

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

G. Edward Welmaker, Circuit Court Judge

Appellate Case No. 2013-001945

Charles Christopher Williams,

Petitioner

v.

The State of South Carolina,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Did the PCR judge commit error by finding trial counsel made a strategic decision not to present evidence of fetal alcohol syndrome, when trial counsel testified they simply failed to realize and investigate the evidence of fetal alcohol syndrome and would have liked to have had such evidence before the jury?
2. Did the PCR court err by using a harmless error analysis when addressing the solicitor's inappropriate argument, and further by failing to address the vast amount of inappropriate comments the solicitor made in his closing argument?
3. Is the South Carolina Death Penalty statute unconstitutional under *Furman versus Georgia*, and more importantly, was there an adequate proportionality review done in this case?
4. Was trial counsel ineffective in failing to recognize the petitioner was a German citizen?
5. Did the petitioner have a constitutional right to plea guilty and still be sentenced by a jury?
6. Are aggravating circumstances required to be in the indictment?

## STATEMENT OF THE CASE

On February 15, 2005, petitioner was convicted of murder and kidnapping; he was sentenced to death by the same jury on February 19, 2005. On direct appeal, his conviction was affirmed by this Court. *State v. Williams*, 386 S.C. 503, 690 S.E.2d 62 (2010). The United States Supreme Court denied certiorari on October 4, 2010. Petitioner filed his first application for post-conviction relief on November 30, 2010, and amended applications on September 30, 2011 and November 20, 2012. He also incorporated his pre-trial brief into his application which was filed on January 16, 2013. He alleges trial counsel or appellate counsel was deficient in several aspects during the trial and appeal in violation of state and federal constitution.

The dismissal order was filed on July 24, 2013 and received on July 26, 2013 by the petitioner's attorney. A motion for reconsideration was served on August 5, 2013 which was denied in an order filed August 9, 2013, and received by petitioner's attorneys on August 14, 2013. Notice of appeal was served on September 12, 2013. Petitioner now seeks a writ of certiorari to review this denial.

## STATEMENT OF FACTS

Around 10:00 a.m. on September 3, 2003, Petitioner entered a Bi-Lo grocery store in Greenville where his former girlfriend, Maranda Williams (Victim), worked.

Petitioner accosted Victim and forced her into an office in the bakery/deli. Victim called 911 from her cell phone. During the ninety-minute phone call, hostage negotiators tried to convince Petitioner to release Victim. When Victim attempted to escape Petitioner chased, shot, and killed her. Hearing the shots, law enforcement entered the store and apprehended Petitioner. Shortly after his arrest, Petitioner gave a statement in which he confessed to the crimes for which he was later charged.

Petitioner was tried and found guilty of murder, kidnapping, and possession of a firearm during the commission of a violent crime. The State withdrew a public place aggravator before sentencing, and the jury found the remaining statutory aggravating circumstance, kidnapping. S.C. Code Ann. § 16-3-20(C)(a)(1)(b), (C)(a)(3) (2003 & Supp. 2007). As its primary witness, the State called Dr. Pamela Crawford. Dr. Crawford testified that she was associated with SLED and called by the Greenville County Solicitor's Office within an hour and fifteen minutes of the crime to "provide assistance." *State v. Williams*, 386 S.C. 503, 690 S.E.2d 62 (2010).

## ARGUMENT

- I. **THE PCR JUDGE COMMITTED ERROR BY FAILING TO ADDRESS THE OVERWHELMING EVIDENCE AND THE CLEAR ADMISSIONS FROM TRIAL ATTORNEYS THAT THEY NOT ONLY FAILED TO CONSIDER FETAL ALCOHOL SYNDROME, BUT THAT THEY WOULD HAVE LIKED TO HAVE HAD SUCH EVIDENCE BEFORE THE JURY. HE FURTHER COMMITTED ERROR BY USING INAPPROPRIATE STANDARDS AND ANALYSIS TO DETERMINE WHETHER SAID ERROR WAS PREJUDICIAL.**

### STATEMENT OF FACTS REGARDING FETAL ALCOHOL SYNDROME

The trial team presented Dr. Robert Richards and Dr. Seymour Halleck as expert psychiatrists. Dr. Richards testified that he was not a forensic psychiatrist and that Williams was a complicated case: "I'd say that his primary diagnosis is bipolar disorder, type one or type two. I'd lean towards type one, probably with rapid cycling mixed features." App. p. 1965. He also diagnosed him with obsessive compulsive disorder (OCD). App. p. 1967. On cross-examination, he testified that he was not sure about the legal standard for competence at trial, nor the mental standard to stand trial in South Carolina. App. p. 1991 - 1992. He did not know whether Williams could conform his actions to the requirements of the law or whether he was competent to assist his attorneys. App. p. 1992.

Dr. Halleck testified that Williams had a major depressive episode and was OCD. App. p. 2309. He testified that Williams capacity to conform his behavior was somewhat impaired. App. p. 2319. The defense also hired Jim Evans, a neuropsychologist who performed cognitive testing on the petitioner that indicated almost the exact deficits the PCR expert found. App. p. 3553. Dr. Evans did not testify, but notes of his interview indicate that information did not appear to crossover from one side of Williams' brain to

the other, “as tho[sic] no corpus callosum”. Plaintiff’s Exhibit 12, App. p. 4278.<sup>1</sup> The team hired a neurologist, Dr. David Griessemar, who reported on the results of an MRI days before trial and signed an affidavit for the PCR that he was not given adequate history or testing by trial counsel. He also specifically requested the same type of testing that had already been completed by Dr. Evans, but he never saw that information. He noted specifically that if he had seen Dr. Evan’s testing or if he had been informed that the mother drank during pregnancy, he would have advised the team to consider fetal alcohol syndrome (FAS). Plaintiff’s Exhibit 24, App. p. 4851.

The PCR judge found, trial counsel “made a strategic decision to not present to the jury evidence of brain damage or a diagnosis of Fetal Alcohol Syndrome (though trial counsel was unable to articulate the reasons for that strategic decision).” App. p. 4210. In contrast, the trial attorneys testified that they never discussed FAS, they never considered it, they never ruled it in or ruled it out, they had no explanation why they did not consider it, and they would have liked to have had it before the jury.

Attorney Nettles testified they never discussed FAS.<sup>2</sup> App. p. 3269. That they made no correlation between the mother’s drinking and FAS. App. p. 3269. That he had no memory of the issue being raised and rejected. App. p. 3270. That they never discussed FAS in relation to the checklist they used. App. p. 3270. That they never ruled it in or ruled out. App. p. 3271. Nettles acknowledged he had no idea what the corpus callosum meant. He acknowledged they had indications there may have been brain

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<sup>1</sup> As will be seen *infra*, the corpus callosum is the area of the brain most commonly damaged by fetal alcohol syndrome.

<sup>2</sup> It was no secret petitioner’s mother was an alcoholic before and after petitioner was born and the trial transcript is replete with references to the mother’s drinking. App. pp. 1877, 1978, 2179, 2180, 2182, 2214, 2236, 2237, 2252, 2262, 2331, 2336. The mother admitted heavy drinking during pregnancy at the PCR. App. p. 3412.

damage and he knew that drinking by a birth mother could cause brain damage, but connecting those dots never happened. App. pp. 3272-3. And: “Question: Okay. So I think we’ve beat this horse enough. It was just never, ever brought up, to your knowledge, of FAS?” Answer: “Right. It wasn’t ever brought up. It wasn’t discussed. It wasn’t ruled in, it wasn’t ruled out.” App. p. 3274. He was also clear on cross-examination that FAS never came up in discussion. App. p. 3293. There was never a meeting where they questioned whether they wanted to “chase down” FAS; he didn’t recall FAS ever being mentioned. App. p. 3294. That whether the mother’s drinking would lead to FAS was never discussed and he would dispute that it was discussed. App. p. 3294.

Nettles also testified on re-direct that they would have liked to have had such evidence: “Question: If you’d had a diagnosis of guilty but mentally ill, you would have wanted that in [the trial] phase; wouldn’t you?” Answer: “Oh, yeah.” Question: “Wouldn’t you?” Answer: “Oh, yeah.” App. p. 3310. Mr. Nettles was honest about the fact that they struggled with what was wrong with Williams, and he acknowledged that he felt there was just something about Williams “that I just couldn’t get my hand around.” App. 3311.

Mr. Mauldin was even more forthcoming that drinking during pregnancy is a red flag for fetal alcohol syndrome, “and I honestly cannot say why it wasn’t a red flag for me eight years ago. I cannot explain that.” App. 3331-2. He testified that after being shown PCR evidence and exhibits he was “dumbfounded” as to why a certain course of action did not occur – that a natural course would be to bring in a neurologist and tell him they had evidentiary information to suspect FAS and they needed whatever testing

needed to be done to determine whether it existed. App. pp. 3367-8. That he was aware the circumference of the head at birth had a correlation with FAS and one expert was requesting those records and therefore suggesting the expert suspected some symptoms or review of FAS, but Attorney Mauldin did not connect that; he didn't "have an explanation for why [he] was missing those kinds of indicators. But apparently - - looking back, [he] was." App. pp. 3359-60. He would have wanted guilty but mentally ill diagnosis. App. p. 3333. He would certainly want evidence that the defendant suffers from brain damage before the jury. App. p. 3362. If FAS had been discussed it would have been noted on the checklist. App. p. 3347. That he had no explanation why he did not follow up with experts about the fact that the mother drank during pregnancy. App. p. 3348. That he acknowledged an MRI was not done until a week before trial. App. pp. 3343-4. That he had no explanation why it was not done before then considering he was on notice the mother drank during pregnancy. App. p. 3368. And when asked if he ever went to any experts about the problem of the mother drinking, he responded, "And what could possibly have lead me to not conduct some sort of follow-up is just beyond my - I don't have an explanation for it. I just don't know. ... I surely didn't do it intentionally. I will assure you, I did not do that intentionally. I think that would be horrible. App. p. 3381. "And why in the world I didn't, with these memos being provided me, why didn't I further take the course of action that I described to Mr. Zelenka about a neurological evaluation as to that specific issue, I just - I don't know. I can't explain that." App. p. 3382.

The PCR judge also found, "we are just beginning to understand the role that Fetal Alcohol Syndrome (FAS) plays in human behavior in general and criminal activity

in particular.” PCR order, page 37, App. p. 4203. The PCR judge was given a 317 page Appendix before trial with articles discussing the numerous scientific and medical studies regarding FAS and human behavior and criminal activity. This appendix was introduced at trial as Plaintiff’s Exhibit 23, App. p. 4531. Before trial, the PCR judge was also given the 200 page manual or text book, Fetal Alcohol Syndrome: Diagnosis, Epidemiology, Prevention, and Treatment. Stratton K, Howe C, Battaglia F (editors). National Academy Press. (1996). A copy of this manual was introduced as Plaintiff’s Exhibit 31(a duplicate copy has been mailed to this Court and the referenced pages are at App. p. 4898). All of the publications (Except the article on morphometrics, App. p. 4816) note FAS causes poor impulse control and puts the individual at heightened risk for criminal activity.<sup>3</sup>

It would be impossible to adequately condense the above material and the massive amounts of research and publications done on this subject; modern investigation into the effects of Fetal Alcohol Syndrome (FAS) began in the 1970s. Plaintiff’s Exhibit 23, App. p. 4534. The United States Congress mandated that the Institute of Medicine (IOM) of the National Academy of Sciences conduct a study of FAS and related birth defects in Section 705 of Public Law 102-321, the ADAMHA Reorganization Act. Fetal Alcohol Syndrome: Diagnosis, Epidemiology, Prevention, and Treatment. Stratton K, Howe C, Battaglia F (editors). Page 1. National Academy Press. (1996). (Plaintiffs Exhibit 31, App. p. 4900, cited as NAP).

While society often uses the term Fetal Alcohol Syndrome (FAS) to encompass any *in utero* damage due to alcohol, it would be more correct in using the term, fetal

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3 App. pp. 4538, 4542, 4568-4570, 4607, 4614-4615, 4621, 4642-4643, 4648-4652, 4674-4677, 4686-4689, 4717, 4745-4746, 4781-4790, 4792-4793, 4841-4851.

alcohol spectrum disorder (FASD) to encompass all of the diagnoses possible due to maternal ingestion of alcohol. South Carolina Fetal Alcohol Spectrum Disorders Strategic Plan, State Fiscal Years 2011-2013. Plaintiff's Exhibit 23, App. p. 4606. Confusing this even more is the fact that numerous authors and studies initially used the term Fetal Alcohol Effects to describe conditions that met all FAS diagnostic criteria except for the full array of facial abnormalities. NAP, p. 63, App. p. 4901. Indeed, the IOM publication consistently references simply FAS. To be precise, the IOM set forth criteria for five diagnoses: Fetal Alcohol Syndrome confirmed with maternal alcohol exposure, Fetal Alcohol Syndrome without confirmed maternal alcohol exposure, Partial Fetal Alcohol Syndrome with maternal alcohol exposure, Alcohol Related Birth Defects, and Alcohol Related Neurodevelopmental Disorder. NAP, p. 76, App. p. 4904.

One reason FAS is often used to describe all FASD diagnoses is the fact that they all have the same signs and symptoms except for the face, which develops during a very small window of time in early pregnancy and may not be as affected as the brain, which develops throughout the pregnancy. NAP, p. 78, App. p. 4906. The IOM committee also had concerns about the other labels being seen as somehow less serious than an FAS diagnosis, and specifically the IOM had reservations about the term Partial Fetal Alcohol Syndrome because, "'Partial' denotes, to some people, that the condition might not be as severe, which the committee did not wish to imply." NAP, p. 78, App. p. 4906. "This diagnosis could be particularly useful, for example, for some patients who present for diagnosis as an adult. The natural history of FAS is such that some of the 'hallmark' indicators used in infancy or childhood are not maintained into adolescence or adulthood." NAP, p. 75, App. p. 4903. In other words, while we typically think of people

with Fetal Alcohol Syndrome as displaying facial features that make it apparent something is wrong with the individual, the vast majority of people suffering from some type of Fetal Alcohol Spectrum Disorder, especially adults, do not look dramatically different than the rest of us.

While petitioner has been diagnosed with Partial Fetal Alcohol Syndrome (PFAS), (App. p. 3718) the term FASD is used as well to describe his condition as well as to describe all of the conditions related to problems resulting from maternal ingestion of alcohol during pregnancy. Furthermore, it is important to realize that PFAS does not suggest the petitioner's condition is less severe than FAS; in fact, in some circumstances, PFAS can put an individual at much higher risk for adverse life course outcomes (e.g. criminal conduct) due to his condition not being recognized and his ability to mask his cognitive deficits. App. p. 3707.

After Congress mandated that the IOM establish official FASD diagnostic categories, Congress continued to appropriate resources for research and assistance; in 2002, they mandated that the Centers for Disease Control and Prevention (CDC), acting through the National Center on Birth Defects and Developmental Disabilities Fetal Alcohol Syndrome Prevention Team and in coordination with the National Task Force on Fetal Alcohol Syndrome and Fetal Alcohol Effect, develop guidelines for the diagnosis of FAS and other negative birth outcomes from prenatal exposure to alcohol. App. p. 4550.

The CDC published *Fetal Alcohol Syndrome: Guidelines for Referral and Diagnosis* (CDC) in July of 2004. App. p. 4548. While the CDC did not complete the congressional mandate to define all FASD disorders, it more specifically defined the criteria and symptoms the IOM relied on in its diagnostic criteria for all FASD

conditions. Petitioner actually meets all the criteria of the CDC diagnosis described in the CDC publication, except small palpebral features, which is only one of the three facial dysmorphia noted. App. pp. 3638-43, 4573. Furthermore, these dysmorphia are formed in a narrow window of 6-8 weeks during the gestational period and are known to disappear into adulthood. NAP, p. 75, App. p. 4903.

Regardless of the specific diagnosis, organizations and agencies have been clear that prenatal exposure to alcohol creates a destructive condition that puts children and adults into a high risk category of not being able to conform to society's norms due to significant cognitive deficits that impair executive and adaptive functioning; the South Carolina Fetal Alcohol Spectrum Disorders Strategic Plan for State Fiscal Years 2011-2013, describes the problems associated with individuals with FASD: "Resulting impairments may include, but are not limited to, intellectual disability; learning disabilities; attention deficits; hyperactivity; and problems with impulse control, language, memory and social skills." App. p. 4606. They also note it is the leading cause of intellectual disability and,

"Individuals (especially youth) with FASD are at high risk of engaging in criminal activity. They face many challenges that make them vulnerable, such as being easily influenced by peer pressure; lacking impulse control; not understanding cause and effect; not learning from mistakes; making poor decisions; having memory problems; and having difficulty understanding future consequences. Researchers at the University of Washington estimate that 35% of individuals with an FASD have been in jail or prison, and more than half of the individuals diagnosed with an FASD have been in trouble with the law."

*Id.*

## EVIDENCE PRESENTED AT PCR

Petitioner presented his evidence through three experts who all have expertise in Fetal Alcohol Spectrum Disorders. Paul Connor, A neuropsychologist who conducted testing on the petitioner and determined he was deficient in 8 out of the 11 cognitive ability domains tested. Richard Adler, a forensic psychiatrist, who diagnosed the petitioner with partial fetal alcohol syndrome (PFAS), and Natalie Novick Brown, a forensic psychologist who reviewed petitioner's entire life history, as well as the other experts' investigations and conclusions, and determined the petitioner's PFAS impaired his ability to such an extent that he could not conform his conduct to the requirements of the law.

Dr. Connor did extensive testing on the petitioner that showed the abysmal adaptive functioning of the petitioner. He testified that these are the same cognitive deficits that would make the petitioner mentally retarded. App. p. 3446. Dr. Connor spent his early FASD work in research, and was actually part of the study cited in the quote from the South Carolina publication cited on the preceding page. App. p. 3450. He also worked with the CDC on the diagnostic criteria. App. p. 3454.

Dr. Connor gave detailed testimony regarding alcohol's effect on the fetus. App. p. 3457. He noted that despite popular belief, alcohol is more harmful to the fetus than crack cocaine, heroin, marijuana and a host of other substances. App. pp. 3483-4. It is a poison that kills brain cells, causes some brain cells to move to wrong places, and affects all parts of the brain and all the synapses. App. p. 3485. He compared it to Alzheimers in its ability to affect the entire brain and discussed how people with Alzheimers can become disinhibited and sexually inappropriate; they also can remember certain things

but not others. App. pp. 3486-7. As compared to a stroke which only affects a localized part of the brain, FAS is affecting every part, every synapse. App. p. 3494.

Dr. Connor testified that FASD affects executive functioning most commonly associated with the frontal lobe but it also affects connections with the frontal lobe to all parts of the brain, bringing in all the different areas and putting it together and making appropriate decisions. App. p. 3494. He testified that his testing validates the cognitive deficits, App. p. 3498, and noted that his group of tests are standard tests that neurologists around the world would recognize as sensitive to the impacts of prenatal alcohol exposure. App. pp. 3499-3501. He also had a slide showing black/dead cell damage in the frontal area of the brain, and noted that this was where the facial features and frontal lobe would be formed. App. p. 3464. He also re-iterated that facial features are formed in a very short window in the gestation period, specifically in weeks 6-8. App. p. 3464-7.

Just as was mentioned in the literature above, this is partially why someone with PFAS can have worse than expected outcomes, because the facial features are formed in such a tight window, they are not really an accurate indicator of the amount of damage done to the brain. App. p. 3468. He testified, "that there's really no difference between FAS, PFAS and ARND when it comes to the cognitive impacts." App. p. 3454. He also described why these cognitive impacts were far more important than IQ - that IQ is a structured test on paper; that it is not a good indication of how people can perform in the unstructured world of everyday life. App. p. 3471. The IQ test tends to overestimate their abilities; just because someone is a good speller, does not mean they you have good impulse control. App. p. 3472.

With FASD you see people that perform poorly despite their IQ. App. p. 3473. In fact he rarely expects to see an IQ below 70, and in PFAS cases it happens only 10% of the time; what he does see is exactly what he found in Williams: large splits in the IQ scores along with the social and adaptive deficits. App. p. 3504. With FASD, IQ scores are not a reliable measure. App. p. 3509. Williams has the IQ, but he can't use it. App. p. 3511. For example, he reads a lot but he can't understand what he reads. App. p. 3516. Dr. Connor also confirmed that Williams was not malingering based on a test he gave measuring level of effort. App. p. 3505-6.

Dr. Connor also noted he uses the CDC criteria regarding deficits because they are much more restrictive than the IOM. App. pp. 3482-3. The CDC requires 3 cognitive deficits out of 10; Williams had 8 out of 11. App. pp. 3517, 3703. He's particularly bad about processing information and figuring out what to do about it. App. p. 3520. He did fairly well in language tests, but that is part of the problem; that is why his deficits are not realized and he is expected to function normally. App. p. 3521. He talks a good game so people don't recognize his deficits; Dr. Connor described it as masking. App. p. 3522. Dr. Connor also discussed motor coordination tests and how they revealed that the two sides of Williams' brain were not communicating. App. p. 3523. The two parts of the brain are connected by the corpus colossum. App. p. 3524. He described executive functioning - planning, problem solving, putting it all together. App. p. 3524. He then gave very detailed information about his testing. App. pp. 3527-39.

Dr. Connor also evaluates people for mental retardation with these same tests. App. p. 3538. Williams has similar deficits consistent with people that have mental retardation; he cannot understand social cues or behave appropriately. App. p. 3539. Dr.

Connor explained that people with FASD have consistently poor adaptive functioning. Williams shows abilities to perform in high structured environments, but with less structure in our normal day to day activities, he cannot perform. App. pp. 3542-4.

Dr. Connor noted that people with FASD do much worse than you would expect from their IQ: "They're essentially functioning at a level of somebody who's mentally retarded, even though their IQ is in the average range. Their day to day functioning is so impaired." App. p. 3474. Their ability to manage day to day life, hold a job, being able to interact with people and interpret social cues, being able to cope with things if something happens to them and work around it is impaired. App. p. 3474. They cannot learn from mistakes and 95% of people with FAS have mental health problems. App. p. 3478.

Dr. Connor also testified that his testing was completely consistent with the QEEG, Plaintiff's 36, App. p. 4972, which Dr. Adler would testify about. App. pp. 3547-50. And completely consistent with Dr. Evan's testing done for the trial team in 2004. App. p. 3553. Dr. Connor overlapped his test results with Dr. Evan's on a chart showing deficits in adaptive functioning, and there was almost a complete overlay. App. p. 3553.

Dr. Connor is just one part of this multi-disciplinary team. The actual diagnosis was performed by a medical doctor, which was performed by Dr. Richard Adler, whose role as part of the multi-disciplinary team is to diagnosis the petitioner. App. pp. 3606, 3613-4. Dr. Adler testified that he had some initial exposure to FASD as a fellow at Harvard with Dr. Biederman, a known expert on attention deficit disorder, which is commonly associated with FASD. App. p. 3608. Dr. Adler does criminal and civil forensic work. App. p. 3605. He has spent a large part of his practice in child psychiatry and maintains an active clinical practice. App. p. 3604.

As the literature noted, Dr. Adler explained that PFAS is a medical diagnosis based on the IOM manual. NAP at 75-77, App. pp. 4903-5. The CDC and the IOM were mandated by congress to develop criteria for all aspects of FASD. The IOM has criteria for FAS, PFAS, and ARND, but the CDC has only published complete criteria for FAS. Because the CDC used more stringent measurements, the team uses the CDC whenever possible. App. p. 3615.

An outline of the CDC criteria for the diagnosis of FAS is printed in the CDC manual. App. p. 4573. Williams meets all the criteria, except small palpebral features. App. p. 3638-43; however, the CDC did not complete their mandate to define all FASDs. Therefore, one must look to the IOM for the criteria of PFAS: In order for an individual to be diagnosed with PFAS, he must have A. Confirmed exposure to alcohol. B. Two of the three facial feature deformities (small palpebral features, thin vermilion, or smooth philtrum). In addition, the individual must have one of the following: C. Growth Retardation; D. Central Nervous System (CNS) Abnormalities; or E. Cognitive Abnormalities. NAP p. 76-77, App. pp. 4903-5. In petitioner's case, Dr. Adler testified petitioner had A, B, C, D and E; although he only needed three of the criteria, Dr. Adler opined he had every one and the most criteria he had ever found in a case. App. p. 3632. Dr. Adler also testified Williams had certain additional signs that were consistent with FASD or neurological impairments, including nystagmus, birth defects, and consistent QEEG readings. App. pp. 3668-70, 3704.

#### A. CONFIRMED EXPOSURE TO ALCOHOL

Dr. Adler testified that the general consensus is that 14 drinks a week will produce a child with FASD. App. p. 3620. He noted that the strongest examples were

mothers that confirmed they drank every night and had multiple binges during the month which was apparently what happened in Williams' case. App. p. 3621-3. He considered the amount of alcohol that Williams' mother drank significant (4-5 drinks a night and more on weekends. App. p. 3412), App. p. 3618, and he considered this confirmation. App. p. 3624.

#### B. AT LEAST TWO FACIAL FEATURES

Dr. Adler next explained that as far back as 1973, there were known facial features associated with FASD: small palpebral fissures – distance between the eyelids; smooth philtrum – the valley between the nose and middle of the mouth; and thin vermilion border – thin upper lip. App. p. 3629. These are the same as printed in the CDC publication under "Facial Dysmorphia". App. p. 4573. He explained that the CDC developed more stringent criteria than the IOM and that these standards are based on computer models where the examiner inputs the data. App. pp. 3629-30. He also explained that the facial features had almost nothing to do with the negative trajectory or bad impact of FASD on the person's life, but it is helpful to explain how you know this is what caused his problems. App. p. 3631. Exhibit 33, App. p. 4969, was introduced that was a computer printout of the facial feature report, indicating Williams had a thin vermilion and smooth philtrum even in adulthood. App. p. 3634-9.

#### C. GROWTH RETARDATION

Dr. Adler explained that Williams disproportion between height and weight would meet the criteria for growth retardation. He referenced a growth chart similar to all growth charts parents look at when they visit the pediatrician. Plaintiff's Exhibit 5, App. p. 4261. The growth chart was from when Williams was 10 months old, where Williams

was between 75 and 90<sup>th</sup> percentile in height but just above the 10<sup>th</sup> percentile in weight. This would fit the criteria under disproportional low weight to height found in the IOM manual, NAP p. 76, App. p. 4904. See also CDC publication – Growth Problems. App. p. 4970.

#### D. CNS ABNORMALITIES

Dr. Adler explained that Part of the direct evidence of CNS abnormalities that is referenced by the IOM and CDC is “reduction in size, or change in shape of the corpus callosum, cerebellum, or basal ganglia”. App. p. 4567. Dr. Adler presented a normal MRI of a corpus callosum. App. pp. 5028, 3648. He also presented the MRI of petitioner’s corpus callosum. Plaintiff’s Exhibit 35, App. p. 4971.

Dr. Adler testified that not only is Williams’ corpus callosum abnormal, his cingulated gyrus directly above the corpus callosum is also abnormal. App. p. 3656. He also indicated he reviewed this information with Dr. Wendy Cohen, their neuroradiologic consultant at the University of Washington, who opined the corpus callosum had moderate thinning. App. p. 3660. Furthermore, the abnormality above the corpus callosum was a developmental abnormality, described also by Dr. Connor as migration, where the tissue is somewhere it is not supposed to be. App. p. 3666. Dr. Cohen described it as medium or kiwi sized, as opposed to small or pea size, or severe or grapefruit size. App. p. 3667. While the 2011 MRI report noted the corpus callosum had “mild” thinning, Dr. Adler testified that Dr. Harrington at MUSC later agreed it was more than mild thinning and Dr. Cohen did not believe it was mild thinning. App. pp. 3787-94.

He also noted that the measurements he received from MUSC noted the corpus callosum thinned by more than 50%. App. p. 3660. He also noted that the trial

investigator's interview notes with the trial team's expert, Dr. Jim Evans, noted that information did not appear to crossover from one side of Williams' brain to the other, "as tho[sic] no corpus callosum". Plaintiff's Exhibit 12, App. p. 4278. And Dr. Adler actually spoke to Dr. Evans about his tests and conclusions and noted it was a huge red flag. App. p. 3653-4. When shown the notes, the trial attorneys did not know what the corpus callosum meant and had no explanation about the corpus callosum and brain damage references by Dr. Evans. App. p. 3215-6, 3272, 3337.

Dr. Adler noted the additional slides the attorney general introduced, Slide 12 and 14,(Defense Exhibits 1,3,5; App. pp. 5030, 5032, 5034) actually showed the corpus callosum as thinner than slide 13(Plaintiff Exhibit 35 and Defense Exhibit 4, App. 4971, 5033). App. pp. 3756-7. And while the original 2005 MRI indicated "Normal MRI", the physician normally indicates what they are looking for in the MRI, and in 2005 they indicated they were looking for Autism Spectrum Disorder, App. p. 3791, which has nothing to do with FASD or the corpus callosum. App. p. 3796. In 2011 when they were told they were testing for FASD, the radiologists did notice the thinning of the corpus callosum. App. p. 3787-94.

Dr. Adler also noted that the average neuroradiologist is looking for profound abnormalities, such as a tumor or stroke and doesn't focus on the corpus callosum, App. p. 3787-98, and that one study found the vast majority of neuroradiologists will not discern significant thinning in these cases, so the fact that this neuroradiologist called it mild thinning was meaningful. App. p. 3790. And regardless, due to the IOM criteria, even if there was no evidence of corpus callosum damage, because all the other criteria was met, he still fits the diagnosis of PFAS. App. p. 3798. (It should be noted here, that

the CDC places MRI abnormalities and cognitive deficit abnormalities under the same category of “CNS Abnormalities”, so like the IOM, you do not have to show all of the deficits listed on page 20 of the CDC – For example the summation on page 20, “Criteria for FAS Diagnosis”, requires Dysmorphia, Growth Deficits and CNS Abnormality.) App. p. 4573.

Before we had MRIs, the main way to determine whether an individual had brain damage was by exam. That is why doctors (and police officers) examine nystagmus; it is a red flag showing something is not working right in the brain. App. p. 3667. Dr. Adler also noted Dr. Griesemer found nystagmus years before, and that others found mirror movement and Romberg sign; these are “soft signs” showing something is wrong with the brain. App. p. 3668. He also explained that their expectations were validated by the QEEG. The QEEG is similar to an EKG that simply registers inappropriate electrical activity. App. p. 3671. The QEEG was simply verifying problems where they believed they would find them; he explained that the brain should be working like a symphony, but when the QEEG registers “hot spots” it is like an instrument blaring out louder than the rest. App. p. 3684.

Dr. Brown later noted that they now suggest getting a QEEG first, because if it does not show problems, there is little likelihood the patient will have FASD. App. p. 3817. In this case, the QEEG verified Dr. Connor’s and Dr. Evan’s testing, that the frontal lobe was “essentially untethered, intermittently doing its own thing.” App. p. 3692. He also noted there were consistent birth defects, misshapen fingers and an abnormal “hockey stick” crease on the petitioner’s palm. App. p. 3704. Dr. Adler testified that it was an “embarrassment of riches in the field of medicine. This is all additional,

confirmatory, illuminating material that is not even really centrally necessary to make the diagnosis.” App. p. 3693.

#### E. COGNITIVE ABNORMALITIES

The cognitive abnormalities are shown by Dr. Connor’s and Dr. Evan’s testing; you need three, Connor found eight out of eleven and Evans found five. App. pp. 3517, 3703. Dr. Evans did not administer as many tests as Dr. Connor. App. p. 3553. Dr. Adler classified these cognitive disorders or neuropsychological abnormalities as severe. App. p. 3707. He also explained that the impacts of Partial Fetal Alcohol Syndrome are more serious than Fetal Alcohol Syndrome because as a general rule, people that have the full abnormal face and lower IQs get more help and more services. App. p. 3707.

Because petitioner is able to mask his disability he appears good on the surface and his problems are not identified. App. p. 3708. Therefore, even though he has an average IQ and talks a good game, he could not interpret simple proverbs like a rolling stone gathers no moss. App. p. 3709. Dr. Adler cited a journal article (App. p. 4781) that speaks to the very negative life impacts of having PFAS. App. p. 3709. He noted that these individuals are totally different from normal individuals, having statistically significant differences in school achievement, intellectual ability, development, depression, family problems, delinquency, withdrawal, anxiety, and psychosis. App. p. 3710. They have psychosis and attention problems at a much higher rate. App. p. 3711.

He then described the alarming rate that these individuals have depression and are psychotic, and notes that Williams was given an antipsychotic shortly after he was arrested, indicating the doctors did not know what was wrong, but they were concerned enough to give him that. App. p. 3713. He also noted it was common, just as in

petitioner's case, that doctors will misdiagnose FASD, and that the state used that to its advantage in closing argument, when Solicitor Arian argued the defense experts could not even agree on a diagnosis. App. pp. 3714-5. Mental Illness is simply a manifestation of FASD. App. p. 3716. FASD is a far more serious and the impairments are markedly greater than either expert's diagnosis of bipolar disorder or OCD. FASD implicates a host of different areas in life functioning and eclipses the others. App. p. 3717.

Dr. Adler confirmed what Dr. Connor said, that the trial attorneys had the cognitive deficit information through Dr. Evans. App. p. 3693. Unfortunately, the trial team's neurologist, Dr. David Griesemmer, indicated he was never given this information or any history of the patient and that he requested further neuropsychiatric evaluation, which had in part, unknown to him, already been done by Dr. Jim Evans. His affidavit is clear that if he had seen Dr. Evan's testing or had history of the mother drinking alcohol while pregnant, he would have informed the team to investigate FAS or rule out fetal alcohol effects. Plaintiff's Exhibit 24, App. p. 4851.

Dr. Adler finished his testimony by reiterating his role in the multi-disciplinary team as simply to give the diagnosis, PFAS, but he has been involved in cases where that information has resulted in a life sentence.

Dr. Natalie Novick-Brown is the culmination of the multi-disciplinary team. She began work in the field with Dr. Streissguth, the godmother of FAS, in 1995. App. p. 3801. She has testified for the government as well as the defense and has 15 peer reviewed articles mostly dealing with FAS. App. p. 3803. Dr. Brown reviews all the work of the other team members, all of the petitioner's medical, school and other records, the trial transcript, and anything else in order to determine the exact impact the FASD has on

the petitioner and its relevance to the crime. App. p. 3817-8. She explained how FASD effects executive functioning – self regulation, behavior control, thought and emotion control and how the frontal lobe takes in and controls information from all over the brain faster than a computer, using all our memories and senses to make decisions, reduce urges, and reduce the intensity of emotion; and when those executive functions are impaired you see real problematic behavioral difficulties. App. p. 3818.

We have urges all the time and we rely on executive functioning to hit the brakes all the time. App. p. 3819. Mr. Williams' executive functioning is significantly impaired – learning from experience, linking cause and effect and being able to understand and foresee consequences and take those into account when planning; all people with FASD plan, but their plans are impaired by the brain damage. They have real difficulty organizing thoughts and it showed in Williams as early as the first grade. App. p. 3820. They have a goal in mind but blinders on to everything else; they particularly cannot see the consequences of their plan, and she has seen that in virtually every clinical patient she has evaluated; it is like having no warning system. App. p. 3825.

People with FASD have trouble self-monitoring and being aware of the impact of their actions; virtually everyone with FASD has impulse control problems - difficulty controlling strong feelings which overwhelm their ability to resist urges. App. p. 3821. This explains why Williams had the incessant reiteration with his journal - this war within his brain going back and forth, trying to control himself, but the stronger the emotion the harder it is. App. p. 3822. Williams' damaged brain doesn't play out what might happen; it does not have the capacity to determine what is the worst thing that can happen and use that to resist his urges. App. p. 3823. Their executive functioning is

damaged so that they cannot understand the significance of their behavior on others and ultimately control their behavior. App. p. 3824. Stress only exacerbates that problem. App. p. 3824. This is all backed up by Williams' school records where you always see the word impulsive. App. p. 3826. These executive function deficits create the adaptive deficits that are noted in Dr. Connor's testing. App. p. 3825.

Dr. Brown has also performed *Atkins* evaluations before, and there is no doubt these were obviously life-long problems for Chris, and the adaptive functions would fit the criteria for that prong of *Atkins*; in fact, Dr. Brown testified that a number of experts and mental health professionals now believe the adaptive functions are more important than his IQ – an IQ is measured in a structured environment, but the adaptive functioning is the real indication of how the individual is able to perform in the community on a day to day basis. App. p. 3828. His school history is a good example - he has an IQ that should be sufficient, but he is in special education early on, fails eighth grade, and eventually drops out of ninth. App. p. 3850.

In fact, Dr. Brown testified she had never seen a child repeat kindergarten and first grade and his disability was entirely consistent with FASD. App. p. 3865. He cannot use his intellect, his IQ. App. p. 3851. The adaptive deficits interfere with his ability to use the IQ, the intellect, in the real world. He can read well for example, or perform well in a routine environment without distractions. App. p. 3829. So for example, he could perform well at his work at Blockbuster if he was doing a routine repetitive task that he was familiar with, but if you mix it up and add new people, new environment or stress, there is deterioration in his performance. App. pp. 3830, 3849.

For example there are people with mental retardation that can pass the driver's test, but they have to take it multiple times; Williams also had to take it 5 or 6 times. App. p. 3832. There are a lot of similarities between mental retardation and FASD; in the terms of their adaptive functioning and performance there is not a lot of difference. App. p. 3832. People with FASD might have better verbal skills so there is an appearance of normalcy, so by the time mentally retarded people get to adulthood, they are not very adept at disguising their mental retardation; people with FASD are better at masking. App. p. 3833. But in reality, people with FASD have child-like coping skills; they are socially children, emotionally children, and there is research going back 30 years that their adaptive functioning is equivalent to children in elementary school. App. p. 3836. In fact, Dr. Brown testified that the standardized testing placed Williams at the skill level of a nine year old. App. p. 3837-8.

Dr. Brown also testified about secondary disabilities and explained that almost 100% of people with FASD have mental health problems. The bipolar diagnosis is just a symptom of the much larger problem caused by his brain damage. App. p. 3844. The research is clear that people with FASD have life-long impacts because their impairments get worse as they reach adulthood and as they are expected to mature; their childlike ability to self regulate and cope simply cannot manage adulthood. App. p. 3847. Dr. Brown would never have expected Williams to be able to live independently. App. p. 3849. He cannot function at school by getting to class on time; he cannot function at work; Dr. Connor's testing is important because it shows Williams cannot function in these unstructured environments. App. p. 3852. Prison is structured and Williams has no

problem there, but our day to day life is not structured and that is where he had problems. App. p. 3853.

Dr. Brown verified what the other experts had said, that FASD impacts the entire brain and being able to comprehend what is around you. Williams had these plans but could not follow them and in this unstructured environment; he is unable to quickly comprehend and respond appropriately. App. p. 3858-9. This behavior is consistent with Dr. Connor's testing and his school performance, specifically the history from his first grade teacher. App. p. 3867. Impulsivity is not normal in non-brain damaged children. App. p. 3868. The first grade teacher's comments are entirely consistent: impulsivity, physically aggressive, easily frustrated, blames others for mistakes. App. p. 3871.

Dr. Brown explained how these child-like behaviors led to his inability to handle the break up with the victim and his suicide attempt. App. pp. 3876-7. The child-like thinking that somehow this plan was going to work and the victim was going to admit her mistakes and they would get back together. App. pp. 3879-80. The lack of sophistication in his plan, such as "get cigarettes" or running out of gas in front of the store which caused him to believe he could not leave even though he wanted to. App. pp. 3882-3. There was never an indication that Williams ever considered trying to plan a way to do this in such a manner so he would not get caught. App. p. 3884.

He walks around the store and bends down with the victim behind her. He has never contemplated the one thing that happened – that there would be a struggle. App. p. 3885. While he writes in his journal he wants to kill her, he indicates to negotiators he just wants her attention and wants to talk to her. App. p. 3886. He never contemplates a struggle and when it happens, he reverts to fight or flight reaction and because of his

brain damage he reacts aggressively. App. p. 3888. He cannot deal with it appropriately, and then he runs away and hides, despite knowing the SWAT team is right outside. App. p. 3889. Dr. Brown continued to describe the childlike planning, inability to see contingencies or consequences and link cause and effect. App. p. 3891.

She also explained why Dr. Crawford's interview was so damaging. Dr. Crawford was very skilled at questioning Williams to lead him away from what he originally said to the other police investigators and in the end to take complete responsibility for planning the entire episode. App. p. 3887. Dr. Brown explained that research shows FASD people are particularly open to suggestion. In fact, there is a known and validated test for suggestibility known as the Gudjonsson Test. App. p. 3892. The testing revealed that Williams was very suggestible. App. p. 3896. Dr. Crawford's interview was very manipulative. App. p. 3892. Dr. Brown showed through her powerpoint slides the multiple statements that Williams made during the immediate interview with police officers and specifically how he was unsure about what he was going to do when he went to the store, and how those statements changed with skilled questioning by Dr. Crawford; and while Williams continued to vacillate, Dr. Crawford manipulated him into agreeing he premeditated the murder. App. p. 3897-8.

Dr. Brown testified that the situation overwhelmed his capacity to come out with the right behavior. App. p. 3899. She said PFAS explains why he did this unthinkable act and if he would have been born with a normal brain, she would not have expected this result. App. p. 3900. Dr. Brown ultimately opined that Williams met the definition of Guilty But Mentally Ill in that he lacked sufficient capacity to conform his conduct to the requirements of the law. App. p. 3901.

The solicitor emphasized the fact that the defense's theories were inconsistent and did not provide an explanation worthy to save the petitioner's life. Solicitor Arial specifically told the jury that,

"The defense presented to you evidence of mental disorders through the testimony of a couple of psychiatrists. By the way, the psychiatrists didn't agree on the diagnosis. One talked about bipolarity. Other didn't say he had bipolar. Had different opinions from the two psychiatrists; but they argued to you why he did it.

App. p. 2374.

"His mental issues may have existed at the same time as this killing, but they're not the why. They just existed concurrently with it. Because he knew right from wrong. And he could conform his behavior to the requirements of the law. No one has said the mental issues caused him to kill Mandy. The reason they haven't said they caused him to kill Mandy is because they didn't. They may have affected the way he thought about things. But didn't cause him to kill Mandy, because he knew what was right, he knew what was wrong, and he knew how to conform his behavior."

App. p. 2375.

#### ARGUMENT

Ineffective assistance of counsel claims are reviewed under the familiar two-prong test established by *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which requires a petitioner to show that: (1) trial counsel's performance was deficient; and, (2) the deficiency resulted in prejudice. *See also, Porter v. McCollum*, 130 S.Ct. 447, 452 (2009); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Whether an attorney's performance was deficient is determined by a standard of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. In capital cases, the professional norms require counsel to conduct a thorough investigation into "*all reasonably available*

mitigating evidence.” *Wiggins*, 539 U.S. at 524 (emphasis in original). It is well-established that trial counsel should be particularly diligent to investigate evidence of mental impairments, such as organic brain damage, because of its powerful mitigating effect. *See, e.g., Sears v. Upton*, 130 S.Ct. 3259, 3261 (2010) (holding evidence of brain damage was “significant mitigating evidence a constitutionally adequate investigation would have uncovered”); *Porter*, 130 S.Ct. at 454 (finding evidence of brain damage and cognitive deficits in reading, writing and memory were part of “the kind of troubled history we have declared relevant to assessing a defendant’s moral culpability.”) (quoting *Wiggins*, 539 U.S. at 535); *Rompilla v. Beard*, 545 U.S. 374, 392 (2005) (holding trial counsel was ineffective for failing to discover and present evidence of organic brain damage caused by fetal alcohol syndrome); *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) (holding evidence of impaired intellectual functioning is inherently mitigating in the penalty phase of a capital case); *Wiggins*, 539 U.S. at 535 (stating that a competent attorney, aware of the defendant’s history of diminished mental capacities, among other things, would have introduced it in the capital sentencing proceeding).<sup>4</sup>

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<sup>4</sup> Numerous lower courts have likewise recognized that brain damage is uniquely mitigating. *See, e.g., Hooks v. Workman*, 689 F.3d 1148, 1205 (10th Cir. 2012) (“the involuntary physical alteration of brain structures, with its attendant effects on behavior, tends to diminish moral culpability, altering the causal relationship between impulse and action.”); *Wilson v. Sirmons*, 536 F.3d 1064, 1094 (10th Cir. 2008) (stating mental conditions “associated with abnormalities of the brain” are “likely to [be] regarded by a jury as more mitigating than generalized personality disorders.”); *Blystone v. Horn*, 664 F.3d 397 (3rd Cir. 2011) (trial counsel’s deficient performance was prejudicial where counsel failed to investigate and present evidence that petitioner suffers from “untreated brain damage and psychiatric disorders, all of which were aggravated by a history of poly-substance abuse.”); *Haliym v. Mitchell*, 492 F.3d 680, 718 (6th Cir. 2007) (prejudice found where trial counsel failed to present evidence that, among other things, petitioner suffered a serious brain injury and functional brain impairment, which caused problems with impulsivity, judgment and problem solving); *Caro v. Woodford*, 280 F.3d 1247, 1258 (9th Cir. 2002) (“By explaining that [defendant’s] behavior was physically compelled, not premeditated, or even due to a lack of emotional control, his moral culpability would have been reduced.”).

To begin with, there is simply no evidence whatsoever that the trial attorneys made a strategic decision not to put FAS before the jury. Trial counsel cannot, as a matter of law, make an informed strategic decision about whether to present certain information when they do not know what that information is. *See, e.g., Sears v. Upton*, --- U.S. ---, 130 S.Ct. 3259, 3265 (2010); *Porter v. McCollum*, --- U.S. ---, 130 S.Ct. 447, 453 (2009). It constitutes reversible error for a court to “merely assume that the investigation was adequate.” *Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003); *see also, Williams v. Taylor*, 529 U.S. 362, 396 (2000). Such an absolute failure to acknowledge or appreciate the testimony of the trial attorneys brings into question the entire order of dismissal.

The order also clearly ignores the undisputed PCR testimony that the petitioner could not conform his actions to the law, and that he had the mental capacity of a nine year old child. It also fails to acknowledge the fact that the solicitor used the fact that not only did the experts disagree, but they testified Williams could conform his conduct to the requirements of the law. The order also failed to address the Gudjohnson test that rated Williams as highly suggestible, which could have explained the damaging evidence of Dr. Crawford, who this Court described as the state’s primary witness. *Williams* at 64. The PCR order also fails to address the fact that the trial team’s neurologist was hired on the eve of trial, not given an adequate history, specifically Dr. Evan’s testing, which upon seeing caused the neurologist to realize the petitioner’s brain damage was far more serious than the neurologist’s two hour exam indicated. Furthermore, the neurologist admitted he was not an expert in FAS, but he indicated that he would have advised the team to consider FAS if he would have been given a complete history. The PCR judge did not address any of this.

The PCR judge also failed to address the significant disabilities FAS causes, and instead believed that the scientific community was just beginning to understand the role FAS plays in human behavior and criminal activity. Order p. 37, App. p. 4203. As evidenced by the massive amount of literature entered into evidence, this is simply not true. The damaging effects of FAS have been known for decades. Even the ABA Guidelines for Death Penalty defense specifically mention FAS in two different places. App. pp. 4340, 4390. This belief brings into question whether the PCR judge gave appropriate consideration to this condition. The PCR judge also seemed to be concerned that this condition was inevitable or possibly that he doubted it was still not common knowledge that drinking during pregnancy was harmful, because there were still pregnant women drinking despite the literature. App. pp. 4005-6.

The PCR judge also found that each expert acknowledged that the state of the art for FASD forensic assessment was “hit or miss” prior to 2007. PCR Order p. 37, App. p. 4203. While the experts testified this was a slide on a power point presentation they gave at a FAS conference in 2009, they all testified there were qualified experts making this diagnosis and testifying in 2005. App. pp. 3570-1, 3723-4, 3727, 3805-3816. In fact, Dr. Novick-Brown was available to testify in 2004. App. p. 3808.<sup>5</sup> Furthermore, the diagnostic criteria for FAS have been widely accepted since the 1970s, the standard four criteria were codified by the Institute of Medicine in 1996, and evidence of FAS has long been recognized as mitigating in capital cases. *See, e.g., Wiggins and Rompilla*. There are undoubtedly still many individuals in many fields claiming to be experts that might

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<sup>5</sup> All of the experts essentially agreed that the point of the slide and their presentation was that it was important to put together a multi-disciplinary approach as the diagnostic criteria suggested. Dr. Adler testified teams were put together more like pick-up basketball and when they created their ensemble, they created a more protocolized approach. App. 3723-4.

give an improper diagnosis, but that does not mean one can ignore the fact that there were qualified experts available to give an appropriate opinion in 2005.

To establish prejudice, a PCR applicant “‘must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Porter*, 130 S.Ct. at 453 (quoting *Strickland*, 466 U.S. at 694). The test is not whether a capital defendant would have received a life sentence absent trial counsel’s deficient performance. As the United States Supreme Court recently reiterated in *Porter*:

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

130 S.Ct. at 455-56 (quoting *Strickland*, 466 U.S. at 693-94). The question is whether “‘the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury’s appraisal of [a defendant’s] culpability.’” *Rompilla*, 545 U.S. at 393. Prejudice is established if “‘there is a reasonable probability that at least one juror would have struck a different balance.’” *Wiggins*, 539 U.S. at 537.

This history of FASD and its effects on Petitioner’s life would have made a powerful mitigation story – far different from two experts that could not agree on a diagnosis and did not testify that the petitioner could not control his actions in compliance with the law. The mitigation evidence established in PCR would have undermined the State’s case in aggravation and offered a far more sympathetic explanation for Petitioner’s actions. It would have directly challenged the solicitor’s argument that petitioner could control his actions. Altogether, this case in mitigation

could have convinced at least one juror that death was not an appropriate sentence. *See Wiggins*, 539 U.S. at 536.

The PCR judge relied on *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998). Jones is different in that Jones' PCR counsel introduced more of the same evidence: "The 'new' evidence is the same as the 'old' evidence." Here there is new and different evidence trial counsel failed to find and admitted they wanted. The PCR judge also relied on *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006). Similarly, in *Simpson* there was additional mitigation information, but not a new diagnosis. In Williams' case, the defense simply missed all the evidence of organic brain damage and presented instead, two differing diagnosis regarding mental illness. More importantly, the new experts gave an uncontradicted opinions that petitioner had severe cognitive deficits, impulse control problems and could not conform his actions to the law.

The United States Supreme Court has consistently found trial counsel ineffective for failing to investigate and present similar evidence. For example, in *Wiggins*, the Supreme Court held that defense counsel's performance was unreasonable where, much like here, trial counsel failed to offer expert testimony on the significance of Wiggins' likely FASD and instead relied on evidence of Wiggins' mental illness even though trial counsel knew that "[Wiggin's] mother was a chronic alcoholic". *Wiggins*, 539 U.S. at 524–25. Similarly, in *Rompilla v. Beard*, the Supreme Court found that counsel's assistance was ineffective when counsel failed to present evidence that the defendant suffered from organic brain damage as a result of fetal alcohol exposure, because it was an impairment that by definition existed since childhood and thus likely impaired the defendant's ability to appreciate the criminality of his conduct at the time of the offense.

545 U.S. 374, 392–393 (2005); *see also*, *Porter*, 130 S.Ct. at 451 (holding trial counsel was ineffective for failing to present evidence of brain damage that could manifest in impulsive behavior); *Sears*, 130 S.Ct. at 3262 (holding trial counsel was ineffective for failing to present evidence that the defendant had “problems with planning, sequencing and impulse control”).

Several state supreme courts have also found that failure to present evidence of FASD amounts to ineffective assistance. In *Hurst v. State*, 18 So. 3d 975, 1010–1011 (Fla. 2009), the Florida Supreme Court held that trial counsel’s failure to present evidence of FASD was not consistent with any reasonable trial strategy. The court emphasized that counsel’s performance was unreasonable in light of his knowledge that Hurst’s mother drank heavily during her pregnancy, and because Hurst’s family presented counsel with information that Hurst had borderline intellectual functioning and was emotionally immature. *Id.* The Washington Supreme Court also found counsel ineffective for failing to present evidence of FASD when, despite knowing that the defendant likely suffered from FASD, counsel retained a psychologist who was not an expert in FASD, could not make an individualized diagnosis of the defendant’s FASD, and provided erroneous testimony about FASD’s effects. *In re Brett*, 16 P.3d 601, 604–607 (Wash. 2001); *see also*, *Bond v. Beard*, 539 F.3d 256, 283 and 288 (3rd Cir. 2008) (finding trial counsel was ineffective for failing to present evidence of fetal alcohol, among other things, and noting that trial counsel did not obtain readily available school or medical records or “conduct a meaningful inquiry into [the defendant’s] family life.”);

*Silva v. Woodford*, 279 F.3d 825, 847 n.17 (9th Cir. 2002) (holding trial counsel was ineffective for failing to present evidence that the defendant “may suffer” from FASD).<sup>6</sup>

Perhaps the most compelling part of this evidence is the expert’s analysis that Williams is emotionally on the level of a nine year old. The massive amounts of research combined with Dr. Connor’s extensive testing make it clear that Williams was functioning like a dysfunctional child on the days and weeks leading up to the murder. The culmination of this child like behavior is Williams attempt to run and hide from the police after knowing that countless police officers, including SWAT and helicopters had surrounded the building and were immediately coming to find him. The PCR judge failed to note any of these cognitive deficits in petitioner as a result of FAS.

While it is true the petitioner has an average IQ, the experts were clear that his cognitive deficits, just like those of the mentally retarded, made it impossible for him to use this IQ appropriately. They were also clear, that just because an individual is good at spelling or a standardized testing, it has no bearing on how he can conform his actions in real world situations. Just as the United States Supreme Court noted in *Hall v. Florida*,

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<sup>6</sup> On page 45 of the PCR judge’s order, he relies on decisions in other states for the proposition that the trial attorneys were not deficient. Review of these cases finds them easily distinguished from this case, and some of them are not relevant at all. *Johnson v. State*, 333 S.W.3d 459 (Mo. 2011). In that case the trial experts testified defendant met conditions of FAS and went into detail of where he fell on the spectrum and how his behavior was characteristic of the syndrome. The trial attorneys clearly made a decision to focus on mental retardation in that case but did investigate and present evidence of FAS as well. Similarly in *Burgess v. State*, 962 So.2d 272 (2005), PCR counsel did not call trial attorneys and there was no evidence that they failed to investigate FAS. Furthermore, the jury voted 8 to 4 for Life and PCR experts did not find Burgess had a serious mental disease or defect. Also in *In re Andrews*, 28 Cal.4<sup>th</sup>1234, 1259, 52 P.3d 656 (Cal. 2002): There was one brief reference that defendant “might” have suffered from FAS, but majority of the opinion is based on fact that trial attorneys gave strategic reasons for conducting the trial in the way they did. In *State v. Murphy*, 91 Ohio St. 3d 516, 542, 747 N.E.2d 765, 797 (2001) PCR counsel did not show trial counsel failed to investigate FAS. In *State v. Cooper*, 410 N.J. Super. 43, 979 A.2d 792 (N.J. Super. Ct. App. Div. 2009), New Jersey had abolished the death penalty by the time this case was reconsidered; furthermore, trial counsel had presented evidence, and the jury had found, that the mother’s prenatal ingestion of alcohol had damaged the defendant physically and developmentally.

\_\_\_ U.S. \_\_\_, No. 12-10882 (May 27, 2014): “‘IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks.’ DSM–5, at 37.” And, “It is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment. See DSM–5, at 37 (‘[A] person with an IQ score above 70 may have such severe adaptive behavior problems . . . that the person’s actual functioning is comparable to that of individuals with a lower IQ score’). *Id.*

Petitioner’s cognitive deficits are exactly the same evidence that protects the mentally retarded from execution.

by definition, they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others’ reactions. Their deficiencies do not warrant an exemption from criminal sanctions, but diminish their personal culpability.

*Hall v. Florida*, quoting *Atkins v. Virginia*, 536 U.S. 304 (2002).

Considering the fact that the PCR judge failed to acknowledge the vast amount of evidence regarding the severe circumstances of FAS, combined with the mistaken belief that the trial attorneys somehow decided to strategically not present FAS to the jury, it was impossible for the PCR judge to adequately weigh this evidence. Furthermore, as countless courts have held, organic brain damage is powerful evidence before a jury, and the lack of this evidence establishes a probability sufficient to undermine confidence in the outcome. This is especially true considering the divided jury, 8 - 4, and the extended deliberations. *State v. Williams*, 386 S.C. 503, 690 S.E.2d 62 (2010).

**II. THE PCR COURT ERRED IN FAILING TO FIND THE SOLICITOR REPEATEDLY INJECTED ARBITRARY CONSIDERATIONS BEFORE THE JURY, INCLUDING COMPARING HIS DECISION TO SEEK THE DEATH PENALTY TO THE JURY’S DECISION TO IMPOSE DEATH, REPEATEDLY INJECTING HIS PERSONAL OPINIONS BEFORE THE JURY, AND BY REPEATEDLY MINIMIZING THE JURY’S SENSE OF RESPONSIBILITY, INCLUDING TELLING THEM, “YOU’RE NOT KILLING ANYONE.”**

STATEMENT OF FACTS REGARDING ARGUMENT

The PCR judge found that the solicitor’s comments were nearly identical to comments Solicitor Arial made in *Sigmon v. State*, 403 S.C. 120, 742 S.E.2d 394 (2013).

The language the PCR judge cited in this section was partially redacted; the redacted portions are in bold:

**[The State is asking you to impose the death penalty. That’s what we’re here for and what this section is about. This phase of this case, you may hear arguments from the defense. I have to anticipate what they may say. I don’t know what they will say. But you may hear arguments from defense counsel that tries to persuade you that giving the death penalty is somehow wrong or that killing the defendant is somehow wrong. Those phrases you may hear and that try to indicate to you that what you’re doing may not be right.**

**Let me talk a little bit about that. I want to put it in context. The state, represented by the solicitor, can in certain circumstances under our law ask for the imposition of the death penalty. However, it is only in limited circumstances, specifically murder cases, and only those murder cases in which is specifically defined by our statutory law by our legislature. And only in those cases can the state seek to have the death penalty imposed.]**

So, this is a legal process, a legal penalty enacted by our legislators; and it is a function of government *carried out by you*, the citizens. ...**[And that’s the way the process has been initiated and created by our state legislature and approved by our courts.]** *This is a function of you as citizens carrying out part of our government process. You are shaping a lawful punishment to an unlawful act. So, the responsibility is given to you to decide what the appropriate punishment is.*

...

**[I remember in voir dire we went over this,] [Y]ou are the judge. The judge does not sentence, you sentence. And that's what this process is about. And it is a process which we have entrusted to you as our citizens to carry it out fairly. . . .[; and there's nothing wrong with what you're doing. You're not killing anyone, and you're not making a decision that is in any way wrong.]**

**[Now, let's talk a little bit about the fact that this is obviously a difficult decision, that this is not an easy decision. It's not easy for me to ask you to even make it. But responsible people make tough decisions all the time. You make tough decisions in your jobs, at your homes, regarding your children, and you make them in your marriage.]**

*The process makes you responsible for this difficult decision; but we can't run and hide from our responsibilities. The law places it on our shoulders, the law entrusted it to you and it means we'll do it, just like any other tough decision that we make; that is, you will apply common sense, you will consider the facts and you will consider the alternative solution, just like you do when you make your decisions on your jobs, with your family, otherwise. If you imagine yourself making a tough decision and handling it in the same way you would handle it with your job or with your family, we trust you would make the right decision."*

App. p. 2366 – 68 (emphasis added [by PCR judge])." App. p. 4186.

The PCR judge failed to discuss the passages deleted above. He also failed to cite or discuss the following additional language on the next page:

It's not enjoyable for me or us to ask for you to impose the death penalty. That's not something we like to do.

We wish these cases didn't exist. We wish we didn't have a case load, but we do. And our responsibility is to come to you as the elected prosecutor and present these cases we deem appropriate for the death penalty. It's a necessary decision.

App. p. 2369, Line 22.

The PCR judge did cite the following language from Solicitor Arial's argument:

They have said earlier the solicitor is not satisfied with a life sentence. And I agree, I am not. They told you he's going to want the death penalty, and I do. Why is the death penalty the appropriate sentence in this case? And that is a fair question for you to ask, ask of us, the State of South Carolina. And I submit to

you that this is the reason, is that there are mean and evil people who live in this world who do not deserve to continue to live with the rest of us regardless of how confined they may be.

The law limits the State's right to seek the death penalty to a very few murders. We seek the death penalty in only a few cases. But the circumstances where it's available are for mean and evil people. The worst of the worst. Christopher Williams and this murder are one of those cases. The worst of the worst."

App. p. 2370, Line 16.

However, the PCR judge failed to note or account for the fact that Solicitor Arial was not accurate when he stated, "They have said earlier the solicitor is not satisfied with a life sentence. And I agree, I am not. They told you he's going to want the death penalty, and I do." In fact the undersigned specifically noted that he could find no indication in the record that anyone made these comments or anything similar. App. p. 4022.

Furthermore, as is noted later in the argument section, this is virtually the identical language Solicitor Arial used in the Freddie Owens case.

The PCR judge also failed to cite or discuss the following language:

We will agree that the defendant could adapt to prison, because they will make him adapt. But that's not the issue. Because, otherwise, we would never have the death penalty. There would be no reason for it. And the solicitor says there is a reason for it and that it's something you should consider in shaping the punishment to fit the extent of the crime.

App. p. 2374, Line 7.

In opening, the assistant solicitor made the following comments:

Part of that, when the legislature passed the laws, said that the state could not seek the death penalty in every case. We talked a little bit about this. It has to be a murder plus an aggravating circumstance. And I actually went back and looked at the statute. There are 11 aggravating circumstances outlined in the statute. So, if it's murder and we don't have one of those aggravating circumstances, we can't even seek the death penalty.

So it's a very limited situation. There are only limited crimes for which we can even seek the death penalty. And out of those 11 we are going to rely on two. We only have to prove one. We're going to offer to you two different aggravating circumstances for your consideration, your determination."<sup>7</sup>

App. p. 2112, Line 7.

There was also discussion during Dr. Crawford's testimony that she was there to help the solicitor make his decision; Justice Pleicones specifically mentioned the nature of this testimony in his concurrence: "Here, however, Dr. Crawford's testimony was offered only to bolster the solicitor's decision that this case warranted a death sentence. Unlike the majority, I do not see how the curative instruction negates the prejudice from Dr. Crawford's irrelevant yet prejudicial testimony." *Williams* at 73.

Furthermore, the defense was on notice that Dr. Crawford was potentially going to testify about the Solicitor's decision making process. In a pre-trial hearing, Dr. Crawford and the solicitor both explained that was her number one responsibility. The solicitor asked Dr. Crawford about their working relationship in cases and what he was looking for, and she answered, "information about mitigating issues that may lead you to decide, in fact, not to seek the death penalty." And the solicitor continued, "So that the information that you would provide me in these various cases may be relevant as to whether or not, number one, I would seek the death penalty in a particular case." App. p. 2696 – 2697.

The Solicitor also made the following comments in closing:

[T]hey just can't argue a bad childhood and bad parent and get the minimum sentence. Surely, there's more to punishment in a case like this than the minimum sentence.

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<sup>7</sup> The solicitor withdrew the public place aggravator before sentencing arguments. App. p. 2354.

App. p. 2370.

Life imprisonment is the least of the two punishments the law allows in this case. Does this case deserve the least?

Mr. Nettles: Your honor, may we approach the bench?  
(Whereupon a bench conference was held.)

App. p. 2372.

So, what is the appropriate sentence to fit this crime and hold him responsible? Life in prison is not appropriate. You can't put him in prison for life and expect him to suffer. You can't do it. Because he is not going to think about it every day, because there's not going to be anybody there to remind him of the damage that's done to Mandy's family or to his family. No one is going to do that. Nobody is going to constantly remind him. So, he's not going to think about it.

Sure you and I may think going to prison for life is a serious sentence, but what about Chris Williams? Being in prison is like a small city, allow all things of life. Places, Restaurant, places to exercise, recreation when he wants. Doctors, hospital take care of him, clothing provided, TV. Contact with family and loved ones. He'll have freedom of movement, a social structure. He'll play cards and games. Go to work if he wants, go to school if he wants. Watch ball games on TV.

Sure, he doesn't have a car and his travel is limited, but it's not really much more than a serious change of address. He will have his family to visit him but Mandy's family won't, and her daughter won't.

App. p. 2378, Line 1.

Attorney Nettles testified that he believed this argument was so ridiculous that he decided to mock Solicitor Arial for making these comments, instead of objecting to them. App. p. 3285. The PCR judge found this was a strategic decision not to object to the argument. PCR order, page 24, App. p. 4190. Attorney Nettles was one of the attorneys that represented Troy Burkhart, where this error was specifically addressed by this Court. He also acknowledged he had prior warnings about this behavior and to be prepared to

object to it. App. pp. 3286-90. Attorney Nettles did not offer strategic reasons for failing to object to anything else and testified, "If the transcript says I didn't object, I didn't object. Okay? And if, you know, if Bob said something that smarter people now say I should have objected to, I should have objected. Okay. I mean, I objected to everything in that closing argument that I thought was objectionable." App. p. 3291. Attorney Mauldin testified that he deferred to Nettles to object. App. p. 3350.

Solicitor Arial also ended his closing with the following statement:

And it is your decision and as you speak for this community, make that decision, whatever that decision is, it will ring like a bell outside of this courthouse. It will ring like a bell to be heard while all of those who are reasoning and all of those who want to listen. And I urge you, on behalf of the State of South Carolina that the appropriate punishment under this crime is the death penalty. Let that bell ring so this community will know that we will not tolerate conduct of this type without the maximum punishment.

App. p. 2380.

## ARGUMENT

This Court has been clear and adamant about a prosecutor's argument in a capital sentencing. It should be focused on the nature of the crime and the character of the defendant. Whenever a solicitor strays from these factors, he jeopardizes the jury relying on arbitrary factors when determining death. *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982); *State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2005).

### THE PCR JUDGE USED THE WRONG STANDARD

Once an arbitrary factor has been introduced to the jury a death sentence cannot be upheld. South Carolina Code 16-3-25(C)(1); *State v. Burkhardt*, 371 S.C. 482, 640 S.E.2d 450, 454 (2007)(Justice Pleicones concurrence); see also *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007)("We conclude the solicitor's closing argument requires

reversal of Appellant's death sentence because the sentence was imposed under the influence of passion and prejudice in violation of S.C.Code Ann. § 16-3-25(C).”) (Compare Chief Justice Toal’s dissent in *Burkhart* at 456 and *Northcutt* at 883.)

In his order, the PCR judge never considered the standard relied on in *Burkhart* and *Northcutt* based on section 16-3-25 and instead quoted the wrong standard:

“Petitioner must prove a reasonable probability exists that a jury would not have sentenced him to death if trial counsel had objected to the solicitor’s comments.’ *Vasquez v. State*, 388 S.C. 447, 466-467, 698 S.E.2d 561, 571 (2010).” PCR Order, page 18, App. p. 4184. This is a quote from Chief Justice Toal’s dissent in *Vasquez*, where she argued the majority created a “*per se* rule of prejudice”. (In *Vasquez* the solicitor referred to the defendant as a domestic terrorist and referred to 9/11.)

The PCR judge repeated this standard on page 25 of his order:

Therefore, considering the closing statement in its entirety within the context of the full record and the careful instructions by the trial judge, and given the overwhelming evidence of guilt and the egregious circumstances of the crime, Petitioner has failed to prove that there is a reasonable probability that the jury would have returned a different verdict had the Solicitor not made these comments. Furthermore, the South Carolina Supreme Court conducted a review of the trial record pursuant to S.C. Code Ann. § 16-3-25 and concluded that “the death sentence was not the result of passion, prejudice, or any other arbitrary factor.”

App. p. 4191. The majority in *Vasquez* specifically rejected such an analysis, noting the PCR judge in *Vasquez*, “[e]ssentially appl[ied] a harmless error analysis[.]” *Vasquez* at 565. Indeed, in *Vazquez*, this Court reiterated a long line of decisions noting the difficulty of evaluating improper arguments on a jury with the responsibility of determining death:

Based on the foregoing, we find there is a reasonable probability that trial counsel's failure to object to the solicitor's comments affected the jury's deliberation of Petitioner's sentence of death. See *Von Dohlen v. State*,

360 S.C. 598, 613, 602 S.E.2d 738, 746 (2004) ("It is difficult to determine the precise impact of the solicitor's argument on the jury's deliberation of the sentence, but the potential impact must be carefully and thoroughly evaluated in a capital case."); State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000) ("We note the evaluation of the consequences of an error in the sentencing phase of a capital case [is] more difficult because of the discretion that is given to the sentencing jury. A capital jury can recommend a life sentence for any reason or no reason at all."); State v. White, 246 S.C. 502, 507, 144 S.E.2d 481, 483 (1965) (noting that "[i]n view of the absolute discretion of the jury with regard to the issue of mercy, it is impossible to determine whether the argument actually had a prejudicial effect upon the verdict").

Not only did the PCR judge use the wrong standard, he apparently relied on this Court's proportionality review as grounds for failing to adequately consider petitioner's complaints of the entire argument or as if it was evidence that this Court has already considered these arguments and found them to be meritless. Such a view is in direct contrast to the abolition of the in favorem vitae doctrine. *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). This alone mandates grant of the certiorari petition.

On page 17 of the PCR judge's order he also quoted *Simmons v. State*, 331 S.C. 333, 503 S.E.2d 164 (1998) for the proposition that the argument must be considered in context of the entire record including "whether there is overwhelming evidence of the defendant's guilt." App. p. 4183. But the PCR judge failed to heed *Simmons* explicit language:

The evidence of petitioner's guilt is overwhelming. [Footnote omitted] However, because the issue is whether the solicitor's improper argument prevented the jury from fairly considering the guilty with a recommendation of mercy verdict, the overwhelming evidence of petitioner's guilt does not eliminate the reasonable probability that the result of the trial would have been different had trial counsel objected to portions of the solicitor's closing argument. See *State v. McGee*, 268 S.C. 618, 235 S.E.2d 715 (1977) (where this Court found the trial judge erred by refusing to instruct the jury as to the penalty for the crime of burglary and by preventing the jury from determining, as the statute requires, whether to recommend mercy, and further finding this type of error could not be considered

harmless because the recommendation of the jury is an important part of the verdict and without proper instructions, the probability of prejudice is great); see also *State v. White*, 246 S.C. 502, 144 S.E.2d 481 (1965) (finding where the jury had absolute discretion with regard to the issue of mercy, it was impossible to determine whether the solicitor's improper argument actually prejudiced defendant; however, the probability of prejudice was great, and defendant was entitled to a new trial).

It is clear that *Vazquez* and *Simmons* require reversal due to the solicitor continuously injecting matters outside the record, by repeatedly referencing the legislature and how they had already limited the death penalty to a very few cases, by discussing prison conditions, including implying it was a Club Med type atmosphere with restaurants, recreation, social life and TV, by telling the jury they “were not killing anyone”, by telling the jury that they were part of a process that had been approved by the courts, and by repeatedly discussing his personal feelings and opinions, including that he wanted the death penalty, would not be satisfied with a life sentence, that it was not easy for him to ask for the death penalty but it was necessary, that the solicitor said there was a reason for it and that that is something the jury should consider, that the solicitor sought death in very few cases, and that it was his responsibility as the elected prosecutor to come forward with cases that he deemed appropriate for the death penalty.

But even if the PCR judge did not agree with the standards in the above cases, it is clear this case is in direct violation of the very specific distinction laid down in *Sigmon v. State*, 403 S.C. 120, 742 S.E.2d 394 (2013). In *Sigmon* this Court held that Solicitor Arial's argument was different from *State v. Woomer*, 277 S.C. 170, 284 S.E.2d 357 (1981), because in *Woomer* the solicitor minimized the juror's sense of responsibility in choosing death by comparing his decision to theirs and because the argument contained his personal opinions.

The PCR judge found appellant's case to be nearly identical to *Sigmon*. This case is in no way identical to *Sigmon*. First, the solicitor did not take *some leeway* in referencing the State's decision, he repeatedly discussed the decision process and the limits placed upon them. Furthermore the assistant solicitor discussed it in opening and a witness testified to it on direct.

Second, the language the solicitor used could have done nothing but minimize the jury's sense of responsibility. Not only did he blatantly tell the jury that they "were not killing anyone", he then immediately equated their difficult decision to his difficult decision: "this is not an easy decision. It's not easy for me to ask you to even make it." He then not only compared their decisions, he specifically told the jury the law placed this difficult decision on "our shoulders" and "we'll do it". And just a short time later he again tells the jury it is also not enjoyable for him to ask them to impose the death penalty, but it was his responsibility as the elected prosecutor to present cases he deemed appropriate for the death penalty. As *Sigmon* noted, in *Woomer*, "We held the solicitor's statements were inadmissible because he repeatedly stated that he himself had undertaken the same difficult process." *Sigmon* at 130, 399. And, "As *Bell* illustrates, the solicitor has some leeway in referencing the State's decision to request death, provided he does not go so far as to equate his initial determination with the jury's ultimate task of sentencing the defendant." *Sigmon* at 130, 400.

Solicitor Arial's statements are similar to a case this Court reversed more than 30 years ago:

"...I, as Solicitor and chief prosecuting officer in this county, must make the decision whether or not the State of South Carolina must seek the

death penalty.... So, you see, you are not alone in your decision. I have already made that decision....  
I made that decision some months ago.  
And if I can do it, you can [do]" [sic]

*State v. Koon*, 278 S.C. 528, 298 S.E.2d 769 (1982).

This is extremely similar to the language this Court quoted in *Sigmon* from *Woomer*:

[T]he initial burden in this case was not on you all. It was on me. I am the only person in the world that can decide whether a person is going to be tried for his life or not. . . . I had to make this same decision, so I have had to go through the same identical thing that you all do. It is not easy.

By empathizing with the jury over their shared difficult decision, the prosecutor was clearly injecting an arbitrary factor into the deliberations.

#### PERSONAL OPINION

Third, this case is further differentiated from *Sigmon* because here the solicitor repeatedly injected his personal opinion into the proceeding. This Court was particular in distinguishing *Sigmon* by noting the argument “did not contain the Solicitor’s personal opinions.” *Id.* at 400. This legal precedent has a long history in this state and in our constitution. A prosecutor’s expression of personal opinion improperly “carries with it the imprimatur of the Government and may induce the jury to trust the Government’s judgment rather than its own view of the evidence.” *United States v. Young*, 470 U.S. 1, 19 (1985). This is exactly the problem in this case; the solicitor not only repeatedly told them he had found this case appropriate for the death penalty, he told them he only sought death in a few cases – the worst of the worst. This language could do nothing but suggest to the jury that the legislature and the solicitor had already determined this case was the worst of the worst.

But again, Solicitor Arial did not stop there. He also blatantly injected his personal opinion by acting as if the defense stated he would not be satisfied with life and he wanted the death penalty, and then agreeing to that statement. First, even if this had been some type of “invited response” it would be inappropriate. *United States v. Young*, 470 U.S. 1, 11 (1985). But in this case it was simply not true. The defense never said this. Furthermore, it was clearly intentional because Solicitor Arial used almost the exact same phrase in Freddie Owen’s case. Supreme Court Case No. 2013-001026; Owen’s Appendix p. 1607, ll.9-25<sup>8</sup>. Therefore, he was not only going outside the record, he was intentionally misleading the jury into thinking the defense had made these comments. “[T]he prosecutor's remarks were impermissible because they were inaccurate and misleading in a manner that diminished the jury's sense of responsibility.” *Romano v. Oklahoma*, 512 U.S. 1 (1994).

Solicitors cannot indicate they disapprove of a life sentence. In *State v. Smart*, 278 S.C. 515, 299 S.E.2d 686 (1982) this Court reversed a death sentence because a solicitor drew attention to his decision to seek the death penalty and because he told the jury that other citizens, including himself, would disapprove of a life sentence. This Court reiterated this decision in *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007):

“The solicitor also repeatedly told the jury he “expects” the death penalty and, in doing so, ignored our precedent which rebukes such an imposition of the solicitor's personal belief. [Footnote: *See State v. Smart*, 278 S.C. 515, 299 S.E.2d 686 (1982) (reversing a death sentence because of the same error by the same solicitor), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) ; *Thompson v. Aiken*, 281 S.C. 239, 315 S.E.2d 110 (1984) (finding prejudicial error where

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<sup>8</sup>In Owens, Arial stated, “They have said earlier that the solicitor is not satisfied with a life sentence, and I am not, and that’s why we have asked for the death penalty. They told you that I was going to want the death penalty, and I do.”

prosecutor's argument put his personal opinion before the jury regarding the death penalty in murder cases and requiring a new sentencing proceeding).]

Furthermore, while there were three alleged errors in the closing argument in *Northcutt*, the Supreme Court made it clear that, “Any one of these three miscues requires reversal of Appellant's sentence.” And in the dissent, Chief Justice Toal specifically pointed out the fact that the solicitor’s comments were minimal in comparison to the entire record:

“Likewise, I disagree with the assertion that the solicitor's remark in which he expressed that he expected the death penalty requires reversal. The solicitor's closing argument fills thirty-five pages of the record. I seriously doubt that either of these two comments, each filling only one line on separate pages of the record, permeated the sentencing proceeding with any degree of unfairness.”

Our Supreme Court has made it clear that whenever a solicitor explicitly puts his personal opinion or desires into a closing argument, the result is prejudicial to the defendant.

And again, the Solicitor did not stop there; he could not have injected his personal opinion in a more direct way than by telling the jury, “the solicitor says there is a reason for [the death penalty] and that it’s something you should consider in shaping the punishment to fit the extent of the crime.” App. p. 2374, Line 7. The PCR judge failed to cite or address this statement.

#### ADDITIONAL INSTANCES OF MISLEADING THE JURY

The most repeated arbitrary factor the solicitor injected was the legislative limitations on the death penalty. App. p. 2112, Line 20; App. p. 2113, Line 2; App. p. 2113, Line 4; App. p. 2366, Line 13 – 20. Part of the problem with the solicitor telling the jury that he is limited as to when he can seek death is that it has no basis in the record and it was simply not true. Petitioner included every murder indictment from 2003, the year

of the murder, and 2005, the year of the trial, and showed that the solicitor could seek death in every case, except possibly one. App. p. 4099. “The State’s closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence.” *Vasquez v. State*, 388 S.C. 447, 698 S.E.2d 561 (2010). The PCR judge failed to mention this or discuss it in his PCR order.

Furthermore, our Supreme Court has repeatedly held that legislative considerations of any type are inappropriate in the jury room; “[L]egislative determinations are wholly beyond the proper concern of a jury as it weighs the sentence of death.” *State v. Smart*, 278 S.C. 515, 299 S.E.2d 686 (1982).

#### PRISON CONDITIONS

This Court relied on the same logic – that legislative considerations had no place in the jury room – when it held prison conditions had no place in jury deliberations:

“We have long held that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime. *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982) . The jury’s sole function is to make a sentencing determination based on these factors and not to legislate a plan of punishment. *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987) .”

*State v. Burkhardt*, 371 S.C. 482, 640 S.E.2d 450 (2007). There was simply no reason for Solicitor Arial to suggest that the death penalty was appropriate because life in prison would not make the petitioner “suffer” and think about the crime on a daily basis. Prison conditions are beyond petitioner’s control and the solicitor’s argument heightened the risk of arbitrariness by encouraging the jury to act out of dissatisfaction with South Carolina’s penological policies. See *State v. Atkinson*, 253 S.C. 531, 534-35, 172 S.E.2d 111, 112 (1970), *overruled on other grounds by Torrence*, 305 S.C. 45, 406 S.E.2d 315.

This is particularly egregious here because the defense did not introduce conditions of prison, and the solicitor was speaking entirely outside the record when he told the jury that prisons “allow[ed] all things of life. Places, restaurant, places to exercise, recreation when he wants.”

This Court continued in *Burkhart*:

This case was tried before our decision in *Bowman* [366 S.C. 485, 623 S.E.2d 378 (2005)]; however, we apply that reasoning here because it is consistent with our long-standing rule that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime.

*State v. Burkhart*, 371 S.C. 482, 640 S.E.2d 450 (2007). Trial counsel attempted to negate the solicitor’s discussion of prison conditions by asking the jury if they truly believed prison had restaurants. App. p. 2380. Whether or not petitioner’s trial counsel believed this was an effective strategy, this argument was clearly irrelevant and prejudicial, and allowed the jury to still consider arbitrary factors, such as whether or not the petitioner would be allowed to watch TV, play games and cards, exercise and visit loved ones.

Here, unlike *Bowman*, appellant objected to the State’s evidence regarding general prison conditions. Although appellant attempted to counter the testimony of the State’s witness with evidence regarding the harshness of prison life, this entire subject matter injected an arbitrary factor into the jury’s sentencing considerations.

*Id.* Petitioner’s case is similar in the fact that trial counsel attempted to counter the argument of the solicitor that there were restaurants in prison; however, there was never any counter of the remaining prison conditions the solicitor inappropriately injected.

Furthermore, this Court has noted that based on the evident impropriety of a solicitor's argument, it may be incumbent to object to the argument, regardless of an attorney's trial strategy:

"In view of this improper argument, we agree with the PCR judge that it was incumbent upon Brown's trial counsel to object to the solicitor's closing remarks. Furthermore, although we do not believe trial counsel was disingenuous in articulating a trial strategy to explain his failure to object to these comments, we find this "strategy" cannot be construed as a valid one given the evident impropriety of the solicitor's remarks."

*Brown v. State*, 383 S.C. 506, 680 S.E.2d 909 (2009). Regardless of trial counsel's response to the argument, the argument was highly prejudicial, furthermore, it is an example, looking at the closing argument as a whole, of the solicitor's continued willingness to go outside of the record and introduce irrelevant and prejudicial material in front of the jury.

While *Bowman* and *Burkhart* were published after this trial, defense counsel should have been prepared well in advance for this argument. They were warned by Jeff Bloom (Plaintiff's Exhibit 17, App. p. 4458) to object to this type of argument and numerous cases suggested it was improper. *State v. Gardner*, 332 S.C. 389, 505 S.E.2d 338 (1998) (Per Curiam). *State v. Patterson*, 324 S.C. 5, 482 S.E.2d 760 (1997). Furthermore, attorney Nettles represented Troy Burkhart and was aware that the identical issue was on appeal in that case. App. p. 3285.

Petitioner would also note that repeatedly telling the jury that life was the minimum sentence allowed and would not make the defendant suffer, suggested that life in prison would allow the petitioner to somehow escape punishment. By suggesting to the jury that they were allowing the defendant to get the minimum sentence, the solicitor

injected an arbitrary factor before the jury that was not based on reason. *Beck v. Alabama*, 447 U.S. 625, 638 (1980). Solicitor Arial also improperly suggested that petitioner's mitigation should not be given meaningful consideration, by telling the jury, the defendant was not allowed to use his sister to escape a more proper punishment. App. p. 2373. These arguments "affirmatively misled" the jury "regarding its role in the sentencing process." *Romano*, 512 U.S. 1, 10 (1994). They also prejudiced petitioner's constitutional right to present mitigating evidence for the jury's meaningful consideration. *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

Finally, petitioner would also note that while *State v. Cain*, 377 S.E.2d 556, 297 S.C. 497 (1988) held the "send a message" to the community argument was not improper, the Fourth Circuit has held this argument improper. *United States v. Runyon*, 707 F.3d 475 (4th Cir. 2013): "We also decline to approve the prosecution's encouraging the jury to 'send a message to the community, send a message with your verdict.' In *United States v. Caro*, we expressed skepticism about 'the government's comments about messages sent to anyone other than' the defendant, 597 F.3d 608, 625 n. 17 (4th Cir.2010) — skepticism that other circuits seem to share, see, e.g., *Sinisterra v. United States*, 600 F.3d 900, 910 (8th Cir.2010) (holding that urging 'the jury to send a message with its verdict' is improper because it 'impinge[s] upon the jury's duty to make an individualized determination that death is the appropriate punishment for the defendant')."

#### PREJUDICIAL ANALYSIS

Our Supreme Court has repeatedly reversed cases when the solicitor injects arbitrary factors into the proceedings. In light of S.C.Code Ann. § 16-3-25(C)(1) (2003) it

is arguably mandatory to reverse once an arbitrary factor is introduced. See *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007).

The combined effect of these comments was to limit the jury's sense of responsibility in the decision making process, by convincing them that the legislature and prosecutor had already limited these cases to the worst of the worst, that the Solicitor shared this difficult decision with them, that he wanted the death penalty and would not be satisfied with life, that he was telling the jury there is a reason for the death penalty and that was something they should consider in determining punishment, and regardless, they were not to worry, they were simply part of a government process approved by the courts: "You're not killing anyone."

Even taking the argument as a whole, the solicitor continuously goes outside the record. In fact there are very few pages in the solicitor's argument where he does not stray outside the evidentiary record or inject his personal feelings into the process. The PCR judge failed to cite or discuss the vast majority of these statements and further failed to address the cumulative nature of these comments. These statements demand a rehearing based on Section 16-3-25 and the United States and South Carolina Constitutions.

**III. THE SOUTH CAROLINA DEATH PENALTY STATUTE IS UNCONSTITUTIONAL UNDER FURMAN VERSUS GEORGIA, AND MORE IMPORTANTLY, AN ADEQUATE PROPORTIONALITY ANALYSIS HAS NEVER BEEN PERFORMED IN THIS CASE, AND THE DEATH PENALTY IS EXCESSIVE IN THIS CASE.**

In *Furman v. Georgia*, 408 U.S. 238 (1972) the United States Supreme Court found that Georgia's death penalty statute was cruel and unusual based on the fact that it was imposed in an arbitrary and capricious manner. *Id.* at 309-310 (STEWART, J., concurring). Four years later, quoting Justice Stewart, the Court approved Georgia's new death penalty statute in *Gregg v. Georgia*, 428 U.S. 153 (1976), and relied on three factors: (A) The new statute ensured that the death penalty could only be given under narrow circumstances; (B) The jury had to consider the particular circumstances of the crime and the defendant; and (C) the Georgia supreme court reviewed the sentence to ensure it was appropriate under the circumstances. This Court held that our death penalty statute was constitutional in *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979).

The petitioner asserts that South Carolina's death penalty statute does not restrict the circumstances wherein a jury may impose death for a murder. Specifically, because the legislature has increased circumstances wherein the death penalty may be imposed, and because the South Carolina Supreme Court has defined those circumstances in the broadest terms, virtually every murder in this state is eligible for the death penalty. Furthermore, the United States Supreme Court was particularly concerned that the state supreme court in *Gregg* exercised discretionary review of death verdicts thereby mandating sentences were only given for the most egregious cases. While this Court has acknowledged the importance of this proportionality review in *State v. Copeland*, 278

S.C. 572, 591, 300 S.E.2d 63, 75 (1982), it has never declared a death sentence arbitrary or out of proportion.

### **THE UNITED STATES SUPREME COURT FACTORS A and C**

#### **A. UNDER SOUTH CAROLINA'S STATUTE VIRTUALLY EVERY MURDER CASE CAN QUALIFY FOR THE DEATH PENALTY RESULTING IN A COMPLETE FAILURE TO NARROW THE CIRCUMSTANCES UNDER WHICH A JURY MAY SENTENCE THE DEFENDANT TO DEATH.**

The death penalty is supposed to be reserved for the "worst of the worst". *Roper v. Simmons*, 543 U.S. 551, 568 (2005). Capital punishment must narrow the circumstances where death can be sought. *Kansas v. Marsh*, 548 U.S. 163, 173-174 (2006); *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).<sup>9</sup> It is almost impossible to conceive of a murder case in this state where the defendant is not eligible for the death penalty; in particular, two aggravating circumstances, kidnapping and physical torture (S.C. Code Ann. § 16-3-20(c)(a)(1)(b) and (i) respectively), have been defined so broadly, that every defendant charged with intentional murder qualifies for the death penalty.

Almost all murder cases also involve a "kidnapping". While the traditional view of kidnapping might be an abduction in order to make some type of monetary or personal gain, South Carolina has defined kidnapping far more broadly:

"South Carolina does not have different levels of crimes involving deprivation of freedom. Instead, the crime of kidnapping in South Carolina is broad in scope. Under our statute, a person is guilty of kidnapping if he should " unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law." S.C.Code Ann. § 16-3-910 (2010). Furthermore, we have interpreted this statute to encompass restraint regardless of duration or whether the victim was moved. *See State v. Tucker*, 334 S.C. 1, 13-14,

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<sup>9</sup> As discussed above, the solicitor's opening and closing arguments exacerbate the failure of any legitimate narrowing circumstances, by repeatedly asserting the legislature had restricted the death penalty to a very limited number of circumstances when in fact it does not. This portion of the argument also relies on the 15 cases cited in Section II wherein at least 14 of 15 were eligible for the death penalty.

512 S.E.2d 99, 105 (1999) (noting that the offense of kidnapping " commences when one is wrongfully deprived of freedom and continues until the freedom is restored" and further finding that proof of kidnapping existed where defendant had bound victim with duct tape in her home)."

*Lozada v. South Carolina Law Enforcement Div.*, 395 S.C. 509, 719 S.E.2d 258 (S.C. 2011). In the *Tucker* case cited above in *Lozada*, the defendant argued he duct-taped the victim to the bed in order to search for things to steal and not to kidnap the victim, and therefore he did not have the *mens rea* to establish kidnapping. This Court rejected that argument and held, "Further, we have held restraint constitutes kidnapping within the meaning of section 16-3-910, [footnote eliminated] regardless of the fact that the purpose of this seizure was to facilitate the commission of a sexual battery." *State v. Tucker*, 334 S.C. 1, 14, 512 S.E.2d 99, 105 (1998).

If kidnapping can be completed with the above requisite intent and for any duration, no matter how slight, it would obviously encompass the vast majority of murder cases. Any time a defendant aimed a weapon at a victim, the victim would be immediately kidnapped unless the victim somehow believed they could walk or run away without being shot. Even if the defendant physically assaulted a victim, the victim would be considered "kidnapped" unless the victim was able to leave or believed they were able to leave during the assault. The same would apparently be true even it was simply an attempted kidnapping. *Humphries v. State*, 325 S.C. 28, 479 S.E.2d 52 (1996).

The only time a victim would not be "kidnapped" is if the victim was unaware of the physical injury of the murder while it took place; however, even that circumstance may constitute kidnapping, because the definition does not require conscious knowledge of the kidnapping based on the definitions of fraud, inveigle and decoy. Petitioner avers

that it is almost impossible to commit murder without committing the offense of kidnapping under these definitions. Therefore, South Carolina Code Ann. § 16-3-20 fails to narrow the circumstances wherein one can be subject to the death penalty for murder.

In *State v. Koon*, 278 S.C. 528, 298 S.E.2d 769 (1982) this Court held that it disposed of the argument that kidnapping was too overly broad to define a statutory aggravating circumstance in *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982). In reality, *Copeland*, did not address this issue, but merely re-iterated that the kidnapping statute was not overbroad based on *State v. Plath*, 277 S.C. 126, 284 S.E.2d 221 (1981) and *State v. Smith*, 275 S.C. 164, 165, 268 S.E.2d 276 (1980). *Smith* was not even a death penalty case. This Court did partially consider this issue again in *State v Ray*, 310 S.C. 431, 427 S.E.2d 171 (1993), where sentencing was conducted by the trial judge. In that case, this Court held, “[T]rial judges are presumed to know the law and apply a narrowing definition. See *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990).” *Id.* at 174.

Here, the trial attorneys specifically requested a limited instruction, that may have resolved this issue, but the trial court refused. App. p. 2067. They also requested a lesser included charge of false imprisonment. App. p. 2064. Instead, the Court used a standard kidnapping charge. App. p. 2056.<sup>10</sup> This allowed the State to argue exactly what the appellant complains of – that every murder is the ultimate kidnapping. App. p. 2022, 2024.

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<sup>10</sup> The judge did not define kidnapping in the penalty phase, but only charged that the jury had to find that the murder was committed “while in the commission of the crime, act, kidnapping.” App. p. 2400, Line 11. (See also App. p. 2399-2400 for the charge that an aggravating circumstance, kidnapping, must be found.)

Furthermore, the State cannot argue that the petitioner's conduct so plainly falls within the definition of the aggravator that the jury's decision is appropriate. The United States Supreme Court addressed this argument in *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853 (1988), and in an unanimous opinion held that such an analysis was not sufficient to make sure the jury was adequately informed what they must consider in deciding a death sentence. *Maynard* at 361-362. Even if this case clearly fits into the definition of kidnapping, part of the problem with having such broad circumstances is it gives unfettered discretion to the solicitor in determining which cases are death eligible. This subjects the process to individual bias on the part of one person in regards to what is the worst of the worst, not to mention potentially far greater improper concerns. This is particularly a concern in cases like these, where there is a black defendant and white victim. *Walker v. Georgia*, 381 U.S.355 (2008)(Justice Stephens citing Baldus & Woodworth, Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception, 53 DePaul L. Rev. 1411, 1424-1426 (2004)).

The statute must not be so broad as to encompass every murder.<sup>11</sup> It is abundantly clear that despite what the prosecutors repeatedly told the jury, there is very little narrowing in the death penalty statute, as can be seen by the fact that the solicitor could have sought death in at least 14 out of the 15 murder cases he had in 2003 and 2005. The statute as a whole fails to narrow these circumstances and is unconstititutional.

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<sup>11</sup> The statute is also overly broad because it allows juries to find the aggravator of "physical torture" which is broadly defined as an aggravated battery accompanied by circumstances of aggravation, such as the use of a dangerous or deadly object or the infliction of serious bodily injury. *State v. Davis*, 422 S.E. 2d 133 (S.C. 1992). And the victim does not even have to be conscious of the injury. *State v. Johnson*, 525 S.E.2d 519 (S.C. 2000).

**B. THIS COURT FAILED TO ADEQUATELY REVIEW THE SENTENCE TO ENSURE IT WAS APPROPRIATE UNDER THE CIRCUMSTANCES.**

The third factor the United States Supreme Court relied on in upholding the Georgia death penalty, was that the state supreme court reviewed the case to make sure it was appropriate under the circumstances.<sup>12</sup> South Carolina has adopted the same proportionality analysis. *State v. Copeland*, 278 S.C. 572, 591, 300 S.E.2d 63, 75 (1982). South Carolina Code Ann. § 16-3-25(c)(3) requires the court to determine “Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.”<sup>13</sup>

In the petitioner’s case the Supreme Court’s analysis consisted of two sentences:

“Pursuant to S.C. Code Ann. § 16-3-25(C) (2003), we have conducted a proportionality review and find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions demonstrates that Appellant’s sentence is neither excessive nor disproportionate. *See, e.g., State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996).”<sup>14</sup>

*State v. Williams*, 386 S.C. 503, 690 S.E.2d 62 (S.C. 2010). This is virtually the identical language used in every death penalty “proportionality review” in South Carolina. See *When Lightning Strikes Back: South Carolina’s Return to the Unconstitutional, Standardless, Capital Sentencing Regime of the Pre-Furman Era*, Blume, JH, et al. 4 Charleston L. Rev. 479 (2010).

It is impossible to judge the adequacy of this analysis, and regardless, this fails to inform defendants and their counsel what factors may be considered relevant in such a

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12 Petitioner’s appellate counsel admitted he did not pursue this issue on appeal and that it had never been successful in the past. App. p. 3388.

13 Petitioner further argues that this proportionality assessment is required under the United States Constitution, due to the fact that the statute does not adequately channel the sentencer’s discretion. *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987); *Pulley v. Harris*, 465 U.S. 37, 51 (1984).

14 *Tucker* is the identical case discussed above that held any restraint constitutes kidnapping.

review. Still, Petitioner has attempted to show that his case is not proportional when compared to the case cited, *Tucker*, nor when compared to those actually executed in this state. Finally, petitioner has attempted to analyze murder cases that were served with notice of intent to seek the death penalty in Greenville County since 1997 in an attempt to show that there is no logical reason his case was noticed as a death penalty case under the statute.

#### COMPARISION TO *TUCKER*

To begin with, this Court's proportionality analysis in petitioner's case is inevitably brief and uninformative. As noted above, it consists of a standard two sentence analysis and a citation to *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996). There is no indication in petitioner's case why this Court cited *Tucker* as a similar case; in most death penalty cases, at least two cases are cited as examples. In *Tucker*, the Court described the facts as follows:

On June 25, 1992, Rosa Lee Dolly Oakley ("Victim") was in her yard when Appellant pulled his car into her driveway. He talked to Victim long enough to make sure she was alone, then pulled out a gun and forced her into the house and her [324 S.C. 161] bedroom. He was preparing to tape Victim up when Joe Black rang the doorbell. Black and James Howard (outside in the car) were looking for Victim's husband. Both appellant and Victim went out into the driveway after Black. Victim began screaming, "Don't leave me, he's going to kill me," holding on to Black's arm as he sat in Howard's car. Howard panicked and left. Appellant pulled Victim away from the retreating car, dragged her back into the house, took fourteen dollars from her purse, and shot her twice in the head at close range. He testified he shot her the first time when she tried to grab the gun. As he was leaving, he shot her again to "put her out of her misery."

On the run from police, Appellant broke into the Christian Fellowship Church on June 26-27, 1992, and into Kenneth Parker's mobile home between June 27-29, 1992. Appellant then hitched rides under trucks until he got to Calhoun County, where he killed another person while attempting to get a car and money to escape police looking for him on the Oakley murder. Appellant was tried, convicted, and sentenced to death for this subsequent murder ("Mellon murder") before going on

trial for the present offenses. Appellant was caught July 10, 1992 in Maggie Valley, North Carolina and gave a detailed confession to police.

*Id.* at 263. The jury found three aggravating factors in *Tucker*: kidnapping, burglary and robbery. *Id.* at 271.

There is no explanation why petitioner's case is similar to *Tucker* nor why *Tucker* shows the petitioner's case is not "excessive or disproportionate", however, it seems relevant to point out the dissimilarities: Tucker killed two individuals after he robbed them. He was on the run from police when he committed the second murder. While he was on the run, he broke into two other establishments. Tucker had an extensive criminal record including rape. *Id.* at 269. Evidently, he had previously been convicted of raping an 8 year old boy and an 83 year old woman.<sup>15</sup> The jury found not one, but three aggravating factors in Tucker's case. There is no reference to any evidence that Tucker was mentally ill, and of course, in Williams' direct appeal, this Court was unable to include in their analysis that Mr. Williams was unable to conform his actions due to his fetal alcohol syndrome.

While counsel does not make the argument that the murder and kidnapping of an ex-girlfriend is incapable of being a death penalty case, undersigned does argue that an in depth proportionality review has not been done on this case, and if one is done, it is clear that the death penalty is inappropriate in petitioner's case. This is not to say that the facts of this murder case are not tragic and gruesome; all murder cases are, however, appellant's case simply does not compare to that of a rapist of children and matrons who murders one woman, runs from the law, burglarizes multiple dwellings, murders another

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<sup>15</sup> [http://en.wikipedia.org/wiki/James\\_Neil\\_Tucker](http://en.wikipedia.org/wiki/James_Neil_Tucker) .

individual in the process, and flees the state; furthermore, when one factors in the petitioner's inability to control his behavior, because of brain damage induced *in utero*, it would be cruel and unusual to uphold the death penalty.

THE REVIEW IS UNINFORMATIVE AND PLAGUED BY THE FACT THAT IT CONTINUOUSLY RELIES ON MULTIPLE CASES THAT DO NOT RESULT IN EXECUTIONS.

In the second place, the proportionality review is so undefined it is impossible to determine what factors this Court has relied on in the past and it is impossible for defendants to be on notice what factors make their cases disproportionate. What we do know, is this Court has never found a case to be disproportionate.<sup>16</sup> This includes a defendant under the age of 18. *State v. [Roach]Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979)<sup>17</sup>; a defendant that was mentally retarded. *State v. Middleton*, 368 S.E.2d 457, 295 S.C. 318 (S.C. 1988); and a domestic murder where the defendant suffered extreme mental duress. *State v. Weik*, 356 S.C. 76, 587 S.E.2d 683 (2002).

This Court also refused to find the death penalty disproportionate for a defendant who was found Guilty But Mentally Ill (GBMI) - who because of mental disease or defect could not control his actions. *State v. Wilson*, 306 S.C. 498, 413 S.E.2d 19 (1992). In *Wilson*, the Court agreed Wilson could not control his actions and was operating under an "irresistible impulse" when he committed the murder, however, the Court declined to declare the death penalty disproportionate. The Court relied on the fact that despite the defendant's inability to control his actions, there was "no diminishment in his 'personal responsibility and moral guilt'", because under South Carolina statutory law he was just

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<sup>16</sup> The South Carolina system is further compromised by the fact that no governor has granted clemency since the death penalty was re-instituted.

<sup>17</sup> Roach was not only 17, he was apparently mentally retarded and suffering from Huntington's Chorea.

as culpable as any other defendant; therefore, the “penological goal of retribution” was served by his death sentence. *Id.* at 508. This analysis is in direct conflict with *Hall v. Florida*, \_\_\_\_\_ U.S. \_\_\_\_\_, No. 12-10882 (May 27, 2014) and *Atkins v. Virginia*, 536 U.S. 304 (2002), where the United States Supreme Court held diminished capacities did in fact diminish personal culpability. These are almost the exact same diminished capacities appellant has. In granting certiorari in *Atkins*, the United States Supreme Court noted the gravity of the concerns of the dissenters in the state court decision; part of those concerns were that “the imposition of the sentence of death upon a criminal defendant who has the mental age of a child between the ages of 9 and 12 is excessive.”

This Court affirmed *Wilson* in *State v. Weik*, 356 S.C. 76, 587 S.E.2d 683 (2002), without revisiting the analysis that diminished capacity does not mean less culpable. *Weik* was a mentally ill defendant who had a child in common with the victim. When the victim told *Weik* he was no longer going to be able to see his 10 year old son, *Weik* went out to his truck to get a shotgun and then entered the victim’s house and killed her.

Further, the death penalty here is proportionate to other cases where the murder resulted from domestic problems. *E.g.*, *State v. Kelly*, [331 S.C. 132, 502 S.E.2d 99 (1998)]; *State v. Ard*, 332 S.C. 370, 505 S.E.2d 328 (1998). Finally, while it violates the Eighth Amendment to impose a death sentence on a mentally retarded defendant, *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), the imposition of such a sentence upon a mentally ill person is not disproportionate. *State v. Wilson*, 306 S.C. 498, 413 S.E.2d 19 (1992).

A further problem with this review process is that it bears little resemblance to people who are actually executed. For example, while *Jamie Wilson* committed his murders in 1988 and the Supreme Court issued its ruling in 1992, *Wilson* is currently incompetent and will most likely never be executed. Similarly, the cases relied on in

*Weik*, have been overturned (*Ard v. Catoe*, 472 S.C. 318, 642 S.E.2d 590 (2007)); *Kelly* was granted PCR).<sup>18</sup> “[O]ur prior decisions vacating and remanding death sentences for retrial must be disregarded in the course of proportionality review.” *State v. Copeland*, 300 S.E.2d 63, 75, 278 S.C. 572, 592 (1982).

Recently, this Court discussed its current proportionality review in *State v. Dickerson*, 395 S.C. 101, 716 S.E.2d 895 (S.C. 2011). While *Dickerson* argued proportionality review should essentially include all murder cases, not just ones where the death penalty was noticed and found, the Court found the issue was not before them and it would require overruling *Copeland*. The Court did however note that restricting proportionality review to only similar cases is “largely a self-fulfilling prophecy as simply examining similar cases where the defendant was sentenced to death will almost always lead to the conclusion that the death sentence under review is proportional.”

Petitioner would note that the statute requires a determination “whether the sentence is excessive or disproportionate to the penalty imposed in similar cases.” It does not limit the review to similar death penalty cases. The South Carolina Supreme Court proportionality review consists of comparing the death sentence with similar death cases:

The United States Constitution requires the death penalty to be imposed only if the sentence is "neither excessive nor disproportionate in light of the crime and the defendant." *State v. Copeland*, 278 S.C. 572, 590, 300 S.E.2d 63, 74 (1982). In conducting a proportionality review, this court searches for "similar cases" where the death sentence has been upheld. *Id.*"

*State v. Passaro*, 350 S.C. 499, 567 S.E.2d 862 (2002).

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18 : *Ard* was originally sentenced to death for killing his girlfriend and her unborn fetus. He was later convicted of involuntary manslaughter and sentenced to time served. <http://www.wltx.com/news/story.aspx?storyid=196072> . *Kelly* murdered his estranged wife and his daughter’s fiancé and shot his step daughter. He was later granted post conviction relief and is parole eligible in 2014. <http://www.goupstate.com/article/20120503/articles/120509864>.)

*Copeland* is currently the law of the land, and it is therefore logical to start with death penalty cases that have resulted in actual executions. In the case of Williams, no similar death penalty case exists where an individual was actually executed for killing his ex-girlfriend and the sole aggravator was kidnapping. This would seem to be doubly important when the defendant is under extreme mental duress.

#### COMPARISON TO ACTUAL EXECUTIONS

The petitioner also included a list of every execution in this state since the death penalty was reintroduced, based on information from the department of corrections. Post Trial Brief, p. 38-41, App. p. 4055-8. Of the 43 executions listed, 25 of them killed more than one person. Of the remaining 18, 2 killed police officers and 2 waived their rights to appeal. Of the remaining, 3 raped their victims, and the remaining robbed their victims which would obviously necessitate committing kidnapping as well. There was no execution involving kidnapping as a sole aggravator.

#### DEATH NOTICED CASES IN GREENVILLE COUNTY

It would be impossible for the undersigned counsel to review every death penalty case in the state, however, the undersigned asked the Clerk of Court for every death noticed murder case since 1997. If we consider these cases, no other defendant in Greenville County in the past two decades has received the death penalty for killing his ex-girlfriend or with the sole aggravator of kidnapping. The following list was included in the post-trial brief listing every case that was served with notice to seek the death penalty in the County of Greenville and their sentence (App. p. 4059):

Vincent Raymond Allen – 2004; One victim; 30 year sentence  
Raymond Lewis Carter – 1998; murder; armed robbery; kidnapping; LWOP

Benjamin Erik Case – 2006; murder; armed robbery; LWOP. (Also sentenced to ABWIK; Burglary 1<sup>st</sup>; GL; Burg 1<sup>st</sup>; Burg 1<sup>st</sup>; ABWIK).

David Edens – 2004; murder; kidnapping; Sentenced to LWOP by jury.

Britney Emanuel Ervin – 2003; 2 murders; ABWIK; Grand Larceny. 30 years + 5 years consecutive on the grand larceny; (Co-Defendant – Mattison).

Kamell Evans – 2003; Double murder. Kidnapping, Burglary First, Murder of Law Enforcement Officer; Death Penalty.

Dwayne Lamar Farmer – Accessory after fact murder; 15 + 15 consecutive.

Steven Andra Golden – 1997; manslaughter; armed robbery; 28 years; (co-defendant Freddie Eugene Owens).

Freddie Eugene Owens – 1997; Murder; Armed Robbery; Larceny with a deadly weapon; Death Penalty.

Jeniffer Holloway – 2004; murder; kidnapping; Sentenced to LWOP by jury.

William Looper Hunter, Jr. – 1987; Murdered Ronald Tyner by shooting him in the head during burglary; Also a Burglary of Mike Watkins; also murdered John Gutman after breaking into his house; Life with aggravating circ; sentence to run consecutive to burglary and consecutive to armed robbery.

Troy Lee Kilgore – 2001; Murdered Jeanne Anne Kilgore; ABWIK Sylvia Anne Wright; 30 years.

Amos Lamont Mattison – 2003; Two murders; withdrew DP notice 2006; GL; ABWIK; (co-defendant Ervin). LWOP. Priors: Burg First; Burg First; Burg First.

Michael Torlando Robinson – 2001; Two murders; Life consecutive to burglary; The notice to seek the death penalty lists burglary; 2 murders; prior criminal history; character of Defendant and circumstances of crime and future dangerousness as aggravators.

Jeffrey Brian Motts – 2005; Death Penalty. Killed his cell mate. Was currently serving LWOP for murder and armed robbery of his aunt and uncle.

Patrick Nicole Scott – 1993; robbed Western Family Steak House and Pizza Hut.

Joseph R. Sheppard – 1996; Murdered a police officer; Jury sentence LWOP.

Brad Sigmon – 2001; Two murders with baseball bat (parents of his girlfriend, who he also tried to find and kill); Burglary; Sentenced to death.

James William Spooone – 2004; Murder of ex-girlfriend; Burglary; LWOP.

Dana Ricardo Weldon – 1985; murder and armed robbery of a lady on the highway; had previously robbed Taco Cid twice in Jan and July, Pizza Hut and Mazzio's Pizza Twice (once in Aug once in September).

John Richard Wood – 2000; Murdered a police officer; Sentenced to death.

Many of the above murders include double homicides, additional assault and batteries with intent to kill, armed robberies, burglaries, kidnappings and lengthy prior

records. Five of these received the death penalty - four of them had committed at least two murders, and the fifth had killed a police officer. None of these involved a domestic murder, with the possible exception of Brad Sigmon, who killed both parents of his ex-girlfriend. Many of the remainder received sentences of less than life without parole. Considering petitioner's case, there is no logical reason his case was proportionally worse than the above. More importantly, these are only death penalty noticed cases; it is inconceivable that there were no other domestic murders during these years that were never served with death notice.

#### FLORIDA PROPORTIONALITY REVIEW

Florida is an example of a state that has an extensive proportionality review system. "In performing a proportionality review, a reviewing court must never lose sight of the fact that the death penalty has long been reserved for only the most aggravated and least mitigated of first-degree murders." *Urbin v. State*, 714 So.2d 411, 416 (Fla. 1998). Florida has repeatedly held that absent unusual circumstances, death is not indicated in a single-aggravator case where there is substantial mitigation. *Green v. Florida*, 975 So.2d 1081, 1088 (Fla. 2008). The vast majority of cases where a single aggravator warranted the death penalty was when that aggravator was a prior murder. Florida has consistently refused to uphold a death sentence when the mitigation was mental illness or organic brain damage, finding it as among the most compelling. *Id.* While Florida does not bar the death penalty for domestic murders, it acknowledges a prior domestic relationship may be considered mitigating. *Douglas v. State*, 575 So.2d 165 (Fla. 1991); furthermore, it has held a life recommendation is consistent in cases involving domestic confrontations. See, e.g., *Cheshire v. State*, 568 So.2d at 911-12; *Fead v. State*, 512 So.2d

176 (Fla.1987), receded from on other grounds, *Pentecost v. State*, 545 So.2d 861 (Fla.1989); *Irizarry v. State*, 496 So.2d 822 (Fla.1986); *Chambers v. State*, 339 So.2d 204 (Fla.1976).

This Court should acknowledge that the death penalty is rarely sought and has never been implemented in cases involving individuals that murdered prior domestic partners, unless there are multiple murders. This Court should hold that when a defendant has the mental faculties of a nine year old child, and is under extreme duress due to the inability of his diminished mental capacity to deal with the ending of a romantic relationship, and he cannot conform his actions to the requirements of the law, and the jury only finds only one aggravating circumstance, specifically kidnapping, the death penalty is not proportionate to other sentences imposed in similar cases.

**IV. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO RECOGNIZE THE FACT THAT PETITIONER IS A GERMAN CITIZEN AND ENTITLED TO CERTAIN RIGHTS AS SUCH AND ENTITLED TO AID FROM THE GERMAN GOVERNMENT IN ASSISTING IN HIS DEFENSE. FAILURE TO UTILIZE SUCH AID WAS PREJUDICIAL TO PETITIONER'S CASE.**

Trial counsel failed to realize that petitioner was a dual German and American Citizen, despite the fact that they were fully aware his mother was from Germany. The German consulate was present at the entire PCR and utilized the services of White and Case to file an amicus brief with the court. In order not to burden the Court with duplicate argument, petitioner would incorporate and rely on that brief as well as an amicus brief the consulate will file with this Court as proof that failure to request assistance from the German Government was prejudicial to petitioner's case.

While petitioner relies on the German government's brief to fully address this topic, it is clear petitioner's attorneys never investigated this matter. App. pp. 3281-2, 3300, 3324-7. The International Court of Justice (ICJ) has held that the United States violated Article 36(1)(b) of the Vienna Convention in *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) (Avena)*, 2004 I.C.J. 12 (March 31). Whether or not there is an obligation on the states to subordinate their postconviction review procedures to the ICJ ruling mentioned above, states are still free to do so. For example, both Nevada and Oklahoma have "unhesitatingly assumed" the burden of complying with *Avena*, describing the burden as minimal "when balanced against the United States plainly compelling interests in ensuring the reciprocal observance of the Vienna convention, protecting relations with foreign governments, and demonstrating commitment to the role

of international law". *Gutierrez v. State*, No. 53506, 2012 WL 4355518 (Nev. September 19, 2012).

When considering the enormous goodwill and economic impact German companies and citizens have in this state, our courts should strive to follow the international rule of law and be mindful of the importance of good foreign relations. Considering this enormous impact, there is sufficient probability to undermine the confidence in this verdict, especially considering the fact that the Greenville Solicitor may have been willing to entertain a life sentence in the case, especially in light of the devastating impact of petitioner's fetal alcohol syndrome.

**V. THE PETITIONER HAD A RIGHT TO PLEA GUILTY TO THE MURDER CHARGE AND STILL HAVE A RIGHT TO TRIAL BY JURY.**

Petitioner desired to plea guilty to the murder charge in order to show acceptance of responsibility. Our Supreme Court has held that a defendant does not have a right to plea guilty and still receive a sentencing hearing by a jury. See *State v. Inman*, 359 S.C. 539, 720 S.E.2d 31 (2011); *State v. Allen*, 386 S.C. 93, 687 S.E.2d 21 (2009), *cert. denied*, --- U.S. ----, 130 S.Ct. 3329, 176 L.Ed.2d 1229 (2010); *State v. Crisp*, 362 S.C. 412, 608 S.E.2d 429 (2005); *State v. Wood*, 362 S.C. 135, 607 S.E.2d 57 (2004).

Petitioner believes this issue was preserved by trial counsel, but regardless, either it was not preserved by trial counsel or appellate counsel, and petitioner desires to preserve this issue for further review, despite the overwhelming case law in South Carolina against the petitioner. Petitioner believes failure to allow him to plea guilty and still have a jury trial violates his constitutional rights under the sixth, eighth, and/or fourteenth amendments.

**VI. THE PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE FAILURE OF THE AGGRAVATING CIRCUMSTANCES TO BE INCLUDED IN THE INDICTMENT.**

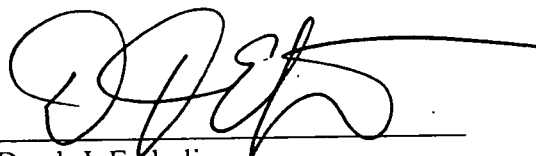
In its return, the State noted that trial counsel objected to the fact that the circumstances of aggravation were not included in the indictment and that the trial court ruled on this issue. State's Return to the First Amended Application, App. p. 3121. Petitioner also agrees that the South Carolina Supreme Court has previously ruled on this issue. *State v. Laney*, 367 S.C. 639, 649-650, 627 S.E.2d 726, 732 (2006); *State v. Downs*, 361 S.C. 141, 147-48, 604 S.E.2d 377, 380-381 (2004). Petitioner believes this issue was not preserved by appellate counsel and petitioner desires to preserve this issue for further review despite the overwhelming case law in South Carolina against the petitioner. Petitioner believes the failure to include the circumstances of aggravation in the indictment violates his constitutional rights under the sixth, eighth, and/or fourteenth amendments. This right is doubly important in this case due to the petitioner's argument in section III of this brief and the broadness of the kidnapping definition in South Carolina.

CONCLUSION

For the reasons stated, petitioner asks this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

June 4, 2014

A handwritten signature in black ink, appearing to read 'Derek J. Enderlin', written over a horizontal line.

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THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

G. Edward Welmaker, Circuit Court Judge

Appellate Case No. 2013-001945

**RECEIVED**

JUN - 4 2014

**S.C. Supreme Court**

Charles Christopher  
Williams,

Appellant,

v.

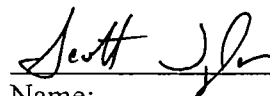
The State of South  
Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the petition for writ of certiorari and the appendix in the above case on the State of South Carolina, by personally delivering a copy of it to the Attorney General's Office, Attn: Donald J. Zelenka, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, South Carolina on this day.

June 4, 2014



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