(CAPITAL CASE)
NO. _____

IN THE
Supreme Court of the United States

JOHN R. WOOD,

Petitioner,

v.

BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections;
LYDELL CHESTNUT, Deputy Warden of Broad River Correctional Institution Secure Facility,

Respondents.

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

APPENDIX
(CAPITAL CASE)

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-11

JOHN R. WOOD,

Petitioner – Appellant,

v.

BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections; LYDELL CHESTNUT, Deputy Warden of Broad River Correctional Institution Secure Facility,

Respondents – Appellees.

Appeal from the United States District Court for the District of South Carolina, at Rock Hill. David C. Norton, District Judge. (0:12−cv−03532−DCN)

Argued: October 29, 2021 Decided: March 2, 2022

Before MOTZ, DIAZ, and RICHARDSON, Circuit Judges.

Affirmed by published opinion. Judge Diaz wrote the opinion, in which Judge Motz and Judge Richardson joined.

ARGUED: Elizabeth Anne Franklin-Best, ELIZABETH FRANKLIN-BEST, P.C., for Appellant. Melody Jane Brown, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellees. **ON BRIEF:** Emily C. Paavola, JUSTICE 360, Columbia, South Carolina, for Appellant. Alan Wilson, Attorney General, Donald J. Zelenka, Deputy Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellees.

DIAZ, Circuit Judge:

John R. Wood shot and killed an on-duty police officer. A South Carolina jury convicted him of murder and sentenced him to death. Having exhausted his state remedies, Wood petitioned the district court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He now appeals the district court's grant of summary judgment to the state officials Bryan P. Stirling and Lydell Chestnut.

We granted a certificate of appealability on one issue: whether Wood's trial counsel provided ineffective assistance by failing to object to the State's introduction and use of prison-conditions evidence at the penalty phase. We find that the state postconviction court's denial of relief didn't constitute an unreasonable application of clearly established federal law or an unreasonable determination of the facts. Thus, we affirm.

I.

A.

In December 2000, Trooper Eric Nicholson encountered Wood while patrolling I-85 near Greenville, South Carolina. Wood was on a moped. After Nicholson confirmed with another officer that mopeds couldn't be operated on the interstate, he activated his lights and siren to pull Wood over. But Wood didn't stop. Instead, he led the officer off the highway and onto a frontage road. Nicholson sped up to get beside Wood and used his car to block the moped's progress. Wood came to a stop near the driver-side window of Nicholson's car. Within seconds, Wood drew a gun and shot Nicholson five times through

the window. Having fatally wounded the officer, Wood fled and met up with his girlfriend, who had been following him in her Jeep.

When police caught up with the pair, a high-speed chase ensued. Wood's girlfriend drove while Wood fired at pursuing officers from the passenger seat. He shot one of the officers in the face, but the officer survived. As the chase continued, the Jeep ran several cars off the road, striking one. And when the Jeep stalled, Wood hijacked a truck at gunpoint—this time, he jumped into the driver's seat. Officers eventually cornered and arrested Wood.

B.

A South Carolina grand jury indicted Wood for Nicholson's murder and possession of a weapon during the commission of a violent crime. The State gave notice it would seek the death penalty, and Wood's capital trial began in February 2002. Attorneys John Mauldin, James Bannister, and Rodney Richey represented him. The jury returned a guilty verdict on both counts. The penalty phase began two days later.

The State began the penalty phase by reintroducing all the evidence from the guilt phase for the jury's consideration. The rest of its penalty case consisted of Wood's criminal record and six witnesses. The State read Wood's record to the jury, which included convictions for shoplifting, grand theft, burglary, obtaining controlled substances by fraud, and conspiring to use fraudulent identification in connection with counterfeit securities.

As for its witnesses, the State spent the bulk of its time examining Jimmy Sligh, a 20-year employee of the South Carolina Department of Corrections. Sligh testified on "the

difference between life in prison without parole versus the punishment of death."[1] J.A. 317. Sligh described a prison as being "like a mini city." J.A. 323. He explained that prisoners in the general population typically have access to several privileges, assuming good behavior. These privileges include access to vocational and work programs, recreational activities, freedom of movement around their cell block, and full-contact family visits.

In contrast, Sligh explained that death row prisoners are on 23-hour lockdown, have no access to work programs, and have constrained, no-contact family visits. Still, Sligh testified that violence is more limited on death row where prisoners spend their time either behind bars or restrained.

At no point did Wood's counsel object to Sligh's testimony. Instead, on cross-examination, counsel highlighted the danger of prison life in the general population. Counsel asked whether Wood's small stature and race (Wood is white) would be "strikes" against him in the general population, and Sligh agreed that Wood's "safety would be at the highest it could be" if placed on death row. J.A. 350.

Four other State witnesses testified about the day of the crime and Wood's arrest. One officer talked about his experience as a first responder. Another recounted being shot in the face by Wood during the pursuit. A third spoke on Wood's apparent lack of remorse after being captured. And the victim whose truck Wood stole discussed being hijacked at gunpoint.

[1] We refer to such testimony as "prison-conditions evidence."

The State concluded by calling Misty Nicholson, Trooper Nicholson's widow, who recounted their relationship and the lasting impact of Nicholson's death. Mrs. Nicholson told the jury about how they "grew up together" and married after five years of dating. J.A. 392. She described how they once "planned to have children" but now she "come[s] home to an empty house." J.A. 394–95. "Every aspect of [her] life ha[d] been changed." J.A. 394.

Mrs. Nicholson also related how Nicholson's death was "really difficult" for his parents. J.A. 393. She said Nicholson's father was "not in the best . . . health," and the death "put a real strain on h[im]." J.A. 394. Finally, she detailed the day Nicholson died and how she arrived at the hospital to find him gone. "From that point on [she] had to live with what happened." J.A. 398.

Wood then presented his mitigation case, focusing on his mental health issues (and their root causes) and his adaptability to confinement. He offered expert testimony from a social worker and a psychiatrist, who both examined Wood and agreed that he suffered from paranoid-personality disorder. Wood's psychiatrist went further, diagnosing him with bipolar disorder. And when considered with his hallucinations and delusions of grandiosity, the psychiatrist said Wood exhibited symptoms of psychosis.

The State called its own forensic psychiatrist in rebuttal, who had evaluated Wood and reviewed his medical records. Contrary to Wood's experts, the State's psychiatrist testified that Wood suffered only from an antisocial personality disorder and substance-abuse issues. As support, he noted Wood's psychiatric evaluation conducted at the jail just

days after Nicholson's murder, which found no mental illness other than an antisocial personality disorder.

Wood's adaptability-to-confinement presentation proceeded in two parts. First, he offered video footage of his good behavior in jail over the previous fourteen months. Second, he called James Aiken, a former South Carolina prison warden, as an expert to testify to Wood's "future prison adaptability" and a "risk assessment of prisoners." J.A. 468–69.

Aiken briefly explained his impression that Wood was "compliant to orders" based on his review of prison records and an interview of Wood. J.A. 470. Given Wood's cooperative and nonviolent behavior in prison, Aiken opined Wood would pose no risk to prison staff if confined for the rest of his life.

Most of Aiken's testimony, however, compared life in the general population of a maximum-security prison (where Wood would serve a life sentence) versus death row—i.e., prison conditions. Though a layperson might think an inmate is better off in the general population, Aiken said, "that's not necessarily the case." J.A. 473. A death row inmate gets "peace and quiet" in their single cell, while general-population inmates are "dealing with [multiple] security threat groups." *Id.*

Aiken explained such threats in the general population came from "predator groups," which he defined as "people that are constantly trying to take control of you. . . . people that have killed over and over and over again." *Id.* And Aiken agreed that Wood's size and race would make him an "easier target" and "more likely to be subjected to persons

inflicting violence upon him" in the general population. J.A. 475. A life sentence would be "very difficult for [Wood]," according to Aiken. J.A. 476.

At closing, the State featured the prison-conditions evidence. It argued that a life sentence wouldn't be "serious business for . . . Wood." J.A. 599. That's because "going to prison is like being in a big city – in a little city. You've got a restaurant. . . . You get contact visits with your family. . . . You've got a social structure. You've got freedom of movement. . . . Thirty or forty acres to live in. [You can w]atch ball games on the T.V." J.A. 599–600. The State told the jury that life in prison for Wood would be "a change of address and nothing more." J.A. 600.

Wood's counsel didn't object. Instead, counsel challenged Sligh's framing of prison as "soft." J.A. 614. And counsel referred to Aiken's testimony, explaining that "prisons contain violent, dangerous people for long periods of time." J.A. 616.

The case went to the jury. On the second day of deliberations, the jury asked to review the competing psychiatrists' testimony. After having this testimony played back, the jury informed the court of an eleven-to-one deadlock. The court gave the jury a modified *Allen*[2] charge, instructing them to continue deliberations. The next morning, the jury returned a verdict of death.

The Supreme Court of South Carolina affirmed Wood's convictions and sentence on direct appeal. *State v. Wood*, 607 S.E.2d 57, 62 (S.C. 2004), *cert. denied*, 545 U.S. 1132 (2005).

[2] *Allen v. United States*, 164 U.S. 492 (1896).

C.

Wood filed for postconviction relief in state court. Among several issues, Wood raised ineffective assistance of his trial counsel for their failure to object to the State's introduction and use of prison-conditions evidence at the penalty phase.

The state postconviction court held an evidentiary hearing at which Wood's trial counsel testified. Mauldin, lead trial counsel, said he had no strategic reason for failing to object to the State's prison-conditions evidence and the use of such evidence in closing. While Mauldin first suggested that he thought Sligh would testify only about adaptability-to-confinement evidence, the State on cross refreshed his memory with the trial transcript. Mauldin had expressly decided not to object to Sligh's "conditions of confinement" testimony after huddling with the rest of the defense team.

Bannister and Richey also testified. Both agreed that they knew of no strategic reason not to object to the evidence but that such an objection was Mauldin's to make.

The state court dismissed Wood's petition. On the prison-conditions evidence, it analyzed South Carolina case law to explain why such evidence is "problematic." J.A. 1217. And applying *Strickland*,[3] the court found Wood's counsel were deficient for not objecting to the evidence. But that deficiency didn't prejudice Wood. Because there was a "relative equality of presentation" on the improper-but-admitted evidence, the state court determined that there was no reasonable probability of a different result when considering the admissible evidence. J.A. 1226.

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

Wood appealed, but the Supreme Court of South Carolina declined review.

D.

Wood then petitioned for federal habeas relief in the District of South Carolina.[4] He raised a host of issues, including his trial counsel's failure to object to the prison-conditions evidence. The State moved for summary judgment. A magistrate judge recommended granting the State's motion.

Applying 28 U.S.C. § 2254(d)'s review standard to Wood's *Strickland* claim on the prison-conditions evidence, the magistrate judge agreed that "admission of an arbitrary factor, such as conditions of confinement, may invite prejudice." *Wood v. Stirling*, No. 12-cv-3532, 2018 WL 4701388, at *21 (D.S.C. Oct. 1, 2018). Still, she found that "nothing in federal jurisprudence requires a finding that admission of evidence of conditions of confinement prejudiced [Wood]." *Id.*

The magistrate judge determined the state postconviction court had properly applied *Strickland* when it weighed the prison-conditions evidence's impact on the verdict. Wood had also questioned the state court's reliance on the aggravated facts of his crime while ignoring the jury's long deliberations. But the magistrate judge found no evidence tying the jury's deadlock to the admission of prison-conditions evidence or to mitigating evidence that the state court didn't consider.

[4] The federal proceedings were stayed while Wood pursued a second postconviction petition in state court. The state court granted summary judgment against Wood on his second petition, finding it improperly successive and untimely.

Wood objected to the magistrate judge's report and recommendation. The district court, however, overruled those objections. *Wood v. Stirling*, No. 12-cv-3532, 2019 WL 4257167, at *12–14 (D.S.C. Sept. 9, 2019).

On the prison-conditions evidence, the district court agreed that the state court had properly applied *Strickland* by examining the evidence's prejudicial effect. Rejecting Wood's other objections, the district court found that no Supreme Court precedent required a court to consider the length of jury deliberations in a *Strickland*-prejudice analysis. Nor was the district court persuaded that the State's repetition of the prison-conditions evidence in closing needed to be considered, either. The district court accordingly entered judgment for the State.

We granted a certificate of appealability on the *Strickland* claim.

II.

Wood argues that the state postconviction court's refusal to grant relief on his claim that counsel were ineffective for failing to object to the prison-conditions evidence was either an unreasonable application of the Supreme Court's *Strickland* line of cases or based on an unreasonable determination of the facts. We review the district court's denial of habeas relief de novo. *Owens v. Stirling*, 967 F.3d 396, 410 (4th Cir. 2020). And because the state court adjudicated Wood's claim on the merits, we review that denial through the highly deferential lens required by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See* 28 U.S.C. § 2254(d).

We conclude that Wood fails to meet AEDPA's stringent bar for relief.

A.

Under AEDPA, we may grant habeas relief on a claim that a state postconviction court rejected on the merits only when the decision: (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1); or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2).

Under § 2254(d)(1), a state court's application of Supreme Court precedent is unreasonable "when the court identifies the correct governing legal rule from the Supreme Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Owens*, 967 F.3d at 411 (cleaned up). "[A]n *unreasonable* application of federal law is different from an *incorrect* or *erroneous* application of federal law." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). In other words, we may not grant relief if "it is possible fairminded jurists could disagree" that the state court's decision conflicts with Supreme Court precedent. *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

Under § 2254(d)(2), a state court's decision is based on an unreasonable determination of the facts when there "is not merely an incorrect determination, but one 'sufficiently against the weight of the evidence that it is objectively unreasonable.'" *Gray v. Zook*, 806 F.3d 783, 790 (4th Cir. 2015) (quoting *Winston v. Kelly*, 592 F.3d 535, 554 (4th Cir. 2010)). We presume the state court's factual findings are sound unless the petitioner "rebuts the 'presumption of correctness by clear and convincing evidence.'" *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (quoting 28 U.S.C. § 2254(e)(1)).

And "when a petitioner's habeas corpus claim is based on alleged ineffective assistance of counsel, we review the claim through the additional lens of *Strickland* and its progeny." *Richardson v. Branker*, 668 F.3d 128, 139 (4th Cir. 2012). "The AEDPA standard and the *Strickland* standard are dual and overlapping, and we apply the two standards simultaneously rather than sequentially." *Id.*

To succeed on an ineffective-assistance claim, a petitioner must show that (1) "counsel's performance was deficient"; and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Performance is deficient if it falls below "an objective standard of reasonableness," which is defined by "prevailing professional norms." *Id.* at 688. Prejudice means there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. And a reasonable probability is one "sufficient to undermine confidence in the outcome." *Id.*

"Surmounting *Strickland*'s high bar is never an easy task" for a habeas petitioner seeking relief under § 2254(d). *Richter*, 562 U.S. at 105 (cleaned up). That's partly because "[t]he *Strickland* standard is a general one, so the range of reasonable applications is substantial." *Id.*; *see Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004) ("[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.").

B.

1.

The state postconviction court correctly identified *Strickland* as the appropriate framework to address Wood's claim. It found (as the State concedes) that defense counsel were deficient for not objecting to the prison-conditions evidence. *See Bowman v. State*, 809 S.E.2d 232, 241 (S.C. 2018); *State v. Plath*, 313 S.E.2d 619, 627 (S.C. 1984). But the state court also determined Wood couldn't show prejudice from this deficiency.

Wood argues that the state court's application of *Strickland*'s prejudice test either was objectively unreasonable or resulted in a decision based on an unreasonable determination of the facts. We disagree.

2.

To assess *Strickland* prejudice in capital sentencing, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. Wood framed that question for the state court in terms of his counsel's failure to object to the prison-conditions evidence. Thus, put differently, Wood would have been "entitled to relief only if he [could] show that had the [prison-conditions evidence] not been admitted, there is a reasonable probability that at least one juror would have struck a different balance." *Powell v. Kelly*, 562 F.3d 656, 668 (4th Cir. 2009) (cleaned up).

The state court held that Wood hadn't shown "a reasonable probability of a different result." J.A. 1226. It compared the "extremely aggravated" facts of the case against

Wood's "limited" mitigation case. *Id.* Wood had done more than "merely murder[] Trooper Nicholson," the state court said, he wounded another officer and endangered several civilians. *Id.* The state court also noted the "particularly moving" victim-impact evidence and Wood's prior criminal record. *Id.*

As for Wood's mitigation case, the state court explained Wood had called no family members and presented only "relatively mild mental health testimony." *Id.* That latter evidence, the state court determined, showed that Wood didn't suffer from psychosis or delusion at the time of the offense, but had an antisocial personality disorder.

On the prison-conditions evidence, the state court found the defense "was able to score as many points if not more as the [State]," thereby neutralizing any prejudice. *Id.* Wood's counsel had elicited "how tough prison is, how [Wood] would be far more susceptible to danger in general population than on death row, and how [Wood] would likely be at the mercy of predator groups inside the general population of prison given his small stature and older age." *Id.*

According to the state court, both sides "fully joined the issue" and achieved a "relative equality of presentation." *Id.* And "[g]iven the overwhelming evidence in aggravation and the limited evidence in mitigation," admission of the prison-conditions evidence didn't prejudice Wood. *Id.* By the same token, the state court found the closing arguments didn't change this outcome because both sides introduced prison-conditions evidence and argued on the issue.

3.

We recently examined a state court's application of *Strickland* to the evidentiary issue before us. In *Sigmon v. Stirling*, we denied habeas relief where a state court found no reasonable probability that, but for defense counsel's failure to object to prison-conditions evidence at the penalty phase, the jury wouldn't have imposed a death sentence. 956 F.3d 183, 193 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 1094 (2021).

There, defense counsel first elicited the improper evidence from its own expert. *Id.* Concluding the petitioner hadn't established prejudice, we found that "overwhelming and uncontested evidence of aggravating circumstances" outweighed any potential harm from the prison-conditions evidence. *Id.* Exclusion of such evidence "would have also excluded parts of Sigmon's mitigation case" since the petitioner opened the door on the topic through his expert. *Id.*

The *Sigmon* prejudice analysis informs our decision here. The state postconviction court identified the "extremely aggravated" facts of Wood's crime, along with his criminal history and the "moving" victim-impact evidence, and then weighed the effect of the prison-conditions evidence presented to the jury. J.A. 1226. Though Wood offered a mitigation case based on his mental health, we don't think it was unreasonable for the state court to have found that the substantial aggravating evidence overcame that case. *See, e.g.*, *Morva v. Zook*, 821 F.3d 517, 532 (4th Cir. 2016) ("Even the most sympathetic evidence in the record about [the petitioner's] troubled childhood and mental health does not outweigh the aggravating evidence presented at trial." (cleaned up)).

Wood's counterarguments are unpersuasive. He first claims that the state court "failed to appreciate the inherently prejudicial nature" of the prison-conditions evidence and its "central role" in the State's case. Appellant's Br. at 24. To be sure, Sligh's testimony featured prominently in the State's penalty case. Based on the transcript, Sligh's testimony made up more than half of the direct testimony elicited from the State's six penalty-phase witnesses. J.A. 319–46, 352–59. And the State highlighted Sligh's testimony in closing. By contrast, the defense's questioning of Aiken made up less than a fifth of the direct testimony it elicited from all its witnesses. J.A. 464–78.

But the record convinces us that the state court did, in fact, appreciate the troubling nature of the prison-conditions evidence. Before tackling the *Strickland* analysis, the court examined South Carolina case law to explain why such evidence is "problematic" and thus inadmissible. J.A. 1217. And, in a single sentence, it found Wood's trial counsel were deficient under *Strickland* for failing to object to the evidence.

With that conclusion firmly in mind, the state court weighed the effect of the prison-conditions evidence. It determined that there was a "relative equality of presentation by both sides" on this evidence and that the defense "score[d] as many points if not more" than the State. J.A. 1226.

True, the prison-conditions evidence made up a disproportionate share of the new evidence offered by the State during the penalty phase. But the state court found that Wood's counsel countered the State's central premise through more efficient questioning. What's more, the defense opened the penalty phase by telling the jury that "life without parole is perhaps a more punishing penalty." J.A. 297. Taken altogether, the state court

could reasonably conclude that the defense met its objective and scored enough points on the prison-conditions evidence to nullify the State's presentation.

Though the state court didn't reach Wood's desired result, we can't say it unreasonably applied *Strickland* when it weighed the prison-conditions evidence and found its effect on the verdict inconsequential.[5] At bottom, it's precisely this type of inquiry the Supreme Court asks habeas courts to engage in when assessing *Strickland* prejudice. *See Sears v. Upton*, 561 U.S. 945, 955–56 (2010) (explaining that the prejudice inquiry should be "probing and fact-specific" and will "necessarily require a court to 'speculate'" on the consequences of counsel's errors).

Wood's challenges to the state court's consideration of his mitigation evidence are also unavailing. Wood argues the court "unreasonably substituted its own judgment discounting [his] mitigation evidence" when considering his criminal history and mental health evidence. Appellant's Br. at 29. He also asserts that the court "unreasonably

[5] Wood claims the state court's weighing of the prison-conditions evidence can't be reconciled with the result in *State v. Burkhart*, 640 S.E.2d 450 (S.C. 2007), but that argument misses the mark. In *Burkhart*, South Carolina's high court, without conducting a prejudice analysis, reversed a death sentence on direct review where the State had introduced general prison-conditions evidence over the defendant's timely objection. *See id.* at 488. Though the defendant "attempted to counter" the State's prison-conditions evidence with his own, the court found the "entire subject matter injected an arbitrary factor into the jury's sentencing considerations" in violation of a state statute. *Id.* Even so, South Carolina's treatment of such evidence on direct review can't control Wood's collateral *Strickland* claim, which requires him to establish prejudice. *See Bowman*, 809 S.E.2d at 246 ("*Burkhart* provides no support for Petitioner's claims in this matter, as this is a [postconviction relief] claim, which is evaluated under the two-pronged approach of *Strickland*[.]").

conflated" Aiken's adaptability and prison-conditions testimony. Appellant's Br. at 31. We disagree.

For starters, the state court's order shows it considered both Wood's criminal history and his mental health evidence. On Wood's criminal history, the court specifically noted his prior record and time spent in prison. It's true, as Wood argues, that the court didn't mention the nonviolent nature of his past crimes or his good behavior while in prison. But that the court wasn't persuaded by this evidence is understandable when considered in context. After all, it assessed Wood's criminal history just after recounting the violent facts of his murder conviction.

Similarly, we reject Wood's contention that the state court unreasonably discounted his mental health evidence. The court found the evidence "relatively mild" because there were no "findings of psychosis or delusion at the time of the offense." J.A. 1226. This conclusion is supported by the State's expert psychiatrist, who said Wood exhibited no mental illness apart from substance abuse and an antisocial personality disorder.

The State's expert explained how he had relied on another psychiatrist's evaluation of Wood just days after Nicholson's murder that revealed neither psychosis nor delusion. So, while Wood's expert psychiatrist attested that he suffered from symptoms of psychosis—even at the time of the offense—the record provides ample support for the state court's decision to instead credit the State's evidence.[6] *See Walters v. Martin*, 18 F.4th

[6] Wood's claim that the state court's treatment of his mental health evidence violated *Tennard v. Dretke* also fails. *See* 542 U.S. 274, 284 (2004) (explaining that mitigation evidence need not bear any "nexus to the crime" to be considered). The court didn't

434, 444 (4th Cir. 2021) ("We defer to the state court's credibility finding [when] we perceive no stark and clear error with it." (cleaned up)).

Nor do we think the state court unreasonably conflated Aiken's adaptability and prison-conditions testimony. Wood points to the court's statement that "[h]ad counsel objected to the State's evidence on the issue, it would not have been allowed to make its own points along these lines as well." J.A. 1226. Wood claims the court treated Aiken's adaptability testimony (which is admissible[7]) as equivalent to the prison-conditions evidence (which isn't).

There's no dispute that Wood would have been able to present evidence on his adaptability to prison, regardless of the introduction of prison-conditions evidence. But the state court never said otherwise. It said only that Wood wouldn't have been able to make his points "on the *issue*"—the "issue" being "conditions of confinement." *Id.* (emphasis added). And other portions of the court's order show that it understood Aiken testified on Wood's "mentality" and that he'd be "adaptable to prison." *See* J.A. 1162, 1178. In short, we find no indication that the state court conflated Aiken's testimony in the manner Wood suggests, much less that it did so unreasonably.[8]

disregard Wood's mental health evidence by finding it "relatively mild." *See* J.A. 1226. Rather, the court's finding informs the weight it gave to Wood's evidence when tempered by the State's rebuttal expert.

[7] *See Skipper v. South Carolina*, 476 U.S. 1, 7 (1986).

[8] Having found the state court reasonably considered the mitigation and prison-conditions evidence, we conclude Wood's claims that the court unreasonably focused on the facts of his crime and the victim-impact evidence are of no moment.

Finally, Wood contends the state court failed to reasonably apply *Strickland* because it didn't acknowledge that the jury deliberated over three days and, at one point, appeared deadlocked. According to Wood, this shows that "even a tiny fraction less on the aggravating side of the scale could have made a difference" in the verdict. Appellant's Br. at 35.

Indeed, we've held that the significance of evidence can be "further heightened" when considering the reasonableness of a *Strickland* application if a jury is "initially deadlocked on whether to impose the death penalty." *Williams v. Stirling*, 914 F.3d 302, 319 (4th Cir. 2019). Wood's reliance on *Williams* thus seems apt on its face.

Yet there's good reason why the jury's deadlock is not as telling as Wood suggests. Just before the jurors informed the court that they were deadlocked, they asked to rehear the testimony of the expert psychiatrists. This request suggests that the mental health evidence led to the impasse, not the prison-conditions evidence. Given that there's another reasonable explanation for the jury's indecision having nothing to do with counsel's effectiveness, we won't fault the state court for not expressly considering the jury's deadlock in its prejudice analysis.

III.

In sum, the state postconviction court properly applied *Strickland* to Wood's ineffective-assistance claim, and in doing so, it wasn't unreasonable in finding no reasonable probability that, but for trial counsel's errors, the jury wouldn't have sentenced Wood to death. The district court's judgment is therefore

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

JOHN R. WOOD,	)	
	)	
Petitioner,	)	No. 0:12-cv-3532-DCN
	)	
vs.	)	**OPINION AND ORDER**
	)	
BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections; and WILLIE D. DAVIS, Warden, Kirkland Reception and Evaluation Center,	)	
	)	
Respondents.	)	

Petitioner John R. Wood ("Wood") is a death row inmate in the custody of the South Carolina Department of Corrections ("SCDC"). He filed a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on September 19, 2013. This matter is before the court for consideration of Wood's objections to the Report and Recommendation ("R&R") of United States Magistrate Judge Paige J. Gossett, who recommends granting respondents' motion for summary judgment and granting in part and denying in part Wood's motion for an evidentiary hearing and to expand the record. For the reasons stated below, the court adopts the R&R, grants the respondents' motion for summary judgment, and grants in part and denies in part Wood's motion for further factual development.

I. BACKGROUND AND PROCEDURAL HISTORY

Wood was convicted by a jury and sentenced to death for the murder of Trooper Eric Nicholson ("Nicholson"). The R&R ably recites the facts of this case, as summarized by the Supreme Court of South Carolina. In short, Wood was driving a moped on I-85 in the Greenville area, and Nicholson informed the dispatcher that he was

going to pull Wood over. Several witnesses observed the moped, followed by a trooper with activated lights and sirens, take the off-ramp to leave the interstate and turn right onto a frontage road. Nicholson sped up to drive alongside the moped and then veered to the left and stopped at a raised median to block the moped's path. The moped came to a stop close to the driver's side window of Nicholson's car.

Upon stopping, Wood stood up over the moped, fired several shots in the driver's side window, turned the moped around, and fled. Officers heard Nicholson scream on the radio, went to the scene, and found that Nicholson had been shot five times. Both of Nicholson's pistols were secured in their holsters, and eight shell casings were found at the scene. While fleeing, Wood drove into a parking lot and jumped into the passenger's seat of a Jeep. The police began pursuing the Jeep, and Wood opened fired on the officers. One officer was struck in the face by a bullet fragment, but he survived the injury. Wood then abandoned the Jeep and hijacked a truck but was eventually stopped and taken into custody.

Wood was indicted in May 2001 in Greenville County for murder and possession of a weapon during the commission of a violent crime. ECF No. 45-3 at 74. At trial, Wood was represented by attorneys John I. Mauldin, James Bannister, and Rodney Richey (referred to collectively or individually as "trial counsel"). On February 11, 2002, the jury found Wood guilty of both charges and recommended a death sentence on the murder charge, finding the aggravating factor of murdering a state law enforcement officer during the performance of his official duties. ECF Nos. 42-7 at 20; 43-3 at 25–27. On February 16, 2002, the state circuit court sentenced Wood to death. ECF No. 43-3 at 30.

Wood appealed his case to the Supreme Court of South Carolina. On December 6, 2004, the Supreme Court of South Carolina affirmed Wood's convictions and sentence. ECF No. 43-5 at 107. Wood petitioned for rehearing, which the court denied on January 20, 2005. ECF No. 43-5 at 108. Then on July 28, 2005, Wood filed a pro se application for post-conviction relief ("PCR"). ECF No. 43-5 at 112. The PCR court appointed attorneys to handle Wood's PCR proceeding. On February 9, 2007, Wood filed an amended PCR application. ECF No. 40-15. The PCR court held an evidentiary hearing from March 6–8, 2007, ECF Nos. 44-1 at 34 through 44-7 at 8, and on December 19, 2007, the PCR court dismissed Wood's application, ECF Nos. 45-2 at 92 through 45-3 at 73. Wood filed a motion to reconsider, which the PCR court denied. ECF No. 45-4 at 21, 55. Wood then filed a petition for writ certiorari with the Supreme Court of South Carolina. ECF No. 40-6. After the petition was fully briefed, the Supreme Court of South Carolina denied Wood's petition on November 2, 2012, ECF No. 40-16, and issued a remittitur on November 26, 2012, ECF No. 40-8.

On December 7, 2012, Wood commenced this action by filing a motion for stay of execution and a motion to appoint counsel. ECF No. 1. Wood then filed his petition for writ of habeas corpus under § 2254 on September 19, 2013. ECF No. 85. Wood contemporaneously filed a motion to stay his habeas proceeding while he pursued his unexhausted claims in state court. ECF No. 86. The court granted the motion to stay on October 23, 2013. ECF No. 93.

On September 26, 2013, Wood filed a second PCR application in state court. ECF No. 134-1. On July 19, 2016, the PCR court dismissed the application as untimely and improperly successive under state law. ECF No. 135-1. Wood moved to alter or

amend the court's order, ECF No. 135-2, and the PCR court denied that motion on August 3, 2017, ECF No. 135-3. This ended Wood's state court proceedings, and the court lifted the stay in Wood's habeas proceeding on August 29, 2017. ECF No. 126.

Respondents filed their motion for summary judgment on November 2, 2017. ECF No. 136. Wood filed his response and traverse on December 17, 2017, ECF No. 150, and respondents replied on January 7, 2018, ECF No. 154. In addition, on December 17, 2017, Wood filed a motion for an evidentiary hearing and an opportunity to expand the record with respect to Grounds Four, Five, Seven, and Ten. ECF No. 151. Respondents responded on January 2, 2018, ECF No. 153, and Wood replied on January 16, 2018, ECF No. 160. On October 1, 2018, the magistrate judge issued her report recommending that respondents' motion for summary judgment be granted and her order granting in part and denying in part Wood's motion for an evidentiary hearing and expansion of the record.[1] Wood filed timely objections to the R&R and order on November 14, 2018. ECF No. 193. Respondents replied to Wood's objections on November 28, 2018. ECF No. 194. Wood's claims are now ripe for resolution.

II. STANDARDS

A. Magistrate Judge Review

1. R&R

The magistrate judge makes only a recommendation to the court. Mathews v. Weber, 423 U.S. 261, 270 (1976). The recommendation carries no presumptive weight,

[1] The R&R granted in part Wood's motion for further factual development because the R&R considered the testimony of SLED agent Gene Donohue, which was not part of the state record and was attached to Wood's traverse. Donohue's testimony was provided in the case State v. John Richard Wood and Karen Pittman McCall, which was a separate trial that took place in Anderson County. ECF Nos. 150 at 46; 150-2.

and the responsibility to make a final determination remains with the court. Id. at 270-71. The court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge . . . or recommit the matter to the magistrate judge with instructions." 28 U.S.C. § 636(b)(1). The court is charged with making a de novo determination of any portion of the R&R to which a specific objection is made. Id. When a party's objections are directed to strictly legal issues "and no factual issues are challenged, de novo review of the record may be dispensed with." Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982) (citation omitted). Analogously, de novo review is unnecessary when a party makes general and conclusory objections without directing a court's attention to a specific error in the magistrate judge's proposed findings. Id.

2. Order

Magistrate judges have "the authority to hear and determine any pretrial matter pending before the court" except for dispositive motions. United States v. Benton, 523 F.3d 424, 430 (4th Cir. 2008). A party may object to a magistrate judge's order on a nondispositive matter within 14 days of service of the order. Fed. R. Civ. P. 72(a). The district court reviews such orders for clear error. 28 U.S.C. § 636(b)(1)(A); Springs v. Ally Fin. Inc., 657 F. App'x 148, 152 (4th Cir. 2016).

B. Summary Judgment

Summary judgment shall be granted if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "By its very terms, this standard provides that the mere existence of some

alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. at 248. "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 249. The court should view the evidence in the light most favorable to the non-moving party and draw all inferences in its favor. Id. at 255.

C. Habeas Corpus

1. Standard for Relief

This court's review of Wood's petition is governed by 28 U.S.C. § 2254, which was amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, Pub. L. No. 104-132, 110 Stat. 1213. See Lindh v. Murphy, 521 U.S. 320 (1997). Section 2254(a) provides federal habeas jurisdiction for the limited purpose of establishing whether a person is "in custody in violation of the Constitution or laws or treaties of the United States." This power to grant relief is limited by § 2254(d), which provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

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

28 U.S.C. § 2254(d). The "contrary to" and "unreasonable application" clauses contained in § 2254(d)(1) are to be given independent meaning—in other words, a petitioner may be entitled to habeas corpus relief if the state court adjudication was either contrary to or an unreasonable application of clearly established federal law.

A state court decision can be "contrary to" clearly established federal law in two ways: (1) "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law," or (2) "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [the Supreme Court]." Williams v. Taylor, 529 U.S. 362, 405 (2000) (plurality opinion). Section 2254(d)(1) restricts the source of clearly established law to holdings of the Supreme Court as of the time of the relevant state court decision. See id. at 412; see also Frazer v. South Carolina, 430 F.3d 696, 703 (4th Cir. 2005).

With regard to "unreasonable" application of the law, a state court decision can also involve an "unreasonable application" of clearly established federal law in two ways: (1) "if the state court identifies the correct governing legal rule from [the Supreme Court's] cases but unreasonably applies it to the facts of the particular state prisoner's case," or (2) "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Williams, 529 U.S. at 407.

It is important to note that "an unreasonable application of federal law is different from an incorrect application of federal law," and that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 410–11 (emphasis in original). Indeed, "an 'unreasonable application of federal law is different from an incorrect application of federal law,' because an incorrect application of federal law is not, in all instances, objectively unreasonable." Humphries v. Ozmint, 397 F.3d 206, 216 (4th Cir. 2005) (quoting Williams, 529 U.S. at 410).

2. Procedural Default

A petitioner seeking habeas relief under § 2254 may only do so once the petitioner has exhausted all remedies available in state court. 28 U.S.C. § 2254(b)(1)(A). "To satisfy the exhaustion requirement, a habeas petitioner must fairly present his claim to the state's highest court." Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997), abrogated on other grounds by United States v. Barnette, 644 F.3d 192 (4th Cir. 2011). Under the doctrine of procedural default, "a federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule." Martinez v. Ryan, 566 U.S. 1, 9 (2012); see also Lawrence v. Branker, 517 F.3d 700, 714 (4th Cir. 2008) (explaining that generally "[f]ederal habeas review of a state prisoner's claims that are procedurally defaulted under independent and adequate state procedural rules is barred.").

However, "[t]he doctrine barring procedurally defaulted claims from being heard is not without exceptions." Martinez, 566 U.S. at 10. One such exception occurs when a

prisoner seeking federal review of a defaulted claim can show cause for the default and prejudice from a violation of federal law. Id. "Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." Id. at 10. In order to establish such cause, the following elements must be established:

> (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law requires that an "ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding."

Trevino v. Thaler, 569 U.S. 413, 423 (2013) (quoting Martinez, 566 U.S. at 14, 17–18). A claim is "substantial" if it has "some merit." Martinez, 566 U.S. at 14.

D. Ineffective Assistance of Counsel

A petitioner asserting ineffective assistance of counsel must demonstrate that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced the petitioner. Strickland v. Washington, 466 U.S. 668, 687 (1984). Counsel's performance is deficient when "counsel's representation fell below an objective standard of reasonableness." Id. at 688. In assessing counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. "Judicial scrutiny of counsel's performance must be highly deferential[,] and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id.

To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. When considering prejudice in the context of a death penalty case, "the question is whether there is a reasonable probability that, absent the 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." Id. at 695.

Because "[s]urmounting Strickland's high bar is never an easy task," Padilla v. Kentucky, 559 U.S. 356, 371 (2010), "[e]stablishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult," Harrington v. Richter, 562 U.S. 86, 105 (2011). The Supreme Court has explained that "[t]he standards created by Strickland and § 2254(d) are both 'highly deferential.'" Id. (quoting Strickland, 466 at 689). Therefore, a court's review of an ineffective assistance counsel claim under the § 2254(d)(1) standard is "doubly deferential." Knowles v. Mirzayance, 556 U.S. 111, 123 (2009).

III. DISCUSSION

Wood raises two general objections to the R&R and various specific objections to Grounds Three, Four, and Five.

A. General Objections

Wood makes two "general objections" to the R&R. Objections must be "sufficiently specific to focus the district court's attention on the factual and legal issues that are truly in dispute." Page v. Lee, 337 F.3d 411, 416 n.3 (4th Cir. 2003) (quoting

United States v. 2121 E. 30th Street, 73 F.3d 1057, 1060 (10th Cir. 1996)). Although Wood labels his initial objections as "general," the court finds that they are specific enough to warrant review.

1. Standard of Review

Wood first objects to the standard of review employed by the R&R. He argues that the R&R's discussion of Harrington v. Richter, 562 U.S. 86 (2011), erroneously suggests that the standard of review enunciated in Richter should apply to all § 2254(d) cases.

After discussing the general principles of the § 2254 standard of review, the R&R notes that "review of a state court decision under the AEDPA standard does not require an opinion from the state court explaining its reasoning." ECF No. 190 at 22 (citing Richter, 562 U.S at 98). The R&R went on to explain that

> Pursuant to § 2254(d), a federal habeas court must (1) determine what arguments or theories supported or could have supported the state court's decision; and then (2) ask whether it is possible that fairminded jurists could disagree that those arguments or theories are inconsistent with the holding of a prior decision of the United States Supreme Court. Id. at 102. "If this standard is difficult to meet, that is because it was meant to be." Id. Section 2254(d) codifies the view that habeas corpus is a "'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." Id. at 102–03 (quoting Jackson v. Virginia, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)).

ECF No. 190 at 23.[2] Wood argues that the R&R's explanation of this law suggests that the magistrate judge believes that the Richter standard should apply in all § 2254(d) cases, as opposed to just in cases in which there are state court decision or decisions containing no reasoning. Wood contends that Richter does not apply here because while

[2] The "id." citations in this paragraph refer to Wilson v. Sellers, 138 S.Ct. 1188 (2018); however, this law and accompanying quotes are found in Richter, 562 U.S. at 102–03.

the Supreme Court of South Carolina's denial of certiorari contained no reasoning, the PCR court did provide its reasoning in 94-page order. Wood explains that Wilson v. Sellers, 138 S. Ct. 1188 (2018), addressed this exact point, namely that the Richter standard should only apply in cases in which no reasoned state court decision exists.

Wood's description of the state of the law on this issue is accurate. In Wilson, the Supreme Court considered whether federal habeas law should use the "look through" approach as opposed to a "could have supported" approach when a higher court affirms or denies the lower court decision without providing its reasoning. 138 S. Ct. at 1193. The "look through" approach involves the federal court assuming that the summary higher court opinion rested on the grounds given in a lower court opinion, while the "could have supported" approach requires the federal court to identify the bases that it believed reasonably could have supported the higher court opinion. Id. The Supreme Court held that generally "federal habeas law employs a 'look through' presumption." Id.

In squaring this holding with Richter, the Court first explained that Richter "did not directly concern the issue before" the court because there was no lower court opinion to which a court could look through. In Richter, the defendant brought his federal constitutional claim for the first time in the California Supreme Court, as permitted by state law, and the California Supreme Court summarily denied Richter's petition. Therefore, in Richter, the court had to use the "could have supported approach" because there was no reasoned state court opinion. Next, the court clarified that Richter still contemplated the possibility of applying Ylst v. Nunnemaker, 501 U.S. 797 (1991), a case in which the Court employed the "look through" approach, suggesting that Richter

did not abolish the "look through" approach. Finally, the Court explicitly rejected the principle that "Richter's 'could have supported' framework [should] apply even where there is a reasoned decision by a lower state court." Id. at 1195. In sum, a federal court should only use the "could have supported" framework articulated in Ritcher when there is a higher court opinion with an unexplained decision on the merits and no lower court opinion to which the court can "look through."

While Wood's explanation of the law is correct, he fails to explain how the R&R misapplied the law. He only points to one portion of the R&R in which he argues that the magistrate judge misapplied this standard. Wood contends that the R&R's finding about trial counsel's performance contradicts the PCR court's finding that trial counsel was deficient for failing to object to inadmissible prison condition testimony. Wood argues that this suggests that the R&R did not "look through" to the PCR court's reasoning but instead substituted its own reasoning based on the "could have supported" approach.

The portion of the R&R cited by Wood discusses whether one of the arguments in Ground Five had been procedurally defaulted. The argument was that trial counsel's failure to object to the Solicitor's reference to evidence about general prison conditions during his closing argument constituted ineffective assistance of counsel. This claim was not raised in Wood's first PCR application that was considered on the merits but was raised in his second PCR application, which was dismissed as untimely and improperly successive, meaning that the claim is procedurally defaulted. In order to excuse the procedural default under Martinez, Wood must show that his underlying ineffective assistance of counsel claim—that trial counsel's failure to object to the Solicitor's closing argument constitutes ineffective assistance of counsel—is substantial. This requires

Wood to show that trial counsel's failure to object constitutes deficient performance, and that the deficient performance prejudiced Wood. In considering whether trial counsel's performance was deficient, the R&R stated that:

> In its discussion above regarding Ground Three, this court determined that the PCR court did not unreasonably err in its consideration of this standard [regarding the admissibility of prison conditions] under Strickland and its resulting finding that trial counsel's failure to object to evidence of prison conditions did not prejudice Wood. Wood has not shown that the evidence of conditions of confinement presented during the sentencing phase was impermissible. Thus, the court cannot find that the solicitor's comments on this topic in his closing statement were based on inadmissible evidence.

ECF No. 190 at 51.

Wood takes issue with the R&R's description of Ground Three regarding trial counsel's performance and its application to Ground Five. In Ground Three, Wood alleged that his trial counsel was ineffective for failing to object to evidence of general prison conditions. That claim was raised in Wood's first PCR application and was therefore considered by the PCR court. The PCR court concluded that trial counsel was deficient for failing to object to this evidence, but that the deficient performance did not prejudice Wood. Wood argues that this finding contradicts the R&R's conclusions that "Wood has not shown that the evidence of conditions of confinement presented during the sentencing phase was impermissible" and that "the court cannot find that the solicitor's comments on this topic in his closing statement were based on inadmissible evidence." Id.

However, the problem with Wood's argument is that the PCR court made no specific findings about why trial counsel was deficient for failing to object to the evidence. Instead, the PCR court summarily concluded that "counsel were [sic] deficient for not objecting to the evidence." ECF No. 45-3 at 70. The PCR court provided no

reasoning as to why trial counsel was deficient for failing to object. The PCR court's earlier discussion about South Carolina law regarding the impropriety of evidence of conditions of confinement, which is discussed in greater detail below, suggests that the PCR court relied on that law in finding trial counsel deficient. But the PCR court did not explicitly find that the evidence of conditions of confinement was inadmissible or impermissible.[3] As such, the R&R did not contradict the PCR opinion when it concluded that "Wood has not shown that the evidence of conditions of confinement presented during the sentencing phase was impermissible" and that the R&R could not "find that the solicitor's comments on this topic in his closing statement were based on inadmissible evidence." ECF No. 190 at 51.

As mentioned above, Wood fails to direct to the court's attention to any other portion of the R&R in which the magistrate judge allegedly misapplied the standard of review. Moreover, a review of the R&R indicates that the R&R did apply the correct standard of review when applicable, namely, when a claim was raised in Wood's first PCR application and the PCR court considered the claim in its opinion. For example, in Ground Three, the R&R does consider the reasoning of the PCR court and cites to the PCR opinion, indicating that the R&R "looked through" the summary Supreme Court of South Carolina denial of certiorari to the PCR court opinion. See ECF No. 190 at 33–37.

[3] Indeed, as the PCR court acknowledged, all but one of the South Carolina cases specifically opining on the admissibility of this evidence were not decided until after Wood's trial took place. ECF No. 45-3 at 62 ("The reason this issue [about evidence on general prison conditions] is problematic stems from four South Carolina cases—one that was in existence prior to this case and three that were handed down after [Wood]'s trial."). It is unclear to what extent the PCR court relied on the cases decided after Wood's trial and whether they played a role in the PCR court's holding that trial counsel was deficient for failing to object to the evidence because the PCR court simply does not provide reasoning for its conclusion.

The R&R explicitly said it was doing so. Id. at 30 ("In the case at bar, this court has the benefit of the PCR court's written opinion, certiorari review of which was denied by the South Carolina Supreme Court, which may provide reasons or theories that the appellate court could have relied upon in summarily denying Wood's petition."). The same is true for the claim in Ground Five that was raised in Wood's first PCR application about references to prison hierarchy in the Solicitor's closing argument. In considering this claim, the R&R summarized the PCR's decision and analyzed its reasoning. Id. at 41–42.

However, many of Wood's claims were not raised until his second PCR application. See, e.g., ECF No. 190 at 43 ("Wood has pursued his state remedies with regard to the remaining portions of Ground Five through his second PCR application, but Wood did not raise these claims in his original PCR application and, therefore, they are procedurally defaulted."); id. at 72 ("Ground Seven was raised only in the second PCR proceeding and is, therefore, exhausted but defaulted."). Because Wood's second PCR application was dismissed as untimely and improperly successive, the PCR court did not consider the claims in that application on the merits. Therefore, with regard to the newly raised claims, the magistrate judge could not "look through" to the PCR court's opinion because there is no PCR court opinion that considered the claims. Instead, the R&R determined that the claims were procedurally defaulted and conducted an analysis to see if the procedural default should be excused under Martinez. In that analysis, the standard of review discussed here is inapplicable. In sum, the court finds that the R&R did not improperly apply the standard of review.

2. Evidentiary hearing

Wood also generally objects to the magistrate judge's order denying Wood's request for an evidentiary hearing. Wood filed a motion for an evidentiary hearing and an opportunity to expand the record with respect to Grounds Four, Five, Seven, and Ten. These grounds contain procedurally barred claims, and Wood sought an evidentiary hearing and record expansion to prove facts that establish cause and prejudice to excuse the procedural default. As a reminder, because the magistrate judge issued an order on this motion, as opposed to a R&R, the court reviews the order only for clear error. 28 U.S.C. § 636(b)(1)(A).

Section 2254(e) "generally bars evidentiary hearings in federal habeas proceedings initiated by state prisoners." McQuiggin v. Perkins, 569 U.S. 383, 395 (2013); see also 28 U.S.C. § 2254(e)(2) ("If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless" certain conditions apply). It is within a district court's discretion to permit an evidentiary hearing so that a petitioner can establish cause and prejudice to excuse his procedural default. Cristin v. Brennan, 281 F.3d 404, 417 (3d Cir. 2002). "In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." Schriro v. Landrigan, 550 U.S. 465, 474 (2007); see also Fielder v. Stevenson, 2013 WL 593657, at *3 (D.S.C. Feb. 14, 2013) ("In determining whether to expand the record, a federal court must consider whether doing so would enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief.").

Wood argues that the R&R erred by inconsistently denying his request for an evidentiary hearing and then faulting Wood for failing to offer evidence outside of the record to prove his claims. Wood cites to various portions of the R&R in which the magistrate judge faulted him for failing to offer evidence. The court will discuss each portion in turn.

As for Ground Four, Wood cites to the portion of the R&R that found that Wood's claim was procedurally barred absent a showing of cause and prejudice. See ECF No. 193 at 3 (citing ECF No. 190 at 37). The R&R correctly noted that Ground Four is procedurally defaulted, and that because Ground Four is not an ineffective assistance of counsel claim, Wood cannot use Martinez to excuse its procedural default. See Martinez, 566 U.S. at 9 ("recognizing a narrow exception" to procedural default where "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."). As such, in order to excuse the procedural default of Ground Four, Wood must show cause for the procedural default, which must be that an "objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). Wood seeks an evidentiary hearing to establish cause, but the issue is that Wood has not even alleged a cause for the procedural default of Ground Four. He only discussed Martinez and the effectiveness of PCR counsel to excuse procedural default, but as discussed above, the procedural default of Ground Four cannot be excused by Martinez. Indeed, the R&R faulted Wood for "failing to express[ ] any particular cause of his default." ECF No. 190 at 38. Wood is not entitled to an evidentiary hearing simply because his claim is procedurally defaulted.

Instead, he must allege facts as to the cause of his default that, if proven true, would entitle him to habeas relief. Schriro, 550 U.S. at 474. Because Wood did not do so, the R&R did not clearly err by denying an evidentiary hearing to excuse the procedural default of Ground Four.

For Ground Five, Wood cites to a portion of the R&R in which the R&R held that Wood did not offer any evidence regarding trial counsel's decision to not object to a portion of the Solicitor's closing argument. See ECF No. 193 at 3 (citing ECF No. 190 at 52, 53, 57, 58). Similarly, for Ground Seven, Wood cited to the portion of the R&R that concluded that Wood did not show that trial counsel's opening statement was not a reasonable trial tactic. See id. (citing ECF No. 190 at 76). These portions of the R&R provided the reasoning for the R&R's conclusion that Wood was unable to show that trial counsel's performance was deficient. With Wood unable to show that trial counsel's performance was deficient, the R&R found that Wood could not establish substantial ineffective assistance of counsel claims, and as a result the claims' procedural default could not be excused.

Wood argues that an evidentiary hearing is warranted for this precise reason—to determine why trial counsel made these decisions and whether that decision-making rendered trial counsel's performance deficient. However, the R&R clarified that even if Wood presented evidence about trial counsel's decision on both of these grounds to show that their performance was deficient, Wood has still failed the second prong of an ineffective assistance of counsel claim by failing to show any resulting prejudice. As such, the R&R concluded, Wood failed to show that his underlying ineffective assistance of counsel claims are substantial because he has not alleged facts that, if proven true at an

evidentiary hearing, would prove an ineffective assistance of counsel claim and entitle him to habeas relief. Therefore, the R&R denied Wood's request for an evidentiary hearing.

The court finds no clear error in this conclusion. In both Grounds Five and Seven, Wood failed to explain how his trial counsel's performance prejudiced him. In Ground Five, Wood argued that he was prejudiced by all of the alleged improper comments in the Solicitor's closing argument, and that the jury's lengthy deliberations indicate that the case was close. ECF No. 150 at 25–26. However, as discussed in greater detail below, Strickland's requirement of prejudice involves showing that "there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695. Wood has made no mention of the balancing of the aggravating and mitigating circumstances, and as such, he failed to show prejudice. As for Ground Seven, Wood simply asserted that "[t]rial counsel's improper opening statement and subsequent failure to object to Solicitor Ariail's argument in summation and the improper juror forms were unreasonable and prejudicial." ECF No. 150 at 42. Alleging prejudice in such a conclusory manner is insufficient to establish a substantial ineffective assistance of counsel claim. As such, the court finds that Wood did not sufficiently allege facts to show that he was prejudiced by trial counsel's performance, which would establish an ineffective assistance of counsel claim and entitle him to habeas relief. The court finds no clear error in the R&R's denial of an evidentiary hearing on these claims.

Wood does not cite to any portions of the R&R discussing Ground Ten in arguing that the R&R faulted him for failing to provide evidence. Wood's final citation, ECF No. 190 at 92, cites to a portion of the R&R in which the magistrate judge explains that Wood could have provided evidentiary support through affidavits attached to his petition to show that his default should be excused, but that Wood failed to do so. The court finds no clear error with this conclusion

B. Specific Objections

Wood also brings several specific objections with regards to the R&R's reasoning and conclusions on Grounds Three, Four, and Five. The court addresses each in turn.

a. Ground Three

In Ground Three, Wood alleges that his trial counsel was ineffective for failing to object to the introduction of evidence about conditions of confinement during the sentencing phase of his trial. In order to track the procedural history of this claim and the various decisions on it, the court will first review the evidence related to this issue that was presented at trial. The court will then summarize the PCR court's consideration of Wood's ineffective assistance of counsel claim that Wood raised as a result of trial counsel failing to object to the evidence. Next, the court will review Wood's argument regarding this claim in his habeas petition as well as the R&R's analysis of the claim. Finally, the court will consider Wood's objections and conduct its own analysis of the issue.

i. Facts

Evidence about conditions of confinement was first introduced by the state. The state called Jimmy Sligh, Classification Director for the South Carolina Department of

Corrections, "to establish what life in prison without parole means and to have a discussion as to the difference between life in prison without parole versus the punishment of death." ECF No. 42-7 at 116. Trial counsel did not object to Sligh being called as a witness. Id. at 117. The R&R recounts the highlights of Sligh's testimony in detail. Sligh agreed that "prison is kind of like a mini city," id. at 122, and testified about the various accommodations in prisons. He also explained that inmates in general population have greater freedom and contact visitation, as opposed to inmates on death row who have little freedom and only noncontact visitation.

On cross-examination, Sligh confirmed that Wood would be classified at the highest level of security classifications along with "other murderers [and rapists]." ECF No. 42-8 at 15–16. Sligh agreed with trial counsel that prison is "a tough place with tough people." Id. at 16. On redirect, Slight testified that "the great majority" of inmates make it though their time in prison without any violent incidents and that a defendant's physical characteristics are taken into account when assigning him to a cell so that prison officials do not "put a 6'8", 300 pound guy in with a 5'2" little guy." Id. at 23. On recross, Sligh confirmed that the Department of Corrections will isolate a prisoner if there is a problem with the prisoner. Id. at 24.

Trial counsel then called James Aiken ("Aiken") to testify as an expert on "future prison adaptability and risk assessment of prisoners." ECF No. 43-1 at 52, 56–57. Aiken testified that a person's behavior during prior incarceration can help predict his future prison behavior, and that there was a lack of any violent instances in Wood's past prison experience. Aiken then described differences between general population and death row, explaining that on death row "you are locked into a single cell by yourself [so] you get

peace and quiet" as opposed to general population, where "you are dealing with the security threat groups." Id. at 61. Aiken explained that these "security threat groups" consist of "predators" who "are constantly trying to take control of you as well as the prison population." Id. Finally, Aiken explained that Wood would be an "easier target . . . to be suscepted [sic] to this type of predator environment" due to his size, weight, and age. Id. at 63–64. The Solicitor did not cross-examine Aiken.

ii. PCR Order

During Wood's PCR proceeding, Wood argued that trial counsel's failure to object to the evidence about prison conditions constituted ineffective assistance of counsel. In its order, the PCR court began its consideration of the claim by recounting the evidence described above. It then summarized several South Carolina cases that discuss the impropriety of evidence on conditions of confinement during the penalty phase of a capital trial. Next, the PCR court reviewed the relevant law on ineffective assistance of counsel, including the standards used to evaluate a Strickland claim. In its application of this law, the PCR court found that trial counsel was deficient for not objecting to the evidence on conditions of confinement but concluded that Wood's claim failed because Wood was not prejudiced by his trial counsel's failure to object to the evidence.

The PCR court began its prejudice analysis by weighing the aggravating and mitigating evidence. The court explained that the nature of Wood's crime was "extremely aggravated" given the murder of a police officer as well as Wood's "subsequent wild chase" during which he wounded another police officer. ECF No. 45-3 at 71. In addition, the PCR court noted that Wood had a prior record, had been to prison

before, and that the victim impact evidence was "particularly moving." Id. In comparison, the PCR court explained, there was little mitigation evidence, including no testimony from family members and "relatively mild" testimony about Wood's mental health. Id. The PCR court also noted that rebuttal testimony about Wood's mental health simply concluded that Wood was antisocial.

The PCR court then considered the presentation of the evidence of conditions of confinement. The PCR court explained that

> [t]hrough cross of Sligh and presentation of James Aiken, the defense elicited how tough prison is, how [Wood] would be far more susceptible to danger in general population than on death row, and how [Wood] would likely be at the mercy of predator groups inside the general population of prison given his small stature and older age.

Id. The PCR court went on to say that "[b]oth sides fully joined the issue and both sides were able to make headway[,]" resulting in "relative equality of presentation by both sides on the issue of conditions of confinement." Id. The PCR court then concluded that "[g]iven the overwhelming evidence in aggravation and the limited evidence in mitigation, admission of both the State's and defense's evidence of conditions of confinement does not establish Strickland prejudice." Id.

iii. Wood's Argument and the R&R's Holding

Wood raised his ineffective assistance of counsel claim again in his habeas petition, ECF No. 85 at 5, and in his traverse in response to defendants' motion for summary judgment, ECF No. 150 at 2–9. In his traverse, Wood argued that the PCR court unreasonably applied Strickland to find that Wood was not prejudiced by the introduction of evidence regarding prison conditions. Wood explained that both federal and South Carolina law require a capital sentencing decision to be based on evidence related to the defendant and to the crime, and that it is improper to inject an arbitrary

factor, like evidence on general prison conditions, into the decision-making process. Wood then contended that the introduction of evidence about general prison conditions is an especially grave error pursuant to State v. Burkhart, 640 S.E.2d 450 (S.C. 2007), and that the PCR court did not take this into account when it found that there was "relative equality of presentation by both sides on the issue of conditions of confinement." ECF No. 150 at 7. Finally, Wood argued that the PCR court failed to consider in its prejudice analysis the prolonged amount of time during which the jury deliberated over Wood's sentence.

In considering these arguments, the R&R found that, pursuant to federal law, admission of evidence of conditions of confinement do not per se prejudice a defendant, but instead, the totality of the evidence must be considered to determine prejudice. The R&R concluded that the PCR court properly engaged in such an analysis when it considered the aggravating and mitigating evidence. The R&R then found that "it is reasonable to conclude that [the PCR court] recognized the relevance" of Burkart given its discussion of the case and went on to discuss the impact of Bowman v. State, 809 S.E.2d 232 (S.C. 2018), a recent case that clarified Burkhart and held that the introduction of evidence about conditions of confinement does not automatically support a finding of prejudice. ECF No. 190 at 36. Finally, in considering Wood's argument about the length of jury deliberations, the R&R stated that "Wood's contention appears to be that the jury found the evidence more equally weighted than the PCR court, so the PCR court's determination was unreasonable." Id. at 37. The R&R then explained that "Wood neither asserts nor points to any evidence that the jury's indecisiveness resulted from admission of evidence of conditions of confinement or that it was due to any

mitigating evidence that the PCR court failed to consider in its analysis." Id. As a result, the R&R concluded, Wood did not connect the erroneous admission of prison condition evidence to any perceived prejudice.

iv. Discussion

The court now considers Wood's objections to the R&R's analysis of this claim. As a reminder, the court reviews the portions of the R&R to which Wood objects de novo. In doing so, the court reviews the PCR court's opinion to determine whether, pursuant to § 2254, the PCR court unreasonably applied Strickland. Because the court is employing the deferential standards of review under both Strickland and § 2254, the court's review is "doubly deferential." Knowles, 556 U.S. at 123.

Wood first objects to the R&R's finding that "nothing in federal jurisprudence requires a finding that admission of evidence of conditions of confinement prejudiced the defendant." ECF No. 193 at 4 (citing ECF No. 190 at 35). It is unclear why Wood objects to this finding. Indeed, there is nothing within federal law that states that, in the context of a Strickland analysis, a counsel's deficient performance that allowed for the introduction of evidence about prison conditions prejudices a defendant. Instead, Strickland requires a court to "consider the totality of the evidence before the judge or the jury" when determining whether a defendant was prejudiced by counsel's deficient performance. Strickland, 466 U.S. at 695. The mere fact that evidence of prison conditions was admitted does not necessitate an automatic finding of prejudice. Instead, the court must consider the evidence of prison conditions in addition to the rest of the evidence presented during sentencing. Wood appears to believe that this statement indicates a misunderstanding of Wood's claim, namely, that the PCR court's application

of Strickland and its prejudice analysis was unreasonable pursuant to South Carolina state law. Yet the R&R simply made this point to show that evidence of conditions of confinement is not per se prejudicial under federal law or Strickland. Instead, the R&R goes on to explain what is required of a Strickland prejudice analysis and concludes that the PCR court properly stated and applied the law on this issue. As such, the court overrules this objection.

Wood next argues that the R&R erroneously failed to determine whether Burkhart factored into the prejudice analysis. As mentioned above, the PCR court summarized the relevant South Carolina law about the introduction of evidence on prison conditions, including Burkhart. In Burkhart, the Supreme Court of South Carolina reversed a death sentence on direct appeal, not on a PCR application, because evidence about general prison conditions was introduced during the penalty phase of the trial. 640 S.E.2d at 453. The court explained that even though both parties introduced this evidence, "this entire subject matter injected an arbitrary factor into the jury's sentencing considerations." Id. at 488. The court reversed the death sentence because, pursuant to S.C. Code Ann. § 16-3-25(c)(1), a jury may not impose a death sentence under the influence of any arbitrary factor.

The R&R concluded that the PCR court's detailed discussion of Burkhart suggested that the PCR court did consider Burkhart in its prejudice analysis. Indeed, while the PCR court did not explicitly reference Burkhart in its prejudice analysis, it did provide a detailed explanation of the case and its holding. However, whether or not the PCR court considered Burkhart in its prejudice analysis is irrelevant, because in Bowman v. State, 809 S.E.2d 232 (S.C. 2018), the Supreme Court of South Carolina clarified that

Burkhart is inapplicable to a PCR ineffective assistance of counsel claim. Indeed, the Bowman court "flatly reject[ed] the suggestion that a violation of section 16-3-25(C)(1) precludes a harmless error analysis in all circumstances." 809 S.E.2d at 245.

Moreover, the Supreme Court of South Carolina opined that "[i]n any event, Burkhart provides no support for Petitioner's claims in this matter, as this is a PCR claim." Id. at 346. Instead, a court must still employ the approach articulated in Strickland, which requires a showing "that 'there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" Bowman, 809 S.E.2d at 246 (quoting Jones v. State, 504 S.E.2d 822, 828 (S.C. 1998)).[4] In other words, while South Carolina disallows evidence about general prison conditions during the sentencing phase of a capital trial, this type of evidence is treated as any other evidence for the purposes of a PCR claim and Strickland analysis. The Bowman court, which was considering the appeal of a PCR opinion, illustrated this point by going on to find that "[b]ecause the evidence of guilt and aggravating factors is overwhelming, there is ample evidence to support the PCR court's determination that Petitioner failed to establish prejudice" for the petitioner's counsel's failure to object to questioning about general prison conditions. In sum, Burkhart is not controlling in the Strickland prejudice analysis, meaning that the R&R did not err in failing to find whether or not the PCR court considered Burkhart.

[4] While the Bowman court cites Jones for this law, the same language appears in Strickland. See Strickland, 466 U.S. at 695 ("[T]he question is whether there is a reasonable probability that, absent the 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.").

Wood then makes several objections to the portion of the R&R that found that "Wood neither asserts nor points to any evidence that the jury's indecisiveness resulted from admission of evidence of conditions of confinement or that it was due to any mitigating evidence that the PCR court failed to consider in its analysis." ECF No. 190 at 37. Wood first objects to the R&R's finding that the amount of time a jury spends deliberating is not properly considered in a prejudice analysis. Admittedly, Wood's original argument on this issue was not particularly clear. Wood originally argued that "[t]he PCR judge found that [Wood] could not prove prejudice because of the highly aggravated nature of the crime. This finding, however, fails to consider the jury's protracted deliberations regarding petitioner's sentence." ECF No. 150 at 8 (citation to record omitted). Wood went on to describe the timing of the jury deliberations and concluded that "[t]he jury clearly carefully considered the evidence they received in the case and did not find the issue of sentence to be a quickly resolved issue." Id.

The R&R interpreted this argument to be that the PCR court's prejudice determination was unreasonable because the jury may have found the evidence to be more equally weighted than the PCR court did, as indicated by the jury's lengthy deliberations. But the R&R concluded that this argument failed because "Wood neither asserts nor points to any evidence that the jury's indecisiveness resulted from admission of evidence of conditions of confinement" and therefore Wood "fail[ed] to tie any perceived prejudice to counsel's alleged ineffective act or omission." ECF No. 190 at 37. In other words, the R&R held that Wood failed to show that the prolonged jury deliberations were caused by the evidence about general prison conditions. This appears to misapprehend Wood's argument, which was subsequently clarified in Wood's

objections. Wood does not argue that the jury's indecisiveness itself indicates prejudice. Instead, Wood argues that the PCR unreasonably weighed the evidence by concluding that the aggravating evidence clearly outweighed the mitigating evidence when in fact the length of the jury deliberations suggest that the case was a close one in which the aggravating evidence did not clearly outweigh the mitigating evidence.

The court finds that the PCR court's failure to consider the length of jury deliberations was not a clearly unreasonable application of Strickland. To be sure, some courts have considered the amount of time the jury deliberated as an indication of how close the case was. See Roche v. Davis, 291 F.3d 473, 484 (7th Cir. 2002) (explaining that because "after eight hours of deliberation, the jury was unable to recommend the death penalty . . . whether the aggravating circumstances outweighed the mitigating circumstances in this case was apparently a closer call"). However, Strickland does not require a court to consider the length of jury deliberations but instead requires a court to balance the aggravating and mitigating circumstances. Strickland, 466 U.S. at 695; see also Wiggins v. Smith, 539 U.S. 510, 534 (2003) ("In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence.").

Indeed, none of the cases cited by Wood require a court conducting a prejudice analysis under Strickland to consider the length of jury deliberations. Almost none of the cases cited by Wood involve a Strickland prejudice analysis and instead consider the prejudice of a constitutional error while applying a harmless error analysis. See Parker v. Gladden, 385 U.S. 363, 365 (1966) (considering whether comments made by the court bailiff about the defendant were in violation of the defendant's rights of confrontation and cross-examination and whether the comments prejudiced the defendant); Dallago v.

United States, 427 F.2d 546, 558–59 (D.C. Cir. 1969) (considering whether the error of sending certain evidence to the jury was prejudicial); United States v. Varoudakis, 233 F.3d 113, 126 (1st Cir. 2000) (considering whether admission of inadmissible evidence of prior bad act evidence was prejudicial); United States v. Lopez, 500 F.3d 840, 845–46 (9th Cir. 2007) (considering whether the prosecutor's reference to the defendant's post-arrest silence was prejudicial). Courts have distinguished between a Strickland prejudice analysis and a harmless error analysis. See Walker v. Martel, 709 F.3d 925, 940 (9th Cir. 2013) ("Strickland bears its own distinct substantive standard for a constitutional violation; it does not merely borrow or incorporate other tests for constitutional error and prejudice."); Siverson v. O'Leary, 764 F.2d 1208, 1215 (7th Cir. 1985) ("Respondents correctly note that with respect to this second [prejudice] requirement, the Strickland analysis differs fundamentally from the traditional harmless error analysis applied to most types of constitutional error."). Wood does cite to one case in which a court considered the length of jury deliberations in its Strickland prejudice analysis, Stafford v. Saffle, 34 F.3d 1557, 1564 (10th Cir. 1994); however, the court remains unconvinced that the weighing of evidence to determine prejudice, as mandated by Strickland, requires consideration of the length of time for which the jury deliberated. As such, the court concludes that the PCR court did not unreasonably apply Strickland when it failed to consider the length of jury deliberations while conducting its prejudice analysis.

In a related objection, Wood contends that the R&R improperly faulted Wood for failing to show that the evidence of prison conditions may have affected the jurors' decision-making. He contends that because inquiry into juror deliberations is prohibited by the Federal Rules of Evidence, the R&R placed "an impossible burden" on Wood.

ECF No. 193 at 4–5. However, as discussed above, Wood's argument is not premised on the claim that the juror deliberations were prolonged because of the evidence of conditions of confinement. Instead, Wood argued that the PCR court should have considered the jury's indecisiveness when determining how close the case was. Therefore, whether the evidence about prison conditions affected the jurors' decision-making is irrelevant, and this objection is overruled.

Wood's final objection to the R&R's analysis of Ground Three is that the R&R failed to factor into its prejudice analysis the Solicitor's reliance on prison conditions in his closing argument. But yet again, Wood has not shown that a court should consider the repetition of improper evidence in a closing argument when conducting a Strickland prejudice analysis regarding the introduction of that evidence. Wood solely relies on Hyman v. Aiken, 824 F.2d 1405 (4th Cir. 1987), but that case is inapposite. In Hyman, the Fourth Circuit considered whether an improper jury instruction was harmless error or whether it entitled the death-sentenced defendant to a new trial on the issue of his guilt. 824 F.2d at 1409. The judge had instructed the jury "that malice is 'presumed from the willful, the deliberate, the intentional doing of an unlawful act without justification or excuse' or from 'the use of a deadly weapon.'" Id. The Fourth Circuit found that the instruction may have caused the jury to reasonably believe that that state did not have an affirmative burden to prove malice, and that this shifting of the burden of proof on intent was a denial of the defendant's due process. In concluding that the jury instruction was not harmless error, the court also noted that the Solicitor relied on the concept of malice presumptions in his closing argument. Id. at 1410. However, Hyman's harmless error analysis was not in the context of a Strickland prejudice analysis, and Wood provides no

reference to a case in which a court considered the prosecution's reliance on improper evidence when conducting a Strickland prejudice analysis. Therefore, the court overrules this objection.

b. Ground Four

Wood addresses his objections to Grounds Four and Five in the same section. However, the R&R found that Ground Four was procedurally barred from federal habeas review because the state court found that the claim was procedurally barred under state law, and Wood has not expressed any cause for his default. As such, the R&R did not substantively consider Ground Four. Wood does not object to the R&R's finding that Ground Four is procedurally barred; therefore, the court adopts the R&R's finding as to Ground Four and finds that it is procedurally barred.

c. Ground Five

Ground Five alleges ineffective assistance of counsel for trial counsel's failure to object to various statements in the Solicitor's closing argument. Wood only objects to the R&R's findings on some of those statements—namely, the Solicitor's statements about his decision to seek the death penalty and the death penalty's statutory limitations, the Solicitor's reference to evidence about conditions of confinement, and the Solicitor's comments about the jury "sending a message" with its verdict.

As a reminder, Wood has exhausted his state remedies for these arguments, but they were not raised in his first PCR application. Therefore, they are procedurally defaulted and must fit within the Martinez exception to be properly considered in determining whether Wood is entitled habeas relief. To fit within the Martinez exception, Wood must first show that his underlying ineffective assistance of counsel

claim—that trial counsel's failure to object to the Solicitor's statements constitutes ineffective assistance of counsel—is substantial. For each of the Solicitor's statements, the court will summarize Wood's argument in his habeas petition and traverse, review the R&R's finding, and consider Wood's objections.

i. Personal Opinion and Statutory Limitations

Wood first argues that trial counsel was ineffective for failing to object to the Solicitor's statements in his closing argument about the Solicitor's decision to seek the death penalty and the state's limited ability to seek the death penalty. The relevant portions of the Solicitor's closing argument are as follows:

> Now, I'm going to tell you again it's a tough decision, and we know it's a tough decision. It was a tough decision - - it's a tough decision for me to ask you to make a tough decision. But responsible people make tough decisions.
>
> . . .
>
> Now, why is the death penalty appropriate in this case? That's a fair question for you to ask me, and that's a fair question that you should ask yourselves. And I'm going to tell you why.
>
> There are mean and evil people in this world who do not deserve to continue to live with us regardless of how well confined they are, and that's why the death penalty is appropriate. And John Richard Wood is such a mean and evil person.
>
> . . .
>
> And the law limits the right of the state to seek the death penalty. We can't seek it in every murder. We can only seek it in certain murders. And we can only seek it in those cases where the murderers are mean and evil people, based on the circumstances of the crime, and that's what we're doing in this case. John Wood is such a person.

ECF No. 43-2 at 81, 83–84.

With regard to Wood's argument about the Solicitor's comments regarding his decision to seek the death penalty, the R&R held that Wood failed to establish trial

counsel's performance was deficient based on Wood's reliance on State v. Woomer, 284 S.E.2d 357 (S.C. 1981), and State v. Butler, 290 S.E.2d 420 (S.C. 1982), overruled on other grounds by State v. Torrence, 406 S.E.2d 315 (S.C. 1991). Because Wood failed to show that trial counsel's performance was deficient, the R&R concluded that Wood failed to establish a substantial claim of ineffective assistance of counsel, and that the procedural default could not be excused under Martinez.

Wood objects to this holding, arguing that the R&R failed to appreciate the strong similarities between the Solicitor's closing argument and the closing arguments in Woomer and Butler. In Woomer, the Supreme Court of South Carolina vacated a death sentence on direct appeal in part because the Solicitor's closing argument injected his personal opinion into the jury deliberations by discussing his decision to pursue the death penalty in the case. 284 S.E.2d at 359–60. In his closing argument, the Solicitor stated:

> You know, the initial burden in this case was not on you all. It was on me. I am the only person in the world that can decide whether a person is going to be tried for his life or not. I mean I had the same thing you all did. I had to make up my mind in regards to this and under the law, if there is any question about it, you ask the judge, I have to make the first decision as to whether or not a person is going to be tried for the electric chair. If I didn't want him tried for the electric chair, there is no way the Sheriff or anybody else can make it happen. I had to make this same decision, so I have had to go through the same identical thing that you all do. It is not easy.

Id. at 359. The court held because the Solicitor injected his personal opinion, the resulting death sentence may have been influenced by an arbitrary factor in contravention of S.C. Code Ann. § 16-3-25(C)(1). Id.

Similarly, in Butler, the Supreme Court of South Carolina vacated a death sentence on direct appeal due to the Solicitor's improper injection of his personal opinion in his closing argument. In discussing the case, the Solicitor stated:

> First, it has to pass over my desk. I make the decision. People elect me to make the decision as to whether or not I think cases ought to be prosecuted. We don't prosecute all the cases. And I think that's one of the hardest impressions sometimes that we have to make, because people think that I am the mouthpiece of the county or the mouthpiece of the police and that everything that comes along Norman Fogle has got to get up there and holler and advocate a position. That is not correct. I have to use my common sense. So I can share with you just to a small degree this morning how each and everyone of you feel, because as I stated yesterday before that in order for this case to get moving as far as the death penalty was concerned I first had to make that decision, you see, and I have in my opinion, based upon the evidence in this case, overall, decided that if we are going to have a death penalty law on the books that if there were any facts that could ever justify it this case justifies it, justifies it.

Id. at 421. The court, relying on Woomer, held that because the Solicitor injected his personal opinion into the jury's determinations, the death sentence may not be free from the influence of an arbitrary factor. Id.

The R&R found that the closing arguments in Woomer and Butler were sufficiently distinguishable from the Solicitor's closing argument here because the Solicitor here "did not go so far as to compare his role to that of the jury or even emphasize his own decision to seek the death penalty; he merely explained that the State does not choose to pursue the death penalty for every murder charge, so he had to make an affirmative decision to seek death in this case." ECF No. 190 at 47–48. The court agrees with the R&R's assessment. The Solicitor did reference himself when he said "[n]ow, I'm going to tell you again it's a tough decision, and we know it's a tough decision. It was a tough decision - - it's a tough decision for me to ask you to make a tough decision." ECF No. 43-2 at 81. However, the Solicitor did not expand on his "tough decision" like the Solicitors in Woomer and Butler nor did he expand on his reasoning to seek the death penalty. And most importantly, in Woomer and Butler, the Solicitors explained their decision to seek the death penalty as a way to relate to the jury.

They were clearly arguing to the jury that they understood the process of deciding whether the death penalty should be applied to the defendant because they too had to make the decision of whether to seek the death penalty. Here, the Solicitor only acknowledged that it was hard for him to ask the jury to consider the death penalty. His statements simply do not rise to the level of the statements made in Woomer and Butler.

Wood next objects to the R&R's failure to address his argument about trial counsel's failure to object to the Solicitor's comments about the statutory limitations on seeking the death penalty. The Solicitor explained that the state "can't seek [the death penalty] in every murder" but can "only seek it in certain murders." ECF No. 43-2 at 83–84. He went on to explain that the state "can only seek [the death penalty] in those cases where the murderers are mean and evil people, based on the circumstances of the crime, and that's what we're doing in this case." Id. at 84. In his traverse, Wood argued that trial counsel was deficient for failing to object to these statements because they are not true. Wood explained that at the time of Wood's sentencing proceeding, South Carolina's death penalty statute contained eighteen circumstances that made a murder death-eligible, and that many of those circumstances have been broadly interpreted by the Supreme Court of South Carolina. As a result, Wood argued, "the overwhelming majority of murders were death-eligible and the State had broad discretion to seek death in virtually hundreds of cases that year." ECF No. 150 at 21–22. The R&R found this argument to be unconvincing because South Carolina's death penalty statute does limit the cases in which the state may seek the death penalty, making the Solicitor's statements true. As such, the R&R concluded that trial counsel's performance was not deficient and that Wood could not establish a substantial claim of ineffective assistance of counsel.

Wood argues that the R&R "simply fails to address the Petitioner's argument that, in fact, the overwhelming majority of murders, at the time of Petitioner's trial and even now, are death-eligible due to the expansive interpretations afforded statutory aggravators given by the South Carolina Supreme Court." ECF No. 193 at 7–8. Yet the R&R summarizes Wood's argument and cites to the portion of Wood's traverse that contains his argument. ECF No. 190 at 45 (citing ECF No. 150 at 21–22). Therefore, the R&R clearly did consider Wood's argument and simply found it unavailing.

Moreover, even if the majority of murders were death-eligible in South Carolina at the time of Wood's sentencing trial, this fact does not conflict with what the Solicitor told the jury. As the R&R explained, South Carolina's death penalty statute limits the cases in which the state may seek the death penalty. See S.C. Code Ann. § 16-3-20(B), (C)(a). The Solicitor did not claim that the state can only seek the death penalty on rare occasions or even in the minority of murder cases, as Wood's argument seems to suggest. Instead, he explained that the state can only seek the death penalty in "certain" murder cases. ECF No. 43-2 at 84. This is legally accurate. And while characterizing death-eligible crimes as ones "where the murderers are mean and evil people" is not legally precise, see ECF No. 43-2 at 84, the characterization is not so drastic as to misstate the law. Therefore, the court overrules Wood's objections regarding trial counsel's failure to object to these comments in the Solicitor's closing argument.

ii. Evidence about Conditions of Confinement

Wood also alleges that trial counsel's failure to object to reference to the evidence about conditions of confinement in the Solicitor's closing argument constituted ineffective assistance of counsel. In his closing argument, the Solicitor stated

> Now, you and I may think going to prison for life is serious business. But that's not the issue. The issue is, is going to prison for life serious business for John Richard Wood? Are we really doing anything to John Richard Wood?
>
> Going to prison is like being in a big city - - in a little city. You've got a restaurant. You've got a canteen. You've got a medical center. You've got a gymnasium. You've got fields to work in. They give you clothing. You get contact visits with your family. You've got T.V. You play cards and games. You've got a social structure. You've got freedom of movement. It might be limited, but you've got freedom of movement. Thirty or forty acres to live in. Watch ball games on the T.V. You go to school. And you do all of those things that you want to. You may not have a car to drive around, and they may limit your travel. And your standards may not be as high as what you're used to. But based on what John Richard Wood was doing, prison is just about going to be a change of address and nothing more.
>
> He will see his baby every weekend, and that baby will sit on his lap.

ECF No. 43-2 at 88–89.

The R&R held that Wood failed to demonstrate a substantial claim of ineffective assistance of counsel for trial counsel's failure to object to this argument. The R&R first stated that "[i]n its discussion above regarding Ground Three, this court determined that the PCR court did not unreasonably err in its consideration of this standard [about the inadmissibility of evidence on general prison conditions] under Strickland and its resulting finding that trial counsel's failure to object to evidence of prison conditions did not prejudice Wood." ECF No. 190 at 51. The R&R went on to explain that "Wood has not shown that the evidence of conditions of confinement presented during the sentencing phase was impermissible. Thus, the court cannot find that the Solicitor's comments on this topic in his closing statement were based on inadmissible evidence." Id.

In his objections, Wood first argues that the R&R erroneously held that Wood did not show that evidence of confinement conditions was impermissible during sentencing

proceeding. Wood claims that the PCR court "found that the statements were, in fact, impermissible," and that the Magistrate Judge cannot second-guess that finding. ECF No. 193 at 8. It is unclear to the court what exactly Wood means by "statements." If he is referring to statements made during the closing argument about general prison conditions, the PCR court did not consider these statements, so the PCR court could not have found them to be impermissible. Wood did not raise this argument until his second PCR application, so the order on his first PCR application does not address the permissibility of statements during the Solicitor's closing argument. To the extent that Wood is referring to some other statement, his argument is not specific enough for the court to determine what statement to which he is referring. To the extent that Wood means "evidence" instead of "statements," the court addressed that argument in its consideration of Wood's objection to the standard of review. Therefore, this objection is overruled.

Wood also argues that the R&R incorrectly found that trial counsel was not deficient for failing to object to the Solicitor's reference to evidence about prison conditions because he may have had some strategic reason for doing so. The R&R found that "it would not be unreasonable for Wood's trial attorney, who had the benefit of making his argument after the solicitor, to choose not to object to the solicitor's comments, but instead to take the opportunity to respond and have the last word on the subject before the jury deliberated." ECF No. 190 at 53. Wood claims that this finding is erroneous because at the PCR hearing, Wood's trial counsel "characterized the testimony as 'devastating to [Wood's] case,' and testified he did not have any strategic reason for

failing to object." ECF No. 193 at 8 (quoting ECF No. 44-4 at 65–71; ECF No. 44-5 at 9).

As an initial matter, it is important to distinguish between counsel's failure to object to the introduction of evidence about conditions of confinement and counsel's failure to object to the reference to that evidence in closing argument. Most of the testimony from the PCR hearing cited by Wood relates to trial counsel's failure to object to the introduction of evidence about general prison conditions. See ECF No. 44-4 at 67–71 (discussing the testimony of Slight and Aiken); ECF No. 44-5 at 9 (discussing the introduction of testimony about general prison conditions and trial counsel's failure to object to the testimony). The strategy behind trial counsel's failure to object to the introduction of evidence could be different that the strategy behind trial counsel's failure to object to reference to that evidence during a closing argument. This is especially true given trial lawyers' general reluctance to object during a closing argument.

Nevertheless, trial counsel did admit at the PCR hearing that he did not have a strategic reason for failing to object during the Solicitor's closing argument. After reviewing the portion of the Solicitor's closing argument in which the Solicitor discussed general prison conditions, trial counsel was asked "[a]s far as failure to object to the closing arguments, did you fail to object to this information for any strategic reason?" ECF No. 44-4 at 65–66. Trial counsel responded, "no." Id. Therefore, trial counsel did explicitly testify that his failure to object was not strategic.

However, the Magistrate Judge cannot be faulted for her failure to reference this testimony because Wood did not cite to this or any other portion of the record in his traverse to support his argument that trial counsel did not have a strategic reason for

failing to object. Instead, he summarily argued that "[t]rial counsel's failure to object to these arguments was objectively unreasonable." ECF No. 150 at 25. As such, as the R&R concluded, he provided no evidence in his argument before the Magistrate Judge that trial counsel's decision not to object was not strategic or reasonable. It is not the Magistrate Judge's job to comb through thousands of pages of the record to find support for Wood's arguments.

Moreover, the issue of whether trial counsel's failure to object was strategic is not as clear cut as trial counsel's initial testimony may suggest. On cross-examination at the PCR hearing, trial counsel was directed to the portion of the Solicitor's closing argument in which the Solicitor generally described prison in a manner that seemed favorable. ECF No. 44-5 at 4. Trial counsel testified that "I read that, and while I certainly think that that's bordering on - - I'm not even real sure I'd object to it if it happened today." Id. Trial counsel was then asked if it was possible that he did not object because the defense had introduced Aiken's testimony about prison and Wood's vulnerability to predator groups. Id. at 5. Trial counsel responded that he was unsure, explaining that "[r]eading this today I do not recall having that state of mind just described" but "[o]n the other hand, if they were making this argument because it was in response to some testimony, then just so be it." Id. Trial counsel stated that "I don't believe I was sitting there thinking that that argument is being made and is admissible because it's responsive to testimony." Id. Then in conclusion, trial counsel was asked "if you do not recall that though, if in fact that testimony had been elicited, is that the kind of thing you would say, well that's borderline, I'm not going to object to that directly responsive stuff we put out?" Id. Trial counsel responded, "Well, like I said a moment ago, I'm not really sure

I'd object to it right now." Id. This testimony indicates that trial counsel's failure to object could have been strategic, given both his inability to recall his state of mind during this portion of the closing argument as well as the fact that he was unsure whether he'd object to the argument now.

To be sure, in order to show that counsel's conduct does not fall "within the wide range of reasonable professional assistance[,]" a "defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). However, trial counsel's testimony about his strategy, or lack thereof, alone does not convince this court that trial counsel's performance was unreasonable. Instead, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688. The R&R considered the reasonableness of trial counsel's performance, holding that "Wood has not offered evidence suggesting counsel's decision not to object was not strategic or reasonable." ECF No. 190 at 53 (emphasis added). The R&R explained that "[i]t would not be unreasonable for both sides to refer to [evidence about conditions of confinement] to support their closing arguments" because both sides presented evidence about conditions of confinement. Id.

As an initial matter, Wood did not object to the R&R's reasonableness determination, but in any event, the court agrees with the R&R's reasonableness assessment. "'Deficient performance' is not merely below-average performance; rather, the attorney's actions must fall below the wide range of professionally competent performance." Griffin v. Warden, Maryland Corr. Adjustment Ctr., 970 F.2d 1355, 1357

(4th Cir. 1992). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. At the time of closing arguments, evidence about general prison conditions from both sides had been admitted without objection. Because the evidence was already admitted, the court agrees with the R&R that it would not be unreasonable for trial counsel to not object to the Solicitor's reference to the evidence. Indeed, the court "must be highly deferential in scrutinizing [trial counsel]'s performance and must filter the distorting effects of hindsight from [its] analysis." Burket v. Angelone, 208 F.3d 172, 189 (4th Cir. 2000). In hindsight, and with the benefit of subsequent and additional South Carolina case law opining on the impropriety of evidence on general prison conditions, a different conclusion may be warranted. But examining trial counsel's performance at the time of Wood's trial and without the benefit of hindsight, as Strickland requires, the court simply cannot conclude that trial counsel's performance was unreasonable.

Wood also objects to the R&R's finding that Wood was not prejudiced by the introduction of evidence about confinement conditions because trial counsel remarked on the conditions as well. Wood argues that this finding does not address the prejudice of the introduction of the evidence in the first place. While this objection relates to the prejudice of "the introduction of this evidence [on conditions of confinement]", ECF No. 193 at 8, the court interprets this objection to apply to the mention of the conditions of confinement in the Solicitor's closing argument. The objection is brought under Ground Five, which relates to the Solicitor's closing argument, and Wood argues that he "had the

right to respond to the State's arguments on this issue," further evincing that this objection relates to the closing argument and not the introduction of the evidence through witnesses. ECF No. 193 at 8.

The R&R made no findings about the prejudice of trial counsel's failure to object to the discussion of this evidence during the Solicitor's closing argument. In considering whether Wood has a substantial ineffective assistance of counsel claim, the R&R found that Wood did not establish that his trial counsel's performance was deficient. ECF No. 190 at 53 ("Accordingly, the court finds no reason to set aside the 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" (quoting Strickland, 466 U.S. at 689)). Therefore, the R&R did not reach the question of whether Wood was prejudiced by trial counsel's failure to object. As such, this objection is overruled.

iii. Send a Message

Wood next alleges that trial counsel's failure to object to the portion of the Solicitor's closing argument about "sending a message" to the community constituted ineffective assistance of counsel. That portion is as follows:

> Now, in closing, let me tell you one other thing. You have been intrusted [sic] by society, by our system, you twelve have been intrusted [sic] as representatives of the community to determine what the appropriate sentence is under the facts of this case. And you know this case now as well as anyone involved it [sic] and anyone in the community. So no one can question your judgment because you have all the facts. And it is your decision and it will be your decision, and you will speak for the community when you make that decision. And whatever decision you make, it will ring like a bell outside this courthouse. It will ring like a bell to all of those who will listen and all of those who are listening. And I urge you on behalf of the state of South Carolina and the people of this community to let that bell ring, to let them know that anyone who is involved in the killing of a law enforcement officer in the line of duty who is there to protect the rest of us,

> that such conduct will not be tolerated and will receive the ultimate punishment under our law.

ECF No. 43-2 at 91–92. The R&R found that Wood did not show that this underlying ineffective assistance of counsel was substantial because trial counsel's decision to not object may have been strategic, meaning that trial counsel's performance was not deficient. The R&R explained that if trial counsel had objected, he would have both highlighted the comment and forfeited the opportunity to respond to the comment in his own closing. In doing so, the Solicitor would have had the last word on this issue.

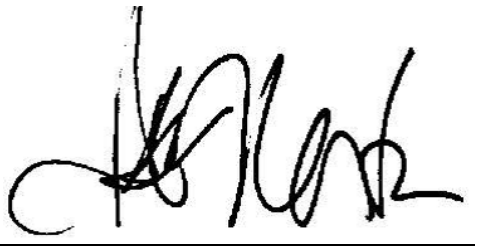
Wood objects to the R&R's finding that trial counsel's decision may have been strategic, arguing that "[t]he state court did not rely on that reasoning in denying Petitioner's claim, and this Court is not empowered to substitute its reasoning." ECF No. 193 at 9. However, the state PCR court did not consider this claim. Wood first raised this argument in his second PCR application, which was not considered on the merits and was instead dismissed as untimely and improperly successive. Therefore, the PCR court did not rely on this reasoning because it provided no reasoning on this issue. Because this argument is procedurally defaulted, the R&R properly considered whether trial counsel's failure to object may have been strategic. As such, Wood's objection on this issue is overruled.

In conclusion, the court overrules all of Wood's objections and adopts the R&R.

III. CONCLUSION

For the foregoing reasons the court **ADOPTS** the R&R, **GRANTS** the respondents' motion for summary judgment, **DENIES** Wood's petition for writ of habeas corpus, and **GRANTS** in part and **DENIES** in part Wood's motion for further factual development, in accordance with the R&R.[5]

AND IT IS SO ORDERED.



DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

September 9, 2019
Charleston, South Carolina

[5] By way of reminder, the R&R granted in part Wood's motion for further factual development for the limited purpose of the R&R considering the testimony of SLED agent Gene Donohue, which was not part of the state record and was attached to Wood's traverse. Donohue's testimony was provided in the case State v. John Richard Wood and Karen Pittman McCall, which was a separate trial that took place in Anderson County. ECF Nos. 150 at 46; 150-2. The R&R's partial grant of Wood's motion for further factual development does not implicate the court's holding that Wood's petition is denied.

3633

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	In the Court of Common Pleas Thirteenth Judicial Circuit
John Richard Wood, #6005, Applicant, vs. The State of South Carolina, Respondent.	C/A No.: 2005-CP-23-04737 **ORDER OF DISMISSAL WITH PREJUDICE**

This matter is before this Court on the Application for Post-Conviction Relief ("APCR") filed by John Richard Wood ("Applicant"), who was convicted of murder and sentenced to death. For the following reasons, this Court denies and dismisses the application with prejudice.

I.

Procedural History

At the May 2001 term, the Greenville County Grand Jury indicted Applicant, John Richard Wood, for murder and possession of a weapon during the commission of a violent crime (01-GS-23-3106). (R. at 2516-17). The state gave notice of intent to seek the death penalty, and served its notice of evidence in aggravation.

Voir dire in the case began on February 4, 2002 before The Honorable John W. Kittredge. Public Defender John I. Mauldin, Attorney James Bannister, and Attorney Rodney Richey represented Applicant at his jury trial. Solicitor Robert M. Arial, Deputy Solicitor Betty C. Strom, and Assistant Solicitor Mindy Hervey were the prosecutors at trial. On February 11, 2002, Applicant's jury convicted him of both charges.

Applicant exercised his right to the 24-hour cooling-off period in subsection 16-3-20(B) of

the Code of Laws of South Carolina. The sentencing phase of his trial began on February 13, 2002. Judge Kittredge submitted the following statutory aggravating factor to the jury:

> The murder of a federal, state, or local law enforcement officer, peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.

(R. at 2221-22). Judge Kittredge submitted the following statutory mitigating factors to the jury:

> (1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.
>
> (2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.
>
> (3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.
>
> (4) The age or mentality of the defendant at the time of the crime.

(R. at 2223-24).

On February 16, 2002, Applicant's jury found the existence of the statutory aggravating factor and recommended a sentence of death for the murder conviction. That same day, Judge Kittredge sentenced Applicant to death for murder. (R. at 2259).

Applicant filed and served a timely notice of appeal with the Supreme Court of South Carolina. Assistant Appellate Defender Robert M. Dudek, of the South Carolina Office of Indigent Defense, represented Applicant during his direct appeal. On July 22, 2004, Dudek filed a Final Brief of Applicant in which he asserted the following issues on behalf of Applicant:

> (1) Whether the judge erred by excusing Juror Smith for cause, where she testified she could vote for the death penalty, and sign the form imposing the death sentence, since Smith was a qualified juror?
>
> (2) Whether the court erred by refusing to instruct the jury on the law of voluntary manslaughter where there was evidence the trooper engaged in an "aggressive" traffic

> stop which endangered appellant, who was on a motorcycle, while the trooper was in a patrol car, since this created the heat of passion and legal provocation necessary for an instruction on voluntary manslaughter?
>
> (3) Whether the judge erred by ruling South Carolina's death penalty statute was constitutional where it mandated that appellant, seeking the mitigating evidence attendant to pleading guilty, and accepting responsibility, must waive jury sentencing, since this procedure denied appellant his right to present mitigating evidence to a sentencing jury?
>
> (4) Was the court without subject matter jurisdiction to sentence appellant to death, pursuant to Jones v. United States, Apprendi v. New Jersey, and Ring v. Arizona where the indictment issued by the Greenville County Grand Jury did not allege an aggravating circumstance?

The State, through Assistant Attorney General S. Creighton Waters, filed its Final Brief of Respondent on July 22, 2004. Dudek followed with a Final Reply Brief of Applicant also dated July 22, 2004.

The Supreme Court of South Carolina held oral argument in the case on October 5, 2004. An opinion was issued affirming the convictions and death sentence on December 6, 2004. State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (S.C. 2004). The court denied a petition for rehearing on January 20, 2005, and a death warrant issued on January 21, 2005.

Applicant filed a stay request with the Supreme Court of South Carolina on January 25, 2005 in order to pursue review by the United States Supreme Court. The State filed a Return to the stay request on February 1, 2005. The Supreme Court of South Carolina granted a stay by Order dated February 2, 2005.

Applicant, through counsel Dudek, filed a Petition for Writ of Certiorari with the United States Supreme Court on April 15, 2005, in which he raised the following issue:

> Whether the South Carolina Supreme Court erred by holding that the trial judge's disqualification of a black juror who stated she could

> impose the death penalty was justified under Wainwright v. Witt, 469 U.S. 412 (1985), since an appeal for a cross-section of the community was not condemned in Wainwright v. Witt, and the trial court did not rule the potential juror was not credible?

The State, through Assistant Attorney General Waters, filed a Brief in Opposition to the Petition for Writ of Certiorari on May 19, 2005. The United States Supreme Court denied the Petition for Writ of Certiorari on June 20, 2005.

Applicant, on July 1, 2005, filed with the Supreme Court of South Carolina a second Petition for Stay of Execution so he could seek his state post-conviction relief (PCR) remedies. The State filed a Return to the Petition for a Stay of Execution on July 11, 2005. By Order dated July 21, 2005, the Supreme Court of South Carolina granted a stay and appointed this Court to preside over the case.

Applicant filed a *pro se* Application for Post-Conviction Relief on July 28, 2005. The State filed a Return dated August 29, 2005. On October 15, 2005, this Court appointed counsel and gave Applicant 120 days to file an Amended Application. Applicant filed no Amended Application. On July 7, 2006, this Court *sua sponte* issued an Order giving Applicant 45 additional days to file an Amended Application. Again, Applicant filed no Amended Application. On September 28, 2006, this Court held a hearing as to the State's motion for summary judgment. While this Court believed the State had good arguments, it declined to grant summary judgment. This Court ruled, however, that no further amendments would be allowed.

As the initial hearing of January 8, 2007 approached, Applicant filed a motion for continuance and motion to amend, which this Court denied. Despite this, Applicant served on the State a First Amended Application for Post-Conviction Relief in which he asserted the following

claims:

Ground A.

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-13-26(B)(1) and §17-23-60 by trial counsel's failure to investigate, challenge and present evidence impeaching the testimony of Karen A. McCall, a witness for the prosecution during the verdict or penalty phase of the trial proceedings. Strickland v. Washington, 466 U.S. 668 (1984).

Ground B.

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26 (B)(1) and §17-23-60 by trial counsel's failure to present sufficient evidence and sufficiently articulate a request for an instruction for voluntary manslaughter. Strickland v. Washington, 466 U.S. 668 (1984).

Ground C.

As an alternative ground to Ground B, Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26 (B)(1) and §17-23-60 by trial counsel's failure to concede guilt during the verdict phase of the proceedings. Florida v. Nixon, 543 U.S. 175, (2004) and Strickland v. Washington, 466 U.S. 668 (1984).

Ground D.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to accept the trial court's offer to instruct the jury that the defendant is required to plead not guilty in order to obtain jury sentencing. Strickland v. Washington, 466 U.S. 688 (1984).

Ground E.

Applicant was denied the effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of

the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object to the testimony of from medical providers of the South Carolina Department of Mental Health. Estelle v. Smith, 451 U.S. 454 (1981); Buchanan v. Kentucky, 483 U.S. 402 (1987); Powell v. Texas, 492 U.S. 680 (1989), Hudgins v. Moore, 524 S.E.2d 105 (S.C. 1999); Thomas-Bey v. Nuth, 67 F.3d 296 (Unpublished, 4th Cir. 1995); and Strickland v. Washington, 466 U.S. 688 (1984).

Ground F.

Applicant was denied the effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to prevent access to Mr. Wood by the South Carolina Department of Mental Health. Estelle v. Smith, 451 U.S. 454 (1981); Buchanan v. Kentucky, 483 U.S. 402 (1987); Powell v. Texas, 492 U.S. 680 (1989), Hudgins v. Moore, 524 S.E.2d 105 (S.C. 1999); Thomas-Bey v. Nuth, 67 F.3d 296 (Unpublished, 4th Cir. 1995); and Strickland v. Washington, 466 U.S. 668 (1984).

Ground G.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to expose the incorrect diagnosis of the medical providers from the South Carolina Department of Mental Health. Strickland v. Washington, 466 U.S. 668 (1984).

Ground H.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to present mitigating evidence at the penalty phase of the trial. 1 ABA Standards for Criminal Justice (2d ed. 1982 Supp.); Wiggins v. Smith, 539 U.S. 510 (2003), Rompilla v. Beard, 125 S. Ct. 2456 (2005); Strickland v. Washington, 466 U.S. 688 (1984).

Ground I.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object to improper closing argument of the prosecutor. Strickland v. Washington, 466 U.S. 668 (1984).

At the hearing on January 8th, 2007, the State indicated it would not oppose the late amendments if a delay of some weeks could be had for the State's case after the Applicant presented his case. This Court agreed. However, as testimony began, Applicant stood up and requested to withdraw his APCR. The Court took a recess for Applicant to discuss this with his attorneys and to place a phone call to his sister. Applicant held firm to this desire, so this Court issued an Order requiring an evaluation of Applicant on his competence to waive his APCR.

Prior to the evaluation, Applicant changed his mind and through counsel indicated he wished to go forward with his APCR. The evaluation proceeded, however, without Applicant's cooperation. The evaluation noted no mental issues.

On February 9, 2007, Applicant filed a Second Amended Application for Post-Conviction Relief in which he raised the following issues:

Ground A.

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to investigate, challenge and present evidence impeaching the testimony of Karen A. McCall, a witness for the prosecution during the verdict or penalty phase of the trial proceedings. Strickland v. Washington, 466 U.S. 668 (1984).

Ground B.

Application was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26 (B)(1) and §17-23-60 by trial counsel's failure to present sufficient evidence and sufficiently articulate a request for an instruction for voluntary manslaughter. Strickland v. Washington, 466 U.S. 668 (1984).

Ground C.

As an alternative ground to Ground B, Applicant was denied the effective assistance of

counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to concede guilt during the verdict phase of the proceedings. Florida v. Nixon, 543 U.S. 175, (2004) and Strickland v. Washington, 466 U.S. 668 (1984).

Ground D.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to accept the trial court's offer to instruct the jury that a defendant is required to plead not guilty in order to obtain jury sentencing. Strickland v. Washington, 466 U.S. 668 (1984).

Ground E.

Applicant was denied the effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object to the testimony of from medical providers of the South Carolina Department of Mental Health. Estelle v. Smith, 451 U.S. 454 (1981); Buchanan v. Kentucky, 483 U.S. 402 (1987); Powell v. Texas, 492 U.S. 680 (1989), Hudgins v. Moore, 524 S.E.2d 105 (S.C. 1999); Thomas-Bey v. Nuth, 67 F.3d 296 (Unpublished, 4th Cir. 1995); and Strickland v. Washington, 466 U.S. 668 (1984).

Ground F.

Applicant was denied the effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to prevent access to Mr. Wood by the South Carolina Department of Mental Health. Estelle v. Smith, 451 U.S. 454 (1981); Buchanan v. Kentucky, 483 U.S. 402 (1987); Powell v. Texas, 492 U.S. 680 (1989), Hudgins v. Moore, 524 S.E.2d 105 (S.C. 1999); Thomas-Bey v. Nuth, 67 F.3d 296 (Unpublished, 4th Cir. 1995); and Strickland v. Washington, 466 U.S. 668 (1984).

Ground G.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26 (B)(1) and §17-23-60 by trial counsel's failure to expose the incorrect diagnosis of the medical

providers from the South Carolina Department of Mental Health. Strickland v. Washington, 466 U.S. 668 (1984).

Ground H.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code Sections §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to present mitigating evidence at the penalty phase of the trial. 1 ABA Standards for Criminal Justice (2d ed. 1982 Supp.); Wiggins v. Smith, 539 U.S. 510 (2003), Rompilla v. Beard, 125 S. Ct. 2456 (2005); Strickland v. Washington, 466 U.S. 688 (1984).

Ground I.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object to improper closing arguments of the prosecutor. Strickland v. Washington, 466 U.S. 668 (1984).

Ground J.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including SC Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object to the prosecution's introduction of evidence relevant to an arbitrary factor during the penalty phase of the trial. Strickland v. Washington, 466 U.S. 668 (1984) and State v. Burkhart, ___ S.E. 2d___, 2007 WL 80036 (S.C. 2007).

Ground K.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments of the Untied States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including SC Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object to the equal protection violation created by the aggravating circumstances making Mr. Wood death eligible. Strickland v. Washington, 466 U.S. 668 (1984).

The Court held an evidentiary hearing in the case from March 6, 2007 to March 8, 2007.

Applicant was present and represented by his counsel Brown and Godfrey, and Assistant Attorney

General Waters represented the State. Applicant called psychiatrist Dr. Thomas Cobb, his sister Connie Jantz, computer expert Jeffrey Naylor, psychiatrist Dr. Donna Schwartz-Watts, Dr. John Steedman, psychologist Dr. Camilla Tezza, social worker Carlos Torres, Investigators Paul Silvaggio and Tim Jones, United States Probation Agent Bryan Bowen, psychiatrist Dr. Pratep Narayan, and the trial attorneys: John Mauldin, Jim Bannister, and Rodney Richey. Applicant also called his Anderson County trial counsel Bruce Byrholdt. The State called no witnesses.

This Court has heard the testimony and reviewed the record and now rules as follows:

II.

Grounds for Relief

None of the Applicant's grounds are sufficient for relief. Appellant raises eleven (11) grounds of ineffective assistance of counsel. Pursuant to the familiar doctrine in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), Applicant must first demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. Strickland, 466 U.S. at 688. Judicial scrutiny of counsel's performance is highly deferential and not subject to the distorting effects of hindsight, and counsel may reasonably choose from a wide range of acceptable strategies. Id. at 689; Burket v. Angelone, 208 F.3d 172, 189-190 (4th Cir. 2000).

The law measures competency by what an objectively reasonable attorney would have done under circumstances existing at the time of the representation. Savino v. Murray, 82 F.3d 593, 599 (4th Cir. 1996). The court should "decline to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial." Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996). The mere

fact that trial counsel's strategy was unsuccessful does not render counsel's assistance unconstitutionally ineffective. Strickland, 466 U.S. at 689. Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995).

In addition to deficient performance, Applicant must also establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. It is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding because virtually every act or omission of counsel would meet that test. Id. at 693. "The Petitioner bears the 'highly demanding' and 'heavy burden' in establishing actual prejudice." Williams v. Taylor, 529 U.S. 362, 394, 120 S.Ct. 1495, 1514 (2000).

In Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998), the Supreme Court of South Carolina stated the prejudice prong in a capital sentencing proceeding was established 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. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome." Jones, 332 S.C. at 333 (citing Strickland, 466 U.S. at 694).

A PCR Applicant has the burden of proving his claims for relief by a preponderance of the evidence. Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 596 (1992).

A. Ground A

Applicant's first ground for relief is as follows: ARP

> Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to investigate, challenge and present evidence impeaching the testimony of Karen A. McCall, a witness for the prosecution during the verdict or penalty phase of the trial proceedings. Strickland v Washington, 466 U.S. 668 (1984).

Applicant contends his counsel was ineffective in both the guilt and sentencing phases for allegedly failing to examine Karen McCall on her involvement in the crime and failing to introduce a gunshot residue (GSR) test showing round lead particles on the backs and palms of both hands. Applicant contends that Ms. McCall's testimony portrayed her as a victim of his criminal actions rather than a willing co-participant, and that counsel should have dispelled this notion.

1. Facts

Applicant's girlfriend Karen McCall gave a statement to police the night of the shooting. At trial, she testified that she had been in the Jeep following Applicant on I-85 as they were going to Greenville for lunch. When Trooper Nicholson got in between them and blue-lighted the scooter, she thought that Applicant would try to elude the police because he had always said he could. She got off at the Woodruff exit when she saw Applicant come by on the scooter. She quickly followed him to the gymnastics center parking lot where he parked the scooter, jumped in the Jeep, and told her to "drive, now". Karen claimed she only thought Applicant had escaped from the trooper, not that he had killed him. (R. at 1424-25, 1430-34, 1452-53).

Applicant directed Karen to make certain turns, but did not seem upset. He talked to her about vacationing for Christmas in Mexico or Alabama. They stopped at a gas station, where Applicant took their Glock 9mm and put it on the console. As they continued on, Applicant received a call from his sister and made dinner plans. (R. at 1435-40).

Once Deputy Jones got on their tail, though, Applicant's demeanor changed to "cold", "hard", and "possessed". Applicant put his foot on Karen's to mash the gas pedal to the floor, and he told her, "Drive, bitch, drive, I shot the son of a bitch!" Applicant waved the gun at her and forced her to drive. He then reached over, flipped the switch to lower the rear glass window, and began shooting at police. Throughout the drive, he would occasionally reach over and snatch the wheel, saying, "We're going to die today." (R. at 1441-46).

When the jeep simply would not go anymore, Applicant said, "I'm going to get us another vehicle. When I tell you to, get your ass up here and bring that bag." After commandeering the utility truck, Applicant called for Karen, who then ran to the passenger seat and crawled into the floorboard. Eventually, Karen heard Applicant inhale and slump over, and the police ordering her out of the car. (R. at 1447-52).

The State tried and convicted Ms. McCall in Anderson County for her part in the crimes. During her direct appeal, McCall argued for dismissal of the charges based on the doctrine of judicial estoppel, since the State, in Greenville County, elicited her testimony in Applicant's trial during which she testified she was under duress. The trial court and the South Carolina Court of Appeals rejected this claim, with the appellate court finding that even if the doctrine of judicial estoppel applied, McCall could not meet its elements. State v. McCall, 364 S.C. 205, 210, 612 S.E.2d 453, 455 (2005).

At the PCR hearing before this Court, trial counsel Mauldin testified that he saw no strategic advantage to trying to "trash" or "make a liar" out of Karen McCall under the circumstances of this case. Applicant was on trial for murdering Trooper Nicholson and, by all accounts, McCall was not around when the murder happened. Counsel stated he was aware of the information of McCall's

activities in the jeep during the escape attempt, and was aware of the SLED GSR report (introduced at PCR as Applicant's Exhibit #3), but none of that changed his position that attempting to show McCall was more involved in the crime would have done nothing to aid the defense in this case. Trying to "trash" McCall was not what the defense "was trying to do," and counsel Mauldin wanted to reduce the Anderson evidence as much as possible, not discuss it more. He stated he made the decision not to impeach her unless what she stated was entirely inconsistent with the evidence.

Counsel Bannister added that the defense strategy was to go ahead and allow Anderson evidence to come out in the guilt phase to try to lessen its effect in the event of a sentencing phase by putting distance between it and an eventual sentencing decision. Indeed, prior to trial the defense specifically gave notice to the trial court that they wanted to rescind their objection to admission of the Anderson evidence in the guilt phase, and that in the defense's judgment the evidence was fair game for both sides. (R. at 8-9, 997, 1020).

2. Analysis

a. Deficient Performance

Applicant's first claim before this Court - that his counsel was ineffective for not doing a "better" job cross-examining Karen on whether she was assisting him rather than under his dominion at the time of the crime, or for failing to introduce a GSR report with regard to Karen - is without merit. "In hindsight, there are few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster." Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996). The extent of examination and cross-examination of witnesses is an area of trial tactics left to the discretion of counsel. Yarrington v. Davies, 779 F.Supp. 1304, 1308 (D. Kan. 1991). Counsel is not required to

raise every conceivable issue or pursue every avenue of inquiry, but is required only to exercise normal skill, judgment, and diligence. Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980).

As to the guilt phase, counsel was not unreasonable strategically in expressly deciding there was nothing of value to be gained in attacking Karen to show she may have been more of a participant in the escape than she claimed on the stand. Even if trial counsel had shown that Karen was more of a willing partner in Applicant's Anderson County escape attempt rather than a person acting under duress, this would do nothing to diminish or remove Applicant's own personal guilt for killing Trooper Nicholson in Greenville County, particularly considering the McCall was not involved in the murder. (R. at 1584). Moreover, even if it could be shown that Karen was more of a willing participant during the escape, the evidence still shows that Applicant was the one who repeatedly fired shots at the pursuing police throughout the chase and that by the end of the chase Karen was huddling in the floorboard of the cab while Applicant continued to drive aggressively and shoot at police. (R. at 1541-43). Further, as the SLED agent testified at trial, having found lead particles on one's hand merely means that one was in the vicinity of a weapon when it was fired and not that the person fired the weapon; thus, the GSR report does not conclusively establish that Karen fired the weapon at any time during the pursuit. (R. at 1622). Counsel made the reasonable strategic decision to allow the Anderson County evidence to be elicited in the guilt phase in order to mute its effect in the event of a later sentencing phase. Their judgment was also reasonable that nothing could be gained by "trashing" McCall where it would not serve to diminish Applicant's guilt by any measurable amount.

Also, counsel used Karen's testimony as part of their strategically reasonable but ultimately unsuccessful defense theory that Applicant's extreme fear of police and belief that he could outrun

the officer on his motorbike led to a situation of voluntary manslaughter, or at least lack of malice, when the officer pulled his cruiser in front of Applicant's motorbike. (R. at 1712-19, 1745-56). See generally Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995) ("Standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel."). Counsel elicited from Karen not only Applicant's fear of police and belief that he could outrun the police, but also that he behaved that day in an extremely uncharacteristic manner that was entirely different from the sweet, non-violent man he normally was. (R. at 1456-57, 1467-68, 1474, 1478-80). Counsel Mauldin also testified at PCR that Applicant's paranoia of police and his accompanying perceptions at the time of the stop were part of the justification the defense offered to support its voluntary manslaughter charge.

Although counsel was ultimately unsuccessful in getting a voluntary manslaughter charge, a risk of which they were aware, they still decided it was their best option. Indeed, counsel Mauldin testified that even if the voluntary manslaughter "defense" was unsuccessful, in his view it was worth it in that it might convince at least one juror to hesitate during the sentencing phase decision. Moreover, counsel Bannister used this evidence to make arguments as to lack of malice during the guilt phase (R. at 1745-56), which the trial court noted was particularly clever given there was not much with which the defense could work. (R. at 1838-40). Further, the evidence elicited from Karen about the chase allowed the defense to use a prosecution witness in the guilt phase to set the stage for its mitigation case, which included the theme that a number of factors all combined, "like the blowing of air into a balloon until December the 6th when the balloon exploded," to result in the murder of Trooper Nicholson. (R. at 1858). In deciding to use Karen to their advantage in attempting to show an uncharacteristic crime brought on by a sudden confluence of factors, counsel

was strategically reasonable and not deficient in either the guilt or the penalty phase.

Counsel's strategic decisions were reasonable and not deficient. See generally Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995) ("Standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel," and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy); United States v. Lively, 817 F. Supp. 453, 462 (D. Del. 1993) (mere criticism of a strategy or tactic is insufficient for relief).

c. Prejudice

There was no possible prejudice in this case. First, Applicant never called Karen to testify at PCR and engaged in the cross-examination he asserts counsel should have done; thus, his claim is speculative and he has not met his burden of proof. See Moss v. Hofbauer, 286 F.3d 851, 864-65 (6th Cir. 2002) (speculation as to possible lines of cross-examination insufficient where no evidence presented how witness would have testified had the cross-examination been pursued).

Regardless, there is no prejudice even assuming that some headway as to her participation could have been made with Karen had counsel gone on the attack with cross and the GSR report. The evidence of Appellant's guilt was overwhelming in this case, and, as noted before, whether Karen was more of a participant in the subsequent Anderson County pursuit does nothing to reduce Applicant's legal or moral guilt for killing the trooper. As such, Applicant could not have been prejudiced in the guilt phase with regard to such a legally insignificant issue. See generally Reed v. Norris, 195 F.3d 1004, 1006 (8th Cir. 1999) (failure to raise Batson issue not prejudicial under Strickland given overwhelming evidence); Savino v. Murray, 82 F.3d 593, 599 (4th Cir. 1996) (if there exists no reasonable probability that a possible defense would have succeeded at trial, the

alleged error in failing to disclose or pursue it cannot be prejudicial); Bell v. Evatt, 72 F.3d 421, 427 (4th Cir. 1995) (decision to recommend GBMI verdict was reasonable given overwhelming evidence and desire to reduce possible sentencing outcomes).

For similar reasons, there was no prejudice in the penalty phase. In the sentencing phase, Applicant must show "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." Jones, 332 S.C. at 333 (citing Strickland, 466 U.S. at 694).

Here, we have as extremely aggravated a crime as there could be. It would be bad enough if Applicant had merely murdered Trooper Nicholson. Applicant's subsequent wild chase, however, provides an incredible amount of further aggravation. The Applicant wounded another officer with a gunshot to the face, ran civilians off the road, commandeered a Blue Ridge truck at gunpoint, and only by luck or grace was not a good enough shot to kill more police officers or innocent civilians with his repeated gunfire. Applicant had a prior record, having served time in prison. The victim impact evidence in this case was particularly moving, especially from Trooper Nicholson's widow and his partners on the Highway Patrol. Compared to this there was limited mitigation with no family members and relatively mild mental health testimony without findings of psychosis or delusion at the time of the offense itself. There was evidence in rebuttal that Applicant was anti-social.

Given these circumstances, trying to show that McCall was a little bit more involved in Applicant's crimes than she claimed on the stand would have done little if anything to reduce the extremely aggravated nature of this crime. Indeed, trying to attack Karen might be just as likely to

offend the jury in that it displayed an attempt to shift blame or limit responsibility when Applicant clearly was the reason these crimes occurred.

The issue is without merit and is denied.

B. Ground B

Applicant's second allegation is as follows:

> Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to present sufficient evidence and sufficiently articulate a request for an instruction for voluntary manslaughter. Strickland v. Washington, U.S. 668 (1984).

Applicant contends that counsel was ineffective for failing to produce testimony that alleged Trooper Nicholson conducted the traffic stop other than in accordance with law enforcement guidelines to support the claim that Applicant was only guilty of voluntary manslaughter.

1. Facts

As noted before in the Statement of Facts, evidence suggested Trooper Nicholson conducted an "aggressive" stop by pulling in front of Applicant's scooter to force him to stop when Applicant initially refused to comply. The defense requested a charge on voluntary manslaughter, contending that the trooper mistakenly believed the scooter was illegally on the highway, and that the trooper's cutting Applicant off at the curb was sufficient legal provocation. The trial court rejected this argument, finding that the officer did what was reasonable and necessary when Applicant fled the lights and siren, and that the officer's legal action could not constitute sufficient legal provocation. (R. at 1712-17).

Applicant raised this issue on direct appeal, contending the trial court's denial of the charge

was error. The court recognized Applicant's claim that the trooper's action in cutting off Applicant's moped meant that Applicant was forced to avoid hitting either the trooper's car, the curb, or the bushes, but still found the case inappropriate for voluntary manslaughter. Unlike State v. Lindler, 276 S.C. 304, 307-308, 278 S.E.2d 335, 337 (1981), where the court found a voluntary manslaughter charge was appropriate because the defendant alleged the officer knocked his motorcycle to the ground with a patrol car and then came out firing, the court in this case reasoned "there was no evidence that Trooper Nicholson acted in an unlawful manner in discharging his duties" and no evidence that Nicholson bumped Applicant's scooter or fired on Applicant. See State v. Wood, 362 S.C. 135, 142-143, 607 S.E.2d 57, 61 (2004).

At PCR, counsel Mauldin testified that the defense tried to show an unlawful and aggressive stop of the scooter to support their voluntary manslaughter claim. Mauldin saw Applicant's Exhibit 4, a police report reflecting that the tag on the scooter belonged to a different vehicle, and Applicant's Exhibit 5, which reflected witness statements referring to an "aggressive stop" and the patrol car "cutting the person off." Mauldin testified he would have had these reports in his file.

Counsel Bannister testified that he thought the testimony from the prosecution's eyewitnesses at trial as to the aggressive stop was very favorable to the defense. Bannister was asked about his assertion to the trial court during argument for a voluntary manslaughter charge that there was no evidence in the record the tag was illegal (R. at 1712-13) when in fact the trial court pointed out there was in fact evidence from Karen the tag on the scooter did not belong to it. (R. at 1459, 1483). Bannister testified that in making his argument for a charge he was relying on the fact that the inferences should be considered in his favor.

2. Analysis

The specific claim raised to this Court in the Application is that counsel failed to introduce evidence the stop was not conducted in accordance with guidelines promulgated by law enforcement. Applicant produced no evidence at the hearing to support this claim, and thus has failed in his burden of proof. Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992) (PCR Applicant has the burden of proving his claims by a preponderance of the evidence).

Moreover, Applicant at the PCR hearing presented no additional evidence about the circumstances of the stop that would call into question this result or add a new factual element that would require reassessment of the voluntary manslaughter decision. While the police reports referred to witness statements calling the stop "aggressive," or stating the trooper cut Applicant off, that type of information was more than sufficiently presented at trial. (R. at 1265-66, 1274-75, 1289-90, 1294-96, 1300-01, 1306, 1310, 1338, 1353). See generally Jones, 332 S.C. 329, 338 (no prejudice shown where mitigation evidence presented at PCR was not that different from evidence presented at trial). The Supreme Court of South Carolina has already ruled as a matter of law that these facts simply do not rise to the level of voluntary manslaughter.

As to the evidence the tag was illegal, if Applicant in PCR is merely criticizing counsel Bannister for stating there was no evidence the tag was illegal when in fact there was such evidence in the record, that provides no assistance in proving any claim for relief. Even if counsel was mistaken about one particular fact in his argument as to voluntary manslaughter, this is of no moment as counsel's supposed misstep during argument does not add any new facts to the calculus in a record that the Supreme Court of South Carolina has already held was insufficient to require a charge on voluntary manslaughter. The trial court considered the issue and the Supreme Court of

South Carolina found the issue preserved and considered it on appeal, and there was nothing about counsel's one possible misstep during argument that was fatal to the issue. This decision was fact driven, and counsel's argument cannot change the facts.

Indeed, whether or not the tag was illegal would not be determinative of this issue anyway as there was no evidence Trooper Nicholson called in the tag and then attempted to stop the scooter because the tag came back illegal; the only evidence was that Trooper Nicholson believed the scooter itself was not highway-legal in the first place. (R. at 1076-77). See generally Savino v. Murray, 82 F.3d 593, 599 (4th Cir. 1996) ("[I]f there exists no reasonable probability that a possible defense would have succeeded at trial, the alleged error in failing to disclose or pursue it cannot be prejudicial.").

Since Applicant has offered no additional evidence of proper police procedures or any other unpresented facts that might change the binding decision already made by the Supreme Court of South Carolina, then Applicant has failed his burden of proof and there was neither deficient performance nor prejudice. See generally Bassette v. Thompson, 915 F.2d 932, 940-941 (4th Cir. 1990) (petitioner's allegation that attorney did ineffective investigation does not support relief absent proffer of the supposed witness's favorable testimony).

C. Ground C

Applicant's third ground for relief is as follows:

> As an alternate ground to Ground B, Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to concede guilt during the verdict phase of the proceedings. Florida v. Nixon, 543 U.S. 175, (2004) and Strickland v. Washington, 466 U.S. 668 (1984).

As an "alternative" to the preceding ground, Applicant contends his counsel was ineffective for failing to concede guilt during the first phase of the trial. Apparently, Applicant is contending that counsel was unreasonable in even attempting the voluntary manslaughter "defense" at all, if this Court concludes that counsel was not ineffective in the manner in which they asserted that defense. Applicant asserts that counsel set forth a "he didn't do it" defense during the guilt phase, and followed that with a "he is sorry he did it" mitigation presentation, which Applicant asserts is deficient.

1. Facts

At PCR, counsel Mauldin testified that he specifically chose to not concede guilt as he wanted to challenge the jury and make them "work" to find all the elements of murder. Counsel hoped that even if the efforts were unsuccessful in the guilt phase, at least making the jurors think about Applicant's guilt of murder in first phase would be beneficial in the sentencing phase inasmuch as it might create residual doubt or cause a juror to hesitate. When asked if his defense at trial was a "he didn't do it" defense, counsel stated the defense was that Applicant was not guilty of *murder*. Counsel Mauldin stated that he is aware of the "healthy debate" among the defense bar of the wisdom of conceding guilt, but pointed out he has his own opinion on the subject.

On cross, counsel confirmed that his opinion on the stratagy of conceding guilt was that it was not the correct way to handle things. Regardless, counsel Mauldin added that based on his conversations with Applicant, he did not believe he could concede guilt in the case.

Counsel Bannister echoed similar sentiments on the defense strategy in this case, stating that if they could not achieve a lesser-included offense, they might at least get the jury thinking about it during the sentencing phase. Counsel Bannister stated the defense fully consulted Applicant during

discussions of the defense strategy.

2. Analysis

This Court finds the claim to be without merit, and finds counsel's decision not to concede guilt to be neither deficient nor prejudicial. This claim can only be directed to the sentencing phase because the failure to concede guilt could by no means be deficient or prejudicial in the first phase since the jury convicted Applicant.

First, Applicant's apparent objection to concession of guilt precludes counsel from being deficient in mounting the "voluntary manslaughter" guilt phase defense. As noted before, counsel Mauldin testified that based on his conversations with Applicant, he did not believe he could concede guilt. It is true that in Florida v. Nixon, 543 U.S. 175, 188-189, 125 S.Ct. 551, 561-562 (2004), the Court held that the Florida Supreme Court erred in finding automatically deficient and prejudicial counsel's decision to concede guilt without the capital defendant's express consent. In Nixon, counsel attempted to consult with his client about the strategy of conceding guilt in the first phase, but the defendant there was purposefully nonresponsive. Id. at 189.

Nixon first noted that while an attorney has a duty to consult on "important decisions" and questions of "overarching defense strategy," counsel does not have to obtain the defendant's consent for every tactical decision. Id. at 187. Similarly, Rule 1.4 of our South Carolina Rules of Professional Conduct require counsel to "reasonably consult with the client about the means by which the client's objectives are to be accomplished," and the Comment to that rule notes that some tactical decisions are so important that the consultation must occur prior to action. Undoubtedly, something as significant as conceding guilt to a capital crime is one of those important decisions that requires prior consultation. See Rule 1.4(a)(2), Rule 407, SCACR. See also Nixon, 543 U.S. at 189

("[Counsel] was obliged to, and in fact several times did, explain his proposed trial strategy to Nixon.").

Nixon next noted, though, that the client has ultimate authority "to determine whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Nixon, 543 U.S. at 187. Our South Carolina Rules of Professional Conduct also codify virtually these same points. Rule 1.2(a), Rule 407, SCACR. Despite this latter provision, though, Nixon held that the Florida Supreme Court erred in concluding that counsel's decision to concede guilt in the first phase of a capital trial with the express permission of the defendant amounted to a guilty plea for which the client had absolute control. Id. at 188. The Court noted that unlike a guilty plea the defendant did in fact have his jury trial. Id. Moreover, it concluded that in the two-phase context of a capital trial, a decision to concede guilt in a case of overwhelming evidence and focus instead on the penalty phase did not amount to a "failure to function in any meaningful sense as the Government's adversary." Id. at 190. Given that avoiding execution might have been the only realistic expectation possible, counsel reasonably decided to focus on the sentencing phase and avoid the credibility issues in the sentencing phase that might come with attacking the prosecution's overwhelming case in the guilt phase. Id. at 190-92.

However, there is a difference between a situation where a defendant is purposefully nonresponsive to counsel's consultation, and a situation where the defendant expressly objects to such an important decision as whether to admit guilt before the jury to an offense carrying the death penalty. While Nixon commands that situations in which counsel concedes guilt over a nonresponsive defendant should still be subjected to the normal deficiency and prejudice analysis of Strickland, nothing in Nixon supports the view that counsel can concede a defendant's guilt to

capital murder over that defendant's express objection. Nixon notes that the lawyer "was obliged to, and in fact several times did, explain his proposed trial strategy to Nixon." 543 U.S. at 189. Other post-Nixon decisions have noted that it would be ineffective (and perhaps unethical) for counsel to concede guilt over a defendant's express objection. See, e.g. United States v. Thomas, 417 F.3d 1053, 1060 (9th Cir. 2005) (Fletcher, J., concurring) (it is "entirely inappropriate" for a lawyer to concede guilt without prior consultation to give the client the opportunity to object; unlike the situation in Nixon, where the defendant is cooperative, counsel should obtain express consent before conceding guilt); Sleeper v. Spencer, 453 F.Supp.2d 204, 220 fn. 8 (D. Mass. 2006) (noting that "[c]ourts have found that where a trial counsel openly concedes guilt over a defendant's objections, such actions may amount to a constitutionally deficient performance"); Frascone v. Duncan, 2005 WL 1404791, *2 (S.D.N.Y. 2005) (defendant bears the burden of showing he objected to counsel's strategy of concession to a lesser offense and his will was overborne by counsel). Cf. People v. Arko, 159 P.3d 713, 723 (Colo. Ct. App. 2006) (decision to request a lesser nonincluded offense is akin to conceding guilt, and the decision whether to submit such a charge and create additional exposure to culpability should rest with the defendant). Indeed, while a number of cases have wrestled with the ineffectiveness of counsel's decision to concede guilt in a capital trial, this Court is unaware of any decision faulting counsel for refusing to concede his client's guilt for a crime that might subject him to the death penalty.

Here, without deciding whether or not a lawyer would be *per se* ineffective (and in violation of the Rules of Professional Conduct) for overruling his client's wishes against a strategy of conceding guilt, this Court does find that counsel here was not deficient for honoring his client's apparent decision that guilt not be conceded to a capital offense. Since after conversations with

Applicant about the case Mauldin believed he could not concede guilt, he was not deficient in proceeding with the voluntary manslaughter "defense".

However, even if counsel could permissibly concede guilt in the first phase over the objection of the defendant, or even if Applicant had not objected or was incommunicative, counsel's decision to mount a guilt phase defense in this case was still not deficient. Applicant cites a law review article that was quoted in Nixon to support the Court's conclusion that a lawyer can reasonably decide to concede guilt in the first phase and focus instead on the penalty phase: "It is not good to put on a 'he didn't do it' defense and a 'he is sorry he did it' mitigation. This just does not work. The jury will give the death penalty to the client and in essence, the attorney." See Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 Mercer L. Rev. 695, 708 (1991) (quoted in Nixon, 543 U.S. at 191).

However, in this case, counsel Mauldin declined to characterize the defense as a "he didn't do it" defense, but stated rather they were attempting to prove Applicant was not guilty of *murder* when he killed Trooper Nicholson. Of course, in this case there was overwhelming evidence of identity, but counsel did not challenge it; counsel never contended "he didn't do it." Instead, counsel sought a lesser-included offense and ultimately challenged mental state, which is almost always inferential and leaves more room for argument regardless, or even in spite of, how strong the evidence of identity is. Thus, even if the Mercer Law Review article is now the gold standard *requiring* lawyers to concede guilt in capital cases whenever evidence of identity was overwhelming, that is precisely what the defense did, never once contending Applicant was not the shooter.

Unlike that suggested by Applicant in his citation of the law review article, counsel thought their guilt phase and sentencing phase presentations dovetailed nicely, and making the jury think

about the mental state necessary for murder might have worked to their advantage when adding the mitigation presentation on Applicant's mentality from Dr. Schwartz-Watts, Jeffrey Youngman, and Jim Aiken. This Court agrees, as set forth earlier in the discussion of Ground A regarding counsel's use of Karen's testimony to set up Applicant's extreme fear of police and uncharacteristic behavior on the day of the incident. Moreover, this Court finds counsel's strategic judgment reasonable that making the jury "work" on the elements of murder in the guilt phase might have had a beneficial effect in causing a juror to hesitate before giving the death sentence in the penalty phase.

Thus, this Court finds counsel's strategic performance was intelligent and professional in view of the difficult hand dealt. See generally Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995) ("Standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel," and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy); Bean v. Calderon, 163 F.3d 1073, 1082 (9th Cir. 1998) (finding counsel not ineffective where diminished capacity defense would have conflicted with alibi defense). See also Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision cannot be second-guessed by court reviewing a collateral attack).

Moreover, this Court finds no prejudice under Jones's recitation of the standard for prejudice in alleged sentencing phase errors. Given the extremely aggravated nature of the murder of Trooper Nicholson and the subsequent escape, and the limited mitigation that was available in this case, it simply cannot be said that there is a reasonable probability that the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death had counsel just conceded guilt of murder in the first phase rather than conceding Applicant was the shooter but

continuing to argue mental state.

The issue is denied.

D. Ground D

Applicant's fourth ground for relief is as follows:

> Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to accept the trial court's offer to instruct the jury that a defendant is required to plead not guilty in order to obtain a jury sentencing. Strickland v. Washington, 466 U.S. 668 (1984).

Applicant contends his counsel was ineffective for failing to agree to the trial court's offer to instruct the jury he wished to plead guilty but under the law has to plead not guilty to obtain jury sentencing.

1. Facts

In a pretrial motion, Appellant moved to quash the state's death penalty notice on the basis that he could not plead guilty and receive jury sentencing. Applicant argued that this denied him equal protection and due process inasmuch as it was "fundamentally unjust and results in undue pressure on the Defendant to seek a trial." (R. at 2510). The State filed a response in which it generally asserted that the court had previously rejected jury sentencing after a guilty plea and that the United States Supreme Court had upheld judge-sentencing capital schemes. (R. at 2511-12).

At a pretrial hearing, Appellant argued that pleading not guilty to receive jury sentencing forces the defendant into an "obvious untruth" that destroys the defendant's credibility. The defense also complained that the jury would penalize Appellant for his failing to accept responsibility. The judge ruled that the statute was constitutional. (Supp. R. at 11-12).

The judge subsequently issued a written order in which he "appreciate[d] the practical

considerations," but noted that the defense cited no authority supporting a constitutional violation. The court noted that it was willing "to address these concerns during jury *voir dire* if Defendant so requests." (R. at 2513-14).

At trial, the defense re-raised the issue as it went through pre-trial motions. The following then occurred:

> **Mr. Mauldin**: All right. The next one, your Honor, was motion filed in November the 21st where we requested a quashing of the death notice where the Defendant- - under statutory scheme the defendant was required to enter a plea of not guilty and the sentence - - do you remember that motion?
> **The Court**: I do.
>
> **Mr. Mauldin**: All right.
>
> **The Court**: And I also remember either I told you on the bench or put it in a footnote in the order that that struck me as a very sound argument. I don't believe it's constitutionally infirm to have - -
>
> **Mr. Mauldin**: I'll hand you my note, your Honor. What I wrote you said, and I think that's exactly what you said.
>
> **The Court**: It doesn't rise to a constitutional violation. But from a practical standpoint I can understand the benefit a party would seek to obtain by that initial admission on the front end in the inability to plead guilty to a Judge and then submit sentencing to a jury.
>
> **Mr. Mauldin**: Yes, sir.
>
> **The Court**: And I offered from the bench and/or in writing to address that and to handle that during jury selection if defense counsel so desired.
>
> **Mr. Mauldin**: Yes, sir.
>
> **The Court**: So I was willing to tell the jury that the individual wished to plead guilty, but in order to submit the sentencing issue to them we would go through the process of a trial first. And then if you had desired that, we would have had long discussions of how we could approach that with the jury and things of that nature.
>
> **Mr. Mauldin**: Yes, sir.

> **The Court**: I specifically remember that one. It struck a chord with me.
>
> **Mr. Mauldin**: Yes, sir. And the way our statement is set up is just the way it's set up. But we don't believe that it's appropriate the way it's set up where it requires - - well, I'm not going to through and rehash the argument.
>
> **The Court**. Right. My ruling stands on that.
>
> **Mr. Mauldin**: Yes, sir. The next motion, your Honor, that would be appropriate at this time which was held in abeyance, if I'm not mistaken. At the time of the hearing, was the sequestration of witnesses.

(R. at 1004-1006).

On direct appeal, Applicant contended the South Carolina statutory death penalty scheme was unconstitutional inasmuch as it requires a defendant to plead not guilty if he wants a jury to sentence him. He asserted the scheme denied him the mitigating evidence of an admission of guilt, and that he had a right to jury sentencing pursuant to the intervening decision of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002). The Supreme Court of South Carolina rejected this issue, finding Ring inapplicable to South Carolina's death penalty procedure. See State v. Wood, 362 S.C. 135, 143, 607 S.E.2d 57, 61 (2004).

At PCR, counsel Mauldin testified that he was "shocked" he did not take up the judge's offer to charge on the necessity of pleading not guilty in order to get jury sentencing and stated he wanted the trial court to instruct it and it was error for him to have not ensured the trial court gave the instruction. On cross, however, Mauldin admitted he would not have wanted the charge as the trial court ultimately phrased it - that "the individual wished to plead guilty, but in order to submit the sentencing issue to [the jury] we would go through the process of a trial first." (R. at 1005). As noted before in the discussion of the preceding ground, counsel Mauldin also testified that after

conversations with Applicant he did believe he could not concede guilt, that in his opinion conceding guilt was not good strategy, and that he preferred to make the jury "work" on the mental elements during the guilt phase in the hopes that it would cause hesitation in the event of a sentencing phase. The defense vigorously challenged the mental state element throughout trial and sought the lesser-included offense of voluntary manslaughter. Applicant's other trial counsel testified that Mr. Mauldin handled this issue.

2. Analysis

This Court finds that counsel was neither deficient nor Applicant prejudiced with regard to this issue. Admittedly, counsel stated he was shocked he did not ask for the instruction, but the trial court did not offer the instruction Mauldin wanted. Mauldin's requested instruction would be to the more "passive" effect that in order to have a jury sentence him, a capital defendant must plead not guilty. The specific charge the trial court offered, that Applicant "wished to plead guilty but in order to submit the sentencing issue to [the jury] we would go through the process of a trial first," is different, and Mauldin was clear he would not want this charge as it definitively states Applicant wanted to plead guilty. As noted in the discussion of the previous ground and incorporated here, the defense could not and did not plead guilty or concede guilt, based not only on counsel's reasonable strategic judgment to challenge guilt of murder in the first phase, but also based on Applicant's own representations that precluded such a concession or plea. See generally Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995) ("Standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel," and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy); Bean v. Calderon, 163 F.3d 1073, 1082 (9th Cir. 1998) (finding counsel not ineffective where diminished capacity defense would

have conflicted with alibi defense).

In any event, Applicant offers no authority that requires such a charge, and this Court is unaware of any. Cf. State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981) (the portion of the death penalty statute addressing what happens when a sentencing jury is hung is addressed to the trial judge only and "need not be divulged to the jury"). There is no mandatory legal requirement that the trial court give the charge as Mauldin would phrase it as opposed to the way the trial court phrased it. This alone is sufficient to defeat Applicant's claim because there is no legal rule requiring such a charge and thus no denial to Applicant of anything to which he had a right. Since the only charge offered by the trial court was one unacceptable to the defense strategy, and Applicant had no legal right to a differently phrased charge, then counsel could not have been deficient or Applicant prejudiced from either the declination of the offered charge or the failure to request the desired one. See, e.g. United States v. Roane, 378 F.3d 382, 399 (4th Cir. 2004) (counsel could not have been ineffective for failing to seek an instruction that the jurors must be unanimous as to the five people supervised in a continuing criminal enterprise, because the law did not require such unanimity on that issue); Nichols v. Scott, 69 F.3d 1255, 1288 (5th Cir. 1995) (counsel not ineffective for failing to request a charge on a point that was not yet clearly required by federal or state law).

Indeed, the only allegation expressly raised to this Court in the Second Amended Application is a claim that counsel failed to take the trial court's version of the charge. Since that charge expressly stated Applicant wanted to plead guilty, and counsel stated he would not want that charge because it was entirely inconsistent with the defense presented during the guilt phase, then counsel could not have been deficient for refusing it. See Bean v. Calderon, 163 F.3d 1073, 1082 (9th Cir. 1998) (finding counsel not ineffective where diminished capacity defense would have conflicted with

alibi defense).

Finally, there can be no prejudice. This issue only goes to the sentencing phase, as the failure to have the judge tell the jury Applicant wanted to plead guilty by no means could be deficient or prejudicial in the first phase where the jury convicted Applicant anyway. Again, Jones commands this Court to assess whether there is a reasonable probability that the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. 332 S.C. at 332-333 (citing Strickland, 466 U.S. at 694). If the trial court gave the charge it offered, it would have actually been prejudicial to Applicant as it would have been directly contradictory to the defense Applicant mounted at trial. Indeed, a jury might be more likely to have credibility problems with the defense that continued into the sentencing phase if told Applicant wanted to plead guilty but then the defense team challenged his guilt.

This Court is not convinced that the Jones standard for sentencing phase prejudice is met even if Mauldin's version of the charge is considered. Telling the jury that a defendant is forced to plead not guilty to get jury sentencing in a case where the defense vigorously seeks a lesser-included offense or argues against malice would either be of no effect or it would be prejudicial to the defendant in that it still suggests he is engaging in an extensive charade before the jury during the guilt phase. However phrased, the charge is simply not congruent with the defense's chosen strategy in this case. Regardless, given the extremely aggravated nature of Applicant's crime spree and the limited mitigation, this Court concludes that the charge, given in any form, would not create a reasonable probability of a different result pursuant to Jones.

The issue is denied.

E. Ground E

Applicant's fifth ground for relief is as follows:

> Applicant was denied effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object to the testimony of from medical providers of the South Carolina Department of Mental Health. Estelle v. Smith, 451 U.S. 454 (1981); Buchanan v. Kentucky, 483 U.S. 402 (1987); Powell v. Texas, 492 U.S. 680 (1989), Hudgins v. Moore, 524 S.E.2d 105 (S.C. 1999); Thomas-Bey v. Nuth, 67 F.3d 296 (Unpublished, 4th Cir. 1995); and Strickland v. Washington, 466 U.S. 668 (1984).

Applicant contends his counsel was ineffective for failing to object to use of the competency and criminal responsibility evaluation in sentencing.

1. Facts (events at trial)

Submitted at the PCR hearing before this Court was a transcript from September 21, 2001 hearing before the trial court in this case. At the hearing, the State requested that the competency and criminal responsibility evaluation to take place for the Anderson County charges also be available for the same issues in the Greenville County case.

The defense responded that the Greenville solicitor had not moved for an evaluation, and that the defense had concerns the evaluation process would open the door to the use of the information as a discovery tool by the government. The court noted that the Anderson County court already signed the order directing an evaluation and it was taking place the following week. The defense then contended that the State was, by a "back door," getting the Applicant to waive his Fifth and Sixth Amendment rights, and getting support for a later request for an independent examination by a State expert. (9/21/01 R. at 3-7).

Next, the defense requested placement of any evaluation report and communications or

records obtained for the evaluation under seal and provided only to the court. Defense counsel specifically wanted to put on the record that the court relieved them as Anderson County counsel on August 9th and Anderson County counsel did not consult them about the evaluation. Finally, defense counsel argued that if the court was ordering an evaluation based on detecting a mental disability in Applicant, then it should appoint a guardian *ad litem*. (9/21/01 R. at 3-7).

In response, the court noted that it received from Applicant personally a written *pro se* motion in Anderson County for an evaluation, and that Anderson County counsel had also sought an order for the evaluation.[1] The court pointed out that it did not understand the logic of preventing usage of the evaluation at the county line for events that happened on the same day. The court also had concerns that if mental issues in fact arose at trial, lack of access to the Defendant would disadvantage the State. The defense responded that at the present juncture they were simply objecting to any use of the process as a discovery tool for the Government. (9/21/01 R. at 7-10).

As the conversation continued, defense counsel again asked that since there was no moving party in Greenville for the evaluation, that the court make the results of it for the court's "eyes and ears only," and prevent the Anderson County prosecutor from disclosing the report to the Greenville prosecutor. The defense noted this would not interfere with the process in Anderson since the trial in the Anderson case was not for several months. The State responded that it did not understand how evidence of incompetence could "stop at the Saluda River." The prosecutor assured the judge he was not interested in discovery; he just wanted to make sure a previously undisclosed mental health issue did not delay the trial at the last minute. The prosecutor had no objection to a sealed report as long

[1] Anderson County counsel consented to the evaluation order. And, in September 2001, Applicant also personally wrote the Greenville Clerk requesting that new counsel be appointed and that he receive a mental evaluation. Applicant described "earreckensiable [sic] difference of opinion [with counsel] that can not [sic] be worked out."

as he was not sandbagged the day before trial. The defense responded that the court should decide about release of the information. (9/21/01 R. at 10-13).

The court then ordered that "based on the defendant's request through Anderson County counsel" for an evaluation, any result from that evaluation would also be considered in the Greenville case. The court also directed that the Department of Mental Health submit the report directly to the court "for both counties," and that the parties would revisit later the matter of disclosure. (9/21/01 R. at 14).

The record reflects that the court's psychiatrist tasked with determining Applicant's criminal responsibility and competence to stand trial called the judge prior to trial to express his frustration that the defense refused to respond to his request for consent to get Applicant's updated medical records from the jail. The defense responded to this by telling the trial court they have been objecting to the evaluation process since the beginning, and did not want to give their file information to the doctor. The court noted it would find out from the doctor, Dr. Narayan, what he needed to complete his evaluation. (R. at 720-23).

After a break, the trial court noted that he had talked to the doctor, who was concerned that he would be unable to give an opinion as to competency because he could not get any information or cooperation from the defendant. The judge noted he simply told the doctor he would have to do the best he could, as the judge did not feel like he could order family members to talk to the doctor or order blood tests of the defendant. (R. at 723-24).

Prior to the competency hearing, the trial court noted it did receive Mauldin's letter stating Applicant would not meet with the designated examiner, Dr. Narayan. (R. at 950). At the competency hearing, Dr. Narayan was examined by the trial court. During the examination the court

specifically noted that it "want[ed] to limit our discussion to the issue of competency." Dr. Narayan testified that he interviewed Applicant on two prior occasions, that he advised Applicant of his Miranda rights each time, and that Applicant waived them after reciting them back in a paraphrased form. Applicant also signed the waiver of rights form on two separate occasions. (Tr. Ct. Ex. 16). Applicant also indicated his understanding that information gained from him could be used in determination of sentence.

Dr. Narayan believed Applicant understood those rights and was competent to stand trial at the time of his evaluations. The court noted Dr. Narayan's report included findings placed under seal and filed with the clerk. However, Dr. Narayan was unable to give an opinion as to competency at the time of the hearing because he had no access to the defendant or information about him since those initial interviews. (R. at 952-62).

Under examination by the solicitor, Dr. Narayan noted that during their earlier meetings Applicant told him that he was not on nor had he ever been on any psychiatric medications. Dr. Narayan said he could not render as opinion as to the present time because they received information that Applicant's psychiatric situation may have changed because detention staff had told Dr. Narayan that a doctor hired by Applicant had placed him on medication. Dr. Narayan requested further information about that but had no access by Applicant to his records or to Applicant himself. (R. at 963-66).

On cross by the defense, Dr. Narayan reiterated that in light of information that the situation may have changed, he was simply unable to give an opinion at the present time. Dr. Narayan noted that he called the jail and received the information about the medications, but no information was received from Applicant or his lawyers. Dr. Narayan noted he had no access to the detention records.

Dr. Narayan stated, however, that at the time of the initial evaluation, Applicant, after being advised of his rights, still agreed to a release of his medical information. During the cross-examination, counsel Mauldin showed medical records to Dr. Narayan that he had not seen with the specific reservation that he was not disclosing it to the State through the examination. The defense requested that Dr. Narayan make them a copy of his entire file, and the trial court ordered it.

As the examination continued, Dr. Narayan noted that during their conversation on October 29, Applicant told Narayan that he was planning on firing his Greenville attorneys and having his Anderson counsel represent him in both jurisdictions. Applicant also indicated he had written a letter to the Clerk of Court attempting to fire Mauldin and Bannister. Dr. Narayan noted he had contact with the Anderson County lawyer, Bruce Byrholdt. (R. at 965-83).

At the conclusion of cross, the defense made a motion for every piece of paper relating to Applicant at the State Hospital. The court agreed. The solicitor then requested that he receive a copy, but the court denied that without prejudice, ruling instead that the court should receive a copy. (R. at 982-83, 990-92).

During reexamination by the trial court, Dr. Narayan noted that no one from the defense team called him and offered to assist in the evaluation, although that has happened in the past. Dr. Narayan noted that he felt he had plenty of information to find Applicant competent at the prior time, and described Applicant's waiver of rights prior to the interviews. (R. at 981-86).

A psychologist named Dr. Tezza also testified about Applicant's decision to execute the waiver of rights at the prior interviews, including the declination to have his attorney present. (R. at 986-89).

The trial court then found Applicant competent to stand trial. The court noted that Applicant

had the burden, and there was no real effort to challenge competence. The court also noted that it might have to revisit the issue of providing the mental health information to the State. (R. at 993-95). Moreover, the court made part of the record letters reflecting Dr. Narayan's attempt to get further information from Applicant and his attorneys, as well as the letter from defense counsel in which the defense declined to allow such access. (R. at 995-96; Tr. Ct. Ex. 17).

Following Applicant's cross-examination of Karen McCall during the guilt phase on Applicant's fear of police, headache, and uncharacteristic behavior on the day of the incident, the State again requested that it receive Dr. Narayan's full report from his evaluation of Applicant at the State Hospital and moved for an independent mental health examination. The solicitor argued that capacity had been made an issue before the jury by the cross, and he contended that there were statements by Applicant in the report that the State should be allowed to use.

The trial court denied the motion, responding that there was no notice of insanity or a GBMI defense. The solicitor complained that the defense was attempting to use his mental condition to support a lesser-included offense, but the trial court did not yet think they had arrived at the point where it would require full disclosure of the state psychiatrist's report. The solicitor complained that he was at a disadvantage because the defense was barring him access to any mental health records, and the court noted it would not allow the defense to introduce mental health issues through the "back door" with an attack on intent. (R. at 1490-97).

At the close of the State's guilt phase case, the defense stated it had no intention of calling any psychiatric witnesses. Accordingly, the trial court ordered the State's mental health expert to leave the courtroom pursuant to the sequestration order and also denied the State's renewed request to see the rest of Dr. Narayan's file or for an independent mental health examination. (R. at 1662-

65). The State then raised that under state law diminished capacity is never a defense to murder. The defense replied all they were going to do was call lay witnesses to describe the defendant at the time of the offense. (R. at 1679-81).

During pre-sentencing phase motions, the State again renewed its request that it receive Dr. Narayan's entire report rather than just the redacted portion. The State also again asked for an independent examination, asserting the defense's scenario in guilt phase argument that Applicant reacted with such fear and panic put mental issues in play. The solicitor noted he was not going to call Dr. Narayan in his case-in-chief, but may call him in reply, put him up, subpoena the jail records the defense would not provide, and let Dr. Narayan look at them on the stand. (R. at 1822-27).

The defense responded that it had objected to the evaluation all along, and that criminal responsibility and GBMI were already "out of the way" with the guilt phase verdict. The defense argued it did not ask for any mental health instructions nor did it bring any mental health testimony before the jury in the guilt phase. (R. at 1827-29).

The court responded that it was likely the defense would present some mental health expert in the sentencing phase, and it would be unfair to allow the defense to do so with its hired experts without the State being able to look at Dr. Narayan's report that might have contrary information. The court noted it was trying to be fair to both sides, but if the defense called a mitigation expert to support some of the mental health mitigators, then the State was only entitled to be privy to possibly contradictory information in the report. (R. at 1830-31).

The defense responded that the evaluation was only for criminal responsibility and competency, and there was no authority to order the defendant to submit to an evaluation if he was merely claiming entitlement to mitigators in the sentencing phase. (R. at 1831-33).

The trial court then noted that the defense's recitation of the procedural history was not accurate, and that the State had no way of knowing what the defense had represented to the trial court in *ex parte* funding requests and other communications. The court simply believed that if Applicant made a statement to Dr. Narayan after a waiver of rights, it simply was not fair for the State to be unaware of it, given the factual scenario the defense attempted to elicit from Karen McCall. (R. at 1833-34).

With regard to funding requests, defense counsel noted that he has his clients evaluated for mental health issues in every single capital case. The defense stated that the State's position would essentially allow for preemptive evaluations just based on the likelihood that the defense was going to present mental health mitigation.

Ultimately, the court decided that it was not going to disclose the report at the time, and it would wait until the defense presented its case to reassess the decision. (R. at 1836-38).

In opening during the sentencing phase case, the defense argued it was going to present evidence of "mental impairment," and of "a spiral pattern of acts and circumstances . . . almost like the blowing of air into a balloon until December the 6th when that balloon exploded." (R. at 1858).

As its second witness, the State called Dr. Narayan. The defense objected, arguing again that Blair issues were already decided and Dr. Narayan had no relevance. The State contended that the defense's opening argument clearly put mental impairment into play, and that Dr. Narayan told the solicitor that there are things in the report Dr. Narayan needs to use to support his opinion that have not been disclosed to the solicitor. The court sustained the objection to Dr. Narayan's report, finding argument is not evidence, and stating again that the defense presentation needed to occur first to finally decide the issue. (R. at 1871-75).

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During its sentencing phase case, the defense called social worker Jeffrey Youngman, who testified: (1) Applicant's social and emotional functioning was affected by his family's dysfunction; (2) his social environment played a role in his level of functioning; (3) his behavior is consistent with someone suffering from mental illness; and (4) he has no significant prior history of criminal convictions involving violence. (R. at 1975). Later, Youngman theorized Applicant had paranoid personality disorder. (R. at 1988). On cross, Youngman admitted he reviewed the state mental health evaluation as part of his opinion in the case. (R. at 1992-93, 2016-17).

The solicitor then asked to review all documents upon which Youngman relied in forming his opinion. Defense counsel noted that it had been objecting to disclosure from the beginning, but conceded:

> On the other hand, if Mr. Youngman, who said that it was part of the material he looked at, I really don't think an objection is appropriate, quite frankly, Judge.

(R. at 1997-98). The judge noted he appreciated defense counsel's candor, and stated, "[W]hen an expert says he or she relied on certain documents, the rules unequivocally permit cross examination on the sources of the expert's opinion." (R. at 1998).

Defense counsel then asserted that there should be a distinction between statements merely contained within a report the expert reviewed and statements actually relied upon by the expert. The court noted that potential hearsay information in reports is not offered for the truth of the matter asserted but only for the jury's consideration as to the adequacy of the expert's opinion, and suggested a limiting instruction might be in order. (R. at 1999-2001).

Youngman then returned to the courtroom with the state hospital report, and the State then had the opportunity to review Dr. Narayan's report in its entirety. (R. at 2002-03). Following an

examination of Youngman outside of the presence of the jury, the court overruled the defense objection to examination on certain statements relied upon by Youngman, but gave a limiting instruction that examination on statements relied upon by the expert were only to be considered as to the assessment of the expert's opinion, not for the truth of the matter asserted. (R. at 2003-15). The solicitor then examined Youngman on the state mental health report, including inconsistencies in the two stories Applicant told the examiners on separate occasions. (R. at 2017-19).

The defense also called former warden James Aiken, who testified that Applicant would be adaptable to prison, that he would not be a danger to staff or other inmates, and that he in fact would be at the mercy of the prison predator population. (R. at 2037-44).

Following Aiken's testimony, the solicitor advised the court that since he had now had a chance to review the entire evaluation report, it was his intention to discuss the previously redacted portions with Dr. Narayan and Dr. Crawford from Department of Mental Health. The court declined, stating that for the moment the prior ruling remained in effect until the court could see the entire "parameters of the defendant's effort in mitigation" and until the court has had an opportunity to discuss with the defense what mitigators they think the evidence supports. The solicitor then noted that he would need expert help to assist him with cross-examination of the defense's mental health expert the following day, and the court stated it would give the solicitor the necessary time if needed. (R. at 2045-49).

The next day, Applicant called his mental health expert, Dr. Schwartz-Watts. Dr. Schwartz-Watts testified that the results of Applicant's neurological exam were completely normal. (R. at 2066). Dr. Schwartz-Watts diagnosed Applicant with "bipolar disorder not otherwise specified" and "paranoid personality disorder." (R. at 2070). She noted that bipolar disorder is only "a problem

with the way you feel," although she claimed Applicant has hallucinated. (R. at 2071, 2077). Dr. Schwartz-Watts also testified that since Applicant had been on medication that she prescribed, he was more stable, less grandiose, and "able to process things" in a slower and more deliberate fashion. (R. at 2087).

After direct examination of Dr. Schwartz-Watts concluded, the parties discussed the parameters of cross-examination. Ultimately, the court instructed the witness that while the solicitor was going to ask general questions about Applicant's alleged grandiosity or hallucinations, the witness was not to mention Applicant's claim that God told him to blow up the Pentagon, which Karen McCall told to Dr. Narayan. (R. at 2094-2102).

During cross, Dr. Schwartz-Watts testified that she reviewed Dr. Narayan's report and absolutely agreed that Applicant was not only competent to stand trial but also criminally responsible for the murder. (R. at 2118-21). At the end of cross, the solicitor asked and the court agreed for time to review the notes. (R. at 2124).

In reply, the State called Dr. Narayan, who testified to a reasonable degree of medical certainty that Applicant was not only competent to stand trial but also criminally responsible. (R. at 2146-48). Dr. Narayan disagreed with the defense doctor's diagnosis, though, and said Applicant only had antisocial personality disorder. (R. at 2148-51). Dr. Narayan also noted that there was no evidence of Applicant displaying any abnormal behavior. (R. at 2152-53). Dr. Narayan stated that his diagnostic impression, confirmed by psychological testing, was that Applicant began to malinger his supposed symptoms. (R. at 2157-58).

During the examination, the defense objected and the court sustained the objection to questioning about Dr. Narayan's attempt to get further information in the case. The court gave a

curative instruction on the defendant's right to remain silent. (R. at 2141-43). Dr. Narayan did note, however, that he had recently had the opportunity to review information from Dr. Schwartz-Watts' file. (R. at 2151).

At the close of reply, the defense requested the mitigators referring to mental or emotional disturbance, substantial impairment of the defendant to appreciate the criminality of his conduct or to conform his conduct with the law, and the age or mentality of the defendant at the time of the crime. (R. at 2176).

During closing, defense counsel repeatedly argued that Applicant had a mental illness, and that his capacity to conform to the law was substantially impaired. (R. at 2202-05, 2207, 2209-10). The trial court charged the jury on the statutory mitigating circumstances that refer to "mental and emotional disturbance," "substantial impairment of the capacity to conform," and the "age and mentality of the defendant at the time of the crime." The court also charged the jury on its right to consider any non-statutory mitigating factors. (R. at 2223).

During deliberations, the jury requested that the court play back the testimony of defense psychiatrist Dr. Schwartz-Watts and court's psychiatrist Dr. Narayan. Defense counsel reasserted its objection to the reference to Appellant's right to remain silent during Dr. Narayan's testimony and requested direction of a life sentence. The court denied the motion. (R. at 2236-40).

As the jury continued to deliberate, counsel Mauldin put on the record his contention that the decision of Anderson counsel to consent to the evaluation was *per se* ineffective assistance of counsel because it led to the sentencing phase testimony of Dr. Narayan that the jury asked to rehear. The judge noted that while it did not intend to rehash the issue yet again, Applicant personally through his Anderson counsel had requested an evaluation, "which started the process." The judge

then went on to say that his own dealings with Applicant at the August 2000 hearing and Applicant's letters to the Clerk's Office in both counties "convinced me that absent the initiation by Mr. Wood himself I would have been duty bound to require a state evaluation as to competency." The court noted that subsequent *ex parte* communications with Greenville counsel and Dr. Schwartz-Watts "confirmed" this conclusion because they told the court the defendant needed to be treated for mental illness. The judge finished by noting his "firm judgment" that ordering the evaluation was "the appropriate thing to do," which he would have done *sua sponte* had Applicant not requested it. (R. at 2250-52).

2. Facts (evidence at PCR)

At the PCR hearing before this Court, counsel Mauldin testified on direct by Applicant that he was very opposed to the evaluation of Applicant from the beginning. He testified he did not attend the evaluation, stating he could not recall why but it may have been his other commitments. Admitted into evidence during Mauldin's testimony were a copy of Applicant's *pro se* request for an evaluation, dated September 13, 2001, a memorandum from the trial judge setting a hearing on the request, and the Anderson County order setting the evaluation. Mauldin stated he requested the hearing on the evaluation prior to it taking place, as already described above.

On cross, Mauldin stated that one of the major disagreements he had with Applicant was whether to have an evaluation done. He strongly advised Applicant not to go and talk to any state mental health officials. As to whether he personally advised Applicant of his rights, counsel was adamant that he told Applicant that he did not want Applicant to do the evaluation and that it would be used against him. Counsel admitted he simply could not remember why he did not attend the evaluation. Discussed during Mauldin's testimony at this point was Court's Exhibit 16 from the

trial, which was the advice of rights form executed by Applicant prior to his evaluation at the South Carolina Department of Mental Health (DMH).

Mauldin also testified that, subsequent to the conducting of the evaluation, they considered the danger of the State being able to use what was in the report. However, they decided to go forward anyway with their own mental health testimony from Dr. Schwartz-Watts and Jeffrey Youngman.

Counsel Bannister testified that the defense did not want any DMH testimony introduced at the trial. Initially, the court appointed he and Mauldin on the Anderson case as well, and the defense team was ready to go inasmuch as it looked like the Anderson solicitor was going to try that case prior to the death penalty case in Greenville. However, Applicant insisted he wanted an evaluation. Mauldin and Bannister refused, and on cross by the State Bannister testified the defense specifically advised Applicant that in their judgment nothing good for the defense could come of the evaluation process. However, since Mauldin and Bannister would not agree to the evaluation, Applicant had them relieved in Anderson County.

Anderson County counsel, Bruce Byrholdt, testified at the PCR hearing as well. He stated that he consented to an evaluation of Applicant for criminal responsibility and competency, but that he did not recall advising Applicant on his right to remain silent. On cross by the State, Byrholdt stated that after the release of John Mauldin as Anderson counsel, he met with Applicant who advised Byrholdt that he wanted an evaluation. Moreover, Byrholdt testified that his observations of Applicant and Applicant's behavior warranted an evaluation.

Dr. Narayan from DMH testified that he had Applicant execute an advice of rights form prior to any session of an evaluation. Court's Exhibit #16 was the advice of rights form signed by Applicant prior to his evaluation. Dr. Narayan testified he normally gives the form to the subject,

requests that the subject read it, and then asks the subject if he has any questions.

3. Analysis

Applicant's contention with this ground for relief is that his counsel "failed to object to the testimony from medical providers of the South Carolina Department of Mental Health." Applicant argues that counsel was "unaware" information from the evaluation could be used since no issue as to criminal responsibility or competency was raised at trial, and further asserts that counsel "failed to object to the presentation of this evidence outside of the limited purpose for which the evaluation was ordered."

Of course, this record is clear that Greenville counsel objected to the evaluation process throughout the proceedings, both to their client in private and the judge at various hearings, because of their expressed concern that the information would ultimately be used in aggravation against Applicant. Since Greenville counsel objected to the evaluation process from the start both to their client and the judge, Applicant's claim really starts at the decision of Anderson counsel to agree to Applicant's repeated demand for an evaluation for criminal responsibility and competency to stand trial.

However, as an initial matter, this aspect of the claim is not even proper for consideration in the present action. First, of course, this is not the pled claim. Applicant filed this PCR action in Greenville County challenging his murder and possession of a weapon convictions from Greenville County, for which only Mauldin, Bannister, and Richey were appointed. Indeed, in section 16 of his Second Amended Application, Applicant only lists Mauldin, Bannister, and Richey as the counsel who represented him at trial, and the text of the present allegation only refers to what "trial counsel" or "capital trial counsel" did or failed to do. Thus, Applicant has only expressly alleged a claim

against his Greenville counsel. Applicant filed this Second Amended Application long after missing two deadlines of this Court for Final Amended Applications, and the State requested and this Court was clear that only the pled allegations would be before the Court at the hearing. Moreover, the State was adamant throughout the hearing that it was not trying anything by consent. Accordingly, inasmuch as the present allegation attacks the decisions or actions of Anderson counsel, this Court finds it is not pled properly and timely.

Even if it was properly and timely pled, however, it is still questionable whether an allegation against Anderson counsel is proper in this Greenville case. As has been repeatedly set out, this Greenville PCR challenges actions of Greenville counsel in an attempt to seek relief from Greenville convictions, and it was Greenville counsel who objected to the evaluation process from the start. The fact of the matter is Anderson counsel never represented Applicant in the Greenville case. This procedural impediment prevents a claim of ineffective assistance of counsel on this ground. See generally Comm. v. Carpenter, 725 A.2d 154, 164 (Pa. 1999) (question of whether guilty plea was knowing and voluntary for a prior conviction in a different county used as aggravation in a capital trial was not properly before the post-conviction court for the capital trial); Poyner v. State, 720 N.W.2d 194 (Iowa Ct. App. 2006) (since claim of ineffective assistance of PCR counsel only related to counsel's performance in a different case, the claim was without merit).

Thus, if a claim against Anderson counsel is improper in this action, Applicant's claim in reality would have to be that the *judge* erred in allowing the evaluation ordered for Anderson County be "transferred" to Greenville over Greenville counsel's objection. This is a freestanding claim that, even if pled properly, is not proper for PCR but rather is for direct appeal. See, e.g. Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) (issues that could have been raised at trial or on direct

appeal can not be raised in a PCR application absent a claim of ineffective assistance of counsel).

However, even if a claim against Anderson counsel for consenting to the evaluation is proper in this action, it is without merit. As noted before, Applicant himself requested the evaluation, and Anderson counsel testified that, after speaking with Applicant and observing his behavior, in counsel's judgment he believed Applicant should be evaluated. This Court finds no reason to question Anderson counsel's judgment on this point. Indeed, ultimately Anderson counsel's decision to consent to the evaluation is of no consequence, because the trial court specifically noted on the record that had Anderson counsel not consented, the court would have been duty bound to order the evaluation based on Applicant's conduct and communications. See S.C. Code Ann. §44-23-410 (2002) (noting the judge "shall" order an evaluation whenever a judge "has reason to believe" a person facing a criminal offense is not fit to stand trial).

Since there is no viable issue with regard to the decision to proceed with the evaluation in the first place, the issue next turns as to counsel's handling of the information at trial. Applicant contends that trial counsel was "unaware" that the information was to be used at sentencing, and "failed to object to the presentation of this evidence outside of the limited purpose for which this evaluation was ordered." However, the record is clear that counsel was *very* aware and very concerned that the evaluation would ultimately be used by the State for purposes other than competency or criminal responsibility.

As exhaustively set forth in factual description, Greenville counsel strongly advised their client against evaluation until the point that he had them removed from the Anderson case; Greenville counsel then objected at a hearing prior to the evaluation in an attempt to prevent it from being used in the Greenville proceedings; Greenville counsel prevented Dr. Narayan from getting

further information about Applicant from the jail after Applicant went to see the evaluators against Greenville counsel's advice; Greenville counsel successfully prevented the State from reviewing the complete report throughout much of the trial despite the State's repeated request to do so; Greenville counsel objected to admission of statements made by Applicant to his wife and achieved a limiting instruction from the judge; and Greenville counsel successfully prevented Dr. Narayan from testifying during the State's sentencing phase case despite claims that the defense had crossed the line into arguing mental health. It was only after the defense in the sentencing phase presented mental health information from experts who admitted they had reviewed Dr. Narayan's report in its entirety that the court allowed the State to review the report in its entirety and communicate freely with Dr. Narayan as to the findings.

Thus, the only viable issues with regard to Greenville counsels' handling of this issue were the decision to proceed with their own mental health presentation despite the risk that it could open the door to the State's use of the evaluation report and the ultimate concession that the defense had no valid objection once their own expert admitted he had reviewed the report. Once counsel proceeded with their mental health mitigation no further objection to the State's use of the report was valid, and counsel's decision to proceed despite this fact was reasonable and made with full knowledge of this risk.

Of course, in Estelle v. Smith, 451 U.S. 454, 462-463, 101 S.Ct. 1866, 1873 (1981), the Court held that it was a violation of the Fifth Amendment privilege against self-incrimination for a state doctor to be allowed to testify as to future dangerousness in a sentencing phase where the defendant was not advised at the competency evaluation of his right to remain silent and that any statements could be used against him. The Court also found a violation of the Sixth Amendment

right to counsel, inasmuch as counsel were not notified in advance the evaluation would encompass the issue of future dangerousness, and thus the defendant was denied the opportunity to consult with counsel about whether to submit to examination. Id. at 469-470. Importantly, the Court expressly did not decide whether there was any right for counsel to be present at the examination, noting that the lower court had recognized such presence might be disruptive. Id. at 470 n. 14. Moreover, the Court pointed out that a "different situation" would exist "where a defendant intends to use psychiatric evidence at the penalty phase," noting the question was left open whether a defendant could introduce his own psychiatric evidence without being subject to an examination by a State psychiatrist. Id. at 466 n.10, 471.

Along these lines, in Buchanan v. Kentucky, 483 U.S. 402, 422, 107 S.Ct. 2906, 2917-2918 (1987), the Court specifically noted that "if a defendant requests an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested." The Court in Buchanan found no Fifth or Sixth Amendment violation where the defense joined in the motion for an evaluation, and the "entire defense strategy was to establish the 'mental status' defense of extreme emotional disturbance." Id. at 423-24. In addressing the Sixth Amendment claim, the Court specifically pointed out that the focus was the opportunity for consultation with informed counsel about the scope and nature of the proceeding, not the ultimate use to which the prosecution was to put the information. Id. at 424.

In Powell v. Texas, 492 U.S. 680, 683-686, 109 S.Ct. 3146, 3149-3150 (1989), the Court held that a defendant did not waive his Sixth Amendment right to notification by putting up psychiatric evidence of insanity, particularly where the Sixth Amendment right to notification was violated in the first place because the examination took place without notice to counsel or the

defendant that the examination would encompass the issue of future dangerousness.

In Hudgins v. Moore, 337 S.C. 333, 337-338, 524 S.E.2d 105, 106 (1999), the Supreme Court of South Carolina held that it was error under state law for the court to permit the prosecutor to impeach the defendant during guilt phase on answers he gave to the state psychologist during testing for the competency evaluation. Defense counsel did not object, and thus was ineffective. Id. at 338. The court, while finding no constitutional violation because voluntary statements obtained in violation of Miranda or the Sixth Amendment right to counsel are still admissible for impeachment, nevertheless found a violation of State v. Myers, 220 S.C. 309, 67 S.E.2d 506 (1951), which held that confessions made to examiners at the State Hospital would not be permitted to be revealed over objection of the defendant. Id.

In the present case, the fact that testifying defense experts reviewed it and relied upon it placed the complete report in play. Of course, Rule 705, SCRE, provides that an expert may be required to disclose during cross-examination the underlying facts and data upon which he or she relied. Once defense expert Jeffrey Youngman admitted on cross that he had read and relied upon the State evaluation in forming his opinions, defense counsel conceded there was no further valid objection to the State being privy to the report. The court agreed, noting the rules clearly allowed exploration of the bases underlying the expert's opinion. (R. at 1997-98). Defense psychiatric expert Dr. Schwartz-Watts also testified she reviewed and relied on the report in preparing her opinions offered in mitigation.

This Court finds no deficiency on the part of defense counsel in conceding that no further valid objection could be made to the State's review of the evaluation report following the defense expert testimony. As noted in State v. Slocumb, 336 S.C. 619, 628, 521 S.E.2d 507, 512 (Ct. App.

1999), Rule 705 allows the cross-examiner "to ask the expert to reveal otherwise inadmissible underlying information to the jury," and also permits counsel to cross-examine the expert "with respect to material reviewed by the expert but upon which the expert does not rely." Slocumb, 336 S.C. at 628 (quoting 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 705.05 (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 1999) and 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 13, at 56-57 (John William Strong ed., 4 ed. 1992)., respectively). Slocumb held that the trial court did not err in allowing the prosecution to cross-examine the defense's mental health expert on reports of misconduct in DJJ, where the expert testified he had reviewed DJJ reports in forming his opinion and they were relevant in allowing the State to explore the basis for the expert's opinion of insanity. Id. at 631-632. Moreover, Slocumb held the reports were not inadmissible character evidence under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), as they were not admitted to prove propensity but rather elicited as part of cross-examination on an expert opinion. Slocumb, 336 S.C. at 632.

The same or similar justification exists here given the defense presentation from Youngman and Dr. Schwartz-Watts. Since the cross-examination using the full evaluation report was permissible, then counsel could not have been deficient nor Applicant prejudiced from the concession or failure to object. See Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001) ("ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test," as it was neither deficient nor prejudicial).

Similarly, there was no valid objection with regard to the solicitor's presentation of Dr. Narayan in reply after the defense case in mitigation. Once Applicant's mitigation expert testified on

direct that Applicant did not have anti-social personality disorder, and that he was not malingering his symptoms of mental illness, it was permissible for the state to rebut this mental health presentation with the contrary opinions of Dr. Narayan without any violation of the Fifth Amendment. Moreover, there could be no violation of the Sixth Amendment right to counsel based on notification as Greenville counsel was expressly aware and concerned that the State could ultimately use the evaluation report for sentencing and told Applicant that as they futilely attempted to prevent him from agreeing to the evaluation. The applicant personally requested the evaluation, and he was made aware by Dr. Narayan of his rights and the consequences of speaking.

No further objection to Dr. Narayan's testimony was proper, as seen in the language from the United States Supreme Court in Estelle and Buchanan, but there are quite a number of cases from other jurisdictions that have sustained use of such evidence in similar situations. See, e.g. Schneider v. Lynaugh, 835 F.2d 570, 577-578 (5th Cir. 1988) (defendant who requests evaluation and then puts his mental state into issue with psychological evidence cannot then use the Fifth Amendment as a bar to State rebuttal, even though State was using evaluator to rebut on issue of rehabilitative potential; also, there was no Sixth Amendment notification violation where the prosecution was merely rebutting defense evidence); Coffey v. Messer, 945 S.W.2d 944, 948 (Ky. 1997) (Kentucky Rules, which are based on Federal Criminal Procedure Rules specifically crafted to protect defendant's rights under Estelle v. Smith, are not unconstitutional, as since the State can only use the evidence in rebuttal, defendant can prevent introduction of such evidence by declining to call mental health evidence itself); Evans v. State, 725 So.2d 613, 686-689 (Miss. 1997) (no Fifth Amendment error in allowing State to use competency evaluator in rebuttal, because, in part, the defense called a mental health expert, and since the defendant did not testify, there was no other way for the prosecution to

rebut the defense presentation; there likewise was no Sixth Amendment violation of "notification" even though the evaluation order specified that the information could not be used in sentencing, where the defense intended to introduce psychiatric evidence and obviously could anticipate the use by the prosecution); See also State v. Davis, 506 S.E.2d 455, 476-479 (N.C. 1998) (no Fifth Amendment error in allowing State to cross-examine defense expert on information from State competency evaluation, even though this was a different purpose for which the evaluation was ordered, where defense expert testified at trial he relied on the information in forming his opinion; no Sixth Amendment error, where defendant had the opportunity to discuss the evaluation with counsel, and counsel should have anticipated that the State would attempt to use the report if the defense put on a mental status defense).

Here, this Court finds Greenville counsel vigorously pursued this issue as well as any lawyer could. Ultimately, as counsel Mauldin testified, they eventually made the strategic choice that it was better to proceed with their own mental health defense despite the fact that this would likely open the door for the State with the DMH information. This Court finds this strategic decision was reasonable, especially given the difficult hand counsel were dealt in this case, with an extremely aggravated crime and limited mitigation. See Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack). This Court finds it hard to imagine what more Greenville counsel could have done to keep out the DMH information; counsel kept it away from the State as long as possible. Ultimately, the evaluation took place on Applicant's own motion and the agreement of his Anderson counsel, and this could hardly be attributed as constitutional fault to Greenville counsel who opposed it from the start. Applicant's

own personal and repeated efforts at obtain a competency evaluation place the consequences of having the evaluation done in the first place upon him and him alone.

The issue is without merit and is denied.

F. Ground F

Applicant's next ground for relief is as follows:

> Applicant was denied the effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Unites States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to prevent access to Mr. Wood by the South Carolina Department of Mental Health. Estelle v. Smith, 451 U.S. 454 (1981); Buchanan v. Kentucky, 483 U.S. 402 (1987); Powell v. Texas, 492 U.S. 680 (1989), Hudgins v. Moore, 524 S.E.2d 105 (S.C. 1999); Thomas-Bey v. Nuth, 67 F.3d 296 (Unpublished, 4th Cir. 1995); and Strickland v. Washington, 466 U.S. 668 (1984).

Applicant contends counsel was ineffective for failing to "deny access" of the Department of Mental Health to Applicant.

As noted before in the discussion of facts in the preceding subsection and incorporated here, Applicant insisted on a psychological evaluation over the objection and against the advice of Greenville counsel, to the point where Applicant had Greenville counsel removed from the Anderson case and new counsel appointed. Anderson counsel consented to Applicant's evaluation request, and the trial counsel issued an order for the evaluation. The evaluation result was "transferred" to the Greenville County case over the objection of trial counsel. However, after the initial evaluation report issued finding Applicant competent and criminally responsible, and as trial approached, counsel sent a letter in February 2002 precluding further access of DMH to Applicant and his jail records. This led to Dr. Narayan complaining immediately before trial that he could not update his conclusions for the Blair hearing. Ultimately, the trial court told Dr. Narayan to do the best he could,

and Dr. Narayan simply testified that at the time of his evaluation he had no concerns about Applicant's competency or criminal responsibility.

Applicant complains that if counsel could have prevented DMH access prior to February 2002, then they were ineffective for not preventing access prior to February 2002. For many of the reasons discussed in the preceding ground and incorporated here, this allegation is without merit. First, since Applicant wilfully sought an evaluation over the strenuous objection of Greenville counsel to the point where Applicant had Greenville counsel removed, Applicant cannot now blame Greenville counsel for that evaluation. Second, as set forth in the ruling on the previous ground, even if a claim against Anderson counsel was procedurally proper in this action, Anderson counsel was not ineffective for consenting to the evaluation based on his observations of Applicant. The trial court stated it would have been duty bound to have ordered the evaluation even if Anderson counsel had not consented. There was nothing more Greenville counsel could have done to "prevent" DMH access when an evaluation occurred based on Applicant's personal request, the reasonable judgment of Anderson counsel, and the trial court's independent view, despite Greenville counsel's best attempts to prevent it at every turn.

Obviously, after the evaluation came back with an "unfavorable" result to Applicant and the death penalty trial approached, Greenville counsel and Applicant came back to terms, and counsel was able to send out the letter precluding further access after the defense hired mental health experts who met with Applicant at the jail in anticipation of a mitigation case. The fact that counsel was able to send out the letter at this point does nothing to establish that they could or should have sent out the letter earlier. Indeed, Applicant cannot show prejudice because such a letter earlier would have been fruitless given that Anderson counsel and Applicant himself were cooperating with the

evaluation.

The issue is without merit and is denied.

G. Ground G

Applicant next ground for relief is as follows:

> Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-13-26(B)(1) and §17-23-60 by trial counsel's failure to expose the incorrect diagnosis of the medical providers from the South Carolina Department of Mental Health. Strickland v. Washington, 466 U.S. 668 (1984).

Applicant contends his counsel was ineffective for failing to "expose" that no evidence allegedly supported the diagnosis of the DMH examiners that Applicant has anti-social personality disorder, or ASPD.

1. Facts

As noted before, at the sentencing phase defense expert Dr. Schwartz-Watts diagnosed Applicant with "bipolar disorder not otherwise specified" and "paranoid personality disorder." (R. at 2070). Counsel asked her, on direct, to define ASPD, and then asked whether the diagnosis of ASPD depended on information from childhood. Dr. Schwartz-Watts testified that one had to have a pattern of antisocial behavior before age 16 to meet the criteria, and then asserted that Applicant did not have such a history at a young age. She asserted there was "no history before he was 16 of being in trouble;" denied that Applicant was ever in a boy's home noting he was only there because his parents worked there; and stated that, according to his sister, the only fight Applicant had ever been in was when he finally stood up to an older boy who was picking on him. Dr. Schwartz-Watts continued:

> So he certainly . . . has antisocial traits. He had a pattern of breaking the law as an adult. He has - certainly, he has been in prison a few times. He's been a thief. He had done fraudulent things in terms of the Wal-Mart check scam and that sort of thing. But he does not meet the criteria [of ASPD].

In reply, Dr. Narayan disagreed with the defense doctor's diagnosis of paranoid personality disorder, finding only one of the seven criteria when three were needed. Dr. Narayan said Applicant only had ASPD. (R. at 2148-51). Dr. Narayan noted that the psychiatrist who saw Applicant five days after the crime also diagnosed him as a sociopath, which "is pretty much what [ASPD] is." (R. at 2151-52).

On cross, defense counsel Mauldin asked Dr. Narayan if one of the "absolute necessities" for ASPD was that there had to be a conduct disorder prior to age 15, and then asked Dr. Narayan what evidence he had that Applicant had such a conduct disorder prior to the age of 15. Dr. Narayan testified that Applicant said he shoplifted and destroyed property as a child. After a discussion of whether Dr. Narayan considered this self-reporting reliable, defense counsel pointedly asked Dr. Narayan if he had heard the prior witnesses say there was no prior juvenile history. At this point, Dr. Narayan pointed out that the evidence of conduct disorder did not have to include "adjudications, legal charges, arrests or any kind of sentencing." Defense counsel then asked if Dr. Narayan had Applicant confused with his mother, and Dr. Narayan answered no. (R. at 2170-73).

At PCR, Applicant first called Dr. Thomas Cobb, a psychiatrist who treated Applicant on death row beginning in 2002 or 2003. Dr. Cobb stated that while some of Applicant's diagnoses of bipolar disorder, depression, intermittent explosive disorder, and others were treatable, the only treatment for anti-social personality disorder was incarceration. He stated that over the years as he has treated Applicant, Applicant has improved on medication but deteriorated when not on

medication. In Dr. Cobb's opinion, these differing reactions showed Applicant was responding to the medical treatment.

On cross, Dr. Cobb admitted that mental condition could be fluid and new problems could develop, and indeed that a sentence of death and placement on death row at Lieber Correctional Institution could cause new psychological problems. Dr. Cobb admitted that intermittent explosive disorder could be part of ASPD. Counsel showed Dr. Cobb various SCDC medical records over recent years that he conceded repeatedly mentioned the diagnosis of ASPD by the treatment teams for Applicant.

Later, Applicant called other witnesses who were involved in the DMH evaluation of Applicant. Dr. John Steadman testified that he relied on the patient (Applicant) for the report that he shoplifted as a child. Dr. Camilla Tezza testified that Dr. Narayan advised her that he had evidence of conduct disorder behaviors prior to the age of 15, but she did not have those reports in her notes. She admitted she was relying on self-reports. Social worker Carlos Torres testified that he obtained a social history including the legal history, but could not recall activity prior to age fifteen. United States Probation Agent Bryan Bowen testified that he prepared the pre-sentence report for Applicant's federal convictions. He spoke with Applicant's older sister, Connie Jantz, for a personal history, and ultimately provided this report to the solicitor's office. He also interviewed Applicant as part of his report. His report did not reflect any convictions or adjudications prior to age fifteen.

Connie Jantz also testified at PCR. She generally described aspects of Applicant's life growing up, including the inconsistent education and "abysmal" parenting of Applicant's mother. She noted their mother would shoplift and believed their mother lost a job for stealing from one of her employers. According to Jantz, the only trouble Applicant got into as a child was when he stole a

toy gun from K-Mart, possibly when he was younger than 10. She stated Applicant had learned shoplifting from his mother.

Ms. Jantz stated that she first learned of Applicant's arrest from a reporter who contacted her in Harper's Ferry, WV. According to Ms. Jantz, her sister used her as a reference on a rental agreement. She testified that she never heard from any member of the defense team until PCR counsel contacted her.

However, on cross, Ms. Jantz admitted: (1) that when she moved to Harper's Ferry she did not want her mother to know where she had gone; (2) that she was living in Harper's Ferry when the trooper was murdered; (3) that she then moved to Knoxville, Maryland, and she did not like to give out her address because of the threat of her mother finding out where she was; (3) that she did not talk to her family about the case and only talked to Betsy a little about the case the day after the murder; (4) that she did not even know when Applicant was convicted until she later found news articles; (5) that she did not attempt to contact Applicant in prison; (6) that her only correspondence with Applicant was a few years later while he was in custody; and (7) that while they were not on speaking terms, her sister Betsy knew she was in Maryland and their mother could have contacted her through family. On redirect, Ms. Jantz stated that she in fact had moved after Applicant's arrest, but on recross, Ms. Jantz admitted she never contacted the defense team or Applicant because she was just in shock after the arrest.

Dr. Donna Schwartz-Watts testified at PCR that she never spoke to Ms. Jantz, but that she remembered defense counsel Mauldin unsuccessfully tried to contact Jantz. She never met with Applicant's parents but did meet once with Applicant's sister, Betsy Martinez. She noted, as she testified at trial, that she had concerns that Applicant did not meet the criteria for ASPD because of

the lack of a childhood history of conduct disorder. She conceded that Applicant clearly has antisocial traits. She further noted that Applicant would not cooperate with her interview, would not allow a video, and admitted he faked symptoms of mental illness. She stated it was very difficult to get a history from Applicant. Finally, she agreed that she had reviewed the SCDC mental health records, which also contained diagnoses of ASPD.

On cross, Dr. Schwartz-Watts noted she worked with Mauldin before, and that he was very organized in preparing a mitigation investigation. She stated there were periodic meetings that would include her, the defense team, and the mitigation investigator, Paige Tarr. She also agreed that she had plenty of notice and time to prepare, but that it was difficult to find family members despite the fact that the mitigation investigator and Mauldin tried.

Trial counsel Mauldin testified about efforts made to locate and contact Connie Jantz. He stated that no response came to letters sent to the Harper's Ferry address and that the phone there was not in service. In seeking assistance, the defense team advised Betsy Martinez that they were unable to contact Jantz. Moreover, counsel advised Paige Tarr to contact all mitigation witnesses she could.

On cross, Mauldin testified that his defense team included both co-counsel, a private investigator, the social worker Jeffrey Youngman, attorney Jeff Bloom for jury selection, and Paige Tarr for mitigation investigation. Mauldin testified that he had worked with Paige Tarr before and she was very experienced and competent.

Mauldin stated he was aware as a capital litigator of the need to develop the defendant's history, but he was concerned at the difficulty they were having in locating such a history despite the effort being made. Mauldin did not recall why they did not call Applicant's sister Betsy Martinez as a witness. As far as subpoenaing Jantz, Mauldin did not think that sort of measure would be

effective in obtaining a favorable witness for the defense, as "dysfunctional" as the family was.

Jim Bannister testified that despite their investigative efforts, they knew they were "slim on mitigation" as trial approached. Bannister recalled one sister did not want to participate, and the defense could only get in touch with one of the other sisters. He also stated that if Betsy was the sister in the courtroom during trial, they made a specific decision not to put her up on the stand as they did not think she would be favorable.

Rodney Richey testified that in his experience working with Mauldin and Dr. Schwartz-Watts, they worked well together and were on the same mission, and that Paige Tarr was an experienced and very good mitigation investigator.

Finally, Dr. Narayan from DMH testified at PCR. He first noted that while the DSM-IV TR does require evidence of a conduct disorder prior to age fifteen, the DSM-IV expressly states that it is not a "cookbook" with regard to individual criteria. According to Dr. Narayan, in the clinical setting what the expert is really looking for is a pervasive pattern of anti-social behavior, which Applicant clearly evidenced.

Dr. Narayan stated he received information from Applicant himself that he had engaged in stealing as a child. Moreover, he had information from Applicant's wife Karen McCall to that effect as well. Dr. Narayan noted that actual adjudications or convictions were not necessary, and that only one instance or symptom was necessary to meet the criteria because there were likely other instances in which the subject was not caught or charged. He noted that had Connie Jantz testified (as she did at PCR) about the one instance of shoplifting at Kmart, this would have been enough to support a conclusion of conduct disorder prior to age fifteen. Dr. Narayan was unpersuaded that his diagnosis of ASPD was incorrect or unsupported, and, like Dr. Schwartz-Watts at trial and in PCR, noted that

regardless of whether Applicant technically met the criteria for ASPD or not he clearly evidenced a personality disorder with antisocial traits.

2. Analysis

This Court finds counsel was neither deficient nor Applicant prejudiced with regard to their handling of the ASPD issue.

To start this analysis, we must first incorporate the discussion in the preceding subsection to the effect that Applicant insisted on an evaluation over the repeated objection of Greenville counsel, and, had Applicant listened to Greenville counsel, there would not have been a diagnosis by Dr. Narayan of ASPD. Thus, even if we assume Applicant suffered any prejudice with regard to this allegation, it was not because of any deficiency of counsel but is chargeable to Applicant based on his own conduct. Applicant does not get to ignore his counsel's advice on an issue and then achieve a windfall in PCR on the very same issue.

Regardless, counsel was not deficient inasmuch as counsel at trial elicited from Dr. Schwartz-Watts her contrary opinion on ASPD and flatly challenged Dr. Narayan on evidence supporting the existence of a conduct disorder at an early age. Counsel raised the very point of which Applicant now complains with not only the presentation of his own expert's contrary opinion on the issue of conduct disorder prior to age 15, but also cross-examination of the State's expert on the fact that other witnesses stated there was no such evidence. Counsel cannot "force" an expert witness to testify to a particular opinion, and even in PCR Applicant did not get Dr. Narayan to abandon his view that Applicant exhibited ASPD. This Court finds that even if counsel could have done more to present evidence or cross-examine Dr. Narayan on this issue, what counsel did do was more than adequate to be above the standard for constitutional deficiency. See generally Kavanaugh v. Berge,

73 F.3d 733 (7th Cir. 1996) (finding no deficiency in the failure to exhaustively cross-examine expert on his use of leading questions when interviewing the victim, where counsel presented an expert to testify generally on the subject and argued the issue extensively in closing).

Moreover, counsel was not deficient with regard to obtaining information from Applicant's sister, Ms. Jantz. This Court finds that Ms. Jantz was attempting to avoid contact with her mother by hiding her whereabouts, and, despite being aware that Applicant was in trouble, Ms. Jantz made no effort to contact Applicant or the defense team. This Court finds counsel's efforts to contact Ms. Jantz were reasonable given that they attempted phone calls, letters, and contact through Applicant's other sister, Ms. Martinez. The trial court record supports this, as defense social worker Youngman admitted on cross that while they think Ms. Jantz lived in Maryland, the defense could not contact her. He said, "[N]obody could locate her. None of the family knows where she's at." (R. at 1991-92). When asked if he could have subpoenaed Ms. Jantz, counsel responded that he would question what of value he could have gained by subpoenaing a reluctant family member in the hopes that family member would provide mitigating evidence. This Court agrees, and overall finds counsel made reasonable and constitutionally sufficient efforts to obtain Ms. Jantz's help that were frustrated by Ms. Jantz's own unwillingness to have contact with her family at the time and be involved in the defense of her brother. See. e.g. Timberlake v. Davis, 409 F.3d 819, 824 (7th Cir. 2005) ("Coerced testimony dragged out of truculent family members is unlikely to persuade a jury that a defendant has redeeming features.").

As far as Ms. Martinez, counsel Bannister testified the defense made a strategic decision not to put her on the stand. Applicant has presented nothing to call this decision into question. Indeed, Applicant presented no testimony from Ms. Martinez about any testimony she could have offered or

even if she was willing to testify; thus, Applicant has failed to meet his burden of establishing both deficiency and prejudice. See generally Beaver v. Thompson, 93 F.3d 1186, 1195 (4th Cir. 1996) (rejecting claim that counsel was ineffective for failing to present as mitigation evidence family members where there was no proffer of this testimony); Bassette v. Thompson, 915 F.2d 932, 940 (4th Cir. 1990) (petitioner's allegation that attorney did ineffective investigation does not support relief absent a proffer of the supposed witness's favorable testimony).

However, even if counsel was somehow constitutionally deficient in not doing more than counsel did to challenge Dr. Narayan's view on ASPD, this Court finds no prejudice. Despite the evidence presented in PCR, Dr. Narayan held firm that his diagnosis of ASPD was correct. This Court finds credible Dr. Narayan's testimony that the DSM IV is not to be a "cookbook", and that in the clinical setting the practitioner is looking for a pervasive pattern of antisocial behavior that Applicant clearly exhibited. Dr. Narayan's testimony also persuades the Court that he received information from Applicant himself as well as Applicant's wife as to the commission of crimes or wrongs by Applicant prior to the age of fifteen, and, as Dr. Narayan pointed out, the evidence does not need to involve convictions, charges, or adjudications since Applicant may not have been caught, charged, or convicted on a particular incident. Dr. Narayan pointed out that Ms. Jantz's description of a shoplifting incident was enough to meet the criteria precluding the possibility of any prejudice on the issue from the failure to find and talk her into testifying.

Although Dr. Cobb testified as to his treatment of Applicant once Applicant entered SCDC under a death sentence, he also admitted that one's psychological makeup is fluid and can change, that being sentenced to death and incarcerated could trigger new psychological problems that did not exist before, and that in any event the medical records from SCDC contained repeated references to

the diagnosis of ASPD. Thus, this Court finds that sufficient evidence supports the diagnosis of ASPD. There is enough to support it that this Court cannot say it is an "incorrect" diagnosis.

Given the examination of both the defense expert and the state expert on this very issue at trial, and that this Court finds Dr. Narayan credible in his continued diagnosis of ASPD despite the testimony in PCR, this Court cannot find Applicant's presentation at PCR creates a reasonable probability that the sentencing jury would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. Jones, 332 S.C. at 333 (citing Strickland, 466 U.S. at 694). Even if Applicant had succeeded in convincing this Court (or the jury) that the diagnosis of ASPD was "incorrect" based on the lack of evidence of a conduct disorder at an early age, Applicant's experts conceded he still had antisocial traits, namely "personality disorder not otherwise specified with antisocial traits." This Court concludes that the difference between ASPD and antisocial traits is not such that it would create a reasonable probability of a different result in sentencing.

Applicant has not met his burden of proof and the issue is denied.

H. Ground H

Applicant's next ground for relief is as follows:

> Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to present mitigating evidence at the penalty phase of the trial. 1 ABA Standards for Criminal Justice (2d ed. 1982 Supp.); Wiggins v. Smith, 539 U.S. 510 (2003), Rompilla v. Beard, 125 S. Ct. 2456 (2005); Strickland v. Washington, 466 U.S. 688 (1984).

Applicant contends that his counsel was ineffective for failing to present pleas of mercy from family members or other information that Applicant would be of emotional value to others.

1. Facts

At trial, no family members testified on Applicant's behalf. During the defense case in sentencing, social worker Youngman testified that in doing his investigation he talked to Applicant's sister Elizabeth (or "Betsy") and Applicant's wife Karen McCall, but he did not talk to Connie. When asked why, Youngman testified that he thought Jantz lived in Maryland, but no one could locate her because "none of the family knows where she's at." Youngman admitted that Applicant's mother and Betsy were both codefendants with Applicant in the federal fraudulent checks case. (R. at 1991-92). As cross proceeded, Youngman admitted he had not actually talked with the mother, but relied on information passed on to him from the mitigation investigator. (R. at 1996-97).

On redirect, Youngman testified under questioning by defense counsel that because of the frequency of moves in the Wood family, the home schooling, and the lack of meaningful relationships, it was "virtually impossible" to obtain documents and find people to interview. (R. at 2021). On recross, Youngman admitted that he relied on the mitigation investigator because Applicant's mother would not make herself available to him. (R. at 2024).

Defense investigator Richard Kearns introduced into evidence a picture of Applicant as a young child. He noted Betsy Martinez had brought the picture to him yesterday. (R. at 2054).

During her direct examination, Dr. Schwartz-Watts testified that she made "numerous attempts" to speak with Applicant's parents, but after they spoke with the mitigation investigator, they changed their phone number and refused further contact with the defense. Dr. Schwartz-Watts did meet with Betsy and Karen McCall. (R. at 2067-68).

As noted in the previous subsection, Applicant's sister Connie Jantz testified at PCR. She described the upbringing she and Applicant had, including frequent moves, inconsistent messages

from their mother who shoplifted on one hand but professed strict Christian beliefs on the other, the lack of education Applicant received from home schooling or private religious schools, the fact that Applicant's mother was very conniving, and some of the extended family history including alcoholism and depression. Jantz testified that she never heard from the defense team and that if she had been called, she could have asked the jury to spare her brother's life, and to consider the value of her brother to his child.

As noted before, Jantz admitted on cross that when she moved she was trying to prevent her mother from knowing where she was; that she did not talk to the family about the case except for Betsy a little bit the day after the incident; that she did not even know of Applicant's conviction or sentence until she later searched for news articles; that she did not attempt to contact her brother while he was in custody; that her only contact was a couple of years after the trial; that her sister Betsy knew she was in Maryland but that she was not on speaking terms with Betsy; that her mother could contact her through family; and that her sister had the P.O. Box in Maryland. Jantz stated that she was "in shock" after the arrest, but never attempted to contact the defense team.

As set forth in the previous subsection more fully and incorporated here, Dr. Schwartz-Watts testified at PCR that Mauldin tried to contact Jantz but was unsuccessful, that the attorneys tried to conduct a mitigation investigation with plenty of time but it was simply difficult to find family members, and that Applicant was not forthcoming as to history. Mauldin noted that no response was made to the letters sent to Jantz's last known address, that the phone was not in service, and that Betsy had no success enlisting Jantz's help despite defense requests that she try. Mauldin also noted he had worked with the mitigation investigator before and she was very experienced and competent.

Bannister testified that one sister did not want to participate in the defense efforts, and the

defense team made a strategic decision not to call to the stand the sister who was at trial. Richey noted that Mauldin and Tarr were very experienced in mitigation investigation.

Given these facts, this Court reiterates its earlier finding, set forth in full in the prior subsection, that counsel was not deficient with regard to seeking family help for background and possible testimony in mitigation. The fact is that for the most part the family was uncooperative. Based on the above detailed testimony from defense team members both at trial and in PCR, this Court finds that despite reasonable efforts of counsel and the defense investigators, Jantz was nonresponsive because of her desire to avoid contact with her family and her desire not to be involved with Applicant's case. Moreover, counsel cannot be faulted for not subpoenaing Jantz and seeking mitigation testimony from her against her will. See, e.g. Timberlake, 409 F.3d 819, 824 (7th Cir. 2005) ("Coerced testimony dragged out of truculent family members is unlikely to persuade a jury that a defendant has redeeming features.").

Further, this Court finds no prejudice from the fact that Ms. Jantz did not testify. Much of the background to which she testified was set forth at trial during the testimony of Youngman and Dr. Schwartz-Watts. Given the introduction of much of the background at trial and the extremely aggravated nature of this crime, this Court is not persuaded that Jantz's request to the jury to spare her brother's life and her mention of the fact that he has a child would create a reasonable probability that the jury would have concluded the balance of aggravating and mitigating circumstances did not warrant death. Jones, 332 S.C. at 333 (citing Strickland, 466 U.S. at 694).

Again, as far as Ms. Martinez, counsel Bannister testified the defense made a strategic decision not to put her on the stand, and Applicant presented nothing to call this decision into question. Applicant presented no testimony from Ms. Martinez as to what she could have offered or

even if she was willing to testify; thus, Applicant failed to meet his burden of establishing both deficiency and prejudice. Similarly, with regard to any other possible family or other mitigation witnesses who did not testify at PCR, Applicant failed to meet his burden of proof. See generally Beaver v. Thompson, 93 F.3d 1186, 1195 (4th Cir. 1996) (rejecting claim that counsel was ineffective for failing to present as mitigation evidence family members where there was no proffer of this testimony); Bassette v. Thompson, 915 F.2d 932, 940 (4th Cir. 1990) (petitioner's allegation that attorney did ineffective investigation does not support relief absent a proffer of the supposed witness's favorable testimony).

The issue is without merit and is denied.

I. Ground I

Applicant's next ground for relief is as follows:

> Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object improper closing arguments of the prosecutor. Strickland v. Washington, 466 U.S. 668 (1984).

Applicant contends his counsel was ineffective for failing to object to aspects of the prosecutor's argument.

1. Alleged burden shifting argument

Applicant first contends counsel was ineffective for failing to object to the solicitor's guilt phase closing when he allegedly made a burden shifting argument.

In closing during the guilt phase at trial, the solicitor argued that since he did not have final argument, he had to anticipate what the defendant would argue. He noted that he believed the defense would assert that Applicant did not have the requisite intent because of his fear of police, the

legitimacy of the scooter on the highway, and the alleged "aggressive" stop by the trooper. The solicitor went on to argue that such a contention was not consistent with the law, but also continued that it was not supported factually either. After arguing that there was no evidence Applicant knew Trooper Nicholson was stopping him for having the scooter on the highway, the solicitor continued:

> The point is that the defendant had no knowledge of why he was being stopped. So to assert that defense to you based on those facts has absolutely no factual support, and that's what you're looking for. You're looking for factual support to support any suggestion he didn't have the requisite intent.

(R. at 1735-39). A few paragraphs later, the solicitor went on to say that the defense position was "an effort to divert you from the facts and create something in your mind related to intent, that we haven't proved that this individual . . . had the reckless intent." The solicitor pointed out that "the only intent we [the State] have to do is show the intent to raise his arm and fire the gun." (R. at 1738). The solicitor later argued that defense "suggestion to you he lacked intent is nothing more than an effort to escape responsibility." (R. at 1740). Finally, the solicitor argued that "he's presenting to you in an effort to escape responsibility one more time, and I urge you to act in accordance with the evidence and recognize that for what it is." (R. at 1741). The trial court repeatedly and properly instructed the jury on the State's burden of proof.

Attorney Bannister testified that since he gave the guilt phase closing, it would have been his job to object, but that it was not a hard and fast rule. When asked about the allegedly offending passage, Bannister responded that what the solicitor was saying was in fact exactly what he was asking the jury to do.

This Court finds neither deficiency nor prejudice. It is true that our state supreme court has looked with disfavor on jury instructions to "seek the truth" as potentially burden shifting. See State

v. Aleksey, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000). However, Aleksey ultimately held there was no denial of due process because in the context of the entire charge there was no reasonable likelihood the jury applied the "seek" language to the detriment of the charges on the State's burden of proof beyond a reasonable doubt. Id. at 28.

Moreover, our state appellate courts have held improper, as a comment on the right to silence, prosecutorial argument that evidence was "uncontradicted" when only the non-testifying defendant could have contradicted the evidence. See, e.g. State v. Sweet, 342 S.C. 342, 348, 536 S.E.2d 91, 94 (Ct. App. 2000). However, such a violation does not necessarily mandate reversal, and a defendant must show the argument denied him a fair trial. Id. The comments also must be viewed in the context of the entire record. Id.; See also State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997) (arguments must be confined to record and its reasonable inferences, but reversal will not automatically result from failure to do so).

Indeed, in order for a solicitor's comments to warrant a new trial, the defendant must show that the solicitor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871 (1974). "[I]t is not enough that the remarks were undesirable or even universally condemned." Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). In Darden, the Court found no due process violation under the Donnelly test because (1) the prosecutor's comments were an invited response to the defendant's argument, (2) there was overwhelming eyewitness and circumstantial evidence of guilt, and (3) the trial court instructed the jurors that argument was not evidence. State v. Tubbs, 333 S.C. 316, 321 fn. 2, 509 S.E.2d 815, 818 fn.2 (1999) (citing Darden, 477 U.S. at 181). Here, this Court finds that taken in the context of the entire record, the

argument was not burden shifting. The solicitor was clear that he was simply anticipating the defense theory of the case, as he had to since he did not have final argument, and contending that there was no evidence or factual support in the record to support the defense theory, which defense counsel conceded at PCR was aimed precisely at what they did contend to the jury in argument. As noted in the facts, the solicitor not but a few paragraphs later referred to the necessity of the State proving intent (R. at 1738). The fact that the passage in isolation *might* be possibly construed as burden shifting is at odds with the context of the rest of the solicitor's argument and simply not enough to find error. See generally Donnelly, 416 U.S. at 643 ("[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations"). See generally State v. Shuler, 353 S.C. 176, 187, 577 S.E.2d 438, 444 (2003) (solicitor's comments did not refer to defendant's right to remain silent but merely were a comment on the evidence presented by the prosecution).

Moreover, even if the comment was improper, this Court simply cannot find a denial of a fair trial. This is because of the overwhelming evidence in this case, the minimal and brief nature of the reference in the context of the entire record, the solicitor's subsequent clear reference to the State's burden to prove intent, and the trial court's correct instructions on the burden of proof. Cf. Sweet, 342 S.C. at 349 (finding error not harmless where the State's evidence was not overwhelming). Had counsel objected, perhaps the comment would have been stricken and a curative instruction given. However, because of the relatively timid nature of the comment, a mistrial was not warranted, and this Court finds the absence of such an instruction in no way prevented Applicant from a fair trial. Moreover, the trial court refused to charge voluntary manslaughter, a decision affirmed on direct

appeal. Thus, the reference was hardly prejudicial to any legally valid theory. Whether in the context of due process or in the context of ineffective assistance of counsel, this Court cannot say that the comment denied Applicant a fair trial or that a timely objection would have raised a reasonable probability of a different result.

The issue is denied.

2. Cop killer in prison

Applicant next contends counsel were ineffective for failing to object to prosecutorial argument in the sentencing phase that Applicant, as a "cop killer," would be well-regarded by other inmates in the prison if he received a life sentence.

In arguing against the defense evidence from former warden James Aiken, the prosecutor asserted that since the most despised thing to an inmate in prison is the "cop that put him there," Applicant would be a "king" or "leader" in prison, and would rise in the hierarchy of inmates. (R. at 2189-92).

Of course, a solicitor in argument must stay within the record and its reasonable inferences. Huggins, 325 S.C. at 107 (arguments must be confined to record and its reasonable inferences, but reversal will not automatically result from failure to do so). Here, the solicitor's argument was within the evidence and inferences. During the defense sentencing phase case, Applicant elicited from their prison expert, James Aiken, that "there is nothing that would indicate [Applicant] would ever be allowed into an unofficial hierarchy in a prison setting." (R. at 2043). Obviously, the solicitor was merely raising his own contrary inference in response to this defense evidence, by arguing the point that a "cop killer" might very well be highly regarded by his fellow criminals, of which all of whom most likely have had their freedom taken away by the actions of law enforcement.

See generally, e.g. State v. New, 338 S.C. 313, 320-321, 526 S.E.2d 237, 240-241 (Ct. App. 1999) (solicitor's argument that testifying accomplice was credible and had nothing to gain by testifying as he would be considered a "rat" in prison was permissible and based in the reasonable inferences of the record, and was a matter of common knowledge within the permissible bounds of advocacy). See also Darden, 477 U.S. at 182 (rejecting claim of improper argument in part because it was invited response to defendant's argument). Since the argument was permissible, counsel could not have been deficient nor Applicant prejudiced from the failure to object. See generally Hough, 272 F.3d at 898 ("ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test," as it was neither deficient nor prejudicial).

Even if the comment was error, this Court finds neither a due process violation nor ineffective assistance from the failure to object. This one comment in the context of an entire sentencing hearing for an extremely aggravated crime with limited mitigation would not have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly, 416 U.S. at 643. Had counsel objected, perhaps the comment would have been stricken and a curative instruction given. Considering the brief nature of the comment, a mistrial was not warranted, and this Court finds the absence of such an instruction in no way prevented Applicant from receiving a fair trial.

The issue is denied.

3. Susan Smith reference

Applicant finally complains about the prosecutor's argument that Applicant was not like Susan Smith, who would have to spend the rest of her life in prison worrying about the fact that she

killed her own two children.

During the sentencing phase opening argument, defense counsel argued:

> DEFENSE COUNSEL: I've heard people say that life without parole is perhaps a more punishing penalty. You know, like the girl over in Union that drowned her two children? Every day she lives with that guilt in her miserable imprisoned life. And John Wood, every day for the rest of his life when he looks in the mirror and sees the scar on his face, the mark of sin emblazoned on his own face .

(R. at 1856). At this point, the State objected, but the court agreed to give the defense some latitude.

During the State's closing argument in the sentencing phase, the solicitor argued that Applicant was "no Susan Smith," and that Applicant was not going to be sitting in prison "worrying about having killed her two children." The prosecutor pointed out that Applicant had called Trooper Nicholson a "SOB", and argued that Applicant would not be worrying or thinking about what he did if he received life in prison. (R. at 2190).

Even assuming that the argument was somehow objectionable, the prosecutorial argument was made in direct response to the defense argument on the very same point. Given the overwhelming evidence and the responsive nature of the argument, this brief reference did not deny Applicant a fair trial. Tubbs, 333 S.C. at 321 fn. 2 (citing Darden, 477 U.S. at 181) (no due process violation under the Donnelly test because (1) the prosecutor's comments were an invited response to the defendant's argument, (2) there was overwhelming eyewitness and circumstantial evidence of guilt, and (3) the trial court instructed the jurors that argument was not evidence). For the same reasons, counsel was not deficient nor Applicant prejudiced from the lack of an objection to this argument.

The issue is denied.

J. Ground J

Applicant's next ground for relief is as follows:

> Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including SC Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object to the prosecution's introduction of evidence relevant to an arbitrary factor during the penalty phase of the trial. Strickland v. Washington, 466 U.S. 668 (1984) and State v. Burkhart, ___ S.E. 2d___, 2007 WL 80036 (S.C. 2007).

Applicant contends that counsel were ineffective for failing to object to the prosecution's introduction of evidence of conditions of confinement in the sentencing hearing of this case.

For context, the following is a summary of the relevant facts to this issue from both the trial and the PCR.

1. Facts

During the defense opening statement in the sentencing phase, defense counsel Mauldin argued that "people say that life without parole is perhaps a more punishing penalty," and reminded the jury of the "girl over in Union who drowned her children," pointing out that "every day she lives with that guilt in her miserable imprisoned life." Defense counsel then related that to the guilt Applicant would suffer, arguing he would "every day . . . see . . . the mark of sin emblazoned on his own face." (R. at 1856).

During the State's sentencing phase case, the solicitor indicated his intent to call Jimmy Sligh from the South Carolina Department of Corrections. The solicitor noted that Sligh would be called to testify as to "what life in prison without parole means," as well as "the difference between life in prison without parole versus the punishment of death." The solicitor argued the evidence was relevant since the United States Supreme Court had held the jury needed to know a life sentence was

without parole, and concluded:

> SOLICITOR: And so if Your Honor's position is that [the Sligh testimony is] premature at this point because it's been raised in opening, only raised in opening, there's no evidence of that, there is a distinction there about difference.

(R. at 1876).

The court then inquired of the defense whether it had an objection. After a brief discussion with the court, the transcript reflects that defense counsel had an off-record conversation with co-counsel. Lead counsel Mauldin then told the court:

> DEFENSE COUNSEL: If our understanding of the summary proffer is that a Department of Corrections personnel will testify as to conditions of life without parole, if that's what this really is being offered as, then we're not going to enter an objection at this point to that witness.

(R. at 1876-77).

The solicitor then called Jimmy Sligh. On direct, Sligh testified about custody levels, security classifications, the prison cafeteria, the prison laundry, work opportunities, the daily routine, recreational opportunities, cell sizes, visitation and communication with the outside world, religious opportunities, violence in prison, the more limited opportunities on death row, and the lesser amount of violence on death row. (R. at 1878-1904).

On cross, the defense elicited that, if sentenced to life, Applicant would be in a high security environment with the inmates convicted of violent crimes. The defense pointed out Applicant would not be allowed to work outside the facility, and that he would always be classified at the highest level of security. Sligh testified that there are gangs in prison, that life in general population is "a tough place with tough people," that there was no assurance one would wake up in morning, and that prison officials are authorized to use deadly force on inmates. (R. at 1905-10). On redirect, the

solicitor elicited that deadly force is typically reserved for attempts to breach the security of the prison and that most guards carry batons. Sligh testified that corporal punishment is not used as a control means, that rehabilitative opportunities do exist in the prison, that most inmates make it through without being harmed by other inmates, and that they take body size in account when making room assignments. (R. at 1911-18).

During its sentencing phase case, the defense called former SCDC Warden James Aiken, who in many respects traveled down the same road as Mr. Sligh. Aiken testified that he had no concerns about Wood and stated to the jury that Wood was not likely to be a predator in prison. Aiken stated that death row was a far more preferable and safer place to be than general population, because a death row inmate has his own cell and does not have to worry about security threats from other inmates. He noted there were a lot of "predator groups" in general population, that prison was a very dangerous place, and theorized that Applicant would be more likely to be subjected to violence in prison from predators given his smaller size and older age. Aiken concluded that SCDC would have no problem safely containing Wood for the rest of his life. Finally, Aiken saw nothing that would indicate Applicant would ever rise in the *de facto* hierarchy among inmates. (R. at 2033-44). The solicitor had no cross.

In closing, counsel argued that prison was not "soft;" that Applicant would die in prison after spending the rest of his life in a small cell under the highest security classification, and that prisons contain violent, dangerous people. (R. at 2206-08).

In PCR, defense counsel Mauldin initially testified on direct by the Applicant that he thought Sligh was only going to testify as to the specific adaptability of Wood personally, and that Sligh surprised him by venturing down the road of conditions of confinement.

However, on cross by the State, Mauldin was shown the transcript reflecting the defense was clearly aware Sligh was going to testify to conditions of confinement, but expressly decided on the record not to object after an off-the-record discussion among the defense lawyers. Mauldin then stated he could not recall what he and the other attorneys were discussing during the off-the-record moment, and could not recall the strategic basis for the decision not to object to evidence on conditions of confinement. Mauldin admitted, though, that the defense lawyers would have been discussing whether as a strategic matter to object or not during the off-the-record conference.

Defense counsel Jim Bannister testified that the sentencing phase case was primarily the responsibility of Mr. Mauldin. He likewise could not specifically remember what the defense lawyers were discussing during the off-the-record conference, but also agreed they would not have been discussing baseball or some other irrelevancy. They would have been discussing whether to object or not to Sligh's testimony on conditions of confinement. Richey's testimony was similar to Bannister's in that he could not recall the discussion, but it would have involved whether or not to object as a strategic matter.

2. Plath, Bowman, Burkhart,* and *Bryant

The reason this issue is problematic stems from four South Carolina cases - one that was in existence prior to this case and three that were handed down after Applicant's trial.

In State v. Plath, 281 S.C. 1, 11-12, 313 S.E.2d 619, 625-626 (1984), the court addressed the state's cross-examination of a professor who generally testified that life imprisonment was a punishment superior to the death penalty. During his direct examination, the professor testified about conditions of life imprisonment at Central Correctional Institute, and called life imprisonment "a form of slavery", a statement that the Supreme Court of South Carolina concluded was used "to

demonstrate the permanence and deprivation entailed in life imprisonment". Id. On cross, the State asked about another inmate's escape, which the court ultimately held was permissible:

> Since the witness claimed an intimate knowledge of CCI, and based his testimony upon that knowledge, it was not amiss for the State to pursue his claim more closely.

Id. at 12.

After also rejecting a claim that the State improperly crossed a prison social worker on a complaint letter she wrote about an inmate's freedom of movement, the court very strongly rebuked sentencing phase defenses which "sought to portray life imprisonment as preferable to capital punishment as a matter of social policy," or "drew a picture of life imprisonment as slavery, a condition of irretrievable loss." Id. at 14. The court stated that such defenses improperly "invite[d] the jury to intrude upon the strictly legislative function of determining the nature of crime and punishment," and concluded:

> In the sentencing phase of a capital case, the function of the jury is not to legislate a plan of punishment but to make the "either/or" selection .... Such determinations as the time, place, manner, and conditions of execution or incarceration, as well as the matter of parole are reserved by statute and our cases to agencies other than the jury.

Id. at 14-15.

In Plath, 281 S.C. at 15, the court went on to note that while psychiatric testimony of future dangerousness was permissible, it had held that future adaptability to prison evidence was not, a conclusion subsequently overruled by the United States Supreme Court in Skipper v. South Carolina, 476 U.S. 1, 4, 106 S.Ct. 1669, 1671. Only in the context of justifying this distinction, Plath stated:

> A jury needs to know how a given defendant came to commit a given aggravated murder, to include aspects of his background, his character and the setting of the crime itself which may explain or even mitigate the conduct of which he has been found guilty. A jury does not need to know how often he will take a shower or whether or not he will be lonely and withdrawn during his tenure at CCI.

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281 S.C at 15.

Despite these admonitions, the Plath Court returned to how the State's challenged questioning was the only proper response to what that court considered at the time to be improper sentencing phase defenses on the utility of capital punishment or the conditions of capital punishment:

> In the case before us, defendants elected to enter the forbidden field of social policy and penology. It is neither surprising nor can it be deemed prejudicial that the State responded in kind, attempting to show through defendants' own witnesses that life imprisonment was not the total abyss which they portrayed it to be. . . . [The solicitor's] references [were] . . . merely reminders to the jury that life imprisonment was by no means as hopeless as defendants would have it believed. *The State was entitled to make this response.*

Plath, 281 S.C. at 15-16 (emphasis added). See also State v. Woomer, 278 S.C. 468, 472, 299 S.E.2d 317, 319 (1982) (evidence of defendant's prior escape was proper reply to defense evidence of good conduct while in prison).

Two decades later, the Supreme Court of South Carolina decided State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005). The State argued that the questioning about prison conditions was not preserved because the issue was not raised before the trial court nor was there a contemporaneous objection. The court agreed the issue was not preserved, but added a cautionary instruction to both sides that evidentiary presentations along these lines are improper:

> We take this opportunity, however, to caution the State and the defense that the evidence presented in a penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character. Generally, questions regarding escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole. We emphasize that how inmates, other than the defendant at trial, are treated in prison, and whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial. We admonish both the

> State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that particular defendant.

Bowman, 366 S.C. at 498-99.

Subsequent to Bowman, the Supreme Court of South Carolina addressed a case where the *solicitor* preemptively called a witness who testified extensively to the conditions of confinement for an inmate serving life without parole. State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007). The defense objected to the state's evidence, and later put in its own evidence of "bad" prison conditions. Id. at 487. Justice Waller joined by Justice Moore, who wrote the opinion of the court. Id. at 482. Justice Moore cited Plath and other cases from the 80s and 90s for the proposition that evidence outside of the circumstances of the crime and the characteristics of the defendant was inadmissible in a sentencing phase. Id. at 487. This included conditions of incarceration, the process of execution, or the deterrent effect of capital punishment. Id. at 487-488. Justice Moore noted that while trial of the case at issue was before the decision in Bowman, its result was consistent with the "long-standing rule that evidence in the sentencing phase of a capital trial . . . be relevant to the character of the defendant or the circumstances of the crime." Id. at 488. Thus, Justice Moore concluded that the evidence of conditions of confinement "invited the jury to speculate about irrelevant matters" and injected an arbitrary factor in the proceedings in violation of S.C. Code Ann. §16-3-25(C)(1) (2003). Id. at 488-489.

In concurrence, Justice Pleicones wrote that he did not believe the court should apply the normal harmless error standard for constitutional violations to this issue, concluding that "once improper evidence of any kind injects an arbitrary factor into the jury's consideration, [the] Court cannot uphold the death sentence under §16-3-25(C)(1)." Id. at 490. Justice Pleicones saw no

prejudice component once a statutory violation was established. Id.

In dissent, the Chief Justice, joined by Justice Burnett, applied the normal rule that the introduction of evidence will not result in reversal unless it prejudiced the defendant. Id. The Chief Justice concluded that both sides fully joined the issue and the defendant used the issue to his advantage. Id. at 491. Finally, the Chief Justice noted that the standard in §16-3-25(C)(1) was merely a recitation of the Eighth Amendment standard, which is subject to a harmless error analysis. Id. at 492.

Subsequent to Burkhart, the Supreme Court of South Carolina decided State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007). There, the defense called an expert that testified in great detail as to the "dismal conditions of prison life in general." Bryant, 372 S.C. at 317. Like Bowman, the Court reiterated that *defense* evidence on conditions of confinement was just as improper as State evidence on the subject. Id. at 318.

3. Applicability of a *Strickland* prejudice analysis to this issue

The first hurdle that must be crossed is whether a normal Strickland prejudice analysis applies to this claim. Unlike Burkhart, Bowman, or Bryant, this case is in PCR, and in such a collateral attack Applicant must establish his claims through the constitutional vehicle of ineffective assistance of counsel. Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993) ("Issues that could have been raised at trial or on direct appeal can not be raised in a PCR application absent a claim of ineffective assistance of counsel."). The familiar standard in Strickland that applies to claims of ineffective assistance of counsel requires a showing of *both* deficient performance *and* prejudice, or a reasonable probability of a different result at trial. 466 U.S. at 689, 694.

In Jones v. State, 332 S.C. 329, 333, 504 S.E.2d.822, 823-824 (1998) (citing Strickland, 466

U.S. at 695), the Supreme Court of South Carolina stated the "prejudice" prong in a capital sentencing proceeding as being established 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." "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Jones, 332 S.C. at 333 (citing Strickland, 466 U.S. at 694). Accord Plath v. Moore, 130 F.3d 595, 602 (4th Cir. 1997) (quoting Strickland, 466 U.S. at 700) ("given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and hence, the sentence imposed.").

There are only limited exceptions presuming prejudice; none of them apply here. In Nance v. Ozmint, 367 S.C. 547, 551-552, 626 S.E.2d 878, 880 (2006), the Supreme Court of South Carolina outlined these limited exceptions:

> In Cronic, the Court identified three distinct situations in which a presumption of prejudice is appropriate. First, prejudice is presumed when the defendant is completely denied counsel "at a critical stage of his trial." Cronic, 466 U.S. at 659, 104 S.Ct. 2039. Second, per-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer "entirely fails to subject the prosecution's case to meaningful adversarial testing," thus making "the adversary process itself presumptively unreliable." *Id.* Third, the Court identified certain instances "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* (citing Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)). A finding of per-se prejudice under any of these three prongs is "an extremely high showing for a criminal defendant to make." Brown v. French, 147 F.3d 307, 313 (4th Cir.1998).

The court in Nance pointed out that these situations of presumed prejudice are rare, and concluded

with this instruction:

> Absent these narrow circumstances of presumed prejudice under Cronic, defendants must show actual prejudice under Strickland.

Nance, 367 S.C. at 552.

These limited exceptions of presumed prejudice do not apply here. Counsel was present at all critical stages of Applicant's trial, so the first exception is inapplicable. The third exception is not viable either, as it applies only when extreme circumstances external to counsel would prevent anyone from providing effective representation. The classic case, discussed in Cronic, is Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55 (1932), where in the 1930s black youths in Alabama were charged with a horrible crime. Hostile sentiment pervaded the community, and the defendants had to be kept under the guard of soldiers. Id. at 53. Only on the day of trial did the court appoint a lawyer, who was not only unprepared but also was from a different state and unfamiliar with local procedure. Id. Applicant's trial nowhere approaches the inherently prejudicial circumstances of Powell.

Finally, the second exception of Nance, where counsel "entirely fails to subject the prosecution's case to adversarial testing," is also inapplicable. An example of this exception is Nance itself, where lead counsel was hampered by alcoholism, drug intake, and health issues affecting his memory, and co-counsel was a new lawyer who had only been practicing for eighteen months. Nance, 367 S.C. at 553. The lawyers only interviewed one family member in preparation, and the mental expert received none of his requested background information. Id. The lawyer told the jury in opening argument that he did not ask for the case; counsel only called three witnesses in the guilt phase, during which they elicited prejudicial information; counsel failed to qualify their expert; and counsel called the sister at the last minute without any preparation. Id. at 554. The defense

sentencing phase case only lasted seven minutes, and during closing co-counsel did not plead for his client's life, instead describing him as a "sick" man who did "sick" things. Id. at 554-58.

Such a woeful description is of course nothing like the aggressive representation that Applicant received in this case. He had three highly qualified and active lawyers, one of whom is among the most experienced capital defense litigators in the State. Whether or not they made an individual mistake during the course of the representation, counsel in this case certainly endeavored to challenge the State's case throughout the proceedings. Clearly, this is not a Nance-type situation where counsel "entirely failed to subject the prosecution's case to any meaningful adversarial testing." Thus, where as here there was a sufficient effort overall, any alleged individual mistakes are properly adjudged through Strickland's normal process, including the prejudice analysis.

This conclusion is consistent with the language of Strickland itself, despite the Supreme Court of South Carolina's view in Burkhart of conditions of confinement evidence as an arbitrary factor for which it did not perform a prejudice analysis on direct appeal. During collateral attack concerns of finality are of "profound importance." See generally Strickland, 466 U.S. at 693-94 (discussing concerns of finality when deciding the appropriate standard for prejudice). Hence, on collateral attack it is appropriate to filter claims through a prejudice analysis to ensure that the extreme social cost of reversing final convictions and sentences is only borne by society where the alleged error had a reasonable probability of affecting the result of the proceedings.

An example of this principle is found in Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001). There, the Supreme Court of South Carolina held that a prejudice analysis should be applied to claims that the defendant was not advised of and thus did not waive his right to personally give closing argument in the guilt phase of a capital trial. Franklin, 346 S.C. at 570-571. Franklin noted

the general rule that claims under Strickland include a prejudice analysis, and went on to conclude that since *in favorem vitae* review had been abolished and a PCR system of collateral attack established to explore such issues, a finding of *per se* reversible error was no longer warranted. Franklin, 346 S.C. at 571-74. Finally, the court noted that it and the United States Supreme Court have repeatedly held that "a harmless error analysis is appropriate where a capital defendant has suffered a deprivation of a *constitutional right*." Id. at 575 n.8 (emphasis in original).

That last statement precisely raises the final point of why a prejudice analysis is appropriate to a claim that counsel failed to object to evidence of conditions of confinement. Burkhart phrases its issue as a statutory one in that introduction of evidence of conditions of confinement injects an arbitrary factor under S.C. Code Ann. §16-3-25(C)(1). Applicant in PCR raises a *constitutional* issue by stating that he was effectively denied his Sixth Amendment right to counsel based on counsel's omission. Applicant must filter his statutory claim through the constitutional one; as a fundamental and legal matter, the claim he pled before this Court is constitutional. As Franklin specifically notes, the overriding constitutional claim upon which the statutory claim depends is subject to a harmless error analysis just like any other constitutional claim. 346 S.C. at 575 n.8.

4. There was no prejudice

This Court finds counsel were deficient for not objecting to the evidence. This deficiency does not warrant reversal, however. In the sentencing phase, Applicant must show "there is a reasonable probability that, absent [counsel's] errors, the sentence - including an appellate court to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Jones, 332 S.C. at 333 (citing Strickland, 466 U.S. at 694).

Here, we have as extremely aggravated a crime as there could be. It would be bad enough if Applicant had merely murdered Trooper Nicholson; however, Applicant's subsequent wild chase provides an incredible amount of further aggravation. Applicant wounded another officer with a gunshot to the face, ran civilians off the road, commandeered a Blue Ridge truck at gunpoint, and only by luck or grace was not a good enough shot to kill more police officers or innocent civilians with his repeated gunfire. Applicant had a prior record and had been in prison before, and the victim impact evidence in this case was particularly moving. Compared to this, there is limited mitigation, with no family members and relatively mild mental health testimony without findings of psychosis or delusion at the time of the offense. There was evidence in rebuttal that Applicant was anti-social.

As to the conditions of confinement evidence itself, the defense was able to score as many points if not more as the prosecution. Counsel apparently believed they could score more points on the issue as they made the decision not to object. Through cross of Sligh and presentation of James Aiken, the defense elicited how tough prison is, how Applicant would be far more susceptible to danger in general population than on death row, and how Applicant would likely be at the mercy of predator groups inside the general population of prison given his small stature and older age. Both sides fully joined the issue and both sides were able to make headway.

Given the relative equality of presentation by both sides on the issue of conditions of confinement, it cannot be said there is a reasonable probability of a different result. Had counsel objected to the State's evidence on the issue, it would not have been allowed to make its own points along these lines as well. Given the overwhelming evidence in aggravation and the limited evidence in mitigation, admission of both the State's and defense's evidence of conditions of confinement does not establish Strickland prejudice. Since evidence from both sides came before the jury,

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argument on the subject was proper as within record, and the fact that both sides made argument on this issue does not change the calculation.[2]

The issue is denied.

K. Ground K

Applicant's final ground for relief is as follows:

> Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments of the Untied States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object to the equal protection violation created by the aggravating circumstances making Mr. Wood death eligible. Strickland v. Washington, 466 U.S. 668 (1984).

Applicant contends his counsel were ineffective for failing to lodge an equal protection violation as to the aggravator regarding the murder of a law enforcement officer during or because of the performance of his official duties.

Such an aggravator does not violate equal protection as it acts as a deterrent from killing those who risk their lives daily for public protection, fosters respect for an officer's authority and arrest powers even from those who might otherwise be committing crimes, and recognizes the greater punishment needed for a crime that displays such a complete lack of regard for that law and social order, beyond the act of murder itself, that is inherent in the murder of one of her enforcers. Thus, counsel could not have been deficient nor Applicant prejudiced from the failure to raise this

[2] It should be noted that it would be inappropriate to claim, as trial counsel Mauldin did on the stand, that had he objected and the trial court overruled his objection, the case would have been reversed on appeal and thus prejudice is established. Strickland is clear that the Court must "presume . . . that the judge or jury acted according to law," and "and assessment of the likelihood of result must exclude the possibility of arbitrariness, whimsy, caprice, nullification, or the like." 466 U.S. at 695. "A defendant has not entitlement to the luck of a lawless decisionmaker." Id. Although the trial court here found the evidence relevant, that was only *after* defense counsel expressly chose not to object on the record. This Court must presume that had counsel made an objection based on Plath, and articulated the issue as it was subsequently done in Bowman, that the judge would have ruled correctly and excluded the evidence.

issue.

The issue is denied. See Commonwealth v. Travaglia, 723 A.2d 190 (Pa. Super. Ct. 1998) (rejecting a similar equal protection claim); Ex parte Cade, 521 So. 2d 85 (Ala. 1987). See generally Williams v. Illinois, 399 U.S. 235, 243 (1970) ("there is no requirement that two persons convicted of same offense receive identical sentences").

III.

For the foregoing reasons, the Court denies and dismisses with prejudice the Applicant's APCR.

Applicant is hereby advised that if he wishes to appeal this Order, a notice of intent to appeal must be filed within thirty (30) days of the receipt of this Order. Applicant's attention is also directed to Rules 203, 206, and 227 of the South Carolina Appellate Court Rules for appropriate procedures to follow after notice of intent to appeal has been timely filed.

Therefore, it is ORDERED that:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice.
2. Applicant is remanded to the custody of the State of South Carolina.

This 19 day of December, 2007.

Larry R. Patterson
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

FILED: March 30, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-11
(0:12-cv-03532-DCN)

JOHN R. WOOD

Petitioner - Appellant

v.

BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections; LYDELL CHESTNUT, Deputy Warden of Broad River Correctional Institution Secure Facility

Respondents - Appellees

O R D E R

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

For the Court

/s/ Patricia S. Connor, Clerk