

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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

Appellate Case No. 2018-001499

WILLIAM O. DICKERSON PETITIONER,

v.

STATE OF SOUTH CAROLINA.....RESPONDENT.

APPENDIX
VOLUME 20 OF 22

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1 Q. Are you familiar with the official
2 position of the Catholic Church concerning
3 the death penalty?

4 A. Yes.

5 Q. What is that?

6 A. That they are against the death
7 penalty.

8 Q. Do you believe that your jury service
9 would do damage to your faith if you were to
10 participate in a death penalty case?

11 A. No.

12 Q. Now, as the Judge told you, this is
13 kind of a two-step process. The jury has
14 already found him guilty of murder, this is
15 not an accident, it is not an 'Oops, I did
16 not mean to do that.' Killed somebody,
17 meant to kill them, and he has been found
18 guilty of that.

19 A. (Affirmative nod).

20 Q. And the jury has also come to the
21 second phase of the case and found an
22 aggravating circumstance beyond a reasonable
23 doubt. You understand that it is only at
24 that point that you could even consider a
25 death penalty? Do you understand that?

1 A. Yes.

2 Q. Do you have any ideas in your mind as
3 to what type of situation would warrant the
4 death penalty?

5 A. No.

6 Q. If you don't, that's fine. That's why
7 we're asking. Okay? We just need to find
8 out things like this. I am assuming that
9 because you said that you are a type three
10 juror that there must be cases where you
11 would believe that the death penalty was
12 appropriate?

13 A. Yes.

14 Q. That you can't envision what those
15 cases might be?

16 A. I really have not thought about what
17 they would be.

18 Q. Uh, ---

19 A. I am just thinking that there would be
20 some.

21 Q. I'm sorry. I didn't mean to interrupt
22 you. What do you think about life without
23 parole?

24 A. (No verbal response).

25 Q. As a sentence, do you think that is a

1 harsh sentence?

2 A. A harsh sentence?

3 Q. (Affirmative nod).

4 A. No.

5 Q. So you don't think it is?

6 A. (Negative gesture).

7 Q. I assume from what you said, being a
8 type three juror, and please don't let me
9 put words in your mouth, but I'm assuming
10 that there are cases where you could
11 envision voting for the death penalty and
12 that there are situations where you could
13 envision voting for life without parole; is
14 that a correct statement?

15 A. Correct.

16 Q. Do you know what kind of factors are
17 important to you to determine which would
18 move you one way or the other?

19 A. No, not really.

20 Q. Okay. Now assuming once again that
21 the defendant has been found guilty of a
22 potential murder, that the jury has found an
23 aggravating circumstance, the defendant at
24 that time has the opportunity but is not
25 required to present evidence of what is

1 called mitigating circumstances. Do you
2 understand that?

3 A. Yes.

4 Q. The mitigating circumstances, as the
5 Judge told you, can be things like mental
6 illness, his background, his lack of prior
7 criminal record, things of that nature.

8 Are those things of any interest to you in
9 determining his sentence?

10 A. I think that they need to be
11 considered.

12 Q. Do you consider those things important?

13 A. I do.

14 Q. And you would give meaningful
15 consideration to those before reaching a
16 determination of whether someone was
17 entitled to the death penalty or life
18 without parole?

19 A. Yes.

20 Q. Okay.

21 BRUCE DURANT: Could I have
22 just a moment to consult with co-counsel?

23 THE COURT: Yes, sir.

24 BRUCE DURANT: Just a couple of
25 other questions and I will be through.

EXAMINATION RESUMED

BY BRUCE DURANT:

Q. You said that you are in favor of the death penalty, or that you're not against the death penalty?

A. Correct.

Q. That you could envision situations in which you would impose it?

A. (Affirmative nod).

Q. If it came down to it and you, as a juror, were sitting on the jury and determined that the death penalty was an appropriate sentence, could you sign your name to a verdict putting someone to death -- and you would have to sign your name.

A. (Affirmative nod).

THE COURT: Can you say 'yes' or 'no', please ma'am?

JUROR NUMBER 328: I believe that I can, yes.

EXAMINATION CONTINUED

BY BRUCE DURANT:

Q. It's not a question of that you believe you can, you would have to sign your name to a form saying that 'It is my verdict, along

1 with my fellow jurors, that this person be
2 put to death.' Can you do that?

3 A. Yes.

4 Q. In the appropriate case. Correct?

5 A. (Affirmative nod), in the appropriate
6 case.

7 Q. And you don't really know what that is.
8 Is it something that you just have to hear?

9 A. Yes.

10 BRUCE DURANT: Thank you,
11 ma'am. I don't have any other questions.

12 THE COURT: Mr. Maguire.

13 WILLIAM MAGUIRE: No questions.
14 Thank you, ma'am.

15 THE COURT: Any Motions?

16 WILLIAM MAGUIRE: No, sir.

17 THE COURT: Solicitor, any
18 Motions?

19 SCARLETT WILSON: No, sir.

20 THE COURT: Ms. Still, if you
21 would be back in the courtroom tomorrow at
22 2:30, be back in this courtroom at 2:30.
23 Don't discuss the case with anybody today,
24 don't read anything in the paper or watch
25 television. Okay?

1 JUROR NUMBER 328: Okay.

2 THE COURT: See you tomorrow at
3 2:30.

4 JUROR NUMBER 328: Thank you.

5 (JUROR NUMBER 328 EXITS COURTROOM)

6 THE COURT: Bring us a juror.

7 (JUROR NUMBER 363 ENTERS COURTROOM)

8 CLERK: State your name.

9 JUROR NUMBER 363: Charles Walker.

10 THE COURT: Mr. Walker, how are
11 you today?

12 JUROR NUMBER 363: Fine.

13 THE COURT: Have you reviewed the
14 sheet concerning opinions about the death
15 penalty?

16 JUROR NUMBER 363: Yes, I have.

17 THE COURT: Did you understand
18 types one, two and three?

19 JUROR NUMBER 363: Yes, I did.

20 THE COURT: Could you determine
21 if you fall into any of the types?

22 JUROR NUMBER 363: Type three.

23 THE COURT: You fell into type
24 three?

25 JUROR NUMBER 363: Yes, sir.

1 THE COURT: Okay. I have some
2 questions for you. I am going to ask you
3 some questions and then the attorneys will
4 have some questions for you.

5 JUROR NUMBER 363: Okay.

6 CHARLES WALKER, having been
7 previously sworn to tell the truth testified
8 as follows:

9 EXAMINATION

10 BY THE COURT:

11 Q. Have you also reviewed the one hundred
12 thirty-four names of the potential witnesses
13 in the trial?

14 A. Yes, sir, I did not recognize anyone.

15 Q. All right. I'm going to ask you some
16 questions and then the attorneys will ask
17 you some questions. There are no right or
18 wrong answers. Just answer the questions as
19 truthfully as you can and as straightforward
20 as you can, be honest with your answers. If
21 you don't know the answers, you may say that
22 you don't know.

23 A. Okay.

24 Q. Have you heard anyone this week talking
25 about the case?

1 A. No, sir.

2 Q. Have you read anything in the paper
3 about the case?

4 A. No, sir.

5 Q. Have you seen anything on television
6 about it?

7 A. No, sir.

8 Q. Have you heard anybody talk about the
9 case prior to this week?

10 A. No.

11 Q. You absolutely know nothing about the
12 case? Other than what you've been told here
13 today?

14 A. Yes, sir.

15 Q. Do you have any relatives or close
16 friends employed in law enforcement?

17 A. No, sir.

18 Q. I've got a friend that I work with, her
19 husband is a retired Charleston County
20 police officer. I think he was in the
21 transportation part.

22 Q. Do you know him personally or you just
23 know him through your coworker?

24 A. I know him through my coworker.

25 Q. He is not a personal friend?

1 A. No.

2 Q. Would that cause you any difficulty in
3 sitting on this jury?

4 A. No, sir.

5 Q. Can you be fair to both the State and
6 the Defendant?

7 A. I'm sorry. Say that again?

8 Q. Can you be fair to both the State and
9 the Defendant?

10 A. (Affirmative nod), I believe so.

11 Q. Has the Solicitor or any member of her
12 staff prosecuted you or any family member?

13 A. No, sir.

14 Q. Have you or any member of your family
15 or a close personal friend been the victim
16 of a crime?

17 A. No, sir.

18 Q. Do you have any relatives in jail?

19 A. No, sir.

20 Q. Are you a member of any group which
21 primarily supports law enforcement, such as
22 MADD?

23 A. No, sir.

24 Q. Do you have any special or particular
25 interest in the outcome of this case?

1 A. No, I don't.

2 Q. Are you aware of any bias or prejudice
3 against the defendant as a result of the
4 charges which the State has been brought
5 against him?

6 A. No, sir.

7 Q. Do you have any religious beliefs that
8 would make you biased or prejudiced for or
9 against the defendant?

10 A. No, sir.

11 Q. Do you have any religious beliefs that
12 would make you biased or prejudiced for or
13 against the State?

14 A. No, sir.

15 Q. The Defendant is black. Do you have a
16 bias or prejudice against the defendant
17 because of his race?

18 A. No.

19 Q. Have you had any bad experiences or
20 good experiences with law enforcement?

21 A. No, sir.

22 Q. Do know of any reason, personal or
23 otherwise, as to why you cannot serve on
24 this jury?

25 A. No, sir.

1 Q. Do you know of any reason why you could
2 not give the State and the Defendant a fair
3 and impartial trial?

4 A. No, sir.

5 Q. I talked to you earlier about the
6 bifurcation, the two-part trial in a murder
7 case concerning the death penalty. Do I
8 need to review it again for you? Do you
9 want me to approve briefly with you again or
10 did you understand what I told you earlier?

11 A. Could you go over it again, please?

12 Q. Yes, sir. A murder trial, when the
13 death notice has been served, is two parts.

14 The first part is the aggravating
15 circumstances. The State is required to
16 prove an aggravating circumstance beyond a
17 reasonable doubt. All twelve jurors have to
18 find that the State has proven an
19 aggravating circumstance before you can --
20 if all twelve jurors do not find that the
21 aggravating circumstance has been proven by
22 the State, then it would be life without
23 parole. Death would not be a choice. Do
24 you understand?

25 A. Yes, sir.

1 Q. Assuming that the State has proven an
2 aggravating circumstance and all twelve
3 jurors say that they believe that the State
4 has proven it, then you will go to the
5 mitigating circumstances. Do you
6 understand?

7 A. Yes, sir.

8 Q. Mitigation circumstances would be
9 anything about the Defendant -- I said,
10 earlier, his background, his upbringing, his
11 childhood or any other factor that would be
12 relevant to mitigation. In other words,
13 reducing the severity of the crime.

14 The jury would then consider the
15 mitigation aspect before you decided whether
16 to give the defendant life without parole or
17 death. Do you understand?

18 A. Yes, sir.

19 Q. So my question to you, can you consider
20 the aggravating circumstances and all the
21 mitigating circumstances before you make a
22 decision whether the defendant should
23 receive life without parole or death?

24 A. Yes, sir..

25 THE COURT: Thank you very much.

1 Whose turn.

2 EXAMINATION

3 BY WILLIAM MAGUIRE:

4 Q. Good afternoon, Mr. Walker. How are
5 you doing today, sir?

6 A. Good. How are you?

7 Q. I'm good. Thank you. I know that this
8 is difficult, that you've been waiting
9 around a long time, very inconvenient. I am
10 going to ask a little bit more of you right
11 now. That's just to be honest in your
12 responses, just to be candid with me. Okay?

13 A. Okay.

14 Q. No right or wrong answers.

15 A. Okay.

16 Q. If you were out or at work and the
17 conversation turned to the death penalty,
18 the topic was should we have or should we
19 not have it and you chimed in, what would be
20 your two cents on that?

21 A. I don't -- I've never really given it
22 any thought. I wouldn't know how to answer
23 that.

24 Q. Okay. Well, let me ask you -- let me
25 rephrase it a different way. Let's assume

1 that we don't have the death penalty in
2 South Carolina at all and it ends up on the
3 ballot, all the voters can decide to go vote
4 for it or against it. Are you going to vote
5 for or against?

6 A. Again, I've never really given it any
7 thought either way.

8 Q. But you're a number three juror,
9 according to your sheet; is that correct?

10 A. Number three?

11 Q. Yes, number three.

12 A. Type three, yes.

13 Q. The sheet that the Judge gave you, a
14 type three?

15 A. (Affirmative nod), right.

16 Q. That indicates that you can consider
17 both the death penalty and the life penalty
18 in a capital murder case. Is that true with
19 you?

20 A. Yeah.

21 Q. And I'm assuming that since you can
22 consider the death penalty as one of the
23 options that you see some usefulness in
24 having the death penalty available?

25 A. Okay. Yeah.

1 Q. Okay. And that there are some cases
2 that in your mind rise to the level of
3 deserving the death penalty?

4 A. Yeah, I guess. Like I said, I don't --
5 yeah. I mean, if it -- if the State
6 requires it or ---

7 Q. Well, the death penalty is never
8 required, sir. Let me ---

9 A. I mean if the States says -- or, what's
10 the word? Supports the death penalty or --
11 I guess I can too.

12 Q. Okay. Well, I am going to walk you
13 down a road here and I want to check in with
14 your thought process. Okay?

15 A. Okay.

16 Q. What I am going to do is -- in your
17 mind, I want to put you on a jury right
18 here, with eleven other people. Okay?

19 A. Um-humm.

20 Q. And you're going to hear a case, that
21 case is going to be a murder case. You and
22 your eleven other jurors are going to
23 convict a defendant of murder.

24 That means that the defendant -- you
25 and eleven other jurors found beyond a

1 reasonable doubt that a defendant, a person,
2 unlawfully, without justification killed an
3 innocent person with malice aforethought.

4 Malice aforethought means that the
5 defendant, his state of mind, that he was
6 operating with a black, depraved, malignant
7 heart fatally bent on wickedness and
8 mischief. Are you with me?

9 A. Okay.

10 Q. Then you are going to go another step
11 and that's going to be that you're going to
12 hear aggravation. That's going to -- like
13 the Judge said, those are circumstances,
14 facts, which increase the enormity of the
15 crime.

16 I am not going to talk about specifics
17 but I want to talk to you about sort of a
18 category of the crime. Okay?. That's going
19 to be a burglary, going into a home with
20 people there or a home invasion, a
21 kidnaping, rape, murder; all at one time,
22 committed by a single person; the single
23 person that you have on trial in front of
24 you.

25 You and your eleven others convict him

1 and-you find that you he did those things.

2 Is the life in prison penalty appropriate in
3 that scenario?

4 A. I, I -- yeah, I guess it could be.
5 Yeah.

6 Q. And I am assuming that the death
7 penalty also could be? Or am I wrong?

8 A. No, I guess that could be too. It
9 depends on the circumstances, the situation.

10 Q. I want to move you now to the next
11 step, which would be hearing some mitigation
12 evidence. That could be anything about a
13 defendant's record, his character, his life.
14 Is there anything about that -- and you
15 would have the choice, personally, to decide
16 if any of that mattered to you or if you --
17 could weigh in your decision. Would that
18 stuff be important to you in weighing your
19 decision, or not?

20 A. Yeah, I guess it could be.

21 Q. Mr. Walker, have you ever heard the
22 phrase "a foot in both camps"?

23 A. No.

24 Q. Mr. Walker, I am just going to talk to
25 you a little bit longer here.

1 A. Okay.

2 Q. What I am going to do is that I am
3 going to talk to you a little bit about this
4 kind of case and how it is a little bit
5 different from some other cases. Okay?

6 A. Okay.

7 Q. This kind of case, a human being's life
8 hangs in the balance. Okay? We have to
9 talk about penalty because this is my only
10 time to talk to you. I can't wait until
11 after the trial, so even though we don't
12 even know if Mr. Broughton will be convicted
13 or not, this is my only shot at talking to
14 you about penalty. So ---

15 A. Okay.

16 Q. So I want to talk to you about the
17 penalty phase. Okay?

18 A. All right.

19 Q. The fact that I am doing that, you're
20 not going to hold that against Mr.
21 Broughton, are you?

22 A. No.

23 Q. I want to talk about a civil case, a
24 typical legal case, kind of like a car
25 wreck, like two people are suing each other

1 over money because their cars hit. If you
2 were on that jury, you would have to decide,
3 say, if the light was red or green. That's
4 a fact issue. Somebody is right, somebody
5 is wrong. Agree with me?

6 A. Yes.

7 Q. This case is different because of the
8 grave matter that we are here for, Mr.
9 Broughton's life. An individual juror's
10 decision in the penalty phase is described
11 as an individual moral judgment or a
12 individual moral assessment. Does that
13 sound fair to you?

14 A. Yeah.

15 Q. That you would be allowed to reach your
16 own individual moral opinion?

17 A. Yeah.

18 Q. And given the fact that it is not just
19 a right or wrong answer, like a car wreck
20 case, like a civil case, could you respect
21 everybody else's individual moral judgment?

22 A. Yeah.

23 Q. And you would want your opinion to be
24 respected?

25 A. Right.

1 Q. Mr. Broughton is entitled to fairness
2 not just here in the courtroom but in the
3 jury room. If you saw somebody or a group
4 of people trying to get somebody else to
5 give up their individual moral judgment, you
6 could send a note out to the Judge and said
7 'things aren't fair here.' Could we count
8 on you to do that, to make sure that it is
9 fair in the jury room?

10 A. Yeah, there shouldn't be any coercion
11 in there.

12 Q. Exactly. Everybody is entitled to
13 their own individual judgment?

14 A. Right.

15 Q. On something so important as a human
16 being's life literally hanging in the
17 balance, it would be okay to end the day
18 agreeing to disagree; wouldn't it?

19 A. Yeah.

20 Q. I mean, you wouldn't look at your watch
21 and say, 'We're got to end this thing.
22 Let's just take a straw vote and go with
23 democracy.' In something this important,
24 it's okay to disagree?

25 A. Of course.

1 WILLIAM MAGUIRE: Thank you, sir.

2 THE COURT: Do you have any
3 question?

4 BRUCE DURANT: Mr. Walker, it's
5 three long days for us and we're getting
6 punchy and I apologize for that. I don't
7 have any questions. Thank you for coming
8 here today.

9 JUROR NUMBER 363: Okay.

10 THE COURT: Any Motions?

11 WILLIAM MAGUIRE: No, sir.

12 THE COURT: Mr. Walker. Please
13 don't discuss the case with anybody. Don't
14 watch television or read anything in the
15 paper. Okay?

16 JUROR NUMBER 363: Okay.

17 THE COURT: Be back in the
18 courtroom tomorrow afternoon at 2:30.

19 JUROR NUMBER 363: Okay.

20 THE COURT: See you at 2:30.
21 Have a good evening.

22 (JUROR NUMBER 363 EXITS COURTROOM)

23 THE COURT: Would you bring in
24 Thurmond Fyall next, please.

25 (JUROR NUMBER 99 ENTERS COURTROOM)

1 THE COURT: Mr. Fyall, how you
2 doing today?

3 JUROR NUMBER 99: I am alright.

4 THE COURT: I had given you a
5 sheet that laid out three different opinions
6 about the death penalty. Did you understand
7 it?

8 JUROR NUMBER 99: Yes, I did.

9 THE COURT: Did you understand
10 type one, type two and type three

11 JUROR NUMBER 99: Yes.

12 THE COURT: Could you make a
13 determination whether or not you fell into
14 one, two or three?

15 JUROR NUMBER 99: One.

16 THE COURT: One?

17 JUROR NUMBER 99: Yes.

18 THE COURT: You understand that
19 type one says that you could not give death
20 to anybody under any circumstances for a
21 crime, is that right?

22 JUROR NUMBER 99: That's correct.

23 THE COURT: Mr. Fyall, I
24 appreciate your opinion. Thank you very
25 much for sharing it with me. I am going to

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Jury Trial of September 14-29, 2009
Before The Honorable J.C. Nicholson, Jr.

1 have to excuse you for service on this jury.
2 Okay?

3 JUROR NUMBER 99: Okay.

4 (JUROR NUMBER 99 EXCUSED)

5 (JUROR NUMBER 99 EXITS COURTROOM)

6 THE COURT: Bring in Mr. Nixon.

7 (JUROR NUMBER 244 ENTERS COURTROOM)

8 CLERK: State your name.

9 JUROR NUMBER 244: Ralph Nixon.

10 THE COURT: Mr. Nixon, how are
11 you doing today?

12 JUROR NUMBER 244: All right,
13 sir.

14 THE COURT: Did you have an
15 opportunity to review the sheet that I gave
16 you concerning opinions on the death
17 penalty?

18 JUROR NUMBER 244: Yes, sir.

19 THE COURT: Did you understand
20 type one, two and three?

21 JUROR NUMBER 244: Yes, sir.

22 THE COURT: Did you make a
23 determination if you fell into one of those
24 three types?

25 JUROR NUMBER 244: Yes, sir.

1 THE COURT: Which type did you
2 fall under?

3 JUROR NUMBER 244: One.

4 THE COURT: One says that you
5 cannot give the death penalty under any
6 circumstance. Is that correct?

7 JUROR NUMBER 244: Yes, sir.

8 THE COURT: Mr. Nixon, I
9 appreciate your opinion. I respect your
10 opinion but I'm going to have to excuse you
11 from service on this jury. Okay?

12 JUROR NUMBER 244: Yes, sir.

13 THE COURT: Thank you very much.

14 (JUROR NUMBER 244 EXCUSED)

15 (JUROR NUMBER 244 EXITS COURTROOM)

16 THE COURT: What time is Panel 17
17 coming in tomorrow?

18 CLERK: Nine o'clock. Seventeen
19 and eighteen are both coming at the same
20 time.

21 THE COURT: We'll -- have we got
22 anybody behind that?

23 CLERK: Yes, sir. Nineteen,
24 twenty, twenty-one.

25 THE COURT: So we have got five

1 groups coming in tomorrow?

2 CLERK: Yes, sir.

3 THE COURT: Okay. By my count we
4 have forty qualified jurors. That means --
5 I would like to try to get five more if we
6 can. That would give us two extra. We need
7 forty-three for four alternates. I would
8 like to get five. We'll see how it goes
9 tomorrow. We got two panels coming in at
10 nine o'clock, seventeen and eighteen. I'll
11 bring both of those in at the same time and
12 send them back to read, then we'll start --
13 if we need to go, we've got five panels, so
14 we have plenty of people to get five jurors.

15 Is there anything else that we need
16 to deal with tonight before we adjourned?

17 WILLIAM MAGUIRE: Yes, Your Honor.
18 I believe the Court said that the jurors are
19 going to be presented in the order they have
20 been qualified.

21 THE COURT: No, I didn't say
22 that. I asked you'all did you have any
23 objection to presenting them in the order
24 that they were qualified. I was asking.
25 I thought that both parties said yes.

1 WILLIAM MAGUIRE: Yes.

2 SCARLETT WILSON: Correct.

3 THE COURT: So what's the
4 problem?

5 WILLIAM MAGUIRE: The question is
6 -- of the first twenty-seven jurors,
7 assuming that everybody uses their strikes,
8 would be the jury panel and then the next
9 four would be alternate one, the next four
10 would be alternate two, ---

11 THE COURT: Right. That's
12 correct.

13 WILLIAM MAGUIRE: So if we got to
14 the jury -- just one little point. If we
15 got to -- if everybody agreed on the first
16 twelve jurors, we would go to juror twenty-
17 eight, twenty-nine, thirty, thirty-one ---

18 THE COURT: Right.

19 WILLIAM MAGUIRE: Great.

20 THE COURT: If you don't exhaust
21 all your strikes, whoever is next on the
22 list we'll start with the alternates.

23 SCARLETT WILSON: Like number
24 thirteen would be alternate one. Thirteen,
25 fourteen, fifteen would be alternate one if

1 nobody struck anybody?

2 THE COURT: That's right. Yeah.

3 WILLIAM MAGUIRE: Or -- okay. If
4 the first alternate was number one, then it
5 would be fourteen, fifteen, sixteen,
6 seventeen.

7 THE COURT: It would be
8 thirteen, fourteen, fifteen, sixteen. If
9 you use all of your strikes. If you don't
10 use but three strikes, it would be thirteen.

11 WILLIAM MAGUIRE: Right.

12 THE COURT: What's the question?

13 WILLIAM MAGUIRE: We are going to
14 figure out how to organize our strikes
15 tonight, so that we can be efficient
16 tomorrow. I mean, different people do it
17 differently.

18 THE COURT: How else would you do
19 it?

20 WILLIAM MAGUIRE: The first four
21 jurors, number twenty-eight, twenty-nine,
22 thirty, and thirty-one would be the jurors
23 for alternate number one. If juror number
24 twenty-eight was ---

25 THE COURT: What do you do

1 between fourteen and twenty-seven, just
2 throw them out the window?

3 WILLIAM MAGUIRE: Yeah.

4 THE COURT: We're not going to do
5 it that way. Okay?

6 WILLIAM MAGUIRE: All right.

7 THE COURT: Anything else? Do I
8 need to prepare a sheet of one through forty
9 or do you'all have them lined up?

10 SCARLETT WILSON: I would like for
11 you to.---

12 BRUCE DURANT: We would like
13 for the clerk to do one, just to compare
14 with ours to make sure that we've got them
15 -- we don't need to do that right now.

16 THE COURT: Ollie, sometime
17 tomorrow morning can you prepare a sheet
18 with the names on it as they were qualified,
19 with their juror numbers?

20 CLERK: Yes, I will just have to
21 manually type them up because our system
22 does not allow us to do that.

23 THE COURT: Can you do it
24 sometime before 2:30?

25 CLERK: Yes. I will have to

1 manually do it.

2 THE COURT: How soon do you need
3 that, Solicitor? I mean, she has got to
4 manually do it.

5 SCARLETT WILSON: Noon.

6 BRUCE DURANT: I would assume
7 that, you know, we can get five by noon.

8 THE COURT: I don't think we
9 really need this on the record.

10 (OFF RECORD DISCUSSION RE: SCHEDULE)

11 (COURT IN RECESS)

12 (TRANSCRIPT CONTINUED NEXT PAGE)

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1 SEPTEMBER 18, 2009 9:00 A.M.

2
3 (DEFENDANT PRESENT)

4 THE COURT: Let me see the
5 attorneys up here just a second. Mia, I
6 don't need this on the record.

7 (OFF RECORD BENCH CONFERENCE)

8 (JUROR PANELS 17 & 18 ENTER COURTROOM)

9 THE COURT: Please be seated.
10 Ladies and Gentlemen of the jury panel,
11 I am going to make some remarks to you and
12 give you some instructions about what is
13 taking place. Then what we would do is that
14 we will ask you to leave the courtroom and
15 we will bring you back in individually and
16 I'll ask you some questions individually and
17 the attorneys will also ask you some
18 questions individually. But before we get
19 to that, I wanted to explain some things to
20 you. . .

21 In this case the State has charged
22 the defendant with attempted arson, armed
23 robbery, assault and battery with intent to
24 kill, criminal sexual conduct first, grand
25 larceny, burglary and murder.

1 I want to talk to you about the
2 murder charge specifically. In this
3 particular case the State has served a
4 notice of the death penalty on the
5 defendant, so this is a death penalty case.
6 So I am going to talk to you about a death
7 penalty case because they are different and
8 they are tried differently than other cases
9 are tried in South Carolina.

10 A death penalty case is divided up
11 into two parts. The first part is the guilt
12 phase. The second part is the sentencing
13 phase or the penalty phase. Some people
14 call it sentencing and some people call it
15 the penalty phase. But it is two parts.
16 That is what is legally referred to as a
17 bifurcated trial. You have two parts. The
18 first part is guilt.

19 Now for the purposes of our
20 discussion this morning, let's assume that
21 the jury has found the defendant guilty of
22 murder. Please don't assume that the court
23 or anyone else is assuming that the
24 defendant is guilty but for purposes of our
25 discussion this morning, please assume that

1 a jury has found him guilty.

2 The State has the burden of proving
3 the defendant guilty beyond a reasonable
4 doubt of all charges brought against him and
5 all twelve jurors have to agree in the guilt
6 phase.

7 Now, in the penalty phase you, the
8 jury, make the determination of the
9 defendant's sentence. That is what the
10 second phase is about, sentencing. You, the
11 jury, make that determination.

12 You have two choices: life without
13 parole or death.

14 When I use the term "life without
15 parole", I mean exactly what it says. The
16 defendant will never be eligible for parole,
17 he would die in jail. There is no parole.

18 So those are your two choices, life
19 without parole or death.

20 In arriving at that decision or
21 reaching that decision, you will have to
22 consider what is referred to as aggravating
23 circumstances. What are aggravating
24 circumstances? Aggravating circumstances
25 or facts, incidents, details or occurrences

1 which state law says aggravates the offense
2 of murder. In other words, the
3 circumstances increase the enormity of the
4 crime of murder. There are several
5 statutory aggravating circumstances that are
6 set out by statute. The State has to prove
7 one of those. It does not have to prove
8 more than one, just one. The State has to
9 prove this to your satisfaction beyond a
10 reasonable doubt. All twelve jurors have to
11 agree that the State has proven an
12 aggravating circumstances.

13 I am going to read some of the
14 aggravating circumstances to you. The
15 murder was committed while in the commission
16 of the following crimes or acts:
17 Criminal sexual conduct in any degree;
18 kidnaping; burglary in any degree; robbery
19 while armed with a deadly weapon; larceny
20 with the use of a deadly weapon; or physical
21 torture. Those are some of the statutory
22 aggravating circumstances.

23 If in fact all twelve, one, two,
24 three, or all twelve jurors do not agree
25 that the State has proven an aggravating

1 circumstance, then it would be life without
2 parole. You would not have the option of
3 death. All twelve of you have to find that
4 the State has proven one or more aggravating
5 circumstances beyond a reasonable doubt.

6 So for the purposes of our
7 discussion this morning, assume that all
8 twelve jurors have found that the State has
9 proven an aggravating circumstance.

10 Then we would move to what is
11 legally referred to as mitigating
12 circumstances. Now, mitigating
13 circumstances are facts surrounding the
14 incident itself, which shed light on a
15 defendant's history, background, upbringing,
16 childhood, which makes the crime less severe
17 or less harsh.

18 I am going to read some of the
19 statutory mitigating circumstances:

20 The defendant has no significant
21 history or prior criminal convictions
22 involving the use of violence against
23 another person.

24 The murder was committed while the
25 defendant was under the influence of mental

1 or emotional distress.

2 The capacity of the defendant to
3 appreciate the criminality of his conduct or
4 to conform his conduct to the requirements
5 of the law was substantially impaired.

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

8 Plus any other relevant issue that
9 should arise concerning mitigation. These
10 are some of the statutory mitigating
11 circumstances.

12 The mitigating circumstances are
13 offered to show that the defendant is less
14 culpable, which reduces the severity of the
15 murder charge.

16 Mitigating evidence can be, in
17 essence, any reason for a sentence less than
18 the death penalty.

19 To try to summarize, in the second
20 part of the trial you the jury have to find
21 aggravating circumstances. Then you have to
22 listen and consider the mitigating
23 circumstances, whatever is offered. The
24 defendant does not have to offer any
25 mitigating circumstances but for the

1 purposes of our discussion, let's assume
2 that he will. You have to consider those
3 mitigating circumstances and then make a
4 decision of life without parole or death.
5 All twelve of you have to agree.

6 Also, I have prepared some forms.
7 The first form talks about murder in South
8 Carolina and it lays out types -- one, two,
9 and three -- which are the three types of
10 opinions about the death penalty.

11 Now, the bailiff is going to give
12 you this form. I am going to ask you to
13 review it. Please do it individually. Do
14 not discuss it amongst yourselves. It is
15 a personal decision about your viewpoint on
16 the death penalty. When I bring you back
17 into the courtroom, I will ask you about
18 your viewpoint on the death penalty.

19 I have also prepared a list of one
20 hundred and thirty-four names which are
21 potential witnesses in this case. I want
22 you to review that list, see if you
23 recognize anybody on the list or if you know
24 anybody on that list and I will ask you
25 about it when you come back in the court

1 room. There was one name that was left off,
2 Jessica Broughton -- before I ask you this
3 question, I am going to ask the clerk swear
4 you, please.

5 CLERK: Please stand and raise
6 your right hands. (Jurors comply).

7 You should truthfully answer all
8 questions asked of you concerning this
9 matter now before the court, by the Court
10 or by order thereof.

11 You should speak the truth, the
12 whole truth and nothing but the truth, so
13 help you God. Say "I do." (Affirmative
14 response from jurors). Please be seated.

15 THE COURT: Now I am going to
16 ask you the question, is there anybody on
17 the jury panel who knows a Jessica
18 Broughton? If so, raise your right hand.
19 (No response).

20 Solicitor, if you want to introduce
21 yourself.

22 SCARLETT WILSON: Yes, sir. Thank
23 you. Good morning, Ladies and Gentlemen, I
24 am Scarlett Wilson. I am the solicitor for
25 Charleston and Berkeley counties, which is

1 known as 9th Circuit, both of those counties.

2 This is Bruce Durant, he is the
3 chief deputy for the 9th Circuit.

4 This is Brian Alfaro. He is the
5 deputy over our Berkeley office.

6 Together the three of us will be
7 asking questions, submitting evidence,
8 taking testimony, making arguments during
9 this trial over the next week or so. Thank
10 you. We will be asking witnesses
11 questions, introducing evidence, making
12 arguments, things of that nature. We
13 appreciate you all being here and having
14 patience with us.

15 THE COURT: Is there any member
16 of the jury panel who has a close contact or
17 personal relationship with the Solicitor
18 herself or anyone in the solicitor's office?
19 If so, raise your right hand.

20 (No response).

21 Mr. Maguire?

22 WILLIAM MAGUIRE: Thank you,
23 Judge. My name is Bill Maguire. I am a
24 lawyer, I live in Columbia, South Carolina,
25 I work for the State Government.

1 We are introducing ourselves just
2 in case you all recognize us from someplace.
3 So I need to tell you that I also used to
4 practice law in the lowcountry, in
5 Charleston, for a number of years. I worked
6 for Ashley Pennington in the 9th Circuit
7 Public Defender's Office in Charleston and I
8 also worked for Andy Savage for a number of
9 years in Charleston.

10 I represent Mr. Colin Broughton, my
11 client. Colin is sitting at the table
12 between me and Morgan Daniels.

13 Morgan is a mitigation investigator
14 in my office. She's from Florida but she is
15 a graduate of USC.

16 To her right is Ms. Pati Kennedy.
17 Ms. Kennedy is the head public defender of
18 the Berkeley County Public Defender's Office
19 and her office is here in Moncks Corner.

20 At the end of the table is Mr. Boyd
21 Young. Mr. Young is a lawyer in my office
22 who works with me; and he, like me, has
23 practiced both in the lowcountry and in
24 Georgia and he also works in Columbia and
25 lives in Columbia now. Thank you'all.

1 THE COURT: Is there any member
2 of the panel who is close personal friends
3 with Mr. Maguire, anyone that he introduced
4 or who has been represented by Mr. Maguire
5 or any of the attorneys that he introduced.
6 If so, raise your right hand.

7 (No response).

8 Let the record reflect that no
9 juror has raised their hands to the last two
10 questions the court asked the jurors.

11 All right. What I am going to do
12 now is that I am going to call out names
13 from panel seventeen and ask you to go to
14 the jury room. The bailiff will give you
15 the sheets:

16 Daniel Newlin

17 Patricia Anderson

18 Norma Middleton

19 Patricia Lussier

20 Duane Greenbaum

21 Brian McGee

22 If you will, follow the bailiff to
23 the jury room please.

24 (JURY PANEL NUMBER 17 EXITS COURTROOM)

25 THE COURT: Panel 18 is:

1 Donald Bogart

2 Tracy Robinson

3 Sandra Lair

4 Regina Delvin

5 Marcella Sweeper-Howell.

6 Is it Howell-Sweeper or Sweeper-
7 Howell?

8 JUROR NUMBER 334: Sweeper-Howell.

9 THE COURT: Okay. Go with the
10 bailiff.

11 (JURY PANEL NUMBER 18 EXITS COURTROOM)

12 THE COURT: We will take a short
13 break and give them an opportunity to read
14 the sheets. Let me see the two lead
15 attorneys up here for just a second, please.

16 BENCH CONFERENCE:

17 THE COURT: You'all look at
18 this sheet. He would be the third
19 alternate. Look at your sheet on this
20 Darrell Turner.

21 If he's really got a
22 legitimate problem, let's go ahead and
23 excuse him and not spend a lot of time
24 talking to him. I mean, if you want to --
25 if you'all agree. If you don't agree, then

1 I will grill him the best that I can and
2 tell him that's he's got to be here.
3 But I don't know what the situation is and
4 I ---

5 SCARLETT WILSON: Do you think
6 he's the third alternate?

7 THE COURT: Thirty-seven.

8 SCARLETT WILSON: Okay.

9 THE COURT: We need thirty-
10 nine for three alternates if you'all use all
11 your strikes.

12 SCARLETT WILSON: Okay.

13 (BENCH CONFERENCE CONCLUDED)

14 THE COURT: Would you bring us
15 the first juror, please, ma'am?

16 (JUROR NUMBER 241 ENTERS COURTROOM)

17 BAILIFF: State your name.

18 THE COURT: Yes, sir, your name?

19 JUROR NUMBER 241: Daniel
20 Newlin.

21 THE COURT: Mr. Newlin, how are
22 you doing today?

23 JUROR NUMBER 241: Doing good.

24 THE COURT: Did you have an
25 opportunity to review the sheet concerning

1 opinions about the death penalty?

2 JUROR NUMBER 241: Yes, I did.

3 THE COURT: Did you understand
4 types one, two and three?

5 JUROR NUMBER 241: Yes.

6 THE COURT: Did you make a
7 determination if you were any of those three
8 types?

9 JUROR NUMBER 241: Yes.

10 THE COURT: Which one?

11 JUROR NUMBER 241: Two.

12 THE COURT: Two?

13 JUROR NUMBER 241: Yes.

14 THE COURT: And two says that if
15 a person is convicted of murder, you would
16 always sentence them to death; is that
17 correct?

18 JUROR NUMBER 241: Yes.

19 THE COURT: Okay. I appreciate
20 your opinion and I respect your opinion but
21 I am going to have to disqualify you for
22 service on this jury.

23 JUROR NUMBER 241: All right.

24 THE COURT: Thank you very much.

25 (JUROR NUMBER 21 EXCUSED)

(JUROR NUMBER 241 EXITS COURTROOM)

(JUROR NUMBER 214 ENTERS COURTROOM)

THE COURT: Your name, sir?

JUROR NUMBER 214: My name is
Brian McGee.

THE COURT: Mr. McGee, how are
you doing?

JUROR NUMBER 214: Pretty good.

THE COURT: Did you have an
opportunity to review the sheet concerning
the death penalty or opinions about the
death penalty?

JUROR NUMBER 214: Yes, sir.

THE COURT: Did you understand
the types: one, two and three?

JUROR NUMBER 214: Yes, sir.

THE COURT: Did you determine if
you fit into one of those types?

JUROR NUMBER 214: I would say
type two.

THE COURT: Type two?

JUROR NUMBER 214: Yes, sir.

THE COURT: And type two says
that if someone is convicted of murder that
you would always sentence them to death. Is

1 that correct?

2 JUROR NUMBER 214: Yes, sir.

3 THE COURT: I appreciate your
4 opinion and I respect your opinion but I am
5 going to have to excuse you from service on
6 this jury. Okay?

7 JUROR NUMBER 214: Yes, sir.

8 THE COURT: Thank you very much.

9 (JUROR NUMBER 214 EXCUSED)

10 (JUROR NUMBER 214 EXITS COURTROOM)

11 (JUROR NUMBER 123 ENTERS COURTROOM)

12 THE COURT: Your name, sir?

13 JUROR NUMBER 123: Duane Greenbaum.

14 THE COURT: Mr. Greenbaum, how
15 are you doing today?

16 JUROR NUMBER 123: Fine, sir.

17 THE COURT: Mr. Greenbaum, did
18 you have an opportunity to read the sheet
19 that we gave you concerning death penalty
20 opinions?

21 JUROR NUMBER 123: Yes, sir, I
22 have.

23 THE COURT: Did you understand
24 types one, two and three?

25 JUROR NUMBER 123: Yes, sir.

1 THE COURT: Could you determine
2 if you fell into one of those types?

3 JUROR NUMBER 123: Yes, sir, I
4 have.

5 THE COURT: Which type do you
6 fall into?

7 JUROR NUMBER 123: Type one,
8 sir.

9 THE COURT: Type one?

10 JUROR NUMBER 123: (Affirmative
11 nod).

12 THE COURT: Type one says that
13 you could never sentence another human being
14 to death, regardless, for any reason; is
15 that correct?

16 JUROR NUMBER 123: Yes, sir.

17 THE COURT: All right. I
18 appreciate your opinion, I respect your
19 opinion; however, I have to excuse you from
20 jury service on this jury.

21 JUROR NUMBER 123: All right.

22 THE COURT: Thank you very much.

23 (JUROR NUMBER 123 EXCUSED)

24 (JUROR NUMBER 123 EXITS COURTROOM)

25 (JUROR NUMBER 7 ENTERS COURTROOM)

1 BAILIFF: State your name.

2 JUROR NUMBER 7: Patricia A.
3 Anderson.

4 THE COURT: Ms. Anderson, how are
5 you doing?

6 JUROR NUMBER 7: Fine.

7 THE COURT: If you would, just
8 have a seat.

9 JUROR NUMBER 7: (Complies)

10 THE COURT: How are you doing
11 today?

12 JUROR NUMBER 7: I am fine.

13 THE COURT: Ms. Anderson, did you
14 have an opportunity to read the sheet which
15 the Court gave to you concerning the
16 opinions about the death penalty?

17 JUROR NUMBER 7: Yes, I did.

18 THE COURT: Did you understand
19 the three types?

20 JUROR NUMBER 7: Yes, sir.

21 THE COURT: Could you determine
22 if you fit into any of those types?

23 JUROR NUMBER 7: Yes, sir.

24 THE COURT: You did?

25 JUROR NUMBER 7: (Affirmative

1 nod).

2 THE COURT: Say 'yes' or 'no', if
3 you would.

4 JUROR NUMBER 7: Oh, -- yes, sir.

5 THE COURT: She (court reporter)
6 has to take it down and sometime shaking you
7 head gets confusing. Okay?

8 JUROR NUMBER 7: (Affirmative nod).

9 THE COURT: Which type did you
10 fall into?

11 JUROR NUMBER 7: I am type one.

12 THE COURT: You are a type one?

13 JUROR NUMBER 7: (Affirmative nod).

14 THE COURT: So type one, you
15 could never sentence someone to death; is
16 that right?

17 JUROR NUMBER 7: I don't believe
18 that I could, sir.

19 THE COURT: Okay. I thank you
20 for your opinion, I respect your opinion.
21 I am going to have to excuse you from
22 service on this jury.

23 JUROR NUMBER 7: Thank you.

24 THE COURT: Thank you very much.

25 (JUROR NUMBER 7 EXCUSED)

1 (JUROR NUMBER 7 EXITS COURTROOM)

2 (JUROR NUMBER 221 ENTERS COURTROOM)

3 BAILIFF: State your name.

4 JUROR NUMBER 221: My name is
5 Norma J. Middleton.

6 THE COURT: Ms. Middleton, how
7 are you doing today?

8 JUROR NUMBER 221: Fine. And,
9 you?

10 THE COURT: Fine. Did you have
11 an opportunity to review the sheet that the
12 Court gave you concerning the varying
13 opinions about the death penalty?

14 JUROR NUMBER 221: Yes, I did.

15 THE COURT: Did you understand
16 that types: one, two and three?

17 JUROR NUMBER 221: Yes.

18 THE COURT: Could you make a
19 determine whether or not you fell into one
20 of those types?

21 JUROR NUMBER 221: Three.

22 THE COURT: Pardon?

23 JUROR NUMBER 221: Three.

24 THE COURT: Three?

25 JUROR NUMBER 221: (Affirmative

1 nod).

2 THE COURT: Okay, I've got some
3 questions for you.

4 NORMA J. MIDDLETON, having been
5 previously sworn to tell the truth testified
6 as follows:

7 EXAMINATION

8 BY THE COURT:

9 Q. Did you have an opportunity to read an
10 review the list of one hundred thirty-four
11 potential witnesses?

12 A. Yes.

13 Q. Did you recognize any names?

14 A. No.

15 Q. You did not know anyone on the list?

16 A. No.

17 Q. I am going to ask you some questions
18 and after I ask you those questions the
19 attorneys will be asking you some questions.
20 There are no right or wrong answers. Answer
21 the questions truthfully as best you can.
22 If you don't know the answer, you can say
23 that 'I do not know.' Okay?

24 A. Yes.

25 Q. All right. Do you have any knowledge

1 of the case, have you heard anybody talking
2 about the case, either this week or prior to
3 this week?

4 A. No, I have not.

5 Q. Have you read anything in the paper?

6 A. No, I have not.

7 Q. Seen anything on television?

8 A. No, I have no.

9 Q. Do you have any relatives or close
10 friends employed in law enforcement?

11 A. Church family.

12 Q. Family?

13 A. Church members.

14 Q. Anybody in particular that you are
15 close to at church?

16 A. No.

17 Q. You just know that they work for
18 various police agencies?

19 A. Yes.

20 Q. Which church?

21 A. Bethlehem Baptist.

22 Q. Bethlehem Baptist?

23 A. (Affirmative nod).

24 Q. Can you tell me by name who these
25 people are?

1 A. Mark Hamilton and Cheretha Kinlaw.

2 Q. Do you know who they work for?

3 A. I do not.

4 Q. You just know that they are in law
5 enforcement?

6 A. Yes.

7 Q. Okay. Has the solicitor or anyone in
8 her office prosecuted you or any member of
9 your family?

10 A. No, sir.

11 Q. Have you or any member of your family
12 or close personal friend been a victim of a
13 crime?

14 A. No, sir.

15 Q. Do you have any relatives in jail?

16 A. No, sir.

17 Q. Are you a member of any group which
18 primarily supports law enforcement, such as
19 MADD or CAVE?

20 A. Repeat that, sir?

21 Q. Are you a member of any group or groups
22 which primarily support law enforcement,
23 such as MADD -- which is Mothers Against
24 Drunk Driving -- or CAVE, which is Citizens
25 Against Violent Crimes.

1 A. No, sir.

2 Q. Do you have any special or particular
3 interest in the outcome of this particular
4 case?

5 A. No, sir.

6 Q. Are you aware of any bias or prejudice
7 against the defendant as a result of the
8 charges which the State has brought against
9 him?

10 A. No, sir.

11 Q. Do you have any religious beliefs that
12 would create bias or prejudice for or
13 against the Defendant?

14 A. No, sir.

15 Q. Any religious beliefs that would create
16 a bias or prejudice for or against the
17 State?

18 A. No, sir.

19 Q. Do you have any bias or prejudice
20 against the Defendant because of his race,
21 being black?

22 A. No, sir.

23 Q. Have you had any bad or good
24 experiences with law enforcement?

25 A. No, sir.

1 Q. Do you know of any reason, personal or
2 otherwise, as to why you could not serve on
3 this jury?

4 A. No, sir.

5 Q. Do you know of any reason why you could
6 not give the State and the Defendant a fair
7 and impartial trial?

8 A. No, sir.

9 Q. Now, I explained to you this morning
10 the second phase of a death penalty trial.
11 We talked about aggravating circumstances
12 and mitigating circumstances. Do you need
13 me to summarize that again for you?

14 A. No, sir.

15 Q. You understood what I told you earlier?

16 A. Yes, sir.

17 THE COURT: Whose turn?

18 EXAMINATION

19 BY SCARLETT WILSON:

20 Q. Thank you, Ms. Middleton, for being
21 patient with us. I think after you see what
22 happens in here you'll understand why it has
23 sort of take awhile and why we can't predict
24 exactly when we need you.

25 At this point, I have a chance to ask

1 you some questions and then the other side
2 will have a chance to ask you some questions
3 just to get a clear idea of your thoughts on
4 life without parole and the death penalty.

5 Okay?

6 A. Okay.

7 Q. We can't talk about the specifics of
8 this case, so we'll be talking to you in
9 generalities and -- it might be a little bit
10 confusing or awkward. If it is, just let me
11 know.

12 A. Okay.

13 Q. You mentioned to the Judge that after
14 reading your sheet you feel that you are a
15 type three.

16 A. (Affirmative nod).

17 Q. Can you tell me in your own words what
18 that means to you?

19 A. I feel like if he did commit the crime,
20 that it was a family member, that he has
21 suffered and that he will be suffering for
22 taking a life of one of his family members.

23 Q. What does that mean about the death
24 penalty or life without parole with regards
25 to that?

1 A. Repeat that.

2 Q. What is your feeling about -- if a
3 person committed a crime, that he would
4 suffer, how does that relate to what
5 punishment is appropriate?

6 A. Life without parole.

7 Q. Would be automatic?

8 A. Yes.

9 Q. You mentioned that there was a family
10 member involved. How did you know that?

11 A. I am just assuming it. I don't know.
12 I just used that for an example.

13 Q. You don't have any knowledge about this
14 case?

15 A. No, I don't know have no -- (negative
16 gesture).

17 Q. So in a situation where someone has
18 committed a murder and it's a brutal murder,
19 you always would think that they should get
20 life without parole, have to live with what
21 they did.

22 A. No.

23 Q. Okay. In what situations should they
24 always get life without parole?

25 A. It's hard to say.

1 Q. Well, just a minute ago you said
2 something about family members and I'm
3 trying to ---

4 A. Repeat that again.

5 Q. In what situations do you think that
6 there should always be life without parole?

7 A. (Pause) -- if they are under a medical
8 condition, mental distable (sic) or mentally
9 something.

10 Q. So in your mind, whether or not the
11 victim was a family member would play a
12 role?

13 A. No, it does not.

14 Q. So what did you mean earlier when you
15 said if he killed a family member, he
16 suffered, he should continued to suffer?

17 A. I just used that for an example.

18 Q. An example of what?

19 A. Taking a life.

20 Q. And, again, the sentence for that
21 should be -- what?

22 A. Life without parole.

23 Q. Is that because if a family member is
24 killed, that would be a loved one and the
25 person would have to suffer knowing that

1 they killed a loved one -- forever?

2 A. Right.

3 Q. In your mind, would -- in that
4 situation would life without parole be more
5 severe than the death penalty?

6 A. I believe so.

7 Q. The death penalty might be the easy way
8 out in that sort of situation?

9 A. I think so.

10 Q. Tell me more about what kind of
11 situation that you can think of that would
12 require the death penalty or where the death
13 penalty would be appropriate?

14 A. I really don't know.

15 Q. You can't think of one?

16 A. (No verbal response).

17 Q. Rape. Burning someone in a house.

18 You know, I -- I really don't know.

19 Q. What types of things would you want to
20 hear in order to make your decision about
21 the death penalty or life without parole?

22 A. I'd like to hear more evidence, of
23 which I've never -- I've not heard any
24 evidence, as we're still going through this
25 elimination process.

1 Q. Right.

2 A. I'd like to hear more evidence, what
3 evidence that they found.

4 Q. Okay.

5 A. To make that decision.

6 Q. What types of things would you like to
7 hear about the defendant in order to make
8 that decision?

9 A. I mean, I've never been in a situation
10 like this so I ---

11 Q. I know that it is hard. There isn't a
12 right or wrong answer, at all. We're just
13 trying to get a better snapshot of your
14 views and, again, a -- as general or as
15 specific as you can be. What do you think
16 would interest you about a defendant or his
17 life in determining what kind of sentence
18 they could get.

19 A. What type of background, how he was
20 brought up.

21 Q. How would that play into your feelings
22 about the sentence?

23 A. If he -- if -- how that would play into
24 the sentencing for him?

25 Q. Yes, the sentence that you think would

1 be appropriate?

2 A. It all depends on his background. I
3 believe that if he never was a violent
4 person and, you know, he was raised up in a
5 good home and -- you don't know what caused
6 him to snap.

7 Q. Okay. What types of kinds -- is there
8 anything in your mind about the crime that
9 would affect whether or not you thought
10 death or life without parole would be
11 appropriate?

12 A. I don't -- this is the first time I've
13 heard about this when I was summoned for
14 court.

15 Q. What did you hear about when you were
16 summoned for court?

17 A. That I was summoned for General
18 Sessions.

19 Q. I am asking not what you know,
20 necessarily, about the case but what types
21 of things generally would you be interested
22 in hearing about a crime. You know, the
23 Judge told you about aggravating
24 circumstances.

25 A. Yes.

1 Q. Can you think of some that might be of
2 interest to you in making your decision
3 about whether death were appropriate or
4 whether life without parole were
5 appropriate?

6 A. What really caused him to commit that
7 crime.

8 Q. So for you it is more about the
9 defendant and what was going on with him
10 than the actual crime itself?

11 A. Right. What really caused him to that
12 breaking point.

13 Q. Okay. The Judge was telling you that
14 if -- if you made a determination about an
15 aggravating circumstance, that would mean
16 that the State had presented enough evidence
17 as ---

18 A. Right.

19 Q. --- far as an aggravator went. You
20 would still be interested in knowing about
21 the defendant?

22 A. Well, I would like to -- to know what
23 caused him -- I would like to have all the
24 evidence before I make that decision on life
25 or death.

1 Q. Is there anything, any situation, where
2 you think death would be automatic?

3 A. Right off the top, no.

4 Q. Okay. Anything where you think life
5 could be automatic?

6 A. Rape, uh, -- ma'am, I -- I'm blank.
7 I'm nervous.

8 Q. I know. We're not -- there's no rush.
9 That's okay. We are nervous too sometimes.
10 I know that sitting on that stand, probably
11 you've never had to do that before. Have
12 you?

13 A. No, sir. No, ma'am.

14 Q. But you can't think of anything
15 regarding that either?

16 A. (Negative gesture).

17 Q. Well, let me ask you this, do you
18 understand that life without parole is
19 always an option, no matter what?

20 A. No, I do not know.

21 Q. And if life without parole, as I said,
22 and the Judge will tell you, is always an
23 option, would you always pick that over the
24 death penalty?

25 A. Repeat that.

1 Q. If life without parole were always an
2 option, would never be taken away from you
3 and the other jurors, always would be on the
4 table, would you always pick life without
5 parole rather than the death penalty?

6 A. I think so.

7 SCARLETT WILSON: That's all that
8 I have. Thank you.

9 THE COURT: Mr. Maguire.

10 EXAMINATION

11 BY WILLIAM MAGUIRE:

12 Q. Good morning, Ms. Middleton. How you
13 doing?

14 A. Nervous.

15 Q. Don't be nervous. We've asked a lot of
16 you. I know that it is very taxing. The
17 only thing that I am going to ask of you
18 right now is to keep being honest with your
19 responses. There are no right or wrong
20 answers. No one expects you to have any
21 sophisticated knowledge about the legal
22 system. I just want to chat with you like
23 one of your close friends. Okay?

24 A. Okay.

25 Q. I am not going to try to do anything to

1 make you nervous, because I know you're
2 nervous. Okay?

3 A. (No verbal response).

4 Q. Ms. Middleton, it sounds like you're
5 the kind of person, and being a number three
6 on the sheet, that you want to see and hear
7 everything before making a decision?

8 A. Yes.

9 Q. All the facts, all the circumstances,
10 all the evidence?

11 A. Yes.

12 Q. And the Judge would tell you that the
13 law is that you would have to hear
14 everything before you could make your
15 decision. Could you follow that
16 instruction?

17 A. Yes.

18 Q. You wouldn't halfway through the trial
19 decide what your vote is and tune out the
20 Judge, 'Hey, I'm only halfway through the
21 trial but I've already got my decision.'

22 A. No.

23 Q. You could wait to the end?

24 A. Yes.

25 Q. And follow the Judge's instruction?

1 A. Yes.

2 Q. And you would make your decision only
3 after hearing absolutely everything?

4 A. Yes.

5 Q. And you would pay attention and take to
6 heart everything that you hear?

7 A. Yes.

8 Q. Whether it is facts about the crime,
9 the circumstances, aggravating
10 circumstances, or if it came from us over
11 here about the defendant and that sort of
12 thing. You would weigh all of that
13 together?

14 A. Yes.

15 Q. And you would keep those in mind?

16 A. Yes.

17 Q. Be fair?

18 A. Yes.

19 Q. And not reach a decision until the end?

20 A. Yes.

21 Q. It sounds like, since you determined
22 that you are a number three as on the sheet,
23 that there are some cases that in your mind
24 it's possible for you that would be bad that
25 the death penalty might be appropriate?

1 A. Some case.

2 Q. It would have to be pretty bad?

3 A. Right.

4 Q. And it would have to be what you'd call
5 aggravated, an aggravated murder or worse
6 than just a regular murder?

7 A. Right.

8 Q. And that's what the Judge means when he
9 says aggravating circumstances, something
10 that makes a murder worse. The phrase that
11 the Judge used was that it "increases the
12 enormity of the crime."

13 A. Right.

14 Q. And for something like that, that the
15 Judge talked to you about, perhaps that
16 would be good for the death penalty or
17 appropriate for the death penalty?

18 A. (No verbal response).

19 Q. The aggravated murder.

20 A. The aggravated murder, (affirmative
21 nod).

22 Q. Right. And you don't even have to -- I
23 am going to just talk to you a little bit
24 about the law. The death penalty in South
25 Carolina is never required, it is never

1 automatic. It is not like there is a form
2 with a check box and you check, 'Well, if
3 the State proves this, this and this, then
4 you have to vote death.' You never have to
5 do that. Did you understand that before?

6 A. Not really.

7 Q. So you learned that for the first time
8 from me? Right?

9 A. Right.

10 Q. Well, that is the law and the Judge
11 will tell you that's the law, that the jury
12 is never ever required to vote for death.

13 Okay?

14 A. Okay.

15 Q. Does that make you feel better?

16 A. Okay.

17 Q. You never, ever, ever have to give up
18 your individual vote, whatever that is.

19 In a sentencing case like this, it's unique
20 from all other cases in the law. For
21 instance, if two cars hit each other and
22 people were suing each other for money, the
23 big issue might be who had the right of way
24 at the corner, was the light red or green.
25 That is sort of a somebody was right,

1 somebody was wrong, kind of a fact issue.

2 You have to figure out what probably

3 happened, try to get the right answer.

4 But in a case like this, a sentencing

5 decision, it is what is called an individual

6 moral judgment or individual moral

7 assessment of the case. Each juror is

8 entitled to their own individual opinion.

9 Does that sound fair to you?

10 A. Yes.

11 Q. And you could respect each and every

12 juror's individual opinion?

13 A. Right.

14 Q. And you would want your opinion to be

15 respected?

16 A. Yes.

17 Q. If you followed the Judge's instruction

18 and looked at everything, all the evidence,

19 all the facts about the crimes, all the

20 things about the aggravation and your

21 individual moral judgment was the death

22 penalty, you could vote for that?

23 A. (Pause) -- if the evidence, I mean the

24 overall ---

25 Q. Right, if the ---

1 A. --- overall -- if the evidence points
2 to that.

3 Q. Right. But you would be fair and if
4 the evidence didn't, then you could vote for
5 life without parole, too?

6 A. Right.

7 Q. That would be after considering
8 absolutely everything?

9 A. All the evidence.

10 Q. And you could delivery whatever your
11 verdict is to the court?

12 A. Right.

13 Q. And in a case like this, the only time
14 that the jury would have to be unanimous on
15 something would be to find somebody guilty
16 beyond a reasonable doubt or to find an
17 aggravating circumstance. Those are the
18 only unanimous parts.

19 When it comes to voting life without
20 parole, each individual juror has the
21 absolute right to look for what is called
22 mitigation evidence. It doesn't have to be
23 unanimous. Three people over there could
24 say, 'Well, based on his childhood, I can't
25 vote that.' Perhaps somebody over here

1 might say, 'Based on the fact that drugs
2 were involved, I can't vote death.'
3 Everybody could be different. Does that
4 sound fair to you?

5 A. Yes, sir.

6 Q. In a matter as serious as this, it
7 would be okay at the end of the day agreeing
8 to disagree?

9 A. Repeat that, sir.

10 Q. In a sentencing decision, with
11 everybody having their own individual moral
12 judgment, it would be okay to end the day
13 agreeing to disagree, respecting everybody's

14 ---

15 A. Agreeing to -- right.

16 Q. I think that's all that I have for you.

17 WILLIAM MAGUIRE: May I have one
18 second.

19 THE COURT: Yes, sir.

20 EXAMINATION CONTINUED

21 BY WILLIAM MAGUIRE:

22 Q. I am going to talk to you about the
23 formality in the legal system -- just two
24 more questions. The way that it works is if
25 -- if you deliver a verdict, you have to

1 sign your name to a verdict form or an
2 indictment. If the evidence moved you to
3 vote for life without parole, you could sign
4 your name for life without parole?

5 A. Yes.

6 Q. And if the evidence moved you to the
7 death penalty, you could sign your name
8 saying 'I vote for the death penalty'?

9 A. If the evidence ---

10 Q. Moved you in that direction?

11 A. Right.

12 Q. Okay.. That's all I have. Thank you.

13 THE COURT: Do you want to ask
14 any questions, Solicitor?

15 SCARLETT WILSON: Yes, sir.

16 EXAMINATION RESUMED

17 BY SCARLETT WILSON:

18 Q. Just a few more and we will be done.
19 When I was asking you questions earlier, you
20 said that you had not realized before that
21 life without parole would always be an
22 option; but you know that now?

23 A. Right.

24 Q. Okay. I also asked you if you always
25 had that as an option if you would always

1 choose that and you said ---

2 A. If the evidence -- like I told him.

3 Q. All right. And when you -- so last
4 time we talked, you thought life without
5 parole was harsher than the death penalty?

6 A. I said that if it was a family member.

7 Q. That it would be harsher?

8 A. Right, that he is suffering for taking
9 a family member's family.

10 Q. Thank you.

11 A. You're welcome.

12 THE COURT: Ms. Middleton, would
13 you step out in the hall? I'll get you back
14 in shortly. Okay?

15 (JUROR NUMBER 221 EXITS COURTROOM)

16 THE COURT: Any Motions?

17 SCARLETT WILSON: Yes, sir, Your
18 Honor.

19 THE COURT: Be glad to hear you.

20 SCARLETT WILSON: First of all, it
21 causes us great concern that the first thing
22 out of the juror's mouth was 'information
23 about' -- she said 'if he killed a family
24 member', went on and on about killing a
25 family member when the Court had told her

1 nothing about the facts of this case. I
2 realize that when I pressed her on that she
3 said, 'Oh, I was just coming up with a
4 hypothetical.' There is no absolutely no
5 reason to interject that into the case or
6 into her answers. That is our first
7 concern.

8 The second concern was that, when I
9 was asking her questions, she thought life
10 without parole was a harsher sentence. When
11 I asked her again on my re-questioning she
12 qualified she thought so if it was a family
13 member, which clearly shows in this
14 situation that she can't consider or give
15 meaningful consideration to the death
16 penalty.

17 The totality of her testimony, I
18 think, disqualifies her.

19 THE COURT: Mr. Maguire?

20 WILLIAM MAGUIRE: I don't know if
21 it is necessary for me to add anything. I
22 believe that she is qualified. She said
23 repeatedly that she would want to hear
24 everything.

25 THE COURT: If you don't want to

1 add anything, that's fine. I was just
2 giving you an opportunity.

3 WILLIAM MAGUIRE: Thank you. She
4 believe that she is qualified.

5 THE COURT: I am going to find
6 her qualified. I believe that gives us
7 forty-one. Is that correct?

8 WILLIAM MAGUIRE: Yes, sir.

9 THE COURT: Would you bring
10 Patricia Lussier in, please.

11 CLERK: Do you want Ms. Middleton
12 back?

13 THE COURT: Oh, yes.

14 (JUROR NUMBER 221 ENTERS COURTROOM)

15 THE COURT: Ms. Middleton, what
16 we are doing is qualifying a group of people
17 from which we will strike the jury. We are
18 going to do that this afternoon at 2:30. Be
19 back in the courtroom this afternoon at
20 2:30. You are now a part of that group.
21 Understand?

22 JUROR NUMBER 221: Yes, sir.

23 THE COURT: Please don't talk to
24 anybody about the case, don't read anything,
25 have any contact with anybody about the

1 case. If anybody tries to talk to you,
2 please walk away. Can you do that?

3 JUROR NUMBER 221: Yes, sir.

4 THE COURT: Thank you very much.
5 See you at 2:30.

6 (JUROR NUMBER 221 EXITS COURTROOM)

7 (JUROR NUMBER 205 ENTERS COURTROOM)

8 THE COURT: Ms. Lussier, have you
9 had an opportunity to review the sheet that
10 the Court gave you concerning opinions about
11 the death penalty?

12 JUROR NUMBER 205: Yes, sir.

13 THE COURT: Did you understand
14 types one, two and three?

15 JUROR NUMBER 205: Yes, sir.

16 THE COURT: Were you able to
17 determine whether or not you fit into one of
18 those types?

19 JUROR NUMBER 205: Yes, sir.

20 THE COURT: Pardon?

21 JUROR NUMBER 205: Yes.

22 THE COURT: Which type?

23 JUROR NUMBER 205: Type two.

24 THE COURT: Type two?

25 JUROR NUMBER 205: Type two.

1 THE COURT: Type two is for a
2 person convicted of murder, you would always
3 sentence them to death. Is that correct?

4 JUROR NUMBER 205: I feel like
5 that if there was the death penalty for
6 murder maybe there would be less murders.

7 THE COURT: All right. I
8 appreciate your opinion but I am going to
9 have to excuse you from service on this
10 jury. Okay?

11 JUROR NUMBER 205: All right.

12 (JUROR NUMBER 205 EXCUSED)

13 (JUROR NUMBER 205 EXITS COURTROOM)

14 THE COURT: Solicitor, wouldn't
15 you like to have her on your jury? She's
16 over and above type two.

17 SCARLETT WILSON: I heard that.

18 (JUROR NUMBER 296 ENTERS COURTROOM)

19 BAILIFF: State your name.

20 JUROR NUMBER 296: Tracy Robinson.

21 THE COURT: What was your name
22 again?

23 JUROR NUMBER 296: Tracy Robinson.

24 THE COURT: Ms. Robinson, how are
25 you doing?

State of South Carolina v. Colin James Broughton 1701
Case No. 06-GS-08-2164
Jury Trial of September 14-29, 2009
Before The Honorable J.C. Nicholson, Jr.

1 JUROR NUMBER 296: Fine.

2 THE COURT: Have you had an
3 opportunity to review the sheet concerning
4 the opinions about the death penalty?

5 JUROR NUMBER 296: I did.

6 THE COURT: Did you understand
7 types one, two and three?

8 JUROR NUMBER 296: I do.

9 THE COURT: Were you able to make
10 a determination which type you fit into?

11 JUROR NUMBER 296: Yes, sir.

12 THE COURT: Which one?

13 JUROR NUMBER 296: Type three.

14 THE COURT: Have you had an
15 opportunity to renew the potential witness
16 list of one hundred thirty-four names?

17 JUROR NUMBER 296: I did, sir.

18 THE COURT: Did you recognize any
19 name?

20 JUROR NUMBER 296: Stewart Lamb
21 (phonetic).

22 THE COURT: What number is that?

23 JUROR NUMBER 296: Fifty-two.

24 THE COURT: Fifty-two (52).

25 Are you his patient or ---

State of South Carolina v. Colin James Broughton 1702
Case No. 06-GS-08-2164
Jury Trial of September 14-29, 2009
Before The Honorable J.C. Nicholson, Jr.

1 JUROR NUMBER 296: No, no.

2 THE COURT: How do you know him?

3 JUROR NUMBER 296: I work at
4 MUSC and I've been to a couple of his talks,
5 but that's it.

6 THE COURT: Some of his seminars
7 that he puts on?

8 JUROR NUMBER 296: (Affirmative
9 nod).

10 THE COURT: What is his
11 specialty?

12 JUROR NUMBER 296: Trauma.

13 THE COURT: What do you do at
14 MUSC?

15 JUROR NUMBER 296: I work in
16 radiology.

17 THE COURT: You don't know him
18 personally?

19 JUROR NUMBER 296: No, no.

20 THE COURT: Okay. All right. I
21 am going to ask you some questions. There
22 are no right or wrong answers to any of the
23 questions. After I finish asking you
24 questions the attorneys will be asking you
25 some questions. Just be as truthful and as

1 straightforward as you can. If you do not
2 know the answer, just say 'I do not know.'
3 Understand?

4 JUROR NUMBER 296: Um-humm.

5 TRACY ROBINSON, having been
6 previously sworn to tell the truth testified
7 as follows:

8 EXAMINATION

9 BY THE COURT:

10 Q. Have you heard anybody talking about
11 the case, either this week or prior to this
12 week?

13 A. No, sir.

14 Q. Heard any other jurors talking about
15 the case?

16 A. Jurors? Just contemplating what it
17 could be, possibly.

18 Q. What do you remember jurors saying?

19 A. That it was -- that something was in
20 the paper on, like, Thursday -- that it's a
21 big trial. That's really all they said.

22 Q. That's all that they said?

23 A. (Affirmative nod).

24 Q. You didn't hear the article?

25 A. (Negative gesture), I don't take the

1 paper on Thursday.

2 Q. Do you take it on Monday, Tuesday,
3 Wednesday or just not Thursday?

4 A. No, I get it on Friday, Saturday and
5 Sundays.

6 Q. Okay. All right. Have you read
7 anything else in the paper about it?

8 A. No, sir.

9 Q. Seen anything on TV?

10 A. No, sir.

11 Q. Do you have any relatives or close
12 personal friends employed in law
13 enforcement?

14 A. No, sir.

15 Q. Has the solicitor or any member of her
16 staff prosecuted you or any member of your
17 family?

18 A. No.

19 Q. Have you been or any member of your
20 family or a close personal friend been the
21 victim of a crime?

22 A. No, sir.

23 Q. Do you have any relatives in jail?

24 A. No, sir.

25 Q. Are you a member of any group which

1 primarily supports law enforcement, such as
2 MADD?

3 A. No, sir.

4 Q. Do you have any special or particular
5 interest in the outcome of this case?

6 A. No, sir.

7 Q. Are you aware of any bias or prejudice
8 against the defendant as a result of the
9 charges which the State has been brought
10 against him?

11 A. No.

12 Q. Do you have any religious beliefs that
13 would make you biased or prejudiced for or
14 against the defendant?

15 A. No, sir.

16 Q. Do you have any religious beliefs that
17 would make you biased or prejudiced for or
18 against the State?

19 A. No, sir.

20 Q. Do you have a bias or prejudice against
21 the defendant because of his race, being
22 black?

23 A. No, sir.

24 Q. Have you had any bad experiences or
25 good experiences with law enforcement?

1 A. No, sir.

2 Q. Do know of any reason, personal or
3 otherwise as to why you cannot serve on this
4 jury?

5 A. No, sir.

6 Q. Do you know of any reason why you could
7 not give the State and the Defendant a fair
8 and impartial trial?

9 A. No, sir.

10 Q. This morning I went over and explained
11 to you about the penalty phase in a murder
12 case and explained to you the aggravating
13 circumstances and mitigating circumstances
14 and the jury's obligation. Do I need to
15 summarize that to you again?

16 A. I don't think so, sir.

17 THE COURT: Thank you very much.

18 WILLIAM MAGUIRE: Thank you,
19 Judge.

20 EXAMINATION

21 BY WILLIAM MAGUIRE:

22 Q. Good morning, Ms. Robinson. How are
23 you doing today?

24 A. Good.

25 Q. I know this is taxing on the jurors,

1 inconvenient, have had to wait a lot. I am
2 sure that you're probably frustrated with
3 all of that. I'm going to ask you a little
4 bit more, that is that you be honest and
5 candid in your responses. Okay?

6 A. Okay.

7 Q. There are no right or wrong answers
8 today.

9 A. Okay.

10 Q. Ms. Robinson, I am going to put you in
11 a hypothetical place -- I am going to put
12 you at the water cooler at your office.
13 Okay?

14 A. (No verbal response).

15 Q. There are a couple of people milling
16 around and the discussion turns to the death
17 penalty. One person says, 'I think we ought
18 to use the death penalty more often.'

19 Somebody on the other side of the cooler
20 says, 'I think we use it too much.' Where
21 would you fall out with your opinion?

22 A. I really don't read the paper or listen
23 to the news as much as I should, so I am not
24 -- I don't really know how much that we use
25 it at all.

1 Q. Fair to say that you don't really have
2 an opinion on that?

3 A. I don't, really.

4 Q. Well, you are still at the water cooler
5 and one of your coworkers says, 'I think the
6 death penalty should be automatic for some
7 categories of crimes because they are so
8 bad. Like maybe for a rape murder or a
9 child victim, something like that.' They
10 say, what do you think?

11 A. No, I don't agree with that.

12 Q. You don't believe that the death
13 penalty should ever be automatic?

14 A. Exactly. (Negative gesture), no.

15 Q. Okay. But it would be justified in
16 some cases?

17 A. Yes.

18 Q. In making your decision, life in prison
19 or the death penalty, what would move you
20 one direction or the other? Anything that
21 you can think of. There's no right or wrong
22 answer.

23 A. The harshness of the crime, how it was
24 committed. I would have to hear details to
25 know.

1 Q. Okay. I am going to take you away from
2 the water cooler now and put you on a jury,
3 right here in the jury box with eleven other
4 people. I am going to walk through a trial.
5 I want you to see yourself, with your eleven
6 other jurors, convicting a person of murder.

7 In South Carolina murder is the
8 intentional unlawful killing of an innocent
9 person without justification or excuse, with
10 malice aforethought. That's our definition
11 of murder.

12 Malice aforethought being defined as a
13 person operating with a black, depraved,
14 wicked heart fatally bent on wickedness and
15 mischief.

16 In South Carolina that would be murder.
17 It is not a fight that gets out of hand,
18 it's a deliberate act, to choose to take the
19 life of an innocent person -- with malice.
20 Are you with me?

21 A. Yeah.

22 Q. Then in this trial there would be
23 another step. There would be what the Judge
24 referred to as aggravating circumstances,
25 things that increase the enormity of the

1 crime.

2 I am not going to go into specific
3 facts but I am going to talk to you about a
4 crime using some terms and I want you to see
5 that with me. Okay?

6 A. Okay.

7 Q. A home invasion, somebody goes into a
8 home when people are there, kidnaping, rape,
9 armed robbery, murder that happens all at
10 one time. Are you with me?

11 A. Um-humm.

12 Q. In that situation is the life in prison
13 sentence severe enough?

14 A. Yes. I mean -- that's pretty bad.
15 That's a pretty big punishment.

16 Q. So the crime is severe but the penalty
17 is also severe?

18 A. Yes.

19 Q. Another stage that the Judge will talk
20 to you about could also be where you might
21 hear some mitigation evidence from me or
22 from a defense lawyer in the trial, things
23 about the defendant. Is there anything
24 about the defendant's life, background,
25 history that would be important to you in

1 making this kind of decision?

2 A. Yes.

3 Q. What would that be for you?

4 A. How a person was raised, how they were
5 treated, what they've been through in their
6 life. I mean, what they've been around
7 their whole life; if what they know is
8 'normal.' I mean, -- a history of drugs
9 and, you know, -- I don't know.

10 Q. So you're the kind of person that would
11 take everything into account and withhold
12 your judgment to the very end. You would
13 hear about the facts of the crime,
14 aggravating circumstances, mitigating
15 circumstances, hear it all and would wait to
16 make a decision at the end?

17 A. I think you would have to. It's a
18 really big judgment.

19 Q. Sure. And you would keep an open mind
20 and want to hear everything?

21 A. Yes.

22 Q. And you wouldn't reject anything out of
23 hand?

24 A. No.

25 Q. I want to talk to you a little bit

1 longer about this case and how it is
2 different from, say, another case.-- like a
3 civil case where there is a car wreck and
4 people might be suing each other for money.
5 Like who had the right-of-way and was the
6 light red or green? That's a fact issue.
7 You and the jury would try to figure out
8 what probably happened, to get to the right
9 answer. Like a normal civil case. Okay?

10 A.. Um-humm.

11 Q. For a sentencing decision it is
12 different. The law is different. It is
13 described as individual moral judgment or a
14 individual moral assessment, individual to
15 each and every juror. Can you tell the
16 difference?

17 A. Yes.

18 Q. Because your decision would be based on
19 your walk in life, your experiences and what
20 you see in the case. That might be
21 different from somebody else? Are you with
22 me?

23 A. Yes.

24 Q. Another issue about the law is that
25 when it comes to aggravating circumstances,

1 which would make somebody eligible for the
2 death penalty, the jury has to be absolutely
3 unanimous beyond a reasonable doubt in that
4 situation.

5 But on the mitigation aspect of the
6 case, the law is different. Each individual
7 juror has the right to see and give weight
8 to whatever mitigation evidence,
9 individually.

10 So there may be three people who
11 say, 'Based on what I heard about his
12 childhood, I just can't vote for the death
13 penalty.' One person over here might say,
14 'Well, based on drugs being a part of it,
15 I'm not going to vote the death penalty.'
16 They could all be absolutely different. Do
17 you understand that?

18 A. Um-humm.

19 Q. Does that sound fair to you?

20 A. Yes.

21 Q. Mr. Broughton is entitled to not only
22 fairness in the courtroom but also to
23 fairness in the jury room. If you should
24 make it on the jury and you're in the jury
25 room, could you respect everybody's

1 individual opinion?

2 A. Yes.

3 Q. And if you were on the jury and the
4 group started to bully another juror, could
5 we count on you to end that; to send a note
6 out here saying, 'things aren't fair'?

7 A. Yes.

8 Q. That's all that I have for you. Thank
9 you, ma'am.

10 THE COURT: Solicitor?

11 EXAMINATION

12 BY SCARLETT WILSON:

13 Q. Ms. Robinson, I just have a few
14 followup questions.. Did you understand from
15 all of this that life without parole is
16 always an option?

17 A. Yes.

18 Q. In that situation, knowing that, do you
19 think you could ever vote for the death
20 penalty -- where life was an option?

21 A. Yes.

22 Q. Can you -- again, we can't talk about
23 this case, so we have to talk sort of
24 generally. Can you think of some situations
25 where death might be appropriate?

1 A. I am thinking anything that has to do
2 with my family, I guess. But torture, uh, I
3 would think torture or just total lack of
4 caring about life and hatefulness, meanness.

5 Q. Well, now you understand that -- Mr.
6 Maguire explained that in South Carolina all
7 murders are malicious. You know, some
8 states have Murder One, Two, three degrees
9 or whatever.

10 The situation in South Carolina, we're
11 talking about murder -- which means
12 malicious. It's intentional, no accident,
13 no provocation, a person meant to do it and
14 they did it. So that would be sort of the
15 starting point, a conviction for that kind
16 of murder.

17 Did you understand that?

18 A. Yes, ma'am.

19 Q. Okay. Now, you mentioned that -- and
20 it's totally understandable, that if it was
21 something that involved your family that
22 certainly you could see the death penalty in
23 that. I know that's hard to think about.

24 A. Yeah.

25 Q. Is that pretty much the only time that

1 you could think about the death penalty,
2 signing your name to the death verdict?

3 A. No.

4 Q. You can think of other type situations?

5 A. Yes, ma'am.

6 SCARLETT WILSON: That's all that
7 I have, Judge.

8 THE COURT: Any Motions?

9 WILLIAM MAGUIRE: No, sir.

10 SCARLETT WILSON: No, sir.

11 THE COURT: Ms. Robinson, what we
12 are doing is forming a group of jurors from
13 which we are going to strike this jury. You
14 are now part of that group.

15 Be back in the courtroom this
16 afternoon at 2:30. Okay?

17 JUROR NUMBER 296: Yes, sir.

18 THE COURT: Don't talk to anybody
19 about the case or read anything. Okay?

20 JUROR NUMBER 296: Yes, sir.

21 THE COURT: See at 2:30. Okay.

22 (JUROR NUMBER 196 EXITS COURTROOM)

23 (JUROR NUMBER 186 ENTERS COURTROOM)

24 BAILIFF: State your name.

25 JUROR NUMBER 186: I am Sandra

1 Lair.

2 THE COURT: Ms. Lair, how are you
3 doing?

4 JUROR NUMBER 186: Fine. And
5 you?

6 THE COURT: Okay. Have you had
7 an opportunity to read the sheet that the
8 court gave you this morning about the
9 opinions pertaining to the death penalty?

10 JUROR NUMBER 186: Um-humm.

11 THE COURT: Did you understand
12 the three different types?

13 JUROR NUMBER 186: Yes, sir.

14 THE COURT: Did you determine
15 whether or not you fit into one of those
16 types?

17 JUROR NUMBER 186: I fit into
18 type one.

19 THE COURT: Type one

20 JUROR NUMBER 186: Yes, sir..

21 THE COURT: Type one, you could
22 never vote for the death penalty under any
23 circumstances; is that correct?

24 JUROR NUMBER 186: Yes, sir.

25 THE COURT: Ms. Lair, I

1 appreciate your opinion. Thank you for
2 giving me your opinion. I am going to have
3 to excuse you from service on this jury.
4 Okay?

5 JUROR NUMBER 186: Thank you.

6 (JUROR NUMBER 186 EXCUSED)

7 (JUROR NUMBER 186 EXITS COURTROOM)

8 (JUROR NUMBER 78 ENTERS COURTROOM)

9 BAILIFF: State your name.

10 JUROR NUMBER 78: Regina Devlin.

11 THE COURT: Ms. Devlin, did you
12 have an opportunity to read the sheet that
13 the court gave you this morning concerning
14 opinions about the death penalty?

15 JUROR NUMBER 78: Yes, sir.

16 THE COURT: Did you understand
17 the three different types?

18 JUROR NUMBER 78: Yes, sir.

19 THE COURT: Could you determine
20 whether or not you fit into one of those
21 types?

22 JUROR NUMBER 78: Yes, sir.

23 THE COURT: Which type?

24 JUROR NUMBER 78: Type two.

25 THE COURT: Type two?

1 JUROR NUMBER 78: (Affirmative nod).

2 THE COURT: Type two is that
3 anyone convicted of murder should be
4 sentenced to death; is that correct?

5 JUROR NUMBER 78: Yes.

6 THE COURT: Always? Is that
7 correct?

8 JUROR NUMBER 78: Convicted of
9 murder, (affirmative nod). Yes, sir.

10 THE COURT: Okay. All right, I
11 appreciate your opinion, I respect your
12 opinion but I am going to have to excuse you
13 from service on this jury. Okay?

14 JUROR NUMBER 78: Yes, sir.

15 THE COURT: Thank you very much.

16 (JUROR NUMBER 78 EXCUSED)

17 (JUROR NUMBER 78 EXITS COURTROOM)

18 THE COURT: Bring us the next
19 juror.

20 (JUROR NUMBER 334 ENTERS COURTROOM)

21 BAILIFF: Please state your
22 name?

23 JUROR NUMBER 334: My name is
24 Marcella Sweeper-Howell, Marcella Marie
25 Sweeper-Howell.

1 THE COURT: Ms. Sweeper-Howell,
2 are you today?

3 JUROR NUMBER 334: I am okay.
4 A little nervous.

5 THE COURT: Have you had an
6 opportunity to review the sheet ---

7 JUROR NUMBER 334: I have.

8 THE COURT: Did you understand
9 type one, two and three?

10 JUROR NUMBER 334: Yes, sir.

11 THE COURT: Which type are you?

12 JUROR NUMBER 334: I am type
13 three.

14 THE COURT: You are a type three?

15 JUROR NUMBER 334: Yes, sir.

16 THE COURT: Okay, I have some
17 questions for you.

18 MARCELLA SWEEPER-HOWELL, having
19 been previously sworn to tell the truth
20 testified as follows:

21 EXAMINATION

22 BY THE COURT:

23 Q. Did you have an opportunity to review
24 the list of potential witnesses which
25 included a hundred thirty-four names?

1 A. Yes, sir.

2 Q. Did you recognize any of those names?

3 A. I did not.

4 Q. You did not know anybody or recognize
5 any names?

6 A. No, sir.

7 Q. All right. I am going to ask some
8 questions and then the attorneys will ask
9 you some questions. There are no right or
10 wrong answers.

11 A. Okay.

12 Q. Just answer the questions as best you
13 can. Okay?

14 A. Okay. All right.

15 Q. Be truthful with the answer. If you
16 don't know the answer, just say that you
17 don't know.

18 A. I will.

19 Q. Okay?

20 A. (Affirmative nod).

21 Q. Have you had any prior knowledge of
22 this case? Has anybody talked to you about
23 the case or have you read anything in the
24 paper about it?

25 A. I have not read anything about it. The

1 only knowledge that I have of this case is
2 from Monday, just little conversations where
3 they were asking or talking about, uh,
4 somebody killing his aunt.

5 Q. Okay.

6 A. But before Monday, I absolutely don't
7 remember anything about this in the news or
8 anything.

9 Q. So do you specifically remember
10 somebody talking about killing an aunt. Is
11 that correct?

12 A. I do, (affirmative nod).

13 Q. Do you have any other information or
14 knowledge about the case?

15 A. No, sir.

16 Q. Based on what you heard Monday from
17 some other juror, do you have an opinion
18 about the defendant?

19 A. I do not.

20 Q. Okay. Do you have any relatives or
21 close personal friends employed in law
22 enforcement?

23 A. No, sir.

24 Q. Has the solicitor or any member of her
25 staff prosecuted you or any member of your

1 family?

2 A. No.

3 Q. Have you or any member of your family
4 or a close personal friend been the victim
5 of a crime?

6 A. Yes. We were robbed ---

7 Q. Tell me first, who is "we"?

8 A. My home, me and my husband and our two
9 teenagers. I am trying to remember this
10 date -- this is September. I would say
11 three or four months ago we were robbed.

12 My husband was at a bowling tournament.
13 He got robbed on his tournament in Augusta.

14 And when he came home, I was at work --
15 and when he walked into the house, our TV
16 was down on the floor and all of his video
17 games had been stolen -- like three video
18 games were stolen. That was a few months
19 ago.

20 About a year ago, we were robbed in our
21 same home and they just took his video
22 games.

23 So it didn't affect me, because I don't
24 play the games. My husband and my -- but I
25 did -- I was angered because, you know, they

1 came in the same way both times -- my
2 kitchen window.

3 Q. Did they break the window out?

4 A. Yeah, the second time they did.

5 Q. Has anybody been caught or do you know?

6 A. The officer called my husband. They
7 have gotten one game back. My husband
8 picked it up like two weeks ago. But, no,
9 sir, no one has been arrested.

10 Q. Do have a bias or prejudice as a result
11 of that experience towards law enforcement
12 for failing to have arrested someone?

13 A. No.

14 Q. Do you have any bias or prejudice in
15 general as a result of those experiences?

16 A. A little, yes.

17 Q. Tell me about it.

18 A. I have bias against people who don't
19 want to work, to get what they want. I work
20 very hard and I have -- my husband, you
21 know, we work very hard to get what we have.
22 Yes, sir, I would say yes that I have a
23 bias.

24 Q. That is a very traumatic experience,
25 having someone break into your home, -- for

1 anyone.

2 A. Um-humm.

3 Q. I think anyone would probably feel like
4 you do. But let me ask you this, would that
5 prejudice or that bias affect your
6 impartiality on this jury in this case?

7 A. No. No, it's different. It's not
8 personal.

9 Q. Do you have any relatives in jail?

10 A. No, not currently.

11 Q. Previously?

12 A. Yes, sir.

13 Q. Who was in jail?

14 A. My oldest uncle, he was mentally
15 unstable. He was a Vietnam vet. He hit my
16 grandmother who raise him, then he cut a
17 cop. So he went to jail.

18 Then I have another uncle, who is my
19 youngest uncle on my mother's side. He is
20 divorced and he has a child, so he's been in
21 jail for child support.

22 Q. Thank you very much. Are you a member
23 of any group which primarily supports law
24 enforcement, such as MADD?

25 A. No, sir, I am not.

1 Q. Do you have any special or particular
2 interest in the outcome of this case?

3 A. No, I don't.

4 Q. Are you aware of any bias or prejudice
5 against the defendant as a result of the
6 charges which have been brought against him?

7 A. No, I am not aware.

8 Q. Do you have any religious beliefs that
9 would make you biased or prejudiced for or
10 against the defendant?

11 A. I do not.

12 Q. Do you have any religious beliefs that
13 would make you biased or prejudiced for or
14 against the State?

15 A. No.

16 Q. Do you have a bias or prejudice against
17 the defendant because of his race, being
18 black?

19 A. No.

20 Q. Have you had any bad experiences or
21 good experiences with law enforcement?

22 A. Both.

23 Q. Both?

24 A. Mostly good.

25 Q. Do know of any reason, personal or

1 otherwise, as to why you cannot serve on
2 this jury?

3 A. No, sir.

4 Q. You mentioned that you have a health
5 problem. Would that interfere with your
6 ability to serve on the jury? I am not
7 going to pry into your personal health
8 situation, but ---

9 A. No, no, that's fine.

10 Q. --- would that interfere with your jury
11 service?

12 A. As long as I can, like, suck on mints
13 like I am doing now.

14 Q. I will give you as many mints as you
15 need.

16 A. Yes, sir. Okay, then I will be fine.

17 Q. All right. Do you know of any reason
18 why you could not give the State and the
19 Defendant a fair and impartial trial?

20 A. Can you repeat that?

21 Q. Do you know of any reason why you could
22 not give the State and the Defendant a fair
23 and impartial trial?

24 A. No, I don't know of a reason.

25 Q. Earlier today I explained to you the

1 two-trial (sic) process on the death penalty
2 case. Do I need to review that with you or
3 are you satisfied with what I told you
4 earlier?

5 A. I'm satisfied. One was mitigation and
6 the other was ---

7 Q. Aggravation.

8 A. (Affirmative nod), okay. No, I
9 remember. I remember. You may want to ask,
10 but I remember.

11 Q. Oka. I will just cover it very
12 briefly. Okay?

13 A. All right.

14 Q. In a death penalty case, it's two
15 parts. I'm talking about the sentencing
16 phase of the trial.

17 A. Okay.

18 Q. The State has to prove aggravation.

19 A. Right.

20 Q. Then there may be mitigation?

21 A. (Affirmative nod).

22 Q. You have to consider the mitigation
23 before you make up your mind or decide
24 whether the defendant should receive life
25 without parole or death.

1 A. Or death, okay.

2 Q. Are you able to do that?

3 A. Yes.

4 THE COURT: Whose turn?

5 EXAMINATION

6 BY SCARLETT WILSON:

7 Q. Good morning, Ms. Sweeper-Howell.

8 A. Hi.

9 Q. What happens now is that both sides has
10 a chance to ask you some more followup
11 questions about your thoughts on life
12 without parole and the death penalty.

13 A. Okay.

14 Q. We can't talk about this case, so we
15 have to kind of talk generally in the
16 abstract. So if I don't make sense, tell
17 me.

18 A. Okay.

19 Q. We know that it is kind of hard.

20 A. Okay.

21 Q. Did you understand from what your read
22 and from what the Judge told you -- did you
23 know that life without parole is always an
24 option?

25 A. Did I know that life without parole is

1 always an option?

2 Q. (Affirmative nod), for a murder?

3 A. Not previously, not before he explained
4 it..

5 Q. So you know that in a death penalty
6 case, even if there were a conviction
7 leading to the penalty phase, nobody would
8 take life without parole off the table. It
9 would always be there for the jury to
10 consider?

11 A. Okay. Yeah.

12 Q. And the only way that the jury would
13 even consider the death penalty was if they
14 found an aggravating circumstance..

15 A. Yes.

16 Q. Then death would be on the table.

17 A. Okay.

18 Q. Are you with me?

19 A. Yes.

20 Q. Okay. In that situation also, what has
21 to happen -- we talked about this concept of
22 murder, which is different in other states
23 but in South Carolina a murder is something
24 that is intentional.

25 A. Right.

1 Q. It is something that is done with
2 malice, meanness.

3 A. Right.

4 Q. It's not about an accident, it is not
5 about being provoked, none of that.

6 A. Okay.

7 Q. So if the jury gets to the penalty
8 phase, that is all a given.

9 A. Okay. Yes.

10 Q. The question sort of is, can you keep
11 your mind open until the end, until all the
12 evidence comes in?

13 A. Until all the evidence come in,
14 (affirmative nod). I can.

15 Q. You could make sure that the State
16 proved beyond a reasonable doubt that
17 aggravating circumstance to even put the
18 death penalty on the table?

19 A. Yes.

20 Q. And if we didn't, it's over -- life
21 without parole?

22 A. Right.

23 Q. Okay. Now, in that penalty phase --
24 again talking about not this situation but
25 -- if you heard a lot of evidence about

1 aggravation, -- it might be stuff about how
2 brutal the crime was, things like that.

3 A. Okay.

4 Q. Could you still withhold making up your
5 mind as to the sentence until you heard
6 things about the defendant in that
7 mitigation? Things that make it not as bad?
8 Things about his background, substance
9 abuse, that sort of thing?

10 A. I could.

11 Q. You could wait and ---

12 A. Yes.

13 Q. That would be even in a situation where
14 somebody has committed a burglary, a rape or
15 something like that? You still would listen
16 if there were anything else to hear?

17 A. Yes, ma'am.

18 Q. And factor it into your decision?

19 A. Yes, 'ma'am.

20 Q. Do you think that if you were part of
21 the jury who had come to a consensus that
22 the death penalty was appropriate, do you
23 think you would have any trouble at all
24 signing your name to that verdict form?

25 A. I would not.

1 Q. Because it's not a matter of raising
2 your hand, you'd actually have to sign if
3 you believed that?

4 A. Um-humm.

5 Q. In the deliberation process, do you
6 think that you could engage in that give-
7 and-take, listening to other people's views
8 and ---

9 A. I could.

10 Q. --- factor that in, as well?

11 A. I could.

12 Q. But if you formed an opinion, you ---

13 A. Right.

14 Q. --- could stick to it?

15 A. I could.

16 Q. Stand up for yourself?

17 A. Yes, ma'am.

18 Q. Tell me, if you can, what would move
19 you in the direction of a life without
20 parole sentence, what types of things?

21 A. The lack of reasonable doubt.

22 Q. Now, again remember that -- let's go
23 back a minute. I know that this is kind of
24 confusing.

25 A. Yeah.

1 Q. If you're even looking at the death
2 penalty, if you're even sitting there in the
3 penalty phase, you and the other jurors have
4 found guilt beyond a reasonable doubt?

5 A. Right.

6 Q. So you would have been convinced beyond
7 a reasonable doubt that he was guilty?

8 A. Okay. Right.

9 Q. So from that point what would make you
10 think life without parole was appropriate
11 here?

12 A. The mitigation, aggravation.

13 Q. Things about mitigation, like things
14 about the defendant's life?

15 A. Yeah.

16 Q. Remorse?

17 A. Uh, -- (pause).

18 Q. Feeling bad, if the person felt bad
19 that they'd done it?

20 A. No, ma'am.

21 Q. That doesn't move you too much?

22 A. No, ma'am.

23 Q. But things about the background,
24 history, what was going on with the person
25 at the time?

1 A. Yes, ma'am.

2 Q. You would want to know that before you
3 made your decision?

4 A. Yes, ma'am.

5 Q. That's all that I have for you. I
6 appreciate -- did you have something you
7 want to ask?

8 A. No. I was just going to say more like
9 his childhood and background.

10 Q. Because -- why?

11 A. Because I believe that most of our past
12 and childhood ---

13 Q. Makes you who you are?

14 A. Basically, yes.

15 Q. That's all that I have. Thank you.

16 A. Thank you, ma'am.

17 THE COURT: Mr. Maguire, are you
18 going to start at the cooler or in the box?
19 You don't have a cooler on the front porch?

20 WILLIAM MAGUIRE: We don't.

21 EXAMINATION

22 BY WILLIAM MAGUIRE:

23 Q. Ms. Sweeper-Howell, how are you doing
24 today?

25 A. I am doing well, thanks.

1 Q. Good. We've asked a lot of you'all.
2 It's been inconvenient, waiting around a
3 long time. I am just going to ask a little
4 bit more of you, to give me honest
5 responses. Okay?

6 A. Yes, sir.

7 Q. There are no right or wrong answers.

8 A. All right.

9 Q. You talked about your oldest uncle who
10 is a Vietnam vet. He hit your grandmother?

11 A. Um-humm, (affirmative nod)

12 Q. Was he charged?

13 A. He was charged after he cut the cop.

14 Q. A police officer came in, there was a
15 struggle and he was actually charged with
16 that?

17 A. Right. He ran. He was -- he was very
18 unstable and very mad and when they got him,
19 -- yes, sir, he attacked the cop.

20 Q. I see. If there was a jury sitting on
21 his case, would you want them to take into
22 consideration his background, being a
23 Vietnam vet ---

24 SCARLETT WILSON: Your Honor, I
25 object.

1 THE COURT: I sustain the
2 objection. I think it's -- I don't want you
3 to stake her out on her uncle or wherever
4 you are headed with that.

5 WILLIAM MAGUIRE: Okay.

6 EXAMINATION CONTINUED

7 BY WILLIAM MAGUIRE:

8 Q. I don't want to be too personal or
9 anything, I was just using that as an
10 example.

11 A. That's all right.

12 Q. But in any case, if somebody had to
13 make a decision what to do with somebody,
14 for you there's background, who they are,
15 what they've gone through in life? That
16 would be important?

17 A. Yes, sir.

18 WILLIAM MAGUIRE: I'll start out
19 at the water cooler.

20 THE COURT: Okay.

21 EXAMINATION CONTINUED

22 BY WILLIAM MAGUIRE:

23 Q. Ma'am, I want to put you at work, at
24 the water cooler, if you have one in the
25 lobby or the hallway or the break room or

1 whatever.

2 A. All right.

3 Q. A conversation comes up, about the
4 death penalty.

5 A. All right.

6 Q. Somebody says, 'I think the death
7 penalty should be used more often.'

8 Somebody on the other side of the cooler
9 says, 'I think that it is used too much.

10 I think it should be a last resort.'

11 How do you fall out in that discussion?

12 A. I fall in that discussion -- (pause) --
13 the evidence. You know, the evidence
14 proving the intent or the -- oh, gosh,
15 premeditation of the crime. .

16 Q. Okay.

17 A. I don't feel too much towards that case
18 and ---

19 Q. On an individual basis. . On an
20 individual basis, a particular case? Is
21 that what you're saying?

22 A. Yes, that is what I am saying.

23 Q. You would want to make your call on a
24 case by case basis? .

25 A. Case by case, absolutely.

1 Q. Now, the Judge is going to tell you
2 that all murders -- you mentioned
3 intentional and premeditation.

4 A. Right.

5 Q. All murders in South Carolina are
6 intentional.

7 A. All right.

8 Q. I am going to back up a little bit and
9 I am going to take you away from that water
10 cooler and I am going to put you on a jury
11 now -- right over here (indicating jury box)
12 with eleven other people.

13 A. Okay.

14 Q. What you are doing to is that you and
15 the eleven other jurors are going to convict
16 a man, a defendant of murder.

17 A. Um-humm.

18 Q. What that means is that you and eleven
19 other jurors have found beyond a reasonable
20 doubt that a defendant, the defendant in
21 your case, unlawfully and intentionally,
22 with malice aforethought, deliberately took
23 the life of an absolutely innocent victim.

24 A. Okay.

25 Q. Malice aforethought, a malicious

1 murder. Malice aforethought being defined
2 as have a black, depraved, wicked heart
3 fatally bent on mischief. The defendant
4 intentionally committed the act, he was
5 operating with a black and malignant, evil
6 heart fatally bent on wickedness and
7 mischief.

8 A. Okay.

9 Q. Kind of an old definition, but that's
10 our definition of murder in South Carolina.

11 A. Okay.

12 Q. Are you with me?

13 A. Yes, sir.

14 Q. We are talking about an intentional,
15 chose to take an innocent life.

16 A. Right. Okay.

17 Q. Not self-defense, not accident, ---

18 A. All right.

19 Q. --- not being involved in an
20 altercation or nothing like that.

21 A. All right.

22 Q. Chooses to take the life of an innocent
23 person. Are you with me?

24 A. Yes, sir.

25 Q. Then you hear aggravation evidence.

1 Like the Judge said, facts and circumstances
2 that would increase the enormity or severity
3 of the crime.

4 I am not going to talk about the facts
5 of this case, but I want to get you to see a
6 crime with me. Okay?

7 A. All right.

8 Q. A home invasion, going into a home when
9 people are there, burglary, armed robbery,
10 rape, kidnaping, murder. One person does
11 all that at one time.

12 A. Okay.

13 Q. And you and your eleven other jurors
14 have jurors have just convicted a defendant
15 of that scenario. What are your thoughts
16 about the death penalty as the appropriate
17 punishment in that case?

18 A. For this particular case everything is
19 proven?

20 Q. Yes, everything is proven.

21 A. And, like you said, it was planned or
22 was ---

23 Q. Intentional.

24 A. --- intentional, ---

25 Q. With malice aforethought.

1 A. --- with malice aforethought. Yes,
2 sir.

3 Q. In that scenario, would the death
4 penalty always be appropriate?

5 A. No, it would not always.

6 Q. Would the life penalty ever be severe
7 enough for that situation?

8 A. Yeah.

9 Q. In making that life and death decision,
10 what would you look at to kind of move you
11 one way or the other?

12 A. The severity of the maliciousness.

13 Q. The violence of the crime?

14 A. Yes, and the premeditation.

15 Q. Okay. The solicitor asked you some
16 questions about the defendant or the person
17 accused of the crime, and you would want to
18 hear about their background?

19 A. Yes, sir.

20 Q. Is that because you believe that a
21 person's upbringing, how they were raised,
22 affects them significantly as to how they
23 turn out?

24 A. I think that -- everything, you know,
25 it affects what we do and the decisions that

1 we make.

2 Q. So even though we know what we're doing
3 is right or wrong, we're influenced by our
4 past?

5 A. We are influenced by our thought
6 processes, you know, the past, the thought
7 processes; yes, sir.

8 Q. I want to talk to you just briefly
9 about how this case is differently from a
10 typical legal case.

11 A. Okay.

12 Q. Because this is the only case, the only
13 kind of case in the whole state of South
14 Carolina where the jury actually gets to
15 pick what sentence that they think is right
16 or appropriate.

17 A. Okay.

18 Q. All other cases in South Carolina are
19 different. This case has two phases and the
20 sentencing part of it, the last part of it,
21 is -- I am actually doing a really bad job
22 right now of explaining that. So I am going
23 to take you through an example. Okay?

24 A. Okay.

25 Q. A typical case in South Carolina, maybe

1 a car wreck case where two people hit each
2 other at an intersection. The big issue in
3 that case is who had the right-of-way, who
4 had the green light, who had the red light.
5 You and your other jurors would try to
6 figure out the right answer, what happened.
7 It was that the light was either red or it
8 was green?

9 A. Exactly.

10 Q. That's sort of a yes/no type dilemma.

11 A. Right.

12 Q. In the sentencing decision, at the end
13 of this case, at the end of the day a
14 sentencing decision is described as an
15 individual juror's individual moral
16 judgment.

17 A. Okay.

18 Q. It is not necessarily a right or wrong
19 answer.

20 A. All right.

21 Q. Does that sound fair to you?

22 A. Yes, sir.

23 Q. Would you respect all of the other
24 individual juror's individual moral
25 judgment?

1 A. I can respect. Yes, sir.

2 Q. And you would want your individual
3 decision to be respected?

4 A. Right.

5 Q. Even if somebody couldn't even
6 articulate why they are voting a certain way
7 or why they are feeling something, if I say
8 that 'based on my walk in life, I've seen
9 something in this case and this is my
10 decision', could you respect that?

11 A. I don't think I could respect that.

12 Q. Well, the State -- the government in
13 South Carolina never requires a juror to
14 explain their decision.

15 A. Oh, okay.

16 Q. And you wouldn't require them to do
17 that, would you?

18 A. No. Well, -- (pause) -- we -- as
19 jurors, we get to vote ---

20 THE COURT: Jurors share
21 information. They discuss the case.
22 Withdraw that question and move to another
23 one.

24 WILLIAM MAGUIRE: All right.

25 EXAMINATION CONTINUED

1 BY WILLIAM MAGUIRE:

2 Q. In a matter as severe as this, a life
3 hanging in the balance, you would agree that
4 you would not want it to be a straw poll or
5 a democracy, take one vote and be done with
6 it?

7 A. Correct.

8 Q. You would want everybody to have their
9 own individual opinion?

10 A. Correct.

11 Q. Share information?

12 A. Yes.

13 Q. But at the end of the day it would be
14 okay to agree to disagree?

15 A. Yeah, hopefully agree to disagree.

16 Yes.

17 Q. That's all that I have for you, ma'am.

18 THE COURT: Any Motions?

19 SCARLETT WILSON: No, sir.

20 WILLIAM MAGUIRE: No, sir.

21 THE COURT: Ms. Sweeper-Howell,
22 we are getting a group of people together so
23 that we can strike this jury, draw this
24 jury. You are now part of that group. Be
25 back in the courtroom this afternoon at

1 2:30. Please don't discuss the case with
2 anyone. What kind of mints do you use?

3 JUROR NUMBER 334: Anything
4 with sugar. Any hard candy.

5 THE COURT: Okay. Well, bring
6 enough and we will share some.

7 JUROR NUMBER 334: Okay, I will
8 go get some.

9 THE COURT: Have a good day. See
10 you at 2:30.

11 (JUROR NUMBER 334 EXITS COURTROOM)

12 THE COURT: Bring in Donald
13 Bogard.

14 (JUROR NUMBER 27 ENTERS COURTROOM)

15 THE COURT: Mr. Bogard, how you
16 doing?

17 JUROR NUMBER 27: Fine, sir.

18 THE COURT: Mr. Bogard, did you
19 have an opportunity to review the sheet
20 laying out the three different opinions
21 about the death penalty?

22 JUROR NUMBER 27: Yes, sir.

23 THE COURT: Did you understand
24 those types: one, two and three?

25 JUROR NUMBER 27: Yes, sir.

1 THE COURT: Did you determine if
2 you fit into one of those categories?

3 JUROR NUMBER 27: More towards
4 type two.

5 THE COURT: More towards type
6 two?

7 JUROR NUMBER 27: Yes, sir.

8 THE COURT: So you feel like a
9 person is convicted of murder that you would
10 always give the death penalty?

11 JUROR NUMBER 27: Yes, sir.

12 THE COURT: I appreciate your
13 opinion. However, I am going to have to
14 excuse you from service on this jury. Okay?

15 JUROR NUMBER 27: Yes, sir.

16 THE COURT: Thank you very much.

17 (JUROR NUMBER 27 EXCUSED)

18 (JUROR NUMBER 27 EXITS COURTROOM)

19 THE COURT: Do you have Panels 19
20 and 20 ---

21 BAILIFF ALLISON: Yes, sir.

22 THE COURT: Yes, sir, do you want
23 to bring both of them in?

24 THE COURT: Yeah, bring in
25 nineteen and twenty and also Mr. Steven

1 Thornsberry.

2 BAILIFF ALLISON: Yes, sir.

3 THE COURT: Do we have Mr. Turner
4 here?

5 BAILIFF ALLISON: He is supposed
6 to come in at 2:30.

7 THE COURT: All right. Thank
8 you.

9 (JURY NUMBER 345 ENTERS COURTROOM)

10 (JUROR PANELS 19 & 20 ENTER COURTROOM)

11 THE COURT: Ladies and Gentlemen
12 of the jury panel, before we get started, I
13 am going to ask the Clerk to swear the
14 panel.

15 CLERK: Please stand and raise
16 your right hands. (Jurors comply).

17 You should truthfully answer all
18 questions asked of you concerning this
19 matter now before the court, by the Court
20 or by order thereof.

21 You should speak the truth, the
22 whole truth and nothing but the truth, so
23 help you God. Say "I do." (Affirmative
24 response from jurors). Please be seated.

25 THE COURT: Ladies and gentlemen

1 of the jury panel, I am going to give you
2 some instructions concerning a particular
3 aspect of this trial. The State has charged
4 the defendant with the following crimes:
5 attempted arson, armed robbery, assault and
6 battery with intent to kill, criminal sexual
7 conduct first, grand larceny, burglary first
8 and murder.

9 I am going to talk to you
10 specifically about the murder charge. In
11 this State -- the State has served a notice
12 of the death penalty on the Defendant, which
13 means that it becomes a death penalty case.

14 Death penalty cases in South
15 Carolina are tried differently from other
16 cases. The trial is broken up into two
17 parts, which means that it is bifurcated.
18 The first part is referred to as the guilt
19 portion and the second part is referred to
20 as the sentencing or the penalty phase.

21 The fact that I am going to talk to
22 you this morning about the penalty phase or
23 the sentencing phase, please do not consider
24 that any determination has been made of the
25 defendant's innocence or guilt of the

1 charges, which the State has brought against
2 him. The State still has the burden of
3 proving all of those charges, as well as the
4 murder charge, beyond a reasonable doubt.

5 All twelve jurors have to make the
6 determination that the State has proven
7 their case.

8 However, for our purposes this
9 morning please consider that a jury has
10 found the defendant guilty of murder. I want
11 to talk to you, as I said, about the penalty
12 phase.

13 In the penalty phase, you the jury
14 decides the penalty for the defendant. You
15 have two choices: life without parole or
16 death. You, the jury, make that
17 determination. You make a recommendation
18 to the Court and the Court is obligated to
19 follow your recommendation.

20 When I use the term "life without
21 parole", that means what it says. It means
22 that the defendant will never be eligible
23 for parole, he will never get out of jail,
24 he would die in jail.

25 In the penalty phase, you the jury

1 decide the penalties. I am going to go over
2 some details of what you will consider and
3 what you will hear in a case, a death
4 penalty case..

5
6 The state of South Carolina has
7 laid out certain aggravating circumstances.
8 Aggravating circumstances are facts,
9 incidents, details or occurrences which
10 state law says aggravates the offense of
11 murder. In other words those circumstances
12 increase the enormity of the crime.

13 Now, the state has laid out several
14 aggravating circumstances. I am going to
15 read some of those to you. The murder was
16 committed while in the commission of the
17 following crimes or acts: Criminal sexual
18 conduct in any degree; kidnaping; burglary
19 in any degree; robbery while armed with a
20 deadly weapon; larceny with the use of a
21 deadly weapon; or physical torture.

22 And, that is some of the
23 aggravating circumstances laid out by state
24 statute. The State is required to prove one
25 of those circumstances beyond a reasonable

1 doubt. You, the jury, would have to find
2 that the State had proven one of those
3 aggravating circumstances. I do not know
4 what the aggravating circumstances are in
5 this case, because I have not heard the
6 case.

7 What I want you to understand is
8 that it is the State's responsibility to
9 prove a, or one, of the aggravating
10 circumstances. You the jury has to
11 determine if the State state has proven --
12 all jurors have to agree that the State has
13 proven one or more aggravating circumstances
14 beyond a reasonable doubt.

15 After the jury has made that
16 determination, you move to what is referred
17 to as mitigation. Mitigation -- excuse me.

18 Mitigating circumstances are facts
19 either surrounding the incident itself or
20 which shed light on the defendant's history,
21 background, upbringing, childhood, which
22 makes the crime less severe or less harsh.
23 Some examples set by state statute for
24 mitigation are:

25 The defendant has no significant

1 history or prior criminal convictions
2 involving the use of violence against
3 another person.

4 The murder was committed while the
5 defendant was under the influence of mental
6 or emotional disturbance.

7 The capacity of the defendant to
8 appreciate the criminality of his conduct or
9 to conform his conduct to the requirements
10 of the law was substantially impaired.

11 The age or the mentality of the
12 defendant at the time of the crime.

13 There are some of the mitigating
14 circumstances. I do not know what
15 mitigating circumstances are going to be
16 offered.

17 A defendant is not required to
18 offer or obligated to offer any mitigating
19 circumstances.

20 Mitigation evidence can in essence
21 be any reason for a sentence less than the
22 death penalty.

23 In summary, what I am telling you
24 - - in the penalty phase, you the jury make
25 the determination of life or death. In

1 order to arrive at that decision, you have
2 to find that the State has proven one or
3 more aggravating circumstances, all twelve
4 of you have to agree; then you have to
5 listen to the mitigation, to seriously
6 consider the mitigation and take it under
7 advisement; and then make a decision on life
8 without parole or death.

9 So you have to consider both
10 aspects before you decide life or death.

11 Now, I have prepared a sheet.
12 On that sheet it talks about murder and is a
13 list of three types or opinions about the
14 death penalty. The bailiff is going to take
15 you to a jury room very shortly, give each
16 of you a copy of the sheet. I want you to
17 read it, see if you fit into any of the
18 types in your personal opinion.

19 It is a personal opinion. Please
20 do not discuss your opinion with anyone
21 else, it is a personal decision you make.

22 Then we're going to bring you back
23 into the courtroom and I'm going to ask you
24 about your opinion on the death penalty one
25 at a time.

1 I also have prepared a list of
2 names. There are one hundred thirty-four
3 names on the list. These are potential
4 witnesses in the case. I want you to look
5 at the names, see if you know anybody or if
6 you recognize any names on that list. I
7 want to ask about those names when you come
8 back into the courtroom.

9 There is one name that was left
10 off, that is Jessica Broughton. Is there
11 any member of the jury panel that knows
12 Jessica Broughton or you recognize the name
13 Jessica Broughton? If you have, raise your
14 right hand. If you do, raise your right
15 hand. (No response).

16 Solicitor?

17 SCARLETT WILSON: Yes, sir. Thank
18 you. Ladies and Gentlemen, I am Scarlett
19 Wilson. I am the solicitor for Charleston
20 and Berkeley counties. That is known as the
21 9th Circuit, both of those counties.

22 This is Bruce Durant, he is the my
23 chief deputy over the 9th Circuit.

24 This is Brian Alfaro. He is the
25 chief deputy over our Berkeley office.

1 Together the three of us will be
2 asking questions, submitting evidence,
3 taking testimony during this trial over the
4 next week or so. Thank you. We will be
5 asking witnesses questions, introducing
6 evidence, making arguments, things of that
7 nature. We appreciate you all being here
8 and taking part in this process.

9 THE COURT: Is there any member
10 of the jury panel who has a close contact or
11 personal relationship with the Solicitor
12 herself or anyone in the solicitor's office?
13 If so, raise your right hand. (No
14 response).

15 Mr. Maguire?

16 WILLIAM MAGUIRE: Thank you,
17 Judge. Good morning. My name is Bill
18 Maguire. I am a lawyer, I live in
19 Columbia, I work for the State Government.

20 The reason we are introducing
21 ourselves is just in case you recognize us
22 from someplace. So I need to tell you that
23 I used to practice law in the lowcountry for
24 a number of years. I worked for Ashley
25 Pennington in the 9th Circuit Public

1 Defender's Office in Charleston and I also
2 worked for Andy Savage for a number of
3 years.

4 On my immediate right is Mr. Colin
5 Broughton, my client. He sits right between
6 me and Morgan Daniels.

7 Next to him is Morgan Daniels. She
8 is an investigator in my office. She's from
9 Florida but she is a graduate of USC.

10 To her right is Ms. Pati Kennedy.
11 Ms. Kennedy is the head public defender of
12 the Berkeley County Public Defender's system
13 and her office is here in Moncks Corner.

14 At the end of the table is Mr. Boyd
15 Young. Mr. Young is a lawyer in my office
16 who works with me; and he, like me, has
17 practiced both in the lowcountry and in
18 Georgia and he works with me in Columbia and
19 that is where we both live now.

20 THE COURT: Is there any member
21 of the panel who is close personal friends
22 with Mr. Maguire, anyone that he introduced
23 or who has been represented by Mr. Maguire
24 or any of the attorneys that he introduced.
25 If so, raise your right hand. (No .

1 response).

2 Let the record reflect that no one
3 has raised their right hands to the last two
4 questions that the court has asked of the
5 jurors, concerning the solicitor's office or
6 Mr. Maguire and his staff.

7 Ladies and gentlemen, I am going
8 to call out the names -- first of all, Mr.
9 Steven Thornsberry.

10 JUROR NUMBER 345: Yes, sir?

11 THE COURT: Did you get your tire
12 fixed okay?

13 JUROR NUMBER 345: Yes, sir.

14 THE COURT: Okay. I am going to
15 call out the list of Panel 19, ask you to
16 stand and follow the bailiff to the jury
17 room:

18 Thomas Baker

19 Mattie Mitchell

20 Latoya Brown

21 Jacob Henry

22 Cheri Murdock

23 Pamela Stevens

24 Mr. Thornsberry, you may join them.

25 (JURY PANEL NUMBER 19 EXITS COURTROOM)

1 (JUROR NUMBER 345 EXITS COURTROOM)

2 THE COURT: The next group is
3 Panel Number 20:

4 Anita Putman

5 Robert Fortney

6 Rebecca Wenrich

7 Michelle Ellis

8 Cassandra Washington

9 Donna Noplis.

10 (JURY PANEL NUMBER 10 EXITS COURTROOM)

11 THE COURT: All right, we will
12 take a recess and give them an opportunity
13 to review the documents. When somebody is
14 ready, we will come back in the courtroom
15 and get started.

16 (BRIEF RECESS 9:25 - 9:35 A.M.)

17 (DEFENDANT PRESENT)

18 SCARLETT WILSON: Your Honor, may
19 we bring in Mr. Thornsberry first?

20 THE COURT: I don't know if he is
21 finished reading it. Whoever has finished
22 reading it, we will bring them in. Then I
23 am going to bring him in as soon as he has
24 finished reading it. Can you (bailiff) to
25 see if Mr. Thornsberry is finished?

1 CLERK: He is.

2 THE COURT: Bring him in first.

3 (JUROR NUMBER 345 ENTERS COURTROOM)

4 THE COURT: Mr. Thornsberry, have
5 you had an opportunity to read the sheet
6 concerning about the death penalty?

7 JUROR NUMBER 345: Yes, sir.

8 THE COURT: Did you understand
9 it?

10 JUROR NUMBER 345: Yes, sir.

11 THE COURT: Could you determine
12 if you were in type one, two or three?

13 JUROR NUMBER 345: Type three.

14 THE COURT: You are type three?

15 JUROR NUMBER 345: (Affirmative
16 nod).

17 STEVEN THORNSBERRY, having been
18 previously sworn to tell the truth testified
19 as follows:

20 EXAMINATION

21 BY THE COURT:

22 Q. Have you had an opportunity to review
23 the one hundred thirty-four names?

24 A. Yes, sir.

25 Q. And did you recognize any of those

1 names?

2 A. No, sir.

3 Q. You don't know anybody?

4 A. No, sir.

5 Q. All right. I am going to ask you some
6 questions and then the attorneys are going
7 to ask you some questions. Okay?

8 A. Yes.

9 Q. There are no right or wrong answers.

10 Just answer the questions as best you can.

11 If you don't know the answer, just say that
12 you don't know. Okay?

13 A. Yes, sir.

14 Q. Have you heard anyone talking about the
15 case, either this week or prior to this
16 week?

17 A. No, sir.

18 Q. Have you heard any jurors talking about
19 the case?

20 A. I have heard things but they did not
21 talk about the case particularly, it was
22 more about the jury selection process.

23 Q. What did you hear?

24 A. That it was a criminal case and what
25 you told us in here about it being a murder

1 case.

2 Q. Have you read anything in the paper?

3 A. No, sir.

4 Q. Have you seen anything on television?

5 A. No, sir.

6 Q. Do you have any relatives or close

7 personal friends employed in law

8 enforcement?

9 A. Not in this state; no, sir.

10 Q. What state?

11 A. Ohio.

12 Q. What type of job?

13 A. My uncle -- or my uncle and aunt are

14 both retired police officers up there.

15 Q. Retired police officers?

16 A. Yeah.

17 Q. Would that cause you any difficulty in

18 sitting on this jury?

19 A. No, sir.

20 Q. Could you be fair to both the State and

21 the Defendant?

22 A. Yes, sir.

23 Q. Has the solicitor or any member of her

24 staff prosecuted you or any member of your

25 family?

1 A. No, sir.

2 Q. Have you or any member of your family
3 or a close personal friend been the victim
4 of a crime?

5 A. No, sir.

6 Q. Do you have any relatives in jail?

7 A. No that I know of, sir.

8 Q. Are you a member of any group which
9 primarily supports law enforcement, such as
10 MADD?

11 A. No, sir.

12 Q. Do you have any special or particular
13 interest in the outcome of this case?

14 A. No, sir.

15 Q. Are you aware of any bias or prejudice
16 against the defendant as a result of the
17 charges which have been brought by the
18 State?

19 A. No, sir.

20 Q. Do you have any religious beliefs that
21 would make you biased or prejudiced for or
22 against the defendant?

23 A. No, sir.

24 Q. Do you have any religious beliefs that
25 would make you biased or prejudiced for or

1 against the State?

2 A. No, sir.

3 Q. Do you have a bias or prejudice against
4 the defendant because of his race, which is
5 black?

6 A. No.

7 Q. Have you had any bad experiences or
8 good experiences with law enforcement?

9 A. Both.

10 Q. Both?

11 A. (Affirmative nod).

12 Q. Which were worse?

13 A. Getting speeding tickets. That's not
14 good.

15 Q. Speeding tickets?

16 A. That's about all that I've gotten.

17 Q. That is all that you've gotten?

18 A. (Affirmative nod).

19 Q. Had some good experiences also?

20 A. Yeah, they -- yeah, my soon took off
21 one day, come up missing, and they came and
22 found him.

23 Q. Do know of any reason, personal or
24 otherwise, as to why you cannot serve on
25 this jury?

1 A. No, sir.

2 Q. Do you know of any reason why you could
3 not give the State and the Defendant a fair
4 and impartial trial?

5 A. No, sir.

6 Q. I explained to you earlier about the
7 penalty phase of a murder trial. Did you
8 understand what I told you?

9 A. Yes.

10 Q. Do you need me to review it for you?

11 A. No, sir.

12 Q. Okay.

13 THE COURT: Mr. Maguire, let's go
14 the water fountain.

15 WILLIAM MAGUIRE: That's where we
16 are heading, Judge.

17 THE COURT: Okay.

18 EXAMINATION

19 BY WILLIAM MAGUIRE:

20 Q. Mr. Thornsberry, ---

21 THE COURT: I was more
22 comfortable on the front porch.

23 WILLIAM MAGUIRE: Well, we can do
24 that, go the front porch.

25 THE COURT: Oh, okay. All right.

1 WILLIAM MAGUIRE: We've been doing
2 this a couple days now. We are punch-drunk,
3 as you can see.

4 JUROR NUMBER 345: That's okay.

5 EXAMINATION CONTINUED

6 BY WILLIAM MAGUIRE:

7 Q. I want to put you on your front porch
8 here, just talking to me like -- you know,
9 just two guys talking about a subject. I
10 want to talk about the death penalty. Kind
11 of throw out all of your preconceived
12 notions of law, or what you think that it
13 should be and just answer the questions
14 candidly and honestly. There are no right
15 or wrong answers today. Okay?

16 A. Okay.

17 Q. All right. If you and I were on your
18 front porch and I just asked you what are
19 your thoughts about the death penalty, what
20 would you say?

21 A. I would say that it would depend on the
22 case.

23 Q. And if there was somebody else on the
24 porch with us and he said, 'I think the
25 death penalty should be used more often.'

1 If there was somebody else on your porch and
2 they said, 'I think it should be less
3 often.' How would you fall out?

4 A. I couldn't make a call based on that.

5 Q. Okay.

6 A. I would have to hear the facts.

7 Q. Sort of a case by case basis?

8 A. Oh, yeah.

9 Q. Okay. Well, let's do that. Let's look
10 at case. I am now going to take you off of
11 the porch and I am going to put you in the
12 jury box. Okay? With eleven other jurors.

13 A. Okay.

14 Q. What you are going to do is that you're
15 going to convict a person, a defendant, of
16 murder in South Carolina. What that means
17 is that you and your eleven other jurors
18 found beyond a reasonable doubt that a
19 defendant took the life of an innocent
20 person without justification or excuse, and
21 they had malice aforethought, a malicious
22 murder. Malice aforethought being defined
23 in the legal system as their heart -- they
24 have a black, depraved, wicked heart fatally
25 bent on wickedness and mischief. Are you

1 with me?

2 A. Yes.

3 Q. It is not an accident, it is not a
4 self-defense, it is not drunk in a bar
5 hitting somebody, it is not a fight that
6 gets out of hand, it is a deliberate act,
7 they choose to take the life of an innocent
8 person. Okay?

9 A. (Affirmative nod).

10 Q. Then you would hear even more evidence
11 to suggest -- to increase the enormity of
12 the crime, aggravating circumstances.

13 I am not going to go into specifics
14 of this case or the specific facts of this
15 case but I want you to 'see' a crime with me
16 here. Okay?

17 A. (Affirmative nod).

18 Q. A home invasion, going into a home when
19 people are in there, kidnaping, rape, armed
20 robbery, burglary, murder. One person does
21 all of that at one time. Okay? Are you
22 with me?

23 A. Yes, sir.

24 Q. At that point in the process, what are
25 your thoughts about the death penalty is the

1 appropriate punishment?

2 A. I would not have a problem with it if
3 the case called for it, yeah.

4 Q. Can you think of anything -- well, let
5 me ask you that. Let me ask you this, is
6 the life penalty, life in prison, is that a
7 severe enough punishment for that kind of
8 scenario?

9 A. Sure.

10 Q. Do you think that life without parole
11 is a severe punishment?

12 A. Yes.

13 Q. Well, it sounds like in your decision-
14 making process that you are a case-by-case
15 kind of fellow?

16 A. (Affirmative nod).

17 Q. And you would want to hear everything?

18 A. Right.

19 Q. Is there anything about a defendant,
20 his walk in life, his record and character,
21 who he is, uh, -- is there anything about
22 him that would factor into your decision
23 making process?

24 A. No. I am a military brat, so I grew up
25 with everybody -- everybody from Germany to

1 hear. So it would not have anything to do
2 with it. No.

3 Q. It would not have anything to do with
4 it?

5 A. Right.

6 Q. Okay. So for argument sake, if you
7 were to reach a death penalty verdict based
8 on the facts of the crime, it would be
9 driven by the facts of the crime? That is
10 what your decision would be based on?

11 A. Yes, sir.

12 Q. Okay. Other stuff outside the
13 courtroom that did not have anything to do
14 with the crime would not be relevant?

15 A. Right.

16 Q. Okay. So you are a case by case kind
17 of guy but it is based on the facts of the
18 crime?

19 A. Right.

20 Q. Will always be based on the facts the
21 crime?

22 A. Yes.

23 Q. And you want to keep an open mind and
24 consider everything in the case, right?

25 A. Yes.

1 Q. And you will withhold your decision
2 until the end of the case, obviously?

3 A. Yes.

4 Q. You would follow the Judge's
5 instructions?

6 A. (Affirmative nod).

7 Q. But at the end of the day, it is going
8 to be a careful analysis of the facts of a
9 particular offense that is going to drive
10 your decision?

11 A. Correct.

12 Q. Would always drive your decision?

13 A. Yes.

14 Q. What I am going to do is to tell you a
15 little bit about the legal system and how
16 this case may be different than other cases.
17 Like a civil case, like a car wreck case,
18 maybe two people collide at an intersection
19 and the big issue in the case is who had the
20 right-of-way, was the light red or green.
21 You and your eleven other jurors would try
22 to find the right answer, to find out what
23 happened.

24 A. Right.

25 Q. Well, a sentencing decision is

1 different. It is described in the law as an
2 individual moral judgment. Can you see the
3 difference?

4 A. Yeah. Instead of getting everybody
5 else's opinion you've got your own.

6 Q. Exactly. Because it is such a grave
7 matter, a human being's life hangs in the
8 balance, can you see how every individual
9 juror would have a right to their own
10 decision?

11 A. Their own opinion, yes.

12 Q. Sure. Because it is not like what
13 happened on a street corner, like a car
14 wreck, there really is no right or wrong
15 answer. Do you see the difference?

16 A. Yes.

17 Q. Does that sound fair to you?

18 A. Sure.

19 Q. And would you respect all the other
20 jurors individual opinions?

21 A. Yes.

22 Q. And you would want yours to be
23 respected?

24 A. Absolutely.

25 Q. Mr. Broughton is entitled to fairness

1 not only in the courtroom but also in the
2 jury room. If you saw people trying to
3 coerce someone into giving up their
4 individual moral judgment, you could send a
5 note out and stop that. Could you do that?

6 A. Sure.

7 Q. Insist on fairness in the jury room?

8 A. Sure.

9 Q. And if you saw somebody who had their
10 individual moral judgment, could you protect
11 them and make sure that they delivered their
12 verdict?

13 A. Sure.

14 Q. And in a matter so grave as a life
15 hanging in the balance, would you agree that
16 it would be fair at the end of the day to
17 agree to disagree?

18 A. Sure.

19 Q. That's all that I have -- well hold on
20 one second. (Sidebar with Mr. Young), my
21 co-counsel just wants to make sure that I
22 covered an issue. If I presented some
23 information, say about my client's
24 childhood, ten or fifteen years ago maybe,
25 and it doesn't directly relate to the crime,

1 you could listen to that, couldn't you?

2 A. I would have to.

3 Q. You absolutely do not have the capacity
4 to leave the jury box or to go into the
5 hallway, so you would have to.

6 A. Yes.

7 Q. But if I understood you correctly that
8 would never be a reason to move you from
9 your opinion regarding the verdict?

10 A. Correct.

11 WILLIAM MAGUIRE: Thank you, sir.

12 THE COURT: Solicitor.

13 EXAMINATION

14 BY SCARLETT WILSON:

15 Q. When Mr. Maguire -- good morning.

16 A. Good morning.

17 Q. When Mr. Maguire was asking you about
18 things about the defendant and you said that
19 you were a military brat, tell me how that
20 kind of factored into your answer and what
21 you meant by that.

22 A. Well, he asked if like race would have
23 anything to do with it. You know, being in
24 the military, we were around all aspects of
25 people. My dad was stationed in Germany,

1 Omaha, Delaware, and now he's here. So --
2 (pause).

3 Q. So when you said -- I think his
4 question was something about the defendant
5 is. You meant like -- you didn't say this,
6 but sort of like if it is a movie star you
7 don't care about that. If it is a Hispanic
8 person, you don't care about that. Or a
9 black person.

10 A. Right.

11 Q. In these types of cases, as the Judge
12 told you and Mr. Maguire talked about with
13 you, at the end of the guilt phase if you
14 and twelve others found someone guilty, the
15 question would then become despite that fact
16 that he has been found guilty of a
17 malicious, brutal, heinous crime, whether
18 or not you could keep an open mind going
19 through the second phase.

20 A. I could, yes.

21 Q. That is where kind of the rub is,
22 because when Mr. Maguire asked you some
23 questions, you said that you couldn't
24 consider or wouldn't consider things about
25 the defendant in the mitigation part.

1 So I am just trying to get a feel
2 whether you could or couldn't give those
3 meaningful consideration and factor those
4 into your decision.

5 A. Are we past the guilt phase?

6 Q. Yes. We are in the second phase.

7 A. The penalty phase?

8 Q. (Affirmative nod).

9 A. So it's whether I would believe whether
10 they should get life or death?

11 Q. That is not exactly it. It's perfectly
12 fine for a juror to lean one way or the
13 other. The question is whether or not they
14 can follow the Judge's instructions, keep an
15 open mind.

16 In the first part of the penalty phase,
17 you and the other eleven would have to make
18 sure that the State met its burden of
19 proving an aggravating circumstance.

20 A. Right.

21 Q. If we did not prove an aggravating
22 circumstance to all of your satisfaction
23 beyond a reasonable doubt, you could not
24 even consider the death penalty.

25 A. Correct.

1 Q. So you could hold us to that burden?

2 A. Yes. Burden of prove, right.

3 Q. Even though you'd already found the
4 person guilty, that extra requirement of the
5 aggravating circumstance, you could hold us
6 to that burden?

7 A. Yes.

8 Q. And be okay with a life sentence?

9 A. Yes.

10 Q. You might not like it, but you could do
11 that? Follow the law?

12 A. Yes.

13 Q. Okay. So, again, the second part of
14 the second phase might; in a death penalty
15 case, a time to hear about what was going on
16 with the defendant in his life -- what made
17 him the type of person that he had become.
18 The question then would be whether or not
19 you could use that information, and would
20 use it, before coming up with your final
21 decision?

22 A. Um-humm. Okay.

23 Q. Does that make sense to you?

24 A. Yes.

25 Q. Is that a little more clear than it

1 was?

2 A. Yes.

3 Q. So what is the answer to that question?

4 Could you factor that in and give it
5 meaningful consider?

6 A. On the case of things that happened
7 fifteen to twenty years ago, I don't think
8 that would have very much to do with, you
9 know, an act -- you know, extenuating
10 circumstances or whatever.

11 Q. What types of things would matter to
12 you?

13 A. Just what would have happened in the
14 last couple of months leading up to the
15 crime, I guess.

16 Q. Can you think of anything else?

17 A. No, ma'am.

18 Q. Do you think that you could consider
19 things about their mental status? Not --
20 again, if you found him guilty, you would
21 have found intentional -- meaning that he
22 knew right from wrong -- but could you
23 consider things about emotional/mental
24 distress that the person might be in?

25 A. That the -- sure. Sure.

1 SCARLETT WILSON: That is all that
2 I have, Judge.

3 THE COURT: Any Motions?

4 WILLIAM MAGUIRE: Yes, sir.

5 THE COURT: All right. Mr.
6 Thornsberry, if you would step out in the
7 hall just very briefly, sir.

8 (JUROR NUMBER 345 EXITS COURTROOM)

9 THE COURT: Be glad to hear your
10 Motion.

11 WILLIAM MAGUIRE: Thank you Judge.
12 Move to strike for cause. Failure to do so
13 would violate Mr. Broughton's Sixth and
14 Fourteenth Constitutional rights to an fair
15 and impartial jury in this matter

16 Mr. Thornsberry, once he understood
17 that we were talking about a capital murder,
18 he was consistent in saying that his
19 decision would always be driven by the facts
20 of the case.

21 Though he said that he could vote
22 for the death penalty, he said that his
23 focus would always be on the facts and that
24 -- based on my client's background, his
25 childhood growing up, if it is remote in

1 time it's not going to matter to him. It's
2 not going to move him from his verdict. We
3 can't predict his verdict but assuming that
4 he votes death penalty, he is mitigation
5 impaired. He will not consider what he
6 needs to, which is mitigation evidence, any
7 reason to vote for a sentence less than life
8 (sic).

9 Assuming that we present testimony
10 about my client's childhood, some extreme
11 hardships that he suffered, this man is not
12 going to consider that. He told us that
13 very specifically.

14 If he sits on this jury, he will be
15 mitigation impaired. Substantially impaired
16 because he could not give meaningful
17 consideration to mitigation evidence.

18 THE COURT: He didn't say that he
19 wouldn't give consider to mitigation
20 evidence. He said that he wouldn't give
21 consider to something that happened fifteen
22 or twenty years ago, he would be interested
23 to know what'd transpired -- I think he used
24 the term 'months before the trial (sic).'

25 Excuse me, the crime. So I don't think that

1 he said that he would not consider
2 mitigation.

3 You just phrased one thing to him:
4 childhood. He said that wasn't important,
5 that he wouldn't consider it but he didn't
6 say that he wouldn't, completely, consider
7 mitigation. He said that he would consider
8 what transpired prior to the murder, is what
9 he basically said.

10 WILLIAM MAGUIRE: Right.

11 THE COURT: Just because he won't
12 consider one facet of what you want to offer
13 in mitigation doesn't disqualify him, Mr.
14 Maguire.

15 WILLIAM MAGUIRE: Well, I think
16 that I phrased it as 'anything in my
17 client's background, record, character'
18 which is a pretty big ---

19 THE COURT: But you put a time
20 limit on it, I believe. I don't remember if
21 you put a time limit on it or not. But he
22 said very clearly that if it was something
23 that happened fifteen or twenty years ago
24 that he wasn't going to consider it.

25 WILLIAM MAGUIRE: Exactly.

1 THE COURT: That's just one
2 aspect of mitigation. That's just -- I
3 mean, there are other aspects of mitigation.
4 I mean, I don't know what you're going to
5 offer. For me to sit here and have this
6 discussion with you, I don't know you're
7 going to offer -- if you're going to offer
8 what happened thirty minutes before the
9 killing or thirty years before the killing.
10 I don't know.

11 WILLIAM MAGUIRE: Sure. And this
12 what my -- my point would be that he gave me
13 sort of a -- (pause) -- hold on just a
14 second, Judge.

15 THE COURT: If you want to talk
16 to whoever handed you the note, talk to
17 them.

18 WILLIAM MAGUIRE: I can't read
19 their writing, Judge -- (sidebar with co-
20 counsel).

21 Judge, I am reminded by Mr. Young
22 that under *Lockett*, *Edings* and *Morgan* that
23 any juror can identify, specifically say
24 'well, I am not going to give consideration
25 to a type of mitigation evidence', that they

1 are lawfully disqualified. That's the
2 information that

3 ---

4 THE COURT: If you would hand up
5 that case, I will be happy to look at it.

6 WILLIAM MAGUIRE: I think Mr.
7 Young might be able to get that for you.

8 THE COURT: Anything else that
9 you want to say?

10 WILLIAM MAGUIRE: Failure to
11 strike would violate Mr. Broughton's Sixth
12 and Fourteenth Constitutional rights to an
13 fair and impartial jury in this matter

14 THE COURT: You have already said
15 that. Thank you very much.

16 BOYD YOUNG: I just wanted to make
17 sure that I covered that.

18 THE COURT: Solicitor?

19 SCARLETT WILSON: Judge, again I
20 think that the problem arises because Mr.
21 Maguire in his questions and in his
22 arguments wants to talk about the specifics
23 of this case but not the witness/juror's
24 general qualifications.

25 I think that it was clear that this

1 juror could follow your instructions. He
2 gave an example of some things that would
3 matter to him. He said that he could
4 withhold his opinion. I think based on
5 those things and, again, him not being
6 staked out -- if he is not staked out, yes,
7 he can give a fair and reasonable decision
8 based on your instructions.

9 THE COURT: Thank you very much.
10 Mr. Young, do you have case that you would
11 like for me to look at? While you're
12 looking for it, I will just put Mr.
13 Thornsberry in the jury room and I'll read
14 the case to make a decision.

15 Tell Mr. Thornsberry to go in the
16 jury room and not to discuss anything with
17 the other jurors. Okay?

18 I will give you an opportunity to
19 look at it. I will read your case before I
20 make a decision.

21 BOYD YOUNG: Thanks, Judge.

22 (JUROR NUMBER 146 ENTERS COURTROOM)

23 BAILIFF: State your name?

24 JUROR NUMBER 146: Jacob Henry.

25 THE COURT: Mr. Henry, how you

1 doing today?

2 JUROR NUMBER 146: Pretty good.

3 THE COURT: Did you have an
4 opportunity to review the sheet concerning
5 opinions about the death penalty?

6 JUROR NUMBER 146: Yes, sir.

7 THE COURT: Did you understand
8 it?

9 JUROR NUMBER 146: Well, I
10 don't want to serve on a death penalty.

11 THE COURT: Pardon?

12 JUROR NUMBER 146: I don't want
13 to serve on a death penalty case.

14 THE COURT: You don't want to sit
15 on one?

16 JUROR NUMBER 146: (Negative
17 gesture).

18 THE COURT: Well, which category
19 would you fit in?

20 JUROR NUMBER 146: Any of the
21 rest of it, I ain't got a problem with. Any
22 of the rest of it, I don't have a problem
23 with. Any of the -- besides ---

24 THE COURT: Which type -- what is
25 your opinion about the death penalty?

1 JUROR NUMBER 146: Well, my
2 religion, I just don't believe in the -- in
3 putting a man to death.

4 THE COURT: You don't think that
5 you could put a man to death under any
6 circumstances?

7 JUROR NUMBER 146: No, sir.

8 THE COURT: I appreciate your
9 opinion, Mr. Henry, but I am going to excuse
10 you from service on the jury. Okay?

11 JUROR NUMBER 146: Okay.

12 THE COURT: Thank you very much.

13 (JUROR NUMBER 146 EXCUSED)

14 (JUROR NUMBER 146 EXITS COURTROOM)

15 (OFF RECORD SIDEBAR, COURT WITH CLERK)

16 (JUROR NUMBER 234 ENTERS COURTROOM)

17 BAILIFF: State your name.

18 JUROR NUMBER 234: My name?

19 THE COURT: Yes, ma'am.

20 JUROR NUMBER 234: Cherie Murdock.

21 THE COURT: Ms. Murdock, how are
22 you doing?

23 JUROR NUMBER 234: Good.

24 THE COURT: Have you had an
25 opportunity to review the sheet that I gave

1 you concerning opinions on the death
2 penalty?

3 JUROR NUMBER 234: Yes.

4 THE COURT: Did you understand
5 categories one, two and three?

6 JUROR NUMBER 234: Yes.

7 THE COURT: Did you fit into any
8 of those categories?

9 JUROR NUMBER 234: Not completely.

10 THE COURT: Tell me which
11 category that you would consider?

12 JUROR NUMBER 234: I would like
13 to consider myself a type three but -- the
14 mitigating circumstances that you mentioned,
15 I have my own feelings on mitigating
16 circumstances.

17 THE COURT: What are your
18 feelings on mitigating circumstances?

19 JUROR NUMBER 234: If the
20 person was found guilty of murder, uh, I
21 believe -- I don't remember all the
22 mitigating circumstances that you gave but I
23 feel that the only mitigating circumstance
24 would be age and mental capacity.

25 THE COURT: Okay. That is one of

1 the mitigating circumstances that I read to
2 you.

3 JUROR NUMBER 234: I believe
4 that it was.

5 THE COURT: I read you three
6 more.

7 JUROR NUMBER 234: Okay.

8 THE COURT: You would not
9 consider anything except age and mentality
10 is that what you're saying?

11 JUROR NUMBER 234: Would you
12 read them again?

13 THE COURT: Well, let me say
14 this. I will be happy to read them again to
15 you. These are -- the defendant is not
16 limited to these factors. Okay?

17 JUROR NUMBER 234: Right.

18 THE COURT: The defendant can
19 bring in other factors. I don't know what
20 is going to be brought because I haven't
21 heard the case.

22 JUROR NUMBER 234: Right.

23 THE COURT: So the question is --
24 I understand what you're telling me about
25 age or mentality of the defendant that would

1 impress you as to mitigation but there may
2 be other mitigating factors that I haven't
3 even talked about.

4 JUROR NUMBER 234: But didn't
5 you say that there were certain mitigating
6 circumstances were allowable under South
7 Carolina law?

8 THE COURT: Yes, ma'am, and I
9 read you some of them. I will read them to
10 you again, (reading):

11 The defendant has no significant
12 history or prior criminal convictions
13 involving the use of violence against
14 another person:

15 Do you understand that one?

16 JUROR NUMBER 234: I do. But I
17 wouldn't consider that a mitigating
18 circumstance.

19 THE COURT: The law considers it
20 a mitigating circumstance.

21 JUROR NUMBER 234: I know but
22 if I was deliberating with people and this
23 person had committed murder, my own personal
24 feeling is that someone that doesn't have
25 the mental capacity to appreciate that they

1 are committing murder could conceivably not
2 receive the death penalty.

3 THE COURT: Let me say this. I
4 don't know what you mean when you say the
5 capacity to appreciate. In South Carolina
6 the insanity defense is to know right or
7 wrong. That would come up in the guilt
8 phase.

9 JUROR NUMBER 234: That's what I
10 thought also.

11 THE COURT: If the defendant was
12 insane, you would never get to the penalty
13 phase; do you understand?

14 JUROR NUMBER 234: That's what
15 I thought.

16 THE COURT: You will never get to
17 the penalty phase.

18 JUROR NUMBER 234: Um-humm.

19 THE COURT: The second one is
20 that the murder was committed while the
21 defendant was under the influence of mental
22 or emotional disturbance. Could you
23 consider that one?

24 JUROR NUMBER 234: No.

25 THE COURT: (Reading): The

1 capacity of the defendant to appreciate the
2 criminality of his conduct or to conform his
3 conduct to the requirements of the law was
4 substantially impaired.

5 JUROR NUMBER 234: No.

6 THE COURT: You couldn't consider
7 that one?

8 JUROR NUMBER 234: No.

9 THE COURT: So the only one that
10 I read that you could consider would be the
11 age or the mentality of the defendant at the
12 time of the crime. Is that correct?

13 JUROR NUMBER 234: Right.

14 THE COURT: Could you consider
15 the defendant's history, his background?

16 JUROR NUMBER 234: No.

17 THE COURT: His upbringing?

18 JUROR NUMBER 234: No.

19 THE COURT: His childhood?

20 JUROR NUMBER 234: No.

21 THE COURT: Could you consider
22 his use of alcohol, drugs?

23 JUROR NUMBER 234: Definitely
24 not.

25 THE COURT: Okay. Have you

1 handed that case up yet?

2 BOYD YOUNG: Yes, sir.

3 THE COURT: Ms. Murdock, if you
4 would, I am going to ask you to just step in
5 the jury room. Please don't discuss
6 anything in the jury room as to what
7 transpired in here, please, ma'am.

8 (JUROR NUMBER 234 EXITS COURTROOM)

9 THE COURT: All right. I want to
10 take a short time to read this case. I
11 think that is the same issue raised with Mr.
12 Thornsberry. Give me a chance to read his
13 case and then I will be glad to listen to
14 any arguments that you had.

15 Now, I may let you'all ask
16 questions before I rule on this witness.

17 SCARLETT WILSON: I was just going
18 to say that for the sake of time, if they
19 have an objection, -- I don't think that she
20 is the same as Mr. Thornsberry.

21 THE COURT: I don't either. I
22 think she is more severe, but the question
23 is where do you stop?

24 SCARLETT WILSON: I understand. I
25 was just saying that we wouldn't have an

1 objection ---

2 THE COURT: I mean, where do you
3 stop? She believes three out of four or if
4 she believes one out of four, or four out of
5 four. Where do you stop?

6 SCARLETT WILSON: I think it's not
7 where you stop but where you start, and
8 you're not supposed to do it on specifics.
9 I have an objection to her. I think that
10 she is more severe than Mr. Thornsberry. If
11 you want to excuse her, excuse her.

12 THE COURT: Do you'all have any
13 problem excusing her?

14 WILLIAM MAGUIRE: No. We ask that
15 she be excused.

16 THE COURT: Okay, I will bring
17 her in and excuse her. Bring her back,
18 please.

19 (JUROR NUMBER 234 ENTERS COURTROOM)

20 THE COURT: Ms. Murdock, I
21 appreciate you giving me your opinions. I
22 respect your opinions but I am going to
23 excuse you from service on this jury. Okay?

24 JUROR NUMBER 234: Okay.

25 THE COURT: Thank you very much.

1 (JUROR NUMBER 234 EXCUSED)

2 (JUROR NUMBER 234 EXITS COURTROOM)

3 THE COURT: Bring us the next juror,
4 please.

5 For your records real quick, Steven
6 Thornsberry, if I deny the Motion, he will
7 be number forty-four. He will stay number
8 forty-four irrespective of what happens with
9 these other jurors.

10 WILLIAM MAGUIRE: Yes, sir.

11 BRUCE DURANT: He is not going
12 to be ---

13 THE COURT: We haven't been
14 calling them in order, Mr. Durant. We've
15 been bringing them in as they finish
16 reading. He is going to be forty-four.

17 BRUCE DURANT: I understand
18 that but I thought the order of the jurors
19 was still going to be their order on the
20 panels regardless of whether one was called
21 before the other?

22 THE COURT: I have no enumerated
23 them that way. I enumerated them according
24 to the way that we have called them because
25 we didn't call them according to the panel,

1 one through six.

2 BRUCE DURANT: I understand
3 that.

4 THE COURT: If we qualified six
5 it would be forty, or four would be forty-
6 two and so on.

7 BRUCE DURANT: Okay.

8 THE COURT: We haven't done that
9 for three days and I am not going to start
10 it now.

11 BRUCE DURANT: I understand
12 that. I just didn't know that that was the
13 way that you were doing them. I thought
14 that they were still in the order that they
15 were in the panel regardless of when they
16 were brought out.

17 THE COURT: He is still in that
18 panel, yes.

19 BRUCE DURANT: I understand
20 that. I just didn't know that you were
21 actually doing them that way as opposed to
22 their order in a panel.

23 THE COURT: I have not gone back
24 and gone in the order of the panel. No, I
25 have not done that. I have been qualifying

1 them as we found them. She (clerk) has a
2 list for you of the ones as how they have
3 been qualified.

4 BRUCE DURANT: That's good
5 because ours is completely different. Ours
6 is in the order they were in on the panels.

7 SCARLETT WILSON: The order that
8 they were drawn.

9 THE COURT: Well, the list that
10 she is going to give you is the order that
11 they were qualified. Okay?

12 (JUROR NUMBER 327 ENTERS COURTROOM)

13 THE COURT: Yes, ma'am, your
14 name?

15 JUROR NUMBER 327: Pamela
16 Stevens.

17 THE COURT: Ms. Steven, how you
18 doing today?

19 JUROR NUMBER 327: Good.

20 THE COURT: Have you had an
21 opportunity to review the sheet concerning
22 the opinions of the death penalty?

23 JUROR NUMBER 327: Yes, sir.

24 THE COURT: Did you understand
25 the types -- one, two and three?

1 JUROR NUMBER 327: Yes, sir.

2 THE COURT: Did you fit into any
3 of those types?

4 JUROR NUMBER 327: Type three.

5 THE COURT: Type three?

6 JUROR NUMBER 327: Yes, sir.

7 THE COURT: Okay. I am going to
8 ask you some questions. There are no right
9 or wrong answers. Just answer the questions
10 as best you can. Okay?

11 JUROR NUMBER 327: Yes, sir.

12 THE COURT: If you don't know,
13 tell me that you don't know. Or if you
14 don't know the answer to either of the
15 lawyer's questions, please tell them that
16 you don't know. Do you understand?

17 JUROR NUMBER 327: Okay.

18 PAMELA STEVENS, having been
19 previously sworn to tell the truth testified
20 as follows:

21 EXAMINATION

22 BY THE COURT:

23 Q. Have you heard anything about the case?

24 A. No, sir.

25 Q. Have you heard anybody talking about

1 the case this week or prior to this week?

2 A. No, sir.

3 Q. Read anything in the paper?

4 A. No, sir.

5 Q. Seen anything on television?

6 A. No, sir.

7 Q. Do you have any relatives or close
8 personal friends employed in law
9 enforcement?

10 A. No, sir.

11 Q. Has the solicitor or any member of her
12 staff prosecuted you or any member of your
13 family?

14 A. No, sir.

15 Q. Have you or any member of your family
16 or a close personal friend been the victim
17 of a crime?

18 A. No, sir.

19 Q. Do you have any relatives in jail?

20 A. No, sir.

21 Q. Are you a member of any group which
22 primarily supports law enforcement, such as
23 MADD?

24 A. No, sir.

25 Q. Do you have any special or particular

1 interest in the outcome of this case? .

2 A. No, sir.

3 Q. Are you aware of any bias or prejudice
4 against the defendant as a result of the
5 charges which the State has brought against
6 him?

7 A. No, sir.

8 Q. Do you have any religious beliefs that
9 would make you biased or prejudiced for or
10 against the defendant?

11 A. No, sir.

12 Q. Do you have any religious beliefs that
13 would make you biased or prejudiced for or
14 against the State?

15 A. No, sir.

16 Q. Do you have a bias or prejudice against
17 the defendant because of his race, being
18 black?

19 A. No, sir.

20 Q. Have you had any bad experiences or
21 good experiences with law enforcement?

22 A. No.

23 Q. Do know of any reason, personal or
24 otherwise, as to why you cannot serve on
25 this jury?

1 A. No, sir.

2 Q. Do you know of any reason why you could
3 not give the State and the Defendant a fair
4 and impartial trial?

5 A. No, sir.

6 Q. Did you understand this morning when I
7 told you about the penalty phase of a death
8 penalty case?

9 A. Yes, sir.

10 Q. Do you want me to review it with me?

11 A. Yes, sir.

12 Q. Pardon?

13 A. One more time.

14 Q. Pardon?

15 A. One more time.

16 Q. Okay. In a death penalty case, when
17 you're in the penalty phase, testimony would
18 be offered of aggravating circumstances.

19 The State has that obligation. All twelve
20 jurors would have to find that the State had
21 proven an aggravating circumstance.

22 A. Okay.

23 Q. Assuming that the jury has found that,
24 then you would look at mitigating
25 circumstances. Mitigating circumstances are

1 things about the defendant individually and
2 other statutory mitigation.

3 A. Okay.

4 Q. The defendant is not obligated to offer
5 that. So my question, before you made a
6 decision on life without parole or death,
7 would you seriously consider aggravating
8 circumstances and the mitigating
9 circumstances before you made a decision?

10 A. Yes, sir.

11 THE COURT: Solicitor?

12 EXAMINATION

13 BY SCARLETT WILSON: .

14 Q. Ms. Stevens, I am Scarlett Wilson.
15 What we are doing now is that both sides
16 have an opportunity to ask you a few more
17 questions so that we can get, in your own
18 words, what you think about life without
19 parole and what you think about the death
20 penalty. Okay?

21 A. (Affirmative nod).

22 Q. We can't talk about the specifics of
23 this case so we have to talk generally.

24 A. Okay.

25 Q. Can you tell me what your thoughts are

1 about life without parole? Do you think
2 that it is a severe punishment?

3 A. No.

4 Q. You don't?

5 A. No.

6 Q. How about the death penalty, more
7 severe obviously than life without parole?

8 A. Yes

9 Q. Do you think the death penalty is
10 always what should happen in a murder case?

11 A. No.

12 Q. What makes the difference in whether it
13 would be a death case or a life without
14 parole case?

15 A. Evidence.

16 Q. What kind of evidence?

17 A. (No verbal response).

18 Q. About the crime?

19 A. Yes, ma'am.

20 Q. How about evidence about the defendant,
21 could you listen to that sort of evidence
22 and factor in evidence about the defendant
23 and what was going on in his life, what his
24 background might be like, what made him the
25 person that he is? Could you listen to and

1 factor in that evidence, too?

2 A. Yes, ma'am.

3 Q. Okay. So in this -- in a situation,
4 not this case ---

5 A. Yes, ma'am.

6 Q. In a hypothetical death penalty case,
7 the jurors would have reached a decision as
8 to guilt in the first phase, as the Judge
9 was telling you. What that means in South
10 Carolina is that the defendant -- the jury
11 would have found that the defendant
12 committed an intentional murder and that he
13 had malice in his heart, that he had a
14 wicked heart when he committed that murder.

15 So moving in to the second phase, could
16 you still keep an open mind -- moving into
17 the second phase ---

18 A. Yes, ma'am.

19 Q. --- and hold -- what you and the other
20 jurors would have to do is to make sure that
21 the State proved one aggravating
22 circumstance beyond a reasonable doubt. If
23 we did not, you couldn't even consider the
24 death penalty. Could you hold us to that
25 burden?

1 A. Yes, ma'am.

2 Q. Even though you would have already
3 found the person guilty, you could still
4 hold us to that burden?

5 A. Yes, sir.

6 Q. Now, let's take a situation -- say that
7 you had, again, in this malicious murder
8 that we are talking about that you had
9 evidence in aggravation, perhaps of robbery
10 or a rape that happened at the same time as
11 the murder and you were -- that you heard a
12 lot of evidence about that.

13 Could you still keep your mind open and
14 factor in those mitigating factors that the
15 Judge was telling you about, things about
16 the defendant, drugs and alcohol, how he
17 might have been mistreated. Anything that
18 affected him. Could you factor those in?

19 A. Yes, ma'am.

20 Q. Even if they didn't directly relate to
21 what happened the day or the night of the
22 crime, you could consider those?

23 A. Yes, ma'am.

24 SCARLETT WILSON: That's all that
25 I have, Judge.

1 THE COURT: Mr. Maguire.

2 EXAMINATION

3 BY WILLIAM MAGUIRE:

4 Q. Good morning, Ms. Stevens. How you
5 doing today?

6 A. Pretty good. How are you.

7 Q. Thank you. Thank you. I know that
8 this is hard on you and on all the rest of
9 the people that we have called here, that it
10 is inconvenient to wait around a lot.
11 You're probably frustrated with us.

12 A. No, sir.

13 Q. If you are, that's fine. I am just
14 going to ask a little bit more of you --
15 just being honest with your responses.
16 There are no right or wrong answers. Okay?

17 A. Okay.

18 Q. What school do you work at?

19 A. I work at Sedgefield Intermediate. I
20 work in the cafeteria.

21 Q. My wife works with the school system
22 and some of her most important friends are
23 people who work in the cafeteria. She gets
24 a little bit of special treatment sometimes.

25 I want to put you at work. Maybe

1 you'all have a snack room or watercooler or
2 something like that. If the conversation
3 about the death penalty came up and someone
4 said, 'We should use the death penalty more
5 often.' And then they said , 'What do you
6 think about that?' What do you think about
7 that phrase, that statement?

8 A. (No verbal response).

9 Q. Or let's say that somebody else on the
10 other side of the watercooler said, 'I think
11 we use it too much.' How would you fall out
12 in maybe taking a position?

13 A. (No verbal response).

14 Q. You don't really have an opinion?

15 A. No, sir.

16 Q. Fair enough. That's fair enough.

17 Okay, well, let's talk about things a little
18 bit in more concrete terms. What I am going
19 to do is I'm going to take you away from
20 that snack room or that watercooler and I'm
21 going to out you over here on the jury.

22 Okay?

23 A. Yes, sir.

24 Q. You and eleven other people are going
25 to convict somebody of murder.

1 A. Okay.

2 Q. In South Carolina, what that means is
3 that you and eleven other jurors have found
4 beyond a reasonable doubt that a defendant
5 deliberately acted and took the life of an
6 innocent person with no justification or
7 excuse, and that they acted with malice
8 aforethought. Malice aforethought being
9 defined as have a black, depraved, wicked
10 heart fatally bent on wickedness and
11 mischief. It is kind an archaic/old
12 definition, but that's our definition in
13 South Carolina.

14 It is not an accident, it is not self-
15 defense, it is not a fight that gets out of
16 hand, it is not being drunk in a, it is a
17 deliberate act choosing to take the life of
18 an innocent person. Are you with me?

19 A. Yes, sir.

20 Q. In that situation is a life in prison
21 punishment severe enough?

22 A. No.

23 Q. Okay. In that situation the life
24 penalty would never really be secure enough?

25 A. No.

1 Q. When I talk to people sometimes they
2 hear different words in the definition. A
3 lot of people focus on the fact that it was
4 a choice. That the person knew what they
5 were doing and chose to kill. Does that
6 resonate with you?

7 A. (No verbal response).

8 Q. Do you agree that that makes the murder
9 especially bad?

10 A. In some ways.

11 Q. In that intentional, malicious murder,
12 with regard to the life penalty not ever
13 been severe enough for you, -- well, I guess
14 what I am going to do this but I'm going to
15 take it even a step further.

16 Not only do you have an intentional
17 murder but you would also hear what is
18 called aggravation. The Judge talked to you
19 a little bit. But that is, is factors that
20 make it even worse than an intentional
21 killing. Even worse. I am not going to
22 give you factor specifics or anything like
23 that, we cannot talk about this case, but I
24 want to get you to 'see' a crime with me.
25 Okay?

1 A. (No verbal response).

2 Q. That is a home invasion, going to a
3 home where people are and committing the
4 offenses of kidnaping, rape, armed robbery,
5 burglary, murder. One person does all of
6 that at one time. Okay?

7 A. (No verbal response).

8 Q. Based on your prior responses that the
9 life penalty was not appropriate for an
10 intentional killing/murder, when you add all
11 of that onto it, I am assuming that the life
12 in prison penalty would never be appropriate
13 for that scenario; is that correct?

14 A. Um-humm. Yes.

15 Q. Just so that we are clear, ---

16 THE COURT: What did she say? I
17 didn't hear what she said.

18 BOYD YOUNG: She said "yes", that
19 the life penalty would never be appropriate
20 in that scenario?

21 JUROR NUMBER 327: I don't under-
22 stand. I'm sorry.

23 SCARLETT WILSON: (Sidebar with
24 Mr. Maguire).

25 EXAMINATION CONTINUED

1 BY WILLIAM MAGUIRE:

2 Q. Ms. Stevens, I want to go ahead and
3 stop. That's all that I've got for you.
4 I really appreciate you coming. Okay?

5 A. Thank you.

6 THE COURT: Step out in the hall
7 just a second.

8 (JUROR 327 EXITS COURTROOM)

9 THE COURT: Solicitor?

10 SCARLETT WILSON: Judge, it sort
11 of became clear to me when I was asking the
12 question and then watching the juror during
13 Mr. Maguire's questioning that this juror
14 was not altogether there intelligence-wise
15 and for that reason, I let Mr. Maguire know
16 that if they wanted her stricken that we
17 wouldn't object.

18 WILLIAM MAGUIRE: We move to
19 strike for cause, Judge.

20 THE COURT: Okay. All right.
21 She is stricken for cause by agreement.
22 Is that correct, Solicitor?

23 SCARLETT WILSON: Yes, sir. For a
24 different reason but ---

25 THE COURT: I understand. Just

1 that it is by agreement, that's all that I
2 am putting on the record. Both parties
3 agreed to strike her.

4 WILLIAM MAGUIRE: Yes, sir.

5 THE COURT: Anybody that you'all
6 agree to strike is fine with me. Bring the
7 juror in, please.

8 (JUROR NUMBER 327 ENTERS COURTROOM)

9 THE COURT: Ms. Stevens, thank
10 you so very much for being here. Thank you
11 so very much for your questions and answers.
12 I am going to excuse you from service on
13 this jury. Okay? Thank you very much

14 (JUROR NUMBER 327 EXCUSED)

15 (JUROR NUMBER 317 EXITS COURTROOM)

16 THE COURT: Would you bring in
17 Mr. -- I don't believe that Mr. Thornsberry
18 is even here right now but I am going to
19 qualify Mr. Thornsberry. I have reviewed
20 the case of *Morgan v. Illinois*, the Supreme
21 Court case 504 U.S. 719, and the dissenting
22 Opinion.

23 The dissenting Opinion is where,
24 "...where mitigating evidence exists, a
25 juror who would invariably impose the death

1 *penalty would not give the mitigating*
2 *evidence the consideration the statute*
3 *contemplates."*

4 I don't think that's a factor with
5 Mr. Thornsberry. He would consider, he just
6 would not consider something -- your Motion
7 to dismiss him is denied.

8 Thank you very much. If you want
9 to put any more cases on the record, feel
10 free to do that. I quoted that one case,
11 not the others cases that you gave me. Any
12 other case that you want to put on the
13 record, do it.

14 WILLIAM MAGUIRE: I think *Lockett*
15 and *Edings* are ---

16 THE COURT: Go ahead and put them
17 on the record.

18 WILLIAM MAGUIRE: That's it.

19 THE COURT: Thank you. Would you
20 bring Mr. Thornsberry in? He is juror
21 qualified as number forty-four.

22 THE COURT: Solicitor, I am sorry
23 about the confusion of how they were
24 numbered. I just didn't go back and
25 renumbered them according to how they were

1 on the panels.

2 BRUCE DURANT: I am sorry, too.
3 The last time we did this we kind of did the
4 same thing but we always went back to the
5 number that they would be on the panels, in
6 the order that they were drawn and that's
7 why I was thinking that we would ---

8 THE COURT: I didn't do that
9 because we were bringing them out in random
10 order..

11 BRUCE DURANT: That's fine.
12 That's why I wanted the clerk's list. I
13 wanted to be sure that we had it right.

14 THE COURT: She's got the list
15 prepared.

16 BRUCE DURANT: Thank you, sir.

17 (JUROR NUMBER 345 ENTERS COURTROOM)

18 THE COURT: Mr. Thornsberry, we
19 are forming a group from which we are going
20 to strike the jury. You are now a part of
21 that group. If you would, be back at two
22 thirty this afternoon in the court room.

23 JUROR NUMBER 345: Two thirty this
24 afternoon?

25 THE COURT: Two thirty this

1 afternoon. Have a good day. Don't talk to
2 anybody about the case.

3 JUROR NUMBER 345: Okay.

4 THE COURT: Thank you.

5 (JUROR NUMBER 345 EXITS COURTROOM)

6 THE COURT: Bring us the next
7 juror -- let me see the attorneys up here
8 just a second. Mia, I don't need this on
9 the record.

10 (OFF RECORD BENCH CONFERENCE)

11 (OFF RECORD SIDEBAR, JUDGE WITH CLERK)

12 THE COURT: Let me see the
13 attorneys one more time, please. I don't
14 need it on the record. I am just trying to
15 coordinate with them what we are doing.

16 (OFF RECORD BENCH CONFERENCE)

17 THE COURT: Take Turner out.
18 Tell the remaining juror, on Panels 19 and
19 20, tell them to come back at three o'clock.
20 When they come back at three o'clock, put
21 them in the grand jury room.

22 What I am going to do is, I am
23 going to start striking the jury. I know
24 we're got enough to strike three alternates.
25 If they use all the strikes and we need one

1 or two more, then we will bring them in and
2 qualify two more and let them strike.

3 Once we get the jury and three
4 alternates, I can send them home -- no need
5 to sit here and strike to get more than we
6 need.

7 Okay. Tell twenty-one to come back
8 at three o'clock.

9 Let's be back at two thirty. We
10 will strike at two thirty. I have two and
11 half panels that will be here at three, so
12 we will have plenty of people to get enough
13 for that one strike. If needed, we will
14 send the twelve jurors and the three
15 alternates home and tell them to be back at
16 9:30 Monday and we will sit here and qualify
17 one more juror for whoever's strike it is
18 that hasn't struck. Okay?

19 WILLIAM MAGUIRE: Yes, sir.

20 BRUCE DURANT: Yes, sir.

21 THE COURT: Before we adjourn, is
22 there anything that we need to deal with
23 before the jury gets here at two thirty.

24 WILLIAM MAGUIRE: Get our list.
25 That's it.

1 THE COURT: You've got a list
2 that the clerk is preparing. I am going to
3 have her call these jurors up, just like you
4 do in a normal General Sessions and you'all
5 can strike as they come up here. You'll
6 have the list and we will call them up in
7 that order. Do you want to call them?

8 SCARLETT WILSON: I'd rather just
9 strike from the list.

10 THE COURT: If you don't want to
11 call them, that's fine. I don't care.

12 WILLIAM MAGUIRE: Judge, I ---

13 THE COURT: It doesn't matter to
14 me.

15 WILLIAM MAGUIRE: --- would ask
16 that we call them up so that we can see
17 them.

18 THE COURT: It really doesn't
19 matter. If you can't agree, then we are
20 going to do it like we normally do it in
21 General Sessions.

22 SCARLETT WILSON: Judge, at some
23 point, and I don't know when we should do
24 this, I would like to have a discussion with
25 you about what sort of instructions and

1 requirements that we are going to have to
2 the jury since they are not going to be
3 sequestered.

4 THE COURT: Okay. We can talk
5 about that. One issue that I want to ask
6 you to be thinking about -- and I don't need
7 this on the record, Mia.

8 (OFF RECORD DISCUSSION)

9 (IN CHAMBERS CONFERENCE)

10 (LUNCH RECESS 12:25-2:30 P.M.)

11 (DEFENDANT PRESENT)

12 (JURY PANEL PRESENT)

13 THE COURT: Please be seated.
14 Mr. Maguire, let me see you just a second.

15 (OFF RECORD BENCH CONFERENCE)

16 THE COURT: Mr. Berry, would you
17 come around, please, sir?

18 JUROR NUMBER 23: Yes, sir.

19 SIDEBAR:

20 THE COURT: Mr. Berry, why
21 did it take you so long to get a doctor's
22 excuse?

23 JUROR NUMBER 23: When I got
24 an appointment and I went to him, I was
25 telling him about what -- what I was up

1 against.

2 THE COURT: But you hadn't
3 asked him for an excuse. Why didn't you get
4 it before now? We've been going on since
5 Monday. You could have come -- you've known
6 about this for several weeks. You could
7 have had this doctor's excuse a month ago.
8 Why did you wait until today to bring it?

9 JUROR NUMBER 23: Well, number
10 one, I did not know what type of juror it
11 was going to be or nothing like that.

12 THE COURT: That doesn't
13 have anything to do with your health. I
14 mean, you're either qualified to do jury
15 duty or to not do jury duty.

16 JUROR NUMBER 23: Well, I ---

17 THE COURT: I mean, I just
18 think that is absolutely totally
19 irresponsible on your part to walk in here
20 at this time with a doctor's excuse. I am
21 going to honor the doctor's excuse and
22 excuse you. I am tempted to fine you for
23 contempt of court.

24 JUROR NUMBER 23: I apologize,
25 sir.

1 THE COURT: Pardon?

2 JUROR NUMBER 23: I apologize.

3 THE COURT: You could have
4 had this doctor's excuse. Monday morning and
5 I would have excused you. You are excused.
6 Bye.

7 (JUROR NUMBER 23 EXCUSED)

8 (SIDEBAR CONCLUDED)

9 (JUROR NUMBER 23 EXITS COURTROOM)

10 THE COURT: I will put on the
11 record later that I excused him because he
12 had a doctor's excuse. I was tempted to
13 fine him \$500.

14 SCARLETT WILSON: Judge, I think
15 that he might have told us that he had an
16 appointment scheduled.

17 THE COURT: The doctor didn't
18 automatically write that excuse, Solicitor.
19 Okay?

20 SCARLETT WILSON: I understand.

21 THE COURT: Doctors just don't
22 volunteer excuses for jury duty unless they
23 are asked for it.

24 SCARLETT WILSON: Just trying to
25 make you feel better.

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1 THE COURT: Well, -- okay. Thank
2 you, I appreciate the effort.

3 CLERK: They are calling to see
4 where Rachel Peterson, 263, is.

5 THE COURT: Okay.

6 (JUROR NUMBER 263 ENTERS COURTROOM)

7 BAILIFF: All the jurors are
8 here.

9 CLERK: Thank you.

10 THE COURT: Is state ready to
11 strike?

12 SCARLETT WILSON: Yes, sir.

13 THE COURT: Is the defense ready
14 to strike?

15 BOYD YOUNG: Yes, sir.

16 THE COURT: Madame Clerk?

17 CLERK MARY BROWN: We will
18 moving to the left, please. State strikes?

19 THE COURT: Do you want to use
20 the list or do you want to bring them up?

21 CLERK MARY BROWN: Okay.
22 John Phillips, Juror 264.

23 (JUROR BEFORE COUNSEL)

24 CLERK MARY BROWN: What says
25 the State?

1 SCARLETT WILSON: Please present
2 Mr. Phillips.

3 CLERK MARY BROWN: What says
4 the defense?

5 BOYD YOUNG: Please excuse Mr.
6 Phillips from the trial of this case.

7 CLERK MARY BROWN: Excuse the
8 juror.

9 (JUROR NUMBER 264 EXCUSED)

10 CLERK MARY BROWN: Shirley B.
11 Mobley, Juror 228.

12 (JUROR BEFORE COUNSEL)

13 CLERK MARY BROWN: What says
14 the State?

15 SCARLETT WILSON: Please present
16 Ms. Mobley.

17 CLERK MARY BROWN: What says
18 defense?

19 BOYD YOUNG: Please seat Ms.
20 Mobley.

21 CLERK MARY BROWN: Seat the
22 juror.

23 (JUROR NUMBER 228 SEATED)

24 CLERK MARY BROWN: Angela M.
25 Corte, Juror Number 64.

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(JUROR BEFORE COUNSEL)

CLERK MARY BROWN: What says
the State?

SCARLETT WILSON: Please present
Ms. Corte.

CLERK MARY BROWN: What says
the defense?

BOYD YOUNG: Please swear Ms.
Corte.

CLERK MARY BROWN: Seat the
juror.

(JUROR NUMBER 64 SEATED)

CLERK MARY BROWN: Ronald K.
Williams, Jr., Number 388.

(JUROR BEFORE COUNSEL)

THE COURT: When you come forward,
bring all your personal belongings with you,
please.

CLERK MARY BROWN: What says
the State?

SCARLETT WILSON: Please swear Mr.
Williams.

CLERK MARY BROWN: What says
the defense?

BOYD YOUNG: Please swear Mr.

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1 Williams.

2 CLERK MARY BROWN: Seat the
3 juror.

4 (JUROR NUMBER 388 SEATED)

5 CLERK MARY BROWN: Cynthia
6 Fann, Juror Number 98.

7 (JUROR BEFORE COUNSEL)

8 CLERK MARY BROWN: What says
9 the State?

10 SCARLETT WILSON: Please excuse
11 Ms. Fann.

12 CLERK MARY BROWN: Excuse the
13 juror.

14 (JUROR NUMBER 98 EXCUSED)

15 CLERK MARY BROWN: Juror Number
16 six (sic) was excused by the Court. That
17 was juror twenty-two (sic).

18 Alice Bowman, Juror Number 32.

19 (JUROR BEFORE COUNSEL)

20 CLERK MARY BROWN: What says
21 the State?

22 SCARLETT WILSON: Please excuse
23 Ms. Bowman.

24 Clerk MARY BROWN: Excuse the
25 juror.

1 (JUROR NUMBER 32 EXCUSED)

2 CLERK MARY BROWN: Angela S.
3 Etling, Juror Number 97.

4 (JUROR BEFORE COUNSEL)

5 CLERK MARY BROWN: What says
6 the State?

7 SCARLETT WILSON: Please present
8 Ms. Etling.

9 CLERK MARY BROWN: What says
10 the defense?

11 BOYD YOUNG: Please excuse Ms.
12 Etling from the trial of this case.

13 CLERK MARY BROWN: Excuse the
14 juror.

15 (JUROR NUMBER 97 EXCUSED)

16 CLERK MARY BROWN: Danielle C.
17 Johnson, Juror Number 161.

18 (JUROR BEFORE COUNSEL)

19 CLERK MARY BROWN: What says
20 the State?

21 SCARLETT WILSON: Please excuse
22 Ms. Johnson.

23 CLERK MARY BROWN: Excuse the
24 juror.

25 (JUROR NUMBER 161 EXCUSED)

1 CLERK MARY BROWN: Stacy D.

2 Plone, Juror Number 271.

3 (JUROR BEFORE COUNSEL)

4 CLERK MARY BROWN: What says
5 the State?

6 SCARLETT WILSON: Please present
7 Ms. Plona.

8 CLERK MARY BROWN: What says
9 the defense?

10 BOYD YOUNG: Please excuse Ms.
11 Plona from the trial of this case.

12 CLERK MARY BROWN: Excuse the
13 juror.

14 (JUROR NUMBER 271 EXCUSED)

15 CLERK MARY BROWN: Leigh M.
16 Thomson, Juror 343.

17 (JUROR BEFORE COUNSEL)

18 CLERK MARY BROWN: What says
19 the State?

20 SCARLETT WILSON: Please present
21 Ms. Thomson.

22 CLERK MARY BROWN: What says
23 the defense?

24 BOYD YOUNG: Please swear Ms.
25 Thomson.

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1 CLERK MARY BROWN: Seat the
2 juror.

3 (JUROR NUMBER 343 SEATED)

4 CLERK MARY BROWN: Dixie L.
5 Carmen; Juror Number 48.

6 (JUROR BEFORE COUNSEL)

7 CLERK MARY BROWN: What says
8 the State?

9 SCARLETT WILSON: Please present
10 Ms. Carmen.

11 CLERK MARY BROWN: What says
12 the defense?

13 BOYD YOUNG: Swear Ms. Carmen.

14 CLERK MARY BROWN: Seat the
15 juror.

16 (JUROR NUMBER 48 SEATED)

17 CLERK MARY BROWN: Tabitha
18 Villaneuva, Juror Number 361.

19 (JUROR BEFORE COUNSEL)

20 CLERK MARY BROWN: What says
21 the State?

22 SCARLETT WILSON: Please present
23 Ms. Villaneuva.

24 CLERK MARY BROWN: What says
25 the defense?

1 BOYD YOUNG: Please excuse Ms.
2 Villaneuva.

3 CLERK MARY BROWN: Excuse the
4 juror.

5 (JUROR NUMBER 361 EXCUSED)

6 CLERK MARY BROWN: Emma J.
7 Hennix, Juror Number 145.

8 (JUROR BEFORE COUNSEL)

9 CLERK MARY BROWN: What says
10 the State?

11 SCARLETT WILSON: Please present
12 Ms. Hennix.

13 CLERK MARY BROWN: What says
14 the defense?

15 BOYD YOUNG: Please swear Ms.
16 Hennix.

17 CLERK MARY BROWN: Seat the
18 juror.

19 (JUROR NUMBER 145 SEATED)

20 CLERK MARY BROWN: John L.
21 Reeb, Juror Number 285.

22 (JUROR BEFORE COUNSEL)

23 CLERK MARY BROWN: What says
24 the State?

25 SCARLETT WILSON: Please present

1 Mr. Reeb.

2 CLERK MARY BROWN: What says
3 the defense?

4 BOYD YOUNG: Please excuse Mr.
5 Reeb from the trial of this case.

6 CLERK MARY BROWN: Excuse the
7 juror.

8 (JUROR NUMBER 185 EXCUSED)

9 CLERK MARY BROWN: Eric R.
10 Meibers, Juror Number 215.

11 (JUROR BEFORE COUNSEL)

12 CLERK MARY BROWN: What says
13 the State?

14 SCARLETT WILSON: Please present
15 Mr. Meibers.

16 CLERK MARY BROWN: What says
17 the defense?

18 BOYD YOUNG: Please excuse Mr.
19 Meibers.

20 CLERK MARY BROWN: Excuse the
21 juror.

22 (JUROR NUMBER 215 EXCUSED)

23 CLERK MARY BROWN: Derrick J.
24 Weatherly, Juror Number 370.

25 (JUROR BEFORE COUNSEL)

1 CLERK MARY BROWN: What says
2 the State?

3 SCARLETT WILSON: Please present
4 Mr. Weatherly.

5 CLERK MARY BROWN: What says
6 the defense?

7 BOYD YOUNG: Please seat Mr.
8 Weatherly.

9 CLERK MARY BROWN: Seat the
10 juror.

11 (JUROR NUMBER 370 SEATED)

12 CLERK MARY BROWN: Darrius
13 Lloyd, Juror 198.

14 (JUROR BEFORE COUNSEL)

15 CLERK MARY BROWN: What says
16 the State?

17 SCARLETT WILSON: Please present
18 Mr. Lloyd.

19 CLERK MARY BROWN: What says
20 the defense?

21 BOYD YOUNG: Please seat Mr.
22 Lloyd.

23 CLERK MARY BROWN: Seat the
24 juror.

25 (JUROR NUMBER 198 SEATED)

1 CLERK MARY BROWN: Brittany L.

2 Storo, Juror Number 331.

3 (JUROR BEFORE COUNSEL)

4 CLERK MARY BROWN: What says
5 the State?

6 SCARLETT WILSON: Please present
7 Ms. Storo.

8 CLERK MARY BROWN: What says
9 the defense?

10 BOYD YOUNG: Please seat Ms.
11 Storo.

12 CLERK MARY BROWN: Seat the
13 juror.

14 (JUROR NUMBER 331 SEATED)

15 CLERK MARY BROWN: Dana J.
16 Alvas, Juror Number 6.

17 (JUROR BEFORE COUNSEL)

18 CLERK MARY BROWN: What says
19 the State?

20 SCARLETT WILSON: Please present
21 Ms. Alves.

22 CLERK MARY BROWN: What says
23 the defense?

24 BOYD YOUNG: Please seat Ms.
25 Alves.

1 CLERK MARY BROWN: Seat the
2 juror.

3 (JUROR NUMBER 6 SEATED)

4 CLERK MARY BROWN: Alfreda P.
5 Wilson, Juror 389.

6 (JUROR BEFORE COUNSEL)

7 CLERK MARY BROWN: What says
8 the State?

9 SCARLETT WILSON: Please excuse
10 Ms. Wilson.

11 CLERK MARY BROWN: Excuse the
12 juror.

13 (JUROR NUMBER 389 EXCUSED)

14 CLERK MARY BROWN: Charles L.
15 Kent, Juror 173.

16 (JUROR BEFORE COUNSEL)

17 CLERK MARY BROWN: What says
18 the State?

19 SCARLETT WILSON: Please present
20 Mr. Kent.

21 CLERK MARY BROWN: What says
22 the defense?

23 BOYD YOUNG: Please excuse Mr.
24 Kent from this trial.

25 CLERK MARY BROWN: Excuse the

1 juror.

2 (JUROR NUMBER 173 EXCUSED)

3 CLERK MARY BROWN: Cori Merritt,
4 Juror Number 217.

5 (JUROR BEFORE COUNSEL)

6 CLERK MARY BROWN: What says
7 the State?

8 SCARLETT WILSON: Please present
9 Ms. Merritt.

10 CLERK MARY BROWN: What says
11 the defense?

12 BOYD YOUNG: Please excuse Ms.
13 Merritt.

14 CLERK MARY BROWN: Excuse the
15 juror.

16 (JUROR NUMBER 217 EXCUSED)

17 CLERK MARY BROWN: Rocko Patrick,
18 Juror Number 257.

19 (JUROR BEFORE COUNSEL)

20 CLERK MARY BROWN: What says
21 the State?

22 SCARLETT WILSON: Please present
23 Mr. Patrick.

24 CLERK MARY BROWN: What says
25 the defense?

1 BOYD YOUNG: Please excuse Mr.
2 Patrick.

3 CLERK MARY BROWN: Excuse the
4 juror.

5 (JUROR NUMBER 257 EXCUSED)

6 CLERK MARY BROWN: Mark A.
7 Paulhamus, Juror 258.

8 (JUROR BEFORE COUNSEL)

9 CLERK MARY BROWN: What says
10 the State?

11 SCARLETT WILSON: Please present
12 Mr. Paulhamus.

13 CLERK MARY BROWN: What says
14 the defense?

15 BOYD YOUNG: Please excuse the
16 juror.

17 CLERK MARY BROWN: Excuse the
18 juror.

19 (JUROR NUMBER 158 EXCUSED)

20 CLERK MARY BROWN: Juror --
21 Michelle Missroon, Juror 225.

22 (JUROR BEFORE COUNSEL)

23 CLERK MARY BROWN: Is there any
24 challenge for cause from the State? I mean,
25 what says the State?

1
State of South Carolina v. Colin James Broughton 1835
Case No. 06-GS-08-2164
Jury Trial of September 14-29, 2009
Before The Honorable J C. Nicholson, Jr.

1 SCARLETT WILSON: Please present
2 Ms. Missroon.

3 CLERK MARY BROWN: Is there any
4 challenge for cause from the defense?

5 BOYD YOUNG: None from the
6 defense. Please seat the juror.

7 CLERK MARY BROWN: Seat the
8 juror.

9 (JUROR NUMBER 225 SEATED)

10 CLERK MARY BROWN: Kelly
11 Harris.

12 (JUROR BEFORE COUNSEL)

13 CLERK MARY BROWN: What says
14 the State?

15 SCARLETT WILSON: Excuse Ms.
16 Harris.

17 CLERK MARY BROWN: Excuse the
18 juror.

19 (JUROR NUMBER 136 EXCUSED)

20 CLERK MARY BROWN: Shannon Praete,
21 Juror Number 274.

22 (JUROR BEFORE COUNSEL)

23 CLERK MARY BROWN: Is there any
24 challenge for cause from the State?

25 SCARLETT WILSON: No, ma'am.

1 CLERK MARY BROWN: From the
2 defense?

3 BOYD YOUNG: No, ma'am.

4 CLERK MARY BROWN: Seat the
5 juror.

6 (JUROR NUMBER 274 SEATED)

7 THE COURT: The first alternate.
8 Start with twenty-nine on your sheet, the to
9 the left number, the number on the left.

10 CLERK MARY BROWN: Cheryl Prather-
11 Williams.

12 (JUROR BEFORE COUNSEL)

13 CLERK MARY BROWN: What says
14 the State?

15 SCARLETT WILSON: Please excuse
16 the juror.

17 CLERK MARY BROWN: Excuse the
18 juror.

19 (JUROR NUMBER 175 EXCUSED)

20 CLERK MARY BROWN: Richard W.
21 Peck, Juror 260.

22 (JUROR BEFORE COUNSEL)

23 CLERK MARY BROWN: Any
24 challenge for cause from the State?

25 SCARLETT WILSON: No, ma'am.

State of South Carolina v. Colin James Broughton 1837
Case No. 06-GS-08-2164
Jury Trial of September 14-29, 2009
Before The Honorable J.C. Nicholson, Jr.

1 CLERK MARY BROWN: What says
2 the defense?

3 BOYD YOUNG: Please excuse Mr.
4 Peck.

5 CLERK MARY BROWN: Excuse the
6 juror.

7 (JUROR NUMBER 260 EXCUSED)

8 CLERK MARY BROWN: Michael A.
9 Singletary, Juror 313.

10 (JUROR BEFORE COUNSEL)

11 CLERK MARY BROWN: Any
12 challenge for cause from the State?

13 SCARLETT WILSON: No, ma'am.

14 CLERK MARY BROWN: What says
15 the defense? -----

16 BOYD YOUNG: Please seat Mr.
17 Singletary.

18 CLERK MARY BROWN: Seat the
19 juror.

20 (JUROR NUMBER 313 SEATED)

21 THE COURT: Second alternate,
22 start with number two (sic) on your sheet,
23 thirty-two on the left.

24 CLERK MARY BROWN: Larry B.
25 Yeadon, Juror Number 397.

1 (JUROR BEFORE COUNSEL)

2 CLERK MARY BROWN: What says
3 the State?

4 SCARLETT WILSON: Please present
5 Mr. Yeadon.

6 CLERK MARY BROWN: What says
7 the defense?

8 BOYD YOUNG: Please excuse Mr.
9 Yeadon.

10 CLERK MARY BROWN: Excuse the
11 juror.

12 (JUROR NUMBER 397 EXCUSED)

13 CLERK MARY BROWN: Rachel M.
14 Peterson, Juror Number 263.

15 (JUROR BEFORE COUNSEL)

16 CLERK MARY BROWN: What says
17 the State?

18 SCARLETT WILSON: Please excuse
19 Ms. Peterson.

20 CLERK MARY BROWN: Excuse the
21 juror.

22 (JUROR NUMBER 263 EXCUSED)

23 CLERK MARY BROWN: Jervise Locke,
24 Juror 200.

25 (JUROR BEFORE COUNSEL)

State of South Carolina v. Colin James Broughton 1839
Case No. 06-GS-08-2164
Jury Trial of September 14-29, 2009
Before The Honorable J.C. Nicholson, Jr.

1 CLERK MARY BROWN: Is there any
2 challenge for cause from the State?

3 SCARLETT WILSON: No, ma'am.

4 CLERK MARY BROWN: What says
5 the defense?

6 BOYD YOUNG: Please seat Mr.
7 Locke.

8 CLERK MARY BROWN: Seat the
9 juror.

10 (JUROR NUMBER 200 SEATED)

11 THE COURT: Alternate number
12 three will start at number thirty-five on
13 your sheet.

14 CLERK MARY BROWN: Connie J.
15 Pittman, Juror 267.

16 (JUROR BEFORE COUNSEL)

17 CLERK MARY BROWN: What says
18 the State?

19 SCARLETT WILSON: Please present
20 Ms. Pittman.

21 CLERK MARY BROWN: What says
22 the defense?

23 BOYD YOUNG: Please excuse Ms.
24 Pittman.

25 CLERK MARY BROWN: Excuse the

1 juror.

2 (JUROR NUMBER 267 EXCUSED)

3 CLERK MARY BROWN: Yvette
4 Shuler, Juror 311.

5 (JUROR BEFORE COUNSEL)

6 CLERK MARY BROWN: What says
7 the State?

8 SCARLETT WILSON: Please present
9 Ms. Shuler.

10 CLERK MARY BROWN: What says
11 the defense?

12 BOYD YOUNG: Please excuse Ms.
13 Shuler.

14 CLERK MARY BROWN: Excuse the
15 juror.

16 (JUROR NUMBER 311 EXCUSED)

17 CLERK MARY BROWN: Naqual Abdallah.

18 (JUROR BEFORE COUNSEL).

19 CLERK MARY BROWN: What says
20 the State?

21 BRUCE DURANT: Court's indulgence.

22 SCARLETT WILSON: Please present
23 Ms. Abdalla.

24 CLERK MARY BROWN: Seat the
25 juror. Was there any challenge for cause

1 from the defense?

2 BOYD YOUNG: No, ma'am.

3 (JUROR NUMBER 2 SEATED)

4 THE COURT: Alternate four,
5 starting at thirty-eight.

6 CLERK MARY BROWN: Jane Still,
7 Juror 328.

8 (JUROR BEFORE COUNSEL)

9 CLERK MARY BROWN: What says
10 the State?

11 SCARLETT WILSON: Please present
12 Ms. Still.

13 CLERK MARY BROWN: What says
14 the defense?

15 BOYD YOUNG: Please excuse Ms.
16 Still.

17 CLERK MARY BROWN: Excuse the
18 juror.

19 (JUROR NUMBER 328 EXCUSED)

20 CLERK MARY BROWN: Charles E.
21 Walker, Juror 363.

22 (JUROR BEFORE COUNSEL)

23 CLERK MARY BROWN: What says
24 the State?

25 SCARLETT WILSON: Please present

1 Mr. Walker.

2 CLERK MARY BROWN: What says
3 the defense?

4 BOYD YOUNG: Please excuse Mr.
5 Walker.

6 CLERK MARY BROWN: Excuse the
7 juror.

8 (JUROR NUMBER 363 EXCUSED)

9 CLERK MARY BROWN: Norma J.
10 Middleton, Juror 221.

11 (JUROR BEFORE COUNSEL)

12 CLERK MARY BROWN: What says
13 the State?

14 SCARLETT WILSON: Please excuse
15 Ms. Middleton.

16 CLERK MARY BROWN: Excuse the
17 juror.

18 (JUROR NUMBER 221 EXCUSED)

19 CLERK MARY BROWN: Tracy Robinson.

20 (JUROR BEFORE COUNSEL)

21 CLERK MARY BROWN: Any challenge
22 for cause from the State?

23 SCARLETT WILSON: No, ma'am.

24 THE COURT: From the defense.

25 BOYD YOUNG: No, ma'am.

1 CLERK MARY BROWN: Seat the
2 juror.

3 (JUROR NUMBER 221 SEATED)

4 (JURY SEATED @ 3:18 P.M.)

5 THE COURT: Ladies and Gentlemen
6 of the jury, what I am going to ask you to
7 do is to go to the jury room and either
8 elect a foreman or a forelady. You may
9 elect anyone except one of the four
10 alternates:

11 Michael Singletary,

12 Jervis Locke,

13 Ms. Abdalla or

14 Tracy Robinson.

15 After you've done that, write the
16 name down on a piece of paper, give it to
17 the bailiff and I'll get you back in the
18 courtroom very shortly after.

19 (JURY OUT @ 3:20 P.M.)

20 THE COURT: Solicitor, other than
21 the Motions previously made when we went
22 through juror qualifications, do you have
23 any Motions on the striking of the jury and
24 the drawing of the jury?

25 SCARLETT WILSON: I do not.

1 THE COURT: Does the defense?

2 BOYD YOUNG: Yes, sir.

3 THE COURT: What is the defense's
4 Motion -- other than what you have already
5 made throughout the qualifying process?
6 What is your new Motion?

7 BOYD YOUNG: Batson.

8 THE COURT: A Batson?

9 BOYD YOUNG: Yes, sir.

10 THE COURT: Okay. I am going to
11 go through ---

12 BOYD YOUNG: May we approach?

13 THE COURT: Yeah.

14 BENCH CONFERENCE:

15 THE COURT: We don't have
16 but two jurors left. I am going to send
17 them into the jury room with the other
18 panels in case I have to use them.

19 BOYD YOUNG: I was just
20 coming up to say that I didn't want to start
21 doing the Motion or state the reasons on the
22 record with the panel in here.

23 THE COURT: What difference
24 would it make? They've all been excused
25 except for two.

1 BOYD YOUNG: Except that if
2 the Motion were to be granted, we would have
3 to ---

4 THE COURT: We would not use
5 these again.

6 BOYD YOUNG: We would start
7 requalifying?

8 THE COURT: I don't think
9 that we could -- I guess that we would have
10 to put them all back in the pot and start
11 all over again.

12 BOYD YOUNG: That's my under-
13 standing -- qualifying and everything.

14 THE COURT: What do you
15 think, Bruce?

16 BRUCE DURANT: I don't
17 really know. I don't think his *Batson* is
18 going to fly.

19 THE COURT: I don't either
20 but ---

21 BRUCE DURANT: We had valid
22 reasons for striking all those jurors.

23 THE COURT: What I will do,
24 just as a precaution, I'll send them out in
25 the hall and we -- when you -- after your

1 Batson Motion, we can make that decision.

2 (BENCH CONFERENCE CONCLUDED)

3 THE COURT: Ladies and Gentlemen
4 of the jury panel, what I going to do is to
5 ask you to step out in the hall, please,
6 while I hear this Motion. Don't go any-
7 where. Just stay out there, I'll get you
8 back in here very shortly.

9 (JURY PANEL EXITS COURTROOM)

10 THE COURT: I am going to go
11 through the list real quick:.

12 The State struck Alice Bowman, who
13 is a black female, Juror Number 32.

14 The State struck Danielle Johnson,
15 Juror Number 161.

16 The State struck Alfreda Wilson,
17 Juror Number 389, who is a black female.

18 As far as the primary jury, that's
19 all.

20 As to alternates, the State struck
21 Norma Middleton, Juror Number 221, who is a
22 black female.

23 The defense struck Larry Yeadon,
24 who was a black male, on the defense side.

25 Solicitor, I am going to ask you to

1 give a racially neutral reason for striking
2 the jurors that I just called out. We will
3 start with Alice Bowman, Juror Number 32.

4 SCARLETT WILSON: Beg the court's
5 indulgence one second.

6 THE COURT: Did I miss any?

7 BOYD YOUNG: Cynthia Fann, Number
8 98.

9 THE COURT: She is a white
10 female, is what I have on my sheet.

11 SCARLETT WILSON: We haven't heard
12 the basis of the Motion yet.

13 THE COURT: Cynthia Fann is a
14 white female. Are you doing it on a female
15 basis or a black basis.

16 BOYD YOUNG: On an African
17 American basis, Your Honor.

18 THE COURT: Well, she is not
19 African American. Is she?

20 BOYD YOUNG: No, sir.

21 THE COURT: What the basis of
22 your Motion?

23 BOYD YOUNG: Your Honor, the State
24 used all five extraction to strike women and
25 three of the five strikes strike African

1 American people.

2 THE COURT: Well, that is what I
3 just asked you. Are you basing it on
4 striking women? I mean, he's a male. Are
5 you -- or are you asking on race? Which is
6 it?

7 BOYD YOUNG: On race, Your Honor.

8 THE COURT: Race only?

9 BOYD YOUNG: Yes, sir.

10 THE COURT: And they used three
11 or five strikes on black individuals, is
12 that correct? Black/African Americans?

13 BOYD YOUNG: Yes, Your Honor.

14 THE COURT: All right. Let me
15 hear your racially neutral reason for
16 striking each juror. I'll start with Alice
17 Bowman, Juror Number 32.

18 SCARLETT WILSON: Your Honor, Ms.
19 Bowman was a juror who initially told the
20 Court that she was torn between being a
21 number one and a number three. She also had
22 a nephew in jail who was doing time, twelve
23 years.. She indicated that she was a
24 "balancer" and that her conscience would
25 bother her if she returned a death verdict.

1 THE COURT: All right, let me
2 hear you on -- anything else you want to
3 tell me on Ms. Bowman?

4 SCARLETT WILSON: No, sir. Beg
5 the court's indulgence -- (sidebar with Mr.
6 Durant). That's all, Your Honor.

7 THE COURT: Let me hear you on
8 Danielle Johnson.

9 SCARLETT WILSON: Danielle
10 Johnson, Your Honor, was the juror that
11 defense approached the Court initially
12 saying that the Defendant's mother knew her,
13 would recognize her in a store and would
14 wave to speak to her. She was called back
15 in chambers shortly before jury selection
16 and the court questioned her. I also
17 questioned her. It was clear that she knew
18 the pastor who is a defense witness. I rely
19 on my questions and my reasons for moving
20 for her to be struck for cause, as well.

21 THE COURT: Let me hear you on
22 Alfreda Wilson, Juror Number 389.

23 SCARLETT WILSON: Your Honor, this
24 juror was one who basically intimated during
25 her testimony that the only thing that would

1 affect her or that would move her towards
2 the death penalty was future dangerousness.

3 THE COURT: I find that the
4 State has offered racially-neutral reasons
5 for striking the three black African
6 Americans. I will be glad to hear you, Mr.
7 Young, if there is anything that you want to
8 offer showing that it is a pretext.

9 BOYD YOUNG: Your Honor, I believe
10 that there is one juror who had a son who
11 was in jail here in Berkeley County. I am
12 trying to locate that juror's name and
13 number right this second, if I could have a
14 few minutes.

15 THE COURT: Before we get there,
16 we might as well cover, Solicitor, Norma
17 Middleton who you struck on alternate three.
18 I forgot about her. Excuse me.

19 SCARLETT WILSON: Yes, sir, Your
20 Honor. She was the juror who we had this
21 morning that we moved to strike for cause.
22 I would rely upon that explanation given.

23 Just to remind the court, she was
24 the one who initially sat down and started
25 talking about the defendant having killed a

1 family member, having to live with that for
2 the rest of his life in prison was
3 punishment enough. It caused us great
4 concern that she indicated having knowledge
5 about the case and then denying that later.

6 THE COURT: Okay. Be glad to
7 hear you, Mr. Young.

8 BOYD YOUNG: Your Honor, Juror
9 Number 145, Emma Hennix, which was ---

10 THE COURT: What number on the
11 sheet?

12 BOYD YOUNG: I believe -- well, it
13 was fourteen prior to removing Mr. Berry.

14 THE COURT: Okay.

15 BOYD YOUNG: Still fourteen.

16 THE COURT: What about her?

17 BOYD YOUNG: She had a son in jail
18 here in Berkeley County. The State said
19 that one of the reasons for striking Ms.
20 Bowman was that she had a son in jail. Ms.
21 Hendrix would be similarly situated, raising
22 the presumption that the State's strike of
23 Mrs. Bowman was pretextual. Where the
24 State offers multiple reasons for a strike,
25 they all must be valid reasons, not one of

1 which could be pretextual. The striking
2 Mrs. Bowman was pretextual in that Mrs.
3 Hennix is in the same situation as Mrs.
4 Bowman with regard to one of the reasons
5 proffered by the State.

6 THE COURT: What else?

7 BOYD YOUNG: That's it.

8 THE COURT: Anything else, other
9 than that one?

10 BOYD YOUNG: That's it.

11 THE COURT: Motion denied. Has
12 the jury elected a foreman?

13 BAILIFF: (Tenders note to
14 Court).

15 THE COURT: Juror Number --
16 Shannon Praete, Juror Number 274, twenty-
17 eight on the strike sheet, has been elected
18 as the forelady for the trial.

19 BRUCE DURANT: What was the
20 number again, Your Honor?

21 THE COURT: Number twenty-eight
22 on the strike sheet, Juror Number 274.

23 BRUCE DURANT: Thank you, sir.

24 THE COURT: Bring in the panel.
25 I am going to discharge them first. Any

1 other Motions before I bring them in
2 concerning the jury?

3 BOYD YOUNG: No, sir.

4 SCARLETT WILSON: Does the defense
5 submit anything regarding your instructions
6 as far as sequestration?

7 THE COURT: I probably am not
8 going to do that today. I will probably do
9 it Monday after we start testimony. But I
10 will talk to them briefly about. Okay?

11 SCARLETT WILSON: Yes, sir.

12 THE COURT: I will talk to them
13 briefly about sequestration. Bring in the
14 full panel.

15 To answer your question, no, they
16 did not submit anything.

17 WILLIAM MAGUIRE: We are working
18 on it, Judge.

19 SCARLETT WILSON: We are concerned
20 about this weekend.

21 BRUCE DURANT: Yeah. We are
22 going to tell them that ---

23 WILLIAM MAGUIRE: We have some-
24 thing if you want it now, Judge. We have
25 been working on it. It's hot off the press,

THE STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

William O. Dickerson, Jr.,

Applicant,

vs.

State of South Carolina,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2012-CP-10-3216

**William Dickerson's Post-Hearing Brief in
Support of Granting His Application for
Post-Conviction Relief**

William O. Dickerson, Jr. submits the following post-hearing brief in support of granting his application for post-conviction relief ("PCR").

I. PROCEDURAL HISTORY.

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 the commission of a criminal sexual conduct, kidnapping, and physical torture. S.C. Code § 17-20(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 application on ***, ***, and July 13, 2015. This Court convened evidentiary hearings on the following dates and took the following testimony:

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

At the conclusion of the evidentiary hearings, this Court called for post-hearing briefs. This brief follows. Mr. Dickerson proceeds 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 proceeds 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 asks this 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 but also argued the Court should not enter such an order until the final order in this case.

II. PCR CLAIMS RELATED TO JURY SELECTION.

In his post-conviction relief application, Mr. 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. Additionally, claims relevant to this issue which are not discussed below are abandoned.

A. Trial counsel rendered ineffective assistance of counsel by failing to advance a comparative juror analysis when he raised his *Batson*¹ challenge.

B. 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.

C. 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.

D. William Dickerson was denied his rights to due process and equal protection under the law in violation of the Fifth and Fourteenth Amendment when the Solicitor's Office committed prosecutorial misconduct by improperly striking qualified African-American jurors from the jury venire.

A. 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 Gadsen, Ms. Melissa Fields-

¹ *Batson v. Kentucky*, 476 U.S. 79 (1986).

Copeland, and Ms. Sallyisha Toomer. Mr. Dickerson raises this *Batson* claim with respect to Ms.

Gadsen and Ms. Fields-Copeland. 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?²

² The answer to Judge Dennis's question was "yes," but Solicitor Wilson, the only person with access to the rap sheets, did not disclose that fact. According to Solicitor Wilson's testimony

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

SOLICITOR WILSON: She had qualified convictions.³

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.

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.

R. 2028, l. 8- 2031, l. 18.

B. The Improperly Excluded Jurors

1. Georana Gadsden

on May 12, 2016, her office does not have an "open-file policy" nor does she share criminal history records with defense counsel. May 12, 2016 Hearing, p. 72-74; 85. The following seated jurors had arrests and convictions: Nathan Hood, Joshua Partee, Donna Melville and Michael Page. And, as further discussed, Donna Melville had a very significant criminal history that included acts of violence.

³ As did the other jurors.

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. R. 825, l. 17. She explained that to impose a death sentence, she "would need to know all the facts." R. 826, l. 15. She reiterated that there were circumstances where she could consider imposing a death sentence. R. 827, 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. R. 832, ll. 10-22. She reaffirmed yet again that she was a "number three" juror. R. 833, ll. 1-6.

Solicitor Wilson was allowed to approach the potential juror and asked Ms. Gadsen about her questionnaire. She claimed that she could not read her handwriting on question #47 regarding her opinion of the death penalty. R. 837, l. 14- 838, l. 10. Ms. Gadsen reiterated that she was a "type three" juror and that she would have to know all of the facts. R. 838, l. 8-10. Ms. Gadsen also stated that she had not thought much about the death penalty. R. 838, ll. 11-13.

Solicitor Wilson then asked the juror about a comment she had made to the bailiff about working that night. Solicitor Wilson tried to get details about her work schedule for the next couple of weeks. Solicitor Wilson asked her if it would cause her hardship to serve on the jury. Gadsden unequivocally stated to Solicitor Wilson that she could get off work for the next couple of weeks to serve on the trial if selected. R. 839, ll. 8-24. She stated that she could have her schedule rearranged. R. 840, ll. 1-8.

Solicitor Wilson then continued questioning her about her thoughts on the death penalty, and about whether she thought life without parole was "a pretty stiff sentence." R. 840, l. 9- 841, l. 3. After repeated needling by Solicitor Wilson, Ms. Gadsden stated she would have difficulty signing the death verdict. R. 842, 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. R. 843, ll. 1-20. Solicitor Wilson then again questioned her on malicious killing. R. 843, ll. 21-844, l. 20.

Solicitor Wilson continued—this time asking Ms. Gadsden if she could “put a man to death.” R. 845, ll. 12-16. Then she asked her for specific situations where she could impose the death penalty. R. 845, 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 Solicitor Wilson’s question, and remarked, “She’s answered that question. She said she could.” R. 846, ll. 1-7.

Solicitor Wilson 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.”

R. 846, ll. 10-18.

Solicitor Wilson challenged her for cause based on her “inconsistent answers” but the judge overruled her. R. 848, l. 8- 849, l. 12.

During the *Batson* hearing, the judge asked Solicitor Wilson to provide her “race-neutral or gender-neutral” reason for striking her. R. 2028, ll. 21.

Solicitor Wilson responded that Ms. Gadsden worked from 11:00 to 7:00 and that “she had an issue if it would conflict with her employment.” R. 2029, 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. R. 2029, ll. 3-8.

The Court overruled the *Batson* objection. R. 2029, ll. 9-22.

Solicitor Wilson's purported reasons for striking Ms. Gadsden smacks of racial pretext. First of all, Solicitor Wilson'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 *Ali v. Hickman*, 571 F.3d 902 (9th Cir. 2009) (court reversing and remanding case where state mischaracterized potential jurors' views); *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"—Solicitor Wilson never asked a single question of Ms. Gadsden about this. For all Solicitor Wilson 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. Solicitor Wilson just assumed that Ms. Gadsden would have financial difficulty given her status as a "single mother" that is completely unsupported by the record. 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 squared with Solicitor Wilson'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." R. 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." R. 4750. Melissa Fields-Copeland's answer to this question on the questionnaire was, "No opinion." R. 4577. 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, Solicitor Wilson's questioning of Ms. Gadsden was calculated to produce answers to serve as a basis for her disqualification. Solicitor Wilson 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. 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.

Solicitor Wilson'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”). Solicitor Wilson’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.

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

2. Melissa Fields-Copeland

Melissa Fields-Copeland is Juror 92, and she self-identified as a “number three” juror. R. 901, ll. 15-22. Solicitor Wilson just asked her basic questions about her views of the death penalty. R. 920, l. 24-923, l. 22. She was found to be qualified. R. 924, ll. 8-13.

During the *Batson* hearing, however, Solicitor Wilson’s “reasons” were that “she has a number of charges for prostitution, a charge for shoplifting, a concealed weapon, --.” R. 2030, ll. 2-4. When asked if there were similarly situated jurors, Solicitor Wilson responded, “Not that many or not for those things.” R. 2030, ll. 16-17. Again, Solicitor Wilson’s purported reasons

smack of racial pretext. Solicitor Wilson 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 Solicitor Wilson 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 Solicitor Wilson *did not ask a single juror about convictions, yet seated some with convictions*, it is clear that Solicitor Wilson is using 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. Esparanza-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.)

Equally problematic is that Solicitor Wilson did not strike a similarly situated white juror, Donna Melville. Counsel, during the course of these proceedings, obtained a copy of Ms. Melville's criminal records pursuant to this Court's order directing the FBI to provide criminal history records to counsel. Because Solicitor Wilson did not provide juror rap sheets to defense counsel, counsel was unable to object that Donna Melville was a white, seated juror with an alarming criminal record that involved physical acts of violence. According to records secured by PCR counsel from the FBI (the NCIC reports that Solicitor Wilson had in her possession at the

time of trial), Melville was charged in Alaska in August 1998 of Assault Fourth Degree, Domestic Violence, II Counts, and Burglary 1st degree. She was found guilty of 2 counts of Assault and given 15 days in jail, suspended to one-year probation. In May 1999, she was charged with Assault 4th, Domestic Violence, 2 counts and was found guilty of resisting arrest, received a 90-day jail sentence, suspended on 3 years' probation. She was also found guilty of domestic violence, given a jail sentence of 120 days, suspended to 90 days, with probation for three years. In September 2000, she was also found guilty of assault and placed on probation for one year. In 2004, she was charged with Driving under the Influence, Leaving the Scene of an Accident, and Failure to Stop at Direction of Officer. She was found guilty of DUI and leaving the scene of an accident and received jail time suspended on 5 years of probation. Solicitor Wilson did not ask Melville any questions about her criminal record, either, strongly suggesting that Solicitor Wilson's "concerns" about these criminal records is mere pretext for making racially discriminatory strikes. See *Miller-El v. Dretke*, 545 U.S. at 241 ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step"). And see *Snyder v. Louisiana*, 552 U.S. 472, 483 (2008) ("The implausibility of this explanation is reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as Mr. Brooks'").

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. 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. Solicitor Wilson'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 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.") Solicitor Wilson's strike of Ms. Fields-Copeland was improper under *Batson*, and denied Mr. Dickerson his right to due process.

In assessing the Solicitor's behavior in this capital case, it is relevant to consider how she behaved in other another capital case. Solicitor Wilson was also the lead Solicitor in Colin Broughton's death penalty case.

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

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

According to the materials assessed by the professors from Michigan State University, Solicitor Wilson struck 50% of qualified African-American from the venire. She only struck 14.8% of qualified white potential jurors. See Amended Michigan State Study, August 29, 2017, p. 10.

1. Alice Bowman

Solicitor Wilson 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. Tr. 1848, l. 18- 1849, l. 3. However, Solicitor Wilson’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, Solicitor Wilson 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, Tr. 528, ll. 3-15, and whether she could sign her name to the death verdict. Tr. 583, 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, Solicitor Wilson’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. Tr. 461. Too, he claimed that “Life in jail would be worse than the death penalty.” Tr. 472. 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. And too, Emma Hennix's son was currently charged with firearms, assault and battery, and possession of drugs. His charges were pending at the time of this trial.

And also, Ronald K. Williams could be described as a "balancer" as he informed Solicitor Wilson 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 Solicitor Wilson 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. Solicitor Wilson'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. Kears*, 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 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. Tr. 1059, ll. 4-14. Solicitor Wilson asked very few questions of Ms. Wilson. On questioning by Solicitor Wilson, Ms. Wilson stated that she thought living in prison with regret would be suffering. Tr. 1066, l. 18-1067, l. 13. Solicitor Wilson asked if, based on this belief, would she only render a life sentence. Tr. 1068, 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. Tr. 1068, l. 23- 1069, l. 2. Then Solicitor Wilson asked her what factors would make death an appropriate sentence for her. Tr. 1069, 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. Tr. 1069, l. 25- 1070, l. 17. Solicitor Wilson did not ask any additional questions after this statement.

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

Tr. 1849, l. 23- 1850, 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.

Tr. 1069, l. 23- 1070, l. 19.

Ms. Wilson did not “intimate” that the **only** thing she would consider would be future dangerousness. Solicitor Wilson asked her a general and broadly framed question, and Ms. Wilson answered it. If Solicitor Wilson 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.

Solicitor Wilson’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 Mr. 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.

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

Investigation conducted by PCR counsel reveals that Solicitor Wilson's discriminatory removal of qualified jurors is not confined to capital cases, nor is it a recent phenomenon. In 2004, Solicitor Wilson 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 blacks and did not remove any whites. In other words, the state used 100% of its strikes to remove blacks who only constituted 28% of the jury pool. Solicitor Wilson 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—Solicitor Wilson 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—Solicitor Wilson struck her because she was unemployed and a housekeeper.
- Ms. Edna Ferguson—Solicitor Wilson 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, Solicitor Wilson struck her.

Based on Solicitor Wilson's responses, defense counsel asked to view the juror rap sheets.

The court agreed. Tr. 26. 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.

Tr. 60-61.

Also, the recent case of *State v. Ryan Deleston*, a murder trial involving a black defendant and a white victim, tried in October 2013 illustrates Solicitor Wilson's persistent removal of African-Americans from juries. In Deleston, Solicitor Wilson struck D. Dixon, a black female; Shavis Doyley, a black male, and M. Washington, a black female. Although defense counsel did not challenge the strike of Dixon, Dixon revealed to the court that she had a friend in prison serving a sentence for murder. Solicitor Wilson did not challenge similarly situated jurors, D. Yates (a white female) whose brother was incarcerated, nor did she challenge D. O'Brien (a white female) who had a friend in prison for embezzlement, nor did she challenge T. Horne (a white female) who had her own arrest for criminal domestic violence and whose baby's father was in prison in Georgia.

Solicitor Wilson also struck Shavis Doyley, a black male, because he was a security guard at local nightclubs. She did not, however, strike M. O'Brien (white male) who had a close friend in the FBI, nor did she challenge J. Carson who is friends with a number of police officers.

Solicitor Wilson struck M. Washington, a black female, because she had two nephews in prison, and those crimes involved drugs and weapons. Again, she did not challenge other similarly situated jurors—D. Yates (white female) whose brother was incarcerated, D. O'Brien (white female) who has a friend serving time in prison due to embezzlement, or T. Horne (a white female) who had her own arrest for criminal domestic violence and whose baby's father was in prison in Georgia.

Solicitor Wilson's improper removal of African-American jurors from juries is a long-standing phenomenon, and this Court should find that she improperly struck Ms. Georana Gadsden and Ms. Melissa Fields-Copeland in William Dickerson's case.

E. Prosecution Coordination Commission's Programs

In addition to Solicitor Wilson'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. The Prosecution Deskbook is available and provided to all solicitors in the state. Solicitor Wilson testified 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. May 12, 2016 Hearing, p. 64-65. It was available to her and her staff at the time of William Dickerson's trial. May 12, 2016 Hearing, p. 69.

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. The lesson here is that a solicitor need only recite one of these “sufficient reasons” and they 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).

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 unambiguously 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 Solicitor Wilson, 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)⁴

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

⁴ 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 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.

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.⁵ 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.”** 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

⁵ Why would number of children be relevant to a juror’s qualification to sit on a jury except to provide some information a solicitor could use to make a gender based discriminatory strike?

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 employment⁶, relationship with law enforcement⁷, 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, demeanor⁸, (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,⁹ 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.

⁶ Solicitor Wilson used “employment” in the Beyah trial to get rid of Ms. Singleton and Ms. Cheatham; in Dickerson’s trial to remove Georona Gadsden; and in Deleston’s trial to remove Shavis Doyley.

⁷ Solicitor Wilson used “relationship with law enforcement” in the Deleston trial to get rid of Shavis Doyley and M. Washington; in Dickerson’s trial to remove Melissa Fields-Copeland; in Broughton’s trial, Alice Bowman; in Beyah’s trial, Kevin Kornickey and Ms. Edna Ferguson.

⁸ Solicitor Wilson used demeanor to remove Mr. Freeman in Beyah’s trial.

⁹ Solicitor Wilson used “general appearance” to remove Mr. Freeman in Beyah’s trial.

In May 2010, two elected Solicitors gave a presentation on Jury Selection in Capital Cases in which they indicate 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? Solicitors Stone and Pascoe are clearly attempting to illustrate to 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 Mr. Dickerson’s claim that Solicitor Wilson 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 defendant’s 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).

F. 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. 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 Solicitor Wilson. 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.

MSU Amended Report, p.8.

The authors of the study also indicated they thought that race was a factor in Solicitor Wilsons' use of peremptory challenges in William Dickerson's capital case. May 12, 2016 Hearing, p. 15- 16. 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.

October 23, 2017 Hearing, p. 12-13.

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 Solicitor Wilson. October 23, 2017 Hearing, p. 23.

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 Solicitor Wilson.

G. Legal Analysis

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.

H. Arguments

1. Trial counsel rendered ineffective assistance of counsel by failing to advance a comparative juror analysis 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.

Trial counsel rendered ineffective assistance of counsel by failing to obtain access to the same criminal history information that the Solicitor possessed so that he could urge the trial court judge to conduct a comparative juror analysis. Had he done so, he could have brought Donna Melville's extraordinary criminal history to the judge's attention which would have shown the Solicitor's pretextual reasons for striking Ms. Melissa Fields- Copeland. *Strickland v. Washington*, 446 U.S. 668 (1984); *Miller-El v. Dretke*, 545 U.S. 231 (2005). Respectfully, the Court should grant relief on this claim.

2. 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 Solicitor Wilson testified, she did not provide juror criminal histories to trial counsel, so trial counsel was unable to conduct a proper comparative juror analysis 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). See *Strickland v. Washington*, 446 U.S. 668 (1984); *Miller-El v. Dretke*, 545 U.S. 231 (2005). Respectfully, the Court should grant relief on this claim.

Trial counsel's failure to litigate his access to the same juror materials as the Solicitor impeded his ability to ensure his client's rights to due process were protected. Respectfully, this Court should grant relief on this claim.

- 3. 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.**

SLED records only reveal that a person has been convicted of a crime in the state of South Carolina. It does 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. 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 relief on this claim.

- 4. William Dickerson was denied his rights to due process and equal protection under the law in violation of the Fifth and Fourteenth Amendment when the Solicitor's Office improperly struck qualified African-American jurors from the jury venire.**

Solicitor Wilson violated *Batson* when she removed Ms. Georana Gadsen 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). For the reasons argued above, this Court should grant relief on this claim.

I. Conclusion

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 Mr. Dickerson is entitled to a new sentencing. 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 Solicitor Wilson's jury selection history and related relevant investigation, as current counsel undertook during the course of these 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 Mr. Dickerson was prejudiced by his substandard performance because two otherwise qualified jurors were struck from his venire. *Strickland*, *supra*.

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).

III. PCR CLAIMS RELATED TO SENTENCING.

A. Mitigation Evidence Presented at Trial.

During the penalty phase, the prosecution called two correctional officers—Lester Williams and Michael Huggins—to testify about an assault incident at the Charleston County

Detention Center. R. 3788-3810. Trial counsel responded by calling witnesses to demonstrate William Dickerson's adaptability to incarceration. Five Charleston County Correctional Officers testified about their interactions with William. Joseph Ladson described William as quiet, civil, and cooperative. R. 3908-12. John Hewett described William as a cooperative, "mild mannered inmate" that could be a calming influence on younger inmates. Mr. Hewett explained there were several occasions when a new inmate caused problems, and William would talk to that inmate about doing the right thing. R. 3913-15. Stacy Simmons described William as "quiet and laid back" and observed William help other inmates by providing soap and shampoo. R. 3916-17. 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. R. 3918-21. 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. R. 3921-23.

James Aiken, an expert in risk assessment and inmate adjustment,¹⁰ 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." R. 3930-39.

¹⁰ 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. R. 3925-30.

Marjorie Hammock, a social worker,¹¹ 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. R. 4107. Ms. Hammock's testimony outlined William's social history. She testified William was born prematurely, weighting about three pounds. William's father, William O. Dickerson, Sr.,¹² physically abused William's Mother, Sandra Fokes,¹³ 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 abuse are unable to care for their children, resulting in neglect of the children by that parent. R. 4108-12, 4117.

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

¹¹ 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. R. 4101-04.

¹² William, Sr. was extremely violent and was incarcerated assault and battery, armed robbery, and murder during most of William's life. R. 4111-12.

¹³ 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." R. 4115-16.

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. R. 4116-25.

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),¹⁴ 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

¹⁴ There’s no reports of William misbehaving at his grandmother’s house, which he considers a safe place. R. 4134.

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. R. 4125-31.

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 behavioral problems at school and at his grandmother's home confirms an issue in Sandra's home and suggests 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 is 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 recommend William not be returned to Sandra. On July 13, 1988, William was placed at Tara Hall, which is a residential facility for young children. R. 4131-45.

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 didn't 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. R. 2145-49.

Dr. Johnnie K. Rivers, a child psychologist,¹⁵ saw William in individual and small group counseling sessions at Tara Hall. She recalled William doing well at Tara Hall. After William got 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. R. 4045-49, 4053-61.

After returning home, 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."¹⁶ According to Ms.

¹⁵ 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. R. 4043-45.

¹⁶ 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

Hammock, the structure of the Marine Institute, combined with “positive expectations,” resulted in William’s positive behavior. R. 2149-52.

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 DEHEC’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 sweat,” 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. R. 3113-15. On cross-examination, Ms. Hammock acknowledged that William’s sole lead test was lower than Armom’s lead level and didn’t lead to further DHEC observation. R. 4159-61.

vehicle. William successfully completed his probation, which include getting a job and paying restitution. Sandra subsequently alleged William was ungovernable. Ms. Rankin that Sandra did not keep William’s appointment for a psychological evaluation and missed court on two occasions, resulting in the Family Court appointing a guardian *ad litem* for William. Ms. Rankin also confirmed the Family Court placed William at the Marine Institute. R. 4089-97.

Dr. Alexander Morton, an expert in Psychopharmacology,¹⁷ 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. R. 3983-84.

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. R. 1401-04.

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 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

¹⁷ 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. R. 3976-81.

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. R. 3984-92, 4020-21.

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. R. 4014-16.

Dr. Robert Phillips, a forensic psychiatrist,¹⁸ met with William on three occasions and reviewed his social history records. From reviewing records of the three psychiatric hospitalizations, Dr. Phillips observed William was raised in a "toxic emotional environment," both inside the home and in a neighborhood "riff 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

¹⁸ 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. He has served as the Director of Forensic Services for the State of Connecticut, the Chief Executive Officer of the Whiting Forensic Institute (a state maximum security hospital), Deputy Medical Director of the American Psychiatric Association, consulted for the United States Secret Service. R. 4206-12.

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.” R. 4212-24.

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 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. R. 4224-29.

Dr. Phillips observed William showed commitment to living the “straight and narrow” after spending nine years in prison. William received training as a welder. When he didn’t 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 didn’t 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. R. 4229-31.

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. R. 4231-40.

Dr. Mark Cunningham, a clinical and forensic psychologist,¹⁹ 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. R. 4269-71. Applying the Justice Department model, Dr. Cunningham testified about the risk factors present in William’s childhood.

¹⁹ 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. R. 4262-67.

The first set of risk factors are present from conception to age six. Of the seven factors from this age period, Dr. Cunning 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 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.

R. 4271-72.

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.

R. 4283, line 13 – 4285, line 11 (emphasis added). Dr. Cunningham's cumulative, 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. R. 4313, 4316-20.

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." R. 4272-76.

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

- 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." R. 4293.
- Emotional rejection and neglect by Sandra. According to research, neglect is "more injurious to children than active abuse" in terms of outcome. R. 4293-94.
- 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." R. 4294-98.
- 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. R. 4298, 4305, 4307.
- The neighborhood William grew up in is a neighborhood of single-parent homes. Alcoholism, drug use, and prostitution were common. R. 4299.
- 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. R. 4299-4301.
- 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" him might have been exposed to HIV. R. 4202-03.

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. R. 4309-10.

B. 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. December 8, 2015 Hearing, pp. 402-03, 430-32; May 13, 2016 Hearing, pp. 154-58, 232-44; Applicant's Ex. 1; State's Ex. 3. 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,²⁰ 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

²⁰ 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. December 7, 2015 Hearing, pp. 8-9.

reviewed the laboratory report showing William had 9 micrograms per deciliter²¹ of lead in his blood when he was eleven years, nine months, and nine days old. December 7, 2015 Hearing, pp. 10-11, 58-60; Applicant's Ex. 1, 2. 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.

Dr. Canfield explained that lead is an element,²² 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." Overtime, 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 home 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

²¹ [A] deciliter is about 20 teaspoons, and a child has about four quarts of blood." December 7, 2015 Hearing, p. 31.

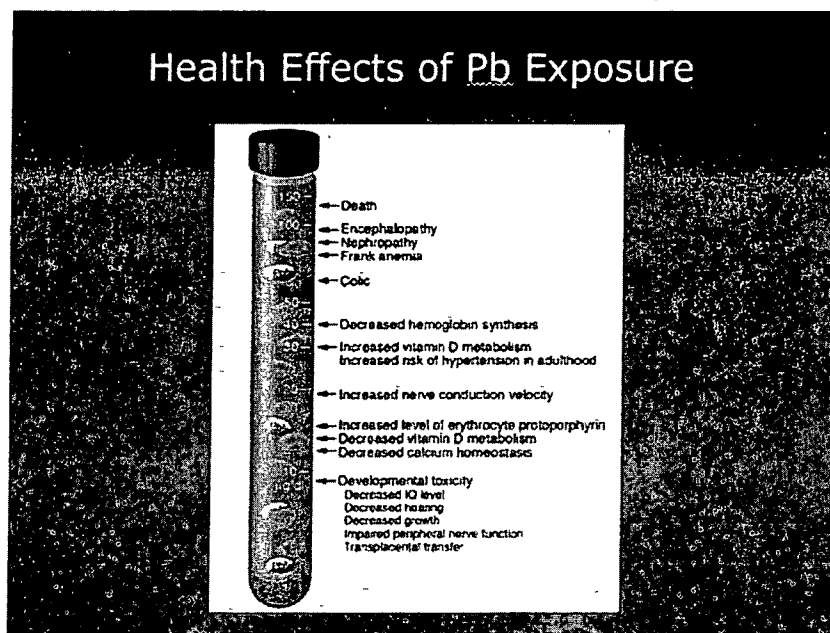
²² The chemical element symbol for lead is Pb.

adults.” At the same time, “the brain is developing its basic capacities at those ages and is most sensitive to environmental insults.” December 7, 2015 Hearing, pp. 14-25, 34.

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. December 7, 2015 Hearing, pp. 24-30.

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



Applicant's Ex. 3, Slide 28.²³ As this chart illustrates, visible, physical symptoms begin at blood levels of 60 micrograms per deciliter with colic and upset stomach. As 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

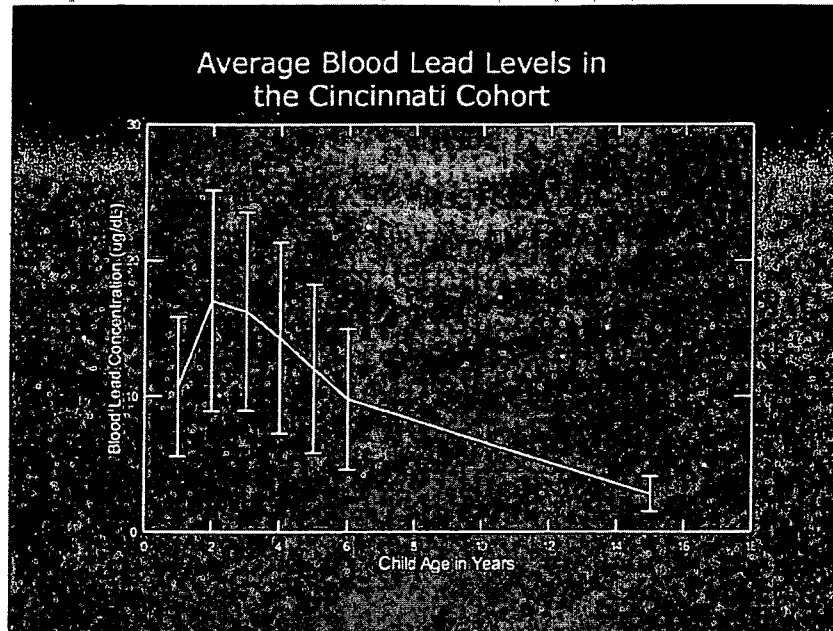
²³ The slide should reflect "decreased nerve conduction velocity" rather than "increased never conduction velocity" as lead levels approach 20 micrograms per deciliter. December 7, 2015 Hearing, pp. 32-33.

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 1991.²⁴ 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. December 7, 2015 Hearing, pp. 31-36.

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 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. December 7, 2015 Hearing 38-41. Lead blood levels decrease

²⁴ 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 an elevated blood level of lead. December 7, 2015 Hearing, pp. 35-36.

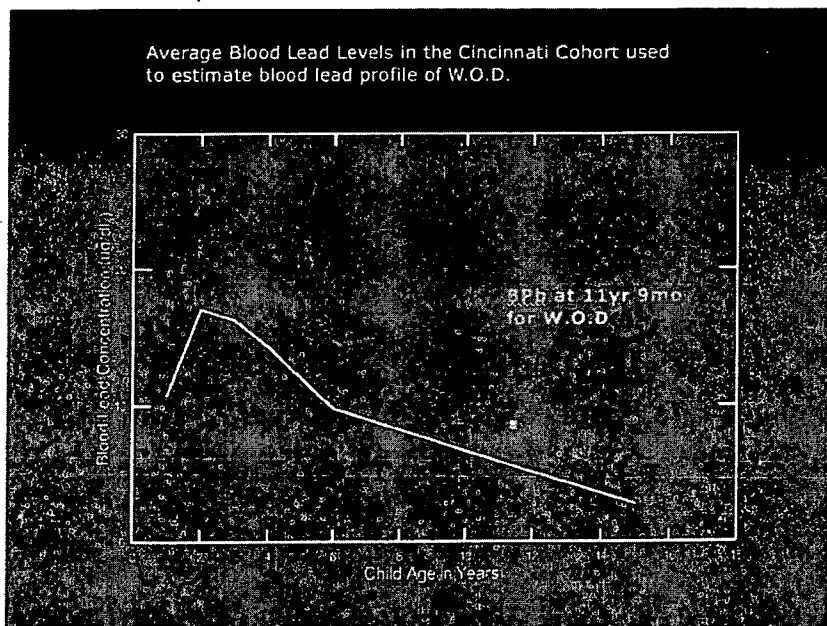
over time as children grow older. Dr. Canfield charted how a child's blood level rises and falls with age:



Applicant's Ex. 3, Slide 43. Researchers documented this same pattern in studies conducted in Rochester, New York,²⁵ Boston, Massachusetts, Cleveland, Ohio, Port Pirie, Australia, and the former Yugoslavia. December 7, 2015 Hearing, pp. 42-48.

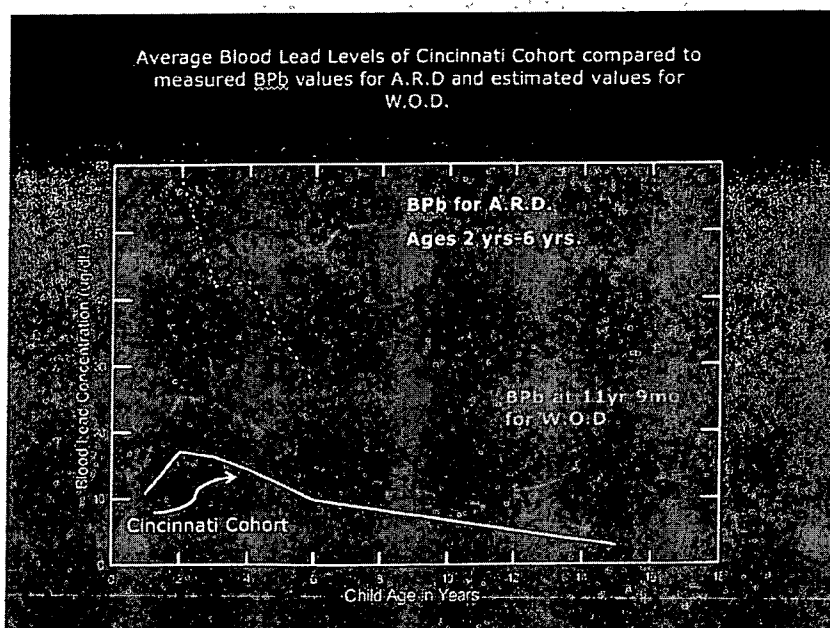
Based on the research, William's blood levels would have been higher when he was eighteen to thirty-six months old. Dr. Canfield provided context for William's test results, at age eleven years, nine months revealing a blood level of 9 micrograms per deciliter, by Dr. Canfield charting William's blood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

²⁵ 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. December 7, 2015 Hearing, pp. 42, 71-87.



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. December 7, 2015 Hearing, pp. 52-62. 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,²⁶ 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 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. December 7-8, 2015 Hearing, pp. 153-64.

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. December 7-8 Hearing, pp. 164-67.

²⁶ 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. December 7-8, 2015 Hearing, pp 138-45.

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. December 7-8, 2015 Hearing, pp. 167-82; Applicant's Ex. 1, 7, 8, 9, 10.

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 emotion and behavior were regulated well 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 attentional 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. December 7-8, 2015 Hearing, pp. 182-95; Applicant's Ex. 11, 12.

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. December 7-8, 2015 Hearing, pp. 195-201.

Tara Hall discharged William on June 1, 1990, and he returned to Sandra's home. William entered the eighth grade and failed. After completed 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. December 7-8, 2015 Hearing, pp. 197-205.

After he was released from Tara Hall, William became involved with the Department of Youth Services (“DYS”).²⁷ The Family Court Judge ordered a psychological evaluation for William at the Reception and Evaluation Center. 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, poses poor planning abilities, lack 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. December 7-8, 2015 Hearing, pp. 205-16; Applicant’s Ex. 13, 14.

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. December 7-8, 2015 Hearing, pp. 216-18; 269-72. 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 Malinger (“TOMM”) and the Victoria

²⁷ The South Carolina Department of Youth Services (“DYS”) is the predecessor for the South Carolina Department of Juvenile Justice (“DJJ”).

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. December 7-8, 2015 Hearing, pp. 225-31.

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.” December 7-8, 2015 Hearing, pp. 231-35.

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 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. December 7-8, 2015 Hearing, pp. 235-40.

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,” with 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. December 7-8, 2015 Hearing, pp. 240-67.

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. December 7-8, 2015, pp. 275-84.

C. Arguments.

- 1. 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.²⁸ 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

²⁸ A tape recording of the hearing does not exist. R. 3752.

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 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." R. 3742-53.

After this hearing, the State called a firearms identification expert. R. 3757-70. When the State called Ms. Davis to testify before the jurors, trial counsel did not renew the objection. R. 3770-78.

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. December 8, 2015 Hearing, pp. 392-98; Applicants Ex. 15.

“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). Our Supreme 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.

2. 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.

R. 4369-70.

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.

R. 4374.

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." December 8, 2015 Hearing, p. 401, ll. 7-15. 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)). The South Carolina Supreme 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 Mr. Dickerson relief.

- 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 the South Carolina Supreme 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. December 8, 2015 Hearing, pp. 410-11. 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. As seen, 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*.

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.

4. 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. 2920-93. 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. R. 3877-79.
- State's Ex. 336 shows multiple abrasions on the back resulting from blunt trauma. R. 3879.
- State's Ex. 160 shows "sharp injuries" to the right arm and abrasions to the right abdomen with hemorrhage to the underlying tissue. R. 3879-80.
- State's Ex. 161 shows soft tissue swelling and bruising to the left wrist. Bones in the right wrist and hand were broken. R. 3880.
- State's Ex. 162 shows a laceration and several abrasions to the inner, upper left arm. R. 3880.
- 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. R. 3880-81.
- 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. R. 3881.
- State's 166 shows several abrasion injuries, several sharp injuries, and a fractured tibia bone. R. 3882

- State's Ex. 173 shows a skin avulsion where the skin is pulled away on the fingers of the right hand. R. 3883..
- 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. R. 3883-87.
- State's Ex. 181, taken after Dr. Schandl shaved Mr. Roper's head, shows multiple lacerations, abrasions, and punctures. R. 3887-89.
- State's Ex. 178, taken after Dr. Schandl shaved Mr. Roper's head, shows abrasions, contusions, and a puncture wound to the ear. R. 3889-91.
- 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. R. 3891-92.
- State's Ex. 184 shows a burn to the scrotum. R. 3892-93.
- State's Ex. 141 shows the anal abscess. R. 3893-96.

The defense did not cross-examine Dr. Schandl. R. 3898.

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. May 13, 2016 Hearing, pp. 195-96; 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. December 8, 2015 Hearing, pp. 440, 442-44.

"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 order a new sentencing hearing.

5. 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. R. 4243-46. Mr. Bloom testified this issue should have been included in Mr. Dickerson’s direct appeal. May 13, 2016 Hearing, p. 196; 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 order a new sentencing hearing.

V. KIDNAPPING SENTENCE.

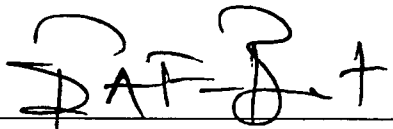
As seen, the trial judge sentenced Mr. Dickerson to thirty years imprisonment for kidnapping. South Carolina law prohibits sentencing for kidnapping when someone is also sentenced for murder pursuant to S.C. Code Ann. §16-3-20. *See also Owens v. State*, 331 S.C. 582, 585, 503 S.E.2d 462, 463 (1998) (see also numerous case cited therein); *State v. Stroman*, 281 S.C. 508, 514 316 S.E.2d 395, 400 (1984); *State v. Copeland*, 278 S.C. 572, 597, 300 S.E.2d 63, 77-78 (1982); and *State v. Vick*, 384 S.C. 189, 202-203, 682 S.E.2d 275, 281-82 (Ct. App. 2009). The State conceded this sentence “should be set aside” in its Return to Mr. Dickerson’s First Amended Application for Post-Conviction Relief dated November 16, 2012, at pp. 35-36. On November 19, 2012, Mr. Dickerson moved, pursuant to Rule 12(c), SCRCP, for a partial judgment on the pleadings or, in the alternative, for partial summary judgment on this issue. At the hearing on this motion, the State argued the PCR court should delay entering that order until

the final disposition of this case. December 19, 2012 Hearing, pp. 4-14. This issue is still pending, and this Court should enter an order vacating the kidnapping sentence.

VI. CONCLUSION.

This Court should grant William Dickerson's application for post-conviction relief. Because of the *Batson* violation, this Court should order a new trial. In the alternative, this Court should order a new sentencing hearing.

Respectfully Submitted,

By 

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Attorneys for William O. Dickerson, Jr.

January 16, 2018.

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

WILLIAM O. DICKERSON, SK6030)
Applicant,)

v.)

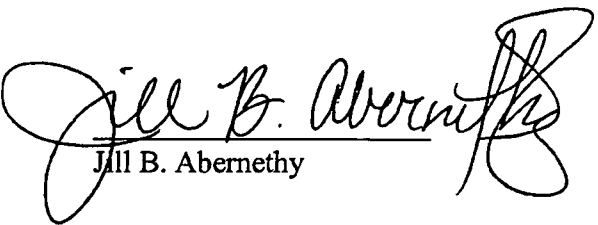
THE STATE OF SOUTH CAROLINA.)
Respondent.)

IN THE COURT OF COMMON PLEAS
CA No. 12-CP-10-3216

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Applicant's Post Hearing Brief was served by first class United States mail, postage prepaid, this 16th day of January, 2018, upon the following:

Melody Brown
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


Jill B. Abernethy

FILED
2018 JAN 18 PM 2:02
JULIE J. ARNOLD
CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

FOR THE NINTH JUDICIAL CIRCUIT
IN THE COURT OF COMMON PLEAS

William O. Dickerson, #6030,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)
_____)

C/A No. 2012-CP-10-3216
(Capital PCR)

**ORDER DENYING POST-CONVICTION
RELIEF**

2018 JUN 27 PM 12:20

This matter comes before the Court by way of an Application for Post-Conviction Relief originally filed May 16, 2012, and amended March 5, 2015 and July 15, 2015. An evidentiary hearing was initially convened on December 7-8, 2015, with additional hearings held March 31, 2016; May 12-13, 2016; May 27, 2016; and, October 23, 2017.

A. The Underlying Prosecution and Direct Appeal History

Applicant William O. Dickerson (Applicant) was called to trial on April 23, 2009, in Charleston County on the charges of murder, criminal sexual conduct first degree, and kidnapping. The State sought the death penalty. The Honorable R. Markley Dennis presided over the jury trial. Applicant was represented by defense counsel Jeffrey Bloom, Esq., and Calvin Andrew (Drew) Carroll, Esq. The Ninth Circuit Solicitor, Scarlett Wilson, tried the case along with Chief Deputy Solicitor Bruce Durant and former Assistant Solicitor Rutledge Durant. On April 30, 2009, the jury convicted Applicant as charged. On May 4, 2009, the penalty phase began. On May 7, 2009, the jury found three aggravating circumstances: 1) criminal sexual conduct; 2) kidnapping; and 3) torture. The jury recommended death. The judge imposed a death sentence for murder, and thirty years on each of the other crimes. The judge also found "as an affirmative fact that the evidence

in the case warrants the imposition of a death penalty and its imposition is not the result of prejudice, passion or any other arbitrary factor.”

Applicant appealed, filing his Final Brief of Appellant on March 17, 2011. Robert Dudek and Kathrine Hudgins, Esquires, from the South Carolina Commission on Indigent Defense appeared on brief as appellate counsel, as did trial counsel Bloom. *State v. Dickerson*, 395 S.C. 101, 716 S.E.2d 895 (2011). Applicant’s appellate brief raised four issues, none of which overlap into the present proceeding, and each of which were addressed by the South Carolina Supreme Court:

1.

Whether the court erred by refusing to allow defense counsel to cross examine the pathologist, Dr. Schandl, about the fact the decedent tested positive for cocaine in his urine, since the pathologist testified on direct examination that the decedent’s blood tested negative for drugs and appellant had the right to correct the misleading perception the pathologist had given the jury and the omission in her testimony reflected on her credibility as a “neutral” expert witness?

2.

Whether the court erred by refusing to charge the jury on the lesser offense of accessory after the fact of murder since there was evidence appellant was only guilty of that offense since appellant’s brother admitted he beat the decedent inside decedent’s apartment, his brother’s wife decided the decedent should be killed, the decedent died inside his apartment, and appellant’s brother testified appellant helped remove the body to a vacant apartment next door?

3.

Whether the court erred by refusing to allow appellant’s first cousin, Johnette Watson, to whom appellant was like a brother, to testify that appellant’s execution would deeply hurt her, since appellant’s ability to maintain this positive relationship was admissible character evidence during the penalty phase?

4.

Whether the judge erred in qualifying a juror who would, if the state proved aggravating circumstances, automatically vote for the death penalty unless the defense presented evidence that convinced him that a death sentence was not warranted, improperly shifting the burden to the defendant to prove he should not be executed?

(Final Br. of Appellant, pp. 1-2); *Dickerson*, *supra* at 113-14, 716 S.E.2d at 902.

The court heard oral argument on May 24, 2011, and subsequently issued an opinion affirming the convictions and sentence. *State v. Dickerson*, Opinion No. 27048 (S.C. Sup. Ct. filed October 3, 2011), *reported at* 395 S.C. 101, 716 S.E.2d 895 (2011). Applicant pursued rehearing, which was denied. He next filed a petition for writ of certiorari in the Supreme Court of the United States on February 15, 2012, pursuing the fourth issue from the direct appeal. After the State filed a Brief in Opposition, the Supreme Court denied the petition on April 23, 2012.

B. Respondent's Statement of Facts as Established at Trial

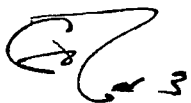
The facts concerning Dickerson's capital conviction are included herein as presented by the South Carolina Supreme Court in its opinion affirming Dickerson's conviction and sentence.

Dickerson and Gerard Roper had been friends, even best friends, since childhood. On the morning of March 6, 2006, Roper went to his friend, Ben Drayton's, house to play video games. Around the same time, Dickerson went to his friend, Antonio Nelson's, house asking for a ride to his brother, Armon Dickerson's, house. Nelson was unable to give Dickerson a ride at that time and told him to come back later. When Dickerson returned later that afternoon, he was carrying a gun.

En route to Armon's house, however, Dickerson began calling Roper from his cell phone. After receiving no answer, Dickerson asked if they could make a stop at Drayton's house so he could "get some money." When they arrived at Drayton's home, Dickerson entered brandishing his weapon and asking for money. Roper told Dickerson "I got your money," begging "don't shoot me" and "please don't kill me." Dickerson nevertheless fired a shot at Roper but missed. He then struck Roper in the head with the gun, dragged him out of the house, and forced him into Nelson's car. Dickerson then took Roper to Armon's house.¹

Armon and Dickerson brought Roper inside and systematically tortured him over approximately thirty-six hours. It started with Dickerson continuing to hit Roper with the gun, knocking out some of his teeth. Armon then left to retrieve

¹ After dropping Dickerson and Roper off, Nelson left and did not return. There is no suggestion he knew of Dickerson's plans beforehand or had any involvement in the subsequent events.



Dickerson's car and some drugs, and blood covered the inside of the house when he returned. Dickerson then called another friend of his, Rashid Malik, and threatened him with death if he did not come to Armon's house.² When Malik arrived, Roper was still conscious but clothed only in his T-shirt, and Armon was attempting to clean up the blood covering the house. Malik then joined Armon and Dickerson.

Although Dickerson, Armon, and Malik all tortured Roper to varying degrees, Dickerson appeared to be the primary actor.³ Through this entire ordeal, Roper suffered the following at the hands of Dickerson alone: choking, being tied up and placed in a closet, being sodomized with a gun and a broomstick, having his scrotum burned, being hit with a heavy vase and a mirror, and generalized beating and cutting. At one point, Roper began asking that they just let him die.

All told, Roper received over 200 individual wounds to the outside of his body, including lacerations to his anus. He also received several internal injuries, including various broken bones in his face that caused it to appear misshapen, blunt force trauma to his neck resulting in the breaking of various structures, a broken tibia, broken fingers and wrist, brain swelling, and bleeding into the internal structures around his rectum as the result of objects being inserted into it. Although there is no definite timeline of events, Roper survived for eighteen to twenty-four hours after the sodomy occurred, and none of these wounds were inflicted post-mortem. No single wound was fatal. Instead, Roper died from the sum total of his injuries, apparently shortly after he was struck with the mirror and the vase on the morning of March 8.

As these events transpired, Dickerson made several phone calls to various people during which he discussed what he was doing to Roper. Many of them were to Dickerson's girlfriend, and she managed to record one of them containing his description of the sodomy and even Roper's own confirmation of what was happening. Dickerson also confirmed the sodomy, as well as the burning of Roper's scrotum, over the phone to another friend. In a later call to that same friend, he said

² Malik attempted to bring Dickerson's mother to Armon's house to calm Dickerson down. When Dickerson learned of this, he threatened to kill Malik's mother and cut the baby out of Malik's pregnant girlfriend.

³ Armon's girlfriend, Selena Rouse, was in and out of the house during that evening, along with her young son. At some point, Dickerson asked her whether he should let Roper live or die. However, there is no evidence that she actually participated in the torture.

that Roper was “gone.” However, he told a different friend that Roper was all right but that Dickerson needed to run.

Dickerson and Armon wrapped Roper’s semi-clothed body in a blanket and dumped it in the vacant townhouse next to Armon’s. Dickerson then changed clothes and fled. Armon and Rouse attempted to clean Armon’s house, but they abandoned it upon realizing their efforts would be futile. That same day, a woman who was planning to rent the vacant townhouse entered and discovered Roper’s bloodied and mutilated body.

State v. Dickerson, supra at 107–09, 716 S.E.2d at 898–99 (footnotes in original).

C. PCR Procedural History

Applicant filed his application for post-conviction relief (PCR), on May 16, 2012. By Order dated July 31, 2012, the Supreme Court of the South Carolina vested the Honorable Edgar W. Dickson with exclusive jurisdiction over this capital post-conviction relief action.

By Order dated August 20, 2012, Judge Dickson appointed counsel Elizabeth Franklin-Best, Esquire, and E. Charles Grose, Jr., Esquire (Applicant’s counsel). Throughout the course of this litigation, Respondent has been represented by Senior Assistant Deputy Attorney General Melody Brown, with appearances also made by Deputy Attorney General Donald Zelenka, Senior Assistant Attorney General Anthony Mabry, and Assistant Attorneys General Caroline Scrantom and Brendan McDonald (Respondent’s Counsel).

Applicant, through counsel and pursuant to the terms of a scheduling order issued by Judge Dickson, filed an amended application on October 18, 2012. To this application, Respondent filed a Return on November 19, 2012.

For reasons unrelated to the specific issues raised, Judge Dickson recused himself from further participation in this case by Order dated June 2, 2014. Thereafter, the Supreme Court of the South Carolina vested the undersigned with exclusive jurisdiction over the present action in an Order issued June 20, 2014. Applicant’s counsel filed a second amended application nearly nine



months later on March 5, 2015. A third and final amended application followed, being served upon Respondent on July 13, 2015, and filed July 15, 2015.

Respondent moved to strike or, in the alternative, to dismiss claims within that application not cognizable in PCR. Specifically, Respondent postured that the claim styled as a denial of “due process and equal protection” alleging that the Solicitor “committed prosecutorial misconduct by improperly striking qualified African-Americans from the jury venire” was a freestanding claim which alleged a *Batson* violation that was appropriate at the time of trial and on direct appeal, but not under the Uniform Post-Conviction Relief Act. *See Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975). Respondent filed this motion on October 1, 2015. Applicant responded in opposition and Respondent replied. In an order filed December 8, 2015, this Court denied Respondent’s motion to strike or dismiss finding that “Petitioner is asserting his *Batson* claim as part of his ineffective assistance of counsel claim. Thus, Petitioner’s *Batson* claim, in this Court’s opinion, is not a freestanding claim and is a proper claim in this post-conviction relief matter.”

The third amended application gives rise to the allegations pursued at the series of evidentiary hearings before this Court which have convened in both Charleston and Richland Counties: First, on December 7-8, 2015; Second, on March 31, 2016; Third, on May 12, 2016; Fourth, on May 27, 2016; Fifth, on October 23, 2017. Applicant has been present at each hearing and represented by Applicant’s counsel.

During the course of these hearing installments, this Court received testimony from (in no particular order and in some cases on more than one occasion): developmental psychologist Dr. Richard Canfield, neuropsychologist Dr. Marlyne Israelian, Applicant’s first chair trial counsel Jeffrey Bloom, Applicant’s second chair trial counsel Drew Carroll, Applicant’s appellate counsel Robert Dudek, law professor Barbara O’Brien from Michigan State University College of Law,



Ninth Circuit Solicitor Scarlett Wilson, and mathematics and statistics professor Dr. Robert Norton.

Following the fourth convening in May 2016, discovery recommenced with the issuance of a July 21, 2016, Order granting Applicant's mid-hearing Motion to Compel. Following this Order, the undersigned also formally ordered, at Respondent's request and without opposition by Applicant, that the evidentiary hearing be suspended until such time as both parties had a full and fair opportunity to complete the discovery ordered on July 21, 2016, and any additional discovery deemed necessary as a result.

During the suspension of the evidentiary hearing and while mid-hearing discovery was pursued by both parties, this Court reconvened on March 16, 2017, for a limited hearing on Respondent's Motion for Special Interrogatories and Concomitant Request to Produce regarding the jury selection claims. This Court denied Respondent's motion. Also at that hearing, Applicant moved to compel additional jury selection data from the *State v. Michael Slager*, C/A No. 2015-GS-10-03466 (Charleston County Court of General Sessions), which had been sealed by the Honorable Clifton Newman during the course of the *Slager* trial. Prior to the resolution of Applicant's related motion before Judge Newman to unseal the information sought by Applicant, this Court denied Applicant's Motion to Compel in an order issued June 1, 2017.

Applicant's 2017 discovery request⁴ was also related to Applicant's two prior mid-hearing requests to supplement and amend the data counsel provided their expert witness, Barbara O'Brien

⁴ Discovery on this particular issue commenced when Applicant served a FOIA request and subpoena upon Ninth Circuit Solicitor Scarlett Wilson seeking:

the incident report, complete and accurate copies of the jury list(s) prepared by the Clerk of Court, your juror strike sheet, all information created or assembled about all potential jurors (regardless of whether it was prepared by you or by someone else and given to you), and your notes



of the Michigan State University College of Law, in furtherance of Applicant's claim that the Ninth Circuit Solicitor impermissibly used race during capital jury selection ("the jury selection claims").⁵

In regard to the segmentation of the PCR evidentiary hearing, this was a result in almost exclusive part of matters related to the jury selection claims:

- Between the hearings on December 7-8, 2015, and March 31, 2016, Applicant was allowed time for its experts' completion of the statistical analysis intended for presentation in furtherance of the jury selection claims.⁶
- Applicant introduced expert Barbara O'Brien at the March 31, 2016, hearing. O'Brien presented a "Report on Jury Selection Study" in furtherance of the jury selection claims. The report was dated March 8, 2016. This hearing was suspended until May 12, 2016, at Applicant's request, to allow O'Brien time to amend her report to include raw data from public records (trial transcripts) presented by Respondent during its cross-examination of O'Brien.

made during the roll call of jurors, juror qualification, voir dire, and jury selection

for a list of fourteen specific General Sessions cases. (Aug. 27, 2015, Ltr. from Charles Grose to Sol. Scarlett Wilson; see Exhibit A-4 from May 12-13, 2016 PCR Hearing). This is not the discovery process authorized by S.C. Code Ann. § 17-27-150(B), nor is the Solicitor a proper representative party to the action from which discovery may be directly pursued. See Rule 5(a), SCRPC; *Langford v. McLeod*, 269 S.C. 466, 238 S.E.2d 161 (1977). Applicant had previously deposed the Solicitor and had served discovery requests upon Respondent, but had not made any request for data specific to the study conducted.

⁵ Respondent has maintained throughout this proceeding that the evidence admitted should only concern claims within the PCR application pertaining to ineffective assistance in the jury selection challenge and procedures leading up to and during Applicant's 2009 trial. This Court has previously limited the presentation of evidence to this proposed time frame in regards to Applicant's Motion to Compel prosecution training materials and in numerous presentations where Applicant has attempted to exceed that limitations, (Respondent maintaining objection to post-2009-trial materials; Court limiting question to 2009 trial and before).

⁶ The December 7-8, 2015, hearing was limited to issues pertaining to ineffective assistance of counsel in regards to an underlying allegation of lead poisoning, and various other strategy and record based claims. Applicant was not ready to present his statistical theories at the December 2015 hearing.

- At the May 12, 2016, hearing Applicant re-called Barbara O'Brien via Skype. She presented an "Amended Report on Jury Selection Study" dated May 5, 2016. Applicant also called Ninth Circuit Solicitor Scarlett Wilson to testify in furtherance of these allegations.⁷
- The hearing was then suspended order for Applicant to depose Respondent's expert witness who was retained in rebuttal to Applicant's second presentation of the jury selection allegations. That hearing occurred on May 27, 2016, when the State presented Dr. Robert Norton, who offered a critique of the report presented by Applicant's expert. Doctor Norton did not conduct, and the State did not present, an independent study. The State then rested. At this juncture, Applicant indicated he would obtain another amended report from its experts for the purposes of presenting a case-in-reply.

The evidentiary hearing re-convened before this Court on October 23, 2017, in Richland County. Applicant once again presented Barbara O'Brien, who addressed her "Second Amended Report on Jury Selection Study." This report was provided to Respondent and this Court on August 30, 2017, and dated August 29, 2017.

D. List of PCR Exhibits

The following exhibits have been introduced at each hearing installment and are before this Court in relation to the allegations enumerated above.

Exhibits Entered at the December 7-8, 2015, hearing in Richland County:

- A-1 June 2, 1988 Lab Report analyzing lead in Applicant's blood at 9 micrograms per deciliter when Applicant was age 11 yrs 9 months 9 days
- A-2 2003 Research Article from *Public Health Reports* containing map of the Charleston Peninsula and designating addresses with confirmed cases of childhood lead levels at or above level 10
- A-3 Copy of Dr. Canfield's PowerPoint Presentation
- A-4 CV of Dr. Marlyne Israelian, expert in developmental neuropsychology

⁷ Also at this hearing, Respondent called trial counsel Jeffrey Bloom in regards to the lead claims, as Mr. Bloom produced discoverable material to Respondent which was requested but not provided by Applicant during discovery.



- A-5 Map of Charleston Peninsula – Enlarged from Dr. Canfield's presentation which ID's houses with children who screened with lead levels above '10
- A-6 Street Map of Orrs Court – street where Dickerson lived for part of his youth
- A-7 May 12, 1988 MUSC Psychological Evaluation of Dickerson from Commitment
- A-8 Social History of William Dickerson Pertaining to Commitments
- A-9 Summary
- A-10 Dickerson's Blood Test Results from same date as lead screening on June 2, 1988
- A-11 Psychological Evaluation for William Dickerson
- A-12 IQ Testing Protocol for Tests Administered to Dickerson in 1990
- A-13 Social Worker's Report by Department of Youth Services (Type of Social History)
- A-14 Evaluation of Social Worker's Report by Department of Youth Services
- A-15 Post-Trial Letter by Jeffrey Bloom dated July 22, 2009 to Robert Lominack expressing list of hearings and of potential appellate issues
- A-16 A Law Review Article by John Blume dated April 1, 2010
- R-1 Medical Report Pertaining to Dickerson's Suffering a Gunshot Wound to the Head
- R-2 Collection of Letters from Dickerson
- R-3 *Jones v. Warden*, 753 F.3d 1171 (11th Cir. 2014)
- R-4 *K.C. v. Fulton Co. Sch. Dis.*, 2006 WL 1868348 (N.D. Ga. Atlantic Div. 2006)
- R-5 MUSC Psychological Evaluation for Dickerson
- R-6 WSH Hospital Records for Dickerson
- R-7 Trial Counsel's Motions Seeking the Death Penalty be Declared Unconstitutional
- R-8 Appellate Counsel's Notes Re: Formulating Appellate Issues

Exhibits Entered at the March 31, 2016, hearing in Richland County

- A-1 CV of Barbara O'Brien
- A-2 Michigan State University College of Law Report on Jury Selection Study
- A-3 Privileged Production Ordered 11/30/2015
- A-4 Privileged Production Ordered 12/10/2015
- A-5 Sealed Criminal History of Jurors from FBI

 10

- A-6 Affidavit of Eddie Haselden from Charleston County Clerk's Office re: Destruction of Juror Lists
- A-7 Prosecution Coordination Commission Documents re: Trainings up to 2009; Additional Materials Proffered for Post-2009
- A-8 Deposition of Bruce DuRant
- A-9 (Proffer Only) Deposition of Scarlett Wilson
- A-10 (Proffer Only) Deposition of Bruce DuRant 3/26/2013
- A-11 (Proffer Only) Deposition of Rutledge DuRant 3/25/2013
- A-12 Transcript Excerpt Used in Respondent's Cross-Examination: Ronald Coulter
- A-13 Transcript Excerpt Used in Respondent's Cross-Examination: Jemol Brown
- A-14 Transcript Excerpt Used in Respondent's Cross-Examination: Ethan Mack
- A-15 Transcript Excerpt Used in Respondent's Cross-Examination: Michael Jeter
- A-16 Flash Drive Containing Underlying Data Utilized in (First) Jury Selection Study

Exhibits Entered at the May 12-13, 2016, hearing in Charleston County

- A-1 Michigan State University College of Law Report Amended Report on Jury Selection Study
- A-2 Standard Interrogatories Served January 2013 by Applicant Upon Respondent
- A-3 Request to Produce Served January 2013 by Applicant Upon Respondent
- A-4 Freedom of Information Act Request Sent to Ninth Circuit Solicitor
- A-5 Incident Report
- A-6 Incident Report
- A-7 Incident Report
- A-8 Incident Report
- A-9 Incident Report
- A-10 Incident Report
- A-11 Incident Report
- A-12 Incident Report
- A-13 Incident Report
- A-14 Incident Report



- A-15 Incident Report
- A-16 Incident Report
- A-17 SC Supreme Court Appendix to Review Assignment of PCR Judge
- A-18 Motion to Dismiss the Death Penalty Due to Unconstitutionality of State Proportionality Review Filed by Trial Counsel
- A-19 Motion to Bar Death Penalty Based on Race
- R-1 Data Compilation Utilized in Creation of Jury Selection Study
- R-2 Criminal Justice Information Services Security Policy Re: Inappropriate to Disseminate Rap Sheets and Criminal History of Jurors
- R-3 E-mails between Jeff Bloom and Dr. Herbert Needleman Re: Lead Poisoning Research and Pre-Trial Consult
- R-4 North Charleston Police Department Booking Report for Juror Stricken by State
- Court-1 Demonstrative Copies

Exhibits Entered at the May 27, 2016, hearing in Richland County

- R-1 CV of Dr. Robert Norton
- R-2 Emailed Opinion of Dr. Robert Norton
- R-3 Formal Critique by Dr. Robert Norton
- A-1 CV of Barbara O'Brien
- A-2 CV of Catherine Grosso
- A-3 (Proffer Only) Questions Applicant Sought Solicitor Wilson to Answer as Part of Applicant's Motion to Compel

Exhibits Entered at the October 23, 2017, hearing in Richland County

- A-1 Michigan State University College of Law Report Second Amended Report on Jury Selection Study
- A-2 Flash Drive Containing Underlying Data for Use in Preparation of A-1 above

Additional Documents Provided to Court Under Seal

Additional information may be sealed and/or before this Court for review, such as prosecution training materials provided under protective order by the South Carolina Commission



on Prosecution Coordination, whose motion to intervene was granted at one point in this proceeding.

E. Surviving PCR Allegations

In Applicant's Post-Hearing Brief of January 16, 2018, Applicant represented he would only proceed on the following allegations:

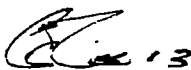
Concerning Jury Selection:

- 10/11(a)(2) Defense counsel rendered ineffective assistance of counsel by failing to advance a comparative juror analysis when he raised his Batson challenge.
- 10/11(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.
- 10/11(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.
- 10/11(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 improperly struck qualified African-Americans from the jury venire

Concerning Ineffective Assistance Alleged During the Sentencing Phase:

- 10/11(b)(2) Trial counsel rendered ineffective assistance of counsel by failing to renew his objection when Cederick Davis, William Dickerson's former probation agent, testified that Mr. Dickerson stated he wished he had shot the cop.
- 10/11(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.
- 10/11(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.⁸

⁸ This claim of "significant neurological deficits" rests on the allegations pertaining to lead exposure.



Concerning Ineffective Assistance of Appellate Counsel:

- 10/11(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.
- 10/11(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.

Concerning Sentence Received:

- 10/11(e) Applicant was improperly sentenced to both murder and kidnapping in violation of S.C. Code Ann. § 16-3-910⁹

These were the only issues briefed by Applicant in any capacity throughout the course of the litigation.

F. Abandoned PCR Allegations

Applicant has abandoned a number of claims appearing in its third amended PCR application. This Court specifically finds those claims waived and abandoned on the basis that they have been expressly waived by Applicant either on the record or in its Post-Hearing Brief. *See generally* S.C. Code Ann. § 17-27-80 ("The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented."); *Marlar v. State*, 375 S.C. 407, 409, 653 S.E.2d 266, 266-67 (2007) (general language on failure to present evidence "should not be included in a PCR order unless there are allegations contained in the application and/or mentioned at the PCR hearing about which absolutely no evidence is presented"); *see also Suber*

⁹ Applicant is correct that the kidnapping sentence should be vacated if the murder sentence is left undisturbed. However, as argued in Respondent's return to the first amended application, the conviction remains.

v. *State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) (“the applicant bears the burden of establishing that he is entitled to relief”);

First, Applicant’s counsel abandoned several allegations at the December 7-8, 2015, evidentiary hearing. Referencing the third amended PCR application, Applicant’s counsel abandoned claims numbered 11(b)(1) and 11(b)(6)-(8) concerning the effective assistance of counsel during the sentencing phase of his capital trial. Applicant’s counsel also abandoned claims 11(c)(4) and 11(c)(6) concerning the effective assistance of counsel on direct appeal.

Second, Applicant’s counsel has abandoned the following claims alleged within its third amended PCR application and not included in the Post-Hearing Brief. Applicant has failed to present evidence and argument in furtherance of the following claims summarized below from the third amended application:

- 10/11(a)(1) Ineffective assistance of counsel during the guilt phase of trial: Counsel did not advance a consistent theory between the guilt-and-innocence and sentencing phases of trial
- 10/11(a)(3) Ineffective assistance of counsel during the guilt phase of trial: Counsel failed to secure jurors’ criminal records from SLED prior to the jury strike¹⁰
- 10/11(c)(1) Ineffective assistance of counsel on appeal: Appellate counsel did not appeal the outcome of trial counsel’s motion to dismiss the death penalty due to the unconstitutionality of South Carolina’s proportionality review¹¹

¹⁰ Applicant has only pressed the issue as to FBI records, not SLED records. These are different reports and different databases. (See Order of March 3, 2015, allowing applicant to obtain a subpoena for FBI data bases, p. 2 (noting differences)). Thus, the actual claim differs.

¹¹ Respondent notes that, as addressed in the return to the first amended application, the South Carolina Supreme Court expressly considered the proportionality of the sentence in its opinion affirming Applicant’s convictions. *State v. Dickerson*, 395 S.C. 101, 123-24, 716 S.E.2d 895, 907 (2011).

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- 10/11(c)(2) Appellate counsel did not appeal the outcome of trial counsel's motion to bar the death penalty based on race
- 10/11(c)(3) Appellate counsel did not appeal the outcome of trial counsel's *Batson* motion
- 10/11(d)(1-4) The death sentence was obtained in violation of the United States Constitution because South Carolina's capital sentencing scheme violates the mandates of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1972)¹²
 1. The statute does not perform the constitutionally mandated narrowing function.
 2. South Carolina's sentencing system permits racial discrimination
 3. The State Supreme Court consistently fails to conduct meaningful proportionality review in capital cases
 4. The death penalty is unconstitutional because it is unreliable, arbitrary, and lacks penological purpose

G. General Standard of Review in PCR

The scope of this Court's jurisdiction in post-conviction relief matters is set out in S.C.

Code Ann. § 17-27-20(a), which provides:

Any person who has been convicted of, or sentenced for, a crime and who claims:

- (1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
- (2) That the court was without jurisdiction to impose sentence;
- (3) That the sentence exceeds the maximum authorized by law;

¹² The South Carolina death penalty statute has long been held Constitutional and "indistinguishable from the statutory complex approved by the United States Supreme Court." *E.g. State v. Shaw*, 273 S.C. 194, 200-03, 255 S.E.2d 799, 802-04 (1979) (citing *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909 (1976)).

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- (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
- (5) That his sentence has expired, his probation, parole, or conditional release unlawfully revoked, or he is otherwise held unlawfully held in custody or other restraint; or
- (6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

Section (b) further limits the jurisdiction of the PCR court as follows: "This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." S.C. Code Ann. § 17-27-20(b). Because a PCR action is not a substitute for those proceedings, a PCR applicant cannot assert any issues in his PCR action that could have been raised at trial and on direct appeal. This prohibition has long been recognized. *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings."); *see also Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("The Simmons rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.").

While previously heard or unheard freestanding trial or direct appeal issues are not cognizable, the general factual basis for the previously unheard issues may be reached by and through an allegation of ineffective assistance of counsel. *Drayton*, 312 S.C. at 9, 430 S.E.2d at 520 ("Issues that could have been raised at trial or on direct appeal cannot be asserted in an



application for post-conviction relief absent a claim of ineffective assistance of counsel.”); *see also Cummings v. State*, 274 S.C. 26, 28, 260 S.E.2d 187, 188 (1979) (“At trial, respondent failed to object to the imposition of the sentence and, therefore, waived the right to have that sentence reviewed on direct appeal, or to raise such issue on Post-Conviction absent an allegation of ineffective assistance of counsel.”). Ineffective assistance of counsel claims constitute the general nature of issues appropriate for post-conviction relief actions. *See, e.g., Al-Shabazz v. State*, 338 S.C. 354, 367, 527 S.E.2d 742, 749 (2000) (discussing jurisdiction pursuant to S.C. Code § 17-27-20(a), and finding “A typical PCR claim of ineffective assistance of counsel falls into this category....”).

To establish that Sixth Amendment counsel was ineffective, a PCR applicant must show that counsel’s representation fell below an objective standard of reasonableness, and but for counsel’s error, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068 (1984); *Simpson v. Moore*, 367 S.C. 587, 595–96, 627 S.E.2d 701, 706 (2006). “A reasonable probability is a probability sufficient to undermine confidence in the outcome” of the trial. *Strickland, supra*. Relief will not be granted on a showing of mere error—prejudice must also be shown. *Id.* The standard of “prejudice” differs depending upon whether it is related to guilt phase issues or penalty phase issues. In order to prove “prejudice” in the guilt phase, an applicant must show that but for counsel’s errors, there is a reasonable probability the result of the trial would have been different. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). In *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998), the court instructed that prejudice may be found in a capital sentencing proceeding “when ‘there is a reasonable probability that, absent [counsel’s] errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded

that the balance of aggravating and mitigating circumstances did not warrant death.” 332 S.C. at 333, 504 S.E.2d at 823 (quoting *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2068). Again, “[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (quoting *Strickland*, 466 U.S. at 694).

Further, a defendant is entitled to a due process right of effective assistance in his first appeal. *Evitts v. Lucey*, 469 U.S. 387 (1985). The *Strickland* deficient performance and prejudice test applies to determine the merits of any claims of ineffective assistance of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S.Ct. 726 (2000); *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). However, “it is difficult to demonstrate that counsel was incompetent” as for the most part, deficient performance may be shown “only when ignored issues are clearly stronger than those presented” *Smith v. Robbins*, 528 U.S. at 288, 120 S.Ct. at 765 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). “To prove prejudice, the applicant must show that, but for counsel’s errors, there is a reasonable probability he would have prevailed on appeal.” *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

In either case, to effect a fair review of counsel’s performance, a reviewing court must “eliminate the distorting effects of hindsight” and attempt “to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Butler v. State*, 286 S.C. 444–45, 334 S.E.2d 815 (1985).

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H. Respondent's Position on the Merits: Ineffective Assistance in Jury Selection

Introductory Summary

Applicant has primarily presented argument challenging Solicitor Wilson's use of peremptory strikes during Applicant's jury selection. The transcript of record shows trial counsel challenged three of the prosecution's four strikes during a *Batson* motion at the 2009 trial.

Because a *Batson* motion was made at the 2009 trial, the precise and only claim available is one of ineffective assistance of counsel. Applicant asserts defense counsel was ineffective by:

- failing to advance a comparative juror analysis when he raised his *Batson* challenge;
- 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;
- 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.

Applicant's further allegation that he "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 improperly struck qualified African-Americans from the jury venire," is not cognizable as that is a direct appeal issue. Review of that claim is barred by the *Simmons* rule.

1. Defining the Claims and Appropriate Standard of Review

At trial, counsel pursued a *Batson*¹³ motion which is reflected on pages 2028 to 2031 of the Record on Appeal. As noted, Applicant makes three separate ineffective assistance of counsel

¹³ *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986) (hereinafter *Batson*).

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claims pertaining to this motion: (A) that trial counsel failed to advance a comparative juror analysis in furtherance of his *Batson* motion; (B) trial counsel failed to subpoena to the FBI to secure the Criminal Justice Information Services Division (CJIS) records pertaining to the potential jurors; and (C) trial counsel failed to litigate that he did not have the same access to juror information, such as CJIS records, as the prosecution possessed prior to the jury strike. Applicant has also alleged a due process and equal protection violation premised on his assertion: "the Solicitor's Office committed prosecutorial misconduct by improperly striking qualified African-American jurors from the jury venire." This is not treated as freestanding claim based on this Court's previous ruling in regard to Respondent's motion to strike.

This Court denied Respondent's Motion to Strike the freestanding claim in its Order filed December 8, 2015, based on the fact that this Court construed the allegation as one of ineffective assistance of counsel: "Here, Petitioner is asserting his *Batson* claim as part of his ineffective assistance of counsel claim. Thus, Petitioner's *Batson* claim, in this Court's opinion, is not a freestanding claim and is a proper claim in this post-conviction relief matter." This affects the standard of review and this Court's review of the evidence. Respondent adheres to the Court's interpretation of the claim as one of ineffective assistance and will follow the review standards of ineffective assistance of counsel claims.

2. Defining the Available Evidence

This Court must examine what information was available to trial counsel at the time of Applicant's trial in order to make a determination on any ineffective assistance of counsel claim. *See, e.g., Strickland v. Washington*, 466 U.S. at 689, 104 S. Ct. at 2065 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the



conduct from counsel's perspective at the time.”). Significant portions of the evidentiary basis argued in Applicant’s Post-Hearing Brief are not proper for this Court’s consideration as the information offered was not available to defense counsel at or before Applicant’s trial – in particular evidence related to cases tried by the Ninth Circuit Solicitor *after* Applicant’s May 2009 trial. To the extent Applicant expands the record to introduce argument concerning the use of preemptory strikes in *State v. Colin Broughton*, tried September 2009, and *State v. Ryan Deleston*, tried October 2013, that evidence will not be considered. Where the underlying occurrence of the evidence argued in favor of relief past Applicant’s trial date, that evidence cannot be considered for the purpose of any post-conviction relief determination on the issue of ineffective assistance and its consideration is consequently improper. *Strickland, supra*. See also Rules 401 and 402, SCRE.

Further, Applicant’s inclusion of a jury strike analysis in the 2004 *Jelal Beyah* trial, though prior to the 2009 trial, is still irrelevant to this Court’s consideration of the claims before it for several reasons. Apart from the well-established fact that discovery is not allowed in criminal proceedings and Applicant has not shown how trial counsel should be criticized for failing to obtain the additional information about any of these unrelated cases, Applicant has attempted to thrust great weight on the fact that an adverse ruling was made in one case, *Beyah*, in regard to one strike. Reliance on *Beyah* to establish some sort of pattern is suspect for its isolated nature. There is only this one instance where a trial court found the prosecutor’s explanation lacking. But the larger point is that the relevant consideration here is the *Batson* motion already in the record.

Trial counsel did pursue a *Batson* challenge and the solicitor’s response was fully set out and is supported by the record. Any reference to other unrelated cases will never affect, inform, or alter the record made at the 2009 trial as to the prosecution’s reasons for the strikes. Moreover,

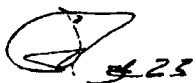
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Applicant's suggestion the responses were pretext is similarly moot, as the responses and consideration of the responses were made back in 2009. *Hernandez v. New York*, 500 U.S. 352, 359, 111 S.Ct. 1859 (1991) ("Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot."); *see also Juniper v. Zook*, 117 F. Supp. 3d 780, 799 and n.10 (E.D. Va. 2015), *motion for relief from judgment denied*, No. 3:11-CV-00746, 2016 WL 413099 (E.D. Va. Feb. 2, 2016) (statistics demonstrating "the prosecution struck black venire members at nearly three times the rate of white venire members," even if accepted, are irrelevant where reasons for strikes on the record given "statistical disparity between black and non-black jurors goes to the first step of *Batson*," and "not purposeful discrimination at the third step").

Applicant's Post-Hearing Brief addresses and includes information included only *in camera* and under seal by this Court. "The Prosecutor's Handbook" and other prosecutorial training materials have been ruled work-product not available for production and/or privileged and held under seal. These documents have already been found to be irrelevant to a *Batson* motion analysis. This past October, our Court of Appeals decided this very issue in *State v. Daise*, 421 S.C. 442, 461–63, 807 S.E.2d 710, 720–21 (Ct. App. 2017), *reh'g denied* (Dec. 14, 2017). The *Daise* opinion is directly on point and against Applicant's position.

Like Applicant, "Daise subpoenaed the records custodian of the South Carolina Commission on Prosecution Coordination (the Commission)¹⁴ to provide '[a]ll documents regarding jury selection, including but not limited to training documents, training agendas,

¹⁴ In Applicant's case, the Commission has been granted intervenor status as to this issue. (May 12-13, 2016, Tr. p. 146; *see id.* pp. 133-41).



manuals, policy statements or . . . advisements, correspondence with current or former prosecutors and circuit court judges.” *Id.* Daise’s capital counsel suggested the State had a “handbook on how to get around *Batson*” and supported his posture with pre-trial expert testimony from a statistician. The statistician testified that “in Beaufort County, African-American males were struck at a rate four and a half times higher than Caucasian males.” *Id.* Our appellate court affirmed the circuit court’s finding the materials at issue “did not ‘include any abusive instructions or teaching materials, nor use of improper technique,’” and that the materials were “generally protected as work-product, as they were created and disseminated in a limited fashion with the purpose of assisting the State’s preparations for trial.” *Id.* at 462-63, 807 S.E.2d at 720 (citing e.g., *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010) (“[A]ttorney work product doctrine protects from discovery documents prepared in anticipation of litigation, unless a substantial need can be shown by the requesting party.”); *State v. Myers*, 359 S.C. 40, 49, 596 S.E.2d 488, 493 (2004) (noting Rule 5, SCRCrimP, exempts from discovery work product and internal prosecution documents which contain no impeachment or exculpatory evidence); Rule 5(a)(2), SCRCrimP (“Except as provided in [prior subsections], this rule does not authorize the discovery or inspection of reports, memoranda, or other internal prosecution documents made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case....”)).¹⁵ The Court of Appeals specifically found that

¹⁵ Former defense counsel testified in these PCR proceedings that defense attorney presentations similarly have materials referencing case law that would outline holdings and what was acceptable or not acceptable – materials that are also similarly considered restricted and “property of the organization putting on the seminar....” (See May 12-13, 2016 PCR Hearing Tr. p. 153). Further, the concept of listing out cases and reviewing the explanation in given cases is fairly standard.

the circuit court did not err in quashing the subpoena for these documents after conducting an *in camera* review. *Id.* at 463, 807 S.E.2d at 721.

An additional limitation to the evidence presented to this Court in Applicant's Post-Hearing Brief pertains to the criminal histories subpoenaed and maintained under seal in this action. (Mar. 3, 2015, "Order Granting Applicant's Request for Access to Criminal Histories of Jurors"). As testified to by the Solicitor in this case, CJIS information is not for dissemination once received by the State. The State introduced as Respondent's Exhibit 2 to the May 12-13 hearing in this matter the security policy and information sheet directing that these criminal histories not be physically duplicated or disseminated. This policy additionally instructs on how to specifically destroy these rap sheets once the timeframe for using them expires. (Resp. Ex. 2, May 12-13, 2016, PCR Hearing). Even though similar documents may be produced (as by the subpoena issued for purposes of this action), Applicant could not have access to that information at the time of trial. And, to the extent access to similar information has been granted by this Court for purposes of this litigation, such is to remain under seal, with replication and dissemination to inappropriate parties forbidden in accord with FBI policies.

The evidence that is relevant to this Court's review remains in the form of testimony presented at each installment of the PCR hearing to the extent it pertains to Applicant's trial counsel's performance, any alleged prejudice derived therefrom, and any evidence which was discoverable at or before the time of Applicant's May 2009 trial.

3. Defining the Specific Standard of Review

The outcome as to each ineffective assistance of counsel claim pursued by Applicant in the Post-Hearing Brief is resolved by reference to the *Strickland* deficiency-and-prejudice standard.

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"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064 (1984). But it is not just a purported error that controls whether relief may be granted. Rather, "[t]he 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." *Id.*, 466 U.S. at 694, 104 S. Ct. at 2068. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.*, 466 U.S. at 691, 104 S. Ct. at 2066.

Batson procedure is certainly relevant to this Court's determination of whether trial counsel rendered deficient performance and any prejudice derived therefrom. It is unconstitutional for either the prosecution or defense to strike a venire person on the basis of race or gender. *J.E.B. v. Alabama*, 511 U.S. 127, 114 S.Ct. 1419 (1994); *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348 (1992); *State v. Shuler*, 344 S.C. 604, 545 S.E.2d 805 (2001). This prohibition derives from the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Id.* Upon motion by either party, *Batson* provides a mechanism for the trial court to evaluate whether a party executed one or more of its peremptory challenges in a manner in violation of the Equal Protection Clause. "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. Shuler*, 344 at 615, 545 S.E.2d at 810. South Carolina restated its application of *Batson*'s three-prong test in *State v. Inman*:

First, the [the party asserting the *Batson*] challenge must make a prima facie showing that the challenge was based on race [or gender]. If a sufficient showing is made, the trial court will move to the second step in the process, which requires the [party opposing the *Batson*] challenge to provide a race [or gender] 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 [party asserting] the challenge has proved purposeful discrimination.

409 S.C. 19, 25, 760 S.E.2d 105, 108 (2014) (alterations in original) (quoting *State v. Giles*, 407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014)).

In order to make the initial prima facie showing, a movant is required to note that the strikes' proponent exercised peremptory challenges to remove venire members of a particular race or gender. *Batson v. Kentucky*, 476 U.S. at 96, 106 S.Ct. at 1712. The movant "is entitled to rely on the fact, as to which there can be no dispute that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Id.* (quoting *Avery v. Georgia*, 345 U.S. 559, 563, 73 S.Ct. 891, 892 (1953)). The movant may point to particular circumstances in his opponent's jury strike which give rise to an inference of discrimination, such as demonstrating to the trial court that his opponent exercised a "pattern" of strikes against a particular race or gender. *Id.* at 96, 106 S. Ct. at 1723. The showing required in this jurisdiction is light: "...the trial judge must hold a *Batson* hearing when members of a cognizable racial group or gender are struck and the opposing party requests a hearing." *State v. Adams*, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996), *overruled on other grounds by State v. Giles*, 407 S.C. 14, 754 S.E.2d 261 (2014).

Further, establishing a pattern of discrimination does not require a showing that every potential juror of a specific race or gender was struck by a party. In finding a prima facie case has been made, the relevant inquiry is not whether it is more likely than not that the peremptory challenges, if unexplained, were based on an impermissible bias. *Johnson v. California*, 545 U.S. 162, 164, 125 S.Ct. 2410, 2413-14 (2005). "[A] prima facie case of discrimination can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives 'rise to

an inference of discriminatory purpose.” *Id.* at 169, 125 S.Ct. at 2416. “The [remainder of the] *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process.” *Id.* at 172, 125 S.Ct. at 2418. “In deciding whether the [movant] has made the requisite showing, the trial court should consider all relevant circumstances.” *Batson* at 96, 106 S.Ct. at 1723.

The neutral reason the motion’s opponent provides for each strike need not prove persuasive or plausible. *State v. Inman*, 409 S.C. at 26, 760 S.E.2d at 108 (citing *Purkett v. Elem*, 514 U.S. at 768, 115 S.Ct. at 1769). “The explanation must only be ‘clear and reasonably specific such that the [party asserting the *Batson* challenge] has a full and fair opportunity to demonstrate pretext in the reason given.” *Id.* (alterations in original). “In contrast, step three of the above analysis requires the court to carefully evaluate whether the party asserting the *Batson* challenge has proven racial discrimination by demonstrating that the proffered race-neutral reasons are mere pretext for a discriminatory intent.” *Id.* at 27, 760 S.E.2d at 108.

Applicant argues the Solicitor engaged in prosecutorial misconduct when using peremptory strikes in Applicant’s jury selection. However, “[f]or more than a century, th[e Supreme] Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause.” *Miller-El v. Dretke*, 545 U.S. 231, 239, 125 S.Ct. 2317, 2324 (2005) (quoting *Georgia v. McCollum*, 505 U.S. 42, 44, 111 S.Ct. 1364, 2348 (1991)).

The cognizable claim rests on the sufficiency of the *Batson* motion made at trial. Even if Applicant could show some error in counsel’s representation at trial, he must show *Strickland* prejudice. In the *Batson* context, *Strickland* prejudice is often impossible to show due to the nature of the equal protection error. See, for example, *Young v. Bowersox*, 161 F.3d 1159, 1160 (8th Cir. 1998) (rejecting call to presume prejudice in *Batson* context); *Cabrera v. State*, 173 A.3d 1012,

1021–22 (Del. 2017) (“even if we assume a *Batson* violation, the Superior Court correctly held that Cabrera was not relieved of showing prejudice under *Strickland*.”); see also *United States v. Lee*, 715 F.3d 215, 223 (8th Cir. 2013) (“Bias will not be presumed simply because some jurors were of a different race than the defendant.”). Cf. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1913 (2017) (even if an actual “structural error is raised in the context of an ineffective-assistance claim ... petitioner must show prejudice in order to obtain a new trial.”).

4. Even if Available for Review, the Freestanding Allegations
Lack Merit Based on the Record

Applicant cannot succeed in demonstrating that he is entitled to relief based on an ineffective assistance of counsel claim. Applicant makes a number of allegations against the Solicitor and questions her integrity and character.¹⁶ These accusations are unsupported by the record before this Court.

First, this Court must assign deference to the credibility determination which accompanies the trial court’s ruling regarding the Solicitor’s representations at the *Batson* hearing. “A trial court

¹⁶ Applicant asserts the Solicitor’s reasons for striking potential jurors “smacks of racial pretext” and repeatedly assigns nefarious cause to particular portions of the voir dire record. (Applicant’s Brief pp. 9-12 (Solicitor “just assumed” one juror “would have financial difficult given her status as a ‘single mother’ that is completely unsupported by the record.”) (“questioning [of a juror] was calculated to produce answers to serve as a basis for her disqualification”) (“Clearly this question was calculated to make [a juror] pause and generate equivocation that she then used to justify her strike of her.”) (“since Solicitor Wilson did not ask a single juror about convictions, yet seated some with convictions, it is clear that Solicitor Wilson is using convictions as pretext”)); (see also *id.* at 24 n.5 (“Why would number of children be relevant to a juror’s qualification to sit on a jury except to provide some information a solicitor could use to make a gender based discriminatory strike?”)).

Applicant deposed the Solicitor and called the Solicitor as a witness during the evidentiary hearing. Applicant had every opportunity to ask the Solicitor the basis for questions she asked during voir dire. 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 do so.

finding regarding the credibility of an attorney's explanation of the ground for a peremptory challenge is "entitled to 'great deference'" when reviewed. *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015) (citing *Felkner v. Jackson*, 562 U.S. 594, 598, 131 S.Ct. 1305 (2011), quoting *Batson*, 476 U.S., at 98, n. 21, 106 S.Ct. 1712)); see also *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S. Ct. 1203, 1208 (2008) (only in "exceptional circumstances" should a reviewing court overturn the trial court's "determinations of credibility and demeanor").

Second, Applicant fails to mention the Solicitor's own testimony offered at the PCR hearing. That testimony plainly contradicts the rank speculation appearing in Applicant's brief:

Q. Have you ever trained any attorney to strike solely on the basis of race or gender?

A. No. Not solely or not in any way.

Q. And do you believe you should?

A. No, I don't think you should.

Q. And are you careful not to?

A. I am careful not to.

Q. Because it's not right?

A. Because I don't think it's right. I don't think it's right for the defendant. I don't think it's right for the juror who has a right to be a part of our system.

Q. It's not a legal maneuver, is it?

A. It is not.

Further, the Solicitor testified she did not go to any educational materials in the office and did not need to go such materials:

A. ... I knew that we didn't need to strike on the basis of race and we didn't need to strike on the basis of gender and we didn't. I didn't need to go to the desk book to learn that.

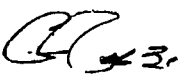
Q. Because that is actually a moral decision for you?

A. It is.

The credibility of that testimony is further corroborated by the trial record made at the time of the *Batson* motion and ruling finding the reasons for the strike were not race motivated. Applicant's speculation is also dispelled by defense counsel's responses at the original *Batson* hearing, and defense counsel's revisiting of the issue in light of the record as reflected in his PCR testimony. There is no cause to conclude the factually supported reasons were pretext.

Third, a comparative juror analysis does not demonstrate that the Solicitor acted in the manner speculated to in Applicant's brief. In particular, Applicant's allegation Juror 209 had a criminal history which was not disclosed for a proper comparative analysis does nothing to show a false statement was made during the *Batson* proceedings. The record¹⁷ Applicant references shows Juror 209's name was used as an alias; there are different dates of birth between the record individual and Juror 209's information in the state court record; there are vastly different locations for a span of activity (Alaska rather than South Carolina); and, employee and residence information for Juror 209 obtained during the 2009 trial proceedings does not square with the Alaska entries. Further, this Court declines to assign an improper motive to a prosecutor based on reliance upon a report that is later determined to be incorrect or incomplete. This is not a matter of evolving reasons which smack of pretext. *See generally Foster v. Chatman*, 136 S. Ct. 1737, 1751 (2016) ("... the prosecution's principal reasons for the strike shifted over time, suggesting that those

¹⁷ The face of the record cautions that the information, in addition to being restricted, is not conclusive: "... The FBI cannot guarantee that this record concerns the person in whom you are interested."



reasons may be pretextual"). The basis for the strikes have been a part of the public record since the 2009 trial. This is not a record showing the reasons at trial have been contradicted by the facts of trial. *Id.*, 136 S. Ct. at 1751 ("...in evaluating the strike of Garrett, we are not faced with a single isolated misrepresentation" but several instances where the reasons were in tension with the record of voir dire responses). The trial court ruling on this underlying issue is founded in fact and includes a finding of credibility equally supported in fact. Applicant wholly fails in his burden of proof.

Applicant has relied upon *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317 (2005), throughout this proceeding. That case examined a Texas prosecutor's use of ten peremptory strikes, all against African-Americans, resulting in exclusion of "91% of the eligible African-American venire members" for trial. *Id.*, at 241; 125 S.Ct. at 2325. The facts also showed the prosecution's use of "a procedure known in Texas as the jury shuffle" where either side could "literally reshuffle the cards bearing panel members" names, thus rearranging the order in which members of a venire panel are seated and reached for questioning." *Id.* at 253, 125 S.Ct. at 2332-33. In that case, the prosecution repeatedly shuffled the cards each time a series of African-Americans were seated at the front-end of a venire panel. *Id.* at 254, 125 S.Ct. at 2333. No such practice exists in South Carolina. Thus, a key basis for the United States Supreme Court's in *Miller-El* is completely missing from the process in this State and this record. But even so, the case is critical for marginalizing bare statistics – a key portion of Applicant's argument to this Court. The Supreme Court expressly rejected that the 91% statistic presented during the collateral proceeding held any significant weight and forwarded a comparison of juror to juror upon known facts. *Id.*, at 241, 125 S. Ct. at 2325 ("More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed

to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step.").

Applicant's counsel presented a statistical analysis in furtherance of this single claim: Solicitor Wilson engaged in misconduct by committing a *Batson* violation. The best evidence lies in the trial record. Solicitor Wilson placed her reasons for exercising each strike on the record. She also testified in the PCR proceedings that she believed in upholding the integrity of the judicial system and of her own moral code, and would not exercise peremptory strikes based on race or gender. And, as noted, Applicant failed to confront or challenge the Solicitor as to any purported inconsistency in her reasons, and none is readily apparent. The record reflects the actual reasons for her use of strikes, and they were:

First Challenged Strike

(1) Juror 10 for Selection Purposes (Juror #101): "a CNA" and single mother who would be missing work, or having work conflicts, by serving on the jury, and said at one point during *voir dire* that she couldn't vote for death.

Defense counsel's notes confirm the juror's information to the judge that she "need[ed] to be @ work 1pm" and also "backs up" when considering whether she could impose death.

Second Challenged Strike

(2) Juror 11 for Selection Purposes (Juror #92): "She has a number of charges for prostitution, a charge for shoplifting, a concealed weapon...." The trial judge inquired of the Solicitor whether another juror has any record, to which the Solicitor replied: "Not that many or not for those things."

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The FBI records apparently did not return any convictions for Juror #92. However, Respondent introduced at the May 2016 hearing, certified copies of the arrests.

Third Challenged Strike

(3) Juror 16 for Selection Purposes (Juror #315): "... 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 with ..." The trial judge noted "I recall that she was inconsistent and I find that to be a race-neutral and gender-neutral reason."

"A trial court is best situated to evaluate both the words and the demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor who exercised those strikes." *Davis v. Ayala*, 135 S. Ct. at 2201. In addition to the trial court's conclusion, this Court also has defense counsel's testimony at the PCR hearing and the record in both proceedings – trial and PCR. There is no inconsistency or factual error to indicate pretext. Nevertheless, Applicant presses arguments that the reasons "smack[] of racial pretext." None of his arguments support that conclusion.

Arguments Made for the First Time in PCR

Initially, Respondent notes Applicant does not challenge the prosecution's strike of Juror #315. At the beginning of his argument, any "pattern" evidence within the strikes here is diminished. He does, however, make new arguments for comparative juror analysis regarding Juror # 101 and Juror #92. His arguments suffer from lack of evidence and lack of specificity in the analysis.

Applicant argues Juror #101 "was unequivocal in her responses that" work would pose no problem. He does not contest that defense counsel's note indicated at least one concern about being at work at a particular time, 1:00 pm. He does not contest that the juror's information

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reflected she was single. He argues though, that Juror #101 was not asked questions about being a "single mother with two children and that she would be missing work throughout the week..."

Applicant fails to consider the information in this pointed exchange:

- Q. I believe that you mentioned to one of the bailiffs that you have to work tonight?
- A. Yes, I do.
- Q. Do you always work nights?
- A. I do -- well, it just depends.
- Q. So for the next few weeks you aren't scheduled nights, or you are or ---
- A. I am scheduled for nights. In fact, I picked up overtime before knowing ---
- Q. What does that mean, you picked up overtime?
- A. I have, like for the next couple of weeks I'm going to be working and I think I only have one day off.
- Q. What are your hours for the next few weeks?
- A. All night shift.
- Q. Is that 5:00 to 5:00 or 7:00 to 7:00?
- A. I work 7:00 p.m. to 7:00 a.m.
- Q. Okay. Do you think that would cause you a hardship, serving on the jury if after you got off work at 7:00 a.m. that you had to come into court at 9:00 or so and spend the day in court with us?
- A. It probably would as far as me getting sleep. I'd need to let my supervisor know to reassign the schedule.
- Q. So you could get off of work for the next couple of weeks
- A. Exactly.

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Q. --- if need be?

A. Yes.

Q. Okay. So if the Judge told you that it wouldn't be appropriate for you to work after leaving after your service during the day, you would be able to have that rearranged?

A. Yes, I could.

Q. That would make for quite a long day if you had to go to work and then sit in here and do all this all day?

A. Yeah.

Without question, there was a concern that the juror would try to work, and, logically, if she was "picking up" overtime, there is a need for additional work. Applicant has shown no pretext.

Applicant next argues the "equivocation" the Solicitor cited was not more than expressed by accepted Jurors 306 and 221 he claims "expressed stronger reservations about imposing the death penalty than" Juror #101. The voir dire transcript demonstrates that the question was posed because the prosecutor "couldn't read [the] handwriting on the question number forty-seven" on the questionnaire which asks, "What is your opinion, if any, about the death penalty." The uncertainty is reflected in the record. Moreover, the juror did equivocate, saying both that she "could consider" but "wouldn't vote for" the death penalty. Applicant also includes Juror #92's answer without acknowledging she was struck. That could not be evidence of a similarly situated juror who was seated. Applicant's argument simply proves what the Supreme Court has recently again observed:

In a capital case, it is not surprising for prospective jurors to express varying degrees of hesitancy about voting for a death verdict. Few are likely to have experienced a need to make a comparable decision at any prior time in their lives. As a result, both the prosecution and the defense may be required to make fine

judgment calls about which jurors are more or less willing to vote for the ultimate punishment. These judgment calls may involve a comparison of responses that differ in only nuanced respects, as well as a sensitive assessment of jurors' demeanor. We have previously recognized that peremptory challenges "are often the subjects of instinct," *Miller-El v. Dretke*, 545 U.S. 231, 252, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (citing *Batson*, 476 U.S., at 106, 106 S.Ct. 1712 (Marshall, J., concurring)), and that "race-neutral reasons for peremptory challenges often invoke a juror's demeanor," *Snyder*, 552 U.S., at 477, 128 S.Ct. 1203. A trial court is best situated to evaluate both the words and the demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor who exercised those strikes. As we have said, "these determinations of credibility and demeanor lie peculiarly within a trial judge's province," and "in the absence of exceptional circumstances, we [will] defer to the trial court." *Ibid.* (alterations and internal quotation marks omitted). "Appellate judges cannot on the basis of a cold record easily second-guess a trial judge's decision about likely motivation." *Collins*, 546 U.S., at 343, 126 S.Ct. 969 (BREYER, J., concurring).

Davis v. Ayala, 135 S. Ct. at 2201.

He has not proven the trial judge was incorrect either in factual finding or legal conclusion.

Applicant next argues the Solicitor's questioning was "calculated to produce answers to serve as a basis for her disqualification." He takes exception to the Solicitor asking repeated questions concerning the juror's work schedule. However, this underscores the Solicitor's concern was the work schedule. It is evidence there was no improper motive. Applicant argues other jurors worked, but cites to no indication that any of the other jurors asked about having to leave court proceedings, or that others had expressed it would difficult for them to work at night and participate. They are not similarly situated. He also takes exception to the question posed to the jury about whether the juror could "put a man to death." It is an unsurprising question for voir dire in a death penalty case. It is also echoed in the other questions. [voir dire of Juror #209], "Could you also sign your name to the warrant or verdict commanding someone's death?").

As to Juror #92, Applicant argues the Solicitor's reasons (the listed crimes) "smack of racial pretext." He first argues the convictions did not concern the Solicitor because no questions were posed. However, the Solicitor was already aware of those convictions, and it is unclear as to what should be asked to explore the conviction in reference to the discretionary *voir dire* for discretionary strikes. And, as Applicant concedes, the prosecution did not ask any juror about his or her conviction. Thus, Juror #92 was not treated differently. His argument then progresses to a comparison with a seated juror, Juror #209. Applicant asserts this juror is Caucasian, had a record, the Solicitor knew she had a record, and she was not struck. The trial court record supports the juror is Caucasian, and was seated. Applicant's other assertions are without merit.

The FBI record obtained post-trial, which Applicant relies upon, shows Juror 209's name was used as an *alias*, not that the record reflects the juror's background. Moreover, there are significant differences in information: there are different dates of birth between the record of the individual who used the juror's name as an alias, and Juror 209's information in the state court record; there are vastly different locations for a span of activity (Alaska rather than South Carolina); the FBI record shows a 5'7" blond individual while defense counsel's notes reflect a petit dark haired individual presented at the 2009 trial; and, the employee and residence information for Juror 209 obtained during the 2009 trial proceedings does not square with the Alaska entries. Applicant failed to call the Juror during the PCR proceedings to clarify the discrepancies.

Applicant presented no evidence nor does he have a sound basis for asserting the Solicitor "knew" of a record in Alaska. To the exact contrary, there is no indication Juror #209 had worked or lived in Alaska. Her information reflected in the record on appeal shows she lived only in the Charleston and Berkeley areas for approximately 49 years. In fact, the defense asked the juror

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about her work at MUSC in Charleston. Applicant has wholly failed in his burden of proof of even showing a conviction exists for Juror #209, much less that the Solicitor knowingly omitted the information. Applicant has not shown the juror was similarly situated.

Applicant further posits three white males had DUI and DUS convictions. He again does not show the jurors were similarly situated – he does not show multiple convictions, or a gun conviction in any of the records. The evidence is consistent with the Solicitor's truthful response that other jurors seated did not have the same type of history or quantity of convictions.

Applicant abandons any attempt to question the strike of Juror #315, and with good reason. The strike is well supported by the record. While defense counsel did not mark a score for that juror that is evidenced in the record, her hesitation is reflected in the record, as Judge Dennis noted at the time of the *Batson* motion. The pattern he attempts to show in regard to the three strikes is undermined by the record itself.

Applicant next argues other later cases that have no bearing on the reasons presented. That has been previously addressed above. The information is from after the 2009 trial and irrelevant to the *Strickland* analysis.

He next argues the Prosecution Commission programs suggest methods for hiding improper reasons for striking jurors. He omits entirely the evidence that the Solicitor did not even utilize or rely upon any such materials for the strikes. Further, under *Daise*, the information does not support his claim.

Lastly, Applicant turns to bare statistics. This is even further removed for the comparative juror analysis on the *Batson* step three analysis at issue. *Hernandez v. New York, supra*; *Juniper v. Zook, supra*. The study from the Michigan State College of Law, twice amended during these proceedings, falls outside the zone of relevancy. Bare statistics are not demonstrative of causation

for any disproportion in strikes and a jury venire's racial composition. The statistics submitted in this case are nothing more than the creation of a ratio between the number of Caucasians stricken versus the number of African-Americans stricken. They do not address even the mere existence of additional reasons for striking jurors; they do not address the entire practice of the Ninth Circuit Solicitor's Office; nor do they address the reasons that strikes were used in Applicant's case which were offered at trial and available in the record. To be sure, statistical studies – indeed, statistical studies undertaken by these same individuals– have been academically considered; however, their other studies are valued precisely because they have taken variables into account. See Ann M. Eisenberg, *Removal of Women and African Americans in Jury Selection in South Carolina Capital Cases, 1997-2012*, 9 Ne. U.L. Rev. 299, 322–23 (2017) (describing the North Carolina study by O'Brien and Grosso, "Their study used detailed, descriptive information about one sample of venire members in order to control for factors other than race that may have accounted for the decision to strike."). In a 2010 report, Professors O'Brien and Grosso wrote: "To account for other factors that might bear on the decision to strike, more detailed information about individual venire members must be considered." Barbara O'Brien & Catherine M. Grosso, *Report on Jury Selection Study*, 8 (2011), <http://digitalcommons.law.msu.edu/facpubs/331/>. Here, variables are sorely missing, yet Applicant still depends on the results. There has been no explanation as to why this bare study should be accepted in light of the author's own recognition that variables "must be considered." *Id.* See also David C. Baldus et. al., *Statistical Proof of Racial Discrimination in the Use of Peremptory Challenges: The Impact and Promise of the Miller-El Line of Cases As Reflected in the Experience of One Philadelphia Capital Case*, 97 Iowa L. Rev. 1425, 1454 (2012) ("An ideal model of proof is based on an analysis of valid data for all relevant variables.").

Respondent presented Dr. Robert Michael Norton, retired statistics and mathematics professor from College of Charleston. Dr. Norton critiqued the methodology used to create the MSU report and amended report: He had the following comments:

- He critiqued the report as being incomplete from a mathematical and statistical perspective because the sample used, the “universe of cases” was not a true “random sample” as is accepted in statistics;
- He criticized the report as incomplete and simple because it didn’t speak to other factors that go into making a strike;
- He also critiqued the report as failing to show causation. He said it merely showed a correlation between strikes and race which he likened to a type of conclusion that is “over simplistic” for the proposition stated;
- He also testified it would not be sound practice to include the same case twice as was done in one instance (Beyah) because some variables going into the jury pool would overlap and by counting each of two strikes occurring in one case, you’re counting data twice without qualifying it.

In particular, when asked, from a statistical perspective,¹⁸ if a court should rely on the “study to determine whether the Ninth Circuit Solicitor’s Office routinely excluded black juror in jury selection up to and including Mr. Dickerson’s trial in May 2009,” he responded:

Not by itself. There needs to be - - some of the concerns that I have need to be aired including: correlating variables, the idea of selecting the populations, how you pick a sample.

¹⁸ The professor testified that the studies referenced by Professors O’Brien and Grosso were not published in statistical venues.

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This point is also underscored when reviewing the remainder of the process in this case. In the main jury of twelve, the State had available five strikes. The State exercised four strikes. The defense challenged only three of those strikes. The "study" does not reflect that. Moreover, three African-American jurors were presented and the State, with available strikes, did not exercise those strikes. The "study" does not reflect that. This Court also heard how the defense used all of its strikes – exhausted all 10 strikes – on Caucasian jurors; a rate of 100%. In fact, in subsequent testimony, defense counsel explained the basics of his strike system and explained, though the number rests at 100% for his strikes against Caucasians, the strikes were for specific reasons not pretext:

So even though I acknowledge all 10 strikes were used on Caucasian jurors from their answers these were jurors we felt who would be very pro prosecution in the case, pro death penalty, not open to mitigation and that's why we used that rating system so hopefully it is gender and race neutral and then we can justify that if a motion is made.

Defense counsel also acknowledged that the Solicitor could certainly have made a motion based on the number of strikes against Caucasian jurors; but the individual reasons would have controlled why the jurors were struck.¹⁹ Professor O'Brien did not "analyze defense strikes" in the "study," though she admitted defense strikes "shape the jury" as well as State strikes. Further, Professor O'Brien agreed the jury makeup "appears to be roughly proportional to the population according to the census," with three African American jurors seated and nine Caucasian jurors

¹⁹ For clarity, Respondent reviewed with defense counsel during one of the PCR hearings a portion of the evidence of the rating system as reflected in the Record on Appeal filed previously in the direct appeal proceedings which reflected high ratings on the jurors struck. (See May 12-13, 2016 PCR Tr. p. 203, line 9 – p. 205, line 16). Defense counsel testified that when teaching on capital jury selection, he advises people "to put gender and race and ethnicity aside and really listen to their answers," and, based on his review of the materials, he "would have been able to respond" to any motion against his strikes based on individual ratings on the jurors. (May 12-13, 2016 PCR Tr. p. 206, lines 4-19).

seated. All of these factors shaped the jury selection in this case. Further, and important to the instant issue, the context sheds additional light on the weight that should be given any statistical study.

Nothing in the record undermines the factual basis put forth by the Solicitor for her use of peremptory strikes in this case. Nothing in the record undermines the ruling by Judge Dennis. Nothing in this record undermines the credibility assessment by Judge Dennis. Any evidence outside of the record included in Respondent's discussion is irrelevant.

The statistical study presented in this case failed to give any acknowledgment to the strikes that were considered on *Batson* motions, and were found not to be racially motivated. This is important because the specific strike at issue had already been given judicial, specific consideration. This is evidence of bias or result-focused presentation. It is akin to combining non-errors to obtain reversal which is not recognized. *See Moore v. Reynolds*, 153 F.3d 1086, 1113 (10th Cir. 1998) ("Cumulative error analysis applies where there are two or more actual errors; it does not apply to the cumulative effect of non-errors."); *see also United States v. Basham*, 561 F.3d 302, 330 (4th Cir. 2009) ("When 'none of [the] individual rulings work[] any cognizable harm, ... [i]t necessarily follows that the cumulative error doctrine finds no foothold.'") (alterations in original) (citation omitted). Additionally, the information known also shows the prosecutor routinely did not use all available strikes. Rather, the numbers are based on the simple strike ratio tied to race. Professor Grosso testified, when confronted with the fact that in one case in the original study that the Solicitor did not exercise any strikes:

... what you're looking at is the pattern over time because in any one case, you might see a particular pattern that just has something to do with the particular jurors that came into the box that day. When you can look across a lot of cases and you see it's a consistent pattern, that doesn't necessarily mean you see it in every single case, but consistent pattern, that's where the -- - that's where the P value

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is sort of a way of measuring whether or not you've actually like tapped into something real.

Q. Okay. Then it goes back to that more information is generally better; correct?

A. Yes.

Our appellate court has viewed with disfavor the use of gross figures, statistics, and probabilities in support of post-conviction relief allegations, particularly where "the petitioner has elected not to consider various intangible factors entering into prosecutorial decisions." *Thompson v. Aiken*, 281 S.C. 239, 241, 315 S.E.2d 110, 111 (1984).²⁰ In fact, the Thompson court analysis takes care to show the irrelevance of statistical patterns in post-conviction relief actions designed to focus on real errors and actual prejudice:

The record before this Court includes the full transcript of the post-conviction proceedings. Therein we find much testimony designed to support questions which we have declined to hear on this appeal. Among these questions is petitioner's allegation and attempted showing of a racially discriminatory pattern in prosecutorial decisions to seek a sentence of death. The petitioner submitted to the post-conviction court a deposition taken of Professor Raymond Paternoster, University of South Carolina, bolstered by statistical data which he had compiled. We feel it necessary to comment upon this submission in light of our concern expressed in *State v. Truesdale*, 278 S.C. 368, 371, 296 S.E.2d 528, about "unwise depletion of the obviously limited public funds available for the defense of indigents." Because we are convinced that the issue which petitioner sought to raise is not appropriately framed for

²⁰ In this respect, Respondent maintains its objection to the introduction of statistics in support of any allegations contained in the post-conviction relief application. Respondent also maintains its objection to the use of statistics upon the basis that statistics are not relevant to the third step of the recognized *Batson* analysis. That is, statistics may assist a movant in demonstrating a *prima facie* case for its *Batson* motion, but once the proponent of the strikes replies with its reasons for exercising its preemptory strikes, statistics no longer play a role. The outcome of the motion beyond the first step of the procedure is not aided by statistics because they do not explain why a party's enumerated reasons for striking jurors are, or are not, race and gender neutral. Statistics do substantively answer whether the proponent of the strikes indeed violated *Batson* by refusing to strike other similarly situated jurors.

resolution in the context of a capital case, we would recommend to the bench and bar that judicial resources be applied to more fruitful endeavors.

In the record before us, the petitioner has made an elaborate presentation of testimony and data purporting to show that prosecutors in this State consciously and systematically choose to seek the death penalty in a racially discriminatory manner. As noted by the post-conviction court in its Order, the petitioner has relied upon gross statistics and probabilities. The petitioner has elected not to consider various intangible factors entering into prosecutorial decisions. The petitioner has provided no direct testimony to support his charge that impermissible influences routinely distort the application of capital punishment throughout this State.

In the final analysis, the allegation of statewide "patterns" raised by a specific capital defendant has no real bearing upon his individual guilt or innocence nor upon the correctness of any sentence imposed in his particular case. The commission of an aggravated murder places every potential defendant at risk; he may indeed be ultimately sentenced to death. On the other hand, he may never be caught. He may never be tried, for any number of reasons. He may plead guilty or be tried on a lesser charge. A jury may, for reasons of its own, elect to acquit him or, in sentencing, elect to spare his life. Our role as an appellate court is not to base rulings upon such possibilities. Far less are we entitled to intrude upon the operations of executive officers when we have no more than general data comp[il]ed for academic purposes.

281 S.C. at 241-42, 315 S.E.2d at 111.

In short, the *Thompson* court rejected statistical studies that result in simple possibilities. The Court found and cautioned in other cases that such statistics should give way to consideration of "real and substantial issues in future capital cases." *Id.*

Though *Thompson* dealt with a determination of death penalty notices, the logic is applicable in this case. Peremptory strikes are by nature defined as subjective, nuanced and individual juror fact-driven. *See Davis v. Ayala, supra.* Moreover, *Batson* does not simply suggest but *requires* individual consideration over broad strokes of possibilities. *Johnson v. California*, 545 U.S. at 172, 125 S. Ct. at 2418 ("The *Batson* framework is designed to produce actual answers

to suspicions and inferences that discrimination may have infected the jury selection process.”). Of further note, the issue here is the third step of the *Batson* analysis not general prima facie evidence. Raw statistics simply do not apply. *Juniper v. Zook*, 117 F. Supp. 3d 780, 799 and n.10 (E.D. Va. 2015), *motion for relief from judgment denied*, No. 3:11-CV-00746, 2016 WL 413099 (E.D. Va. Feb. 2, 2016) (statistics demonstrating “the prosecution struck black venire members at nearly three times the rate of white venire members,” even if accepted, are irrelevant where reasons for strikes on the record given “statistical disparity between black and non-black jurors goes to the first step of *Batson*,” and “not purposeful discrimination at the third step”); *see also State v. Jacobs*, 32 So. 3d 227, 236–37 (La. 2010) (“we have more than a bare statistical viewpoint to gauge the appropriateness of the peremptory challenges” and finding “after a comprehensive review of these issues, five of the seven state peremptory challenges of non-white prospective jurors did not evince a racially-discriminatory intent. Thus, the statistical argument fails to have merit upon further inquiry.”); *State v. Benich*, No. 1 CA-CR 06-0901, 2008 WL 2641309, at *1 (Ariz. Ct. App. Jan. 10, 2008) (“[d]efendant cites no case ... in which a *Batson* challenge was granted based on statistics alone ... Although there might be a case in which the statistics alone would be sufficient, it is unlikely that in such a case there would not be other factors supporting the inference of intentional discrimination,” citing *Miller-El*); *Jackson v. State*, No. 2-09-023-CR, 2010 WL 1509692, at *8 (Tex. Ct. App. Apr. 15, 2010) (“Although the statistical analysis demonstrates that the State used a disproportionate number of peremptory strikes on African-Americans, our comparative analysis of venire member 3 demonstrates that the State’s reason for striking her was not pretextual, and our analysis of the State’s remaining strikes on African-American venire members does not demonstrate discriminatory intent.”).

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This position holds true to the Supreme Court's finding in *Miller-El*. After acknowledging statistics that calculated "prosecutor's used their peremptory strikes to exclude 91% of the eligible African-American venire members," the Court still considered the statistics "bare" statistics that did not prove the asserted motive: "More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." *Miller-El v. Dretke*, 545 U.S. 231, 241, 125 S. Ct. 2317, 2325 (2005). In short, the Supreme Court has instructed "that proper analysis of a *Batson* claim requires that a court engage in comparative juror analysis...." *United States v. Barnette*, 644 F.3d 192, 205 (4th Cir. 2011). Applicant's reliance on bare statistics is misplaced.

5. The Ineffective Assistance of Counsel Allegations Lack Merit
Based on the Record

When the PCR claim is properly analyzed under *Strickland*, the evidence shows Applicant's trial counsel did not perform below the Constitutionally-mandated standard as alleged. The record indicates defense counsel did not have FBI criminal history information at trial, or the privileged prosecutorial training materials created for use by prosecutors in South Carolina. As noted above, training materials – both for the prosecution and defense – are generally considered protected. Moreover, our case law holds that a defendant is not entitled to the criminal history information.

In *State v. Childs*, 299 S.C. 471, 474, 385 S.E.2d 839, 841 (1989), the Supreme Court of South Carolina held a defendant was not "entitled to criminal records checks or records of arrest" as "[n]o right to discovery exists in a criminal case absent statute or court rule" and there is no statute or court rule requiring a disclosure of this information...." This decision still holds true.

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Rule 5 (a)(1), S.C.R.Crim.P., sets out the information subject to disclosure by the State, and does not include juror criminal histories run in preparation for jury selection. In fact, Rule 5 (a)(2), specifically reserves the protection of other documents "made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case...." See also *State v. Myers*, 359 S.C. 40, 49, 596 S.E.2d 488, 493 (2004) ("Rule 5(a)(2) SCRCrimP, exempts from discovery work product, or 'internal prosecution documents made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case....'"); *State v. Matthews*, 296 S.C. 379, 384, 373 S.E.2d 587, 591 (1988) (pre-Rule 5 case finding "[b]ackground information on the venire, if any, held by the solicitor here qualified as 'internal prosecution' matter connected with the prosecution of the case. As such it was not subject to disclosure."). *Accord Tobacoville USA, Inc. v. McMaster*, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010) (discussing "work product privilege" in civil case context: "in determining whether a document has been prepared 'in anticipation of litigation,' most courts look to whether or not the document was prepared because of the prospect of litigation.") (internal citations omitted). Other jurisdictions follow the logic specifically in regard to arrest records. See, for example, *Kelley v. State*, 602 So.2d 473, 478 (Ala. Crim. App. 1992) ("This court has held that arrest and conviction records of potential jurors do not qualify as the type of discoverable evidence that falls within the scope of *Brady* and that a trial court will not be held in error for denying an Petitioner's motion to discover such documents."); *State v. Weiland*, 540 So. 2d 1288, 1290 (La. App. 5 Cir. 1989) ("Weiland complains because his request for the rap sheets of prospective jurors was denied by the trial judge. A defendant is not entitled to this information.").

To the extent Applicant would allege the rap sheet was incorrect, that would prove nothing in support of the *Batson* motion as it is only discriminatory intent at issue, not correctness in the

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record relied upon. Aside from the fact our jurisdiction would not support such a demand, it should be noted a pre-selection request would had to have been for all the potential jurors. This would have been overly broad. NCIC reports on all jurors, even those not selected for the petit jury, are unnecessary. *Cf. State v. Wright*, 803 So.2d 793, 794 (Fla.App. 4 Dist. 2001) (quashing order requiring State to disclose "criminal records of all 100 listed witnesses, notwithstanding the state's notification that it only intended to call 30 of those witnesses"). Such reports contain privileged information that should not be released to an unauthorized user, or may involve other privilege asserted by the database authority. *See generally United States Dept. of Justice v. Reporters Committee For Freedom of Press*, 489 U.S. 749, 765 and 780 (1989) (acknowledging "the web of federal statutory and regulatory provisions that limits the disclosure of rap-sheet information" and as to FOIA request, holding "a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted.'"); *State v. Wright*, 803 So.2d at 795 ("because the defendants/respondents offered no authority to refute the state's claim that it is prohibited from disseminating the NCIC information, we hold that the trial court cannot order the state to produce such information."). *See also State ex rel. Multimedia, Inc. v. Snowden*, 647 N.E.2d 1374, 1378 (Ohio 1995) (denying mandamus to compel release of "rap sheets" noting concession that "NCIC and RCIC [Regional Crime Information Center] 'rap sheets' generated in the investigation of police applicants are prohibited from being released by state and federal law"); *Commissioner of Public Safety v. Freedom of Information Com'n*, 76 A.3d 185, 189 (Conn. App. 2013) ("In *Commissioner of Correction v. Freedom of Information Commission*, 307 Conn. 53, 68-74, 52 A.3d 636 (2012), our Supreme Court determined that a copy of an NCIC



printout was exempt from disclosure under § 1-210(a) because disclosure was barred by 8 C.F.R. § 236.6 (2007). Although the court did not decide the issue of whether the disclosure of NCIC documents was barred by 28 U.S.C. § 534, *Commissioner of Correction v. Freedom of Information Commission*, supra, at 53, 52 A.3d 636 nonetheless is instructive. Copies of NCIC documents have been held to be exempt from disclosure under § 1-210(a) because our legislature authorized participation in the compact.”). They are not the type of materials which defense counsel would have been granted access to pre-trial.

As to the prosecutorial training materials cited by Applicant, his argument on this issue ignores (1) precedent protecting these documents and (2) that the materials provided are based upon published case law pertaining to *Batson* motions. “The Prosecutor’s Handbook” and other prosecutorial training materials were not privy to defense counsel in preparation for Applicant’s trial, nor could they be produced pre-trial as a matter of law. As more fully addressed above, the Court of Appeals recent decision directly address this issue in *State v. Daise*, 421 S.C. 442, 461–63, 807 S.E.2d 710, 720–21 (Ct. App. 2017), *reh’g denied* (Dec. 14, 2017). This case, too, supports that even had defense counsel made a successful pre-trial request for the training materials, and utilized them in furtherance of his *Batson* motion, he would not have made a meritorious motion.

Akin to part of the ineffective assistance allegation before this Court, Daise argued “that the court’s failure to require disclosure of the State’s *Batson* ‘handbook’ prevented him from making a viable *Batson* challenge.” *Id.* at 461-62, 807 S.E.2d at 720. Like Applicant, “Daise subpoenaed the records custodian of the South Carolina Commission on Prosecution Coordination (the Commission) to provide ‘[a]ll documents regarding jury selection, including but not limited to training documents, training agendas, manuals, policy statements or .

... advisements, correspondence with current or former prosecutors and circuit court judges.” *Id.* Daise’s capital counsel suggested the State had a “handbook on how to get around *Batson*” and supported his posture with pre-trial expert testimony from a statistician. The statistician testified that “in Beaufort County, African-American males were struck at a rate four and a half times higher than Caucasian males.” *Id.*

The appellate court affirmed the outcome of the circuit court’s *in camera* review of the Commission’s training materials, which found “they did not ‘include any abusive instructions or teaching materials, nor use of improper technique,’” and found the materials “generally protected as work-product, as they were created and disseminated in a limited fashion with the purpose of assisting the State’s preparations for trial.” *Id.* at 462-63, 807 S.E.2d at 720. The Court of Appeals specifically found

the approximately 1000 pages of Commission materials sealed for appellate review revealed nothing encouraging prosecutors to strike jurors for impermissible reasons—race-based or otherwise. The documents include outlines, slideshows, and handouts from various lectures and training sessions. Many discuss the *Batson* framework, and some do provide general advice on how to evaluate jurors. However, nothing in the submitted documents suggests an intent to help prosecutors racially discriminate. In fact, the materials contain statements such as “the critical question is whether or not a juror can give both the State and the defendant a fair trial” and the repeated caution: “DO NOT RELY ON STEREOTYPES & PREJUDICE.”

Id. at 463, 807 S.E.2d at 720-21 (footnotes omitted).

The record supports defense counsel made the *Batson* motion in furtherance of his client’s right equal protection simply not knowing the precise reason for the strikes. When the reasons were offered, he could determine, as is supported by the record, there was no argument for pretext to be made which is exactly what the trial record reflects.

Additionally, no prejudice flows from any juror-related claim. For all reasons discussed heretofore, Applicant was not denied equal protection as he was tried by a qualified jury and



because the basis for the strikes exercised by the Solicitor befit the known Constitutional requirements of jury selection.

The reasons for the Solicitor's strikes have not been hidden nor are they suspect. The reasons for the strikes have been a matter of records since the 2009 trial. The selection shows careful consideration by both parties, strikes exercised by both parties, and a challenge to just three of the Solicitor's strikes. Those strikes were explained to the satisfaction of the trial judge and still remain fully and fairly supported by the trial record. Applicant has shown no deficient performance by defense counsel. Applicant is not entitled to relief on this issue.

I. Respondent's Position on the Merits: The Lead Poisoning Claim

The sentencing-phase ineffective assistance of counsel allegation most prominently pursued by Applicant during the course of this litigation pertains to the claim that trial counsel "failed to uncover and present evidence of Applicant's significant neurological deficits" in furtherance of mitigation. Specifically, Applicant alleges trial counsel "unreasonably limited the investigation into Mr. Dickerson's early childhood exposure to lead" by failing to follow up with a preeminent expert in the field, Dr. Herbert Needleman, and by failing to provide subtest results to a neuropsychologist for interpretation, thereby eliminating from the jury's consideration the scientific research demonstrating Applicant's blood lead level at earlier ages and any related neurotoxic effects. Applicant argues that the mitigation evidence it proffered at PCR compels this Court to find the mitigation case put forth at trial *Strickland* error and prejudice. Respondent submits the PCR presentation was largely cumulative to the substance of the mitigation presented at trial.

"When determining if want of mitigation evidence resulted in prejudice, we must determine whether the 'mitigating evidence, taken as a whole, might well have influenced the jury's appraisal

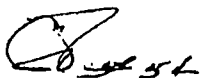
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of [the defendant's] culpability.'" *Rosemond v. Catoe*, 383 S.C. 320, 326–27, 680 S.E.2d 5, 9 (2009) (citing *Wiggins v. Smith*, 539 U.S. 510, 538, 123 S.Ct. 2527 (2003)) (quoting *Williams v. Taylor*, 529 U.S. 362, 398, 120 S.Ct. 1495 (2000)). "[T]he likelihood of a different result if the [mitigation] evidence had gone in is 'sufficient to undermine confidence in the outcome' actually reached at sentencing." *Rompilla v. Beard*, 545 U.S. 374, 393, 125 S.Ct. 2456, 2468 (2005) (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052) (alteration in original). Prejudice is therefore determined to exist from the lack of proffered mitigation evidence if trial counsel's "complete failure to present mitigation evidence undermines confidence in the outcome." *Rosemond, supra*; see also *Jones v. State*, 332 S.C. at 333, 504 S.E.2d at 824 ("The bottom line is that we must determine whether or not Jones has met his burden of showing that it is reasonably likely that the jury's death sentence would have been different if counsel had presented additional information about Jones's mental condition.").

The "error" prong of *Strickland* remains the same: did counsel utilize reasonable professional strategy in pursuing (or abandoning) a particular mitigation presentation. "During the sentencing phase of a death penalty trial, counsel is required to investigate and present meaningful mitigating evidence absent a reasonable strategic choice not to do so." *Weik v. State*, 409 S.C. 214, 234, 761 S.E.2d 757, 767 (2014) (citing *Rompilla v. Beard*, 545 U.S. at 390-93, 125 S.Ct. at 2467-68). As to Appellant's reliance on specific ABA Guidelines for Appointment and Performance of Counsel in Capital Cases, our courts have found they "may be useful or may offer assistance in the analysis of an issue" in certain instances, but have nonetheless regularly held "these standards are not controlling or dispositive." *State v. Blakely*, 402 S.C. 650, 664-65, 742 S.E.2d 29, 36-37 (Ct. App. 2013); see also *Council v. State*, 380 S.C. 159, 172–73, 670 S.E.2d 356, 363 (2009) (noting that trial counsel's conduct fell below the standards set by the ABA for

the appointment and performance of counsel in death penalty cases). South Carolina courts have “never adopted the ABA guidelines as the standard for prevailing professional norms in South Carolina,” instead maintaining that reasonableness of counsel’s actions “is best assessed in the broader context suggested by *Strickland*.” *Ard v. Catoe*, 372 S.C. 318, 338 n.19, 642 S.E.2d 590, 600 n.19 (2007) (Toal, C.J., dissenting and Burnett, J., concurring with dissent) (majority citing the ABA’s standards for defense counsel’s performance regarding investigation of a capital case in support of its decision to affirm the PCR court’s finding of ineffective assistance of counsel). The United States Supreme Court has consistently maintained that the guidelines are “‘only guides’ to what reasonableness means; not its definition” nor “inexorable commands” defense counsel must follow. *Bobby v. Van Hook*, 558 U.S. 4, 8, 130 S.Ct. 13, 17 (2009) (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065).

Applicant’s proffered mitigation presentation on lead neurotoxicity fails to meet the *Strickland* standard. At the initial installment of the evidentiary hearing, the Court heard from Applicant’s experts in detail on lead levels and purported correlative damage to cognitive development (specifically hyperactivity and impulsivity), but the presentation put forth in furtherance of this claim ultimately replicated the mitigation evidence put forward during the sentencing phase of trial, with an added emphasis on lead exposure. Trial counsel added compelling testimony regarding the extent of his investigation into Applicant’s known childhood exposure to lead. Defense counsel Jeffrey Bloom testified at two stages of the evidentiary hearing: on December 8, 2015, and on May 13, 2016. His testimony established that counsel investigated the scientific information proffered as mitigation at this PCR hearing. The totality of the testimony demonstrates that 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 than was presented on this subject. Applicant fails to demonstrate prejudice flowing from the manner and extent to which his childhood exposure to lead was presented at trial. The mitigation evidence proffered at PCR does not make it more likely than not that the jury would have returned with a recommendation for a different sentence.

1. The Trial Evidence on Lead

Dr. Robert Phillips, a forensic psychiatrist, offered testimony pertaining to social factors and individual behaviors indicative of Applicant's emotional maturity at certain stages in his life. Regarding the earliest phase of Applicant's life, Phillips testified that he was affected by a number of psychosocial stressors, describing the environment Applicant grew up in as emotionally toxic. Ultimately, Phillips' presentation concluded with a professional opinion that throughout the timeframe of the crimes, Applicant "began to develop psychotic symptoms that culminate in what [he] would diagnose as a cocaine psychosis" onset by "heavy abuse of cocaine" and resulting in a condition of delusions and/or paranoia and hallucinations. Phillips opined that as a result of a cocaine psychosis brought about by Applicant's escalating addiction, that during the timeframe of the murder (1) he was affected by a mental disturbance, (2) his capacity to conform his behaviors was substantially impaired, and (3) his mentality was impaired.

Dr. Mark Cunningham, a psychologist, offered testimony pertaining to a variety of risk factors identified by the Department of Justice as increasing a person's likelihood of delinquency and violence. He described these factors as they pertain to each stage of a person's life and explained why he identified a high concentration of these factors applying to Applicant. He stated that between the time when a person is conceived and when they reach six years of age, Applicant embodied five of a possible seven factors. At the outset, Cunningham stated Applicant's "exposure to lead in his childhood" was one contributing factor, but that "there is no testing that was done

that demonstrated brain damage, for example, in that earlier age." Later, he expounded upon why, stating "there is no safe lead level for a child to have. It is never a vitamin." Cunningham explained in common terms that the one known blood-lead level of 9 "doesn't mean that it wasn't higher or lower when he was [younger]." His testimony corresponded to a PowerPoint graph depicting how childhood blood-lead levels correspond to incidences of adult crime. He went on to note Armon's higher blood-lead levels "in the same household, around the same paint chips, around the same lead dust" and concluded: "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 [was] living in when we talk about lead."

Cunningham also stated on cross-examination that from the known blood-lead level he "may be able to infer to some extent" what Applicant's earlier lead levels were if certain testing was done looking at brain function, neuropsychological assessment "and that sort of thing." Cunningham stated he could have ordered a current lead level test for Applicant and did not. He later noted that Applicant's one test was not high enough to be flagged by the Center for Disease Control for additional testing. The State's cross-examination actually focused for a period of time on how children ingest lead, the dangers of lead poisoning and resulting lawsuits, and pointed out that the specific area where Applicant grew up had older low-income homes with a huge lead risk. Cunningham testified that the homes were likely not compliant with lead remediation standards.

Cunningham also agreed with Phillips' cocaine psychosis diagnosis and additionally independently opined that Applicant's capacity to conform and mental state were substantially impaired at the time of the murder, and that he was under the influence of a mental or emotional disturbance at that time.

Also at trial, Marjorie Hammock, a social worker, described the known extent of Applicant's lead exposure in her social history testimony presented at the sentencing phase. Specifically to the point of the PCR presentation, Bloom asked Hammock: "Why should we care if children are exposed to high levels of lead or if they eat . . . old lead paint chips . . . ?" Hammock responded:

high level leads and children eating actual lead have a real hazardous effect on their development, both their emotional and physical development. It can cause brain damage and it can cause organic impairment . . . [b]rain development, brain functioning. . . . we know that [Applicant was placed in a leaden environment] but we don't know the result of that.

Defense counsel Bloom then extracted an agreement from Hammock that agencies have taken steps to try to reduce lead levels in certain housing projects. Hammock clarified on cross-examination an awareness that Applicant may have only been screened once for blood-lead levels, but it was known that he lived "in that environment where it was reported that typically had [lead-poisoning] sufferers."

2. Applicant Cannot Demonstrate *Strickland* Error

In December 2015, defense counsel Bloom established his familiarity with lead poisoning and its ability to be utilized as a capital defense—he had used it as a defense in *State v. LeVar Bryant* in Richland County. For Applicant's case, he set up a blood test but "knew that probably wouldn't show anything because of the passage of time." He also looked into conducting an x-ray fluorescence test. However, that test could not be accomplished because South Carolina lacked any medical facility that could administer it and because Applicant could not be transported to Boston. But defense counsel still pursued information in furtherance of a lead-based defense. He explained that his mitigation investigator Dale Davis collected a number of records from "Charleston County and other agencies regarding specific neighborhoods and houses that had had

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lead paint problems over the decades." Defense counsel Bloom furthered the investigation by obtaining an order from the trial court directing DHEC to release records "regarding lead levels and specific records also on both William and his brother, Armon." Defense counsel then turned this information over to psychiatrist Dr. Robert Phillips as well as psychologist Dr. Mark Cunningham, who both testified at trial.

Defense counsel retained a neuropsychologist, Dr. Robert Deysach. Deysach consulted with defense counsel and, like Cunningham and Phillips, met with Applicant to assess him in preparation of a mitigation presentation. But Applicant did not cooperate with Deysach's testing. According to defense counsel Bloom, Applicant "wasn't really interested in helping us build a mitigation case." Second-chair trial counsel, Drew Carroll, corroborated defense counsel Bloom's recollection that Applicant would not cooperate with all the tests required to further the lead defense, believing Applicant "saw it as a stigma to even participate in them." Because Applicant would not complete the neurological testing, Deysach could not establish a score or opinion - let alone opine as to potential neurological deficits resulting from childhood exposure to lead.

The dearth of actual records pertaining to Applicant proved another weakness in the accumulation of evidence in furtherance of a lead-based mitigation presentation. The records defense counsel Bloom and his mitigation investigator were able to uncover largely only pertained to Applicant's little brother Armon. All defense counsel could obtain in regards to Applicant was a single lead test taken when he was nearly twelve years old.

This scarcity led to weakness in the defense's ability to further a lead-based mitigation: defense counsel Bloom testified he consulted with the preeminent expert in the field of lead neurotoxicity, Dr. Herbert Needleman, whom he had retained in the LeVar Bryant case, but learned that there was not enough information from which Needleman could testify about lead poisoning.

Defense counsel Bloom notably distinguished the evidence available in Bryant from that available in Applicant's: "We were never able to find the records on William other than what [appears] in the [trial] transcript." Bloom stated:

I just didn't have enough to bring Dr. Needleman in to testify. As I said, I consulted with him via email. And we just weren't able to find the smoking gun, if I can use that phrase, for Dr. Needleman to be confident enough to have the, the documentation he needed to testify. . . . And I did not have a neuropsychological test.

Instead, he presented the extent of the information he could gather on lead poisoning through his psychologist and social worker

From his December 8, 2015, testimony, defense counsel Bloom established that he took reasonable steps to investigate the potential for a lead-based mitigation defense, and that he was familiar with that type of defense as he had pursued it in a previous case. Not only did the defense uncover records about the known lead in the residential area where Applicant grew up and Applicant's one known blood-lead level, but the defense hired a neuropsychologist to assist in developing and presenting a lead-based mitigation defense.

However, defense counsel Bloom had more testimony to offer on this point. His admitted consultation with Needleman prompted a late discovery disclosure and additional testimony on this issue in May 2016. Bloom produced for Respondent the emails he referenced in December. Testimony taken at the May 2016 installment of the evidentiary in this case indicates that the emails were previously made part of a privilege log by Applicant's Counsel. The emails themselves became part of this Record at that hearing and Bloom further testified to the extent of his investigation into the lead mitigation in his testimony taken that day:

BLOOM: [Needleman's email] says, quote, Jeff: A blood level of eight UG/DL at age eight suggests that it was higher in infancy, but no certainty to this statement. Anymore info? End quote.

Q BY RESPONDENT: So you were, is it fair to say, looking not only at past records but what you could extrapolate from those records as well?

BLOOM: Yes.

Q BY RESPONDENT: And you were also looking at modern testing, you attempted to do that as well?

BLOOM: Yes.

Q BY RESPONDENT: And Dr. Needleman is a well-regarded expert in this field, correct?

BLOOM: He is. Dr. Herbert Needleman is an expert in blood levels, lead poisoning and the effects of lead poisoning on brain development, especially in children. He is a professor of psychiatry in pediatrics at the University of Pittsburgh School of Medicine in Pittsburgh, Pennsylvania, and I have a professional association with him in this regard. I don't know him personally.

This Court must consider whether defense counsel Bloom's testimony credibly indicates that a strategic decision was exercised to present evidence of Applicants' early childhood exposure to lead in the manner done at trial.

In considering strategic decisions, reviewing courts must take care to consider the decision in light of the circumstances at the time of trial: "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington*, 466 U.S. at 689, 104 S. Ct. at 2065. Reviewing courts also must consider "[t]here are countless ways to provide effective assistance in any given case." *Id.* The record here supports there was no deficient performance.

Defense counsel Bloom established the infeasibility of hiring an expert to address Applicant's exposure to lead at trial. Bloom consulted with a qualified expert – the same qualified expert, Dr. Needleman, that both of Applicant's PCR experts, Drs. Canfield and Israelian, testified

to as being an influential actor in achieving mainstream recognition of the dangers of lead poisoning as well as scientific change. The information the defense uncovered was not expansive enough to pinpoint a solid cause or existence of lead poisoning in Applicant. Moreover, unquestionably, Applicant impeded the defense team's ability to further explore any neuropsychological effects of the evidence of lead exposure that did exist because Applicant failed to fully cooperate with written tests from a neuropsychologist. And, as expounded upon within the remainder of the PCR testimony, Applicant's only known lead level was simply not medically or scientifically significant – Dr. Needleman indicated as much.

3. Applicant's Additional PCR Presentation on Lead

Dr. Richard Canfield, a developmental psychologist with specialties in early development and lead toxicity, testified that Applicant's *only known* lead level was 9 micrograms per deciliter. This level was taken on June 2, 1988, when Applicant was 11 years, 9 months, and 9 days of age. In 1988, the standard for lead poisoning was much higher than 9: it was 25 micrograms per deciliter. The 1990s witnessed that standard reduce to 10 micrograms per deciliter. And while some studies prior to 2009 indicated that 10 was too high a lead level, the standard has only been reduced to 5 micrograms per deciliter since 2012. Applicant's trial occurred in 2009.

Canfield's larger focus on concrete blood-lead levels and correlative evidence of neurotoxicity did not relate so much to Applicant as it did his younger brother Armon Dickerson, who was notably younger than Applicant during the time of testing and whose blood screens showed a significantly higher lead level requiring a number of follow-up tests. Accordingly, Armon—not Applicant—provided Canfield with data points to support his testimony.²¹ Moreover,

²¹ Specifically, two-year-old Armon initially tested on November 16, 1982, at 70 micrograms per deciliter. A test conducted one week later on November 23, 1982 returned a level of 45 micrograms per deciliter. Testing continued on Armon until he reached age 5 with differing results.



to the extent Canfield plotted Applicant's blood-lead levels,²² he testified he could "just make a guess that his lead level was 50% above at all ages" based off of the one number he had been provided with and a straight-line graph plotted for a study based on children from Cincinnati, Ohio. Canfield testified that the reason he used the Cincinnati Cohort for comparison was because it began in the late 1970s, which Canfield dictated was "very much the same time period as when William was growing up in Charleston." Without additional testimony to support his contention, he opined that "inner-city Cincinnati is very similar in terms of its housing stock, in terms of the population: largely African-American; largely impoverished; and, and housing of, of very fairly poor quality, meaning that there's a lot of lead paint hazard. So, Cincinnati will help us understand Charleston." He later testified that he relied upon Google Maps to determine the location and appearance of one address Applicant resided in at some point in his youth. In referencing known causes for these blood-lead levels, Canfield was unable to corroborate, when asked by the court, from where in the materials he determined that someone "tore all the walls out" of one of Applicant and Armon's childhood residences, or when that may have occurred in relation when Applicant may have lived there. Canfield continued to have difficulty tracing where Armon was living versus where Applicant was living during the timeframe in which Armon's blood-lead levels were being consistently screened.

Canfield's remaining testimony, therefore, does not provide a foundation for projecting Applicant's blood-lead levels. Canfield laid a comprehensive presentation regarding lead's

²² Applicant's counsel failed to produce Canfield's graphs depicting specific plot points for Applicant in the ordinary course of discovery. Instead, a draft PowerPoint presentation was furnished to Respondent. The plot points or notations presented to this Court pertaining specifically to Applicant were not inserted and provided until their presentation in open court. Canfield's PowerPoint presentation became Applicant's Exhibit 3 at the December 7, 2015, evidentiary hearing over Respondent's objection to the discovery violation.

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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, Applicant's jury would have returned an alternative sentencing recommendation. Canfield's testimony lacked sufficient underlying facts to support his conclusion that Applicant's environment caused blood-lead levels were consistently 50% above a conservative average prior to the actual blood-lead level that was produced at Applicant's age 11 years and 9 months. Moreover, Canfield based his graph of Applicant's estimated blood-lead level upon a linear study conducted on children from Cincinnati, Ohio in the 1970s, and not concrete data from houses on the upper portion of the Charleston Peninsula in the late 1970s and 1980s.

In addition to Canfield, Applicant produced PCR testimony from developmental neuropsychologist Dr. Marlyne Israelian. Israelian reiterated Applicant's entire social history which was offered during the sentencing phase of Applicant's trial, but did so in correlation to purported childhood exposure to lead, as well as Applicant's reliance on cocaine and his maltreatment as a child. Israelian testified that demographically, Applicant fell at high risk for lead exposure as did other black males in urban centers and communities with antiquated, unrefurbished homes. She described that Applicant grew up in zip codes on the Charleston Peninsula where there were known cases of children with blood-lead levels higher than the threshold level of 10.

Israelian pointed out that Applicant underwent IQ testing in 1990 when he resided at Tara Hall, a group home for boys in Georgetown County, scoring 86 in nonverbal reasoning. Israelian defined his nonverbal score of 86 as below average, and his scoring 96 on verbal as average. Averaged, this IQ score placed him in the 50% percentile. Israelian testified that Applicant performed poorly on one subtest, the Object Assembly Test, which to her was significant because "lead affects selectively that area of the brain" that controls visuospatial functioning necessary for

completion of that test. Israelian juxtaposed this 1990 IQ test with a later test conducted by the Department of Youth Services wherein Applicant's scores dropped to a full scale IQ of 83, a verbal of 81 and a performance of 89. Youth Services administered the adult version of the test though Applicant was only sixteen and still eligible for the children's scaled test. Israelian characterized this reduced score as consistent with previously assessed deficiencies which could, according to Israelian, relate back to lead exposure.

Ultimately, Israelian described the results of her own neuropsychological assessment conducted with Applicant, including an IQ test wherein Applicant's full-scale score was 86. She opined that Applicant has executive frontal-lobe dysfunction. She additionally noted the impact of cocaine, a toxin, on Applicant's functioning. She testified that individuals with lead poisoning "are quite drawn to cocaine" and "are quite susceptible to cocaine" because it allows them to feel reward. "[L]ead exposure will predispose you to cocaine abuse."

Israelian also discussed Applicant's maltreatment as a child. She finally opined that Applicant suffered from a mental and emotional distress disorder at the time of the murder and that his poor executive functioning played a role in the crime because Applicant expresses an inability to regulate his emotions. She opined his capacity to conform was substantially impaired from (1) lead neurotoxicity, (2) childhood maltreatment, and (3) cocaine psychosis. Israelian did not, however, recommend Applicant undergo any medical tests such as an MRI to see if his brain was visually affected by lead. Nor did she order or recommend any new blood test be conducted for the presence of lead.

Israelian's testimony fails to demonstrate that Applicant suffered prejudice by the failure to have a neuropsychologist, or a developmental neuropsychologist, testify at trial. Bloom established at PCR that Applicant would not comply with the neuropsychological testing required

to garner this testimony. Without assistance by his client prior to trial, this type of testimony was not at Bloom's disposal. Moreover, Israelian's testimony does not identify neurotoxicity as a result of childhood exposure to lead to a degree which undermines confidence in the jury's sentencing recommendation. She largely reiterated other mitigation testimony offered at trial by way of outlining Applicant's childhood circumstances and cocaine addiction.

Israelian's testimony signifies a lack of prejudice flowing from the present PCR allegation. At trial, Bloom pursued and put forth a consistent sentencing-phase presentation that mentioned all of the same risk factors discussed by Israelian, including childhood exposure to lead. But the crux of Bloom's mitigation case lay in professional opinions that Applicant's capacity to conform was compromised due to a cocaine psychosis. Israelian did not deny that a cocaine psychosis and childhood maltreatment affected Applicant. She simply assigned an additional factor by a more scientific name, lead neurotoxicity, and compounded her analysis with additional scientific testimony pertaining to the effects of Applicant's known lead exposure. She opined at PCR that Applicant's cocaine usage contributed to his capacity to conform and led to substantial impairments at the time of the murder. Nothing she said excused or altered the cocaine psychosis theory presented at trial.

4. Applicant Fails in Showing Deficient Performance
And Resulting Prejudice

What is clear from the aggregate of the PCR testimony is that trial counsel had access to the basis for the lead poisoning defense and investigated it. Most importantly, Bloom's PCR testimony and his correspondence with Dr. Herbert Needleman notes his awareness of Applicant's childhood lead exposure, the existence of lead in the area where Applicant grew up, and his investigation into the extent or certainty with which he could establish Applicant suffered a physiological deficiency as a result of that exposure. If this Court were to determine that Bloom



halted his investigation into the lead poisoning, it must be deemed reasonable based upon information counsel culled from notable experts in the field. Ultimately, the preeminent lead professional in the field at the time, Needleman interjected that he would need more information.

Applicant's PCR presentation has not compellingly proffered additional lead-based mitigation in a manner undermining confidence in the jury's sentencing recommendation. The only lead level screening conducted upon Applicant occurred when he was almost 12 years old, and the results, a lead level of 9 micrograms per deciliter, fell below the threshold level for concern applicable in 1988 and even in the 1990s. Key to this Court's analysis is that in 1988, and even through the 1990s, Applicant's only known lead level fell below the standard flagged by the medical community for follow-up. Also key to this Court's analysis is Applicant's lack of cooperation with neuropsychological testing in preparation for trial. Bloom did not abjectly fail to present subtests to a neuropsychologist for review as alleged.

Therefore, even if Bloom had presented the same testimony at trial as was presented at PCR, it fails to persuasively indicate that the jury would have returned an alternative sentencing recommendation. The evidence on this issue shows that Bloom, a seasoned capital trial attorney, exercised a strategic decision that the pursuit of additional lead neurotoxicity evidence was not a viable defense which could be supported by medical testimony at the time of trial. Instead, Bloom incorporated the known evidence of lead exposure through experts other than those presented at PCR. Given the totality of the foregoing, Applicant cannot meet his burden of showing error-and-prejudice in regards to counsel's investigation and presentation of a defense based on Dickerson's purported childhood exposure to lead.

J. Respondent's Position on the Merits: Remaining Sentencing Phase Claims

Applicant pursues two additional claims of ineffective assistance of counsel during the sentencing phase of Applicant's trial.

Applicant alleges that trial counsel were ineffective in their sentencing-phase representation because, in addition to the claims discussed above, they (1) failed to preserve for the appellate record an objection to Applicant's former probation officer's testimony that Applicant repeatedly stated during a 1996 probation hearing he wished he had shot a police officer; and (2) failed to object to portions of State's closing argument that, according to Applicant, diluted the responsibility of the jurors in rendering a possible death verdict.

When "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). Pursuant to *Strickland*, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." 466 U.S. at 690, 104 S.Ct. at 2066. "However, counsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial." *Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). Therefore, ineffective assistance counsel claims "based on a failure to object are tied to the admissibility of the underlying evidence." *Hough v. Anderson*, 272 F.3d 878, 898 (7th Cir. 2001). "There can be no ineffective assistance of counsel for failing to raise a claim which is not legally viable." *Almon v. United States*, 302 F.Supp.2d 575, 586 (D.S.C. 2004); see, e.g., *Werts v. Vaughn*, 228 F.3d 178, 203 (3rd Cir. 2000) ("counsel cannot be ineffective for failing to raise a meritless claim"). Admissible but unobjected-to testimony fails both prongs of *Strickland* because "failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." *Hough, supra*.

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1. Claim that Counsel Failed to Preserve Objection to Probation Officer's Testimony

During the sentencing phase, the State presented a former South Carolina Department of Probation, Pardon and Parole Officer who served as the presiding Administrative Officer over Applicant's 1996 parole hearing. This witness, Cededrick Davis, testified that during that hearing Applicant repeatedly stated he wished he shot the police officer(s) involved in the incident. Prior to this testimony, the trial court ruled it admissible over Bloom's objection, finding it more probative as to Applicant's character than prejudicial. The court finished: "your objection is noted and preserved."

At PCR, defense counsel Bloom was called upon to address the efficacy of this testimony and whether a proper contemporaneous objection was lodged. He explained that his objection at trial, which was handled *in limine* and included a proffer of Davis' testimony, was that Davis was being called to testify at Applicant's murder trial about a parole proceeding that occurred in 1996 in which Applicant was not represented by, nor had an automatic right to, counsel.²³ Defense counsel Bloom's basis for objection was that the Department kept the report a confidential part of the probation file; it was never objected to; nor could the report ever be challenged after the hearing. Thus, under his logic, its introduction at the 2009 death penalty trial constituted a due process violation. He also recognized that he received the report in discovery and had it well in

²³ The *in limine* record includes testimony from Davis that at a parole hearing the defendant is "advised that it is a matter of evidence, and that they have the right to an attorney at that hearing, and whatever they say can be used against them at a future hearing." (R. p. 3745, lines 12-16). On cross-examination in front of the jury, defense counsel Bloom did not re-elicit this information, but rather pointed out that the Department maintained the report in a confidential file and that Applicant's statements about wanting to shoot the officers was not part of the revocation order issued as a result of that hearing. (R. p. 3774, line 4 – p. 3777, line 24).

advance of trial. Defense counsel Bloom stated that once admitted, he "could tell from the jury's reception of the evidence that it was . . . bad[.]"

The record on this PCR allegation bears out that counsel reasonably reacted to the trial court's notation that the issue was preserved following its *in limine* treatment and strategically decided not to object in front of the jury when the evidence came before it. Defense counsel Bloom testified that he believed he properly preserved the issue for appeal and that he later included it in a memorandum to appellate counsel suggesting the issue for appeal. He later stated he believed the objection was preserved because it was handled *in limine*, not in a pretrial hearing, and that "it was clear how the trial judge had ruled" in that the ruling did not leave Bloom feeling as though he needed to renew the objection in front of the jury. "You don't need have to keep objecting just because the jury is now in the courtroom."

But even assuming this issue were later raised on appeal and found unpreserved by our appellate court, Davis' testimony was ruled admissible and thus its admission cannot form a basis for post-conviction relief. Character evidence is admissible (and highly relevant) during the sentencing phase of a capital trial. *State v. George*, 323 S.C. 496, 511, 476 S.E.2d 903, 912 (1996); *see State v. Tucker*, 324 S.C. 155, 168, 478 S.E.2d 260, 267 (1996). "The purpose of the bifurcated proceeding in a capital case is to permit the introduction of evidence in the sentencing proceeding which ordinarily would be inadmissible in the guilt phase. In the sentencing proceeding, the trial court may permit the introduction of additional evidence in extenuation, mitigation or aggravation." *State v. Kornahrens*, 290 S.C. 281, 289, 350 S.E.2d 180, 185 (1986) (citing *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979)) (emphasis in original).

2. Claim that Counsel Failed to Object to State's
Sentencing-Phase Closing Argument

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Applicant next alleges that counsel failed to object to the portions of the State's closing argument which Applicant now identifies as having diluted the jurors' sense of responsibility in rendering a possible death verdict. Applicant has identified two portions of the closing argument in its post-trial brief in support of this allegation.

Any excerpt of the State's closing exists as "one moment in an extended trial." *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872 (1974). So, while the question before this Court is undoubtedly "whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process," *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166-67 (1998), a court must conduct an "examination of the entire proceedings." *Donnelly* at 643, 94 S.Ct. at 1871; *Northcutt, supra* ("We must review the [closing] argument in the context of the entire record."); *State v. Bell*, 302 S.C. 18, 35, 393 S.E.2d 364, 374 (1990).

"Solicitors are bound to rules of fairness in their closing arguments." *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007).

While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based upon this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice.

State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981); S.C. Code Ann. § 16-3-25(C)(1) (capital sentence may not be "imposed under the influence of passion, prejudice, or any other arbitrary factor").

As to whether the State's sentencing-phase argument in this case crept outside the bounds of fairness and required an objection by Applicant's counsel, the record reflects a thirteen-page argument in adherence to the principles stated in *Linder, supra*. An examination of the passages cited by Appellant in the full context of the closing indicates that the State was arguing in favor of



a recommendation of death and asking the jury to reject the application of mercy. The State argued for the jury to discount the mitigation evidence put forward by Applicant and assign significance to evidence it put forward in aggravation. The State did not ask the jury to weigh aggravation against mitigation and come to a decision that way.

Testimony on this issue taken at Applicant's PCR hearing also supports a finding that the State's closing argument did not call for objection. Defense counsel Carroll testified at PCR that he believed they should have objected because the excerpts presented to him at the PCR hearing indicated that "the solicitor was clearly painting a picture of the absolute worst of the worst of inhumanity, and telling the jury that they should disregard all the mitigation that had been offered that was relevant to their decision about imposing this ultimate penalty." But defense counsel Carroll acknowledged in later testimony that it is permissible for a prosecutor to argue in favor of their position. Likewise, defense counsel Bloom testified at PCR that at the time the State delivered its closing, he did not view the excerpted portions as problematic but, in hindsight, "should have interposed an objection" and characterized the State's closing as asking the jury to weigh aggravation against mitigation. However, his cross-examination testimony highlights the alternative position, perhaps the one held at the time of trial, that the State's closing argument was indeed within the confines of argument allowed by South Carolina law and was not worthy of objection.

Accordingly, Applicant's allegation fails to meet *Strickland's* error-and-prejudice standard and does not warrant relief.

K. Respondent's Position on the Merits: Ineffective Assistance of Appellate Counsel Claims

Applicant seeks post-conviction relief on two claims of ineffective assistance of appellate counsel. The test for reviewing such claims is the basic *Strickland* error-and-prejudice analysis



with little adjustment. To succeed, the applicant must demonstrate that appellate counsel was "objectively unreasonable in failing to find arguable issues to appeal." *Smith v. Robbins*, 528 U.S. 259, 285, 120 S.Ct. 726, 764 (2000). "To prove prejudice, the applicant must show that, but for counsel's error, there is a reasonable probability that he would have prevailed on appeal" on the issue proffered in the PCR application. *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). The *Smith* Court noted "it is difficult to demonstrate that counsel was incompetent" as for the most part, deficient performance may be shown "only when ignored issues are clearly stronger than those presented[.]" *Smith, supra* at 288, 120 S.Ct. at 766 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)).

When reviewing appellate counsel's actions under *Strickland* as enunciated in *Smith* and *Anderson, supra*, no finding of deficient Sixth Amendment performance and prejudice is warranted within appellate counsel's selection and treatment of the issues pursued on direct appeal before the South Carolina Supreme Court. Specifically, Applicant alleges in claims 10/11(c)(5) and (7) that appellate counsel should have pursued on direct appeal (1) the objections lodged to a number of autopsy photographs introduced during sentencing²⁴; and (2) the objection lodged to the State's questioning Dr. Phillips about whether Applicant "knew right from wrong" at the time of the murder.

Testimony taken at the December 8, 2015, and May 13, 2016, evidentiary hearings established that first-chair trial counsel Jeff Bloom, who was listed as appellate counsel on the final brief and participated in oral argument before the South Carolina Supreme Court, shared his suggestions for appellate issues in a memorandum to appellate counsel at the Commission on

²⁴ Specifically, State's Exhibits 141, 153, 160, 161, 162, 166, 171, 172, 173, 177, 178, 181, 184, 335, and 336, on file and available for review at the South Carolina Supreme Court.

Indigent Defense. Within that memorandum, he suggested both the photograph issue and the Dr. Phillips issue as potential appellate issues. Jeff Bloom's testimony demonstrated that he discussed potential appellate issues with appellate counsel and considered a range of issues that he believed should be raised on appeal. He also completed portions of oral argument before the Supreme Court. Bob Dudek, Chief Appellate Defender with the Commission on Indigent Defense, also testified about Bloom's memorandum and the proffered issues at the December 8, 2015, PCR hearing.

1. Testimony in the Record Pertaining to the Photograph Allegation

One of the aggravating factors before the jury during the sentencing phase of Appellant's trial was that the murder occurred during the commission of physical torture. During the sentencing-phase, the State re-called forensic pathologist Dr. Cynthia Schandl²⁵ to testify in regards to specific injuries recorded as part of the victim's autopsy. Over Applicant's objection, the trial court admitted the photographs subject to this allegation as probative of the aggravating factor of physical torture. Shandl's testimony was thereafter received and trial counsel did not cross-examine the pathologist.

First-chair trial counsel Jeff Bloom testified at PCR only briefly that he recalled preserving the objection to these photographs and agreed with Applicant's counsel that they "are what they are." At the first convening of the PCR evidentiary hearing, appellate counsel Dudek testified that which he did not recall the specific photographs in this case, that having worked on capital appeals before he was aware that "some horrible, horrible, horrible photographs" have been reviewed on

²⁵ During the guilt phase of the proceedings Dr. Schandl was qualified as an expert and testified in regards to the autopsy she conducted on the victim. (R. p. 2920-93).

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appeal by our courts, but that the court has issued "kind of standard language [that] while not pleasant to look at . . . [it did not] think they denied the defendant a fair sentencing phase.

2. Testimony in the Record Pertaining to the Dr. Phillips Allegation

During the sentencing phase, Applicant's counsel put forth Dr. Robert Phillips who was qualified as an expert in psychiatry and forensic psychiatry. Phillips' testimony assigned behavioral significance to certain events in Applicant's life prior to the murder. At the conclusion of his direct examination, Phillips opined that (1) Applicant "was experiencing a cocaine psychosis and, as such, he was affected by a mental disturbance" at the time of the murder; (2) "that as a result of his cocaine psychosis that his capacity to conform his behaviors was substantially impaired" at the time of the murder; and (3) that as a result of cocaine psychosis, that his mentality was impaired" at the time of the murder.

On cross-examination, the State extracted testimony that Applicant does not suffer from any mental or emotional disorder that would impair his decision-making, day-to-day functioning, or require psychiatric treatment—and that he was competent to stand trial. Bloom lodged an objection raised during an off-record bench conference.²⁶ Following the conference, the State elicited a response from Phillips regarding whether Applicant's actions at the time of the murder were volitional. Phillips responded he believed Applicant was in a cocaine psychosis at the time

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Q: That he was competent to stand trial?

A. Yes.

Q. That means that he basically knows what is going on here, who the lawyers are, who the judge is, the jury is, all that kind of stuff, is that correct?

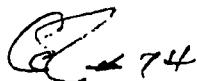
A. That's correct.

Q. And that does not meet the standard for ---

Mr. Bloom: Judge, I am going to object at this point. If we may approach?

[OFF RECORD BENCH CONFERENCE]

(R. p. 4242, line 2 – p. 4243, line 9).

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of the murder and therefore "his decision was not free," but that "he would have known what he was doing was wrong based on his behaviors after the event."

At PCR, defense counsel Bloom acknowledged that in his practice he consistently objects when the State cross-examines a mental health expert regarding whether the defendant knows right from wrong. He testified he believes that it confuses a jury to hear testimony that a defendant knows right from wrong, which pertains to an insanity defense, when insanity is not an issue in the trial, has not been presented during the guilt phase, and is likewise not part of the mitigation defense being presented. Defense counsel Bloom acknowledged that he included this issue in his memo to appellate counsel as a suggestion for the appeal. Appellate Counsel Dudek simply testified on this point that he did not raise that issue on appeal.

3. Argument in Opposition of Post-Conviction Relief

The above-cited issues would not have prevailed on appeal as argued by Applicant. Effective assistance of appellate counsel does not require that *all* issues that *may* have merit be pursued on direct appeal. *Bell v. Jarvis*, 236 F.3d 149, 164 (4th Cir. 2000) (*en banc*). "Appellate counsel accordingly enjoys a 'presumption that he decided which issues were most likely to afford relief on appeal,' a presumption that a defendant can rebut 'only when ignored issues are clearly stronger than those presented.'" *United States v. Baker*, 719 F.3d 313, 318 (4th Cir. 2013) (quoting *Bell v. Jarvis*, *supra*). Appellate counsel is given wide discretion in his professional decisions during representation. "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." *Tisdale v. State*, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004), (quoting *Jones v. Barnes*, 463 U.S. 745, 754 (1983)).

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Specifically in regards to the photographs, our Supreme Court has expressly upheld the introduction of autopsy photographs during the sentencing phase when the photographs corroborate witness testimony and illustrate the circumstances of the crime and the character of the defendant. *State v. Torres*, 390 S.C. 618, 623–24, 703 S.E.2d 226, 229 (2010) (citing *State v. Rosemond*, 335 S.C. 593, 597, 518 S.E.2d 588, 590 (1999); *State v. Burkhardt*, 371 S.C. 482, 487, 640 S.E.2d 450, 453 (2007)). In Applicant's case, as in *Torres*, "[t]he doctor who performed the autopsy used the introduced photographs during h[er] testimony to illustrate the number of injuries, location of the injuries, and manner in which the injuries were committed." *Id.* Though graphic in nature, the photographs' "net effect" was to show what Applicant did to the victim, "which goes straight to the circumstances of the crime." *Id.* Photographs "are not inadmissible merely because they are gruesome, especially where, as here, the photos simply mirror the unfortunate reality of the case." *State v. Collins*, 409 S.C. 524, 535, 763 S.E.2d 22, 28 (2014) (no abuse of discretion in admission of pre-autopsy photographs of child victim mauled by dogs); see also *State v. Gray*, 408 S.C. 601, 759 S.E.2d 160 (Ct. App. 2014) (in prosecution for murder and lynching, gruesome autopsy photographs held more probative than prejudicial and relevant to issue of malice).

The photographs at issue depict the nature of the injuries established by the forensic pathologist as contributing to the victim's death. Given the status of South Carolina jurisprudence on this issue, any likelihood that Applicant would have prevailed on the proffered appellate issue is low. The photographs are relevant to the State's requirement to establish the aggravating factor that the murder occurred during the commission of physical torture. Thus, the photographs were directly linked to a question before the jury's consideration as part of the sentencing phase of trial. Dudek's testimony reflects that appellate counsel was aware of the status of the law on this issue



and intimates that the low likelihood of success caused him to make a strategic choice to forego the issue in Applicant's appeal. Accordingly, the failure to challenge the trial court's admission of those photographs on appeal is not a meritorious ineffective assistance of counsel claim.

Specifically in regards to Dr. Phillip's cross-examination testimony, assuming the off-record objection preserved the issue for appeal, the testimony received was not at all inconsistent with Applicant's mitigation-phase presentation. In fact, it was probative of the mitigating circumstances charged to the jury: that the murder was committed while the defendant was under the influence of mental or emotional disturbance; that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired; and the age or mentality of the defendant at the time of the crime. S.C. Code Ann. § 16-3-20(C)(b)(2), (6), and (7). At no point during his examination did Phillips obfuscate the elements of an insanity defense with his evaluation of facts probative of the mitigating factors named herein. Instead, the crux of his testimony on both direct and cross examination was that Applicant was subject to a state of cocaine psychosis at the time of the crime. To that end, Bloom's PCR testimony that he believed that type of evidence confused a jury and gave rise to his objection does not form a meritorious basis for appeal. Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues . . ."). Appellate counsel cannot be found ineffective for failing to raise an issue which, from the record, appears "far from 'apparent,' and may be nonexistent." *Lawrence v. Branker*, 517 F.3d 700, 711-12 (4th Cir. 2008) (finding state PCR court's denial a reasonable application of *Strickland*, *supra* and *Bell*, *supra*).

Applicant fails to demonstrate how either of the above-cited issues are stronger than those pursued on appeal, and this claim does not warrant the granting of post-conviction relief. *Hill v.*

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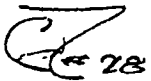
State, 415 S.C. 421, 430-31, 782 S.E.2d 414, 419 (Ct. App. 2016) (counsel need not raise every nonfrivolous issue to be considered effective on appeal). The totality of the testimony put forward on the appellate counsel claims shows that in deciding which claims to raise on appeal, counsel considered the likelihood of success of those claims. Counsel does not have to file a "kitchen-sink brief" in order to be effective as "that is not necessary, and is not even particularly good appellate advocacy." *Smith v. Stewart*, 140 F.3d 1263, 1274 n.4 (9th Cir. 1998). Applicant has failed to show error and prejudice in regards to appellate counsel's performance and post-conviction relief is not warranted on either claim.

L. Respondent's Position on the Merits: The Kidnapping Sentence

In addition to the death sentence received, Applicant was indeed sentenced by the trial court to a concurrent thirty years for kidnapping. This concurrent sentence is in violation of S.C. Code Ann. § 16-3-910. If a concurrent sentence is imposed as in this case, the sentence is considered "ineffective." *State v. Council*, 335 S.C. 1, 6, n.2, 515 S.E.2d 508, 510, n.2 (1999). "Generally, when a defendant is convicted for murder any sentence for the kidnapping of the victim would be vacated." *State v. Vasquez*, 364 S.C. 293, 302, 613 S.E.2d 359, 363 (2005) (citing *Owens v. State*, 331 S.C. 582, 585, 503 S.E.2d 462, 463 (1998) (holding that a sentence for kidnapping should be vacated when the defendant received concurrent sentence under the murder statute). While Applicant's kidnapping sentence should be set aside, the kidnapping conviction shall remain. *Id.*; *Vasquez, supra* (affirming conviction but vacating sentence for kidnapping of murder victims).

M. Conclusion

Therefore, Applicant is not entitled to post-conviction relief on any surviving allegation. All allegations appearing in the third amended PCR application yet not presented in Applicant's

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Post-Hearing Brief have been waived and abandoned. The totality of Applicant's claims shall be denied and dismissed in full as Applicant has failed to meet his burden on any claim herein—with the exception of the concurrent thirty-year sentence for kidnapping. That sentence, but not the conviction, is ordered vacated.

AND IT IS SO ORDERED.



G. Thomas Cooper, Jr.
Presiding Judge

JUNE 26, 2018

Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF Charleston

William O. Dickerson, Jr.

vs.

State of South Carolina

Plaintiff,

Defendant.

IN THE COURT OF COMMON PLEAS
9th JUDICIAL CIRCUIT

CASE NO.: 2012-CP-10-03216

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

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☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Rule 59(e), SCRPC Motion & Re-Submission of Mr. Dickerson's Post-Hearing Brief

Estimated Time Needed: _____ Court Reporter Needed: ☐ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

July 9, 2018

Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT: \$ _____

☒ EXEMPT

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☒ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☒ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____

☐ CONTESTED - AMOUNT DUE: \$ _____

SCCA 233 (11/2003)

THE STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

FILED

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

2018 JUL 11 PM 4:47

Case No. 2012-CP-10-3216

William O. Dickerson, Jr.

JULIE J. ARMSTRONG
CLERK OF COURT

vs.

BY J Rule 59(e), SCRPC Motion & Re-Submission
of Mr. Dickerson's Post-Hearing Brief

State of South Carolina

Pursuant to Rule 59(e), SCRPC, William Dickerson moves this Court for and order altering and amending the order dismissing his post-conviction relief ("PCR") case signed on June 26, 2018, filed on June 27, 2018, mailed to counsel by the Clerk of Court on June 28, 2018, and received by counsel on June 29, 2018. This motion is based on the following grounds.

A. The findings of fact and conclusions of law are those of an advocate and not the Court.

As a threshold matter, the procedure followed by this Court denied Mr. Dickerson an opportunity to have his post-conviction relief claims adjudicated by a judicial officer. "S.C. Code Ann. §17-27-80 (1976), requires the PCR court to 'make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.'" *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991). See also *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992). This Court did not do that, but rather delegated that responsibility to the Attorney General's Office. Although this Court allowed both parties to submit post-hearing briefs, the order of dismissal is taken verbatim from the State's brief. In fact, the findings of fact and conclusions of law regarding Mr. Dickerson's specific grounds for relief are captioned "H. Respondent's Position on the Merits: Ineffective Assistance in Jury Selection," "I. Respondent's Position on the Merits: The Lead Poisoning Claim," "J. Respondent's Position on the Merits:

Remaining Sentencing Phase Claims,” “K. Respondent’s Position on the Merits: Ineffective Assistance of Appellate Counsel Claims,” and “L. Respondent’s Position on the Merits: The Kidnapping Sentence.” Mr. Dickerson, therefore, does not know the Court’s reasons for denying his post-conviction relief application. Although the Attorney General addressed the merits of each issue presented during the hearing, the reasoning in the order is entirely that of an advocate and not an independent judicial officer, which violates the separation of powers. S.C. Const. Art. I, §8. In capital cases, our Supreme Court “strongly encourage[s] PCR judges to draft their own findings of fact and conclusions of law.” *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). The admonition in *Hall* is consistent with this Court’s responsibility to “safeguard the rights of litigants.” *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012). This Court, therefore, should withdraw this order and make its own findings of fact and conclusions of law.

Based on the Court adopting the State’s Post-Hearing Brief, Mr. Dickerson is not certain this Court reviewed his Post-Hearing Brief. An additional copy of Mr. Dickerson’s Post-Hearing Brief is attached and incorporated by reference. Once the Court considers Mr. Dickerson’s Post-Hearing Brief, the need to grant him post-conviction relief is apparent.

B. Respondent’s Position on the Merits: Ineffective Assistance in Jury Selection (Section H).

Once this Court considers Mr. Dickerson’s Post-Hearing Brief, Section II: PCR Claims Related to Jury Selection, the need to grant him post-conviction relief is apparent. Mr. Dickerson additionally objects to the Court’s order of dismissal as follows.

Mr. Dickerson objects to the Court’s finding that his claim of prosecutorial misconduct against the Ninth Circuit Solicitor’s Office for improperly striking qualified African-Americans from the jury venire cannot be raised in PCR because it “is a direct appeal issue.” Order at 20.

Mr. Dickerson objects to this Court's failure to consider evidence presented at the PCR hearing in assessing the merits of his claim regarding trial counsel ineffectiveness related to the *Batson*¹ violation. 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.

Mr. Dickerson also objects to the Court's finding that materials from the Prosecutor Deskbook are irrelevant to a *Batson* analysis.

Counsel vehemently disagrees with this Court's characterization of her arguments in support of the *Batson* violation "questions [the Solicitor's] integrity and character." Order p. 29. Counsel's advocacy for her client and pointing out that some of the Solicitor's arguments do not make sense is not an attack on the character of the Solicitor, but rather are a justified critique of the Solicitor's reasons for striking qualified African-American jurors from Dickerson's venire.

Counsel also objects to the second part of footnote 16 where the Court faults 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." First of all, this Court overlooks the protracted litigation in this case for counsel to even obtain the information it needed to conduct the Michigan State University study. If the Court recalls, 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

¹ *Batson v. Kentucky*, 476 U.S. 79 (1986).

Solicitor Wilson accused counsel of “cherry-picking” the cases for inclusion in the MSU study at the hearing on May 12, 2016 did this Court order Solicitor Wilson to provide these cases. 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.

Counsel also objects to the Court’s assessment of the three challenged strikes because the Court fails to consider other similarly situated Caucasian jurors as urged by counsel in its post-trial briefing. Order at 33-34.

Counsel objects to this Court’s finding that the Michigan State University Study is irrelevant for Mr. Dickerson’s *Batson* claim.

The Court is mistaken when it asserts that the “study” (Court’s quotation marks) do not account for the fact that counsel only challenged three of the strikes or that the Solicitor did not strike all African-Americans. Those considerations are included in the study, as explained by Professor O’Brien in her testimony. Also, defense counsel’s strikes of Caucasian jurors are irrelevant to the *Batson* claim before the Court.

Counsel objects to this Court’s finding that “any evidence outside of the [trial Court record] included in Respondent’s discussion is irrelevant.” Order at 43. Respectfully, all information relating to a Solicitor’s exercising of juror strikes is relevant for a *Batson* analysis.

Counsel objects to this Court’s reliance on a pre-*Batson* case, *Thompson v. Aiken*, 281 S.C. 239, 315 S.E.2d 110 (1984), in finding that statistics are not relevant to Dickerson’s *Batson* claim.

Counsel also objects to this Court’s finding that trial counsel was not ineffective for failing to secure access to the same criminal histories of the potential jurors as the Solicitor has.

C. Respondent's Position on the Merits: The Lead Poisoning Claim (Section I).

Once this Court considers Mr. Dickerson's Post-Hearing Brief, Section III: PCR Claims Related to Sentencing, Subsections A, B, and C(3), the need to grant him post-conviction relief is apparent. Mr. Dickerson additionally objects to the Court's order of dismissal as follows.

This 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, at 52, incorrectly concludes “the PCR presentation was largely cumulative to the substance of the mitigation presented at trial.” As discussed below 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 54-55, incorrectly concludes 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 in Mr. Dickerson’s post-hearing brief, 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.

1. The Trial Evidence on Lead.

This section of the order, at 55-57, offers a brief summary of some of the expert testimony presented as mitigation at trial. As noted in the order, Dr. Robert Phillips’ testimony concentrated on Mr. Dickerson’s cocaine psychosis at the time of the crimes. Dr. Phillips did not offer any testimony about Mr. Dickerson’s early childhood exposure to lead or how exposure to lead damages the brain and changes how the brain responds to cocaine.

The order, at 55, references Dr. Mark Cunningham’s reliance on “a variety of risk factors identified by the Department of Justice as increasing a person’s likelihood of delinquency and violence,” which included Mr. Dickerson’s “exposure to lead in his childhood.” This section of the order, however, establishes trial counsel’s deficient performance. The order, at 56, notes Mr. Dickerson’s “blood-lead level of 9” might have been higher when he was younger, Dr. Cunningham “may be able to infer to some extent” what [Mr. Dickerson’s] lead levels were if certain testing was done looking at brain function,” and “the specific area where [Mr. Dickerson] grew up had older low-income homes with a huge lead risk.” This information from Dr.

Cunningham placed trial counsel of notice that further investigation into Mr. Dickerson's early childhood exposure to lead. Significantly, Dr. Cunningham did not conduct appropriate analysis or review the appropriate scientific literature to offer an opinion about Mr. Dickerson's blood lead levels earlier in his life.

The order, at 57, summarizes Marjorie Hammock's brief trial testimony about Mr. Dickerson's early childhood exposure to lead. Once again, this information placed trial counsel in notice to conduct a more thorough investigation into this issue. As discussed in more detail in Subsection 2 below, trial counsel unreasonably limited the investigation into this issue by not providing all of the available information to an expert on early childhood exposure to lead—even after that expert specifically requested more information.

2. Strickland Error.

This section of the order, at 56-57, correctly points out that trial counsel's investigation collected materials relevant to Mr. Dickerson's early childhood exposure to lead. The order, at 57-61, however, is controlled by the error of law discussed above, to wit: trial counsel abandoned the investigation into Mr. Dickerson's early childhood exposure to lead without providing all the relevant information to an appropriate expert for review. The order, at 59, correctly notes that Dr. Herbert Neddleman wrote trial counsel, "Jeff: A blood level of eight UG/DL at age eight suggests that it was higher in infancy, but no certainty to this statement. Any more info?"² The Court's order, however, never addresses the fact that trial counsel *never* provided the available,

² Counsel disagrees with the Court's characterization of "late discovery disclosure" of Mr. Bloom's emails with Dr. Neddleman and Dr. Canfield's PowerPoint. Order at 59 and 62 (fn. 22). The State had a full opportunity to question Mr. Bloom about the emails. Dr. Canfield's PowerPoint was work in progress and produced to the State. Not only did the State use demonstrative aids during the evidentiary hearing that it did not disclose until the hearing, the State engaged in a game of "gotcha" regarding cases and transcripts relevant to Mr. Dickerson's *Batson* claim that resulted in this Court ordering additional disclosure and delays in completing this evidentiary hearing.

additional information to Dr. Needleman. *See Weik, supra*. With this additional information, Dr. Richard Canfield was able to form the opinion he offered at the evidentiary hearing.

The order, at 58, 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*.

3. Additional PCR Presentation on Lead.

This section of the order is influenced by the Court overlooking the scientific method and accepted scientific principles. *See, e g, Hall v. Florida*, ___ U.S. ___, 134 S. Ct. 1886, 1895 (2014) (mandating states use "established medical practice" to determine whether a person is ineligible for the death penalty because of an intellectual disability).³ This Court ignored

³ 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*,

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 61, “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 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 62-63, 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 63-64, accepts the accuracy of Dr. Israelian’s testimony but, at 64-65, additionally concludes:

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.*

Israeli'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 overlooks significant portions of Dr. Israeli'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. Israeli testified that these records contained a wealth of evidence documenting Mr. Dickerson's early childhood exposure to lead.

4. Showing of Deficient Performance and Resulting Prejudice.

This section of the order, at p. 65, begins, "What is clear from the aggregate of the PCR testimony is that trial counsel had access to the basis of the lead poisoning defense and investigated it." This statement is controlled by an error of law. Trial counsel unreasonably limited their investigation into Mr. Dickerson's early childhood exposure to lead by not providing Dr. Neddleman with the additional information he requested. See *Frierbruger, Ingle, and Weik, supra*. Trial counsel, likewise, unreasonably limited their investigation by not providing the medical and psychological records to Dr. Deysach. *Id.*

The order, at 66, once again errs by attributing the failure to discover this information to Mr. Dickerson's lack of cooperation with Dr. Deysach. All of Dr. Canfield's testimony was based on his review of the available records and scientific literature, and his opinion was not impacted by Mr. Dickerson's cooperation or lack of cooperation. By reviewing the medical and psychological records that trial counsel did not provide to Dr. Deysach, Dr. Israeli offered substantial testimony about the damage to Mr. Dickerson's brain caused by his early childhood exposure to lead.

D. Respondent's Position on the Merits: Remaining Sentencing Phase Claims (Section J).

1. Claim that Counsel Failed to Preserve Objection to Probation Officer's Testimony.

Once this Court considers Mr. Dickerson's Post-Hearing Brief, Section III: PCR Claims Related to Sentencing, Subsections A, B, and C(1), the need to grant him post-conviction relief is apparent. Mr. Dickerson additionally objects to the Court's order of dismissal as follows.

The order, at 68-69, acknowledges that trial counsel did not renew his objection contemporaneously with admission of the testimony and further acknowledges the prejudicial nature of the testimony. The order, however, errs as a matter of law by concluding trial counsel "reasonably" failed to follow our State's error preservation rules. A failure to follow these rules can never be a strategic decision. *See Frierbruger and Ingle, supra*.

Although the order, at p. 69, discusses the general rule regarding admissibility of character evidence during the sentencing phase of a capital trial, it never discussed the specific due process objections raised by trial counsel during the motion *in limine* and discussed in Mr. Dickerson's Post-Hearing Brief.

2. Claim that Counsel Failed to Object to State's Sentencing Phase Closing Argument.

Once this Court considers Mr. Dickerson's Post-Hearing Brief, Section III: PCR Claims Related to Sentencing, Subsections A, B, and C(2), the need to grant him post-conviction relief is apparent. Mr. Dickerson additionally objects to the Court's order of dismissal as follows.

The order, at 69-71, never finds the challenged passages of prosecution's closing argument to be permissible. Rather, the order tries to justify these arguments in the context of the entire argument but overlooks the legal arguments presented by Mr. Dickerson's Post-Hearing Brief.

Although acknowledging trial counsel's evidentiary hearing testimony that they should have objected to these arguments, the order concludes trial counsel "perhaps" had a strategic reason for not objecting, even though trial counsel never advanced a strategic reason for not objecting. *See Frierbruger and Ingle, supra*

E. Respondent's Position on the Merits: Ineffective Assistance of Appellate Counsel Claims (Section K).

1. Photograph Allegation.

Based on the Court adopting the State's Post-Hearing Brief, Mr. Dickerson is not clear whether this Court even reviewed the photographs relevant to this PCR claim. Once this Court reviews the photographs *and* considers Mr. Dickerson's Post-Hearing Brief, Section III: PCR Claims Related to Sentencing, Subsections A, B, and C(4), the need to grant him post-conviction relief is apparent. Mr. Dickerson additionally objects to the Court's order of dismissal as follows.

The order, at 72-73, acknowledged that Mr. Bloom lobbied for the Office of Appellate Defense to raise this issue on appeal. The order, at 73, acknowledges appellate counsel Robert Dudek "did not recall the specific photographs in this case." The order then excused appellate counsel's failure to brief this issue because he was aware that "some horrible, horrible, horrible photographs" have been held admissible on appellate review in other cases. The order never reviewed the *specific* photographs involved in this case or stated why admitting these *specific* photographs did not deprive Mr. Dickerson of a fair sentencing proceeding.

2. Dr. Phillip's Allegation.

Once this Court considers Mr. Dickerson's Post-Hearing Brief, Section III: PCR Claims Related to Sentencing, Subsections A, B, and C(3), the need to grant him post-conviction relief is apparent. Mr. Dickerson additionally objects to the Court's order of dismissal as follows.

The order never explains why testimony about Mr. Dickerson's competency to stand trial or not meeting the criteria for an insanity defense was relevant for the jurors to consider during the sentencing phase. Nor could it. Mr. Dickerson did not raise either issue, and this testimony was not relevant to any sentencing issue.

F. Respondent's Position on the Merits: The Kidnapping Sentence (Section L).

Mr. Dickerson agrees his kidnapping sentence should be vacated.

G. Conclusion.

For the foregoing reasons, this Court should grant Mr. Dickerson's Rule 59(e), SCRPC Motion, withdraw the order of dismissal, grant post-conviction relief, and enter an order vacating Mr. Dickerson's convictions and sentences.

IT IS SO MOVED.

Respectfully Submitted,

By



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July 9, 2018

THE STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

William O. Dickerson, Jr.)

vs.)

State of South Carolina)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2012-CP-10-3216

FILED
2018 JUL 11 PM 4:48
JULIE J. ARMSTRONG
CLERK OF COURT
BY 

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to⁴

Melody J. Brown, Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

By 

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
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(864) 538-4466

July 9, 2018
Greenwood, South Carolina

⁴ A copy of this pleading was also provided to the Court and counsel for the State by email on July 9, 2018.

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	Case No. 2012-CP-10-3216
William O. Dickerson, Jr.,	)	
	)	
Applicant,	)	
	)	William Dickerson's Post-Hearing Brief in
vs.	)	Support of Granting His Application for
	)	Post-Conviction Relief
	)	
State of South Carolina,	)	
	)	
Defendant.	)	
	)	

William O. Dickerson, Jr. submits the following post-hearing brief in support of granting his application for post-conviction relief ("PCR").

I. PROCEDURAL HISTORY.

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 application on ***, ***, and July 13, 2015. This Court convened evidentiary hearings on the following dates and took the following testimony:

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

At the conclusion of the evidentiary hearings, this Court called for post-hearing briefs. This brief follows. Mr. Dickerson proceeds 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 proceeds 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 asks this 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 but also argued the Court should not enter such an order until the final order in this case.

II. PCR CLAIMS RELATED TO JURY SELECTION.

In his post-conviction relief application, Mr. 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. Additionally, claims relevant to this issue which are not discussed below are abandoned.

A. Trial counsel rendered ineffective assistance of counsel by failing to advance a comparative juror analysis when he raised his *Batson*¹ challenge.

B. 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.

C. 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.

D. William Dickerson was denied his rights to due process and equal protection under the law in violation of the Fifth and Fourteenth Amendment when the Solicitor's Office committed prosecutorial misconduct by improperly striking qualified African-American jurors from the jury venire.

A. 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 Gadsen, Ms. Melissa Fields-

¹ *Batson v. Kentucky*, 476 U.S. 79 (1986).

Copeland, and Ms. Sallyisha Toomer. Mr. Dickerson raises this *Batson* claim with respect to Ms.

Gadsen and Ms. Fields-Copeland. 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?²

² The answer to Judge Dennis's question was "yes," but Solicitor Wilson, the only person with access to the rap sheets, did not disclose that fact. According to Solicitor Wilson's testimony

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

SOLICITOR WILSON: She had qualified convictions.³

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.

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.

R. 2028, l. 8- 2031, l. 18.

B. The Improperly Excluded Jurors

1. Georana Gadsden

on May 12, 2016, her office does not have an "open-file policy" nor does she share criminal history records with defense counsel. May 12, 2016 Hearing, p. 72-74; 85. The following seated jurors had arrests and convictions: Nathan Hood, Joshua Partee, Donna Melville and Michael Page. And, as further discussed, Donna Melville had a very significant criminal history that included acts of violence.

³ As did the other jurors.

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. R. 825, l. 17. She explained that to impose a death sentence, she "would need to know all the facts." R. 826, l. 15. She reiterated that there were circumstances where she could consider imposing a death sentence. R. 827, 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. R. 832, ll. 10-22. She reaffirmed yet again that she was a "number three" juror. R. 833, ll. 1-6.

Solicitor Wilson 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. R. 837, l. 14- 838, l. 10. Ms. Gadsden reiterated that she was a "type three" juror and that she would have to know all of the facts. R. 838, l. 8-10. Ms. Gadsden also stated that she had not thought much about the death penalty. R. 838, ll. 11-13.

Solicitor Wilson then asked the juror about a comment she had made to the bailiff about working that night. Solicitor Wilson tried to get details about her work schedule for the next couple of weeks. Solicitor Wilson asked her if it would cause her hardship to serve on the jury. Gadsden unequivocally stated to Solicitor Wilson that she could get off work for the next couple of weeks to serve on the trial if selected. R. 839, ll. 8-24. She stated that she could have her schedule rearranged. R. 840, ll. 1-8.

Solicitor Wilson then continued questioning her about her thoughts on the death penalty, and about whether she thought life without parole was "a pretty stiff sentence." R. 840, l. 9- 841, l. 3. After repeated needling by Solicitor Wilson, Ms. Gadsden stated she would have difficulty signing the death verdict. R. 842, 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. R. 843, ll. 1-20. Solicitor Wilson then again questioned her on malicious killing. R. 843, ll. 21-844, l. 20.

Solicitor Wilson continued—this time asking Ms. Gadsden if she could “put a man to death.” R. 845, ll. 12-16. Then she asked her for specific situations where she could impose the death penalty. R. 845, 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 Solicitor Wilson’s question, and remarked, “She’s answered that question. She said she could.” R. 846, ll. 1-7.

Solicitor Wilson 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.”

R. 846, ll. 10-18.

Solicitor Wilson challenged her for cause based on her “inconsistent answers” but the judge overruled her. R. 848, l. 8- 849, l. 12.

During the *Batson* hearing, the judge asked Solicitor Wilson to provide her “race-neutral or gender-neutral” reason for striking her. R. 2028, ll. 21.

Solicitor Wilson responded that Ms. Gadsden worked from 11:00 to 7:00 and that “she had an issue if it would conflict with her employment.” R. 2029, 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. R. 2029, ll. 3-8.

The Court overruled the *Batson* objection. R. 2029, ll. 9-22.

Solicitor Wilson's purported reasons for striking Ms. Gadsden smacks of racial pretext. First of all, Solicitor Wilson'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 *Ali v. Hickman*, 571 F.3d 902 (9th Cir. 2009) (court reversing and remanding case where state mischaracterized potential jurors' views); *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"—Solicitor Wilson never asked a single question of Ms. Gadsden about this. For all Solicitor Wilson 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. Solicitor Wilson just assumed that Ms. Gadsden would have financial difficulty given her status as a "single mother" that is completely unsupported by the record. 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 squared with Solicitor Wilson'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." R. 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." R. 4750. Melissa Fields-Copeland's answer to this question on the questionnaire was, "No opinion." R. 4577. 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, Solicitor Wilson's questioning of Ms. Gadsden was calculated to produce answers to serve as a basis for her disqualification. Solicitor Wilson 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. 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.

Solicitor Wilson'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"). Solicitor Wilson'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.

Solicitor Wilson's justifications for striking Ms. Georana Gadsden were pretextual, and violated *Batson*.

2. Melissa Fields-Copeland

Melissa Fields-Copeland is Juror 92, and she self-identified as a "number three" juror. R. 901, ll. 15-22. Solicitor Wilson just asked her basic questions about her views of the death penalty. R. 920, l. 24- 923, l. 22. She was found to be qualified. R. 924, ll. 8-13.

During the *Batson* hearing, however, Solicitor Wilson's "reasons" were that "she has a number of charges for prostitution, a charge for shoplifting, a concealed weapon, --." R. 2030, ll. 2-4. When asked if there were similarly situated jurors, Solicitor Wilson responded, "Not that many or not for those things." R. 2030, ll. 16-17. Again, Solicitor Wilson's purported reasons

smack of racial pretext. Solicitor Wilson 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 Solicitor Wilson 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 Solicitor Wilson *did not ask a single juror about convictions, yet seated some with convictions*, it is clear that Solicitor Wilson is using 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. Esparanza-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.)

Equally problematic is that Solicitor Wilson did not strike a similarly situated white juror, Donna Melville. Counsel, during the course of these proceedings, obtained a copy of Ms. Melville's criminal records pursuant to this Court's order directing the FBI to provide criminal history records to counsel. Because Solicitor Wilson did not provide juror rap sheets to defense counsel, counsel was unable to object that Donna Melville was a white, seated juror with an alarming criminal record that involved physical acts of violence. According to records secured by PCR counsel from the FBI (the NCIC reports that Solicitor Wilson had in her possession at the

time of trial), Melville was charged in Alaska in August 1998 of Assault Fourth Degree, Domestic Violence, II Counts, and Burglary 1st degree. She was found guilty of 2 counts of Assault and given 15 days in jail, suspended to one-year probation. In May 1999, she was charged with Assault 4th, Domestic Violence, 2 counts and was found guilty of resisting arrest, received a 90-day jail sentence, suspended on 3 years' probation. She was also found guilty of domestic violence, given a jail sentence of 120 days, suspended to 90 days, with probation for three years. In September 2000, she was also found guilty of assault and placed on probation for one year. In 2004, she was charged with Driving under the Influence, Leaving the Scene of an Accident, and Failure to Stop at Direction of Officer. She was found guilty of DUI and leaving the scene of an accident and received jail time suspended on 5 years of probation. Solicitor Wilson did not ask Melville any questions about her criminal record, either, strongly suggesting that Solicitor Wilson's "concerns" about these criminal records is mere pretext for making racially discriminatory strikes. See *Miller-El v. Dretke*, 545 U.S. at 241 ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step"). And see *Snyder v. Louisiana*, 552 U.S. 472, 483 (2008) ("The implausibility of this explanation is reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as Mr. Brooks'").

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. 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. Solicitor Wilson'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 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.") Solicitor Wilson's strike of Ms. Fields-Copeland was improper under *Batson*, and denied Mr. Dickerson his right to due process.

In assessing the Solicitor's behavior in this capital case, it is relevant to consider how she behaved in other another capital case. Solicitor Wilson was also the lead Solicitor in Colin Broughton's death penalty case.

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

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

According to the materials assessed by the professors from Michigan State University, Solicitor Wilson struck 50% of qualified African-American from the venire. She only struck 14.8% of qualified white potential jurors. See Amended Michigan State Study, August 29, 2017, p. 10.

1. Alice Bowman

Solicitor Wilson 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. Tr. 1848, l. 18- 1849, l. 3. However, Solicitor Wilson’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, Solicitor Wilson 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, Tr. 528, ll. 3-15, and whether she could sign her name to the death verdict. Tr. 583; 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, Solicitor Wilson’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. Tr. 461. Too, he claimed that “Life in jail would be worse than the death penalty.” Tr. 472. 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. And too, Emma Hennix's son was currently charged with firearms, assault and battery, and possession of drugs. His charges were pending at the time of this trial.

And also, Ronald K. Williams could be described as a "balancer" as he informed Solicitor Wilson 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 Solicitor Wilson 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. Solicitor Wilson'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. Kears*e, 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 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. Tr. 1059, ll. 4-14. Solicitor Wilson asked very few questions of Ms. Wilson. On questioning by Solicitor Wilson, Ms. Wilson stated that she thought living in prison with regret would be suffering. Tr. 1066, l. 18-1067, l. 13. Solicitor Wilson asked if, based on this belief, would she only render a life sentence. Tr. 1068, 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. Tr. 1068, l. 23-1069, l. 2. Then Solicitor Wilson asked her what factors would make death an appropriate sentence for her. Tr. 1069, 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. Tr. 1069, l. 25- 1070, l. 17. Solicitor Wilson did not ask any additional questions after this statement.

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

Tr. 1849, l. 23- 1850, 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.

Tr. 1069, l. 23- 1070, l. 19.

Ms. Wilson did not "intimate" that the only thing she would consider would be future dangerousness. Solicitor Wilson asked her a general and broadly framed question, and Ms. Wilson answered it. If Solicitor Wilson 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.

Solicitor Wilson'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 Mr. 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.

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

Investigation conducted by PCR counsel reveals that Solicitor Wilson's discriminatory removal of qualified jurors is not confined to capital cases, nor is it a recent phenomenon. In 2004, Solicitor Wilson 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 blacks and did not remove any whites. In other words, the state used 100% of its strikes to remove blacks who only constituted 28% of the jury pool. Solicitor Wilson 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—Solicitor Wilson 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—Solicitor Wilson struck her because she was unemployed and a housekeeper.
- Ms. Edna Ferguson—Solicitor Wilson 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, Solicitor Wilson struck her.

Based on Solicitor Wilson's responses, defense counsel asked to view the juror rap sheets.

The court agreed. Tr. 26. 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. Kearsse*, 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.

Tr. 60-61.

Also, the recent case of *State v. Ryan Deleston*, a murder trial involving a black defendant and a white victim, tried in October 2013 illustrates Solicitor Wilson's persistent removal of African-Americans from juries. In Deleston, Solicitor Wilson struck D. Dixon, a black female; Shavis Doyley, a black male, and M. Washington, a black female. Although defense counsel did not challenge the strike of Dixon, Dixon revealed to the court that she had a friend in prison serving a sentence for murder. Solicitor Wilson did not challenge similarly situated jurors, D. Yates (a white female) whose brother was incarcerated, nor did she challenge D. O'Brien (a white female) who had a friend in prison for embezzlement, nor did she challenge T. Horne (a white female) who had her own arrest for criminal domestic violence and whose baby's father was in prison in Georgia.

Solicitor Wilson also struck Shavis Doyley, a black male, because he was a security guard at local nightclubs. She did not, however, strike M. O'Brien (white male) who had a close friend in the FBI, nor did she challenge J. Carson who is friends with a number of police officers.

Solicitor Wilson struck M. Washington, a black female, because she had two nephews in prison, and those crimes involved drugs and weapons. Again, she did not challenge other similarly situated jurors—D. Yates (white female) whose brother was incarcerated, D. O'Brien (white female) who has a friend serving time in prison due to embezzlement, or T. Horne (a white female) who had her own arrest for criminal domestic violence and whose baby's father was in prison in Georgia.

Solicitor Wilson's improper removal of African-American jurors from juries is a long-standing phenomenon, and this Court should find that she improperly struck Ms. Georana Gadsden and Ms. Melissa Fields-Copeland in William Dickerson's case.

E. Prosecution Coordination Commission's Programs

In addition to Solicitor Wilson'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. The Prosecution Deskbook is available and provided to all solicitors in the state. Solicitor Wilson testified 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. May 12, 2016 Hearing, p. 64-65. It was available to her and her staff at the time of William Dickerson's trial. May 12, 2016 Hearing, p. 69.

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. The lesson here is that a solicitor need only recite one of these “sufficient reasons” and they 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).

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 unambiguously 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 Solicitor Wilson, 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)⁴

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

⁴ 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 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.

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.⁵ 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." 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

⁵ Why would number of children be relevant to a juror's qualification to sit on a jury except to provide some information a solicitor could use to make a gender based discriminatory strike?

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 employment⁶, relationship with law enforcement⁷, 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, demeanor⁸, (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,⁹ 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.

⁶ Solicitor Wilson used "employment" in the Beyah trial to get rid of Ms. Singleton and Ms. Cheatham; in Dickerson's trial to remove Georona Gadsden; and in Deleston's trial to remove Shavis Doyley.

⁷ Solicitor Wilson used "relationship with law enforcement" in the Deleston trial to get rid of Shavis Doyley and M. Washington; in Dickerson's trial to remove Melissa Fields-Copeland; in Broughton's trial, Alice Bowman; in Beyah's trial, Kevin Kornickey and Ms. Edna Ferguson.

⁸ Solicitor Wilson used demeanor to remove Mr. Freeman in Beyah's trial.

⁹ Solicitor Wilson used "general appearance" to remove Mr. Freeman in Beyah's trial.

In May 2010, two elected Solicitors gave a presentation on Jury Selection in Capital Cases in which they indicate 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? Solicitors Stone and Pascoe are clearly attempting to illustrate to 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 Mr. Dickerson’s claim that Solicitor Wilson 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 defendant's 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).

F. 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. 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 Solicitor Wilson. 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.

MSU Amended Report, p.8.

The authors of the study also indicated they thought that race was a factor in Solicitor Wilsons' use of peremptory challenges in William Dickerson's capital case. May 12, 2016 Hearing, p. 15- 16. 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.

October 23, 2017 Hearing, p. 12-13.

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 Solicitor Wilson. October 23, 2017 Hearing, p. 23.

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 Solicitor Wilson.

G. Legal Analysis

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.

H. Arguments

1. Trial counsel rendered ineffective assistance of counsel by failing to advance a comparative juror analysis 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.

Trial counsel rendered ineffective assistance of counsel by failing to obtain access to the same criminal history information that the Solicitor possessed so that he could urge the trial court judge to conduct a comparative juror analysis. Had he done so, he could have brought Donna Melville's extraordinary criminal history to the judge's attention which would have shown the Solicitor's pretextual reasons for striking Ms. Melissa Fields- Copeland. *Strickland v. Washington*, 446 U.S. 668 (1984); *Miller-El v Dretke*, 545 U.S. 231 (2005). Respectfully, the Court should grant relief on this claim.

2. 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 Solicitor Wilson testified, she did not provide juror criminal histories to trial counsel, so trial counsel was unable to conduct a proper comparative juror analysis 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). See *Strickland v. Washington*, 446 U.S. 668 (1984); *Miller-El v. Dretke*, 545 U.S. 231 (2005). Respectfully, the Court should grant relief on this claim.

Trial counsel's failure to litigate his access to the same juror materials as the Solicitor impeded his ability to ensure his client's rights to due process were protected. Respectfully, this Court should grant relief on this claim.

3. **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.**

SLED records only reveal that a person has been convicted of a crime in the state of South Carolina. It does 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. 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 relief on this claim.

4. **William Dickerson was denied his rights to due process and equal protection under the law in violation of the Fifth and Fourteenth Amendment when the Solicitor's Office improperly struck qualified African-American jurors from the jury venire.**

Solicitor Wilson violated *Batson* when she removed Ms. Georana Gadsen 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). For the reasons argued above, this Court should grant relief on this claim.

I. Conclusion

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 Mr. Dickerson is entitled to a new sentencing. 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 Solicitor Wilson's jury selection history and related relevant investigation, as current counsel undertook during the course of these 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 Mr. Dickerson was prejudiced by his substandard performance because two otherwise qualified jurors were struck from his venire. *Strickland, supra*.

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).

III. PCR CLAIMS RELATED TO SENTENCING.

A. Mitigation Evidence Presented at Trial.

During the penalty phase, the prosecution called two correctional officers—Lester Williams and Michael Huggins—to testify about an assault incident at the Charleston County

Detention Center. R. 3788-3810. Trial counsel responded by calling witnesses to demonstrate William Dickerson's adaptability to incarceration. Five Charleston County Correctional Officers testified about their interactions with William. Joseph Ladson described William as quiet, civil, and cooperative. R. 3908-12. John Hewett described William as a cooperative, "mild mannered inmate" that 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. R. 3913-15. Stacy Simmons described William as "quiet and laid back" and observed William help other inmates by providing soap and shampoo. R. 3916-17. 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. R. 3918-21. 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. R. 3921-23.

James Aiken, an expert in risk assessment and inmate adjustment,¹⁰ 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." R. 3930-39.

¹⁰ 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. R. 3925-30.

Marjorie Hammock, a social worker,¹¹ 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. R. 4107. Ms. Hammock's testimony outlined William's social history. She testified William was born prematurely, weighting about three pounds. William's father, William O. Dickerson, Sr.,¹² physically abused William's Mother, Sandra Fokes,¹³ 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 abuse are unable to care for their children, resulting in neglect of the children by that parent. R. 4108-12, 4117.

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

¹¹ 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. R. 4101-04.

¹² William, Sr. was extremely violent and was incarcerated assault and battery, armed robbery, and murder during most of William's life. R. 4111-12.

¹³ 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." R. 4115-16

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. R. 4116-25.

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),¹⁴ 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

¹⁴ There’s no reports of William misbehaving at his grandmother’s house, which he considers a safe place. R. 4134.

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. R. 4125-31.

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 behavioral problems at school and at his grandmother's home confirms an issue in Sandra's home and suggests 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 is 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 recommend William not be returned to Sandra. On July 13, 1988, William was placed at Tara Hall, which is a residential facility for young children. R. 4131-45.

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 didn't 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. R. 2145-49.

Dr. Johnnie K. Rivers, a child psychologist,¹⁵ saw William in individual and small group counseling sessions at Tara Hall. She recalled William doing well at Tara Hall. After William got 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. R. 4045-49, 4053-61.

After returning home, 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."¹⁶ According to Ms.

¹⁵ 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. R. 4043-45.

¹⁶ 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

Hammock, the structure of the Marine Institute, combined with "positive expectations," resulted in William's positive behavior. R. 2149-52.

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 DEHEC'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 sweat," 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. R. 3113-15. On cross-examination, Ms. Hammock acknowledged that William's sole lead test was lower than Armon's lead level and didn't lead to further DHEC observation. R. 4159-61.

vehicle. William successfully completed his probation, which include getting a job and paying restitution. Sandra subsequently alleged William was ungovernable. Ms. Rankin that Sandra did not keep William's appointment for a psychological evaluation and missed court on two occasions, resulting in the Family Court appointing a guardian *ad litem* for William. Ms. Rankin also confirmed the Family Court placed William at the Marine Institute. R. 4089-97.

Dr. Alexander Morton, an expert in Psychopharmacology,¹⁷ 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. R. 3983-84.

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. R. 1401-04.

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

¹⁷ 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. R. 3976-81.

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. R. 3984-92, 4020-21.

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. R. 4014-16.

Dr. Robert Phillips, a forensic psychiatrist,¹⁸ met with William on three occasions and reviewed his social history records. From reviewing records of the three psychiatric hospitalizations, Dr. Phillips observed William was raised in a "toxic emotional environment," both inside the home and in a neighborhood "riff 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

¹⁸ 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. He has served as the Director of Forensic Services for the State of Connecticut, the Chief Executive Officer of the Whiting Forensic Institute (a state maximum security hospital), Deputy Medical Director of the American Psychiatric Association, consulted for the United States Secret Service. R. 4206-12.

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." R. 4212-24.

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 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. R. 4224-29.

Dr. Phillips observed William showed commitment to living the "straight and narrow" after spending nine years in prison. William received training as a welder. When he didn't 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 didn't 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. R. 4229-31.

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. R. 4231-40.

Dr. Mark Cunningham, a clinical and forensic psychologist,¹⁹ 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. R. 4269-71. Applying the Justice Department model, Dr. Cunningham testified about the risk factors present in William's childhood.

¹⁹ 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. R. 4262-67.

The first set of risk factors are present from conception to age six. Of the seven factors from this age period, Dr. Cunning 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 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.

R. 4271-72.

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.

R. 4283, line 13 – 4285, line 11 (emphasis added). Dr. Cunningham's cumulative, 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. R. 4313, 4316-20.

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." R. 4272-76.

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 dripped 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." R. 4276-80. 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. R. 4281-83.
- 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." R. 4285-86.
- Genetic predisposition to mental health disorders R. 4286-87.
- Genetic predisposition to substance abuse. R. 4287.
- Witnessing and being a victim of domestic violence when William was a child. R. 4290.
- William, Sr.'s criminality and imprisonment when William was a child. R. 4290-91.
- Sandra's abuse of marijuana and cocaine when William was a child. R. 4291.
- 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. R. 4291-92.

- 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." R. 4293.
- Emotional rejection and neglect by Sandra. According to research, neglect is "more injurious to children than active abuse" in terms of outcome. R. 4293-94.
- 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." R. 4294-98.
- 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. R. 4298, 4305, 4307.
- The neighborhood William grew up in is a neighborhood of single-parent homes. Alcoholism, drug use, and prostitution were common. R. 4299.
- 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. R. 4299-4301.
- 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" him might have been exposed to HIV. R. 4202-03.

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. R. 4309-10.

B. 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. December 8, 2015 Hearing, pp. 402-03, 430-32, May 13, 2016 Hearing, pp. 154-58, 232-44; Applicant's Ex. 1; State's Ex. 3. 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,²⁰ 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

²⁰ 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. December 7, 2015 Hearing, pp. 8-9.

reviewed the laboratory report showing William had 9 micrograms per deciliter²¹ of lead in his blood when he was eleven years, nine months, and nine days old. December 7, 2015 Hearing, pp. 10-11, 58-60; Applicant's Ex. 1, 2. 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.

Dr. Canfield explained that lead is an element,²² 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." Overtime, 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 home 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

²¹ [A] deciliter is about 20 teaspoons, and a child has about four quarts of blood." December 7, 2015 Hearing, p. 31.

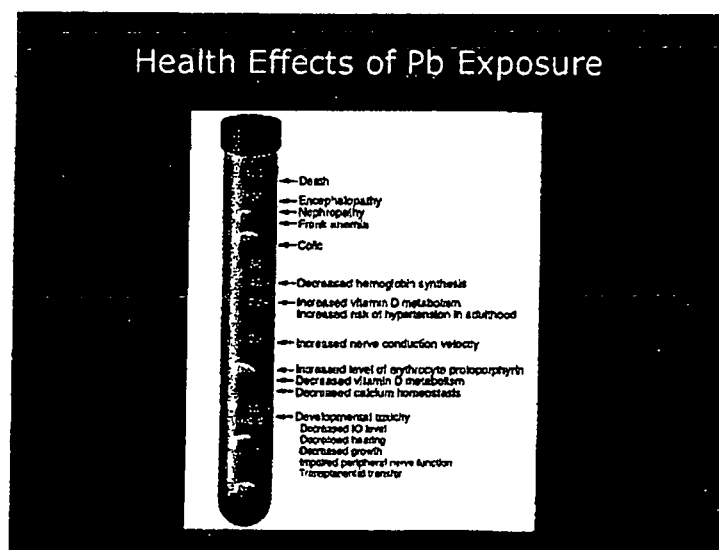
²² The chemical element symbol for lead is Pb.

adults.” At the same time, “the brain is developing its basic capacities at those ages and is most sensitive to environmental insults.” December 7, 2015 Hearing, pp. 14-25, 34.

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. December 7, 2015 Hearing, pp. 24-30.

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



Applicant's Ex. 3, Slide 28.²³ As this chart illustrates, visible, physical symptoms begin at blood levels of 60 micrograms per deciliter with colic and upset stomach. As 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

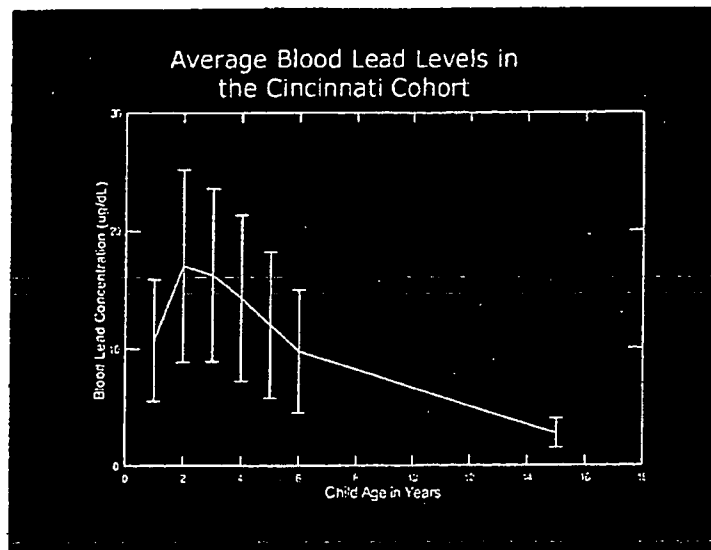
²³ The slide should reflect "decreased nerve conduction velocity" rather than "increased nerve conduction velocity" as lead levels approach 20 micrograms per deciliter. December 7, 2015 Hearing, pp. 32-33.

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 1991.²⁴ 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. December 7, 2015 Hearing, pp. 31-36.

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 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. December 7, 2015 Hearing 38-41. Lead blood levels decrease

²⁴ 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 researchers "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. December 7, 2015 Hearing, pp. 35-36.

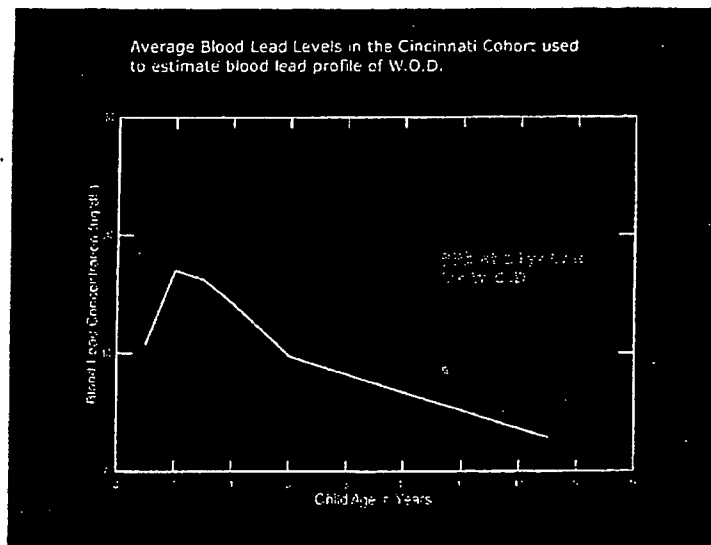
over time as children grow older. Dr. Canfield charted how a child's blood level rises and falls with age:



Applicant's Ex. 3, Slide 43. Researchers documented this same pattern in studies conducted in Rochester, New York,²⁵ Boston, Massachusetts, Cleveland, Ohio, Port Pirie, Australia, and the former Yugoslavia. December 7, 2015 Hearing, pp. 42-48.

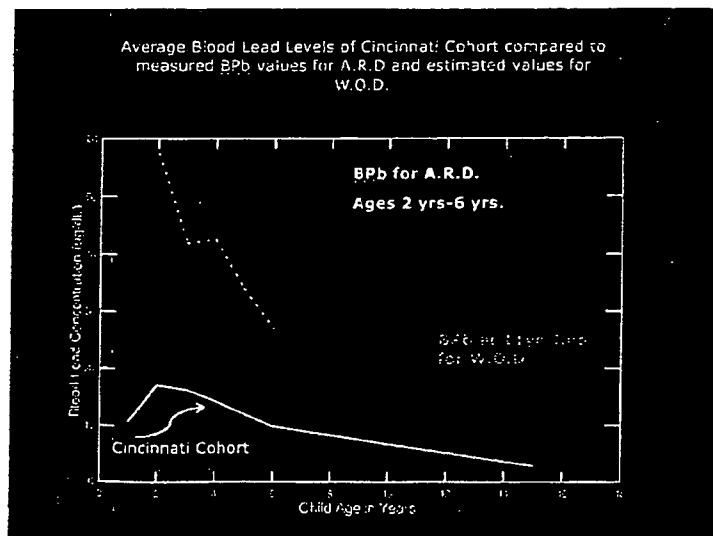
Based on the research, William's blood levels would have been higher when he was eighteen to thirty-six months old. Dr. Canfield provided context for William's test results, at age eleven years, nine months revealing a blood level of 9 micrograms per deciliter, by Dr. Canfield charting William's blood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

²⁵ 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. December 7, 2015 Hearing, pp. 42, 71-87.



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. December 7, 2015 Hearing, pp. 52-62. 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,²⁶ 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 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. December 7-8, 2015 Hearing, pp. 153-64.

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. December 7-8 Hearing, pp. 164-67.

²⁶ 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. December 7-8, 2015 Hearing, pp 138-45.

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. December 7-8, 2015 Hearing, pp. 167-82; Applicant's Ex. 1, 7, 8, 9, 10.

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 emotion and behavior were regulated well 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 attentional 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. December 7-8, 2015 Hearing, pp. 182-95; Applicant's Ex. 11, 12.

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. December 7-8, 2015 Hearing, pp. 195-201.

Tara Hall discharged William on June 1, 1990, and he returned to Sandra's home. William entered the eighth grade and failed. After completed 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. December 7-8, 2015 Hearing, pp. 197-205.

After he was released from Tara Hall, William became involved with the Department of Youth Services ("DYS").²⁷ The Family Court Judge ordered a psychological evaluation for William at the Reception and Evaluation Center. 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, poses poor planning abilities, lack 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. December 7-8, 2015 Hearing, pp. 205-16; Applicant's Ex. 13, 14.

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. December 7-8, 2015 Hearing, pp. 216-18; 269-72. 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

²⁷ The South Carolina Department of Youth Services ("DYS") is the predecessor for the South Carolina Department of Juvenile Justice ("DJJ").

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. December 7-8, 2015 Hearing, pp. 225-31.

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." December 7-8, 2015 Hearing, pp. 231-35.

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 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. December 7-8, 2015 Hearing, pp. 235-40.

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," with 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. December 7-8, 2015 Hearing, pp. 240-67.

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. December 7-8, 2015, pp. 275-84.

C. Arguments.

- 1. 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.**

Cedrick 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.²⁸ 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

²⁸ A tape recording of the hearing does not exist. R. 3752.

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 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." R. 3742-53.

After this hearing, the State called a firearms identification expert. R. 3757-70. When the State called Ms. Davis to testify before the jurors, trial counsel did not renew the objection. R. 3770-78.

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. December 8, 2015 Hearing, pp. 392-98; Applicants Ex. 15.

"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). Our Supreme 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.

2. 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.

R. 4369-70.

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.

R. 4374.

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." December 8, 2015 Hearing, p. 401, ll. 7-15. 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)). The South Carolina Supreme 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 Mr. Dickerson relief.

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 the South Carolina Supreme 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. December 8, 2015 Hearing, pp. 410-11. 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. As seen, 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*.

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.

4. 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. 2920-93. 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. R. 3877-79.
- State's Ex. 336 shows multiple abrasions on the back resulting from blunt trauma. R. 3879.
- State's Ex. 160 shows "sharp injuries" to the right arm and abrasions to the right abdomen with hemorrhage to the underlying tissue. R. 3879-80.
- State's Ex. 161 shows soft tissue swelling and bruising to the left wrist. Bones in the right wrist and hand were broken. R. 3880.
- State's Ex. 162 shows a laceration and several abrasions to the inner, upper left arm. R. 3880.
- 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. R. 3880-81.
- 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. R. 3881.
- State's 166 shows several abrasion injuries, several sharp injuries, and a fractured tibia bone. R. 3882