APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6

[Filed: July 26, 2022]

QUINCY J. ALLEN,	)
	)
Petitioner - Appellant,	)
	)
v.	)
	)
MICHAEL STEPHAN, Warden, Broad River Correctional Institution,	)
	)
Respondent - Appellee.	)

Appeal from the United States District Court for the District of South Carolina, at Rock Hill. Donald C. Coggins, Jr., District Judge. (0:18-cv-01544-DCC-PJG)

Argued: September 22, 2021 Decided: July 26, 2022

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

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

ARGUED: Aren Kevork Adjoian, FEDERAL COMMUNITY DEFENDER OFFICE, Philadelphia, Pennsylvania, for Appellant. Melody Jane Brown, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellee. **ON BRIEF:** Joshua Snow Kendrick, KENDRICK & LEONARD, P.C., Greenville, South Carolina; E. Charles Grose, Jr., GROSE LAW FIRM, Greenwood, South Carolina, for Appellant. Alan Wilson, Attorney General, Donald J. Zelenka, Deputy Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellee.

GREGORY, Chief Judge:

Quincy Allen was convicted of two capital murders and sentenced to death in a South Carolina state court. During the penalty phase, the government and defense experts agreed that Allen suffered persistent childhood abuse; they also agreed that he had at least one mental illness—rumination disorder—and disagreed as to another—schizophrenia. Yet, the sentencing judge concluded that "Allen was [not] conclusively diagnosed as mentally ill" and found no "conclusive proof of mitigating circumstances." Allen exhausted his state court direct appeal and post-conviction remedies in seeking to overturn his death sentence. He then filed the instant federal petition pursuant to 28 U.S.C. § 2254, raising several claims. The district court dismissed his petition, and Allen appealed.

We granted a certificate of appealability on five issues, including whether the sentencing judge committed constitutional error by "[(i)] fail[ing] to find that any mitigating circumstance had been established and [(ii)] us[ing] an impermissibly high standard for determining whether [] Allen suffered from mental illness."

As explained below, we conclude that the state court's conclusion that the sentencing judge "considered Allen's mitigation evidence as presented" was an unreasonable determination of the facts and its conclusion that the sentencing judge gave "proper" consideration was contrary to clearly established federal law. Because we have grave doubt that the state court's errors did not have a substantial and injurious effect, we reverse and remand.

I.

A.

Quincy Allen's childhood was marked by severe abuse and neglect. He also has a lengthy history of mental health issues, including major mental illness diagnoses and a history of commitments. Because both forms of mitigating evidence are important to resolution of his claims, we go into some detail about them here.

Allen is the product of a short-term relationship between a 19-year-old soon-to-be deployed military man who "never really thought about [the] family thing" and a woman who confesses "never bonded" with any of her five children. S.J.A. 1804, 1807, 1809, 1819. "[P]atterns of intergenerational abuse and neglect go

back at least to [Allen's] maternal great-grandfather's large and chaotic family and bear strong similarities to the abuse and neglect" that branded Allen's childhood. S.J.A. 1804.[1]

Allen's early hospital emergency room and pediatric notes show an ingestion of a bottle of perfume (twelve months of age) and a burn on his foot that his mother said came from a babysitter (fifteen months of age). S.J.A. 1807. At nineteen months, Allen was hospitalized for a week after an untreated fever progressed to pneumonia. Noting signs of medical neglect, emergency room personnel referred Allen's case to Protective Services. S.J.A. 1807–08.

Allen witnessed and suffered physical abuse throughout his childhood as well. His earliest memories are of when his mother was married to his stepfather. S.J.A. 1808. He remembers his stepfather beating him and his mother. *Id.* On one occasion, Allen's stepfather entered his room, picked up a gun from the floor and returned to another room where he pistol-whipped Allen's mother. *Id.*; J.A. 1262. During another incident, while in the backyard, Allen's stepfather held Allen up, placed a gun to his face, aligned the gun site with Allen's eye, and pulled the trigger—his stepfather needed "target practice." J.A. 294; S.J.A. 1808. When Allen was three, his stepfather hit him so hard that he fractured Allen's tibia. S.J.A. 1808. About one year

---

[1] The quoted testimony in this subsection is based on the report of social worker Deborah Grey and is undisputed unless otherwise noted. This report is part of the state court record and is located on the district court docket (18-cv-01544) under ECF No. 65-24.

later, his mother got a restraining order against Allen's stepfather; his stepfather found them, attacked his mother with a knife and hammer, and repeatedly broke into their home and stole things. S.J.A. 1809. Allen hid under the bed with a telephone so he could call 911 if his stepfather showed up. *Id.* By this point, Allen's mother had four children and all of them were "accidents," according to Allen's stepfather. S.J.A. 1810. He said Allen's mother would have sold Allen if she could have made money off him. *Id.*

Allen's grade school career would include fifteen school changes before it ended. S.J.A. 1811. When Allen was elementary school-age and did something wrong, his mother forced him into a dark closet. *Id.* She also punished him by pushing him down, then kicking or stomping on him, or forcing him to sleep in the bathroom with no clothes, pillow, or blanket. S.J.A. 1815–16. She also stripped him naked, used an extension cord to tie him up to the end of the bunk beds "kind of like Jesus," and beat him with a belt, switch, or her hands. S.J.A. 1811, 1815. When she got tired, she walked off to rest awhile and eventually came back to beat him some more. S.J.A. 1811. Allen's aunt said that he "stayed . . . [getting] beat half to death," sometimes for insignificant transgressions. S.J.A. 1816. On one occasion, she threw him into a large trashcan—"the kind with wheels and a swing shut lid" that "trash men pick up with a machine and dump over," Allen described. S.J.A. 1811. She shut the lid on him. *Id.* At some point during his childhood, after seeing a television show during which a guy survived being in ice cold water in Alaska by convincing himself that the water was warm, Allen decided that pain is all in the

mind. S.J.A. 1811–12. As an adult, he told some friends this and they beat him with a wire hanger: "[He] didn't feel it." S.J.A. 1812.

During this time, Allen's mother began denying Allen and his siblings food. *Id.* She stacked and stored the food by type, so she immediately knew if something went missing; she marked all containers, so she could tell if food was removed; and she punished Allen by withholding food for several days in a row. S.J.A. 1812, 1815–16. According to his aunt, Allen always looked "scrawny and half starved." S.J.A. 1812. He stole Kool-aid, cookies, and Little Debbie's snacks from nearby stores, and hoarded food. *Id.* During family gatherings, he ate so much that he threw up. *Id.* And a neighbor once observed Allen and his siblings drinking rainwater as it came down the gutter. J.A. 299. Around the second grade, Allen began ruminating. S.J.A. 1812. About half an hour after eating, he would push his food back up by contracting his stomach muscles, fill his mouth until his cheeks puffed out, re-chew the food, swallow it, and then bring it up again and again. S.J.A. 1812–13. He smelled of vomit all the time. J.A. 308. Allen states he continues to do this daily; it's a compulsion. S.J.A. 1813. "Now its just like getting up in the morning," he said. *Id.*

Allen also experienced a highly unstable home environment, marked by his mother locking and kicking him out of the house as early as second grade and attempting to give up custody of him. When Allen was in the second grade, his mother warned him to come straight home from school. *Id.* One day, he went to a friend's house instead. *Id.* When he got home, his

mother put him in the car, drove him to Social Services, and placed him in foster care. *Id.* His first set of foster parents hit their own kids with pots and pans. *Id.* Eventually, his mother signed over custody to a family friend, with whom Allen lived for about half a year. *Id.* At the beginning of third grade, Allen returned home and, when he was in fourth grade, Allen's mother began kicking him out of the house. *Id.* She would open the door, tell him to get out, and he slept outside in whatever he happened to have on. *Id.* Allen ran away from home with his sister in the fifth grade. *Id.* They left immediately after school and kept running until night hit. *Id.* A sheriff took them home. *Id.* Allen's mother was not happy to see him back: She said, "[i]f you run away again, leave your sister here." *Id.* And she yelled a lot, saying things like, "I hate you. When you're 18, you're getting out of this house." S.J.A. 1815.

In the sixth grade, Allen's mother locked him out overnight on the first of what would become countless occasions. S.J.A. 1816. He would sleep on the porch, where he feared the neighborhood dogs might attack him. *Id.* By this time, Allen's mother had also thrown a chair at him, shoved him against a stove, tried to hit him with a hammer, and choked him with a tie until he fainted. S.J.A. 1818. His mother, his siblings, and the neighborhood kids beat, teased, and picked on Allen, calling him "Alien," "Waterhead," "Mr. Spock," and "Elephant Ears." S.J.A. 1814-15, 1822. In the seventh grade, he got caught with a knife on school property. S.J.A. 1817. On a different occasion, he brought a large glass bottle to school intending to go after one of his bullies. *Id.* He was eventually suspended, taken to court, and sent to a juvenile correctional center for over

a month. *Id.* He then lived in a group home for two weeks; with his uncle in Rock Hill, South Carolina for half a year; with his father in Georgia for over three months; and eventually made his way back to his mother's home. S.J.A. 1819.

Allen lived with his mother for half of ninth grade. S.J.A. 1820. But the instability and chaos persisted. She continued to withhold food and beat him as he stood naked, holding onto the back of the kitchen chair. *Id.* He moved up to Colorado to live with his father for the following year. *Id.* Halfway through the tenth grade, he again returned to his mother's home. S.J.A. 1821. During this time, Allen's mother continued her tradition of requiring her kids to come home immediately after school and wait in the driveway or walk around the house until she eventually arrived home (even in the winter). *Id.* She also installed motion detectors to ensure the kids remained in the basement, never went upstairs, and did not go outside without her permission. S.J.A. 1821, 1823. Eventually, Allen went to live with his uncle again but does not remember why because, by that point, his mother had thrown him out of the house many times for many reasons. S.J.A. 1821. But just under one year later, he returned to his mother's home, where she continued the pattern of repeatedly kicking him out, rendering Allen homeless. *Id.* During periods of homelessness, Allen slept in bushes, a friend's treehouse, or on the McDonald's playground after closing each day—all while trying to keep up with school assignments. J.A. 269–70; S.J.A. 1829. His clothes remained filthy, and teachers found his body odor unbearably overwhelming. S.J.A. 1830. One of Allen's friends said that, eventually, "the light

seemed to go out" in him. S.J.A. 1831. He would not look at you, showed no emotion on his face or in his voice, began to mumble to himself, and started setting fires for no reason, including using gasoline to burn a smiley face onto someone's lawn. S.J.A. 1831–32.

While enduring this abuse, Allen began having mental health problems. By 2002, he had been hospitalized seven times and had received various diagnoses. The mental health challenges began at a young age. As mentioned earlier, he regularly engaged in the practice of ruminating, beginning in second grade. In sixth grade, he saw a mental health professional fourteen times during the academic year and was diagnosed with oppositional defiant disorder. S.J.A. 1817. During his senior year, Allen's mother finally took him to a dentist to address his severely eroded, chipped, and discolored teeth. S.J.A. 1825. The dentist referred Allen to an internist, who formally diagnosed Allen with rumination syndrome, which the internist described as "[a] diagnosis [] rarely made in adolescence and adults and [] not easy to treat." *Id.* "[I]t was going to take extraordinary effort on [Allen's] part to overcome this longstanding problem," the internist explained at the time, and treatment would include "counseling[] [and] possible psychopharmacologic intervention." *Id.*

The internist referred Allen to a child psychiatrist, Dr. Richard Harding. *Id.* During his first appointment with Dr. Harding, Allen admitted to ruminating multiple times a day for about the last 10 years. *Id.* Dr. Harding noted that "this obsessive behavior is more difficult to treat the longer it has existed and the more

frequent it occurs." S.J.A. 1826. "I am less than optimistic about the prognosis in this case," he wrote back then. *Id.* But still, he started Allen on Prozac, which could "decrease the compulsivity." *Id.* Allen and his mother returned about one month later, at which time she asked when Allen could stop taking the antidepressants and "do it on his own." *Id.* Dr. Harding "tried to explain that this was a long-term process and will take an extended period of time to be helpful, and [] may not be [helpful at all]." *Id.* "Mother is very demanding and difficult," he noted. *Id.* About three weeks later, Allen reported to Dr. Harding that he was doing well but, soon after, Allen heard a voice for the first time. *Id.* The voice said: "I want you to kill a lot of people at your school tomorrow." *Id.* It "freaked me out," Allen explained, "but I also thought it was ridiculous because I didn't even have a gun." *Id.*

Between the ages of 17 and 20, Allen cycled in and out of psychiatric hospitals seven times. Nine days after Allen's last visit with Dr. Harding, Allen's mother threw him out of the house. S.J.A. 1827. He returned, busted windows and threw furniture, and made his way to the attic where the police observed him eating insulation.[2] J.A. 339; S.J.A. 1827. He was referred to an inpatient psychiatric facility, marking his first commitment. J.A. 339–41. At the end of his two-day stay, he was discharged with diagnoses of depressive reaction, atypical eating disorder, and identity disorder of adolescence, and given a prescription for Prozac. S.J.A. 1827.

---

[2] Allen stated he got some insulation in his mouth as the police tried to pull him out of the attic. J.A. 534.

His second commitment came about one week later, after his mother kicked him out again. J.A. 343. He went to a Wal-Mart, stole Tylenol, and ingested it. *Id.* When he arrived at the emergency room, hospital staff administered charcoal and contacted his mother, who refused to come and refused to take him home. J.A. 268. Though he was initially involuntarily committed, he voluntarily committed himself on his 18th birthday. J.A. 267–68. His progress notes described Allen as having "no coping skills," a "flat affect," and "zero insight." S.J.A. 1828–29. He was discharged two weeks later with diagnoses of atypical eating disorder, major depression-nonpsychotic, and identity disorder of adolescence. J.A. 269; S.J.A. 1829.

When Allen was 18 and a half, he climbed up onto a maintenance platform of a road sign over the interstate. J.A. 349–50. He threatened to commit suicide by jumping off the overpass. J.A. 2169. Emergency personnel reached him using a cherry picker; once inside the cherry picker basket, Allen refused to exit because he was "comfortable in it." J.A. 349–50. He rode to the emergency room in the basket and was committed for the third time. J.A. 350. Upon discharge eight days later, his final diagnosis was adjustment disorder with depressed mood. S.J.A. 1834.

Allen's fourth commitment occurred one month later, when he brought himself to the hospital expressing suicidal ideation. J.A. 359–60; S.J.A. 1834. During this stay, he threatened staff members and received the antipsychotic Haldol and the antianxiety medication Ativan. J.A. 361–62. When a social worker contacted Allen's mother, she demanded the social

worker not contact her again and made clear that Allen could not come live with her. J.A. 362. After about three weeks of hospitalization, he was diagnosed with adjustment disorder with depressed mood, history of marijuana abuse, personality disorder not otherwise specified, and was discharged to live at the Salvation Army. J.A. 2169; S.J.A. 1835.

Two months later, Allen was hospitalized a fifth time, at which time he was again homeless and living out of his car. J.A. 363, 2169; S.J.A. 1834. After wrapping up his third day on the job at Kroger, Allen was waiting in the video section of the store for a ride. J.A. 363; S.J.A. 1836. The store manager, thinking Allen was a vagrant, told him to leave. J.A. 363. Upon learning that Allen worked there, the manager fired him. J.A. 363–64. Later that night, Allen was found atop the store threatening to jump. J.A. 364. The police called his mother and, when she arrived a couple of hours later, she laughed and walked away. S.J.A. 1836. Allen was, again, committed. J.A. 364. During this visit, Allen declared that he wanted to kill his mother and be the next mass murderer. J.A. 374–75, 378. He was diagnosed with adjustment disorder with depressed mood and personality disorder not otherwise specified. J.A. 2169.

About one month before his 19th birthday, Allen was discharged to a different facility for further treatment at his request, marking his sixth commitment. *Id.* At the new facility, staff noted his visual hallucinations, as well as suicidal and homicidal thoughts. J.A. 381, 384, 391. Four days after he informed staff that he wanted to buy a gun and kill his

family, the hospital decided he had achieved "maximum benefit" and discharged him. S.J.A. 1838. He was diagnosed with depression and placed on Prozac. J.A. 2169. Upon discharge, Allen was again homeless. J.A. 399.

Within a matter of days, he attempted to steal a car from someone's garage and was arrested, convicted, and incarcerated. J.A. 399–403. During this period, he was hospitalized for the seventh time and reported thoughts of going on a murder spree and hurting everyone who had ever harmed him. J.A. 402–03. These homicidal thoughts coincided with more serious suicide attempts. *Id*. He initially attempted to ingest soap while he was awaiting trial in the Richland County Detention Center. J.A. 401. After he was moved to the Department of Corrections, he tried to swallow hoarded bleach, then attempted to overdose on hoarded antidepressants. J.A. 406–07. He was diagnosed with major depressive disorder and placed on antidepressants. S.J.A. 1839. Allen remained incarcerated from October 27, 1998 to August 31, 2000, which was about two months before his 21st birthday. J.A. 2170.

After his release, Allen returned to live with his mother and worked a variety of jobs. *Id*. He did relatively well for a period of time, until his mother once again threw him out of her house. J.A. 407–09. Allen then quit his job and became "intensely suicidal." J.A. 409. He again attempted suicide by swallowing ammonia capsules and Excedrin pills, J.A. 411, and later swallowed a box of rat poison, *id*. By 2002, he

reported feeling immortal because of his repeated lack of success in killing himself. J.A. 2170.

B.

At approximately 3:00 a.m. on July 7, 2002, when Allen was 22 years old, he approached James White, a 51-year-old man lying on a swinging bench in a park located in Columbia, South Carolina. Allen ordered White to stand and shot him in the shoulder. After White fell back onto the bench, Allen ordered him to stand back up and shot him again. White survived and Allen would later tell the police that he used White as target practice because he did not know how to shoot his new gun.

Three days later, on July 10, Allen picked up Dale Hall on Two Notch Road in Columbia during a break from his job at Texas Roadhouse Grill. He drove her to an isolated cul-de-sac and shot her with a 12-gauge shotgun in the left thigh, shattering her leg. Hall pleaded for her life; she had kids and they would be motherless. Allen shot her in the torso. He then dragged Hall down a bank to a wooded area, placed the gun in Hall's mouth, and fired his third and final shot. Allen left to purchase a can of gasoline, returned to douse Hall's body, and set her on fire. He then made his way back to work to continue serving the dinner crowd. Later, after police descended on the crime scene, he found a dog and pretended to walk it atop a bridge that had a good view of the investigatory action.

One month later, on August 8, while working at the restaurant, Allen got into an argument with two sisters, Taneal and Tiffany Todd. He threatened to slap

Tiffany, who was 12-weeks pregnant, so hard that her baby would have a mark on it. Tiffany's boyfriend, Brian Marquis, pulled up to the restaurant, accompanied by his friend Jedediah Harr, who drove the pair. A confrontation erupted outside, and Allen fired his shotgun into Harr's car, attempting to shoot Marquis; Allen missed Marquis, and the bullet struck Harr in the head. As the car rolled downhill, Marquis jumped out and ran into a nearby convenience store, where an employee hid him in a cooler. Allen entered the store looking for Marquis and eventually left; he made his way to Marquis' home and set the front porch ablaze. A few hours later, Allen set fire to the car of Sarah Barnes, another Texas Roadhouse employee. And shortly thereafter, Harr died of the shotgun blast to the head.

The following day, on August 9, Allen set fire to the car of another man, Don Bundrick, whom he did not know. Later that evening, Allen went to a strip club in Columbia, where he pointed his shotgun at a patron. Allen then left South Carolina and drove all the way up to New York City. On his way back, while in North Carolina, Allen shot and killed two men at a convenience store in Surrey County. Allen then made his way to Texas, where police apprehended him on August 14.

Allen confessed to committing the crimes. He began killing people because, while he was incarcerated, an inmate told Allen that he could get Allen a job as a mafia hit man. But Allen got tired of waiting for his first assignment and decided to embark on his own killing spree. He would have killed more people if he

could have gotten his hands on a gun sooner, Allen explained. But, of course, his prior record made that difficult.

C.

Allen first faced prosecution in North Carolina, where he pleaded guilty to two counts of first-degree murder, two counts of armed robbery, and one count of larceny of an automobile. *See* J.A. 113–15. In exchange, Allen received a sentence of life without the possibility of parole for the murders and terms of years on the remaining charges. *See id.* Although the North Carolina sentence had been agreed upon, both the government and defense called multiple witnesses at Allen's three-day sentencing hearing. *See id.* The North Carolina trial court found that "the evidence is convincing that [] Allen is mentally ill" and recommended he receive a psychiatric evaluation, counseling, and treatment upon entering the Department of Corrections. J.A. 115, 117.[3]

---

[3] The full list of mitigating factors found by the North Carolina trial court is as follows: (i) "[t]he defendant was suffering from a mental or physical condition that was insufficient to constitute a defense, but significantly reduced the defendant's culpability for the offense"; (ii) "[t]he defendant's age and maturity or limited mental capacity at the time of the commission of the offense significantly reduced the defendant's culpability for the offense"; (iii) "[p]rior to arrest or at an earlier stage of the criminal process the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer"; (iv) "[t]he defendant has accepted responsibility for the defendant's criminal conduct"; (v) "[t]he felony was committed while the defendant was under the influence of mental or emotional disturbance"; and (vi) "[t]he capacity of the defendant to appreciate the criminality of his

The South Carolina proceedings began thereafter. In September 2002, a Richland County grand jury indicted Allen for two counts of murder, assault and battery with intent to kill, second degree arson, two counts of third-degree arson, and pointing and presenting a firearm. J.A. 2535–36. The Honorable G. Thomas Cooper, Circuit Court Judge, presided over the case and appointed E. Fielding Pringle, April Sampson, Robert Lominack, and Kim Stevens to represent Allen. *See* J.A. 120. Two years passed and, on April 5, 2004, the government filed a Notice of Intent to Seek the Death Penalty. J.A. 1658–59.

Trial was set for Monday, February 28, 2005. About one week prior, on Tuesday, February 22, Lominack asked Solicitor Barney Giese to meet with Dr. Pam Crawford, one of the defense's mental health experts. J.A. 2241, 2243. Pringle had directed Dr. Crawford to meet with and convince the government that Allen was mentally ill and, thus, that the government should consider a plea agreement. J.A. 2243. The next day, on Wednesday, February 23, after refusing initially, Giese agreed to meet with Dr. Crawford. J.A. 2242. That same day, Dr. Crawford met with the government without trial counsel present. *Id.* The parties agree that the government declined to strike a deal but encouraged the defense to meet with the trial judge *ex parte* to discuss a life sentence. J.A. 2244; *see also* J.A. 43, 2486, 2498–99.

---

conduct or conform his conduct to the requirements of law was impaired." J.A. 102–03.

The next day, on Thursday, February 24, Pringle, Lominack, and Sampson attended an *ex parte* meeting with the trial judge. J.A. 2245, 2321. Pringle explicitly and repeatedly asked the trial judge if he would return a life sentence if Allen pleaded guilty. J.A. 2246–48. Though the trial judge made no explicit commitments, J.A. 45, 2418, he did (prior to the *ex parte* meeting) gift Pringle a book called *Ultimate Punishment*, which—as the trial judge later explained—discusses why the death penalty is reserved for the "worst of the worst." J.A. 2009–10, 2013. In addition, during the *ex parte* meeting, the trial judge said that no judge likes to see the bold, black word "reversed" under his name and one way to keep that from happening would be to give Allen life. J.A. 2009–10, 2249. The trial judge also mentioned that he called Giese, who stated that he would not be upset if the trial judge sentenced Allen to life. J.A. 2009–10, 2247–48. The trial judge explained that Giese's position mattered to him and maintained that he would not be bothered if the public disliked a decision to hand down a life sentence. J.A. 2009–10, 2249. Pringle told the trial judge that she "did not want to be sitting on a witness stand in a capital PCR hearing one day explaining why [she] pled [Allen] in front of a judge who would give him death." J.A. 1957. According to Pringle, the trial judge said: "[T]here will never be a capital PCR hearing[,] so you don't have to worry about that." *Id.*

In an affidavit drafted in October 2005—seven months after the conclusion of the sentencing ("Post-Sentencing Affidavit")—the trial judge did not deny telling defense counsel "there will never be a capital PCR hearing[,] so you don't have to worry about that."

Id. Rather, he stated that he has "no recollection of any discussion of [the] PCR hearing that [] Pringle reference[d]." J.A. 2010. He also did not disclaim trial counsel's assertion that he gave them "hints." *Id.* The trial judge admitted he was "sympathetic" and inclined to give Allen a life sentence based on what trial counsel told him about Allen's "severe mental illness." *Id.* But, the trial judge explained in the Post-Sentencing Affidavit:

> "I did say . . . that, if they pled [] Allen guilty, I thought the [d]efense team would have to trust Dr. Crawford to convince me that [] Allen was so mentally ill throughout the time of his crimes and was so mentally ill at the time of trial, that imposition of the death penalty would violate the Eighth Amendment's ban on cruel and unusual punishment."

Id. "I did not use these words," the trial judge declared, "but assumed they knew what I meant by saying 'you'll have to trust Dr. Crawford.'" *Id.*

On Friday, February 25, the day after the *ex parte* meeting, trial counsel called the trial judge to inform him that Allen would plead guilty. J.A. 2033. The weekend passed and, on Monday, February 28, Allen pleaded guilty to all seven charges and waived his right to a jury trial. J.A. 123, 2475–76.

D.

The penalty phase of the trial began one week later, on March 7, 2005. The government presented evidence

of aggravating factors supporting a death sentence.[4] J.A. 175–77.

Defense counsel then opened its presentation of mitigators, explaining that the evidence would show the "chain of isolation, neglect[,] and abuse" Allen endured, as well as his schizophrenia and "rare" "psychiatric disorder called rumination." Dist. Ct. Dkt., ECF No. 19-1 at Pg ID 87–88.[5]

A team of five specialists presented Allen's mitigating evidence. The team included social worker Deborah Grey, general and forensic psychiatrist Dr. Crawford, forensic and correctional psychiatrist Dr. Donna Schwartz-Watts, general and forensic psychiatrist Dr. George Corvin, and child psychiatrist Dr. Harding.

Grey testified at length about Allen's childhood abuse, psychiatric admissions, suicide attempts, and mental status leading up to the murders. J.A. 251–433.

Dr. Crawford interviewed Allen six times—twice in May 2004, once in July 2004, once in February 2005, and twice in March 2005—and ultimately diagnosed

---

[4] The South Carolina Code requires the finding of at least one statutory aggravating circumstance beyond a reasonable doubt during the penalty phase before a death sentence can be imposed. S.C. Code Ann. § 16-3-20(B), (C). The record is clear that the trial judge found at least that. J.A. 214 ("[finding] specifically that the State has made a sufficient showing of [the first] aggravating circumstance [as to Dale Hall] beyond a reasonable doubt").

[5] "Dist. Ct. Dkt." cites refer to documents included in the state court record and located on the district court docket (18-cv-01544).

him with schizophrenia and rumination disorder.[6], [7]

---

[6] It also appears that Dr. Crawford diagnosed Allen with depression. J.A. 758 ("He clearly had episodes of depression. He is diagnosed with depression."). But the parties do not discuss this apparent diagnosis, so we need not either.

In addition, Dr. Crawford did not disagree that Allen has anti-social personality disorder. J.A. 834–35. But she further explained: "The way DSM-IV talks about it is that you can't diagnose anti-social personality disorder when the symptoms are appearing in the context of psychotic illness. . . . [I]t's reductionistic as to what's going on with him. . . . [H]e did a lot of things that would be consistent with traits of people with anti-social personality disorder. The problem again is in the presence of the mental illness that he had[,] it's difficult to distinguish what is from the primary mental illness and what is from the personality problem . . . ." J.A. 834–35, 932.

[7] The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition ("DSM-IV") "devise[s] a set of meaningful criteria for diagnoses that allow psychiatrists and other mental health practitioners to . . . communicate with each other about patients[] and . . . develop a rational strategy for treating these illnesses." J.A. 608–09 (Dr. Corvin Transcript). Dr. Crawford describes Axis I disorders as mental illnesses and Axis II disorders as personality disorders. *See* J.A. 833–34, 959–60 (describing Axis I disorders as "major mental illness[es]"). All other experts who testified on the matter said the same. *See* J.A. 1050 (defense expert Dr. Schwartz-Watts agreeing that Axis I disorders are "major mental illness[es]"); J.A. 1274–75 (government expert Dr. Karla deBeck describing Axis I disorders as "major mental," "mood," or "psychotic disorder[s]" and Axis II disorders as personality disorders); J.A. 1442 (government expert Dr. Camilla Tezza discussing "Axis [I] mental illness"); J.A. 1480 (government expert Dr. Majonna Mirza describing "an Axis I disorder" as "a mental illness"). Schizophrenia (psychotic disorder category), rumination (eating disorder category), and depression (mood disorder category) are on Axis I. *See* J.A. 1275, 1447–48. Anti-social personality disorder is on Axis II. *Id.*

J.A. 757–60. Rumination, Dr. Crawford explained, is a "significant" and "truly bizarre disorder." J.A. 816, 958. "What it shows is that he had significant pathology from the second grade on. . . . Very atypical. . . . [I]t highlights that there's something very unusual about this person and . . . it would [] affect his social relationships and make his life a lot more difficult. It's very unusual." J.A. 816. Dr. Crawford explained that Allen continued to suffer from rumination disorder even after he committed the attendant crimes. J.A. 760. "[T]his is essentially a long lasting problem that's not going to go away with medication." *Id*.

Dr. Crawford also testified that she did not believe Allen was malingering (feigning his mental illness):

> [M]alingering or feigning symptoms does not mean you also do not have a mental illness. . . . We have numerous times mentally ill people who sometimes minimize symptoms, which I think he did at one point, and sometimes exaggerate symptoms. . . . But it means you've got to look through all that stuff to determine what is in the mental illness and what is the exaggeration of it. So that's something that's been very important . . . and difficult in this case.

J.A. 793.

She testified that when Allen was given the Structured Interview of Reported Symptoms test—a test to assess whether a patient is malingering—in North Carolina, the results indicated he was exaggerating but not malingering. J.A. 838. When he

was given the same test three weeks prior to his South Carolina trial, the results showed no evidence of malingering. *Id.*

Dr. Schwartz-Watts met with Allen twice in March 2004, once in January 2005, and three times in February 2005. J.A. 1021–22. She opined that Allen suffered from schizophrenia and, at one point during her evaluation, was on "the highest dose of [the antipsychotic] Prolixin Decanoate [she had] ever seen in anybody," as well as "the maximum dose of [the antipsychotic] Geodon." J.A. 1021–22, 1032, 1047. She also diagnosed him with rumination, revealing the following during direct examination:

> Q: Dr. Schwartz-Watts, have you had occasion to observe Mr. Allen ruminating?
>
> A: Yes.
>
> Q: Do you recall when that is?
>
> A: Yes. . . . I noted on February 28th, that was the day that Mr. Allen pled guilty, I observed him in the courtroom.
>
> Q: What did you observe that indicated to you that he was still ruminating?
>
> A: What I saw at the [angle] I was sitting, you could actually see what's called reverse [peristalsis]. You could see the muscles in his neck moving upwards, pushing through upwards. And I watched him. He was drinking water or something with ice, and I would watch it come up, and he would

> swallow again. In fact, I had my residents with me and pointed it out to them also and they observed it.

J.A. 1022–23. On cross-examination, Dr. Schwartz-Watts stated she did not believe Allen was malingering. J.A. 1035.

Dr. Corvin evaluated Allen on five occasions. J.A. 603–06. He opined that Allen suffered from schizophrenia and explained why he previously diagnosed Allen with schizoaffective disorder. J.A. 606–08. "From a forensic standpoint," Dr. Corvin explained, Allen's many psychiatric hospitalizations are significant because "the symptoms . . . described [] are . . . very, very consistent in their entirety with prodromal schizophrenia[8]. . . . [W]hat you see are many repeated diagnoses of depressive illnesses one way, shape, form or fashion on top of the rumination disorder, which is, as the Court has heard, an unusual psychiatric illness." J.A. 624–25. "In fact, this is the first case I've ever seen of rumination of this sort," Dr. Corvin said. J.A. 625. Dr. Corvin also testified that he did not believe Allen was malingering. J.A. 640.

---

[8] Dr. Crawford described "prodromal schizophrenia" as the beginning stage of schizophrenia. J.A. 613. She quoted the DSM-IV: "The onset may be abrupt or insidious, but the majority of individuals display some type of prodromal phase manifested by the slow and gradual development of a variety of signs and symptoms such as social withdrawal, loss of interest in school or work, deterioration in hygiene and grooming, unusual behavior and outbursts of anger. Family members may find this behavior difficult to interpret and assume that the person is going through a phase." *Id.* "This is [] Allen's history," Dr. Crawford said. *Id.*

Next up was Dr. Harding. He discussed Allen's course of treatment since 1997. He also explained that "[f]rom a psychiatric standpoint," rumination is a "form of self comfort," "a way of keeping control on emotions," and "a calming kind of activity that is effective for the people who do it." J.A. 541–42.

In addition, forensic psychologist Dr. James Hilkey examined Allen for about 12 hours, conducting a battery of psychological tests prior to the North Carolina sentencing. Dist. Ct. Dkt., ECF No. 23 at Pg ID 109. Dr. Hilkey concluded that Allen has a paranoid-type schizophrenia, rumination disorder, and borderline personality disorder with obsessive-compulsive and anti-social features. *Id.* at Pg ID 115. He had another expert confirm, by blind analysis, that Allen was "a person who has some exaggeration, but a person who was suffering from schizophrenia and was psychotic."[9] *Id.* at Pg ID 478–79.

The reports of psychologist Dr. Vasudha Gupta and psychiatrist Dr. Gordon Lavin were also entered into evidence during the penalty phase of the South Carolina trial. J.A. 783–86. Dr. Gupta interviewed Allen in November 2002, after he was admitted to

---

[9] Sometime after Allen's North Carolina sentencing, Dr. Hilkey was contacted by Allen's South Carolina trial counsel. Dist. Ct. Dkt., ECF No. 23 at Pg ID 73. Dr. Hilkey met with trial counsel and reevaluated Allen, at their request. *Id.* at Pg ID 73–74. Trial counsel had Dr. Hilkey on standby during the South Carolina proceeding, and though they did not call him to testify, they entered Dr. Hilkey's North Carolina report into evidence during the penalty stage. *Id.* at Pg ID 76, 78, 80; *see also* J.A. 1222–25, 1554, 1603.

Central Prison Mental Health following his crimes. Dist. Ct. Dkt., ECF No. 65-24 at Pg ID 270. He diagnosed Allen with psychotic disorder, among other conditions. *Id.* at Pg ID 272. Dr. Lavin, who also worked at Central Prison Mental Health, also interviewed Allen around that time and diagnosed him with psychotic disorder. *Id.* at Pg ID 257. But in August 2003, Dr. Lavin determined that, while Allen had anti-social personality disorder, "[h]is claims of auditory hallucinations and other psychotic symptoms are assessed as malingered." *Id.* at Pg ID 265.

The government called five mental health experts in rebuttal: forensic psychiatrist Dr. Karla deBeck, forensic psychologist Dr. David Hattem, forensic psychologist Dr. Camilla Tezza, psychiatrist Dr. Majonna Mirza, and forensic psychiatrist Dr. James Ballenger.[10] These experts generally agreed that Allen has anti-social personality disorder, but believed that he was malingering with respect to schizophrenia symptoms. None of the government experts challenged Allen's diagnosis with rumination disorder.

Dr. deBeck spent 10 to 15 hours with Allen pursuant to the North Carolina court's order for a psychiatric evaluation to assess criminal responsibility. J.A. 1257, 1299–30. Dr. deBeck's "primary diagnosis" was anti-social personality disorder. J.A. 1273–74. She noted Allen had a history of rumination and conceded,

---

[10] Dr. Ballenger never met with or interviewed Allen. J.A. 1058. The sentencing judge found his testimony to be "contrived and unreliable" and, accordingly, gave the testimony "little weight, if any." J.A. 1604–05.

during cross examination, that she had "no idea" if he still has it. J.A. 1323. She also diagnosed him with malingering, J.A. 1274, but agreed that "even if a person malingers or exaggerates or fakes symptoms for some gain, they can still suffer from a mental illness," J.A. 1295. Still, she concluded that Allen did not have symptoms of schizophrenia, schizoaffective disorder, or any other psychotic disorder on or prior to August 2003 (the last time she saw Allen). J.A. 1296, 1308. She did not express any opinion as to whether Allen had a psychotic disorder any time after August 2003. And during cross-examination, Dr. deBeck made clear that she conducted an evaluation regarding his mental state during the North Carolina crimes—she did not evaluate him as to the South Carolina crimes. J.A. 1309.

Dr. Hattem evaluated Allen in August 2003 pursuant to Dr. deBeck's request. J.A. 1382. Dr. deBeck requested that he review Allen's past test results and conduct any additional tests he felt necessary. J.A. 1391–92. Dr. Hattem concluded that Allen "was over endorsing symptoms, possibly in an [] attempt to malinger, but in any case not validly reporting symptoms." J.A. 1412. In addition, he conceded the following during cross-examination:

> Q: [T]he testing . . . [for] malingering, that . . . . does not determine whether or not a person has a mental illness?
>
> A: If somebody is malingering, it does not determine whether or not they have a mental illness." . . .

Q: You do not have an opinion today as to whether [] Allen is presently mentally ill, correct?

A: That's correct. I do not.

Q: And you did not have an opinion when you did your evaluation as to whether in fact [] Allen was mentally ill at that time. Is that correct?

A: That's correct.

Q: Nor do you have an opinion as to whether Mr. Allen was mentally ill at the time of the crimes either in North Carolina or South Carolina?

A: I do not.

J.A. 1412, 1416.

Dr. Mirza evaluated Allen in December 2004. J.A. 1470. She diagnosed Allen with anti-social personality disorder and concluded that he was malingering as to psychosis disorder symptoms. *See* J.A. 1471, 1479–80 (noting that (i) Allen was admitted with symptoms of auditory hallucinations and suicidal ideation; (ii) she discontinued antipsychotics to "rule out psychosis"; and (iii) auditory hallucinations that resolve without medication "would be very hard to ascribe" to an "Axis [I]" "mental health" disorder).

Dr. Tezza evaluated Allen in November 2004 pursuant to Dr. Mirza's request. J.A. 1421. Dr. Mirza requested a psychological consultation to rule out malingering of psychosis. J.A. 1422. Dr. Tezza

determined that Allen was malingering psychotic disorder symptoms and found no evidence of schizophrenia. J.A. 1433, 1434. But he found evidence of anti-social personality and borderline personality disorders. J.A. 1434–36. He also noted that "the problem with malingering" is that "[y]ou cannot be entirely sure that someone doesn't have a severe mental disorder. You can know they're malingering but sometimes malingering can obscure diagnosis." J.A. 1433–34. During cross-examination, Dr. Tezza confirmed that "[she] [was] [] consulted for a specific purpose by [Dr. Mirza]." J.A. 1457. Trial counsel asked, "Not to diagnosis mental illness but to rule out malingering?" *Id.* "That's correct," Dr. Tezza admitted. *Id.* Trial counsel followed-up, "And that's all you did?" *Id.* "That's correct," Dr. Tezza said. *Id.*

In closing, the government conceded that Allen has anti-social personality disorder and argued: "Schizophrenia? The State submits it's a joke. . . . This man has no schizophrenia; the State submit[s] at any time, but especially in 2002." Dist. Ct. Dkt., ECF No. 19-5 at Pg ID 467, 488, 493. The government did not discuss any other mental illness.

Trial counsel began its closing by stating: "[T]his is not a question of whether he knew right from wrong. This has been an issue that, respectfully, Your Honor, has distorted this entire process . . . [over] these past two weeks. If he . . . didn't know the difference between right and wrong, we wouldn't be here. You would never reach the penalty phase . . . of a death penalty trial if he didn't know the difference." *Id.* at Pg ID 499–500. Rather, the question is whether Allen deserves death

considering that "the death penalty is for the worst of the worst crimes and for the worst of the worst criminals." Dist. Ct. Dkt., ECF No. 19-6 at Pg 33. Trial counsel further argued that "the question for the Court is: Is he mentally ill?" *Id.* at Pg ID 13. And "to suggest that because he exaggerates sometimes means he's not mentally ill is just wrong," counsel argued. *Id.* at Pg ID 14. Trial counsel also summarized Allen's "completely undisputed" childhood abuse, which they argued "by itself is mitigating in the extreme." *Id.* at Pg ID 24–33; Dist. Ct. Dkt., ECF No. 19-5 at Pg ID 35, 500. "That's a reason for life. . . . [Y]ou don't ignore the first 20 years of his life when you're deciding whether he gets life or death." Dist. Ct. Dkt., ECF No. 19-5 at Pg ID 35.

E.

On March 18, 2005, after 10 days of testimony, the judge sentenced Allen to death. In the Oral Sentencing Order, the sentencing judge explained in relevant part:

> In considering the outcome of this sentencing hearing[,] I have tried to understand the unique forces and events which have put Mr. Allen in the situation in which he finds himself today. I have considered his upbringing so masterfully chronicled by Debra [sic] Grey. I've considered his list of mental illness [sic] as described by Dr. Pam Crawford. . . .
>
> Mr. Allen raises the issue of mental illness as his reason for avoiding the death penalty. His attorneys argue that due to his diagnosed mental illness his culpability was diminished

and no retributive or deterrent effect would be served by the imposition of the death penalty.

Addressing the issue of mental illness, I have not seen convincing evidence that Mr. Allen had a major mental illness at the time of the crimes in 2002. I have seen a series of shortstay hospitalizations from 1997, 1998 and 1999, but no recognition of a mental illness that required or demanded a treatment program.

If he had a major mental illness in 1997 or 1998 or 1999, then the mental illness community failed him and failed this community. His sole form of treatment was to give him some pills and send him away. This leads me to believe that his mental condition and behavior were primarily a reaction to a very poor and destructive home life as a child from which he chose to act out in ways that would garner attention for himself, whether by being annoying, or childish or aggravating.

His subsequent actions of attempting to kill James White and ultimately killing Dale Hall were, I believe, a result of his desire to be noticed and respected. And if he had a major mental illness at that time in 2002, no one, not even his psychiatrists, were aware of it. . . .

Th[is] lead[s] me to believe that if indeed he had schizophrenia, it was not evident and the disease did not control his mind to such a degree as to exonerate or lessen the culpability of his actions.

And what is Mr. Allen's condition today? I have listened to and read the accounts of all of the psychiatrists and psychologists in this case: Doctors Hilkey, Gupta, Lavin, DeBeck [sic], Hattem, Crawford, Mirza, Tezza, Corvin and Schwartz-Watts.

Quite frankly, I cannot tell with certainty what his mental state is today. I know he is on medication. I have observed him sitting quietly at counsel table, making notes, reading a dictionary, and not exhibiting any unusual or bizarre behavior. I have noticed him communicating with counsel and on occasion, smiling. He has always had a neat and well-groomed appearance.

Yet, three respected psychiatrists, Dr. Corvin, Dr. Crawford, and Dr. Schwartz-Watts have testified that as he sits here today he has a major mental illness characterized by delusions, hallucinations, disorganized speech, grossly disorganized or catatonic behavior, and negative symptoms, such as affective flattening, alogia, or avolition. And maybe he does, although his outward appearance belies such a condition.

On the other hand, I have heard Dr. DeBeck [sic] and Dr. Hattem say that in August 2003, their diagnosis was that he was malingering. Dr. DeBeck [sic] said, "Mr. Allen did not show symptoms of a psychiatric disorder during his hospital stay, despite being off antipsychotics since April 11th, 2003."

> Dr. Tezza and Dr. Mirza also testified that on December 3rd, 2004, they found that Mr. Allen was malingering when sent to Just Care by the Richland County Detention Center. . . .
>
> These contrary opinions lead me to no firm conclusions as to Mr. Allen's mental state at this time.

J.A. 1600–05.

The sentencing judge then cited *Ake v. Oklahoma*, 470 U.S. 68 (1985), for the proposition that "because 'psychiatrists disagree widely and frequently on what constitutes mental illness and on the appropriate diagnosis to be attached to given behavior and symptoms,' the fact finder must resolve differences in opinion . . . on the basis of the evidence offered by each party when a defendant's sanity is at issue in a criminal trial." J.A. 1605–06 (quoting *Ake*, 470 U.S. at 81). He went on to discuss Supreme Court decisions prohibiting capital punishment for the mentally incompetent, insane, and youth under 18 years old. J.A. 1606–09 (citing *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005); *Ford v. Wainwright*, 477 U.S. 399 (1986)).[11] The sentencing judge then recited South Carolina's two-prong test for determining whether a defendant is competent to be

[11] The trial judge began his discussion of *Ford v. Wainwright* with the following question: "So what is the state of the law as it applies to mental illness?" J.A. 1608.

executed.[12] J.A. 1609–10 (citing *Singleton v. State*, 437 S.E.2d 53 (S.C. 1993)). The trial judge ultimately determined that, "in light of the lack of guiding principles dealing with the imposition of the death penalty on persons with mental illnesses, the Court can only look to the *Singleton* principles as a guide"—principles the trial judge also described as "the appropriate test in South Carolina for execution of the mentally ill." J.A. 1610, 1638 (quoting *Singleton*, 437 S.E.2d at 58). Ultimately, "[he] [saw] [] nothing in the course of the t[he] trial to convince [him] that the defendant cannot meet this [two]-prong test." J.A. 1620.

The sentencing judge wrestled with whether Allen's actions were driven by fate, mental illness, or free will. J.A. 1620–23. He then considered deterrence and retribution before announcing Allen's sentence. J.A. 1624–25.

About two weeks after the sentencing, the sentencing judge memorialized his findings in a written sentencing report dated April 1, 2005 ("Post-Sentencing Report").[13] J.A. 1935–48.

---

[12] The sentencing judge explained: "The first prong can be characterized as the cognitive prong, which is defined as the ability to recognize the nature of the punishment and the reason for the punishment." J.A. 1636. "The second prong is characterized as the assistance prong, which is defined as the ability to assist counsel or the court in identifying exculpatory or mitigating information." J.A. 1636–37.

[13] Whenever the death penalty is imposed, South Carolina Code § 16-3-25(A) requires the trial court, within ten days after receiving the sentencing transcript, to transmit a report prepared

Question #8 of Section A ("Data Concerning the Defendant") asked: "Was a psychiatric evaluation performed?" J.A. 1935. The sentencing judge marked, "Yes." *Id.* Subsection 8(a) asked: "If performed, by whom?" J.A. 1936. The sentencing judge wrote: "Dr. Pam Crawford." *Id.* Subsection 8(b) asked, "Able to distinguish right from wrong?" and, "Able to cooperate intelligently in his own defense?" *Id.* The sentencing judge marked, "Yes" as to both questions. *Id.* Subsection 8(c) asked: "If performed, were character or behavior disorders found?" *Id.* The sentencing judge marked, "Yes." *Id.* It then asked: "If yes, please elaborate." *Id.* Next to this question, the sentencing judge wrote a single word: "Schizophrenia." *Id.* Three lines demarcated for additional text remained bare. *Id.*

Question #3 of Section D ("Data Relating to Sentencing Proceeding") asked: "Was (were) the aggravating circumstance(s) found supported by the evidence?" J.A. 1942. The sentencing judge marked, "Yes" next to that question.[14] *Id.* Question #4 asked:

---

by the trial judge. The report is in the form of a standard questionnaire prepared and supplied by the Supreme Court of South Carolina. S.C. Code § 16-3-25(A); Resp. Br. at 9, n.5 (describing the Post-Sentencing Report as "statutorily required").

[14] As to Dale Hall, the trial judge marked the boxes associated with (i) "Kidnapping"; (ii) "Larceny with use of a deadly weapon"; (iii) "Physical torture"; and (iv) "Murder was committed by a person with a prior record of conviction for murder." J.A. 1935–48. The form did not have an option to mark "dismemberment" and that statutory aggravating circumstance was not noted anywhere in the Post-Sentencing Report. As to Jedediah Harr, the trial judge marked the boxes associated with (i) Murder was committed by person with a prior record of conviction for murder" and (ii) "The

"Was there evidence of mitigating circumstances found supported by the evidence?" *Id.* Next to that question, the trial judge marked, "No." *Id.* Question #5 read: "If so, which of the following mitigating circumstances was in evidence?" *Id.* The sentencing judge placed an "X" next to three categories concerning "influence of mental or emotional disturbance," "capacity . . . to appreciate the criminality of his conduct or to conform his conduct to the requirements of law," and "age or mentality . . . at the time of the crime(s)," and also placed an "X" next to the category labeled "Other." J.A. 1942–43. It then stated: "Please explain if [Other] is checked." J.A. 1943. To this, the sentencing judge wrote: "Conclusive proof of mitigating circumstances was not found. Numerous psychiatrists and psychologists testified to conflicting diagnoses of the Defendant's mental health." *Id.*

In the sworn Post-Sentencing Affidavit drafted seven months after sentencing, the sentencing judge wrote: "Mr. Allen was NOT conclusively diagnosed to be mentally ill." J.A. 2010.

II.

A.

Allen raised several issues on direct appeal. *See* J.A. 1933. The Supreme Court of South Carolina affirmed his convictions and sentence, *State v. Allen*, 687 S.E.2d 21 (S.C. 2009), and the United States Supreme Court

---

offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person." J.A. 140–41.

denied his petition for writ of certiorari, *Allen v. South Carolina*, 560 U.S. 929 (2010).

Allen filed for post-conviction relief ("PCR") in the Richland County Court of Common Pleas. He raised various claims relating to the validity of his guilty plea and the constitutionality of his sentencing proceeding. Specifically, Allen argued that his guilty plea was involuntary because it had been induced by a promise of a life sentence from the judge. In the alternative, Allen argued that if the judge *hadn't* made such a promise, then his lawyers rendered ineffective assistance of counsel in advising him to plead guilty without adequate assurance that there was any benefit to doing so. On the sentencing front, Allen argued that the sentencing court made various constitutional errors in weighing the aggravating and mitigating factors before imposing the death sentence, including that it failed to consider all of his mitigating evidence, instead improperly focusing only on whether he was competent to be executed. J.A. 2542–45.

The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge, was assigned to the case. *See* J.A. 2165. After Allen attempted to waive his appellate rights, Judge Cothran ordered him to undergo a competency evaluation. J.A. 2207. On January 15, 2014, Judge Cothran conducted a competency hearing, at which Dr. Richard Frierson opined that Allen was competent to proceed with his PCR action and Allen subsequently withdrew his request. *Id.* But, on February 2, Allen attempted suicide by slicing his arm open. *Id.* He received 22 stitches and, shortly thereafter, began spreading false information to sabotage his case. *Id.*

Judge Cothran noted: "He is refusing to take medications that could address his depressive symptoms. Allen has a very long, and well documented history of attempting suicide." *Id.* Finding Allen incapable of acting in his own self-interest, Judge Cothran assigned Allen a guardian. *Id.*

Judge Cothran held an evidentiary hearing and, on December 1, 2015, adopted a proposed opinion and order drafted by the government and denied relief. J.A. 2530–89. First, addressing the challenges to Allen's guilty plea, the court determined that while the sentencing judge "may have indicated an inclination" toward a life sentence, counsel understood there was no guarantee, and that they "would have to convince the court of the existence of a significant mental illness." J.A. 4202–03. The court emphasized Allen's own testimony, at the evidentiary hearing, denying that anyone had promised him a life sentence. J.A. 2558–60. And in light of all the circumstances, the court found, Allen had received effective assistance of counsel because pleading guilty was a sound strategic decision.

The court also rejected Allen's claims that the sentencing judge failed to consider Allen's mitigating circumstances and "confus[ed] the competency to be executed standard with the standard for finding [a defendant] to be mentally ill," J.A. 2632, 2633–34, explaining:

> Judge Cooper's statement where he discussed the failure to show that [Allen] met the standards of competency to be executed . . . does not indicate that Judge Cooper declined to consider the mitigation evidence as presented.

> Rather the order expresses a conclusion that Judge Cooper did not give the evidence of mental illness the weight that [Allen] wanted him to give. . . . [C]onsideration of the evidence was properly given[.] . . . The transcript is [] fairly read to reflect a global assessment of the facts and circumstances before the sentencing judge, which he considered, weighed and narrowed, until arriving at his sentencing conclusion.

J.A. 2582. Judge Cothran denied Allen's subsequent motion to alter or amend the state court order. *See* J.A. 2640.

On April 19, 2018, the Supreme Court of South Carolina denied Allen's Amended Petition for Writ of Certiorari "on the merits" in an unexplained order. *See* J.A. 2642. Allen sought rehearing, which the court denied. *See* J.A. 2681.

B.

Allen filed a timely petition for a writ of habeas corpus in the United States District Court for the District of South Carolina, asserting nine claims under 28 U.S.C. § 2254, including:

> Mr. Allen's rights under the Sixth, Eighth, and Fourteenth Amendments were violated because the trial judge [(i)] failed to find that any mitigating circumstance had been established and [(ii)] used an impermissibly high standard for determining whether Mr. Allen suffered from mental illness . . . .

J.A. 19. He also renewed his challenges to his guilty plea. J.A. 20. On March 25, 2020, the district court dismissed the petition. J.A. 11–95, 2768.

As to Allen's mitigation evidence claim, the district court explained that the record before the state court rebutted Allen's assertions that "[the sentencing judge] failed to discuss [Allen]'s life history" and "focused solely on whether Petitioner was mentally ill at the time he committed the crimes or at the time of trial." J.A. 32. The district court further explained:

> [T]he Constitution does not require a capital sentencer to find the existence of a mitigating factor, only to consider all of the evidence offered in mitigation. Here, Judge Cooper explicitly stated he considered the evidence of Petitioner's abusive childhood and alleged mental illness in reaching his decision. He went on to discuss some of that evidence in detail and describe how he assessed it. Judge Cooper's decision to grant that evidence little weight does not rebut the record's clear indication that he did, in fact, consider it.

J.A. 37.

Turning to the challenges to Allen's guilty plea, the court concluded that there had been no constitutional error. Disagreeing in part with the PCR court, the district court concluded that the sentencing judge made a promise, or at least an implicit assurance, of a life sentence. J.A. 47, 47–48 n.9. This finding defeated the ineffective assistance of counsel claim because the court concluded that, having received that assurance,

trial counsel made a reasonable strategic decision to advise Allen to plead guilty. J.A. 48, 51. With respect to the voluntariness of the guilty plea, the district court concluded that no promise had been relayed to Allen by his counsel or by the judge, and thus he had not relied on any improper inducement in deciding to plead guilty. J.A. 53. Acknowledging that the questions were close, however, the district court issued a certificate of appealability on these two claims.

Allen timely noted this appeal, and we granted his motion to expand the certificate of appealability ("COA") to include the mitigation evidence issue.[15]

As explained below, we reverse the district court's decision as to Allen's mitigation evidence claim.[16]

---

[15] The COA also included the following four issues: (i) "Trial Counsel were ineffective in violation of [] Allen's rights under the Sixth and Fourteenth Amendments because they advised him to plead guilty without adequate assurances from the judge"; (ii) "[]Allen's guilty plea was involuntary, in violation of the rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments, because the trial judge indicated to counsel that he would impose a life sentence if [] Allen pled guilty to two counts of capital murder and [] Allen relied on that assurance in pleading guilty"; (iii) "[] Allen's Sixth, Eighth, and Fourteenth Amendment rights were violated where the judge sentenced him to death without finding that the statutory aggravating factors were proven beyond a reasonable doubt"; and (iv) "The sentencing judge's reliance on the deterrent effect a sentence of death might have on other abusive mothers violated the Eighth Amendment's protection against the consideration of an arbitrary factor in determining the penalty." J.A. 95, 2961.

[16] Allen also appeals the district court's ruling that his guilty plea was voluntary and that he received effective assistance of counsel

III.

We review de novo a district court's dismissal of a habeas petition. *Grueninger v. Director, Virginia Dep't of Corr.*, 813 F.3d 517, 523 (4th Cir. 2016). When a state court has adjudicated a petitioner's claim on the merits, we 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 (i) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court"; or (ii) "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)).

A state court's decision is "contrary to" clearly established federal law under § 2254(d)(1) when it "arrives at a conclusion opposite to that reached by [the

---

in rendering that plea. Like the district court, we are troubled by the events preceding Allen's guilty plea, including the *ex parte* meeting with the sentencing judge. However, in light of the deferential standard under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), we agree with the district court that the PCR court did not unreasonably find that Allen's lawyers were not ineffective and that the guilty plea was not involuntary. Even if it is the case that the lawyers reasonably perceived they had received a promise of a life sentence, we agree with the district court that *Allen* did not receive or rely on any such promise, as his own testimony made clear. And with or without a promise, we agree with the district court that it would be a reasonable strategic choice to recommend a guilty plea under the circumstances. With this understanding of the facts, the PCR court's decision is not contrary to any clearly established federal law.

Supreme Court] on a question of law" or "decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000).

A state court's decision involves an "unreasonable application" of clearly established federal law under § 2254(d)(1) "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. "In order for a state court's decision to be an unreasonable application of [the Supreme] Court's case law, the ruling must be objectively unreasonable, not merely wrong; even clear error will not suffice." *Virginia v. LeBlanc*, 137 S.Ct. 1726, 1728 (2017) (per curiam) (internal quotation marks omitted). This means that to obtain relief, "a litigant must show that the state court's ruling was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* (alterations and internal quotation marks omitted).

Similarly, when a petitioner alleges that a state court based its decision on an "unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding" under § 2254(d)(2), the question is not whether the state court's determination was incorrect but whether it is "sufficiently against the weight of the evidence that it is objectively unreasonable." *Winston v. Kelly*, 592 F.3d 535, 554 (4th Cir. 2010). A state court's factual determinations are presumed correct, and the

petitioner must rebut this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Finally, even if constitutional error occurs, habeas relief will not be granted unless the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (internal quotation marks omitted). However, "[i]f we are in 'grave doubt' as to the harmlessness of an error, the habeas petitioner must prevail." *Fullwood v. Lee*, 290 F.3d 663, 679 (4th Cir. 2002) (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995)).

In assessing a petitioner's habeas claims, we look to "the last reasoned decision of a state court addressing the claim." *Woodfolk v. Maynard*, 857 F.3d 531, 544 (4th Cir. 2017) (internal quotation marks omitted). Thus, we look to trial court's decision on PCR review. In this case, even if we assume the most stringent AEDPA standard applies, we conclude that Allen has met his burden.

IV.

A.

We begin by discussing the clearly established law at issue. The Eighth Amendment bars the arbitrary imposition of the death penalty, *Beard v. Banks*, 542 U.S. 406, 421 (2004), because death—"the most irremediable and unfathomable of penalties"—is different, *Ford*, 477 U.S. at 411 (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)).

Decades of back-and-forth between legislative enactments and jury determinations—"the two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society"—"point[s] conclusively to [a] repudiation of automatic death sentences." *Woodson*, 428 U.S. at 293. Well-established capital punishment jurisprudence recognizes "the fundamental respect for humanity underlying the Eighth Amendment" and, thus, "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* at 304 (internal citation omitted).

To this end, any sentence imposed in a capital case must be a "reasoned moral response to the defendant's background, character, and crime." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). The constitutional demand for a reasoned moral response requires a sentencing scheme to satisfy two criteria—one governs the character of the evidence placed before the decisionmaker, and the other goes to the substantive justification that must undergird a death sentence.

As to the first criteria, the decisionmaker must be presented with evidence that permits an informed sentencing choice—specifically, the evidence must speak to the crime committed and the specific individual who committed it. *Id*. Of course, a defendant must be permitted to place any constitutionally relevant mitigating evidence in the decisionmaker's

hands. *Id.* at 318–19. In determining whether mitigating evidence is "relevant" in the penalty phase of a capital case, the broad evidentiary standard for relevance applies. *Tennard v. Dretke*, 542 U.S. 274, 284 (2004) (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990)) (internal quotation marks omitted). "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a factfinder could reasonably deem to have mitigating value." *McKoy*, 494 U.S. at 440 (internal quotation marks omitted). So certain evidence that does "not relate specifically to petitioner's culpability for the crime he committed" may nevertheless "be 'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.'" *Tennard*, 542 U.S. at 285 (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)) (internal quotation marks omitted).

Second, "[o]nce this low threshold for relevance is met," the decisionmaker must weigh the aggravating and mitigating evidence to determine whether sentencing a particular defendant to death is the morally rational and justifiable result. *Id.*; *see also Lockett*, 438 U.S. at 604. This is because capital punishment must be reserved for "the worst of the worst." *Roper*, 543 U.S. at 568. It "must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Id.* (quoting *Atkins*, 536 U.S. at 319). Put simply, a constitutionally valid capital sentencing scheme "eliminates the risk that a death sentence will be imposed in spite of facts calling for a lesser penalty." *Penry*, 492 U.S. at 328–29.

But mere "consideration" of mitigating evidence—in the sense that such evidence is *presented* to the decisionmaker—is not enough to satisfy the Eighth Amendment's dictates. Sentencers "must be able to give *meaningful* consideration and effect to *all* mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007) (emphasis added); *see also Brewer v. Quarterman*, 550 U.S. 286, 295 (2007) (requiring sentencer to give "full effect" to mitigating evidence). For example, in *Abdul-Kabir*, the trial court instructed the jury to decide only two special issues: (i) whether the defendant's criminal conduct was "committed deliberately and with the reasonable expectation that the death of the deceased or another would result" and (ii) whether there was "a probability that the defendant . . . would commit criminal acts of violence that would constitute a continuing threat to society." 550 U.S. at 238. Though Abdul-Kabir presented mitigating evidence from mental health experts related to his troubled childhood and lack of impulse control, the trial court refused Abdul-Kabir's requested jury instructions, which would have permitted a negative answer to either of the special issues based on his mitigating evidence. *Id.* at 239–40, 242. The jury answered "yes" to both special issues, and Abdul-Kabir was sentenced to death. *Id.* The Supreme Court concluded that this sentencing scheme amounted to an end-run around the Eighth Amendment's protections. Abdul-Kabir's mitigating evidence had relevance to his moral culpability beyond the scope of the two special questions in the Texas statute, the Supreme Court explained, and a sentencing process that does not

"provide the [decisionmaker] with a vehicle for expressing its 'reasoned moral response'" "to a defendant's mitigating evidence" is "fatally flawed." *Id.* at 252–53, 256–67, 264 (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 185 (1988) (O'Connor, J., concurring)).

"Equally clear is the corollary rule that the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence." *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (internal quotation marks omitted); *Eddings v. Oklahoma*, 455 U.S. 104, 113–14 (1982). The sentencer "may determine the weight to be given relevant mitigating evidence," but "may not give it no weight by excluding such evidence from their consideration." *Eddings*, 455 U.S. at 114–15. And the sentencer may not screen out mitigating evidence that meets the minimal relevance standard by imposing more stringent requirements on valid evidence. *See Tennard*, 542 U.S. at 287 (holding that state may not require mitigating evidence to have some nexus to the crime). As this Court has explained before, "the Supreme Court [is] [] very sensitive to any impediment to the consideration of any type of mitigating evidence in a death sentencing hearing." *Hutchins v. Garrison*, 724 F.2d 1425, 1436 (4th Cir. 1983) (citations omitted).

At bottom, when state law permits a decisionmaker to determine whether a defendant shall live or whether he shall die, the Constitution does not permit "the risk of an unguided emotional response" to the ultimate issue. *Penry*, 492 U.S. at 328. Rather, "[f]ull consideration of evidence that mitigates against the death penalty is essential if the [decisionmaker] is to

give a reasoned moral response to the defendant's background, character, and crime." *Id.* at 319 (emphasis added).

B.

We now turn to the mitigation evidence claim before us. Allen contends that the sentencing judge (i) "refus[ed] to consider and give effect to [] [his] mitigating evidence" as demonstrated by "[the] failure to find any mitigating circumstances" and (ii) "imposed an unconstitutionally restrictive burden on [] consideration of [] [his] mental health evidence" by requiring proof of insanity or incompetence. Op. Br. at 53–54. Allen argues that the latter action required him to be "categorically ineligible for death before . . . any effect to the mental health mitigating evidence" would be given, rendering the aggravator-mitigator balancing "illusory." Op. Br. at 53–56.

The PCR court reached a different conclusion. It reasoned that the sentencing judge "consider[ed] the mitigation evidence as presented" but just "did not give the evidence of mental illness the weight that [Allen] wanted him to give." J.A. 2582. And ultimately, the state court concluded, "consideration of the evidence was properly given." *Id.*

But the analysis is not as simple as stating that the sentencing judge "considered" Allen's mental health evidence "properly" or "as presented" and, therefore, no constitutional violation occurred. If the record before the state court shows clearly and convincingly that the trial court did not consider and give effect to *all* of Allen's mitigating evidence, the state court's conclusion

that the trial court "consider[ed] the mitigation evidence as presented" constitutes an unreasonable determination of the facts and its conclusion that such consideration was "proper" would contravene clearly established federal law. Furthermore, if the sentencing judge failed to give "*meaningful* consideration and effect" to all of Allen's mitigating evidence, the state court's conclusion that such consideration was "proper" contravenes clearly established federal law.

It does not matter which of these things happened here because one is as arbitrary and constitutionally improper as the other. In the end, when placed against the backdrop of the record and considered within the bounds of clearly established federal law, the state court's conclusion that the sentencing judge "properly considered" Allen's mitigating evidence was in error.

1.

Our examination of the record compels us to conclude that the sentencing court did not consider all of Allen's mitigating evidence. Thus, the PCR court's critical factual determination—that the trial court "consider[ed] the mitigation evidence as presented"—was objectively unreasonable. With this cracked factual foundation exposed, we conclude that the state court's determination that the sentencing judge "properly" considered Allen's mitigating evidence was contrary to clearly established federal law.

First, in the Post-Sentencing Affidavit, the sentencing judge states outright: "Allen was NOT conclusively diagnosed to be mentally ill." J.A. 2010. No doubt, we are bound by the sentencing judge's sworn

declaration as to this factual finding. The problem is that the record plainly and unequivocally belies this conclusion. The government's own experts conclusively diagnosed Allen with rumination disorder; the government conceded as much during oral argument. And Dr. Crawford could not have been clearer when she said "[Allen] is mentally ill now" and "[he] was mentally ill" in the summer of 2002. J.A. 763, 774; *see also* J.A. 761, 764, 810, 850, 853, 862, 963–64, 967. Dr. Corvin and Dr. Schwartz-Watts were just as clear when they said the same. J.A. 621, 640, 653–54, 701, 1022.

And no government rebuttal expert said different. Dr. Hattem had no opinion about whether Allen was mentally ill as of the date of Dr. Hattem's testimony, at the time he conducted the evaluation, or at the time of the South Carolina crimes. J.A. 1412. Dr. Tezza confirmed that "[she] [was] [] consulted for a specific purpose" and that purpose was "*not* to diagnose mental illness." J.A. 1457 (emphasis added). Dr. Mirza testified that Allen was malingering as to *psychosis* disorder symptoms; he made no conclusions as to any other mental health disorder. *See* J.A. 1471, 1479–80. And Dr. deBeck also concluded that Allen was malingering as to *psychosis* disorder symptoms, offered no opinion as to whether Allen was malingering as to any other Axis I mental health issue, and admitted that individuals can malinger and still be mentally ill. J.A. 1295–96, 1308.

The sentencing judge could not have concluded that "Allen was NOT conclusively diagnosed to be mentally ill," J.A. 2010, without excluding uncontested

mitigating evidence. We cannot be bound by the sentencing judge's finding that Allen had no conclusively diagnosed mental illness and conclude anything other than that Allen's conclusively diagnosed rumination disorder was excluded. At bottom, the sentencing judge could not have considered mitigating factors that the sentencing judge swore did not exist. Any other conclusion would be objectively unreasonable.

Second, in the Post-Sentencing Report, the sentencing judge concluded that there "[were] [] aggravating circumstance(s) found supported by the evidence." J.A. 1942. He then concluded that there was "[no] evidence of mitigating circumstances found supported by the evidence." *Id.* But there *was* evidence of mitigating circumstances supported by the evidence: Allen suffered from rumination and anti-social personality disorders and endured persistent childhood abuse. No expert or party debated these mitigating circumstances. That the sentencing judge found that the evidence presented did not support the existence of mitigating circumstances, despite undisputed expert testimony regarding two disorders and childhood abuse, shows that the sentencing judge excluded the uncontroverted expert testimony from the analysis.

Third, the sentencing judge *again* emphasizes that no mitigating circumstances existed when articulating why he found "[no] evidence of mitigating circumstances [was] [] supported by the evidence." *Id.* After acknowledging that trial counsel placed several pieces of mitigating evidence on the record—including the "influence of mental or emotional disturbance,"

"capacity . . . to appreciate the criminality of his conduct or to conform his conduct to the requirements of law," and "age or mentality . . . at the time of the crime(s)"—the sentencing judge explained that "[no] evidence of mitigating circumstances [was] found supported by the evidence" because "[c]onclusive proof of mitigating circumstances was not found." *Id.*

But again, what of Allen's rumination disorder, anti-social personality disorder, and childhood abuse? Aren't these circumstances potentially mitigating as a matter of law? *See Abdul-Kabir*, 550 U.S. at 262 (explaining that evidence of "mental illness, substance abuse, and a troubled childhood" have "mitigating qualities"). Didn't all experts who testified about these mitigators agree? Doesn't a lack of conflicting testimony as to a fact create "conclusive proof" of that fact? The only way to reconcile the sentencing judge's conclusion that no conclusive proof of mitigating circumstances existed with the conclusive proof of Allen's rumination and anti-social personality disorders, as well as childhood abuse, is to conclude that the sentencing judge did not consider these mitigators.

Fourth, per the Post-Sentencing Report, "a psychiatric evaluation [was] performed"; Dr. Crawford was the evaluator; and she found "character or behavior disorders." J.A. 1936. Yet, when asked to elaborate, the sentencing judge memorialized a single disorder: schizophrenia. *Id.* The Post-Sentencing Report is silent as to Allen's rumination disorder, an Axis I mental illness with which Dr. Crawford diagnosed Allen. It may be true, as the government

argues, that sentencing judges are required to memorialize only aggravating—not mitigating—circumstances found to exist. But this specific portion of the Post-Sentencing Report does not concern *mitigators* found by the *sentencer*—it concerns "*character or behavior disorders*" found by the *psychological evaluator*. The government has not suggested that a sentencing judge can opt out of filling in all relevant portions of this report. Nor has the government suggested that a sentencing judge can cherry-pick which "character or behavior disorders" to memorialize for review by the South Carolina Supreme Court and which to omit. Indeed, the report contains three full lines upon which a sentencing judge can list the "character or behavior disorders found," suggesting that the South Carolina Supreme Court anticipates a full account of all disorders. That the sentencing judge left the three lines devoid of any mention of Allen's rumination disorder suggests that he did not consider this disorder when making the sentencing decision.

Fifth, that schizophrenia was the only mental health disorder the sentencing judge discussed during oral sentencing further supports the conclusion that schizophrenia was the only mental health condition under consideration. We acknowledge that the sentencing judge states that he "considered [Allen's] list of mental illness [sic] as described by Dr. [] Crawford." J.A. 1600. And of course, that a sentencing order does not refer to some mitigating factors does not mean that such evidence was not considered. But, when trying to ascertain "what [Allen's] mental state is *today*," the sentencing judge discusses what he describes as the "major mental illness" of schizophrenia

only. J.A. 1603 (emphasis added) ("Dr. Schwartz-Watts ha[s] testified that[,] as he sits here today[,] [Allen] has a major mental illness characterized by delusions, hallucinations, disorganized speech, grossly disorganized or catatonic behavior, and negative symptoms, such as affective flattening, alogia, or avolition.") Critically, the sentencing judge concludes that, because some government rebuttal witnesses opined that Allen may be malingering or exaggerating his *schizophrenic or psychosis* symptoms, he could come to "no firm conclusions as to [] Allen's mental state at [the] time [of sentencing]." J.A. 1605. But again, there were absolutely no contrary opinions as to Allen's rumination disorder, which is also an Axis I mental illness. This serves as further evidence that the sentencing judge swiped some of Allen's mitigating evidence off the table.

Sixth, during oral sentencing, the judge announced his sentencing decision by explaining in relevant part:

> After carefully considering all relevant facts and circumstances, including the *existence* of statutory aggravating circumstances as well as the *claim* of mitigating circumstances, this Court finds and concludes that the defendant shall be sentenced to death.

J.A. 2553–54 (emphasis added). But of course, Allen did not merely *claim* to have mitigating circumstances. Again, no expert disputed Allen's rumination and anti-social personality disorders; nor did any expert dispute his childhood abuse. So, these mitigators existed just as much as the aggravators did. Yet, the sentencing judge's final words following ten days of testimony

suggests the exact opposite. This fact too supports the conclusion that the sentencing judge failed to consider Allen's uncontested mitigators.

On this record, therefore, the PCR court unreasonably determined that the sentencing court considered all the mitigating evidence. Although § 2254(d)(2) imposes a high bar for showing an unreasonable determination of the facts, we conclude that Allen cleared it. When the record is read in its entirety, it is clear that the sentencing judge considered Allen's disputed schizophrenia diagnosis only and paid no mind to the several uncontroverted mitigators.

We also note, as further support for this conclusion, that the PCR court failed to even consider the most probative piece of evidence of how the sentencing judge analyzed the mitigating evidence—his own statements memorialized in the Post-Sentencing Affidavit. When a state court during post-conviction review ignores evidence in the record placed before it, "its fact-finding process may lead to unreasonable determinations of fact under § 2254(d)(2)." *Gray v. Zook*, 806 F.3d 783, 791 (4th Cir. 2015) (citing *Moore v. Hardee*, 723 F.3d 488, 499 (4th Cir. 2013) (citing *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004), *overruled on other grounds by Murray v. Schriro*, 745 F.3d 984, 999–1000 (9th Cir. 2014))); *Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003) (expressing concern that a state court "had before it, and apparently ignored" petitioner's probative evidence of a constitutional violation). Of course, "a state court need not refer specifically to each piece of a petitioner's evidence to avoid the accusation that it

unreasonably ignored the evidence." *Id.* (citing *Moore*, 723 F.3d at 499). "Rather, to determine whether the state court considered or ignored particular evidence, the federal court must review 'the entirety of the [state] court's order.'" *Id.* (*Moore*, 723 F.3d at 499).

The record here demonstrates that the state court disregarded the Post-Sentencing Affidavit. The state court said as much in its opinion:

> This Court has also reviewed the affidavit of the Honorable G. Thomas Cooper. . . . [The affidavit] was a part of the direct appeal record and a part of the [r]eturn in the instant action . . . . In an abundance of caution, this Court has used its discretion to resolve not to consider the affidavit in regard to the allegations in this action. . . . [I]t is not necessary to resolve any claim in this action.

J.A. 2532, 2583–84.

Based on this statement, we must conclude that the state court did not consider the Post-Sentencing Affidavit as to any of the claims[17]—unless, of course, it stated or indicated otherwise. Interestingly, the state court did use the affidavit to hedge its decisionmaking, but it did so only as to three specific claims: (i) "Alleged Ineffective Assistance of Appellate Counsel," J.A. 2586; (ii) "Alleged Involuntary Guilty Plea Due to Trial Judge's Involvement in Plea," J.A. 2553; and

---

[17] The district court thought the same, explaining: "[A]lthough the PCR court did not consider Judge Cooper's Affidavit, the Affidavit is part of the record before this Court." J.A. 48.

(iii) "Alleged Involuntary Guilty Plea," J.A. 2584 ("[T]his Court recognizes that Judge Cooper's affidavit plainly rebuts and clarifies the earlier affidavit of Ms. Fielding Pringle and rebuts the affidavit of Mr. Robert Lominack, but it is not necessary to resolve any claim in this action. Critically, the affidavit does not contain any assertions that a promise was made such as would undermine the fairness of the proceeding if the affidavit would not be considered.")

The state court said nothing at all about the Post-Sentencing Affidavit when deciding Allen's two-part mitigation evidence claim. This leads us to conclude that the Post-Sentencing Affidavit played no part in the outcome of this issue, which the state court analyzed in its opinion under Section (D) ("Alleged Ineffective Assistance of Trial Counsel"), Subsection (g) ("For Failing to Object to the Trial Court's Confusing of the Competency to be Executed Standard With the Standard for Finding Mental Illness"). J.A. 2581. The affidavit contained commentary about the judge's assessment of the mitigating evidence—most notable, his conclusion that "Allen was NOT conclusively diagnosed to be mentally ill," J.A. 2010—which bears directly on Allen's claim. "A rational fact-finder might discount [the affidavit] or, conceivably, find it incredible, but no rational fact-finder would simply ignore it." *Gray*, 806 F.3d at 791 (quoting *Taylor*, 366 F.3d at 1006); *see also Taylor*, 366 F.3d at 1001 ("To fatally undermine the state fact-finding process, and render the resulting finding unreasonable, the overlooked or ignored evidence must be highly probative and central to petitioner's claim.").

The state court's decision to ignore the Post-Sentencing Affidavit fatally undermined the fact-finding process.[18] The omission "[led] to unreasonable determinations of fact" because the PCR court overlooked highly probative evidence that the sentencing judge did not consider Allen's rumination diagnosis or history of childhood abuse. *See Gray*, 806 F.3d at 791.

We find clear and convincing evidence that the sentencing judge did not consider *all* of Allen's mitigating evidence, and therefore hold that the state court's determination that the sentencing judge "consider[ed] the mitigation evidence as presented" is an unreasonable determination of the facts because it is based on a factual finding that is plainly contradicted by the record. We thus do not defer to the state court's ultimate ruling on Allen's Eighth Amendment claim, predicated as it is on an unreasonable factual determination, and instead review that claim de novo. *See Dodson v. Ballard*, 800 F. App'x 171, 175–76 (4th Cir. 2020). Failing to consider some of a defendant's

---

[18] "What goes for juries goes no less for judges. In making findings, a judge must acknowledge significant portions of the record, particularly where they are inconsistent with the judge's findings. The process of explaining and reconciling seemingly inconsistent parts of the record lays bare the judicial thinking process, enabling a reviewing court to judge the rationality of the fact-finder's reasoning. On occasion, an effort to explain what turns out to be unexplainable will cause the finder of fact to change his mind. By contrast, failure to take into account and reconcile key parts of the record casts doubt on the process by which the finding was reached, and hence on the correctness of the finding." *Taylor*, 366 F.3d at 1007–08.

mitigating evidence, as the sentencing court did here, violates clearly established federal law. And it follows that the state court's conclusion that the sentencing judge "properly" considered Allen's mitigating evidence is contrary to clearly established federal law. In the end, "the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, [so] it is our duty to remand this case for resentencing." *Mills v. Maryland*, 486 U.S. 367, 375 (1988) (quoting *Eddings*, 455 U.S. at 117 n.13 (O'Connor, J., concurring)).

2.

Attempting to rationalize and breathe ambiguity into the sentencing judge's determination, the government maintains that the sentencing judge did not *exclude* any such evidence. Rather, the government asserted during oral argument that the sentencing judge placed all such evidence on the scale and simply gave it no weight. To be clear, "[c]onclusive proof of mitigating circumstances was not found" and "no evidence of mitigating circumstances was found supported by the evidence" are clear statements of exclusion—not devaluation.[19] Yes, a sentencer may consider mitigating evidence and decide that none of that evidence is worthy of weight. But the distinction between deciding mitigating evidence deserves no weight and deciding that there is *no* mitigating evidence is one with a constitutional difference. In the

[19] This is especially so when paired with the sentencing judge's sworn testimony that "Mr. Allen was NOT conclusively diagnosed to be mentally ill." J.A. 2010.

end, the government's attempt to shove the genie back into the constitutional bottle fails especially because it requires re-writing the sentencing judge's own explanation of the sentence.

Still, we pause to entertain the government's position, in response to which we ask: *Why* did the trial court give Allen's evidence of childhood abuse, rumination disorder, and anti-social personality disorder no weight? The answer to this question reveals that, under the government's theory, the sentencing judge's determination does not comport with the Eighth Amendment principle prohibiting barriers that preclude a sentencer from giving meaningful consideration and effect to all relevant mitigating evidence.

The first possible explanation for the trial court's no-weight determination is that it mistakenly overlooked uncontested mitigating evidence, focusing exclusively—and erroneously—on the contested schizophrenia diagnosis. Recall that the sentencing judge explained in full: "Conclusive proof of mitigating circumstances was not found. *Numerous psychiatrists and psychologists testified to conflicting diagnoses of the defendant's mental health*." J.A. 1943 (emphasis added). This explanation as to why Allen's mitigating evidence was given no weight can be interpreted in only one way: The sentencing judge gathered Allen's evidence of childhood abuse, rumination disorder, and anti-social personality disorder; placed it on the analytical scale; and proceeded to give all of this evidence zero weight, and did so *because* the experts could not agree as to Allen's mental health diagnoses.

But we know that this factual conclusion is erroneous because, as discussed at length above, no one contested Allen's rumination disorder. So, to the extent that the state court viewed the sentencing judge's consideration through the "no weight" lens and determined that such consideration of Allen's mitigating evidence was "proper," this conclusion is defective because it flowed from the unreasonable factual determination that the sentencing judge "considered the mitigation evidence as presented."

A second possible explanation for why the sentencing court gave Allen's mitigating evidence no weight is that it applied the wrong legal standard—inquiring whether Allen was competent to be executed, rather than whether a death sentence would be a reasoned moral response to the defendant's background, character, and crime. Operating under this wrong standard, the sentencing judge may have assigned no weight to Allen's mitigating evidence because he believed that schizophrenia amounts to insanity or incompetency and, without schizophrenia, Allen's mental illness did not render him insane or competent such that the Eighth Amendment would bar his execution. That would be consistent with the judge's oral sentencing, described above, at which he reviewed Supreme Court decisions categorically prohibiting the execution of the mentally incompetent or insane and "look[ed] . . . as a guide" to South Carolina's standard for whether a defendant is competent to be executed. J.A. 1610. It also is precisely what the sentencing judge suggested he required in the Post-Sentencing Affidavit that the PCR court failed to consider: "I did say . . . I thought the Defense team

would have to trust Dr. Crawford to convince me that Mr. Allen was so mentally ill throughout the time of his crimes and was so mentally ill at the time of trial, that imposition of the death penalty would violate the Eighth Amendment's ban on cruel and unusual punishment." J.A. 2009.[20]

---

[20] During the penalty stage, the sentencing judge appeared to remain interested in whether Allen was insane. Take for example the following exchange during Dr. deBeck's direct examination:

> Q: You were also asked . . . by [] Court Order to assess Mr. Allen's state of mind at the time o[f] August [] 12th . . .?
>
> A: Yes. . . .
>
> Q: And did you come to some conclusions regarding specifically his state of mind around the time of August the 12th of 2002?
>
> Q: Yes.
>
> [Defense Counsel]: Your Honor, for the record, we do object to the relevance of this in this proceeding.
>
> [The Court]: What's the question?
>
> [Solicitor]: She was ordered to assess his state of mind [for the North Carolina trial], whether or not he was experiencing some major mood or psychotic disorder at the time of around August the 12th, 2002, at the time of the crimes. I think that would be critical.
>
> [The Court]: What's the objection?
>
> [Defense Counsel]: The objection is based on the fact that she was ordered to do an insanity evaluation. Mr. Allen pleaded guilty in

Of course, *Lockett* and its progeny are reduced to a hollow promise if a sentencer—*before* hearing aggravating or mitigating evidence—decides that a defendant must surmount the guilt-phase insanity or incompetency hurdle in the context of the sentencing-phase determination of who shall live and who shall die. If this is the case, no matter the aggravators and their weight and no matter the mitigators and their weight, the defendant dies if he cannot prove he is insane or incompetent. Mitigators that fall short of proving insanity or incompetency stand no chance of sparing the defendant's life and any aggravators would not matter: The defendant must die essentially as a categorical matter. In applying a predetermined standard, particularly one unmoored from a defendant's mitigating evidence, the sentencer sidelines the only vehicle for arriving at a "reasoned moral *response*" to a defendant's specific character and crime. This would be unconstitutional.

North Carolina, pleaded guilty in South Carolina, and insanity—

[The Court]: He didn't plead guilty. He didn't plead guilty. She made her evaluation before he pled guilty.

[Defense Counsel]: Yes, Your Honor. Yes, she did. But this is no longer a relevant issue, and I believe it's getting somewhat confused.

[The Court]: Well, I'm not confused it. . . . I'll overrule the objection. Go ahead.

J.A. 1299–1300.

Moreover, the sentencing judge also appeared to place an unconstitutional nexus requirement on the mitigating evidence. The judge stated in his affidavit that he was looking for evidence that Allen "was so mentally ill *throughout the time of his crimes* and was so mentally ill *at the time of trial*," that the death penalty would be unconstitutional. J.A. 2009. The judge's focus on Allen's mental state at these two discrete points in time impermissibly narrowed his focus to mitigating evidence that had some nexus to Allen's crimes, and screened out, for example, evidence of Allen's history of mental health problems and commitments that preceded either his crimes or his trial. *Cf. Tennard*, 542 U.S. 274 (barring sentencing courts from imposing any requirement that mitigating evidence must have a nexus to the crime).

Whatever the reason for assigning the mitigating evidence no weight—mistaken oversight of evidence, application of an unjustifiably stringent legal standard, or both—it is clear that the Eighth Amendment does not tolerate a capital sentencing scheme where the sentencer ignores or overlooks the existence of a mitigating factor and, as a result, assigns no weight to that mitigating factor or other such factors. As the Supreme Court explained in *Eddings*, "[t]he sentencer . . . may determine the weight to be given relevant mitigating evidence. But [the sentencer] may not give it no weight by excluding such evidence from [its] consideration." 455 U.S. at 114–15. Improperly screening out mitigating evidence that does not rise to an arbitrary level of severity, or does not bear a direct nexus to the offense, similarly violates the Eighth Amendment by excluding potentially relevant evidence,

contrary to the constitutional requirement that all must be considered. *See Tennard*, 542 U.S. at 287 ("[T]he question is simply whether the evidence is of such a character that it 'might serve "as a basis for a sentence less than death."'").

As the United States Supreme Court has further explained, the source or form of the barrier to giving meaningful consideration and effect to mitigating evidence is immaterial:

> Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, by the sentencing court, or by an evidentiary ruling. . . . *Whatever the cause*, . . . *the conclusion would necessarily be the same*: "Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing."

Mills, 486 U.S. at 375 (emphasis added) (citations omitted); *see also Abdul-Kabir*, 550 U.S. at 259 n.21 (recognizing that prosecutorial argument that prohibits a jury from considering relevant mitigating evidence violates the Eighth Amendment); *McKoy*, 494 U.S. at 440 ("[W]e held that it would be the 'height of arbitrariness to allow or require the imposition of the death penalty' where 1 juror was able to prevent the other 11 from *giving effect* to mitigating evidence." (emphasis added) (quoting *Mills*, 486 U.S. at 374)).

In other words, any barrier to a capital sentencer giving meaningful consideration and effect to all relevant mitigating evidence renders the sentencing scheme constitutionally infirm, "[w]hatever the cause." *Mills*, 486 U.S. at 375. The same must be true when a sentencer imposes his or her own barrier by ignoring, overlooking, or screening out mitigating evidence. *See Caldwell v. Mississippi*, 472 U.S. 320, 329 n.2 (1985) ("[T]his Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or *mistake*." (emphasis added) (quoting *Eddings*, 455 U.S. at 118 (O'Connor, J., concurring))). Here, by ignoring, overlooking, or improperly screening out undisputed mental health evidence, the sentencing judge erected a barrier to giving the requisite meaningful consideration and effect to all of Allen's mitigating evidence.

It is no answer that a sentencing judge "considers" mitigating evidence once he or she permits such evidence to be placed on the record and may then assign some or no weight to such evidence. The Supreme Court's unwavering insistence on giving *meaningful* consideration and effect to mitigating evidence shows that there are situations in which the mere admission of mitigating evidence may not, by itself, guard against the arbitrary imposition of the death penalty.[21] This is such a case. A sentencer can

---

[21] *See Penry*, 482 U.S. at 319 ("[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that in

assign little to no weight to such evidence if the sentencer finds it wanting; but a sentencer may not give it no weight by ignoring or overlooking it (thereby giving it less than full effect, and effectively swiping it off the analytical scale). Because assigning no weight to mitigating evidence based on such barriers violates the principles established in *Lockett*, *Eddings*, and its progeny, Allen's death sentence cannot stand. *McKoy*, 494 U.S. at 468 ("Any barrier to such consideration [of mitigating evidence] must fall.").

V.

Even though we conclude the state court's adjudication was an unreasonable determination of the facts and contrary to clearly established federal law, "our inquiry is not over." *Barnes v. Joyner*, 751 F.3d 229, 239 (4th Cir. 2014). On collateral review, we cannot grant habeas relief unless the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623. "[I]f the federal court is 'in grave doubt' about whether the trial error had a 'substantial and injurious effect or influence' on the verdict and therefore finds itself 'in virtual equipoise' about the issue, the error is not harmless." *Cooper v. Taylor*, 103 F.3d 366, 370 (4th Cir. 1996) (en banc) (quoting *O'Neal*, 513 U.S. at 435). We must make this determination "based on [our] review of the record . . . as a whole." *Id.*

---

imposing sentence. Only then we can be sure that the sentencer has treated the defendant as a 'uniquely individual human bein[g]' and has made a reliable determination that death is the appropriate sentence." (quoting *Woodson*, 428 U.S. at 304–05)).

We are in grave doubt that the errors in this case did not have a substantial and injurious effect. First, the evidence presented demonstrates that Allen is conclusively diagnosed with rumination—an Axis I mental illness. The sentencing decision likely would be different if the sentencing judge had not excluded, ignored, or overlooked this disorder. Indeed, the sentencing judge found no conclusive proof of mitigating circumstances specifically because the experts disagreed as to Allen's mental illness. Had his rumination been placed in the analytical mix, the sentencing judge likely would have found conclusive proof of a mitigating circumstance.

Moreover, as the sentencing judge swore in the Post-Sentencing Affidavit: "I believed Mr. Allen was seriously mentally ill and had that been proven during the penalty phase, there likely would have been no PCR issues because *he would have received the life sentences* the [d]efense team sought." J.A. 2010 (emphasis added). We cannot be certain what "seriously mentally ill" means to the sentencing judge. A reasonable guess (based on our analysis thus far) is that schizophrenia would fall within that bucket and because rumination is also an Axis I disorder, if the sentencing judge had considered it, rumination may have fit the "seriously mentally ill" bill too. Notably, despite a lengthy discussion about the depravity of Allen's crimes, the sentencing judge still made this unequivocal proclamation that Allen "would have received [a] life sentence[]" had trial counsel proven "serious[] mental[] illness." *Id.* So, the Post-Sentencing Affidavit itself indicates that the aggravators would not

have throttled the imposition of a life sentence if Allen proved "serious[] mental[] illness."

Beyond overlooking the fact that Allen does, in fact, have a serious mental illness uncontested by any psychiatrist testimony, the sentencing judge also failed to consider another major component of Allen's mitigation case—his history of childhood abuse. As the Supreme Court has acknowledged, "[e]vidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation." *Eddings*, 455 U.S. at 115. Proper consideration of Allen's thorough case of an abusive and unstable childhood may very well have also changed the sentencing decision.

The record in this case leaves us with grave doubt that excluding, ignoring, or overlooking Allen's serious mental illness and history of childhood abuse had no substantial and injurious effect or influence on the outcome of the sentencing proceeding. Therefore, Allen is entitled to relief.

The doubt surrounding the voluntariness of Allen's guilty plea makes us particularly unwilling to conclude that the sentencing judge's error here may have been harmless. The sentencing judge denied that he promised Allen a life sentence, but even by his own account, he did strongly suggest he was inclined toward leniency if Allen's lawyers were able to convince him of Allen's serious mental illness. J.A. 2009. And the PCR court, in finding no due process violation, cited statements from the lawyers that they believed, based on the representations of the judge, that if they convinced him Allen was seriously mentally ill, the

judge would impose a life sentence. J.A. 2566. Allen then chose to waive his right to a jury and put the sentencing decision in the judge's hands. After making such consequential representations to the lawyers, it was particularly important for the judge to give fair and full consideration to the mitigating evidence that Allen proffered. In such circumstances, we are especially reluctant to conclude that the failure to properly consider mitigating evidence was harmless when the mitigation case factored so heavily into the decision to enter a guilty plea at all.

VI.

Death is final. Well-storied Eighth Amendment jurisprudence recognizes that a capital defendant's due process rights require far greater protection during the penalty phase because this last phase determines whether he lives or dies. Equal justice under the law demands that a death-eligible defendant's individual background, characteristics, and culpability are given meaningful consideration and effect before imposing a sentence of death.

A sentencer may very well impose the death sentence because she believes a defendant should pay for his crimes with his life. But a sentencer can only do so after considering all of the aggravators and all of the mitigators, and weighing them in a way that conforms with Eighth Amendment jurisprudence. That did not happen here. And we know this because, in this rare instance, the sentencer's words and sworn testimony are in the record.

The sentencer in this case excluded, ignored, or overlooked Allen's clear and undisputed mitigating evidence, thereby erecting a barrier to giving this evidence meaningful consideration and effect and eviscerating the well-established requirements of due process in deciding who shall live and who shall die. Because this violates the Eighth Amendment's guarantee against the arbitrary imposition of the death penalty, 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 Allen a new sentencing hearing within a reasonable time.

REVERSED AND REMANDED

RUSHING, Circuit Judge, dissenting:

The majority opinion paints a picture of a South Carolina judge who presided over a ten-day capital sentencing trial and then, when imposing the sentence on the final day, either forgot or deliberately ignored all of the defendant's evidence except his contested schizophrenia diagnosis. Unsurprisingly, that portrayal is not accurate. And it certainly is not the only reasonable way to read the record, which is "the only question that matters" for our purpose as a federal court reviewing a state court's decision on post-conviction review. *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (internal quotation marks omitted).

I respectfully dissent.

I.

In our federal system, "the States possess primary authority for defining and enforcing the criminal law and for adjudicating constitutional challenges to state convictions." *Shinn v. Ramirez*, 142 S. Ct. 1718, 1730–1731 (2022) (internal quotation marks, brackets, and citations omitted). Federal habeas review—by which a federal court may order the release or retrial of a state prisoner—is accordingly highly constrained. We may not "disturb[] state-court judgments on federal habeas review absent an error that lies 'beyond any possibility for fairminded disagreement.'" *Mays v. Hines*, 141 S. Ct. 1145, 1146 (2021) (per curiam) (quoting *Shinn v. Kayer*, 141 S. Ct. 517, 520 (2020) (per curiam)). This means federal habeas review is not "'a second criminal trial, and federal courts are not to run roughshod over the considered findings and judgments of the state courts.'" *Walters v. Martin*, 18 F.4th 434, 441 (4th Cir. 2021) (quoting *Williams v. Taylor*, 529 U.S. 362, 383 (2000)), *cert. denied*, 142 S. Ct. 1455 (2022).

Specifically, Congress has instructed that a federal court "shall not" grant a writ of habeas corpus with respect to any claim adjudicated on the merits in state court unless the state adjudication resulted in a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law" or "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). These standards are "difficult to meet." *Richter*, 562 U.S. at 102.

As relevant here, a decision is "contrary to" clearly established federal law only "if the state court applies a rule different from the governing law set forth in [the Supreme Court's] cases, or if it decides a case differently than [the Supreme Court has] done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002). And a decision is based on an unreasonable determination of the facts only where "the factual determination is sufficiently against the weight of the evidence that it is objectively unreasonable, which means it must be more than merely incorrect or erroneous." *Burr v. Jackson*, 19 F.4th 395, 403 (4th Cir. 2021) (internal quotation marks and brackets omitted); *see Burt v. Titlow*, 571 U.S. 12, 18 (2013) ("[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." (internal quotation marks omitted)) The state court's factual determinations are "presumed to be correct," and the petitioner must rebut this presumption by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

In sum, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Richter*, 562 U.S. at 101 (internal quotation marks omitted).

II.

After Quincy Allen received the death penalty and lost his direct appeal in state court, he sought relief in South Carolina's post-conviction relief (PCR) court. That court considered and rejected Allen's arguments

against his death sentence. He tried again in federal court, arguing that the sentencing judge failed to consider all the evidence he offered in mitigation and that the judge applied the wrong standard for analyzing his mental-health evidence.[1] The district court denied relief, concluding that Allen failed to show that the PCR court's ruling rejecting these arguments was contrary to, or an unreasonable application of, clearly established federal law or based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d). The district court's conclusion was correct. Because fairminded jurists could agree with the PCR court's decision, the majority errs in overriding the state court to grant relief.

A.

Allen contends that the PCR court made an unreasonable determination of the facts or application of law when it found that the sentencing judge considered all the mitigating evidence Allen presented.

---

[1] This opinion focuses on the ground on which the majority grants relief. But the other four claims included in the certificate of appealability also fail under AEDPA's deferential standard. The majority does not address Allen's other two sentencing-related claims. *See supra*, at 35–36 n.15. As for the remaining two assignments of error, the majority rejects them, correctly denying Allen relief from his guilty plea. *See supra*, at 36 n.16. The PCR court determined that, in pleading guilty, Allen relied on counsel's advice that he had a better chance for a life sentence with the judge than with a jury and counsel's strategic decision in this regard was not constitutionally ineffective assistance. These decisions were not "contrary to" or an "unreasonable application of" clearly established federal law, nor were they "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d).

Allen argues that, to the contrary, the sentencing judge confined his consideration of mitigating evidence to Allen's "mental state during the crimes and at trial" and "did not discuss any aspect of [his] non-mental-health mitigating evidence in any depth." Opening Br. at 52–53.

The Eighth Amendment to the United States Constitution requires that a sentencer "be able to consider and give effect to" a capital defendant's relevant mitigation evidence. *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (internal quotation marks omitted). Relevant evidence offered in mitigation cannot be excluded from the sentencer's consideration, whether by statute, evidentiary ruling, or the sentencing court's refusal to consider evidence as a matter of law. *Mills v. Maryland*, 486 U.S. 367, 375 (1988); *see Eddings v. Oklahoma*, 455 U.S. 104, 113–114 (1982). Likewise, the sentencer must be "permitted to give that evidence meaningful, mitigating effect in imposing the ultimate sentence." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 260 (2007). In other words, the State may not prevent a capital sentencer from considering relevant mitigation evidence and according that evidence significance in its sentencing decision. But the Constitution does not *require* a sentencer to conclude that any evidence mitigates a defendant's culpability or otherwise warrants a sentence of life instead of death. Rather, the sentencer retains discretion, within the bounds of state law, to "determine the weight to be given relevant mitigating evidence." *Eddings*, 455 U.S. at 115.

The sentencing judge here did not exclude or refuse to consider Allen's mitigation evidence. No statute or rule prevented the judge from considering the evidence. Indeed, South Carolina law required the sentencing judge to consider both statutory and nonstatutory mitigating circumstances. *See* S.C. Code Ann. § 16-3-20(C) (2005). Nothing in the record suggests that the sentencing judge believed he could not consider, or otherwise would not consider, any of the mitigation evidence Allen offered.

To the contrary, the sentencing judge expressly stated that he considered all of Allen's evidence. For example, at the sentencing hearing, the judge stated:

> In considering the outcome of this sentencing hearing I have tried to understand the unique forces and events which have put Mr. Allen in the situation in which he finds himself today. I have considered his upbringing so masterfully chronicled by Debra Grey. I've considered his list of mental illness as described by Dr. Pam Crawford.
>
> I've considered the facts of the various murders that Mr. Allen does not deny. I've considered the impact to [the victims]. I've also considered the effect of this trial on Quincy Allen's two younger brothers who have sat through the majority of this trial. And I have considered the passionate arguments of counsel on both sides of this case.
>
> . . .
>
> I have listened to and read the accounts of all of the psychiatrists and psychologists in this case:

> Doctors Hilkey, Gupta, Lavin, DeBeck, Hattem, Crawford, Mirza, Tezza, Corvin and Schwartz-Watts.

J.A. 1600, 1603; *see also* J.A. 1626 (judge pronouncing sentence "[a]fter carefully considering all relevant facts and circumstances, including the existence of statutory aggravating circumstances as well as the claim of mitigating circumstances"). A reasonable jurist could credit the judge's statements when announcing Allen's sentence. As the Supreme Court concluded in a similar circumstance: "We must assume that the trial judge considered all [the defendant's mitigation] evidence before passing sentence. For one thing, he said he did." *Parker v. Dugger*, 498 U.S. 308, 314–315 (1991), *holding modified by Brown v. Sanders*, 546 U.S. 212 (2006).

The sentencing judge then went on to discuss in detail some of Allen's evidence—particularly his evidence of mental illness—and describe how he assessed it. Mental illness was the most disputed mitigation argument and the one the defense pressed most vigorously, so the judge's lengthy discussion of that evidence is unsurprising. *See*, *e.g.*, J.A. 1561–1562 (defense counsel asserting in closing argument that "[t]here is only one real disputed issue here," and "[t]he one disputed issue is whether or not [Allen] was mentally ill in the summer of 2002, whether or not he is mentally ill now"). Because the State did not dispute Allen's age or traumatic childhood, not much remained to be said about those circumstances other than the fact that the judge considered them.

The post-sentence report further demonstrates that the sentencing judge considered the evidence offered in mitigation but found it unpersuasive. On that form, the judge indicated that several statutory mitigating circumstances, including the presence of a mental disturbance, were "in evidence" but none were "found supported by the evidence." J.A. 1942; *see* S.C. Code Ann. § 16-3-20(C)(b) (2005). The judge explained, writing: "Conclusive proof of mitigating circumstances was not found. Numerous psychiatrists and psychologists testified to conflicting diagnoses of the Defendant's mental health." J.A. 1943. Thus, the sentencing judge acknowledged that Allen presented evidence in support of mitigation, but the judge ultimately did not find the evidence to be mitigating, a decision that South Carolina law entrusted to him alone. *See State v. Bell*, 360 S.E.2d 706, 713 (S.C. 1987).

The PCR court rightly concluded that the sentencing judge "consider[ed] the mitigation evidence as presented." J.A. 2582. As the district court put it, "the Constitution does not require a capital sentencer to find the existence of a mitigating factor, only to consider all of the evidence offered in mitigation," and Allen "does not rebut the record's clear indication that [the sentencing judge] did, in fact, consider it." J.A. 37. At a minimum, the PCR court's determination is not objectively unreasonable, as required for federal habeas relief, because it is reasonable to read the sentencing judge's statements as considering and rejecting Allen's mitigation claims. Because "fairminded jurists could disagree on the correctness of the PCR court's decision," the law "precludes federal habeas relief."

Richter, 562 U.S. at 101 (internal quotation marks omitted).

The majority nevertheless grants Allen federal habeas relief based on its own reimagination of the law and the record. First, the majority incorrectly asserts that the sentencing judge was required to "give effect to *all* of Allen's mitigating evidence." *Supra*, at 43. As explained above, that is not true. The sentencing judge must be "*permitted* to consider fully such mitigating evidence" and "*permitted* to give that evidence meaningful, mitigating effect in imposing the ultimate sentence," *Abdul-Kabir*, 550 U.S. at 260 (emphases added) (internal quotation marks omitted), but he is not required by clearly established federal law to give particular weight to any evidence offered in mitigation, *see Eddings*, 455 U.S. at 114–115. The majority's conclusion that the sentencing judge "failed to give *meaningful* consideration and effect to all of Allen's mitigating evidence" is not a critique founded in law; it is merely a statement that the majority would have evaluated Allen's evidence differently. *Supra*, at 43 (internal quotation marks omitted).

Second, and relatedly, much of the majority's supposed proof that the sentencing judge did not consider certain evidence Allen presented instead demonstrates that the judge did not find that evidence mitigating in Allen's case. The majority conflates two uses of the term "mitigating." In one sense, all evidence a capital defendant introduces at the penalty phase of trial is "mitigating evidence" because it "might serve as a basis for a sentence less than death." *Tennard*, 542 U.S. at 285 (internal quotation marks omitted). But not

all evidence offered for its potential mitigation value ultimately will be found by the factfinder to warrant a lesser sentence—i.e., to "mitigate" the defendant's culpability or his punishment. And that judgment, of course, was for the sentencing judge to make.

For example, the majority reads the statements in the post-sentence report that mitigating circumstances were not "found supported by the evidence" and "[c]onclusive proof of mitigating circumstances was not found," J.A. 1942–1943, to mean that the sentencing judge refused to consider Allen's evidence about "rumination disorder, anti-social personality disorder, and childhood abuse" because those circumstances are "potentially mitigating as a matter of law," *supra*, at 46. But a reasonable jurist could understand that the sentencing judge considered this potentially mitigating evidence—as he said he did, *see* J.A. 1600—and was not persuaded that it in fact mitigated Allen's culpability or punishment.

Similarly, the majority takes issue with the sentencing judge's statement, in announcing his sentence, that he considered "the existence of statutory aggravating circumstances as well as the claim of mitigating circumstances." J.A. 1626. According to the majority, mitigating circumstances "existed just as much as the aggravators did" because Allen presented undisputed evidence of childhood abuse, rumination, and anti-social personality disorder. *Supra*, at 48. But again, the sentencing judge was entitled to consider that evidence and find it not mitigating. More to the point for the purpose of this federal habeas appeal, nothing in this statement suggests the judge ignored or

overlooked the evidence supporting Allen's "claim of mitigating circumstances." J.A. 1626.

The remainder of the majority's supposed proof that the sentencing judge did not consider all of Allen's mitigation evidence focuses on his rumination disorder, an issue not even Allen advances. Nowhere in his briefs does Allen argue that his rumination disorder was a mental illness that the sentencing judge excluded or ignored; indeed, he mentions the word "rumination" only twice—on a single page in the factual background of his opening brief. *See* Opening Br. at 9. That is consistent with Allen's treatment of the disorder at trial.

According to the majority, the sentencing judge must have excluded rumination from his consideration because he stated in a post-sentencing affidavit that Allen was not "'conclusively diagnosed to be mentally ill.'" *Supra*, at 44 (quoting J.A. 2010). Although rumination qualifies as a "psychiatric illness," J.A. 625, Allen's witnesses repeatedly referred to rumination as an "eating disorder," *see*, *e.g.*, J.A. 334, 336, 340, 540–543, 587, 590, 759, 760, 1323; *see also* J.A. 1922–1925, 1927–1930, 2169. By contrast, when Allen's counsel argued for mercy based on his mental illness, they focused on schizophrenia—which they claimed made him "very dangerous," "delusional," "oblivious," "[n]onresponsive," and "bizarre," J.A. 1568, 1573–74, 1581—not rumination. *See*, *e.g.*, J.A. 1562–1586 (defense closing argument focusing on the "one disputed issue" of "whether or not [Allen] was mentally ill in the summer of 2002, whether or not he is mentally ill now"). As defense counsel made crystal

clear: "Time has proven what is wrong with Quincy Allen. . . . [I]t is our position that he is schizophrenic, that he was schizophrenic at the time, and he is schizophrenic now." J.A. 1585. Given the context, the sentencing judge's statement about mental illness in his post-sentencing affidavit naturally refers to the schizophrenia that Allen argued controlled his actions. It blinks reality to read the judge's comment as asserting that Allen never suffered from rumination.[2]

The majority also infers that the sentencing judge must have refused to consider rumination from the fact that he wrote on the post-sentence report that Dr. Crawford diagnosed Allen with schizophrenia, omitting mention of a rumination diagnosis. *See supra*, at 46–47. But the judge's report is in line with Dr. Crawford's testimony that her diagnosis of Allen was schizophrenia. *See* J.A. 757 ("My diagnosis of him is schizophrenia."). Dr. Crawford discussed the criteria for diagnosing schizophrenia, the symptoms, and how Allen's statements during one of his crimes aligned with schizophrenic delusions. Dr. Crawford also spent a significant amount of time discussing whether Allen

---

[2] Regarding the post-sentencing affidavit, the majority also asserts that the PCR court's "decision to ignore" it "when deciding Allen's two-part mitigation evidence claim" "fatally undermined the fact-finding process" and "no rational fact-finder" would have done so. *Supra*, at 51 (internal quotation marks omitted). But Allen presented his mitigating evidence argument to the PCR court solely in the context of a claim that counsel rendered ineffective assistance by failing to object during the sentencing hearing. *See* J.A. 2542–2543, 2581–2582. The post-sentencing affidavit was written months after the sentencing hearing and thus could not possibly be relevant to the PCR court's assessment of Allen's claim.

was malingering the schizophrenia—that is, faking the symptoms. In hundreds of pages of testimony, Dr. Crawford mentioned rumination only in passing. Dr. Crawford's main dialog about rumination emphasized that Dr. Harding, Allen's psychiatrist as a child, had made the rumination diagnosis and she merely adopted his understanding. *See* J.A. 759 ("He also has a eating disorder not otherwise specified, what Dr. Harding referred to as the atypical eating disorder, the rumination."). In fact, Dr. Crawford emphasized that she "certainly was not an expert in rumination." J.A. 760.

At bottom, the majority claims the sentencing judge did not give sufficient consideration and weight to some of the evidence Allen offered in mitigation. Even accepting that premise, it cannot support federal habeas relief under the standards imposed by Congress. *See* 28 U.S.C. § 2254(d). Having identified neither an objectively unreasonable factual determination by the PCR court nor a "materially indistinguishable" Supreme Court decision that the PCR court contradicted, the majority errs in granting relief. *Bell*, 535 U.S. at 694; *see also Burr*, 19 F.4th at 403.

B.

Allen also contends that the sentencing judge analyzed his mental health evidence under the wrong legal standard. The PCR court was not persuaded that the sentencing judge "confused the competency to be executed standard with the standard for finding mental illness," concluding that the record was "more fairly read to reflect a global assessment of the facts and

circumstances before the sentencing judge, which he considered, weighed and narrowed, until arriving at his sentencing conclusion." J.A. 2582. After comprehensively reviewing the sentencing judge's analysis, the district court agreed, explaining that the judge found Allen competent to be executed "but did not end his analysis there." J.A. 35. The majority does not decide this question.

The PCR court's conclusion was reasonable. Tracking the defense's argument about mental illness, the sentencing judge first discussed whether Allen was mentally ill around the time of the murders, concluding that Allen did not have "a major mental illness at the time of the crimes" and "if indeed he had schizophrenia, it was not evident and the disease did not control his mind to such a degree as to exonerate or lessen the culpability of his actions." J.A. 1601, 1603.[3] Then the judge considered whether Allen was mentally ill at the time of trial. It was in the context of this second inquiry that the sentencing judge discussed the standard for competency to be executed, among other considerations.

---

[3] Two statutory mitigating factors under South Carolina law concern the effect of mental illness on the defendant at the time of the crime. *See* S.C. Code Ann. § 16-3-20(C)(b)(2), (6) (2005). Throughout closing arguments, defense counsel portrayed Allen as so impaired, even controlled, by mental illness at the time of the crimes that he was not able to act rationally. *See*, *e.g.*, J.A. 1569 ("[H]is aha [moment] was I'm a serial killer. This is my job and this is what I am supposed to do. I have no control over it."); J.A. 1572–1573 ("[H]e is delusional and has set out to complete his mission of being a serial killer because he believes that that's what he has to do, that he is compelled to do that, that that is his job.").

Allen argues that the sentencing judge's post-sentencing affidavit shows that he applied too strict a standard to Allen's evidence of mental illness. In that affidavit, the judge wrote that he had told the defense lawyers before trial, in not so many words, that they "would have to trust Dr. Crawford to convince [him] that Mr. Allen was so mentally ill throughout the time of his crimes and was so mentally ill at the time of trial, that imposition of the death penalty would violate the Eighth Amendment's ban on cruel and unusual punishment." J.A. 2009. Considered in isolation, the implication of the affidavit is troubling. But we may not consider it isolated from the judge's explanation for his sentencing decision on the record at the sentencing hearing seven months earlier. Assessed as a whole, the record is at worst ambiguous, meaning reasonable jurists could disagree and we may not upset the PCR court's judgment. *See Mays*, 141 S. Ct. at 1146.

III.

The state PCR court considered and rejected Allen's arguments about the sentencing judge's treatment of his mitigation evidence in this South Carolina capital case. Because that determination "was not so obviously wrong as to be 'beyond any possibility for fairminded disagreement,'" we are bound by federal law to defer to the state court and deny habeas relief. *Kayer*, 141 S. Ct. at 526 (quoting *Richter*, 562 U.S. at 103); *see* 28 U.S.C. § 2254(d). The majority, however, "set[s] aside reasonable state-court determinations of fact in favor of its own debatable interpretation of the record." *Rice v. Collins*, 546 U.S. 333, 335 (2006). I cannot go along

with the majority's retelling or its disregard of the "settled rules that limit [our] role and authority." *Id.*

APPENDIX B

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

Case No. 0:18-cv-01544-DCC

[Filed: March 25, 2020]

Quincy J. Allen,	)
	)
Petitioner,	)
	)
v.	)
	)
Michael Stephan, Warden, Broad River Correctional Institution,	)
	)
Respondent.	)
	)

ORDER

This matter is before the Court on Respondent's Motion for Summary Judgment, ECF No. 51, and Motion to Strike, ECF No. 74, and Petitioner's Motion for Discovery, ECF No. 85. Petitioner, Quincy J. Allen, is a death-sentenced state prisoner seeking habeas corpus relief under 28 U.S.C. § 2254. Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02(B)(2) (D.S.C.), pre-trial proceedings were referred to the Honorable Paige J. Gossett, United States Magistrate Judge. On August 2, 2019, the Court

unreferred Respondent's Motion for Summary Judgment for consideration without a Report and Recommendation. ECF No. 55. Having carefully considered the parties' submissions and the record in this case, the Court GRANTS Respondent's Motion for Summary Judgment, GRANTS IN PART and DENIES IN PART Respondent's Motion to Strike, and DENIES Petitioner's Motion for Discovery.

FACTUAL BACKGROUND

The following facts are recited verbatim from the Supreme Court of South Carolina's opinion affirming Petitioner's death sentence on direct appeal:

> At approximately 3:00 a.m. on July 7, 2002, Quincy Allen approached a homeless man, fifty-one year old James White, who was lying on a swinging bench in Finlay Park in downtown Columbia. Allen ordered White to stand up, and proceeded to shoot him in the shoulder. When White fell back to the bench, Allen ordered him to stand up and shot him again. According to Allen's subsequent statement to police, he had just gotten the shot[]gun and he used White as a practice victim because he did not know how to shoot the gun. White survived the assault.
>
> A few days later, on July 10, 2002, Allen met a prostitute named Dale Hall on Two Notch Road in Columbia; he took her to an isolated dead end cul-de-sac near I-77 where he shot her three times with a 12 gauge shotgun, placing the shotgun in her mouth as she pleaded for her life. After shooting her, Allen left to purchase a can

of gasoline, and came back to douse Hall's body and set her on fire. He then went back to work at his job at the Texas Roadhouse Grill restaurant on Two Notch Road.

Several weeks later, on August 8, 2002, while working at the restaurant, Allen got into an argument with two sisters, Taneal and Tiffany Todd; he threatened Tiffany, who was then 12 weeks pregnant, that he was going to slap her so hard her baby would have a mark on it. Tiffany's boyfriend Brian Marquis came to the restaurant, accompanied by his friend Jedediah Harr. After a confrontation, Allen fired his shotgun into Harr's car, attempting to shoot Marquis; however, Allen missed Marquis and instead hit Harr in the right side of the head. As the car rolled downhill, Marquis jumped out and ran into a nearby convenience store, where he was hidden in the cooler by an employee. Allen left the convenience store, and went and set fire to the front porch of Marquis' home. A few hours later Allen set fire to the car of Sarah Barnes, another Texas Roadhouse employee. Harr died of the shotgun blast to his head.

The following day, Allen set fire to the car of another man, Don Bundrick, whom he apparently did not know. Later that evening, August 9, 2002, Allen went to a strip club, Platinum Plus, in Columbia, where he pointed his shotgun at a patron. Allen left South Carolina and proceeded to New York City. On his way back, while in North Carolina, Allen

> shot and killed two men at a convenience store in Surrey County.[2] Allen then went to Texas, where he was apprehended by law enforcement on August 14th.
>
> > [2] Allen pleaded guilty to those murders in 2004 and was sentenced to life in prison.
>
> Allen gave statements to police outlining the details of his crimes. He told police he began killing people because an inmate in federal prison, where Allen spent time for stealing a vehicle, had told him he could get a job as a mafia hit man. Allen got tired of waiting and embarked on his own killing spree. Allen told police he would have killed more people if he had had a handgun, but his prior record prohibited him from obtaining a handgun.

State v. Allen, 687 S.E.2d 21, 22–23 (S.C. 2009) (footnote in original).

PROCEDURAL HISTORY

Guilty Plea & Sentencing

In September 2002, the Richland County Grand Jury indicted Petitioner for the murders of Dale Hall and Jedediah Harr, assault and battery with intent to kill, second degree arson, two counts of third degree arson, and pointing and presenting a firearm. App. 2937–50.[1] The State filed its Notice of Intent to Seek

---

[1] The Appendix is located at ECF Nos. 19–23. In addition, the Supplemental Appendix, which the Court cites as "Supp. App.," is located at ECF No. 65.

the Death Penalty on April 5, 2004. App. 2951–53. The Honorable G. Thomas Cooper, Circuit Court Judge, presided over the case and appointed E. Fielding Pringle, April Sampson, Robert Lominack, and Kim Stevens[2] to represent Petitioner. *See* App. 0010.

On February 28, 2005, Petitioner waived his right to a jury trial and pled guilty to all seven indictments. App. 0011–38. Judge Cooper accepted Petitioner's pleas and Petitioner agreed to the facts as recited by the State. App. 0023–38. The penalty phase commenced on March 7, and proceeded through March 17, 2005. App. 0040–2555. On March 18, 2005, after hearing ten days of testimony and evidence from both sides, Judge Cooper sentenced Petitioner to death for both murders. App. 2553–55. Judge Cooper memorialized his findings in a written sentencing report dated April 1, 2005. App. 2955–68.

Motion to Vacate Guilty Plea

On February 6, 2008, through appellate counsel Robert M. Dudek and Kathrine Hudgins, Petitioner filed a motion before the Supreme Court of South Carolina to vacate his guilty plea or remand his case for a hearing on the voluntariness of his plea. App. 2997–3005. On March 5, 2008, after briefing by the State, App. 3070–91, the court denied Petitioner's motion, App. 3153.

---

[2] Ms. Stevens also represented Petitioner in his North Carolina proceedings.

Direct Appeal

Petitioner raised the following issues on direct appeal:

1.

> Whether appellant's death sentence should be vacated where the court sentenced appellant to death to deter other mothers from abusing their children in the manner in which appellant's mother abused him, since the death sentence being imposed on the basis of this arbitrary factor violates the Eighth Amendment, and therefore mandates relief under S.C. Code § 16-3-25(C)(1)?

2.

> Whether appellant's death sentence should be vacated where the court did not designate the finding of a statutory aggravating circumstance as mandated by S.C. Code § 16-3-20(C), and the death sentence therefore must be vacated pursuant to S.C. Code § 16-3-25(C)(2)?

3.

> Whether the court erred by ruling it did not have the authority to rule that S.C. Code § 16-3-20 was unconstitutional, and by ruling that S.C. Code § 16-3-20 did not violate the Eighth and Fourteenth Amendments because it forced appellant to choose between his constitutional right to a jury trial and his constitutional right to present compelling mitigating evidence by

> pleading guilty, and accepting responsibility for his actions before a jury of his peers?

App. 3161. On November 16, 2009, after full briefing and oral argument, the Supreme Court of South Carolina affirmed Petitioner's convictions and sentence. *Allen*, 687 S.E.2d at 21–26.

Post-Conviction Relief Action

Petitioner timely filed for post-conviction relief ("PCR") in the Richland County Court of Common Pleas. On November 12, 2014, through appointed counsel Elizabeth Franklin-Best and Laura Young, Petitioner filed his final PCR application, raising the following grounds:

> 10(a): Applicant was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during the sentencing phase of his capital trial as a result of trial counsel's acts or omissions set forth below in section 11(b) [sic]. Trial counsel's performance was both unreasonable and prejudicial as outlined below. *See Strickland v. Washington*, 466 U.S. 668 (1984), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004).
>
> 11(a): Trial counsel's acts or omissions included:
>
> (i) Encouraging Allen to plead guilty to capital murder in Richland County without adequate

assurances that the trial court judge would impose Life sentences.

(ii) Encouraging Applicant to plead guilty to capital murder in Richland County when statistics show that Richland County juries do not generally impose death sentences.

(iii) Failing to adequately litigate issue of striking [the] death penalty on the basis of race.

(iv) Failing to elicit any execution impact evidence during the sentencing hearing when that evidence would have resulted in the judge's imposing a life sentence.

(v) Failing to present mitigation evidence of Applicant's childhood trauma and abuse when that evidence would have resulted in the judge's imposing a life sentence.

(vi) Failing to object to the trial court judge's imposition of a death sentence at the time the sentence was rendered.

(vii) Failing to object to the trial court judge's confusing the competency to be executed standard with the

standard for finding applicant to be mentally ill.

10(b): Applicant's plea of guilty was rendered involuntarily, in violation of the rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and by Article I, §§ 12 and 14 of the South Carolina Constitution, because trial counsel informed him, and apparently without any factual basis, that the trial court judge promised to impose Life sentences in exchange for the guilty pleas.

11(b): Applicant pleaded guilty to two counts of capital murder because trial counsel informed him the trial court judge would impose Life sentences.

10(c): Applicant's plea of guilty was rendered involuntarily, in violation of the rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and by Article I, §§ 12 and 14 of the South Carolina Constitution, because of the inherently coercive effect of the trial judge's involvement in plea negotiations.

11(c): The trial court judge was extremely involved in the disposition of this case, engaging in numerous ex parte contacts with the parties, and with the intention of having Applicant plead guilty to two counts of capital murder.

10(d): Applicant received ineffective assistance of appellate counsel, in violation of the rights

> guaranteed by the Sixth, Eighth, and Fourteenth Amendments and by Article I, §§ 3 and 14 of the South Carolina Constitution, because appellate counsel failed to raise the issue that Applicant's guilty plea was involuntary due to the inherently coercive effect of the trial judge's involvement in plea negotiations.
>
> 11(d): The inherently coercive effect of the trial judge's involvement in plea negotiations was apparent to appellate counsel, and sufficiently raised in the Motion to Vacate Guilty Plea, and appellate counsel was ineffective for [not] raising the issue on direct appeal.

App. 3275–76.

The State made a timely return and the Honorable R. Ferrell Cothran, Jr., Circuit Court Judge, was assigned to the case. App. 3280–306. After Petitioner attempted to waive his PCR proceeding, Judge Cothran ordered Petitioner to undergo a competency evaluation. On January 15, 2014, Judge Cothran conducted a competency hearing, at which Dr. Richard Frierson opined Petitioner was competent to proceed with his PCR action and Petitioner withdrew his request to waive his appellate rights. App. 3421–47. Accordingly, Judge Cothran found Petitioner competent to proceed. *Id.* However, on February 2, 2014, Petitioner attempted suicide and, shortly thereafter, began spreading false information in an attempt to sabotage his case. App. 4259. Thus, PCR counsel moved for the court to appoint Petitioner a guardian. App. 4258–60. On April 10,

2014, Judge Cothran granted counsels' motion and appointed Diana Holt as guardian. *Id.*

Judge Cothran held evidentiary hearings on November 17–18, 2014, and March 30, April 1, and April 10, 2015. App. 3486–4017. On December 1, 2015, Judge Cothran dismissed Petitioner's application and denied PCR relief. App. 4199–257.[3] Petitioner moved to alter or amend the court's order and, on March 31, 2016, after briefing by the State, Judge Cothran denied Petitioner's motion. App. 4261–4311.

PCR Appeal

Franklin-Best and Young continued to represent Petitioner on appeal and raised the following issues in Petitioner's Amended Petition for Writ of Certiorari:

> I. Was Quincy Allen's guilty plea involuntary, in violation of the rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and by Article I, Sections 12 and 14 of the South Carolina Constitution because the trial court judge indicated to trial counsel that he would impose a life sentence in exchange for Allen's pleading guilty to two counts of capital murder and Allen

[3] This copy of the PCR order is partially illegible. For the remainder of this order, the Court will cite to the copy Petitioner submitted to the Supreme Court of South Carolina with his Petition for Writ of Certiorari, available at ECF No. 22-2.

relied on that [] assurance when he pleaded guilty?

II. Did trial counsel render ineffective assistance of counsel when they urged their client to forfeit his right to a jury trial without obtaining adequate assurances from the trial court judge that he would impose a life sentence, in violation of Allen's rights under the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 3 and 14 of the South Carolina Constitution?

III. Did trial counsel render ineffective assistance of counsel, in violation of Allen's rights under the Sixth and Fourteenth Amendments to the United States Constitution and by article I, Sections 3 and 14 of the South Carolina Constitution when they encouraged Quincy Allen to plead guilty and when Judge Cooper did not indicate he would sentence him to life sentences because Richland County juries historically do not impose the death penalty and a jury would not have sentenced Allen to death?

IV. Did trial counsel render ineffective assistance of counsel, in violation of Allen's rights under the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 3 and 14 of the South Carolina

Constitution, when they failed to present available and highly mitigating evidence of Quincy Allen's horrendously abusive and neglectful childhood?

V. Did trial counsel render ineffective assistance of counsel, in violation of Allen's rights under the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 3 and 14 of the South Carolina Constitution, when they failed to present readily available and compelling evidence of Allen's mental illness that would have rebutted the State's claim, and that Judge Cooper appears to have credited, that Allen malingered his mental illness?

VI. Did trial counsel render ineffective assistance of counsel, in violation of Allen's rights under the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 3 and 14 of the South Carolina Constitution, when they failed to object to the trial judge's confusing the competency to be executed standard with the standard for finding Allen to be mentally ill?

VII. Did trial counsel render ineffective assistance of counsel, in violation of Allen's rights under the Sixth and Fourteenth Amendments to the United States Constitution and by Article I,

> Sections 3 and 14 of the South Carolina Constitution, by failing to elicit any execution impact evidence during the sentencing hearing when that evidence would have resulted in the judge's imposing a life sentence?

ECF No. 22-6 at 9–10. On April 19, 2018, after briefing by the State and a reply from Petitioner, the Supreme Court of South Carolina denied Petitioner's petition on the merits. ECF No. 22-9. Petitioner sought rehearing, ECF No. 22-10, which the court denied, ECF No. 22-11. The Supreme Court of South Carolina issued the remittitur on May 25, 2018, and it was filed on May 29, 2018. ECF No. 22-12.

Federal Habeas Corpus Action

Petitioner timely commenced this federal habeas corpus action on May 25, 2018. ECF No. 1. On May 15, 2019, Petitioner filed an amended petition[4] for

---

[4] In its Order appointing counsel, the Magistrate Judge directed Petitioner to file a "placeholder petition" within 90 days of the order appointing counsel. ECF No. 13 at 6. The Magistrate Judge further ordered that Petitioner would "then have until the expiration of the one[-]year limitation period prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 ('AEDPA') to amend his petition." *Id.* This practice has been used in this District to prevent the State of South Carolina from moving forward with an execution prior to the expiration of a petitioner's one-year statute of limitations under AEDPA. Such a procedure is necessary because federal law permits a federal court to stay execution of a death sentence for no longer "than 90 days after counsel is appointed" and *after* a federal habeas petition is actually filed. 28 U.S.C. §§ 2251(a)(1), (a)(3). However, there does not appear to be a mechanism by which a federal court can stay an

habeas corpus and raises the following grounds for relief:

I. Mr. Allen's Sixth, Eighth, and Fourteenth Amendment rights were violated where the judge sentenced him to death without finding that the statutory aggravating factors were proven beyond a reasonable doubt.

II. Mr. Allen's rights under the Sixth, Eighth, and Fourteenth Amendments were violated because the trial judge failed to find that any mitigating circumstance had been established and used an impermissibly high standard for determining whether Mr. Allen suffered from mental illness; Trial Counsel ineffectively failed to object to the judge's failure to appropriately consider and give effect to relevant mitigating evidence.

III. The sentencing judge's reliance on the deterrent effect a sentence of death might have on other abusive mothers violated the Eighth Amendment's protection

---

execution during the period (of up to nine months) when a petitioner is researching and drafting a petition after the 90-day stay expires. This is further complicated by the Supreme Court of South Carolina's ruling in *In re Stays of Execution in Capital Cases*, which makes clear that "[a]ny request for a stay pending federal habeas corpus proceedings should be made to the federal court." 471 S.E.2d 140, 142 (S.C. 1996).

against the consideration of an arbitrary factor in determining the penalty.

IV. Mr. Allen's guilty plea was not knowing, intelligent, and voluntary, in violation of the rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments because Mr. Allen did not understand the significance and the consequences of deciding to plead guilty due to the medication he was taking; Trial Counsel was ineffective in failing to ensure Mr. Allen's plea was knowing, intelligent, and voluntary.

V. Trial Counsel were ineffective in violation of Mr. Allen's rights under the Sixth and Fourteenth Amendments because they advised him to plead guilty without adequate assurances from the judge.

VI. Mr. Allen's guilty plea was involuntary, in violation of the rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments, because the trial judge indicated to counsel that he would impose a life sentence if Mr. Allen pled guilty to two counts of capital murder and Mr. Allen relied on that assurance in pleading guilty.

VII. Trial Counsel were ineffective in violation of Mr. Allen's rights under the Sixth and Fourteenth Amendments when they

failed to present available and compelling mitigation evidence.

VIII. South Carolina Code § 16-3-20(B) violates the Sixth, Eighth and Fourteenth Amendments because it requires capital defendants to plead not guilty to exercise their right to a jury sentencing.

IX. Petitioner is entitled to relief from his conviction and sentence because of the prejudicial effects of the cumulative errors in this case.

ECF No. 39.

APPLICABLE LAW

One of the principal purposes of summary judgment "is to isolate and dispose of factually unsupported claims . . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). It is not "a disfavored procedural shortcut," but is instead the "principal tool by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." *Id.* at 327. To that end, Rule 56 states "[t]he 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). A fact is "material" if proof of its existence or non-existence would affect disposition of the case under applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a

reasonable jury might return a verdict for the non-movant. *Id.* at 257. When determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the court that there is no genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings. *Id.* at 324. Rather, the non-moving party must demonstrate specific, material facts exist that give rise to a genuine issue. *Id.* Under this standard, the existence of a mere scintilla of evidence in support of the non-movant's position is insufficient to withstand the summary judgment motion. *Anderson,* 477 U.S. at 252. Likewise, conclusory allegations or denials, without more, are insufficient to preclude granting the summary judgment motion. *Ross v. Commc'ns Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985), *overruled on other grounds by Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). "Only 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." *Anderson*, 477 U.S. at 248.

Habeas Corpus

Petitioner's claims are governed by 28 U.S.C. § 2254(d), which provides that his petition cannot be

granted unless the claims "(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). "[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." *Williams v. Taylor*, 529 U.S. 362, 411 (2000). Importantly, "a determination of a factual issue made by a State court shall be presumed to be correct," and Petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

Procedural Bypass

Procedural bypass, sometimes referred to as procedural bar or procedural default, is the doctrine applied when a petitioner seeks habeas corpus relief based on an issue he failed to raise at the appropriate time in state court, removing any further means of bringing that issue before the state courts. In such a situation, the petitioner has bypassed his state remedies and, as such, is procedurally barred from raising the issue in his federal habeas petition. *See Smith v. Murray*, 477 U.S. 527, 533 (1986). The United States Supreme Court has stated that the procedural bypass of a constitutional claim in earlier state proceedings forecloses consideration by the federal

courts. *Id.* Bypass can occur at any level of the state proceedings if a state has procedural rules that bar its courts from considering claims not raised in a timely fashion. *Id.*

The Supreme Court of South Carolina will refuse to consider claims raised in a second application for PCR that could have been raised at an earlier time. *See* S.C. Code Ann. § 17-27-90; *Aice v. State*, 409 S.E.2d 392, 394 (S.C. 1991). Further, if a prisoner has failed to file a direct appeal or a PCR application and the deadlines for filing have passed, he is barred from proceeding in state court. S.C. App. Ct. R. 203(d)(3), 243. 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. *See Reed v. Ross*, 468 U.S. 1, 11 (1984); *see also Kornahrens v. Evatt*, 66 F.3d 1350, 1357 (4th Cir. 1995). As the Supreme Court of the United States explained:

> [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, 468 U.S. at 10–11.

However, if a federal habeas petitioner can show both (1) "'cause' for noncompliance with the state rule" and (2) "'actual prejudice resulting from the alleged constitutional violation[,]'" the federal court may consider the claim. *Smith*, 477 U.S. at 533 (quoting

Wainwright v. Sykes, 433 U.S. 72, 84 (1977)). When a petitioner has failed to comply with state procedural requirements and cannot make the required showing of cause and prejudice, the federal courts generally decline to hear the claim. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Further, if the petitioner does not raise cause and prejudice, the court need not consider the defaulted claim. *See Kornahrens*, 66 F.3d at 1363.

If a federal habeas petitioner has failed to raise a claim in state court and is precluded by state rules from returning to state court to raise the issue, he has procedurally bypassed his opportunity for relief in the state courts and in federal court. *Coleman v. Thompson*, 501 U.S. 722, 731–32 (1991). Absent a showing of cause and actual prejudice, a federal court is barred from considering the claim. *Wainwright*, 433 U.S. at 87. In such an instance, the exhaustion requirement is technically met, and the rules of procedural bar apply. *Teague v. Lane*, 489 U.S. 288, 298 (1989).

Cause and Actual Prejudice

Because the requirement of exhaustion is not jurisdictional, this Court may consider claims that have not been presented to the Supreme Court of South Carolina in limited circumstances—where 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 where a "fundamental miscarriage of justice" has occurred, *Carrier*, 477 U.S. at 495–96. A petitioner may prove cause if he can demonstrate ineffective assistance of counsel relating to the default, show an external factor hindered compliance with the

state procedural rule, or demonstrate the novelty of a particular claim, where the novelty of the constitutional claim is such that its legal basis is not reasonably available to the petitioner's counsel. *Id.* at 487–89; *Reed*, 468 U.S. at 16. Absent a showing of "cause," the court is not required to consider "actual prejudice." *Turner v. Jabe*, 58 F.3d 924, 931 (4th Cir. 1995). However, if a petitioner demonstrates sufficient cause, he must also show actual prejudice to excuse a default. *Carrier*, 477 U.S. at 492. To show actual prejudice, the petitioner must demonstrate more than plain error. *Engle v. Isaac*, 456 U.S. 107, 134–35 (1982).

As an alternative to demonstrating cause for failure to raise the claim, the petitioner must show a miscarriage of justice. To demonstrate a miscarriage of justice, the petitioner must show he is actually innocent. *See Carrier*, 477 U.S. at 496 (holding a fundamental miscarriage of justice occurs only in extraordinary cases, "where a constitutional violation has probably resulted in the conviction of someone who is actually innocent"). Actual innocence is defined as factual innocence, not legal innocence. *Bousley v. United States*, 523 U.S. 614, 623 (1998). To meet this actual innocence standard, the petitioner's case must be truly extraordinary. *Carrier*, 477 U.S. at 496.

Ineffective Assistance of Counsel

To challenge a conviction or sentence based on ineffective assistance of counsel, a petitioner must prove two elements: (1) his counsel's representation was deficient and (2) he was prejudiced as a result of counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To satisfy the first prong, a

petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. "[B]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

To satisfy the second prong, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 692. Where a petitioner contests his decision to plead guilty due to ineffective assistance of counsel, he must show that "there is a reasonable probability that, but for counsel's errors, [he] would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

DISCUSSION

All of Petitioner's grounds for relief are preserved, except Ground Four, part of Ground Seven, and Ground Nine's allegation of cumulative error. The Court will address the preserved grounds first.

Preserved Claims

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may not grant habeas relief unless the underlying state court decision was contrary to or an unreasonable application of federal law, as determined by the United States Supreme Court, 28 U.S.C. § 2254(d)(1), or based on an unreasonable determination of the facts before the court, *id.* § 2254(d)(2). The Supreme Court has held the

"contrary to" and "unreasonable application of" clauses present two different avenues for relief. *Williams*, 529 U.S. at 405 ("The Court of Appeals for the Fourth Circuit properly accorded both the 'contrary to' and 'unreasonable application' clauses independent meaning."). The Court stated there are two instances when a state court decision will be contrary to Supreme Court precedent:

> A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. . . . A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.

Id. at 405–06. On the other hand, a state court decision is an unreasonable application of Supreme Court precedent when the decision "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* at 407–08; *see also Harrington v. Richter*, 562 U.S. 86, 102 (2011) ("Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court. . . . It bears repeating that even a strong case for relief does not mean the state court's contrary

conclusion was unreasonable."). Finally, a decision cannot be contrary to or an unreasonable application of Supreme Court precedent unless applicable Supreme Court precedent exists; without applicable Supreme Court precedent, there is no habeas relief for petitioners. *Virsnieks v. Smith*, 521 F.3d 707, 716 (7th Cir. 2008) (citing *Lockhart v. Chandler*, 446 F.3d 721, 724 (7th Cir. 2006)); *Simpson v. Battaglia*, 458 F.3d 585, 597 (7th Cir. 2006)); *see Bustos v. White*, 521 F.3d 321, 325 (4th Cir. 2008).

Ground One

In Ground One, Petitioner asserts the trial judge erred in (1) sentencing Petitioner to death without finding the existence of specific aggravating factors and (2) failing to find any aggravating factors proven beyond a reasonable doubt. *See* ECF No. 39 at 41–43. Petitioner contends these errors were structural in nature and violated his Sixth, Eighth, and Fourteenth Amendment rights. *Id.*

Judge Cooper made specific findings concerning the aggravating factors at the close of the State's case. The State sought to prove seven enumerated aggravating factors concerning Dale Hall's murder: (1) the murder was committed while in the commission of a kidnapping, (2) the murder was committed while in the commission of a robbery with a deadly weapon, (3) the murder was committed while in the commission of a larceny with a deadly weapon, (4) the murder was committed while in the commission of physical torture, (5) the defendant had a prior conviction for murder, (6) the defendant committed at least two murders pursuant to one scheme or course of conduct, and

(7) the murder was committed while in the commission of dismemberment of the victim. App. 2952–53. Regarding the murder of Jedidiah Harr, the State sought to show (1) the defendant had a prior conviction for murder, (2) the murder was committed by the defendant who by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives or more than one person, and (3) the defendant committed at least two murders pursuant to one scheme or course of conduct. App. 2951.

After the State concluded its penalty phase case, trial counsel moved for a directed verdict on all of the State's proffered aggravating circumstances, asserting "there ha[d] been insufficient evidence presented by the State to satisfy the prevailing legal definitions in South Carolina of these particular statutory aggravating circumstances." App. 0880–81. Regarding Dale Hall's murder, Judge Cooper denied counsels' motion and thus found the State made a sufficient showing as to five of the statutory aggravators. App. 0879–86. With regard to the State's first statutory aggravator—the murder was committed while in the commission of a kidnapping—Judge Cooper found "specifically that the State ha[d] made a sufficient showing of that aggravating circumstance beyond a reasonable doubt." App. 0881. Judge Cooper further denied trial counsels' motion on two of the State's statutory aggravators for Jedidiah Harr's murder. App. 0886–88.

After ruling on each statutory aggravator, Judge Cooper stated, "[t]herefore, pursuant to Section 16-3-

20, this trial will continue. Having found statutory aggravating circumstances enumerated by the statute, this trial shall continue to the mitigation phase of the trial." App. 0888–89.

Petitioner's trial counsel presented their mitigation case and then renewed their directed verdict motions, which Judge Cooper denied. App. 0926–1969. The State presented several reply witnesses before resting. App. 1972–2437. Despite being provided the opportunity to do so, the defense did not call any additional witnesses. App. 2436–37.

After closing arguments, Judge Cooper announced his sentencing decision, stating in relevant part:

> I find that, pursuant to 16-3-20 of the Code of Laws of South Carolina, the death penalty is warranted under the evidence of this case and is not the result of prejudice, passion, or any other arbitrary factor.
>
> . . . .
>
> After carefully considering all relevant facts and circumstances, including the existence of statutory aggravating circumstances as well as the claim of mitigating circumstances, this Court finds and concludes that the defendant shall be sentenced to death by electrocution or lethal injection as set forth in South Carolina Code Annotated Section 24-3-530.

App. 2553–54.

In a sentencing report dated April 1, 2005, several weeks after the conclusion of the penalty phase, Judge Cooper memorialized his sentence and noted he found the following statutory aggravating circumstances and that those circumstances were supported by the evidence:

> Victim Dale Hall: Kidnapping, Larceny with use of a deadly weapon, Physical torture, murder committed by person with prior conviction for murder
>
> Victim Jedediah Harr: Murder committed by person with prior conviction for murder, knowingly creating a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to more than one person.

App. 2960–62.

In addressing this issue on direct appeal, the Supreme Court of South Carolina relied on Judge Cooper's sentencing report and remarks at the close of the penalty phase and found:

> Accordingly, Allen's contention that the trial court failed to set forth specific statutory aggravating circumstances is meritless and the sentence was imposed in compliance with S.C. Code § 16-3-20(C). *State v. Chaffee*, 285 S.C. 21, 328 S.E.2d 464 (1984), *overruled on other grounds State v. Torrence*, 317 S.C. 45, 451

> S.E.2d 883 (1994) (death penalty may be imposed upon finding at least one statutory aggravating factor).

Allen, 687 S.E.2d at 24–25.

Petitioner asserts the state court's ruling is an unreasonable determination of the facts and an unreasonable application of *Ring v. Arizona*, 536 U.S. 584 (2002), and *Chambers v. Mississippi*, 410 U.S. 284 (1973). ECF No. 63 at 26. Petitioner argues, under *Chambers*, he had the right to present his defense before the trial court found the existence of any statutory aggravating circumstances and, in violation of *Ring*, Judge Cooper failed to find any statutory aggravating circumstances proven beyond a reasonable doubt. ECF No. 63 at 21, 26. In addition, Petitioner asserts to the extent the state court decision is based on a factual finding that Judge Cooper found specific statutory aggravators proved beyond a reasonable doubt after Petitioner presented his case, the decision is based on an unreasonable determination of the facts and is directly contradicted by the record. ECF No. 63 at 26.

The Court finds all of Petitioner's arguments lack merit. First, Petitioner was not deprived of an opportunity to present evidence in his own defense, nor did his presentation of that evidence after Judge Cooper found the existence of statutory aggravators violate his constitutional rights. As the Supreme Court of the United States has explained:

> Since *Furman v. Georgia*, we have required States to limit the class of murderers to which

> the death penalty may be applied. This narrowing requirement is usually met when the trier of fact finds at least one statutorily defined eligibility factor at either the guilt or penalty phase. Once the narrowing requirement has been satisfied, the sentencer is called upon to determine whether a defendant thus found eligible for the death penalty should in fact receive it.

Brown v. Sanders, 546 U.S. 212, 216–17 (2006) (citations omitted). That is the procedure Judge Cooper followed in Petitioner's case and Petitioner has not offered reason to doubt its constitutionality.

Second, as detailed above, Judge Cooper stated on the record that he found the State had proven the first statutory aggravating factor related to Dale Hall's murder beyond a reasonable doubt. *See* App. 0881. Judge Cooper further specifically denied trial counsels' motions for directed verdict on four other statutory aggravating factors applicable to Dale Hall's murder and two statutory aggravating factors relating to Jedidiah Harr's murder, thus finding the State had proven the existence of those factors. *See* App. 0880–88. And in making his findings, Judge Cooper twice referenced S.C. Code Ann. § 16-3-20, which requires the finding of a statutory aggravating circumstance beyond a reasonable doubt before a death sentence may be imposed. *See* App. 0888–89, 2553; S.C. Code Ann. § 16-3-20(A). Thus, the record supports the state court's finding that Judge Cooper applied the correct standard and found at least one statutory aggravating circumstance proven beyond a reasonable doubt with

respect to each murder. *See Wainwright v. Witt*, 469 U.S. 412, 431 (1985) ("As we have stated on other occasions, . . . where the record does not indicate the standard applied by a state trial judge, he is presumed to have applied the correct one."); *United States v. Hunt,* 794 F.2d 1095, 1100 (5th Cir. 1986) ("[Defendant] argues nevertheless that a fair trial can occur only if the judge utters the magic words 'with bad purpose.' For us to require certain ways of defining terms . . . without our reviewing the entire charge, without our inquiring into all circumstances of the trial, would promote shallow form over substance. We emphatically refuse to straightjacket the district courts' discretion in instructing juries because a criminal defendant raises some abstract semantical debate.").

For these reasons, Petitioner fails to show the state court's decision was an unreasonable application of established Supreme Court precedent or based on an unreasonable determination of the facts and has not shown entitlement to habeas relief on Ground One.

Ground Two

In Ground Two, Petitioner alleges violations of his Sixth, Eighth, and Fourteenth Amendment rights because (1) Judge Cooper failed to find the existence of any mitigating circumstance, (2) Judge Cooper used an impermissibly high standard for determining whether Petitioner suffered from mental illness, and (3) Petitioner's trial counsel were ineffective for failing to object to Judge Cooper's failure to appropriately consider and give effect to relevant mitigating evidence. ECF No. 39 at 43. Petitioner raised and properly

exhausted this claim in this PCR application and on PCR appeal.

Petitioner's argument again focuses on Judge Cooper's oral sentencing order. He contends, despite trial counsels' presentation of mostly undisputed evidence of Petitioner's childhood trauma and abuse and longstanding history of mental illness, Judge Cooper failed to discuss Petitioner's life history during sentencing and focused solely on whether Petitioner was mentally ill at the time he committed the crimes or at the time of trial. ECF No. 39 at 43–55. The record rebuts these assertions.

Judge Cooper began his sentencing order by recognizing the importance of Petitioner's mental health evidence: "In the case of The State vs. Quincy Jovan Allen, this is a difficult case. Because of the far-reaching mental health implications of this decision, it is significant to our society and our community." App. 2527. After recognizing the case's significance to others who were impacted by Petitioner's crimes and by the trial itself, Judge Cooper described the evidence before him:

> In considering the outcome of this sentencing hearing I have tried to understand the unique forces and events which have put Mr. Allen in the situation in which he finds himself today. I have considered his upbringing so masterfully chronicled by Debra [sic] Grey. I've considered his list of mental illness[es] as described by Dr. Pam Crawford.

I've considered the facts of the various murders that Mr. Allen does not deny. I've considered the impact to James White, to Dale Hall's family and to the Harr family. I've also considered the effect of this trial on Quincy Allen's two younger brothers who have sat through the majority of this trial. And I have considered the passionate arguments of counsel on both sides of this case.

I have further considered the North Carolina proceedings and the defendant's prior motion to bar the State from contesting Mr. Allen's mental illness due to the findings of Judge Martin in that case. I wish to state for the record that this proceeding has been completely different from the one in North Carolina.

In North Carolina, a plea agreement was entered into by both the State and the defendant, the terms of which were that Mr. Allen would be sentenced to two life without parole sentences by Judge Martin in exchange for Mr. Allen's guilty plea. That was not a sentencing hearing as this has been. During the North Carolina sentencing hearing no death penalty was sought. No contesting witnesses were called by the State. I am hesitant to speculate, but I suspect that that hearing was not in the least comparable to the one we have experienced in the last two weeks. I, therefore, affirm my earlier decision not to be bound by the North Carolina court's decisions.

Mr. Allen raises the issue of mental illness as his reason for avoiding the death penalty. His

attorneys argue that due to his diagnosed mental illness his culpability was diminished and no retributive or deterrent effect would be served by the imposition of the death penalty.

Addressing the issue of mental illness, I have not seen convincing evidence that Mr. Allen had a major mental illness at the time of the crimes in 2002. I have seen a series of short-stay hospitalizations from 1997, 1998 and 1999, but no recognition of a mental illness that required or demanded a treatment program.

If he had a major mental illness in 1997 or 1998 or 1999, then the mental illness community failed him and failed this community. His sole form of treatment was to give him some pills and send him away. This leads me to believe that his mental condition and behavior were primarily a reaction to a very poor and destructive home life as a child from which he chose to act out in ways that would garner attention for himself, whether by being annoying, or childish or aggravating.

His subsequent actions of attempting to kill James White and ultimately killing Dale Hall were, I believe, a result of his desire to be noticed and respected. And if he had a major mental illness at that time in 2002, no one, not even his psychiatrists, were aware of it.

Add to this his casual, if not happy, conversations with Tia Brown immediately after killing two people in North Carolina and his remarkably calm descriptions to Agent Lloyd

Terry on August 15th, 2002, immediately after his capture in great detail of the crimes that he had just committed.

These lead me to believe that if indeed he had schizophrenia, it was not evident and the disease did not control his mind to such a degree as to exonerate or lessen the culpability of his actions.

And what is Mr. Allen's condition today? I have listened to and read the accounts of all of the psychiatrists and psychologists in this case: Doctors Hilkey, Gupta, Lavin, DeBeck, Hattem, Crawford, Mirza, Tezza, Corvin and Schwartz-Watts.

Quite frankly, I cannot tell with certainty what his mental state is today. I know he is on medication. I have observed him sitting quietly at counsel table, making notes, reading a dictionary, and not exhibiting any unusual or bizarre behavior. I have noticed him communicating with counsel and on occasion, smiling. He has always had a neat and well-groomed appearance.

Yet, three respected psychiatrists, Dr. Corvin, Dr. Crawford, and Dr. Schwartz- Watts have testified that as he sits here today he has a major mental illness characterized by delusions, hallucinations, disorganized speech, grossly disorganized or catatonic behavior, and negative symptoms, such as affective flattening, alogia, or

> avolition. And maybe he does, although his outward appearance belies such a condition.
>
> On the other hand, I have heard Dr. DeBeck and Dr. Hattem say that in August 2003, their diagnosis was that he was malingering. Dr. DeBeck, a psychiatrist at the Dorothea Dix Hospital in North Carolina, on August 29th, 2003, after a thorough evaluation said, "Mr. Allen did not show symptoms of a psychiatric disorder during his hospital stay, despite being off antipsychotics since April 11th, 2003."
>
> Dr. Tezza and Dr. Mirza also testified that on December 3rd, 2004, they found that Mr. Allen was malingering when sent to Just Care by the Richland County Detention Center.
>
> . . . .
>
> These contrary opinions lead me to no firm conclusions as to Mr. Allen's mental state at this time.

App. 2527–33.

Judge Cooper then cited *Ake v. Oklahoma*, 470 U.S. 68 (1985), for the proposition that "because 'psychiatrists disagree widely and frequently on what constitutes mental illness and on the appropriate diagnosis to be attached to given behavior and symptoms,' the fact finder must resolve differences in opinion within the psychiatric profession 'on the basis of the evidence offered by each party' when a defendant's sanity is at issue in a criminal trial." App. 2533–34 (quoting *Ake*, 470 U.S. at 81). He went on to

discuss Supreme Court decisions banning capital punishment for the mentally incompetent, insane, and youth under eighteen years old, and specifically the Court's reliance on the lack of deterrent or retributive effect on those categories of offenders. App. 2534–37 (citing *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005); *Ford v. Wainwright*, 477 U.S. 399 (1986)). Judge Cooper then recited South Carolina's two-prong test for determining whether a defendant is competent to be executed, but stated he relied on that authority "as a guide" because of "the lack of guiding principles dealing with the imposition of the death penalty on persons with mental illness." App. 2538, 2548 (quoting *Singleton v. State*, 437 S.E.2d 53, 58 (S.C. 1993)). He concluded Petitioner was competent under *Singleton*'s test but did not end his analysis there. App. 2548.

Judge Cooper then wrestled with whether Petitioner's actions were driven by fate, mental illness, or free will before concluding:

> Mr. Allen set out on a journey sometime in 2002 to become a serial killer. The force that determined whether he would accomplish that goal was in his own mind, his own intelligence, his own will, a will that his doctors tell us now was not free.

App. 2548–51. In addition, Judge Cooper asked whether he should consider Petitioner's prior declarations of his desire and intent to murder more people or whether those statements resulted from mental illness. App. 2551. Judge Cooper returned to his

consideration of deterrence and retribution before finally announcing Petitioner's sentence. App. 2552–53.

In his PCR application, Petitioner framed this claim as an assertion that trial counsel were ineffective for "failing to object to the trial court's confusing of the competency to be executed standard with the standard for finding mental illness." ECF No. 22-2 at 53. In denying this claim, the PCR court found:

> [C]ounsel was not deficient in failing to object to Judge Cooper's statement where he discussed the failure to show that he met the standards of competency to be executed because it does not indicate that Judge Cooper declined to consider the mitigation evidence as presented. Rather the [sentencing] order expresses a conclusion that Judge Cooper did not give the evidence of mental illness the weight that Applicant wanted him to give. Since consideration of the evidence was properly given, counsel could not be deemed ineffective for failing to object. The suggestion that Judge Cooper confused the concept with guilty but mentally ill, a guilt phase issue, is not persuasive. The transcript is more fairly read to reflect a global assessment of the facts and circumstances before the sentencing judge, which he considered, weighed and narrowed, until arriving at his sentencing conclusion. Applicant has not persuaded this Court that the sentencing court confused the competency to be executed standard with the standard for finding

> mental illness. As such, the Applicant has failed to establish either prong of *Strickland*.

ECF No. 22-2 at 54.

Petitioner contends that, because he presented a large amount of mitigating evidence, much of which was uncontested, and Judge Cooper failed to find the existence of any mitigating circumstances, Judge Cooper could not have possibly considered, weighed, or given effect to all of the relevant mitigating evidence as required by *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978); and *Eddings v. Oklahoma*, 455 U.S. 104 (1981). ECF No. 63 at 34. Thus, Petitioner asserts the PCR court's contrary conclusion is based on an unreasonable determination of the facts and represents an unreasonable application of *Woodson*, *Lockett*, and *Eddings*. *Id.*

Under *Woodson*, *Lockett*, and *Eddings*, a jury or sentencing court may "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604 (emphasis in original). Moreover, the sentencing authority "may determine the weight to be given relevant mitigating evidence," "[b]ut it may not give [this evidence] no weight by excluding such evidence from [its] consideration." *Eddings*, 455 U.S. at 114–15.

Thus, the Constitution does not require a capital sentencer to find the existence of a mitigating factor, only to consider all of the evidence offered in

mitigation. Here, Judge Cooper explicitly stated he considered the evidence of Petitioner's abusive childhood and alleged mental illness in reaching his decision. He went on to discuss some of that evidence in detail and describe how he assessed it. Judge Cooper's decision to grant that evidence little weight does not rebut the record's clear indication that he did, in fact, consider it.

Accordingly, Petitioner fails to show the PCR court's ruling is contrary to, or an unreasonable application of, clearly established federal law or is based on an unreasonable determination of the facts. Respondent's Motion for Summary Judgment is granted as to Ground Two.

Ground Three

In Ground Three, Petitioner alleges Eighth and Fourteenth Amendment violations because Judge Cooper considered an arbitrary factor—the potential deterrent effect on other abusive mothers—in reaching his sentencing decision. ECF No. 39 at 56–59. Petitioner properly exhausted this claim on direct appeal and asserts the state court's denial is based on an unreasonable determination of the facts and unreasonably applies established Supreme Court precedent requiring an individualized sentence. ECF No. 63 at 35–39.

Much of Petitioner's penalty phase evidence focused on his traumatic childhood, including the abuse he suffered by his own mother. *See, e.g.*, App. 1069–72 (describing 19-month-old Petitioner's referral to protective services because his mother "had other

things on her mind" and failed to treat his fever, which turned into pneumonia); App. 1073–75 (describing the violence Petitioner's stepfather inflicted on Petitioner and his mother); App. 1093–95 (describing other extreme incidents of Petitioner's mother abusing him); App. 1111–12 (Petitioner's mother withheld basic food and shelter as punishment); App. 2094 (Petitioner's mother used to throw him in a trashcan, beat him with a belt, and lock him in a closet). Trial counsel's closing statement, the last argument Judge Cooper heard before announcing Petitioner's sentence, further emphasized that evidence and its relevance to Petitioner's defense. App. 2514–25.

As discussed in Ground Two, Judge Cooper's sentencing order highlighted the concepts of retribution and deterrence as guiding factors in the Supreme Court's capital punishment jurisprudence. Judge Cooper defined retribution as "the interest in seeing that the offender gets his 'just deserts,'" and stated "the severity of the appropriate punishment necessarily depends on the culpability of the offender." App. 2534 (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). Importantly, again citing *Atkins*, Judge Cooper defined deterrence as "the interest in preventing capital crimes by prospective offenders," and noted the Court's observation that "capital punishment can serve as a deterrent only when the murder is a result of premeditation and deliberation." App. 2535.

Judge Cooper discussed some of the crueler aspects of Petitioner's crimes in assessing Petitioner's claims of mental illness and then returned to his consideration of retribution and deterrence as applied to Petitioner's

case. App. 2549–52. Judge Cooper found both concepts applicable, stating:

> Retribution in a sense is the easiest. Considering the fear Mr. Allen struck into the heart of James White and the subsequent shooting of James White for practice, I find retribution appropriate.
>
> Considering the fear Mr. Allen struck into the heart of Dale Hall, the absolute depravity of her murder, and the subsequent burning of her body, I find retribution appropriate.
>
> Considering the callous killing of Jedediah Harr and the subsequent stalking of Brian Marquis for the purpose of killing him, I find retribution appropriate.
>
> And how could Quincy Allen's death serve as a deterrent to others, to the abused and neglected young people of this community? Maybe it will make some young man or some young girl stop and think about the results of destructive behavior.
>
> Hopefully, hopefully, it will make some young mother, single or otherwise, think about the love and care that children need, no matter how tough the circumstances, and would deter that mother from making the same horrible choices made with Quincy Allen. I would hope that this sentence has at least that deterrent effect, but we may never know.

App. 2552–53. It is this last paragraph that forms the basis of Petitioner's claim.

Considering this claim on direct appeal, the Supreme Court of South Carolina cited the relevant precedent requiring sentencing phase evidence to relate to the defendant's character or the circumstances of the crime, listing retribution and deterrence as justifications supporting imposing the death penalty, and allowing admission of general deterrence evidence in the penalty phase of a capital trial. App. 3269 (citing, e.g., U.S. Const. amend. 8; *Gardner v. Florida*, 430 U.S. 349 (1977); *Beck v. Alabama*, 447 U.S. 625 (1980); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Enmund v. Florida*, 458 U.S. 782 (1982); *State v. Shuler*, 577 S.E.2d 438 (S.C. 2003)).

The Supreme Court of South Carolina found as follows:

> It is clear from reading the entirety of the trial court's sentencing order, along with the written sentencing report, that the death sentence was based upon the characteristics of Allen and the circumstances of the crime, such that the penalty is warranted . . . .
>
> . . . .
>
> We do not find the trial court's imposition of the death sentence in this case to be the result of any arbitrary factor. In reading the entirety of the court's colloquy, it is clear that the sentence was premised primarily on retribution to this particular defendant, and the fact that the murders were deliberate, premeditated and

> cruel. The trial court commented on the way Allen put a shotgun to Dale Hall's mouth and pulled the trigger, then went to the gas station, bought gas, and went back and burned her body. He commented on the fact that Allen changed the load in his shotgun to hollow point slugs to make it more destructive. He commented on the fact that it was Allen's intention to become a serial killer in order to garner respect. He commented on the fact that Allen told people he would kill again if given the opportunity. He commented on the fact that Allen then left the state and went and committed more murders in North Carolina.
>
> Notwithstanding the trial court's isolated comment concerning deterrence to abusive parents, it is patent the sentence does not rest on this ground and was not imposed due to an arbitrary factor. Accordingly, the sentence is affirmed.

Allen, 687 S.E.2d at 24.

Petitioner argues, "[t]o the extent that the state court ruled that deterring other mothers from abusing their children is not an 'arbitrary factor,' that decision is contrary to and an unreasonable application of" Supreme Court precedent requiring an individualized sentencing, related to the defendant's character and the circumstances of the crime. ECF No. 63 at 38. While the Court agrees that basing a death sentence on its potential deterrent effect on abusive mothers could be arbitrary and capricious in some circumstances, Petitioner has not shown that to be the case here.

The crux of the issue here is whether and to what degree Judge Cooper actually relied on the potential deterrence of abusive mothers in reaching his sentencing decision. Petitioner insists the record clearly disputes the state court's finding that Petitioner's sentence did not rest on this factor and points to Judge Cooper's discussion of deterrence and retribution as controlling considerations. ECF No. 63 at 38.

Under 28 U.S.C. § 2254(d)(2), a federal court may not grant Petitioner relief on a claim already adjudicated on the merits in state court unless the adjudication "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." In considering such a claim, the Court must presume the correctness of any "determination of a factual issue made by the State court" and Petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." § 2254(e)(1). "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). "[E]ven if '[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the trial court's . . . determination.'" *Id.* (quoting *Rice v. Collins*, 546 U.S. 333, 341–42 (2006)).

While Petitioner clearly disagrees with the state court's finding, he has not shown that finding to be unreasonable. The record before the state court

suggests Judge Cooper properly considered the retributive and deterrent effect of Petitioner's sentence. Judge Cooper clearly emphasized retribution in this case, but also noted a potential deterrent effect on possible future offenders. *See* App. 2552 ("And how could Quincy Allen's death serve as a deterrent to others, to the abused and neglected young people of this community? Maybe it will make some young man or some young girl stop and think about the results of destructive behavior."). In context, Judge Cooper's brief mention of a "hopeful" deterrent effect on abusive mothers is reasonably read as a response to the abundant evidence before him of Petitioner's horrible, abusive childhood, and not as a basis for his sentencing decision.

Accordingly, Petitioner fails to show the state court based its decision on an unreasonable factual determination; thus, the Court grants Respondent's Motion for Summary Judgment as to Ground Three.

Grounds Five & Six

In Grounds Five and Six, Petitioner contends he involuntarily pled guilty due to trial counsels' bad advice (Ground Five), which they based on an indication from Judge Cooper that he would not impose the death penalty if Petitioner pled guilty (Ground Six). *See* ECF No. 39 at 71–89. Petitioner's assertions in these two grounds were hotly contested during the PCR proceedings, accounting for the bulk of the testimony and final PCR order.

Relevant Background

The following facts are uncontested. At some point prior to Petitioner's guilty plea, defense counsel asked Dr. Crawford to meet with Richland County Solicitor Barney Giese, with whom she had a good working relationship, to share her opinion that Petitioner suffered from schizophrenia and see if the State would be open to pleading Petitioner to life. App. 3579–80. Giese informed Dr. Crawford that one victim's family was adamant that the State should seek the death penalty and the State was reluctant to go against their wishes. App. 3521–22. However, Giese indicated he would not oppose an *ex parte* meeting between defense counsel and Judge Cooper to discuss a potential guilty plea in exchange for Judge Cooper sentencing Petitioner to life. App. 3522.

On February 24, 2005, Petitioner's attorneys—Pringle, Lominack, and Sampson—met with Judge Cooper in his chambers. App. 3523. Pringle, Petitioner's lead attorney, attempted to elicit an affirmative promise from Judge Cooper that he would sentence Petitioner to life if Petitioner pled guilty. App. 3527. During the meeting, Judge Cooper and Pringle briefly discussed Scott Turow's book, "The Ultimate Punishment,"[5] and its admonishment that capital punishment be reserved for the "worst of the worst." App. 3526–28. Judge Cooper also repeatedly told trial counsel to trust Dr. Crawford. App. 3530.

---

[5] Turow, Scott. 2003. *Ultimate Punishment: A Lawyer's Reflections on Dealing with the Death Penalty*. New York: Farrar, Straus, and Giroux.

Pringle attests that the meeting ended after she stated she did not want to find herself on the witness stand at a capital PCR hearing trying to explain why she pled her client without an assurance from the judge and Judge Cooper responded, "there will never be a capital PCR hearing, you don't have to worry about that."[6] App. 3528–29. Judge Cooper has no recollection of making this comment, but admits he was sympathetic to Petitioner and inclined to impose life sentences during the pre-trial phase based on trial counsels' portrayal of Petitioner's severe mental illness and acknowledges that he may have made comments indicating as much. App. 3039.

Pringle signed an Affidavit on September 7, 2005—several months after the sentencing—which outlined the circumstances leading to the *ex parte* meeting and her recollection of the meeting in detail. Pringle stated that Judge Cooper invited her, Lominack, and Sampson to an in chambers meeting, without a law clerk or secretary present. Pringle further stated:

> I told him why we were there and he said he knew and he was glad because he had been "dropping us hints" to plead the case in front of

---

[6] Recounting her meeting with Judge Cooper during her testimony at the PCR hearing, Pringle testified, "the last thing I remember saying is I cannot be sitting on a witness stand in a capital PCR explaining why I pled my client in a death penalty case where he ended up getting death where I had no assurance from you, from the judge. I said I think I know what you're saying, but I've got, you know, I don't think I can do that. And then he said Fielding there will never be a capital PCR hearing, you don't have to worry about that." App. 3528–29.

him. He acknowledged that one time he had dropped a hint on the record and also acknowledged that his loaning me Scott Turow's book "The Ultimate Punishment" was another such time. He had loaned this book to me in the summer of 2004 after notice was served on [Petitioner] and after Cooper had been assigned to the case. I returned the book to him some time after August 2004 with a note of thanks tucked inside. He stated that he, like Scott Turow, believes capital punishment should be reserved only for the "worst of the worst" and only in the rarest of times. I told him that worried me because he might think [Petitioner] was the worst of the worst. I told him the details and facts of the crimes [Petitioner] had committed. He responded that that did not mean [Petitioner] was the worst of the worst, that what he had done might be, but there might be things that mitigate the situation. We told him [Solicitor] Giese was adamant that Judge Cooper would give him life if we'd plead the case. I asked him why. At that point he said well there's something you should know. He told me he had called [Solicitor Giese] earlier in the week after the pre-trial hearings to see if he could resolve the case, if there was any way to plead it. He told us the solicitor was very upset and that he "counseled him" and tried to help him see that business is business and not to take things personally. He said that [Solicitor] Giese told him that he would not be upset if Judge Cooper gave [Petitioner] life if he pled. I continued to mention that Dr. Crawford said the

> judge would give [Petitioner] life. At one point, Judge Cooper responded that we would have to trust our expert Dr. Crawford. Judge Cooper also said that we should realize that no judge likes to be reversed and one way to ensure he was not reversed would be to give [Petitioner] life. I continued to ask him if he would tell me directly that he would give [Petitioner] life as opposed to talking around the issue. I told him I did not want to be sitting on a witness stand in a capital PCR hearing one day explaining why I pled [Petitioner] in front of a judge who would give him death. He responded, "there will never be a capital PCR hearing so you don't have to worry about that." At that point, we knew he had said what we needed to hear and we concluded the meeting. It was our interpretation of Judge Cooper's remarks that he was saying clearly and unequivocally that he would give Quincy a life sentence if we placed the case in his hands.

ECF No. 39-10 at 98–99.

In addition to this Affidavit, there is other evidence to support Pringle's testimony about the *ex parte* meeting. On February 25, 2005—the day after the *ex parte* meeting—Lominack sent an email to his co-counsel recounting "[his] reasons for thinking that [Judge Cooper] was telling us that he would definitely give Quincy life." *Id.* at 87. The email supports Pringle's testimony and Affidavit, *in toto*, including recounting Judge Cooper's statement about there being no PCR hearing. *See id.* (setting forth numerous

statements from Judge Cooper). The email also indicates that Lominack discussed the meeting with two preeminent death penalty lawyers—David Bruck and John Blume[7]—both of whom agreed that Judge Cooper's statements were "clear signals that [Judge Cooper] is telling us exactly what he'd do." *Id.* Lominack noted in a second email that Judge Cooper also "said he would not be swayed by public opinion" and that Judge Cooper told defense counsel he had called Solicitor Giese earlier that week to ask him about a potential plea offer. *Id.* As a result of this call, Judge Cooper told defense counsel that "he believe[d] [Solicitor Giese] would not be upset with him no matter what the outcome." *Id.*

It is clear that defense counsel left this meeting with the clear and unequivocal understanding that Judge Cooper would sentence Petitioner to life if he pled guilty and that the evidence presented during the penalty phase needed to support their assertion of Petitioner's severe mental illness. *See* App. 3529–30. In contrast, Judge Cooper claims in an October 14, 2005 Affidavit[8] that he left the meeting thinking Petitioner

---

[7] Pringle testified at the PCR hearing that, after the meeting, she called Blume and Lominack called Bruck. App. 3551–52.

[8] In the same Affidavit, Judge Cooper stated that he had "no recollection of any PCR discussion"; however, he "admit[ted] that throughout the pre-trial phase of this case, [he] was inclined, if the matter were left in [his] hands, to impose life sentences based on what [he] had been told by the Defense team of [Petitioner's] severe mental illness." App. 3122. Judge Cooper further acknowledged that he had "no doubt some of [his] comments may have indicated" sympathy. *Id.* However, Judge Cooper's Affidavit

was not going to plead guilty and he continued with his preparations for trial. App. 3038–39.

The next day, trial counsel met with Petitioner, informed him of their discussion with Judge Cooper, and advised him to plead guilty. Petitioner has repeatedly stated on the record that counsel did not tell him Judge Cooper made an express promise of a life sentence, nobody promised him any particular sentence, and he based his decision to plead guilty on his impression that he would have a better chance at a life sentence. *See, e.g.*, App. 0018–20 (expressing understanding during plea colloquy that Judge Cooper could sentence him to either life or death and stating nobody promised him any sentence); App. 3494–95 (testifying at PCR hearing that he did not expect to receive a particular sentence by pleading guilty and that counsel advised him he would "have a better chance" at life if he pled guilty).

With these facts in mind, the PCR court made the following conclusions:

> The guilty pleas by Quincy Allen were freely and voluntarily entered and not the product of a promise of a life sentence by either the sentencing court or his counsel.
>
> The decision to plead guilty in front of Judge Cooper was a strategic decision on the part of

---

makes clear that, after hearing the testimony at the sentencing hearing, he "believe[d] [he] was misled" by defense counsel about the nature of Petitioner's mental illness and "the viciousness and brutality of [Petitioner's] crimes." *Id.*

> the defense team with a hope of receiving a life sentence, but that decision was not made based on a guarantee of a life sentence by the sentencing judge to counsel as counsel were aware that they had to convince the court of the existence of a significant mental illness and to dispute the conclusion of malingering.
>
> Defense counsel knew it was a risk to waive a jury trial; however, they concluded and represented to Applicant that, based upon (a) the circumstances of the crime, and (b) their investigation into mitigation and, in particular, their investigation into the Applicant's mental health, that an extensive proffer of evidence (even if contested) could convince the plea judge to impose a life sentence.
>
> Since there was no promise or guarantee of a life sentence, counsel was not deficient in failing to object to the death sentence on that basis.
>
> The decision to advise the Applicant to plead guilty and be sentenced by Judge Cooper was a reasonable decision by counsel based upon their investigation of the facts.
>
> Although the judge's actions may have indicated an inclination toward life sentences, all counsel understood it was not a guaranteed life sentence, and the judge refused to guarantee such a sentence in advance of the evidence.

ECF No. 22-2 at 6–7.

Ground Five – Ineffective Assistance of Counsel

In Ground Five, Petitioner alleges trial counsel were ineffective for advising him to plead guilty because they: (1) knew Richland County juries rarely imposed the death penalty, even for heinous crimes; (2) failed to obtain adequate assurance from Judge Cooper that he would sentence Petitioner to life; and (3) misrepresented their conversation with Judge Cooper to Petitioner, leading him to believe Judge Cooper would sentence him to life. ECF Nos. 39 at 71–77; 63 at 49. Respondent maintains the PCR court's decision is supported by the record. ECF No. 50 at 58–61.

As discussed above, the PCR court found Petitioner failed to prove either deficiency or prejudice. Judge Cothran based this decision, in part, on his finding that Judge Cooper never promised a life sentence in exchange for Petitioner's guilty plea. The Court agrees with Petitioner that the record does not support such a finding. While Judge Cooper indicates that he never intended to issue an express "promise" or "guarantee," the Court sees no other way to interpret his comments during the *ex parte* meeting, especially his indication to Pringle that there would never be a capital PCR hearing, than as an implicit assurance at the very least.[9] Nonetheless, the PCR court's decision that trial

[9] In addition, although the PCR court did not consider Judge Cooper's Affidavit, the Affidavit is part of the record before this Court. Significantly, Judge Cooper does not deny making this statement in his Affidavit and openly admits he was inclined to sentence Petitioner to life prior to hearing all the evidence at the penalty phase and may have suggested as much to counsel through

counsel were not deficient is supported by the record. Under the unique circumstances of this case, trial counsels' interpretation of Judge Cooper's comments made their advice to plead guilty more reasonable under the unique circumstances of this case. Indeed, because the Court finds trial counsels' interpretation of Judge Cooper's remarks was reasonable under the circumstances, their indication to Petitioner that he may have a better shot at a life sentence if he pled guilty was equally reasonable.[10] *See Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.").

Petitioner's pleading also suggests that any defense attorney working a capital case in Richland County

---

various remarks. The Court does not doubt the sincerity of Judge Cooper's assertion that he did not intend to convey a promise; however, the undisputed and reliable evidence of record supports defense counsels' recitation of what Judge Cooper said during the *ex parte* meeting, and those statements did, in fact, convey an assurance of a life sentence.

[10] Petitioner asserts trial counsel misled him to believe Judge Cooper had promised to impose a life sentence. *See* ECF No. 63 at 49. However, the record supports the PCR court's finding that counsel never told Petitioner that Judge Cooper had made any promises and that Petitioner understood from his conversation with counsel that a death sentence was still possible. This is critical, as Petitioner's understanding of what Judge Cooper told defense counsel is dispositive on the prejudice prong of the *Strickland* analysis.

who pleads his client without an express assurance of a life sentence from the judge is per se ineffective.[11] Such a finding would directly contradict *Strickland*'s presumption of reasonableness, recognition of a "wide range" of reasonable professional assistance, and mandated context-specific review of attorney performance:

> [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Strickland, 466 U.S. at 689 (citations omitted). Thus, the Court finds the PCR court reasonably applied *Strickland* in holding that trial counsel were not deficient.

Additionally, the Court finds Petitioner has failed to show the PCR court's prejudice finding was unreasonable. The Sixth Amendment's guarantee of effective assistance of counsel applies with equal force to critical pretrial matters, including the decision whether to plead guilty. *See Lafler v. Cooper*, 566 U.S.

---

[11] The Court acknowledges that juries in Richland County are generally hesitant to impose a death sentence. *See* ECF No. 39 at 72–73 (outlining the results of prior Richland County death penalty cases).

156, 165 (2012); *Hill*, 474 U.S. at 58. *Strickland*'s two-part test governs the analysis, but here, the prejudice prong "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59. "In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* This inquiry "focuses on a defendant's decisionmaking" and does not turn on the outcome of a defendant's actual criminal proceeding or potential outcome had a defendant chosen to proceed to trial. *Lee v. United States*, __ U.S. __, 137 S. Ct. 1958, 1966 (2017).

The Supreme Court has cautioned that, because "the strong societal interest in finality has 'special force with respect to convictions based on guilty pleas,' . . . [c]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for an attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Lee*, 137 S. Ct. at 1967 (quoting *United States v. Timmereck*, 441 U.S. 780, 784 (1979)).

Here, the only contemporaneous evidence related to Petitioner's decision to plead guilty is Petitioner's plea colloquy, during which, under oath, Petitioner indicated he understood that pleading guilty meant Judge Cooper, rather than a jury, would decide his sentence; acknowledged that Judge Cooper could either sentence him to life without parole or death; and affirmed that he had not been promised either sentence

in return for his plea. App. 18–20. Petitioner has not shown any reason for the Court to doubt these representations and, in fact, re-affirmed these statements in his PCR testimony. Accordingly, the Court agrees with the PCR court's conclusion that Petitioner fails to show he suffered prejudice as a result of counsels' alleged deficiencies. *See Blackledge v. Allison*, 431 U.S. 63, 73–74 (1977) ("[T]he representations of the defendant . . . [during the plea hearing], as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Respondent's Motion for Summary Judgment is granted as to Ground Five.

Ground Six – Involuntary Guilty Plea

In Ground Six, Petitioner alleges he entered his guilty plea involuntarily because he relied on Judge Cooper's "implied assurances" of a life sentence in exchange for his plea. ECF No. 39 at 78–89. Petitioner clarifies that Ground Six "argues that his plea was involuntary because the trial judge indicated to counsel that he would impose a life sentence if Mr. Allen pled guilty, and Mr. Allen relied on that assurance," thus focusing "on the trial judge's misleading conduct and not counsel's deficient performance." ECF No. 76 at 20. Petitioner claims the PCR court's decision was based on an unreasonable determination of the facts because his

decision to grant Judge Cooper a protective order and quash the subpoena for his testimony resulted in a materially incomplete record. ECF No. 63 at 61–65. As a result, Petitioner asserts the Court should review this claim de novo. ECF No. 63 at 65.

Because a guilty plea involves the waiver of constitutional rights, it must be voluntary, knowing, and intelligent. *See Brady v. United States*, 397 U.S. 742 (1970).

> [A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).

Id. at 755 (citation omitted). "Under this standard, a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty." *Id.*

The Court is troubled by the procedural history of this case. The record of the *ex parte* meeting supports defense counsels' interpretation of Judge Cooper's comments as a promise not to impose a death sentence if Petitioner plead guilty. That finding inherently makes defense counsels' advice to Petitioner to plead guilty a reasonable, strategic decision, which forecloses relief on ineffective assistance of counsel grounds.

However, that finding also begets the obvious question of whether Petitioner's guilty plea was involuntary *because of* that promise.

During the guilty plea hearing, Petitioner responded to a series of questions about the voluntariness of his plea. Petitioner acknowledged that Judge Cooper could impose either the death penalty or a life sentence. App. 18–19. Petitioner further stated that no one promised him he would receive either a sentence of death or life without parole. App. 19; *see also* App. 20 (stating that no one had promised Petitioner any specific sentence). During the PCR hearing, Petitioner was asked, "[W]hen you [plead guilty], what sentence did you expect to receive?" App. 3494. Petitioner answered, "Well, I don't, I didn't expect to receive anything. I knew it could go either way." *Id.*; *see also* App. 3498 ("Q: Okay, but you still said there were no promises made, correct? A: Yes."). To that end, Petitioner testified that his attorneys told him about their meeting with Judge Cooper and "said Judge Cooper said if I pled guilty in front of him I'd have a better chance at a life sentence." App. 3495.

Defense counsels' testimony at the PCR hearing is in accord with Petitioner's testimony. Pringle testified that she met with Petitioner the day after the *ex parte* meeting and told him "that [she] thought that what Judge Cooper was trying to say is if [Petitioner] would plead guilty, that he was going to give him a life sentence and that it was [her] advice that [Petitioner] should do that." App. 3533. Pringle also told Petitioner "of [her] background with Judge Cooper and that [she] really trusted him and . . . believed him and . . . didn't

think he would trick [them] or mislead [them] or do anything like that." *Id.* Specifically, however, Pringle testified that she did not use the word "promise" or "guarantee" when meeting with Petitioner. App. 3533–34.

Therefore, under either a de novo or deferential standard of review, the fact remains that neither Judge Cooper nor trial counsel made any promise or misrepresentation to Petitioner and, thus, as demonstrated by Petitioner's responses during the plea colloquy and PCR evidentiary hearing, he was not induced to plead guilty by any improper means. Put simply, while the only evidence in the record supports a finding that defense counsel reasonably believed a promise had been made, no such promise was relayed to Petitioner and Petitioner did not enter a guilty plea in reliance on any such promise. As the PCR court noted, "[s]ometimes in state post-conviction relief actions, the testimony of the [Petitioner] is the most persuasive. This is one of those times." App. 4201. There is nothing in the record to suggest "that his admissions in open court were anything but the truth." *Id.* at 758.

The proceedings below are unusual in many ways, and this Court is troubled by what occurred. On the one hand, Judge Cooper, perhaps unintentionally, conveyed an implicit assurance to defense counsel to sentence Petitioner to life without parole. On the other hand, defense counsel did not relay that assurance or promise to Petitioner prior to his guilty plea. Therefore, Petitioner could not have relied on such a promise. In light of Petitioner's testimony during the guilty plea

and the PCR hearing, the Court must conclude that Petitioner's guilty plea was knowingly and voluntarily entered based on strategically sound advice from his attorneys. Accordingly, the Court is constrained to resolve the issues before it in light of the well-established case law governing federal habeas corpus litigation.

Request for an Evidentiary Hearing & Motion for Discovery

Petitioner requests an evidentiary hearing "in order to hear from the trial judge himself to resolve whether he did make statements implicitly assuring counsel that he would impose a life sentence were Mr. Allen to plead guilty." ECF No. 63 at 65. In addition, Petitioner moves for discovery of Judge Cooper's entire file on this case. ECF No. 85.

Under the AEDPA, evidentiary hearings are generally prohibited even when a habeas petitioner has failed to develop the factual basis of a claim in his state court proceedings. 28 U.S.C. § 2254(e)(2); *see Cullen v. Pinholster*, 563 U.S. 170, 181–84 (2011) (recognizing both that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits" and also that for claims for which the factual basis was not developed in state court "§ 2254(e)(2) bars a federal court from holding an evidentiary hearing, unless the applicant meets certain statutory requirements"). However, the statute itself creates an exception to the general rule if the petitioner can show that the claim relies on a new, retroactive rule of constitutional law or "a factual predicate that could not have been previously discovered through due

diligence[,]" and that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *Id.*

Thus, the Fourth Circuit has recognized:

> A petitioner who has diligently pursued his habeas corpus claim in state court is entitled to an evidentiary hearing in federal court, on facts not previously developed in the state court proceedings, if the facts alleged would entitle him to relief, and if he satisfies one of the six factors enumerated by the Supreme Court in *Townsend v. Sain*, 372 U.S. 293, 313 (1963).

Juniper v. Zook, 876 F.3d 551, 563 (4th Cir. 2017) (quoting *Conaway v. Polk*, 453 F.3d 567, 582 (4th Cir. 2006)). The six *Townsend* factors are:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing.

Townsend, 372 U.S. at 313.

Petitioner's stated reason for requesting the hearing and discovery[12]—to receive additional evidence regarding what was said or not said by Judge Cooper during the *ex parte* meeting with counsel—has no bearing on these claims. What matters is Petitioner's perspective of the circumstances supporting his decision to plead and Petitioner has consistently and repeatedly asserted the basis for his plea on the record. Accordingly, the Court denies Petitioner's request for an evidentiary hearing and motion for further factual development related to Grounds Five and Six. *See also Schriro v. Landrigan*, 550 U.S. 465, 474 (2000) ("In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief."); *Wolfe v. Johnson*, 565 F.3d 140, 165 n.36 (4th Cir. 2009) ("'[G]ood cause' [for discovery] will exist when 'specific allegations before the court show reason to believe that the petitioner

[12] As to Petitioner's Motion for Discovery, ECF No. 85, the parties agreed that Judge Cooper's counsel would review Judge Cooper's file and submit any documents relevant to the *ex parte* meeting for the Court's *in camera* review. Judge Cooper's counsel—an employee of the South Carolina Attorney General's Office—submitted several documents for the Court to review *in camera*. ECF No. 87 at 8. The Court has reviewed these documents and DENIES Petitioner's Motion for Discovery, ECF No. 85. In so ruling, the Court finds that there is not good cause for production of the requested discovery, and the Court specifically concludes that Petitioner cannot show that he would be entitled to relief if the requested documents were produced. These documents have been included on the docket as a Court Only exhibit and can be found at Docket Entry Number 89.

may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief.'") (quoting *Bracy v. Gramley*, 520 U.S. 899, 908–09 (1997)).

For these reasons, Respondent's Motion for Summary Judgment is granted as to Grounds Five and Six.

Preserved Portions of Ground Seven

In Ground Seven, Petitioner asserts his trial counsel were ineffective for putting forth an incomplete mitigation presentation based on the false belief that Judge Cooper had agreed to give Petitioner a life sentence. ECF No. 39 at 90–98. Specifically, Petitioner contends counsel should have: (1) called lay witnesses with firsthand knowledge of his abusive childhood, rather than presenting that evidence through a social worker; (2) presented expert testimony to rebut evidence suggesting Petitioner malingered his mental illness symptoms; and (3) investigated and presented neuropsychological evidence of Petitioner's brain impairments. *Id.* Petitioner raised the first two portions of this ground in his PCR application and/or on PCR appeal and Respondent asserts they are preserved for review. However, the third portion is, admittedly, defaulted. The Court will address the preserved portions now and the defaulted portion further below.

Under *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 that particular investigation 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.

466 U.S. 690–91. Thus, counsel must conduct a reasonable investigation, thorough enough to make an informed decision regarding which mitigating evidence to present. In assessing counsel's investigation, the Court "must consider an objective review of their performance, measured for 'reasonableness under prevailing professional norms,' which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Wiggins v. Smith*, 539 U.S. 510, 523 (2009) (quoting *Strickland*, 466 U.S. at 688, 689).

Further, to establish a Sixth Amendment violation, Petitioner "must show that but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence." *Porter v. McCollum*, 558 U.S. 30, 41 (2009). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. To assess that probability, the Court must "evaluate the totality of the evidence—'both that adduced at trial,

and the evidence adduced in the habeas proceeding'—and 'reweigh it against the evidence in aggravation.'" *Porter*, 558 U.S. at 41 (quoting *Williams v. Taylor*, 529 U.S. 362, 397–98 (2000)).

Evidence of Childhood Trauma and Abuse

During the penalty phase, trial counsel called several witnesses who testified about Petitioner's difficult upbringing. Valerie Schultz, a guidance counselor at Petitioner's high school, testified that she became aware that Petitioner had been thrown out of his home and was living in the woods. App. 0928. She indicated she and several other teachers tried to help him. App. 0928–29. Ms. Schultz testified Petitioner demonstrated academic aptitude and potential but always kept to himself and appeared sad. App. 0933–36. She described a marked decline in Petitioner's hygiene, which she linked to living outside of a "home situation" for so long. App. 0931–32.

Hope Spillane, Petitioner's high school English teacher, described Petitioner as a good student with immature social skills who struggled to fit in with his peers. App. 0956–59. She also remembered some deterioration in Petitioner's appearance later in his junior year. App. 0961–62.

Margaret Britt, another teacher at Petitioner's high school, remembered Petitioner struggling to afford snacks and as being in need of attention. App. 0984–85. She recalled Petitioner as a good kid, but awkward and withdrawn, and also described a time when Petitioner's hygiene had steeply declined and he appeared rattled. App. 0986–89, 1002.

Cheryl Hart, Petitioner's neighbor when he was seven to nine-years-old, was friends with Petitioner's mother and described her financial problems. App. 1765–66. She testified that Petitioner's step-father beat his mother while she was pregnant with his younger siblings and that the family did not have heat, food, or electricity for a period of time. App. 1766. Ms. Hart recalled Petitioner's mother worked all day and did not return home until 2:00 a.m., leaving Petitioner to care for himself and his three younger siblings. App. 1767. She described observing Petitioner and his siblings drinking water from a gutter, hearing Petitioner's mother beating the children, and seeing a mark on Petitioner's sister's face where their mother had hit her with a belt buckle. App. 1768–69.

Petitioner's friend and neighbor, Brian Santiago, and Brian's parents testified that Petitioner was repeatedly kicked out of his house for extended periods of time and forced to live anywhere he could find shelter, including the bushes, a treehouse, an abandoned house, and a McDonalds play area. App. 1785–87, 1806, 1817–18. The Santiagos took Petitioner in for a while and described him as grateful, respectful, and quiet. App. 1788, 1808. They contacted Petitioner's father but he also refused to help. App. 1803–04. The Santiagos also noticed a decline in Petitioner's demeanor over time and eventually cut ties with him. App. 1802–03, 1807–08, 1815–16.

Edwina Walker, who spent time with Petitioner and his mother when he was young, testified about several incidents of abuse, including witnessing Petitioner's mother beating him with a belt. App. 1861–63. She

indicated Petitioner's mother treated him much worse than her other children. App. 1863–64.

Deborah Grey, a licensed social worker, presented an extensive and exhaustive account of Petitioner's life history, from birth until right before the murders. App. 1035–318. Ms. Grey reviewed over 1,400 pages of records relating to Petitioner's educational history, mental health, medical and dental history, employment, family court proceedings, and time in prison. App. 1043–48. In addition, Ms. Grey interviewed Petitioner and his mother, father, brothers, and two aunts. App. 1204–08. She attempted to talk to additional family members, but they refused to speak with her. App. 1204–08.

Ms. Grey's testimony detailed specific instances of abuse and neglect throughout Petitioner's childhood and described his resulting mental decline. *See* App. 1050–1217.

In his PCR application, Petitioner alleged his trial counsel were ineffective for failing to present mitigation evidence of his childhood trauma and abuse. *See* ECF No. 22-2 at 47. At the PCR evidentiary hearing, Petitioner presented testimony from the following additional lay witnesses regarding his childhood and his abusive mother: Bennie Richard Gordon, Petitioner's step-brother; Phyllis Blake, Petitioner's step-cousin; Kirsten Kirkland, Petitioner's cousin; Martell Whitaker, who was incarcerated with Petitioner for a time; and Peggy Clore, Petitioner's music teacher who also taught several of Petitioner's siblings. App. 3765–878.

Petitioner lived with his father and Mr. Gordon for approximately two years when he was fifteen or sixteen. App. 3767. Mr. Gordon testified that Petitioner's father regularly beat Petitioner with a belt, got into physical altercations with Mr. Gordon's mother, and had no interest in spending time with the boys. App. 3769–73. He portrayed Petitioner as a good big brother and student with an active social life. App. 3774–77.

Ms. Blake testified that she met with Petitioner's trial attorneys in 2004 but told them she was busy and did not wish to be involved. App. 3788. However, she stated she would have testified at Petitioner's trial if she had been subpoenaed. App. 3788–89. Ms. Blake testified regarding the maternal side of Petitioner's family tree and described multiple generations of abusive parents. She indicated Petitioner's mother and her siblings were abused and neglected by their mother and they and their children and many of Petitioner's relatives exhibited odd, sometimes violent, behavior and got into legal trouble. App. 3794–802. Ms. Blake described Petitioner's mother as both physically and mentally abusive to her children and said she was particularly hard on Petitioner and never showed him any affection. App. 3802–04, 3807. She also recalled feeling afraid of Petitioner, thinking he was scary, and having a feeling something was wrong with him. App. 3805–06. However, she felt Petitioner never had a chance at life because of his upbringing and stated executing him would have a personal impact on her. App. 3807–08.

Ms. Kirkland, Ms. Blake's daughter, recalled witnessing Petitioner's mother's harsh treatment of her children. App. 3824–25. She went to high school with Petitioner for one year and described other kids, including his cousins, bullying Petitioner. App. 3826–27. Ms. Kirkland stated she was twenty-four years old at the time of Petitioner's trial and was not contacted by Petitioner's attorneys. App. 3827–28. She indicated she would have testified if asked and that Petitioner's execution would have a personal impact on her. App. 3828–29.

Mr. Whitaker was incarcerated with Petitioner for seven months when Petitioner was nineteen years old. He stated Petitioner was intelligent, often studied the dictionary, and that he had a rough childhood and regretted not being able to protect his mother from his stepfather's abuse. App. 3838–39. He described Petitioner as the little brother he never had and said Petitioner's trial team never contacted him. App. 3841.

Ms. Clore taught Petitioner music in elementary school and then taught his siblings. App. 3860. She stated that one of Petitioner's attorneys for his North Carolina case interviewed her, but not his South Carolina attorneys. App. 3860–61. Ms. Clore testified she did not have disciplinary problems with Petitioner but that his brothers were a handful. App. 3864. When she mentioned their behavior to the guidance counselor, she was told not to send a note home because their mother would punish them by withholding food. App. 3865. Ms. Clore later learned the cafeteria workers would send food home with the

children because they would be locked out of the house after school until their mother got home. App. 3865–66.

Quoting from Petitioner's own appellate brief, with direct references to the record, the PCR court detailed a significant portion of trial counsels' mitigation presentation, including testimony from the Santiagos, Petitioner's neighbors, and Ms. Grey. ECF No. 22-2 at 47–52.

The PCR court concluded:

> The above recitation details just a portion of the mitigation case presented by defense counsel during the mitigation phase as summarized by Applicant's own appellate counsel in the direct appeal. Defense counsel presented numerous witnesses at that stage including three of Applicant's teachers from high school. The record shows that defense counsel presented an extensive mitigation case and giving great focus to Applicant's childhood. While Applicant presented several different witnesses in the PCR action, the evidence in PCR was simply not particularly compelling or of great import. Applicant's PCR claim on the mitigation issue is hereby denied.

ECF No. 22-2 at 52. In addition, the PCR court specifically found, "The manner the defense presented the evidence in mitigation was informed by professional decisions, not the product of neglect, in an attempt as a matter of strategy to convince Judge Cooper in a cogent manner that life was the appropriate sentence" and "[c]ounsel were not deficient

in their mitigation presentation concerning not eliciting so-called execution impact evidence or additional evidence concerning the Applicant's childhood experiences." ECF No. 22-2 at 6, 7.

Petitioner contends the PCR court unreasonably applied *Strickland* because "the idea that the post-conviction evidence was cumulative is relevant only to prejudice, not to deficient performance" and the court failed to re-weigh the combined PCR and trial mitigation evidence against the evidence in aggravation. ECF No. 63 at 74–77. Regarding trial counsels' performance, Petitioner asserts they unreasonably failed to investigate and present the lay witness testimony presented at PCR. *Id.* at 67. He continues to contend that this testimony provided a "fuller picture" of his abusive childhood and "might have been more convincing than the account conveyed by the mitigation specialist." *Id.*

Notably, while Petitioner ostensibly challenges trial counsels' investigation, he does not specify what further actions they should have taken. The Court assumes Petitioner's assertion is that counsel should have contacted and interviewed the witnesses who testified at PCR. However, PCR testimony shows that the trial team did contact Ms. Blake, who refused to speak with them, and had Ms. Clore's potential statement through Petitioner's North Carolina counsel.[13] In addition, trial counsel testified at PCR

[13] In addition, it appears Ms. Grey interviewed Ms. Clore. *See* App. 1092–93 (referring to a Ms. Peggy Clora who taught all of the Allen children).

that they interviewed Petitioner's brothers and sister, who spoke openly to them and the mitigation specialist about the abuse but were reluctant to testify. App. 3601–04. Counsel testified the defense team contacted Mr. Gordon but decided not to call him as a witness because they "felt like there was more proof of abuse in [Petitioner's] life f[rom] people who were here than from his family outside." App. 3929–32.

Further, despite Petitioner's disagreement, after a thorough review of the evidence presented at trial and at PCR, the Court finds the PCR court's assessment reasonable. While the PCR evidence may have added some details of Petitioner's abusive and neglectful upbringing, it did not significantly "alter[] the sentencing profile presented to the sentencing judge." *Strickland*, 466 U.S. at 700. It is not unreasonable or against prevailing professional norms for counsel to rely on a qualified mitigation investigator and other experts. *See Rhodes v. Hall*, 582 F.3d 1273, 1283 (11th Cir. 2009) ("Since . . . counsel hired investigators who interviewed potential witnesses and shared all of their information with counsel, we cannot say that counsel performed deficiently by delegating the mitigation investigation to them."). In addition, as the Supreme Court has recognized, "there comes a point at which [more evidence] can reasonably be expected to be only cumulative, and the search for it distractive from more important duties." *Van Hook*, 558 U.S. at 11; *see also Rompilla*, 545 U.S. at 389 ("Questioning a few more family members and searching for old records can promise less than looking for a needle in a haystack, when a lawyer truly has reason to doubt there is any needle there."). Thus, trial counsel are not required to

"investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing," *Wiggins*, 539 U.S. at 533, but, rather, must uphold their "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," *Strickland*, 466 U.S. at 691. Once counsel has conducted their investigation, decisions concerning the calling of witnesses are matters of strategy and ordinarily cannot constitute ineffective assistance. *Jones v. Barnes*, 463 U.S. 745, 808 (1983).

Based on the Court's review of the evidence and relevant precedent, the PCR court's decision does not "lie well outside the boundaries of permissible difference of opinion." *Tice v. Jonson*, 647 F.3d 87, 108 (4th Cir. 2011) (holding "[m]indful of the deference owed under AEDPA, we will not discern an unreasonable application of federal law unless 'the state court's decision lies well outside the boundaries of permissible differences of opinion.'") (quoting *Goodman v. Bertrand*, 467 F.3d 1022, 1028 (7th Cir. 2006)). Accordingly, the Court finds Petitioner has failed to show the PCR court's decision was contrary to, or an unreasonable application of, clearly established federal law.

Additional Mental Health Experts – Dr. Hilkey and Dr. Griffin

In addition, Petitioner asserts trial counsel failed to thoroughly investigate and present evidence of his severe mental illness and brain impairments. ECF No. 39 at 93. Specifically, in this preserved portion of the claim, Petitioner contends trial counsel should have

called Dr. James Hilkey and Dr. Adrian Griffin to "explain how [Petitioner's] history of embellishing or exaggerating symptoms on some occasions did not rule out that [he] was indeed severely mentally ill." *Id.* Dr. Hilkey and Dr. Griffin both testified at Petitioner's North Carolina sentencing and were available to testify at the South Carolina proceeding.

Petitioner did not raise this claim in his PCR application and, thus, the PCR court did not address it in its order. Petitioner's PCR counsel deposed Dr. Hilkey and provided that deposition, along with Dr. Hilkey's 2003 psychological evaluation of Petitioner and 2004 addendum to the evaluation as exhibits in the PCR action. *See* App. 4555–609. Although Dr. Griffin had passed away by the time of Petitioner's PCR action, PCR counsel filed as an exhibit the entire transcript of Petitioner's North Carolina proceeding, including Dr. Griffin's testimony. *See* App. 5123–61.

Petitioner raised this claim in his amended petition for writ of certiorari, ECF No. 22-6 at 69–76, and the State argued it was procedurally barred and also lacked merit, ECF No. 22-7 at 21–22. The Supreme Court of South Carolina summarily denied the petition, but stated the denial was "on the merits." ECF No. 22-9. Accordingly, Petitioner exhausted this claim by fairly presenting it to the state's highest court. However, it is not properly preserved. Respondent does not assert this portion of Ground Seven is procedurally barred but contends it is preserved for review. ECF No. 50 at 25. And both parties appear to analyze this claim under § 2254(d)'s deferential standard. However, the Court is left without a state court decision to which to defer.

Out of an abundance of caution, the Court has conducted a de novo review of this portion of Ground Seven and finds it lacks merit. Thus, the Court would reach the same conclusion under a more deferential review.

Petitioner's mental status was hotly contested throughout the penalty phase of his trial, resulting in a textbook battle of the experts. Ms. Grey spent a considerable portion of her testimony discussing Petitioner's erratic behaviors, psychiatric admissions, suicide attempts, mental illness risk factors, and his mental status leading up to the murders. *See* App. 1034–216.

Trial counsel then presented four mental health experts. Dr. Richard Harding, an expert in child psychiatry, testified regarding his treatment of Petitioner's rumination disorder[14] and general opinion of his overall mental status. *See* App. 1321–75. Petitioner was referred to Dr. Harding in the fall of 1997 and by then had experienced periods of rumination for almost a decade. App. 1327. Shortly after he began treatment with Dr. Harding, Petitioner was admitted to a psychiatric unit after a confrontation with his mother. App. 1329–30. Dr. Harding was Petitioner's attending physician and diagnosed him

---

[14] According to Dr. Harding's testimony, rumination is a very uncommon disorder "that is found mostly in very young children from one to three where children are able to bring up stomach contents into their mouths and generally re-swallow them." App. 1324. From a psychiatric standpoint, it is a "form of self comfort," "a way of keeping control on emotions, a calming kind of activity that is effective for the people who do it." App. 1325–26.

with depression, rumination, and identity disorder. App. 1330–31. About eight days later, Petitioner was again hospitalized after a perceived suicide attempt. App. 1331–32. At the end of that hospitalization, Dr. Harding again diagnosed depression, rumination, and identity disorder. App. 1337. Dr. Harding testified that Petitioner's behaviors were not consistent with anti-social personality disorder but could foreshadow the possibility of a more serious mental illness, like schizophrenia. App. 1338–39.

Dr. George Corvin, an expert in general and forensic psychiatry who also testified at Petitioner's North Carolina sentencing, reviewed Petitioner's medical records and evaluated him on five separate occasions. App. 1387–90. Dr. Corvin opined Petitioner suffered from schizophrenia and explained why he had previously diagnosed Petitioner with schizoaffective disorder. App. 1390–92. Dr. Corvin specifically testified he did not believe Petitioner was malingering and thoroughly explained his opinion. App. 1419–24. Further, Dr. Corvin had reviewed reports from several of the State's experts finding malingering and discussed, at length, why he disagreed with those findings. App. 1425–42, 1506–10.

Dr. Pamela Crawford, an expert in forensic psychiatry, reviewed eight to ten thousand pages of records, interviewed 23 people, and interviewed Petitioner six times and ultimately diagnosed Petitioner with schizophrenia. App. 1551. Regarding malingering, Dr. Crawford testified:

> there is certainly at some point in North Carolina where he is exaggerating or feigning

> symptoms. I think there's really no question about that. Where - - and I say exaggerating and feigning which doesn't necessarily mean malingering. It doesn't necessarily mean he's doing it to avoid the death penalty. But I think that he is exaggerating or citing symptoms that either aren't real or they're exaggerated in some way.

App. 1586–87. She further explained:

> Now, malingering or feigning symptoms does not mean you also do not have a mental illness. And that's the other thing. We have numerous times mentally ill people who sometimes minimize symptoms, which I think he did at one point, and sometimes exaggerate symptoms. It doesn't mean there's not a mental illness. But it means you've got to look through all that stuff to determine what is in the mental illness and what is the exaggeration of it. So that's something that's been very important in this case and difficult in this case.

App. 1587.

Dr. Crawford discussed in detail why she believed Petitioner was not faking his reports of hallucinations. App. 1588–605. As part of that discussion, Dr. Crawford referenced her interview with Dr. Griffin and Dr. Griffin's opinion that Petitioner was clearly psychotic. App. 1592–97. Dr. Crawford noted:

> [W]hat's significant about this is, Dr. Griffin who is not a forensic psychiatrist in this issue, who was not involved in this issue recognized

> [Petitioner] as being psychotic and started him on medication. Against, that's something other than just [Petitioner's] report. And I asked him is it possible he was malingering, and he says absolutely not. He could tell that this person was mentally ill. And he treated people in the jail. So that was significant to me.

App. 1596–97.

Dr. Crawford also directly addressed some of the State's experts' opinions finding malingering and anti-social personality disorder. App. 1599–602, 1627–37, 1653–54, 1674–79. She explained her disagreement with those findings and discussed Petitioner's results on the Structured Interview of Reported Symptoms ("SIRS")—a test to assess whether a patient is malingering. App. 1631–33. She testified that when Petitioner was given the test in North Carolina, the results indicated he was exaggerating, but not malingering, and again emphasized that the results did not "rule out that he was mentally ill, but there may be some exaggeration of symptoms." App. 1632. When Petitioner was given the same test three weeks prior to his South Carolina trial, the results showed no evidence of malingering. *Id.*

Dr. Donna Schwartz-Watts, an expert in forensic and correctional psychiatry, met with Petitioner several times and referred him for civil commitment and opined Petitioner suffered from schizophrenia. App. 1831–32. On cross-examination, Dr. Schwartz-Watts stated she did not believe Petitioner was malingering. App. 1846.

In response, the State called several experts who opined Petitioner was malingering, each of whom was subject to cross-examination by trial counsel. *See* App. 1983–84, 2010–59 (testimony of Dr. James Ballenger regarding malingering); App. 2229–30, 2247–88 (cross-examination of Dr. Ballenger); App. 2106, 2118–36 (testimony of Dr. Karla deBeck regarding malingering); App. 2140–98 (cross-examination of Dr. deBeck); App. 2325–43 (testimony of Dr. David Hattem regarding malingering); App. 2343–44 (cross-examination); App. 2349–65 (testimony of Dr. Camilla Tezza regarding malingering); App. 2365–86 (cross-examination); App. 2404–07 (testimony of Dr. Majonna Mirza regarding malingering); App. 2407–31 (cross-examination). Notably, the State's experts also testified that people can malinger but still suffer from an underlying mental illness. App. 2127–28, 2175, 2340.

In his sentencing order, Judge Cooper stated he had "listened to and read the accounts of all of the psychiatrists and psychologists on this case," including Dr. Hilkey. App. 2531. He outlined the disagreement between the experts and found, "These contrary opinions lead me to no firm conclusions as to Mr. Allen's mental state at this time." App. 2531–33.

The evidence introduced at PCR showed Dr. Hilkey, a forensic psychologist, spent considerable time evaluating Petitioner prior to the North Carolina sentencing and administered a battery of psychological tests. App. 4966–67, 4971, 5044. Dr. Hilkey opined Petitioner was seriously mentally ill and suffered from a schizophrenic spectrum disorder. App. 4970. Dr. Hilkey acknowledged that his tests, like the

prosecution's, showed Petitioner tended to exaggerate his symptoms. App. 4968. He testified that he paid close attention to those results and even had two of the tests peer-reviewed. *Id.* On one test, a national expert confirmed the results indicated "a person who has some exaggeration, but a person who was suffering from schizophrenia and was psychotic." App. 4968–69. Dr. Hilkey explained:

> [O]ften times individuals will exaggerate, especially early in their illness, as a way to draw attention to their illness to make sure that people see that they in fact need help. And that is my interpretation of the results of those tests that are exaggerated. It is in many ways a plea for help or a way of addressing or calling attention to the problems that he had.
>
> When you look at the profiles you'll see that some of the clinical scales are elevated, some of them are not. And this tells me that there was, the symptoms that were real and true for Mr. Allen were endorsed. Other scales that were also pathological that did not apply were not endorsed. And this pattern of responses would be consistent with people who are making a real attempt to convey the problems that they have, albeit some of those were exaggerated in ways that may be trying to draw attention to their illness and their pain.

App. 4969.

On cross-examination, Dr. Hilkey directly addressed the issue of malingering at length and maintained his

position that many of Petitioner's test results indicated he exaggerated symptoms, but did not rule out his diagnosis of a chronic, severe mental illness. App. 5028–49.

Sometime after Petitioner's North Carolina sentencing, Dr. Hilkey was contacted by Petitioner's South Carolina trial counsel. App. 4561. Dr. Hilkey met with trial counsel and reevaluated Petitioner, at their request. App. 4563–64. Trial counsel had Dr. Hilkey on standby during the South Carolina proceeding but did not call him to testify. App. 4566, 4570, 4581. During his deposition, Dr. Hilkey stated he was prepared to testify as he did in North Carolina—that there was some exaggeration but that Petitioner was chronically and severely mentally ill. App. 4568.

Dr. Griffin was a psychiatrist with a Surry County, North Carolina mental health center who evaluated Petitioner after he exhibited bizarre behavior in jail. App. 5123–24. He was not retained by either side and was not compensated for his testimony. App. 5147. Regarding his first meeting with Petitioner, Dr. Griffin testified:

> When I saw him he was delusional. False beliefs. Difficulty in comprehending what was happening. I only saw him basically 10 or 15 minutes the first time. But I was worried enough to start him on a medication called Abilif[y]. Abilif[y] is one of our new antipsychotic medications, to reintegrate thought processes. Because I look at people how they interact with me. And I felt that he had what we would call frontal lobe disassociation. Frontal lobe is here.

> Responsible for your higher mental faculties, planning, rationalization, consideration, courtesy, thoughtfulness. That was not there.

App. 5129.

Dr. Griffin met with Petitioner two more times and opined he exhibited signs of schizoaffective and bipolar disorders. App. 5126, 5135. Dr. Griffin formed his opinions solely based on his personal interactions with Petitioner. He did not review any prior testing or reports or speak with any of the other mental health professionals who had treated Petitioner, nor had he reviewed Petitioner's confession or the video of the North Carolina murders. App. 5147–48, 5154–55.

Dr. Griffin did not offer an opinion as to whether Petitioner was malingering, except to state that, in his experience, people with psychotic illnesses tend to attempt to cover them up. App. 5139. He explained: "If you're flawdly (sic) psychotic - - there's a question we always debate: If you're psychotic you cannot turn psychosis on and off at will. So you cannot be a remarkably good actor. I'm going to act psychotic today and not tomorrow. That's not psychosis." *Id.* Notably, Dr. Griffin did not respond or offer rebuttal when the prosecution informed him other mental health professionals had diagnosed Petitioner with anti-social personality disorder and malingering. *See* App. 5147–52.

The evidence at PCR and sentencing suggest trial counsel were aware of Dr. Griffin and their team was in contact with him. *See, e.g.*, App. 1592 (Dr. Crawford refers to interviewing Dr. Griffin); App. 3538–40

(Pringle testifying regarding Dr. Griffin's North Carolina testimony and stating she went to see him and interviewed him and thought he would be an excellent witness); App. 3636 (Lominack testifying he specifically remembered Dr. Griffin, thought he was a good witness, and would have called him if he had not been under the impression Judge Cooper was going to give Petitioner a life sentence).

To the extent Petitioner asserts trial counsel conducted a deficient mental health investigation because they did not discover Dr. Hilkey and Dr. Griffin, that claim is clearly without merit. The record unequivocally shows that trial counsel and their team were well aware of Dr. Hilkey and Dr. Griffin and the potential content of their testimony. Thus, Petitioner's precise claim is that trial counsel were deficient for not calling these two witnesses in the South Carolina proceeding and that Petitioner was prejudiced because they did not testify. Petitioner has failed to show prejudice and is not entitled to relief on this claim. *See Strickland*, 466 U.S. at 687 ("Unless a defendant makes both showings [deficiency and prejudice], it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.").

Regardless of trial counsels' reason for not presenting Dr. Hilkey and Dr. Griffin, the testimony they could have offered "would barely have altered the sentencing profile presented to the sentencing judge." *Strickland*, 466 U.S. at 700. During sentencing, multiple experts on both sides explained that Petitioner's malingering or exaggerating symptoms did

not preclude a finding of severe mental illness. Dr. Crawford in particular offered lengthy rebuttal testimony concerning the state's experts' opinions. Dr. Crawford also discussed Dr. Griffin's findings and why his opinion in particular was significant. Further, Dr. Griffin's testimony added little, if anything, to the malingering debate. Dr. Hilkey's testimony may have reinforced Dr. Crawford's but does not add anything of substance to the information already before the court. Moreover, Judge Cooper stated on the record that he considered Dr. Hilkey's findings in reaching his decision and Petitioner has offered nothing to dispute that record evidence. Thus, additional testimony from Dr. Hilkey and Dr. Griffin would have been cumulative and largely insignificant. *See Wong v. Belmontes*, 558 U.S. 15, 23 (2009) (finding no prejudice where cumulative evidence would have "offered an insignificant benefit, if any at all").

Petitioner has not shown how that insignificant benefit could have tipped the scales in his favor. As discussed above, while Judge Cooper thoroughly considered all of the evidence before him concerning Petitioner's mental illness, he found only that the evidence did not convince him Petitioner suffered from a severe mental illness when he committed the crimes, but if Petitioner did have schizophrenia at the time, his illness "did not control his mind to such a degree as to exonerate or lessen the culpability of his actions." App. 2529–31. Similarly, Judge Cooper expressed ambivalence regarding Petitioner's mental status leading up to the crimes and at the time of sentencing. App. 2529–30, 2533.

Petitioner has not shown how additional evidence from Dr. Hilkey and Dr. Griffin would have altered Judge Cooper's analysis. Further, there is no evidence, nor does Petitioner assert, that if Judge Cooper had found Petitioner mentally ill, he would not have still imposed a death sentence; accordingly, Petitioner has not shown "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See Strickland*, 466 U.S. at 694. Petitioner's assertion of mental illness, while a key element of the sentencing proceeding, was not the only factor Judge Cooper considered. Judge Cooper also found significant the extremely aggravated nature of Petitioner's crimes, his seemingly nonchalant attitude about his actions, his expressed desire to be a serial killer, and his repeated indications that he would continue to kill if given the opportunity. *See* App. 2549–52. And Judge Cooper's comment that, even if Petitioner suffered from schizophrenia, it did not lessen his culpability, App. 2529–31, suggests an affirmative finding that Petitioner suffered from severe mental illness may not have convinced him to give Petitioner a life sentence.

For these reasons, having independently "reweigh[ed] the evidence in aggravation against the totality of available mitigating evidence," *Wiggins*, 539 U.S. at 534, the Court finds Petitioner has failed to show his trial counsel were ineffective for not calling Dr. Hilkey and Dr. Griffin at sentencing, and he is not entitled to relief on this claim.

Accordingly, Respondent's Motion for Summary Judgment is granted as to these two portions of Ground Seven.

Ground Eight

In Ground Eight, Petitioner claims South Carolina's death penalty statute, S.C. Code Ann. § 16-3-20(B), violates the Sixth, Eighth, and Fourteenth Amendments by forcing a capital defendant who pleads guilty to give up his right to have a jury decide his sentence.[15] ECF No. 39 at 98–102. Petitioner raised this issue through pretrial motions, which were denied, and again on direct appeal. *See* App. 3177–86. The Supreme Court of South Carolina analyzed and rejected Petitioner's Eighth and Fourteenth Amendment arguments but did not directly address Petitioner's Sixth Amendment claim other than through reference to prior decisions rejecting similar assertions. *See Allen*, 687 S.E.2d at 25–26.

---

[15] S.C. Code Ann. § 16-3-20(B) provides:

> When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. . . . The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment.

Sixth Amendment Claim

Petitioner asserts § 16-3-20(B) violates a capital defendant's Sixth Amendment right to have a jury, rather than a judge, find any fact necessary to the imposition of a death sentence. ECF No. 39 at 99.

Because the state court did not directly address the merits of this portion of Ground Eight, Petitioner asserts the Court should review his Sixth Amendment claim de novo. ECF No. 63 at 78–79. Alternatively, Petitioner asserts the state court's determination, if it did address the merits, was contrary to and an unreasonable application of clearly established federal law, specifically, the United States Supreme Court's decisions in *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, __ U.S. __, 136 S.Ct. 616 (2016). *Id.* Petitioner's argument fails under either standard of review.

This District has considered this argument twice before and found South Carolina's death penalty statute complies with the Sixth Amendment. *See Mahdi v. Stirling*, No. 8:16-cv-3911-TMC, 2018 WL 4566565, at *41–42 (D.S.C. Sept. 24, 2018) (finding "South Carolina's capital sentencing procedures have not violated Mahdi's constitutional rights" where Mahdi pled guilty and agreed to the facts as stated by the State during his plea); *Wood v. Stirling*, No. 0:12-cv-3532-DCN-PJG, 2018 WL 4701388, at *15–18 (D.S.C. Oct. 1, 2018), *Report and Recommendation adopted by* 2019 WL 4257167 (D.S.C. Sept. 9, 2019) (finding the state court did not err in finding South Carolina's death penalty statute does not violate either the Sixth or Fourteenth Amendment). Petitioner has

not distinguished his case from *Mahdi* or *Wood* or provided the Court with novel argument warranting reconsideration of its prior holdings.

In addition, the Fourth Circuit has rejected the same challenge to Virginia's capital sentencing scheme, which is functionally equivalent to South Carolina's,[16] finding *Ring* did not hold "that a defendant who pleads guilty to capital murder and waives a jury trial under the state's capital sentencing scheme retains a constitutional right to have a jury determine aggravating factors." *Lewis v. Wheeler*, 609 F.3d 291, 309 (4th Cir. 2010). Petitioner "acknowledges" the Fourth Circuit's decision in *Lewis* and that Virginia's statutory scheme is "comparable" to South Carolina's, but "contends that *Lewis* is inconsistent with *Ring*," without further elaboration. ECF No. 63 at 78. Petitioner's disagreement with the Fourth Circuit's conclusion is not reason for the Court to disregard the Fourth Circuit's clear position on this issue.

For these reasons, and those stated in *Mahdi* and *Wood*, the Court finds Petitioner has not shown a Sixth Amendment violation or that the state court's decision

---

[16] Under Virginia's capital sentencing scheme, when a defendant is charged with a death-eligible offense, the trial court first submits the issue of guilt or innocence to a jury. If the defendant is found guilty, then the same jury decides the penalty. However, if a defendant pleads guilty and waives his right to a jury determination of guilt, a judge conducts the sentencing proceeding alone and determines the existence of any aggravating factors. *See* Va. Code Ann. § 19.2-257.

was an unreasonable application of federal law and is not entitled to habeas relief on this claim.[17]

Eighth and Fourteenth Amendment Claim

Petitioner further asserts South Carolina's capital sentencing structure violates his Eighth and Fourteenth Amendment rights by denying him the right to present a jury with the mitigating evidence that he pled guilty and, therefore, accepted responsibility for his crimes. ECF No. 39 at 99–102 (citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)).

The Supreme Court of South Carolina found this claim lacked merit. *See Allen*, 687 S.E.2d at 25–26. After summarizing its prior decisions upholding the death penalty statute's constitutionality under the Sixth Amendment, the court found:

---

[17] While Respondent's Motion for Summary Judgment was pending, the Supreme Court of the United States decided *McKinney v. Arizona*, 140 S. Ct. 702 (Feb. 25, 2020), which addresses a similar issue. In *McKinney*, the Court clarified "Under *Ring* and *Hurst*, a jury must find the aggravating circumstance that makes the defendant death eligible. But importantly, in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range." *Id.* at 707. However, in *McKinney*, the defendant was convicted by a jury and then sentenced by the judge, *id.* at 705—06, and the Court did not address a situation like this one where a defendant pleads guilty, waives his right to a jury trial, and admits the facts supporting the finding of aggravating circumstances.

> Contrary to Allen's assertion, the statute's requirement that the trial court conduct the sentencing does not deprive him of due process, nor does it result in cruel and unusual punishment. S.C. Code Ann. § 16-3-20(C) requires that, in capital sentencing proceedings conducted by the judge alone, the judge consider any mitigating circumstances allowed by law and must also consider the enumerated statutory aggravating and mitigating circumstances. Although Allen would suggest otherwise, he was indeed permitted to offer evidence of his remorse, and his acceptance of responsibility, to the trial court. Further, the trial court was required to receive evidence in extenuation, mitigation, and aggravation of punishment, and was required to find the existence of statutory aggravating circumstances beyond a reasonable doubt prior to imposing a sentence of death. S.C. Code Ann. § 16-3-20(B) & (C).
>
> Contrary to Allen's contention, the sentencer was not precluded from considering, as a mitigating factor, that he accepted responsibility and showed remorse. Allen's Eight[h] and Fourteenth amendment claims are without merit.

Id.

Petitioner argues the state court decision is an unreasonable application of federal law because the statute forced him to "choose between his Eighth Amendment right to present the mitigating effect of

acceptance of [responsibility] in the form of a guilty plea and his Sixth Amendment right to a jury trial." ECF No. 63 at 77–80. Petitioner contends the state court's analysis is contrary to the Supreme Court of the United States' finding in *United States v. Jackson* that the death penalty provision of the Federal Kidnaping Act was unconstitutional because it "impose[d] an impermissible burden upon the exercise of a constitutional right." 390 U.S. 570, 572 (1968).

Essentially, Petitioner asserts an Eighth Amendment right to have a jury consider the mitigating impact of his guilty plea. However, Petitioner has not identified Supreme Court precedent establishing such a right. "[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604 (emphasis in original).

Petitioner argues pleading guilty is the best possible evidence of his remorse and acceptance of responsibility. While that may be so, under the statute, if he chooses to plead guilty and waive his right to a jury trial, the judge—the sentencer—is required to consider any mitigating factor, including Petitioner's remorse and acceptance of responsibility. And, should a capital defendant choose to proceed with a jury trial, nothing in the statute precludes that defendant from showing the jury the relevant aspects of his character—his remorse and acceptance of responsibility—in other

ways. Thus, either scenario preserves a capital defendant's Eighth and Fourteenth Amendment right to present his sentencer with any mitigating aspect of his character, and the statute preserves the defendant's right to choose whether that sentencer will be a jury or a judge.

For these reasons, the Court finds Petitioner fails to show the state court's decision unreasonably applied clearly established Supreme Court precedent or was based on an unreasonable determination of the facts. Accordingly, Respondent's Motion for Summary Judgment is granted as to Ground Eight.

Procedurally Barred Claims

Procedural default is an affirmative defense that is waived if not raised by respondents. *Gray v. Netherland*, 518 U.S. 152,165–66 (1996). If the defense is raised, it is the petitioner's burden to raise cause and prejudice or actual innocence; if not raised by a petitioner, the court need not consider the defaulted claim. *Kornahrens v. Evatt*, 66 F.3d 1350 (4th Cir. 1995). Here, Respondent contends Ground Four and part of Ground Seven are procedurally barred. Petitioner argues he can establish cause for any procedurally barred claims of ineffective assistance of trial counsel under *Martinez v. Ryan*, 566 U.S. 1 (2012).

In *Martinez*, the Supreme Court held,

> [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*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). 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.

Id. at 14. Accordingly, Petitioner may establish cause for the defaulted grounds if he demonstrates that (1) his PCR counsel was ineffective and (2) the underlying ineffective assistance of trial counsel claim is a substantial one, i.e., it has some merit.

Ground Four

In Ground Four, Petitioner asserts his guilty plea was unknowing and involuntary due to the effects of medications he was taking and that trial counsel were ineffective for not ensuring he understood the significance and consequences of pleading guilty. ECF No. 39 at 60–71.

Expansion of the Record

In support of this claim, Petitioner offers a 2019 report by Dr. Susan E. Rushing, MD, JD, opining Petitioner's medications "would result in cognitive impairment," ECF No. 39-11 at 108, and declarations from PCR counsel regarding their investigations and

strategy, ECF Nos. 63-2, 63-3. Petitioner also requests an evidentiary hearing to resolve alleged factual disputes. ECF No. 63 at 39–40. Respondent opposes any expansion of the record related to this claim but admits Petitioner may introduce extra-record evidence "in support of an argument to excuse any procedural default." ECF No. 74 at 3 n.3. The Court agrees and grants Petitioner's request to expand the record with respect to Dr. Rushing's report and PCR counsels' declarations but will consider this evidence only as it relates to Petitioner's claims of cause and prejudice to excuse the default. *See Fielder v. Stevenson*, No. 2:12-cv-412-JMC, 2013 WL 593657, at *3 (D.S.C. Feb. 14, 2013) (finding while "[s]ection 2254(e)(2) sets limits on a petitioner's ability to expand the record in a federal habeas proceeding[,] . . . courts have held that § 2254(e)(2) does not similarly constrain the court's discretion to expand the record to establish cause and prejudice to excuse a petitioner's procedural defaults").

However, the Court denies Petitioner's request for an evidentiary hearing. "In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro*, 550 U.S. at 474. Thus, to grant an evidentiary hearing, "there 'must be a viable constitutional claim, not a meritless one, and not simply a search for evidence that is supplemental to evidence already presented.'" *Segundo v. Davis*, 831 F.3d 345, 351 (5th Cir. 2016) (quoting *Ayestas v. Stephens*, 817 F.3d 888, 896 (5th Cir. 2016) (per curiam), *judgment vacated on other grounds by Ayestas v. Davis*, 138 S. Ct. 1080

(2018)). *Martinez* itself provides little guidance regarding when a claim is viable or substantial, other than a "cf." cite to *Miller-El v. Cockrell*, which describes the standards for certificates of appealability. *Martinez*, 566 U.S. at 14. Based on *Miller-El*'s holding, a petitioner alleges a substantial claim "by demonstrating that jurists of reason could disagree with the district court's resolution . . . or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

"This threshold inquiry does not require full consideration." *Id.* at 336. "Where documentary evidence provides a sufficient basis to decide a petition, the court is within its discretion to deny a full hearing." *Runningeagle v. Ryan*, 825 F.3d 970, 990 (9th Cir. 2016); *accord Schriro*, 550 U.S. at 474 ("[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing"); *Segundo*, 831 F.3d at 351 ("*Martinez* and *Trevino* protect . . . habeas petitioners from completely forfeiting an [ineffective assistance of counsel] claim; neither entitles petitioners to an evidentiary hearing in federal court in order to develop such a claim.").

For the reasons below, based on the record and Petitioner's newly offered evidence, the Court finds Petitioner has failed to allege a substantial claim and is not entitled to an evidentiary hearing.

Discussion

Respondent does not dispute that at the time of his February 2005 meeting with trial counsel and subsequent plea, Petitioner was taking two antipsychotic medications, Geodon and Prolixin Decanoate, and two medications to help with side effects from those medications and with insomnia, Cogentin and Benadryl. While his recorded doses of Cogentin and Benadryl appear to be within the normal range, all of the experts agree Petitioner was being administered significantly higher-than-normal doses of the antipsychotics. In particular, Petitioner received a 100mg injection of Prolixin Decanoate one day prior to his meeting with counsel to discuss pleading guilty. *See* ECF No. 39-10 at 34. All of the experts associated with this case consistently testified that Prolixin Decanoate and Geodon are normally started at a low dose and titrated over time. While it appears both medications were titrated throughout 2004,[18] the records suggest Petitioner had not received a Prolixin injection since November 2004, ECF No. 39-10 at 7 (noting orders to discontinue Prolixin on November 14, 2004). Petitioner began taking the relevant dose of Geodon in early December 2004. He did not receive Geodon while hospitalized from February 14, 2005 to February 24,

---

[18] *See* ECF No. 39-7 at 141 (showing Petitioner received 25mg injections of Prolixin starting March 29, 2004); ECF No. 39-9 at 120 (showing Petitioner began receiving 100mg injections of Prolixin in May 2004); ECF No. 39-9 at 126 (showing Petitioner started taking Geodon in March 2004); ECF No. 39-10 at 11 (ordering Geodon increased from 80mg to 160mg to 240mg over time); ECF No. 39-10 at 7 (Geodon dose increased to 320mg on November 14, 2004).

2005, but requested to restart Geodon and Prolixin on February 24, the day prior to his meeting with counsel, ECF No. 39-10 at 31.

Petitioner's plea colloquy is not dispositive of this issue. *See Sanders v. United States*, 373 U.S. 1, 19–20 (1963) (finding administration of narcotic drugs while in prison could impact defendant's mental capacity in a way not apparent to the plea judge at the time). Rather, to show these medications rendered his plea involuntary, Petitioner must "demonstrate 'that his mental faculties were so impaired by drugs when he pleaded that he was incapable of full understanding and appreciation of the charges against him, of comprehending his constitutional rights and of realizing the consequences of his plea.'" *United States v. Truglio*, 493 F.2d 574, 578–79 (4th Cir. 1974) (quoting *United States v. Malcolm*, 432 F.2d 809, 812 (2d Cir. 1970)); *see also Godinez v. Moran*, 509 U.S. 389, 401 n.12 (1993) ("The purpose of the 'knowing and voluntary' inquiry . . . is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced.").

Neither the record nor Dr. Rushing's report show Petitioner suffered this level of impairment. Throughout 2004, Petitioner occasionally reported the Geodon made him tired during the day when he took it in the morning and that, when he took it at night, it made him feel "hungover" in the morning. ECF No. 39-9 at 135 (complained Geodon injection made him drowsy); ECF No. 39-10 at 12 (complained Geodon made him sleepy during the day when taken in the

morning); ECF No. 39-10 at 30 (reports getting ten hours of sleep on Geodon, but feeling hungover in the morning). Petitioner's medical records leading up to February 2005 do not note any cognitive side effects specifically linked to Prolixin. Petitioner reported trouble sleeping, nightmares, and hearing voices throughout this time period and required inpatient psychiatric care three times. ECF No. 39-9 at 17 (March 29, 2004 admission); ECF No. 39-9 at 5 (November 22, 2004 admission); ECF No. 39-9 at 50 (December 3, 2004 summary of November 22 admission noting Petitioner reported trouble sleeping, nightmares, and hearing voices); ECF No. 39-10 at 40 (transfer summary for February 2005 admission after possible Benadryl overdose).

Regarding their meeting with Petitioner to discuss pleading guilty, trial counsel recalled Petitioner as "passive," "compliant," "easy to deal with," and quiet. App. 3533. Pringle attributed Petitioner's demeanor to finally getting his medications straight. App. 3533. Immediately before Petitioner's plea, Judge Cooper asked Pringle, "What is [Petitioner's] mental health condition in terms of medication, those issues today?" App. 0014. Pringle responded:

> Mr. Allen is currently being treated for psychotic disorders. He has been diagnosed with schizoaffective disorder and paranoid schizophrenia alternately, Your Honor. He is currently being treated with psychotropic drugs, medications. He received a shot for Prolixin last Thursday. He is also taking Geodon.

> He has been taking those medications continuously. But the Prolixin is a medication that he receives every two weeks and remains in his system. The Geodon is a medication that he takes every day. He is current on his medication and thinking clearly today, Your Honor.

App. 0014.[19] During the colloquy, Petitioner stated he was taking medication but the medication did not interfere with his ability to understand what he was doing and that he did, in fact, clearly understand what he was doing. App. 0022.

During the penalty phase, several of the experts testified concerning Petitioner's medications. Regarding potential effects of Petitioner's current doses of Prolixin and Geodon, Dr. Harding testified:

> Well, everybody has some variation. But I think those are both high levels of medication. And you would see serious sedation, as in if I took that I would probably be asleep for the next three days, that type of level of medication. If you start at a very low dose and build up gradually over months, you could get to a point where somebody could function with that, but it's a lot of medication, that amount.

App. 1341.

---

[19] In addition, in a February 28, 2005 email to Dr. Corvin, Pringle explained Petitioner's recent hospitalization and stated Petitioner was "back on meds, got a shot of Prolixin last week, and is much improved." App. 4455.

Dr. Corvin testified that a non-psychotic person who had not received the proper titration would likely end up in the emergency room if administered Petitioner's dose of Prolixin. App. 1433–34. Recounting a description from one of his schizophrenic patients, Dr. Corvin testified "taking a neuroleptic like Prolixin" is like "throwing a wet towel over your brain. Everything just shuts down, slows down," including, hopefully, the psychotic symptoms. App. 1434. However, Dr. Corvin testified Petitioner's treatment notes indicated Petitioner was in the recreation hall playing cards the day after he received his first dose of Prolixin in 2004. App. 1435. Dr. Corvin agreed Petitioner received a large dose of Prolixin on February 24, 2005 without titration but noted: "It certainly has been my experience that patients with chronic psychotic illnesses can just . . . take large doses of medicines and it doesn't hit them in the same way that it would you and I, especially if they're not naïve to the medication." App. 1436.

Dr. Crawford noted Prolixin can cause people to appear more withdrawn and demonstrate flat affect and that Petitioner probably had those side effects. App. 1612. Regarding the dose of Prolixin that Petitioner received on February 24, 2005, Dr Crawford, who interviewed Petitioner on six different occasions leading up to trial, testified:

> Now, he's given a huge dose of Prolixin, not having been on Prolixin for a long time, I mean, a very large dose all of a sudden. Which you would expect that a person who is not psychotic to knock him out. What actually happened, and

in my interviews with him, is that he had requested the Prolixin. He said that helps with the voices. This is not a medication people request. This has horrendous side effects. He requested the Prolixin. And on the Prolixin he told me the voices were better, he wasn't hearing voices at the time any more, and he was actually brighter. Now, that's the exact opposite of what you'd expect by giving somebody a massive dose or a very large dose of Prolixin. You'd expect them to be, you know, less communicative. Well, with the voices improved, he's actually - - I mean, he's not talkative, but he would actually smile on occasion and seem a little bit better, and he said he had relief because the voices were gone, that the other antipsychotic had not been helping but the Prolixin did. And so I thought that was interesting, as opposed to suddenly seeing him - - I mean, as he is right now in court, he is on a huge amount of medication. And this isn't a huge amount of medication that was slowly increased 'til he could get to this point. Because, in fact, for how many days? 12 days he was off all medication and then he was slammed on the highest amount of recommended [Prolixin] Decanoate and a tremendous dose of something they call Geodon, another antipsychotic. Yet now as he is, he's actually the brightest I've seen him since I've been working with him.

. . . .

> [H]e's less suspicious and guarded with me. He, you know, smiles at times. In fact, at one point he said hello, you know, turned to me and smiled which was not something I had from him before. There was like more of a person in there than there had been.

App. 1615–16.

Dr. Schwartz-Watts testified Petitioner was on the "highest dose of Prolixin Decanoate" she had ever seen in anybody and the maximum dose of Geodon. App. 1854. She also testified that neither Geodon nor Prolixin cause poverty of thought or poverty of speech. App. 1856.

During the PCR evidentiary hearing, Petitioner testified his medications slowed him down. App. 3497. He indicated he could not recall all of the details of his meeting with trial counsel because he was "under medication then." App. 3495. When asked later how the medications made him feel, he responded: "It just subdued my mind where I wasn't myself. I was slow motion. I couldn't think. You know what I'm saying? And I was just basically a zombie." App. 3967. Petitioner testified trial counsel went over the plea questions with him prior to the colloquy and he answered how counsel instructed him to. App. 3502–03. However, he never challenged the truth of his statements or expressed a lack of understanding of the process or its consequences.

Dr. Rushing reviewed Petitioner's medical records, transcripts of his guilty plea and the sentencing phase, and reports from the trial experts, as well as Dr.

Frierson's 2013 report for the PCR hearing. ECF No. 39-11 at 102. However, Dr. Rushing never personally evaluated Petitioner. *Id.* After summarizing Petitioner's medication history, Dr. Rushing describes the medications Petitioner was on at the time of his plea and concludes, "The combination of these medications would result in cognitive impairment." ECF No. 39-11 at 108. In addition, Dr. Rushing expresses her "substantial doubts about [Petitioner's] understanding the significance and consequences of his pleading guilty and waiving his right to a jury trial at the time he plead guilty, given the effects of the medication administered." *Id.*

However, Dr. Rushing's opinion appears conclusory and speculative and is not enough to rebut the strong presumption that trial counsel performed reasonably and create a genuine issue of material fact. *See Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 (4th Cir. 2002) (holding that "[c]onclusory or speculative allegations do not suffice, nor does a 'mere scintilla of evidence'" in support of the non-moving party's case) (quoting *Phillips v. CSX Transp., Inc.*, 190 F.3d 285, 287 (4th Cir. 1999)). She lists common side effects for each of Petitioner's medications, including: feeling sleepy, dizzy, irritable, fatigued, having blurred vision, feeling the need to move, dry mouth, nausea, vomiting, headache, lack of appetite, speech disturbance, tachycardia, anorexia, dyspepsia, depression, orthostatic hypotension, sensitivity to light, impaired body temperature regulation, sedation, nervousness, impaired coordination, urinary retention, paradoxical central nervous system stimulation, diaphoresis, and extrapyramidal symptoms. ECF No.

39-11 at 106–07. Less common side-effects of Geodon can include neuroleptic malignant syndrome, severe extrapyramidal symptoms, dystonia, QT prolongation, irregular cardiac rhythm, seizure, syncope, stroke, severe hypertension, serotonin syndrome, agranulocytosis, leukopenia, neutropenia, and Stevens-Johnson Syndrome. ECF No. 39-11 at 106–07. Dr. Rushing notes Petitioner "was manifesting physical side effects from his medication when he was admitted to the hospital two weeks prior to the plea," ECF No. 39-11 at 107, but, other than her conclusory statement, Dr. Rushing does not describe any specific cognitive side effects Petitioner exhibited or even list common cognitive side effects of his medications. Thus, Dr. Rushing's report does not support Petitioner's allegation of cognitive impairment making him "'incapable of full understanding and appreciation of the charges against him, of comprehending his constitutional rights and of realizing the consequences of his plea.'" *Truglio*, 493 F.2d at 578–79 (quoting *Malcolm*, 432 F.2d at 812).

Petitioner's reliance on the PCR testimony from counsel and Petitioner himself is equally unpersuasive. The PCR testimony suggests only that Petitioner was subdued, and possibly tired and thinking slowly. The record clearly shows trial counsel and their experts were acutely aware of Petitioner's ever-evolving mental state and his medications throughout their trial preparations. Further, at the time of his meeting with counsel, plea, and sentencing hearing, trial counsel, Judge Cooper, and numerous experts with personal knowledge of Petitioner's medications and mental state did not observe evidence of cognitive impairment.

Rather, they expressed their beliefs, based on their personal observations of Petitioner both at the time and over the previous year, that he, for some reason, did not react to large doses of Prolixin as they would expect and was doing better after receiving the injection. Trial counsel has every right to rely on their experts' opinions and their own personal experience, observations, and judgment. *See Wilson v. Greene*, 155 F.3d 396, 403 (4th Cir. 1998) (finding reasonably effective counsel not required to second-guess contents of expert reports); *United States v. Mason*, 774 F.3d 824, 830 (4th Cir. 2014) ("Attorneys exist to exercise professional judgment").

Thus, Petitioner fails to state a viable, substantial underlying ineffective assistance of counsel claim and cannot overcome the procedural bar. Respondent's Motion for Summary Judgment is granted as to Ground Four.

Defaulted Portion of Ground Seven

In this defaulted portion of Ground Seven, Petitioner asserts trial counsel were ineffective for failing to present available neuropsychological evidence that Petitioner suffered brain impairments. ECF No. 39 at 95–98.

Expansion of the Record

In support of this claim, Petitioner offers a new neuropsychological report from Dr. Joette James, ECF No. 39-11 at 111–28, and a 2019 affidavit from Lominack concerning his contact with Dr. Evans, ECF No. 39-11 at 97–99. Respondent opposes any expansion of the record for this claim. ECF No. 50 at 77. For the

same reasons discussed in Ground Four, the Court will consider this extra-record evidence but only for the purpose of evaluating whether Petitioner has shown cause and prejudice under *Martinez*. Further, for the reasons below the Court finds Petitioner fails to allege a substantial underlying claim. Accordingly, to the extent Petitioner has requested an evidentiary hearing on this claim, the Court denies that request.

Discussion

It is indisputable that trial counsels' primary strategy at sentencing was to convince Judge Cooper of Petitioner's mental illness and that they focused the bulk of their mitigation investigation and presentation on mental health evidence. Trial counsels' investigation included a neuropsychologist, Dr. James Evans. ECF No. 39-11 at 97. Dr. Evans performed neuropsychological testing on Petitioner and provided the results to counsel. ECF No. 39-11 at 97–98, 129. However, counsel did not call Dr. Evans to testify or present his testing results by other means. In his affidavit, Lominack states that he "does not recall talking with Dr. Evans after he conducted the testing" and that he lacked the knowledge or experience at the time to have an informed discussion about the meaning of the test results. ECF No. 39-11 at 97–98. Petitioner contends this objective data would have provided context for his behavior, bolstered his case for severe mental illness, and provided Judge Cooper with an additional basis from which to conclude his behavior was the result of brain impairment and mental illness rather than malice. ECF No. 39 at 96–97.

Petitioner's claim lacks merit for several reasons. First, Petitioner has not shown that Dr. Evans's testing revealed any particularly mitigating information that would have added to trial counsels' sentencing presentation. Petitioner provides only Dr. Evans's raw data, which this Court is not qualified to interpret, and claims these results showed Petitioner suffered from impaired executive functioning. ECF No. 39 at 95; ECF No. 39-11 at 129. Petitioner's new expert, Dr. James, reviewed Dr. Evans's data and notes Petitioner showed: average to low-average intellectual ability; deficits in some aspects of executive functioning, including complex information processing speed, attention (both auditory and visual), and problem solving in the face of feedback; and weaknesses in tactile and motor functioning. ECF No. 39-11 at 113–14. She also indicates Dr. Evans noted Petitioner was heavily medicated at the time of his testing. ECF No. 39-11 at 113.

Neither Dr. James nor Petitioner offer any further explanation of these results, what they reveal about Petitioner, or exactly how they are mitigating. Accordingly, Petitioner fails to rebut the strong presumption that counsel acted reasonably in choosing not to present Dr. Evans or the results of his testing. *See Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) ("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. . . . [However,] 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."); *Wilson v. Greene*, 155

F.3d 396, 404 (4th Cir. 1998) ("Decisions about what types of evidence to introduce 'are ones of trial strategy, and attorneys have great latitude on where they can focus the [sentencer'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)).

Dr. James's explanation of her results offers some insight into Dr. Evans's results. However, her results appear to differ in many ways, as one might expect considering her testing occurred fifteen years later. Where Dr. Evans noted deficits in information processing speed and attention, Dr. James found Petitioner performed in the average range "on simple measures of attention control." ECF No. 39-11 at 116. She later concluded Petitioner "demonstrates good initial attention, [but] lacks cognitive flexibility and is easily overwhelmed when faced with large quantities of information." *Id.* at 118. Dr. James then notes that "[i]mpaired attention is a common element of many psychiatric disorders, and problems with attention are frequently noted in patients with depression, anxiety, mania, and thought disorders like schizophrenia." *Id.* Petitioner relies on this statement to support his argument that presentation of neuropsychological evidence could have bolstered the case that he suffered from a severe mental illness and was not malingering his symptoms. *See, e.g.*, ECF No. 39 at 97. However, Dr. James never explicitly finds Petitioner suffered impaired attention, nor does this statement directly link impaired attention to schizophrenia. Based on this statement alone, any deficit in Petitioner's attention

could just as easily be linked to his repeatedly diagnosed depression.

In addition, where Dr. Evans noted a deficit in information processing speed, Dr. James found Petitioner average in this regard. ECF No. 39-11 at 117. Dr. James's report does not specifically mention "problem solving in the face of feedback," but Dr. James did find Petitioner demonstrated mild to moderate impairment in cognitive flexibility and problem solving, which is consistent with Dr. Evans's findings. *Id.* at 116.

Based on her results, Dr. James reached the following conclusions specifically about Petitioner:

> Mr. Allen presents with a complex neuropsychological profile. He demonstrates relative strengths in overall reasoning, particularly in the verbal domain. He also demonstrates relative strengths in core academic skills, including reading decoding, spelling, and sentence comprehension.
>
> In contrast, Mr. Allen presents with clear weaknesses in multiple, important domains of functioning; the chief areas of deficit are in some, though not all, aspects of executive functioning, particularly impulse control, emotional regulation, and cognitive flexibility. He also demonstrates relative weaknesses in complex working memory and planning/ organization.
>
> . . . .

Mr. Allen's attention and executive functioning deficits significantly interfere with organized, efficient learning and recall, in that he is prone to becoming 'stuck,' making poor decisions, being overwhelmed by his emotions, encoding information much more slowly and inefficiently than would be expected and 'outputting' information more slowly as well. This is particularly true in new, novel, and stressful circumstances, where his ability to effectively function is undermined by multiple tasks or increasing complexity and emotional color. Information processing can prove to be extremely effortful for him at those times. These neurocognitive deficits make him highly vulnerable to overwhelm and overload, particularly when the situation is novel, complex, or emotionally laden. In such circumstances, he is less able to be future-oriented and resist the urge to act impulsively and is more likely to be distracted by short-term actions based on current emotions and impulses versus recognizing the future implication of those actions[.] His capacity to initiate and develop organized approaches to problems, self-monitor behaviors and actions, respond to feedback and revise an approach where it no longer seems to be working, are all likely to deteriorate under such conditions, making him subject to extreme and inappropriate reactions.

. . . .

> Mr. Allen's impairments in these areas are very likely to interfere with his ability to utilize his cognitive strengths, and make him prone to poor adaptive functioning in real world settings, in that he is less able than most individuals with his base intellectual ability to regulate his emotions, control his impulses, think quickly and efficiently, respond appropriately to changing stimulus demands, and consider long-term consequences of his actions. Again, this is particularly true in situations that are complex, unfamiliar, fluctuating, present a great information load, and/or are emotionally laden.

ECF No. 39-11 at 117–21.

The Court fails to see how even Dr. James's impressions would have significantly altered the sentencing profile presented to Judge Cooper. *See Sears v. Upton*, 561 U.S. 945, 954 (2010) ("[T]here is no prejudice when the new mitigating evidence 'would barely have altered the sentencing profile presented' to the decisionmaker") (quoting *Strickland*, 466 U.S. at 700). As Dr. James states in her report, "[i]n part, [Petitioner's] broader weaknesses in executive functioning may be gleaned from Mr. Allen's history, which indicates a longstanding history of extreme emotional and behavioral dysregulation." ECF No. 39-11 at 118. That history was thoroughly presented to Judge Cooper through the social historian, Ms. Grey.

Further, the Court fails to see the qualitative difference between neuropsychological testing and the extensive psychological and psychiatric testing Petitioner underwent in this case. Petitioner contends:

> The data from this neuropsychological testing would have provided mental health mitigation that was qualitatively different from the psychiatric presentation of mental illness and would have side-stepped the dispute over the correct diagnosis or malingering. The evidence of brain impairment would have also provided context for Mr. Allen's impulsive and irrational behavior, and would have relied on objective data from validated testing, as opposed to a battle of the experts regarding mental illness.

ECF No. 63 at 71–72. However, much of the dispute surrounding malingering was whether Petitioner had malingered results on psychological testing. *See, e.g.*, App. 1653–54. There is no indication that the neuropsychological testing used by Dr. Evans and Dr. James is any less susceptible to manipulation than any other psychological testing. The results are certainly not any more "objective," in the way a brain scan or blood test might be.

In short, Petitioner fails to show neuropsychological evidence would have done anything but add to or bolster an already thorough mental health presentation. Thus, Petitioner fails to allege a substantial underlying ineffective assistance of counsel claim and cannot meet his burden under *Martinez*. This claim remains defaulted and Respondent's Motion for Summary Judgment is granted as to Ground Four.

Ground Nine

In Ground Nine, Petitioner alleges entitlement to relief based on cumulative error. ECF No. 39 at

102–03. "Pursuant to the cumulative error doctrine, '[t]he cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error.'" *United States v. Basham*, 561 F.3d 302, 330 (4th Cir. 2009) (quoting *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990)). "Generally, however, if a court 'determine[s] . . . that none of [a Petitioner's] claims warrant reversal individually,' it will 'decline to employ the unusual remedy of reversing for cumulative error.'" *Id.* (quoting *United States v. Fields*, 483 F.3d 313, 362 (4th Cir. 2007)). Further, regarding claims of ineffective assistance of counsel, the Fourth Circuit has expressly stated courts are to review these claims individually, rather than collectively. *Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998) ("Having just determined that none of counsel's actions could be considered constitutional error . . . it would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived [the petitioner] of a fair trial. Not surprisingly, it has long been the practice of this Court individually to assess claims under *Strickland v. Washington*. . . . To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do now.") (internal citations omitted).

Having found no constitutional error, the Court also finds no cumulative error. Respondent's Motion for Summary Judgment is granted as to Ground Nine.

Respondent's Motion to Strike

Respondent has moved to strike multiple documents Petitioner attaches to his pleadings and the portions of his pleadings relying on those documents. ECF No. 74. To the extent Respondent moves to strike the documents the Court has considered for the sole purpose of Petitioner's arguments in favor of cause and prejudice to excuse procedural default, the motion to strike is denied. The motion is granted as to any document not expressly considered by the Court.

CONCLUSION

The Motion for Summary Judgment [50] is **GRANTED**, the Amended Petition [39] is **DISMISSED**, Respondent's Motion to Strike [74] is **GRANTED IN PART** and **DENIED IN PART**, and Petitioner's Motion for Discovery [85] is **DENIED**.

CERTIFICATE OF APPEALABILITY

The governing law provides that:

> (2) A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability . . . shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c). A prisoner satisfies the standard by demonstrating that reasonable jurists would find this Court's assessment of his constitutional claims debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. *See*

Miller-El v. Cockrell, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). In this case, Petitioner has met the legal standard for the issuance of a certificate of appealability as to Grounds Five and Six. Therefore, a certificate of appealability is **GRANTED** as to those grounds.

IT IS SO ORDERED.

s/ Donald C. Coggins, Jr.
United States District Judge

March 25, 2020
Spartanburg, South Carolina

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6
(0:18-cv-01544-DCC-PJG)

[Filed: August 23, 2022]

QUINCY J. ALLEN	)
	)
Petitioner - Appellant	)
	)
v.	)
	)
LYDELL CHESTNUT, Deputy Warden of Broad River Correctional Secure Facility	)
	)
Respondent - Appellee	)

O R D E R

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

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6
(0:18-cv-01544-DCC-PJG)

[Filed: June 22, 2020]

QUINCY J. ALLEN	)
	)
Petitioner - Appellant	)
	)
v.	)
	)
MICHAEL STEPHAN, Warden, Broad River Correctional Institution	)
	)
Respondent - Appellee	)
	)

O R D E R

Upon consideration of submissions relative to appellant's request to expand the certificate of appealability, the court grants the motion.

The district court granted a certificate of appealability on the following grounds:

- the petitioner involuntarily pled guilty due to trial counsel's bad advice (Ground Five) and

- counsel's advice was based on an indication from Judge Cooper that he would not impose the death penalty if petitioner pled guilty (Ground Six).

The court now grants a certificate of appealability on the following additional issues:

- the trial court unconstitutionally failed to consider and give effect to mitigating evidence and counsel ineffectively failed to object;
- the trial court unconstitutionally relied on the potential deterrent effect of a death sentence on other abusive mothers as a factor in determining the penalty; and
- the trial court unconstitutionally found statutory aggravating circumstances without allowing the defense an opportunity to rebut them, and then imposed sentence without finding any specific aggravating circumstance by any standard.

By separate order, the Clerk shall issue a briefing schedule.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX E

Sentencing Comments from March 18, 2005

* * *

[pp. JA1599]

Friday, March 18, 2005

THE COURT: In the case of The State vs. Quincy Jovan Allen, this is a difficult case. Because of the far-reaching mental health implications of this decision, it is significant to our society and our community. It's significant to the families of the victims who have sat here day after day anticipating that justice will eventually prevail.

It is significant to the citizens of Columbia, who were terrorized for weeks on end, not knowing when or where the next murder might occur. It's significant to these fine attorneys who have devoted countless hours of their lives to present all of the facts to this Court in a professional and extraordinary manner. It's significant to law enforcement who, through their considerable efforts, may have prevented one of the worst killing sprees ever experienced in this country.

And it's significant to those hundreds of jurors who took their time to advise this Court of some of their most personal beliefs and their willingness to come and sit to hear the facts of this case. And last, but not least, it is significant to Quincy Jovan Allen whose life will never be the same after this day.

And I might add, this case is significant to me. I am asked to decide whether Quincy Allen should live or die at the hand of the State of South Carolina. Let me only say that I do not take this responsibility lightly.

In considering the outcome of this sentencing hearing I have tried to understand the unique forces and events which have put Mr. Allen in the situation in which he finds himself today. I have considered his upbringing so masterfully chronicled by Debra Grey. I've considered his list of mental illness as described by Dr. Pam Crawford.

I've considered the facts of the various murders that Mr. Allen does not deny. I've considered the impact to James White, to Dale Hall's family and to the Harr family. I've also considered the effect of this trial on Quincy Allen's two younger brothers who have sat through the majority of this trial. And I have considered the passionate arguments of counsel on both sides of this case.

I have further considered the North Carolina proceedings and the defendant's prior motion to bar the State from contesting Mr. Allen's mental illness due to the findings of Judge Martin in that case. I wish to state for the record that this proceeding has been completely different from the one in North Carolina.

In North Carolina, a plea agreement was entered into by both the State and the defendant, the terms of which were that Mr. Allen would be sentenced to two life without parole sentences by Judge Martin in exchange for Mr. Allen's guilty plea. That was not a sentencing hearing as this has been. During the North

Carolina sentencing hearing no death penalty was sought. No contesting witnesses were called by the State. I am hesitant to speculate, but I suspect that that hearing was not in the least comparable to the one we have experienced in the last two weeks. I, therefore, affirm my earlier decision not to be bound by the North Carolina court's decisions.

Mr. Allen raises the issue of mental illness as his reason for avoiding the death penalty. His attorneys argue that due to his diagnosed mental illness his culpability was diminished and no retributive or deterrent effect would be served by the imposition of the death penalty.

Addressing the issue of mental illness, I have not seen convincing evidence that Mr. Allen had a major mental illness at the time of the crimes in 2002. I have seen a series of short-stay hospitalizations from 1997, 1998 and 1999, but no recognition of a mental illness that required or demanded a treatment program.

If he had a major mental illness in 1997 or 1998 or 1999, then the mental illness community failed him and failed this community. His sole form of treatment was to give him some pills and send him away. This leads me to believe that his mental condition and behavior were primarily a reaction to a very poor and destructive home life as a child from which he chose to act out in ways that would garner attention for himself, whether by being annoying, or childish or aggravating.

His subsequent actions of attempting to kill James White and ultimately killing Dale Hall were, I believe, a result of his desire to be noticed and respected. And

if he had a major mental illness at that time in 2002, no one, not even his psychiatrists, were aware of it.

Add to this his casual, if not happy, conversations with Tia Brown immediately after killing two people in North Carolina and his remarkably calm descriptions to Agent Lloyd Terry on August 15th, 2002, immediately after his capture in great detail of the crimes that he had just committed.

These lead me to believe that if indeed he had schizophrenia, it was not evident and the disease did not control his mind to such a degree as to exonerate or lessen the culpability of his actions.

And what is Mr. Allen's condition today? I have listened to and read the accounts of all of the psychiatrists and psychologists in this case: Doctors Hilkey, Gupta, Lavin, DeBeck, Hattem, Crawford, Mirza, Tezza, Corvin and Schwartz-Watts.

Quite frankly, I cannot tell with certainty what his mental state is today. I know he is on medication. I have observed him sitting quietly at counsel table, making notes, reading a dictionary, and not exhibiting any unusual or bizarre behavior. I have noticed him communicating with counsel and on occasion, smiling. He has always had a neat and well-groomed appearance.

Yet, three respected psychiatrists, Dr. Corvin, Dr. Crawford, and Dr. Schwartz-Watts have testified that as he sits here today he has a major mental illness characterized by delusions, hallucinations, disorganized speech, grossly disorganized or catatonic behavior, and negative symptoms, such as affective

flattening, alogia, or avolition. And maybe he does, although his outward appearance belies such a condition.

On the other hand, I have heard Dr. DeBeck and Dr. Hattem say that in August 2003, their diagnosis was that he was malingering. Dr. DeBeck, a psychiatrist at the Dorothea Dix Hospital in North Carolina, on August 29th, 2003, after a thorough evaluation said, "Mr. Allen did not show symptoms of a psychiatric disorder during his hospital stay, despite being off antipsychotics since April 11th, 2003."

Dr. Haddem, after conducting numerous psychological tests on August 29th, 2003, reported that "Mr. Allen did not display any signs of active psychosis." And I might add that the records presented during this hearing indicate no psychotic episodes or hospitalizations in 2000, 2001 or 2002.

Dr. Tezza and Dr. Mirza also testified that on December 3rd, 2004, they found that Mr. Allen was malingering when sent to Just Care by the Richland county Detention Center.

Let me just add a comment about Dr. Ballenger's testimony. I found it to be contrived and unreliable. His serial killer analysis was little more than an extraction of the words "mass murderer" or "serial killer" from the numerous records in this case and concluding from that alone that Mr. Allen has serial killer tendencies. His failure to have examined Mr. Allen convinces me to give his testimony little weight, if any.

Dr. Ballenger's considerable experience in the field of anxiety disorders, panic disorders and

psychopharmacology, that is his field for which he has a national reputation. Nevertheless, he attempted to come into this courtroom and explain what is, or is not, in the mind of a confessed quadruple murderer. He stated that this was the first capital murder case in which he had ever testified.

These contrary opinions lead me to no firm conclusions as to Mr. Allen's mental state at this time.

In the case of Ake v. Oklahoma, a 1985 United States Supreme Court case, the court recognized that, because "psychiatrists disagree widely and frequently on what constitutes mental illness and on the appropriate diagnosis to be attached to given behavior and symptoms," the fact finder must resolve differences in opinion within the psychiatric profession "on the basis of the evidence offered by each party" when a defendant's sanity is at issue in a criminal trial.

In deciding whether or not to impose the ultimate punishment the State can impose on an individual, that being death, I am compelled to review the current state of death penalty law as pronounced by the United States Supreme Court. In 2002 the court decided, in the case of Atkins v. Virginia, a six to three decision, that the Eighth Amendment ban on cruel and unusual punishment prohibits the executions of persons who are mentally retarded. The court reiterated the recognized bases for the death penalty, those being "retribution and deterrence of capital crimes by prospective offenders" as the social purposes to be served by the death penalty.

With respect to retribution; that is, the interest in seeing that the offender gets his "just desserts", the severity of the appropriate punishment necessarily depends on the culpability of the offender.

"If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. Thus, pursuant to our narrowing jurisprudence which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate."

And with respect to deterrence, the interest in preventing capital crimes by prospective offenders, "it seems likely that capital punishment can serve as a deterrent only when the murder is a result of premeditation and deliberation. Exempting the mentally retarded from that punishment will not affect the cold calculus that precedes the decisions of other potential murderers." The court found neither of these goals would be served by executing Mr. Atkins.

In March of this year the court decided in the case of Roper v. Simmons, a five to four decision, that the Eighth Amendment ban on cruel and unusual punishment prohibits the execution of persons who are under the age of 18 at the time of their crimes. Again, the court cited retribution and deterrence as the bases for the imposition of the death penalty and decided that neither prong was as strong with a minor as it would be with an adult. In the case at bar, Mr. Allen was 22 years of age when he committed his crimes, and there is no history or indication of mental retardation.

So what is state of the law as it applies to mental illness? In the case of Ford v. Wainwright decided in 1986, a seven to two decision, the U.S. Supreme Court held that the Eighth Amendment's ban on cruel and unusual punishment prohibits the execution of persons who are "insane at the time scheduled for their execution."

The common law has prohibited the execution of insane persons. American court decisions have repeatedly reaffirmed this common rule, variously suggesting that it is a rule of simple humanity, or that with the death of the mind, the prisoner is no longer the same person who was convicted of the crime. The Supreme Court noting in Ford v. Wainwright these precedents and authorities, as well as the many state statutes prohibiting the execution of the insane, concluded that this consensus made such executions unconstitutional as a violation of the cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment, a view that has been adhered to by numerous subsequent decisions in various American jurisdictions.

While noting the many rationales advanced for the rule, the plurality decision in Ford focused on the doubtful retributive value of executing a person who cannot understand why, and the natural abhorrence civilized societies feel at killing someone who lacks the capability to come to grips with his or her conscience. This ancestral legacy has not outlived its time.

Today no state in the union or permits the execution of the insane. For today, no less than before, we may seriously question the value, the retributive value, of

executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life.

South Carolina most recently came to grips with this issue in the case of Singleton v. State decided by our Supreme Court in 1993. After an evidentiary hearing in December of 1990, a post conviction relief judge issued an Order holding Singleton incompetent to be executed under either the American Bar Association criminal justice mental health standard or the standard set forth in Justice Powell's concurring opinion in Ford v. Wainwright.

The ABA standard sets forth a two-prong test when inquiring into the competency of a defendant subject to execution. The first prong can be characterized as the cognitive prong, which is defined as the ability to recognize the nature of the punishment and the reason for the punishment. The second prong is characterized as the assistance prong, which is defined as the ability to assist counsel or the court in identifying exculpatory or mitigating information.

Justice Powell proposed a separate standard, saying, "I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment that they are about to suffer and why are to suffer it."

After reviewing numerous decisions from other jurisdictions, our South Carolina Supreme Court announced the appropriate test in South Carolina for execution of the mentally ill. I quote: "The Court after comparing both standards adopted a standard which

satisfies the mandates of Federal due process, the common law, and the South Carolina Constitution. By so doing, we announce the appropriate test in South Carolina as a two-prong test. The first prong is the cognitive prong, which can be defined as whether a convicted defendant can understand the nature of the proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. The second prong is the assistance

* * *

[pp. JA1620]

prong, which can be defined as whether the convicted defendant possesses sufficient capacity or ability to rationally communicate with counsel."

The Court is aware that should the death penalty be imposed, numerous and lengthy appeals and review of this record will be conducted. All of that takes time, time which may or may not affect Mr. Allen's mental condition. However, in light of the lack of the guiding principles dealing with the imposition of the death penalty on persons with mental illnesses, the Court can only look to the Singleton principles as a guide.

I have seen nothing in the course of this trial to convince me that the defendant cannot meet this pro-prong test. He has communicated to the Court that he understands these proceedings, and he appears to have been communicating with counsel verbally and with written notes. In addition, his counsel has informed the Court that he is competent to participate in this trial.

As noted by counsel for the defense, this has been a complex trial, and it raises complex issues not only for

Mr. Allen, but for society in general. We are only beginning to understand what goes on in the human brain. Forensic psychiatry is not a licensed profession in this state. What makes a brain go haywire, and what cures for mental illness may be just around the corner?

Mr. Allen talks about fate as his justification for these brutal murders. Webster's Dictionary defines fate as "a force viewed as unalterably determining in advance the way things happen; or destiny."

If one believes in fate, where is the force of free will? How can human beings live in peace and order in society if we do not have control over our own actions?

I must ask the question: Who or what controlled the twelve-gauge shotgun the night Mr. Allen shot James White with birdshot; and who or what compelled Mr. Allen to thereafter change his shotgun load from birdshot to hollow point slugs before he approached Dale Hall on Two Notch Road?

Who or what placed the twelve-gauge shotgun in Mr. Allen's car? Was it fate, a mental illness, or was it the product of his own free will? And what is fateful about shooting a defenseless woman in the back or putting a shotgun to her mouth and pulling the trigger? Mr. Allen was not threatened by Dale Hall, and fate cannot be a scapegoat.

I believe Dale Hall's murder was a deliberate, conscious, brutal act intended to inflict gross pain and suffering on a fellow human being, a depraved act of killing spawned in his own mind. And how does fate determine that her body should be burned to a crisp?

Did fate buy the gas can and gasoline to pour on her body? Fate unfortunately is not here on trial today.

Mr. Allen says that fate controlled the destiny of Jedediah Harr. Again, did fate make the decision to change the load in his shotgun to a hollow point slug; a load that carries the most destructive effect of any shotgun shell, or was that a conscious decision on his part to carry a lethal weapon loaded with a lethally destructive load?

Perhaps fate did enter into Jedediah's death by some strange confluence of events. But if Mr. Allen had his way, Brian Marquis would now be dead and his child fatherless. Perhaps fate kept Brian Marquis alive to witness this day. And did fate or a mental illness cause Mr. Allen to enter the Citgo Convenience Store in Dobson, North Carolina, on August the 12th, 2002? Did fate decide to rob the store, or was that Mr. Allen's conscious greed at seeing the opportunity to rob and kill the unarmed Mr. Hawks on a lonely, quiet night in a rural area where there would be no witnesses to the crime?

And, yes; fate may have placed Mr. Roush in that store at that time and at that place; but Mr. Allen decided that Mr. Roush was a threat to his escape plan with the money from the cash register and was a threat to identify him as the killer of Mr. Hawks.

I don't sentence Mr. Allen for those two killings. That has already been done. I only mention them to question Mr. Allen's defense; in his own words, of fate, an unseen force determining who lives or dies.

Mr. Allen set out on a journey sometime in 2002 to become a serial killer. The force that determined whether he would accomplish that goal was in his own mind, his own intelligence, his own will, a will that his doctors tell us now was not free.

And what should be Mr. Allen's fate? He has told many people that he has had desires to kill human beings, that he would kill again if given the opportunity. Should this Court consider those statements, or are they statements of a mind impaired by mental illness? I believe these threats must be considered as character evidence in light of his past history.

So I come to the consideration of the factors which should control a death penalty sentence: Retribution and deterrence. Retribution in a sense is the easiest. Considering the fear Mr. Allen struck into the heart of James White and the subsequent shooting of James White for practice, I find retribution appropriate.

Considering the fear Mr. Allen struck into the heart of Dale Hall, the absolute depravity of her murder, and the subsequent burning of her body, I find retribution appropriate.

Considering the callous killing of Jedediah Harr and the subsequent stalking of Brian Marquis for the purpose of killing him, I find retribution appropriate.

And how could Quincy Allen's death serve as a deterrent to others, to the abused and neglected young people of this community? Maybe it will make some young man or some young girl stop and think about the results of destructive behavior.

Hopefully, hopefully, it will make some young mother, single or otherwise, think about the love and care that children need, no matter how tough the circumstances, and would deter that mother from making the same horrible choices made with Quincy Allen. I would hope that this sentence has at least that deterrent effect, but we may never know.

I find that, pursuant to Section 16-3-20 of the Code of Laws of South Carolina, the death penalty is warranted under the evidence of this case and is not the result of prejudice, passion, or any other arbitrary factor.

Mr. Allen, will you stand, please.

(Defendant stands)

THE COURT: On the non-capital indictments; on the charge of assault and battery with intent to kill James White, the sentence of the Court is you be committed to the State Department of Corrections for a period of 20 years.

On the charge of arson second on the home of Brian Marquis, the sentence of the Court is you be committed to the State Department of Corrections for a period of 25 years.

On the charge of pointing and presenting a firearm at Bucky Michon, the sentence of the Court is you be committed to the State Department of Corrections for a period of five years.

On the charge of arson third; that is, the arson of the vehicle of Sarah Barnes, the sentence of the court

is you be committed to the State Department of Corrections for a period of ten years.

On the arson third charge; that is, the arson of the vehicle of Don Bundrick, the sentence of the Court is you be committed to the State Department of Corrections for a period of ten years.

All of these sentences are to run consecutive, and you are given credit for time served.

After carefully considering all relevant facts and circumstances, including the existence of statutory aggravating circumstances as well as the claim of mitigating circumstances, this Court finds and concludes that the defendant shall be sentenced to death by electrocution or lethal injection as set forth in South Carolina Code Annotated Section 24-3-530.

It is therefore ordered that the judgment and sentence of the Court for the murders of Dale Hall and Jedediah Harr, is that the defendant be taken to the Richland County Detention Center and thereafter to the South Carolina Department of Corrections, henceforth to be kept in close and safe confinement until the 18th day of September 2005, upon which day, between the hours of 6:00 p.m. and 6:00 a.m. on September 18th, 2005, or upon an Order of Execution issued by the South Carolina Supreme Court, the defendant, Quincy Jovan Allen, shall suffer death by electrocution or a lethal injection in the manner provided by law.

And it is so ordered.

This matter is concluded. Court is adjourned.

(Whereupon, the proceedings are concluded)

APPENDIX F

IN THE COURT OF COMMON PLEAS
IN THE FIFTH JUDICIAL CIRCUIT

C/A No. 2010-CP-40-03644
(Capital PCR)

[Filed: December 8, 2015]

STATE OF SOUTH CAROLINA	)
COUNTY OF RICHLAND	)
	)
Quincy Jovan Allen, # 6019,	)
	)
Applicant,	)
	)
vs.	)
	)
State of South Carolina,	)
	)
Respondent.	)
	)

ORDER

This matter comes before this Court by an Application for Post-Conviction Relief, initially dated June 14, 2010, by appellate counsel Robert Dudek. The Respondent made its Return on July 9, 2010. Christopher Adams, Esq., and Michael Siem, Esq. were initially appointed to represent the Applicant. Subsequently, this Court appointed Elizabeth

Franklin-Best, Esq., and, later, Laura Young, Esq., to represent the Applicant, replacing prior appointed counsel. The Applicant, through appointed counsel Ms. Franklin-Best and Ms. Young, made a Third Amended Application dated November 11, 2014. The Respondent made a Return to the third application on November 17, 2014.

This Court held evidentiary hearings in these matters on November 17-18, 2014, March 30, 2015, and April 10, 2015. The Applicant was present and represented by Ms. Franklin-Best and Ms. Young. During various times in the proceedings, the Applicant's guardian ad litem Diana L. Holt, Esq., was present. The Respondent was represented by Senior Assistant Deputy Attorney General Donald Zelenka, Senior Assistant Attorney General Melody Brown, Assistant Attorney General Kaycie Timmons, and Assistant Attorney General Caroline Scrantom.

Testimony was received from the Applicant, Fielding Pringle, Esq. (plea counsel), Dr. Pamela Crawford, April Sampson, Esq., (plea counsel), Sheila Mims, Esq., Robert Lominack, Esq. (plea counsel), John Blume, Esq., (through SKYPE), David Bruck, Esq., (through SKYPE) Douglas Strickler, Esq., Robert Dudek, Esq., (appellate counsel), Bennie Richard Gordon, Phyllis Blake, Kirsten Kirkland, Martell Whitaker (by phone), Peggy Clore, former Solicitor of the Fifth Circuit Warren B. "Barney" Giese, Esq., SLED Agent Michael Prodan, SLED Agent David Caldwell, and former Deputy Solicitor John Meadors, Esq. This Court also received the May 18, 2015 depositions *de bene esse* of Dr. George Corvin and Dr.

James Hilkey. This Court has also reviewed the affidavit of the Honorable G. Thomas Cooper.[1] The Court has before it transcript of these proceedings and exhibits from these proceedings, as well as the transcripts of the guilty plea and sentencing proceedings and the appellate court materials.[2]

---

[1] This Court has concluded, however, the substance of the affidavit will not be considered in the factual findings in this order. The ruling finding same is addressed in a separate order.

[2] These materials include the following:

1. "Motion to Vacate Guilty Plea or Remand for a Hearing on Voluntariness of Appellant's Guilty Plea" dated February 6, 2008;
2. Allen's Appendix to Motion to Vacate Guilty Plea (55 pages, including September 7, 2005 affidavit of E. Fielding Pringle, February 1, 2008 affidavit of Robert Lominack and September 8, 2005 hearing transcript);
3. Return in Opposition to the Motion to Vacate Guilty Plea, with an affidavit from the plea judge attached, February 19, 2008;
4. Allen's "Reply to State's Return in Opposition to Motion to Vacate," February 26, 2008, with affidavit from Quincy Allen;
5. *State v. Allen,* Letter Order from S.C. S. Ct. dated March 8, 2008;
6. Final Brief of Appellant (Direct Appeal);
7. Final Brief of Respondent (Direct Appeal);
8. Final Reply Brief of Appellant (Direct Appeal);
9. *State v. Allen (Quincy),* 386 S.C. 93, 687 S.E.2d 21 (2009);

Pursuant to S.C. Code Ann. Section 17-27-80, and based upon careful consideration of the record and the evidence presented, this Court is constrained to make the following findings of fact and conclusions of law and deny the application for post-conviction relief, as amended, in its entirety.

Sometimes in state post-conviction relief actions, the testimony of the Applicant is the most persuasive. This is one of those times. Before this Court, the Applicant testified:

> . . . I didn't expect to receive anything. I knew it could go either way.
>
> Q. Did your lawyers encourage you to plead guilty?
>
> A. Yes.
>
> Q. And could you describe the circumstances under which you discussed with them pleading guilty?
>
> A. They said if **I pled guilty in front of Judge Cooper I'd have a better chance.**
>
> Q. Did you know that they had discussed your case with Judge Cooper?
>
> A. Yeah, they told me they had just come back from talking to him.

---

10. Allen's Petition for Rehearing, dated December 1, 2009;

11. *State v. Allen,* Letter Order Denying Petition for Rehearing, December 17, 2009; and

12. Record on Appeal (6 Volumes).

Q, And what did they tell you about that?

A. Judge Cooper – they said Judge Cooper said if I pled guilty in front of him I'd have a better chance at a life sentence.

(Nov. 17, 2014 PCR Hearing, Tr. p. 8, line 12-p. 9, line 4). This Court notes that the Applicant has been consistent in his assertions that no specific promise as to sentencing was made to him or relied upon by him. In light of this concession, and the other facts of records, this Court makes the following initial conclusions at the outset of this Order:

1. The guilty pleas by Quincy Allen were freely and voluntarily entered and not the product of a promise of a life sentence by either the sentencing court or his counsel.

2. The decision to plead guilty in front of Judge Cooper was a strategic decision on the part of the defense team with a hope of receiving a life sentence, but that decision was not made based on a guarantee of a life sentence by the sentencing judge to counsel as counsel were aware that they had to convince the court of the existence of a significant mental illness and to dispute the conclusion of malingering.

3. Defense counsel knew it was a risk to waive a jury trial; however, they concluded and represented to Applicant that, based upon (a) the circumstances of the crime, and (b) their investigation into mitigation and, in particular, their investigation into the Applicant's mental health, that an extensive

proffer of evidence (even if contested) could convince the plea judge that the Applicant was mentally ill and thereby convince the plea judge to impose a life sentence.

4. Defense counsel knew the state would vigorously seek a death sentence and would challenge the existence of a mental illness, which was the basis that defense counsel rested their strategy for a life sentence.

5. The manner the defense presented the evidence in mitigation was informed by professional decisions, not the product of neglect, in an attempt as a matter of strategy to convince Judge Cooper in a cogent manner that life was the appropriate sentence.

6. Since there was no promise or guarantee of a life sentence, counsel was not deficient in failing to object to the death sentence on that basis.

7. The decision to advise the Applicant to plead guilty and be sentenced by Judge Cooper was a reasonable decision by counsel based upon their investigation of the facts. The fact that counsel may have presented the evidence differently before a jury than it presented it before a judge was a matter of informed strategy, not the product of neglect or ignorance.

8. Counsel were not deficient in their mitigation presentation concerning not eliciting so-called execution impact evidence or

additional evidence concerning the Applicant's childhood experiences.

9. The defense team's decision to meet with the judge to discuss sentencing was not improper where the prosecution agreed to not be present.

10. Although the judge's actions may have indicated an inclination toward life sentences, all counsel understood it was not a guaranteed life sentence, and the judge refused to guarantee such a sentence in advance of the evidence.

11. The judge's discussion with the defense was not improperly coercive concerning the sentencing potential in the case where sentencing discussions with a trial judge are allowed in South Carolina pursuant to *Medlin v. State*, 276 S.C. 540, 280 S.E. 2d 648 (1981), and *Harden v. State*, 276 S.C. 249, 277 S.E.2d 692 (1981).

I. PROCEDURAL HISTORY

Applicant, Quincy Jovan Allen, is currently incarcerated at Kirkland Correctional Institution Maximum Security Unit pursuant to orders of commitment from the Clerk of Court for Richland County. He was indicted by the Court of General Sessions for Richland County at the September 2002 term of court for the murder of Dale Hall (2002-GS-40-8108), the murder of Jedediah Harr (2002-GS-40-8109), assault and battery with intent to kill upon James White (2002-GS-40-8301), arson in the second degree

upon Brian Marquis's home (2002-GS-40-8289), arson in the third degree upon the vehicle of Sarah Barnes (2002-GS-40-8110), arson in the third degree upon the vehicle of Don Bundrick (2002-GS-40-8290), and pointing and presenting a firearm upon Bucky Mishon (2002-GS-40-8287). The State made its notice of intent to seek the death penalty on April 5, 2004. (ROA, p. 2510). The Applicant was represented by E. Fielding Pringle, Esq., April Sampson, Esq., Robert Lominack, Esq., and Kim Stevens Esq. The prosecution was handled by W. Barney Giese, Esq., then-Solicitor of the Fifth Judicial Circuit, and Deputy Solicitors Kathryn Luck Campbell and John Meadors.

A. The Guilty Pleas

On February 28, 2005, the Applicant entered a guilty plea to each of the seven (7) indictments before the Honorable G. Thomas Cooper. (ROA, p. 6, line 9-p. 8, line 21). At the guilty plea, Deputy Solicitor John Meadors set out the factual basis for Mr. Allen's crimes—including the shooting of James White, the murders of Dale Hall, Jedediah Harr, and two victims from North Carolina, and multiple arsons.[3] At the

[3] The Supreme Court of South Carolina summarized the facts of Allen's crimes as follows:

> At approximately 3:00 a.m. on July 7, 2002, Quincy Allen approached a homeless man, fifty-one year old James White, who was lying on a swinging bench in Finlay Park in downtown Columbia. Allen ordered White to stand up, and proceeded to shoot him in the shoulder. When White fell back to the bench, Allen ordered him to stand up and shot him again. According to Allen's subsequent statement to police, he had just gotten the shot-gun and he

used White as a practice victim because he did not know how to shoot the gun. White survived the assault.

A few days later, on July 10, 2002, Allen met a prostitute named Dale Hall on Two Notch Road in Columbia; he took her to an isolated dead end cul-de-sac near I-77 where he shot her three times with a 12 gauge shotgun, placing the shotgun in her mouth as she pleaded for her life. After shooting her, Allen left to purchase a can of gasoline, and came back to douse Hall's body and set her on fire. He then went back to work at his job at the Texas Roadhouse Grill restaurant on Two Notch Road.

Several weeks later, on August 8, 2002, while working at the restaurant, Allen got into an argument with two sisters, Taneal and Tiffany Todd; he threatened Tiffany, who was then 12 weeks pregnant, that he was going to slap her so hard her baby would have a mark on it. Tiffany's boyfriend Brian Marquis came to the restaurant, accompanied by his friend Jedediah Harr. After a confrontation, Allen fired his shotgun into Harr's car, attempting to shoot Marquis; however, Allen missed Marquis and instead hit Harr in the right side of the head. As the car rolled downhill, Marquis jumped out and ran into a nearby convenience store, where he was hidden in the cooler by an employee, Allen left the convenience store, and went and set fire to the front porch of Marquis' home. A few hours later Allen set fire to the car of Sarah Barnes, another Texas Roadhouse employee. Harr died of the shotgun blast to his head.

The following day, Allen set fire to the car of another man, Don Bundrick, whom he apparently did not know. Later that evening, August 9, 2002, Allen went to a strip club, Platinum Plus, in Columbia, where he pointed his shotgun at a patron. Allen left South Carolina and proceeded to New York City. On his way back, while in North Carolina, Allen shot and killed two men at a

conclusion of the factual recitation, Applicant admitted the facts were "true and correct." (ROA, p. 28, lines 14-16). Judge Cooper accepted the guilty pleas.

B. The Sentencing Proceedings

On March 7, 2005, the penalty phase began. The State was seeking the death penalty for the murders of Dale Hall and Jedediah Harr. As to the murder of Dale Hall, the State announced it was seeking the death penalty for the following aggravating circumstances:

1. The murder of Dale Hall was committed by Allen while in the commission of kidnapping. (ROA, p. 60, lines 8-13).

2. The murder of Dale Hall was committed by Allen while in the commission of robbery while armed with a deadly weapon. (ROA, p. 60, lines 14-16).

3. The murder of Dale Hall was committed by Allen while in the commission of larceny

---

convenience store in Surrey County. Allen then went to Texas, where he was apprehended by law enforcement on August 14th.

Allen gave statements to police outlining the details of his crimes. He told police he began killing people because an inmate 'in federal prison, where Allen spent time for stealing a vehicle, had told him he could get him a job as a mafia hit man. Allen got tired of waiting and embarked on his own killing spree. Allen told police he would have killed more people if he had a handgun, but his prior record prohibited him from obtaining a handgun.

State v. Allen, 386 S.C. 93, 95-97, 687 S.E.2d 21, 22-23 (2009).

through use of a deadly weapon. (ROA, p. 60, line 16-19).

4. The murder of Dale Hall was committed by Allen while in the commission of physical torture. (ROA, p. 60, lines 19-21).

5. The murder of Dale Hall was committed by Allen, who has a prior conviction for murder. (ROA, p. 60, lines 22-23).

6. Allen committed at least two murders pursuant to one scheme or course of conduct. (ROA, p. 60, lines 24-25).

7. The murder of Dale Hall was committed by Allen while in the commission of dismemberment of the victim. (ROA, p. 2765, lines 7-10).

Concerning the murder of Jedidiah Harr, the State sought to prove the following statutory aggravating factors to support the death penalty:

1. The murder of Jedidiah Harr was committed by Allen, who has a prior conviction of murder. (ROA, p. 61, lines 23-25).

2. The murder of Jedidiah Harr was committed by Allen, who by his act of murder knowingly created a risk of death to more than one person in a public place by means of a weapon or device that would normally be hazardous to the lives of more than one person. (ROA, p. 62, lines 1-6).

3. Allen committed at least two murders pursuant to one scheme or course of conduct. (ROA, p. 62, lines 6-8).

During the penalty phase, the prosecution presented testimony from a series of witnesses concerning the numerous crimes Applicant had pled guilty to, including the two North Carolina murders[4] (ROA, pp. 853-54), his criminal history, and victim impact statements. (ROA, pp. 77-855).

At the conclusion of the State's aggravation portion of the hearing on March 9, 2005, the defense moved for a directed verdict on all of the aggravating factors. Judge Cooper granted the motion for directed verdict of Hall aggravating factors 2 and 6 and of Harr aggravating factor 3. But Judge Cooper denied the directed verdict motion with regards to the remaining aggravating factors.[5] (ROA, pp. 867-76). In particular,

---

[4] The defense did not object to the two North Carolina murder convictions being admitted. (ROA, pp. 853-55; State's Ex. 197 & 198).

[5] In the sentencing court's sentencing report, dated April 1, 2005, the following statutory aggravating factors were marked as found: murder was committed while in the commission of kidnapping (Hall); murder was committed while in the commission of larceny with use of a deadly weapon (Hall); murder was committed while in the commission of physical torture (Hall); murder was committed by a person with a prior record (Hall); murder was committed by a person with a prior record of conviction for murder (Harr); the offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person (Harr). (ROA, pp. 2912-13).

the sentencing court found that the State had shown the kidnapping aggravator beyond a reasonable doubt, (ROA, p. 868, lines 4-10), and further found that Applicant had a prior conviction for murder, (ROA, p. 872, lines 7-14). Additionally, the sentencing court found that Harr's murder "was committed by the Defendant who by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person." (ROA, p. 874, line 24-p. 875, line 7). After making these findings and conclusions, Judge Cooper stated: "Therefore, pursuant to Section 16-3-20, this trial will continue. Having found statutory aggravating circumstances enumerated by the statute, the trial shall continue to the mitigation phase of the trial . . . ." (ROA, p. 875, line 22-p. 876, line 1).

On March 10, 2005, the mitigation phase began. (ROA, p. 889). Prior to the testimony, defense counsel renewed all previous motions, including the directed verdict motions. (ROA, p. 912, lines 13-19). The motions were denied. (ROA, p. 912, lines 20-21). The mitigation phase continued through March 16, 2005 and was concluded on March 17, 2005. (ROA, p. 2397).

The prosecution made its closing arguments through Deputy Solicitor Meadors and Solicitor Giese. (ROA, pp. 2402-47). Defense closing arguments were made by Ms. Pringle (ROA, pp. 2449-75), and Mr. Lominack (ROA, pp. 2475-87). Applicant waived his opportunity to make a statement. (ROA, p. 2487, lines 1-17).

C. The Sentence

On March 18, 2005, Judge Cooper pronounced sentence. (ROA, pp. 2488-2507, 2907-35). Judge Cooper sentenced the Applicant in the following manner:

- assault and battery with intent to kill – twenty (20) years
- arson second degree – twenty-five (25) years
- pointing and presenting a firearm – five (5) years
- arson third degree (vehicle of Barnes) – ten (10) years
- arson third degree (vehicle of Bundrick) – ten (10) years

(ROA, pp. 2505-06). Judge Cooper stated that the above sentences shall be served consecutively. (ROA, p. 2506, lines 6-7). Judge Cooper then pronounced the sentences for the murder of Dale Hall and Jedidiah Harr:

> After carefully considering all relevant facts and circumstances, **including the existence of statutory aggravating circumstances as well as the claim of mitigating circumstances**, this Court finds and concludes that the defendant shall be sentenced to death by electrocution or lethal injection as set forth in South Carolina Code Annotated Section 24-3-530.

(ROA, p. 2506, lines 8-16 (emphasis added)).

D. The Direct Appeal

Applicant made a timely appeal to the South Carolina Supreme Court. In the direct appeal, he was represented by Robert M. Dudek, Esq., and Katherine Hudgins, Esq., of the South Carolina Commission on Indigent Defense, Division of Appellate Defense. While the appeal was pending, Applicant attempted to abandon the appeal. The matter was ultimately remanded to then-Court of Appeals Judge John Kittredge, who found that Applicant was competent to waive his appeal by order entered November 9, 2007. The Court issued a briefing order on November 19, 2007. However, Applicant revised his decision to proceed.

On February 6, 2008, appellate counsel made a "Motion to Vacate Guilty Plea Or Remand For A Hearing On Voluntariness of Appellant's Guilty Plea." The Respondent made a Return in Opposition on February 19, 2008. On March 5, 2008, the Supreme Court issued a letter order that the motion was denied.

Appellate counsel filed an Initial Brief of Appellant on July 7, 2008, and the Final Brief of Appellant on May 7, 2009. In the Final Brief of Appellant, he raised the following issues:

1.

> Whether appellant's death sentence should be vacated where the court sentenced appellant to death to deter other mothers from abusing their children in the manner in which appellant's mother abused him, since the death sentence being imposed on the basis of this arbitrary

> factor violates the Eighth Amendment, and therefore mandates relief under S.C. Code §16-3-25(C)(1)?
>
> 2.
>
> Whether appellant's death sentence should be vacated where the court did not designate the finding of a statutory aggravating circumstance as mandated by S.C. Code § 16-3-20(C), and the death sentence therefore must be vacated pursuant to S.C. Code § 16-3-25(C)(2)?
>
> 3.
>
> Whether the court erred by ruling it did not have the authority to rule that S.C. Code § 16-3-20 was unconstitutional, and by ruling that S.C. Code § 16-3-20 did not violate the Eighth and Fourteenth Amendments because it forced appellant to choose between his constitutional right to a jury trial and his constitutional right to present compelling mitigating evidence by pleading guilty, and accepting responsibility for his actions before a jury of his peers?

(FBOA, p. 1). The Respondent filed an Initial Brief of Respondent on January 21, 2009, and the Final Brief of Respondent on April 29, 2009. A Final Reply Brief of Appellant was filed on May 7, 2009. On September 15, 2009, oral argument was held in the matter.

The Supreme Court of South Carolina entered its opinion on November 16, 2009, denying the direct appeal and affirming his conviction and sentence of death from Richland County. *State v. Allen (Quincy)*,

386 S.C. 93, 687 S.E.2d 21 (2009). The Court denied rehearing on December 17, 2009. The Court's issuance of its order set January 8, 2010 (Fourth Friday after service, pursuant to S.C. Code § 17-25-370) as the projected date of execution for his 2005 Richland County death sentences. On January 5, 2010, the Court issued an order staying the scheduled execution to allow the seeking of certiorari review from the Supreme Court of the United States.

Applicant, through appellate counsel, made a Petition for Writ of Certiorari on March 16, 2010, raising the following question presented:

> Whether it violates the Eighth Amendment and Fourteenth Amendments for a state to force a capital defendant to choose between the constitutional right to a jury trial and his constitutional right to present the most compelling mitigation evidence that he pled guilty, accepted responsibility for his crimes, and displayed genuine remorse before a jury of his peers by mandating that he must waive jury sentencing and be sentenced by a judge in order to plead guilty?

(*Allen v. South Carolina*, Petition for Writ of Certiorari). Respondent made a Brief in Opposition on April 22, 2010. On May 24, 2010, the Supreme Court of the United States entered its order denying the petition for writ of certiorari. *Allen v. Sottth Carolina*, 560 U.S. 929, 130 S. Ct. 3329 (2010).

On June 2, 2010, appellate counsel made a Motion for Stay Pending Post-Conviction Relief in the South

Carolina Supreme Court. Respondent made its opposition to the stay on June 11, 2010. The Supreme Court of South Carolina granted the stay on July 9, 2010, which remained in effect during the subsequent post-conviction relief proceedings.

II. ALLEGATIONS IN THIS ACTION

Applicant has made the following allegations of error in his November 11, 2014[6] amended PCR application:

> 10(a): Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the sentencing phase of his capital trial as a result of trial counsel's acts or omissions set forth below in section 11(b). Trial counsel's performance was both unreasonable and prejudicial as outlined below. *See Strickland v. Washington*, 466 U.S. 668 (1984), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004).
>
> 11(a): Trial counsel's acts or omissions included:
>
> (i) Encouraging Allen to plead guilty to capital murder in Richland

[6] Applicant's second amended application was filed October 16, 2014.

County without adequate assurances that the trial court judge would impose Life sentences.

(ii) Encouraging Applicant to plead guilty to capital murder in Richland County when statistics show that Richland County juries do not generally impose death sentences.

(iii) Failing to adequately litigate issue of striking death penalty on the basis of race.

(iv) Failing to elicit any execution impact evidence during the sentencing hearing when that evidence would have resulted in the judge's imposing a life sentence.

(v) Failing to present mitigation evidence of Applicant's childhood trauma and abuse when that evidence would have resulted in the judge's imposing a life sentence.

(vi) Failing to object to the trial court judge's imposition of a death sentence at the time the sentence was rendered.

(vii) Failing to object to the trial court judge's confusing the competency

to be executed standard with the standard for finding applicant to be mentally ill.

10(b): Applicant's plea of guilty was rendered involuntarily, in violation of the rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and by Article I, §§ 12 and 14 of the South Carolina Constitution, because trial counsel informed him, and apparently without any factual basis, that the trial court judge promised to impose Life sentences in exchange for the guilty pleas.

11(b): Applicant pleaded guilty to two counts of capital murder because trial counsel informed him the trial court judge would impose Life sentences.

10(c): Applicant's plea of guilty was rendered involuntarily, in violation of the rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and by Article I, §§ 12 and 14 of the South Carolina Constitution, because of the inherently coercive effect of the trial judge's involvement in plea negotiations.

11(c): The trial court judge was extremely involved in the disposition of this case, engaging in numerous ex parte contacts with the parties, and with the intention of

having Applicant plead guilty to two counts of capital murder.

10(d): Applicant received ineffective assistance of appellate counsel, in violation of the rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments and by Article I, §§ 3 and 14 of the South Carolina Constitution, because appellate counsel failed to raise the issue that Applicant's guilty plea was involuntary due to the inherently coercive effect of the trial judge's involvement in plea negotiations.

11(d): The inherently coercive effect of the trial judge's involvement in plea negotiations was apparent to appellate counsel, and sufficiently raised in the Motion to Vacate Guilty Plea, and appellate counsel was ineffective for raising the issue on direct appeal.

(Third Amended Application for Post-Conviction Relief, pp. 2-3). Some of the allegations raised in Applicant's original PCR application and Applicant's first amended PCR application have not been included, either specifically or by reference to the prior applications, in the third amended application.[7] Any claims previously raised but not included in Applicant's Third Amended

[7] Upon review of the Third Amended Application for Post-Conviction Relief, the claims are identical to the second amended application with the addition of ground 11(a)(vii).

Application for Post-Conviction Relief are found to be waived and abandoned.

III. DISCUSSION

A. Review in Post-Conviction Relief Cases

The scope of this Court's jurisdiction in post-conviction relief matters is set out in S.C. Code Ann. Section 17-27-20(a), which provides:

> (a) Any person who has been convicted of, or sentenced for, a crime and who claims:
>
> (1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
>
> (2) That the court was without jurisdiction to impose sentence;
>
> (3) That the sentence exceeds the maximum authorized by law;
>
> (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
>
> (5) That his sentence has expired, his probation, parole, or conditional release unlawfully revoked, or he is otherwise held unlawfully held in custody or other restraint; or

> (6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. *Provided, however,* that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

(emphasis in original).

Section (b) further limits the jurisdiction of the PCR court as follows: "This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." Because a PCR action is not a substitute for those proceedings, a PCR applicant cannot assert any issues in his PCR action that could have been raised at trial and on direct appeal. This prohibition has long been recognized. *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings."); *see also Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("The *Simmons* rule gives effect to the Legislature's clear intent that the post-conviction relief

procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.").

While previously heard or unheard freestanding trial or direct appeal issues are not cognizable, the general factual basis for the previously unheard issues may be reached by and through an allegation of ineffective assistance of counsel. *Drayton*, 312 S.C. at 9, 430 S.E.2d at 520 ("Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel."); *see also Cummings v. State*, 274 S.C. 26, 28, 260 S.E.2d 187, 188 (1979) ("At trial, respondent failed to object to the imposition of the sentence and, therefore, waived the right to have that sentence reviewed on direct appeal, or to raise such issue on Post-Conviction absent an allegation of ineffective assistance of counsel."). In sum, ineffective assistance of counsel claims are of "the general nature of issues appropriate for post-conviction relief" actions. *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996); *see, e.g., Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984).

To establish that Sixth Amendment counsel was ineffective, a PCR applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *Strickland*, 466 U.S. at 694; *Simpson v. Moore*, 367 S.C. 587, 595-96, 627 S.E.2d 701, 706 (2006). "A reasonable probability is a

probability sufficient to undermine confidence in the outcome" of the trial. *Strickland*, 466 U.S. at 694. Relief will not be granted on a showing of mere error—prejudice must also be shown. *Id.* at 687. The standard of "prejudice" differs depending upon whether it is related to guilt phase issues or penalty phase issues. In order to prove "prejudice" in the guilt phase, an applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). In *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998), the court instructed that prejudice may be found in a capital sentencing proceeding "when 'there is a reasonable probability that, absent [counsel's] errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" 332 S.C. at 333, 504 S.E.2d at 823 (*quoting Strickland*, 466 U.S. at 695). Again, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (*quoting Strickland*, 466 U.S. at 694).

Further, a defendant is entitled to a due process right of effective assistance in his first appeal. *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830 (1985). The *Strickland* deficient performance and prejudice test applies to determine the merits of any claims of ineffective assistance of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S. Ct. 746 (2000); *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). However, "it is difficult to demonstrate that counsel was incompetent" as for the most part,

deficient performance may be shown "only when ignored issues are clearly stronger than those presented . . . ." *Smith v. Robbins*, 528 U.S. at 288 (*quoting Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). "To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal." *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

In either case, to effect a fair review of counsel's performance, a reviewing court must "eliminate the distorting effects of hindsight" and attempt "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; *Butler v. State*, 286 S.C. 444-45, 334 S.E.2d 815 (1985).

B. Guilty Plea Standard of Review and Restrictions

A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. *Blackledge v. Allison*, 431 U.S. 63, 97 S. Ct. 1621 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. *Crawford v. United States*, 519 F.2d 347 (4th Cir. 1975); *Edmonds v. Lewis*, 546 F.2d 566 (4th Cir. 1976).

A guilty plea must be "a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25,

31, 91 S. Ct. 160 (1970); *see Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709 (1969) (requiring an affirmative showing that a guilty plea was entered intelligently and voluntarily). Entering a guilty plea results in a waiver of several constitutional rights; therefore, the Due Process Clause requires that defendants enter into guilty pleas voluntarily, knowingly, and intelligently. *Boykin*, 395 U.S. at 238. The South Carolina Supreme Court has held that, "in addition to the requirements of *Boykin*, a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (*citing Dover v. State*, 304 S.C. 433, 405 S.E.2d 391 (1991); *State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980)). A plea made in ignorance of its direct consequences is entered in ignorance and is invalid. *Hazel*, *supra.*

Specifically, to find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. *Boykin v. Alabama*, 395 U.S. at 242; *Roddy v. State*, 339 S.C. 29, 33-34, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's

counsel, or both." *Pittman v. State*, 337 S.C. 597, 600, 524 S.E.2d 623, 625 (1999).[8]

Disappointed hope or expectation of leniency—so long as it is not wrongfully induced by the government—does not justify withdrawal of a guilty plea nor afford occasion for invalidating it, *United States v. Taylor*, 303 F.2d 165, 168 (4th Cir. 1962); *Vanater v. Boles*, 377 F.2d 898, 900 (4th Cir. 1967). "A guilty plea is not rendered involuntary by the defendant's mere subjective understanding that [she] would receive a lesser sentence.... [I]f the defendant's expectation of a lesser sentence did not result from a promise or guarantee by the court, the prosecutor or defense counsel, the guilty plea stands." *Daniel v. Cockrell*, 283 F.3d 697, 703 (5th Cir. 2002).

The fact that a defendant, at the time he enters his guilty plea, does not know the precise sentence he will

---

[8] Once a defendant enters a plea of guilty, the decision whether to allow withdrawal of the plea is left to the trial court's sound discretion, *State v. Riddle*, 278 S.C. 148, 292 S.E.2d 795 (1982); *State v. Barton*, 325 S.C. 522, 481 S.E.2d 439 (Ct. App. 1997); *State v. Rosier*, 312 S.C. 145, 439 S.E.2d 307 (Ct. App. 1993). The failure to exercise discretion, however, is itself an abuse of discretion. *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997); *see also Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred."); *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) ("It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly."); *State v. Mansfield*, 343 S.C. 66, 86, 538 S.E.2d 257, 267 (Ct. App. 2000). However, here, Quincy Allen never sought to withdraw his guilty pleas.

receive does not mean that the plea was "unknowing." *United States v. Stephens*, 906 F.2d 251, 254 (6th Cir. 1990). A defendant's subjective hope of a lesser sentence is unavailing. "Courts naturally look with a jaundiced eye upon any defendant who seeks to withdraw a guilty plea after sentencing on the ground that he expected a lighter sentence." *United States v. Crusco*, 536 F.2d 21, 24 (3d Cir. 1976).

Even when a defendant claims that his attorney was "ineffective" and that therefore his plea was not "voluntary," other courts have held that "the trial court's proper plea colloquy cured any misunderstanding he may have had about the consequences of his guilty plea." *Ramos v. Rogers*, 170 F.3d 560, 561 (6th Cir. 1999); *see also Baker v. United States*, 781 F.2d 85, 90 (6th Cir. 1986) (a "defendant's plea agreement consists of the terms revealed in open court"). "Entry of a plea of guilty is not some empty ceremony, and statements made to a federal judge in open court are not trifles that defendants may elect to disregard." *United States v. Loutos*, 383 F.3d 615, 619 (7th Cir. 2004) (*quoting United States v. Stewart*, 198 F.3d 984, 987 (7th Cir. 1999)); *see also United States v. Gwiazdzinski*, 141 F.3d 784, 788 (7th Cir. 1998) ("The purpose of the Rule 11 colloquy is to expose coercion, and the district judge must be able to rely on the defendant's sworn testimony at that hearing."). A defendant's "[s]olemn declarations in open court carry a strong presumption of verity." *Blackledge*, 431 U.S. at 74.

The United States Supreme Court has held:

> ...a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

Tollett v. Henderson, 411 U.S. 258, 267, 93 S. Ct. 1602 (1973).

It is within these standards and restrictions that this Court has considered the claims and evidence. An individual discussion of the claims follows.

C. Alleged Involuntary Guilty Plea Due to Trial Judge's Involvement in Plea Negotiations

Applicant alleges in 10(c) and 11(c) of his PCR application that his plea was rendered involuntary "because of the inherently coercive effect of the trial judge's involvement in plea negotiations." (Third Amended Application, p. 3).

This issue is the critical issue in this case and involves the testimony that Judge Cooper had made a reference during a motion hearing concerning the judicial sentencing that occurred in North Carolina and allowed the defense team to meet with him in a discussion about sentencing after there had been no plea negotiations. This Court must conclude that there was no improper coercion on the part of Judge Cooper

that made the guilty plea involuntary since there was no promise or guarantee of a life sentence; Quincy Allen credibly admitted as much.

In the past, the proper procedure to be utilized by a trial judge in accepting a guilty plea has been the subject of considerable debate within the Supreme Court. In a line of cases beginning with *State v. Cross*, 270 S.C. 44, 240 S.E.2d 514 (1977), and culminating in *Harden v. State*, 276 S.C. 249, 277 S.E.2d 692 (1981), and *Medlin v. State*, 276 S.C. 540, 280 S.E.2d 648 (1981) ("a trial judge may participate in the plea bargaining process if he follows guidelines to minimize the fear of coercion."), the Supreme Court set forth guidelines for the approval of a guilty plea bargain between the defendant and the State, along with strict limits upon the trial judge's involvement in any negotiations leading to such a plea.

One guiding principle, which remained constant in all of these opinions, was that the terms, conditions, and reasons for any plea agreement must be disclosed to the trial judge. In *State v. Thrift*, 312 S.C. 282, 440 S.E.2d 341 (1994), the Court added the requirement that such disclosure must be made on the record. Adherence to this procedure is the shared responsibility of the trial judge and trial counsel for the state and the defendant. The effect of *Thrift* was that neither the State nor the defendant are able to enforce plea agreement terms that do not appear on the record before the trial judge who accepts the plea.

In the instant matter, the evidence supports the trial judge's inquiries with the Applicant that there was no agreement for a life sentence after the defense

counsel's meeting with the trial judge. Similarly, it is persuasive to this Court, as reported by former Deputy Solicitor Meadors in his testimony, that after the meeting with Judge Cooper, no one on the defense team advised the State that there was a guarantee or promise to the defense from Judge Cooper. What was advised was that a decision had been made to plead guilty and to have Judge Cooper sentence Applicant. What was further indicated to the defense, without contradiction by their actions in the record, was that the State would vigorously challenge the defense presentation. The Applicant's suggestion that the sentencing proceeding was a charade defies a reasonable review of the record and the vigor of both parties.

In *Medlin v. State*, *supra*, the Supreme Court rejected an assertion that a defendant could have reasonably felt coerced by the trial judge's participation in negotiations of his guilty plea. Importantly, in *Medlin*, the Court adopted a portion of the ABA Standards particularly applicable in this setting:

> (c) When the parties are unable to reach a plea agreement, if the dependant's counsel and prosecutor agree, they may request to meet with the judge in order to discuss a plea agreement. If the judge agrees to meet with the parties, the judge shall serve as a moderator in listening to their respective presentations concerning appropriate charge or sentence concessions. Following the presentation of the parties, the judge may indicate what charge or sentence concessions would be acceptable or whether the

> judge wishes to have a pre-plea report before rendering a decision. The parties may thereupon decide among themselves, outside of the presence of the court, whether to accept or reject the plea agreement tendered by the court.

Medlin, *supra.* Further, the Court's opinion in *Harden* stated:

> We now specifically disavow adherence to the apparent position of the Federal Rules quoted in Cross that there are no circumstances in which a trial judge should participate in the plea bargain process prior to the taking of the actual plea. We believe that the position of the ABA Standard here set forth is sound. It provides access by the State and the defendant to the judge, and yet provides standards to guide all concerned so that the fear of coercion in the plea-bargain process . . . should be minimal.

276 S.C. at 256, 277 S.E.2d at 695.

The fact that the defense and prosecution met together after the defense's meeting with Judge Cooper and did not discuss any promises or sentencing concessions is powerful evidence that there was no coercion by the trial judge. To the contrary, the parties were "wondering what Judge Cooper might do, not what he will do." (*See* Meadors Transcript pp. 8, 10, 12-13 (no indication from counsel Pringle that Judge Cooper indicate he promised a life sentence); March 30, 2015 PCR Tr. p. 181). The claims otherwise are without

merit.[9] *Cf. Fielding v. LeFevre*, 548 F.2d 1102, 1106 (2nd Cir. 1977) ("[The trial judge's] alleged threat of a more severe sentence should [the defendant] go to trial[, i]f true, . . . would establish a per se violation of the defendant's Sixth Amendment right to a trial, and require resentencing before a different judge [for a defendant who went to trial].") (note state trial judge provided an affidavit in the matter).[10]

As previously indicated, the guilty plea was entered within the mandates of *Boykin v. Alabama*, *supra.* This Court dismisses this allegation.

D. Alleged Ineffective Assistance of Trial Counsel

All of the claims raised under grounds 10(a) and 11(a) in the PCR application pertain to trial counsel's representation; thus, *Strickland* controls. Applicant has failed to show *Strickland* deficient performance and prejudice. Consequently, he is not entitled to any relief.

---

[9] This Court is aware of the recent decision in the Fourth Circuit in *United States v. Braxton*, 784 F.3d 240 (4th Cir. 2015), which found under Rule 11 of the Federal Rules of Criminal Procedure as adopted in 1974 that trial judges were expressly prohibited from participating in plea discussions. However, in the 1981 case *Harden* and *Medlin*, South Carolina did not adopt Federal Rule 11, instead expressly allowing for such participation.

[10] In *Pilkington v. United States*, 315 F.2d 204, 207 (4th Cir. 1963), the Court indicated that where a criminal defendant was induced to enter a guilty plea "by statements of the presiding judge or prosecuting officials, or even under some circumstances of his own attorney, with regard to the nature of the charge of the possible penalty involved," his plea may be rendered invalid. *See Quillien v. Leeke*, 303 F. Supp. 698, 712 (D.S.C. 1969).

a. *For Encouraging Guilty Plea Without Adequate Assurances of Life Sentences*

In 11(a)(i) Applicant alleges that trial counsel rendered ineffective assistance of counsel by encouraging him to plead guilty without adequate assurances that the trial court would impose life sentences. This Court agrees with the premise that the plea court gave no promise of a life sentence, but not that counsel performed deficiently in attempting to obtain said promise. Rather, this Court finds that counsel acted reasonably in advising their client to plead guilty in light of the circumstances leading up to the guilty plea. This Court finds that there was no meeting of the minds among defense counsel and the plea court, only the exercise of reasonable professional judgment by counsel. There are several succinct areas of testimony and post-conviction relief evidence which support this Court's finding that the plea court gave no promise of a life sentence:

1. *Sworn Statements of Quincy Allen at Guilty Plea Denying a Promise*

The guilty plea record is probative concerning this issue and undermines the legal claim for relief. *See Blackledge v. Allison*, 431 U.S. at 74 ("defendant's solemn declarations in open court . . . 'carry a strong presumption of verity . . . .' Indeed, because they do carry such a presumption, they present 'a formidable barrier in any subsequent collateral proceedings.'"). Initially, the Court notes that Ms. Pringle stated Mr. Allen was "competent, understands what he is doing

today." (ROA, p. 5, lines 3-5). [11] Thereafter, Mr. Allen, who was placed under oath (ROA, p. 6, lines 4-7), stated that he was guilty of each of the indictments and then confirmed under oath:

> **THE COURT: Has anyone promised you would receive either a**

---

[11] A review of the pretrial proceedings on February 18, 2005 reveals that Ms. Pringle indicated that the defense had no question concerning Allen's competency to stand trial. (ROA, p. 2768, lines 23-24). At that time, the defense opposed a state request for an independent evaluation, noting that even during the earlier North Carolina proceeding the evidence presented was that he was competent to stand trial. (ROA, p. 2770, lines 23-25). Also, Mr. Lominack confirmed at the same motion hearing "there's not a competency issue," in distinguishing *State v. Locklair*. (ROA, p. 2772, lines 10-12). At that time, Judge Cooper deferred on considering the mental health issues until the Court reconvened on Tuesday. (ROA, p. 2773, lines 13-15).

When Judge Cooper pronounced sentence on March 18, 2005, he stated: "And what is Mr. Allen's condition today? I have listened to and read the accounts of all the psychiatrists and psychologists in the case . . . Quite frankly, I cannot tell with certainty what his mental state is today. . . ." (ROA p. 2492, lines 6-12). However, after a review of applicable case law, including *Singleton v. State*, he stated:

> I have seen nothing in the course of this trial to convince me that the defendant cannot meet the two prong test [under *Singleton*]. He has communicated to the Court that he understands these proceedings, and he appears to have been communicating with counsel verbally and with written notes. In addition, his counsel informed the Court that he is competent to participate in this trial.

(ROA, p. 2500, lines 13-20).

sentence of death or life without parole?

MR. ALLEN: ***No, sir.***

THE COURT: **Has anyone promised you any sentence?**

MR. ALLEN: ***No sir.***

(ROA, p. 10, line 20-p. 11, line 5 (emphasis added)). The plea transcript also reveals that Judge Cooper advised Mr. Allen that if he was dissatisfied with his sentence, he had ten days to file a notice of appeal. (ROA, p. 14, lines 4-14).

Mr. Allen stated that he was guilty of each of the indictments and waived his right to a jury trial:

THE COURT: You are charged in the indictment 2003-GS-40-8108 with the murder of Dale Hall. The state in that case has notified you of aggravating circumstances and its intent to seek the death penalty. Do you understand that?

MR. ALLEN: *Yes, sir.*

THE COURT: How do you wish to plead to that charge?

MR. ALLEN: *Guilty.*

THE COURT: You are charged in indictment no. 2003-GS-40-8109 with the murder of Jedediah Harr. That

charge also carries a penalty based on the fact that the State is seeking the death penalty of either death or life in prison without parole. Do you understand that?

MR. ALLEN: *Yes, sir.*

THE COURT: How do you plead to that charge?

MR. ALLEN: *Guilty...*

(ROA, p. 6, line 23-p. 7, line 14 (emphasis added)). Further, the following sworn colloquy occurred:

THE COURT: . . . Now, Mr. Allen. Do you understand that in the two murder cases the State is seeking the death penalty in those two cases?

MR. ALLEN: Yes, sir.

THE COURT: Do you understand that you have a right to have a jury determine your guilt or innocence on all of the charges that have been filed against you?

MR. ALLEN: Yes, sir.

THE COURT: Do you understand that you have the right to have a jury determine you sentence and

that the jury could impose the death penalty or sentence you to life without parole at the Department of Corrections? Do you understand that?

MR. ALLEN: Yes, sir.

THE COURT: Do you understand that by pleading guilty you are waiving your right to have the jury determine guilt or innocence?

MR. ALLEN: Yes, sir.

THE COURT: You understand that by pleading guilty you are waiving the right to have the jury determine your sentence?

MR. ALLEN: Yes, sir.

THE COURT: Do you understand that by pleading guilty the judge, the Court, must then impose your sentence? Do you understand that?

MR. ALLEN: Yes, sir.

THE COURT: And do you understand that I could either impose the death penalty or sentence you to life without parole?

MR. ALLEN: Yes, sir.

THE COURT: And that life without parole means until the end of your natural life. Do you understand that?

MR. ALLEN: Yes, sir.

THE COURT: Do you understand the concept of aggravating circumstances? Have your lawyers talked to you about that?

MR. ALLEN: Yes, sir.

THE COURT: Do you understand that if I find aggravating circumstances a result of your guilty plea I could sentence you to death or to life without parole?

MR. ALLEN: Yes, sir.

THE COURT: Do you understand that?

MR. ALLEN: Yes, sir.

THE COURT: Do you still wish to plead guilty?

MR. ALLEN: Yes, sir.

THE COURT: Has anyone promised you would receive either a sentence of death or life without parole?

MR. ALLEN: No, sir.

THE COURT: Has anyone promised you any sentence?

MR. ALLEN: No sir.

(ROA, p. 8, line 22-p. 11, line 1 (emphasis added)).

After further discussion about his right to a jury trial and a unanimous jury, Mr. Allen confirmed that he understood those rights and wished to plead guilty. (ROA, p. 12). Mr. Allen further verified that he was satisfied with counsel who had fully discussed the charges with him, the witnesses and State evidence, as well as any possible legal defenses and his witnesses. (ROA, pp. 12-13). He declared he was pleading guilty freely and voluntarily. The judge concluded:

THE COURT: I find the decision of the defendant, Quincy Javon Allen, to plead guilty to be freely, voluntarily and intelligently made. He has the representation of competent counsel in this case with whom he's said he's satisfied, and I'll accept his plea.

Now, Mr. Allen, if you disagree with the sentence I give you or the procedure we've just completed, you have ten days from the date on which I impose sentence to file a notice of intent to appeal. Do you understand that?

MR. ALLEN: Yes, sir.

(ROA, p. 14, lines 4-15 (emphasis added)).

2. Testimony of Quincy Allen at PCR Hearing – Better Chance, Not A Promise!

More powerfully, during this PCR proceeding, Mr. Allen consistently denied that his guilty plea was the product of misinformation or a promise that he would receive a life sentence. Again, under oath before this Court, Mr. Allen stated that his lawyers encouraged him to plead guilty, and as to what sentence did he expect to receive:

A. . . . I didn't expect to receive anything. I knew it could go either way.

Q. Did your lawyers encourage you to plead guilty?

A. Yes.

Q. And could you describe the circumstances under which you discussed with them pleading guilty?

A. They said if **I pled guilty in front of Judge Cooper I'd have a better chance.**

Q. Did, you know that they had discussed your case with Judge Cooper?

A. Yeah, they told me they had just come back from talking to him.

Q. And what did they tell you about that?

A. Judge Cooper --- they said Judge Cooper said if I pled guilty in front of him I'd have a better chance at a life sentence.

(Nov. 17, 2014 PCR Tr. p. 8, line 12-p. 9, line 4 (emphasis added)).

Mr. Allen testified that during the penalty phase of the trial when the victim's family got upset, he had a feeling that he was going to be sentenced to death. However, Mr. Allen also stated that he had confirmed in front of Judge Cooper that there were no promises and that his attorney had gone over the questions with him before Judge Cooper asked them:

Q. . . . but you still said there were no promises made, correct?

A. Yes.

Q. And that was the truth wasn't it?

A. Yes, it was the truth.

(Nov. 17, 2014 PCR Tr. p. 12, lines 12-25).

Mr. Allen later confirmed that he had rejected an affidavit that he thought had stated he was promised a life sentence. (Nov. 17, 2014 PCR Tr. p. 15, lines 10-23). However, though he clearly confirmed that it was clear to him there were no promises, he also confirmed he understood that there was a "better chance" for a life sentence with Judge Cooper than if a jury out of Richland County decided his sentence. (Nov. 17, 2014 PCR Tr. p. 16, lines 9-13). He knew that death was always a possibility because the death notice had not

been taken off the table. (Nov. 17, 2014 PCR Tr. p. 18, lines 8-14).

Allen stated that after the death sentence, he did not complain that he did not receive an expected life sentence. Rather, he advised counsel that he did not want to appeal and wanted to be executed. (Nov. 17, 2014 PCR Tr. p. 19, line 16-p. 20, line 1).

At the conclusion of the PCR hearing, Allen again confirmed that his lawyers told him, "[I]f you plead guilty, Judge Cooper say you got a better chance of getting a life sentence. . . .[] Is that 50 --- 50/50; 51/49; 80/20? I don't know. He just said better chance than with a jury." (March 30, 2015 PCR Tr. p. 197, lines 5-15; see also March 30, 2015 PCR Tr. p. 197, lines 20-22 ("They said Judge Cooper said you got a better chance at a life sentence if I pled guilty in front of him and forego a jury. That's what I was told back in 2005.")).

3. *Ruling on the PCR Issue*

Here, as set out, the record of the guilty plea of February 28, 2005 reveals it was entered within the mandates of *Boykin v. Alabama*, *supra.* Absent any contrary statements by Quincy Allen, there is nothing to rebut his sworn affirmations in open court. *Blackledge v. Allison*, 431 U.S. at 74 ("[A] defendant's solemn declarations in open court . . . 'carry a strong presumption of verity. . . .' Indeed, because they do carry such a presumption, they present 'a formidable barrier in any subsequent collateral proceedings.'"); *see Rayford v. State*, 314 S.C. 46, 443 S.E.2d 805 (1994) (finding a guilty plea voluntary where Respondent admitted committing the crimes, acknowledged the

potential sentences, and stated that his plea had not been induced by promises); *see also United States v. Lambey*, 974 F.2d 1389, 1395 (4th Cir. 1992) (upholding the denial of defendant's post-sentencing request to withdraw his plea based on his expectation of a lesser sentence).

This Court finds Mr. Allen was aware that he was pleading guilty to the two murders at the risk of Judge Cooper sentencing him to death based upon the existence of the statutory aggravating circumstances. Mr. Allen was aware of his right to a jury trial and chose on his own to waive that right and plead guilty and be sentenced by Judge Cooper. As he has confirmed, no promises had been made to him concerning the sentence. It was only that he had a better chance for a life sentence with Judge Cooper. This is a strategic decision. Relief must be denied.

A finding that a guilty plea was made involuntarily is not one to be made lightly. In two cases, *Brooks v. State*, 325 S.C. 269, 481 S.E.2d 712 (1997), and *Holland v. State*, 322 S.C. 111, 470 S.E.2d 378 (1996), the South Carolina Supreme Court reversed decisions by PCR courts that defendants' guilty pleas were involuntary because the evidence did not support the finding that the pleas were not knowing and voluntary. In *Holland* the defendant was advised by his attorney of the possibility that the judge would not accept the plea recommendation. *Holland*, 322 S.C. at 114, 470 S.E.2d at 380. In *Brooks* because the defendant was completely unaware of the negotiated sentence, he could not claim his plea was rendered involuntary by the judge deviating from the recommendation. 325 S.C.

at 272, 481 S.E.2d at 713. Here, there has been no showing by Mr. Allen that he was induced or aware of any promise of a life sentence.[12]

The record reveals and this Court concludes that the Applicant's plea was freely and voluntarily entered within the mandates of *Boykin v. Alabama*, *supra*, as stated above. Further, the sentencing transcript reflects substantial evidence both sides participated in convincing the Judge Cooper of the appropriate sentence which provides additional support for this ruling.

4. *The Sentencing Battle*

At the outset of the sentencing proceedings on March 7, 2005, Solicitor Giese asserted "that Mr. Allen because of his crime spree deserves the death sentence." (ROA, p. 63, lines 2-3). For the ***ten days*** over which the sentencing proceedings spanned, the record reveals aggressive advocacy by both parties. (*See* ROA, pp. 58, line 1-p. 2487, line 20). In fact, on March 16, 2005, Judge Cooper referred to the advocacy as

[12] To the extent that Applicant may rely on *State v. Williams*, 107 Ariz. 421, 422 P.2d 231, 232 (1971), any such reliance is misplaced. This situation is clearly distinguishable. In *Williams*, the defendant sought to withdraw his guilty plea after it appeared the sentencing judge would sentence him to death though the judge had previously made a statement to counsel that "no judge would sentence a defendant to death on a guilty plea." Here, there was a sworn affirmation by Mr. Allen that there were no promises.

"contentious on everybody's part," (ROA, p. 2268, lines 5-12).[13]

Foremost is the fact that after a lengthy penalty phase hearing consisting of 2400 pages of evidence and argument, Judge Cooper sentenced Mr. Allen to death on both of the murder indictments. (ROA, p. 2506). Additionally, a reasonable review of the penalty phase of the trial reveals no promises and no expectations of a guaranteed life sentence. It remains unclear what that alleged evidence is that the defense chose not to present to Judge Cooper, particularly since the defense presentation during the mitigation phase of the sentencing proceeding consisted of copious amounts of evidence, including twenty (20) witnesses and eighty-four (84) defense exhibits. (ROA, pp. 40-43, 54-57).

---

[13] Contrary to the testimony of Mr. Lominack, the record of the sentencing phase reveals a high number of objections (72) by defense counsel and the previous noted recognition by the trial judge that the proceedings between defense and prosecution were "contentious." (ROA p. 2268). The particular objections by the defense team during the penalty phase were at the following transcript pages: ROA pp. 178, 224, 257, 311, 312, 341, 354, 371, 390, 427, 437, 438, 440, 443, 449, 506, 561, 615, 616, 617, 637, 638, 639, 641, 662, 663, 671, 681, 698, 701, 845, 855, 858; (Mitigation): 936, 937, 954, 961, 964, 965, 986, 991, 1221, 1225, 1241, 1253, 1268, 1276, 1278, 1285, 1296, 1297, 1361, 1434, 1435, 1437, 1438, 1449, 1463, 1467, 1471, 1618, 1620, 1640, 1701, 1708, 1720, 1722, 1769, 1812, 1818, 1905, 1906, 1922-23, 1931, 1932, 1933, 1947, 1950, 1953, 1961, 1975, 2014-15, 2031, 2053-54, 2085, 2092-93, 2160, 2249, 2250, 2254, 2259, 2263, 2264, 2268, 2288, 2303, 2304, 2393, 2394, 2395, 2396, 2400, 2419, 2427. These references defeat a claim, which has been suggested by current counsel, that there was an automatic expectation of a life sentence.

The Court would further note that a review of the prosecution's closing argument plainly reveals the State had no knowledge of any deal or expectation of life when it asked: "Justice in this case means one verdict, Your Honor, that's death and the State asks that today for them." (ROA, p. 2449). Similarly, Ms. Pringle asserted the question was how Mr. Allen would be punished, sought to "temper" her "outrage at what is in [her] opinion a dangerous and irresponsible presentation of psychiatric testimony by the Government of South Carolina," (ROA, p. 2452), and expressed her request that the judge find the appropriate sentence was a life sentence, (ROA, p. 2475). Mr. Lominack similarly did not suggest that a life sentence was pre-ordained when he declared that "this case has been hotly contested." (ROA, p. 2475, lines 16-17). He further made his basis for the life sentence throughout his argument. (ROA, p. 2486). On March 18, 2005, the trial judge issued his sentence and revealed the judicial materials and matters he reviewed in coming to the conclusion. (ROA, p. 2447-64).

This Court notes that no motion to reconsider the death sentence was ever made to complain that the Applicant had been promised a life sentence. Nothing in counsel's PCR testimony convinces the Court that a judicial promise was made.

Ms. Pringle testified that there was no offer from the Solicitor's Office for a life sentence in plea negotiations. However, she testified that the Solicitor's Office indicated that they were willing to allow the defense team to meet with Judge Cooper out of their

presence after a defense mental health expert, Dr. Pamela Crawford, had met with them, (Nov. 17, 2014 PCR Tr. pp. 33-36).[14] Subsequent to the Giese-Crawford

---

[14] Testimony regarding the impact of the meeting between Dr. Crawford and Solicitor Giese is not consistent. Counsel Pringle indicated that Dr. Crawford reported to the defense after the meeting that the Solicitor was open to pleading and wanted it resolved, but one of the victim's family was opposed to a life sentence, and the Solicitor was going to respect the wishes of that family and would not withdraw the death notice. (Nov. 17, 2014 PCR Tr. pp. 35-36; *see also*, Nov. 17, 2014 PCR Tr. pp. 75-75 (purpose of sending Dr. Crawford to reveal defense information to Solicitor Giese)). Ms. Pringle claimed that the Solicitor advised Dr. Crawford that it could be resolved if Judge Cooper would give him life, which he believed he would do, although the Solicitor did not indicate to Dr. Crawford why he thought that way. (Nov. 17, 2014 PCR Tr. pp. 35-36).

At the PCR hearing, Dr. Crawford testified that the reason she met with Solicitor Giese was because the defense thought she had credibility with that office because she had worked with them previously as a state expert. (Nov. 17, 2014 PCR Tr. pp. 94-95). Dr. Crawford stated that when she went over her findings with Solicitor Giese he was skeptical about what she had to say, and she believed that the State was still going to contest everything and seek the death penalty. (Nov. 17, 2014 PCR Tr. pp. 101-02).

Former Solicitor Giese testified that he met with Dr. Crawford as a defense expert in the Allen case and discussed her position that Mr. Allen had schizophrenia. He recalled that when she asked what he thought would happen if he pled in front of Judge Cooper, and Solicitor Giese answered that Judge Cooper might give him life if you can prove Mr. Allen has schizophrenia. (March 30, 2015 PCR Tr. pp. 140-41). Solicitor Giese stated, at that point, he became interested in the mental aspect of the case and learned later about some North Carolina doctors who had opined that Mr. Allen was malingering, and Mr. Giese also got Dr. Ballenger from Charleston involved in the case. (March 30, 2015 PCR Tr. pp.140-41).

meeting, a meeting with Judge Cooper was set up to discuss sentencing with the approval, but not the presence, of the Solicitor's Office.

The Applicant contends that during a February 24, 2005 meeting with defense counsel and Judge Cooper, there was a discussion about Scott Turow's book, "The Ultimate Punishment" at which time Judge Cooper expressed his opinion that the death penalty should be reserved for the "worst of the worst." (Nov. 17, 2014 PCR Tr. pp. 32-34, 44; Applicant's Exhibit 2). Ms. Pringle testified:

> And I told him in some details the side of version of it as I could and he said that he agreed with Scott Turow that the, that the death penalty may be appropriate for the worst of the worst, but that that was determined by what the person did rather than by who the person is and I, I only remember saying, well I'm worried that you might think Quincy is the worst of the worst and, but I, I only remember telling him what he'd done. I'm trying to think of the middle of the conversation. The end of it, the, the problem was he didn't want to say directly and it was, was, I kept saying to him I know what I think you're saying to me and I think you're telling me you'll give him life. I just want, the last thing I remember saying is I cannot be sitting on a witness stand in a capital PCR explaining why I pled my client in a death penalty case where he ended up getting death where I had no assurance from you, from the judge. I said I think I know what you're saying, but I've, you

> know, I don't think I can do that. And then he said Fielding there will never be a capital PCR hearing, you don't have to worry about that.

(Nov. 17, 2014 PCR Tr. pp. 38-43). Ms. Pringle testified that Judge Cooper kept saying to trust her expert. (Nov. 17, 2014 PCR Tr. p. 44).

Ms. Pringle stated that, subsequent to the defense team's meeting with Judge Cooper, she told the Applicant what happened during the meeting, and she thought "what Judge Cooper was trying to say was if Quincy would plead guilty, that he was going to give him a life sentence and that it was my advice that he should do that." (Nov. 17, 2014 PCR Tr. p. 47, lines 2-4). Counsel testified that she did not use the word "promise" or "guarantee" with Allen. (Nov. 17, 2014 PCR Tr. p. 47, line 23-p. 48, line 1).

She confirmed that Mr. Allen was telling the truth when he stated that there were no promises made to him as to whether he would receive a life sentence. (Nov. 17, 2014 PCR Tr. pp. 63-64). She confirmed that Mr. Allen was advised that his best chance for a life sentence was to plead in front of Judge Cooper. (November 17, 2014 PCR Tr. pp. 64-65). Counsel stated that the way the whole thing had evolved was that she thought Judge Cooper was telling them he was going to give him life, and her co-counsel also thought Judge Cooper's intention was to give him life "if we were to place it in his hands." (Nov. 17, 2014 PCR Tr. pp. 65-66; *see also* Nov. 17, 2014 PCR Tr. pp. 84-85).

There was also evidence introduced that the defense team was of an opinion that a life sentence was not a

guarantee after the meeting with Judge Cooper. During the *de bene esse* deposition of Dr. George Corvin, two emails were introduced which reveal that the defense still had to convince the judge before there would be a life sentence. An email from Ms. Pringle to Dr. Corvin sent on February 28, 2005 at 9:06 AM (the morning of the guilty plea) goes to the heart of this litigation and states in pertinent part:

> . . . We are pleading him this morning. The judge has indicted he will give him life, but we still have to have a full blown penalty phase. The state is going to contest that he is mentally ill and will bring Karla DeBeck down to testify. So we have to fight this issue. **I think if we can convince him Q is mentally ill the judge will give him life**. . .

(Dr. Corvin Deposition, pp. 40-41; Corvin State Exhibit 1 (emphasis added)).

Consistent with lack of a guarantee of a life sentence, in another email to Dr. Corvin,this one dated **February 25, 2005 at 10:34 AM,** from Ms. Pringle to Dr. Corvin, she wrote: "George – we may need you on Thursday or Friday of next week. Things have changed and we may plead with an **extensive proffer of evidence** before the judge . . . ." (Dr. Corvin deposition, p. 40, lines 8-14; Corvin State Exhibit 1 (emphasis added)).

These critical factors—"I think if we can convince him that he was mentally ill the judge will give him life" and the expressed need to present "an extensive proffer of evidence"—speak volumes about the fact that

this was not a guarantee, but rather a strategic decision by counsel about the perceived best course. The strategic needs and hopes of counsel revealed through these probative emails were made **after** the meeting with Judge Cooper.

However, as evident from the factual basis set out at the plea and sentencing proceedings, the Applicant fits into the "worst of the worst" category Judge Cooper had mentioned. As Judge Cooper outlined in his sentencing statement (ROA, pp. 2488-506), Mr. Allen set out on a journey to become a serial killer, and the results of that journey were: the attempted murder of Mr. James White (shooting of him "for practice"), which demanded retribution; the murder of Ms. Dale Hall where the judge found "absolute depravity" and the subsequent burning of her body, which demanded retribution; the callous killing of Mr. Jedediah Harr and the subsequent stalking of Mr. Brian Marquis for the purpose of killing him, which made further demands for retribution. As Judge Cooper admitted appropriately, until he received the evidence, he had no idea of the pain Mr. Allen had caused the victims or the thought process he went through before the murders, nor was Judge Cooper aware of Mr. Allen's express desire to kill others. (ROA, pp. 2503-04).

5. *Quincy Allen's Lellers*

Further, Quincy Allen's own writings to the courts of this State contradict the present position that he was promised a life sentence. In fact, Applicant's writings are directly contradictory to the position put forward within present litigation. On June 2, 2005, the Court

received a letter that Applicant sent the Honorable G. Thomas Cooper which stated:

> Dear Judge Cooper 5-14-05
>
> I keep asking my lawyers to stop my appeal, but they refuse to do it. I have no wish to appeal your decision. So if you can please talk to my lawyers: E Fielding Pringle and Robert Lominack. I would gladly appreciate it.
>
> Sincerely
>
> S/ Quincy Allen

(Letter, May 14, 2005 to Judge Cooper, Copy Attached).

In a letter dated January 29, 2006 (after the hearing in which John Freeman testified), Applicant wrote in part:

> My attorneys would not even tell the SC Supreme Court that I wanted to waive my appeals when I received my sentence on Friday March 18th 06. [sic]. When Fielding Pringle approached me in the hallway after the sentence was read she said that we will appeal. **I told her flat out that I had no desire to appeal**. I finally had to write Judge Cooper to let him no [sic] my intention since they wouldn't listen to me

(Letter, January 29, 2006 to Chief Justice Toal, Copy Attached). These are not the only such letters. However, these letters reveal, contemporaneous to the time of the plea, that Applicant was not misled, nor did he believe he had dissatisfaction with Judge Cooper

about his sentence. Conspicuously absent from the post-sentencing letters, or any letter written by Applicant in the Respondent's possession, is any claim of a denied promise. To the contrary, the letters express confidence in the ability of Judge Cooper to do what he was being asked to do, not disagreement with the sentence or suggestion it was based upon a false promise. This completely rebuts the legal claim of an involuntary plea.

Again, for all of these reasons, the Court is not convinced that a promise was made and relied upon. In the absence of such a showing, Applicant has not demonstrated *Strickland* deficient performance and prejudice. This claim is denied.

b. *For Encouraging Guilty Plea Though Richland County Juries Do Not Generally Impose Death Sentences*

In 11(a)(ii) Applicant asserts that trial counsel rendered ineffective assistance by encouraging Applicant to plead guilty in Richland County though, according to Applicant's allegation, Richland County juries do not generally impose death sentences. This Court finds Applicant fails to meet its burden of proof on this issue; Applicant's showing is neither compelling nor concrete.

Plea counsel, Ms. Pringle, testified during the PCR action that when she met with Applicant to discuss whether to plead guilty and have Judge Cooper issue the sentence or have a jury trial, the only jury-given death sentence she was aware of was that in the Jason

Byram case.[15] She recalled that there had not been a death verdict in Richland County for a number of years. (November 17, 2014 PCR Tr. pp. 49-50).

Co-counsel at the plea, Mr. Lominack, testified that he was aware of an impression that juries in Richland County rarely gave the death penalty. (Nov. 17, 2014 PCR Tr. p. 146, lines 20-25). He recounted that there was an aggravated murder case (Lino Delacruz) where a life verdict was entered. (Nov, 17, 2014 PCR Tr. pp. 146-47). Mr. Lominack testified about his knowledge of the tendency of Richland County jurors to rarely impose death. He confirmed that there were life sentences given to Lavar Bryant, Felix Cheeseboro, Eugene Carey, and Max Knoten. (Nov. 17, 2015 PCR Tr. pp. 160-61).

This Court concludes counsel was not deficient in their investigation concerning the history of Richland County juries and the death penalty. Further, counsel was not deficient in their advice in recommending that a trial by a Richland County jury be waived and that Applicant seek sentencing by Judge Cooper. This is especially so where the decision was made with consideration of counsel's own understanding of Judge Cooper's fairness and sentencing history. Counsel

---

[15] This Court takes notice that other Richland County defendants sentenced to death after the 1977 act included Donald Gaskins (*State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (1985)), Jonathan Dale Simmons (*State v. Simmons*, 310 S.C. 439, 427 S.E.2d 175 (1993), *reversed on other grounds by Simmons v. South Carolina*, 512 U.S. 154, 114 S. Ct. 2187 (1994)). Jason S. Byram (*State v. Byram*, 326 S.C. 107, 485 S.E.2d 360 (1997)), and Marcellus Pierce (*State v. Pierce*, 289 S.C. 430, 346 S.E.2d 707 (1986)).

would have been aware that by recommending Judge Cooper as the sentencer they were abandoning any ability to have a Richland County jury sentence Applicant since that would be the appropriate procedure under South Carolina law when a capital defendant pleads guilty.

Applicant again fails to demonstrate *Strickland* deficient performance and prejudice. This claim is denied.

c. *For Failing to Adequately Litigate Issue of Striking Death Penalty on Basis of Race*

According to Applicant's 11(a)(iii) claim, trial counsel failed to adequately litigate the issue of striking the death penalty on the basis of race, On November 5, 2014, Respondent filed a motion in this Court seeking a more definite statement of this allegation from Applicant.[16] There was no amendment to the claim.

In simplest terms, the Applicant has failed in his burden of proof on this issue. Defense counsel filed a Motion to Quash the State's Notice of Intent to Seek the Death Penalty due to Racially Discriminatory Prosecution by the Fifth Judicial Circuit Solicitor's Office, and that motion was argued before Judge Cooper on Monday, February 14, 2005. (ROA, pp. 2652-68). At the conclusion of that argument, defense counsel offered to provide supplemental documentation

[16] Respondent requested a more definite statement of this claim by letter dated October 21, 2014, but opposing counsel did not respond to that letter. *See* Motion for More Definite Statement.

on the issue. (ROA, p. 2666-68). The trial court heard further argument on Friday, February 18, 2005. (ROA, pp. 2791-800). The trial court then orally denied the motion, noting the great differences with facts and defendants in different cases in general, and stating the following in conclusion:

> ...
>
> [B]ased on the showing that has been made—and I know there's been great effort put into this showing by the defense—I do not feel that I can dismiss the death notice based on these facts as presented to the Court.
>
> There are perhaps sociological studies or statistical studies that would prove more convincing than the defense has been able to develop. And I agree that Ms. Pringle's analysis that this is a very issue to—not just that it's sensitive, but that it's a difficult issue to try and prove based on the records that are available in the Clerk of Court's Office. They may be the types of records that would raise an eyebrow or would at least give—should give—the Court concern, but I'm not at this point in time convinced that this case should be dismissed, based on the evidence that has been presented to me.
>
> ...
>
> So I must respectfully deny your Motion to Dismiss the Death Notice Based on Alleged Racially Discriminatory Prosecution by the Fifth Judicial Circuit Solicitor's Office.

(ROA, pp. 2800-03). Clearly, there was not a total failure by counsel to raise this issue. They made an allegation that the death penalty had been sought in a discriminatory way, but they were ultimately unsuccessful in convincing Judge Cooper of that claim.

During the PCR proceeding, the Applicant introduced as Applicant's Exhibit 7 the Motion to Quash Notice of Death Penalty. (Nov. 17, 2014 PCR Tr. pp. 155-56). The Applicant additionally presented as Applicant's Exhibit 8 a 2010 law review article compiled after the sentencing proceeding.

This Court finds the article to be of limited probative value. It is authored by John H. Blume, Sheri L. Johnson, Emily C. Paavola, Keir M. Weyble, and titled *When Lightning Strikes Back: South Carolina's Return to the Unconstitutional, Standardless Capital Sentencing Regime of the Pre-Furman Era.* 4 Charleston L. Rev. 479 (Spring 2010).[17] (November 17, 2014 PCR Tr. pp. 156-59). Further, this Court limited the article's introduction to "data was available prior to this hearing." (November 17, 2014 PCR Tr. p. 159, lines 14-17).[18]

---

[17] It must be noted that the author of the law review article is John Blume, Esq., who is both a partner in PCR counsel Franklin-Best's law firm, Blume, Norris and Franklin-Best, LLC, and someone who was consulted prior to the entry of the guilty plea by counsel Pringle. (Nov. 17, 2014 PCR Tr. pp. 65-66, 211-13).

[18] This Court's assessment of limited admissibility and probative value of the article is appropriate. Within the article, the Mr. Blume and the authors state:

> [R]esearchers assembled profiles on 152 total homicide cases that occurred in Richland County between 2000 and 2008. Of those 152 cases, 117 – or 77% – involved facts that would render them death-eligible under South Carolina's current death penalty statute as interpreted and applied. Out of the 117 legally death-eligible homicides, only 4—a mere 3.4% of the death-eligible cases—were actually prosecuted as a capital case.

Also, the article specifically makes a reference to the Solicitor, but fails to address any records from 2007 through 2010 while Solicitor Giese was still solicitor:

> Although no formal study has been done in Richland County, the racial impact of the official actions taken by Solicitor Giese is dramatic. African-American males in the Richland County community are being noticed for death--and white defendants are not. Solicitor Giese has managed to maintain a record of 100% discretionary use of the death penalty against non-white defendants, thereby singling out non-white, primarily African-American, defendants for the ultimate penalty of death. Put simply, life and death decisions line up perfectly with the color of the defendant's skin.

Id.

The article further states:

> Researchers collected data on all homicides in Richland County for the years 2000 to 2008. During this period of time, there were 152 homicide profiles collected. One-hundred and seventeen (117) – or 77% – of these cases involved facts that made them death-eligible, yet Richland County solicitors sought the death penalty in only 4 of these cases. With regard to the remaining 113 cases in which the State could have, but elected not to seek the death penalty, a comparison with the facts of Mr. Mercer's case again reveals no meaningful difference that would render him more deserving of death:

Here, the record reveals Solicitor Giese's cogent reasons as to why he sought the death penalty in this case.

> As Your Honor knows, each case is different. They all live on their facts or die on their facts. In this specific case I looked at the facts of the case, I looked at his prior bad acts. The thing that struck me about the cases we had here in South Carolina, and Richland County, the young lady that he killed prior to the Roadhouse murder, he had basically, I felt like, physically tortured her. He shot her in the legs first and I think then killed her and I want to say burned her body, found not mistaken that had a profound effect on me. The homicide at the Roadhouse had an effect on the and on my office then you know what he had done in North Carolina [two murders] obviously had something to do with it as a prior bad act so I weighed all that. I knew that at least one of the victim's family in the case was intent on seeking the death penalty so I weighed all that he made the decision to file.

> • 38 of the 113 cases involved armed robbery;
> • 4 involved physical torture;
> • 85 involved facts that would support more than one aggravating circumstance;
> • 57 cases involved three or more aggravating circumstances.

Id.

(March 30, 2015 PCR Tr. pp. 128-29). He testified that he had offered no plea negotiations in this case. He stated that this case was shocking because it was a spree kind of killing. He stated that the government was focused on seeking the death penalty throughout until the sentence was given. (March 30, 2015 PCR Tr. pp. 131-32).

The Supreme Court has determined that absent a showing that a system operated in an arbitrary and capricious manner, a petitioner "cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty." *McCleskey v. Kemp*, 481 U.S. 279, 306-07, 107 S. Ct. 1756 (1987) (emphasis in original); *see Williams v. Illinois*, 399 U.S. 235, 243, 90 S. Ct. 2018 (1970) ("The Constitution permits qualitative differences in meting out punishment and there is no requirement that two persons convicted of the same offense receive identical sentences."); *see also Pulley v. Harris*, 465 U.S. 37, 50-51, 104 S. Ct. 871 (1984) ("There is thus no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it."); *cf. Gregg v. Georgia*, 428 U.S. 153, 199, 96 S. Ct. 2909 (1976) (explaining that pre-sentencing decisions by actors in the criminal justice system that may remove an accused from consideration for the death penalty are not unconstitutional).

Simply put, the Constitution does not prohibit the use of prosecutorial discretion. *McCleskey v. Kemp*, 481 U.S. at 307-08, n.28. "The Constitution does not require

that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment." *Id.* at 315-19.

In *Thompson v. Aiken*, 281 S.C. 239, 315 S.E.2d 110 (1984), our own Supreme Court similarly opined that the pattern Applicant attempts to establish is instead explained by a variety of other factors. The Court found this issue "is not appropriately framed for resolution in the context of a capital case," and cautioned:

> **... Because we are convinced that the issue which petitioner sought to raise is not appropriately framed for resolution in the context of a capital case, we would recommend to the bench and bar that judicial resources be applied to more fruitful endeavors.**
>
> In the record before us, the petitioner has made an elaborate presentation of testimony and data purporting to show that prosecutors in this State consciously and systematically choose to seek the death penalty in a racially discriminatory manner. As noted by the post-conviction court in its Order, the petitioner has relied upon gross statistics and probabilities. The petitioner has elected not to consider various intangible factors entering into prosecutorial decisions. The petitioner has provided no direct testimony to support his charge that impermissible influences routinely distort the application of capital punishment throughout this State.

In the final analysis, the allegation of statewide "patterns" raised by a specific capital defendant has no real bearing upon his individual guilt or innocence nor upon the correctness of any sentence imposed in his particular case. The commission of an aggravated murder places every potential defendant at risk; he may indeed be ultimately sentenced to death. On the other hand, he may never be caught. He may never be tried, for any number of reasons. He may plead guilty or be tried on a lesser charge. A jury may, for reasons of its own, elect to acquit him or, in sentencing, elect to spare his life. Our role as an appellate court is not to base rulings upon such possibilities. Far less are we entitled to intrude upon the operations of executive officers when we have no more than general data compiled for academic purposes.

The petitioner acknowledges that this Court has already settled the scope of proportionality review. *State v. Copeland*, 278 S.C. 572, 586-596, 300 S.E.2d 63, *cert. denied*, 460 U.S. 1103, 103 S.Ct. 1802. Prosecutorial discretion plays no role in such review, yet the sole basis upon which this or any other petitioner could offer a showing of "patterns" would be an argument based on disproportionate punishment. **We are not persuaded and accordingly we recommend that the bench and bar focus attention upon real and substantial issues in future capital cases.**

Thompson v. Aiken, 281 S.C. at 241-42, 315 S.E.2d at 111 (emphasis added).

This Court finds that Applicant has failed to show either deficient performance or Sixth Amendment prejudice on this issue and dismisses Applicant's claim accordingly.

d. *For Failing to Elicit Any Execution Impact Evidence*

Applicant asserts in 11(a)(iv) that trial counsel was ineffective for failing to elicit any execution impact evidence. On November 5, 2014, Respondent filed a motion in this Court seeking a more definite statement of this allegation from Applicant.

As an initial matter, this Court finds that not all evidence styled as "execution impact" is admissible in this jurisdiction. *See State v. Dickerson,* 395 S.C. 101, 122, 716 S.E.2d 895, 906-07 (2011) ("For example, "[a] capital defendant is prohibited from directly eliciting the opinion of family members or other penalty-phase witnesses about the appropriate penalty . . . .' A capital defendant also cannot present witnesses who will testify as to what punishment the jury 'ought' to recommend. However, defense witnesses who know the defendant well can beg for mercy on his behalf." (internal citations omitted)).

During the PCR proceeding, plea counsel, Mr. Lominack, testified that he did not recall what was specifically discussed about so-called execution impact evidence and how that differs from family member evidence. (November 17, 2014 PCR Tr. pp. 153-54). Again, this Court finds that Applicant has failed in his

burden of proof; however, as the evidence at issue is shared with another claim, the Court addressed the instant claim in tandem with the next claim regarding mitigation evidence in general.

e. *For Failing to Present Mitigation Evidence of Applicant's Childhood Trauma and Abuse*

In 11(a)(v) Applicant alleges that trial counsel failed to present mitigation evidence of Applicant's childhood trauma and abuse. The record reflects and this Court finds that defense counsel indeed presented the following ample evidence of Applicant's childhood in their mitigation case:

> Appellant's mother was a Jehovah's Witness. Neighbor Brian Santiago recalled that when appellant was a teenager he would be "kicked out of the house" for "weeks and weeks and weeks at a time" for such things as not reading out of a religious book "to his younger siblings. It was something that he was required to do . . . two hours at a time every evening." R. 1762, l. 13-1767, l. 1.
>
> Santiago testified, for example, that appellant "got kicked out on Christmas Day in 1987," Santiago remembered that he and his father searched for appellant. They "found out he had to sleep out at the McDonald's playground." Santiago also recalled incidents during his first two years in high school where appellant "would come out from a neighbor's yard where he was sleeping in the bushes." R. 1757, l. 20 – 1758, l. 17. Santiago gave appellant

a jacket and a sweater so that he could attempt to keep warm. R. 1758, ll. 12 – 17. . . . [S]ocial worker Deborah Grey chronicled for the court how appellant was repeatedly denied shelter and food, and how he suffered physical abuse, and repeated humiliation—such as being put in a trash can and the lid closed—at the hands of his mother.

Santiago also remembered that appellant developed a "bad infection in his toes" because he continued to have to wear the same pair of socks. Appellant stayed with Santiago's family for a short time in 1987. At that time, Santiago said, his father tried to contact appellant's father in Colorado to let him know that "Quincy needs some help." R. 1759, ll. 5 - 19.

Santiago testified, and his family would corroborate, that appellant was always "very polite, thankful for everything we did for him, you know, just incredibly thankful." R. 1760, ll. 15 - 17. However, Santiago described that "slowly but surely he wasn't as cheerful as he normally was when I first met him . . . it was really evident that he was becoming more and more resentful of the situation." R. 1760, l. 15 - 1761, l. 9.

Santiago explained that part of the resentment was that appellant had expressed a desire to become a military police officer, and Santiago's father talked with appellant about that goal since he had been in the military for twenty-three years. The problem was, Santiago

said, that appellant's frequent homelessness due to his mother's actions caused him to miss too many days in school. "It was a slow but definite deterioration." R. 1757, l. 2 - 1761, l. 15.

Santiago testified that appellant began lighting fires at night "to try and stay warm." Santiago later suspected appellant also began starting "fires maybe kind of lashing out or looking for some attention." R. 1761, l. 16 - 1762, l. 12.

Joseph Santiago was Brian Santiago's father. Mr. Santiago met appellant around 1995 when he retired from the military and moved his family to Columbia, South Carolina. R. 1771, l. 13 - 1772, l. 23. Santiago described appellant as "just a young boy, just like all other young boys really." R. 1772, l. 21 - 1773, l. 11.

Mr. Santiago recalled appellant was also "happy, engaging with other boys, playing, friendly, always polite." R. 1773, ll. 14 - 22. However, Mr. Santiago recalled that appellant "started having some problems though evidently at home. His mother would, you know, kick him out of the house." Mr. Santiago explained:

> And I just kind of felt bad for the young man, you know, I was thinking he was more along Brian's age, to tell you the truth. I was feeling bad for that. So, you know, we would kind of give him a meal here and there. And then that pattern just kind of kept coming up.

> But really December of '97 is when it kind of reached a peak. His mother kicked him out on Christmas Eve. And it was freezing cold that day. I mean, it was freezing cold, bitter cold. And so we asked him just to spend the night with us.

R. 1774, ll. 3 - 13.

Mr. Santiago recalled that he telephone appellant's father in Colorado and "explained the situation to him." R. 1775, ll. 2 - 4. Santiago said he told appellant's father: "Quincy is out on the streets, here it is the holiday season. I don't care what the boy did, you know. You don't kick a boy out, especially when it is bitter cold like this." R. 1775, ll. 5 - 9.

Mr. Santiago recalled appellant ultimately was let back in with his mother "and then a week or two later or something like that, then he's back out on the street. It was kind of in again, back home, out, in. It was—very hectic. He was trying to go to school. He expressed to me that he wanted to become a policeman." R. 1775, ll. 18 - 25.

Mr. Santiago said he thought going into the military would be good for appellant but that appellant had to finish school first. "You just can't get there from here if you don't have continuity in school. He did have a car, but the car would be pulled from him by his mother whenever she—whenever they had some

arguments, disagreements." R. 1775, l. 18 - 1776, l. 20.

Mr. Santiago testified appellant at times lived in a "tree house" around the winter of 1997, and that his "clothes were in disrepair, smelled pretty strong." Appellant's shoes were tom and "he needed a place to say." R. 1777, l. 16 - 1778, l. 1. Mr. Santiago told the court: "I don't know if he lost hope or he just didn't see that he was making any progress or what the situation was . . . Quincy was staying out on the street. He was sleeping over at the school in the bushes." Appellant then moved into an abandoned house in the neighborhood. R. 1779, ll. 7 - 17.

Mr. Santiago recalled, "so I kind of forbid my boys to kind of hang around with him anymore because I didn't want my boys to get into that kind of mischief." R. 1778, ll. 2 - 21. Mr. Santiago lamented: "If I had to do it all over again . . . I would have pulled him into my house and kept him for six months." R.1779, ll. 7 - 17.

Inge Santiago testified that her son, Brian, met appellant playing basketball. R. 1784, l. 18 - 1785, l. 20. Santiago said "as time went on and he [appellant] got kicked out of his house every once in a while, you could tell he was kind of—he wasn't as cheerful anymore, he was down most of the time." R. 1786, ll. 1 - 19.

Mrs. Santiago described how appellant would be "kicked out of his house and he is out there in the freezing cold." R. 1787, ll. 9 - 21. Mrs.

Santiago recalled appellant "was very run down. I mean, his clothes was (sic) dirty, and he was smelling very bad." R. 1788, ll. 3 - 8. Mrs. Santiago remembered appellant telling her: "You know, every time my mom has a new boyfriend I get kicked out. And I really felt bad for him." R. 1793, ll. 2 - 11.

Mrs. Santiago recalled at times when appellant's mother kicked him out of the house that her family would "pack him some sandwiches at least or tell him to come home, you know for supper, let him have a meal and ask him if he's cold." Mrs. Santiago said they also gave appellant "some blankets and some wann clothes." Mrs. Santiago testified "sometimes he spent the night in our tree house, which I didn't know until he came out the morning." Mrs. Santiago told the court that appellant "was ashamed because he would never come into the house, you know, to have breakfast. He would kind of run off." Appellant told Mrs. Santiago: "Brian is so lucky to have a good fami1y like this." R. 1788, l. 20 - 1789, l. 18.

Mrs. Santiago described that, as this process continued, appellant started setting fires. Mrs. Santiago said she talked to her husband and they came to conclusion it was best for their children not to be around appellant any longer. R. 1788, l. 3 - 1790, l. 23.

Edwina Walker was a neighbor of appellant's family when he "was a little boy back in 1981." R. 1830, l. 8 - 1831, l. 20. Walker described how

appellant's mother treated him badly as a young child, and how she beat appellant with a belt. R. 1833, l. 6 - 1835, l. 6.

Deborah Grey was a licensed social worker. She received a bachelors degree from Wake Forest University, a master's degree from Wake Forest University in communications and a master's degree in social work from the University of North Carolina. R. 1013, ll. 2 - 10. Grey prepared appellant's social history. R. 1020, ll. 4 - 6.

Grey testified appellant's mother, Sharon Cousar, told her she "looked on Quincy as liability . . . he was almost like a stepchild." R. 1045, l. 9 - 1046, l. 13. Grey said records revealed that appellant's day care center took him to Richland Memorial Hospital in June of 1981. Appellant returned to the emergency room three days later, and the hospital records revealed appellant's mother did not fill the prescription for Amoxicillin she was previously given, and that appellant's fever therefore become [sic] worse "although mother appears unconcerned." R. 1048, l. 1 - 1049, l. 20. Appellant told hospital officials she did not have the prescription filled or give appellant aspirin "because she had other things on her mind . . . mother is hostile and shows no affection for the child." R. 1049, l. 21 - 1050, l. 5.

Grey testified that when appellant was in kindergarten and in the first grade his mother would beat him "usually with sticks or switches,

and then putting him, locking him into the closet where she would leave him for extended periods of time." Grey said appellant's early years were "marked by exposure to profound violence and neglect." R. 1056, ll. 5 - 24. Grey described one incident when appellant was six years old where "his mother beat him, and then put him into the trash can, the big kind with wheels on it, and [she] slammed the lid shut." R. 1056, l. 25 - 1057, l. 7.

From first grade through the third grade appellant's mother "beat him with sticks or belts or her hands. Also at that period of time she began to withhold food as a way of punishment . . . not just for mealtime but sometimes for extended periods of time." R. 1057, l. 11 - 1058, l. 3. Grey described how appellant's mother would "mark her storage containers so she could tell if anyone had eaten any of her food." This led to appellant's eating disorder, rumination disorder[19] R. 1060, l. 24 - 1061, l. 16; R. 1069, ll. 5 - 24. One of appellant's brothers verified to Grey that appellant's mother:

> Would tie him up to the ends of the bed with extension cords. And the way that he described it was she'd tie him up and put

---

[19] "Repeated regurgitation and rechewing of food for a period of at least one month following a period of normal functioning . . ." Kaplan & Sadock, Comprehensive Textbook of Psychiatry/ VI, *Feeding and Eating Disorders of Infancy and Early Childhood,* at p. 2322, Table 40-2, *Diagnostic Criteria for Rumination Disorder* (6th Ed.).

> his arms up kind of like Jesus and tie his arms up with cords, and then she would whip him either with sticks or belts or whatever. She would leave him hanging there and then come back and do it some more.

R. 1064, ll. 8 - 15.

Around the time appellant was attending Heyward Gibbes Middle School his mother "would have him strip down and take all of his clothes and hold on to the chair back in his underpants while she would whip him. It was during this time when appellant's mother "would put him out." Appellant would ring the doorbell, and "if she didn't let him in, it meant he was not going to be allowed back in the house." Appellant had to sleep outside on the porch overnight "without a coat if it's winter." Grey said this frightened appellant because of the neighborhood dogs, and that appellant would rather sleep on the bathroom floor when he was being punished in this manner. R. 1072, l. 18 - 1073, l. 20.

The practice of locking appellant out of the house continued while appellant was in high school. "She continued to withhold food, so at this point basic food and shelter were issues that were being withheld as punishment . . ." R. 1088, l. 20 - 1089, l. 18.

Dr. Richard Harding, the former president of the American Psychiatric Association, and a child

psychiatrist, treated appellant for his rumination disorder. Dr. Harding diagnosed appellant as having an "atypical eating disorder; depression, major, non-psychotic . . . He noted that his affect was flat, judgment is poor . . ." R. 1301, ll. 11 - 13; 1306, l. 12 - 20. Dr. Harding said appellant's mother was "demanding and difficult," and that she was suspicious of him as a psychiatrist because of her religious beliefs. The mother also believed that "psychotic medications" should not be administered, and she was very uneasy with appellant being prescribed Prozac although "it did help some" with the disorder.[20] R. 1327, l. 19 - 1329, l. 6.

> Grey also testified consistently with Brian, Joseph, and Inge Santiago that appellant "started living in the bushes and staying with friends when he could." Appellant also continued trying to go to school. R. 1107, l. 19 - 1108, l. 3.

(Final Brief of Appellant (Direct Appeal), pp. 3-10).

The above recitation details just a portion of the mitigation case presented by defense counsel during the mitigation phase as summarized by Applicant's own appellate counsel in the direct appeal. Defense counsel presented numerous witnesses at that stage

---

[20] Dr. Pamela Crawford, a perennial prosecution witness, evaluated appellant on six different occasions between May 5, 2004 and March 6, 2005. She diagnosed appellant as being schizophrenic, and she was a defense witness in this case. (R. p. 1519, l. 20 - 1520, l. 14). Dr. Donna Schwartz-Watts also diagnosed appellant as being schizophrenic, and she noted the evidence appellant had auditory hallucinations instructing him to harm others. (R. p. 1800, [sic] l. 3-1816, l. 2).

including three of Applicant's teachers from high school. The record shows that defense counsel presented an extensive mitigation case and giving great focus to Applicant's childhood. While Applicant presented several different witnesses in the PCR action, the evidence in PCR was simply not particularly compelling or of great import. Applicant's PCR claim on the mitigation issue is hereby denied.

f. *For Failing to Object to the Imposition of Death Sentences at the Time the Sentences Were Rendered*

In 11(a)(vi) Applicant asserts that trial counsel were ineffective for failing to object to the imposition of death sentences at the time the sentences were rendered. Applicant has failed to identify a basis for objection.

During the PCR proceedings, plea counsel, Mr. Lominack, stated he did not object after Judge Cooper imposed the death sentence. He claimed at that point they were shocked and felt "blindsided" and didn't say a word and just walked out. He further stated that there was no reason why the defense team did not file any post-trial motions. (November 17, 2014 PCR Tr. pp. 152-53).

Plea counsel, Ms. Sampson, testified at the PCR hearing that after sentencing, counsel "might have talked about, do we file an appeal. That was going to be automatic but none of [them] thought to go run back in the room and do anything that minute. [They] just knew [they] had time." According to Ms. Sampson, counsel decided to "figure that out later." (November 17-18, 2014 PCR Tr. p. 112, lines 5-11; p. 113, lines 9-

13; *see also* pp. 217-18 (PCR testimony of John Blume, Esq., recalling plea counsel "were very upset" at sentencing, but opining it appeared to him to be more of a post-conviction issue, though he had no recollection of giving any "specific legal advice" as to what counsel should do after sentencing)).

In sum, Applicant has failed to articulate what objection at sentencing would be appropriate, and also failed to show counsel performed deficiently by failing to raise such an objection at sentencing. Consequently, this claim must be dismissed.

g. *For Failing to Object to the Trial Court's Confusing of the Competency to be Executed Standard With the Standard for Finding Mental Illness*

In 11(a)(vii) Applicant alleges that trial counsel were ineffective for failing to object to trial court's "confusing the competency to be executed standard with the standard for finding applicant to be mentally ill." (Third Amended Application, p. 3). The record shows this claim is without merit. (*See* ROA, pp. 2488-507).

Plea counsel, Mr. Lominack, testified that there was no reason that he failed to object to Judge Cooper's sentencing statement where he discussed the standard to be executed relating to mitigation and mental illness. He testified that when he reviewed Judge Cooper's written order he felt that the mitigation

evidence standards of *Lockett v, Ohio*[21] was not what Judge Cooper did. (November 17, 2014 PCR Tr. p. 154).

This Court finds counsel was not deficient in failing to object to Judge Cooper's statement where he discussed the failure to show that he met the standards of competency to be executed because it does not indicate that Judge Cooper declined to consider the mitigation evidence as presented. Rather the order expresses a conclusion that Judge Cooper did not give the evidence of mental illness the weight that Applicant wanted him to give, Since consideration of the evidence was properly given, counsel could not be deemed ineffective for failing to object. The suggestion that Judge Cooper confused the concept with guilty but mentally ill, a guilt phase issue, is not persuasive. The transcript is more fairly read to reflect a global assessment of the facts and circumstances before the sentencing judge, which he considered, weighed and narrowed, until arriving at his sentencing conclusion. Applicant has not persuaded this Court that the

---

[21] 438 U.S. 586, 605, 98 S. Ct. 2954 (1978) (finding state "statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendants character and record and to circumstances of the offense proffered in mitigation" offends the Eight and Fourteenth Amendments); *see also Eddings v. Oklahoma,* 455 U.S. 104, 114, 102 S.Ct. 869 (1982) (interpreting rule in *Lockett:* "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence."). *But see Lockett*, 438 U.S. at 605 n.12 ("Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.").

sentencing court confused the competency to be executed standard with the standard for finding mental illness. As such, the Applicant has failed to establish either prong of *Strickland*.

E. Alleged Involuntary Guilty Plea

In allegations 10(b) and 11(b), Applicant contends that defense counsel specifically advised Applicant that the trial court had promised to impose life sentences in exchange for Applicant's guilty pleas. This Court has previously found that no promise or guarantee was made by the plea judge or conveyed to and relied upon by Mr. Allen. The prior factual findings and conclusions of law are incorporated by reference as if repeated verbatim.

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, (1969); *Roddy v. State*, 339 S.C. 29, 33-34, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both." *Pittman v. State,* 337 S.C. 597, 600, 524 S.E.2d 623, 625 (1999).

"[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction

hearing." *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984); *Roddy*, 339 S.C. at 33, 528 S.E.2d at 420. In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. *Wolfe v. State,* 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997).

This claim is without merit based upon the previously sworn statement of Quincy Allen in open court that no promises were made to him at the time of the plea. *See Blackledge*, *supra*; *Wolfe*, *supra.*

Respondent submitted that an affidavit by Judge Cooper, which was a part of the direct appeal record and a part of the Return in the instant action, confirmed that no promise of a life sentence was made.[22] In an abundance of caution, this Court has used its discretion to resolve not to consider the affidavit in regard to the allegations in this action. This Court is aware that S.C. Code of Laws Ann. § 17-27-80 (1976), and the decision in *Beckett v. State*, 278 S.C. 223, 294 S.E.2d 46 (1982), which allowed a plea judge's affidavit and found sworn affidavits are admissible at post-conviction proceedings in the discretion of the PCR judge, could support admissibility. *See also U.S. ex rel.*

---

[22] Further, this Court has previously reviewed the affidavit in considering the Motion to Quash and Protective Order. In particular, the Court noted "Judge Cooper's Affidavit (1) is plain on its face, (2) involves an alleged representation occurring a considerable time in the past, [and] (3) denies that any such representation was ever made . . . ." (Order, p. 4).

Weidner v. Thieret, 735 F.Supp. 284 (N.D. Ill., 1990) (state court judge's affidavit detailing findings of fact regarding confession that habeas petitioner claimed was coerced and should not have been admitted in criminal prosecution were sufficient to establish constitutionality of confession and appropriateness of its admission). Further, this Court recognizes that Judge Cooper's affidavit plainly rebuts and clarifies the earlier affidavit of Ms. Fielding Pringle and rebuts the affidavit of Mr. Robert Lominack,[23] but it is not necessary to resolve any claim in this action. Critically, the affidavit does not contain any assertions that a promise was made such as would undermine the fairness of the proceeding if the affidavit would not be considered.[24]

---

[23] Conspicuously absent from either affidavit of plea counsel or their testimony is any affirmation that ***prior*** to the guilty plea that Quincy Allen was specifically told by either counsel that there was a "promise of a life sentence." *See* Robert Lominack Affidavit, ¶ 8 ("Ms. Sampson, Ms. Pringle and I conveyed the substance of our meeting with Judge Cooper to Mr. Allen before he pled guilty."). The first representations to QuincyAllen of an intent by Judge Cooper to render a life sentence (according to Lominack's affidavit) were directed to sentencing phase—after the plea had already been entered. Robert Lominack Affidavit, ¶ 8 ("On those occasions we reassured Mr. Allen that we were doing this on the basis of our understanding that Judge Cooper intended to sentence him to life imprisonment."). Mr. Allen's sworn affirmations in open court that there were no promises to him at the time of the plea are thus uncontested.

[24] In particular, the sworn affidavit declares:

1. "Until Friday, February 25, 2005 this case was to be tried before a jury. At approximately 5:30 PM on that date Ms. Pringle called me at my home and announced

to me that Mr. Allen would plead guilty. I believe she was in Solicitor Meadors office when she made the call. At that time there was no discussion about a commitment from myself, or the solicitor's office, to impose two life sentences." (p. 2).

2 "At no time did Mr. Giese ever indicate to me that he would be willing to do so [(agree to withdraw the death sentence and let Allen plead to two life sentences)], nor did he indicate anything other than he would push hard for death." (p. 2).

3. "I did say, in the meeting on February 24, that, if they pled Mr. Allen guilty, I thought the Defense team would have to trust Dr. Crawford to convince me that Mr. Allen was so mentally ill throughout the time of trial, that imposition of the death penalty would violate the Eighth Amendment's ban on cruel and unusual punishment. I did not use these words but assumed they knew what I meant by saying ". . . .you'll have to trust Dr. Crawford." (p. 2).

4. "When asked by Ms. Pringle in that [February 24] meeting if I would asssure [sic] her that I would impose life sentences, I distinctly remember saying that I could not give her that assurance. She said she could not plead him if she did not have my assurance and I told her that was fine with me. When the meeting ended, I had every reason to believe that Mr. Allen would not plead guilty and I went ahead with my preparations for the jury trial." (pp. 2-3).

5. "After the meeting in my office on February 24, no one from the Defense team, or the Solicitor's office, ever mentioned to me that they understood there was a commitment from me to impose two life sentences. I only learned that upon reading Ms. Pringle's affidavit." (p. 3).

This claim is without merit based upon the previously **sworn** statement of Quincy Allen in open court that no promises were made to him at the time of the plea. *See Blackledge*, *supra*; *Wolfe*, *supra.*

F. Alleged Ineffective Assistance of Appellate Counsel

Finally, in Applicant's 10(d) and 11(d), he asserts that appellate counsel was ineffective for failing to raise[25] that his guilty plea was involuntary due to the

---

6. "I reiterate , at no time did the Solicitor's office ever take, or offer to take the death penalty off the table in exchange for two life sentences." (p. 4).

7. **"At no time did I ever agree to impose two life sentences in exchange for a guilty plea."** (p. 4 (emphasis added)).

8. "My decision to impose the death penalty was made in the early morning hours of March 18, 2005 after 2 weeks of brutal testimony and evidence that was presented in the penalty phase of the trial. (p. 4).

J. Cooper Affidavit.

[25] There is some inconsistency in this claim. Under 10(d) Applicant states that appellate counsel was ineffective "because appellate counsel failed to raise the issue that Applicant's guilty plea was involuntary . . . ." (Third Amended Application, p. 3). In 11(d) Applicant states that "appellate counsel was ineffective for raising the issue on direct appeal." (Third Amended Application, p. 3). Respondent sought clarification of whether this claim is alleging that appellate counsel was ineffective for failing to raise the claim or if appellate counsel was ineffective for raising the claim. Such clarification was never provided, but the Court assumes, for purposes of this order, that Applicant intended to assert that appellate counsel was ineffective for failing to raise the claim.

inherently coercive effect of the trial judge's involvement in plea negotiations. It is well-established that only preserved errors may be considered on appeal. *See State v. Sheppard*, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) ("[A] party must have a contemporaneous and specific objection to preserve an issue for appellate review." (*citing State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005))).

The testimony before the Court by appellate counsel Dudek testified that he did not raise this issue because an issue about the meeting with Judge Cooper and whether it was coercive to the entry of the guilty plea was not preserved in the record. (Nov. 17, 2014 PCR Tr. pp. 244-45). It was not preserved in the record:

> A. . . . there would have had to have been that matter . . . raised to the trial judge at some point that you improperly injected yourself into plea negotiations in this case. Now, whether, you know, that was made, done by my way of thinking, motion to set aside the guilty plea (during the appeal), but you know, motion . . . brought to the judge's attention. Otherwise you know, again right or wrong, it was my thinking that a record had to be made of that in order for that to be an appellant issued and that you know, is what I attempted to do by way of a motion to set aside the guilty plea.

(Nov. 17, 2014 PCR Tr. pp. 244-45). On cross-examination, appellate counsel conceded that it was not raised in the record before the trial court (and apparently, only in his later motion to remand which was denied by the Supreme Court based upon the

affidavits of Lominack and Pringle and countered by the affidavit of Judge Cooper). (Nov. 17, 2014 PCR Tr. pp. 266, 268 (noting in the record about an ex parte meeting)).

A defendant is constitutionally entitled to the effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830 (1985) (to be effective appellate counsel must give assistance of such quality as to make appellate proceedings fair); *Thrift v. State*, 302 S.C. 535, 397 S.E.2d 523 (1990) (appellate counsel must provide effective assistance but need not raise every nonfrivolous issue presented by the record). In deciding a claim of ineffective assistance of counsel, the focus is on "the fundamental fairness of the proceeding whose result is being challenged." *Strickland v. Washington*, 466 U.S. at 685 and 696. First, the burden of proof is upon applicant to show that counsel's performance was deficient as measured by the standard of reasonableness under prevailing professional norms. *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999). Second, the applicant must prove that he or she was prejudiced by such deficiency to the extent of there being a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, *supra*; *Anderson v. State*, *supra*; *see also People v. Griffin*, 178 Ill.2d 65, 227 Ill. Dec. 338, 687 N.E.2d 820 (1997) (defendant who contends appellate counsel rendered ineffective assistance by failing to argue issue must show that failure to raise issue was objectively unreasonable and that, but for this failure, defendant's conviction or sentence would have reversed).

Here, the allegation that the plea was coerced by the *ex parte* meeting between the defense and Judge Cooper was not preserved for an appeal. Appellate counsel is not constitutionally deficient for failing to raise on appeal an issue that was not preserved for review. *Legge v. State*, 349 S.C. 222, 562 S.E.2d 618 (2002); *Gilchrist v. State*, 364 S.C. 173, 612 S.E.2d 702 (2005) (appellate counsel not ineffective where trial counsel's submission of the request to charge, without any further explanation of his point, was insufficient to preserve for review the trial court's failure to charge the specific language regarding "a right to act on appearances."); *see State v. Hicks*, 330 S.C. 207, 499 S.E.2d 209, *cert. denied*, 525 U.S. 1022 (1998) (issue must be raised to and ruled upon by trial court to be preserved for review); *State v. Dickman*, 341 S.C. 293, 534 S.E.2d 268 (2000) (party may not argue one ground at trial and an alternate ground on appeal). For this initial reason, the allegation must be dismissed.

Further, since the issue was not preserved the Applicant is unable to prove the additional requirement of Sixth Amendment prejudice. To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. *Strickland*, *supra*; *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). That is, Applicant must prove prejudice by showing he would have prevailed on appeal had the issue been raised in his Initial Brief of Appellant. He has wholly failed to

satisfy that showing.[26] This Court denies this allegation.

IV. CONCLUSION

Applicant has failed to show he is entitled to relief on any of the claims for all the forgoing reasons. As such, this Court must deny relief.

IT IS THEREFORE ORDERED:

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

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 1 day of Dec., 2015.

---

[26] This Court notes that after the remand during the appeal to resolve Applicant's stated desire to drop the appeal this issue was developed, but not addressed during the remand when the motion to recuse Judge Cooper was made. Appellate counsel, Mr. Dudek, then attempted to raise the issue in a motion before the Supreme Court. "Motion to Vacate Guilty Plea or Remand for a Hearing on Voluntariness of Appellant's Guilty Plea," dated February 6, 2008. The State made a Return in Opposition to the Motion to Vacate Guilty Plea, with an affidavit from the plea judge attached, February 19, 2008. A response was made to the Return. A "Reply to State's Return in Opposition to Motion to Vacate," February 26, 2008, was submitted with an affidavit from Quincy Allen. On March 8, 2008, the Supreme Court denied the motion. *See State v. Allen*, Letter Order from S.C. S. Ct. dated March 8, 2008.

/s/ R. Ferrell Cothran, Jr.
R. FERRELL COTHRAN, JR.
Presiding Judge
Third Judicial Circuit

/s/ [illegible], South Carolina.