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**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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Appeal from Lexington County  
Court of Common Pleas  
Honorable William P. Keesley, Circuit Court Judge

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Appellate Case No. 2019-001104

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RON O'NEAL FINKLEA .....*Respondent,*

v.

STATE OF SOUTH CAROLINA .....*Petitioner.*

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**BRIEF OF RESPONDENT**

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## **RESTATEMENT OF THE QUESTIONS PRESENTED**

1. The PCR court issued a thoroughly reasoned, fact-bound decision finding that: (a) trial counsel failed to “exercise reasonable diligence” and ignored multiple indicators of a need for further investigation; and, (b) trial counsel’s failures resulted in a penalty phase presentation that was “substantially incomplete,” “inaccurate” and lacking “any details about the physical, sexual, and emotional trauma” that Finklea endured as a child, as well as its “significant psychological effects.” Must this Court affirm that decision under the “any evidence” standard because it is amply supported by the record?
2. Whether this Court should affirm the judgment below or dismiss the writ as improvidently granted where the crux of the State’s argument on appeal turns on an alleged legal “error” that is both: (a) no error at all; and, (b) unpreserved because it was not raised at the PCR hearing or ruled upon by the PCR trial court?

## **INTRODUCTION**

Respondent, Ron O’Neal Finklea, was convicted of the murder of Walter Sykes, a security guard at the Selectron plant, where Finklea and his brother-in-law, Theodore Davis, attempted to rob an ATM. Sykes sustained gunshot wounds to the face and neck, as well as severe burns from gasoline that the defendants brought inside the building for the purpose of “destroy[ing] video evidence.” App. 3036. Finklea’s trial counsel—Stephen Soltis and Melissa Armstrong—focused their penalty-phase presentation on attempting to show “that he’s not a bad person, got some problems, doesn’t deserve to die.” App. 2634. A Lexington County jury returned a unanimous death verdict on September 4, 2007.

In post-conviction, Finklea asserted that trial counsel unreasonably failed to investigate and present mitigating evidence, including childhood trauma and abuse. At a two-day evidentiary

hearing before Judge William P. Keesley, Finklea offered testimony from five witnesses. Soltis, Armstrong and Dr. Donna Maddox (a forensic psychiatrist hired by trial counsel) testified regarding the trial. Two additional expert witnesses—Janet Vogelsang, a licensed social worker, and Dr. Susan Knight, a forensic psychologist—testified about Finklea’s life history and the mental illness repercussions of the abuse and trauma he endured during his childhood.

The State was represented at the PCR hearing by Donald J. Zelenka, the most senior and experienced attorney in the Attorney General’s capital post-conviction office. Zelenka called no witnesses to testify and raised no objections to the testimony of either Vogelsang or Knight. As discussed more fully below, Zelenka raised a single objection throughout the entire hearing, which was expressly limited to the admission of Knight’s written report. After the PCR court sustained this objection, and following his cross-examination of Dr. Knight, Zelenka stated, “[i]n light of her testimony, I withdraw my objection to her report coming in.” App. 2865.

On March 6, 2019, the PCR court issued a carefully considered order granting relief. The State now claims that the PCR court committed a legal error by relying “solely on inadmissible hearsay” (specifically, the testimony of Vogelsang and Knight) and failed to consider the totality of the evidence. Pet’r’s Br. 9, 25. Both arguments are meritless. The expert testimony on which the PCR court relied is routinely offered and clearly admissible in capital sentencing proceedings. Even if that were not true (and it undoubtedly is), the State *never objected* to the evidence about which it now complains. Thus, there is no preserved legal issue for this Court to review.

In addition, the PCR court’s decision is thoroughly supported by the record. The thirty-six-page written opinion plainly demonstrates that Judge Keesley fully understood and fulfilled his obligation to “consider ‘the totality of the available mitigation evidence,’ including both mitigation evidence from trial and from the PCR hearing, and ‘reweigh[] it against the evidence in

aggravation.” App. 3062 (quoting *Williams v. Taylor*, 529 U.S. 362, 397–98 (2000), and *Weik v. State*, 409 S.C. 214, 233, 761 S.E.2d 757, 767 (2014)). The State’s arguments to the contrary are based on multiple mischaracterizations of the record. This Court should uphold the decision of the lower court, either by a reasoned opinion or by dismissal of the writ.

## **STATEMENT OF THE CASE**

### **I. Trial Counsel’s Inadequate Investigation**

Finklea’s trial counsel, Soltis and Armstrong, acknowledged at the PCR hearing that they had little doubt that the jury would find their client guilty of murder and armed robbery. App. 2583, 2971. Similarly, they were aware that the State would be able to establish the existence of one or more statutory aggravating circumstances. App. 2583, 2971–72. Given their (correct) assessment that a penalty phase and death eligibility were both “a foregone conclusion,” (App. 2583, 2970–71), the investigation, development, and presentation of all available mitigating evidence was critical to persuading at least one juror to decide that life without parole, rather than the death penalty, was the appropriate punishment. App. 2972.

Soltis was appointed shortly after Finklea was indicted in 2003. App. 2572. He hired a fact investigator, Dave McDougall, “to find out what we’re looking at in the way of evidence against us.” App. 2575. Soltis asked McDougall to focus on the events of the crime. App. 2577 (“Sentencing wasn’t my concern at that time; it was guilt/innocence.”). McDougall reached out to Finklea’s ex-wife (Cherena Roland) and his then-current wife (Teresa Fuller) and also interviewed Finklea himself. App. 2573–78, 2639, 2nd Supp. App. 35–38, 118–22. McDougall’s notes from these interviews included the following account from Cherena Roland, who lived in Seattle, Washington:

Cherena had some interesting knowledge about Ron’s childhood. She told of Ron not having a father at home and his mother being

abusive and strange. When he was a child Ron was in the yard and his mother shot a gun at him to make him do something. The mother also believes in voodoo and casts spells on people. His mother has berated Ron in front of Cherena and others including a time the mother said to Ron, “*Come here you black motherfucker.*”

2nd Supp. App. 38 (emphasis in original). Roland told McDougall she was “willing to come to South Carolina to testify in this matter,” and “voiced her willingness to tell anyone what she told [McDougall] about Ron.” 2nd Supp. App. 39.

These early signs of abuse and trauma were ignored for several years, and it wasn’t until 2006 that Soltis traveled to Finklea’s hometown in Alabama. App. 2588–89. Once there, he conducted a group “family” interview with approximately a dozen of Finklea’s family members; including Finklea’s mother, who arranged the meeting. App. 2589–90, 2nd Supp. App. 23. Unsurprisingly, this interview produced little more than generic “good guy” information, and Soltis failed to follow up on a statement suggesting abuse, that Finklea had a “hard life,” because Soltis (for no apparent reason) interpreted this comment to mean financial hardship. App. 2619 (“At that initial meeting . . . I don’t recall anybody telling me any bad things that happened in Ron’s life. They said he had a hard life, but nothing specific.” “I took that as meaning a poor lifestyle . . . financially challenged.”).

Soltis also made one trip to Seattle in a failed attempt to interview Roland, although he claimed he spent 8 hours in Seattle “review[ing] file and meeting with witnesses” in his time entry on his billing statement. App. 2599–2600, 2nd Supp. App. 23. Soltis made no further attempt to interview Roland or any other witnesses who were familiar with his client’s life history. App. 2600. During his PCR testimony, Soltis repeatedly testified that Armstrong was primarily responsible for the penalty-phase preparations. App. 2583, 2617, 2625. When asked whether he had any discussions with Finklea about “whether he was abused by any family members [or] other

individuals,” Soltis stated, “I don’t recall specifically asking him those questions, but I never heard anything from him that he had been.” App. 2623.

Counsel also hired a mitigation specialist, Carolyn Graham, to aid the defense team. App. 2584, 2972–73. Neither Soltis nor Armstrong closely supervised her work. App. 2591–92, 2989–90. Graham made one trip to Alabama without even interviewing Finklea. App. 2594, 2976, 2nd Supp. App. 48. She spent between nine and twelve hours over two days travelling to and from Alabama and locating and interviewing witnesses on her trip<sup>1</sup> and, again unsurprisingly, uncovered nothing about the abuse.<sup>2</sup> App. 2593–94, 2nd Supp. App. 48. Graham met with Finklea only once during the course of her work on his case. 2nd Supp. App. 64.

Despite assuming primary responsibility for the mitigation presentation (App. 2969–70), Armstrong never traveled to Alabama or interviewed any of her client’s family members except in brief witness “prep” sessions immediately before their testimony at the penalty phase of trial. App. 2977, 2985–86. When asked whether she attempted to get any new information from the family during these pretrial sessions, Armstrong explained, “I thought we had all the information we were

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<sup>1</sup> There is some discrepancy in the record as to precisely how long Ms. Graham spent talking with family members. Soltis’s testimony at the PCR hearing was that she spent nine hours interviewing Finklea’s family members. App. 2593–94. Graham’s initial November 3, 2006 bill indicates that she invoiced 27 hours of time for this trip, including 11 hours for travel to Alabama, one entry of 7 hours for locating and interviewing family members on October 7, 2006, and one entry for 9 hours of time for both meetings with family members and travelling back to Columbia. 2nd Supp. App. 48. Graham submitted another bill on June 11, 2007, that invoiced 12 hours of time for locating and interviewing family members and 20 hours of travel for her October 2006 trip. 2nd Supp. App. 64. Neither version of Graham’s bill indicates any other attempt to obtain information from Finklea’s family members. 2nd Supp. App. 48–49, 64–65.

<sup>2</sup> A two-page summary of the information gathered by Graham is available at Plaintiff’s PCR Exhibit 27 (App. 3228–29) and essentially mirrors the brief testimony counsel sought to elucidate from the family members at trial. App. 2994–95.

going to get and so I did not probe for additional information. I did not do that.” App. 2986.

Regarding her contact with Finklea himself, Armstrong testified:

Q: Were you the person that was trying to build a relationship of trust with him to ask the information about childhood abuse et cetera or did you leave that to your mitigation investigator Ms. Graham?

A: I think unfortunately I left it to Steve who had [a] relationship with Ron and—or I believed had a relationship with Ron and to Carolyn. I was kind of the late comer and I may have put two [sic] much stock in that.

Q: So were you the person—do you recall talking with Mr. Finklea about whether or not he had been abused as a child?

A: I don’t specifically recall that, no.

App. 2984. Besides a handful of sporadic meetings with Finklea, this was the entirety of counsel’s efforts to obtain social history information. App. 2983–85.

## **II. The Penalty Phase Presentation**

Trial counsel’s prediction that Finklea would be found guilty proved accurate, and, during its case in aggravation, the State argued that Finklea was an unredeemable, “calculating,” and cold-blooded murderer. App. 1822, 2299. In doing so, the State focused on the nature of the offense and contended that the murder was motivated by greed and included acts that were tantamount to “physical torture.” App. 2296–97. The State also focused on evidence that Finklea owed back payments in child support and had sold drugs (App. 2307–10) to support its claim that he had manipulated everyone in his life, including his family and the experts who evaluated him. This, the State argued, negated the mitigating value of any evidence of Finklea’s good character. App. 2312–14.

Finklea’s attorneys presented two types of mitigating evidence: (1) evidence that the offense was totally out of character for Finklea, especially considering his exemplary military

service; and, (2) evidence that Finklea posed no threat to prison officials and other inmates if sentenced to life without parole. On the first theme, counsel called several of Finklea's family members who discussed his redeeming qualities (App. 2115–17, 2124–26, 2129–30, 2135, 2142–46), and two of Finklea's fellow servicemen to describe his exemplary military record and good character. App. 2154–95, 2211–16. One of the character witnesses, Ms. Roland, vaguely alluded to Finklea's "rough younger life," which "caused him to have a lot of insecurities [and] to devalue himself," but she was not questioned further on this matter. App. 2221.

Additionally, two experts testified about Finklea's suicide attempt during his pre-trial incarceration and the resulting anoxic brain injury, which resolved before he left the hospital and before he was interviewed by his investigator on August 19, 2003, but neither addressed the important issue of whether Finklea's moral culpability was reduced due to mental illness or impairment that pre-dated or contributed to the homicide.<sup>3</sup> App. 2196–2210, 2242–59, 3122, 3173. The defense also called Dr. Anna Cherry, Finklea's treating psychiatrist at the Lexington County Detention Center, who had worked with him consistently throughout his pretrial detention. App. 2229. In the course of discussing Finklea's "kind, gentle, soul," Dr. Cherry alluded without elaboration to "his past trauma," but provided no additional information, and counsel, clearly caught off guard by the testimony, did not press her further. App. 2231. During her discussion of statutory mitigating circumstances with the Court, Ms. Armstrong acknowledged her surprise at Dr. Cherry's reference to trauma. App. 2284–85.<sup>4</sup> Finally, counsel called James Aiken, an expert

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<sup>3</sup> Finklea initially was not candid with his trial counsel about having no memory of the time before the offense and his suicide attempt in jail following his arrest. App. 2620, 2840. It was established at the PCR hearing that Finklea had more memory of the facts of the crime than was believed at trial, but did not trust any member of the trial team. App. 2837–39.

<sup>4</sup> Ms. Armstrong admitted during her PCR hearing testimony that she did not know any specifics about the trauma Dr. Cherry referenced. App. 3000, 3010. She also expressly denied having any

in prison adaptability, to testify that Finklea was extremely unlikely to be a threat to other inmates. App. 2267–72, 2276.<sup>5</sup>

After the close of the evidence and arguments, the jury found the existence of two aggravating circumstances and sentenced Finklea to death. This Court affirmed on direct appeal. *State v. Finklea*, 388 S.C. 379, 697 S.E.2d 543 (2010).

### **III. The PCR Hearing and the Substantial Mitigating Evidence the Jury Did Not Hear**

As set forth in detail by the PCR court, the uncontradicted evidence presented at the PCR hearing established that Finklea’s life was marked by brutal beatings, humiliating sexual abuse, and degrading treatment, largely at the hands of his mother. The testimony also revealed that the psychological consequences of this chronic abuse on Finklea’s mental functioning were profound. This evidence painted a significantly different story of Finklea’s life than the jury heard at trial.

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strategic reason for failing to present evidence of childhood trauma, abuse, and its effects. App. 3013–15.

<sup>5</sup> Dr. Donna Maddox, a forensic psychiatrist, was scheduled to testify during the sentencing phase about her evaluation of Finklea, which involved limited interviews with family members. App. 2873–81. The night before her scheduled testimony, Dr. Maddox received an email from Ms. Fuller detailing some of the abuse that post-conviction counsel later uncovered. App. 2881, 3221. She was also “fortunate enough to stand next to Cherena in the back of the courtroom,” and “took her aside and spoke with her,” where information about the abuse came up. App. 2882–84. This information was new to her and came up after she had already submitted her report. App. 2884–86. When Dr. Maddox approached Finklea about the allegations, he confirmed details regarding his mother’s abuse. App. 2886, 2945–46. By the time Ms. Armstrong learned of this—near the end of Finklea’s capital sentencing proceeding—it was too late. When recounting these events at the PCR hearing, Armstrong stated, “I’m not really sure what we could have done at that point. If I could have stopped the trial, that would have been ideal.” App. 3002. Trial counsel made no motion to delay or continue the trial, and the sentencing jury never heard evidence of the profound abuse that Finklea suffered. As the PCR court concluded, “a sufficient investigation and distribution of information among the defense team beforehand would have averted this situation.” App. 3048.

a. *Testimony from Janet Vogelsang About the Facts of the Abuse*

Janet Vogelsang, a licensed social worker, presented extensive testimony about Finklea's childhood and upbringing based on her work investigating his social history. App. 2643–2771. Vogelsang explained that she prepared a biopsychosocial assessment of Finklea, a task she has performed and testified about in approximately “75 cases over a period of 28 years.” App. 2648. For Finklea's case, Vogelsang interviewed 18 family members over the course of 23 interviews. App. 2646. She also reviewed extensive records, assessed the community environment, interviewed Finklea, and prepared several demonstrative exhibits. *Id.* The State did not object at any point during her lengthy testimony.<sup>6</sup>

Vogelsang described how Finklea was born out of an affair between his mother, Betty Peoples, and a married man, who ultimately abandoned them. App. 2669–70. Ms. Peoples viewed her son as a constant reminder of the rejection and singled him out for more degrading and disproportionately harsh punishments than meted out on her other children. App. 2676, 2679, 2695–97. Finklea was a victim of constant, severe, actual and threatened physical and sexual abuse at the hands of his mother and stepfather from the age of four until at least age sixteen. App. 2676–77, 2681, 2688–93.

Vogelsang testified that Finklea's mother would beat him regularly using broom handles, an axe handle, spatulas, pots, extension cords, water hoses, clothes hangers, belts, and switches, often making him strip naked before the beatings and leaving behind welts and cuts. App. 2691–92, 2nd Supp. App. 111–12. Peoples also pointed a gun at Finklea and, on at least one occasion,

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<sup>6</sup> During the PCR hearing, Vogelsang made clear that she was offering testimony of the kind that could have been offered at trial (and, in fact, *has been offered* in numerous other capital cases) had trial counsel conducted an adequate investigation and retained an appropriate expert. *See* App. 2690 (“And this would have been, again, projected onto a screen at trial while I was talking about those various events of when his mother was beating him.”).

beat him to the edge of death, only stopping due to her fear that the police might intervene. App. 2697, 2738–39, 2763, 2765. She would punish him by locking him in closets for hours at a time. App. 2676–77. Ms. Peoples would grab Finklea’s genitals, both inside and outside of his clothes, stating that she could do what she wanted to him because he was “her property.” App. 2677, 2692, 2769–70. This sexual degradation was particularly common whenever Finklea developed a romantic interest in a girl. App. 2692. Finklea struggled with bedwetting, and his mother used cruel strategies to address this such as wrapping his penis with rubber bands, duct taping a milk jug to his penis, making him sit naked in tubs of ice-cold water, and making him sleep naked in the bathtub. App. 2677, 2690–91. Ms. Peoples referred to Finklea by racist and derogatory epithets so frequently that Finklea was unsure as a child what his real name was. App. 2677.<sup>7</sup> She left Finklea at home while his other siblings were taken on social outings, and she never told him she loved him throughout his entire childhood. App. 2682. Vogelsang testified that these incidents of verbal, physical, and sexual abuse continued into Finklea’s late teens. App. 2688.

Vogelsang testified that alongside the treatment he endured, Finklea also witnessed the severe abuse of other relatives, including his favorite Aunt Ruby, who was beaten and cut by a violent boyfriend. App. 2683–84. On several occasions, he rescued his sister from being molested by both his great-uncle and his mother’s boyfriend. App. 2681–82. Both he and his sister were violently punished by their mother when they tried to confide in her about the molestation. App. 2682. Finklea’s grandfather also shot and killed his beloved dog, after which Finklea attempted suicide by pulling the family car’s engine over himself. App. 2766–67.

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<sup>7</sup> According to Ms. Vogelsang, “Ron said, at one point, he didn’t know—he thought he maybe didn’t know his real name because her favorite name for him was MF’er, you bubble-eyed MF’er, you black bastard.” App. 2677.

Vogelsang described the poverty that Finklea’s family lived in throughout his childhood, with the children often going barefoot because they could not afford to wear their shoes out. App. 2675. To make ends meet, his mother sold alcohol and drugs from their home, often forcing her children to find customers, pour shots, and cut the drugs. App. 2680–81. Finklea would be dispatched to rough neighborhoods, usually on his own, to find customers and would be beaten by his mother if he failed to do so. App. 2680–81.

*b. Testimony from Dr. Knight About the Psychological Effects of the Abuse*

During her testimony at the PCR hearing, Dr. Susan Knight, an experienced clinical forensic psychologist explained her clinical opinions and conclusions about Finklea’s mental impairments, including the profound effects the abuse had on his psychological wellbeing and functioning, and how his impairments, which were untreated at the time of the crime, compounded along with additional life stressors culminating in Finklea’s commission of the crime. App. 2800–02, 2823–24, 3196–97. Dr. Knight testified that she personally interviewed collateral witnesses, reviewed extensive records, and conducted seven clinical interviews with Finklea, which is the type of information relied upon by experts in her field. App. 2776–78. Early in her testimony, Zelenka raised a single objection to the admission of Dr. Knight’s written report—Plaintiff’s Exhibit 22. App. 2778–79. At the colloquy that followed, Zelenka repeatedly stated that his objection was to admission of the report itself—not to Dr. Knight’s testimony or the bases for her opinions:

- “We’re not disputing that Dr. Knight can give her opinion and can give her opinions listed in the report.” App. 2780.
- “We have no objection, again, to the conclusions of Dr. Knight coming in. And we have no objection to her reliance in formulating that opinion on the hearsay that she received from other individuals.” App. 2781–82.

- “This is an affirmative representation in the opinion—the written report that she has given, that is what we’re objecting to, not the data underlying her opinion eventually coming in as appropriate and consistent with the rules of evidence.” App. 2783.

The PCR court noted that “a great deal of the hearsay that is in here has already been testified about by the previous expert witness, Ms. Vogelsang.” App. 2786; *see also, id.* (“[I]t’s already been admitted without objection.”). Nevertheless, the PCR court sustained the objection, stating:

All right. The question before [the court] is whether the report itself is admissible in evidence. And the ruling at this time, which is subject to change based on how the testimony develops, is that the objection is sustained.

App. 2787.

Dr. Knight’s testimony then continued. She testified that Finklea suffers from PTSD with a “specifier of panic attacks,” severe obsessive-compulsive disorder, and a history of major depression, all linked directly to the “complex trauma” from his abusive childhood. App. 2790, 2822–23, 3193. In addition, Finklea experiences frequent panic attacks, intrusive memories of his past abuse, hypervigilance, chronic anxiety, sleep disturbances, and obsessions. App. 2812–15, 3183–86, 3188. He processes his emotions in a guarded way, and has since his childhood, as Finklea learned to mask his emotions because he “had gotten to the point of being beaten so many times that he felt like there was nothing he could do to stop the abuse, sort of a learned helplessness kind of way of thinking . . . and so he just stopped trying.” App. 2798, 3184. Finklea also began engaging in compulsive behaviors from a young age as a means to control his environment. App. 2791–92, 2794. The constant threats of violence caused significant anxiety and compulsions which undermined his ability to maintain meaningful interpersonal relationships, contributing directly to the dissolution of his first marriage. App. 2794–95, 3162–63. This abuse has made it difficult for Finklea to respond to existing conflict or potential conflict in a measured and logical

manner. App. 2793–94. The abuse has also made it difficult for Finklea to trust other people. App. 2815. According to Dr. Knight, Finklea had (and has) a deep need to bring order to chaos tied to the randomly violent environment that defined his childhood and adolescence. App. 2819.

Knowing about Finklea’s mental impairments would also have significantly assisted the jury in understanding his involvement in the offense, something that was completely absent from the defense trial presentation. Dr. Knight testified that Finklea was medically discharged from the Army in 2002 due to a knee injury, ending his intended military career, which “had a significant psychological impact.” App. 2799–2800, 3195. Finklea joined the military when he was seventeen, and his career was not only his main avenue of escape from the abusive environment of his youth, but also central to his functioning and sense of self, as “the only adult life he’s ever known.” App. 2800.<sup>8</sup> He was depressed, anxious, at loose ends, and unable to function because of this unexpected turn of events that removed much needed structure from his life. App. 2799–2802, 3183.<sup>9</sup> At the same time, Finklea’s second wife was deployed to Iraq, creating a new worry that she was going to “move on” and “leave him behind.” App. 2799–2800. His small disability check was insufficient to support himself and his children, and he began selling drugs to meet his financial needs, behavior that he was taught in his childhood by his mother. App. 2802, 3195. But he lost money (App. 2802), which only exacerbated his psychological symptoms, in turn deepening his reliance on drugs and

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<sup>8</sup> In his allocution, Finklea discussed how meaningful being in the military was to him: “Growing up, to me, there was nothing more prestigious than serving this country. To be an ambassador as a soldier for this country was the most important thing to me in my life.” App. 2343–44.

<sup>9</sup> Dr. Knight expanded on what Finklea’s inability to function because of this loss of structure and identity as follows: not only did Finklea change jobs several times over a short period of time, but “he started to engage, again, in pretty severe OCD behavior,” including, “arranging things by sets of five,” refusing to “drink out of glasses unless they were boiled,” “excessively washing his hands,” and “taking multiple baths a day,” as an attempt “to put order back into his environment.” App. 2800–01. These compulsions overtook his daily life and “intensified up until the time of the capital offense.” App. 2824.

alcohol as a coping mechanism. App. 2800–02, 2823–24, 3155. In Dr. Knight’s opinion, the culmination of these factors combined with Finklea’s mental illnesses led to a series of disastrous decisions resulting in his involvement in Mr. Sykes’ murder. App. 2800–02, 2824, 3196–97. “Essentially, all of those factors put him at a greater risk of a bad outcome and the bad outcome was the capital offense.” App. 2824.

At the conclusion of Dr. Knight’s testimony, Zelenka withdrew his objection to her report, saying, “[i]n light of her testimony, I withdraw my objection to her report coming in.” App. 2865. Dr. Knight’s report was then admitted into evidence. *Id.*

#### **IV. The PCR Court’s Order and Findings**

After considering all the available evidence, the PCR court concluded that Finklea had been denied his Sixth Amendment right to the effective assistance of counsel. The Court did not take the new evidence about the abuse lightly, especially considering the prior non-disclosure of abuse by Finklea and his family members, noting that this in particular “caused the court to review this case extensively.” App. 3032. On the deficient performance prong, the PCR court first noted that counsel “should have recognized and pursued indications from [Finklea’s] first wife about trauma and, from that, discovered what the PCR team learned about the extent of the trauma and how it affected his mental health at the time of the murder.” App. 3057. The PCR court also found that trial counsel’s failure to adequately interview Dr. Cherry, given that she had been Finklea’s treating psychiatrist for years prior to trial, was objectively unreasonable. App. 3057–58. As for trial counsel’s interactions with Finklea’s family members, the PCR court determined that many of these family members had “specific knowledge” about the abuse and thus would “almost certainly” have disclosed the information had they been interviewed individually, outside of the presence of Finklea’s mother. App. 3059. The PCR court faulted trial counsel for failing to spend

enough time with Finklea to build a relationship of trust that would have allowed him to disclose his trauma history with them. App. 3057–58. In sum, the PCR court concluded that counsel were “obligated to conduct a more thorough investigation” on the basis of the “red flags” that appeared in the information that was available to them. App. 3059. Trial counsel’s failure to do so was not the result of a “conscious and informed” strategic decision, but instead was the product of the failure to conduct a “reasonable underlying investigation.” App. 3059–60.

As to prejudice, the PCR Judge determined that there was “a reasonable probability that absent [trial counsel’s] errors at least one juror would have believed that life imprisonment was the appropriate punishment.” App. 3064. “[I]n light of the extensive precedent at both the federal and state levels recognizing that evidence of a defendant’s history of trauma and his mental health status at the time of the murder is critical in the mitigation stage of a death penalty case,” the Court concluded that counsel’s failure to “discover and present relevant mitigating evidence” was prejudicial. App. 3062, 3064. Adhering to this Court’s prior precedents, the PCR Judge found that “this is not a case where the mitigating evidence trial counsel failed to discover and present is merely a ‘fancier’ version of the evidence they did present.” App. 3063. Rather, the evidence of “physical, sexual, and emotional trauma” and “significant psychological effects of that abuse” were “both quantitatively and qualitatively different from the evidence presented at trial.” *Id.* Finally, the PCR Judge concluded that the “lack of evidence” of trauma and the “inconsistency” between the testimony of Dr. Cherry and Ms. Roland on one hand and the testimony of Finklea’s other family members on the other hand “allowed the State to suggest to the jury that the Applicant had manipulated those two witnesses.” App. 3062–63. This evidentiary gap tipped the scale for the State’s argument for death.

## ARGUMENT

### I. The PCR Court Did Not Err in Finding that Trial Counsel Were Ineffective for Failing to Investigate and Present Mitigating Evidence.

The PCR court determined that Finklea was denied his Sixth Amendment right to the effective assistance of counsel during the sentencing phase of his capital trial. In doing so, the court made sound, record-based findings about the ways in which Finklea’s trial counsel’s performance was deficient and how that deficient performance prejudiced Finklea. In reviewing a PCR court’s decision finding trial counsel ineffective, “an appellate court is concerned only with whether any evidence of probative value exists to support that decision.” *Kolle v. State*, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). Thus, the question before this Court is simply whether there is “any evidence” supporting the PCR court’s findings of deficient performance and prejudice. Here, there is abundant evidence.

#### A. Relevant Legal Framework

An individual alleging ineffective assistance of counsel must prove that: (1) trial counsel’s performance was deficient; and (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984); *Von Dohlen v. State*, 360 S.C. 598, 603, 602 S.E.2d 738, 740–41 (2004).

Determining whether trial counsel’s actions were deficient performance is well-established and straightforward. Respondent must show that his trial counsel’s performance was objectively unreasonable. *Strickland*, 466 U.S. at 688. While courts generally owe deference to trial counsel’s reasonable and informed strategic judgments, trial counsel’s decisions are objectively unreasonable when they do not adhere to “prevailing professional norms.” *Id.* at 688–89. In capital cases, prevailing professional norms demand that trial counsel make “efforts to discover *all reasonably available* mitigating evidence” in preparation for the sentencing phase. *Wiggins v.*

*Smith*, 539 U.S. 510, 524 (2003); *see also Council v. State*, 380 S.C. 159, 171–73, 670 S.E.2d 356, 362–63 (2008). To meet this requirement, counsel must “conduct a thorough investigation of the defendant’s background.” *Porter v. McCollum*, 588 U.S. 30, 39 (2009) (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)). A capital defendant’s family and social history are important avenues of investigation, for they often provide powerful sources of mitigation that can bear on the jury’s appraisal of a defendant’s moral culpability for sentencing purposes. *See Rompilla v. Beard*, 545 U.S. 374, 393 (2005); *Wiggins*, 539 U.S. at 535; *Weik v. State*, 409 S.C. 214, 234, 761 S.E.2d 757, 767 (2014); *Council*, 380 S.C. at 177–78, 670 S.E.2d at 366. While counsel need not “scour the globe on the off chance that something will show up,” *Rompilla*, 545 U.S. at 383, they still must exercise “reasonable professional judgment.” *Porter*, 558 U.S. at 40. Counsel’s investigation is unreasonable as a matter of law when they “ignore[] pertinent avenues for investigation of which he [or she] should have been aware.” *Id.*

Trial counsel conducts an unreasonable mitigation investigation when they fail to pursue “red flags” that would have led a reasonably competent attorney to investigate further. *See Rompilla*, 545 U.S. at 390–91 (finding deficient performance where counsel failed to investigate potential mitigating information already contained in the court record and the investigation that counsel had already conducted); *see also Wiggins*, 539 U.S. at 524 (finding deficient performance where trial counsel “abandoned their investigation of petitioner’s background after having acquired only rudimentary knowledge of his history from a narrow set for sources”); *Council*, 380 S.C. at 173, 670 S.E.2d at 363 (holding that even though counsel had “limited information,” they should have been “on notice that . . . additional investigation[] could potentially yield powerful mitigating evidence”). The duty to conduct a reasonable investigation remains even if counsel is working with a client (or client’s family) who is not particularly helpful or who suggest there is no

mitigation of a certain topic available, including clients who are “actively obstructive by sending counsel on false leads” about available mitigation evidence. *Rompilla*, 545 U.S. at 377, 381.

While trial counsel has some discretion to make strategic decisions regarding the mitigation investigation, the decisions must still be conscious and informed. *Weik*, 409 S.C. at 236, 761 S.E.2d at 768 (“Decisions made in ignorance of relevant, available information cannot be characterized as strategic”). There is a difference between a strategic decision not to investigate mitigating evidence and a failure to investigate mitigating evidence that results from trial counsel’s “inattention.” *Wiggins*, 539 U.S. at 526. Even when trial counsel’s decision to not pursue mitigating evidence is purportedly “strategic,” that decision is only reasonable insofar as it is supported by a reasonable underlying investigation. *Strickland*, 466 U.S. at 690–91; *Von Dohlen*, 360 S.C. at 607, 602 S.E.2d at 743. Having a “rudimentary knowledge” of a defendant’s history from only a “narrow set of sources” is not enough to support a reasonable decision to stop investigating mitigating evidence. *Andrus v. Texas*, 140 S. Ct. 1875, 1882 (2020).

In order to establish prejudice, the court must assess if there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Von Dohlen*, 360 S.C. at 603, 603 S.E.2d at 740–41. When trial counsel’s deficient performance occurs in the penalty phase of a capital trial, the reviewing court determines whether there is a reasonable probability that the sentence would have determined that “the balance of aggravating and mitigating circumstances did not warrant death.” *Strickland*, 466 U.S. at 695; *Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 823 (1998). In making that determination, the court “reweigh[s] the evidence in aggravation against the totality of available mitigating evidence.” *Wiggins*, 539 U.S. at 534; *Weik*, 409 S.C. at 233, 761 S.E.2d at 767. In doing

so, courts must consider not only the mitigation evidence the jury did (and did not) hear, but also whether the new evidence “reduced the ballast on the aggravating side of the scale.” *Porter*, 558 U.S. at 42. After engaging in the constitutionally required reweighing, prejudice exists if “there is a reasonable probability that at least one juror would have struck a different balance” on the question of life or death. *Wiggins*, 539 U.S. at 536; *Weik*, 409 S.C. at 233, 761 S.E.2d at 767.

*B. Trial Counsel’s Mitigation Investigation Was Unreasonable*

After hearing the PCR evidence about the scope and sources of trial counsel’s mitigation investigation, reviewing the trial transcript to identify what mitigation the jury heard, and then taking into consideration the information developed by PCR counsel about the horrific abuse Finklea endured and its debilitating psychological effects, Judge Keesley found that trial counsel’s performance was objectively unreasonable. This finding is well-supported by the record.

Judge Keesley faithfully followed *Wiggins*, its progeny, and the relevant decisions of this Court in determining that trial counsel’s mitigation investigation deprived the jury of considering powerful mitigating evidence. Counsel’s failure to investigate and present this evidence was not the result of an informed, objectively reasonable strategic decision made by counsel. Nor was it the result of witnesses’ reluctance to disclose information about the details of the profound systemic abuse inflicted on Finklea throughout his childhood. Rather, the jury was not provided with the information because trial counsel unreasonably ignored major “red flags” of significantly more mitigation that should have been investigated.<sup>10</sup>

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<sup>10</sup> The State asserts that the PCR court was dismissive when discussing the efforts of the trial team in reaching his conclusions on deficient performance. Pet’r’s Br. 18 n.7. This assertion is not supported by the record. The PCR court discussed the actions undertaken by the trial team for several pages in its order including a thorough discussion of why the court determined their actions fell below the constitutionally required standard of care. App. 3035–48, 3057–61.

As the PCR court found, Investigator McDougall’s initial conversations with Finklea’s ex-wife, Cherena Roland, put counsel “on notice” of potential abuse and provided ample incentives to conduct a probing analysis of Finklea’s life history. App. 3039–40. Instead, nothing happened for years and the resulting investigative efforts were minimal: a brief group interview by Soltis of several family members that included Finklea’s primary abuser, his mother (with a failure by counsel to follow up on a comment that he has a “rough life”) <sup>11</sup>; a single, short trip to Finklea’s hometown by the trial mitigation investigator; and a single failed attempt by Soltis to interview Roland.<sup>12</sup> The State’s depiction of the investigative efforts of the entire trial team is inaccurate and refuted by the record.<sup>13</sup> The PCR court properly concluded that trial counsel’s minimal

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<sup>11</sup> The State submits that when Armstrong met individually with Finklea’s family members during trial, the purpose of those meetings was “to review Finklea’s childhood and upbringing,” and that these meetings should be considered as an investigative step undertaken by counsel into abuse information. Pet’r’s Br. 18. This is contradicted by the record. Armstrong testified that while these meetings were individual meetings, they were “pre-direct exam,” meetings when “we were already in trial.” App. 2985. During those meetings, Armstrong testified that she, “thought we had all the information we were going to get and so I did not probe for additional information.” App. 2986.

<sup>12</sup> The State maintains that Soltis’s meeting with Ms. Roland did not happen solely because Roland was “a wholly uncooperative witness” who “refused to meet or even speak” with counsel. Pet’r’s Br. 17. The State offers no citation to the record in support of these assertions because there is no evidence to that effect. The record is silent as to why Soltis’s meeting with Roland did not happen; the only evidence is that it did not occur. App. 2599–60. Moreover, there is absolutely no other evidence indicating that Roland was uncooperative, as she met with McDougall early on, expressed her willingness to testify, stated she would be willing to repeat what she knew about Finklea to “anyone,” attended Finklea’s trial, and, again, disclosed to Dr. Maddox in the midst of trial that Finklea had been badly abused by his mother. App. 2599, 2627–28, 2882–84, 2997, 3039–40, 3043, 3048; 2nd Supp. App. 37–39.

<sup>13</sup> The State suggests that Dr. Maddox was a mitigation expert “specially trained” for the purpose of mitigation investigation. Pet’r’s Br. 21, n.9. That is both not true and is in stark contrast to her testimony. Dr. Maddox testified, “[t]ypically, when I’m called in to a case, the mitigation investigation will have already been completed. And when I do contact a family member, it’s usually just to—before trial or in preparation for my report to just affirm that—the findings that have already been discovered and to make sure that they’re in agreement with any of the notes that I had.” App. 2868–69. Dr. Maddox met with six family members at the courthouse prior to her testimony. She spoke to them from 9:15 to 10:30 a.m. App. 2880–81. Her purpose for this meeting was to focus on issues regarding Finklea’s criminal responsibility. App. 2949 (“I don’t recall that

investigative efforts were deficient and “trial counsel was obligated to conduct a more thorough investigation.” App. 3059.

The PCR Court also discussed several other ways that trial counsel’s investigation constituted deficient performance. First, trial counsel failed to adequately consult Finklea’s treating psychiatrist, Dr. Cherry, despite her longstanding relationship with Finklea. Trial counsel did not adequately interview her pre-trial, were clearly caught off guard by testimony about PTSD at trial and failed to follow up on her vague reference to abuse at trial. App. 3057–58.<sup>14</sup> The PCR court was also influenced by the fact that trial counsel met infrequently with Finklea, fostering distrust and hampering his willingness to disclose details of the abuse. But, contrary to the State’s assertion, the PCR court did not ignore the Supreme Court’s decision in *Morris v. Slappy*, 461 U.S. 1 (1983) (holding that there is no right to a meaningful attorney-client relationship). Instead, the PCR court made the important, common-sense observation that “it was especially necessary to build a relationship in order to uncover the trauma asserted here because abuse victims will do ‘anything to not talk about [their trauma]’ either out of shame, to avoid being disbelieved, or to avoid reopening old wounds.” App. 3059 (alteration in original).

Moreover, the State’s assertion that Finklea “twice denied any history of childhood abuse” to trial counsel is not supported by the record. *See* Pet’r’s Br. 19. While Finklea did not tell the

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my agenda was to go in and ask about—ask about abuse. I recall I think I was just getting general information and much more concerned about his relationship with the co-defendant.” App. 2949.

<sup>14</sup> The PCR court also found that trial counsel’s request that the trial judge charge the jury regarding the statutory mitigating circumstance regarding mental state at the time of the offense—which admitted her surprise at Dr. Cherry’s fleeting mention of abuse—foreclosed any argument that the failure to investigate and present mitigation of Finklea’s life history was strategic. App. 3060–61. Armstrong also testified at the PCR hearing that she was not even aware of the abuse until Dr. Cherry testified and that she would have definitely presented evidence of the details and psychological impact of the abuse if she had known the details. App. 3013–14.

truth about not remembering the facts of the offense. *se* App. 3037–38, it is far from clear that he withheld information about the physical, sexual, or emotional abuse. Soltis testified that he did not remember ever asking Finklea if he was abused. App. 2623. Armstrong testified that, although she was responsible for the penalty phase, she did not remember talking with Finklea ever about whether he had been abused and left it to Soltis and Graham to have those discussions with him and his family members. App. 2984. Thus, there is no affirmative evidence that trial counsel asked him about it.<sup>15</sup> Further, even if counsel had asked Finklea point-blank “have you been abused,” such questioning is unlikely to result in disclosure of traumatic and abusive experiences for two reasons. First, survivors of the type of abuse Finklea endured tend to normalize it in their own minds, meaning that they do not think of it as abuse. Second, as Dr. Knight testified at the PCR hearing, such experiences are only disclosed after substantial trust and rapport is built so that the individual feels safe in sharing their experiences, and trial counsel failed to build that trust with Finklea. App. 2809–11.<sup>16</sup>

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<sup>15</sup> The State asserts that Dr. Maddox conducted four interviews with Finklea, each of which “revisited the topic of abuse and family relationships.” Pet’r’s Br. 22. There was no evidence presented that Dr. Maddox continuously revisited the issue of abuse with Finklea. Dr. Maddox in fact only testified that she had at some point asked Finklea about his childhood and specifically about abuse. App. 2885–86. She testified that she typically would do a full “trauma history,” including more experiences than just childhood abuse, on her first interview with an individual and follow up with them about things in later evaluations, although it was unclear from her notes and memory whether she actually did a full trauma history assessment with Finklea. App. 2886–88, 2943. She further testified that if he had disclosed abuse or trauma information at the first meeting, it would have been contained in her report. App. 2943. Dr. Maddox testified that she had notes of her following meetings and all that her notes indicate is that on September 4<sup>th</sup>, in the middle of his capital trial, she confronted Finklea with the new abuse information she had learned in the email from Teresa Fuller and he admitted that it was true. App. 2945–46.

<sup>16</sup> It is clear from her testimony that Finklea had disclosed at least some of the abuse uncovered by PCR counsel to his treating psychiatrist, Dr. Anna Cherry. *See, e.g.*, App. 2233, 2235, 2240. It is also clear that trial counsel failed to adequately interview her about her work with Finklea, as they were surprised by some of her testimony. App. 2284–85. Dr. Cherry was not a member of the defense team, but rather worked for the Department of Mental Health as a contract psychiatrist at the Lexington County Detention Center to help detainee manage their psychiatric symptoms. App.

All of the PCR court’s findings about trial counsel’s investigation were grounded in both the record and in prevailing professional norms. Trial counsel testified that they were aware of their duty to investigate all aspects of Finklea’s life history and present a robust mitigation case to attempt to save Finklea’s life, a duty that was heightened given their well-founded belief that Finklea was almost certain to be found guilty of the underlying offenses. App. 2583, 2971–72. *See Andrus*, 140 S. Ct. at 1883 (finding the failure to further investigate “red flag” evidence about abuse, privation, and mental illness “all the more alarming given that counsel’s purported strategy was to concede guilt and focus on mitigation”). The record makes clear that trial counsel failed in their Sixth Amendment duty “to discover *all reasonably available* mitigating evidence.” *Wiggins*, 539 U.S. at 524; *see also Council*, 380 S.C. at 171–73, 670 S.E.2d at 62–63. And their investigation was unreasonable as a matter of law because they “ignore[d] pertinent avenues for investigation which they were or should have been aware.” *Porter*, 558 U.S. at 40. In sum, the first prong of the *Strickland* standard was clearly satisfied.

*C. Trial Counsel’s Failure to Investigate Was Prejudicial*

In finding that the prejudice prong of *Strickland* was satisfied, the PCR court noted that “extensive precedent at both the federal and state levels recogniz[es] that evidence of a defendant’s history of trauma and his mental health status at the time of the murder is critical in the mitigation stage of a death penalty case.” App. 3062. The court was clearly correct. *See, e.g., Rompilla*, 545 U.S. at 391–93 (finding prejudice where defense counsel failed to uncover evidence that defendant’s parents were “severe alcoholics” who “fought violently,” and that defendant’s father

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2229. Dr. Cherry saw Finklea consistently and continuously at the Lexington County Detention Center for three years before his capital trial. *Id.* However, even Dr. Cherry noted that while Finklea was honest with her, he did not readily discuss his past trauma: “[F]or people with PTSD, talking about traumas can be very upsetting to them and he’s one that talked very little of that. . . . You almost had to dig it out of him.” *Id.*

“beat him when he was young with his hands, fists, leather straps, belts, and sticks”); *Wiggins*, 539 U.S. at 534–35 (finding prejudice where defense counsel failed to uncover evidence of “severe privation and abuse” in *Wiggins*’ childhood while being raised by an “alcoholic, absentee mother,” as well as “physical torture, sexual molestation, and repeated rapes during his subsequent years in foster care”); *Williams*, 529 U.S. at 398 (finding prejudice where defense counsel failed to present “the graphic description of *Williams*’ childhood, filled with abuse and privation”); *Weik*, 409 S.C. at 238, 761 S.E.2d at 769 (finding prejudice where defense counsel failed to present testimony containing “graphic and detailed accounts of Petitioner’s abusive and dysfunctional childhood, saturated with violence and military fantasies”).

In light of this precedent and the evidence of horrific abuse and its psychological effects detailed at the PCR hearing, the PCR court came to the only reasonable conclusion: “there is a reasonable probability that absent [counsel’s] errors at least one juror would have believed that life imprisonment was the appropriate punishment.” App. 3064. The PCR court further noted that “this is not a case where the mitigating evidence trial counsel failed to discover and present is merely a ‘fancier’ version of the evidence they did present,” and that the inconsistent and incomplete nature of the minimal trauma evidence actually presented at sentencing opened the door for the State to argue (falsely) that Finklea had manipulated the witnesses who testified to that trauma during the sentencing proceeding. App. 3063. In reaching his determination that Finklea had been prejudiced, the PCR court clearly considered and weighed all the available evidence, including the case in aggravation at trial, the trial sentencing phase, and the new evidence developed at the evidentiary hearing. App. 3035–36. While the crime itself was gruesome, involving shooting a man to rob an ATM and the man being set on fire, the mitigating evidence presented at the PCR hearing is also very powerful, and as the PCR court concluded, paints a humanizing and sympathetic portrait of

Finklea that was wholly absent from his trial and very likely would have led one or more jurors to choose life over death.<sup>17</sup> App. 3055–56.

Moreover, the mitigating evidence presented in the PCR hearing is directly related to Finklea’s offense. Finklea had no prior criminal record and honorably served his country in the military for over a decade. Dr. Knight’s testimony clearly established that Finklea had multiple mental impairments caused by prolonged and systemic childhood abuse. App. 2788, 2790. These untreated mental impairments were exacerbated by “losing structure and stability in multiple areas of his life,” beginning with the profound loss of structure and identity Finklea dealt with because of the end of his military career. App. 2800–02, 2823. Finklea’s functioning began to quickly deteriorate as additional life stressors in his relationship and finances accumulated. *Id.* As Dr. Knight stated, “[i]t just snowballed from the time that he left the military to the time of the capital offense.” App. 2803. The nexus between the unrepresented evidence and the crime itself is far closer in Finklea’s case than in many of the cases where this Court or the United States Supreme Court have found prejudice. *See e.g., Rompilla*, 535 U.S. at 390–93; *Porter*, 558 U.S. at 40–44; *Williams*,

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<sup>17</sup> The United States Supreme Court and this Court have both found prejudice resulting from a deficient mitigation investigation in cases that are equally or more aggravated than this one. *See, e.g., Rompilla*, 545 U.S. at 393 (trial counsel’s deficient investigation resulted in prejudice where Rompilla repeatedly stabbed his victim and then set him on fire and where Rompilla had a significant history of prior violence); *Wiggins*, 539 U.S. at 536 (prejudice resulted from trial counsel’s failure to offer mitigating evidence where Wiggins robbed an elderly woman, ransacked her apartment and drowned her in a bathtub); *Williams*, 529 U.S. at 398 (prejudice resulted from trial counsel’s deficient investigation where Williams killed a man with a mattock (i.e., a type of pickaxe) simply for his refusal to lend Williams “a couple of dollars” and subsequently committed two separate violent assaults on elderly victims, leaving one woman in “a vegetative state”); *Council*, 380 S.C. at 176, 670 S.E.2d at 365 (prejudice established where the State offered “overwhelming evidence” of guilt, the jury found six aggravating factors, and Council’s crime was “violent and brutal”).

529 U.S. at 396–98; *Wiggins*, 535 U.S. at 536–37; *Weik*, 409 S.C. at 238–39, 761 S.E.2d at 769–70; *Council*, 380 S.C. at 176–79, 670 S.E.2d at 365–66.

The State wrongly contends that the PCR court should have considered “the credibility and weight” (Pet’r’s Br. 25–30) of possible conflicting testimony in a possible resentencing proceeding that has not yet occurred. This is the incorrect inquiry, as *Strickland* requires a court to assess what happened at the actual proceeding, not a hypothetical proceeding when evaluating prejudice. *Strickland*, 466 U.S. at 694. More importantly, the newly presented evidence at PCR is not in conflict with what was presented at trial. The trial evidence was a presentation of relatively generic “good guy” evidence that solely focused on Mr. Finklea’s good qualities instead of including any evidence of the abuse, which trial counsel admittedly knew nothing about. Moreover, it is clear from Vogelsang’s testimony that Finklea’s mother saw “absolutely nothing wrong” or unusual with her abuse of him during his childhood and that it was not done because of bad behavior, but because of Betty’s belief that it was “how she was treated as a child and that’s why she turned out so good.” App. 2676, 2724. Peoples “does not deny that she did these things, and, in fact, laughs about them and thinks they’re kind of funny.” App. 2690. *See also* App. 2688, 2691, 2732, 2735.

Moreover, the PCR court did not run afoul of *Wong v. Belmontes*, 558 U.S. 15 (2009), as the State contends in their briefing. Pet’r’s Br. 25. As discussed, the PCR court carefully considered all the available evidence. *See* App. 3035–36, 3055–56. Finklea’s case is materially distinguishable from *Belmontes*. *Belmontes* included a well-reasoned and conscious strategic decision by counsel to not present mitigating evidence that was largely cumulative to what was already being presented because including it would have opened the door to the admission of devastating aggravating evidence, including a prior murder that Belmontes was known to brag about. 558 U.S. at 17–18, 22–23. Here, Finklea’s trial attorneys simply did not know about the abuse evidence and it did not

carry the additional aggravation seen in *Belmontes*. As the PCR court noted, the evidence of Finklea’s childhood trauma is not a “fancier” or “more elaborate” version of the evidence already presented; rather, it “is both quantitatively and qualitatively different from the evidence presented at trial.” App. 3063.<sup>18</sup>

Considering all the evidence and the applicable law, the PCR court correctly found Finklea had been prejudiced. This Court should not disrupt his well-reasoned and supported finding.

## **II. The Writ Should Be Dismissed as Improvidently Granted.**

“A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” Rule 242, SCACR. *See also In re Exhaustion of State Remedies in Criminal Post-Conviction Relief Cases*, 321 S.C. 563, 564, 471 S.E.2d 454, 454 (1990). This Court should dismiss the writ because there is no preserved legal issue for the Court to review. *Cf. State v. Morales*, No. 2021-000622 (S.C. May 31, 2023) (denying appeal based on evidentiary issues because petitioner failed to object to the evidence in the trial court); *State v. Williams*, No. 2021-001493 (S.C. June 14, 2023) (denying appeal because the main issue of the appeal required a contemporaneous objection that was not made in the trial court).

The State’s entire appeal rests on an assertion that the PCR court erred by relying on the expert testimony of Vogelsang and Knight. The State is wrong. The PCR court committed no error by crediting the testimony of these experts, who each testified (without objection) to the many

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<sup>18</sup> The PCR court was fully cognizant of this Court’s decision in *Jones*, 332 S.C. at 338–39, 504 S.E.2d at 826–27, declining to find prejudice because “the ‘new’ evidence [was] the same as the ‘old’ evidence.” App. 3063. However, the PCR court determined that the evidence in this case, the here was “both quantitatively and qualitatively different from the evidence presented at trial.” *Id.* As the PCR court noted, defense counsel’s failure to uncover and present this evidence prevented the jury from hearing “any details about the physical, sexual, and emotional trauma inflicted upon [Finklea].” *Id.*

ways in which their findings were corroborated by multiple sources. The State further asserts, without any legal authority, that capital sentencing courts are not permitted to rely on expert testimony unless at least “one witness” who personally observed the abuse also testifies. Pet’r’s Br. 11, n.3. This “one witness” rule lacks any legal support and was neither raised to nor ruled upon by the court below. Moreover, the State’s argument that the PCR court failed to consider the totality of the evidence and rendered a decision lacking the support of “any evidence” is meritless and based on multiple material misrepresentations of the record.

*A. Hearsay is Admissible at a Capital Post-Conviction Relief Hearing*

Petitioner’s hearsay arguments are meritless. The Supreme Court of the United States has explicitly held that a capital defendant may present hearsay at the penalty phase of a capital trial (and thus, by extension, at a capital post-conviction relief hearing where the court considers evidence to establish what could have been presented at trial). *Sears v. Upton*, 561 U.S. 945, 950 n.5 (2010) (“[W]e have also recognized that reliable hearsay evidence that is relevant to a capital defendant’s mitigation defense should not be excluded by rote application of a state hearsay rule”). *See also Green v. Georgia*, 442 U.S. 95, 97 (1979) (per curiam) (“Regardless of whether the proffered testimony comes within Georgia’s hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause . . .”).<sup>19</sup> In fact, as seen in both the United States Supreme Court’s jurisprudence and in practice in South Carolina capital cases, relying on licensed

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<sup>19</sup> The question under *Strickland* is what reasonable trial counsel would have done at the time of trial had they conducted an adequate investigation. The State—represented at the PCR hearing by Zelenka—was undoubtedly well-aware that it is common for capital trial counsel to offer a biopsychosocial assessment at sentencing. Indeed, elsewhere in the record, Zelenka effectively said so. In explaining his view on why he should be permitted to ask certain questions of trial counsel, Zelenka successfully argued that his questions were permissible, in part because “[m]uch of the defense in a mitigation case can be based upon hearsay.” App. 2622.

social workers and social historians in the sentencing phase is the standard of care in capital sentencing proceedings.<sup>20</sup>

For example, in *Wiggins v. Smith*, 539 U.S. 510 (2003), the Court relied exclusively on information contained in the report of a licensed social worker to grant Mr. Wiggins relief. Hans Selvog, a licensed social worker who was qualified as an expert witness at Wiggins’ state post-conviction hearing, testified “concerning an elaborate social history report he had prepared containing evidence of the severe physical and sexual abuse petitioner suffered at the hands of his mother. . . .” *Id.* at 516. In finding that Wiggins has established both deficient performance and prejudice, the Court relied on Selvog’s testimony, based on conversations with Wiggins and his family members, that “Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother.” *Id.* at 535. Similarly, in *Council v. State*, 380 S.C. 159, 166, 670 S.E.2d 356, 359 (2008), this Court relied on similar evidence of abuse and family dysfunction presented by forensic social worker Marjorie Hammock, who testified about abuse, poverty, and mental illness “based on her investigation.” *See also Andrus v. Texas*, 140 S. Ct. 1875, 1882 (2020) (relying on testimony from a clinical psychologist who testified at the habeas hearing about the effects of “‘severe neglect’ and exposure to domestic violence, substance abuse, and death in his childhood” on petitioner to support holding that counsel were ineffective for failing to investigate and present mitigating evidence at trial); *Von Dohlen v.*

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<sup>20</sup> Undersigned counsel examined all capital trials since 2000, including those resulting in a sentence less than death, to determine whether a social historian or similar witness was utilized during the penalty phase. On the information available to counsel and excluding Respondent’s original capital trial, about two-thirds of the capital trials had penalty phases where a licensed social worker or social historian testified about the defendant’s life history. Of the trials that did not include this kind of testimony, several cases had or have claims for ineffective assistance of counsel for not having a social historian or licensed social worker engaged in the case presented in post-conviction proceedings.

*State*, 360 S.C. 598, 606, 602 S.E.2d 738, 742 (2004) (relying on testimony of a psychiatrist who testified at the PCR hearing about applicant’s mental illness resulting from a “physically abusive childhood” in finding an ineffective assistance of counsel claim meritorious). Thus, the State’s argument that this evidence cannot be considered to support PCR claims is fundamentally at odds with settled precedent and established capital trial and post-conviction practice.<sup>21</sup>

There are no grounds to support the State’s representation that witnesses who personally observed the abuse are the only acceptable reporters of this information. This proposed “one witness” law is improper and contrary to how capital penalty hearings are generally conducted. No case law supports this position, nor does the State point to any, and the established precedent from the United States Supreme Court and this Court support presenting this kind of evidence in the manner Finklea did in post-conviction proceedings. Moreover, it is disingenuous of the State to now claim that the evidence about abuse cannot be true simply because the family members did not testify to this matter at the evidentiary hearing or at trial. *E.g.*, Pet’r’s Br. 28 n.12 (“[T]he State was never afforded an opportunity to cross-examine this new hearsay claim of “abuse” that was contradicted by family members’ trial testimony”). The State had an opportunity to present witnesses at the evidentiary hearing and many of Finklea’s family members were present in the courtroom throughout the proceedings. Had the State had real concerns about the veracity of the abuse evidence being presented,<sup>22</sup> it could have called any or all of them to the stand to test the

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<sup>21</sup> Moreover, if the Court were to adopt the State’s position, which, given *Sears*, *Green*, and *Wiggins*, it cannot do, the time and expense repercussions would be substantial. If capital defense trial and post-conviction teams were required to call as a witness every person interviewed by defense mitigation experts, trials and PCR hearings would be much longer and significantly more expensive.

<sup>22</sup> Moreover, it is clear that the PCR court carefully considered whether or not the abuse evidence was true and the general credibility of the PCR expert witnesses. The first page of the order granting relief clearly stated that the court had “review[ed] this case extensively.” App. 3032.

bona fides of the expert witnesses' assertions.<sup>23</sup> Instead, the State chose not to call a single witness. App. 3025.

*B. The State's Argument is Unpreserved and Waived*

Moreover, any hearsay issue is not properly preserved for consideration by this Court. One simply need to read the transcript of the evidentiary hearing to reach this conclusion. Zelenka lodged only one objection during the multi-day evidentiary hearing, which went solely to the admission of an expert report.<sup>24</sup> The report in question was ultimately admitted, but only after Zelenka explicitly withdrew his objection on the record. App. 2865. The State made zero objections to Vogelsang's testimony, which it now contests as being improperly considered by the trial court. App. 2643–2771.<sup>25</sup> The State's hearsay argument was not raised until it filed its 59(e) motion, after the PCR court had already thoughtfully considered all the evidence in this case and entered an order granting Finklea relief. *See* App. 3072–3106. Any argument the State now has

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<sup>23</sup> Furthermore, had PCR counsel had any doubts about the veracity of the information the family members provided to Dr. Vogelsang and Dr. Knight, they would not have allowed them to be in the courtroom and listen to their testimony.

<sup>24</sup> As discussed above, this objection was limited to the Dr. Knight's report because of hearsay information contained in the report itself, and the State repeatedly affirmed on the record that it was in no way challenging Dr. Knight's opinions, or even testimony from her about the bases of her opinions. *E.g.*, App. 2780, 2781–82, 2783.

<sup>25</sup> It is worth noting that a close examination of the PCR court's order shows that it did not actually rely on the "hearsay" facts from Dr. Knight's report in reaching its conclusion that Finklea is entitled to penalty phase relief. App. 3032–67. The vast majority of the PCR court's analysis focuses on Dr. Knight's opinions as guiding its consideration of the issue at hand. *See, e.g.*, App. 3055–64. No one disputes those opinions were admissible. To the extent that Ms. Vogelsang's testimony was discussed and relied upon, it was admitted without objection. *See* App. 2643–2771, 2786 (noting that the evidence presented by Ms. Vogelsang had "already been admitted without objection").

with hearsay issues has either been waived by not being made during the hearing or was expressly withdrawn and is therefore not properly appealable.<sup>26</sup>

The State's challenges to Vogelsang's testimony are meritless and unpreserved. At a minimum, established issue preservation rules require that an "issue be raised to and ruled upon by the trial judge," and recognize that unobjected to issues "cannot be raised for the first time on appeal." *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (quoting *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 386 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)). See also *State v. Sheppard*, 391 S.C. 415, 420–23, 706 S.E.2d 16, 19–20 (2011). Moreover, "a party cannot use a Rule 59(e)[, SCRCP,] motion to advance an issue the party could have raised to the [trial] court prior to judgment, but did not." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) (citing *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990)); *C.A.H. v. L.H.*, 315 S.C. 389, 392, 434 S.E.2d 268, 270 (1993). Given that no objection was made at the appropriate time (i.e., while Vogelsang was testifying), such challenges cannot be lodged now simply because the State is dissatisfied with the PCR court's ruling.<sup>27</sup>

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<sup>26</sup> If the State had truly believed there was no competent evidence supporting Finklea's claims, it would have made the necessary motion for a directed verdict or summary judgment at the close of his case or the end of the PCR hearing to preserve this issue. See *Epting v. Brumble*, 264 S.C. 114, 116, 212 S.E.2d 711, 712 (1975) (sufficiency of evidence argument could not be raised on appeal because no motion for directed verdict was made in the trial court). See also *Evans v. Wabash Life Ins. Co.*, 247 S.C. 464, 466, 148 S.E.2d 153, 153 (1966). It made no such motion. App. 3024–26.

<sup>27</sup> The State's assertion that it "drew attention" to this issue regarding Vogelsang's testimony in the hearing during their objection to Dr. Knight's report (Pet'r's Br. 10–11), is simply not true. First, Vogelsang had already testified without objection. Second, there was no discussion of concerns about hearsay and Vogelsang whatsoever from the State in its colloquy with the Court about their only objection. App. 2778–87.

As to the challenges about Dr. Knight’s report, the issue is not appealable as the objection was affirmatively withdrawn on the record. *See State v. King*, 416 S.C. 92, 112, 784 S.E.2d 252, 262 (Ct. App. 2016), *rev’d on other grounds*, 424 S.C. 188, 818 S.E.2d 204 (2018) (“[W]here an objection is expressly withdrawn, it [the underlying issue] cannot be raised on appeal.”); *Rosamund Enterprises, Inc. v. McGranahan*, 278 S.C. 512, 513, 299 S.E.2d 337, 338 (1983) (issue was not preserved for appellate review because counsel “expressly withdrew that objection”). The State lost the right to appeal on this issue when Zelenka stated “[i]n light of her testimony, I withdraw my objection to her report coming in.” App. 2865.

*C. The State Materially Misrepresents the Record to this Court*

As undersigned counsel has pointed out on a number of occasions, the State’s brief contains numerous assertions that either have no record support or are directly refuted by the evidence presented at the PCR hearing.<sup>28</sup> For this additional reason, the writ should be dismissed as improvidently granted.

**CONCLUSION**

For the reasons set forth in this brief, the PCR court’s finding that Finklea was deprived of his Sixth Amendment right to the effective assistance of counsel is supported by ample, probative evidence. This Court should affirm the judgment below or dismiss the writ as improvidently granted.

*[Signature block appears on following page]*

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<sup>28</sup> A chart is attached to this brief as Attachment A that more thoroughly details the misrepresentations made by the State about the investigative efforts undertaken by trial counsel as well as what the evidence from the record actually established.

Respectfully submitted,

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July 19, 2023.

**ATTACHMENT A**

<p style="text-align: center;"><b>Petitioner’s Claims About Defense Team’s Alleged Efforts to Discover Mitigating Evidence, Including “Potential History of Childhood Abuse”: (Pet’r’s Br. 21-22)<sup>29</sup></b></p>	<p style="text-align: center;"><b>What the Record Shows:</b></p>
<p>“Mr. Soltis hired Mr. MacDougall<sup>30</sup> to perform early interviews and investigative efforts;”</p>	<p>McDougall was a fact investigator and was not hired to search for mitigating evidence. Rather, as Soltis testified, McDougall was instructed to focus on the guilt/innocence phase, not on the penalty phase. App. 2575, 2577.</p>
<p>“Mr. MacDougall’s contact with Finklea’s wife Teresa, who told the defense team that she had no desire to assist in mitigation and demanded she not be contacted further;”</p>	<p>Teresa initially appeared non-responsive to defense team outreach and, aside from a single interaction with McDougall and Soltis in 2003, did not interact with the trial defense team. App. 2576–77, 2nd Supp. App. 8, 36, 67. Dr. Maddox testified that, although she understood that Teresa had been non-receptive to prior outreach attempts, she requested another attempted contact with Teresa. App. 2881. Teresa did reply to Dr. Maddox’s outreach email, which was sent mid-trial, within a day, and provided her with information about Finklea’s abusive upbringing, even offering that “[i]f there is anything else I can help you with please let me know.” App. 2881, 2892–93, 2945, 3221.</p>
<p>“Collectively, the defense team communicated with at least ten to twelve family members in multiple states, nearly half of them providing mitigation testimony at trial;”</p>	<p>While it is true that the defense team communicated with a number of family members, the testimony indicates these contacts were limited and brief. App. 2589–90, 2594, 2599–2600, 2949, 2976–77, 2985–86. The ultimate penalty phase</p>

<sup>29</sup> Emphasis in original omitted.

<sup>30</sup> The record uses a different spelling – “McDougall.”

	<p>presentation was centered on “good guy” character testimony about Finklea. App. 2634 (focus of penalty-phase was “that [Finklea]’s not a bad person, got some problems, doesn’t deserve to die.”)</p>
<p>“Certain witnesses were either unwilling to cooperate (Finklea’s recent ex-wife Teresa Fulmer<sup>31</sup>), or were otherwise unavailable to attend (his sister Chenel);”</p>	<p>With regards to Teresa, see second row of this table.</p> <p>Regarding Finklea’s sister, while she was unable to attend the trial in person, there is no indication in the record that she was unavailable or unwilling to be interviewed about Finklea and his childhood in the four years prior to trial. Graham interviewed her one time in person. App. 3228. Indeed, Chanell later spoke with multiple investigators and experts from the PCR team and attended the PCR hearing in person. App. 2667, 3144–45, 3223.</p>
<p>“Mr. MacDougall’s initial interviews producing Ms. Roland’s singular incident of alleged abuse; (Ms. Roland’s commentary during this interview also contained undeniable concern for bias, as she describes more-so her own mistreatment by the Finklea’s family);”</p>	<p>Cherena Roland’s interview with McDougal did not suggest a “singular incident” of abuse. On the contrary, Roland “told of Ron not having a father at home and his mother being abusive and strange. When he was a child Ron was in the yard and his mother shot a gun at him to make him do something. The mother believes in voodoo and casts spells on people. His mother has berated Ron in front of Cherena and others including a time the mother said to Ron, ‘Come here you black motherfucker.’” 2nd Supp. App. 38.</p> <p>There is no evidence that this was ever specifically followed up on. Moreover, there is no evidence in the record to suggest that trial counsel or any other defense team member failed to follow up on this account because they viewed Roland as biased.</p>

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<sup>31</sup> As per the record, Teresa’s last name was “Fuller,” not “Fulmer.”

<p>“Mr. Soltis drove to Alabama personally to introduce himself, speak with Finklea’s family, and get an initial understanding of Finklea’s background;”</p>	<p>Soltis did travel one time to Alabama to introduce himself to Finklea’s family. App. 2588–59. While there, he talked briefly to Ms. Peoples at the restaurant she worked at and then had one group interview with several family members the following day. App. 2589–90. Although Soltis was aware (or should have been aware) of Roland’s statement that Finklea’s mother was abusive, Soltis met with the family as a group (in a meeting organized by Finklea’s mother) and made no attempt to interview family members outside her presence. App. 2589–90; 3040. At the meeting, Soltis was told that Finklea “had a hard life,” which he assumed referred to “a poor lifestyle...financially challenged.” App. 2619. No abuse information was elicited during this group interview. <i>Id.</i></p> <p>At the PCR hearing, the experts testified that group interviews, particularly when an abuser is present, are not the ideal way to elicit abuse information. <i>See</i> App. 2653-4 (Dr. Vogelsang testifying in detail about the importance of individual interviews); App. 2876 (Dr. Maddox testimony on the importance of interviews being conducted outside the presence of the abuser).</p>
<p>“Upon his return from Alabama, Mr. Soltis, having been given no indication of such abuse from the family, began immediate efforts to communicate with Ms. Cherena Roland and pre-arrange an in-person meeting with her in Seattle, Washington.”</p>	<p>The record shows that Soltis’s failed trip to Seattle resulted from Finklea’s request that he meet with Ms. Roland; and not because Soltis’s meetings with the family had failed to turn up any evidence of childhood abuse. App. 2627.</p>
<p>“Mr. Soltis flew across the country to meet and interview Ms. Cherena Roland regarding the ‘red flag’ and potential history of abuse;”</p>	<p>There is no evidence that Soltis sought to meet with Roland regarding a potential history of abuse. Soltis testified that Finklea asked him to meet with Roland because “[s]he had good information about him.” App. 2627. After his failed attempt to meet with her, Soltis sent a letter to Roland stating, “[a]s you know I was in Seattle last</p>

	<p>week on business. I am sorry we could not meet.” 2nd Supp. App. 109.</p>
<p>“This meeting did not occur solely because of Ms. Roland’s refusal to meet with Mr. Soltis or even communicate with him as she had originally agreed to do before his travel;”</p>	<p>The record is completely silent on why the meeting did not occur, and Soltis never testified that Roland refused to meet or communicate with him. There is likewise no evidence that Roland was uncooperative with the defense team. She spoke freely with McDougall, provided her contact information, stated she was willing to come to South Carolina to testify and “voiced her willingness to tell anyone what she told [McDougal] about Ron.” 2<sup>nd</sup> Supp. App. 39. She then did indeed travel to South Carolina for the trial and testified as a penalty-phase witness (although trial counsel did not ask her any questions regarding childhood abuse). App. 2217–28.</p>
<p>“The request and assignment of Ms. Armstrong as co-counsel, primarily focused on the development and presentation of the available mitigation evidence;”</p>	<p>Soltis and Armstrong both testified that Armstrong was primarily responsible for the penalty phase presentation. App. 2583, 2617, 2625, 2969–70. However, despite this responsibility, Armstrong testified that she did not remember ever talking to Finklea or his family members about whether he had been abused, testifying that she “unfortunately” left that to Soltis and Graham because she believed they had a relationship with Finklea. App. 2984. Armstrong never met any of Finklea’s family members until after they arrived for the trial, at which point she did not probe them for additional information because she “thought we had all the information we were going to get.” App. 2986.</p>
<p>“The defense team hired Carolyn Graham, a mitigation investigator, whose sole duty was to be the ‘boots on the ground’ individual charged with investigating Finklea’s upbringing and to find as much information as she possibly could about his family and early life;”</p>	<p>Graham made one trip to Alabama to meet with Finklea’s family members and investigate his upbringing. 2nd Supp. App. 48–49, 64–66. She had not met Finklea before she made this trip. 2nd Supp. App. 48, 64. There is no indication that she attempted to meet with family members again for in-person interviews. There is no</p>

	<p>indication in the record that she was aware of Ms. Roland’s statements about Finklea’s childhood abuse before she met with Finklea’s family. App. 2594, 2976.</p>
<p>“Ms. Graham conducted an in person trip to Alabama wherein she interviewed Finklea’s family members for approximately nine hours on the various topics of his life and upbringing, to which none of the witnesses divulged any history of abuse;”</p>	<p>There is no evidence about how these interviews were conducted, what topics were discussed, or how long any interview was. The summary document prepared by Graham for trial counsel about what testimony the witnesses might be able to provide at trial provides minimal, surface level topics about Finklea’s good character. App. 3228–29. There are no other notes or memos prepared by Graham detailing these interviews and what topics were discussed.</p>
<p>“Ms. Graham conducted an in-person meeting and interview with Finklea himself, who provided no indication of abuse;”</p>	<p>Graham’s timesheet indicates that she met with Finklea only one time during the course of her mitigation investigation. 2nd Supp. App. 48, 64. Graham billed two hours for this meeting, including her travel time to and from the detention center where Finklea was housed, on October 25, 2006 – approximately 10 months before Finklea’s capital trial began. <i>Id.</i> There is no evidence in the record that this sole interview touched on the issue of childhood abuse. <i>See also</i>, App. 2809–11 (Dr. Knight explaining why it is unrealistic to expect that the first interview would result in disclosure of childhood trauma.).</p>
<p>“The defense team hired Dr. Maddox as a forensic psychiatrist and mitigation expert to investigate and evaluate the available mitigation evidence so as to help form the best mitigation strategy for Finklea at trial;”</p>	<p>Dr. Maddox’s assignment did not include investigation of mitigation evidence; as Dr. Maddox testified, she typically joins when the mitigation investigation has been completed. To the extent that she reaches out to family members, it is for the limited purpose of affirming findings of already-completed mitigation investigation. App. 2868–69.</p>
<p>“Dr. Maddox conducted an initial interview with Finklea, wherein Finklea informed her explicitly that he had not experienced any</p>	<p>There is no evidence that Finklea explicitly denied being abused to Dr. Maddox. Dr. Maddox testified that, although the notes</p>

<p>childhood abuse and that he has a positive relationship with his mother;”</p>	<p>from her initial interview with Finklea (in June of 2006) could not be located at the time of the PCR hearing, the notes she had available and her report would have indicated abuse if Finklea had disclosed any to her and there was no mention of abuse in either. App. 2888, 2942–44. Based on her typical practice, Dr. Maddox believed that Finklea must have “essentially” denied the existence of trauma in their first meeting. App. 2943–44. Dr. Maddox also testified that she had no memory of seeing McDougall’s interview notes (including McDougall’s report of his interview with Cherena Roland) prior to the PCR hearing. App. 2875–76.</p>
<p>“Dr. Maddox conducted four total evaluations with Finklea which revisited the topic of abuse and family relationships, and in none of these meetings did he disclose a history of child abuse or his alleged poor relationship with his mother;”</p>	<p>There was no testimony to suggest that Dr. Maddox continuously revisited the topic of childhood abuse with Finklea during the course of her pretrial evaluation. While the sentencing phase of the trial was in progress, Dr. Maddox received an email from Teresa Fuller in which Fuller stated that Finklea “had a terrible childhood” and suffered “beatings” by his mother. App. 3221. When Dr. Maddox discussed Teresa’s email with Finklea on the sidelines of the sentencing hearing, he “admitted that it was true.”” App. 2945–46.</p>
<p>“Dr. Maddox interviewed Finklea’s family members individually, and they again failed to divulge any history of abuse;”</p>	<p>These meetings – six meetings over a period of 75 minutes, which were conducted at the courthouse prior to Dr. Maddox’s testimony –did not probe Finklea’s childhood trauma. App. 2949 (“I don’t recall my agenda was to go in and ask about [] abuse.”)</p>
<p>“Ms. Armstrong communicated with Dr. Cherry, Finklea’s treating psychiatrist from the detention center, for which the record demonstrates she was not there to provide therapy, but to diagnose and treat Finklea’s symptoms. Wherein, Ms. Armstrong testified that she met with and believed she had fully discussed the testimony for which</p>	<p>Armstrong testified that she did know generally the PTSD diagnosis that Dr. Cherry had given Finklea, but that she did not know any specifics about the trauma Dr. Cherry referenced in her testimony or underlying her diagnosis. App. 3000, 3010. Armstrong also testified she made no</p>

<p>Dr. Cherry could provide at trial, none of which included a history of abuse.”</p>	<p>strategic decision not to present evidence of childhood trauma. App. 3013–14.</p>
<p>“Dr. Maddox consulted with Dr. Cherry regarding Finklea, but Dr. Cherry provided no indication of abuse to Dr. Maddox;”</p>	<p>Shortly before Dr. Maddox was going to testify in Finklea’s sentencing hearing, she had a brief phone conversation with Dr. Cherry from the parking lot of the courthouse to find out how Finklea was doing in prison, where Dr. Cherry disclosed that she thought Finklea was mentally ill but was medicated and he had been adjusting well to his detention setting. App. 2956–57. There is no indication that Dr. Maddox and Dr. Cherry discussed the information underlying Dr. Cherry’s diagnoses. Moreover, Dr. Cherry was not a member of the defense team, and had no obligation to disclose the abuse evidence she did know about.</p>
<p>“Ms. Armstrong conducted individual pre-trial meetings with the family members chosen to be mitigation witnesses. These witnesses again did not divulge a history of abuse.”</p>	<p>Armstrong met with Finklea’s family in brief witness “prep” sessions immediately before their testimony at the penalty phase of trial; these prep sessions did not probe Finklea’s childhood abuse. App. 2985–86 (Armstrong explained, “I thought we had all the information we were going to get and so I did not probe for additional information. I did not do that.”)</p>