APPENDIX

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6

[Filed: August 19, 2021]

SAMMIE LOUIS STOKES,

Petitioner – Appellant,

v.

BRYAN P. STIRLING, Director, South Carolina Department of Corrections; MICHAEL STEPHAN, Warden of Broad River Correctional Institution,

Respondents – Appellees.

Appeal from the United States District Court for the District of South Carolina, at Aiken. R. Bryan Harwell, Chief District Judge. (1:16-cv-00845-RBH)

Argued: May 6, 2021 Decided: August 19, 2021

Before GREGORY, Chief Judge, HARRIS, and QUATTLEBAUM, Circuit Judges.

Reversed and remanded by published opinion. Chief Judge Gregory wrote the opinion, in which Judge Harris joined. Judge Quattlebaum wrote a dissenting opinion.

ARGUED: Paul Alessio Mezzina, KING & SPALDING LLP, Washington, D.C., for Appellant. Michael Douglas Ross, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellees. **ON BRIEF:** Diana L. Holt, DIANA L. HOLT, LLC, Columbia, South Carolina; Michele J. Brace, VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER, Charlottesville, Virginia; Ashley C. Parrish, Joshua C. Toll, Isra J. Bhatty, Edward A. Benoit, KING & SPALDING LLP, Washington, D.C., for Appellant. Alan Wilson, Attorney General, Donald J. Zelenka, Deputy Attorney General, Melody J. Brown, Senior Assistant Deputy Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellees.

GREGORY, Chief Judge:

Sammie Louis Stokes confessed to capital murder, putting mitigation of the death penalty at the heart of his defense. His trial counsel prepared some personal mitigation evidence but, at the last minute, withheld it. Instead, counsel presented a single witness at sentencing: a retired prison warden who was unprepared and counterproductive. The jury returned a death sentence without hearing a word from the defense about Stokes as an individual. In postconviction proceedings, new counsel found more information about Stokes's traumatic upbringing, but

failed to pursue a mitigation-based ineffective assistance of counsel claim. We conclude that postconviction counsel were ineffective, providing good cause for Stokes's procedural default of such a claim. On the merits, we find that trial counsel's failure to adequately investigate and present personal evidence was objectively unreasonable and prejudicial. We reverse the district court order dismissing Stokes's petition and remand for issuance of the writ unless the State grants resentencing.

I.

A.

Stokes's childhood in Branchville, South Carolina was marked by extreme abuse and neglect. His parents were serious alcoholics. Stokes initially lived with his father. He met his mother, Pearl, for the first time when he was four years old. When he was five, Stokes went to live with Pearl and met his sister Sara for the first time.

Pearl lived with a man, Richard, whom the kids regarded as a stepfather. As one relative put it, the family lived in a "run-down wooden shack" without running water or indoor plumbing. Richard and Pearl sometimes took the children along to clubs and bars, and other times the children were left unsupervised. Stokes and Sara often skipped school and sometimes stole food from neighbors to eat. On some weekends, they stayed with their paternal grandmother, who ran a liquor house and brothel out of her home. When Stokes was nine years old, his father died suddenly on

the front lawn, where Stokes saw his body. Afterwards, the kids lived with Pearl and Richard permanently.

The children witnessed and suffered physical and sexual abuse. Richard sexually abused Sara, regularly and openly. When Sara was as young as 13 years old, Pearl sometimes "gave" Sara to men as "payment" in exchange for car rides. Stokes was disciplined by whippings with an extension cord. Pearl and Richard fought explosively. One witness recalled Pearl being hospitalized after Richard broke a bottle over her head; Stokes recalled Richard breaking her jaw. When Stokes was 13, he witnessed his mother, on the couch, intoxicated, as she fell into a coma and then died, leaving Stokes parentless.

Stokes remembers his mother's death as a point when his life turned for the worse. Stokes and Sara briefly lived with an aunt but ultimately chose to live unsupervised with Richard. Stokes began using drugs and alcohol. He attended under-resourced schools where his failure to progress was ignored. Stokes repeated the eighth grade three times, yet only stopped attending school at age 18, when he was in the ninth grade. Around age 11 or 12, Stokes had been sexually abused by a babysitter. Thereafter, he had many sexual encounters, and at age 15, impregnated two partners. At that same age, a "relationship" began between Stokes and Audrey Smith, a friend of his mother's, who was almost ten years older than him. Stokes was "obsessed" with Smith, and their relationship was often tumultuous. When Stokes was 18 and Smith was 27, they married.

According to the child development expert retained by Stokes's federal counsel, these facts amount to an extraordinarily traumatic childhood that impaired Stokes's future emotional regulation and social adaptation.[1]

B.

In 1988, Stokes was convicted of assaulting Smith with a knife. Soon after his release in 1990, the couple became involved again. Before long, Stokes assaulted Smith for a second time, choking her in a park and leaving her unconscious. He was convicted of that assault in 1991 and sentenced to ten years. While serving the sentence, in 1998, Stokes was cellmates with Roy Toothe. Toothe's mother, Pattie Syphrette, lived with his children and their mother, Connie Snipes. Syphrette wanted to gain custody of her grandchildren by having Snipes killed. Stokes agreed to carry out the murder for $2,000.

Stokes was released from prison several months later. Within weeks, he and Syphrette met to make plans. Syphrette falsely told Snipes that she had kidnapped and planned to murder Doug Ferguson, a

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[1] The expert, Dr. James Garbarino, applied the Centers for Disease Control and Prevention's well-known "Adverse Childhood Experiences" (ACE) standard to quantify the adversity Stokes experienced on a ten-point scale. According to Dr. Garbarino, only 13 percent of the population have an ACE score of four or greater, with less than one percent scoring seven or greater. Based on his evaluation, Dr. Garbarino concluded Stokes has an ACE score of nine, meaning he was exposed to more childhood adversity than 999 out of 1,000 individuals on average. *See generally* J.A. 2173–2201.

man who sometimes lived with them. Syphrette invited Snipes to join, and Snipes agreed. Stokes also invited Norris Martin, a longtime friend from childhood. Martin, who has an intellectual disability, was a "follower" of Stokes growing up. Snipes went with Syphrette, Stokes, and Martin on a drive to an isolated area. While Syphrette waited by the car, Snipes walked with Stokes and Martin into the woods. Though the factual accounts differ about exactly what happened next, it is undisputed that Stokes drew a gun and held Snipes at gunpoint; Martin raped Snipes, followed by Stokes; and Martin and Stokes each shot Snipes once in the head, killing her. When a car passed nearby, they fled, leaving the body in the woods where it was found days later. At the scene, police found a hat, knife, and wallet belonging to Martin. The group was arrested soon after, and Stokes penned a detailed confession in county jail.

Martin later testified to further details about the crime. According to Martin, Stokes instigated the rape and murder of Snipes; Stokes was especially abusive, anally raping Snipes and using Martin's knife to mutilate her breasts; Stokes pushed the gun into Martin's hand and forced him to pull the trigger; and Stokes mutilated the corpse, cutting off a portion of the scalp and cutting off the genitals.

The jury also heard about the subsequent murder of Doug Ferguson. In the days after the Snipes murder, Syphrette feared Ferguson's knowledge of her plans to murder Snipes. Syphrette enlisted Stokes and a friend, Faith Lapp, to kidnap Ferguson. The group had bound Ferguson with duct tape when police arrived at

Syphrette's home. Ferguson died of suffocation from his bindings. In a subsequent prosecution, Stokes pleaded guilty to Ferguson's murder.

C.

In 1998, the trial court appointed Thomas Sims as Stokes's lead counsel and Virgin Johnson as second chair. The lawyers were former prosecutors with several years of experience in private practice. They had some limited death penalty experience, but little to no experience preparing a mitigation defense. Trial preparation spanned nine months. Sims and Johnson began preparing mitigation evidence six months in. Trial counsel's efforts on the mitigation investigation totaled around 45 hours out of the hundreds they billed. They hired their fact investigator's receptionist as the mitigation investigator, though she had no prior experience with mitigation investigations. She was conducting an interview the same day that the jury reached its initial verdict.

The guilt phase of the trial began on October 25, 1999. The parties agreed to restrict the guilt phase to a bare recitation of the facts and reserve any aggravating facts about the crime for the penalty phase. Four days later, the jury returned a guilty verdict after an hour's deliberation. For the penalty phase, trial counsel decided to focus on prison adaptability: they planned to argue that Stokes's health condition made him especially suitable for a life sentence. Stokes was HIV-positive. His health was declining significantly around this time; he even needed an emergency blood transfusion in the days before trial. Trial counsel retained a neurologist who

was prepared to testify to evidence of brain damage possibly caused by AIDS. They also prepared a forensic psychiatrist to testify that Stokes was likely to imminently die of AIDS in prison.

Stokes was hesitant about this strategy, and trial counsel knew it. They repeatedly intervened to secure his consent. For example, a memorandum by the mitigation investigator describes a "very tense meeting" with Stokes five days before trial, in which Stokes opposed disclosing his HIV status. J.A. 2544. She secured his approval on the condition that the courtroom be cleared when the issue would be discussed. Ultimately, though, on the eve of sentencing, Stokes withdrew his consent, refusing to allow his counsel to mention his HIV status under any circumstances.

Still, the defense team had other evidence ready. Their investigation had not uncovered the full extent of Stokes's life story, but they knew the broad outlines. At the start of sentencing, Stokes's sister and aunt were on the witness list and prepared to testify. The same was true of the psychiatrist and neurologist, as well as a social worker who was prepared to testify about Stokes's psychological profile. However, in another last-minute decision, trial counsel decided not to present any personal evidence about Stokes.

In post-conviction testimony, Sims and Johnson explained that they reached this decision based on their impressions of the jury from the guilt phase, knowing that the worst details of the crimes were yet to come. They believed that "an Orangeburg County jury" "back in '97, '98, '99, when this was going on,"

would not be receptive to evidence about "the background of the individual and the kind of life that they had had as a child" after hearing the prosecution's case in aggravation. J.A. 3469–73; J.A. 3423–25. Trial counsel was also mindful of the jury's racial composition and "certain inner biases" that they believed would follow. J.A. 3523–24. They believed white jurors might react especially to Stokes, a Black man, raping Snipes, a white woman. And for Black jurors, especially "with the older Black females during that time," there was "this whole idea of homosexuality." *Id.;* J.A. 3520–21 ("AIDS, homosexuality . . . during that time there was a prejudice and a bias against it."). On this basis, trial counsel declined to present any background evidence about Stokes and proceeded with their prison adaptability approach. But because Stokes withdrew consent to present evidence related to his HIV status, this approach amounted to a single witness, James Aiken, offered as an adaptability expert.

Aiken was a retired prison warden. He opined that Stokes "does not demonstrate the behaviors of being a predator" and does not demonstrate an "unusual" risk of harm in prison. J.A. 1309–14. Aiken explained that his opinion was based on the prison facility more than Stokes as an individual. Indeed, he refused to meet Stokes, or interview anyone who knew Stokes, explaining that his analysis simulated how a prison official would evaluate an inmate from their case file alone. Yet the record Aiken reviewed was apparently incomplete, and he often could not recall the details. He emphasized the prison system's punitive nature, stating that if Stokes acted out, he would be punished,

including by lethal force if necessary.[2] In total, direct examination of Aiken—the entirety of the defense's case at sentencing—spans around four pages of trial transcript, while the State's cross-examination spans over 25. J.A. 1310–14; J.A. 1315–41. In closing arguments, the State emphasized that Aiken effectively agreed that Stokes may commit violence while in prison: "So it's sort of like an Alice in Wonderland thing, where he's using the punishment for infractions, the ability to deal with that, to say that the man is adaptable. It's just the opposite. If it's adapting to prison, you don't have to punish him." J.A. 1365–66.

Meanwhile, the State presented robust aggravating evidence, calling 12 witnesses. Martin and the state pathologist added further details about the violence of the Snipes murder, and Faith Lapp testified about Stokes's role in the Ferguson murder. The State also presented evidence related to Stokes's prior criminal convictions. Early in his second prison stint, Stokes assaulted an inmate with a box cutter, and the State presented graphic pictures of the victim and the crime scene. Smith, Stokes's ex-wife, testified to the facts underlying Stokes's 1988 and 1991 assault convictions.

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[2] Aiken stated: "[Prison guards] have the ability, have the technique, have the training and have the equipment to effect lethal force if that person does not adequately follow certain rules and regulations," and "I have ordered inmates killed because they did not follow rules and regulations and that inmate has been killed." J.A. 1321. He said the facility could "put[] [Stokes] in a prison within a prison . . . [using] lethal force and taking his life if required." J.A. 1327.

The evidence of Stokes's 1991 assault of Smith is especially relevant on appeal. Stokes's lead trial counsel, Sims, personally prosecuted that case against Stokes. In so doing, he developed and presented extensive testimony from Smith. Stokes had refused to be present in the courtroom for the 1991 trial, so he had not personally witnessed Sims's arguments and presentation. Sims never disclosed this issue to the court.[3] He later explained, "It was never asked, and I did not—it just didn't come up." J.A. 1612. It is undisputed that Sims told Stokes about his prior role; he recalled, "[W]e did discuss with Mr. Stokes, my role, who I was, and what my role had been in the previous matter with him. . . . He never expressed any desire not to have me as his attorney." J.A. 1612; *see* J.A. 1640–56. Despite his prior prosecution of the crime now being presented by the State as aggravating evidence against his client, Sims elected to personally cross-examine Smith. Indeed, the second chair, Johnson, never spoke a word on the record.

After the close of evidence, the jury deliberated for around three hours before returning a death sentence.

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[3] Sims did point out that his name appeared on the 1991 indictment when it was entered into evidence, requesting that it be redacted. J.A. 1426–27. However, in the brief exchange, he states that his name was on every indictment the office issued at that time; it does not appear that the request put the court on notice that Sims had personally prosecuted the case against Stokes and presented extensive testimony from Smith. *See id.*

D.

Stokes filed an application for postconviction relief ("PCR") in October 2001, claiming ineffective assistance based on trial counsel's mitigation presentation. The court appointed PCR counsel—Keir Weyble and Robert Lominack—who filed an amended application in May 2002, adding some additional claims. PCR counsel deposed trial counsel, hired new experts, and hired a mitigation investigator.

In August 2004, PCR counsel filed another amended application, this time dropping the mitigation claim while adding an Eighth Amendment intellectual disability claim and a Sixth Amendment conflict-of-interest claim. As a result, the State initiated a formal competency assessment process that stretched on for years. Stokes was eventually found competent, and PCR counsel dropped the disability claim. They proceeded on their remaining claims, including the conflict-of-interest claim and other ineffective assistance claims but not the mitigation theory.

The PCR court denied Stokes's application in October 2010. The parties litigated issues related to the court's order into 2013. Stokes petitioned for South Carolina Supreme Court review in November 2014, which was denied in February 2016. The United States Supreme Court also denied Stokes's petition for review, and the State set an execution date.

Stokes then filed a petition for habeas corpus, asserting two mitigation-based ineffective assistance claims and the conflict-of-interest claim. Because the ineffectiveness claims were not exhausted in state

proceedings, a federal magistrate judge held an evidentiary hearing to determine whether there was good cause for the default under *Martinez v. Ryan,* 566 U.S. 1 (2012). After hearing testimony from both sets of counsel, the magistrate recommended denying all relief. Stokes filed objections to the magistrate's report and the district court overruled them. The court adopted the report and concluded that PCR counsel were not ineffective, meaning the unexhausted mitigation-based claims were defaulted. Alternatively, the court found that trial counsel's alleged ineffectiveness was not prejudicial. Finally, the court found no actual conflict of interest, and, even if there had been a conflict, that Stokes waived any objection.

Stokes filed a timely appeal. Under 28 U.S.C. § 2253, we may consider whether Stokes is entitled to a certificate of appealability on his exhausted claims, and under *Martinez,* 566 U.S. 1, we may determine whether Stokes is entitled to appellate review of his defaulted claims. *See Owens v. Stirling,* 967 F.3d 396, 423–26 (4th Cir. 2020).

II.

In general, a state prisoner must exhaust all state court remedies before filing a 28 U.S.C. § 2254 petition. *Williams v. Stirling,* 914 F.3d 302, 311 (4th Cir. 2019). We then apply the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") standard of review, under which a petitioner is entitled to relief only if the state court adjudication of their claim was 1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court"; or 2) "based on an unreasonable determination

of the facts in light of the evidence presented." *Long v. Hooks,* 972 F.3d 442, 457–58 (4th Cir. 2020) (en banc) (quoting 28 U.S.C. § 2254(d)).

Under this framework, a federal habeas court may not hear a claim that was procedurally defaulted in state proceedings unless the petitioner can show cause for the default. *Coleman v. Thompson,* 501 U.S. 722, 750 (1991). Ordinarily, an attorney's error is not valid cause for such a default because "[t]here is no constitutional right to an attorney in state post-conviction proceedings." *See id.* at 752–57. Ineffective assistance claims complicate matters, however, because state law sometimes dictates that collateral post-conviction proceedings are a defendant's first opportunity to challenge their trial counsel's effectiveness. *See id.* at 755–57. That is the case here under South Carolina law. *Sigmon v. Stirling,* 956 F.3d 183, 198 (4th Cir. 2020). In *Martinez v. Ryan,* the Supreme Court adopted a narrow exception to address this gap. *See* 566 U.S. at 9. The Court held that—if state law restricts ineffective assistance claims to initial-review collateral proceedings—the ineffectiveness of a petitioner's state PCR counsel may provide cause in a federal habeas proceeding to excuse the petitioner's failure to challenge the ineffectiveness of his trial counsel. *See id.* "[B]ecause 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 v. Zook,* 806 F.3d 783, 789 (4th Cir. 2015).

Stokes argues the district court erred in concluding that his PCR counsel provided constitutionally effective

representation. Therefore, Stokes argues, we may reach his underlying claim against his trial counsel. He asserts two distinct theories of trial counsel's ineffectiveness: that trial counsel unreasonably failed to investigate and present personal mitigation evidence, and trial counsel unreasonably presented Aiken as their sole mitigation witness. Finally, Stokes argues the state court's conclusions as to the conflict-of-interest claim were an unreasonable application of clearly established federal law.

III.

We first address PCR counsel's effectiveness to determine whether Stokes has shown good cause for defaulting his ineffectiveness claims. We conclude that PCR counsel's failure to develop and present a claim based on trial counsel's mitigation efforts amounts to ineffective assistance. Proceeding to the underlying claim, we conclude that trial counsel's mitigation investigation and choice not to present any personal mitigation evidence was unreasonable and prejudicial, establishing ineffectiveness. Because these conclusions alone require resentencing, we do not reach Stokes's remaining claims.

A.

The *Martinez* exception applies when, first, the petitioner shows that "appointed counsel in the initial-review . . . was ineffective under the standards of *Strickland* [*v. Washington,* 466 U.S. 668, 687 (1984)]." *Martinez,* 566 U.S. at 14. This means that PCR counsel "performed deficiently[] under the first prong of *Strickland,* . . . but not that said counsel's deficient

performance was prejudicial[] under the second prong of *Strickland*."[4] *Owens,* 967 F.3d at 423. Second, the petitioner must show that the underlying ineffectiveness claim against trial counsel "is a substantial one," meaning that it "has some merit."[5] *Martinez,* 566 U.S. at 14.

1.

To establish ineffectiveness under *Strickland,* a petitioner must show counsel's performance was constitutionally deficient, meaning it fell below an objective standard of reasonableness. 466 U.S. at 687. Counsel's performance is evaluated based on

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[4] Asking the petitioner to show that PCR counsel's ineffectiveness prejudiced the state proceedings would effectively require the petitioner "to show that the defaulted claim is itself meritorious." *Owens,* 967 F.3d at 423 (explaining this "apparent incongruity"). Circularly, the petitioner would have to "*prevail* on the merits of [their] underlying claim merely to excuse the procedural default and obtain consideration on the merits." *Id.* (internal quotations omitted). Therefore, we have joined our sister circuits in reading *Martinez's* use of the phrase "the standards of *Strickland*" to refer only to performance, not prejudice. *See id.*

[5] In imposing this requirement, the Supreme Court cited the standard that governs certificates of appealability under 28 U.S.C. § 2253(c)(2). *See Martinez,* 566 U.S. at 14 (citing *Miller-El v. Cockrell,* 537 U.S. 322, 327 (2003)); *Owens,* 967 F.3d at 423. Under that standard, "a petitioner must 'sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" *Miller-El,* 537 U.S. at 327 (quoting *Slack v. McDaniel,* 529 U.S. 473, 484 (2000) (internal quotations omitted)); *Owens,* 967 F.3d at 423.

"prevailing professional norms" at the time of the representation and in light of "all the circumstances." *Id.* at 688. Professional norms may be reflected in American Bar Association ("ABA") standards, or other comparable guides, though such guides are not dispositive of what constitutes reasonable representation in any given case. *Owens,* 967 F.3d at 412 ("[N]o fixed set of rules may 'take account of the variety of circumstances faced by defense counsel.'") (quoting *Strickland,* 466 U.S. at 688–89). Our assessment of counsel's performance is "highly deferential." *Id.* "[A] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight . . . and to evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689.

Capital defense counsel have a duty to investigate and present substantial mitigating evidence, which includes the "obligation to conduct a thorough investigation of the defendant's background." *See Williams v. Taylor,* 529 U.S. 362, 391–99 (2000). The Supreme Court reaffirmed this duty several times before and during PCR counsel's representation of Stokes. *See, e.g., id.; Wiggins v. Smith,* 539 U.S. 510 (2003); *Rompilla v. Beard,* 545 U.S. 374 (2005); *Porter v. McCollum,* 558 U.S. 30 (2009) (per curiam); *Sears v. Upton,* 561 U.S. 945 (2010). Counsel's investigation should cover the defendant's "psychological history," which "could explain or lessen the client's culpability for the underlying offense." *See Williams v. Stirling,* 914 F.3 d at 313. A reviewing court considers not only the "quantum of evidence already known to counsel," but also whether that evidence "would lead a

reasonable attorney to investigate further." *Id.* (quoting *Wiggins,* 539 U.S. at 527). If counsel declined to present their findings, the inquiry focuses on "whether the investigation supporting counsel's decision . . . was itself reasonable." *Wiggins,* 539 U.S. at 523.

Here, the district court found that PCR counsel performed reasonably because they investigated Stokes's background "to some extent" and then "intentional[ly]" withdrew the mitigation claim. J.A. 3839. True, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that [they] did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry,* 540 U.S. 1, 5 (2003).

But intentionality does not guarantee reasonableness, and presumptions are rebuttable. The adequacy of counsel's investigation informs the strength of the presumption of strategy. *See Strickland,* 466 U.S. at 690–91 ("[S]trategic choices made after less than complete investigations are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."); *Wiggins,* 539 U.S. at 527–28 ("[C]ounsel were not in a position to make a reasonable strategic choice . . . because the investigation supporting their choice was unreasonable."). For example, in *Williams v. Stirling,* counsel's investigation uncovered evidence of the defendant's brain damage and his mother's alcoholism, but counsel "did not even consider whether [the defendant] had [fetal alcohol syndrome]" and "whether to pursue that evidence." 914 F.3d at 314. That counsel conducted some investigation in general was not

enough; they were ineffective because they "failed to conduct *any* investigation" into a potentially mitigating condition "despite the red flags." *Id.* at 315.

Similarly, in *Wiggins,* counsel learned of the defendant's "alcoholic, absentee mother" and his "physical torment [and] sexual molestation" in foster care, but they did not pursue either discovery further. *See id.* at 523–25. "Counsel's decision not to expand their investigation" violated professional standards because they did not attempt to discover "all reasonably available mitigating evidence." *Id.* ("[A]ny reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses, ..."). Thus, *Wiggins* rejected the "presumption" of strategy: "[T]he 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations." *Id.*

The same is true here of PCR counsel. Though they investigated "to some extent," their investigation was nevertheless inadequate because they ignored the valuable leads they uncovered. They knew about adversity in Stokes's background from trial counsel's cursory investigation. They hired their own investigator, whose additional interviews generated rich leads about Stokes's psychological, educational, and familial history. At that point, an objectively reasonable attorney would be prompted to investigate further. *See Williams v. Stirling,* 914 F.3d at 313–15 (holding "there was *necessarily* no opportunity for

counsel to make a strategic decision" after counsel failed to "further explor[e]" significant "red flags"). Yet PCR counsel conducted essentially no investigation beyond the investigator's interviews. They did not re-interview any of the witnesses themselves or seek out corroborating documentary evidence. They did not speak to or request files from the social worker retained by trial counsel. While they interviewed the neurologist, who had found indicators of brain damage, they did not obtain his files or his testing results.

And, perhaps most consequentially, they did not retain an expert capable of applying their investigator's findings. Because "psychological and social history" and "emotional and mental health" are often of "vital importance" to a mitigation defense, "the defense team should include at least one person qualified to screen for mental or psychological defects." *Id.* That duty was certainly implicated in this case when the investigator found reports of Stokes's childhood experiences of physical and sexual abuse and neglect, domestic violence, and substance abuse. Without consulting an expert capable of analyzing these significant "red flags," counsel did not make "efforts to discover *all reasonably available* mitigating evidence." *See Wiggins,* 539 U.S. at 524 (quoting ABA Guideline § 11.4.1(C) (1989)); *see, e.g., Gray v. Branker,* 529 F.3d 220, 229–32 (4th Cir. 2008) (holding counsel ineffective where they "simply missed or ignored—and failed to act on—the many signs that [the defendant] was mentally and emotionally unstable" and failed to "explor[e] the need for mental health testimony from an expert"); *Hamilton v. Ayers,* 583 F.3d 1100, 1114–17 (9th Cir. 2009) (finding ineffectiveness where indicators of mental

illness meant that counsel "should have retained a mental health expert and provided the expert with the information needed to form an accurate profile of [the defendant's] mental health").

PCR counsel themselves testified that this error explained their unreasoned approach to the mitigation issues. When asked whether they "consult[ed] an expert to assess [the] rather wealth of mitigation information," Weyble responded, "No, we didn't." J.A. 2718. And when asked "Did you have a strategic reason for failing to do that?" he said, "No." *Id.* Similarly, Lominack testified, "We did not hire a social worker. And I do not think that I worked on a case before or since . . . in which I did not hire a social worker." J.A. 2998 ("I absolutely need someone who has the knowledge and the expertise to take this evidence and characterize it and put it in the right boxes."); *see also* J.A. 3377 ("[W]e stopped short of putting [the findings] in front of people who could help us understand it and generate that plausible explanation for behaviors."). He explained that this error was due to a lack of experience, as opposed to strategy:

> I look back at the cases I handled early in my career with some degree of embarrassment. I think the most specific example is ever working on a case without a social worker. I can't imagine doing that at the end of my career. And when I encountered that in other cases, it was shocking because it's not the standard of care and wasn't when I worked on this case.

J.A. 2621. And while it is true that a decision not to investigate may itself be strategic—for example, if the

findings would be more harmful than helpful, *see Wiggins,* 539 U.S. at 525 (collecting cases)—there is no evidence that informed PCR counsel's decisions here.

Instead, PCR counsel cited non-strategic reasons for their investigatory decisions and abandonment of the claim. *See, e.g.* J.A. 2983–85 (explaining that the failure to "personally interview[] any of those [mitigation witnesses]" was either "lazy or not knowing that should have been done or not knowing I should have done it."); J.A. 3018 ("We didn't have a social worker. . . . I don't think we had enough information at the time to decide that it was a claim that needed to be thrown out, and I don't think that's what we did, certainly not with any intentionality."); J.A. 3031 ("We weren't thoughtful enough to have personally interviewed any of the people that were relevant to the claim that we dropped."). Because PCR counsel's investigation fell short of professional standards, it cannot support the presumption that their subsequent abandonment of the claim was strategic. *See Wiggins,* 539 U.S. at 527–28, 536 ("[C]ounsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible."); *Williams v. Stirling,* 914 F.3d at 316–17 ("[T]he PCR court relied on the factual assumption that trial counsel made a strategic choice not to present" mitigation evidence, but "it was impossible for trial counsel to have made a strategic choice because there was no investigation into" that issue).

Beyond the investigation's shortcomings, PCR counsel's testimony directly rebuts the presumption

that they dropped the mitigation claim strategically. PCR counsel testified that they neglected the mitigation theory after becoming preoccupied with other claims. When asked if he recalled "why [he] would have omitted that claim," Weyble explained: "At that same time, what was then called mental retardation [and] is now called intellectual disability claim arose, somewhat to our surprise, frankly. And I think we became somewhat distracted by the shiny object, if you will, and thought we—that we were really on to something there." J.A. 3259. Likewise, when asked "why did [he] withdraw the mitigation claim," Lominack responded:

> [W]e were so focused at the time on the intellectual disability claim, . . . somewhat to the detriment of . . . [a] mitigation claim. I don't recall having a specific reason why we would abandon a general mitigation claim, especially when at trial nothing was presented, which is quite rare, actually, for there not to be any mitigation presented about a client's childhood. I don't recall in Mr. Stokes's case, and frankly, in any case, how I could have thought that that was going to be a wise or reasonable choice, and the only thought that I have now is that we were so focused on the I.D. claim that we dropped it and focused on that instead.

J.A. 2918. This testimony does not describe strategic prioritization among multiple claims. Rather, counsel testified that their prioritization of other claims was uninformed and happenstance, the product of distraction, inexperience, and carelessness. *See, e.g.,*

J.A. 3018 ("I'd love to, in hindsight, say, yeah, we knew what we were doing. We didn't. We were focusing on the [disability], adaptability, and IQ investigation."); J.A. 3031 ("I think one of the reasons I'm not remembering a real strategic reason . . . is that, to be blunt, I'm not sure that we were that thoughtful about it."); *cf Wood v. Allen,* 558 U.S. 290, 309 (2010) (Stevens, J., dissenting) (distinguishing a decision that is "the product of a deliberate choice between two permissible alternatives" from one that is "the product of inattention and neglect by attorneys preoccupied with other concerns").

Also, Stokes was ultimately found competent years later, and PCR counsel dropped the disability claim that had been hogging their attention. PCR counsel did not testify to any strategic basis for declining to pursue the mitigation theory at that point. *See, e.g.,* J.A. 2993 ("[T]o me, it's nonsensical to be so hyper-focused [on intellectual disability], . . . especially when th[at claim] went by the wayside after the [state] evaluation."); J.A. 3262 (responding, after being asked why they did not revive the mitigation claim after the intellectual disability claim failed, "I don't have a good answer to that question").[6] Nothing suggests that counsel was

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[6] The district court largely ignored PCR counsel's testimony. It relied on one exchange from Weyble's cross-examination, where Weyble responded "yes" to the prosecutor's statement that "there had to be a reason that [he] withdrew [the claim]" because if he "thought it was a strong claim," he would have presented it. *See* J.A. 3840–41. The court discredited the countervailing portions of PCR counsel's testimony as "fall[ing] on their sword for their former client." J.A. 3840. But nothing in the record justifies selectively crediting this exchange while disregarding extensive

strategically winnowing the claims, selecting only those few deemed most meritorious: In their original petition, PCR counsel raised six claims in addition to the intellectual disability claim, three of which were so weak that they later abandoned them and two of which, alleging ineffective assistance of appellate counsel, had obvious and dispositive weaknesses.[7] Considering the dramatic lack of mitigation evidence presented at trial despite Stokes's background, PCR

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contrary evidence from the same witnesses. An evidentiary ruling may not rest solely on the court's presumption of the witness's sympathies and intentions. For example, the dissent the district court cited as its sole authority called out perceived "sword falling" in a footnote, but it supported that charge by arguing the witness's testimony about "the particulars of his investigation" contradicted his "self-denigrating" characterizations. *Dugas v. Coplan,* 428 F.3d 317, 346 n.39 (1st Cir. 2005) (Howard, J., dissenting). Here, the district court pointed to no factual contradictions in Weyble and Lominack's testimony that undermined their generally negative portrayal of their performance. They gave reasonable explanations for why they made decisions they now believed to be improper, such as a lack of experience or being distracted by new developments. The district court did not identify, nor do we find, anything in the record making PCR counsel any less credible than trial counsel, whose testimony the district court relied on extensively.

[7] As the PCR court explained, the two claims alleging ineffective assistance by appellate counsel were without merit because they improperly faulted appellate counsel for failing to argue points that had not been preserved at trial. Additionally, the PCR court noted that one of the claims—that appellate counsel should have argued that the trial court erred by failing to instruct on a mitigating factor for the victim's participation or consent in the act—was "groundless" in any event, because "Snipes did not consent to the violence that was about to strike her." J.A. 1775–76 n.6.

counsel's failure to consider adding the mitigation claim back into the petition is further evidence of unreasonableness, not strategy. *See McKee v. United States,* 167 F.3d 103, 106 (2d Cir. 1999) ("A petitioner may rebut the suggestion that the challenged conduct reflected merely a [tactical] choice . . . by showing that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker."). Here, like in *Wiggins,* the purportedly strategic decision "resembles more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations." *See* 539 U.S. at 523–25.

Absent strategic justifications, PCR counsel's abandonment of the mitigation claim was objectively unreasonable. PCR counsel knew that trial counsel's investigation was paltry. Further, trial counsel presented no background mitigation evidence at all, and the Supreme Court had recently deemed trial counsel ineffective for even more robust presentations. *See, e.g., Williams v. Taylor,* 529 U.S. at 368, 395 (finding mitigation presentation ineffective, despite testimony from the defendant's "mother, two neighbors, and . . . a psychiatrist," because counsel failed to relay "[the defendant's] nightmarish childhood"); *Porter,* 558 U.S. at 32, (finding ineffectiveness, despite testimony about the defendant's relationship with his son, because counsel "failed to . . . present any evidence of [the defendant's] mental health . . ., his family background, or his military service").

PCR counsel's own failure to pursue and present a mitigation-based claim arising from trial counsel's

performance constitutes ineffective assistance. *See, e.g., Blake v. Baker,* 745 F.3d 977, 982–83 (9th Cir. 2014) (finding PCR counsel ineffective where counsel did nothing with witness statements describing "the abhorrent conditions of [the petitioner's] upbringing and family history" and "failed to . . . retain experts" to review the findings); *Trevino v. Davis,* 829 F.3d 328, 348–49 (5th Cir. 2016) (holding that PCR counsel were ineffective in failing to pursue a mitigation claim where trial counsel "presented only one mitigation witness and no other evidence," and "[t]he deficiency in that investigation would have been evident to any reasonably competent habeas attorney").

2.

Given the extraordinary facts of this case, Stokes's underlying ineffectiveness claim against his trial counsel is "substantial" for *Martinez* purposes. *See* 566 U.S. at 14. The basis for questioning trial counsel's effectiveness is plain enough that PCR counsel's failure to adequately pursue it was objectively unreasonable. It follows that the underlying claim has "some merit"—meaning, at the very least, reasonable jurists could debate its viability.[8] *See id.; Miller-El,* 537 U.S. at 327.

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[8] The district court also found, alternatively, that Stokes could not show prejudice from trial counsel's alleged ineffectiveness, and therefore "his underlying claim . . . is not substantial." J.A. 3849 (citing *Martinez,* 566 U.S. at 14). Though inconsequential, this was an improper application of *Martinez's* substantiality requirement. A claim that fails on the merits may very well still be "substantial" for purposes of showing cause for a procedural default. *See Owens,* 967 F.3d at 423. The question is whether the claim has "some merit," meaning that reasonable jurists could at least debate its

Therefore, under *Martinez,* Stokes has established cause for procedurally defaulting his mitigation-based ineffective assistance claim against trial counsel in state proceedings. Accordingly, we proceed to the merits.

B.

To establish trial counsel's ineffectiveness, the petitioner must show that 1) their performance fell below an objective standard of reasonableness, and 2) the deficient performance was prejudicial. *See Strickland,* 466 U.S. at 687. To establish prejudice, the petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See id.* at 694.

1.

Trial counsel were constitutionally deficient for much the same reasons as PCR counsel. Their investigation was inadequate, and their decision to withhold all personal mitigation evidence was unreasonable.

Trial counsel had little-to-no experience preparing a mitigation defense, yet they consulted with no experienced attorneys or mitigation experts. Their mitigation efforts, totaling around 45 hours, began six months into their nine-month representation, though the ABA Guidelines stated that sentencing investigation should "begin immediately upon counsel's entry into the case and should be pursued

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viability. *See Martinez,* 566 U.S. at 14 (citing *Miller-El,* 537 U.S. at 327); *Owens,* 967 F.3d at 423.

expeditiously." ABA Guidelines § 11.4.1 (1989). They hired an inexperienced mitigation investigator who was still conducting interviews through the guilt phase of the trial. They did not personally conduct any follow-up interviews or otherwise develop the investigator's findings. They retained experts to testify at sentencing, but those experts were apparently not consulted about the personal mitigation evidence. In a capital murder trial where mitigating the death penalty was the central issue in the defense, such an investigation is objectively unreasonable.[9] *See Wiggins,* 539 U.S. at 523–25 ("Despite these well-defined norms, . . . counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources."); *see also Earp v. Ornoski,* 431 F.3d 1158, 1175–76 (9th Cir. 2005) ("*Wiggins* . . . establishes that the presence of certain elements in a capital defendant's background, such as a family history of

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[9] Trial counsel did conduct *some* investigation. Their investigator subpoenaed records and interviewed several friends and family members, going beyond some investigations that have been deemed unreasonable. *See, e.g., Wiggins,* 539 U.S. at 523–24 (counsel only obtained the presentence report and one set of social services records); *Porter,* 558 U.S. at 39 (counsel obtained no records and conducted no interviews of the defendant's family). Nevertheless, trial counsel unreasonably failed to pursue the indications of extreme childhood trauma, neglect, and abuse. *See Gray v. Branker,* 529 F.3d at 229–32 (finding unreasonableness, even where counsel interviewed "friends and associates" and retained experts, because they "failed to investigate for mental health evidence"); *Williams v. Stirling,* 914 F.3d at 313–16 (faulting counsel for ignoring "red flags," though their investigation otherwise "*did* bear the hallmarks of effective assistance").

alcoholism, abuse, and emotional problems, triggers a duty to conduct further inquiry before choosing to cease investigating.").

Trial counsel's subsequent decision to withhold the personal mitigation evidence they did have was also objectively unreasonable. At the outset of sentencing, members of Stokes's family and a social worker were prepared to testify. A neurologist and psychiatrist were prepared to testify about Stokes's HIV status, but presumably could have offered other personal testimony about Stokes instead. Yet counsel abandoned this evidence based on their impressions of the jury, deciding the jurors—the Black jurors in particular—would react negatively to evidence of Stokes's life story after hearing the prosecution's aggravating case. As Johnson put it:

> [H]ow do you go to a jury and say, look, we want you to look at the fact that he had a poor upbringing, particularly African-American, which a lot of us had struggles coming up, how do you say, well, just because he had a poor upbringing, you need to overlook the fact that he raped this woman, you need to overlook the fact that he cut her vagina out, you need to overlook the fact that he cut her nipples off, you need to overlook the fact that he killed somebody else.

J.A. 3424–25.

This concern reflects a misunderstanding of the duty to mitigate. Trial counsel were not obliged to ask the jury to excuse Stokes's actions. Instead, their duty was to mitigate Stokes's "moral culpability." *See, e.g.,*

Williams v. Taylor, 529 U.S. at 398 (explaining that "the graphic description of [the defendant's] childhood, filled with abuse and privation, . . . might well have influenced the jury's appraisal of his moral culpability" by showing that his violence was "compulsive" as opposed to "cold-blooded premeditation"); *Caro v. Woodford,* 280 F.3d 1247, 1258 (9th Cir. 2002) ("By explaining that [the defendant's] behavior was physically compelled, . . . or even due to a lack of emotional control, his moral culpability would have been reduced."). Counsel can carry out this duty without diminishing the defendant's responsibility for their actions or the seriousness of their crimes. *See Eddings v. Oklahoma,* 455 U.S. 104, 115–16 (1982) (qualifying, after explaining why youth mitigates moral culpability, that "[a]ll of this does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case"). As one mitigation specialist has put it:

> Mitigation is *not* a defense to prosecution. It is not an excuse for the crime. It is not a reason the client should "get away with it." Instead, mitigation is a means of introducing evidence of a disability or condition which inspires compassion, but which offers neither justification nor excuse for the capital crime. . . . It explains the influences that converged in the years, days, hours, minutes, and seconds leading up to the capital crime, and how information was processed in a damaged brain. It is a basis for compassion—not an excuse.

Russell Stetler, *The Mystery of Mitigation,* 11 U. Pa. J. L. & Soc. Change 237, 261 (2008). Thus, trial counsel did not have to ask the jury to "overlook" the graphic details of the prosecution's case. Instead, their personal evidence could have provided humanizing context, allowing the jury to reach a more sympathetic understanding of the individual behind the aggravating evidence. *See Allen v. Woodford,* 395 F.3d 979, 1000 (9th Cir. 2005) ("[Using] mitigation evidence to complete, deepen, or contextualize the picture of the defendant presented by the prosecution can be crucial to persuading jurors that the life of a capital defendant is worth saving.").

But because trial counsel had no experience or formal training in mitigation, conducted a shallow investigation, and failed to consult with experts, they underestimated the value of their evidence. Stokes's life story contains far more than a merely "difficult upbringing" and "struggles coming up"; the evidence shows profound and chronic trauma that was about as extreme as any child can experience. Such evidence is prototypical for a personal mitigation narrative. *Wiggins,* 539 U.S. at 535 (referring to "severe privation and abuse in the first six years of [the defendant's] life" as "the kind of troubled history we have declared relevant to assessing a defendant's moral culpability"); *Hooks v. Workman,* 689 F.3d 1148, 1203–04 (10th Cir. 2012) ("[E]ven the most minimal investigation would have uncovered a life story worth telling, . . . [which is] exactly the sort of evidence that garners the most sympathy from jurors."). If trial counsel believed the jury would not have responded well to a presentation that minimized Stokes's conduct, their duty was to find

a way to convey this highly significant evidence without doing so.

That is especially true when considered against their alternative decision: to offer almost no mitigation presentation at all. Having declined to present their personal mitigation evidence, trial counsel put forward one witness, the former prison warden, who never met Stokes and was repeatedly unfamiliar with the details of Stokes's records. Trial counsel's direct examination produced about four pages of trial transcript, the entirety of their sentencing presentation. *Cf. Wiggins,* 539 U.S. at 526–27 (describing counsel's presentation, which failed to provide details of the defendant's history, but did provide one expert's testimony about prison adaptability, a "halfhearted mitigation case" taking a "shotgun approach"). Meanwhile, as anticipated, the government put forward 12 witnesses detailing Stokes's violence in the Snipes murder and in previous incidents. Thus, the only evidence the jury heard about Stokes detailed his crimes and violence, distorting the jury's perception of "the uniqueness of the individual" facing execution. *See Lockett v. Ohio,* 438 U.S. 586, 604–05 (1978); *see, e.g., Ferrell v. Hall,* 640 F.3d 1199, 1234, 1236 (11th Cir. 2011) (concluding that, because "the jury heard absolutely nothing about the substantial mitigating evidence," including childhood abuse, "[t]he jury labored under a profoundly misleading picture of [the defendant's] moral culpability").

The basis for trial counsel's decision—that a South Carolina jury in the 1990s, and particularly Black people, would not be open to a personal mitigation

narrative—was objectively unreasonable. In 1989, ten years before Stokes's trial, the Supreme Court referred to "the belief, *long held by this society,* that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh,* 492 U.S. 302, 319 (1989) (emphasis added) (quoting *California v. Brown,* 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)), *overruled on other grounds by Atkins v. Virginia,* 536 U.S. 304 (2002). Even earlier, in 1976, the Court explained: "A process that accords no significance to relevant facets of the character and record of the individual offender . . . excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson v. North Carolina,* 428 U.S. 280, 304 (1976). There is no reason to believe that South Carolinians in 1999—no matter their race—would have been indifferent to the "frailties of humankind" and these bedrock principles of mercy and morality.

Therefore, even when giving appropriate deference to trial counsel's strategic judgment, trial counsel's failure to investigate and present personal mitigation evidence was objectively unreasonable under professional standards at the time of the representation.

2.

As to prejudice, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not

warrant death." *Strickland,* 466 U.S. at 694–95. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the sentencer in this case was a unanimous jury, prejudice "requires only 'a reasonable probability that at least one juror would have struck a different balance'" when appraising Stokes's moral culpability and deciding on death. *See Andrus v. Texas,* 140 S. Ct. 1875, 1886 (2020) (quoting *Wiggins,* 539 U.S. at 537). To determine whether the petitioner has made that showing, "the reviewing court must consider 'the totality of the available mitigation evidence,'" both at trial and from postconviction proceedings, "and 'reweig[h] it against the evidence in aggravation.'" *Id.* (quoting *Williams v. Taylor,* 529 U.S. at 397–98).

The district court summarized the evidence of Stokes's life story in a sentence, referring to the death of his parents, his "abusive[] and neglectful" childhood, and "that he struggled in school with no intervention." J.A. 3843. It also considered the report of Stokes's new expert, who concluded that these "aspects of [Stokes's] background" likely impacted his adult behavior. J.A. 3843–44. The court then summarized the State's case in aggravation and concluded that Stokes failed to establish prejudice because the aggravating evidence "was overwhelming." J.A. 3844–48. The court especially emphasized the "horrific circumstances" of the Snipes and Ferguson murders, noting that an additional murder is recognized as "the most powerful imaginable aggravating evidence."[10] *Id.* (citing *Wong v. Belmontes,*

[10] In emphasizing these aspects of the Snipes murder, and the commission of the Ferguson murder, the district court considered

558 U.S. 1, 27–28 (2009); *Morva* v. *Zook,* 821 F.3d 517, 532 (4th Cir. 2016)). Thus, the court concluded that "all the mitigating evidence does not outweigh all the aggravating evidence presented at trial," and so Stokes did not show "a reasonable probability that at least one juror would have voted against the death penalty had it heard the additional mitigating evidence in question." J.A. 3848–49.

We disagree. While there is no doubt that the State's aggravation case was extensive, the analysis is not as simple as comparing two piles of evidence and asking which is greater. The addition of just some meaningful mitigating evidence could be enough to sway one juror against death, even in the face of plentiful aggravating evidence. *See, e.g., Williams v. Taylor,* 529 U.S. at 398 ("Mitigating evidence . . . may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case."). And when a jury heard virtually no mitigation evidence at trial, and nothing about the defendant as

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evidence going to the aggravating factors that the jury did not find. The jury found the evidence established: 1) criminal sexual conduct; 2) kidnapping; 3) murder for the purpose of receiving money; and 4) that the defendant caused another person to participate. But the jury did not find that the State established: 1) physical torture; or 2) that two or more persons were murdered by the defendant. While there were surely other "horrific" elements of the Snipes murder that the court may have been referring to, the court should not have given weight to Stokes's alleged torture of Snipes or his role in the Ferguson murder. *Cf. Porter v. McCollum,* 558 U.S. 30, 41–42 (2009) (explaining that "the weight of evidence in aggravation" was "not as substantial as the sentencing judge thought" where one of two aggravating factors was reversed on appeal).

an individual, the unheard personal evidence is especially impactful on the prejudice calculus. *See Porter,* 558 U.S. at 41–44.

In *Porter,* the jury "heard almost nothing that would humanize [the defendant] or allow them to accurately gauge his moral culpability." 558 U.S. at 41–44. The jury could have heard about the defendant's PTSD from military service, a "childhood history of physical abuse," and a "brain abnormality" that caused learning disabilities. *Id.* "Instead, they heard absolutely none of that evidence, evidence which 'might well have influenced the jury's appraisal of [the defendant's] moral culpability.'" *Id.* (quoting *Williams v. Taylor,* 529 U.S. at 398). Some negative facts in the mitigation evidence were not enough to undermine its impact because the negative aspects were still "consistent with th[e] theory of mitigation and d[id] not impeach or diminish the evidence." *Id.* The Court found the prejudice requirement satisfied, especially because "[w]e do not require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome, . . . but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.'" *Id.* at 44 (quoting *Strickland,* 466 U.S. at 693–94).

The same reasoning applies here. The unheard mitigation evidence would have shown Stokes experienced an "extraordinarily high" degree of childhood adversity, likely surpassing 99.9% of the population. J.A. 2181–82; *see generally* J.A. 2173–2201. And, through expert evidence, the defense could have explained the likely consequences of such a childhood, connecting "chronic trauma" to brain development and

adult behavior. Instead, by presenting no personal evidence at all, counsel failed to "explain to the jury why [Stokes] may have acted as he did . . . connect[ing] the dots between, on the one hand, [his] mental problems, life circumstances, and personal history and, on the other, his commission of the crime in question." *See Hooks v. Workman,* 689 F.3d at 1204. As a result, "jurors faced with an especially brutal crime were left with almost nothing to weigh in the balance." *See id.*

Thus, the prejudice analysis turns on the likely influence of dramatic mitigation evidence on a jury that heard dramatically little about the defendant. In that context, the weight of the unpresented mitigation evidence is significantly increased, enough to outweigh even the upsetting and extensive aggravating evidence. *See, e.g., Williams v. Taylor,* 539 U.S. at 537 (finding prejudice in failure to present personal evidence even where the petitioner "had savagely beaten an elderly woman, stolen two cars, set fire to a home, stabbed a man during a robbery, and confessed to choking two inmates and breaking a fellow prisoner's jaw"); *see also Smith v. Stewart,* 189 F.3d 1004, 1013–14 (9th Cir. 1999) (explaining that "[t]he horrific nature of the crimes . . . does not cause us to find an absence of prejudice," especially "where the presentation of mitigating evidence was wholly inadequate"). If the jury could have placed Stokes's "excruciating life history on the mitigating side of the scale," then "there is a reasonable probability that at least one juror would have struck a different balance." *See Wiggins,* 539 U.S. at 537; *Porter,* 558 U.S. at 42. Simply put, "there exists too much mitigating evidence that was not presented to now be ignored." *Porter,* 558 U.S. at 44 (quoting *Porter*

v. Florida, 788 So.2d 917, 937 (Fla. 2001) (Anstead, J., concurring in part and dissenting in part)).

The district court failed to consider that trial counsel's decisions meant they presented almost no mitigating evidence. It cited cases where additional personal evidence was insufficient to show prejudice after a jury heard a significant quantity of such evidence at trial. *See Wong,* 558 U.S. at 20–21 (noting that "the mitigating evidence [the defendant] did present" at sentencing "was substantial," including nine witnesses who "highlighted [his] terrible childhood"); *Morva,* 821 F.3d at 522–23 (listing mitigation efforts including two court-appointed mental health experts, a specialist investigator, and thirteen witnesses). The hypothetical impact of Stokes's life story and expert evidence on a jury that heard nothing about Stokes at all is quite distinct from the impact of a few more witnesses on a jury that heard an already-robust mitigation presentation. *Cf. Wong,* 558 U.S. at 22 (finding that the proposed evidence "was merely cumulative of the humanizing evidence [the defendant] actually presented" and "would have offered an insignificant benefit"); *Morva,* 821 F.3d at 522–23, 529 (stating that counsel interviewed "many" family members, and several testified or submitted affidavits, but the defendant "complains that counsel could have interviewed other[s]").

In sum, trial counsel's unreasonable mitigation efforts prejudiced Stokes. Given Stokes's immediate confession, his defense turned almost exclusively on mitigation from its very outset. Yet trial counsel spent too little time on their investigation and failed to

appreciate their findings. Then, despite the wealth of reasonably available, highly compelling mitigation evidence, counsel told the jury effectively nothing about Stokes as an individual. Had the jury heard the unpresented evidence, the probability that at least one juror would have voted against death is great enough to undermine our confidence in the outcome. *See Porter,* 558 U.S. at 44; *Andrus,* 140 S. Ct. at 1886.

We conclude that Stokes has satisfied both the deficient performance and prejudice prongs of *Strickland* on his mitigation-based claim, establishing that he received ineffective assistance of counsel at sentencing. Because this conclusion alone requires resentencing, we do not reach the remaining claims.

IV.

For the foregoing reasons, we reverse the judgment of the district court and remand with instructions that the district court issue the writ of habeas corpus unless the State of South Carolina grants Stokes a new sentencing hearing within a reasonable time.

REVERSED AND REMANDED

QUATTLEBAUM, Circuit Judge, dissenting:

When considering the important skills of a trial attorney, those that might first come to mind are the skills we see in action—opening statements, examining witnesses and closing arguments. But as important as those skills are, just as important is a skill we don't see—strategic decision-making. A lawyer must make many decisions before and during the course of a trial. And what often makes those decisions so difficult is

that many cut both ways. The decision to advance an argument, introduce certain evidence, call a witness, cross-examine a witness aggressively or lightly and so many other decisions can be—and often are—double-edged swords. There are pros and cons each way.

Evaluating these decisions, a lawyer must consider a litany of questions. How much benefit can be gained? How much harm can be caused? Can the harm be mitigated? Is the benefit that can be gained worth the harm that can result? And so on.

Oftentimes, the answers to these questions are not obvious. In fact, answering them is more a matter of art than science because intangible factors come into play. A lawyer must rely on experience, intuition and even gut instinct.

Making things even harder, trials are fluid. What might have made sense before trial may become a bad idea based on events that transpire during trial. To address that fluidity, a lawyer must constantly consider how the trial is progressing, and how the judge and jury are responding to the evidence and arguments.

In these difficult decisions, different lawyers can, and do, come to different conclusions. For some issues, you could ask ten lawyers and often get ten different decisions. Nevertheless, decisions must be made.

In this appeal, we review the decisions made by lawyers in the weightiest of circumstances—the defense of a capital defendant. Although the decisions were quintessentially strategic and informed by a thorough investigation, the majority determines that

they amounted to ineffective assistance of counsel. I disagree. These decisions, according to our precedent, merit our highest deference. In my view, the record does not come close to overcoming that required deference. Accordingly, I dissent.

I.

Over twenty years ago, Thomas Sims and Virgin Johnson's client, Sammie Stokes, was charged with the gruesome murder of Connie Snipes. The State sought the death penalty. The evidence against Stokes was overwhelming and horrific. Stokes even confessed to the murder. Because Sims and Johnson suspected Stokes would be convicted, they developed a strategy they felt would be most effective during the probable sentencing phase of the case. They wanted to emphasize Stokes' remorse and highlight the conduct and motivation of Norris Martin, who participated in the murder with Stokes, with the hope that the jury would view him as "the bad guy." J.A. 1543.

Trial counsel also planned to focus on the fact that Stokes had AIDS. Counsel planned for experts, including a forensic psychiatrist, to talk about Stokes' mental health and related medical issues. Sims and Johnson felt the best way to move the jury to spare Stokes' life would be to point out how AIDS would debilitate Stokes and given the knowledge about that disease at the time, that AIDS effectively was its own death sentence.

But trial counsel's preparation did not stop there. Sims and Johnson also investigated mitigating evidence. They hired a mitigation investigator and

interviewed witnesses including Stokes' family and friends. From that work, trial counsel learned that Stokes' childhood included significant trauma and abuse which might be useful in providing some context for Stokes' conduct.

For example, the trial defense team's interview with Stokes' sister revealed that Stokes' parents, who did not live together, both drank excessively. After their father died, Stokes' mother remarried. The stepfather also drank a lot but was violent as well. Stokes' sister reported that he abused their mother. Stokes' sister told the team that she and Stokes had to fight their stepfather to keep him from beating their mother.

Other family members revealed similar information to the trial team. A cousin told the trial team Stokes' mother was "a drinker, fighter and was wild" and that her children "grew to be the same." J.A. 2535. Another relative told the team that Stokes' mother and stepfather "liked to drink, party, go to clubs and often took [Stokes and his sister]." J.A. 2536. She added that Stokes' mother and stepfather both assaulted each other.

In addition to uncovering this evidence through their mitigation investigator, trial counsel assembled experts to testify about the mitigation evidence if they decided to use it. They engaged and worked with a forensic psychiatrist, a jury consultant and an expert in social work.

But Sims and Johnson's investigation revealed risks of utilizing this mitigation evidence. The witnesses who would, if asked, be able to provide mitigating evidence,

also had information that was damaging to their strategy of portraying Martin as the main culprit. Stokes' sister, during the trial team's interview of her, described Stokes as "very moody" and that his personality would "flip." J.A. 2529. She also talked about Stokes' relationship with Martin. She said Stokes frequently made Martin, who had been his friend since childhood, "hustle for him." J.A. 2529. And Stokes was violent toward Martin if he was not successful in those activities. More specifically, Stokes "beat [Martin] up when he did not get his money on time." J.A. 2529. Stokes' sister told the trial team that Martin was "very afraid of [Stokes]." J.A. 2529.

An ex-girlfriend provided additional information that Sims and Johnson had to consider. She told the team that they dated when she was fifteen but broke up after she became pregnant with Stokes' child. She said Stokes never supported the child in any way. She also revealed that it was rumored that Stokes was a bisexual and sexually abused Martin in the past.

With knowledge of the background of Stokes' relationship with Martin from these interviews and of the fact that there was even "some question as to whether or not there was even a homosexual relationship between [Stokes and Martin]," trial counsel "didn't want it to come out that [Stokes] had, you know, used him and had him doing everything . . . ." J.A. 1537.

Trial counsel's predictions about guilt proved to be correct. An Orangeburg County, South Carolina jury found Stokes guilty of murder, kidnapping, first degree criminal sexual conduct and criminal conspiracy

arising from the murder of Connie Snipes. J.A. 990–91. That set the stage for the penalty phase where the jury would determine whether Stokes would be sentenced to death or life in prison. J.A. 1013. South Carolina sought to prove several statutory aggravating circumstances in seeking the death penalty. With Stokes' life on the line, Sims and Johnson had to decide whether any statutory mitigating circumstances or other evidence might help save his life. J.A. 997–98.

Complicating their decision-making, about five days before trial, Stokes developed cold feet about introducing information about his AIDS prognosis to the jury. Even so, he decided that theme could only be pursued if certain people, particularly family and friends, were removed from the courtroom. J.A. 2544. And that was the plan—to clear the courtroom prior to offering the evidence. J.A. 1548–49, 3480.

Then Stokes changed his mind. As the sentencing phase began, "[j]ust as [they] got ready to start presenting that evidence, [Stokes] then said, no, I don't want it coming in," forcing the court into a recess as the defense team tried to persuade Stokes to allow the prepared defense to go forward. J.A. 1546. At the eleventh hour, Stokes decided he did not want his children and family, and the jury for that matter, to hear he had AIDS. While that was his choice, it substantially gutted his mitigation defense.

Based on this, Sims and Johnson had to adapt and decide what to do instead. Presenting mitigating evidence about Stokes' traumatic and abuse-ridden childhood was an option. The benefit of that mitigating evidence was that it might give jurors some

understanding of how and why Stokes came to the point of committing the horrific events the jury had just learned about. If jurors understood how such an upbringing could cause real psychological harm and lead to a propensity toward violence, they might be willing to spare Stokes' life. Sims and Johnson had gathered this evidence. The witnesses were available.

But they also knew that many of the witnesses who would testify about Stokes' childhood and background in a manner that provided some explanation or context for Stokes' criminal conduct—like Stokes' sister and aunt—also knew about Stokes' temperament and his relationship with Martin. They knew that along with the potential mitigating evidence, there was damaging information that would likely come out on cross-examination, information that would be harmful to Stokes' defense.

And they also felt the mitigating evidence might not, in this context, be helpful at all. They felt the jury might perceive the evidence not as mitigating evidence, but as an attempt to avoid responsibility for the crime. So, after considering the issue, they decided not to introduce it. Sims described how they came to that decision:

> Q. So did -- ultimately, did Sara Stokes, Ruth Davis, or Dr. Rodgers testify on Mr. Stokes' behalf at sentencing?
> A. No, they didn't.
> Q. And why was that?
> A. We made a strategic decision -- after having the opportunity to get together, we made a strategic decision that certain -- that mitigation

kind of evidence that was the ongoing way that things were done at that time was not going to work in Orangeburg County.

Having had the opportunity to look at the jury, having had the opportunity to see how they reacted to a number of things that were going on in the courtroom, we made a decision that we were going to take another avenue in order to try to save his life.

J.A. 3469. He continued:

Q. Okay. At the -- what made you decide that the jury would not be receptive to that testimony?

A. In trial work, and having been in trial work for a period of time up to that time -- this is going on my 40th year of being a trial lawyer -- you get the opportunity to look at the jury, you see their reaction to what is happening in the courtroom, you look at those who are leaning forward at certain times to certain testimony, you look at those who are leaning back and closing their arms at certain testimony, you try to look to see if anybody's shaking their head with where you want to go, and you try to -- and during the trial you look at things that are developing.

I always say that a trial has a life of its own. You may start out with a theory and a process that you want to go through, but in the middle of the trial, as it begins to progress, you may have to change the way that you are actually going to go, and that's what happened in this case.

And take into consideration also you're in Orangeburg County and there were things that, back in '97, '98, '99 when this was going on, that we have to take into consideration too. When you -- the way I looked at it, and I believe Mr. Johnson will verify this also, when we looked at it and we talked about the kind of crime that had been committed, we talked about some of the things that had happened to the young lady who was killed, how her body was mutilated, and those kind of things in Orangeburg County, we have to take that into consideration too.

Q. Can you help me understand what about the jury made you think that the type of evidence that you had intended to introduce originally through Sara Stokes, Ruth Davis, Dr. Rodgers, would not be persuasive to them?

A. I would have looked at that jury, I would have looked at the composition of the jury, probably during the trial would have gone home and reviewed the jurors' background information again to determine the best way that you could probably get that juror on your side. I would have -- would have -- there were African-Americans and there were white people on the jury too.

Looking at that, taking it into consideration as a whole and how the trial had been going and what was being brought out, the question at that point is whether or not putting out the background of the individual and the kind of life that they had had as a child would be effective

in light of the facts of the case and the people that you had on the jury.

J.A. 3470–3472.

Johnson also testified about their decision:

Q. So in terms of deciding how to or whether to investigate [Stokes'] childhood and background, did the aggravated nature of the case affect how you approached that?
A. It didn't affect how I approached it, but it sure enough affected how we presented it.
Q. In what way?
A. When you had to present it -- in your presentation at trial, you had to try to find a way to present it, if you had to present it, in the preparation. If you had to present it, you had to try to find a way to present it where it didn't seem so offensive, yet you can't play it down. It's just a fine balance, because how do you -- how do you tell somebody, how do you go to a jury and say, look, we want you to look at the fact that he had a poor upbringing, particularly African-American, which a lot of us had struggles coming up, how do you say, well, just because he had a poor upbringing, you need to overlook the fact that he raped this woman, you need to overlook the fact that he cut her vagina out, you need to overlook the fact that he cut her nipples off, you need to overlook the fact that he killed somebody else.

And my job was to defend [Stokes]. So what I did was I looked at every aspect of the case. If I was trying that case now, it would be a heck of

> a lot different because the tolerance we have now. But I would change nothing because they just wasn't tolerant of that.

J.A. 3524– 3525.

This testimony reveals that Sims and Johnson, in the exercise of their reasonable professional judgment, undertook a contemplative thought process about the pros and cons of using mitigation evidence of Stokes' childhood and upbringing. After doing so, they felt the circumstances of Stokes' crime were just too horrific for such evidence to be helpful. They decided not to introduce it.

They did, however, offer a different kind of mitigating evidence. They presented James Aiken, a prison adaptability expert, to testify about Stokes' ability to adapt to prison. Aiken's testimony was intended to dovetail with evidence concerning Stokes' AIDS diagnosis. Of course, Stokes' refusal to allow the AIDS evidence to be used made this strategy more challenging. But even without the AIDS evidence, Aiken emphasized that Stokes could be managed in a maximum-security environment for the rest of his life. Trial counsel used this testimony to argue that Stokes' life should be spared.

The jury was not convinced. They deliberated for 3 hours and 15 minutes before returning a death sentence finding four of the six aggravating factors alleged by the State to make Stokes eligible for the death sentence and recommended the death penalty.

II.

Now, over two decades later, the majority grades trial counsel's strategic decisions about mitigation evidence as ineffective. In my view, that conclusion ignores the reality of trial work and conflicts with Supreme Court precedent.

Importantly, Stokes did not press the mitigation strategy in his state PCR efforts. Since he did not, he must satisfy *Martinez v. Ryan,* 566 U.S. 1 (2012), which "provides a narrow exception to the general rule . . . 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). *Martinez* permits a petitioner to excuse certain procedurally defaulted ineffective-assistance-of-trial counsel claims. *Id.* at 789. But the petitioner must establish cause to excuse the procedural bar before the federal court will consider the merits of that defaulted claim. This standard reflects the "well-established principle that [f]ederal habeas courts reviewing the constitutionality of a state prisoner's conviction and sentence are guided by rules designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism." *Owens v. Stirling,* 961 F.3d 396, 422 (4th Cir. 2020) (alteration in original) (internal quotation marks omitted).

Thus, Stokes must show that the underlying ineffective assistance of trial counsel claim is substantial, and that PCR counsel was deficient in not pursing that claim. *Id.* at 423. And if Stokes crosses those two hurdles, he must then show trial counsel was

deficient and that the deficiency prejudiced his defense. While ordinarily I would address these issues in that order, here I will address them chronologically because this really is somewhat of a chicken or the egg dilemma. PCR counsel could not have been ineffective unless trial counsel was as well. In my view, neither was defective.

A.

I begin with a discussion of Stokes' trial counsel because I do not believe that Stokes has shown a substantial underlying ineffective of assistance of counsel claim. Where a state prisoner claims ineffective assistance of counsel as the basis of habeas relief, the Court must also review the claim through the highly deferential lens of *Strickland v. Washington,* 466 U.S. 668 (1984). First, a petitioner must show counsel's performance was deficient and fell below an objective standard of reasonableness. *Id.* at 687–88. Second, the petitioner must show the deficient performance prejudiced the defense, meaning "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. But in considering these two factors, the bar is higher for strategic decisions. Much higher. Counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.*

Stokes' complaints involve classic strategic decisions that the Supreme Court has determined to be "virtually unchallengeable." Sims and Johnson—seasoned trial

lawyers with experience trying capital cases in Orangeburg County—felt the personal mitigation evidence cut both ways. Despite the potential benefits of that evidence to humanize Stokes, there were risks. Their strategy throughout the trial was to admit guilt, portray the other participants in the murder as more culpable than Stokes and ask for mercy. And they felt that jurors might view mitigating evidence as to Stokes' background as a poor excuse for him committing a gruesome murder. They questioned whether those jurors, from a poor county in South Carolina, many of whom may have had tough upbringings and life experiences, might take offense at the mitigating evidence. In other words, "the question at that point [was] whether or not putting out the background of the individual and the kind of life that they had had as a child would be effective in light of the facts of the case and the people that you had on the jury." J.A. 3472.

In weighing the pros and cons, Sims and Johnson evaluated how the trial was going. They had been with the jurors throughout the trial. They saw how the jury reacted to the opening statements and closing arguments and to the evidence presented. They also drew upon their knowledge of the community where the jurors lived. Recall that Sims and Johnson lived in that community too.

All of these things went into making the decision, that at that time, in that venue, with that jury, against the evidence that had been presented so far in that trial, they should not introduce certain mitigating evidence. Sims and Johnson made the choice—the

excruciating choice—that the benefits of the mitigation evidence, in this situation, were not worth the risks.

To be sure, one could have a different view. Like the majority, one could conclude that in the face of the inevitably gruesome evidence about what Stokes did, the best chance to save his life was to attempt to humanize that conduct through the personal mitigation evidence. Maj. Op. at 28.

But trial counsel considered that approach. Their best judgment, sitting in counsel's chair with an appreciation of the dynamics at the moment, was that the mitigating evidence would do more harm than good. We are in no position to label that decision unreasonable. In fact, the Supreme Court has provided guidance in the context of similar arguments. Substituting Stokes for the petitioner in *Wong v. Belmontes,* 558 U.S. 15, 25 (2009), Stokes would argue for a "more-evidence-is-better" approach; "after all, what is there to lose?" "But here there was a lot to lose. A heavyhanded case to portray [Stokes] in a positive light, with or without experts, would have invited the strongest possible evidence in rebuttal—the evidence that [Stokes] was responsible for not one but two murders." *Id.* The Supreme Court tells us that we should not second guess those decisions.

Despite that, the majority engages in just that sort of second guessing, chastising Sims and Johnson about how they should have tried the case. According to the majority, the concern counsel identified "reflects a misunderstanding of the duty to mitigate. Trial counsel were not obliged to ask the jury to excuse Stokes's actions. Instead, their duty was to mitigate Stokes's

'moral culpability.'" Maj. Op. at 27. Remarkably, the majority goes on: "[i]f trial counsel believed the jury would not have responded well to a presentation that minimized Stokes's conduct, their duty was to find a way to convey this highly significant evidence without doing so." Maj. Op. at 29.

I agree with the majority that the purpose of mitigating evidence is not to excuse conduct, but to help place the moral judgment about the conduct in a context more favorable to the defendant. And in sociology classes, law review articles and even appellate court chambers, that distinction may seem clear. But in the fast-paced and intense context of a trial, particularly one in which a defendant's life is in the hands of twelve jurors from the community, the line is blurry. Even if presented in the best way by the most capable of lawyers, it seems far from unreasonable for Sims and Johnson to be concerned that the jury would not accept that distinction. In my view, this is the exact type of strategic judgment to which we must defer. Indeed, *Strickland* tells us that. It counsels us to make every effort to "eliminate the distorting effects of hindsight" and to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Strickland,* 466 U.S. at 689.

Likely recognizing the difficult hurdle of claiming ineffective assistance based on strategic decisions, Stokes tries to masquerade his criticism of those strategic decisions as criticism about preparation. He is right that without a reasonable investigation, counsel does not get the benefit of the strong deference

we afford to strategic decisions. Seizing on that law, Stokes argues that trial counsel did not sufficiently investigate mitigation evidence and did not do so soon enough. Although the majority largely agrees with Stokes, in my view this argument also falls short. "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Harrington v. Richter,* 562 U.S. 86, 105 (2011) (internal quotation marks omitted). Capital sentencing counsel has an "obligation to conduct a thorough investigation of the defendant's background . . . to discover all reasonably available mitigating evidence," but the investigation need only be "*reasonably* thorough." *Owens*, 961 F.3d at 413 (internal quotation marks and citations omitted). We are to employ a highly deferential view of trial counsel's performance, recognizing the dangers of second-guessing counsel's assistance after an adverse sentence and acknowledging there are "countless ways to provide effective assistance in any given case." *Strickland,* 466 U.S. at 689.

Here, as noted above, the record demonstrates the significant work that trial counsel and their team did in interviewing witnesses and working with experts to develop a trial strategy. As described above, trial counsel's investigative efforts involved interviewing a significant number of Stokes' family and friends to learn about his upbringing. Through those efforts, trial counsel learned extensive and specific information about the traumatic and abusive upbringing Stokes endured. While I recognize not every detail of mitigation evidence was discovered, that, of course, is

not required. What is clear is that trial counsel's investigation went well beyond broad outlines of Stokes' childhood troubles.

This simply is not a situation where trial counsel overlooked "red flags" about Stokes in investigating their case. *Rompilla v. Beard,* 545 U.S. 374, 392 (2005). It is also not a case where trial counsel "did not even take the first step of interviewing witnesses or requesting records." *Porter v. McCollum,* 558 U.S. 30, 39 (2009). Indeed, trial counsel's investigative efforts here were more than sufficient, particularly when compared to the attorneys' work in *Bobby v. Van Hook,* 558 U.S. 4, 9–10 (2009) where the record there showed that counsel "looked into enlisting a mitigation specialist when the trial was still five weeks away" and were in touch with expert witnesses "more than a month before trial." The Supreme Court there found that trial counsel's performance was not constitutionally deficient in terms of the timing and scope of the investigation, and that "even if . . . counsel performed deficiently by failing to dig deeper, [the defendant] suffered no prejudice as a result." *Id.* at 12.

Interestingly enough, the majority's analysis confirms that trial counsel's investigation went "beyond some investigations that have been deemed unreasonable." Maj. Op. at 26 n.9. It also rightly notes that counsel responded to that investigation by identifying witnesses who could have presented the personal mitigating evidence available. "[M]embers of Stokes's family and a social worker were prepared to testify. A neurologist and psychiatrist were prepared to testify about Stokes's HIV status, but presumably could

have offered other personal testimony about Stokes instead." Maj. Op. at 27. The absence of mitigating evidence about Stokes' upbringing and childhood was not a matter of preparation, or lack thereof. It was the result of strategic decision-making by trial counsel in the thick of an intense trial.

In hindsight, one could argue that counsel could have done more. Hindsight, after all, is always twenty-twenty. But that is simply not the standard we apply here. "*Strickland* does not require counsel 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).

Trial counsel conducted the "reasonably thorough" investigation required of capital sentencing counsel. *Owens,* 967 F.3d at 413, 417 (finding no deficiency in counsel's mitigation team's efforts and further rejecting the complaint that counsel failed to present mitigating evidence within their possession, noting that counsel "judged with reasonable competence in avoiding such 'double-edged' evidence" (quoting *Gray,* 529 F.3d at 239)); *see also Strickland,* 466 U.S. at 691 (1984). With a thorough investigation of law and facts completed, we must credit counsel's exercise of reasonable professional judgment. *Strickland,* 466 U.S. at 690. One thing professional judgment teaches is that the evidence can cut both ways. Here, trial counsel thought the burdens outweighed the possible benefits. Stokes has not presented sufficient evidence to overcome the presumption of adequate assistance for trial counsel's strategic decisions.

B.

I turn now to Stokes' PCR counsel. Stokes claims that not only was his trial counsel ineffective, his PCR counsel was also. Like trial counsel, PCR counsel investigated mitigation evidence. They hired a mitigation investigator to conduct more interviews of family, friends, teachers and Stokes' ex-wife. That investigation also unearthed even more aggravating evidence against Stokes. They had the benefit of trial counsel's consultation with a social worker who was a part of Stokes' trial defense and had met with Stokes as well. But, Stokes' PCR counsel, like trial counsel, decided not to pursue the mitigation claim, focusing instead on an intellectual disability claim and an actual conflict of trial counsel claim, which they felt were the stronger claims.[*]

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[*] Stokes claimed that trial counsel labored under an actual conflict of interest because the State's key witness at trial was Stokes' ex-wife. Trial counsel Sims prosecuted Stokes in his earlier assault case. Stokes claimed this conflict prejudiced him because Sims failed to explore several lines of inquiry in cross-examining Stokes' ex-wife during the sentencing phase allegedly due to this conflict. I am not convinced that trial counsel Sims labored under any actual conflict of interest. This issue was adjudicated below and as the district court recognized, the PCR court credited Sims' testimony that he knew Stokes' ex-wife would testify and his declaration that there was nothing in his earlier prosecution that would inhibit his defense. Sims testified that he had a theory in mitigation as to how to address the incident involving Stokes' ex-wife and noted that one of the issues he was trying to show was Stokes' remorse. As for his representation as a whole, when asked if he labored under a conflict Sims stated that "if I thought I couldn't have represented Mr. Stokes to the best of my ability I would not have been in the case." J.A. 1618.

Stokes claims in doing so, PCR counsel's assistance was ineffective. He claims that the mitigation issue should have been pressed. And as he and the majority note, PCR counsel now agree. In this collateral proceeding, PCR counsel conceded that they should have pursued the claim.

The testimony of PCR counsel certainly supports Stokes' claim. But their testimony as a whole must be considered from counsel's perspective at that time and without the "distorting effects of hindsight." *Strickland,* 466 U.S. at 689. And importantly, PCR counsel admitted that if they thought the ineffective assistance of counsel claim was strong, they would have presented that claim. In their own words, they "made some sort of judgment, explicit or implicit" in deciding not to pursue the referenced mitigation claim. J.A. 3259. That was the judgment at the time.

That testimony suggests that PCR counsel considered presenting mitigating evidence but decided against it. In other words, like trial counsel, they made a strategic decision not to include that and other claims that, at the time, they considered weaker. Instead, they felt the best approach was to focus only on the strongest claims.

Consistent with that conclusion, the record reveals that Stokes' pro se application for habeas relief includes the mitigating evidence issue. Then PCR counsel filed an amended application removing the mitigation issue. Removing an existing ground provides additional evidence of a conscious decision.

And let's not forget that PCR counsel are experienced death penalty lawyers. One of Stokes' PCR attorneys is currently a law professor and director of death penalty litigation at a law school who transitioned to that role after working almost exclusively on post-conviction and federal habeas cases while in private practice. He was trained in the development and presentation of mitigating evidence in death penalty cases and had done this work before. While even the best lawyers can make mistakes, PCR counsel's experience is even more evidence that counsel made a strategic decision not to pursue the mitigating evidence claim.

Finally, I find it significant that PCR counsel acknowledged "falling on [the] sword" for Stokes. J.A. 3044. In fairness, counsel admitted that in using that term, he meant "I didn't do as good a job as I should have." J.A. 3044. But to me, when considered in the context of his testimony as a whole, PCR's admission amounts to acceptance of responsibility in hindsight for a failed effort; not necessarily an effort that was ineffective at the time. In other words, PCR counsel, after his efforts proved unsuccessful, stated that he would have done things differently as he thought about that case several years later. Accepting that as true, it does not change the fact that PCR counsel, at the time, made a strategic decision to pursue the claims that they felt were the strongest. That view of the decision in hindsight is precisely what the Supreme Court has prohibited.

While one might reasonably say PCR counsel took the wrong approach in dropping the claim, it was

hardly unreasonable. In presenting arguments, lawyers often debate whether to pursue all potential arguments hoping one will stick—or to laser in on the best arguments because of concerns that the weaker ones may dilute the stronger ones. Reasonable minds can differ on that question. But the Supreme Court tells us that this approach is not unreasonable. "Even if some of the arguments would unquestionably have supported the defense, it does not follow that counsel was incompetent for failing to include them." *Yarborough v. Gentry,* 540 U.S. 1, 7 (2003). As is the case with almost any trial decision, "[f]ocusing on a small number of key points may be more persuasive...." *Id.* Thus, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." *Id.* at 8; *see also Workman v. Superintendent Albion SCI,* 915 F.3d 928, 942 (3d Cir. 2019) (discussing this presumption in an attorney's decision to pursue some claims and decline to pursue others as a tactical choice in relation to *Martinez).* Guided by *Strickland,* we must indulge the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland,* 466 U.S. at 689. Here, PCR counsel made a strategic decision to focus on other claims and that was reasonable under *Strickland.*

C.

But even if Stokes could establish his trial counsel and his PCR counsel were deficient, he must show prejudice under *Strickland.* To show prejudice, a petitioner must demonstrate a reasonable probability that "at least one juror would have struck a difference

balance" and voted against the death penalty after having heard additional available mitigation evidence. *Wiggins,* 539 U.S. at 537. "To assess that probability, we consider 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweig[h] it against the evidence in aggravation.'" *Porter,* 558 U.S. at 41 (quoting *Williams v. Taylor,* 529 U.S. 362, 397–98 (2000)).

Considering the totality of the evidence, both aggravating and mitigating, I do not see where Stokes has "affirmatively prove[n] prejudice." *Strickland,* 466 U.S. at 693. Even crediting mitigating evidence derived from both trial counsel and PCR counsel's efforts and interviews, as well as potential testimony about Stokes' troubled childhood, neglectful parents, abuse, and trauma, and even if federal habeas counsel's child development expert testified, the aggravating evidence is simply overwhelming. It is hard to conjure a more horrific set of facts. The jury, of course, heard it all. They learned of how Stokes plotted several months in advance to murder Connie Snipes, a complete stranger, as he sat in a jail cell for having already committed yet another violent act. They heard testimony about the gruesome rape and murder of Connie. They learned that the murderers scalped her head, stabbed and mutilated her nipples and body, and cut her vagina out of her body. They heard the testimony of a forensic pathologist and then saw the graphic pictures of Connie's mutilated and dismembered body. They heard that Stokes committed another horrific murder mere days later. They also heard about his criminal history and that he assaulted his ex-wife and served prison

time for that conduct. And on top of it all, Stokes wrote a letter admitting to much of the detail about his role in the murders of Connie and Doug Ferguson. That letter is laced with profanity, graphic and detailed in nature, but shows little remorse—"[t]elling their family sorry would only make them hate me more." J.A.1225.

In light of this overwhelming evidence, I do not see how Stokes satisfies his burden or how any additional expert or fact testimony about his upbringing and difficult childhood would outweigh the gruesome and horrific nature of Connie Snipes' murder. Stokes and the majority rightly note that the relevant question is whether "there is a reasonable probability that at least one juror would have struck a different balance." *See Wiggins,* 539 U.S. at 537. But that does not mean we compromise our objective analysis or decline to view the evidence "taken as a whole." *Id* at 538. If we do, we water down the prejudice requirement to something akin to anything is possible. *See Cullen v. Pinholster,* 563 U.S. 170, 189 (2011) (noting that a reasonable probability sufficient to undermine confidence in the outcome requires a "'substantial' not just 'conceivable,' likelihood of a different result"). That, however, is exactly what Stokes asks us to do. His argument boils down to conjecture, speculating that it just takes one juror; so, the mitigating evidence could have made a difference. Of course, it could have. Anything could have made a difference. That is not, however, the approach the Supreme Court requires. Stokes must show that there is a "*reasonable probability* that at least one juror would have struck a different balance." *Wiggins,* 539 U.S. at 537 (emphasis added). A reasonable probability is one "sufficient to undermine

confidence in the outcome" but in the capital sentencing context, this means whether the sentencer would have concluded that the "balance of aggravating and mitigating circumstances did not warrant death." *Owens,* 967 F.3d at 412 (internal quotation marks omitted). Objectively considering the facts here, there is no basis to conclude that presenting the mitigating evidence would have had any effect on the outcome of Stokes' sentence.

III.

In my view, the record does not support the conclusion that the choice Sims and Johnson made was unreasonable. It does not support the conclusion that PCR counsel was unreasonable. But the record does support the district court's conclusion that even if we are to conclude that their representation was deficient, Stokes faced no prejudice because of the overwhelming and horrific aggravating evidence before the jury. Therefore, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

Civil Action No.: 1:16-cv-00845-RBH

[Filed: September 28, 2018]

Sammie Louis Stokes,	)
	)
Petitioner,	)
	)
v.	)
	)
Bryan P. Stirling, *Director, South Carolina Department of Corrections*; and Willie D. Davis, *Warden of Kirkland Correctional Institution*,	)
	)
Respondents.	)

ORDER

Petitioner Sammie Louis Stokes, 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 Shiva V. Hodges, 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 as modified herein.

Background[2]

In 1999 an Orangeburg County, South Carolina jury convicted Petitioner of murder, kidnapping, first-degree criminal sexual conduct, and criminal conspiracy, and he was sentenced to death for the murder conviction.[3] The facts giving rise to these convictions are summarized in the South Carolina Supreme Court's opinion rejecting Petitioner's direct appeal:

> Stokes was hired by Patti[e] Syphrette to kill her daughter-in-law, 21-year-old Connie Snipes, for $2000.00. On May 22, 1998, Syphrette called Stokes and told him Connie "got to go and tonight." At 9:30 pm that evening, Syphrette and Snipes picked up Stokes at a pawn shop, and the three of them went to Branchville and picked up Norris Martin.[2] The four of them then drove

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[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 R & R thoroughly details the factual and procedural history, which the Court briefly recounts here.

[3] Petitioner was sentenced to thirty years for first-degree criminal sexual conduct and five years for criminal conspiracy. Because of his death sentence for murder, no sentence was imposed for the kidnapping conviction in accordance with S.C. Code Ann. § 16–3–910 (Supp. 2000).

down a dirt road in Branchville and stopped. Syphrette remained in the car while Stokes, Martin and Snipes walked into the woods. When they got into the woods, Stokes told Snipes, "Baby, I'm sorry, but it's you that Pattie wants dead . . . [.]"

> FOOTNOTE 2: Allegedly, Snipes accompanied the others on the premise that they were going to Branchville to kill a man named Doug Ferguson, whom Syphrette and Stokes had tied up in the woods.

According to Norris Martin, Stokes forced Snipes to have sex with Martin at gunpoint. After Martin was finished, Stokes had sex with Snipes. While doing so, Stokes grabbed her breast and stabbed her in the chest, cutting both her nipples. Stokes then rolled her over and began having anal sex with her. When Stokes was finished, he and Martin each shot the victim one time in the head,[3] and then dragged her body into the woods. Stokes then took Martin's knife and scalped her, throwing her hair into the woods. According to Martin, Stokes then cut Snipes' vagina out.[4]

> FOOTNOTE 3: Martin testified that Stokes placed the gun into his (Martin's) hand and then pulled the trigger.

> FOOTNOTE 4: According to the pathologist, Snipes' injuries were consistent with having been scalped, had the nipple area cut from

> each breast, and having had the vaginal area cut out.
>
> Snipes' body was found by a farmer on May 27th, and Martin's wallet was found in the field near it. Martin was interviewed by police the following morning, after which police went to the Orangeburg home of Pattie Syphrette's husband Poncho; by the time police arrived at the home on May 28, 1998, Stokes and Syphrette had already murdered Doug Ferguson by wrapping duct tape around his body and head, suffocating him.[5]
>
> FOOTNOTE 5: Stokes pleaded guilty to Ferguson's murder in a separate proceeding and was sentenced to life.

State v. Stokes, 548 S.E.2d 202, 203–04 (S.C. 2001). Attorneys Thomas Ray Sims and Virgin Johnson Jr. (collectively, "trial counsel") were appointed to represent Petitioner. In 2001, the South Carolina Supreme Court affirmed Petitioner's convictions and death sentence, denied his petition for rehearing, and remitted the case. *See id.* at 206–07; ECF Nos. 18-4 through 18-7.

Thereafter, Petitioner filed an application for post-conviction relief ("PCR") in state court and amended it twice. Attorneys Keir Weyble, Robert Lominack, and Susan Hackett (collectively, "PCR counsel") were appointed to represent Petitioner. In 2009, the state PCR court conducted an evidentiary hearing, and in 2010, it issued a written order denying and dismissing

Petitioner's PCR application with prejudice. *See* App.[4] 2139–84. In 2013, the PCR court denied Petitioner's motion to alter or amend the judgment. *See* App. 2373–95. Petitioner appealed the denial of his PCR application to the South Carolina Supreme Court, which summarily denied certiorari in February 2016. *See* ECF Nos. 18-8 through 18-12. In May 2016 (after the instant § 2254 action was filed), Petitioner filed a petition for a writ of certiorari in the United States Supreme Court.[5] In December 2016, the U.S. Supreme Court denied certiorari to review the judgment of the South Carolina Supreme Court. *See Stokes v. South Carolina*, 137 S. Ct. 589 (Dec. 12, 2016).[6]

On March 9, 2016, Petitioner commenced the instant § 2254 action by filing a motion to stay his execution and a motion to appoint counsel. *See* ECF No. 1. The Court granted the motions, *see* ECF Nos. 8 & 12, and Petitioner subsequently filed his § 2254 petition and a supplemental petition. *See* ECF Nos. 22, 51, & 75. Respondents answered and moved for

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[4] "App." refers to the appendix filed by Respondent, and it is available at ECF No. 19. The R & R cites the electronic court filing numbers ("ECF Nos."), but the Court cites the state-court appendix for the sake of clarity and brevity.

[5] *See* ECF No. 61 at p. 3; *Stokes v. South Carolina*, Case No. 15-9329 (U.S.S.C. filed May 11, 2016), *available at* https://www.supremecourt.gov/search.aspx?filename=/docketfiles/15-9329.htm.

[6] Also during the pendency of this § 2254 action, Petitioner filed a state habeas corpus action in the South Carolina Supreme Court, which denied Petitioner's habeas petition in March 2017. *See* ECF No. 102-1.

summary judgment, *see* ECF Nos. 56, 89, 160, 161, & 175; Petitioner responded to the motion for summary judgment, *see* ECF Nos. 74, 96, & 172; and the Magistrate Judge determined an evidentiary hearing was necessary for Petitioner's *Martinez*[7] claims.[8] *See* ECF No. 101.

In January 2018, the Magistrate Judge held a four-day evidentiary hearing on the *Martinez* claims; Petitioner himself did not testify but he called other witnesses. *See* ECF Nos. 101, 195–99, & 204–07. In May 2018, the Magistrate Judge issued an R & R recommending granting Respondents' motion for summary judgment and denying and dismissing Petitioner's habeas petition with prejudice. Petitioner filed timely objections to the R & R, and Respondents filed a reply to Petitioner's objections. *See* ECF Nos. 221 & 222.

The matter is now before the Court for consideration of Petitioner's three remaining grounds

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[7] *Martinez v. Ryan*, 566 U.S. 1 (2012).

[8] The Magistrate Judge directed the parties to participate in discovery on the *Martinez* claims, *see* ECF No. 101, and the parties took depositions of trial counsel, PCR counsel, and Petitioner's childhood trauma expert Dr. James Garbarino. *See* ECF Nos. 126, 127, 130, 131, 134, 135, & 142; *see generally* Rule 6(a) of the Rules Governing Section 2254 Cases ("A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure . . . ."); *Maynard v. Dixon*, 943 F.2d 407, 412 (4th Cir. 1991) ("A court should grant discovery in its discretion where there is 'good cause' why discovery should be allowed." (quoting Rule 6(a))).

for relief: Grounds Three, Six and Seven.[9] These grounds are, verbatim, as follows:

- **Ground Three (exhausted claim)**: "[Petitioner's] right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was violated as a result of representation by counsel who labored under an actual conflict of interest." ECF No. 22 at p. 9.
- **Ground Six (*Martinez* claim)**: "Trial and collateral counsel were ineffective to the prejudice of [Petitioner] by failing to investigate, develop[,] and present any mitigation evidence." ECF No. 75 at p. 5.
- **Ground Seven (*Martinez* claim)**: "[Petitioner's] Sixth Amendment right to the effective assistance of counsel was violated when his trial counsel offered an expert witness not suitable for the case and failed to prepare[] that witness." ECF No. 75 at p. 32.

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

[9] Petitioner originally raised eight grounds for relief, but has since withdrawn Grounds One, Two, Four, Five, and Eight. *See* ECF No. 140; ECF No. 221 at p. 39 n.7.

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 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 indicated above, Petitioner presently seeks habeas relief on three grounds: a conflict of interest claim (Ground Three) and two *Martinez* claims (Grounds Six and Seven).[10] The Magistrate Judge recommends granting summary judgment on all three grounds.[11] *See* R & R at pp. 88–120, 133–93. Petitioner has filed objections to the R & R. *See* Pet.'s Objs. [ECF No. 221].

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[10] The Court refers to these grounds as originally identified in Petitioner's initial petition and supplemental petition, i.e., as Grounds Three, Six, and Seven. *See* ECF Nos. 22 & 75.

[11] The R & R also addresses Grounds Four and Five, *see* R & R at pp. 120–33, but Petitioner withdrew these grounds in his objections. *See* Pet.'s Objs. at p. 39 n.7.

I. Exhausted Claim—Ground Three (Conflict Claim)

Petitioner alleges in Ground Three that his "right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was violated as a result of representation by counsel who labored under an actual conflict of interest." ECF No. 22 at p. 9. Petitioner's conflict of interest claim arises from the undisputed fact that one of his trial counsel, Thomas Sims, had previously prosecuted him for an assault that Petitioner committed against his former wife, who testified about that assault during the sentencing phase of trial. *See* Pet.'s Objs. at pp. 2–10; ECF No. 22 at pp. 9–23; ECF No. 51 at pp. 3–36; ECF No. 172 at pp. 7–45.

A. Facts

1. Thomas Sims' Prosecution of Petitioner in 1991

In January 1991 (eight years before the underlying capital trial), an Orangeburg County grand jury indicted Petitioner for assault and battery with intent to kill ("ABWIK") allegedly committed against his former wife, Audrey Smith, in December 1990. App. 1696–97. At the time, Thomas Sims was an assistant solicitor for the First Circuit Solicitor's Office in Orangeburg, and he signed the indictment[12] and personally prosecuted the ABWIK case against Petitioner. App. 2396–2540. In March 1991, the

[12] Sims signed the indictment because he was the acting solicitor at the time. App. 1859.

ABWIK case was called for trial before Judge John H. Smith, and Sims appeared in court on behalf of the State. App. 2396–99. Petitioner was also present in the courtroom accompanied by his defense counsel, and before jury selection began, Petitioner waived his right to be present and voluntarily absented himself from the courtroom during trial. App. 2400–09. Ultimately, Petitioner was convicted of the lesser-included offense of assault and battery of a high and aggravated nature ("ABHAN") and sentenced to ten years' imprisonment. App. 2535–36. Sims went into private practice in 1993. App. 1505, 1860.

2. Sims' Representation of Petitioner at the 1999 Capital Trial

In May 1998, Petitioner committed the offenses giving rise to his capital trial, and in January 1999, the trial court (Judge M. Duane Shuler presiding) held a hearing at which it appointed Sims and Virgin Johnson Jr. to represent him. App. 1503–07. When providing his particular qualifications, Sims noted he had worked in the Solicitor's Office from 1982 until 1993, App. 1505–06, but did not inform the trial court that he had previously prosecuted Petitioner. The trial court appointed Sims as lead counsel given his prior experience in capital cases, and Johnson as second-chair counsel. App. 1503–07. At the conclusion of the hearing, the trial court noted that Petitioner was present in the courtroom and that Sims and Johnson had "talked to him ahead of time." App. 1511.

Petitioner proceeded to trial before Judge Paul Burch in October 1999, and after he was found guilty, the State introduced his criminal record as aggravating

evidence during the sentencing phase. App. 1112–13. This criminal record included the aforementioned 1991 ABHAN conviction as well as a 1988 ABHAN conviction also involving Petitioner's former wife Smith, who was the victim in both offenses and testified about the facts giving rise to the convictions and several threatening letters that Petitioner had written her from prison.[13] App. 1113–45. Sims briefly cross-examined Smith, asking her about the letters and whether Petitioner had contacted her after being released from prison in May 1998. App. 1142–44. Smith answered that Petitioner had no direct contact with her after being released from prison and that she had not received a letter from him for a couple years. App. 1142–43. Smith also acknowledged that when she and Petitioner were having problems, he was on drugs and jealous and possessive of her. App. 1143–44. Smith also confirmed that in a number of Petitioner's letters he was asking to be her friend and wanting to talk with her "about trying to get his head straight." App. 1144.

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[13] The record indicates the 19**8**8 ABHAN conviction is from "19**9**8," but this appears to be a typographical error in the trial transcript. *Compare* App. 1112 (solicitor reading the date as "March 9, 1998"), *with* App. 1121 (Smith testifying Petitioner "was convicted in March of th[e] assault" that had occurred in the preceding year of 1987).

The State also introduced a 1993 ABHAN conviction relating to Petitioner's assault of an inmate while he was incarcerated. App. 1113. The State presented a chart—not the indictments themselves—summarizing Petitioner's criminal record. App. 1087. This procedure was used due to Sims' name being on the 1991 indictment. App. 1637.

The parties agree the trial record is silent on the alleged conflict at issue, and that the trial court never inquired into the existence of any potential conflict due to Sims' prior prosecution of Petitioner. *See* ECF No. 22 at pp. 10–11; ECF No. 56 at p. 51.

3. PCR Evidentiary Hearing

At the 2009 evidentiary hearing before the state PCR court, Sims and Johnson testified about their representation of Petitioner and the alleged conflict of interest. App. 1857–1915.

a. Sims' Testimony at the PCR Hearing

Sims recalled signing the ABWIK indictment and handling Petitioner's 1991 prosecution. App. 1859–60. Sims had no further involvement with either Petitioner or Smith after the 1991 trial, and after unsuccessfully running for solicitor in 1992, he went into private practice. App. 1860–62. He remembered being appointed to represent Petitioner in 1999. App. 1862–63. When asked why he did not inform the trial court that he had prosecuted Petitioner, Sims stated "it just didn't come up." App. 1863. However, Sims explained he and Johnson met with Petitioner and discussed this issue; Sims testified as follows:

> Q: Do you recall meeting with Mr. Stokes and discussing if at all your prior prosecution of him?
>
> A: As I recall, after going through the information we did discuss with Mr. Stokes, my role, who I was, and what my role had

been in the previous matter with him. We discussed it, me and Attorney Johnson. We did discuss it. He never expressed any desire not to have me as his attorney.

. . . .

Q: What was the purpose of those discussions?

A: For him to know fully who I was, what was there before him, and it was in my mind that if I tell you that, you know, hey, you know who I am. I'm the one who prosecuted you, sent you to jail, do you still want me as your lawyer, and he says, yes. That also says the other side to me that if I don't want you I can say I don't want you any more.

Q: But just to be clear, did you have that type of discussion with Sammie?

A: We had that type of discussion in terms of, look, you know who I am. I'm the prosecutor, I was the prosecutor here. I've been here and you know who I am. I've – you and I have met before, we've been involved before.

Q: So it was clear from your discussion that Sammie could have said he didn't want you as a lawyer?

A: Yes.

Q: Right?

A: Yes.

Q: And he said he wanted you to continue?

A: Yeah.

. . . .

Q: [F]rom your representation in January of 1999, through the trial, did your client ever indicate to you any desire to have you removed as his lawyer?

A: None.

App. 1863–64, 1866. Sims also recalled that while Petitioner's direct appeal was pending, Petitioner called him, indicated that if the appeal succeeded he "still wanted [Sims] to be his lawyer," and said he thought Sims was "top flight." App. 1864–65.

Sims testified the State provided him information concerning the statutory aggravating circumstances and the evidence in aggravation. App. 1866. Specifically, the State notified him of its intention to call Audrey Smith as a witness and to put into evidence the 1991 ABHAN conviction as well as Petitioner's letters to Smith. App. 1867. Sims anticipated the conviction, Smith's testimony, and Petitioner's letters would be introduced at trial, and he discussed this fact "in depth" with Petitioner. App. 1867–88. Sims confirmed he knew this evidence "was coming in" and planned to address it with a showing of remorse. App. 1868. He answered questions about his cross-examination of Smith, testifying as follows:

Q: Did the fact that you had previously prosecuted Mr. Stokes for that same incident that was part of Audrey Smith's testimony, did that affect the way that you approached

her on cross-examination or any objection you may have available to you?

A: Now, look, if I thought that I couldn't have represented Mr. Stokes to the best of my ability I would not have been in the case.

Q: All right. And was that consideration that you had from the beginning of your appointment with Mr. Stokes being aware that you had, in fact, prosecuted him?

A: I take the position that if I got a conflict, if I have a moral issue, if I have an ethical issue or if I have any issue that's going to prevent me from presenting [*sic*] anyone, I will not take the case.

. . . .

Q: Is there anything that you learned in your prosecution of Mr. Stokes that inhibited you in his defense in any manner?

A: No.

App. 1869. Sims also spoke with co-counsel Johnson, who never expressed any concern about Sims' prior prosecution of Petitioner. App. 1870.

On cross-examination, Sims recalled researching the admissibility of Petitioner's prior convictions under South Carolina law, filing a motion to exclude the prior convictions, and arguing the motion to the trial court. App. 1876, 1880–90. Sims also recalled informing the trial court that his name appeared on the 1991 indictment. App. 1885; *see* App. 1637 (Sims informing

the trial court). Furthermore, Sims reiterated he had conversations with Petitioner in which they discussed his prior prosecution of Petitioner, the fact that Petitioner went to prison because of that prosecution, and the evidence the State would seek to use at trial (including the 1991 ABHAN conviction). App. 1891–92.

On redirect, Sims again testified he anticipated Audrey Smith would testify at trial and explained that fact to Petitioner. App. 1895. Sims recalled his name being on the 1991 indictment and wanting to make sure the jury did not see the actual indictment. App. 1896. He testified he "fought to keep [] out" Smith's testimony but anticipated the trial court would still admit it. App. 1906. He again confirmed Petitioner knew of his prior prosecutorial role:

> Q: What exactly did you tell [Petitioner] his options were as far as representation, who could represent him?
>
> A: Let me put it this way, he knew that I had been the prosecutor. He knew that I had been the one to prosecute him, and, of course, my practice would have been to say, look, you have any problems with that? And, of course, after the trial he had no problem with it because he wanted me to go back and represent him again if the matter had been -- if the appeal had been upheld. . . . Mr. Stokes knew quite well if he had a problem with it all he had to do was to voice a problem, because during the course of our conversations I said, no, look, if you've got a problem with this let me know. And during

the trial, when that issue came up - - we talked about that indictment, too.

Q: Okay. And Virgin Johnson was present during your discussions with him about that?

A: Yes.

App. 1896.

On recross, Sims clarified the trial record indicated that the trial court was aware he had "conducted the ministerial task of signing the [1991] indictment," but not that he "had personally prosecuted that case." App. 1899. Additionally, Sims confirmed he (not Johnson) was the attorney who made all arguments and examined all witnesses at trial. App. 1904. Sims again testified he reminded Petitioner he was the prosecutor from the 1991 trial. App. 1904–05.

b. Johnson's Testimony at the PCR Hearing

Johnson testified that he knew Sims had prosecuted Petitioner and that they (Johnson and Sims) discussed the potential conflict of interest issue with Petitioner when they began representing him. App. 1909–10. Johnson remembered Sims "said . . . you know I put you in jail or I prosecuted you[,] and Sammie said yes," and that Petitioner said he had no problem with Sims representing him. App. 1910. Sims and Petitioner had a "good" relationship, and Petitioner expressed a desire to have Sims as his attorney again if his appeal succeeded. App. 1910. Johnson and Sims discussed with Petitioner the possibility of Smith's testimony concerning the 1991 ABHAN conviction being

presented during the penalty phase, and Petitioner never sought to have Sims relieved as counsel. App. 1910–11, 1913. Johnson never sensed Sims was hesitating to act on Petitioner's behalf based upon the prior conviction. App. 1911–12.

At the conclusion of the hearing, the PCR court confirmed "[t]here's no waiver on the [trial] record that anybody could find." App. 1916. Petitioner did not offer his live testimony at the PCR hearing and thus did not contradict Sims' or Johnson's testimony about their conversations with him on this issue.[14]

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[14] Sims and Johnson were the State's witnesses at the PCR hearing. App. 1810, 1857, 1908. Petitioner called two witnesses, one of which was attorney Jeffrey Bloom. App. 1848. Bloom testified he met with Sims "shortly sometime after April 1999" to discuss a jury issue as well as "a potential conflict of interest issue" regarding Sims' prior prosecution of Petitioner and the resulting conviction. App. 1850–51. Bloom asserted he told Sims to request an ex parte hearing before the trial court to address the matter, but when Sims later called to discuss the jury issue and "didn't seem concerned about" the conflict issue, Bloom "sever[ed] any professional relationship to the case." App. 1853–54. However, Sims (who was sequestered during Bloom's testimony) testified he did not recall discussing any potential conflict issue with Bloom, App. 1866, and the PCR court found Sims' testimony credible and discounted Bloom's testimony. App. 2173 n.10, 2385–90.

Moreover, Petitioner was present at the PCR hearing but did not testify. He later submitted an affidavit seeking to contradict the testimony of Sims and Johnson. App. 1929–30. The PCR court rejected the affidavit because it was untimely and "a blatant attempt to avoid the pitfalls of cross-examination and subjecting [him] to the adversarial process." App. 2183, 2379–85.

B. PCR Orders[15]

The PCR court issued an order denying relief on Petitioner's conflict of interest claim. App. 2163–83. Citing cases including *Cuyler v. Sullivan*, 446 U.S. 335 (1980), and *Mickens v. Taylor*, 535 U.S. 162 (2002), the PCR court found (1) that Petitioner did not demonstrate an actual conflict of interest and (2) that he did not show the alleged conflict adversely affected Sims' representation of him. App. 2168–77. Alternatively, the PCR court found Petitioner made a knowing waiver of any conflict. App. 2163, 2177–83. In making these findings, the PCR court found Sims' testimony and Johnson's testimony were both credible. App. 2163. The PCR court subsequently issued an order denying Petitioner's motion to alter or amend and reaffirming its prior rulings. App. 2373–95.

C. Magistrate Judge's R & R & Petitioner's Objections

The Magistrate Judge recommends denying relief on Ground Three. R & R at pp. 88–120. Initially, the Magistrate Judge rejects Petitioner's argument that a different standard of review should apply because the PCR court adopted the State's proposed order without modification. *Id.* at pp. 96–97. Regarding the merits of Petitioner's claim, the Magistrate Judge concludes the PCR court's finding of no actual conflict of interest was not based on an unreasonable determination of the facts because Petitioner fails to show either an actual conflict or an adverse effect. *Id.* at pp. 97–112. The

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[15] The R & R extensively quotes the PCR court's order denying relief and thoroughly summarizes its findings. R & R at pp. 89–96.

Magistrate Judge further concludes the PCR court's alternative finding that Petitioner waived any actual conflict was not an unreasonable application of Supreme Court precedent. *Id.* at pp. 113–20. Petitioner objects to these findings. *See* Pet.'s Objs. at pp. 2–10.

D. Standard of Review

Ground Three is exhausted and ripe for review on the merits because Petitioner presented it to the state PCR court, the PCR court denied relief on the claim, and the South Carolina Supreme Court denied certiorari to review the PCR court's ruling.[16] *See generally Hedrick v. True*, 443 F.3d 342, 364 (4th Cir. 2006) ("[A] federal habeas court may consider only those issues which have been fairly presented to the state's highest court." (internal quotation marks omitted)). Because the South Carolina Supreme Court summarily denied Petitioner's certiorari petition, *see* ECF No. 18-11, the Court directly reviews the state PCR court's reasoning. *Brumfield v. Cain*, 135 S. Ct. 2269, 2276 (2015) (applying the "look-through" doctrine); *Hope v. Cartledge*, 857 F.3d 518, 523 (4th Cir. 2017) (same).

Petitioner filed this habeas action after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and therefore 28 U.S.C. § 2254

[16] As mentioned above, the U.S. Supreme Court denied certiorari to review the judgment of the South Carolina Supreme Court. The U.S. Supreme Court denied certiorari after conferencing the case multiple times and requesting the state court record. *See* https://www.supremecourt.gov/search.aspx?filename=/docketfiles/15-9329.htm.

governs review of his claim in Ground Three. *Lindh v. Murphy*, 521 U.S. 320 (1997); *Breard v. Pruett*, 134 F.3d 615, 618 (4th Cir. 1998). Under the AEDPA, 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)).

Petitioner objects to the Magistrate Judge's conclusion that the PCR court's order warrants deference under 28 U.S.C. § 2254, claiming the PCR court merely rubber-stamped an order prepared by the State. Pet.'s Objs. at p. 10. Although the practice of signing proposed orders without modification is criticized by both the Fourth Circuit and the South Carolina Supreme Court, *see Bell v. Ozmint*, 332 F.3d 229, 233 (4th Cir. 2003); *Hall v. Catoe*, 601 S.E.2d 335, 341 (S.C. 2004),[17] the PCR court adopted the order as its own and adjudicated Petitioner's conflict claim on the merits. *See Young v. Catoe*, 205 F.3d 750, 755 n.2. (4th Cir. 2000) ("[T]he disposition of a petitioner's constitutional claims in such a manner [adopting a party's proposed order *in toto*] is unquestionably an 'adjudication' by the state court. If that court addresses the merits of the petitioner's claim, then § 2254(d) must be applied."); *Bell*, 332 F.3d at 233 (citing *Young*). Accordingly, the Court still must apply the highly deferential standard of § 2254(d) to Petitioner's conflict claim in Ground Three.

E. Analysis

"A criminal defendant's Sixth Amendment right to effective assistance of counsel includes a right to counsel unhindered by conflicts of interest." *Mickens v. Taylor*, 240 F.3d 348, 355 (4th Cir. 2001), *aff'd*, 535 U.S. 162 (2002). In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the Supreme Court articulated a two-prong test

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[17] The PCR court cited *Hall* when rejecting a similar challenge made in Petitioner's motion to alter or amend. App. 2375–79.

for analyzing conflict of interest claims.[18] *See Stephens v. Branker*, 570 F.3d 198, 208–09 (4th Cir. 2009) (summarizing the *Cuyler* test). "To establish ineffective assistance of counsel based on a conflict of interest that was not raised before the trial court, the defendant must demonstrate that (1) counsel operated under 'an actual conflict of interest' and (2) this conflict 'adversely affected his lawyer's performance.'" *Woodfolk v. Maynard*, 857 F.3d 531, 553 (4th Cir. 2017) (quoting *Cuyler*, 446 U.S. at 348). "If the defendant satisfies this showing, prejudice is presumed, and the defendant need not demonstrate a reasonable probability that, but for counsel's conflicted representation, the outcome of the proceeding would have been different." *Id.*; *see Mickens*, 240 F.3d at 355 ("After a petitioner satisfies this two-part test, prejudice is presumed.").

"[B]ecause an actual conflict of interest requires not only a theoretically divided loyalty, but also a conflict that actually affected counsel's performance, the actual conflict and adverse effect inquiries frequently are intertwined." *Woodfolk*, 857 F.3d at 553. "[T]he possibility of conflict is insufficient to impugn a criminal conviction," and "until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for

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[18] The *Cuyler* test differs from the typical standard governing ineffective assistance claims articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Mickens*, 240 F.3d at 355 ("The *Strickland* Court recognized that a claim of ineffective assistance of counsel arising from counsel's conflict of interest presents a special case subject to the standard articulated by *Cuyler v. Sullivan*, 446 U.S. 335 (1980).").

his claim of ineffective assistance." *Cuyler*, 446 U.S. at 350.

The Court will address each prong of the *Cuyler* test in turn.

1. Actual Conflict

Cuyler's first prong requires a habeas petitioner to demonstrate "that his counsel actively represented conflicting interests." 446 U.S. at 350. The petitioner "must show that his interests diverged from his attorney's with respect to a material factual or legal issue or to a course of action." *Stephens*, 570 F.3d at 209 (internal brackets and quotation marks omitted).

The PCR court determined Sims' prior prosecution of Stokes did not create an actual conflict for the following reasons:

- Sims and Johnson both gave credible testimony. App. 2163, 2173, 2389–90.
- A per se conflict does not exist based upon a prior prosecution involving a different crime. App. 2173 (citing *State v. Childers*, 645 S.E.2d 233, 235 (S.C. 2007)).
- Sims and Johnson discussed with Petitioner his right to have different counsel appointed due to Sims' earlier prosecution of him; Petitioner was aware of Sims' prior prosecution of him and never requested to have Sims removed; and Petitioner advised them that he desired to have Sims continue to represent him. App. 2168–69, 2393.

- Petitioner knowingly and voluntarily waived a conflict of interest with full knowledge of the conflict and the ability to have a different lawyer; and he still desired to have Sims continue to represent him. App. 2163.
- Petitioner never attempted to have Sims relieved as counsel, and the record was "uncontradicted" that Petitioner knew of the prior prosecution. App. 2175.
- Regarding Audrey Smith's testimony and use of the 1991 ABHAN conviction at trial, the PCR court found: "[W]ith at least a six (6) year lapse between Sims being a prosecutor, any divided loyalties argument must fail. Additionally, there was no connection between the former offense and the instant case. The only matter was the existence of the conviction – a proven fact – as evidence in aggravation and the fact that Audrey Smith testified in the penalty phase about the circumstances of the conviction.[19] There is no

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[19] In his objections, Petitioner quotes this sentence and the previous sentence and argues that the PCR court "mischaracterized the scope of the issue" by erroneously treating "the conflict as one involving only the introduction of a conviction as opposed to the presentation of the very same testimony by the very same witness, only with Mr. Sims now participating on the opposite side." Pet.'s Objs. at p. 3. Petitioner further argues the Magistrate Judge erred in "rewriting [] the PCR court's order" and finding its conclusion reasonable. *Id.* However, contrary to Petitioner's argument, the Court notes the PCR court's order clearly grasps the full extent of the issue—as one involving not only Sims' prior prosecution of Petitioner and use of the prior conviction against Petitioner but also the witness's (Audrey

showing that the prior prosecution adversely affected his representation of Stokes based upon this state witness (Audrey Smith) – a person whom he never represented. There were no divided loyalties in the matter. The simple fact of the former prosecution did not provide proof of a conflict of interest." App. 2176. The PCR court further credited Sims' testimony "that he was aware of the [S]tate's intent to use the Audrey Smith indictment and conviction in the penalty phase," "that he fought to keep the evidence out," and that he denied ever telling Petitioner that the evidence would not be admitted. App. 2391–93.

- Alternatively, the PCR court determined Petitioner made a knowing waiver of a conflict of interest, finding "Sims's earlier prosecution arose from an independent action and was unrelated to the present prosecution of Stokes. It was already a matter of record concerning the earlier conviction for the Audrey Smith incident. . . . Stokes was aware that Sims had prosecuted him in 1990-1991. He was aware – based upon the credible testimony of Virgin Johnson [–] that he could have somebody else represent him and he stated no. This Court finds that the Applicant waived his right to have

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Smith's) testimony against Petitioner at his capital trial. This is highlighted by the fact that the PCR court's order summarizes and compares Smith's testimony from the 1991 ABWIK trial and the 1999 capital trial and Sims' testimony regarding same.

> counsel other than Thomas Sims represent him." App. 2177, 2183.

In reaching the above findings, the PCR court summarized the facts relating to Sims' 1991 prosecution of Petitioner, Smith's testimony at the 1991 trial and Sims' direct examination of her, Smith's testimony at the 1999 capital trial and Sims' cross-examination of her, and the PCR testimony of Sims and Johnson. App. 2163–67, 2169–73.

The Court finds the PCR court's conclusion that no actual conflict existed was not contrary to or an unreasonable application of clearly established Supreme Court precedent, nor was it based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d). Initially, the Court emphasizes it does not take lightly the alleged conflict at issue and the fact that Sims' prior prosecution of Petitioner was never raised in open court and never brought to the trial court's attention during any phase of the proceedings. It goes without saying that the obvious and prudent course would have been for Sims to have immediately brought the potential conflict to the trial court's attention and placed Petitioner's knowing and voluntary waiver on the record. The Court further recognizes the unique distinction in this case is not only that Petitioner was previously prosecuted by one of his attorneys, but also that the prior conviction was used against him as aggravating evidence and that the victim from the prior prosecution (his ex-wife, no less) testified against him in aggravation. However, the Court cannot ignore Sims' and Johnson's PCR

testimony and the PCR court's credibility findings regarding it.

As both Sims and Johnson testified, they met with Petitioner before trial and squarely addressed the conflict issue by discussing with him the fact that Sims had previously prosecuted him, that Petitioner was incarcerated due to this prosecution, and that the 1991 ABHAN conviction *and* Audrey Smith's testimony would be presented as aggravating evidence at trial. Notably, Sims told Petitioner in unequivocal terms that "I'm the one who prosecuted you, sent you to jail," after which Petitioner said he still wanted Sims as his attorney. Sims also made it clear to Petitioner that he could have another lawyer besides him. Moreover, Sims and Johnson testified that Petitioner was aware of Sims' prior prosecutorial role and that Petitioner *never* indicated to them that he wanted Sims relieved as counsel.

Significantly, the PCR court heard Sims' and Johnson's testimony and found them both credible, and this Court is mindful that a federal habeas court cannot overturn a state court's credibility findings absent "stark and clear" error. *Cagle v. Branker*, 520 F.3d 320, 324 (4th Cir. 2008) (citing 28 U.S.C. § 2254(e)(1)). "Indeed, 'federal habeas courts [have] no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them.'" *Id.* (quoting *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983)). The Court discerns no stark and clear error in the PCR court's credibility findings that Sims and Johnson both discussed the conflict issue with Petitioner and that Petitioner waived any

potential conflict. *See, e.g.*, *Vinson v. True*, 436 F.3d 412, 418 (4th Cir. 2006) (rejecting a conflict claim where the petitioner's second-chair counsel was suing lead counsel, in part because the petitioner "was fully informed by counsel of the details of the conflict and was told he could obtain alternate counsel, but that he decided to continue with . . . his counsel").

Petitioner argues the record "remains silent on whether Mr. Stokes waived his right to conflict-free counsel with a complete understanding of the full implications of the waiver." Pet.'s Objs. at p. 7. He asserts the PCR court's conclusion regarding waiver is unreasonable. *Id.* at pp. 7–10.[20] "To establish in habeas corpus a deprivation of their constitutional right to effective assistance of counsel, [p]etitioners must show that they did not intentionally, knowingly, and voluntarily relinquish this right." *Gilbert v. Moore*, 134 F.3d 642, 653 (4th Cir. 1998). A "habeas petitioner carries the burden of showing the absence of a valid waiver of conflict-free counsel." *Id.* Importantly, "the question whether the accused waived his rights *is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights*." *Id.* (internal quotation marks omitted and emphasis added). Here, the PCR court determined—after finding

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[20] Petitioner further argues the record does not indicate he actually knew before trial that Sims would be cross-examining Smith (rather than just the 1991 ABHAN conviction being admitted). Pet.'s Objs. at p. 7. This assertion is simply incorrect because, as summarized above, both Sims and Johnson testified they discussed with Petitioner the strong possibility that Smith herself would testify at trial about the facts giving rise to the 1991 ABHAN conviction. *See* App. 1867–88, 1891–92, 1895, 1910–11, 1913.

Sims' and Johnson's testimony credible—that Petitioner was apprised of the potential conflict by both trial counsel, knew he could have Sims removed as counsel if he wanted, and knowingly and voluntarily waived any potential conflict with full knowledge of it by keeping Sims as his lawyer. Given this credibility-driven determination, the Court cannot conclude the PCR court's (1) finding of no conflict and (2) determination that Petitioner waived any potential conflict after speaking with his lawyers were contrary to or unreasonably applied Supreme Court precedent or were an unreasonable determination of the facts.[21] *See* 28 U.S.C. § 2254(d); *see, e.g.*, *Gilbert*, 134 F.3d at 653 (finding habeas petitioners represented by a single attorney at trial "failed to establish that they did not

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[21] To the extent Petitioner claims his waiver is invalid because the trial court never inquired into a possible conflict of interest, that argument lacks merit. *See Fullwood v. Lee*, 290 F.3d 663, 690 (4th Cir. 2002) ("Fullwood claims that he is entitled to relief . . . because there was no inquiry by the trial court into a possible conflict of interest. The Supreme Court, however, recently rejected the idea that a habeas petitioner is automatically entitled to relief when the trial court fails to make an inquiry mandated by *Cuyler*. *See Mickens v. Taylor*, 535 U.S. 162, 172–73 (2002).").

Furthermore, the Court notes the PCR court never actually found an *actual* conflict of interest but still made an alternative finding of waiver. App. 2177–83. The Fourth Circuit has indicated it is appropriate to discuss waiver when addressing the first prong of the *Cuyler* test. *See, e.g.*, *Vinson*, 436 F.3d at 417–18 (discussing conflict and waiver together); *Hester*, 679 F. App'x at 284 (same). *But see Gilbert*, 134 F.3d at 652–53 (treating waiver separately from the conflict analysis). In any event, the Court finds the PCR court's alternative finding that Petitioner made "a knowing waiver of a conflict of interest," App. 2177, was not contrary to or an unreasonable application of Supreme Court precedent or an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d).

intentionally, knowingly, and voluntarily waive their right to conflict-free counsel"; and relying in part on trial counsel's PCR testimony that he discussed the conflict issue with his clients before trial); *Hester v. Ballard*, 679 F. App'x 273, 284 (4th Cir. 2017) ("Any 'actual conflict of interest' that may have existed . . . was rendered null by [a] knowing and voluntary waiver of the conflict . . . , and the state habeas court's conclusion was, accordingly, not an unreasonable application of clearly established law.").

To reiterate, "the *possibility* of conflict is insufficient to impugn a criminal conviction," and "a defendant must establish that an *actual* conflict of interest" existed. *Cuyler*, 446 U.S. at 350 (emphases added). Petitioner has not demonstrated an *actual* conflict and therefore has not satisfied the first prong of the *Cuyler* test. *See, e.g.*, *Hester*, 679 F. App'x at 284–85 (finding the state court did not unreasonably apply *Cuyler* in finding no actual conflict where trial counsel had previously represented a prosecution witness); *Chandler v. Lee*, 89 F. App'x 830, 839–41 (4th Cir. 2004) (finding "that while [trial counsel]'s prior representation of [a key prosecution witness] created a *potential* conflict of interest, there was never an *actual* conflict"). However, even assuming *arguendo* the existence of an actual conflict, Petitioner's claim still fails because he cannot show an adverse affect.

2. Adverse Effect

Cuyler's second prong (that an actual conflict "adversely affected" the lawyer's performance) requires a habeas petitioner to satisfy three requirements, referred to as the "*Mickens* factors." *See Stephens*, 570

F.3d at 209–12. A petitioner must "(1) identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued, (2) show that this strategy was objectively reasonable under the facts of the case known to the attorney at the time, and (3) show that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict." *Woodfolk*, 857 F.3d at 553 (internal quotation marks omitted); *see Mickens*, 240 F.3d at 361 (articulating this three-part test). "The adverse effect inquiry is often fact dependent, mandating due deference to the factfinder," and as mentioned above, "the actual conflict and adverse effect inquiries frequently are intertwined." *Id.*

The PCR court made the following findings relevant to the Court's adverse effect inquiry:[22]

- Sims and Johnson both gave credible testimony. App. 2163, 2173, 2389–90.
- Regarding Audrey Smith's testimony and the use of the 1991 ABHAN conviction at trial, the PCR court found: "[W]ith at least a six (6) year lapse between Sims being a prosecutor, any divided loyalties argument must fail. Additionally, there was no connection between

[22] Petitioner argues the PCR court made no findings regarding adverse effect "other than an implicit denial." Pet.'s Objs. at p. 5. However, as the bulletpoints below indicate, the PCR court did in fact make such findings and specifically found no adverse effect. *See, infra*, App. 187 ("There is no showing that the prior prosecution adversely affected [Sims'] representation of Stokes based upon this state witness (Audrey Smith) . . . ."). Also, as mentioned above, "the actual conflict and adverse effect inquiries frequently are intertwined." *Woodfolk*, 857 F.3d at 553.

> the former offense and the instant case. The only matter was the existence of the conviction – a proven fact – as evidence in aggravation and the fact that Audrey Smith testified in the penalty phase about the circumstances of the conviction. There is no showing that the prior prosecution ***adversely affected*** his representation of Stokes based upon this state witness (Audrey Smith) – a person whom he never represented. There were no divided loyalties in the matter. The simple fact of the former prosecution did not provide proof of a conflict of interest." App. 2176 (emphasis added).

- The PCR court further credited Sims' testimony "that he was aware of the [S]tate's intent to use the Audrey Smith indictment and conviction in the penalty phase," "that he fought to keep the evidence out," and that he denied ever telling Petitioner that the evidence would not be admitted. App. 2391–93.

As explained below, the Court concludes the PCR court's finding of no adverse effect was not contrary to or an unreasonable application of clearly established Supreme Court precedent, nor was it based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d).

The first *Mickens* factor requires Petitioner "to identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued." 240 F.3d at 361. Petitioner argues Sims failed to thoroughly cross-examine Smith to elicit discrepancies between her testimony at the 1991 trial and the 1999

capital sentencing proceeding.[23] *See* Pet.'s Objs. at pp. 3–6. Even assuming this strategy was plausible, Petitioner still fails to satisfy both the second and third *Mickens* factors.

Regarding the second *Mickens* factor, Petitioner's proposed defense strategy of vigorous cross-examination was not objectively reasonable given the facts available to Sims at the time of trial. *See* 240 F.3d at 361. "To demonstrate objective reasonableness, the petitioner must show that the alternative strategy or tactic was clearly suggested by the circumstances." *Stephens*, 570 F.3d at 209 (brackets and internal quotation marks omitted). As indicated above, Sims' brief cross-examination of Smith did not contest the underlying facts of the 1991 ABHAN conviction but instead focused on the letters Petitioner had written her from prison in which he "ask[ed her] about being [her] friend" and "trying to get his head straight." App. 1142–44. The PCR court credited Sims' testimony that he knew Audrey Smith would testify, that Petitioner's letters would be introduced at trial, and that he planned to address these matters by attempting to show remorse. App. 1867–68 (Sims' testimony); App. 2163, 2168, 2170 (PCR court order). Because Sims' trial strategy was to show Petitioner's remorse for what he had done to Smith, it would have been objectively unreasonable for him to have exhaustively cross-examined and attacked her about testimony in which she described for the jury Petitioner's assault upon her. The fact remained that Petitioner had choked Smith

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[23] The R & R identifies these alleged discrepancies. *See* R & R at pp. 108–09.

with an extension cord until she passed out, and Smith reaffirmed the essential facts underlying that proven, prior conviction. A contrary approach would have undermined Sims' defense theory of remorse. As the Magistrate Judge aptly observed, "[a]n attempt to have more aggressively cross-examined Smith on those points could have hindered Sims's attempts to show Petitioner's remorse or could have spurred even more detailed testimony on the previous incidents." R & R at p. 112. Accordingly, Petitioner fails to satisfy the second *Mickens* factor.

As for the third *Mickens* factor, Petitioner has not established Sims' failure to pursue the alternative strategy—thoroughly cross-examining Smith about discrepancies in her 1991 testimony and 1999 testimony—was linked to the alleged actual conflict. *See* 240 F.3d at 361. Petitioner argues there is a "dramatic difference" in how Petitioner's defense attorney in the 1991 trial cross-examined Smith and in how Sims cross-examined her at the 1999 sentencing phase. Pet.'s Objs. at pp. 4–6. This argument is akin to comparing apples and oranges; a defense attorney contesting his client's guilt in a non-capital trial is in an entirely different position than a capital defender striving to get his client a life sentence and having to dampen the effect of a prior conviction. Furthermore, the PCR court credited Sims' testimony that he "fought" to keep out the 1991 ABHAN conviction and that his prior prosecution of Petitioner for the assault against Smith did not affect how he cross-examined her. App. 1876, 1880–90, 1869, 1906 (Sims' testimony); App. 2163, 2168, 2170–71 (PCR court order). The PCR court also credited Johnson's testimony that he never

sensed Sims was hesitating to act on Petitioner's behalf because of the 1991 conviction. App. 1911–12 (Johnson's testimony); App. 2163, 2168, 2173 (PCR court order). Again, Petitioner has not shown "stark and clear" error in these credibility findings, *see Cagle*, 520 F.3d at 324, nor has he rebutted them by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see Stephens*, 570 F.3d at 211 (applying § 2254(e)(1) to a *Mickens* factor). In short, there is no evidence in the record to support a finding that Sims' purportedly inadequate cross-examination of Smith resulted from his prior prosecution of Petitioner. Accordingly, Petitioner fails to satisfy the third *Mickens* factor, and thus cannot establish the alleged conflict of interest adversely affected Sims' representation. And again, Petitioner offered no live testimony of his own at the PCR hearing to dispute Sims' or Johnson's testimony.[24]

3. Conclusion

The Court finds the state PCR court's rejection of Petitioner's conflict of interest claim was not contrary to or an unreasonable application of clearly established Supreme Court precedent, nor was it based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d). Accordingly, the Court denies relief on Ground Three.

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[24] *See Milledge v. State*, 811 S.E.2d 796, 800 (S.C. 2018) ("The PCR applicant bears the burden of proving his allegations by a preponderance of the evidence." (citing Rule 71.1(e), SCRCP, and *Frasier v. State*, 570 S.E.2d 172, 174 (S.C. 2002))).

II. *Martinez Claims*—Grounds Six and Seven

Petitioner brings his procedurally defaulted claims, Ground Six and Seven, pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), and the Magistrate Judge permitted discovery and held an evidentiary hearing on these claims. The Court notes that as in the state PCR proceedings, Petitioner in the federal *Martinez* hearing did not offer any of his own live testimony to dispute or contradict what his counsel discussed with him regarding any of the issues raised herein.

A. Applicable Law

1. *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).[25] The *Martinez* Court explained the approach for reviewing such a claim:

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

Id. at 15–16 (emphasis added). Thus, "when a State requires a prisoner to raise an ineffective-assistance-of-

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[25] *"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); *see State v. Felder*, 351 S.E.2d 852, 852 (S.C. 1986) ("This Court usually will not consider an ineffective assistance of counsel issue on appeal from a conviction.").

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*[.[26]]" *Id.* at 14. The Fourth Circuit has expounded on the requirement of a "substantial" claim:

> Regarding the requirement that there be a "substantial" claim, the Supreme Court held that a prisoner must "demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 132 S. Ct. at 1318. Relatedly, to show ineffective assistance, the petitioner must make a "substantial" showing with respect to both counsel's competency (first-prong *Strickland*) and prejudice (second-prong *Strickland*).
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> As to the specific elements of the ineffective assistance claim, a petitioner must make a substantial showing of incompetency, i.e., that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. Further, the petitioner must make a substantial showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable, i.e.,

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[26] *Strickland v. Washington*, 466 U.S. 668 (1984).

> that there was a substantial, not just conceivable, likelihood of a different result.

Teleguz v. Zook, 806 F.3d 803, 815 (4th Cir. 2015) (ellipsis, some internal quotation marks, and some internal citations omitted).

> 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, 753 F.3d at 461 (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*, 898 F.3d 408, 438 (4th Cir. 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.[27]

2. *Strickland* Test

Claims of ineffective assistance of counsel must be reviewed under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). First, a petitioner must show counsel's performance was deficient and fell below an objective standard of reasonableness. *Id.* at 687–88. Second, the petitioner must show prejudice, meaning "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Regarding the deficiency prong, "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688. "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* at 689. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged

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[27] *Martinez* is inapplicable in South Carolina PCR actions. *See Robertson v. State*, 795 S.E.2d 29, 34, 37 (S.C. 2016); *Kelly v. State*, 745 S.E.2d 377, 377 (S.C. 2013).

conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690.

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."[28] *Id.* at 695 (emphasis added). "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*, 857 F.3d at 524 (quoting *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

Applying this framework, the Court will now consider Petitioner's *Martinez* claims raised in Grounds Six and Seven.

B. Ground Six (Mitigating Evidence Claim)

Petitioner alleges in Ground Six that "[t]rial and collateral counsel were ineffective to the prejudice of [Petitioner] by failing to investigate, develop[,] and present any mitigation evidence." ECF No. 75 at p. 5.

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[28] In contrast, "[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695.

Specifically, Petitioner claims trial counsel were ineffective for failing to investigate and present mitigating evidence regarding his history and background. *See* Pet.'s Objs. at pp. 10–32; ECF No. 75 at pp. 5–32; ECF No. 96 at pp. 1–9; ECF No. 172 at pp. 45–84. Petitioner faults PCR counsel for failing to pursue this ineffective-assistance-of-trial-counsel claim in the state PCR proceedings, and thus seeks to bring the claim in this Court pursuant to *Martinez*.

1. Facts[29]

Trial counsel called one witness to testify in mitigation during the penalty phase: James Aiken, a prison adaptability expert who opined Petitioner could serve a life sentence without causing undue risk of harm to other inmates or staff.[30] App. 1387–1429. Although trial counsel had hired a mitigation investigator and assembled additional witnesses to testify in mitigation, they ultimately did not call any other witnesses besides Aiken or present any other mitigating evidence.

In 2001, Petitioner filed his initial PCR application asserting a single ground for relief: that trial counsel were ineffective for "[f]ail[ing] to present mitigating evidence." App. 1714–19.

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[29] The R & R thoroughly summarizes the facts relevant to Petitioner's claim in Ground Six, and the Court briefly recaps them here.

[30] Petitioner contests trial counsel's presentation of Aiken's testimony in Ground Seven, which is addressed below.

In 2002, Keir Weyble and Robert Lominack were appointed as PCR counsel, *see* Tr.[31] 57, 368, and they filed an amended PCR application raising three claims, including that trial counsel were ineffective for "fail[ing] to investigate and present available mitigating evidence during the sentencing phase." App. 1720–22; Pet. Ex. 40. PCR counsel investigated the mitigation claim by, *inter alia*: reviewing the trial transcript and trial counsel's file, *see* Tr. 31, 371–72; obtaining funding for experts and service providers including a private investigator, a penalty phase investigator, a neuropsychologist, and a forensic pathologist/forensic entomologist, *see* Resp. Exs. 11 & 12; retaining and meeting with their mitigation investigator Tracy Dean, who interviewed Petitioner, family members, and acquaintances and prepared summaries of those interviews, *see* Tr. 39, 54, 380–81; Pet. Ex. 43; Resp. Exs. 13–20, 22; speaking with the neuropsychologist (Dr. Robert Deysach) and the psychiatrist (Dr. Donna Schwartz-Watts) that trial counsel had retained before trial, *see* Tr. 34–36, 489–90; and deposing Sims, who testified at his 2003 deposition that he had originally planned to present evidence showing Petitioner had AIDS and "at some point because of this condition, he's going to be a vegetable," that the AIDS evidence would dovetail with Aiken's prison adaptability testimony (i.e., Petitioner's past history of violence in prison would be a non-issue because of his deteriorating physical condition), that he explained this strategy to Petitioner, and that at the

[31] "Tr." refers to the transcript of the evidentiary hearing before the Magistrate Judge. *See* ECF Nos. 204–07.

last minute Petitioner "absolutely refused" to allow trial counsel to introduce the AIDS evidence because Petitioner did not want his family or the jury to hear it. App. 1755–56, 1774–78; *see, e.g.*, App. 1775 (Sims: "Just as we got ready to start presenting that evidence, Sammie then said, no, I don't want it coming in. I don't want it coming out.").

In 2004, PCR counsel filed a second amended PCR application raising seven grounds for relief but specifically removing and omitting the mitigation claim. App. 1782–86; Pet. Ex. 44. Notably, after filing the second amended PCR application, PCR counsel sent letters to trial counsel informing them that the "application does not contain any allegations of ineffective assistance of trial counsel." Pet. Ex. 45. The mitigation claim was not further pursued in the state PCR proceedings.[32]

At the federal *Martinez* evidentiary hearing, Petitioner called his trial counsel and PCR counsel to testify concerning the mitigating evidence claim in Ground Six. *See* Tr. 27–235 (Lominack), 366–537 (Weyble), 578–630 (Sims), 631–54 (Johnson), 656–70 (Hackett). Petitioner also presented testimony from the neuropsychologist (Dr. Deysach) and the social worker (Dr. Augustus Rodgers) that trial counsel had retained before Petitioner's trial. *See* Tr. 538–50 (Rodgers), 550–66 (Deysach). Finally, Petitioner presented

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[32] Lominack temporarily left the practice of law after filing the second amended PCR application, but he later returned and was reappointed to represent Petitioner. Susan Barber Hackett was appointed to replace Lominack during his absence.

testimony from Dr. James Garbarino, an expert in childhood trauma and developmental psychology retained for purposes of this § 2254 action. *See* Tr. 237–353. Besides the testimony, the Magistrate Judge received into evidence exhibits from Petitioner and Respondent. *See generally* ECF No. 200 (exhibit list). The Court has thoroughly reviewed all this evidence in reaching its decision.

2. Magistrate Judge's R & R & Petitioner's Objections

The Magistrate Judge recommends denying relief on Ground Six. R & R at pp. 136–81. Initially, the Magistrate Judge concludes Petitioner fails to establish that PCR counsel's performance (i.e., abandoning the mitigation claim) was deficient, and this alone prevents him from overcoming the procedural default of Ground Six pursuant to *Martinez*. *Id.* at pp. 138–58. Nevertheless, the Magistrate Judge further concludes Petitioner's underlying ineffective-assistance-of-trial-counsel claim lacks merit because trial counsel were not deficient and because Petitioner has not shown resulting prejudice. *Id.* at pp. 158–81. Petitioner objects to these conclusions. *See* Pet.'s Objs. at pp. 10–32.

3. Analysis

Having carefully studied the arguments and evidence pertaining to Ground Six, the Court concludes Petitioner is not entitled to habeas relief for two reasons: (1) he has not shown PCR counsel's decision to abandon the mitigation claim was unreasonable; and more significantly, (2) he cannot show *Strickland*

prejudice resulting from trial or PCR counsel's performance.

a. PCR Counsel's Performance

As indicated above, a court considering a *Martinez* claim need not always evaluate trial counsel's performance and may alternatively deny relief if it finds "that the attorney in the initial-review collateral proceeding did not perform below constitutional standards," *Martinez*, 566 U.S. at 16, meaning "the standards of *Strickland v. Washington*." *Id.* at 14. Here, the Court finds PCR counsel's decision to abandon the mitigation claim in favor of other claims was objectively reasonable, and therefore Petitioner fails to show PCR counsel were deficient.

PCR counsel specifically raised a mitigation claim and two other claims when they filed the amended PCR application. However, after investigating the mitigation claim to some extent, they specifically omitted it from the second amended PCR application and presented seven other claims instead. Their contemporaneous 2004 letters to Sims and Johnson—specifying Petitioner was not pursuing any ineffective assistance claims in PCR—underscores their intentional withdrawal of the claim. Although PCR counsel obviously could have pursued the mitigation claim and raised as many claims in PCR as they wanted, they, as capital habeas counsel, chose to pursue the claims they thought would enable Petitioner to obtain relief, such as the conflict claim discussed in Ground Three.

"As commonly happens in post-conviction proceedings," PCR counsel initially attempted to "f[a]ll on [their] sword for [their] former client" during direct examination at the *Martinez* evidentiary hearing. *Dugas v. Coplan*, 428 F.3d 317, 346 n.39 (1st Cir. 2005) (Howard, J., dissenting); *see* R & R at pp. 152–53 (summarizing specific instances of Lominack's and Weyble's testimony). However, under cross-examination by the State, Weyble testified as follows:

> Q: Well, a claim of failure to present mitigation evidence against trial counsel and an *Atkins*[33] claim, they're not mutually exclusive.
>
> A: No.
>
> Q: You could have raised both of those claims.
>
> A: That's correct.
>
> Q: And you admit the *Atkins* claim is cleaner.
>
> A: Cleaner could mean one thing to you and one thing to me. It is more discrete. It is.
>
> Q: Okay. And the conflict claim is more discrete.
>
> A: Yes.
>
> Q: And there had to be a reason that you withdrew it, correct?
>
> A: True.

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[33] *Atkins v. Virginia*, 536 U.S. 304 (2002).

Q: If you thought it was a strong claim, the IAC [ineffective assistance of counsel] claim, at the time, if you had thought it was a strong claim, would you have presented it?

A: Yes.

Q: If you thought you could obtain relief for Mr. Stokes from a death sentence on this claim, you wouldn't have dropped it, would you?

A: I can't imagine we would have.

Tr. 502–03 (emphasis added). The Magistrate Judge found this portion of Weyble's testimony credible, and having reviewed the transcript de novo, the Court agrees. *See generally United States v. Boatrite*, 165 F. Supp. 3d 484, 489 (N.D.W. Va. 2016) ("Where a party objects to a magistrate judge's credibility determinations, the district court must conduct a *de novo* determination on credibility, but the court need not rehear the contested testimony in order to carry out the statutory command to make the required determination under § 636. *United States v. Raddatz*, 447 U.S. 667, 674 (1980). . . . A magistrate judge's credibility determinations based on live testimony are entitled to deference where they are supported by the record as a whole." (internal quotation marks omitted) (collecting cases)); *cf. Alexander v. Peguese*, 836 F.2d 545, 1987 WL 30215, at *1 (4th Cir. 1987) (unpublished table decision) (indicating a district court "must review a magistrate's credibility determinations" by "considering the actual testimony" and may do so by

"listening to a tape or reading a transcript of the hearing" (citing *Wimmer v. Cook*, 774 F.2d 68, 76 (4th Cir. 1985))).

"When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect. *See Strickland*, 466 U.S. at 690 (counsel is 'strongly presumed' to make decisions in the exercise of professional judgment)." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). "Moreover, even if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Id.* at 6. Here, PCR counsel focused on the issues they thought would afford Petitioner relief from his death sentence, and they reasonably abandoned the mitigation claim as Weyble credibly testified. Thus, PCR counsel were not deficient in their representation of Petitioner.

b. *Strickland* Prejudice

Although Petitioner devotes the majority of his objections to Ground Six, he focuses primarily on the *performance* of trial counsel and PCR counsel and only briefly addresses the *prejudice* prong of *Strickland*. *See* Pet.'s Objs. at pp. 10–32. The Court notes:

> [T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether

> counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. ***If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.***

466 U.S. at 697 (emphasis added); *see, e.g.*, *Wong v. Belmontes*, 558 U.S. 15, 19–28 (2009) (declining to resolve whether trial counsel was deficient because the petitioner could not show prejudice); *Buckner v. Polk*, 453 F.3d 195, 202 (4th Cir. 2006) (same). Here, the Court need not resolve whether trial counsel's performance was deficient because Petitioner cannot establish prejudice.[34]

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 concerning his history and background. *See Strickland*, 466 U.S. at 695; *Wiggins*, 539 U.S. at 537; *Wong*, 558 U.S. at 19–20. "To assess that probability," the Court must "consider 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweig[h] it

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[34] Given this disposition of Ground Six, the Court need not resolve Petitioner's objections concerning trial counsel's performance or the Magistrate Judge's credibility findings regarding their testimony.

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)). A *Strickland* prejudice analysis requires the Court to "consider the totality of the evidence before the . . . jury." 466 U.S. at 695.

i. Available Mitigating Evidence

Again, Petitioner's only mitigating evidence during sentencing was Aiken's prison adaptability testimony (fully summarized in Ground Seven below) that Petitioner could serve a life sentence without posing undue risk of harm to other inmates or staff. Petitioner claims the jury should have heard mitigating evidence concerning his history and background, asserting the files of both trial and PCR counsel "contain copious evidence, in the form of interviews and records, revealing that Mr. Stokes suffered from an extremely chaotic background marked by parental instability, poverty, addiction, violence, and profound trauma." ECF No. 75 at p. 81. Such evidence includes, *inter alia*, that both of Petitioner's parents died by the time he was thirteen; that his mother and stepfather were notorious, abusive, and neglectful alcoholics; and that he struggled in school with no intervention. *See* Pet.'s Objs. at pp. 10–11.

Petitioner further claims the jury should have heard about the cumulative impact that these and other aspects of his background are known to have on behavioral outcomes, and to support this claim, he presented the testimony and report of Dr. James

Garbarino, an expert in childhood trauma.[35] The R & R thoroughly summarizes Dr. Garbarino's testimony, *see* R & R at pp. 32–44; in brief, Dr. Garbarino interviewed Petitioner, reviewed various materials relating to his background, and testified that Petitioner "was very damaged by the nature of his upbringing" and that "the kind of damage that he experienced is very consistent with the terrible nature of the crime that he committed." Tr. 248. Dr. Garbarino also prepared a report with the following summary:

> Sammie Stokes is a damaged human being. He did not choose this damage. Rather, it resulted from the adverse, traumatic, and psychologically toxic nature of his family and social environment during childhood and adolescence. Central to this dynamic being abandoned by his mother when he was a young child. This maternal rejection proved to be a developmentally catastrophic psychological trauma that has dominated his life and his relationships ever since. As a result, the best way to understand him is as "an untreated traumatized child inhabiting an adult's body." This accounts for his serious problems with pro-social decision making ("executive functioning") and appropriately managing his feelings ("affective regulation"). His chronic mental health issues, substance abuse, and issues of acting out

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[35] Petitioner objects to the Magistrate Judge's treatment of Dr. Garbarino's testimony, *see* Pet.'s Objs. at pp. 28–30. For purposes of its prejudice analysis, the Court will assume Dr. Garbarino's testimony qualifies as available mitigating evidence.

> violently and antisocially can be traced to his adaptation to extreme adversity, and being the victim of physical and psychological maltreatment (abuse and neglect) during childhood. He has experienced pervasive problems with interpersonal relations that have limited his ability to take advantage of whatever positive opportunities have been made available to him and contributed to the crime for which he is being sentenced. Nonetheless, he has demonstrated a capacity to live safely within a controlled prison environment—as he did for a period of five years prior to his release in 1998.

Pet. Ex. 49 at p. 3.

ii. Aggravating Evidence

The State presented extensive aggravating evidence during sentencing. *See generally* App. 1113–1379. First, there was the murder for which Petitioner was on trial. One evening while Petitioner was in state prison "chilling out watching T.V.," his cellmate James Roy Toothe came into the room upset and cursing about how Connie Snipes had caused Toothe's daughter to be taken away by social services. Toothe said that he and his mother Pattie Syphrette wanted Snipes dead so Syphrette could obtain custody of his daughter, and that Petitioner would "be paid well" if he did the job. Over the following weeks, Petitioner spoke to and corresponded with Syphrette, who agreed to pay Petitioner $2,000 and provide a gun to kill Snipes. Petitioner was released from prison in May 1998, and after he told Norris Martin about the deal with Syphrette, Martin indicated his desire to participate.

On May 22, 1998, Syphrette drove Petitioner, Martin, and Snipes down a dirt road in Branchville, South Carolina, and then Petitioner and Martin walked with Snipes into the woods on the premise that they were going to kill somebody else—Doug Ferguson. Once in the woods, Petitioner informed Snipes that it was she who Syphrette wanted dead. Thereafter,

> Stokes forced Snipes to have sex with Martin at gunpoint. After Martin was finished, Stokes had sex with Snipes. While doing so, Stokes grabbed her breast and stabbed her in the chest, cutting both her nipples. Stokes then rolled her over and began having anal sex with her. When Stokes was finished, he and Martin each shot the victim one time in the head, and then dragged her body into the woods. Stokes then took Martin's knife and scalped her, throwing her hair into the woods. According to Martin, Stokes then cut Snipes' vagina out.

Stokes, 548 S.E.2d at 203 (footnotes omitted). Martin testified Snipes was screaming, crying, and moaning when Petitioner cut her breasts, and the State's forensic pathologist testified Snipes' injuries were consistent with having been scalped, having had the nipple area cut from each breast, and having had the entire vaginal area cut out. The pathologist further testified that "[i]t definitely would have been painful" if Snipes were alive when her nipples were cut off, and that she also had incise wounds on her hands that would have been "very painful" and a stab wound on her neck that also would likely have been painful. The

jury saw autopsy photographs of Snipes' mutilated and decomposed body.[36]

Petitioner and Syphrette eventually killed Ferguson a few days later, and the jury heard about the horrific circumstances of his murder. When Petitioner was still in prison, he sent Syphrette two gold rings and a watch to hold for him until his release, but Ferguson apparently stole these items. Ferguson had lived with Syphrette, Snipes, and Snipes' newborn son Brian during the spring of 1998. After Snipes' body was found and reported on the news, Syphrette told Petitioner that she was worried Ferguson would talk to police and that they needed "to do something with Doug." On May 28 (six days after Snipes' murder), Syphrette picked up Ferguson from another location and drove him to her home where Petitioner was waiting. Brian Snipes and Faith Lapp (Syphrette's friend and neighbor) were also there. Ferguson hugged and kissed baby Brian and then sat down on the couch, whereupon Petitioner entered the room wearing latex gloves telling Ferguson he was going to teach him a lesson for having stolen his rings and watch. Syphrette said they should tie up Ferguson with duct tape. According to Lapp, Ferguson started crying while being taped up and begged

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[36] The jury found four statutory aggravating circumstances: (1) Snipes' murder was committed while in the commission of criminal sexual conduct; (2) Snipes' murder was committed while in the commission of kidnapping; (3) Petitioner murdered Snipes for himself or another for the purpose of receiving money or a thing of monetary value; and (4) Petitioner caused or directed another to murder Snipes as an agent or employee of another person. *See generally* S.C. Code § 16–3–20. Based on these aggravating circumstances, the jury recommended the death penalty.

Petitioner and Syphrette not to shoot him. Ultimately, Petitioner and Syphrette wrapped duct tape around Ferguson's entire body and head, thereby suffocating him. Petitioner also punched Ferguson in the face and drew blood. Later that day, police arrived at Syphrette's residence to serve a warrant and found Petitioner hiding under a bed and Ferguson's duct-taped body. To perform the autopsy, the State's pathologist had to cut layers of tape from Ferguson's body. The pathologist testified that Ferguson's face was wrapped with multiple layers of duct tape and that he was conscious during the taping and died from suffocation due to the tape covering his nose and mouth. The pathologist further testified a suffocating person unable to breath experiences a great deal of pain before passing out. The jury saw autopsy photographs of Ferguson's body both before and after the duct tape was removed.

Petitioner confessed to both murders in a lengthy letter that was read to the jury during sentencing. He concluded the letter—which was replete with profanity and described the murders in a largely apathetic fashion—by stating, "there's no excuse because we all have choices in life."

The State also presented evidence of Petitioner's future dangerousness, including his criminal history consisting of three prior ABHAN offenses, two committed against his former wife Audrey Smith and the other committed against an inmate.[37] Smith

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[37] "[I]nformation concerning prior criminal convictions [is] admissible as additional evidence during the sentencing or

testified as the State's first witness during sentencing, and she described Petitioner's assaults on her in November 1987 and December 1990. During the 1987 assault, Petitioner came to Smith's apartment asking for a glass of water, told her to turn around, and put a knife to her throat. After a struggle during which Petitioner cut both of Smith's hands, he held her hostage in a hot attic at knifepoint while her family looked for her, threatening to kill her children if she made a sound. When it was dark, Petitioner took Smith outside and put her in a ditch; when Smith yelled for her brother, Petitioner stabbed her three times in the back and took off running. Petitioner was convicted and sentenced for this assault.

During the 1990 assault, Petitioner came to Smith's house, told her he had something to tell her, and took her on a walk in the afternoon. Petitioner gave her a letter that stated he was going to kill her that night. Petitioner took the letter back and led her into the woods, where he pulled out a knotted extension cord that he put around her neck. Smith passed out and woke up later that night, and she was in the hospital for several weeks. Petitioner was convicted and sentenced for this assault.

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resentencing phase of a capital trial under [the South Carolina death penalty] statute." *State v. Plath*, 313 S.E.2d 619, 623 (S.C. 1984). "[T]he State's evidence in aggravation is not limited to evidence relating to statutory aggravating circumstances." *Simmons v. South Carolina*, 512 U.S. 154, 162 (1994). "The defendant's character, prior criminal history, mental capacity, background, and age are just a few of the many factors, in addition to future dangerousness, that a jury may consider in fixing appropriate punishment." *Id.* at 163.

During Smith's testimony, the State published numerous letters that Petitioner wrote her from prison. In these letters, Petitioner indicated he was struggling with thoughts of killing her and reminded her that he would eventually get out of prison and search for her.

Regarding Petitioner's third ABHAN offense, the State presented evidence showing he was in a prison restroom when he attacked another inmate—Jackie Williams—by slashing Williams' face with a box cutter. The jury also saw photographs of Williams' injured face. Petitioner was convicted and sentenced for this assault.

Finally, the State presented evidence that Petitioner assaulted another inmate while he was in jail awaiting trial. During this assault, Petitioner hit the inmate multiple times with his fist, and the inmate did not strike Petitioner. Jail officials placed Petitioner on lockdown as a result of the incident.

iii. Aggravating Evidence vs. Mitigating Evidence

Having reweighed "the entire body of mitigating evidence" (i.e., Aiken's prison adaptability testimony and the additional evidence about Petitioner's traumatic background) "against the entire body of aggravating evidence," *Wong*, 558 U.S. at 20, the Court concludes Petitioner fails to show *Strickland* prejudice. The aggravating evidence in this case was overwhelming. "It is hard to imagine expert testimony and additional facts about [Petitioner's] difficult childhood outweighing the facts of [Snipes'] murder. It becomes even harder to envision such a result when the

evidence that [Petitioner] had committed another murder [of Ferguson]—the most powerful imaginable aggravating evidence—is added to the mix." *Id.* at 27–28 (internal citation omitted). And the additional evidence of Petitioner's ABHAN offenses further tips the scale against him. *See, e.g., Morva v. Zook*, 821 F.3d 517, 532 (4th Cir. 2016) ("Even the most sympathetic evidence in the record about Morva's troubled childhood and mental health does not outweigh the aggravating evidence presented at trial." (internal footnote omitted)).

Simply put, all the mitigating evidence does not outweigh all the aggravating evidence presented at trial, and Petitioner has not shown a reasonable probability that at least one juror would have voted against the death penalty had it heard the additional mitigating evidence in question. Because Petitioner fails to show *Strickland* prejudice, his underlying claim of ineffective assistance of trial counsel is not substantial and thus is procedurally defaulted. *See Martinez*, 566 U.S. at 14. The Court denies relief on Ground Six.

C. Ground Seven (Prison Adaptability Expert)

Petitioner alleges in Ground Seven that his "Sixth Amendment right to the effective assistance of counsel was violated when his trial counsel offered an expert witness not suitable for the case and failed to prepare[] that witness." ECF No. 75 at p. 32. Specifically, Petitioner argues trial counsel's decision to present prison adaptability expert James Aiken had negative consequences because: Aiken had never met or spoken

to Petitioner; Aiken failed to point out Petitioner had not committed an infraction during the last four-and-a-half years prior to his release; and the State was able to introduce additional aggravating evidence and undermine Aiken's testimony by using it against Petitioner. *See* Pet.'s Objs. at pp. 32–39; ECF No. 75 at pp. 32–36; ECF No. 96 at pp. 10–15; ECF No. 172 at pp. 84–94. Petitioner faults PCR counsel for failing to raise this ineffective-assistance-of-trial-counsel claim in the state PCR proceedings, and therefore seeks to bring the claim in this Court pursuant to *Martinez*.

1. Facts

As previously mentioned, trial counsel called Aiken as Petitioner's sole witness during the sentencing phase. App. 1387–1429. Aiken, a former prison warden, testified as an expert in the area of prison adaptability, and on direct examination by Sims, he opined that "[t]his individual can be incarcerated in the South Carolina Department of Corrections for the remainder of his life without causing undue risk o[f] harm to other inmates, staff[,] or the general community," and that "I do not see anything in this profile that would indicate that the South Carolina Department of Corrections was not capable of adequately managing this individual." App. 1397–98. Aiken explained he reached these conclusions after reviewing "all of" Petitioner's prison records and the disciplinary violations that Petitioner had committed while incarcerated, including the assault against another inmate resulting in an ABHAN conviction. App. 1393–1401. Aiken noted Petitioner's record reflected incidents of fighting in prison, but explained that "prison is a violent place" and that the

Department of Corrections "took very deliberate actions" to deal with the assault. App. 1399–1400.

On cross-examination by the State, Aiken acknowledged he had never spoken to Petitioner but asserted he chose not to because he formed his opinion the way a prison warden would—by reviewing Petitioner's official record and making decisions based on that record. App. 1405. Aiken reiterated "this particular record . . . indicates to me very clearly that he can [be] housed in the correctional environment for the remainder of his life without causing undue risk of harm to staff, inmates as well as the general public." App. 1405–06. Aiken further testified "this individual, Mr. Stokes, should be housed in a maximum security facility for the remainder of his life" and that maximum security houses "[t]he most volatile, dangerous inmates." App. 1410. The State also asked Aiken about Petitioner's three prior ABHAN convictions, namely the 1988 and 1991 ABHAN convictions involving Petitioner's former wife Smith and the 1993 ABHAN conviction involving inmate Jackie Williams. App. 1406–19. When questioned about the specifics of the 1993 ABHAN conviction and how it affected his opinion, Aiken explained that prison adaptability encompasses "managing" prisoners who commit infractions and that Petitioner would be housed in a maximum security environment. App. 1411–12. Aiken clarified, "I'm not saying that he will not have any problems adapting. . . . What I'm saying is that if that [violent] behavior is demonstrated, the Department of Corrections can adequately deal with that situation."

App. 1414.[38] Aiken further testified that the Department of Corrections could "effect lethal force" if necessary and that he himself had ordered inmates killed because they did not follow rules. App. 1408, 1414. When asked how he would classify Petitioner based on his convictions for murder, rape, and kidnapping, Aiken stated Petitioner would "remain in maximum custody" and "will never be able to go down to medium or minimum security as long as he lives. There is no behavior that he can demonstrate that will bring him out of maximum security." App. 1425. Finally, Aiken reiterated Petitioner would be placed in a prison where the probability of him assaulting another inmate was "minuscule." App. 1426–27.

During the *Martinez* evidentiary hearing before the Magistrate Judge, both Sims and Johnson recalled offering Aiken to testify about prison adaptability. Tr. 591, 646, 653. When shown a copy of Petitioner's prison records, Sims acknowledged that "something important for James Aiken to know about" would have been the fact that Petitioner had not had an infraction for several years prior to his 1998 release. Tr. 592. However, Sims testified his impression of Aiken's testimony was "[t]hat [it] was a very strong statement," particularly Aiken's testimony that corrections officials would kill Petitioner if necessary to control him. Tr.

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[38] The State also drew Aiken's attention to other disciplinary violations including an incident where Petitioner and another inmate assaulted an older inmate and an incident in jail where Petitioner struck another inmate. App. 1415–16, 1420–22. Aiken acknowledged these incidents appeared in Petitioner's record, and indicated he formed his opinion after reviewing all documentation. App. 1415–16, 1420–22.

605. Johnson likewise recalled this specific portion of Aiken's testimony. Tr. 653 ("[T]hat made my heart grieve for Sammie more because Mr. Aiken said, yes, we can control him, because if he acts up, we'll kill him."). Lominack and Weyble also testified about their decision not to raise a claim concerning Aiken, *see* Tr. 53–54, 393–94, and the Magistrate Judge found their testimony credible. R & R at pp. 182–84.

2. Magistrate Judge's R & R & Petitioner's Objections

The Magistrate Judge recommends denying relief on Ground Seven. R & R at pp. 181–92. Initially, the Magistrate Judge concludes Petitioner fails to establish that PCR counsel's performance (i.e., failing to raise in PCR an ineffective assistance claim regarding Aiken's testimony) was deficient, and this alone prevents him from overcoming the procedural default of Ground Seven pursuant to *Martinez*. *Id.* at pp. 182–84. Nevertheless, the Magistrate Judge further concludes Petitioner's underlying ineffective-assistance-of-trial-counsel claim lacks merit because trial counsel were not deficient and because Petitioner has not shown resulting prejudice. *Id.* at pp. 184–92. Petitioner objects to these conclusions. *See* Pet.'s Objs. at pp. 32–39.

3. Analysis

Petitioner alleges "trial counsel's decision to put [Aiken] on, in this situation, was ineffective." Pet.'s Objs. at 34. As previously explained, this claim is procedurally defaulted and Petitioner must show cause to excuse the default by demonstrating that the underlying claim of ineffective-assistance-of-trial

counsel is "substantial." *Martinez*, 566 U.S. at 1318. Petitioner cannot make that showing because, as explained below, he fails to demonstrate trial counsel were ineffective under *Strickland*.

a. Deficient Performance

Petitioner fails to show trial counsel were deficient for calling Aiken as a witness. Again, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms," *Strickland*, 466 U.S. at 688, and "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. Specifically, "[t]he choice of what type of expert to use is one of trial strategy and deserves a heavy measure of deference." *Fulks v. United States*, 875 F. Supp. 2d 535, 598 (D.S.C. 2010) (internal quotation marks omitted). Regarding Petitioner's claim that Aiken was an unsuitable witness because he had never met or spoken to Petitioner, Aiken's very testimony belies this assertion. Aiken (a former warden himself) testified he formed his opinion the way a prison official would—not by interviewing the prisoner himself but by reviewing the prisoner's official record and the infractions/violations recorded therein. In fact, Aiken flatly stated he chose not to interview Petitioner and still "d[id]n't care to" because Petitioner's prison record "very clearly" gave him all the information needed to form his opinion. App. 1405–06.

Moreover, to the extent Petitioner challenges trial counsel's alleged failure to have Aiken testify that Petitioner had not committed a disciplinary infraction during the last several years before his release in 1998 (the last infraction being in July 1993), this claim lacks

merit for several reasons. First, this challenge is a classic example of wanting to review counsel's performance with "the distorting effects of hindsight." *Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). Second, Aiken's expert method entailed review of what Petitioner's prison record contained, not what it did not. Third, Aiken actually confirmed that "the last thing [he] kn[e]w about any problems in the Department of Corrections" was "July 28, 1993," App. 1418–19, and the jury was aware through previous evidence that Petitioner had been released from prison in May 1998. *See, e.g.*, App. 1296 (Petitioner's letter to police stating, "I got out in May, '98.").

The Court also disagrees with Petitioner's claims that trial counsel failed to fully prepare Aiken for his testimony and that the State exploited Aiken's testimony to introduce additional aggravating evidence such as the specifics of the 1993 ABHAN conviction involving Jackie Williams. To begin with, the State had already introduced evidence of Petitioner's assault on Williams during its case-in-chief, *see* App. 1146–55, and Aiken's testimony was not the first time this evidence came up. Moreover, Aiken indicated early on in his direct examination that he formed his opinion after reviewing *all* of Petitioner's prison records. App. 1396–97. Sims also drew Aiken's attention to examples of incidents involving violence in prison—including the ABHAN conviction resulting from Petitioner's assault

on an inmate—because Sims likely contemplated the State's focusing on such incidents during cross-examination. Of course Sims did not ask about every instance of violence and did not linger too long on this subject, as he took the pragmatic approach of having Aiken confirm that prison officials could adequately manage Petitioner despite his imperfect prison record.

Notably, as discussed in Ground Six above, trial counsel originally planned to present Aiken's testimony in conjunction with evidence of Petitioner's AIDS and deteriorating physical condition to show Petitioner's prior violence in prison would be a non-issue going forward, but Petitioner "absolutely refused" at the last minute to allow trial counsel to present the AIDS evidence.[39] App. 1774–78. Thus, trial counsel were

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[39] The trial record corroborates this fact, as the following occurred during a bench conference with the trial court immediately before the penalty phase:

> MR. SIMS: Your Honor, I've had an opportunity to have a conversation in regards to certain - - - what we felt to be certain mitigating factors regarding a medical condition of my client. He has informed me that he does not want us to pursue that as a medical condition and as a mitigating circumstance in this matter. And if the Court would inquire of him if that is, in fact, the case.
>
> THE COURT: Mr. Stokes, is that correct?
>
> MR. STOKES: Yes, sir.
>
> THE COURT: You know you have a right to have your attorneys go into that?

forced to reshuffle their strategy for sentencing, and "[Petitioner]'s recasting of the pros and cons of trial counsel's decision amounts to Monday morning quarterbacking." *Stamper v. Muncie*, 944 F.2d 170, 178 (4th Cir. 1991); *see also Strickland*, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant."). Notably, Petitioner did not offer his own live testimony to dispute or contradict what Sims discussed with him.

MR. STOKES: Yes, I do, I understand.

THE COURT: And you do not want them to do it?

MR. STOKES: No, sir. Thank you.

THE COURT: Thank you.

SOLICITOR: Your Honor, just to make the record clear, the matter that Mr. Sims was talking about, I think the record should reflect that it was [a] matter of trial strategy and that Mr. Sims wanted to get into that situation but he was unable to do that and his client has been fully informed.

MR. SIMS: Yes, sir.

THE COURT: That's correct. . . . All right, now, we have on the record the defendant's wish to waive certain submissions on the record concerning mitigating circumstances.

App. 1085–87.

The manner in which trial counsel presented Aiken's testimony—having Aiken focus on Petitioner's adaptability to prison yet still account for Petitioner's history of fighting in prison in anticipation of the State's cross-examination—was objectively reasonable and a "sound trial strategy." *Strickland*, 466 U.S. at 689; *see United States v. Terry*, 366 F.3d 312, 317 (4th Cir. 2004) ("The decision whether to call a defense witness is a strategic decision demanding the assessment and balancing of perceived benefits against perceived risks, and one to which [a court] must afford enormous deference." (internal quotation marks and ellipsis omitted)). Petitioner has not shown trial counsel's presentation of Aiken's testimony regarding prison adaptability "fell below an objective standard of reasonableness," *Strickland*, 466 U.S. at 688, and therefore Petitioner has not satisfied the first *Strickland* prong. *See, e.g.*, *Thomas v. Taylor*, 170 F.3d 466, 473 (4th Cir. 1999) ("[B]ecause we find no fault with trial counsel's preparation and presentation of expert [] testimony at sentencing, we reject appellant's [] ineffective assistance claim.").

b. Prejudice

Petitioner also fails to show *Strickland* prejudice. First, after being cross-examined, Aiken told the solicitor, "I do not feel intimidated at all," App. 1428, and maintained throughout the entirety of his testimony—both direct and cross—that the Department of Corrections could adequately manage Petitioner in a maximum security environment for the rest of his life. While acknowledging Petitioner's prior history of violence in prison, Aiken still emphasized

prison officials could deal with such behavior to reduce the probability of Petitioner assaulting another inmate to a "minuscule" level. Aiken elaborated that prison officials could segregate extremely violent inmates to "a prison within a prison," and even kill an inmate if necessary. App. 1408, 1414. Both Sims and Johnson recalled nearly eighteen years later the powerful effect of such stark testimony.

The fact that Aiken provided mitigating evidence is obvious because the trial court charged the jury as follows:

> A non-statutory mitigating circumstance is one which is not provided for by statute, but is one which serves the same purpose, that is, to reduce the degree of the guilt of the offense or reduce the punishment that should be fairly imposed. **An example of these which you may consider if found in the evidence would include the following, which the defendant asserts and *should be found in the evidence, and that is, the defendant is adaptable to prison.***

App. 1483 (emphasis added). Notably, during its deliberations, the jury sent a note asking the trial court the following questions: "Define maximum security prison for life in prison without parole. [W]hat privileges does one have? Define maximum security prison for the death penalty. What privileges does one have?"[40] App. 1492. Thus, as reflected by the trial

[40] The trial court answered the question by telling the jury, "The only comment I can make in regard to your inquiry, ladies and

court's instruction and the jury's inquiry, Aiken's opinion regarding prison adaptability operated as a mitigating circumstance considered by the jury. As the Magistrate Judge shrewdly observed: "[w]hile additional aggravating evidence may have come out through Aiken's testimony, his opinion about Petitioner's ability to adapt to prison and the prison's ability to control Petitioner was mitigating." R & R at p. 192.

In sum, Petitioner has not shown a reasonable probability that, but for trial counsel's presentation of Aiken's testimony, the result of sentencing would have been different. *See Strickland*, 466 U.S. at 694–95. Petitioner has therefore not satisfied *Strickland*'s prejudice prong.

c. Conclusion

The Court finds Petitioner's underlying claim of ineffective assistance of trial counsel is not substantial, and therefore must reject it as procedurally defaulted. *See Martinez*, 566 U.S. at 15–16 ("When faced with the question whether there is cause for an apparent default, a State may answer that the ineffective-assistance-of-trial-counsel claim is insubstantial . . . ."); *see, e.g.*, *Richey v. Cartledge*, 653 F. App'x 178, 186 (4th Cir. 2016) ("Richey's underlying ineffective-assistance claim is . . . not substantial and must be rejected for

---

gentlemen, is to say this. That you, the jury, must base your decision on the evidence in the record." App. 1492.

procedural default.").[41] The Court denies relief on Ground Seven.

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. 218] *as modified herein*.

---

[41] Because the Court finds the underlying claim is insubstantial, it follows that PCR counsel were not ineffective for failing to raise it.

Accordingly, the Court **GRANTS** Respondent's motion for summary judgment [ECF No. 160] 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 28, 2018

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

APPENDIX C

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

C/A No.: 1:16-845-RBH-SVH

[Filed: May 9, 2018]

Sammie Louis Stokes, #5069,	)
	)
Petitioner,	)
	)
vs.	)
	)
Bryan P. Stirling, Director, South Carolina Department of Corrections; Willie D. Davis, Warden of Kirkland Correctional Institution,	)
	)
Respondents.	)

REPORT AND RECOMMENDATION

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I. Introduction

Petitioner Sammie Louis Stokes is an inmate at the Kirkland Correctional Institution of the South Carolina Department of Corrections who filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. [ECF Nos. 22, 51, 75].[1] This matter is before the court pursuant to 28 U.S.C. § 636(b) and Local Civ. Rule 73.02(B)(2)(c) (D.S.C.) for a Report and Recommendation on Petitioner's petition for writ of habeas corpus and Respondent's motion for summary judgment and return. [ECF Nos. 160, 161]. On January 9–12, 2018, the undersigned held an evidentiary hearing for Petitioner to present evidence to support select claims raised in his petition. [*See* ECF Nos. 196, 197, 198, 199]. Having been fully briefed, the petition and motion are ripe for disposition.

Having carefully considered the parties' submissions and the record in this case, the undersigned recommends that the court grant Respondent's motion for summary judgment and deny and dismiss the habeas corpus petition.

---

[1] The habeas corpus petition was filed in the following three parts: (1) Petitioner first filed a habeas corpus petition to properly comply with 28 U.S.C. § 2251 and have his execution stayed by this court [*see* ECF Nos. 8, 22]; (2) Petitioner filed a memorandum in support of his petition [*see* ECF No. 51]; and following his counsel's investigation pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), Petitioner filed a supplemental petition to raise additional grounds that had not been previously raised in state court [*see* ECF No. 75].

II. Factual Background

The South Carolina Supreme Court summarized the facts of Petitioner's case as follows:

> Stokes was hired by Patti Syphrette to kill her daughter-in-law, 21-year-old Connie Snipes, for $2000.00. On May 22, 1998, Syphrette called Stokes and told him Connie "got to go and tonight." At 9:30 pm that evening, Syphrette and Snipes picked up Stokes at a pawn shop, and the three of them went to Branchville and picked up Norris Martin.[FN2] The four of them then drove down a dirt road in Branchville and stopped. Syphrette remained in the car while Stokes, Martin and Snipes walked into the woods. When they got into the woods, Stokes told Snipes, "Baby, I'm sorry, but it's you that Pattie wants dead . . ."
>
> > FN2. Allegedly, Snipes accompanied the others on the premise that they were going to Branchville to kill a man named Doug Ferguson, whom Syphrette and Stokes had tied up in the woods.
>
> According to Norris Martin, Stokes forced Snipes to have sex with Martin at gunpoint. After Martin was finished, Stokes had sex with Snipes. While doing so, Stokes grabbed her breast and stabbed her in the chest, cutting both her nipples. Stokes then rolled her over and began having anal sex with her. When Stokes was finished, he and Martin each shot the victim one time in the head,[FN3] and then dragged her

body into the woods. Stokes then took Martin's knife and scalped her, throwing her hair into the woods. According to Martin, Stokes then cut Snipes' vagina out.[FN4]

> FN3. Martin testified that Stokes placed the gun into his (Martin's) hand and then pulled the trigger.
>
> FN4. According to the pathologist, Snipes' injuries were consistent with having been scalped, had the nipple area cut from each breast, and having had the vaginal area cut out.

Snipes' body was found by a farmer on May 27th, and Martin's wallet was found in the field near it. Martin was interviewed by police the following morning, after which police went to the Orangeburg home of Pattie Syphrette's husband Poncho; by the time police arrived at the home on May 28, 1998, Stokes and Syphrette had already murdered Doug Ferguson by wrapping duct tape around his body and head, suffocating him.[FN5]

> FN5. Stokes pleaded guilty to Ferguson's murder in a separate proceeding and was sentenced to life.

State v. Stokes, 548 S.E.2d 202, 203–04 (S.C. 2001).

III. Procedural Background

Petitioner was indicted by the Orangeburg County Grand Jury during the May 1999 term of court for

(1) murder (98GS38-1246), (2) criminal conspiracy (98GS38-1247), (3) kidnapping (98GS38-1248), and (4) criminal sexual conduct, first degree (98GS38-1245). [ECF No. 19-4 at 189–90, 199–200, 202–05]. Petitioner was represented by court-appointed counsel Thomas Ray Sims, Esquire, and Virgin Johnson, Jr., Esquire. [ECF No. 19-1 at 12]. On October 25, 1999, Petitioner proceeded with a jury trial before the Honorable Paul M. Burch, Circuit Court Judge. [ECF No. 19-1 at 12]. The jury convicted Petitioner as charged. [ECF No. 19-3 at 88–89]. After the sentencing phase of the trial, the jury recommended the sentence of death, finding the following aggravating circumstances beyond a reasonable doubt:

> The murder of Connie Lee Snipes was committed while in the commission of criminal sexual conduct in any degree.
>
> The murder of Connie Lee Snipes was committed while in the commission of kidnapping.
>
> The defendant committed the murder of Connie Lee Snipes for himself or another for the purpose of receiving money or a thing of monetary value.
>
> The defendant caused or directed another to commit murder or committed the murder of Connie Lee Snipes as an agent or employee of another person.

[ECF No. 19-3 at 504–05].

Petitioner appealed his convictions and sentences to the South Carolina Supreme Court. On appeal, Petitioner was represented by Joseph L. Savitz, III, Deputy Chief Attorney with the South Carolina Office of Appellate Defense, who filed a final brief on December 18, 2000, raising the following issues:

> 1. The judge erred by refusing to allow the defense to introduce the portion of appellant's letter to the police the state had redacted, which indicated that the decedent had willingly accompanied appellant, Syphrette and Martin as the member of a conspiracy to kill Doug Ferguson.
>
> 2. The judge erred at sentencing by refusing to allow appellant to tell the jury during allocution that he had asked God to forgive him for his crimes.

[ECF No. 18-1 at 4]. The State submitted a final brief. [ECF No. 18-2]. Petitioner filed a reply brief. [ECF No. 18-3]. On May 29, 2001, the South Carolina Supreme Court filed an opinion affirming Petitioner's convictions and sentences. *State v. Stokes*, 548 S.E.2d 202 (S.C. 2001); [ECF No. 18-4]. Petitioner filed a petition for rehearing that was denied on July 2, 2001. [ECF Nos. 18-5, 18-6]. The remittitur issued on July 2, 2001. [ECF No. 18-7].

Petitioner filed an application for post-conviction relief ("PCR") on October 17, 2001, as amended May 6, 2002, and August 9, 2004, in which he alleged the following grounds for relief:

9(a) *Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution, as a result of trial counsel's failure to object to the solicitor's mischaracterizations of life in prison during closing argument.*

10(a) The facts supporting this claim are as follows: During closing argument, the prosecutor argued that life in prison without parole would reward applicant, because the prison system would exert no control over his behavior. The prosecutor inaccurately argued that the prison system could only take away canteen privileges or lock applicant down for a short time if he misbehaved. In the end, the prosecutor, based on this inaccurate portrayal, argued that the death penalty was the only punitive sentence. Although the prosecution's argument violated applicant's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as applicable state law, trial counsel raised no objection. Had counsel properly objected to the prosecution's inaccurate and prejudicial closing argument, there is a reasonable probability that the result of applicant's

sentencing proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *see also, e.g., Beck v. Alabama*, 447 U.S. 625 (1980); *Gardner v. Florida*, 430 U.S. 349 (1977); *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984); *State v. Atkinson*, 253 S.C. 531, 172 S.E.2d 111 (1970); *State v. Reed*, 293 S.C. 515, 362 S.E.2d 13 (1987).

9(b) *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was denied as a result of appellate counsel's failure to raise on direct appeal the trial judge's failure to determine what statutory mitigating circumstances were supported by the evidence and his failure to hold a charge conference prior to instructing the jury in the sentencing phase of the trial.*

10(b) Prior to instructing the jury at the sentencing phase of the trial, the trial judge was required to make an initial determination of which statutory mitigating factors were supported by the evidence and then to conduct a charge conference. *State v. Victor*, 300 S.C. 220, 387 S.E.2d 248 (1989). In this case, the trial judge failed to follow the clear rule set out in *Victor*. Furthermore, this failure to apply existing state law

deprived applicant of due process. *See, e.g., Vitek v. Jones*, 445 U.S. 480 (1980); *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979); *Morrisey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Appellate counsel failed to raise this claim on direct appeal; had counsel done so, there exists a reasonable probability that the result of applicant's appeal would have been different. *Williams v. Taylor*, 120 S.Ct. 1495 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984); *Douglas v. California*, 372 U.S. 353 (1963); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999).

9(c) *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was denied as a result of appellate counsel's failure to raise on direct appeal the trial judge's failure to submit for the jury's consideration a statutory mitigating circumstance.*

10(c) S.C. Code § 16-3-20(C) provides that the trial judge "shall include in his instructions to the jury for it to consider . . . the following . . . mitigating circumstances which may be supported by the evidence." In this case, the trial judge

failed to instruct the jury on § 16-3-20(C)(b)(3) (the victim was a participant in the defendant's conduct or consented to the act), despite the fact that there was evidentiary support for this mitigating circumstance. *See State v. Pierce*, 289 S.C. 430, 346 S.E.2d 707 (1986) (trial judge required to instruct the jury on statutory mitigating circumstances), *overruled on other grounds, State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *State v. Rogers*, 338 S.C. 435, 521 S.E.2d 101 (2000). Appellate counsel failed to include this claim on direct appeal had counsel done so, there exists a reasonable probability that the result of applicant's appeal would have been different. *See Douglas v. California*, 372 U.S. 353 (1963); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999).

9(d) *Applicant's right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as a result of his representation by counsel who labored under an actual conflict of interest.*

10(d) The facts supporting the claim are as follows: From approximately 1981 until 1992, Thomas Sims, who would subsequently be appointed as lead defense counsel for applicant, was

employed as an assistant solicitor in the First Circuit Solicitor's Office. In his capacity as assistant solicitor, Mr. Sims prosecuted applicant for a violent offense against his ex-wife. Largely on the strength of applicant's ex-wife's testimony, elicited at the trial by Assistant Solicitor Sims, a jury found applicant guilty of aggravated assault and battery, for which he received a substantial prison sentence. Later, in the capital trial challenged in this application, the prosecution began its sentencing phase presentation with evidence, again offered by applicant's ex-wife, of the offense for which Mr. Sims had previously prosecuted applicant. On cross-examination of the complaining witness, Mr. Sims did not explore several lines of inquiry which, had they been explored, would have mitigated the seriousness of the offense described by the witness and undermined the accuracy of her account. The record of proceedings before the trial court in this case contains no discussion or waiver of the conflict of interest arising out of Mr. Sims' successive involvement as prosecutor then defender of applicant. *See, e.g., Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978)[;] *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001); *United States v. Swartz*, 975 F.2d 1042 (4th Cir. 1992); *Hoffman v.*

Leeke, 903 F.2d 280 (4th Cir. 1990); *United States v. Zeigenhagen*, 890 F.2d 937, 940–941 (7th Cir. 1989); *United States v. Kitchin*, 592 F.2d 900 (5th Cir. 1979).

9(e) *Applicant's sentence of death may not be carried out consistently with the Eighth and Fourteenth Amendments to the United States Constitution because he has mental retardation.*

10(e) The facts supporting the claim are as follows: Applicant suffers from significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, as evidenced by a full scale IQ that is below the accepted threshold for mental retardation, and by historical information indicating that his adaptive skills are deficient. *Atkins v. Virginia*, 536 U.S. 304 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003).

9(f) *Pursuant to Article I § 11 of the South Carolina Constitution and the Sixth and Fourteenth Amendments to the United State Constitution, the trial court lacked jurisdiction to sentence applicant to death as a result of the omission from the indictments of the aggravating factor(s)*

essential to expose him to punishment greater than life in prison.

10(f) The facts supporting the claim are as follows: Applicant was separately indicted for murder, conspiracy, criminal sexual conduct, and kidnapping. Applicant's eligibility for a sentence of death rested on the jury's finding of four statutory aggravating circumstances: murder during the commission of kidnapping; murder during the commission of criminal sexual conduct; murder for hire; and commission of murder as the agent of another. None of the indictments alleged that the victim's murder occurred "during the commission of" either criminal sexual conduct or kidnapping. Likewise, none of the indictments made any reference to murder for hire or commission of murder as the agent of another. *See* S.C. Code § 16-3-20; *Ring v. Arizona*, 122 S.Ct. 2428 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Jones v. United States*, 526 U.S. 227 (1999); *Hooks v. State*, 353 S.C. 48, 577 S.E.2d 211 (2003); *State v. Grim*, 341 S.C. 63, 66, 533 S.E.2d 329, 330 (2000); *State v. Brown*, 24 S.C. 224 (1886).

9(g) *Applicant's sentence of death by lethal injection cannot be carried out because the procedures and policies for executing such a sentence presently followed by the State of South Carolina will result in*

> *unnecessary pain, torture and suffering in violation of the Eighth and Fourteenth Amendments to the United States Constitution.*
>
> 10(g) The facts supporting the claim are as follows: The lethal injection procedures and protocols followed by the South Carolina Department of Corrections fail to ensure, *inter alia*, that qualified personnel perform the tasks necessary to carry out a lethal injection without causing unnecessary pain and suffering, or that appropriately humane chemicals are administered during the execution process. Because of these and other deficiencies, South Carolina's methods for carrying out sentences of death by lethal injection are inconsistent with evolving standards of decency. *See, e.g., Farmer v. Brennan*, 511 U.S. 825 (1994); *In re Kimmler*, 136 U.S. 436 (1890).

[ECF No. 19-4 at 294–97].[2] Petitioner was represented by Keir Weyble, Esquire, and Robert Lominack, Esquire. [ECF No. 19-4 at 233].

A PCR evidentiary hearing was held before the Honorable Casey W. Manning, Circuit Court Judge, on August 5, 2009, at which Petitioner presented the testimony of Joseph L. Savitz, III, and Jeff Bloom, and

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[2] According to the record, Petitioner's allegations 9(e) and 9(g) were abandoned prior to the PCR evidentiary hearing. [ECF No. 19-4 at 324–25].

the State presented the testimony of trial counsel Sims and Johnson. [ECF Nos. 19-4 at 320–50, 19-5 at 1–82]. On October 21, 2010, Judge Manning issued an order of dismissal. [ECF No. 19-6 at 150–95]. Petitioner filed a motion to alter or amend the judgment on November 17, 2010. [ECF No. 19-6 at 196–206]. Judge Manning heard argument on the motion on December 8, 2011, and subsequently denied the motion on February 19, 2013. [ECF No. 19-6 at 219–244, 384–406].

Petitioner appealed from the denial of PCR and was represented by Weyble and Chief Appellate Defender Robert M. Dudek of the South Carolina Commission on Indigent Defense, Division of Appellate Defense. [ECF No. 18-8]. Counsel filed a petition for writ of certiorari on Petitioner's behalf raising the following issues:

> I. As a matter of first impression in South Carolina, whether a lawyer's successive participation, first as prosecutor of a defendant for a violent assault, and later as defense attorney for that same defendant in a capital trial at which the victim of the prior assault testifies for the prosecution, violates the Sixth Amendment guarantee of conflict-free counsel?
>
> II. Whether the PCR court erred as a matter of law in finding a waiver of the right to conflict-free counsel on the basis of a trial record containing no mention of a conflict or waiver, and a post-conviction record that does not address, let alone satisfy,

most of the constitutionally essential elements of a valid waiver?

III. Whether the PCR court erred as a matter of law in holding that direct appeal counsel was not ineffective for failing to challenge the trial court's failure to conduct an independent assessment of the evidence to determine which statutory mitigators were supported, or to instruct the jury on a mitigator for which there was evidentiary support?

[ECF No. 18-8 at 9]. The State filed a return to the petition. [ECF No. 18-9]. Petitioner filed a reply. [ECF No. 18-10]. The South Carolina Supreme Court denied the petition on February 12, 2016. [ECF No. 18-11]. The remittitur issued on March 1, 2016. [ECF No. 18-12].

This action was initiated on March 9, 2016, by Petitioner's filing of a motion to stay execution and motion to appoint counsel. [ECF No. 1]. Petitioner filed a federal petition for a writ of habeas corpus on June 13, 2016, pursuant to this court's directive that he comply with 28 U.S.C. § 2251(a)(1) should he seek a further stay of execution. [*See* ECF Nos. 8, 21, 22]. The initial petition included five grounds for relief, and Petitioner subsequently briefed three of the grounds. [ECF Nos. 22, 51]. On December 20, 2016, Petitioner filed a supplement to his petition, raising three additional grounds for relief. [ECF No. 75]. Thereafter, Petitioner withdrew Grounds One, Two, and Eight. [ECF No. 140]. The undersigned determined an evidentiary hearing was necessary on Petitioner's

Martinez claims (Grounds Six and Seven). [*See* ECF No. 101].

IV. Evidentiary Hearing Before This Court

The court held an evidentiary hearing on four days during the week of January 8, 2018. [*See* daily hearing transcripts at ECF Nos. 196, 197, 198, 199]. Petitioner presented evidence in support of his *Martinez* grounds through the testimony of Robert Lominack, James Garbarino, Keir Weyble, Augustus Rodgers, Thomas Sims, Virgin Johnson, and Susan Hackett. [ECF Nos. 204, 205, 206, 207]. Respondents did not call any witnesses during the evidentiary hearing.

A. Opening Statements

The court allowed the parties to present brief opening statements. Petitioner's arguments echoed much of what had been presented to this court through his briefs. For example, Petitioner's counsel argued that trial counsel were inexperienced in the area of capital litigation in that Sims had only participated in one capital trial prior to Petitioner's trial, and Johnson had not participated in any. Tr. 12:3–14. Additionally, Petitioner noted trial counsel had not had any formal training in capital defense work. Tr. 12:8–14. According to Petitioner's counsel, trial counsel did some investigation in preparing their mitigation investigation, and they were, thus, "aware of powerful mitigating evidence, not only on its face, but many red flags that would have led to even more possible avenues for investigation of further mitigating evidence . . . ." Tr. 12:20–23. Yet trial counsel decided "weeks before trial" to present a mitigation case centered on

the fact that Stokes was HIV-positive and did not have long to live. Tr. 13:5–14. Trial counsel chose that route despite knowing Stokes's resistance to presenting the information in open court in front of his family and others. Tr. 13:21–14:4.

Petitioner's counsel argued that Petitioner "had the kind of background that mitigation cases are made of. His family was split, his mother and stepfather were active and notorious alcoholics, they witnessed severe domestic abuse, they were largely unsupervised, he was struggling in school, no resources were offered or any intervention made." Tr. 14:9–14. Furthermore, according to Petitioner's counsel,

> The value of that mitigating evidence is not simply that that's sad. The value of that mitigating evidence is that trauma affected his ability to regulate his emotions, it affected his ability to make decisions, it created the defects in functioning we see throughout his life, and this is endemic to . . . the history of the conduct underlying this case.

Tr. 14:21–15:2.

As to the expert who trial counsel did call during their mitigation presentation—a prison adaptability expert—Petitioner's counsel suggested he was a poor choice "given the fact that for many years, Mr. Stokes was not successfully managed in prison." Tr. 15:6–10. However, that expert's testimony could have been powerful if he had been "provided with the piece of information that in the several few years coming up to

the sentencing phase, he had been [successfully managed in prison] . . . ." Tr. 15:10–12.

As to PCR counsel's representation, Petitioner's counsel argued that they were aware of the same information in Petitioner's background that trial counsel had uncovered, and PCR counsel found even more details about Petitioner's childhood, but they never presented that information "to any kind of expert who could have assessed it and explained the impact that that had on Mr. Stokes' development and his behavior, his relationship with women, and other aspects of his life." Tr. 16:14–17. Petitioner's counsel further indicated that PCR counsel were aware that it was part of the "standard of care" to present that evidence to an expert, but they simply failed to do so. Tr. 16:17–21. As such, Petitioner's counsel asserted that PCR counsel were ineffective and that the default of the underlying ineffective-assistance-of-trial-counsel claim should be excused in this habeas corpus action. Tr. 17:12–20.

Respondents' counsel argued that the "critical testimony to be presented and heard . . . goes to the actions and the decisions of PCR counsel." Tr. 18:5–7. Respondent's counsel elaborated:

> We submit petitioner . . . can't show that PCR counsel's representation fell below an objective standard of reasonableness. We submit that the evidence that will be presented from PCR counsel is that they did, in fact, consider the mitigation, the mitigation case, but they made the decision to withdraw and they cannot recall exactly why, the conversations, the strategy, the

> reasons, the very critical points to determine whether that decision was professionally reasonable. If that situation continues, and that is the evidence that is received by this Court, then petitioner cannot overcome the presumption of ineffectiveness [sic]. There's an absence of evidence. He cannot carry his burden of proof.

Tr. 19:10–21.

Turning to trial counsel's representation, Respondents' counsel argued that Petitioner's underlying ineffective-assistance-of-trial-counsel claim is not substantial. Tr. 20:21–22:14. Respondents' counsel noted that trial counsel "investigated both the facts of the crime and possible mitigation avenues." Tr. 21:4–5. They also retained multiple experts. Tr. 21:6–12. While trial counsel "wanted to present evidence of petitioner's advanced HIV/AIDS issues[,]" Petitioner ultimately refused to allow trial counsel to present such evidence "[n]ot just to prevent family and friends or even court spectators from hearing private personal information on [his] medical condition, but specifically because he didn't want the jury to hear that he had raped Connie Snipes knowing he had AIDS." Tr. 21:23–22:2.

B. Robert Lominack

Robert Lominack testified that he attended college at University of the South in Tennessee, law school at Northeastern University in Boston, and prior to returning to South Carolina to practice law, he had a

Prettyman Fellowship at Georgetown Law Center.[3] Tr. 27:22–28:1. Lominack testified that he became "somewhat" familiar with capital cases while in law school, having worked at the Southern Center for Human Rights, at the Public Defender's Office in Washington, D.C., at the New York City Capital Defender Office, and at the Montgomery County, Maryland Public Defender's Office. Tr. 64:13–25. He started as an associate with David Bruck in 2000, Tr. 28:2–5, and the firm handled "[m]ostly capital post-conviction cases, some trial cases, but all death penalty cases." Tr. 28:15–16.

He and Keir Weyble were appointed to represent Petitioner.[4] Lominack testified that Petitioner's case "would have been one of [his] first cases[,]" so he was sure that Weyble would have been considered lead counsel. Tr. 28:22–25. Lominack did not recall "any large scale divvying up of responsibilities[,]" explaining that they would take on discrete tasks, but he and Weyble were able to work together as they were located in the same office. Tr. 29:1–9.

---

[3] Lominack testified,

> It was a two-year fellowship. The first year we would take a very small number of misdemeanor cases and have lead counsel, who was an experienced former public defender, and then the second year we would take a small felony caseload and also help mentor the criminal justice clinic students.

Tr. 65:8–12.

[4] The undersigned will use "PCR counsel" to refer to Lominack and Weyble collectively.

Before PCR counsel were appointed, a PCR application had already been filed in which Petitioner raised a claim that trial counsel were ineffective for having failed to present mitigation evidence. Tr. 57:10–21. Lominack testified that he filed the First Amended Application for Post-Conviction Relief in Petitioner's case in May 2002. Tr. 30:1–16; Pet. Ex. 40. Although Lominack could not recall all that he had done prior to filing the amended petition, he stated, "generally . . . [y]ou review the record and that's probably all we did before we filed this first amended application." Tr. 30:17–23.

Petitioner's counsel questioned Lominack on his review of trial counsel's representation. Lominack testified that he reviewed trial counsel's file after being appointed to Petitioner's case. Tr. 31:4–12. He recalled that trial counsel did not present any "kind of life story mitigation[,]" but he remembered that there was a plan to present evidence that Petitioner was HIV-positive that did not come to fruition. Tr. 31:13–25.

Lominack recalled that trial counsel had hired a mitigation investigator, and he recalled seeing memoranda that she had prepared in their file. Tr. 32:1–12. Lominack also recalled a number of experts hired by trial counsel that were all on trial counsel's witness list but none of whom testified. Tr. 34:25–39:1; *see also* Pet. Ex. 42. Upon having his recollection refreshed, Lominack remembered Dr. Robert Deysach as "a neuropsychologist . . . [who] was prepared to talk about Mr. Stokes' mental functioning and capacity and ultimately did not testify at all because of the previously discussed HIV status issue." Tr. 35:20–23.

Lominack was also very familiar with Dr. Donna Schwartz-Watts, who he "believe[d] also did not testify in this case for the same reason that Dr. Deysach didn't." Tr. 36:25–37:1. Lominack also remembered Augustus Rodgers was a "[s]ocial worker, and that's all that I recall." Tr. 38:20–25.

As to PCR counsel's own investigation, Lominack testified that they hired Tracey Dean as their mitigation investigator, which was "[s]tandard practice." Tr. 39:12–24. Dean conducted interviews and gathered records on PCR counsel's behalf. Tr. 39:22–40:1. PCR counsel also met with Dean, whose office was in the same building as that of PCR counsel. Tr. 42:10–14.

During the time that he represented Petitioner, Lominack received "a good bit of training" in the development and presentation of mitigation evidence in capital cases. Tr. 42:15–23. Prior to his representation of Petitioner, Lominack had represented another death-sentenced individual, Andre Rosemond, and by the time Petitioner's PCR hearing took place, Lominack had presented mitigation in multiple trial and post-conviction cases. Tr. 42:24–43:6. When asked what kind of evidence he considered to be mitigating, Lominack responded,

> Evidence of childhood trauma, evidence of mental impairment. Frankly, evidence of—just the general evidence about the client's childhood, about the family background. It didn't have to be something concrete like schizophrenia or a mental impairment like that. It could have been as simple as stories about the child that

> reflected both the character of the client at the time they were a child and also what had happened to them when they were a child. Obviously, educational history and mental capacity would be something that could be mitigating.

Tr. 43:8–17.

Following their investigation, PCR counsel filed a second amended PCR application, which omitted the claim that trial counsel were ineffective for failing to present any evidence regarding Petitioner's background in mitigation. Tr. 44:12–24. Lominack testified that PCR counsel did not hire a social worker or present any of Petitioner's background information to an expert who could have assessed the impact of Petitioner's upbringing on his development. Tr. 44:25–45:9. Although Lominack testified that he believed it was "the standard of care at the time" to do so, he could not recall why he and Weyble did not take that step. Tr. 45:10–19. He surmised that they were "hyper-focused" on the mental retardation[5] claim that they were pursuing at the time. Tr. 45:20–46:1.

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[5] This same diagnosis is now referred to as "intellectual disability" or "ID" in the medical community. However, at the time PCR counsel raised this claim, the proper terminology was "mental retardation" or "MR" in the medical community. This terminology was used interchangeably during the evidentiary hearing, but the court will use the term "mental retardation" herein to be consistent with the wording used by the doctors who examined Petitioner and by PCR counsel when they raised and then eventually abandoned the claim that Petitioner was mentally retarded. *See* Tr. 48:20–49:1, 385:8–15.

After having filed the second amended PCR application, Weyble sent letters to trial counsel on Petitioner's behalf informing them that there were no longer any pending ineffective-assistance-of-trial-counsel claims so as "to ensure that trial counsel knew that and that they also were aware that, at least in our opinion, though their representation had terminated, their obligation to the client to protect confidential or privileged communication ha[d] not terminated." Tr. 47:11–15. Lominack did not recall PCR counsel being concerned about any particular information in trial counsel's file being released, but they generally felt that the privilege had not been waived to the extent any information in trial counsel's files had not already been shared with the State.[6] Tr. 48:10–19.

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[6] Lominack later clarified that, pursuant to state statute, he believed the attorney-client privilege had been waived in order for trial counsel to defend themselves against the allegation that they had been ineffective for failing to present mitigation evidence of Petitioner's background, which was part of Petitioner's initial and first amended PCR application. Tr. 57:15–60:22. Lominack testified,

> I believe that once that claim has been dropped, if no information has been provided up to that point, then there is no reason for them to defend themselves because there's no longer an ineffective assistance of counsel claim. And so it would be my opinion . . . that if there is no reason for them to defend themselves, then providing privileged and confidential information would be improper.

Tr. 60:3–6. The state statute that codifies the waiver of attorney-client privilege when an allegation of ineffective assistance of counsel is made is S.C. Code Ann. § 17-27-130. *See* Tr. 146:8–147:25.

Lominack testified that he left the practice of law for approximately two years, and during that time, Susan Hackett joined Weyble as PCR counsel in Petitioner's case. Tr. 49:2–50:17. At some point, Lominack resumed practicing law, and he was reappointed to represent Petitioner when Hackett took another job. Tr. 50:13–51:5. By the time Lominack was reappointed, the mental retardation claim that PCR counsel had raised in the second amended PCR application had been dropped. Tr. 51:6–52:6. When asked if he considered amending the application or having an expert assess Petitioner's background information at that time, Lominack stated, "I don't think we considered it. We certainly didn't do it." Tr. 52:7–12. Lominack testified that it would not have been inconsistent for PCR counsel to have pursued both the mental retardation claim and the general mitigation claim, noting "one of the prongs of an intellectual disability claim is the client's adaptive functioning, which really goes hand-in-hand with mitigation investigation generally." Tr. 52:16–19. However, Lominack testified that the same experts who examined Petitioner for the mental retardation claim would not necessarily have been able to advise them on any effect that childhood trauma had on Petitioner. Tr. 53:3–14.

Lominack testified that he reviewed the testimony of the prison adaptability expert, James Aiken, who testified during the sentencing phase. Tr. 53:15–21. Lominack recalled that Petitioner had a serious assault on his prison record, but he did not consider raising a claim challenging trial counsel's decision to present Aiken as a witness. Tr. 53:22–54:5. Lominack explained

that he still saw the value of having an expert "who knows the ins and outs of a prison and knows how inmates are classified" testify, and he did not "recall thinking that that was a mistake of trial counsel or that they were ineffective for failing to do that—or for actually doing that." Tr. 54:6–13.

On cross-examination, Lominack testified that he thought the first person he told that he was ineffective for withdrawing the ineffective-assistance-of-trial-counsel claim was Diana Holt, one of Petitioner's federal habeas corpus attorneys. Tr. 63:3–20. Lominack later explained his thoughts about his representation of Petitioner as follows:

> I think the problem I have with what I did, and I can only speak for myself, is by not having a social worker hired on the case and consult with a social worker, it's no different than me trying to read an MRI scan and not have a neuropsychiatrist or a neuropsychologist interpret that for me. We really needed someone to come in and tell us what we had and what it meant, and, you know, and make a more educated decision, at least in my view.

Tr. 67:24–68:6. Lominack admitted that there was a social worker, Rodgers, who was part of the trial team that PCR counsel could have put on the stand, but he did not recall meeting with Rodgers. Tr. 139:25–141:8.

Lominack also testified,

> When I went back and looked at the file as was requested, I would say I felt less comfortable about our investigation because of how few

> interviews Mr. Weyble and I conducted ourselves, how little I knew about the people. So I'm not as comfortable saying we found everybody we should have found and we got all the records we should have gotten . . . .

Tr. 127:14–19. But Lominack confirmed that Weyble sent a letter to one of their experts that stated, "we have conducted interviews with virtually every person our mitigation investigator could find who may have known Mr. Stokes prior to his incarceration." Tr. 126:24–128:12; Resp't Ex. 21.

Lominack agreed with the statement that attorneys can make a strategic decision not to present certain evidence if it is objectively reasonable under the circumstances. Tr. 69:19–23. He also agreed that, as PCR counsel, he would have had to prove both deficient performance and prejudice, and he would have considered that in analyzing the ineffective-assistance-of-trial- counsel claim. Tr. 69:24–70:7. Lominack agreed that the claim that trial counsel were ineffective for failure to present mitigation evidence is "a typical ground . . . raised in a capital PCR[.]" Tr. 85:9–11. He considered the claim "somewhat new" to him, as Petitioner's case was only his second case at the time he was appointed, but stated, "ten years later, I wouldn't consider that . . . a new issue." Tr. 85:12–16.

Lominack recalled that the aggravating evidence against Petitioner involved two murders, which Lominack described as "quite aggravated." Tr. 73:2–6. Lominack recalled that Petitioner had been hired to commit a murder for a "very small amount of money" while he was in prison. Tr. 73:14–23. Lominack

remembered that Petitioner had been imprisoned on two separate occasions for assaulting his ex-wife, once for stabbing her multiple times and kidnapping her in an attic and once for taking her to the woods and trying to strangle her with a cord. Tr. 74:9–24. Lominack also recalled that Petitioner had a number of disciplinary infractions while serving his sentences, including an instance where he "slashe[d] up a cellmate with a box cutter." Tr. 74:25–13.

Lominack recalled that Petitioner had only been on parole for a short time when he and Norris Martin killed Snipes. Tr. 78:25–79:3. Lominack also recalled that there was evidence presented during the sentencing phase that Petitioner "cut off the nipples of [Snipes], cut out her vagina, and also scalped her with a knife." Tr. 80:1–5. Lominack recalled that "there were questions about [Martin's] mental capacity." Tr. 80:16–24. Lominack did not recall PCR counsel having information that Petitioner had abused Martin.[7] Tr. 90:2–4. Lominack then confirmed that there were memoranda in trial counsel's file, which he would have reviewed, that indicated as follows: Sara Stokes said that Martin "hustle[d]" for Petitioner and that Petitioner "would beat up [ ] Martin if he didn't bring him his money on time[;]"[8] Kathy Bowman Gordan heard that Petitioner sexually abused Martin; Sara

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[7] Respondents' counsel's questions had to do with notes from a trial team meeting, which stated "sexually abuse Norris[,]" but Lominack did not want to mischaracterize the meaning of those notes. *See* Tr. 86:21–90:4; Resp't Ex. 3.

[8] Tr. 92:12–14.

Stokes said that Petitioner had "an extremely short temper and ha[d] never been able to control it[;]"[9] Craig Oliver said Petitioner was well-known for his short temper. Tr. 90:24–98:8; Resp't Exs. 4, 5, 6, 7, 8. Lominack did not recall any of that information being presented to the jury at trial. Tr. 98:9–10. Lominack also had information from his own investigator indicating that Petitioner had abused Martin. Tr. 109:24–111:17. Ricky Stokes told Dean that Martin disclosed to Ricky that Petitioner had made Martin "suck his dick." Tr.110:6–24; Resp't Ex. 13. There was also a memorandum from Dean memorializing an interview with Bill Carmichael in which Carmichael said Petitioner "was notorious for stealing, bullying kids for money, and told [Dean] that he used to beat [Martin] up all the time." Tr. 114:14–24; Resp't Ex. 16.

Lominack agreed that any witnesses who would have testified about Petitioner's background could have been cross-examined about negative information in Petitioner's past. Tr. 131:5–132:7. For instance, Respondents' counsel asked, "If you put the sister on the stand, you can ask the sister, did your brother used to sell drugs and beat Norris up when he didn't bring him his money on time[,]" Lominack responded, "Sure." Tr. 132:4–7.

Lominack recalled that trial counsel wanted to present evidence that Petitioner was dying from HIV at the time of his trial. Tr. 119:18–24. Lominack could not recall if that was still an issue at the time of the PCR hearing, but he testified, "we definitely talked about

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[9] Tr. 95:9–10.

the issue of HIV status and him not wanting his family to know about it." Tr. 167:11–12.

When asked if "the concept of mitigation" had evolved since his appointment on the case, Lominack stated,

> I don't think that the concept of mitigation has evolved. I think that the science supporting it, I think the standards of defense counsel has evolved, but . . . it's always been anything . . . in the defendant's life that might provide some reason for a sentence other than death or for mercy in South Carolina . . . .

Tr. 157:8–21.

As to the omission of the mitigation claim in the second amended application, Lominack agreed with Respondents' counsel that PCR counsel would have had a reason for withdrawing that claim and that they would not have withdrawn a claim on which they "believed [they] had a reasonable chance of prevailing . . . ." Tr. 158:14–21. Lominack reiterated that he could not remember why they omitted the claim, but he testified,

> I think the answer is we were so focused on that ID claim that we put all of our eggs in that basket, took out the general claim, focused on that and the conflict claim, and then when the ID claim didn't work out, we didn't revisit the issue. And I think that's—I don't want to imply a kind of decision-making process that wasn't there.

Tr. 159:6–12. Upon further questioning by the court, Lominack testified that he could not recall the reason that PCR counsel withdrew the claim and, thus, it was difficult for him to classify that decision as "strategic." Tr. 173:23–175:18. But he confirmed that there was a strategic plan by PCR counsel to focus on the mental retardation claim at the sacrifice of other claims. Tr. 175:8–12.

On redirect examination, Lominack testified that he did not believe that he met his obligation of adequate investigation in 2004 or in 2009. Tr. 189:9– 13. Based on his training and experience, he knew that he could use experts to reframe or put into context aggravating facts from Petitioner's background. Tr. 190:13–25. Lominack further explained,

> The social worker becomes the social historian and tells the story. And the reason that that's helpful is because the social worker is able to put all the pieces together into a coherent story with also the expertise of being able to recognize and sometimes diagnose, if needed, mental health impairments, but to put all of that into one coherent story rather than kind of a particular person at the age of 3 or 8 or 9, where things can be taken out of context.

Tr. 191:19–192:1. Lominack later agreed that a social worker could also be cross-examined about the information they relied upon in reaching their opinion. Tr. 223:24–224:1. Lominack testified,

> the solicitor would be provided all the interview notes or documents that the social worker relied

> on in coming to their opinion, and the solicitor would be allowed to, and does, cross-examine the social worker based on that information and also whatever other information the solicitor would have from their own investigation.

Tr. 224:1–6. As such, the solicitor could question the social worker as to any negative information in those records, as well as "the bad aspects of the crime itself or any other statutory aggravating or nonstatutory aggravating factors . . . ." Tr. 224:9–11.

Lominack testified that PCR counsel did not have a mental health expert determine if there was anything about Petitioner's background that affected his decision-making in connection with the aggravating circumstances of the Snipes murder. Tr. 195:1–7. Lominack testified that he believed it was "part of the standard of care in 1999 for trial counsel to try to contextualize or explain aggravating evidence if possible[.]" Tr. 197:18–21. Lominack also testified, "I don't think that it's ever been the standard that you have to have a particular expert." Tr. 229:15–16.

C. Dr. James Garbarino

James Garbarino, Ph.D., was qualified as an expert in childhood trauma and developmental psychology. Tr. 244:2–24. He testified that he is a professor of developmental psychology at Loyola University in Chicago, and he also serves as a senior faculty fellow for the Center for the Human Rights of Children. Tr. 238:10–14. He received a bachelor's degree from St. Lawrence University, a master's degree in education from Cornell University, and a Ph.D. in human

development from Cornell University. Tr. 238:22–25. Dr. Garbarino testified that he authored twenty-seven books and over one hundred articles and journals. Tr. 240:1–4. Dr. Garbarino testified that he previously testified in over 70 cases, including approximately twenty to twenty-four capital cases, about four of which were in South Carolina. Tr. 295:11–299:16.

When asked about the focus of his work, Dr. Garbarino stated, "childhood trauma is certainly one of the major themes as reflected in many of the articles and books that I've published. It certainly figures very prominently in the work as a psychological expert witness." Tr. 240:15–18. Dr. Garbarino further explained that, in his work, he performs a developmental analysis, bridging the social history and clinical assessments of a person "to illuminate the significance and meaning of events, experiences, and biological and social forces in development . . . ." Tr. 241:3–4.

When questioned as to what he was asked to do in Petitioner's case, Dr. Garbarino stated, "I was asked to try to help understand how Sammie Stokes became such a damaged person." Tr. 245:3–5. In answering that question, Dr. Garbarino relied upon a number of documents that were provided to him, including investigator reports, school records, prison records, and medical records. *See* Tr. 245:6–247:16; Pet. Ex. 49, 50, 51. Dr. Garbarino also interviewed Petitioner on October 24, 2016, for approximately two hours. Tr. 247:17–21, 343:8–10.

During the evidentiary hearing, Dr. Garbarino opined as follows:

> My opinion is that [Petitioner] was very damaged by the nature of his upbringing, a number of very traumatic experiences, probably in combination with a vulnerable temperament, and as a result, as he moved into adulthood, he was very damaged with respect to thinking clearly about making decisions and managing feelings and emotions and had many, many years of very ineffective relationships and relationships with the larger society, including problems with aggression and various acting out that I think culminated in the murder for which he is being considered now.
>
> And the kind of damage that he experienced is very consistent with the terrible nature of the crime that he committed and his ongoing problems of threatening violence, particularly against women, particularly against women with whom he has relationships, and that all of this serves to illuminate how he got to this point in his life . . . .

Tr. 248:2–17. Dr. Garbarino issued a report outlining his findings. *See* Pet. Ex. 49 at 1–29.

During his interview with Petitioner, Dr. Garbarino administered a structured questionnaire called the Adverse Childhood Experience ("ACE") Scale, which Dr. Garbarino testified has "been adopted by the Centers for Disease Control as something they promote as a standard way of assessing the level of adversity growing up." Tr. 249:11–17. According to Dr. Garbarino,

> One reason for its widespread acceptance is that research shows that the answers to these ten questions are highly predictive of difficulties in life that range from high blood pressure and cardiac problems to morbid obesity. But more germane to our concerns, accounting for about half of the variation in substance abuse, in suicidal thoughts and behavior, in depression, and something like 40 percent of the variation in aggressive behaviors.

Tr. 249:18–25. Dr. Garbarino testified that the ACE Scale had gained traction, in part, because it dealt with the accumulation of risk factors, and he explained, "the way child development works is it's to some degree the accumulation of risk factors, not the presence or absence of any one . . . ." Tr. 254:6–8.

The ACE Scale consists of ten questions, which Dr. Garbarino described as follows:

> The first one deals with being afraid in your home, being verbally abused, verbally insulted.
>
> The second question deals with the topic of physical assault by parents. Questions like, did a parent or other adult in the household often or very often push, slap, grab, or throw something at you or ever hit you so hard you had marks or were injured?
>
> The third question deals with being sexually abused, asking about sex with a person who is at least five years older than you were.

> The fourth question talks about feeling unloved or emotionally neglected.
>
> The fifth question asks about physical neglect, including parents who were incapable of caring for you because they were incapacitated because of substance abuse.
>
> The sixth question asks if your parents were separated or divorced.
>
> The seventh question asks about your mother being a victim of domestic violence.
>
> And the eighth question asks about, was anyone in your family a problem drinker or alcoholic or a street drug user?
>
> The ninth question asks about family members being depressed or mentally ill or attempting suicide?
>
> And the tenth question asks about a household member going to prison.

Tr. 250:18–251:18. Dr. Garbarino rated Petitioner as a nine on the scale based on Petitioner's own answers to the questions and other information gleaned from both the interview and Dr. Garbarino's review of the relevant records. Tr. 251:19–252:7. Dr. Garbarino testified that "about two-thirds of Americans get a score of zero or 1 . . . . Only one-tenth of 1 percent, one in a thousand people, get a score of 8, 9, or 10 . . . ." Tr. 251:20–23. According to Dr. Garbarino, in his own experience, the average score for a killer or a murderer is about seven. Tr. 336:12–18.

Dr. Garbarino discussed each question and explained why he gave Petitioner an ACE score of nine. According to Dr. Garbarino,

> [t]he main themes really in his questions were his difficult relationship with his mother and his stepfather, these inappropriate and illegally sexually abusive relationships with older females when he was a child or a teenager, feeling that after his mother's death when he was 13, that he was emotionally abandoned by the rest of his family, his reports of significant alcohol use on the part of his mother and his stepfather, domestic violence of which his mother was a victim.
>
> The only question that he didn't say yes to was did a household member go to prison, and I don't recall any other evidence suggesting that was true.

Tr. 252:8–18. As to the physical abuse, Dr. Garbarino testified, "he reported, and it's not uncommon, that he was whipped with electric cords and other objects, which is the basic definition of physical child abuse." Tr. 252:22–24. As to the sexual abuse, Dr. Garbarino noted Petitioner's experience with a female babysitter, a friend of his sister's, "who drew him into sexual activity" when he was just eleven or twelve.[10] Tr.

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[10] Dr. Garbarino's testimony about the respective ages of Petitioner and the older girl was confusing. Dr. Garbarino appeared to testify that the babysitter was at least five years older than Petitioner because he noted that experience as a reason that he gave Petitioner a point towards his ACE score for sexual abuse. Tr.

253:5–10. Dr. Garbarino also mentioned Petitioner's relationship with Audrey Smith, who was nine years older than Petitioner. Tr. 253:10–12.

Dr. Garbarino testified as to Petitioner's conflicted relationship with his mother, which contributed to what Dr. Garbarino described as Petitioner's "very strong sense of abandonment . . . ." Tr. 256:2. Dr. Garbarino explained,

> [Petitioner] also spoke about something that became very important in my report that is, frankly, very difficult to know exactly what to make of it, but he said that when I was born, I went to live with my father and his girlfriend. When I was about five, I was sent to live with my mother. I had seen her and acknowledged her when I was four, but it was the first time I met my sister. I had no answers about why I was with my father and not my mother.

Tr. 255:19–256:1. Dr. Garbarino admitted that other reports of Petitioner's history found in the documentation that Dr. Garbarino reviewed contradicted the above statement, but Dr. Garbarino rationalized that Petitioner's own conflicting statement "may reflect that children who have a lot of trauma in

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259:10–260:15. Then on cross-examination, Dr. Garbarino admitted that Petitioner's sister was only two or three years older than Petitioner, and it was unclear the age of her friend, the babysitter. Tr. 331:2–332:11. In any event, Dr. Garbarino stated, "[I]t does go to disruptive sexual experience and that's why the answer to the Adverse Childhood Experience Scale was a yes." Tr. 332:9–11.

the first three or four years of life characteristically cannot report accurately or effectively about their early experience . . . .” Tr. 256:19–22. Nevertheless, Dr. Garbarino stated, “[G]iven the catastrophic nature of early abandonment, I thought that his account certainly in his own mind justified including that as an element in my report.” Tr. 257:21–23.

As to instances of neglect and substance abuse in the home, Dr. Garbarino noted Petitioner’s recollection of his parents being too drunk to take care of him, which Dr. Garbarino testified “is very common among parents who have problems with alcohol or other substance abuse problems . . . .” Tr. 260:16–19. Dr. Garbarino also testified that Petitioner reported that “after his mother died . . . his stepfather made no attempt to discipline or socialize he and his sister.” Tr. 260:20–21.

During his testimony, Dr. Garbarino also recounted Petitioner’s own recollection of the domestic abuse to which his mother was subjected. According to Dr. Garbarino, Petitioner “spoke quite convincingly and movingly about witnessing his mother being victimized by his stepfather particularly.” Tr. 261:1–3. Dr. Garbarino testified,

> [Petitioner] reported his mother being beaten and otherwise assaulted. Being humiliated. All the very typical aspects of domestic violence. And he had—he talked about having the reaction that boys often have, of wishing that he could protect his mother, and I believe he even said, I think it’s included in a report, that I thought at that time when I get big enough and

> old enough, I'm going to kill him, meaning the stepfather. Again, that's not uncommon for boys in dysfunctional families witnessing domestic violence as it affects their mother particularly.

Tr. 261:5–14.

As to familial alcohol or drug abuse, Dr. Garbarino noted that Petitioner "viewed his mother and his stepfather as both having very significant substance abuse problems" and further that there was corroboration for that in the reports of others. Tr. 262:8–12.

Dr. Garbarino also testified that Petitioner reported that his mother was "depressed" and "act[ed] crazy[,]" an assessment for which Dr. Garbarino found other corroboration. Tr. 263:11–21.

There was no evidence either from Petitioner or from the records that Dr. Garbarino reviewed that Petitioner had a family member go to prison. Tr. 263:22–23.

Dr. Garbarino also testified as to how other factors not captured in the ACE score, such as poverty and specific trauma, could have had an effect on Petitioner. Tr. 265:3–268:20. In addition to these external factors that could have had an impact on Petitioner's development, Dr. Garbarino testified that Petitioner's "volatility, to some degree, may reflect his temperament, as well as the chaotic nature of his experience." Tr. 269:1–3.

Dr. Garbarino testified that there were "three organizing principles" that affect child development—

the accumulation of risk factors, individual temperament, and trauma. Tr. 263:24–266:18. According to Dr. Garbarino, there is a synergistic effect between those principles, "so teenagers who have these traumatic dysfunctional backgrounds often are the worst when it comes to executive function and affective regulation." Tr. 270:9–12. As to Petitioner, Dr. Garbarino opined,

> Sammie certainly demonstrated much of that as a teenager and as a young man. What is distinctive about him, I think, is that this damage has not—did not clearly ameliorate, rehabilitate, transform completely as he moved through his 30s, as it does for many individuals, and of course, the murder we're talking about occurred when he was 32, so that's—that bolsters my view that he was not just in an adolescent crisis, as many are, but was profoundly damaged by these experiences . . . .

Tr. 270:13–21.

Petitioner also used Dr. Garbarino's testimony to highlight details from Petitioner's background. For example, Dr. Garbarino relied upon and then testified to information from Petitioner's school records and summaries from interviews with Petitioner's former teachers and administrators that were created by PCR counsel's mitigation investigator. Tr. 281:10–288:23. Generally, these educators remembered Petitioner as a kid who was not that bad, but who had a difficult home life. Tr. 283:20–288:23. For example, Petitioner's third grade teacher, Libby Street, remembered Petitioner's mother, Pearl, being an embarrassing

figure, as she would visit the school after she had been drinking. Tr. 283:10–284:12. Dr. Garbarino testified that Street also recalled "some of the difficulties [Petitioner] had as a black child during this period of integrating schools." Tr. 284:12–14. According to Dr. Garbarino, Tyler Dufford, a principal, recalled the lack of support and guidance that Petitioner received from his parents, and he described Petitioner not as a student, but "just there." Tr. 284:20–285:23. A grade school counselor, Debbie Dukes, who did not recall Petitioner being in one of her classes, remembered him "as being evil." Tr. 287:25–288:23.

On cross-examination, Dr. Garbarino testified that he taught at Cornell University from 1994 to 2005. Tr. 293:1–10. He recalled speaking at the law school, and he testified that he had met John Blume, who taught at Cornell Law School. Tr. 293:22–295:4. He could not recall if it was Blume who had asked him to guest lecture at the law school. Tr. 295:2–4. Dr. Garbarino could not recall if he had met Keir Weyble. Tr. 294:7–16.

When asked if he could recall specific South Carolina cases in which he had testified, Dr. Garbarino stated, "[w]hat I tend to do is when I finish one case, I try to clear it out of my head and move on to the next item on my agenda . . . ." Tr. 297:7–9. He recalled working on a case in which "the Cornell Center" was involved, but he could not recall if it was the case of Roger Dale Johnson with John Blume in 2003. Tr. 297:21–25. The name Emily Paavola sounded familiar from the Freddie Owens case, but he did not recall Keir Weyble from that case. Tr. 298:1–19.

Dr. Garbarino was cross-examined extensively about his process for reaching his opinion. He testified that when he interviewed Petitioner, he took handwritten notes, but he did not tape-record the interview. Tr. 300:3–7. After issuing his report, Dr. Garbarino discarded his handwritten notes. Tr. 300:8–301:11. Dr. Garbarino testified that there was one quote "that [he] typed out and retained because it was so central to his statement[,]" Tr. 302:1–2, Petitioner's statement that:

> when I was born I went to live with my father and his girlfriend. When I was about five I was sent to live with my mother. I had seen her and acknowledged her when I was four, but it was the first time I met my sister. I had no answers about why I was with my father and not my mother.

Tr. 301:17–21. Dr. Garbarino testified that the quote did not appear in the report and he was "sorry that it doesn't, of course, but it was the basis for the comments on page 3 and other pages about abandonment and rejection." Tr. 302:4–6. Dr. Garbarino later testified that he found the typed quotation in his file after his deposition. Tr. 307:19–308:14.

Two days after his deposition, Dr. Garbarino sent an email to habeas counsel about the above quotation:

> Dear Marta and Diana: Following up on the prosecutor and the issue of maternal abandonment, Lou/Sammie told me ["]when I was born, I went to live with my father and his girlfriend. When I was about five, I was sent to

> live with my mother. I had seen her and acknowledged her when I was four, but it was the first time I met my sister. I had no answers about why I was with my father and not my mother.["] This is the basis for what I wrote in the report about 'maternal abandonment.' . . . (I don't make these things up LOL). Given his ["]attack["] on the malingering issue, do we have another source for this account of Lou/Sammie's first five or six years of life? That would be helpful to ["]rebut["] the attack.
>
> Best regards, Jim

Tr. 311:19–312:6. Dr. Garbarino testified that the other documents he reviewed did not support the statement that Petitioner had been abandoned as a baby and had not seen his mother again until he was six years old. Tr. 313:4–316:11.

Dr. Garbarino was also cross-examined about a document that he referred to as a "social history prepared by Diana Holt." See Tr. 316:12–318:25; Pet. Ex. 49 at 3.

When asked if there was "a problem with trusting [Petitioner] for a valid social history[,]" Dr. Garbarino stated, "I think there are a number of problems, given his inconsistent thoughts and feelings about his life and . . . the long period of time that's passed. There are a lot of uncertainties in the case from that perspective, yes." Tr. 319:18–21. Dr. Garbarino testified that even without that statement from Petitioner, he would still reach the same conclusion. Tr. 323:9–18. Dr. Garbarino testified, "even without the abandonment, there's still

the instability of care related to her alcoholism and the dysfunctional nature of the family during that period." Tr. 327:3–5.

Dr. Garbarino agreed with Respondents' counsel that Petitioner had been found to be malingering in previous evaluations at Hall Psychiatric before his murder trial and at the South Carolina Department of Disabilities and Special Needs ("DDSN") during his mental retardation evaluation. Tr. 324:20–325:11.

Dr. Garbarino recalled from the records he reviewed that there had been allegations that Petitioner had sexually abused Norris Martin when they were growing up. Tr. 332:25–333:5. Dr. Garbarino agreed that the murders of Snipes and Ferguson were "not about domestic violence[,]" but were "strictly money." Tr. 333:9–16. As to the Snipes murder, Dr. Garbarino noted, "I think it started strictly as money and then became something else because he went beyond simply killing her." Tr. 333:15–16.

D. Keir Weyble

Keir Weyble testified that he currently teaches at Cornell University and serves as the director of death penalty litigation there. Tr. 366:22–24, 419:9–17. He received an undergraduate degree from Ramapo College of New Jersey and a law degree from the University of South Carolina School of Law. Tr. 367:2–5. While in law school, he clerked with the South Carolina Death Penalty Resource Center, a federally-funded office that provided both direct representation and consultation to private attorneys representing death-sentenced prisoners. Tr. 399:6–400:22. After

graduating from law school, Weyble worked at a firm with John Blume where they focused "[a]lmost exclusively [on] capital cases, . . . the vast majority of it was post-conviction or federal habeas corpus work." Tr. 367:6–368:3.

Weyble testified that he had "attended a significant number of training seminars, conferences, things like that, aimed at capital litigation, mostly post-conviction or federal habeas corpus, some certainly that would bleed over into trial." Tr. 401:24–402:2. The importance of mitigation evidence was emphasized in such training sessions. Tr. 402:9–407:1.

Weyble recalled being appointed in Petitioner's case and testified that he had served as appointed counsel in a capital post-conviction case in only one other case previously.[11] Tr. 368:4–18. Although he could not remember if he and Weyble sought out the appointment in Petitioner's case or if Judge Manning called PCR counsel and asked them to take the case, he was sure that one of those two preceded their appointment. Tr. 514:3–22. He testified that the appointment process in state court was not rigorous, but he believed there was an appointment hearing in Petitioner's case. Tr. 517:9–518:21. Weyble testified that he had to meet statutory qualifications to be

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[11] On cross-examination, Weyble listed a number of other individuals on whose capital cases he worked where he was not an appointed attorney—Michael Elkins, Robert South, Sterling Spann, Edward Elmore, Andy Smith, Shannon Ardis, and Bobby Lee Holmes. Tr. 413:16–415:8. He indicated that were probably others, as well, but he did not recall them during his testimony. Tr. 415:9–10.

appointed to represent Petitioner in his PCR action. Tr. 518:17–521:5.

Weyble testified that he "probably" was considered lead counsel because he "was a little bit older and a little bit more experienced . . . ." Tr. 368:22–369:2. Weyble testified that he and Lominack divided the responsibilities of the case informally and there were some tasks, such as reading the records or talking to certain witnesses, that they both did. Tr. 369:4–15.

Weyble recalled that the Office of Appellate Defense helped Petitioner prepare and file his initial PCR application before PCR counsel were appointed.[12] Tr. 370:4–20. Although he did not have specific recollections of having reviewed the trial record or trial counsel's file, Weyble testified that he was sure he had done both. Tr. 371:19–372:9. Weyble testified that PCR counsel determined, at the time of the PCR action, that trial counsel had done little investigation and had not presented a "traditional mitigation case[,]" but had, instead, presented Aiken on prison adaptability. Tr. 372:10–23. Weyble did not recall anything about trial counsel having a plan to present evidence that Petitioner was HIV-positive. Tr. 372:24–373:5.

Weyble further testified that he could not specifically recall having reviewed memoranda prepared by trial counsel's mitigation investigator, but he provided that he was "quite certain [he] must have at some point . . . ." Tr. 374:6–12. Weyble also could not

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[12] Weyble further testified that it was a simple process to get the case file, including the record on appeal, from appellate defense. Tr. 515:2–20.

recall much about the experts who were part of the trial team. *See* Tr. 376:19–380:2. He recalled having met with Dr. Deysach, whom he thought was a neurologist. Tr. 376:19–377:16. He testified that Dr. Donna Schwartz-Watts was a psychiatrist who did not testify at Petitioner's trial. Tr. 377:17–378:22. He testified that Augustus Rodgers was a social worker who also did not testify at trial. Tr. 378:23–379:6.

As to PCR counsel's own investigation, Weyble testified that they hired Tracey Dean "to conduct a social history investigation toward the end of assembling a biopsychosocial history." Tr. 380:15–20. Weyble further testified that PCR counsel met with Dean informally, as they were all located in the same building at the time, and that he would have reviewed the memoranda that she created during her PCR investigation. Tr. 381:4–11.

Weyble testified that, prior to his appointment in Petitioner's case, he had received training on the development and presentation of mitigating evidence in capital cases. Tr. 381:12–15. He had also developed and presented mitigating evidence in other capital cases. Tr. 381:16–18. Weyble testified, "the category of mitigating evidence is extremely wide as a matter of law. That's the one thing the Supreme Court has been very clear and forceful on and has never really wavered from since 1976. . . . [It is] anything that a defendant wishes to present as a basis for a sentence less than death." Tr. 381:22–382:3. Weyble agreed that information regarding a defendant's childhood and upbringing was generally central to a mitigation presentation, describing such evidence as "classic

mitigation material." Tr. 382:13–17. In response to questions asked by the court later, Weyble gave the following explanation of how mitigation can be helpful:

> if you see somebody who is engaged in this whole series of really terrible or antisocial behaviors and you think what a horrible, hatable person, and then you find out their story and you think, what a damaged person, it doesn't change the fact that he did those horrible things, but it changes how you think about it, right? So that, to me, would—plenty of that could have gone on in this trial.
>
> So, you know, I think certainly some of those sharp edges could have been blunted. You're not going to completely sand them away because the facts still remain, but it can start to put things in a different light.

Tr. 530:20–531:5.

Weyble testified that he was familiar with the ABA guidelines for the performance of counsel in death penalty cases at the time he was appointed in Petitioner's case. Tr. 382:18–24. He described the ABA guidelines as a reflection of "the basic expectations that bear upon counsel doing these kinds of cases." Tr. 383:2–5. He testified that he did not believe that PCR counsel complied with the standard of care when they decided to omit the ineffective-assistance-of-trial-counsel claim without first consulting an expert. Tr. 385:3–7. He also testified that he did not think that PCR counsel's actions "survive[d] the ABA guidelines . . . ." Tr. 386:1–4. Weyble could not recall specifically

why PCR counsel omitted the claim, but he surmised that they became "somewhat distracted by the shiny object"—the mental retardation claim. Tr. 385:8–19. Weyble testified, "obviously we made some sort of judgment, explicit or implicit, that resulted in us not going further." Tr. 385:20–21.

Weyble testified that PCR counsel retained Dr. Jim Evans and Dr. Caroline Everington to help them evaluate the mental retardation claim. Tr. 386:5–11. Dr. Evans tested Petitioner's IQ. Tr. 386:12–21. Dr. Everington evaluated Petitioner's deficits and adaptive behavior. Tr. 386:22–387:7. Weyble did not recall asking Dr. Everington to specifically look at how trauma affected those variables. Tr. 387:13–22.

Weyble testified that DDSN determined that Petitioner was not mentally retarded, and PCR counsel subsequently abandoned the claim. Tr. 388:1–9. He did not recall revisiting the ineffective-assistance-of-trial-counsel claim at that time, and he did not recall why PCR counsel did not do so. Tr. 388:10–21. Weyble stated, "[w]e must have just sort of implicitly treated it as kind of closed, you know, we didn't go back and revisit it . . . ." Tr. 388:18–20.

As to the letters that PCR counsel sent to trial counsel after they withdrew the ineffective-assistance-of-trial-counsel claim, Weyble explained,

> there had been instances in other cases in which trial counsel had simply handed over their file to counsel for the state, and that was something that, I judged to be—be inappropriate, legally

> inappropriate, and inappropriate under the rules of professional responsibility.
>
> . . . .
>
> I wanted to make sure that prior counsel for Mr. Stokes understood that they were not obligated or even authorized to disclose their file to counsel whose interests are obviously adverse to Mr. Stokes, because there were no allegations in the case at that time that would permit that kind of a disclosure.

Tr. 390:13–391:3. Later, Weyble testified that there was nothing particular in trial counsel's file that he was trying to keep from being disclosed. Tr. 456:12–19. However, he felt it was his obligation as PCR counsel to make sure that the attorney-client privilege was preserved. Tr. 456:12–457:9.

Weyble agreed with Petitioner's counsel that it was part of his understanding that the standard of care required him as PCR counsel to attempt to contextualize aggravating evidence about Petitioner. Tr. 392:5–10. He also agreed that an expert could have helped him to do that. Tr. 392:11–13.

Weyble testified that he read Aiken's testimony about Petitioner's prison adaptability. Tr. 393:7–12. He recalled that Petitioner had a prison record of "less than clean prison conduct." Tr. 393:25–394:1. Weyble could not recall if it occurred to PCR counsel to challenge trial counsel's decision to offer Aiken as an expert given the extent of Petitioner's prison record, but he testified, "I imagine we would have thought about . . . is this adequate, you know? Should there

have been more—should this not have been in there? But, you know, how much further or deeper we thought about that, I just can't sit here and say. I don't know." Tr. 394:9–13.

On cross-examination, Weyble testified that he tried to follow the standards of professional practice in representing Petitioner. Tr. 407:24–408:9. When questioned further about his own assessment of his representation, Weyble stated, "if the ABA guidelines capture prevailing professional norms, then I stand by my statement that at least as to our failure to consult with an expert, we did not meet the prevailing professional norms as reflected in the ABA guidelines." Tr. 409:13–17.

Weyble testified that he started teaching at Cornell in August 2008. Tr. 419:9–11. He did not recall meeting Dr. Garbarino or hearing him lecture in his connection with the law school, but he did serve as counsel in the PCR action of Freddie Owens, and Dr. Garbarino served as an expert witness in that case. Tr. 420:20–421:4.

Weyble agreed with Respondents' counsel that counsel can make an informed decision not to present certain mitigating evidence if that decision is objectively reasonable under the circumstances. Tr. 423:7–18.

Weyble recalled that the prosecution's evidence showed that Petitioner was incarcerated when he agreed to commit Snipes's murder for $2,000. Tr. 438:1–9. He also remembered Petitioner's co-defendant, Norris Martin, and that "for lack of a better term, he

was slow." Tr. 443:17–444:1. He remembered that Martin had left his ID and a plastic police badge at the crime scene, noting "there are many details of this case I do not recall, but those have stuck with me . . . ." Tr. 448:11–23.

Weyble testified that it was typical in a capital PCR application to raise a claim of ineffective assistance of trial counsel for failure to present mitigation evidence. Tr. 449:7–10, 451:17–21.

Weyble testified that it would be "pretty difficult" to present a social history of Petitioner's life and to keep out the fact that Petitioner was HIV-positive. Tr. 469:10–16. Weyble later clarified that he did believe it was possible to compartmentalize the two in a mitigation presentation, but admitted that it would be possible for the State to cross-examine the witness about Petitioner's HIV status. Tr. 536:5–23.

When asked if he would agree that attitudes towards homosexuality were different in Orangeburg in 1999 when Petitioner's case was tried, Weyble responded, "I don't know." Tr. 472:12–15. However, he agreed that attitudes about homosexuality had evolved generally in the last twenty years. Tr. 472:12–20. Weyble did not recall that his mitigation investigator found information that Petitioner had forced Martin to perform oral sex on him, but he stated, "[i]f it was in a memo from Tracey, then I think it's safe to assume that I was aware of it." Tr. 477:12–17. Weyble testified that he would not want that sort of information being introduced to a jury without "a plausible explanation for those behaviors." Tr. 477:18–22. Weyble recalled from the mitigation investigation materials that

Petitioner was known for bullying, stealing, and beating up people. Tr. 480:15–18.

Weyble testified that PCR counsel purposefully withdrew the ineffective-assistance-of-trial-counsel claim for failure to present mitigating evidence following their investigation. Tr. 483:12–23. He testified that PCR counsel's decision was made "in context of what was going on that summer in the case, . . . a shift in focus away from . . . kind of the traditional mitigation-oriented ineffectiveness claim to this *Atkins* claim. We did—that happened." Tr. 484:2–10. When asked if Weyble discussed omitting the ineffective-assistance-of-counsel claim with Lominack, Weyble stated, "I'm sure I did. I'm sure we did discuss it." Tr. 485:14–16. He testified that it was also possible that PCR counsel had discussed omitting the claim with Blume and Bruck. Tr. 485:17–486:3. He did not recall either Blume or Bruck telling PCR counsel not to withdraw the claim. Tr. 485:23–486:7. When questioned as to whether PCR counsel discussed the withdrawal of the claim with Petitioner, Weyble stated, "I believe we did, yes." Tr. 486:8–10. Weyble further testified, "he trusted us and didn't ask a lot of questions, and so we might have sat down with him and said, here's what we're thinking of doing, and are you comfortable with that? And he would have said, whatever you all want—whatever you all think is best." Tr. 487:9–13.

Weyble later admitted that the conflict claim that PCR counsel did pursue in the PCR action was "factually narrower." Tr. 498:8–11. He also testified that the conflict claim and the mitigation presentation

claim were not mutually exclusive. Tr. 502:11–16. However, PCR counsel had a discussion about the mitigation presentation claim and made a judgment to withdraw the claim. Tr. 501:4–8. Weyble further explained, "the key question for me has been, and really is, did we know enough? Did we do enough to educate ourselves about what we had available to us before we made that decision?" Tr. 501:9–11. Weyble then answered his question, "I think the failing for us was we didn't educate ourselves enough. That's the problem. It was a decision, but it wasn't a sufficiently informed decision." Tr. 501:16–19; *see also* Tr. 523:11–531:21 (explaining further his belief that PCR counsel were not sufficiently informed when they withdrew the claim). Weyble admitted that PCR counsel would not have withdrawn the claim if they thought that it would be successful, but he stated that PCR counsel's decision was made "[b]ased on an incomplete workup . . . ." Tr. 503:4–11.

E. Dr. Augustus Rodgers

Augustus Rodgers, Ph.D., testified that he is a social worker and a retired professor. Tr. 538:19–23. He has a Ph.D. from the counseling department of the University of South Carolina, a master's degree in social work from New York University, and a master's of divinity from the Lutheran Theological Southern Seminary. Tr. 538:24–539:4.

Dr. Rodgers testified that he was hired "to serve as a social worker in developing a case that would support the claim of mitigating circumstances" in Petitioner's trial. Tr. 539:13–19. He had served as an expert in social work in other cases. Tr. 539:20–540:8. In his role

as an expert, Dr. Rodgers testified that he would generally interview both the primary source, the client, and collateral sources, other individuals who could share information about the client. Tr. 540:9–16. He also reviewed documents and other information provided to him. Tr. 540:17–19.

Dr. Rodgers recalled meeting with Petitioner at the county jail in Orangeburg, but he had difficulty remembering the specifics of the meeting.[13] Tr. 541:4–543:3. He did recall that his meeting with Petitioner was pleasant and that Petitioner expressed gratitude for the help he was receiving from the trial team. Tr. 542:8–19. Dr. Rodgers also recalled that Petitioner was cooperative during their meeting. Tr. 542:20–23. Dr. Rodgers specifically recalled Petitioner telling him that he did not want his family hearing about his HIV status in court. Tr. 544:13–545:6.

Dr. Rodgers did not recall meeting with Petitioner again, but he did attend trial team meetings. Tr. 542:24–543:6. Dr. Rodgers had difficulty recalling the specifics of those meetings, but he had the impression that he was not "given an opportunity to say a whole lot" and that "there was more talking being done by other people, less by me, and I did more of the listening." Tr. 544:2–8.

Dr. Rodgers recalled being present in court and hearing Aiken's testimony. Tr. 546:1–8. He also affirmed that he was prepared to testify at that time,

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[13] Dr. Rodgers testified that he was given the chemotherapy drug Adriamycin about thirteen years ago, which "erased practically half of [his] memory." Tr. 541:10–22.

but he was never called as a witness. Tr. 546:11–25. Dr. Rodgers testified that he could not recall specifically what testimony he was prepared to give during the sentencing phase of Petitioner's trial, Tr. 548:16–24, but he "knew it was within the confines of the setting that Mr. Stokes will probably be gone beyond these earthly bounds before he was executed[,]" Tr. 549:16–18.

Dr. Rodgers testified that he had a policy of retaining his files for fifteen years, but he was not contacted anytime between 2002 and 2009 by either Robert Lominack or Keir Weyble for a copy of his file. Tr. 547:13–20. If they had contacted him, he would have provided his file to them. Tr. 547:21–23.

F. Dr. Robert Deysach

Robert Deysach, Ph.D., testified that he received a bachelor's degree from Marquette and both a master's degree and a Ph.D. in clinical psychology from Syracuse University. Tr. 550:17–23. He did an internship and postdoctoral work in medical psychology at the University of Oregon Medical School before joining the faculty at USC East in South Carolina, where he served until he retired in 2006. Tr. 550:24–551:3. Additionally, Dr. Deysach directed the department of neuropsychology at HealthSouth Rehabilitation Hospital until he retired in 2013. Tr. 551:8–13.

Dr. Deysach further testified that he has been qualified to testify as an expert in neuropsychology in South Carolina courts for thirty years. Tr. 552:7–16. He has worked in both criminal and civil cases "to supply

kind of a unique set of data points that look at brain behavior relationships, how it is that condition of the brain can affect behavior." Tr. 552:3–6. Dr. Deysach further explained that, as an expert, he would "try to take a knowledge of the brain structure and physiology and try to understand how it impacts behavior." Tr. 552:20–21.

Dr. Deysach testified that his approach in Petitioner's case was "fairly typical" in that he spent about four hours giving Petitioner a neuropsychological examination. Tr. 552:17–553:12. According to Dr. Deysach, such a neuropsychological examination does not merely involve a comparison of the client to other individuals who are not impaired, but it also evaluates "the things they do well and the things they do poorly . . . [to] give us a picture of what might be going on in the brain and then try to take that and link that to behavioral strengths and weaknesses." Tr. 553:9–12.

As to Petitioner's performance during the neuropsychological evaluation, Dr. Deysach testified, "I was able to garner from him a very good level of attention, concentration, and attempt to please me, to do things as well as he could, so I felt that he was trying." Tr. 554:14–16. Dr. Deysach later testified that Petitioner's initial effort appeared low, but once they got into "the meat of the testing session, [Dr. Deysach] felt like [Petitioner's] responses were effortful and he was trying to do his best."[14] Tr. 561:18–24.

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[14] Dr. Deysach testified that he probably gave Petitioner a test for malingering because that was something he routinely did. Tr. 561:25–562:8. Dr. Deysach testified that he sometimes looked at

Following his examination of Petitioner, Dr. Deysach was prepared to testify that Petitioner's results were indicative of brain dysfunction. Tr. 553:13–17. Dr. Deysach testified that he was present in court with Dr. Rodgers and Dr. Schwartz-Watts, but he did not testify. Tr. 553:13–554:7. Dr. Deysach testified that he was familiar with plans changing in the middle of trials as evidence is introduced and arguments change, but it was "a unique experience" to be asked to appear in court to testify and then ultimately not be called as a witness. Tr. 564:21–565:7.

Dr. Deysach testified that he usually retained his file for about six or seven years. Tr. 554:19–22. He was contacted by and subsequently met with PCR counsel, but they did not ask him to review his file, nor did they ask him to provide his file to another expert. Tr. 554:23–556:3.

Dr. Deysach testified that he could have discussed his testing of Petitioner and his findings regarding Petitioner's brain function without talking about potential causes for Petitioner's performance. Tr. 556:7–557:4. In other words, he could have avoided mentioning that Petitioner was HIV-positive. Tr. 556:24–557:2. However, Dr. Deysach admitted on cross-examination that Petitioner's AIDS was a potential cause of some of his decreased functioning. Tr. 560:3–18. Dr. Deysach testified, "I mean, it could come

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other medical records of a client, and if those records showed that Petitioner had been found to be malingering in other instances, it might have influenced Dr. Deysach's own desire to give a malingering test. Tr. 562:9–17.

out. I didn't need that information. I could have gotten along fine without sharing that information unless somebody said, do you know if he's got AIDS?" Tr. 560:6–9.

When asked if he was aware that Petitioner did not want his HIV status to be presented in court, Dr. Deysach stated, "[m]y assumption was that's one of the factors that led to my not being asked to testify."[15] Tr. 560:19–22.

G. Thomas Sims

Thomas Sims testified that he graduated from college in 1974 and received a law degree from Catholic University School of Law in Washington, D.C. in 1978. Tr. 578:20–23. He then moved to Mississippi and began practicing law with North Mississippi Rural Legal Services. Tr. 578:23–25. Sims later moved to South Carolina and began practicing with Palmetto Legal Services. Tr. 614:25–615:2. In 1981, he moved to the Solicitor's Office in Orangeburg County. Tr. 579:2–14. He began prosecuting juvenile cases, then moved to prosecuting major crimes, and he eventually was appointed deputy solicitor and then acting solicitor of the office. Tr. 579:7–14. He was involved in the prosecution of a number of death penalty cases during his time with the Solicitor's Office. Tr. 579:15–24. Sims testified that although he did not attend any formal

[15] Dr. Deysach also offered that, at the time of Petitioner's trial, attorneys were not as comfortable with the area of neuropsychology, and thus, there was sometimes a reluctance to present an expert witness in an unfamiliar field. Tr. 560:24–561:8.

training on how to prosecute a death penalty case, he received on-the-job training. Tr. 580:3–20.

In 1992, Sims left the Solicitor's Office and began working as a defense attorney. Tr. 580:21–25. Before being appointed to represent Petitioner in his capital trial, Sims "defended everything from DUIs to murders to rapes to all kinds of major cases, and . . . [Sims] was second chair in the [capital case of] *State versus Bayan Aleksey*."[16] Tr. 581:5–7. Sims testified that he did not attend any formal training on how to defend a death penalty case, but he stated that he "probably did" read publications regarding the investigation, development, and presentation of mitigation evidence. Tr. 581:8–25. Sims denied consulting any attorneys who had significant experience in the development, investigation, and presentation of mitigation evidence prior to or during his representation of Petitioner. Tr. 582:7–11.

Sims testified that he was appointed to represent Petitioner because he happened to be in the courthouse at the time counsel was appointing counsel for Petitioner. Tr. 582:12–583:3. Johnson, who had never been involved in a capital case, was initially appointed, but since Sims had recently finished representing Bayan Aleksey in another capital case, he was appointed, as well. Tr. 582:20–583:3. Sims testified that he and Johnson did not have a formal division of tasks and that they worked together very well. Tr. 583:15–24. Trial counsel discussed their plans for the case together, and although Johnson did not have

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[16] *See State v. Aleksey*, 538 S.E.2d 248 (S.C. 2000).

capital trial experience, he was a veteran lawyer at that time. Tr. 583:19–24.

Sims recognized a voucher he submitted for his work on Petitioner's case. Tr. 584:3–21; Pet. Ex. 55. Sims testified that the document reflected the time for which he felt he could charge, but it did not capture the entirety of the time he spent thinking about Petitioner's case. Tr. 584:10–585:1.

Sims testified that trial counsel retained B.J. Johns as their fact investigator. Tr. 585:2–586:5. According to Sims, trial counsel probably asked Johns or someone from his organization to do interviews related to the preparation of mitigation evidence. Tr. 586:6–16. He had no independent recollection of the memoranda containing details of Petitioner's background, and he did not recognize the name Kimberly McKay, but he did remember a young lady who was in Johns's office. Tr. 586:17–587:21. He did not know of her qualifications or experience in mitigation investigation. Tr. 587:22–588:1. Sims testified that he did not recall speaking with any of Petitioner's family members, friends, teachers, or employers about his childhood and upbringing. Tr. 588:18–589:7.

Sims testified that trial counsel had Dr. Rodgers meet with Petitioner and prepare mitigation material, but Sims could not recall who else Dr. Rodgers met with during his preparation. Tr. 589:10–20. Sims testified that Dr. Rodgers was in court for Petitioner's sentencing hearing. Tr. 594:10–15. According to Sims, "[k]nowing Dr. Rodgers and having been around him, he would have talked about the things that he had done in regards to the case and would have been able

to say—give background information and all that information as a social worker . . . ." Tr. 594:25–595:3.

Sims recalled that trial counsel retained Aiken to testify on Petitioner's adaptability to prison. Tr. 591:1–19. Sims testified that Petitioner's prison record was "[f]airly extensive." Tr. 592:4–6. Sims further agreed with Petitioner's counsel that if Petitioner "had not had an infraction for several years prior to his release from prison, . . . that would have been something important for James Aiken to know about[.]" Tr. 592:17–21. Sims testified that Aiken's testimony made a strong statement to the jury, in particular, Aiken's testimony that the South Carolina Department of Corrections ("SCDC") had the ability to kill Petitioner if he did not "act right." Tr. 591:1–16, 605:17–606:2.

Sims recognized trial counsel's potential witness list from Petitioner's trial. Tr. 593:3–6; Pet. Ex. 42. He recalled that Sara Stokes, whose name was on that list, was a relative of Stokes, and he testified that "[s]he may have been a sister." Tr. 593:12–17. He did not recall Ruth Davis. Tr. 594:2–5. He could not remember if Sara Stokes or Ruth Davis were present in court on the day of sentencing or what their testimony would have been. Tr. 593:18–594:22. Sims testified, "[w]ith this list, if we give a list, we usually have those people there during the trial when their particular time is going to come up." Tr. 594:7–9.

Sims testified that Dr. Rodgers, Sara Stokes, and Ruth Davis did not testify on Petitioner's behalf at the sentencing hearing. Tr. 595:9–11. According to Sims, trial counsel made a "strategic decision that . . . [the]

kind of evidence that was the ongoing way that things were done at that time was not going to work in Orangeburg County." Tr. 595:13–17. When asked if trial counsel made that decision on the day of the sentencing hearing, Sims stated, "I can't tell you that it was on that day. All I can tell you is that that's a decision that we made." Tr. 595:23–25.

Sims described how his perceptions of the jury influenced his decision-making—

> you get the opportunity to look at the jury, you see their reaction to what is happening in the courtroom, you look at those who are leaning forward at certain times to certain testimony, you look at those who are leaning back and closing their arms at certain testimony, you try to look to see if anybody's shaking their head with where you want to go, and you try to—and during the trial you look at things that are developing.

Tr. 596:24–597:6. Sims testified that "a trial has a life of its own[,]" Tr. 597:7, and in Petitioner's trial, counsel considered the fact that they were "in Orangeburg County . . . back in '97, '98, '99 . . ." and the specifics of Petitioner's crimes when trial counsel determined that the jury would not be receptive to the details of Petitioner's background. Tr. 596:20–597:20. Sims testified that he also considered the racial composition of the jury—the fact that there were both African-Americans and white people on the jury. Tr. 597:21–598:6. Sims stated, "the question at that point is whether or not putting out the background of the individual and the kind of life that they had had as a

child would be effective in light of the facts of the case and the people that you had on the jury." Tr. 598:9–12.

During the evidentiary hearing before this court, Sims could not recall certain details about Petitioner's background, such as Petitioner's age at the time of his parents' deaths. Tr. 598:13–599:14. He testified that he did not believe that trial counsel presented Petitioner's background information to an expert who could have explained how Petitioner's background affected his development. Tr. 599:15–20.

Sims testified that he made himself and his file available to PCR counsel during the state PCR proceedings. Tr. 600:9–16. Sims did not recall anyone who represented the State contacting him about Petitioner's case prior to his receipt of the letter from PCR counsel informing him that the ineffective assistance of counsel claim was no longer part of the PCR application. Tr. 628:2–10.

Sims testified that trial counsel had planned to present a mitigation case regarding Petitioner's AIDS, but Petitioner refused to allow trial counsel to do so. Tr. 603:1–25. Sims testified that part of trial counsel's theory was that SCDC could control Petitioner better due to his diminished health, but more importantly, Petitioner would not have been in prison a long time because of his advanced AIDS status and what people believed about the disease at the time. Tr. 605:1–8.

Petitioner told trial counsel that he did not want his family to hear about his AIDS, but even when trial counsel offered to clear the courtroom for that testimony, Petitioner still refused. Tr. 606:3–18. Sims

stated, "[Petitioner] specifically did not want the jury to know that . . . he had AIDS and had sex with that young lady out there at that time, and he absolutely refused to allow us to put that up." Tr. 603:20–23.

Sims testified that he believed trial counsel's AIDS-based strategy would have given the jury something on which they could have based a decision to give Petitioner a life sentence. Tr. 604:1–12.

Sims testified that trial counsel had to take into consideration the general attitudes in the Orangeburg community when deciding what evidence the jury should hear. Tr. 607:3–19. He testified that the African-American community was not receptive to homosexuality in the late nineties. Tr. 607:13–19. Sims agreed with the following statement by Petitioner's counsel:

> if you put in the background evidence, trauma, childhood disadvantages, you're still going to get to Norris Martin, you're still going to get to the theory that Mr. Stokes was the dominant partner in that homosexual relationship, and you're still going to get to Mr. Stokes then being in control.

Tr. 608:9–15.

Sims testified that Petitioner's confession had a big impact on how trial counsel approached the case. Tr. 608:15–609:2. Based on his own conversations with Petitioner, Petitioner was hired to kill Snipes, and there was no personal grudge on Petitioner's part, nor was there a drug or alcohol component to the crime. Tr. 611:5–612:10.

Sims testified that Petitioner did not have a good reputation in Branchville that "he was a terror in Branchville." Tr. 613:9–17. Sims also testified that he did not think that it would have helped the jury to hear from an expert who testified that on a scale of risk factors, the average score for a murderer was a 7, and Petitioner scored a 9. Tr. 616:1–8.

Sims acknowledged that trial counsel had multiple experts meet with Petitioner, but none offered any diagnosis or opinion that he felt was helpful—"[n]othing that he was dimished capacity or anything like that in terms of mental functioning and that kind of thing, no." Tr. 616:9–15. Sims further agreed that he would have factored in the sadistic nature of the crime and the negative aspects of Petitioner's background in making trial decisions. Tr. 616:16–19.

Sims was not surprised that he did not mention AIDS in his opening statement based on how trial counsel was considering proceeding in the case. Tr. 617:5–12. Sims testified that he ultimately tried to humanize Petitioner during the sentencing phase and to further encourage the jury to choose a life sentence based on Petitioner's confession and remorse. Tr. 617:24–618:20. Petitioner made a statement directly to the jury, and Sims recalled that Petitioner had "a very good persona before the jury . . . ." Tr. 619:1–9.

Sims later agreed with Petitioner's counsel that, in his opinion, "areas of mitigation sort of have an ebb and flow and things come in and out of favor." Tr. 6209–14. He further testified that he did not consult with experienced death penalty counsel regarding that opinion. Tr. 620:15–621:3.

Sims testified that "[t]here were very few people who thought about AIDS in any other way than homosexual relationship, even though it could have been blood transfusions and stuff like that." Tr. 622:18–20.

Upon questioning by the court, Sims provided the following assessment of the African-American community's perception of homosexuality in the late nineties:

> I can specifically say, as an African-American man, that homosexuality was taboo, and to a large degree it's still taboo, but we've become a little more progressive. But at that time, it was just not to be done and you turned off. African-American men and African-American women who would have an idea or an understanding that you had a—were involved in a homosexual relationship, you would completely lose them.

Tr. 624:6–13.

Sims testified that Snipes, Syphrette, and Toothe were all white, and Martin was African-American. Tr. 624:23–625:7. When asked if Petitioner did not want the jury to know that he had AIDS and had sex with Snipes because he had not used proper protection, Sims indicated he did not believe that was Petitioner's rationale. Tr. 625:19–626:4. Sims further testified, "I believe it could have been race that was playing a part. He didn't—he never articulated his reason why he did not want the jury to know that he had had sex with her." Tr. 626:5–8.

H. Virgin Johnson

Johnson testified that he graduated from Benedict College and the University of South Carolina School of Law. Tr. 631:20–25. Johnson went into private practice and had a general practice with about thirty percent criminal cases at the time he was appointed to represent Petitioner. Tr. 632:1–18. Johnson testified that he had tried fifteen or more felony cases in front of a jury prior to his appointment, but he had never been counsel in a capital case. Tr. 633:1–7.

Johnson testified that he had no formal training on capital cases prior to or during his representation of Petitioner. Tr. 633:8–11. He read a number of books on capital cases once he was appointed, but he could not recall the specifics of those books. Tr. 633:12–23. He did not consult with any experienced capital trial counsel other than Sims. Tr. 633:24–634:3.

Johnson testified that representing Petitioner was a "joint effort" between himself and Sims, but he often deferred to Sims, who had much more experience. Tr. 634:4–11. Johnson testified that he was involved in planning trial counsel's strategy for the sentencing phase of trial. Tr. 634:12–15. As to the selection of experts for the sentencing phase, Johnson testified that he and Sims discussed them, but he deferred to Sims. Tr. 635:9–14.

Johnson recalled that trial counsel retained an investigator to assist in the investigation for Petitioner's case. Tr. 635:15–17. He could not recall the investigator's name, but testified that the name B.J. Johns "sounds right." Tr. 635:18–22. Johnson could not

recall the details of the mitigation investigation or whether he had a copy of the memoranda created by the investigator. Tr. 635:25–636:13. Upon being shown Petitioner's Exhibit 51, Johnson recognized some of the memoranda from the mitigation investigator. Tr. 636:14–637:8. Johnson did not recall having any planned meetings with Petitioner's family members or speaking with any of Petitioner's friends or teachers. Tr. 637:9–638:8.

Johnson recalled that Dr. Rodgers was part of the mitigation team assembled by trial counsel. Tr. 638:9–24. Johnson generally recalled the substance of the mitigation team meetings—that they discussed "the strategy of how to keep Sammie from receiving the death penalty." Tr. 639:2–15.

Johnson recognized the proposed witness list from Petitioner's trial. Tr. 639:20–22. He could not recall who Sara Stokes and Ruth Davis were or whether they were present for the sentencing phase. Tr. 639:23–640:11. Johnson recalled that Dr. Rodgers was present in court for some of the proceedings, but he could not remember if he was present on the day of sentencing. Tr. 640:12–18. Johnson remembered Aiken testifying, but he did not recall that any other witnesses testified. Tr. 640:19–641:1.

On cross-examination Johnson recalled the particularly aggravating circumstances of Petitioner's crimes, testifying that "[a]nytime somebody is killed, it's aggravating. However, to cut somebody's nipples off and cut their vagina out, that's pretty aggravating." Tr. 642:15–17. Johnson also recounted Petitioner's other murder where "the tape was around [the victim's] nose,

. . . suffocating over a period of time while you were dying. I thought that would be kind of aggravating." Tr. 643:3–6. Johnson recalled that Petitioner had a history of prison disciplinary violations from prior incarcerations. Tr. 643:22–25. Johnson also testified that Petitioner had been out of prison on parole for only a short time prior to Snipes's murder. Tr. 644:8–12.

While he could not remember the details of the mitigation investigation, Johnson recalled that a mitigation investigation was done. Tr. 644:16–645:8.

Johnson testified that "[t]here were things in [Petitioner's] past that [trial counsel] didn't want to come out . . . ." Tr. 645:12–13. Johnson recalled that Petitioner had a homosexual relationship with Jackie Williams and that Petitioner had written letters to Williams and that the Solicitor had those letters. Tr. 645:14–23. Johnson also remembered that trial counsel's mitigation investigation uncovered allegations that Petitioner had abused Martin when they were growing up. Tr. 645:24–646:4. Johnson noted, "some of it was conjecture, but a lot of stuff was in that statement about that . . . ." Tr. 646:3–4.

Johnson testified that trial counsel had planned to present evidence that Petitioner had AIDS as part of their mitigation investigation, hoping that the jury would choose to give him a life sentence because he would not live long anyway. Tr. 646:5–648:4. However, Petitioner "was adamant that he did not want that information to be presented in court . . . ." Tr. 646:10–11. Johnson testified, "[f]or whatever reason, our strategy after discussing that was not to put any history in. I don't know why. So evidently there was a

reason, but I don't remember what it was." Tr. 646:17–19.

Johnson testified that he did everything that he could to save Petitioner's life. Tr. 648:18–649:5.

On redirect examination, Johnson testified that the aggravating circumstances of Petitioner's crimes "didn't affect how [he] approached [the decisions on how to investigate Petitioner's background], but it sure enough affected how we presented it." Tr. 650:5–9. Johnson further testified,

> People, whether or not they admit it, have certain inner biases. On that jury we had blacks and we had whites. Yes, every time I selected a white—a white juror, I thought about Sammie being a black man raping a white woman and doing what he did. So any time I was preparing for aggravation on anything for that trial, we don't talk about this now, but yes, that was in the back of my mind.
>
> And then with the older black females during that time, more so than the males, is this whole idea of homosexuality. So everything I did in Sammie's case, because we're in the Bible belt, I mean, certain things even now are not acceptable, so every part of that case, I had in my mind, yes.

Tr. 649:17–650:4. Johnson further testified that trial counsel had to consider how to best present their case to the jury, explaining,

> how do you go to a jury and say, look, we want you to look at the fact that he had a poor upbringing, particularly African-American, which a lot of us had struggles coming up, how do you say, well, just because he had a poor upbringing, you need to overlook the fact that he raped this woman, you need to overlook the fact that he cut her vagina out, you need to overlook the fact that he cut her nipples off, you need to overlook the fact that he killed somebody else.

Tr. 650:16–24. Johnson told the court, "[i]f I was trying that case now, it would be a heck of a lot different because the tolerance we have now. But I would change nothing because they just wasn't tolerant of that." Tr. 651:1–4.

Johnson testified that he remembered Petitioner had "a tough upbringing." Tr. 651:12–13. He also testified that he thought that presenting the details of Petitioner's upbringing could have hurt trial counsel's case with the jury. Tr. 652:5–9.

I. Susan Hackett

Susan Hackett testified that she currently works as a staff attorney at the Office of Appellate Defense. Tr. 656:7–17. She testified that she graduated from law school in 2003 then clerked for a state circuit court judge for a year. Tr. 656:21–657:2. She then joined the law firm of Blume Weyble and Lominack, where she worked for two years before becoming the executive director of the Center for Capital Litigation. Tr. 657:2–5. In February of 2008, she left that position and joined the Office of Disciplinary Counsel. Tr. 657:6–8.

In September 2011, she joined the Office of Appellate Defense. Tr. 657:8–9.

Hackett testified that she clerked for Blume's firm while she was in law school. Tr. 657:10–15. In addition to handling administrative tasks, she met with clients, conducted some investigations, performed legal research, drafted legal memoranda, and helped draft pleadings. Tr. 658:6–12.

Hackett did not have any recollection of working on Petitioner's case prior to her appointment in Lominack's stead. Tr. 659:2–19. She testified that she was appointed to handle a number of Lominack's cases after his departure from the practice of law. Tr. 659:13–19.

While an associate with the law firm of Blume Weyble and Lominack, Hackett attended a number of training sessions on the development and presentation of mitigation evidence, including national conferences and in-house training sessions. Tr. 660:2–13. Hackett testified that prior to representing Petitioner, she had presented a mitigation case to a judge, but not a jury. Tr. 660:14–661:1. Hackett testified that, in her view, the role of mitigating evidence is to save the life of a defendant and to humanize him. Tr. 661:2–10. She testified that almost anything could serve as mitigating evidence:

> You can show the jury that this is an aberration in this person's life, and there's certainly individuals for whom that is true. And other times you show the jury that this bad day is a product of the really horrible upbringing or any

> other of the peer pressures that may be involved, family pressures that may be involved, drug abuse, alcohol abuse. Anything that sort of helps explain that bad day of the crime is mitigating.

Tr. 661:20–662:2.

Hackett testified that when she was first appointed to Petitioner's case, there was little being done on it. Tr. 662:3–10. She recalled meeting with Petitioner "quite a bit," reviewing the transcripts from his case, and reviewing trial counsel's file. Tr. 662:10–18. Although she did not have an independent recollection of reviewing the PCR applications, Hackett testified that she was certain that she did review them. Tr. 662:19–24.

Hackett testified that she was primarily brought onto the case to try to help determine if there was evidence that Petitioner had mental retardation. Tr. 663:1–8. To that end, she reviewed documentation that had been gathered or created by the mitigation investigator. Tr. 663:9–664:1. Hackett testified that she did not recall personally investigating the intellectual disability claim by speaking to witnesses or gathering documents. Tr. 663:9–664:1. She testified, "this is based primarily on the documents that have been provided to me in preparation for my testimony. The independent recollection of what happened so long ago is almost nonexistent. But I have reviewed those documents and they've refreshed it." Tr. 663:20–24.

Hackett testified that she never recommended to Weyble to amend the application to include a claim that trial counsel were ineffective for failing to present

sufficient mitigation evidence. Tr. 665:1–4. She testified that she was not removed from Petitioner's case until she left the Center for Capital Litigation. Tr. 665:5–16.

On cross-examination, Hackett clarified that she was not focused solely on the mental retardation claim, but that she "was reviewing every aspect of his case to see if there was something that we could do to help Mr. Stokes." Tr. 667:5–8. She then reiterated that she "reviewed the mitigation investigator's notes that [PCR counsel] had from trial counsel, as well as the one that we got from Ms. Dean . . . I don't have an independent recollection of doing that at the time. I've relied on the documentation . . . provided to me in that regard . . . ." Tr. 667:11–17. Hackett remembered being "extremely frustrated with the lack of documentation that we had." Tr. 668:3–4.

Hackett testified that both she and Weyble were present when Petitioner was evaluated by DDSN. Tr. 668:10–14.

Hackett testified that she was not told why Weyble and Lominack withdrew the ineffective-assistance-of-trial-counsel claim. Tr. 668:24–669:9. When asked if she ever told Weyble to put the claim back in or if she amended the application to do so, she stated, "Regretfully, I did not." Tr. 668:15–23.

Hackett testified that Weyble, Lominack, and she were relatively inexperienced in capital litigation. Tr. 669:4–14. She testified that Blume and Bruck were more qualified in the area, and while Bruck had left

the state prior to her joining the firm, Blume was around for guidance. Tr. 669:7–21.

J. Closing Arguments

In closing arguments, Petitioner's counsel offered the "position that the jury in this highly aggravated case, having heard nothing about the childhood and background and trauma of Mr. Stokes, did not result in a reliable verdict." Tr. 674:24–675:2. Petitioner's counsel argued that there were a number of "red flags" in trial counsel's investigation that should have alerted them to the need to determine whether Petitioner's background affected his later actions. Tr. 675:9–11.

Petitioner's counsel challenged the testimony given by trial counsel, arguing it was unclear how an attorney could look at a jury and know what it would and would not believe. Tr. 675:20–676:4. As to the testimony that mitigation themes ebb and flow, Petitioner's counsel noted that opinion was unsupported by training or consultation with experienced capital litigators. Tr. 676:5–19. Petitioner's counsel further argued that the negative information that could have come out had trial counsel presented Petitioner's background "pale[d] in comparison to the bad things that the jury had already heard about Mr. Stokes which took on a much greater importance and impact because they were not countered by any mitigation whatsoever." Tr. 677:9–12.

Petitioner's counsel argued that Dr. Garbarino's testimony showed the type of expert that could have been presented by trial counsel to explain how Petitioner's childhood traumas affected him as an

adult. Tr. 677:13–678:24. Petitioner's counsel argued that Petitioner's childhood experiences were "not just reasons to feel sorry for the client, however. It is a way to help and explain and contextualize his conduct. For example, it is not just sad that his mother died. That kind of trauma with no intervention has effects on behavior." Tr. 678:25–679:4.

As to PCR counsel, Petitioner's counsel noted,

> You heard from both of them unequivocal testimony that whatever reason they had for dropping the claim, as we discussed with trial counsel, that would not have been a reasonable decision because they did not know entirely what claim they were dropping. They knew about the facts. They knew the facts were sad. They did not know the impact of those facts on Sammie.

Tr. 680:5–11.

In their closing, Respondents' counsel first focused on whether PCR counsel performed deficiently. Tr. 680:23–682:9. Respondents' counsel argued that qualified PCR counsel were appointed, and they adopted and then further supported the claim that trial counsel were ineffective for failing to present an adequate mitigation case. Tr. 681:11–15. However, after fully investigating the trial and trial counsel's representation, and after performing their own mitigation investigation, PCR counsel withdrew that claim. Tr. 681:19–25. Respondents' counsel submitted that there had been no evidence that the decision was the result of neglect or ignorance on the part of PCR

counsel. Tr. 682:1–9. Respondents' counsel noted that PCR counsel could not provide an explanation for their decision to withdraw the claim, arguing that Petitioner could not rely on the absence of evidence to carry his burden of proof as to PCR counsel's deficiency. Tr. 682:3–9.

Respondents' counsel argued that there were problems with the mitigation presentation offered by Petitioner, referencing flaws in Dr. Garbarino's testimony and alluding to negative information in Petitioner's background. Tr. 682:10–683:10. According to Respondents' counsel, the proposed mitigation strategy "wouldn't hold up under questioning and it wouldn't work in the real world of juries." Tr. 682:21–23.

Respondents' counsel finally contrasted the testimony of PCR counsel with that of trial counsel, arguing that trial counsel were forthcoming with their trial strategy. Tr. 683:11–684:19. Respondents' counsel asserted that trial counsel made a reasonable strategic decision based on the advice of experts and based on their own experience with jury trials in their community. Tr. 684:5–14. Respondents' counsel submitted that PCR counsel had likely come to the same conclusion following their investigation, and that is why they withdrew the claim. Tr. 684:20–685:4.

Respondents' counsel contends that Petitioner failed to show the default of Petitioner's Grounds Six and Seven should be excused and asks that court to apply the procedural bar. Tr. 685:5–8.

V. Discussion

A. Federal Habeas Issues

Petitioner now asserts he is entitled to a writ of habeas corpus on the following claims:

Ground Three: Mr. Stokes' right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was violated as a result of representation by counsel who labored under an actual conflict of interest.

Grounds Four and Five: Appellate counsel deprived Mr. Stokes of his Sixth Amendment right to counsel when he failed to raise on direct appeal the trial court's related failures to: (1) conduct an independent assessment of the evidence to determine which statutory mitigators were supported by the evidence and (2) instruct the jury on a mitigator for which there was evidentiary support.

Ground Six: Trial and collateral counsel were ineffective to the prejudice of Mr. Stokes by failing to investigate, develop and present any mitigation evidence.

Ground Seven: Mr. Stokes' Sixth Amendment right to the effective assistance of counsel was violated when his trial counsel offered an expert witness not suitable for the case and failed to prepare that witness.

[ECF No. 22 at 9–17, ECF No. 75 at 5, 32].[17]

B. Standard for 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). The movant bears the initial burden of demonstrating that summary judgment is appropriate; if the movant carries its burden, then the burden shifts to the non-movant to set forth specific facts showing that there is a genuine issue for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). If a movant asserts that a fact cannot be disputed, it must support that assertion either by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials;" or "showing . . . that an

[17] Petitioner withdrew Grounds One, Two, and Eight. [ECF No. 140]. To avoid confusion, the undersigned has maintained the numbering used in the petition rather than renumber the remaining grounds. Thus, Grounds One, Two, and Eight will not be further addressed herein, as they were withdrawn. [*See* ECF No. 151].

adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

In considering a motion for summary judgment, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in favor of the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id*. at 248.

C. Habeas Corpus Standard of Review

1. Generally

Because Petitioner filed his petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), review of his claims is governed by 28 U.S.C. § 2254(d), as amended. *Lindh v. Murphy*, 521 U.S. 320 (1997); *Noland v. French*, 134 F.3d 208, 213 (4th Cir. 1998). Under the AEDPA, 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 at the state court proceeding. 28 U.S.C. § 2254(d)(1)(2); *see Williams v. Taylor*, 529 U.S. 362, 398 (2000). "[A] federal habeas court may not issue the writ simply because that court concludes in its

independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id*. at 410. Moreover, state court factual determinations are presumed to be correct and the petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

2. Procedural Bar

Federal law establishes this court's jurisdiction over habeas corpus petitions. 28 U.S.C. § 2254. This statute permits relief when a person "is in custody in violation of the Constitution or laws or treaties of the United States[,]" and requires that a petitioner present his claim to the state's highest court with authority to decide the issue before the federal court will consider the claim. *Id*. The separate but related theories of exhaustion and procedural bypass operate in a similar manner to require a habeas petitioner to first submit his claims for relief to the state courts. A habeas corpus petition filed in this court before the petitioner has appropriately exhausted available state-court remedies or has otherwise bypassed seeking relief in the state courts will be dismissed absent unusual circumstances detailed below.

a. Exhaustion

Section 2254 contains the requirement of exhausting state-court remedies and provides as follows:

> (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to

the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254.

The statute requires that, before seeking habeas corpus relief, the petitioner first must exhaust his state court remedies. 28 U.S.C. § 2254(b)(1)(A). In South

Carolina, a person in custody has two primary means of attacking the validity of his conviction: (1) through a direct appeal, or (2) by filing an application for PCR. State law requires that all grounds be stated in the direct appeal or PCR application. Rule 203 SCACR; S.C. Code Ann. § 17-27-10, *et seq*.; S.C. Code Ann. § 17-27-90; *Blakeley v. Rabon*, 221 S.E.2d 767 (S.C. 1976). If the PCR court fails to address a claim as is required by S.C. Code Ann. § 17-27-80, counsel for the applicant must make a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP. Failure to do so will result in the application of a procedural bar by the South Carolina Supreme Court. *Marlar v. State*, 653 S.E.2d 266 (S.C. 2007).[18] Furthermore, strict time deadlines govern direct appeal and the filing of a PCR in the South Carolina courts. A PCR must be filed within one year of judgment, or if there is an appeal, within one year of the appellate court decision. S.C. Code Ann. § 17-27-45.

The United States Supreme Court has held that "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process"—which includes "petitions for discretionary review when that review is part of the

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[18] In *Bostick v. Stevenson*, 589 F.3d 160, 162–65 (4th Cir. 2009), the Fourth Circuit found that, prior to the Supreme Court of South Carolina's November 5, 2007 decision in *Marlar*, South Carolina courts had not been uniformly and strictly enforcing the failure to file a motion pursuant to Rule 59(e), SCRCP, as a procedural bar. Accordingly, for matters in which there was a PCR ruling prior to November 5, 2007, the court will not consider any failure to raise issues pursuant to Rule 59(e) to effect a procedural bar.

ordinary appellate review procedure in the State." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). This opportunity must be given by fairly presenting to the state court "both the operative facts and the controlling legal principles" associated with each claim. *Baker v. Corcoran*, 220 F.3d 276, 289 (4th Cir. 2000) (internal citations omitted). That is to say, the ground must "be presented face-up and squarely." *Mallory v. Smith*, 27 F.3d 991, 995 (4th Cir. 1994) (citation and internal quotation marks omitted).

b. Procedural Bypass

Procedural bypass, sometimes referred to as procedural bar or procedural default, is the doctrine applied when a petitioner who seeks habeas corpus relief as to an issue failed to raise that issue at the appropriate time in state court and has no further means of bringing that issue before the state courts. In such a situation, the person has bypassed his state remedies, and, as such, is procedurally barred from raising the issue in his federal habeas petition. Procedural bypass of a constitutional claim in earlier state proceedings forecloses consideration by the federal courts. *See Smith v. Murray*, 477 U.S. 527, 533 (1986). Bypass can occur at any level of the state proceedings if the state has procedural rules that bar its courts from considering claims not raised in a timely fashion.

The South Carolina Supreme Court will refuse to consider claims raised in a second appeal that could have been raised at an earlier time. Further, if a prisoner has failed to file a direct appeal or a PCR and the deadlines for filing have passed, he is barred from

proceeding in state court. If the state courts have applied a procedural bar to a claim because of an earlier default in the state courts, the federal court honors that bar. As the Supreme Court explains:

> . . . [state procedural rules promote] not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case.

Reed v. Ross, 468 U.S. 1, 10–11 (1984).

3. Cause and Actual Prejudice

Because the requirement of exhaustion is not jurisdictional, this court may consider claims that have not been presented to the state courts in limited circumstances in which a petitioner shows sufficient cause for failure to raise the claim and actual prejudice resulting from the failure, *Coleman*, 501 U.S. at 750, or by "prov[ing] that failure to consider the claims will result in a fundamental miscarriage of justice." *Lawrence v. Branker*, 517 F.3d 700, 714 (4th Cir.), *cert. denied*, 555 U.S. 868 (2008). A petitioner may prove cause if he can demonstrate ineffective assistance of counsel relating to the default, show an external factor which hindered compliance with the state procedural rule, or demonstrate the novelty of a particular claim. *Id*. Absent a showing of "cause," the court is not required to consider "actual prejudice." *Turner v. Jabe*, 58 F.3d 924 (4th Cir. 1995). However, if a petitioner demonstrates sufficient cause, he must also show

actual prejudice to excuse a default. *Murray*, 477 U.S. at 492. To show actual prejudice, the petitioner must demonstrate more than plain error.

D. Analysis

1. Ground Three

In Ground Three, Petitioner asserts that his right to counsel under the Sixth and Fourteenth Amendments was violated because he was represented by counsel who labored under an actual conflict of interest. Petitioner submits the conflict arose because Thomas Sims prosecuted an assault and battery with intent to kill ("ABWIK") case against Petitioner in 1991[19] and because that ABHAN conviction was later used by the State in the sentencing phase in 1999. According to Petitioner, Sims was unconcerned about the potential conflict, but the conflict became problematic when Sims had to cross-examine the ABHAN victim, Petitioner's ex-wife Audrey Smith, during the sentencing phase of Petitioner's trial. Respondents, on the other hand, assert the PCR court reasonably concluded there was no actual conflict of interest in Sims's representation of Petitioner and, alternatively, that Petitioner waived any such conflict.

a. PCR Court's Findings

The PCR court made extensive findings in considering and rejecting this claim. The PCR court first described the issue and outlined the facts of the

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[19] Petitioner was convicted of the lesser-included offense of aggravated assault and battery of a high and aggravated nature ("ABHAN"). [ECF No. 19-7 at 46].

ABWIK prosecution and its later relevance to the State's case in aggravation:[20]

> The Applicant in this specification asserts that counsel Thomas Sims had an actual conflict of interest in representing Stokes because he had previously personally prosecuted Stokes on Indictment 91-GS-38-0190 involving the December 2, 1990 incident involving the assault on Audrey Smith that resulted in a 1991 conviction for assault and battery of a high and aggravated nature and sentence of 10 years after a jury trial before Judge John H. Smith. The record also reveals that Sims signed the indictment for assault and battery with intent to kill and personally handled the trial. Further, the evidence of the 1991 conviction and sentence was introduced by the State in the penalty phase in State Exhibit One in the chart [ROA 1110-1111] and also through the penalty phase testimony of Audrey Smith. It should be noted that counsel Sims cross-examined Smith in the matter. The record reveals that there is no indication on n the record before the jury that Sims had prosecuted Stokes.
>
> This Court finds as a fact, based upon the credible testimony of both Virgin Johnson and Thomas Sims, that Stokes knowing and voluntarily waived a conflict of interest and with full knowledge of the conflict and ability to have a different lawyer desired to have Thomas Sims

[20] The undersigned has quoted the PCR court's order verbatim.

continue to represent him in the trial. Applicant failed in their burden of proof at the PCR hearing and failed to timely call the Applicant to contradict the testimony of either Mr. Johnson or Mr. Sims. The belated presentation of a statement of Applicant after the hearing is insufficient to satisfy their burden of proof under these discrete circumstances.

How This Issue Was Presented

Judge Shuler appointed Thomas Sims after initially appointing Virgin Johnson. A pretrial hearing was held on January 19, 1999 in Stokes presence by Judge Shuler. During the qualification, Sims noted that he was in the Solicitors Office from 1982-1993. ROA 1502-1504. No objection is made to the representation by either Sims or Stokes. Nothing is stated on the record about Sims prior prosecution of Stokes in the earlier matter involving Audrey Smith. A review of the trial record reveals no further on the record inquiry concerning the prior representation. In the penalty phase of the trial, the Solicitor indicates that he is presenting the chart, State Exhibit One, rather than the indictments to remove any potential prejudice. ROA 1085.

The Stokes-Audrey Smith Trial

This Court has before it the transcript of the March 12, 1991 trial of Stokes for the incident against Audrey Smith. Plaintiff Exhibit 1. The 1991 record reveals that Sims personally

prosecuted the case and signed the indictment against Stokes. The victim, Audrey Smith, the ex-wife of Stokes was the primary witness. The crime involved a December 2, 1990 incident between them. At the trial, Stokes was represented by Reddick Bowman. However, Stokes chose to waive his presence in court during the trial. 1991 Tr. p. 4-14. Audrey Smith testified in the 1991 trial that Stokes had gone on a walk with her to a schoolyard and then took her clothes off and forced her to have sex with him after she refused. 1991 Tr. p. 43. She stated that he had a letter that stated he was going to kill her that night and he told her that he had changed his mind. 1991 Tr. p. 44. He later took out an extension cord and put it around her neck and held it tight until she became unconscious. 1991 Tr. p. 46. She later woke up in the field and called 911 from a nearby house. 1991 Tr. p. 46-47.

During cross-examination by Mr. Bowman, Smith stated that when she woke up she reached for her shoes and hid when she saw some automobiles because she thought that Stokes was returning. 1991 Tr. p. 48-49. She admitted that Stokes did not own an automobile, but had friends who did. She said he was supposed to arrive at 6 the evening before, but did not get there until 7 PM at Turnkey Apartments in Branchville. 1991 Tr. p. 50. She stated that they traveled across the open field. She stated that they went up there at the schoolyard swinging and two of his friends came

by. 1991 Tr. p. 52-53. A little while after the friends left, she stated that they had sex. 1991 Tr. p. 53. She stated sometime after that he put the cord around her neck but she could not be definite about the time. 1991 Tr. p. 54.

Counsel Bowman then inquired of her concerning matters presented at a preliminary hearing. 1991 Tr. p. 56. Smith stated that she thought she did say to the police that Stokes took the letter back from her because he feared that she would take it to the police. 1991 Tr. p. 59. She admitted that she was afraid of Stokes who did not let her talk to his friends, however, she did not scream in fear that date nor have any conversation with his friends. 1991 Tr. p. 60-61. She stated that they would not have help her anyways because they were his friends. 1991 Tr. p. 62.

After Smith testified, Stokes remained outside of court due to his dissatisfaction with appointed counsel and the court's refusal to delay the matter to allow him to attempt to retain counsel. 1991 Tr. p. 67-68.

Solicitor Sims next asked Smith on re-direct examination concerning why she did not request help from the two men at the schoolyard when they came up. She stated that she had not seen the threatening letter yet and that they were just sitting and talking then. 1991 Tr. p. 71-72.

Audrey Smith's Testimony in the 1999 Penalty Phase

In the State's case in aggravation in 1999, Solicitor Bailey put in the record the following criminal record concerning Stokes:

March 9, 1998	Assault and Battery of a High and Aggravated Nature – 8 years and 5 years probation
August 31, 1990 -	Paroled from conviction.
March 13, 1991 -	Assault and Battery of a High and Aggravated Nature. 10 year sentence.
April 3, 1991 -	Parole from first sentence revoked.
February 11, 1993	Assault and Battery of a High and Aggravated Nature 3 years consecutive.

ROA. 1110-1111.

The state also presented the testimony of Audrey Smith, the Applicant's ex-wife who testified about incidents where Stokes assaulted her. The incidents included a November 1987 incident when Stokes held a knife to her throat which resulted in a tussle and her hands getting cut when she tried to grab the knife and held her hostage and threatened to kill her children and brother if she made a sound. ROA 1115-1117.

She later attempted to call for her brother after he placed her in a ditch and Stokes stabbed her three times in the back and then he fled. ROA 1118-1119. She then stated she went to the hospital. ROA 1119. He was convicted in March due to that assault.

Ms. Smith next described an incident on December 2, 1990. ROA 1119. Stokes had gotten out on an early release program. Smith was staying at her mother's home. Stokes came by and they went for a walk up the hill implicitly to get something that a lady was making for him. However, he forced her to have intercourse with him and then went to the high school and gave her a letter that stated he was going to kill her that night. ROA 1120-21. She said they walked away and that Stokes declared that he was looking for guns that he left in a field. Unable to find the guns, Stokes pulled out an extension cord with knots on it and put the cord around her neck and she passed out. When she awoke, she was bleeding and fled to the emergency room. ROA 1125. She stated that she was in the hospital for 3 to 4 weeks. ROA 1125. She stated that this included being in the regular part of the hospital for 8 days and then being placed in the Rose Center, a place for people with mental and emotional problems for 11 to 12 days to deal with returning to Branchville. ROA 1126. Smith testified that as a result of this assault on March 31, 1991, Stokes received aa ten year sentence. Id.

> Smith testified that while being locked up he wrote her a series of threatening letters towards her or anyone who may attempt to aid her. State Exhibit 2, 3, 4, 5, 6, 7, 8. ROA 1127-1138. She denied that she had ever done anything to cause him to stab her or attempt to strangle her. ROA 1138.
>
> On cross-examination, defense counsel Simms had her confirm that Stokes had no direct contact with her after he got out of prison and had not come around or called her in 1998. She stated that it had been a couple of years since Stokes had written her. ROA 1139-1140. She asserted that Stokes had told her when they were having problems that he was on drugs and jealous, and possessive of her. ROA 1140-41. She confirmed that in a number of the letters Stokes wrote that he was asking to be able to talk and write him and that he was trying to get his head straight. Id.
>
> On re-direct examination, she stated that she had to go to Branchville Police Department and the Parole Department to get the letters stopped. ROA 1141.

[ECF No. 19-6 at 174–78 (footnote omitted) (errors in original)].

The PCR court concluded that Sims's prior prosecution of Petitioner did not create an actual conflict of interest. [ECF No. 19-6 at 179]. The PCR court gave great weight to the testimony of Sims and co-counsel Johnson, who both testified that they

discussed the prior prosecution with Petitioner. [ECF No. 19-6 at 180, 183]. Both attorneys also confirmed that Petitioner did not request different counsel after their discussions. [ECF No. 19-6 at 180–81, 183–84]. According to the PCR court's factual findings, Sims attempted to exclude the ABHAN conviction from the penalty phase, but "he knew it was coming in and that he needed to address it with a showing of remorse." [ECF No. 19-6 at 181–82]. Sims denied that his prior prosecution of Petitioner had any effect on his handling of Smith's testimony, and he testified that if he thought his representation could have been compromised by the prior prosecution, then he would not have been on the case. [ECF No. 19-6 at 181–82]. Johnson similarly confirmed that Sims did his best in representing Petitioner and that the prior prosecution did not affect his performance. [ECF No. 19-6 at 184].

The PCR court found that there was no *per se* conflict of interest based on counsel's prior prosecution of Petitioner for a different crime. The PCR court cited a South Carolina Supreme Court opinion affirming a trial court's refusal to relieve counsel at a defendant's request where counsel had previously prosecuted the defendant on a separate crime but the defendant failed to show either divided loyalties or an actual conflict of interest. [ECF No. 19-6 at 184 (citing *State v. Childers*, 645 S.E.2d 233, 235 (S.C. 2007))]. The PCR court further found where "there was no evidence of conflict, or even serious potential conflict under the particular facts of [Petitioner's] case, there could be no Sixth or Fourteenth Amendment error." [ECF No. 19-6 at 185]. The PCR court relied upon the United States Supreme Court opinion in *Mickens v. Taylor*, 535 U.S. 162

(2002), in which the Court announced that "'an actual conflict of interest' mean[s] precisely a conflict *that affected counsel's performance*—as opposed to a mere theoretical division of loyalties." [ECF No. 19-6 at 185 (quoting *Mickens*, 535 U.S. at 171 (emphasis in original))]. The PCR court found that counsel did not perceive there to be any conflict, nor did Petitioner express any complaint about counsel prior to trial. [ECF No. 19-6 at 185]. The PCR court then expressly found as follows:

> In this case, with at least a six (6) year lapse between Sims being a prosecutor, any divided loyalties argument must fail. Additionally, there was no connection between the former offense and the instant case. The only matter was the existence of the conviction—a proven fact—as evidence in aggravation and the fact that Audrey Smith testified in the penalty phase about the circumstances of the conviction. There is no showing that the prior prosecution adversely affected his representation of Stokes based upon this state witness (Audrey Smith)—a person whom he never represented. There were no divided loyalties in the matter.

[ECF No. 19-6 at 187].

The PCR court made an alternative finding that Petitioner had knowingly waived any conflict of interest, noting that the South Carolina Appellate Court Rules provide for a waiver of some attorney conflicts of interest where the attorney believes the representation will not be adversely affected and the client consents to the representation after consultation.

[ECF No. 19-6 at 188]. While recognizing that some conflicts of interest cannot be waived, the PCR court determined that such was not an issue in Petitioner's case and further concluded:

> Here, Stokes was aware that Sims had prosecuted him in 1990–1991. He was aware—based upon the credible testimony of Virgin Johnson that he could have somebody else represent him and he stated no. This Court finds that the Applicant waived his right to have counsel other than Thomas Sims represent him.

[ECF No. 19-6 at 194].

b. PCR Court's Adoption of Proposed Order

The undersigned first addresses Petitioner's argument that this court's review of the PCR court's order should be "[t]empered" because the PCR court "adopted the [State's proposed] order, *in toto*, typos and all . . . ." [ECF No. 51 at 32, 33]. This court and others have criticized such practices by state courts. *See, e.g., Longworth v. Ozmint*, 302 F. Supp.2d 535, 540–42 (D.S.C. 2003) ("This Court agrees with the Petitioner, as does the Fourth Circuit, that this method of issuing orders is not the preferred method of decision-making."). However, the Fourth Circuit has held that "'[t]he adoption of one party's proposed findings and conclusions . . . [,]'" while disfavored, "is unquestionably an 'adjudication' by the state court. If that court addresses the merits of the petitioner's claim, then § 2254(d) must be applied." *Young v. Catoe*, 205 F.3d 750, 755 n.2 (4th Cir. 2000). Petitioner recognizes as

much in his petition and provides no distinguishing factors that would warrant the application of a different standard of review in light of the controlling precedent. [*See* ECF No. 51 at 37]. Accordingly, the undersigned rejects this argument.

c. PCR Court's Finding of No Actual Conflict of Interest

According to Petitioner, the PCR court's finding that he did not demonstrate an actual conflict of interest was based on an unreasonable determination of the facts.

It is well-established that the Sixth Amendment guarantees a criminal defendant to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685–86 (1984). To provide effective assistance, counsel should be free from conflicts that will hinder their representation and ultimately prejudice their clients. The United States Supreme Court has held "that the possibility of a conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). Further, "until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Id.* In contrast to the normal burden under *Strickland* in which a defendant must show both deficiency and prejudice, "a defendant who shows that a conflict of interest actually affected the

adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Id*. at 349–50.

As outlined above, the PCR court's conclusion that Petitioner was not entitled to post-conviction relief as a result of any conflict of interest was based on multiple, different findings. These findings included the PCR court's determination that there was no *per se* conflict of interest due to Sims's prior prosecution of Petitioner for a different crime, that Petitioner failed to meet his burden of proving that Sims labored under a conflict of interest due to his prior prosecution of Petitioner, and that Petitioner failed to show that Sims's representation of Petitioner was adversely affected by his prior prosecution of Petitioner. [ECF No. 19-6 at 184–94].

As part of the PCR court's analysis, the court found "there was no connection between the former offense and the instant case. The only matter was the existence of the conviction—a proven fact—as evidence in aggravation and the fact that Audrey Smith testified in the penalty phase about the circumstances of the conviction." [ECF No. 19-6 at 187]. Petitioner disagrees with the PCR court's characterization of the connection between the cases, asserting "[t]his is a gross understatement of what happened." [ECF No. 172 at 41]. Petitioner notes that it was not merely the fact that Petitioner had been convicted of ABHAN that was presented to the jury, but also the facts of the crime itself that the jury heard from Audrey Smith. [ECF No. 172 at 41]. In addition, Petitioner asserts that "[t]his same cramped understanding of the relationship between the two proceedings also underscored the state

court's inexplicable conclusion Sims suffered no 'divided loyalties.'" [ECF No. 172 at 41].

The undersigned cannot find that the PCR court made unreasonable factual findings regarding the relationship between the ABWIK case and the capital case. The record supports the PCR court's finding that the crimes themselves were not connected, but were against two separate victims; they occurred years apart, and the impetus for the Snipes murder was a contract for money, and there was no evidence of a contract for hire in the assault against Smith, which was primarily a domestic abuse. The PCR court's order imprecisely describes Smith's testimony as about "the circumstances of the conviction," as opposed to the circumstances of the crime, but the order itself includes a synopsis of Smith's testimony, thereby recognizing that Smith testified to the facts of the crime itself during the sentencing proceeding. Although arguably inartfully phrased, the language of the PCR court's order does not rise to the level of an unreasonable factual finding. *Cf. Williams v. Taylor*, 529 U.S. 362, 410 (2000) (explaining that "[t]he term 'unreasonable' is no doubt difficult to define[,]" but also noting that "Congress specifically used the word 'unreasonable,' and not a term like 'erroneous' or 'incorrect'" in 28 U.S.C. § 2254). The undersigned further notes that the PCR court also recognized both the scope of Sims's participation in the ABWIK case and the subsequent use of the underlying facts in the sentencing phase of Petitioner's trial. Nevertheless, the PCR court found that the fact that Sims had previously prosecuted Petitioner for a crime that was presented as a part of

the State's case in aggravation did not in and of itself create a conflict of interest for Sims at that stage.

The PCR court's finding that there was no conflict of interest was based, in part, on Sims's and Johnson's testimony that Sims was not hampered by a conflict of interest, testimony which the PCR court apparently found credible. [*See* ECF No. 19-6 at 185]; *see also*, *Cagle v. Branker*, 520 F.3d 320, 324 (4th Cir. 2008) (citing 28 U.S.C. § 2254(e)(1)) ("[F]or a federal habeas court to overturn a state court's credibility judgments, the state court's error must be stark and clear."); *see also Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) ("28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them."). Contrary to Petitioner's assertion that the PCR court failed to grapple with the question of whether Sims's own self-interest created a conflict, the PCR court found there to be "*no showing* that the prior prosecution adversely affected his representation of Stokes based upon this state witness (Audrey Smith)—a person whom he never represented." [ECF No. 19-6 at 187 (emphasis added)]. Petitioner bore the burden to present credible evidence that Sims's self-interest created a conflict. *See Pauling v. State*, 503 S.E.2d 468, 470 (S.C. 1998) ("In a post-conviction proceeding, the burden is on the applicant to prove the allegations in his application."). As detailed herein, the United States Supreme Court has made clear that a conflict of interest must be more than "a mere theoretical division of loyalties[,]" *Mickens*, 535 U.S. at 171, and Petitioner failed to make a sufficient showing to the PCR court that there was an actual conflict,

which necessarily includes an adverse effect. Petitioner simply failed to meet his burden. Accordingly, in addition to finding that there was no *per se* conflict of interest, the PCR court concluded that there was no conflict of interest based on the evidence presented at the PCR evidentiary hearing. The undersigned cannot find that the PCR court's determination that there was no conflict of interest was based on unreasonable factual findings.

Although Petitioner has not argued that the PCR court's conclusion was based on an unreasonable application of Supreme Court law, Petitioner references multiple cases in which other courts have found a conflict of interest where defense counsel previously prosecuted a client on a charge that was later used as enhancement for the sentence of the subsequent crime on which defense counsel was representing the client. For example, Petitioner draws the court's attention to the Seventh Circuit's decision in *United States v. Ziegenhagen*, 890 F.2d 937 (7th Cir. 1989). In that case, Ziegenhagen was represented on a firearms possession charge by counsel who appeared on behalf of the district attorney's office twenty years earlier to recommend a sentence on two convictions. 890 F.2d at 938. The government intended to use those two 20-year-old convictions to enhance Ziegenhagen's sentence on the possession charge. *Id*. Counsel learned of his role in Ziegenhagen's former sentencing proceeding prior to trial, and counsel discussed the possible conflict with the prosecutor (who felt there was no conflict) and with Ziegenhagen (who did not say anything regarding that information). *Id*. at 939. However, counsel did not inform the district court of

the situation. *Id*. The Seventh Circuit found "[t]his former representation amounted to an actual conflict of interest," noting "the prosecutorial role that Ziegenhagen's counsel took in the earlier convictions was substantial enough to represent an actual conflict of interest." *Id*. at 940–41. Upon finding a conflict, the Seventh Circuit went on to explain that

> Despite the fact that Ziegenhagen had been convicted by a jury of the present offense, that does not mean that [his counsel] could not decide his defense strategy either at sentencing or on appeal on the basis of the conflict. Needless to say, there may be countless ways in which the conflict could have hindered a fair trial, the sentencing hearing or even this appeal. We cannot say that there was nothing another attorney could have argued based on the record to more zealously advocate on this defendant's behalf. Thus, we presume Ziegenhagen was prejudiced by [counsel's] representation.

Id. at 941. In *Ziegenhagen*, which was decided in 1989, the Seventh Circuit did not have the Supreme Court's clarification in 2002 that "'an actual conflict of interest' mean[s] precisely *a conflict that affected counsel's performance*—as opposed to a mere theoretical division of loyalties." *Mickens*, 535 U.S. at 171. The above-excerpted passage indicates that the Seventh Circuit did not apply that standard. Instead, because the Seventh Circuit could not say that the conflict did not affect counsel's performance, it presumed prejudice. The Seventh Circuit's course in *Ziegenhage*n is inconsistent with the standard established by *Cuyler*

and *Mickens*. The fact that the Seventh Circuit found an attorney conflict of interest in a case prior to the Supreme Court's explicit clarification of the relevant standard does not render the PCR court's finding of no conflict in the instant case unreasonable.[21]

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[21] Respondents similarly rely upon a pre-*Mickens* case to support their argument that the PCR court reasonably found that there was no actual conflict of interest in Petitioner's case, drawing the court's attention to *Hernandez v. Johnson*, 108 F.3d 554 (5th Cir. 1997), another case with similarities to this matter, but where the court found no actual conflict of interest. Hernandez was convicted of capital murder and sentenced to death while represented by counsel who had previously worked at the district attorney's office when Hernandez was convicted of two other felonies, aggravated assault with a deadly weapon in 1976 and murder in 1978. 108 F.3d at 556, 558. Although counsel had not acted as trial counsel in either of those earlier cases, he had

> signed a motion requesting psychiatric evaluation of [Hernandez] in connection with the 1978 charge, signed a motion to dismiss a related indictment after Hernandez pled guilty, and probably approved Hernandez's plea bargain. With respect to the 1976 felony, [counsel] signed two applications for subpoenas and moved to dismiss related charges after appellant pled guilty.

Id. at 558–59 (footnote omitted). The Fifth Circuit stated that it would "assume *arguendo* that the putative conflict presented by [counsel's] prior service as district attorney when Hernandez was convicted of felonies in Webb County present[ed] a *Cuyler* problem, although [counsel] did not represent multiple *defendants* but two parties with arguably disparate interests." *Id*. at 559–60. Hernandez's counsel withdrew a motion that would have challenged the prior convictions; nevertheless, the court was not convinced that there was an actual conflict of interest. *Id*. at 560. The Fifth Circuit also dismissed the notion that counsel had actively represented conflicting interests, noting that counsel's participation was not personal and substantial enough to give rise

In his reply, Petitioner relies upon the United States Supreme Court's recent opinion in *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), in which the Court considered the following issue:

> [T]he Supreme Court of Pennsylvania vacated the decision of a postconviction court, which had granted relief to a prisoner convicted of first-degree murder and sentenced to death. One of the justices on the State Supreme Court had been the district attorney who gave his official approval to seek the death penalty in the prisoner's case. The justice in question denied the prisoner's motion for recusal and participated in the decision to deny relief. The question presented is whether the justice's denial of the recusal motion and his subsequent judicial participation violated the Due Process Clause of the Fourteenth Amendment.

136 S. Ct. at 1903. The Court ultimately decided that the justice's "significant, personal involvement in a critical decision in Williams's case gave rise to an unacceptable risk of actual bias" and further that the "risk so endangered the appearance of neutrality that

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to an automatic conflict (referencing ABA Model Rules of Professional Conduct Rule 1.11(a)), that counsel's service as a district attorney had ended nine years before Hernandez's trial, and that counsel had determined himself there was no hindrance after culling the records of Hernandez's prior felonies. *Id*. The court also agreed with the district court's finding that there was no evidence that the alleged conflict affected counsel's performance, and, accordingly, found that the adverse effect prong of *Cuyler* had not been met. *Id*.

his participation in the case 'must be forbidden if the guarantee of due process is to be adequately implemented.'" *Id.* at 1908–09 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). The language used by the Court throughout the opinion highlights the very real risk that an individual who earlier served as a prosecutor might be unable to set aside their personal interest in the outcome. The Court explains, "There is . . . a risk that the judge 'would be so psychologically wedded to his or her previous position as a prosecutor that the judge 'would consciously or unconsciously avoid the appearance of having erred or changed position.'" *Id.* at 1906 (quoting *Withrow*, 421 U.S. at 57). However, the opinion further evidences that even where the justice's prior participation in the case was both "significant" and "personal," there is not necessarily per se bias. *See id.* at 1905–07 ("To establish an enforceable and workable framework, the Court's precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present."). Nevertheless, in the recusal context, "when the likelihood of bias on the part of the judge 'is too high to be constitutionally tolerable[,]'" recusal is required. *Id.* at 1903 (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009)). Of course, in the conflict of interest context, the inquiry is focused upon whether an *actual* conflict exists rather than on whether there is a risk or likelihood of a conflict.

None of the above cases dictates that it was unreasonable for the PCR court to find no conflict of interest in this situation, particularly where the PCR court was able to observe the testimony of both Sims

and Johnson and judge their credibility as to any conflict that potentially resulted from Sims's prior prosecution of Petitioner.[22] However, even assuming that the PCR court erred in concluding there was no conflict of interest, to have been entitled to relief, Petitioner would have also had to establish that the conflict adversely affected Sims's performance, and the PCR court found that Petitioner failed to show any such adverse effect. [ECF No. 19-6 at 187]. The Fourth Circuit has laid out the following test to determine whether there was an adverse effect on counsel's representation:

> First, the petitioner must identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued. Second, the petitioner must show that the alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney at the time of the attorney's tactical decision. . . .

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[22] The undersigned finds the following guidance from the Fourth Circuit helpful in analyzing the state court's findings regarding whether an actual conflict of interest existed in this case:

> Conflicts claims present "mixed questions of law and fact that we review de novo." *Williams v. French*, 146 F.3d 203, 212 (4th Cir. [1998]) (citing [*Cuyler v.*] *Sullivan*, 446 U.S. [335,] 342), *cert. denied*, 525 U.S. 1155 (1999). . . . Because much of the adverse effect inquiry is heavily fact dependent, we believe appropriate deference should be given to the findings of the district court. In this respect, we note that a significant part of the testimony was taken orally, and the district judge saw the witnesses and heard them testify.

Mickens v. Taylor, 240 F.3d 348, 360 (4th Cir. 2001).

> [T]he petitioner must show that the alternative strategy or tactic was "clearly suggested by the circumstances." [*United States v.*] *Tatum*, 943 F.2d [370,] 376 [(4th Cir. 1991)]. Finally, the petitioner must establish that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict.

Mickens v. Taylor, 240 F.3d 348, 361 (4th Cir. 2001), *aff'd*, 535 U.S. 162.

Notably, Petitioner has not specifically argued that the PCR court either made unreasonable factual findings or unreasonably applied Supreme Court precedent in concluding that there was no adverse effect on Sims's performance. [*See* ECF No. 172 at 7–45]. During Petitioner's PCR action, his counsel indicated that Sims was disillusioned about the admissibility of Petitioner's ABHAN conviction and also that Sims failed to properly cross-examine Smith, noting "[t]he comparison between what Mr. [S]ims did in '99 and what defense counsel did in '91 . . . is fairly obvious and plain to see so I won't belabor to [sic] court with that." [ECF No. 19-6 at 222, 238]. In his petition, Petitioner contends that Sims did not comprehend that the ABHAN conviction would be admissible in the sentencing phase. [*See* ECF No. 51 at 17–20]. Petitioner also asserts that "Smith . . . provided Sims with multiple opportunities to challenge the details of her claims, and in so doing to raise at least some questions about her portrayal of what had transpired between she and Stokes, [but] Sims made use of none of them." [ECF No. 51 at 21]. Petitioner lists the following "material differences in the details" between

Smith's 1991 trial testimony and her 1999 sentencing proceeding testimony:

- On cross-examination at the 1991 trial, Smith was forced to concede that she had initiated contact with Stokes after moving back to Branchville and breaking up with her boyfriend. ROA 2460–62. This fact was not mentioned at the 1999 trial.

- At the 1991 trial, Smith acknowledged that after she read Stokes' letter, he told her that he had changed his mind and did not intend to kill her. ROA 2439, 2441. In her 1999 testimony, Smith made no mention of Stokes changing his mind. ROA 1120–21.

- At the 1991 trial, Smith was confronted with an inconsistency between her preliminary hearing testimony and her trial testimony, and was forced to resort to a claim that the preliminary hearing transcript must have been incomplete. ROA 2450. Neither the inconsistency nor the criticism of the transcript appeared at the 1999 trial.

- At the 1991 trial, Smith testified that Stokes took her into the field to look for a "box." ROA 2440. At the 1999 trial, Smith claimed Stokes had actually been looking for guns. ROA 1123.

- At the 1991 trial, Smith testified that after Stokes placed a cord around her neck, he asked, "Is it tight?," to which she replied, "Yeah." In 1999, Smith simply said that "he

> put it around my neck and I passed out." ROA 1124.

[ECF No. 51 at 21].

Petitioner has failed to connect any alternative defense strategy or tactic to his claim that Sims did not recognize the ABHAN conviction would be admissible during the sentencing phase in part due to his previous prosecution of Petitioner. Thus, he has not shown under *Mickens* that there was an adverse effect on counsel's representation. Furthermore, as Respondents point out, and as the record reflects, while Sims attempted to exclude the ABHAN conviction, he testified that he knew it was likely to be admitted into evidence. [*See* ECF No. 19-5 at 28–30, 37–50; *see also* ECF No. 19-6 at 181 ("As to the Smith incident, Sims stated that he knew it was coming in and that he needed to address it with a showing of remorse.")].[23]

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[23] There is some ambiguity in the record regarding Sims's belief that the ABHAN conviction would be admissible. When asked on direct examination if he "anticipate[d] that both the conviction would come in at the end and that Audrey Smith would testify in the State's case," Sims responded, "Yes, I did." [ECF No. 19-5 at 29]. Shortly thereafter, Sims explained how he intended to handle the conviction and Smith's testimony, saying "I knew that it was coming in, and part of his elocution . . . was to show remorse . . . and to show that he was sorry for some of the things that he had done . . . ." [ECF No. 19-5 at 29]. Later, on cross-examination, Lominack and Sims had the following exchange when discussing Sims' attempt to keep Petitioner's prior convictions out under Rule 404(b) and *State v. Lyle*, 118 S.E. 803 (S.C. 1923):

> Q. . . . [D]efense attorneys have to raise lots of issues and they come in categories. Issues you feel like you've got to raise to preserve them, and issues you raise because

The PCR court concluded there had been "no showing that the prior prosecution adversely affected his representation of Stokes based upon this state witness (Audrey Smith) . . . ." [ECF No. 19-6 at 187].

As Respondents note, the specific differences that Petitioner now identifies between Smith's 1991 testimony and 1999 testimony were not presented to the PCR court, nor was Sims questioned about why he did not pursue those lines of cross-examination during the sentencing proceeding. [*See* ECF No. 56 at 77].

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you're right and you're going to win on that issue. This issue was one that you felt like you were right on and this evidence wasn't coming in, right?

A. The judge refused on all occasions to allow that kind [of] evidence to come—to follow my position.

Q. Right, but before the judge ruled on that you put this in the category of the types of things you think you're going to win. You did not think that evidence of prior convictions was going to come in?

A. No. Yeah, I did not think. I was trying to keep it out as much as possible, as much as I possibly could.

Q. And you thought it was going to stay out?

A. I hoped so.

Q. And you thought so?

A. Yes.

THE COURT: Lawyers are always hopeful.

[ECF No. 19-5 at 49–50]. The PCR court resolved any ambiguity in the record by the findings in its order, crediting Sims's testimony that the ABHAN conviction would be admissible and that Smith would testify. [*See* ECF No. 196 at 181–83, 187].

While there is no information about why Sims did not more vigorously cross-examine Smith on those specific points, he did indicate that his mitigation theory was to have Petitioner show remorse for his actions against Smith. The undersigned has reviewed differences in Smith's testimony and would characterize them as relatively minor, particularly in comparison with the unsettling nature of her testimony as a whole, including the details of the aggravated assault and other incidents between Petitioner and Smith. An attempt to have more aggressively cross-examined Smith on those points could have hindered Sims's attempts to show Petitioner's remorse or could have spurred even more detailed testimony on the previous incidents.[24] Thus, the alternative tactic of vigorously cross-examining Smith was not clearly suggested in the sentencing phase of Petitioner's trial. In any event, Petitioner failed to show in the PCR action or now that Sims's decisions as to his cross-examination of Smith were not tactical judgments. Even if Sims were to have suffered from a conflict of interest, Petitioner has never

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[24] Petitioner highlights the contrast between Sims's cross-examination of Smith and of Martin and asserts "[t]he source of the disparity in Sims' approaches is self-evident; he was free to attack Martin's credibility as any zealous advocate would, but his hands were tied by the conflict during the Smith examination." [ECF No. 51 at 28 n.15]. Petitioner's argument ignores another likely reason for the disparity in the cross-examinations—Smith was a victim, who was stabbed, beaten, and strangled by Petitioner; Martin, on the other hand, was a co-defendant, who assisted Petitioner in raping and murdering another victim. The undersigned gives little value to the suggestion that Sims should have handled the cross-examinations of those two, very differently-situated witnesses in a similar manner.

established that Sims's cross-examination of Smith was linked to any such conflict. *Cf. Stephens v. Branker*, 570 F.3d 198, 211–12 (4th Cir. 2009).

d. PCR Court's Finding That Any Conflict Was Waived

Petitioner also challenges the PCR court's alternative finding that Petitioner waived any actual conflict. According to Petitioner, that determination was the result of both an unreasonable application of Supreme Court precedent and was based on an unreasonable determination of the facts.

Petitioner claims the PCR court misapplied Supreme Court precedent by finding Petitioner had waived his right to conflict-free counsel despite a silent record at the trial level, thereby contravening law discussed in *Boykin v. Alabama*, 395 U.S. 238 (1969), that a waiver cannot be inferred from a silent record. [*See* ECF No. 172 at 38–39]. The issue in *Boykin* was whether a guilty plea was proper where "[s]o far as the record show[ed], the judge asked no questions of petitioner concerning his plea, and petitioner did not address the court[,]" 395 U.S. at 239, and the Court reversed because the record did not show that Boykin's guilty plea had been knowingly and voluntarily made, *id*. at 244. In reaching that conclusion, the Supreme Court relied, in part, on law announced in an earlier case:

> The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation. In *Carnley v. Cochran*, 369 U.S. 506, 516 [(1962)], we dealt

> with a problem of waiver of the right to counsel, a Sixth Amendment right. We held: "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

395 U.S. at 242. In *Carnley*, a state supreme court had presumed that a petitioner had waived his right to counsel at trial because the record showed that he did not have counsel at trial. 369 U.S. at 513. As quoted above, the United States Supreme Court found that waiver to be "impermissible." *Id*. at 516. The instant case is readily distinguishable from *Boykin* and *Carnley*, as the PCR court did not presume that Petitioner had waived conflict-free counsel based on a silent record. While the trial record may not have adequately reflected whether Petitioner knowingly and voluntarily waived conflict-free counsel, the PCR judge made his determination based on testimony from trial counsel that was presented at the PCR evidentiary hearing. [ECF No. 19-6 at 174 ("This Court finds as a fact, based upon the credible testimony of both Virgin Johnson and Thomas Sims, that Stokes knowing[ly] and voluntarily waived a conflict of interest and with full knowledge of the conflict and the ability to have a different lawyer desired to have Thomas Sims continue to represent him in the trial.")]. It would have been preferable for the trial court to inquire as to the waiver; however, the United States Supreme Court has not required as much and has recognized that the evidence on waiver may have to be taken after the trial. *See*

Cuyler v. Sullivan, 446 U.S. 335, 346–47 (recognizing that trial courts need not make an inquiry "[u]nless the trial court knows or reasonably should know that a particular conflict exists . . ."); *Carnley*, 369 U.S. at 516 (noting that because the petitioner had not pled guilty and because the state had not alleged that the right to counsel had been waived, "there [was] no disputed fact question requiring a hearing"). The PCR court did not misapply Supreme Court precedent by finding Petitioner had waived any conflict based on the evidence presented at the PCR evidentiary hearing.

Petitioner next argues that the PCR court unreasonably held that Petitioner "'failed in their (sic) burden of proof' regarding the waiver, 'and failed to timely call [Petitioner] to contradict the testimony of either Mr. Johnson or Mr. Sims.'" [ECF No. 172 at 39 (quoting ECF No. 19-6 at 174)]. In Petitioner's view, the PCR court presumed a waiver, which Petitioner then needed to rebut. [*See* ECF No. 172 at 40]. However, the undersigned disagrees with that interpretation of the PCR court's analysis. Carefully reading the PCR court's order, the PCR court relied upon evidence presented at the evidentiary hearing in finding that Petitioner made a knowing waiver of any conflict of interest. In fact, the PCR court specifically stated,

> [T]his Court finds as a fact based upon credible evidence presented at the hearing that counsel Sims and counsel Johnson had discussions with the Applicant about his right to have new counsel other than Sims because of the earlier prosecution and Stokes advised them then and

> since that he desired to have Mr. Sims represent him in the matter. Further, this Court finds credible evidence that Stokes, aware of the prior involvement of Sims in the Smith prosecution wanted to have Sims continue to represent him in this matter.

[ECF No. 19-6 at 179–80]. Furthermore, the PCR court's factual findings are supported by the record and are based, in part, on its assessment that trial counsel's testimony was credible. The PCR court's credibility determination is entitled to deference in this action. *Cagle v. Branker*, 520 F.3d 320, 324 (4th Cir. 2008) (citing 28 U.S.C. § 2254(e)(1)) ("[F]or a federal habeas court to overturn a state court's credibility judgments, the state court's error must be stark and clear."); *see also Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) ("28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them."). Petitioner may overcome this presumption of correctness only by showing "'clear and convincing evidence to the contrary.'" *Wilson v. Ozmint*, 352 F.3d 847, 858–59 (4th Cir. 2003) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)). Petitioner has shown no cause to discount the PCR court's credibility determination.

The PCR court referenced both state and federal precedent in its analysis of Petitioner's waiver of any conflict posed by Sims. [*See* ECF No. 19-6 at 188–94]. Federal precedent makes clear "that, '[A]lthough a defendant may waive his right to conflict-free representation, such waiver must be knowing,

intelligent, and voluntary.'" *United States v. Brown*, 202 F.3d 691, 697 (4th Cir. 2000) (quoting *United States v. Gilliam*, 975 F.2d 1050, 1053 (4th Cir. 1992)). According to the Fourth Circuit, "if a defendant waives the conflict with knowledge of the crux of the conflict *and* an understanding of its implications, the waiver is valid—even if the defendant does not know each detail concerning the conflict." *Id*. at 698 (emphasis in original). The PCR court relied upon the testimony by both Sims and Johnson in finding that a valid waiver had been made. As outlined above, there is evidence in the record to support that conclusion. For example, Sims testified, "[W]e did discuss with Mr. Stokes, my role, who I was, and what my role had been in the previous matter with him." [ECF No. 19-5 at 24]. When asked what the purpose of those discussions with Petitioner had been, Sims stated:

> For him to know fully who I was, what was there before him, and it was in my mind that if I tell you that . . . you know who I am. I'm the one who prosecuted you, sent you to jail, do you still want me as your lawyer, and he says, yes.

[ECF No. 19-5 at 25]. Johnson similarly testified that he and Sims sat down with Petitioner and discussed the fact that Sims had previously prosecuted Petitioner. [*See* ECF No. 19-5 at 70–71]. Although he could not recall how many times they discussed that issue with Petitioner, Johnson stated that during the conversation they "went through the questions of do you have a problem with [Sims] representing you . . . do you want somebody else, and he said no." [ECF No. 19-5 at 71]. Sims also testified that he conveyed to

Petitioner that the ABHAN conviction would be admitted and that Smith would testify:

> Q. Okay. Was there a discussion about the use or knowledge of the use of the—a particular conviction that you were involved in in prosecuting Mr. Stokes for?
>
> A. Yes. I told him—and we talked about that, definitely. It was a part of the case, it was a part of the case. As a former prosecutor, my practice was to look at the case from both sides, because I knew, as a prosecutor, what I would have done, and I would look at it from both sides to try to develop a defense around what I thought they would use, and, of course, that information would come up.
>
> Q. Okay. Did you anticipate that both the conviction would come in at the end and that Audrey Smith would testify in the state's case?
>
> A. Yes, I did.
>
> Q. And what, if anything, did you do in relation to that particular type of testimony in his defense?
>
> A. . . . I tried to look for my records, but I know we had an in depth discussion with Mr. Stokes in regards to that, to all of the information because we would meet with him on a regular basis to discuss what was coming up, and let him know the kinds of things that he was going to be facing.

[ECF No. 19-5 at 28–29]. Sims continued to testify that he planned to have Petitioner show remorse for his actions regarding Smith. [*See* ECF No. 19-5 at 29]. The above evidence, which the PCR court cited to and found credible [*see* ECF No. 19-6 at 179–84], supports the PCR court's finding that Petitioner's waiver was knowing and voluntary. Although Petitioner correctly notes that the record is sometimes inconsistent, this court must give deference to the facts as found by the state court, *see Evans v. Smith*, 220 F.3d 306, 311–12 (4th Cir. 2000) ("We . . . accord state court factual findings a presumption of correctness that can be rebutted only by clear and convincing evidence."); *Bell v. Jarvis*, 236 F.3d 149 (4th Cir. 2000) (*en banc*). The PCR court found Sims's and Johnson's testimony to be credible and concluded from that evidence that Petitioner had been made aware of Sims's prior involvement in the case and had knowingly and voluntarily waived any conflict.[25] For the foregoing reasons, the undersigned must disagree with the contention by Petitioner in his reply that "there is absolutely no evidence in the record that Mr. Stokes had a full knowledge of the conflict, i.e., that the conviction Sims garnered would be used in support of his death sentence, and that the victim, whose testimony Sims previously sponsored, would be testifying." [ECF No. 74 at 8].

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[25] Petitioner relies, in part, on the testimony of Jeff Bloom in his argument that the PCR court made unreasonable factual findings in determining that Petitioner waived any conflict on Sims's part. However, the PCR court apparently did not give credit to Bloom's testimony to the extent it contradicted the court's ultimate finding.

In finding that Petitioner made a knowing and voluntary waiver of conflict-free counsel (assuming arguendo that Sims had a conflict in representing Petitioner), the PCR court did not make unreasonable factual findings, nor did the court unreasonably apply any Supreme Court precedent. Accordingly, there is no basis on which to grant habeas corpus relief, *see* 28 U.S.C. § 2254(d), and the undersigned recommends granting Respondents' motion for summary judgment and denying and dismissing the petition as to Ground Three.

2. Grounds Four and Five

In Grounds Four and Five, Petitioner asserts that his right to counsel under the Sixth and Fourteenth Amendments was violated because his appellate counsel was ineffective in not raising the trial court's failures to (1) conduct an independent assessment of the evidence to determine which statutory mitigating circumstances were supported by the record and (2) instruct the jury on a mitigating circumstance supported by the evidence. Specifically, Petitioner argues that appellate counsel failed to assert that the trial court should have considered and instructed the jury on the statutory mitigating circumstance enumerated in S.C. Code Ann. § 16-3-20(C)(b)(3) that "the victim was a participant in the defendant's conduct or consented to the act."

To put into context the trial court's decisions as to which statutory mitigating circumstances were supported by the record, it is necessary to look at the trial court's evidentiary rulings during the guilt phase. In particular, the trial court excluded some evidence

that showed Snipes accompanied Petitioner into the woods believing that they were going there to kill Doug Ferguson. [*See* ECF No. 19-2 at 245–61]. The trial court's exclusion of this evidence became an issue on direct appeal, and the South Carolina Supreme Court thoroughly described the excluded evidence:

> Stokes wrote a lengthy letter to police in which he gave a detailed account of his participation in both the Snipes and Ferguson murders. Prior to trial, Stokes agreed on the record that he intended to "keep out everything as it relates to Doug Ferguson" from the guilt phase.
>
> At trial, the solicitor moved to redact portions of Stokes' letter which indicated [Connie] Snipes had been misled into believing they were all going to Branchville that evening for the purpose of killing Doug Ferguson. Counsel for Stokes maintained this portion of Stokes' letter should not be redacted, claiming it demonstrated Snipes had voluntarily accompanied Stokes and [Pattie] Syphrette to Branchville and had willingly gone into the woods with Stokes, thereby rebutting the State's claim of kidnapping. . . .
>
> Stokes sought to admit the following portions of his letter to police:
>
> > She [Syphrette] said Connie thinks we are going to kill Doug and she thinks we already got him tied up in Branchville somewhere. She [Syphrette] said I wish that were true so we could do all both of

> them. She said Connie can't stand Doug and wants to be there to help us and besides she wants to meet you anyway, I know you've been talking to her on the phone when Roy calls and I wasn't home . . . .
>
> While riding to Branchville, Connie said Doug ain't shit and I'd love to see him get his. She said I had plans tonight but this is better . . . .
>
> That's when Connie said well where is he at.
>
> The unredacted portion of the letter continues, "I said 'Baby, I'm sorry but it's you that Pattie wants dead.'"

State v. Stokes, 548 S.E.2d 202, 204 (S.C. 2001). Despite the exclusion of the above evidence, there was other evidence introduced during the guilt phase that, under the defense's theory, showed Snipes's willing participation in the events preceding her death. [*See*, *e.g.*, ECF No. 19-2 at 433–36 (testimony by Martin that Snipes voluntarily went into the woods and voluntarily had sex with Martin and Stokes); ECF No. 19-2 at 498–99 (trial counsel arguing for a directed verdict on the charge of kidnapping, as there was evidence that Snipes entered the car and later went into the woods and "there was no evidence that anyone tried to restrain her to keep her from going anywhere she wanted to"); ECF No. 19-3 at 48 (trial counsel's closing arguments that Snipes voluntarily accompanied Martin and Stokes into the woods to have sex)].

Turning to the sentencing phase and the issues raised in Petitioner's Grounds Four and Five, the trial court asked trial counsel at the beginning of the sentencing phase to inform the court of any mitigating circumstances they intended to show. In addition to adaptability to prison, Sims responded, "we, under section B(3), the victim was a participant in the defendant's conduct or consented to the act, we think that there is ample evidence in the record that the victim participated up to a point by being involved in the actions of the defendant at the time and we would think that that would be a mitigating circumstance." [ECF No. 19-3 at 96]. Sims did not elaborate on what evidence he believed warranted that instruction. The trial court expressed no problem with instructing on adaptability to prison, but, with regard to the Snipes's participation, the court stated,

> The victim having participated in the act situation, if that goes back to what was not allowed in because of the way the letter came in and all, you're not going to be able to do it but if you develop that during the—if you develop something else—
>
> MR. SIMS: Yes, sir.
>
> THE COURT: —not in regards to that, that would be fine because I understand that the State is going to develop some of theirs, too, from this proceeding.

[ECF No. 19-3 at 97].

During the sentencing phase, the State introduced Petitioner's statement to the police in its entirety,

including the previously-redacted portions referencing the victim's belief that she was accompanying Petitioner to kill someone else, Doug Ferguson. [ECF No. 19-3 at 302–23]. After Petitioner's statement was read to the jury, Sims restated his continuing objection to redacting the statement in the guilt phase and noted, "It has now been put in in the penalty phase of the matter and . . . it has been read into the record that Connie Snipes at that time was out there to kill, according to my client's statement, was out there with them in order to kill Doug Ferguson." [ECF No. 19-3 at 328]. The record does not reflect that trial counsel presented any evidence of the victim's involvement in the crime during the sentencing phase. After all the evidence was presented, but before the sentencing phase closing arguments, the trial judge stated he would review his checklist and held a short recess. [ECF No. 19-3 at 443].

During closing arguments, both sides made only brief reference to Petitioner's statement and the victim's involvement. The State suggested to the jury, "Anything that the defense tells you about Connie Snipes, why she was out there, what she was doing, would have to come through the only evidence which would be [Petitioner's] letter in which he's trying to bring whoever he can down with him." [ECF No. 19-3 at 449]. And Sims argued:

> I want to point out to you that in the first part of the trial when [Petitioner's] statement was read, if you will recall there was nothing to tell you as to why Connie Snipes was out there. The question is whether or not she was there for sex.

> In the second statement it was read to you that Connie Snipes went out there to kill Doug Ferguson. That does not mean that anybody should be killed but it is an indication of everything that was going on in this scenario.

[ECF No. 19-3 at 475].

After closing arguments, the jury was excused and counsel raised pre-charge objections, which did not include objections to either of the instant issues. [*See* ECF No. 19-3 at 482–87]. The trial court instructed the jury on mitigating circumstances. Specifically, the court charged that the jury "may consider any other mitigating circumstances which are supported by the evidence in this case," stated that Petitioner had not alleged or brought forth any statutory mitigating circumstances, and explained non-statutory mitigating circumstances, with particular reference to adaptability to prison. [ECF No. 19-3 at 493–94]. In addition, the court instructed the jury that Petitioner did not have to prove mitigating circumstances beyond a reasonable doubt, explaining, "[R]ather you are to consider each and every mitigating circumstance which you find to be supported by the evidence before you." [ECF No. 19-3 at 495]. After the instructions, counsel discussed the charges with the trial court and requested two additional charges, which the court delivered to the jury. [ECF No. 19-3 at 499–502]. However, trial counsel did not object to the court's failure to instruct a particular statutory mitigating circumstance.

At the PCR hearing, former appellate counsel, Joseph Savitz, testified that he could not remember why he did not raise either issue on appeal. [ECF No.

19-4 at 343]. Before Petitioner's appeal, appellate counsel had asserted that trial courts should ask defendants which statutory mitigating circumstances they wished to include and evaluate the evidence supporting the ones requested. Accordingly, he would argue on appeal that trial courts were deficient for not instructing on certain statutory mitigating circumstances, even if trial counsel had not objected to the lack of instruction. [*See* ECF No. 19-4 at 348–50]. At the time of Petitioner's appeal, the Supreme Court of South Carolina had denied an appeal based on this argument. *See State v. Humphries*, 325 S.C. 28, 479 S.E.2d 52 (1996) (ruling that issue not preserved for appeal where trial counsel failed to object to trial court's failure to instruct on statutory mitigating circumstance). However, appellate counsel said he continued to raise this type of issue until the Supreme Court of South Carolina clarified the law in *State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006), which the court decided after Petitioner's appeal. [ECF No. 19-6 at 350].

On cross-examination, appellate counsel stated that, prior to briefing, he had reviewed the evidence from the guilt phase; had reviewed the trial judge's instructions and knew they did not reference a statutory mitigating circumstance; had reviewed the objections and knew that counsel had not objected to the lack of instruction; and was aware of the victim participation or consent statutory mitigating circumstance. [ECF No. 19-4 at 346–47].

The PCR court found that Petitioner failed to show either deficient performance or prejudice under *Strickland*. Specifically, the PCR court found:

> Appellate counsel Savitz cannot be *Strickland* deficient in failing to raise these two particular issues because neither issue was presented to the trial court by a timely objection on the record. Absent a specific request by counsel to charge a mitigating circumstance at trial, the issue of whether the mitigator should have been charged is not preserved for appellate review. *State v. Evans (Kamell)*, 371 S.C. 27, 32, 637 S.E.2d 313, 315 (2006).
>
> In *State v. Victor*, 300 S.C. 220, 224, 387 S.E.2d 248, 250 (1989), the Supreme Court set forth the proper procedure for submission of statutory mitigating factors to the jury in the penalty phase of a capital case:
>
> > Once the trial judge has made an initial determination of which statutory mitigating circumstances are supported by the evidence, the defendant shall be given an opportunity on the record: (1) to waive the submission of those he does not wish considered by the jury; and (2) to request any additional mitigating statutory circumstances supported by the evidence that he wishes submitted to the jury.
>
> See, *State v. Stanko*, 376 S.C. 571, 577–578. 658 S.E.2d 94, 97–98 (S.C., 2008) (not preserved).

One of the earlier cases addressing this assertion was handled by appellate counsel Savitz prior to his handling in the instant case resulted in rejection of the argument as not preserved. *State v. Humphries*, 325 S.C. 28, 36, 479 S.E.2d 52, 57 (1996). The Court has constantly rejected this claim absent request and objection, except in the intoxication evidence area which was corrected in *Evans*. The recent cases have stated that absent a request by counsel to charge a mitigating circumstance at trial, the issue whether the mitigator should have been charged is not preserved for review. *See State v. Vazquez*, 364 S.C. 293, 301, 613 S.E.2d 359, 363 (2005); *State v. Bowman*, 366 S.C. 485, 494, 623 S.E.2d 378, 383 (2005); and *State v. Sapp*, 366 S.C. 283, 621 S.E.2d 883, n.3 (2005).

In the instant case, trial counsel did not request an instruction on the particular statutory mitigator and did not object to the failure to give an instruction of the mitigating factors. ROA 1486–87. Since there was no objection, nothing was preserved for the appeal. Reasonable appellate counsel cannot have raised the issue on appeal since there was no objection. This Court concludes that appellate counsel Savitz was not deficient in failing to brief an unpreserved claim.

Further, there was nothing in the record to show that the trial court failed to hold a charge

> conference.[26] Similarly, there was no showing that the defense objected to the lack of a charge conference to preserve the issue for an appeal. Appellate counsel cannot be found deficient when the issue was not raised at trial.
>
> Since there is no showing that the trial court refused to hold a charge conference or that the defense objected to the failure to instruct on the particular mitigating factor, reasonable appellate counsel could not have been required under the Constitution to assert these unpreserved claims, particularly in 2000 when the appellant's brief was written after the decision in *Humphries*. His claims set forth in these two specifications must be dismissed.

[ECF No. 19-6 at 172–73 (errors in original)].

Petitioner disagrees with the PCR court's interpretation of state law and continues to assert that the trial court had a duty to examine the evidence and instruct on any supported statutory mitigating factors. [ECF No. 51 at 49–50]. "When a claim of ineffective assistance of counsel raised in a habeas corpus petition involves an issue unique to state law, . . . a federal court should be especially deferential to a state post-

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[26] Ground Four of Petitioner's PCR application asserted that appellate counsel was ineffective for failing to raise "the trial judge's failure to determine what statutory mitigating circumstances were supported by the evidence and his failure to hold a charge conference prior to instructing the jury in the sentencing phase of the trial." [ECF No. 22 at 3]. However, Petitioner's federal habeas Grounds Four and Five do not specifically reference a failure to hold a charge conference.

conviction court's interpretation of its own state's law." *Richardson v. Branker*, 668 F.3d 128, 141 (4th Cir. 2012). Indeed, "[i]t is beyond the mandate of federal habeas courts [] to correct the interpretation by state courts of a state's own laws." *Sharpe v. Bell*, 593 F.3d 372, 383 (4th Cir. 2010) (citing *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991)). Having thoroughly reviewed the record and the relevant authority, the undersigned cannot say that the PCR court erred in its interpretation and application of the existing law. The applicable South Carolina cases do not definitively rule that a trial court's lack of instruction on a mitigating circumstance, to which trial counsel did not object, is a cognizable issue on appeal. In fact, the state courts have denied appeals based on those claims.

Even if the law were unsettled or unclear, as appellate counsel testified he believed it to be, counsel would not be ineffective for failing to raise a claim under those circumstances. *See Richardson*, 668 F.3d at 141–42 ("[T]he unsettled nature of [the] law on this issue precludes a finding that [the petitioner] demonstrated a 'reasonable probability' that he would have prevailed on his direct appeal had his appellate counsel raised the . . . mitigation instruction issue."); *see also Jones v. Barnes*, 463 U.S. 745, 751–54 (1983) (recognizing appellate counsel has no duty to raise every colorable claim, but may use professional judgment to select the most promising issues).

Next, Petitioner asserts the PCR court's finding—that appellate counsel's failure to raise these issues on appeal was neither deficient nor prejudicial because the appellate court would have declined review

because neither issue was preserved—"overlooked state precedent that indicated that the court will not find a claim to be waived where 'the tone and tenor of the trial judge's remarks' indicate that an objection will be futile." [ECF No. 51 at 51 (citing *State v. Pace*, 447 S.E.2d 186, 187 (S.C. 1994))]. Petitioner argues, "[h]ere, when the defense raised the issue of introducing this evidence in mitigation, the court clearly stated that it did not believe it could do so." [ECF No. 51 at 51].[27]

The undersigned disagrees. South Carolina courts have found an objection at trial futile, and found reversible error, where the trial court's comments tended to impugn counsel's credibility. These cases have involved fairly egregious remarks by the trial court, usually in the presence of the jury. *See Pace*, 447 S.E.2d at 186–87 (finding reversible error where trial court made numerous remarks about counsel's age and gender, suggesting she was inexperienced); *State v. Simmons*, 229 S.E.2d 597 (S.C. 1976) (finding reversible error where trial court threatened defense counsel with jail time); *State v. Davis*, No. 2006-UP-316, 2006 WL 7286742 (S.C. Ct. App. Aug. 4, 2006) (finding reversible error where trial court made repeated comments regarding counsel's incompetence and ethics). However, when the trial court's comments and rulings are routine, do not involve any improper, personal comments about counsel, and do not "impugn counsel's credibility or diminish him in the eyes of the

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[27] Petitioner does not cite to a specific exchange in the record. The undersigned assumes he is referring to the beginning of the sentencing phase when the trial court and trial counsel discussed potential mitigating circumstances. [*See* ECF No. 19-3 at 96–97].

jury," South Carolina courts have found no prejudice. *See State v. Cooper*, 514 S.E.2d 584, 587 (S.C. 1999) (finding no prejudice where trial court made routine evidentiary and testimonial rulings not in counsel's favor); *see also Graves v. State*, 422 S.E.2d 125 (S.C. 1992) (finding, generally, no prejudice when trial court's hostile comments are made outside of the jury's presence); *State v. DeBerry*, 157 S.E.2d 637 (S.C. 1967) (holding that trial court's admonition to defense counsel to be brief and stop wasting court's time was not abuse of discretion nor prejudicial to the rights of defendant).

Here, the trial court and counsel had a brief exchange prior to the presentation of evidence in the sentencing phase, during which the trial court informed counsel that he may not have enough evidentiary support for his requested charge, but that he could further develop the evidence during the sentencing phase. [*See* ECF No. 19-3 at 97 ("[I]f that goes back to what was not allowed in because of the way the letter came in and all, you're not going to be able to do it but if you develop that during the—if you develop something else . . . not in regards to that," referring to Petitioner's statement to the police, "that would be fine because I understand that the State is going to develop some of their[] [aggravating circumstances], too, from this proceeding.")]. The trial court did not make any improper, personal comments to or about counsel, and nothing in this exchange tends to impugn counsel's credibility. Further, trial counsel continued to make objections and discuss other matters, including the jury charges, with the trial court throughout the rest of the sentencing phase. Thus, the

record does not indicate that objecting to the trial court's failure to instruct the jury on a statutory mitigating circumstance would have been futile.

Petitioner cannot satisfy the *Strickland* test. He has failed to show the PCR court unreasonably applied United States Supreme Court precedent in deciding his ineffective assistance of counsel claims. Additionally, Petitioner has failed to show by clear and convincing evidence the PCR court reached an unreasonable factual determination given the evidence and record before it. Therefore, Petitioner has failed to overcome the deferential standard of review afforded the state PCR court's determination of these issues. Based on the foregoing, Petitioner is not entitled to federal habeas relief on Grounds Four and Five, and the undersigned recommends Grounds Four and Five be dismissed.

3. Procedurally-Barred Grounds

Petitioner admits that the ineffective assistance of trial counsel claims he raises in his Grounds Six and Seven are procedurally barred, as those claims were not previously raised to and ruled upon in state court.[28] In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claim is barred unless the prisoner can demonstrate cause for the default and

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[28] Although Petitioner raised Ground Six in a state habeas corpus action, the South Carolina Supreme Court summarily denied the petition for writ of habeas corpus on March 28, 2017. [*See* ECF No. 96 at 1–2; ECF No. 102].

actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *See* 28 U.S.C. § 2254; *Rodriguez v. Young*, 906 F.2d 1153, 1159 (7th Cir. 1990) ("Neither cause without prejudice nor prejudice without cause gets a defaulted claim into Federal Court."); *see also Mazzell v. Evatt*, 88 F.3d 263, 269 (4th Cir. 1996) (finding that, to show prejudice, a petitioner must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different); *Rodriguez*, 906 F.2d at 1159 (holding a fundamental miscarriage of justice occurs only in extraordinary cases, "'where a constitutional violation has probably resulted in the conviction of one who is actually innocent'" (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986))).

Petitioner contends that he can demonstrate both cause and prejudice for the procedural default of Grounds Six and Seven, claiming that PCR counsel were ineffective for failing to present evidence in the PCR action on trial counsel's ineffectiveness. In *Coleman v. Thompson*, the Supreme Court held that ineffective assistance of counsel will constitute cause only if it is an independent constitutional violation. 501 U.S. 722, 755 (1991). In a subsequent case, *Martinez v. Ryan*, 566 U.S. 1 (2012), the Court recognized a narrow exception to the rule established in *Coleman* and held that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez*, 566 U.S. at 9. The

Supreme Court has carefully laid out the boundaries of the *Martinez* exception as follows:

> [W]hen 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 in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*. To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.

566 U.S. at 14 (internal citation omitted).

Thus, in accordance with *Martinez*, to overcome the procedural default of Grounds Six and Seven, Petitioner must establish that PCR counsel were deficient in failing to present those grounds and that Petitioner was prejudiced as a result. Petitioner must also show that the grounds of ineffective assistance of trial counsel themselves are substantial claims. For all of the reasons that follow, Petitioner has not met this burden as to either Ground Six or Ground Seven. As such, the procedural default of these grounds has not been overcome. The undersigned thus recommends

granting summary judgment as to both Ground Six and Ground Seven.

4. Ground Six

Petitioner contends in Ground Six that trial and collateral counsel were ineffective for failing to investigate, develop, and present mitigation evidence. Specifically, the petition asserts that the files of both trial and PCR counsel

> contain copious evidence, in the form of interviews and records, revealing that Mr. Stokes suffered from an extremely chaotic background marked by parental instability, poverty, addiction, violence, and profound trauma, resulting in large part from the deaths of both of his parents, when he was nine and then thirteen, before his very eyes.

[ECF No. 75 at 8].[29] Trial counsel presented only one witness, an expert on prison adaptability, during the sentencing phase. According to Petitioner, trial counsel should have presented evidence of Petitioner's background and history and were deficient for failing to do so. In his response to the motion for summary judgment, Petitioner further alleges that trial counsel started their investigation too late, failed to pursue leads during the course of that investigation, focused

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[29] The mitigation evidence Petitioner presented to this court focused on "parental instability, poverty, addiction, [and] violence . . . ." However, Petitioner appears to have rescinded the allegations that he witnessed the deaths of both of his parents. Tr. 259:2–6 ("Q. Okay. But we're not saying that Sammie saw his father dead. A. No. Q. And he didn't tell you that. A. No.").

on presenting a mitigation case based on Petitioner's HIV/AIDS status too early, and had extreme lack of experience and lack of training generally. [ECF No. 172 at 52–55]. In the closing arguments before this court, Petitioner identified perceived problems with trial counsel's testimony during the evidentiary hearing regarding their decisions and reasoning at the time they represented Petitioner. *See supra* p. 77.

The petition focuses almost entirely on trial counsel's performance and offers only that PCR counsel's "files indicate that they developed mitigating evidence even beyond what trial counsel had, [but] post-conviction counsel raised no claims regarding trial counsel's failure to present any evidence regarding Mr. Stokes [sic] history and background, and, thus, offered the court no such evidence." [ECF No. 75 at 8]. In his response to Respondents' motion for summary judgment, Petitioner elaborates on his ineffective-assistance-of-PCR-counsel claim, asserting that PCR counsel "abandoned their investigation of Mr. Stokes' background prematurely and without the assistance of a qualified mental health expert, despite the fact that such assistance was clearly indicated. That decision was objectively unreasonable." [ECF No. 172 at 71]. At the evidentiary hearing, Petitioner submitted that PCR counsel were, by their own testimony, ineffective. *See supra* p. 78.

In assessing the *Martinez* claim raised in Ground Six, the undersigned first considers PCR counsel's representation.

a. Factual Findings

Petitioner's initial PCR application was filed on October 17, 2001.[30] [ECF No. 19-4 at 225–30]. It included a single claim: that trial counsel were ineffective for their "[f]ailure to present mitigating evidence." [ECF No. 19-4 at 227]. In early 2002, Keir Weyble and Robert Lominack were appointed as PCR counsel. Tr. 57:8–9, 513:20–517:2. Both Weyble and Lominack testified that, after being appointed, they reviewed the trial transcript and trial counsel's file to determine what kind of mitigation evidence was presented to the jury. Tr. 31:4–12, 371:19–372:9. On May 6, 2002, PCR counsel filed a first amended PCR application. [ECF No. 19-4 at 231–35]. In it, PCR counsel added two claims of ineffective assistance of trial counsel and elaborated on the earlier-pled claim, asserting

> Trial counsel failed to investigate and present available mitigating evidence during the sentencing phase of applicant's trial. Had counsel investigated and presented mitigating evidence, there is a reasonable probability that the result of applicant's sentencing proceeding would have been different. *Williams v. Taylor*, 529 U.S. 362 (2000); *Strickland v. Washington*,

[30] Weyble explained during his testimony that Petitioner's initial PCR application was likely prepared and filed by Petitioner's direct appeal counsel, Joseph Savitz, to "stop the clock" on the one-year statute of limitations. Tr. 513:5–23.

> 466 U.S. 668 (1984); *Jolly v. State*, 314 S.C. 17, 443 S.E.2d 566 (1994).

[ECF No. 19-4 at 232].

On July 8, 2002, the State filed its return to Petitioner's first amended PCR application and noted that Petitioner had failed to identify "what the evidence is that counsel failed to develop[,]" and, accordingly, asked for a more definite statement under SCRCP 12(e). [ECF No. 19-4 at 245–46]. The State further requested an evidentiary hearing on the issue of ineffective assistance of counsel. [ECF No. 19-4 at 247].

In the summer of 2002, PCR counsel requested and were granted funding for a number of experts and service providers to assist them in their PCR investigation, including a private investigator, a penalty phase investigator, a neuropsychologist, a

forensic pathologist/entomologist.[31] *See* Resp. Ex. 11, 12.

PCR counsel retained Tracy Dean as a mitigation investigator and directed her to "[c]onduct family interviews, gather records, kind of the basic nuts and bolts of a mitigation investigation." Tr. 39:23–24; *see also* Tr. 380:7–20. As part of her mitigation investigation, Dean interviewed Petitioner and a number of his family members and acquaintances. *See* Pet. Ex. 43; Tr. 380:15–381:3. She created memoranda summarizing those interviews, and PCR counsel reviewed those memoranda. Tr. 54:17–24. PCR counsel also met with Dean during the course of her investigation. Tr. 381:4–11. Weyble explained that such meetings took place both formally and informally due to the fact that Dean and PCR counsel worked in the same building. Tr. 381:4–11.

Additionally, PCR counsel conducted their own investigation into trial counsel's mitigation

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[31] In their initial request for funding, PCR counsel indicated:

> While this list encompasses most of the experts necessary for counsel's investigation and presentation of claims, it is likely that after conducting the investigation into applicant's life . . . counsel will request additional funds. For instance, counsel is certain that either a social worker or a mental retardation expert will be necessary; however, until applicant's social history has been compiled . . . , counsel cannot determine which of these experts will be necessary.

Resp. Ex. 11 at 1. PCR counsel did not request any funding for a social worker during or after their mitigation investigation. Tr. 208:23–209:8.

investigation and preparation. For example, Lominack testified that PCR counsel met with Dr. Robert Deysach, a neuropsychologist who had been retained by trial counsel to testify regarding Petitioner's mental functioning and capacity, but who did not ultimately testify. Tr. 34:25–36:2. Lominack could not specifically recall meeting with Dr. Donna Schwartz-Watts, a psychiatrist on trial counsel's mitigation team, about Petitioner's case, explaining, "I've met Dr. Schwartz-Watts so many times over the years, but I'm positive we would have met about this case, but I don't specifically recall." Tr. 36:17–19; *see also* Tr. 489:14–490:14 (testimony by Weyble recalling that Lominack spoke with Dr. Schwartz-Watts about the Stokes case).

On April 18, 2003, PCR counsel deposed Sims. [ECF No. 19-4 at 250–92]. During that deposition, Sims testified that he had Dr. Schwartz-Watts and other medical professionals examine Petitioner as part of his mitigation investigation. [ECF No. 19-4 at 284–85]. Sims testified that he learned early on in his representation of Petitioner that Petitioner had AIDS, and Sims advised Petitioner that the AIDS diagnosis could be used to their advantage during the sentencing phase of trial. [ECF No. 19-4 at 285–87]. Sims described his plan for his mitigation presentation as follows:

> We had, Donna was there, I've forgotten the name of the other doctor who was there, the treating physician. And it was my understanding, from what I can recall, that they both were going to testify as to his condition,

> what his prognosis was, how he would eventually become, Donna used the phrase, that he was going to be a vegetable or could be a vegetable and that even though he sits there now and he looks healthy, he looks good, his body is literally being eaten up from the inside. And at some point because of this condition, he's going to be a vegetable.

[ECF No. 19-4 at 285–86]. Because there was other evidence that Petitioner had been dangerous when he was previously incarcerated, Sims intended to present James Aiken to testify that the prison could manage Petitioner and that "they were going to have him secure. . . . He was going to be all these good things that they were going to do or they would do for them in jail and to be sure there would be no issue as related to that." [ECF No. 19-4 at 287]. Sims explained during the deposition how he intended Aiken's testimony to dovetail with the evidence regarding Petitioner's AIDS prognosis to ease any concerns the jury may have had regarding Petitioner's future dangerousness. [ECF No. 19-4 at 287–88]. According to Sims, Petitioner expressed some reservations about having his family learn about his AIDS diagnosis, but trial counsel were able to make arrangements so that his family would not be present for that testimony. [ECF No. 19-4 at 286–89]. However, ultimately Petitioner decided he did not want the jury hearing the evidence about his AIDS diagnosis either—"he just absolutely refused." [ECF No. 19-4 at 286].

The PCR court scheduled a hearing for September 13, 2004. [*See* ECF No. 19-6 at 150.] On August 9,

2004, PCR counsel filed a second amended PCR application. [ECF No. 19-4 at 293–99]. The second amended application included seven claims, three of which were ineffective assistance of counsel claims. [ECF No. 19-4 at 294–97]. However, PCR counsel did not assert that trial counsel were ineffective for failing to investigate and present available mitigating evidence. [ECF No. 19-4 at 294–97].

Because one of the newly-added claims asserted that Petitioner was mentally retarded, the matter was continued for DDSN to evaluate Petitioner. [*See* ECF No. 19-6 at 150]. After filing the second amended PCR application, Lominack temporarily left the practice of law. Tr. 49:2–12. He left in the summer of 2005, and Susan Hackett was appointed to replace him as counsel in Petitioner's PCR action. Tr. 49:10–25. During that time period, Weyble and Hackett continued to pursue the mental retardation claim, and at some point they received the opinion from DDSN that Petitioner was not mentally retarded. Tr. 386:5–388:9, 662:3–664:8. Thereafter, Lominack returned to the practice of law, and he was eventually reappointed to represent Petitioner because Hackett had taken another job. Tr. 50:7–17. On October 22, 2007, DDSN submitted a report to the PCR court opining that Petitioner was not mentally retarded, and PCR counsel eventually abandoned the mental retardation claim. [*See* ECF No. 19-6 at 150].

On August 5, 2009, the PCR court held an evidentiary hearing. [ECF No. 19-4 at 320–50, ECF No. 19-5 at 1–82]. During the hearing, PCR counsel called Savitz and Jeff Bloom as witnesses, and the State

called Sims and Johnson as witnesses. [ECF No. 19-4 at 321]. In an order filed October 22, 2010, Judge Manning denied and dismissed the second amended PCR application. [ECF No. 19-6 at 150–95].

b. Discussion of PCR Counsel's Representation

Petitioner states that "PCR counsel without question discharged an initial portion of their duties." [ECF No. 172 at 72]. That is, in Petitioner's view, PCR counsel properly hired an investigator and had her collect additional background information about Petitioner that was not in trial counsel's file. However, Petitioner contends that PCR counsel were deficient in "abandon[ing] the claim before having an expert assess the information, which presented numerous red flags indicating significant childhood trauma . . . ." [ECF No. 172 at 74].

In their reply, Respondents point to well-established Supreme Court precedent that counsel are presumed to have provided reasonable representation. [ECF No. 175 at 10 (citing *Strickland*, 466 U.S. at 689)]. Respondents provide further case law in which courts have found that without evidence as to the nature of counsel's strategy, the presumption of reasonable representation should stand. [*See* ECF No. 175 at 10–11].

It is clear from their funding request to the PCR court that PCR counsel understood it might be necessary to have a social worker or other expert examine Petitioner's family history and background at some point during their investigation. *See* Resp. Ex. 11. However, PCR counsel did not seek the advice or input

of any such expert. Tr. 44:20–45:9. At the evidentiary hearing before this court, both Lominack and Weyble were questioned as to why they did not consult a social worker or other expert regarding possible mitigation evidence in Petitioner's background. Tr. 45:13–46:1, 384:9–386:4. Neither could recall any particular reason that they did not have a social worker review the information uncovered in their mitigation investigation. Tr. 45:13–46:1, 385:8–386:4. During the evidentiary hearing, Lominack testified he believed that it was required under the "standard of care" at the time to consult a social worker, but he did not recall why he as PCR counsel did not take that step. Tr. 44:25–45:19. Weyble testified similarly, expressing a belief "that at least as to our failure to consult with an expert, we did not meet the prevailing professional norms as reflected in the ABA guidelines." Tr. 409:14–17.

During the evidentiary hearing, neither Lominack nor Weyble could recall their reasoning for removing from the second amended PCR application the claim that trial counsel were ineffective for having failed to present evidence of Petitioner's background during the sentencing phase of his trial. Tr. 62:1–17, 173:23–175:7, 385:8–386:4. However, both offered their present-day speculations as to why they would have omitted the claim. Tr. 62:1–19, 174:9–175:7, 385:8–386:4. For example, Lominack testified, "I think at the time we were hyper-focused on the intellectual disability claim." Tr. 45:25–46:1. But he later admitted, "It may have been that hyper focusing on the ID claim wasn't the reason. I just don't recall there being a very intentional reason or that we sat down and discussed

it in any detail." Tr. 175:4–7. When asked if he could recall why as PCR counsel he omitted the ineffective-assistance-of-trial-counsel-claim, Weyble testified

> Specifically why? No, but I mean, the only thing I can surmise is that—well, I suppose two things: One, at that same time, what was then called mental retardation is now called intellectual disability claim arose, somewhat to our surprise, frankly. And I think we became somewhat distracted by the shiny object, if you will, and thought we—that we were really on to something there. That, though, also isn't really an excuse, because it's not like you can only do one, you know, and you have to pick.
>
> But, you know, obviously we made some sort of judgment explicit or implicit that resulted in us not going further.

Tr. 385:11–21. Weyble testified that the removal of the claim from the second amended PCR application was purposeful, explaining "there was definitely a shift in focus away from that . . . kind of the traditional mitigation-oriented ineffectiveness claim to this *Atkins* claim. We did—that happened." Tr. 484:8–11. Lominack also conceded that there was a strategic plan to focus on the mental retardation claim at the sacrifice of other claims. Tr. 175:8–18.

i. Investigation

The undersigned first examines the reasonableness of PCR counsel's investigation. Petitioner has not identified, nor is the undersigned aware of, any Supreme Court case that requires counsel to hire a

social worker or any particular expert to review family history and background to assist in the mitigation investigation and presentation. *Yarbrough v. Johnson*, 520 F.3d 329, 338–39 (4th Cir. 2008) (noting "the ABA Guidelines require that 'expert assistance should *always* be requested and provided' for the proper preparation of capital cases," but that the Guidelines "still serve only as 'guides," . . . not minimum constitutional standards" (citations omitted)). The Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead ha[s] emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 688). Thus, PCR counsel were not *per se* deficient for failing to consult with a social worker or other expert concerning their mitigation evidence.

However, the consultation with experts is part of counsel's duty to investigate, and counsel's discharge of that duty impacts how a court evaluates their decisions during their representation. As the Supreme Court stated in *Strickland*:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a

> reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690–91.

In this case, PCR counsel's investigation was arguably less complete than it would have been had a social worker or other comparable expert consulted with them on the results of the mitigation investigation. But, between their own investigation and that of trial counsel, PCR counsel had evidence of Petitioner's childhood difficulties and hardships, including the following: substance abuse by Petitioner's parents, episodes of physical abuse toward Petitioner, exposure to domestic violence against Petitioner's mother, Petitioner's father's death when Petitioner was a young boy, Petitioner's mother's death when Petitioner was in his early teens, and Petitioner's witnessing his stepfather being shot in the hand. *See* Pet. Ex. 41, 43. Furthermore, PCR counsel also knew that trial counsel had consulted with and retained a social worker who met with Petitioner and was prepared to testify in the sentencing phase of Petitioner's trial. *See* Tr. 539:13–19.

In addition to the above-mitigating information, PCR counsel also had evidence detailing Petitioner's poor behavior as an adolescent and an adult that trial counsel discovered during their investigation. At trial, the State's case in aggravation focused primarily on the

details of the murders of Snipes and Ferguson and also on other crimes that Petitioner had committed as an adult, including assaults on Audrey Smith, Jackie Williams, and Shawn Windburn. But there was additional aggravating evidence about Petitioner that the jury never heard. For example, Petitioner's sister Sara told trial counsel's investigator that Petitioner "would make Norris [Martin] hustle for him and beat him up when he did not get his money on time. She says Norris was very afraid of Louis." Pet. Ex. 41. There were also indications in the investigation memoranda that Petitioner had possibly sexually abused Martin. Pet. Ex. 41. Petitioner's sister reported that Petitioner had "an extremely short temper and ha[d] never been able to control it." Pet. Ex. 41.

PCR counsel also had information from trial counsel regarding their mitigation strategy for trial. During their investigation, PCR counsel made copies of trial counsel's file and spoke with trial counsel. Tr. 371:22–373:2. PCR counsel deposed Sims in April 2003. [ECF No. 19-4 at 250–92]. During the deposition, PCR counsel did not ask Sims why he did not present the details of Petitioner's background as part of his mitigation case,[32] but did ask about trial counsel's

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[32] Neither Lominack nor Weyble was asked at the evidentiary hearing before this court whether, at the time they were conducting their PCR investigation, they asked trial counsel to explain why trial counsel did not present evidence of Petitioner's background to the jury. Although that line of inquiry would be highly relevant given the claim of ineffective counsel raised in the first amended PCR application, the undersigned will not presume that PCR counsel pursued that line of inquiry. However, had PCR counsel asked trial counsel why they did not present evidence of

strategy for the sentencing phase. [ECF No. 19-4 at 279–89]. After filing the second amended PCR application, which omitted the claim that trial counsel were ineffective for failing to present an adequate mitigation case, PCR counsel sent letters to trial counsel advising them that the claim had been dropped and informing them that they should not disclose their file to the Attorney General's Office. Pet. Ex. 45; Tr. 47:9–48:19, 483:12–489:6. During the evidentiary hearing, PCR counsel denied having any recollection of having removed the claim in an effort to prevent the State from accessing particularly harmful information from trial counsel's file that could be used against Petitioner in a retrial in the event that PCR counsel were successful in the PCR action. Tr. 483:12–489:13, 504:6–506:10.

Finally, as outlined above, PCR counsel were pursuing other claims in the PCR action—specifically, claims of conflict of interest and mental retardation—which PCR counsel believed to have merit and which were "more discrete" than the claim of ineffective assistance of counsel. Tr. 502:11–21.

In considering the reasonableness of PCR counsel's investigation, the undersigned further finds that PCR counsel were not generally uninformed about the type of evidence that could be presented in a mitigation

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Petitioner's background, and had trial counsel's explanation been consistent with their testimony at the evidentiary hearing in this case (which will be discussed in greater detail below), it would have been reasonable for PCR counsel to limit any further investigation of that claim and turn their efforts to other claims that had potential merit.

case. PCR counsel had both worked on multiple capital PCR cases, in one form or another, prior to being appointed as counsel for Petitioner. Weyble testified that he began working on capital cases as a law student. Tr. 399:6–401:19. Once he started practicing in 1996, he primarily worked on capital cases, both post-conviction and federal habeas, but he was also responsible as a young associate with keeping up with the developments in federal habeas corpus law. Tr. 411:7–413:15. By the time he was appointed to represent Petitioner, Weyble was familiar with the importance of mitigation in capital cases, and he had made claims that trial counsel were ineffective for failing to present adequate mitigation in other cases. Tr. 413:8–415:10. Lominack was also familiar with capital cases based on his law school experience and his time in practice before being appointed to represent Petitioner. Tr. 64:9–65:25, 177:21–179:25. Furthermore, PCR counsel worked at boutique capital defense firms and were mentored by two of the foremost experts in capital defense in South Carolina, John Blume and David Bruck. *See* Tr. 28:2–16, 65:13–25, 411:7–22, 669:4–11; *see also Fulks v. United States*, 875 F. Supp. 2d 535, 546, 563–64 (D.S.C. 2010) (detailing Blume's extensive qualifications and experience in capital defense work). PCR counsel were well familiar with the concept of mitigation, and the evidence regarding Petitioner's childhood was the type of "classic" mitigation with which PCR counsel were knowledgeable.

During the evidentiary hearing, PCR counsel readily confessed their perceived shortcomings of their investigation. Weyble testified that PCR counsel

dropped the claim "[b]ased on an incomplete workup . . . ." Tr. 503:10. Lominack testified similarly, stating, "[M]y opinion is that we actually never completed a thorough mitigation investigation, which I don't think, frankly, can be done without a social worker providing his or her expert opinion about what it all means and helping to package it for you . . . ." Tr. 135:1–6. While PCR counsel's testimony appeared genuine, it was also evident that their testimony was influenced by 20/20 hindsight.

The Supreme Court has stated, "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Such a fair assessment in this habeas action of PCR counsel's actions must include, not only their investigation into the mitigating evidence from Petitioner's background, but also their knowledge about the additional aggravating evidence available, their knowledge of the strategic decisions by trial counsel as far as their mitigation presentation, and the other claims which PCR counsel were pursuing in the PCR action. With that body of evidence in mind, the undersigned concludes "counsel's assistance was reasonable considering all the circumstances." *See Strickland*, 466 U.S. at 688. Petitioner has not established that PCR counsel violated the prevailing professional norms by having failed to consult a social worker or other expert who could analyze how Petitioner's childhood affected him later in life. Indeed, based on the particular facts of this case, it may have

been a poor use of PCR counsel's efforts and resources to do so, particularly because trial counsel had consulted with a social worker and had nevertheless decided not to present evidence of Petitioner's background for the reasons discussed in greater detail below.

ii. Withdrawal of Claim of Ineffective Assistance of Trial Counsel

Having reviewed the arguments by both parties, the evidence in the state court record, and the evidence presented at the evidentiary hearing, the undersigned finds that Petitioner has not met his burden of showing that PCR counsel were deficient in not pursuing the claim that trial counsel were ineffective for failing to present evidence of Petitioner's background during the sentencing phase. In coming that that conclusion, the undersigned has given "a heavy measure of deference to counsel's judgments" as required by the Supreme Court. *Strickland*, 466 U.S. at 691. In this case, PCR counsel made the decision to omit the claim based on a fairly extensive investigation of Petitioner's background and of trial counsel's preparation and strategy. As described above, PCR counsel had ample evidence of both the mitigating and aggravating evidence in Petitioner's background. PCR counsel knew trial counsel's mitigation strategy. And PCR counsel had other claims that they were pursuing in the PCR action. They did not omit the claim inadvertently, and they spoke to Petitioner about removing the claim from the PCR application. *See* Tr. 486:25–489:6.

Although PCR counsel could not recall or articulate, thirteen years later at the evidentiary hearing, a

particular strategic reason to this court for their decision to omit the claim, the evidence reflects a clear strategy by PCR counsel to focus on the mental retardation claim and the conflict claim. The undersigned found the following testimony by Weyble to be credible and also indicative of PCR counsel's strategy and shift in focus:

Q. Well, a claim of failure to present mitigation evidence against trial counsel and an *Atkins* claim, they're not mutually exclusive.

A. No.

Q. You could have raised both of those claims.

A. That's correct.

Q. And you admit the *Atkins* claims is cleaner.

A. Cleaner could mean one thing to you and one thing to me. It is more discrete. It is.

Q. Okay. And the conflict claim is more discrete.

A. Yes.

Q. And there had to be a reason you withdrew it, correct? Withdrew the IAC claim, because they're not mutually exclusive.

A. True.

Q. If you thought it was a strong claim, the IAC claim, at the time, if you had thought it was a strong claim, would you have presented it?

A. Yes.

> Q. If you thought you could obtain relief for Mr. Stokes from a death sentence on this claim, you wouldn't have dropped it, would you?
>
> A. I can't imagine we would have.

Tr. 502:11–503:7. It was not unreasonable for PCR counsel to focus their efforts on the claims that they believed to have merit and to omit a claim that they did not think would be meritorious in the PCR action.[33] *See Harrington v. Richter*, 562 U.S. 86, 109 (2011) ("There is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.'" (quoting *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003))).

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[33] Compare *Basham v. United States*, 109 F. Supp. 3d 753 (D.S.C. 2013), in which this court declined to second guess capital defense counsel's strategy and favorably cited the following observation by the Fourth Circuit:

> Resourceful lawyers . . . often desire to be thorough and overlook nothing in their commendable zeal to afford first class representation. Consequently in many cases they tend to excess as they inundate us with a plethora of arguments, some good and some not so good. Sometimes one wonders whether such lack of selectivity is not counterproductive, for a party raising a point of little merit exposes himself to the risk of excessive discount for a better point because of the company it keeps.

109 F. Supp 3d at 797 (quoting *United States v. Computer Scis. Corp.*, 689 F.2d 1181, 1183 (4th Cir. 1982), *overruled in part on other grounds by Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990)). This reasoning is even more applicable when attorneys have limited time and resources to devote to the pursuit of particular claims.

Petitioner has not established that PCR counsel were unreasonable in omitting the ineffective-assistance-of-trial-counsel-claim from the second amended PCR application. Although PCR counsel made that decision after an arguably "less than complete investigation[,]" as they did not have a social worker or other expert identify the mitigating areas of Petitioner's background or compile a comprehensive mitigation presentation, PCR counsel's decision to pursue other, more discrete and potentially meritorious claims, made such further investigation unnecessary. Petitioner has failed to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy[,]'" and he has thus failed to show deficiency. *See Strickland*, 466 U.S. at 689 (citing *Michel v. Louisiana*, 350 U.S. 91 (1955)).

c. No Deficiency

Because Petitioner has failed to establish that PCR counsel were deficient, he cannot overcome the procedural default of Ground Six pursuant to *Martinez*. Accordingly, the undersigned recommends denying and dismissing this ground as procedurally barred.

The above findings are fully sufficient to foreclose Petitioner's *Martinez* claim as to Ground Six. *See supra* pp. 144–57. However, out of an abundance of caution, and to preserve the factual findings as to the remainder of the evidence presented by Petitioner at the evidentiary hearing, the undersigned addresses the merits of the underlying ineffective-assistance-of-trial-counsel claim, as well. For all of the reasons that follow, even if Petitioner had shown that PCR counsel were deficient for omitting the ineffective-assistance-

of-counsel claim from the second amended PCR application without having consulted a social worker or other expert, Petitioner cannot overcome the procedural default of the claim because he has not shown prejudice. As explained below, the underlying trial counsel claim is not meritorious.

d. Discussion of Trial Counsel's Representation

Petitioner alleges trial counsel were ineffective because they "ignored information in their possession that should have alerted them to the need for further investigation; failed to present the mitigating evidence that they did have in their possession; and failed to consult appropriate experts to develop and present evidence of the trauma Petitioner experienced throughout his life." [ECF No. 75 at 25].

Petitioner concedes that trial counsel did some investigation into his background. [ECF No. 75 at 25]. Trial counsel hired Kimberly McKay as a mitigation investigator and collected records concerning Petitioner's medical history, school performance, and incarceration history, but Petitioner faults trial counsel for failing to interview the teachers and principals from Petitioner's past and for failing to obtain reports from neighbors and extended family members about "specific instances of violence witnessed by Sammie." [ECF No. 75 at 25–26]. Petitioner further argues that trial counsel unreasonably failed to present the evidence they had about Petitioner's background, which included the following: that Petitioner's school performance declined following the deaths of his parents; that Petitioner struggled with depression; that Petitioner's

parents were both drinkers; and that Petitioner's step-father was violent and Petitioner had to intervene to protect his mother from him. Finally, Petitioner argues that trial counsel should have consulted "with appropriate experts in order to develop Petitioner's mitigation case at trial." [ECF No. 75 at 28]. Specifically, Petitioner contends that trial "[c]ounsel should have recognized that the death of both parents in front of a child's eyes—even leaving aside all the substance abuse, neglect, and violence witnessed by Sammie was a trauma cocktail that an expert in the effects of childhood trauma on development could be effectively opine on."[34] [ECF No. 75 at 28]. Accordingly, Petitioner offers that trial counsel should have consulted with someone like Dr. James Garbarino, an expert in the field of childhood trauma. According to Petitioner, "No strategy can possibly justify the failure to present to the jury any evidence regarding Sammie's traumatic background. Even if there were such a strategy, that claim would be unworthy of respect under *Strickland* because trial counsel's decisions were totally uninformed by a reasonable investigation." [ECF No. 75 at 29].

i. Decision Not to Present Background

Petitioner called both Sims and Johnson as witnesses at the evidentiary hearing, and they testified to their recollection of their mitigation investigation and strategy for the 1999 trial. Sims had little independent recollection of the mitigation

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[34] Again, contrary to the statements in the Petition, Petitioner did not witness the deaths of both of his parents. *See supra* n. 29.

investigation, but his recollection was refreshed with the memoranda created by Kimberly McKay, and he confirmed that there was a young woman who worked on the Stokes investigation. Tr. 586:12–588:17. Sims also recalled a social worker, Augustus Rodgers, speaking with Petitioner and being part of the mitigation team. Tr. 589:8–590:25. Rodgers, Sara Stokes, and Ruth Davis were all named on the witness list that trial counsel provided to the State during Petitioner's trial, but none of them testified. Pet. Ex. 42; Tr. 592:24–595:11. When asked if he could recall what Rodgers would have testified to during the sentencing phase, Sims responded,

> Knowing Dr. Rodgers and having been around him, he would have talked about the things that he had done in regards to the case and would have been able to say—give background information and all that information as a social worker or—he would have done his work and we would have been able to put that in there—into the case . . . .

Tr. 594:25–595:5.

Sims further testified that trial counsel decided not to present Rodgers's testimony, explaining, "after having the opportunity to get together, we made a strategic decision that certain—that mitigation kind of evidence that was the ongoing way that things were done at that time was not going to work in Orangeburg County." Tr. 595:13–17. Sims testified to a number of factors that were part of the decision to not present evidence of Petitioner's background. For example, the decision was based, in part, on Sims's observations

about the jury and how they had reacted to certain parts of the trial. Tr. 595:18–20. Additionally, trial counsel considered the aggravated facts of the crime and the general attitudes of those in Orangeburg County in the late nineties. Tr. 597:12–20. When asked what made Sims believe that testimony from Rodgers, Sara Stokes, and Ruth Davis would not be persuasive to the jury, Sims detailed his thought process:

> I would have looked at that jury, I would have looked at the composition of the jury, probably during the trial would have gone home and reviewed the jurors' background information again to determine the best way that you could probably get that juror on your side. . . . [T]here were African-Americans and there were white people on the jury too.
>
> Looking at that, taking it into consideration as a whole and how the trial had been going and what was being brought out, the question at that point is whether or not putting out the background of the individual and the kind of life that they had had as a child would be effective in light of the facts of the case and the people that you had on the jury.

Tr. 597:25–598:12.

Johnson testified that there were parts of Petitioner's past that trial counsel did not want coming out during the sentencing phase. Tr. 645:9–13. Petitioner had been involved in a homosexual relationship with another inmate while he was incarcerated. Tr. 645:14–23. Additionally, there was

some evidence that Petitioner had abused his codefendant, Norris Martin, while they were growing up. Tr. 645:24–646:4. Johnson testified that trial counsel took into account the attitudes and potential biases of the jury in how they planned their mitigation presentation. Tr. 649:13–650:4. Johnson also considered the highly aggravating nature of Petitioner's crimes in deciding whether it would be beneficial to present evidence of Petitioner's background, explaining,

> [Y]ou had to try to find a way to present [the aggravating circumstances] where it didn't seem so offensive, yet you can't play it down. It's just a fine balance . . . how do you go to a jury and say, look, we want you to look at the fact that he had a poor upbringing, particularly African-American, which a lot of us had struggles coming up, how do you say, well, just because he had a poor upbringing, you need to overlook the fact that he raped this woman, you need to overlook the fact that he cut her vagina out, you need to overlook the fact that he cut her nipples off, you need to overlook the fact that he killed somebody else.

Tr. 650:14–24. Johnson testified that he was aware that Petitioner had been young when both of his parents died, that Petitioner had a tough upbringing, and that Petitioner witnessed domestic violence in his home as a young boy. Tr. 651:5–19. Nevertheless, Johnson testified that he did not think that presenting evidence of Petitioner's upbringing would have swayed the jury. Tr. 652:5–9. According to Johnson, "[N]ot only

did I not think it would sway the jury, . . . I thought it may have hurt." Tr. 652:7–9.

Trial counsel decided to present to the jury that Petitioner had advanced HIV/AIDS in an attempt to convince the jury that they should not give him the death penalty. Tr. 647:22–648:4. Sims testified to the following:

> The Friday before we were beginning to go through jury voir dire, Mr. Stokes had to be taken to Columbia because his white blood cell count was down to 15. So they gave him a transfusion, got him back up to snuff, and we . . . Donna and Deysach, who was there that day, had testified or told us that they would testify that Sammie would be dead. He was going to die. . . . [A]t that time, the knowledge about AIDS was not where it is today. . . . And we wanted to put it out and put them up to tell this.

Tr. 603:4–18. Johnson confirmed that in the late nineties, "folks thought [HIV/AIDS] just killed you, bam . . . ." Tr. 647:17. Although Petitioner "looked good" at the time of his trial, trial counsel believed that he would not live much longer based on what they had been told. Tr. 648:1–4. Sims testified that he wanted to assuage any fears that the jury had about Petitioner's future dangerousness, and if "the testimony had come in that he was going to die, that would have given them the opportunity to say, we're going to give him life." Tr. 604:10–12. Thus, trial counsel's mitigation theory had multiple facets. They intended to show the jury that SCDC would be able to control Petitioner, particularly as he became physically diminished due to HIV/AIDS,

"but the main thing was that the longevity period of him being in prison was not going to be that long, based upon what people knew about AIDS at that time." Tr. 605: 5–8. However, trial counsel were ultimately unable to present their mitigation case as they had planned because Petitioner forbid them from doing so. Tr. 606:3–24.

The undersigned finds trial counsel's testimony to be very credible, and it is apparent from their testimony that they considered presenting evidence of Petitioner's background as part of their mitigation case, but they ultimately decided against that course for a number of reasons. The primary reason was that they did not think that the details of Petitioner's background would be compelling to a jury in Orangeburg in 1999. Tr. 623:4–11. As Johnson succinctly explained, "[A] lot of us had struggles coming up, . . ." and in trial counsel's view, the details of Petitioner's history would be unlikely to convince an Orangeburg jury to "overlook" the particularly aggravated nature of Petitioner's crimes—raping, mutilating, and murdering Snipes and subsequently murdering Ferguson. Tr. 650:19.

Trial counsel were both familiar with juries in Orangeburg. Sims had started his law career in Mississippi, but later moved to South Carolina and began working in the Solicitor's Office in Orangeburg in 1981. Tr. 578:23–579:8. During his time with the Solicitor's Office, Sims served as deputy solicitor and as acting solicitor, and he prosecuted death penalty cases. Tr. 579:8–24. After leaving the Solicitor's Office, Sims began working on the defense side, where he "defended

everything from DUIs to murders to rapes to all kinds of major cases, and prior to Sammie, [he] was second chair in the *State versus Bayan Aleksey*." Tr. 581:5–7. Sims testified that he had been involved in multiple trials during the roughly ten years that he was with the Solicitor's Office. Tr. 615:3–8. When asked if he read juries for a living, Sims responded, "Well, yes, in a way." Tr. 615:9–10. Unlike Sims, Johnson did not have any capital trial experience prior to representing Petitioner, but he had tried many cases up to that point, including fifteen or more felony jury trials. Tr. 633:1–7. Thus, both attorneys had a wealth of knowledge from which to draw in assessing how a local jury would receive their mitigation case.

Trial counsel's testimony at the evidentiary hearing also revealed that they considered the race of the jury, of Petitioner, of his co-defendants, and of the victim in evaluating their options for the mitigation presentation. Sims testified that, in the late nineties, the African-American community in Orangeburg would not have been receptive to certain aspects of Petitioner's background that could have come out in a mitigation presentation, such as his homosexual relationship with Martin. Tr. 607:3–19, 624:2–13. Furthermore, as the jury was made up of both African-Americans and whites, trial counsel had to consider "whether or not putting out the background of the individual and the kid of life that they had had as a child would be effective in light of the facts of the case and the people that you had on the jury." Tr. 598:9–12. Johnson plainly stated the challenge that trial counsel faced in crafting an effective mitigation presentation to combat the aggravating facts of the case—"a black man

with AIDS rapes a white woman, cut her vagina out, cut her nipple off . . . it exaggerates how big the problem is . . . .” Tr. 647:3–5. Trial counsel’s assessment of the African-American community in the late nineties was particularly compelling, as they were part of that community, unlike PCR counsel and habeas counsel. *See* Tr. 624:6–13 (“I can specifically say, as an African-American man, . . .” (Sims)), 650:15–24 (“he had a poor upbringing, particularly African-American, which a lot of us had struggles coming up . . .” (Johnson)).

Trial counsel’s testimony revealed that Petitioner himself may have also been concerned about the optics of his crimes. Petitioner and Martin were both African-American, and Snipes, Syphrette, and Toothe were all white. Tr. 624:23–625:8. When Petitioner refused to allow trial counsel to introduce evidence of his HIV/AIDS status, he told them “I don’t want that jury to hear that I had sex with that girl and got AIDS.” Tr. 626:17–18. When pressed further as to why Petitioner restricted trial counsel’s mitigation presentation, Sims testified that he did not think it was a matter of Petitioner having had unprotected sex with Snipes, but that “it could have been that race was playing a part.” Tr. 626:5–6.

ii. Preparation of Mitigation Case

In his response to Respondent’s motion for summary judgment, Petitioner challenges the adequacy of trial counsel’s mitigation preparation, alleging that they started too late and failed to pursue leads. But the record shows that trial counsel hired a mitigation investigator that gathered information on Petitioner’s

background. They also had a social worker, a psychiatrist, and a neuropsychologist examine Petitioner, but those experts were unable to provide any diagnosis that trial counsel felt was helpful. Tr. 616:9–24. Sims admitted during his direct examination that trial counsel did not "provide[] any of Mr. Stokes'[s] information about his background and childhood to an expert who could have explained how . . . [certain] aspects of his background[] would have affected his development[,]" but there is also no evidence or case law before the court that it was incumbent on trial counsel to retain a childhood trauma expert to provide reasonable representation. Tr. 599:15–20. The social worker, psychiatrist, and neuropsychologist would have been able to provide trial counsel with some insight as to how particular aspects of Petitioner's childhood would have affected him, or to advise trial counsel that additional experts were needed to properly analyze Petitioner, but there is no evidence that they made such recommendations. Trial counsel were entitled to rely on the opinions of the experts they hired and to determine how those opinions would be received by the jury. *See Wilson v. Greene*, 155 F.3d 396, 403–04 (4th Cir. 1998) (indicating that counsel need not second-guess experts to be reasonably effective). Without particularly helpful "traditional" mitigation evidence available to them, trial counsel decided to pursue a strategy based on Petitioner's HIV/AIDS status.

Petitioner asserts that trial counsel focused on their HIV/AIDS mitigation strategy too early. [ECF No. 172 at 54]. He also argues that the pursuit of that strategy did not excuse the abandonment of traditional

mitigation and that trial counsel's strategy was risky, as Petitioner had expressed resistance to it. [ECF No. 172 at 54]. However, the evidence presented to this court does not support the allegation that trial counsel abandoned their traditional mitigation presentation prematurely. Rather, the evidence shows that trial counsel explored that avenue and ultimately chose not to present that evidence, in part due to trial counsel's estimation of how the jury would receive the evidence. *See* Tr. 593:3–595:25. While it is not clear from the evidence precisely when trial counsel decided not to present evidence of Petitioner's background to the jury, the witness list that trial counsel submitted to the State days before the start of trial listed Petitioner's sister and aunt as potential witnesses, which seems to corroborate trial counsel's testimony. *See* Pet. Ex. 42; Tr. 595:9–25. Contrary to the arguments made by Petitioner, the evidence shows that trial counsel left their options open concerning the direction of their mitigation presentation. Sims explained,

> I always say that a trial has a life of its own. You may start out with a theory and a process that you want to go through, but in the middle of the trial, as it begins to progress, you may have to change the way that you are actually going to go, and that's what happened in this case.

Tr. 597:7–11.

Based on the credible evidence presented to this court, trial counsel's decision to not present evidence of Petitioner's background was a "strategic choice[] made after thorough investigation of law and facts relevant to plausible options[,]" which the Supreme Court has

indicated is "virtually unchallengeable . . . ." *Strickland*, 466 U.S. at 690. None of the evidence presented to this court leads the undersigned to conclude that trial counsel's decision was unreasonable. *See Wilson*, 155 F.3d at 404 ("Decisions about what types of evidence to introduce 'are ones of trial strategy, and attorneys have great latitude on where they can focus the jury's attention and what sort of mitigating evidence they can choose not to introduce.'" (quoting *Pruett v. Thompson*, 996 F.2d 1560, 1571 n.9 (4th Cir. 1993))). Accordingly, Petitioner has not met his burden of showing that trial counsel were deficient and, thus, has also failed to show that they were ineffective.

However, even if Petitioner were able to establish deficiency by trial counsel, his ineffective-assistance-of-trial-counsel claim lacks merit, as he has not shown resulting prejudice for the reasons explained below.

e. Expert Testimony Regarding the Effect Petitioner's Background Had on His Development

During the evidentiary hearing before this court, Petitioner did not present a social historian to describe Petitioner's family history and background. Petitioner did present the testimony of Dr. James Garbarino, which has been thoroughly summarized herein. *See supra* pp. 32–44. Dr. Garbarino reached his opinion after reviewing documents detailing Petitioner's background and interviewing Petitioner for about two hours. Pet. Ex. 49–51; Tr. 246:6–247:19, 343:8–10. Throughout his testimony, Dr. Garbarino provided details of Petitioner's personal history that he gathered

from reviewing records and from interviewing Petitioner.

Certainly, there is information in the evidence presented to this court that is mitigating, and the jury did not hear any of it. However, the prejudice inquiry is not focused solely on whether there is information that was not presented that would have served as mitigation. *See Strickland*, 466 U.S. at 693 (rejecting the idea that attorney error need only have "some conceivable effect on the outcome of the proceeding" since "[v]irtually every act or omission would meet that test"). For Petitioner to successfully prove prejudice, he must convince the court "that had the jury been confronted with this . . . mitigating evidence, there is a reasonable probability that it would have returned with a different sentence." *Wiggins v. Smith*, 539 U.S. 510, 536 (2003). "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (citing *Strickland*, 466 U.S. at 693). For the reasons that follow, Petitioner has not met his burden.

i. Problems With Dr. Garbarino's Testimony

To establish prejudice that resulted from trial counsel's failure to present background mitigation, Petitioner relies heavily on the testimony and opinion of Dr. Garbarino, but the undersigned found some aspects of Dr. Garbarino's opinion testimony to be problematic, and those problems would likely have lessened the impact of his testimony in front of a jury.

For instance, Dr. Garbarino testified that, rather than record his interview with Petitioner, he took handwritten notes during their time together. Tr. 300:3–10. Dr. Garbarino testified he then created his report, incorporating a number of statements made by Petitioner during the interview, and those statements serve as a partial basis for Dr. Garbarino's opinion about Petitioner. *See* Pet. Ex. 49. Despite the significance of those statements to his opinion, after writing his report, Dr. Garbarino discarded his handwritten notes. Tr. 299:20–300:14. Dr. Garbarino testified that it was his normal practice to discard his notes after writing his report, explaining:

> Because my notes are—many of them, except for the quotes that I put in the report, are sort of telegraphic speech to myself, reminders to think about something or look at something, and they're often barely legible at the time, and then after time has passed, it would be very difficult to go back and reconstruct what they meant.
>
> So early on in this 25-year period, I decided it was a better representation of my thought process to just issue the report, have the quotes in the report that I thought were relevant to the analysis, and since there's so much other documentation, have that available in the record.

Tr. 300:22–301:7.

While it may be Dr. Garbarino's practice to destroy his notes following his interviews, the prudence of that practice is questionable, as without his notes, and in

the absence of any other recording of his interview, the only record of the statements allegedly made by Petitioner during the course of the interview is found in Dr. Garbarino's transcription of those statements in his report. While it may make sense that Dr. Garbarino might want to discard notes he makes to himself that may constitute his work product, the destruction of the only commemoration of Petitioner's own statements during the interview could reasonably be perceived as suspicious. There are additional potential problems that could arise during Dr. Garbarino's testimony due to the destruction of those notes. For instance, there is no way to confirm the context in which the statements were made and if other statements were made that Dr. Garbarino did not find relevant, but that may have been germane, unless Dr. Garbarino could recall that information from the two-hour interview. There is also the concern as to whether Dr. Garbarino transcribed the statements accurately in his report, especially when he himself characterizes his notes as "sort of telegraphic speech to myself . . . often barely legible at the time . . . ." Tr. 300:23–301:1.

Another potential problem unfolded during the evidentiary hearing in this case: Dr. Garbarino's reliance on a statement allegedly made by Petitioner during the interview, but which was *not* included in the report. Dr. Garbarino testified that Petitioner made the following statement during their interview:

> [W]hen I was born, I went to live with my father and his girlfriend. When I was about five, I was sent to live with my mother. I had seen her and acknowledged her when I was four, but it was

> the first time I met my sister. I had no answers about why I was with my father and not my mother.

Tr. 255:21–256:1. However, the above quote was not included in Dr. Garbarino's report, although he testified that it was an important part of his finding that Petitioner had maternal abandonment issues. Tr. 255:19–256:7.

Based on the information provided to the court, it appears that Dr. Garbarino followed his general practice of destroying the handwritten notes from his interview with Petitioner after writing his report. *See* Tr. 307:15–308:14. However, during Dr. Garbarino's deposition, he testified that Petitioner shared with him that he had been abandoned by his mother when he was a baby and did not reunite with her until he was five. *See* Tr. 306:2–21. Following his deposition, Dr. Garbarino claims he discovered a typed copy of that particular quote that was not included in the report, but that he had retained in his file. Tr. 308:7–12. Dr. Garbarino shared the quote with federal habeas counsel in an email, stating, "This is the basis for what I wrote in the report about 'maternal abandonment.' . . . (I don't make these things up LOL)." Tr. 311:25–312:2. Dr. Garbarino asked federal habeas counsel in that same email if there was any other source that could corroborate Petitioner's account regarding the first five years of his life. Tr. 312:2–5. During the evidentiary hearing, Dr. Garbarino produced a strip of paper on which the above quote had been typed out. *See* Pet. Ex. 53 (ID only); Tr. 347:11–353:2. Dr. Garbarino could not explain why,

given his practice of destroying his interview notes, he had retained a typed version of that statement. He did, however, surmise "I think . . . I was intending to use it in something I was going to write or a lecture I was going to give, and so I just pulled out that piece, you know, cut the rest of the page . . . ." Tr. 349:14–17. Dr. Garbarino did not explain why that quote was typed out and could also not explain why that quote did not appear in the report, although he testified that it should have been. Tr. 345:5–14. The sequence of events that played out during the evidentiary hearing appeared to be surprising to Petitioner's own counsel, and the court found it detrimental to Dr. Garbarino's credibility.

While unrelated to the concern about Dr. Garbarino having discarded his notes, another problem with Dr. Garbarino's testimony stems from the fact that he relied on the above quotation as true, although he admitted that there was much evidence in the record contradicting its veracity. In his report, Dr. Garbarino opined, "Whatever positive elements that existed in Sammie's life once he was re-united with his mother at age 6, were insufficient to overcome the initial trauma of being rejected by his mother and the subsequent instability of his relationship to her." Pet. Ex. 49 at 12. Indeed, Dr. Garbarino stated that the information in Petitioner's statement "became very important in my report . . . ." Tr. 255:19–20. When confronted with the fact that the remainder of the record contradicted that information, Dr. Garbarino qualified, "[G]iven the catastrophic nature of early abandonment, I thought that his account certainly in his own mind justified including that as an element in my report." Tr.

257:21–23. However, his report reflects that Dr. Garbarino did not simply rely on that statement as if it were only in Petitioner's own mind and evidenced Petitioner's feelings of maternal abandonment. Dr. Garbarino considered it as truth in his report, as confirmed in the email he sent to habeas counsel following his deposition. His reliance on the truth of that statement called into question his personal barometer for what was information was credible and relevant in his own analysis of Petitioner.

Similarly, in preparing his report, Dr. Garbarino relied upon a document that he referred to as a "Social History prepared by Diana Holt." Pet. Ex. 49 at 3. Respondents' counsel questioned Dr. Garbarino about the document during the evidentiary hearing because he had agreed to provide it to Respondents' counsel following his deposition, and he failed to do so. *See* Tr. 303:10–306:1. Based on Dr. Garbarino's testimony and statements by Petitioner's counsel, it appears that the social history that Dr. Garbarino relied upon for his report was "not a social history at all and it was nothing like a social history." Tr. 341:11–12. Rather, it was the "facts section" from the working draft of the habeas petition. Tr. 341:13–21. During the evidentiary hearing, the undersigned explained the problem with Dr. Garbarino relying on such information in his opinion:

> [T]he allegations contained in the petition are not facts. They're allegations that may be proven through subsequent supplementation, through documentation, interviews, notes, information contained in counsel's files . . . . [I]t's the

> equivalent of saying, we filed the complaint with allegations, we gave those allegations to an expert, the expert construed those as facts, and on that basis, rendered an opinion, but those allegations were just allegations . . . .

Tr. 342:13–21. As already explained herein, Petitioner has changed his position on some of the allegations made in his petition. *See supra* n. 29. The above facts call into question the information that forms the foundation of Dr. Garbarino's opinion.

ii. Value of Dr. Garbarino's Testimony

Parts of Dr. Garbarino's testimony were hampered by the undersigned's concerns with Dr. Garbarino's methodology and credibility, but there was other information that Dr. Garbarino conveyed about Petitioner's life that appeared to be undisputed and that was available to trial counsel. Much of that evidence has been discussed herein—for example, that both of Petitioner's parents died when he was young, that Petitioner's mother, father, and stepfather drank heavily, and that Petitioner witnessed domestic abuse in his home. Based on the undersigned's review of the record, that evidence, although unfortunate and sad, would not have changed the outcome of the sentencing hearing, particularly where the aggravating circumstances—including the rape and contract murder of Connie Snipes and the mutilation of her body and the subsequent murder of Doug Ferguson—were overwhelming. Contrary to the arguments raised by Petitioner, the undersigned did not find the mitigating evidence presented by Petitioner through

the testimony of Dr. Garbarino to provide much context for the particularly aggravating nature of Petitioner's crimes.

As to Dr. Garbarino's opinion as an expert in childhood trauma and developmental psychology, parts of that testimony would have been detrimental to Petitioner's mitigation case. Dr. Garbarino's testimony highlighted something that trial counsel fashioned their entire mitigation case around, Petitioner's dangerousness:

> Q. Okay. So that makes him more dangerous, according to you, than a person who scores 7, because it's more increasingly likely he'll commit a violent crime, isn't it?
>
> A. That he'll commit violent acts. Certainly, yes, that's what the correlation would imply.
>
> Q. Okay.
>
> A. And we certainly have a lot of evidence that he did.

Tr. 337:16–22.[35]

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[35] As previously noted, Sims was specifically asked about the potential impact of this type of testimony,

> Q. Well, if, for instance, based on the jury that you had and what you know of the case or what you can recall of the case, if you had a mitigation expert come in and suppose that there's a scale of risk factors from 1 to 10, and that the average for murder—murderers would be about a 7, a risk for inflicting more violence in the

Moreover, the undersigned found striking the evidence that some of Petitioner's experiences as a child were not uncommon. *See* Tr. 252:19–253:3 (testifying that being whipped with electrical cords and other objects "may be common, and even culturally sanctioned by some individuals . . ."), 260:16–21 (testifying that it was "common among parents who have problems with alcohol or other substance abuse problems" for the parents to be too intoxicated to care for their children). Overall, the substance of Dr. Garbarino's testimony underscored the concerns that trial counsel expressed during their testimony—that the adversity that Petitioner experienced as a child would not sway a jury in Orangeburg, South Carolina, in 1999 to give Petitioner a life sentence when considered in combination with the brutality of Petitioner's crimes.

As the Supreme Court has stated, "actual ineffectiveness claim alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." *Strickland*, 466 U.S. at 693. The undersigned has found that trial counsel made a reasonable strategic decision not to present evidence of Petitioner's personal background and history. However, even if Petitioner were to have sufficiently proven deficient performance, he would not be entitled to relief in this action, as he

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> future, and Mr. Stokes was about a 9, do you think that would have helped with your jury?
>
> A. No.

Tr. 616:1–8.

has not "show[n] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

5. Ground Seven

In Ground Seven, Petitioner argues that trial counsel was ineffective for choosing to present the testimony of an expert who was not suitable for the case and for failing to properly prepare that witness. During the sentencing phase of trial, trial counsel chose to present only one witness, James Aiken, who testified about Petitioner's adaptability to prison. [*See* ECF No. 19-3 at 398–440]. According to Petitioner, that decision, coupled with trial counsel's failure to properly prepare Aiken for his testimony, had a number of negative consequences. For example, the State introduced additional aggravating evidence while questioning Aiken, the State was able to minimize the effect of Aiken's testimony because he was not fully aware of Petitioner's record, and the State was able to twist the thrust of Aiken's testimony into another argument for death. Petitioner admits that this same claim was not presented during his PCR action, but argues that the default should be excused, as PCR counsel were ineffective for failing to raise it. For the following reasons, the undersigned finds that Petitioner has not met his burden under *Martinez*, and thus, the procedural default of Ground Seven cannot be overcome. Accordingly, the undersigned recommends granting summary judgment as to Ground Seven.

a. Discussion of PCR Counsel's Representation

During the evidentiary hearing before this court, PCR counsel testified they reviewed Aiken's sentencing phase testimony. Tr. 53:15–54:1, 393:7–12. Lominack recalled Petitioner had committed "a relatively serious assault of another inmate" while he was incarcerated. Tr. 53:24–25. Lominack was then asked if he considered raising a claim concerning the presentation of Aiken as a witness:

> Q. Given his prison record, did you consider raising a claim challenging trial counsel's decision to use a prison adaptability expert as a mitigating witness?
>
> A. I didn't.
>
> Q. Why was that?
>
> A. I still—I still believe that despite someone's prior institutional conduct, having an expert who knows the ins and outs of a prison and knows how inmates are classified is a helpful thing at trial, and so I don't recall thinking that that was a mistake of trial counsel or that they were ineffective for failing to do that—or for actually doing that.

Tr. 54:2–13. Weyble also recalled that Petitioner had "at least one violent incident" on his prison record, but he could not recall if PCR counsel considered raising a claim of ineffective assistance of counsel for trial counsel calling Aiken as a witness. Tr. 393:13–394:13. Weyble testified:

> I honestly can't tell you whether that occurred to us or not. I know that was sort of the featured component of the penalty phase for the defense at trial. So I imagine we would have thought about, well, really, . . . is this adequate, you know? Should there have been more—should this not have been in there? But, you know, how much further or deeper we thought about that, I just can't sit here and say. I don't know.

Tr. 394:6–13.

In assessing PCR counsel's performance, the undersigned again starts from the presumption that PCR counsel provided reasonable representation. *See Strickland*, 466 U.S. at 689 ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ."). Petitioner has not "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *See id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

The undersigned found the above testimony by PCR counsel to be very credible. Their testimony reflects that, having reviewed Aiken's testimony, PCR counsel did not challenge trial counsel's decision to call him as a witness because there was general value to the information Aiken shared with the jury, despite the aggravating evidence in Petitioner's prison record. *See id.* at 688–89 (recognizing there are a "range of legitimate decisions regarding how best to represent a criminal defendant"). The undersigned cannot say that PCR counsel performed unreasonably where they properly reviewed Aiken's testimony and did not think

trial counsel had erred in presenting Aiken as a witness. Accordingly, Petitioner has failed to establish ineffective assistance by PCR counsel, and the procedural default of Ground Seven must stand, as Petitioner has not shown cause pursuant to *Martinez*. The undersigned recommends denying and dismissing Petitioner's Ground Seven.

b. Discussion of Trial Counsel's Representation

Having failed to meet his burden that PCR counsel were deficient, Petitioner cannot overcome the procedural default of Ground Seven, but out of an abundance of caution, the undersigned also addresses whether PCR counsel's actions resulted in prejudice. The undersigned finds no prejudice for PCR counsel's failure to raise the claim about trial counsel, as the underlying ineffective-assistance-of-counsel claim lacks merit.

Before this court, Sims testified that trial counsel retained Aiken to opine on Petitioner's adaptability to prison. Tr. 591:1–16. Sims felt that Aiken's testimony was very powerful in front of the jury. Tr. 605:14–23. During direct examination, Petitioner's counsel pointed out to Sims that Petitioner's last prison infraction before his release in 1998 was on July 28, 1993, and asked, "If Mr. Stokes had not had an infraction for several years prior to his release from prison, would you think that would have been something important for James Aiken to know about?" Tr. 592:7–20. Sims responded, "Yes." Tr. 592:21. Johnson was asked very few questions during his testimony about trial counsel's decision to use Aiken as a witness, but he did confirm

that trial counsel presented Aiken to testify that SCDC could confine and control Petitioner. *See* Tr. 653:6–11.

During the sentencing phase and prior to Aiken's testimony, the State presented evidence on Petitioner's disciplinary infractions while incarcerated. [ECF No. 193 at 156–57]. During his testimony, Aiken testified that he had reviewed Petitioner's prison disciplinary history and had reached the opinion that Petitioner could "be incarcerated in the South Carolina Department of Corrections for the remainder of his life without causing undue risk or harm to other inmates, staff nor the general community." [ECF No. 19-3 at 408]. In particular, Aiken noted that Petitioner "[did] not demonstrate behaviors of being a predator, that he [did] not try to control the facility, that he [was] not inflicting risk upon the staff." [ECF No. 193 at 409]. Sims specifically asked Aiken about two instances of violent conduct from Petitioner's prison disciplinary record—one from 1988 and one from 1991. [ECF No. 19-3 at 410–11]. As to the 1988 assault, Aiken noted that Petitioner did not have a weapon during that altercation and also that it had taken place "over ten years ago and people change over periods of time." [ECF No. 19-3 at 410–11]. Regarding the ABHAN in 1991, Aiken explained how SCDC had effectively managed that situation after-the-fact. [ECF No. 19-3 at 411].

During Aiken's cross-examination, he testified that his opinion as to Petitioner's future adaptability was "[a] prediction based on factors that we have determined to better predict human behavior[,]" but he admitted that he could not provide an opinion with

absolute certainty. [ECF No. 19-3 at 412–13]. Aiken also explained that he did not meet with Petitioner in forming his opinion because he approached the question of Petitioner's adaptability "as a warden and as a warden, I would look at the official record and make decisions on the official record. That's why I chose not to even interview Mr. Stokes. . . ." [ECF No. 19-3 at 416]. The Solicitor provided Aiken with the internal affairs file from the 1991 ABHAN, and Aiken confirmed that there seemed to be some overlap between that file and Petitioner's official record, which Aiken had reviewed in reaching his opinion. [ECF No. 19-3 at 420]. When pressed as to whether someone who had committed an assault like the one Petitioner committed on Jackie Williams could adapt to the prison environment, Aiken explained,

> Yes, I'm not saying that he will not have any problems adapting. What I am saying is that if those behaviors are demonstrated they can adequately be managed and that based on looking at his record, the probability of him adapting very well is tremendously high and that's based on thousands and thousands of reviews, as well as developing and designing systems myself.

[ECF No. 19-3 at 425]. Aiken further testified on cross-examination that SCDC had the ability to use lethal force on an inmate who was not properly adapting or to house the inmate in "a prison within a prison . . . so they will not have access to other population." [ECF No. 19-3 at 425–26].

Petitioner now argues that trial counsel were deficient in presenting Aiken as an expert witness "after apparently conducting little to no investigation on what Mr. Stokes' prison adaptability actually had been . . . ." [ECF No. 172 at 88]. Petitioner further asserts that trial counsel were either unaware of or did not understand the significance of the fact that he had evidence of violence in his prison record and that they failed to consider that fact in offering Aiken as a witness. [ECF No. 172 at 88]. However, Petitioner's assertions appear to be based on speculation, as there is insufficient evidence to support those claims. Rather, the record reflects that trial counsel consulted with a prison adaptability expert, who believed that, despite Petitioner's earlier disciplinary infractions, he would adapt well to prison. *Cf. United States v. Roane*, 378 F.3d 382, 409 (4th Cir. 2004) (noting trial counsel was "was presented with a mental health report, and he was under no mandate to second-guess that report"); *Hendricks v. Calderon*, 70 F.3d 1032, 1039 (9th Cir. 1995) ("If an attorney has the burden of reviewing the trustworthiness of a qualified expert's conclusion before the attorney is entitled to make decisions based on that conclusion, the role of the expert becomes superfluous."). Additionally, trial counsel did not attempt to hide the existence of Petitioner's disciplinary infractions from either their expert or the jury. In fact, Sims specifically questioned Aiken about those disciplinary infractions during direct examination. [ECF No. 19-3 at 410–11]. Trial counsel's testimony during the evidentiary hearing revealed that they wanted to address the jury's concern about Petitioner's prison adaptability and future dangerousness through their mitigation presentation,

and they believed that Aiken's testimony was a way to do so because Petitioner had refused to let trial counsel introduce evidence about his HIV/AIDS status. *See* Tr. 603:1–606:2, 653:6–11. Although Petitioner couches trial counsel's decision to present Aiken as unreasonable, based on the undersigned's review of the circumstances surrounding trial counsel's mitigation presentation, it was a strategic decision that fell "within the wide range of professional assistance." *See Strickland*, 466 U.S. at 689 (recognizing also that there are a "range of legitimate decisions regarding how best to represent a criminal defendant"). Thus, the undersigned concludes that trial counsel were not deficient in calling Aiken as a witness in the mitigation case.

Petitioner further asserts that trial counsel "unreasonably failed to provide his expert with the complete evidence of the most serious incident, the assault on Jackie Williams, leaving the expert open to attack on his credibility and open to accusation of minimizing a serious incident." [ECF No. 172 at 88]. There is insufficient evidence in the record to support this assertion. The record shows that Aiken reviewed Petitioner's "official record" to mimic the review that a warden would perform. [ECF No. 19-3 at 416]. When the Solicitor showed Aiken additional documents from the "internal affairs record of the South Carolina Department of Corrections" in connection with the Williams assault, Aiken indicated that he had seen a number of those documents that were also a part of Petitioner's "official record." [ECF No. 19-3 at 420]. Later, the Solicitor showed a picture of Williams, and the following exchange occurred:

Q. Would you dispute, if I told you that was Jackie Williams would you dispute it?

A. I have no grounds to dispute it. I just don't—I've never seen a picture of Jackie Williams.

Q. The second page of the internal affairs records that I think you said you reviewed, is that not a picture of Jackie Williams, the same picture up here?

A. Well, yes, sir, I see it now and I do relate the two.

[ECF No. 19-3 at 424]. Aiken continued to maintain his opinion that "the probability of [Petitioner] adapting very well is tremendously high" despite the nature of the assault on Williams. [ECF No. 19-3 at 424–25]. Petitioner assumes that Aiken was not provided the entirety of the records available regarding the Williams assault. But based on the above, it is unclear exactly which documents, if any, Aiken was allegedly not provided by trial counsel. It is further unclear if trial counsel had the documentation used by the Solicitor during his cross-examination of Aiken. Petitioner failed to present additional evidence to clarify those details during the evidentiary hearing. As a result, the undersigned cannot find either deficiency or prejudice based on the speculation advanced by Petitioner herein.

At the beginning of the evidentiary hearing, Petitioner argued that Aiken "was not provided with the piece of information that in the several few years coming up to the sentencing phase, [Petitioner] had

been [successfully managed in prison], which would have made an otherwise marginally useful piece of testimony much more powerful." Tr. 15:10–14. While questioning Sims, Petitioner's counsel established that Petitioner's last infraction before he was released from prison was July 28, 1993, and he was released from prison in 1998. Tr. 591:20–592:11; Pet. Ex. 56. Petitioner's counsel then asked Sims, "If Mr. Stokes had not had an infraction for several years prior to his release from prison, would you think that would have been something important for James Aiken to know about[,]" and Sims responded, "Yes." Tr. 592:17–21. However, there is no evidence that Aiken was not provided with that information. Furthermore, given that Aiken testified that he was provided with Petitioner's prison records, it is likely that he did know about the period of time between Petitioner's July 28, 1993 disciplinary infraction and Petitioner's 1998 release date. [*See* ECF No. 19-3 at 407–08]. Petitioner has not met his burden of proof as to this argument.

Finally, as to Petitioner's contention that Petitioner was prejudiced by Aiken's testimony during the mitigation presentation, the undersigned disagrees. Petitioner argues that Aiken's testimony opened the door to additional aggravating evidence regarding the details of Petitioner's prison record, that Aiken's credibility was damaged because trial counsel did not provide Aiken with the full details of the Williams assault, and that the State "was able to turn the entire thrust of the testimony into an argument for death." [ECF No. 172 at 89]. As previously explained, there is insufficient evidence before this court for the undersigned to conclude to conclude that trial counsel

failed to provide Aiken with the full details of the Williams assault. While additional aggravating evidence may have come out through Aiken's testimony, his opinion about Petitioner's ability to adapt to prison and the prison's ability to control Petitioner was mitigating. As frequently seen with the evidence available to trial counsel in the sentencing phase of a capital case, Aiken's testimony was double-edged, with some aspects of his testimony being mitigating and some being aggravating. *See e.g.*, *Moody v. Polk*, 408 F.3d 141, 151–54 (4th Cir. 2005) (finding trial counsel were not ineffective for failing to present "double-edged" evidence "'that might have easily have condemned [the petitioner] to death as excused his actions'" (quoting *Byram v. Ozmint*, 339 F.3d 203, 210 (4th Cir. 2003))). In assessing whether trial counsel's actions prejudiced Petitioner, the inquiry is whether Petitioner has shown "a reasonable probability that . . . the result of the proceeding would be different." *Strickland*, 466 U.S. at 694. In this case, the aggravating evidence against Petitioner—particularly the details of the crimes for which he was on trial—was overwhelming. Accordingly, the undersigned cannot find a reasonable probability that the jury would have struck a different balance absent Aiken's testimony.

VI. Conclusion and Recommendation

For the foregoing reasons, the undersigned recommends that the court grant Respondent's motion for summary judgment [ECF No. 160] and deny and dismiss the petition with prejudice.

IT IS SO RECOMMENDED.

May 9, 2018
Columbia, South Carolina

/s/ Shiva V. Hodges
Shiva V. Hodges
United States Magistrate Judge

The parties are directed to note the important information in the attached "Notice of Right to File Objections to Report and Recommendation."

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6
(1:16-cv-00845-RBH)

[Filed: September 23, 2021]

SAMMIE LOUIS STOKES	)
	)
Petitioner - Appellant	)
	)
v.	)
	)
BRYAN P. STIRLING, Director, South Carolina Department of Corrections; MICHAEL STEPHAN, Warden of Broad River Correctional Institution	)
	)
Respondents - Appellees	)

ORDER

The petition for rehearing en banc and response thereto were 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