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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Court of Common Pleas
Honorable G. Thomas Cooper, Jr., Circuit Court Judge

WILLIAM O. DICKERSON, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT,

Appellate Case No. 2019-001499

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Though not separately set out in the petition, Petitioner submits the PCR court erred in denying relief and makes the following specific allegations in support of that position:

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

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

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

2. The Ninth Circuit Solicitor committed prosecutorial misconduct and denied Dickerson's rights to due process and equal protection of the law by striking qualified African-American jurors from his venire because of their race.

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

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

5. Trial counsel rendered ineffective assistance of counsel by failing to object to the state's closing argument that diluted the jurors' sense of responsibility in rendering a possible death verdict.

6. Trial Counsel's cumulative errors during the sentencing phase of William Dickerson's capital trial require this Court to order a new sentencing hearing.

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

8. Appellate counsel rendered ineffective assistance of counsel for failing to present, for appellate review, defense counsel's objection to the solicitor's questioning of Dr.

Phillips about whether William Dickerson "knew right from wrong" at the time of the killing.

(Petition, Arguments, pp. i-ii and 9, 20-21 and 40).

STATEMENT OF THE CASE

Petitioner William O. Dickerson was tried by a jury in April 2009, in Charleston County, on the charges of murder, criminal sexual conduct first degree, and kidnapping. The Honorable R. Markley Dennis presided. Jeffrey P. Bloom, Esq., and C. Andrew (Drew) Carroll, Esq. represented Dickerson. On April 30, 2009, the jury convicted as charged. (App. pp. 3765-70). On May 4, 2009, the penalty phase began. (App. pp. 3846-47). On May 7, 2009, the jury found three aggravating circumstances: 1) criminal sexual conduct; 2) kidnapping; and 3) torture, and recommended death. (App. pp. 4699-4703). Judge Dennis imposed a death sentence for murder, and thirty years on each of the other crimes. (App. pp. 4707-4709). Petitioner appealed.

Robert M. Dudek and Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, along with trial counsel Bloom, represented Dickerson on appeal. After hearing argument on May 24, 2011, this Court affirmed by published opinion issued October 3, 2011. *State v. Dickerson*, 395 S.C. 101, 716 S.E.2d 895 (2011). Dickerson sought rehearing, which was denied on November 17, 2011. His petition for a writ of certiorari in the Supreme Court of the United States was denied on April 23, 2012.

Dickerson filed an application for post-conviction relief (PCR) on May 16, 2012. By Order dated July 31, 2012, this Court assigned the Honorable Edgar W. Dickson as PCR judge. Judge Dickson appointed Elizabeth Franklin-Best, Esq., and E. Charles Grose, Jr., Esq., to represent Dickerson. PCR counsel filed an amended application on October 18, 2012, and Respondent filed a Return on November 19, 2012. Judge Dickson recused himself from further

participation in this case by Order dated June 2, 2014. This Court assigned the matter to the Honorable G. Thomas Cooper, Jr. by order dated June 20, 2014.

Dickerson's counsel filed a second amended application on March 5, 2015, and third on July 15, 2015. On October 1, 2015, Respondent moved to strike or, in the alternative, to dismiss claims within the third application as not cognizable in PCR. Dickerson responded in opposition and Respondent replied. In an order filed December 8, 2015, Judge Cooper denied the motion finding: "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 evidentiary hearing was held in several parts beginning December 7-8, 2015 and continuing on March 31, 2016, May 12, 2016, May 27, 2016, and, October 23, 2017. At the close of the record, the PCR court ordered post-trial briefing. By Order dated June 26, 2018, filed June 27, 2018, Judge Cooper denied relief. (App. pp. 9314-9392). On July 11, 2018, Dickerson filed a Rule 59(e), SCRCP motion. (App. pp. 9395-9407). On July 16, 2018, the State filed its response in opposition to the motion.[1] By order dated July 20, 2018, filed July 25, 2018, Judge Cooper denied the motion to alter or amend; however, Judge Cooper acknowledged that he had inadvertently used several section headings from the State's briefing that should not have been included. (App. p. 9488). Judge Cooper filed an Amended Order Denying Post-Conviction Relief on July 25, 2018, with those corrections. (App. pp. 9490-9567).

Dickerson has now filed a petition for writ of certiorari in this Court pursuant to Rule 243, SCACR. This return follows.

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[1] This response in not included in the appendix before the Court, but does show as filed in the Clerk of Court's office. See https://jcmsweb.charlestoncounty.org/PublicIndex/CaseDetails.

STATEMENT OF FACTS

The facts of the crime were summarized in this Court's 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. [FN 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. [FN 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. [FN 3]. Through this entire ordeal, Roper suffered the following at the hands of Dickerson alone: choking, being tied up and placed in a closet, being sodomized with a gun and a broomstick, having his scrotum burned, being hit with a heavy vase and a mirror, and generalized beating and cutting. At one point, Roper began asking that they just let him die.
>
> All told, Roper received over 200 individual wounds to the outside of his body, including lacerations to his anus. He also received several internal injuries, including various broken bones in his face that caused it to appear misshapen, blunt force trauma to his neck resulting in the breaking of various structures, a broken tibia, broken fingers and wrist, brain swelling, and bleeding into the internal structures around his rectum as the result of objects being inserted into it.

> Although there is no definite timeline of events, Roper survived for eighteen to twenty-four hours after the sodomy occurred, and none of these wounds were inflicted post-mortem. No single wound was fatal. Instead, Roper died from the sum total of his injuries, apparently shortly after he was struck with the mirror and the vase on the morning of March 8.
>
> As these events transpired, Dickerson made several phone calls to various people during which he discussed what he was doing to Roper. Many of them were to Dickerson's girlfriend, and she managed to record one of them containing his description of the sodomy and even Roper's own confirmation of what was happening. Dickerson also confirmed the sodomy, as well as the burning of Roper's scrotum, over the phone to another friend. In a later call to that same friend, he said 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.
>
> > [FN1] 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.
> >
> > [FN 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.
> >
> > [FN 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.

Dickerson, 395 S.C. at 107–09, 716 S.E.2d at 898–99.

This Court summarized Dickerson's claims in the direct appeal as four allegations of trial court error: "(1) in not excusing a juror for cause; (2) in limiting the cross-examination of the pathologist called by the State; (3) in not charging the jury on the law of accessory after the fact; and (4) in limiting the testimony of Dickerson's cousin during the penalty phase of his trial." *Id.*, at 106-07, 716 S.E.2d at 898. The Court affirmed after review of all four issues. *Id.*, at 107, 716

S.E.2d at 898. Additionally, pursuant to the mandatory review under S.C. Code § 16-3-25 (C), the Court found "that Dickerson's sentence is proportional, supported by the evidence, and not the result of passion, prejudice, or any other arbitrary factor." *Id.*

In the post-conviction relief action, Dickerson raised multiple claims of ineffective assistance of trial counsel and appellate counsel which required testimony on counsel's experience and representation. The testimony established trial counsel was experienced in capital case work, formed a team of experts to aid in defense investigation and development, and had access to funding. Bloom testified regarding his educational and legal background, including experience in approximately 50 to 60 capital cases and 15 to 20 capital case jury trials. (See App. pp. 5827-28; 6909-11). He also testified that he worked with Dale Davis, an experienced mitigation investigator in capital cases, and Vicki Childs as a fact investigator, and further testified "Judge Dennis did not deny us any funding request at all." (App. p. 5829; see also pp. 5852-53). Co-counsel Carroll also testified to his qualification and experience, in particular that he had previously worked on a capital case with Bloom. (App. pp. 5809-10).

For the appeal, Bloom, who had also had experience in capital case appeals, (see App. p. 6910), continued to represent Dickerson in the direct appeal, along with an experienced appellate defender (now chief appellate defender), Robert M. Dudek, and another appellate defender, Kathrine H. Hudgins. (App. p. 5890). Dudek testified that he had handled approximately 10 to 12 capital cases on direct appeal. (App. p. 5878).

After careful review of Dickerson's claims, the record, the additional evidence presented during the PCR action, and counsel's argument, the PCR court found Dickerson failed to show ineffective assistance and concluded that he was not entitled to post-conviction relief. (App. pp. 9508-67).

STANDARD OF REVIEW

"An appellate court must give deference to the PCR court's factual findings, and must uphold them if there is any evidence of probative value to support them." *Buckson v. State,* 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). However, appellate courts "review questions of law de novo, with no deference to trial courts." *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018).

Ineffective Assistance Claims

To gain relief on an ineffective assistance claim, 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, 687 (1984); *Stone v. State*, 419 S.C. 370, 798 S.E.2d 561 (2017). "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. *Strickland,* 466 U.S. at 687.

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), this 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 (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 . . . ." *Robbins*, 528 U.S. at 288 (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; *Butler v. State*, 286 S.C. 444–45, 334 S.E.2d 815 (1985).

DISCUSSION

I.

The PCR judge properly addressed only Dickerson's ineffective assistance of counsel claim regarding the *Batson* motion made at trial, and not Dickerson's freestanding claim asserting prosecutorial misconduct by *Batson* violation, as Dickerson's freestanding claim was not cognizable under the PCR statute. Further, the PCR judge correctly concluded Dickerson had failed to show deficient performance and prejudice to warrant relief when neither the record nor other evidence submitted during the PCR action supported finding the Solicitor inappropriately exercised jury strikes in violation of *Batson*. [PETITION ARGUMENTS 1 AND 2].

Trial counsel made a *Batson*[2] motion at the 2009 trial. (App. pp. 2178-82). Dickerson argues that the PCR judge erred in not finding ineffective assistance when counsel failed to make a comparative juror analysis in support of the motion. (See Petition, p. 9 and 38). He also argues the PCR judge improperly found his claim of prosecutorial misconduct was not cognizable in PCR. (See Petition, pp. 20-21). Respondent submits the PCR judge's ruling is well-supported factually and is a correct application of the law.

> A. *The PCR judge correctly found Dickerson's allegation of prosecutorial misconduct for an alleged violation of Batson is a direct appeal issue and is not cognizable in post-conviction relief.*

Dickerson attempted to argue a claim of prosecutorial misconduct[3] based on the State's use of its strikes at the 2009 trial. Dickerson argues here that the PCR judge should have heard the claim in PCR because "it required additional fact development that was unknown to counsel at the time of trial." (Petition, p. 21). Yet, he also argues that the "factual record," which includes the trial transcript, supports that two of the challenged strikes were pretext and a *Batson* violation occurred. (Petition, p. 21). The inconsistency of this position undercuts Dickerson's argument. Even so, well-established precedent supports the PCR court's ruling.

Because a PCR action is not a substitute for direct appeal, see S.C. Code Ann. § 17-27-20(B), a PCR applicant cannot assert any issues in his PCR action that could have been raised on direct appeal. This prohibition has long been recognized under the *Simmons* rule. *See Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("Errors in a petitioner's trial which

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2 *Batson v. Kentucky*, 476 U.S. 79 (1986).

3 Dickerson submitted in the PCR action that the Solicitor engaged in prosecutorial misconduct when using her peremptory strikes. However, as the PCR judge found, the Supreme Court has historically held the issue is one of equal protection. (App. p. 9516). The analysis structure is different. See generally 75 Am. Jur. 2d Trial § 406 ("...the touchstone for the analysis of a claim of prosecutorial misconduct is the fairness of the trial ...").

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."). Though barred as a freestanding claim of error, the general factual basis for any previously unheard trial 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."). Consequently, in light of the statute and case law, the PCR judge correctly ruled that Dickerson's free-standing claim was barred though his ineffective assistance of counsel claim could go forward. (App. pp. 9495 and 9508). Dickerson's argument to the contrary should be rejected.

B. *The PCR judge correctly found Dickerson's allegation of trial counsel's deficient performance in not advancing a comparative juror analysis based upon criminal record entries and purported differences in questioning was not supported in fact.*

It is well-settled that it violates equal protection for a party to use a strike to discriminate by race or gender. *See, e.g., J.E.B. v. Alabama,* 511 U.S. 127 (1994); *Georgia v. McCollum,* 505 U.S. 42 (1992); *State v. Shuler,* 344 S.C. 604, 545 S.E.2d 805 (2001). To evaluate a challenge to a strike, the following procedure is used:

> 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.

State v. Inman, 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) (internal citations omitted)).

The challenging party generally offers some pattern in the strikes to support an inference of discrimination. *Batson,* 476 U.S. at 96. "In deciding whether the [movant] has made the requisite showing, the trial court should consider all relevant circumstances." *Id.*, at 96. In the third step, the judge must "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." *Inman,* 409 S.C. at 27, 760 S.E.2d at 108.

The PCR court correctly found "the cognizable claim rests on the sufficiency of the *Batson* motion made at trial." (App. pp. 9516-17). Thus, the *Strickland* test control and Dickerson is tasked with showing prejudice. *Id.* (citing *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.*")). The PCR court also correctly found Dickerson was not entitled to relief most specifically because he failed to show any evidence that would undermine the credibility ruling made at trial, or other evidence showing pretext. (See App. pp. 9517-19).

1. The Record supports the trial judge's finding that the Solicitor's responses were credible and Dickerson failed to show credible and persuasive evidence of pretext during the PCR action.

Dickerson made a number of allegations against the Solicitor's reasons as offered at the 2009 trial but each failed. As a general point, the PCR judge found that Dickerson had the opportunity to ask the Solicitor the basis for questions, or confront her with the questioning style, both in her deposition and her subsequent PCR hearing testimony. However, he did not avail himself of the opportunity to develop these points. Had he done so, credibility could have been

assessed more fully. The PCR judge found this failing telling. (App. pp. 9517-18 and n. 16). The PCR judge appropriately gave deference to the trial court's ruling on credibility. (App. p. 9517-18, citing *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015)). In considering the evidence before him in the PCR hearing, the PCR judge found Dickerson had failed to address critical testimony from the solicitor which included, in relevant part, a denial that she had ever trained anyone to discriminate, and she does not personally strike on the basis of race or gender for this reason: " 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." (App. pp. 9518). Similarly, the PCR judge quoted from the Solicitor's testimony that she did not go to any educational materials[4] in the office in preparation to strike a jury, 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.

(App. pp. 9518-19).

The PCR judge found "[t]he 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," especially in light of defense counsel's comments at trial, and his testimony during the PCR hearing. (App. p. 9519). The PCR judge observed that Dickerson did not contest that defense counsel's notes from trial indicated general support for a concern for Juror #101's work commitments, and also a note of "backs up" about sentencing – facts which supported the reason for the strike as outlined at trial. (See App. pp. 9519 and 9521).

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[4] Dickerson attempted to show a prosecution resource manual was a guide for defeating *Batson* claims. The rejected claim is addressed below at pages 29-31 of this return.

Dickerson's position in PCR was further undermined when he argued that Juror #209 had a criminal history, discovered by investigation in PCR, which was not disclosed by the Solicitor. But, upon examination of the juror information from trial compared to a criminal history produced for the PCR, the PCR judge found the juror's name was listed as an alias in the new report, and the different dates of birth, and the vastly different geographical area involved, detracted from showing the individuals were one in the same. (App. p. 9519). Dickerson's argument on Juror #209 was abandoned in his petition to this Court. (See Petition, pp. 18-20). But it still is part and parcel of the whole of the case before the PCR judge.

Further still, Dickerson's argument was undermined by review of the record on the third strike – the one for Juror #315. The record fully and fairly supports the responses given. Judge Dennis, at the time of the *Batson* motion, confirmed his own observations of the juror's hesitancy as was similarly referenced by the Solicitor. (See App. 9527; see also App. pp. 2181 and 1145-59). This was no vague suggestion that was not obvious to others. The Solicitor's responses for all the strikes were equally steady and clear, were not contradicted by any fact at trial. *See Foster v. Chatman,* 136 S. Ct. 1737, 1751 (2016) (considering whether "the prosecution's principal reasons for the strike shifted over time," or there are several instances where the reasons were in tension with the record as evidence of pretext).

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 record 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. The PCR judge reasonably found Dickerson failed to show deficient performance by defense counsel in regard to *Batson.*

2. The Record does not support Dickerson's allegations of differing treatment of similarly situated jurors on the basis of their criminal histories or his allegation of suspect questioning as evidence of possible pretext.

The PCR court reviewed the record in detail. In particular, the PCR court started with the reasons for the strikes as placed on the record and the other evidence produced during the PCR hearing which, in turn, supported those reasons:

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).

(App. pp. 9521-22).

The PCR judge found "no inconsistency or factual error to indicate pretext." (App. p. 9522). The record supports his conclusion.

As noted above, Dickerson has not challenge the prosecution's strike of Juror #315, so any "pattern" argument is immediately diminished. Further, the PCR judge correctly found Dickerson's specific PCR arguments in regard to Juror # 101 (Ms. Gadsden) and Juror #92 (Ms. Fields-Copeland) are not supported.

Dickerson argues the PCR judge was wrong in not considering that Juror #101 "was unequivocal in her responses that" work would pose no problem, thus, there is evidence of pretext that the PCR judge failed to acknowledge. (See Petition, p. 12). As noted above, the PCR judge also considered defense counsel's notes as produced during the PCR action that indicated in connection with this juror at least one concern about being at work at a particular time, 1:00 pm.. (App. p. 9521). He also considered that juror information confirmed the juror was single. (App. pp. 9522-23). The PCR judge also relied upon the following exchange between the Solicitor and the juror that he found relevant to the issue:

> 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.

(App. pp. 9523-24).

Thus, the PCR judge found specific record support that "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," and concluded Dickerson failed to show pretext. (App. p. 9524). Contrary to Dickerson's assertions, the PCR judge's decision is well-supported by the record.

Dickerson also argued to the PCR judge, as he does here, the "equivocation" reference was evidence of pretext because two other jurors (Jurors 306 and 221) "expressed stronger

reservations about imposing the death penalty than" Juror #101. (Petition, p. 13). The PCR judge rejected Dickerson's argument, again, after review of the record, finding "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.'" (App. p. 9524). Thus, the reason for posing that question was actually in the record and verifiable. (App. p. 9524). Moreover, as the PCR judge also found, the record demonstrates the juror did equivocate, saying both that she "could consider" but "wouldn't vote for" the death penalty. (App. p. 9524).

Dickerson additionally argues the Solicitor's questioning on Juror's 101's work schedule was "calculated to produce answers to serve as a basis for her disqualification." (Petition, p. 14). The PCR judge rejected that argument below finding the record supports that the Solicitor's concern was actual concern over the juror's work obligations, not pretext. (App. p. 9525). Simply, Dickerson's logic is strained when one considers the responses the juror gave about the hardship and her work at night. Further, Dickerson could show "no indication that any of the other jurors asked about having to leave court proceedings," and the PCR judge found no similarly situated juror was seated. (App. p. 9525).

Dickerson further asserts in his petition that the question on sentencing to death was evidence of pretext, again, that the PCR judge did not accept. (Petition, p. 15). However, the PCR judge logically found no cause to question the reason the Solicitor would ask if a juror could "put a man to death," (see Petition, p. 15), as that is "is an unsurprising question for voir dire in a death penalty case" and was "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?")." (App. p. 9525). Again, the record did not support Dickerson's strained allegations of pretext.

As to Juror #92, Dickerson argues pretext because the Solicitor did not ask questions about the juror's criminal convictions. (Petition, p. 18). However, the PCR judge logically concluded "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." (App. p. 9526).

As to Dickerson's argument that three white males had DUI and DUS convictions, (see Petition, p. 19), the PCR judge found he again failed to show similarly situation jurors as "he does not show multiple convictions, or a gun conviction in any of the records" and the record supported "the Solicitor's truthful response that other jurors seated did not have the same type of history or quantity of convictions." (App. p. 9526).

In sum, the PCR judge carefully considered but ultimately rejected Dickerson's argument in support of his assertion of ineffective assistance in the *Batson* violation. The record supports the PCR judge's fact-findings and those findings support his reasonable application of the *Strickland* test. Dickerson's argument that the PCR court erred should be rejected, and the petition denied.

3. *The PCR judge did not err in declining to find trial counsel ineffective for not litigating access to criminal histories when case law does not support Dickerson's position and Dickerson failed to show prejudice in this case.*

Dickerson maintains that counsel was ineffective in failing to litigate to have access to criminal histories in order to make a comparative jury, and should not have relied upon the State's representations at trial. (Petition, p. 16). This point is moot as Dickerson failed to show any information that tended to support pretext. *Strickland* is not a vehicle for determining best or

better practice, but a test to determine real error in actual trials. *Strickland, supra.* Even so, and as the PCR court found in rejected Dickerson's claim, our case law is against his position. (App. pp. 9535-36).

In *State v. Childs,* 299 S.C. 471, 474, 385 S.E.2d 839, 841 (1989), this Court held a criminal 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 controls. And Rule 5, SCRCrimP, specifically Section (a)(2) protects documents "made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case," which also appears to protect this information. *See also State v. Matthews,* 296 S.C. 379, 384, 373 S.E.2d 587, 591 (1988) (pre-rule decision holding "[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 ... not subject to disclosure."). As the PCR judge found, precedent from other jurisdictions show similar decisions on the issue. (App. p. 9536, citing to *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.")).

The PCR judge was also correct to reject Dickerson's argument that the rap sheet could be incorrect because, the rap sheet being incorrect would not show discriminatory intent as it is

only the *prosecutor's* intent, not the accuracy of the information, that is at issue. (See App. pp. 9536-37).[5]

Finally, the PCR court also noted that a "pre-selection request would had to have been for all the potential jurors," and overly broad and burdensome. (See App. pp. 9536-38). Essentially, if allowed, that would allow the sharing of law enforcement records runs for all names, even those not ever considered for selection on the jury. As the PCR court found, that broad approach is "unnecessary" and runs afoul of the protections afforded those records. (See App. 9537-58, citing *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")). He also correctly noted the privilege concerns and privacy issues associated with unrestricted release. *See United States Dept. of Justice v. Reporters Committee For Freedom of Press,* 489 U.S. 749, 765 and 780 (1989) (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"); *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."). In fact, the PCR judge noted that he had found the criminal histories information received in PCR should be "maintained under seal in this action, (Mar. 3, 2015, "Order Granting Applicant's Request for Access to Criminal Histories of Jurors")," and recognized the security policy that directs "criminal histories not be physically

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[5] The judge issued an order to the FBI to obtain new history runs. The original sheets were not available. Testimony at the PCR hearing established the restriction for maintaining the rap sheets, including the direction to destroy the items after trial. (App. pp. 6864-65). There was no negative inference to be drawn from the fact the trial rap sheets did not exist given the directive the Solicitor was under.

duplicated or disseminated" and "instructs on how to specifically destroy these rap sheets once the timeframe for using them expires." (App. p. 9513). The PCR court ordered the information was "to remain under seal, with replication and dissemination to inappropriate parties forbidden in accord with FBI policies." (App. p. 9513).[6]

At any rate, given the fact that in the 2009 trial counsel was not entitled to this information as a matter of state law, the PCR court fairly decided Dickerson could not show ineffective assistance. (App. p. 9513).

Dickerson also suggests that a broad statistical study involving the Solicitor's prior jury trials, and general prosecution educational materials should be considered in support of his claim. (Petition, at 29-39). However, the PCR judge properly rejected each one in context of this case and in the procedural posture in which the claim was presented.

C. The PCR judge correctly found Dickerson's after-trial, general statistical study was not persuasive.

Dickerson argues a general study commissioned in PCR from individuals at the Michigan State College of Law, twice amended during these proceedings to address failings, should be considered support of finding a *Batson* violation. (Petition, p. 22). However, Dickerson's reliance on broad statistics failed to support a showing of ineffectiveness as the general basic

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[6] Some of the document pages were attached to Respondent's sealed brief filed with the Charleston County Clerk of Court. A redacted copy was filed with the sealed copy. A copy of the sealed brief was submitted to this Court and marked "under seal" as Volume 22 of the Appendix in this appeal. A joint and unopposed motion to seal was filed. However, subsequent to the filing with this Court, the sensitive information was redacted. This Court denied the motion to seal, noting the redactions. After review of the petition, Respondent has determined it does not need to rely on the redacted information at this time. Thus, Respondent seeks no further action at this time concerning Dickerson's appendix as redacted after filing. Essentially, the information went to Dickerson's argument a juror in the 2009 trial actually had a criminal record that was not disclosed. The sealed argument shows in detail why records would not support that conclusion. The filed Order reflects the PCR judge found the records did not support the argument. (See App. p. 9526). Dickerson does not raise that argument again to this Court.

calculations show at the outset a limited persuasive force. Moreover, when considered in detail, the study here reflected flaws to reduce whatever persuasive value could attach. The PCR court did not err in its treatment of the study.

The PCR court considered the possible weight of Dickerson's statistical study of the Solicitor's strikes in other trials and Dickerson's reliance on *Miller-El v. Dretke*, 545 U.S. 231 (2005) in support of his claim. (App. pp. 9520-21). Dickerson maintains in his petition to this Court that his statistical study presented in the action below is critical, should have been heavily considered, and again relies upon *Miller-El*. (Petition, pp. 21-22). That reliance is misplaced.

Citing to *Miller-El*, the PCR court correctly noted such general statistics, *according to the Supreme Court*, did not have the weight of other evidence. (See App. p. 9520). The prosecution in *Miller-El* used strikes in such a way as to exclude "91% of the eligible African-American venire members." 545 U.S. at 241.[7] The Court continued, however, to reason: "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." *Id.* Thus, the Supreme Court focused on the facts of record, not statistical calculations, and the PCR court did so, as well. (See App. pp. 9527-35). In fact, the Supreme Court in the more recent case of *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019), also appears to continue to rate the persuasive impact of general pattern statics as fairly low. While noting statistics may be considered, the *Flowers* Court found "[t]he numbers speak loudly" when reviewing the strikes over the multiple trials *for that particular defendant*, and that the state courts found *Batson* violations in his prior trials. 139 S. Ct. at 2245.

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[7] The prosecution in *Miller-El* also utilized a practice for "shuffling of the venire panel," which allows for restructuring of the panel order and prevent some potential jurors from even being reached. 545 U.S. at 253-54. South Carolina does not have such a practice. (App. p. 9520). The PCR judge correctly found a "key basis" of the "case for discrimination" in *Miller-El* is not present here. (App. p. 9520; *see also* 545 U.S. at 253).

This is also consistent with a *Batson* individual case approach as opposed to a broad practice showing rejected with the overruling of *Swain v. Alabama*, 380 U.S. 202 (1965). The precedent continues to support finding limited persuasive impact of generalized statistics. The PCR court did not err in not finding the general statistical study offered in his case as unpersuasive.

The PCR court recognized that statistical studies from these same individuals who authored the study for Dickerson have been academically considered. However, their other studies were generally rated valuable because of the consideration of variables. 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."). The study's authors had previously written: "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/. (emphasis added). Here, though, the PCR judge noted multiple missing, but logical, variables in the study presented. (App. p. 9528). The judge reasoned: "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.'" (App. p. 9528). The PCR judge found credible and persuasive the testimony from Dr. Robert Michael Norton, retired statistics and mathematics professor from College of Charleston. Dr. Norton noted the following criticisms which the PCR court listed in its order as follows:

- He critiqued the report as being incomplete from a mathematical and statistical perspective because the sample used, the "universe of cases" was not a true "random sample" as is accepted in statistics;

- He criticized the report as incomplete and simple because it didn't speak to other factors that go into making a strike;

- He also critiqued the report as failing to show causation. He said it merely showed a correlation between strikes and race which he likened to a type of conclusion that is "over simplistic" for the proposition stated;

- He also testified it would not be sound practice to include the same case twice as was done in one instance (Beyah) because some variables going into the jury pool would overlap and by counting each of two strikes occurring in one case, you're counting data twice without qualifying it.

(App. p. 9529).

The PCR judge asked the witness whether – "from a statistical perspective" – a court should rely on the study to establish whether the prosecution "routinely excluded black jurors in jury selection," the witness replied, "Not by itself." (App. p. p. 9529). Rather, the witness again underscored the need for determining or considering "correlating variables, the idea of selecting the populations, how you pick a sample." (App. 9529). The PCR judge agreed with the observation, noting the study did not exactly reflect the information from the jury strikes from the 2009 trial. (App. p. 9530). For instance, the PCR court noted the record showed the State only used 4 of its available 5 strikes for the main jury; and the defense only challenged 3 of those 4. (App. p. 9530). Additionally, the study did not take into account that three African-American jurors were presented and the State, with available strikes, did not exercise those strikes. (App. p. 9530). Further, as far as the totality of the jury composition in this case, even Professor O'Brien had to agree 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. (App. pp. 9530-31). The PCR judge also considered that the defense used all 10 of their

strikes on Caucasian jurors which would translate, in bare number terms, to 100%, but the defense explained its reason which demonstrated gender and race neutral reasons. (App. p. 9530). Again, the PCR judge found that actual reasons were more highly valued than simple numbers.

The PCR judge also noted additional issues with the study, such as some of the cases referenced in the study reflected *Batson* motions were made, and the responses had already been given judicial, specific consideration as to credibility and propriety. (App. p. 9531). Yet, the study sought to use these non-errors to argue error. And, the information presented showed that the prosecutor routinely did not use all available strikes, and in one used in the study, the solicitor didn't use any strikes at all. (App. p. 9531).

In short, the PCR court properly considered there the presence of multiple factors that shaped the composition of the jury. He also correctly noted that this Court has viewed with disfavor the use of "gross 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). (See App. p. 9532). Though a different discretionary matter was the subject of study in *Thompson*, as the PCR judge found, "the logic is applicable" given that "[p]eremptory strikes are by nature defined as subjective, nuanced and individual juror fact-driven." (App. p. 9533).

Moreover, Dickerson sought to use the statistics in third step analysis, not merely to suggest further inquiry. Raw statistics should not be used at that stage. *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").

In sum, the PCR court's determination is consistent with the Supreme Court's reference to statistics. Even dramatic numbers such as those in *Miller-El, supra*, are less persuasive than real, case-specific information. It is that real, case-specific information that carries the day. *Id.* *See also Flowers, supra.* Dickerson's reliance on bare statistics continues to be misplaced.

> D. *The PCR judge correctly found Dickerson's reliance on general education materials to assert prosecutors are taught how to avoid detection of discriminatory strikes found no support in the ordinary teaching materials submitted.*

Omitting entirely the evidence the Solicitor did not even utilize or rely upon any such materials for the strikes, (App. p. 6861; see also 9527), Dickerson maintains his argument that "The Prosecutor's Handbook" is a guide to how to hide improper motive when responding to a *Batson* challenge which should be considered in support of his claim. (See Petition, p. 29). The materials constituted protected work product and would not be available for defense counsel to use for a trial motion. (See App. p. 9539, citing *State v. Daise,* 421 S.C. 442, 807 S.E.2d 710 (Ct.App. 2017)). It would be difficult to fault counsel under a proper *Strickland* analysis. Even so, the materials do not show what Dickerson contends. Consequently, Dickerson failed in his burden of showing, if available, and if relied upon, they would have made a difference.

Dickerson presented "The Prosecutor's Handbook," which was accepted under seal. (App. p. 9511). The PCR judge found reliance on the handbook was misplaced when the Court of Appeals had just recently reviewed the handbook offered in a separate case and found it "irrelevant to a *Batson* motion analysis." (App. p. 9511, citing *State v. Daise*).

Much like this case, in *Daise,* capital trial counsel asserted the prosecution had a "handbook on how to get around *Batson*" (and also, as they did here, offered statistics evidence in support of a claim that the strikes exercised were invalid). The Court of Appeals "affirmed the circuit court's finding the materials at issue 'did not "include any abusive instructions or teaching materials, nor use of improper technique," and that the materials were 'generally protected as work-product, as they were created and disseminated in a limited fashion with the purpose of assisting the State's preparations for trial.'" (App. pp. 9511-12, citing *Daise,* 421 S.C. at 462-63, 807 S.E.2d at 720). After review of those materials, the Court of Appeals found nothing in "the approximately 1000 pages of Commission materials sealed for appellate review" actually showed a vehicle for "encouraging prosecutors to strike jurors for impermissible reasons—race-based or otherwise." *Id.,* at 463, 807 S.E.2d at 720-21. The Court of Appeals considered the materials to be ordinary educational presentations. *Id.* Further, part of the material directed specifically " 'DO NOT RELY ON STEREOTYPES & PREJUDICE.' " *Id.*, at 721.

The PCR court similarly found these standard educational materials were not appreciable different than similar defense training:

> 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.

(App. p. 9512, n. 15).

An example supporting the PCR judge's reasoning that the concept is "fairly standard" is easily found. The *Trial Handbook for South Carolina Lawyers* by Alex Sanders and John S. Nichols (Fifth Edition), well-supports the PCR court's observation. Section 6:9 of the handbook,

titled "Valid and invalid explanations for striking jurors," 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). The PCR did not err in finding Dickerson's argument that similar educational material is an attempt to teach prosecutors how to thwart *Batson* is strained and unpersuasive.

Moreover, the handbook or other prosecutorial training materials were not available to defense counsel in preparation for trial, nor could they be produced pre-trial as a matter of law. As *Daise* also shows, Dickerson's counsel could not avoid the work product protections in order to receive the information. 421 S.C. at 462-63, 807 S.E.2d at 720. Dickerson's suggestion that his difficulty in obtaining protected materials should lend support to his argument that the materials are meant to be used to thwart *Batson*, (see Petition, p. 39), does not square with the generally accepted reasoning that protected materials *should be protected.* Dickerson has shown no support for an assertion that privileged materials should be presumed suspect.

The PCR judge correctly found no persuasive value to Dickerson's argument, and should not have found counsel deficient in not obtaining that which he is not entitled to have. At bottom, though, Dickerson failed to show any improper directions or intent by presentation of the materials and cannot meet his burden of showing *Strickland* prejudice.

E. *The PCR judge correctly rejected evidence Dickerson offered that offended the contemporaneous-to-trial limitations necessary for a proper* Strickland *analysis.*

Dickerson also argues to this Court that the PCR court should have considered additional evidence from other, unrelated trials. (See Petition, pp. 21-28). However, the only cognizable issue limits the available evidence to that contemporaneously available for the investigation and trial. *See Strickland*, 466 U.S. at 689 ("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."). As the PCR judge found in the circuit court litigation, "evidence related to cases tried by the Ninth Circuit Solicitor *after* [Dickerson]'s May 2009 trial" was not relevant. (App. p. 9510).[8] The PCR judge correctly found both *Strickland* and the Rules of Evidence, Rules 401 and 402, SCRE, disallowed such evidence to be considered for the claim of ineffective assistance. (App. p. 9510). Additionally, the PCR judge found, even in considering the prior trials, Dickerson failed to show a pattern of violations, but relied on an anomaly-finding from one trial in 2004:

> Apart from the well-established fact that discovery is not allowed in criminal proceedings and [Dickerson] has not shown how trial counsel should be criticized for failing to obtain the additional information about any of these unrelated cases, [Dickerson] 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.

(App. p. 9510). Dickerson relies again on this one finding. (See Petition, pp. 27-28). There remains a lack of a pattern to consider. At any rate, the PCR court continued, "the larger point is that the relevant consideration here is the *Batson* motion already in the record," and the reasons for the strikes are already a part of the record. (App. p. 9510). Thus, the reasons may be critically considered without speculation about what reasons may have been offered in the absence of a *Batson* motion.

> F. *The PCR judge correctly found Dickerson failed to show prejudice even if he could somehow show deficient performance because the juror was not tainted by counsel's error.*

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[8] In particular, the judge did not consider Dickerson's "argument concerning the use of preemptory strikes in *State v. Colin Broughton*, tried September 2009, and *State v. Ryan Deleston*, tried October 2013" as these trials occurred after Dickerson's May 2009 trial. (App. p. 9510).

Additionally, no prejudice flows from any juror-related claim. For all reasons discussed, the PCR judge properly Dickerson was not denied equal protection as he was tried by a qualified jury. (App. p. 9540). Dickerson failed to show counsel erred in his representation. Moreover, Dickerson presented no evidence that any juror was improperly seated and served on his jury. Having failed to show prejudice, he was not entitled to relief. *Strickland. See also Young v. Bowersox*, 161 F.3d 1159, 1160 (8th Cr. 1998) (no presumed *Strickland* prejudice in *Batson* context). *Cf. Weaver v. Massachusetts,* 137 S.Ct. 1899, 1913 (2017) (*Strickland* prejudice must be shown even if counsel deficiency alleged involves a structural error at trial).

II.

The record supports the PCR judge's denial of relief on Dickerson's claim counsel failed to "uncover and present" evidence of "neurological deficits" where the record shows proper investigation into neurological deficits and in particular the possibility of lead exposure and effects from lead exposure. [PETITION ARGUMENT 3]

Dickerson claims the PCR Court erred in denying relief on the claim that trial counsel "failed to uncover and present evidence of Dickerson's significant neurological deficits" in the mitigation case. (Petition, p. 40). He claims counsel "unreasonably limited the investigation into Mr. Dickerson's early child exposure to lead." (Petition, p. 74). However, the PCR Court found Dickerson failed in his burden of proof for *Strickland* error, and the record supports that decision.

The PCR judge considered that the social worker at trial, Marjorie Hammock, had referenced known lead exposure, explained Dickerson had lived in an environment ripe for exposure, and explained that such exposure can cause damage and deficits. (App. p. 9545). The PCR judge also considered that the trial psychologist, Dr. Mark Cunningham, referenced childhood exposure to lead, and explained Dickerson's younger brother was noted to have a high level of exposure. (App. p. 9544).

"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). "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). Critically, the PCR court credited trial counsel's investigation – particularly the lead exposure and effects – as reasonable. *Strickland*, 466 U.S. at 690 ("strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable").

The PCR court determined that counsel, based on "his December 8, 2015 testimony... 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." (App. p. 9547). Bloom had testified he had developed such a defense for a separate case in Richland County (LeVar Bryant), and in this case he pursued testing and consulted with an expert. (See App. pp. 5853-56; pp. 5867-72). He testified he shared the information obtained with psychiatrist Dr. Phillips, and psychologist Dr. Cunningham. (App. pp. 5842-43). He also retained a neuropsychologist, Dr. Robert Deysach, but Dickerson did not cooperate with Dr.

Deysach's testing. (App. pp. 5843-45). 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:

> 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.

(App. pp. 5869-70).

Even so, he presented the evidence available through his psychologist and social worker.

After Bloom's December 2015 testimony concerning consultation with Dr. Needleman, Dickerson released subsequent discovery disclosures which led to additional testimony on this issue in May 2016. Contemporaneous to trial investigation emails where introduced and along with testimony explaining that the defense was "looking at modern testing" and "attempted to do," and was in consultation with "Dr. Herbert Needleman ... an expert in blood levels, lead poisoning and the effects of lead poisoning on brain development, especially in children." (See App. pp. 6913-17 and 9547-49). The evidence in the record here supports the PCR court's conclusion there was no deficient performance.

Bloom consulted with a qualified expert, as the PCR court noted, "the same qualified expert, Dr. Needleman, that both of Dickerson'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." (App. pp. 9548-49). However, "[t]he information the defense uncovered was not expansive enough to pinpoint a solid cause or existence of lead poisoning ...." (App. p. 9549). The PCR judge noted that Dickerson actively thwarted the

investigation, refusing to cooperate with the neuropsychologist. (App. p. 9549). Further, the only known test level for Dickerson (as opposed to his brother, Armon), "was simply not medically or scientifically significant," as indicated by Dr. Needleman. (App. p. 9549). This was not disputed in the later PCR evidence. Further, much of the general lead exposure information additionally submitted in PCR failed to show contemporaneous-to-trial availability.

For example, the PCR judge considered that Dickerson's PCR expert, Dr. Richard Canfield, a developmental psychologist with specialties in early development and lead toxicity agreed Dickerson's "*only known* lead level was 9 micrograms per deciliter," from a 1988 test when Dickerson was approximately 11 years old. (App. p. 9549). It was not until 2012 that the guideline was reduced to 5. (App. p. 9549). He also considered Dr. Canfield's testimony was based in large part on information from testing of Dickerson's younger brother Armon. (App. p. 9549). The PCR judge noted, absent real concrete test information, Dr. Canfield testified to an estimation of Dickerson's levels. (App. p. 9550; see also App. pp. 5564-65). In fact, he testified he could "just make a guess that his lead level was 50% above at all ages" based Dickerson's single number and a "straight-line graph" study based on children from Cincinnati, Ohio. (App. p. 5489). When Dr. Canfield was asked by the PCR court about his assumptions of construction issues with the home environment and exposure to toxic materials, he was unable to point to actual record support. (App. p. 9550; see also p. 5495). Though the testimony spanned a significant amount of pages in the evidentiary hearing transcript, the PCR court reasonably that the new evidence submitted would not allow Dickerson to meet his *Strickland* prejudice burden:

> This presentation does not make it more likely than not that, had it been given at trial, Dickerson's jury would have returned an alternative sentencing recommendation. Canfield's testimony lacked sufficient underlying facts to support his conclusion that Dickerson's environment caused blood-lead levels were consistently 50% above a conservative average prior to the actual blood-lead level that was produced at Dickerson's age 11 years and 9 months. Moreover,

> Canfield based his graph of Dickerson'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.

(App. pp. 9550-51).

The PCR judge also considered that Dickerson presented developmental neuropsychologist Dr. Marlyne Israelian who testified generally to Dickerson's high risk for lead exposure, and that he performed poorly on one subtest, the Object Assembly Test, in IQ testing. (App. p. 9551). She opined both that Dickerson has executive frontal-lobe dysfunction, and that cocaine had an impact on his functioning. (App. pp. 9552). The PCR judge noted Bloom had testified that Dickerson failed to cooperate with the neuropsychological testing attempted for trial preparation. (App. p. 9552). The PCR judge logically reasoned Dickerson failed to carry his burden of showing ineffective assistance. He noted Bloom obtained the same testing level and investigated the same facts as presented at the PCR; that the "level of concern" had changed over time, but the only known level was too low to prompt treatment at the time; that trial counsel still investigated and consulted with a leading expert, and presented what was known in mitigation, apart from what could not be obtained based on Dickerson's failure to cooperate with certain testing. (App. p. 9554). His ruling is well supported by the record. Dickerson failed to show either deficient performance or prejudice.

III.

The PCR judge reasonably found trial counsel was not ineffective in failing to renew an objection to information from a Probation and Parole officer that was properly received in sentencing as evidence of character. [PETITION ARGUMENT 4]

During sentencing, the State presented Cededrick Davis, a former South Carolina Department of Probation, Pardon and Parole Officer who served as the presiding Administrative Officer over Dickerson's 1996 parole hearing. Prior to her sentencing phase testimony that Dickerson stated that he wished he had shot a police office in a prior incident, though he denied

pointed his weapon at an officer, (App. pp. 4008-11), Judge Dennis heard the defense objection that the report was confidential and could not have been "objected to" and received a proffer of testimony. (App. pp. 3980-91). Judge Dennis found the credibility of the witness was for the jury, that the testimony squarely went to character and thus was relevant for sentencing, and that the statement was further evidence stemming from an event which had been previously described, and ruled the testimony was admissible. (App. pp. 3990-91; see also pp. 3966). Judge Dennis stated the objection was noted and preserved. (App. p. 3991).

The PCR court found counsel reasonably relied on the trial court's assurance and the *in limine* proceeding and his decision not to object when the witness was called was not deficient. (App. p. 9557). Critically, the issue, if preserved and if presented, would not support relief. Character evidence is admissible and relevant during the sentencing phase of a capital trial. *State v. George*, 323 S.C. 496, 511, 476 S.E.2d 903, 912 (1996); *State v. Tucker*, 324 S.C. 155, 168, 478 S.E.2d 260, 267 (1996). Consequently, the PCR judge correctly found Dickerson was not entitled to post-conviction relief as there could be no *Strickland* prejudice. (App. p. 9557).

IV.

The PCR judge reasonably found trial counsel was not ineffective in failing to object to the State's closing argument when the argument did not diminish the jury's sense of responsibility but argued the State's case for the death penalty. [PETITION ISSUE 5]

The Solicitor argued for a recommendation of death. (R. p. 4369 -78). The PCR court found no impropriety, and none appears in the record. Though both attorneys testified in the PCR hearing that, even knowing the State may argue their case, that an objection, at least in hindsight, should have been made, (see App. p. 9559), it is not counsel's post-trial review of their actions, but whether the record supports that an objection should be made. The PCR court correctly looked to the record and found no error. (App. pp. 9558-59). Dickerson argues to this Court that the specific argument explaining the penalty appropriate for the worst of the worst

"diluted" the jury's sense of responsibility. (See Petition, pp. 84-85 and 88). However, a review of the passage simply shows an argument to impose the penalty, not a pre-determined action by the solicitor. The argument is much like the permissible argument considered in *Sigmon v. State,* 403 S.C. 120, 742 S.E.2d 394 (2013). The solicitor in that case explained that the facts of the case supported the death penalty. There was no indication that the solicitor attempted to equate bring the case to the jury with the jury's duty to decide sentencing; thus, there was no effort to diminish the jury's sense of responsibility. *Id.,* at 130, 742 S.E.2d at 399-400. The PCR court correctly found Petitioner failed to meet his burden of proof.

V.

Dickerson's issue that he is entitled to relief under the theory of cumulative error is not preserved for review having never been raised and ruled upon in the action below. [PETITION ISSUE 6]

Dickerson lists a cumulative errors argument in his PCR sentencing phase issues listing. (App. pp. 39-40). Dickerson, though, did not raise a cumulative error issue in the PCR action. (See App. pp. 9502-03). The PCR judge did not rule on the issue that was not raised. Consequently, Dickerson's claim is procedurally barred from review. *See, e.g., Plyler v. State*, 309 S.C. 408, 409, 424 S.E.2d 477, 478 (1992). Further, the assertion of allegation of error appears abandoned as there is not a separate argument presented in the petition. *State v. Lindsey,* 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."). At any rate, seeking relief under the doctrine requires a party "demonstrate more than error," he must demonstrate the "errors ... adversely affect his right to a fair trial." *State v. Johnson,* 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). Here, Dickerson does not make any such showing – either of multiple errors or that his right to a fair trial was negatively affected. Dickerson has failed to present an issue upon relief may be granted.

VI.

The PCR judge correctly found appellant counsel was not ineffective for failing to raise an issue on appeal based on admissibility of certain photographs as overly graphic where those photographs were admitted in corroboration and explanation of expert testimony and demonstrated the circumstances of the crime. [PETITION ISSUE 7]

Dickerson argues the PCR court erred in not finding appellate counsel ineffective for failing to raise an issue challenging the admissibility of certain autopsy photographs introduced during the sentencing phase.[9] (Petition, pp. 88-89). The PCR judge found

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. The PCR judge found that the photographs were admitted during her testimony "as probative of the aggravating factor of physical torture." (App. p. 9561). The PCR judge found credible and persuasive appellate counsel Dudek's testimony that, having worked on capital trial appeals before, he was aware that "some horrible, horrible, horrible photographs" have been challenged, but this Court has resolved "while not pleasant to look at . . . [it did not] think they denied the defendant a fair sentencing phase," (App. pp. 9561-62). The PCR judge correctly reasoned the gruesomeness of the photographs were admissible precisely because they demonstrated the circumstances of the crime, and given the case law in support of its admission, Dickerson failed to carry his burden of showing a reasonable probability of a different result had the issue been raised on appeal." (App. p. 9564). The record and case law supports that decision. *State v. Torres* is instructive on the issue.

In *Torres*, this Court found no error in the admission of autopsy photographs in the sentencing phase when those photographs corroborated witness testimony and illustrated the

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[9] Specifically, State's Exhibits 141, 153, 160, 161, 162, 166, 171, 172, 173, 177, 178, 181, 184, 335, and 336.

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). Here, 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.* The PCR court found that the photographs are "graphic in nature," but they reflect "what Dickerson did to the victim, '"which goes straight to the circumstances of the crime."' (App. p. 9564, quoting *Torres*). The PCR court was correct that such photographs '"are not inadmissible merely because they are gruesome" and accurately reflect the gruesome nature of the crime. (App. p. 9564). The PCR judge correctly found Dickerson failed to show ineffective assistance of appellate counsel. There is no requirement that all preserved claims be raised for an appellate attorney to be found effective. *Tisdale v. State,* 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004). "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). Dickerson did not meet his burden, and was not entitled to relief.

VII.

The PCR judge correctly found appellate counsel was not ineffective for failing to raise an issue on appeal based on an objection to the questioning of a defense expert on mental state when mental state is a proper consideration in the sentencing phase. [PETITION ISSUE 8]

Dickerson also argues appellate counsel was ineffective in not presenting an issue on the cross-examination of Dr. Phillips. (Petition, pp. 91-93). During the sentencing phase, Dr. Phillips opined Dickerson was under "a cocaine psychosis" at the time of the murder, and that he suffered a "mental disturbance," the "capacity to conform his behaviors was substantially impaired" and his "mentality was impaired." (App. pp. 4507-08). On cross-examination, Dr. Phillips agreed that Dickerson does not suffer from any mental or emotional disorder that would impair daily decisions or require treatment, and that he met the requirements to be considered

competent for trial. Counsel objected to the State's cross-examination, but Judge Dennis allowed the State to continue. The State then asked Dr. Phillips whether Dickerson's actions at the time of the murder were volitional, to which he replied, because of the cocaine psychosis, "his decision was not free" but "he would have known what he was doing was wrong based on his behaviors after the event." (App. pp. 4509-12).

Bloom testified at the PCR hearing that it is his practice to object when the prosecution asks questions about "knowing right from wrong," believing that it confuses a jury and introduces insanity concepts when insanity is not an issue. (App. pp. 6955 and 6984-6986). Though included in Bloom's memo to appellate defense on possible appeal issues, (App. p. 6955), the issue was not raised.

The PCR judge rejected the claim of ineffective assistance because the testimony elicited "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)." (App. p. 9565). He noted the witness did not blend mitigation with the insanity defense, and underscored his opinion that Dickerson was in "a state of cocaine psychosis at the time of the crime." (App. p. 9565). In short, the PCR court resolved Dickerson failed to show the issue should have been raised and he was prejudiced by the failure to raise the issue. *See Tisdale, supra; Anderson, supra.* Dickerson did not meet his burden, and was not entitled to relief.

CONCLUSION

In light of the foregoing, Respondent submits the petition should be denied.

Respectfully submitted,

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September 23, 2019
Columbia, South Carolina.

RECEIVED
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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESON COUNTY
Court of Common Pleas (PCR)

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

WILLIAM DICKERSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 2018-001499

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Return to Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Elizabeth Franklin-Best, Esquire, 2725 Devine Street, Columbia, South Carolina 29205.

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

This 23rd day of September, 2019.

Angela Bennett

ANGELA BENNETT
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