THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Honorable William P. Keesley, Circuit Court Judge

Appellate Case No. 2019-001104

RON O'NEAL FINKLEA, SK6025..... RESPONDENT,

v.

STATE OF SOUTH CAROLINA..... PETITIONER.

RETURN

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RESPONDENT'S COUNTER-STATEMENT OF THE ISSUES ON APPEAL

(1) Whether certiorari should be denied because the State's main argument on appeal (i.e., that the PCR Court erred in relying on hearsay from two expert witnesses) was never raised at the PCR hearing, is inconsistent with settled precedent and practice, and is disingenuous given the circumstances that transpired at the PCR hearing?

(2) Whether certiorari should be denied because the PCR Court's findings of fact and conclusions of law are supported, not just by "any evidence," but by abundant probative evidence admitted without objection at the PCR hearing?

(3) Whether certiorari should be denied because the PCR Court's determination that Finklea was deprived of his Sixth Amendment right to the effective assistance of counsel as a result of trial counsel's failure to develop and present the full range of mitigating evidence involved a straight-forward application of the established precedent to the evidence presented at the PCR hearing?

STATEMENT OF THE CASE

Ron Finklea's trial counsel, Stephen Soltis and Melissa Armstrong, acknowledged at the PCR hearing that they had little doubt that the jury would find their client guilty of murder and armed robbery. App. 2583, 2971. And they were similarly aware that the State would be able to establish the existence of one or more statutory aggravating circumstances. App. 2583, 2971–72. Given their (correct) assessment that a penalty phase and death eligibility were both "a foregone conclusion" (App. 2583; 2971), the investigation, development, and presentation of all available mitigating evidence was critical to persuading at least one juror to decide that life without parole, rather than the death penalty, was the appropriate punishment. App. 2972. Based on the evidence presented at the evidentiary hearing, the PCR judge, the Honorable William Keesley, found that trial counsel's efforts in this regard were deficient and prejudicial. App. 3057–64. As detailed below, Judge Keesley's thoughtful and considered judgment is well supported by the record evidence and certiorari should be denied.

1. Trial Counsel's Inadequate Investigation

Soltis was appointed shortly after Finklea was indicted in 2003. App. 2572. He hired a fact investigator, Dave McDougall, who reached out to Finklea's ex-wife (Cherena Roland) and his then-current wife (Teresa Fuller) and also interviewed Finklea himself several times. App. 2573–78, 2639, 2nd Supp. App. 35-38, 118-122. MacDougall's notes from these interviews included not only an account (from Roland) of Finklea's mother attempting to shoot him when he was a child, but also McDougall's own observation that Finklea had some hidden trauma that he was reluctant to disclose. App. 2614, 3009, *id.* These early signs of abuse and trauma were ignored for several years, and it wasn't until 2006 that Soltis traveled to Finklea's hometown in Alabama. App. 2588–89. Once there, Soltis testified that he conducted a group "family" interview with approximately a dozen of Finklea's family members; including Finklea's mother. App. 2589–90, 2nd Supp. App. 23. Unsurprisingly, this interview produced little more than generic "good guy" information, and Soltis failed to follow up on a statement suggesting abuse, i.e., that Finklea had a "hard life," because Soltis (for no apparent reason) interpreted this comment to mean financial hardship. App. 2617–19. Soltis also made one trip to Seattle in a failed attempt to interview Finklea's ex-wife, although he claimed he spent 8 hours in Seattle "review[ing] file and meeting with witnesses" in his time entry on his billing statement. App. 2599–2600, 2nd Supp. App. 23. However, he made no further attempt to interview Ms. Roland or any other witnesses who were familiar with his client's life history. App. 2600.

Counsel also hired a mitigation specialist, Carolyn Graham, to aid the defense team. App. 2584, 2972–73. Her work was not closely supervised by either Soltis or Armstrong. App. 2591–92, 2989–90. Graham made one trip to Alabama without even interviewing Finklea beforehand. App. 2594, 2976, 2nd Supp. App. 48. She spent only nine hours over two days interviewing

witnesses on her trip and, again unsurprisingly, uncovered nothing about the abuse. App. 2593–94, 2nd Supp. App. 48.

Despite the fact that she assumed primary responsibility for the mitigation presentation (App. 2969–70), Finklea's other attorney, Melissa Armstrong, never traveled to Alabama or interviewed any of her client's family members except in brief witness "prep" sessions prior to their testimony at the penalty phase of the trial. App. 2977, 2985–86. Besides a handful of sporadic meetings with Finklea, this was the sum total of counsel's efforts to obtain social history information about their client's life. App. 2983–85.

2. The Penalty Phase Presentations

Trial counsel's prediction that Finklea would be found guilty proved accurate, and, during its case in aggravation, the State portrayed Finklea as an unredeemable, "calculating," and cold-blooded murderer. App. 1822, 2299. To make its case, the State focused on the nature of the offense, which it portrayed as particularly egregious, contending that it was motivated by greed and included acts that were tantamount to "physical torture." App. 2296–97. The State also focused on evidence that Finklea owed back payments in child support and had sold drugs (App. 2307–10) to support its claim that he had manipulated everyone in his life, including his family and the experts who evaluated him. This, the State argued, negated the mitigating value of the any evidence of Finklea's good character. App. 2312–14.

Finklea's attorneys presented two types of mitigating evidence: (1) evidence that the offense was totally out of character for Finklea, especially considering his military service; and, (2) evidence that Finklea posed no threat to prison officials and other inmates if sentenced to life without parole. On the first theme, counsel called several of Finklea's family members who discussed his redeeming qualities (App. 2115–17, 2124–26, 2129–30, 2135, 2142–46), and two of

Finklea's fellow servicemen to describe his exemplary military record and good character.[1] App. 2154–94, 2211–16. One of the character witnesses, Ms. Roland, vaguely alluded to Finklea's "rough younger life," which "caused him to have a lot of insecurities [and] to devalue himself," but she was not questioned further on this matter. App. 2221.

Additionally, two experts testified about Finklea's suicide attempt during his pre-trial incarceration and resultant anoxic brain injury, which resolved before he left the hospital and before he was interviewed by his investigator on August 19, 2003, but neither addressed the important issue whether Finklea's moral culpability was reduced due to mental illness or impairment that pre-dated or contributed to the homicide. App. 2195–2210, 2242–59, 3122. The defense also called Dr. Anna Cherry, Finklea's treating psychiatrist at the Lexington County Detention Center, who had worked with him consistently over the course of his pretrial detention. App. 2229. In the course of discussing Finklea's "kind, gentle, soul," Dr. Cherry alluded without elaboration to "his past trauma," but provided no additional information, and counsel, clearly caught off guard by the testimony, did not press her further. App. 2231. During her discussion of statutory mitigating circumstances with the Court, Ms. Armstrong acknowledged her surprise at Dr. Cherry's reference to trauma. App. 2284–85.[2] Finally, counsel called James Aiken, an expert in prison adaptability, to testify that Finklea was extremely unlikely to be a threat to other inmates. App. 2267–72.[3]

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[1] This evidence was not, as the State claims, in conflict with the evidence presented at the PCR Hearing. Pet. 20. Rather, this was simply a presentation of relatively generic "good guy" evidence that solely focused on Mr. Finklea's good qualities instead of including any evidence of the abuse, which trial counsel knew virtually nothing about.

[2] Ms. Armstrong admitted during her PCR hearing testimony that she did not know any specifics about the trauma Dr. Cherry referenced. App. 3000, 3010.

[3] Dr. Donna Maddox, a forensic psychiatrist, was scheduled to testify during the sentencing phase about her evaluation of Finklea, which had involved limited interviews with family members. App. 2873–78. The night before her scheduled testimony, Dr. Maddox received an email from Ms. Fuller detailing some of the abuse that post-conviction

3. The Substantial Mitigating Evidence the Jury Did Not Hear

As set forth in detail by Judge Keesley in the Order granting post-conviction relief, the evidence presented at the PCR hearing established that Finklea's life was marked by brutal beatings, humiliating sexual abuse, and degrading treatment, largely at the hands of his mother. The testimony also revealed that the psychological consequences of this chronic abuse on Finklea's mental functioning were profound.

a. Evidence Regarding the Facts of the Abuse

Finklea was born out of an affair between his mother (Betty Peoples) and a married man, who ultimately abandoned them. App. 2669–70. Ms. Peoples viewed her son as a constant reminder of the rejection and singled him out for more degrading and disproportionately harsh punishments than meted out on her other children. App. 2676, 2679, 2695–97. Finklea was a victim of constant, severe, actual and threatened physical and sexual abuse at the hands of his mother and stepfather from the age of four until at least age sixteen. App. 2676–77, 2681, 2690–93, 3147, 3152, 3190–91.

Finklea's mother would beat him on a regular basis using broom handles, an axe handle, spatulas, pots, extension cords, water hoses, clothes hangers, belts, and switches, often making him strip naked before the beatings and leaving behind welts and cuts. App. 2691–92, 3147–49, 3190. Peoples also pointed a gun at Finklea and, on at least one occasion, beat him to the edge of death, only stopping due to her fear that the police might intervene. App. 2765, 3160. She would punish him by locking him in closets for hours at a time. App. 2676–77, 3150. Ms. Peoples would

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counsel later uncovered. App. 2881, 3221. She also happened to have a conversation with Ms. Roland in the courtroom where information about the abuse came up. App. 2882–84. When she approached Finklea about the allegations, he confirmed what Ms. Fuller had detailed regarding his mother's abuse. App. 2886, 2945–46. Ms. Armstrong did not call Dr. Maddox because she was unable to figure out how to integrate the trauma information into the mitigation case she had presented. This deprived the jury of any evidence of the profound abuse. App. 2986–87.

grab Finklea's genitals, both inside and outside of his clothes, stating that she could do what she wanted to him because he was "her property." App. 2677, 2692, 2770, 3151. This sexual degradation was particularly common whenever Finklea developed a romantic interest in a girl. App. 2692. Finklea struggled with bedwetting, and his mother used cruel strategies to address this such as wrapping his penis with rubber bands, duct taping a milk jug to his penis, making him sit naked in tubs of ice cold water, and making him sleep naked in the bathtub. App. 2677, 2690–91, 2798. Ms. Peoples referred to Finklea by racist and derogatory epithets so frequently that Finklea was unsure as a child what his real name was. App. 2677, 2812.[4] She left Finklea at home while his other siblings were taken on social outings, she never told him she loved him throughout his entire childhood, and he never once had a birthday party (or birthday cake) even though his mother celebrated his sibling's birthdays. App. 2768, 2682, 3152. These incidents of verbal, physical, sexual and emotional abuse continued into Finklea's late teens. App. 2688, 3152.

Finklea also witnessed the severe abuse of other relatives, including his favorite Aunt Ruby, who had a violent boyfriend who beat and cut her. App. 2683–84. On several occasions, he rescued his sister from being molested by his great uncle and his mother's boyfriend. App. 2681–82, 2789, 3150. Both he and his sister were violently punished by their mother when they tried to confide in her about the molestation. App. 2682, 2789. Finklea's grandfather also shot and killed his beloved dog, after which Finklea attempted suicide. App. 2766–77.

Finklea's family also lived in poverty throughout his childhood, with the children often going barefoot because they could not afford to wear their shoes out. App. 2675. To make ends meet, his mother sold alcohol and drugs from their home, often forcing her children to find customers, pour shots, and cut the drugs. App. 2680–81, 2789–90, 3190. Finklea would be

[4] According to Ms. Vogelsang, "Ron said, at one point, he didn't know—he thought he maybe didn't know his real name because her favorite name for him was MF'er, you bubble-eyed MF'er, you black bastard." App. 2677.

dispatched to rough neighborhoods, primarily on his own, to find customers and would be beaten by his mother if he failed to do so. App. 2680–81, 2789–90.

b. Evidence Regarding the Psychological Effects of the Abuse

The PCR hearing testimony established that the multiple forms of abuse Finklea endured had profound effects on his psychological wellbeing and functioning. Dr. Susan Knight, an experienced clinical forensic psychologist, testified that Finklea suffers from PTSD with a "specifier of panic attacks," severe OCD, and a history of major depression, all linked directly to the "complex trauma" from his abusive childhood. App. 2790, 2822, 3193. In addition, Finklea experiences frequent panic attacks, intrusive memories of his past abuse, hypervigilance, chronic anxiety, sleep disturbances, and obsessions. App. 2812–15, 3183–86, 3188. He processes his emotions in a guarded way and "learned to wear a mask to cover what was going on inside because he just saw no way out, he felt helpless." App. 2693. Finklea also began engaging in compulsive behaviors as a means to control his environment. App. 2694. The constant threats of violence caused significant anxiety and compulsions which undermined his ability to maintain meaningful interpersonal relationships, contributing directly to the dissolution of his first marriage. App. 2697–98, 2703–05, 2794–95. This abuse made it difficult for Finklea to respond to existing conflict or potential conflict in a measured and logical manner. App. 2703, 2793–94. The abuse also made it difficult for Finklea to trust other people. App. 2815. According to Dr. Knight, Finklea had (and has) a deep need to bring order to chaos tied to the randomly violent environment that defined his childhood and adolescence. App. 2819.

Finklea's mental impairments also would have significantly assisted the jury in understanding his involvement in the offense; something that was completely lacking from the defense trial presentation. Finklea was medically discharged from the Army in 2002 due to a knee

injury, ending his intended military career. App. 2707–09, 2799–2800, 3195. He was depressed, anxious, "at loose ends," and unable to function because of this unexpected turn of events that removed much needed structure from his life. App. 2707–09, 3183. At the same time, Finklea's second wife was deployed to Iraq, creating a new worry that she was going to "move on" and "leave him behind." App. 2799–2800. His small disability check was insufficient to support himself and his children, and he began selling drugs to meet his financial needs, behavior that he learned from his mother in childhood. App. 2802, 3195. But, he lost money (App. 2707–09, 2800), which only exacerbated his psychological symptoms, which in turn deepened his reliance on drugs and alcohol as a coping mechanism. App. 2800–02, 2823–24, 3155. In Dr. Knight's opinion, the culmination of these factors, combined with Finklea's mental illnesses led to a series of disastrous decisions resulting in his involvement in Mr. Sykes' murder. App. 2800–02, 2824, 3196–97. "Essentially, all of those factors put him at a greater risk of a bad outcome and the bad outcome was the capital offense." App. 2824.

4. The PCR Court's Order and Findings

After hearing the evidence, the PCR Judge concluded that Finklea had been denied his Sixth Amendment right to the effective assistance of counsel. On the deficient performance prong, Judge Keesley first noted that counsel "should have recognized and pursued indications from [Finklea's] first wife about trauma and, from that, discovered what the PCR team learned about the extent of the trauma and how it affected his mental health at the time of the murder." App. 3057. He also found that trial counsel's failure to adequately interview Dr. Cherry, given that she had been Finklea's treating psychiatrist for years prior to trial, was objectively unreasonable. App. 3057–58. As for trial counsel's interactions with Finklea's family members, Judge Keesley determined that many of these family members had "specific knowledge" about the abuse and thus

would "almost certainly" have disclosed the information had they been interviewed individually, outside of the presence of Finklea's mother. App. 3059. The PCR Court also faulted trial counsel for their failure to spend enough time with Finklea to build a relationship of trust that would have allowed him to disclose his trauma history with them. App. 3057–58. In sum, the PCR Court concluded that counsel were "obligated to conduct a more thorough investigation" on the basis of the "red flags" that appeared in the information that was available to them. App. 3059. Trial counsel's failure to do so was not the result of a "conscious and informed" strategic decision, but instead was the product of the failure to conduct a "reasonable underlying investigation." App. 3059–60.

As to prejudice, the PCR Judge determined that there was "a reasonable probability that absent [trial counsel's] errors at least one juror would have believed that life imprisonment was the appropriate punishment." App. 3064. "[I]n light of the extensive precedent at both the federal and state levels recognizing that evidence of a defendant's history of trauma and his mental health status at the time of the murder is critical in the mitigation stage of a death penalty case," the Court concluded that counsel's failure to "discover and present relevant mitigating evidence" was prejudicial. App. 3062, 3064. The Court thought it "[o]f particular note in this analysis . . . that a single juror may stop the imposition of a sentence of death." App. 3062. Adhering to this Court's prior precedents, the PCR Judge found that "this is not a case where the mitigating evidence trial counsel failed to discover and present is merely a 'fancier' version of the evidence they did present." App. 3063. Rather, the evidence of "physical, sexual, and emotional trauma" and "significant psychological effects of that abuse" were "both quantitatively and qualitatively different from the evidence presented at trial." *Id.* Finally, the PCR Judge concluded that the "lack of evidence" of trauma and the "inconsistency" between the testimony of Dr. Cherry and

Ms. Roland on one hand and the testimony of Finklea's other family members on the other hand "allowed the State to suggest to the jury that the Applicant had manipulated those two witnesses." App. 3062–63. This evidentiary gap tipped the scale for the State's argument for death.

REASONS CERTIORARI SHOULD BE DENIED

I. THE STATE'S ARGUMENT THAT CERTIORARI SHOULD BE GRANTED BECAUSE THE PCR COURT RELIED EXCLUSIVELY ON HEARSAY IS WAIVED AND MERITLESS.

A. Waiver

The main thrust of the State's Petition for Writ of Certiorari is that the PCR Judge erred in relying upon "hearsay" evidence from Finklea's experts, primarily Licensed Social Worker Jan Vogelsang, to establish the horrific childhood physical, sexual and emotional abuse Finklea endured. Pet. 7–11. The State further asserts that because this "hearsay" was inadmissible, it was not "evidence," and thus Finklea's claim fails as a matter of law because there is no probative evidence supporting the PCR Court's decision that trial counsel's mitigation investigation was both unreasonable and prejudicial. *Id.* at 10. The State's petition has more vigor than candor, however, given that no hearsay objection was raised at the PCR hearing. In fact, the argument that is the foundation of the State's appeal was made for the first time in a Rule 59(e) motion after the PCR Court entered the order finding that Finklea was deprived of his Sixth Amendment right to the effective assistance of counsel during the sentencing phase of his trial.

During Ms. Vogelsang's extensive testimony at the PCR hearing, counsel for the State—the most senior attorney in the Criminal Division of the Attorney General's Office—stipulated to her qualifications (App. 2644), and made no objections whatsoever, much less the specific argument contained in the State's Petition. Thus, not only is the State's complaint wrong as a matter of law, as will be discussed in the next sub-section of this Return, it is waived in every way

that an argument can be waived.[5] As this Court has stated repeatedly, "[i]ssue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (quoting *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 386 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)). At a minimum, established state rules require that an "issue be raised to and ruled upon by the trial judge." *Id.* As a corollary principle, "[i]t is 'axiomatic that an issue cannot be raised for the first time on appeal.'" *Id.* (quoting *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)); *see also State v. Sheppard*, 391 S.C. 415, 420–23, 706 S.E.2d 16, 19–20 (2011) (holding that "[o]ur law is clear that a party must make a contemporaneous objection that is ruled upon by the trial judge to preserve an issue for appellate review," and issues not objected to "may not be raised for the first time on appeal").

While the State did make one hearsay objection during Dr. Susan Knight's testimony, it went only to the admission of her report, not to any of the testimony or opinions she offered regarding the details or the psychological impact of the abuse. App. 2778–79. The PCR Judge noted that "a great deal of the hearsay that is in here [the report] has already been testified about by the previous expert witness . . . . [I]t's already been admitted without objection." App. 2786. However, he did sustain the State's objection. App. 2787. Two things cementing the waiver of even this lone objection then occurred. First, Dr. Knight testified in detail as to the specifics of the abuse inflicted on Finklea. App. 2787–824. Counsel for the State made no hearsay objections

[5] It is also not evident that the State's argument is properly before the Court, given that it was not specifically raised in the Petition's Statement of Issues on Appeal. *See* Rule 208(b)(1)(B), SCACR; *see also Buckson v. State*, 423 S.C. 313, 321, 815 S.E.2d 436, 441 (2018) (finding that State waived argument by failing to expressly include it in the Statement of Issues on Appeal).

at all during her testimony. Then, at the conclusion of the State's cross-examination of Dr. Knight, counsel for the State withdrew the original objection and stipulated to the report's admissibility. App 2865 ("In light of her testimony, I withdraw my objection to her report coming in."). Thus, not only was the evidence admitted (again) without objection, but the one argument advanced at the PCR hearing was not the same as the one contained in the Petition, which constitutes a second layer of forfeiture. And, to top it all off, the one objection the State did make was affirmatively and expressly withdrawn. *See State v. King*, 416 S.C. 92, 112, 784 S.E.2d 252, 262 (Ct. App. 2016), *rev'd on other grounds*, 424 S.C. 188, 818 S.E.2d 204 (2018) ("[W]here an objection is expressly withdrawn, it [the underlying issue] cannot be raised on appeal."); *Rosamund Enterprises, Inc. v. McGranahan*, 278 S.C. 512, 513, 299 S.E.2d 337, 338 (1983) (issue was not preserved for appellate review because counsel "expressly withdrew that objection").

The State's assertion that Finklea's ineffective assistance of counsel claim fails as a matter of law because only the hearsay testimony of Vogelsang and Knight supports it fares no better on the waiver front. Once again, no such objection was made at the PCR hearing. Neither at the conclusion of Finklea's case, nor at the end of the PCR hearing, did the State make the necessary motion for a directed verdict or summary judgment on the basis that Finklea had failed to present any competent evidence supporting his claim. App. 3024–26. For this additional reason, the State has failed to preserve the arguments essential to its request for certiorari. *Epting v. Brumble*, 264 S.C. 114, 116, 212 S.E.2d 711, 712 (1975) (sufficiency of the evidence argument could not be raised on appeal because no motion for a directed verdict was made in the trial court); *Evans v. Wabash Life Ins. Co.*, 247 S.C. 464, 466, 148 S.E.2d 153, 153 (1966) ("An appropriate motion in the trial court after all of the evidence is in is necessary to preserve an issue as to the sufficiency of the evidence for review by this court").

The State only got around to making this argument long after the PCR hearing in its Rule 59(e) motion. This is much too little and way too late. The law in this State is clear that a party, even the State (to whom normal rules of error preservation also apply), may not raise an issue for the first time in a post-trial motion. *See, e.g.*, *C.A.H. v. L.H.*, 315 S.C. 389, 392, 434 S.E.2d 268, 270 (1993) (holding that a party cannot attempt to backdoor error preservation using a Rule 59(e) motion for an issue it could have raised prior to judgment but did not); *Hickman v. Hickman*, 301 S.C. 455, 457, 392 S.E.2d 481, 482 (1990) (same).

In sum, the State's hearsay arguments are not properly before this Court for consideration and certiorari should be denied.

B. Hearsay is Admissible at the Penalty Phase of a Capital Trial and by Extension at a Capital PCR hearing.

Aside from waiver, the State's argument is meritless. The Supreme Court of the United States has explicitly held that a capital defendant may present hearsay at the penalty phase of a capital trial (and thus by extension at a capital PCR hearing where the evidence generally is offered to establish what could have been presented at the trial). *Sears v. Upton*, 561 U.S. 945, 950 n.6 (2010) ("[W]e have also recognized that reliable hearsay evidence that is relevant to a capital defendant's mitigation defense should not be excluded by rote application of a state hearsay rule."); *see also Green v. Georgia*, 442 U.S. 95, 97 (1979) (per curiam) ("Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause . . . ."). The proof is also in the pudding; in *Wiggins v. Smith*, 539 U.S. 510 (2003), for example, the death sentenced inmate relied exclusively on the report of a social worker, Hans Selvog, to prove the details of childhood abuse and neglect underlying his ineffective assistance of counsel. Selvog, a licensed social worker who was qualified as an expert witness at Wiggins' state post-conviction hearing, testified "concerning an

elaborate social history report he had prepared containing evidence of the severe physical and sexual abuse petitioner suffered at the hands of his mother . . . ." *Id.* at 516. In finding that Wiggins had established both deficient performance and prejudice, the Court relied upon Selvog's testimony, based on conversations with Wiggins and members of his family, that "Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother." *Id.* at 535. Similarly, in *Council v. State,* 380 S.C. 159, 166, 670 S.E.2d 356, 359 (2008), this Court relied on similar evidence of abuse and family dysfunction presented by Marjorie Hammock, a forensic social worker, who testified ("based on her investigation") regarding abuse, poverty and mental illness. *See also Von Dohlen v. State*, 360 S.C. 598, 606, 602 S.E.2d 738, 742 (2004) (in finding ineffective assistance of counsel claim meritorious this Court relied on testimony of psychiatrist who testified at the PCR hearing regarding applicant's mental illness resulting from a "physically abusive childhood"). Thus, the State's argument is fundamentally at odds with settled precedent and established capital trial and post-conviction practice.[6]

Finally, the State's argument rings especially hollow in this case. The State's primary complaint regarding the use of expert hearsay is that it was not afforded the opportunity to cross-examine members of Finklea's family who provided details of the abuse to Ms. Vogelsang and Dr. Knight. Pet. 9–10, n.3. However, as the State acknowledges, most of these individuals were present throughout Finklea's PCR hearing. *Id.* If counsel for the State had any doubt as to the bona fides of the information they provided to Finklea's expert witnesses, they were free to put the family members on the witness stand, place them under oath, and ask them questions. All that

[6] Furthermore, if this Court were to adopt the State's position, which, given *Sears*, *Green*, and *Wiggins*, it cannot do, the time and expense repercussions would be enormous. If capital defense trial and post-conviction teams were required to call as a witness every person interviewed by defense mitigation experts, trials and PCR hearings would be much longer and significantly more expensive.

was needed were the following words: "Your honor, the State calls . . . ." Having chosen to forego that opportunity at the PCR hearing, the State's argument on appeal rings especially hollow.

In sum, the State's Petition should be denied because its primary argument for certiorari—that Finklea's claim fails because the evidence of abuse was supported only by inadmissible hearsay presented through by expert witnesses—is forfeited, meritless, and disingenuous.

II. The PCR Court's Considered Judgment that Ron Finklea was Denied his Sixth Amendment Right to the Effective Assistance of Counsel as a Result of Trial Counsel's Failure to Investigate and Present the Full Range of Available Mitigating Evidence Should not be Disturbed Because it is Grounded in a Straight-Forward Application of Settled Precedent to the Record Evidence.

A. Relevant Legal Framework

An inmate alleging ineffective assistance of counsel must first prove that: (1) trial counsel's performance was deficient; and, (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984); *Von Dohlen v. State*, 360 S.C. 598, 603, 602 S.E.2d 738, 740–41 (2004). In reviewing a PCR court's decision finding trial counsel ineffective, "an appellate court is concerned only with whether any evidence of probative value exists to support that decision." *Kolle v. State*, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). Thus, the question before this court is simply whether there is "any evidence" supporting the PCR court's findings of deficient performance and prejudice. In this case, the evidence is abundant.

The deficient performance legal framework is straightforward and well-established: Applicant must show that his trial counsel's performance was objectively unreasonable. *Strickland*, 466 U.S. at 688. Although courts generally owe deference to trial counsel's reasonable and informed strategic judgments, trial counsel's decisions are objectively unreasonable when they do not adhere to "prevailing professional norms." *Id.* at 688–89. In capital cases such as this one, prevailing professional norms demand that trial counsel make "efforts to discover *all reasonably*

available mitigating evidence" in preparation for the sentencing phase. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *see also Council v. State*, 380 S.C. 159, 171–73, 670 S.E.2d 356, 362–63 (2008). Accordingly, counsel must "conduct a thorough investigation of the defendant's background." *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000). A capital defendant's family and social history are important avenues of investigation, for they often provide powerful sources of mitigation that can bear on the jury's appraisal of a defendant's moral culpability for sentencing purposes. *See Rompilla v. Beard*, 545 U.S. 374, 393 (2005); *Wiggins*, 539 U.S. at 535; *Weik v. State*, 409 S.C. 214, 234, 761 S.E.2d 757, 767; *Council*, 380 S.C. at 178, 670 S.E.2d at 366. To fulfill this mandate, counsel—while not required to "scour the globe on the off chance something will turn up," *Rompilla v. Beard*, 545 U.S. at 383—must exercise "reasonable professional judgment." *Porter*, 558 U.S. at 40. Counsel's investigation is unreasonable as a matter of law when they "ignore[] pertinent avenues for investigation of which he [or she] should have been aware." *Id.*

Thus, trial counsel's penalty phase investigation is unreasonable if counsel fail to pursue "red flags" that would have led a reasonably competent attorney to investigate further. *See Rompilla*, 545 U.S. at 390–91 (finding deficient performance where counsel failed to investigate potential mitigating information contained in the record and the investigation that counsel had already conducted); *Wiggins*, 539 U.S. at 524 (finding deficient performance where trial counsel "abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources"); *Council*, 380 S.C. at 173, 670 S.E.2d at 363 (holding that even though trial counsel had "limited information," counsel should have been "on notice that . . . additional investigation[] could potentially yield powerful mitigating evidence"). The duty to conduct a reasonable investigation remains even if counsel is working

with a client or a client's family who are not particularly helpful or who suggest there is no mitigation of a certain topic available. *Rompilla*, 545 U.S. at 377, 381.

Though trial counsel has some leeway to make strategic decisions regarding the mitigation investigation, those decisions must be conscious and informed. *Weik*, 409 S.C. at 236, 761 S.E.2d at 768 ("Decisions made in ignorance of relevant, available information cannot be characterized as strategic."). As the Supreme Court made clear in *Wiggins*, there is a difference between a *strategic decision* not to investigate mitigating evidence and a *failure* to investigate mitigating evidence that results from trial counsel's "inattention." 539 U.S. at 526. Additionally, even if trial counsel's decision not to pursue mitigating evidence is purportedly "strategic," that decision is only reasonable insofar as it is supported by a reasonable underlying investigation. *Strickland*, 466 U.S. at 690–91; *Von Dohlen*, 360 S.C. at 607, 602 S.E.2d at 743.

The prejudice inquiry is also firmly settled, asking if there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Von Dohlen*, 360 S.C. at 603, 602 S.E.2d at 740–41. When trial counsel's deficient performance occurred in connection with the penalty phase of a capital trial, a reviewing court asks whether there is a reasonable probability that the sentencer would have determined that "the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; *Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 823 (1998). In making that determination, a court "reweigh[s] the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534; *Weik*, 409 S.C. at 233, 761 S.E.2d at 767. And, in doing so, courts must not only consider the mitigation evidence the jury did (and did not) hear, but also whether the new evidence "reduced the ballast on the aggravating side of the

scale." *Porter*, 558 U.S. at 42. After engaging in the constitutionally required reweighing, prejudice exists if "there is a reasonable probability that at least one juror would have struck a different balance" on the question of life or death. *Wiggins*, 539 U.S. at 536; *Weik*, 409 S.C. at 233, 761 S.E.2d at 767.

B. Trial Counsel's Mitigation Investigation was Unreasonable

After hearing the PCR evidence regarding the scope and sources of trial counsel's mitigation investigation, reviewing the trial transcript to identify the mitigation case the jury heard, and then taking into consideration the information developed by PCR counsel regarding the horrific abuse Finklea endured and its debilitating psychological effects, Judge Keesley found that trial counsel's performance was objectively unreasonable. This finding is well-supported by the record.

The PCR Court faithfully followed *Wiggins*, *Rompilla* and the relevant decisions of this Court discussed above in finding that trial counsel's mitigation investigation deprived the jury of powerful mitigating evidence. This failure was not the result of an informed strategic decision, or (as the State argues) the reluctance of the witnesses to disclose information regarding the details of the systematic abuse inflicted on Finklea, but rather by an inadequate investigation that ignored or failed to capitalize on "red flags" indicating that there was much more mitigation to be mined. As the PCR Court found, Investigator McDougall's initial conversations with Finklea's ex-wife Cherena, and with Finklea himself, provided ample incentives to conduct a probing analysis of his life history. App. 3039–40. But instead, nothing happened for several years, and then, the effort was minimal: a group interview by Soltis with family members that included his mother (and the failure to follow-up a comment that Finklea had a "rough life"); a short stint in Finklea's hometown

by the mitigation investigator; and Soltis' failed attempt to interview Cherena.[7] The PCR Court correctly concluded that "trial counsel was obligated to conduct a more thorough investigation." App. 3059.

The PCR Court also relied upon several other considerations in finding deficient performance. First, trial counsel failed to adequately consult with Finklea's treating psychiatrist, Dr. Cherry. Dr. Cherry had a long-standing relationship with Finklea, yet trial counsel failed to adequately interview her pre-trial and were clearly caught off guard by, and did not follow up on, the vague reference to abuse she made during her testimony. App. 3057–58.[8] The PCR Court was also influenced by the fact that trial counsel met infrequently with Finklea himself, fostering distrust which hampered his willingness to disclose details of the abuse. But, contrary to the State's assertion in the Petition (Pet. 16–17), the PCR Court did not ignore the Supreme Court's decision in *Morris v. Slappy*, 461 U.S. 1 (1983) (holding that there is not a right to a meaningful attorney-client relationship), but rather made the much more common sense observation, supported by ample precedent, that "it was especially necessary to build a relationship in order to uncover the trauma asserted here because abuse victims will do 'anything not to talk about [their trauma]' either out of shame, to avoid being disbelieved, or to avoid reopening old wounds." App. 3059 (alteration in original).

[7] The State's assertion the meeting did not occur because Cherena was not cooperative is belied by the record. There is no evidence as to why the meeting did not occur; just that it did not happen. And there is no other evidence suggesting Cherena was uncooperative; she spoke to McDougall early on, attended the trial, and, again, disclosed to Dr. Maddox that Finklea had been badly abused by his mother.

[8] The PCR Court also found that trial counsel's request that the trial judge charge the jury regarding the statutory mitigating circumstances regarding mental state at the time of the offense—which admitted her surprise at Dr. Cherry's fleeting mention of abuse—foreclosed any argument that the failure to investigate and present mitigation regarding Finklea's life history was strategic. App. 3060–61. Armstrong also testified at the PCR hearing that she was not even aware of the abuse until Dr. Cherry's testimony, and that had she known about the details and psychological impact of the abuse, she definitely would have presented that evidence. App. 3010. 3013–14.

All of the PCR Court's findings regarding trial counsel's shortcomings were grounded not only in the record evidence but established prevailing professional norms. Trial counsel acknowledged that they were aware of their duty to investigate all aspects of Finklea's life history in order to be able to present a robust mitigation case; a duty that was highlighted by their well-founded belief that Finklea would almost certainly be found guilty of the underlying offenses. App. 2583, 2971–72. The record makes clear, however, that they failed in their Sixth Amendment duty "to discover *all reasonably available* mitigating evidence." *Wiggins*, 539 U.S. at 524; *see also Council*, 380 S.C. at 171–73, 670 S.E.2d at 62–63. And their investigation was unreasonable as a matter of law because they "ignore[d] pertinent avenues for investigation" of which they were or should have been aware. *Porter*, 558 U.S. at 40. In sum, the first prong of the *Strickland* standard was clearly satisfied.

C. Trial Counsel's Failure to Investigate Was Prejudicial

In finding that the prejudice prong of *Strickland* was satisfied, the PCR court noted that "extensive precedent at both the federal and state levels recogniz[es] that evidence of a defendant's history of trauma and his mental health status at the time of the murder is critical in the mitigation stage of a death penalty case." App. 3062. The Court was clearly correct. *See, e.g.*, *Rompilla*, 545 U.S. at 391–93 (finding prejudice where defense counsel failed to uncover evidence that defendant's parents were "severe alcoholics" who "fought violently," and that defendant's father "beat him when he was young with his hands, fists, leather straps, belts, and sticks"); *Wiggins*, 539 U.S. at 534–35 (finding prejudice where defense counsel failed to uncover evidence of "severe privation and abuse in the first six years of [Wiggins'] life while in the custody of his alcoholic, absentee mother," along with "physical torment, sexual molestation, and repeated rape during his subsequent years in foster care"); *Williams*, 529 U.S. at 398 (finding prejudice where defense

counsel failed to present "the graphic description of Williams' childhood, filled with abuse and privation"); *Weik*, 409 S.C. at 238, 761 S.E.2d at 769 (finding prejudice where defense counsel failed to present testimony containing "graphic and detailed accounts of Petitioner's abusive and dysfunctional childhood, saturated with violence and military fantasies").

In light of this precedent and the evidence of horrific abuse and its psychological effects detailed at the PCR hearing, the PCR Court came to the only reasonable conclusion: "there is a reasonable probability that absent [counsel's] errors at least one juror would have believed that life imprisonment was the appropriate punishment." App. 3064. The PCR court further noted that the inconsistent and incomplete nature of the minimal trauma evidence actually presented at sentencing opened the door for the State to argue (falsely) that Finklea had manipulated the witnesses who testified to that trauma during the sentencing proceeding. Because only Dr. Cherry and Finklea's first wife Ms. Roland gave any testimony about Finklea's history of trauma, and because their testimony was so vague and nonspecific, the State was able to "seize[] upon . . . the inconsistency of their testimony with what was stated by other defense witnesses." App. 3062. This reinforced the State's theory that Finklea was a manipulative person: "[H]is ex-wife and that Doctor Cherry . . . they were saying he said something about bad stuff happening to him in Alabama. I don't know what that was about because he brought his family in to testify that good things happened to him. Is he manipulating people here?" App. 2301–02. The State's manipulation theory was central to its argument that Finklea was not deserving of mercy, and thus the gaps in defense counsel's mitigation presentation not only hampered Finklea's affirmative case for life imprisonment, but also bolstered the State's argument for the death penalty. In short, trial counsel's deficient performance put two extra thumbs on the scale for death.

The State contends that the PCR court "failed to consider the totality of the evidence within the record" in finding prejudice. Pet. 20. This argument mischaracterizes the *Strickland* prejudice analysis and fails to call into legitimate question PCR Court's considered findings of fact and conclusions of law. First, the State's reliance on *Wong v. Belmontes*, 558 U.S. 15 (2009), for the principle that "more evidence is not always best" is non-controversial but misplaced. Pet. 21. In *Belmontes*, defense counsel faced a very specific challenge: "Substantial evidence indicated that Belmontes had committed a prior murder, and the prosecution was eager to introduce that evidence during the penalty phase of the [current] trial." *Belmontes*, 558 U.S. at 17. Further complicating defense counsel's task, "Belmontes had not been shy about discussing the [prior] murder," and in fact had bragged about it to multiple people. *Id.* at 17–18. In order to prevent evidence of the prior murder from being admitted in rebuttal, Belmontes' lawyer made a strategic decision to construct his mitigation arguments in a way that would ensure the exclusion of that highly aggravating evidence. *Id.* at 18. Furthermore, the exclusion of the additional mitigating evidence in *Belmontes* was not particularly prejudicial in its own right, even without considering the aggravating evidence that would come along with it, because it was largely cumulative to the humanizing evidence that trial counsel did present. *Id.* at 22–23.

This case is distinguishable from *Belmontes* in every meaningful way. First, defense counsel's choice in *Belmontes* was a conscious, strategic choice, and a well-reasoned one at that. *See id.* at 28. Finklea's lawyers, on the other hand, admitted that they made no strategic decision not to present information about Finklea's childhood trauma; they simply did not know about the abuse. App. 3013–14. Second, the additional mitigating evidence in this case did not carry with it any additional aggravating evidence of the sort that was dispositive in *Belmontes*. Finklea had no criminal history prior to this offense, and the evidence of his childhood trauma and subsequent

mental illness could do nothing but help explain his mental state leading up to and at the time of the offense. Finally, and most importantly, the additional mitigating evidence presented at the PCR hearing was nothing like the cumulative evidence at issue in *Belmontes*. As the PCR court noted, the evidence of Finklea's childhood trauma is not a "fancier" or "more elaborate" version of the evidence already presented; rather, it "is both quantitatively and qualitatively different from the evidence presented at trial." App. 3063.[9]

Several other points made in the State's Petition need to be briefly addressed. First, in a fundamentally misguided attempt to diminish the weight of the substantial new mitigation evidence presented at the PCR hearing, the State contends that "the hearsay tale of abuse offered squarely conflicts with the existing sworn testimony of the family member witnesses who testified at the sentencing hearing." Pet. 23. Thus, in the State's view, prejudice cannot be shown because at a new sentencing hearing, "presenting this alleged evidence would subject every family member witness to a substantial degree of impeachment." *Id.* Not only is this not true as a factual matter—the evidence that Finklea was severely abused and profoundly traumatized is not inconsistent with the trial evidence that he was at heart a good person and a good soldier—it not relevant to the *Strickland* prejudice analysis.

Under *Strickland*, a defendant establishes prejudice if he or she "show[s] 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 (emphasis added). The analysis, therefore, turns on the *actual* result of the *original* proceeding, not the hypothetical result of a future

[9] The PCR Court was fully cognizant of this Court's decision in *Jones*, 332 S.C. at 338–39, 504 S.E.2d at 826–27, declining to find prejudice because "the 'new' evidence [was] the same as the 'old' evidence." App. 3063. However, the PCR Court determined that the evidence in this case, the here was "both quantitatively and qualitatively different from the evidence presented at trial." *Id.* As the PCR court noted, defense counsel's failure to uncover and present this evidence prevented the jury from hearing "any details about the physical, sexual, and emotional trauma inflicted upon [Finklea]." *Id.*

proceeding. The State maintains that the PCR Court should have considered "the credibility and weight" (Pet. 23) of possible conflicting testimony in a possible resentencing proceeding that has not yet occurred. This is not only beyond this Court's (or any other court's) ability, it is also not what the law requires (or permits).

Finally, the State contends that a "court must conclude whether ***a jury*** would have rejected death after weighing the entire body of mitigating evidence against the entire body of aggravating evidence." Pet. 21 (emphasis added). Again, this is inconsistent with established precedent. A court does not have to determine that every juror would have been swayed after hearing the evidence of the abuse and its psychological effects. Rather, the court is required to find prejudice if (and only if) "there is a reasonable probability that at least ***one juror*** would have struck a different balance." *Weik*, 409 S.C. at 233, 761 S.E.2d at 767 (quoting *Wiggins*, 539 U.S. at 537) (emphasis added); *accord* S.C. Code Ann. § 16-3-20(C) ("The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided."). The PCR Court gave appropriate weight to the circumstances of the underlying murder, which Finklea acknowledges are—as is true of most murders—gruesome. App. 3035–36. But the mitigating evidence presented at the PCR hearing is also very powerful, and as the PCR Court concluded, draws a humanizing and sympathetic portrait of Finklea that very likely would have led one or more jurors to choose life over death. App. 3055–56.

CONCLUSION

For the reasons set forth in this Return, the PCR Court's finding that Finklea was deprived of his Sixth Amendment right to the effective assistance of counsel is supported by ample, probative evidence. The State's Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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January 7th, 2020

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

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

The undersigned hereby certifies that a copy of the Respondent's Return was served by first class mail, postage prepaid, this 7th day of January 2020, upon the following:

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Jill B. Abernethy