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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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 22 OF 22
SEALED

ELIZABETH FRANKLIN-BEST
SC Bar No. 72555
Blume Franklin-Best & Young, LLC
900 Elmwood Ave., Suite 200
Columbia, SC 29201
(803) 765-1044
Counsel for Petitioner

MELODY BROWN
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Counsel for Respondent

INDEX

EXHIBITS

EXHIBITS

EXHIBITS

EXHIBITS

EXHIBITS

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)**

RESPONDENT'S POST-HEARING BRIEF

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

CAROLINE SCRANTOM
Assistant Attorney General

RESPONDENT'S POST-HEARING BRIEF INDEX

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)** **RESPONDENT'S POST-HEARING BRIEF**

This matter comes before the Court on application for post-conviction 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. At the conclusion of the hearing on October 23, 2017, this Court set out a schedule for post-hearing briefing. Respondent received Applicant's brief on January 18, 2018. This brief follows. Respondent submits relief should be denied as Applicant has failed to carry his burden of proof on each of the cognizable claims. In support of its position, Respondent would respectfully show the Court:

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. (R. p. 3526, line 17- p. 3532, line 6). On

May 4, 2009, the penalty phase began. (R. p. 3608, line 4 - p. 3609, line 20), On May 7, 2009, the jury found three aggravating circumstances: 1) criminal sexual conduct; 2) kidnapping; and 3) torture. (R. p. 4430, line 20 - p. 4431, line 12). The jury recommended death. (R. p. 443 1, lines 13-19). The judge imposed a death sentence for murder, and thirty years on each of the other crimes. (R. p. 4439, line 7 - p. 4440, line 9). 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." (R. p. 4440, lines 12-20).

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 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

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[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.

[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.

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 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 Honorable G. Thomas Cooper, Jr. 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.[4]

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

[4] The Court has been separately provided copies of the transcripts in these five proceedings.

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 request[5] 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 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").[6]

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[5] 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 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), SCRCP; *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.

[6] 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, (see Mar. 31, 2016, PCR Tr. at 16, lines 8-16; May 12-13, 2016 PCR Tr. p. 132, line 19 – p. 134, line 19; p. 143, lines 7-10), and in numerous presentations where Applicant has attempted to exceed that limitations, (see October 23, 2017 PCR Tr. p. 7 [Respondent maintaining objection to post-2009-trial materials]; May 27, 2016 PCR Tr. p. 62, line 23 – p. 63, line 10 [Court limiting question to 2009 trial and before]).

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.[7]

- 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 amend her report to include raw data from public records (trial transcripts) presented by Respondent during its cross-examination of O'Brien.[8]

- 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.

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[7] 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.

[8] Applicant worked outside the authorized discovery process, using Freedom of Information Act requests in place of the discovery procedures available to a civil litigant in PCR. (See March 31, 2016 PCR Tr. pp. 110-111; see also May 27, 2016 PCR Tr. pp. 79-80). It became clearer only after concessions at the March 16, 2017 PCR motion hearing on Respondent's motion for special interrogatories, that Applicant's counsel's research in compliment to and in support of the requests was simply faulty in many respects, and also that counsel failed to include other known information in the report. (See March 16, 2017 PCR Tr. p. 16). Applicant's multiple errors and refusal to fairly utilize available discovery procedures available within the PCR action led to a series of delays in these proceedings. Moreover, the inadequacies of outside records produced an academic comment which references Respondent's motion wherein Respondent attempted to discover why there were inadequacies, misrepresentations and omissions of known materials in the presentation. See Catherine M. Grosso, Barbara O'Brien, *A Call to Criminal Courts: Record Rules for Batson*, 105 Ky. L.J. 651, 668 (2017) ("In South Carolina, we could not even get a proper list of eligible cases from the court," citing "Respondent's Motion for Special Interrogatories and Concomitant Requests for Production of Documents, Dickerson v. South Carolina, C/A No. 2012-CP-10-03216 (S.C. Ct. Com. PL, Ninth Cir., Sept. 30, 2016) (on file with authors) (recounting efforts to establish the universe of cases)."). Respondent respectfully maintains its continued objection to Applicant's repeated efforts to fault Respondent in this action for inadequacies and inaccuracies produced by his own faulty and inconsistent methods.

Applicant also called Ninth Circuit Solicitor Scarlett Wilson to testify in furtherance of these allegations.[9]

- The hearing was then suspended for a couple of weeks in 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
- 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

[9] 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. (See May 12, 2016 PCR Tr. p. 12).

- 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'Brian
- 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
- 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[10]

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

[10] The original flash drive presented to the Court had Applicant's counsel's notes included. Counsel for Respondent has conferred with Applicant's counsel in order to substitute the flash drive and withdraw Applicant's counsel's notes. (See October 23, 2017 PCR Tr. pp. 36-37). However, as of this filing, that substitution has not yet been made.

- 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. (Mar. 31, 2016, PCR Tr. at 5-20; Apr. 12, 2016, PCR Tr. at 125-46).

E. Surviving PCR Allegations

In Applicant's post-hearing brief of January 16, 2018, Applicant represented that he proceeds only 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.[11]

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. § 16-3-910[12]

(Applicant's Jan. 16, 2018, Br. pp. 2-3). 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. Respondent asks this Court specifically find 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

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[11] This claim of "significant neurological deficits" rests on the allegations pertaining to lead exposure.

[12] 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.

application and/or mentioned at the PCR hearing about which absolutely no evidence is presented"); *see also Suber 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 claimed 11(c)(4) and 11(c)(6) concerning the effective assistance of counsel on direct appeal. (Dec. 7-8, 2015, PCR Tr. p. 221, line 15 – p. 222, line 10).

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 strike[13]

- 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 review[14]

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[13] 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.

[14] 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

- 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)[15]
  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;

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opinion affirming Applicant's convictions. *State v. Dickerson*, 395 S.C. 101, 123-24, 716 S.E.2d 895, 907 (2011).

[15] Respondent addressed constitutionality and whether these allegations were cognizable in a PCR action in its return to first amended application. Not only are these freestanding claims not cognizable in the present action, but 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)).

(2) That the court was without jurisdiction to impose sentence;

(3) That the sentence exceeds the maximum authorized by law;

(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).

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. (R. p. 2028; tr. p. 1836).[16] Portions of the trial record as contained in the Record on Appeal will be of critical importance in discussion of this issue, and the arguments Applicant has offered in regard to one juror in particular, Juror 209. To aid in review, Respondent has attached the following portions of the Record on Appeal to this brief:

Attachment 1, R. pp. 2028-2031 (the *Batson* motion at trial);

Attachment 2, R. pp. 4656-4665 (Clerk's information card and Juror Questionnaire with defense counsel notations for Juror 209);

Attachment 3, R. pp. 1190-1217 (voir dire for Juror 209).

Because a 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;

[16] The selected transcript pages are taken from the Record on Appeal as submitted in Applicant's direct appeal. The large number on the top left of the page reflects the Record on Appeal page number. Those numbers are referenced as "R.p." The smaller numbers on the top right are the original transcript page numbers designated as "tr.p."

- 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. Respondent will expand its position in detail in the following explanation.

1. Defining the Claims and Appropriate Standard of Review

At trial, counsel pursued a *Batson*[17] motion which is reflected on pages 2028 to 2031 of the Record on Appeal. (Attachment 1). As noted, Applicant makes three separate ineffective assistance of counsel 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 form the jury venire." (Applicant's Brief p. 4; Third Amended PCR App.). This is not treated as freestanding claim in this brief based on this Court's previous ruling in regard to Respondent's motion to strike.

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[17] *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986) (hereinafter *Batson*).

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 free-standing claim and is a proper claim in this post-conviction relief matter." In light of this Court's previous ruling, Respondent submits the viability of the freestanding claim has already been ruled upon, and such claim is not allowed independent of an ineffective assistance claim. This, in turn, 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. (Applicant's Jan. 16, 2018, Br. pp. 14-18, 20-21). 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, Respondent

maintains its objection to the introduction of any evidence pertaining to any event occurring after the May 2009 conclusion of Applicant's trial. Where the underlying occurrence of the evidence argued in favor of relief seeps 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 admission 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. [18] Even Applicant is constrained to admit there is only this one instance where a trial court found the prosecutor's explanation lacking.[19] But the larger point is that the relevant consideration here is the *Batson* motion already in the record.

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[18] Curiously, Applicant also makes a bold assertion that had he pursued an appeal in the *Broughton* case, he would have been successful, presumably to gain momentum for some type of pattern. (See Applicant's Brief, p. 14). As a first point, the defendant in that separate case clearly was not successful at trial – the motion was not granted. As a second point, whether relief would have been available on appeal is not a matter this Court can consider – this Court does not exercise appellate jurisdiction over other circuit court cases. As a third point, the assertion shows a recurring failing of Applicant's position – his "pattern" argument seeks to have this Court re-evaluate credibility and cause for strikes ruled upon by other circuit court judges in order to pronounce a non-existing pattern. The flaws in that theory are legion – not only as to omission of critical factual distinctions from case to case to attempt to show a bare statistical likelihood, but also to legal restrictions on limiting the ability of one circuit court judge to overrule another.

[19] Of note, there is a likely possibility the trial judge misapprehended the precedent affecting her consideration of the reason of the strike which included "[h]e had dreadlocks"

Again, 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, 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

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which gave "concern that may be associated with some Rastafarian type situation" and "anti-government beliefs...". *See, e.g., Purkett v. Elem,* 514 U.S. 765, 769, 115 S. Ct. 1769, 1771 (1995) ("The prosecutor's proffered explanation in this case-that he struck juror number 22 because he had long, unkempt hair, a mustache, and a beard-is race neutral and satisfies the prosecution's step two burden of articulating a nondiscriminatory reason for the strike."); *Lacey v. Kramer,* No. 207-CV-02640VAPHC, 2010 WL 1486484, at *6–7 (E.D. Cal. Apr. 13, 2010) (habeas relief denied where the trial court, though noting a simple reference "to dreadlocks may have sent a mixed message that suggested consideration of his race," critically considered the reference to dreadlocks in context, *i.e.,* the prosecutor's observations that the dreadlocks may signal associate with drug culture, thus supporting a reasonable application of *Batson* in light of the facts of record); *State v. Washington,* 288 S.W.3d 312, 316 (Mo. Ct. App. 2009) (agreeing with trial court reference to dreadlocks followed by concerned of "individualistic" qualities prevented a race neutral reason for the strike). This is consistent with our own post-2004-Beyah-trial state precedent that sets out a ***bare*** reference to a hairstyle most identified with a minority group is not race-neutral. *McCrea v. Gheraibeh,* 380 S.C. 183, 187, 669 S.E.2d 333, 335 (2008) ("...in our view, counsel's explanation that he struck the particular juror based simply on counsel's "uneasiness" over the juror's dreadlocks was not a race-neutral reason for exercising a peremptory strike"). Respondent does not ask this Court to revisit the ruling as that would be improper. Respondent notes this issue as but one of the many points of individual case consideration that is solely missing from Applicant's argument, and the generalities and stark numbers study upon which Applicant relies.

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").

In other segments, Applicant's Post-Hearing Brief addresses and includes information included only *in camera* and under seal by this Court. (Applicant's Brief, pp. 21-27). "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. Even so, 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)[20] 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.* 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

[20] 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).

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....")).[21] The Court of Appeals specifically found that 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

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[21] Of note, 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. One need look no further than the Trial Handbook for South Carolina Lawyers by Alex Sanders and John S. Nichols. Section 6:9 reflects such a listing divided into explanations that "have been held to constitute valid, racially neutral explanations for striking jurors" and those considered "not valid, racially neutral explanation." (emphasis in original). Applicant's argument that such educational material is an attempt to thwart *Batson* is strained and unpersuasive. Education is generally considered a benefit to the legal community, not a detriment.

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. Perhaps most troubling, though, is Applicant's publication of the name of a juror that he contends actually had a criminal record that was not disclosed. (See Applicant's Brief, pp. 12-13). The trial records reflect adequate and clear information indicating such assertion is not correct. Such a damaging allegation which directly and negatively affects the character and/or reputation of an individual juror should not be made without at the very least calling or in some manner questioning the juror or otherwise addressing and resolving the great inconsistencies. Applicant did not. Applicant asserts reliance on the post-trial records[22] to make his argument; however, the very post-trial record he relies upon for the allegations against Juror 209 compared to the information from trial conflicts in critical ways (which is expanded upon more fully within), and shows Applicant's conclusions are likely not in the least correct. Respondent submits a copy of the

[22] Though clearly a different record, Applicant nevertheless surmises the Solicitor must have had this information from a different source from a different time. See Applicant's Brief, p. 12. This is not shown by any contemporaneous document. Respondent notes Applicant has information from the prosecution files that reflect spreadsheets and /or other notes made in preparation for the 2009 trial regarding potential jurors. No such history is noted for Juror 209, or, had it been, Applicant would have presented that in support of his argument. There is no support for his argument.

post-trial record referenced in regard to Juror 209. (Attachment 4).[23] To assert an individual juror has a lengthy and serious criminal history when the totality of the available records reflect such assertion is not well-founded should not just be highly suspect, it could lead to serious infliction of unnecessary strain on a juror who has done nothing more than comply fully with her civic duty.[24] In this litigation, it again shows a strained and unsupported argument.

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.

"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

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[23] Respondent has filed only a redacted version of the record with the Clerk of Court for Charleston County in compliance with this Court's Order of March 3, 2015 that the information is not to be publically accessible and the juror's privacy is to be protected, but has submitted an un-redacted version directly to this Court for this Court's consideration.

[24] Also of note is that one juror in the *Beyah* jury selection was excused when she expressed the extreme anxiety caused by allegation of the existence of a criminal record which the juror knew to be false. (See Beyah Trial Transcript, pp. 26-28). It is beyond dispute that special care should be taken before publication of materials that affect the reputation of a private individual. Based on the available record, it does not appear that special care was taken prior to Applicant's assertion against the juror's reputation in this litigation.

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 that 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)). Therefore, to the extent Applicant asserts prosecutorial misconduct as a separate basis for relief, that assertion is either not well-founded in our *Batson* jurisprudence or reflective of a claim barred by the Simmons rule.[25]

At any rate, 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 (which

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[25] Applicant's focus on the elected solicitor personally throughout these proceedings is very telling of the overreaching evident in this allegation. A post-conviction relief action is limited to a challenge to an applicant's "conviction or sentence." See S.C. Code Ann. § 17-27-20. The jurisdictional limitations of the Uniform Post-Conviction Relief Act do not allow for discovery or action against a party or fact witness personally.

Respondent submits he cannot), 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,* ___ U.S. ___, ___, 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 such claim whether construed as an allegation of prosecutorial misconduct, an equal protection violation, or as an ineffective assistance of counsel claim. Respondent, though, specifically and clearly asserts Applicant's assertions against the Solicitor are wholly without merit. Applicant makes a number of allegations against the Solicitor and questions her integrity and character.[26] These accusations are undeniably unsupported by the record before this Court.

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[26] 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

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. (Attachment 1, R. pp. 2027-31). It is without question that "a trial court 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,* ___ U.S. ___, ___, 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?

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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 imaginable to ask the Solicitor the basis for questions she asked during voir dire. Applicant likewise had every opportunity imaginable 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 do so and his paper claims of racial discrimination ring utterly hollow.

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.

(May 12-13, 2016 PCR Tr. pp. 101-102).

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.

(May 12-13, 2016 PCR Tr. pp. 102-103).

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. Further still, Applicant's speculation is also roundly trounced 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. (May 12-13, 2016 PCR Tr. pp. 168-179). There is no cause to conclude the factually supported reasons were in anyway 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 actually had a criminal history which was not disclosed for a proper comparative analysis does nothing – absolutely nothing – to show a false statement was made during the *Batson*

proceedings. For one point, the record[27] 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. (Compare Attachment 4 with Attachments 2 and 3 from trial). For another point, it would not be logical to assign an improper motive to a prosecutor based on reliance upon a report that is later determined to be incorrect or incomplete. Moreover, this is not a matter of evolving reasons which smacks of pretext. *See generally Foster v. Chatman*, ___ U.S. ___, ___, 136 S. Ct. 1737, 1751 (2016) ("... the prosecution's principal reasons for the strike shifted over time, suggesting that those reasons may be pretextual"). Again, the basis for the strikes have been a part of the public record since the 2009 trial. And, as another point, 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

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[27] 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." (Attachment 4).

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 statics – 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, though, presented a statistical analysis in furtherance of this single claim: Solicitor Wilson engaged in misconduct by committing a *Batson* violation. (See Applicant's opening statement; March 31, 2016 PCR Transcript, pp. 22-23). Again, the best evidence lies in the trial record. Solicitor Wilson placed her reasons for exercising each strike on the record. (Attachment 1, R. pp. 2028-31). 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. (May 12-13, 2016 PCR Tr. pp. 101-103). And, as noted, Applicant failed to confront or challenge the solicitor as to any purported

inconsistency in her reasons, and none is readily apparently. The record is the only evidence that 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. (Attachment 1, R. pp. 2028-2029).

On R. p. 4561, 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 consider 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." (Attachment 1, R. p. 2030).

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. (May 12-13, 2016 PCR Tr. pp. 174-178, Respondent's Exhibit No. 4).

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." (Attachment 1, R. p. 2031).

"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, we also have 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." (Applicant's Brief, p. 9). 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. (Applicant's Brief, p. 9). 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. (See R. p. 4561). He does not contest that the juror's information reflected she was single. (R. p. 4561). 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's Brief, p. 9). 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.

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.

(R. p. 838, line 19 – p. 839, line 8).

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. (Applicant's Brief, p. 9). That is of course expressed with a healthy dose of subjectivity by the writer, but it does not deny the equivocation. Further, 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. (R. p. 838, lines 2-5; see also R. p. 4568). Moreover, the juror did equivocate, saying both that she "could consider" but "wouldn't vote for" the death penalty. (See for example, R. p. 842, line 9 – p. 843, line 20). Curiously, Applicant also includes that Juror #92's answer without acknowledging she was struck. (Applicant's Brief, p. 10). That could not be evidence of a similarly situated juror who was seated. At any rate, 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." (Applicant's Brief, p. 10). He takes exception to the Solicitor asking repeated questions concerning the juror's work schedule. (Applicant's Brief, p. 10). However, this underscores the Solicitor's concern was the work the schedule. It is evidence that was no improper motive. Applicant's logic is strained when one considers the responses the juror gave about the hardship and her work at night. Applicant argues other jurors worked, but cites to no indication that any of the other jurors asked about having to leave court proceedings as defense counsel noted Juror #101 had asked, 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." (Applicant's Brief, p. 10). It is an unsurprising question for voir dire in a death penalty case. It is also echoed

in the other questions. (See, for example, Attachment 3, [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." (Applicant's Brief, p. 12). He first argues the convictions did not concern the Solicitor because no questions were posed. (Applicant's Brief, p. 12). 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 in his argument, the prosecution did not ask any juror about his or her conviction. (Applicant's Brief, p. 12). 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. (Applicant's Brief, pp. 12-13). Respondent agrees the trial court record supports the juror is Caucasian, and was seated. (See R. pp. 4469-70). Applicant's other assertions are without merit.

The FBI record obtained post-trial, which Applicant relies upon, (See Applicant's Brief, p. 12), shows Juror 209's name was used as an *alias*, not that the record reflects the juror's background. (Attachment 4). 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. (Compare Attachment 4 with

Attachments 2 and 3 from trial). Applicant failed to call the Juror during the PCR proceedings to clarify the discrepancies. It is curious that he would attempt to fault the prosecutor for not asking Juror #92 about uncontested convictions, but when Applicant wants to rely on information he knows is in conflict with record information – information he wants to rely upon as true – he fails to question the one individual who could clarify the truth of the matter asserted.[28]

Further still, 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. (Attachment 3, R. p. 4657). In fact, the defense asked the juror about her work at MUSC in Charleston. (See Attachment 3, R. p. 1212-1213). 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. (Applicant's Brief, p. 13). 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

[28] It is not disputed that rap sheets are a law enforcement tool, and may not be correct. (See Attachment 4, qualification on rap sheet summary). There has never been a suggestion that law enforcement cannot rely upon the assertions in the rap sheets. Neither has there been a suggestion that a solicitor cannot rely upon the information in the law enforcement rap sheets to show either disqualification or potential for bias against law enforcement or any related concern. However, as defense counsel testified in the PCR hearing, to find if the information is actually correct, one must necessarily look to the individual records. (See May 12-13, 2016 PCR Tr. p. 176, lines 3-16). For example, the FBI records did not return information on Juror #92, and Respondent introduced certified records in the PCR to show the information did exist and supported precisely the information offered at trial by the Solicitor. (See May 12-13, 2016 PCR Tr. p. 177, line 4 – p. 178, line 20). In this PCR proceeding, Applicant has not exercised the same diligence, and depends on the truthfulness of the identification in the post-trial record obtained which is in significant conflict with known information to the contrary.

the Solicitor's truthful response that other jurors seated did not have the same type of history or quantity of convictions.

As noted above, 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 evidence in the record, her hesitation is reflected in the record, as Judge Dennis noted at the time of the *Batson* motion. (See R. p. 4616; see also R. pp. 1055-1069: responses range from "no way" she could ever impose death to could set aside, back to she would always choice life without parole). 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 whatsoever on the reasons presented. (Applicant's Brief, pp. 14-21). That has been previously addressed above. *Infra.*, pp. 23-25. The information is from after the 2009 trial and irrelevant to the *Strickland* analysis.

He next argues the commission programs suggest methods for hiding improper reasons for striking jurors. (Applicant's Brief, pp. 21-27). He omits entirely the evidence that the Solicitor did not even utilize or rely upon any such materials for the strikes. (See May 12-13, 2016 PCR Tr. p.p. 102, line 18 – p. 103, line 2). Further, under *Daise*, the information does not support his claim.

Lastly, Applicant turns to bare statistics. (Applicant's Brief, p. 27). 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.* This 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 put forward 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 from Michigan – 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/. Yet, here, variables are sorely missing, though the pronounce of the findings are still made. 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.").

On this point, 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, (see May 27, 2016 PCR Tr. p. 20, lines 8-23; p. 21, line 8 – p. 23, line 22);
- He criticized the report as incomplete and simple because it didn't speak to other factors that go into making a strike, (see may 27, 2016 PCR Tr. p. 19, line 25 – p. 20, line 4; p. 24, line 7 – p. 26, line 10; p. 58, lines 1-13; p. 59, line 19 – p. 60, line 2);
- 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, (May 27, 2016 PCR Tr. p. 28, line 2- p. 31, line 16);
- 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, (May 27, 2016 PCR Tr. p. 58, line 14 – p. 59, line 18).

In particular, when asked, from a statistical perspective,[29] 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.

(May 27, 2016 PCR Tr. p. 62, line 23 – p. 63, line 5).

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. (March 31, 2016 PCR Tr. p. 94, line 6 – p. 95, line 3). 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. (March 31, 2016 PCR Tr. p. 95, line 4 – p. 96, line 17). This Court also heard how the defense used all of its strikes – exhausted all 10 strikes – on Caucasian jurors; a rate of 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

(May 12-13, 2016 PCR Tr. p. 206, line 20-207, line 1).

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[29] The professor testified that the studies referenced by Professors O'Brien and Grosso where not published in statistical venues.

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. [30] (May 12-13, 2016 PCR Tr. p. 207, lines 13-20). Professor O'Brien did not "analyze defense strikes" in the "study," though she admitted defense strikes "shape the jury" as well as State strikes. (March 31, 2016 PCR Tr. p. 97, lines 13-19). 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 seated. (March 31, 2016 PCR Tr. p. 100, lines 8-9). All of these factors, however, shaped the jury selection in this matter. Further, and important to the instant issue, the context sheds additional light on the weight that should be given any statistical "study." The bare numbers offered here may offer dramatic appeal, but they offer little realism.

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.

Also on this point of "outside the record" evidence, 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. (See March 31, 2016 PCR Tr. p. 106, line 14 – p. 109, line 1; October 23, 2017 PCR Tr. p. 35). This is a keenly important bit of

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[30] 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).

information 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 that the prosecutor routinely did not use all available strikes. (See March 31, 2016 PCR Tr. p. 104, lines 9-25). 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 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.

(March 31, 2016 p. 92, lines 9-21).

While purporting to be a neutral, scientific study, the greater weight of the evidence shows multiple flaws.

Our appellate court has viewed with disfavor the use of 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).[31] 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 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

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[31] 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.

> 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 discretion determination of notices, the logical is even more greatly 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 veniremember 3 demonstrates that the State's reason for striking her was not pretexual, and our analysis of the State's remaining strikes on African-American veniremembers does not demonstrate discriminatory intent.").

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," (emphasis added), 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 viewed through the proper *Strickland* lens, the evidence supports 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.

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 Tobaccoville 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 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"). As this Court has already observed, 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."). In any event, 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. He certainly cannot show prejudice here.

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 South Carolina Court of Appeals likewise took no issue with the circuit court's rejection of any statistical correlation between race and the exercise of strikes in Beaufort County. *Id.* at n.14. Thus, defense counsel does not now and did not then have access to potential jurors' CJIS records which have been detailed in Applicant's post-hearing brief.

Nevertheless, had defense counsel obtained the FBI database information Applicant relies upon here, that information is shown to be incorrect as to Juror #209, and irrelevant to the remaining assertions. Applicant has failed to show either deficient performance or resulting

prejudice in regard to defense counsel's presentation of the *Batson* motion. Of note, capital jury selection was not a mystery to defense counsel Bloom, whose testimony established his substantial experience not just in capital jury trials, but specifically as a jury consultant, and lecturer on capital trial jury selection. (May 12-13, 2016, PCR Tr. p.150, line 13 – p. 152, line19). His jury selection technique utilizes a number system (1 to 7 with 7 being the worst) that he acknowledges rests in large part on subjectivity. (May 12-13, 2016, PCR Tr. p. 163, line 24 – p. 166, line 23). Though any qualified jury would still, necessarily, have members who could return a death sentence such that defense counsel Bloom could not state he was "satisfied" with the selection, he did opine that he believed there to be "three or four jurors who would be very open to mitigation based on their answers in voir dire." (May 12-13, 2016 PCR Tr. p. 167, lines 11-24). In fact, if one applies the admitted numbering system Juror #92, the record shows the juror was not particularly a juror defense counsel highly favored for selection. (R. p. 4570 "3+"). This may support an inference that the strike was not necessarily one counsel would otherwise challenge. Moreover, the third strike – the one for Juror #315 – is well supported by the record. While defense counsel did not mark a score for that juror that is evidence in the record, her hesitation is reflected in the record, as Judge Dennis noted at the time of the *Batson* motion. (See R. p. 4616; see also R. pp. 1055-1069: responses range from "no way" she could ever impose death to could set aside, back to she would always choice life without parole). And there is simply no basis to question the clear, and supported, factual basis for the strike. Again, the reasonable inference is that there was simply nothing with which to challenge that strike.

The record most comfortably 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.

In sum, 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. What the selection shows is 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. And, though the matter is barred from review on the merits, Applicant cannot carry his burden of proof on a freestanding claim. Applicant is not entitled to any 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. (*See* Third Amended PCR App.). 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's Brief, pp. 68-71). 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 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, we 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. Moreover, trial counsel

himself 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, for a handful of reasons, Bloom could not uncover or produce enough evidence to make a more persuasive presentation than was presented on this subject. Applicant further 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

Before considering the PCR presentation on this matter, it is helpful to briefly review the hallmarks of the sentencing-phase presentation and the inclusion of the evidence of lead poisoning known to defense counsel.

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. (R. pp. 4215-24). 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 in a condition of delusions and/or paranoia and

hallucinations. (R. pp. 4231-34). 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. (R. pp. 4234-40).

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. (R. pp. 4270-4312). 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. (R. p. 4271). 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." (R. p. 4272). Later, he expounded upon why, stating "there is no safe lead level for a child to have. It is never a vitamin." (R. p. 4283). 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]." (R. pp. 4281-81). His testimony corresponded to a PowerPoint graph depicting how childhood blood-lead levels correspond to incidences of adult crime. (R. p. 4282). 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." (R. pp. 4284-85).

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." (R. pp. 4313-14). Cunningham, like Israelian, stated that he could have ordered a current lead level test for Applicant and did not. (R. p. 4313). He later noted that Applicant's one test was not high enough to be flagged by the Center for Disease Control for additional testing. (R. pp. 4316-17). 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. (R. pp. 4317-20).

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. (R. pp. 4308-09).

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. (R. pp. 4113-15, 4159-61, 4173). 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.

(R. pp. 4113-14).

Defense counsel Bloom then extracted an agreement from Hammock that agencies have taken steps to try to reduce lead levels in certain housing projects. (R. p. 4115). 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." (R. pp. 4159-60).

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. (Dec. 7-8, 2015 PCR Tr. p. 413, 427-28). 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. (Dec. 7-8, 2015 PCR Tr. pp. 414-15). 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 lead paint problems over the decades." (Dec. 7-8, 2015 PCR Tr. p. 402). 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." (*Id.*). Defense counsel then turned this information over to psychiatrist Dr. Robert Phillips as well as psychologist Dr. Mark Cunningham, who both testified at trial. (Dec. 7-8, 2015 PCR Tr. p. 403).

Defense counsel Bloom also 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. (Dec. 7-8, 2015 PCR Tr. pp. 403-05). According to defense counsel Bloom, Applicant "wasn't really interested in helping us build a mitigation case." (Dec. 7-8, 2015 PCR Tr. p. 404). 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." (Dec. 7-8, 2015 PCR Tr. p. 379). 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. (Dec. 7-8, 2015 PCR Tr. pp. 415-16).

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. (Dec. 7-8, 2015 PCR Tr. p. 404; Applicant's Exhibit 1 from Dec. 7-8, 2015).

This scarcity led to yet another, and perhaps the most compelling, 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. (Dec. 7-8, 2015 PCR Tr. p. 427-30). 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." (Dec. 7-8, 2015 PCR Tr. p. 429). 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.

(Dec. 7-8, 2015 PCR Tr. pp. 429-30).

Instead, he presented the extent of the information he could gather on lead poisoning through his psychologist and social worker. (Dec. 7-8, 2015, Tr. p. 430).

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 himself 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. (May 12-13, 2016 PCR Tr. pp. 153-56). The emails themselves became part of this Record at that hearing, (Respondent's Exhibit 3 from May 12-13, 2016), and defense counsel 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.

(May 12-13, 2016 PCR Tr. p. 157).

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. (*See* Dec. 7-8, 2015 PCR Tr. pp. 63, 67-69, 319). 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

Also at PCR, 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. (Dec. 7-8, 2015 PCR Tr. p. 11). 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.* (Dec. 7-8, 2015 PCR Tr. pp. 35-36). 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—and not Applicant—provided Canfield with data points to support his testimony.[32] (Dec. 7-8, 2015 PCR Tr. pp. 46-114). Moreover, to the extent Canfield plotted Applicant's blood-lead levels,[33] 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. (Dec. 7-8, 2015 PCR Tr. pp. 48-49). 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." (Dec. 7-8, 2015 PCR Tr. p. 39). 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. (Dec. 7-8, 2015 PCR Tr. p. 60). 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

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[32] 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.

[33] It bears noting that 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 Saturday eve before trial. The plot points or notations presented to this Court pertaining specifically to Applicant were not inserted and provided until their presentation in open court. (Dec. 7-8, 2015 PCR Tr. pp. 49-51, 56). Canfield's PowerPoint presentation became Applicant's Exhibit 3 at the December 7, 2015, evidentiary hearing over Respondent's objection to the discovery violation. (Dec. 7-8, 2015 PCR Tr. at 96-97). These slides have been included in Applicant's post-hearing brief. (Applicant's Brief, p. 54).

Armon's childhood residences, or when that may have occurred in relation when Applicant may have lived there. (Dec. 7-8, 2015 PCR Tr. pp. 53-61). 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. (Dec. 7-8, 2015 PCR Tr. pp. 100-14).

Canfield's remaining testimony, therefore, does not provide so clean a foundation for projecting Applicant's blood-lead levels. 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, 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—much like at trial—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. (Dec. 7-8, 2015 PCR Tr. pp. 156-58). 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. (Dec. 7-8, 2015 PCR Tr. p. 160-61, 164).

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. (Dec. 7-8, 2015 PCR Tr. pp. 188-89). 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. (Dec. 7-8, 2015 PCR Tr. pp. 191-94). 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. (Dec. 7-8, 2015 PCR Tr. pp. 207, 210). Israelian characterized this reduced score as consistent with previously assessed deficiencies which could, according to Israelian, relate back to lead exposure. (Dec. 7-8, 2015 PCR Tr. p. 215).

Ultimately, Israelian described the results of her own neuropsychological assessment conducted with Applicant, including an IQ test wherein Applicant's full-scare score was 86. (Dec. 7-8, 2015 PCR Tr. pp. 225-63). She opined that Applicant has executive frontal-lobe dysfunction. (Dec. 7-8, 2015 PCR Tr. pp. 264-66). She additionally noted the impact of cocaine, a toxin, had on Applicant's functioning. (Dec. 7-8, 2015 PCR Tr. pp. 267-72). 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. (Dec. 7-8, 2015 PCR Tr. p. 270). "[L]ead exposure will predispose you to cocaine abuse." (Dec. 7-8, 2015 PCR Tr. p. 271).

Israelian also discussed Applicant's maltreatment as a child. (Dec. 7-8, 2015 PCR Tr. pp. 272-74). 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. (Dec. 7-8, 2015 PCR Tr. pp. 274-80). She opined his capacity to conform was substantially impaired from (1) lead neurotoxicity, (2) childhood maltreatment, and (3) cocaine psychosis. (Dec. 7-8, 2015 PCR Tr. p. 281). 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. (Dec. 7-8, 2015 PCR Tr. pp. 288-90).

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 hone in on 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.

Israelians' testimony signifies a stark 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 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 important on this point is Bloom's PCR testimony and his correspondence with Dr. Herbert Needleman noting 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, himself interjected that he would need more information. But Bloom had none.

Nor has Applicant's PCR presentation compellingly proffered additional lead-based mitigation in a manner undermining confidence in the jury's sentencing recommendation. It remains apparent that the only lead level screening conducted upon Applicant occurred when he was almost 12 years old, and that 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 rather 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. At the outset, Respondent notes Applicant's representation by able capital counsel at trial. Jeff Bloom established through his PCR testimony that he is seasoned in capital work and in capital jury selection consulting, having consulted on a few dozen capital jury selections alone. He testified he never had a single funding request denied in this case. Additionally, Bloom established that in preparation for trial he hired and worked with Dale Davis, a mitigation investigator who has worked on a number of other capital cases, as well as Vicki Childs as a fact investigator. (Dec. 7-8, 2015 PCR Tr. pp. 387-89; May 12-13, 2016 PCR Tr. p. 151, line 12 – p. 152, line 22). Drew Carroll, second chair trial counsel, likewise

established though his PCR testimony that prior to appointment on Applicant's case, he had experience not only trying murder cases, but with capital murder. Carroll explained he was first contacted by Judge Dennis to represent Applicant at trial, and Carroll in turn made contact with Bloom to serve as co-counsel—they previously worked together on a capital case. (Dec. 7-8, 2015 PCR Tr. pp. 369-71). Stated succinctly by Carroll, counsel presented on Applicant's behalf at the trial's sentencing phase:

> Mitigation theory was that Mr. Dickerson had lived a very difficult life. He was brought up by a mother who was distant at best, very detached from him. His father died in prison while serving a life term after having been convicted of committing a murder. He had been abused. Our, our investigation showed over the course of his life had spent a significant amount of time incarcerated, and so he was a broken individual who suffered from, we think, some drug-induced psychosis during this event

(Dec. 7-8, 2015 PCR Tr. p. 371, line 25 – p. 372, line 8; *see also id.* pp. 382-85; *id.* p. 391, lines 2-10 (Bloom agreeing with Carroll's recitation)).

Now on PCR, Applicant alleges that Bloom and Carroll 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. (Third Amended PCR App.).

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.*

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. (R. p. 3770, line 17 – p. 3777, line 23). 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. (R. p. 3752, line 19 – p. 3753, line 11). The court finished: "your objection is noted and preserved." (R. p. 3753, line 11).

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.[34] 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 advance of trial. (Dec. 7-8, 2015 PCR Tr. p. 394, line 19 – p. 395, line 4; *id.* p. 419, line 1 – p. 422, line 25; R. p. 3737, line 7 – p. 3753, line 11). Defense counsel Bloom stated that once admitted, he "could tell from the jury's reception of the evidence that it was . . . bad[.]" (Dec. 7-8, 2015 PCR Tr. p. 395, lines 10-12).

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. (Dec. 7-8, 2015 PCR Tr. p. 396, lines 3-11). 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. (Dec. 7-8, 2015, Tr. p. 397, line 18 – p. 398, line 9). "You don't

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[34] 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).

need have to keep objecting just because the jury is now in the courtroom." (Dec. 7-8, 2015, Tr. p. 398, lines 4-6).

But even assuming this issue were later raised on appeal and found unpreserved by our appellate court, Davis' testimony was 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

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. (Applicant's Brief, pp. 62-63).

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*. (R. p. 4364, line 1 – p. 4378, line 4). 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. (R. p. 4369, line 3 – p. 4370, line 24; 4373, line 24 – p. 4378, line 4). 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. (*See, e.g.*, R. p. 4371, line 6 – p. 4375, line 17). The State did not ask the jury to weigh aggravation against mitigation and come to a decision that way. (*Id.*).

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." (Dec. 7-8, 2015 PCR Tr. p. 378, lines 15-24). But defense counsel Carroll acknowledged in later testimony that it is permissible for a prosecutor to argue in favor of their position. (Dec. 7-8, 2015 PCR Tr. p. 385, line 15 – p. 386, line 21). 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. (Dec. 7-8, 2015 PCR Tr. p. 399, line 14 – p. 400, line 10). 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. (Dec. 7-8, 2015 PCR Tr. p. 423, line 14 – p. 425, line 7).

Respondent submits that the State's sentencing-phase argument did not leap outside the bounds of appropriateness and into the territory of invading the province of the jury. When it did, near its conclusion, defense counsel Bloom objected and the objection was sustained. (R. p. 4377, lines 16-21). Otherwise, the closing argument did not warrant objection because it stuck to the facts presented and reasonable inferences therefrom and did not act to inflame the passions of the jury in a manner disallowed within the framework of a capital trial. 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 efforts through the *Strickland* lens 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 sentencing[35]; 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. (Third Amended PCR App.).

---

[35] 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.

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 partook 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 Indigent Defense. Within that memorandum, he suggested both the photograph issue and the Dr. Phillips issue as potential appellate issues. (May 12-13, 2016 PCR Tr. pp. 195-96, 224-25). 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. (May 12-13, 2016 PCR Tr. pp. 187-98). Bob Dudek, Chief Appellate Defender with the Commission on Indigent Defense, also testified, in a general nature, about Bloom's memorandum and the proffered issues at the December 8, 2015, PCR hearing. (Dec. 7-8, 2015 PCR Tr. pp. 438-61).

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 Schandl[36] to testify in regards to specific injuries recorded as part of the victim's autopsy. (R. p. 3614, line 23 – p. 3615, line 9). Over Applicant's objection, the trial court admitted the photographs subject to this allegation as probative of the aggravating factor of physical torture. (R. p. 3820, line 24 – p. 3834, line 9; R. p. 3874, lines 13-25). Shandl's testimony was thereafter received and trial counsel did not cross-examine the pathologist. (R. p. 3872 – p. 3898).

---

[36] 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).

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." (May 12-13, 2016 PCR Tr. p. 195, line 8 – p. 196, line 6; *id.* p. 224, lines 10-25). 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 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. (Dec. 8, 2015 PCR Tr. p. 443, lines 7-17).

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. (R. pp. 4206-10). Phillips' testimony assigned behavioral significance to certain events in Applicant's life prior to the murder. (R. pp. 4211-38). 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. (R. pp. 4239-40).

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. (R. pp. 4241-42). Bloom lodged an objection raised during an off-record bench conference. (R. p. 4243, lines 6-

9).[37] 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 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." (R. pp. 4243, line 10 – p. 4245, line 20).

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. (May 12-13, 2016 PCR Tr. p. 196, lines 15-23; *id.* at p. 225, line 3 – p. 228, line 23[38]). Defense counsel Bloom acknowledged that he included this issue in his memo to appellate counsel as a suggestion for the appeal. (May 12-13, 2016 PCR Tr. p. 196, lines 7-14). Appellate Counsel Dudek simply testified on this point that he did not raise that issue on appeal. (Dec. 7-8, 2015 PCR Tr. p. 444, lines 4-25).

---

[37] 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 is 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).

[38] ". . . it fools a jury into this thinking, well, if he knew right from wrong there's, you know, no mental health problem here." (*Id.* at p. 226, lines 14-16).

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)).

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. Burkhart,* 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 substantially 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 not 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. 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). Respondent submits Applicant has failed to show error and prejudice in regards to appellate counsel's performance and that 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. (R. p. 4439, lines 7-10). 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. Vazsquez*, 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).

However, should the murder sentence be disturbed, this sentence should be upheld as there would no longer be a conflict with the statute.

M. Conclusion

Having made its post-hearing brief, Respondent submits that Applicant is not entitled to post-conviction relief on any surviving allegation. Respondent further submits that all allegations appearing in the third amended PCR application yet not presented in Applicant's post-hearing brief have been waived and abandoned. Respondent submits that 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, should be ordered vacated.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

CAROLINE SCRANTOM
Assistant Attorney General

BY: _____
MELODY J. BROWN

BY: _____
CAROLINE SCRANTOM

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803)734-6305

March 23, 2018.
Columbia, South Carolina.

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA) COUNTY OF CHARLESTON)) William O. Dickerson, #6030,)) Applicant,) v.)) State of South Carolina,) Respondent.))	FOR THE NINTH JUDICIAL CIRCUIT IN THE COURT OF COMMON PLEAS **C/A No. 2012-CP-10-3216** **(Capital PCR)** **RESPONDENT'S POST-HEARING BRIEF**

ATTACHMENT 1

-- I will come down and we will do that with the court reporter. Solicitor, would you approach, as well?

SOLICITOR WILSON: Yes, sir.

BENCH CONFERENCE:

THE COURT: Let's take them one at a time. Which one first?

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?

MR. BLOOM: Yes, sir.

THE COURT: No challenge as to -- for three?

MR. BLOOM: No, sir.

THE COURT: Solicitor, give me your race-neutral or gender-neutral reason for striking juror number ten.

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 an 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.

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?

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

SOLICITOR WILSON: She had qualified convictions.

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?

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 with ---

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.

THE COURT: Thank you.

(BENCH CONFERENCE CONCLUDED)

THE COURT: Are there any other matters from the state or from Mr. Dickerson before we ask the jury to come forward?

SOLICITOR WILSON: None from the State, Your Honor.

THE COURT: Anything else, Mr.

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)** **RESPONDENT'S POST-HEARING BRIEF**

ATTACHMENT 2

[redacted – see Brief n. 23]

Return this bottom portion as instructed during the [illegible]

INFORMATION SECTION (PLEASE PRINT OR TYPE CLEARLY.)	FOR TERM BEGINNING WEEK OF:	04-20-2009	JUROR NUMBER:	208

	AGE	DATE OF BIRTH	# OF CHILDREN	MARRIED	SINGLE	WIDOWED	DIVORCED
Charleston, SC	49		2	☑	☐	☐	☐

	PRESENT OR FORMER EMPLOYER	YEARS
	Parkwood Pediatric Group	1
EDUCATION COMPLETED	NAME OF SPOUSE Gary Melville	
Professor	SPOUSE'S PRESENT OR FORMER EMPLOYER Trident Technical College	YEARS 12

HAVE YOU EVER SERVED ON A ☐ CRIMINAL JURY? NO

HAVE YOU EVER BEEN A PARTY TO A CIVIL LAWSUIT? ☐ YES ☑ NO

HAVE YOU EVER BEEN CONVICTED OF A CRIME (OTHER THAN A MINOR TRAFFIC OFFENSE)? ☐ YES ☑ NO

NAME AND/OR ADDRESS CORRECTION: If the information below is incorrect, please write in the correct information in the space provided to the left.

MELVILLE DONNA L
[illegible]
C [illegible]

4

THE PRESIDING JUDGE REQUIRES THAT YOU ANSWER TO THE BEST OF YOUR KNOWLEDGE THE FOLLOWING QUESTIONS AND RETURN WITHIN THREE DAYS OF RECEIPT OF THIS LETTER.

petite
sht. blk hair

JUROR QUESTIONNAIRE

PLEASE PRINT YOUR ANSWERS IN BLUE OR BLACK INK ONLY.

"no strg beelgs"
"DP apply to HR of a child" — Sol-spectrum? "it in middle"

To Prospective Jurors:

Please answer all of the questions as completely and honestly as you can. You may be questioned in Court, but your answers to these questions entered herein will speed the process.

Please do not assume anything from these questions. The fact that any one or all of them are being asked does not necessarily have anything to do with the evidence you will hear.

As you answer the questions, please keep in mind that there are no "right" or "wrong" answers.

Do not assume that any of your answers will qualify you or disqualify you from serving on this jury.

JUROR NUMBER: 209

1. Name: Donna Melville

Age: 49 Date of Birth: ___ / ___ / ___
Month Day Year

2. Address: [redacted]

Charleston SC 29412

What is Your Race? : white

Do you: (check one) { } Rent {✓} Own { } Live with other family member/friends

What community or area do you live in? James Island

How long have you lived in Charleston County? on + off 49 years

Have you lived outside of Charleston County within the last 10 years? yes

If so: Where: Berkeley County When: 1995 - 2001

3. What is your marital status? (Check all that apply)
{ } Never married {✓} Married (how long?) 7yrs (to 2nd spouse) {✓} Divorced (2001)
(22 years to 1st spouse)

{ } Separated { } Widow/Widower

4. If married, is your spouse: (Check all that apply)
{✓} Currently Employed { } Unemployed { } Homemaker
{ } Retired { } Student

5. Name of Spouse: Gary Melville

6. Employer of Spouse: Trident Tech College

7. Educational level of Spouse: Masters

8. What kind of work does your Spouse do? teach Psychology

9. If you have children, list the number, ages and gender: two, 27 & 21, male

10. What are (or were) your parents' primary occupations?

Mother: homemaker

Father: electrician

11. Are you: (Check all that apply)
{✓} Currently Employed { } Unemployed { } Homemaker
{ } Retired { } Student { } Disabled

12. Name of your employer: Parkwood Pediatric Group

Address: 1243 Savannah Hwy Chas SC

How long have you worked there? 9 Months

13. Please give a description of work you do at your job:

Nursing assessments of Pediatric patients from birth to 18 years. Administer Vaccinations

Do you (or did you) have a second job? { } yes {✓} no
If yes, please explain:

14. Are you the primary wage earner for your family? { } yes {✓} no
Are you a salaried or hourly employee? { } salaried {✓} hourly

15. Please list any other jobs, occupations, and employers you have held in the last 10 years:

Charleston County School district- Guidance Counselor
MUSC- Childrens Hospital- Registered Nurse
University Medical Associates- Pediatric Oncology- RN

16. Have any of your jobs involved supervisory responsibilities? { } yes {X} no

Explain: _____

17. Please name the schools you have attended, their locations, and the grade level completed:

Grade School: J. Howard Berry Elem. N. Charleston 7th

Junior High School: _____

High School: North Charleston High School- N. Chas. 12th

18. If you attended college, what school or university? Trident Tech College
College of Charleston

Major Subject: Nursing
Psychology
Minor Subject: Sociology

Did you graduate? {X} yes { } no

What degree(s) did you receive? Associate in Nursing
Bachelor of Science

19. If you attended graduate school after college, what was your:

Major Subject: Counseling
Elementary School
Minor Subject: _____

What university did you attend? Citadel

What degree(s) did you receive? Master of Education in
Elem. School Counseling

20. What type of training, if any, have you received beyond high school?

Training Associated with Nursing

21. If you were in the service (including National Guard or Reserves), please state:

N/A

Branch:_____ Highest Rank:_____

Occupational Specialty:_____ Dates of Service:_____

Type of Discharge:_____

Please describe combat experience, if any:_____

_____

22. Are you a member of any church, temple, or other religious organization? { } yes {X} no

If so, what is the name and location?_____

23. What activities, if any, are you involved with at present with your church, temple, or religious organization?

N/a

_____

24. What societies, unions, professional associations, volunteer groups, civic clubs, or other organizations have you or any family members joined?

~~Sorra~~ Chi Sigma Iota, SC Counselors Association

Happy Days Special Times

Are you/they presently a member? { } yes {X} no

25. Do you know any of the following attorneys or have you, or any family member or close personal friend, been represented by any of them?:

___Solicitor Scarlett Wilson
___Deputy Solicitor Bruce DuRant
___Attorney C. Andrew Carroll, of the Joye Law Firm
___Attorney Jeffrey P. Bloom, of Columbia.

If you checked yes, please explain:

NO

_____

_____

_____

26. Have you ever served as a juror, witness or a party in a law suit? {X} yes { } no

If yes, which one? Juror ✓ Witness_____ Party to Law Suit_____

In which court: {✓} State Court How many times? 6
{✓} Federal Court How many times? 1
{ } Military Court How many times?_____

What type(s) of civil case(s)? UNSure

What type(s) of criminal case(s)? UNSure

Have you ever served on a grand jury? { } yes {✓} no
If yes, how many times?_____

27. Have you, or any family members or anyone close to you, ever studied law? { } yes {✓} no
If yes, please describe:

28. Have you, or any family or household members, ever been employed by any organization, or connected with any organization that represents or assists criminal defendants, or crime victims? If so, where and when, and please explain?

NO

29. Have you, or any family or household members, been employed by law enforcement or applied for work with law enforcement? { } yes {✓} no
If yes, please state where and when:_____

30. Have you, or any family or household members, ever received any training in law enforcement? { } yes {✓} no If yes, please describe the training, job title, and your relationship:

31. Have you, or any family or household members, ever volunteered your services to any law enforcement agency? { } yes {✓} no
If yes, please describe:_____

32. Have you, or any family or household members, now or ever been connected with a member of a Solicitor or Prosecutor's Office, by blood or marriage, or as a close friend?
{ } yes {✓} no If yes, please state who, which office, position held, and dates:

33. Do you personally know anyone in the Solicitor's Office or Public Defender Office? ND

34. Have you, or any family or household members, ever had the occasion to use the services of any state or federal prosecutor's office?
{ } yes {✓} no If yes, please describe:

35. Have you, or any member of your immediate family or household, ever been a victim of a crime?
{✓} yes { } no If yes, please describe:
≈1979 Armed Robbery McDonalds Ashley Phosphate held at gun point.

36. Was anyone arrested for any of the above incidents? { } yes {✓} no

What, if anything, happened to the person charged after the arrest?

If there was a trial, did you testify? { } yes {✓} no

37. Have you known anyone who died as the result of a violent act? { } yes {✓} no

38. Have you, or any family or household member, ever been a witness to a crime?
{ } yes {✓} no If yes, please describe:

39. What crime?

When?

Result?

40. What are your main source(s) of news and information? (Check all that apply)

{ } Television {✓} Newspaper { } News Magazines

{✓} Conservations with others { } Radio
{ } Internet { } Other

41. Do you presently have a magazine subscription? {✓} yes { } no
If yes, please identify: Southern living, Outdoor Photography, Shutterbug, Coastal Living

42. Which newspapers do you read? (Check all that apply)
{ } USA Today {✓} The Post and Courier { } Other

List all other newspapers and magazines that you presently read:

How often do you read the newspaper?
{ } Daily { } Most Days { } Weekends {✓} Seldom { } Never

What internet sites, if any, do you read for news and information?

If something interesting catches my eye when I open my yahoo account everyday, I will read it.

43. What television shows do you regularly watch? Seinfeld reruns, Nature & travel channel.

What radio stations/programs do you presently listen to? None

44. Which television stations do you watch for local and state news? None

Which radio stations do you listen to for local and state news? None

45. Do you, or any member of your immediate family or household, have any educational training, professional or volunteer employment in the following fields? (Check all that apply)

(Self) Family

Medicine (including nursing, EMT)	{✓}	{ }
Psychology, Counseling, Mental Health	{✓}	{✓}
Criminal Justice, Government	{ }	{ }
Political Science, Police Sciences, Sociology	{✓}	{✓}
Forensic Sciences, Pathology	{ }	{ }
Biology, Chemistry	{ }	{ }
Religion, Philosophy, Ethics	{ }	{ }
Photography, Videography	{✓}	{ }
Security/Investigative Services	{ }	{ }
Social Work	{ }	{ }

Briefly describe the relationship to you and the area of work of the person(s) for any of the above categories you have checked: My Spouse and I both have a Master's Degree in Counseling. My husband teaches Psychology & I have been practicing Nursing since 1995. I am a serious photographer in my spare time.

46. Have you ever had a bumper sticker on your car? { } yes {✓} no
If yes, what did it say:

47. What is your opinion, if any, about the death penalty?
I have no strong opinion about the death penalty.

49. Have you, or any member of your immediate family or household, ever belonged to any group or organization that is either in favor or opposed to the death penalty, or attended a rally, handed out leaflets, signed petitions, lobbied legislators, campaigned on the death penalty issue, or traveled to the site of a scheduled execution? { } yes {✓} no
If yes, please explain:

Is there other information which you believe might be important for the Court and attorneys to know? { } yes {✓} no
If yes, please explain:

STATE OF SOUTH CAROLINA) COUNTY OF CHARLESTON)) William O. Dickerson, #6030,)) Applicant,) v.)) State of South Carolina,) Respondent.)) _____)	FOR THE NINTH JUDICIAL CIRCUIT IN THE COURT OF COMMON PLEAS **C/A No. 2012-CP-10-3216** **(Capital PCR)** **RESPONDENT'S POST-HEARING BRIEF**

ATTACHMENT 3

Ask her to come in.

(JUROR NUMBER 121 ENTERS COURTROOM)

THE COURT: Thank you, Ms. Green. I am going to excuse you from further participation in this dispute. You're free to leave. You've finished your services this week. Thank you for working with us, thank you for your patience. Good luck to you, ma'am.

JUROR NUMBER 121: Thank you.

(JUROR NUMBER 121 EXITS COURTROOM)

THE COURT: Next is Donna Melville, Number 209.

(JUROR NUMBER 209 ENTERS COURTROOM)

THE COURT: Good morning, Ms. Melville. If you will sit and pull yourself up so that you can speak into that mic comfortably. How are you?

JUROR NUMBER 209: I'm good. How are you?

THE COURT: Fine. I apologize for keeping you so long. In this process, we make the best predictions that we can but you don't always get them right.

JUROR NUMBER 209: I understand.

THE COURT: But I certainly

appreciate you patience. We are going to continue the process that we started on Friday. There are some questions that I have for you and then the attorneys may have some questions. As you will recall from Friday, there really are no correct answers to any of these questions. Their purpose is really to help you to make a determination as to whether you can be a fair and impartial juror?

JUROR NUMBER 209: Okay.

THE COURT: And to help us make that assessment and determination, as well. So all that we ask is that you be truthful in your responses and that you will respond completely. Will you do that?

JUROR NUMBER 209: I can do that.

THE COURT: Please understand that we are not trying to change your beliefs or philosophies. You're entitled to those, and don't think that you have to defend them at all. Nor are we trying to invade your privacy either. Just answer the questions completely and truthfully, that is all that we are asking of you.

JUROR NUMBER 209: Yes, sir.

THE COURT: I would remind you in that regard that you are still under oath in this matter. Okay?

JUROR NUMBER 209: Yes, sir.

DONNA MELVILLE, being duly sworn to tell the truth, the whole truth and nothing but the truth, testified, as follows:

VOIR DIRE EXAMINATION

BY THE COURT:

Q. Since we were last together, have you talked with anyone or let anyone talk about this case in your presence?

A. At work some of the others had read things in the paper and they asked me if this was the trial that I was going to be on the jury for, and I told them yes but that was the extent of it.

Q. That was the extent of it?

A. (Affirmative nod).

Q. The court would not consider that to violate anything, that's just simply responding where you're going to be. That's all.

A. Right.

Q. They didn't talk any specifics about the case itself, is that correct?

A. No, they didn't.
Q. Or attempt to talk with you about it?
A. (Negative gesture).
Q. Have you read anything about it or viewed any news accounts about it?
A. No, sir.
Q. I know you heard a number of names on Friday but I failed to mention two names that I need to ask you about. Are you related by blood or marriage, have any business dealings with or socially or casually acquainted with or have any dealings with Jeff Osborne or Matt Casey?
A. No.
Q. You were given a sheet when you came in that sets forth three types of jurors, have you had a opportunity to review that sheet?
A. (Affirmative nod).
Q. Which type most accurately describes you?
A. Type three.
Q. Type three as I understand it, basically we're talking about -- the type juror that we are talking about, that jury would have the responsibility of determining an appropriate sentence in a murder case.

What type three says is that while that juror has just completed, would have completed the first phase, that is that they've found that person guilty of the crime of intentionally killing somebody, not a mistake, not manslaughter, not self-defense, not accident, a person with malice has killed somebody intentionally, willfully, meant to do, they've got the right person and now the jury has concluded that the State has the right person charged with the crime.

This is before you start the second phase where the jury is now going to hear some evidence to help the jury make a determination as to what the appropriate sentence would be, you haven't heard that yet.

Am I to understand that notwithstanding that you have been a part of the jury where you have considered a very serious, horrible crime, somebody had been killed intentionally, you still don't have a decision in your mind of what the appropriate sentence would be at that point. Is that correct?

A. Yes, sir.

Q. Because a type three juror says 'I haven't

heard it all yet", and that's what you are?
A. (Affirmative nod).
Q. In other words, you want to wait until you go through that part where you hear all the evidence, receive the law and then deliberate about what the appropriate sentence would be. Is that correct?
A. (Affirmative nod).
Q. Now, you understand that a jury has a very important function in this process of dispute resolution. They have the job of deciding the facts, they are the sole judges of the facts. Do you understand that?
A. (Affirmative nod).
Q. I appreciate that -- it's very conversational and it doesn't offend me in the slightest, nor does -- Ms. Garrison (court reporter) is sitting there and she can put "nods head" but it's very important and would help if you would just say "yes" or "no".
A. Okay.
Q. Please understand that it is not offensive at all, it's just for the purpose of the record. You would promise if you were on a jury to decide those facts by considering one

source, that's evidence. Evidence is testimony of witnesses and exhibits. You would do that?
A. (Affirmative nod).
Q. Obviously you're expected to use your common sense, your sense of logic and reasoning and your life's experiences. Part of that function is that you promise that you'd have an open mind, just as you've just talked about in that situation we just discussed. You hadn't heard all the evidence about the appropriate sentence and you'd have an open mind as to the sentence, is that correct?
A. Right.
Q. That is the way that a jury has to start a case, do you understand that?
A. Yes, I do.
Q. That would be yours?
A. Yes.
Q. You'd promise not to change that until the court told you to begin your deliberations. Is that correct?
A. That's true.
Q. And you have the ability then of applying, and would apply, your common sense, your sense of logic and reasoning fairly in deciding what

you believe to be the truth?
A. Yes.
Q. Now, you understand that in a criminal dispute in this state persons who are accused are never required to prove or disprove anything at all; do you understand that?
A. (Affirmative nod).
Q. In fact, we talked about one principle of law, that is the presumption of innocence on Friday and I mentioned to you that while Mr. Dickerson has been accused of several criminal offenses that the law presumes that he is innocent until the State proves him guilty beyond a reasonable doubt. Do you understand that?
A. Yes, sir.
Q. As I recall, you have no problem with that principle of law?
A. No.
Q. That principle of law is really not just a thought, it is an active presumption. It means that when people are accused of something, we're required as citizens, as persons in this state, to look at him and see him as innocent. Do you see Mr. Dickerson as innocent of those

charges against him today?
A. Yes, sir.
Q. Okay. You understand that that position can't change until we've been convinced beyond a reasonable doubt and that is each element of the offense has been established to our satisfaction to make us change that position. Do you understand that?
A. Yes, sir.
Q. I would tell you that in criminal disputes, persons accused don't have to prove or disprove anything. They certainly don't have to prove their innocence. They don't even have to present any evidence. Do you understand that?
A. Yes, I do.
Q. Nor does a person accused of a criminal offense even have to testify in a dispute, do you realize that?
A. Yes.
Q. And you understand that the court would instruct you, if you're on a jury in that situation, that you couldn't use that against that person in any way, shape or form at any time during that proceeding. Would you have

any problem following that instruction?
A. No.
Q. Okay. As I understand it, you would then after hearing all the evidence and receiving the law, you would then in that situation be able to retire, evaluate that evidence and decide for yourself whether or not the State has convinced you beyond a reasonable doubt of the offense of murder? Is that correct?
A. That's correct. Yes, sir.
Q. And my instruction would be that if you are convinced as to each element, your responsibility and duty would be to return a verdict of guilty. But if you weren't convinced of one or more elements, then your duty and responsibility would be to return a verdict of not guilty. Would you have any problem following that instruction?
A. No, sir.
Q. Now, let's assume in that situation that the jury had found a verdict of guilty. This would be one of those unusual cases because typically in this state, it is not common for a jury to participate in sentencing someone for murder. Do you understand that?

A. (No verbal response).
Q. Typically that decision of whether they committed the offense is certainly left to the jury and the jury makes a decision of whether the State has established it's case. Once the jury convicts that person of murder, then the trial judge would impose the sentence. Do you understand?
A. Yes, sir, I do.
Q. The trial judge in that setting, without a jury empaneled, unless there was some special waiver involved, would never have the option of sentencing that person to a death sentence. The most serious sentence that a judge could impose would be life without the possibility of parole. Do you understand that?
A. Yes.
Q. And the judge isn't bound to that sentence. Do you realize that?
A. I do.
Q. It's only in these limited situations where we have a jury empaneled, and its very restricted types of case where the jury decides what the sentence will be. In this murder case, assume for the purpose of discussion, it

is that type of case.

As I understand -- now I want to reaffirm something and confirm something, you at that point -- you've participated now and decided on the guilt but you still don't have an opinion yet as to what is the appropriate sentence, is that correct?

A. Yes, sir.

Q. In the second phase, it's an important part, this second phase, because the State has to prove something before the jury can even think about imposing a death sentence. They have to prove the existence of some aggravating circumstances. The law defines those. The court would define them for you. You have to concluded, considering the evidence, that at least one of those aggravating circumstances has been established beyond a reasonable doubt.

Some of them or a couple of them would be the killing of a police officer, the killing of a child. That would then -- if the jury found that type of situation, that would be one of those aggravating circumstances.

The jury has to decide that aggravating circumstances exist before they could even

consider it, because if the jury in analyzing the evidence finds that they are not convinced of an aggravating circumstance, then the only verdict that can be returned is life without parole. Do you understand that?

A. I understand.

Q. Would you have any problem following that instruction?

A. No, sir.

Q. The instruction would further say that if the jury did conclude that the State had met its burden of proof, that the jury then and only then would have the option of considering a death sentence. That doesn't mean that they have to, in fact the court would never instruct you that you had to return a death sentence. It is just to imply that now the jury has to make the choice, the jury now has to weigh and evaluate the evidence and determine whether a death sentence or life imprisonment without the possibility of parole is appropriate. Do you understand that.

A. I understand.

Q. And it is my understanding that as a type three juror that it is after that analysis has

been performed, there's discussion among the jurors, the law considered, that you could decide whether in that situation that we are talking about you -- you in some situations may impose the death sentence, even though you have the right to find life imprisonment without the possibility of parole or you may impose life without parole even though you have the option of imposing a death sentence. Is that correct?

A. That's correct.

Q. In addition the aggravating circumstances and all evidence that would be in the record for your consideration of determining the appropriate sentence, I would instruct you that there are certain statutory mitigating circumstances that may be in the record, some nonstatutory mitigating circumstances, and I would instruct the jury that they have to give meaningful consideration to those mitigating circumstances. Some of the statutory mitigating circumstances are -- such as the background of the person accused, maybe mental health issues, their upbringing, the kind of childhood that they've had, addictions, those types of things. It is my understanding that

if the record contained that, that you could consider and would consider that in determining what the appropriate sentence would be. Is that correct?

A. That's correct.

Q. Do you understand that the record may have -- that the evidence may be none, that there may be no mitigating circumstances?

A. (Affirmative nod).

Q. I would tell you that, obviously as I told you before, the person accused of committing a criminal offense doesn't have the responsibility of proving anything, and that includes the second phase. If there aren't any, you wouldn't hold that against the person; would you?

A. No, sir.

Q. That's very important before the instruction would also say that you have the right to impose a life imprisonment without the possibility of parole for no reason whatsoever if you choose to do so. Do you understand that?

A. Yes, sir.

Q. And you would consider that right, as

well, as I understand?
A. Yes, sir.
Q. But it is my understanding that you just don't know which one it would be until you've heard it all and go through that process?
A. That's correct.
Q. Let me ask you -- of course, we've been talking about this abstract case and nothing, nothing that we talk about implies anything about Mr. Dickerson's case, but what you've heard thus far about this case would give you no concern, based on your philosophy, your background, your experiences in life, of your being a fair and impartial judge with me?
A. (Negative gesture), only what you told me from Friday.
Q. And that doesn't give you any concern?
A. No, sir.
Q. Okay.
THE COURT: Please answer any questions that the attorneys may have.

VOIR DIRE EXAMINATION

BY SOLICITOR WILSON:
Q. Thank you, Ms. Melville. I'm Scarlet Wilson, I'm the Solicitor here. This is Bruce

Durant and this is Rutledge Durant, they are both prosecutors in my office as well. We're the prosecutors in the case, so we will be the ones presenting evidence and I just want to ask you a few followup questions to the Judge's questions. Okay.

A. Okay.

Q. That is mainly based on your answers here and also we were able to get, both sides, a copy of your questionnaire. In your questionnaire you stated that you have no strong feelings about the death penalty.

A. That's right.

Q. Can you just tell me what your feelings are?

A. I think that maybe the death penalty would apply to someone who'd killed or murdered a child, but ---

Q. Is that the only time you think?

MR. BLOOM: Objection.

THE COURT: Sustained.

JUROR NUMBER 209: I ---

SOLICITOR WILSON: You can't -- you've got to wait for me to ---

THE COURT: Wait for the next

question.

JUROR NUMBER 209: Okay.

EXAMINATION CONTINUED

BY SOLICITOR WILSON:

Q. You said that you were a type three juror?

A. Yes, ma'am.

Q. You understand -- and the Judge has talked about this a good bit -- that not all murders qualify for the death penalty?

A. Yes, I do.

Q. Even though murder in itself means that something was malicious, that a person acted with malice, intent, killed someone, we're talking about a situation where a jury has already found that but then the State has an additional burden. We have a burden to prove aggravating circumstances.

A. Okay.

Q. Would you be able to listen and consider and make a decision about an aggravating circumstance beyond the guilt phase?

A. Yes, I would.

Q. After a guilty verdict, if you were on a case, you wouldn't just shut down and say, 'I don't want to hear any more.'

SOLICITOR WILSON: That's all that I have, Your Honor.

THE COURT: Thank you. Any questions?

VOIR DIRE EXAMINATION

BY MR. BLOOM:

Q. Good afternoon, Ms. Melville. How are you today?

A. Good.

Q. My name is Jeff Bloom. Along with Andrew Carroll, we represent Mr. Dickerson. I am just going to do some followup and I will try not to repeat. Okay?

A. Okay.

Q. Is this your first time in this kind of situation?

A. Yes, it is.

Q. Are you a little nervous?

A. I'm okay.

Q. Well, I was nervous when I started off Monday so -- it's getting easier. Let me start by asking you -- I am not going to try to repeat but I want to make sure that I understand your answers. Judge Dennis asked you if you were a juror on a case, trying to

decide one penalty, life without parole or the death sentence, that you would look to mitigating circumstances.

A. (Affirmative nod).

Q. Sometimes we forget what these words are but he gave you a list and it was things like drug addiction, mental health, how a person was raised. I understand that would be important to you and that you could consider that?

A. Yes.

Q. Because you understand that some jurors, 'I just want to look at the facts of the crime. That other stuff has nothing to do with it.' But you're not in that group?

A. No, sir.

Q. So that is something that you could give meaningful consideration to, and you'd be interested in hearing that?

A. Yes, sir.

Q. Let me ask you next, the Judge also described of course that you'd never get to a sentence phase, second phase, and decide the penalty unless a person is convicted of what the Judge explained to you as malice murder -- that the person did it, intended to do it, with

malice, an evil heart, got the right person, it was not accident, not self-defense, insanity or manslaughter, heat-of-passion. There are some jurors that say, 'Once I've convicted someone of malice murder, I'm going to automatically vote for death.' That doesn't describe you?

A. No.

Q. All right. Now, I just want to ask you a few questions about your questionnaire. You have worked at MUSC in the past at some point?

A. (Affirmative nod).

Q. Some of the witnesses have also been employed there. I know it's a big place. You heard their names but I just want to review. One of the witnesses was listed as Sandra Fokes, she has also gone by Sandra Jenkins or Sandra Dickerson in the past. Does that name ring a bell?

A. No.

Q. She may have worked in maintenance, clerical duties or -- but you don't know her?

A. I don't remember anyone by those names.

Q. What department did you work in when you were there?

A. Pediatrics, for children.

Q. Again, I ---

THE COURT: Ms. Melville, I am going to ask you -- could you pull that mic so that you could speak into it, please. Thank you so very much. I'm sorry.

EXAMINATION CONTINUED

BY MR. BLOOM:

Q. There is a Dr. Cynthia Schandl who works there in Pathology, does autopsies. Do you know her?

A. No, sir, I don't know her.

Q. Lastly, ma'am, I want to ask you -- Judge Dennis of course instructed you that in such cases that one reasons jurors may consider a life sentence is for any reason, no reason, no reason at all, for a simple act of mercy. Some jurors, you know, just say 'I can't follow that.' I take it from your answers that is an instruction that you could follow?

A. Yes.

Q. That is something that is important to you?

A. Yes.

Q. All right. And you understood his instructions that the death penalty is never

required.
A. I understand that.
Q. Okay. In fact, the law says that it is an individual, reasoned moral, individualized judgement. Right?
A. Right.
Q. And you could make that moral, individualized choice for you if you were in a jury room?
A. Yes.
Q. After you've heard all the evidence and discussed with your fellow jurors, there had been debate back and froth, everybody had listened to each other and you came to your own moral, individualized choice about the penalty that you thought was appropriate and eleven jurors were going one way and you another, would you be able to stand by your reasoned, individual moral judgment?
A. Yes, sir.
Q. You are not the kind of person who would just say, 'You know, it's late. I'm hungry. I'm ready to go along to get along.'
A. No.
Q. You don't strike me as that but you know

that I have to ask.

A. Yes, sir.

Q. You would want them to respect your choice and you would respect theirs?

A. Yes, sir.

MR. BLOOM: Thank you, ma'am.

THE COURT: Anything else, Solicitor?

SOLICITOR WILSON: No, sir.

THE COURT: Ms. Melville, thank you very much. If you would step out for just a few moments, we will be with you in just a second.

(JUROR NUMBER 209 EXITS COURTROOM)

THE COURT: The court believes that she is qualified. Any objection from the State?

SOLICITOR WILSON: No, sir.

THE COURT: Any objection from the defendant?

MR. BLOOM: No, Your Honor.

THE COURT: Thank you very much. Ask her to step in.

(JUROR NUMBER 209 ENTERS COURTROOM)

THE COURT: Ms. Melville, thank you

very much. I appreciate your patience. You've been found to be qualified to be a member of the panel from which we will select our jury.

We anticipate and hope that will occur Thursday morning at 9:30. It will occur here in this courtroom. So when you are instructed to return, you will need to come back and take your seat out there. If you are -- when you do come, please know that we -- we need to be prepared to go forward, so make whatever arrangements that you need to do at work that day.

At this moment, we think it is going to be Thursday. I need for you to call the number after 6:00 tonight, follow the instructions that pertain, that are there for the Dickerson panel. There will be an instruction about, more than likely, Panel Number Eleven and Panel Number Twelve. Those are the additional panels, and that doesn't apply to you because you were in Panel Six.

Just follow the instructions for the Dickerson panel. Probably it's going to say to report but it may say to call back tomorrow night. Whatever the instruction, follow it and

whenever you are instructed to come, just come here to this courtroom.

Until then and until you have been dismissed from this case, please remember that you still are not at liberty to discuss this case with anyone or permit anyone to talk with you about it. Also, please continue not to watch any news programs about it or read any news accounts. Have a great day and we'll see you, hopefully, Thursday.

(JUROR NUMBER 209 EXITS COURTROOM)

BRUCE DURANT: Your Honor, before we call the next witness, could I ask the court for some direction?

THE COURT: Yes.

BRUCE DURANT: During the last juror's examination, the Solicitor asked some questions concerning some comments that the juror made about the death penalty imposed for the death of a child and then there was the followup question if that would be the only situation where you could impose the death penalty.

THE COURT: Right.

BRUCE DURANT: Is there a case on

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)** **RESPONDENT'S POST-HEARING BRIEF**

ATTACHMENT 4

[redacted – see Brief n. 23]

-1-126a (Rev. 11-1-07)

FEDERAL BUREAU OF INVESTIGATION
Criminal Justice Information Services Division
Clarksburg, WV 26306

Date April 9, 2015

The Honorable G. Thomas Cooper, Jr.
Judge of the Ninth Judicial Circuit Court of Common Pleas
Room 320
1701 Main Street
Columbia, SC 29202-0192

RE: William O. Dickerson, #6030 vs. State of South Carolina
Case Number: 2012-CP-10-3216

(X) In compliance with the court order (copy attached) and based on the information furnished, subject(s) of your inquiry was(were) searched in the FBI Criminal Justice Information Services Division name indices only* without locating any summary(ies) identifiable with:

SEE ENCLOSED LISTS

(X) In compliance with the court order (copy attached) and based on the information furnished, subject(s) of your inquiry was(were) searched in the FBI Criminal Justice Information Services Division name indices only.* The enclosed summary(ies) is(are) a possible identification(s):

SEE ENCLOSED LISTS

*Note: Name checks are inconclusive. Positive identifications are effected only by the comparison of fingerprints or through the use of other positive identifying data, such as FBI number or local arrest number. If additional information is available, please let us know and we will make a further search of the FBI Criminal File.

Criminal History Analysis Team 1
BSS, CJIS Division

(X) Enclosures (31)

Biometric
Services Section

FBI/DOJ

STATE OF SOUTH CAROLINA OFFICE OF THE CLERK OF COURT NINTH JUDICIAL CIRCUIT CHARLESTON COUNTY	EXEMPLIFICATION

I, Julie J. Armstrong As Clerk of Court for Common Please and General Sessions in and for the County of Charleston, South Carolina, legal custodian of the records, documents, and papers, of, or appertaining to said Court, and on file or of record in the office of said Court, certify that the attached copies of the documents described below are true and accurate reproductions of the originals now on file in this office.

Docket or Judgment Roll Number 2012-CP-10-3216

William O. Dickerson vs. State of South Carolina

Date: March 19, 2015

Signature: Julie J. Armstrong

Julie J. Armstrong

As a Presiding Judge of said court, I certify that the signature appearing above is that of the Clerk of Court for Charleston County, who is duly sworn. I further certify that the seal affixed to the certificate appearing above is the seal of this court and that it has been used here in good form by the proper officer.

Date: March 19, 2015

Signature of Judge: G. Irving Carl

As Clerk of Court for Charleston, South Carolina, I certify that the signature appearing above is that of a duly sworn judge of said court, duly commissioned and qualified.

Date: March 19, 2015

Signature: Julie J. Armstrong

Julie J. Armstrong

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	Cases Number: 2012-CP-10-3216
	)	
	)	
William O. Dickerson, #6030	)	
	)	COURT ORDER
v.	)	
	)	
State of South Carolina,	)	
Defendant.	)	

FILED
2015 MAR 19 PM 3:18
JULIE J. ARMSTRONG
CLERK OF COURT

TO: Federal Bureau of Investigation
Criminal History Analysis Team 1
BSS, CJIS DIVISION
1000 Custer Hollow Road
Clarksburg, West Virginia 26306

This ORDER hereby directs the CJIS DIVISION of the FBI, pursuant to 5 U.S.C. §552a(b)(11) to release the criminal history and records of the following persons listed on the attached page to the following recipient of the information:

The Honorable G. Thomas Cooper, Jr.
Presiding Judge in the Matter of *William O. Dickerson v. State of South Carolina*
1701 Main Street, Room 320
Columbia, South Carolina 29202-0192

IT IS ORDERED.

G. Thomas Cooper
The Honorable G. Thomas Cooper, Jr.

Dated 19 day of March, 2015.

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., G.S. & F.C.
By: _____
DEPUTY CLERK

NUMBER	NAME	DATE OF BIRTH	POSSIBLE FBI UCN (IF APPLICABLE)
383	MARLENE A. MORTON		No FBI IdHS
370	NATHAN HOOD		91 146 KC9
377	TERRY L. MANIER JR		No FBI IdHS
278	NATHANIEL SIMMONS	2/1/46	
386	JOSHUA PARTEE		
228	JAMES NICKLAUS	3/	No FBI IdHS
133	DENODE MORTICE HEYWARD		174 923 ED7
227	LAURI J. NEWKIRKPAGGI		FBI IdHS
372	MAXINA R. HOWARD		No FBI IdHS
134	CHARLES A. HIGH		No FBI IdHS
19	JANET J. BERGEN		No FBI IdHS
280	JEANETTE F. SINGLETON		
232	JAMES A. ORR		013 081 EA6
37	DIANE BUCHANAN		FBI IdHS
65	STEVEN DEAS		
389	JOHN L. RAYMOND	7/0/78	No FBI IdHS
197	BRIAN MANIGAULT		
66	TERENCE DEAS		No FBI IdHS
101	GEORONA GADSDEN		No FBI IdHS
160	ROBERT E. JONES IV		
207	GUY F. MEAD		13 V6
92	MELISSA DENISE FIELDS COPELAND		945 KAU
256	LISA ROBINSON		
402	MARY COX		No FBI IdHS
385	CHARLES R. OTT		No FBI IdHS
363	DEBRA GRANT		
378	JAMES K. MARTIN		
315	SALLYLISHA TOOMER		
306	REBEKAH J. SZIVAK		No FBI IdHS
398	DAVID E. WHITE	1/3/64	
124	CHARLIE HALL JR.		No FBI IdHS
330	GARRETT E. WATERMAN		
121	ANITA F. GREEN		
209	DONNA L. MELVILLE		
54	ANTHONY R. COCHRAN		No FBI IdHS
343	STEVEN WINEINGER		No FBI IdHS
358	GORDON M. BADGLEY		No FBI IdHS
149	DAVID R. ISHMAEL		No FBI IdHS
314	VIRGINIA L. TOMPKINS		No FBI IdHS
157	MICHAEL A. JOHNSON		No FBI IdHS
392	ORTEZ D. SIMMONS		No FBI IdHS

NUMBER	NAME	DATE OF BIRTH	POSSIBLE FBI UCN (IF APPLICABLE)
381	DEBORAH J. METERAUD		No FBI IdHS
247	ELAINE L. PRIOLEAU		No FBI IdHS
177	PHILLIP W. KUHNEMANN		No FBI IdHS
221	SUSAN M. MULLEN		No FBI IdHS
289	DAMON R. SMITH		
364	MARILYN DENISE GRANT		No FBI IdHS
234	MICHAEL PAGE		
8	RANDY M. ATKINSON		No FBI IdHS
50	RICHARD CLAPP		No FBI IdHS
262	KEVIN SALMONSEN		No FBI IdHS
4	THERESA ANCRUM		No FBI IdHS
72	REGINA DOBSON		No FBI IdHS
7	CHRISTINA AREHART		No FBI IdHS
246	DANA PRIDGEN		o FBI IdHS
331	RENALA E. WATERS		No FBI IdHS
264	RODNEY M. SANDERS		
272	DONNA SETZEKORN		lo FBI IdHS
148	SAMANTHA IORIO		No FBI IdHS
357	LEVERNE C. DAWSON		o FBI IdHS
11	SHERI A. BARKER		
104	CHRISTOPHER GASKINS		No FBI IdHS
69	JOHN DEDEN		No FBI IdHS
22	PAMELA BLANK		
252	CAROLYN RHYNE		No FBI IdHS
90	ANDREA FERGUSON		No FBI IdHS
287	ROBERT SMALLS		
317	DANIEL TRIBUNA		VA9
63	DEAN CUNLIFFE		No FBI IdHS
319	SUZANNE ULMER		No FBI IdHS
38	ANN BURDETTE		No FBI IdHS
26	LAURA BRADSHAW		No FBI IdHS
281	TAMEKA SINGLETON		No FBI IdHS
304	DANIEL SUGGS		No FBI IdHS
133	DENODE M. HEYWARD		Duplicate
19	JANET BERGEN		Duplicate
247	ELAINE PRIOLEAU		Duplicate
31	SABRINA BROWN		

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FEDERAL BUREAU OF INVESTIGATION
CRIMINAL JUSTICE INFORMATION SERVICES DIVISION
CLARKSBURG, WV 26306

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DESCRIPTORS ON FILE ARE AS FOLLOWS:

NAME BECKER,DONNA LAUREE

SEX	RACE	BIRTH DATE	HEIGHT	WEIGHT	EYES	HAIR
F	W		507	125	HAZEL	BLOND

BIRTH CITY	BIRTH PLACE
UNREPORTED	ALASKA

CITIZENSHIP
UNITED STATES

HENRY CLASS
0 I 32 W IMI 22
I 32 W MMM 0

PATTERN CLASS
WU WU WU WU WU WU WU

OTHER BIRTH DATES	SCARS-MARKS-TATTOOS	SOCIAL SECURITY	MISC NUMBERS
NONE	NONE	5[redacted]	NONE

ALIAS NAME(S)
BECKER,DONNA
LONG,DONNA
LONG,DONNA LAUREE
MELVILLE,DONNA L
MELVILLE,DONNA LAUREE

END OF COVER SHEET

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FEDERAL BUREAU OF INVESTIGATION
CRIMINAL JUSTICE INFORMATION SERVICES DIVISION
CLARKSBURG, WV 26306

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NAME	FBI UCN	DATE REQUESTED
BECKER,DONNA LAUREE	158998JB6	2015/04/09

SEX	RACE	BIRTH DATE	HEIGHT	WEIGHT	EYES	HAIR
F	W	[redacted]7		125	HAZ	BLN

BIRTH PLACE
ALASKA

PATTERN CLASS
WU WU WU WU WU WU WU

CITIZENSHIP
UNITED STATES

1-ARRESTED OR RECEIVED 1998/08/03 SID- AK00683639
AGENCY-MAT SU PRETRIAL FAC PALMER (AK170015B)
AGENCY CASE-

CHARGE 1-ASSLT FOURTH DEG DOMESTIC VIOLENCE II CTS
CHARGE 2-BURGLARY FIRST DEG/ARR ALASKA STATE TROOPERS

COURT-MAGISTRATE'S COURT PALMER (AK170015J)
CHARGE-ASLT/FAM/STRNGARM CHANGED TO ASSAULT
9/25/1998 GUILTY, FINE $250.00, FINE SUSP $250.00; JAIL 15 DAYS, JAIL SUSP 15 DAYS, PROBATION 1 YR
CHARGE-BURG /NO FORCE RES CHANGED TO BURGLARY
9/25/1998 DISMISSED
CHARGE-ASLT/FAM/STRNGARM CHANGED TO ASSAULT
9/25/1998 GUILTY, FINE $250.00, FINE SUSP $250.00; JAIL 15 DAYS, JAIL SUSP 15 DAYS; PROBATION 1 YEAR; 8/27/99-PV-PROB EXT 3 YRS, 9/28/00 PV-2 DYS IMPSD

END OF PART 1 - PART 2 TO FOLLOW

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PART 2

- FBI IDENTIFICATION RECORD -

2-ARRESTED OR RECEIVED 1999/05/15 SID- AK00683639
AGENCY-MAT SU PRETRIAL FAC PALMER (AK170015B)
AGENCY CASE-405636

CHARGE 1-ASLT 4TH DOM VIOL 2CTS

COURT-MAGISTRATE'S COURT PALMER (AK170015J)
CHARGE-ASLT/NON AGGRAVATED CHANGED TO RESISTING ARRES
8/19/1999 GUILTY, FINE $500.00, FINE SUSP $500.00; JAIL 90 DAYS,
JAIL SUSP 90 DAYS, PROBATION 3 YEARS
CHARGE-ASLT/POL OFF/STRNGAR CHANGED TO ASSAULT
8/19/1999 GUILTY DOMESTIC VIOLENCE; FINE $1,000.00, FINE SUSP $1,
000.00, JAIL 120 DAYS, JAIL SUSP 90 DAYS,
PROBATION 3 YEARS; DV 4TH DEGREE 9/28/00 PV-45 DYS IMPSD
CHARGE-ASSAULT
8/19/1999 DISMISSED

3-ARRESTED OR RECEIVED 2000/04/24 SID- AK00683639
AGENCY-PALMER CORR CTR PALMER (AK170015C)
AGENCY CASE-DOC00405636

FINGERPRINT INFORMATION
BSI/2000098071578
PRINT DATE/2000/04/24

CHARGE 1-AS11.41.230 X41.2 103413951 000001
CHARGE 2-AS11.41.230 X41.2 103413951 000002 ASSAULT 4

COURT-MAGISTRATE'S COURT PALMER (AK170015J)
CHARGE-ASSAULT 4
9/28/2000 DISMISSED
CHARGE-ASSAULT
9/25/1998 GUILTY, FINE $250.00, FINE SUSP $250.00; JAIL 15 DAYS,
JAIL SUSP 15 DAYS,
PROBATION 1 YEAR; 8/27/99 PV-PROB EXT 3 YRS. 9/28/00-PV-8 DYS
IMPSD

END OF PART 2 - PART 3 TO FOLLOW

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CRIMINAL JUSTICE INFORMATION SERVICES DIVISION
CLARKSBURG, WV 26306

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PART 3

- FBI IDENTIFICATION RECORD - F

4-ARRESTED OR RECEIVED 2004/06/05 SID- AK00683639
AGENCY-STATE TROOPERS PALMER (AKAST0700)
AGENCY CASE-DOC9111FADLAK0683639

FINGERPRINT INFORMATION
BSI/2000098071597
PRINT DATE/2004/06/05

CHARGE 1-DRIVING UNDER INFLUENCE
CHARGE 2-LEAVE SCENE OF ACCIDENT
CHARGE 3-FAIL TO STOP AT DIR OF OFFICER

COURT-MAGISTRATE'S COURT PALMER (AK170015J)
CHARGE-DUI- ALCOHOL/CONTR SUBST CHANGED TO DUI - OPER
9/1/2004 GUILTY, JAIL 120 DAYS, JAIL SUSP 100 DAYS, FINE $3,000.00,
FINE SUSP $1,500.00, LIC RST/SU 90 DAYS, ALCOHOL SC,
PROBATION 5 YEARS
CHARGE-LV SCENE OF ACCID - INVOLVE INJURY/DEATH CHANG
9/1/2004 GUILTY, JAIL 60 DAYS, JAIL SUSP 60 DAYS, FINE $200.00,
FINE SUSP $200.00, PROBATION 5 YEARS
CHARGE-FAIL TO STOP AT DIRECTION OF OFFICER 2
9/1/2004 DISMISSED

RECORD UPDATED 2015/03/31

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CRIMINAL JUSTICE INFORMATION SERVICES DIVISION
CLARKSBURG, WV 26306

SC010015A

NCN H20150990400123592S7

SC010015A
CHARLESTON COUNTY
SOLICITOR'S OFFICE
STE 400
101 MEETING ST
CHARLESTON, SC 29401

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)** **CERTIFICATE OF SERVICE**

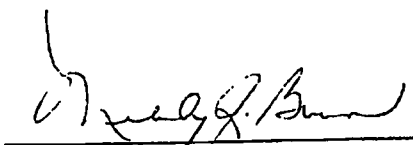
I, Melody J. Brown, counsel for the Respondent, certify that I have served the within Post-Hearing Brief with attachments on Appellant by depositing a copy of the same in the United States mail, addressed to his attorneys of record:

Elizabeth Franklin-Best, Esq.
Blume Norris & Franklin-Best, LLC
900 Elmwood Ave., Suite 200
Columbia, South Carolina 29201

E. Charles Grose, Jr., Esq.
Grose Law Firm
404 Main Street
Greenwood, South Carolina 29646

I further certify that all parties required by Rule to be served have been served.

This 23rd day of March, 2018.



MELODY J. BROWN

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT