STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Lexington County
Honorable William P. Keesley, Circuit Court Judge

Appellate Case No. 2019-001104

RON O'NEAL FINKLEA, SK6025,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

QUESTIONS PRESENTED

I. **Whether the PCR Court erred in its application of *Strickland v. Washington* in granting a new capital sentencing proceeding where there is no probative evidence in the record to support the factual basis for the ruling and where existing precedent contradicts the legal reasoning of the court?**

II. **Whether the PCR court failed to consider, in plain contravention of *Wong v. Belmontes*, to consider the totality of the evidence which included the directly contrary sworn statements and overwhelming evidence in aggravation of punishment?**

STATEMENT OF THE CASE

The Lexington County Grand Jury indicted Respondent Ron O'Neil Finklea for murder (04-GS-32-2260), arson in the first degree (04-GS-32-2261), attempting to commit safecracking (04-GS-32-2259), criminal conspiracy (04-GS-32-2263) and possession of a firearm while in the commission of a violent crime (04-GS-32-2264). (App. 2412-31). The charges arose from an incident beginning in the early morning hours of August 2, 2003, which resulted in the death of Walter Sykes, a fifty-six year old security guard employed at the Solectron Plant. The prosecution served a notice of intent to seek the death penalty on and before June 8, 2007. On the same date, the indictments were served. (App. 86-87).

The case was called to trial before the Honorable Clifton Newman on August 27, 2007. Finklea was present and Melissa J. Kimbrough and Stephen R. Soltis, Jr., represented him. The Honorable Donald V. Myers, Solicitor of the Eleventh Circuit, and Assistant Solicitors David Shawn Graham and Samuel R. Hubbard, II, prosecuted the case. On August 31, 2007, the jury returned verdicts of guilty for murder, arson in the first degree, attempting to commit safecracking, criminal conspiracy and possession of a firearm during the commission of a violent crime. (App. 1868-72).

At the conclusion of the sentencing phase, the trial judge submitted three statutory aggravating circumstances for the jury's consideration that the murder was committed while defendant was in the commission of a burglary, that the murder was committed while in the commission of a robbery while armed with a deadly weapon, and that the murder occurred while in the commission of physical torture. (App. 2351-54). Judge Newman also submitted the statutory mitigating circumstances that the defendant has no significant history of prior criminal convictions involving the use of violence against another person and the age or mentality of the defendant at the time of the crime. (App. 2359-60). Judge Newman also instructed jurors that "You may also consider any nonstatutory mitigating circumstances, including, but not limited to ... the defendant's honorable service in the military ... and his adaptability to prison life. (App. 2360-61).

Deliberations began at 1:12 p.m. (App. 2366). The jury returned its verdict at 8:26 p.m. The jury found the following existence of each of the three charged statutory aggravating circumstances and recommended a sentence of death. (App. 2367-70). Judge Newman found that the verdict was supported by the evidence (App. 2370-71) and he found, as an affirmative fact, that the evidence warranted the imposition of the death penalty and that its imposition was not the result of prejudice, passion, or corrupt motive. (App. 2371). He sentenced Finklea to ten years for arson in the first degree, to five years for criminal conspiracy, and to death for murder.

DIRECT APPEAL

Finklea was represented on direct appeal by Joseph L. Savitz of the South Carolina Commission on Indigent Defense, Division of Appellate Defense. He raised the following issues in his Final Brief of Appellant:

1. The trial judge erred by holding that, even though Finklea had amnesia and could not recall his involvement in Sykes' murder, he was nevertheless competent to assist in his own defense at sentencing.

2. The trial judge erred by allowing the Solicitor to ignite an incendiary device during his closing argument at sentencing, as this tactic, taken in context, so infected the jury's sentencing determination with passion and prejudice that the death sentence must be vacated.

(App. 2472). This Court filed its opinion affirming his conviction and sentence of death on July 26, 2010. *State v. Finklea,* 388 S.C. 379, 697 S.E.2d 543 (2010). Finklea's timely petition for rehearing was denied on August 19, 2010. The remittitur was issued on August 19, 2010. Finklea did not seek certiorari in the United States Supreme Court.

POST-CONVICTION RELIEF

On November 19, 2010, Finklea, with the assistance of appointed counsel Norris and Holt, made his first Application for post-conviction relief. Finklea's application was later amended on January 15, 2016. It was amended a second time on June 22, 2017. In the 2nd Amended Application, Finklea alleged, in relevant part, that:

10(a) Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law because counsel failed to adequately investigate and present mitigating evidence of Applicant's childhood traumas, resulting Post-Traumatic Stress Disorder ("PTSD"), PTSD resulting from military training as an Airborne soldier and readiness for battle training, and other neurological and mental health impairments, including an extensive family history of "seizures" related to brain abnormalities and degenerative brain problems, or , and failed adequately to rebut the state's arguments surrounding these issues.

11(a) During sentencing, Applicant's ex-wife referred to the Applicant's "rough younger life" and a psychiatrist treating Finklea while in confinement at the Lexington County Detention Center testified that she diagnosed Post-Traumatic Stress Disorder (PTSD) due to Applicant's childhood and past "trauma" and "violence." In his own closing statement in sentencing, Finklea referred to losing family members due to violent crime and growing up without a father. No other evidence was presented to address Applicant's traumatic childhood, resulting

> PTSD, PTSD resulting from military training and service, and other neurological and mental health impairments, including a significant family history of members suffering seizures due to degenerative brain damage and brain anomalies, all due to counsel's failure adequately to investigate and present this evidence.
>
> Counsel's conduct was deficient in failing adequately to investigate Finklea's background, brain anomalies and damage, and mental health issues. Counsel's conduct was prejudicial in failing to adequately investigate and present powerful and abundant mitigation. Counsel failed to interview scores of friends and family members who would provide independent corroboration of the abuse and the brain anomalies and seizures. Counsel failed to obtain the assistance of expert witnesses and/or failed to develop and provide the information to experts it did retain and utilize. Likewise, counsel's conduct was prejudicial because the State capitalized on the minimal evidence of abuse presented such that this information was used as aggravation. Specifically, because the limited evidence of childhood trauma seemingly contradicted the testimony of Finklea's family members, who did not mention any abuse, the State argued several times in closing arguments in sentencing that Finklea was simply "manipulating" his ex-wife and the Detention Center psychiatrist. See *Wiggins v. Smith*, 539 U.S. 510 (2003); *Strickland v. Washington*, 466 U.S. 668 (1984); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008).

The State made its Amended Return to the 2nd Amended PCR Applications on July 24, 2017. The Honorable Judge William P. Keesley held an evidentiary hearing before on September 6-7, 2017. (App. 2564-3031). On March 7, 2019, the Court sent the parties, via e-mail, a signed and filed copy of an Order granting Finklea a new resentencing proceeding based on counsel's failure to discover and present relevant mitigation evidence. (App. 3032). The Court denied relief on Finklea's remaining allegations.

The State filed a Notice of Motion and Motion to Alter or Amend Judgment on March 18, 2019. (App. 3072). The State argued that the PCR Court granted relief based on factual findings that were unsupported by the record and that its ruling was based on multiple instances of plain legal error. Counsel for Finklea submitted its Response to the Motion to Alter Judgment on April 30, 2019. (App. 3109). Judge Keesley denied the Motion to Alter or Amend on June 10,

2019.

STATEMENT OF FACTS

In 2003, Finklea had fallen into a destructive lifestyle involving the use and sale of drugs, and excessive drinking. He lost his second wife and decimated her financial savings. In an effort to recover a portion of his losses, he conspired with his brother-in-law, co-defendant Theodore Davis (aka JR), to commit a robbery of the Solectron plant, where he had worked as a temporary employee from March to May of 2003. He and Davis decided to rob the plant's ATM machine. Before the night of the crime, the two cased the plant and casually spoke with plant security personnel. In the days prior to August 2, 2003, Finklea also purchased a gas can, gasoline, gloves, and a rental car. (App. 1259-63; 1469). On August 2, 2003, Finklea and Davis put in motion their plan to rob the ATM machine. (App. 1380; 1156-57). During the armed robbery, Finklea shot the Solectron security guard, Victim Walter Sykes. After shooting Mr. Sykes, Finklea set him on fire. Mr. Sykes tried to escape but was consumed by the flames. These actions were caught on surveillance video.

STANDARD OF REVIEW

The standard of review is determined by the specific question presented to the Court in an appeal from a post-conviction relief action. Questions of law are reviewed *de novo*. *Smalls v. State*, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018) (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). However, this Court will "defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Id.*

ARGUMENTS

I. The PCR Court erred in its application of *Strickland v. Washington* in granting a

new capital sentencing proceeding where there is no probative evidence in the record to support the factual basis for the ruling and where existing precedent contradicts the legal reasoning of the court.

The PCR judge granted relief finding trial counsel failed to uncover evidence of childhood abuse, and Finklea was prejudiced. The PCR Court acknowledged that trial counsel, with assistance of qualified experts,[1] made substantial and repeated efforts to investigate Finklea's background for possible childhood abuse. (See App. 3045-46; 3048; 3058 & 3058 FN 13). The PCR Court also acknowledged counsel did not simply accept Finklea's own word that he had not been abused, the team – including counsel personally – interviewed family members, several times, seeking any relevant evidence. They received a narrative close to Finklea's own admission there was little to report. Further, at sentencing, family members testified, under oath, to the consistent story of a wholesome upbringing they shared with counsel and the defense team. (App. 2943-44; 2114-49). However, the PCR Court concluded counsel and/or their experts may have missed evidence of past abuse. The path to that conclusion is misdirected and wrong.

There is no probative evidence in the record to support the factual finding that forms the basis for the PCR Court's legal conclusion. The PCR Court erroneously rested his decision *solely* on a hearsay narrative of a traumatic life story presented only by a new social worker hired for the PCR proceedings. Although noting this evidence was hearsay, the Court reasoned that it was acceptable to consider because it was offered through an expert. This was legally wrong because hearsay related in court as a basis for an opinion does not make the statement non-hearsay to prove the truth of matter. The record demonstrates that trial counsel provided

[1] The team included forensic psychiatrist Dr. Donna Schwartz Maddox (App. 2866) and mitigation investigator Carolyn Graham. (App. 2991).

effective assistance of counsel under the prevailing professional norms and were within the wide range of competent professional assistance. Relief was not warranted and this Court should reverse.

The PCR Court Granted Relief Based On Inadmissible Hearsay

One primary error permeating the grant of relief is that it is based on inadmissible hearsay. The PCR court specifically admitted in the Order that it received hearsay as support for Finklea's ineffectiveness claim. (App. 3049). Not one person testified as to personal knowledge of abuse, though Finklea and his family were present at the hearing. The presentation of such evidence was especially critical because sworn penalty phase testimony depicting a wholesome childhood directly contradicted the hearsay offered by the PCR team's experts. (App. 2115-17; 2120; 2124; 2126; 2129-30; 2132-35; 2141-42; 2144-45; 2148). Finklea failed in the most basic of evidence rules – evidence must be admissible to be considered at trial - and the PCR court erred by accepting inadmissible hearsay as a factual basis for finding of both deficient performance and prejudice.

"This Court has repeatedly held a PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (emphasis in original). In short, Finklea failed to prove that actual evidence of childhood abuse exists.

Rule 703, SCRE, "permits an expert giving an opinion to rely on facts or data 'that are not admitted in evidence or even admissible into evidence,' but it "does not allow for the unqualified admission of hearsay evidence merely because an expert has used it in forming an

opinion." *Jones v. Doe*, 372 S.C. 53, 62-63, 640 S.E.2d 514, 519 (Ct.App.2006) (footnote omitted); see also *High v. High*, 389 S.C. 226, 238, 697 S.E.2d 690, 696 (Ct.App.2010). Although the expert may testify to the inadmissible hearsay, "*[i]t is received only for the limited purpose of informing the jury of the basis of the expert's opinion and therefore does not constitute true hearsay exception.*" *Jones*, 372 S.C. at 63, 640 S.E.2d at 519 (emphasis added). See also 2 Kenneth S. Broun, et al., *McCormick on Evidence* § 324, at 418 (2006); *Kim v. Nazarian*, 216 Ill.App.3d 818, 159 Ill.Dec. 758, 576 N.E.2d 427, 433 (1991). Rule 703's importance is substantial as it prevents the abuse of evidentiary rules via conduits for hearsay: hearsay that would ride on the coattails of an expert witness. See *State v. Simmons*, 423 S.C. 552, 565, 816 S.E.2d 566, 573 (2018), reh'g denied (Aug. 2, 2018).[2]

The State brought Rule 703's limitation on the proper use of hearsay to the PCR Court's attention of when it objected to introduction of Dr. Knight's Report (Applicant's Exhibit 22). The State argued that while an expert is may testify to an opinion based on the consideration of hearsay evidence, Rule 703 bars admission of the hearsay for the truth of the matter asserted. (App. 2778-87). Thus, although the Court was permitted to hear hearsay evidence as an underlying basis for the opinions of experts, it could not rely exclusively upon hearsay as proof of the matter asserted, i.e., that Finklea experienced systemic childhood abuse. Finklea needed to either testify himself, have a family member with firsthand knowledge of the abuse testify, or offer non-hearsay proof of abuse in a manner permissible under the rules of evidence. The opportunity to do so was readily available, as Finklea and numerous family members were present for the duration of the PCR hearing. Again, the PCR Court acknowledged that neither

[2] The lack of a true exception to hearsay demonstrates that there are no indicia of reliability to the hearsay evidence presented.

Finklea nor his family testified at hearing, and that the only evidence of systemic abuse came from the experts who testified at the PCR hearing. (App. 3049).[3] Yet, the PCR Court failed to recognize the significance of this failure of proof.

Additionally, the PCR Court acknowledged (App. 3043-44; 3049; 2114-2277) that the existing sworn testimony of the family expressly contradicted the alleged history of abuse presented by experts at PCR. The family members each testified at trial as to the wholesome and loving childhood that Finklea grew up with in Alabama. Either their sworn trial testimony is true, or the hearing testimony (related via third person hearsay) is true, but not both. Although the PCR court acknowledged that the alleged abuse is entirely based on hearsay (App. 3049) that had no corroboration, and that the accuracy of this narrative is in question (App. 3043, second paragraph, sentence one), the PCR Court nevertheless relied on the uncorroborated hearsay. Accordingly, the PCR Court erroneously concluded that Finklea met his burden of proof, since he failed to present any competent, admissible evidence that the supposed abuse actually occurred. *See* Rule 602, SCRE.

The PCR Court offered no legal basis for ignoring the limitations of hearsay admissibility under Rule 703, or for how its Order granting relief can be squared with prior precedent set forth in *Jones* and *High*. The Order granting relief contains a single sentence conceding that the PCR expert testimony is in fact hearsay and finding it admissible, "as it was provided in support of

[3] Despite the ease at which any one of these individuals could have been called to testify, the State was never afforded an opportunity to cross-examine this new hearsay claim of "abuse" that was contradicted by family members' trial testimony. At most, Finklea proved that an expert opinion could be formed on the hearsay "facts." He failed to prove these "facts were true or that existed for trial counsel to find.

opinions given by experts." (App. 3049). The Order granting relief is otherwise completely silent to the issue.[4]

Under *Bannister*, it is insufficient for an applicant to speculate as to the testimony of an unpresented witness, and in turn, neither can the court speculate as to a witness's testimony when applying *Strickland. There is no appreciable difference in an applicant giving the hearsay testimony of an absent witness and an expert giving the hearsay testimony of an absent witness.* This is especially apparent when the "absent" witnesses have already testified at trial in a way irreconcilable to the expert's supposed hearsay testimony offered ten years after the imposition of the death sentence. *Both circumstances require the court to speculate that the witness would have actually testified as suggested.* The credibility of the testimony itself cannot be addressed by the court in either circumstance and therefore cannot serve as the basis for relief.

Bannister permits an applicant to "otherwise offer the testimony in accordance with the rules of evidence," but there is no applicable exception here. As discussed, Rule 703, *Jones*, and *High* all emphasize the limitation of hearsay testimony offered via an expert witness. *See also Pauling v. State*, 331 S.C. 606, 611, 503 S.E.2d 468, 471 (1998). Again, nothing in the PCR testimony shows any witness with personal knowledge of any abusive event – including Finklea – was willing to assert the new and different story in sworn testimony. This undermines the PCR Court's findings of deficient performance and prejudice. Because Finklea had the burden to prove the necessary facts for his underlying claim, a failure to present any admissible evidence of actual abuse renders his burden unsatisfied.

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[4] The Order of Dismissal found that the PCR hearing evidence presented via experts was "obtained from interviews and reviewing records" and that "[m]ost of it is hearsay." However, the Court provides no explanation of what evidence of abuse exists within the record that is *not hearsay*.

Ineffective Assistance Claims: Capital Sentencing Counsel

"An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). The PCR applicant must prove both deficient performance and prejudice by a preponderance of the evidence. *Strickland*, 466 U.S. at 700; Rule 71.1, SCRCP.

Strickland dictates that in preparing for capital sentencing proceedings, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. The relevant inquiry is not whether certain mitigation should have been presented, but whether counsel conducted an adequate investigation under "'prevailing professional norms....'" *Wiggins,* 539 U.S. 523 (quoting *Strickland*, 466 U.S. at 688-89).

If counsel's investigation is deficient, a court must consider "*all* the relevant evidence that the jury would have had before" to determine whether there is a "a reasonable probability that the jury would have rejected a capital sentence...." *Wong v. Belmontes*, 558 U.S. 15, 20 (2009); *see also Sears v. Upton*, 561 U.S. 945, 956 (2010) ("A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence ... along with the mitigation evidence introduced during [the] penalty phase trial, to assess whether there is a reasonable probability that [the applicant] would have received a different sentence...").

The Defense Team Effort Adhered to Professional Norms

Strickland held that pursuant to the Sixth Amendment, trial counsel has a duty to investigate mitigating evidence and that such efforts to investigate must be *reasonable in light of*

the circumstances. 466. U.S. at 668. In granting relief on Finklea's allegation that his defense team failed to adequately investigate and present mitigating evidence of systemic childhood abuse, the PCR Court made numerous factual and legal errors in evaluating the efforts of counsel and incorrectly applied the standard set forth in *Strickland* concerning counsels' duty to investigate.

Instead of weighing the collective efforts taken by the various members of the trial team to determine whether a history of abuse existed in Finklea's childhood, the PCR Court focused almost exclusively on three details within the state court record, each of which was inaccurately referenced by the PCR Court in light of the record facts, and then relied upon in such a way as to improperly apply the *Strickland* standard. The first is what the PCR Court identifies as a "red-flag" indication of possible abuse, acquired via the hearsay interview note of Cherena Roland. The PCR Court reasoned that counsel's failure to sufficiently investigate this note, which was taken by Investigator MacDougal at the beginning of Finklea's legal representation, resulted in the defense team failing to uncover the history of childhood abuse. (App. 3039-40; 3059).

In tandem with this "red-flag" issue, the PCR Court erroneously found that the defense team never interviewed family members individually and outside the presence of Finklea's mother in the course of four years of representation. (App., p. 3040; 3049). The PCR Court also presumed based on hearsay by the experts, that the mother's presence hindered other family members from speaking freely about Finklea's childhood. (App. 3040; 3049; 3059). Finally, the PCR Court found that the various efforts of the defense team to broadly inquire and investigate the possibility of childhood abuse were negated because of the team's "poor rapport" with Finklea and his family. (App. 3049; 3054; 3058-59). Accepting the expert witness hearsay as

proof of Finklea's child abuse, the PCR Court reasoned that this lack of rapport led to Finklea's and the family's repeated dishonesty during the defense team's four years of legal representation. (App. 3049; 3058-59). The PCR Court relied heavily on the idea of "poor rapport" as a basis for explaining the trial team's failure to discover a history of abuse, despite repeated inquiries.

The PCR Court's reliance upon these three improper details is summarized in the Order as follows:

> [I]t 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 has 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. [5]

(App. 3059).

The PCR Court's factual findings and legal reasoning were in error on multiple instances. For instance, the record demonstrates that lead counsel took extraordinary efforts to address the "red-flag" issue of abuse found in Ms. Roland's interview note. However, he was hindered by

[5] The Court refers to multiple "red flags" in this excerpt. However, the Order granting relief only labels Ms. Roland's interview note as a red flag. If the PCR Court is referring to the testimony of Dr. Cherry, Finklea's treating psychiatrist during his incarceration, the consideration of Dr. Cherry as a "red flag" is error. Dr. Cherry never provided any detail of abuse during her mitigation testimony, and instead left her reference to trauma so vague as to require total conjecture. The record demonstrates that both Ms. Armstrong and Dr. Maddox consulted with Dr. Cherry prior to trial to determine the extent of what she could testify, and Dr. Cherry did not divulge any evidence of abuse to either member of the defense team. Thus, her testimony of prior trauma was never made known to the defense team before she took the stand at trial and could not possibly be a "red flag" for which further investigation was ignored.

Ms. Roland because she was a wholly uncooperative witness. She refused to meet or even speak with him despite counsel's cross-country airline flight to conduct the prescheduled in person interview. The Court mentions this effort but dismissed the effort entirely because "the interview never occurred." The PCR Court's Order noticeably lacks any context as to why the interview never occurred. (App., p. 3040; p. 3058 FN 13).

The PCR Court likewise erred in concluding that Finklea's family members were never interviewed outside the presence of Finklea's mother. (App. 3049). The PCR Court admits that Dr. Maddox conducted her own interviews of family members in constructing the mitigation defense investigation. (App. 3045; 3048). Additionally, the PCR Court disregards that the mitigation specialist, Carolyn Graham, drove to Alabama and interviewed family for nine hours in an effort to construct a family history. Surely, the ability of family members to freely disclose any abuse were not "stymied" by Finklea's mother in these interviews, since she was not present. Yet, the PCR Court was critical that such effort was conducted "only once" and it gave no further consideration of Ms. Graham's assistance to the trial team. (App. 3040; 3058).[6]

Lastly, the PCR Court found that Ms. Armstrong met with family members individually prior to sentencing in order to prepare them for their direct examinations. However, the PCR Court found that Ms. Armstrong was not able to probe family members for additional information. The PCR Court erroneously disregarded the importance of these meetings because their purpose was to review Finklea's childhood and upbringing with family members in

[6] The PCR Court's treatment of the efforts of the trial team's mitigation experts was dismissive, at best. In any case, the Court cannot grant relief under *Strickland* based on the ineffectiveness of an expert. Cf. *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir. 1998) (noting that defendant is not entitled to effective assistance of an expert witness.); *Waye v. Murray*, 884 F.2d 765, 766-67 (4th Cir. 1989) (per curiam).

anticipation of giving sworn testimony, and they were conducted without the alleged "stymying" effect of Finklea's mother presence the PCR Court referenced in its Order. (App. 3049; 3058; 2981-82; 2985-86). Despite these *individual interviews* by both counsel and the mitigation specialist, the family still offered no indication of abuse.[7]

Most importantly, in evaluating the defense team's investigative efforts, the PCR Court discounted that Finklea, personally, twice denied having any history of childhood abuse during the time in which the mitigation strategy was being prepared. *Contra Strickland*, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. .... In particular, what investigation decisions are reasonable depends critically on such information"). The PCR Court's basis for ignoring Finklea's denial of abuse was counsel's "poor rapport" with him. Yet, the Court committed clear legal error in relying upon "poor rapport" as a basis to discount efforts of the defense team.

Neither *Strickland* nor its progeny establishes a duty to form rapport with a client, and the PCR Court's ruling that the defense team's efforts to investigate were nullified by a poor rapport so as to avoid deceitful responses from Finklea and his family is a substantial misapplication of *Strickland* and existing case law. The United States Supreme Court has previously ruled that a "good rapport" is not a protection contemplated under the Sixth Amendment in *Morris v. Slappy*, 461 U.S. 1, 12-14 (1983):

> The Court of Appeals' conclusion that the Sixth Amendment right to counsel "would be without substance if it did not include the right to a meaningful attorney-client relationship," 649 F.2d, at 720 (emphasis added), is without basis

[7] The PCR Court failed to square its conclusion that Finklea's mother was always present during interviews with the conceded fact that Dr. Maddox, Ms. Graham, and Ms. Armstrong each had individual discussions with family members regarding Finklea's background and their mitigation testimony.

> in the law. No authority was cited for this novel ingredient of the Sixth Amendment guarantee of counsel, and of course none could be. No court could possibly guarantee that a defendant will develop the kind of rapport with his attorney—privately retained or provided by the public—that the Court of Appeals thought part of the Sixth Amendment guarantee of counsel. Accordingly, we reject the claim that the Sixth Amendment guarantees a "meaningful relationship" between an accused and his counsel.

Id. See also *Shaw v. United States*, 403 F.3d 528 (8th Cir. 1968); *United States v. Golden*, 102 F.3d 936, 942 (7th Cir. 1996); *United States v. Turk*, 870 F.2d 1304, 1308 (7th Cir. 1989). Thus, a "poor rapport" or a lack of "meaningful relationship" cannot be relied upon by the court as the basis of ineffective assistance of counsel under the Sixth Amendment. This case law and argument was presented to the PCR Court on Petitioner's Rule 59(e) Motion to Alter or Amend Judgment, but it was not addressed by the PCR Court in the Order granting relief or the Order denying the Rule 59(e) motion.

Moreover, counsel were entitled to rely on the reasonable evaluations and opinions of the experts they hired, as well as the information provided by their own client. *Strickland,* 466 U.S. at 691; *DeCastro v. Branker*, 642 F.3d 442, 456 (4th Cir. 2011) ("the state court did not act unreasonably in refusing Petitioner's attempt to upend his conviction and sentence based on the information that he failed to timely provide to counsel"); *Moody v. Polk*, 408 F.3d 141, 148 (4th Cir. 2005) (finding that there is no "minimum number" of meetings necessary for which to satisfy proper preparation to guarantee effective assistance of counsel and holding that ***"[i]f Moody had told the truth at the meetings he had with counsel, counsel could have pursued the leads he gave them and acquired all available mitigating evidence. Because of Moody's dishonesty to his own counsel, however, counsel were limited in their possibilities for mitigation investigation.***") (emphasis added); *Thomas v. Gilmore*, 144 F.3d 513, 515 (7th Cir.

1998); *Soria v. Johnson*, 207 F.3d 232, 251 (5th Cir. 2000) (petitioner concealed abuse information despite exhortations to be candid); *Sims v. Singletary,* 155 F.3d 1297, 1316 (11th Cir. 1998). *See also United States v. Pellerito*, 878 F.2d 1535, 1543 (1st Cir. 1989) ("If counsel was ineffective in any sense, it was only because the client rendered him so .... That is not the sort of 'ineffectiveness' for which relief can be granted"); *Segundo v. Davis*, 831 F.3d 345, 352 (5th Cir. 2016).[8]

In summary, the question at issue in this case is a simple one – under professional norms, did counsel conduct a reasonable investigation into Finklea's background to determine whether childhood abuse occurred in Finklea's past? Unquestionably, the answer to that question is yes, based on the present record and a proper application of *Strickland.* The record demonstrates the following actions of counsel, each of which geared toward discovery of mitigation evidence, including potential history of childhood abuse:

- Mr. Soltis hired Mr. MacDougall to perform early interviews and investigative efforts;
- Mr. MacDougall's contact with Finklea's wife Teresa, who told the defense team that she had no desire to assist in mitigation and demanded she not be contacted further;
- Mr. MacDougall's initial interviews producing Ms. Roland's singular incident of alleged abuse; (Ms. Roland's commentary during this interview also contained undeniable concern for bias, as she describes more-so her own mistreatment by the Finklea's family);
- Mr. Soltis drove to Alabama personally to introduce himself, speak with Finklea's family, and get an initial understanding of Finklea's background;
- ***Upon his return from Alabama, Mr. Soltis, having been given no indication of such abuse from the family, began immediate efforts to communicate with Ms. Cherena***

[8] Aside from "poor rapport", the PCR Court did not explain why the various efforts of Ms. Graham and Dr. Maddox were insufficient to be relied upon by counsel in the formation of a mitigation strategy. This is especially peculiar given that Ms. Graham and Dr. Maddox were specially trained for such a purpose. The PCR Court even voluntarily praised Dr. Maddox as "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 Finklea's family and his upbringing." (App. 3045). *Compare Council v. State*, 380 S.C. 159, 173–74, 670 S.E.2d 356, 363 (2008) and *Weik v. State*, 409 S.C. 214, 235, 761 S.E.2d 757, 768 (2014).

Roland and pre-arrange an in-person meeting with her in Seattle, Washington.

- *Mr. Soltis flew across the country to meet and interview Ms. Cherena Roland regarding the "red flag" and potential history of abuse;*
- This meeting did not occur ***solely*** because of Ms. Roland's refusal to meet with Mr. Soltis or even communicate with him as she had originally agreed to do before his travel;
- The request and assignment of Ms. Armstrong as co-counsel, primarily focused on the development and presentation of the available mitigation evidence;
- *The defense team hired Carolyn Graham, a mitigation investigator, whose sole duty was to be the "boots on the ground" individual charged with investigating Finklea's upbringing and to find as much information as she possibly could about his family and early life;*
- *Ms. Graham conducted an in person trip to Alabama wherein she interviewed Finklea's family members for approximately nine hours on the various topics of his life and upbringing, to which none of the witnesses divulged any history of abuse;*
- *Ms. Graham conducted an in-person meeting and interview with Finklea himself, who provided no indication of abuse;*
- *The defense team hired Dr. Maddox as a forensic psychiatrist and mitigation expert to investigate and evaluate the available mitigation evidence so as to help form the best mitigation strategy for Finklea at trial;*
- **Dr. Maddox conducted an initial interview with Finklea, wherein Finklea informed her explicitly that he had not experienced any childhood abuse and that he has a positive relationship with his mother;**
- **Dr. Maddox conducted four total evaluations with Finklea which revisited the topic of abuse and family relationships, and in none of these meetings did he disclose a history of child abuse or his alleged poor relationship with his mother;**
- **Dr. Maddox interviewed Finklea's family members individually, and they again failed to divulge any history of abuse;**
- *Ms. Armstrong communicated with Dr. Cherry, Finklea's treating psychiatrist from the detention center, for which the record demonstrates she was not there to provide therapy, but to diagnose and treat Finklea's symptoms. Wherein, Ms. Armstrong testified that she met with and believed she had fully discussed the testimony for which Dr. Cherry could provide at trial, none of which included a history of abuse.*
- *Dr. Maddox consulted with Dr. Cherry regarding Finklea, but Dr. Cherry provided no indication of abuse to Dr. Maddox;*
- *Ms. Armstrong conducted individual pre-trial meetings with the family members chosen to be mitigation witnesses. These witnesses again did not divulge a history of abuse.*

Thus, the record does not and cannot reasonably support the conclusion that counsel failed to diligently investigate for mitigating evidence, including possible abuse. In conflict with the ruling of the PCR Court, the record demonstrates that Finklea has failed to present credible

evidence to support his current claim of prolonged physical and sexual abuse by his mother. The record is also conclusive that counsel and the defense team made more than reasonable efforts to discover potential childhood abuse were under *Strickland.*

II. **In plain contravention of *Wong v. Belmontes*, the PCR court failed to consider the totality of the evidence, which included the directly contrary sworn statements and overwhelming evidence in aggravation of punishment.**

The PCR Court failed to consider the totality of evidence within the record as required by *Wong v. Belmontes*, 558 U.S. 15, 26 (2009), and erroneously found prejudice under *Strickland* as a result. As discussed, the PCR Court assumed the hearsay narrative of abuse offered by the PCR expert witnesses was truthful. The PCR Court then concluded prejudice based upon this hearsay without considering how that narrative aligns with the contrary sworn testimony offered by Finklea's family members at trial, and how such new testimony would prove problematic and counterproductive if introduced during sentencing. The PCR Court also failed to reweigh the aggravating and mitigating evidence, and provided no discussion at all to the horrendous and torturous nature in which Finklea carried out his murder of Victim.

"To establish prejudice, a defendant claiming ineffective assistance of counsel must show 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. "When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the 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." *Id.* at 695. In its later application of this standard, the Court in *Belmontes* specifically held a reviewing court is required to consider the

entire record in evaluating prejudice, noting that more evidence is not always best. The court must conclude whether a jury would have rejected death after weighing the entire body of mitigating evidence against the entire body of aggravating evidence. See *Belmontes*, 558 U.S. at 26. Also, evidence presented in sentencing cannot be viewed in a vacuum; a court must consider the consequences that would come if the allegedly omitted evidence was introduced. *Id.*

At trial, the State proved three separate statutory aggravating circumstances in support of the death penalty: the murder was committed during the commission of a burglary while armed with a deadly weapon, the murder was committed during the commission of a robbery while armed with a deadly weapon, and the murder was committed while in the commission of physical torture. The evidence in aggravation demonstrated that Finklea planned the burglary of his former employer's ATM machine in advance by casing the security (App. 1895; 1940-41), and demonstrated an intent to set the building on fire (App. 1525-26). He then perpetrated the burglary, found Victim at his desk (App. 1993), shot him once in the face and again in the neck (App. 1774). Then, Finklea poured gasoline on Victim and set him on fire. Video footage of the crime shows Victim attempted to escape and made it outside before succumbing to the flames and gunshot wounds. (App. 1986-87; 1223; 1226; 1244). The record supported the conclusion that Finklea did not just commit murder, but intentionally inflicted unbearable pain and needless suffering upon his victim sufficient to constitute torture. Additionally, the record also presented other evidence of aggravation, including:

- Finklea's failure to pay over $21,800 dollars in child support for his son, such that Finklea had his wages garnished. (App. 1893-94);
- Finklea was dealing drugs from the very first day he moved in with his sister-in-law and disobeyed her requests to stop. (App. 1926-29; 1932);
- Finklea had his own stepson Brandon sell drugs for him. (App. 1930);
- Finklea made previous threats to a drug trafficking accomplice that he would shoot the

accomplice in the head, set her on fire, and throw her in the woods so no one would find her. (App. 1951-53);

- Finklea sent a letter to his stepson Brandon stating "Brandon, son, please change, you're headed down a dead end street. You're just like Tommy. And I know if I came across you, I would put a bullet in your head." (App. 1979, line 25 - 1980, line 3).

The mitigating evidence at trial, put together through the efforts of both counsel and their mitigation experts, painted a picture of Finklea as an upstanding citizen and soldier, who experienced a loving family and childhood,[9] but who fell upon hard times. Also, he was led astray into criminal behavior by his co-defendant and, as a result of post-traumatic stress from trauma, committed a heinous crime. Without any discussion of the evidence in aggravation, the PCR Court concluded that the hearsay narrative of abuse presented through an expert witness would have tipped the scales. However, the PCR Court never discussed the evidence in aggravation, and why the alleged omitted mitigation evidence would be so influential as to alter the balance of evidence for sentencing, particularly when considered in conjunction with the evidence in mitigation trial counsel presented to the sentencing jury. Though not made known to the defense team and not elaborated upon, Dr. Cherry informed the jury that Finklea suffered from PTSD resulting from trauma. (App. 2230; 2233). *If believed*, the hearsay testimony would only provide the jury with the specifics for which the PTSD is based. It would not provide further explanation for Finklea's actions.

If the hearsay narrative of abuse were to be offered at trial, the calculus behind the defense team's mitigation strategy does not merely add the alleged new evidence of abuse. Introduction of it would considerably alter the defense team's strategy as a whole. Part of the

[9] Testimony from Cherena Roland indicated that Finklea had a "rough younger life" that she thought "caused him to have a lot of insecurities and devalue himself." But, she did not contradict the testimony offered by Finklea's family members. (App. 2221, lines 1-6).

defense team's mitigation strategy was to show that Finklea's co-defendant, Theodore Davis, was the manipulative and coercive force that led to Finklea involvement in the violent crime. (App. 2334; 2948-49). Yet, the evidence of abuse from Finklea's estranged wife, Teresa, whom had adamantly refused to speak with any member of the defense team and only changed her mind on the eve of sentencing, also included very damaging evidence that Finklea was a bully, was often scary, and that she believed Davis was scared of Finklea. Teresa's comment that Davis was a follower would imply that Finklea was not coerced or led astray by Davis, but was instead the leader of this criminal endeavor. The PCR Court acknowledged the reasonableness of not putting forward this information at trial, as it was contrary to their existing strategy, but the court failed to recognize that the existence of this evidence would have eliminated a key theme of the mitigation strategy – laying blame at the feet of Finklea's co-defendant.

Equally problematic of the court's failure to consider the total record and circumstances is that the hearsay tale of abuse offered squarely conflicts with the existing sworn testimony of the family member witnesses who testified at the sentencing hearing.[10] The PCR Court failed to consider that the presenting this alleged evidence would subject every family member witness to a substantial degree of impeachment, since they had previously given contrary, sworn testimony of the wholesome family connections and religious upbringing that Finklea experienced as a child. The credibility and weight of their respective testimonies would be significantly damaged in light of the sworn testimony already provided.

[10] No family member testified to this abuse at the PCR hearing and Finklea did not offer an affidavit from anyone who had witnessed the supposed systemic abuse of Finklea to which his PCR experts testified.

If Finklea were to testify in his own defense about alleged abuse, he would also be subjected to substantial impeachment for his pervasive dishonesty regarding his feigned amnesia for the crime itself, the testimony that he "wish[es] [he] could remember so [he] could give this family closure as to what happened on that night", for his claim that he was "raised to be responsible, respectable, and respectful", and for his plea to the jury to consider the sworn testimony of his family members and psychiatrist. (App. 2344-45). If the alleged history of abuse were to be offered at re-sentencing through the PCR experts, that future jury would be made fully aware that the same witnesses who provided this hearsay information to the experts testified in stark contrast before the previous jury.[11] Thus, it is questionable that such evidence would be believed by a subsequent jury.

The PCR Court failed to look at the whole record in its evaluation of prejudice. The court provided no discussion of the three proven aggravating circumstances. Not only was victim shot in the face, which is painful in and of its self, but Finklea set Victim on fire while he was still alive. In doing so, Finklea inflicted immeasurable pain upon Victim constituting a sadistic and torturous murder that the jury saw for themselves via a video. Aside from the factual recitation, the PCR Court made no mention of this aggravating circumstance, or any other aggravating circumstance, which collectively could be reasonably argued as "overwhelming". *Strickland*, 466 U.S. at 677 (finding "the aggravating circumstances were so overwhelming that no substantial prejudice resulted from the absence at sentencing of the psychiatric evidence offered in the collateral attack."); *United States v. Runyon*, 707 F.3d 475, 499 (4th Cir. 2013) (the nature and motivation of murder held overwhelming force despite the defense presenting two

[11] The jury would also recognize that this evidence of abuse is only offered now after the family watched Finklea receive the death penalty.

dozen witnesses regarding defendant's childhood, character, relationships, employment history, pretrial conduct, and adaptability to prison life). In addition to failing to consider and weigh the aggravating circumstances supporting the death penalty against the mitigation evidence, the PCR court failed to recognize that the mitigation evidence itself would add little to the existing PTSD explanation offered by the defense team, but would change the nature of the mitigation theme considerably, and not necessarily result in an improved case for mitigation. The PCR Court's evaluation of prejudice was erroneous and runs afoul of *Belmontes* and *Strickland.*

CONCLUSION

This Court should grant Certiorari and reverse the judgment of the PCR Court.

Respectfully submitted,

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October 28, 2019

By: _____.
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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
Honorable William P. Keesley, Circuit Court Judge

Appellate Case No. 2019-001104

RON O'NEAL FINKLEA, SK6025,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Petition for Writ of Certiorari on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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

This 28th day of October, 2019.

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