THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON WRIT OF CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas

G. Edward Welmaker, Circuit Court Judge

Case No. 2010-CP-23-09792
Appellate Case No. 2013-001945

Charles Christopher Williams, — Petitioner,

v.

The State of South Carolina — Respondent.

BRIEF OF *AMICUS CURIAE*
THE FEDERAL REPUBLIC OF GERMANY

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QUESTION PRESENTED

Did the Post-Conviction Relief Court (the "PCR Court") commit error by finding that trial counsel was not ineffective under Strickland v. Washington, 466 U.S. 668 (1984), for failing to investigate and present evidence of Fetal Alcohol Syndrome to the jury, when the PCR Court's finding is directly contradicted by trial counsel's testimony, and where the PCR Court failed to make any finding as to the credibility of trial counsel's testimony, whether Mr. Williams suffers from Fetal Alcohol Syndrome, or its effects on him?

I. INTEREST OF AMICUS CURIAE

Pursuant to Rule 213, SCACR,[1] the Federal Republic of Germany ("Germany") respectfully submits this brief as amicus curiae in support of Mr. Williams' application to vacate his conviction, or in the alternative, to remand for a new sentencing.

The Petitioner in this action, Charles Christopher Williams, is a dual citizen of Germany and the United States and faces the death penalty in South Carolina. Germany has taken an active interest in Mr. Williams' case since learning of the matter and, indeed, has a constitutional obligation to assist all German citizens who face execution anywhere in the world.[2] Though Germany, as part of the European Union, opposes the

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[1] All procedures required under Rule 213, SCACR, have been followed. No counsel for a party authored this brief in whole or in part, and no counsel, party or any person other than the amicus curiae or its counsel made a monetary contribution intended to fund the preparation or submission of this brief, which was prepared by White & Case LLP on a pro bono basis. This brief was shown to defense counsel, Derek Enderlin, to ensure that it contains an accurate representation of the facts.

[2] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 16, 1980, 90 ILR 386, 396-97 (Ger.); see also Patrick Boehler, German Sentenced to Death in China for Double Murder of Ex-Girlfriend and Her Partner, S. China Morning Post (Aug. 21, 2014), http://www.scmp.com/news/china-insider/article/1578276/german-man-sentenced-death-china-double-murder (Germany's Foreign Ministry spokesman announcing that "the [German] federal government will do everything in its power to work towards preventing or changing the sentence" of a German citizen sentenced to death in China); Iran Quashes Death Sentence, BBC News (Feb. 20, 1999), http://news.bbc.co.uk/2/hi/middle_east/283273.stm (Iran quashing death sentence of German citizen); Charles Lane, No More Hanging. How Germans Abolished the Death Penalty (July 2005), http://www.atlantic-times.com/archive_detail.php?recordID=247 ("Berlin has intervened to defend the rights under international law of German citizens on death row in the U.S., fueling litigation that has now reached the U.S. Supreme Court."); Sex Charges Dropped in Iran Trial of German Businessman, Hurriyet Daily News (Sept. 30, 1999), http://www.hurriyetdailynews.com/sex-charges-dropped-in-iran-trial-of-german-businessman.aspx?pageID=438&n=sex-charges-dropped-in-iran-trial-of-german-businessman-1999-09-30 ("Germany, an important European trading partner for

death penalty, Germany's concern here is amplified by the ineffective assistance of counsel that Mr. Williams received during his trial, resulting in the imposition of the death penalty against Mr. Williams under United States law.

Mr. Williams suffers from Partial Fetal Alcohol Syndrome ("PFAS"), a result of his mother's alcohol abuse while pregnant. This chronic condition affects Mr. Williams' neurological functioning, behavior control, ability to utilize his intellect, and other cognitive functions. Mr. Williams never received assistance for his mental impairments. Despite the clear relevance of these cognitive disabilities, the jury in Mr. Williams' case sentenced him to death without learning of his PFAS and therefore without the ability to judge his crime and culpability with the knowledge of Mr. Williams' mental handicap. The significance of this omission has been admitted by his trial counsel, who testified in no uncertain terms that they "certainly would want" evidence of PFAS to present at the trial. Germany thus has an acute interest in sharing with this Court the information necessary to correct the procedural shortcomings that precipitated a mentally impaired German citizen's death sentence in the United States.

II. STATEMENT OF THE CASE

The Petitioner, Mr. Williams, was convicted of murder and kidnapping on February 15, 2005 and sentenced to death four days later. This Court affirmed that conviction, State v. Williams, 386 S.C. 503, 690 S.E.2d 62 (2010), and the United States Supreme Court denied certiorari review on October 4, 2010, Williams v. South Carolina, 562 U.S. 899 (2010) (mem.). Mr. Williams filed his application for post-conviction relief

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Iran, has warned that Hofer's execution would severely affect the two countries' relations.").

on November 30, 2010, with amended applications following on September 30, 2011 and November 20, 2012. In an application filed January 16, 2013, he also incorporated his pre-trial brief. He raised state and federal constitutional issues tied to his trial and appellate counsel's ineffectiveness.

After the dismissal order was filed on July 24, 2013, Mr. Williams filed a motion for reconsideration on August 5, 2013. Mr. Williams filed and served a petition on September 12, 2013, seeking this Court's review of the PCR Court's denial of relief. This Court granted the petition and issued a writ of certiorari as to a single question on August 20, 2015.

III. STATEMENT OF FACTS

At the age of 20, Charles Christopher Williams committed the acts that led to his indictment for the murder of his ex-girlfriend. A jury found him guilty of kidnapping, murder, and possession of a firearm during a violent crime. Though initially deadlocked on the sentence of death, the jury ultimately recommended the death penalty.

It is undisputed that Mr. Williams suffers from PFAS, a result of his mother's alcohol abuse while pregnant. PFAS and the closely related Fetal Alcohol Syndrome ("FAS") fall under the umbrella term Fetal Alcohol Spectrum Disorder ("FASD") and are chronic neurological conditions that result in mental impairment tied to prenatal alcohol exposure. The main difference between PFAS and FAS is that individuals with FAS have facial abnormalities and a growth deficit in addition to central nervous system abnormalities.[3] However, a diagnosis of PFAS still requires "central nervous system

[3] Nat'l Org. on Fetal Alcohol Syndrome, Recognizing FASD, https://www.nofas.org/recognizing-fasd/ (last visited Feb. 3, 2016).

abnormalities at the same level as FAS"[4] and the term "partial" should not be read as indicating a condition less severe than FAS.[5] In short, "individuals with [PFAS] have the same functional disabilities but 'look' less like an individual with FAS."[6] Because formal diagnosis can be difficult in the absence of distinctive facial features, children born with PFAS, as opposed to FAS, may be less likely to receive necessary assistance from professionals such as neuropsychologists, social workers, and speech therapists. Indeed, Mr. Williams never received assistance for his mental impairments. (R. p. 2255, line 5-p. 2256, line 5; R. p. 2257, lines 6-19; R. p. 2263, lines 21-24).

To further confuse matters, terminology has evolved in the field studying prenatal exposure to alcohol. Until recently, to the extent PFAS was identified in a patient, it would have been diagnosed as Fetal Alcohol Effects,[7] and many sources discussing FAS and FASD use those terms broadly to encompass the cognitive disabilities that are

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4 Id.

5 Margaret E. Clarke & W. Benton Gibbard, Overview of Fetal Alcohol Spectrum Disorders for Mental Health Professionals, 12 J. of the Canadian Academy of Child & Adolescent Psychiatry 57, 58 (Aug. 2003), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2582751 ("The term partial FAS is applied to the patient with a confirmed history of prenatal alcohol exposure who has some but not all the characteristics of FAS. Partial does not mean that the condition is less severe than FAS.").

6 Nat'l Org. on Fetal Alcohol Syndrome, Recognizing FASD, https://www.nofas.org/recognizing-fasd/ (last visited Feb. 3, 2016).

7 Margaret E. Clarke & W. Benton Gibbard, Overview of Fetal Alcohol Spectrum Disorders for Mental Health Professionals, 12 J. of the Canadian Academy of Child & Adolescent Psychiatry 57, 58 (Aug. 2003), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2582751 ("Many patients diagnosed as partial FAS would have been designated as Fetal Alcohol Effect or FAE under previous informal classification systems. . . . A common misconception is that FAE is a less severe form of FAS. Although the patient designated as FAE may not have all the physical abnormalities of FAS, the cognitive and behavioural impairments and hence life long disabilities are similar in severity.").

associated with PFAS or Fetal Alcohol Effects. Sources discussing the cognitive effects of FAS and FASD therefore remain applicable to the more-nuanced diagnoses of PFAS.

The record on appeal establishes that Mr. Williams suffers profoundly from the effects of PFAS. This chronic condition affects Mr. Williams' neurological functioning, behavior control, ability to utilize his intellect, and other cognitive functions. To put it simply, because of brain damage caused by alcohol exposure in utero, Mr. Williams' cognitive, emotional, social, and coping skills have been stunted at the level of a nine-year-old child. (R. p. 3655, lines 23-25; R. p. 3836, line 14-p. 3837, line 22; R. p. 3876, lines 7-24). His abnormal brain prevents him from controlling his frustration and anger (R. p. 3491, lines 24-25; R. p. 3821, lines 18-24), so he acts on urges that a person without PFAS would be able to resist. (R. p. 3821, lines 18-24). He also is unable to appreciate the consequences of his behavior. (R. p. 3823, lines 3-19; R. p. 3825, lines 6-14). So serious are his impairments that his adaptive functioning is comparable to that of someone who is intellectually disabled. (R. p. 3827, line 9-p. 3828, line 19; R. p. 3832, line 17-p. 3833, line 9).

Nonetheless, during the preparation and conduct of his trial, sentencing, and appellate hearings, Mr. Williams' counsel at the time did not conduct an adequate investigation of Mr. Williams' medical history and its relationship to his mental health. Mr. Williams' trial counsel admitted that they had failed to identify his PFAS despite being aware of his mother's alcohol abuse during pregnancy. (R. p. 3273, lines 1-5; R. p. 3274, lines 21-25; R. p. 3332, lines 10-17; R. p. 3333, lines 6-p. 3334, line 13). FAS "wasn't ever brought up. It wasn't discussed. It wasn't ruled in, it wasn't ruled out" during preparation for trial. (R. p. 3274, lines 24-25 (testimony of trial counsel)). Even

though alcohol use by an expectant mother would "clearly be a red flag . . . today," one of Mr. Williams' counsel admitted that he "honestly [could] not say why it wasn't a red flag . . . eight years ago." (R. p. 3332, lines 10-17). Trial counsel recognized the significance of this omission, testifying in no uncertain terms that they "certainly would want" evidence of brain damage resulting from PFAS to present at the trial. (R. p. 3333, line 23-p. 3334, line 13).

As a result, despite the obvious relevance of Mr. Williams' cognitive disabilities, these crucial mitigating factors were not brought to light, and the jury was thus denied a complete picture of the young man it was sentencing to death. This picture failed to show multiple mitigating factors regarding the hardship and significant impairment he has endured *and* the toxic effects of his mother's alcohol abuse, not only on the environment of his upbringing, but also on his physical, cognitive, and emotional development. Indeed, Mr. Williams' counsel failed to discover that Mr. Williams has PFAS until *after* his conviction and death sentence. And, it is undisputed that the jury in Mr. Williams' case sentenced him to death without learning of his PFAS diagnosis and therefore without the ability to judge his crime and culpability with the knowledge of Mr. Williams' mental handicap. The PCR Court found, however, that trial counsel had made a "strategic decision" not to present PFAS to the jury and therefore Mr. Williams had not received ineffective assistance of counsel. (R. p. 4210-11).

IV. SUMMARY OF THE ARGUMENT

It is undisputed that Mr. Williams suffers from PFAS and that trial counsel failed to present evidence of his condition to the jury. In fact, counsel failed to investigate Mr. Williams' PFAS despite the obvious red flags. The PCR Court nevertheless held that Mr.

Williams' counsel had not been ineffective but had made a "strategic decision to not present to the jury evidence of brain damage or a diagnosis of Fetal Alcohol Syndrome," though counsel were "unable to articulate the reasons for that strategic decision." (R. p. 4210; see also R. p. 4208). The PCR Court also found that this failure did not prejudice Mr. Williams. (R. p. 4212).

As a result, a man with significant documented mental impairments was sentenced to death. This flies in the face of the United States Supreme Court precedent instructing that the death penalty should not be applied to individuals with impaired mental functioning. See infra Part V.A. Failing to fully investigate Mr. Williams' medical history and its relationship to his cognitive abilities rendered trial counsel ineffective under the standard established in Strickland v. Washington, 466 U.S. 668 (1984). And having utterly missed the issue and therefore having no awareness of Mr. Williams' PFAS until after he was sentenced, trial counsel's failure to present PFAS to the jury could not, by definition, have been a "strategic decision." (R. p. 3273, lines 1-5; R. p. 3274, lines 21-25; R. p. 3332, lines 1-17; R. p. 3334, lines 8-13; R. p. 4210). Finally, the PCR Court, by declining to make any factual findings concerning Mr. Williams' PFAS, failed to make the "probing" inquiry required by the United States Supreme Court for prejudice under Strickland. See, e.g., Sears v. Upton, 561 U.S. 945, 951, 954-56 (2010). The limited findings in the PCR Court's order (the "PCR Order") are directly contradicted by the record and are insufficient to withstand appellate review.

V. ARGUMENT

A. The United States Supreme Court Has Made Clear that the Death Penalty Should Not Be Applied to Individuals with Impaired Mental Functioning, and this Trend Should Not Be Ignored in Cases Involving PFAS

The PCR Court failed to address the United States Supreme Court's limitations on applying the death penalty to individuals with impaired mental functioning, despite a growing body of case law so holding. As the High Court has held, "[such] deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability." Atkins v. Virginia, 536 U.S. 304, 318 (2002); Franklin v. Maynard, 356 S.C. 276, 588 S.E.2d 604 (2003) (per curiam) (establishing procedures to implement Atkins); see also Roper v. Simmons, 543 U.S. 551, 568, 570-71 (2005) (death penalty for juveniles violates the Eighth Amendment because they have "diminished culpability" due to their "susceptibility . . . to immature and irresponsible behavior" and therefore "the penological justifications for the death penalty apply to them with lesser force than to adults"); Miller v. Alabama, 132 S. Ct. 2455, 2464, 2469 (2012) (mandatory life without parole for juveniles violates the Eighth Amendment because, in part, juveniles have a "'lack of maturity and an underdeveloped sense of responsibility' leading to recklessness, impulsivity, and heedless risk-taking" (citing Roper, 543 U.S. at 569)); Graham v. Florida, 560 U.S. 48, 68 (2010) ("A juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.'" (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988))); Montgomery v. Louisiana, No. 14-280, 577 U.S. __, 2016 WL 280758, slip op. at 22 (Jan. 25, 2016) (Court applied Miller retroactively in light of what the Court "has said in *Roper*, *Graham* and *Miller*

about how children are constitutionally different from adults in their level of culpability").

In Atkins v. Virginia, the Supreme Court held that executing the intellectually disabled[8] is excessive and therefore prohibited under the Eighth Amendment. Atkins, 536 U.S. at 321. The Court did not believe that the "execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty." Id. More than that, people with "disabilities in areas of reasoning, judgment, and control of their impulses . . . do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." Id. at 306. This language echoes the dissent at the Virginia Supreme Court that "[intellectually disabled] individuals have substantial limitations not shared by the general population. A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way." Atkins v. Virginia, 260 Va. 375, 397, 534 S.E.2d 312, 325 (2000) (Koontz, J., dissenting); see also Hall v. Florida, 134 S. Ct. 1986, 1993 (2014) ("The diminished capacity of the intellectually disabled lessens moral culpability and hence the retributive value of the punishment.").

Like the intellectually impaired defendant in Atkins, Mr. Williams suffers from proven disabilities in the areas of reasoning, judgment, and impulse control, and therefore does not act with the same level of culpability as someone without these handicaps. Testifying experts at the PCR hearing established the magnitude of Mr. Williams' mental impairment. Mr. Williams has the emotional, social, and coping skills of a nine-year-old

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[8] In the past, intellectual disability was referred to as "mental retardation." In order to use proper terminology, this brief will consistently use "intellectual disability" except when directly quoting a source.

child. (R. p. 3836, line 14-p. 3837, line 22; R. p. 3876, lines 7-24; see also Brief of Respondent, filed Jan. 20, 2016 ("Br. of Resp.") at 68). His damaged brain prevents him from controlling his frustration and anger (R. p. 3491, line 24-p. 3492, line 4; R. p. 3821, lines 18-24; R. p. 3823, lines 5-19), so he falls prey to urges that a person without PFAS would be able to resist. (R. p. 3821, lines 18-24). He cannot appreciate the consequences of his actions or the effect his behavior will have on others (R. p. 3823, lines 3-19; R. p. 3824, lines 5-8; R. p. 3825, lines 6-14) and he has the adaptive functioning[9] of someone who is intellectually disabled. (R. p. 3827, line 9-p. 3828, line 19; R. p. 3474, lines 12-21; R. p. 3832, lines 12-15).

Though Mr. Williams has not been diagnosed as intellectually disabled—which requires a showing of both a subaverage IQ as well as limitations in adaptive skills—much of Atkins' reasoning is persuasive in the context of PFAS. See Atkins, 536 U.S. at 318. Indeed, despite a nominally average IQ, individuals with FASD, which, as discussed above includes FAS and PFAS, often function at an intellectually disabled level (R. p. 3473, line 10-p. 3474, line 17-21) because intellectual deficiencies prevent them from fully utilizing their IQ. (R. p. 3511, lines 3-12; R. p. 3544, lines 2-5; see also R. p. 3472, lines 6-10; Petitioner's Brief, filed Oct. 21, 2015 ("Pet'r's Br.") at 13, 15-16, 25-26); Am. Psychiatric Ass'n, DSM-5 37 (2013) ("[A] person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social

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[9] Adaptive functioning describes a person's ability to handle the everyday demands of unstructured, daily life. This includes the ability to manage a job, interact appropriately with others, read social cues, etc. (R. p. 3474, lines 1-21); Am. Psychiatric Ass'n, DSM-5 37 ("Deficits in adaptive functioning . . . refer to how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background.").

understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score."); Hall, 134 S. Ct. at 2001 ("Intellectual disability is a condition, not a number."). Mr. Williams' culpability is lessened due to his disabilities; he is simply not the "worst of the worst" for which the death penalty is reserved. See, e.g., Kansas v. Marsh, 548 U.S. 163, 206 (2006) ("[W]ithin the category of capital crimes, the death penalty must be reserved for 'the worst of the worst.'").

And it is no answer to say, as the PCR Court does, that "we are just beginning to understand the role that Fetal Alcohol Syndrome . . . plays in human behavior." (R. p. 4203). The scientific and legal communities understood the effect of FASD and PFAS, and therefore the powerful mitigating effect of evidence of PFAS, long before Mr. Williams' PCR hearing and the PCR Court's decision. Indeed, the PCR Court was presented with over 500 pages of scientific and medical information on FASD and PFAS, human behavior, and criminal activity (Pet'r's Br. at 15 (citing Plaintiff's Exhibits 23 and 31)) and heard testimony from experts who had been studying FASD for years. (See, e.g., R. p. 3442, lines 21-24; R. p. 3607, lines 4-7).

Courts have seen FASD as an important factor worthy of consideration for over ten years. See, e.g., Dilbeck v. State, 643 So. 2d 1027, 1029 (Fla. 1994) (holding that FASD should be considered a relevant mitigating factor during the sentencing phase of a case because it is a "specific, commonly recognized condition that [is] beyond [the defendant's] control" like other commonly considered conditions, such as epilepsy). Moreover, the ABA passed a resolution on FASD in 2012, stating that "[c]ourts should also be considering [FASD] as a factor in mitigation . . . during sentencing, particularly

where the death penalty is an option," because individuals suffering the effects of this condition are significantly more likely to commit crimes.[10] The resolution urges criminal attorneys to better understand the effects and symptoms of FASD.[11] As noted below, the resolutions and guidelines of the ABA are considered key indicators of the benchmarks for adequate representation, Ard v. Catoe, 372 S.C. 318, 332 n.14, 642 S.E.2d 590, 597 n.14 (2004) (citing Wiggins v. Smith, 539 U.S. 510, 524 (2003)).

Not only has the United States Supreme Court outlawed the death penalty for the intellectually disabled, but it has also proscribed the death penalty for those who committed crimes as minors—i.e., those who were intellectually and emotionally immature at the time of the crime. This is, in part, because youth exhibit a "lack of maturity and an underdeveloped sense of responsibility." Roper v. Simmons, 543 U.S. 551, 569 (2005) (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)); see also Miller v. Alabama, 132 S. Ct. 2455, 2468, 2475 (2012) (holding mandatory life without parole for juvenile offenders violates the Eighth Amendment because it precludes consideration of "hallmark features" of youth, including "immaturity, impetuosity, and failure to appreciate the risks and consequences"); Graham v. Florida, 560 US 48, 68 (2010) ("developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"); Aiken v. Byars, 410 S.C. 534, 576, 765 S.E.2d 534, 541-42 (2014) ("the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes" (quoting Miller, 132 S. Ct. at 2465)). These limitations tied to

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10 Am. Bar Ass'n, Resolution 112B at 8 (Aug. 6-7, 2012), available at http://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/Resolution_112B.authcheckdam.pdf.

11 Id.

youth lead to the conclusion that "juvenile offenders cannot with reliability be classified among the worst offenders." Roper, 543 U.S. at 568. Accordingly, as this Court has made clear, "the failure of a sentencing court to consider the hallmark features of youth prior to sentencing . . . offends the Constitution." Aiken, 410 S.C. at 576-77. So significant is the Constitutional prohibition on failing to consider the hallmarks of youth that the Supreme Court has made this ban retroactive on all youth offenders. Montgomery v. Louisiana, No. 14-280, 577 U.S. __, 2016 WL 280758, slip op. at 2, 14, 21-22 (applying Miller to 69-year-old prisoner who was 17 years old when he committed murder in 1963 for which he was serving a sentence of life without parole).

Mr. Williams suffers from similar impairments as a result of his PFAS—lack of maturity and impulse control, as well as an underdeveloped sense of responsibility—which, though linked to his mental impairments rather than his age, have the same effect on his culpability. (R. p. 3837, line 6-p. 3839, line 1 (expert testimony that standardized tests placed Mr. Williams at the mental capacity of a nine-year-old child)). Regardless of the source of such impairments, they undermine culpability, separating mentally impaired individuals from the most heinous criminals for whom the death penalty is reserved.

Mr. Williams' right to have his PFAS diagnosis considered by the jury flows from the more basic principle that individuals with impaired cognitive abilities are not the "worst of the worst" for which the death sentence is reserved. The case for death made here suggests meting out punishment based on the source of an impairment and not on the actual impairment suffered, elevating form over substance. Should Mr. Williams have had a lower IQ or been a few years younger at the time of the crime, he would have automatically been ineligible for the death penalty. As it stands, Mr. Williams suffers

many of the same impairments as an intellectually disabled or a youth offender, yet he thus far has had no right to have the sentencer even learn about his PFAS diagnosis and the associated handicaps. This arbitrary allotment of justice cannot, and should not, stand in the courts of South Carolina. Furman v. Georgia, 408 U.S. 238, 274 (1972) (Brennan, J., concurring) (imposing a moratorium on the death penalty because the "very words [of the Eighth Amendment] imply condemnation of the arbitrary infliction of severe punishments" such as the death penalty).

B. Courts in the United States, Germany, and Elsewhere Recognize the Paramount Importance of Full Access to Available Mitigation, and South Carolina Must Ensure Such Access Is Provided Here

The availability of mitigation evidence is a foundational principle of justice: it is critical to ensuring that punishment is proportional to an individual defendant's culpability. Like South Carolina, Germany places great importance on ensuring justice in its criminal courts and therefore uses statutory mitigating factors to further this goal. In accordance with the German Penal Code, German courts consider cognitive and developmental disabilities, such as PFAS, as relevant mitigating factors during sentencing. Strafgesetzbuch [StGB] [Penal Code], § 21 (Ger.) (tr: "If the capacity of the offender to appreciate the unlawfulness of his actions or to act in accordance with any such appreciation is substantially diminished at the time of the commission of the offence due to [a pathological mental disorder, a profound consciousness disorder, debility or any other serious mental abnormality], the sentence may be mitigated . . . .");[12] see also id. § 19 (lack of criminal capacity of children), § 20 (insanity). Further, German law generally imposes hospitalization in addition to, or instead of, prison terms for offenders who suffer

[12] Translation available at https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb .html.

from mental illness. Landy F. Sparr, Personality Disorders and Criminal Law: An International Perspective, J. Am. Acad. Psychiatry Law 37:168-81 (2009).

The German experience is relevant here, as the United States Supreme Court has made clear that a United States court may properly consider international standards of justice in deciding the matters before them. See, e.g., Graham v. Florida, 560 U.S. 48, 80 (2010) ("The judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment. But [t]he climate of international opinion concerning the acceptability of a particular punishment is also not irrelevant." (quotation marks omitted) (quoting Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982)); Roper v. Simmons, 543 U.S. 551, 575 (2005) ("[T]he Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"); Lawrence v. Texas, 539 U.S. 558, 577 (2003) (declaring unconstitutional laws barring consensual homosexual conduct and noting "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries").

In South Carolina, a defendant's ability to present full mitigation evidence is critical given that a mentally impaired individual may face a death sentence. For this reason, it is paramount that Mr. Williams' mental disabilities and their relevance to mitigating factors under South Carolina law are fully considered. This is especially true here because Mr. Williams has already been denied the support that Germany offers any German citizen who faces a death sentence around the world—support that would have revealed his PFAS at the trial stage. The failure to offer Mr. Williams the opportunity to

fully avail himself of South Carolina's mitigation statute deprives him of a bedrock principle of justice, proportionality between his culpability and his sentence, which has been adopted by the United States Supreme Court, the South Carolina Supreme Court, the Federal Republic of Germany, and many other nations.

C. Recent Scientific Research Demonstrates the Significant Impairments Caused by Fetal Alcohol Syndrome and the Necessity of Relaying this Mitigation Evidence to the Jury

Current research on FASD indicates that adults with FASD have increased behavioral problems as compared to control groups. Eileen M. Moore & Edward P. Riley, What Happens When Children with Fetal Alcohol Spectrum Disorders Become Adults?, 2 Current Dev. Disorder Rep. 219, 221 (2015). Specifically, individuals with FASD struggle with higher-level tasks that rely on complex executive functioning skills at a significantly higher rate than individuals who have not been prenatally exposed to alcohol. Katherine Wyper & Jacqueline Pei, Neurocognitive Difficulties Underlying High Risk and Criminal Behavior in FASD: Clinical Implications, 63 Int'l Lib. of Ethics, L., & The New Med. 101, 102-03 (2015); Jennifer E. Khoury et al., Executive Functioning in Children and Adolescents Prenatally Exposed to Alcohol: A Meta-Analytic Review, 25 Neuropsychology Rev. 149, 165 (2015); Pet'r's Br. at 9, 24.

Executive functioning refers to "processes that oversee thought and action under conscious control and . . . guide adoptive responses to novel situations." Wyper & Pei, 63 Int'l Lib. of Ethics, L., & The New Med. at 105. Executive functions can be further characterized as "hot" or "cold." "Hot" executive functions are those involved in high stress, emotional situations, while "cold" executive functions are utilized in more neutral situations. Inhibition and reasoning include two executive functioning tasks that

individuals with heavy prenatal alcohol exposure experience difficulty with, and multiple studies have shown that impairments in executive functioning are related to violent and aggressive behavior. Id. at 106, 109-10. High-risk behavior, like criminal activity, is thus correlated with such neurocognitive deficits, and "it is little wonder that individuals with FASD are especially vulnerable to engaging in such behaviors" given that they have repeatedly been shown to display significant deficits in executive functioning. Id. at 110; Pet'r's Br. at 9, 24.

As discussed earlier, the main difference between FAS and PFAS is that individuals with FAS have facial abnormalities and a growth deficit in addition to central nervous system abnormalities present in both. However, in a June 2015 study, subjects with PFAS had the most documented behavioral problems as compared to those with FAS and in the control group. Philip A. May et. al., Prevalence and Characteristics of Fetal Alcohol Syndrome and Partial Fetal Alcohol Syndrome in a Rocky Mountain Region City, 155 Drug & Alcohol Dependence 118, 121 (2015). Another study notes that individuals with PFAS and FAS, in particular, may have a more pronounced deficit in inhibition than individuals with a mixture of FASD diagnoses. Khoury et al., 25 Neuropsychology Rev. at 165.

In Mr. Williams' case, evidence of the effects of his PFAS would have provided the jury with mitigating information directly related to his culpability—information that was missing from the evidence trial counsel presented. "Hot" executive functioning impairments are especially relevant in situations like the one here. Mr. Williams' PFAS-related deficits in his executive functioning and impulse control, and his child-like social skills, interfered with his ability to deal with an emotionally charged situation like his

girlfriend's rejection of him. (R. p. 3876, line 7-p. 3877, line 7). Deficits in his perception, resulting from his PFAS, led him to fixate on the false conclusion that his ex-girlfriend had aborted their child. (R. p. 3875, line 15-p. 3876, line 3). Further, his inability to comprehend the ramifications of his behavior seemingly led him to believe that after cornering his victim, she would simply admit she had been wrong and the situation would be remedied. (R. p. 3879, line 23-p. 3880, line 5).

Mr. Williams' PFAS impaired the very skills an average-functioning person would use to overcome the impulses that ultimately drove his actions, which skills are linked to multiple mitigating criteria under South Carolina sentencing laws. S.C. Code Ann. § 16-3-20(C)(b)(2) is a statutory mitigator for circumstances in which the murder was committed while the defendant was under the influence of mental or emotional disturbance, as Mr. Williams was because of his mental impairments resulting from PFAS when trying to cope with his girlfriend's rejection of him. (R. p. 3876, line 7-p. 3877, line 7). Mr. Williams' capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was also impacted by his PFAS, a mitigating factor pursuant to S.C. Code Ann. § 16-3-20(C)(b)(6). PFAS impacted Mr. Williams' mentality at the time of the crime, relevant to mitigation under S.C. Code Ann. § 16-3-20(C)(b)(7). These multiple mitigating factors tied to PFAS could and should have been presented to the jury for its consideration.

The PCR Court failed to develop a record on PFAS, contrary to the requirements of S.C. Code Ann. § 17-27-80—a grave error, discussed infra at Part V.E. Further, evidence of the impairments caused by PFAS would have provided the jury with information that was directly related to Mr. Williams' actions toward his ex-girlfriend.

To Mr. Williams' severe detriment, his jurors had no information about these specific disabilities and their direct connection to his behavior on the night of the crime. Trial counsel's failure to offer the jury this explanation proves an especially keen miscarriage of justice where a man with mental impairments receives the death penalty.

D. Trial Counsel's Failure to Present Evidence of Mr. Williams' PFAS to the Jury Is Ineffective Under Strickland

Trial counsel's performance is ineffective under Strickland v. Washington, 466 U.S. 668 (1984) where (1) his performance was deficient and (2) prejudice resulted. Id. at 687; see also Gibbs v. State, 403 S.C. 484, 492, 744 S.E.2d 170, 174 (2013). A deficient performance is one that falls below an objective standard of reasonableness under prevailing professional norms, Strickland, 466 U.S. at 687-88; Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995), which, in this case, are properly determined by reference to the relevant guidelines issued by the American Bar Association. Ard, 372 S.C. at 332 n.14.[13] A defendant in a death penalty case can show prejudice by demonstrating that "there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695.

The ABA Guidelines require that counsel at every stage "conduct thorough and independent investigations relating to both guilt and penalty." ABA Guidelines at 1015.

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[13] See also Council v. State, 380 S.C. 159, 171, 670 S.E.2d 356, 362 (2009) (affirming trial court's finding that "counsel[']s decision not to expand their investigation . . . was unreasonable given it fell short of professional state standards and the American Bar Association standards governing capital defense work"); see also Am. Barr Ass'n, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913 (2003) (hereinafter "ABA Guidelines").

This requirement is only bolstered by the ABA's Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases ("Supplementary Guidelines"), which command that the "defense team must conduct an ongoing, exhaustive, and independent investigation of every aspect of the client's character, history, record and . . . other factors." 36 Hofstra L. Rev. 677, 689 (2007-2008) (emphasis added); see also id. at 688 ("It is the duty of counsel to lead the team in conducting an exhaustive investigation into the life history of the client." (emphasis added)); id. at 689 ("[t]he investigation into a client's life history must survey a broad set of sources and includes, but is not limited to: medical history; complete prenatal, pediatric and adult health information; exposure to harmful substances in utero and in the environment; . . . [and] mental health history" (emphasis added)).

Here, Mr. Williams' attorneys were ineffective in that they failed to reasonably investigate the obvious signs of his PFAS. This error compounded an earlier failure to identify Mr. Williams as a German citizen—a failure that prevented Mr. Williams from receiving the assistance of the German government at the trial stage. Such assistance would have ensured he received adequate representation and had the financial resources necessary to fully investigate his background and any mitigating factors, including PFAS, which likely would have spared him from death. As a result, the jury never learned of the significant mental impairments from which Mr. Williams suffers due to his PFAS. That is, the jury sentenced him to death without having the opportunity to view his culpability within the context of his mental handicap and consequent disadvantages.

That prejudice resulted from counsel's inadequate performance is demonstrated by the jury's difficulty during deliberations. In fact, even without knowing Mr. Williams

suffered from PFAS, at trial the jurors were so unsure as to whether Mr. Williams deserved the death penalty that they first reported they were deadlocked on the sentence. (R. p. 2410, lines 15-24). Under these circumstances, it is difficult to see how the jury would have settled on death as a matter of "reasonable probability" had they been offered evidence of a diagnosed medical condition that had more profound impacts than any mitigation evidence the jurors heard—namely, obsessive-compulsive disorder and bipolar disorder—and offered a partial explanation for Mr. Williams' behavior. See Strickland, 466 U.S. at 695; R. p. 3717, lines 1-7 ("[T]he implication of having FASD, the impairment that it gives you in life is markedly greater than bipolar disorder, than having OCD . . . FASD, in my book, kind of eclipses the other things. But having the other things on top of it is very bad." (medical expert testimony));[14] see also Rompilla v. Beard, 545 U.S. 374, 393 (2005) (ordering retrial or stipulation to life sentence without parole and counting Fetal Alcohol Syndrome, organic brain damage, and impaired cognitive functioning among mitigation evidence that did not reach the jury).

Having received ineffective assistance from his trial counsel, under South Carolina and United States law, Mr. Williams is entitled to have his conviction vacated or, at minimum, a new sentencing hearing.

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[14] Respondent's argument that no prejudice resulted because evidence of FAS would be "double-edged in nature" is unavailing. Br. of Resp. at 83-86. The State accepts that FAS may reduce a defendant's culpability and cites no precedent for the suggestion that failing to present evidence that could arguably be "double-edged" automatically forecloses prejudice. Such an argument would be absurd and, if accepted, would mean that the failure to present mitigation evidence would never amount to prejudice, contrary to Supreme Court holdings, because almost all mitigation evidence, especially that tied to mental impairment, could be spun as harmful in some way.

E. The PCR Court Erred in Finding that Trial Counsel's Performance Was Not Ineffective Despite Their Failure to Present to the Jury Mr. Williams' Mental Impairments Due to PFAS

The omission of PFAS mitigation evidence presents an injustice that could and should have been avoided. Nonetheless, the PCR Court ruled that Mr. Williams' counsel was not ineffective for failing to present PFAS evidence because they "made a strategic decision to not present to the jury evidence of brain damage or a diagnosis of Fetal Alcohol Syndrome." (R. p. 4210). Yet, trial counsel made no decision, strategic or otherwise, concerning this evidence—because, quite simply, they did not have it. The PCR Court's order provided no factual reasoning for its conclusion; the PCR Order made no reference to the trial counsel's testimony directly contradicting the Court's finding and disregarded the factual record on the discovery and development of the evidence of Mr. Williams' PFAS. The PCR Order fails to explain how trial counsel's failure to recognize, investigate, and formally diagnose Mr. Williams' condition was not "ineffective assistance" of counsel, even though this meant a crucial and pertinent mitigating factor was not presented to the jury during sentencing. See Am. Bar Ass'n, Resolution 112B, at 8 (noting that "[c]ourts should . . . be considering [FASD] as a factor in mitigation . . . during sentencing, particularly where the death penalty is an option"); Franklin v. Maynard, 356 S.C. 276, 279, 588 S.E.2d 604, 606 (2003) (holding that the defendant has the right to present mitigating evidence of mental retardation to the jury at the sentencing stage, pursuant to S.C. Code Ann. § 16-3-20(C)(b)(10), even if a judge determines pre-trial that a defendant is not intellectually disabled, and "[i]f the jury finds this mitigating circumstance, then a death sentence will not be imposed"). Moreover the PCR Court failed to make any findings of fact about whether Mr. Williams' suffered from PFAS and its effect on him.

Thus, the PCR Court did not, as required by the South Carolina Code, "make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." S.C. Code Ann. § 17-27-80. The PCR Order, unsubstantiated by the record and bereft of explanation, cannot stand. Bryson v. State, 328 S.C. 236, 236, 493 S.E.2d 500 (1997) (per curiam) (vacating a PCR order "because it does not contain specific findings of fact and conclusions of law with regard to each issue raised in [the] application and at the hearing thereon"); McCullough v. State, 320 S.C. 270, 272, 464 S.E.2d 340, 341 (1995) (vacating and remanding the PCR order because it did not address the merits of the issues raised in the PCR proceedings); Pruitt v. State, 310 S.C. 254, 255, 423 S.E.2d 127, 127-28 (1992) (per curiam) (finding that remand for rehearing was necessary where order denying request for PCR failed to address petitioner's claims that his trial counsel was ineffective); McCray v. State, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991) (reversing and remanding because the PCR Court failed to "make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented" as required by S.C. Code Ann. § 17-27-80).

1. The PCR Court's Finding that Trial Counsel Made a "Strategic Decision" Is Contradicted by the Record

Medical professionals made the PFAS diagnosis only *after* Mr. Williams' conviction and sentencing, and at the request of new counsel, a fact the PCR Court does not acknowledge. Thus, Mr. Williams' trial counsel could not have made a strategic decision to withhold the information about Mr. Williams' PFAS because they did not know about it. It is well-settled that trial counsel cannot make a "strategic decision" about whether to present certain information when they do not know what that information is. See, e.g., Sears, 561 U.S. 945 at 951, 953-54 (holding that trial counsel's

failure to present mitigating evidence was not "justified by a tactical decision" when "none of this evidence was known to Sears' trial counsel" but "emerged only during state postconviction relief" (emphasis in original)); Council, 380 S.C. 159, 171, 670 S.E.2d 356, 362 (2008) (affirming finding of ineffective assistant of counsel where lower court "rejected counsels[']' assertion that the omission of the evidence constituted a trial strategy").

Both of Mr. Williams' trial counsel testified at the PCR hearing that the defense team had simply missed the FAS issue altogether. During preparations for trial and sentencing, FAS "wasn't ever brought up. It wasn't discussed. It wasn't ruled in, it wasn't ruled out." (R. p. 3274, lines 24-25 (testimony of trial counsel)). And Mr. Williams' other trial counsel stated, "[alcohol use by an expectant mother] would clearly be a red flag for me today. And I honestly cannot say why it wasn't a red flag for me eight years ago." (R. p. 3332, lines 10-17).[15] This testimony directly contradicts the Court's finding that counsel made a "strategic decision" not to present the evidence. And counsel's failure to articulate a valid trial strategy for failing to present the evidence constitutes ineffective assistance of counsel where prejudice occurs. Dawkins v. State, 346 S.C. 151, 157, 551 S.E.2d 260, 263 (2001) ("In sum, counsel did not articulate a valid strategy for failing to object to the testimony. Accordingly, we find petitioner is entitled to a new trial because he was prejudiced by counsel's deficient performance."); Smith v. State, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010) ("The presumption of

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15 See also R. p. 3273, lines 1-5 (Q. "You now know drinking by a birth mother could cause organic brain damage right now?" A. "I do. I'm aware of that." Q. "Connecting those dots never happened?" A. "No.") (testimony of trial counsel); R. p. 3274, lines 21-24 (Q: "Okay. So I think we've beat this horse enough. It was just never, ever brought up, to your knowledge, of FAS?" A: "Right . . . .") (testimony of trial counsel).

adequate representation based on a valid trial strategy disappears when trial counsel acknowledged there was no trial strategy in mind."). But see Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006) ("[W]here counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel."). On this record there is no basis for upholding the PCR Court. As the United States Supreme Court held in Williams v. Taylor, 529 U.S. 362, 396 (2000), "the failure to introduce . . . evidence that did speak in [the defendant's] favor was not justified by a tactical decision" when counsel "did not fulfill their obligation to conduct a thorough investigation of the defendant's background."

Indeed, even if counsel had done the work to learn of Mr. Williams' PFAS, not presenting evidence of it to the jury could never be "strategic" because this omission could only harm Mr. Williams' case by rendering the jury unable to consider his mental impairments. That trial counsel appreciated this fact is demonstrated by their testimony: "[O]ne of the things that I would want to be conscious of is brain damage. And I certainly would want that. And if you're asking me if that's something that I would think would be a good thing for the Defense of a capital case to have in their case, the answer is yes." (R. p. 3333, line 24-p. 3334, line 3). When asked "if you'd had organic brain damage with pictures and so forth, potentially evidence of guilty but mentally ill because of that, you would have put it in the same place, in the trial phase?" trial counsel explicitly stated: "If I had that, I would have put it in at that point." (R. p. 3334, lines 8-13).

Moreover, the PCR Order fails to acknowledge trial counsel's actions that clearly failed to meet the standards required by the ABA Guidelines and South Carolina law.

The PCR Court did not recognize that Mr. Williams' diagnosis was based on symptoms known to counsel prior to trial, which, as his defense counsel have since admitted, should have prompted investigation. From interviews with Mr. Williams' family members, defense counsel was aware that Mr. Williams' German-born mother was an alcoholic and drank during her pregnancy. (R. p. 3368, lines 2-10; see also R. p. 2180, lines 5-9; p. 2182, lines 8-9). Despite this knowledge, defense counsel failed to pursue a proper diagnosis, if any at all. They hired the neurologist on the eve of trial and did not give him any of Mr. Williams' educational or medical information, thereby hindering an accurate diagnosis. The neurologist stated that, had he known about Mr. Williams' mother's drinking, he would have advised the defense team to investigate FAS. (R. p. 4852 ("I was also unaware that his mother consumed alcohol during her pregnancy. . . . The mother's drinking is a significant piece of history. If this were made known to me, I would have certainly informed the team to investigate fetal alcohol syndrome or to at least rule out fetal alcohol effects.")). However, because the neurologist was hired so late in the process and was not provided with any medical or educational records, both facts the PCR Court failed to address, he did not have the opportunity to recommend this investigation. Id. at 4581-82; Pet'r's Br. at 6-7. This is a glaring error. Even Respondent concedes that the failure to provide one's experts with necessary information constitutes deficient performance. Br. of Resp. at 16.

Mr. Williams' trial team not only failed to investigate PFAS but also failed to discuss key evidence with their experts. The trial team thus admitted that they failed to meet the standards established by the ABA Guidelines and South Carolina law, see ABA Guidelines, at 1015, 1021-26; Council, 380 S.C. at 173, 670 S.E.2d at 363 (affirming

finding of ineffective assistant of counsel where defense attorney "failed to provide his only expert witness . . . with sufficient records and . . . [the expert] only met with [defendant] on two occasions, the first being shortly before trial"), a fact which the PCR Court does not acknowledge.

The PCR Court made no finding that trial counsel's testimony had not been credible. In fact, the PCR Court simply ignored their testimony. Trial counsel's own testimony clearly shows they made no strategic decision concerning Mr. Williams' PFAS. Moreover the record establishes that contrary to their duties under the ABA Guidelines and South Carolina law, trial counsel failed to pursue a proper diagnosis and adequately equip their experts. Thus, the PCR Court's holding that trial counsel were not deficient because they had made a strategic decision not to present the diagnosis, without a finding that trial counsel's testimony was not credible, cannot stand. Bryson, 493 S.E.2d at 500; McCray, 408 S.E.2d at 241.

2. The PCR Court Failed to Make Required Findings About PFAS to Support its Strickland Analysis

The PCR Court's finding that trial counsel was not ineffective because Mr. Williams did not suffer prejudice fails to withstand appellate scrutiny because it is not adequately explained in the PCR Order. Contrary to S.C. Code Ann. § 17-27-80 (2003), the PCR Court failed to make any finding as to whether Mr. Williams suffers from PFAS and failed to consider the actual effects of PFAS on him. In doing so, the PCR Court neglected to conduct the analysis required by Strickland to determine prejudice.

As discussed above, to satisfy the Strickland standard for ineffective assistance of counsel, a defendant must show that defense counsel's performance fell below an objective standard of reasonableness and that, absent counsel's deficiency, there is a

reasonable probability that the sentencer would not have favored a sentence of death. Strickland, 466 U.S. at 687-88, 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. Strickland, 466 U.S. at 694; Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 167 (1998). The court below—without analyzing the actual effect PFAS had on Mr. Williams—found that counsel's performance was not deficient because the jury heard evidence of Mrs. Williams' alcohol use during pregnancy and of Mr. Williams' bipolar disorder and obsessive-compulsive disorder. (R. p. 4209-11). Analogizing to Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998), and Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006), the PCR Court found that evidence of PFAS would not have offered the jury significantly different mitigating evidence, just a vehicle for crafting a "fancier" package. (R. p. 4207-08). These conclusions cannot be supported by the prevailing understanding of PFAS, its effect on Mr. Williams, and the explicit ABA guidance on point.

In Mr. Williams' case, evidence of the effects of PFAS would have provided the jury with information directly related to culpability, information otherwise unavailable to it and which could not be gleaned from mere testimony that his mother drank during pregnancy. Unlike bipolar disorder and obsessive-compulsive disorder, PFAS impairs the very skills an average-functioning person would use to cope with an emotionally charged situation like the end of a romantic relationship: mastery over one's mental and emotional capacities, impulse control, and an ability to conceptualize the impact one's behavior has on others.[16] Because evidence of PFAS would have offered a meaningful

[16] Individuals who suffer from FASD, while often appearing outwardly normal, tend to demonstrate reduced impulse control and have difficulty functioning in society. Kathryn Page, The Invisible Havoc of Prenatal Alcohol Damage, J. Center for Fam. Child. & Cts. 67, 69-70 (2002) (examining the effects of FASD on adaptive

new explanation for why Mr. Williams' actions did not warrant death—and did not just constitute a new label to describe evidence already presented—the PCR Court's reliance on Jones v. State and Simpson v. Moore is misplaced.

The PCR Court also failed to make sufficient factual findings concerning Mr. Williams' condition to allow it to adequately weigh the mitigating evidence to determine prejudice, with an eye to how powerful it could have been to the already-uncertain jury. Sears, 561 U.S. at 954-56 (vacating the PCR Court's judgment because it failed to undertake "the type of probing and fact-specific analysis" required by Strickland to adequately assess the probability of a different outcome). The United States Supreme Court has instructed courts to "consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the [later] proceeding—and reweigh it against the evidence in aggravation" when assessing the probability of a different outcome under Strickland. Porter v. McCollum, 558 U.S. 30, 41 (2009) (vacating a post-conviction order where trial counsel failed to present any evidence of the defendant's mental health or mental impairment); Sears, 561 U.S. at 955-56 (finding the post-conviction court's review insufficient where it held, without considering new evidence, that trial counsel made a "reasonable" "tactical decision" concerning which mitigation evidence to present at trial).

The PCR Court did not consider the mitigation evidence adduced at the PCR stage, let alone conduct a "probing and fact-specific analysis" of the new evidence of PFAS, and therefore failed to undertake the analysis required by Strickland. The PCR

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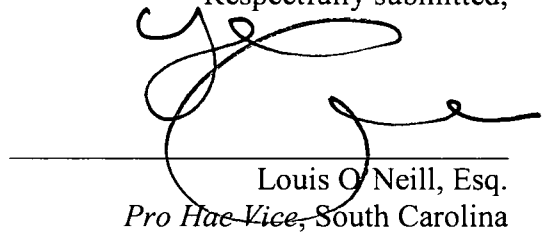
behavior and executive functioning and noting that "victims of FASD who do not display the telltale [facial] features [i.e., those with PFAS] out-number those who do by at least three to four times").

Order is devoid of any discussion of the medical evidence and the expert testimony concerning Mr. Williams' diagnosis. The PCR Court did not make any finding as to whether Mr. Williams suffers from PFAS. Nor did the court consider whether and how PFAS could have affected Mr. Williams' behavior. Because the PCR Court developed no record concerning these facts, this Court has been deprived of the required basis upon which to decide whether the PCR Court adequately considered the evidence to evaluate prejudice. At the very least, remand to the PCR Court for a full consideration for the record is therefore warranted. McCray, 408 S.E.2d at 241 (remanding for a new PCR hearing where the PCR order was unsupported by findings of fact).

VI. CONCLUSION

For the foregoing reasons, *amicus curiae* the Federal Republic of Germany respectfully urges the Court to reverse the PCR Court's decision below, grant Mr. Williams' application to vacate his conviction, or in the alternative, to remand for a new sentencing proceeding.

Respectfully submitted,



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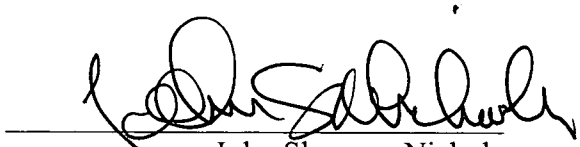

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON WRIT OF CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas

G. Edward Welmaker, Circuit Court Judge

Case No. 2010-CP-23-09792
Appellate Case No. 2013-001945

Charles Christopher Williams, Petitioner,

v.

The State of South Carolina Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel of record with a copy of the *Motion to Accept Brief of Amicus Curiae and the conditionally filed Brief of Amicus* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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