearing, and whatever they say can be used against them at a future hearing." (R. p. 3745, lines 12-16). On cross-examination in front of the jury, defense counsel Bloom did not re-elicit this information, but rather pointed out that the Department maintained the report in a confidential file and that Applicant's statements about wanting to shoot the officers was not part of the revocation order issued as a result of that hearing. (R. p. 3774, line 4 – p. 3777, line 24).

advance of trial. Defense counsel Bloom stated that once admitted, he "could tell from the jury's reception of the evidence that it was . . . bad[.]"

The record on this PCR allegation bears out that counsel reasonably reacted to the trial court's notation that the issue was preserved following its *in limine* treatment and strategically decided not to object in front of the jury when the evidence came before it. Defense counsel Bloom testified that he believed he properly preserved the issue for appeal and that he later included it in a memorandum to appellate counsel suggesting the issue for appeal. He later stated he believed the objection was preserved because it was handled *in limine*, not in a pretrial hearing, and that "it was clear how the trial judge had ruled" in that the ruling did not leave Bloom feeling as though he needed to renew the objection in front of the jury. "You don't need have to keep objecting just because the jury is now in the courtroom."

But even assuming this issue were later raised on appeal and found unpreserved by our appellate court, Davis' testimony was ruled admissible and thus its admission cannot form a basis for post-conviction relief. Character evidence is admissible (and highly relevant) during the sentencing phase of a capital trial. *State v. George*, 323 S.C. 496, 511, 476 S.E.2d 903, 912 (1996); *see State v. Tucker*, 324 S.C. 155, 168, 478 S.E.2d 260, 267 (1996). "The purpose of the bifurcated proceeding in a capital case is to permit the introduction of evidence in the sentencing proceeding which ordinarily would be inadmissible in the guilt phase. In the sentencing proceeding, the trial court may permit the introduction of additional evidence in extenuation, mitigation *or aggravation*." *State v. Kornahrens*, 290 S.C. 281, 289, 350 S.E.2d 180, 185 (1986) (citing *State v. Shaw,* 273 S.C. 194, 255 S.E.2d 799 (1979)) (emphasis in original).

2. Claim that Counsel Failed to Object to State's Sentencing-Phase Closing Argument

Applicant next alleges that counsel failed to object to the portions of the State's closing argument which Applicant now identifies as having diluted the jurors' sense of responsibility in rendering a possible death verdict. Applicant has identified two portions of the closing argument in its post-trial brief in support of this allegation.

Any excerpt of the State's closing exists as "one moment in an extended trial." *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872 (1974). So, while the question before this Court is undoubtedly "whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process," *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166–67 (1998), a court must conduct an "examination of the entire proceedings." *Donnelly* at 643, 94 S.Ct. at 1871; *Northcutt, supra* ("We must review the [closing] argument in the context of the entire record."); *State v. Bell*, 302 S.C. 18, 35, 393 S.E.2d 364, 374 (1990).

"Solicitors are bound to rules of fairness in their closing arguments." *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007).

> While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based upon this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice.

State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981); S.C. Code Ann. § 16-3-25(C)(1) (capital sentence may not be "imposed under the influence of passion, prejudice, or any other arbitrary factor").

As to whether the State's sentencing-phase argument in this case crept outside the bounds of fairness and required an objection by Applicant's counsel, the record reflects a thirteen-page argument in adherence to the principles stated in *Linder*, *supra.* An examination of the passages cited by Appellant in the full context of the closing indicates that the State was arguing in favor of

a recommendation of death and asking the jury to reject the application of mercy. The State argued for the jury to discount the mitigation evidence put forward by Applicant and assign significance to evidence it put forward in aggravation. The State did not ask the jury to weigh aggravation against mitigation and come to a decision that way.

Testimony on this issue taken at Applicant's PCR hearing also supports a finding that the State's closing argument did not call for objection. Defense counsel Carroll testified at PCR that he believed they should have objected because the excerpts presented to him at the PCR hearing indicated that "the solicitor was clearly painting a picture of the absolute worst of the worst of inhumanity, and telling the jury that they should disregard all the mitigation that had been offered that was relevant to their decision about imposing this ultimate penalty." But defense counsel Carroll acknowledged in later testimony that it is permissible for a prosecutor to argue in favor of their position. Likewise, defense counsel Bloom testified at PCR that at the time the State delivered its closing, he did not view the excerpted portions as problematic but, in hindsight, "should have interposed an objection" and characterized the State's closing as asking the jury to weigh aggravation against mitigation. However, his cross-examination testimony highlights the alternative position, perhaps the one held at the time of trial, that the State's closing argument was indeed within the confines of argument allowed by South Carolina law and was not worthy of objection.

Accordingly, Applicant's allegation fails to meet *Strickland's* error-and-prejudice standard and does not warrant relief.

K. Respondent's Position on the Merits: Ineffective Assistance of Appellate Counsel Claims

Applicant seeks post-conviction relief on two claims of ineffective assistance of appellate counsel. The test for reviewing such claims is the basic *Strickland* error-and-prejudice analysis

with little adjustment. To succeed, the applicant must demonstrate that appellate counsel was "objectively unreasonable in failing to find arguable issues to appeal." *Smith v. Robbins,* 528 U.S. 259, 285, 120 S.Ct. 726, 764 (2000). "To prove prejudice, the applicant must show that, but for counsel's error, there is a reasonable probability that he would have prevailed on appeal" on the issue proffered in the PCR application. *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). The *Smith* Court noted "it is difficult to demonstrate that counsel was incompetent" as for the most part, deficient performance may be shown "only when ignored issues are clearly stronger than those presented[.]" *Smith, supra* at 288, 120 S.Ct. at 766 (quoting *Gray v. Greer,* 800 F.2d 644, 646 (7th Cir. 1986)).

When reviewing appellate counsel's actions under *Strickland* as enunciated in *Smith* and *Anderson, supra,* no finding of deficient Sixth Amendment performance and prejudice is warranted within appellate counsel's selection and treatment of the issues pursued on direct appeal before the South Carolina Supreme Court. Specifically, Applicant alleges in claims 10/11(c)(5) and (7) that appellate counsel should have pursued on direct appeal (1) the objections lodged to a number of autopsy photographs introduced during sentencing[24]; and (2) the objection lodged to the State's questioning Dr. Phillips about whether Applicant "knew right from wrong" at the time of the murder.

Testimony taken at the December 8, 2015, and May 13, 2016, evidentiary hearings established that first-chair trial counsel Jeff Bloom, who was listed as appellate counsel on the final brief and participated in oral argument before the South Carolina Supreme Court, shared his suggestions for appellate issues in a memorandum to appellate counsel at the Commission on

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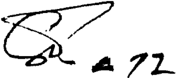
[24] Specifically, State's Exhibits 141, 153, 160, 161, 162, 166, 171, 172, 173, 177, 178, 181, 184, 335, and 336, on file and available for review at the South Carolina Supreme Court.



Indigent Defense. Within that memorandum, he suggested both the photograph issue and the Dr. Phillips issue as potential appellate issues. Jeff Bloom's testimony demonstrated that he discussed potential appellate issues with appellate counsel and considered a range of issues that he believed should be raised on appeal. He also completed portions of oral argument before the Supreme Court. Bob Dudek, Chief Appellate Defender with the Commission on Indigent Defense, also testified about Bloom's memorandum and the proffered issues at the December 8, 2015, PCR hearing.

1. Testimony in the Record Pertaining to the Photograph Allegation

One of the aggravating factors before the jury during the sentencing phase of Appellant's trial was that the murder occurred during the commission of physical torture. During the sentencing–phase, the State re-called forensic pathologist Dr. Cynthia Schandl[25] to testify in regards to specific injuries recorded as part of the victim's autopsy. Over Applicant's objection, the trial court admitted the photographs subject to this allegation as probative of the aggravating factor of physical torture. Shandl's testimony was thereafter received and trial counsel did not cross-examine the pathologist.

First-chair trial counsel Jeff Bloom testified at PCR only briefly that he recalled preserving the objection to these photographs and agreed with Applicant's counsel that they "are what they are." At the first convening of the PCR evidentiary hearing, appellate counsel Dudek testified that which he did not recall the specific photographs in this case, that having worked on capital appeals before he was aware that "some horrible, horrible, horrible photographs" have been reviewed on

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25 During the guilt phase of the proceedings Dr. Schandl was qualified as an expert and testified in regards to the autopsy she conducted on the victim. (R. p. 2920-93).

appeal by our courts, but that the court has issued "kind of standard language [that] while not pleasant to look at . . . [it did not] think they denied the defendant a fair sentencing phase.

2. Testimony in the Record Pertaining to the Dr. Phillips Allegation

During the sentencing phase, Applicant's counsel put forth Dr. Robert Phillips who was qualified as an expert in psychiatry and forensic psychiatry. Phillips' testimony assigned behavioral significance to certain events in Applicant's life prior to the murder. At the conclusion of his direct examination, Phillips opined that (1) Applicant "was experiencing a cocaine psychosis and, as such, he was affected by a mental disturbance" at the time of the murder; (2) "that as a result of his cocaine psychosis that his capacity to conform his behaviors was substantially impaired" at the time of the murder; and (3) that as a result of cocaine psychosis, that his mentality was impaired" at the time of the murder.

On cross-examination, the State extracted testimony that Applicant does not suffer from any mental or emotional disorder that would impair his decision-making, day-to-day functioning, or require psychiatric treatment—and that he was competent to stand trial. Bloom lodged an objection raised during an off-record bench conference.[26] Following the conference, the State elicited a response from Phillips regarding whether Applicant's actions at the time of the murder were volitional. Phillips responded he believed Applicant was in a cocaine psychosis at the time

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[26] Q: That he was competent to stand trial?
A. Yes.
Q. That means that he basically knows what is going on here, who the lawyers are, who the judge is, the jury is, all that kind of stuff; is that correct?
A. That's correct.
Q. And that is does not meet the standard for ---
Mr. Bloom: Judge, I am going to object at this point. If we may approach?
[OFF RECORD BENCH CONFERENCE]

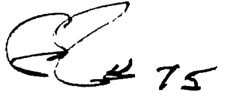
(R. p. 4242, line 2 – p. 4243, line 9).

of the murder and therefore "his decision was not free," but that "he would have known what he was doing was wrong based on his behaviors after the event."

At PCR, defense counsel Bloom acknowledged that in his practice he consistently objects when the State cross-examines a mental health expert regarding whether the defendant knows right from wrong. He testified he believes that it confuses a jury to hear testimony that a defendant knows right from wrong, which pertains to an insanity defense, when insanity is not an issue in the trial, has not been presented during the guilt phase, and is likewise not part of the mitigation defense being presented. Defense counsel Bloom acknowledged that he included this issue in his memo to appellate counsel as a suggestion for the appeal. Appellate Counsel Dudek simply testified on this point that he did not raise that issue on appeal.

3. Argument in Opposition of Post-Conviction Relief

The above-cited issues would not have prevailed on appeal as argued by Applicant. Effective assistance of appellate counsel does not require that *all* issues that *may* have merit be pursued on direct appeal. *Bell v. Jarvis,* 236 F.3d 149, 164 (4th Cir. 2000) (*en banc*). "Appellate counsel accordingly enjoys a 'presumption that he decided which issues were most likely to afford relief on appeal,' a presumption that a defendant can rebut 'only when ignored issues are clearly stronger than those presented.'" *United States v. Baker*, 719 F.3d 313, 318 (4th Cir. 2013) (quoting *Bell v. Jarvis, supra*). Appellate counsel is given wide discretion in his professional decisions during representation. "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . . ." *Tisdale v. State*, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004), (quoting *Jones v. Barnes*, 463 U.S. 745, 754 (1983)).



Specifically in regards to the photographs, our Supreme Court has expressly upheld the introduction of autopsy photographs during the sentencing phase when the photographs corroborate witness testimony and illustrate the circumstances of the crime and the character of the defendant. *State v. Torres*, 390 S.C. 618, 623–24, 703 S.E.2d 226, 229 (2010) (citing *State v. Rosemond,* 335 S.C. 593, 597, 518 S.E.2d 588, 590 (1999); *State v. Burkhart,* 371 S.C. 482, 487, 640 S.E.2d 450, 453 (2007)). In Applicant's case, as in *Torres*, "[t]he doctor who performed the autopsy used the introduced photographs during h[er] testimony to illustrate the number of injuries, location of the injuries, and manner in which the injuries were committed." *Id.* Though graphic in nature, the photographs' "net effect" was to show what Applicant did to the victim, "which goes straight to the circumstances of the crime." *Id.* Photographs "are not inadmissible merely because they are gruesome, especially where, as here, the photos simply mirror the unfortunate reality of the case." *State v. Collins*, 409 S.C. 524, 535, 763 S.E.2d 22, 28 (2014) (no abuse of discretion in admission of pre-autopsy photographs of child victim mauled by dogs); *see also State v. Gray*, 408 S.C. 601, 759 S.E.2d 160 (Ct. App. 2014) (in prosecution for murder and lynching, gruesome autopsy photographs held more probative than prejudicial and relevant to issue of malice).

The photographs at issue depict the nature of the injuries established by the forensic pathologist as contributing to the victim's death. Given the status of South Carolina jurisprudence on this issue, any likelihood that Applicant would have prevailed on the proffered appellate issue is low. The photographs are relevant to the State's requirement to establish the aggravating factor that the murder occurred during the commission of physical torture. Thus, the photographs were directly linked to a question before the jury's consideration as part of the sentencing phase of trial. Dudek's testimony reflects that appellate counsel was aware of the status of the law on this issue

and intimates that the low likelihood of success caused him to make a strategic choice to forego the issue in Applicant's appeal. Accordingly, the failure to challenge the trial court's admission of those photographs on appeal is not a meritorious ineffective assistance of counsel claim.

Specifically in regards to Dr. Phillip's cross-examination testimony, assuming the off-record objection preserved the issue for appeal, the testimony received was not at all inconsistent with Applicant's mitigation-phase presentation. In fact, it was probative of the mitigating circumstances charged to the jury: that the murder was committed while the defendant was under the influence of mental or emotional disturbance; that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired; and the age or mentality of the defendant at the time of the crime. S.C. Code Ann. § 16-3-20(C)(b)(2), (6), and (7). At no point during his examination did Phillips obfuscate the elements of an insanity defense with his evaluation of facts probative of the mitigating factors named herein. Instead, the crux of his testimony on both direct and cross examination was that Applicant was subject to a state of cocaine psychosis at the time of the crime. To that end, Bloom's PCR testimony that he believed that type of evidence confused a jury and gave rise to his objection does not form a meritorious basis for appeal. Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues . . ."). Appellate counsel cannot be found ineffective for failing to raise an issue which, from the record, appears "far from 'apparent,' and may be nonexistent." *Lawrence v. Branker*, 517 F.3d 700, 711-12 (4th Cir. 2008) (finding state PCR court's denial a reasonable application of *Strickland, supra* and *Bell, supra*).

Applicant fails to demonstrate how either of the above-cited issues are stronger than those pursued on appeal, and this claim does not warrant the granting of post-conviction relief. *Hill v.*

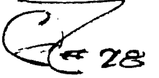
State, 415 S.C. 421, 430-31, 782 S.E.2d 414, 419 (Ct. App. 2016) (counsel need not raise every nonfrivolous issue to be considered effective on appeal). The totality of the testimony put forward on the appellate counsel claims shows that in deciding which claims to raise on appeal, counsel considered the likelihood of success of those claims. Counsel does not have to file a "kitchen-sink brief" in order to be effective as "that is not necessary, and is not even particularly good appellate advocacy." *Smith v. Stewart*, 140 F.3d 1263, 1274 n.4 (9th Cir. 1998). Applicant has failed to show error and prejudice in regards to appellate counsel's performance and post-conviction relief is not warranted on either claim.

L. **Respondent's Position on the Merits: The Kidnapping Sentence**

In addition to the death sentence received, Applicant was indeed sentenced by the trial court to a concurrent thirty years for kidnapping. This concurrent sentence is in violation of S.C. Code Ann. § 16-3-910. If a concurrent sentence is imposed as in this case, the sentence is considered "ineffective." *State v. Council*, 335 S.C. 1, 6, n.2, 515 S.E.2d 508, 510, n.2 (1999). "Generally, when a defendant is convicted for murder any sentence for the kidnapping of the victim would be vacated." *State v. Vazsquez*, 364 S.C. 293, 302, 613 S.E.2d 359, 363 (2005) (citing *Owens v. State*, 331 S.C. 582, 585, 503 S.E.2d 462, 463 (1998) (holding that a sentence for kidnapping should be vacated when the defendant received concurrent sentence under the murder statute). While Applicant's kidnapping sentence should be set aside, the kidnapping conviction shall remain. *Id.*; *Vasquez, supra* (affirming conviction but vacating sentence for kidnapping of murder victims).

M. **Conclusion**

Therefore, Applicant is not entitled to post-conviction relief on any surviving allegation. All allegations appearing in the third amended PCR application yet not presented in Applicant's



Post-Hearing Brief have been waived and abandoned. The totality of Applicant's claims shall be denied and dismissed in full as Applicant has failed to meet his burden on any claim herein—with the exception of the concurrent thirty-year sentence for kidnapping. That sentence, but not the conviction, is ordered vacated.

AND IT IS SO ORDERED.

G. Thomas Cooper, Jr.
Presiding Judge

June 26, 2018
Charleston, South Carolina

The Supreme Court of South Carolina

William O. Dickerson, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2018-001499

ORDER

By order dated August 6, 2021, this Court denied Petitioner's request for a writ of certiorari to review the denial of his application for post-conviction relief. Petitioner now asks this Court to reconsider the denial. The petition for rehearing is denied.

J.

J.

J.

We would grant the petition for rehearing as to the *Batson*[1] issue.

C.J.

J.

[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

Columbia, South Carolina
October 13, 2021

cc:
Elizabeth Anne Franklin-Best, Esquire
Melody Jane Brown, Esquire
Alan McCrory Wilson, Esquire