NO. ____________

In The
Supreme Court of the United States

BRAD KEITH SIGMON,
Petitioner,

v.

BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections; WILLIE D. DAVIS, Warden of Kirkland Correctional Institution,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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****CAPITAL CASE****

QUESTIONS PRESENTED

In *Martinez v. Ryan*, 563 U.S. 1032 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), this Court held that ineffective assistance of trial counsel claims defaulted by absent or ineffective state post-conviction counsel can be revived on federal habeas. This exception to *Coleman v. Thompson*, 501 U.S. 722 (1991), was rooted in the idea that petitioners should have the chance to press the critical constitutional claim of the right to effective representation at least once through competent counsel. To demonstrate cause under *Martinez*, a prisoner must show: (1) that appointed collateral counsel were ineffective under the standards of *Strickland*; and (2) "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*. at 15 (citing *Miller-El v. Cockrell*, 537 U.S. 322, (2003)) [emphasis added].

The Fourth Circuit in *Sigmon v. Stirling,* 956 F.3d 183 (4th Cir. 2020) held a detailed mitigation presentation by *Martinez* counsel that created a much richer understanding of capital petitioner Brad Keith Sigmon's childhood abuse, mental health, remorse, and ability to adapt to prison could not pass this low bar of having "some merit." Finding this new evidence cumulative, and as a matter of law insubstantial, they denied Sigmon an evidentiary hearing. Judge King dissented, strongly disagreeing with the majority's characterization of the new evidence as "insubstantial," as that could only mean "it does not have any merit or is wholly

without factual support" under this Court's precedent, and responding to the question of whether Sigmon was entitled to an evidentiary hearing with an "emphatic yes." *Id.* at 211, 212.

The questions presented are:

1. Capital defendant Brad Sigmon presented additional mitigation evidence uncovered during a *Martinez* investigation that addressed the same general subject matter presented at the sentencing phase of trial in greater depth and detail. Did the Fourth Circuit, in a decision that widened an existing circuit split, violate this Court's directives on the Sixth Amendment's right to effective counsel when it rejected Sigmon's *Martinez* evidence as cumulative, and as a matter of law insubstantial, simply because it covered similar topics as those presented at trial?

2. In considering whether to grant an evidentiary hearing on a *Martinez* claim, does the requirement that evidence be substantial merely require a showing of some merit, as suggested by this Court, or must the reviewing court be convinced of a reasonable probability of a different outcome before allowing such a hearing?

LIST OF PARTIES TO THE PROCEEDINGS

All parties to this proceeding are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Brad Sigmon respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The decision of the Fourth Circuit is reported at 956 F.3d 183. (App. 1a). The district court opinion is unreported but available at 2018 U.S. Dist. LEXIS 168699. (App. 52).

STATEMENT OF JURISDICTION

The Fourth Circuit issued an opinion on April 14, 2020. *Sigmon v. Stirling,* 956 F.3d 183 (4th Cir. 2020). A timely petition for rehearing was filed and denied by the Fourth Circuit on May 27, 2020. *Sigmon v. Stirling,* 2020 U.S. App. LEXIS 16932 (4th Cir. 2020)(App. 50a). 28 U.S.C. § 1254(1) authorizes jurisdiction in this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

INTRODUCTION

Brad Sigmon is asking for a hearing on claims that have never been heard and evidence that has never been duly considered in court. Significant, compelling, and detailed mitigation evidence was overlooked by his trial counsel and again by his state post-conviction counsel. That oversight is preventing him from presenting the

very evidence that could save his life, despite authority from this Court that should allow the presentation of that evidence.

This Court's opinion in *Martinez v. Ryan* allows the presentation of mitigation evidence, despite his prior lawyers' failure to present such evidence. *Martinez v. Ryan*, 566 U.S. 1 (2012). Available mitigation could have added context to Sigmon's crime, added detail to Sigmon's life, and countered the State's evidence in support of the death penalty.

Sigmon has not had a fair opportunity to present this evidence because of the body of law that is quickly developing in the lower courts regarding the grant of an evidentiary hearing on defaulted claims brought under *Martinez*. Two specific areas need to be addressed by this Court.

First, capital trials often turn on mitigation evidence. Like many death penalty cases, Sigmon's case involved no real dispute over his guilt. When guilt is conceded and a trial focuses on mitigation, it is critical that counsel thoroughly investigate all sources of potential mitigation evidence. *Andrus v. Texas*, 140 S. Ct. 1875, 1883 (2020). When that investigation fails at both trial and in state post-conviction proceedings, it is left to federal habeas counsel to uncover the missing pieces.

Despite the importance of habeas counsel's duty in discovering additional mitigation evidence, there is no guarantee of a hearing in the federal proceedings. As in this case, counsel is required to find evidence, convert it to documentary form, and present it to a district court during the pleading stage of a case, or in response to a summary judgment argument. Sigmon's case is typical of many capital cases – there

was mitigation evidence presented at trial, but a closer look reveals far more compelling evidence that paints a fuller picture of Sigmon's life.

Because this evidence in federal habeas proceedings is presented in pleadings or declarations, reviewing courts are quick to find it "cumulative" and insubstantial as a matter of law. As a result, district courts are weighing the credibility of evidence they have not fully heard, and appellate courts are engaging in the type of credibility weighing they have long declined to do. *Thompson v. Keohane,* 516 U.S. 99, 111 (1995).

This Court has a wealth of authority on mitigation evidence. It has never held merely similar evidence should be considered cumulative and rejected as a matter of law. Instead, it has held that all of the newly-discovered mitigation evidence must be considered in combination with what was presented at trial and weighed against aggravating evidence to determine if even one juror could potentially strike a different balance on moral culpability and vote for life instead of death. *Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510, 537 (2003); *Andrus,* 140 S. Ct. at 1886. This cannot be done on pleadings – it requires a hearing.

A second, related problem is the standard used by the Court to grant an evidentiary hearing on a *Martinez* claim. The claim must only have some merit. It is irrelevant whether a court believes the claim will ultimately prevail – it only needs to be worthy of further discussion. Because courts have set the bar for an evidentiary hearing on a *Martinez* claim too high, *Martinez*'s protection of the right to effective assistance of counsel, especially in capital cases, has become no protection at all.

Both claims involve lower courts looking at authority from this Court and electing to add restrictions this Court has not. *Martinez* simply requires some merit, as the opinion spells out in no uncertain terms. A good rule of thumb for reading decisions of this Court is "that what they say and what they mean are one and the same." *Mathis v. United States*, 136 S. Ct. 2243, 2254 (2016).

STATEMENT OF THE CASE

This capital case arises from an ill-fated plan to win back a girlfriend that ended in the tragic and unplanned deaths of David and Gladys Larke, two people Brad Sigmon considered family.

During his July 2002 trial in Greenville County, South Carolina, Sigmon admitted guilt; he was, from the beginning, repentant, confessing to members of law enforcement and others multiple times. DE 32-8, p.104; DE 32-9, p.104-108, 143-145.[1] Trial counsel admitted Sigmon's guilt in the opening argument of the guilt phase, DE 32-8, p.105, and while it was their constitutional duty to present a mitigation case robust enough to convince the jury that Sigmon was worthy of mercy and a sentence of less than death, they put on a self-described "simple" mitigation case with only a "few witnesses." J.A. 82.[2]

This abbreviated mitigation case merely scratched the surface of Sigmon's life. In the federal habeas proceeding, *Martinez* counsel uncovered a wealth of mitigation evidence that provided a much more robust and compelling look into Sigmon's

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[1] These citations refer to the South Carolina state court trial transcript, filed in the district court in initial federal habeas proceedings.

[2] These citations refer to the Joint Appendix filed in the Fourth Circuit Court of Appeals.

childhood, religious beliefs, positive relationship with the victim's family, and remorse. This mitigation evidence that the jury did not hear, and what Fourth Circuit Judge Robert King would later find so "compelling," painted a much deeper and richer picture of who Brad Sigmon was. *Sigmon v. Stirling,* 956 F.3d 183, 211 (4th Cir. 2020).

Sigmon's request for a hearing on the claim that his trial counsel's failure to discover and present this compelling evidence amounted to constitutionally ineffective assistance under *Strickland v. Washington* was denied by the district court without an evidentiary hearing. *Sigmon v Stirling*, 2018 U.S. Dist. LEXIS 168699 (unreported) (App. 52a). This decision was affirmed by the Fourth Circuit, but Judge King entered a strong dissent urging for an evidentiary hearing, calling this new evidence "markedly more compelling, detailed, and favorable to Sigmon than what was presented at trial." *Sigmon,* 956 F.3d at 211.

A. TRIAL COUNSEL FAILED TO PRESENT MEANINGFUL MITIGATION EVIDENCE.

Sigmon's trial attorneys attempted to advance as mitigating factors Sigmon's lack of significant criminal history; that he murdered the Larkes under the influence of mental or emotional disturbance; that his capacity to conform his conduct to the requirements of the law was impaired (due to his drug and alcohol use the night prior); and that he was adaptable to prison. They also brought up his childhood issues, historic drug use, and mental illness.

Three expert witnesses were presented at the mitigation stage. The experts introduced limited information regarding Sigmon's life history and parental neglect,

his drug abuse and its effect on his mental state and the crime, and his ability to adapt to prison if given a life sentence.

None of the expert evidence was particularly compelling or helpful. The addiction and psychopharmacology expert testified to Sigmon's history of depression and alcohol and drug addiction, and how Sigmon's drug use the night prior could have affected his behavior during the murder. J.A. 354-346. However, no court to review this case has ever found Sigmon was under the influence of drugs at the time of the murder. *Sigmon*, 956 F.3d at 195-196.

The social worker's testimony, summarizing Sigmon's entire 43-year life history, including family and romantic relationships, mental health, and work history, was brief and added little to the mitigation case. Her assessment focused primarily on the way Sigmon stepped in to be a "surrogate parent" for his younger siblings in the wake of his parents' divorce and how the family's frequent moves made him anxious and "overly involved or attached to relationships." J.A. 218, 227. The prison adaptability expert, who did testify that Sigmon could be incarcerated safely for a life without parole term, also opened the door to prejudicial and otherwise inadmissible evidence. J.A. 362-364; *Skipper v. South Carolina*, 476 U.S. 1, 7 n.2 (1986).

The defense's mitigation case involved five family members: aunt Brenda Clark, who testified he was a loving and caring person; stepfather Donnie Wooten, who testified that he was a "normal kid;" son Robbie Sigmon, who testified that his dad was a loving father; father Ronnie Sigmon, who testified to his son's peaceful

nature and his fondness for sports and the outdoors; and finally mother Virginia Wooten, who testified about Sigmon's confession and immediate remorse. J.A. 156, 157, 161, 381, 382, 389. Testimony from Sigmon's family, which could have humanized him in the eyes of the jury, covered just a fraction of the sentencing phase.

Trial counsel called six final witnesses who had interacted with Sigmon during his pretrial detention. Nurse Rosa Jones, who had spoken to him once upon his arrival at the jail, said "he was sad, and acted sort of remorseful." J.A. 187. A counselor in the jail testified that she held three ten-minute meetings with Sigmon which led her to conclude that Sigmon was not dangerous. J.A. 180. C.O. Valerie Putnam testified that Sigmon was not a threat, but had limited interactions with him. J.A. 264-65. C.O. Matt Talley stated that Sigmon was "just like any other inmate," but then testified on direct that Sigmon had become aggressive with another officer and Talley had to intervene. J.A. 175. Captain Melton described Sigmon's move from maximum security housing to medium security based on his good behavior, but then his return to the maximum security unit due to a jail visitation pass that Sigmon had squirreled away (contraband, even though he was not going to use it for any nefarious purpose). J.A. 290. Afterwards, there were no significant behavior problems with Sigmon. J.A. 300, 304. Finally, a volunteer who led a Bible class in jail testified that Sigmon regularly attended those classes. J.A. 268. None of these witnesses knew Sigmon outside the prison context, nor did they know Sigmon for any significant period of time.

In the face of this sparse showing from trial counsel, it took the jury less than three hours of deliberation to sentence Sigmon to death.[3]

B. APPOINTED POST-CONVICTION COUNSEL FAILED TO RAISE THE ISSUE OF TRIAL COUNSEL'S INEFFECTIVENESS.

Sigmon's death sentence was upheld on direct appeal. *State v. Sigmon*, 366 S.C. 552 (2005). Sigmon was appointed post-conviction relief counsel who began investigating his claims for state collateral proceedings. Those attorneys only conducted a few interviews themselves, leaving almost all the witness interviews to their mitigation investigator. The investigator failed to interview Pastor Don McKellar, the family pastor, and the victims' grandson, who Sigmon had raised like his own son. PCR counsel then filed for post-conviction relief. Notably absent from the list of claims was a claim of ineffective assistance of counsel for failure to present mitigating evidence. *Sigmon*, 956 F.3d at 190.

The South Carolina Supreme Court reviewed three of Sigmon's PCR claims but affirmed his death sentence. *Sigmon v. State*, 403 S.C. 120 (2013).

C. FEDERAL COURTS REFUSED TO GRANT AN EVIDENTIARY HEARING ON SIGMON'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, HOLDING THE MOUNTAIN OF NEW MITIGATION EVIDENCE WAS SIMPLY "CUMULATIVE" AND THE CLAIM HAD "NO MERIT."

Sigmon next filed for habeas relief in the federal district court. He was initially represented by his state post-conviction counsel who raised six preserved claims.

[3] Empirical studies examining juror behavior in capital sentencing have found that "It is quite possible that weak mitigating evidence in the context of a capital murder is worse than no mitigation evidence at all." Michelle E. Barnett, *When Mitigation Evidence Makes a Difference: Effects of Psychological Mitigating Evidence on Sentencing Decisions in Capital Trials*, 22 BEHAV. SCIS. & L. 751 (2004).

Sigmon was appointed an additional lawyer to comply with this Court's directive in *Martinez* and evaluate whether there were any defaulted claims based on the ineffectiveness of his state post-conviction counsel, who were also representing him in the federal habeas proceedings.

With new appointed counsel, Sigmon filed an amended habeas corpus petition for writ of habeas corpus that raised four defaulted claims under *Martinez*, including a claim that trial counsel was ineffective for failing to present mitigation evidence. Unlike state post-conviction counsel, who never even attempted to raise this issue in state court, federal habeas counsel supported this theory of ineffectiveness by interviewing and collecting affidavits from family members, childhood friends, religious figures, prison officials, and even the victim's own grandson. Sigmon requested an evidentiary hearing to further develop the mitigation case that should have been presented on his behalf in order to establish a reasonable probability that, but for trial counsel's deficient performance, the outcome at trial would have been different.

a. The District Court Ignored Sigmon's New Mitigation Evidence

Federal habeas counsel uncovered critical mitigation evidence that was never presented to the jury.

1. Evidence of positive adjustment to prison

Trial counsel ignored compelling evidence of adjustment to prison from two witnesses who had direct experience with the South Carolina Department of

Corrections ("SCDC"). That experience would have given them instant credibility with the jury on the issue of adjustment to prison.[4]

Ronnie Sigmon, Brad's[5] own father, was a prior employee of SCDC. Trial counsel was surprised to learn this during direct examination. J.A. 381. Ronnie had worked at a maximum-security prison and supervised thousands of inmates, both problem inmates and well-adjusted inmates. J.A. 859. He could have testified Brad would have adjusted well to prison life. J.A. 859-860. Ronnie was never interviewed by trial counsel until a brief interview in the courthouse immediately before he testified. J.A. 860.

Don McKellar was the pastor at Brad Sigmon's parents' church. J.A. 845. He was willing to testify for Brad if he had been asked. J.A. 845. In addition to seeing Brad's sincere remorse, McKellar had extensive experience with inmates. J.A. 846. He had dealt with thousands of inmates and had significant insight into the type of character that would lead to positive adjustment in prison. J.A. 846. McKellar attended most of Brad's trial and was even introduced to one or both trial counsel but was never interviewed or asked to testify. J.A. 846-847.

Brad's brother, Mike Sigmon, was also available and willing to testify at his trial. J.A. 854. Brad was a peaceful child. He worked third shift at a young age to help support his mother and siblings. J.A. 854. Mike knew about Brad's drug and alcohol abuse, which was powerful mitigating evidence. J.A. 855. Brad was very remorseful,

[4] This is important mitigation evidence. See generally, *Skipper v. South Carolina,* 476 U.S. 1 (1986).

[5] When discussing family members with the last name of Sigmon, Brad Sigmon will be referred to as "Brad" instead of "Sigmon" to avoid confusion.

and his actions were an anomaly based on his brother's knowledge of his life. *Id*. Mike observed his brother getting along and acting in a respectful manner at the jail. Mike told trial counsel he wanted to testify, but he was neither asked what he had to say nor asked to testify. *Id*.

2. Positive character evidence

Trial counsel never presented the jury with testimony from people that had known Sigmon all his life. They would testify that Sigmon had never behaved violently and this crime was shockingly out of character for him. J.A. 855. Federal habeas counsel was able to gather this valuable information from Sigmon's father, who was a former correctional officer with SCDC, and their family pastor, who had experience working with "thousands of inmates," about Sigmon's ability to adapt to prison. His father felt that Sigmon would "adjust positively to prison" and "would obey correctional offices and staff," while Pastor Don McKellar believed "Sigmon would have been one of the good and well-behaved inmates and… would try to help others in prison." J.A. 846; 859-60.

Troy Barbare, Jr. was Becky's son and the grandson of the victims in this case. J.A. 826. Despite his young age at the time of the trial, he would have testified Brad was more of a father than his own father and always treated him very well. J.A. 826. Troy observed Brad and his mother's relationship and though they argued, he never saw Brad do anything violent towards her. J.A. 826-827. Considering his relationship to the victims and knowledge of the defendant, this would have been powerful mitigation testimony.

Pastor McKellar, in addition to testifying about Brad's potential adaptability to prison, could have testified to Brad's positive character traits, his strong work ethic, and his good nature. J.A. 845.

As additional support for his good character, there were other witnesses to testify Brad went to work full time at the age of 15 to support his family. Virginia Wooten, Mike Sigmon, and Louis Burrell were all available to testify to this information. J.A. 861; 854; 828.

3. Evidence of cruel and repeated physical abuse in Sigmon's childhood

No witness at trial testified to any physical abuse or domestic violence during Sigmon's childhood. Brad's mother, Virginia Wooten, could have testified about Ronnie Sigmon, Brad's father, getting drunk and physically assaulting her. J.A. 862. As early as age 6, Brad would get in the middle of the abuse and try to stop his mother from hurting his father. J.A. 862. Sigmon would yell things like "Don't hit my mama." J.A. 862.

When he was older, around 10 or 12 years old, he would physically get between his parents, and his father would "knock him out of the way or shove him or slap him… [t]his happened a lot." *Id.* At age 15, Sigmon intervened in yet another domestic violence situation and was punched so hard he was knocked to the ground.

Trial counsel never discovered any of these "many incidents" where his father would hit or punch Sigmon while he was trying to protect his mother. *Id.* Nor did they discover that Sigmon's response to his father's abuse and abandonment was to go out and get a full-time job at the age of 16 to support the family. J.A. 828, 854, 861.

Virginia Wooten was not asked about these events when she was on the stand. She did not remember either trial counsel spending much time with her preparing for her testimony. J.A. 862.

4. History and treatment for major mental illness: Depression

Dr. Ernest Martin is a licensed physician practicing forensic psychiatry. J.A. 840. He is in private practice in addition to serving as a forensic psychiatrist at the Greenville jail and he is on staff at two Upstate hospitals. He had experience in evaluating defendants in a variety of settings. *Id.*

In his role as the forensic psychiatrist at the jail where Sigmon was held before and during trial, Dr. Martin saw Brad and was in a position to offer an opinion on his mental state. Dr. Martin could have testified to Brad's major depression, which is a major mental illness. J.A. 841-842. He believed Brad's problems were sincere and did not see any signs of malingering. J.A. 842.

Dr. Martin was not contacted about Brad's case. *Id.* He was willing to testify at the trial, even stating that if he was on vacation he was still in South Carolina and could have come to court. *Id.* Trial counsel testified he did not think to ask for a deposition prior to trial, did not take any steps to compel Dr. Martin's appearance at trial, and otherwise made no effort to ensure his appearance. J.A. 821. While he was later subpoenaed for the state post-conviction hearing, Dr. Martin was never called as a witness and was not paid for his time working on the case. J.A. 843.

5. Evidence of remorse

Perhaps most importantly, trial counsel failed to present testimony about remorse from people that knew both Sigmon and the Larke family. Evidence of remorse is incredibly powerful mitigation evidence. Many empirical studies have shown that jurors' perceptions of the defendant's remorse are critical when making their sentencing determination, and their judgment of the defendant's sincerity is affected by whether the defendant admits to the crime.[6] Sigmon had confessed multiple times, and federal habeas counsel presented two affidavits from critical witnesses never interviewed by the post-conviction team that could have illuminated Sigmon's deep remorse for his actions.

Both Pastor McKellar and Dr. Martin could have offered compelling testimony of Sigmon's remorse. The substance of McKellar's testimony was discussed earlier; he spent significant time with Sigmon and was aware he was very remorseful for what happened. Dr. Martin directly observed Sigmon in a detention and medical setting and was able to observe his feelings about the crime.

Both witnesses could have offered mitigating evidence related to Sigmon's remorse. They were not properly investigated by trial or state post-conviction counsel and this opportunity for mitigation was lost to Brad.

Despite being faced with this extensive new mitigation evidence, the district court granted the state's motion for summary judgment on all claims. *Sigmon,* 956

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[6] Stephen P. Garvey, The Emotional Economy of Capital Sentencing, 75 N.Y.U. L. REV. 26 (2000); Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, Mitigation Means Having to Say You're Sorry: The Role of Remorse in Capital Sentencing, 83 CORNELL L. REV. 1599 (1998); Scott Sundby, The Jury and Absolution: Trial Tactics, Remorse and the Death Penalty, 83 CORNELL L. REV. 1557 (1998).

F.3d at 190; (App. 52a). The Fourth Circuit granted a certificate of appealability on all but one claim.

b. The Court of Appeals Affirmed the District Court

The Fourth Circuit found that Sigmon had not presented a substantial claim of ineffective assistance of counsel claim as required under *Martinez*. It held that much of the evidence federal habeas counsel discovered (detailed above) was simply cumulative of evidence presented to the jury, and stated, without further explanation, that the evidence of physical abuse and domestic violence never heard by any decision maker was "not on par with the substantial mitigation evidence missed by counsel in *Williams, Gray*, and *Wiggins*." *Sigmon,* 956 F.3d at 200. It also based its opinion on Sigmon's failure to specifically argue the ineffective assistance of post-conviction relief counsel. *Id.* at 200-201.

Judge King dissented from the opinion because the mitigation evidence found in the *Martinez* investigation did in fact warrant a hearing; specifically, he found that it was "markedly more compelling, detailed, and favorable to Sigmon than what was presented at trial." *Id*. at 211. The overall content of the mitigation testimony at trial was "generic," only including a "bare mention" of Sigmon's choice to provide for his family as a young teen and stripped of the "plethora of evidence" available regarding Sigmon's battle with major depressive disorder. *Id*. Judge King answered the question of whether Sigmon was entitled to an evidentiary hearing with "an emphatic yes." *Id* at 212.

Sigmon filed a petition for rehearing, arguing the Fourth Circuit misapplied the *Martinez* standard and erroneously held that Sigmon had to specifically argue that post-conviction counsel was ineffective in failing to present evidence of trial counsel's ineffectiveness. This petition was denied.

REASONS FOR GRANTING THE PETITION

I. THE PREVAILING STANDARD IN THE LOWER COURTS ON WHAT MITIGATION EVIDENCE IS CUMULATIVE AND WHEN IT IS CONSIDERED SUBSTANTIAL FOR *MARTINEZ* PURPOSES HAS RESULTED IN DEATH-SENTENCED PETITIONERS' INABILITY TO PRESENT ADDITIONAL MITIGATION EVIDENCE NEVER PRESENTED BY TRIAL COUNSEL OR POST-CONVICTION COUNSEL.

Mitigation evidence is of the "utmost importance" in a capital trial. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Introduction. If a jury is presented with proper mitigation evidence and can appropriately weigh it against the death penalty, a petitioner merely needs to show a "reasonable probability" just one juror would favor life. *Wiggins v. Smith*, 539 U.S. 510, 537 (2003). This evidence should encompass the full range of a capital defendant's life, and investigations into mitigating evidence should involve efforts to discover evidence related to topics including, but not limited to, the defendant's medical and mental health history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences. *Lockett v. Ohio*, 438 U.S. 586, 608 (1978); *Porter v. McCollum*, 130 S. Ct. 447, 453 (2009); ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7 (A), cmt. at p. 83, 10.11 (A), p.

108 (2003). Both *Wiggins* and *Williams v. Taylor* emphasize the importance of a reasonable investigation into mitigation evidence. *Id.;* 529 U.S. 362 (2000).

Unfortunately, most new evidence uncovered during later stages of a capital proceeding is labeled "cumulative," regardless of its strength or substance. This Court has agreed cumulative evidence does not warrant habeas relief but has never said evidence involving the same subject matter or theme is automatically cumulative as a matter of law and cannot meet the *Martinez* requirement of substantial.

A. This case presents the opportunity for the Court to speak clearly on this issue of "cumulative" evidence.

Sigmon's case is the right procedural vehicle to address this problem. He presented the classic *Martinez* claim in the district court. Powerful mitigation evidence in his case was missed by his trial counsel. However, they did present some mitigation evidence. During the *Martinez* review, habeas counsel located witnesses who either testified at the sentencing phase or were readily available and had additional information that could have transformed the mitigation case from a scant collection of disjointed witnesses to a comprehensive and persuasive case for life.

Affidavits describing this evidence were presented in the district court. Following the common pattern of habeas cases, the State moved for summary judgment and the focus of the argument became less about granting relief and more about just allowing a hearing so the new evidence could be properly considered. The district court found the mitigation evidence was, "for the most part, cumulative," because it covered some of the same ground as the evidence presented at the sentencing phase. *Sigmon v. Stirling,* 2018 U.S. Dist. LEXIS 168699 *57-58 (D.S.C.

Sept. 30, 2018); (App. 90a). The Fourth Circuit reached the same conclusion. Notably, neither court actually heard the evidence. They only knew the general substance of the evidence.

Because this case involves a common problem in capital cases, the Court can address a broad problem and a number of cases with its opinion. By speaking clearly on this issue, the Court can create a rule to guide the lower courts in determining when newly discovered mitigation evidence warrants a hearing and when it is truly cumulative and can add no further value to the case for life.

B. The district court and Fourth Circuit in this case, along with many other Circuit Courts, imposed a restrictive view of cumulative evidence that was not envisioned by this Court in *Belmontes* and *Van Hook*.

In *Belmontes*, this Court discussed a case where substantial mitigation evidence was presented at trial. *Wong v. Belmontes*, 558 U.S. 15, 23 (2009). Each "humanizing" factor was presented at trial and the jury was already "well-acquainted" with the defendant's background. *Id*. That knowledge meant any additional evidence was of insignificant benefit.

The *Belmontes* opinion used "cumulative" in its truest sense – the evidence was no different than what was presented at trial. However, relying on *Belmontes* for a bright-line rule on the introduction of cumulative mitigation evidence is a mistake. The unique and overarching limitation on the introduction of mitigation evidence in the *Belmontes* case was the existence of a second murder. *Id*. at 25. Any additional mitigation evidence risked admission of that additional murder and the devastating weight it would have added to the State's case in aggravation. *Id*. at 17-18.

Around the same time *Belmontes* was decided, this Court addressed a similar issue in its *per curiam* opinion in *Bobby v. Van Hook*, 558 U.S. 4 (2009). In discussing the effectiveness of defense counsel, this Court recognized "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 7. Nowhere is this ideal more apparent than a capital case, where defense counsel must effectively handle both a guilt phase and a sentencing phase.

Van Hook noted one general requirement from the United States Constitution on the representation of criminal defendants: counsel must make objectively reasonable choices. *Id* at. 9. This Court found Van Hook's lawyers' mitigation investigation was effective in timing, scope, and quality. Lay witnesses were contacted "early and often." *Id.* There was extensive information from family members related to Van Hook's childhood negligence, abuse, and trauma. *Id.* at 10. Detailed expert testimony about mental conditions was introduced. *Id.* at 10-11. Most importantly, the opinion suggests the evidence was introduced in a logical way, allowing for an explanation of a violent crime and a full picture of the man on trial.

Circuit courts attempting to apply a rule from *Belmontes* and *Van Hook* have struggled. Most courts, like the Fourth Circuit in this case, seem to believe any evidence covering subject matter similar to what was introduced at trial is cumulative as a matter of law. Compounding the problem is that much of the Circuit precedent involves deference to state court rulings that have already analyzed the evidence. No

such deference is afforded in a *Martinez* claim because there is no prior analysis. Courts are making rulings without the benefit of any prior analysis, but at the same time, neglecting to conduct their own detailed and fact-specific analysis.

For example, the Fourth Circuit in its opinion below recognized some of the evidence presented in Sigmon's *Martinez* claim was unknown to trial counsel. *Sigmon,* 956 F.3d at 200. Though that reflects trial counsel's decisions were not "reasonable, informed decisions about the scope of the investigation" the Fourth Circuit held the evidence was merely cumulative to that which was presented. *Id*.

Despite its holding, the Fourth Circuit offered no substantive analysis of whether the evidence was truly cumulative. It simply listed witnesses who had testified to the same general subject matter, as opposed to carefully analyzing whether the new evidence could have potentially changed the mind of one juror. *Id*. at 199-200. This is a common mistake Circuits are making when considering claims involving newly-discovered mitigation evidence.

The Tenth Circuit, for example, considered evidence it found cumulative on the ground that "one of the thrusts of the evidence [the petitioner] offers in support of this ineffective assistance of counsel claim was, to some degree, already before the jury such that its theoretical mitigating value is minimized." *Simpson v. Carpenter,* 912 F.3d 542, 595 (10th Cir. 2018). The recent precedent from the Tenth Circuit, which governs capital mitigation claims, has the power to eviscerate nearly all mitigation claims. By creating such a tenuous link between evidence, calling it similar "to some degree," the Tenth Circuit risks no mitigation claims having merit

in its Circuit.[7] Its approach is in clear violation of this Court's decisions, as it fails to add all of the new evidence to the existing evidence and reweigh the resulting total to determine if there could be a different outcome.

The Eleventh Circuit took a similarly troubling approach to mitigation evidence in *Dallas v. Warden*, 964 F.3d 1285 (11th Cir. 2020). The Court held affidavits in habeas proceedings that did nothing more than "simply add some details, substantiate, or explain some aspects of Dallas's life that had already been graphically presented…" were cumulative of previously presented themes. *Id.* at 1308-09. But the evidence analyzed did far more. For example, at trial the defendant's sister testified living with their mother was "hell" and police had taken their mother "to an insane asylum a couple of times." *Id.* at 1308. The affidavits presented in the habeas proceedings offered far more detail, describing the harrowing details of growing up with a severely mentally-ill mother.

The Eleventh Circuit found the jury was aware of the mother's mental illness, so the new evidence merely served to "amplify the theme." *Id.* Amplifying a particular theme, by adding detail and strength, would certainly change the equation when all evidence was considered together. The Eleventh Circuit opines this Court has only found prejudice when faced with failure to present mitigating evidence if the difference between the new evidence and the existing evidence is "vast." *Id.* at 1312. The existing rule is quite different; this Court's precedent simply requires an undermining of the sentence. There is no requirement of "vastly" different evidence,

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[7] This Court clearly recognizes there are mitigation claims that will warrant relief. See *Andrus, supra*.

just that the evidence calls the outcome into question. That could be accomplished with minimally different evidence, depending on the expected effect of the evidence.[8]

In contrast, the Ninth Circuit followed the *Martinez* ruling in properly remanding a case for an evidentiary hearing to consider additional mitigation evidence. In *Ramirez v. Ryan*, the Ninth Circuit applied the correct test to new evidence and found the additional mitigation evidence was not too speculative, weak, or irrelevant to disregard. *Ramirez v. Ryan,* 937 F.3d 1230, 1247 (9th Cir. 2019). The Ninth Circuit recognized the mitigation presented at the trial was "relatively innocuous" compared to details later learned about the defendant's life. *Id.* at 1246.

In addition to properly determining what type of evidence was presented, the Ninth Circuit used the proper procedure to determine whether a hearing was warranted. After adding all the evidence together and considering it as a whole, the Court found it was possible the sentencer "would have struck a different balance." *Id.* at 1246-47. It then held that without allowing further evidentiary development, the Court could not conclude the ineffective assistance of counsel claim was "insubstantial, *i.e.*, it does not have any merit or [ ] it is wholly without factual support." *Id.* at 1247 (citing *Martinez*, 566 U.S. at 16).

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[8] The Eleventh Circuit misinterprets this Court's opinion in *Cullen v. Pinholster*, citing it for the claim that evidence that substantiates, supports, or explains trial testimony is cumulative. *Dallas*, 964 F.3d at 1308 (quoting *Cullen v. Pinholster*, 563 U.S. 170, 200-01 (2011)). That is not at all what *Pinholster* stands for. The opinion simply held that type of evidence added nothing to the mitigation case because it was duplicative and sparse. *Pinholster*, 563 U.S. at 201.

The Eleventh Circuit's idea that evidence that details or amplifies previously presented themes is cumulative comes from its own faulty precedent, not any holding from this Court. *Dallas*, 964 F.3d at 1308 (citing *Holsey v. Warden, Ga. Diagnostic Prison*, 694 F.3d 1230, 1260-61 (11th Cir. 2012)).

In *Foust v. Hook*, 655 F.3d 524, 539 (6th Cir. 2011), the Sixth Circuit considered affidavits introduced in habeas proceedings that covered the same ground as mitigation evidence presented at the sentencing phase of a capital trial. The Court recognized evidence covering similar themes was not cumulative as a matter of law. “Because the facts adduced at the mitigation hearing on this point were neither numerous nor detailed, [the Sixth Circuit] conclude[d] that new evidence is substantially different and not cumulative. *Id*. at 540.

Notably, *Foust* was decided under AEDPA, which required deference to a prior state court decision. The Sixth Circuit granted relief, vacating the petitioner’s death sentence. Sigmon’s case involves no deference and a request for a hearing, which has a much lower standard than the request for relief at issue in *Foust*.

In an unpublished opinion the Eleventh Circuit appropriately granted an evidentiary hearing on additional mitigation evidence. *Maples v. Comm’r, Ala. Dep’t of Corr.*, 729 Fed. Appx. 817 (11th Cir. 2018). Accepting the allegations from petition as true, the Eleventh Circuit recognized there was additional mitigation evidence that “accurately depicted” some of the prior mitigation themes. *Id*. at 826. While the Court granted an evidentiary hearing for a proper consideration of the new mitigation evidence, the later opinion from the same Circuit in *Dallas*, *supra*, suggests not just a Circuit split, but disagreement on the proper standard even within the Circuits.

The lack of appropriate analysis in many lower courts demonstrates the need for this Court to impose a high bar for denying a hearing as a matter of law. Without evaluating the evidence in a courtroom, the judicial system risks credibility when it

makes a determination on evidence that has been described but not actually presented. The Circuits are effectively holding any similar evidence, regardless of how broad the category is, cumulative.

C. Lower courts should not find new evidence insubstantial as a matter of law for merely covering similar ground as previously presented evidence.

Courts are quick to find any similar evidence presented in habeas proceedings "cumulative" and insubstantial. The default position is to find evidence previously presented that is close enough to the new evidence to label it cumulative. The proper rule should be that new evidence that could objectively meet the low standard of convincing just one juror to favor life should be the subject of an evidentiary hearing so it can be properly evaluated.

"Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984). A court's proper inquiry into additional mitigation evidence, even when trial counsel introduced mitigation evidence, should be probing and fact-specific. *Sears v. Upton*, 561 U.S. 945, 955 (2010). This Court has never limited its prejudice inquiry under *Strickland* to cases where "little or no mitigation evidence" was presented, but has also found deficient performance in cases where counsel presented "a superficially reasonable mitigation theory." *Sears v. Upton,* 561 U.S. 945, 954 (2010).

Deeming new mitigation evidence cumulative, and insubstantial, because it covers the same subject matter as trial evidence is not authorized by this Court's

precedent. Determining deficient performance related to mitigation requires the reviewing court to consider "the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding [and] reweigh it against the evidence in aggravation." *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)).

The "cumulative" designation often comes from the lower courts putting as much evidence as they can in similar categories. The default position is to deny hearings, which makes the denial of habeas relief a virtual certainty. The correct process is found in *Ramirez*, where the Ninth Circuit followed this Court's instruction to weigh the evidence in total and grant a hearing unless the claim is completely meritless and completely unsupported by facts.

II. THE LOWER COURTS' IMPROPERLY RESTRICTIVE VERSION OF THE *MARTINEZ* 'SUBSTANTIALITY STANDARD' IN HABEAS CLAIMS HAS CREATED AN ARTIFICIALLY HIGH BAR FOR "SUBSTANTIAL CLAIMS" UNDER *MARTINEZ*.

Martinez v. Ryan created a narrow exception to the traditional default rule in federal habeas proceedings. *Martinez v. Ryan*, 566 U.S. 1. (2012). Some states, like South Carolina, require a prisoner to raise claims of ineffective assistance of counsel in an "initial-review collateral proceeding," as opposed to direct appeal. In those cases, failure to raise a substantial claim of ineffective assistance of counsel will not bar a federal habeas court from hearing that claim if the default was caused by ineffective assistance of counsel in the collateral proceeding. *Davila v. Davis*, 137 S. Ct. 2057, 2065 (2017).

A. Sigmon's case presents the opportunity for this Court to reaffirm *Martinez* and make sure it is followed in the lower courts.

Martinez is in danger of becoming a dead letter. *Detrich v. Ryan,* 740 F.3d 1237, 1247 (9th Cir. 2013). Courts are insistent on finding the vast majority of defaulted habeas claims "insubstantial," negating the need for a hearing and leaving appellate courts to rule on an incomplete record.

Sigmon presents a typical *Martinez* claim, which will likely be repeated in future cases. He has a valid claim that was not raised in his state post-conviction relief proceedings. New counsel found a wealth of new mitigation evidence and developed as well as possible within the confines of only being able to collect interviews and affidavits. This new evidence was provided to the district court to obtain a hearing – not win relief on pleadings.

Sigmon's case serves as the right vehicle for this Court to clarify its *Martinez* holding and ensure its directive is honored in the lower courts.

B. Lower courts are misapplying the "substantial" requirement.

Martinez spent little time discussing what constituted "substantial." It simply pointed to *Miller-El v. Cockrell* in defining when a claim has "some merit." *Martinez*, 566 U.S. at 15. While most of the Circuits have recognized the "some merit" requirement, it is inconsistently applied. The Third, Seventh, and Ninth Circuits have properly applied the standard, recognizing the cause to excuse procedural default is separate from whether a petitioner would prevail on the merits.

Workman v. Superintendent Albion SCI, 915 F.3d. 928, 940-41 (3d Cir. 2019); *Brown v. Brown*, 847 F.3d 502 (7th Cir. 2017); *Detrich v. Ryan*, 740 F.3d 1237 (9th Cir. 2013).

A "substantial" claim does not have to automatically warrant prima facie relief. It is merely a claim that has some merit. *Martinez*, 566 U.S. at 14. The standard is the same as that required to grant a certificate of appealability; jurists of reasonable mind could disagree about the resolution of the matter or the issues presented are adequate to encourage further proceedings. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

This standard is critical. If the bar is too low, judicial efficiency is lost. If it is too high, the relief offered by *Martinez* is meaningless. "Substantial" offers a meaningful point between the two. Discussing "substantial" in terms of evidence, the Fourth Circuit has held that substantial evidence is more than a mere scintilla but less than a preponderance. *Laws v. Celebrezze*, 368 F.2d 640, 642 (4th Cir. 1966). A preponderance is not much. It would only require a court to believe a fact is more probable than not. *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993).

Substantial evidence does not even require a likelihood. An unlikely or improbable conclusion could be supported by substantial evidence. This Court has repeatedly held that substantial evidence is merely more than a scintilla and acceptable to a reasonable mind as adequate to support a conclusion. *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938). There is no requirement the court

believe the conclusion or accept the conclusion. It must simply be more than a meritless, unsupported argument.

In other words, substantial means measurable. This is the same as not being meritless. Each of the grounds raised by Sigmon has merit. Each ground could have made a difference in the ultimate penalty imposed by the jury. While the district court required a prima facie case for relief on affidavits attached to the amended petition, case law only requires those affidavits result in some substance. Once that substance is produced, a district court must grant an evidentiary hearing to further determine whether relief should be granted.

C. The Court should reaffirm the rule from *Martinez* – 'substantial' merely requires some factual support and some merit, and a substantial claim warrants an evidentiary hearing in federal habeas proceedings.

For a *Martinez* claim, this Court should review each claim for substance based on the argument above. Each substantial claim should be remanded to the district court with instructions that the district court conduct an evidentiary hearing so these claims can be developed further. To get to that point, the *Martinez* rule is clear: a claim must have some merit and some factual support. Yet lower courts are not following this Court's directive.

A claim wholly without merit means there is little for the court to do – the petitioner could never prevail regardless of the strength of the claims. The rule is simple: if the claim is one the petitioner could conceivably prevail on, the first element is satisfied.

A similar analysis dictates the factual portion of the *Martinez* test. If any facts support the claim, a hearing should be granted. This is not an unfamiliar standard. Regardless of counter-narratives raised by the State in a criminal case, if the petitioner can advance facts in support of a claim, there is a dispute to resolve. It is well-settled that factual disputes are best resolved in evidentiary hearings, where a factfinder can assess evidence, evaluate credibility, and question both witnesses and facts.

The lower courts are not granting hearings on cases with substantial claims. Rather, they are insisting the claim must be a winner at the start to warrant a hearing. In addition to violating *Martinez*, this rule makes little sense. Evidentiary development is nearly always required to convince a court to grant habeas relief.[9] Requiring that high bar prior to a hearing, and at the same time preventing a petitioner from meeting the bar by preventing a hearing, means few habeas claims will be successful.

This Court can avoid *Martinez* continuing to be a hollow promise by reaffirming its holding and clarifying the standard for a hearing contained in the opinion.

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[9] *Martinez* claims and claims subject to AEDPA are very different. Principles of comity dictate a federal court will override a state court only when faced with unreasonable action by a State, so federal courts are hesitant to reevaluate claims already developed in state court. *Martinez* claims, on the other hand, have never been developed.

CONCLUSION

Petitioner Brad Sigmon requests this Court grant the petition for a writ of certiorari, vacate the opinion of the Fourth Circuit Court of Appeals and remand this matter for an evidentiary hearing as required by *Martinez v. Ryan*.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-7

BRAD KEITH SIGMON,

Petitioner - Appellant,

v.

BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections and WILLIE DAVIS, Warden of Kirkland Correctional Institution,

Respondents - Appellees.

Appeal from the United States District Court for the District of South Carolina, at Anderson. R. Bryan Harwell, Chief U.S. District Court Judge. (8:13-cv-01399-RBH)

Argued: October 30, 2019 Decided: April 14, 2020

Amended: April 15, 2020

Before NIEMEYER, KING, and WYNN, Circuit Judges.

Affirmed by published opinion. Judge Wynn wrote the majority opinion, in which Judge Niemeyer joined. Judge King wrote a dissenting opinion.

ARGUED: Joshua Snow Kendrick, KENDRICK & LEONARD, P.C., Greenville, South Carolina, for Appellant. Melody Jane Brown, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellees. **ON BRIEF:** Jeffrey Phillip Bloom, Columbia, South Carolina, for Appellant. Alan Wilson, Attorney General, Donald J. Zelenka, Deputy Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellees.

WYNN, Circuit Judge:

Petitioner Brad Keith Sigmon seeks habeas relief from his death sentence for the murders of David and Gladys Larke. Sigmon argues that he received ineffective assistance of counsel and that the Supreme Court of South Carolina violated his due process and equal protection rights by granting relief to other similarly situated inmates.

Following a state court's denial of relief, the United States District Court for the District of South Carolina determined that the state court's denial did not constitute an unreasonable application of clearly established federal law or an unreasonable determination of the facts. As to Sigmon's procedurally defaulted claims of ineffective assistance of counsel, the district court concluded Sigmon has not demonstrated cause for the default or actual prejudice.

We affirm.

I.

In 2001, Sigmon and Rebecca Barbare had been in a romantic relationship for approximately three years and lived together in a trailer near the trailer of Barbare's parents, David and Gladys Larke. *Sigmon v. State*, 742 S.E.2d 394, 396 (S.C. 2013). But early in that year, after Barbare ended their relationship and moved in with her parents, Sigmon became increasingly obsessed with Barbare. *Id.*

On April 26, 2001, Sigmon and an acquaintance, Eugene Strube, spent the evening drinking alcohol and smoking crack cocaine. *Id.* Early in the morning of April 27, Sigmon told Strube that when Barbare left to take her children to school the next morning, Sigmon

would go to the Larkes' home, "tie her parents up," and "get ahold of" Barbare. J.A. 40–41.

Later that morning, after Barbare left to take her children to school, Sigmon took a baseball bat from beneath his trailer and entered David and Gladys Larke's home. *Sigmon*, 742 S.E.2d at 396. When David Larke, upon seeing Sigmon, called to Gladys Larke to bring him his gun, Sigmon struck David Larke in the back of his head with the bat several times. *Id.* Thereafter, Sigmon chased Gladys Larke into the living room and struck her several times in the head. *Id.* at 397. Sigmon then went to the kitchen, saw David Larke was still moving, and struck him again. *Id.* And after seeing that Gladys Larke was also still moving, Sigmon struck her several more times. *Id.* David and Gladys Larke died within minutes.

Sigmon retrieved David Larke's gun and waited for Barbare to return. *Id.* When she arrived, Sigmon forced her into her car and drove her away. *Id.* But during the ride, Barbare jumped from the car, causing Sigmon to pull over, chase after her, and shoot her. *Id.* Barbare survived the shooting. *Id.*

Meanwhile, Sigmon fled but was captured in Tennessee ten days later after his mother helped authorities locate him. *Id.* Upon his capture, Sigmon confessed to the murders. *Id.*

A South Carolina grand jury indicted Sigmon, charging him with two counts of murder, first degree burglary, and other offenses, including kidnapping. The state filed notice of its intent to seek the death penalty. Shortly before trial, the state dismissed all charges other than the two counts of murder and the single count of burglary.

Attorneys John Abdalla and Frank Eppes represented Sigmon at his July 2002 trial. During the guilt phase, Sigmon admitted his guilt to the jury. *Id*. The state presented evidence that David and Gladys Larke had likely lived for three to five minutes after Sigmon's assault, hemorrhaging and breathing blood, before dying as a result of blunt force trauma to the head. *Id.* The jury found Sigmon guilty of all charges. *Id.*

During sentencing, Sigmon's mitigation case focused on childhood abandonment and the development of his social mores and judgment, as well as evidence of drug use and mental illness. Sigmon also presented evidence he was adapting to prison life and was not a difficult prisoner. Mitigation witnesses included three experts—a clinical social work expert, a pharmacology expert, and an expert on prison adaptability. Sigmon also called five jail employees, five family members, and a volunteer who led a Bible class at the jail. Other witnesses testified about Barbare's previous relationships. After presenting sentencing evidence, the prosecutor and Attorney Eppes each made a closing argument. As permitted by South Carolina law, Sigmon also made a statement to the jury. S.C. Code Ann. § 16-3-28.

The jury recommended a sentence of death after finding three aggravating factors: two or more persons were murdered in one course of conduct; the murder was committed in the commission of a burglary; and the murder was committed in the commission of physical torture. The trial court sentenced Sigmon to thirty years for the burglary charge and to death for the two murder charges. The Supreme Court of South Carolina upheld the sentence on direct appeal. *State v. Sigmon*, 623 S.E.2d 648, 649–50 (S.C. 2005).

Sigmon then pursued relief through an application for post-conviction relief ("PCR") filed in state court. The PCR court appointed Attorneys William Ehlies and Teresa Norris to represent Sigmon.

Sigmon alleged in his PCR application that his trial counsel were ineffective in, among other things, failing to object to improper prison conditions evidence, failing to object to improper closing arguments, and making various errors related to the court's instructions on mitigation. An evidentiary hearing was held in August 2008, and in July 2009, the PCR court denied and dismissed Sigmon's PCR application. Sigmon sought review by the Supreme Court of South Carolina, which considered three of Sigmon's claims but ultimately affirmed the PCR court's dismissal. *See Sigmon*, 742 S.E.2d 394.

Thereafter, Sigmon sought relief in federal district court, asserting six grounds for relief, all of which had been presented to the South Carolina courts. After this Circuit's decision in *Juniper v. Davis*, 737 F.3d 288 (4th Cir. 2013), the district court appointed a new attorney—one who had not represented Sigmon before the PCR court—to review the case for claims available under *Martinez v. Ryan*, 566 U.S. 1 (2012). The attorney identified five additional grounds for relief. Sigmon amended his petition to include all eleven grounds. Federal proceedings were stayed while Sigmon pursued a second PCR action in state court, where the state court determined Sigmon's five new claims were procedurally defaulted under South Carolina law. When federal proceedings resumed, the state moved for summary judgment on Sigmon's eleven claims. Sigmon withdrew one defaulted claim before the magistrate judge issued a report and recommendation, leaving four procedurally defaulted *Martinez* claims.

Applying the deferential standard of review found in 28 U.S.C. § 2254(d), the magistrate judge recommended denying relief on all six of Sigmon's preserved claims. As for the four *Martinez* claims, the magistrate judge considered affidavits offered by Sigmon in support of these claims and nonetheless concluded none were substantial. Sigmon objected to the magistrate judge's report and recommendation. The district court overruled the objections, finding no preserved claim satisfied the standard articulated in § 2254(d) and no *Martinez* claim was substantial. The district court therefore granted the state's motion for summary judgment.

Thereafter, this Court granted a certificate of appealability on all of Sigmon's preserved claims and all but one of Sigmon's *Martinez* claims. On appeal, Sigmon argues that the district court erred on each asserted ground for relief and seeks to have his sentence vacated or, alternatively, seeks remand for an evidentiary hearing.

II.

We review the district court's denial of habeas relief on summary judgment de novo. *Bostick v. Stevenson*, 589 F.3d 160, 163 (4th Cir. 2009). However, we view this appeal generally through the highly deferential lens mandated by the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d). Our deference under § 2254 ensures "state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Accordingly, we may grant habeas relief on claims adjudicated on their merits in state court only if the adjudication "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 "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); *see also Cummings v. Polk*, 475 F.3d 230, 237 (4th Cir. 2007).

On the other hand, this highly deferential standard does not apply to Sigmon's *Martinez* claims, which were not adjudicated on their merits in state court. Generally, a federal court will not review the merits of habeas claims "that a state court declined to hear because the prisoner failed to abide by a state procedural rule." *Martinez*, 566 U.S. at 9. However, under certain circumstances, including raising a claim under *Martinez*, a petitioner may excuse a state court procedural default. *Id.* at 17. In such cases, a federal court considers those claims de novo. *Gray v. Zook*, 806 F.3d 783, 789 (4th Cir. 2015).

III.

We start with Sigmon's preserved claims. Deference under § 2254 permits habeas relief only if the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law or if the decision was based on an unreasonable determination of the facts. A state court adjudication is contrary to clearly established federal law when, on a question of law, the state court "arrives at a conclusion opposite" to a conclusion by the Supreme Court, or when, on "materially indistinguishable facts," a state court decides a case differently than the Supreme Court. *Cummings*, 475 F.3d at 237 (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)). And a state court unreasonably applies federal law when it "applies Supreme Court precedent in a different factual context from the one in which the precedent was decided and one to which extension of the legal principle of the precedent is not reasonable [or] fails to apply the

principle of a precedent in a context where such failure is unreasonable." *Id.* (alteration in original) (internal quotation marks omitted). In essence, to obtain federal habeas relief, "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." *Harrington*, 562 U.S. at 103.

Most of Sigmon's arguments allege his trial counsel—Attorneys Eppes and Abdalla—were ineffective. To demonstrate ineffective assistance of counsel, "[a] petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984).

A deficient performance is one that falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. A petitioner must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Id.* at 687. In this analysis, we must resist the temptation to "second-guess counsel's assistance after conviction or adverse sentence" and instead must make "every effort . . . to eliminate the distorting effects of hindsight." *Id.* at 689.

The question of whether counsel's deficiency prejudiced the defense "centers on 'whether there is a reasonable probability that, absent [counsel's] errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Williams v. Ozmint*, 494 F.3d 478, 484 (4th Cir. 2007) (alterations in original) (quoting *Strickland*, 466 U.S. at 695). Such a showing "requires a 'substantial,'

not just 'conceivable,' likelihood of a different result." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (quoting *Harrington*, 562 U.S. at 112). In making this determination, we review the "totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. And where, as here, a claim of ineffective assistance of counsel is advanced on habeas review, the petitioner's bar is even higher: "The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Harrington*, 562 U.S. at 105 (citations omitted).

A.

First, Sigmon claims trial counsel rendered ineffective assistance by failing to object to prison conditions evidence elicited by the state during cross-examination of a defense expert and by failing to object to the state's closing arguments reiterating that evidence. The PCR court concluded that Sigmon failed to satisfy either *Strickland* prong, noting that trial counsel opened the door to the evidence and concluding Sigmon could not show prejudice "given the overwhelming evidence of aggravating circumstances, and the limited mitigation." J.A. 756–57. The Supreme Court of South Carolina declined to review this claim. Because the PCR court's conclusion that Sigmon could not show prejudice is not contrary to clearly established federal law or an unreasonable determination of the facts, we agree that Sigmon is not entitled to relief on this claim.

At trial, Sigmon called James Aiken as an expert witness on prison adaptability and prison conditions. During direct examination, trial counsel asked Aiken, "Tell me a little bit about the way the day is structured in a maximum security facility?" J.A. 359–60. Aiken testified about the constant monitoring, the risk of violence, and the limited rights prisoners

are entitled to while incarcerated. On cross-examination, the state asked Aiken about visitation, television, recreation, library access, and showers for prisoners. Trial counsel did not object. During closing arguments, the state argued, "[W]e may think life imprisonment is serious business, but you still have your visitation with your family. You still have your mail. You still have your TV. You still eat three meals a day. Somebody washes and takes care of your clothes. You get all the benefits of health care, and recreation." J.A. 412. Again, trial counsel did not object. Before the PCR court, Sigmon argued trial counsel's failure to object constituted deficient performance because this evidence was inadmissible—and the closing argument improper—under *State v. Plath*, 313 S.E.2d 619 (S.C. 1984).

The PCR court concluded that, at the time of the trial, admission of prison condition evidence was not recognized as reversible error, particularly if the allegedly improper evidence was first elicited by defense counsel. Because trial counsel opened the door to the evidence by calling Aiken and asking him about prison conditions in the first place, "[t]here could be no proper basis for objection," and any failure to object was therefore not deficient performance. J.A. 752. Additionally, the PCR court noted trial counsel's statements in the PCR record demonstrated it was counsel's strategy to offer evidence of prison conditions and show "prison life in harsh reality." *Id.* Finally, the PCR court concluded Sigmon had not shown a reasonable probability that the sentencer would have imposed a different sentence had counsel successfully objected to this evidence.

The record is ambiguous as to whether trial counsel failed to object due to strategy or due to ignorance of the law. In South Carolina capital cases, evidence of prison

conditions is inadmissible. *See Bowman v. State*, 809 S.E.2d 232, 241 (S.C. 2018). And even at the time of Sigmon's trial, this rule was clear. *See Plath*, 313 S.E.2d at 627–28. Nonetheless, evidence before the PCR court suggests trial counsel's actions were part of a strategy "to elicit testimony about the harshness of prison life." J.A. 752. However, the record also suggests trial counsel did not know that prison conditions evidence was inadmissible. "[A]cts or omissions made by counsel under a mistaken belief or an ignorance of law are rarely—if ever—'reasonable' in light of prevailing professional norms." *Thompson v. Gansler*, 734 F. App'x 846, 855 (4th Cir. 2018) (unpublished) (collecting cases); *see also Strickland*, 466 U.S. at 690 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ."). Therefore, if trial counsel did not know the evidence was inadmissible, counsel's failure to object cannot be excused as trial strategy.

Nonetheless, even if trial counsel performed deficiently, the PCR court's conclusion that Sigmon cannot show prejudice was neither an unreasonable application of clearly established federal law nor an unreasonable factual determination. There was overwhelming and uncontested evidence of aggravating circumstances, and exclusion of prison conditions evidence would have also excluded parts of Sigmon's mitigation case. And the PCR court was not unreasonable in concluding there was not a reasonable probability that, had counsel objected to this evidence, the sentencer would not have imposed a death sentence. Therefore, Sigmon is not entitled to relief on this claim.

B.

Second, Sigmon argues the Supreme Court of South Carolina violated his due process and equal protection rights by denying him certiorari and relief on the issue of prison conditions evidence when "other death-sentenced inmates were granted relief." Appellant's Br. at 27.

In this Circuit, "claims of error occurring in a state post-conviction proceeding cannot serve as a basis for federal *habeas corpus* relief." *Bryant v. Maryland*, 848 F.2d 492, 493 (4th Cir. 1988). Sigmon's claim that the Supreme Court of South Carolina violated his due process and equal protection rights in his post-conviction proceedings is not a cognizable claim, and Sigmon cannot obtain relief. *See, e.g.*, *Lawrence v. Branker*, 517 F.3d 700, 717 (4th Cir. 2008) (concluding petitioner's due process claims arising from state post-conviction proceedings "are not cognizable on federal habeas review").

C.

Third, Sigmon argues trial counsel were ineffective for failing to object to two portions of the prosecutor's closing argument: comments that suggested the prosecutor had already made a reasoned decision that the death penalty was appropriate; and the prosecutor's argument that the jury should send a message to the community. The Supreme Court of South Carolina concluded that trial counsel's failure to object did not constitute deficient performance because the prosecutor's comments were not objectionable. *Sigmon*, 742 S.E.2d at 399–400. On federal habeas review, the district court concluded these comments were "borderline, but not necessarily improper." J.A. 1116. As explained below, under current Fourth Circuit law, the prosecutor's comments about sending a message

would be impermissible. However, at the time of Sigmon's trial, these comments were not clearly improper, and trial counsel had a strategic reason for declining to object. Therefore, Sigmon is not entitled to relief on this claim.

During the state's closing arguments, the prosecutor, Robert Ariail, made the following statement: "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?" J.A. 408–09. He then articulated a justification for the death penalty. Later, he argued that the jury's "decision will ring like a bell in this community as [to] what is the standard for appropriate conduct . . . . [,] 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." J.A. 415.

On review of the PCR court's decision, the Supreme Court of South Carolina observed, "[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." *Sigmon*, 742 S.E.2d at 400. The court then found the prosecutor "did not equate his role with that of the jury," noting, in the context of the entire closing argument, "the solicitor often emphasized the important role the jury played." *Id*. Because the closing argument was not objectionable, the court concluded trial counsel's failure to object was not deficient performance. *Id*.

The Supreme Court of South Carolina correctly observed that the prosecutor emphasized the role of the jury in his closing argument. And in the context of the prosecutor's closing argument, the comments Sigmon argues suggested the prosecutor had

already made a reasoned decision about the death penalty did not misstate the role of the jury. The Supreme Court of South Carolina was not unreasonable in concluding these statements were not objectionable.

As to the prosecutor's comments about sending a message, at the time of Sigmon's trial, South Carolina law suggested the comments were permissible. *See 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."). But Sigmon points to *United States v. Runyon*, in which this Court concluded a prosecutor's argument to the jury to "send a message to the community, send a message with your verdict," was improper. 707 F.3d 475, 514–15 (4th Cir. 2013). Under current Fourth Circuit law, the prosecutor's comments about sending a message would be improper. However, *Runyon* was decided more than a decade after Sigmon's trial, so trial counsel's failure to object to a similar argument was not deficient performance under then-applicable precedent.

Moreover, during PCR, trial counsel indicated his strategy was to avoid objecting to the state's closing argument. Specifically, Attorney Eppes testified the prosecutor is "an elected official and jur[ies] tend to think a lot of them. So, unless I caught Solicitor [Ariail] in what I would consider to be a whopper, I can't imagine that I would have objected." J.A. 683. These types of strategic choices are "virtually unchallengeable." *Strickland*, 466 U.S. at 690. Accordingly, the Supreme Court of South Carolina's conclusion that it was not deficient performance to refrain from objecting to these arguments is not contrary to clearly established federal law or an unreasonable determination of facts. Sigmon is therefore not entitled to relief on this claim.

D.

Fourth, Sigmon argues trial counsel were ineffective for failing to request a mitigating charge related to intoxication. The PCR court concluded the evidence at trial did not establish Sigmon was intoxicated at the time of the murders. The Supreme Court of South Carolina found the PCR court's conclusion to be sufficiently supported by the record. That conclusion is not an unreasonable determination of the facts in light of the evidence presented, and Sigmon is not entitled to relief on this claim.

During trial, Sigmon offered evidence he consumed alcohol and drugs the night before the crimes. Specifically, Strube, Sigmon's companion that night, testified that Sigmon "drank a six-pack" and that Strube and Sigmon smoked "a couple hundred dollars worth" of crack cocaine. J.A. 52–53. And Charles Hall, who worked for Sigmon, testified that when he saw Sigmon around 8:00 or 8:30 p.m. that night, he "could tell [Sigmon] had been drinking." J.A. 58. Finally, a defense expert testified Sigmon reported in a clinical interview that he had used "about $50 worth" of crack cocaine and had consumed "between two mixed drinks as well as . . . half a bottle of peppermint [Schnapps]." J.A. 326. However, Strube testified that by the time he and Sigmon left Sigmon's trailer, around 8:00 a.m. on the morning of the murders, neither Sigmon nor Strube was under the influence of crack cocaine.

Under South Carolina law at the time of Sigmon's trial, where there is evidence a defendant was intoxicated at the time of a murder, the trial judge must submit to the jury for consideration three mitigating circumstances provided for by state statute. *See State v. Stone*, 567 S.E.2d 244, 248 (S.C. 2002); *see also State v. Evans*, 637 S.E.2d 313, 314–15

(S.C. 2006). Specifically, the trial judge must instruct the jury to consider: whether the "murder was committed while the defendant was under the influence of mental or emotional disturbance"; whether the defendant's capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired"; and "[t]he age or mentality of the defendant at the time of the crime." S.C. Code Ann. § 16-3-20(C)(b)(2), (6)–(7). Here, the trial court instructed the jury on the first two of these statutory mitigating factors—influence of a mental or emotional disturbance and capacity to appreciate the criminality or conform his conduct—but did not instruct the jury to consider the statutory mitigating factor of Sigmon's "age or mentality." The PCR court concluded that this failure was irrelevant because it found that the record did not support an allegation that Sigmon was intoxicated at the time of the murder.

The Supreme Court of South Carolina affirmed the PCR court's dismissal, concluding that "there is evidence of probative value supporting the PCR court's finding that Sigmon was not intoxicated at the time of the murders." *Sigmon*, 742 S.E.2d at 400. Because Strube, who was with Sigmon the night preceding and the morning of the murders, testified Sigmon was not under the influence of crack cocaine just before the murders, the Supreme Court of South Carolina's conclusion is not "an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(2). And the resulting conclusion—that trial counsel did not perform deficiently by failing to request a mitigating circumstance unsupported by the record—similarly survives review under § 2254. Accordingly, Sigmon is not entitled to relief on this claim.

E.

Sigmon next argues trial counsel were ineffective for failing to object to the trial court's characterization of non-statutory mitigating circumstances in the jury instructions. Viewing the challenged remarks in the context of the jury instructions as a whole, the Supreme Court of South Carolina concluded the instructions were unobjectionable, and therefore trial counsel were not deficient in failing to object. We agree.

During the jury charge, the trial court instructed the jury to consider mitigating circumstances. Sigmon objects to the trial court's explanation of mitigating circumstances:

> [A] mitigating circumstance is neither a justification or an excuse for the murder. It[ ] simply lessens the degree of one's guilt. That is it makes the defendant less blameworthy, or less culpable. . . . A non-statutory mitigating circumstance is one that is not provided for by statute, but it is one which the defendant claims serves the same purpose.

J.A. 453. Sigmon argues these portions of the trial court's instructions limited the mitigating circumstances the jury was instructed to consider and improperly diminished the role of non-statutory factors.

After the PCR court's dismissal, the Supreme Court of South Carolina reviewed this claim and concluded that in the context of the overall charge, "the court clearly indicated the jury's power to consider any circumstance in mitigation." *Sigmon*, 742 S.E.2d at 402. Moreover, the description of a non-statutory circumstance as "not provided for by statute" "seems to have been added for clarity, not to inject a hierarchy into mitigating circumstances." *Id.* Because the trial court's instructions did not improperly describe non-statutory mitigating circumstances, the Supreme Court of South Carolina concluded trial counsel were not deficient in failing to object. *Id.*

It is "well established . . . that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146–47 (1973). Here, the trial court explained to the jury that it could choose a sentence of life imprisonment if it found a statutory mitigating circumstance, if it found a non-statutory mitigating circumstance, or as an act of mercy. And the trial court further explained each of those in turn. Therefore, the Supreme Court of South Carolina's conclusion that the instructions, when read in context, were not objectionable is not an unreasonable application of clearly established federal law or an unreasonable determination of the facts. The trial court's instructions correctly explained the jury should consider both statutory and non-statutory mitigating circumstances. Accordingly, Sigmon is not entitled to relief on this claim.

F.

In the last of his preserved claims, Sigmon argues trial counsel rendered ineffective assistance by pursuing an instruction for a mitigating circumstance of provocation by the victim. The PCR court concluded Sigmon had failed to demonstrate deficient performance or prejudice. On habeas review, the district court noted trial counsel's "somewhat confusing deposition testimony" but concluded the PCR court's conclusion that Sigmon had failed to demonstrate prejudice was not an unreasonable application of clearly established federal law or an unreasonable determination of facts. J.A. 1127. We agree.

Trial counsel sought an instruction on the statutory mitigating circumstance of provocation by the victim, which the trial court found supported by "the action of Mr. Larke saying he was going to get his gun." J.A. 399. Sigmon argues "[d]uring closing

arguments, however, counsel focused on Sigmon's relationship with Rebecca Barbare as the provocation." Appellant's Br. at 41. Sigmon argues counsel's closing argument sought to blame Barbare—Sigmon describes this as blaming the victim—and risked offending the jury.

On this claim, the PCR court observed the argument "confuses several positions" because it essentially "argues that because counsel failed to specify the supporting facts for the mitigating charge within his closing argument, that the jurors would interpret that as 'blaming the victim,' Ms. Barbare." J.A. 771. Based on its review of trial counsel's description of their strategy, the PCR court concluded the charge and argument were consistent with counsel's strategy and with Sigmon's confessions and statement to the jury. Moreover, the PCR court concluded Sigmon failed to demonstrate prejudice from any error related to this claim "for three reasons: 1) there is a factually distinguishable basis for the charge [in David Larke's action] that is not challenged; 2) the fact of [Sigmon]'s obsessive infatuation with Ms. Barbare was part and parcel of the case . . . ; and 3) the tremendous amount of evidence in aggravation in this brutal double murder." J.A. 773.

As the district court noted, in PCR, trial counsel gave inconsistent testimony on this issue "that could be read to indicate that trial counsel believed the basis for the provocation by victim charge was related to Ms. Barbare's actions with regard to her relationship with" Sigmon. J.A. 1127. However, even if trial counsel misunderstood the basis for the mitigation charge—believing Barbare's actions, rather than David Larke's, provided the basis—Sigmon has not undermined the PCR court's conclusion that he has not demonstrated prejudice.

Sigmon's argument focuses on how testimony about Barbare and her previous relationships may have offended the jury. But, as trial counsel testified during PCR, Sigmon and Barbare's relationship was central to counsel's theory of the case. Sigmon does not challenge that strategic choice. Further, Sigmon does not explain how the mitigating charge of provocation by a victim—a charge the trial court concluded was supported by the action of David Larke—caused any alleged offense to the jury. And we will not assume the jury misunderstood the instruction to refer not to provocation by the victim of the charges at trial, but to provocation by the victim's daughter. *See Penry v. Johnson*, 532 U.S. 782, 799 (2001) ("We generally presume that jurors follow their instructions."). The PCR court's conclusion that any deficiency regarding this mitigating charge did not prejudice Sigmon survives review under § 2254. Therefore, Sigmon is not entitled to relief on this claim.

IV.

We now turn to Sigmon's procedurally defaulted claims, three of which are before us. Generally, if a claim is procedurally defaulted in state court, federal habeas review is barred "unless the prisoner can demonstrate cause for the default and actual prejudice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). And ineffective assistance of state post-conviction counsel generally cannot establish cause for the default because "[t]here is no constitutional right to an attorney in state post-conviction proceedings." *Id.* at 752. However, when state law requires "claims of ineffective assistance of trial counsel [to] be raised in an initial-review collateral proceeding" and not on direct review—which South Carolina law does—procedural default does not bar federal habeas review of "a substantial

claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Martinez*, 566 U.S. at 17. Accordingly, to invoke *Martinez* and obtain federal habeas review of a claim defaulted in state court, Sigmon "must demonstrate that state habeas counsel was ineffective or absent, and that the underlying [ineffective assistance of counsel] claim is substantial." *Porter v. Zook*, 898 F.3d 408, 438 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 2012 (2019). To demonstrate that "the underlying ineffective-assistance-of-trial-counsel claim is a substantial one," Sigmon must show "that the claim has some merit." *Martinez*, 566 U.S. at 14.

Sigmon seeks an evidentiary hearing on his *Martinez* claims. We review a district court's decision to deny a habeas petitioner an evidentiary hearing for abuse of discretion. *Conaway v. Polk*, 453 F.3d 567, 582 (4th Cir. 2006). "In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). And as the Supreme Court recognized in *Martinez*, claims of ineffective assistance of counsel "often depend on evidence outside the trial record." *Martinez*, 566 U.S. at 13; *see also Detrich v. Ryan*, 740 F.3d 1237, 1246 (9th Cir. 2013) (en banc) (plurality opinion). "*Martinez* would be a dead letter if a prisoner's only opportunity to develop the factual record of his state PCR counsel's ineffectiveness had been in state PCR proceedings, where the same ineffective counsel represented him." *Detrich,* 740 F.3d at 1247 (citing *Strickland*, 466 U.S. at 694). Nonetheless, "[w]here documentary evidence provides a

sufficient basis to decide a petition, the court is within its discretion to deny a full hearing." *Runningeagle v. Ryan*, 825 F.3d 970, 990 (9th Cir. 2016).

A.

Sigmon argues trial counsel failed to find and present significant mitigating evidence at the sentencing phase. Sigmon did not present this claim to the PCR court in his first PCR application, so to overcome this procedural default, Sigmon must show PCR counsel were ineffective or absent, and that his underlying claim of ineffective assistance for failure to present additional mitigation evidence is substantial. The district court concluded Sigmon's claim was not substantial and therefore habeas review was barred. We agree.

Trial counsel presented mitigation evidence through three experts, five jail employees, five family members, and a volunteer who led a Bible class at the jail. However, Sigmon alleges trial counsel failed to elicit sufficient mitigating evidence from these witnesses and failed to call additional mitigation witnesses. Specifically, Sigmon argues the following evidence should have also been offered: Sigmon's father, his brother, and Pastor Don McKellar—the pastor at Sigmon's mother and stepfather's church—could have testified about Sigmon's positive adjustment to prison. Barbare's son, who was 12 years old at the time of the trial, could have testified that Sigmon treated him like a son. Sigmon's mother could have testified that Sigmon's father pushed or hit Sigmon during his childhood. She and other family members could have testified that Sigmon began working at age 15 to support his family. Greenville County Detention Center staff psychiatrist Dr.

Ernest Martin could have testified about Sigmon's history of depression. And Dr. Martin and Pastor McKellar could have testified to Sigmon's remorse.

Sigmon did not present this claim in his first PCR action, and the state court concluded it was procedurally defaulted. To invoke *Martinez*, Sigmon must demonstrate that this underlying ineffective assistance of counsel claim is substantial with reference to *Strickland*'s two familiar prongs.

Sigmon has not made out a substantial claim that trial counsel performed deficiently. Generally, trial counsel are not required to "investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Wiggins*, 539 U.S. at 533. Rather, trial counsel must "make reasonable investigations or . . . make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691.

This case is distinguishable from the cases Sigmon cites. For example, in *Williams v. Taylor*, the Supreme Court held trial counsel were deficient when they failed to seek mitigating prison records and prison-official testimony and when they "failed even to return the phone call of a certified public accountant who had offered to testify" regarding his visits to the defendant "as part of a prison ministry program." 529 U.S. 362, 396 (2000). And in *Gray v. Branker*, despite repeated and serious indications of the defendant's mental impairment, defense counsel never investigated the defendant's mental health after the defendant instructed counsel not to do so on one occasion at the pre-indictment stage. 529 F.3d 220, 229–31 (4th Cir. 2008). This Court held that a "reasonable lawyer" would not rely on such a "self-assessment" by the defendant, and the mental health

evidence would have provided the jury a "medical explanation for Gray's compulsive behavior and his inability to control his reactions." *Id.* at 231, 236; *see also Williams v. Stirling*, 914 F.3d 302, 313–15 (4th Cir. 2019) (concluding trial counsel were deficient when they failed to follow up on indications of the defendant's potentially mitigating fetal alcohol syndrome). Similarly, in *Wiggins*, the only significant mitigating factor the defendant's capital jury heard was that the defendant had no prior convictions. 539 U.S. at 537. While defense counsel had indications that the defendant's childhood had been traumatic, defense counsel conducted only a minimal investigation and failed to discover that the defendant experienced severe, long-term physical and sexual abuse, including repeated rape while in foster care. *Id.* at 523–24, 535. The Supreme Court held that such compelling mitigating evidence might have produced a different outcome and that counsel's efforts were prejudicially deficient. *Id.* at 536.

No comparable deficiency occurred here. Much of the evidence Sigmon argues should have been discovered and presented was cumulative of evidence presented to the jury. *See Morva v. Zook*, 821 F.3d 517, 530 (4th Cir. 2016) ("That the mitigating evidence [the defendant] insists should have been presented at trial is merely cumulative to the evidence actually heard by the jury further undercuts [the defendant's] claim for deficient performance."). Several jail employees and an expert testified to Sigmon's adaptability to prison. Positive character evidence came in through a jail volunteer and several family members, including Sigmon's parents and son. A social work expert testified about Sigmon's difficult childhood, including the fact that Sigmon worked as a teenager to support his family. Dr. Martin's diagnosis of major depressive disorder came in through

another defense expert. Trial counsel introduced evidence of Sigmon's remorse through Sigmon's mother, through a jail employee, and through their closing argument, which referred to Sigmon's call to his mother before his capture. Sigmon argues no witnesses testified to any physical abuse or domestic violence during his childhood. However, this potentially mitigating fact—in light of the testimony from the social work expert and Sigmon's family about his difficult childhood more generally—is not on a par with the substantial mitigation evidence missed by counsel in *Williams*, *Gray*, and *Wiggins*.

Moreover, Sigmon has not demonstrated how trial counsel's investigation was deficient. Counsel used a mitigation expert, as suggested by the ABA guidelines for death penalty cases. *See American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* 11.4.1(D)(7) (1989). And the mitigation team interviewed several of the people Sigmon now argues should have been asked to testify. *See Rompilla v. Beard*, 545 U.S. 374, 389 (2005) ("Questioning a few more family members and searching for old records can promise less than looking for a needle in a haystack, when a lawyer truly has reason to doubt there is any needle there.").

Affidavits of trial counsel suggest they were not aware of some of the mitigating evidence Sigmon argues should have been presented. However, even if trial counsel did not make reasonable, informed decisions about the scope of the investigation, because the evidence Sigmon identifies is cumulative of evidence presented to the jury, trial counsel's failure to present that evidence did not prejudice Sigmon. *See Morva*, 821 F.3d at 530; *see also Huffington v. Nuth*, 140 F.3d 572, 580 (4th Cir. 1998) ("The Sixth Amendment . . .

does not always compel counsel to undertake interviews and meetings with potential witnesses where counsel is familiar with the substance of their testimony.").

Moreover, even assuming Sigmon presents a substantial claim of ineffective assistance of trial counsel, to invoke *Martinez*, he must also demonstrate PCR counsel were ineffective in failing to raise this issue. Sigmon suggests the additional information was "easily located during the *Martinez* review." Appellant's Br. at 52. But PCR counsel's affidavits indicate that although they did not independently interview Sigmon's proposed additional witnesses (other than Dr. Martin) prior to the PCR proceedings, PCR counsel "retained a mitigation investigator who conducted a number of interviews" with family and community witnesses. J.A. 848. Attorney Norris stated that "to [her] knowledge[,] [the] investigator did not interview [Barbare's son] or [Pastor] McKellar." J.A. 849. Nonetheless, Sigmon's allegations of deficient performance are simply that PCR counsel failed to conduct interviews themselves and that their investigator failed to interview Barbare's son and the pastor at Sigmon's parents' church. This is insufficient to show ineffective assistance by PCR counsel, and no other facts alleged in the petition support such a finding.

Sigmon's underlying claim of ineffective assistance of counsel is not substantial and Sigmon fails to show ineffective assistance of PCR counsel, as required under *Martinez*. And the district court did not abuse its discretion by considering the affidavits submitted by Sigmon but not granting him an evidentiary hearing. The facts, as Sigmon alleges them, do not entitle Sigmon to relief.

B.

Sigmon next argues trial counsel were ineffective for failing to object to the stun belt he wore during trial. Like the claim relating to mitigation evidence, this claim was procedurally defaulted in state court. The district court concluded Sigmon failed to demonstrate prejudice sufficient to establish a substantial claim under *Martinez*. In light of the limited allegations regarding whether any juror saw the stun belt, we agree that Sigmon has not demonstrated that this claim is substantial.

Once again, to overcome the procedural bar facing claims not adjudicated on the merits by the state court, Sigmon must demonstrate this underlying ineffective assistance of counsel claim is substantial, considering the deficient performance and prejudice requirements of *Strickland*. Here, Sigmon offers affidavits from both trial counsel, each stating that Sigmon

> was required to wear a stun belt in court. This started with the very first hearing in the case. There was never a hearing in court for the judge to decide whether or not Mr. Sigmon would be required to wear a stun belt. We did not consider filing a motion or objecting to Mr. Sigmon wearing a stun belt. I specifically recall that he was wearing a stun belt during jury selection and the voir dire process of jurors. In retrospect, I am concerned that jurors probably saw him with the stun belt. This, coupled with Sigmon's own terrible closing argument, would have been enough to frighten jurors or cause them concern so that it likely influenced their verdict for death.

J.A. 823–24. Attorney Eppes adds, "It never occurred to me to object to Mr. Sigmon being required to wear a stun belt." J.A. 834.

At the time of Sigmon's trial in 2002, it was established that "[w]henever unusual visible security measures in jury cases are to be employed, [courts] require the district judge to state for the record, out of the presence of the jury, the reasons therefor and give counsel

an opportunity to comment thereon." *United States v. Samuel*, 431 F.2d 610, 615 (4th Cir. 1970). Three years after Sigmon's trial, in *Deck v. Missouri*, the United States Supreme Court reiterated the "basic principle" that visible restraints like shackling "'should be permitted only where justified by an essential state interest specific to each trial'" and applied the principle to capital sentencing trials. 544 U.S. 622, 628–29 (2005) (quoting *Holbrook v. Flynn*, 475 U.S. 560, 568–69 (1986)). This principle similarly applies to stun belts. *See United States v. Moore*, 651 F.3d 30, 45–48 (D.C. Cir. 2011); *Wrinkles v. Buss*, 537 F.3d 804, 814–15 (7th Cir. 2008); *United States v. Miller*, 531 F.3d 340, 344–45 (6th Cir. 2008); *Gonzalez v. Pliler*, 341 F.3d 897, 899–901 (9th Cir. 2003); *United States v. Durham*, 287 F.3d 1297, 1305–07 (11th Cir. 2002).

The record offers little information about whether the stun belt was visible to the jury. If it was, the longstanding requirement for the trial court to articulate a reason for visible restraints on the record would have applied. *See, e.g.*, *Samuel*, 431 F.2d at 615. There is no such record here, and trial counsel "did not consider filing a motion or objecting" to Sigmon wearing a stun belt for the entirety of the proceedings before the jury. J.A. 823. So, if the stun belt were visible, this would constitute deficient performance. If, on the other hand, the stun belt were not visible, whether trial counsel were deficient for failing to object to a non-visible restraint finds less support in cases decided before Sigmon's trial. *See, e.g.*, *Durham*, 287 F.3d at 1304 ("We have never addressed whether the use of stun belts to restrain criminal defendants raises the same set of constitutional concerns as do other physical restraints."). Although now a trial court must articulate on the record a reason for requiring a defendant to wear a stun belt, it is less clear that counsel's

failure to object to a stun belt that was not visible to the jury would have fallen below an objective standard of reasonableness at the time of Sigmon's trial. But even assuming counsel's failure to object was deficient performance, to make out a substantial claim under *Martinez*, Sigmon must also show counsel's error prejudiced him.

Sigmon argues the Supreme Court's decision in *Deck* requires this Court to presume prejudice. *See* 544 U.S. at 635. However, *Deck* was a direct appeal. *Id.* at 625. Here, Sigmon raises a claim of ineffective assistance of counsel. Accordingly, Sigmon must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

To establish prejudice, Sigmon alleges "[t]he likelihood that jurors saw the stun belt means that jurors . . . were fearful of him." J.A. 814. But Sigmon has offered minimal allegations about the stun belt he wore and whether jurors actually saw it. For example, Sigmon does not allege he wore the stun belt over his clothes or that it was visible under his clothing, and he alleges no information about its size other than that it was "large." J.A. 812. As to whether any juror actually saw the stun belt, Sigmon does not allege any juror saw it, and the only evidence offered by Sigmon is trial counsel's affidavits, which state that they are "concerned that jurors probably saw him with the stun belt." J.A. 824, 834.

Where a petitioner presents no evidence a juror saw the stun belt, courts have been reluctant to assume prejudice. *See Miller*, 531 F.3d at 347–48 (collecting cases). At least some courts have considered stun belts to present a lower risk of prejudice than shackles and other methods of restraint because stun belts are worn under clothes and are less obvious to jurors. *See, e.g.*, *Nance v. Warden, Ga. Diagnostic Prison*, 922 F.3d 1298, 1305–

06 (11th Cir. 2019) (holding that a state court's conclusion that the petitioner's stun belt was not visible to the jury because it was worn under the petitioner's clothes was not an unreasonable determination of the facts); *Bland v. Hardy*, 672 F.3d 445, 450 (7th Cir. 2012) ("A stun belt may be less prejudicial to a defendant than a courtroom full of armed guards."). But here, Sigmon does not even *allege* a juror saw the stun belt, and we will not assume Sigmon was prejudiced by the stun belt without, at a minimum, an allegation that at least one juror actually saw the stun belt.*

Even if Sigmon's ineffective assistance of trial counsel claim were substantial, he must also show PCR counsel were ineffective for failing to raise it. Sigmon offers the affidavit of one PCR counsel, stating she was not aware that Sigmon wore a stun belt at trial, but that if she had been aware of evidence supporting that allegation and the allegation "that jurors who were actually seated likely saw the stun belt," she would have asserted the issue. J.A. 850. This does not demonstrate deficient performance. And although Sigmon alleges that PCR counsel were "unaware of the underlying facts," Sigmon has not argued, except by implication, that PCR counsel performed deficiently in failing to raise this issue. J.A. 814. Because Sigmon's allegations, even if true, do not entitle him to relief, the district court did not abuse its discretion in declining to hold an evidentiary hearing and Sigmon is not entitled to relief on this claim.

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* Courts have considered other ways stun belts may cause prejudice. *E.g.*, *Gonzalez*, 341 F.3d at 900 (considering the "psychological consequences" to a defendant of wearing a stun belt during trial); *Durham*, 287 F.3d at 1306 ("[A] stun belt imposes a substantial burden on the ability of a defendant to participate in his own defense and confer with his attorney during a trial."). But Sigmon has not alleged those other sources of prejudice here.

C.

Finally, Sigmon argues that trial counsel were ineffective for not knowing that each defense attorney could present a closing argument at sentencing, allowing one to argue after Sigmon's statement to the jury. The district court observed the record was unclear as to whether trial counsel knew of this option, but nonetheless concluded Sigmon could not show the outcome of the proceeding would have been different had trial counsel addressed the jury one more time. We agree that Sigmon cannot demonstrate prejudice on this underlying claim of ineffective assistance of trial counsel and therefore has not shown this claim is substantial under *Martinez*.

First, it is not clear that trial counsel were unaware of their options regarding the closing argument. During the guilt phase, Attorney Eppes's discussion with the trial court demonstrated he knew counsel's argument could follow Sigmon's and that "the statute did not specify whether the defendant spoke first or second." D. Ct. Dkt. No. 33-1 at 18–19. And the statute Sigmon now cites addresses argument in both the guilt and sentencing phases. S.C. Code Ann. § 16-3-28. However, an affidavit from Attorney Eppes states, "At the time, I believed the law required Mr. Sigmon to be the very last speaker at closing argument at sentencing." J.A. 833. Acts by counsel made "under a mistaken belief or an ignorance of law are rarely" reasonable. *Thompson*, 734 F. App'x at 855.

But second, even assuming that counsel's ignorance of the law regarding the order for closing arguments constitutes deficient performance, Sigmon has not shown "a reasonable probability that, but for counsel's" failure to offer an additional closing argument, "the result of the proceeding would have been different." *See Strickland*, 466

U.S. at 694. Attorney Eppes states in an affidavit that if he had known his co-counsel could give a closing argument after Sigmon, he “certainly would have had Mr. Abdalla give a closing argument after Mr. Sigmon.” J.A. 833. But even if a second closing argument by counsel had “defused the situation and gotten the jury to re-focus,” the jury would have considered the same aggravating and mitigating evidence. *Id.* Here, evidence of aggravating circumstances was uncontested, and Sigmon has not shown a reasonable probability that a second argument by counsel would have resulted in a different outcome.

Moreover, even if Sigmon’s ineffective assistance of counsel claim were substantial, he must also show PCR counsel were ineffective for failing to raise it. Sigmon has not argued PCR counsel were ineffective in failing to raise this issue, other than that PCR counsel “would have asserted this issue . . . if counsel had been aware that trial counsel was unfamiliar with the law.” J.A. 816. Sigmon is therefore not entitled to relief on this claim.

V.

Sigmon has failed to show that the state court that denied him post-conviction relief unreasonably applied clearly established federal law or unreasonably determined the facts. He has also failed to demonstrate post-conviction counsel were ineffective in failing to raise any substantial claims. Accordingly, we affirm the district court’s denial of habeas relief.

AFFIRMED

KING, Circuit Judge, dissenting:

Brad Keith Sigmon committed horrific murders. He repeatedly confessed that to police, and he admitted it throughout his trial in the South Carolina state court. Indeed, the only real question for the jury was whether Sigmon deserved the death penalty or a life sentence. In the circumstances, the defense's paramount responsibility was to convince the jury that Sigmon was worthy of some mercy. Yet Sigmon's trial counsel presented a feeble mitigation case, resulting in a significant imbalance between the evidence in aggravation and the evidence in mitigation that has since been repeatedly invoked by the state and federal courts to deny Sigmon relief from his death sentence. Now that the lawyers appointed to represent Sigmon in these federal habeas proceedings have gathered evidence supporting a stronger mitigation case, Sigmon merely asks for a hearing on his claim that his trial counsel's failure to discover and present such evidence amounted to constitutionally ineffective assistance (Ground VII of Sigmon's 28 U.S.C. § 2254 petition). But the district court and my esteemed colleagues in the panel majority have ruled that no hearing is warranted, deeming much of Sigmon's new evidence to be cumulative and his ineffective assistance claim to be facially meritless. Because I disagree and would accord Sigmon a hearing, I respectfully dissent.[1]

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[1] To be clear, I focus on the ineffective assistance claim raised in Sigmon's § 2254 petition as Ground VII because it is his strongest claim and plainly merits a hearing. I would vacate the judgment and remand for further proceedings that could also include further consideration of Sigmon's other claims, as appropriate.

I.

A.

In the sentencing phase of Sigmon's July 2002 trial, the prosecution argued that Sigmon deserved no mercy because he showed no mercy to his victims, Gladys and David Larke, "living and breathing human beings who underwent what had to be the most horrific death that [one] could ever imagine, of seeing someone coming at you with a baseball bat." *See* J.A. 413.[2] The prosecution relied on three aggravating factors to obtain a death sentence, needing to prove only one and having already proved the first two in the trial's guilt phase: that Sigmon murdered two or more victims; that he committed the murders in the commission of a burglary; and that he committed the murders in the commission of physical torture.

The defense countered that Sigmon, distraught over his breakup with the Larkes' daughter, Rebecca Barbare, was "a love-sick idiot that snapped" — but he was "not a very bad individual" or "a very bad prisoner." *See* J.A. 416, 427. Among the mitigating factors advanced by the defense were that Sigmon did not have a significant criminal history, that he murdered the Larkes while under the influence of a mental or emotional disturbance, that his capacity to conform his conduct to the requirements of the law was impaired, and that he was adaptable to prison.

[2] Citations herein to "J.A. __" refer to the contents of the Joint Appendix filed by the parties in this appeal.

1.

The defense presented three expert witnesses in the sentencing phase. Alex Morton, an expert in addictions and psychopharmacology, concluded based on an examination of Sigmon and a review of medical and psychiatric records that Sigmon (1) suffers from "a medical disorder of the brain called recurrent major depressive disorder" (a diagnosis made by a psychiatrist, and not by Morton); (2) has "chemical dependency disorders, specifically regarding cocaine, alcohol and marijuana, and some past use of other substances"; and (3) "was using a number of substances to treat his depression and temporarily was probably helping . . . but overall made that depression worse." *See* J.A. 320-21. Morton also testified that Sigmon's use of alcohol and crack cocaine prior to the murders could have caused him to be violent, agitated, and impulsive. Regarding the evidence that Sigmon repeatedly struck the Larkes with a baseball bat, Morton explained that "repetitive behaviors" are consistent with cocaine use, and that "it's almost like once [Sigmon] started, he did not stop, and that is something you see with animals that are being studied with cocaine." *Id.* at 345-46.

Shirley Furtick, a licensed clinical social worker employed by the South Carolina Department of Mental Health, conducted a biopsychosocial assessment that included interviews with Sigmon, his parents, and other family members, along with a review of Sigmon's available medical and law enforcement records. *See* J.A. 199-200 (Furtick's testimony that a biopsychosocial assessment is used to "explore histories of persons" and "explain how they came to be who they are"). Recounting significant aspects of Sigmon's childhood, Furtick noted that Sigmon was the oldest of five children, born in quick

succession when their mother was between the ages of just seventeen and twenty-two; that Sigmon's father was in the military, causing the family to relocate frequently, including to the Philippines soon after the fifth child was born; that Sigmon's mother had difficulty coping with being a young mother and adjusting to military life; that Sigmon's father abused alcohol and spent a lot of time away from the family; that Sigmon's parents intermittently separated, eventually divorced, and both remarried, with Sigmon being moved back and forth between the parents and various stepparents; that Sigmon lived in ten different states by the time he was sixteen years old; and that he dropped out of high school at nineteen to get married, nine weeks before graduation. Furtick also mentioned that Sigmon "was not only what we call a surrogate parent or caretaker for his younger siblings, but he was also a provider for the family in helping the mother to financially provide for the children. He went to work at age 16 while also trying to attend school." *Id.* at 218.

According to Furtick, although Sigmon's "basic human needs" for food, shelter, clothing, and education were met as a child, his family's frequent moves were "very disruptive" and "a problem area for [Sigmon]." *See* J.A. 227. Additionally, Sigmon was a victim of "emotional neglect," in that his mother, as a result "of her responsibilities for all of these kids, could not have been consistently emotionally available to all of these kids at the same time." *Id.* Furtick explained that children like Sigmon often "end up feeling depression" and "develop anxious habits," causing them to be unable to "establish and maintain healthy relationships" and to "tend to be over reactive and overly involved or attached to relationships." *Id.* Furtick also related that, as an adult, Sigmon "saw his role

as provider and caretaker"; when he was in a relationship and his partner "would start to reject him, he couldn't understand that, and he would get depressed and he would self-medicate his depression with his alcohol [and drugs]." *Id.* at 239. In Furtick's view, Sigmon's mental state and substance abuse impaired "his ability to use good judgment and insight," with "[v]ery poor" results. *Id.* at 242.

James Aiken, an expert in prison adaptability, assessed Sigmon and determined "that he can be incarcerated in a prison setting for the remainder of his life without causing an undue risk of harm to staff, inmates, as well as to the general community." *See* J.A. 362. Aiken based his assessment on, inter alia, evidence that Sigmon "adjusted very well to his confinement" during his pretrial detention and that he was not a member of a gang or other security threat group. *Id.* at 363-64.

2.

The defense called five of Sigmon's family members to testify on his behalf. Sigmon's aunt, Brenda Clark, testified that Sigmon had been "a happy little baby" and "just seemed like a normal child that did normal childhood things." *See* J.A. 279. As an adult, Sigmon "loved to be around the family" at Christmas get-togethers, where he would "hug [Clark] and say, I love you, Aunt Brenda." *Id.* at 280. Clark said she could feel that Sigmon was sincere and knew him to be a loving and caring person.

Sigmon's stepfather, Donnie Wooten, testified that Sigmon "was just like a normal kid" who did "[n]ot really" need discipline, answered "yes, sir," and did what he was told. *See* J.A. 156. Wooten said that Sigmon "seemed fine" as an adult; treated his mother "nice, good"; treated Wooten "[f]ine, good, real good"; treated the remainder of the family

"[n]ice"; and generally "treats everybody fine, you know, decent." *Id.* at 157. Wooten also testified that he knew the Larke family and they were "[r]eal nice people." *Id.*

Sigmon's adult son, Robbie Sigmon, testified that Sigmon never abused him and was "a loving father." *See* J.A. 161. Robbie recalled "the happiest birthday [he] ever had," when his father "bought [him] a dirt bike" rather than "getting insurance." *Id.* Robbie also recalled frequently playing outside with his father and helping him at work.

Sigmon's father, Ronnie Sigmon, testified that he "was very proud of [Sigmon], still am," though Sigmon had "made a mistake of course." *See* J.A. 381. Ronnie said that "what's so shocking about [the murders]" was that Sigmon "was always the peace maker" and "the one that stopped the fights." *Id.* (elaborating that he "used to think [Sigmon] might be a coward, but he just didn't want the trouble"). Ronnie praised his son as a talented hunter, fisherman, and athlete who was "tremendously good in soccer" but whose potential sports career was hindered by the family's frequent moves. *Id.* Turning back to the murders, Ronnie said that he felt "as bad for the Larke family as [Sigmon did]," that such conduct had "never been in our family on either side," and that "[s]omething pushed [Sigmon's] buttons." *Id.* at 382.

The final family member to testify was Sigmon's mother, Virginia Wooten, who described learning about the murders and then urging Sigmon to surrender to the police. Virginia recounted that Sigmon immediately expressed remorse, saying "he didn't want to live" and had "done an awful thing." *See* J.A. 389. According to Virginia, both she and Sigmon would have given their lives in order to "bring [Gladys and David Larke] back." *Id.* at 391-92.

3.

The defense's mitigation case also involved six witnesses who had interacted with Sigmon during his pretrial detention at the Greenville County Detention Center. Rosa Jones, a licensed practical nurse on staff, recalled that she spoke with Sigmon upon his arrival at the jail in May 2001. Jones said Sigmon "was sad, and he acted sort of remorseful." *See* J.A. 187.

Julia Moore, a licensed professional counselor who worked with jail inmates, testified that she spoke with Sigmon three times — first when he arrived at the jail in May 2001 and then in September 2001 and February 2002 to check medication prescribed by the jail psychiatrist. Each meeting lasted for approximately five to ten minutes and led Moore to conclude that Sigmon was not exhibiting any suicidal or homicidal ideations. *See, e.g.*, J.A. 180 (Moore's testimony regarding the jail intake meeting that "[a]t that point he seemed not to be any danger to himself or anyone else").

Correctional officer Valerie Putnam testified that she had interacted with Sigmon at the jail "[e]very now and then" and he had never posed a threat to her or anyone. *See* J.A. 264-65. Their conversations had been "short and brief," and he was always "pleasant" to be around. *Id.*

Officer Matt Talley testified that Sigmon was "just like any other inmate, as far as [Talley had] never had any problems with him personally." *See* J.A. 175. When asked by defense counsel to comment on Sigmon's "aggressive or violent nature," however, Talley recalled that Sigmon once became aggressive "with another younger officer," prompting

Talley to "step[] in at that time and calm[] the situation down." *Id.* Otherwise, Talley had "never heard [Sigmon] threaten anybody." *Id.*

Captain Michelle Melton, who oversaw the jail, testified that Sigmon was initially housed in a maximum-security unit because of the severity of the charges against him, but was soon moved to a medium-security unit because of his good behavior. Thereafter, officers found a jail visitation pass — a contraband item that could be used to facilitate an escape — hidden in Sigmon's cell. When Melton confronted Sigmon about the pass, he admitted that he had been "trying to find a way to get out of here," but opted not to use the pass to escape and concealed it in his cell for lack of a way to dispose of it. *See* J.A. 290-91. As punishment, Sigmon was temporarily returned to the maximum-security unit, where he staged a brief hunger strike in protest. Since then, Melton testified, there had been "no significant behavioral problems from [Sigmon]." *Id.* at 300. Melton described Sigmon as "well mannered, respectful, well presented in his communication skills and his appearance, actively involved in religious activities. He goes about business . . . in an institution as expected." *Id.* at 304.

Finally, Terry Bradley, who led a weekly Bible class at the jail, testified that Sigmon was "very faithful in coming [to the class]" and "showed enthusiasm to simply learn more about God." *See* J.A. 268. Bradley recounted that Sigmon once brought to class a Muslim fellow inmate who subsequently converted to Christianity. Bradley said Sigmon "seemed to be a normal average person" and did "not really" "seem any different than the other guys who had lesser crimes." *Id.* at 276.

B.

Reflective of the weakness of the mitigation evidence presented by Sigmon's trial counsel, it took the jury less than three hours to return its unanimous recommendation that Sigmon be sentenced to death. Since then, courts have repeatedly cited the defense's meager mitigation case in concluding that Sigmon was not and could not have been prejudiced by other errors in his trial. For example, in rejecting the ineffective assistance claim raised in Sigmon's application for post-conviction relief ("PCR") on the ground that his trial counsel should have objected to prison conditions evidence elicited by the prosecution, the state PCR court ruled that Sigmon suffered no prejudice "given the overwhelming evidence of aggravating circumstances[] and the limited mitigation." *See Sigmon v. State*, No. 2006-CP-23-6547, at 30-31 (S.C. Ct. Com. Pl. July 20, 2009). Today, our panel majority defers to the PCR court's prejudice ruling to reject the same claim (Ground I of Sigmon's 28 U.S.C. § 2254 petition).

C.

As the lawyers appointed to represent Sigmon in these federal habeas proceedings have shown by way of affidavits, however, there was a stronger mitigation case to be made. These affidavits reflect that, because of an inadequate investigation by Sigmon's trial counsel, there were witnesses who took the stand without imparting important information, as well as other potentially helpful witnesses who were never called. Based on the affidavits, Sigmon simply requests "an evidentiary hearing to further develop the mitigation case that should have been presented on [his] behalf," in an endeavor to prove

the ineffective assistance claim raised in his § 2254 petition as Ground VII. *See* Br. of Appellant 59.

Perhaps most importantly, the affidavit of Sigmon's mother, Virginia Wooten, reveals she and Sigmon were both victims of repeated physical abuse by Sigmon's father, Ronnie Sigmon. In Virginia's account, during her marriage to Ronnie, he would "often get physical and violent with [her]," while Ronnie was both intoxicated and sober. *See* J.A. 862. Although "Ronnie did not normally beat [his] children," he abused Sigmon because Sigmon, as the eldest child, made efforts to protect Virginia. *Id.* Sigmon's efforts began around age six, when he "would say things like, 'Don't hit my mama.'" *Id.* At about ten or twelve years old, Sigmon "would physically get between [Virginia and Ronnie] and try to grab Ronnie's hands. Ronnie would knock him out of the way or shove him or slap him. This happened a lot." *Id.* During an argument between Virginia and Ronnie that occurred when Sigmon was approximately fifteen years old, "Ronnie hit [Virginia] multiple times in the face," causing Virginia's glasses to scratch her face and leave marks. *Id.* In response, Sigmon "tried to intervene to protect [Virginia,] and Ronnie punched [Sigmon] and knocked him down." *Id.* According to Virginia, there were "many other incidents . . . where Ronnie hit or punched [Sigmon] when [Sigmon] was trying to protect [Virginia] from Ronnie during a physical and violent fight." *Id.*

The various affidavits also provide the following additional information relevant to Sigmon's mitigation case:

- Dr. Ernest Martin, the staff psychiatrist at the Greenville County Detention Center, would have provided a "general summary" of his ongoing treatment of Sigmon, including that Martin diagnosed

Sigmon with "Major Depression" ("a major mental illness"), prescribed him various medications, and "found no evidence that [Sigmon] was malingering in any way whatsoever." Martin also would have given more detailed testimony as to relevant "opinions, impressions, diagnoses, notes, [and] reports," *see* J.A. 840-44;

- Sigmon's brother, Mike Sigmon, would have testified that, "[d]uring the time just before the [murders, Sigmon and Rebecca Barbare] were having problems," and Sigmon "was very upset and was abusing alcohol and illegal drugs." Nevertheless, Mike "was shocked when [he] learned of the [murders]," as "[i]t was completely out of character for [his] brother . . . to have done [those] horrible crime[s]" and Sigmon "had never borne any ill will or bad feelings toward the Larkes," *id.* at 855;

- Mike Sigmon, Virginia Wooten, and Virginia's brother Louis Burrell each would have explained that, when Sigmon was about fifteen years old and his father was withholding money from the family while stationed overseas, Sigmon chose to both attend school and work the night shift (approximately forty hours per week) at a local mill to support mother Virginia and his siblings, *id.* at 828, 854, 861;

- Rebecca Barbare's son and the Larkes' grandson, Troy Barbare, Jr., would have testified that, when his mother and Sigmon were dating, Sigmon treated Troy "like a son" and "was more of a father to [Troy] than [Troy's] own biological father," *id.* at 826;

- Don McKellar, the pastor of the church attended by Sigmon's mother and stepfather, would have testified — despite his friendship with the Larkes' son, Pastor Darrell Larke — that he visited Sigmon at the jail and Sigmon expressed genuine remorse about the murders, *id.* at 846 (recounting that Sigmon "was very remorseful. He was very sorry for the harm that he had caused to the Larke family, and to his own family. [Sigmon] was very sincere in his remorse");

- Pastor McKellar also would have testified that he had experience working with "thousands of inmates," that he possessed "good insight into the type of character that makes inmates act positively during their incarceration," and that he expected "Sigmon would have been one of the good and well-behaved inmates and . . . would try to help others in prison," *id.*; and

- Sigmon's father, Ronnie Sigmon, similarly would have testified that, based on his more than five years of experience as a correctional officer with the South Carolina Department of Corrections (from 1995 through 2000), he was confident that Sigmon would "adjust[] positively to prison," "would obey correctional officers and staff," and "would not be a future danger or threat," *id.* at 859-60.

II.

Again, with respect to Sigmon's claim that his trial counsel's failure to discover and present stronger mitigation evidence amounted to constitutionally ineffective assistance, the sole question before us is whether that claim merely warrants a hearing. Under the applicable standard of *Martinez v. Ryan*, 566 U.S. 1 (2012), the panel majority agrees with the district court that the answer is "no." *See Martinez*, 566 U.S. at 14 (concluding that where, as here, a state post-conviction proceeding was the first and a missed opportunity to raise a claim of ineffective assistance of trial counsel, a prisoner may establish cause for the default by showing that counsel in the state post-conviction proceeding was constitutionally ineffective and "that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one"). The majority specifies that the documentary evidence provides a sufficient basis to decide that Sigmon cannot satisfy the *Martinez* standard and, thus, "the district court did not abuse its discretion by considering the affidavits submitted by Sigmon but not granting him an evidentiary hearing." *See ante* 26.

As the majority sees it, Sigmon's claim of ineffective assistance of trial counsel is "not substantial." *See ante* 22. That is, the majority concludes that the claim does not qualify as "substantial" under *Martinez*, which defines a substantial claim as one that "has some merit." *See Martinez*, 566 U.S. at 14. Rather, the majority rates Sigmon's claim

"insubstantial," meaning that "it does not have any merit or that it is wholly without factual support." *See id.* at 16.

The majority reasons that, because "[m]uch of the evidence Sigmon argues should have been discovered and presented was cumulative of evidence presented to the jury," Sigmon cannot prove either deficient performance or prejudice under the familiar standard of *Strickland v. Washington*, 466 U.S. 668 (1984). *See ante* 24-26. In deeming the new evidence to be "cumulative," the majority describes the trial evidence thusly:

> Several jail employees and an expert testified to Sigmon's adaptability to prison. Positive character evidence came in through a jail volunteer and several family members, including Sigmon's parents and son. A social work expert testified about Sigmon's difficult childhood, including the fact that Sigmon worked as a teenager to support his family. Dr. Martin's diagnosis of major depressive disorder came in through another defense expert. Trial counsel introduced evidence of Sigmon's remorse through Sigmon's mother, through a jail employee, and through their closing argument, which referred to Sigmon's call to his mother before his capture.

Id. at 24-25. As for the revelation that Sigmon and his mother were subjected to repeated physical abuse by Sigmon's father, the majority summarily dismisses that evidence as "not on a par with the substantial mitigation evidence missed by counsel" in cases in which ineffective assistance has been found, including *Williams v. Taylor*, 529 U.S. 368 (2000), and *Wiggins v. Smith*, 539 U.S. 510 (2003). *See ante* 25.

I cannot agree with the majority that the evidence proffered by Sigmon in these federal habeas proceedings is largely cumulative of the trial evidence. Simply put, the new evidence is markedly more compelling, detailed, and favorable to Sigmon than that presented at trial.

For example, Sigmon's family pastor and father — both with ample personal knowledge of Sigmon and extensive experience with inmates — have now attested that Sigmon would remain a "good and well-behaved inmate[]" and "would not be a future danger or threat." *See* J.A. 846, 859-60. That evidence is not cumulative of the trial testimony of a few jail employees, based on limited interactions with Sigmon during his pretrial detention, that they had "never heard [Sigmon] threaten anybody" and that he was generally "pleasant" and "respectful." *See id.* at 175, 264, 304. Nor is it cumulative of the prison adaptability expert's opinion, based on Sigmon's stint in pretrial detention and his lack of membership in a gang, that Sigmon "can be incarcerated in a prison setting for the remainder of his life without causing an undue risk of harm." *See id.* at 362.

The positive character evidence offered by the murder victims' grandson that Sigmon "was more of a father to [him] than [his] own biological father," is not cumulative of the generic testimony of Sigmon's family members and the jail volunteer that, inter alia, Sigmon "loved to be around the family," "treat[ed] everybody fine," bought his son a dirt bike and played with him outside, "was always the peace maker," and was "very faithful in coming [to the jail Bible class]." *See* J.A. 157, 161, 268, 280, 381, 826. Furthermore, the full description of Sigmon choosing, as a teenager, to both attend school and work a forty-hour-per-week night shift at a local mill to financially support his mother and siblings, is not cumulative of the bare mention at trial by the clinical social worker that Sigmon "help[ed] [his] mother to financially provide for the children" by going "to work at age 16 while also trying to attend school." *See id.* at 218, 828, 854, 861. Similarly, the plethora of evidence available through Sigmon's treating psychiatrist as to Sigmon's

ongoing battle with major depression, is not cumulative of the addiction expert's testimony that a psychiatrist had made that diagnosis. *See id.* at 320, 840-44. And finally, the account of Sigmon's remorse from his family pastor, shared by the pastor despite his friendship with the murder victims' son, is not cumulative of testimony from Sigmon's own mother that Sigmon was sorry for his crimes. *See id.* at 389, 846. Nor is the pastor's account of Sigmon's profound remorse cumulative of the testimony of the jail nurse that, upon arriving at the jail, Sigmon "acted sort of remorseful." *See id.* at 187.

I also cannot agree with the majority that the new evidence that Sigmon and his mother were physically abused by Sigmon's father is too insignificant to possibly merit habeas relief. Such abuse constitutes "the kind of troubled history [the Supreme Court has] declared relevant to assessing a defendant's moral culpability." *See Wiggins*, 539 U.S. at 535. Moreover, the Court has instructed that an ineffective assistance claim like Sigmon's requires an individualized assessment, in which we must "evaluate the totality of the available mitigation evidence . . . in reweighing it against the evidence in aggravation." *See Williams*, 529 U.S. at 397-98. Here, there is likely more to be divulged about the extent and the effect of the physical abuse that Sigmon witnessed and endured before a proper individualized assessment can occur.

In these circumstances, the answer to the question of whether a hearing on Sigmon's ineffective assistance claim is warranted should be an emphatic "yes." Contrary to the panel majority, Sigmon's new evidence is not cumulative of the trial evidence and otherwise insufficient to potentially entitle him to habeas relief, and thus the ineffective

assistance claim is not facially insubstantial nor is it otherwise deficient under *Martinez*.[3]

Accordingly, I dissent.

[3] Notably, the majority ventures beyond the district court's decision and concludes that, in addition to being facially insubstantial, Sigmon's claim of ineffective assistance of trial counsel is deficient under *Martinez* because Sigmon has failed to "demonstrate PCR counsel were [constitutionally] ineffective in failing to raise this [claim]." *See ante* 26. The issue of PCR counsel's ineffectiveness, however, is one that should be developed in a hearing and not decided by this Court in the first instance.

FILED: April 14, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-7
(8:13-cv-01399-RBH)

BRAD KEITH SIGMON

Petitioner - Appellant

v.

BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections; WILLIE D. DAVIS, Warden of Kirkland Correctional Institution

Respondents - Appellees

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: May 27, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-7
(8:13-cv-01399-RBH)

BRAD KEITH SIGMON

Petitioner - Appellant

v.

BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections; WILLIE D. DAVIS, Warden of Kirkland Correctional Institution

Respondents - Appellees

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

UNITED STATES DISTRICT COURT

for the

District of South Carolina

Brad Keith Sigmon, *SK#6008*,

Petitioner,

v.

Civil Action : 8:13-cv-01399-RBH

Willie D. Davis, *Warden of Kirkland Correctional Institution*, Bryan P Stirling, *Commissioner SCDC,*

Defendant(s),

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

❒ the plaintiff *(name)* _________ recover from the defendant *(name)* _________ the amount of ________ dollars ($__), which includes prejudgment interest at the rate of ____ %, plus postjudgment interest at the rate of ____ %, along with costs.

❒ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* ____________________ recover costs from the plaintiff *(name)* __________________.

■ other: Petitioner's Section 2254 petition dismissed in its entirety with prejudice. The Court DENIES a certificate of appealability.

This action was *(check one)*:

❒ tried by a jury, the Honorable _______________ presiding, and the jury has rendered a verdict.

❒ tried by the Honorable ____________ presiding, without a jury and the above decision was reached.

■ decided by the Honorable R. Bryan Harwell

Date: October 1, 2018

CLERK OF COURT

s/ G. Prescott, Deputy Clerk

Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

Brad Keith Sigmon, Petitioner, v. Bryan P. Stirling, *Commissioner, South Carolina Department of Corrections*, and Willie D. Davis, *Warden of Kirkland Correctional Institution*, Respondents.	)))))))))))))	Civil Action No.: 8:13-cv-01399-RBH **ORDER**

Petitioner Brad Keith Sigmon, a state prisoner sentenced to death and represented by counsel, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter is before the Court for consideration of Petitioner's objections to the Report and Recommendation ("R & R") of United States Magistrate Judge Jacquelyn D. Austin, who recommends granting Respondents' motion for summary judgment and denying and dismissing Petitioner's habeas petition with prejudice.[1] The Court adopts the R & R for the reasons herein.

Background[2]

On April 27, 2001, Petitioner entered the home of David and Gladys Larke and beat them to death with a baseball bat. Petitioner had been in a volatile relationship with the Larkes' daughter, Rebecca Barbare ("Rebecca"). Sometime before the murders, Rebecca had ended her relationship with Petitioner and was staying at her parents' home.

[1] This matter was referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 73.02(B)(2)(c) for the District of South Carolina.

[2] The Magistrate Judge's R & R thoroughly summarizes the factual and procedural history, which the Court briefly recounts here.

According to Petitioner's statement to law enforcement, his intentions were to go into the Larkes' home and tie them up, then kidnap Rebecca so he could talk to her. [App. 1473].[3] Instead, Petitioner beat the Larkes to death with each sustaining up to nine blows to the skull. [App. 1627, 1640]. After killing the Larkes, Petitioner waited in their home for Rebecca to return home from taking her children to school. [App. 1474].

When Rebecca returned to her parents' home after taking her children to school on the morning of April 27th, Petitioner took Rebecca in a car and tried to flee. *Id*. Rebecca eventually escaped after being shot. *Id*. Petitioner then fled to Tennessee where he was captured in a campground approximately 10 days later. Petitioner confessed to both Tennessee and South Carolina law enforcement officers.

Petitioner was indicted in November 2001 on two counts of first degree murder and one count of first degree burglary. Petitioner was represented by John Abdalla, Esq. ("Abdalla") and Frank Eppes, Jr., Esq. ("Eppes") at trial. On July 19, 2002, the jury found Petitioner guilty on all three charges. [App. 1705].

Following a sentencing proceeding, the jury recommended a sentence of death after finding three statutory aggravating factors: 1) two or more persons were murdered by the Petitioner by one act or pursuant to one scheme or course of conduct; 2) the murder was committed while in the commission of a burglary; and 3) the murder was committed while in the commission of physical torture. [App. 2384]. On July 21, 2002, the circuit court sentenced Petitioner to thirty years for the burglary charge and death for the two murder charges. [App. 2385].

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[3] For reference, [App. ____] refers to the state court appendix and can be found on this Court's docket at docket entries 32-1 through 33-8.

On December 19, 2005, the Supreme Court of South Carolina affirmed Petitioner's murder convictions and death sentence. [App. 2429-33]. Remittitur was issued on January 13, 2006. [ECF No. 34]. Petitioner then filed a petition for writ of certiorari to the United States Supreme Court, which was denied on June 26, 2006. [ECF No. 34-3].

On October 13, 2006, Petitioner filed a pro se application for post-conviction relief ("PCR") in state court. The court appointed William H. Ehlies, II, Esq. ("Ehlies") and Teresa L. Norris ("Norris") to represent Petitioner in his post-conviction matter. Petitioner's PCR counsel filed an amended PCR application on June 4, 2008. [App. 2478-81]. An evidentiary hearing was held on August 4, 2008, before the Honorable J.C. Nicholson, Jr. [App. 2718-2812]. In an order filed July 20, 2009, Judge Nicholson denied and dismissed Petitioner's PCR application. [App. 2846-93].

Petitioner appealed the denial of his PCR application to the South Carolina Supreme Court raising six grounds for relief. [ECF No. 34-5 at 2-4]. The South Carolina Supreme Court granted certiorari as to three issues and requested additional briefing. [ECF No. 34-8]. On March 20, 2013, the South Carolina Supreme Court affirmed the circuit court's dismissal of Petitioner's PCR application in a published opinion. [ECF No. 34-12]. Remittitur was issued on May 13, 2013.

Petitioner then filed a petition for writ of certiorari in the United States Supreme Court, which was denied on November 18, 2013. [ECF No. 59-3].

On May 10, 2013, Petitioner commenced the instant § 2254 action by filing a motion to stay his execution and a motion to appoint counsel. *See* [ECF No. 1]. On May 23, 2013, the Court stayed Petitioner's execution and appointed Norris and Ehlies as Petitioner's counsel. [ECF Nos. 17; 19]. Petitioner filed his petition on August 21, 2013, raising six grounds for relief. [ECF No. 42]. The Court then extended Petitioner's stay of execution during the pendency of this case. [ECF No

43].

On January 17, 2014, in light of the U.S. Supreme Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), the Court appointed Jeffrey P. Bloom, Esq. to investigate whether Petitioner may have additional claims not previously presented that may nevertheless be asserted under *Martinez*. [ECF No. 81]. On April 17, 2014, Mr. Bloom reported to the Court that he had discovered five additional potential claims that had not been previously asserted. [ECF No. 106].

On July 23, 2014, the Court granted Petitioner's motion to amend his habeas petition and to substitute counsel. [ECF No. 123]. Petitioner filed an amended petition on August 8, 2014, raising the six grounds raised in the original petition and the five new grounds discovered by Mr. Bloom.[4] [ECF No. 131]. Petitioner's amended petition for writ of habeas corpus asserts the following grounds for relief:

I. Trial counsel rendered ineffective assistance of counsel, in violation of Sigmon's rights under the Sixth and Fourteenth Amendments, by failing to object to the state's improper cross-examination of a defense sentencing expert on adaptability to confinement and failing to object to the state's closing arguments concerning the day to day details of prison life.

II. The Supreme Court of South Carolina violated both the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States by exercising its discretion in an arbitrary and capricious manner on Ground I by granting relief to other death-sentenced inmates while denying certiorari and relief to Sigmon when he presented the same issue with nearly identical facts and is therefore similarly situated.

III. Trial counsel rendered ineffective assistance of counsel, in derogation of Sigmon's Sixth and Fourteenth Amendment rights, for failing to object to the solicitor's

[4] On August 22, 2014, Petitioner filed a motion to stay informing the Court that the he had filed a second PCR action in state court raising the five new and unexhausted grounds discovered by Mr. Bloom. [ECF No. 142]. The Court stayed this action while Petitioner's second PCR application was pending. [ECF No. 161]. Petitioner's second PCR action was dismissed as successive and barred by the statute of limitation in an order filed March 3, 2017. [ECF No. 204-16]. This Court lifted the stay after the South Carolina Supreme Court dismissed Petitioner's appeal from the dismissal of his second PCR action. [ECF No. 195].

improper closing arguments wherein the solicitor gave his personal opinions that death was the appropriate punishment and made improper "send a message" arguments.

IV. Trial counsel rendered ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments for failing to request a charge on the statutory mitigating circumstance of age or mentality, when evidence presented at trial established that Sigmon was extremely intoxicated at the time of the murders, having consumed large quantities of beer and crack cocaine beforehand.

V. Trial counsel rendered ineffective assistance of counsel, in derogation of petitioner's Sixth and Fourteenth Amendment rights, for failing to object to the trial court's instructions that a non-statutory mitigating circumstance was one the defendant "claims" lessens his culpability since this improperly impugned the legitimacy of non-statutory mitigating evidence under the Eighth and Fourteenth Amendments.

VI. Trial counsel rendered ineffective assistance of counsel, in derogation of Sigmon's Sixth and Fourteenth Amendment rights, by requesting and obtaining the statutory "mitigating" circumstance of "provocation by the victim" based on the testimony of three defense witnesses who were called to testify about their bad relationships with Sigmon's ex-girlfriend, and thereby blame her for her parents' murders, since this patently offensive strategy was very likely to inflame the jury.

VII. Sigmon was denied his right to effective assistance of counsel per the Sixth and Fourteenth Amendments by the failure of trial counsel to interview and call as witnesses additional family members and community witnesses, and by inadequately interviewing those family members that they did call as witnesses, and/or by failing to call the county detention center psychiatrist as a witness, and/or by failing to introduce an available video exhibit, such that substantial mitigating evidence was not presented and Sigmon was prejudiced thereby at the capital sentencing phase of his trial.

VIII. Sigmon was denied his right to effective assistance of counsel per the Sixth and Fourteenth amendments, and per S.C. Code §16-3-26(b)(1), in that the "second chair" attorney – who was not qualified under state law to serve as lead counsel – nonetheless served and acted as "lead counsel," contrary to the order of the court appointing counsel, and without objection from actual lead counsel, such that the trial attorneys rendered ineffective assistance of counsel, and the petitioner was prejudiced thereby at the capital sentencing phase of his trial.

IX. Sigmon was denied his right to effective assistance of counsel per the Sixth and Fourteenth amendments in that trial counsel failed to object to the

petitioner being made to wear a stun-belt in court which was visible to jurors during the proceedings, and the petitioner was prejudiced thereby at the capital sentencing phase of his trial.

X. Sigmon was denied his right to effective assistance of counsel per the Sixth and Fourteenth amendments, and per S.C. Code §16-3-28, in that trial counsel was unaware that the second defense attorney could also have presented a closing argument at sentencing after the petitioner, and the petitioner was prejudiced thereby at the capital sentencing phase of his trial.

XI. Sigmon was denied his right to effective assistance of appellate counsel on direct appeal per the Sixth and Fourteenth amendments for failure to raise as issues the objections made by trial counsel at voir dire, and the petitioner was prejudiced thereby as it relates to the capital sentencing phase of his trial.[5]

Legal Standards

I. Review of the Magistrate Judge's R & R

The Magistrate Judge makes only a recommendation to the Court. The Magistrate Judge's recommendation has no presumptive weight, and the responsibility to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261, 270–71 (1976). The Court must conduct a de novo review of those portions of the R & R to which specific objections are made, and it may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

The Court must engage in a de novo review of every portion of the Magistrate Judge's report to which objections have been filed. *Id.* However, the Court need not conduct a de novo review when a party makes only "general and conclusory objections that do not direct the [C]ourt to a specific error in the [M]agistrate [Judge]'s proposed findings and recommendations." *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982). In the absence of specific objections to the R & R, the

[5] Petitioner has withdrawn ground eleven. [ECF No. 213 at 3 n.2].

Court reviews only for clear error, *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005), and the Court need not give any explanation for adopting the Magistrate Judge's recommendation. *Camby v. Davis*, 718 F.2d 198, 199–200 (4th Cir. 1983).

II. Summary Judgment

"The court shall grant summary judgment if the movant shows 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); *see generally* Rule 12 of the Rules Governing Section 2254 Cases ("The Federal Rules of Civil Procedure . . . , to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules."); *Brandt v. Gooding*, 636 F.3d 124, 132 (4th Cir. 2011) ("Federal Rule of Civil Procedure 56 'applies to habeas proceedings.'" (quoting *Maynard v. Dixon*, 943 F.2d 407, 412 (4th Cir. 1991))). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record . . . ; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). "The evidence must be viewed in the light most favorable to the non-moving party, with all reasonable inferences drawn in that party's favor. The court therefore cannot weigh the evidence or make credibility determinations." *Reyazuddin v. Montgomery Cty.*, 789 F.3d 407, 413 (4th Cir. 2015) (internal citation and quotation marks omitted).

Discussion

As mentioned above, Petitioner presently seeks habeas relief on ten grounds. The Magistrate Judge recommended granting summary judgment on all ten grounds. Petitioner has filed objections to the Magistrate Judge's R&R arguing that Respondent's motion for summary judgment should be

denied. Petitioner also argues the Court should hold an evidentiary hearing on the *Martinez* claims.

I. Preserved Grounds

A. Standard of Review

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254, federal courts may not grant habeas corpus relief unless the underlying state adjudication:

> (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." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal quotation marks and citations omitted). "Section 2254(d)(1) describes the standard of review to be applied to claims challenging how the state courts applied federal law, while § 2254(d)(2) describes the standard to be applied to claims challenging how the state courts determined the facts." *Winston v. Kelly*, 592 F.3d 535, 553 (4th Cir. 2010). "'[A] determination on a factual issue made by a State court shall be presumed correct,' and the burden is on the petitioner to rebut this presumption 'by clear and convincing evidence.'" *Tucker v. Ozmint*, 350 F.3d 433, 439 (4th Cir. 2003) (quoting 28 U.S.C. § 2254(e)(1)). "Under § 2254(d), an *unreasonable* application of federal law differs from an *incorrect* application of federal law, and a state court 'must be granted a deference and latitude that are not in operation when the case involves review under the Strickland standard itself.'" *Jones v. Clarke*, 783 F.3d 987, 991 (4th

Cir. 2015) (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011)).

B. Ground One

In ground one, Petitioner claims trial counsel rendered ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), by failing to object to the state's cross-examination of a defense sentencing expert on prison adaptability. Within ground one, Petitioner also claims trial counsel was ineffective under *Strickland* for failing to object to the state's closing arguments concerning the details of prison life.

In *Strickland v. Washington*, the United States Supreme Court established that to challenge a conviction based on ineffective assistance of counsel, a prisoner must prove two elements: (1) his counsel was deficient in his representation and (2) he was prejudiced as a result. 466 U.S. 668, 687 (1984). To prove that counsel's performance was deficient, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness," *Id*. at 688, and that the "acts and omissions" of counsel were, in light of all the circumstances, "outside the range of professionally competent assistance." *Id*. at 690. Such a determination "must be highly deferential," with a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. at 689; *see also, Burket v. Angelone*, 208 F.3d 172, 189 (4th Cir. 2000) (reviewing court "must be highly deferential in scrutinizing [counsel's] performance and must filter the distorting effects of hindsight from [its] analysis"); *Spencer v. Murray*, 18 F.3d 229,233 (4th Cir. 1994) (court must "presume that challenged acts are likely the result of sound trial strategy.").

To satisfy *Strickland's* prejudice prong, 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." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to

undermine confidence in the outcome." *Id*. The two prongs of the *Strickland* test are "separate and distinct elements of an ineffective assistance claim," and a successful petition "must show both deficient performance and prejudice." *Spencer*, 18 F.3d at 233. Therefore, a court need not review the reasonableness of counsel's performance if a petitioner fails to show prejudice. *Quesinberry v. Taylor*, 162 F.3d 273, 278 (4th Cir. 1998).

Regarding the prejudice prong, "[w]hen 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." *Id*. at 695. "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Id*. "In jurisdictions such as South Carolina, where a jury must return a unanimous verdict . . . , the prejudice prong of *Strickland* is met where 'there is a reasonable probability that at least one juror would have struck a different balance.'" *Hope v. Cartledge*, 857 F.3d 518, 524 (4th Cir. 2017) (quoting *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

When evaluating a habeas petition based on a claim of ineffective assistance of counsel, "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard." *Richter*, 562 U.S. at 101. "A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Id*.; *see also Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (stating judicial review of counsel's performance is "doubly deferential when it is conducted through the lens of federal habeas"). Even if a state court decision questionably constitutes an unreasonable application of federal law, the

"state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Richter*, 562 U.S. at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Thus, in such situations, the habeas court must determine whether it is possible for fairminded jurists to disagree that the arguments or theories supporting the state court's decision are inconsistent with Supreme Court precedent. *Id*.

(1) Facts

Petitioner's trial counsel called James Aiken ("Aiken") as a defense expert witness on prison adaptability and the conditions of prison. [App. 2006]. On cross-examination, Aiken testified that Petitioner could have regularly scheduled visitors, the ability to watch television, recreation, access to a library, access to a telephone, canteen, showers, the ability take educational classes, send and receive mail, religious services, and a personal locker. *Id*. at 2022-2025. Petitioner's trial counsel did not object to any portion of the solicitor's cross-examination of Aiken.

In his penalty phase closing argument, the solicitor argued that with life imprisonment, Petitioner would still have mail, tv, three meals a day, someone to do his laundry, health care, and recreation. Petitioner's trial counsel did not object. [App. 2066-67].

(2) PCR Order

The PCR court found that trial counsel were not deficient and that Petitioner suffered no prejudice as there was no basis for an objection for either the cross-examination or resulting argument by the solicitor. [App. 2869]. The PCR court stated that because general conditions evidence was intentionally elicited during Aiken's direct examination by defense counsel, the solicitor was entitled to cross-examine the witness on the conditions issue. [App. 2874]. The PCR

court stated further that "since the evidence was in the record, and both defense and the State argued prison conditions based on the evidence, the record based responsive argument cannot support proof of error, as there could be no reasonable basis for an objection." *Id*.

Disposing of ground one, the PCR court found:

> In sum, Applicant has failed to show error and prejudice where the defense essentially received what was requested, that is to introduce evidence (of their own choosing and through a defense witness as opposed to a prosecution witness (Mr. Sligh)), and to argue that the punishment of life imprisonment was an extraordinarily harsh sentence, and the State merely cross-examined the defense witness on same. Not only was this case tried without the benefit of *Burkhart*, it is also specifically distinguishable from *Burkhart* in the major respect of who offered the evidence when, and whether there is fair response. Moreover, the record demonstrates that the balance of evidence on each side fails to support a finding of prejudice on this record. Lastly, given the overwhelming evidence of aggravating circumstances, and the limited mitigation, there could be no "reasonable probability that, absent [counsel's] errors, the sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Jones*, 332 S.C. at 340, 504 S.E.2d at 829. There is overwhelmingly strong evidence in aggravation, including the finding of torture, burglary first degree, and the murder of not one but two elderly victims in a vicious and personal beating with a baseball bat, the victims having been surprised in their own home. Applicant has not established error on these particular facts, however, if error could be shown, he has not established prejudice such that would entitle him to a new proceeding.

[App. 2875-76].

(3) R & R

The Magistrate Judge recommended dismissing ground one. As to the failure to object to the cross examination of Aiken on general prison conditions, the Magistrate Judge stated the PCR

court's finding that counsel were not deficient was not contrary to, or an unreasonable application of, any clearly established federal law. [R&R, ECF No. 223 at 31]. The Magistrate Judge found that "[g]iven the state of the law at the time of Petitioner's trial and trial counsel's testimony, the PCR court's determination that trial counsel made tactical decisions not to object to the solicitor's cross-examination of Aiken and the solicitor's closing argument so that they could present their own prison condition evidence is far from unreasonable." *Id*. at 36. In summary, the Magistrate Judge concluded that the PCR court reasonably applied *Strickland* and based its decision on a reasonable determination of the facts.

(4) Discussion

Petitioner objected to the Magistrate Judge's recommendation that ground one be dismissed arguing the PCR court unreasonably applied the law to the facts of Petitioner's case by failing to recognize that trial counsel had presented evidence without a full understanding of the ramifications of that evidence. Petitioner contends that failure to understand the nature of the evidence presented is an unreasonable decision under the *Strickland* standards. Petitioner further contends the evidence allowed the State to make a compelling argument it otherwise would not have been able to make, which was prejudicial to Petitioner.

Petitioner's trial counsel may have arguably misunderstood the ramifications of presenting Aiken as a defense witness on prison adaptability and may have not fully understood the nuances between prison adaptability evidence and general prison conditions evidence. *See Bowman v. State*, 809 S.E.2d 232, 241 (S.C. 2018) (recognizing the unique distinction South Carolina jurisprudence has drawn between evidence of prison adaptability, which S.C. has held is relevant and admissible, and evidence of general prison conditions, which S.C. has held is not). However, at the time of

trial, the admission of general prison condition evidence was not recognized as a reversible error, especially where defense counsel opened the door to such evidence. *See Bowman*, 809 S.E.2d at 243-44 (stating "once the defendant opens the door, the solicitor's invited response is appropriate so long as it is does not unfairly prejudice the defendant . . .unless the State's response is inappropriate or unfairly prejudicial, counsel is not deficient for failing to object").

Since trial counsel opened the door to general prison condition evidence with Aiken's direct examination, it is doubtful whether trial counsel even had a valid basis for an objection to the solicitor's cross-examination of Aiken. As to the closing argument, it was certainly a reasonable trial strategy not to object to opposing counsel's closing argument, especially when the argument was supported by the evidence at trial. Accordingly, the PCR court's finding that there was no basis for an objection and that trial counsel was not deficient was not contrary to, or an unreasonable application of, clearly established Federal law, nor was it based on an unreasonable determination of the facts in light of the evidence presented.

Even if there was a valid basis for an objection to either the cross-examination or the closing argument, Petitioner has failed to demonstrate prejudice. As noted by the PCR court, this case involved overwhelming evidence of aggravating circumstances, including torture, burglary first degree, and the murder of two victims during one course of conduct. Given the overwhelming evidence of aggravating circumstances, and the limited mitigation evidence, the PCR court concluded there was no reasonable probability that the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. [App. 2876]. The PCR court's finding of no prejudice was not contrary to, or an unreasonable application of, clearly established Federal law, and was not based on an unreasonable determination of the facts.

The Court finds the Magistrate Judge correctly applied the law to the facts of the case and overrules Petitioner's objections as to ground one. Ground one is due to be dismissed.

C. Ground Two

In ground two, Petitioner claims the Supreme Court of South Carolina violated both the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States by exercising its discretion in an arbitrary and capricious manner on ground one above by granting relief to other death-sentenced inmates while denying certiorari and relief to Petitioner when he presented the same issue with nearly identical facts and is therefore similarly situated.

The Magistrate Judge rejected ground two finding that Petitioner's challenge to the South Carolina Supreme Court's decision not to review a collateral claim of ineffective assistance of counsel was a procedural error that was not cognizable on federal habeas review. *See Bryant v. Maryland*, 848 F.2d 492, 493 (4th Cir. 1988) ("[C]laims of error occurring in a state post-conviction proceeding cannot serve as a basis for federal *habeas corpus* relief"); *see also Wright v. Angelone*, 151 F.3d 151, 159 (4th Cir. 1998) ("[Petitioner] is not currently detained as a result of a decision of the [state supreme court] in the state habeas action. Accordingly, we agree with the district court that this claim, a challenge to . . . state habeas proceedings, cannot provide a basis for federal habeas relief").

Petitioner does not make a specific objection to the Magistrate Judge's recommendation as to ground two. Petitioner merely states: "[t]he South Carolina Supreme Court's decision not to grant certiorari on [ground one] resulted in a decision contrary to federal law as determined by the United States Supreme Court or reached an unreasonable determination of the facts on the evidence

presented, particularly where the South Carolina Supreme Court has declared that each case involving 'prison conditions' should be decided on a case-by-case (and fact-by-fact) basis." [Objections to R&R, ECF No. 229 at 4]. Petitioner's objection does not address the Magistrate Judge's recommendation regarding whether ground two is a cognizable claim.

A federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a). Here, Petitioner is not in custody as a result of the South Carolina Supreme Court's decision not to grant certiorari as to ground one. Petitioner's claim in ground two is therefore not cognizable. *See Wright*, 151 F.3d at 159. Moreover, this Court's reading of *Bowman*, 809 S.E.2d 232, indicates that had the South Carolina Supreme Court granted certiorari on ground one, it would have denied relief just as it did in *Bowman*. 809 S.E.2d at 239-246 (rejecting petitioner's argument that defense counsel was deficient in failing to object to the Solicitor's questioning of defense prison expert Aiken regarding general prison conditions).

Petitioner's objection with respect to ground two is overruled. The Magistrate Judge correctly applied the law to the facts and correctly concluded that Petitioner's claim in ground two was not cognizable on federal habeas review. Ground two is due to be dismissed.

D. Ground Three

In ground three, Petitioner claims trial counsel rendered ineffective assistance of counsel under *Strickland* by failing to object to the portion of the solicitor's closing argument where the solicitor gave his personal opinion that death was the appropriate punishment and made improper

"send a message" arguments.[6]

(1) Facts

During his closing argument, the solicitor stated:

> 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.

[App. 2064-64; 2070]. Trial counsel did not object.

(2) South Carolina Supreme Court Opinion

The South Carolina Supreme Court found that the solicitor's comments were not improper

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[6] PCR counsel did not specifically raise an ineffective assistance of counsel claim regarding the solicitor's "send a message" comments. The precise issue raised in the PCR litigation centered on trial counsel's failure to object to comments suggesting the solicitor's personal opinion and involvement in the process, not a freestanding challenge to the "send a message" argument. Thus, the "send a message" argument was not addressed separately in the PCR court Order of Dismissal or the Supreme Court of South Carolina Opinion. Accordingly, the Court finds Petitioner's claim that trial counsel were ineffective for failing to object to the solicitor's "send a message" argument is procedurally defaulted and Petitioner has failed to establish cause and prejudice for the default. Regardless, even if not procedurally defaulted, the claim fails on the merits as discussed below.

and therefore trial counsel were not deficient for not objecting. *Sigmon v. State*, 742 S.E.2d 394, 400 (S.C. 2013). The court held the solicitor's comments did not diminish the role of the jury in sentencing Petitioner to death and the solicitor 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. *Sigmon*, 742 S.E.2d at 399.

(3) R & R

The Magistrate Judge recommended granting summary judgment and dismissing ground three. As to the solicitor's argument regarding his reasons for seeking the death penalty, the Magistrate Judge found that, based on the solicitor's closing argument as a whole, the state court could have reasonably determined that the solicitor's comments did not improperly mislead the jury about its role in determining Petitioner's sentence. With respect to the "send a message" argument, the Magistrate Judge noted that Petitioner's trial counsel responded to those portions of the solicitor's closing argument in his own closing argument. Thus, the Magistrate Judge concluded that although trial counsel may not have expressed a strategic reason for not objecting to the specific portions of the solicitor's closing at issue in ground three, trial counsel's actions appear to comport with the stated general strategy of responding, rather than objecting, to opposing counsel's closing argument. In concluding that the state court's decision was neither contrary to nor an unreasonable application of applicable Supreme Court precedent, nor based on an unreasonable determination of the facts, the Magistrate Judge found the record supported the state court's determination that trial counsel were not ineffective for not objecting to the solicitor's closing argument during the penalty phase of Petitioner's trial.

(4) Discussion

Petitioner objected to the Magistrate Judge's recommended dismissal of ground three arguing that by offering his personal opinions that he had decided the death penalty was the right sentence, the jury was left with the impression that their decision was far less important than it should have been. Petitioner also argues the solicitor's request to "send a message" injected an arbitrary and capricious factor into the imposition of death, which the Eighth Amendment prohibits. Petitioner argues that in failing to grant relief on this ground, the state court's decision was contrary to clearly established federal law as determined by the Supreme Court.

A prosecutor's improper remarks violate the Constitution only if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Similarly, the South Carolina Supreme Court has held that the relevant question in determining whether a solicitor's closing arguments were improper is "whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Sigmon*, 742 S.E.2d at 399 (quoting *Simmons v. State*, 503 S.E.2d 164, 166-67 (S.C. 1998).

In this case, the solicitor's comments referencing his decision to seek the death penalty and that the jury should "send a message" with their verdict were borderline, but not necessarily improper. Fairminded jurists could disagree regarding whether the solicitor's comments were objectionable. *See Richter*, 562 U.S. at 101. Petitioner cites *United States v. Runyon*, 707 F.3d 475, (4th Cir. 2013), in support of his position the comments in the closing argument were improper, but Petitioner fails to distinguish between a direct challenge of the propriety of the comments and a claim of ineffective assistance of counsel. Affording the state court the required deference under AEDPA, Petitioner has not established that the state court's decision was contrary to, or an

unreasonable application of, clearly established federal law, nor has he demonstrated that the state court's decision was based on an unreasonable determination of the facts.

Assuming the solicitor's comments were objectionable and trial counsel was deficient for failing to object, Petitioner has failed to demonstrate prejudice as a result of trial counsel's failure to object. As the PCR court noted, the solicitor's comments "are so minor in comparison with the tremendous amount of evidence in aggravation," that any such error could not reasonably be said to have affected sentencing. [App. 2878].

The Magistrate Judge correctly applied the law to the facts with respect to ground three. Petitioner's objections as to ground three are overruled and ground three is due to be dismissed.

E. Ground Four

In ground four, Petitioner argues trial counsel was ineffective under *Strickland* for failing to request a charge on the mitigating circumstance of age or mentality based on evidence that Petitioner could have been intoxicated at the time of the crime.

(1) Facts

Petitioner contends there is "extensive and credible evidence in the record" that Petitioner was intoxicated at the time of the crime. Charles Hall, one of Petitioner's employees, testified that Petitioner came to work two days before the murders and stated he had been drinking since 8:00 a.m. [App. 1616]. Hall also testified that around 8:00 or 8:30 the night before the murders, Petitioner came to Hall's house and asked if Hall knew where he could buy a gun. [App. 1613]. Hall testified that he could tell Petitioner had been drinking, but he seemed coherent. [App. 1614].

Around 9:00 p.m. the night before the murders, Petitioner and Eugene Strube bought beer at a gas station and went to Petitioner's trailer. [App. 1578-80]. Strube testified that Petitioner drank a

six-pack of beer and smoked "a couple hundred dollars worth" of crack. [App. 1593-94]. Strube testified that by the time they left the trailer the next morning before the murders, neither of them was under the influence of crack. [App. 1587].

Additionally, Dr. Alex Morton testified that based on what Petitioner consumed the day and night before the murders, drugs and alcohol could have impacted Petitioner's mental and psychological functioning for up to twenty-eight days after using them. [App. 1981]. According to Dr. Morton, Petitioner reported using about fifty dollars worth of crack cocaine and drinking two mixed drinks and half a bottle of peppermint schnapps the day and night before the murders. [App. 1980-81].

(2) South Carolina Supreme Court Opinion

The South Carolina Supreme Court rejected Petitioner's claim and found that "[a]lthough the record supports the conclusion Sigmon ingested alcohol prior to the murders, it does not establish he was intoxicated when he committed the crimes." *Sigmon*, 742 S.E.2d at 401. The court therefore concluded Petitioner's trial counsel were not deficient for failing to argue that Petitioner's intoxication warranted the mitigating charge of age or mentality. *Id.*

(3) R & R

The Magistrate Judge recommended granting summary judgment on ground four. Importantly, the Magistrate Judge noted that Petitioner had not indicated, and the Court had not found, any evidence that Petitioner was intoxicated at the time of the crime. [R&R, ECF No. 223 at 54]. The Magistrate Judge concluded that Petitioner failed to show by clear and convincing evidence that the state court's determination was incorrect, based on an unreasonable determination of the facts, or that it was contrary to, or an unreasonable application of, clearly established federal

law.

(4) Discussion

Petitioner argues in his objections that ample evidence existed to support the assertion of intoxication. Petitioner contends the state court's finding on this ground was an unreasonable application of precedent to the facts, as well as an unreasonable determination of the facts.

Under South Carolina law, where there is evidence that the defendant was intoxicated at the time he committed the crime, the trial judge is required to submit the following statutory mitigating circumstances: "(2) [t]he murder was committed while the defendant was under the influence of mental or emotional disturbance;" "(6) [t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;" and "(7) [t]he age or mentality of the defendant at the time of the crime." S.C. Code Ann. §§ 16-3-20(C)(b)(2), (6), (7); *State v. Vazsquez*, 613 S.E.2d 359, 363 (S.C. 2005).

During the penalty phase, trial counsel requested a jury charge pursuant to S.C. Code Ann. § 16-3-20(C)(b)(7) on the "age or mentality of the defendant at the time of the crime" based on the evidence presented as to Sigmon's mental state at the time of the murders. The court declined to charge "age or mentality" concluding any inference from mental state was covered by the court's other charges on mental state. Trial counsel did not argue that a charge on "age or mentality" was warranted based on Petitioner's alleged intoxication at the time of the murders.

The court did, however, charge the following statutory mitigating circumstances under S.C. Code Ann. § 16-3-20(C)(b): (1) "[t]he defendant has no significant history of prior criminal conviction involving the use of violence against another person;" (2) "[t]he murder was committed while defendant was under the influence of mental or emotional disturbance; (6) "[t]he capacity of

the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;" and (8) "[t]he defendant was provoked by the victim into committing murder."

Petitioner argues there is ample evidence of intoxication at the time of the crime. While the record supports the conclusion that Petitioner abused drugs and alcohol the night before the murders and possibly into the early morning, the record does not establish that Petitioner was intoxicated when he left his trailer the morning of the murders before going to the Larkes' trailer. Strube testified that he and Petitioner ran out of crack sometime during the night and that neither were under the influence of crack by the time they left the trailer the morning of the murders. There is also no indication that Petitioner was still drunk based on the amount of alcohol he reportedly consumed. Petitioner has failed to meet his burden of rebutting the state court's factual determination that Petitioner was not intoxicated at the time of the murders.

Because the record supports the state court's conclusion that Petitioner was not intoxicated at the time of the murders, Petitioner's trial counsel were not deficient in failing to argue that Petitioner's alleged intoxication warranted an "age or mentality" jury charge under S.C. Code Ann. § 16-3-20(C)(b)(7).

Even if it was somehow error for trial counsel not to press the issue of an "age or mentality" instruction, Petitioner has failed to demonstrate any prejudice. The trial court's charges - that (2) "[t]he murder was committed while defendant was under the influence of mental or emotional disturbance; (6) "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired" - adequately informed the jury that they could consider Petitioner's impaired mental state. Petitioner has failed to

demonstrate how an additional charge on "age or mentality" would have changed the results of the proceeding.

The state court's rejection of ground four was not contrary to, or an unreasonable application of, clearly established federal law, nor was it an unreasonable determination of the facts in light of the evidence presented. The Magistrate Judge correctly applied the law to the facts in recommending summary judgment on ground four. Petitioner's objections are overruled and ground four is due to be dismissed.

F. Ground Five

In ground five, Petitioner argues his trial counsel were ineffective under *Strickland* for failing to object to the trial court's instructions on non-statutory mitigating circumstances, which Petitioner contends impugned the legitimacy of non-statutory mitigating factors and suggested that the jury should consider only mitigating factors directly related to the offense.

(1) Facts

Petitioner contends the following portions of the trial court's penalty phase jury instruction warranted an objection:

> Now, a mitigating circumstance is neither a justification or an excuse for the murder. It's [sic] simply lessens the degree of one's guilt. That is it makes the defendant less blameworthy, or less culpable.
>
> . . .
>
> So what is a non-statutory mitigating circumstance? A non-statutory mitigating circumstance is one that is not provided for by statute, but it is one which the defendant claims serves the same purpose. That is to reduce the degree of his guilt in the offense.

[App. 2108-09].

(2) South Carolina Supreme Court Opinion

The South Carolina Supreme Court rejected Petitioner's claim that trial counsel was ineffective for failing to object to the trial court's jury instruction on non-statutory mitigating circumstances. The Supreme Court found the trial court's overall charge to the jury clearly indicated the jury's power to consider any circumstance in mitigation, and a reasonable juror would have known he could consider *any* reason in deciding whether to sentence Petitioner to death. *Sigmon*, 742 S.E.2d at 401-02.

(3) R & R

In recommending summary judgment, the Magistrate Judge concluded the South Carolina Supreme Court's decision was fully supported by the record. The Magistrate Judge closely examined the trial court's entire jury charge and found that the trial court's charge clearly indicated that non-statutory mitigating circumstances were to be weighted equally with statutory mitigating circumstances and that the jurors may choose a sentence of life imprisonment for any reason.

(4) Discussion

In his objections, Petitioner argues the wording of the judge's jury instructions suggested the non-statutory mitigating circumstances were things the defendant "claimed" served the same purpose as statutory mitigating circumstances and that the judge's instructions clearly drew a bright line between statutory and non-statutory mitigating circumstances. However, Petitioner's argument is incorrectly premised on the notion that the challenged portion of the jury charge can be read in isolation.

It is well established that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973); *State v. Hicks*, 499 S.E.2d 209, 215 (S.C. 1998) (stating "[a] jury instruction must be

viewed in the context of the overall charge"). In this case, the trial court's overall charge weighted statutory mitigating circumstances and non-statutory mitigating circumstances equally. *See* [App. 2107-2111]. The trial court's charge does not impugn or disparage non-statutory mitigating circumstances. The trial court instructed the jury that it could consider any factor in mitigation of the offense and it could impose a sentence of life imprisonment for no reason at all. [App. 2111]. When viewed in the context of the overall charge, Petitioner has failed to demonstrate that the trial court's non-statutory mitigating circumstance charge was improper or that trial counsel was deficient for failing to object to it. Even if trial counsel were deficient for failing to object to challenged portions of the trial court's charge, Petitioner has not established any resulting prejudice.

For those reasons, the state court's decision on ground five was not contrary to, or an unreasonable application of, clearly established federal law, nor an unreasonable determination of the facts. Respondents are entitled to summary judgment on ground five as recommended by the Magistrate Judge. Petitioner's objections are overruled and ground five is due to be dismissed.

G. Ground Six

In ground six, Petitioner argues trial counsel were ineffective under *Strickland* for requesting and obtaining a statutory mitigating circumstance charge related to provocation by the victim. While the trial court agreed to give the instruction based on Mr. Larke's statement he was going to get his gun, Petitioner contends that trial counsel misunderstood the basis for the instruction and pursued a patently offensive argument that Rebecca provoked Petitioner into murdering her parents.

(1) Facts

During the penalty phase of Petitioner's trial, trial counsel pursued a theory that Petitioner's actions were provoked by his volatile relationship with the Larkes' daughter, Rebecca Barbare.

Trial counsel called two of Ms. Barbare's ex-husbands and her current husband in an attempt to show that Ms. Barbare had a pattern of beginning a relationship with one man before ending a relationship with another. [App. 1825-28; 1907-18].

Trial counsel requested a statutory mitigating circumstances charge that the defendant was provoked by the victim in committing the murder. *See* S.C. Code Ann. § 16-3-20(C)(b)(8). The trial court agreed to charge that the defendant was provoked by the victim based on evidence that Mr. Larke said he was going to get his gun. [App. 2053-54].

Trial counsel also argued for a statutory mitigating charge that the defendant acted under duress or under domination of another person, specifically Rebecca Barbare. [App. 2052-53]. The trial court declined to give a "duress" instruction but informed trial counsel they could argue it as a mitigating circumstance. [App. 2053].

(2) PCR Order

The PCR court addressed this claim on the merits and found that trial counsel was not ineffective for developing a "trigger" or "love sick" theory and presenting such evidence as mitigation. [App. 2889]. The PCR court also found no prejudice from this strategy based on the "wealth of evidence in aggravation." *Id*. The PCR court further concluded that trial counsel were not ineffective for requesting and obtaining an instruction on the statutory mitigating circumstance of provocation by the victim. [App. 2890-92]. The PCR court set forth three reasons for finding no prejudice with respect to trial counsel's request for the "provocation by the victim" charge: 1) there is a factually distinguishable basis for the charge that is not challenged; 2) the fact of [Petitioner's] obsessive infatuation with Ms. Barbare was part and parcel of the case and would be addressed within trial, by [Petitioner's] confession alone if nothing else; and 3) the tremendous amount of

evidence in aggravation in the double murder of Ms. Barbare's parents in their own home. [App. 2892].

(3) R & R

The Magistrate Judge recommended granting summary judgment and dismissing ground six. The Magistrate Judge found there was a reasonable argument that trial counsel satisfied *Strickland*'s deferential standard when they pursued the "trigger" or "love sick" theory. *See Richter*, 562 U.S. at 105. Significantly, the Magistrate Judge noted that Petitioner failed to challenge the PCR court's finding that he suffered no prejudice from the jury charge or trial counsel's pursuit of the "trigger" or "love sick" theory. Based on Petitioner's failure to challenge the PCR court's prejudice findings on ground six, the Magistrate Judge found no reason to conclude the PCR court's prejudice analysis was based on an unreasonable determination of the facts or was an unreasonable application of *Strickland*. Accordingly, the Magistrate Judge found that Petitioner was not entitled to habeas relief on ground six.

(4) Discussion

In his objections, Petitioner argues trial counsel misunderstood the factual basis for the provocation by victim charge, which led to an offensive argument to the jury, specifically that Ms. Barbare caused her parents' death. Petitioner, however, has failed to establish that the PCR court's decision was contrary to, or an unreasonable application of, clearly established federal law, or based on an unreasonable determination of the facts.

Trial counsel are granted wide latitude in making tactical decisions and reviewing courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. In this case, Petitioner has failed to establish

that trial counsel's pursuit of the "trigger" or "love sick" theory was objectively unreasonable. While the "trigger" or "love sick" theory was not successful, it was nevertheless consistent with Petitioner's Tennessee confession [App. 1507-1528] and statement to the jury ("Was I obsessed with her? Yes . . . What set me off? Go back three years. The second time Becky left Troy for me.") [App. 2085]. It was objectively reasonable for trial counsel to attempt to explain that Petitioner's actions were the result of passion or stress from the relationship with Ms. Barbare. Granting trial counsel wide latitude in making strategic decisions, the Court finds that trial counsel were not ineffective in pursuing the "trigger" or "love sick" theory. Furthermore, even if trial counsel were ineffective for pursuing this theory, Petitioner has not indicated how he suffered prejudice in light of the overwhelming evidence in aggravation.

As to the request for a charge of provocation by the victim and the assertion that trial counsel misunderstood the factual basis for the charge, Petitioner has failed to establish any error or resulting prejudice. The trial court indicated the factual basis for the charge on the record and trial counsel appeared to agree.

> The court: All right. I'm going to scratch number five. Defendant was provoked by the victim in committing the murder, I'll leave. I find there is sufficient evidence in the record. And the reason is the action of Mr. Larke saying he was going to get his gun, that would be a mitigating factor as opposed to - - you know, that might have been an impulse to have him do something, so I would leave that. I assume you want that left in?
>
> Mr. Eppes: Yes, sir, Your Honor.

[App. 2053-54].

There was a factual basis for the charge and it appears that trial counsel understood the basis

for the charge. However, the Court does acknowledge that trial counsel gave somewhat confusing deposition testimony in the PCR case that could be read to indicate that trial counsel believed the basis for the provocation by victim charge was related to Ms. Barbare's actions with regard to her relationship with Petitioner. [App. 2700-01]. To the extent trial counsel misunderstood the basis for the charge and to the extent that resulted in arguing that Ms. Barbare's actions "triggered" or provoked Petitioner, the pursuit of that theory was neither objectively unreasonable or patently offensive. Again, even if there was error, Petitioner has failed to establish, or even address in his objections, any prejudice resulting from the provocation by victim jury charge or trial counsel's theory that Petitioner was triggered or provoked to commit the murders by his relationship with Ms. Barbare.

The PCR court's rejection of Petitioner's claims in ground six was not contrary to, or an unreasonable application of, clearly established federal law, or based on an unreasonable determination of the facts in light of the evidence presented. The Magistrate Judge correctly recommended granting summary judgment in favor of the Respondents on ground six. Petitioner's objections are overruled and ground six is due to be dismissed.

II. Procedurally Barred/Non-exhausted *Martinez* Claims

A. Standard of Review

Petitioner did not raise grounds seven through ten in state court. Respondents argue that, as a result of Petitioner's failure to raise grounds seven through ten in state court, Petitioner has procedurally defaulted those claims. It is Petitioner's burden to raise cause and prejudice or actual innocence in order to excuse the procedural default of claims seven through ten. *Kornahrens v. Evatt*, 66 F.3d 1350, 1362–63 (4th Cir.1995). Here, Petitioner argues the cause for the procedural

default is ineffective assistance of PCR counsel under *Martinez*.

"*Martinez* provides a narrow exception to the general rule, stated in *Coleman v. Thompson*, 501 U.S. 722, 752–53 (1991), that errors committed by state habeas counsel do not provide cause to excuse a procedural default." *Gray v. Zook*, 806 F.3d 783, 788 (4th Cir. 2015). The *Martinez* Court held:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

566 U.S. at 17 (emphasis added).[7] Thus, "when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim" if "appointed counsel in the initial-review collateral proceeding[—]where the claim should have been raised[—]was ineffective under the standards of *Strickland*[.]" *Id.* at 14; *see also Gray v. Zook*, 806 F.3d 783, 789 (4th Cir. 2015) ("[A] *Martinez* claim requires a showing that state habeas counsel was ineffective."). "To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel

[7] "*Martinez* did not purport to displace *Coleman* as the general rule governing procedural default. Rather, it 'qualifie[d] *Coleman* by recognizing a narrow exception' that applies only to claims of 'ineffective assistance of counsel at trial' and only when, 'under state law,' those claims 'must be raised in an initial-review collateral proceeding.'" *Davila v. Davis*, 137 S. Ct. 2058, 2065–66 (2017) (quoting *Martinez*, 566 U.S. at 9, 17). "This limited qualification of the *Coleman* rule was based on the fact that when an 'initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim.'" *Fowler v. Joyner*, 753 F.3d 446, 460 (4th Cir. 2014) (quoting *Martinez*, 566 U.S. at 11). "[F]or states like [South Carolina]—where a petitioner can only raise an ineffective assistance claim on collateral review— *Martinez* announced that federal habeas counsel can investigate and pursue the ineffectiveness of state habeas counsel in an effort to overcome the default of procedurally barred ineffective-assistance-of-trial-counsel claims." *Juniper v. Davis*, 737 F.3d 288, 289 (4th Cir. 2013).

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.

> To summarize, then, *Martinez* held that 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 "consist[s] 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 v. Joyner, 753 F.3d 446, 461 (4th Cir. 2014) (internal quotation marks and alteration in original) (quoting *Trevino v. Thaler*, 569 U.S. 413, 423 (2013)).

In short, "[t]o invoke *Martinez*, [a petitioner] must demonstrate that state habeas counsel was ineffective or absent, and that the underlying [ineffective-assistance-of-trial counsel] claim is substantial." *Porter v. Zook*, __ F.3d __, __, 2018 WL 3679610, at *21 (4th Cir. Aug. 3, 2018). Significantly, "because a petitioner raising a *Martinez* claim never presented the claim in state court, a federal court considers it de novo, rather than under AEDPA's deferential standard of review." *Gray*, 806 F.3d at 789.

B. Ground Seven

In ground seven, Petitioner asserts that trial counsel were ineffective for failing to investigate and present available mitigating evidence. Specifically, Petitioner argues counsel should have presented evidence of Petitioner's 1) positive adjustment to prison; 2) good character; 3) cruel and repeated physical abuse during childhood; 4) history of and treatment for depression; and 5)

remorse. Ground seven was not raised in state court. Petitioner, nevertheless, argues ground seven is not procedurally defaulted pursuant to *Martinez* because the underlying claim is substantial and PCR counsel was ineffective for failing to raise it in the state collateral review proceeding.

(1) Facts

Trial counsel retained a mitigation investigator to look into potential mitigating evidence. Trial counsel also consulted with three mental health professionals - Dr. Alex Morton, Dr. Ernest C. Martin, and Dr. Donna Schwartz-Watts. Additionally, trial counsel consulted with a prison adaptability expert and a clinical social worker. The social worker interviewed Petitioner three times and interviewed several of his family members including Petitioner's mother, father, sisters, brother, two step-siblings, and aunt.

The mitigation evidence at trial was fairly substantial consisting of 14 witnesses. Trial counsel presented three experts, five Greenville County Detention Center employees, five family members, and one religious volunteer.

Dr. Morton testified about Petitioner's mental health and addictions and testified that Petitioner: 1) suffered from recurrent major depressive disorder; 2) suffered from chemical dependency disorders, specifically regarding cocaine, alcohol, and marijuana; and 3) was using a number of substances to treat his depression. [App. 1975-76].

The clinical social worker, Shirley Furtick, testified regarding Petitioner's family history and background. Ms. Furtick testified that Petitioner's father abused alcohol and that Petitioner suffered emotional neglect during his childhood. [App. 1871-82]. Ms. Furtick testified that the emotional neglect Petitioner suffered in his childhood resulted in developmental losses and led to his depression, anxiety, and inability to establish and maintain healthy relationships. [App. 1882]. Ms.

Furtick testified that children who experience neglect generally tend to be over-reactive and overly involved or attached to relationships. [App. 1882].

James Aiken testified regarding Petitioner's prison adaptability and stated that Petitioner could be incarcerated in a prison setting for the remainder of his life without causing an undue risk of harm to staff, inmates, or the general community. [App. 2017-21]. Trial counsel presented the testimony of five Greenville County Detention Center employees, which supported Aiken's conclusion on Petitioner's prison adaptability.

Trial counsel also presented testimony of Terry Bradley, a religious volunteer at the detention center who led a weekly Bible class. [App. 1921-32]. The rest of the mitigation witnesses were members of Petitioner's family.

Petitioner contends trial counsel should have introduced additional mitigation evidence in the categories of: 1) positive adjustment to prison; 2) good character; 3) cruel and repeated physical abuse during childhood; 4) Petitioner's history of depression; and 5) remorse. Petitioner submitted affidavits to support his additional mitigation evidence. [ECF Nos. 117-3 - 117-16].

Petitioner states that his father, brother, and Pastor Don McKellar could have testified about his positive adjustment to prison. Petitioner contends that Ms. Barbare's son, Troy Barbare, Jr., could have presented additional positive character evidence that Petitioner treated Troy like a son. Petitioner contends that his mother could have presented testimony that Petitioner's father would push or hit Petitioner during Petitioner's childhood. Petitioner also contends that trial counsel should have called the Greenville County Detention Center staff psychiatrist, Dr. Martin, to testify about Petitioner's history of depression, as well as his anxiety. Finally, Petitioner argues that trial counsel should have presented or introduced additional evidence of Petitioner's remorse.

(2) R & R

The Magistrate Judge found that ground seven was not a substantial claim under *Martinez*. The Magistrate Judge noted that the information offered in support of the additional mitigation evidence was cumulative of the information presented at trial, with the exception of Petitioner's mother's report of physical abuse in Petitioner's childhood. Finding that trial counsel were not ineffective, the Magistrate Judge stated "this is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face or would have been apparent from documents any reasonable attorney would have obtained. It is instead a case in which defense counsel's decision not to seek more mitigating evidence from the defendant's background than was already in hand fell well within the range of professionally reasonable judgments." [ECF No. 223 at 85]. The Magistrate Judge also found that Petitioner suffered no prejudice from trial counsel's failure to present the additional mitigating evidence. "[G]iven its cumulative nature, the additional evidence Petitioner offers "would barely have altered the sentencing profile presented to the jury . . . and would have done little to counter the weight of the aggravating evidence of Petitioner's gruesome beating of an elderly couple he knew well in their own home and his attempt to flee." [ECF No. 223 at 95]. Accordingly, the Magistrate Judge found that Petitioner's underlying claim of ineffective assistance of counsel was insubstantial and that Petitioner failed to show cause and prejudice under *Martinez*. The Magistrate Judge recommended that ground seven remain defaulted and subject to summary judgment.

(3) Discussion

In his objections, Petitioner does not address the cumulative nature of the additional evidence he claims should have been presented. Rather, Petitioner argues in general terms that there

was evidence that could have changed the outcome of this case the jury never heard. Petitioner's objections focus on the proposed testimony of Troy Barbare, Jr. (Ms. Barbare's son) and Dr. Ernest Martin (Greenville County Detention Center staff psychiatrist).

Trial counsel are not required to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. *Wiggins v. Smith*, 539 U.S. 510, 533 (2003). There comes a point at which more evidence can reasonably be expected to be only cumulative, and the search for it distractive from more important duties. *Bobby v. Van Hook*, 558 U.S. 4, 11 (2009). As the Magistrate Judge noted, this is not a case where trial counsel failed to act while potentially powerful mitigating evidence stared them in the face. Rather, this is a case in which trial counsel's decision not to seek more mitigating evidence falls well within the range of professionally reasonable judgments.

Petitioner contends trial counsel should have introduced additional mitigation evidence in the categories of: 1) positive adjustment to prison; 2) good character; 3) cruel and repeated physical abuse during childhood; 4) Petitioner's history of depression; and 5) remorse.

Positive Adjustment to Prison

Petitioner's father, Ronnie Sigmon, who was a correctional officer with the S.C. Department of Corrections, would have testified that, based on his experience as a correctional officer, Petitioner would obey correctional officers and staff and would not be a future danger or threat to any correctional officer or staff. [Ronnie Sigmon Aff., ECF No. 117-15].

Petitioner's brother, Mike Sigmon, stated in his affidavit that he visited Petitioner a lot while Petitioner was at the Greenville County Detention Center. Regarding prison adaptability, Mike stated that he would have testified that Petitioner was always very respectful of the correctional

officers and staff and that he did not appear to be a problem inmate at all. [Mike Sigmon Aff., ECF No. 117-13].

Pastor Don McKellar is the retired pastor of Petitioner's mother and step-father's church. Mr. McKellar indicates in his affidavit that "[b]ased on his experience both as a minister and with the prison system programs, I can state Brad Sigmon would have been one of the good and well-behaved inmates and he would try to help others in prison." [Don McKellar Aff., ECF No. 117-10].

Good Character Evidence

Petitioner contends trial counsel should have presented additional positive character evidence. Petitioner submitted the affidavit of Troy Barbare, Jr., Ms. Barbare's son, who was twelve years old at the time of the murders. [Troy Barbare, Jr. Aff., ECF No. 117-4]. Troy stated that Petitioner treated him like a son, even though he was not his actual father. *Id.* Troy further stated that he would have testified that he thought of Petitioner like a father. *Id.* If called to testify, Troy would have stated that he never saw Petitioner mistreat Ms. Barbare in any way or physically assault her or commit or attempt to commit any act of domestic violence against her. *Id.*

Petitioner also contends that Pastor McKellar would have offered positive character evidence. Pastor McKellar stated in his affidavit that Petitioner appeared to be a good natured person, hard-worker, and of good moral character. [ECF No. 117-10].

Petitioner also submits the affidavits of Louis Burrell, Virginia Wooten, and Mike Sigmon to show that they would have testified that when Petitioner was about 15 years old, he went to work virtually full time while also staying in school to help support his mother and the family. [Louis Burrell Aff., ECF No. 117-5; Virginia Wooten Aff., ECF No. 117-16; Mike Sigmon Aff., ECF No. 117-13].

Physical Abuse

Petitioner's mother, Virginia Wooten, stated in her affidavit that Petitioner's father would physically abuse her after drinking alcohol and that Petitioner would often get in the middle of the physical altercation and try to protect her. [Virginia Wooten Aff., ECF No. 117-16]. Ms. Wooten stated that her husband would knock Petitioner out of the way, or shove, or slap him. *Id.* Ms. Wooten stated that when Petitioner was 15 years old, his father hit her multiple times in the face and when Petitioner tried to intervene his father punched him and knocked him down. *Id.* She stated that these altercations occurred numerous times. *Id.*

History of Depression

Dr. Ernest Martin (Greenville County Detention Center staff psychiatrist), if called to testify, would have testified regarding Petitioner's history of depression. [Ernest Martin Aff., ECF No. 117-9]. Dr. Martin stated that Petitioner entered the detention center with a previous diagnosis of Depression, which was being treated with Elavil (.75 milligrams). *Id.* On May 9, 2001, Dr. Martin diagnosed Petitioner with Depression recurrent, currently in remission. *Id.* On October 12, 2001, Dr. Martin examined Petitioner again and concluded that Petitioner was showing signs of situational anxiety. *Id.* On February 4, 2002, Dr. Martin saw Petitioner again and determined that Petitioner was suffering from mild Depression, in partial remission. *Id.* Dr. Martin stated that his diagnosis of Petitioner during the time he was incarcerated at the detention center was Major Depression, recurrent without Psychotic features in remission. *Id.*

Remorse

Pastor McKellar visited Petitioner in the Greenville County Detention Center after Petitioner was arrested. [Don McKellar Aff., ECF No. 117-10]. Pastor McKellar stated in his affidavit that

Petitioner was very remorseful and very sorry for the harm that he had caused to the Larke family, and to his own family. *Id*.

Petitioner contends that Dr. Martin's diagnosis of Major Depression is also evidence of remorse. [ECF No. 131 at 30]. Petitioner also raises counsel’s failure to play for the jury a video and audio recording of a phone call between Petitioner and his mother after his arrest as evidence of remorse.

The additional mitigating evidence of positive adjustment to prison, good character, cruel and repeated physical abuse during childhood, Petitioner’s history of depression, and remorse as set forth in the affidavits and outlined above is, for the most part, cumulative of the mitigation case trial counsel presented through its 14 mitigation witnesses. Trial counsel were not deficient in failing to investigate, discover, and/or introduce this additional mitigating evidence. The determination of what constitutes "enough" mitigation evidence is a strategic decision that falls within the wide range of reasonable professional assistance and should not be second guessed after the fact. It was objectively reasonable for trial counsel to "rest" with the mitigation case that was presented through Dr. Morton (mental health expert), Shirley Furtick (clinical social worker), James Aiken (prison adaptability expert), Matt Tally (Field Training Officer - Greenville County Detention Center), Julia Moore (Licensed Professional Counselor - Greenville County Detention Center), Rosa Jones (Nurse - Greenville County Detention Center), Valerie Putnam (Greenville County Detention Center), Captain Michelle Melton (Manager - Greenville County Detention Center), Terry Bradley (religious volunteer), Donnie Wooten (step-father), Robbie Sigmon (son), Brenda Clark (aunt), Ronnie Sigmon (father), and Virginia Wooten (mother).

However, even assuming trial counsel should have discovered and presented the additional

mitigating evidence set forth in the affidavits, Petitioner has failed to establish any resulting prejudice. To show prejudice, Petitioner must demonstrate a reasonable probability that at least one juror would have voted against the death penalty had the jury heard the additional available mitigating evidence. *See Strickland*, 466 U.S. at 695; *Wiggins*, 539 U.S. at 537. To answer this question, the Court must "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534.

Petitioner has failed to show a reasonable likelihood that the additional evidence of prison adaptability, good character, physical abuse, depression, and remorse would have resulted in a life sentence, especially when the evidence is cumulative of what was already presented. *See Morva v. Zook*, 821 F.3d 517, 531 (4th Cir. 2016). The additional evidence of mitigation set forth in the affidavits is not particularly compelling and amounts to only minimal mitigation evidence at best. There is no reasonable probability that at least one juror would have changed his or her sentencing vote based on anything set forth in the affidavits. When the evidence in aggravation (torture, burglary, two murders committed during one course of conduct) is weighed against the totality of available mitigating evidence, there is no reasonable probability that at least one juror would have changed his or her sentencing vote.

Accordingly, Petitioner has failed to establish that his underlying ineffective assistance of counsel claim is substantial under *Martinez*. Because trial counsel were not ineffective for failing to investigate and present available mitigating evidence, and there was no resulting prejudice, PCR counsel were not ineffective for failing to raise ground seven in the PCR proceeding. The Court agrees with the Magistrate Judge that Petitioner has not established "cause" for the default of ground seven. The Court also agrees with the Magistrate Judge that Petitioner is not entitled to a *Martinez*

evidentiary hearing on ground seven because the claim is not substantial. Petitioner's objections as to ground seven are overruled. Ground seven remains defaulted and Respondents are entitled to summary judgment.

C. Ground Eight

In ground eight, Petitioner alleges he was denied effective assistance of counsel per the Sixth and Fourteenth Amendments, and per S.C. Code Ann. § 16-3-26(b)(1), because second chair counsel, Frank Eppes, impermissibly served as lead counsel, even though he lacked the requisite felony trial experience to serve as lead counsel. Ground eight was not raised in state court but Petitioner, nevertheless, argues the ground is not procedurally defaulted pursuant to *Martinez*.

John Abdalla, who was appointed "lead" counsel, stated in his affidavit that "Mr. Eppes was appointed as 'second chair'" and "Mr. Eppes insisted on acting as lead counsel." [John Abdalla Aff., ECF No. 117-3].

Frank Eppes, who was appointed "second chair" counsel, stated in his affidavit that he "took over as lead counsel." [Frank Eppes Aff., ECF No. 117-7]. Eppes states that he remembers saying to Mr. Abdalla that "you may be appointed as lead counsel by the court, but you will bend to my will." *Id*. Eppes states that Mr. Abdalla acceded to his request to act as lead counsel. *Id*.

The Magistrate Judge found that ground eight was not a substantial claim under *Martinez* and recommended granting summary judgment. In reaching this conclusion, the Magistrate Judge noted that there was no rule specifying which aspects of a capital case should fall to lead counsel and which responsibilities should fall to second chair counsel.

In his objections, Petitioner argues that Eppes did not have the requisite trial or felony experience to serve as lead counsel in a capital case, though he was qualified to serve as second

chair. Petitioner argues that South Carolina's qualifications statute and rule are a codification of the Sixth Amendment guarantee to effective counsel and there should be a presumption of ineffectiveness when the capital appointment statute is violated, which should result in a new trial for Petitioner.

Under S.C. Code Ann. § 16-3-26(B)(1),

> Whenever any person is charged with murder and the death penalty is sought, the court, upon determining that such person is unable financially to retain adequate legal counsel, shall appoint two attorneys to defend such person in the trial of the action. One of the attorneys so appointed shall have at least five years' experience as a licensed attorney and at least three years' experience in the actual trial of felony cases . . . .

Section 16-3-26(B) promulgates the "exclusive procedure for appointment of counsel for indigent defendants charged with capital murder." *State v. Brown*, 347 S.E.2d 882, 884 (S.C. 1986). Rule 421 of the South Carolina Appellate Court Rules provides:

> (a) Classes of Certified Attorneys. There shall be two classes of attorneys certified to handle death penalty cases: lead counsel and second counsel.
>
> (b) Lead Counsel. Lead counsel shall have at least five years experience as a licensed attorney and at least three years experience in the actual trial of felony cases. .

. .

> (c) Second Counsel. Second counsel shall have at least three years experience as a licensed attorney. Second counsel is not required to be further certified to be eligible for appointment.

Rule 421, SCACR.

Petitioner offers no authority for the proposition that trial counsel are *per se* ineffective when second chair counsel assumes the role of lead counsel. Also, Petitioner offers no authority that

specifies which aspects of a capital case should fall to lead counsel and which responsibilities should fall to second chair counsel.

A review of the record indicates that Mr. Abdalla made the opening statement in the guilt phase and closing argument in the guilt phase. Mr. Eppes made the opening statement and closing argument in the penalty phase. In total, it appears Abdalla examined 19 witnesses, while Eppes examined 24. Abdalla examined the mental health expert, Dr. Morton, and the clinical social worker, Shirley Furtick. Eppes examined the prison adaptability expert, James Aiken. Abdalla had the most contact with Petitioner [App. 2595] and investigated Petitioner's personal history [App. 2647] and mental health [App. 2596–97]. Eppes, on the other hand, focused on the other evidence in the case, such as police reports. [App. 2647]. Abdalla questioned potential jurors [see, e.g., App. 282]; cross-examined State witnesses [e.g., App. 1269–70, 1280–82, 1285–87]; and examined defense witnesses in the penalty phase, including two of the three experts [App. 1849–1901, 1965–2002]. Abdalla and Eppes appear to have divided the workload fairly evenly. The trial transcript does not support the notion that Eppes acted as lead counsel or that he assumed a majority of the workload.

Petitioner has failed to show how S.C. Code Ann. § 16-3-26(B)(1) or Rule 421 of the Appellate Court Rules were violated when the court properly appointed Abdalla as lead counsel and Eppes as second chair. Again, there is no rule setting forth how duties should be divided between lead counsel and second chair counsel in a capital case.

Even if Eppes did assume the role of lead counsel, Petitioner has failed to establish error or that Eppes was ineffective under *Strickland*. As noted by the Magistrate Judge, a violation of a defendant's statutory right regarding counsel does not automatically equate to a constitutional

violation. *See United States v. Blankenship*, 548 F2d 1118, 1121 (4th Cir. 1976). Thus, Eppes's lack of felony trial experience does not automatically render his assistance ineffective under *Strickland*. Neither *Strickland* nor the Constitution specify the number of years or type of experience a capital defense attorney must have. Rather, "the proper standard for attorney performance is that of reasonably effective assistance." *Strickland*, 466 U.S. at 687. As discussed throughout this Order and the Magistrate Judge's R&R, Eppes and Abdalla both rendered effective assistance of counsel under *Strickland*. Petitioner has not shown that he was denied effective assistance of counsel simply because his second chair attorney acted as lead counsel while lacking the requisite felony trial experience to serve as lead counsel.

Petitioner relies on *United States v. Watson*, 496 F.2d 1125 (4th Cir. 1973), for the proposition that there is a presumption of ineffectiveness when the capital appointment statute is violated by the attorneys appointed. Petitioner, however, attempts to expand *Watson* far beyond its holding. *Watson* simply held that when a capital defendant requests two attorneys under 18 U.S.C. § 3005, § 3005 provides an absolute statutory right to additional counsel. 496 F.2d at 1129. In *Watson*, the court did not presume prejudice under *Strickland* as Petitioner implies. Instead, the court simply declined to apply a harmless error analysis where a capital defendant's request for two lawyers under 18 U.S.C. § 3005 was denied. *Id*. at 1130.

For the reasons stated above, Petitioner has failed to establish that ground eight is a substantial claim under *Martinez*. Because ground eight is not a substantial claim, PCR counsel was not ineffective for failing to raise it in the state court PCR proceeding. Petitioner has, therefore, not established "cause" for the default of ground eight. Also, because ground eight is not a substantial claim, Petitioner is not entitled to a *Martinez* evidentiary hearing. Petitioner's objections as to

ground eight are overruled. Ground eight remains defaulted and Respondents are entitled to summary judgment.

D. Ground Nine

In ground nine, Petitioner argues that trial counsel was ineffective for failing to object to Petitioner wearing a stun belt that may have been visible to jurors. This claim was not presented to the state court and is procedurally defaulted unless Petitioner can establish "cause" for the default under *Martinez*, i.e., that the underlying ineffective assistance of counsel claim is substantial, and that state habeas counsel was ineffective or absent.

The Magistrate Judge recommended summary judgment in favor of Respondents on ground nine. The Magistrate Judge stated that Petitioner had failed to state a viable constitutional claim, let alone a substantial one. As a result, Petitioner could not overcome the procedural default under *Martinez*.

In his objections on ground nine, Petitioner states the jury likely saw the stun belt and that no actual prejudice is required to show a violation of due process. Petitioner relies on *Deck v. Missouri*, 544 U.S. 622 (2005), where the U.S. Supreme Court held that when the trial court, without adequate justification, orders a defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation; instead, the state must prove beyond a reasonable doubt that the shackling error did not contribute to the verdict obtained. *Deck*, 544 U.S. at 634.

Petitioner's reliance on *Deck* is misplaced insofar as *Deck* was a direct appeal issue and did not involve a claim of ineffective assistance of counsel. Thus, while *Deck* may not require a defendant to demonstrate actual prejudice to make out a due process violation, Petitioner has not

alleged such a due process violation based on wearing a stun belt. Instead, Petitioner has asserted an ineffective assistance of counsel claim under *Strickland* based on the failure to object to the stun belt. The distinction is critical. Petitioner must establish prejudice to be entitled to relief on a *Strickland* claim of ineffective assistance of counsel. Furthermore, to overcome the procedural default of this ineffective assistance of counsel claim, Petitioner must show that the underlying claim of ineffective assistance of trial counsel is a substantial one and that Petitioner's state PCR counsel was ineffective in failing to raise it.

As noted by the Magistrate Judge, on this procedurally defaulted ineffective assistance of counsel claim, Petitioner must rebut a strong presumption that trial counsel performed reasonably and show that trial counsel's errors impacted the verdict in order to state a substantial claim. [R&R, ECF No. 223 at 101]. Where Petitioner only alleges that the jury "likely" saw the stun belt, and there is no evidence in the record that any member of the jury noticed the stun belt, he has failed to establish prejudice sufficient to establish a substantial claim under *Martinez*. *See United States v. McKissick*, 204 F.3d 1282, 1299 (10th Cir. 2000) ("However, there is no evidence in the record that any member of the jury noticed the stun belts. Thus, we do not presume prejudice . . . .").

There was overwhelming evidence supporting the death penalty and overwhelming evidence in aggravation of these murders, including torture, burglary, and two murders committed during the same course of conduct. On these facts, where there is no evidence in the record that any member of the jury noticed the stun belt, Petitioner has not shown a reasonable probability that, but for counsel's failure to object to the stun belt, the result of the proceedings would have been different, or that the proceedings would have resulted in a life sentence. Because there is no prejudice from trial counsel's failure to object to the stun belt, Petitioner has failed to establish that the underlying

ineffective assistance of counsel claim is a substantial one.

Petitioner has also failed to establish that trial counsel's failure to object to the stun belt was objectively unreasonable. "Omitting a motion directed to [a] stun belt is not the sort of inexplicable omission that renders even an apparently sturdy defense so deficient that the representation as a whole fell below an 'objective standard of reasonableness.'" *Bland v. Hardy*, 672 F.3d 445, 451 (7th Cir. 2012).

Because Petitioner has failed to establish that the underlying ineffective assistance of counsel claim based on the failure to object to the stun belt is a substantial one, PCR counsel was not ineffective for failing to raise it. As such, Petitioner has not established "cause" for the procedural default. The Court agrees with the Magistrate Judge that ground nine remains defaulted and Respondents are entitled to summary judgment. Petitioner is not entitled to a *Martinez* evidentiary hearing on this insubstantial claim.

E. Ground Ten

In ground ten, Petitioner asserts that trial counsel were ineffective because trial counsel were unaware that the second defense attorney could have also presented a closing argument at sentencing after the Petitioner. Petitioner contends that he suffered prejudice as a result because trial counsel were unable to remedy the damaging effects of Petitioner's closing argument and refocus the jury on the mitigating evidence.

This claim was not raised in state court. Thus, it is procedurally defaulted unless Petitioner can establish "cause" for the default under *Martinez*, i.e., that the underlying ineffective assistance of counsel claim is substantial, and that state habeas or PCR counsel was ineffective or absent.

In his affidavit, trial counsel Eppes states that "[a]t the time, I believed the law required

[Petitioner] to be the very last speaker at closing argument at sentencing." [Eppes Aff., ECF No. 117-7]. Eppes characterizes Petitioner's closing argument at sentencing as "just awful." *Id.* Abdalla stated that Petitioner's "closing argument did not go over well with the jury." [Abdalla Aff., ECF No. 117-3]. Both trial counsel stated in their affidavits that had they known they could offer a closing argument after Petitioner, then Abdalla would have made the final closing argument after Petitioner.

The Magistrate Judge found that evidence in the record supported the notion that trial counsel at least knew that they could offer a closing argument after Petitioner.

> THE COURT: . . . What is the order of argument?
>
> MR. ABDALLA: I believe we're not going to require them to open, if that's what you're asking? Unless there's something I don't know. It goes State, defense, then defendant is my understanding, am I incorrect on that?
> . . . .
>
> MR. EPPES: Well, I don't know -- I thought the statute did not specify whether the defendant spoke first or second.
>
> THE COURT: I don't know if it does or does not.
>
> MR. EPPES: We would plan to go State, defendant, defense
>
> THE COURT: Anything on that?
>
> MS. STROM: They're always entitled to the last argument.
> . . . .
>
> THE COURT: I understand that. I'm saying -- you know, defendant, defense?
>
> MS. STROM: That's not defined as far as which way it has to go.

[App. 1668–69.]

The Magistrate Judge found while trial counsel's decision to let Petitioner go last in the closing argument sequence may have been a poor one, it appears to have been made with full knowledge of the relevant law. More importantly though, the Magistrate Judge found that even if trial counsel were deficient, Petitioner had not shown prejudice. "Any possible mitigating effect of counsel addressing the jury after Petitioner and 're-focus[ing]' the jury on mitigating circumstances and counsel's argument for a life sentence cannot outweigh the aggravating evidence in this case." [R&R, ECF No. 223 at 105].

In his objections on ground ten, Petitioner argues that trial counsel's decision to allow Petitioner to make the last argument was neither a failed strategy nor a reasonable mistake; it was a decision based on a lack of understanding of the law. Petitioner maintains that trial counsel were ineffective under *Strickland* for failing to mitigate the harm caused by Petitioner's closing argument, "despite a legal right to effectively soften the damage from [Petitioner's] closing." [Petitioner's Objections to R&R, ECF No. 229 at 16].

S.C. Code Ann. § 16-3-28 provides: "[n]otwithstanding any other provision of law, in any criminal trial where the maximum penalty is death or in a separate sentencing proceeding following such trial, the defendant and his counsel shall have the right to make the last argument." While the trial transcript indicates that trial counsel at the guilt phase knew that the defense could offer a closing argument after Petitioner (Mr. Eppes stated "We would plan to go State, defendant, defense"), the transcript does not indicate that trial counsel knew that both attorneys could make a closing argument at the sentencing phase.

However, even assuming that trial counsel were deficient for not knowing that both

attorneys could offer a closing argument or that they could offer a closing argument after Petitioner, there is no prejudice from this minimal error. Petitioner has failed to show that he would have received a life sentence had one of his attorneys made the final closing argument. Petitioner's closing argument was not good, but it was not as bad as trial counsel suggest. Petitioner does not dispute the aggravating circumstances of these murders (torture, burglary, and two murders committed during one course of conduct). Petitioner struck each elderly victim at least nine times with a baseball bat, then left them to die in their home. The aggravating circumstances of this brutal crime far outweigh the mitigating circumstances. Any attempts by trial counsel to "refocus" the jury on the mitigating circumstances would have been a largely futile effort. Petitioner does not indicate what trial counsel could have said to minimize any impact of Petitioner's closing argument. Thus, Petitioner's suggestion that he could have mitigated the effects of Petitioner's closing argument and refocused the jury on the mitigating circumstances is just mere speculation. The jury was aware of the mitigating circumstances as well as the aggravating circumstances. The order of closing arguments would not have impacted the jury's decision. Petitioner has failed to show a reasonable likelihood that had his attorney given the final closing argument, he would have received a life sentence. *See Morva v. Zook*, 821 F.3d 517, 531 (4th Cir. 2016). Having failed to establish prejudice from this minimal error, Petitioner has not demonstrated that ground ten is a substantial claim under *Martinez* or that PCR counsel was ineffective for failing to raise it in the state PCR proceeding.

Accordingly, ground ten remains procedurally defaulted. Petitioner is not entitled to a *Martinez* evidentiary hearing on this insubstantial claim. Petitioner's objections as to ground ten are overruled and Respondents are entitled to summary judgment.

Certificate of Appealability

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a) of the Rules Governing Section 2254 Cases. A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a petitioner satisfies this standard by demonstrating that reasonable jurists would find that the court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336–38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate *both* that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484–85. In this case, the Court concludes that Petitioner has failed to make the requisite showing of "the denial of a constitutional right."

Conclusion

For the foregoing reasons, the Court overrules Petitioner's objections and adopts the Magistrate Judge's R & R [ECF No. 223] to the extent it is consistent with this Order. Accordingly, the Court **GRANTS** Respondents' motion for summary judgment [ECF No. 207] and **DENIES AND DISMISSES** Petitioner's § 2254 petition in its entirety *with prejudice*. The Court **DENIES** a certificate of appealability because Petitioner has not made "a substantial showing of the denial of a constitutional right" under 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

Florence, South Carolina
September 30, 2018

s/ R. Bryan Harwell
R. Bryan Harwell
United States District Judge