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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

Honorable J. Michael Baxley, Circuit Court Judge

CA No. 06-CP-11-223
Appellate Case No. 2012-212107

JONATHAN KYLE BINNEY, SK 6009. . . . . *Petitioner/Respondent*

v.

STATE OF SOUTH CAROLINA . . . . . *Respondent/Petitioner.*

BRIEF OF RESPONDENT BY PETITIONER-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

OTHER

RESTATEMENT OF THE QUESTION PRESENTED

The PCR Court determined that Petitioner-respondent [hereafter, "Petitioner"] was entitled to a new sentencing proceeding due to trial counsel's failure to object to the judge's penalty phase instruction that the jury could not consider mercy in determining whether the appropriate punishment was life imprisonment without the possibility of parole or the death penalty. Thus, the question presented is whether this Court should affirm that decision because there is ample record evidence supporting the PCR Court's decision that Petitioner's trial counsel was ineffective for failing to object to the trial court's idiosyncratic charge which, as this Court has previously recognized, was clearly at odds with longstanding state and federal law.

ADDITIONAL SUSTAINING GROUND

The PCR Court's order granting Petitioner a new sentencing trial should also be sustained because trial counsel provided ineffective assistance in the penalty phase when, despite knowing that Petitioner's birth mother was an alcoholic who drank heavily throughout her pregnancy, they failed to investigate, retain an appropriate expert, and present mitigating evidence that Petitioner suffers from Fetal Alcohol Spectrum Disorder.

STATEMENT OF THE CASE

Petitioner-Respondent, Jonathan Binney [hereafter, "Petitioner"], was convicted by a Cherokee County jury of murder and first-degree burglary for the June 7, 2000 shooting death of Judy Southern. Defense counsel's penalty phase presentation centered on testimony from Dr. Donna Schwartz-Watts, a forensic psychiatrist who specializes in sexual disorders, and concluded that Petitioner was a sexual sadist. App. pp.3400-01. She relied entirely on Petitioner's self-report to reach this conclusion because trial counsel failed to utilize the services of a mitigation specialist or investigator. App. p.3425. While Dr. Schwartz-Watts suggested that Petitioner may have Fetal Alcohol Spectrum Disorder [hereafter, "FASD"], she stated that such a diagnosis is "really more of a medical phenomenon than it's probably going to be a psychiatric phenomenon."[1] App. p.3411. She further described (mistakenly) the medical community's knowledge of FASD as "limited" and "unclear" and claimed (erroneously) that there were "no real criteria" for properly diagnosing the disorder. When asked to describe the behavioral symptoms of FASD, Dr. Schwartz-Watts testified that a person with FASD might "have a little bit of trouble in school paying attention." App. pp.3412-13.

Trial counsel also called Reverend James Binney, Petitioner's adoptive father, to testify. Reverend Binney provided some information regarding Petitioner's family life and background and stated that he and his wife loved Petitioner and had a good relationship with Petitioner and his children. In addition to providing this general background mitigation, Reverend Binney

[1] Dr. Schwartz-Watts testified that Petitioner's birth mother, Gayle Dove Murray [hereafter, "Ms. Dove"] "drank very heavily in an attempt to abort [her] pregnancy" with Petitioner. App. p.3406. On cross examination, however, Dr. Schwartz-Watts admitted that she had no records to support this assertion. App. pp.3443-44. Ms. Dove committed suicide while Petitioner was awaiting his capital trial. App. p.3405. Specifically, with regard to Ms. Dove's purported use of drugs and alcohol while pregnant with Petitioner, Dr. Schwartz-Watts testified: "there is no documentation to back that up at all." App. p.3444.

specifically asked that the jury return a life sentence as an act of mercy. App. p. 3550 ("I would ask for mercy for my son"); App. p.3550 ("I ask for mercy"). Despite Reverened Binney's request for mercy, the trial court instructed the jury to disregard it, stating, in relevant part: "[Y]ou may recommend a sentence of life imprisonment for any reason, or for no reason at all, *other than as an act of mercy*." App. p.3609 (emphasis added). Trial counsel did not object to the trial court's instructions, and the jury sentenced Petitioner to death.

After this Court affirmed his convictions and sentences on direct appeal, *State v. Binney*, 362 S.C. 353, 608 S.E.2d 418 (2005), Petitioner sought post-conviction relief. On May 11, 2012, the PCR court granted Petitioner a new sentencing proceeding based on the trial court's erroneous charge that the jury could not consider mercy as a reason to impose a life sentence. The PCR court denied relief on all other grounds.

ARGUMENT

I. THE PCR COURT CORRECTLY HELD THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S SENTENCING INSTRUCTION THAT THE JURY COULD NOT CONSIDER MERCY AS A REASON TO IMPOSE A LIFE SENTENCE.

Petitioner's trial counsel raised no objection to the trial court's sentencing instruction that jurors could "recommend a sentence of life imprisonment for any reason, or for no reason at all, *other than as an act of mercy*." App. p.3609 (emphasis added). Trial counsel testified at the PCR hearing that they had no strategic reason for failing to object. App. pp.4538-39. The PCR Court held that trial counsel's failure to object was deficient performance and resulted in prejudice "because [the erroneous instruction] permitted the jury to operate under the false belief that they could not consider mercy as a reason to impose a life sentence when, in fact, it has long been the law in this State that a jury may properly consider mercy and may impose a life sentence for any reason or no reason at all." App. p.5603. The PCR Court noted that the challenged instruction in

Petitioner's case is identical to the one that this Court found erroneous in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009), and, further, that two other circuit courts had recently granted post-conviction relief on the basis of this same instruction. *Hughey v. South Carolina*, 2000-CP-01-0212 (May 14, 2010), and *Evans v. South Carolina*, 2006-CP-23-7719 (August 29, 2011).

In *Rosemond*, this Court ordered a new sentencing proceeding based on Rosemond's trial counsel's prejudicial failure to present any evidence of mental health issues in the penalty phase. 383 S.C. at 329, 680 S.E.2d at 10. The Court also elected to address Rosemond's argument that trial counsel was ineffective for failing to object to this same instruction. The Court held that the challenged instruction prevents jurors from considering mercy as part of their sentencing decision, contrary to longstanding state law under which a defendant is entitled to present evidence of mercy (*see State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 318-19 (1991)) and state law requiring that jurors be instructed that they can return a life sentence "for any reason or no reason at all." *Rosemond*, 383 S.C. at 329-30, 680 S.E.2d at 10.

A jury's consideration of mercy has long been central in capital sentencing proceedings in general[2] and in South Carolina, specifically.[3] This Court's well-established precedents provide

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[2] *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 177 (1976) (noting, throughout the twentieth century, "widespread adoption of laws expressly granting juries the discretion to recommend mercy") (citing *McGautha v. California*, 402 U.S. 183, 199-200 (1971) and *Woodson v. North Carolina*, 428 U.S. 280, 289-92 (1976)); *California v. Brown*, 479 U.S. 538, 562-63 (1987) (Blackmun, J., dissenting) ("[W]e adhere so strongly to our belief that sentencers should have the opportunity to spare a capital defendant's life on account of compassion for the individual because, recognizing that the capital sentencing decision must be made in the context of 'contemporary values,' we see in the sentencer's expression of mercy a distinctive feature of our society that we deeply value.").

[3] *See, e.g., Rosemond*, 383 S.C. at 329, 680 S.E.2d at 10 ("[I]f a plea for mercy is admitted in evidence, then a jury should be entitled to consider it."); *State v. Wise*, 359 S.C. 14, 27, 596 S.E.2d 475, 481 (2004) ("[A] capital defendant may present witnesses who know and care for him, and who are willing on that basis to plead with the jury for mercy on his behalf."); *State v. Chasteen*, 228 S.C. 88, 104, 88 S.E.2d 880, 887 (1955) ("The discretion of the jury as to recommending mercy is an unlimited one. As pointed out in *State v. Jones*, a recommendation to mercy does not have to be based on evidence. It was held in *State v. King* that it was sufficient to simply inform

that, *inter alia*: (a) a capital defendant is entitled to offer evidence asking "for mercy on his behalf," *State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 318 (1991); (b) defense counsel may properly "appeal to the jury's sense of mercy," *Drayton v. Evatt*, 312 S.C. 4, 12, 430 S.E.2d 517, 522 (1993); and, (c) the defendant may address the jury and ask for mercy. *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004). Moreover, mercy is embraced in the statutory directive of S.C. Code Ann. § 16-3-20(C) that "the judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law." In addition, South Carolina does not require juries to weigh aggravating circumstances against mitigating circumstances – in other words, South Carolina is a non-weighing state in which it has long been the rule that a jury may return a life sentence for any reason.

The trial judge's directive to ignore the mercy evidence also cannot be squared with the United States Supreme Court's Eighth Amendment jurisprudence. In *Lockett v. Ohio*, 438 U.S. 586 (1978), and its progeny, the Court has made clear that the sentencing jury must be permitted to hear and fully consider any and all relevant mitigating evidence. *See, e.g.*, *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (reversing a death sentence where the trial judge instructed the jury it could consider only mitigating circumstances enumerated in the state's death penalty statute); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (reversing a death sentence where the trial court excluded mitigating evidence of the defendant's good behavior in pre-trial detention); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (reversing a death sentence where the sentencing judge refused, as a matter of law, to consider mitigation evidence of a difficult family and of emotional disturbance).

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the jury that they may recommend the defendant to mercy, the effect of which is to reduce the punishment to life imprisonment.") (citing *State v. Jones*, 201 S.C. 403, 23 S.E.2d 387 (1942) and *State v. King*, 158 S.C. 251, 155 S.E.2d 409 (1930)); *Chubb v. State*, 303 S.C. 395, 397, 401 S.E.2d 159, 160 (1991) ("A recommendation of mercy rests entirely in the discretion of the jury and may be exercised independently of whether the evidence warrants it.").

Mitigating evidence has been construed broadly as is defined as any evidence that might serve "as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604; *see also Skipper*, 476 U.S. at 5. In *Lockett*, the Court held that a statute that prevents the sentencer from giving effect to applicable mitigation "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." 438 U.S. at 605. Subsequent decisions have made clear that a capital sentencing jury must be able to consider *and give effect* to mitigating evidence, for it is only when a jury is provided a vehicle for expressing its reasoned moral response to such evidence that "we can be sure the jury has treated the defendant as a uniquely individual human being and has made a reliable determination that death is the appropriate sentence." *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (internal citation omitted).

The South Carolina legislature has decided to allow mercy as a sentencing consideration, encompassed in the language "for any reason or no reason at all," and this Court has so interpreted the statute. As such, mercy is indisputably a valid basis for imposing a life sentence under state law, and a capital jury must be able to consider and give effect to a capital defendant's mercy-based mitigation presentation under *Lockett*. Here, the jury was specifically instructed, both orally and in writing, that they could not consider Petitioner's father's multiple requests to impose a life sentence as an act of mercy. Accordingly, the trial judge's instruction in this case violated both state and federal law.

Petitioner's case is one of a small handful of cases in which the same trial judge gave this identical erroneous instruction. As the PCR Court noted, there are only three other cases addressing this identical charge, and in all three cases courts, including this Court, have found the charge at odds with this State's core principles of capital sentencing. *See Rosemond*, 383 S.C. at

329-30, 680 S.E.2d at 10; *Hughey*, 2000-CP-01-0212; and *Evans*, 2006-CP-23-7719. In sum, this this was an idiosyncratic jury instruction given by one (and only one) judge in four capital cases. There is no legitimate, principled basis to distinguish Petitioner's case from *Rosemond*, *Hughey* or *Evans*. Respondent strains to do so by ignoring this Court's well-established jurisprudence and rests its argument, instead, on a mischaracterization of *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000). *Hughey* cannot reasonably be read to overrule this State's longstanding use of mercy as valid consideration in capital sentencing.[4] As the PCR Court aptly noted, Respondent's argument that the central role of mercy is a "new rule" in South Carolina cannot be squared with years of contrary decisions predating Petitioner's capital sentencing proceeding. App. p.5603 ("It has been the rule for decades that mercy can be considered by a South Carolina capital jury.").[5]

Respondent's next argument – that "the jury would have reasonably interpreted the language to allow mercy, not exclude it,"(Brief of Petitioner at p.20) – cannot be squared with either the plain language of the charge or common sense. And it is for that reason that this Court has already held that the charge contradicts state law because it specifically precludes capital juries from returning life sentences as acts of mercy. *Rosemond*, 383 S.C. at 330, 680 S.E.2d at 10.[6]

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[4] *Hughey* did not discuss or decide the issue here; instead, *Hughey* only went so far as to find that the charge was consistent with the common law rule that a jury can properly be instructed that its verdict cannot be swayed by sympathy or prejudice. *See id.* at 460, 529 S.E.2d at 732 ("a judge's charge that the jury should not be guided by sympathy, prejudice, passion, or public opinion is not reversible error.").

[5] Even if such a rule were somehow deemed "new," Respondent also errs in arguing that a new rule would not apply in post-conviction under *Teague*. Brief of Petitioner at p.13, n.9. This Court has never adopted *Teague's* retroactivity framework and Respondent is clearly wrong to argue that this Court would be required to do so. *See Danforth v. Minnesota,* 552 U.S. 264 (2008) (holding *Teague* is not binding on state courts).

[6] The overall context of the charge did not "ameliorate" the trial court's error or "clarif[y] the ability of the jury to sentence [Petitioner] to a life sentence as an act of mercy," as Respondent suggests. Brief of Petitioner at p.18. The trial court used the word "mercy" only once – in the erroneous instruction telling jurors that they could not consider mercy in reaching a morally

Accordingly, Respondent is wrong to argue that the improper charge was harmless because "there was overwhelming evidence presented that Binney is guilty of murder and the statutory aggravating circumstance." Brief of Petitioner at p.17. As explained above, South Carolina is not a weighing state. A capital jury is never required to give a death sentence, even if the case involves overwhelming aggravation and no mitigation.[7] Rather, a South Carolina jury is always permitted to give life as an act of mercy. But, that was exactly the power stripped from the jury here. It is simply impossible to conclude that Petitioner was not prejudiced by the erroneous charge, especially given Reverend Binney's multiple requests for mercy for his adopted son. *See, e.g., State v. McClure*, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000) ("We note the evaluation of the consequences of an error in the sentencing phase of a capital case are more difficult because of the discretion that is given to the sentencing jury. A capital jury can recommend a life sentence for any reason or no reason at all.").

Thus, for these reasons, there is ample support for the PCR Court's decision that Petitioner was entitled to a new sentencing proceeding and the judgment below should be affirmed.

II. THE PCR COURT'S ORDER GRANTING PETITIONER A NEW SENTENCING TRIAL SHOULD ALSO BE SUSTAINED BECAUSE TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE AND PRESENT EVIDENCE OF FETAL ALCOHOL SPECTRUM DISORDER.

A. RELEVANT LEGAL PRINCIPLES.

Penalty phase claims of ineffective assistance of counsel are reviewed under the familiar two-prong test established by *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which requires

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reasoned sentencing decision. The jurors were also told that they must follow the law as instructed by the trial court. No language in the charge as a whole abated the trial court's mercy instruction error.

[7] Petitioner's case is not one devoid of mitigation. In fact, there was a compelling mitigation story to be told, but Petitioner's trial counsel failed to adequately investigate and present the available evidence. *See* Section II, below.

a petitioner to show that: (1) trial counsel's performance was deficient; and, (2) the deficiency resulted in prejudice. *See also Porter v. McCollum*, 558 U.S. 30, 38 (2009); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Whether an attorney's performance was deficient is determined by a standard of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. In capital cases, the professional norms require counsel to conduct a thorough investigation into "*all reasonably available* mitigating evidence." *Wiggins*, 539 U.S. at 524 (emphasis in original); *see also Porter*, 558 U.S. at 39 ("It is unquestioned that under the prevailing professional norms . . . counsel ha[s] an 'obligation to conduct a thorough investigation of the defendant's background.'") (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)).[8] It is well-established that trial counsel should be particularly diligent to investigate evidence of mental impairments, such as organic brain damage, because of its powerful mitigating effect. *See, e.g., Sears v. Upton*, 130 S.Ct. 3259, 3261 (2010) (holding evidence of brain damage was "significant mitigation evidence a constitutionally adequate investigation would have uncovered"); *Porter*, 558 U.S. at 41 (finding evidence of brain damage and cognitive deficits in reading, writing and memory were part of "the 'kind of troubled history we have declared relevant to assessing a defendant's moral culpability.'") (quoting *Wiggins*, 539 U.S. at 535); *Rompilla v. Beard*, 545 U.S. 374, 392 (2005) (holding trial counsel was ineffective for failing to discover and present evidence of organic brain damage caused by fetal alcohol syndrome); *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) (holding evidence of impaired intellectual functioning is inherently mitigating in the penalty phase of a capital case); *Wiggins*, 539 U.S. at 535 (stating that a competent attorney, aware of the defendant's history of

[8] The topics trial counsel should investigate and consider presenting include, among other things, "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experiences, and religious and cultural influences." *Wiggins*, 539 U.S. at 524.

diminished mental capacities, among other things, would have introduced it in the capital sentencing proceeding).[9]

Moreover, trial counsel must not "ignore[] pertinent avenues for investigation of which he should have been aware." *Porter*, 558 U.S. at 40. Where trial counsel fail to conduct a thorough mitigation investigation, they necessarily lack the information required to make reasonable strategic judgments concerning the selection and presentation of evidence, and deference to decisions made under such conditions is inappropriate. *See e.g., Sears*, 130 S.Ct. at 3265 ("We reject[] any suggestion that a decision to focus on one potentially reasonable trial strategy . . . [can be] justified by a tactical decision when counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background.").

To establish prejudice, a PCR applicant "'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

[9] Numerous lower courts have likewise recognized that brain damage is uniquely mitigating. *See, e.g., Hooks v. Workman*, 689 F.3d 1148, 1205 (10th Cir. 2012) ("the involuntary physical alteration of brain structures, with its attendant effects on behavior, tends to diminish moral culpability, altering the causal relationship between impulse and action."); *Blystone v. Horn*, 664 F.3d 397, 406, 420 (3rd Cir. 2011) (trial counsel's deficient performance was prejudicial where counsel failed to investigate and present evidence that petitioner suffers from "untreated brain damage and psychiatric disorders, all of which were aggravated by a history of poly-substance abuse."); *Wilson v. Sirmons*, 536 F.3d 1064, 1094 (10th Cir. 2008) (stating mental conditions "associated with abnormalities of the brain" are "likely to [be] regarded by a jury as more mitigating than generalized personality disorders"); *Haliym v. Mitchell*, 492 F.3d 680, 718 (6th Cir. 2007) (prejudice found where trial counsel failed to present evidence that, among other things, petitioner suffered a serious brain injury and functional brain impairment, which caused problems with impulsivity, judgment and problem solving); *Bryan v. Mullin*, 335 F.3d 1207, 1244 (10th Cir. 2003) (Henry, J., concurring in part and dissenting in part) ("[Counsel's] performance left the jury no reason even to consider as a possibility that [the defendant] might not be morally culpable enough, as a result of his involuntarily adduced organic brain disorder, for the death penalty."); *Caro v. Woodford*, 280 F.3d 1247, 1258 (9th Cir. 2002) ("By explaining that [defendant's] behavior was physically compelled, not premeditated, or even due to a lack of emotional control, his moral culpability would have been reduced.").

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different.'" *Porter*, 558 U.S. at 38-39 (quoting *Strickland*, 466 U.S. at 694). The test is not whether a capital defendant would have received a life sentence absent trial counsel's deficient performance. As the United States Supreme Court recently reiterated in *Porter*:

> [w]e do not require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.

Id. at 44 (quoting *Strickland*, 466 U.S. at 693-94). The question is whether "the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [a defendant's] culpability." *Rompilla*, 545 U.S. at 393. Prejudice is established if "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537.

B. TRIAL COUNSEL FAILED TO PRESENT EVIDENCE OF FASD.

Trial counsel was aware that Petitioner's birth mother drank alcohol during her pregnancy. App. p.4656. In fact, Petitioner's adoptive parents specifically informed trial counsel that his biological mother was an alcoholic and that they believed he had FASD. App. p.4600. Despite these obvious red flags, trial counsel failed to retain an expert in FASD and, further, failed to obtain available medical, school, and other information to document and support a diagnosis of FASD. Instead, trial counsel relied on Dr. Schwartz-Watts, who is not an expert in FASD and was unable to explain its devastating effects and their strong nexus to Petitioner's behavior. Had trial counsel performed an adequate social history investigation and retained the services of an appropriate expert, they could have presented a powerful mitigation case.

Dr. Natalie Novick-Brown is a clinical and forensic psychologist with a certified specialization in Fetal Alcohol Spectrum Disorders and sexual predator evaluations. She is also a clinical assistant professor with the University of Washington's nationally renowned Fetal Alcohol

and Drug Unit. App. p.4197. Dr. Novick-Brown evaluated Petitioner in connection with the PCR proceedings and concluded that "[h]e meets the criteria for full Fetal Alcohol Spectrum Disorder." App. p.4207. Dr. Novick-Brown reached this conclusion by applying the following four diagnostic criteria widely accepted since the 1970s and codified by the Institute of Medicine in 1996: (1) prenatal alcohol exposure; (2) facial dysmorphology; (3) growth deficits in height and weight; and, (4) central nervous system abnormalities. App. pp.4212-13.

First, Dr. Novick-Brown reviewed extensive records – none of which were obtained by trial counsel – documenting that Gayle Dove, Petitioner's birth mother, consumed alcohol and other drugs during her pregnancy. App. pp.4213-14.[10] She described the evidence of prenatal alcohol exposure here as "one of the strongest cases I've seen." App. p.4214. Second, Dr. Novick-Brown reviewed childhood photographs to look for facial dysmorphology. App. p.4216. As a child, Petitioner had small eyelid openings, drooping of the eyelids, some arching of the eyebrows,

[10] Although both Dr. Schwartz-Watts and Teresa Norris advised trial counsel to retain the services of a mitigation investigator, App. p.4716; p.4756, trial counsel never "actually discuss[ed] doing that." App. p.4595. Instead, they decided to handle the mitigation investigation themselves. *Id.* And yet, trial counsel did not even meet with Petitioner until several months after their appointment. App. p.4663. After this initial meeting, trial counsel met with Petitioner only two more times over the next year. App. pp.4664-65. These three meetings constituted the entirety of trial counsel's interactions with Petitioner until approximately three weeks before trial. App. p.4665; 4567. Petitioner's case was the first capital case that either attorney had ever handled as defense counsel, and neither attorney had any specific training in mitigation investigation or presentation. App. pp.4494; 4625. Trial counsel never: (a) spoke to any of Petitioner's aunts, uncles, cousins or other extended relatives; (b) interviewed any of Petitioner's former teachers or guidance counselors; (c) spoke to any childhood friends or people who knew Petitioner and his family; (d) visited any of the places where Petitioner had lived; or, (e) collected any information regarding Petitioner's biological mother. App. pp.4524-4525; pp.4665-4666; Applicant's PCR Exhibit 15. Furthermore, trial counsel failed to collect the overwhelming majority of Petitioner's social history records. App. pp.4666-67. Dr. Novick-Brown explained that this body of information, which trial counsel failed to collect, was "essential" to an accurate evaluation and diagnosis of Petitioner's FASD. App. p.4205.

and low-set ears. App. pp.4216-17.[11] She confirmed her conclusion that Petitioner exhibited the facial dysmorphology characteristic of FASD by consulting with Dr. Michael Lyons, a dysmorphologist at the Greenwood Genetic Center. *Id.* Third, Dr. Novick-Brown noted growth deficits throughout Petitioner's childhood. App. pp.4217-18; PCR Ex. No. A-9. Throughout his childhood, Petitioner's height and weight were significantly below average, often falling in the lowest tenth percentile for his age. App. p.4069. Fourth, Dr. Novick-Brown concluded that Petitioner suffered serious central nervous system abnormalities, based on a number of cognitive deficits uncovered by neuropsychological testing, App. pp.4222-28, as well as structural brain damage documented by Dr. Fred Bookstein, a preeminent scholar in the brain morphometrics of individuals with FASD. App. p.4219; p.4857.[12]

The *corpus callosum* is an arch of neural tissue that links the two halves of the cerebral cortex and thus plays a vital role in what is called "executive functions," meaning the ability of an individual to regulate his own behavior and impulses. App. p.4860. Dr. Bookstein observed "a very severe deformity, nearly a disconnection of the callosum (partial callosal ageneis)" in Petitioner's brain, which he described as being "more extreme" than usual among FASD patients. *Id.* In fact, Petitioner's callosum was 10% thinner than the thinnest callosum Dr. Bookstein had observed in a study of 178 callosa, including 117 from people diagnosed with FASD. App. p.4863. Since as early as 1995, neuropsychologists have been looking at the thinness of the *corpus*

[11] Facial dysmorphology refers to abnormalities of the face known to be caused by maternal ingestion of alcohol during a small window of time during pregnancy – approximately the sixth to eighth week of pregnancy. App pp.4215-16. These facial characteristics can be detected during childhood but typically dissipate as a person grows into adulthood. *Id.*

[12] Dr. Bookstein submitted a detailed affidavit, and gave additional testimony by deposition, on the basis for his conclusion that Petitioner's *corpus callosum* is significantly damaged. Both the affidavit and the deposition were admitted into evidence during the lower court proceedings. App. pp.4857-4868.

callosum structure to diagnose FASD. App. p.4866. Petitioner's brain exhibits "[c]lear effects of heavy prenatal alcohol exposure." App. p.4860.

Dr. Novick-Brown explained that as a result of his FASD, Petitioner suffered from feelings of extreme inadequacy because he was unable to achieve academically or behave appropriately with his peers. App. pp.4228-29. Individuals with FASD struggle to comprehend interpersonal boundaries, as a result of their difficulty in reading social cues and understanding other people's behavior. App. pp.4229-30. Petitioner struggled virtually from birth with "chronic and constant" impulse control and a high degree of suggestibility. App. p.4231. Nearly all of his early criminal activity, particularly his nearly-kleptomaniacal drive to steal, is paradigmatic of the impulse control problems commonly seen in people with FASD. *Id.* Dr. Novick-Brown explained that impulsivity is one of the most common characteristics found in people with FASD. "[A]bout two thirds of [people with FASD] end up arrested and/or in jail or prison. . . . So it's impulse control and being able to withstand those urges that is defective or deficient." App. p.4231. Petitioner also has serious motor skill, attention, and memory deficits, and struggles to integrate verbal and non-verbal information, which are also all common characteristics of individuals with FASD. App. pp.4233-34.

Moreover, like many people with FASD, Petitioner's life history is marked by a constant struggle with extremely poor judgment as a result of deficits in "executive functioning," or the set of essential skills necessary for an individual to function in a pro-social manner. App. p.4233. Executive functions include memory, attention, impulse control, social awareness, and the ability to perceive and adhere to social boundaries and social cues. Petitioner suffers from profound deficits in all of these areas. His executive functioning deficits made it extremely difficult for him to engage in the sort of organized thought processes and consideration of consequences necessary

to exercise good judgment. App. p.4232. He often dissociated thought from behavior—that is, he struggled to understand the connection between his thoughts and behavior and, as a result, to control his behavior. App. p.4222. Dr. Novick-Brown explained that FASD affected Petitioner in "virtually every aspect of his life," including his ability to control his behavior and make good decisions.[13] App. p.4238.

Indeed, Petitioner's entire life history is remarkably consistent with FASD. Ms. Dove was fifteen years old when she became pregnant with Petitioner. App. pp.4059-60. She, like many of her family members, suffered from alcoholism and mental illness.[14] App. p.4062. Dove began drinking at the age of fourteen, and continued drinking throughout her pregnancy, at least once to the point of overdose.[15] App. p.4065. During his early childhood, Petitioner experienced serious cognitive, developmental and emotional impairments that would affect him throughout his life. He began manifesting behavioral problems as early as age three, particularly when he was not in a "predictable environment or his own home." App. p.4069. Petitioner struggled at school virtually from the beginning, and over the years his academic difficulties only worsened. App.

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[13] Petitioner's serious cognitive and emotional deficits were further exacerbated by the fact that, despite exhibiting all the characteristics of someone who suffered from FASD from his early childhood, he was not definitively diagnosed with the disorder until the post-conviction relief proceeding. Individuals who are not diagnosed with FASD by age six and who do not receive appropriate medical and psychological intervention, regardless of the support they may receive at home, are much more likely to develop numerous secondary disabilities. App. p.4236. These include criminal behavior, substance abuse, mental health problems, difficult remaining employed, frequently institutionalization and inappropriate sexual behavior. App. pp.4236-37.

[14] Dove's father, grandfather and uncle were all documented to be alcoholics. App. p.4062. Dove's mother suffered from a serious mental-health disorder and was known to have attempted suicide. App. pp.4062-63.

[15] After Petitioner's birth, Dove's drinking worsened and she began to abuse other substances. App. p.4066. She was diagnosed with, among other things, Post-Traumatic Stress Disorder, Depression, Bipolar Disorder, and severe migraines. App. pp.4066-67. Dove committed suicide in 2002. App. p.4063.

pp.4070-71. He was frequently bullied at school and had no regular friends. App. p.4071; p.4076. By the time he reached the seventh grade, after having to repeat the sixth grade, Petitioner was receiving mostly failing grades and tested at a fourth-grade level in language and a third-grade level in math. App. p.4074-75. He was in only the second percentile for his age in problem solving. App. pp.4075-76. His parents enrolled him in tutoring programs, to no avail. *Id.*

During his early teen years, Petitioner developed an obsession with women's clothing. App. pp.4076-77. At around the age of fifteen he began stealing women's underwear from guests of his family, and would wear this underwear under his own clothing.[16] App. p.4078. Because he got into trouble with increasing frequency and did not respond to his parents' discipline, the Binneys sent Petitioner to a boarding school. App. p.4079. Within a month he was caught forging checks and stealing a car, and ultimately failed out of the school. *Id.* The Binneys sent Petitioner to another boarding school, where he stole another car, broke into a store, and was incarcerated for several months. App. p.4079-80. During his incarceration Petitioner became depressed, anxious, suicidal,[17] and delusional. App. p.4080. After his release, at the age of seventeen, Petitioner was finally diagnosed with a neurodevelopmental disorder and was prescribed Ritalin. *Id.* He was institutionalized in a psychiatric hospital at the age of eighteen, where he was diagnosed with depression, dysthymic disorder, attention deficit with hyperactivity disorder, and serious cognitive impairments. App. p.4081. The evening after his release from the psychiatric hospital, Petitioner stole yet another car and then attempted suicide. App. pp.4082-83.

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[16] Dr. Novick-Brown testified that sexually inappropriate behavior is observed in almost fifty percent of individuals diagnosed with any FASD condition. App. p.4237. In addition, Petitioner was a victim of sexual abuse. At age eight, Petitioner was sexually molested by an older boy at school. App. p.4072. When he later told his adoptive parents about this incident, they did not seek counseling for Petitioner and told him not to disclose the abuse to anyone else. *Id.*

[17] People with FASD can have a high incidence of suicidal ideation.

Petitioner enrolled in college but was expelled within three months. App. p.4086. He quickly lost one job after another and continued to run into legal trouble for stealing. App. p.4089. Shortly before the crime occurred, Petitioner met his birth mother for the first time. App. pp.4098-99. Petitioner hoped to form a stable relationship with Ms. Dove, but she continued to struggle with her own demons and was hospitalized for a drug overdose. App. p.4102. In the weeks leading up to crime, Petitioner attempted suicide. App. p.4103. He had no place to live; his driver's license was suspended; he could not get a job; and his birth mother kicked him out of her house. Petitioner was in an "acute suicidal state." App. p.5261. "He was confused, he was alone, he was chaotic. . . . He was pretty well deteriorated at that point in time." App. p.4109.

In sum, Petitioner's FASD "made a significant difference in his life" and impacted "his functioning from early childhood up to the present time." App. p.4238. FASD affected Petitioner's ability to control his behavior, achieve academically, behave in a socially appropriate manner, and function as an adult across all domains of life. *Id.* Because of his FASD, Petitioner "has deficient reasoning ability, deficient judgment and deficient impulse control. And those aspects . . . were involved in the behavior in the case in question, in the crime in question." App. p.4239. At the time of the crime, Petitioner's life was on a sharp downward spiral, and the deficits he suffers as a result of FASD significantly impaired his ability to productively cope with those circumstances and contributed to his behavior at the time of the crime. This history of FASD and its effects on Petitioner's life would have made a powerful mitigation story – one that is categorically, quantitatively and qualitatively different from the brief suggestion of FASD that was offered at trial.[18] *See Weik v. State*, No. 2007-060700, 2014 WL 3610954, at *11 (S.C. July 23,

[18] *See, e.g., Outten v. Kearney*, 464 F.3d 401, 421 (3d Cir. 2006) ("Simply because some mitigating evidence regarding Outten's abusive childhood was introduced to the jury . . . it does not follow that the jury was provided a comprehensive understanding of Outten's abusive relationship with

2014) (overturning a death sentence where trial counsel introduced mitigation in the form of psychological testimony but failed to present readily available and mitigating social history evidence). The mitigation evidence established in PCR would have undermined the State's case in aggravation and offered a far more sympathetic explanation for Petitioner's actions. Altogether, this case in mitigation could have convinced at least one juror that death was not an appropriate sentence. *See Wiggins*, 539 U.S. at 536.

C. TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT AND PREJUDICIAL.

Trial counsel was ineffective in failing to investigate and present evidence of FASD. At the PCR hearing, trial counsel admitted that they were aware that Petitioner's birth mother drank alcohol during her pregnancy and that Petitioner's life history was consistent with FASD. App. Pp.4656-58. And yet, trial counsel did not collect any records on Petitioner's biological mother,

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his father or other aspects of his troubled childhood."); *Lewis v. Dretke*, 355 F.3d 364, 368 (5th Cir. 2003) (holding that although trial counsel did present evidence of child abuse through petitioner's grandmother, "her conclusional testimony contained none of the details provided by Lewis's siblings at the habeas hearing, which could have been truly beneficial. [The grandmother's] skeletal testimony concerning the abuse of her grandson was wholly inadequate to present to the jury a true picture of the tortured childhood experienced by Lewis."); *Powell v. Collins*, 332 F.3d 376, 399 (6th Cir. 2003) (rejecting contention that post-conviction evidence was cumulative to trial evidence, finding trial counsel ineffective for presenting "vague references to [p]etitioner's family history and background" through a witness who "was not able to fully describe . . . [p]etitioner's background, history, and character for mitigation purposes"); *Cargle v. Mullin*, 317 F.3d 1196, 1222 (10th Cir. 2003) (finding trial counsel ineffective when "as a result of counsel's utter lack of preparation, the jury heard only brief, personally remote, and fairly generic testimony . . . [which did] not relate the individualized, humanizing facts that other potential witnesses could have provided"); *Neal v. Puckett*, 286 F.3d 230, 238-240 (5th Cir. 2002) (*en banc*) (trial counsel ineffective where, "[a]lthough [the mitigation evidence presented at trial] seems to touch many relevant points, it was presented . . . in an abbreviated form with no elaboration" and "counsel never contacted any of the other people . . . who have provided the additional testimony we now have before us, and which would have added to and developed the skeletal evidence before the jury"); *Jermyn v. Horn*, 266 F.3d 257, 311 (3rd Cir. 2001) ("While the jury clearly was aware that [petitioner] claimed that he suffered from a mental illness, the lack of directed and specific testimony about [his] childhood and its impact on [his] mental illness left the jury's awareness incomplete.").

App. p.4656, nor did they seek out someone with specific expertise in FASD. App. p.4660. Specifically, trial counsel testified:

> Q: [Did you] make an effort to find someone whose area of expertise and specialty was fetal alcohol syndrome?
>
> A: I did not do that.

Id.

Instead, trial counsel relied entirely on Dr. Schwartz-Watts even though she never claimed any specific expertise. At the PCR hearing, Dr. Schwartz-Watts testified that she did not consider herself an expert in FASD, she had never written anything on that subject, and she had never before been qualified as an expert on that topic. App. pp.4686-87. Dr. Schwartz-Watts' lack of expertise in this particular area is also evident from her trial testimony, which provided only a general suggestion that Petitioner may suffer from FASD. However, Dr. Schwartz-Watts undermined even this vague suggestion by incorrectly stating that there were "no real criteria" for diagnosing FASD and erroneously claiming that the scientific research was undeveloped and unclear. More significantly, Dr. Schwartz-Watts never explained what FASD is or how its effects impacted Petitioner's behavior throughout his life and at the time of the crime. In fact, Dr. Schwartz-Watts testified that FASD had nothing to do with the events of the crime and, instead, named sexual sadism as "clearly related" to the murder.[19] App. pp.3447-48. Without a comprehensive discussion of FASD by someone with the requisite expertise, the jury was deprived of an

[19] The overwhelming majority of Dr. Schwartz-Watts' testimony focused on her opinion that Petitioner has a sexual disorder. App. pp.3390-3441. This testimony did more to bolster the state's case in aggravation than it did to further any efforts at obtaining a life sentence. The volume and detail of this part of Dr. Schwartz-Watts' testimony dwarfed the tiny amount of testimony she offered regarding FASD.

explanation bearing directly on Petitioner's culpability – one that would have made a compelling case for life.

The United States Supreme Court has consistently found trial counsel ineffective for failing to investigate and present similar evidence. For example, in *Wiggins*, the Supreme Court held that defense counsel's performance was unreasonable where, much like here, trial counsel failed to offer expert testimony on the significance of Wiggins' likely FASD and instead relied on evidence of Wiggins' sexual pathology even though trial counsel knew that "[Wiggin's] mother was a chronic alcoholic" and that Wiggins displayed emotional difficulties and contemplated suicide. *Wiggins*, 539 U.S. at 524–25. Similarly, in *Rompilla*, the Supreme Court found that counsel's assistance was ineffective when counsel failed to present evidence that the defendant suffered from organic brain damage as a result of fetal alcohol exposure, because it was an impairment that by definition existed since childhood and thus likely impaired the defendant's ability to appreciate the criminality of his conduct at the time of the offense. 545 U.S. 392–393; *see also Porter*, 558 U.S. 36-37 (holding trial counsel was ineffective for failing to present evidence of brain damage that could manifest in impulsive behavior); *Sears*, 130 S.Ct. at 3262 (holding trial counsel was ineffective for failing to present evidence that the defendant had "problems with planning, sequencing and impulse control").

Several state supreme courts have also found that failure to present evidence of FASD amounts to ineffective assistance. In *Hurst v. State*, 18 So. 3d 975, 1010–1011 (Fla. 2009), the Florida Supreme Court held that trial counsel's failure to present evidence of FASD was not consistent with any reasonable trial strategy. The court emphasized that counsel's performance was unreasonable in light of his knowledge that Hurst's mother drank heavily during her pregnancy, and because Hurst's family presented counsel with information that Hurst had

borderline intellectual functioning and was emotionally immature. *Id.* The Washington Supreme Court also found counsel ineffective for failing to present evidence of FASD when, despite knowing that the defendant likely suffered from FASD, counsel retained a psychologist who was not an expert in FASD, could not make an individualized diagnosis of the defendant's FASD, and provided erroneous testimony about FASD's effects. *In re Brett*, 16 P.3d 601, 604–607 (Wash. 2001); *see also Bond v. Beard*, 539 F.3d 256, 283, 288 (3rd Cir. 2008) (finding trial counsel was ineffective for failing to present evidence of fetal alcohol, among other things, and noting that trial counsel did not obtain readily available school or medical records or "conduct a meaningful inquiry into [the defendant's] family life."); *Silva v. Woodford*, 279 F.3d 825, 847 n.17 (9th Cir. 2002) (holding trial counsel was ineffective for failing to present evidence that the defendant "may suffer" from FASD).

Likewise, here, Petitioner's trial counsel failed to conduct an adequate social history investigation, failed to consult with an expert in FASD, and failed to present substantial mitigating information regarding FASD and its effects on Petitioner's lifelong behavior. Trial counsel's conduct was both deficient and prejudicial.

CONCLUSION

For all of the reasons stated above, this Court should allow the lower court's Order granting a new sentencing proceeding to stand.

Respectfully submitted,

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August 13th, 2014.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2012-212107

Jonathan Kyle Binney, #6009, Petitioner/Respondent

v.

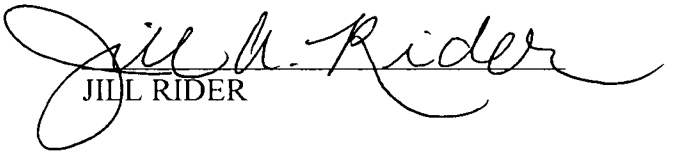
State of South Carolina, Respondent/Petitioner.

CERTIFICATE OF SERVICE

I, Jill Rider, hereby certify that I have served upon the attorney for the Respondent/Petitioner one (1) copy of the Petitioner/Respondent's Brief of Respondent in the above-captioned case by depositing a copy of same in the United States Mail, first class, postage pre-paid, addressed as follows:

William Edgar Salter, III
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

This the 13th day of August, 2014, in Columbia, South Carolina.



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