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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2018-001499

WILLIAM O. DICKERSON, Jr.....Petitioner,

v.

STATE OF SOUTH CAROLINA.....Respondent.

PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Beginning April 23, 2009, the State tried Mr. Dickerson for murder, first-degree criminal sexual conduct, and kidnapping before the Honorable R. Markley Dennis and a Charleston County jury. Ninth Circuit Solicitor Scarlett A. Wilson, Deputy Solicitor Bruce Durant, and Assistant Solicitor Rutledge Durant prosecuted the case. Jeffery P. Bloom and C. Andrew Carroll represented Mr. Dickerson. On April 30, 2012, the jurors convicted Mr. Dickerson of all charges. The State sought the death penalty. The penalty phase began on May 4, 2009. On May 7, 2009, the jurors found, as aggravating circumstances, the murder was committed while in the commission of a criminal sexual conduct, kidnapping, and physical torture. *S.C. Code* §16-30-20(C)(a)(1)(a), (b) and (i). The jurors recommended the death penalty for murder. Judge Dennis sentenced Mr. Dickerson to death for murder, thirty (30) years for first degree criminal sexual conduct, and thirty (30) years for kidnapping.

Mr. Dickerson appealed his convictions and sentences. Robert M. Dudek, Kathrine H. Hudgins, and Mr. Bloom represented Mr. Dickerson. Donald J. Zelenka and Melody J. Brown represented the State. On October 3, 2011, the South Carolina Supreme Court affirmed Mr. Dickerson's convictions and sentences. *State v. Dickerson*, 395 S.C. 101, 716 S.E.2d 895 (2011). The Supreme Court of the United States denied Mr. Dickerson's petition for a writ of certiorari on April 23, 2012. *Dickerson v. South Carolina*, 566 U.S. 964 (2012).

On May 16, 2012, Mr. Dickerson filed a *pro se* PCR application pursuant to S.C. Code §17-27-160. On July 13, 2012, the South Carolina Supreme Court granted

Mr. Dickerson a stay of execution to pursue his PCR remedies. By written order dated August 20, 2012, the Court appointed undersigned counsel to represent Mr. Dickerson. Through counsel, Mr. Dickerson amended his PCR applications. The final application was filed on July 13, 2015. The PCR court convened evidentiary hearings on the following dates and took the following testimony:

- On December 7-8, 2015, the court heard testimony from Dr. Richard Canfield, Dr. Marlyne Israelian, Mr. Bloom, Mr. Carroll, and Mr. Dudek.
- On March 31, 2016, the court heard testimony from Dr. Barbara O'Brien.
- On May 12-13, 2016, the court heard testimony from Dr. O'Brien, Solicitor Wilson, and Mr. Bloom.
- On May 27, 2016, the court heard testimony from Dr. William "Mick" Norton.
- On October 23, 2017, the court heard testimony from Dr. O'Brien.

At the conclusion of the evidentiary hearings, the court called for post-hearing briefs. At the post-conviction hearings, Mr. Dickerson proceeded on the following allegations contained in his Third Amended PCR Application regarding jury selection:

10(a) & 11(a)(2). Defense counsel rendered ineffective assistance of counsel by failing to advance a comparative juror analysis when he raised his *Batson* challenge.

10(a) & 11(a)(4). Defense counsel rendered ineffective assistance of counsel by failing to secure available criminal records of the jurors by requesting the trial court judge issue a subpoena to the FBI, Criminal Justice Information Services Division prior to the jury strike.

10(a) & 11(a)(5). Defense counsel rendered ineffective assistance of counsel by failing to litigate the issue of defense counsel's access to the

same juror information as was in the possession of the prosecution prior to the jury strike.

10(f) & 11 (f). Applicant was denied his rights to due process and equal protection under the laws in violation of the Fifth and Fourteenth Amendments to the United States Constitution [when] [t]he Ninth Circuit Solicitor's Office committed prosecutorial misconduct by improperly striking qualified African-Americans from the jury venire.

Mr. Dickerson proceeded on the following allegations of ineffective assistance of trial counsel and appellate counsel contained in his Third Amended PCR Application regarding the sentencing phase of his capital trial:

10(b) & 11(b)(2). Trial counsel rendered ineffective assistance of counsel by failing to renew his objection when Cededrick Davis, William Dickerson's former probation agent, testified that Mr. Dickerson stated he wished he had shot the cop.

10(b) & 11(b)(3). Trial counsel rendered ineffective assistance of counsel by failing to object to the State's closing argument that diluted the responsibility of the jurors in rendering a possible death verdict.

10(b) & 11(b)(4). Trial counsel rendered ineffective assistance of counsel when they failed to uncover and present evidence of Applicant's significant neurological deficits and when that evidence would have been highly mitigating.

10(c) & 11(c)(5). Appellate counsel rendered ineffective assistance of counsel for failing to present, for appellate review, defense counsel's objections to the admission of photographs [State's Trial Exhibits] 141, 153, 160, 161, 162, 166, 171, 172, 173, 177, 178, 181, 184, 335, and 336.

10(c) & 11(c)(7). Appellate counsel rendered ineffective assistance of counsel for failing to present, for appellate review, defense counsel's objection to the solicitor's questioning of Dr. Phillips about whether Mr. Dickerson "knew right from wrong" at the time of the killing.

Finally, Mr. Dickerson asked the post-conviction court to enter an order vacating his kidnapping sentence because South Carolina law prohibits sentencing for kidnapping when someone is also sentenced for murder pursuant to *S.C. Code*

Ann. § 16-3-20, as requested in paragraphs 10(e) and 11(e) of his Third Amended PCR Application. The State consented to this relief in its Return and during a hearing on December 19, 2012.

The State filed a Motion to Strike and or in the Alternative to Dismiss Claim Not Cognizable in Post-Conviction Relief on September 28, 2015. Dickerson then filed his Memorandum in Response to State's Motion to Strike and or in the Alternative to Dismiss Claim not Cognizable in Post-Conviction Relief on September 30, 2015. The State then filed its reply on October 8, 2015.

After the various evidentiary hearings in this case, the PCR court filed its order denying post-conviction relief on July 27, 2018. Petitioner then filed his Rule 59(e) motion on July 11, 2018. The PCR court then filed its order denying applicant's motion to alter or amend and amended order denying post-conviction relief on July 25, 2018. This appeal timely follows.

I. PCR CLAIMS RELATED TO JURY SELECTION

In his post-conviction relief application, Dickerson raised a number of claims relating to the Solicitor's decision to remove particular African-American jurors from his jury. For purposes of clarity and expediency, those claims are addressed in this section of the briefing. The following claims are addressed below.

- 1) Defense counsel rendered deficient and prejudicial assistance of counsel in violation of the Sixth Amendment of the federal Constitution and *Strickland v. Washington*, 466 U.S. 668 (1984) during jury selection of William Dickerson's capital trial in the following manners:
 - A) Failing to advance a comparative juror analysis under the third prong of *Batson v. Kentucky*, 476 U.S. 79 (1986),

- B) Failing to secure available criminal histories of the prospective jurors by failing to request the trial judge issue a subpoena from the FBI Criminal Justice Information Services Division prior to the jury strike,
 - C) Failing to litigate the issue of trial counsel's access to the same juror information about the jurors' criminal histories that was in the possession of the prosecution prior to the jury strike, and
- 2) The Ninth Circuit Solicitor's Office committed prosecutorial misconduct and denied William Dickerson his rights to due process and equal protection by striking qualified African-American jurors from his venire because of their race.

Statement of Relevant Facts

This constellation of claims arises from events that occurred during the selection of William Dickerson's capital jury. Trial counsel raised a *Batson* objection to the Solicitor's striking of three African-American women from the venire, Ms. Georana Gadsden, Ms. Melissa Fields-Copeland, and Ms. Sallyisha Toomer. Mr. Dickerson raises this *Batson* claim with respect to Ms. Gadsden and Ms. Fields-Copeland. During trial, the following exchange occurred:

MR. BLOOM: Your Honor, we would have a *Batson* motion. My particulars—well, first I would note for the record that the State used four strikes for the first panel of twelve jurors. Three of those were black females and they would be juror ten in the order, Juror 101, and—

THE COURT: Let's just refer to the list that you have. Number ten? . . .

THE COURT: Solicitor, give me your race-neutral or gender-neutral reason for striking juror ten. [Georona Gadsden]

SOLICITOR WILSON: Your Honor, juror ten was a CNA, as I recall, who worked from 11:00 to 7:00 and I recall that she had an issue if it would conflict with her employment. I had that concern. Also she is a single mother with two children and she would be

missing work throughout the week. I believe at one point she said that she would consider the death penalty but at another point she couldn't vote for it.

THE COURT: Okay. I find those reasons to be race-neutral and gender-neutral. Is there any other juror who was selected who was a single mother or who worked as a CNA, who--

MR. BLOOM: No, sir.

THE COURT: Okay. I find that to be a race-neutral, gender neutral reason. I further find that the court is not aware of any pretextual situation, so there is no pretextual and that Motion is denied.

MR. BLOOM: Your Honor, I would just note for the record that Juror 101 is an African American female?

THE COURT: (Affirmative nod), she is. Next?

MR. BLOOM: Also number eleven. [Juror Melissa Fields-Copeland]

SOLICITOR WILSON: She has a number of charges for prostitution, a charge for shoplifting, a concealed weapon, --

THE COURT: Do we have knowledge of anyone else on the jury who has a prior arrest?¹

MR. BLOOM: I don't know of any.

SOLICITOR WILSON: She had qualified convictions.²

THE COURT: All right. I find that to be a race-neutral, gender neutral reason. Are you aware of any juror that has any record, that is sitting?

SOLICITOR WILSON: Not that many or not for those things.

THE COURT: Very well, that's fine. Prostitution, shoplifting.

² As did the other jurors. The following seated jurors had arrests and convictions: Nathan Hood, Joshua Partee, and Michael Page.

SOLICITOR WILSON: And for a concealed weapon.

THE COURT: And concealed weapon. I find that is not pretext.

The next juror for which the State exercised a strike was an African American female, can you tell me your race-neutral or gender-neutral reason for striking that juror? [Sallyisha Toomer]

SOLICITOR WILSON: Your Honor, again she was a juror who said, when I was examining her or asking her questions, she first said that she could never give the death penalty, then she said that she could, she didn't answer the question on her questionnaire and she seemed to struggle—

THE COURT: That's fine. I recall that she was inconsistent and I find that to be a race-neutral and gender-neutral reason. Your Motion is denied.

MR. BLOOM: Thank you, and I have nothing further.

App. 2178, l. 8- 2181, l. 18.

Neither Ms. Gadsden nor Ms. Fields-Copeland sat on William Dickerson's capital jury.

Applicable Law

"The 'Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" *Foster v. Chatman*, 577 U.S. ___, 136 S. Ct. 1737, 1747 (2016) (quoting *Snyder v. Louisiana*, 522 U.S. 472, 478 (2008)). In *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986), the Supreme Court of the United States held the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States forbids a prosecutor from challenging potential jurors solely on account of their race or on the assumption that African American jurors as a group will be unable to impartially consider the State's case against an African-American

defendant. Also, the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States prohibits the striking of a potential juror based on race or gender. *State v. Evins*, 373 S.C. 40, 415, 645 S.E.2d 904, 909 (2007). When one party strikes a member of a cognizable racial group or gender, the trial court must hold a *Batson* hearing if the opposing party requests one. *State v. Haigler*, 334 S.C. 623, 629, 515 S.E.2d 88,90 (1999).

In *State v. Giles*, the South Carolina Supreme Court explained the proper procedure for a *Batson* hearing:

First, the opponent of the peremptory challenge must make a *prima facie* showing that the challenge was based on race. If a sufficient showing is made, the trial court will move to the second step in the process, which requires the proponent of the challenge to provide a race neutral explanation for the challenge. If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the opponent of the challenge has proved purposeful discrimination.

407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014) (internal citations omitted).

Merely denying a discriminatory motive is insufficient; however, the proponent of the strike need only present a race or gender neutral reason. *State v. Casey*, 325 S.C. 447, 451-52, 481 S.E.2d 169, 171-72 (Ct. App. 1997): "[A] 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Purkett v. Elam*, 514 U.S. 765, 769 (1995). The explanation "need not be persuasive, or even plausible, but it must be clear and reasonably specific such that the opponent of the challenge has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty to assess the plausibility of the reason in light of all the evidence with a bearing on it." *Giles*, 407 S.C. at 21-22, 754 S.E.2d at

265. "The burden of persuading the court that a *Batson* violation has occurred remains at all times on the opponent of the strike." *Evins*, 373 S. Ct. at 415, 645 S.E.2d at 909. The opponent of the strike must show the race or gender-neutral explanation was mere pretext, which generally is established by showing the party did not strike a similarly-situated member of another race or gender. *Haigler*, 334 S.C. at 629, 515 S.E.2d at 91. The dual motivation doctrine does not apply in the *Batson* context. Therefore, one racially neutral explanation for striking a potential juror is insufficient to sustain peremptory strike if another explanation given was pretextual. *Payton v. Kearse*, 329 S.C. 51, 495 S.E.2d 205 (1998).

Arguments

1A) Trial counsel rendered ineffective assistance of counsel in violation of the Sixth Amendment to the federal Constitution and *Strickland v. Washington*, 46 U.S. 668 (1984) by failing to advance a comparative juror analysis under the third prong of *Batson* when he raised his *Batson* challenge.

Trial counsel rendered ineffective assistance of counsel by failing to call attention to the fact that the Solicitor's ostensible reasons for removing Georana Gadsden were not supported by the record. As detailed later in more depth, trial counsel lacked access to the same juror criminal records possessed by the Solicitor. However, counsel failed to argue that the Solicitor's reasons for removing Juror Gadsden was belied by the factual record that counsel was aware of at the time of the strike.

Georana Gadsden, Juror 101, was 36 years old at the time of trial, and employed as a nurses' aid. During individualized questioning, Gadsden indicated that she was a "number three" juror. App. 885, l. 17. She explained that to impose a

death sentence, she “would need to know all the facts.” App. 887, l. 15. She reiterated that there were circumstances where she could consider imposing a death sentence. App. 887, ll. 5-9. She understood that murder was the intentional killing of someone, and not an accident, or someone getting angry and killing. She understood that murder requires malice. App. 892, ll. 10-22. She reaffirmed yet again that she was a “number three” juror. App. 893, ll. 1-6.

The Solicitor was allowed to approach the potential juror and asked Ms. Gadsden about her questionnaire. She claimed that she could not read her handwriting on question #47 regarding her opinion of the death penalty. App. 897, l. 14- 898, l. 10. Ms. Gadsden reiterated that she was a “type three” juror and that she would have to know all of the facts. App. 898, l. 8-10. Ms. Gadsden also stated that she had not thought much about the death penalty. App. 898, ll. 11-13.

The Solicitor then asked the juror about a comment she had made to the bailiff about working that night. The Solicitor tried to get details about her work schedule for the next couple of weeks. The Solicitor asked her if it would cause her hardship to serve on the jury. Gadsden unequivocally stated to the Solicitor that she could get off work for the next couple of weeks to serve on the trial if selected App. 899, ll. 8-24. She stated that she could have her schedule rearranged. App. 900, ll. 1-8.

The Solicitor then continued questioning her about her thoughts on the death penalty, and about whether she thought life without parole was “a pretty stiff sentence.” App. 900, l. 9- 901, l. 3. After repeated needling by the Solicitor, Ms. Gadsden stated she would have difficulty signing the death verdict. App. 902, ll. 15-

20. Ms. Gadsden then reiterated that she could set aside her personal feelings and sign her name to a death warrant after looking at all aspects of the case. App. 903, ll. 1-20. The Solicitor then again questioned her on malicious killing. App. 903, ll. 21-844, l. 20.

The Solicitor continued—this time asking Ms. Gadsden if she could “put a man to death.” App. 905, ll. 12-16. Then she asked her for specific situations where she could impose the death penalty. App. 905, ll. 17-25. After questioning Ms. Gadsden yet again about whether she could impose the death penalty, the judge sustained defense counsel’s objection to the Solicitor’s question, and remarked, “She’s answered that question. She said she could.” App. 906, ll. 1-7.

The Solicitor kept at it—

BY SOLICITOR WILSON:

Q: The example you volunteered, that you gave, is that the only example that you can think of?

MR. BLOOM: Objection.

THE COURT: I will sustain the objection. I am not going to allow you to go any further. She volunteered it, you didn’t ask it but I’m not going to allow you to go any further.”

App. 906, ll. 10-18.

The Solicitor challenged her for cause based on her “inconsistent answers” but the judge overruled her. App. 908, l. 8- 909, l. 12.

During the *Batson* hearing, the judge asked the Solicitor to provide her “race-neutral or gender-neutral” reason for striking her. App. 2178, ll. 21.

The Solicitor responded that Ms. Gadsden worked from 11:00 to 7:00 and that “she had an issue if it would conflict with her employment.” App. 2180, ll. 1-2. She also stated that she was a single mother with two children and that she would be missing work throughout the week. And then she said that at one point she said she could consider the death penalty, but at another point she could not vote for it. App. 2179, ll. 3-8.

The Court overruled the *Batson* objection. App. 2179, ll. 9-22.

The Solicitor’s purported reasons for striking Ms. Gadsden supports an inference of racial pretext. The Solicitor’s “reasons” for striking Ms. Gadsden are not supported by the record. Ms. Gadsden was unequivocal in her responses that there would **not** be a conflict between her work schedule and serving. *See Castellanos v. Small*, 766 F.3d 1137 (9th Cir. 2014) (granting habeas relief where prosecutor’s factually erroneous reason could be construed as pretextual); *Ali v. Hickman*, 571 F.3d 902 (9th Cir. 2009) (court reversing and remanding case where state mischaracterized potential jurors’ views); *McClain v. Prunty*, 217 F.3d 1209, 1221 (9th Cir. 2000) (“Where the facts in the record are objectively contrary to the prosecutor’s statements, serious questions about the legitimacy of a prosecutor’s reasons for exercising peremptory challenges are raised.” (citing *Caldwell v. Maloney*, 159 F.3d 639, 651 (1st Cir. 1998))); *Addison v. State*, 942 N.E.2d 925 (Ind.2012) (noting that the state mischaracterized prospective juror’s responses to questioning, and given the state was “concerned” about an issue, they conducted no further questioning on it);

And as for the claim that she was a “single mother with two children and that she would be missing work throughout the week”—the Solicitor never asked a single question of Ms. Gadsden about this. For all the Solicitor knew, Ms. Gadsden may have family members who can keep the children, or maybe Ms. Gadsden has work-leave saved up, or maybe Ms. Gadsden is wealthy and could afford to take a week off from work. The Solicitor seems to have simply assumed that Ms. Gadsden would have financial difficulty given her status as a “single mother” that is unsupported by the record. *Cf. Miller-El II*, 545 U.S. at 246 (discrediting the prosecutor where he “asked nothing further about the influence his brother’s history might have...as [he] probably would have done if the family history had actually mattered”); *and see Harris v. Hardy*, 680 F.3d 942 (7th Cir.2012) (raising “loss-of-income” reason for striking juror when juror never stated he was concerned about the loss of income contributed to finding that Government engaged in purposeful discrimination). And her claim that she was concerned about her equivocation on the issue of whether she could impose the death penalty cannot be reconciled with the Solicitor’s acceptance of juror No. 306, Rebekah Zivak, or No. 221, Susan Mullen who both expressed stronger reservations about imposing the death penalty than Ms. Gadsden.

Rebekah Zivak stated on her questionnaire that she would prefer that the death not be an option. In fact, she stated: “I would prefer that it was not an option but know that I cannot understand the emotions of people that are victims of horrible crimes.” App. 4605. Susan Mullen disclosed on her questionnaire that she did not believe in the death penalty: “I do not believe in the death penalty. Life in prison

without parole is a better solution.” App. 5048. Melissa Fields-Copeland’s, another African-American potential juror struck by the Solicitor, answer to this question on the questionnaire was, “No opinion.” App. 4875. *See McClain v. Prunty*, 217 F.3d 1209, 1224 (9th Cir. 2000) (concluding that *Batson* was violated where two of six proffered race-neutral explanations were “pretextual based upon comparisons of voir dire responses by non-black jurors who were seated without objection by the prosecutor,” and other four were contrary to the facts); *Jones v. Ryan*, 987 F.2d 960 (3rd Cir. 1993) (rejecting the prosecutor’s proffered race-neutral reason for striking black jurors where the prosecutor did not apply the same rationale to similarly-situated white jurors).

Additionally, the Solicitor’s questioning of Ms. Gadsden appears to have been calculated to produce answers to serve as a basis for her disqualification. The Solicitor repeatedly asked Ms. Gadsden about her work schedule even though other jurors also had busy work schedules. Charles High, a white male seated on the jury, for example, disclosed on his questionnaire that he held **two** jobs— he works in golf marketing at Charleston Golf, Inc. and also holds a second job at the Governor’s House Inn. He also noted that he is the primary wage earner for his family. App. 4810-11. Ms. Gadsden did **not** note on her questionnaire that she was the primary wage earner. And also, Garrett Waterman, another white male, worked as a manager of Andolini’s Pizza, a restaurant that also surely involved working nighttime hours. App. 4945-52. The Solicitor did not express any concern that Mr. High or Mr. Waterman might have employment conflicts with jury duty. *Cf. United States v. Atkins*, 843 F.3d 625, 637

(6th Cir. 2016) (“[A] comparative analysis shows that the government did not express concerns about the ability of similarly-situated white jurors to focus throughout the trial despite their large number of children and inconsistent work history”).

The Solicitor’s attempt to elicit a basis for removing Ms. Gadsden is nowhere more apparent than when she pointedly asked her (and did not ask anyone else) whether she could “put a man to death.” Clearly this question was calculated to make Ms. Gadsden pause and generate equivocation that she then used to justify her strike of her. *See Miller-El v. Dretke* (Miller-El II), 545 U.S. 231, 255 (2005) (“Some of these prefatory statements were cast in general terms, but some followed the so-called graphic script, describing the method of execution in rhetorical and clinical detail. It is intended, as Miller-El contends, to prompt some expression of hesitation to consider the death penalty and thus to elicit plausibly neutral grounds for a peremptory strike of a potential juror subjected to it, if not a strike for cause”). The Solicitor’s strike of Ms. Georana Gadsden violated Mr. Dickerson’s right to an impartial jury and further violated Ms. Gadsden’s rights to equal protection under the law:

Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury, *Strauder v. West Virginia*, but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish “state-sponsored group stereotypes rooted in, and reflective of, historical prejudice. (quoting *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 128 (1994)) (internal citations omitted).

Miller-El v. Dretke, 545 U.S. at 237-38.

The Solicitor’s justifications for striking Ms. Georana Gadsden were pretextual and violated *Batson*.

Trial counsel should have urged a comparative juror analysis when he objected to the Solicitor's strike of Ms. Gadsden. His failure to do so rendered his performance deficient. *Strickland v. Washington*, 446 U.S. 668 (1984); *Miller-El v. Dretke*, 545 U.S. 231 (2005). Respectfully, the Court should grant Dickerson's petition for a writ of certiorari.

B) Defense counsel rendered ineffective assistance of counsel by failing to litigate the issue of defense counsel's access to the same juror information as was in the possession of the prosecution prior to the jury strike.

As the Solicitor testified, App. 6833, she did not provide juror criminal histories to trial counsel, so trial counsel was unable to conduct a proper comparative juror analysis on that basis, at the time of his *Batson* motion, at least with respect to Melissa Fields-Copeland. Trial counsel rendered ineffective assistance of counsel when he did not litigate his access to the juror criminal records so that he could properly assess the Solicitor's reasons for removing Ms. Fields-Copeland. Trial counsel completely abdicated his role in representing his client when he failed to even review the Solicitor's claims regarding the other jurors in the venire. It has long been established law that a capital sentence cannot stand when a defendant is not allowed to rebut evidence provided by the State. *Gardner v. Florida*, 430 U.S. 349 (1977). The same is true here. Trial counsel, as an advocate for a capital-sentenced defendant, was obliged to do more than simply rely on the Solicitor's representations regarding potential juror information. Voir dire is no less important a stage in the proceeding than any other in a capital trial, and trial counsel's failure on this point cannot be squared with his duties to ensure a reliable proceeding that comports with Mr.

Dickerson's rights under the Federal and State Constitutions. Courts have long recognized that the Eighth Amendment carries within it a "heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). And see *Rompilla v. Beard*, 545 U.S. 374 (2005) (Trial counsel rendered ineffective assistance of counsel by failing to examine the court file on defendant's prior convictions). See ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION, Standard 4-1.2(c), in ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993) (due to the extraordinary and irrevocable nature of the penalty, at every stage of the proceedings counsel must make "extraordinary efforts on behalf of the accused..."). The ultimate burden of persuasion regarding racial motivation rests with, and does not shift from, the defendant. See *Purkett v. Elem*, 51 U.S. 765, 768 (1995); *Strickland v. Washington*, 446 U.S. 668 (1984); *Miller-El v. Dretke*, 545 U.S. 231 (2005).

But additionally, had trial counsel had the criminal records of the jurors, he could have challenged the Solicitor's strike of Melissa Fields-Copeland. Melissa Fields-Copeland is Juror 92, and she self-identified as a "number three" juror. App. 961, ll. 15-22. The Solicitor just asked her basic questions about her views of the death penalty. App. 980, l. 24- 983, l. 22. She was found to be qualified. App. 984, ll. 8-13.

During the *Batson* hearing, however, the Solicitor's ostensible reasons for striking her were that "she has a number of charges for prostitution, a charge for shoplifting, a concealed weapon, --." App. 2180, ll. 2-4. When asked if there were similarly situated jurors, the Solicitor responded, "Not that many or not for those things." App. 2180, ll. 16-17. Again, the Solicitor's purported reasons suggest racial pretext. The Solicitor did not ask the juror **a single question** about these convictions or arrests, suggesting that they did not actually concern her at all. This is even more striking since the Solicitor apparently did not object to other jurors who did have convictions. Either the convictions were a concern to the Solicitor, or they were not, and since the Solicitor *did not ask a single juror about convictions, yet seated some with convictions*, it is clear that the Solicitor used criminal convictions as pretext in the case of Ms. Fields-Copeland. *See Miller-El*, 545 U.S. at 246 ("The state's failure to engage in any meaningful *voir dire* examination on a subject the state alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination."); *United States v. Esperanza-Gonzalez*, 422 F.3d 897, 905 (9th Cir. 2005) ("Although the prosecutor has no obligation to question all potential jurors, his failure to do so [before] removing a juror of a cognizable group...may contribute to a suspicion that this juror was removed on the basis of race.") And *see Green v. Lamarque*, 532 F.3d 1028 (9th Cir. 2008) (noting that the prosecutor's "concern" about potential juror's five jobs was undermined by the fact that he did not ask her a single question about it.) And *see Rice v. State*, 84 So.3d 144 (Ala.Crim.App.2010) (reversing

the conviction based on the disparate treatment afforded blacks and non-blacks, and the state's lack of questioning of any juror as to criminal convictions.)

Juror Joshua Partee, a white male, also had a conviction for Driving under the Influence of Alcohol and was given supervised probation and restitution. Nathan Hood, a white male, was also arrested for Driving under Suspension and Failing to Appear for Uniform Traffic Citation. Juror Michael Page, another white male, also had a conviction for DUI.³ These white jurors were allowed to serve on William Dickerson's jury while Melissa Fields-Copeland, an African-American woman, was singled out for exclusion based on purported "concerns" that the Solicitor never questioned any of them about. And *see State v. Stewart*, 413 S.C. 308, 775 S.E.2d 416 (Ct. App. 2015) (noting that in determining whether potential jurors are similarly situated, our courts have focused on whether there are meaningful distinctions between individuals compared). The Solicitor's reasons for excluding her were pretext for her racially discriminatory strike. A comparison between a stricken black juror and a sitting white juror is relevant to determining whether the prosecutions' asserted justification for striking the black juror is pretextual. *See McClain v. Prunty*, 217 F.3d 1209, 1220 (9th Cir. 2000) ("A prosecutor's motives may be revealed as pretextual where a given explanation is equally applicable to a juror of a different race who was not stricken by the exercise of a peremptory challenge."); *Jordan v. Lefevre*, 206 F.3d 196, 201 (2d Cir. 2000) ("Support for the notion that there was purposeful discrimination in the peremptory challenge may lie in the similarity

³ These criminal records are under seal at the Charleston County Courthouse.

between the characteristics of jurors struck and jurors accepted. Where the principle difference between them is race, the credibility of the prosecutor's explanation is much weakened.") The Solicitor's strike of Ms. Fields-Copeland was improper under *Batson*. Trial counsel should have litigated to have equal access to the criminal records in William Dickerson's trial so he could have made a comparative juror challenge on this basis.

C) **Defense counsel rendered ineffective assistance of counsel by failing to secure available criminal records of jurors by requesting the trial court judge issue a subpoena to the FBI, Criminal Justice Information Services Division prior to the jury strike.**

Criminal histories provided by the South Carolina Law Enforcement Division only reveal that a person has been convicted of a crime in the state of South Carolina. They do not reveal other arrests or out-of-state convictions. Trial counsel had a duty to ensure that he had all relevant information for assessing the strike decisions of the Solicitor's Office in this capital trial. There was no reason why trial counsel could not undertake what PCR counsel had to do to obtain this information-- request a court order from the trial court judge to secure these records. Had he done so, he could have properly urged a comparative juror analysis with respect to Ms. Fields-Copeland because he could have secured, prior to trial, the records of the other jurors who had criminal records. *See Bell v. Ozmint*, 332 F.3d 229 (2003) (finding that a comparative juror analysis clearly is a relevant consideration in a *Batson* analysis). Respectfully, this Court should grant William Dickerson's petition for a writ of certiorari.

2) The Ninth Circuit Solicitor committed prosecutorial misconduct and denied Dickerson's rights to due process and equal protection of the law

by striking qualified African-American jurors from his venire because of their race.

The Solicitor violated *Batson* when she removed Ms. Georana Gadsden and Ms. Melissa Fields-Copeland from William Dickerson's capital venire. These African-American women were fully qualified to serve and were removed after she provided ostensible reasons that were belied by the factual record. *See Batson v. Kentucky*, 476 U.S. 79 (1986); *Georgia v. McCollum*, 505 U.S. 42 (1992); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) *Miller-El v. Cockrell*, 537 U.S. 322 (2003) *Miller-El v. Dretke*, 545 U.S. 231 (2005) and *Snyder v. Louisiana*, 552 U.S. 472 (2008). The Constitution forbids striking even a single prospective juror for a discriminatory purpose. *See, e.g., United States v. Lane*, 866 F.2d 103, 105 (4th Cir. 1989); *United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir. 1987); *United States v. David*, 803 F.2d 1567, 1571 (11th Cir. 1986). The PCR court found that this issue could not be raised in PCR because it is a direct appeal issue. App. 9333. Respectfully, this holding is error. *See Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006) (*Brady* violation cognizable in PCR); *Gibson v. State*, 334 S.C. 5155, 514 S.E.2d 320 (1999) (same). This claim is cognizable in PCR because it required additional fact development that was unknown to defense counsel at the time of trial. For the reasons argued above, this Court should grant Dickerson's petition for a writ of certiorari.

Additional Evidence this Court Should Consider Regarding Dickerson's *Batson* Claim

As the United States Supreme Court has made clear, a court assessing whether racial discrimination has occurred during jury selection should assess all of the

available information that may bear on the question. *Miller-El v. Dretke*, 545 U.S. 231 (2005). In this case, this Court should also consider this Solicitor's jury strikes in another death penalty case, *State of South Carolina v. Colin Broughton*, 06-GS-08-2164, and her strike of jurors Alice Bowman and Alfreda Wilson. This Court should also consider this Solicitor's *Batson* violation in *State v. Jalal Beyah*'s first trial. It is also important for this Court to consider materials provided to young solicitors in this state by the Prosecution Coordination Commission which illustrates a consciousness of race and gender when instructing prosecutors how to select their juries. And finally, this Court should consider the results of a statistical study performed by two professors, Barbara O'Brien and Catherine Grosso, at Michigan State University who analyzed a large universe of juror strikes conducted by this particular Solicitor and found very significant disparities in the treatment of African-Americans and whites.

A. Colin Broughton's Capital Trial and Improperly Excluded Jurors

The Solicitor's improperly striking black jurors is not just confined to the Dickerson trial. In the Solicitor's other capital trial, *State of South Carolina v. Colin Broughton*, she engaged in the same improper discriminatory exclusion of qualified African-American jurors. This case resulted in a life sentence imposed by the judge, so the *Batson* claim was never before this Court. Had it been, Broughton would have prevailed because the Solicitor improperly excluded qualified jurors from the venire.

1. Alice Bowman

The Solicitor claims that she struck potential juror Alice Bowman for the following reasons: (1) she was "torn between #1 and #3", (2) she has a nephew in jail,

(3) she's a "balancer", and (4) her conscience would bother her if a death verdict were rendered. App. 9231, l. 18- 9232, l. 3. However, as in the case of Ms. Fields-Copeland in Dickerson's trial, the Solicitor's purported concerns about Bowman's responses are belied by her lack of questioning about them. When given the opportunity to ask questions of Ms. Bowman, the Solicitor asked just a few questions, and none of them related to her being "torn between #1 and #3", her nephew's incarceration, being a "balancer" or her conscience. Instead, she asked how motive would affect her decision, App. 7913, ll. 3-15, and whether she could sign her name to the death verdict. App. 7968, ll. 2-8. *See Miller-El v. Dretke*, 545 U.S. at 246 ("[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting the explanation is a sham and a pretext for discrimination.") (quoting *Ex parte Travis*, 776 So. 2d 874, 881 (Ala. 2000)).

Additionally, the Solicitor's "reasons" for striking Bowman cannot be squared with her decision not to strike Ronald K. Williams, Jr., a white male. Williams, in fact, went through pre-trial intervention for his own possession with intent to distribute charge. He also had a couple of family members charged with crimes, but they, too, went through PTI. He also had a cousin in jail for criminal sexual conduct. App. 7846. Too, he claimed that "Life in jail would be worse than the death penalty." App. 7857. He had an uncle who described to him how terrible prison is. *See Green v. Lamarque*, 532 F.3d 1028 (9th Cir. 2008) (reversing where prosecutor claimed he struck juror because she visited her stepfather in prison when prosecutor did not strike any of the white prospective jurors whose relatives and friends had also been

arrested, indicted or convicted of crimes.). Alternate juror, Michael Singletary, also had been arrested by Berkeley County Sheriff's Department for assault and battery, according to his juror questionnaire.⁴ And too, Emma Hennix's son was currently in jail on a bench warrant for charges that Ms. Hennix claimed she did not know. App. 8195.

And also, Ronald K. Williams could be described as a "balancer" as he informed the Solicitor that he would have to take everything into account in rendering a death verdict, including a defendant's background.

It is evidence of pretext that the Solicitor claims that Bowman's nephew's being in jail is a reason to exclude her when Williams had numerous family members (including himself) with significant contacts with the jail and prison system. The Solicitor's purported reasons for striking Alice Bowman were pretextual. Under the dual-purpose doctrine, each reason a solicitor provides must be race-neutral. *Payton v. Kearse*, 329 S.C. 51, 59–60, 495 S.E.2d 205, 210 (1998) ("Once a discriminatory reason has been uncovered either inherent or pretextual this reason taints the entire jury selection procedure. By adopting dual motivation, this Court would be approving a party's consideration of discriminatory factors so long as sufficient nondiscriminatory factors were also part of the decision to strike a juror and the discriminatory factor was not the substantial or motivating factor. However, any consideration of discriminatory factors in this decision is in direct contravention of

⁴ These criminal records are under seal at the Charleston County Clerk of Court's office.

the purpose of *Batson* which is to ensure peremptory strikes are executed in a nondiscriminatory manner.”). Here, it is clear from the record that none of her reasons were race-neutral, but instead were pretext for engaging in racially discriminatory strikes.

2. Alfreda Wilson

Alfreda Wilson was Juror 389 and self-identified as a type three juror. App. 8444 ll. 4-14. The Solicitor asked very few questions of Ms. Wilson. On questioning by the solicitor, Ms. Wilson stated that she thought living in prison with regret would be suffering. App. 8452, l. 18- 8452, l. 13. The solicitor asked if, based on this belief, would she only render a life sentence. App. 8453, ll. 17-22. In response to this, Ms. Wilson stated: “To be honest, after reading the third, I would have to know something about this before I could say that a person deserves this or that. Right now I don’t know a lot about this. App. 8453, l. 23- 8454, l. 2. Then the Solicitor asked her what factors would make death an appropriate sentence for her. App. 8454, ll. 23-24. Ms. Wilson responded that if there was any chance that the defendant would kill again then the death penalty would be appropriate. App. 8454, l. 25- 8455, l. 17. The solicitor did not ask any additional questions after this statement.

When asked her reason for exercising a peremptory challenge to remove Ms. Wilson, the Solicitor stated:

Your Honor, this juror was the one who basically intimated during her testimony that the only thing that would affect her or that would move her towards the death penalty was future dangerousness.

App. 9232, l. 23- 9233, l. 2.

This statement is a mischaracterization of Ms. Wilson's statement. During voir dire, the following exchange occurred:

BY SOLICITOR WILSON:

Q. What factors would make death appropriate for you?

A. Right now I am thinking that maybe if there is any chance at all that this could happen again—or even if it could happen in prison, if this person is capable of ending somebody's life in prison then he shouldn't be there.

Q. When you say "this happening again", understand that life means life without parole.

A. Right.

Q. So it wouldn't be an issue of it happening out in the community.

A. Right. I am still going with what I've heard about prison and people do get killed in prison, so if there is any chance that this could happen again—even in prison—I think the death penalty should be.

SCARLETT WILSON: Thank you.

WILLIAM MCGUIRE: No more questions.

App. 8454, l. 23- 8455, l. 19.

Ms. Wilson did not "intimate" that the **only** thing she would consider would be future dangerousness. The Solicitor asked her a general and broadly framed question, and Ms. Wilson answered it. If the Solicitor were so concerned that this juror would "only" consider future dangerousness (and it is not at all clear why this would disqualify a juror from the state's perspective anyway), she had the opportunity to ask further questions about it. Her decision not to probe any further on this issue, yet maintained it was the reason for the strike, evidences pretext.

The Solicitor's history of removing qualified black jurors from jury trials was not confined to William Dickerson's trial. Her history of discrimination is relevant to this Court's finding a *Batson* violation in Dickerson's capital trial. See *Miller-El v. Dreke*, 545 U.S. 239:

If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*. Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand. Hence *Batson's* explanation that a defendant may rely on "all relevant circumstances" to raise an inference of purposeful discrimination.

B. *Batson* Violation in Jalal Beyah's First Jury Selection

Investigation conducted by counsel reveals that the Solicitor's discriminatory removal of qualified jurors is not confined to capital cases, nor is it a recent phenomenon. In 2004, the Solicitor was found to have violated *Batson* by the Honorable Diane Goodstein in *State of South Carolina v. Jalal Beyah*, 2001-GS-10-1736, a case involving a black defendant and two white victims.

Beyah's jury was selected from the first 29 jurors. Of these 29 jurors, 8 were black. Wilson used all five of her strikes to remove African-Americans and did not remove any whites. In other words, the state used 100% of its strikes to remove blacks who only constituted just 28% of the jury pool. The Solicitor offered the following justifications:

- Kevin Kornickey—he was arrested by the Charleston County Police Department for what appeared to be criminal sexual conduct.
- Mr. Freeman—The Solicitor struck him because he was "rather sloppily, casually dressed. He had dreadlocks. He did not take the oath in the qualification room (she noticed) and he was also dozing

several times.” She wanted to strike him because he was a Rastafarian.

- Ms. Singleton—the Solicitor struck her because she was unemployed and a housekeeper.
- Ms. Edna Ferguson—the Solicitor struck her because she was called to the front for jury qualifications because she had a breach of trust conviction for which she was pardoned. Also, she was a social worker.
- Ms. Cheatham was struck because she was unemployed, and that was “inconsistent” with information she gave in her questionnaire. Solicitor Wilson qualified that and stated that the notes prepared for her by her staff stated “unemployed slash student.” When she stood up, she said she was an administrative assistant. Based on that difference, the Solicitor struck her.

Based on the Solicitor’s responses, defense counsel asked to view the juror rap sheets. The court agreed. App. 9624. After argument, Judge Goodstein found a *Batson* violation:

THE COURT: That’s pretextual then. It violates *Batson* and I am going to order a new jury strike because if she was also struck because she had a 1984 conviction for breach of trust, I find that that strike on that basis is pretextual because Juror Number 88 was kept who had a 1996 conviction for DUI, shoplifting and larceny against city property—more recent and he kept.

So obviously under *Peyton v. Kears*e, one person without any distinguishing factors that I can determine—one of the black jurors is struck and has a pardon; whereas, Mr. Hendricks who is white is kept with a DUI, shoplifting and larceny.

App. 9632.

The Solicitor’s conduct in earlier cases is relevant to the claim that racial discrimination occurred in William Dickerson’s trial because it evidences a long-standing consciousness of race in jury selection.

C. Prosecution Coordination Commission's Programs

In addition to the Solicitor's removal of qualified African-American jurors in her cases, it is also relevant for this Court to consider the Prosecution Coordination Commission's materials, specifically their Prosecution Deskbook, and how these materials educate young assistant solicitors about "sufficient reasons for" striking otherwise qualified jurors from the criminal trial venires.⁵ The Prosecution Deskbook is available and provided to all solicitors in the state. The Solicitor testified at the hearing conducted in Charleston County on May 12, 2016 that this manual is kept on the office's shared hard drive so that the solicitors have access to it. App. 6823-24. It was available to her and her staff at the time of William Dickerson's trial. App. 6828.

The Prosecution Deskbook provides a litany of "sufficient reasons" to strike qualified jurors from the venire. Later editions of the Deskbook, provided to young solicitors at their yearly "Bootcamp" contain a helpful Appendix of "Race-Neutral Reasons for Excluding a Juror" that include the following: Acquaintance with one of the defendant's attorneys, possible criminal record, unemployment, "general instability," lying on juror questionnaire, solicitor struck juror earlier in the week, juror lived near defendant, solicitor struck because lived in high crime area; trouble with abstract thinking; lacked an understanding of the court process; her husband had been arrested, "disinterested in court proceedings," solicitor tried two men for murder with same last name as juror, juror seemed in a hurry and impatient to leave, and juror's husband employed at a business that was involved in a lot of court cases.

⁵ These materials are under seal at the Charleston County Clerk of Court's Office.

The lesson here is that a solicitor need only recite one of these “sufficient reasons” and he or she can survive a *Batson* challenge.

These “educational” materials are similar to the ones that have been in circulation in South Carolina since at least 2001 and reveal a conscious awareness of striking persons on the basis of race. Under Juror Selection Strategy and Preparation, is the following:

When evaluating prospective jurors, one must keep in mind that *Batson* limits striking prospective jurors based on race and gender. Therefore race/ gender would never be proper reasons to strike a juror. **Race or gender may be one consideration for wishing to strike; however, to prevent a *Batson* motion another valid reason must be evident.**

2001 TSRP Training Greenville—Jury Selection in DUI Cases (Weston) (emphasis added).

In other words, solicitors in South Carolina are taught that race and gender may, in fact, be the reason why you want to remove a juror, but you need to make sure you can provide another reason, too, to avoid getting caught. *Cf. Hernandez v. New York*, 500 U.S. 352, 371 (1991) (“[A] race-neutral reason for a peremptory challenge means a reason other than race.”). This information to solicitors—that race or gender *may* be a consideration for wishing to strike—is unequivocally a violation of *Batson*. *Georgia v. McCollum*, 505 U.S.42, 44 (1992) (“[T]his Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause.”). This educational material simply fails to acknowledge that consideration of race and gender is categorically prohibited in the exercise of peremptory challenges. Instead, this educational material informs South Carolina solicitors that they “may” use gender and race, but that they also need

another reason so they can survive a *Batson* challenge (“to prevent a *Batson* motion”). Conspicuously lacking is any statement affirming the rights of all persons to participate in civic society, or affirmation that using these forbidden bases is, in fact, racial and gender discrimination. This is the material that this solicitor, as well as all other solicitors in this state, use to train young solicitors, and it is unconstitutional.

Young solicitors are also taught how to find bases for removing jurors which evidences a strong suspicion regarding these necessary participants in our criminal justice system:

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

Verbal clues also reveal information about a juror . . . Does he sound intelligent, sarcastic, etc.? *Does he choose words which distinguish and distance himself from certain ethnic or racial groups?*

2001 TSRP Training Greenville—Jury Selection in DUI Cases (emphasis added)⁶

⁶ See also 2002 TSRP Training Florence—Jury Selection; 2002 TSRP Training Greenwood (District 2)—Jury Selection. In fact, for the Greenwood training, it appears that assistant solicitors were given an exercise in striking jurors based on their gender, race, age, and profession, E-17, based on a hypothetical “white female,” 53, named “Ima Drunkdriver” being represented by famed African-American attorney, Johnny Cochran. See also 2003 TSRP Training Columbia—Jury Selection in DUI Cases; 2003 TSRP Training Greenville—Jury Selection in DUI Cases; 2003 TSRP Training Myrtle Beach—Jury Selection

Again, the training materials provided to all young assistant solicitors overtly acknowledges the role that race plays in the selection of jurors in this State as they are literally taught to evaluate the words a prospective juror uses and how that interplays with that juror's ethnic or racial identity. What these materials show is that solicitors are being taught, in a systematic way, how to engage in purposeful discrimination without getting caught. This material teaches South Carolina solicitors to use racial and ethnic identity as a legitimate basis to exercise peremptory challenges, and it violates *Batson*. Again, absent from these educational materials is any acknowledgement of the harm caused by exercising strikes in a racially discriminatory manner.

As part of the Prosecution Deskbook, young solicitors are taught the “procedure” for preparing for jury selection. It advises getting a copy of the jury panel list, and listing their places of employment, education level, marital status, and number of children. Then, they run rap sheets on each juror. Solicitors are to then encourage law enforcement officers, victims and witnesses to review the list and to be present during jury qualification to see if they can give a specific reason why a particular person should not be seated on the jury. Then, they are to keep a record of which jurors were picked on previous juries, and whether those trials resulted in guilty verdicts which “*can be used as a neutral reason for a strike in a Batson motion.*”

in DUI Cases; 2004 TSRP Training Charleston—Jury Selection in DUI Cases; 2004 TSRP Training Columbia HP—Jury Selection in DUI Cases; 2005 TSRP Training Charleston—Jury Selection Batson; 2005 TSRP Training Columbia—Jury Selection in DUI Cases.

Again, these educational materials show a consciousness of being able to “give a reason” if they are suspected of using the impermissible bases of race and gender to exclude otherwise qualified jurors from the venire. The lesson here is not to make peremptory challenges on bases other than race and gender, but to make those illegal strikes without getting caught. The Deskbook advises that when jurors approach the bench to disclose personal information, that information can be used as “ammunition” for peremptory challenges.

The materials provided by the Prosecution Coordination Commission pursuant to Mr. Dickerson’s FOIA request also illustrate that at least since 2009, solicitors attending the yearly “Prosecution Bootcamp” have been provided with “Appendix C” which provides young prosecutors with a list of 12 “Race-Neutral Reasons for Excluding a Juror.” Young solicitors are also provided with “Appendix D,” a jury strike sheet that indicates that solicitors should be tracking both the race and gender of potential jurors evidencing a race and gender consciousness that solicitors are being taught to consider as they exercise peremptory challenges.

In Chapter 6 of the Prosecution Deskbook, that has been in existence since at least 2006, solicitors are helpfully provided with a list of “sufficient reasons” for striking jurors that includes: lack of employment or place or type of employment, relationship with law enforcement, knowledge of and association with the defendant, past prosecution by that particular solicitor’s office, possible criminal record, prior jury service, recipient of prior strike in another trial, demeanor, (which includes: apparent disinterest, appeared to be slow, appeared to be too intelligent, vacillated

in response to *voir dire* questions, trouble with abstract thinking and lacking in understanding of court process), third party's decision to strike if that person's clear and reasonably specific reason is provided, being late for jury duty, "general instability," youth, inappropriate dress all week, acquaintance with one of the attorneys of the principal in the case where the defendant was on trial for accessory before the fact of murder. The Prosecutor's Deskbook provides a veritable roadmap for solicitors wishing to use the impermissible bases of gender and race to exclude qualified jurors without getting caught with a *Batson* challenge.

In May 2010, two elected solicitors gave a presentation on Jury Selection in Capital Cases in which they indicated that the television shows jurors watch may indicate their fitness for serving on a capital jury. Prosecutors are taught to "pay special attention to activities and causes the juror chooses to participate in" (emphasis in original). A screenshot shows:

What's your favorite tv show?

- SpongeBob SquarePants
- CSI, Law & Order, etc.
- Discovery Channel
- Bill O'Reilly
- Sanford & Son
- C-SPAN
- Golden Girls
- Sopranos

- “I refuse to answer. What kind of court is this?”

It is not hard to see that this “educational” program is teaching solicitors in capital cases to use race and gender proxies to remove jurors. What does it matter that a particular juror enjoys Sanford & Son or Golden Girls? What legal relevance could that possibly have for a juror’s fitness to sit on a capital trial? These two solicitors were clearly attempting to illustrate to other solicitors that they can use these ostensibly “neutral” bases to choose jurors without explicitly using race or gender. Again, this is a violation of *Batson* and is unconstitutional.

It is relevant to Dickerson’s claim that the solicitor violated *Batson* in his capital trial that the umbrella organization for solicitors in this state has, for years, been teaching new and young solicitors how to violate *Batson* without getting caught. Indeed, there does not appear to be any focus on the harm such violations have—on the excluded jurors themselves, or for the integrity of the judicial system—much less on defendants’ rights. Instead, they are taught that they, in fact, *can* use race and gender (so long as they have another reason, too) and moreover, that race and ethnicity are relevant considerations in deciding on jury strikes. This violates the clear holding of a long line of United States Supreme Court cases that insist, unambiguously, that race and gender are improper bases upon which to exercise peremptory challenges. See *Batson v. Kentucky*, 476 U.S. 79 (1986); *Georgia v. McCollum*, 505 U.S. 42 (1992); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) *Miller-El v. Cockrell*, 537 U.S. 322 (2003) *Miller-El v. Dretke*, 545 U.S. 231 (2005) and *Snyder v. Louisiana*, 552 U.S. 472 (2008).

D. The Michigan State University Study

On August 29, 2017, Professors Barbara O'Brien and Catherine Grosso published their Second Amended Report on Jury Selection Study. App. 7362. The report, which included all 20 cases that were suitable for inclusion because there exist jury selection transcripts and information relating to the race of the jurors, found a pattern of race-based strikes on the part of the solicitor. In its summary of findings, the authors concluded:

In every analysis that we performed race was a significant factor in prosecutorial decisions to exercise peremptory challenges in jury selection in these proceedings. Regardless of how one looks at the data, a robust and substantial disparity in the exercise of prosecutorial strikes against black venire members compared to others persists.

A statistically significant disparity persists at a magnitude of more than five to one whether calculated by looking at all strike decisions pooled across cases (a disparity of 5.4 to 1, 37.8/7.0), or by comparing the mean strike rates for each case (a disparity of 5.6 to 1, 339/6.1).

The effect of race was statistically significant across analyses. Thus, for each of these analyses, the chances that we would see a disparity of that magnitude in a race-neutral jury selection are slight. The robustness of our findings of racial disparities across a variety of analyses provides powerful evidence that race was a substantial factor in prosecutorial strike decisions in the 20 proceedings in Charleston County.

App. 7369.

The authors of the study also indicated they thought that race was a factor in the solicitor's use of peremptory challenges in William Dickerson's capital case. App. 6774-75. At the hearing on October 23, 2017, Dr. O'Brien discussed the disparities present in Mr. Dickerson's specific case:

Q: And do you recall what the racial disparity was in William Dickerson's specific case?

A: I believe that it was, I will check my notes here, 11.1 to 1.

Q: So 11.1 to 1. And, again, could you just sort of flesh that out? I mean, what exactly does that mean?

A: Well, that's an extremely large disparity by any standard. In simplest terms, it simply means that black potential jurors were struck at 11.1 times the rate that white potential jurors were struck. So if you think of it as like a roulette table, you had a certain number that-- forgive me, I'm not a gambler, but you had a certain number that the ball landed on 11 times as often as another, that would be pretty strange.

Q: And would you bet on that number?

A: I would.

App. 7326-27.

Dr. O'Brien also testified that she believed the racial disparities observed in William Dickerson's jury selection supported an inference of intentional discrimination on the part of the solicitor. App. 7337.

Based on the abundant empirical evidence uncovered by PCR counsel during the pendency of this case, this Court should find that two African-American jurors were improperly removed from William Dickerson's venire by the solicitor.

The Solicitor in William Dickerson's case improperly used race as a basis to remove qualified African-Americans from his venire. This conduct violates *Batson*, and Dickerson is entitled to a new sentencing proceeding. Additionally, to the extent that trial counsel should have more vigorously argued this motion by insisting on a comparative juror analysis, and by obtaining the criminal records of the potential jurors, he rendered ineffective assistance of counsel. Also, had trial counsel

undertaken the investigation into the solicitor's jury selection history and related relevant investigation, as current counsel undertook during the course of the post-conviction proceedings, he could have more fully argued the violation to the trial court judge. Trial counsel's failures on these points rendered his performance ineffective, and William Dickerson was prejudiced by his substandard performance because two otherwise qualified jurors were struck from his venire.

The PCR court erred when it failed to consider evidence presented at the PCR hearing in assessing the merits of his claim regarding trial counsel ineffectiveness related to the *Batson*. Counsel submits that all evidence is relevant to the claim, including materials that counsel obtained relating to events that occurred after Dickerson's trial and Jelal Beyah's 2004 trial. *Batson v. Kentucky*, 476 U.S. 79 (1986) (urging consideration of "any relevant circumstances"). The court's analysis in this order resembles the pre-*Batson* analysis articulated in *Swain v. Alabama*, 380 U.S. 202 (1965) which was expressly overruled by *Batson*. App. 9334-9338.

The PCR court additionally erred when it relies on *Thompson v. Aiken*, 281 S.C. 239, 315 S.E.2d 110 (1984), a pre-*Batson* case, in finding that statistics are not relevant to Dickerson's *Batson* claim. App. 9356-9359.

Counsel also submits the PCR court erred for faulting counsel for not asking Solicitor Wilson her reasons for conducting the strikes in the manner that she did, and its finding that "Applicant likewise had every opportunity to ask the Solicitor the

basis for her use of peremptory strikes at Applicant's trial and to call the jurors about potential undisclosed histories. Applicant chose not to." App. 9342, n. 16. First of all, the PCR court overlooked the protracted litigation in this case for counsel to even obtain the information it needed to conduct the MSU study. As the PCR Court should have recalled, the Solicitor's Office, Charleston County's legal office, the Attorney General's Office, and the Prosecution Coordination Commission all sought to prevent counsel for obtaining any of the criminal history records, any of the Prosecution coordination materials, and refused to disclose Solicitor Wilson's prior trials. It was not until Solicitor Wilson accused counsel of "cherry-picking" the cases for inclusion in the MSU study at the hearing in May 2016 did this Court order Solicitor Wilson to provide these cases for inclusion in the study. Also, as Solicitor Wilson confirmed at the hearing, she refused to speak with counsel about these issues. Also, at the time Solicitor Wilson was deposed, it was before counsel had identified a potential *Batson* issue in this case. The PCR court simply overlooked the extended litigation the parties engaged in to even be able to raise this claim to the court.

Because there has been discrimination in the selection of William Dickerson's capital jury, his sentence must be reversed. *Whitus v. Georgia*, 385 U.S. 545 (1967), *Hernandez v. Texas*, 347 U.S. 475 (1954); *Patton v. Mississippi*, 332 U.S. 463 (1947).

II. PCR CLAIMS RELATED TO SENTENCING

William Dickerson raised a number of claims related to the sentencing in his case. For purposes of clarity, these claims are addressed in this section of the briefing. The following claims are addressed below.

- 3) Trial counsel rendered ineffective assistance of counsel when they failed to uncover and present evidence of Applicant's significant neurological deficits and when that evidence would have been highly mitigating.
- 4) Trial counsel rendered ineffective assistance of counsel by failing to renew his objection when Cedrick Davis, William Dickerson's former probation agent, testified that Dickerson stated he wished he had shot the cop.
- 5) Trial counsel rendered ineffective assistance of counsel by failing to object to the state's closing argument that diluted the jurors' sense of responsibility in rendering a possible death verdict.
- 6) Trial Counsel's cumulative errors during the sentencing phase of William Dickerson's capital trial require this Court to order a new sentencing hearing.
- 7) Appellate counsel rendered ineffective assistance of counsel for failing to present, for appellate review, defense counsel's objections to the admission of photographs [State's Trial Exhibits] 141, 153, 160, 161, 162, 166, 171, 172, 173, 177, 178, 181, 184, 335, and 336.
- 8) Appellate counsel rendered ineffective assistance of counsel for failing to present, for appellate review, defense counsel's objection to the solicitor's questioning of Dr. Phillips about whether William Dickerson "knew right from wrong" at the time of the killing.

Relevant Mitigation Facts Presented at Trial

During the penalty phase of William Dickerson's trial, the prosecution called two correctional officers—Lester Williams and Michael Huggins—to testify about an assault incident at the Charleston County Detention Center. App. 4026-4048. Trial counsel responded by calling witnesses to demonstrate William Dickerson's adaptability to incarceration. Five Charleston County Correctional Officers testified about their interactions with Dickerson. Joseph Ladson described William as quiet, civil, and cooperative. App. 4146-4150. John Hewett described William as a cooperative, "mild mannered inmate" who could be a calming influence on younger

inmates. Mr. Hewitt explained there were several occasions when a new inmate caused problems, and William would talk to that inmate about doing the right thing. App. 4151- 4153. Stacy Simmons described William as “quiet and laid back” and observed William help other inmates by providing soap and shampoo. App. 4154-55. Curtis Hood described William as “respectful,” “helpful,” a “[v]ery calm, person,” and a “good inmate” with “no odd behavior” and a “nice” temperament that could “calm” younger inmates. App. 4156-4159. David Gadeic described William as “respectful,” “a calm, cool, collected-type person,” and an easy person to be around.” He also observed William calm younger inmates. App. 4160-4162.

James Aiken, an expert in risk assessment and inmate adjustment,⁷ reviewed William’s confinement records from the Department of Juvenile Justice, the Department of Corrections, and the Charleston County Detention Center. Mr. Aiken opined that William “can be managed in a confinement setting for the remainder of his life without risk of harm to staff, inmates, or the general community. Mr. Aiken opined the incident at the Charleston County Detention Center was an “aberration” for William that “didn’t fit the behavior pattern for Mr. Dickerson in all the years he was incarcerated.” App. 4168-4177.

⁷ Mr. Aiken has an undergraduate degree from Benedict College. He has a master’s degree from the University of South Carolina. He was a warden and regional deputy administration for the South Carolina Department of Corrections, the Corrections Commissioner for Indiana, and the Director of Corrections for the United States Virgin Islands. He has consulted with the United States Department of Justice. App. 4163-68.

Marjorie Hammock, a social worker,⁸ reviewed William's school records, medical records, psychiatric records, and juvenile records. She interviewed William's mother, grandmother, two of his maternal aunts, and Jerome Fludd, the father of William's half-brother, Armon Dickerson. App. 4375. Ms. Hammock's testimony outlined William's social history. She testified William was born prematurely, and weighed about three pounds. William's father, William O. Dickerson, Sr.,⁹ physically abused William's Mother, Sandra Fokes,¹⁰ during her pregnancy. According to Ms. Hammock, physical abuse during pregnancy effects "overall physical development" and "impacts negatively" on the mother-child relationship. William stayed in the hospital for the first two months of his life. At William's first physical check-up, Sandra was unable to provide William's developmental history, raising concerns about Sandra's "ability and willingness to care for" William. During the periods of time when William, Sr. was in the home, he continued to abuse Sandra. Victims of

⁸ Ms. Hammock has a master's degree in social work. She spent fifteen years as the Director of Social Work for the South Carolina Department of Corrections. She also has experience working for child protective services, providing assessment intervention and treatment in private psychiatric facilities, and in private practice. She has testified as an expert in Circuit Court and Family Court. App. 4369-72.

⁹ William, Sr. was extremely violent and was incarcerated for assault and battery, armed robbery, and murder during most of William's life. App. 4379-80. He died in prison.

¹⁰ Sandra did not cooperate with Ms. Hammock. Sandra claimed William "had been a problem all [of] his life" and "interfered with her joy." Sandra was worried Ms. Hammock would paint her "in a negative light." App. 4383-84.

abuse are unable to care for their children, resulting in neglect of the children by that parent. App. 4376-80, 4385.

When Jerome Fludd moved into the house, Sandra and William were living in “deplorable conditions,” without heat. Rats ran up and down the walls. Jerome renovated the interior of the house while he lived there. Jerome moved out after Armon was born. Sandra treated Armon better than she treated William—likely because William reminded Sandra of his father, William, Sr. According to Ms. Hammock, rejection by a primary care giver “interferes with normal healthy development of relationships with others and it makes for a lack of trust in other people.” Ms. Hammock testified that, after William, Sr. was out of the home, Sandra was abusive towards William. Jerome Fludd heard Sandra tell William, “You’re no good, like your father” and, “You’re not going to turn out well.” Jerome witnessed Sandra punch William in the head and beat his chest with a belt, resulting in scaring. Other family members witnessed Sandra throw things at William, some of which also left scars. Sandra forced William to leave the house naked when he was ten years old. Sandra explained that, because she had bought William’s clothes, they were “her” clothes to do with as she wished. App. 4384-93.

Ms. Hammock summarized William’s childhood psychiatric hospitalizations. Shortly after Sandra put him out of the house without his clothing, William was admitted to the Medical University of South Carolina (“MUSC”) for major depression, at age eleven. Sandra reported William was performing poorly in the sixth grade,

running away from home (almost always to his grandmother's house),¹¹ and displaying oppositional behavior. William reported "that he was extremely unhappy," "felt that he was in physical harm because [Sandra] was very aggressive," was getting "poor sleep," had a "limited appetite," "felt hopeless, and had suicidal ideations. William's general functioning score was 45, on a scale of zero to 100, "which is pretty low." When Sandra was in the room, the MUSC doctors described William as a "very sad young man," with sloped shoulders," "glaz[ing]downward," with a "barely audible" voice. Once Sandra left the room, William's "demeanor changed" but his sadness and hopelessness remained. During this same period of time, Ms. Hammock noted that Williams school records reflect dropping grades and attendance issues but the behavior issues were not present at school. During this period of his life, William was not using alcohol or drugs. App. 4393-99.

After MUSC, William was admitted to the William S. Hall Psychiatric Institute ("WSHPI") following a suicide threat. William threatened suicide when he was sitting on a window sill and threatened to jump. He had run away from home for the tenth time. Doctors reported William was withdrawn, discouraged, and wished he was dead. Doctors documented a mark and tenderness on William's chest from where Sandra beat William with a belt. The discharge summary describes Sandra as "a single mother who has limited education and economic support and is overwhelmed by lack of parenting abilities." According to Ms. Hammock, William's lack of

¹¹ There's no reports of William misbehaving at his grandmother's house, which he considers a safe place. App. 4402.

behavioral problems at school and at his grandmother's home confirms an issue in Sandra's home and suggested the need for intervention. On June 10, 1988, the WSHPI discharged William to one of his aunts and notified the Department of Social Services ("DSS") about the possibility of abuse and neglect. Within four days, William was back at the WSHPI after threatening to stab himself with a knife. William told the doctors he would not be able to function in Sandra's home. The doctors recommended William not be returned to Sandra. On July 13, 1988, William was placed at Tara Hall, a residential facility for young children. App. 4399-4413.

William stayed at Tara Hall for two and one-half years where he celebrated his twelfth and thirteenth birthdays. William kept a positive attitude and did not have any behavioral problems until about two weeks before William was returned to Sandra. During a weekend home visit, William ran away. He was also disruptive in class on one occasion. Ms. Hammock testified this "acting out" was evidence William still would not be able to function in his mother's home. The Tara Hall doctors noted William to be "an exceptional young man" when he is not in his mother's environment. App. 4413-17.

Dr. Johnnie K. Rivers, a child psychologist,¹² saw William in individual and small group counseling sessions at Tara Hall. She recalled William doing well at

¹² Dr. Rivers received her Ph.D. from the University of Mississippi in 1981 in educational counseling and psychology. From 1980-87, Dr. Rivers was a counseling psychologist in an alcohol and drug treatment program in Arkansas. From 1987-89, she was a forensic psychologist at the Arkansas State Hospital. In South Carolina, she was a Psychologist III at Waccamaw Mental Health, where she consulted with Tara Hall. She retired from the Darlington School District as a School Psychologist III. App. 4311-13.

Tara Hall. After William became intoxicated during a home visit, towards the end of William's commitment to Tara Hall, Dr. Rivers conducted a clinical interview and psychological evaluation. From the Tara Hall admission records, Dr. Rivers was aware of William's suicide attempts and alleged behavioral problems in Sandra's home that were not present when William was at school. According to Dr. Rivers, when explosive behavior is directed towards one parent, but not towards other authority figures, there is a likely probability of sexual molestation or another traumatic occurrence. Dr. Rivers performed an IQ test that showed William's full-scale IQ to be 90. App. 4313-17, 4321-29.

After returning home from Tara Hall, and when William was in the ninth grade (at age fifteen), Sandra filed a petition with the Family Court alleging William was ungovernable. Sandra had remarried. William was not welcome in Sandra's home, effectively making him homeless. During the Family Court process, Sandra failed to appear for court and missed an appointment for William to receive an evaluation. According to Ms. Hammock, this is more evidence of Sandra failing to provide William with a consistent, stable support structure. The Family Court eventually placed William at the Marine Institute where William "received an award for good behavior."¹³ According to Ms. Hammock, the structure of the Marine

¹³ Charleston County Assistant Public Defender Mary Ellen Rankin represented William in Family Court. Initially, the Family Court placed William on probation for possession of a stolen vehicle. William successfully completed his probation, which include getting a job and paying restitution. Sandra subsequently alleged William was ungovernable. Ms. Rankin testified that Sandra did not keep William's appointment for a psychological evaluation and missed court on two occasions, resulting in the Family Court

Institute, combined with “positive expectations,” resulted in William’s positive behavior. App. 4417-20.

Ms. Hammock provided very limited information about William’s early childhood exposure to lead. She testified:

[O]ver a period of four or five years, William—as did his brother—were in an environment where the lead levels were extremely high, according to DHEC’s records. Armon, the younger brother, was tested regularly, with abnormally high lead levels. William is only tested once, and that’s later on in the period; however, William is in this home where – and evidentially it was quite frequent in parts of this town. Again, there were repeated, uh, citations in terms the physical home and the mother in asked to make sure that they are in a safer environment so that that doesn’t happen.

Ms. Hammock testified that “eating actual lead” damages physical and emotional development and can cause “organic brain damage.” She then testified, “[Sandra] was unable to place her children in a lead-free environment. So, again, it’s an exposure that we don’t know. *We know that it actually occurred but we don’t know the results of that.*” Children eat lead because “[i]t is sweet,” similar to “getting holed on chocolate.” Ms. Hammock was aware that DHEC “and others” have taken “steps to try to reduce lead levels in certain housing projects or homes.” Ms. Hammock’s entire testimony about William’s early childhood exposure to lead was less than three pages. App. 4381-83. On cross-examination, Ms. Hammock acknowledged that William’s sole lead test was lower than Armon’s lead level and did not lead to further DHEC observation. App. 4427-29.

appointing a guardian *ad litem* for William. Ms. Rankin also confirmed the Family Court placed William at the Marine Institute. App. 4357-65.

Dr. Alexander Morton, an expert in Psychopharmacology,¹⁴ reviewed William's social history records. William's substance abuse started with alcohol at age thirteen. By age fourteen, William drank three to four quarts of alcohol at a time. On weekends, William drank up to seven quarts of alcohol at a time. Later on, William started smoking marijuana and formed a daily habit. William used cocaine regularly for a period of time but quit because of the cost. By age eighteen, William was using cocaine on a regular basis. William also used Ecstasy. App. 4221-22.

Dr. Morton testified William was genetically predisposed to drug addiction. William's father was an alcoholic and drug addict. A paternal uncle had a drug addiction. Sandra used alcohol, marijuana, and cocaine. Dr. Morton believed William Sr.'s abuse of Sandra while she was pregnant with William and William's premature birth were developmental factors that contributed to William's drug addiction. The drug selling and use in William's neighborhood were environmental factors that contributed to William's drug addiction. William Sr.'s incarceration and Sandra's abuse of William were additional "stressors" Dr. Morton believes contributed to William's drug addiction. App. 4269-72.

Dr. Morton charted Williams' drug use from February 1, 2006 though the crimes on March 7-8, 2006. Multiple people observed William smoking blunts, which

¹⁴ Dr. Morton received a B.S. in Pharmacy from the university of North Carolina in Chapel Hill in 1972. He received a doctorate in Pharmacy from the University of Tennessee in 1975. He completed a residency at the University of California in 1976. He is board certified in the psychiatric pharmacy practice. He is retired from MUSC but continues to consult at MUSC. Before he retired, Dr. Morton treated patients. App. 4214-19.

are cigarettes containing marijuana and cocaine. William was also using Ecstasy on March 6, 2006. William experienced a “tremendous change in behavior” that is best described as “bizarre behavior.” People described William as “loud and argumentative,” “amped up,” “acting weird,” “flipped out,” “out of his mind,” “totally someone else,” “talking fast,” “jittery,” and “very hyper.” William lost weight, was unshaven, “look[ed] bad,” and acted erratic. William was paranoid, believing people were after him and trying to kill him. William was delusional, even hallucinating, about what he saw in a video on his cellphone. Dr. Morton opined “these symptoms are consistent with excessive cocaine consumption” and evidence that William’s physical and mental state was deteriorating because of his cocaine use. He experienced visual hallucinations. He was disorganized and aggressive. William’s symptoms were consistent with a psychotic state. Dr. Morton explained “sensitization.” For cocaine addicts, the psychosis becomes more severe and occurs more rapidly with continued use of cocaine. App. 4222-30, 4288-89.

Dr. Morton opined that, at the time of the crimes, William suffered from a mental or emotional disturbance, his mental state was substantially impaired, and his ability to appreciate the criminality of his conduct and concern his conduct to the requirements of law was substantially impaired. App. 4282-84.

Dr. Robert Phillips, a forensic psychiatrist,¹⁵ met with William on three occasions and reviewed his social history records. From reviewing records of the three

¹⁵ Dr. Phillips received a B.S. from Boston College. He received a master’s degree in education planning and public policy from Harvard University. He received a Ph.D. in science education from the University of Iowa. He received a M.D. from the Mayo Clinic.

psychiatric hospitalizations, Dr. Phillips observed William was raised in a “toxic emotional environment,” both inside the home and in a neighborhood “rife with alcohol, drug use and criminal conduct.” Dr. Phillips explained major depression is a “profoundly significant illness in children.” According to Dr. Phillips, suicidal thoughts at eleven years of age are significant. William experienced “significant psychological stressors” at home that interfered with his normal development, caused him not to want to be at home, and led to suicidal thoughts. Like Ms. Hammock, Dr. Phillips found it significant that William did not have behavioral problems outside Sandra’s home. Dr. Phillips opined the “problem is not only with William’s difficulty of adapting to the environment” in Sandra’s home, but also with Sandra “adapting to her role as the primary care giver” and in dealing with William in “the appropriate parental way.” Sandra forcing William to go outside naked was “profoundly disruptive and very psychologically traumatic” because, at age eleven, when “body image is a very important thing,” children are “conscious of their developing sexually.” App. 4480-92.

By his late teens, William was engaging “in activities that are counterproductive to his functioning well in society.” Tara Hall’s structure enabled William engage in activities normal for his age. In the structured environment of the Department of Juvenile Justice William did not create problems. Sandra’s home

He has served as the Director of Forensic Services for the State of Connecticut, the Chief Executive Officer if the Whiting Forensic Institute (a state maximum security hospital), Deputy Medical Director of the American Psychiatric Association, consulted for the United States Secrete Service. App. 4474-80.

lacked structure, and there was “ongoing emotional conflict” between William and his mother. Dr. Phillips noted that William’s substance abuse started “at around age thirteen or fourteen, not long after having left the structure of Tara Hall.” William moved from alcohol, to marijuana, to cocaine. Cocaine became William’s drug of choice, which he often used while drinking alcohol. App. 4492-97.

Dr. Phillips observed that William showed commitment to living the “straight and narrow” after spending nine years in prison. William received training as a welder. When he did not get a job as a welder, William got a job at a restaurant and later a hotel. Lacking transportation, William walked to work every day. The “strife” that existed between William and his mother continued. Sandra had remarried. If he got home from work before Sandra, William had to sit on the stoop because his mother did not allow William to have a key to the house. William returned to substance abuse. William abandoned a healthy romantic relationship and formed a relationship with Shelley Nelson, which was characterized by the constant use of marijuana and cocaine. App. 4497-99.

At the time of the crimes—March 7-8, 2006—Dr. Phillips opined William’s “heavy abuse of cocaine” developed psychotic symptoms that culminated in a diagnosis of a cocaine psychosis. William’s appearance became unkempt and disheveled because he was not “even attending to the basic functions of body hygiene.” William became paranoid, thinking someone was out to get him. William was delusional. To William, the perception of the video on the cellphone was more important than the reality of what was actually present. Because of the cocaine

psychosis, Dr. Phillips opined that, at the time of the crimes, William suffered from a mental or emotional disturbance, his mental state was substantially impaired, and his ability to appreciate the criminality of his conduct and concern his conduct to the requirements of law was substantially impaired. App. 4499-4508.

Dr. Mark Cunningham, a clinical and forensic psychologist,¹⁶ evaluated William. Dr. Cunningham testified that scientific research helps understand how someone, like William, “who became involved in delinquent behaviors as a teenager,” goes on to become “involved in criminality and substance abuse and violence as an adult.” Research also identified protective factors that “buffer” the effects of some of the risk factors. Based on the research, the United States Department of Justice developed a model to identify risk factors for children that later engage in criminal activity. App. 4537-39. Applying the Justice Department model, Dr. Cunningham testified about the risk factors present in William’s childhood.

The first set of risk factors are present from conception to age six. Of the seven factors from this age period, Dr. Cunningham saw evidence of five of those factors “with some certainty” and “some evidence” of the other two. Rather than focusing on the five “certain” risk factors, Dr. Cunningham’s focused on the other two. The first was a “minor physical abnormality that [William] only weigh[ed] three pounds, three ounces when he was born and later had some abnormal findings on EKG when he

¹⁶ Dr. Cunningham received an undergraduate degree in psychology and mass communication from Allen Christian College. He received master’s and Ph.D. degrees in clinical psychology from Oklahoma State University. He has practiced psychology for over thirty years. He is board certified in both clinical and forensic psychology. App. 4530.

was an adolescent.” Regarding the second factor—possible brain damage—Dr. Cunningham testified:

The brain damage had to do with there being— they are associated with being that premature, being that small when you are born, and also his exposure to lead in his childhood. That is not — there is no testing that was done that demonstrated brain damage, for example, in that earlier age.

App. 4539-40.

Later on, during his direct examination, Dr. Cunningham added more information about the dangers of early childhood exposure to lead:

[T]here is no safe lead level for a child to have. It is never a vitamin.

What we are talking about are increasing levels of problems that are associated with increasing levels of lead exposure that the child had.

Now when William’s blood was measured at age eleven [it] was at a nine. That doesn’t mean it wasn’t higher or lower when he was lower [sic].

You get some *implication* even with the indication that that has — this is a study that looks at the relationship between childhood lead exposure and adult crime. A blood level of nine is right here on this curve. These are odds ratios, so even with a blood level of nine the child is about forty to fifty percent more likely to end up criminality as an adult. Now, the dotted lines show you the full range of that, which is anywhere from about twice as likely down to some kids that it didn’t affect at all. The midpoint of that is about a fifty percent increased risk even at a blood level of nine.

There is also information that we have about another child in the home, his younger brother, Armon, who is about four years younger than he is. [Armon] had his blood levels measured much more systematically across his early childhood. These show his blood levels. The red dotted lines, where that ten is, right here, and you see how high Armon’s blood levels are in the same household, around the same paint chips, the same lead dust. This problem is that the paint flakes off, then it’s ground up and it’s in a dust form in those environments.

So it raises the *implication* that the blood levels that William would have had at earlier points in his childhood might have been higher, and certainly gives some confirmation to the zone of risk that he [is] living in when we talk about lead.

App. 4551, line 13 – 4553, line 11 (emphasis added). Dr. Cunningham's direct testimony about William's early childhood exposure to lead was approximately three pages.

On cross-examination, the State extensively cross-examined Dr. Cunningham about William's lead exposure. Dr. Cunningham did not conduct any tests to determine William's lead exposure or brain damage. He acknowledged William's lead level was not as elevated as Armon's lead level. He acknowledged William's blood lead level at age eleven was not elevated enough for the Center of Disease Control ("CDC") to "flag" William for further observation. He acknowledged not being aware of any information that William's blood level was ever above 10 milligrams per deciliter. App. 4581, 4584-88.

According to Dr. Cunningham, there is an additional set of risk factors to consider from age six to adolescence. He testified that William has either "all of the risk factors for delinquency and violence, or all but two depending" how you view it. According to Dr. Cunningham, the risk factors have an "additive effect," meaning "with each additional risk factor that you [add] on you're steadily increasing the percentages of the young men and women, or teens, that are going to end up in delinquency and violence and substance abuse." Of the twenty-three risk factors identified by the Justice Department, Dr. Cunningham concluded William had

“twenty or twenty-one of those, a catastrophically cumulative assortment of risk factors.” App. 4540-44.

Dr. Cunningham explained the Department of Justice model also recognizes factors that help prevent a juvenile from becoming delinquent or engaging in criminality as an adult. These preventative factors include high intelligence, social bonding with role models, healthy beliefs, clear standards for behavior, and early intervention. Although placement at Tara Hall was evidence of early intervention for William, Dr. Cunningham testified it was “too short to compensate for the risk factors that are present, particularly when he gets dropped right back into that same world again.” According to Dr. Cunningham, William had a “tremendous imbalance” between the risk factors and protective factors. This imbalance increases the likelihood that children will “make choices that that carry [them] into delinquency, criminality and drug abuse.” App. 4544-48. Dr. Cunningham summarized the risk factors he identified in William’s individual background, family and community:

- Premature birth and low birth weight, requiring William to remain in the hospital for the first two months of his life, which damages the mother-child relationship. William’s developmental delays and impulsivity can be attributed to his premature birth. App. 4549-51.
- Cognitive and neurological effects from a gunshot wound to the head in May 1996. The emergency room reported William was “intermittently inappropriate and confused, which is an indication of there being some disorientation that is occurring in response to this wounding.” App. 4553-54.
- Genetic predisposition to mental health disorders. App. 4554-55.
- Genetic predisposition to substance abuse. App. 4555.

- Witnessing and being a victim of domestic violence when William was a child. App. 4558.
- William, Sr.'s criminality and imprisonment when William was a child. App. 4558-59.
- Sandra's abuse of marijuana and cocaine when William was a child. App. 4559.
- Sandra's depression when William was an "infant, during the very critical period of bonding between mother and child," continuing later in life where doctors documented in 1988 that Sandra was "an overwhelmed single mother" reporting the same depressive symptoms as William. App. 4559-60.
- Sandra's "sequential live-in romantic partners." Family members described Sandra having "lots of boyfriends that moved in with her." "Jerome Fludd was the most enduring of those." App. 4561.
- Emotional rejection and neglect by Sandra. According to research, neglect is "more injurious to children than active abuse" in terms of outcome. App. 4561-62.
- Physical and emotional abuse by Sandra. She "hit him, cursed him, put him out naked." Sandra treated William differently than she treated Armon. According to research, children that were mistreated are "almost five times more likely to be arrested as juveniles," "twice as likely to be arrested as adults," and "three times more likely to be arrested of violence crimes as adults." App. 4562-66.
- Sandra's duplicity, meaning she complained about William's behavior but did not accept responsibility for her own actions that contributed to William's behavior. For example, she reported William as ungovernable but accepted proceeds from William selling drugs to support the household. App. 4566, 4573, 4575.
- The neighborhood William grew up in is a neighborhood of single-parent homes. Alcoholism, drug use, and prostitution were common. App. 4567.
- Community violence including hearing gunfire on a daily basis and witnessing a stabbing and armed robberies of drug dealers. Several of William's and family were victims of murder. Research shows children growing up in high-violence neighborhoods are prone to

psychological disorders, grief and loss reactions, school problems, and distorted value systems. App. 4567-69.

- Sexually traumatic exposures. Dr. Rivers strongly suspected William had been sexually molested in the home. Additionally, at age 13, William's first sexual experience was with a prostitute, after which he became "alarmed" he might have been exposed to HIV.

Dr. Cunningham agreed with Dr. Phillips that William, at the time of the crimes, experienced a cocaine induced psychosis. Dr. Cunningham opined that, at the time of the crimes, William suffered from a mental or emotional disturbance, his mental state was substantially impaired, and his ability to appreciate the criminality of his conduct and concern his conduct to the requirements of law was substantially impaired. App. 4577-78.

Relevant Mitigation Evidence Presented at the Evidentiary Hearing

Jeff Bloom, lead trial counsel, was responsible for presenting mitigation evidence during sentencing. As part of the mitigation investigation, Mr. Bloom contacted Dr. Herbert Needleman on October 11, 2007, providing him with a copy of William's 1988 blood lead level test results showing William had 9 micrograms per deciliter of lead in his blood when he was just under twelve years old. Dr. Needleman responded on October 24, 2007, noting William's lead level was high for his age and might have been higher when William was younger. In that same email, Dr. Needleman asked Mr. Bloom for more information. Mr. Bloom did not send Dr. Needleman additional information, even though William's legal team collected additional information relevant to William's early childhood exposure to lead, including Armon's blood lead level test results and information about the prevalence

of lead paint in the inner-city housing projects where William grew up in Charleston. An internal defense memorandum noted that Charleston's lead levels were medically unacceptable by 2008 standards. App. 5842-43, 5870-72; 6913-17, 6991-7003. Following up with Dr. Needleman, as he had requested, would have led to a wealth of information about the neurotoxic effects caused by lead during William's childhood.

Dr. Richard Canfield, a developmental psychologist with specialization in early childhood and infant cognitive development,¹⁷ was aware that William grew up in Charleston in an inner-city area that scientific research documented to contain housing containing lead paint. He also reviewed the laboratory report showing William had 9 micrograms per deciliter¹⁸ of lead in his blood when he was eleven years, nine months, and nine days old. App. 5451-52, 5498-60. Dr. Canfield then provided a history of lead exposure in the United States, discussed the effects of lead exposure on the brain, explained the significance of William's lead level, and projected William's lead levels when he was younger.

¹⁷ Dr. Canfield has an undergraduate degree in psychology from the University of Puget Sound and a doctorate degree in developmental psychology from the University of Denver. He completed a post-doctoral fellowship in developmental psychology in human development at Cornell University. He has studied infant and child development for over thirty years. He is a professor at Cornell University in the Division of Nutritional Sciences where he studies lead exposure, mercury toxicity, and nutritional effects on early brain and cognition in children. App. 5448-49.

¹⁸ [A] deciliter is about 20 teaspoons, and a child has about four quarts of blood." App. 5471.

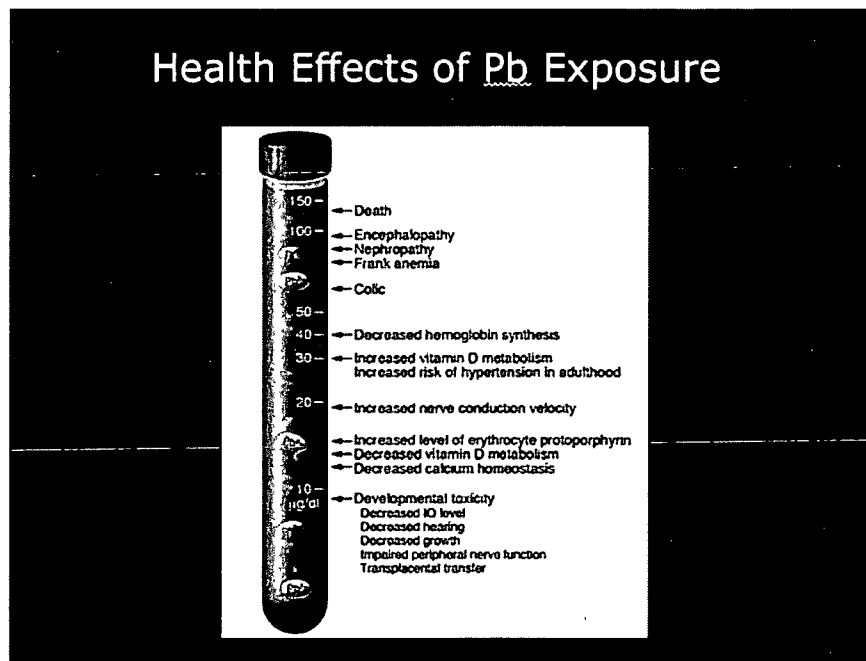
Dr. Canfield explained that lead is an element,¹⁹ so it does not degrade. Historically, two common uses of lead were in paint and as an antiknock additive in gasoline. Lead's use was banned in house paint in 1978. Lead's use in gasoline ended in 1988. Lead exposure "is still one of the most common environmental health problems in children." Lead is "often referred to as the silent villain" because children appear normal while suffering serious health and mental health consequences of lead exposure. In the United States, lead chips and lead dust from peeling and chalking paint, inside and outside homes, is the most common way children are exposed to lead. Sadly, corporations distributed child-friendly marketing material at the same time the lead industry and paint industry were "documenting lead poisoning from high-lead paint." Houses built before 1950 very likely contain "a significant amount of lead-based paint." Over time, as the paint wears, chips and dust particles fall onto the floor and ground where children contact them. When infants and toddlers first begin to crawl and walk, their hands are on the floor a lot. Outside, paint chips and dust fall around the foundation of homes where children play. Small children commonly put their fingers and objects, such as toys, in their mouths. Paint chips and dust stick to the saliva on fingers and objects. Children ingest lead when they put their fingers and objects back into their mouths. Dust particles containing lead can be inhaled. "[C]hildren absorb lead more readily than adults." At the same time, "the brain is developing its basic capacities at those ages and is most sensitive to environmental insults." App. 5454-65, 5474.

¹⁹ The chemical element symbol for lead is Pb.

Dr. Canfield explained how lead is absorbed into the body and the resulting neurotoxicity effects. When a child inhales lead, it goes into the respiratory tract where over ninety percent gets absorbed into the blood. Although the gastrointestinal tract is less efficient, ten to fifteen percent of the lead is absorbed into the blood. Though the blood, lead gets into soft tissues and bones. Most lead is stored in bones. When children grow, calcium is released from the bones. Lead is released at the same time. Lead's half-life is twenty-five days in the blood, forty-five days in the soft tissues such as kidneys, liver, and brain, and *twenty-five years* in the bones. Lead mimics "necessary minerals" such as iron and calcium. "The problem is when it gets into the cell, [lead] doesn't have the same properties as the nutrients; lead has no known nutritional value. It's only a toxin." Lead disrupts cellular metabolism in the brain, kidneys, and other tissues. The brain uses calcium as a signal to control internal processes. Children are born with more brain cells than are necessary and lose some of those brain cells growing up through a process known as programmed cell death. A high level of calcium signals the cell to start programmed cell death. Lead gets into cells because it has a similar chemical structure as calcium. Lead, however, "is 1000 times more effective than calcium at starting the programmed cell death." A small amount of lead makes "the cell think it's got enough calcium inside that it needs to engage in this programmed cell death." Lead, therefore, damages the brain by killing cells that otherwise would have survived. Lead also damages astroglial cells which produce the "fatty insulating sheaths around axons" called myelin. Lead causes demyelination which leads to less efficient processing of signals

to the brain. Lead also disrupts neurotransmitter synthesis, which is the generation of the neurotransmitters like dopamine and serotonin. Lead also affects the uptake and reuptake of these neurotransmitters. Lead, therefore, affects both the structure and neurochemistry of the brain. Lead also mimics iron, preventing iron from being absorbed into the body, resulting in iron deficiency called anemia. Dr. Cunningham noted William was treated with medication for iron deficiency. App. 5464- 5470.

Dr. Canfield charted the negative health effects of lead for children with various blood lead levels:



Applicant's Ex. 3, Slide 28.²⁰ As this chart illustrates, visible, physical symptoms begin at blood levels of 60 micrograms per deciliter with colic and upset stomach. As

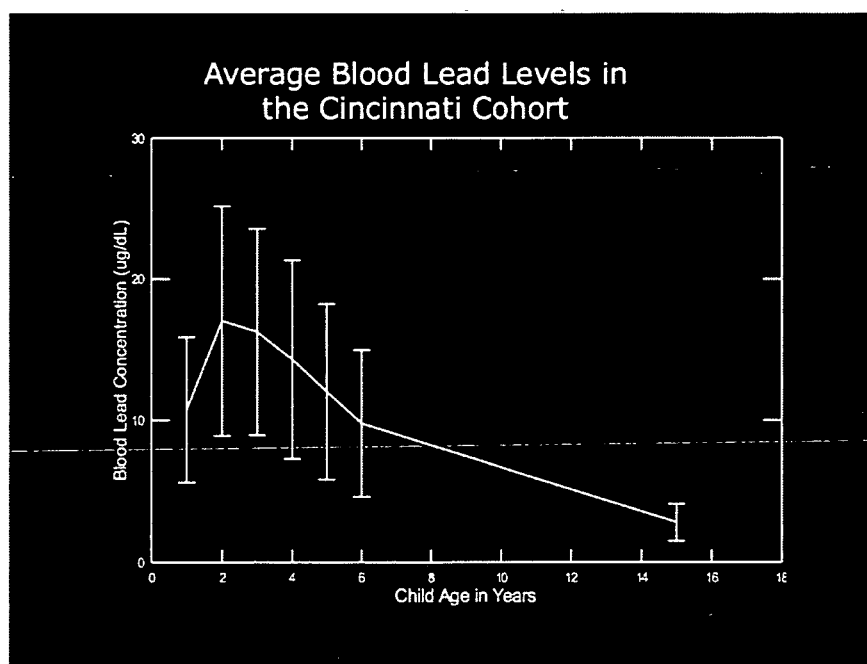
²⁰ The slide should reflect "decreased nerve conduction velocity" rather than "increased nerve conduction velocity" as lead levels approach 20 micrograms per deciliter. App. 5472-73.

lead levels approach 100 micrograms per deciliter, brain inflammation swelling damages the structure of the brain. Also at this level, the kidneys cannot absorb iron, resulting in frank anemia. Lead levels approaching 150 micrograms per deciliter can result in death. Because of these visible, physical effects, the federal government once defined elevated blood levels at 60 micrograms of lead per deciliter of blood. But, lead is the “silent villain.” At levels below 60 micrograms per deciliter, lead has dangerous effects including decreased hemoglobin synthesis, decreased nerve conduction velocity, and decreased calcium homeostasis. Dr. Canfield explained Vitamin D metabolism is decreased at and some levels between 10 and 60 micrograms per deciliter and increased at other levels. As a result of learning more about the dangers of lead exposure the federal government reduced the safe levels to 25 micrograms per deciliter by 1988 and 10 micrograms per deciliter in 1991.²¹ Below 10 micrograms per deciliter, lead causes developmental toxicity, including decreased IQ, decreased hearing, decreased growth, and impaired peripheral nerve function. Even at levels below 10 micrograms per deciliter, lead can be transferred through the placenta. App. 5471- 5476.

Dr. Canfield relied on the Cincinnati Cohort to illustrate that a child’s blood lead level “at one age is a good predictor of their lead level at previous ages or subsequent ages.” The Cincinnati Cohort was conducted in the late 1970s, which is

²¹ According to Dr. Canfield, the research “that forced the standard to be reduced from 25 to 10 [micrograms per deciliter] was published in 1979.” Prior to 2003, a number of published studies convinced most researches “that the level of 10 micrograms per deciliter was [] too high.” In 2012, the government adopted 5 micrograms per deciliter as the standard for and elevated blood level of lead. App. 5475-76.

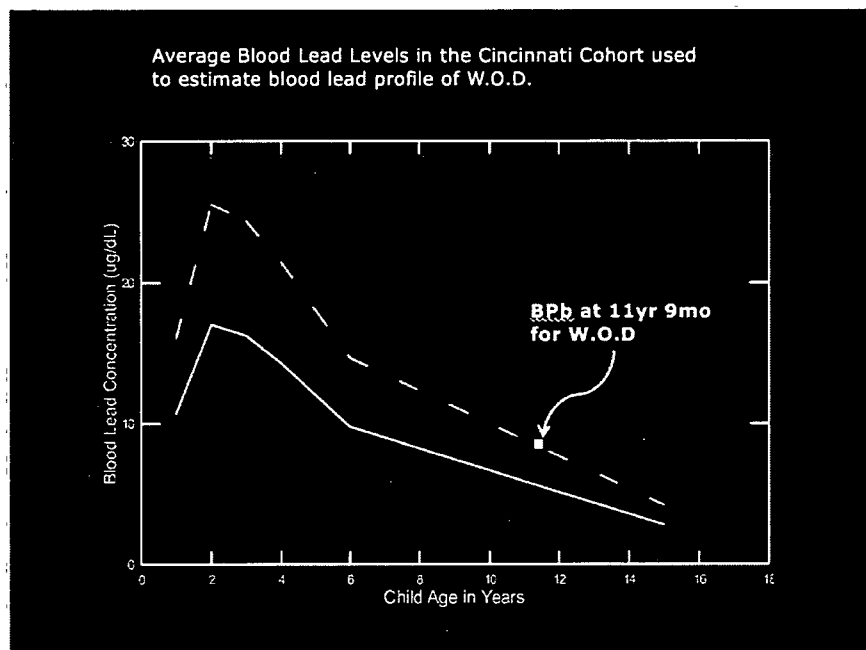
the same time period as when William was growing up in Charleston.” Additionally, inner-city Cincinnati is very similar to inner-city Charleston in terms of its “housing stock.” Researchers measured the blood levels of children from birth through age fifteen. Blood lead levels peak “somewhere between eighteen and thirty-six months,” when children are “engaged in a high degree of hand-to-mouth behavior” and ingesting lead particles and dust. App. 5478- 5481. Lead blood levels decrease over time as children grow older. Dr. Canfield charted how a child’s blood level rises and falls with age:



Applicant’s Ex. 3, Slide 43. Researchers documented this same pattern in studies conducted in Rochester, New York,²² Boston, Massachusetts, Cleveland, Ohio, Port Pirie, Australia, and the former Yugoslavia. App. 5482-88.

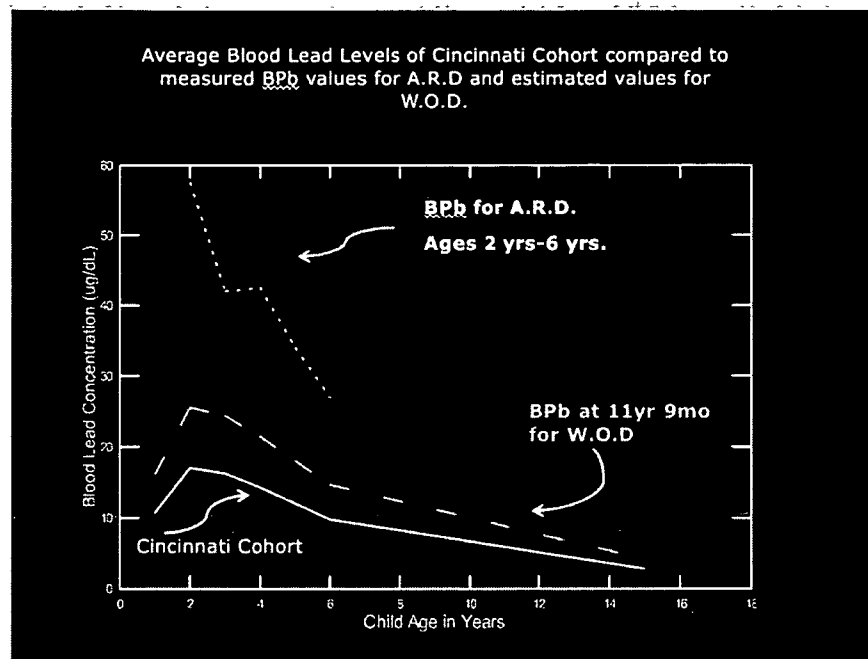
²² Dr. Canfield was the lead researcher in the Rochester Cohort, which focused exposure to lead at lower levels in children from six months to six years old. The results were published in the *New England Journal of Medicine* in 2003. App. 5482, 5511- 5527.

Based on the research, William's blood levels would have been higher when he was eighteen to thirty-six months old. Dr. Canfield provided context for William's test results, at age eleven years, nine months revealing a blood level of 9 micrograms per deciliter, by Dr. Canfield charting William's blood levels based on these test results and the Cincinnati Cohort average:



Applicant's Ex. 3, Slide 45; December 7, 2015 Hearing, pp. 48-52; Applicant's Ex. 1.

Armon's lead blood levels were measured multiple times between ages two and six, and his blood lead levels followed the Cincinnati Cohort pattern. App. 5492-5502. Dr. Canfield charted the Cincinnati Cohort average, Armon's test results, and William's projected blood lead levels based on his test result:



Applicant's Ex. 3, Slide 46.

Dr. Marlyne Israelian, a clinical psychologist who specializes in developmental neuropsychology,²³ reviewed William's social history records, which were significant for early childhood exposure to lead and lead neurotoxicity. William was born two months prematurely, weighing slightly over three pounds. Dr. Israelian identified three reasons why children are born prematurely: (1) maternal factors, (2) genetic factors, and (3) environmental factors. "[I]nteractions between those factors" can be significant. Dr. Israelian identified Sandra's poverty and William, Sr.'s domestic violence as maternal factors that might cause a premature birth. Dr. Israelian was aware that William grew up in an inner-city neighborhood with houses containing

²³ Dr. Israelian received a B.S. from McGill University in Canada. She received a master's degree and Ph.D. from Emory University. She completed an internship at the University of Alabama, Birmingham focused on developmental neuropsychology. She completed a fellowship at the Regent Center for Learning Disorders at Georgia State University. She has a private practice and teaches at Emory University. App. 5578- 85.

lead paint. During pregnancy, lead stored in bones leeches into the blood. According to Dr. Israelian, lead in Sandra's system is a possible cause of William's premature birth. App. 5593- 5604

During William's early life, Sandra was abusive. Sandra called William "Little Man" and told him he was like his father and would never amount to anything. William always felt "on edge." When William misbehaved, Sandra's punishment was disproportionate to his offense. Armon received better treatment. Sandra would punish William, instead of Armon, when Armon misbehaved. Nevertheless, during these early years, Jerome Fludd was a stabilizing influence. Jerome was a "buffer" between Sandra and William. During grades one through five, William was an average student. He was reading at a grade-appropriate level, and there was no indication William was a behavioral problem. App. 5604-07.

Things changed dramatically for William in the sixth grade. Dr. Israelian testified about the May 12, 1988 MUSC psychiatric evaluation and the two subsequent WSHPI involuntary hospitalizations. William was depressed, intensely sad, withdrawn from friends, and impulsive. He reported decreased appetite, weight loss, and reduced sleep. William had difficulty regulating his behavior. William had run away from home on multiple occasions and threatened suicide by threatening to fall off a ledge where he was sitting. Dr. Israelian testified these symptoms are evidence of lead toxicity. The WSHPI conducted the test that established William blood lead level to be 9 micrograms per deciliter at age eleven years, nine months. Additionally, William's serum iron level was low, and doctors prescribed ferrous oxide

to treat anemia. Dr. Israelian agreed with Dr. Canfield that anemia is caused by lead toxicity. William had a “significantly low thyroid stimulating hormone level.” Dr. Israelian explained lead interferes with thyroid functioning. Doctors additionally diagnosed William with major depression and began treating him with antidepressant medication. Because of evidence of child abuse, doctors recommended William not be returned to Sandra’s custody. During the WSHPI hospitalizations, William worked on himself and participated in therapy. App. 5607- 5622.

After the WSHPI, William was placed at Tara Hall, where he lived and went to school for two years. Dr. Israelian noted that William’s emotions and behavior were well-regulated at Tara Hall. Dr. Israelian testified about the psychological evaluation conducted by Dr. Rivers dated May 18, 1990, just prior to William’s release from Tara Hall back to Sandra’s custody. William was “tense” and “anxious” during the evaluation. William put forth good effort but struggled on certain questions. Dr. Israelian attributed this struggling to attention problems, which are “hallmarks of lead neurotoxicity.” William obtained a full-scale IQ score of 90 on the Wechsler Intelligence Scale for Children, Revised. Dr. Israelian reviewed the subtest results of William’s IQ tests. Each subtest “is designed to assess a different cognitive faculty.” By reviewing the subtest results, Dr. Israelian identified patterns of strengths and weaknesses. Dr. Israelian testified William’s weaknesses correspond to the occipital lobe, which is one of the areas of the brain affected by lead neurotoxicity. App. 5623- 5635.

Dr. Israelian opined that the records from MUSC, WSHPI, and Tara Hall contained evidence that William's brain was damaged by lead neurotoxicity. In addition to the damage to the occipital lobe, William's impulsivity and inability to regulate his mood is evidence of executive dysfunction. Executive functioning is the "purview of the frontal lobes" that are responsible for planning, strategy, organization, self-control, self-monitoring, and mental flexibility. Dr. Israelian was able to draw these conclusions independent from the neuropsychological testing she conducted. App. 5635- 41.

Tara Hall discharged William on June 1, 1990, and he returned to Sandra's home. William entered the eighth grade and failed. After completing summer school, William was socially promoted to the ninth grade. William was unable to perform in the ninth grade and dropped out of school. Dr. Israelian attributed William's inability to perform in the eighth and ninth grade to William's brain damage. Tara Hall followed a sequential model of teaching that "works well with people that have problems with executive functioning." Tara Hall actually predicted William would not do well in the public schools that do not follow the sequential model. Dr. Israelian agreed the structure of Tara Hall helped William make decisions. App. 5637- 45.

After he was released from Tara Hall, William became involved with the Department of Youth Services ("DYS").²⁴ The Family Court Judge ordered a psychological evaluation for William at the Reception and Evaluation Center.

²⁴ The South Carolina Department of Youth Services ("DYS") is the predecessor for the South Carolina Department of Juvenile Justice ("DJJ").

William obtained a full-scale IQ of 83 on the Wechsler Adult Intelligence Scale. Because she did not have the subtest scores, Dr. Israelian was not able to compare William's patterns of strengths and weaknesses that she saw in the Tara Hall testing. Overall the DYS testing revealed William to be impulsive, has poor planning abilities, lacks the ability to consider the consequences of his behavior, and to be emotionally inaccessible. Dr. Israelian testified these symptoms of executive dysfunction, emotional dysregulation, impulsivity, and lack of judgment are consistent with lead neurotoxicity. App. 5645- 5656.

Dr. Israelian was aware of William's drug use, which began after he was released from Tara Hall. William reacted to cocaine differently than his peers. For example, William could take cocaine and still fall asleep. Dr. Israelian attributes William's unusual reaction to cocaine to the toxic impact of lead on brain structure, brain function, and the brain's neurochemicals. Ordinarily, cocaine causes a release of dopamine. Lead interferes with neurotransmitter functioning, storage, and reception. Research demonstrates that people with early exposure to lead need more cocaine to get the same response (or high) as someone without the early exposure to lead. App. 5656-5658; 5709-5712. Once again, Dr. Israelian was able to draw these conclusions independent from the neuropsychological testing she conducted.

Dr. Israelian summarized the neuropsychological testing she conducted with William over two days. She administered the Test for Memory Malingering ("TOMM") and the Victoria Symptom Validity Test ("VSVT") to determine whether William was putting forth his best effort. William's results on these tests indicated

he was “very invested in doing well.” In fact, William got frustrated at times, when he did not do well, because the testing exposed his weaknesses. App. 5665- 5671.

Dr. Israelian administered the Wechsler Adult Intelligence Scale, Fourth Edition (“WAIS-IV”). William obtained a full-scale IQ of 83. On the subtests, William’s pattern of strengths and weaknesses was seminal to the Tara Hall IQ subtests, with the exception of two subtest scores that reflect “the ability to sustain attention and concentration and exert mental control,” which were “slightly lower.” App. 5671- 75.

To assess academic achievement, Dr. Israelian administered the Wide Range Achievement Test, Version IV (“WRAT-IV”) and the Woodcock-Johnson Test of Achievement, Fourth Edition. These tests revealed William has difficulty with reading and writing. His ability to read and write fluently and quickly was at a third-grade level. Overall, William operates at a sixth-to-seventh grade level, with a strength when he is given a full sentence or paragraph to read and sufficient time to comprehend it. Even though he has difficulty deciphering individual words, where there are enough words for context, William can extract enough meaning to operate on the level of a high school graduate. App. 5675- 80.

Dr. Israelian also administered a battery of tests that focused on different parts of William’s brain. These tests confirmed William’s strengths and weaknesses Dr. Israelian observed in the Tara Hall test results. William has deficient frontal lobe functioning based on his performance across a number of tests. The data shows “profound executive dysfunction,” which is “the purview of the frontal lobe.” William

has “dysfunction in temporal lobe functioning with respect to learning and memory.” William has deficits in phonological processing, rapid processing, and verbal fluency, which indicate damage to the left temporal and left parietal areas. William also displayed “profoundly deficient performance” of the cerebellar, which is the area beneath the brain that coordinates behavior and fine motor abilities. According to Dr. Israelian, this pattern of deficits to William’s brain is the “thumbprint” of the damage caused by lead exposure. App. 5680- 5707.

Dr. Israelian opined that, at the time of the crimes, William suffered from a mental or emotional disturbance, his mental state was substantially impaired, and his ability to appreciate the criminality of his conduct and concern his conduct to the requirements of law was substantially impaired. She also explained that William’s deficits in executive functioning and his inability to regulate his emotions contributed to the crimes. She opined that the brain damage resulting from William’s early childhood exposure to lead contributed to William’s state of mind at the time of the crimes. App. 5715- 24.

Arguments

- 3) Trial counsel rendered ineffective assistance of counsel when they failed to uncover and present evidence of Applicant’s significant neurological deficits and when that evidence would have been highly mitigating.**

As this Court recognized long ago, “capital trials today, as never before, present a myriad of complexities heretofore unknown.” *Bailey v. State*, 309 S.C. 455, 457, 424 S.E.2d 503, 505 (1992).

The attorney must be conversant with constantly *new* interpretations of constitutional law by not only the United States Supreme Court, but by

courts of all jurisdictions, both Federal and State. Moreover, in preparation for trial, he must investigate the facts and circumstances of the alleged crime with no less vigor and thoroughness than the publicly compensated solicitor, who has at his disposal the entire array of state, county, and municipal law enforcement. Dramatic technological advances, such as the science of DNA (deoxyribonucleic acid) analysis, are employed by prosecutors, requiring defense attorneys to acquire special knowledge and retain expert witnesses. . . .

While the greater demands now made upon defense attorneys in the guilt phase are severe, it is in the sentencing phase that new and different issues, heretofore unknown, are introduced as a result of recent decisions of the United States Supreme Court. For example, in today's capital trial, the defendant is entitled to produce evidence concerning his childhood and family background in mitigation of his criminal conduct, so that the jury may impose life imprisonment as an alternative to the death sentence. In preparing this evidence the attorney must employ investigators in the course of thoroughly researching the defendant's entire life.

309 S.C. at 460-61, 424 S.E.2d at 506-07. *See also State v. Haight*, 649 N.E.2d 294, 309 (Ohio Ct. App. 1994) ("Because death is unique as a penalty, more is and should be expected of attorneys who undertake the responsibility to represent individuals who face the prospect of being executed").

In determining whether trial defense counsel provided ineffective assistance of counsel, pursuant to the Sixth and Fourteenth Amendments, this Court must apply the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, the defendant "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." *Id.* at 688.

Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides.

Id. at 688-89. *See also Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (“We long have recognized that “[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable”). The Supreme Court of the United States looks to the ABA Guidelines for Appointment and Performance of Counsel in Capital Cases (“ABA Guidelines”) as evidence of the prevailing professional norms in capital cases. *See, e.g., Wiggins v. Smith*, 539 U.S. 510 (2003) and *Rompilla v. Beard*, 545 U.S. 374 (2005). The South Carolina Supreme Court “has adhered to the principles and analysis in *Wiggins* in determining whether counsel was ineffective in failing to thoroughly investigate potential guilt and penalty phase evidence.” *Council v. State*, 380 S.C. 159, 171, 670 S.E.2d 356, 362 (2008) (citing *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007), *Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006), and *Von Dohlen v. State*, 360 S.C. 598, 605, 602 S.E.2d 738, 742 (2004)). The 2003 revision of the ABA Guidelines were in effect at the time of Mr. Dickerson’s capital trial. “Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.” ABA Guideline 10.7. “The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.” ABA Guideline 10.7(2). During the penalty phase of a capital trial, counsel should select “[e]xpert and lay witness along with supporting documentation (e.g., school records, military records) to provide medical, psychological, sociological, cultural or other insights into

the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s)." ABA Guideline 10.11(F)(2).

In assessing the investigation in *Strickland*, the Court stated that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation." Any decision to halt investigation must be assessed for reasonableness. *Strickland* at 690-91. When assessing the reasonableness of an investigation, it is necessary to consider not only the evidence already known to counsel, but also whether this evidence would lead a reasonable attorney to conduct further investigation. *Wiggins*, 539 U.S. at 527. *See also Council*, 380 S.C. at 173, 670 S.E.2d at 363 ("Even the limited information obtained should have put counsel on notice that Respondents background, with additional investigation, could potentially yield powerful mitigating evidence"). Counsel need not investigate every possible line of mitigating evidence regardless of how likely that evidence would be to strengthen a mitigation case; however, a limited investigation must be supported by "reasonable professional judgments." *Wiggins*, 539 U.S. at 533.

Here, trial counsel unreasonably limited the investigation into Mr. Dickerson's early childhood exposure to lead. Dr. Needleman informed trial counsel that Mr. Dickerson's blood lead level of 9 micrograms per deciliter was high for his age and might have been higher when Mr. Dickerson was younger. Dr. Needleman asked trial counsel for more information, which was never provided even though it was uncovered during trial counsel's investigation. Information about lead levels in the

inner-city neighborhoods where Mr. Dickerson grew up confirmed his ongoing exposure. Armon's ongoing exposure to lead was confirmed by his blood lead levels measured over time. With Mr. Dickerson's blood lead level and Armon's blood lead level, Dr. Canfield was able to plot Mr. Dickerson's blood lead level throughout his childhood. Dr. Canfield's calculations were based on results of scientific studies. Dr. Israelian identified evidence of Mr. Dickerson's early childhood exposure to lead in his social history records. The subtest results of Mr. Dickerson's Tara Hall IQ test allowed Dr. Israelian to identify patterns of strengths and weaknesses that were consistent with the neurotoxic effects of lead exposure. Trial counsel never provided these subtest results to a neuropsychologist for interpretation. App. 5850-51. Dr. Israelian's neuropsychological testing provided further evidence that Mr. Dickerson's brain was damaged by lead exposure. The permanent brain damage resulting from lead exposure also explains why Mr. Dickerson used cocaine in such large amounts. Because of changes in his brain chemistry, greater amounts of cocaine are required for Mr. Dickerson to achieve a "high," thereby contributing to his cocaine psychosis at the time of the crimes. Trial counsel was deficient for failing to further investigate Mr. Dickerson's early childhood exposure to lead. *See Ard v. Catoe*, 372 S.C. at 332, 642 S.E.2d at 597 ("We find respondent proved that trial counsel should have further investigated and more thoroughly challenged the gunshot residue evidence."). *See also McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354 (2008) (counsel rendered ineffective assistance when she failed to investigate medical evidence contradicting the State's experts' testimony on the link between cocaine and stillbirth); *Reeves v.*

State, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015) (finding trial counsel ineffective for not consulting expert to refute state’s medical evidence).

Once the defendant asserting ineffective assistance of counsel has established counsel’s failure to comply with the prevailing professional norms, he must affirmatively prove that this deficiency has prejudiced him. Specifically:

The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694. The totality of the evidence must be considered in deciding whether the defendant was prejudiced by counsel’s errors. All mitigating evidence that would have been presented, but for counsel’s errors, should be weighed against the aggravating evidence presented at trial to determine whether the sentencer would have concluded a death sentence was not warranted. *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998). However, the test is not whether the sentencer could have heard all available mitigating evidence and still decided on a death sentence. In other words, “[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” *Strickland*, 466 U.S. at 694. Thus, “a defendant need *not* show that counsel’s deficient conduct more likely than not altered the outcome in the case.” *Id.* at 693 (emphasis added).

In determining prejudice, the Court must determine whether the undiscovered “mitigating evidence, taken as a whole, might well have influenced the jury’s appraisal” of the defendant’s culpability. *Rompilla*, 545 U.S. at 376 (quoting *Wiggins*,

539 U.S. at 538). “Mitigating evidence unrelated to dangerousness may alter the jury’s selection of penalty, even if it does not undermine or rebut the prosecution’s death-eligibility case.” *Williams*, 529 U.S. at 398. *See, e.g., Council*, 380 S.C. at 176, 670 S.E.2d at 365 (finding prejudice despite “overwhelming evidence” of guilt and six statutory aggravating factors because “there was very strong mitigating evidence to be weighed against the aggravating circumstances” that “may well have influenced the jury’s assessment of . . . culpability”). Prejudice is established if “there is a reasonable probability that *at least one juror* would have struck a different balance” but for counsel’s errors. *Wiggins*, 539 U.S. at 537 (emphasis added).

Here, even though Ms. Hammock and Dr. Cunningham provided limited testimony about William’s blood lead level of 9 micrograms per deciliter at twelve years of age, the prosecution effectively neutralized that testimony because that reading at that age was not high enough to trigger further governmental monitoring. The jurors never learned that scientific research demonstrates that Mr. Dickerson’s blood lead level was substantially higher when he was younger. The jurors did not learn about the scientific research in existence at the time of Mr. Dickerson’s trial documented the neurotoxic effects of lead at levels below 10 micrograms per deciliter. The jurors additionally did not learn about how lead exposure damages the portions of the brain that control executive functioning, including the ability to control impulses and consider the consequences of conduct. Mr. Dickerson’s early childhood exposure to lead provided context for his excessive cocaine use, thereby providing context to Mr. Dickerson’s cocaine psychosis at the time of the crimes. The neurotoxic

effects of early childhood exposure to lead would have provided the jurors with the information necessary to impose a life sentence. *See Strickland, Wiggins, Rompilla, Council, and Ard, supra.*

The PCR court's order discussing Mr. Dickerson's early childhood exposure to lead does not dispute—but often ignores—the scientific evidence presented during the PCR hearing. The introductory section to this portion of the order makes two fundamental errors that influence the entire discussion of this claim. First, the order, App. 9365, incorrectly concluded “the PCR presentation was largely cumulative to the substance of the mitigation presented at trial.” As discussed in this section and in Mr. Dickerson's post-hearing brief the presentation of mitigation evidence at trial did not diagnosis or conclusively establish Mr. Dickerson's early childhood exposure to lead.

Second, the order, at App. 9367-68, incorrectly concluded Mr. Dickerson's trial counsel, Jeffery Bloom, “reasonably decided not to more heavily base his mitigation presentation on childhood exposure to lead because Bloom could not uncover or produce enough evidence to make a more persuasive presentation that was presented on this subject.” This conclusion is controlled by an error of law. Under the first prong of *Strickland v. Washington*, the defendant “must show that counsel's representation fell below an objective standard of reasonableness,” which must be judged under “prevailing professional norms.” 466 U.S. 668, 688 (1984). “The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance

remains simply reasonableness under prevailing professional norms.” *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (internal quotations omitted). “If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy.” *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015). *And see Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). “Decisions made in ignorance of relevant, available information cannot be characterized as strategic.” *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014). As discussed, trial counsel abandoned the investigation into Mr. Dickerson’s early childhood exposure to lead without providing all the relevant information to an expert for review. Trial counsel also unreasonably limited their investigation by not having a neuropsychologist review the medical and psychological records that were available.

The order at App. 9371 additionally errs by relying on Mr. Dickerson’s lack of cooperation with Dr. Robert Deysach, a neuropsychologist retained by trial counsel because Mr. Dickerson purportedly was not interested in helping build a mitigation case. Reliance on this fact is a “red herring” controlled by an error of law. Under the A.B.A Guidelines 10.7, trial counsel had a duty to conduct a mitigation investigation regardless of their client’s wishes. Under A.B.A Guideline 10.11, trial counsel had an obligation to provide all of the material collected during the investigation to the appropriate expert. All of Dr. Canfield’s PCR testimony was based on his review of the records available to trial counsel and reliance on scientific research existing at the time of Mr. Dickerson’s trial. His opinion was not impacted by Mr. Dickerson’s

cooperation or lack of cooperation. Much of Dr. Marlyne Israelian's testimony relied on records available to trial counsel that were not provided to Dr. Deysach for review. Trial counsel's failure to discover and present this information at trial resulted from their failure to provide this information to their expert witnesses, which was an unreasonable limitation of the mitigation investigation. *See Frierbruger, Ingle, and Weik, supra.*

The PCR court erred when it overlooked the scientific method and accepted scientific principles. *See, e.g., Hall v. Florida*, 572 U.S. ___, 134 S. Ct. 1986, 1995 (2014) (mandating states use "established medical practice" to determine whether a person is ineligible for the death penalty because of an intellectual disability).²⁵ The PCR court ignored multiple scientific studies—conducted throughout our Nation and the world—documenting children's blood lead levels at different ages and different stages of the developmental and growth process. Based on these studies, focusing on the results of the Cincinnati cohort, Dr. Canfield plotted Mr. Dickerson's blood levels throughout his childhood.

The record does not support the order's conclusion, at App. 9374, "Canfield's larger focus on concrete blood lead levels and correlative evidence of neurotoxicity did not relate so much to [Mr. Dickerson] as it did to his younger brother Armon

²⁵ By citing *Hall*, Mr. Dickerson is not arguing he has an intellectual disability. "The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show" that this penalty is not appropriate to them. *Hall*, 134 S.Ct. at 2001. Ignoring scientific principles "contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world." *Id.*

Dickerson.” As stated above, based on these studies, focusing on the results of the Cincinnati cohort, Dr. Canfield plotted Mr. Dickerson’s blood levels throughout his childhood. Armon Dickerson’s blood lead levels, however, provides evidence confirming the reliability of Dr. Canfield’s testimony about Mr. Dickerson’s blood lead levels.

The order, at App. 9375-76, states, “Canfield laid a comprehensive presentation regarding lead’s absorbency into young bones and the negative effects of lead absorption. But this presentation does not make it more likely than not that, had it been given at trial, [Mr. Dickerson’s] jury would have returned an alternative sentencing recommendation.” This conclusion overlooks, not only the absence of such a presentation at Mr. Dickerson’s jury trial, but also Dr. Canfield’s testimony, based on the scientific method, about Mr. Dickerson’s blood lead levels and Dr. Israelian’s neuropsychiatric testing of Mr. Dickerson and her review of his childhood medical and psychological records.

This Court’s order, at App. 9376-77, accepts the accuracy of Dr. Israelian’s testimony but, at App. 9377-78, additionally concludes:

Israelian’s testimony fails to demonstrate that [Mr. Dickerson] suffered prejudice by the failure to have a neuropsychologist, or a developmental neuropsychologist, testify at trial. Bloom established at PCR that [Mr. Dickerson] would not comply with the neuropsychological testing required to garner this testimony. Without assistance by his client, this type of testimony was not at Bloom’s disposal.

This conclusion overlooked significant portions of Dr. Israelian’s testimony that was based on reviewing medical and psychological records that trial counsel never provided to Dr. Deysach. *See Frierbruger, Ingle, and Weik, supra.* Dr.

Isrealian testified that these records contained a wealth of evidence documenting Mr. Dickerson's early childhood exposure to lead.

Trial counsel was deficient for not fully investigating Mr. Dickerson's early childhood exposure to lead and presenting that evidence during sentencing. Mr. Dickerson was prejudiced because the neurotoxic effect of early childhood exposure to lead would have provided the jurors with information leading to the imposition of a life sentence. This Court, therefore, should order a new sentencing hearing.

3) Trial counsel rendered ineffective assistance of counsel by failing to renew his objection when Cededrick Davis, William Dickerson's former probation agent, testified that Dickerson stated he wished he had shot the cop.

Cededrick Davis, an Administrative Hearing Officer for the South Carolina Department of Probation, Parole, and Pardon Services, presided over a hearing on June 4, 1996 to consider whether Mr. Dickerson violated his parole regarding the incident where Mr. Dickerson was shot by a police officer.²⁶ Mr. Dickerson was present at the hearing but did not have a right to appointed counsel. According to Ms. Davis, Mr. Dickerson "denied that he pointed a gun at the police officers, but he did admit to being in possession of the gun and repeatedly during the course of the hearing he advised that he wished he had shot the officers." Ms. Davis included this statement in her confidential, summary of the hearing. This statement was not included in the order of the Parole Board revoking Mr. Dickerson's parole. Trial counsel objected during an *in camera* hearing and argued, "[I]t's almost like a secret

²⁶ A tape recording of the hearing does not exist. App. 3990.

finding that she makes that only the Probation and Parole Board gets.” Mr. Dickerson did not have an opportunity to rebut or correct the statement. Trial counsel compared Ms. Davis’ report to the undisclosed presentencing report in *Gardner v. Florida*, 430 U.S. 349 (1977) (denial of due process for sentencing judge to receive presentencing report not provided to the defendant and counsel). Trial counsel argued the statement was obtained in violation of the Fifth Amendment right against self-incrimination because Mr. Dickerson was advised only that any statements could be used by the Parole Board. Trial counsel further argued that the statement was obtained in violation of Mr. Dickerson’s Sixth Amendment right to counsel. The trial judge ruled “the probative value outweighs the prejudice.” App. 3980-91.

After this hearing, the State called a firearms identification expert. App. 3995-4008. When the State called Ms. Davis to testify before the jurors, trial counsel did not renew the objection. App. 4008-4016.

At the evidentiary hearing, trial counsel explained the probation report was labeled confidential, meaning Mr. Dickerson and his attorney in 1996 neither saw the report nor had an opportunity to respond to it. Trial counsel believed Ms. Davis’ testimony was “devastating.” Mr. Bloom listed this testimony as a potential appellate issue in his post-trial memorandum to the Appellate Defense Division. Trial counsel mistakenly believed he did not need to renew his objection when the State called Ms. Davis as a witness. App. 5832-38.

“To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court.” *State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005). This Court has explained,

In most cases, [m]aking a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced. However, where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection.

State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) (internal citations and quotations omitted).

Trial counsel was deficient for not renewing the objection. Had trial counsel renewed this objection, then the South Carolina Supreme Court would have considered this issue and ordered a new sentencing hearing. *See Strickland, Evitts, Smith, Sutherland, and Patrick, supra*. This Court should order a new sentencing hearing.

- 4) Trial counsel rendered ineffective assistance of counsel by failing to object to the state’s closing argument that diluted the jurors’ sense of responsibility in rendering a possible death verdict.**

During its closing argument, the State argued:

Let me talk to you about mercy....They may talk to you about mercy, they may ask you to give William Dickerson his life as an act of mercy. It is natural to want to be merciful, it is human nature but mercy is not automatic. If it were automatic, we would not even have the death penalty. Mercy is something that you receive that you do deserve.

App. 4637-38.

So why is the death penalty the appropriate penalty in this case? It is a legitimate question. Quite simply, there are people in this world that are so evil, that are so mean, that are so depraved that they just do not deserve to continue to walk among the living-- no matter who confined they may be.

The law limits the State's right to seek the death penalty to just a very murders involving aggravating circumstances. The death penalty is for the worst of the worse, for those whose conduct is so over the top that it sets them apart from ever the rest of the criminals.

App. 4642.

Trial counsel failed to object at trial, and he did not offer any strategic reason for this failure. As he acknowledged at the evidentiary hearing on February 2, 2015, it was "perhaps misleading to tell the jury that the narrowing has already been done so that his case, among all cases, is proper for the death penalty." App. 5814. He should have objected at the time of the offending argument, and his failure to do so rendered his performance ineffective.

In determining whether trial counsel provided ineffective assistance of counsel, pursuant to the Sixth and Fourteenth Amendments, this Court must apply the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, the defendant "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." *Id.* at 688. The *Strickland* standard is satisfied if a petitioner establishes both that his attorney's representation fell below an objective standard of reasonableness, *id.*, and that the petitioner was prejudiced by his attorney's substandard performance, *id.* at 692. *See also Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374

(2005); *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam); *Sears v. Upton*, 130 S. Ct. 3259 (2010) (per curiam); *Winston v. Pearson*, 683 F.3d 489 (4th Cir. 2012); *Elmore v. Ozmint*, 661 F.3d 783 (4th Cir. 2011); *Gray v. Branker*, 529 F.3d 220 (4th Cir. 2008).

Violations of the Fourteenth Amendment occur when improper prosecutorial closing arguments “so infect[] the trial with unfairness as to make the resulting [sentence] a denial of due process.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *see also Romano v. Oklahoma*, 512 U.S. 1, 12 (1994); *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). To determine whether a solicitor’s remarks so infected a proceeding with unfairness as to make the jury’s verdict a violation of due process, “examination of the entire proceedings” is necessary. *Donnelly*, 416 U.S. at 643; *see also Darden*, 477 U.S. at 179 (remarks must be placed “in context”). The United States Supreme Court has made clear that within the universe of improper arguments, some are more likely to infect a proceeding with unfairness than others. One focus of concern is whether “the prosecutor’s remarks so prejudiced a specific right . . . as to amount to a denial of that right.” *Donnelly*, 416 U.S. at 643. In a parallel vein, the Court has warned against prosecutorial misconduct that “implicate[s] other specific [constitutional] rights of the accused.” *Darden*, 477 U.S. at 182; *see also Donnelly*, 416 U.S. at 643 (noting that when specific guarantees are involved, the Court “has taken special care to assure that the prosecutorial conduct in no way impermissibly infringes on them”).

In addition, frequency and repetition of comments are relevant considerations. Jurors are less likely to be improperly influenced by “isolated passages” than by repeated remarks or themes. *Donnelly*, 416 U.S. at 646. The length of remarks is relevant for the same reason. *Id.* at 647 (noting that impropriety, if any, was limited to “a few brief sentences”). Thus, remarks that are both extended and repeated are especially likely to produce fundamental unfairness. Whether the jury is “affirmatively misled” is also of importance. *See Romano*, 512 U.S. at 9. A jury may be misled “regarding its role in the sentencing process,” *id.*, or it may be misled when the solicitor “manipulate[s] or misstate[s] the evidence.” *Darden*, 477 U.S. at 182.

Moreover, the Eighth Amendment is violated when the decision to impose the death penalty is made in an arbitrary manner, or under the influence of a “whim, passion, prejudice, or mistake.” *Caldwell v. Mississippi*, 472 U.S. 320, 329 n.2 (1985) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O’Connor, J., concurring)). This Court has repeatedly 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.” *Burkhart*, 371 S.C. at 488, 640 S.E.2d at 453; *see also State v. Bowman*, 366 S.C. 485, 498-499, 623 S.E.2d 378, 385 (2005), *abrogated on other grounds by State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006). Accordingly, evidence regarding general prison conditions “is not relevant to the question of whether a defendant should be sentenced to death or life imprisonment.” *Burkhart*, 371 S.C. at 488, 640 S.E.2d at 453 (describing the Court’s holding in *Bowman*). It is also improper for a solicitor to inject his personal opinion regarding the jury’s sentencing decision. *Northcutt*, 372

S.C. at 223, 641 S.E.2d at 881 (reversing a death sentence where the solicitor “ignored our precedent which rebukes such an imposition of the solicitor’s personal belief”); *Thompson v. Aiken*, 281 S.C. 239, 315 S.E.2d 110 (1984) (finding prejudicial error where solicitor’s argument put his personal opinion before the jury regarding the death penalty); *State v. Smart*, 278 S.C. 515, 299 S.E.2d 686 (1982) (reversing a death sentence because the solicitor stated he expected the death penalty), *overruled on other grounds by Torrence*, 305 S.C. 45, 506 S.E.2d 315.

Trial counsel's failure to object to the Solicitor's improper closing argument, which diluted the jury's sense of responsibility in imposing a death sentence, denied Petitioner his right to due process. Respectfully, this Court should grant William Dickerson’s petition for writ of certiorari.

- 5) Appellate counsel rendered ineffective assistance of counsel for failing to present, for appellate review, defense counsel’s objections to the admission of photographs [State’s Trial Exhibits] 141, 153, 160, 161, 162, 166, 171, 172, 173, 177, 178, 181, 184, 335, and 336.**

Dr. Cynthia Schandl, a forensic pathologist, testified about the cause and manner of death, and the defense did not challenge her description of Mr. Roper’s injuries. R. App. 3098-3171. During sentencing, the Solicitor announced her intention to introduce autopsy photographs by recalling Dr. Schandl, and the trial judge convened an *in camera* hearing. After declaring State’s Exhibits 141, 153, 160, 161, 162, 166, 171, 172, 173, 177, 178, 181, 184, 335, and 336 admissible, the trial judge allowed the defense to place objections on the record. Mr. Bloom explained admitting fifteen enlarged color photographs is excessive, “more prejudicial than probative,” and intended to inflame the passion and prejudice of the jurors. Counsel

argued “the photographs of the rectal area and the scrotum are particularly prejudicial and offensive.” Solicitor Wilson acknowledged the photograph of the scrotum (State’s Ex. 184) is “an ugly picture.” The trial judge described the photograph of the anal abscess (State’s Ex. 141) as “extremely inflammatory in many ways” but probative of torture. Mr. Bloom pointed out the defense had not challenged Dr. Schandl’s testimony about the injuries. He also reminded the trial judge that Dr. Schandl “was able to use black-and-white charts and graphs and drawings during her [earlier] testimony to describe the injuries.” The trial judge overruled the objection.

R. 3819-34. Dr. Schandl testified about the photographs:

- State’s Ex. 153 shows abrasions to the chest. App. 4115-17.
- State’s Ex. 336 shows multiple abrasions on the back resulting from blunt trauma. App. 4117.
- State’s Ex. 160 shows “sharp injuries” to the right arm and abrasions to the right abdomen with hemorrhage to the underlying tissue. App. 4117-18.
- State’s Ex. 161 shows soft tissue swelling and bruising to the left wrist. Bones in the right wrist and hand were broken. App. 4118.
- State’s Ex. 162 shows a laceration and several abrasions to the inner, upper left arm. App. 4118.
- State’s Ex. 171 shows lacerations or punctures to the back of the right hand and fractures to the right index finger, pinkie, and thumb. App. 4118-19.
- State’s Ex. 172 shows a puncture wound and several abrasions to the back of the left hand. The entire hand is swollen. This picture also depicts the fractured right wrist. App. 4119.
- State’s 166 shows several abrasion injuries, several sharp injuries, and a fractured tibia bone. App. 4120.

- State's Ex. 173 shows a skin avulsion where the skin is pulled away on the fingers of the right hand. App. 4121.
- State's Ex. 335 shows twenty lacerations to the forehead and the bridge of the nose. There were multiple fractures to frontal skull and nose. The photo also showed fifteen abrasions to the lower face around the cheeks and nose, a fractured nose, two missing teeth with recent bleeding into the sockets, swelling of the lips, eyes, and forehead. App. 4121-4125.
- State's Ex. 181, taken after Dr. Schandl shaved Mr. Roper's head, shows multiple lacerations, abrasions, and punctures. App. 4125-27.
- State's Ex. 178, taken after Dr. Schandl shaved Mr. Roper's head, shows abrasions, contusions, and a puncture wound to the ear. App. 4127-29.
- State Ex. 177, shows lacerations and abrasions to the head, neck, and ear, fractures to the skull, Adam's apple, and hyoid bone, and a flattening of the brow ridge and nasal bone. App. 4129-30.
- State's Ex. 184 shows a burn to the scrotum. App. 4130-31.
- State's Ex. 141 shows the anal abscess. App. 4131-34.

The defense did not cross-examine Dr. Schandl. App. 4136.

At the evidentiary hearing, Mr. Bloom recalled these photographs were "horrendous." He included this issue in his memorandum to the Appellate Defense Division identifying issues for appeal. App. 6954-55; Applicant's Ex. 15. Lead appellate counsel Dudek did not offer any reason for not including this issue in the appeal, although he acknowledged being "a little jaded" from seeing horrible photographs in capital cases throughout his career. App. 5880, 5882-5884.

"Photographs which are calculated to arouse the sympathies or prejudices of the jury should be excluded from the guilt phase of a capital case if they are irrelevant or not substantially necessary to show material facts or conditions." *State v.*

Kornahrens, 290 S.C. 281, 288, 350 S.E.2d 180, 185 (1986) (citing *State v. Middleton*, 288 S.C. 21, 339 S.E.2d 692 (1986)). Use of horrendous photographs during the sentencing phase of a capital trial is “an area of growing concern” for our Supreme Court that has strongly encourage[d] all solicitors to refrain from pushing the envelope.” *State v. Torres*, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010). Here, the defense never challenged Dr. Schandl’s description of the injuries. Dr. Schandl was able to use diagrams to explain the jurors the nature and extent of Mr. Roper’s numerous injuries. These photographs, accordingly, did not establish any material facts or conditions and should have been excluded from evidence.

Trial counsel was deficient for not briefing the admissibility of these photographs during the direct appeal. Prejudice resulted because the photographs were so inflammatory to the jurors. Due process requires a defendant receive effective assistance of counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Effectiveness of appellate counsel is judged under *Strickland*. *Smith v. Robbins*, 528 U.S. 259 (2000). Appellate counsel is ineffective for not raising a meritorious issue entitling an appellant to relief. *See, e.g., Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999); *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002). This Court should grant Dickerson’s petition for a writ of certiorari.

- 6) Appellate counsel rendered ineffective assistance of counsel for failing to present, for appellate review, defense counsel’s objection to the solicitor’s questioning of Dr. Phillips about whether William Dickerson “knew right from wrong” at the time of the killing.**

During cross-examination and over trial counsel’s objection, the Solicitor asked Dr. Phillips whether Mr. Dickerson knew his conduct at the time of the crimes was

wrong. App. 4511-14. Mr. Bloom testified this issue should have been included in Mr. Dickerson's direct appeal. App. 6955, Applicant's Ex. 15. Mr. Dudek acknowledged the Solicitor's questioning of Dr. Phillips mixed the *McNaughton* standard with the standard for mitigation evidence in capital cases. December 8, 2015 Hearing, p. 444.

The *McNaughton* standard is codified *S.C. Code Ann.* § 17-24-10(1), which provides:

It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong.

If this standard is satisfied, the accused is adjudicated not guilty by reason of insanity and committed to the Department of Mental Health for therapeutic treatment. *S.C. Code Ann.* §§ 17-24-40 to 60. Our state's criminal procedures also provides:

A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17-24-10(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.

S.C. Code Ann. § 17-24-20(1). An accused adjudicated guilty but mentally ill "must be sentenced by the trial judge as provided by law for a defendant found guilty," and provided treatment in the Department of Corrections. *S.C. Code Ann.* § 17-24-70. If raised by an accused, the court submits these issues to the jurors for consideration of guilt and innocence. *S.C. Code Ann.* § 17-24-30. Our state's procedure expressly provides, "The verdict of guilty but mentally ill may be rendered only during the

phase of a trial which determines guilt or innocence and is not a form of verdict which may be rendered in the penalty phase.” *S.C. Code Ann.* § 17-24-20(C).

In a capital trial, *S.C. Code Ann.* § 16-3-20(C)(b) requires the jurors to consider the following mitigating circumstances when such evidence is presented at trial:

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(7) The age or mentality of the defendant at the time of the crime.

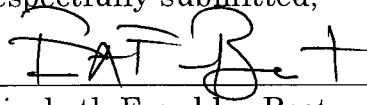
William Dickerson presented evidence supporting all three of these mitigation circumstances. Whether Mr. Dickerson “knew right from wrong” is not probative of any of these mitigating circumstances and should have been excluded. Rule 401 and 402, SCRE. Additionally, evidence should be excluded when “its probative value is substantially outweighed by the danger of unfair prejudice,” confuses of the issues, or misleads the jury.” Rule 403, SCRE. It is well-settled that the trial court can limit expert testimony that is irrelevant or when the “limited probative value is substantially outweighed by the prejudicial effect the evidence could have on the jury. *State v. Irick*, 344 S.C. 460, 465, 545 S.E.2d 282, 285 (2001).

Appellate counsel is ineffective for not raising a meritorious issue entitling an appellant to relief. *See Strickland, Evitts, Smith, Sutherland, and Patrick, supra*. This Court should grant Dickerson’s petition for a writ of certiorari.

CONCLUSION

This Court should grant the writ.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "E. Franklin-Best", written over a horizontal line.

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April 1, 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY S.C. SUPREME COURT
Court of Common Pleas

The Honorable G. Thomas Cooper, Circuit Court Judge

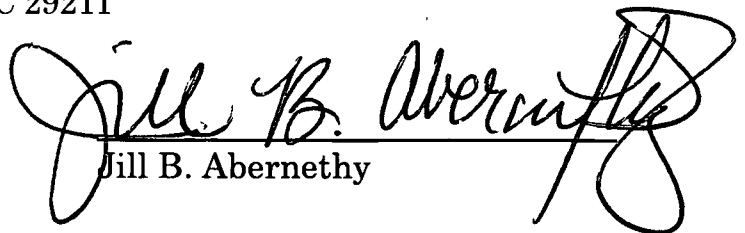
Appeal Case No. 2018-001499

William O. Dickerson Petitioner,
v.
State of South Carolina. Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Petitioner's Petition for Writ of Certiorari and Appendix was served by hand-delivery, on this 1st day of April, 2019, upon the following:

Melody Brown
SC Attorney General's Office
PO Box 11549
Columbia, SC 29211


Jill B. Abernethy