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APPENDIX A

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

C.A. No. 2010-CP-23-9792

[Filed July 24, 2013]

Charles Christopher Williams,	)
	)
Petitioner,	)
	)
v.	)
	)
State of South Carolina,	)
	)
Respondent.	)
	)

ENTERED COMPUTER

ORDER OF DISMISSAL

Before the Court is Petitioner's Application for Post-Conviction Relief. Petitioner was convicted of murder, kidnapping, and possession of a weapon during the commission of a violent crime, and was sentenced to death. On November 17, 2010, the South Carolina Supreme Court granted a stay of execution and assigned jurisdiction over the matter to this Court. Having carefully considered the evidence and

testimony presented, the record before the Court, and the erudite arguments and briefs of counsel, and for the reasons set forth below, this Court denies the Petitioner's request for relief and dismisses this application with prejudice.

FACTS

This matter arises from the murder of Maranda Williams ("Victim") by Charles Christopher Williams ("Petitioner"). On the morning of September 3, 2003, the Petitioner, armed with a shotgun, entered the Bi-Lo grocery store where his former girlfriend, the Victim, was working. Petitioner accosted the Victim and forced her into an office in the bakery/deli area. The Victim called 911 from her cell phone. During the ninety-minute phone call, hostage negotiators tried to convince Petitioner to release the Victim. When the Victim attempted to escape, Petitioner chased, shot, and killed her. Hearing the shots, law enforcement entered the store and apprehended Petitioner. Shortly after his arrest, Petitioner gave a statement in which he confessed to the crimes for which he was later charged.

PROCEDURAL HISTORY

The Petitioner was indicted on March 23, 2004, for murder, possession of a weapon during the commission of a violent crime, and kidnapping. A jury trial was held before the Honorable J.C. "Buddy" Nicholson beginning on February 7, 2005. Thirteenth Judicial Circuit Solicitor Robert Ariail and Deputy Solicitor Betty Strom prosecuted the case for the State. The Petitioner was represented by Attorneys John Mauldin

and William Nettles of the South Carolina Bar and Attorneys Mark MacDougall and Colleen Coyle of the Washington D.C. law firm Akin Gump Strauss Hauer & Feld. On February 15, 2005, the jury found the Petitioner guilty of murder, kidnapping, and possession of a firearm during a violent crime.

The penalty phase of the trial began on February 17, 2005. The jury was charged to consider the existence of one aggravating factor: "Murder was committed while in the commission of kidnapping." Record on Appeal ("ROA") at 2399. The jury was also charged to consider two statutory mitigating circumstances:

1. Murder was committed while the defendant was under the influence of mental or emotional disturbance.
2. The age or mentality of the defendant at the time of the crime.

ROA at 2403. The jury was also charged to consider five non-statutory mitigating circumstances:

1. Any testimony regarding the defendant's mental illness is treatable with medication.
2. Any testimony regarding the defendant's adaptability to prison.
3. Any testimony regarding the defendant's future violence in prison.
4. Any testimony the defendant is loved and supported by his sister, Maureen, and her family that have and will continue to encourage, sustain, and assist him in the future.

5. Any other testimony or any other reason or reasons which the jury may consider.

ROA at 2404-05.

On February 19, 2005, the jury returned a verdict finding the existence of the statutory aggravating circumstance "murder was committed while in the commission of kidnapping." ROA at 2417. The jury recommended a sentence of death. Judge Nicholson then sentenced the Petitioner to death.

The Petitioner filed an appeal and was represented by Attorney Robert M. Dudek of the South Carolina Office of Indigent Defense. The South Carolina Supreme Court affirmed the convictions and sentence on February 8, 2010. *See State v. Williams*, 386 S.C. 503, 690 S.E.2d 62 (2010) (petition for rehearing denied, Mar. 25, 2010). On October 4, 2010, the United States Supreme Court denied the Petitioner's request for a writ of certiorari. *Williams v. South Carolina*, 131 S.Ct. 230 (2010). On November 17, 2010, the South Carolina Supreme Court granted the Petitioner's request for a stay of execution so that he could pursue state post conviction relief.

Petitioner filed his Application for Post-Conviction Relief on November 30, 2010, arguing that both trial counsel and appellate counsel were ineffective. On September 30, 2011, the Petitioner filed his First Addendum to Application for Post-Conviction Relief. On November 20, 2012, the Petitioner filed his Second Addendum to Application for Post-Conviction Relief. The State filed a Return to Application for Post-Conviction Relief on January 13, 2011, and a Return to

Amended Application for Post-Conviction Relief on November 20, 2011. A hearing was held before this Court from January 28, to January 31, 2013, at the Greenville County Courthouse. The Petitioner was present at the hearing and was represented by Attorneys Derek J. Enderlin and Richard W. Vieth. Attorney Donald Zalenka of the South Carolina Office of the Attorney General represented the Respondent, State of South Carolina.

The following testified at the PCR hearing: Petitioner's trial counsel and defense team members, Attorney John Mauldin, Attorney Bill Nettles, and Jan Vogelsang; Petitioner's appellate counsel, Attorney Robert Dudek; Petitioner's mother, Daisy Huckaby, and father, Dwight Williams; Petitioner's experts, Dr. Paul D. Connor, Dr. Richard S. Adler, and Dr. Natalie Novick Brown. The Court had before it the record on appeal from the guilt and penalty phases of Petitioner's trial ("ROA"), the Greenville County Clerk of Court records, the PCR application and addenda, the State's return, the parties' briefs, and the parties' exhibits.

STANDARD OF REVIEW - INEFFECTIVE ASSISTANCE OF COUNSEL

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 (1984); *Vasquez v. State*, 388 S.C. 447, 456, 698 S.E.2d 561, 565 (2010). In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief by a preponderance of the evidence. *Council v. State*, 380 S.C. 159, 169, 670 S.E.2d 356, 361 (2008); *Frasier v.*

State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002). In order to prevail on a claim for ineffective assistance of counsel, a PCR applicant must satisfy a two prong test. The applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland*, *supra*; *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). "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). The PCR applicant must satisfy both the deficiency prong and the prejudice prong of this test. *Franklin v. Catoe*, 346 S.C. 563, 570-71, 552 S.E.2d 718, 722-23 (2001).

"Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690; *Morris v. State*, 371 S.C. 278, 639 S.E.2d 53 (2006); *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). "The burden is on the applicant in a post-conviction proceeding to prove the allegations in his application." *Von Dohlen v. State*, 360 S.C. 598, 603, 602 S.E.2d 738, 741 (2004). "'[W]here counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.' *Watson v. State*, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006). . . . Counsel's strategy will be reviewed under 'an objective standard of reasonableness.' *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d401, 402 (2002)." *Brown v. State*, 375 S.C. 464, 481, 652 S.E.2d 765, 774 (Ct. App. 2007).

Furthermore, a defendant is constitutionally entitled to effective assistance of appellate counsel. *Southerland v. State*, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999); *Evitts v. Lucey*, 469 U.S. 387 (1985) (to be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair). Effective assistance of appellate counsel does not require the presentation of all issues on appeal that may have merit; appellate counsel is presumed to have decided which issues were most likely to afford relief on appeal. *Bell v. Jarvis*, 236 F.3d 149, 164 (4th Cir. 2000). "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Lawrence v. Branker*, 517 F.3d 700, 709 (4th Cir. 2008); *Thrift v. State*, 302 S.C. 535, 397 S.E.2d 523 (1990) (appellate counsel must provide effective assistance but need not raise every nonfrivolous issue presented by the record). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." *Tisdale v. State*, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citations omitted).

The standard established by *Strickland* is that the defendant must establish by a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Smith v. State*, 309 S.C. 413, 424 S.E.2d 480, 481 (1992); *Southerland v. State*, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999) (noting "defendant who contends appellate counsel rendered ineffective assistance, e.g., by failing to argue issue, must show that failure to

raise issue was objectively unreasonable and that, but for this failure, defendant's conviction or sentence would have reversed").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner raised fifteen issues in his Application for Post-Conviction Relief and subsequent Addenda. This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented by counsel at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Dr. Crawford's Testimony

In Petitioner's first three grounds for relief, he alleges that trial counsel failed to properly respond to testimony offered during the penalty phase of the trial by State's witness, Dr. Pamela Crawford. Petitioner alleges that trial counsel was ineffective (1) for waiving various objections to the confession given by the Petitioner to Dr. Pamela Crawford, (2) for waiving the objection to Dr. Crawford being allowed to testify before the jury, and (3) for failing to effectively move for a mistrial based on Dr. Crawford's cumulative testimony.

Dr. Crawford was employed as a forensic psychiatrist with the South Carolina Department of Health and as a consultant for the South Carolina Law Enforcement Division. ROA at 2150-51. Soon after the

Petitioner was taken into custody, Dr. Crawford interviewed the Petitioner at the Solicitor's request to help assess the case. ROA at 2153. During the penalty phase of the trial, the Solicitor called Dr. Crawford as a lay fact witness. Defense counsel moved to suppress Dr. Crawford's testimony and Petitioner's confession to her, made numerous objections during her testimony, requested curative instructions, and moved for a mistrial. ROA at 2694-2756, 2103-09, 2153-69, 2861-63. The trial court instructed the Solicitor to treat Dr. Crawford "as if she was an investigating officer that took a confession" and to limit questioning of the witness to those permitted by Rule 701, SCRE. ROA at 2165.

Petitioner has failed to demonstrate that trial counsel was ineffective in handling Dr. Crawford's testimony. At his PCR hearing, Petitioner did not provide further evidence to support the allegations in his PCR application related to Dr. Crawford's testimony. To the contrary, at the PCR hearing. Attorney Nettles stated "we tried everything we could to keep [Dr. Crawford's testimony] out[, b]ut given the fact that it came in, I felt the best we could do is utilize [it]." PCR Transcript of Record at 123. The trial transcript supports Attorney Nettles' assertion. Trial counsel made pre-trial motions to exclude Dr. Crawford's testimony; trial counsel strenuously objected numerous times[1] during Dr. Crawford's

[1] Mr. Nettles objected to Dr. Crawford's testimony, emphatically stating "[m]y legal objection is that this testimony has been ruled on repeatedly," and noted people "mocked John Mauldin for how many times he stands up and gets this clear." ROA at 2152-53. Mr.

testimony; trial counsel requested curative instructions and drafted a charge that the judge read to the jury; trial counsel moved for a mistrial; and, during a post-verdict motions hearing, trial counsel moved for a new sentence, based on the previous objections to Dr. Crawford's testimony.[2] ROA at 2150-87. Petitioner has not met his burden of showing that trial counsel's performance fell below an objective standard of reasonableness.

Furthermore, even if trial counsel's handling of Dr. Crawford's testimony was in some way defective, Petitioner has not shown prejudice. The admissibility of Dr. Crawford's testimony was one of Petitioner's key arguments on appeal. The Supreme Court addressed the merits of that argument and found no error:

> We find that there was nothing improper about the solicitor's examination of Dr. Crawford as a lay witness. Furthermore, to the extent there was any confusion among the jurors regarding Dr. Crawford's role as a lay witness, such confusion was effectively cured by the trial

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Mauldin later affirmed this, stating "we done everything . . . pretrial motions, hearings, I been reserving it until I'm blue in the face." ROA at 2163.

[2] The Supreme Court analyzed trial counsel's performance, to determine whether the matter was properly preserved for appeal, and noted: "Appellant objected to Dr. Crawford's testimony before it was given and renewed this objection both during and after her testimony. Appellant moved for mistrial on these grounds, and the judge denied the motion. Appellant then sought to introduce a curative instruction, which the trial judge accepted." *Williams*, 386 S.C. at 516, FN 8, 690 S.E.2d at 68, FN 8.

> court's instruction to the jury. ... There is no indication in the record that the jury's responsibility for determining Appellant's fate was diminished in any way by the solicitor's questioning of Dr. Crawford. Even if Dr. Crawford's testimony was improper, any prejudice was cured by the jury instruction.

State v. Willliams, 386 S.C. 503, 516, 690 S.E.2d 62, 69 (2010). Accordingly, Petitioner has failed to show either deficient performance or prejudice regarding his claims for ineffective assistance of counsel related to Dr. Crawford's testimony.

Mitigation Evidence

Petitioner alleges that trial counsel failed to present available mitigation evidence regarding Petitioner's extremely troubled childhood. Petitioner has failed to support these allegations with any evidence. Furthermore, a review of the record shows that, contrary to Petitioner's allegations, trial counsel presented an array of mitigation evidence at Petitioner's trial.

For example, Attorney Nettles developed mitigation testimony regarding Petitioner's troubled childhood in his cross-examination of Dr. Crawford, who testified that Petitioner had difficulty with his parent's divorce, feeling like he was an "evil child" after the divorce; that his mother's multiple failed marriages had a negative impact on him; that his mother was an alcoholic for 30 years and was intoxicated for much of his childhood; that he had difficulty in school; that he had ADD, but was never medicated for it; among other difficulties.

ROA at 2173-86. Dwight Williams, Petitioner's father, testified about the impact of the divorce on Petitioner, the violence and disturbances within the home, Daisy's drinking problem, and his own (Dwight's) mental health issues. ROA at 2208-17. Ann Wilson, a teacher at Taylors Elementary School, testified that Petitioner was very weak academically and that he was referred to special education classes, but his mother had negative attitudes towards helping him. ROA at 2220-2232. Rebecca Owens, who worked with Petitioner's mother, testified that Daisy drank heavily and had a volatile relationship with Petitioner. ROA at 2234-40. Additionally, trial counsel called numerous other experts and family members, who provided strong mitigation evidence: Professor Margorie Hammock, a clinical social worker, who testified as an expert in sociology; James Tollison, a retired Mauldin police officer who testified concerning domestic violence calls involving Petitioner's mother; Dr. Eric Elbogen, an assistant professor in clinical forensic psychology who testified as an expert in the field of violence risk assessment; James Aiken, a former warden in the South Carolina correctional system, who testified as an expert regarding Petitioner's prison adaptability; Dr. Seymour Halleck, a forensic psychiatrist, who testified extensively about his findings regarding Petitioner's troubled childhood; and Maureen Bangcuyo, the Petitioner's sister, who gave a first-hand account about Petitioner's troubled childhood. ROA at 2241-2351.

Notably absent from Petitioner's list of mitigation witnesses was Petitioner's mother, Daisy Huckaby. At the PCR hearing, Attorney Nettles testified that the reason for not calling Daisy Huckaby to testify was

trial counsel's "concerns about her willingness to tell the truth." PCR Transcript at 130. Trial counsel concluded that "as a matter of strategy, based upon those concerns . . . we felt the best thing to do is not call her." *Id.* Here, trial counsel articulated a valid strategic reason for not calling Petitioner's mother. *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992); *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). Furthermore, any information that Daisy Huckaby could have offered regarding mitigation had already been elicited through the testimony of other witnesses, including Petitioner's father and sister.

Finally, trial counsel hired Jan Vogelsang, a well-respected clinical social worker, to work as the defense team's mitigation expert. Ms. Vogelsang testified at the PCR hearing regarding the thoroughness of her investigation and the collection of mitigation evidence. PCR Transcript of Record at 12-84. Further, Attorney Mauldin testified that he had full confidence in Ms. Vogelsang's expertise, noting "[s]he's an extraordinary investigator." PCR Transcript of Record at 153.

Accordingly, Petitioner has not shown that trial counsel was ineffective in failing to present mitigation evidence of Petitioner's troubled childhood. Inasmuch as this claim for relief also relates to mitigation testimony regarding Fetal Alcohol Syndrome, that issue will be discussed in detail below.

Jury Disclosure of Vote Division

Petitioner alleges that trial counsel was ineffective for failing to move for a mistrial and request a life sentence on the ground that the trial judge introduced

an arbitrary factor when he distinguished between a judge inquiring into a jury's division and a jury's reporting its division on its own. During deliberations in the penalty phase of Petitioner's trial, the jury sent a note to the judge explaining that it was divided nine to three in favor of death. ROA at 2410. Trial counsel moved for a mistrial and asked that the judge impose a life sentence on the grounds that the jury had revealed its split.[3] The judge explained that the jury revealed the split on its own and that the court did not ask for it; the judge further noted the jury requested "instruction about what procedure to follow in resolve." ROA at 2411. The judge denied the motion for a mistrial and instead concluded the proper "procedure is to give an *Allen* charge and let them continue deliberation." ROA at 2411. Trial counsel then objected to the *Allen* charge. ROA at 2416.

Petitioner contends that trial counsel made the wrong argument and should have argued that the trial judge's distinction injected arbitrariness into the jury deliberations. This assertion is without merit. During Petitioner's direct appeal, the South Carolina Supreme Court reviewed the *Allen* charge issue and concluded that "the trial judge's issuance of an *Allen* charge was not improper" and held that "the trial judge committed no error in not declaring a mistrial and giving an *Allen* charge after the jury revealed it was divided nine to three in favor of death." *Williams*, 386 S.C. at 510, 690

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[3] Counselor Mauldin explained: "We believe the disclosure . . . does now require that this court end deliberations and impose a life without parole sentence. We believe that the law requires that." ROA at 2411.

S.E.2d at 65. Additionally, the Supreme Court reviewed the applicable case law and confirmed that the judge's distinction was not improper:

> Initially, we agree with Appellant that it is improper for a trial judge to inquire into the numerical division of a jury. [Citations omitted.] However, these decisions are inapplicable in the instant case because the jury here voluntarily disclosed its numerical division and requested further instructions on how to proceed. The judge then promptly informed the attorneys of the jurors' numerical division and indicated that he could give an Allen charge. Unlike other cases, the trial judge did not inquire about the specifics of the jury's impasse. Therefore, we hold the trial judge committed no error.

Williams, 386 S.C. at 510, 690 S.E.2d at 65. Furthermore, the Supreme Court conducted a proportionality review and concluded that "the death sentence was not the result of passion, prejudice, or any **other arbitrary factor**." *Id.* (emphasis added). Accordingly, the Petitioner's contention that the judge introduced an arbitrary factor is without merit. Petitioner has failed to show either deficient performance or prejudice by trial or appellate counsel.

Admissibility of Petitioner's Journal

Petitioner alleges that trial counsel was ineffective in failing to argue that certain portions of Petitioner's journal should have been excluded under Rule 403, SCRE. Petitioner has failed to support this allegation with any evidence. Furthermore, a review of the record

shows that trial counsel moved to suppress the journal, which the trial judge denied. ROA at 6. Additionally, during the course of the trial, trial counsel used the journal in Petitioner's defense. ROA at 1878-88. Importantly, defense expert Dr. Robert Richards relied, in part, on the journal in making his diagnosis that Petitioner had bipolar disorder, a diagnosis Petitioner used in his mitigation argument. ROA at 1971-77. Accordingly, Petitioner has not shown that counsel was ineffective.

Death Penalty Not Appropriate/ Arbitrary Manner

Petitioner alleges trial counsel and appellate counsel failed to argue that the death penalty was not appropriate and that the death penalty was used in an arbitrary manner. Petitioner asserts that South Carolina's death penalty statute is unconstitutional under *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976). Specifically, Petitioner argues that the death penalty statute does not narrow the circumstances for which a person can be subject to the death penalty for murder. Petitioner contends that in South Carolina, "virtually every murder case can qualify for the death penalty," due to South Carolina's broad statutory definitions of kidnapping and physical torture. Petitioner's Post-Trial Brief at 25-27. Petitioner asserts that "it is almost impossible to commit murder without committing the offense of kidnapping under these definitions," violating the principle that the death penalty should only be available in limited circumstances. *Id.* at 27 (citing *Kennedy v. Louisiana*, 554 U.S. 407 (2008)).

Contrary to Petitioner's argument, trial counsel and appellate counsel were not ineffective for failing to argue that South Carolina's death penalty statute is unconstitutional. The Eighth Amendment to the United States Constitution requires capital punishment to be limited to "those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)); U.S. Const. Amend. VIII; S.C. Const. Art. I, § 15. The South Carolina Supreme Court has ruled that our State's current death penalty sentencing scheme is constitutional pursuant to the limitations mandated by *Furman* and *Gregg*. *See State v. Shaw*, 273 S.C. 194, 211, 255 S.E.2d 799, 807 (1979). Our Supreme Court has consistently upheld the death penalty statute as constitutional. *See, e.g., State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981); *State v. Goolsby*, 275 S.C. 110, 268 S.E.2d 31 (1980), cert. denied, 449 U.S. 1037 (1981); *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982).

In South Carolina, a murder is death-eligible if it occurs during the commission of a kidnapping. S.C. Code Ann. § 16-3-20(C)(a)(1)(b). South Carolina's kidnapping statute provides that "[w]hoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law" is guilty of kidnapping. S.C. Code Ann. § 16-3-910. The South Carolina Supreme Court has consistently held the kidnapping statute is constitutional, and not overbroad or ambiguous. *See, e.g., State v. Smith*, 275 S.C. 164,

166, 268 S.E.2d 276, 277 (1980) (holding the statute's terms were not unconstitutionally vague and defendant's conduct fell squarely within the language of the statute); *State v. Plath*, 277 S.C. 126, 284 S.E.2d 221 (1981); *State v. Copeland*, 278 S.C. 572, 577, 300 S.E.2d 63, 66 (1982). In *State v. Tucker*, our Supreme Court affirmed the statutory definition of kidnapping when used as an aggravating circumstance of murder. *State v. Tucker*, 334 S.C. 1, 8, 13, 512 S.E.2d 99, 102, 105 (1999) (citing *State v. Hall*, 280 S.C. 74, 310 S.E.2d 429 (1983)). The Supreme Court has repeatedly upheld cases where kidnapping was used as an aggravating circumstance for a death-eligible murder. *See, e.g.*. *State v. Vasquez*, 364 S.C. 293, 613 S.E.2d 359 (2005); *State v. Kelly*, 343 S.C. 350, 540 S.E.2d 851 (2001), *reversed on other grounds by Kelly v. South Carolina*, 534 U.S. 246 (2002); *State v. Cheeseboro*, 346 S.C. 526, 552 S.E.2d 300 (2001). Likewise, the Supreme Court has consistently upheld kidnapping as an aggravating circumstance in capital cases against constitutional challenges. *See, e.g., State v. Plath*, 277 S.C. 126, 284 S.E.2d 221 (1981), *overruled on other grounds by Slate v. Short*, 333 S.C. 473, 511 S.E.2d 358 (1999), (kidnapping statute in death penalty case was not unconstitutionally vague or overbroad); *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982) (death sentence for murder in the commission of a kidnapping does not violate the Eighth Amendment; the statutory definition of kidnapping is not overbroad or ambiguous); *State v. Koon*, 278 S.C. 528, 537, 298 S.E.2d 769, 774 (1982) (kidnapping statute, as used in defining statutory aggravating circumstance, is not so overly broad that it virtually encompasses all cases of murder); *State v. Davis*, 309 S.C. 326, 348, 422 S.E.2d

133, 147 (1992); *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993). Based on all the foregoing, Petitioner's argument that South Carolina's death penalty statute is unconstitutional is without merit.

Additionally, the facts of this case clearly support the jury's finding of the aggravating circumstance of kidnapping. The State provided overwhelming evidence that Petitioner kidnapped his Victim. *See, e.g.*, ROA at 1565, 1579-81, 1597-1602, 1669, 1748-49, 1914-20. Petitioner held Victim at gunpoint against her will for over ninety minutes. Petitioner confined the Victim primarily to the bakery/deli office area of the Bi-Lo store, although they did at certain times move to other parts of the store. The Victim, as well as hostage negotiators, pleaded with Petitioner to let her go. When the Victim attempted to escape, Petitioner chased her and shot her in the back.

Furthermore, the record shows that trial counsel objected to the judge's kidnapping charge and requested additional instruction. During the guilt phase of trial, the trial judge instructed the jury with the standard jury charge on the law of kidnapping. *See* ROA at 2056. Petitioner's trial counsel requested an additional charge relating to kidnapping and requested a question regarding the kidnapping, which the judge denied. ROA at 2067. During the penalty phase, while the trial judge did not redefine kidnapping, he instructed the jury that an aggravating circumstance, kidnapping, must be found. ROA at 2399-2400. Accordingly, Petitioner has not shown that trial counsel's performance was deficient.

Similarly, Petitioner's argument that the Supreme Court's proportionality review was inadequate is without merit. South Carolina's death penalty statute mandates that the South Carolina Supreme Court review all death sentences to determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." S.C. Code Ann. § 16-3-25(C)(3). This review is intended to serve as "[a]n additional check against the random imposition of the death penalty.'" *State v. Shaw*, 273 S.C. 194, 211, 255 S.E.2d 799, 807 (1979); *State v. Copeland*, 278 S.C. 572, 591, 300 S.E.2d 63, 75 (1982). The Supreme Court conducted a proportionality review in Petitioner's case:

> Pursuant to S.C. Code Ann. § 16-3-25(C) (2003), we have conducted a proportionality review and find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions demonstrates that Appellant's sentence is neither excessive nor disproportionate. *See, e.g.*, *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996).

State v. Williams, 386 S.C. 503, 517, 690 S.E.2d 62, 69 (2010). This review was consistent with the Supreme Court's mandates regarding its death sentence proportionality reviews. *See State v. Harrison*, 402 S.C. 288, 741 S.E.2d 727 (2013); *State v. Passaro*, 350 S.C. 499, 567 S.E.2d 862 (2002). Accordingly, Petitioner has not shown that trial counsel or appellate counsel were ineffective.

Solicitor's Improper Argument

Petitioner alleges that trial counsel was ineffective in failing to object to various comments made by the Solicitor during the opening and closing statements of the penalty phase of his trial. Petitioner contends that the Solicitor strayed from the record and failed to limit his arguments to the circumstances of the crime and character of the defendant, thereby lessening the jury's responsibility and injecting arbitrary factors into the jury's deliberation process. Specifically, Petitioner alleges that the Solicitor improperly referred to his personal decision to seek the death penalty, told the jury that the legislature had limited the times when the State could seek the death penalty, and commented on prison conditions.

Law

"A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices." *State v. Cooper*, 334 S.C. 540, 514 S.E.2d 584 (1999). The State's closing arguments must be confined to the evidence in the record and the reasonable inferences that maybe drawn from the evidence. *Stale v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996); *State v. Woomer*, 277 S.C. 170, 284 S.E.2d 357 (1981). "[The] evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime. . . . The jury's sole function is to make a sentencing determination based on these factors." *State v. Burkhart*, 371 S.C. 482, 487-88, 640 S.E.2d 450, 453 (2007). "A solicitor has a right to state his version of

the testimony and to comment on the weight to be given such testimony." *Randall v. State*, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). However, a solicitor is bound to rules of fairness; a closing argument must therefore be "carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice." *Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010).

This Court must "view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). The relevant question is whether, in light of the context of the entire record, the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Smith v. State*, 375 S.C. 507, 523, 654 S.E.2d 523, 532 (2007); *State v. Hornsby*, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) ("A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice."). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002).

The Petitioner has the burden of proving he did not receive a fair trial because of the alleged inappropriate comments. *Simmons*, 331 S.C. at 338, 503 S.E.2d at 166. "To establish prejudice, Petitioner must show a reasonable probability the result of the proceeding

would have been different but for trial counsel's deficiency. *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). Therefore, to demonstrate prejudice . . . Petitioner must prove a reasonable probability exists that a jury would not have sentenced him to death if trial counsel had objected to the solicitor's comments." *Vasquez*, 388 S.C. at 466-67, 698 S.E.2d at 571.

Solicitor's Personal Opinion and Legislative Determinations/Limitations

Petitioner contends that trial counsel failed to object when the Solicitor improperly injected his personal opinion and his decision to seek the death penalty into the jury deliberations. He argues that the Solicitor repeatedly told the jury that the legislature had limited the cases where the solicitor could seek the death penalty and that he also had made the difficult decision to seek the death penalty. *See* Petitioner's Post-Trial Brief at 3. He further alleges that the Solicitor improperly invoked Dr. Crawford's opinion in arguing for the death penalty.

The Solicitor made the following statements in his closing argument during the penalty phase of Petitioner's trial:

> They have said earlier the solicitor is not satisfied with a life sentence. And I agree, I am not. They told you he's going to want the death penalty, and I do. Why is the death penalty the appropriate sentence in this case? And that is a fair question for you to ask, ask of us, the State of South Carolina. And I submit to you that this

> is the reason, is that there are mean and evil people who live in this world who do not deserve to continue to live with the rest of us regardless of how confined they may be.
>
> The law limits the State's right to seek the death penalty to a very few murders. We seek the death penalty in only a few cases. But the circumstances where it's available are for mean and evil people. The worst of the worst. Christopher Williams and this murder are one of those cases. The worst of the worst.

ROA at 2370. Petitioner argues that the Solicitor's comments are similar to those made in *State v. Woomer*, 277 S.C. 170, 284 S.E.2d 357 (1981). However, this Court finds that the Solicitor's comments are distinguishable from those made in *Woomer*. Instead, the Solicitor's comments in the instant case are nearly identical to the comments made by Solicitor Ariail in a different trial that the Supreme Court recently reviewed and upheld in *Sigmon v. State*:

> Now, when we asked for the death penalty, it's a fair and appropriate question for you to say back to me, *Solicitor Ariail, why do you think that the death penalty is an appropriate punishment in this case? And I can best summarize it by a response that I got from a juror in another case on voir dire, and that juror said, as to her response in her argument for the death penalty, that they're [sic] are mean and evil people who live in this world, who do not deserve to continue to live with the rest of us, regardless of how confined they are*. And that's

> what the basis of our request for the death penalty is. There are certain mean and evil people that live in this world that do not deserve to continue to live with us.
>
> ....
>
> And there are people, there are people who will argue that the death penalty is not a deterrent. But *my response as the solicitor of this circuit is, it is a deterrent to this individual and that is what we are asking, is to deter Brad Sigmon and send the message that this type of conduct will not be tolerated in Greenville County, or anywhere in this State*. And let that decision that you reach ring like a bell from this courthouse, that people will understand that we will not accept brutal behavior such as this. Thank you.

Sigmon v. State, 403 S.C. 120, 128-29, 742 S.E.2d 394, 399 (2013) (emphasis by the Supreme Court). In Sigmon, the Court concluded that the solicitor's comments were distinguishable from those in *Woomer*[4] because the comments did not diminish the role of the jury in sentencing *Sigmon* to death. *See Sigmon*, 403

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[4] In *Woomer*, the Court concluded the solicitor's statements were improper because he repeatedly stated that he himself had undertaken the same difficult process of deciding to impose the death penalty: "[T]he initial burden in this case was not on you all. It was on me. I am the only person in the world that can decide whether a person is going to be tried for his life or not. . . . I had to make this same decision, so I have had to go through the same identical thing that you all do. It is not easy." *Woomer*, 277 S.C. at 175, 284 S.E.2d at 359.

S.C. at 130, 742 S.E.2d at 399 ("Although the solicitor mentioned his own considerations, he did not go so far as to compare his undertaking in requesting the death penalty to the jury's decision to ultimately impose a death sentence."). Similarly, in the instant case, the Solicitor's comments did not diminish the role of the jury in determining the appropriate sentence, even though the Solicitor referenced his role in choosing to request the death penalty.

Furthermore, throughout his closing argument, the Solicitor emphasized the important role the jury played in determining the appropriate sentence:

> So, this is a legal process, a legal penalty enacted by our legislators; and it is a function of government *carried out by you*, the citizens. . . . *This is a function of you as citizens* carrying out part of our government process. *You are shaping* a lawful punishment to an unlawful act. So, *the responsibility is given to you* to decide what the appropriate punishment is.
>
> . . .
>
> *[Y]ou are the judge*. The judge does not sentence, *you sentence*. And that's what this process is about. And it is a process which *we have entrusted to you* as our citizens to carry it out fairly . . . .
>
> . . .
>
> *The process makes you responsible* for this difficult decision; but we can't run and hide from our responsibilities. The law places it on our

> shoulders, the law *entrusted it to you* and it means we'll do it, just like any other tough decision that we make; that is, you will apply common sense, you will consider the facts and you will consider the alternative solution, just like you do when you make your decisions on your jobs, with your family, otherwise. If you imagine yourself making a tough decision and handling it in the same way you would handle it with your job or with your family, we trust you would make the right decision.

ROA at 2366-68 (emphasis added). Similarly, the trial judge carefully instructed the jury regarding its role in determining the appropriate sentence. ROA at 2397-2405.

The Solicitor did not inject his own personal opinion concerning the death penalty into the proceedings, and he did not diminish the role of the jury in determining the appropriate sentence. Instead, the Solicitor merely explained his involvement in the State's decision to seek the death penalty and explained that the State does not choose to pursue the death penalty for every murder charge. The Solicitor's comments, without more, were not improper. *See State v. Bell*, 302 S.C. 18, 34, 393 S.E.2d 364, 373 (1990); *Sigmon*, 403 S.C. at 130, 742 S.E.2d at 400 ("[T]he solicitor has some leeway in referencing the State's decision to request death, provided he does not go so far as to equate his initial determination with the jury's ultimate task of sentencing the defendant. Although the solicitor here articulated why he chose to request the death penalty, he did not equate his role with that of the jury.");

Williams v. Ozmint, 380 S.C. 473, 479, 671 S.E.2d 600, 602 (2008) (a solicitor's comments are not improper where he states that he is asking for the death penalty or even expecting the death penalty, as long as he does not attempt to minimize the jurors' own sense of responsibility). Accordingly, Petitioner has not shown deficient performance.

Conditions of Prison

Petitioner also alleges trial counsel was ineffective for failing to object to the Solicitor's improper statements about prison conditions, which allowed the jury to return a death sentence based on arbitrary factors. *See* Petitioner's Post-Trial Brief at 6. In particular, Petitioner claims the following statements by the Solicitor were improper:

> So, what is tire appropriate sentence to fit this crime and hold him responsible? Life in prison is not appropriate. You can't put him in prison for life and expect him to suffer. You can't do it. Because he is not going to think about it every day, because there's not going to be anybody there to remind him of the damage that's done to Mandy's family or to his family. No one is going to do that. Nobody is going to constantly remind him. So, he's not going to think about it.
>
> Sure you and I may think going to prison for life is a serious sentence, but what about Chris Williams? Being in prison is like a small city, allow all things of life. Places, restaurant, places to exercise, recreation when he wants. Doctors, hospital take care of him, clothing provided, TV.

> Contact with family and loved ones. He'll have freedom of movement, a social structure. He'll play cards and games. Go to work if he wants, go to school if he wants. Watch ball games on TV.
>
> Sure, he doesn't have a car and his travel is limited, but it's not really much more than a serious change of address. He will have his family to visit him but Mandy's family won't, and her daughter won't.

ROA at 2377-78.

It is well-settled that "evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime," and that "[t]he jury's sole function is to make a sentencing determination based on these factors and not to legislate a plan of punishment." *State v. Burkhart*, 371 S.C. 482, 487-88, 640 S.E.2d 450, 453 (2007); *see also State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982); *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987). Furthermore, "[s]uch determinations as the time, place, manner, and conditions of execution or incarceration ... are reserved ... to agencies other than the jury." *State v. Plath*, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984). In *State v. Bowman*, our Supreme Court cautioned that evidence regarding general prison conditions is not relevant to the question of whether a defendant should be sentenced to death or life imprisonment. *State v. Bowman*, 366 S.C. 485, 498-99, 623 S.E.2d 378, 387 (2005).[5]

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[5] "[T]he evidence presented in a penalty phase of a capital trial is to be restricted to the individual defendant and the individual

However, our Supreme Court has recognized a "tension between evidence regarding the defendant's adaptability to prison life, which is clearly admissible, and this restriction on the admission of evidence regarding prison life *in general*." *State v. Burkhart*, 371 S.C. 482, 488-89, 640 S.E.2d 450, 453 (2007). The Supreme Court has emphasized that "evidence of the defendant's characteristics may include prison conditions if narrowly tailored to demonstrate the defendant's personal behavior in those conditions." *Id.* When considering whether a solicitor's arguments were improper, a reviewing court must examine the comments in light of the entire record, including the overwhelming evidence of the defendant's guilt. *Vasquez v. State*, 388 S.C. 447, 698 S.E.2d 561 (2010); *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). A solicitor's comments are grounds for reversal only if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002).

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defendant's actions, behavior, and character. Generally, questions regarding escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole. We emphasize that how inmates, other than the defendant at trial, are treated in prison; and whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial. We admonish both the State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that particular defendant." *State v. Bowman*, 366 S.C. 485, 498-99, 623 S.E.2d 378, 385 (2005) *abrogated by State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006).

Here, given the context of the entire closing argument, even if the Solicitor's statements were improper, the improper statements do not warrant reversal. While the Solicitor did briefly address prison conditions, he did so in the context of whether a prison sentence would be appropriate for the Petitioner under the facts of this particular case. The Solicitor noted

> It's not really much more than a serious change of address. [Chris Williams] will have his family to visit him. But Mandy's family won't, and her daughter won't. The death penalty is the appropriate punishment.

ROA at 2378. The Solicitor went on to contrast the grievous nature and "extent of ***this crime*** and the culpability of ***this defendant***" with a life versus a death sentence. ROA at 2378 (emphasis added).

> Maybe one shot, maybe one shot we could say he deserved life; but not three, not three shots to her back as she was running away. Maybe one, but three? The extent of the culpability after she had begged for her life, "Please, please, please don't kill me."

ROA at 2378-79. The Solicitor also highlighted the following facts as demonstrated by the evidence at trial: Petitioner stole a work schedule and meticulously planned the killing; he drew a diagram of the scene and planned what clothes he would wear; he kidnapped and emotionally and mentally tortured the Victim for nearly two hours; he ordered her to call her mother to tell her she was going to die; he made the Victim choose how she was going to die; he carried out the crime in a

public supermarket where he endangered the safety of others; the hostage negotiator begged for the Victim's life; after firing the first non-fatal shot that paralyzed the Victim, Petitioner walked up to her and shot her two more times in the back at point blank range. ROA at 2372-80.

Furthermore, based on a reading of the trial transcript and in considering trial counsel's testimony at the PCR hearing, this Court finds that trial counsel's failure to object to the Solicitor's improper comments was a valid strategic decision. At the PCR hearing, Attorney Nettles stated that he objected to everything in the Solicitor's statements that he thought was objectionable. PCR Transcript of Record at 117. He stated that at the time of the trial, he felt the Solicitor's statements were improper, irresponsible, and prejudicial to his client. *Id.* at 112-13, 128. However, he explained that he believed the Solicitor's comments were "so improper and so irresponsible that by mocking him" he could "begin to undermine [the Solicitor's] credibility." *Id.* at 125. Attorney Nettles further explained that the jury responded to the Solicitor's improper comments by snickering because it was so irresponsible and ridiculous. *Id.* at 109. Ultimately, Attorney Nettles believed that while the Solicitor's comments were improper, it would be "more powerful" to mock the Solicitor, erode his credibility, and explain away his comments. *Id.* at 110. Thus, Attorney Nettles began his closing statement with the following rebuttal:

> Did he say restaurants? Did he say Chris Williams is going to a place in prison with

> restaurants there? Because I didn't hear anything about restaurants. What I heard about where Chris Williams is going at the end of this trial is a place where it's men and he's in a cell by himself. What I heard Jim Aiken talk about was a place where if you don't do what they tell you to do, they'll kill you.
>
> He said restaurants. Restaurants in prison? Do any of you all really believe your tax dollars are paying for restaurants in prison? They're not. Prison is a very serious place. And what you are being asked is to decide between whether Chris Williams dies on God's time or your time.
>
> What you're being asked to decide is whether Chris Williams spends the rest of his life until he's dead in prison or whether that, however they want to word it to try to make it seem okay, whether the government either electrocutes him or straps him to a gurney and kills him. That's where we are. Let's make no doubt about that. Let's not try to do anything to make that seem less severe. That's what we're talking about.

ROA at 2380-81. Failing to make an objection does not render trial counsel ineffective where counsel articulates a valid trial strategy. *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (counsel's conduct not ineffective where counsel articulates a valid reason for employing certain strategy); *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). Here, trial counsel articulated a legitimate trial strategy—rather than objecting to the Solicitor's improper statements, he responded by emphasizing to

the jury the absurdity and ridiculousness of those statements. Accordingly, trial counsel was not deficient.

Finally, even if trial counsel's performance was deficient, Petitioner has not proven prejudice. The allegedly improper statements were only a small part of the Solicitor's closing argument. *See State v. Tucker*, 324 S.C. 155, 169, 478 S.E.2d 260, 268 (1996) (noting solicitor's improper comment "was one isolated event in the entire argument"). Also, the trial judge gave clear instructions to the jury that they were to decide what verdict to return and that they were not required to return a death sentence. *See* ROA at 2397-2405. Therefore, considering the closing statement in its entirety within the context of the full record and the careful instructions by the trial judge, and given the overwhelming evidence of guilt and the egregious circumstances of the crime, Petitioner has failed to prove that there is a reasonable probability that the jury would have returned a different verdict had the Solicitor not made these comments.

Furthermore, the South Carolina Supreme Court conducted a review of the trial record pursuant to S.C. Code Ann. § 16-3-25 and concluded that "the death sentence was not the result of passion, prejudice, or any other arbitrary factor." *See State v. Williams*, 386 S.C. 503, 517, 690 S.E.2d 62, 69 (2010). Accordingly, Petitioner's argument that he was prejudiced by counsel's failure to object to the solicitor's improper statements and injection of arbitrary factors into the jury's deliberation is without merit.

Recommendation Instruction

Petitioner alleges that trial and appellate counsel were ineffective in failing to object to or argue that the trial judge erred in his instructions to the jury that their decision concerning the sentence was a recommendation. At a pretrial motions hearing on January 13, 2005, trial counsel raised the issue of the judge using the term "recommendation" in his jury charge, after which the following exchange took place:

> The Court: Well, in my charge, I say it is a recommendation. It says it in the statute; however, it is mandatory on the court. And I tell them that in my charge.
>
> Mr. Mauldin: All right, sir. So you say the word, but you tell them that you're going to do what they say?
>
> The Court: Right. It doesn't mean what it says. It means that I am obligated to follow what the jury does, okay, and I do that in my charge.

ROA at 2607-08. Again, at the beginning of the sentencing phase of Petitioner's trial, Attorney Mauldin objected to the use of the term "recommendation." ROA at 2085. Judge Nicholson overruled the objection, explaining:

> It's the state law. The form was provided by the state law. I got to go into it and I will explain it to the jury. I will explain to the jury it is not a recommendation, the court is obligated to follow – the statute needs to be amended, the word recommendation needs to be taken out.

ROA at 2085. Judge Nicholson gave the following charge to the jury:

> Mr. Foreman, members of the Jury, it now becomes your duty to decide what sentence you recommend this Court impose upon the Defendant. . . . Please understand your sentence recommendation will be followed by this Court. . . . And even though the form says "recommendation," I charge you that the Court is obligated to follow that recommendation.

ROA at 2397-99. *See also* ROA at 26-27.

At the PGR hearing, appellate counsel, Robert Dudek, testified that based on his understanding of the law and his prior experience with the issue, "as long as the jury was made known that their sentence would be binding, that that solved any problem." PCR Transcript of Record at 223. He further testified that he did not believe he could prevail on this issue because the trial judge clearly instructed the jury "that this is not a recommendation. Whatever verdict you come back with, death or life, that's going to be the verdict and that's going to be the sentence that I'm going to impose." *Id.* at 222. Citing Justice Toal's book, Mr. Dudek also stated that standard appellate practice is to raise only those issues most likely to succeed, not every possible issue. *Id.* at 221-22. Petitioner has not shown that trial or appellate counsel were deficient.

Further, Petitioner has not shown prejudice. Notwithstanding the imprecise use of the word "recommendation" in the statute, the case law in this state is well-settled that there is no error where a judge

uses the word "recommendation" in his jury charge, if he also explains the binding nature of the jury's decision. "The idea should be conveyed to the jury that its sentencing recommendation will be followed. *See State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981)." *State v. Bellamy*, 293 S.C. 103, 107, 359 S.E.2d 63, 65 (1987) *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *see also State v. Smith*, 286 S.C. 406, 409, 334 S.E.2d 277, 279 (1985) (approving "the judge's sentencing phase charge concerning the jury's responsibility to recommend a sentence and the finality of their recommendation"). Here, the trial judge properly instructed the jury that its sentencing recommendation would be followed. Accordingly, Petitioner's allegations are without merit.

Adequacy of Voir Dire/ Exclusion of Jurors/ Venue Preservation

Petitioner alleges that trial counsel was ineffective for failing to conduct an adequate jury voir dire, exclude certain jurors, and request a change of venue. At a pretrial motions hearing on January 13, 2005, trial counsel made a motion for ten additional peremptory challenges, which the trial judge denied. ROA at 2564-66. Similarly, at the same hearing, trial counsel moved for a change of venue, stating that the "case is a highly publicized, very well-known case." ROA at 2570, 18-20. The trial judge took this matter under advisement stating that they could revisit the issue, if necessary, during the jury voir dire process. Trial counsel made numerous other motions related to jury selection, some of which the trial judge granted and others he denied. ROA at 28-39, 2570-2606.

"[T]he process of jury selection inherently falls within the expertise and experience of trial counsel. *Palacio v. State*, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999). . . . [J]ury selection is within the ambit of trial strategy. . . . '[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury.' *Id.* at 516, 511 S.E.2d at 68." *Magazine v. State*, 361 S.C. 610, 617, 606 S.E.2d 761, 764-65 (2004). "A motion to change venue is addressed to the sound discretion of the trial judge . . . *Sheppard v. State*, 357 S.C. 646, 654, 594 S.E.2d 462, 467 (2004). . . . A denial of a change of venue is not error if the jurors are found to have the ability to set aside any impressions or opinions and render a verdict based on the evidence presented at trial. *State v. Tucker*, 334 S.C. 1, 14, 512 S.E.2d 99, 106 (1999)." *State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013).

Petitioner has not provided any explanation or put forward any evidence to support his bald assertions regarding ineffective assistance on the issues of jury selection and change of venue. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668, 690 (1984); *Morris v. State*, 371 S.C. 278, 639 S.E.2d 53 (2006); *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. *Edwards v. State*, 372 S.C. 493, 494, 642 S.E.2d 738, 739 (2007); *Caprood v. State*, 338 S.C. 103, 525 S.E.2d 514 (2000). In light of the foregoing, Petitioner has not met his burden of showing ineffective assistance of counsel.

Guilty Plea and Jury Sentencing

Petitioner alleges that trial counsel and appellate counsel were ineffective for failing to argue that Petitioner should have the right to plead guilty and still receive a jury trial for sentencing. Petitioner contends that he desired to plead guilty to the murder charge in order to show acceptance of responsibility, and that he wanted to be sentenced by a jury.

The law in this state is well-settled regarding the right to a jury sentencing after a guilty plea in a death penalty case. State statute mandates that in all capital cases in which the defendant pleads guilty, "the sentencing proceeding must be conducted before the judge." S.C. Code Ann. § 16-3-20(B). Our Supreme Court has repeatedly upheld this statute, finding that a defendant does not have a constitutional right to plead guilty and receive a sentencing hearing by a jury. *See State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004); *State v. Crisp*, 362 S.C. 412, 608 S.E. 2d 429 (2005); *State v. Allen*, 386 S.C. 93, 687 S.E.2d 21 (2009); *State v. Inman*, 359 S.C. 539, 720 S.E.2d 31 (2011). Petitioner concedes that his position—that he should have the right to plead guilty and still receive a jury sentencing—is contrary to the overwhelming case law in South Carolina. *See* Petitioner's Post-Trial Brief at 76-77.

Furthermore, at a pre-trial motions hearing, trial counsel moved to quash the death penalty, arguing that if Petitioner pled guilty to murder, he would be deprived of a jury sentencing and the ability of using his guilty plea as evidence of remorse. ROA at 2432. Trial counsel renewed this motion at the beginning of

Petitioner's trial and again subsequent to the verdict and sentence. ROA at 7-9, 2085, 2844-45. The trial judge appropriately denied these motions. At the PCR hearing, appellate counsel, Robert Dudek, testified that he did not raise this issue on appeal because the South Carolina Supreme Court has not shown "any interest" in the issue, and because he did not believe it would be a "winning" issue based on the applicable case law and his past experiences with this issue. PCR Transcript of Record at 212-14, 225-28; *see Lawrence v. Branker*, 517 F.3d 700, 713 (4th Cir. 2008) (noting appellate counsel has wide discretion in deciding which issues are most likely to afford relief on appeal and cannot be ineffective for failing to assign error to an issue that is without merit). Accordingly, Petitioner has not shown that trial counsel or appellate counsel were ineffective on this issue.

Aggravators in the Indictment

Petitioner argues that trial counsel or appellate counsel failed to argue that the circumstances of aggravation should have been included in the indictment. The law in this state is well-settled regarding the inclusion of circumstances of aggravation in an indictment. Our Supreme Court has repeatedly affirmed that the State is not constitutionally required to allege aggravating circumstances in the indictment for capital murder cases. *See State v. Laney*, 367 S.C. 639, 649-650, 627 S.E.2d 726, 732 (2006); *State v. Crisp*, 362 S.C. 412, 419-20, 608 S.E.2d 429, 433-34 (2005); *State v. Downs*, 361 S.C. 141, 147-48, 604 S.E.2d 377, 380-81 (2004) ("aggravating circumstances need not be alleged in an indictment for murder").

Petitioner concedes that his position—that circumstances of aggravation should be included in the indictment—is contrary to the overwhelming case law in South Carolina. *See* Petitioner's Post-Trial Brief at 77-78.

Furthermore, at the beginning of Petitioner's trial, trial counsel objected to the fact that the circumstances of aggravation were not included in the indictment. ROA at 9-12. Also, trial counsel made a motion to reconsider this issue subsequent to the verdict and sentence. ROA at 2845-49. The trial judge appropriately denied these motions. ROA at 12, 2849. At the PCR hearing, appellate counsel, Robert Dudek, testified that he did not raise this issue on appeal because he had raised the issue before and lost, and because he did not believe he would prevail on that issue based on the applicable case law and his past experiences with the issue. PCR Transcript of Record at 223-25; *see Lawrence v. Branker*, 517 F.3d 700, 713 (4th Cir. 2008) (noting appellate counsel has wide discretion in deciding which issues are most likely to afford relief on appeal and cannot be ineffective for failing to assign error to an issue that is without merit). Accordingly, Petitioner has not shown that trial counsel or appellate counsel were ineffective on this issue.

Foreign National

Petitioner alleges that his trial counsel was ineffective for failing to recognize that Petitioner was a German citizen and for failing to notify the Petitioner of his rights as a foreign national. The Federal Republic of Germany submitted an *amicus curiae* brief

to this Court, making arguments on Petitioner's behalf. Also, representatives from the German Consulate were present throughout Petitioner's PCR hearing held before this Court.

The Petitioner's mother, Daisy Huckaby, is a German citizen; she was born in Germany and immigrated to the United States in 1978 after meeting and marrying the Petitioner's father, Dwight Williams. By virtue of his mother's German citizenship, Petitioner apparently is also a German citizen.[6] *See* Plaintiffs Exhibit 26, Citizenship Certification. Petitioner contends that because of his German citizenship, he was entitled to consultation rights and protections as a foreign national as outlined in Article 36 of the Vienna Convention on Consular Relations.

Contrary to Petitioner's arguments, he is not a "foreign national." Instead, he is a United States citizen and was not entitled to any of the rights of consultation under the Vienna Convention. The Petitioner was born in Greenville, South Carolina, to an American father and is therefore a United States citizen by birth. *See* United States Const., Amend. XIV ("All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the

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[6] At Petitioner's PCR hearing, Gerrit Morking, a representative from the German consulate, posited that a person born to a German citizen is also a German citizen, regardless of place of birth. In fact, Mr. Morking suggested that German citizenship inherited by birth could be passed on from generation to generation such that "if my great, great, great, great grandfather was a German Citizen, I'm still a German Citizen also." *See* PCR Transcript of Record at 801-02.

State wherein they reside."); 8 U.S.C. § 1401 ("[t]he following shall be nationals and citizens of the United States at birth: (a) a person born in the United States, and subject to the jurisdiction thereof).

Evidently, Petitioner is a dual citizen of the United States and German. *See* Plaintiff's Exhibit 26, Citizenship Certification. However, this dual citizenship does not confer upon the Petitioner the status of a "foreign national" for purposes of consular protection in a criminal proceeding in South Carolina. *See, e.g., Commonwealth v. Baumhammers*, 599 Pa. 1, 63-4, 960 A.2d 59, 97-8 (2008) (finding a dual national detained by authorities in his own country and state is not a foreign national and is not entitled to consular protections); *Cauthern v. State*, 145 S.W.3d 571, 628 (Tenn. Crim. App. 2004) (finding a dual national born in the U.S. is not entitled to consular protections under the Vienna Convention and, furthermore, the Vienna Convention does not create a judicially enforceable individual right); *State v. Ahmed*, 103 Ohio St.3d 27 35-6, 813 N.E.2d 637, 651 (2004). The Code of Federal Regulation defines the term "foreign national" as "any individual *other than* a U.S. national," 31 C.F.R. § 800.215 (emphasis added); while a "national" means a "citizen of the United States," 22 C.F.R. § 50.1. Similarly, the U.S. Department of State's "Consular Notification and Access" instruction manual—which, incidentally, is cited in Germany's *amicus* brief—defines a foreign national as "any person who is not a U.S. citizen." *See* Consular Notification and

Access, U.S. Department of State, at 12.[7] Additionally, the State Department manual explains that "consular notification is not required if the detainee has U.S. citizenship, regardless of whether he or she has another country's citizenship or nationality as well." *Id.* at 14.

While our courts have recognized the right of foreign nationals to receive consular protection during criminal proceedings in state courts, those cases presume that the person being charged with the crime is a foreign national and not a U.S. citizen. *See, e.g., State v. Banda*, 371 S.C. 245, 639 S.E.2d 36 (2006) (defendant was a citizen of Zimbabwe and was in the U.S. on a basketball scholarship); *State v. Lopez*, 352 S.C. 373, 574 S.E.2d 210 (2002) (defendant was a Mexican national residing legally in the U.S. as a resident alien). Here, Petitioner is a United States citizen, born in South Carolina, and is therefore not a foreign national. Accordingly, Petitioner has failed to show that he was entitled to the consular protections under the Vienna Convention, and has failed to meet his burden of showing that trial counsel was ineffective for failing to enlist the resources of the German consulate.[8]

Even assuming that the Petitioner was entitled to consular advice and that his trial counsel was deficient

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[7] The Consular Notification and Access manual is available at http://travel.state.gov/pdf/cna/CNA_Manual_3d_Edition.pdf.

[8] Additionally, this Court notes that courts disagree about whether trial counsel's failure to notify a criminal defendant of his rights to consular protection rise to the level of ineffective assistance.

in failing to notify him of his rights, the Petitioner has not demonstrated that he suffered any prejudice. *State v. Lopez*, 352 S.C. 373, 574 S.E.2d 210 (2002). Petitioner argues that if the German consulate had become involved in the case prior to his trial, the German government would have provided financial and legal assistance and the outcome of the trial would have been different. Specifically, Petitioner asserts that the German consulate would have helped uncover the fetal alcohol syndrome issue and would have objected to the Solicitor's improper statements. However, beyond mere speculation, Petitioner has not shown any evidence that assistance from the German consulate would have changed the outcome of his trial. Trial counsel stated that while defense attorneys in death penalty cases always desire more time to prepare, in this particular case, the attorneys felt they were sufficiently prepared. PCR Transcript of Record at 148-49. Further, there is no evidence that the defense team lacked adequate resources. The defense team was composed of highly-qualified, experienced attorneys, including the Public Defender for the Thirteenth Judicial Circuit, John Mauldin, and attorney Bill Nettles, who now serves as United States Attorney for the District of South Carolina. Attorneys Mark MacDougall and Colleen Coyle of the Washington D.C. law firm Akin Gump Strauss Hauer & Feld also aided in the Petitioner's defense. The defense team relied on the skills and resources of its mitigation investigator, Jan Vogelsang, a well-respected and experienced social case worker who has worked with numerous capital

defense teams,[9] and a team of highly-qualified experts who met with the Petitioner and his defense team on numerous occasions and testified at trial. Using the resources at its disposal, the defense team developed a comprehensive trial strategy, even though the Petitioner was ultimately convicted and sentenced to death.

Petitioner contends that the German consulate could have helped collect information about Daisy's family history, including mental health issues and alcohol consumption. PCR Transcript of Record at 67, 80-81. Jan Vogelsang testified that she felt that she could not provide a complete genogram without the opportunity to travel to Germany. *Id.* at 64-65, 67-68. However, in spite of the defense team's lack of ability to travel to Germany to investigate Daisy's family history, the team did in fact collect information and evidence regarding Daisy's family history, mental health history, and alcohol addiction.

While this Court understands the sentiments of trial counsel that additional time and resources are always desirable in a death penalty case, here, Petitioner has failed to show that he was prejudiced in not having the assistance of the German Consulate at his trial. Accordingly, trial counsel was not ineffective for failing to advise the Petitioner of his rights as a foreign national or failing to enlist the help of the German government in the Petitioner's defense.

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[9] Jan Vogelsang's expertise gained national attention in 2006 when she was enlisted by the defense team for September 11 conspirator, Zacarias Moussaoui.

Sex Offender Registry

Petitioner alleges that trial counsel was ineffective for failing to ask the judge to make a finding that he did not have to register as a sex offender.[10] In South Carolina, a person guilty of kidnapping is required to register as a sex offender unless the court "makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense." S.C. Code Ann. § 23-3-430(15); *Lozada v. S.C. Law Enforcement Div.*, 395 S.C. 509, 514, 719 S.E.2d 258, 260-61 (2011).

The trial record shows that Judge Nicholson sentenced the Petitioner to death after the jury found the existence of a statutory aggravating factor for murder; however, no sentence was given for the kidnapping conviction, consistent with S.C. Code Ann. § 16-3-910 (mandating imprisonment for a period not to exceed thirty years for kidnapping, *unless* sentenced for murder as provided in § 16-3-20). *See* ROA at 2420.

At the PCR hearing, attorney John Mauldin testified that he could not recall any discussions about Petitioner being required to register as a sex offender as a result of a kidnaping conviction. PCR Transcript of Record at 176. Notwithstanding trial counsel's

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[10] This Court notes that Petitioner was not convicted of any kind of sexual offense. While investigators initially considered whether there was a sexual aspect to the crimes, due in part to the Petitioner's prior relationship with the victim and the fact that the victim's shirt had been torn from her during her struggle to get away from the Petitioner, there was no other evidence suggesting Petitioner had committed any crimes of a sexual nature.

concession, Petitioner has failed to show counsel's representation fell below an objective standard of reasonableness. *See Williams v. State*, 378 S.C. 511, 515-16, 662 S.E.2d 615, 617-18 (Ct. App. 2008) (finding defendant's trial counsel was not ineffective for failing to request the trial court to make a determination as to whether the kidnapping was sexual in nature).

Additionally, Petitioner has not shown that he was prejudiced by his trial counsel's failure to ask the judge to make a finding that the defendant did not have to register as a sex offender. Petitioner was convicted of murder and sentenced to death. Petitioner's death sentence essentially voids the practical effect and requirements of the sex offender registry act. Accordingly, the Petitioner has not suffered any prejudice as a result of trial counsel's failure to request a finding that the Petitioner did not have to register as a sex offender.

Fetal Alcohol Syndrome

Petitioner alleges trial counsel was ineffective in failing to adequately investigate Petitioner's prenatal exposure to alcohol and the resulting complications of that exposure, including a diagnosis of Fetal Alcohol Syndrome (FAS) or some other type of Alcohol Related Neurodevelopmental Disorder (ARND). Petitioner contends that evidence of prenatal exposure to alcohol and a diagnosis of FAS or ARND would have been powerful mitigation that a jury could have considered in determining an appropriate sentence. Petitioner also contends that such evidence may have been used to prove Petitioner, because of mental disease or defect,

lacked sufficient capacity to conform his conduct to the requirements of the law.

At the outset, this Court recognizes that we are just beginning to understand the role that Fetal Alcohol Syndrome (FAS) plays in human behavior in general and criminal activity in particular. As Petitioner's PCR counsel astutely noted, "we are just now at the tip of the iceberg of what we know about the brain."[11] PCR Transcript of Record at 10. With that understanding, this Court has fully considered the testimony of Petitioner's experts on the issue of FAS, has thoroughly studied the exhibits and information provided to the

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[11] It is noteworthy that each member of the FASD Experts team acknowledged that the state of the art for FASD forensic assessment was "hit or miss" and lacked "a protocolized structured assessment process in the forensic context" prior to 2007 when the FASD Experts team began working together, which was nearly two years after the Petitioner's trial in February 2005. *See* PGR Transcript of Record at 396 (Dr. Connor testifying that the team gave a presentation at a seminar in March 2009, during which they noted that the science of forensic assessment for FASD prior to 2007 was "hit or miss," and that the FASD Experts team developed the current structured, multi-disciplinary team approach in 2007 to better evaluate and assess FASD); 449-50 (Dr. Adler explaining the 2009 "presentation really was the first public scientific, professional presentation about our proposed model for the evaluation," prior to which "there was no . . . protocolized approach"); 636-37, 733-34 (Dr. Brown testifying that during the 1990s and up to 2005, there were people testifying in trials who were not qualified and did not know what they were doing, and thus, the "hit or miss" idea emphasized that "for the forensic context you needed a higher level of protocol and approach that would ensure that . . . the diagnostic criteria, were met and that the individuals working in the context were trained and experienced in the field").

Court by Petitioner's counsel and experts, and has carefully reviewed the relevant cases involving FAS or comparable organic brain damage.

"Counsel has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. *Strickland*, 466 U.S. at 691. Thus, '[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.' *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) (citation omitted). In reviewing a claim that defense counsel failed to properly investigate a defense to a crime, a court's principle concern is whether the investigation '*was itself reasonable*.' *Wiggins v. Smith*, 539 U.S. 510, 522-23, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (emphasis in original) (citation omitted). Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. *Simpson v. Moore*, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006)." *Taylor v. State*, 2009-123871, 2013 WL 3048636 (S.C. June 19, 2013); *see also Council v. State*, 380 S.C. 159, 171-72, 670 S.E.2d 356, 362-63 (2008) (noting our 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).

Trial counsel's failure to conduct a reasonable investigation into mitigating circumstances constitutes ineffective assistance. *Simpson v. Moore*, 367 S.C. 587,

605-06, 627 S.E.2d 701, 710-11 (2006) *citing Wiggins v. Smith*, 539 U.S. 510, 511 (2003) (finding counsel's review of a pre-sentence investigation report and DSS records did not constitute a reasonable investigation into defendant's background, and a more in-depth investigation would have revealed the defendant's "abuse in the first six years of his life while in the custody of his alcoholic, absentee mother" and his diminished mental capacity). Similarly, our Supreme Court has found counsel ineffective for failing to adequately investigate and prepare expert testimony about a defendant's mental condition. *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004) (holding the absence of crucial medical records and related information which existed at the time of trial prevented experts from conveying an accurate diagnosis and explanation of defendant's mental condition); *see also, Ard v. Catoe*, 372 S.C. 318, 332, 642 S.E.2d 590, 597 (2007); *Nance v. Ozmint*, 367 S.C. 547, 557, 626 S.E.2d 878, 883 (2006) (concluding defense counsel in capital murder case should have investigated and presented mitigating social history evidence outlining defendant's troubled childhood and mental illness).

"When determining if want of mitigation evidence resulted in prejudice, we must determine whether the 'mitigating evidence, taken as a whole, "might well have influenced the jury's appraisal" of [the defendant's] culpability.' *Wiggins v. Smith*, 539 U.S. 510, 538 (2003). . . . '[T]he likelihood of a different result if the [mitigation] evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing.' *Rompilla*, 545 U.S. at 393 (quoting *Strickland*, 466 U.S. at 694). Accordingly,

if trial counsel's complete failure to present mitigation evidence undermines confidence in the outcome, then [Petitioner] suffered prejudice." *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009) (citations omitted).

The South Carolina Supreme Court has found prejudice where "there was very strong mitigating evidence to be weighed against the . . . aggravating circumstances presented by the State[, and such] . . . evidence may well have influenced the jury's assessment of [a defendant's] culpability." *Council v. State*, 380 S.C. 159, 176, 670 S.E.2d 356, 365 (2008) (granting new sentencing trial where only very limited mitigation testimony was presented and no medical evidence was presented); *see also, Gray v. Branker*, 529 F.3d 220, 238 (4th Cir.2008) (concluding if a jury had been able to "place [mental disturbance] on the mitigating side of the scale," but was deprived of such evidence, "there is a reasonable probability that at least one juror would have struck a different balance" (quoting *Wiggins*, 539 U.S. at 537)).

In *Jones v. State*, our Supreme Court addressed a claim for ineffective assistance of counsel very similar to the one at issue here. *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998). While the defendant in that case was not diagnosed with FASD, he did claim that trial counsel was ineffective in failing to present mitigating evidence that he had organic brain damage. The Court found that additional evidence about the defendant's mental impairment would not have revealed anything significantly different than what had been presented to the jury. *Id.*, 332 S.C. at 339, 504 S.E.2d at 826. The Court noted that the jury had been presented with

several mitigating factors regarding the mental condition of the defendant, but that they were also presented with overwhelming evidence of the defendant's guilt along with aggravating factors surrounding the murder. *Id.* The Court explained that the defendant was not entitled to retool his mitigation argument into a "fancier" package:

> At the sentencing hearing, the mentality of Jones was the focus of his mitigation case. His counsel's strategy was not to portray Jones as being under active mental and emotional disturbance, but rather to emphasize his mental retardation, as evidenced by his upbringing. This strategy obviously did not succeed. Just because it was unsuccessful does not mean that Jones can now recharacterize the evidence and claim that counsel did not adequately present mitigation evidence. The "new" evidence is the same as the "old" evidence. At best, it is a fancier mitigation case. If the evidence was not persuasive in the first case, the defendant does not get a second chance. Otherwise, there would never be an end to litigation.

Jones v. State, 332 S.C. 329, 339, 504 S.E.2d 822, 826-27 (1998). Accordingly, the Court held that trial counsel was not ineffective.

Our Supreme Court also considered issues similar to those in the instant case[12] in *Simpson v. Moore*, 367

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[12] The Court notes that whether the defendant suffered organic brain damage was not discussed in *Simpson*. Nevertheless, the issues are analogous to the instant case: mother abused drugs

S.C. 587, 627 S.E.2d 701 (2006). In *Moore*, defense counsel called several witnesses, including three experts, to offer mitigating evidence in the sentencing phase of a capital murder trial. The Supreme Court summarized the mitigation testimony from the trial as follows:

> Witnesses testified that Simpson's mother used heroin while pregnant with him, Simpson grew up in a drug environment, he had trouble in school, and he experienced several personal tragedies. One expert, a clinical social worker, testified that Simpson's mother abused drugs while pregnant with Simpson and after, Simpson was often abandoned as a child, he suffered chronic headaches, and had been exposed to traumatic life events. A second expert, a clinical psychologist, testified that Simpson's IQ was at the lower end of the normal range, and that Simpson tested "highly abnormal" on the scales of paranoia, schizophrenia, and mania. Finally, a forensic psychiatrist, Dr. Dupree, testified that Simpson suffered from a mental illness known as dysthymic disorder, which is basically chronic depression that lasts over a period of more than two years. Dr. Dupree also testified that

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while pregnant; defendant had traumatic childhood; PCR counsel claimed trial counsel failed to investigate and present evidence of these issues sufficiently; PCR counsel offered evidence and experts offered opinions regarding the defendant's mental condition, which the defendant claims could have changed the jury's sentencing decision.

> Simpson experienced symptoms associated with attention deficit disorder and post-traumatic stress disorder, but he could not be diagnosed as having these disorders. She also noted his history of drug and alcohol abuse.

Simpson v. Moore, 367 S.C. 587, 606-07, 627 S.E.2d 701, 711-12 (2006). At the PCR hearing, defendant's counsel presented testimony of two experts, who explained the relationship between Simpson's traumatic childhood and the likelihood that he would murder someone. *Id.* Also, Dr. Dupree submitted an affidavit stating her prior opinion was not reliable because she did not know that Simpson's mother had used drugs during her pregnancy with Simpson, among a variety of other facts, and that based on this new information, she was prepared to offer a different opinion. *Id.*

The Court held[13] that defense counsel was not deficient because counsel interviewed a number of witnesses about the defendant's childhood and life; counsel hired a private investigator to gather background information on the defendant; and counsel called several witnesses to offer mitigating evidence, including three experts who were provided the information gathered about the defendant's background. *Simpson v. Moore*, 367 S.C. 587, 606-07,

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[13] The Court reversed the PCR court, which had found that counsel failed to fully investigate the defendant's medical, mental, social, and familial history, and because of this, the jury did not have the opportunity to consider mitigating factors warranting a life sentence as opposed to the death penalty. *See Moore*, 367 S.C. at 607, 627 S.E.2d at 712.

627 S.E.2d 701, 711-12 (2006). The Court also held that the defendant failed to show that he was prejudiced during the mitigation case because "the jury was aware of the defendant's troubled childhood, traumatic life experiences, and mental condition." Citing *Jones v. State*, the Court concluded that any "additional investigation would have merely resulted in a 'fancier' mitigation case, having no effect on the outcome of the trial." *Simpson v. Moore*, 367 S.C. 587, 606-07, 627 S.E.2d 701, 711-12 (2006), *quoting Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998).

This Court finds the instant case analogous to *Jones v. State* and *Simpson v. Moore*. The record shows that trial counsel did not present evidence to the jury that Petitioner suffered from Fetal Alcohol Syndrome or that he had organic brain damage. At Petitioner's PCR hearing, Petitioner's trial counsel and defense mitigation investigator testified that they had evidence that Petitioner's mother, Daisy, drank alcohol during pregnancy and that they were aware of Fetal Alcohol Syndrome and the effects of prenatal exposure to alcohol. However, both Attorney Mauldin and Attorney Nettles stated that they could not identify a reason why they did not develop a mitigation strategy based on Fetal Alcohol Syndrome. PCR Transcript of Record at 93-97, 119, 186-88. Nevertheless, this Court finds that Petitioner has not shown trial counsel was ineffective.

Trial counsel's investigation, preparation, and presentation of defense evidence and mitigation at Petitioner's trial were not deficient. Trial counsel put together a highly qualified defense team, which

included experienced capital defense attorneys, mitigation investigators, social workers, and mental health experts. Trial counsel carefully investigated the social, educational, familial, and mental health background of the Petitioner. Trial counsel developed a cogent mitigation defense, offered an array of compelling evidence, and presented the poignant testimony of a number of lay and expert witnesses.

Trial counsel retained Jan Vogelsang as a mitigation expert. Ms. Vogelsang is a highly-regarded clinical social worker with substantial experience in capital litigation, although this was her first trial working as a mitigation investigator. *See* PCR Transcript of Record at 15-19. Ms. Vogelsang testified that she was familiar with Fetal Alcohol Syndrome, including its symptoms and causes, given her prior experience with working with people affected by FAS. *Id.* at 53-55. During the course of her investigation, Vogelsang investigated and collected information regarding the mother's drinking habits. *Id.* at 50-51. For example, she interviewed family members, including Petitioner's father, Dwight Williams, and Petitioner's sister, Maureen Williams. *Id.* at 55-60. In her testimony at the PCR hearing, Ms. Vogelsang noted that neither Dwight nor Maureen could identify the precise amount of alcohol consumed by the mother. *Id.* at 55-60. Vogelsang also interviewed the mother, Daisy Huckaby, who denied drinking while pregnant. *Id.* at 58. Vogelsang presented the information she collected about the mother's drinking to trial counsel as well as to the defense team's experts. *Id.* at 59-60.

Trial counsel retained Dr. James Evans, a neuropsychologist, who completed a battery of neuropsychological testing that revealed the Petitioner suffered from neuropsychological brain damage affecting the frontal lobes. This information was presented to trial counsel and the other members of the defense team, including Jan Vogelsang, as well as to the defense experts. Also, trial counsel retained Dr. Griesemer who conducted an MRI of the Petitioner's brain and concluded the MRI Report showed a normal brain. This Report was available prior to the start of trial.

Trial counsel retained Dr. Robert Richards who testified during the guilt phase of the trial and diagnosed the Petitioner with bipolar disorder. ROA at 1961. Similarly, trial counsel retained Dr. Seymour Halleck, who testified as a forensic psychiatrist in the penalty phase of the trial. ROA at 2303. At trial, Dr. Halleck testified that Petitioner had a major depressive episode and an obsessive compulsive disorder. ROA at 2309. Dr. Halleck based his diagnosis on an extensive review of Petitioner's background and family history, including defense team's mitigation notes, school records, police records, incident reports, medical records, as well as a four hour interview with Petitioner. ROA at 2306. Having reviewed all of this information, however, Dr. Halleck concluded that Petitioner knew right from wrong and was able, though with difficulty, to conform his behavior to the requirements of the law. ROA at 2318.

Additionally, trial counsel brought in experienced litigation attorneys from the well-regarded Washington

D.C. law firm, Akin Gump, to help prepare Petitioner's defense. In particular, these attorneys helped investigate and prepare mitigation experts, including Dr. Seymour Halleck. PCR Transcript of Record at 135-36. Attorney Nettles testified that he was satisfied with the work of these attorneys and that their presentation of the mitigation experts was consistent with the defense's theory of the case. PCR Transcript of Record at 136.

Based on all the foregoing, this Court finds that trial counsel had evidence that Petitioner's mother drank during pregnancy, and that trial counsel was aware of the resulting complications, including brain damage. Trial counsel also had evidence that Petitioner possibly suffered brain damage, based on Dr. Evans' reports. Trial counsel presented this information, along with other mitigation evidence, to the defense experts. Considering all of the information it had available and in consultation with its experts, trial counsel developed a cogent strategy to present mitigation evidence—including evidence of the mother's alcohol addiction—but also made a strategic decision to not present to the jury evidence of brain damage or a diagnosis of Fetal Alcohol Syndrome (though trial counsel was unable to articulate the reasons for that strategic decision). Instead, trial counsel's strategy was to present mitigation evidence regarding Petitioner's troubled childhood and his mental illness, as diagnosed by defense experts.

Trial counsel carefully developed its mitigation evidence. As explained above, trial counsel attempted to fully develop mitigation evidence of Petitioner's

troubled childhood. As part of that strategy, trial counsel presented evidence of mother's alcohol addiction and her consumption of alcohol during pregnancy. Trial counsel attempted—albeit unsuccessfully—to use that evidence, along with other facts in evidence, to persuade the jury to consider the lesser sentence of life. Similarly, as explained above, trial counsel presented evidence of Petitioner's mental illness, again pleading with the jury for a sentence other than death. While it is easy in retrospective to criticize an unsuccessful trial strategy, Petitioner has not shown that trial counsel's investigation and presentation of mitigation evidence fell below the standard required in a PCR action.

Accordingly, counsel's performance was not deficient. *See Johnson v. State*, 333 S.W.3d 459, 466 (Mo. 2011) (failure to present expert testimony specifically related to fetal alcohol syndrome was not ineffective assistance); *Sells v. Thaler*, CIV. SA-08-CA-465-OG, 2012 WL 2562666 (W.D. Tex. June 28, 2012) (concluding no reasonable probability that, but for the failure of petitioner's trial counsel to present evidence of fetal alcohol syndrome, the outcome of the punishment phase of petitioner's capital murder trial would have been any different); *Garza v. Thaler*, 909 F. Supp. 2d 578 (W.D. Tex. 2012) (petitioner's complaints about his trial counsel's failure to investigate whether petitioner suffers from FAS and to present evidence establishing such a diagnosis did not cause the performance of trial counsel to fall below an objective level of reasonableness); *Burgess v. State*, 962 So. 2d 272 (Ala. Crim. App. 2005) (denying defendant's claims of ineffective assistance of counsel that his trial counsel

should have called an expert witness on FAS and should have obtained a neuropsychological assessment to investigate possible organic brain impairment, where defendant's counsel conducted a diligent investigation and introduced evidence in support of mitigation); *In re Andrews*, 28 Cal. 4th 1234, 1259, 52 P. 3d 656 (Cal. 2002) (concluding counsel's strategic decision to limit the scope of their investigation of mitigating background evidence and to not present evidence at the penalty phase that included FAS and organic brain damage came within "the wide range of reasonable professional assistance"); *State v. Sullivan*, 1995 WL 465172 (Del. Super. June 29, 1995) *aff'd*, 676 A.2d 908 (Del. 1996) (finding trial counsel's failure to investigate FAS not ineffective where trial counsel was provided conflicting evidence regarding mother's drinking habits during pregnancy); *State v. Murphy*, 91 Ohio St. 3d 516, 542, 747 N.E.2d 765, 797 (2001) (finding trial counsel's failure to present evidence of organic brain damage was not ineffective where record showed that counsel presented mitigating factors, including defendant's neglected childhood in an alcoholic home; and noting trial counsel "need not pursue every conceivable avenue"); *Foell v. Mathes*, 310 F. Supp. 2d 1020, 1049 (N.D. Iowa 2004) (concluding trial counsel was not ineffective for failing to present evidence of FAS where attorney conducted a satisfactory and reasonable investigation into defendant's mental state, but rejecting the viability of using FAS as a defense).

Furthermore, Petitioner has not shown prejudice. Petitioner argues that had trial counsel presented evidence of Petitioner's organic brain damage, resulting

from his FAS, it is reasonable that at least one juror would have been persuaded to give a life sentence rather than the death penalty. This Court disagrees. As discussed above, trial counsel presented a well-reasoned mitigation defense, which included compelling evidence of the Petitioner's troubled childhood and evidence of the Petitioner's mental illness based on multiple expert opinions. Petitioner's fetal alcohol argument would have "merely resulted in a 'fancier' mitigation case, having no effect on the outcome of the trial." *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998) (trial counsel not ineffective for failing to thoroughly investigate and present mitigating evidence regarding defendant's metal impairments, including organic brain damage, where trial counsel focused its mitigation on the mental conditions of the defendant); *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006).

This Court also notes that a survey of jury verdicts in sister jurisdictions shows that defendants are often sentenced to death in spite of evidence offered in mitigation that the defendant had fetal alcohol syndrome or organic brain damage. *See, e.g., Zack v. State*, 753 So. 2d 9 (Fla. 2000) (affirming death sentence where jury weighed aggravating circumstances against mitigating circumstances, including evidence and diagnosis of FAS) *aff'd Zack v. State*, 911 So. 2d 1190 (Fla. 2005); *State v. Locklear*, 349 N.C. 118, 134, 505 S.E.2d 277, 286 (1998) (affirming sentence of death in capital case where defendant's evidence during the sentencing phase included evidence that defendant suffered from Fetal Alcohol Syndrome); *State v. Timmendequas*, 168 N.J.

20, 33, 773 A.2d 18, 25 (2001) (affirming death sentence where jury found aggravating circumstances outweighed mitigating circumstances, including jury's finding that defendant was born to a mother who was emotionally unfit and unable to meet his physical and emotional needs and caused him to suffer from fetal alcohol effect due to her drinking throughout her pregnancy); *People v. Roybal*, 19 Cal. 4th 481, 522, 966 P.2d 521 (1998) (jury instructed to consider fetal alcohol syndrome as a mitigating factor after expert testimony that defendant had organic brain damage as a result of the FAS; defendant sentenced to death); *Brown v. State*, 659 N.E.2d 671, 675 (Ind. Ct. App. 1995) (affirming trial court sentence in murder case where the court concluded that the aggravating circumstances outweighed the mitigating circumstances, which included evidence of fetal alcohol syndrome); *Davies v. State*, 758 N.E.2d 981, 988 (Ind. Ct. App. 2001) (affirming sentence where the trial court weighed aggravating and mitigating circumstances, including fetal alcohol syndrome); *State v. Sullivan*, 1995 WL 465172 (Del. Super. June 29, 1995) *aff'd*, 676 A. 2d 908 (Del. 1996) (concluding that a diagnosis of FAS would not have affected the outcome of the sentencing phase because the sentencing court relied on mitigation evidence that defendant had limited intelligence and reasoning powers); *State v. Cooper*, 410 NJ. Super. 43, 979 A.2d 792 (N.J. Super. Ct. App. Div. 2009) (alleged deficiency in failing to present mitigation evidence that defendant had brain damage from fetal alcohol syndrome or fetal alcohol spectrum disorder was not prejudicial and thus did not constitute ineffective assistance). Accordingly, Petitioner has not met his burden.

All Other Allegations

As to any and all other allegations that were raised in Petitioner's application or at the hearing in this matter, and have not been specifically addressed in this Order, this Court finds the Petitioner failed to present any evidence regarding such allegations. Accordingly, this Court finds the Petitioner waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all of the foregoing, this Court finds that the Petitioner has not met his burden. Counsel was not deficient in any manner. Further, the Petitioner was not prejudiced by counsel's representation. Accordingly, this Court finds the allegations raised in this Application for Post-Conviction Relief are without merit and dismisses this Application with prejudice.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. That the Petitioner is remanded to the custody of the South Carolina Department of Corrections for the purpose of carrying out his sentence.

IT IS SO ORDERED this 24 day of July, 2013.

/s/G. Edward Welmaker
The Honorable G. Edward Welmaker
Circuit Court Judge
Thirteenth Judicial Circuit

APPENDIX B

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appellate Case No. 2013-001945

[Filed April 13, 2016]

Charles Christopher Williams, Petitioner,	)
v.	)
State of South Carolina, Respondent.	)

ON WRIT OF CERTIORARI

Appeal from Greenville County
G. Edward Welmaker, Post-Conviction Relief Judge

Memorandum Opinion No. 2016-MO-012
Heard March 22, 2016 – Filed April 13, 2016

DISMISSED AS IMPROVIDENTLY GRANTED

Derek Joseph Enderlin, of Ross & Enderlin, PA, of Greenville, for Petitioner.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, and William W. Wilkins, III, of Greenville, for Respondent.

Louis O'Neill, of White & Case, LLP, of New York, New York and John S. Nichols, of Bluestein Nichols Thompson & Delgado, LLC, of Columbia, for Amicus Curiae, The Federal Republic of Germany.

PER CURIAM: We granted a writ of certiorari to review the decision of the post-conviction relief judge. We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

PLEICONES, C.J., BEATTY, KITTREDGE, HEARN and FEW, JJ., concur.

APPENDIX C

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA GREENVILLE DIVISION

Civil Action No. 6:16-1655-JMC-KFM

[Filed December 11, 2017]

Charles Christopher Williams,	)
	)
Petitioner,	)
	)
vs.	)
	)
Bryan P. Stirling and	)
Willie D. Davis,	)
	)
Respondents.	)
	)

REPORT OF MAGISTRATE JUDGE (DEATH PENALTY CASE)

The petitioner, an inmate incarcerated in Kirkland Correctional Institution in the South Carolina Department of Corrections ("SCDC") under a sentence of death, seeks habeas corpus relief pursuant to 28 U.S.C. § 2254. The petitioner is represented by appointed counsel (doc. 11). Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B), and Local Civil Rule 73.02(B)(2)(c) (D.S.C.), this magistrate judge is

authorized to review post-trial petitions for relief and submit findings and recommendations to the District Court.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. Underlying case facts

The following case facts are taken from the opinion of the Supreme Court of South Carolina in the petitioner's direct appeal. Around 10:00 a.m. on September 3, 2003, the petitioner entered a Bi-Lo grocery store in Greenville, South Carolina, where his former girlfriend, Maranda Williams, worked. The petitioner accosted Maranda and forced her into an office in the bakery/deli. Maranda called 911 from her cell phone. During the 90-minute phone call, hostage negotiators tried to convince the petitioner to release Maranda. When Maranda attempted to escape, the petitioner chased, shot, and killed her. Hearing the shots, law enforcement entered the store and apprehended the petitioner. Shortly after his arrest, the petitioner gave a statement in which he confessed to the crimes for which he was later charged (doc. 19-4 at 2). *State v. Williams*, 690 S.E.2d 62, 63 (2010).

In his initial statement to law enforcement, the petitioner declared, in pertinent part:

> . . . . I met Maranda Williams when she and I worked at Bi-Lo on Woodruff Road together. I started working there in mid 1999 and Maranda in the beginning of December 2002. I started as clerk and I worked my way up to assistant produce manager at the store. Maranda was

working in the deli-bakery as a clerk. We started out as friends and we would talk a lot at work. We talked for a few weeks before we actually started dating. We started dating around the beginning of March 2003.

At first everything went fine and then we started finding out what kind of people we were and it just went to hell after that.

The biggest reason why all this happened was that Maranda had gotten pregnant and had gotten an abortion and did not tell me about it. I found out from someone else that Maranda had gotten pregnant about three weeks into our relationship and that she had gone right out and gotten an abortion. I didn't say anything to her until after we split up sometime in the middle of June.

Maranda denied that she had gotten pregnant and had gotten an abortion, but everyone else was telling me that it was true. That's the main reason why we broke up and why all this happen. Maranda had always been in trouble and she would always tell me that she was on ecstasy, cocaine, heroin, and other things. I never saw her take drugs, but she was around me when she was obviously high. She would always tell me that she didn't see why I would want anything to do with her. She knew that I wasn't into that stuff and she knew that I didn't like it.

At about the time that we split up, Maranda transferred to the store on east north street and has been there ever since.

Over the next month or so, I might have talked to Maranda one or two times on the phone. I think we each called the other person once. We called each other just to talk. Even though we split up, Maranda said that she still wanted to be friends. That really wasn't working, so I just gave up trying.

Then in the middle of July I got arrested. I went up to the Bi-Lo on East North Street to talk to her. We talked outside for a few minutes and I asked if I could come back and talk to her on her lunch break.

She said, yes.

And I went back about three hours later. When I went back up there, I waited in the parking lot. Maranda came out and she walked over to her car. I thought there was a problem, so I got out and walked over to her driver's side car door. And she started cussing and screaming at me. We were there for about 15 or 20 minutes arguing in the parking lot. I didn't know what was wrong with her. She slammed my hand in the car door. And I know I shouldn't have done it, but I hit her in the face. I wanted her to know that I wasn't going to let her slam my hand in the car door. I left and went home and told my mom what happened.

About 9:30 that night two officers came to the house and told me that they had a warrant for my arrest and they arrested me. They charged me with assault and battery with intent to kill and I went to jail. I got out of jail at 8:00 p.m. the next night. My lawyer told me to stay away from Maranda, so I didn't have any contact with her after the incident in the parking lot.

I had bought a shotgun last October just to have the gun. I always kept it in the case in my bedroom at home. This morning I left my house at about 4 a.m. I was just riding around thinking about what I was going to do. I took the shotgun with me, then I left the house and about 9 a.m. I went to the Bi-Lo on East North Street where Maranda works.

When I got to the store I didn't really know what was going to happen. I walked into the store with the shotgun. I had it out of my coat and right by my side. It kind of surprised me that nobody else saw me with the gun. I walked right down one of the aisles and to the deli-bakery. I walked around the counter and there were other girls working there, so I told them to leave. I saw Maranda through the double doors, so I walked through the doors and she turned around and saw me.

We sat in the deli-bakery office and she was asking why I was doing it and telling me I should let her go. We talked for about 45 minutes or so and she asked me two or three times to let her go.

While I was talking to Maranda, two other male managers came by. They walked by the office and looked in and saw me with Maranda. When they saw me, they kept walking by the office, out the double doors. I had the shotgun when they walked by and it was pointed at the door.

While I was in there, a negotiator from the sheriff's office called me on Maranda's cell phone. He was calling me about every ten minutes and he was asking me if I was going to let Maranda go. He was checking to see if she was okay and Maranda talked to him about eight or nine times. I told the negotiator that I would let Maranda go. I was asking for like 45 minutes to talk to her and then I was going let her go.

After we talked, we left the office and Maranda walked out first, I was going to let her go. I told the negotiator that I was going to let her come out and I told I was going to leave the gun in the office. I was going to leave the gun in the office or in the deli–bakery. And when we walked out of the office, Maranda grabbed the barrel of the gun. I had the safety on, but when she grabbed it, she knocked it off safety and she pulled the trigger, and the gun fired.

I struggled with her to get the gun away from her. I finally got it away from her and she ran out of the double doors and started running through the back of the deli–bakery. She almost made it out from around the counter and I raised the gun and shot it the first time. I hit

her in the bottom of her back and her right arm. She fell on the ground and she started to get back up again, and I shot her a second time.

When I shot her the second time, I was about 7 or 8 feet away from her. She was on her hands and knees and I shot her in the back. She laid back on the ground and I shot her twice more. I was standing maybe a few feet away from her when I shot her the last two times. The gun was a Mossburg turkey shot, four shells of bb shot or bird shot.

At that point I really didn't have much intention of going to jail. So, I put the gun in my mouth and pulled the trigger. I forgot that Maranda had fired one shot and that the gun was empty. So, it just clicked. I put the gun down back there and walked to the right side of the stock room. I really don't know why I walked that way, I just started walking. Then I came back to the deli - bakery office and that's when the swat team was there. I had the phone in my hand and I dropped it and put my hands in the air. They told me to lay down on the ground, and I did.

One guy put his knee on the back of my neck, and handcuffed me, and then pulled me up off the ground, then they walked me out front and then they put me in a car. If Maranda wouldn't have tried to take the gun, none of this would have ever happened. I was just mad or angry at her over the whole situation.

> When she got pregnant and had the abortion, I was sure the baby was mine. She had told her friends that I had got her pregnant so I figured the baby was mine. We had been having sex all during our relationship.
>
> When we were wrestling over the gun, Maranda's shirt came off. I was trying to grab a hold of her arm and I caught the shirt and pulled it off. You'll see everything on the videotape and it will tell you everything that you want to know. I didn't purposely pull on any of the clothes. Her shirt came off while we were struggling, but I didn't take it off on purpose.

(Doc. 20-5 at 259-65; app. 1745-51). Subsequent statements made by the petitioner to Pamela Crawford, M.D., a forensic psychiatrist with the South Carolina Department of Mental Health, in interviews after the arrest were also introduced at trial (doc. 20-5 at 285; app. 1771; *see* doc. 20-7 at 363-429, doc. 20-8 at 1-37, app. 2860-2963).

B. The petitioner's trial

The petitioner was indicted by the Greenville County Grand Jury in March 2004 for murder and possession of a weapon during the commission of a violent crime (2004-GS-23-1746) and kidnapping (2004-GS-23-1745). The petitioner was represented by Chief Public Defender for the 13th Judicial Circuit John I. Mauldin; state appointed counsel William Norman Nettles; and Mark J. MacDougall and Colleen Coyle of the Aiken Gump Law Firm, Washington, D.C.

The State gave notice of intent to seek the death penalty on August 30, 2004. Motion hearings were held on May 25, 2004; November 1, 2004; December 15, 2004; January 13, 2005; and January 26, 2005. The matter was called to trial on February 7, 2005, before the Honorable J.C. "Buddy" Nicholson. The State was represented by Solicitor Robert Ariail and Deputy Solicitor Betty Strom. On February 15, 2005, the jury found the petitioner guilty of kidnapping, murder, and possession of a firearm during a violent crime (doc. 20-6 at 87; app. 2069).

On February 17, 2005, the penalty phase began (doc. 20-6 at 88; app. 2072). This phase had 12 witnesses. On February 18, 2005, the jury was charged to consider the existence of the following aggravating factor: "Murder was committed while in the commission of kidnapping" (doc. 20-6 at 418; app. 2399). The jury was also charged to consider the following statutory mitigating circumstances:

> 1. Murder was committed while the defendant was under the influence of mental or emotional disturbance.
>
> 2. The age or mentality of the defendant at the time of the crime.

(Doc. 20-6 at 422; app. 2403).

> The jury was also charged to consider non-statutory mitigating circumstances:
>
> 1. Any testimony regarding the defendant's mental illness is treatable with medication.

> 2. Any testimony regarding the defendant's adaptability to prison.
>
> 3. Any testimony regarding the defendant's future violence in prison.
>
> 4. Any testimony the defendant is loved and supported by his sister, Maureen, and her family that have and will continue to encourage, sustain, and assist him in the future.
>
> 5. Any other testimony or any other reason or reasons which the jury may consider.

(Doc. 20-6 at 423-24; app. 2404-05).

After the jury had deliberated from 3:50 p.m. to 7:00 p.m. for a total of three hours and ten minutes, the trial judge returned the jury to the courtroom noting:

> It's been a long twelve days, and it's been a long day today. I know everyone is tired. What I'm going to do is stop deliberations, . . . get supper and be back in the morning at 9:30. We'll continue deliberations at that time. . . . Don't misunderstand me, don't deliberate, don't discuss the case until all 12 of you are together at 9:30 in the morning. . . . Don't discuss the case among yourselves. . . .

(Doc. 20-6 at 428; app 2409).

On February 19, 2005, the jury returned and began its deliberations at 9:30 a.m. While the jury was out, the court noted that the petitioner had made a request

for an *Allen*[1] charge, which the court noted as "court's exhibit number 13." During deliberations, the jury sent a note to the trial judge indicating that the jury was split between imposition of the death sentence and a sentence for life imprisonment. In the note, the jury told the court that they were "at 9 for death imposition, 3 for life imprisonment" and asked for instruction about what procedure to follow to resolve. The court noted that it had not asked for the actual split (doc. 20-6 at 429, app. 2410; doc. 20-8 at 38-39, app. 2964-65).

Trial counsel Mauldin stated that he had reviewed the note and had seen that it revealed the jury breakdown. He asserted that because the note disclosed the breakdown, the court was required to impose a life without parole sentence without further deliberations. The State asserted in opposition that although the jury, on its own, stated what the breakdown was voluntarily, the court was not required to impose a life sentence. The State noted that law did not allow them to ask the breakdown. Judge Nicholson denied trial counsel Mauldin's motion for a mistrial, noting the jury note also asked, "Please refer to instruction about what procedure to follow to resolve." The court stated the procedure in South Carolina was to give an *Allen* charge and let the jury continue deliberations, and the court denied trial counsel Mauldin's motion (doc. 20-6 at 430; app. 2411).

Trial counsel Mauldin then requested that the trial court consider giving an *Allen* charge as he drafted. The court stated that it had an *Allen* charge that was

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[1] *Allen v. United States*, 17 S. Ct. 154 (1896)

not verbatim of what the defense had but that it covered basically the same thing (doc. 20-6 at 431; app. 2412). Trial counsel Mauldin objected to the charge. The court agreed to remove the language to which the defendant objected[2] and to provide the jury with written copies of the charge (doc. 20-6 at 431-32; app. 2412-13). When the jury returned at 11:55 a.m., the court gave the *Allen* charge (doc. 20-6 at 432-34; app. 2413-14). After the jury had retired to their jury room, trial counsel Mauldin restated his objection (doc. 20-6 at 434-35; app 2415-16).

The jury returned a verdict finding the existence of the statutory aggravating circumstance "murder was committed while in the commission of kidnapping." The jury entered a recommendation of a sentence of death. The jury was polled and confirmed their vote. Judge Nicholson then sentenced the petitioner to death (doc. 20-6 at 436, 439; app. 2417, 2420).

Post-trial motions were filed on February 28, 2005, and heard on April 6, 2005 (doc. 20-7 at 345-70; app. 2842-67). During the April 6, 2005, post-trial motion proceeding, trial counsel Mauldin argued that the petitioner was entitled to a life sentence based upon the jury note during the deliberations. In particular, he noted that once the jury declared what their split was, even on their own, the court was required to impose a life sentence at that point. Judge Nicholson reminded trial counsel of his proposed *Allen* charge, and although

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[2] The language trial counsel Mauldin objected to was "As I instructed you earlier, the verdict of a jury must be unanimous" (doc. 20-6 at 431-32; app. 2412-13).

the court did not charge it, the court modified the charge given to the jury. Trial counsel reiterated that giving an *Allen* charge after the court had been advised of a numerical breakdown was inappropriate and error. Solicitor Ariail pointed out that the note revealed a request for further instruction after they revealed the split, and it was given to them. The court denied the motion (doc. 20-7 at 367, 369; app. 2864, 2866).

C. Direct appeal

On May 19, 2005, a notice of appeal was filed from the written order denying the post-trial motions. In the appeal, the petitioner was represented by Robert M. Dudek of the South Carolina Office of Indigent Defense. The petitioner raised the following issues on appeal:

> 1. Whether the court erred by refusing to sentence appellant to life imprisonment when the jury revealed it was split nine to three in favor of death after hours of deliberation since the alternative of an Allen charge was impractical and was going to be coercive against the minority opposing death under these unusual circumstances, and S.C. Code § 16-3-20 provided for a life sentence where the jury cannot agree on a sentence after "reasonable deliberation"?
>
> 2. Whether the court erred, in the alternative, by refusing to give appellant's proposed Allen charge when the jury revealed it was split 9-3 in favor of the death penalty where the judge's instruction concluded with language telling the

> jury the court hoped they would arrive at a verdict since this instruction was coercive towards the minority whereas appellant's instruction told the jurors not to do violence to their individual judgments to reach a verdict and concluded by correctly stating that "no juror should surrender their honest conviction for the mere purpose of returning a unanimous verdict," since (sic) was the proper instruction given the unusual facts of this case?
>
> 3. Whether the court erred by refusing to declare a mistrial where the solicitor improperly pursued having Dr. Pamela Crawford testify she assisted the solicitor in deciding whether to seek the death penalty in this case by accessing the case since this impermissibly bolstered and vouched for the solicitor's discretionary decision to seek the death penalty with the strong suggestion that a forensic psychiatrist had agreed nothing stood in the way of death as the appropriate punishment, and the solicitor's improper actions irrevocably placed the defense in the highly prejudicial position of appearing to hide relevant evidence from the jury?

(Doc. 19-1 at 1-2).

On February 8, 2010, the South Carolina Supreme Court entered its opinion affirming the judgment of conviction and death sentence (doc. 19-4). *State v. Williams*, 690 S.E.2d 62 (2010). The petitioner made a timely petition for rehearing on February 23, 2010 (doc. 19-5). The petition was denied, with dissent, on March

25, 2010 (doc. 19-6). The remittitur was issued the same date (doc. 19-7).

On June 23, 2010, the petitioner, through counsel Dudek, mailed a petition for writ of certiorari in the United States Supreme Court. In the petition for writ of certiorari, counsel Dudek raised the following issue:

> Whether the South Carolina Supreme Court erred by holding this Court's opinion in *Lowenfield v. Phelps*, 484 U.S. 231, 239-240 (1988) was inapplicable to Petitioner's Due Process and Eighth Amendment violation grounds, where the jury revealed it was split nine to three in favor of death after hours of deliberation, since the *Allen* charge was going to be coercive against the minority opposing death under the unusual facts of this case, and the fact the trial court did not request the jury to reveal its division did not make the *Allen* charge less coercive?

(Doc. 19-8).

The petition was docketed on June 29, 2010. The respondent filed its brief on July 29, 2010 (doc. 19-9). On October 4, 2010, certiorari was denied (doc. 19-10).

D. PCR

On November 30, 2010, the petitioner filed a PCR application (doc. 20-8 at 45; app. 2971). The application was received by the respondent on December 14, 2010. The petitioner asserted the following initial grounds for relief:

(A) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, for waiving various objections to the confession given by petitioner to Dr. Pamela Crawford, where Dr. Crawford told petitioner she would help him get treatment as a psychiatrist where she was in reality a law enforcement officer intent on obtaining a damaging confession.

(B) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, for waiving the objection to Dr. Crawford being allowed to testify before a jury, by agreeing Dr. Crawford could testify but not as an expert, since the trial judge's proposed ruling on the matter was erroneous and it led to great confusion for the jury as Dr. Crawford began what was expert testimony.

(C) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, for failing to effectively move for a mistrial based on Dr. Crawford's cumulative testimony, and by failing to effectively object to the trial judge's curative instruction that this court found solved any need for a mistrial.

(D) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, for failing to present available evidence in mitigation regarding the extreme difficulties between petitioner's mother and father and available mitigating evidence about

> petitioner's extremely troubled childhood, teenage and young adult years.
>
> (E) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, for arguing that the trial judge had to declare a mistrial and sentence the petitioner to life imprisonment where the jury revealed its division since defense counsel should have argued the trial judge's distinction between a jury reporting its division on its own, introduced an arbitrary factor into the case as it related to the trial judge's discretion to give an Allen charge rather than declare a mistrial and sentence petitioner to life imprisonment.
>
> (F) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, for failing to argue that certain portions of petitioner's journal should have been excluded under Rule 403, SCRE due to their tendency to confuse the jury, and because their probative value was substantially outweighed by their unduly prejudicial effect.

(Doc. 20-8 at 50; app. 2976).

On December 21, 2010, pursuant to the South Carolina Supreme Court order of November 17, 2010, staying the execution of the petitioner, Judge Welmaker appointed Derek Joseph Enderlin and Richard W. Vieth to represent the petitioner in the PCR action (doc. 20-8 at 53-60; app. 2979-86). On January 13, 2011, the respondent made a return to the initial PCR application (doc. 20-8 at 63; app. 2989).

On September 30, 2011, the petitioner, through appointed counsel Enderlin and Vieth, made the following additional allegations:

> (G) Trial counsel was ineffective for not preserving, or appellate counsel was ineffective for not briefing, in derogation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and/or South Carolina Code 16-3-25, and/or the corresponding sections of the South Carolina Constitution, that the death penalty was not appropriate and that the death penalty is used in an arbitrary manner.
>
> (H) Trial counsel was ineffective in derogation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as the corresponding sections of the South Carolina Constitution, for failing to object to statements in the Solicitor's closing argument, including, but not limited to, statements discussing life in prison, statements about the death penalty being extremely limited, injecting his own personal beliefs in the argument, repeatedly referencing the community and the result of the verdict in the community, and allowing improper argument.
>
> (H2) Trial counsel was ineffective for not preserving, or appellate counsel was ineffective for not briefing, in derogation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as the corresponding sections of the South Carolina

Constitution, that the judge's instructions to the jury that their decision was a recommendation violated South Carolina Jurisprudence, as well as the Constitution of South Carolina and the United States.

(I) Trial counsel was ineffective in derogation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as the corresponding sections of the South Carolina Constitution, for failing to conduct adequate voir dire, and/or to exclude certain jurors, and/or to preserve the request to change venue.

(J) Trial counsel was ineffective for not preserving, or appellate counsel was ineffective for not briefing the argument in derogation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, that the defendant should have the right to plead guilty and still receive a jury trial for sentencing.

(K) Trial counsel was ineffective for not preserving, or appellate counsel was ineffective for not briefing, in derogation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as the corresponding sections of the South Carolina Constitution, that the aggravating circumstances should be in the indictment.

(L) Trial counsel was ineffective in derogation of the Fifth, Sixth, Eighth and Fourteenth

> Amendments to the United States Constitution, for failing to invoke the defendant's right as a foreign national and in investigating the identity of his grandfather.
>
> (M) Trial counsel was ineffective in derogation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as the corresponding sections of the South Carolina Constitution, and South Carolina Code Ann. 23-3-400 et seq, for failing to ask the judge to make a finding that the defendant did not have to register as a sex offender.

(Doc. 19-13 at 2-3; app. 3037-38).

On November 20, 2012, the petitioner amended the application to add the following allegation:

> (N) Trial counsel was ineffective for failing to investigate and further develop prenatal exposure of alcohol to the defendant and the resulting complications arising out of said exposure. This would include a diagnosis of fetal alcohol syndrome or some other type of Alcohol Related Neurodevelopmental Disorder and testimony and evidence that said exposure was not only powerful mitigation that a jury could have considered to give the defendant life, but it also may have been used to prove the defendant, because of mental disease or defect, lacked sufficient capacity to conform his conduct to the requirements of the law.

(Doc. 20-9 at 155-56; app. 3134-35). The petitioner also amended Ground (H) as follows:

> The undersigned also amends his prior addendum regarding part (h) to include both the opening statement and closing argument as containing improper argument as set out in the original addendum.

(Doc. 20-9 at 155-56; app. 3134-35).

Prior to the PCR evidentiary hearing, the petitioner filed a pretrial brief. In his brief, the petitioner stated:

> This brief is also provided to put the attorney general on notice of the facts we intend to rely on and while we believe the grounds were sufficiently pled in the application, this brief is also submitted to be incorporated into the original application as an addendum thereto in order that all claims have been specifically pled in advance of the hearing

(Doc. 20-13 at 189; app. 4478). In the brief, the petitioner asserted the following additional claims:

> (O) The South Carolina Death Penalty Statute is unconstitutional under *Furman v. Georgia* and the Solicitor's Arguments compounded the very problems the United States Supreme Court sought to correct when it reintroduced the death penalty.
>
> > A. Under South Carolina's Statute every murder case can qualify for the death penalty resulting in a complete failure to narrow the

circumstances under which a jury may sentence the defendant to death and the solicitors compounded this problem telling the jury the legislature had narrowed the circumstances in which it could seek death.

1. Failure to define and limit the definition of kidnapping.

2. Solicitor compounded this problem by emphasizing this definition of kidnapping in their closing argument in the guilt phase.

3. This constitutional failure was exacerbated by the solicitors' related and untrue assertions that they are only allowed to seek the death penalty in limited circumstances.

B. The Solicitors' improper argument compromised the jury's duty to consider the particular circumstances of the crime and the characteristics of the defendant.

C. Whether the South Carolina Supreme Court reviewed the sentence to ensure it was appropriate under the circumstances, and whether the review procedure is adequate under *Gregg v. Georgia*.

(P) Trial counsel committed prejudicial error in its failure to identify and present evidence of fetal alcohol syndrome.

(Q) Right to Plead Guilty.

A. The Applicant claims that he desired to plead guilty to the murder charge to show acceptance of responsibility. [Note - Applicant did testify to this at either the PCR proceeding or at trial]. In the brief, Applicant contended that he believes that the issue is preserved by trial counsel, but regardless, either it was not preserved by trial counsel or appellate counsel and petitioner desires to preserve this issue for further review, despite the overwhelming case law in South Carolina against the Applicant. *See State v. Allen*, 386 S.C. 93, 687 S.E.2d 21 (2009); *State v. Crisp*, 362 S.C. 412, 608 S.E.2d 429 (2005); *State v. Wood*, 362 S.C. 135, 607 S.E.2d 57 (2004); *State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004); *State v. Inman*, 359 S.C. 539, 720 S.E.2d 31 (2011).

(R) Aggravators in the indictment.

A. Trial counsel objected to the fact that the circumstances of aggravation were not included in the indictment. Applicant believes that the issue is preserved by trial counsel, but regardless, either it was not preserved by trial counsel or appellate counsel and petitioner desires to preserve this issue for further review, despite the overwhelming case law in South Carolina against the applicant. *See State v. Laney*, 367 S.C. 639, 649-650, 627 S.E.2d 726, 732

> (2006); *State v. Downs*, 361 S.C. 141, 147-148, 604 S.E.2d 377, 380-381 (2004).

(Doc. 20-13 at 207-41; app. 4496-4530)

On January 28, 2013, a hearing was held in Greenville County before the Honorable G. Edward Welmaker, Presiding Judge. The petitioner was present at the hearing and represented by court-appointed counsel Enderlin and Vieth. The respondent was represented at the hearing by Senior Assistant Deputy Attorney General Donald Zelenka, Assistant Attorney General Al Simon, and Assistant Attorney General Anthony Mabry. In addition, present during a portion of the hearing was Consulate General Gerrit Moerking of the German Consulate General Office in Atlanta, Georgia.

Testimony was received on January 28 through January 31, 2013, from Jan Vogelsang, William N. Nettles (trial counsel), John I. Mauldin (trial counsel), Robert M. Dudek (appellate counsel), Daisy Huckaby (the petitioner's mother), Dwight C. Williams (the petitioner's father), Dr. Paul Connor, Dr. Richard Adler, and Dr. Natalie Novick Brown. The PCR court also received numerous exhibits. On February 6, 2013, arguments on the issues were made by counsel. At that point, the PCR court took the matters under advisement pending briefing and receipt of transcript. The petitioner filed his post-trial brief on June 14, 2013 (doc. 20-12 at 1-79; app. 4017-96). On July 23, 2013, Judge Welmaker entered an order of dismissal (doc. 20-12 at 172-220; app. 4167-4215). The petitioner filed a motion to alter judgment on August 7, 2013 (doc. 20-12 at 222-32; app. 4217-27). Judge Welmaker entered an

order on August 9, 2013, denying the motion (doc. 20-12 at 234-35; app. 4229-31).

E. PCR appeal

On September 12, 2013, the petitioner filed a timely appeal (doc. 20-12 at 237; app. 4232). On June 4, 2014, counsel Enderlin filed a petition for writ of certiorari in the Supreme Court of South Carolina raising the following issues:

> 1. Did the PCR judge commit error by finding trial counsel made a strategic decision not to present evidence of fetal alcohol syndrome, when trial counsel testified they simply failed to realize and investigate the evidence of fetal alcohol syndrome and would have liked to have had such evidence before the jury?
>
> 2. Did the PCR court err by using a harmless error analysis when addressing the solicitor's inappropriate argument, and further by failing to address the vast amount of inappropriate comments the solicitor made in his closing argument?
>
> 3. Is the South Carolina Death Penalty statute unconstitutional under *Furman v. Georgia*, and more importantly, was there an adequate proportionality review done in this case?
>
> 4. Was trial counsel ineffective in failing to recognize the Petitioner was a German citizen?
>
> 5. Did the Petitioner have a constitutional right to plead guilty and still be sentenced by a jury?

> 6. Are aggravating circumstances required to be in the indictment?

(Doc. 74 at 5). An amicus brief on behalf of the Federal Republic of Germany was filed on August 6, 2014 (doc. 20-9 at 157-83; app. 3136-62) The respondent made its return to the petition on January 13, 2015 (doc. 20-8 at 63-74, doc. 20-9 at 22-55; app. 2989-3034). The petitioner made a reply on March 31, 2015 (doc. 19-19).

On August 20, 2015, the Supreme Court of South Carolina entered its order initially granting the petition for writ of certiorari on issue one, denying the petition as to all remaining issues, and directing briefing (doc. 19-20). The petitioner filed his brief on October 21, 2015 (doc 19-21). The respondent filed its brief on January 20, 2016 (doc. 19-22). A reply brief was filed on February 4, 2016 (doc. 19-23). An amicus curiae brief on behalf of the Federal Republic of Germany was filed March 4, 2016. On March 22, 2016, oral argument was heard before the South Carolina Supreme Court. On April 13, 2016, the South Carolina Supreme Court entered its order finding that certiorari had been improvidently granted and dismissing the petition and appeal (doc. 19-24). On April 29, 2016, the remittitur was issued (doc. 19-25).

F. United States Supreme Court certiorari proceeding

On September 9, 2016, the petitioner filed a petition for writ of certiorari through counsel Enderlin in the Supreme Court of the United States, raising the following issues:

> Trial counsel admitted that they failed to consider petitioner's severe organic brain damage caused by Fetal Alcohol Syndrome (FAS) in mitigation, despite numerous red flags, however, the State Post Conviction Judge held that trial counsel made a strategic decision to not present FAS to the jury without explanation as to how he made that decision, and without specific findings of fact.
>
> I. Are state post-conviction courts required to make probing and specific findings of fact regarding both prongs of the *Strickland v. Washington* analysis?
>
> II. Did the post-conviction court properly weigh the prejudice of the failure to investigate and present fetal alcohol syndrome to the jury?

(Doc. 19-8).

On December 14, 2016, the respondent filed its brief in opposition. On April 24, 2017, the Court entered its order denying the petition for writ of certiorari. *Charles Christopher Williams v. State of South Carolina*, 137 S. Ct. 1812 (2017) (mem.).

G. Federal petition

On November 28, 2016, the petitioner filed a § 2254 petition in this court (doc. 46). On January 24, 2017, the respondents filed a motion for summary judgment (doc. 69) and a return and memorandum (doc. 68). On February 15, 2017, the petitioner filed an amended petition, effectively mooting his initial petition (doc. 74). On April 6, 2017, the district court denied the

respondents' motion for summary judgment as moot (doc. 88). On June 4 and 5, 2017, the respondents filed an amended return and second motion for summary judgment (docs. 100, 101). On September 8, 2017, the petitioner filed a response in opposition to the second motion for summary judgment (doc. 108). The respondents filed a reply on October 6, 2017 (doc. 114). On November 1, 2017, after being granted leave file a memorandum of law as *amicus curiae*, the Federal Republic of Germany filed a memorandum in support of the petitioner (doc. 138).

Only those grounds raised in the amended petition will be addressed herein. *See Young v. City of Mount Ranier*, 238 F.3d 567, 572 (4th Cir. 2001) ("As a general rule, 'an amended pleading ordinarily supersedes the original and renders it of no legal effect.'" (quoting *Crysen/Montenay Energy Co. v. Shell Oil Co.*, 226 F.3d 160, 162 (2d Cir. 2000)); *see also* 6 Charles Alan Wright et al., *Federal Practice and Procedure* § 1476 (3d ed. 2017) ("A pleading that has been amended under Rule 15(a) supersedes the pleading it modifies and remains in effect throughout the action unless it subsequently is modified. Once an amended pleading is interposed, the original pleading no longer performs any function in the case[,] and any subsequent motion made by an opposing party should be directed at the amended pleading.").

In his amended federal habeas corpus petition, the petitioner raises the following grounds for relief:

> I. Petitioner's rights to a fair trial and to due process of law under the Sixth, Eighth, and Fourteenth Amendments to the Constitution of

the United States were violated by the trial court's *Allen* charge to the jury.

II. Petitioner's rights to a fair trial and to due process of law under the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States were violated by the trial court's denial of the defense motion for a mistrial on the grounds that testimony elicited by the State from Pamela Crawford, M.D., a forensic psychiatrist, both improperly vouched for and bolstered the State's decision to seek the death penalty and created the false impression that the defense was hiding relevant evidence from the jury.

III. Petitioner's right to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the Constitution of the United States was violated by trial counsel's failure to object to improper comments by the Solicitor in his closing arguments in the penalty phase.

IV. In the alternative to Ground Three, if, and to the extent that, Ground Three is not procedurally exhausted, any failure to exhaust state court remedies on that ground is due to ineffective assistance of post-conviction counsel.

V. Petitioner was denied the effective assistance of trial counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution because counsel failed to assert that Petitioner is a citizen of The Federal

Republic of Germany and, as such, was entitled to assistance from the German government.

VI. Petitioner was denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution due to trial counsel's failure to investigate, develop, and present in mitigation of punishment that Petitioner suffers from Fetal Alcohol Syndrome due to his mother's abuse of alcohol during pregnancy.

VII. Petitioner's right to the effective assistance of counsel under the Sixth and Fourteenth Amendments of the Constitution of the United States was violated by trial counsel's failure to assert either (a) that the Eighth and Fourteenth Amendments to the Constitution of the United States prohibit the imposition of the death penalty on all persons under the age of 21 or (b) that those amendments prohibit the imposition of the death penalty on persons under the age of 21 who have not fully matured and Petitioner, who was only 20 years old at the time of the offense was such a person.

VIII. The imposition of a death sentence on Petitioner violates the Eighth and Fourteenth Amendments to the Constitution of the United States because the death penalty statute of the State of Carolina fails to narrow the circumstances under which the death penalty may be imposed and therefore results in an arbitrary and capricious capital sentencing process.

IX. In the alternative to Ground Eight, if, and to the extent that, Ground Eight is not procedurally exhausted, any failure to exhaust state court remedies on that ground is due to ineffective assistance of appellate and/or post-conviction counsel.

X. Petitioner was denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution due to trial counsel's failure to object to the improper sentencing testimony of witness Tina Smith about the impact on her of witnessing Petitioner holding the victim hostage and being unable to assist her.

(Doc. 74 at 5, 9, 14, 15, 16, 18, 21-23).

Grounds for Federal Habeas Relief under *Martinez*
Extra-Record Evidence Provided

XI. Trial and collateral counsel were ineffective by failing to investigate, develop and present evidence of the defendant's unique characteristics which substantially reduce his moral culpability for the crime. Counsel's failure violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution, prejudiced the Petitioner's case, and undermines confidence in the outcome.

a. A bio-psychosocial assessment is the vehicle by which the unique characteristics of the defendant are consolidated and presented to the jury so that the jury will have the

essential evidence necessary to reach a reasoned moral judgment about the sentence to be imposed.

b. The assessment failed to explain that the petitioner's behavior, in the circumstances of this crime, was determined by the combined effects of the unique social and biological characteristics upon his volition. The assessment did not develop and present the role biology played in cognitive development, the ability to learn from past experience and to moderate impulses.[15]

XII. In violation of the Sixth and Fourteenth Amendments to the United States Constitution, trial and state post-conviction counsel were ineffective to the prejudice of the Petitioner by failing to investigate develop and present objective and scientific evidence of structural and functional brain damage resulting from: 1) genetic anomalies; 2) congenital malformations (FASD); and 3) early childhood trauma that materially limited the Petitioner's ability to make informed decisions, learn from past behavior, and control impulses resulting from recurrence of situational prompts in daily living which were the same or similar to those of his early childhood.

a. Information establishing diminished capacity and impaired volition was never investigated developed or presented even though a specific request for that information was made to trial and collateral counsel.

b. Genetic study was a gateway through which trial and collateral counsel could have investigated, developed and presented the existence of biological defects, the degree of severity, and their impact upon the Petitioner's capacity to conform his behavior to the requirements of the law.

XIII. Trial counsel were ineffective by failing to investigate develop and present evidence that would have demonstrated that the Petitioner's capacity to conform his behavior to the requirements of the law was substantially impaired. That failure prevented the court from instructing the jury that it could consider diminish capacity as a reason to recommend a life sentence because the General Assembly designated it as a statutory mitigator.[33] Collateral counsel was ineffective by failing to charge trial counsel with IAC for missing the opportunity to have the judge charge the statutory mitigator. Counsel's combined failures violate the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution, prejudiced the Petitioner's case, and undermines confidence in the outcome.

XIV. Trial counsel were ineffective: 1) in calling an expert witness to testify in the guilt phase of the case who was not qualified by education, training or by experience to serve in that capacity. The witness' testimony profoundly prejudiced the Petitioner's mitigation case; 2) trial counsel were ineffective for failing to

adequately prepare the witness for the inevitable cross-examination questions and to provide the witness with the necessary facts to respond to the State's questions; 3) trial counsel were ineffective for failing to have a qualified expert witness testify that the Petitioner met the statutory definition of guilty but mentally ill;[41] 4) collateral counsel were ineffective for failing to tether any available evidence of GBMI to trial counsel's failure to request a jury charge of GBMI; 5) trial counsel's strategic decision to "front load" the mitigation by using an unqualified, improperly prepared and ill equipped witness was inherently unreasonable. Collateral counsel were ineffective in failing to articulate and pursue this issue during the post-conviction relief case. Counsel's failures violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution, prejudiced the Petitioner's case, and undermines confidence in the outcome.

XV. Trial and collateral counsel were ineffective to the prejudice of the Petitioner by failing to present evidence of his remorse.[47] This failure violated the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

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[15] The Supreme Court recognized the significant interplay between developmental biology and moral culpability when it determined that intellectual disability renders a defendant ineligible for a death sentence (*Daryl Atkins v.*

Virginia, 536 US 304 (2002)); that a person committing a capital eligible crime prior to majority is ineligible for a death sentence (*Roper v. Simmons*, 543 US 551 (2005)); and young people committing repeated criminal offenses are not eligible for a sentence of life without parole because of impaired volition (*Graham v. Florida*, 560 US 48 (2010); and *Hall v. Florida*, 134 S. Ct. 1986 (2014) that bright-line definitions of mental impairments, especially in the intellectual disability circumstance, do not adequately capture the condition for which a person is ineligible for a sentence of death – impaired adaptive functioning).

[33] The Legislature has provided a set of specific statutory mitigating facts which suggest diminished moral culpability. If the jury determines such facts exist, that finding alone may support a recommendation of a life sentence. SC Code Ann. § 16-3-20(b)(6) provides the following mitigator: "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." Emphasis added. In sentencing the judge defined a statutory mitigator as: "What is a statutory mitigating circumstance? It is in fact an incident, a detail, or an occurrence which the South Carolina General Assembly has declared by statute will reduce the severity of the offense of murder. In other words, a circumstance recognized by statute as one which in fairness and mercy may be considered extenuating or as

> reducing the degree of moral culpability for the commission of the act of murder." (Dkt. No. 20-6 at 421).
>
> [41] S.C. Code Ann. § 17-24-20(A).
>
> [47] For an informative empirical presentation on the significance of remorse in capital sentencing see *Remorse and Demeanor in the Courtroom: the Consequences of Misinterpretation*; Susan Bandes, Law and Philosophy Workshop, University of Texas Law School November 21, 2013. *The Role of Remorse in Capital Sentencing*; Cornell Law Review, Vol 83, 1599 (1997-98); *Remorse, Apology and Mercy*; Murphy, Jeffrie G., Ohio State Journal of Criminal Law 4:424, 2007.

(Doc. 74 at 23, 50, 53, 66).

II. APPLICABLE LAW

A. Summary judgment standard of review

Summary judgment is appropriate when the materials in the record show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[I]n ruling on a motion for summary judgment, 'the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'" *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) (per curiam) (brackets omitted) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and a

fact is material if it "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248.

The party seeking summary judgment shoulders the initial burden of demonstrating to the court that there is no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in its pleadings. Rather, the non-moving party must demonstrate that specific, material facts exist which give rise to a genuine issue. *See id.* at 324.

B. Section 2254 standard of review

Because the petitioner filed the petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), review of his claims is governed by 28 U.S.C. § 2254(d), as amended. *Lindh v. Murphy*, 521 U.S. 320 (1997). As amended by the AEDPA, § 2254 "sets several limits on the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). For instance, § 2254 authorizes review of only those applications asserting a prisoner is in custody in violation of the Constitution or federal law and only when, except in certain circumstances, the prisoner has exhausted remedies provided by the state. *Id.*

When a § 2254 petition includes a claim that has been adjudicated on the merits in a state court proceeding, § 2254 provides that the application shall

not be granted with respect to that claim, unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). "This is a 'difficult to meet,' and 'highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt.' " *Pinholster*, 563 U.S. at 181 (internal citations omitted) (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011); *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)).

C. Ineffective assistance of counsel

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The Supreme Court has held that this right is violated when counsel retained by, or appointed to, a criminal defendant fails to provide adequate or effective legal assistance. *See Strickland* v. Washington, 466 U.S. 668, 686 (1984). For a claim of ineffective assistance of counsel in violation of the Sixth Amendment, *Strickland* established a two-prong test, under which the criminal defendant must show deficient performance and resulting prejudice. *Id.* at 687.

"The performance prong of *Strickland* requires a defendant to show 'that counsel's representation fell below an objective standard of reasonableness.' " *Lafler v. Cooper*, 566 U.S. 156, 163 (2012) (quoting *Hill v. Lockhart*, 474 U.S. 52, 57 (1985)). "[C]ounsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,' " and courts should indulge in a " 'strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance.' " *Burt v. Titlow*, 134 S. Ct. 10, 17 (2013) (quoting *Strickland*, 466 U.S. at 689-90). "To establish *Strickland* prejudice a 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.' " *Lafler*, 566 U.S. at 163 (quoting *Strickland*, 466 U.S. at 694).

The standard of review for an ineffective assistance claim under *Strickland* in the first instance is already "a most deferential one," and " '[s]urmounting *Strickland*'s high bar is never an easy task.' " *Richter*, 562 U.S. at 105 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)). Consequently, "[e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult, as the standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Id.* (internal citations omitted) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009); *Lindh*, 521 U.S. at 333, n. 7 (1997); *Strickland*, 466 U.S. at 689). "When § 2254(d) applies, the question is not whether counsel's actions were

reasonable ... [but] whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

D. Procedural default

A petitioner's failure to raise in state court a claim asserted in his § 2254 petition "implicates the requirements in habeas of exhaustion and procedural default." *Gray v. Netherland*, 518 U.S. 152, 161 (1996). "The habeas statute generally requires a state prisoner to exhaust state remedies before filing a habeas petition in federal court." *Woodford v. Ngo*, 548 U.S. 81, 92 (2006). Thus, "[a] state prisoner is generally barred from obtaining federal habeas relief unless the prisoner has properly presented his or her claims through one 'complete round of the State's established appellate review process.' " *Id.* (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999)). In a similar vein, "a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance" and has procedurally defaulted those claims. *Coleman v. Thompson*, 501 U.S. 722, 732 (1991). Absent an exception, a federal court will not entertain a procedurally defaulted claim, so long as the state procedural requirement barring the state court's review is adequate to support the judgment and independent of federal law. *See Martinez v. Ryan*, 566 U.S. 1, 9-10 (2012); *Walker v. Martin*, 562 U.S. 307, 315-16 (2011). "Thus, if state-court remedies are no longer available because the prisoner failed to comply with the deadline for seeking state-court review or for taking an appeal, those remedies are technically

exhausted, but exhaustion in this sense does not automatically entitle the habeas petitioner to litigate his or her claims in federal court. Instead, if the petitioner procedurally defaulted those claims, the prisoner generally is barred from asserting those claims in a federal habeas proceeding." *Woodford*, 548 U.S. at 93 (internal citation omitted) (citing *Gray*, 518 U.S. at 161-62; *Coleman*, 501 U.S. at 744-51).

However, "[t]he doctrine barring procedurally defaulted claims from being heard is not without exceptions. A prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law." *Martinez*, 566 U.S. at 10 (citing *Coleman*, 501 U.S. at 750). "In *Coleman*, ... the Supreme Court held that ... a federal habeas 'petitioner cannot claim constitutionally ineffective assistance of counsel in [state post-conviction] proceedings' to establish cause.' " *Fowler v. Joyner*, 753 F.3d 446, 460 (4th Cir. 2014) (quoting *Coleman*, 501 U.S. at 752). Subsequently, in *Martinez*, the Supreme Court recognized a "narrow exception" to the rule stated in *Coleman* and held that, in certain situations, "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez*, 566 U.S. at 9. The Fourth Circuit has summarized the exception recognized in *Martinez*:

> [A] federal habeas petitioner who seeks to raise an otherwise procedurally defaulted claim of ineffective-assistance-of-trial-counsel before the federal court may do so only if: (1) the

> ineffective-assistance-of-trial-counsel claim is a substantial one; (2) the "cause" for default "consists of there being no counsel or only ineffective counsel during the state collateral review proceeding"; (3) "the state collateral review proceeding was the initial review proceeding in respect to the ineffective-assistance-of-trial-counsel claim"; and (4) state law "requires that an ineffective-assistance-of-trial-counsel claim be raised in an initial-review collateral proceeding."

Fowler, 753 F.3d at 461 (internal brackets omitted) (quoting *Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013)).

In the alternative to showing cause and prejudice, a petitioner may attempt to demonstrate a miscarriage of justice, e.g., actual innocence, *Bousley v. United States*, 523 U.S. 614, 623 (1998); *see also Schlup v. Delo*, 513 U.S. 298, 327-28 (1995), or abandonment by counsel. *See Maples v. Thomas*, 565 U.S. 266, 283 (2012) (inquiring "whether [the petitioner] ha[d] shown that his attorneys of record abandoned him, thereby supplying the extraordinary circumstances beyond his control, necessary to lift the state procedural bar to his federal petition" (internal quotation marks and citations omitted)).

III. ANALYSIS

A. Waiver of procedural default

As will be discussed below, the respondents have argued that several of the petitioner's grounds are procedurally barred from review by this court.

Procedural default is an affirmative defense that is waived if not raised by the respondents. *Gray v. Netherland*, 518 U.S. 152, 165-66 (1996). The petitioner argues in response to the motion for summary judgment that the respondents have waived this affirmative defense because the return was not timely filed (doc. 108 at 4-5). The amended petition was filed on February 15, 2017 (doc. 74), and, pursuant to several requests for extension, the respondents' deadline for filing a return to the amended petition was extended until June 2, 2017, which was a Friday (doc. 99). The respondents filed their amended return and memorandum of law in support of summary judgment on Sunday, June 4, 2017 (doc. 100). The respondents state that no further request for extension was filed because the return was filed prior to the court's next business day (doc. 114 at 30 n.8).

The only case cited by the petitioner in support of their waiver argument is *Morrison v. Mahoney*, 399 F.3d 1042, 1046 (9th Cir. 2005), which the petitioner states stands for the proposition that "defense of procedural default should be raised in the first responsive pleading in order to avoid waiver" (doc. 108 at 5). Clearly, that was done here,[3] and the petitioner has failed to cite any authority in support of the argument that the respondents waived this affirmative defense by filing the return two days late. Accordingly, the undersigned recommends that the district court

[3] The respondents also raised the procedural bar affirmative defense in response to several grounds alleged in the original petition (*see* doc. 68).

find that the respondents have not waived the procedural bar affirmative defense.

B. Ground One

In Ground One, the petitioner argues that the trial court's *Allen*[4] charge violated the petitioner's right to a fair trial and his due process rights[5] (doc. 74 at 5). Initially, the petitioner asserts that the trial court erred in giving an *Allen* charge when the jury had informed the trial court that it was split with nine in favor of the death penalty and three opposed (*id*. at 6). The petitioner notes that trial counsel objected to the *Allen* charge and stated that the trial court should sentence the petitioner to life imprisonment because the jury had revealed its numerical split (*id.*). The petitioner then argues that the instruction given to the jury, in light of the circumstances surrounding the instruction, coerced the three hold-out members of the jury to vote for the death penalty (*id*.). The petitioner argues that undue coercion resulted from the fact that the three members of the jury knew that the trial court had been informed of the numerical breakdown of the jury, that the trial had gone on for twelve days, and

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[4] An *Allen* charge "is given by a trial court when a jury has reached an impasse in its deliberations and is unable to reach a consensus." *United States v. Cropp*, 127 F.3d 354, 359 (4th Cir. 1997) (citing *Allen v. United States*, 164 U.S. 492 (1896)).

[5] The petitioner also asserts that his Sixth Amendment rights were violated; however, it does not appear that the petitioner argues any ineffective assistance of counsel claim. The petitioner seems to contend that trial counsel Mauldin properly objected, and the trial court erred in overruling him.

that the deliberations had gone on for five hours and thirty minutes and into the weekend (*id.* at 8). Moreover, the petitioner argues the *Allen* charge itself was coercive because it emphasized arriving at a verdict, rather than telling the jurors that they should not surrender their honest conviction to reach a unanimous verdict (*id.*).

The respondents argue that there is no *per se* constitutional requirement for a mistrial when the jury reveals its vote (doc. 100 at 50). Moreover, the instruction as given was not unduly coercive (*id.*). The respondents contend that the state court reasonably applied Supreme Court precedent in its decision (*id.*). The parties agree this issue was raised and addressed on direct appeal; therefore, it is properly exhausted (*id.*).

1. Failure to grant trial counsel Mauldin's motion for a mistrial

The Supreme Court of South Carolina addressed this claim and held as follows:

> Appellant argues the trial judge erred in declining to sentence him to life imprisonment when the jury, by its written note, revealed it was divided nine to three in favor of death. Appellant contends that under these "unusual circumstances" giving the jury an *Allen* charge was impractical and coercive against the minority faction of the jury that opposed the death penalty. Ultimately, Appellant argues that once the jury disclosed its numerical

division it was incumbent upon the trial judge to declare a mistrial. We disagree.

As a threshold matter, "[n]either the Due Process clause nor the Eighth Amendment forbid the giving of an *Allen* charge in the sentencing phase of a capital proceeding." *Tucker v. Catoe*, 346 S.C. 483, 490, 552 S.E.2d 712, 716 (2001) (citing *Lowenfield v. Phelps*, 484 U.S. 231 (1988); *Jones v. United States*, 527 U.S. 373 (1999)). "The typical judicial mechanism for encouraging an indecisive jury is the *Allen* charge, in which jurors are instructed on, among other things, their duties to approach the evidence with an open mind and consider the opinions of their fellow jurors." *State v. Robinson*, 360 S.C. 187, 193, 600 S.E.2d 100, 103 (Ct. App. 2004).

We find the trial judge's issuance of an *Allen* charge was not improper. Initially, we agree with Appellant that it is improper for a trial judge to inquire into the numerical division of a jury. *See State v. Middleton*, 218 S.C. 452, 457, 63 S.E.2d 163, 165 (1951); *Lowenfield*, 484 U.S. at 239-40[;] *Brasfield v. United States*, 272 U.S. 448, 450 (1926). However, these decisions are inapplicable in the instant case because the jury here voluntarily disclosed its numerical division and requested further instructions on how to proceed. The judge then promptly informed the attorneys of the jurors' numerical division and indicated that he could give an *Allen* charge. Unlike other cases, the trial judge did not

> inquire about the specifics of the jury's impasse. *See United States v. Brokemond*, 959 F.2d 206, 209 (11th Cir. 1992) ("Unsolicited disclosure of the jury's division by a juror is not by itself grounds for a mistrial."). Therefore, we hold the trial judge committed no error in not declaring a mistrial and giving an *Allen* charge after the jury revealed it was divided nine to three in favor of death.

(Doc. 19-4 at 5–6).

The record fails to demonstrate the state court confronted a set of facts that were materially indistinguishable from those considered in a decision of the United States Supreme Court but arrived at a result different from the Supreme Court precedent. The Supreme Court in *Allen* specifically approved the use of supplemental jury instructions. *Allen*, 164 U.S. at 501–02. The decision to give such an *Allen* charge is within the discretion of the trial or sentencing court. *United States v. Burgos*, 55 F.3d 933, 935 (4th Cir. 1995); *Booth-El v. Nuth*, 288 F.3d 571, 580 (4th Cir. 2002). In *Brasfield v. United States*, 272 U.S. 448 (1926), after jury deliberations had stalled, the trial court inquired as to how the jury was divided and was informed simply that the jury stood nine to three. The jury resumed deliberations and found the defendants guilty. The Supreme Court concluded that the inquiry into the jury's numerical division necessitated reversal because it was generally coercive and almost always brought to bear "in some degree, serious although not measurable, an improper influence upon the jury." *Id.*, at 450.

Significantly, the trial court in this case did not inquire into the numerical breakdown of the jurors. As the respondents point out, the Supreme Court has not specifically held that habeas relief is required where the trial court gives an *Allen* charge after inadvertently learning the division of a deadlocked jury. *See U.S. v. Parsons*, 993 F.2d 38, 41–42 (4th Cir. 1993) (holding that a trial court may properly issue an *Allen* charge even when the jury has revealed the number of jurors in favor and opposed to a decision, so long as they did not ask the jury how they were divided). Therefore, the petitioner has failed to show that the trial court violated clearly established Supreme Court precedent in declining to grant a mistrial on the basis that the trial court knew the numerical breakdown of the jury deadlock.

2. The trial court's *Allen* charge was unconstitutionally coercive

The Supreme Court of South Carolina addressed this claim and found as follows:

> Alternatively, Appellant argues that the trial judge's *Allen* charge was unconstitutionally coercive. We disagree.
>
> Because we find the trial judge properly charged Appellant's jury with an *Allen* charge, the question before us is whether the charge was coercive. "Whether an *Allen* charge is unconstitutionally coercive must be judged 'in its context and under all the circumstances.'" *Tucker*, 346 S.C. at 490, 552 S.E.2d at 716

(quoting *Lowenfield*, 484 U.S. at 237). This Court has explained:

> In South Carolina state courts, an *Allen* charge cannot be directed to the minority voters on the jury panel. Instead, an *Allen* charge should be even-handed, directing both the majority and the minority to consider the other's views. A trial judge has a duty to urge, but not coerce, a jury to reach a verdict. It is not coercion to charge every juror has a right to his own opinion and need not give up the opinion merely to reach a verdict.

Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002) (citations omitted).

In *Tucker*, we adopted the standard set by the United States Supreme Court in *Lowenfield* to determine whether an *Allen* charge is unconstitutionally coercive. In *Lowenfield*, the Supreme Court set forth the following factors to be considered:

> (1) the charge did not speak specifically to the minority juror(s);
>
> (2) the judge did not include in his charge any language such as "You have got to reach a decision in this case;"
>
> (3) there was no inquiry into the jury's numerical division, which is generally coercive; and

> (4) while the jury returned a verdict shortly after the supplemental charge, which suggests a possibility of coercion, weighing against this is the fact that trial counsel did not object either to the inquiry into whether the jurors believed further deliberation would result in a verdict, nor to the supplemental charge.

Tucker, 346 S.C. at 492, 552 S.E.2d at 716 (citing *Lowenfield*, 484 U.S. at 237).

Applying these factors, we found the *Allen* charge in *Tucker* was unconstitutionally coercive. *Id.* at 494, 552 S.E.2d at 718. Specifically, this Court concluded: (1) viewed as a whole, the jury charge was directed to the minority juror; (2) Tucker's jury was told of the importance of a unanimous verdict; (3) even though the jury informed the trial judge of their numerical split, the judge failed to instruct the jurors not to disclose their division in the future; and (4) Tucker's jury returned a verdict approximately an hour and a half after receiving the *Allen* charge. *Id.* at 492-94, 552 S.E.2d at 717-18.

In this case, defense counsel took exception to the judge's *Allen* charge on the ground that it deviated from counsel's proposed instruction. Defense counsel's proposed *Allen* charge stated:

> By law I cannot tell you where to go from here, but I suggest that you continue deliberations in an attempt to reach a

> verdict. I can tell you that each of you have a duty to consult with one another and to deliberate with a view to reaching an agreement that does not do violence to any one of your individual judgments. Each of you as jurors must decide the case for yourself after impartial consideration of the evidence with your fellow jurors. During the course of your continued deliberations each of you should not hesitate to re-examine your own views and change your opinion if convinced that your opinion is erroneous. Each juror who finds himself or herself to be in the minority should consider their views in light of the opinions of the jurors of the majority. Those in the majority must consider their views in light of the minority. No juror should surrender their honest conviction for the mere purpose of returning a unanimous verdict.

In response to defense counsel's exceptions, the trial court noted that the charge issued covered "basically the same thing" as the submitted *Allen* charge. The trial judge also referenced counsel's concern that the jury be instructed that they should not surrender their convictions just to get a unanimous vote. The trial judge read the following portion of his original charge: "Ladies and gentlemen, you have stated you are unable to agree on a verdict in this case. As I instructed you earlier, the verdict of a jury must be unanimous." The judge then stated, "I am not

going to charge that. I'm taking that sentence out." The trial judge then instructed the jury:

> Mr. Foreman, Ladies and Gentlemen of the jury, you've stated you've been unable to reach a verdict in this case. When a matter is in dispute, it isn't always easy for even two people to agree. So, when 12 people must agree, it becomes even more difficult. In most cases absolute certainty cannot be reached or expected. You should consult with one another, express your own views, and listen to the opinions of your fellow jurors. Tell each other how you feel and why you feel that way. Discuss your differences with open minds. Therefore, to some degree it can be said jury service is a matter of give and take.
>
> Every one of you has the right to your own opinion, the verdict you agree to must be your own verdict, a result of your own convictions. You should not give up your firmly held beliefs merely to be in agreement with your fellow jurors. The minority should consider the majority's opinion and the majority should consider the minority's opinion. You should carefully consider and respect the opinions of each other and evaluate your position for reasonableness, correctness, and partiality. You must lay aside all outside matters and reexamine the

> question before you base[d] [on] the law and the evidence in this case.
>
> I, therefore, ask you to return to your deliberations with the hope that you can arrive at a verdict.

Defense counsel again objected to the trial judge's charge. Relying on this Court's opinion in *State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1999),[6] counsel claimed that his proposed charge "specifically identifies to the jurors that they have the right and specifically essentially an obligation to deal with their own views in this case and not to agree simply to agree." The trial judge denied counsel's motion and explained that his charge covered defense counsel's concern by charging the jury to maintain their own convictions.

We find the *Allen* charge in the instant case was not coercive. First, unlike *Tucker*, the charge was not directed at the minority jurors. Instead, it evenly addressed both the majority and minority jurors and urged them to consider each other's views. *See Green*, 351 S.C. at 195, 569 S.E.2d at 323-24 (finding *Allen* charge was not coercive and did not focus on the position of the minority juror). Second, the trial judge's charge did not include language such as "You have got to reach a decision in this case." Rather, the charge instructed the jurors to resume their deliberations "with the hope you can arrive at a verdict." Third, there was no inquiry into the jury's numerical division. Here, without

solicitation the jury disclosed its numerical division to the trial judge who then informed the trial attorneys. In contrast to *Tucker* where there was one holdout juror, the judge here did not direct his *Allen* charge to the three minority jurors despite his knowledge of the jury's numerical split. Finally, the jury deliberated for approximately three hours and forty-five minutes after being given the *Allen* charge, which was significantly longer than the *Tucker* jury. We believe the extended deliberations would appear to weigh against any allegation that the charge was coercive.

Viewing the *Allen* charge in the context of the specific circumstances of the case, we find it was not coercive.[7] Furthermore, a careful review of the trial judge's charge compared with defense counsel's proposed charge reveals the charge was a correct statement of the law and covered the substance of defense counsel's proposed charge. *See State v. Austin*, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989) (stating, "[I]f the trial judge refuses to give a specific charge, there is no error if the charge actually given sufficiently covers the substance of the request.").

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[6] In *Hughes*, this Court determined an Allen charge was an "even-handed admonition to both the minority and majority jurors" where it stated: "Each juror who finds himself or herself to be in the minority should reconsider their views in light of the opinions of the jurors of the majority and, conversely each juror finding

> themselves in the majority should give equal consideration to the views of the minority." *Hughes*, 336 S.C. at 597-98, 521 S.E.2d at 507
>
> [7] Although we find no reversible error in the *Allen* charge in this case, we take this opportunity to caution trial judges against using the following language: "with the hope that you can arrive at a verdict." Because jurors are not required to reach a verdict after expressing that they are deadlocked, we believe this language could potentially be construed as being coercive. Furthermore, to alleviate problems in future cases where the jury is deadlocked, we would advise trial judges to instruct the jurors not to disclose their numerical division.

(Doc. 19-4 at 8–12).

The record fails to demonstrate the state court confronted a set of facts that were materially indistinguishable from those considered in a decision of the United States Supreme Court but arrived at a result different from the Supreme Court precedent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. *Sheppard v. Maxwell*, 384 U.S. 333 (1966). There is no doubt that "[a]ny criminal defendant, and especially any capital defendant, being tried by a jury is entitled to the uncoerced verdict of that body." *Lowenfield v. Phelps*, 484 U.S. 231, 241 (1988).

In reviewing an *Allen* charge, reviewing courts are instructed to consider "the supplemental charge given by the trial court 'in its context and under all the

circumstances.'" *Id.* at 237 (quoting *Jenkins v. United States*, 380 U.S. 445, 446 (1965) (per curiam)). In the totality of the circumstances of Lowenfield's case, including: the fact that the instruction had been requested by the jury, that the court did not know the numerical division of the jury, and the language of the instruction, the Supreme Court held in *Lowenfield* that the instruction was not coercive.[6]

The Fourth Circuit Court of Appeals has held, as a general proposition, that an *Allen* charge will be upheld as long as it is "fair, neutral, and balanced," *Carter v. Burch*, 34 F.3d 257, 264 (4th Cir.1994), and that court

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[6] The *Allen* charge in *Lowenfield* read as follows:

> Ladies and Gentlemen, as I instructed you earlier if the jury is unable to unanimously agree on a recommendation the Court shall impose the sentence of Life Imprisonment without benefit of Probation, Parole, or Suspension of Sentence.
>
> When you enter the jury room it is your duty to consult with one another to consider each other's views and to discuss the evidence with the objective of reaching a just verdict if you can do so without violence to that individual judgment.
>
> Each of you must decide the case for yourself but only after discussion and impartial consideration of the case with your fellow jurors. You are not advocates for one side or the other. Do not hesitate to reexamine your own views and to change your opinion if you are convinced you are wrong but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Lowenfield, 484 U.S. at 235.

has strongly endorsed the giving of *Allen* charges wherein the majority of jurors are instructed to consider the views of the jurors in the minority. *Burgos*, 55 F.3d at 937 (reversing conviction and remanding for new trial based on coercive *Allen* charge). Based on the *Lowenfield* decision, the Fourth Circuit Court of Appeals has articulated some of the relevant considerations in reviewing an *Allen* charge for coerciveness: the charge in its entirety and in context; suggestions or threats that the jury would be kept until unanimity is reached; suggestions or commands that the jury must agree; indications that the trial court knew the numerical division of the jury; indications that the charge was directed at the minority; the length of deliberations following the charge; the total length of deliberations; whether the jury requested additional instruction; and other indications of coercion. *Tucker v. Catoe*, 221 F.3d 600, 611 (4th Cir. 2000).[7]

The Supreme Court of South Carolina applied the Supreme Court's decision in *Lowenfield* to the facts of this case. Moreover, the record supports the Supreme Court of South Carolina's determination. There is no evidence that the *Allen* charge, in its entirety and context, was unduly coercive. Specifically, the trial court's instruction did not threaten the jury that they would be kept indefinitely until a unanimous verdict

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[7] The undersigned notes that the test articulated by the Fourth Circuit Court of Appeals differs slightly from the four-part test applied by the Supreme Court of South Carolina. The *Lowenfield* Court did not provide a specific test for future use but merely commented on relevant factors. Accordingly, while the two tests are different, neither appears to be erroneous or in conflict with the holding in *Lowenfield*.

was reached. The trial court did not require that the jurors reach a decision; he told the jury not to give up "firmly held beliefs merely to be in agreement with your fellow jurors" and directed them to return to "deliberations with the hope that you can arrive at a verdict." While the trial court was aware of the number of jurors in favor of the death penalty, there was no inquiry by the trial court into the numerical division of the jury. *See U.S. v. Sawyers*, 423 F.2d 1335, 1337 (holding that an *Allen* charge was appropriate even though the trial court knew the numerical breakdown of the jurors). The charge, as given by the trial court, did not speak directly to the minority jurors. *See U.S. v. Martin*, 756 F.2d 323, 325–26 (4th Cir. 1985) (holding that the language "if you are in the minority on the Jury, listen to the views of the majority; and if you're on the majority on the Jury, you listen to the views of the minority" during an *Allen* charge was not coercive because it treated the minority and majority equally).

With respect to the length of deliberations following the charge, the jury returned with its decision three hours and 43 minutes after receiving the *Allen* charge, which does not necessarily suggest that the instruction was coercive. *See U.S. v. West*, 877 F.2d 281, 291 (4th Cir. 1989) ("Since the jury deliberated for a total of approximately two hours after receiving the *Allen* charge, there is no evidence that it had a coercive effect."). The jury began deliberations at 3:50 p.m. on Friday, February 18, 2005, and the trial court stopped deliberations at 7:00 p.m. (doc. 20-6 at 428; app. 2409). The jury reconvened at 9:30 a.m. the following morning, Saturday, February 19, 2005 (doc. 20-6 at

429; app. 2410). After receiving the note from the jury, the trial court's *Allen* charge was given at 11:55 a.m. (doc. 20-6 at 432; app. 2413). Jury deliberations continued from 12:02 p.m. until 3:45 p.m.; the jury returned a recommendation that the petitioner be sentenced to death (doc. 20-6 at 435–36; app. 2416–17). Thus, the jury had already deliberated for approximately five hours over two days before the *Allen* charge was given. The petitioner has pointed to no clearly established Supreme Court precedent indicating that this amount of time weighs in favor of coercion.[8] Finally, the jury had requested additional instruction in their note to the trial court; their note stated: "the jury is at nine for death imposition, 3 for life imprisonment. Please refer to instruction about what procedure to follow to resolve" (doc. 20-8 at 39; app. 2965).

The petitioner has failed to point to any decision by the United States Supreme Court holding that any of these factors indicate that an *Allen* charge is necessarily coercive or that the totality of the circumstances demonstrate coercion. As a result, the Supreme Court of South Carolina's decision cannot be said to be the result of unreasonable application of clearly established Supreme Court precedent. *See*

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[8] The petitioner also notes that the jury was deliberating on a Saturday and that the trial had taken twelve days before deliberations. Moreover, in the response in opposition to the second motion for summary judgment, the petitioner emphasizes that the jury was sequestered during the trial as evidence of coercive conditions. He fails to support his claim that these facts weigh in favor of finding the *Allen* charge was coercive with any relevant law.

Woods v. Donald, 135 S. Ct. 1372, 1377 (2015). Accordingly, the petitioner is not entitled to federal habeas relief under 28 U.S.C. § 2254(d), and summary judgment should be granted with respect to this claim.

C. Ground Two

In Ground Two, the petitioner argues that the trial court erred in denying trial counsel's motion for mistrial (doc. 74 at 9). He states that the trial court's actions violated his right to a fair trial and his Due Process rights under the Sixth, Eighth, and Fourteenth Amendments (*id.*). The petitioner states that the testimony elicited by the State from Pamela Crawford, M.D., a forensic psychiatrist, improperly vouched for and bolstered the state's decision to seek the death penalty (*id.*). The petitioner alleges that Crawford's testimony also created the false impression that the defense was hiding relevant evidence (*id.*).

The respondents argue that this issue is a state evidentiary issue; therefore, it is not appropriate for federal habeas review (doc. 100 at 78). The respondents also assert that because Crawford was called to rebut the presumption that the petitioner was mentally ill, trial counsel had opened the door to this type of questioning (*id.* at 81). Alternatively, the respondents argue that any error was cured by the instruction given by the trial court after trial counsel's objection (*id.*). This issue was exhausted on direct appeal (*id.* at 78). The petitioner is not entitled to federal habeas relief on this ground.

> The Supreme Court of South Carolina found as follows:

Appellant argues the trial judge erred in refusing to declare a mistrial because Dr. Crawford's testimony impermissibly bolstered and vouched for the solicitor's decision to seek the death penalty.[8] We disagree.

We find that there was nothing improper about the solicitor's examination of Dr. Crawford as a lay witness. Furthermore, to the extent there was any confusion among the jurors regarding Dr. Crawford's role as a lay witness, such confusion was effectively cured by the trial court's instruction to the jury.

Dr. Crawford was introduced to give fact testimony regarding her observation of Appellant's mental state within hours of Victim's murder. We have long held that a lay witness may testify as to a defendant's mental state. *See State v. Rimert*, 315 S.C. 527, 446 S.E.2d 400 (1994), *cert. denied*, 513 U.S. 1080 (1995) (where the State relied on lay testimony to establish defendant's sanity); *State v. Smith*, 298 S.C. 205, 379 S.E.2d 287 (1989) (holding that where defendant presents expert testimony regarding his insanity, the State may introduce lay testimony in rebuttal).

We recognize that while a witness of Dr. Crawford's professional expertise may in many cases be called upon to deliver expert testimony, the solicitor was not bound to call her in that capacity so long as her testimony was limited to lay matters. The solicitor was justified in asking Dr. Crawford to observe Appellant's mental

state subsequent to his arrest and in calling upon her to testify regarding her observations. Appellant had been duly informed of his rights under *Miranda*, and spoke with Dr. Crawford voluntarily. Dr. Crawford's testimony was reasonably limited to her factual observations over the course of the interview. In our view, Dr. Crawford was called as a lay witness to give lay testimony. There is no indication in the record that the jury's responsibility for determining Appellant's fate was diminished in any way by the solicitor's questioning of Dr. Crawford.

Even if Dr. Crawford's testimony was improper, any prejudice was cured by the jury instruction. Therefore, we find no error in the trial judge's denial of Appellant's motion for mistrial.

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[8] The question of whether the trial judge committed an abuse of discretion in denying Appellant's mistrial motion is preserved for our review. Appellant objected to Dr. Crawford's testimony before it was given and renewed this objection both during and after her testimony. Appellant moved for mistrial on these grounds, and the trial judge denied the motion. Appellant then sought to introduce a curative instruction, which the trial judge accepted. Under these circumstances, the trial judge's denial of the mistrial motion is properly preserved for appellate review. *See State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004) ("'There are four basic requirements to preserving issues at trial for appellate review.

> The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.'") (quoting JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2d ed. 2002)).

(Doc. 19-4 at 12–14).

The record fails to demonstrate the state court's denial of this claim was contrary to or an unreasonable application of applicable Supreme Court precedent. Here, Crawford was called to the stand and testified that she was employed by the South Carolina Department of Mental Health ("SCDMH") as a forensic psychiatrist (doc. 20-6 at 168–69; app. 2150–51). She stated that, through an agreement between SCDMH and South Carolina Law Enforcement Division ("SLED"), she also worked as a consultant for SLED (doc. 20-6 at 169; app. 2151). The solicitor asked Crawford to "[e]xplain to the jury prior to September the 3rd of 2003, what working relationship you had either with my office or other solicitors" (doc. 20-6 at 169; app. 2151). She responded, in part, "I would be called by a solicitor if, for example, there was some kind of alleged crime of significant magnitude. And they would call me and ask me to come and provide assistance." The solicitor then asked, "What type assistance in particular did I request from you in this particular case on September the 3rd?" Crawford responded, "In this particular case, and again I'm called by various solicitors throughout the state, and I'm only called when it's a case of a very severe nature.

And typically it's when the death penalty may be considered. And I'm asked to assess --" (Doc. 20-6 at 170; app. 2152). At that point, trial counsel Nettles objected, and the jury was sent out (doc. 20-6 at 170; app. 2152). Trial counsel Nettles explained that he objected to Crawford essentially testifying that it was appropriate for the State to seek the death penalty (doc. 20-6 at 171; app. 2154). The objection was sustained (doc. 20-6 at 173; app. 2155). The jury was brought back in and instructed by the trial court as follows, "Mr. [F]oreman, ladies and gentlemen of the jury[,] please disregard anything that she said that she may be asked to assess concerning the death penalty. Disregard that. That's not appropriate. We're not going there" (Doc. 20-6 at 176; app. 2158). The solicitor asked Crawford, "Was the purpose of you interviewing the defendant to provide information to me in consideration of whether or not --" (doc. 20-6 at 177; app. 2159). Trial counsel Nettles objected, and the jury was sent out again. The solicitor withdrew the question; trial counsel Mauldin moved for a mistrial based on the fact that the jury was now going to believe that he was keeping relevant information from them (doc. 20-6 at 177–80; app. 2159–62). The trial court denied the motion for mistrial and sustained the objection (doc. 20-6 at 181, 184; app. 2163, 2166). When the jury was brought back in, the trial court gave the following instruction:

> Mr. [F]oreman, members of the jury, I told you this in the first phase of the trial. I'm going to tell you again. Whenever one of the attorneys makes an objection, they're merely telling the court that they do not think that's admissible

under the rules of evidence or the rules of court. And it's my job to decide whether it's admissible or not admissible. I ask you to leave the courtroom so I can comment on the facts, because I'm not at liberty to comment on the facts when the jury is present.

I'm the one that asked you to leave the courtroom so I can be free with what I say to the attorneys and the questions I ask the attorneys. The attorneys are not trying to hide anything, they just have an opinion it's not admissible, and that's their job. You are not to consider anything for or against either one of the attorneys when they make objections as to the rules of evidence. That's the procedure we are going through, and that's the reason I've been running you in and out of the courtroom, so I would be free, not that the attorneys are hiding anything. You understand?

All right. Now normally opinions are not given in a courtroom. However, opinions may be given in a courtroom by laypersons when they're based on the perceptions of a witness, such as, if someone is staggering and you smell alcohol on their breath, you have an opinion they're intoxicated, that's a lay opinion that may be admissible in a courtroom; or if it's going to be helpful for the jury to understand and does not require special skill, experience, or training.

An expert may give his opinion if they qualify when there's a scientifically, technical, or other

> specialized knowledge for the jury to understand the question.
>
> Now, in this particular case this witness has not been qualified as an expert. In order for an expert to give an opinion, they have to be qualified. This witness has not been qualified as an expert and I'm going to tell you, you must disregard any suggestion either in the solicitor's questions or any answer that this witness has given that Mrs. Crawford was asked, has formulated, or given an opinion of any kind in this case. She's going to be treated as a lay witness, not an expert.

(Doc. 20-6 at 187–89; app. 2169–71).

Here, even assuming that the questions asked by the solicitor and the answers given by Crawford were improper, the petitioner has failed to show that his constitutional rights were violated. The Fourth Circuit Court of Appeals has articulated a test to determine whether a petitioner's substantial rights were prejudiced to the point of denying him a fair trial regarding improper statements made at trial. Several factors are relevant to the determination of prejudice, including:

> (1) the degree to which the prosecutor's remarks have 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; and (4) whether the comments were deliberately

> placed before the jury to divert attention to extraneous matters.

United States v. Adam, 70 F.3d 776, 780 (4th Cir. 1995) (citation and internal quotation marks omitted). The Fourth Circuit also considers "(5) whether the prosecutor's remarks were invited by improper conduct of defense counsel, *United States v. Young*, 470 U.S. 1, 12–13 (1985), and (6) whether curative instructions were given to the jury, *United States v. Harrison*, 716 F.2d 1050, 1053 (4th Cir. 1983)." *U.S. v. Lighty*, 616 F.3d 321, 361 (4th Cir. 2010). These factors are examined in the context of the entire trial, and no one factor is dispositive. *U.S. v. Wilson*, 135 F.3d 291, 299 (4th Cir. 1998).

First, there is no evidence that the questions posed by the solicitor and the answers provided by Crawford had a tendency to mislead the jury. Second, the questions and answers themselves were limited to 14 lines of the trial transcript (doc. 20-6 at 170, 176–77; app. 2152, 2158–59). The court notes that the motions discussion outside the presence of the jury take over 16 pages of the trial transcript; however, in light of the approximately six volumes of trial transcript in this case, this was a relatively isolated event. Third, these comments did not speak to any evidence of the petitioner's guilt; the comments were objected to on the basis that trial counsel believed they improperly bolstered the solicitor's decision to seek the death penalty, not the petitioner's guilt. Fourth, other than the petitioner's unsubstantiated speculation, the record does not suggest that the objectionable statements were deliberately placed before the jury to divert

attention to extraneous matters. Fifth, it does not appear that the solicitor's comments and Crawford's answers were invited by improper conduct of defense counsel. Finally, the trial court gave two curative instructions as requested by trial counsel that specifically instructed the jury that Crawford's opinions should be disregarded and that no attorney was attempting to hide anything from them by objecting to testimony.

Based on a review of the evidence presented at trial, the Supreme Court of South Carolina's decision was not contrary to, nor an unreasonable application of, clearly established federal law.[9] Further, it was not based upon an unreasonable determination of facts in light of the state court record. Accordingly, this ground is without merit and summary judgment should be granted with respect to this issue.[10]

D. Grounds Three and Four

In Ground Three, the petitioner argues that trial counsel was ineffective for failing to object to portions of the closing argument (doc. 74 at 12). Specifically, the

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[9] As in Ground One, the petitioner states that he is bringing a Sixth Amendment claim; however, the petitioner seems to be arguing that the trial court erred in failing to grant trial counsel's motion. The petitioner fails to allege that trial counsel was ineffective at any point in his discussion of Ground Two (*see* doc. 74 at 9–11).

[10] Because the undersigned recommends that summary judgement be granted with respect to this claim, the undersigned declines to address the respondents' other arguments as to why this ground should be denied.

petitioner contends that the following statements by the solicitor were improper:

A. The solicitor improperly referenced his personal beliefs about the appropriateness of the death penalty by stating:

> And our responsibility is to come to you as the elected prosecutor and present these cases we deem appropriate for the death penalty . . . . They have said earlier that the solicitor is not satisfied with a life sentence. And I agree, I am not. They told you he's going to want the death penalty, and I do . . . . The law limits the State's right to seek the death penalty to a very few murders. We seek the death penalty in only a few cases. But the circumstances where it's available are for mean and evil people. The worst of the worst. Christopher Williams and this murder are one of those cases. The worst of the worst.

(Doc. 20-6 at 389; app. 2370 ll. 1–3, 16–18. Doc. 20-6 at 390; app. 2371 ll. 1–6).

B. The solicitor referenced the limitations on his ability to seek the death penalty and the legislative considerations that were false and misleading and relied on matters outside the record by stating:

> The State, represented by the solicitor, can in certain circumstances under our law ask for the imposition of the death penalty. However, it is only in limited circumstances, specifically murder cases, and only those murder cases in which [it] is specifically defined by our statutory

> law by our legislature. And only in those cases can the State seek to have the death penalty imposed . . . . The law limits the State's right to seek the death penalty to a very few murders. We seeks the death penalty in only a few cases. But the circumstances where it's available are for mean and evil people. The worst of the worst. Christopher Williams and this murder are one of those cases. The worst of the worst.

(Doc. 20-6 at 385; app. 2366 ll. 13–20. Doc. 20-6 at 390; app. 2371 ll. 1–6).

C. The solicitor minimized the jury's sense of responsibility by stating:

> The State, represented by the solicitor, can in certain circumstances under our law ask for the imposition of the death penalty. However, it is only in limited circumstances, specifically murder cases, and only those murder cases in which [it] is specifically defined by our statutory law by our legislature. And only in those cases can the State seek to have the death penalty imposed . . . . You're not killing anyone . . . . And our responsibility is to come to you as the elected prosecutor and present these cases we deem appropriate for the death penalty . . . . They have said earlier that the solicitor is not satisfied with a life sentence. And I agree, I am not. They told you he's going to want the death penalty, and I do . . . . The law limits the State's right to seek the death penalty to a very few murders. We seeks the death penalty in only a few cases. But the circumstances where it's

> available are for mean and evil people. The worst of the worst. Christopher Williams and this murder are one of those cases. The worst of the worst.

(Doc. 20-6 at 385; app. 2366 ll. 13–20. Doc. 20-6 at 386; app. 2367 l. 10. Doc. 20-6 at 389; app. 2370 ll. 1–3, 16–18. Doc. 20-6 at 390; app. 2371 ll. 1–6).

D. The solicitor commented on prison conditions that were false, misleading, and suggested that a death sentence was necessary to ensure that the petitioner suffered by stating:

> So, what is the appropriate sentence to fit this crime and hold him responsible? Life in prison is not appropriate. You can't put him in prison for life and expect him to suffer. You can't do it. Because he is not going to think about it every day, because there's not going to be anybody there to remind him of the damage that's done to Mandy's family or to his family. No one is going to do that. Nobody is going to constantly remind him. So, he's not going to think about it.
>
> Sure you and I may think going to prison for life is a serious sentence, but what about Chris Williams? Being in prison is like a small city, allow all things of life. Places, restaurant, places to exercise, recreation when he wants. Doctors, hospital take care of him, clothing provided, TV. Contact with family and loved ones. He'll have freedom of movement, a social structure. He'll play cards and games. Go to work if he wants, go to school if he wants. Watch ball games on TV.

> Sure, he doesn't have a car and his travel is limited, but it's not really much more than a serious change of address. He will have his family to visit him. But Mandy's family won't, and her daughter won't.

(Doc. 20-6 at 396–97; app. 2377–78 ll. 17–13).

E. The solicitor argued that the petitioner should not receive any mercy because he showed no mercy to the victim by stating:

> And I ask you in considering mercy, why should this defendant receive the mercy that he did not give to Mandy? When the negotiator and Mandy pled to him for her life, as they will do to you, plead to you for his life, before he imposed her death sentence. He rejected that mercy plea and he executed her. And he could have stopped at the first shot and we would not be here. Because the first shot was not fatal, and it did not kill Mandy.
>
> So when you hear that they ask for mercy, ask what mercy he showed Mandy when he shot her three times with a shotgun and kept pumping those shells into her body as she ran from that deli in an attempt to escape.
>
> Also, they argued in their opening statement that any life is worth giving meaningful consideration to. We agree with that. Any life is worth giving meaningful consideration to. But I ask you again, in considering and carrying out your responsibility in the context of this case, what meaningful consideration did this

> defendant give to the life of Mandy Williams on September 3rd, 2003? It's not enjoyable for me or us to ask for you to impose the death penalty. That's not something we like to do.

(Doc. 20-6 at 388; app. 2369 ll. 4–24).

F. The solicitor suggested that the jury could speak for the community by stating:

> You have been entrusted under our system and by us as jurors to consider and make a decision as representatives of the community to speak for this community as to what is the appropriate punishment. And the appropriate sentence under the facts of this case -- you know this case as well as anybody, you've heard everything that's been presented in this courtroom -- and it is your decision and as you speak for this community, make that decision, whatever that decision is, it will ring like a bell to be heard while all of those who are reasoning and all of those who want to listen.
>
> And I urge you, on behalf of the State of South Carolina that the appropriate punishment under this crime is the death penalty. Let that bell ring so this community will know that we will not tolerate conduct of this type without the maximum punishment. Those who commit this type of crime must pay the ultimate price.

(Doc. 20-6 at 398–99; app. 2379–80 ll. 19–11).

In their discussion of Ground Three, the respondents argue that trial counsel Nettles' failure to

object was a valid trial strategy or trial counsel Nettles correctly believed that the statements were not prejudicial (doc. 100 at 105). In the event that deficient performance is shown, the respondents assert that there was no resulting prejudice (*id.*). The petitioner is not entitled to federal habeas relief on this ground.

1. Statements A, B, and C

With respect to statements A, B, and C, the PCR court addressed trial counsel's performance under the standard set forth in *Strickland* (doc. 20-12 at 175–77; app. 4170–72). The PCR court found:

> Petitioner alleges that trial counsel was ineffective in failing to object to various comments made by the Solicitor during the opening and closing statements of the penalty phase of his trial. Petitioner contends that the Solicitor strayed from the record and failed to limit his arguments to the circumstances of the crime and character of the defendant, thereby lessening the jury's responsibility and injecting arbitrary factors into the jury's deliberation process. Specifically, Petitioner alleges that the Solicitor improperly referred to his personal decision to seek the death penalty, told the jury that the legislature had limited the time when the State could seek the death penalty and commented on prison condition.
>
> ***
>
> **Solicitor's Personal Opinion and Legislative Determinations/Limitations**

Petitioner contends that trial counsel failed to object when the Solicitor improperly injected his personal opinion and his decision to seek the death penalty into the jury deliberations. He argues that the Solicitor repeatedly told the jury that the legislature had limited the cases where the solicitor could seek the death penalty and that he also had made the difficult decision to seek the death penalty. *See* Petitioner's Post-Trial Brief at 3. He further alleges that the Solicitor improperly invoked Dr. Crawford's opinion in arguing for the death penalty.

The Solicitor made the following statement in his closing argument during the penalty phase of Petitioner's trial:

> They have said earlier the solicitor is not satisfied with a life sentence. And I agree, I am not. They told you he's going to want the death penalty, and I do. Why is the death penalty the appropriate sentence in this case? And that is a fair question for you to ask, ask of us, the State of South Carolina. And I submit to you that this is the reason, is that there are mean and evil people who live in this world who do not deserve to continue to live with the rest of us regardless of how confined they may be.
>
> The law limits the State's right to seek the death penalty to a very few murders. We seek the death penalty in only a few cases. But the circumstances where it's

> available are for mean and evil people. The worst of the worst. Christopher Williams and this murder are one of those cases. The worst of the worst.

ROA at 2370. Petitioner argues that the Solicitor's comments are similar to those made in *State v. Woomer*, 277 S.C. 170, 284 S.E.2d 357 (1981). However, this Court finds that the Solicitor's comments are distinguishable from those made in *Woomer*. Instead, the Solicitor's comments in the instant case are nearly identical to the comments made by Solicitor Ariail in a different trial that the Supreme Court recently reviewed and upheld in *Sigmon v. State*:

> Now, when we asked for the death penalty, it's a fair and appropriate question for you to say back to me, *Solicitor Ariail, why do you think that the death penalty is an appropriate punishment in this case? And I can best summarize it by a response that I got from a juror in another case on voir dire, and that juror said, that they're* [sic] *are mean and evil people who live in this world, who do not deserve to continue to live with the rest of us, regardless of how confined they are*. And that's what the basis of our request for the death penalty is. There are certain mean and evil people that live in this world that do not deserve to continue to live with us.

> ....
>
> And there are people, there are people who will argue that the death penalty is not a deterrent. But *my response as the solicitor of this circuit is, it is a deterrent to this individual and that is what we are asking, is to deter Brad Sigmon and send the message that this type of conduct will not be tolerated in Greenville County, or anywhere in this State*. And let that decision that you reach ring like a bell from this courthouse, that people will understand that we will not accept brutal behavior such as this. Thank you.

Sigmon v. State, 403 S.C. 120, 128-29, 742 S.E.2d 394, 399 (2013) (emphasis by the Supreme Court). In *Sigmon*, the Court concluded that the solicitor's comments were distinguishable from those in *Woomer*[4] because the comments did not diminish the role of the jury in sentencing Sigmon to death. *See Sigmon*, 403 S.C. at 130, 742 S.E.2d at 399 ("Although the solicitor mentioned his own considerations, he did not go so far as to compare his undertaking in requesting the death penalty to the jury's decision to ultimately impose a death sentence."). Similarly, in the instant case, the Solicitor's comments did not diminish the role of the jury in determining the appropriate sentence, even though the Solicitor referenced his role in choosing to request the death penalty.

Furthermore, throughout his closing argument, the Solicitor emphasized the important role the jury played in determining the appropriate sentence:

> So, this is a legal process, a legal penalty enacted by out legislators, and it is a function of government *carried out by you*, the citizens. . . . *This is a function of you as citizens* carrying out part of our government process. *You are shaping a* lawful punishment to an unlawful act. So, *the responsibility is given to you* to decide what the appropriate punishment is.
>
> . . .
>
> *[Y]ou are the judge*. The judge does not sentence, *you sentence*. And that's what this process is about. And it is a process which *we have entrusted to you* as our citizens to carry it out fairly . . . .
>
> . . .
>
> *The process makes you responsible* for this difficult decision; but we can't run and hide from our responsibilities. The law places it on our shoulders, the law *entrusted to you* and it means we'll do it, just like any other tough decision that we make; that is, you will apply common sense, you will consider the facts and you will consider the alternative solution, just like you do when you make your decisions on your jobs, with your family, otherwise.

> If you imagine yourself making a tough decision and handling it in the same way you would handle it with your job or with your family, we trust you would make the right decision.

ROA at 2366-68 (emphasis added). Similarly, the trial judge carefully instructed the jury regarding its role in determining the appropriate sentence. ROA at 2397-2405.

The Solicitor did not inject his own personal opinion concerning the death penalty into the proceedings, and he did not diminish the role of the jury in determining the appropriate sentence. Instead, the Solicitor merely explained his involvement in the State's decision to seek the death penalty and explained that the State does not choose to pursue the death penalty for every murder charge. The Solicitor's comments, without more, were not improper. *See State v. Belt*, 302 S.C. 18, 34, 393 S.E.2d 364, 373 (1990); *Sigmon*, 403 S.C. at 130, 742 S.E.2d at 400 ("[T]he solicitor has some leeway in referencing the State's decision to request death, provided he does not go so far as to equate his initial determination with the jury's ultimate task of sentencing the defendant. Although the solicitor here articulated why he chose to request the death penalty, he did not equate his role with that of the jury."); *Williams v. Ozmint*, 380 S.C. 473, 479, 671 S.E.2d 600, 602 (2008) (a solicitor's comments are not improper where he states that he is asking for the death penalty or even

> expecting the death penalty, as long as he does not attempt to minimize the jurors' own sense of responsibility). Accordingly, Petitioner has not shown deficient performance.
>
> ---
>
> [4] In were *Woomer*, the Court concluded the solicitor's statements were improper because he repeatedly stated that he himself had undertaken the same difficult process of deciding to impose the death penalty: "[T]he initial burden in this case was not on you all. It was on me. I am the only person in the world that can decide whether a person is going to be tried for his life or not. . . . I had to make this same decision, so I have had to go through the same identical thing that you all do. It is not easy." *Woomer*, 277 S.C. at 175, 284 S.E.2d at 359.

(Doc. 20-12 at 189–192; app. 4184–87 (some alterations added)). The PCR court's denial of the petitioner's ineffective assistance claim was neither contrary to nor an unreasonable application of applicable Supreme Court precedent. First, the PCR court applied the *Strickland* standard, which is the applicable Supreme Court precedent. Second, the record fails to demonstrate the PCR court confronted a set of facts that were materially indistinguishable from those considered in a decision of the Supreme Court but arrived at a result different from the Supreme Court precedent.

A prosecutor's improper argument "'may so infect[ ] the trial with unfairness as to make the resulting

conviction a denial of due process.'" *U.S. v. Wilson*, 135 F.3d 291, 297 (4th Cir. 1998) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181(1986)). A court reviewing an alleged improper argument of a prosecutor must consider whether the remarks were, in fact, improper, and, if so, whether the improper remarks so prejudiced the defendant's substantial rights that the defendant was denied a fair trial. *Wilson*, 135 F.3d at 297.

In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the United States Supreme Court held "that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328–39 (holding it is an Eighth Amendment violation to tell jury that the Mississippi Supreme Court would review any death sentence). "[T]o establish a *Caldwell* violation, a defendant must necessarily show that the remarks to the jury improperly described the role assigned to the jury by local law." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (internal quotations marks omitted).

Here, the solicitor's statements did not minimize the role of the jury or communicate to the jury that his decision to seek the death penalty lessened their burden to determine the proper punishment for the petitioner. The solicitor repeatedly informed the jury that this decision was theirs alone. In his closing, the solicitor told the jury that "the process makes you responsible for this difficult decision" and "the responsibility if given to you to decide what the

appropriate decision is" (doc. 20-6 at 386; app. 2367). It is clear in the context of the solicitor's closing argument that his comments regarding his personal decision to seek the death penalty and his statements that the death penalty can only be sought in limited circumstances[11] did not minimize the role of the jury. Accordingly, the PCR court did not violate clearly established Supreme Court precedent in its determination of this issue. *See Young*, 470 U.S. at 18–19 (finding that it was improper for the prosecutor to express his personal opinion about the respondent's guilt; however, in context, the comment could not have misled the jury); *Irick v. Bell*, 565 F.3d 315, 325 (6th Cir. 2009) (finding a prosecutor may refer to the policy rationales behind a State's decision to make the death penalty available); *Strouth v. Colson*, 680 F.3d 596, 606 (6th Cir. 2012) (Any error in the prosecutor's statement to the jury during the penalty phase of a capital murder trial that "no one is asking you to kill anyone" was harmless and thus reversal was not warranted where other parts of the closing argument emphasized

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[11] The undersigned notes that the petitioner states that the solicitor's comments suggested that the legislature had limited the ability of the State to pursue the death penalty; the petitioner contends that this is a false statement because the statute is so broad that the State may seeks the death penalty in the majority of murder cases (doc. 108 at 17). The undersigned notes that the solicitor also stated that the death penalty is actually sought in very few cases, which the petitioner does not dispute (*see* doc. 20-6 at 390; app. 2371). Moreover, "[t]here is not presumption of prejudice from a simple untoward remark; many challenged prosecutorial comments will amount to little more than fleeting remarks whose impact is negligible in the content of an entire trial." *Bennett v. Stirling*, 864 F.3d 319, 327 (4th Cir. 2016).

the importance of the jury's role in the process);*see also Darden,* 477 U.S. at 179 (holding that the prosecutor's comments implying the petitioner was on furlough from prison, that the death penalty was the only way to prevent the petitioner from committing more crimes, and calling the petitioner an "animal" were inappropriate but did not so infect the trial with unfairness as to render the resulting conviction a denial of due process).

Based upon the foregoing, trial counsel's failure to object to these statements of the solicitor was not a deficient performance under *Strickland*. Therefore, summary judgment is appropriate with respect to these claims.

2. Statement D

With respect to statement D, the PCR court addressed trial counsel's performance under the standard set forth in *Strickland* (app. 20-12 at 175–77; app. 4170–72). The PCR court found:

> Petitioner also alleges trial counsel was ineffective for failing to object to the Solicitor's improper statements about prison conditions, which allowed the jury to return a death sentence based on arbitrary factors. *See* Petitioner's Post-Trial Brief at 6. In particular, Petitioner claims the following statements by the Solicitor were improper:
>
> > So, what is the appropriate sentence to fit this crime and hold him responsible? Life in prison is not appropriate. You can't put him in prison for life and expect him to

> suffer. You can't do it. Because he is not going to think about it every day, because there's not going to be anybody there to remind him of the damage that's done to Mandy's family or to his family. No one is going to do that. Nobody is going to constantly remind him. So, he's not going to think about it.
>
> Sure you and I may think going to prison for life is a serious sentence, but what about Chris Williams? Being in prison is like a small city, allow all things of life. Places, restaurant, places to exercise, recreation when he wants. Doctors, hospital take care of him, clothing provided, TV. Contact with family and loved ones. He'll have freedom of movement, a social structure. He'll play cards and games. Go to work if he wants, go to school if he wants. Watch ball games on TV.
>
> Sure, he doesn't have a car and his travel is limited, but it's not really much more than a serious change of address. He will have his family to visit him but Mandy's family won't, and her daughter won't.

ROA at 2377–78.

It is well- settled that "evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime," and that "[t]he

jury's sole function is to make a sentencing determination based on these factors and not to legislate a plan of punishment." *State v. Burkhart*, 371 S.C. 482, 487-88, 640 S.E.2d 450, 453 (2007); *se also State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982); *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987). Furthermore, "[s]uch determinations as the time, place, manner, and conditions of execution or incarceration ... are reserved ... to agencies other than the jury." *State v. Plath*, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984). In *State v. Bowman*, our Supreme Court cautioned that evidence regarding general prison conditions is not relevant to the question of whether a defendant should be sentenced to death or life imprisonment. *State v. Bowman*, 366 S.C. 485, 489-99, 623 S.E.2d 378, 387 (2005).[5]

However, the Supreme Court has recognized a "tension between evidence regarding the defendant's adaptability to prison life, which is clearly admissible, and this restriction on the admission of evidence regarding prison life *in general*." *State v. Burkhart*, 371 S.C. 482, 488-89, 640 S.E.2d 450, 453 (2007). The Supreme Court has emphasized that "evidence of the defendant's characteristics may include prison conditions if narrowly tailored to demonstrate the defendant's person behavior in those conditions." *Id*. When considering whether a solicitor's arguments were improper, a reviewing court must examine the comments in light of the entire record, including the overwhelming

evidence of the defendant's guilt. *Vasquez v. State*, 388 S.C. 447, 698 S.E.2d 561 (2010); *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). A solicitor's comments are grounds for reversal only if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002).

Here, given the context of the entire closing argument, even if the Solicitor's statements were improper, the improper statements do not warrant reversal. While the Solicitor did briefly address prison conditions, he did so in the context of whether a prison sentence would be appropriate for the Petitioner under the facts of this particular case. The Solicitor noted

> It's not really much more than a serious change of address. [Chris Williams] will have his family to visit him. But Mandy's family won't, and her daughter won't. The death penalty is the appropriate punishment.

ROA at 2378. The Solicitor went on to contrast the grievous nature and "the extent of *this crime* and the culpability of *this defendant*" with a life versus death sentence. ROA at 2378 (emphasis added).

> Maybe one shot, maybe one shot we could say he deserved life; but not three, not three shots to her back as she was

> running away. Maybe one, but three? The extent of the culpability after she begged for her life, "Please, please, please don't kill me."

ROA at 2378-79. The Solicitor also highlighted the following facts as demonstrated by the evidence at trial: Petitioner stole a work schedule and meticulously planned the killing; he drew a diagram of the scene and planned what clothes he would wear; he kidnapped and emotionally and mentally tortured the Victim for nearly two hours; he ordered her to call her mother to tell her she was going to die; he made the Victim choose how she was going to die; he carried out the crime in a public supermarket where he endangered the safety of others; the hostage negotiator begged for the Victim's life; after firing the first non-fatal shot that paralyzed the Victim, Petitioner walked up to her and shot her two more times in the back at point blank range. ROA at 2372-80.

Furthermore, based on a reading of the trial transcript and in considering trial counsel's testimony at the PCR hearing, this court finds that trial counsel's failure to object to the Solicitor's improper comments was a valid strategic decision. At the PCR hearing, Attorney Nettles stated that he objected to everything in the Solicitor's statements that the thought was objectionable. PCR Transcript of Record at 117. He stated that at the time of the trial, he felt the Solicitor's statements were improper,

irresponsible, and prejudicial to his client. *Id*. at 112-13, 128. However, he explained that he believed the Solicitor's comments were "so improper and so irresponsible that by mocking him" he could "begin to undermine [the Solicitor's] credibility." *Id*. at 125. Attorney Nettles further explained that the jury responded to the Solicitor's improper comments by snickering because it was so irresponsible and ridiculous. *Id*. at 109. Ultimately, Attorney Nettles believed that while the Solicitor's comments were improper, it would be "more powerful" to mock the Solicitor, erode his credibility, and explain away his comments. *Id*. at 110. Thus, Attorney Nettles began his closing statement with the following rebuttal:

> Did he say restaurants? Did he say Chris Williams is going to a place in prison with restaurants there? Because I didn't hear anything about restaurants. What I heard about where Chris Williams is going at the end of this trial is a place where it's men and he's in a cell by himself. What I need Jim Aiken to talk about was a place where if you don't do what they tell you to do, they'll kill you.
>
> He said restaurants. Restaurants in prison? Do any of you all really believe your tax dollars are paying for restaurants in prison? They're not. Prison is a very serious place. And what you are being asked is to decide between whether

> Chris Williams dies on God's time or your time.
>
> What you're being asked to decide is whether Chris Williams spends the rest of his life until he's dead in prison or whether that, however they want to word it to try to make it seem okay, whether the government either electrocutes him or straps him to a gurney and kills him. That's where we are. Let's make no doubt about that. Let's not try to do anything to make that seem less severe. That's what we're talking about.

ROA at 2380-81. Failing to make an objection does not render trial counsel ineffective where counsel articulates a valid trial strategy. *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (counsel's conduct not ineffective where counsel articulates a valid reason for employing certain strategy); *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). Here, trial counsel articulated a legitimate trial strategy—rather than objecting to the Solicitor's improper statements, he responded by emphasizing to the jury the absurdity and ridiculousness of those statements. Accordingly, trial counsel was not deficient.

Finally, even if trial counsel's performance was deficient, Petitioner has not proven prejudice. The allegedly improper statements were only a small part of the Solicitor's closing argument. *See State v. Tucker*, 324 S.C. 155, 169, 478

S.E.2d 260, 268 (1996) (noting solicitor's improper comment "was one isolated event in the entire argument"). Also, the trial judge gave clear instructions to the jury that they were to decide what verdict to return and that they were not required to return a death sentence. *See* ROA at 2397-2405. Therefore, considering the closing statement in its entirety within the context of the full record and the careful instructions by the trial judge, and given the overwhelming evidence of guilty and the egregious circumstances of the crime, Petitioner has failed to prove that there is a reasonable probability that the jury would have returned a different verdict had the Solicitor not made these comments.

Furthermore, the South Carolina Supreme Court conducted a review of the trial record pursuant to S.C. Code Ann. § 16-3-25 and concluded that "the death sentence was not the result of passion, prejudice, or any other arbitrary factor." *See State v. Williams*, 386 S.C. 503, 517, 690 S.E.2d 62, 69 (2010). Accordingly, Petitioner's argument that he was prejudiced by counsel's failure to object to the solicitor's improper statements and injection of arbitrary factors into the jury's deliberation is without merit.

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[5] "[T]he evidence presented in a penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character. Generally

> questions regarding escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole. We emphasize that how inmates, other than the defendant at trial, are treated in prison; and whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial. We admonish both the State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that particular defendant." *State v. Bowman*, 366 S.C. 485, 498-99, 623 S.E.2d 378, 385 (2005), *abrogated by State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006).

(Doc. 20-12 at 192–96; app. 4187–91).

The PCR court's denial of the petitioner's ineffective assistance claim was neither contrary to nor an unreasonable application of applicable Supreme Court precedent. First, the PCR court applied the *Strickland* standard, which is the applicable Supreme Court precedent. Second, the record fails to demonstrate the PCR court confronted a set of facts that were materially indistinguishable from those considered in a decision of the Supreme Court but arrived at a result different from the Supreme Court precedent.

Moreover, the record supports the PCR court's determination. At PCR, trial counsel Nettles was asked whether the statements by the solicitor regarding the conditions in prison had anything to do with the character of the defendant or the nature of the crime;

he responded "no" to both questions (doc. 20-9 at 305; app. 3284). When asked why he did not object, trial counsel Nettles replied that he "thought it was so ridiculous, [he]'d rather mock him in mine" (doc. 20-9 at 306; app. 3285). He continued that he remembered that the jury laughed at the solicitor's statements; he stated that "[t]he reason I didn't object to it was because I thought it would be more powerful . . . I thought it was so ridiculous, I decided I would rather mock him" (doc. 20-9 at 307–08; app. 3286–87).

Here, trial counsel Nettles articulated a valid trial strategy for declining to object to the solicitor's statements regarding prison conditions. *See Strickland*, 466 U.S. at 689 ("[A] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." (internal citation omitted)). The petitioner has failed to cite to any clearly established Supreme Court precedent finding that it is an unreasonable trial strategy to decline to object to similar statements. Thus, the PCR court's decision was

not contrary to or an unreasonable application of applicable Supreme Court precedent, and, accordingly, summary judgment is appropriate with respect to this claim.

3. Statements E and F

In Ground Four, the petitioner argues that, in the alternative to Ground Three, to the extent that any part of Ground Three has not been properly exhausted, any failure is the result of ineffective assistance of PCR counsel (doc. 74 at 14). The petitioner cites *Martinez v. Ryan*, 566 U.S. 1 (2012), in support of his argument (*id.* at 15). In the second motion for summary judgment, the respondents appear to argue that the solicitor's comments at closing have been exhausted[12] (doc. 100 at 143–44). The respondents also contend that the petitioner cannot raise a free-standing claim for ineffective assistance of PCR counsel (*id.* at 144). In the reply, the respondents argue for the first time that statement E is procedurally defaulted (doc. 114 at 24–25). It appears to this court, that statements E and F were neither raised to nor ruled upon by the PCR court.[13] Because procedural default is an affirmative

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[12] The respondents contend that, to the extent that petitioner alleges trial counsel was ineffective for failing to object to statements by the solicitor during voir dire, this argument is procedurally barred (doc. 100 at 143–44). It does not appear that the petitioner has raised an ineffective assistance of counsel claim concerning any statements made during voir dire.

[13] The undersigned notes that statement F was alluded to in the petitioner's first amended application for PCR (doc. 20-9 at 58; app. 3037).

defense that the respondents failed to raise in the second motion for summary judgment, out of an abundance of caution, the court will address the merits of this argument. The court finds that the petitioner has failed to satisfy the *Strickland* test.

At the PCR hearing, while not specifically asked about either of these statements, trial counsel Nettles testified that he "objected to everything in that closing argument that [he] thought was objectionable" (doc. 20-9 at 312; app. 3291). Trial counsel Mauldin asserted that objections during the solicitor's closing argument "would have been [trial counsel Nettles'] responsibility . . . . Because he was going to make ours. He was going to make out closing" (doc. 20-9 at 371; app. 3350). However, he elaborated that "if [he's] sitting at the table and an horrific comment that is just absolutely untrue or just blatantly improper, then [he thought] the Judge would allow any counsel to stand and object . . . . If [he], as counsel for Mr. Williams, had heard an argument that [he] thought was grotesquely inappropriate under anybody's law then [he thought] it would have been [his] responsibility, as well, to object to it" (doc. 20-9 at 391; app. 3370).

With respect to statement E, concerning the solicitor's comment that the petitioner was not entitled to mercy because he had shown none to the victim, trial counsel was not ineffective for failing to object to this statement. It does not appear that the Supreme Court of South Carolina has commented on the appropriateness of this type of comment. Notably, the Fourth Circuit Court of Appeals has held that "[i]t is . . . perfectly permissible for the prosecution to urge the

jury not to show a capital defendant mercy." *United States v. Runyon*, 707 F.3d 475, 513–14 (4th Cir. 2013). Moreover, these comments, taken in the context of the entire closing, did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Darden,* 477 U.S. at 181; *see also Young*, 470 U.S. at 11–12 (courts must examine the challenged comments in the context of the whole record). This statement is approximately 21 lines out of a nearly seventeen page closing. Moreover, in the defense's closing argument, trial counsel Nettles told the jury that he "hope[d] to each and every one of you the penalty of life in prison is one that is recognized as a truly serious penalty" (doc. 20-6 at 401; app. 2382). Trial counsel Nettles pleaded for mercy on the petitioner's behalf and begged the jury "to judge him on something other than the two worst months of his entire life" (doc. 20-6 at 411–12; app. 2392–93). In the context of the entire trial and sentencing, the court finds the solicitor's comments that the petitioner should not be shown mercy because he did not show mercy to the victim did not deny the petitioner due process. Accordingly, trial counsel was not ineffective for failing to object to statement E.

With respect to statement F, regarding the effect of the jury's decision on the community, trial counsel was not ineffective for failing to object to this statement. The Supreme Court of South Carolina has held that references to the community are not improper at closing. *See State v. South*, 331 S.E.2d 775, 780 (S.C. 1985) ("Appellant further contends the solicitor improperly argued the verdict would be a message to Lexington County and the State of South Carolina.

This contention is meritless."); *State v. Cain*, 377 S.E.2d 556, 562 (S.C. 1988) ("The 'send a message' argument here certainly did not rise to the level of arousing juror passion or prejudice."). The petitioner cites *Runyon*, 707 F.3d at 514–15, in support of the argument that this comment was improper. In that case, the Fourth Circuit Court of Appeals declined to approve of the prosecution's comment encouraging the jurors to send a message to the community with their verdict. *Id*. at 515. The court further stated that it was "confident, however, that neither comment rendered the proceeding unfair, for 'the complained-of comments were isolated, did not rise to the level of argument that mislead or inflame the jury concerning its duty or divert it from its task[.]'" *Id.* at 515 (quoting *U.S. v. Higgs*, 353 F.3d 281, 331 (4th Cir. 2003)). Here, the undersigned finds that this comment was isolated and did not make the trial so unfair that it violated the petitioner's right to due process. *Darden,* 477 U.S. at 179. Accordingly, trial counsel was not ineffective for failing to object to statement F, and the petitioner is not entitled to federal habeas relief under 28 U.S.C. § 2254(d). Thus, summary judgment should be granted with respect to this claim.

E. Ground Five

In this ground for relief, the petitioner contends that he was denied effective assistance of trial counsel because trial counsel "failed to assert that the petitioner is a citizen of The Federal Republic fo Germany and, as such, was entitled to assistance from the German government" (doc. 74 at 15-16). The parties agree (doc. 100 at 144; doc. 74 at 15-16) that this

ground for relief is exhausted as it was raised in the amended application for PCR,[14] the PCR court denied relief, the ground was raised in the petition for writ of certiorari, and the South Carolina Supreme Court denied certiorari on the issue.

It is undisputed that the petitioner's mother is a German citizen, and his father is American. The petitioner was born in the United States and thus is a United States citizen. At PCR, the petitioner introduced a document from the Consulate General of the Federal Republic of Germany, dated September 13, 2012, certifying that a certificate of citizenship for the German citizen Charles Christopher Gerard Williams was issued on July 16, 2012 (app. 4860-62).

The petitioner contends that, despite trial counsel's awareness that the petitioner's mother was born in Germany, counsel failed to discover that the petitioner himself is a citizen of Germany and that, as a result, he was entitled to consular assistance from the German government (doc. 74 at 15). The petitioner alleges that because the United States and Germany are both signatories to the Vienna Convention on Consular Relations, Germany was ensured access to detained citizens in the United States and permitted to secure legal representation and assistance for German citizens (*id.*).

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[14] In PCR, the Federal Republic of Germany submitted an amicus brief in support of the petitioner on the matter (*see* doc. 20-9 at 157-95; app. 3136-74). The amicus brief was incorporated by PCR appellate counsel in the petition for writ of certiorari (doc. 19-17 at 77).

The PCR court rejected this argument, finding that, even if the petitioner had claimed German citizenship at the time of his arrest, his dual citizenship did not confer upon him the status of "foreign national" and entitlement to any of the protections outlined by the Vienna Convention (doc. 20-12 at 203-204; app. 4198-99). Accordingly, the PCR court found that the petitioner's trial counsel was not deficient in failing to notify him of any rights (doc. 20-12 at 204; app. 4199).

The PCR court's finding is neither contrary to nor is it an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Article 36 of the Vienna Convention was drafted to "facilitat[e] the exercise of consular functions." Art. 36(1), 21 U.S.T. 77, 100. Article 36 "provides that if a person detained by a foreign country 'so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State of such detention, and 'inform the [detainee] of his righ[t]' to request assistance from the consul of his own state." *Medellin v. Texas*, 552 U.S. 491, 499 (2008) (quoting Art. 36(1)(b), 21 U.S.T., at 101). As the PCR court appropriately found (doc. 20-12 at 203-204; app. 4198-99), courts in the United States have consistently held that a defendant who holds dual citizenship in the United States and another country are not privy to the consular rights outlined by the Vienna Convention because they are not foreign nationals in the United States. *See Commonwealth v. Baumhammers*, 960 A.2d 59, 97-98 (Pa. 2008) (rejecting claim of capital defendant that his rights under Vienna Convention on Consular Relations were violated where defendant was Latvian and U.S. dual

citizen); *Cauthern v. State*, 145 S.W.3d 571, 627-29 (Tenn. Crim. App. 2004) (denying PCR claims that the petitioner's rights under Vienna Convention were violated and counsel was ineffective in failing to investigate and discover petitioner's German ancestry, noting that petitioner had not shown that "prevailing norms" at time of conviction included intimate familiarity with the Vienna Convention and the petitioner's German nationality was not obvious and was unknown even to petitioner at the time). Furthermore, the United States Department of State's "Consular Notification and Access" instruction manual defines a "foreign national" as "any person who is not a U.S. citizen." U.S. Dep't of State, Consular Notification and Access at 12 (4th ed. Aug. 2016), *available at* https://travel.state.gov/content/travel/en/consularnotification.html. The manual further explains that "consular notification is not required if the detainee has U.S. citizenship, regardless of whether he or she has another country's citizenship or nationality as well." *Id.* at 14.

Here, the petitioner is a United States citizen who had not claimed German citizenship in any manner at the time of his trial in 2005. As noted above, it was not until 2012 that Germany issued a certificate of citizenship for the petitioner (app. 4860-62). The petitioner has failed to show that the petitioner's trial counsel had any duty to seek out whether he possessed dual citizenship as part of the defense where consular rights do not apply. Based upon the foregoing, the petitioner cannot persuasively argue that his trial counsel's failure to assert that he is a citizen of Germany and entitled to assistance from the German

government constitutes ineffective assistance of counsel as counsel's performance did not fall below an objective standard of reasonableness. Accordingly, this ground is without merit, and summary judgment should be granted with respect to this issue. *See Strickland*, 466 U.S. at 697 (finding that court need not address both prongs of ineffective assistance of counsel analysis if petitioner makes an insufficient showing on one).

The PCR court further determined that, even assuming the petitioner was entitled to consular advice and that his trial counsel was deficient in failing to notify him of his rights, the petitioner had not demonstrated that he suffered any prejudice (doc. 20-12 at 204-206; app. 4199-201). The petitioner argues that he was deprived of "the considerable consular resources that would have been provided by Germany," including "assessing the quality of Petitioner's trial counsel, providing access to financial support for developing key evidence by engaging investigators and experts, monitoring the progress of the case through the trial and appellate review, and providing significant input as an amicus in the court proceedings" (doc. 108 at 21; *see also* doc. 74 at 15). The PCR court found as follows:

> [B]eyond mere speculation, Petitioner has not shown any evidence that assistance from the German consulate would have changed the outcome of the trial. Trial counsel stated that while defense attorneys in death penalty cases always desire more time to prepare, in this particular case, the attorneys felt they were

sufficiently prepared. PCR Transcript of Record at 148-49. Further, there is no evidence that the defense team lacked adequate resources. The defense team was composed of highly-qualified, experienced attorneys, including the Public Defender for the Thirteenth Judicial Circuit, John Mauldin, and attorney Bill Nettles, who now serves as the United States Attorney for the District of South Carolina. Attorneys Mark MacDougall and Colleen Coyle of the Washington D.C. law firm of Akin Gump Strauss Hauer & Feld also aided in the Petitioner's defense. The defense team relied on the skills and resources of its mitigation investigator, Jan Vogelsang, a well-respected and experienced social case worker who has worked on numerous capital defense teams, and a team of highly-qualified experts who met with the Petitioner and his defense team on numerous occasions and testified at trial. Using the resources at its disposal, the defense team developed a comprehensive trial strategy, even though the Petitioner was ultimately convicted and sentenced to death.

Petitioner contends that the German consulate would have helped collect information about [the petitioner's mother] Daisy's family history, including mental health issues and alcohol consumption. PCR Transcript of Record at 67, 80-81. Jan Vogelsang testified that she felt that she could not provide a complete genogram without the opportunity to travel to Germany. *Id.* at 64-65, 67-68. However, in spite of the

> defense team's lack of ability to travel to Germany to investigate Daisy's family history, the team did in fact collect information and evidence regarding Daisy's family history, mental health history, and alcohol addiction.
>
> While this Court understands the sentiments of trial counsel that additional time and resources are always desirable in a death penalty case, here, Petitioner has failed to show that he was prejudiced in not having the assistance of the German Consulate at this trial. . . .

(Doc. 20-12 at 205-06; app. 4200-01).

Even if the petitioner could show that his trial counsel's performance fell below an objective standard of competence, he has failed to show that the PCR court's determination on the prejudice prong was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court, or that the decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Based upon the foregoing, the court should grant the respondents' motion for summary judgment as to Ground Five.

F. Ground Six

In Ground Six, the petitioner contends that he was denied the effective assistance of counsel because his trial counsel failed to investigate and present evidence in mitigation of punishment that he suffers from Fetal

Alcohol Syndrome ("FAS") (doc. 108 at 22).[15] The petitioner asserts that this is compelling evidence and could have led one jury member to make a different decision at sentencing (*id.* at 53).

Ground Six was essentially presented to the PCR court as Ground (n) in attachment II of the PCR petition (doc. 20-9 at 156; app. 3135) and was rejected on the merits by the PCR court (doc. 20-12 at 207-19; app. 4202-14). This claim was then rephrased and presented as Ground One in the petitioner's writ of certiorari to the South Carolina Supreme Court (doc. 19-17). The South Carolina Supreme Court accepted certiorari (doc.19-20 at 1), but later dismissed it as improvidently granted (doc. 19-24). As such, this claim is procedurally exhausted and ripe for habeas review by this court. *See In Re Exhaustion of State Remedies*, 471 S.E.2d 454 (S.C. 1990) ("[W]hen the claim has been presented to the Court of Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies."). The respondents do not dispute that Ground Six is procedurally exhausted and is ripe for review by this court[16] (doc. 100 at 167).

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[15] The undersigned construes the petitioner's request to seek relief from the sentencing phase of trial.

[16] On September 9, 2016, the petitioner filed a petition for a writ of certiorari to the United States Supreme Court that was denied on April 24, 2017. *Charles Christopher Williams v. State of South Carolina*, 137 S. Ct. 1812 (2017) (mem.).

1. Background

The petitioner claims that his trial counsel were ineffective for failing to investigate, develop, and present evidence in mitigation of punishment that he suffers from FAS (doc. 74 at 16-18). The petitioner argues that trial counsel were deficient because they failed to recognize evidence that the petitioner suffered from organic brain damage and FAS and, therefore, conducted no investigation into those issues. The petitioner argues that if presented with this additional evidence, "there is a reasonable possibility that at least one juror might have struck a different balance" at sentencing (doc. 108 at 26 (citing *Wiggins v. Smith*, 539 U.S. 510, 537 (2003)).

Under *Strickland*, a trial counsel's failure to conduct an "adequate investigation in preparing for the sentencing phase of a capital trial" may amount to ineffective assistance of counsel. *Rompilla v. Beard*, 545 U.S. 374, 380 (2005). "Counsel has a duty to make reasonable investigations or make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691.

Counsel is not required to "investigate every conceivable line of mitigating evidence." *Wiggins*, 539 U.S. at 523. In considering the reasonableness of counsel's investigation the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. Trial counsel's failure to make a reasonable investigation of whether the petitioner suffered FAS and to present this as mitigating evidence to the jury at sentencing can

constitute ineffective assistance of counsel. *See, e.g. Sears v. Upton*, 561 U.S. 945, 946 (2010) (holding that evidence of brain damage was "significant mitigating evidence constitutionally adequate investigation would have uncovered.").

Counsel's decision not to investigate in a particular area "must be assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments," *Strickland*, 466 U.S. at 691. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689.

a. Trial

At the outset, the undersigned notes that trial counsel John Mauldin and William Nettles are both experienced attorneys who had worked previously on death penalty matters (doc. 20-9 at 283, 341; app. 3262, 3320). The record reflects that trial counsel's mitigation strategy was to present evidence of the petitioner's troubled childhood and that he suffered from mental illness. Trial counsel put together a defense team that included the following experts: Jan Vogelsang ("Vogelsang"), Dr. James Evans ("Dr. Evans"), Dr. Robert Richards ("Dr. Richards"), and Dr. David A. Griesemer ("Dr. Griesemer") to assist in preparation for trial and in preparing mitigation evidence for the

sentencing hearing.[17] Vogelsang, a social worker, was retained to investigate mitigation evidence in preparation for sentencing (doc. 74 at 16). The petitioner maintains that, through Vogelsang's investigation, trial counsel were aware that the petitioner's mother was an alcoholic and that she drank during her pregnancy with the petitioner[18] (*id.* at 16). Further, the petitioner asserts that Dr. Evans, a neuropsychologist, who was retained to conduct testing on the petitioner, determined that the petitioner had learning disabilities and showed neurological impairments, specifically frontal lobe damage. As such, trial counsel were aware of the petitioner's possible brain damage. Dr. Richards, a general psychiatrist, examined the petitioner and diagnosed him with Bipolar Disorder and with Obsessive Compulsive Disorder (*id.*). Dr. Richards testified during the guilt phase of the trial about his diagnoses (doc. 20-5 at 475; app. 1961). The record reflects that Dr. Griesemer, a neurologist, performed an MRI and a neurological

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[17] The record reflects that trial counsel also retained Dr. Seymour Halleck, a forensic psychiatrist who met with the petitioner for four hours and diagnosed him with Major Depressive Episode and Obsessive Compulsive Disorder (doc. 20-6 at 322, 325, 328; app. 2303, 2306, 2309). Additionally, the record reflects that Marjorie Hammock, a clinical social worker, prepared a bio-psycho social assessment of the petitioner in preparation of trial (doc. 20-6 at 262; app. 2244).

[18] Notably, Vogelsang indicated that the petitioner's mother denied drinking while pregnant with the petitioner (doc. 20-9 at 253; app. 3232). However, the petitioner's sister and father advised Vogelsang that the petitioner's mother drank while pregnant (doc. 20-9 at 246; app. 3225).

examination of the petitioner the weekend prior to the petitioner's trial (doc. 74 at 16-17). The record indicates that Dr. Griesemer was not provided with background information on the petitioner when he examined the petitioner (*id.*). The MRI of the petitioner's brain reflected a normal brain (doc. 20-15 at 71; app. 4857).

During the sentencing phase of the trial, the petitioner's counsel presented testimony in support of their mitigation strategy through testimony from the petitioner's father and sister, the petitioner's first grade teacher Ann Wilson, a co-worker of the petitioner's mother, and from other experts (doc. 20-6 at 226, 238, 252; app. 2208, 2220, 2234). Attorney Nettles also developed mitigation testimony as to the petitioner's troubled childhood through his cross examination of the state psychiatrist, Dr. Crawford, who testified, *inter alia*, that the petitioner had trouble with his parents' divorce; that his mother was an alcoholic; that he had difficulty in school; and that he had Attention Deficit Disorder but was never medicated (doc. 20-6 at 196-200; app. 2179-82). As such, this is not a case where counsel completely ignored their duty to investigate background information or conducted a belated investigation.

b. PCR hearing

The petitioner filed an application for PCR relief on November 30, 2010. The PCR court held an evidentiary hearing from January 28 to January 31, 2013 (doc. 20-12 at 172; app. 4167). At the PCR hearing, the petitioner's primary presentation of evidence regarding FAS was provided by three mental health experts who specialize in Fetal Alcohol Syndrome Disorders

("FASD"): Dr. Paul Connor, a neuropsychologist; Dr. Richard Adler, a forensic psychiatrist; and Dr. Natalie Novick Brown, a forensic psychologist (doc. 74 at 17). All three were members of the organization FASD Experts, which was formed in 2007 to provide a multi-disciplinary approach to evaluate individuals for FASD (doc. 20-9 at 468; app. 3447). The petitioner's trial counsel, William Nettles and John Mauldin, also testified at the hearing as to the issue of FAS.

(1) Dr. Connor

Dr. Connor testified that he specializes in clinical neuropsychology and also specializes in FASD (doc. 20-9 at 463-64; app. 3442-43). He indicated that he had been involved with FASD since 1995 (doc. 20-9 at 463; app. 3442). Dr. Connor provided an overview of the history of FASD. As early as 1973, practitioners were seeing children of alcoholic women who had specific facial features, and those were the facial features that were later used for the diagnosis of FAS (doc. 20-9 at 470; app. 3449). The three primary facial features that are usually identified with children suffering from FAS are small eyes, a very thin upper lip, and a smooth philtrum (the ridges between the nose and lip) (doc. 20-9 at 470; app. 3449). Dr. Connor testified that facial features of a fetus usually develop during the sixth to eighth week of pregnancy(doc. 20-9 at 485 & doc. 20-10 at 1-2; app. 3464-66). Dr. Connor observed that in 1996 there were two main diagnoses: FAS, where all facial features existed, and Fetal Alcohol Effects ("FAE"), where there were some or no facial features (doc. 20-9 at 474; app. 3453). According to Dr. Connor, the Institute of Medicine ("IOM"), in an effort to narrow

these diagnoses into different groups, created five diagnoses: (1) full FAS with confirmed exposure; (2) FAS without confirmed exposure; (3); Partial Fetal Alcohol Syndrome ("PFAS") (some physical features, but not the full gambit of facial features and not growth deficiencies); (4) Alcohol Related Neurodevelopmental Disorder ("ARND") (no physical features with normal facial and normal growth); and (5) Alcohol Related Birth Defects ("ARBD")[19] (doc. 20-9 at 453; app 3453). Dr. Connor stated that there is really no difference between FAS, PFAS, and ARND when it comes to cognitive impacts (doc. 20-9 at 475; app. 3454).

Dr. Connor also provided comprehensive testimony concerning alcohol's effect on a fetus (doc. 20-9 at 476-85; doc. 20-10 at 1-2; app. 3455-66). He stated that alcohol is a poison that affects all parts of the brain and all the synapses (doc. 20-9 at 477-78; app. 3456-67). Dr. Connor also indicated that FASD by definition is "brain damage" (doc. 20-10 at 27; app. 3491). Dr. Connor explained that with fetal alcohol exposure, damage to the brain "is occurring at time of development" such that "the brain is never working properly when alcohol is damaging it" (doc. 20-10 at 29; app. 3492). Dr. Connor compared FASD to Alzheimers in that it affects the entire brain as compared to a stroke, which only affects a localized part of the brain (doc. 20-10 at 22-23, 30; app. 3486-87, 3494).

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[19] Dr. Connor stated that ARBD is the category where you are looking for things such as physical anomalies, skeletal anomalies, heart defects, and liver anomalies that are often associated with FASD (doc. 20-9 at 475; app. 3454).

Dr. Connor explained that FASD affects executive functioning that is most commonly associated with the frontal lobe but that it also affects connections with the frontal lobe to all parts of the brain (doc. 20-10 at 30; app. 3494). He described executive functioning as "planning, problem solving, learning from your mistakes. Being given something that you have to figure out how to make it work. How to do it in such a way that you can get the job done and do it as well as possible. And so that's kind of – it's this large process of being able to take in information, see what you've done wrong, try and rework it, adapt and cope in order to solve things" (doc. 20-10 at 30; app. 3494).

Dr. Connor also indicated that IQ is impacted by prenatal alcohol exposure. He noted that about 20% of individuals with FASD have IQs in the mentally retarded range (doc. 20-10 at 6; app. 3470). However, Dr. Connor stated that you cannot look at IQs as a predictor of whether or not an individual has been impacted by fetal alcohol exposure (doc. 20-10 at 7; app. 3471). Dr. Connor observed that with fetal alcohol exposure he sees splits in IQ (doc. 20-10 at 7; app. 3471). Dr. Connor indicated that the petitioner had a large split between his verbal and nonverbal IQ score and that his variability was consistent with what he expects with FASD (doc. 20-10 at 45, 47; app. 3507, 3511).

Dr. Connor conducted a neuropsychological assessment of the petitioner in May 2012 (doc. 20-10 at 25; app. 3489). Dr. Connor stated that he spent approximately six hours with the petitioner while conducting the assessment (doc. 20-10 at 25; app.

3489). He indicated that the neuropsychological assessment is "not designed to measure damage to the brain, *per se*" (doc. 20-10 at 25; app. 3489). Instead, Dr. Connor looks at the functioning and comments on the function or dysfunction of the brain (doc. 20-10 at 25; app. 3489.). Dr. Connor indicated that he uses a series of tests that are broken down into domains or areas of functioning to assess for FASD (doc. 20-10 at 35; app. 3499). Dr. Connor explained that the petitioner was deficient in eight out of eleven cognitive ability domains, including visuospatial construction organization, visuospatial memory, attention, executive functions, suggestibility, communication, daily living skills, and social functioning (doc. 20-10 at 85; app. 3549). Dr. Connor opined that this was a severe functional impairment as the petitioner had deficits in all but three of the domains tested (doc. 20-10 at 86; app. 3550).

Dr. Connor's testing also showed the petitioner had poor adaptive functioning skills. He explained that adaptive functioning is how a person can manage his life day-to-day in the world with no structure around them (doc. 20-10 at 10, 76-82; app. 3474, 3540-46). In addition, Dr. Connor's testing found that the petitioner's information could not pass easily from one side of his brain to the other, indicating a damaged corpus callosum, a symptom of FASD (doc. 20-9 at 234, app. 3215). Dr. Connor indicated that he evaluates people for mental retardation with the same testing used to evaluate the petitioner (doc. 20-10 at 74; app. 3538).

Dr. Connor also testified that his testing was consistent with testing performed by Dr. Richard Evans, who was a part of trial counsel's defense team. Dr. Connor stated that he could not diagnose the petitioner with FAS or any other spectrum disorder as these are medical diagnoses. However, he found nothing inconsistent with FASD in assessing the petitioner (doc. 20-10 at 87-89; app. 3551-53).

(2) Dr. Adler

Dr. Adler, a psychiatrist, is also a member of FASD Experts. He was qualified at the PCR hearing as an expert in clinical and forensic psychiatry and an expert in FASD (doc. 20-11 at 73; app. 3607). He explained that his sole role in FASD Experts is to forensically examine the person and to render a diagnosis, if a diagnosis is appropriate (doc. 20-11 at 72; app. 3606).

Dr. Adler diagnosed the petitioner with PFAS and cognitive disorder not otherwise specific (doc. 20-11 at 80; app. 3614). Dr. Adler indicated that PFAS is a medical diagnosis. Dr. Adler explained that one must look to the IOC for criteria on PFAS. To be diagnosed with PFAS, an individual must have (A) confirmed exposure to alcohol; (B) two of the three facial feature deformities; (C) growth retardation; (D) central nervous system ("CNS") abnormalities; or (E) cognitive abnormalities (doc. 20-11 at 83; app. 3617). Dr. Adler indicated that you only have to have elements A and B and any one of elements C, D, or E to be diagnosed with PFAS, and the petitioner had all five elements (doc. 20-11 at 181-82; app. 3716-3717). Dr. Adler indicated that these cognitive abnormalities were severe. Dr. Adler explained that PFAS is more serious than FAS. He

explained that because people with FAS have the full abnormal face and their IQ is lower, it appears they get services more readily (doc. 20-11 at 173; 3707). Conversely, individuals with PFAS have more difficult lives and more negative things happen to them. Dr. Adler explained that, because individuals with PFAS do not outwardly appear different and because they tend to have higher IQs, individuals with PFAS are able to mask problems they have functioning such that their problems are not readily identified (doc. 20-11 at 174; app. 3708). For example, Dr. Adler indicated that the petitioner has good verbal skills, and his verbal skills mask that he has troubles being able to understand and react appropriately to his environment (doc. 20-11 at 60; app. 3594).

Dr. Adler explained that Bipolar Disorder is not a symptom of FASD because you can have co-occurring disorders (doc. 20-11 at 182; app. 3716). He opined that if you have FASD that you are at an increased risk of having other disorders (doc. 20-11 at 182; app. 3716). When asked whether having FASD or being bipolar was worse, Dr. Adler responded that FASD was worse. He stated that the impairment that FASD gives you in life is markedly greater than a Bipolar Disorder or having Obsessive Compulsive Disorder (doc. 20-11 at 182-183; app. 3716-17).

Both Dr. Adler and Dr. Connor indicated that the petitioner's trial counsel were provided the cognitive deficit information through Dr. Evans' testing (doc. 20-11 at 259; app. 3693). When questioned about the petitioner's 2005 and 2011 MRIs, Dr. Adler conceded that the reports indicated a normal brain, although he

disagreed with the reporters' conclusion as to each (doc. 20-11 at 258; app. 3792).

(3) Dr. Brown

Psychologist Dr. Natalie Novick Brown also testified at the PCR hearing. Dr. Brown specializes in the evaluation and treatment of individuals with FASD and began her work in this field in 1995 (doc. 20-11 at 267; app. 3801). She is a member of FASD Experts and stated that her role is to review all the records to find evidence that might indicate an individual does not have FASD (doc. 20-11 at 283; app. 3817).

Dr. Brown explained that FASD affects executive functioning, including self-regulation, behavior control, and thought and emotion control (doc. 20-11 at 283-84; app. 3817-18). Dr. Brown opined that the petitioner's executive functions were significantly impaired due to PFAS (doc. 20-11 at 283-84; app. 3817-18). She also explained that the frontal lobe controls the processing of information from the brain and uses it to make decisions, resist urges, and reduce the intensity of emotions. Dr. Brown indicated that when the executive functions are impaired it leads to "problematic behavioral difficulties" (doc. 20-11 at 283-84; app. 3817-18). Dr. Brown stated that individuals with FASD have impulse control problems – difficulty controlling strong feelings and stopping urges (doc. 20-11 at 287; app. 3821). Dr. Brown also noted that individuals have urges all the time and that they rely on executive functioning to "hit the brakes" (doc. 20-11 at 285; app. 3819).

Dr. Brown explained that self monitoring is an important aspect of executive functioning and that individuals with FASD have problems self-monitoring – being aware of what you are doing, the significance and implications of what you are doing, the acts you are engaging in, and the impact of that act or those acts on someone else, or others around you, are important aspects of executive functioning (doc. 20-11 at 287; app. 3821). She stated that the petitioner's brain is damaged, thus he does not have the ability to determine what is the worst thing that can happen and resist the urges (doc. 20-11 at 289; app. 3823). She indicated that stress makes the problem worse (doc. 20-11 at 289; app. 3823). Dr. Brown also explained that executive functioning deteriorates in low structure situations, leading to impairments in adaptive functioning (doc. 20-11 at 317; app. 3851). Adaptive functioning is how well a person handles day-to-day life (doc. 20-11 at 294; app. 3828). Dr. Brown suggested the petitioner cannot function in a non-structured environment and that the environment in day-to-day life is not really very structured (doc. 20-11 at 315-19; app. 3849-53). Dr. Brown suggested that the petitioner would not have problems in the prison environment because it is a structured environment (doc. 20-11 at 319; app. 3853).

Dr. Brown stated that individuals with FASD have childlike coping skills and opined that testing suggested the petitioner had the coping skill level of a nine year old (doc. 20-11 at 303; app.3837). Dr. Brown also explained that due to FASD the petitioner had a childlike approach to the world (doc. 20-11 at 342; app. 3876). She stated that the petitioner's childlike

behaviors led to his inability to handle the breakup with the victim (doc. 20-11 at 342-43; app. 3876-77).

Dr. Brown also discussed how the petitioner was suggestible and easily manipulated (doc. 20-11 at 358; app. 3892). Dr. Brown indicated that she used the Gudjonsson test standard for suggestibility and found that the petitioner's score rated him more suggestible than the general population (doc. 20-11 at 360-361; app. 3894-95). Dr. Brown explained that the state's psychiatrist Dr. Crawford's interview of the petitioner immediately after the incident was damaging because Dr. Crawford's questioning led him away from what he originally said about the crime following his arrest (doc. 20-11 at 358; app. 3892). Dr. Brown opined that the petitioner met the definition of Guilty but Mentally Ill and that he lacked sufficient capacity to conform his conduct to the requirements of the law (doc. 20-11 at 367; app. 3901). Dr. Brown also reiterated Dr. Connor's observation that adaptive functions are more reliable in measuring an intellectual deficiency than IQ, because IQ is measured in a structured environment (doc. 20-11 at 294-95; app. 3828-29).

Dr. Connor, Dr. Adler, and Dr. Brown acknowledged that, prior to 2007, there was not a protocolized approach to FASD assessment such as their group uses (doc. 20-11at 36, 276-77; app. 3570, 3810-11). However, they each indicated that there were individual practitioners addressing FASD prior to 2007 (doc. 20-11at 36, 276-77; app. 3570, 3810-11). On cross examination, Dr. Brown indicated that there were some individuals testifying prior to 2007 who were not qualified to do so (doc. 20-11 at 276-77; app. 3810-11).

The petitioner contends that evidence of FAS presented by the experts from FASD Experts was compelling and that if this evidence had been presented at trial, it could have led to one juror into making a different decision.

c. PCR court's order

Following an evidentiary hearing, the PCR court denied the petitioner relief on his claim of ineffective assistance of counsel. In making this determination, the PCR court indicated that *Strickland* was the applicable standard of review of the petitioner's claims of ineffective assistance of counsel. In finding that trial counsel were not deficient, the PCR court found:

> The record shows that trial counsel did not present evidence to the jury that Petitioner suffered from Fetal Alcohol Syndrome or that he had organic brain damage. At Petitioner's PCR hearing, Petitioner's trial counsel and defense mitigation investigator testified that they had evidence that Petitioner's mother, Daisy, drank alcohol during pregnancy and that they were aware of Fetal Alcohol Syndrome and the effects of prenatal exposure to alcohol. However, both Attorney Mauldin and Attorney Nettles stated that they could not identify a reason why they did not develop a mitigation strategy based on Fetal Alcohol Syndrome. PCR Transcript of Record at 93-97, 119, 186-88. Nevertheless, this Court finds that Petitioner has not shown trial counsel was ineffective

(Doc. 20-11 at 213; app. 4208).

The PCR court observed that counsel has a duty to undertake reasonable investigations to discover all reasonably available mitigation evidence (doc. 20-12 at 208; app. 4203 (citing *McKnight v. State*, 66 S.E.2d 354, 360 (S.C. 2008)). As to trial counsel's investigation, the PCR court found:

> Trial counsel's investigation, preparation, and presentation of defense evidence and mitigation at Petitioner's trial were not deficient. Trial counsel put together a highly qualified defense team, which included experienced capital defense attorneys, mitigation investigators, social workers, and mental health experts. Trial counsel carefully investigated the social, educational, familial, and mental health background of the Petitioner. Trial counsel developed a cogent mitigation defense, offered an array of compelling evidence, and presented the poignant testimony of a number of lay and expert witnesses

(Doc. 20-12 at 213; app. 4208). The PCR court also addressed the petitioner's claim that trial counsel were ineffective for failing to present evidence of FAS, finding as follows:

> Based on all the foregoing, this Court finds that trial counsel had evidence that Petitioner's mother drank during pregnancy, and that trial counsel was aware of the resulting complications, including brain damage. Trial counsel also had evidence that Petitioner possibly suffered brain damage, based on Dr. Evan's reports. Trial counsel presented this

> information along with other mitigation evidence, to the defense experts. Considering all of the information it had available and in consultation with its experts, trial counsel developed a cogent strategy to present mitigation evidence—including evidence of the mother's alcohol addiction—but also made a strategic decision to not present to the jury evidence of brain damage or a diagnosis of Fetal Alcohol Syndrome (though trial counsel was unable to articulate the reasons for that strategic decision). Instead, trial counsel's strategy was to present mitigation evidence regarding Petitioner's troubled childhood and his mental illness, as diagnosed by defense experts

(Doc. 20-12 at 215; app. 4210).

The PCR court also found that the petitioner had not shown prejudice (doc. 20-12 at 217; app. 4212). In making this determination, the PCR court explained:

> [T]rial counsel presented a well-reasoned mitigation defense, including "compelling evidence of Petitioner's troubled childhood and evidence of Petitioner's mental illness based on multiple expert opinions. The PCR court determined that Petitioner's PCR argument would have "merely resulted in a 'fancier' mitigation case, having no effect on the outcome of the trial." *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998)

(Doc. 20-12 at 217; app. 4212). The PCR court pointed to a survey of jury verdicts in sister jurisdictions where

defendants had been sentenced to death "in spite of evidence offered in mitigation that the defendant had fetal alcohol syndrome or organic brain damage" (doc. 20-12 at 218-19; app. 4213-14).

2. Analysis

The petitioner argues that the PCR court's determination that he failed to prove that trial counsel were deficient for failing to investigate, develop, and present fetal alcohol as a mitigation factor was both contrary to and an unreasonable application of clearly established federal law and an unreasonable application of the facts in the record (doc. 108 at 27). Specifically, the petitioner argues that the PCR court's finding that trial counsel "made a strategic decision not to present to the jury evidence of brain damage or a diagnosis of Fetal Alcohol Syndrome (though trial counsel was unable to articulate the reason for that strategic decision)" (doc. 20-12 at 215; app. 4210) was a violation of clearly established law because it was based on a less than adequate investigation and unreasonable determination of the facts in evidence and is not supported by the evidence as shown by trial counsel's testimony.

As to any investigation into FAS, attorney Nettles testified that he did not recall any discussion concerning FAS (doc. 20-9 at 291; app. 3270). Attorney Nettles acknowledged that the mitigation specialist, Vogelsang prepared a risk assessment for the defense team and included on that list was "mother drank and smoked throughout pregnancy" (doc. 20-9 at 285; app. 3264). However, attorney Nettles indicated that they never discussed FAS in relation to the checklist (doc.

20-9 at 291; app. 3270). Attorney Nettles also acknowledged that there were indicators that the petitioner may have had brain damage and that he knew that drinking by a birth mother could cause brain damage, but he never connected the dots (doc. 20-9 at 293-94; app. 3272-73). Attorney Nettles indicated his awareness of the American Bar Association's Guidelines for Performance of Defense Counsel in Death Penalty Cases, which states that counsel needs to conduct an in-depth investigation as well as explore all avenues of mitigation, and mentions FAS three times (doc. 20-9 at 288-89; app. 3267-68).

When asked about his investigation into FAS, attorney Nettles stated that FAS "wasn't ever brought up," that "[i]t wasn't discussed," and "[i]t wasn't ruled in, it wasn't ruled out" (doc. 20-9 at 295 ; app. 3274). Attorney Nettles also indicated that there was never an intent to put up evidence of FAS (doc. 20-9 at 289; app. 3267).

In response to being asked what comes to mind when you think of drinking during pregnancy, attorney Nettles responded, "Well, now, Fetal Alcohol Syndrome" (doc. 20-9 at 286; app. 3265). When asked if drinking by the petitioner's mother during pregnancy "rang any bell," attorney Nettles testified that he made no correlation between the mother's drinking and FAS (doc. 20-9 at 290; app. 3269). He explained that the bell that rang for him was to show a correlation between the mother's drinking and that the petitioner had a less than ideal childhood (doc. 20-9 at 290; app. 3269). Attorney Nettles acknowledged during questioning that he would liked to have had evidence to support a

diagnosis of "guilty but mentally ill" (doc. 20-9 at 331; app. 3310).

Attorney Mauldin also testified at the PCR hearing as to whether they conducted any investigation into whether the petitioner suffered from FAS. Attorney Mauldin agreed with attorney Nettles that FAS was not brought up, was not discussed, and was not a part of their trial strategy (doc. 20-9 at 369 ; app. 3348). According to attorney Mauldin, if FAS had been discussed, it would have been noted on the checklist, and it was not (doc. 20-9 at 368; app. 3347).

Attorney Mauldin explained that FAS has become a much more common inquiry than at the time the petitioner was tried, and he now knows more about the concept that he did eight or nine years ago. He explained that if he were to see a risk factor on a list referencing drinking during pregnancy now, a red flag of FAS would pop up (doc. 20-9 at 352-53; app. 3331-32). Attorney Mauldin indicated that he was aware that the circumference of the head at birth had a correlation with FAS and that one of the experts on their defense team had requested birth records that would have contained this information, suggesting the expert may have suspected FAS (doc. 20-9 at 380; app. 3359-60). Attorney Mauldin acknowledged that he did not make such a connection (doc. 20-9 at 381; app. 3361). Attorney Mauldin also acknowledged that an MRI was not done until a week prior to trial and that he had no explanation as to why it was not done earlier given that he was on notice that the petitioner's mother drank during pregnancy (doc. 20-9 at 365; app. 3343).

Attorney Mauldin testified that, after being shown PCR evidence and exhibits, he was "dumbfounded" as to why a certain course of action did not occur – that a natural course would be to bring in a neurologist and tell him they had evidentiary information to suspect FAS and they needed whatever testing needed to be done to determine whether it existed (doc. 20-9 at 387; app. 3366). Attorney Mauldin acknowledged that the risk factor of a mother drinking during pregnancy was a red flag regarding the potential for organic brain damage (doc. 20-9 at 354 ; app. 3333). Attorney Maudlin concurred with attorney Nettles that he would have wanted evidence that the petitioner suffers from brain damage before the jury such that he could present a defense of guilty but mentally ill (doc. 20-9 at 354-55, 393; app. 3333-34, 3372). When asked if he ever went to any experts about the problem of the mother drinking, he responded, "And what could possibly have led me to not conduct some sort of follow-up is just beyond my – I don't have an explanation for it" (doc. 20-9 at 402; app. 3381).

a. Deficient Performance

The petitioner asserts that, on the question of deficient performance, the evidence was that organic brain damage and FAS were not recognized by trial counsel, thus no investigation into those conditions was pursued or undertaken (doc. 108 at 22). In order to establish deficient performance, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Under *Strickland*, "counsel has a duty to make reasonable investigations or to make a

reasonable decision that makes particular investigations unnecessary." *Id.* at 691. Concerning counsel's duty to investigate, the United States Supreme Court explained:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has the duty to make reasonable investigations or to made 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 690–91. Further, the Supreme Court indicated that a court's inquiry "is not whether counsel should have presented a mitigation case. Rather we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of [the petitioner suffering from FAS] was itself reasonable." *Wiggins*, 539 U.S. at 523.

Counsel is not required to "investigate every conceivable line of mitigating evidence." *Id.* In considering the reasonableness of counsel's investigation the court must "judge the reasonableness of counsel's challenged conduct on the facts of the

particular case, viewed as of the time of counsel's conduct." *Strickland,* 466 U.S. at 690. Trial counsel's failure to make a reasonable investigation of whether the petitioner suffered from FAS and to present this as mitigating evidence to the jury at sentencing can constitute ineffective assistance of counsel. *See, e.g. Sears v. Upton*, 560 U.S. 945, 946 (2010) (holding that evidence of brain damage was "significant mitigation evidence a constitutionally adequate investigation would have uncovered.").

Additionally, the performance of counsel is measured in terms of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. "Prevailing professional norms of practice as reflected in the American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides." *Id.* The performance inquiry in this case concerns the nature of trial counsel's duty to investigate mitigating evidence in a capital case. In a capital case, the professional norms require counsel to conduct a thorough investigation into "all reasonably available mitigating evidence." *Wiggin*s, 539 U.S. at 524.

Turning to the PCR court's decision that the petitioner failed to meet his burden of establishing that trial counsel were deficient, the PCR court found that trial counsel "developed a cogent strategy to present mitigation evidence—including evidence of the mother's alcohol addiction — but also made a strategic decision to not present to the jury evidence of brain damage or a diagnosis of Fetal Alcohol Syndrome (though trial counsel was unable to articulate the

reasons for that strategic decision)" (doc. 20-12 at 217). The PCR court also determined that the petitioner had not shown prejudice (doc. 20-12 at 217-19; app. 4212-14). Thus, the AEDPA standard of review applies to both prongs of the *Strickland* test.

The undersigned is mindful that a federal court must give deference to the PCR court's merits determination. 28 U.S.C. § 2254(d), (e). Additionally, "[w]hen § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

The undersigned finds that the PCR court's determination that trial counsel made a "strategic decision" not to investigate and not present evidence of FAS or brain damage during the sentencing phase of trial was unreasonable. First, this finding of the PCR court is directly contradicted by the testimony of both attorney Nettles and attorney Mauldin. *See* 28 U.S.C. § 2254(d)(1). As fully set forth above, both of the petitioner's trial counsel testified at the PCR hearing that FAS was never discussed, it was never considered, and it was never ruled in or out (doc. 20-9 at 295, 369; app. 3274, 3348). Second, trial counsel acknowledged that they were aware that the petitioner's mother drank when she was pregnant with the petitioner and that Dr. Evan's report indicated the petitioner had frontal lobe damage (doc. 20-9 at 293-94, 354. 3272-73, 3333). However, it appears that trial counsel either overlooked or ignored these indicators and failed to investigate for evidence of FAS. *See Gray v. Branker*,

529 F.3d 220, 229 (4th Cir. 2008) (counsel ignored red flags and failed to investigate for mental health evidence) (citing *Rompilla*, 545 U.S. at 392); *Wiggins*, 539 U.S. at 516-18, 522 (counsel was ineffective for failing to pursue leads and investigate further into defendant's background despite knowing that defendant's mother was an alcoholic and that defendant had emotional and academic difficulties as a child). Trial counsel's decision not to present evidence of organic brain damage or FAS cannot be described as strategic, since trial counsel were not aware of the evidence that might have been available. *See, e.g., Sears v. Upton*, 561 U.S. 945, 951 (2010) (failure of trial counsel to present mitigating evidence that they do not know about cannot be a strategic decision). Third, any decision of trial counsel not to investigate was erroneously based on counsel's failure to inquire about and appreciate the potential value of evidence of brain damage and FAS as a mitigating circumstance, as outlined by Drs. Connor, Adler, and Brown at the PCR hearing.

As such, in viewing the record as a whole, including the evidence introduced at the sentencing and at the PCR hearing, and applying deference to the PCR court's decision, the undersigned concludes that there is no reasonable argument to sustain the PCR court's finding that trial counsel made a "strategic decision" to not present evidence of FAS. Further, there could be no disagreement between "fairminded jurists" that the PCR court's decision was incorrect. *Harrington*, 562 U.S. at 102. As such, the state court decision involved an unreasonable determination of the facts in light of

the petitioner's clear and convincing evidence to the contrary. *See* 28 U.S.C. § 2254(d)(1).

b. Prejudice

Having found that the PCR court's decision as to Ground Six was based upon an unreasonable determination of the facts, the undersigned must now determine whether the failure of the petitioner's trial counsel to investigate and present evidence of organic brain damage and FAS at the sentencing proceeding resulted in prejudice. The PCR court addressed the prejudice prong of *Strickland* and found that, even if trial counsel were deficient, the petitioner had failed to establish prejudice (doc. 20-12 at 217-19; app. 4212-14). The PCR court noted that trial counsel had put together a highly qualified defense team, which included experienced capital defense attorneys, mitigation investigators, social workers, and mental health experts. The PCR court also noted that trial counsel had presented a "well-reasoned mitigation defense, which included evidence of the Petitioner's troubled childhood and evidence of the Petitioner's mental illness based on multiple expert opinions" (doc. 20-12 at 217; app. 4212).[20] The PCR court explained that the petitioner's fetal alcohol syndrome argument would have only produced a "'fancier mitigation case'" (doc. 20-12 at 217; app. 4212 (quoting *Jones v. State*, 504 S.E.2d 822 (S.C. 1998) (trial counsel not ineffective for failing to thoroughly investigate and present

[20] At the sentencing phase of the trial, the petitioner's father and sister provided testimony regarding the petitioner's difficult childhood.

mitigating evidence regarding defendant's mental impairments, including organic brain damage, where trial counsel focused its mitigation on the mental condition of the defendant)). The PCR court also set forth a survey of jury verdicts in sister jurisdictions wherein evidence of FAS had been presented in mitigation and the defendants were still found guilty (doc. 20-12 at 218-19; app. 4213-14).

The petitioner argues that if trial counsel had presented evidence of the petitioner's organic brain damage and FAS, it is reasonable that at least one juror would have been persuaded to give a life sentence rather than the death penalty. To establish prejudice, a petitioner must show a "reasonable probability" that counsel's deficient performance prejudiced the outcome of the case. *Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. *Id.* at 696.

As to the penalty phase,"[i]n assessing prejudice, we reweigh the evidence in aggravation against the totality of the available mitigating evidence." *Wiggins*, 539 U.S. at 534. *See Williams v. Taylor*, 529 U.S. 362, 397–98 (2000) (the court must "evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—in re-weighing it against the evidence in aggravation.").

In the instant action, the prosecutor put forward only one aggravating factor, and the jury was split after several hours of deliberation. As previously set forth, the mitigating evidence relates to the petitioner's exposure to alcohol *in utero*. Presented with the additional mitigating evidence regarding the petitioner's organic brain damage and diagnosis of PFAS, there is a reasonable probability that the jury would not have sentenced him to death. Testimony regarding the petitioner's brain damage would have been compelling mitigating evidence and is the type of evidence that the Supreme Court has recognized as relevant in assessing a defendant's moral culpability. *Porter v. McCollum*, 558 U.S. 30, 41 (2009). The petitioner suggests that the testimony of Dr. Brown that the petitioner at the time of the crime was not able to conform his conduct to the requirements of the law was important mitigation testimony that should have been presented to the jury. Further, the petitioner claims that the most compelling evidence presented at the PCR hearing by the petitioner's experts was that the petitioner is emotionally on the level of a nine year old and was functioning as a child on the days leading up to the murder. Further, the petitioner points out that the state has not contradicted the petitioner's diagnosis of PFAS. The petitioner points out that FASD can cause a person to make poor decisions, including criminal behavior as shown in the publications submitted to the PCR court and through the experts' testimony. The petitioner argues that evidence of brain damage caused by *in utero* ingestion of alcohol was compelling evidence that could have led one juror to making a different decision at the sentencing phase.

Because of counsel's omissions in this case, the jury was deprived of powerful evidence: that the petitioner suffered from organic brain damage and that FAS had impaired his judgment and his ability to control his behavior. The petitioner has presented a compelling case that he suffers from FAS, a dysfunction that affected his cognitive ability and his ability to conform his actions. This evidence should have been presented to the sentencing jury. If this evidence had been presented, there is a reasonable probability that the jury would have returned a sentence of life in prison rather than a death sentence. Because trial counsel unreasonably failed to investigate and present compelling mitigation evidence, this court's confidence in the outcome reached at sentencing is undermined. The petitioner has established prejudice resulting from trial counsel's ineffectiveness, and the petitioner is entitled to a new sentencing hearing.

c. Recommendation

Based upon the foregoing, the undersigned recommends that the respondents' motion for summary judgment as to Ground Six be denied and that the petitioner's amended habeas petition be granted as to Ground Six.

G. Ground Seven

In this ground for relief, the petitioner contends that his trial counsel was ineffective for failing to assert that the Eighth and Fourteenth Amendments to the United States Constitution prohibits the imposition of the death penalty for a person under the age of 21 or a person under the age of 21 who has not fully matured

(doc. 74 at 18-19). The parties agree that this issue was not raised in PCR and that it is procedurally defaulted (doc. 100 at 255; doc. 74 at 19). However, in the amended petition,[21] the petitioner contends that because PCR counsel was ineffective in failing to raise this claim in state court, the procedural default should be excused under *Martinez,* in which the Supreme Court of the United States stated:

> When faced with the question whether there is cause for an apparent default, a State may answer that the ineffective-assistance-of-trial-counsel claim is insubstantial, i.e., it does not have any merit or that it is wholly without factual support, or that the attorney in the initial-review collateral proceeding did not perform below constitutional standards.

566 U.S. at 15-16.

As argued by the respondents, the petitioner is unable to show that the ineffective assistance of trial counsel claim has merit, and therefore he has not shown cause for the procedural default. In *Roper v. Simmons*, 543 U.S. 551, 578 (2005), the Supreme Court of the United States held that the Eighth and Fourteenth Amendments to the United States Constitution prohibit execution of offenders who were under 18 years of age when their crimes were committed. At the time of his offense, the petitioner

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[21] In the response in opposition to the motion for summary judgment, the petitioner does not address the procedural bar/*Martinez* issue with regard to this ground but rather simply argues the ground on the merits (doc. 108 at 53-59).

was 20 years old. The petitioner's trial was in February 2005, and *Roper* was decided on March 1, 2005. Even if the petitioner had been under 18 years of age at the time of his offense, trial counsel would not have been ineffective in failing to object to the sentence on that basis as the case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law. *Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995).

Further, the decision in *Roper* has not been extended to individuals between 18 and 21. The constitutional right recognized in *Roper* was limited to those defendants who were under the chronological age of 18 years when they committed their capital offenses. *Mitchell v. State*, 235 P.3d 640, 658 (Okla. Ct. Crim. App. 2010) (defendant was not entitled to an extension of *Roper*, even though defendant was two weeks beyond his 18th birthday when he murdered the victim; the Supreme Court in *Roper* drew a bright line at 18 years of age for death eligibility); *In re Hill*, 437 F.3d 1080, 1082 n. 1 (11th Cir. 2006) (noting *Roper* was inapplicable to 23 year old petitioner).

With regard to the petitioner's claim that trial counsel was ineffective in failing to assert that the Constitution prohibits the imposition of the death penalty for persons under the age of 21 who have not fully matured, *Roper* also has not been extended to such persons. The petitioner has not cited any authority prohibiting the death penalty based upon "juvenile mental age," and he has not demonstrated a national consensus that "mental age" should have been a criterion for trial counsel to have used to exclude the

death penalty in 2005. To the contrary, courts that have been presented with the issue of whether *Roper* was extended in such a way have rejected it. *See Melton v. Sec'y Fla. Dept. of Corr.*, 778 F.3d 1234, 1237 (11th Cir. 2015) (denying certificate of appealability as petitioner failed to establish a debatable question as to whether Supreme Court of Florida violated clearly established federal law when it did not consider petitioner's "mental and emotional age" in light of *Roper*); *Bowling v. Commonwealth*, 224 S.W.3d 577, 584 (Ky. 2006) (rejecting argument that the court in *Roper* intended for the definition of "juvenile" to include those who function mentally at a juvenile level). *See also Thompson v. State*, 153 So. 3d 84, 177-78 (Ala. Crim. App. 2012) (rejecting claim that death sentence was unconstitutional because defendant's mental age warranted that he be treated as a juvenile); *Mitchell v. State*, 235 P.3d 640, 659 (Okla.Crim.App. 2010) ("We find the *Bowling* decision well-reasoned and persuasive."); *State v. Campbell*, 983 So.2d 810, 830 (La. 2008) ("*Roper* established a bright-line demarcation for application of the standard announced therein, rather than a standard which could be applied to a defendant's 'mental age' on a case-by-case basis...."); *Hill v. State*, 921 So.2d 579, 584 (Fla. 2006) ("Hill's third claim is that his mental and emotional age places him in the category of persons for whom it is unconstitutional to impose the death penalty under [*Roper*]. This claim is without merit. *Roper* does not apply to Hill. Hill was twenty-three years old when he committed the crimes at issue. *Roper* only prohibits the execution of those defendants whose chronological age is below eighteen.").

Based upon the foregoing, the petitioner has failed to show cause for his procedural default as the ineffectiveness of trial counsel claims have no merit and his PCR counsel was not ineffective in failing to raise the claims.[22] Accordingly, summary judgment should be granted to the respondents on this ground for relief.

H. Ground Eight and Nine

In Ground Eight, the petitioner alleges a freestanding claim that the imposition of the death sentence violates his Eighth and Fourteenth Amendment rights because South Carolina's death penalty statute[23] fails to narrow the circumstances under which the death penalty may be imposed and therefore results in an arbitrary and capricious capital sentencing process (doc. 74 at 19-21). The respondents argue that this ground is procedurally barred (doc. 100 at 265). The undersigned agrees.

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[22] In the alternative to showing cause and prejudice, a petitioner must demonstrate a miscarriage of justice, e.g., actual innocence, to avoid the procedural bar. *Bousley v. United States*, 523 U.S. 614, 623 (1998)*; Murray v. Carrier*, 477 U.S. 478, 495-96 (1986). The petitioner has not shown—or even argued—that he is actually innocent of the at-issue crime. *See Schlup v. Delo*, 513 U.S. 298, 327-28 (1995).

[23] South Carolina's death penalty statute may be found at S.C. Code Ann. § 16-3-20. The statutory aggravating circumstance found by the jury in the petitioner's trial was murder committed while in the commission of kidnapping (doc. 20-6 at 418, 436; app. 2399, 2417). *See* S.C. Code Ann. §§ 16-3-20(C)(a)(1)(b), 16-3-910 (kidnapping statute).

In his amended state PCR application, the petitioner raised a Sixth Amendment claim that his trial and appellate counsel were ineffective in failing to present or preserve the issue that the death penalty was inappropriate and used in an arbitrary manner (doc. 20-9 at 58; app. 3037). In his post-hearing briefing, the petitioner raised the following issue: "The South Carolina death penalty statute is unconstitutional under *Furman v. Georgia*" (doc. 20-12 at 45-66; app. 4040-61).[24] The PCR court denied the ground as a Sixth Amendment ineffective assistance issue (doc. 20-12 at 183-87; app. 4178-82). In the PCR appeal, the petitioner raised the following freestanding Eighth Amendment ground as Question Three in his certiorari petition:

> The South Carolina death penalty statute is unconstitutional under *Furman versus Georgia,* and more importantly, an adequate proportionality analysis has never been performed in this case and the death penalty is excessive in this case.
>
> A. Under South Carolina's Statute Virtually Every Murder Case Can Qualify for the Death Penalty Resulting in a Complete

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[24] "A fair statement of the consensus expressed by the Court in *Furman* is 'that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'" *Zant v. Stephens*, 462 U.S. 862, 874 (1983) (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

> Failure to Narrow the Circumstances Under Which a Jury May Sentence the Defendant to Death.
>
> B. This Court Failed to Adequately Review the Sentence to Ensure it was Appropriate Under the Circumstances.

(Doc. 19-17 at 2, 62-76). The State of South Carolina asserted in the return to the petition for writ of certiorari that the claim was procedurally barred because the freestanding Eighth Amendment claim was not presented during the PCR proceeding but was instead addressed as a Sixth Amendment ineffective assistance issue (doc. 19-18 at 248-51). In reply, the petitioner admitted that the PCR court addressed the ground as an ineffective assistance of counsel issue (doc. 19-19 at 18). The South Carolina Supreme Court denied certiorari on this ground (doc. 19-20).

As argued by the respondents, this freestanding claim could only have been properly raised on direct appeal and was inappropriate in PCR. S.C. Code Ann. § 17-27-20(b) (2003); *Drayton v. Evatt*, 430 S.E.2d 517 (S.C. 1993) (issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel); *Simmons v. State*, 215 S.E.2d 883, 885 (S.C. 1975) (an application for PCR is not a substitute for an appeal). The petitioner did not raise this ground in his direct appeal. However, in the order affirming the petitioner conviction and sentence in his direct appeal, the South Carolina Supreme Court stated as follows:

PROPORTIONALITY REVIEW

> Pursuant to S.C. Code Ann. § 16-3-25(C) (2003), we have conducted a proportionality review and find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions demonstrates that Appellant's sentence is neither excessive nor disproportionate. *See, e.g., State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996).

State v. Williams, 690 S.E.2d 62, 69 (S.C. 2010) (*see* doc. 19-4 at 14). The relevant South Carolina statute provides, in pertinent part:

> **Punishment for murder; review by Supreme Court of imposition of death penalty.**
>
> (A) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of South Carolina. . . .
>
> (B) The Supreme Court of South Carolina shall consider the punishment as well as any errors by way of appeal.
>
> (C) With regard to the sentence, the court shall determine:
>
> > (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 16-3-20, and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

S.C. Code Ann. § 16-3-25(A)-(C).

The petitioner contends that in the foregoing proportionality review the South Carolina Supreme Court necessarily considered "whether the expansiveness of the South Carolina death penalty scheme is such that imposition of the death penalty is inevitably arbitrary," and thus the ground is not procedurally barred (doc. 108 at 61). The petitioner cites no case law in support of his argument (*see id.*).

While the undersigned has been unable to find cases within this circuit considering implied exhaustion of a petitioner's constitutional grounds by a state supreme court's automatic review of death sentences, the District of Nevada, in considering the Nevada Supreme Court's statutory mandatory review of death sentences, has stated as follows:

> In order to find claims exhausted by virtue of the Nevada Supreme Court's review under NRS 177.055, this Court must be satisfied that such review encompassed the specific factual and federal law grounds advanced by the petitioner in his federal petition. *See Comer v. Schriro*, 463 F.3d 934, 954–56 (9th Cir. 2006) (examining

> whether petitioner's federal habeas claims were impliedly exhausted under the Arizona Supreme Court's statutory automatic review). In finding implied exhaustion in *Comer*, the court of appeals noted that only claims that are "clearly encompassed within Arizona's independent review" and "readily apparent from the record" will be deemed impliedly exhausted. *Id*. at 956.

Snow v. Baker, C.A. No. 2:03-292-MMD, 2013 WL 5149650, at *24 (D. Nev. Sept. 12, 2013). In *Comer,* cited by the District of Nevada in the above quotation, the Ninth Circuit Court of Appeals found that the Arizona Supreme Court's independent review of capital cases ensured "that the death penalty was not imposed under the influence of passion, prejudice, or any other arbitrary factors." *Comer*, 463 F.3d at 954 (citation omitted), *withdrawn on other grounds*, 471 F.3d 1359 (9th Cir. 2006). While the court found that several of the petitioner's claims were impliedly exhausted by the Arizona Supreme Court's independent review of the petitioner's case, the court specifically found that the petitioner's claim that the Arizona death penalty statute failed to narrow the class of defendants subject to the death penalty was not impliedly exhausted because it was "neither as readily apparent from the record nor as clearly encompassed within Arizona's independent review" as other claims. *Id.* at 955-56 & n.16. That claim is substantially similar to the one alleged by the petitioner here – that South Carolina's death penalty statute fails to narrow the circumstances under which the death penalty may be imposed and therefore results in an arbitrary and capricious capital sentencing process in violation of his constitutional

rights (doc. 74 at 19-21). Here, the petitioner has not shown that this ground was "clearly encompassed" within the scope of South Carolina's statutory proportionality review and "readily apparent" in the record reviewed by the South Carolina Supreme Court. As argued by the respondents (doc. 114 at 59), this ground has not been squarely and fairly presented to the state court, and therefore it is procedurally barred. *See Picard v. Connor*, 404 U.S. 270, 275-76 (1971) ("Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts."). Based upon the foregoing, Ground Eight was not exhausted on direct appeal by operation of South Carolina's mandatory review statute, and the ground is procedurally barred.

In his amended petition, the petitioner alleges Ground Nine as an alternative to Ground Eight, arguing that, if Ground Eight is procedurally barred, the ineffective assistance of his appellate and/or PCR counsel provides cause to excuse such procedural default (doc. 74 at 21). In response to the motion for summary judgment, the petitioner concedes that this ground "is not supported by current law" (doc. 108 at 61) and cites the Supreme Court of the United States' recent decision in *Davila v. Davis*, 137 S. Ct. 2058, 2065-70 (2017), in which the Court found that ineffective assistance of state habeas counsel may not provide cause to excuse the procedural default of a claim of ineffective assistance of appellate counsel.

As discussed above, Ground Eight is a direct appeal issue, and it was not raised by the petitioner's appellate counsel. Accordingly, absent a showing of cause and actual prejudice, this court is barred from considering the claim. *Wainwright v. Sykes*, 433 U.S. 72, 84-87 (1977). "[A]n attorney's errors during an appeal on direct review may provide cause to excuse a procedural default . . . ." *Martinez*, 566 U.S. at 11 (citing *Coleman*, 501 U.S. at 754) (other citations omitted). However, the attorney's failure to present an issue on direct appeal can constitute cause for procedural default only if that failure violated the Sixth Amendment's right to counsel. *See Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (citing *Murray*, 477 U.S. at 488–89). "In other words, ineffective assistance adequate to establish cause for the procedural default of some other constitutional claim is itself an independent constitutional claim." *Id.* "[P]rinciples of comity and federalism" require that such an ineffective-assistance claim "'be presented to the state courts as an independent claim before it may be used [in a § 2254 proceeding] to establish cause for a procedural default.'" *Id.* at 451-52 (quoting *Murray*, 477 U.S. at 489).

As set forth above, in PCR, the petitioner raised a Sixth Amendment claim that his trial and appellate counsel were ineffective in failing to present or preserve the issue that the death penalty sentence was inappropriate and used in an arbitrary manner (doc. 20-9 at 58; app. 3037), and the PCR court ruled on that issue (doc. 20-12 at 183-87; app. 4178-82). However, in the petition for writ of certiorari to the South Carolina Supreme Court, the petitioner asserted the issue as a

freestanding claim rather than as a Sixth Amendment counsel issue. "Thus, he cannot use appellate counsel's purportedly deficient performance to excuse the procedural default of Ground [Eight]; that issue is, itself, procedurally defaulted." *Portee v. Stevenson*, C.A. No. 8:15-CV-487-PMD-JDA, 2016 WL 690871, at *3 (D.S.C. Feb. 22, 2016) (citing *Edwards*, 529 U.S. at 453 ("[A]n ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted....")). To the extent the petitioner contends that his PCR appellate counsel's omission excuses the default of his claim of ineffective assistance of counsel in the direct appeal, in *Martinez*, the Supreme Court expressly noted that its holding in that case "does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings . . . ." 566 U.S. at 16. Moreover, as the petitioner concedes, in *Davila v. Davis*, the Supreme Court recently declined "to extend *Martinez* to allow a federal court to hear a substantial, but procedurally defaulted, claim of ineffective assistance of appellate counsel when a prisoner's state [PCR] counsel provides ineffective assistance by failing to raise that claim." 137 S. Ct. at 2065.

Based upon the foregoing, it appears that the petitioner has abandoned Ground Nine, and, nonetheless, the ground is procedurally barred. Accordingly, summary judgment should be granted to the respondents on Grounds Eight and Nine.

I. Ground Ten

In this ground, the petitioner alleges a Sixth Amendment claim of ineffective assistance of trial

counsel for failing "to object to the improper sentencing testimony of witness Tina Smith about the impact on her of witnessing the petitioner holding the victim hostage and being unable to assist her" (doc. 74 at 22-23). The respondents argue that this ground is procedurally barred as it was not raised or addressed in the PCR application, at the PCR hearing, in the PCR court's order of dismissal, or in the petition for certiorari before the South Carolina Supreme Court (doc. 100 at 277-82). The petitioner concedes that this claim was not raised in state court and argues that the failure of his PCR counsel to raise this ground provides cause to excuse the procedural default under *Martinez* (doc. 108 at 62-63). "To overcome the default, a prisoner must . . . demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 566 U.S. at 14 (citing *Miller–El v. Cockrell*, 537 U.S. 322 (2003)). If the ineffective assistance of trial counsel claim "does not have any merit or . . . is wholly without factual support," the procedural default precludes federal habeas review. *Id.* at 15-16.

During the guilt phase of the petitioner's trial, Tina Smith testified that on September 3, 2003, she was employed at the Bi-Lo as deli-bakery manager (doc. 20-5 at 71-81; app.1557-67). She described hiring the victim, Maranda Williams, whom she called "Mandy," that Maranda was a good employee, and that Maranda was well-loved by her coworkers (*id.*). She described the events of her day and her plans to train Maranda to be a manager (*id.*). Ms. Smith described seeing Maranda run to the back and tell her that "Chris is in

the store" (*id.*). She testified that Maranda was upset, and they attempted to leave through another door to get Maranda out of the store, but the petitioner grabbed Maranda by the arm (*id.*). Ms. Smith saw something by the petitioner's side, and knowing that she could not fight the petitioner, Ms. Smith went to another department to get some men to help (*id.*). Ms. Smith described her own fear at that time, stating that she was not even able to speak when she encountered another employee (*id.*). She was able "to get the word 'Mandy' out, and [the other employee] realized something was very wrong and run to try to help" (*id.*). She described that, while she was at the police station, she heard someone on the police scanner say "shots fired," after which an officer had to calm her down (*id.*).

Ms. Smith gave the following testimony during the penalty phase of the petitioner's trial, to which the petitioner argues his trial counsel should have objected:

> Q. Miss Smith, you were obviously present at the Bi-Lo when the defendant entered the store and you've already testified as to what happened. How has that experience affected you personally?
>
> A. I live in fear every day of my life. It's something I think about every single day. That's not an exaggeration. I'm always afraid. At work I look around to see if somebody's coming in with a gun. It's constant fear every day. Actually, I'm suffering from post traumatic stress. It's something I have not been able to get past.

> Q. And specifically how has Mandy's death affected you?
>
> A. It's the most traumatic thing I ever experienced. I will never forget the look on her face when he grabbed her. And I had to leave her, and I have to see her family and know I had to leave her that day. And it was fear. It's something I'll never forget. I'll remember it the rest of her [sic] life. I'm so sorry to her family that I had to leave her.

(Doc. 20-6 at 208; app. 2190).

In *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), the United States Supreme Court held that the introduction of victim impact evidence during capital sentencing does not necessarily violate the Eighth Amendment. The Fourth Circuit Court of Appeals found "no reason to think that the *Payne* Court intended to forbid the introduction of evidence regarding the impact of the victim's death on his friends and colleagues as well as his family." *United States v. Runyon*, 707 F.3d 475, 500 (4th Cir. 2013).[25] "Victim impact evidence is simply another form or method of informing the sentencing authority about the

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[25] The respondents' argument in support of summary judgment focuses on a supposed claim by the petitioner that the Eighth Amendment limits capital sentencing juries to considering victim impact testimony only from family members, rather than friends and co-workers such as Ms. Smith (doc. 100 at 279-81). As such a claim was not made by the petitioner in the amended petition (doc. 74 at 22-23) and no such argument was made in response to the motion for summary judgment (doc. 108 at 62-63), it will not be further addressed here.

specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." *Payne*, 501 U.S. at 825. The Court in *Payne* specifically noted that its holding did not affect the rule in *Booth v. Maryland*, 482 U.S. 496, 508-509 (1987) that "admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." *Payne*, 501 U.S. at 830 n.2. Further, the Due Process Clause prohibits the introduction of victim impact testimony "that is so unduly prejudicial that it renders the trial fundamentally unfair." *Id.* at 825.

The petitioner contends that "Ms. Smith's testimony was so far afield from permissible victim impact testimony that trial counsel's failure to object to its admission constituted ineffective assistance of counsel" (doc. 108 at 62). The petitioner argues that Ms. Smith's testimony had nothing to do with either Ms. Smith's loss or the loss to society as a whole caused by the death of Maranda; instead, the testimony addressed Ms. Smith's experience of witnessing the events leading up to the homicide and her own feelings of inadequacy for not having prevented it (*id.* at 63). The petitioner argues that "such testimony about a bystander's reaction to the crime goes beyond the victim impact evidence approved by *Payne*, and improperly turns the jury's attention to emotional and tangential considerations that cannot be part of its sentencing determination" (*id.*). The petitioner contends that trial counsel's failure to object to the testimony was thus deficient performance, and the failure of PCR counsel

to raise the issue excuses the procedural default of the ineffective assistance of trial counsel claim (*id.*).

In response to the motion for summary judgment, the petitioner cites two affidavits in support of the argument that his trial counsel and PCR counsel were ineffective in failing to object to or raise the issue regarding Ms. Smith's penalty phase testimony (doc. 108 at 63 (citing docs. 74-14 and 74-15)). In the pertinent portion of lead PCR counsel Derek Enderlin's affidavit, he states that he has reviewed Ms. Smith's testimony, and "[t]here was no strategic reason for not challenging trial counsel's failure to object to this testimony as violating the restrictions on victim impact testimony as set forth in *Payne v. Tennessee*, 501 U.S. 808 (1991) and there was no strategic reason for not articulating a specific IAC claim on this issue" (doc. 74-14 at 3, 1/31/17 Enderlin aff. ¶ 2). Trial counsel William Norman Nettles states in his affidavit that he has reviewed Ms. Smith's testimony, and "[t]here was no strategic reason for not objecting to the testimony . . . as improper victim impact testimony" (doc. 74-15 at 1, Nettles aff. ¶ 2). The petitioner has filed a motion to expand the record and for evidentiary hearing (doc. 109). The affidavits cited above and other documents that are the subject of that motion were attached as exhibits to the petitioner's amended petition (*see* doc. 74 & attach.).

In a habeas action, the court's review is limited to the evidence that was placed before the state court. *See Cullen v. Pinholster*, 563 U.S.170, 180, 184 n.7 (2011); *see also* 28 U.S.C. § 2254(d)(2). In *Fielder v. Stevenson*, The Honorable J. Michelle Childs, United States

District Judge, thoroughly examined a respondent's motion to strike a petitioner's affidavit submitted in opposition to a motion for summary judgment. C.A. No. 2:12–cv–412–JMC, 2013 WL 593657 (D.S.C. Feb.14, 2013)(granting motion to strike affidavit where "the majority of the claims in the Affidavit . . . allege detailed facts regarding the shooting which could have been presented in the state proceeding and which could also impact any analysis on the underlying ineffective assistance of counsel claim"). As noted in her order, Rule 7 of the Rules Governing Section 2254 Cases "authorizes a federal habeas court to expand the record to include additional material relevant to the petition in some situations." *Id.* at *2. Judge Childs noted that although § 2254(e)(2) "sets limits on a petitioner's ability to expand the record in a federal habeas proceeding[,] . . . . courts have held that § 2254(e)(2) does not . . . constrain the court's discretion to expand the record to establish cause and prejudice to excuse a petitioner's procedural defaults." *Id.* at *3 (citing *Cristin v. Brennan*, 281 F.3d 404, 416 (3d Cir. 2002); *Buckman v. Hall*, C.A. No. cv 07-141-HU, 2009 WL 204403, at *1 (D. Or. Jan.23, 2009) (noting that courts will "distinguish between an expansion of the record for purposes of establishing the factual predicate of a claim, and an expansion of the record to overcome a procedural default. In the latter circumstance, § 2254(e)(2) does not apply.")). Judge Childs further stated:

> [T]he court retains its discretion to expand the record to allow a petitioner to establish cause and prejudice to excuse a petitioner's procedural defaults. *See Cristin*, 281 F.3d at 414 (3d

Cir.2002). In determining whether to expand the record, a federal court must consider whether doing so "would enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *See Schriro v. Landrigan*, 550 U.S. 465, 474, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007) (discussing evidentiary hearings under § 2254).

The Supreme Court recently held that a habeas corpus petitioner asserting claims for ineffective assistance of counsel can demonstrate sufficient cause to excuse a procedural default upon a showing that counsel in the initial-review collateral proceeding was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), in failing to raise a claim that should have been raised below. *See Martinez*, 132 S.Ct. at 1318 (internal citations omitted). To overcome the procedural bar under *Martinez* however, the petitioner "must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id.* (internal citations omitted).

While *Martinez* recognizes the need for a meaningful review of an ineffective-assistance-of-counsel claim that arises at initial review collateral proceedings such as the PCR hearing at issue here, *Martinez* does not directly provide the authority for a petitioner to expand the record in order to further develop facts that

> could have been presented in the state court proceeding. *See Foster v. Oregon*, 2012 WL 3763543 (D. Or. Aug.29, 2012); *Halvorsen v. Parker*, 2012 WL 5866595 (E.D. Ky. Nov.19, 2012); *Williams v. Mitchell*, 2012 WL 4505181 (N.D. Ohio Sept.28, 2012).

Id. at *3-4.

Based upon the foregoing, the undersigned recommends that the district court consider the cited portions of Mr. Enderlin's and Mr. Nettles' affidavits (doc. 74-14 at 3, 1/31/17 Enderlin aff. ¶ 2; doc. 74-15 at 1, Nettles aff. ¶ 2) for the sole purpose of examining cause and prejudice to excuse the procedural default for this ground.

Here, the testimony at issue by Ms. Smith did not contravene the constitutional limitations on victim impact testimony. Ms. Smith did not opine that the petitioner should be sentenced to death, and she did not share characterizations and opinions about the crime or the defendant. In the challenged testimony, she simply expressed the emotional and mental impact upon her of the crime and her inability to save Maranda's life. Such testimony could not be considered so unduly prejudicial that it rendered the trial fundamentally unfair. *Cf. Payne*, 501 U.S. at 832 (O'Connor, J., concurring) (noting that victim impact testimony does not offend due process when it does not inflame the jury "more than . . . the facts of the crime"). Accordingly, the undersigned cannot conclude that the testimony was such that only constitutionally ineffective counsel would have failed to object to it, and thus the petitioner has failed to demonstrate that the

underlying ineffective assistance of trial counsel claim has merit.

Furthermore, examination of the extra-record evidence presented by the petitioner does not convince this court that the procedural bar should be lifted. Despite trial counsel Nettles' conclusory characterization of Ms. Smith's testimony as "improper victim impact testimony" and PCR counsel Enderlin's testimony that there was no strategic reason for not articulating a specific ineffective assistance of counsel claim on this issue, the foregoing discussion of the relevant law reveals that Ms. Smith's testimony was admissible victim impact testimony. The petitioner has not shown "that his PCR counsel's representation was objectively unreasonable during his PCR proceeding and that, but for his errors, there is a reasonable probability that [he] would have received relief on a claim of ineffective assistance of trial counsel in the state PCR proceeding." *Evans v. Cartledge*, C.A. No. 0:13-2737-TMC, 2015 WL 1006271, at *10 (D.S.C. March 6, 2015) (citation omitted). As the petitioner has failed to show cause for the procedural default, summary judgment should be granted to the respondents on this ground.

J. Grounds Eleven, Twelve, Thirteen, Fourteen, and Fifteen

In Grounds Eleven, Twelve, Thirteen, Fourteen, and Fifteen, the petitioner alleges that his trial counsel were ineffective in presenting certain evidence and in failing to investigate, develop, and present certain other evidence and that these failures prejudiced the mitigation case (*see* doc. 74 at 23-77). The petitioner

further alleges that PCR counsel were ineffective in failing to present these claims in PCR, thus providing cause to excuse the procedural bar of these grounds under *Martinez* (*id.*). The petitioner notes that extra-record evidence has been provided in support of these grounds (*id.* at 23), and several affidavits and other documentary evidence were included as exhibits to the amended petition (*see* docs. 74-1 through 74-26). On September 8, 2017, the petitioner filed a motion to expand the record and for an evidentiary hearing on all *Martinez* claims (doc. 109). The respondents filed a response in opposition on October 6, 2017 (doc. 115), and the petitioner filed a reply on October 26, 2017 (doc. 124). On October 16, 2017, the petitioner filed a motion to stay further proceedings pending the decision by the Supreme Court of the United States in *Ayestas v. Davis*, (doc. 121). The respondents filed opposition to that motion on October 27, 2017 (doc. 126), and the petitioner filed a reply on November 1, 2017 (doc. 126). On November 3, 2017, the undersigned filed a report and recommendation that the district court grant the motion to stay as the Supreme Court is likely to address issues relating to whether the petitioner may present evidence developed during this federal habeas investigation in an evidentiary hearing for consideration in his *Martinez* claims (doc. 139 at 3).

Since the filing of the November 3rd recommendation of a stay, the undersigned has had further opportunity to review the filings by the parties and, as set forth above, recommends that the petitioner's amended habeas petition be granted as to Ground Six. Should the district court adopt the recommendation and order that the petitioner be

returned to the state court for resentencing, the petitioner may present the evidence at issue in Grounds Eleven, Twelve, Thirteen, Fourteen, and Fifteen, along with other relevant evidence, to the state court for its consideration. Therefore, the undersigned recommends that these grounds be dismissed *without prejudice* and the petitioner's motion for evidentiary hearing and to expand the record (doc. 109) be denied as the evidence at issue may be presented to the state court in the first instance. In accordance with this recommendation, the undersigned will withdraw the recommendation (doc. 139) that this case be stayed pending the decision in *Ayestas v. Davis*, as an evidentiary before this court will no longer be needed.

IV. CONCLUSION AND RECOMMENDATION

Wherefore, based upon the foregoing, the undersigned recommends that the respondents' motion for summary judgment (doc. 101) be granted as to Grounds One, Two, Three, Four, Five, Seven, Eight, Nine, and Ten and be denied as to Ground Six. The undersigned further recommends that the petitioner's amended habeas petition be granted as to Ground Six, that his death sentence be vacated, and that the respondents be given a limited period of time within which to conduct a resentencing trial or impose a lesser sentence consistent with the law. Further, as discussed above, Grounds Eleven, Twelve, Thirteen, Fourteen, and Fifteen should be dismissed *without prejudice*. Lastly, the petitioner's motion to expand the record and for evidentiary hearing (doc. 109) and motion to stay pending the decision in *Ayestas v. Davis* (doc. 121) should be denied for the reasons set forth above.

s/ Kevin F. McDonald
United States Magistrate Judge

December 11, 2017
Greenville, South Carolina

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Civil Action No.: 6:16-cv-01655-JMC

[Filed March 8, 2018]

Charles Christopher Williams,	)
	)
Petitioner,	)
	)
v.	)
	)
Bryan P. Stirling, Commissioner, South Carolina Department of Corrections, and Willie D. Davis, Warden of Kirkland Correctional Institution,	)
	)
Respondents.	)

ORDER AND OPINION

This matter is before the court pursuant to Magistrate Judge Kevin F. McDonald's Report and Recommendation. (ECF No. 146.) Petitioner Charles Christopher Williams, an inmate incarcerated in Kirkland Correctional Institution in the South Carolina Department of Corrections ("SCDC") under a sentence

of death, seeks habeas corpus relief pursuant to 28 U.S.C. § 2254. (*Id*.) The petitioner filed fifteen grounds for relief. (ECF No. 74.) The Magistrate Judge recommends that (1) the petitioner's amended habeas petition pursuant to 28 U.S.C. § 2254 be granted as to Ground Six, thereby returning him to state court for resentencing; (2) Grounds Eleven through Fifteen be dismissed without prejudice; (3) the petitioner's Motion for Evidentiary Hearing and to Expand the Record be denied; and (4) the petitioner's Motion to Stay pending the decision in *Ayestas v. Davis*, 137 S. Ct. 1433, No. 16-6795, be denied. (ECF No. 146.)

The petitioner and respondents filed objections and replies to the Report and Recommendation. (ECF Nos. 155, 156, 163, 164.) The Report and Recommendation, filed on December 11, 2017, sets forth the relevant factual and procedural background, which this court incorporates herein without a recitation. (ECF No. 146.)

For the reasons set forth below, the court **ACCEPTS** the Magistrate Judge's Report and Recommendation as to Grounds One through Ten, and **REJECTS** the Report and Recommendation as to Grounds Eleven through Fifteen (ECF No. 146). Therefore, the court **GRANTS** the respondents' Motion for Summary Judgment as to Grounds One, Two, Three, Four, Five, Seven, Eight, Nine, and Ten and **DENIES** it as to Ground Six (ECF No. 101). Consequently, the court **GRANTS** petitioner's amended habeas petition as to Ground Six (ECF No. 74). Further, as to Grounds Eleven through Fifteen, the court **GRANTS** the petitioner a stay pending

exhaustion of these claims in state court. Finally, the court **DENIES WITHOUT PREJUDICE** the petitioner's Motion to Expand the Record and for Evidentiary Hearing (ECF No. 109) and his Motion to Stay pending the decision in *Ayestas v. Davis* (ECF No. 121). Accordingly, the court **REJECTS** the Magistrate Judge's Report and Recommendation as to petitioner's Motion to Stay pending the decision in *Ayestas v. Davis* (ECF No. 139).

I. LEGAL STANDARD

A. The Magistrate Judge's Report and Recommendation

The Magistrate Judge's ReportI'm j and Recommendation is made in accordance with 28 U.S.C. § 636(b)(1) and Local Civil Rule 73.02(B)(2)(c) for the District of South Carolina. The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with this court. *See Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). The court is charged with making a *de novo* determination of those portions of the Report and Recommendation to which specific objection is made, and the court may accept, reject, or modify, in whole or in part, the Magistrate Judge's recommendation or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

B. Summary Judgment Standard

Summary judgment is appropriate when the materials in the record show that "there is no genuine dispute as to any material fact and the movant is

entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[I]n ruling on a motion for summary judgment, 'the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'" *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) (per curiam)(brackets omitted) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and a fact is material if it "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248.

The party seeking summary judgment shoulders the initial burden of demonstrating to the court that there is no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, the nonmoving party, to survive the motion for summary judgment, may not rest on the allegations averred in its pleadings. Rather, the nonmoving party must demonstrate that specific, material facts exist which give rise to a genuine issue. *See id.* at 324.

C. Section 2254 Standard

Because the petitioner filed the petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), his claims are governed by 28 U.S.C. § 2254(d), as amended. *Lindh v. Murphy*, 521 U.S. 320 (1997). Section 2254 "sets several limits on the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). For instance, § 2254 authorizes review of

only those applications asserting a prisoner is in custody in violation of the Constitution or federal law and only when, except in certain circumstances, the prisoner has exhausted remedies provided by the state. *Id.*

When a § 2254 petition includes a claim that has been adjudicated on the merits in a state court proceeding, § 2254 provides that the application shall not be granted with respect to that claim, unless the state court's adjudication of the claim:

a. resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
b. resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d). "This is a 'difficult to meet,' and 'highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt.'" *Pinholster*, 563 U.S. at 181 (internal citations omitted) (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011); *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)).

D. Ineffective Assistance of Counsel

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The Supreme Court has held that this right is violated when counsel retained by, or

appointed to, a criminal defendant fails to provide adequate or effective legal assistance. *See Strickland* v. Washington, 466 U.S. 668, 686 (1984). *Strickland* established a two-prong test for a claim of ineffective assistance of counsel in violation of the Sixth Amendment, under which the criminal defendant must show deficient performance and resulting prejudice. *Id.* at 687.

"The performance prong of *Strickland* requires a defendant to show 'that counsel's representation fell below an objective standard of reasonableness.'" *Lafler v. Cooper*, 566 U.S. 156, 163 (2012) (quoting *Hill v. Lockhart*, 474 U.S. 52, 57 (1985)). "[C]ounsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,'" and courts should indulge in a "'strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance.'" *Burt v. Titlow*, 134 S. Ct. 10, 17 (2013) (quoting *Strickland*, 466 U.S. at 689-90). "To establish *Strickland* prejudice a 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.'" *Lafler*, 566 U.S. at 163 (quoting *Strickland*, 466 U.S. at 694).

The standard for an ineffective assistance claim under *Strickland* in the first instance is already "a most deferential one," and "'[s]urmounting *Strickland*'s high bar is never an easy task.'" *Richter*, 562 U.S. at 105 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)). Consequently, "[e]stablishing that a state court's application of *Strickland* was unreasonable

under § 2254(d) is all the more difficult, as the standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Id*. (internal citations omitted) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)); *Lindh*, 521 U.S. at 333, n. 7 (1997); *Strickland*, 466 U.S. at 689). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable... [but] whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 89.

E. Procedural Default

A petitioner's failure to raise in state court a claim asserted in his § 2254 petition "implicates the requirements in habeas of exhaustion and procedural default." *Gray v. Netherland*, 518 U.S. 152, 161 (1996). "The habeas statute generally requires a state prisoner to exhaust state remedies before filing a habeas petition in federal court." *Woodford v. Ngo*, 548 U.S. 81, 92 (2006). Thus, "[a] state prisoner is generally barred from obtaining federal habeas relief unless the prisoner has properly presented his or her claims through one 'complete round of the State's established appellate review process.'" *Id*. (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999)). In a similar vein, "a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance" and has procedurally defaulted those claims. *Coleman v. Thompson*, 501 722, 732 (1991).

Absent an exception, a federal court will not entertain a procedurally defaulted claim, so long as the state procedural requirement barring the state court's review is adequate to support the judgment and independent of federal law. *See Martinez v. Ryan*, 566 U.S. 1, 9-10 (2012); *Walker v. Martin*, 562 U.S. 307, 315-16 (2011). "Thus, if state-court remedies are no longer available because the prisoner failed to comply with the deadline for seeking state-court review or for taking an appeal, those remedies are technically exhausted, but exhaustion in this sense does not automatically entitle the habeas petitioner to litigate his or her claims in federal court. Instead, if the petitioner procedurally defaulted those claims, the prisoner generally is barred from asserting those claims in a federal habeas proceeding." *Woodford*, 548 U.S. at 93 (internal citation omitted) (citing *Gray*, 518 U.S. at 161-62; *Coleman*, 501 U.S. at 744-51).

However, "[t]he doctrine barring procedurally defaulted claims from being heard is not without exceptions. A prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law." *Martinez*, 566 U.S. at 10 (citing *Coleman*, 501 U.S. at 750). "In *Coleman*, . . . the Supreme Court held that . . . a federal habeas 'petitioner cannot claim constitutionally ineffective assistance of counsel in [state post-conviction] proceedings to establish cause.'" *Fowler v. Joyner*, 753 F.3d 446, 460 (4th Cir. 2014) (quoting *Coleman*, 501 U.S. at 752). Subsequently, in *Martinez*, the Supreme Court recognized a "narrow exception" to the rule stated in *Coleman* and held that, in certain situations, "[i]nadequate assistance of counsel at

initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez*, 566 U.S. at 9. The Fourth Circuit has summarized the exception recognized in *Martinez*:

> [A] federal habeas petitioner who seeks to raise an otherwise procedurally defaulted claim of ineffective-assistance-of-trial-counsel before the federal court may do so only if: (1) the ineffective-assistance-of-trial-counsel claim is a substantial one; (2) the "cause" for default "consists of there being no counsel or only ineffective counsel during the state collateral review proceeding;" (3) "the state collateral review proceeding was the initial review proceeding in respect to the ineffective-assistance-of-trial-counsel claim;" and (4) state law "requires that an ineffective-assistance-of-trial-counsel claim be raised in an initial-review collateral proceeding."

Fowler, 753 F.3d at 461 (internal brackets omitted) (quoting *Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013)).

In the alternative to showing cause and prejudice, a petitioner may attempt to demonstrate a miscarriage of justice, *e.g.*, actual innocence, *Bousley v. United States*, 523 U.S. 614, 623 (1998); *see also Schlup v. Delo*, 513 U.S. 298, 327-28 (1995), or abandonment by counsel. *See Maples v. Thomas*, 565 U.S. 266, 283 (2012) (inquiring "whether [the petitioner] ha[d] shown that his attorneys of record abandoned him, thereby supplying the extraordinary circumstances beyond his

control, necessary to lift the state procedural bar to his federal petition" (internal quotation marks and citations omitted)).

II. ANALYSIS

The parties were advised of their right to file objections to the Report and Recommendation. (ECF No. 146 at 101.) On January 12, 2018, the petitioner and respondents filed objections to the Report and Recommendation. (ECF Nos. 155, 156.) On February 4, 2018, the petitioner filed a reply to respondents' objection (ECF No. 163), and on the following day, respondents filed a reply to the petitioner's objection (ECF No. 164).

After reading the petitioner's objections to Grounds One, Two, Three, Four, Five, Seven, Eight, Nine, and Ten (which the court will grant in favor of respondents), the court does not find that the petitioner has made arguments sufficient to allege any error in the Magistrate Judge's thoroughly reasoned Report and Recommendation.[1] Therefore, because the court will grant the petitioner's amended habeas petition as to Ground Six and order the petitioner to return to state court for resentencing, the court finds it only necessary to discuss Ground Six and the grounds that will be pertinent to the state court's resentencing (*i.e.*, Grounds 11-15).

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[1] The court hereby accepts the Magistrate Judge's Report and Recommendation as to Grounds One, Two, Three, Four, Five, Seven, Eight, Nine, and Ten (*see* ECF No. 146).

A. Ground Six

In Ground Six, the petitioner contends that he was denied the effective assistance of counsel because his trial counsel failed to investigate and present evidence in mitigation of punishment that he suffers from Fetal Alcohol Syndrome ("FAS"). (ECF No. 108 at 22.)[2] The petitioner asserts that his condition is compelling evidence of his mental state and could have led one jury member to make a different decision at sentencing. (*Id.* at 53.)

Ground Six was essentially presented to the post-conviction relief ("PCR") court as Ground (n) in attachment II of the PCR petition (ECF No. 20-9 at 156) and was rejected on the merits by the PCR court (ECF No. 20-12 at 207-19). This claim was then rephrased and presented as Ground One in the petitioner's writ of certiorari to the South Carolina Supreme Court (ECF No. 19-17). The South Carolina Supreme Court granted certiorari (ECF No. 19-20 at 1), but later dismissed it as improvidently granted (ECF No. 19-24). As such, this claim is procedurally exhausted and ripe for habeas review by this court. *See In Re Exhaustion of State Remedies*, 471 S.E.2d 454 (S.C. 1990) ("[W]hen the claim has been presented to the Court of Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies."). The respondents do not dispute that Ground Six is

[2] The court construes the petitioner's request as seeking relief from the sentencing phase of trial.

procedurally exhausted and is ripe for review by this court.[3] (ECF No. 100 at 167.)

1. Background

The petitioner claims that his trial counsel were ineffective for failing to investigate, develop, and present evidence in mitigation of punishment that he suffers from FAS. (ECF No. 74 at 16-18.) The petitioner argues that trial counsel were deficient because they failed to recognize evidence that the petitioner suffered from organic brain damage and FAS, and therefore, conducted no investigation into those issues. (*Id*.) The petitioner argues that if presented with this additional evidence, "there is a reasonable possibility that at least one juror might have struck a different balance" at sentencing (ECF No. 108 at 26 (citing *Wiggins v. Smith*, 539 U.S. 510, 537 (2003))).

Under *Strickland*, a trial counsel's failure to conduct an "adequate investigation in preparing for the sentencing phase of a capital trial" may amount to ineffective assistance of counsel. *Rompilla v. Beard*, 545 U.S. 374, 380 (2005). "Counsel has a duty to make reasonable investigations or make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691.

Counsel is not required to "investigate every conceivable line of mitigating evidence." *Wiggins*, 539

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[3] On September 9, 2016, the petitioner filed a petition for a writ of certiorari to the United States Supreme Court that was denied on April 24, 2017. *See Charles Christopher Williams v. State of South Carolina*, 137 S. Ct. 1812 (2017).

U.S. at 523. In considering the reasonableness of counsel's investigation the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. Trial counsel's failure to make a reasonable investigation and to present this information as mitigating evidence as to whether the petitioner suffered from FAS can constitute ineffective assistance of counsel. *See, e.g. Sears v. Upton*, 561 U.S. 945, 946 (2010) (holding that evidence of brain damage was "significant mitigating evidence that a constitutionally adequate investigation would have uncovered.").

Counsel's decision not to investigate in a particular area "must be assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments," *Strickland*, 466 U.S. at 691. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689.

a. Trial

At the outset, the court notes that trial counsel John Mauldin and William Nettles are both experienced attorneys who had worked previously on death penalty matters. (ECF No. 20-9 at 283, 341.) The record reflects that trial counsel's mitigation strategy was to present evidence of the petitioner's troubled childhood and that he suffered from mental illness. Trial counsel coordinated a defense team that included the following

experts: Jan Vogelsang ("Vogelsang"), Dr. James Evans ("Dr. Evans"), Dr. Robert Richards ("Dr. Richards"), and Dr. David A. Griesemer ("Dr. Griesemer") to assist in preparation for trial and in preparing mitigation evidence for the sentencing hearing.[4] Vogelsang, a social worker, was retained to investigate mitigation evidence in preparation for sentencing. (ECF No. 74 at 16.) The petitioner maintains that, through Vogelsang's investigation, trial counsel were aware that the petitioner's mother was an alcoholic and that she drank during her pregnancy with the petitioner.[5] (*Id.* at 16). Further, the petitioner asserts that Dr. Evans, a neuropsychologist, who was retained to conduct testing on the petitioner, determined that the petitioner had learning disabilities and showed neurological impairments, specifically frontal lobe damage. As such, trial counsel were aware of the petitioner's possible brain damage. Dr. Richards, a general psychiatrist, examined the petitioner and diagnosed him with Bipolar Disorder and with Obsessive Compulsive Disorder. (*Id.*) Dr. Richards testified during the guilt phase of the trial about his diagnoses. (ECF No. 20-5 at

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[4] The record reflects that trial counsel also retained Dr. Seymour Halleck, a forensic psychiatrist who met with the petitioner for four hours and diagnosed him with Major Depressive Episode and Obsessive Compulsive Disorder. (ECF No. 20-6 at 322, 325, 328.) Additionally, the record reflects that Marjorie Hammock, a clinical social worker, prepared a bio-psycho social assessment of the petitioner in preparation of trial. (*Id.* at 262.)

[5] Notably, Vogelsang indicated that the petitioner's mother denied drinking while pregnant with the petitioner. (ECF No. 20-9 at 253.) However, the petitioner's sister and father advised Vogelsang that the petitioner's mother drank while pregnant. (*Id.* at 246.)

475.) The record reflects that Dr. Griesemer, a neurologist, performed an MRI and a neurological examination of the petitioner the weekend prior to the petitioner's trial (ECF No. 74 at 16-17). The record indicates that Dr. Griesemer was not provided with background information on the petitioner when he examined him. *(Id.*) The MRI of the petitioner's brain reflected a normal brain. (ECF No. 20-15 at 71.)

During the sentencing phase of the trial, the petitioner's counsel presented testimony in support of their mitigation strategy through testimony from the petitioner's father and sister, the petitioner's first grade teacher Ann Wilson, a co-worker of the petitioner's mother, and from other experts. (ECF No. 20-6 at 226, 238, 252.) Attorney Nettles also developed mitigation testimony as to the petitioner's troubled childhood through his cross examination of the state psychiatrist, Dr. Crawford, who testified, *inter alia*, that the petitioner had trouble with his parents' divorce; that his mother was an alcoholic; that he had difficulty in school; and that he had Attention Deficit Disorder but was never medicated. (*Id*. at 196-200.) As such, this is not a case where counsel completely ignored their duty to investigate background information or conducted a belated investigation.

b. PCR hearing

The petitioner filed an application for PCR relief on November 30, 2010. The PCR court held an evidentiary hearing from January 28 to January 31, 2013. (ECF No. 20-12 at 172.) At the PCR hearing, the petitioner's primary presentation of evidence regarding FAS was provided by three mental health experts who specialize

in Fetal Alcohol Syndrome Disorders ("FASD"): Dr. Paul Connor, a neuropsychologist; Dr. Richard Adler, a forensic psychiatrist; and Dr. Natalie Novick Brown, a forensic psychologist. (ECF No. 74 at 17.) All three were members of the organization FASD Experts, which was formed in 2007 to provide a multi-disciplinary approach to evaluate individuals for FASD. (ECF No. 20-9 at 468.) The petitioner's trial counsel, William Nettles and John Mauldin, also testified at the hearing as to the issue of FAS.

(1) Dr. Connor

Dr. Connor testified that he specializes in clinical neuropsychology and also specializes in FASD. (ECF No. 20-9 at 463-64.) He indicated that he had been involved with the study of FASD since 1995. (*Id*. at 463.) Dr. Connor provided an overview of the history of FASD. As early as 1973, practitioners were seeing children of alcoholic women who had specific facial features, and those were the facial features that were later used for the diagnosis of FAS. (*Id*. at 470.) The three primary facial features that are usually identified with children suffering from FAS are small eyes, a very thin upper lip, and a smooth philtrum (the ridges between the nose and lip) (*Id*. at 470.) Dr. Connor testified that facial features of a fetus usually develop during the sixth to eighth week of pregnancy (*Id*. at 485, ECF No. 20-10 at 1-2.) Dr. Connor observed that in 1996 there were two main diagnoses: FAS, where all facial features existed, and Fetal Alcohol Effects ("FAE"), where there were some or no facial features (ECF No. 20-9 at 474.) According to Dr. Connor, in an effort to narrow these diagnoses into different groups

the Institute of Medicine ("IOM") created five diagnoses: (1) full FAS with confirmed exposure; (2)FAS without confirmed exposure; (3) Partial Fetal Alcohol Syndrome ("PFAS") (some physical features, but not the full gambit of facial features and not growth deficiencies); (4) Alcohol Related Neurodevelopmental Disorder ("ARND") (no physical features with normal facial and normal growth); and (5) Alcohol Related Birth Defects ("ARBD").[6] (*Id*. at 453.) Dr. Connor stated that there is really no difference between FAS, PFAS, and ARND when it comes to cognitive impacts. (*Id*. at 475.)

Dr. Connor also provided comprehensive testimony concerning alcohol's effect on a fetus. (*Id*.; ECF No. 20-10 at 1-2.) He stated that alcohol is a poison that affects all parts of the brain and all the synapses. (ECF No. 20-9 at 477-78.) Dr. Connor also indicated that FASD by definition is "brain damage." (ECF No. 20-10 at 27.) Dr. Connor explained that with fetal alcohol exposure, damage to the brain "is occurring at time of development" such that "the brain is never working properly when alcohol is damaging it." (*Id*. at 29.) Dr. Connor compared FASD to Alzheimers in that it affects the entire brain as compared to a stroke, which only affects a localized part of the brain. (*Id*. at 22-23, 30.)

Dr. Connor explained that FASD affects executive functioning that is most commonly associated with the

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[6] Dr. Connor stated that ARBD is the category where you look for things such as physical anomalies, skeletal anomalies, heart defects, and liver anomalies that are often associated with FASD. (ECF No. 20-9 at 475.)

frontal lobe but that it also affects connections with the frontal lobe to all parts of the brain. (*Id.* at 30.) He described executive functioning as "planning, problem solving, learning from your mistakes. Being given something that you have to figure out how to make it work. How to do it in such a way that you can get the job done and do it as well as possible. And so that's kind of - it's this large process of being able to take in information, see what you've done wrong, try and rework it, adapt and cope in order to solve things." (*Id.*)

Dr. Connor also indicated that IQ is impacted by prenatal alcohol exposure. (*Id.* at 6.) He noted that about 20 percent of individuals with FASD have IQs in the mentally retarded range. (*Id.*) However, Dr. Connor stated that you cannot look at IQs as a predictor of whether or not an individual has been impacted by fetal alcohol exposure. (*Id.* at 7.) Dr. Connor observed that with fetal alcohol exposure he sees splits in IQ. (*Id.*) Dr. Connor indicated that the petitioner had a large split between his verbal and nonverbal IQ score and that his variability was consistent with what he expects with FASD. (*Id.* at 45, 47.)

Dr. Connor conducted a neuropsychological assessment of the petitioner in May 2012. (*Id.* at 25.) Dr. Connor stated that he spent approximately six hours with the petitioner while conducting the assessment. (*Id.*) He indicated that the neuropsychological assessment is "not designed to measure damage to the brain, *per se*." (*Id.*) Instead, Dr. Connor looks at the functioning and comments on the function or dysfunction of the brain. (*Id.*) Dr. Connor indicated that he uses a series of tests that are broken

down into domains or areas of functioning to assess for FASD. (*Id*. at 35.) Dr. Connor explained that the petitioner was deficient in eight out of eleven cognitive ability domains, including visuospatial construction organization, visuospatial memory, attention, executive functions, suggestibility, communication, daily living skills, and social functioning. (*Id*. at 85.) Dr. Connor opined that the functional impairment was severe as the petitioner had deficits in all but three of the domains tested. (*Id*. at 86.)

Dr. Connor's testing also showed the petitioner had poor adaptive functioning skills. (*Id*. at 10, 76-82.) He explained that adaptive functioning is how a person can manage his life day-today in the world with no structure around him. (*Id*.) In addition, Dr. Connor's testing found that the petitioner's information could not pass easily from one side of his brain to the other, indicating a damaged corpus callosum, a symptom of FASD. (ECF No. 20-9 at 234.) Dr. Connor indicated that he evaluates people for mental retardation with the same testing used to evaluate the petitioner. (ECF No. 20-10 at 74.)

Dr. Connor also testified that his testing was consistent with testing performed by Dr. Richard Evans, who was a part of the petitioner's trial counsel's defense team. (*Id*. at 87-89.) Dr. Connor stated that he could not diagnose the petitioner with FAS or any other spectrum disorder as these are medical diagnoses. (*Id*.) However, he found nothing inconsistent with FASD in assessing the petitioner. (*Id*.)

(2) Dr. Adler

Dr. Adler, a psychiatrist, is also a member of FASD Experts. (ECF No. 20-11 at 73.) He was qualified at the PCR hearing as an expert in clinical and forensic psychiatry and an expert in FASD. (*Id*.) He explained that his sole role in FASD Experts is to forensically examine the person and to render a diagnosis, if a diagnosis is appropriate. (*Id*.)

Dr. Adler diagnosed the petitioner with PFAS and cognitive disorder not otherwise specific (*Id*. at 80.) Dr. Adler indicated that PFAS is a medical diagnosis. (*Id*.) To be diagnosed with PFAS, an individual must have (1) confirmed exposure to alcohol;(2) two of the three facial feature deformities; (3) growth retardation; (4) central nervous system ("CNS") abnormalities; or (5) cognitive abnormalities. (ECF No. 20-11 at 83.) Dr. Adler indicated that you only have to have elements 1 and 2 and any one of elements 3, 4, or 5 to be diagnosed with PFAS, and the petitioner had all five elements. (*Id*. at 181-82.) Dr. Adler indicated that these cognitive abnormalities were severe. Dr. Adler explained that PFAS is more serious than FAS. (*Id*.) He explained that because people with FAS have the full abnormal face and their IQ is lower, it appears they get services more readily. (*Id*. at 173.) Conversely, individuals with PFAS have more difficult lives and more negative things happen to them. Dr. Adler explained that, because individuals with PFAS do not outwardly appear different and because they tend to have higher IQs, individuals with PFAS are able to mask problems they have functioning such that their problems are not readily identified. (*Id*. at 174.) For example, Dr. Adler

indicated that the petitioner has good verbal skills, and his verbal skills mask that he has troubles being able to understand and react appropriately to his environment. (*Id*. at 60.)

Dr. Adler explained that Bipolar Disorder is not a symptom of FASD because you can have co-occurring disorders. (*Id*. at 182.) He opined that if you have FASD, then you are at an increased risk of having other disorders. (*Id*.) When asked whether having FASD or being bipolar was worse, Dr. Adler responded that FASD was worse. He stated that the impairment from FASD is markedly greater than a Bipolar Disorder or having Obsessive Compulsive Disorder. (*Id*. at 182-183.)

Both Dr. Adler and Dr. Connor indicated that the petitioner's trial counsel were provided the cognitive deficit information through Dr. Evans' testing. (*Id*. at 259.) When questioned about the petitioner's 2005 and 2011 MRIs, Dr. Adler conceded that the reports indicated a normal brain, although he disagreed with the reporters' conclusion as to each. (*Id*. at 258.)

(3) Dr. Brown

Psychologist Dr. Natalie Novick Brown also testified at the PCR hearing. Dr. Brown specializes in the evaluation and treatment of individuals with FASD and began her work in this field in 1995. (*Id*. at 267.) She is a member of FASD Experts and stated that her role is to review all of the records to find evidence that might indicate an individual does not have FASD. (*Id*. at 283.)

Dr. Brown explained that FASD affects executive functioning, including self-regulation, behavior control, and thought and emotion control. (*Id.* at 283-84.) Dr. Brown opined that the petitioner's executive functions were significantly impaired due to PFAS. (*Id.*) She also explained that the frontal lobe controls the processing of information from the brain and uses it to make decisions, resist urges, and reduce the intensity of emotions. (*Id.*) Dr. Brown indicated that when the executive functions are impaired it leads to "problematic behavioral difficulties." (*Id.*) Dr. Brown stated that individuals with FASD have impulse control problems – difficulty controlling strong feelings and stopping urges. (*Id.* at 287.) Dr. Brown also noted that individuals have urges all the time and that they rely on executive functioning to "hit the brakes." (*Id.* at 285.)

Dr. Brown explained that self-monitoring is an important aspect of executive functioning and that individuals with FASD have problems self-monitoring – being aware of what you are doing, the significance and implications of what you are doing, the acts you are engaging in, and the impact of that act or those acts on someone else, or others around you, are important aspects of executive functioning. (*Id.* at 287.) She stated that the petitioner's brain is damaged, thus he does not have the ability to determine what is the worst thing that can happen and resist the urges. (*Id.* at 289.) She indicated that stress makes the problem worse. (*Id.*) Dr. Brown also explained that executive functioning deteriorates in low structure situations, leading to impairments in adaptive functioning. (*Id.* at 317.) Adaptive functioning is how well a person

handles day-to-day life. (*Id*. at 294.) Dr. Brown suggested the petitioner cannot function in a non-structured environment and that the environment in day-to-day life is not really very structured. (*Id*. at 315-19.) Dr. Brown suggested that the petitioner would not have problems in the prison environment because it is a structured environment. (*Id*. at 319.)

Dr. Brown stated that individuals with FASD have childlike coping skills and opined that testing suggested the petitioner had the coping skill level of a nine year old. (*Id*. at 303.) Dr. Brown also explained that due to FASD the petitioner had a childlike approach to the world. (*Id*. at 342.) She stated that the petitioner's childlike behaviors led to his inability to handle the breakup with the victim. (*Id*. at 342-43.) Dr. Brown also discussed how the petitioner was suggestible and easily manipulated. (*Id*. at 358.) Dr. Brown indicated that she used the Gudjonsson test standard for suggestibility and found that the petitioner's score rated him more suggestible than the general population. (*Id*. at 360-361.) Dr. Brown explained that state psychiatrist Dr. Crawford's interview of the petitioner immediately after the incident was damaging because Dr. Crawford's questioning led him away from what he originally said about the crime following his arrest. (*Id*. at 358.) Dr. Brown opined that the petitioner met the definition of Guilty but Mentally Ill and that he lacked sufficient capacity to conform his conduct to the requirements of the law. (*Id*. at 367.) Dr. Brown also reiterated Dr. Connor's observation that adaptive functions are more reliable in measuring an intellectual deficiency than

IQ, because IQ is measured in a structured environment. (*Id*. at 294-95.)

Dr. Connor, Dr. Adler, and Dr. Brown acknowledged that, prior to 2007, there was not a protocolized approach to FASD assessment such as their group uses. (*Id*. at 36, 276-77.) However, they each indicated that there were individual practitioners addressing FASD prior to 2007. (*Id*. at 36, 276-77.) On cross examination, Dr. Brown indicated that there were some practioners testifying prior to 2007 who were not qualified to do so. (*Id*. at 276-77.)

(4) PCR Court's Order

Following an evidentiary hearing, the PCR court denied the petitioner relief on his claim of ineffective assistance of counsel. (ECF No. 20-11 at 213.) In making this determination, the PCR court indicated that *Strickland* was the applicable standard of review of the petitioner's claims of ineffective assistance of counsel. (*Id*.) In finding that trial counsel were not deficient, the PCR court found:

> The record shows that trial counsel did not present evidence to the jury that Petitioner suffered from Fetal Alcohol Syndrome or that he had organic brain damage. At Petitioner's PCR hearing, Petitioner's trial counsel and defense mitigation investigator testified that they had evidence that Petitioner's mother, Daisy, drank alcohol during pregnancy and that they were aware of Fetal Alcohol Syndrome and the effects of prenatal exposure to alcohol. However, both Attorney Mauldin and Attorney Nettles stated

> that they could not identify a reason why they did not develop a mitigation strategy based on Fetal Alcohol Syndrome. PCR Transcript of Record at 93-97, 119, 186-88. Nevertheless, this Court finds that Petitioner has not shown trial counsel was ineffective.

(*Id*.)

The PCR court observed that counsel has a duty to undertake reasonable investigations to discover all reasonably available mitigation evidence (ECF No. 20-12 at 208 (citing *McKnight v. State*, 66 S.E.2d 354, 360 (S.C. 2008)). As to trial counsel's investigation, the PCR court found:

> Trial counsel's investigation, preparation, and presentation of defense evidence and mitigation at Petitioner's trial were not deficient. Trial counsel put together a highly qualified defense team, which included experienced capital defense attorneys, mitigation investigators, social workers, and mental health experts. Trial counsel carefully investigated the social, educational, familial, and mental health background of the Petitioner. Trial counsel developed a cogent mitigation defense, offered an array of compelling evidence, and presented the poignant testimony of a number of lay and expert witnesses.

(ECF No. 20-12 at 213.) The PCR court also addressed the petitioner's claim that trial counsel were ineffective for failing to present evidence of FAS, finding as follows:

> Based on all the foregoing, this Court finds that trial counsel had evidence that Petitioner's mother drank during pregnancy, and that trial counsel was aware of the resulting complications, including brain damage. Trial counsel also had evidence that Petitioner possibly suffered brain damage, based on Dr. Evan's reports. Trial counsel presented this information along with other mitigation evidence, to the defense experts. Considering all of the information it had available and in consultation with its experts, trial counsel developed a cogent strategy to present mitigation evidence—including evidence of the mother's alcohol addiction—but also made a strategic decision to not present to the jury evidence of brain damage or a diagnosis of Fetal Alcohol Syndrome (though trial counsel was unable to articulate the reasons for that strategic decision). Instead, trial counsel's strategy was to present mitigation evidence regarding Petitioner's troubled childhood and his mental illness, as diagnosed by defense experts.

(*Id*. at 215.)

The PCR court also found that the petitioner had not shown prejudice. (*Id*. at 217.) In making this determination, the PCR court explained:

> [T]rial counsel presented a well-reasoned mitigation defense, including "compelling evidence of Petitioner's troubled childhood and evidence of Petitioner's mental illness based on multiple expert opinions. The PCR court

> determined that Petitioner's PCR argument would have "merely resulted in a 'fancier' mitigation case, having no effect on the outcome of the trial." *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998).

(ECF No. 20-12 at 217.) The PCR court pointed to a survey of jury verdicts in sister jurisdictions where defendants had been sentenced to death "in spite of evidence offered in mitigation that the defendant had fetal alcohol syndrome or organic brain damage." (*Id.* at 218-19.)

2. Analysis

a. The Parties' Objections and Replies

The petitioner agrees with the Magistrate Judge's recommendation to grant sentencing relief based on Ground Six because the petitioner's trial counsel were ineffective for failing to develop and present evidence that the petitioner suffers from FAS. (ECF No. 155.) The respondents object to this recommendation on both substantive and procedural grounds. (ECF No. 156.) Substantively, the respondents argue that the Magistrate Judge erred in two respects: first, by finding that the PCR Court's determination that trial counsel made a "strategic decision" not to present FAS evidence at sentencing was unreasonable and, second, by finding that the petitioner was prejudiced by that failure. (*Id.*) Procedurally, the respondents argue that, even if the PCR Court made an unreasonable determination of the facts, this court cannot grant summary judgment but instead must hold an evidentiary hearing. (*Id.*)

The petitioner replies to the respondents' objections by stating: (1) the PCR court's finding that trial counsel made a "strategic decision" not to present evidence of fetal alcohol syndrome was an unreasonable determination of the facts; (2) the Magistrate Judge was correct in finding that the petitioner was prejudiced by trial counsel's failure to develop and present evidence of fetal alcohol syndrome; and (3) the court may grant the petitioner relief from the PCR court's finding regardless of whether the petitioner filed a Motion for Summary Judgment. (ECF No. 163.) As discussed below, the court is in agreement with the petitioner's arguments.

b. The Court's Review

The court finds that the PCR court's determination that the petitioner failed to prove that trial counsel were deficient for failing to investigate, develop, and present fetal alcohol as a mitigation factor was both contrary to and an unreasonable application of clearly established federal law to the facts in the record. Specifically, the PCR court's finding that trial counsel "made a strategic decision not to present to the jury evidence of brain damage or a diagnosis of Fetal Alcohol Syndrome (though trial counsel was unable to articulate the reason for that strategic decision)" (ECF No. 20-12 at 215) was a violation of clearly established law because it was based on a less than adequate investigation and unreasonable determination of the facts in evidence and is not supported by the evidence as presented by trial counsel's testimony.

Attorney Nettles testified that he did not recall any discussion concerning FAS. (ECF No. 20-9 at 291.)

Attorney Nettles acknowledged that the mitigation specialist, Vogelsang, prepared a risk assessment for the defense team and included on that list was "mother drank and smoked throughout pregnancy." (*Id*. at 285.) However, attorney Nettles indicated that they never discussed FAS in relation to the checklist. (*Id*. at 291.) Attorney Nettles also acknowledged that there were indicators that the petitioner may have had brain damage and that he knew that drinking by a birth mother could cause brain damage, but he never connected the dots. (*Id*. at 293-94.) Attorney Nettles indicated his awareness of the American Bar Association's Guidelines for Performance of Defense Counsel in Death Penalty Cases, which states that counsel needs to conduct an in-depth investigation as well as explore all avenues of mitigation, and mentions FAS three times. (*Id*. at 288-89.)

When asked about his investigation into FAS, attorney Nettles stated that FAS "wasn't ever brought up," that "[i]t wasn't discussed," and "[i]t wasn't ruled in, it wasn't ruled out." (*Id*. at 295.) Attorney Nettles also indicated that there was never an intent to put up evidence of FAS. (*Id*. at 289.)

In response to being asked what comes to mind when you think of drinking during pregnancy, attorney Nettles responded, "[w]ell, now, Fetal Alcohol Syndrome." (*Id*. at 286.) When asked if drinking by the petitioner's mother during pregnancy "rang any bell," attorney Nettles testified that he made no correlation between the mother's drinking and FAS (*Id*. at 290.) He explained that the bell that rang for him was to show a correlation between the mother's drinking and that

the petitioner had a less than ideal childhood. (*Id*. at 290.) Attorney Nettles acknowledged during questioning that he would liked to have had evidence to support a diagnosis of "guilty but mentally ill." (*Id*. at 331.)

Attorney Mauldin also testified at the PCR hearing as to whether they conducted any investigation into whether the petitioner suffered from FAS. (*Id*. at 369.) Attorney Mauldin agreed with attorney Nettles that FAS was not brought up, was not discussed, and was not a part of their trial strategy. (*Id*.) According to attorney Mauldin, if FAS had been discussed, it would have been noted on the checklist, and it was not. (*Id*. at 368.)

Attorney Mauldin explained that FAS has become a much more common inquiry than at the time the petitioner was tried, and he now knows more about the concept than he did eight or nine years ago. (*Id*. at 352-53.) He explained that if he were to see a risk factor on a list referencing drinking during pregnancy now, a red flag of FAS would pop up. (*Id*.) Attorney Mauldin indicated that he was aware that the circumference of the head at birth had a correlation with FAS and that one of the experts on their defense team had requested birth records that would have contained this information, suggesting the expert may have suspected FAS. (*Id*. at 380.) Attorney Mauldin acknowledged that he did not make such a connection. (*Id*. at 381.) Attorney Mauldin also acknowledged that an MRI was not done until a week prior to trial and that he had no explanation as to why it was not done earlier given that

he was on notice that the petitioner's mother drank during pregnancy. (*Id*. at 365.)

Attorney Mauldin testified that, after being shown PCR evidence and exhibits, he was "dumbfounded" as to why a certain course of action did not occur – that a natural course would be to bring in a neurologist and tell him they had evidentiary information to suspect FAS and they needed whatever testing needed to be done to determine whether it existed. (*Id*. at 387.) Attorney Mauldin acknowledged that the risk factor of a mother drinking during pregnancy was a red flag regarding the potential for organic brain damage. (*Id*. at 354.) Attorney Maudlin concurred with attorney Nettles that he would have wanted evidence that the petitioner suffers from brain damage before the jury such that he could present a defense of guilty but mentally ill. (*Id*. at 354-55, 393.) When asked if he ever went to any experts about the problem of the mother drinking, he responded, "And what could possibly have led me to not conduct some sort of follow-up is just beyond my – I don't have an explanation for it." (*Id*. at 402.)

1. Deficient Performance

On the question of deficient performance, the evidence was that organic brain damage and FAS were not recognized by trial counsel, thus no investigation into those conditions was pursued or undertaken. (ECF No. 108 at 22.) In order to establish deficient performance, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Under *Strickland*, "counsel has a duty to make reasonable

investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. Concerning counsel's duty to investigate, the United States Supreme Court explained:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has the 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 690–91. Further, the Supreme Court indicated that a court's inquiry "is not whether counsel should have presented a mitigation case. Rather we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence was itself reasonable." *Wiggins*, 539 U.S. at 523.

Counsel is not required to "investigate every conceivable line of mitigating evidence." *Id.* In considering the reasonableness of counsel's investigation, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's

conduct." *Strickland,* 466 U.S. at 690. Trial counsel's failure to make a reasonable investigation of whether the petitioner suffered from FAS and to present this as mitigating evidence to the jury at sentencing can constitute ineffective assistance of counsel. *See, e.g. Sears v. Upton*, 560 U.S. 945, 946 (2010) (holding that evidence of brain damage was "significant mitigation evidence a constitutionally adequate investigation would have uncovered.").

Additionally, the performance of counsel is measured in terms of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. "Prevailing professional norms of practice as reflected in the American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides." *Id.* The performance inquiry in this case concerns the nature of trial counsel's duty to investigate mitigating evidence in a capital case. In a capital case, the professional norms require counsel to conduct a thorough investigation into "all reasonably available mitigating evidence." *Wiggin*s, 539 U.S. at 524.

Turning to the PCR court's decision that the petitioner failed to meet his burden of establishing that trial counsel were deficient, the PCR court found that trial counsel "developed a cogent strategy to present mitigation evidence—including evidence of the mother's alcohol addiction — but also made a strategic decision to not present to the jury evidence of brain damage or a diagnosis of Fetal Alcohol Syndrome (though trial counsel was unable to articulate the reasons for that strategic decision)." (ECF No. 20-12 at

217.) The PCR court also determined that the petitioner had not shown prejudice. (*Id.* at 217-19.) Thus, the AEDPA standard applies to both prongs of the *Strickland* test.

The court is mindful that it must give deference to the PCR court's merits determination. 28 U.S.C. § 2254(d), (e). Additionally, "[w]hen § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

The court finds that the PCR court's determination that trial counsel made a "strategic decision" not to investigate and not present evidence of FAS or brain damage during the sentencing phase of trial was unreasonable. First, this finding of the PCR court is directly contradicted by the testimony of both attorney Nettles and attorney Mauldin. *See* 28 U.S.C. § 2254(d)(1). As fully set forth above, both of the petitioner's trial counsel testified at the PCR hearing that FAS was never discussed, it was never considered, and it was never ruled in or out. (ECF No. 20-9 at 295, 369.) Second, trial counsel acknowledged that they were aware that the petitioner's mother drank when she was pregnant with the petitioner and that Dr. Evan's report indicated the petitioner had frontal lobe damage. (ECF No. 20-9 at 293-94, 354.) However, it appears that trial counsel either overlooked or ignored these indicators and failed to investigate for evidence of FAS. *See Gray v. Branker*, 529 F.3d 220, 229 (4th Cir. 2008) (counsel ignored red flags and failed to

investigate for mental health evidence) (citing *Rompilla*, 545 U.S. at 392); *Wiggins*, 539 U.S. at 516-18, 522 (counsel was ineffective for failing to pursue leads and investigate further into defendant's background despite knowing that defendant's mother was an alcoholic and that defendant had emotional and academic difficulties as a child). Trial counsel's decision not to present evidence of organic brain damage or FAS cannot be described as strategic, since trial counsel were not aware of the evidence that might have been available. *See, e.g., Sears v. Upton*, 561 U.S. 945, 951 (2010) (failure of trial counsel to present mitigating evidence that they do not know about cannot be a strategic decision). Third, any decision of trial counsel not to investigate was erroneously based on counsel's failure to inquire about and appreciate the potential value of evidence of brain damage and FAS as a mitigating circumstance, as outlined by Drs. Connor, Adler, and Brown at the PCR hearing.

As such, in viewing the record as a whole, including the evidence introduced at the sentencing and at the PCR hearing, and applying deference to the PCR court's decision, the court concludes that there is no reasonable argument to sustain the PCR court's finding that trial counsel made a "strategic decision" to not present evidence of FAS. Further, there could be no disagreement between "fairminded jurists" that the PCR court's decision was incorrect. *Harrington*, 562 U.S. at 102. As such, the state court decision involved an unreasonable determination of the facts in light of the petitioner's clear and convincing evidence to the contrary. *See* 28 U.S.C. § 2254(d)(1).

2. Prejudice

Having found that the PCR court's decision as to Ground Six was based upon an unreasonable determination of the facts, the court must now determine whether the failure of the petitioner's trial counsel to investigate and present evidence of organic brain damage and FAS at the sentencing proceeding resulted in prejudice. The PCR court addressed the prejudice prong of *Strickland* and found that, even if trial counsel were deficient, the petitioner had failed to establish prejudice. (ECF No. 20-12 at 217-19.) The PCR court noted that trial counsel had put together a highly qualified defense team, which included experienced capital defense attorneys, mitigation investigators, social workers, and mental health experts. The PCR court also noted that trial counsel had presented a "well-reasoned mitigation defense, which included evidence of the petitioner's troubled childhood and evidence of the petitioner's mental illness based on multiple expert opinions." (*Id*. at 217.)[7] The PCR court explained that the petitioner's fetal alcohol syndrome argument would have only produced a "'fancier mitigation case.'" (*Id*. at 217 (quoting *Jones v. State*, 504 S.E.2d 822 (S.C. 1998) (trial counsel not ineffective for failing to thoroughly investigate and present mitigating evidence regarding defendant's mental impairments, including organic brain damage, where trial counsel focused its mitigation on the mental condition of the defendant)). The PCR court also

[7] At the sentencing phase of the trial, the petitioner's father and sister provided testimony regarding the petitioner's difficult childhood.

set forth a survey of jury verdicts in sister jurisdictions wherein evidence of FAS had been presented in mitigation and the defendants were still found guilty. (*Id*. at 218-19.)

If the trial counsel had presented evidence of the petitioner's organic brain damage and FAS, it is reasonable that at least one juror would have been persuaded to give a life sentence rather than the death penalty. To establish prejudice, a petitioner must show a "reasonable probability" that counsel's deficient performance prejudiced the outcome of the case. *Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. *Id.* at 696. As to the penalty phase,"[i]n assessing prejudice, we reweigh the evidence in aggravation against the totality of the available mitigating evidence." *Wiggins*, 539 U.S. at 534. *See Williams v. Taylor*, 529 U.S. 362, 397–98 (2000) (the court must "evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—in re-weighing it against the evidence in aggravation.").

In the present action, the prosecutor put forward only one aggravating factor, and the jury was split after several hours of deliberation. As previously set forth, the mitigating evidence relates to the petitioner's exposure to alcohol *in utero*. Presented with the additional mitigating evidence regarding the

petitioner's organic brain damage and diagnosis of PFAS, there is a reasonable probability that the jury would not have sentenced him to death. Testimony regarding the petitioner's brain damage would have been compelling mitigating evidence and is the type of evidence that the Supreme Court has recognized as relevant in assessing a defendant's moral culpability. *Porter v. McCollum*, 558 U.S. 30, 41 (2009). The testimony of Dr. Brown that the petitioner at the time of the crime was not able to conform his conduct to the requirements of the law was important mitigation testimony that should have been presented to the jury. Further, the evidence presented at the PCR hearing by the petitioner's experts was that the petitioner is emotionally on the level of a nine-year-old and was functioning as a child on the days leading up to the murder. Further, the state has not contradicted the petitioner's diagnosis of PFAS. As shown in the publications submitted to the PCR court and through the experts' testimony, FASD can cause a person to make poor decisions, including criminal behavior. (ECF No. 146 at 85.) The evidence of brain damage caused by *in utero* ingestion of alcohol was compelling evidence that could have led one juror to making a different decision at the sentencing phase.

Because of trial counsel's omissions in this case, the jury was deprived of powerful evidence - that the petitioner suffered from organic brain damage and that FAS had impaired his judgment and his ability to control his behavior. The petitioner has presented a compelling case that he suffers from FAS, a dysfunction that affected his cognitive ability and his ability to conform his actions. This evidence should

have been presented to the sentencing jury. If this evidence had been presented, there is a reasonable probability that the jury would have returned a sentence of life in prison rather than a death sentence. Because trial counsel unreasonably failed to investigate and present compelling mitigation evidence, this court's confidence in the outcome reached at sentencing is undermined. The petitioner has established prejudice resulting from trial counsel's ineffectiveness, and the petitioner is entitled to a new sentencing hearing.

Based upon the foregoing, the respondents' Motion for Summary Judgment as to Ground Six is denied, thereby granting the petitioner's amended habeas petition as to Ground Six.

B. Grounds Eleven, Twelve, Thirteen, Fourteen, and Fifteen

1. Background

In Grounds Eleven through Fifteen, the petitioner alleges that his trial counsel were ineffective in presenting certain evidence and in failing to investigate, develop, and present certain other evidence, and that these failures prejudiced the mitigation phase of the trial. (ECF No. 74 at 23-77.) The petitioner further alleges that PCR counsel were ineffective in failing to present these claims in PCR, thus providing cause to excuse the procedural bar of these grounds under *Martinez*. (*Id*.) The petitioner notes that extra-record evidence has been provided in support of these grounds (*id.* at 23), and several affidavits and other documentary evidence were

included as exhibits to the amended petition (*see* ECF Nos. 74-1 through 74-26). On September 8, 2017, the petitioner filed a Motion to Expand the Record and for an Evidentiary Hearing on all *Martinez* claims. (ECF No. 109.) The respondents filed a response in opposition on October 6, 2017 (ECF No. 115), and the petitioner filed a reply on October 26, 2017 (ECF No. 124).

On October 16, 2017, the petitioner filed a Motion to Stay further proceedings pending the decision by the Supreme Court of the United States in *Ayestas v. Davis*, a case which is likely to address issues relating to whether a petitioner may present evidence developed during his federal habeas investigation in an evidentiary hearing for consideration of his *Martinez* claims. (ECF No. 121.) The respondents filed a response to that Motion on October 27, 2017 (ECF No. 126), and the petitioner filed a reply on November 1, 2017 (ECF No. 126). On November 3, 2017, the Magistrate Judge filed his first Report and Recommendation, recommending that the district court grant the Motion to Stay. (ECF No. 139 at 3). However, after further review of the parties' filings, the Magistrate Judge stated his intention to withdraw his first Report and Recommendation that this case be stayed pending the decision in *Ayestas v. Davis* because of his recommendation to resentence the petitioner, rendering an evidentiary hearing before this court unnecessary.[8] (ECF No. 146 at 99-100.)

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[8] The court notes that this Report and Recommendation has not been withdrawn on the docket. (*See* ECF No. 139.) Therefore, the court will still rule on this Report and Recommendation.

In the Magistrate Judge's second and most recent Report and Recommendation, he recommended that the petitioner be allowed to present the evidence at issue in Grounds Eleven through Fifteen, along with other relevant evidence, to the state court for its consideration. (ECF 146 at 100.) Therefore, the Magistrate Judge recommended that Grounds Eleven through Fifteen be dismissed without prejudice and the petitioner's Motion for Evidentiary Hearing and to Expand the Record (ECF No. 109) be denied as the evidence at issue may be presented to the state court. (*Id*.)

2. The Parties' Objections and Replies

The petitioner objects to the recommendation that the court dismiss the five *Martinez* claims without prejudice because to do so "violates his Fifth Amendment right to due process of law." (ECF No. 155 at 18.) The statute of limitations for the filing of a habeas petition under 28 U.S.C. § 2254 tolled in February of 2017. If the petitioner's *Martinez* claims are dismissed, even without prejudice, and it becomes necessary to refile his claims, tolling provisions will apply. The dismissal "without prejudice" will shelter the claims from principles of *res judicata* but not from the statute of limitations. Although the statute of limitations is not jurisdictional,[9] an untimely filing is subject to the rigors of equitable tolling. Moreover, the petitioner maintains that he has made a prima facie showing entitling him to an evidentiary hearing to establish "cause" for the default, and as such the

[9] *Holland v. Florida*, 560 U.S. 631 (2010).

petitioner believes that the *Martinez* claims are ripe for disposition. (ECF No. 155 at 20.) Accordingly, the petitioner asserts that he is entitled to a ruling on the merits or a stay pending a final order on the exhausted claims. (*Id.* at 19.)

The respondents object to the recommendation that Grounds Eleven through Fifteen be dismissed without prejudice. (ECF No. 164 at 1.) The respondents believe a stay of these five grounds pending a final determination on the remaining claims is not warranted. (*Id.*) In light of the respondents' position that the Report's recommendation on Ground Six should be rejected, the respondents submit the claims presented in Grounds Eleven through Fifteen should be remanded to the Magistrate Judge for resolution. (*Id.*) Further, the respondents espouse that the petitioner's claims in Grounds Eleven through Fifteen were procedurally defaulted in state court, and as a result, are barred from federal habeas review. (ECF No. 164 at 2.) The respondents posit that the petitioner has not shown that procedural default should be excused under *Martinez* and furthermore, based upon the state court record, the claims are "without merit." (*Id.*)

3. The Court's Review

The court acknowledges the petitioner's concern regarding the statute of limitations issue if he were to refile his habeas petition at a later time. *See Rhines v. Weber*, 544 U.S. 269, 269 (2005) (holding that a district court has discretion to stay a mixed petition to allow a petitioner to present his unexhausted claims to the state court in the first instance and then to return to federal court for review of his perfected petition). "It

likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." *Id.* at 278. Because the court does not believe that (1) the petitioner's allegations of ineffective assistance of counsel are frivolous (explaining his failure to exhaust), (2) his unexhausted claims are without merit, or (3) he has engaged in intentionally dilatory litigation tactics, the court finds that a stay pending exhaustion of the potentially meritorious claims is warranted.

In *Rhines*, the Supreme Court referenced approvingly a 30-day time period. *See Rhines*, 544 U.S. at 278 (*citing Zarvela v. Artuz*, 254 F.3d 374, 381 (2d Cir. 2001) ("[District courts] should explicitly condition the stay on the prisoner's [pursuit of] state court remedies within a brief interval, normally 30 days, after the stay is entered and returning to federal court within a similarly brief interval, normally 30 days after state court exhaustion is completed."). As a result, the court will suggest a 30-day time period for the petitioner to be resentenced in state court, and thereafter within 30 days of the petitioner's resentencing, for the petitioner to return to this court for the court's ruling on any related issues.

The petitioner's Motion for Evidentiary Hearing and to Expand the Record (ECF No. 109) are hereby denied without prejudice as the evidence at issue may be presented to the state court. Lastly, the petitioner's Motion to Stay pending the decision in *Ayestas v. Davis*

is denied without prejudice, as an evidentiary hearing before the court at this time is unnecessary.

III. CONCLUSION

The court hereby **ACCEPTS** the Magistrate Judge's Report and Recommendation as to Grounds One through Ten, and **REJECTS** the Report and Recommendation as to Grounds Eleven through Fifteen. (ECF No. 146). Therefore, the court **GRANTS** the respondents' Motion for Summary Judgment as to Grounds One, Two, Three, Four, Five, Seven, Eight, Nine, and Ten and **DENIES** it as to Ground Six (ECF No. 101). Consequently, the court **GRANTS** petitioner's amended habeas petition as to Ground Six (ECF No. 74), and **VACATES** his death sentence. Based on the Supreme Court's decision in *Rhines*, the court suggests that a resentencing trial in state court occur within 30 days or as soon as practical thereafter.

Further, as to Grounds Eleven through Fifteen, the court **GRANTS** the petitioner a stay pending exhaustion of these claims in state court. Finally, the court **DENIES WITHOUT PREJUDICE** the petitioner's Motion to Expand the Record and for Evidentiary Hearing (ECF No. 109) and his Motion to Stay pending the decision in *Ayestas v. Davis* (ECF No. 121). Accordingly, the court **REJECTS** the Magistrate Judge's Report and Recommendation as to petitioner's Motion to Stay pending the decision in *Ayestas v. Davis* (ECF No. 139).

IT IS SO ORDERED.

/s/J. Michelle Childs
United States District Judge

March 8, 2018
Columbia, South Carolina

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2
(6:16-cv-01655-JMC)

[Filed February 5, 2019]

CHARLES CHRISTOPHER WILLIAMS,

Petitioner – Appellee,

v.

BRYAN P. STIRLING, Director, South Carolina Department of Corrections; WILLIE D. DAVIS, Warden of Kirkland Correctional Institution,

Respondents – Appellants,

and

JOSEPH MCFADDEN, Warden of Lieber Correctional Institution,

Respondent.

FEDERAL REPUBLIC OF GERMANY,

Amicus Supporting Appellee.

O R D E R

The Court amends its opinion filed January 28, 2019, as follows:

On page 7, in the first line, the word "psychologist," referring to Dr. Richard Adler, is changed to "psychiatrist."

For the Court – By Direction

/s/ Patricia S. Connor, Clerk

APPENDIX F

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2

[Filed February 5, 2019]

CHARLES CHRISTOPHER WILLIAMS,	)
Petitioner – Appellee,	)
v.	)
BRYAN P. STIRLING, Director, South Carolina Department of Corrections; WILLIE D. DAVIS, Warden of Kirkland Correctional Institution,	)
Respondents – Appellants,	)
and	)
JOSEPH MCFADDEN, Warden of Lieber Correctional Institution,	)
Respondent.	)

FEDERAL REPUBLIC OF GERMANY,

Amicus Supporting Appellee.

Appeal from the United States District Court for the District of South Carolina, at Greenville. J. Michelle Childs, District Judge. (6:16-cv-01655-JMC)

Argued: October 31, 2018 Decided: January 28, 2019

Amended: February 5, 2019

Before NIEMEYER, AGEE and DIAZ, Circuit Judges.

Affirmed by published opinion. Judge Agee wrote the opinion, in which Judge Niemeyer and Judge Diaz joined.

ARGUED: Melody Jane Brown, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellants. Seth C. Farber, WINSTON & STRAWN LLP, New York, New York, for Appellee. Alice Tsier, WHITE & CASE LLP, New York, New York, for Amicus Curiae. **ON BRIEF:** Alan Wilson, Attorney General, Donald J. Zelenka, Deputy Attorney General, Alphonso Simon Jr., Senior Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellants. William Harry Ehlies, II, Greenville, South Carolina; Teresa L. Norris, Charleston, South Carolina, for Appellee. Owen

C. Pell, Amity Boye, WHITE & CASE LLP, New York, New York, for Amicus Curiae.

AGEE, Circuit Judge:

After shooting and killing his former girlfriend, Charles Christopher Williams was convicted by a South Carolina jury of kidnapping, murder, and possession of a firearm during a violent crime. He was sentenced to death for the murder. After exhausting state remedies, Williams petitioned the United States District Court for the District of South Carolina for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court denied or stayed all of Williams' claims, except Ground Six, which asserted a claim of ineffective assistance of counsel resulting from trial counsel's failure to investigate potentially mitigating evidence of Fetal Alcohol Syndrome ("FAS"). On this ground, the district court granted Williams' petition and the State now appeals. For the reasons that follow, we affirm the judgment of the district court.

I.

On the morning of September 3, 2003, Williams entered a Greenville, South Carolina grocery store where his former girlfriend, Maranda Williams, worked. He confronted her, then forced her into a store office, where he held her at gunpoint for approximately 90 minutes. During this period she called 911 and hostage negotiators tried to convince Williams to release her. She eventually attempted to escape, but Williams pursued her, shooting her four times and killing her. Upon hearing the shots, law enforcement

officers entered the store and apprehended Williams. Following his arrest, Williams gave a statement in which he confessed to the crimes for which he was later charged. In February 2005, a Greenville County, South Carolina, jury convicted Williams of kidnapping, murder, and possession of a firearm during a violent crime.

At trial, Williams was represented by attorneys William Nettles and John Mauldin, both of whom were experienced in capital cases. Nettles had handled approximately five death penalty cases through trial and sentencing, as well as a handful of post-conviction relief cases. Mauldin had overseen "close to a dozen [capital cases] to verdict" and worked on nearly three times as many cases after a death notice had been filed. J.A. 493–94.

In preparation for the penalty phase, Nettles and Mauldin assembled a defense team that included, among others, social worker Jan Vogelsang, clinical neuropsychologist Dr. James Evans, clinical psychiatrist Dr. Robert Richards, neurologist Dr. David Griesemer, and forensic psychiatrist Dr. Seymour Halleck. As part of the investigation, Vogelsang gathered information about Williams' upbringing. She interviewed Williams' father, who told her that he had observed Williams' mother, Daisy Huckaby, drinking while pregnant, though he was unable to provide any additional details. Vogelsang also interviewed Williams' sister, who recalled that Huckaby drank while pregnant with Williams, but could not say how much. (The record indicates that Vogelsang either

failed to ask Huckaby about her drinking or that Huckaby denied drinking while pregnant.)

The defense team experts assessed Williams for neurological and psychological issues. Following an evaluation, Dr. Evans concluded that Williams suffered neurological impairments as the result of frontal lobe damage and, consequently, had learning difficulties. Dr. Richards examined Williams and diagnosed him with bipolar and obsessive-compulsive disorder. Finally, following an MRI and neurological exam the week prior to the trial, Dr. Griesemer reported that, though there were some cognitive issues, Williams' MRI showed a normal brain.

During the penalty phase,[1] defense counsel

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[1] Under South Carolina law, juries in capital cases consider guilt and sentencing in separate proceedings. S.C. Code Ann. § 16–3–20(A), (B). Once a jury has determined a defendant's guilt, South Carolina law instructs that "the jury . . . shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment[.]" *Id.* § 16–3–20(B).

Jurors face two questions at sentencing. As an initial matter, they must decide whether the State has proven beyond a reasonable doubt the existence of any statutory aggravating factor. If the jury fails to agree unanimously on this point, it does not make a sentencing recommendation. Rather, the trial judge sentences the defendant to either life imprisonment or a mandatory minimum term of 30 years' imprisonment. But if the jury unanimously finds a statutory aggravating factor, it must recommend either death or life imprisonment without the possibility of parole. *Id.* § 16–3–20(A)–(C); *see also Shafer v. South Carolina*, 532 U.S. 36, 40–41 (2001).

Mitigating circumstances include "[t]he capacity of the defendant to appreciate the criminality of his conduct" and "subaverage general intellectual functioning existing concurrently

presented mitigating evidence of Williams' troubled childhood—including his mother's alcoholism—as well as his mental illness and difficulties in school. To this end, counsel presented testimony from Williams' father and sister; Williams' first grade teacher; a co-worker of Daisy Huckaby; and their experts, including Dr. Richards, who testified about his diagnoses, and Dr. Halleck, who opined that Williams suffered from major depressive disorder and obsessive-compulsive disorder but was able to, with difficulty, conform his behavior to the requirements of the law. Moreover, through his cross-examination of the state psychiatrist, Nettles elicited additional mitigation testimony, including information about Williams' trouble with his parents' divorce, Huckaby's alcoholism, Williams' difficulty in school, and his untreated attention deficit disorder. In turn, the State alleged a single aggravating factor: "Murder was committed while in the commission of kidnapping." J.A. 809.

On the second day of penalty phase deliberations, the jury sent a note to the trial court stating it was deadlocked nine to three in favor of death. Williams moved for a mistrial but the trial court denied the motion and instead gave an *Allen*[2] charge. The jury resumed its deliberations and, after three hours and 45 minutes, returned a sentence of death. The Supreme

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with deficits in adaptive behavior." S.C. Code Ann. § 16–3–20(C)(b)(6), (10). Aggravating circumstances include the commission of the murder during the performance of any number of other crimes, including kidnapping. *Id.* § 16–3–20(C)(a)(1)(b).

[2] *Allen v. United States*, 164 U.S. 492 (1896).

Court of South Carolina affirmed Williams' convictions and death sentence, *State v. Williams*, 690 S.E.2d 62 (S.C. 2010), and the United States Supreme Court denied his petition for a writ of certiorari, *Williams v. South Carolina*, 562 U.S. 899 (2010).

In November 2010, Williams filed a petition for post-conviction relief in the Greenville County, South Carolina Circuit Court ("PCR court"), asserting errors that included trial counsel's failure to investigate signs that Williams suffered from FAS—namely, evidence of Huckaby's drinking during her pregnancy and Williams' corresponding brain damage. In January 2013, the PCR court held an evidentiary hearing at which three FAS experts testified on Williams' behalf. Dr. Richard Adler, a forensic psychiatrist, diagnosed Williams with Partial Fetal Alcohol Syndrome, a form of FAS. Neuropsychologist Dr. Paul Connor testified that his assessment of Williams indicated severe functional impairments and damage to the corpus callosum, all consistent with or symptomatic of FAS. Finally, Dr. Natalie Novick Brown, a forensic psychologist, concluded that Williams' executive functions—including "self-regulation" and "behavior control"—were impaired due to FAS, leading to behavioral difficulties, including impulse control problems and coping skills equivalent to those of a nine year old. J.A. 588. All three experts acknowledged that at the time of the trial in 2005, a widely recognized protocol to forensically assess FAS in the criminal justice context had not yet been fully developed, but that individual practitioners had been addressing FAS

and had developed a framework for diagnosing the condition and treating its symptoms.[3]

Trial counsel also testified, but neither could recall a mitigation investigation into FAS, or why such an investigation was not conducted. Mauldin testified that although FAS awareness had become much more prevalent in the years since Williams' trial, the issue "certainly existed well before" the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.[4] J.A. 500. The commentary in these Guidelines designated FAS as a potentially mitigating factor to be investigated by counsel in capital cases. He further acknowledged that, in hindsight, several issues should have indicated a potential FAS diagnosis for Williams when he was preparing for trial. First, Mauldin testified that he had reports in his files that indicated Huckaby drank during her pregnancy. Mauldin acknowledged that at the time of the trial, such drinking should have signaled a potential FAS issue for

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[3] Williams is a dual German and U.S. citizen. As the brief of amicus curiae Federal Republic of Germany points out, at the time of trial, FAS was a well-defined medical condition. The diagnosis of prenatal alcohol exposure had evolved to encompass, by the time of trial, assessing certain facial and neurological abnormalities. Such diagnoses were used to address, among other issues, permanent deficits exhibited by FAS patients in socialization, communication, motor, and daily living skills. In 2007, a protocolized approach for assessing FAS in the criminal justice context was developed.

[4] ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003), *reprinted in* 31 Hofstra L. Rev. 913 (2003) ("ABA Guidelines").

him. With this information about Huckaby's drinking, he should have, as a first step, directed a neurologist to conduct whatever testing would have been necessary to determine whether Williams was affected by FAS. Nonetheless, Mauldin testified, "I honestly cannot say why [Huckaby's drinking] wasn't a red flag for me eight years ago." J.A. 500. "[A]s extraordinary as that seems," he continued, "I can't explain why there was no discussion or follow-up on that." J.A. 512. Second, Mauldin testified that the developmental delays and learning problems exhibited by Williams were issues he should have associated with FAS. Finally, Mauldin also explained that some of the follow-up information the defense team experts were seeking was of the type he should have associated with FAS. Specifically, Mauldin testified that at the time of the trial he was aware of the correlation between a significantly smaller head circumference at birth and FAS and knew that Dr. Richards, as of August 2004, had become interested in potential brain damage and had requested records containing the circumference of Williams' head at birth and recommended an MRI of Williams' brain. Nonetheless, Mauldin was unable to explain why the records were not produced to Dr. Richards, or why an MRI was not conducted until the week prior to the beginning of the trial in February 2005, rather than in August 2004.

Nettles testified that he was aware of the ABA Guidelines mandating investigation of mitigating evidence, including personal, family, and medical

history, as part of penalty phase preparations.[5] But he could not remember at what point he developed an "understanding" of FAS. J.A. 465. He did recall that the subject of Huckaby's drinking came up, but testified that he was focused on it as evidence of Williams' difficult childhood, not of FAS. He also recalled some evidence of neurological damage. Nonetheless, he did not recall any discussion about FAS or FAS being considered as a potentially mitigating factor.

In denying Williams' petition, the PCR court concluded:

> [T]his Court finds that trial counsel had evidence that [Williams'] mother drank during pregnancy, and that trial counsel was aware of the resulting complications, including brain damage. Trial counsel also had evidence that [Williams] possibly suffered brain damage, based on Dr. Evans' reports. Trial counsel presented this information, along with other mitigation evidence, to the defense experts. Considering all of the information it had available and in consultation with its experts, trial counsel developed a cogent strategy to present mitigation evidence—including evidence of the mother's alcohol addiction—but also *made a strategic decision* not to present to the jury

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[5] Specifically, when asked if he was "familiar . . . [with] the American Bar Association Guidelines for Performance of Defense Counsel in Death Penalty Cases" and Guidelines outlining the "need[] to explore medical history, including . . . prenatal and birth trauma," Nettles responded: "Right." J.A. 462–63.

> evidence of brain damage or a diagnosis of Fetal Alcohol Syndrome (*though trial counsel was unable to articulate the reasons for that strategic decision*). Instead, trial counsel's strategy was to present mitigation evidence regarding [Williams'] troubled childhood and his [other disorders], as diagnosed by defense experts.

J.A. 665 (emphases added). Finally, the PCR court also found that, even if Williams had presented evidence of FAS to the jury, it was unlikely that the jury would have returned a different sentence. The PCR court based its conclusion in part on a survey of eight jury verdicts from other jurisdictions demonstrating that defendants are sentenced to death in spite of mitigating evidence of FAS or organic brain damage. The South Carolina Supreme Court dismissed Williams' petition for writ of certiorari, *Williams v. South Carolina*, No. 2016-MO-012, 2016 WL 1458174 (S.C. Apr. 13, 2016), as did the United States Supreme Court, *Williams v. South Carolina*, 137 S. Ct. 1812 (2017).

After initiating habeas proceedings in the district court in November 2016, Williams filed an amended § 2254 petition in February 2017, asserting 15 grounds for relief, of which only the first six are at issue on appeal. Ground One asserted that the trial court's *Allen* charge was improperly coercive. Ground Two asserted that the State elicited prejudicial testimony from its forensic psychiatrist by asking her if she became involved only in cases in which "the death penalty may be considered." *Compare* J.A. 23–25, *with* J.A. 276. Grounds Three and Four asserted that trial

counsel failed to properly object to a series of allegedly prejudicial comments made during the State's closing argument. Ground Five asserted that trial counsel was ineffective for failing to assert Williams' right to seek assistance from the German government under the Vienna Convention on Consular Relations based on his German citizenship. And of particular importance to this appeal, Ground Six asserted Williams was denied effective assistance of counsel after trial counsel failed to investigate evidence of FAS.

The case was referred to a magistrate judge, who recommended the petition be granted as to Ground Six, and that Williams' death sentence be vacated as a result. The magistrate judge concluded that the PCR court's finding that trial counsel "made a strategic decision" was unreasonable given that this finding was directly contradicted by trial counsel's PCR testimony. *Compare* J.A. 885, *with* J.A. 665. The magistrate judge also concluded that Williams established prejudice: because the State put forward only one aggravating factor and "the jury was deprived of powerful [mitigating] evidence," a reasonable probability existed that the jury would have returned a life sentence had this additional mitigating evidence been presented and credited by the jury. J.A. 888. Finally, the magistrate judge also recommended granting summary judgment to the State as to Grounds One through Five and Seven through Ten, and dismissing without prejudice Grounds Eleven through Fifteen.[6]

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[6] Grounds Seven through Ten asserted an assortment of due process and ineffective assistance of trial and appellate counsel claims. Grounds Eleven through Fifteen also asserted trial and

The district court adopted the magistrate judge's recommendations as to Grounds One through Ten, including granting the petition as to Ground Six. The district court also granted Williams a stay as to Grounds Eleven through Fifteen, pending exhaustion of those claims in state court. Consequently, the district court vacated the death sentence and "suggest[ed]" a resentencing trial. J.A. 959.

The State filed a timely appeal as to Ground Six.[7] This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253.

II.

28 U.S.C. § 2254(a) provides that a federal district court "shall entertain an application for a writ of habeas corpus" filed by a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Generally speaking, before filing a § 2254 petition, a petitioner must exhaust all state court remedies. *Id.*

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appellate counsel were ineffective for failing to investigate and/or present other mitigating evidence. None of these claims are at issue in this appeal and we do not consider them.

[7] The first five issues are raised in Williams' response brief as additional grounds for providing relief. Accordingly, Williams was not required to file a cross-appeal on these issues. *See Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015) (noting, in the context of a § 2254 proceeding, "[a]n appellee who does not take a cross-appeal may urge in support of a decree any matter appearing before the record, although his argument may involve an attack upon the reasoning of the lower court," so long as appellee's theory does not "enlarge[e] his own rights" or "lessen[] the rights of his adversary") (internal quotation marks omitted)).

§ 2254(b); *see also Jones v. Sussex I State Prison*, 591 F.3d 707, 712–13 (4th Cir. 2010) (explaining that § 2254's exhaustion requirement means that a state prisoner must have first presented his claim before every available state court).

Once a state prisoner has exhausted his claims in state court and filed a federal habeas petition, "[i]f a state court has already resolved the merits of a claim for post-conviction relief, a federal court may not grant a writ of habeas corpus [under § 2254] unless the state court's decision" meets the requirements of § 2254(d). *Byrum v. Ozmint*, 339 F.3d 203, 206 (4th Cir. 2003). Specifically, § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Section 2254(d) further "require[s] us to limit our analysis" of the state PCR court's decision "to the law

as it was 'clearly established' by [the Supreme Court] at the time of the [PCR] court's decision." *Wiggins v. Smith*, 539 U.S. 510, 520 (2003).

Under § 2254(d)(1), such a decision is "contrary to" Supreme Court precedent "if the state court applie[d] a rule that contradicts the governing law set forth in" Supreme Court cases, or "confront[ed] a set of facts that are materially indistinguishable from a [Supreme Court decision] and nevertheless arrive[d] at a result different from [that] precedent." *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). A decision is an "unreasonable application" of clearly established Supreme Court precedent if the PCR court "correctly identifie[d] the governing legal rule but applie[d] it unreasonably to the facts of a particular prisoner's case." *Id.* at 407–08. "In order for a federal court to find a state court's application of [Supreme Court] precedent unreasonable, the state court's decision must have been more than incorrect or erroneous. The state court's application must have been objectively unreasonable." *Wiggins*, 539 U.S. at 520–21 (internal citation and quotation marks omitted); *see also Harrington v. Richter*, 562 U.S. 86, 103 (2011) ("[A] state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.").

Alternatively, a state prisoner may be granted relief pursuant to § 2254(d)(2) if the PCR court decision's was based on a factual determination "sufficiently against the weight of the evidence that it is objectively

unreasonable." *Winston v. Kelly*, 592 F.3d 535, 554 (4th Cir. 2010). As with legal conclusions, "[f]or a state court's factual determination to be unreasonable under § 2254(d)(2), it must be more than merely incorrect or erroneous." *Id.* (internal citation omitted).

This Court's review is de novo when a federal district court's habeas decision is based on the state court record. *Gray v. Branker*, 529 F.3d 220, 228 (4th Cir. 2008). State court factual determinations are presumed correct and may be rebutted only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Upon review, we conclude that the PCR court's determination of Williams' Ground Six ineffective assistance claim involved both an unreasonable application of federal law clearly established by Supreme Court precedent at the time of the PCR hearing, and an unreasonable determination of the facts in light of the record before it. Consequently, as described in greater detail below, we affirm the district court's grant of habeas corpus relief under § 2254.

III.

In Ground Six of his petition, Williams contends that his attorneys' performance during the penalty phase violated his Sixth Amendment right to effective assistance of counsel. A prisoner petitioning for habeas relief based on ineffective assistance of counsel must meet two components: "[a] petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins*, 539 U.S. at 521 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). We address each in turn, mindful that on appeal our inquiry is limited to whether the PCR

court's ineffective assistance determination was contrary to or an unreasonable application of Supreme Court precedent or an objectively unreasonable factual determination.

A.

1.

The district court determined that defense counsel were deficient at the sentencing phase because of their failure to investigate evidence indicating that Williams had FAS. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The performance inquiry here focuses on the standard of reasonableness related to counsel's duty to investigate mitigating evidence for sentencing in a capital case. *Strickland* does not require investigation of every conceivable line of mitigating evidence but does impose "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690–91.

Review of trial counsel's investigation is considered "from counsel's perspective at the time," *id.*, and the professional norms then prevailing. *Padilla v. Kentucky*, 559 U.S. 356, 366–67 (2010). A "well-defined

norm" at the time of Williams' trial provided "that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence.'" *Wiggins*, 539 U.S. at 524 (internal citation omitted) (applying norm to a trial that occurred in 1989). "[A reviewing] court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id.* at 527.

In turn, "[p]revailing norms of practice as reflected in the American Bar Association standards and the like are guides to determining what is reasonable[.]" *Strickland*, 466 U.S. at 688. With respect to investigating mitigating evidence in preparation for the penalty phase of capital proceedings, the ABA Guidelines at the time of trial noted that a defendant's psychological history and mental status could "explain or lessen the client's culpability for the underlying offense[]," and therefore should be considered as part of the mitigation investigation. ABA Guidelines § 10.11(F)(2), *reprinted in* 31 Hofstra L. Rev. at 1056. Commentary to § 10.11 explained that expert testimony concerning "the permanent neurological damage caused by fetal alcohol syndrome" could "lessen the defendant's moral culpability for the offense or otherwise support[] a sentence less than death." *Id.* at 1060–61; *see also id.* at 956–57 (noting, with respect to § 4.1, that because "the defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase," the defense team should include at least one person qualified to screen for mental or

psychological defects so as to "detect the array of conditions (e.g., post-traumatic stress disorder, *fetal alcohol syndrome*, pesticide poisoning, lead poisoning, schizophrenia, mental retardation) that could be of critical importance" (emphasis added)). Furthermore, the 2003 Fourth Circuit case *Byrum*—which was decided about 18 months *before* Williams' sentencing—also recognized FAS could be a mitigating factor in a capital case. 339 F.3d at 209–10 (describing that trial counsel's investigation of potential mitigating evidence indicated that the defendant's mother had not abused alcohol during her pregnancy, which, coupled with "the absence of any evidence of organic brain dysfunction, [led] trial counsel [to] conclude[] that they did not have a sufficient factual basis to present FAS as evidence in mitigation").

2.

We note at the outset that most of trial counsels' decisions and actions on issues unrelated to FAS *did* bear the hallmarks of effective assistance: trial counsel had experience in capital cases; counsel consulted with numerous experts in developing a mitigation case; and counsel spent a significant amount of time developing mitigation arguments. *See id.* at 205–11 (listing similar factors to bolster conclusion that counsel's performance was not deficient). But as *Wiggins* makes abundantly clear, an inadequate investigation into potentially mitigating evidence can be, by itself, sufficient to establish deficient performance. 539 U.S. at 534.

Here, counsel's investigation into potentially mitigating evidence of FAS failed to meet an objective standard of reasonableness. By counsel's own PCR-

court admission, their failure to further investigate signs of FAS fell below the then-current standard for mitigation investigations: both attorneys acknowledged they were aware of the mitigating value of neurological defects at the time of Williams' sentencing—with Mauldin *specifically* testifying that he was aware at the time of the importance of FAS as a potential mitigating factor—yet they failed to investigate this issue. Mauldin noted that he *should* have been aware of the issue because the evidence of Williams' brain damage and Huckaby's alcohol consumption during her pregnancy, as well as Dr. Richards' request for medical records concerning the circumference of Williams' head at birth and an MRI, should have alerted counsel to this issue at the time of sentencing. But, as Mauldin testified, he was unable to explain why this information did not raise a red flag: "I wish I could say I connected that, but I did not. . . . I really don't have an explanation for why I was missing those kinds of indicators." J.A. 519. As he further stated, "I am dumbfounded about why a certain course of action did not occur [as the result of being aware of Huckaby's drinking during her pregnancy]. . . . [I]t is unexplainable to me." J.A. 525. Mauldin was similarly unable to explain why, despite awareness of Huckaby's drinking, counsel did not even consider whether Williams had FAS. Nettles' testimony confirmed Mauldin's: despite numerous indicators of FAS, they did not consider whether to pursue that evidence.

Consequently, because there was no recognition of a potential FAS diagnosis by trial counsel, there was no further exploration of FAS as a potential mitigating factor. And because there was no further exploration,

there was *necessarily* no opportunity for counsel to make a strategic decision about whether or not to further develop the FAS evidence or present it in mitigation. Rather, the investigation here was deficient for the same reasons that *Wiggins* found counsel's investigation to be deficient: the lack of an informed decision regarding mitigating evidence. In *Wiggins*, there was evidence of a Maryland death row inmate's alcoholic mother and his problems in foster care. Despite this evidence, counsel failed to follow up on these leads for potentially mitigating evidence. 539 U.S. 525. The Supreme Court concluded that "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of any aggravating factors in petitioner's background." *Id.*

A comparison to our analysis in *Byrum* also highlights the deficiencies in trial counsel's investigation here. In *Byrum*, this Court affirmed a district court's denial of a § 2254 petition, concluding that trial counsel's failure to present mitigating FAS evidence did not amount to deficient performance. 339 F.3d at 211. The Court held that counsel's failure to develop FAS evidence was reasonable in light of two factors: first, there was no indication that the birth mother drank during her pregnancy (specifically, the birth mother denied abusing alcohol during her pregnancy and her records contained no contrary evidence); and second, there was no evidence of organic brain damage or FAS, particularly in the test results evaluated by the defense team. *Id.* at 210 ("Based upon [the] investigation and the absence of any evidence of

organic brain dysfunction, trial counsel concluded that they did not have a sufficient factual basis to present FAS as evidence in mitigation."). Consequently, trial counsel did not fall short of "well-defined norms requiring the discovery of *all reasonably available* mitigating evidence," nor did they "abandon their investigation at an unreasonable juncture." *Id.* (internal quotation marks omitted).

In contrast to *Byrum*, both of these red flags were present here. First, although evidence of Huckaby's drinking during pregnancy was mixed, there was sufficient evidence of alcohol abuse that Vogelsang flagged it for general concern. Second, there was evidence of Williams' brain damage, including impairment of the front lobe. Furthermore, even though evidence of brain damage led Dr. Richards to suggest ordering an MRI of Williams' brain and to request medical records of Williams' head circumference at birth—information often correlated with a FAS diagnosis—the team failed to provide the medical records or to obtain the MRI until the week prior to trial. Consequently, evidence of FAS *was* reasonably available, but counsel failed to connect the indicators suggesting further investigation. And given that FAS evidence was widely acknowledged to be a significant mitigating factor that reasonable counsel should have at least explored—as outlined in the ABA Guidelines and caselaw at the time, and by counsel during their PCR testimony—counsel's actions were deficient. To the point, because counsel failed to conduct *any* investigation despite the red flags, their conduct fell well short of the conduct *Byrum* concluded would have actually been deficient: abandoning *an*

investigation into FAS "at an unreasonable juncture." 339 F.3d at 210; *see also Wiggins*, 539 U.S. at 527–28 ("[C]ounsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible."); *Strickland*, 466 U.S. at 690–91 ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.").

An investigation into FAS evidence would also have been substantively different from the defense team's investigation into other mental illnesses and behavioral issues because FAS could have established both *cause and effect* for Williams' criminal acts whereas the other mitigation evidence went more to effects on behavior. That is, FAS evidence could have provided to the jury evidence of an overarching neurological defect that *caused* Williams' criminal behavior. *See* ABA Guidelines, 31 Hofstra L. Rev. at 1060–61 ("If counsel cannot establish a direct cause and effect relationship between any one mitigating factor and the commission of a capital offense, counsel may wish to show the combination of factors that led the client to commit the crime."); *id.* at 1061 ("[I]t is critically important to construct a persuasive narrative in support of the case for life, rather than to simply present a catalog of seemingly mitigating factors."). Without the information on FAS, the jury could have assumed that Williams was an individual who—despite a challenging childhood, learning disabilities, and other mental health issues—was generally responsible for his

actions, and therefore would have assigned greater moral culpability to him for his criminal behavior.

Of course, counsel would not have been required to present evidence of FAS. Indeed, counsel may have concluded, after investigating and considering FAS as a mitigating factor, that it was an unsound strategy to present this information to the jury because, for example, it could indicate future dangerousness. But that analysis can justify a decision only after a reasonable investigation into FAS. Here, counsel did not collect any FAS evidence or consider its resulting import as part of the mitigation strategy.

3.

But, as noted earlier, it is not enough for us to determine that trial counsel failed to meet the *Strickland* standard for performance. In the § 2254 context, we must also determine whether the district court erred in concluding the PCR court's determination was "contrary to, or involved an unreasonable application of," Supreme Court caselaw or was based on "an unreasonable determination of the facts." 28 U.S.C. § 2254(d). The State contends that the district court failed to afford the appropriate deference to the PCR court's determination—based on "competing evidence of what the defense team knew, and what the defense team did"—and that counsel made a reasonable strategic decision in preparing a mitigation case that excluded presentation of a FAS diagnosis. Opening Br. 31.

We disagree. Applying the correct standard here, we conclude that the PCR court's determination that the

investigation was not deficient involved both an unreasonable application of the law and an unreasonable determination of the facts.

As an initial matter, the PCR court's application of *Strickland* and its progeny to the present case was objectively unreasonable. 28 U.S.C. § 2254(d)(1). In reaching its conclusion, the PCR court confused a strategic decision not to further develop FAS evidence after *some* investigation into its potential mitigating value—which could have complied with *Strickland*—with a complete failure to investigate the FAS evidence for any potential mitigating value, a failure that plainly falls below an objective standard of reasonableness. As *Wiggins* concluded, *even if* trial counsel "would not have altered their chosen strategy" of presenting other mitigating factors, "counsel were not in a position to make a reasonable strategic choice . . . because the investigation supporting their choice was unreasonable." 539 U.S. at 536. "[T]his case is therefore distinguishable from our precedents in which we have found limited investigations into mitigating evidence to be reasonable." *Id.* at 525. Consequently, even under the highly deferential standard afforded to the PCR court, that court's conclusion was unreasonable: "In deferring to counsel's decision not to pursue a mitigation case despite their unreasonable investigation, the [state court] unreasonably applied *Strickland*." *Id.* at 534. In short, the PCR court could not reasonably find trial counsel made a strategic decision in accord with *Strickland* where counsel was unaware of the decision.

The PCR court's determination of the facts was also objectively unreasonable. 28 U.S.C. § 2254(d)(2); *see also Harrington*, 562 U.S. at 100. Specifically, the PCR court relied on the factual assumption that trial counsel made *a* strategic choice not to present the FAS evidence. But, as recounted above, it was impossible for trial counsel to have made a strategic choice because there was no investigation into FAS. Both Nettles and Mauldin testified repeatedly that FAS was never considered, while Vogelsang also testified that nobody ever ruled out FAS. Therefore, counsel could not, as the PCR court found, have made a choice between mitigation strategies. Rather, "[t]he record of the actual sentencing proceedings underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Wiggins*, 539 U.S. at 526.

Additionally, the PCR court erroneously assumed that a lack of an established protocol assessment of FAS in the forensic context meant that FAS was not a widely understood condition at the time of trial; in fact, the ABA Guidelines at the time flagged FAS as a potentially mitigating factor, and trial counsel testified they were sufficiently aware of FAS such that certain issues that arose during their investigation should have triggered an investigation into a possible FAS diagnosis. *See also Moore v. Texas*, 518 U.S. ___, ___, 137 S. Ct. 1039, 1049 (2017) ("[B]eing informed by the medical community does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of current medical standards."). The PCR court's reliance on this

factual determination to reach the conclusion that trial counsel made a strategic decision to exclude FAS evidence underscores the unreasonableness of the PCR court's decision.

* * * *

For these reasons, we agree with the district court that the PCR court erred in concluding that Williams had failed to establish deficient performance of counsel.

B.

This does not end our inquiry either, however, because Williams must also establish that the PCR court's prejudice determination was contrary to or an unreasonable application of Supreme Court precedent, or an objectively unreasonable factual determination. 28 U.S.C. § 2254(d).

1.

To establish *Strickland* prejudice, Williams was required to demonstrate "a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Furthermore, "[i]n assessing prejudice, [the Court] reweigh[s] the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534. Specifically, the Court evaluates *both* the evidence adduced at trial and in the state PCR proceedings.

2.

The PCR court concluded that no prejudice occurred because the addition of FAS evidence "would have 'merely resulted in a 'fancier' mitigation case, [with] no effect on the outcome of the trial.'" J.A. 667. This conclusion by the PCR court was based in part on a survey of jury verdicts in other jurisdictions demonstrating "that defendants are often sentenced to death in spite of evidence offered in mitigation that the defendant had fetal alcohol syndrome or organic brain damage." J.A. 668. Along the same lines, the State argues that Williams cannot establish prejudice because a main indicator of FAS (Huckaby's drinking), as well as two FAS-related or FAS-like symptoms (Williams' mental illnesses and learning disabilities) were already before the jury. Consequently, the State argues, the addition of a diagnosis of FAS would not have changed the outcome. The State also contends that even if FAS evidence had been presented, any mitigation value would have been undercut by it simultaneously suggesting future dangerousness to the jury. *See Brown v. Thaler*, 684 F.3d 482, 499 (5th Cir. 2012) (concluding FAS evidence is "double-edged" because "although it might permit an inference that [a defendant] is not as morally culpable for his behavior, it also might suggest that he, as a product of his environment, is likely to continue to be dangerous in the future" (internal quotation marks and alteration omitted)).

"When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent

the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. We conclude that Williams has established prejudice: had the FAS evidence been presented, there was a *reasonable probability* that, given the balance of aggravating and mitigating factors, the jury would have returned a different sentence. First, as discussed previously, the FAS evidence was different from the other evidence of mental illness and behavioral issues because it could have established *cause and effect* for the jury—specifically, a FAS diagnosis could have provided to the jury evidence of a neurological defect that *caused* Williams' criminal behavior. Without this information, the jury could have assumed that Williams was an individual who—despite challenges in his home life, education, and mental health—was generally responsible for his actions, and therefore would have assigned greater moral culpability to him for his criminal behavior.[8]

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[8] Of course, as noted previously, FAS is only *one* of a number of factors a jury may consider, along with any other mitigating evidence. The presentation of this evidence does not predetermine a lesser sentence for Williams. In fact, as the State correctly notes, a FAS diagnosis can be a double-edged sword, given that it may also indicate future dangerousness to the jury. Consequently, we also cannot presuppose FAS evidence must be presented or will prevail in any further proceedings. We conclude only that *if* counsel had chosen to present this evidence, the jury *may have* returned a different verdict. Nothing in this opinion should be taken to conclude that counsel, after a proper investigation, is compelled to present FAS evidence in another sentencing proceeding.

At the PCR hearing, experts testified that FAS impaired Williams' judgment, as well as his ability to control his impulses and consider the consequences of his actions. This could have been persuasive mitigating evidence for a jury—particularly a deadlocked one—considering the death penalty, and could have been outcome-determinative because of how it framed a defendant's culpability, particularly in comparison to the other mitigating factors submitted for the jury's consideration. *See Rompilla v. Beard*, 545 U.S. 374, 391–93 (2005) (linking brain damage caused by FAS and petitioner's capacity to appreciate the criminality of his conduct).

Further, the State only presented one aggravating factor: that the murder occurred in the commission of a kidnapping. Consequently, had this solitary aggravating evidence been weighed against the totality of the mitigating evidence presented during both the penalty phase and the PCR proceedings, there is a reasonable probability the jury would have determined the balance of factors did not warrant a death sentence.

The district court thus correctly determined that Williams had established *Strickland* prejudice.

3.

We also agree with the district court's conclusion that the PCR court's prejudice determination involved an unreasonable application of clearly-established law. 28 U.S.C. § 2254(d)(1). As an initial matter, we note that, by relying on the survey of jury verdicts, the PCR court failed to examine the facts of this case in view of the *Strickland* requirements and instead made a

generalized assessment unrelated to the case before it. Relatedly, the PCR court's failure to reweigh the totality of the available mitigation evidence against the aggravating evidence in *this specific* case is evidenced by two additional points. *See Williams*, 529 U.S. at 397–98. First, although the mitigation evidence may have been mixed, it was error for the state court to fail to "entertain [the] possibility" that the mitigating FAS evidence could have "alter[ed] the jury's selection of penalty" because it "might well have influenced the jury's appraisal of [the defendant's] moral culpability." *Id.* at 398. As discussed above, the mitigating FAS evidence here could have been significant for the jury because it could have established cause and effect, thereby diminishing Williams' culpability. The evidence's significance is further heightened here given that the jury was initially deadlocked on whether to impose the death penalty. Second, as outlined previously, the aggravating evidence was minimal. When compared to the totality of the mitigating evidence, it is clear that the PCR court assigned unreasonable weight to the sole aggravating factor.

Given the aggravating and mitigating evidence in the context of this particular case, it is evident that the presentation of the FAS evidence would have resulted in, at a minimum, a reasonable probability of a different sentence, even if it did not guarantee one. This is all the law requires. As a result, the district court properly found that the PCR court's prejudice determination was unreasonable.

IV.

Finally, Williams argues the district court erred in granting summary judgment to the State on Grounds One through Five. Because we affirm the district court's grant of summary judgment to Williams as to Ground Six, we do not address these issues further.

V.

For the foregoing reasons, we affirm the district court's judgment.

AFFIRMED

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2
(6:16-cv-01655-JMC)

[Filed February 25, 2019]

CHARLES CHRISTOPHER WILLIAMS,

Petitioner - Appellee,

v.

BRYAN P. STIRLING, Director, South Carolina Department of Corrections; WILLIE D. DAVIS, Warden of Kirkland Correctional Institution,

Respondents - Appellants,

and

JOSEPH MCFADDEN, Warden of Lieber Correctional Institution,

Respondent.

FEDERAL REPUBLIC OF GERMANY,

Amicus Supporting Appellee.

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Agee, and Judge Diaz.

For the Court

/s/ Patricia S. Connor, Clerk