IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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S.C. SUPREME COURT

Appellate Case No. 2018-001499

The Honorable Edgar Dickson, Circuit Court Judge

William O. Dickerson……Petitioner,

v.

State of South Carolina……Respondent.

PETITION FOR REHEARING

Pursuant to SCACR Rule 221, Petitioner respectfully asks this Court to rehear his case. Respectfully, this Court has overlooked or misapprehended issues of law that militate in favor of this Court granting his petition. Respectfully, the issues presented in this capital case are so significant that this Court should grant certiorari and allow additional briefing and argument on the claims contained herein.

I. Petitioner's *Batson* Claim

After he filed his petition for a writ of *certiorari*, but before Petitioner filed his reply to the State's return to his petition, the Supreme Court of the United States decided *Flowers v. Mississippi*, ___ U.S. ___, 139 S. Ct. 2228 (2019). *Flowers* "br[oke] no new legal ground" when the High Court held "all of the relevant facts and circumstances taken together establish that the trial court committed clear error in concluding that the State's peremptory strike of black prospective juror Carolyn Wright was not 'motivated in substantial part by discriminatory intent.'" *Id.,* and

2235 (quoting *Foster* v. *Chatman*, 578 U. S. ___, ____, 136 S.Ct. 1737, 1754 (2016) (internal quotation marks omitted)). Although breaking no new legal ground, *Flowers* succinctly summarizes Supreme Court jurisprudence applying *Batson v. Kentucky*, 476 U.S. 79 (1986). *Flowers* reminded the Court's

> precedents allow criminal defendants raising *Batson* challenges to present a variety of evidence to support a claim that a prosecutor's peremptory strikes were made on the basis of race. For example, defendants may present:
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> - statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
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> - evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case;
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> - side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
>
> - a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing;
>
> - relevant history of the State's peremptory strikes in past cases; or
>
> - other relevant circumstances that bear upon the issue of racial discrimination.

139 S. Ct. at 2243 (citing *Foster*, *Snyder v. Louisiana*, 552 U.S. 472 (2008), *Miller-El v. Dretke*, 545 U.S. 231 (2005) and *Batson*). As set forth in the petition for a writ of *certiorari*, the PCR court's order of dismissal departs from *Batson* jurisprudence in six critical respects: (1) concluding "[a]ny reference to unrelated cases will never affect, inform, or alter the record made at the 2009 trial as to the prosecution's reasons for the strikes, (2) deeming "irrelevant" the judicial finding that Solicitor

Wilson violated *Batson* in Jelal Beyah's 2004 jury trial, (3) excluding from consideration "'The Prosecutor's Handbook' and other prosecutorial training materials," (4) not considering the criminal histories of the jurors, (5) "view[ing] with disfavor" the statistical evidence based in large part on *Thompson v. Aiken*, 281 S.C. 239, 325 S.E.2d 110 (1984), which was decided prior to *Batson*, and (6) failing to consider together all of the relevant facts and circumstances. This Court endorsed the PCR court's departure form *Batson* jurisprudence when it declined to consider this case.

To summarize, as Petitioner argued extensively in his petition for writ of certiorari, trial counsel rendered ineffective assistance of counsel by failing to call attention to the fact that the Solicitor's ostensible reasons for removing Georana Gadsden were not supported by the record. As further detailed in Petitioner's cert petition, trial counsel lacked access to the same juror criminal records possessed by the Solicitor. However, counsel failed to argue that the Solicitor's reasons for removing Juror Gadsden was belied by the factual record that counsel was aware of at the time of the strike.

Georana Gadsden, Juror 101, was 36 years old at the time of trial, and employed as a nurses' aid. During individualized questioning, Gadsden indicated that she was a "number three" juror. App. 885, l. 17. She explained that to impose a death sentence, she "would need to know all the facts." App. 887, l. 15. She reiterated that there were circumstances where she could consider imposing a death sentence. App. 887, ll. 5-9. She understood that murder was the intentional killing of someone,

and not an accident, or someone getting angry and killing. She understood that murder requires malice. App. 892, ll. 10-22. She reaffirmed yet again that she was a "number three" juror. App. 893, ll. 1-6.

The Solicitor was allowed to approach the potential juror and asked Ms. Gadsden about her questionnaire. She claimed that she could not read her handwriting on question #47 regarding her opinion of the death penalty. App. 897, l. 14- 898, l. 10. Ms. Gadsden reiterated that she was a "type three" juror and that she would have to know all of the facts. App. 898, l. 8-10. Ms. Gadsden also stated that she had not thought much about the death penalty. App. 898, ll. 11-13.

The Solicitor then asked the juror about a comment she had made to the bailiff about working that night. The Solicitor tried to get details about her work schedule for the next couple of weeks. The Solicitor asked her if it would cause her hardship to serve on the jury. Gadsden unequivocally stated to the Solicitor that she could get off work for the next couple of weeks to serve on the trial if selected App. 899, ll. 8-24. She stated that she could have her schedule rearranged. App. 900, ll. 1-8.

The Solicitor then continued questioning her about her thoughts on the death penalty, and about whether she thought life without parole was "a pretty stiff sentence." App. 900, l. 9- 901, l. 3. After repeated needling by the Solicitor, Ms. Gadsden stated she would have difficulty signing the death verdict. App. 902, ll. 15-20. Ms. Gadsden then reiterated that she could set aside her personal feelings and sign her name to a death warrant after looking at all aspects of the case. App. 903, ll.

1-20. The Solicitor then again questioned her on malicious killing. App. 903, ll. 21-844, l. 20.

The Solicitor continued—this time asking Ms. Gadsden if she could "put a man to death." App. 905, ll. 12-16. Then she asked her for specific situations where she could impose the death penalty. App. 905, ll. 17-25. After questioning Ms. Gadsden yet again about whether she could impose the death penalty, the judge sustained defense counsel's objection to the Solicitor's question, and remarked, "She's answered that question. She said she could." App. 906, ll. 1-7.

The Solicitor kept at it—

> BY SOLICITOR WILSON:
>
> Q: The example you volunteered, that you gave, is that the only example that you can think of?
>
> MR. BLOOM: Objection.
>
> THE COURT: I will sustain the objection. I am not going to allow you to go any further. She volunteered it, you didn't ask it but I'm not going to allow you to go any further."

App. 906, ll. 10-18.

The Solicitor challenged her for cause based on her "inconsistent answers" but the judge overruled her. App. 908, l. 8- 909, l. 12.

During the *Batson* hearing, the judge asked the Solicitor to provide her "race-neutral or gender-neutral" reason for striking her. App. 2178, ll. 21.

The Solicitor responded that Ms. Gadsden worked from 11:00 to 7:00 and that "she had an issue if it would conflict with her employment." App. 2180, ll. 1-2. She also stated that she was a single mother with two children and that she would be

missing work throughout the week. And then she said that at one point she said she could consider the death penalty, but at another point she could not vote for it. App. 2179, ll. 3-8.

The Court overruled the *Batson* objection. App. 2179, ll. 9-22.

The Solicitor's purported reasons for striking Ms. Gadsden supports an inference of racial pretext. The Solicitor's "reasons" for striking Ms. Gadsden are not supported by the record. Ms. Gadsden was unequivocal in her responses that there would **not** be a conflict between her work schedule and serving. *See Castellanos v. Small*, 766 F.3d 1137 (9th Cir. 2014) (granting habeas relief where prosecutor's factually erroneous reason could be construed as pretextual); *Ali v. Hickman*, 571 F.3d 902 (9th Cir. 2009) (court reversing and remanding case where state mischaracterized potential jurors' views); *McClain v. Prunty*, 217 F.3d 1209, 1221 (9th Cir. 2000) ("Where the facts in the record are objectively contrary to the prosecutor's statements, serious questions about the legitimacy of a prosecutor's reasons for exercising peremptory challenges are raised." (citing *Caldwell v. Maloney*, 159 F.3d 639, 651 (1st Cir. 1998)); *Addison v. State*, 942 N.E.2d 925 (Ind.2012) (noting that the state mischaracterized prospective juror's responses to questioning, and given the state was "concerned" about an issue, they conducted no further questioning on it);

And as for the claim that she was a "single mother with two children and that she would be missing work throughout the week"—the Solicitor never asked a single question of Ms. Gadsden about this. For all the Solicitor knew, Ms. Gadsden may have family members who can keep the children, or maybe Ms. Gadsden has work-

leave saved up, or maybe Ms. Gadsden is wealthy and could afford to take a week off from work. The Solicitor seems to have simply assumed that Ms. Gadsden would have financial difficulty given her status as a "single mother" that is unsupported by the record. *Cf. Miller-El II*, 545 U.S. at 246 (discrediting the prosecutor where he "asked nothing further about the influence his brother's history might have…as [he] probably would have done if the family history had actually mattered"); *and see Harris v. Hardy*, 680 F.3d 942 (7th Cir.2012) (raising "loss-of-income" reason for striking juror when juror never stated he was concerned about the loss of income contributed to finding that Government engaged in purposeful discrimination). And her claim that she was concerned about her equivocation on the issue of whether she could impose the death penalty cannot be reconciled with the Solicitor's acceptance of juror No. 306, Rebekah Zivak, or No. 221, Susan Mullen, who both expressed stronger reservations about imposing the death penalty than Ms. Gadsden.

Rebekah Zivak stated on her questionnaire that she would prefer that the death not be an option. In fact, she stated: "I would prefer that it was not an option but know that I cannot understand the emotions of people that are victims of horrible crimes." App. 4605. Susan Mullen disclosed on her questionnaire that she did not believe in the death penalty: "I do not believe in the death penalty. Life in prison without parole is a better solution." App. 5048. Melissa Fields-Copeland's, another African-American potential juror struck by the Solicitor, answer to this question on the questionnaire was, "No opinion." App. 4875. *See McClain v. Prunty,* 217 F.3d 1209, 1224 (9th Cir. 2000) (concluding that *Batson* was violated where two of six

proffered race-neutral explanations were "pretextual based upon comparisons of voir dire responses by non-black jurors who were seated without objection by the prosecutor," and other four were contrary to the facts); *Jones v. Ryan*, 987 F.2d 960 (3rd Cir. 1993) (rejecting the prosecutor's proffered race-neutral reason for striking black jurors where the prosecutor did not apply the same rationale to similarly-situated white jurors).

Additionally, the Solicitor's questioning of Ms. Gadsden appears to have been calculated to produce answers to serve as a basis for her disqualification. The Solicitor repeatedly asked Ms. Gadsden about her work schedule even though other jurors also had busy work schedules. Charles High, a white male seated on the jury, for example, disclosed on his questionnaire that he held **two** jobs— he works in golf marketing at Charleston Golf, Inc. and also holds a second job at the Governor's House Inn. He also noted that he is the primary wage earner for his family. App. 4810-11. Ms. Gadsden did **not** note on her questionnaire that she was the primary wage earner. And also, Garrett Waterman, another white male, worked as a manager of Andolini's Pizza, a restaurant that also surely involved working nighttime hours. App. 4945-52. The Solicitor did not express any concern that Mr. High or Mr. Waterman might have employment conflicts with jury duty. *Cf. United States v. Atkins*, 843 F.3d 625, 637 (6th Cir. 2016) ("[A] comparative analysis shows that the government did not express concerns about the ability of similarly-situated white jurors to focus throughout the trial despite their large number of children and inconsistent work history").

The Solicitor's attempt to elicit a basis for removing Ms. Gadsden is nowhere more apparent than when she pointedly asked her (and did not ask anyone else) whether she could "put a man to death." Clearly this question was calculated to make Ms. Gadsden pause and generate equivocation that she then used to justify her strike of her. *See Miller-El v. Dretke* (Miller-El II), 545 U.S. 231, 255 (2005) ("Some of these prefatory statements were cast in general terms, but some followed the so-called graphic script, describing the method of execution in rhetorical and clinical detail. It is intended, as Miller-El contends, to prompt some expression of hesitation to consider the death penalty and thus to elicit plausibly neutral grounds for a peremptory strike of a potential juror subjected to it, if not a strike for cause"). The Solicitor's strike of Ms. Georana Gadsden violated Mr. Dickerson's right to an impartial jury and further violated Ms. Gadsden's rights to equal protection under the law:

> Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury, *Strauder v. West Virginia,* but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice. (quoting *J.E.B. v. Alabama ex rel. T. B.,* 511 U.S. 127, 128 (1994)) (internal citations omitted).

Miller-El v. Dretke, 545 U.S. at 237-38.

The Solicitor's justifications for striking Ms. Georana Gadsden were pretextual and violated *Batson*.

Trial counsel should have urged a comparative juror analysis when he objected to the Solicitor's strike of Ms. Gadsden. He failure to do so rendered his performance deficient. *Strickland v. Washington*, 446 U.S. 668 (1984); *Miller-El v. Dretke*, 545

U.S. 231 (2005). The PCR court's adjudication of this issue was wrongly decided and this Court should review the case. This Court should grant Petitioner's petition for rehearing and allow additional briefing and argument on this claim.

Petitioner's petition for a writ of certiorari also raised a significant issue when he showed that the Solicitor in his case has a history of striking qualified African-American jurors from her cases and that she did so in this case. In his cert petition, Petitioner showed that this solicitor struck at least one qualified African-American juror in Colin Broughton's capital trial. Petitioner showed this Court that she improperly struck a juror in Jalal Beyah, a non-capital defendant's trial. Petitioner also offered evidence that the South Carolina Prosecution Coordination Commission's programs systematically teach young prosecutors how to avoid "being caught" violating *Batson* and that these materials were used by the solicitor's office. And then, significantly, Petitioner provided this Court a statistical study conducted by two professors at Michigan State University that indicated a significant racial disparity in this solicitor's striking of African American jurors throughout her career and in this case. The PCR judge in this case erred when he relied on *Thompson v. Aiken*, 281 S.C. 239, 315 S.E.2d 110 (1984), a pre-*Batson* case, to hold that statistics are not relevant to an analysis of Petitioner's Batson claim. The PCR court's holding is demonstrably wrong, and this Court should rehear Petitioner's case. The issues raised by Petitioner in his cert petition are fundamental to the integrity of our justice system in South Carolina. Additionally, the United States Supreme Court has recently evidenced its continued commitment to the principles announced in *Batson*.

This Court should rehear Petitioner's case and express its continuing commitment to racial equality.

II. Petitioner's Lead Poisoning Claim

Additionally, this Court should grant Petitioner's petition for writ of certiorari and review Petitioner's claim. As this Court recognized long ago, "capital trials today, as never before, present a myriad of complexities heretofore unknown." *Bailey v. State,* 309 S.C. 455, 457, 424 S.E.2d 503, 505 (1992).

> The attorney must be conversant with constantly *new* interpretations of constitutional law by not only the United States Supreme Court, but by courts of all jurisdictions, both Federal and State. Moreover, in preparation for trial, he must investigate the facts and circumstances of the alleged crime with no less vigor and thoroughness than the publicly compensated solicitor, who has at his disposal the entire array of state, county, and municipal law enforcement. Dramatic technological advances, such as the science of DNA (deoxyribonucleic acid) analysis, are employed by prosecutors, requiring defense attorneys to acquire special knowledge and retain expert witnesses…
>
> While the greater demands now made upon defense attorneys in the guilt phase are severe, it is in the sentencing phase that new and different issues, heretofore unknown, are introduced as a result of recent decisions of the United States Supreme Court. For example, in today's capital trial, the defendant is entitled to produce evidence concerning his childhood and family background in mitigation of his criminal conduct, so that the jury may impose life imprisonment as an alternative to the death sentence. In preparing this evidence the attorney must employ investigators in the course of thoroughly researching the defendant's entire life.

309 S.C. at 460-61, 424 S.E.2d at 506-07. *See also State v. Haight*, 649 N.E.2d 294, 309 (Ohio Ct. App. 1994) ("Because death is unique as a penalty, more is and should be expected of attorneys who undertake the responsibility to represent individuals who face the prospect of being executed").

In determining whether trial defense counsel provided ineffective assistance of counsel, pursuant to the Sixth and Fourteenth Amendments, this Court must apply the standards set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). Under *Strickland*, the defendant "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." *Id.* at 688.

> Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal Justice 4–1.1 to 4–8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides.

Id. at 688-89. *See also Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) ("We long have recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable ...."). The Supreme Court of the United States looks to the ABA Guidelines for Appointment and Performance of Counsel in Capital Cases ("ABA Guidelines") as evidence of the prevailing professional norms in capital cases. *See, e.g., Wiggins v. Smith*, 539 U.S. 510 (2003) and *Rompilla v. Beard*, 545 U.S. 374 (2005). The South Carolina Supreme Court "has adhered to the principles and analysis in *Wiggins* in determining whether counsel was ineffective in failing to thoroughly investigate potential guilt and penalty phase evidence." *Council v. State*, 380 S.C. 159, 171, 670 S.E.2d 356, 362 (2008) (citing *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007), *Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006), and *Von Dohlen v. State*, 360 S.C. 598, 605, 602 S.E.2d 738, 742 (2004)). The 2003 revision of the ABA Guidelines were in effect at the time of Mr. Dickerson's capital trial. "Counsel at every stage

have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." ABA Guideline 10.7. "The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented." ABA Guideline 10.7(2). During the penalty phase of a capital trial, counsel should select "[e]xpert and lay witness along with supporting documentation (e.g., school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s)." ABA Guideline 10.11(F)(2).

In assessing the investigation in *Strickland*, the Court stated that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation." Any decision to halt investigation must be assessed for reasonableness. *Strickland* at 690-91. When assessing the reasonableness of an investigation, it is necessary to consider not only the evidence already known to counsel, but also whether this evidence would lead a reasonable attorney to conduct further investigation. *Wiggins*, 539 U.S. at 527. *See also Council*, 380 S.C. at 173, 670 S.E.2d at 363 ("Even the limited information obtained should have put counsel on notice that Respondents background, with additional investigation, could potentially yield powerful mitigating evidence"). Counsel need not investigate every possible line of mitigating evidence regardless of how likely that evidence would be

to strengthen a mitigation case; however, a limited investigation must be supported by "reasonable professional judgments." *Wiggins*, 539 U.S. at 533.

Here, trial counsel unreasonably limited the investigation into Mr. Dickerson's early childhood exposure to lead. Dr. Needleman informed trial counsel that Mr. Dickerson's blood lead level of 9 micrograms per deciliter was high for his age and might have been higher when Mr. Dickerson was younger. Dr. Needleman asked trial counsel for more information, which was never provided even though it was uncovered during trial counsel's investigation. Information about lead levels in the inner-city neighborhoods where Mr. Dickerson grew up confirmed his ongoing exposure. Armon's ongoing exposure to lead was confirmed by his blood lead levels measured over time. With Mr. Dickerson's blood lead level and Armon's blood lead level, Dr. Canfield was able to plot Mr. Dickerson's blood lead level throughout his childhood. Dr. Canfield's calculations were based on results of scientific studies. Dr. Israelian identified evidence of Mr. Dickerson's early childhood exposure to lead in his social history records. The subtest results of Mr. Dickerson's Tara Hall IQ test allowed Dr. Israelian to identify patterns of strengths and weaknesses that were consistent with the neurotoxic effects of lead exposure. Trial counsel never provided these subtest results to a neuropsychologist for interpretation. App. 5850-51. Dr. Israelian's neuropsychological testing provided further evidence that Mr. Dickerson's brain was damaged by lead exposure. The permanent brain damage resulting from lead exposure also explains why Mr. Dickerson used cocaine is such large amounts. Because of changes in his brain chemistry, greater amounts of cocaine are required

for Mr. Dickerson to achieve a "high," thereby contributing to his cocaine psychosis at the time of the crimes. Trial counsel was deficient for failing to further investigate Mr. Dickerson's early childhood exposure to lead. *See Ard v. Catoe*, 372 S.C. at 332, 642 S.E.2d at 597 ("We find respondent proved that trial counsel should have further investigated and more thoroughly challenged the gunshot residue evidence."). *See also McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354 (2008) (counsel rendered ineffective assistance when she failed to investigate medical evidence contradicting the State's experts' testimony on the link between cocaine and stillbirth); *Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015) (finding trial counsel ineffective for not consulting expert to refute state's medical evidence).

Once the defendant asserting ineffective assistance of counsel has established counsel's failure to comply with the prevailing professional norms, he must affirmatively prove that this deficiency has prejudiced him. Specifically:

> The defendant must show that 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. The totality of the evidence must be considered in deciding whether the defendant was prejudiced by counsel's errors. All mitigating evidence that would have been presented, but for counsel's errors, should be weighed against the aggravating evidence presented at trial to determine whether the sentencer would have concluded a death sentence was not warranted. *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998). However, the test is not whether the sentencer could have heard all available mitigating evidence and still decided on a death

sentence. In other words, "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 466 U.S. at 694. Thus, "a defendant need *not* show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693 (emphasis added).

In determining prejudice, the Court must determine whether the undiscovered "mitigating evidence, taken as a whole, might well have influenced the jury's appraisal" of the defendant's culpability. *Rompilla*, 545 U.S. at 376 (quoting *Wiggins*, 539 U.S. at 538). "Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Williams*, 529 U.S. at 398. *See, e.g., Council*, 380 S.C. at 176, 670 S.E.2d at 365 (finding prejudice despite "overwhelming evidence" of guilt and six statutory aggravating factors because "there was very strong mitigating evidence to be weighed against the aggravating circumstances" that "may well have influenced the jury's assessment of . . . culpability"). Prejudice is established if "there is a reasonable probability that *at least one juror* would have struck a different balance" but for counsel's errors. *Wiggins*, 539 U.S. at 537 (emphasis added).

Here, even though Ms. Hammock and Dr. Cunningham provided limited testimony about William's blood lead level of 9 micrograms per deciliter at twelve years of age, the prosecution effectively neutralized that testimony because that reading at that age was not high enough to trigger further governmental monitoring. For PCR purposes, "That counsel conducted some investigation in general was not

enough; they were ineffective because they failed to conduct *any* investigation into a potentially mitigating condition despite the red flags." *Stokes v. Stirling*, No. 18-6, 2021 WL 3669570, at *7 (4th Cir. Aug. 19, 2021) (citing *Williams v. Stirling*, 914 F.3d 302, 315 (4th Cir.)). In *Williams*, "trial counsels' decisions and actions on issues unrelated to [fetal alcohol syndrome] *did* bear the hallmarks of effective assistance," but "counsel's investigation into potentially mitigating evidence of [fetal alcohol syndrome] failed to meet an objective standard of reasonableness." 914 F.3d at 313-14 (citing *Wiggins*, 539 U.S. at 534 (emphasis original)). William's childhood blood lead level—combined with Dr. Needleman's request for additional information—were red flags that required additional investigation.

As a result of trial counsel's unreasonably limited investigation, the jurors never learned that scientific research demonstrates that Mr. Dickerson's blood lead level was substantially higher when he was younger. The jurors did not learn about the scientific research in existence at the time of Mr. Dickerson's trial documented the neurotoxic effects of lead at levels below 10 micrograms per deciliter. The jurors additionally did not learn about how lead exposure damages the portions of the brain that control executive functioning, including the ability to control impulses and consider the consequences of conduct. Mr. Dickerson's early childhood exposure to lead provided context for his excessive cocaine use, thereby providing context to Mr. Dickerson's cocaine psychosis at the time of the crimes. The neurotoxic effects of early childhood exposure to lead would have provided the jurors with the information

necessary to impose a life sentence. *See Strickland, Wiggins, Rompilla*, *Council,* and *Ard, supra.*

The PCR court's order discussing Mr. Dickerson's early childhood exposure to lead does not dispute—but often ignores—the scientific evidence presented during the PCR hearing. The introductory section to this portion of the order makes two fundamental errors that influence the entire discussion of this claim. First, the order, App. 9365, incorrectly concluded "the PCR presentation was largely cumulative to the substance of the mitigation presented at trial." As discussed in this section and in Mr. Dickerson's post-hearing brief the presentation of mitigation evidence at trial did not diagnosis or conclusively establish Mr. Dickerson's early childhood exposure to lead. *See Wiggins* and *Williams, supra.*

Second, the order, at App. 9367-68, incorrectly concluded Mr. Dickerson's trial counsel, Jeffery Bloom, "reasonably decided not to more heavily base his mitigation presentation on childhood exposure to lead because Bloom could not uncover or produce enough evidence to make a more persuasive presentation that was presented on this subject." This conclusion is controlled by an error of law. Under the first prong of *Strickland v. Washington*, the defendant "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." 466 U.S. 668, 688 (1984). "The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Padilla v.*

Kentucky, 559 U.S. 356, 366 (2010) (internal quotations omitted). "If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy." *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015). *And see Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). "Decisions made in ignorance of relevant, available information cannot be characterized as strategic." *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014). As discussed, trial counsel abandoned the investigation into Mr. Dickerson's early childhood exposure to lead without providing all the relevant information to an expert for review. Trial counsel also unreasonably limited their investigation by not having a neuropsychologist review the medical and psychological records that were available.

The order at App. 9371 additionally errs by relying on Mr. Dickerson's lack of cooperation with Dr. Robert Deysach, a neuropsychologist retained by trial counsel, because Mr. Dickerson purportedly was not interested in helping build a mitigation case. Reliance on this fact is a "red herring" controlled by an error of law. Under the A.B.A Guidelines 10.7, trial counsel had a duty to conduct a mitigation investigation regardless of their client's wishes. Under A.B.A Guideline 10.11, trial counsel had an obligation to provide all of the material collected during the investigation to the appropriate expert. All of Dr. Canfield's PCR testimony was based on his review of the records available to trial counsel and reliance on scientific research existing at the time of Mr. Dickerson's trial. His opinion was not impacted by Mr. Dickerson's cooperation or lack of cooperation. Much of Dr. Marlyne Israelian's testimony relied

on records available to trial counsel that were not provided to Dr. Deysach for review. Trial counsel's failure to discover and present this information at trial resulted from their failure to provide this information to their expert witnesses, which was an unreasonable limitation of the mitigation investigation. *See Frierbruger, Ingle,* and *Weik, supra.*

The PCR court erred when it failed to acknowledge accepted scientific principles and methodology. *See, e.g., Hall v. Florida*, 572 U.S. ___, 134 S. Ct. 1986, 1995 (2014) (mandating states use "established medical practice" to determine whether a person is ineligible for the death penalty because of an intellectual disability).

The PCR court ignored multiple scientific studies—conducted throughout our Nation and the world—documenting children's blood lead levels at different ages and different stages of the developmental and growth process. Based on these studies, focusing on the results of the Cincinnati cohort, Dr. Canfield plotted Mr. Dickerson's blood levels throughout his childhood.

The record does not support the order's conclusion, at App. 9374, "Canfield's larger focus on concrete blood-lead levels and correlative evidence of neurotoxicity did not relate so much to [Mr. Dickerson] as it did to his younger brother Armon Dickerson." As stated above, based on these studies, focusing on the results of the Cincinnati cohort, Dr. Canfield plotted Mr. Dickerson's blood levels throughout his childhood. Armon Dickerson's blood lead levels, however, provides evidence

confirming the reliability of Dr. Canfield's testimony about Mr. Dickerson's blood lead levels.

The order, at App. 9375-76, states, "Canfield laid a comprehensive presentation regarding lead's absorbency into young bones and the negative effects of lead absorption. But this presentation does not make it more likely than not that, had it been given at trial, [Mr. Dickerson's] jury would have returned an alternative sentencing recommendation." This conclusion overlooks, not only the absence of such a presentation at Mr. Dickerson's jury trial, but also Dr. Canfield's testimony, based on the scientific method, about Mr. Dickerson's blood lead levels and Dr. Israelian's neuropsychiatric testing of Mr. Dickerson and her review of his childhood medical and psychological records.

This Court's order, at App. 9376-77, accepts the accuracy of Dr. Israelian's testimony but, at App. 9377-78, additionally concludes:

> Israelian's testimony fails to demonstrate that [Mr. Dickerson] suffered prejudice by the failure to have a neuropsychologist, or a developmental neuropsychologist, testify at trial. Bloom established at PCR that [Mr. Dickerson] would not comply with the neuropsychological testing required to garner this testimony. Without assistance by his client, this type of testimony was not at Bloom's disposal.

This conclusion overlooked significant portions of Dr. Israelian's testimony that was based on reviewing medical and psychological records that trial counsel never provided to Dr. Deysach. *See Frierbruger, Ingle,* and *Weik, supra.* Dr. Isrealian testified that these records contained a wealth of evidence documenting Mr. Dickerson's early childhood exposure to lead.

Trial counsel was deficient for not fully investigating Mr. Dickerson's early childhood exposure to lead and presenting that evidence during sentencing. Mr. Dickerson was prejudiced because the neurotoxic effect of early childhood exposure to lead would have provided the jurors with information leading to the imposition of a life sentence. This Court should grant Petitioner's Petition for Rehearing and allow additional briefing on this issue.

CONCLUSION

Respectfully, Petitioner asks this Court to grant his Petition for Rehearing.

Respectfully submitted,

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