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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
Honorable William P. Keesley

Case No. 2010-CP-32-5076

RON O'NEAL FINKLEA, SK6025

Respondent,

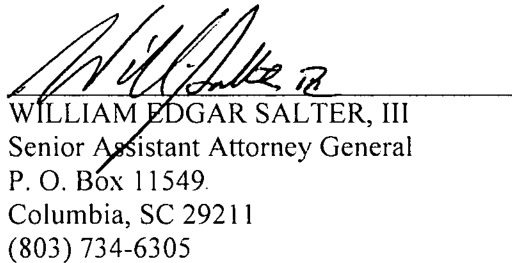
v.

STATE OF SOUTH CAROLINA,

Petitioner

NOTICE OF APPEAL

The State of South Carolina, Respondent in the Circuit Court, hereby appeals from the Order of the Honorable William P. Keesley, Presiding Judge, dated, filed and received by Respondent on June 10, 2019, in *Ron O'Neal Finklea v. State of South Carolina,* Case No. 2010-CP-32-5076, which denied the Respondent's Motion to Alter or Amend Judgment Pursuant to Rule 59(e), SCRCP. Respondent also appeals from the Order Granting Post-Conviction Relief dated and filed March 6, 2019, which granted post-conviction relief for a new sentencing phase and denied with prejudice claims related to the guilt phase.



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PROOF OF SERVICE

I, William Edgar Salter, III, hereby certify that a true copy of the Notice of Appeal with Orders attached has been served upon opposing counsel by depositing copies in the United States mail, postage prepaid, to the following:

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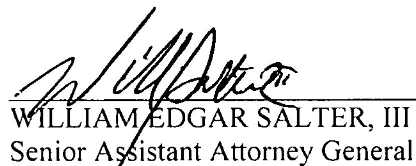
This 8th day of July, 2019.



WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON 2019 MAR -7 AM 8: 19

RON O'NEAL FINKLEA, SK6025) C/A No. 2010-CP-32-5076

Applicant,

vs.

ORDER ON POST-CONVICTION RELIEF GRANTING NEW SENTENCING

STATE OF SOUTH CAROLINA,

Respondent.

WPK #1

Central to this case is the difficult issue of whether a death-sentenced inmate, who lied to his trial attorneys and withheld information about traumatic events in his life, can obtain post-conviction Relief ("PCR") when the attorneys failed to discover his history of trauma and present evidence of its impact upon his mental health. State and federal precedent holds that such evidence is critical in mitigation during the sentencing phase. The decision turns on whether sufficient "red flags" from any source were not properly pursued by counsel. The Applicant has established his entitlement to PCR and a new sentencing proceeding based on the failure of his trial attorneys to recognize and develop such evidence and present it in mitigation. Because this is a death penalty case and requires only one juror to hold out in order to avoid a death sentence, the deficiency is prejudicial under *Strickland*[1] and requires a new sentencing phase.[2]

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[1] *Strickland v. Washington*, 466 U.S. at 668 (1994)

[2] The concealment and lies by the Applicant and his family have caused the court to review this case extensively for any indicia that the Applicant or anyone else intended to place a booby trap into his case to enable relief following an unfavorable result. There is no indication of an effort to game the system by anyone. That determination is supported by the occasions where the Applicant and a family member disclosed information that should have led to the discovery of the evidence in question.

As for the conviction itself, the Applicant committed a calculated, depraved, and torturous act of murdering an innocent man. His attorneys did all that anyone could to properly represent him against the charge. As the Supreme Court of South Carolina noted, he is obviously guilty.

OVERVIEW OF THE ISSUES

PCR is sought on three grounds:[3]

1. Trial counsel failed to adequately investigate and present mitigating evidence concerning Applicant's extensive childhood trauma and resulting mental health disorders, including post-traumatic stress disorder (PTSD) and obsessive compulsive disorder (OCD). PCR is granted on this ground.

2. Trial counsel failed to investigate and present adequate, specific, and individualized expert testimony concerning Applicant's adaptability to prison. The court finds that the Applicant has failed to prove this assertion.

3. Trial counsel was ineffective for failing to object to penalty phase direct examination testimony from State's witness Sherry Bolin to the effect that Applicant told her that his stepson

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[3] The State listed the three grounds in the Applicant's Second Amended Application as follows:

1. Ineffective assistance of counsel for failure to present mitigating evidence, including:
    a. Applicant's childhood traumas, resulting in Post-Traumatic Stress Disorder ("PTSD");
    b. PTSD resulting from military training;
    c. neurological and mental health impairments, including an extensive family history of "seizures" related to brain abnormalities and degenerative brain problems;
2. Ineffective assistance of counsel for failing to object to the State's assertion during closing arguments that Applicant had his minor step-son selling drugs for Applicant prior to the crimes at issue in this case; and
3. Ineffective assistance of counsel for failing to adequately investigate and present expert testimony concerning Applicant's adaptability to prison.

was dealing drugs on Applicant's behalf. (ROA 1866). The Applicant has failed to prove this ground.

In the sentencing phase, "defense counsel's job is to counter the State's evidence of aggravated culpability with evidence in mitigation." *Rompilla v. Beard*, 545 U.S. 374, 380–381 (2005). While *Rompilla* may be argued to be factually distinguishable from the pending case because it involved a failure by counsel to review the file of a prior conviction that they knew the prosecution was going to use in the sentencing phase, the case is sufficiently similar to be instructive.

Mr. Rompilla repeatedly stabbed his victim around the head and neck, beating him with a blunt object, and thereafter setting him on fire. The Supreme Court of the United States, in the opening sentence of *Rompilla* states: "We hold that even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial."

The U.S. Supreme Court has given significant deference to standards for performance of counsel adopted by the American Bar Association (ABA Standards). PCR counsel in the present case also does. *Rompilla* quotes from the ABA Standards in existence at the time of Rompilla's conviction:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. 1 ABA Standards for Criminal Justice 4–4.1 (2d ed. 1982 Supp.).

Penalty phase investigation is unreasonable when counsel performs an initial investigation but fails to pursue "red flags" that would have led a reasonably competent attorney

to investigate further. *Wiggins v. Smith*, 539 U.S. at 534 (finding deficient performance where trial counsel "abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources"); *Council v. State*, 380 S.C. at 172–73, 670 S.E.2d at 363 (2008) (holding that even though trial counsel had "limited information," counsel should have been "on notice that . . . additional investigation, could potentially yield powerful mitigating evidence"); *see, e.g.*, *State v. Bright*, 200 So. 3d 710, 726 (Fla. 2016) (holding performance deficient where trial counsel had red flags of a family history of mental illness based on information from a retained psychologist, but did not investigate further); *McNish v. Westbrooks*, 149 F. Supp. 3d 847 (E.D. Tenn. 2016) (holding performance deficient where counsel had records suggesting a history of attempted suicide, depression, blackouts, and traumatic childhood, but failed to investigate further).

In Footnote 7 of *Rompilla*, the Court notes:

WH #4

> Our decision in *Wiggins* .... cit[ed] the earlier 1989 ABA Guidelines. 539 U. S., at 524 ("The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor' " (quoting 1989 ABA Guideline 11.4.1.C (emphasis in original)).

BACKGROUND

Ron O. Finklea (the "Applicant") was convicted for the August 2, 2003 murder of Walter Sykes, a security guard, during an attempted robbery of an ATM. Mr. Sykes was shot twice and set on fire while still alive. The Applicant's brother-in-law, Mr. Davis, was also present as a co-defendant.

At the time of the crime, the Applicant had fallen into selling and using drugs, as well as drinking excessive amounts of alcohol. Prior to that time, there is evidence that he had done well in the structured life of a soldier in the United States Army until a medical issue required him to

leave the military. He was married to his second wife, who was a soldier deployed to the Middle East at the time of the murder. While she was away, the Applicant squandered funds from their bank account in a drug dealing operation, and he needed money to conceal that from his wife.

The Applicant formerly worked at the Solectron plant where the murder occurred and knew that an ATM was located in the lobby. The co-defendant's statement indicated that the Applicant considered several possible places to rob, but ultimately determined to steal from the ATM. To gain access required getting a security guard to allow admittance. There is strong evidence of premeditation. After going to the location the preceding night and engaging a different guard about security procedures, the Applicant returned the next night to rob the ATM. About ten days beforehand, the Applicant made an unusual trip to Michigan to retrieve his wife's handgun from his father-in-law. The Applicant and his sister-in-law drove straight to Michigan, staying only about twenty minutes before driving directly back to South Carolina. The Applicant had purchased a gas can and gloves shortly before the killing. He rented a car on the same day that the gas can was purchased and took his sister-in-law with him to rent the car, telling her that he was going to drive to his childhood hometown in Alabama. He left South Carolina after the murder and was arrested in Alabama.

WPL #5

Surveillance video and testimony concerning the Applicant's distinctive clothing established him to be the person who shot Mr. Sykes and set him on fire. There is evidence that the purpose of taking gasoline inside the building was to destroy video evidence, and the ATM was doused with gasoline. However, gasoline was also used to set the victim on fire. The robbery was thwarted when the perpetrators realized that the outer shell of the ATM concealed a safe where the money was located, and they could not access the money.

An identification card dropped just outside the door of the building allowed investigators

to obtain a photograph and information about the Applicant very quickly. Through interviews, they learned of the Applicant's intention to drive to Alabama, and they notified authorities there who arrested him. Items allegedly related to the crime were located in a gulley outside the home of a relative in Alabama.

After the Applicant was arrested, he attempted suicide by hanging. His co-defendant gave a statement that the Applicant made a failed suicide attempt in the Alabama jail using shoe strings, which broke. When Mr. Finklea was returned to South Carolina, he hanged himself, lapsed into a coma, and suffered an anoxic brain injury.

Stephen R. Soltis, Esquire, an experienced criminal trial attorney, was appointed on August 13, 2003. He had served as counsel in several death penalty cases. Mr. Soltis obtained funding for an investigator, David MacDougall, with whom he had worked previously. Second counsel, Melissa J. Kimbrough, Esquire (now Armstrong), also an experienced trial attorney, was appointed on May 25, 2005, in anticipation of this being a death penalty case. Ms. Kimbrough had served second chair counsel in a prior death penalty case. While she was technically the second chair in this trial, she quickly found herself effectively acting as lead counsel. A notice of intention to seek the death penalty was served in May 2006.

WJM
#6

Long before Ms. Armstrong was involved and shortly after the Applicant's return to jail from the hospital, Mr. Soltis met with the Applicant on August 19, 2003 at the Lexington County Detention Center. He advised the Applicant that Mr. MacDougall would be interviewing him. He met again with the Applicant around August 22 or 23, 2003. Throughout the PCR hearing, Mr. Soltis was often unable to recall details of his preparation or representation of Mr. Finklea aside from confirming the basic information contained in notes and records.

Defense counsel became convinced and asserted to the trial judge that the Applicant's brain

damage caused him to be unable to recall the crime and to assist his attorneys in his defense. The trial judge held a pretrial competency hearing on July 26, 2007. Trial counsel presented expert testimony from a neuropsychologist, Dr. Tora Brawley, a neurologist, Dr. Kenneth Gaines, and two forensic psychiatrists, Dr. Donna Schwartz-Watts (now Dr. Donna Schwartz-Maddox and hereafter "Dr. Maddox") and Dr. Richard Frierson. All of them testified in support of the Applicant to the effect that he suffered a serious, permanent, and irreversible brain injury in the area of the brain which affects memory. They also testified that none of their testing indicated that the Applicant was malingering. The attorneys were justified in believing that the Applicant had lost his memory of most of the events immediately surrounding the killing.

It is now clear that the Applicant was not truthful with his attorneys and members of the trial defense team about his inability to remember events. However, during the initial interview with the Applicant on August 19, 2003, Mr. MacDougall recorded that the Applicant told him some details of the incident. The notes of the investigator, which were shared with counsel, include the following:

WPL #7

> *Ron has hazy recollections of this incident from shortly before arriving at Solectron and returning to jail after the suicide attempt. He appears to have his full faculties this date [August 19, 2003]. He appears to fully understand his situation and was able to provide a lot of detail other than the incident its self (sic) and a few days afterward. It seems to me he is "blacking out" a traumatic incident which is why he cannot provide full details. I do not believe he is lying.* [Original italicized]

PCR counsel believes that this report put trial counsel on notice that the Applicant recalled the incident. The Applicant has failed to prove that the trial attorneys knew that the Applicant was malingering until, at the earliest, during the sentencing phase. Having some memory of tangential elements related to the crime and having recall sufficient to properly assist counsel are different things, and the quotation above can reasonably be read to support trial

counsel's position that they believed that the Applicant was unable to recall the incident to a degree sufficient to assist in preparing the defense. To the extent that it is asserted that the investigator's notes reveal a need to examine more fully the effect of trauma upon the Applicant and his degree of recall, the court finds that counsel took reasonable steps to determine the impact of the anoxic brain injury and its impact upon the Applicant's memory. They retained expert witnesses in the field of mental health. Dr. Anna Cherry, a treating psychiatrist at the Lexington County Detention Center, was also consulted.[4]

A major red flag did arise in the investigator's notes about childhood trauma contained in a meeting with the Applicant's first wife, Cherena Roland, on September 15, 2004, in Tacoma, Washington. Mr. MacDougall's notes from that meeting include the following:

> Cherena had some interesting knowledge about Ron's childhood. She told of Ron not having a father at home and his mother being abusive and strange. When he was a child Ron was in the yard and his mother shot a gun at him to make him do something. The mother also believes in voodoo and casts spells on people. His mother has berated Ron in front of Cherena and others including a time the mother said to Ron *"Come here you black mother f****r".* [Expletive modified]
>
> Cherena recalled a time when Ron, Jr. was two years old and spending the summer in Alabama with his father, Ron, Sr. Cherena got a call to come and get Jr. since Ron had been called back to Fort Bragg. When Cherena got to Alabama, from Tacoma, she was left stranded at the mother's rural home with no car or transportation. Ron's mother, grandmother of Jr., refused to drive Cherena to the airport. She said she had to go to work. Cherena and Jr. ended up walking to town and relying on good Samaritans and the local police to get them to the airport.

WPH #8

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[4] On August 24, 2007, the trial judge found that the Applicant was competent to stand trial. Despite the apparent memory loss, the trial judge found that the Applicant was sufficiently able to cooperate with counsel and to factually and rationally understand the proceedings. The trial judge ruled against defense counsel's efforts to establish that the Applicant was not competent to stand trial and assist in his defense, both as to the guilt phase (which they anticipated losing) and the penalty phase. The defense argued that the Applicant, because of his inability to recall the incident, could not assist in the penalty phase. The attorneys argued before the trial court and the South Carolina Supreme Court that having information from their client about exactly what transpired between the Applicant and the victim made a huge difference in their ability to argue against the imposition of the death penalty. Principally, counsel argued that a perpetrator who kills another in a moment of panic is judged far differently for sentencing purposes than a defendant who orchestrates and carries out a plan to kill and torture.

Based on this note, trial counsel had an obligation to investigate further the issue of the Applicant's denial of traumatic abuse. This note also put trial counsel on notice that the Applicant's mother was at least one of the possible sources of abuse and that any denial of abuse by her required further inquiry and that other potential witnesses of her abuse needed to be interviewed outside her presence. Nonetheless, when Mr. Soltis contacted the Applicant's mother at the Applicant's childhood hometown in Alabama nearly two years after the murder, he apparently accepted the history of no abuse and did not seek to separate potential witnesses from her while asking about any history of trauma.

Mr. Soltis called the Applicant's mother twice on August 14, 2006, and he went to Alabama to meet with family members around August 26, 2006. While there, he had one large-group interview with ten to twelve of the Applicant's family members. The Applicant's mother was present when Mr. Soltis spoke to the other family members. (PCR Tr. vol. 1, 26–28; Applicant's Ex. 3, p. 16). No evidence of the Applicant having been abused was uncovered in that meeting. No effort was made to separate the Applicant's mother from the other family members in order to discuss the issue of abuse. When Mr. Soltis was told that Mr. Finklea had a rough upbringing, he interpreted that as describing financial hardships and did not question it further to clarify what it really meant.

Mr. Soltis made one other investigative trip when he traveled to the State of Washington to attempt to interview Cherena Roland, who had raised the red flag in her comments to the investigator. The interview never occurred. (PCR Tr. vol. 1, 36–37).

The mitigation specialist hired by the defense counsel, Carolyn Graham, went to Alabama only once. (Applicant's Ex. 8 and PCR Tr. vol. 1, 36–37). She also only met with the

Applicant once, and this meeting occurred after she had already met with his family. (PCR Tr. vol. 1, 31, 88).

The trial began on August 27, 2007. The State asserted that the Applicant was an unredeemable, "calculating, cold-blooded murderer." (ROA 1818, 2237 ("he's got murder and torture on his mind and malice in his heart"), 2243 (describing Applicant as "pure evil")). To make its case, the State focused on the nature of the offense, contending that it was motivated by greed and included acts that were tantamount to "physical torture." (ROA 2216). The State also highlighted the Applicant's character, which it portrayed as bad and manipulative. (ROA 2213). To support that picture, the prosecution presented evidence that the Applicant had sold drugs, owed past-due child support, and manipulated expert witnesses, relatives, friends, and the victim. (ROA 1829–35, 1842, 1863–66, 1879–89, 2232–2235).

WPH #10

The defense was aware of the State's strategy in advance and expected to lose the guilt phase. Trial counsel knew that evidence in mitigation was of paramount importance in this trial. On August 31, 2007, the jury found the Applicant guilty of murder and the related charges.

The sentencing proceeding began on September 4, 2007. In mitigation, the defense portrayed the Applicant as an excellent soldier, family member, and citizen for the great majority of his life. They emphasized redeeming qualities, someone to whom the jurors could justifiably extend mercy, and a person unlikely to commit further crimes while in prison. They argued that his life should be spared because of his current mental condition, his history of non-violence, his history of good conduct, military service, and his adaptability to life in prison.

MITIGATION TESTIMONY AT TRIAL

Unlike many of the cases cited by PCR counsel about deficient performance of trial counsel related to mitigation, this record demonstrates that the trial attorneys knew of the

importance of discovering any trauma in the Applicant's past life, put together a mitigation team, conducted an investigation, and presented mitigation evidence to the jury. During the sentencing phase, counsel presented thirteen witnesses. These included Erica Middleton, the Applicant's cousin (ROA 2035-39), Johnnie Lee Finklea, the Applicant's maternal uncle (ROA 2039-43), Curtis Blunt, the Applicant's older brother (ROA 2043-47), Johnnie Finklea, Sr., the Applicant's grandfather (ROA 2048-51), Betty Finklea Peoples, the Applicant's mother (ROA 2051-61), Nicole Finklea Fantroy, the Applicant's first cousin (ROA 2061-74), Cherena Roland, the Applicant's first wife (ROA 2138-49), and two men who served with the Applicant in the military, Sergeant Major Charlie Turner (ROA 2074-2115) and First Sergeant Vincent Smith (ROA 2131-38). Expert witnesses, Dr. Tora Brawley (ROA 2116-31) and Dr. Richard Frierson (ROA 2162-79) testified about the Applicant's mental condition. James Aiken, a former prison warden and corrections commissioner, testified about the Applicant's adaptability to prison life and that he was deemed extremely unlikely to be a threat to other inmates. (ROA 2189–92). Dr. Anna Cherry (ROA 2149-62), the psychiatrist who consulted with inmates at the Lexington County Detention Center, testified concerning the Applicant's mental state and his conduct while incarcerated.

WPM #11

The testimony from Sergeant Major Turner was glowing. It portrayed the Applicant as a leader who constantly strove to improve himself and those around him, one who had performed commendable service for his country, who supported his fellow soldiers, and was the best soldier that Sergeant Major Turner had encountered in twenty-one years in the Army. (ROA 2074-99). That witness also testified that the Applicant's urinalysis tests were always negative for drugs. (ROA 2114).

First Sergeant Smith described the Applicant as smart, motivated, and dedicated to his

duties in the military, and confirmed that the Applicant's urinalysis tests performed every three months were always clean. (ROA 2132). Sergeant Smith described the Applicant as a good family man and a model soldier.

All of the Applicant's relatives testified about their knowledge of him. Basically, they stated that he was non-violent, a good person, someone not known to use drugs, and a protector. They all testified that it was completely out of character for him to commit this crime. Their depiction of the Applicant was seriously incomplete and, in some respects, false.

If the information collected by the PCR team is accurate, the Applicant's mother, Ms. Betty Finklea Peoples, materially misrepresented the true picture. She testified that the Applicant was a good child and well-behaved his entire life. She testified that she brought him up in school and in church, that he was always respectful of her, and that she loved him dearly. (ROA 2055). She could not understand how her son could have committed this crime, and she believed that he must have gotten involved with the wrong crowd. She testified that she had never known the Applicant to use drugs or even drink alcohol. (ROA 2055). She asked the jury for mercy in sentencing the Applicant. (ROA 2055-56). She said that she was sorry for what happened and asked jurors to spare the Applicant's life. (ROA 2051-61).

WPH #12

The Applicant's ex-wife, Cherena Roland, consistent with the red flag information given to the investigator three years previously, was the only character witness who gave a hint in her testimony that there were negative experiences in the Applicant's childhood. She stated that the Applicant had a "rough younger life," which "caused him to have a lot of insecurities and devalue himself." (ROA 2140–41).

Ms. Nicole Finklea Fantroy, the Applicant's first cousin, described their relationship as being equivalent to that of a brother and sister. They did everything together. She testified that

the Applicant assisted Ms. Fantroy's mother, who experienced seizures. (ROA 2062). She considered the Applicant to be her mentor. (ROA 2063). He kept her from dropping out of high school despite having two children. He was the first in his family to graduate high school, which motivated her to do the same. (ROA 2063). She testified that if it were not for the Applicant, she would not have obtained a college degree. (ROA 2063-64). She testified that the Applicant was raised in church, that they sang together, prayed together, were raised by their parents to have moral values, and that the Applicant certainly has those values. (ROA 2065). She testified that she cannot explain what took place, "but we know that Ron is not a monster, Ron is not a whore monger, Ron is not a drug dealer." She also claimed that she had never seen him around drugs. (ROA 2065). Ms. Fantroy told jurors that the Applicant is not the "monstrous person that had been presented," that the wrong people can often lead others astray, and she pleaded for them to forgive him. (ROA 2066).

WM #13

Dr. Anna Cherry, a treating psychiatrist at the Lexington County Detention Center, testified that the Applicant had nightmares and panic attacks, but she never went into detail regarding the Applicant's past. She testified at the trial, "[o]ut of respect for Ron and people he cares about, <u>I'm going to choose not to discuss those things even though it might help him</u>." [Emphasis added.] (ROA 2155–56). Dr. Cherry additionally described the Applicant as a "kind, gentle soul," who would be a "stabilizing influence" in prison, could "deescalate" situations, and got along with correctional officers. (ROA 2152, 2154). When prodded on cross examination, Dr. Cherry explained: "we talked about whether he had had traumatic events in his past, . . . but I did not ask detailed questions because that is not my role. . .[.] We talked about it just enough for me to understand that there was trauma in his past and that he responded to the trauma like someone with PTSD would respond." (ROA 2160).

Defense counsel had planned to call Dr. Maddox in the sentencing phase. That plan unraveled, and the reasons for not calling Dr. Maddox are discussed below. The jury found aggravating circumstances related to the murder and recommended a death sentence.[5] The trial judge concurred.[6]

UNEXPECTED DEVELOPMENTS DURING SENTENCING PHASE

Dr. Maddox is a highly respected forensic psychiatrist who perhaps has unequaled experience in death penalty cases in South Carolina. In serving as a mitigation expert, her responsibility was to gather records and information about the Applicant's family and his upbringing. According to Dr. Maddox, the mitigation investigation is usually completed by the time she is hired in a case. She then contacts family to affirm findings. In this case, Dr. Maddox cited Ms. Graham, Mr. MacDougall, and others as source information for her findings, and testified that her communication with and receipt of materials was satisfactory. (PCR Tr. vol. 1, 309-10; vol. 2, 17). Dr. Maddox interviewed some family members herself, including the Applicant's mother. (PCR Tr. vol. 1, 316-17). However, she noted that the Applicant's second wife, Teresa, had initially refused to speak with anyone on the matter. (PCR Tr. vol. 1, 318).

WPL
#14

[5] Three statutory aggravating circumstances (murder in the commission of a burglary, murder during a robbery with a deadly weapon, and torture) were submitted for the jury's consideration. The trial judge submitted the following mitigating circumstances to the jury: 1. the defendant has no significant history of prior criminal convictions involving the use of violence against another person; and, 2. the age or mentality of the defendant at the time of the crime. He also instructed jurors that they could consider non-statutory mitigating circumstances, including, but not limited to "the defendant's honorable service in the military ... and his adaptability to prison life."

[6] On July 26, 2010, the Supreme Court of South Carolina affirmed the convictions and death sentence. *State v. Finklea*, Op. No. 2683, 388 S.C. 379, 697 S.E.2d 543 (2010). Rehearing was denied by order filed on August 19, 2010. The remittitur was issued on August 19, 2010. The Applicant did not seek certiorari in the United States Supreme Court. The issues on appeal were assertions of error as to the Applicant's competency due to his lack of memory and an allegation that the prosecutor improperly stoked the passions of jurors through theatrics and argument.

During her first meeting with the Applicant, Dr. Maddox specifically asked whether there was any childhood abuse. He denied being abused. (PCR Tr. vol. II, 7-8). She also asked about the crime itself, and the Applicant told her that he could not remember the crime. (PCR Tr. vol. 2, 8). At the conclusion of their meeting, Dr. Maddox did not reach a diagnosis, but believed that the Applicant was suffering from a cognitive disorder and obtained further evaluation from Dr. Brawley and Dr. Gaines. (PCR Tr. vol. 2, 8-9).

In subsequent meetings with the Applicant, Dr. Maddox's testimony and corresponding notes indicate that she asked him questions about the crime itself, about the possibility of childhood trauma, and about his relationships with family members. (PCR Tr. vol. 2, 9). The Applicant told her that he had a positive relationship with his mother. (PCT Tr. vol. 2, 14).

Based on the Applicant's denial of childhood trauma and his having no memory of the crime, Dr. Maddox focused her preparation on the possible mitigating factor of criminal responsibility and whether the co-defendant had pressured the Applicant into committing the robbery. (PCR Tr. vol. 2, 12-13, 18). The co-defendant, Mr. Davis, had a far more extensive criminal history, including an offense involving violence.

Dr. Maddox had been given a sanitized version of the Applicant's life. Dr. Maddox met with the Applicant's family in a group setting for a little over an hour in September 2007, during the sentencing phase of the trial. (PCR Tr. vol. 1, 317–18; PCR Tr. vol. 2, 25). She prepared and updated a report of what she could offer the defense in mitigation. That plan changed when she received an email to her personal email address from the Applicant's second wife, Teresa, on the date that the sentencing phase began – September 4, 2007. Because it came to her personal email, Dr. Maddox did not have a chance to confront the Applicant with the information or discuss it with

defense counsel until September 5, 2007, during the sentencing phase. (PCR Tr. vol. 2, 22) (PCR Tr. vol. 1, 323; vol. 2, 9-10).

The email from Teresa[7] contains information that was both helpful and harmful to the defense. It read, as follows:

> I am not sure if Ron was using any type of drugs. I was deployed as I am now. I know that he had spent most of the money that I had saved. Ron has seen a spiritual advisor on several occasions. I think he probably did have some mental issues. Sometimes he could be so sweet and then others you would have to walk on egg shells around him. Ron and I knew each other for about a year before we were married and everything was good. After about a month into the marriage he started to change. Ron wasn't the person I thought he was. I think he live [sic] in a fantasy world. He would always brag about all the thing [sic] he had. I later found out that just about everything he ever said was a lie. He was always trying to impress and please his mother. I think that he was really afraid of her. He would sometimes tell me about the beatings that he suffered at her hands and how she treated him differently from her other children. I think that there is really something not right with him. He would sometimes have nightmares and he on [o]ccasion wet the bed. He has asked me why do I think GOD put him here. He said he doesn't have a purpose in life. I use [sic] to try and tell him that everyone has a purpose and that he could do great things. I think something was instilled in him as a child. I think he had a terrible childhood. I know that I was not happy in the marriage because no matter what I did Ron seem [sic] to be miserable. It seems like he was always looking for acceptance.
> After he became disabled he did change he felt useless [sic]. I was coming back in the army and he felt that I was going to leave him behind. He did not [sic] the idea of me taking care of him.
> The relationship with my brother [the co-defendant], I'm not really sure what you are asking. Ron was somewhat of a bully. JR is a follower. I think he was scared of Ron. Ron can be pretty scarey [sic] at times. If there is anything else I can help you with please let me know.

WPM
#16

That email, coming after the Applicant was convicted and during the presentation of the sentencing phase evidence, was disastrous. It contained information that undermined the theory of reduced culpability upon which the defense had been built and it introduced undeveloped (and conflicting) information that case law recognizes as important for mitigation in death penalty

[7] Applicant's Exhibit 26 in the PCR case

cases. When confronted with the email, the Applicant confessed that parts of it were true and that he had been harshly disciplined. (PCR Tr. vol. 2, 9-10; 21). This was the first indication of traumatic abuse that Dr. Maddox had come across in the case, despite interviewing numerous family members. (PCR Tr. vol. 2, 12-14; 16). The Applicant explained that his family was supporting him during the trial, and he said that he did not want to offend them. (PCR Tr. vol. 2, 10).

The defense continued to unravel. Soon after discussing the email with the Applicant, Dr. Maddox encountered the Applicant's first wife by chance in the courtroom. Dr. Maddox asked if Cherena would talk to her, and Dr. Maddox then learned of the abuse in more detail. Dr. Maddox had interviewed Cherena prior to trial, and the information shared about the abuse was new and surprising.[8] (Tr. 321) (PCR Tr. vol. 1, 301, 319–22). As previously noted, Cherena had raised a red flag about trauma to the investigator three years beforehand, and counsel had a duty to make sure that the reported abuse was called to the attention of Dr. Maddox and covered by the defense team.

WPL
#17

Dr. Maddox knew that if she testified and discussed the evidence of abuse, she would also have had to disclose the source of information - Teresa's email – and the damaging information contained therein. (PCR Tr. vol. 2, 19). She expressed her concerns to Ms. Armstrong about testifying. (ROA 2197-98; PCR Tr. vol. 2, 12). The defense team made the decision not to call Dr. Maddox as a witness in mitigation in order to keep the damaging evidence out, at the expense of also excluding the evidence of childhood abuse. (PCR Tr., vol. 1, 325-38). That decision was objectively reasonable under the circumstances, but a sufficient investigation and distribution of information among the defense team beforehand would have averted this situation.

[8] The Solicitor's interview notes likewise lacked these details of abuse. (Tr. 322).

EVIDENCE DEVELOPED BY PCR TEAM

Following the conviction, the PCR team uncovered evidence of extensive abuse, principally by the Applicant's mother. That evidence is discussed below. Family members and the Applicant, who apparently were reluctant to divulge evidence of abuse to the trial team, provided the PCR team members detailed information when contacted in preparation for this PCR hearing. There is credible evidence that the presence of the Applicant's mother in group meetings with the trial team stymied others from disclosing traumatic events in the Applicant's life. There is also credible evidence that defense attorneys in death penalty cases should know about the need to develop a rapport with the accused and his family in order to elicit such sensitive information. The record here supports the finding that the Applicant has proven, by the greater weight of the evidence, that the attorneys did not take sufficient steps to build a sufficient rapport to break through the barrier of reluctance to disclose abuse, that they should have known to follow up with indications of infliction of trauma by the Applicant's mother, and that they should have had meetings with family members outside of the mother's presence. There is expert testimony that the Applicant, despite the abuse and because of it, has a relationship whereby he goes to extraordinary steps to avoid displeasing his mother.

WJH #18

Since neither the Applicant nor any family member testified in the PCR hearing, the evidence concerning what was uncovered after imposition of the death penalty is what the experts obtained from interviews and reviewing records. Most of this is hearsay, though admissible in the PCR hearing as it was provided in support of opinions given by experts. The evidence reveals the following version of facts, none of which was discovered by trial counsel.

The Applicant was born out of an affair between his mother and a married man, who abandoned them. (PCR Tr. vol. 1, 106–07). The Applicant looked like his father and had darker skin than his siblings, and his mother viewed the Applicant's existence as a constant reminder of the abandonment and the difficulties associated with it. (PCR Tr. vol. 1, 116, 134). She singled him out, inflicting belittling and inhumane treatment in the form of physical and mental retribution. She constantly called him profane names related to his skin color, instilled in him that he was no good just like his father, and inflicted harsh punishments that were cruel, unwarranted, and disproportionate to those she meted out to her other children. (PCR Tr. vol. 1, 114, 133, 233–34). She disparaged his achievements in school (Applicant's Ex. 22, p. 26), and taught him a fatalistic view of life. (Applicant's Ex. 22, p. 43). She denied him recognition for milestones or accomplishments that she acknowledged with her other children.

WRL #19

The Applicant's family grew up in dire poverty. Significantly, it was hidden from the defense team that his mother sold alcohol and marijuana from their home to supplement her meager income and forced the Applicant and her other children to find customers, pour shots, and cut marijuana. (PCR Tr. vol. 1, 118, 226). Beginning when the Applicant was around seven years old, he was dispatched into dangerous neighborhoods, primarily his own, to gather customers, beating him if he failed to succeed in recruitment. (PCR Tr. vol. 1, 117–18, 226–27).[9]

The Applicant lived in constant fear of unprovoked and severe physical abuse, starting as early as age four or five. (Applicant's Ex. 22, p. 8). The PCR team discovered beatings inflicted

[9] The PCR evidence established that Applicant grew up in a "high crime area" characterized by drug problems, fights, shootings, and prostitution. (PCR Tr. vol. 1, 136; Applicant's Ex. 18; Applicant's Ex. 22, p. 53). His cousin had to teach him how to protect himself so he did not get hurt. (PCR Tr. vol. 1, 136). His mother would beat him "if [he] didn't stand up to people, and [didn't] fight," but she would also beat him for fighting. (Applicant's Ex. 22, p. 12).

by his stepfather, including beating with a broom handle. (PCR Tr. vol. 1, 123). However, the primary and most egregious abuser was his mother. She locked him in closets for hours at a time. (PCR Tr. vol. 1, 113–14; Applicant's Ex. 22, p. 11), and she beat him on a regular basis with broom handles, axe handles, spatulas, pots, extension cords, water hoses, clothes hangers, belts, and switches, leaving welts and cuts. [See PCR Tr. vol. 1, 128–29, 196–97 describing an occasion where the Applicant's mother beat him at school in front of his classmates (Applicant's Ex. 22, pp. 8, 13)]. She often made him strip naked before beatings (Applicant's Ex. 22, pp. 10, 13, 51) and woke him in the middle of the night to deliver severe beatings for no apparent reason. (PCR Tr. vol. 1, 114; Applicant's Ex. 17). Almost every day of his childhood, he was singled out and/or beaten. (PCR Tr. vol. 1, 113–14). On one occasion, when the Applicant was ten years old, his mother beat him "hellaciously" and locked him in the closet, which led him to cut open his forearm with a knife. (Applicant's Ex. 22, p. 11).

WRR
#20

The Applicant's mother admitted to the PCR team that she inflicted physical punishment, but apparently does not see her conduct as wrongful. (PCR Tr. vol. 1, 127, 130, 169, 196–97, 233–34). These beatings continued into the Applicant's late teen years. (PCR Tr. vol. 1, 125). One of the Applicant's PCR experts, Jan Vogelsang, described the physical abuse that the Applicant suffered as "brutal," "extreme," and akin to "torture[]." (PCR Tr. vol. 1, 129–30).[10]

[10] Additionally, the PCR hearing evidence revealed a familial pattern of domestic abuse, violent behaviors, and substance abuse. (PCR Tr. vol. 1, 99). For example, the Applicant's mother was raised by an alcoholic father who was a violent, "mean drunk" and would beat her and her mother frequently. (PCR Tr. vol. 1, 100–03). The Applicant's stepfather also abused Applicant's mother while they were together. (Applicant's Ex. 22, p. 9). This abuse culminated in an incident where his stepfather had his mother "up against the wall," choking her, and shot at her head with his rifle, which misfired. The Applicant never saw his stepfather again after that incident. (Applicant's Ex. 22, p. 9). Additionally, the Applicant's maternal uncle physically abused his wife and children. (PCR Tr. vol. 1, 120).

His mother emasculated him and treated him in ways that were sexually inappropriate. From the time the Applicant was around seven until he left home after graduating high school, she often possessively grabbed him by his genitals, both inside and outside of his clothes. (PCR Tr. vol. 1, 114, 129, 207). During these episodes, she would yell at him, claiming that she could do whatever she wanted to do to him because he belonged to her and was "her property." (PCR Tr. vol. 1, 114). She seemed to be especially likely to behave this way in order to reassert her control whenever the Applicant developed a romantic interest in another woman. (PCR Tr. vol. 1, 114).

The Applicant has a long history of bedwetting, which his mother addressed by wrapping rubber bands around his penis at night well into his teens (PCR Tr. vol. 1, 114, 235), using duct-tape to affix a milk jug to his penis (PCR Tr. vol. 1, 127), and forcing him to sit naked in tubs of ice cold water and sleep naked in the bathtub. (PCR Tr. vol. 1, 114, 128; Applicant's Ex. 17).

She threatened to beat him with weapons, including guns, knives, and a baseball bat. She threatened to cut off his penis. (PCR Tr. vol. 1, 134). She shot at or threatened him with a gun at least three times during his childhood. (PCR Tr. vol. 1, 200, 205). On one occasion, he entered the house bleeding and his mother fired a gun at him because his blood was soiling the floors. (PCR Tr. vol. 1, 205). She also shot at him in the backyard because she wanted him to do something. (PCR Tr. vol. 1, 200–01). She told him that she would "blow [his] brains out." (Applicant's Ex. 22, p. 10). On yet another occasion, when she was engaging in horseplay with her children and they began getting the better of her, she retrieved her gun, threatened to shoot the Applicant and his sister, and chased them out of the house. (PCR Tr. vol. 1, 202).

The Applicant's mother forbade her children from telling anyone about what went on in their home, threatening to beat them "half to death" if they disobeyed. She carried out her threats by beating the children if they told family members about her behavior. (PCR Tr. vol. 1, 149, 230).

Evidence was also introduced in the PCR case about traumatic events that the Applicant witnessed being inflicted upon those for whom he had greatest affection. His favorite relative as a child was his Aunt Ruby. Her violent boyfriend beat and cut her. (PCR Tr. vol. 1, 121). In one attack, the Applicant witnessed flesh hanging off of her body. (PCR Tr. vol. 1, 121). On two separate occasions, the Applicant found his great uncle and his mother's boyfriend molesting his younger sister. (PCR Tr. vol. 1, 118, 226). He rescued his sister on both occasions. (PCR Tr. vol. 1, 226). When the Applicant and his sister confided in their mother about these sexual assaults, she responded with rage and disbelief. She beat the Applicant's sister in the genitals and blamed her for the molestations. (PCR Tr. vol. 1, 119, 226). When the Applicant was a child, his maternal grandfather shot and killed his pet dog. (PCR Tr. vol. 1, 203). This caused the Applicant to attempt suicide by pulling a car engine over his torso, resulting in him puncturing his legs and bleeding profusely. (PCR Tr. vol. 1, 203–04).

Dr. Susan Knight, a forensic psychologist, presented evidence that this history of trauma resulted in mental disorders and were "instrumental in shaping an adverse life trajectory." (Applicant's Ex. 22, p. 54). Specifically, she testified that, as a result of the chronic trauma, the Applicant suffers from PTSD with a "specifier of panic attacks," severe OCD, and a history of major depression, all linked directly to his traumatic childhood. (PCR Tr. vol. 1, 227, 259).

Dr. Knight based her opinion on seven clinical interviews with the Applicant, interviews with the Applicant's family members, including the Applicant's mother, a review of memos

detailing interviews that other members of the PCR team conducted, and consultations with the Applicant's former correctional psychiatrist, former forensic psychiatrist, current correctional psychologist, current correctional psychiatrist, and Jan Vogelsang, MSW, who also testified at the PCR hearing. She also reviewed case-related documents and a variety of social history records, including records obtained from schools, prisons, and doctors. She conducted numerous interviews with family, preachers, his former spouse, and friends. (PCR Tr. vol 1, 213–15; Applicant's Ex. 22, pp. 2–7).

According to Dr. Knight, the Applicant's PTSD changes the way that he functions emotionally, cognitively, affectively, and interpersonally—changes that affected Applicant at the time of the offense. (PCR Tr. vol. 1, 249). She further explained that the Applicant's "complex trauma" leads to intrusive memories of abusive experiences, results in frequent panic attacks, causes an underlying, constant anxiety, and makes it difficult if not impossible for the Applicant to trust others. (PCR Tr. vol. 1, 249–52 and Applicant's Ex. 22, p. 43).

WPL #23

Dr. Knight testified that the Applicant had malingered his memory loss and that he actually does recall the crime, but in her opinion he chose to lie because he did not trust his legal team. (PCR Tr. vol. 1, 243). She believes that he struggles to develop trust due to trauma, that he was embarrassed by his own actions, and that he was conditioned not to talk about his problems with anyone other than family. (PCR Tr. vol. 1, 243-44). Dr. Knight confirmed that the Applicant lied to Dr. Maddox about suffering any type of abuse growing up (PCR Tr., vol. 1, 246), but communicated with Dr. Cherry who had developed a rapport with him. Dr. Cherry was not responsible for delving into the Applicant's history or providing him with therapy because she was only treating him medically and trying to get his symptoms under control. (PCR Tr., vol. 1, 241).

Substantial testimony was presented at the PCR hearing that the Applicant's traumatic experiences profoundly affected his adult functioning and psychological status. Jan Vogelsang testified that the Applicant tended to process his emotions in a guarded way. (PCR Tr. vol. 1, 130). In an effort to gain some control over his environment, the Applicant engaged in compulsive behaviors. (PCR Tr. vol. 1, 131, 139). He had significant anxiety. His experiences made it difficult for him to respond to existing conflict or even potential conflict in a measured and logical manner. (PCR Tr. vol. 1, 140, 230–31). He developed nighttime anxiety and sleep deprivation. (Applicant's Ex. 22, pp. 45, 49).

His OCD caused him to obsess over mental images of his abuse and have irrational fears. (PCR Tr. vol. 1, 254–55; Applicant's Ex. 22, p. 47). To help calm himself, he compulsively ordered, straightened, cleaned, and counted items in a manner that disrupted his ability to function. (PCR Tr. vol. 1, 255–57). According to Dr. Knight, his behavior demonstrates a need to bring order to chaos and is likely tied to the chaotic and randomly violent environment in which he was raised. (PCR Tr. vol. 1, 256). She testified that his need to bring order, albeit a bizarre kind of order, to what he perceived as his life spinning out of control provides an explanation of why he decided to commit the robbery, as ill-conceived as that decision was. (PCR Tr. vol. 1, 291–92).

These accounts of a mitigating nature for the Applicant's horrendous crime were notably absent from trial counsel's presentation of the case. There was undeveloped evidence of the following things that a juror could find mitigated against imposition of the death penalty:

(1) that the Applicant had mental health issues caused by trauma, and the resulting mental health conditions contributed to the development of an irrational, unnecessary, and ill-conceived attempt to resolve his perceived situation;

(2) that his mental health issues were exacerbated by his separation from the Army, compounded by his wife's subsequent deployment to Iraq and his fear that his wife was going to "move on without him" and "leave him behind." (PCR Tr. vol. 1, 236–37);

(3) that his mental health issues help explain why he seemingly functioned better in a structured environment (the Army) and, by extension, was evidence of adaptability to prison life; and,

(4) that the combination of depression, severe anxiety, PTSD, and OCD demonstrate someone not possessing rational faculties of how to address an unexpected turn of events (PCR Tr. vol. 1, 144–46 and Applicant's Ex. 22, p. 44) and were contributing factors in the horrible act of murder and torture.

According to Dr. Knight, there is evidence that the Applicant suffers severe anxiety when he "can't anticipate" future events and "feels in the dark." (Applicant's Ex. 22, p. 44). After his discharge from the military, the Applicant's symptoms of anxiety and OCD significantly increased (Applicant's Ex. 22, p. 56) as his financial woes worsened. (PCR Tr. vol. 1, 239). Following in his mother's footsteps, he turned to selling drugs. (PCR Tr. vol. 1, 144–45).[11] Due to ineptitude and an allegedly unhinged state of mind, he lost money in the process. (PCR Tr. vol. 1, at 146). As Dr. Knight explained, these events exacerbated his symptoms and accelerated his downward spiral. (PCR Tr. vol. 1, 237–39). She further explained that the Applicant lacked coping mechanisms to deal with the "accumulation of stressors" bombarding him, which resulted in very poor decision making. (PCR Tr. vol. 1, 260–61). During this period, the Applicant

WAL #25

[11] The court understands that an interpretation of the evidence can be made that is not nearly as sympathetic towards the Applicant as Dr. Knight's recitation. For example, as noted near the conclusion of this order, Sherry Bolin testified that he began selling drugs almost immediately upon his arriving at her house in South Carolina and at a time when his wife was there.

suffered from suicidal thoughts. (Applicant's Ex. 22, p. 16). He began drinking heavily and using marijuana, which further compromised his judgment. His OCD symptoms became particularly severe during this time. The OCD symptoms revealed mental illness and represented the Applicant's attempt to put order and control back into his life. (PCR Tr. vol. 1, 237–38).[12]

Dr. Knight discussed how the Applicant went into "straight out panic mode." (Applicant's Ex. 22, pp. 17, 57). She opined that his traumatic history, difficulty processing conflict in interpersonal relationships, and inability to cope with things that fall outside his control left him prone to making the disastrous decisions that led to murder. (*See* PCR Tr. vol. 1, 237–39). This offense, in Dr. Knight's opinion, was the culmination of those factors. (PCR Tr. vol. 1, 261; Applicant's Ex. 22, p. 57–58).

DEFICIENT PERFORMANCE REGARDING MITIGATION EVIDENCE

WPL #26

Trial counsel should have recognized and pursued indications from the Applicant's first wife about trauma and, from that, discovered what the PCR team learned about the extent of the trauma and how it affected his mental health at the time of the murder. In addition, it is apparent that trial counsel did not adequately interview Dr. Cherry. [See the discussion about being surprised by Dr. Cherry's testimony related to PTSD discussed in the Strategic Decisions section below.] Trial counsel knew that Dr. Cherry had a long-term relationship with the Applicant and knowledge of his mental health issues. They called her as a witness on his behalf. Her trial testimony seems to be a desperate attempt to bring out the unexplored trauma. At the PCR hearing, the trial attorneys gave no explanation as to why they did not learn critical information from Dr. Cherry prior to trial. The failure of counsel to explore more fully beforehand what Dr.

[12] There is evidence that the Applicant arranged things in sets of five, was obsessed with pairing things, would not let people enter his home with shoes on, would not drink out of a glass without first boiling it, and engaged in bizarre rituals of cleaning himself and things around him. (See for example PCR Tr. vol. 1, 237–38).

Cherry knew, to build the degree of rapport necessary to effectively follow up on this knowledge, and to discuss the evidence of trauma with the Applicant before trial amounted to deficient representation.

The evidence in mitigation presented at trial was based on what the attorneys knew at the time.[13] As a result of the undeveloped mitigation evidence and the ultimate decision not to call Dr. Maddox when the foundation of her opinions was pulled from under her during the sentencing phase, trial counsel presented experts who did not address the Applicant's life history. Two experts testified about the anoxic brain injury he suffered after his suicide attempt, but neither adequately addressed whether the Applicant had any mental impairments before or at the time of the incident. (ROA 2118–27, 2129, 2166–68).

The only time that Ms. Armstrong met the Applicant's family was after the trial had begun, during the sentencing phase. She met with them to discuss their upcoming direct examinations. At that point, in the middle of trial, she understandably did not have the ability to spend significant time trying to build rapport, and she did not probe for additional information regarding possible trauma because she assumed that the mitigation specialist and her co-counsel had done so. (PCR Tr. vol. 2, 48–50).

WHL
#27

According to the experts presented by the Applicant at the PCR hearing, the result of trial counsel's lack of rapport is that the critical foundation for eliciting information was never established, which infected the Applicant's entire sentencing presentation. Dr. Knight, an expert

[13] As discussed throughout this order, the court has concerns about the sequencing and length of time spent in development of mitigation evidence on a death penalty case where the attorneys expected a conviction in the guilt phase. Mr. Soltis went so far as to travel to the State of Washington to attempt to interview the Applicant's first wife who had raised a red flag in her comments to the investigator. He knew that was important, but the interview never occurred. (PCR Tr. vol. 1, 36–37). Trial counsel's mitigation specialist, Carolyn Graham, went to Alabama on only one occasion. (Applicant's Ex. 8 and PCR Tr. vol. 1, 36–37). Ms. Graham met with the Applicant only once, and this meeting occurred after she had already met with his family. (PCR Tr. vol. 1, 31, 88).

in forensic psychology, testified credibly that it was especially necessary to build a relationship in order to uncover the type of trauma asserted here because abuse victims will "do anything not to talk about [their trauma]" either out of shame, to avoid being disbelieved, or to avoid reopening old wounds. (PCR Tr. vol. 1, 213, 247– 49). She also noted in her report that the Applicant did not trust his trial counsel "at all" because he saw them so few times. (Applicant's Ex. 22, p. 33). Further, it is apparent from Dr. Knight's expert report that most of the character witnesses that trial counsel called during the sentencing phase of Applicant's trial had specific knowledge regarding Applicant's abuse, which trial counsel almost certainly would have uncovered had they pursued the information without the Applicant's mother present and/or after spending the time necessary to develop a greater rapport. (Applicant's Ex. 22, pp. 20–24).

The red flags previously identified were of such a nature that trial counsel was obligated to conduct a more thorough investigation. The PCR hearing established that it is extremely likely that the information of trauma would have been developed had the pretrial investigation been properly conducted, and the resulting evidence of mental health issues likely affecting the Applicant's actions would have been uncovered. Trial counsel did not exercise reasonable diligence.

WPM #28

The result is that the portrait of the Applicant presented in mitigation was substantially incomplete and inaccurate. Trial counsel claimed in closing that the Applicant "had a loving family." (ROA 2225). The sentencing jury never heard evidence of psychological consequences of chronic abuse and trauma, which the Applicant's PCR experts assert to be profound.

STRATEGIC DECISIONS

Though trial counsel has leeway to make strategic decisions, those decisions must be conscious and informed before they can be reasonable. *Weik v. State*, 409 S.C. 214, 236, 761

S.E.2d 757, 768 (2014) ("Decisions made in ignorance of relevant, available information cannot be characterized as strategic."). As the Supreme Court in *Wiggins* made clear, there is a difference between a *strategic decision* not to investigate mitigating evidence and a *failure* to investigate mitigating evidence that results from trial counsel's "inattention." 539 U.S. at 526 (noting that the latter is under most circumstances unreasonable). Additionally, even if trial counsel's decision not to pursue mitigating evidence is purportedly "strategic," that decision is only reasonable insofar as it is supported by a reasonable underlying investigation. *Strickland*, 466 U.S. at 690–91 ("strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation"); *Von Dohlen*, 360 S.C. at 607, 602 S.E.2d at 743. A decision to forego other possible avenues of mitigation is not reasonable if counsel has failed to conduct an investigation sufficient to determine that further investigation would be fruitless. *Wiggins*, 539 U.S. at 523, 527 ("*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy.").

WPd
#29

Here, the Applicant has proven that no strategic decision was made to refrain from presenting the substantial evidence of trauma and the resulting mental health issues that were uncovered after trial. In fact, the evidence is that trial counsel attempted to explore whether such evidence existed and understood, in general terms, the importance of it. The evidence now known was unknown to trial counsel.

Ms. Armstrong testified that she first heard about the Applicant's childhood trauma during the penalty phase and that her failure to present that evidence was not grounded in any reasoned trial strategy. (PCR Tr. vol. 2, 78). She was also surprised to hear Dr. Cherry's testimony regarding the Applicant's PTSD at trial. (ROA 2204). After Dr. Cherry testified about

the Applicant's PTSD during the sentencing phase, Ms. Armstrong discussed statutory mitigating circumstances with the Court. During that exchange, Ms. Armstrong stated "[w]ith Doctor Cherry's testimony, I'm now somewhat concerned that it would be ineffective to not request some of the more mental health statutory mitigators like the age or mentality of the defendant at the time of the crime. I believe her testimony brought forth a diagnosis of posttraumatic stress disorder." (ROA 2205).

Ms. Armstrong testified that if she had possessed evidence akin to the mitigation evidence presented by Jan Vogelsang and Dr. Susan Knight during the PCR, she definitely would have presented it to the Applicant's trial jury. (PCR Tr. vol. 2, 79).

PREJUDICE PRONG UNDER STRICKLAND

Whether the evidence of trauma and mental illness will be likely to cause a single juror to determine that a death sentence is not warranted is an issue that the court has considered at length in evaluating the prejudice prong of the PCR burden of proof. A defendant suffers prejudice as a result of trial counsel's deficient performance if there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Von Dohlen*, 360 S.C. at 603, 602 S.E.2d at 740–41. A reasonable probability is one sufficient to "undermine confidence in the outcome." *Strickland*, 466 U.S. at 693–94 (noting that this standard is less than a preponderance of the evidence); *Von Dohlen*, 360 S.C. at 603, 602 S.E.2d at 740–41.

When a death sentence is at issue, the inquiry is whether there is a reasonable probability that a person faced with sentencing would have determined that "the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; *Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 823 (1998). In making that determination, this Court must

consider "the totality of the available mitigation evidence," including both mitigation evidence from trial and from the PCR hearing, and "reweigh[] it against the evidence in aggravation." *Williams v. Taylor*, 529 U.S. 362, 397–98 (2000); *Weik*, 409 S.C. at 233, 761 S.E.2d at 767. In reweighing the evidence, this Court must also "appropriately reduce[] the ballast on the aggravating side of the scale." *Porter*, 558 U.S. at 42. After engaging in the constitutionally required reweighing, prejudice exists if "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 536; *Weik*, 409 S.C. at 233, 761 S.E.2d at 767.

Under these standards, and in light of the extensive precedent at both the federal and state levels recognizing that evidence of a defendant's history of trauma and his mental health status at the time of the murder is critical in the mitigation stage of a death penalty case, the court finds that the Applicant has established the prejudice prong. Of particular note in this analysis is the fact that a single juror may stop the imposition of a sentence of death.

WPK #31

When the trial attorneys used the good-guy defense in mitigation, the State turned the positive testimony of the Applicant's witnesses and their inconsistencies against the Applicant by arguing its manipulation theory. In closing, the prosecutor noted that the Applicant's character witnesses all testified "that's not the Ron I knew . . . I just can't believe it, can't understand it" and portrayed their disbelief as evidence of the Applicant's successful manipulation. (ROA 2221, 2233 ("Well he's manipulated his family. . . . He's manipulated the servicemen . . . they say we don't know that Ron.")). The State seized upon the non-specific nature of references to trauma and its resulting impact on the Applicant presented by Dr. Cherry and the Applicant's first wife, as well as the inconsistency of their testimony with what was stated by the other defense witnesses. The prosecution told the jury that both Dr. Cherry and Cherena mentioned "bad stuff"

that happened to the Applicant while he was growing up, but all of his family members testified only to "good things happen[ing] to him." (ROA 2221). The lack of evidence and the inconsistency allowed the State to suggest to the jury that the Applicant had manipulated those two witnesses. (ROA 2221–22, 2232 ("[H]is ex-wife and Doctor Cherry again said, well he said things wasn't so good in Alabama. Which is it? Who is he manipulating? The good side or the bad side?")). Similarly, in response to the testimony from Mr. Aiken about adaptability to prison life, the State posed the same questions: "[Aiken] said I've looked into the records, he's all right, he's good, we can control him. Well, is [Applicant] already manipulating that system?" (ROA 2233).

Furthermore, this is not a case where the mitigating evidence trial counsel failed to discover and present is merely a "fancier" version of the evidence they did present. *Jones*, 332 S.C. at 338–39, 504 S.E.2d at 826–27. In *Jones*, the South Carolina Supreme Court found no prejudice where the PCR evidence "would not have revealed anything significantly different" to the jury than what it heard at trial. *Id.* The PCR testimony in this case, however, was not simply a "more elaborate version" of the evidence and case theory presented at trial. In this case, the sentencing jury did not hear any details about the physical, sexual, and emotional trauma inflicted upon the Applicant, nor was it told about the significant psychological effects of that abuse. The PCR evidence is both quantitatively and qualitatively different from the evidence presented at trial, and counsel's failure to discover and present that evidence deprived the sentencing jury of information that courts have recognized as being important in properly evaluating moral culpability and in weighing the prosecution's arguments about the Applicant being a skillful manipulator.

WPK #32

The Applicant has met his burden of proof on both the performance and prejudice prongs of *Strickland*. Trial counsel failed to discover and present relevant mitigating evidence, and there is a reasonable probability that absent these errors at least one juror would have believed that life imprisonment was the appropriate punishment. Accordingly, this Court grants the Applicant's request for post-conviction relief on this ground.

OTHER GROUNDS FOR RELIEF DENIED

GROUND 2. Trial counsel failed to investigate and present adequate, specific, and individualized expert testimony concerning Applicant's adaptability to prison.

The court finds that the Applicant has failed to prove this assertion. The Applicant challenges the fact that James Aiken, who was admitted as a prison adaptability expert, failed to meet with the Applicant, but relied on the Applicant's military records and correctional files. (ROA 2187–88). The Applicant also raises an allegation of ineffectiveness of counsel in that Mr. Aiken noted that if he had to kill the Applicant to prevent him from posing a threat to society or inmates, he would. (ROA 2191).

WPL #33

Mr. Aiken, a former prison warden and correction's commissioner, testified that the Applicant was extremely unlikely to be a threat to other inmates. (ROA 2189–92). Dr. Cherry, who had a wealth of knowledge about the Applicant, testified strongly in favor of his adaptability based on the real-world experience of her observations over a lengthy period in the Lexington County Detention Center. (ROA 2151–2154).

The Applicant maintains that, in addition to the failure to interview the Applicant in person, counsel was deficient in failing to present empirical evidence of adaptability. Dr. Knight asserted the importance of using objective, data-driven methods to assess future dangerousness and adaptability. (PCR Tr. vol. 1, 265). She stated that interviews with correctional officers

familiar with the person, interviews with the person's correctional psychiatrist, and interviews with the person himself are necessary. (PCR Tr: vol. 1, 262). Dr. Knight used empirical research on prison violence and adaptability in order to predict the Applicant's future behavior (PCR Tr. vol. 1, 265; Applicant's Ex. 23) and concluded that the Applicant "does not present a significant risk for future serious violence in prison" and that none of the empirical risk factors for prison violence apply to him. (PCR Tr. vol. 1, 267).

The testimony of Mr. Aiken, in conjunction with that of Dr. Cherry, undermines the claim of ineffectiveness by counsel on the issue of prison adaptability. A very effective presentation was made that the Applicant would likely pose no threat to other inmates, and counsel performed well within required standards for effective representation. Even if a better presentation could have been made, including empirical data, the Applicant has failed to prove that such a presentation would likely result in a different outcome.

WAC #34

GROUND 3. Trial counsel was ineffective for failing to object to penalty phase direct examination testimony from State's witness Sherry Bolin to the effect that Applicant told her that his stepson was dealing drugs on Applicant's behalf. (ROA 1866). [As stated in the Application: Ineffective assistance of counsel for failing to object to the State's assertion during closing arguments {emphasis added} that Applicant had his minor step-son selling drugs for Applicant prior to the crimes at issue in this case.]

The Applicant has failed to prove this ground. PCR counsel asserts that trial counsel had a legitimate objection to make under SCRE 403, as the probative value of admitting the evidence was substantially outweighed by the danger of unfair prejudice. It is argued: a) that Ms. Bolin admitted that she had no independent knowledge of the truth of this statement and no corroboration existed; and, b) Ms. Bolin's bias arising from her romantic relationship with the co-defendant's

sister gave her incentives to make Applicant look worse in an effort to reduce the culpability of her girlfriend's brother. Respectfully, these grounds are not likely to support exclusion of the evidence under Rule 403 or a change of outcome based on an objection to the closing argument.

Sherry Bolin's testimony explained motive for the murder and robbery.[14] The Applicant, his wife Teresa, and stepson lived with Ms. Bolin for approximately four months shortly after his discharge from the Army. (ROA 1862; 1864). Bolin testified that the Applicant immediately began selling crack cocaine out of her house. (ROA 1863). She discussed the issue with her roommate, Irena Fuller,[15] and they agreed to confront the Applicant about his actions. (ROA 1863).

Sherry testified that the Applicant apologized for disrespecting their home and said that he would stop. (ROA 1863). Later, Bolin and Fuller had a conversation with the stepson leading to another discussion with the Applicant about having to move out if he would not stop selling drugs. (ROA 1864-65). Ms. Bolin testified that the Applicant told her that Brandon was selling drugs for him. (ROA 1866). Even if Ms. Bolin said that she did not know the truth of the statement about the Applicant using the stepson to sell drugs, it was presented as an admission by the Applicant.

WPK #35

State's Exhibit 89 in the trial was a letter written by the Applicant. (ROA 1914). It states, "Tell my son I love him and Brandon already knows what was what, I kinda let him in on it, I didn't tell him that's Y he had the letter. . . . Brandon son, please change, U_R headed down a

[14] Ms. Armstrong objected to her testimony *in limine.* (ROA 1848). Ms. Armstrong argued that the produced discovery for this witness's statement lacked specificity as to time and place, and was never the basis of a criminal charge. Ms. Armstrong also argued that under *Gardner v. Florida*, 430 U.S. 349 (1977) it would violate the Eighth Amendment to admit evidence that Applicant had not had a chance to deny, explain, or rebut. (ROA 1848; 1850-51; 1853-54). The State responded that the testimony in question was admissible under *State v. Shuler*, 353 S.C. 176, 577 S.E.2d 438 (2003) and *State v. Gaskins*, 284 S.C. 105326 S.E.2d 132 (1985), as bad character evidence. (ROA 1849-50; 1852). Ms. Bolin's testimony was offered in camera and the trial court deemed it admissible with limiting instruction to the jury. (ROA 1854-61).

[15] Irena Fuller, who also testified at trial, is Teresa Fuller's sister. She was also Applicant's sister-in-law at the time. She confirmed the conversations she had with Finklea about dealing drugs with the Mexicans and to stop doing it. ROA 1868-71.

dead end street, U-R just like Tommy, and I know if I came across U. I would put a bullet in your head, having said that Pooh, please listen 2 your mother. . . ." State Exhibit 89, 91, (ROA 1915-16). Solicitor Myers used the testimony of Ms. Bolin and State's Exhibit 89 as a basis to argue that the Applicant had his stepson selling drugs for him. (ROA 2220-21; 2234).

Trial counsel attempted to exclude the evidence now being challenged. Ms. Armstrong objected *in limine* as detailed in Footnote 14 above. (ROA 1848; 1850-51; 1853-54). Once the evidence was allowed over her objection, the prosecution was allowed to comment on it in closing.

As to a specific argument under Rule 403, SCRE, Ms. Armstrong gave a reasonable explanation for her decisions related to objections (PCR Tr. vol. 2, 76). There was more than one source of information about drug dealing and the involvement of the stepson. The Applicant has failed to prove that a Rule 403 objection would have been likely to exclude the evidence.

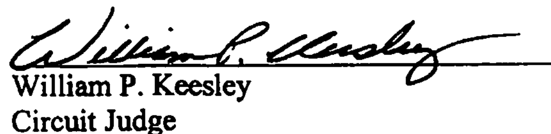
#36 There is also a failure of proof of likelihood of exclusion of this evidence under Rule 403 based on alleged bias related to a romantic relationship. Bias is almost always an issue for cross examination and impeachment.

The Applicant has failed to prove that trial counsel's failure to object fell below an objectively reasonable standard of representation or was independently prejudicial.

CONCLUSION

For the reasons stated above, the sentence of death is vacated and this matter is remanded to the Court of General Sessions of Lexington County for a new sentencing trial.

AND IT IS SO ORDERED.



William P. Keesley
Circuit Judge

March 6, 2019

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP3205076

Ron O Neal Finklea #SK6025		State of South Carolina	
PLAINTIFF(S)		**DEFENDANT(S)**	

Submitted by:

Attorney for: □ Plaintiff □ Defendant □ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

□ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

□ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. □ See Page 2 for additional information.

□ **ACTION DISMISSED (*CHECK REASON*):** □ Rule 12(b), SCRCP; □ Rule 41(a), SCRCP (Vol. Nonsuit); □ Rule 43(k), SCRCP (Settled); □ Other: ____________

□ **ACTION STRICKEN (*CHECK REASON*):** □ Rule 40(j) SCRCP; □ Bankruptcy; □ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; □ Other: ____________

□ **STAYED DUE TO BANKRUPTCY**

□ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
□ Affirmed; □ Reversed; □ Remanded; □ Other: ____________

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: □ See attached order; (formal order to follow) □ Statement of Judgment by the Court:

ORDER INFORMATION

This order □ ends □ does not end the case.
Additional Information for the Clerk: ____________

INFORMATION FOR THE JUDGMENT INDEX
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	Judge Code	3/7/2019 Date

For Clerk of Court Office Use Only

This judgment was entered on **March 7th, 2019**, and a copy mailed first class or placed in the appropriate attorney's box on **March 7th, 2019**, to attorneys of record or to parties (when appearing pro se) as follows:

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 2/17)

John H. Blume III Blume, Franklin-Best & Young 900 Elmwood Ave., Ste 200 Columbia, SC 29201
Diana L. Holt Diana Holt, LLC PO Box 6454 Columbia, SC 29260-6454

Donald J. Zelenka PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

LISA COMER/jp

Court Reporter

Lisa M. Comer - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

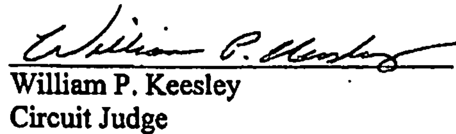
This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	CIVIL ACTION NO.:
RON O'NEAL FINKLEA, SK6025	)	C/A No. 2010-CP-32-5076
Applicant,	)	
vs.	)	ORDER ON MOTION TO ALTER OR AMEND
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	

2019 JUN 10 PM 2:56

Following the court's granting of post-conviction relief to the extent that it granted a new sentencing hearing, the respondent filed a motion to alter or amend. Pursuant to Rule 59(f), SCRCP, the court notified the parties that the motion would be decided on written submissions and both sides filed their briefs. While this was a difficult decision, the court has reconsidered the matter, but does not find any issue of law or fact that was overlooked or not addressed. The motion to alter or amend is denied.

AND IT IS SO ORDERED.



William P. Keesley
Circuit Judge

June 10, 2019

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP3205076

Ron O Neal Finklea #SK6025		State of South Carolina	
PLAINTIFF(S)		**DEFENDANT(S)**	

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: ____________________

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Circuit Court Judge	Judge Code	6/10/2019 Date

For Clerk of Court Office Use Only

This judgment was entered on **June 10th 2019**, and a copy mailed first class or placed in the appropriate attorney's box on **June 10th 2019**, to attorneys of record or to parties (when appearing pro se) as follows:

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 2/17)

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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

LISA COMER/jp

Court Reporter

Lisa M. Comer - Clerk of Court

Court Reporter:

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