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.

SUPPLEMENTAL APPENDIX

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
RON O'NEAL FINKLEA, SK6025	)	C/A No. 2010-CP-32-5076
Applicant,	)	
vs.	)	RETURN OF RESPONDENTS TO APPLICATION FOR POSTCONVICTION RELIEF AND REQUEST FOR STATUS CONFERENCE AND APPOINTMENT OF COUNSEL
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	

The Respondent State of South Carolina hereby makes a Return pursuant to § 17-27-160(B) to the application for post-conviction relief dated November 19, 2010[1] and not yet received from the Clerk of Court. The application was prepared by his court-appointed counsel, Teresa Norris and Diana Holt. This matter was assigned to the Honorable William Keesley by order of the South Carolina Supreme Court dated September 23, 2010.

Respondent request a status conference pursuant to § 17-27-160 to establish a statutory 180 hearing date and other incidental matters. Pursuant to § 17-27-160, this status conference should be held 'not later than thirty(30) days after the filing of the Return." [January 22, 2011].

I.

The Applicant, Ron O'Neal Finklea, #6025, is presently housed as a safekeeper at Lieber

[1]Respondent received the application directly from his court appointed counsel by mail on November 23, 2010.

Correctional Institution of the South Carolina Department of Corrections pursuant to orders of the Clerk of Court for Lexington County. The Applicant, Ron O. Finklea, was indicted by the Court of General Sessions for Lexington County 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). ROA 2332-2351. The charges arose from an incident beginning on August 2, 2003 which resulted in the death of Walter Sykes, a fifty-six (56) year old security guard employed at the Selectron 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. ROA p. 70-71.

On August 27, 2007, the case was called to trial before the Honorable Clifton Newman, Presiding Judge. The Applicant was present and represented by Melissa J. Kimbrough and Stephen R. Soltis, Jr. The prosecution was handled by the Honorable Donald V. Myers, Solicitor of the Eleventh Circuit, and Assistant Solicitors David Shawn Graham and Samuel R. Hubbard, III. On August 31, 2007, at 8:40 p.m. 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. ROA 1804-08.

On September 4, 2007, the sentencing proceeding began. (ROA 1815). The prosecution asserted it was seeking death on the following statutory aggravating circumstances:

1. The murder of Walter Sykes was committed by the defendant while in the commission of a burglary. [ROA p. 1819, ll. 2-8].

2. The murder of Sykes was committed while in the

commission of robbery while armed with a deadly weapon. [ROA p. 1819, ll. 9-15].

3. The murder of Sykes was committed while in the commission of larceny while armed with a deadly weapon. [ROA p. 1819, ll. 16-19].

4. The murder of Sykes by the defendant was committed and accompanied by physical torture. [ROA p. 1819, l. 20 - p. 1820, l. 1].

At the conclusion of the phase, the trial judge charge three (3) of the above statutory aggravating factors. ROA 2271-75.

a) murder was committed while defendant was in the commission of a burglary. [ROA 2271-2272].

b) murder was committed while in the commission of a robbery while armed with a deadly weapon. [ROA 2272-2273].

c) murder occurred while in the commission of physical torture. [ROA 2273-2274].

Judge Newman further instructed concerning mitigating circumstances:

1. The defendant has no significant history of prior criminal convictions involving the use of violence against another person.

2. The age or mentality of the defendant at the time of the crime.

ROA 2279-2280. Judge Newman further instructed 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.

ROA 2280-81. Deliberations began at 1:12 p.m. ROA 2286. The jury returned its verdict at

8:26 p.m.

The jury found the existence of each of the three (3) charged statutory aggravating circumstances. ROA 2287-88. The jury recommended a sentence of death. ROA 2288-2290.

Judge Newman found that the verdict was supported by the evidence. ROA 2290-91. Judge Newman further found as an affirmative fact that the evidence of the case warrants the imposition of the death penalty and its imposition is not the result of prejudice, passion, or corrupt motive. ROA 2291.

Judge Newman sentenced Finklea to ten (10) years for arson in the first degree, five (5) years for criminal conspiracy, and death for murder.

Direct Appeal

The Applicant was represented on direct appeal by Joseph L. Savitz of the South Carolina Commission on Indigent Defense, Division of Appellate Defense. In his Final Brief of Appellant, he raised the following issue:

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.

Final Brief of Appellant, p. 1. The Respondent was represented by below-signed counsel. The Supreme Court of South Carolina entered its opinion on July 26, 2010 denying the direct appeal and affirming his conviction and sentence of death from Lexington County. *State v. Finklea, Op. No. 2683, 388 S.C. 379, 697 S.E.2d 543 (2010) (filed July 26, 2010).* A petition for rehearing was

made by Applicant. The Supreme Court denied rehearing on August 19, 2010 by letter order. The remittitur was issued on August 19, 2010. The Applicant did not seek certiorari in the United States Supreme Court.

Respondent attaches and incorporates by reference the following documents:

1. Final Brief of Appellant.
2. Final Brief of Respondent.
3. *State v. Finklea, Op. No. 2683, 2010 Westlaw 2943671, (S.C.S.Ct. Filed July 26, 2010).*
4. Petition for Rehearing.
5. *State v. Finklea, Letter Order Denying Rehearing, (S.C.S.Ct. Filed August 19, 2010).*
6. Record on Appeal.

II.

Initial Post-Conviction Relief Allegations

In his application, the Applicant, with the assistance of counsel, makes the following allegation:

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 and resulting Post-Traumatic Stress Disorder.

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 and resulting PTSD due to counsel's failure to adequately investigate and present this evidence. Counsel's conduct was deficient in failing to adequately investigate Finklea's background. Counsel's conduct was prejudicial in failing to present powerful mitigation. Likewise, counsel's conduct was prejudicial because the State capitalized on the minimal evidence of abuse presented such that this information was used in 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 (2208).

III.

Respondent submits the entire application is without merit. The record reveals that counsel Stephan Soltis and Lisa (Kimbrough) Anderson presented a case in mitigation on Finklea's behalf. Particularly, they called Erica Middleton, (ROA p. 2035-2039), Johnnie Lee Finklea (ROA p. 2039-2043), Curtis Blunt (ROA p. 2043-2047), Johnnie Finklea (ROA p. 2048-2051), Betty Finklea Peoples (ROA p. 2051-2061), Nicole Finklea Fantroy (ROA p. 2061-2074), Charlie Turner (ROA p. 2074- 2115), Dr. Tora Brawley (ROA p. 2116-2131), Vincent Smith (ROA p. 2131-2138), Cherena Roland (ROA p. 2138-2149), Dr. Anna Cherry (ROA p. 2149-2162), Dr. Richard Frierson (ROA p. 2162-2179) and James Aiken (ROA p. 2179-2195).

Erica Middleton, his first cousin testified that she viewed him as an older brother and he was a leader in her dance group and church going. She stated that she did not know Finklea to be violent not use drugs. (ROA p. 2035-2039).

Johnnie Lee Finklea, the Applicant;'s uncle testified that Finklea was respectful and never violent around him. He stated he was surprised when he learned about this incident. (ROA p.

2039-2043).

Curtis Blunt, Finklea's brother testified that Finklea was a loving, caring and never did anything wrong and was a good brother to anyone of any race who was always good. He stated that he stayed in touch with him. He never knew his brother to be involved in drugs or ever hurt another person. He never knew of Finklea to ever be in trouble and was a good child. (ROA p. 2043-2047).

Johnnie Finklea testified she was the Applicant's grandmother and loves him. She stated that he was a handsome child who was there to help anyone who needed help. She stated that he was good child up to the time he went into the military. She stated that this crime was out of his character and she was surprised. (ROA p. 2048-2051).

Betty Finklea Peoples, the Applicant's mother testified and presented pictures of the Applicant growing up. She said he was close to his siblings. She testified that he was a good child and that she never had any problems with him from birth until this occurred. She stated that she brought him up in the church and that she loved him dearly. She stated that she could not understand how this happened because this is not the Ron she brought up. She stated that she never saw him on drugs or drink anything. She declared: "I just think he got in with the wrong crowd." She concluded:

> "I would ask y'all as a mother, would y'all , please, please, I'm begging spare my child's life. I would rather see him do life. I can go see him. I'm sorry about what happened and I feel for the other side of the family" ROA 2055, l. 18-22. [2]

She concluded that she loved her son and that she was sorry what happened. She stated that she

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[2]Solicitor Myers objected at that point. The trial court sustained the objection to the extent of the plea for a specific sentence, but stated she was allowed to express her feelings. See also ROA p. 2071-2073.

was asking that Ron's life be spared because if he was living she could go see him and if he's dead, she can't. (ROA p. 2051-2061).

Nicole Finklea Fantroy, Finklea's first cousin testified that he was like a brother to her also. He stated that Ron would come to help at her house with her mother's seizures. He did everything for her and stayed at their home. She stated that he was her mentor and had inspired her to be all she could be. She said Finklea was the first person in the family to get diploma. She stated that she had two children before she graduated from high school. He encouraged her to get her diploma and later she was able to get an associate of business administration degree because of Ron and Keith Fantroy. She said Ron was raised in the church and they did everything together. She stated that she cannot explain what took place , "but we know that Ron is not a monster, Ron is not a whore monger, Ron is not a drug dealer." ROA p. 2064, l. 22-25. She also stated that she had never seen Latisha Gilmore before. She stated she had only seen Ron with his wife, Cherena, his son O'Neal, his wife Teresa and the stepchildren. She declared that she had never seen drugs in Ron. She summarized again that Finklea was not a monstrous person and that she asked for forgiveness, but knew that it could not erase what took place. She described photographs with Ron as they grew up. (ROA p. 2061-2074).

Sgt. Major Charlie Turner, testified about Finklea's military background "because Ron, in the past, has always been there for him." ROA 2074. He presented military records concerning special training courses and recognition awards that Finklea had received from 1991. He testified that he met Finklea in 1991 and observed his work performance and found his duty performance matched his uniform, that he was well=spoken and he was about business. He stated that Ron was seeking to be the best that he could be compared to the rest of the team. He stated that Ron

would also talk about family all the time. "He was my best soldier that I had in 20 years of service." (2097-98). He stated that Finklea lifted his team up. He stated the incident was not Ron's character and that he was surprised because he was someone that he would want to be in combat with. He stated that he thought that Finklea had made a mistake and did not know why or how. He stated from Ron's character that he knew from the three years they spent together he was an "excellent soldier, father and husband."

On cross-examination, it was developed that Ron had received training in dealing with hazardous materials in emergency preparedness and medical training. He stated that he received a good conduct medal every three years. (2107). He separated from the military on April 24, 2002 from June 11, 1991. (ROA p. 2074- 2115)

Dr. Tora Brawley, a forensic psychologist and neuropsychologist and expert in clinical psychology and clinical neuropsychology testified that she was asked to look at Finklea's brain functioning. She stated that she ran a battery of neuropsychological tests. She stated that she found some areas of brain deficit that were consistent with anoxic injury and inconsistent with faking deficits. (2119). On cross-examination, she stated that she tested Finklea on May 17, 2007 for three hours. She stated that she had not reviewed any other documents in the matter and looking only at his current functioning. She stated that she found deficits in motor skills but could not state whether the skills did not exist before she spoke with him [or before the crime]. (2124). She also found he had below average verbal memory for stories and verbal information that was told him. (2125). She also found that he had below average confrontation naming and ability to copy and recall a complex design, which she could not say existed prior to 2003. She stated that she was aware that Dr. Gaines had determined that Finklea had zero impairment, but

noted that she did not do impairment ratings. (2128). (ROA p. 2116-2131).

First Sgt. Vincent Smith testified that he had spent 27 years in the military. He stated he met Finklea in 1998 . He stated that they had fun together and that Finklea would count cadence as they ran 6 miles. He described Finklea as smart with a lot of motivation and dedication. When they would run the quarterly urine tests, Finklea was always "cleans" of drugs. He said that he did not know how Finklea got into this situation because he had always taken care of his family spoke about things to do after work and was a model soldier. He stated that Finklea got kicked out of the Army because of asthma, but that Finklea was a leader. (2133-34). (ROA p. 2131-2138).

#10

Cherena Roland testified that she was married to Finklea from when she was 16 until she was 20. They began dating while he was in basis training in the Army. She stated that they had a son, J[redacted] She stated that she found her husband to have been a very caring person and not one who would deliberately hurt anyone. (2140). Although he had a lot of insecurities, he would try to surround himself with good people. "He definitely did make an effort to try to build himself into a better character than what was presented to him when he was growing up. (2140). Concerning Finklea' early life, she stated "he had a rough younger life. I think the stuff that happened to him when he was younger it caused him to have a lot of insecurities to devalue himself." (2141). She stated that he was looking for a productive environment and to be around people who would value and appreciate him. His relationship with their son was good despite that fact that they were young parents trying to discover their priorities. She said concerning child support that while he was in the military he was making good money, but the divorce was ugly in trying to get support. However, she stated that he ended up owing her money but that she talked

about voiding the whole thing. She stated that her son did not go without as a result. (2143). She also stated that he would always ask about their son. Id. She showed some pictures of their son. She stated that while married, he was never around any sort of drug activity and did not interact with people that did drugs. She stated that he did not drink. She stated that he loved his son very much and tried to be that best he could of what a good father should be. She stated that she knew that he was not getting paid very much when he got out of the military, but she did not know because he would not tell her what he was making. She stated that he was limited on what he saw as being a father or a family. "Not saying his family is bad or anything, but from what I've seen, he was missing a lot of things" - like a father and unconditional love. (2145). She stated that the act he did was horrific and she was sorry for their loss and it should not have happened. She stated that she knew he had to be responsible for his actions, but that she did not see this in him. She stated she knew he was remorseful and that's why he tried to commit suicide because he realized what he did and that he had to face the consequences. (2146).

She stated that she still had custody of the son who was 13 years old and lives in Tacoma, Washington. (2147). (ROA p. 2138-2149).

Dr. Anna Cherry , the contract psychiatrist with the Lexington County Detention Center testified that she treated Finklea for major depressive episode and after he started having nightmares "I realized that he actually had post-traumatic stress disorder." (2149050. She stated that for people with PTSD talking about traumas can be upsetting and he spoke very little about it. Finklea was not the type of inmate who declared he had a horrible childhood and woe is me. Dr. Cherry stated that he had required high doses of medications and he was actually doing fairly well. She stated that little things can trigger PTSD symptoms and he started having panic attacks

and difficulty with little things that may be considered normal like an abscess on his thump. (2150). She stated he was more concerned about traveling in chains to get to the dermatologist than having the thumb taken care of. Further, when his asthma inhaler ran out, he started having PTSD symptoms, however, the medications have started to help out to control his depression. (2151).

Dr. Cherry's observations of him as a person was that she saw him as a kind gentle soul out of everyone she had treated. (2151). She stated she had more respect for him and she liked him more than anyone else she had treated. She stated that he was concerned for other people, has an instinct of telling who the good people are and who the bad people are with a good sense on the inner working of human beings. However, he is not a judgmental person. She found him to be a stabilizing influence in the jail and likely to de-escalate a situation rather than escalate it. She stated that they would put people in his cell knowing that he would take care of them and he would keep the environment peaceful. (2153). "I don't know why, I'm guessing that with all the trauma and the violence that he has experienced and given out and with the PTSD symptoms with the severity that they were , I think he needs peace in his environment to survive." (2153). She stated that anything that is negative - anger or hatred - triggers his PTSD and the other things inside him - and he does what he can to make it more peaceful. She stated that she could not speak as to how he was before, but that was consistent with what other people said about his past. She stated that he got along well with the correctional officers. She stated that he was not a discipline problem in the four years that he had been there. She stated he had always shown her the utmost respect. (2155). Dr. Cherry stated that in her job she had learned about people and their secrets. "Out off respect for Ron and people he cares about , I'm going to choose not to

discuss those things even though it may help him, but just keep in mind that everyday something happens —"I think but for the grace of God go I." (2155). She stated that she sees Finklea as fighting to not become the kind of person that he could become a person like you and me. Dr. Cherry then announced "God has saved your life once, he'll do it again." (2156).

On cross-examination, Dr. Cherry admitted that she was against the death penalty. (2158-59). She also stated that she was the first person to diagnose Finklea with post-traumatic stress disorder in 2004. She stated she had diagnosed it as depression and panic disorder. (2159)When asked whether he had disclosed events to support the PTSD, Dr. Cherry stated that when he started having nightmares they talked about whether he had traumatic events in his past , but she did not ask detailed questions because it was not her role. She stated it would have been "counter-therapeutic for me to delve into the details of abuse." (2160). She stated that they talked about it enough to understand that there was trauma in his past and that he responded to trauma like someone with PTSD has. Id. When asked if the PTSD could come from Finklea taking a gun and shooting Walter Sykes twice in the head and setting him on fire, she responded that it was a trigger for his symptoms getting worse, but that she did not believe it was the initial trauma. But she could not answer yes or no if she knew. (2161). She stated that she was testifying because she is an advocate for her patients - and that she had never advocated for or against capital punishment. (2161). (ROA p. 2149-2162)

Dr. Richard Frierson, an expert in forensic psychiatry testified that he evaluated Finklea pursuant to court order. (2164). He opined that Finklea was competent to stand trial and he was not mentally ill to the extent he would be unable to distinguish right from wrong or lack ability to conform his conduct to the requirements of law. He had a diagnostic impression that Finklea

clearly suffered from a major depressive disorder - single episode and appeared to be in full remission when he evaluated him .(2166). He described Finklea's medical conditions of asthma, knee injury, skin abscess and evidence of hypoxic brain injury due to his suicide attempt. He opined that there was not evidence that Finklea was making up his amnesia and the meory loss in 2003. (2167). (ROA p. 2162-2179)

James Aiken, a prison consultant and former employee of the South Carolina Department of Corrections, testified as an expert in the field of prison adaptability. (2187). He declared tah the had reviewed the documentation about Finklea., including his military, medical, incarceration and records from his co-defendant. (2187-88). He stated that he did not see Finklea in his military records involved in systematic violence against people or insubordination to superiors or using lethal weapons against other people or disruptive activity. Instead he saw his patriotism. (2189)He did not find that Finklea was involved with any predator gangs or drug cartels or drug trafficking. Particularly, he did not see any criminal record. (2189). Since he has been incarcerated, he found Finklea to be well-adjusted , meaning not stabbing himself, no contraband weapons or organizing escape or sexual predator activity or prison disruption. He was concerned about a propensity to harm himself when in crisis. (2190). He found Finklea to be the lowest probability on being a threat to other inmates due to his history and his age of beyond 30 years old. (2191). Secondarily, he could be concerned about someone attacking him because he has no affiliation with gangs or security threat groups. Id. (ROA p. 2179-2195).

Counsel initially declared an intent to cal Dr. Donna Schwartz-Watts as their final witness. ROA 2197. After a break, however, the defense chose not to call Dr. Watts "after consultation with Dr. Watts. We believe all of the information we need has been presented."

ROA 2198, l. 4-10.

Finklea waived his right to testify. ROA 2198- 99. During the closing argument, Finklea made a personal statement to the jury:

> . . .I am not an animal. I am not a drug dealer. I am not a drug user, I never have been. You've heard testimony of my traveling to Alabama, trafficking in get drugs, but there's no proof to that, no proof to that.
>
> You've heard that I moved in with an in-law, when I first moved in, the first thing I started doing was selling crack to Mexicans, there's no proof to that, all right.
>
> You heard that I talked to Mr. Sykes seven to ten times at work. Well, how is that possible because of the time that I got off from work and the late hours --
>
> **MR. MYERS**: I'll have to object to him testifying now, Your Honor.
> **THE COURT:** All right. Counsel approach and Mr. Finklea.
> (Whereupon, a bench conference was held off the record, in the presence of the jury, but out of the hearing of the jury.)
>
> **THE COURT:** You may proceed.
>
> **DEFENDANT FINKLEA:** You've heard about – you've heard testimony about my military career and about my patriotism to Lady America, all right. Growing up, to me, there was nothing more prestigious than serving this country. To be an 'ambassador as a soldier for this country was the most important thing to me in my life. For me to actually have something else outside of the immediate family that I was willing to give my life for and it's this, it's this.
>
> I am not an animal. I'm not an animal, all right.
>
> **I've lost family members to violent crimes**, does that mean that I know how this family feels? No, it doesn't. I've seen the video. It jogs no memories.
>
> Does an animal have a heart? No, it doesn't. **I'm sorry for what happened. I'm very, very sorry for what happened, all right.** I never had a father, so I don't know what it's like to lose a father, **all right. I'm sorry. I'm very, very sorry, all right. I cannot stress and explain it enough how sorry I am.**
>
> The State would have you believe that my amnesia and my brain damage is fake. It isn't. I wish I could remember so I could give this family closure as to what happened on that night to their loved one. I wish I could remember. I really do, but I can't. I can't. So what I'm asking from the family --
>
> **MR. MYERS:** Objection, he's now talking to someone other than the jury.
> **THE COURT:** You must address the jury, Mr. Finklea.
> **DEFENDANT FINKLEA:** Yes, sir. Sorry, sir. I'm asking you please, please, consider the expert testimony, the testimony of character witnesses that came in

on my behalf, Doctor Cherry, okay, family members, friends. I'm not that person. I do not know what happened that night. I wish I did so I could explain what happened that night, but I can't. But I am so sorry that it happened. I was raised to be responsible, respectable and respectful. I am not standing here trying to drop responsibility on anyone else, I'm not. I am not, all right. The only thing I'm asking you to do as a jury is to look at me, me, Ron, Ron, not just the individual that the State is trying to make me out to be, me, and spare my life, please. I have a 13-year-old son myself who I will not get to see grow up. Please, please, just spare my life, that's all I'm asking, that's all I'm asking, please, please. Thank you.

ROA 2262, l. 25- 2265, l. 25.

After closing arguments and instructions, the jury deliberated from 1:12 PM until it entered its verdict at 8:26 PM. ROA 2286-87.

In the opinion of the South Carolina Supreme Court, it set out the following facts:

> On August 1, 2003, Angel Peters, a security guard at Selectron, was on duty when Finklea came to the plant around 2:00 AM.[FN1] He was wearing a jacket with a stripe across it. *382 Peters opened the doors and Finklea explained that he needed to use the ATM machine. She told him that it was not working, but let Finklea inside. After talking with Peters, Finklea left but then came back to the building. Finklea asked Peters questions about whether her company was hiring and at one point he followed her into the security room to get a phone number and flier. Finklea asked questions about security, such as how often Peters watches the cameras and who else was working security at night. When another security guard arrived, Finklea departed.
>
> FN1. Peters identified Finklea in a photographic lineup and in court.
>
> The following day, in the early morning hours of August 2, 2003, a man (Man # 1) wearing a jacket with a stripe across it came to the door of the Selectron plant. The State argued at trial and the evidence suggests that Finklea was Man # 1. Walter Sykes was the security guard on duty and, apparently thinking Man # 1 wanted to use the ATM, opened the door. The events that followed were captured on the plant's video system. As Man # 1 approached the ATM, Sykes entered the security office. Man # 1 then followed Sykes into the office and moments later emerged and opened the front door to allow a second man (Man # 2) to enter. Man # 2 carried a gasoline can, which he handed to Man # 1. Man # 1 entered the office again, then exited and approached the ATM and doused it with gasoline. Moments later, Sykes, bleeding from the neck and engulfed in flames, ran from the building. Sykes died on the front lawn from burns and gunshot wounds to the face and neck. From the video it is apparent that Man # 1 is both the person

who shot Sykes and the person who set him on fire.

> Finklea was arrested and, days later, attempted to hang himself in his cell. Though he survived the attempt, Finklea suffered a brain injury resulting in amnesia and claims that he cannot recall the events that occurred the day of the murder. Physicians who examined Finklea found evidence of brain damage and determined that he was likely not feigning memory loss.

State v. Finklea, 388 S.C. 379, 381-382, 697 S.E.2d 543, 545 (2010).

ANALYSIS

The Applicant claims that defense counsel failed to adequately present evidence of Post-Traumatic Stress Disorder in their case in mitigation. Respondent notes that at the conclusion of the mitigation, the defense team chose not to call forensic psychiatrist Dr. Donna Schwartz Watts as a witness in mitigation "after consultation with Dr. Watts. We believe all of the information we need has been presented." ROA 2198, l. 4-10.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The United States Supreme Court has established a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052; *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). Under the second prong, the PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); *Vasquez v. State*, 388 S.C. 447, 456, 698 S.E.2d 561, 565 (2010). Under Strickland and its progeny, Finklea

must demonstrate that, but for counsel's failures to investigate and present evidence of his post-traumatic stress disorder , there is a "reasonable probability" that a jury would not have sentenced him to death. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." "To assess that probability, we consider the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding-and reweigh it against the evidence in aggravation." *Porter v. McCollum*, -- U.S. ----, 130 S.Ct. 447, 453-54, ---L.Ed.2d ---- (2009) (per curiam) (internal quotation marks and brackets omitted).

Under the constitutional standard we employ when reviewing ineffective assistance of counsel claims, we must first determine whether counsel's performance "fell below an objective standard of reasonableness" and so was constitutionally deficient. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel has an obligation to perform a thorough investigation of the defendant's background or make a reasonable decision that such investigation is unnecessary. See *Wiggins v. Smith*, 539 U.S. 510, 522-23, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). [3] This obligation exists even if the defendant is reluctant to cooperate or disclose mitigating evidence. See *Harries v. Bell*, 417 F.3d 631, 638 (6th Cir.2005). See *Williams v. Taylor*, 529 U.S. 362, 395, 120 S.Ct. 1495, 146

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[3]See, e.g., *Rompilla v. Beard*, 545 U.S. 374, 392, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) (post-conviction experts found petitioner " 'suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions' "); *Wiggins*, 539 U.S. at 518, 123 S.Ct. 2527 (" '[D]etailed social service records [ ] recorded ... [petitioner's] borderline retardation.' "); *Williams v. Taylor*, 529 U.S. 362, 370, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (post-conviction testimony showed petitioner "was 'borderline mentally retarded,' had suffered repeated head injuries, and might have mental impairments organic in origin").

L.Ed.2d 389 (2000) (holding that counsel were ineffective because they "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records"); *Strickland*, 466 U.S. at 689-91, 104 S.Ct. 2052 (stating that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary" and that "strategic choices made after less than complete investigation are reasonable" only "to the extent that reasonable professional judgments support the limitations on investigation"); *Johnson v. Bagley*, 544 F.3d 592, 600 (6th Cir. 2008) (finding deficient performance where counsel failed to read files obtained from a state agency that would have revealed a different mitigation strategy); *Jells v. Mitchell*, 538 F.3d 478, 478 (6th Cir.2008) (finding deficient performance where counsel failed to investigate and locate files revealing the petitioner's unstable and abusive home environment or to present such files to the examining psychologist).

In *Rompilla*, the additional mitigation evidence showed that the petitioner was beaten by his father with his hands, fists, leather straps, belts and sticks, was subjected to yelling and verbal abuse, was locked by his father "in a small wire mesh dog pen that was filthy and excrement filled"; was isolated as a child without contact with other children; and suffered from organic brain damage that significantly impaired several of his cognitive functions. 545 U.S. at 391-92, 125 S.Ct. 2456. The aggravating evidence was a murder committed during another felony and by torture, and a prior conviction for rape, burglary, and theft. In *Wiggins*, the petitioner experienced severe privation and abuse in his first six years of life, and physical torment, sexual molestation, and repeated rape thereafter in foster care. The aggravating

evidence consisted solely of his crime, drowning a 77-year old woman in a bathtub and ransacking her apartment. In *Williams*, new evidence showed the petitioner had been severely and repeatedly beaten by his father, had been committed to the custody of the social services bureau, had no schooling beyond sixth grade, and was borderline mentally retarded. The aggravating evidence included a previous conviction for armed robbery, burglary, and grand larceny before the murder for which he received the death penalty, and after it two auto thefts and violent assaults on elderly victims as well as an arson in jail. [4]

The Applicant has not alleged with any specificity evidence that was not presented. The only information is that Dr. Cherry declined to present her basis for the impression of PTSD when questioned in more detail.

Pursuant to SCRCP, Rule 12(e), Respondents herein move this Court for a more definite statement in a timely manner or to strike the allegation because it is too vague and ambiguous. The Respondents cannot be expected to reasonably respond to the broad claim without a precise statement as to what evidence of childhood trauma the Applicant now claims existed at the time of trial that should have been used.

Should the Applicant satisfy the needed specificity, the allegation of ineffective assistance of counsel would probably then raise questions of fact that cannot be conclusively

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[4]Cf. *Porter*, 130 S.Ct. at 448-51 (counsel failed to present evidence the petitioner was his violent father's favorite target, had once been shot at by his father who beat him when the shot missed, had heroic military service, and suffered from brain damage that could manifest in violent, impulsive behavior; he had been convicted of another violent felony committed during a burglary and the same course of events that resulted in the murder for which he received the death penalty); *Pinholster v. Ayers*, 590 F.3d 651, 674-79 (9th Cir.2009) (en banc) (the jury did not hear that petitioner suffered vicious and repeated physical abuse from his step-father and grandmother; had suffered organic, pre-frontal lobe brain damage; and was placed in a home for emotionally disturbed boys then in a state mental hospital).

refuted by the record. The Respondent requests a hearing to fully resolve this issue and demand adequate specificity of the individual claims. *See* Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

CONCLUSION

Each and every allegation in the Application not hereinabove either expressly admitted, denied, qualified or explained is hereby denied.

WHEREFORE, Respondent submits that the Application for Post-Conviction Relief should be dismissed or, in the alternative, that the Court should direct the Applicant to timely serve and file an Amended Application for Post-Conviction Relief specifying all grounds for relief with particularity pursuant to Rule 12(e). Respondents also request this Court to hold a status hearing within thirty (30) days pursuant to Section 17-27-160 and establish a final hearing date.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

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By: _____

December 22, 2010

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

RON O'NEAL FINKLEA, #6025

Applicant,

vs.

State of South Carolina

Respondent.

C/A No. 10-CP-32-5076

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the ***Return of Respondents to Application for Post-Conviction Relief and Request for Status Conference and Appointment of Counsel*** in the foregoing action by depositing copies in the United States Mail, postage prepaid to the following:

Teresa L. Norris, Esquire
Blume Weyble & Norris, LLC
P. O. Box 11744
Columbia, SC 29211

Diana L. Holt, Esquire
P. O. Box 6454
Columbia, SC 29260

This 22nd day of December, 2010.

DONALD J. ZELENKA
Assistant Deputy Attorney General

ORIGINAL

STATE OF SOUTH CAROLINA) COUNTY OF LEXINGTON)		IN THE COURT OF COMMON PLEAS
RON O'NEAL FINKLEA, SK6025 Applicant, vs. STATE OF SOUTH CAROLINA, Respondent.		C/A No. 2010-CP-32-5076 AMENDED RETURN TO APPLICATION FOR POSTCONVICTION RELIEF, AS AMENDED JANUARY 15, 2016 AND JUNE 22, 2017

The Respondent State of South Carolina hereby makes an Amended Return pursuant to § 17-27-160(B) to the initial application for post-conviction relief dated November 19, 2010 and filed November 23, 2010 and the Amended Application received by email on January 15, 2016. The Respondent made an initial return to the first application on December 22, 2010. The Applicant made an second amended application on June 22, 2017. This Amended Return supplements the initial Return. As stated below, the three allegations included as ground one the same issue raised in initial ground one and two supplemental allegations which are record based. For the reasons set forth herein, Respondent make a return and memorandum in support of a motion for summary judgment.

I. Procedural History

The Applicant, Ron O'Neal Finklea, #6025, is presently housed as a safekeeper at Lieber Correctional Institution of the South Carolina Department of Corrections pursuant to orders of the

Clerk of Court for Lexington County. The Applicant, Ron O. Finklea, was indicted by the Court of General Sessions for Lexington County 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). ROA 2332-2351. The charges arose from an incident beginning on August 2, 2003 which resulted in the death of Walter Sykes, a fifty-six (56) year old security guard employed at the Selectron 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. ROA p. 70-71.

On August 27, 2007, the case was called to trial before the Honorable Clifton Newman, Presiding Judge. The Applicant was present and represented by Melissa J. Kimbrough and Stephen R. Soltis, Jr. The mitigation investigator was Carolyn Graham. The prosecution was handled by the Honorable Donald V. Myers, Solicitor of the Eleventh Circuit, and Assistant Solicitors David Shawn Graham and Samuel R. Hubbard, III. On August 31, 2007, at 8:40 p.m. 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. ROA 1804-08.

On September 4, 2007, the sentencing proceeding began. (ROA 1815). The prosecution asserted it was seeking death on the following statutory aggravating circumstances:

1. The murder of Walter Sykes was committed by the defendant while in the commission of a burglary. [ROA p. 1819, ll. 2-8].

2. The murder of Sykes was committed while in the commission of robbery while armed with a deadly weapon. [ROA p. 1819, ll. 9-15].

3. The murder of Sykes was committed while in the commission of larceny while armed with a deadly weapon. [ROA p. 1819, ll. 16-19].

4. The murder of Sykes by the defendant was committed and accompanied by physical torture. [ROA p. 1819, l. 20 - p. 1820, l. 1].

At the conclusion of the phase, the trial judge charge three (3) of the above statutory aggravating factors. ROA 2271-75.

a) murder was committed while defendant was in the commission of a burglary. [ROA 2271-2272].

b) murder was committed while in the commission of a robbery while armed with a deadly weapon. [ROA 2272-2273].

c) murder occurred while in the commission of physical torture. [ROA 2273-2274].

Judge Newman further instructed concerning mitigating circumstances:

1. The defendant has no significant history of prior criminal convictions involving the use of violence against another person.

2. The age or mentality of the defendant at the time of the crime.

ROA 2279-2280. Judge Newman further instructed 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.

ROA 2280-81. Deliberations began at 1:12 p.m. ROA 2286. The jury returned its verdict at 8:26 p.m.

The jury found the existence of each of the three (3) charged statutory aggravating

circumstances. ROA 2287-88. The jury recommended a sentence of death. ROA 2288-2290.

Judge Newman found that the verdict was supported by the evidence. ROA 2290-91. Judge Newman further found as an affirmative fact that the evidence of the case warrants the imposition of the death penalty and its imposition is not the result of prejudice, passion, or corrupt motive. ROA 2291.

Judge Newman sentenced Finklea to ten (10) years for arson in the first degree, five (5) years for criminal conspiracy, and death for murder.

Direct Appeal

The Applicant was represented on direct appeal by Joseph L. Savitz of the South Carolina Commission on Indigent Defense, Division of Appellate Defense. In his Final Brief of Appellant, he raised the following issue:

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.

Final Brief of Appellant, p. 1. The Respondent was represented by Assistant Deputy Attorney General Donald J. Zelenka, below-signed counsel. The Supreme Court of South Carolina entered its opinion on July 26, 2010 denying the direct appeal and affirming his conviction and sentence of death from Lexington County. *State v. Finklea, Op. No. 2683, 388 S.C. 379, 697 S.E.2d 543 (2010) (filed July 26, 2010).* A petition for rehearing was made by Applicant. The Supreme Court denied rehearing on August 19, 2010 by letter order. The remittitur was issued on August 19, 2010. The

Applicant did not seek certiorari in the United States Supreme Court.

Attachments Previously Submitted

Respondent attached and incorporated by reference the following documents to the original Return on December 22, 2010:

1. Final Brief of Appellant.
2. Final Brief of Respondent.
3. *State v. Finklea, Op. No. 2683, 2010 Westlaw 2943671, (S.C.S.Ct. Filed July 26, 2010).*
4. Petition for Rehearing.
5. *State v. Finklea, Letter Order Denying Rehearing, (S.C.S.Ct. Filed August 19, 2010).*
6. Record on Appeal.

II. Allegations in the Applications

Initial Post-Conviction Relief Allegations

In his November 19, 2010 application, the Applicant, with the assistance of appointed counsel Norris and Holt counsel, made the following single allegation:

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 and resulting Post-Traumatic Stress Disorder.

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 and resulting PTSD due

to counsel's failure to adequately investigate and present this evidence. Counsel's conduct was deficient in failing to adequately investigate Finklea's background. Counsel's conduct was prejudicial in failing to present powerful mitigation. Likewise, counsel's conduct was prejudicial because the State capitalized on the minimal evidence of abuse presented such that this information was used in 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 (2208).

AMENDED APPLICATION January 15, 2016.

Five years later after investigation and continuances in hearing dates, the Applicant In his amended application dated January 15, 2016, the Applicant, with the assistance of counsel, makes the following allegation:

#10.

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 and resulting Post-Traumatic Stress Disorder,* ***and other neurological and mental health impairments, and failed to adequately 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 and resulting PTSD due to counsel's failure to adequately investigate and present this evidence. Counsel's conduct was deficient in failing to adequately investigate Finklea's background. Counsel's conduct was prejudicial in failing to present powerful mitigation. Likewise, counsel's conduct was prejudicial because the State capitalized on the minimal evidence of abuse presented such that this information was used in 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 (2208). **[IDENTICAL TO NOVEMBER 19, 2010 Application except for bold))**

10(b) *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 object to the State's wholly unsubstantiated assertion during closing argument that applicant had his stepson, a minor child, selling drugs for Applicant prior to the offenses for which he was arrested.*

11(b) During the State's closing argument at penalty phase, Solicitor Myers argued that the jury should sentence Applicant to death, in part, because the applicant had his 15-year-old stepson selling drugs for him. B[redacted] was Applicant's stepson. His mother, Teresa Finklea, Applicant's then wife, was deployed to Afghanistan at the time of the offenses for which Applicant was convicted and sentenced to death. She was a soldier with U.S. Army at the time. Despite there having been no evidence adduced to support the State's bald assertion, trial counsel failed to object to the highly prejudicial statement. Considering that trial counsel's theory and argument to the jury to vote for life for Applicant because this one tragic criminal action by the Applicant was an aberration of an otherwise very honorable life, there can be no credible strategy for having failed to object to the State's inflammatory statement to the contrary about applicant implying his stepson as a drug dealer. Not only was the statement unsupported and inconsistent with trial counsel's strategy, the statement was presented to the jury while this country was at war and engaged in highly lethal combat in Iraq and Afghanistan, which is where the jury had been told young B[redacted]'s mother was stationed at the time of the alleged drug selling. Applicant was greatly prejudiced by trial counsel's failure to object to correct the record. See *Washington v. Hofbauer*, 228 Fed 3rd 689 (6th Cir. 2000); *Strickland v. Washington*, 466 U.S. 668 (1984). {**ENTIRELY NEW 1/15/2016**}

10(c) *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 adequate, abundant, and available objective expert testimony concerning Applicant's adaptability to prison.*

11 (c) During the penalty phase of Applicant's trial, counsel presented the jury with the testimony of James Aiken, a former corrections official and an oft use the expert in assessing a defendant's potential successful adaptability to prison life, especially on the likelihood of whether a defendant will comply with security mandates in cause no undue harm to fellow inmates or correctional officers. Trial counsel's presentation of Mr. Aiken's assessment was a scant 3 pages in length and

fell woefully short in substance and detail. Trial counsel also called Anna Cherry, M.D., a psychiatrist employed by the Lexington County Jail, who treated Applicant after his attempted suicide by hanging. Dr. Cherry testified that Applicant was a good inmate who looked after other inmates in need. This amounted to a severely anemic and in effect of presentation without any underlying objective testing or future risk assessment analysis. *See Wiggins v. Smith*, 539 U.S. 510 (2003); *Strickland v. Washington*, 466 U.S. 668 (1984); *Council v. State*, 380 S. See. 159, 670 S.E.2d 356 (2008). **[Entirely New 1/15/2016]**

JUNE 22, 2017 Second Amended Application

On June 22, 2017, Respondent's counsel received by email a second amended application for post-conviction relief. In the June 22, 2017 application, Applicant alleges:

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. [New* ***language in bold]***

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). **[New language in bold]**

10(b) *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 object to the State's wholly unsubstantiated assertion during closing argument that Applicant had his step-son, a minor child, selling drugs for Applicant prior to the offenses for which he was arrested.* **[No change from January 2016 application]**.

11(b) During the State's closing argument at the penalty phase of Applicant's trial, Solicitor Myers argued that the jury should sentence Applicant to death, in part, because the Applicant had his 15 year old step-son selling drugs for him. B[redacted] A[redacted] was Applicant's step-son. His mother, Teresa Finklea, applicant's then-wife, was deployed to Afghanistan at the time of the offenses for which Applicant was convicted and sentenced to death. She was a soldier with the U.S. Army at that time. Despite there having been no evidence adduced to support the State's bald assertion, trial counsel failed to object to the highly prejudicial statement. Considering that trial counsel's theory and argument to the jury to vote for life for Applicant because this one tragic criminal action by the Applicant was an aberration of an otherwise very honorable life, there can be no credible strategy for having failed to object to the State's inflammatory statement to the contrary about Applicant employing his step-son as a drug dealer. Not only was the statement unsupported and inconsistent with trial counsel's strategy, the statement was presented to the jury while this country was at war and engaged in highly lethal combat in Iraq and Afghanistan, which is where the jury had been told young B[redacted]'s mother was stationed at the time of the alleged drug selling. Applicant was greatly prejudiced by trial counsel's failure to object and to correct the record. *See Washington v. Hofbauer*, 228 F.3d 689 (6th Cir. 2000); *Strickland v. Washington*, 466 U.S. 668 (1984). **[No change from January 2016 application]**.

10(c) *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 adequate, abundant, and available objective expert testimony concerning Applicant's adaptability to prison.* **[No change from January 2016 application]**.

11(c) During the penalty phase of Applicant's trial, counsel presented the jury with the testimony of James Aiken, a former corrections official and an oft used expert in assessing a defendant's potential successful adaptability to prison life, especially on the likelihood of whether a defendant will comply with security mandates and cause no undo harm to fellow inmates or correctional officers. Trial counsel's presentation of Mr. Aiken's assessment was a scant three pages in length and fell woefully short in substance and detail. Trial counsel also called Anna Cherry, M.D., a psychiatrist employed by the Lexington County jail, who treated Applicant after his attempted suicide by hanging. Dr. Cherry testified that Applicant was a good inmate who looked after other inmates in need. This amounted to a severely anemic and ineffective presentation without any underlying objective testing or future risk assessment analysis. 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). [**No change from January 2016 application**].

II. Analysis and Response to Allegations

Respondent submits the entire application is without merit.

The Case In Mitigation Presented At Trial

The record reveals that counsel Stephan Soltis and Lisa (Kimbrough) Anderson presented a case in mitigation on Finklea's behalf. Particularly, they called Erica Middleton, (ROA p. 2035-2039), Johnnie Lee Finklea (ROA p. 2039-2043), Curtis Blunt (ROA p. 2043-2047), Johnnie Finklea (ROA p. 2048-2051), Betty Finklea Peoples (ROA p. 2051-2061), Nicole Finklea Fantroy (ROA p. 2061-2074), Charlie Turner (ROA p. 2074- 2115), Dr. Tora Brawley (ROA p. 2116-2131), Vincent Smith (ROA p. 2131-2138), Cherena Roland (ROA p. 2138-2149), Dr. Anna Cherry (ROA p. 2149-2162), Dr. Richard Frierson (ROA p. 2162-2179) and James Aiken (ROA p. 2179-2195).

Erica Middleton, Applicant Finklea's his first cousin testified that she viewed him as an older brother and he was a leader in her dance group and church going. She stated that she did not know Finklea to be violent not use drugs. (ROA p. 2035-2039).

Johnnie Lee Finklea, the Applicant's uncle testified that Finklea was respectful and never violent around him. He stated he was surprised when he learned about this incident. (ROA p. 2039-2043).

Curtis Blunt, Finklea's brother, testified that Finklea was a loving, caring and never did anything wrong. He characterized Finklea as a good brother to anyone of any race who was always good. He stated that he had stayed in touch with him. Blunt stated he never knew his brother to be involved in drugs or ever hurt another person. He never knew of Finklea to ever be in trouble and was a good child. (ROA p. 2043-2047).

Johnnie Finklea testified she was the **Applicant's grandmother** and loves him. She stated that he was a handsome child who was there to help anyone who needed help. She stated that he was good child up to the time he went into the military. She stated that this crime was out of his character and she was surprised. (ROA p. 2048-2051).

Betty Finklea Peoples, the Applicant's mother testified and presented pictures of the Applicant growing up. She said he was close to his siblings. She testified that he was a good child and that she never had any problems with him from birth until this occurred. She stated that she brought him up in the church and that she loved him dearly. She stated that she could not understand how this happened because this is not the Ron she brought up. She stated that she never saw him on drugs or drink anything. She declared: "I just think he got in with the wrong crowd." She concluded:

> "I would ask y'all as a mother, would y'all , please, please, I'm begging spare my child's life. I would rather see him do life. I can go see him. I'm sorry about what happened and I feel for the other side of the family" ROA 2055, l. 18-22. [1]

[1]Solicitor Myers objected at that point. The trial court sustained the objection to the extent of the plea for a specific sentence, but stated she was allowed to express her feelings. See also ROA p. 2071-2073.

She concluded that she loved her son and that she was sorry what happened. She stated that she was asking that Ron's life be spared because if he was living she could go see him and if he's dead, she can't. (ROA p. 2051-2061).

Nicole Finklea Fantroy, Finklea's first cousin testified that he was like a brother to her also. He stated that Ron would come to help at her house with her mother's seizures. He did everything for her and stayed at their home. She stated that he was her mentor and had inspired her to be all she could be. She said Finklea was the first person in the family to get diploma. She stated that she had two children before she graduated from high school. He encouraged her to get her diploma and later she was able to get an associate of business administration degree because of Ron and Keith Fantroy. She said Ron was raised in the church and they did everything together. She stated that she cannot explain what took place , "but we know that Ron is not a monster, Ron is not a whore monger, Ron is not a drug dealer." ROA p. 2064, l. 22-25. She also stated that she had never seen Latisha Gilmore before. She stated she had only seen Ron with his wife, Cherena, his son O[redacted], his wife Teresa and the stepchildren. She declared that she had never seen drugs in Ron. She summarized again that Finklea was not a monstrous person and that she asked for forgiveness, but knew that it could not erase what took place. She described photographs with Ron as they grew up. (ROA p. 2061-2074).

Sgt. Major Charlie Turner, testified about Finklea's military background "because Ron, in the past, has always been there for him." ROA 2074. He presented military records concerning special training courses and recognition awards that Finklea had received from 1991. He testified that he met Finklea in 1991 and observed his work performance and found his duty performance matched his uniform, that he was well=spoken and he was about business. He stated that Ron was

seeking to be the best that he could be compared to the rest of the team. He stated that Ron would also talk about family all the time. "He was my best soldier that I had in 20 years of service." (2097-98). He stated that Finklea lifted his team up. He stated the incident was not Ron's character and that he was surprised because he was someone that he would want to be in combat with. He stated that he thought that Finklea had made a mistake and did not know why or how. He stated from Ron's character that he knew from the three years they spent together he was an "excellent soldier, father and husband."

On cross-examination, it was developed that Ron had received training in dealing with hazardous materials in emergency preparedness and medical training. He stated that he received a good conduct medal every three years. (2107). He separated from the military on April 24, 2002 from June 11, 1991. (ROA p. 2074- 2115)

#13

Dr. Tora Brawley, a forensic psychologist and neuropsychologist and expert in clinical psychology and clinical neuropsychology testified that she was asked to look at Finklea's brain functioning. She stated that she ran a battery of neuropsychological tests. She stated that she found some areas of brain deficit that were consistent with anoxic injury and inconsistent with faking deficits. (2119). On cross-examination, she stated that she tested Finklea on May 17, 2007 for three hours. She stated that she had not reviewed any other documents in the matter and looking only at his current functioning. She stated that she found deficits in motor skills but could not state whether the skills did not exist before she spoke with him [or before the crime]. (2124). She also found he had below average verbal memory for stories and verbal information that was told him. (2125). She also found that he had below average confrontation naming and ability to copy and recall a complex design, which she could not say existed prior to 2003. *She stated that she was*

aware that Dr. Gaines had determined that Finklea had zero impairment, but noted that she did not do impairment ratings. (2128). (ROA p. 2116-2131).

First Sgt. Vincent Smith testified that he had spent 27 years in the military. He stated he met Finklea in 1998 . Sgt. Smith stated that they had fun together and that Finklea would count cadence as they ran 6 miles. He described Finklea as smart with a lot of motivation and dedication. When they would run the quarterly urine tests, Finklea was always "cleans" of drugs. He said that he did not know how Finklea got into this situation because he had always taken care of his family spoke about things to do after work and was a model soldier. He stated that Finklea got kicked out of the Army because of asthma, but that Finklea was a leader. (2133-34). (ROA p. 2131-2138).

B #14.

Cherena Roland, Applicant's ex-wife, testified that she was married to Finklea from when she was 16 until she was 20. They began dating while he was in basis training in the Army. She stated that they had a son, J[redacted]. She stated that she found her husband to have been a very caring person and not one who would deliberately hurt anyone. (ROA 2140). Although he had a lot of insecurities, he would try to surround himself with good people. "He definitely did make an effort to try to build himself into a better character than what was presented to him when he was growing up. (2140).

Concerning Finklea's early life, she stated "he had a rough younger life. I think the stuff that happened to him when he was younger it caused him to have a lot of insecurities to devalue himself." (2141). She stated that he was looking for a productive environment and to be around people who would value and appreciate him. His relationship with their son was good despite that fact that they were young parents trying to discover their priorities. She said concerning child support that while he was in the military he was making good money, but the divorce was ugly in

trying to get support. However, she stated that he ended up owing her money but that she talked about voiding the whole thing. She stated that her son did not go without as a result. (2143). She also stated that he would always ask about their son. Id. She showed some pictures of their son. She stated that while married, he was never around any sort of drug activity and did not interact with people that did drugs. She stated that he did not drink. She stated that he loved his son very much and tried to be that best he could of what a good father should be. She stated that she knew that he was not getting paid very much when he got out of the military, but she did not know because he would not tell her what he was making. She stated that he was limited on what he saw as being a father or a family. "Not saying his family is bad or anything, but from what I've seen, he was missing a lot of things" - like a father and unconditional love. (ROA 2145). She stated that the act he did was horrific and she was sorry for their loss and it should not have happened. She stated that she knew he had to be responsible for his actions, but that she did not see this in him. She stated she knew he was remorseful and that's why he tried to commit suicide because he realized what he did and that he had to face the consequences. (ROA 2146). She stated that she still had custody of the son who was 13 years old and lives in Tacoma, Washington. (2147). (ROA p. 2138-2149).

Dr. Anna Cherry , the contract psychiatrist with the Lexington County Detention Center testified that she treated Finklea for major depressive episode and after he started having nightmares "I realized that he actually had post-traumatic stress disorder." (ROA 2149-50). She stated that for people with PTSD talking about traumas can be upsetting and he spoke very little about it. Finklea was not the type of inmate who declared he had a horrible childhood and woe is me. Dr. Cherry stated that he had required high doses of medications and he was actually doing

fairly well. She stated that little things can trigger PTSD symptoms and he started having panic attacks and difficulty with little things that may be considered normal like an abscess on his thumb. (2150). She stated he was more concerned about traveling in chains to get to the dermatologist than having the thumb taken care of. Further, when his asthma inhaler ran out, he started having PTSD symptoms, however, the medications have started to help out to control his depression. (ROA 2151).

Dr. Cherry's observations of him as a person was that she saw him as a kind gentle soul out of everyone she had treated. (2151). She stated she had more respect for him and she liked him more than anyone else she had treated. She stated that he was concerned for other people, has an instinct of telling who the good people are and who the bad people are with a good sense on the inner working of human beings. However, he is not a judgmental person. She found him to be a stabilizing influence in the jail and likely to de-escalate a situation rather than escalate it. She stated that they would put people in his cell knowing that he would take care of them and he would keep the environment peaceful. (2153). "I don't know why, I'm guessing that with all the trauma and the violence that he has experienced and given out and with the PTSD symptoms with the severity that they were , I think he needs peace in his environment to survive." (2153). She stated that anything that is negative - anger or hatred - triggers his PTSD and the other things inside him - and he does what he can to make it more peaceful. She stated that she could not speak as to how he was before, but that was consistent with what other people said about his past. She stated that he got along well with the correctional officers. She stated that he was not a discipline problem in the four years that he had been there. She stated he had always shown her the utmost respect. (2155). Dr. Cherry stated that in her job she had learned about people and their secrets. "Out of respect for

Ron and people he cares about , I'm going to choose not to discuss those things even though it may help him, but just keep in mind that everyday something happens –"I think but for the grace of God go I." (2155). She stated that she sees Finklea as fighting to not become the kind of person that he could become a person like you and me. Dr. Cherry then announced "God has saved your life once, he'll do it again." (2156).

On cross-examination, Dr. Cherry admitted that she was against the death penalty. (ROA 2158-59). She also stated that she was the first person to diagnose Finklea with post-traumatic stress disorder in 2004. She stated she had diagnosed it as depression and panic disorder. (ROA 2159)When asked whether he had disclosed events to support the PTSD, Dr. Cherry stated that when he started having nightmares they talked about whether he had traumatic events in his past , but she did not ask detailed questions because it was not her role. She stated it would have been "counter-therapeutic for me to delve into the details of abuse." (ROA 2160). She stated that they talked about it enough to understand that there was trauma in his past and that he responded to trauma like someone with PTSD has. *Id.* When asked if the PTSD could come from Finklea taking a gun and shooting Walter Sykes twice in the head and setting him on fire, she responded that it was a trigger for his symptoms getting worse, but that she did not believe it was the initial trauma. But she could not answer yes or no if she knew. (2161). She stated that she was testifying because she is an advocate for her patients - and that she had never advocated for or against capital punishment. (2161). (ROA p. 2149-2162)

Dr. Richard Frierson, an expert in forensic psychiatry testified that he evaluated Finklea pursuant to court order. (ROA 2164). He opined that Finklea was competent to stand trial and he was not mentally ill to the extent he would be unable to distinguish right from wrong or lack

ability to conform his conduct to the requirements of law. He had a diagnostic impression that Finklea clearly suffered from a major depressive disorder - single episode and appeared to be in full remission when he evaluated him .(ROA 2166). He described Finklea's medical conditions of asthma, knee injury, skin abscess and evidence of hypoxic brain injury due to his suicide attempt. He opined that there was no evidence that Finklea was making up his amnesia and the memory loss in 2003. (2167). (ROA p. 2162-2179)

James Aiken, a prison consultant and former employee of the South Carolina Department of Corrections, testified as an expert in the field of prison adaptability. (2187). He declared that he had reviewed the documentation about Finklea., including his military, medical, incarceration and records from his co-defendant. (2187-88). He stated that he did not see Finklea in his military records involved in systematic violence against people or insubordination to superiors or using lethal weapons against other people or disruptive activity. Instead he saw his patriotism. (ROA 2189) He did not find that Finklea was involved with any predator gangs or drug cartels or drug trafficking. Particularly, he did not see any criminal record. (ROA 2189). Since he has been incarcerated, he found Finklea to be well-adjusted , meaning not stabbing himself, no contraband weapons or organizing escape or sexual predator activity or prison disruption. He was concerned about a propensity to harm himself when in crisis. (ROA 2190). He found Finklea to be the lowest probability on being a threat to other inmates due to his history and his age of beyond 30 years old. (2191). Secondarily, he could be concerned about someone attacking him because he has no affiliation with gangs or security threat groups. Id. (ROA p. 2179-2195).

Defense counsel initially declared an intent to call **Dr. Donna Schwartz-Watts** as their final witness. ROA 2197. After a break, however, the defense chose not to call Dr. Watts "after

consultation with Dr. Watts. We believe all of the information we need has been presented." ROA 2198, l. 4-10.

Finklea waived his right to testify in the penalty phase . ROA 2198- 99. During the closing argument, **Finklea made a personal statement** to the jury:

> . . .I am not an animal. I am not a drug dealer. I am not a drug user, I never have been. You've heard testimony of my traveling to Alabama, trafficking in get drugs, but there's no proof to that, no proof to that.
>
> You've heard that I moved in with an in-law, when I first moved in, the first thing I started doing was selling crack to Mexicans, there's no proof to that, all right.
>
> You heard that I talked to Mr. Sykes seven to ten times at work. Well, how is that possible because of the time that I got off from work and the late hours --

#19.

MR. MYERS: I'll have to object to him testifying now, Your Honor.
THE COURT: All right. Counsel approach and Mr. Finklea.
(Whereupon, a bench conference was held off the record, in the presence of the jury, but out of the hearing of the jury.)

THE COURT: You may proceed.

DEFENDANT FINKLEA: You've heard about – you've heard testimony about my military career and about my patriotism to Lady America, all right. Growing up, to me, there was nothing more prestigious than serving this country. To be an ambassador as a soldier for this country was the most important thing to me in my life. For me to actually have something else outside of the immediate family that I was willing to give my life for and it's this, it's this.

I am not an animal. I'm not an animal, all right.

I've lost family members to violent crimes, does that mean that I know how this family feels? No, it doesn't. I've seen the video. It jogs no memories.

Does an animal have a heart? No, it doesn't. **I'm sorry for what happened. I'm very, very sorry for what happened, all right.** I never had a father, so I don't know what it's like to lose a father, **all right. I'm sorry. I'm very, very sorry, all right. I cannot stress and explain it enough how sorry I am.**

The State would have you believe that my amnesia and my brain damage is fake. It isn't. I wish I could remember so I could give this family closure as to what happened on that night to their loved one. I wish I could remember. I really do, but I can't. I can't. So what I'm asking from the family --

MR. MYERS: Objection, he's now talking to someone other than the jury.

THE COURT: You must address the jury, Mr. Finklea.

DEFENDANT FINKLEA: Yes, sir. Sorry, sir. I'm asking you please, please, consider the expert testimony, the testimony of character witnesses that came in on my behalf, Doctor Cherry, okay, family members, friends. I'm not that person. I do not know what happened that night. I wish I did so I could explain what happened that night, but I can't. But I am so sorry that it happened. I was raised to be responsible, respectable and respectful. I am not standing here trying to drop responsibility on anyone else, I'm not. I am not, all right. The only thing I'm asking you to do as a jury is to look at me, me, Ron, Ron, not just the individual that the State is trying to make me out to be, me, and spare my life, please. I have a 13-year-old son myself who I will not get to see grow up. Please, please, just spare my life, that's all I'm asking, that's all I'm asking, please, please. Thank you.

ROA 2262, l. 25- 2265, l. 25.

#20

After closing arguments and instructions, the jury deliberated from 1:12 PM until it entered its verdict at 8:26 PM. ROA 2286-87.

Facts of the Crime from the Supreme Court Opinion

In the opinion of the South Carolina Supreme Court, it set out the following facts:

On August 1, 2003, Angel Peters, a security guard at Selectron, was on duty when Finklea came to the plant around 2:00 AM.[FN1] He was wearing a jacket with a stripe across it. *382 Peters opened the doors and Finklea explained that he needed to use the ATM machine. She told him that it was not working, but let Finklea inside. After talking with Peters, Finklea left but then came back to the building. Finklea asked Peters questions about whether her company was hiring and at one point he followed her into the security room to get a phone number and flier. Finklea asked questions about security, such as how often Peters watches the cameras and who else was working security at night. When another security guard arrived, Finklea departed.

FN1. Peters identified Finklea in a photographic lineup and in court.

The following day, in the early morning hours of August 2, 2003, a man (Man # 1) wearing a jacket with a stripe across it came to the door of the Selectron plant. The State argued at trial and the evidence suggests that Finklea was Man # 1. Walter Sykes was the security guard on duty and, apparently thinking Man # 1 wanted to use the ATM, opened the door. The events that followed were captured on the plant's video system. As Man # 1 approached the ATM, Sykes entered the security office. Man # 1 then followed Sykes into the office and moments later emerged and opened the front door to allow a second man (Man # 2) to enter. Man

> # 2 carried a gasoline can, which he handed to Man # 1. Man # 1 entered the office again, then exited and approached the ATM and doused it with gasoline. Moments later, Sykes, bleeding from the neck and engulfed in flames, ran from the building. Sykes died on the front lawn from burns and gunshot wounds to the face and neck. From the video it is apparent that Man # 1 is both the person who shot Sykes and the person who set him on fire.
>
> Finklea was arrested and, days later, attempted to hang himself in his cell. Though he survived the attempt, Finklea suffered a brain injury resulting in amnesia and claims that he cannot recall the events that occurred the day of the murder. Physicians who examined Finklea found evidence of brain damage and determined that he was likely not feigning memory loss.

State v. Finklea, 388 S.C. 379, 381-382, 697 S.E.2d 543, 545 (2010).

III. ANALYSIS

GROUND ONE - PTSD, Childhood Trauma and Mental Health Presentation

The Applicant claims that defense counsel failed to adequately present evidence of Post-Traumatic Stress Disorder in their case in mitigation and other neurological and mental health impairments and failed to rebut the state's argument on these mental health issues. Respondent notes that at the conclusion of the mitigation, the defense team chose not to call forensic psychiatrist Dr. Donna Schwartz Watts (now Maddox) as a witness in mitigation "**after consultation with Dr. Watts. We believe all of the information we need has been presented.**" ROA 2198, l. 4-10. Respondent submits that this allegation is without merit.

In the recent June 22, 2017 Amendment, Applicant expanded on the ineffective assistance assertion noting it included: counsel's alleged failure "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 " June 22, 2017 Amended Application.

In his factual assertion in the June 2017 amended application, Applicant specifically claimed the following failings concerning his counsel's preparation in mitigation:

- "No other evidence was presented to address Applicant's traumatic childhood" other than his ex-wife's assertion the Finklea had a "rough younger life" and a psychiatrist diagnosing PTSD from past "trauma and violence.
- Failed to present evidence of PTSD resulting from military training and service
- Failed to investigate or present other neurological and mental health impairments, including a significant family history of members suffering seizures due to degenerative brain damage and brain anomalies,
- Failed to adequately to investigate Finklea's background, brain anomalies and damage, and mental health issues.
- Failed to interview scores of (unnamed or identified) friends and family members who would provide independent corroboration of the abuse and the brain anomalies and seizures.
- Failed to obtain the assistance of expert witnesses and/or failed to develop and provide the information to experts it did retain and utilize.

June 22, 2017 Application.

Respondents note above the evidence of mitigation that was presented to the jury.[2] A

2 The decision to call family members as witnesses is a strategic decision. *Walls v.*

review of the evidence surrounding competency to stand trial evaluation reveals some mental health information that the defense team had available for its consideration based upon their investigation.

WHAT OCCURRED IN THE COMPETENCY HEARING

On July 26, 2007 an initial competency hearing was held pursuant to defense counsel's motion. The defense presented Dr. Tora Brawley, a clinical psychologist, Dr. Kenneth Gaines, a neurologist, and Dr. Donna Schwartz-Watts, a forensic psychiatrist. ROA p. 182-289. At the outset, the defense asserted that based upon Finklea's memory deficits that he may be incompetent to stand trial.

Dr. Tora Brawley

Dr. Tora Brawley initially testified in her expertise as a clinical psychologist. She spoke of her assessment of Finklea and learning from him a self-report of memory problems after his suicide attempt in jail. ROA p. 189. She stated that he advised her that he had no memory of that and just recalled waking up several days later. She stated that he reports current memory problems, including recalling things that people tell him and concentration problems. He rated those problems as moderate and that he felt better after recent medication. Id. She opined after testing that Finklea does have a select area of deficits that are indicative of brain dysfunction, including a deficit in verbal memory and some deficits in visual spatial areas. ROA p. 190-191. She opined that he was not malingering nor giving less than best effort. ROA p. 191-193.

Bowersox, 151 F.3d 827, 834 (8th Cir. 1998). The failure to present witness testimony that could be detrimental to the defense is not unreasonable under *Strickland. See Johns v. Bowersox*, 203 F.3d 538, 546 (8th Cir. 2000); *see also Haley v. Armontrout*, 924 F.2d 735, 740 (8th Cir. 1991) (counsel did not render ineffective assistance by failing to use witness testimony that would not have benefitted petitioner and may have had significant detrimental effect).

On cross-examination, it was determined that Dr. Brawley had tested Finklea on May 17, 2007. More specifically, Finklea declared to Dr. Brawley that he had no recall of the days prior to his incarceration and last recalled taking his son to meet his grandparents and he felt like that was probably in mid-July. ROA p. 195-196. He stated that he next recalled waking up in his cell and had no idea why he was there. ROA p. 196. She concluded that Finklea has a memory deficit that suggests brain damage that is consistent with anoxia. ROA p. 198. Importantly though, dr. Brawley confirmed that she cannot give any opinion as to whether he is malingering on whether he does not remember what happened from mid-July. ROA p. 200, l. 1-15. Dr. Brawley also noted that he saw some motor deficits in her testing. ROA p. 228-229.

Dr. Kenneth Gaines - Neurologist

The **neurologist, Dr. Kenneth Gaines**, testified that he opined as a results of his testing, that Finklea had suffered an anoxic brain injury as a result of a self-inflicted hanging after his incarceration. ROA p. 206. The injury resulted, he stated, from a lack of oxygen during the attempt and described him as severely impaired neurologically after the incident. ROA p. 206-207. He described Finklea as being near brain death at the time of the hanging. However, Dr. Gaines determined that he tested the cognitive area and did find a recent memory deficit, but that he found "his level of cognitive function to be largely intact and consistent with his previous training." ROA p. 208, l. 9-19. He did find some additional physical movement disorders consistent with someone who had anoxic brain injury. Dr. Gaines opined that the memory impairments were permanent in nature and were not reversible. ROA p. 209, l. 5-10.

On cross-examination, Dr. Gaines conceded that he was not there to render an opinion on whether Finklea had the ability to understand the proceedings or confer with his lawyers. ROA p.,

210. He confirmed that he had spoken with the Appellant about his memory and was told that there was a period about one month prior to the hanging that he does not recall. However, Dr. Gaines conceded that he would have no way of substantiating whether his alleged memory loss around the events of the crime and the events of his suicide are true. ROA p. 217, 19-25.

> Q. Basically bottom line, Doctor, you're saying that his claim of a memory loss of the events surrounding the murder in this case and his hanging is consistent with the anoxic event he suffered because of a self-inflicted hanging; is that correct?
>
> A. That's correct.
>
> Q But bottom line, you can't say whether that memory loss exists or doesn't exist other than it's -- his claim is consistent with, but there's no way to verify whether that's true or not, is there?
>
> A. That's correct.

ROA p. 223, l. 13-24. Also, ROA p. 225, l. 11-p. 226, l. 2.

Dr. Donna Schwartz-Watts

Dr. Donna Schwartz-Watts noted that in her interview with Finklea that she was concerned about the existence of brain damage. ROA p. 236. She noted that after his hanging incident that a neurologist did not think that he would regain consciousness. ROA p. 237. She testified that she diagnosed him with a "cognitive disorder not otherwise specified" which suggests some brain damage but not dementia based upon the anoxia that caused long-term and short term memory impairments.

Dr. Watts also diagnosed him with "adjustment disorder." She based this on the severity of the legal stressors he was under now with family and health issues. ROA p. 238. She noted the medication that he was on to control factors including anxiety. ROA p. 238-240. She opined that the medications would improve his level of functioning.

Concerning the assistance prong for competency to stand trial, she opined that :

> . . it's my opinion with a reasonable degree of medical certainty, he clearly has a rational and factual understanding of these proceedings. Even given his brain damage, his
> current level of functioning -- and you have to keep in mind, when you have brain damage, not all of your brain cells die. So over -- the farther away he gets from his injury, some of his brain functioning is going to improve. His brain cells that were not killed can begin to function again. So over time he should be getting better. So certainly his present mental state is not inconsistent with somebody that's had brain damage, but right now he certainly has a rational and factual understanding of these proceedings.
>
> The concerns I have -- and, Your Honor, he has an ability, he has a present capacity to assist Ms. Kimbrough in his defense. He's self-protective to a degree that he's able to be. He clearly trusts his lawyers. He's very forthcoming. For example, today when I was examining his mental status report, I got the date wrong and he corrected me. I had the date wrong by a day and he was able to tell me it was the 26th today instead of the 27th, so he has a present capacity to pay attention. I think he has a present capacity to take notes.
>
> The concern I have is his reporting that he does not have memory from the time of the summer preceding a few months before this crime until after he was returned from the hospital.

ROA p. 241-242, l. 21. Dr. Watts opined that the memory loss was consistent with an anoxic episode. His last memory before the events were dropping off his son in mid-June. She felt the fact that the memory loss predates the actual crime gave it clinical weight to her. ROA p. 243. She admitted that no one can know if it was true because it would be based on Finklea's own reporting. ROA p. 243-244.

Dr. Watts noted that she had worked on amnesia cases before including the Duncan Proctor case. She noted that there were differences because Finklea has a co-defendant with a prior legal history. She opined to a reasonable degree of certainty in her field that "for whatever reason, he certainly has brain damage is a reason , that he is not giving you details about what happened before, during and after this crime and that it will limit" the defense. ROA p. 248, l. 7-12.

On cross-examination, Dr. Watts confirmed that Finklea has a rational and factual

understanding of the proceedings, that he can assist his counsel (although he cannot relate facts concerning the specific incident) and that he can assist counsel in jury selection. ROA 252-253. She noted that his current memory problems are not that severe. ROA p. 252-253. She confirmed that there was no way to tell if he was telling the truth about his memory loss. ROA p. 253-255. She stated that Finklea has many reasons to lie - shame, guilt, and his family. She noted that Proctor was similar except the there was no co-defendant in that case and the death penalty was not at issue.

As to the Dusky factor's Dr. Watts opined:

Q. And I think this will just be breaking down a little more some of the questions I asked you at the beginning. He does understand the proceedings against him today, he understands that he's facing the death sentence and he understands that he's charged with murder and another crime, doesn't he?

A. Yes.

Q. He understands what those charges are, what the elements are and what the punishment of those crimes are?

A. Yes.

Q. He understand who his attorneys are and what their job is?

A. Yes.

Q. He understands what the role of the Solicitors are in this case?

A. Yes.

Q. He understands what the Judge's job is?

A. Yes.

Q. He understands the process of the jury, how they're involved and how they work and what their duties are?

A. Yes, he does.

Q. He can consult with his attorneys about what's going on in court, he understands what they say and they understand what he says?

A. Yes.

Q. And as the court's going on today, he understands what we're doing today, doesn't he?

A. Yes. He's certainly not at an agreement. He's been paying attention to my testimony. I've watched him, he's paid attention to all the experts today.

ROA p. 258-259.

Dr. Watts on redirect responded that if the codefendant Theodore Davis or witness Robin Gripper testified, that Finklea's lack of memory of the incident would not assist them in asking probing question about the incident. ROA p. 260-61. Dr. Watts opined that she could not give an opinion on whether or not the defense, as opposed to the defendant, had the ability to reconstruct the knowledge of what happened because she had not seen all the sources of information. ROA p. 265.

After this hearing, the trial court deferred ruling until testing could be completed that was presented in the testimony.

August 10, 2007 Hearing

Finklea's testimony at the Competency Hearing

On August 10, 2007, a follow-up competency hearing was held. During that proceeding, Finklea testified. ROA 312- 341. He testified that he understood the charges against him and that the date of the crime was in August 2003. He stated that his last memory prior to the crime was when he took his stepson to his grandparents. ROA 313. He stated that his next memory was waking up in jail. ROA p. 314.

On cross-examination, Finklea stated that he did not recall taking Robin Gripper up to Michigan or renting a car. He stated that he did not recall coming to court after his release from the hospital. He confirmed that he was able to assist his counsel, other than the memory issue, and was aware what the judge and jury's role was. ROA 318. He described the fact that Davis is his brother in law and he last recalled seeing him in May and met Fuller in the middle of June. ROA 319. He recalled telling people in August that he had no memory why he was in custody. ROA 320-322.

Upon the court's inquiry, Finklea recounted his family history. This included how long he had lived in S.C. (October 2002), his movements from Alabama and Michigan, his wife and children and his reasoning for choosing to live in St. Matthews. ROA 323-324. His employment history, his educational background, and the particular medications he was on. ROA 324-326. He described his reasoning for leaving employment in May from Selectron to get back into physical condition to re-join the military. ROA 329, 332.

On redirect, Finklea denied remembering Walter Sykes or any security guards. ROA 334. He recalled using the ATM previously. However, he denied recalling having a nine millimeter gun or cartridge. ROA 335. He testified about other matters related to clothing he possessed. ROA 335-337.

Other Evidence

Deputy Duane Peake testified that he met with the Appellant on August 7, 2003 in Monroeville, Alabama along with Deputy George Brothers. After giving Miranda warnings, he discussed the murder with the Appellant who initially denied any knowledge. ROA 345, l. 9-19. When he was told that his codefendant, Theodore Davis had given a statement that he was there, he stated "I wasn't there." After a video was played , Finklea was asked who right there and they said

to him that it was him. At that point, Deputy Peake stated that Finklea responded: "well if that's me, I'm fu–ked " and fell to the floor crying. Once they got him up, he stated: "well if that's me, I don't remember it." ROA 346, l. 10-20, ROA 355. This interview was before any suicide attempt by the Appellant. ROA 346-347.

Competency Ruling

At the conclusion of the hearing on August 17, 2007, Judge Newman, relying upon the Wilson case's factors, ordered the state to open its file to the defense and provide any defense or any assistance in restructuring the fats and events that date. ROA 395-396. Also ROA 401-402. Solicitor Myers asserted that they had given about all of their file, but concluded that they will worked with them on it. He stated that they had already gone further in providing material in the case than they were required to do. ROA 396.

M #30

August 24, 2007 Hearing

On August 24, 2007, the competency hearing continued. **Dr. Richard Frierson**, the court appointed neutral expert and a forensic psychiatrist testified about his assessment. ROA 412-447. He stated that he did his evaluation of Finklea on February 28, 2007 and March 12, 2007. R. Tr. 415. He stated that he was assisted by **Dr. Marla Domino** and a neurologist. ROA 416. Dr. Frierson stated that in his opinion, he understands the charges against him and the possible punishment, he can explain what the charges are, he is aware of the duties of the defense counsel, the judge and the prosecutor, and the jury. ROA 418. Further, he opined that Finklea understood the difference between guilty and not guilty, the serious nature of the charge and to control his behavior in court. ROA p. 418. Dr. Frierson stated that Finklea was able to converse with his counsel what he remembers and trusts his counsel. ROA 419.

Dr. Frierson stated that Finklea does suffer from a major depressive disorder . He stated that this has been treated and he has shown a favorable response to it. ROA 419. He states that this has no impact on his present competency. Id.

Concerning the alleged amnesia and anoxic brain injury, Dr. Frierson stated that he had reviewed the Lexington medical records and had him examined by their **neurologist, Dr. Miroslav Cuturic** as well. Dr. Frierson opined that the amnesia for the events of the offense is not a per se bar to competency. He stated that in his teaching curriculum, he teaches about the case, Wilson v. U.S. who suffered from amnesia due to a head injury. He stated that in Wilson, it was held that the amnesia was not a bar to competency per se as long as there is abundant evidence in the case to negate all claims of innocence and that Wilson required a separate hearing after to determine whether there was significant prejudice to the case. ROA 421. He noted that the second stage was a legal determination. However, he stated from a psychiatric standpoint, amnesia is not sufficient by itself to render a person incompetent to stand trial. ROA 421-422.

Dr. Frierson stated that there was evidence of amnesia, but it is not a bar to competence. ROA 422. He found evidence of anoxic injury by the twitching of face muscles (hypoxic myoclonus) and some claimed incontinence. ROA 423-424. He also read report of additional spinal damage from the hanging. ROA 425.

Dr. Frierson confirmed that there is no way to determine if Finklea is malingering concerning his loss of memory for that length of time. ROA 436. However, he stated it did not matter to him whether the amnesia was real or malingered because his opinion on competency would be the same. ROA 437. However, he asserted that he had no reason to suspect that he was malingering since the injury to the brain is documented and the symptoms are not uncommon.

ROA 437. Like the other experts, Dr. Frierson stated that Appellant reported his memory after the incident as being at the Lexington County detention center. ROA 437. He reported to Frierson that it went back to mid-July. He reported other matters to him , but he stated he did not recall being in Alabama before his arrest.

Dr. Frierson declined to opine whether amnesia significantly impaired the fairness of a trial. ROA 441-442.

Argument at trial

The defense argued that they had the burden of proof. Counsel Kimbrough asserted that the findings of all the experts were consistent. ROA 447. She relied upon Wilson and sought to address the Wilson factors to suggest that he was not competent. ROA 449-456.

The state asserted that Finklea was competent to stand trial. He noted the additional disclosure that he was done pursuant to the Court's directive. He pointed out that the video showed one person entering the security guard's office who has been identified as the defendant. He notes that the victim is seen coming out and then falling to his death. ROA 458. Solicitor Myers stated that they had provided a witness list for the guilt phase, re-created the three to four weeks of alleged amnesia. He pointed out the evidence of womanizing and drugs happened before the amnesia period. He stated that the work product notes and list of potential witnesses was provided. ROA 459. See also ROA 476-477.

Judge Newman opined that Finklea was competent to stand trial. Particularly, he opined that the test was whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him. ROA 462-463. He stated that the defense is

actually seeking the trial court to extend and make a constitutional ruling that bars execution of a person who does not remember what he did , which the court refused to do. ROA p. 463, l. 4-18. The trial court concluded:

> As to the issue before me, I find that the defendant is competent to stand trial. I do not find that the defense in this case is at such a disadvantage that the defendant's right to a fair trial would be deprived given the measures that the Court took pursuant to the *Wilson* case and also pursuant to the *Stubblefield* case to help ensure that the defendant receives a fair trial.
>
> I believe that given the test in our state regarding competency to stand trial from the Proctor case, the *State versus Reed* -- in the *State versus Reed*, the Court indicates that the test is not whether he's actually cooperating with his lawyer, but whether he has the mental capacity to do so. I find that he has the mental capacity to cooperate with counsel. I find that his ability to assist counsel coupled with the discovery disclosures by the State meets the constitutional test.
>
> And I find that the -- **without the Court attempting to determine whether or not he is, in fact, suffering from amnesia to the extent that he says that he is**, since according to the witnesses, there is no test that can or has been given to make a complete assessment of that issue, maybe he is amnesic or maybe he's not, I don't know, but giving him the benefit of the doubt based on the testimony and based on the Court's ruling assuming that he is, I nevertheless find that he is competent to stand trial. I, therefore, find that the defense has failed to meets its burden of proof by a preponderance of the evidence.

ROA 463-465. The trial court noted that the competency evaluation had been ordered over the defense's objection.

Defense counsel Kimbrough, however, denied that they were asking the trial court to make a constitutional ruling. ROA 466.

The trial began on August 29, 2007 after jury selection. At the outset, the Appellant was placed under oath by his counsel concerning a general concessions of guilt to be made by his counsel at the trial, although still challenging whether he was the shooter and the arson charge. ROA 1112-1119. At the conclusion of the guilt phase, the Appellant was convicted of the charges.

During the penalty phase, the defense called Dr. Tora Brawley, the defense psychologist and Dr. Richard Frierson, the court's expert concerning the mental status and alleged amnesia. ROA 2116-2130, p. 2162-2177. As noted above, defense counsel did not call Dr. Donna Schwartz Watts or the neurologist Dr. Kenneth Gaines. As defense counsel advised the trial court at that time: **"after consultation with Dr. Watts. We believe all of the information we need has been presented." ROA 2198, l. 4-10.**

After the death sentence verdict, Judge Newman, adopting the procedures in *Wilson v. U.S.*, supra., entered and order concluding that a new trial was not necessary and concluding under the Wilson factors that Finklea was competent and the alleged amnesia did not undermine the trial's fairness. The extraordinary order speaks volumes about the fairness:

> THE COURT:
> . . . the case of State versus Finklea, will go down in the annals of human history as a very sad and tragic case. By all accounts, you have a fellow, Mr. Davis -- Mr. Finklea that is, not Mr. Davis, Mr. Finklea, who grew up in Alabama on hard times, seemed to work his way from there out to west -- the north west, ended up in, I guess, in the Seattle, Washington area, got married, had a child and family out there.
>
> And then, at some point, is in the service, did an excellent job in the service, became a leader of men in the service and won the friendship and confidences of a lot of excellent officers in the service and appeared that he was an excellent officer as well.
>
> Then left the service, ended up here in South Carolina. Apparently, in a distraught, dejected, depressed state or some sad state because of whatever he -- whatever joys and successes that he had experienced in the military, he no longer experienced here in Columbia and ended up working these temporary service jobs, including the job at Selectron. It appeared that he missed the military, wanted to get back in the military, could not get back into the military and resorted to criminal activity. And based on the testimony of the case, the criminal activity included dealing drugs.
>
> And it appears he spent his wife's money while she was in Iraq and decided that he needed to try to get some money and thought he could get money at Selectron and was willing to do any and everything to get that money, including robbery and killing, which he did.
>
> Then left South Carolina, went back to Alabama after participating in the

killing of Mr. Sykes and burning his body. And then was arrested in Alabama, brought back to South Carolina where he tried to kill himself and was almost successful in killing himself and suffered serious, permanent injuries, including what has been testified to be amnesia concerning for the period of time of about a month or -- a few weeks before the killing of Mr. Sykes to a few weeks after. But the window of opportunity of this amnesia was -- it wasn't that long. So, in many ways, his case is not unlike a lot of cases of people who come to court and cannot account for the actual criminal offense that they're accused of doing either because they were high on drugs, passed out, blocked it out of their minds, refused to allow themselves to remember, blotted it out for whatever reason. And in most instances, it's not as significant a situation as that of Mr. Finklea.

But courts are often confronted with situations where the defendant is represented by counsel and the defendant is telling his lawyers, I don't remember, I don't know what y'all are talking about, I don't remember any of that. So the court has to figure out ways to address that concern by ensuring that the defendant, despite not being able to remember or recall events, that the defendant nevertheless is afforded a fair trial.

And, in this case, taking everything in the light most favorable to Mr. Finklea as far as whether or not he had amnesia, the Court fashioned a remedy on the assumption and presumption that he did have amnesia. And that remedy was to have the State turn over all of its evidence, that it intended to open its files to give discovery to the defense to help the defense reconstruct any defense and to make certain that the evidence in the case negated all reasonable hypotheses of innocence.

The State did that. We conducted the trial. The defense moved for a continuance. The Court denied the motion for a continuance, but instructed the defense that should the State call any witness that you have not had an opportunity to interview that you want to talk to, that you think that you're being surprised by the testimony, the Court will recess the trial, if necessary, give you an opportunity to talk with those witnesses to be sure that the defendant, Mr. Finklea, is being adequately represented.

There were no requests during the trial for any recess, stopping early for the Court to give the defense an opportunity to talk to any witness. In fact, all of the witnesses who were called, I believe, other than law enforcement officers, were people who were known by Mr. Finklea or by the defense.

They included co-workers, people who worked at Selectron, either worked with Mr. Finklea. The one guy who says that Finklea threatened someone on the job, he was a co-worker of Mr. Finklea, something that Finklea would have had no problem of recalling because this was far in advance of this alleged amnesia.

The other co-workers who testified involved the security people at Selectron. These were people who the defense certainly, through all of thousands of dollars that the State invested in helping the defendant, ensuring the defendant would have an adequate defense, including investigators and medical witnesses, the defense certainly had an opportunity to investigate and learn all they might want to

be -- should have learned about the Selectron security officers, one of whom Mr. Finklea killed. And those folks included people who were there as fellow workers around the time that Mr. Sykes was killed or the supervisors.

The other witnesses who testified were people well known to Mr. Finklea well in advance of this period of alleged amnesia included his sister-in-laws and close family people or people he either lived with, traveled with or knew well. And they testified concerning events well in advance for the most part of the -- of this period of alleged amnesia, except perhaps the lady who said that she went with him to Michigan, I believe it was, to pick up this gun, but that witness also testified to other events involving Mr. Finklea and what he was doing at around the time.

And that Mr. Finklea's period of amnesia is what he said it was and the doctors said it was, then evidence concerning those other witnesses were witnesses that he certainly could have shared with his counsel.

Mr. Finklea had an opportunity to address the jury during the course of the trial and made his plea to the jury in a clear fashion.

I don't know what more the defense could have been able to do had Mr. Finklea told you everything that he did during that period of time that he says he cannot remember. For the most part, his steps were retraced by his own folks and by the State and by law enforcement.

It's clear that he went to the airport and rented a car. It's clear that he went by Selectron the night before the murder and talked with the people there and asked them questions that he already knew the answers to or questions that involve -- that helped him in planning this murder.

He was caught on tape that night wearing a jacket which was the same jacket he wore when he worked there and took his job picture, his photo I.D., they had him in the computer system, they
easily identified him. He dropped that I.D. the night of the murder.

And what was represented initially to be these blurry photographs ended up being quite clear to me, particularly the photographs that were presented during the penalty phase. The photographs -- the video that was taken not by the ATM machine, but by the overhead Selectron security system and the witnesses who identified Mr. Finklea as being the person in the video, I think the evidence was overwhelming that that was, in fact, Mr. Finklea in the video and that was, in fact, Mr. Finklea who shot Mr. Sykes twice, that is Mr. Finklea who set him on fire and that is Mr. Finklea who could have assisted him and had some opportunity to come to his senses, but never did. He left him to die after
shooting him and setting him on fire.

Now, the fact that he had no prior record and the fact that in some other venues, he may have gotten a life sentence, didn't work for him here in Lexington County where he got a death sentence.

I believe that he had a fair trial from the Court's perspective of what the Court could do. Whether or not he had the best advocacy on his own behalf, that's a PCR question for someone else to determine whether his lawyers were effective in

representing him.

But from the Court's perspective in providing money for his defense, making sure that he got a fair trial, and I can't think of anything else the Court could have done to make the playing field anymore level for Mr. Finklea considering the hand that he dealt himself when he tried to kill himself.

There were witnesses that the State paid for the defense or investigators, including the forensic -- Doctor Donna Schwartz-Watts, forensic psychiatrist, other psychiatric people, medical people, neurological people and criminal investigator, none of those folks testified during the trial for him, though some of them were present in the courtroom during portions of the trial.

So I think that the model set forth for dealing with the -- with situations similar to this through this Wilson case was a good guide by the Court to follow in trying to assure a fair trial. And having taken this opportunity to review the trial to determine whether or not the amnesia affected his ability to have a fair trial, I **find that he had a fair trial based on the Court's pretrial orders and also based on the apparent lack of prejudice to him and based on the overwhelming evidence of his guilt.**

It's -- this case of Mr. Finklea's guilt and Mr. Finklea being the trigger man who killed Mr. Sykes was one of the strongest cases I've ever seen, the evidence was overwhelming. I don't believe -- well, I'll be amazed if anyone in the courtroom had any doubt that the jury would find him guilty based on the overwhelming evidence presented that showed his guilt, **not only his guilt of being involved in the crime, but his guilt in being the trigger man.**

Of course, he offered a defense to say that the co-defendant was wearing his clothes and hid murder -- hid those clothes behind his mother's house in Alabama and none of that appeared to have any credibility.

It was fairly clear based on the evidence presented that based on the video, the clothing, the DNA evidence, other forensic evidence and all the evidence taken as a whole, that Mr. Finklea killed Mr. Sykes and that there are very aggravating circumstances that would cause the jury to impose the death penalty despite the fact that he did not have prior criminal convictions.

Of course, the jury was given an instruction concerning mitigating circumstances to include the circumstances of his health and just the overall situation that he found himself in at that time of trial.

So based on all of that, I deny the motion for a new trial. I reaffirm the Court's prior rulings. **And I find that having conducted this hearing post-trial, I find that the amnesia that he claimed did not affect his ability to get a fair trial in this case and I find that he did, in fact, have a fair trial**. And that's the order of the Court.

ROA p. 2320, l. 19 - p. 2329, l. 22.

ANALYSIS

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The United States Supreme Court has established a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052; *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). Under the second prong, the PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); *Vasquez v. State*, 388 S.C. 447, 456, 698 S.E.2d 561, 565 (2010). Under Strickland and its progeny, Finklea must demonstrate that, but for counsel's failures to investigate and present evidence of his post-traumatic stress disorder , there is a "reasonable probability" that a jury would not have sentenced him to death. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." "To assess that probability, we consider the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding-and reweigh it against the evidence in aggravation." *Porter v. McCollum*, --- U.S. ----, 130 S.Ct. 447, 453-54, ---L.Ed.2d ---- (2009) (per curiam) (internal quotation marks and brackets omitted).

Under the constitutional standard we employ when reviewing ineffective assistance of counsel claims, we must first determine whether counsel's performance "fell below an objective standard of reasonableness" and so was constitutionally deficient. *Strickland v. Washington*, 466

U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel has an obligation to perform a thorough investigation of the defendant's background or make a reasonable decision that such investigation is unnecessary. See *Wiggins v. Smith*, 539 U.S. 510, 522-23, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). [3] This obligation exists even if the defendant is reluctant to cooperate or disclose mitigating evidence. See *Harries v. Bell*, 417 F.3d 631, 638 (6th Cir.2005). See *Williams v. Taylor*, 529 U.S. 362, 395, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (holding that counsel were ineffective because they "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records"); *Strickland*, 466 U.S. at 689-91, 104 S.Ct. 2052 (stating that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary" and that "strategic choices made after less than complete investigation are reasonable" only "to the extent that reasonable professional judgments support the limitations on investigation"); *Johnson v. Bagley*, 544 F.3d 592, 600 (6th Cir. 2008) (finding deficient performance where counsel failed to read files obtained from a state agency that would have revealed a different mitigation strategy); *Jells v. Mitchell*, 538 F.3d 478, 478 (6th Cir.2008) (finding deficient performance where counsel failed to investigate and locate files revealing the petitioner's unstable and abusive home

[3]See, e.g., *Rompilla v. Beard*, 545 U.S. 374, 392, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) (post-conviction experts found petitioner " 'suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions' "); *Wiggins*, 539 U.S. at 518, 123 S.Ct. 2527 (" '[D]etailed social service records [ ] recorded ... [petitioner's] borderline retardation.' "); *Williams v. Taylor*, 529 U.S. 362, 370, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (post-conviction testimony showed petitioner "was 'borderline mentally retarded,' had suffered repeated head injuries, and might have mental impairments organic in origin").

environment or to present such files to the examining psychologist).

In *Rompilla*, the additional mitigation evidence showed that the petitioner was beaten by his father with his hands, fists, leather straps, belts and sticks, was subjected to yelling and verbal abuse, was locked by his father "in a small wire mesh dog pen that was filthy and excrement filled"; was isolated as a child without contact with other children; and suffered from organic brain damage that significantly impaired several of his cognitive functions. 545 U.S. at 391-92, 125 S.Ct. 2456. The aggravating evidence was a murder committed during another felony and by torture, and a prior conviction for rape, burglary, and theft. In *Wiggins*, the petitioner experienced severe privation and abuse in his first six years of life, and physical torment, sexual molestation, and repeated rape thereafter in foster care. The aggravating evidence consisted solely of his crime, drowning a 77-year old woman in a bathtub and ransacking her apartment. In *Williams*, new evidence showed the petitioner had been severely and repeatedly beaten by his father, had been committed to the custody of the social services bureau, had no schooling beyond sixth grade, and was borderline mentally retarded. The aggravating evidence included a previous conviction for armed robbery, burglary, and grand larceny before the murder for which he received the death penalty, and after it two auto thefts and violent assaults on elderly victims as well as an arson in jail. [4]

[4]Cf. *Porter*, 130 S.Ct. at 448-51 (counsel failed to present evidence the petitioner was his violent father's favorite target, had once been shot at by his father who beat him when the shot missed, had heroic military service, and suffered from brain damage that could manifest in violent, impulsive behavior; he had been convicted of another violent felony committed during a burglary and the same course of events that resulted in the murder for which he received the death penalty); *Pinholster v. Ayers*, 590 F.3d 651, 674-79 (9th Cir.2009) (en banc) (the jury did not hear that petitioner suffered vicious and repeated physical abuse from his step-father and grandmother; had suffered organic, pre-frontal lobe brain damage; and was placed in a home for emotionally disturbed boys then in a state mental hospital).

The Applicant has still not alleged with any specificity any evidence that was not presented other than a series of conclusory statements. The only information is that Dr. Cherry declined to present her basis for the impression of PTSD when questioned in more detail. In addition neither Dr. Watts or Dr. Gaines were called to testify, although they testified in the competency hearing. However, defense counsel declared at the conclusion of the sentencing phase: "after consultation with Dr. Watts. We believe all of the information we need has been presented." ROA 2198, l. 4-10.

Respondent submits that the Petitioner's fact private investigator was David MacDougall. The defense also retained Carolyn Graham as a fact investigator for mitigation purposes. The record presently is limited to what was presented at the proceedings and what was not. At the time of the sentencing hearing, the Applicant had evidence from Dr. Cherry that she had an opinion that Finklea suffered from Post-Traumatic Stress Disorder and testified about it. ROA 2149-50. 2160-61. Dr. Cherry indicated when Finklea's asthma inhaler gave out , he started having PTSD symptoms. ROA 2151. Dr. Frierson opined to the jury that Finklea suffered from a "major depressive disorder – single episode and amnesia resulting from a hypoxic brain injury. ROA 2166. Dr. Schwartz-Watts had earlier opined in camera that he suffered from an adjustment disorder and a "cognitive disorder not otherwise specified." ROA 237-239. Dr. Gaines, the defense neurologist, testified about the anoxic brain injury and its effect on Finklea's present memory impairment. ROA 206-209.

The defense counsel were also aware that Finklea had military experience prior to the crime and presented it in mitigation. Evidence was presented to the jury by his grandmother Johnnie Finklea that he was a good child until he went into the military. ROA 2048-51. Sgt. Major Turner presented to the jury military training and recognition rewards that Finklea received and

had declared him to be "the best soldier that I had in 20 years of service" and that Finklea was someone he would want to be in combat with. ROA 2097-2107. Evidence was presented that Finklea had served from 1991- and separated from the service on April 24, 2002. In particular, it was developed that he had trained in dealing with hazardous material in emergency situations and medical training. ROA 2107. First Sgt. Smith testified to the sentencing jury that Finklea had been kicked out of the military due to asthma, but was a model soldier. ROA 2133-34.

The record does not presently reflect whether the defense team and mitigation investigator Carolyn Graham investigated whether the diagnosis of PTSD arose from Finklea's military experience. Interestingly, in contrast to that suggestion was evidence that Finklea was an excellent soldier by those involved with him in the military and that they would want to be in combat with him. This is inconsistent with one who suffers from PTSD. Further, it is clear that the defense team investigated Finklea's military record by their presentation. What is strikingly absent from this record is whether he was ever treated in the military for PTSD or subsequently prior to the incident.

The record also does not reflect the friends and family who the mitigations and fact investigators interviewed about family and childhood abuse, the information they provided to the defense team and whether information and evidence was not presented. As stated above, the evidence reflects that family member and friends Erica Middleton, (ROA p. 2035-2039), Johnnie Lee Finklea (ROA p. 2039-2043), Curtis Blunt (ROA p. 2043-2047), Johnnie Finklea (ROA p. 2048-2051), Betty Finklea Peoples (ROA p. 2051-2061), Nicole Finklea Fantroy (ROA p. 2061-2074), Vincent Smith (ROA p. 2131-2138), Cherena Roland (ROA p. 2138-2149) testified at trial. The Applicant has not indicated what other friends and family members should

have been called.

Further, the records indicate that the Applicant retained a forensic psychiatrist – Dr. Schwartz, a forensic psychologist – Dr. Brawley, a neurologist – Dr. Gaines, and a mitigation investigator. The Applicant does not indicate what other particular expert witnesses or type of expert witness he now indicates should have been retained by reasonably effective counsel prior to the trial. However, Respondent acknowledges the Applicant's current counsel, prior to the time of this filing indicated as potential witnesses, in addition to Dr. Maddox (former Dr. Schwartz-Watts), Dr. Susan Knight, a forensic psychologist and forensic social worker Jan Vogelsang. (Email of July 20, 2017).

In the December 22, 2010 Return and motion, the Respondent , pursuant to SCRCP, Rule 12(e), moved the Court for a more definite statement in a timely manner or to strike the allegation because it is too vague and ambiguous. Return, p. 20. The Respondents asserted it cannot be expected to reasonably respond to the broad claim without a precise statement as to what **evidence of childhood trauma** the Applicant now claims existed at the time of trial that should have been used. In the January 15, 2016 and June 2017 amended application, the Applicant has set forth no additional facts to address the conclusory statement and in fact merely repeats it.

#43.

Similarly in the amended application in 10(a) , the Applicant adds the phrase **"and other neurological and mental health impairments"** yet fails to set forth with any specificity – after five years of investigation what "**other neurological or other impairments**" he is suggesting that he suffers from that was not presented at the trial or was known or should have been known by trial counsel Soltis and Armstrong. Instead, the Applicant has amended the Application in June 2017 to include the phrase: "other neurological and mental health impairments, including a

significant family history of members suffering seizures due to degenerative brain damage and brain anomalies," However, he does not indicate the particular family members this evidence applies, the nature of the diagnosis of the seizures and brain anomalies, or whether this information was either known or available to the defense team and mitigation investigator or the defense team's expert witnesses prior to the trial.

Should the Applicant satisfy the needed specificity, the allegation of ineffective assistance of counsel would probably then raise questions of fact that cannot be conclusively refuted by the record. The Respondent requests a hearing to fully resolve this issue and demand adequate specificity of the individual claims. *See* Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

GROUND TWO - Closing Argument Objection Issue

#44.

In his second ground for relief, he complains that defense counsel should have objected to Solicitor Myers argument. He claims that during the State's closing argument at penalty phase, Solicitor Myers argued that the jury should sentence Applicant to death, in part, because the applicant had his 15-year-old stepson selling drugs for him. B[redacted] A[redacted] was Applicant's stepson. His mother, Teresa Finklea, Applicant's then wife, was deployed to Afghanistan at the time of the offenses for which Applicant was convicted and sentenced to death. Respondent submit that the Applicant cannot proved either deficient performance or prejudice under *Strickland v. Washington.* There is an evidentiary basis in the record for the comments.

The Argument

During the argument, Solicitor Myers made the following comments:

> Now, let's talk a little bit about evidence for the defendant, let's go over some things for him. He. put up some family members, he put up some friends . They said, oh, he was respectful when he was young. He was a caring person when

he was young. He dressed well. He was nice to his relatives. They enjoyed seeing him, said that he was a good father to .the son, J[redacted], in Washington state even though when he got out of the Army, he was already $21,000 behind in child support. When he got out in April, he gets a letter in September, he's already $21,800 behind.

His ex-wife said it was an ugly divorce. She wanted him to grow up, wanted him to act better, become a man . .

Well, what about that girlfriend and son in Texas, a good father to him?

MS. KIMBROUGH : Objection, Your Honor.

THE COURT: Objection sustained.

MR. MYERS: **What about .Teresa, his other ex-wife, and her son, B[redacted], who lived with him, good father to him? Had him selling drugs. Good father to him? That's for you to decide.**

And then they had two military men that came in, wonderful soldier, outstanding leader, led people, taught him how to fight, combat, how to kill, if necessary, for your country. He talked other people into taking classes. He picked good crowds. He was the leader. He picked the good people to hang around. They also taught him first aid to render to a – not only to a fellow human being, to a fellow soldier, taught him that.

But you know what, when I hear all of these people testify, and I made some notes down here, they talk about, well, you know, that's not the Ron I knew, that's not the Ron I remember, that's not the Ron Finklea that I'm associated with. I just can't believe it, can't understand it.

#45

APP 2220-2221

The Solicitor also argued:

> **He's manipulated Teresa, his new ex-wife, taking her money living high while she's defending our, country in Iraq.** He's manipulated her.
>
> He manipulated Latisha going with him to Alabama coming back and selling drugs. He manipulated Sherry Bolin and Irena Fuller when he was living with them and selling his drugs to the Mexicans. **He manipulated Brandon, his stepson, into selling drugs for him and then he wants to put a bullet in his head. . . .**

ROA 2234, l. 3-13.

The Record Evidence Supporting the Argument

In the state's case, they called B[redacted] A[redacted] as a witness. He testified that his stepfather Ron Finklea gave him an sealed envelope when he dropped him off at Aunt Nadine's

in Sandy Run which he carried with him to Michigan in June or late summer. A[redacted] stated that Finklea told him that if something happened to him, he was supposed to give it to his mother Teresa. ROA 1693 Robert Fuller from Michigan, B[redacted] A[redacted] grandfather testified that his daughter Teresa was in Iraq at the time of the trial. ROA 1696. Through Robert Fuller, in the guilt phase, the state introduced State Exhibit 89, the unredacted letter Finklea gave his stepson was introduced in the penalty phase In Exhibit 89, it stated :"Tell my son I love him and B[redacted] already knows what was what, I kinda let him in on it, I didn't tell him that's Y he had the letter. . . .B[redacted] **son, please change, U_R headed down a dead end street, U-R just like Tommy, and I know if I came across U. I would put a bullet in your head,** having said that Pooh, please listen 2 your mother. . . ." State Exhibit 89, 91, ROA 1914, l. 17- 1916, l. 3. See specifically ROA 1915, l. 25- p. 1916, l. 3 (publishing "B[redacted] son, please change, U_R headed down a dead end street, U-R just like Tommy, and I know if I came across U. I would put a bullet in your head").

#49

During the penalty phase, the State also called Sherry Bolin to testify.[5] Bolin testified

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5 Sherry Bolin testified initially in camera. ROA 1847-1861. Counsel for Applicant made an objection to her testimony asserting that they were advised that the proffered evidence would suggest that Finklea was involved in drug dealing and particular crack. ROA 1848. Counsel Kimbrough argued that since the Applicant was never charged with the crimes and dates were unknown, that the evidence would violate the Eighth Amendment and *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). The State urged that the evidence would reveal that Bolin would testify that the first day Applicant and his wife moved in with them that they busted him for selling drugs out of their house. ROA 1849. The State asserted that two weeks later, they had another indication that Applicant was still selling drugs out of his house and threatened to kick him out of the house along with his wife and stepson. ROA 1849. The State asserted the evidence was admissible as bad character evidence of the Applicant under *State v. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003) (during the sentencing phase, the trial judge may permit the introduction of additional evidence of aggravation in order to aid the jury in determining whether to recommend a death sentence). Counsel Kimbrough urged that Finklea's drug dealing had nothing to do with the August 3, 2003 incident. ROA 1850. In camera, Bolin

that Finklea, his wife Teresa and her son B[redacted] A[redacted] lived with them three to four months just after they had gotten out of the army. Bolin stated that the first day they moved in Bolin's home, Applicant started selling crack cocaine to the Mexicans in the neighborhood. ROA 1863. In response, Bolin spoke with Irina Fuller and they confronted Finklea who apologized for "disrespecting our home and said he wouldn't do it again." Id. Bolin recalled a couple of weeks later that she was playing basketball with B[redacted] and as a result of a conversation between them, Bolin spoke again with Irina about talking with Finklea and telling him that he could not continue to sell drugs out of her house or he would have to leave. ROA 1865.[6] Bolin stated that she also knew that I[redacted] "J[redacted]" D[redacted] also dealt drugs. Bolin stated that Applicant told her that J[redacted] worked for him. ROA 1865-66.

#47

Pertinent to this ground, the following testimony was presented:

Q. **Did Ron Finklea ever talk about anyone else dealing drugs on his behalf?**

A. **Yes.**

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testified that before Teresa Finklea's second tour of duty, the first day the Finklea's moved into their home, the Bolin's caught them selling crack cocaine to Mexicans in the neighborhood. ROA 1856. Sherry stated that she taught to Irina about what to do with this and she told Applicant that they could not do this and he apologized "for disrespecting our house and he said he would not do it again." ROA 1856. Finklea stated that he had no source of money was selling the drugs for money. Sherry testified that B[redacted] was living with them at the time. Bolin testified that a couple of weeks later, Sherry was playing basketball with B[redacted] and based upon a conversation she had with him, Bolin talked with Irina again about confronting Applicant because he cannot sell drugs out of the house. ROA 1857.

Bolin on cross-examination admitted that she did not call the police or make a report. ROA 1859. The trial judge subsequently determined this evidence was admissible as proper penalty phase evidence of the character of the defendant and additionally not a surprise to the Applicant due to the pretrial filings. ROA 1861. No issue concerning the admission was raised in the direct appeal.

6 Irina Fuller testified and confirmed the conversations she had with Finklea about dealing drugs with the Mexicans and to stop doing it. ROA 1868-1871.

Q. Who?

A. B[redacted].

Q. B[redacted] A[redacted], his stepson?

A. Yes.

Q. Did you have any independent knowledge of whether this was true or not?

A. I did not.

Q. But that's what Ron Finklea told you, or that's what Ron Finklea was talking about.

A. Yes.

ROA 1866, l. 11-23.

Analysis Why the Ground Is Without Merit

Respondent respectfully submits that Applicant has failed to show deficient performance or prejudice under *Strickland*. Simply put there was no viable objection that Applicant could have made to the closing argument which characterizes the admitted evidence about Finklea asserting that B[redacted] was a part of his drug operation.

In State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975), our Supreme Court set forth the parameters of permissible prosecutorial argument:

> In 23A C.J.S. Criminal Law § 1107, closing arguments, similar to that of the solicitor in this case, are discussed as follows:

> "**So long as he stays within the record and its reasonable inferences, the prosecuting attorney may legitimately appeal to the jury to do their full duty in enforcing the law, or to return the verdict which he conceives it to be their duty to return under the evidence, and may employ any legitimate means of impressing on them their true responsibility in this respect, as by stating that a failure to enforce the law begets lawlessness.** Thus, he may in effect tell them that the people look to them for protection against crime, and may illustrate the effect of their verdict on the community or society generally with respect to obedience to, and enforcement of, the law; he has the right to dwell on the evil results of crime and to urge a fearless administration of the criminal law; and he may ask for a conviction, or assert the jury's duty to convict. He may argue with reference to any matter which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider."

Durden, 264 S.C. at 92, 212 S.E.2d at 590.

If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs. *Id.* Undoubtedly, a Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony. *See State v. Raffaldt*, 318 S.C. 110, 456 S.E.2d 390 (1995); *State v. Allen*, 266 S.C. 468, 224 S.E.2d 881 (1976). On the other hand, a closing argument may be held improper where it appeals to personal bias or arouses the jury's passions or prejudice. *See Durden*, supra; *State v. White*, 246 S.C. 502, 144 S.E.2d 481 (1965).[7]

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7 "[The Fourth Circuit] has a two-pronged test for determining whether a prosecutor's misconduct in closing argument so infected the trial with unfairness as to make the resulting conviction a denial of due process." *United States v. Wilson*, 135 F.3d 291, 297 (4th Cir. 1998) (*quoting Darden v. Wainwright*, 477 U.S. 168, 181 (1986)) (internal quotation marks omitted). To prevail, Applicant must show that (1) "the [solicitor's] remarks were improper" and (2) the remarks "prejudicially affected [his] substantial rights so as to deprive [him] of a fair trial." Id. Factors the court should consider include:

> (1) The degree to which the [solicitor's] remarks had a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; (4) whether the comments were deliberately placed before the jury to divert attention to extraneous

Our Supreme Court has held specifically that "[a] solicitor's argument concerning the credibility of the State's witnesses based on the record and its reasonable inferences is not error." *State v. Caldwell*, 300 S.C. 494, 505, 388 S.E.2d 816, 822 (1990). *See also Raffaldt, supra* (the State may comment on the credibility of witnesses in argument); *State v. New*, 338 S.C. 313, 318, 526 S.E.2d 237, 239 (Ct.App.1999) (the Solicitor responded to New's objection by indicating her comments were not outside the record, but instead were based on common knowledge: "It's a common known, it's a well-known fact.... He has testified against someone, he will be considered-[a rat]" and the court affirmed finding the Solicitor's comments regarding the witness's credibility were reasonable inferences from the evidence in the record). *See Caldwell*, supra (finding Solicitor's remarks referencing credibility of critical State witnesses permissible and directly related to the evidence where common sense biases of the witnesses were apparent from the record). *See Caldwell*, 300 S.C. at 506, 388 S.E.2d at 822 (no improper bolstering where Solicitor argued State's witnesses were credible and "should be admired for their fortitude in telling the truth about their own family member"); *State v. Copeland*, 278 S.C. 572, 579, 300 S.E.2d 63, 68 (1982)(Solicitor's statement that defendant's accomplice and State's key witness was " 'going to prison for at least-I submit to you for somewhere around twenty years' " was not bolstering even though accomplice-witness received complete immunity from prosecution in exchange for his testimony, because evidence showed he would be sentenced later for various

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> matters; (5) whether the [solicitor]'s remarks were invited by improper conduct of defense counsel; and (6) whether curative instructions were given to the jury. These factors are examined in the context of the entire trial, and no one factor is dispositive.

United States v. Lightly, 616 F.3d 321, 361 (4th Cir. 2010) (internal quotation marks and citations omitted).

other crimes he committed elsewhere); *cf. United States v. Creamer*, 555 F.2d 612 (7th Cir.1977)(no bolstering where purpose of prosecutorial exchanges with witness was to establish pressures under which witness testified by putting before the jury the witness's understanding of his plea agreement and what would happen to the witness if he did not testify truthfully); *Commonwealth v. Gurney*, 413 Mass. 97, 595 N.E.2d 320 (1992)(prosecutor's argument was permissible inference from facts presented at trial and not bolstering where he stated in closing that police officers and complainant were credible because their testimony was reasonable and they had no reason to target defendant with false accusations).[8]

A petitioner claiming ineffective assistance of counsel must show that his attorney's performance was so inadequate as to violate his Sixth Amendment rights. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Strickland's two-part test governs claims of ineffective assistance of counsel. Under the first or "performance" prong, the petitioner must show that his counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688. A court

8 *See Evans v. Thompson*, 881 F.2d 117, 125 (4th Cir.1989) (no habeas relief on the petitioner's claim that counsel was ineffective in failing to object to the prosecution's assertion that he was a multiple murderer where "[d]efense counsel testified that he chose not to object to the prosecutor's argument because he felt an objection would only have emphasized the matter before the jury"); *Curry v. Warden*, No. 6:07–2933–HFF -WMC, 2008 WL 3887648, at *11 (D.S.C. Aug. 21, 2008) (finding the petitioner was not entitled to habeas relief on claim of ineffective assistance of counsel for failure to object to prosecutor's statement in closing argument where, inter alia, counsel testified as to his strategic reasons for not objecting); *see also Hansford v. Angelone*, 244 F.Supp.2d 606, 613 (E.D.Va.2002) ("Constitutionally effective assistance does not require the assertion of every possible valid objection. Indeed, it is frequently better to remain silent rather than to draw attention to the matter." (internal quotation marks and citations omitted)); *Roberts v. Bowersox*, 61 F.Supp.2d 896, 911–13 (E.D.Mo.1999) (petitioner failed to demonstrate prejudice from counsel's failure to object to prosecutor's "references to petitioner's sexual abuse of family members, conduct in kindergarten, jailhouse fight involvement, and car dealership burglary" where "[t]he evidence regarding petitioner's prior bad acts had mainly been introduced by petitioner in an effort to show that he suffered from a mental disease or defect which precluded him from forming the requisite mental state"; the court noted that the "information was not new to the jury and therefore [ ] was not so prejudicial as to affect the outcome of the trial").

considering a claim of ineffective assistance must "indulge a strong presumption that counsel's conduct falls within a wide range of professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged conduct might be considered sound trial strategy." *Id.* at 689. Under the second or "prejudice" prong, the petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. When assessing prejudice, a court "must consider the totality of the evidence before the jury.... [A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Id. at 695. If the defendant fails to prove either deficiency or prejudice, then the defendant's ineffective assistance of counsel claims fail. Id. at 697.

Deficient performance has not been shown by the failure to object. First there was evidence presented in the penalty phase that Finklea stated his stepson was involved in his drug operation. ROA 1866. Further, in State Exhibit 89, 91, Finklea wrote : "B[redacted] **son,** please change, U-R headed down a dead end street, U-R just like Tommy, and I know **if I came across U. I would put a bullet in your head,**" ROA 1914, l. 17- 1916, l. 3. The prosecutor's comments that: "B[redacted]**, who lived with him, good father to him? Had him selling drugs. Good father to him**?" (ROA 2220-21) and "he manipulated B[redacted], his stepson, into selling drugs for him and then he wants to put a bullet in his head. . . ." (ROA 2234, l. 3-13) are supported by the evidence.

Since there was evidence in the record to support a factual basis for each of the comments, the Applicant has failed to show either deficient performance or prejudice under

Strickland. The ground is subject to summary dismissal.

GROUND THREE - Prison Adaptability Presentation Issue.

In ground three the Applicant contends that counsel was ineffective on both investigation and preparation of mitigating evidence of adaptability to prison of Mr. Finklea. At trial the defense presented the testimony of correctional expert James Aiken and psychiatrist Dr. Anna Cherry who treated Finklea after his incarceration. In particular, Finklea claims counsel's presentation of Mr. Aiken's assessment was a scant 3 pages in length and fell woefully short in substance and detail. Her further characterizes that Dr. Cherry testified that Applicant was a good inmate who looked after other inmates in need. Her specifically claims the presentation "amounted to a severely anemic and in effect of presentation without any underlying objective testing or future risk assessment analysis." Respondent submit that the defense team did a reasonable investigation concerning the Applicant's adaptability to prison. Deficient performance and prejudice has not been shown.

M #53

Evidence About Prison Adaptability

As stated above , a summary of the testimony presented to the jury A review of the record reveals evidence about Applicant's adaptability and future behavior assessment for prison.

Dr. Anna Cherry, the contract psychiatrist with the Lexington County Detention Center testified that she treated Finklea for major depressive episode and after he started having nightmares "I realized that he actually had post-traumatic stress disorder." (ROA 2149-50). She

stated that for people with PTSD talking about traumas can be upsetting and he spoke very little about it. Finklea was not the type of inmate who declared he had a horrible childhood and woe is me. Dr. Cherry stated that he had required high doses of medications and he was actually doing fairly well. She stated that little things can trigger PTSD symptoms and he started having panic attacks and difficulty with little things that may be considered normal like an abscess on his thumb. (2150). She stated he was more concerned about traveling in chains to get to the dermatologist than having the thumb taken care of. Further, when his asthma inhaler ran out, he started having PTSD symptoms, however, the medications have started to help out to control his depression. (ROA 2151).

#54.

Dr. Cherry's observations of him as a person was that she saw him as a kind and gentle soul out of everyone she had treated. (2151). She stated she had more respect for him and she liked him more than anyone else she had treated. She stated that he was concerned for other people, has an instinct of telling who the good people are and who the bad people are with a good sense on the inner working of human beings. However, he is not a judgmental person. She found him to be a stabilizing influence in the jail and likely to de-escalate a situation rather than escalate it. She stated that they would put people in his cell knowing that he would take care of them and he would keep the environment peaceful. (ROA 2153). She testified that "I don't know why, I'm guessing that with all the trauma and the violence that he has experienced and given out and with the PTSD symptoms with the severity that they were, I think he needs peace in his environment to survive." (2153).

She stated that anything that is negative - anger or hatred - triggers his PTSD and the other things inside him - and he does what he can to make it more peaceful. She stated that she could not

speak as to how he was before, but that was consistent with what other people said about his past. She stated that he got along well with the correctional officers. She stated that he was not a discipline problem in the four years that he had been there. She stated he had always shown her the utmost respect. (2155). Dr. Cherry stated that in her job she had learned about people and their secrets. "Out of respect for Ron and people he cares about, I'm going to choose not to discuss those things even though it may help him, but just keep in mind that everyday something happens —"I think but for the grace of God go I." (2155). She stated that she sees Finklea as fighting to not become the kind of person that he could become a person like you and me. Dr. Cherry then announced "God has saved your life once, he'll do it again." (2156).

On cross-examination, Dr. Cherry admitted that she was against the death penalty. (ROA 2158-59). She also stated that she was the first person to diagnose Finklea with post-traumatic stress disorder in 2004. She stated she had diagnosed it as depression and panic disorder. (ROA 2159)When asked whether he had disclosed events to support the PTSD, Dr. Cherry stated that when he started having nightmares they talked about whether he had traumatic events in his past. She did not ask detailed questions because it was not her role. She stated it would have been "counter-therapeutic for me to delve into the details of abuse." (ROA 2160). She stated that they talked about it enough to understand that there was trauma in his past and that he responded to trauma like someone with PTSD has. *Id.* When asked if the PTSD could come from Finklea taking a gun and shooting Walter Sykes twice in the head and setting him on fire, she responded that it was a trigger for his symptoms getting worse, but that she did not believe it was the initial trauma. But she could not answer yes or no if she knew. (2161). She stated that she was testifying because she is an advocate for her patients - and that she had never advocated for or against capital

punishment. (2161). (ROA p. 2149-2162)

Dr. Richard Frierson, an expert in forensic psychiatry testified that he evaluated Finklea pursuant to court order. (ROA 2164). He opined that Finklea was competent to stand trial and he was not mentally ill to the extent he would be unable to distinguish right from wrong or lack ability to conform his conduct to the requirements of law. He had a diagnostic impression that Finklea clearly suffered from a major depressive disorder - single episode and appeared to be in full remission when he evaluated him .(ROA 2166). He described Finklea's medical conditions of asthma, knee injury, skin abscess and evidence of hypoxic brain injury due to his suicide attempt. He opined that there was no evidence that Finklea was making up his amnesia and the memory loss in 2003. (2167). (ROA p. 2162-2179)

James Aiken, a prison consultant and former employee of the South Carolina Department of Corrections, testified as an expert in the field of prison adaptability. (2187). He declared that he had reviewed the documentation about Finklea., including his military, medical, incarceration and records from his co-defendant. (2187-88). He stated that he did not see Finklea in his military records involved in systematic violence against people or insubordination to superiors or using lethal weapons against other people or disruptive activity. Instead he saw his patriotism. (ROA 2189) He did not find that Finklea was involved with any predator gangs or drug cartels or drug trafficking. Particularly, he did not see any criminal record. (ROA 2189). Since he has been incarcerated, he found Finklea to be well-adjusted , meaning not stabbing himself, no contraband weapons or organizing escape or sexual predator activity or prison disruption. He was concerned about a propensity to harm himself when in crisis. (ROA 2190). He found Finklea to be the lowest probability on being a threat to other inmates due to his history and his age of beyond 30 years old.

(ROA 2191). Secondarily, he could be concerned about someone attacking him because he has no affiliation with gangs or security threat groups. Id. (ROA p. 2179-2195).

Defense counsel initially declared an intent to call **Dr. Donna Schwartz-Watts** as their final witness. ROA 2197. After a break, however, the defense chose not to call Dr. Watts "after consultation with Dr. Watts. We believe all of the information we need has been presented." ROA 2198, l. 4-10. [The record does not reveal what Dr. Watts was prepared to testify in this area.[9]]

ANALYSIS

Respondent submits that the Petitioner cannot prove that counsel was deficient in presenting evidence from James Aiken and Dr. Cherry to support that Applicant is likely to be non-violent. At the penalty phase, trial counsel presented testimony from these two witnesses that Finklea was a nonviolent person who did not have any problems getting along with others. Aiken found Finklea to be the lowest probability on being a threat to other inmates due to his history and his age of beyond 30 years old. (ROA 2191). Dr. Cherry observations of him as a person was that she saw him as a kind and gentle soul out of everyone she had treated. (ROA 2151)., had concerned for other people, had an instinct of telling who the good people are and who the bad people are with a good sense on the inner working of human beings and a stabilizing influence in the jail and likely to de-escalate a situation rather than escalate it. (ROA 2153). . Judge Newman

9 As revealed during the competency hearing, Dr. Donna Schwartz-Watts noted that in her interview with Finklea that she was concerned about the existence of brain damage. ROA 236. She noted that after his hanging incident that a neurologist think not think that he would regain consciousness. ROA 237. She testified that she diagnosed him with a "**cognitive disorder not otherwise specified**" which suggests some brain damage but not dementia based upon the anoxia that caused long-term and short term memory impairments.

Dr. Watts also diagnosed him with "adjustment disorder." She based this on the severity of the legal stressors he was under now with family and health issues. ROA 238. She noted the medication that he was on to control factors including anxiety. ROA 238-240. She opined that the medications would improve his level of functioning.

further instructed 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.

ROA 2280-81.

A counsel's failure to investigate adequately for sentencing can be ineffective, thus, violating the performance prong of Strickland. *Emmett v. Kelly*, 474 F.3d 154, 161 (4th Cir.2007). The prevailing question is "whether the investigation supporting counsel's decision not to introduce mitigating evidence of [the petitioner's] background was itself reasonable." *Wiggins v. Smith*, 539 U.S. 510, 523, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *see also Rompilla v. Beard*, 545 U.S. 374, 380, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). In the context of a capital case, "[t]he ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins*, 539 U.S. at 524. However, counsel's actions are assessed in light of context and the facts "as seen from counsel's perspective at the time" Id. "[A] strategic choice made by counsel after a thorough investigation is 'virtually unchallengeable.' " *Emmett*, 474 F.3d at 178 (*quoting Strickland*, 466 U.S. at 691); *see also Stout v. Netherland*, Nos. 95–4008, 95–4007, 1996 WL 496601, at *10 (4th Cir. Sept.3, 1996) ("[P]rovided there is a conceivable strategic advantage to the decision not to introduce certain evidence in mitigation, that choice is virtually unassailable on collateral review."). "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S.

at 690- 691. The Supreme Court clarified that, "[i]n other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 691. A petitioner's counsel does not have to investigate every possible avenue of mitigation. *See id.; see also Emmett*, 474 F.3d at 161

The Petitioner has failed to present what "objective testing or future risk assessment analysis" the Applicant's counsel had a constitutional requirement to present under the Sixth Amendment as a reasonable counsel under the mandates of *Strickland v. Washington,*. The allegation is silent as to that showing. In light of the evidence presented at the penalty phase, Respondent submits that counsel did not perform deficiently in failing to present an additional prison risk assessment expert. Evidence presented by counsel that Finklea was a well-behaved prisoner, and had a reputation for being nonviolent was evidence of a positive ability to adjust to a prison environment. *See Skipper v. South Carolina*, 476 U.S. 1, 7 n. 2, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (noting that evidence suggesting that defendant had been a well-behaved and disciplined prisoner in jail was evidence of adjustability to life in prison). That counsel did not present additional evidence through an expert witness does not render counsel's performance deficient. Counsel acted reasonably in presenting the mitigating evidence about Applicant's character as well behaved, that act of violence out of his normal character and that he was a stabilizing influence in the jail. The evidence presented through Aiken and Dr. Cherry relating to a prison environment connected the specific characteristics of the particular defendant to his future adaptability in the prison environment. This is what the Sixth Amendment required.

Further, Respondent submits that Applicant cannot prove Sixth Amendment prejudice. Regarding prejudice in the context of mitigation evidence, "[w]hen a defendant asserts prejudice with respect to his sentence, the Court must 'reweigh the evidence in aggravation against the totality of available mitigating evidence.' " *Hedrick v. True*, 443 F.3d 342, 349 (4th Cir.2006) (*quoting Wiggins*, 539 U.S. at 534). The Fourth Circuit explained that:

> The question a reviewing court must answer in determining whether a petitioner was prejudiced by a failure to present such evidence, then, is not whether the evidence was as "powerful" as the mitigation evidence in other cases, but rather whether the evidence was "powerful" enough to offset the aggravating evidence and demonstrate a reasonable probability of a different result in the petitioner's case.

Yarbrough v. Johnson, 520 F.3d 329, 342 (4th Cir.2008). Further "[a] defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome...." *United States v. Green*, 882 F.2d 999, 1003 (5th Cir.1989).

Additional testimony that Finklea was generally a nonviolent person and a good prisoner who would likely be able to adapt to prison life without causing any further harm to anyone would have added little to the evidence that was presented. Applicant has not demonstrated a reasonable probability that had such expert testimony been presented, he would have received a life sentence, especially in light of the aggravating circumstances, and evidence already presented about his character. However, as evidence used to mitigate moral culpability, such evidence is largely cumulative and not dispositive. *See Wong v. Belmontes*, 558 U.S. 15, 23, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009) (prejudice did not arise from a counsels' failure to use cumulative "humanizing" mitigation evidence); *Jackson v. Kelly*, 650 F.3d 477, 482 (4th Cir.2011) (holding

that prejudice typically does not arise from a counsel's failure to use anecdotal, cumulative examples of abuse). This is not a case where Finklea's trial counsel did not produce any mitigation evidence or withheld especially helpful evidence supporting a theory that Finklea was not morally culpable. *See, e.g., Wiggins*, 539 U.S. at 535.

Further, the prejudice assessment, in addition to the mitigation evidence actually presented summarized within this pleading and proffered, must also include the evidence in aggravation which was presented to the jury under a Strickland analysis. In addition to the crime, the evidence presented by the State showed that various evidence in aggravation was presented to the jury for sentencing including but not limited to:

1. The Applicant was in arrears of child support in 2002 in an amount around $21,800 (ROA 1829-1830, 1842);
2. The Applicant was about to be fired at Shealy Electric before he began work at Selectron and did not give proper notice. (ROA 1837);
3. The Applicant was terminated by Kelly Services for not showing up to work for three days at Selectron. (ROA 1845);
4. The Applicant was involved in illegal drug sales. (ROA 1863-66)
5. The Applicant was seen selling crack cocaine. (ROA 1869-72);
6. The Applicant had a verbal altercation with Jonathan Peoples and threatened him with a hammer at Selectron and had to be calmed down (ROA 1874-1875);
7. The Applicant was known to have money problems. (ROA 1879);
8. The Applicant was perceived as a cocaine and marijuana drug dealer and involved in interstate transactions (ROA 1880-1886);

9. The Applicant threatened "to shoot Marissa in the head, burn her up and her family will never find her" and throw her in the woods (ROA 1888-1889);

10. Applicant worked with co-defendant Theodore Davis in the drug sales (ROA 1891-92);

Respondent respectfully submits that prejudice has not been shown Confidence in the outcome is not undermined. The allegation must be denied.

CONCLUSION

Each and every allegation in the Application, as amended, not hereinabove either expressly admitted, denied, qualified or explained is hereby denied.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General
(Counsel of Record)

MELODY J. BROWN
Senior Assistant Deputy Attorney General

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By _____
Donald J. Zelenka

ATTORNEYS FOR RESPONDENT

July 24, 2017

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

RON O'NEAL FINKLEA, SK6025)
)
Applicant,)
)
vs.)
)
STATE OF SOUTH CAROLINA,)
)
Respondent.)

C/A No. 2010-CP-32-5076

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the Amended Return to Application for Post-Conviction Relief, as Amended January 15, 2016 and June 22, 2017 in the foregoing action by depositing copies in the United States mail, postage prepaid, and addressed to:

Teresa L. Norris, Esquire
Special Assistant Public Defender
Charleston County Public Defender's Office
101 Meeting Street, 5th Floor
Charleston, SC 29401

Diana L. Holt, Esquire
P. O. Box 6454
Columbia, SC 29260

This 24th day of July, 2017.

DONALD J. ZELENKA
Deputy Attorney General

ALAN WILSON
ATTORNEY GENERAL

ORIGINAL

July 12, 2017

The Honorable Lisa M. Comer
Clerk of Court, Lexington County
205 East Main Street, Suite 128
Lexington, SC 29072

Re: **Ron O'Neal Finklea v. State of South Carolina**
2010-CP-32-507

Dear Ms. Comer:

Enclosed is the Amended Return to Application for Post-Conviction Relief, as Amended in the above-captioned case for filing in your office. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Donald J. Zelenka
Deputy Attorney General

FILED
2017 JUL 27 AM 11:08
LISA M. COMER
CLERK OF COURT
LEXINGTON SC

DJZ/lbb
Enclosure

cc: Teresa L. Norris, Esquire
Diana L. Holt, Esquire
Honorable William P. Keesley

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
The Honorable William P. Keesley, Circuit Court Judge

Appellate Case No. 2019-001104

RON O'NEAL FINKLEA, SK6025,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

CERTIFICATE OF SERVICE

I, **W. Joseph Maye**, hereby certify that a true copy of the Supplemental Appendix to the Petition for Writ of Certiorari has been served upon opposing counsel by depositing copies in the United States mail, postage prepaid, to the following:

Diana L. Holt, Esq.
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Robert M. Dudek, Esq.
SCCID\Division of Appellate Defense
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Columbia, South Carolina 29201

This 29th day of October, 2019.

W. JOSEPH MAYE
Assistant Attorney General
Bar No. 100851