APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-8

FREDDIE OWENS,

Petitioner-Appellant,

v.

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

Respondents-Appellees.

Argued: Dec. 11, 2019
Decided: July 20, 2020

Before WILKINSON, KEENAN, and DIAZ, Circuit Judges.

OPINION

DIAZ, Circuit Judge:

Freddie Eugene Owens was sentenced to death three times by a South Carolina jury for the 1997 murder of Irene Graves during an armed robbery of the Speedway convenience store where she worked. He appeals the district court's grant of summary judgment in favor of the respondent state officials

Bryan P. Stirling and Willie D. Davis (collectively "the State") on his petition for writ of habeas corpus, brought pursuant to 28 U.S.C. § 2254.

Owens argues that counsel in his third capital sentencing trial provided ineffective assistance by failing to thoroughly investigate and present available mitigating evidence and to object on Confrontation Clause grounds to the trial court's admission of state records summarizing a number of his disciplinary infractions while incarcerated. He also contends that counsel in both his third capital sentencing trial and his initial postconviction proceeding were ineffective by failing to develop evidence of frontal lobe abnormalities in his brain through comprehensive neuroimaging.

The state court rejected Owens's first two claims on the merits in 2013 and his third claim, which Owens didn't raise in his initial petition, as procedurally defaulted in 2017. The district court thereafter dismissed Owens's § 2254 petition, holding that the state court reasonably applied clearly established Supreme Court law in rejecting Owens's two exhausted claims under *Strickland v. Washington*, 466 U.S. 668 (1984), and that Owens failed to demonstrate cause under *Martinez v. Ryan*, 566 U.S. 1 (2012), to excuse the procedural default of his third *Strickland* claim.

We agree with the district court on all fronts. Emphasizing our deferential standard of review in regard to the exhausted claims, we decline to disturb the state court's holdings that counsel thoroughly investigated and presented Owens's mitigating evidence and that the Confrontation Clause didn't

apply to a business record not prepared specifically for use at trial. With respect to the defaulted claim, we accentuate *Martinez*'s high procedural bar, which Owens fails to meet because his underlying claim is insubstantial. In so concluding, we exercise our discretion to reconsider an issue that we implicitly resolved in Owens's favor by granting his certificate of appealability. Accordingly, we affirm.

I.

We first sketch the long chain of events giving rise to this capital habeas action, which encompass a criminal trial, three sentencing trials, three rounds of direct appeal, and two rounds of state postconviction proceedings, in addition to the proceedings in the district court.

A.

Owens's conviction for murder, armed robbery, conspiracy to commit armed robbery, and use of a firearm in the commission of a violent crime traces back to October 31, 1997. Early that Halloween evening, Owens was driving around his hometown of Greenville, South Carolina with his three co-defendants—Andre Golden, Nakeo Vance, and Lester Young—when the foursome conspired to hold up a series of local businesses. After "casing" several options, two of them (sans Owens) robbed the Prestige Cleaners on Lauren's Road at around 6:45 p.m. Later in the evening, all four robbed the Conoco Hot Spot convenience store on Augusta Road.

After midnight on November 1, the four men conferred on Owens's front porch about splitting up and robbing two more businesses near the intersection of Lauren's Road and I-85. One was a Waffle House,

which was assigned to Vance and Young (but which they found too crowded to carry out their plan). The other was the Speedway convenience store, which was assigned to Owens and Golden.

Security footage from inside the store showed two men wearing makeshift disguises over their heads—one a ski mask and the other a pair of panty hose—entering at around 4:00 a.m. The masked men accosted Graves (a single mother of three who was working as many jobs), removed what turned out to be $37.29 from the register, and led Graves at gunpoint to the back of the store, where the safe was located. When Graves couldn't open the safe because she didn't know the combination, the man in the ski mask shot her in the right side of the head with a .32 caliber pistol, killing her instantly.

B.

Owens and his companions were indicted the following October, and the State promptly filed a notice of intent to seek the death penalty for Graves's murder. Owens was tried alone for that crime beginning on February 8, 1999. Lacking forensic evidence to connect Owens to the scene, the State's case rested largely on witness testimony. Golden (who had since pleaded guilty) testified to the events described above, including that Owens was the man in the ski mask who pulled the trigger. Vance also testified for the State, adding that Owens took credit for having "shot that bitch in the head" after hopping in Vance's getaway car. J.A. 1329. Owens's then-girlfriend testified that he had confessed to having shot the clerk to her, too. Owens also confessed to a detective and an investigator who had been assigned

to the case and who likewise testified for the State. On this evidence, a jury returned a guilty verdict on all counts on February 15.

The sentencing phase of Owens's trial began two days later. This phase was separate from the guilt phase pursuant to South Carolina law, which provides that "the court shall conduct a separate sentencing proceeding . . . upon [the] conviction or adjudication of guilt of a defendant of murder" in all cases where "the State seeks the death penalty." S.C. Code Ann. § 16-3-20(B). If the sentencing jury (or the judge in non-jury cases) unanimously finds at least one statutory aggravating circumstance beyond a reasonable doubt and recommends that a sentence of death be imposed, "the trial judge shall sentence the defendant to death." *Id.* § 16-3-20(C). The statutory aggravating circumstances include, as relevant here, that the murder was committed during an armed robbery or during an armed larceny. *See id.* § 16-3-20(C)(a)(1)(e), (f). The statute also sets forth a nonexclusive list of mitigating circumstances that the jury (or judge) must be allowed to consider in reaching a sentencing verdict. *See id.* § 16-3-20(C)(b).

On the morning of trial, defense counsel notified the court that they had been served with a Supplemental Notice of Aggravation the previous afternoon, which indicated the State's intent to introduce—as evidence of Owens's future dangerousness and inability to adapt to incarceration—a statement Owens made that morning confessing to the murder of a fellow inmate named Christopher Lee. Defense counsel moved for a brief continuance to investigate the circumstances of

the confession, but the court denied the motion. The sentencing hearing began, evidence of Lee's murder was introduced, and the jury returned a unanimous verdict finding the statutory aggravating circumstance of murder while in the commission of armed robbery and recommending that Owens be sentenced to death.

On appeal, the Supreme Court of South Carolina affirmed Owens's conviction but vacated his capital sentence and remanded for resentencing, finding that the trial court had abused its discretion in refusing to grant a continuance. *State v. Owens*, 552 S.E.2d 745, 759 (S.C. 2001). The high court reasoned that in light of "the capital nature of the proceeding" and "the timing of [Owens's] statement" regarding Lee's death, "due process necessitated a brief . . . continuance to allow defense counsel the opportunity to interview the inmates and personnel at the detention center." *Id.*

C.

Owens elected a bench trial for his second capital sentencing proceeding. The trial court sentenced Owens to death anew, but South Carolina's high court again vacated the sentence and remanded for another resentencing. *See State v. Owens*, 607 S.E.2d 78, 80 (S.C. 2004). This time, the Supreme Court found that Owens's waiver of his right to a jury trial wasn't voluntary under South Carolina law because the trial court had impermissibly injected its personal opinion into Owens's decision. *Id.* at 79-80.

D.

Owens's third capital sentencing trial forms the basis of the ineffective-assistance claims raised in his § 2254 petition. Owens was represented in that

proceeding by Everett P. Godfrey, Jr. and Kenneth C. Gibson (collectively "Sentencing Counsel"), who were appointed on February 2, 2006, for a trial scheduled to begin on October 2. Godfrey took immediate responsibility for Owens's mitigating evidence, while Gibson took charge of the guilt- or crime-related evidence. Closer to trial, once they realized that there was "a whole lot more" mitigating evidence than guilt-related evidence to cover, Gibson took on secondary responsibility for presenting Owens's mitigation case. J.A. 2095.

Counsel spent much of the first six months of their appointment on preliminary tasks, such as performing legal research, reviewing the case files from Owens's previous trials and lawyers, and, closer to summer, performing general trial preparation. They also twice visited Owens at Lieber Correctional Institute, outside of Charleston, and Godfrey visited Owens a third time in early October, after the trial had been pushed back.

In mid-August, Godfrey began to assemble a team of specialists to help investigate and present Owens's mitigating evidence. The team, which came together by September, consisted of five members: clinical social worker Marjorie Hammock, neuropsychologist Dr. Tora Brawley, forensic psychiatrist Dr. Donna Schwartz-Watts, and mitigation investigators Paige Tarr and Carolyn Graham.

The centerpiece of Owens's mitigation case, Hammock had testified in each of his previous sentencing trials; Godfrey selected her not only because she "knew the case" and "knew the facts," J.A. 2195, but because Owens's previous sentencing

counsel "was very happy with her" presentation, J.A. 2157. Hammock's role was to "give the jury an understanding . . . of [the] things that had gone on" in Owens's life, especially with respect to his troubled "family background," that "led up to" his offense conduct. J.A. 2102. Tarr and Graham served as Hammock's boots on the ground, "go[ing] out" to "find witnesses, interview witnesses, [and] identify issues . . . that . . . might mitigate the circumstances" of Owens's conviction. J.A. 2108.

As for Dr. Schwartz-Watts, Godfrey sought her out because they had worked together on numerous cases in the past, and he liked the work she had done in them. The two discussed at length the need to bring on a neuropsychologist, and Dr. Schwartz-Watts recommended Dr. Brawley, whom she knew from previous cases as well.

Like Godfrey, Dr. Schwartz-Watts knew that the role of neuropsychologist had been fulfilled in the previous sentencing trial by Dr. James Evans, who had evaluated Owens by means of a Quantitative Electroencephalogram (or "qEEG" for short)—a diagnostic tool that analyzes behavioral-cognitive function by measuring the brain's electrical activity—and testified that Owens has "mild brain dysfunction" in his frontal lobe. J.A. 76. But Dr. Schwartz-Watts preferred Dr. Brawley's more "conservative" approach, which she found more "reliable" than Dr. Evans's. J.A. 2382.

Godfrey agreed that Dr. Evans's use of a qEEG to assess Owens's cognitive state—which had to be sent "out west, like to California," for diagnosis—"would [not] play in front of a local jury," and that it would be

prudent to take a more cautious approach. J.A. 2196. Accordingly, when Dr. Brawley performed her neuropsychological evaluation of Owens on September 12, her "battery" of tests, J.A. 2404, didn't include a qEEG, which she too found to be "controversial" and "experimental," J.A. 2402.

For her part, Dr. Schwartz-Watts met with Owens three times before trial. These interviews taught her that Owens had witnessed and experienced "a lot of abuse" over the years, though Owens denied having ever been sexually abused. J.A. 2383. Dr. Schwartz-Watts also learned that Owens was "receiving treatment for a presumed bipolar disorder" and taking "powerful psychiatric medications," including an anticonvulsant called Depakote, while incarcerated at Lieber. J.A. 2440. Because "this new evidence" meant that "some of the mitigation that had been completed in prior trials [would] need to be revamped," she urged Godfrey to request a continuance. *Id.* He did so, and on October 2 (the date for which the trial was originally scheduled), the trial court delayed the trial by five weeks, rescheduling for November 6.

Owens's third capital sentencing trial took place from Monday, November 6 to Saturday, November 11, 2006. The State called a dozen witnesses, including various medical experts, several Greenville county sheriffs and special investigators, Nakeo Vance, Owens's girlfriend at the time of Graves's murder, and a state official from Lieber. As in Owens's previous sentencing trials, the State's evidence touched equally on his offense conduct as his future dangerousness and inability to adapt to prison.

Among other things, evidence of the latter included testimony about Owens's killing of his fellow inmate on the eve of his first sentencing trial—the "elephant in the room," as Godfrey later referred to it. J.A. 2147. It also included an official record describing twenty-eight of the numerous disciplinary infractions that Owens had received while in the custody of the South Carolina Department of Corrections (SCDOC),which had been prepared by officials "under a duty to report" the incidents pursuant to state law. J.A. 1530.

For the defense, Godfrey's opening remarks stated that the "evidence in mitigation" would show "how it is that Freddie grew up," especially with regard to "the violence that he ha[d] lived through his entire life," such that the jury would "come to know him as a person." J.A. 1194. Godfrey highlighted that Owens suffered from "an impulse control disorder," J.A. 1196, but that "within th[e] past year" he had begun "asking for help . . . . to control his actions," J.A. 1194. And while Godfrey warned the jury that the mitigating evidence often wasn't "pretty," he asserted that Owens's difficult upbringing, together with his underlying and long-untreated disorders, revealed that life was "the proper sentence." J.A. 1196.

Counsel called five witnesses, starting with Hammock. While her presentation was more succinct than in Owens's previous sentencing hearings, Hammock covered her psychosocial assessment in similar terms. Hammock testified that she had interviewed Owens, his mother, his sisters, one of his brothers, his stepfather, staff from the South Carolina Department of Juvenile Justice (SCDJJ) when he was

incarcerated there, various medical experts, and others yet; and had reviewed many records.

Hammock explained that Owens was born to an eighteen-year-old single mother "who had very limited resources" and "difficulty caring for her family," J.A. 1552; that there was "a great deal of violence" in both his family—largely emanating from his father and stepfather, and often directed at his mother, his siblings, and himself—and neighborhood alike, *id.*; that he and his siblings were put in foster care when he was four due to "abuse and neglect," which didn't cease after his mother regained custody, *id.*; that there was "a considerable amount" of incarceration, mental illness, and substance abuse in his family, J.A. 1554; and that he suffered from "significant learning disabilities" and "educational deficits," J.A. 1553. She also stated that Owens was taught to fight "at a very early age" and developed "the kind of coping strategies that made him always on the defensive." J.A. 1553-54. She concluded by remarking that such troubled upbringings have been shown to increase the likelihood that a child will later engage in violent crime.

Counsel's second witness was Fain Cones Maag, Owens's third-grade teacher. She testified about Owens's "sparse" and violence-ridden home environment as well, J.A. 1562, relating that bullies would often chase him around the neighborhood and that, in response, his stepfather would lock him out in order to teach him that he "had to fight," J.A. 1563. Maag also provided more detail about Owens's "learning deficiencies," including his "tremendous

trouble" learning to read, J.A. 1562, while adding that Owens "had some real gifts," J.A. 1564.

Third up was Dr. Brawley. She testified about the "battery" of neuropsychological tests she had conducted to assess "how the different areas of [Owens's] brain [were] functioning" and the conclusions she had drawn from them. J.A. 1573. In this respect, Dr. Brawley testified that Owens had "a history of lifelong problems with brain function" and related "psychiatric issues," such as impulsivity, irritability, and depression; "some select areas of deficit," particularly in the verbal areas of the brain; and a history of head injury. J.A. 1581. But on cross-examination, Dr. Brawley clarified that, in her professional opinion, Owens's cognitive defects didn't "rise to the level of . . . diagnosing him with . . . any kind of brain syndrome" or "mental illness." J.A. 1582-83. She also stated that she didn't "put a whole lot of clinical significance" on Owens's head injuries. J.A. 1582.

Dr. Brawley was followed by Dr. Thomas Cobb, a forensic psychiatrist with SCDOC who had been treating Owens at Lieber since August 2005. Dr. Cobb had diagnosed Owens with an unspecified anxiety disorder; an unspecified impulse control disorder, meaning "an inability to not react to something [in a way] that may cause . . . harm" to oneself or another; and Antisocial Personality Disorder, which he attributed to Owens's stunted emotional development, and to which he attributed Owens's impulsivity and irritability. J.A. 1593. Dr. Cobb explained that he had prescribed Owens the powerful psychiatric medications that Dr. Schwartz-Watts had noticed in

order to treat these conditions, including Depakote, which he was using in combination with Risperdal (a drug commonly used to treat disorders like bipolarism and schizophrenia) to stabilize Owens's mood and give his brain "time to think." J.A. 1595. He concluded by opining that these and other medications had worked some improvement in Owens's behavior.

Counsel's fifth and final witness was Dr. Schwartz-Watts. She opined that Owens's "long history of illegal behaviors" was rooted in his well-documented impulsivity. And because Owens had "a history of head injury" as well, Dr. Schwartz-Watts considered whether his impulsivity was the result of brain damage. But instead of brain damage, she concluded that Owens's impulsivity was the product of three disorders: Attention Deficit Disorder, Dysthymic Disorder (i.e., chronic depression), and Antisocial Personality Disorder (in agreement with Dr. Cobb).

Dr. Schwartz-Watts also addressed how the circumstances of Owens's "developmental history" as a young child, including his experiences with abuse, neglect, and violence, had contributed to these disorders, and therefore to Owens's impulsiveness and proclivity to violence. *Id.* Finally, Dr. Schwartz-Watts echoed Dr. Cobb in opining that Owens had improved since taking the medications that Dr. Cobb had prescribed, and could continue to receive those medications while in prison.

Owens's third capital sentencing trial wrapped up shortly after Dr. Schwartz-Watts's testimony, and that same day, the jury returned a verdict unanimously finding both of the statutory aggravating circumstances that the State had charged—"[t]hat the

murder was committed while in the commission" both "of robbery while armed with a deadly weapon" and "of larceny with the use of a deadly weapon"—and recommending that Owens be sentenced to death. J.A. 1758, 1768, 1771; *cf.* S.C. Code Ann. § 16-3-20(C)(a)(1)(e), (f). The trial court entered judgment accordingly.

This time on direct appeal, the Supreme Court of South Carolina affirmed Owens's capital sentence. *State v. Owens*, 664 S.E.2d 80, 82 (S.C. 2008). The United States Supreme Court then denied Owens's petition for writ of certiorari. *Owens v. South Carolina*, 555 U.S. 1141 (2009).

E.

Owens then filed a pro se petition for post-conviction relief in state court. Keir M. Weyble (of Cornell Law School), who had worked on Owens's petition for certiorari, and Emily C. Paavola (then a fellow of Cornell's Death Penalty Project) (collectively "Initial Postconviction Counsel") were appointed to represent Owens, and ultimately filed two amended petitions on his behalf. The operative petition asserted over a dozen separate grounds of ineffective assistance, several of which have been consolidated into the first two claims raised in Owens's § 2254 petition.

The state postconviction court held an evidentiary hearing on Owens's petition. All but one of the witnesses called at the hearing had participated in one or more of Owens's sentencing trials, including Godfrey and Gibson, Drs. Schwartz-Watts and Brawley, Owens's previous counsel, and a mitigation

investigator named Drucy Glass, who had worked on the first two trials.

The other witness, called by Initial Postconviction Counsel, was Dr. James Garbarino, an expert in child development. Dr. Garbarino, who had interviewed Owens for four hours, testified about children's vulnerability to trauma and other "risk factors" that have been shown to have a negative impact on a child's development and to increase the likelihood that a child will later engage in violent crime. J.A. 2256. He opined that Owens "had almost all of the risk factors that [he had] ever read about." J.A. 2267. He also related that Owens had revealed during their interview that he had been sexually abused several times as a child, including during his time in SCDJJ custody, though his official records didn't document the abuse.

The state court denied Owens's petition, for reasons that we discuss below (to the extent relevant here). *See Owens v. State*, No. 2009-CP-23-0741 (S.C. Com. Pl. Feb. 13, 2013). The Supreme Court of South Carolina denied Owens's petition for writ of certiorari, and Owens declined to seek a writ of certiorari from the United States Supreme Court.

F.

Owens then commenced this federal habeas action by moving in the district court to stay his execution and appoint new counsel. The district court granted the motions, and Owens's new counsel ("Federal Habeas Counsel") filed the operative petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Federal Habeas Counsel also filed a second petition for postconviction relief in state court, raising

eight new ineffective-assistance claims, including the defaulted claim raised in this appeal. While these new claims would likely be (and later were) denied on procedural grounds due to Owens's failure to raise them in his initial postconviction petition, Owens could (and does) attempt to excuse the procedural default in federal court by showing cause and prejudice under *Martinez* and *Coleman v. Thompson*, 501 U.S. 722 (1991).

In further pursuit of Owens's neuroimaging claim, Federal Habeas Counsel obtained a comprehensive neurobehavioral assessment of his brain from Dr. Ruben C. Gur, an expert in brain behavior. Dr. Gur's assessment comprised structural and functional neuroimaging using both Magnetic Resonance Imaging (MRI) and Positron Emission Tomography (PET) techniques.

Dr. Gur concluded that the neuroimaging showed "abnormalities indicating brain damage" in regions of the brain "important for regulating emotions and behavior," J.A. 4182, suggesting that Owens's frontal lobe was "unable to do its job and act as the brakes on the primitive emotional impulses" emanating from his "hyper-activated" amygdala, J.A. 4183. Dr. Gur's assessment was in turn reviewed by Dr. Stacey Wood, a forensic neuropsychologist, whose independent review and evaluation concurred that Owens "has significant brain impairment" in his frontal lobe, J.A. 4200, resulting in "neuropsychological deficits related to . . . executive functioning," J.A. 4201.

After receiving the results of Drs. Gur's and Wood's assessments, Federal Habeas Counsel filed an amended § 2254 petition in the district court, adding

(among others) the defaulted neuroimaging claim. They then moved to stay the § 2254 action pending the state court's resolution of Owens's second petition, which the district court granted. The state court ultimately denied Owens's second petition as procedurally defaulted, and Owens didn't appeal that denial.

G.

Owens thereafter resumed proceedings in the district court, where his operative § 2254 petition asserted five exhausted grounds and seven unexhausted grounds for relief. The State filed a (second) motion for summary judgment, which was initially considered by a magistrate judge. The magistrate judge issued a Report and Recommendation ("R&R") advising that the district court grant summary judgment in favor of the State and deny Owens's petition and related motions for an evidentiary hearing. *Owens v. Stirling*, No. 0:16-CV-2512-TLW-PJG, 2018 WL 3104276, at *1 (D.S.C. Jan. 12, 2018). Owens objected to the R&R, but the district court adopted it in full. *Owens v. Stirling*, No. 0:16-CV-02512-TLW, 2018 WL 2410641, at *9, *45 (D.S.C. May 29, 2018). The court then denied Owens's motion to alter or amend the judgment. *Owens v. Stirling*, No. 0:16-CV-02512-TLW, 2018 WL 5720445, at *3 (D.S.C. Nov. 1, 2018).

H.

We docketed Owens's case on November 16, 2018. On November 27, we granted Owens's motion to substitute counsel. Counsel thereafter sought a certificate of appealability ("COA"), pursuant to 28 U.S.C. § 2253(c)(1), on the three claims raised here.

We granted the certificate as requested, indicating that Owens had "demonstrate[d] 'a substantial showing of the denial of a constitutional right'" with respect to each claim. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (quoting 28 U.S.C. § 2253(c)(1)). This appeal followed.

II.

Owens's § 2254 petition presents two exhausted claims of ineffective assistance, meaning that the state court rejected them on the merits. First, he claims that Sentencing Counsel provided ineffective assistance by failing to adequately investigate and present available mitigating evidence about his upbringing, family background, and general social history. Second, he claims that counsel was ineffective by failing to raise a readily viable Confrontation Clause objection to the trial court's admission of the State's record summarizing twenty-eight of his disciplinary infractions while in custody.

We consider these claims in turn, "reviewing de novo the district court's denial of [Owens's] petition" with respect to each. *Gray v. Zook*, 806 F.3d 783, 790 (4th Cir. 2015). But we review the state postconviction court's denial of these claims only to the extent of determining whether it involved an unreasonable application of the Supreme Court's clearly established precedent. And we conclude that it didn't.

A.

Our standard of review derives from the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which circumscribes a federal court's ability to issue a writ of habeas corpus "on behalf of a person in custody pursuant to the judgment of a State court."

28 U.S.C. § 2254(d). Under AEDPA, a federal court may not grant habeas relief on a claim that the state postconviction court rejected on the merits unless that court's determination "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2), or "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," *id.* § 2254(d)(1).

Owens relies on § 2254(d)(1), contending that the state court's decision involved an unreasonable application of clearly established federal law under the Supreme Court's *Strickland* line of cases. A state court's decision involves an unreasonable application of such clearly established law when the court "identifies the correct governing legal rule from th[e Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 407 (2000) (O'Connor, J., delivering the opinion of the Court with respect to Part II).

By "clearly established," § 2254(d)(1) "refers to the holdings, as opposed to the dicta, of th[e Supreme] Court's decisions as of the time of the relevant state-court decision." *Id.* at 412. And to be "unreasonable," the state court's application of that law must be "objectively unreasonable," not simply incorrect. *Barnes v. Joyner*, 751 F.3d 229, 238-39 (4th Cir. 2014); *see also Williams*, 529 U.S. at 412 ("[A]n *unreasonable* application of federal law is different from an *incorrect* or *erroneous* application of federal law."). Otherwise stated, "[a] state court's determination that a claim

lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (cleaned up).

In enacting AEPDA, Congress thus recognized that federal courts "owe state tribunals significant deference" with respect to their determination that a state prisoner isn't entitled to habeas relief. *Bennett v. Stirling*, 842 F.3d 319, 323 (4th Cir. 2016). Indeed, AEDPA "reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction." *Harrington*, 562 U.S. at 102 (cleaned up). While our standard of review by no means "preclude[s] relief" or "impl[ies] abandonment or abdication of judicial review," *Miller-El*, 537 U.S. at 340, it does mean that we may not "second-guess the reasonable decisions of state courts," *Renico v. Lett*, 559 U.S. 766, 779 (2010).

Our deference in this case contains an additional layer. For where, as here, a state prisoner claims ineffective assistance of counsel as the basis for habeas relief, we must review the claim through the "highly deferential" lens of *Strickland* as well. *Richardson v. Branker*, 668 F.3d 128, 139 (4th Cir. 2012) (cleaned up). AEDPA and *Strickland* thus provide "dual and overlapping" lenses of deference, which we apply "simultaneously rather than sequentially." *Id.* And because "[s]urmounting *Strickland*'s high bar is never an easy task," it is "all the more difficult" to establish "that a state court's application of *Strickland* was unreasonable . . . under § 2254(d)." *Morva v. Zook*, 821 F.3d 517, 528 (4th Cir.

2016) (cleaned up). "This double-deference standard effectively cabins our review" to determining "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* (cleaned up).

To establish ineffective assistance of counsel under *Strickland*, a defendant must satisfy two standards: (1) "that counsel's performance was deficient," and (2) that counsel's deficient performance "prejudiced the defense." 466 U.S. at 687. The first prong, deficient performance, requires a showing "that counsel's representation fell below an objective standard of reasonableness," as measured by "prevailing professional norms" and in light of "all the circumstances" of the representation. *Id.* at 688. While such professional norms may be "reflected in American Bar Association [ABA] standards and the like," such guides are just that—"only guides"—for determining what constitutes reasonable representation in a given case, *id.* at 688, and no fixed set of rules may "take account of the variety of circumstances faced by defense counsel," *id.* at 688-89.

In assessing counsel's performance, our scrutiny "must be highly deferential." *Id.* at 689. Because "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence," and "all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission . . . was unreasonable," *Strickland* cautions that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight . . . and to evaluate the conduct from

counsel's perspective at the time." *Id.* We must therefore "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* In all, the "critical question" is whether counsel's performance "amounted to incompetence under prevailing professional norms, not whether it deviated from best practices." *Winston v. Pearson*, 683 F.3d 489, 504 (4th Cir. 2012) (cleaned up).

Once a defendant has established that counsel's performance was deficient, he must then prove that counsel's deficient performance prejudiced his defense under *Strickland*'s second prong. In the effective assistance context, prejudice means "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability, in turn, is one "sufficient to undermine confidence in the outcome." *Id.* In the capital sentencing context, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695.

With these dually deferential standards of review firmly in mind, we turn now to consider Owens's claim of ineffective assistance.

B.

Owens contends that Sentencing Counsel was ineffective by failing to adequately investigate and present available mitigating evidence about his life history. Most of his arguments here focus on counsel's allegedly "less than complete investigation," such that

their choices about which mitigating evidence to present could not have been the products of "reasonable professional judgments." *See id.* at 691. Together with evidence that counsel allegedly possessed but didn't present, he asserts that a reasonably complete "mitigation story" would have "neutralized the State's aggravating evidence by explaining [his] behavior through the lens of his past experiences." Pet'r's Br. 48.

The state postconviction court rejected Owens's claim, reasoning that counsel "conducted a thorough investigation into potential mitigating evidence and chose to present evidence that [they] thought would favor Owens at trial." J.A. 3704. While the court observed that counsel didn't discover or present every iota of available mitigating evidence, it concluded that they developed "a cogent mitigation case through the testimony of Hammock, Schwartz-Watts, Cobb, Brawley, and Maag," which substantially covered all of the evidence that Owens claims to have been left out. J.A. 3707. The court also concluded that any mitigating evidence that counsel failed to investigate or present wasn't prejudicial because the additional evidence presented in the postconviction proceeding "would [not] have struck a different balance" between the total aggravating and mitigating evidence. J.A. 3705 (quoting *Gray v. Branker*, 529 F.3d 220, 238 (4th Cir. 2008)).

We think that the state court reasonably applied the Supreme Court's holdings in determining that counsel adequately investigated (and competently presented) Owens's mitigating evidence. Of course, the Court has longed recognized that capital

sentencing counsel have an "obligation to conduct a thorough investigation of the defendant's background," *Williams*, 529 U.S. at 396, in an effort "to discover all reasonably available mitigating evidence," *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (cleaned up). But the issue turns on *how* "thorough" the mitigation investigation must be. And here, the Court's cases indicate that the investigation need only be *reasonably* thorough. *See Strickland*, 466 U.S. at 690-91 (equating capital sentencing counsel's duty of "thorough investigation" to "a duty to make reasonable investigations" and noting that "[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances"); *cf. Wiggins*, 539 U.S. at 533 ("*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence . . . .").

In *Williams*, for instance, the Court found (for the first time in the capital sentencing context) the state court's denial of post-conviction relief unreasonable under § 2254(d)(1) on the ground that counsel had "failed to conduct" *any* investigation into the defendant's background. *See* 529 U.S. at 395. There, counsel overlooked even the most basic available mitigating evidence about the defendant's "nightmarish childhood," *id.*, including with respect to his abusive and neglectful parents, his time in foster care and the juvenile justice system, his borderline intellectual disability, and his failure to advance past sixth grade. *Id.* at 395-96. Instead, "the sole argument in mitigation" that counsel advanced was that the defendant had "turned himself in." *Id.* at 398. And *that* clearly wasn't enough.

The Court reached the same conclusion in *Wiggins*, on the basis that capital sentencing counsel had abandoned their investigation of the defendant's background after reviewing just two sources—the presentence report and certain records from the Baltimore City Department of Social Services—and thus failed to discover any evidence of his history of severe sexual abuse, his diminished mental capacity, and his frequent periods of homelessness. 539 U.S. at 524-35. Similarly, in *Rompilla v. Beard*, the Court found it "obvious" that counsel's performance "fell below the level of reasonable performance," where they had failed "to look at any part" of the defendant's conviction file—"a public document[] readily available for the asking at the very courthouse where [he] was to be tried"—despite notice that the state intended to introduce portions of the file as aggravating evidence. 545 U.S. 374, 383-84 (2005); *see also Andrus v. Texas*, --- S. Ct. ----, No. 18-9674, 2020 WL 3146872, at *1 (U.S. June 15, 2020) (per curiam) (finding deficient performance where counsel "failed even to look for" evidence of the defendant's "grim" life history); *Porter v. McCollum*, 558 U.S. 30, 40 (2009) (per curiam) (same where counsel "failed to uncover and present any evidence of [the defendant's] mental health or mental impairment, his family background, or his military service").

In *Bobby v. Van Hook*, by contrast, the Supreme Court found reasonable the state court's determination that capital sentencing counsel had adequately investigated the defendant's mitigating evidence under circumstances similar to those present here. There, the Court emphasized that counsel had interviewed the defendant's parents, aunt, and "a

family friend whom [the defendant] visited immediately after the crime," *id.* at 9; consulted with two expert witnesses (though *not* "an independent mental-health expert," *id.* at 6) "more than a month before trial," *id.* at 9; and reviewed the defendant's military and medical records, *id.*

The Court also underscored the evidence that counsel discovered (and presented at trial) from their investigation, including that the defendant's parents were heavy drinkers and that the defendant himself "started drinking as a toddler," *id.* at 10; that he "grew up in a combat zone" and "watched his father beat his mother weekly," *id.* (cleaned up); that he "attempted suicide five times," *id.*; and that he suffered from borderline personality disorder, *id.* at 11. In light of such extensive mitigating evidence, the Court reasoned that counsel's failure "to find more" wasn't clearly deficient. *Id.* at 11-12.

This court has reached similar conclusions as well. In *Morva*, for example, we found reasonable the state court's "decision on deficient performance" where capital sentencing counsel had "hired a mitigation expert," interviewed many of the petitioner's family members, and presented thirteen witnesses (including several mental-health experts) who testified about the defendant's absent and neglectful parents, his "nomadic lifestyle and homelessness as a young adult," his "ongoing health problems," and his "odd . . . beliefs and behavior." 821 F.3d at 529-30. We held the same in *DeCastro v. Branker*, where counsel had investigated the defendant's "personal history" by interviewing the defendant, his mother, and his aunt; had reviewed his "school and criminal records"; had

"retained an investigator"; and had obtained a psychiatric evaluation. 642 F.3d 442, 456 (4th Cir. 2011). And conversely, we've gone the other way in cases where counsel's investigation was significantly lacking, such as where counsel altogether "failed to investigate for mental health evidence." *See Gray*, 529 F.3d at 229.

In light of these cases, the state postconviction court's conclusion that Sentencing Counsel's mitigation investigation was reasonably thorough doesn't warrant relief under our dually deferential standards of review. Indeed, counsel's efforts to discover mitigating evidence far exceeded the efforts made in *Williams*, *Wiggins*, *Rompilla*, and *Porter*, more closely resembling (if not exceeding) those made in *Bobby*.

Recall that counsel retained two investigators to help discover Owens's mitigating evidence, a clinical social worker to help assemble Owens's social history, and two medical experts to help evaluate Owens's cognitive functioning. Altogether, this team interviewed the majority of Owens's immediate family members, in addition to others (such as his third-grade teacher) who knew him during his formative years; consulted numerous other experts, including his treating psychiatrist; and reviewed extensive family, school, medical, incarceration, and other records. And it yielded testimony from five witnesses, who painted a clear picture of Owens's impoverished, neglectful, and abusive childhood; his pervasive exposure to violence, substance abuse, and incarceration; and his various learning disabilities and cognitive disorders.

Moreover, counsel undertook their investigation with the benefit of two previous trials' worth of mitigating evidence to draw from, comprising several case files and including an array of additional expert perspectives. In light of all of this, the state court reasonably determined that "[t]his is not a case in which the defendant's attorneys failed to act while potentially powerful mitigation evidence" was available, but rather one where their "decision not to seek more . . . than was already in hand fell within the range of professionally reasonable judgments." *See Bobby*, 558 U.S. at 11-12 (cleaned up).

We are also mindful that "the more general the federal rule" in question, "the more leeway state courts have in reaching outcomes in case-by-case determinations." *Bennett*, 842 F.3d at 322 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004) (alterations adopted)). Whereas the proper application of a "specific" legal rule "may be plainly correct or incorrect" in many cases, the contours of "more general" rules or standards "must emerge in application over the course of time," thereby demanding "a substantial element of judgment" in many cases. *Yarborough*, 541 U.S. at 664. Here, we think it plain that the Supreme Court's thoroughness standard is general enough that state postconviction courts must use substantial judgment in applying it to cases where counsel's investigation is neither clearly adequate nor clearly inadequate. We are therefore confident that the state court's judgment is entitled to deference in this case.

We reject Owens's counterarguments. In particular, Owens complains that his lawyers waited

too long to begin investigating and delegated too much of the responsibility to their team members. Yet the nearly two months that counsel and their team spent investigating far exceeded the one week at issue in *Williams*, *see* 529 U.S. at 363, and roughly equaled the amount of time in *Bobby*, *see* 558 U.S. at 9-10. And especially because counsel had the benefit of two trials' worth of mitigating evidence to build from, the amount of time they devoted to additional investigation was reasonably sufficient.

Nor is this a case in which counsel "abdicated their responsibility" for investigating Owens's mitigating evidence. *See Winston*, 683 F.3d at 505. As our cases recognize, capital sentencing counsel "often must necessarily rely on . . . investigators, experts, and other members of the defense team to gather essential evidence." *Winston v. Kelly*, 784 F. Supp. 2d 623, 632 (W.D. Va. 2011), *aff'd sub nom.*, *Winston v. Pearson*, 683 F.3d 489 (2012). The corollary is that counsel themselves must "be familiar with readily available documents," among other evidence, "necessary to an understanding of [the defendant's] case." *Winston*, 683 F.3d at 505 (cleaned up).

That's precisely what happened here. While counsel employed a team of specialists to gather Owens's available mitigating evidence, they closely supervised the team's efforts and familiarized themselves with the findings. Gibson's and Godfrey's time sheets indicate that they each spent many hours, especially during the two months before trial, studying their team members' files (in addition to the files from Owens's previous sentencing trials), discussing trial strategy with them, and preparing

them for examination. This case is thus unlike *Winston*, on which Owens relies and in which counsel failed to discover that the defendant had an IQ of 66 because they altogether "neglect[ed] to review" the school records obtained by their boots on the ground. *See id.*

We likewise reject Owens's complaint that counsel failed to discover an array of available mitigating evidence. Though Owens contends that counsel neglected to obtain the social chronology prepared by Drucy Glass (a mitigation investigator who had worked with Hammock) during Owens's previous sentencing trial, the record indicates the contrary; indeed, Hammock's testimony about Owens's family history and time in foster care touched upon many of the details contained in Glass's chronology and accompanying records. Owens similarly mischaracterizes the record in asserting that counsel failed to investigate the marginal economic conditions in which his family survived and the violence that riddled his neighborhood. To the contrary, counsel elicited testimony from multiple witnesses about both of these circumstances, which permeated their presentation.

The record similarly belies Owens's contention that Sentencing Counsel failed to look into the horrific conditions of confinement during his period of incarceration at SCDJJ or the sexual abuse he experienced there. Though (as we discuss below) counsel declined to have Dr. Schwartz-Watts present much testimony about Owens's time in juvenile detention, it's clear that she investigated the topic by interviewing Owens and reviewing his SCDJJ records,

including mental-health records from his treating psychiatrist. Dr. Schwartz-Watts and Godfrey were also both aware of the high-profile class-action lawsuit over the conditions of confinement during Owens's time there, which resulted in a judgment against SCDJJ.[1] And Godfrey himself went to one of the facilities not only to discuss the lawsuit with the very lawyer who filed it, but also to observe the "horrible" conditions for himself. J.A. 2199.

As to sexual abuse, Drs. Schwartz-Watts and Brawley alike testified that they "specifically" asked Owens whether he had ever experienced it, whether at SCDJJ or elsewhere, J.A. 2402, and Dr. Schwartz-Watts also looked for evidence of sexual abuse in Owens's records. Yet Owens "denied" having been sexually abused to each of them, J.A. 2383, and none of his records, including his SCDJJ records, contained evidence of such abuse. Counsel can thus hardly be faulted for not discovering evidence that didn't come to light until Owens revealed it during his postconviction interview with Dr. Garbarino.

Owens fares no better in complaining that his lawyers failed to consult with appropriate experts. Specifically, Owens suggests that counsel should have retained an expert like Dr. Garbarino to testify about

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[1] The district court ultimately held that SCDJJ's facilities were marred by numerous "constitutional and statutory deficiencies" and ordered the state to adopt a remedial plan. *Alexander S. ex rel. Bowers v. Boyd*, 876 F. Supp. 773, 804 (D.S.C. 1995), *as modified on denial of recons.* (Feb. 17, 1995); *cf. Davis v. Boyd*, No. 96-2540, 1997 WL 355626, at *1 (4th Cir. June 27, 1997) (per curiam) (discussing some of the remedial measures that the district court approved on June 28, 1995).

the relation between Owens's traumatic childhood and his violent behavior. But the Court has never held that counsel is obligated to consult experts, let alone a particular kind of expert, in developing a mitigation case. While the Court has "assumed that in some cases counsel would be deemed ineffective for failing to consult or rely on experts" at all, it has cautioned that "[r]are are the situations" in which counsel's "wide latitude . . . in making tactical decisions will be limited to any one technique or approach." *Harrington*, 562 U.S. at 106 (cleaned up).

Here, the state postconviction court reasonably found that counsel consulted an appropriate array of mental-health experts—at least two of whom, in any event, *did* testify (to some extent) about the link between Owens's background and his behavior. Even assuming it would have been "best practices" to consult a child-development expert as well, professional norms didn't compel that approach. *See Winston*, 683 F.3d at 504.

To the extent Owens complains that counsel failed to present mitigating evidence within their possession, we reject this argument as well. Owens advances two points in this respect. First, he contends that counsel should have presented evidence of the conditions of confinement during his time in SCDJJ custody. But the state postconviction court reasonably concluded that counsel's decision not to present such evidence was the product of reasonable professional judgment. Godfrey testified that he didn't introduce evidence about the conditions at SCDJJ for two reasons: because it would have "opened the door" to evidence of Owens's "numerous" disciplinary

violations, J.A. 2201; and because its probative value would have been "difficult . . . to . . . sell a jury on," J.A. 2199. While others might have judged differently, we think counsel judged with reasonable competence in avoiding such "double-edged" evidence. *See Gray*, 529 F.3d at 239.

Second, and more generally, Owens contends that counsel should have presented his mitigation story in far greater detail. But regardless of whether such detail would have made for a more compelling narrative, the fact that it would have been "merely cumulative to the evidence actually heard by the jury . . . undercuts [Owens's] claim for deficient performance." *See Morva*, 821 F.3d at 530. The Supreme Court has likewise rejected the notion that counsel must tell a defendant's life history with elaborative detail, reasoning that where (as here) counsel put forth "substantial mitigation evidence," any cumulative evidence about the same circumstances heard by the jury offers "an insignificant benefit, if any at all." *See Wong v. Belmontes*, 558 U.S. 15, 23 (2009) (per curiam); *cf. Bobby*, 558 U.S. at 11 ("[T]here comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative . . . .").

The cases on which Owens relies in this respect are distinguishable because none rested on merely "superficial" or "generalized" presentations. *See* Pet'r's Br. 43. Rather, in each of them, our sister circuits emphasized that the jury had "heard nothing" at all about substantial mitigating evidence. *Outten v. Kearney*, 464 F.3d 401, 421 (3d Cir. 2006); *see also Powell v. Collins*, 332 F.3d 376, 399-400 (6th Cir.

2003) (counsel "fail[ed] to make even a limited investigation"); *Cargle v. Mullin*, 317 F.3d 1196, 1221-22 (10th Cir. 2003) (counsel overlooked "significant mitigating information," including that the defendant had learning difficulties and that his father was abusive); *Neal v. Puckett*, 286 F.3d 230, 240 (5th Cir. 2002) (en banc) (counsel failed to discover similar "readily available" mitigating facts because they had no "time or money" to do so); *Jermyn v. Horn*, 266 F.3d 257, 308-09 (3d Cir. 2001) (counsel "fail[ed] to investigate the circumstances of [the defendant's] childhood," including "allegations of childhood abuse"). The same cannot be said here.

Finally, we think the state postconviction court also reasonably concluded that any deficiency in Sentencing Counsel's investigation or presentation wasn't prejudicial in light of the total balance of aggravating and mitigating evidence. As the court observed, the State presented overwhelming evidence, not only that Owens satisfied both statutory aggravating circumstances charged, but also of his future dangerousness and inability to adapt to incarceration. Weighed against such aggravating evidence, the additional mitigating evidence that Owens contends counsel should have discovered and presented—nearly all of which, as noted, was either doubled-edged or cumulative—would indeed "have offered an insignificant benefit, if any at all." *See Wong*, 558 U.S. at 23. We thus defer to the state court on this ground as well.

C.

Owens next contends that Sentencing Counsel were ineffective by failing to object on Confrontation

Clause grounds to the trial court's admission of the State's record summarizing twenty-eight of his disciplinary infractions while in SCDOC custody. Owens argues that counsel should have so objected because the Supreme Court clearly established his right to confront the authors of his disciplinary record in *Crawford v. Washington*, 541 U.S. 36 (2004), *Davis v. Washington*, 547 U.S. 813 (2006), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). And he asserts that the state court unreasonably applied these cases in concluding to the contrary.

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The "ultimate goal" of this safeguard being "to ensure reliability of evidence," the Confrontation Clause "commands, not that evidence [necessarily] be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. Under the Supreme Court's seminal decision in *Crawford*, the Confrontation Clause accomplishes this goal by barring the admission of "[t]estimonial" out-of-court statements made by declarants unavailable for trial unless the defendant "had a prior opportunity to cross-examine" the declarant. *Id.* at 59.

The state court held that Owens was "unable to establish deficient performance" on this claim because the disciplinary record was a "non-testimonial business record[]" that did "not implicate the Confrontation Clause." J.A. 3700-01. And the court reasoned that the business record was nontestimonial because it wasn't "prepared in anticipation of

producing testimony at [Owens's] trial, but rather in accordance with South Carolina statutory law for the administration of prison affairs." J.A. 3701-02 (citing, *inter alia*, S.C. Code Ann. § 24-21-70). The court also held that any deficiency in counsel's failure to object wasn't prejudicial in light of the "overwhelming evidence of Owens'[s] future dangerousness, bad character, and inability to adapt to prison life," including testimony about many of the same disciplinary infractions. J.A. 3703.

We believe the state court's decision reasonably applied the standard that a plurality of the Supreme Court articulated in *Melendez-Diaz* for determining whether a business record implicates the Confrontation Clause. *Melendez-Diaz* was the first case in which the Court applied *Crawford*'s novel "testimonial" standard to a document and potential business record. The records at issue there were certain "certificates of analysis," which the plurality likened to affidavits, "showing the results of [a] forensic analysis" performed on a white substance (which proved to be cocaine) that police had seized from the defendant's vehicle. *See Melendez-Diaz*, 557 U.S. at 308 (plurality opinion). In holding that there was "little doubt" these affidavits fell within the "'core class of testimonial statements'" first outlined in *Crawford*, *id.* at 310 (quoting 541 U.S. at 51), the Court emphasized that their "sole purpose" under state law "was to provide prima facie evidence" in the defendant's criminal trial, *id.* at 311 (cleaned up); *see also United States v. Cabrera-Beltran*, 660 F.3d 742, 752 (4th Cir. 2011) (noting that the Court's holding "relied heavily on the fact that the affidavits at issue were specifically created for trial purposes").

The limited effect of *Melendez-Diaz*'s holding with respect to business records is evident where the plurality rejected the defendant's argument that the affidavits were categorically nontestimonial because they "qualif[ied] as traditional . . . business records" under Fed. R. Evid. 803(6). *See* 557 U.S. at 321. In this respect, the plurality held that even assuming the affidavits were business records, such records are nonetheless "testimonial" for purposes of the Confrontation Clause "if the regularly conducted business activity is the production of evidence for use at trial." *Id.* In other words, while business records "are generally admissible absent confrontation . . . because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial," that isn't so where the business records were "prepared specifically for use at petitioner's trial." *Id.* at 324.[2]

In light of that reasoning, we have understood *Melendez-Diaz* to establish the principle that a business record is "testimonial" *only* if the record was created primarily for the purpose of "proving some fact at trial." *See Cabrera-Beltran*, 660 F.3d 752 (quoting

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[2] Before *Crawford*, the Court's prevailing interpretation of the Confrontation Clause exempted extra judicial statements by unavailable declarants as long as they bore "adequate indicia of reliability." *See Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (cleaned up), *abrogated by Crawford*, 541 U.S. 36. Because adequate indicia of reliability could be established where the statements fell "within a firmly rooted hearsay exception," *id.*, the right of confrontation didn't attach to business records under *Roberts*, *cf.* Fed. R. Evid. 803(6) (setting forth the traditional business records exception to the rule against hearsay).

Melendez-Diaz, 557 U.S. at 324). Our sister circuits have tended to agree. *See, e.g.*, *United States v. Garcia*, 887 F.3d 205, 213 (5th Cir. 2018); *United States v. Lorenzo-Lucas*, 775 F.3d 1008, 1010 (8th Cir. 2014); *United States v. James*, 712 F.3d 79, 94-96(2d Cir. 2013);*United States v. Cameron*, 699 F.3d 621, 640 (1st Cir. 2012);*United States v. Smith*, 640 F.3d 358, 363 (D.C. Cir. 2011); *United States v. Yeley-Davis*, 632 F.3d 673, 679 (10th Cir. 2011); *United States v. Orozco-Acosta*, 607 F.3d 1156, 1163 (9th Cir. 2010).

Indeed, even an apparent majority of the Supreme Court—including the late Justice Scalia, who authored the plurality opinion in *Melendez-Diaz*—has since adhered to the view that business records "are testimonial and require confrontation" only when they were "prepared specifically for use at a criminal trial." *See Michigan v. Bryant*, 562 U.S. 344, 392 (2011) (Scalia, J., dissenting); *id.* at 358, 359 (plurality opinion) (noting that "when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony," its admissibility "is the concern of state and federal rules of evidence, not the Confrontation Clause"); *see also Bullcoming v. New Mexico*, 564 U.S. 647, 669-70 (2011) (Sotomayor, J., concurring in part and concurring in the judgment) ("*Melendez-Diaz* explained that . . . documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status, except if the regularly conducted business activity is the production of evidence for use at trial." (cleaned up)).

In light of this broad consensus, the state court reasonably applied the Supreme Court's holdings in stating that a business record isn't testimonial unless

it was "prepared in anticipation of producing testimony at trial" rather than for the "administration" of the entity's "affairs." J.A. 3701-02. The court also reasonably determined that Owens's disciplinary record was prepared "for the administration of prison affairs" rather than "in anticipation of producing testimony" in any of his trials. *Id.*

Specifically, South Carolina law provides that, for any prisoner confined in the state penitentiary, the Department of Corrections "must keep a record of the industry, habits, and deportment of the prisoner, as well as other information requested by the board [of probation] or the director [of the department] and furnish it to them upon request." S.C. Code Ann. § 24-21-70. As Owens concedes, the record was thus prepared in the ordinary course of the prison's business, pursuant to its obligation under state law "to furnish upon request records of an inmate's deportment." Pet'r's Br. 63. And while Owens points out that the record *could* be admitted in a criminal trial, *see State v. Whipple*, 476 S.E.2d 683, 687-88 (S.C. 1996), that alone doesn't suffice to trigger the protection of the Confrontation Clause under the Supreme Court's clearly established law.[3]

Owens's counterarguments are unavailing. Above all, Owens is wrong to assert that *Melendez-Diaz*

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[3] Because we uphold the state postconviction court's reasoning under § 2254(d)(1), we needn't address the parties' additional dispute over whether the Confrontation Clause applies to capital sentencing trials such as Owens's, in which the jury is invited to find additional aggravating facts that would support a death sentence.

clearly established the principle that any declaration "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" is testimonial. *See* 557 U.S. at 310 (quoting *Crawford*, 541 U.S. at 52). While the plurality did quote that broader "'formulation[] of th[e] core class of testimonial statements'" from *Crawford* in passing, *id.* (quoting 541 U.S. at 51), its holding (to reiterate) rested on the fact that the affidavits were prepared for "the *sole purpose*" of being used at trial, *id.* at 311. And while some judges have suggested that the broader formulation *should* apply to business records, *see James*, 712 F.3d at 108 (Eaton, J., concurring), such a view is far from clearly established.

Owens further misses the mark in attributing this broader definition to *Crawford* itself. To the contrary, *Crawford* referred to statements "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," 541 U.S. at 52 (cleaned up), as merely one of the "[v]arious formulations of th[e] core class of 'testimonial' statements" proposed in that case by the parties and their amici, *id.* at 51. But *Crawford* declined to adopt any of those formulations as law, reasoning that the statements at issue "qualif[ied] under any definition." *Id.* at 52.

Similarly, in contending that *Davis* stands for the principle that any statement whose "primary purpose . . . is to establish or prove past events potentially relevant to a later prosecution" is testimonial, 547 U.S. at 822, Owens divorces the

Court's language from its narrow context. Like *Crawford*, *Davis* involved the kind of statements that traditionally implicated the Confrontation Clause—those made by an eyewitness to a crime "in response to police interrogation." *See id*. Read in this context, the language on which Owens relies serves only to differentiate *amongst* such statements based on whether or not they were made "to enable police assistance to meet an ongoing emergency." *See id.* at 828.

Indeed, because *Crawford* and *Davis* both dealt only "with ordinary witnesses," neither case clearly established more than the proposition "that formal statements made by a conventional witness—one who has personal knowledge of some aspect of the defendant's guilt—may not be admitted without the witness appearing at trial to meet the accused face to face." *See Melendez-Diaz*, 557 U.S. at 330-31 (Kennedy, J., dissenting). Accordingly, because none of these cases hold that Owens's disciplinary record, as a business record, implicates the Confrontation Clause, the state court reasonably concluded that Sentencing Counsel's failure to raise such an objection wasn't deficient.

We likewise conclude that the state court reasonably determined that any deficiency in counsel's failure to so object wasn't prejudicial in light of the overwhelming evidence of Owens's future dangerousness and inability to adapt to incarceration. Such evidence included testimony not only about Owens's killing of his fellow inmate on the eve of his first sentencing trial, but also about many of the same infractions summarized in the disciplinary record. In

this respect, several of counsel's own witnesses, especially Dr. Cobb, opened the door to testimony about Owens's ongoing disciplinary problems upon cross-examination by testifying about his improvements. It's thus debatable at best that Owens's disciplinary record prejudiced the outcome of his third sentencing trial.

To sum up, the district court properly concluded that the state postconviction court reasonably applied the Supreme Court's precedents in denying each of Owens's exhausted *Strickland* claims. We turn now to consider his unexhausted *Strickland* claim.

III.

Owens's procedurally defaulted claim of ineffective assistance brings us back to the investigation of his mitigation case. Here, Owens requests an evidentiary hearing in the district court on the merits of his claim that Sentencing Counsel was ineffective by failing to obtain a comprehensive neuroimaging evaluation, which revealed evidence of structural and functional brain damage in 2016. Yet because Owens neglected to present this claim in his initial postconviction petition, he must demonstrate cause and prejudice under *Martinez* and *Coleman* to obtain a hearing. And despite implying the contrary conclusion when we granted the COA, we agree with the district court that Owens fails to demonstrate cause because his underlying claim is insubstantial. We therefore deny his request.

A.

We start by describing the cause-and-prejudice standard, which reflects the well-established principle that "[f]ederal habeas courts reviewing the

constitutionality of a state prisoner's conviction and sentence are guided by rules designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism." *See Martinez*, 566 U.S. at 9. Chief among such rules is "the doctrine of procedural default, under which 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." *Id.* As a result, a state court's "invocation of a [state] procedural rule to deny a prisoner's claims precludes federal review of the claims" so long as the state procedural rule is "adequate to support the judgment," is "firmly established," and has been "consistently followed." *Id.*

Of course, "[t]he doctrine barring procedurally defaulted claims from being heard is not without exceptions." *Id.* at 10. As relevant here, in *Coleman* the Supreme Court held that where "a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule," a federal habeas court may nonetheless entertain the claim if "the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law." 501 U.S. at 750. The Court also held that a state prisoner may establish cause by establishing that his attorney's assistance was "constitutionally ineffective under the standard established in *Strickland v. Washington*." *Id.* at 752 (cleaned up). But the Court proceeded to curtail the effect of these rules by further holding that ineffectiveness on the part of a state prisoner's counsel in a *postconviction* proceeding doesn't qualify as cause,

reasoning that because the Sixth Amendment doesn't obligate states to provide counsel beyond direct review, the prisoner "bears the risk" of any errors by postconviction counsel. *Id.* at 754.

In *Martinez*, however, the Court found it necessary to "qualif[y]" *Coleman*'s holding that postconviction counsel's errors don't qualify as cause to excuse a procedural default. 566 U.S. at 9. After all, not only do such errors literally *cause* the default, but there would otherwise be no remedy available to review the prisoner's claims. *See id.* at 10-11. *Martinez* thus announced the following "narrow exception," *id.* at 9: "Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective," *id.* at 17.

Otherwise stated, a state prisoner may establish cause under *Martinez* by showing (1) that the defaulted ineffective-assistance-of-trial-counsel claim is "substantial," (2) that counsel in the initial state collateral-review proceeding was ineffective or absent, and (3) that state law required the ineffective-assistance-of-trial-counsel claim to be raised in the initial collateral-review proceeding as opposed to on direct review. *See Trevino v. Thaler*, 569 U.S. 413, 423 (2013). A "substantial claim" is one that has "some merit," a standard that the *Martinez* Court likened to the one that governs the issuance of COAs under 28 U.S.C. § 2253(c)(2). *See Martinez*, 566 U.S. at 14

(citing *Miller-El*, 537 U.S. 322); *cf. Miller-El*, 537 U.S. at 327 (noting that a prisoner must "demonstrate 'a substantial showing of the denial of a constitutional right'" (quoting 28 U.S.C. § 2253(c)(2)).

A few of our sister circuits have remarked an apparent incongruity lurking in the *Martinez* standard. To establish that postconviction counsel's errors "caused prejudice under *Strickland*," a state prisoner would have to show that counsel "could have obtained a different result had he presented the now-defaulted ineffective-assistance-of-trial-counsel claim." *Workman v. Superintendent Albion SCI*, 915 F.3d 928, 938 (3d Cir. 2019). To do that, however, a state prisoner would have to show that the defaulted claim is itself meritorious. *Id.* at 938-39; *accord Brown v. Brown*, 847 F.3d 502, 513 (7th Cir. 2017). In other words, *Martinez* appears to require a state prisoner to *prevail* on the merits of his underlying claim merely "to excuse the procedural default" and "obtain consideration on the merits." *Workman*, 915 F.3d at 939.

These sister circuits have understandably "rejected that notion." *See id.* at 940. Instead, they have reasoned that a state prisoner satisfies *Martinez* by showing, *first*, that initial postconviction counsel performed deficiently, under the first prong of *Strickland*, by failing to exhaust the underlying ineffective-assistance-of-trial-counsel claim, but not that said counsel's deficient performance was prejudicial, under the second prong of *Strickland*; and *second*, that the underlying claim is substantial, or has some merit, with respect to both prongs of *Strickland*. *Id.*; *accord Brown*, 847 F.3d at 513.

We agree with our sister circuits that this rule "is sensible, workable, and a proper reading of *Martinez*." *Workman*, 915 F.3d at 941. Accordingly, to establish cause to excuse the procedural bar to his underlying ineffective-assistance-of-Sentencing-Counsel claim, Owens must show (1) that the underlying claim is substantial and (2) that Initial Postconviction Counsel's failure to raise it was deficient.[4] We turn now to this inquiry.

With respect to the first of these showings, Owens echoes the petitioner in *Brown* by contending that we "have already determined that his defaulted ineffective assistance of trial counsel claim is substantial under *Martinez*" by granting his COA with respect to it. *See* 847 F.3d at 515. If so, that begs the question of whether we are bound by that prior determination under the "law of the case" doctrine, which "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case," *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (cleaned up), including with respect to "an earlier decision of a panel of an appellate court," *United States v. Houser*, 804 F.2d 565, 567 (9th Cir. 1986).

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[4] We recently held that South Carolina law satisfies the remaining element of *Martinez* by requiring ineffective-assistance claims to be raised on collateral review, *Sigmon v. Stirling*, 956 F.3d 183, 198 (4th Cir. 2020), and the State doesn't argue otherwise here. Additionally, because we find that Owens fails to establish cause under *Martinez*, we needn't address whether he satisfies the prejudice prong of *Coleman*. *Cf. Martinez*, 566 U.S. at 18 (stating that "the question of prejudice" remained open on remand).

Our sister circuit sidestepped this issue in *Brown*, finding that *Martinez* didn't elucidate the nature of its substantiality standard and noting that other circuits have offered "limited further guidance." *See* 847 F.3d at 515; *cf. Martinez*, 566 U.S. at 21 n.2 (Scalia, J., dissenting) ("The Court does not explain where this substantiality standard comes from . . . ."). The court observed that, while *Martinez* cited to *Miller-El* in discussing its substantiality standard, it did so with an ambiguous "*cf.*" signal, and without clarifying how the two standards relate to each other. *See Brown*, 847 F.3d at 515. So the court opted to "conduct a separate and deeper review of the record, beyond [its] grant of a [COA]," and reaffirm thereby that the underlying claim was "substantial" under *Martinez*. *Id.*

The only other circuit that appears to have identified this issue likewise declined to resolve it. *See Dansby v. Hobbs*, 766 F.3d 809, 840 n.4 (8th Cir. 2014) (assuming the two standards are identical but positing that the denial of certain underlying claims as insubstantial under *Martinez* "may be construed as the revocation of the COA as to those claims"). Yet while other circuits haven't squarely addressed it, several have suggested that *Martinez* incorporated the standard for issuing a COA under § 2253(c)(2) into its definition of substantiality. *See Workman*, 915 F.3d at 937-38; *Flores v. Stephens*, 794 F.3d 494, 505 (5th Cir. 2015).

For our part, we think the Supreme Court's cases with respect to § 2253(c)(1) bear out Owens's assertion that the *Martinez* substantiality standard is identical to the one we implicitly resolved in his favor by granting the COA. As the Court "reiterate[d]" in

Miller-El, a prisoner satisfies § 2253(c)(1)'s substantiality standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims." 537 U.S. at 327 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). And in *Slack*, the Court held how that standard (which derives from the Court's pre-AEDPA decision in *Barefoot v. Estelle*, 463 U.S. 880 (1983)) applies to a claim that the district court "dismissed on procedural grounds." 529 U.S. at 484. In that instance, a COA may issue only if the prisoner shows "that jurists of reason would find it debatable" *both* "whether the district court was correct in its procedural ruling" *and* "whether the petition states a valid claim of the denial of a constitutional right." *Id.* In other words, *Slack* requires a prisoner to demonstrate a "substantial *underlying* constitutional claim[]" to warrant a COA under § 2253(c)(1). *Id.* (emphasis added).

That the underlying constitutional claim "is a substantial one" is precisely the showing that Owens must now make (again) to show cause under *Martinez*. *See* 566 U.S. at 14. Simply put, both standards turn on whether the claim underlying the procedural default is "substantial." And while *Martinez* phrases that inquiry in terms of the claim's having "some merit," *see id.*, whereas *Slack* phrases the inquiry in terms of "reasonable jurists" being able to debate the claim's validity, *see* 529 U.S. at 484, we see little daylight between those formulations. If reasonable jurists could debate the merits of the underlying claim, then it must have (at least) some merit.

That said, we don't think this apparent redundancy between the *Martinez* and § 2253(c)(1) substantiality standards precludes us from reconsidering the merit of Owens's underlying claim at *this* stage of the case. As the Supreme Court has recognized, the law of the case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messenger v. Anderson*, 225 U.S. 436, 444 (1912). The doctrine is therefore "discretionary" rather than "mandatory," and admits of a variety of exceptions. *See CNF Constructors, Inc. v. Donohoe Const. Co.*, 57 F.3d 395, 398 n.1 (4th Cir. 1995); *accord Houser*, 804 F.2d at 567. In the context of an earlier decision of a panel of an appellate court, our sister circuits have acknowledged the ability to reconsider a ruling "on the same issue presented in the same action if a showing is made which compels us to reconsider our prior decisions." *See Houser*, 804 F.2d at 568. We too have done so in the context of "a prior ruling of a motion panel," which is essentially what we have here. *See CNF Constructors*, 57 F.3d at 398 n.1.

In the *Martinez* context, we think ourselves warranted in reconsidering the substantiality of the underlying claim for three reasons. *First* and foremost, the substantiality standard implicates our very "jurisdiction to consider [Owens's] appeal," an issue that circuit courts have tended to view as immune from the law of the case doctrine in light of our "duty . . . to dismiss whenever it becomes apparent that we lack jurisdiction." *See Houser*, 804 F.3d at 568-69 (cleaned up); *accord CNF Constructors*, 57 F.3d at 397 n.1; *Johnson v. Burken*, 930 F.2d 1202, 1205 (7th Cir. 1991); *EEOC v. Neches Butane Prods.*

Co., 704 F.2d 144, 147 (5th Cir. 1983); *Green v. Dep't of Commerce*, 618 F.2d 836, 839 n.9 (D.C. Cir. 1980). True, the standard is jurisdictional in the technical sense only with respect to the *Slack* iteration, since § 2253(c)(1) provides that "an appeal may not be taken" from a final order dismissing a § 2254 petition "[u]nless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1). Yet the *Martinez* iteration might be viewed similarly as "quasi-jurisdictional" insofar as no federal court may consider the merits of a defaulted claim until the procedural bar is excused. *See Martinez*, 566 U.S. at 9-10; *cf. Champagne v. Schlesinger*, 506 F.2d 979, 982 (7th Cir. 1974) (noting that "exhaustion is a quasi-jurisdictional problem"). And whether framed as rescinding the COA (as suggested by our sister circuit in *Dansby*) or simply denying the claim under *Martinez*, our ability to reconsider the issue leads to the same result.

Second, as is often the case with the ruling of a "preliminary" panel, "practical realities" required us to rule on the COA "without the benefit of full briefing and oral argument," which prevented the relevant arguments from being "fully present[ed]" to us. *See CNF Constructors*, 57 F.3d at 397 n.1. Indeed, we granted the COA based solely on Owens's opening brief, without the benefit of *any* briefing by the State (not to mention oral argument). *See* Local R. App. P. 22. And reflecting the "provisional" nature of that ruling, our order was not only unpublished but also "without opinion," which furthers weighs against its tying our hands under *Martinez*. *See EEOC*, 704 F.2d at 147. Thus, while a merits panel "does not lightly" revisit an earlier panel decision "during the course of

the same appeal," we have more leeway to do so here, where the issue didn't receive a "[f]ull review" until after the COA had issued. *See Houser*, 804 F.2d at 568.

And *third*, the very fact that *Martinez* directs us to address an issue we already confronted when deciding whether to grant a COA leaves us no doubt that we may reconsider the substantiality of the underlying claim. By citing *Miller-El* in discussing its cause standard, *Martinez* demonstrated (at the very least) the Court's awareness that a prisoner must first, before any argument as to procedural default, make the requisite showing to obtain a COA. *See* 566 U.S. at 14. Yet *Martinez* nowhere suggests that cause is predetermined as soon as a COA is granted. Indeed, because such an effect would render the first step of the *Martinez* standard superfluous, the law of the case doctrine seems antithetical to its operation. We therefore view our duty under *Martinez* to consider the substantiality of the underlying claim, even after granting a COA, as affording us another (and fuller) opportunity to do so.

Accordingly, we turn now to reconsider—without regard to our grant of a COA—whether Owens's underlying claim is substantial under *Martinez*.[5]

C.

Upon reconsideration, we are satisfied that the district court properly found that Owens's underlying

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[5] Our holding in this respect is consistent with our decisions in two recent cases, where we found (without being called to address the issue resolved here) that an underlying *Strickland* claim was insubstantial under *Martinez* despite having granted a COA. *See Sigmon*, 956 F.3d at 193, 199; *Moore v. Stirling*, 952 F.3d 174, 181, 185-86 (4th Cir. 2020).

claim—that Sentencing Counsel rendered ineffective assistance by failing to have him neuroimaged for evidence of structural and functional brain damage—is insubstantial. *See Owens*, 2018 WL 2410641, at *33-35.

As noted with respect to Owens's very first claim, Sentencing Counsel's obligation to conduct a thorough investigation of his mitigating evidence certainly extended to evidence that could "cast light on [his] mental condition." *See Rompilla*, 545 U.S. at 382; *see also Wiggins*, 539 U.S. at 534-35 (counsel "failed to discover and present" evidence of Wiggins's "diminished mental capacities"); *Williams*, 529 U.S. at 396 (counsel "failed to introduce available evidence that Williams was borderline mentally retarded" (cleaned up)). But the issue again turns on *how* thorough the investigation had to be under prevailing professional norms. And here, while counsel may have rendered ineffective assistance had they failed "to investigate [Owens's] mental condition as a mitigating factor" altogether, *see Caro v. Woodford*, 280 F.3d 1247, 1254 (9th Cir. 2002) (cleaned up), or failed "to provide mental health experts with information needed to develop an accurate profile of [his] mental health," *see id.*, or even overlooked "red flags pointing up a need to test further," *see Rompilla*, 545 U.S. at 392 (cleaned up), on this record, there is no merit to the claim that they were ineffective by not obtaining a comprehensive neuroimaging evaluation.

Our analysis of Owens's first claim illustrates that counsel thoroughly investigated his mental condition as a mitigating factor; indeed, along with his impoverished and violence-ridden upbringing, it was

the predominant factor in their mitigation case. Recall that counsel began their representation with the benefit of two previous trials' worth of mitigating evidence, including myriad mental health records and expert opinions. They then enlisted their own team of experts—including a neuropsychologist, forensic psychiatrist, and clinical social worker—to take that information, find more of it, and independently assess Owens's mental condition. These experts, who were well aware of the indicia of mental impairment, probed the mental health histories of Owens and his family members, consulted with treating doctors and other medical experts, and conducted their own suite of evaluations. And finally, counsel presented the opinions of their mental health experts, who testified collectively to the effect that, while Owens suffered from a variety of disorders and deficiencies that made him more prone to engage in violent crime, he didn't suffer from brain damage or mental illness.

Owens fails to show that reasonable jurists could debate whether such a thorough investigation of his mental condition fell short of an objective standard of reasonableness. Not only did counsel take extensive measures to investigate Owens's behavioral cognition for mitigating evidence, their mental health experts reached conclusions that belied the need for comprehensive neuroimaging—which *no* expert suggested during Owens's case until his federal habeas proceedings.

And much as Owens might disagree with those conclusions in retrospect, he provides no reason to believe that they were professionally unreasonable. Thus, because *Strickland* "does not require counsel to

investigate every conceivable line of mitigating evidence," *Wiggins*, 539 U.S. at 533, the fact that Sentencing Counsel didn't see fit to pursue a comprehensive neurobehavioral assessment doesn't amount to "incompetence under prevailing professional norms," *Winston*, 683 F.3d at 504 (cleaned up).

Relatedly, Owens falls short of establishing that counsel missed any red flags pointing to the need to obtain neuroimaging or otherwise further investigate for evidence of structural and functional brain damage. Owens's reliance on his prescription for Depakote in this respect—the only red flag he identifies on appeal—is misplaced.

Specifically, Owens relies on Dr. Wood's opinion that neuroimaging "should have at the very least been considered," J.A. 4203, due to the "history of seizure disorders" indicated by Owens's "treatment with Depakote," J.A. 4202. He also points to Dr. Brawley's affidavit swearing that, had she "been given information regarding previous seizure activity" while preparing for trial, this "would have cause[d] [her] to recommend a full neurological evaluation." J.A. 4231. Yet the record belies the premise that Owens's treatment with Depakote at Lieber was indicative of seizure activity. To the contrary, as Dr. Cobb testified himself in Owens's third sentencing trial, he had prescribed Depakote (in combination with Risperdal) only to help stabilize Owens's moods and "slow [his] brain down." J.A. 1594-95. Dr. Cobb also testified that Depakote is commonly prescribed to treat mood disorders like bipolarism, for which Dr. Schwartz-Watts herself discovered that Owens had been

receiving treatment at Lieber, and thus not only seizure disorders. In light of these explanations, we discern no indication that Sentencing Counsel overlooked evidence of seizure activity.

Finally, we agree with the district court that Sentencing Counsel's decision not to call Dr. Evans as a witness also bears on the analysis. As the neuropsychology expert in the previous sentencing trial, Dr. Evans testified that Owens had mild brain dysfunction in his frontal lobe. That testimony generally echoes the results of Dr. Gur's comprehensive neuroimaging assessment. And the technique that Dr. Evans used to reach his results (qEEG) bears similarity to the techniques used by Dr. Gur (PET and MRI); all three may even be considered subsets of "neuroimaging" technologies. *See* Laura Stevens Khoshbin & Shahram Khoshbin, *Imaging the Mind, Minding the Image: An Historical Introduction to Brain Imaging and the Law*, 33 Am. J.L. & Med. 171, 176-77 (2007).

Sentencing Counsel thus already had "similar evidence" at their fingertips to that which Owens contends they should have developed through neuroimaging. *See Owens*, 2018 WL 2410641, at *35. But when presented with the claim (which Owens didn't raise in his § 2254 petition) that counsel was ineffective by declining to present Dr. Evans's testimony, the state court properly denied it on the ground that counsel's decision to go with Dr. Brawley's testimony reflected a professionally reasonable strategy to take a more conservative approach to the neurological mitigating evidence.

As Godfrey testified during Owens's initial postconviction proceeding, he was concerned that avant-garde diagnostic techniques wouldn't play in front of a local Greenville jury. He was also aware that any evidence of brain damage would be double-edged and might well do more harm than good for Owens's mitigation case, because it would bespeak his inability to become less violent. Since this "sound trial strategy" would apply with comparable force to similar evidence based on Dr. Gur's neuroimaging evaluation, *see Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)), it presents an additional reason why Owens's underlying claim is insubstantial.[6]

* * *

For the foregoing reasons, we hold that the state postconviction court reasonably denied Owens's exhausted *Strickland* claims on the grounds that capital sentencing counsel thoroughly investigated and presented his available evidence in mitigation, and didn't neglect a viable Confrontation Clause objection to his disciplinary record. We also hold that the district court properly denied Owens's defaulted *Strickland* claim as insubstantial under *Martinez*. Therefore, the judgment of the district court is

AFFIRMED.

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[6] Because we conclude that Sentencing Counsel didn't perform deficiently in failing to obtain comprehensive neuroimaging, we needn't address whether Owens's underlying claim is substantial with respect to the prejudice prong of *Strickland*. We also needn't address whether Initial Postconviction Counsel performed deficiently in failing to exhaust Owens's underlying claim.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-8

FREDDIE OWENS,

Petitioner-Appellant,

v.

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

Respondents-Appellees.

Filed: Aug. 18, 2020

Before WILKINSON, KEENAN, and DIAZ, Circuit Judges.

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Wilkinson, Judge Keenan, and Judge Diaz.

For the Court

/s/ Patricia S. Connor, Clerk

Appendix C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

No. 0:16-cv-02512-TLW

FREDDIE OWENS,

Petitioner,

v.

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

Respondents.

Filed: May 29, 2018

ORDER

This is a capital habeas corpus action brought pursuant to 28 U.S.C. § 2254 by Petitioner Freddie Owens against Respondents Bryan P. Stirling and Willie D. Davis (collectively, the State). For the reasons set forth below, the Court grants the State's motion for summary judgment and denies Owens' habeas petition.

I. Factual and Procedural History

A. Trial and First Sentencing

Irene Graves was murdered on November 1, 1997 during an armed robbery of the Speedway convenience store where she worked in Greenville County, South Carolina. Owens was indicted in October 1998 for murder, armed robbery, possession of a firearm during the commission of a violent crime, and criminal conspiracy. He was represented by John M. Rollins Jr. and Karl B. Allen in a jury trial that began on February 8, 1999. The jury returned a guilty verdict on all counts.

During the trial's sentencing phase, after hearing evidence and argument, the jury returned a recommendation of death on the murder conviction, finding as an aggravating circumstance that the murder was committed while in the commission of a robbery while armed with a deadly weapon. The presiding judge sentenced Owens to death for murder, thirty years consecutive for armed robbery, five years concurrent for possession of a weapon during a violent crime, and five years concurrent for criminal conspiracy.

B. First Direct Appeal

Owens timely appealed and was represented on appeal by Rollins, Allen, and Katherine Carruth Link, Assistant Appellate Defender with the South Carolina Office of Appellate Defense. On appeal, he raised issues relating to the trial court's jurisdiction, evidentiary rulings, the denial of a new trial, and sentencing. On September 4, 2001, the South Carolina Supreme Court affirmed his convictions, but vacated his sentence for possession of a firearm during

commission of a violent crime, reversed his death sentence, and remanded for a new sentencing proceeding. *State v. Owens* (*Owens I*), 552 S.E.2d 745, 759-61 (S.C. 2001), *overruled on other grounds by State v. Gentry*, 610 S.E.2d 494 (S.C. 2005).

C. Second Sentencing

On remand, Owens was represented by Alex Kinlaw Jr. and Steve W. Sumner. At this sentencing, he waived his right to a jury and proceeded with a bench sentencing. After hearing evidence and argument, the presiding judge sentenced Owens to death.

D. Second Direct Appeal

Owens timely appealed and was represented on appeal by Joseph L. Savitz III, Acting Chief Attorney with the South Carolina Office of Appellate Defense. The sole issue on appeal involved the propriety of the circuit judge's colloquy with Owens regarding his jury waiver. On December 20, 2004, the South Carolina Supreme Court again reversed his death sentence and remanded for a new sentencing proceeding. *State v. Owens* (*Owens II*), 607 S.E.2d 78, 80 (S.C. 2004).

E. Third Sentencing

On remand, Owens was represented by Everett P. Godfrey Jr. and Kenneth C. Gibson.[1] This time, he proceeded before a jury, and after hearing evidence and argument, the jury returned a recommendation of death as to the murder conviction, finding as

[1] The claims Owens raises in this habeas action all involve the third sentencing, so any references throughout this opinion to "sentencing counsel" refer to Godfrey and Gibson, unless otherwise noted.

aggravating circumstances that the murder was committed while in the commission of a robbery while armed with a deadly weapon and that the murder was committed while in the commission of a larceny with the use of a deadly weapon. On November 11, 2006, the presiding judge once again sentenced Owens to death.

F. Third Direct Appeal

Owens timely appealed and was represented on appeal by Savitz and LaNelle C. DuRant, both with the South Carolina Commission on Indigent Defense, Division of Appellate Defense. Appellate counsel raised the following issues:

> 1. The trial judge abused his discretion when he summarily disqualified a potential juror, Sonya Ables (Juror Number 1), solely because she "went to [her] pastor and talked to him about [the death penalty]," as he incorrectly believed "there is a case right on point, that if a woman talks to her priest after she's been called as a juror about capital punishment, she is disqualified under the law."
>
> 2. The trial judge committed reversible error by admitting Owens' prison disciplinary records, as they violated the rule against hearsay, as well as the Sixth and Fourteenth Amendments.
>
> 3. The trial judge committed reversible error by allowing the Solicitor to argue in closing that the conditions of life imprisonment in general justified a death sentence for Owens, as this argument injected an arbitrary factor

> into the jury sentencing considerations in violation of S.C. Code Section 16-3-25(C)(1).

ECF No. 16-4 at 222. On July 14, 2008, the South Carolina Supreme Court affirmed his death sentence. *State v. Owens* (*Owens III*), 664 S.E.2d 80, 82 (S.C. 2008). He then submitted a petition for rehearing, which was denied.

After the denial of Owens' petition for rehearing, his new counsel, John H. Blume and Keir M. Weyble, filed a petition for a writ of certiorari from the United States Supreme Court. On January 21, 2009, the Supreme Court denied the petition. *Owens v. South Carolina*, 555 U.S. 1141 (2009).

G. First PCR Action

Owens then submitted a pro se petition for post-conviction relief (PCR) on January 29, 2009. Weyble and Emily C. Paavola were appointed to represent Owens in the PCR proceeding. They submitted on his behalf an amended petition and then a second amended petition raising the following claims:

> 10(a) Applicant was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution during jury selection at his 2006 capital re-sentencing proceeding.
>
> 11(a) Supporting Facts: Trial counsel's performance during jury selection was both deficient and prejudicial. *See Strickland v. Washington*, 466 U.S. 668

(1984). Counsel's acts or omissions included the following:

1) Counsel failed to object to statements by the solicitor, and similar instructions by the trial court, that the State may only seek death where aggravating circumstances are present, which improperly suggested to potential jurors that the aggravating circumstances had already been found.

2) Counsel failed to object when the trial judge erred by disqualifying a potential juror, Sonya Ables (Juror Number 1), solely because she "went to [her] pastor and talked to him about [the death penalty]," as the trial judge incorrectly believed "there is a case right on point, that if a woman talks to her priest after she's been called as a juror about capital punishment, she is disqualified under the law."

10(b) Applicant was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, during his 2006 capital sentencing proceeding.

11(b) Supporting Facts: Trial counsel's performance during jury selection was both deficient and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included the following:

1) Counsel failed to object and/or request proper instructions from the court when the State played a crime scene video without further explanation or analysis. 2006 Tr. at 1076. The crime scene video shows two masked men, but their faces are not identifiable. One of the masked men is primarily shown in the video. He stands behind the counter, points a gun at the clerk, and appears to shoot the clerk before the two men run out of the convenience store. Applicant's codefendant, Steven Golden, testified at Applicant's previous trials that it was he (Golden) who is primarily visible in the video. The State then offered an analysis as to why it believed the fatal shot came from the other man standing off-camera. The jury at Applicant's 2006 resentencing heard no analysis about who appears in the video. They were simply instructed that Applicant had already been found guilty of murder, and then they were shown the video without explanation. The trial judge at the

2006 re-sentencing instructed the jurors that they could consider whether Applicant had "minor participation" in the crime as a mitigating circumstance. *2006 Tr. at 1592*. But, without further instruction, the video misled the jury to believe that there was conclusive video-graphic evidence that Applicant fired the fatal shot, thereby foreclosing consideration of both the "minor participation" mitigating circumstance, and the related possibility that Applicant, though perhaps present, had not been the triggerman.

2) Counsel failed to object to improper and prejudicial opinion testimony from Officer Joe Wood that Applicant gave him "cold chills," and the solicitor's reliance on that testimony in closing argument. *2006 Tr. at 1093 and 1559.*

3) Counsel failed to object to victim impact testimony regarding the effect of the victim's death on the victim outreach coordinator. *2006 Tr. at 1274*. Such testimony was outside the scope of proper victim impact evidence, and counsel's failure to lodge an appropriate objection was unreasonable and prejudicial. Counsel also failed to

object to hearsay testimony from the victim outreach coordinator concerning statements that the victim's children made to her after the victim's death. *2006 Tr. at 1268-1271*. These statements violated the evidentiary rules of South Carolina, as well as the confrontation and the due process clauses of the state and federal constitutions.

4) Counsel failed to preserve the state and federal constitutional issues related to the admission of a list of disciplinary infractions by failing to object on the basis of the Confrontation Clause and due process. On appeal, the South Carolina Supreme Court held that counsel's objection was inadequate to preserve the federal constitutional issues and thus, the issue was procedurally barred. *See State v. Stone*, 655 S.E.2d 487, 488-89 (S.C. 2007). Counsel's failure to lodge an appropriate objection was deficient and prejudicial.

5) Counsel failed to present readily available mitigating evidence that had already been developed at Applicant's previous trial and first resentencing proceeding. Ms. Marjorie Hammock previously testified in much greater detail to

Applicant's life history and background. Further, Dr. Jim Evans previously testified that Applicant has brain dysfunction and difficulties with attention and impulse control. Counsel failed to have Ms. Hammock testify to all of the details that were available concerning Applicant's life history, and counsel failed to call Dr. Evans to testify at all.

6) Counsel failed to investigate and present mitigating evidence of Applicant's experiences while incarcerated in the Department of Juvenile Justice, and the impact of those experiences upon his character, conduct, and psychological condition.

7) Counsel failed to ensure that jurors did not see Applicant in restraints.

8) Counsel failed to object to the solicitor's improper and prejudicial closing argument. For example, counsel failed to object to the solicitor's statements that the prosecution seeks death only rarely, even in eligible cases, and this case was one of those rare cases: "Only limited circumstances are allowed for us to seek the death penalty, and rarely do we seek the death penalty in all those cases that are eligible. In

only certain cases do we seek the death penalty." *2006 Tr. at 1552*; *see also, 2006 Tr. at 1555* ("There are mean and evil people in the world who do not deserve to continue to live with the rest of us, regardless of how confined they may be. The law limits the right to seek the death penalty to a very select number of cases, very few, and we seek the death penalty only in a few, but the circumstances where we seek it is available mean and evil people who commit atrocious acts of murder; the worst of the worst. That is what the death penalty is reserved for. Those whose behavior sets them apart even from the criminal world, and that is Freddie Owens, and this murder and his behavior are one of those cases"). Counsel further failed to object when the solicitor argued that the jury should sentence Applicant to death because his life would be easy in prison. *See, e.g.*, *2006 Tr. at 1561* ("[b]ig prison is like a little city. In prison he will have all the necessities in life. . . . He will have clothing that they provide, and he will have contact with his family, and TV at times, and he will have family business. Not much more than a change of address for Freddie Owens. So don't think putting

Freddie Owens in prison for the rest of his life is going to be a significant punishment for him"). Counsel also failed to object when the solicitor told the jury that he personally wanted the death penalty and would not be "satisfied with a life sentence." *2006 Tr. at 1555.* Counsel thus failed to preserve for appeal whether the improper arguments violated the Sixth, Eighth and Fourteenth Amendments and the corresponding provisions of the South Carolina Constitution and South Carolina law, including S.C. Code Ann. § 16-3-25(C) (2003).

10(c) Applicant's death sentence was obtained in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of South Carolina law, because the jurors saw Applicant in restraints.

11(c) The above ground states the relevant facts.

10(d) Applicant was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, during the appellate phase of his 2006 re-sentencing proceeding.

> 11(d) Supporting facts: Appellate counsel's performance on appeal was both deficient and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Evitts v. Lucey*, 469 U.S. 387 (1985). Appellate counsel failed to assert that it was error for the trial court to deny Applicant's request to ask potential jurors if they would have a bias in favor of police officers because of their previous work in that field.

ECF Nos. 16-4 at 409, 16-5 at 1-6. After briefing and an evidentiary hearing, the PCR court denied his petition on February 13, 2013. ECF No. 16-14 at 140-70. He then filed a motion to alter or amend, which was also denied.

H. First PCR Appeal

Owens, through Weyble and Paavola, then filed a petition for a writ of certiorari to the South Carolina Supreme Court, raising the following issues:

> I. Whether Petitioner's right to effective assistance of counsel was violated as a result of trial counsel's failure to investigate and present available and compelling mitigating evidence from Petitioner's entire life history?
>
> II. Whether Petitioner's right to effective assistance of counsel was violated as a result of trial counsel's failure to raise readily available challenges to a variety of evidence offered by the prosecution in support of its case for a sentence of death?

III. Whether Petitioner's rights under the Eighth and Fourteenth Amendments and S.C. Code Ann. § 16-3-25(C)(1) were violated as a result of the prosecutions' improper closing argument and improper statements during jury selection, and whether Petitioner's right to effective assistance of counsel was violated as a result of trial counsel's failure to object to the same?

IV. Whether Petitioner was prejudiced as a result of the cumulative effect of trial counsel's multiple deficient acts and omissions?

ECF No. 15-9 at 9. On June 17, 2015, the South Carolina Supreme Court denied his petition. He filed a petition for rehearing, which was also denied.

I. Federal Habeas Action

Owens commenced the instant action on July 27, 2015 by filing a motion for a stay of execution and a motion to appoint counsel. ECF No. 1. The Court stayed Owens' execution pending appointment of counsel and the filing of a habeas petition. ECF No. 9. On July 11, 2016, Owens' appointed counsel filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. ECF No. 83. The Court then stayed his execution pending resolution of his habeas petition. ECF No. 100. On September 8, 2016, he filed an amended petition. ECF No. 117. On October 18, 2016, the magistrate judge stayed the case pending resolution of a second PCR action that he filed in state court. ECF No. 124.

J. Second PCR Action

On July 20, 2016, shortly after Owens filed his federal habeas petition, he filed a second PCR action in state court, raising the following claims:

(a) Trial and collateral counsel were ineffective to the prejudice of the applicant by failing to investigate, develop and present evidence of institutional negligence which would have mitigated the State's theory that the in-custody death of Mr. Lee conclusively established future dangerousness and the only sentencing option for the petitioner was death. Evidence from expert witnesses available at the time of the petitioner's sentencing trial demonstrated that institutional negligence in failing to classify, and detain the petitioner in accordance with that classification, was the proximate cause of the death of Mr. Lee. 5th, 6th, 8th and 15th Amendments to the *Constitution of the United States of America*; *Skipper v South Carolina*, 476 US 1 (1986).

(b) Trial and collateral counsel were ineffective to the prejudice of the applicant by failing to investigate, develop and present objective and scientific evidence of structural and functional brain damage resulting from early childhood trauma and materially limiting the applicant's ability to make

informed decisions, learn from past behavior, and control impulses resulting from recurrence of situation prompts in daily living which were the same or similar to those of his early childhood. 5th, 6th, 8th, and 14th Amendments to the *Constitution of the United States of America*; *Wiggins v Smith*, 539 US 510 (2003).

(c) Trial and collateral counsel were ineffective to the prejudice of the applicant by failing to investigate, develop and present objective and scientific evidence of structural and functional brain damage resulting from a history of epileptic grand mal seizures and its impact upon the applicant's cognitive functioning and resulting culpability for the crime of conviction. All in violation of the Fifth, Sixth, Eighth, Fourteenth Amendments to the Constitution of the United States of America; and clearly established federal law as announced by the Supreme Court of the United States in *Wiggins v Smith*, 539 US 510 (2003).

(d) Trial and collateral counsel were ineffective to the prejudice of the applicant by failing to object to the court's recurring jury charge that a finding of life without parole must be unanimous when that charge was not in the sentencing statute, was false, materially misleading,

coercive, abusive and irrelevant to the sentencing function. (5th, 6th 8th and 14th Amendments to the *Constitution of the United States of America*; (*Winkler v South Carolina* not yet decided)

(e) Trial and collateral counsel were ineffective to the prejudice of the applicant by failing to investigate, develop and present mitigation evidence that the applicant suffered from repeated early childhood trauma and sexual abuse. These abusive experiences resulted in organic brain injury, ambiguous sexual identity, and created within the applicant a sensitivity to common adult situational prompts that, in his case, lead to a recurrence of the earlier trauma and extreme preemptive fear aggression as the only behavioral response known to the applicant. 5th, 6th, 8th, and 14th Amendments to the *Constitution of the United States of America*; *Rompilla v Beard*, 545 US 374 (2005).

(f) Trial, direct appellate and collateral counsel were ineffective to the prejudice of the applicant by failing to include as reversible error an objection to the trial court's decision to allow testimony of in-custody administrative rules violations as aggravation evidence supporting a sentence of death when those violations were disproportionate to the crime for

which the jury was sentencing the petitioner, did not result in injury, were in part administrative violations common to every inmate and were not characterological of the petitioner's propensity for future violence.

(g) Trial counsel duly requested that the State disclose all evidence which might be favorable to the defense. Nonetheless, the State failed to disclose evidence that impeaches material witnesses against the applicant in violation of the Fifth, Eighth and Fourteenth Amendments to the *Constitution of the United States of America*; *Brady v Maryland*, 373 US 83 (1963) and *Wearry v Cain*, 136 S. Ct. 1002 (2016). Collateral counsel were ineffective to the prejudice of the applicant in failing to recognize that the State did not disclose material items that would have substantially improved the mitigation case and changed cross-examination tactics had the materials been timely disclosed.

(h) Trial and collateral counsel were ineffective to the prejudice of the applicant by failing to challenge the State's decision to seek the death penalty as the decision was motivated by arbitrary factors since the crime was disproportionate to the rare and exceptional case as required by the narrowing features of *Furman v Georgia*

> and *Gregg v Georgia* and the Fifth, Sixth, Eighth and Fourteenth Amendments to the *Constitution of the United States of America.*

ECF No. 113-1 at 4-5. The PCR court denied his petition on April 10, 2017. He did not file a direct appeal. *See* ECF No. 143.

K. Resumption of Federal Habeas Action

After being informed of the conclusion of Owens' second PCR action, the magistrate judge lifted the stay in this case and briefing recommenced. ECF No. 146. In his amended petition, he raises the following issues, quoted verbatim:

> EXHAUSTED GROUNDS FOR FEDERAL HABEAS RELIEF
>
> (1) Trial counsel was ineffective at Petitioner's 2006 sentencing proceeding for failing to investigate and present available and compelling mitigating evidence.
>
> (2) Trial counsel was ineffective at Petitioner's 2006 sentencing proceeding for failing to object to the list of prison disciplinary infractions on Confrontation Clause and Due Process, Eighth Amendment and Proportionality Grounds.
>
> (3) Trial counsel was ineffective at Petitioner's 2006 sentencing proceeding for failing to object or request proper instructions from the

court regarding the crime scene video.

(4) Trial counsel was ineffective at Petitioner's 2006 sentencing proceeding for failing to object to irrelevant, inflammatory, and prejudicial testimony from both Officer Joe Wood, who testified Petitioner gave him "cold chills," and Juliana Christy, a victims' advocate who testified this case was "the hardest case she ever had to work on" in fifteen years at the Greenville County Sheriff's Department.

(5) Petitioner's rights under the Eighth and Fourteenth Amendments were violated as a result of the prosecution's improper closing argument and improper statements during jury selection, and trial counsel was ineffective for failing to object to the same.

UNEXHAUSTED GROUNDS FOR FEDERAL HABEAS RELIEF

Martinez v. Ryan, 132 S. Ct. 1302 (2012)

(6) Trial and collateral counsel were ineffective to the prejudice of the applicant by failing to investigate, develop and present evidence of institutional negligence which would have mitigated the State's theory that the in-custody death of Mr. Lee conclusively established future

dangerousness and the only sentencing option for the petitioner was death. Evidence from expert witnesses available at the time of the petitioner's sentencing trial demonstrated that institutional negligence in failing to classify, and detain the petitioner in accordance with that classification, was the proximate cause of the death of Mr. Lee. 5th, 6th, 8th and 14th Amendments to the *Constitution of the United States of America*; *Skipper v South Carolina*, 476 US 1 (1986).

(7) Trial and collateral counsel were ineffective to the prejudice of the applicant by failing to investigate, develop and present objective and scientific evidence of structural and functional brain damage resulting from early childhood trauma and materially limiting the applicant's ability to make informed decisions, learn from past behavior, and control impulses resulting from recurrence of situation prompts in daily living which were the same or similar to those of his early childhood. 5th, 6th, 8th, and 14th Amendments to the *Constitution of the United States of America*; *Wiggins v Smith*, 539 US 510 (2003).

(8) Trial and collateral counsel were ineffective to the prejudice of the applicant by failing to object to the court's recurring jury charge that a finding of life without parole must be unanimous when that charge was not in the sentencing statute, was false, materially misleading, coercive, abusive and irrelevant to the sentencing function. (5th, 6th 8th and 14th Amendments to the *Constitution of the United States of America*; (*Winkler v South Carolina* not yet decided)

(9) Trial and collateral counsel were ineffective to the prejudice of the applicant by failing to investigate, develop and present mitigation evidence that the applicant suffered from repeated early childhood trauma and sexual abuse. These abusive experiences resulted in organic brain injury, ambiguous sexual identity, and created within the applicant a sensitivity to common adult situational prompts that, in his case, lead to a recurrence of the earlier trauma and extreme preemptive fear aggression as the only behavioral response known to the applicant. 5th, 6th, 8th, and 14th Amendments to the *Constitution of the United States of America*;

Rompilla v Beard, 545 US 374 (2005).

(10) Trial, direct appellate and collateral counsel were ineffective to the prejudice of the applicant by failing to include as reversible error an objection to the trial court's decision to allow testimony of in-custody administrative rules violations as aggravation evidence supporting a sentence of death when those violations were disproportionate to the crime for which the jury was sentencing the petitioner, did not result in injury, were in part administrative violations common to every inmate and were not characterological of the petitioner's propensity for future violence.

(11) Trial counsel duly requested that the State disclose all evidence which might be favorable to the defense. Nonetheless, the State failed to disclose evidence that impeaches material witnesses against the applicant in violation of the Fifth, Eighth and Fourteenth Amendments to the *Constitution of the United States of America*; *Brady v Maryland*, 373 US 83 (1963) and *Wearry v Cain*, 136 S. Ct. 1002 (2016). Collateral counsel were ineffective to the prejudice of the

applicant in failing to recognize that the State did not disclose material items that would have substantially improved the mitigation case and changed cross-examination tactics had the materials been timely disclosed.

(12) Trial and collateral counsel were ineffective to the prejudice of the applicant by failing to challenge the State's decision to seek the death penalty as the decision was motivated by arbitrary factors since the crime was disproportionate to the rare and exceptional case as required by the narrowing features of *Furman v Georgia* and *Gregg v Georgia* and the Fifth, Sixth, Eighth and Fourteenth Amendments to the *Constitution of the United States of America*.

ECF No. 117 at 6-7. The State filed a return to the amended petition and a second motion for summary judgment. ECF Nos. 147, 148. Owens filed a response in opposition to the summary judgment motion, ECF No. 174, and the State filed a reply, ECF No. 184.

On January 12, 2018, the magistrate judge issued a Report and Recommendation (R&R), in which she recommended granting the State's summary judgment motion and denying Owens' petition. ECF No. 193. Owens filed objections to the R&R, ECF No. 199, and the State filed a reply to those objections, ECF No. 202. Additionally, the State filed its own

objections to the R&R,[2] ECF No. 198, and Owens filed a reply to those objections, ECF No. 201.

This matter is now ripe for decision.

II. Standards of Review

A. Report and Recommendation

The magistrate judge issued her R&R in accordance with 28 U.S.C. § 636(b)(1) and Local Civil Rule 73.02(B)(2)(c) (D.S.C.). The R&R is only a recommendation to the Court and has no presumptive weight. The responsibility to make a final determination rests with the Court. *See Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). The Court conducts a *de novo* determination of any portion of the R&R to which a specific objection is made, and the Court may accept, reject, or modify, in whole or in part, the magistrate judge's recommendation, or may recommit the matter to the magistrate judge with instructions. 28 U.S.C. § 636(b)(1). In the absence of an objection, the Court is not required to give any explanation for adopting the recommendation. *See Camby v. Davis*, 718 F.2d 198, 200 (4th Cir. 1983).

B. Summary Judgment

Summary judgment is appropriate when the materials in the record show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court must view the evidence in the light

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[2] The State does not object to the R&R's ultimate conclusion and instead merely objects to the extent that there were additional facts and law that were not included in the R&R. Because the State does not object to the ultimate conclusion, the Court will not separately address those objections.

most favorable to the non-moving party and draw all justifiable inferences in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A fact is material if it "might affect the outcome of the suit under the governing law." *Id.* at 248.

The party seeking summary judgment bears the initial burden of demonstrating to the Court that there is no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this threshold showing, in order to survive summary judgment, the nonmoving party must demonstrate that specific, material facts exist that give rise to a genuine issue. *See id.* at 324.

C. Habeas Corpus Review

1. *Deference to state courts*

Any claim in a § 2254 petition that was adjudicated on the merits in a state court proceeding may not be granted unless the state court's adjudication of the claim

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

28 U.S.C. § 2254(d).

To meet this standard, the state court must have "arrive[d] at a conclusion opposite to that reached by [the United States Supreme] Court on a question of

law or . . . decide[d] a case differently than [the United States Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). This is a "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (citations omitted). "If this standard is difficult to meet, that it because it was meant to be." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

2. *Ineffective assistance of counsel*

Criminal defendants have a constitutional right to the assistance of counsel. U.S. Const. amend. VI. "[T]he right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citation omitted).

To prevail on an ineffective assistance claim, a petitioner must show that (1) counsel's acts or omissions fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *See id.* at 687-88, 694. Failure of proof on either prong ends the matter. *United States v. Roane*, 378 F.3d 382, 404 (4th Cir. 2004). There is "a strong presumption that counsel's conduct falls within the wide range of professional assistance," and a petitioner has the burden of overcoming this presumption. *Strickland*, 466 U.S. at 689. "Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with

the client, with opposing counsel, and with the judge. It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence." *Harrington*, 562 U.S. at 105 (citing *Strickland*, 466 U.S. at 689). "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Id.* (citing *Strickland*, 466 U.S. at 690). An ineffective assistance of counsel allegation requires the submission of specific facts in support of the claim. *See United States v. Witherspoon*, 231 F.3d 923, 926 (4th Cir. 2000).

When *Strickland* is applied in the federal habeas context, it is an even taller hurdle to overcome. "The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." *Harrington*, 562 U.S. at 105 (citations omitted). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* However, if the petitioner demonstrates that there is no reasonable argument that counsel satisfied *Strickland*, then relief would be appropriate.

3. *Exhaustion and procedural default*

A habeas petitioner may not obtain relief in federal court unless he has exhausted his state court remedies. 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 Miller-El v. Dretke, 545 U.S. 231 (2005). "To exhaust a claim, the petitioner must present the state court with 'both the operative facts and the controlling legal principles.'" *Gray v. Zook*, 806 F.3d 783, 798 (4th Cir. 2015) (quoting *Winston v. Kelly*, 592 F.3d 535, 549 (4th Cir. 2010)).

A petitioner's failure to raise in state court a claim asserted in a § 2254 petition "implicates the requirements in habeas of exhaustion and procedural default." *Gray v. Netherland*, 518 U.S. 152, 161 (1996). "[A] habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance," and has therefore procedurally defaulted those claims. *Coleman v. Thompson*, 501 U.S. 722, 732 (1991). "[T]he procedural bar that gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default." *Gray*, 518 U.S. at 162.

In general, a federal court will not entertain a procedurally defaulted claim as long as the state's procedural requirement barring the court's review is adequate to support the judgment and independence of federal law. *See Martinez v. Ryan*, 566 U.S. 1, 9-10 (2012). However, "[t]he doctrine barring procedurally defaulted claims from being heard is not without exceptions. A prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law." *Id.* at 10.

A federal habeas petitioner cannot claim ineffective assistance of counsel in state post-conviction proceedings to establish cause for default because there is no constitutional right to counsel in state post-conviction proceedings. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991). However, *Martinez* recognized a "narrow exception" to *Coleman*, specifically that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. at 9. The Fourth Circuit has summarized the exception recognized in *Martinez* as follows:

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

Fowler v. Joyner, 753 F.3d 446, 461 (4th Cir. 2014) (internal brackets omitted) (quoting *Trevino v. Thaler*, 569 U.S. 413, 423 (2013)). Essentially, if initial-review collateral counsel was constitutionally ineffective in failing to raise the constitutional ineffectiveness of

trial counsel, that ineffectiveness by collateral counsel may excuse the petitioner's procedural default of a substantial claim of trial counsel's ineffectiveness.

III. Discussion

Owens raised twelve grounds for relief in his habeas petition. The Court will address each one.

A. Ground 1 - Failure to investigate and present mitigating evidence

Ground 1 of the amended petition is as follows:

> Trial counsel was ineffective at Petitioner's 2006 sentencing proceeding for failing to investigate and present available and compelling mitigating evidence.

ECF No. 117 at 6. Evaluating this claim requires consideration of the evidence sentencing counsel did present and what Owens says they should have presented.

1. *Overview of mitigation case*

Owens' mitigation case consisted of testimony from five individuals: (1) Marjorie Hammock, a social historian; (2) Fain Maag, Owens' third-grade teacher; (3) Dr. Tora Brawley, a neuropsychologist; (4) Dr. Thomas Cobb, a forensic psychiatrist; and (5) Dr. Donna Schwartz-Watts, a forensic psychiatrist.

a. *Marjorie Hammock*

Hammock testified about Owens' troubled upbringing, including that he was born to an 18-year-old woman who was unable to properly care for Owens and his four siblings, that he witnessed and personally experienced significant violence at the hands of his biological father and then his step-father, that a

number of his family members (both male and female) were very violent and served time for violent offenses, that he was removed from his house at a young age and placed in the foster system for a period of time because of abuse and neglect, that he was taught to be violent in order to survive, that he had learning disabilities that resulted in significant school difficulties, that his family lived a marginal existence in terms of economics and education, and that there is a correlation between this type of upbringing and a person who was raised in that environment turning to violence. She also explained Owens' family tree in some detail, pointing out that a significant number of his family members had been incarcerated, that there was alcohol and drug abuse throughout the family, and that the family members had very low levels of education. *See* ECF No. 16-3 at 466-84.

b. *Fain Maag*

Maag testified about her experiences with Owens as his third-grade teacher. She told a story about how, on his first day of school, he threw a desk across the room and asked her what she was going to do about it. She also described how he had a very difficult time on the playground—his peers, recognizing that he was smaller than they were, would chase him around and he would run to her for help. She also testified about him frequently being chased home from school and that his step-father would lock him out of the house, telling him that he had to fight the other boys so he would grow up to be a man. His problems at home were well-known to her, as she described never having a parent-teacher conference, bringing him a turkey on Thanksgiving, and giving him Christmas gifts. She

further testified about his learning deficiencies, particularly his difficulty reading and poor social skills. However, she did note that he was "one heck of a runner," that he was an artist, and that he used words quite well, even though he did not necessarily spell them correctly. *See* ECF No. 16-3 at 485-89; ECF No. 16-4 at 4-5.

c. *Dr. Tora Brawley*

Dr. Brawley testified about her evaluation of Owens' mental abilities. She testified that his verbal memory and verbal learning were below what she would expect, and that he had a documented learning disability, problems with impulsivity, and poor attention. However, she noted that he had improved his IQ score by a significant margin through his own efforts. She testified that many of his problems were documented as early as elementary school and that there were indications that he had lifelong problems with depression. She explained that childhood depression can manifest itself as aggression, irritability, impulsivity, and resistance. She also referred to a head injury he suffered as a child, though she could not specifically point to any brain malfunction as a result of that injury. *See* ECF No. 16-4 at 6-18.

d. *Dr. Thomas Cobb*

Dr. Cobb testified about his impressions of Owens after treating him over the course of about one year while he was at Lieber Correctional Institution within the South Carolina Department of Corrections (SCDC) system. Dr. Cobb testified that his first interaction with Owens was when he reached out to Dr. Cobb for help because Owens had been getting in a lot of

trouble in prison and wanted help staying out of trouble. Dr. Cobb said that Owens was a likeable person, was very intellectual and philosophical, and was someone Dr. Cobb enjoyed talking to. He discussed some of the troubling aspects of Owens' childhood, including that he had a rough childhood and that most or all of his family members were incarcerated.

Dr. Cobb diagnosed Owens with Impulse Control Disorder (Not Otherwise Specified) and Anxiety Disorder (Not Otherwise Specified), and Dr. Cobb explained to the jury what those diagnoses meant. He also explained the medications that he prescribed for Owens for the purpose of allowing his mind to stay calm and give him time to think before reacting. Dr. Cobb felt that this treatment was helpful and that Owens' prognosis would continue to improve if he stayed on the medication. However, Dr. Cobb acknowledged on cross-examination that, after the medication regime started and after he had been treating Owens for about six months, he possessed in his cell a 12-inch shank and then, six weeks later, an 8½-inch shank. *See* ECF No. 16-4 at 18-38.

e. *Dr. Donna Schwartz-Watts*

Finally, Dr. Schwartz-Watts testified about her evaluation of Owens. She spent about ten hours with him over the course of three visits. She also reviewed a great number of his records, including the following: Department of Juvenile Justice (DJJ) treatment records, disciplinary reports, and write-ups; SCDC disciplinary reports; and medical records (both while in custody and out of custody). She also spoke with a number of people in his life, including his mother,

Maag, Dr. Brawley, Dr. Cobb, the forensic psychiatrists at DJJ, and some of his past doctors.

Dr. Schwartz-Watts discussed some of Owens' traumatic childhood experiences, including that he suffered physical abuse, that he witnessed his grandmother shoot a family member, that he frequently did not go to school because he wanted to stay home to check on his mother (who was physically abused by his father and step-father), and that he witnessed his step-father chase his mother through the house with a machete.

Regarding Owens' time at DJJ, Dr. Schwartz-Watts noted that, even though he had significant disciplinary problems, he did well with the ROTC program and was promoted to the highest rank available at his campus.

Dr. Schwartz-Watts diagnosed Owens with Attention Deficit Disorder (ADD), Dysthymic Disorder (chronic depression), and Antisocial Personality Disorder. Regarding the ADD diagnosis, she testified that he began the testing process for ADD while a child, but he never completed the full assessment and was never given any medication for it. She concluded that the ADD symptoms were in partial remission, noting that he could now pay attention and had taught himself Arabic, Swahili, and sign language, and was studying French. She also said that he was reading scholarly works and was teaching other inmates how to read. Regarding the depression diagnosis, she said that he had experienced symptoms of depression beginning at least in 1995 when he was at DJJ and that he began receiving treatment for major depression in 1997. But when he transferred to SCDC

upon turning 18 years old, he was not continued on his medications even though he had significantly improved on them and wanted to continue taking them. He also asked SCDC for psychiatric help at that time, but did not receive it. However, he had improved since he began receiving treatment from Dr. Cobb. She said that Owens was still impulsive, but not as much as he had been in the past. Finally, she testified that he would be able to receive appropriate treatment while in SCDC custody. *See* ECF No. 16-4 at 38-79.

2. *Owens' claims*

Owens asserts that there were two primary areas of mitigation that sentencing counsel should have presented: (1) a more extensive presentation by Hammock, the social historian; and (2) evidence regarding his experiences while in DJJ.

The gist of Owens' complaint regarding sentencing counsel's mitigation presentation is that it was too short and left out many important details. He notes in particular that Hammock's testimony was significantly shorter than it had been in the two prior sentencing proceedings. In support of his argument, he relies in large part on the PCR testimony of Dr. James Garbarino, who was admitted as an expert on the psychological effects of trauma and violence on youths. He based his testimony and opinions on various reports and other paperwork, as well as a four-hour conversation with Owens. Dr. Garbarino testified on multiple topics, including the general effects of chronic trauma on children and risk factors that increase a person's propensity to engage in violence. As to Owens in particular, Dr. Garbarino testified that Owens' risk factors included parental abandonment

and neglect, living in a violent neighborhood, an extensive family history of violence, school difficulties and learning disabilities, exposure to drug and alcohol abuse, and experiencing and witnessing sexual abuse. Dr. Garbarino testified in significant detail about Owens' childhood and young adult life, which included a number of incidences of physical and sexual abuse that Owens allegedly suffered as a child and while incarcerated in local jails, DJJ, and SCDC. However, Dr. Garbarino acknowledged on cross-examination that there was no corroborating evidence to support the sexual abuse allegations. In particular, there was no indication in any of his custodial records that Owens reported these alleged assaults to anyone. *See* ECF No. 16-6 at 181-286.

3. *PCR order*

In the PCR order, the judge concluded that Owens could not establish ineffective assistance of counsel because sentencing counsel "properly conducted a thorough investigation into potential mitigating evidence and chose to present evidence that it thought would favor Owens at trial." ECF No. 16-14 at 161. The PCR court found legitimate reasons that Hammock's testimony was shorter than in the prior sentencing hearings, including that part of her prior testimony was no longer relevant. *Id.* at 162. The PCR court further found that Owens was not prejudiced by any omissions from her testimony, as the other witnesses addressed those topics that she did not.

As to the evidence regarding Owens' experiences at DJJ, the PCR court noted that "[a]lthough Owens met with six defense attorneys, two mitigation investigators, one private investigator, and a number

of mental health experts before meeting with Garbarino in 2009, he failed to inform any of these individuals of this alleged abuse." ECF No. 16-14 at 164. The PCR court further noted that there were no records to support the allegations of abuse. *Id.* The PCR court also credited sentencing counsel's testimony about why they did not want to present mitigation evidence regarding Owens' time at DJJ, specifically finding that doing so "would have come at the great cost of opening the door for the State to introduce evidence that would characterize Owens as a consistently violent criminal who would be a future danger to society and who would not adapt well to prison." *Id.* at 166.

4. *R&R*

In the R&R, the magistrate judge concluded that the PCR court's analysis regarding Hammock's testimony did not involve an unreasonable application of federal law on either *Strickland* factor. In particular, the magistrate judge noted that sentencing counsel's PCR testimony "reveal[ed] careful planning, which incorporated Hammock's own analysis of how effective her past testimony had been." ECF No. 193 at 22. The magistrate judge further concluded that "it was not unreasonable for the PCR court to conclude that 'Owens' trial counsel made the strategic decision not to elicit testimony from Hammock that was no longer relevant.'" *Id.* at 23 (quoting ECF No. 16-14 at 162). The magistrate judge also found that "there is support in the record for the PCR court's finding that sentencing counsel presented a cogent mitigation case through their five witnesses." *Id.* at 28. Finally, the magistrate judge found that "[t]he PCR court did not

unreasonably misapply federal law in finding [Owens] was not prejudiced by any alleged failure on sentencing counsel's part." *Id.* at 29.

Regarding the DJJ evidence, the magistrate judge again concluded that the PCR court's analysis did not involve an unreasonable application of federal law regarding either *Strickland* factor. The magistrate judge recognized that sentencing counsel were aware, at least to some extent, of Owens' experiences while in DJJ, noting sentencing counsel's testimony at the PCR hearing that "[w]e were clearly looking at that. Dr. Schwartz-Watts had his DJJ records. [Owens] was at DJJ at a time when DJJ in Columbia was a mess." *Id.* at 31 (quoting ECF No. 16-6 at 105). The magistrate judge also noted sentencing counsel's testimony that he reviewed Owens' DJJ records, but that he viewed them as a "two-edge sword" because he "wasn't particularly happy with the reason why he was in DJJ." *Id.* (citing ECF No. 16-6 at 106-07).

The magistrate judge also recognized some apparent confusion in the PCR order regarding its discussion of Dr. Garbarino's testimony,[3] but determined that the PCR order's conclusion was not based solely on that finding and that the overall conclusion was amply supported by the record. *Id.* at 32-34. Thus, the magistrate judge concluded that "the PCR court's ultimate conclusion that sentencing counsel were not deficient was not 'based on an unreasonable determination of the facts in light of the

[3] The PCR order repeatedly refers to allegations of ineffective assistance based on a decision not to present Dr. Garbarino's testimony at sentencing, but he was not involved in the case at the time of sentencing; he only became involved at the PCR stage.

evidence presented in the State court proceeding.'" *Id.* at 34 (quoting 28 U.S.C. § 2254(d)(2)).

5. *Objections*

In Owens' objections, he argues that the R&R erroneously concluded that sentencing counsel were not ineffective. He asserts that there was "reasonably available and readily accessible" evidence that should have been presented at sentencing that "was lurid, compelling and humanizing." ECF No 199 at 4. Specifically, he argues that sentencing counsel should have presented evidence regarding his homosexual prostitution and sexual abuse, as well as physical abuse he suffered *in utero* and as a child.

Owens relies in large part on Dr. Garbarino's PCR testimony. But, as noted above, Dr. Garbarino only became involved in the case after sentencing, so his testimony would not have been available to sentencing counsel. Thus, it appears that Owens' argument is that the facts underlying Dr. Garbarino's testimony, not his testimony itself, should have been offered in mitigation.

Owens also references an incident in September 1997 (shortly after his release from SCDC custody, but before the Graves murder) where Reverend Thomas Davenport "was cruising the street looking for sex with a male," and was shot twice in the head from inside his vehicle, implicitly by Owens. Reverend Davenport survived the shooting. Owens says that an arrest warrant that was issued for him for that incident was closed after his arrest for the Graves murder. He says that sentencing counsel should have investigated this incident further for presentation at sentencing. *Id.* at 9.

He summarizes his objection by asserting that he was prejudiced by sentencing counsel's failure to introduce a more vivid picture of his life history because doing so would have created a reasonable probability that at least one juror would have voted for a life sentence.

6. *Analysis*

At the outset, the Court notes the deferential standard of review in this matter as set forth in the caselaw. The question before the Court is not whether sentencing counsel could have or should have presented a more detailed mitigation presentation. The question the caselaw raises is "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard" by presenting the mitigation case that they did. *Harrington*, 562 U.S. at 105. The Court answers that question in the affirmative.

As the magistrate judge recognized, sentencing counsel's investigation "reveal[ed] careful planning, which incorporated Hammock's own analysis of how effective her past testimony had been." ECF No. 193 at 22. While Hammock's testimony was not as detailed as it had been in the prior two sentencings, she and other witnesses covered the same ground that she had covered in her prior testimony.[4] The jury heard about many different aspects of Owens' life, including the violence he personally suffered and witnessed, the lengthy and violent criminal records of his family members, being taught at a young age to handle his

[4] The longer, more detailed presentations at the two prior sentencing proceedings also resulted in death sentences.

problems through violence, his learning disabilities and school difficulties, his mental health issues, and the correlation between these types of issues and a person resorting to violence in adulthood. The fact that sentencing counsel could have introduced some additional details that would have painted an even more vivid picture of his life does not mean that their decision not to introduce those additional details "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686; *see also Moody v. Polk*, 408 F.3d 141, 154 (4th Cir. 2005) ("[P]rejudice does not exist simply because more corroborating evidence could have been presented. . . . Given that the prosecutor did not present any evidence to contradict the evidence of abuse, there is simply no reasonable probability that the jurors doubted the existence of abuse and would have come to a different verdict had they been presented further evidence that abuse in fact occurred.").

Owens focuses a significant portion of his briefings on the argument that counsel should have presented evidence regarding the sexual abuse he allegedly suffered in his early adolescence and while in DJJ. However, he does not dispute that there was no record of these assaults in any of his records and that he denied being a sexual assault victim when asked. As the magistrate judge recognized, "[i]t is difficult to fathom how counsel could have been deficient for failing to search for or present evidence about incidents that Owens never shared with them or his mitigation team and that they had no reason to

know of otherwise even after an extensive and thorough investigation." ECF No. 193 at 34.

Owens asserts that the R&R would "demand proof in the form of an institutional incident report from DJJ or the statement of an eyewitness of this sexual assault before considering that it unreasonably determined this matter factually," and that it "would mandate that [he] hector and cajole his capital counsel and explain to them what they could find and where to find it in presenting his mitigational case." ECF No. 199 at 6-7. He also asserts that "the PCR Court unreasonably applied relevant law by requiring [him] to provide written documentation of his own sexual abuse at DJJ." *Id.* at 6. These statements are not supported by the analysis in the R&R and PCR order.

The R&R appropriately recognized that sentencing counsel cannot be faulted for failing to undercover evidence that they had no reason to believe existed—there was no evidence of sexual abuse in his records and Owens denied experiencing it when questioned by the mitigation team. Far from requiring the submission of written documentation or requiring him to "hector and cajole" sentencing counsel, *id.* at 7, the R&R and PCR court properly refused to blame sentencing counsel for failing to uncover something that he denied occurred and for which there was no evidence in his records, aside from sentencing counsel's general knowledge that all was not well at DJJ during that time period. *See Strickland*, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. . . . And when a defendant has given counsel reason to believe that

pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.").

The fact that Owens told Dr. Garbarino about these experiences at a much later time is not relevant to the analysis. The Court acknowledges Owens' argument that there may well be factors that would make it difficult for a person in his position to admit having been sexually assaulted, but that cannot form the basis of a finding of ineffective assistance of counsel. A habeas petitioner cannot withhold relevant information from his counsel and mitigation team, and then spring it upon the court in a habeas petition in an attempt to overturn his sentence. *See DeCastro v. Branker*, 642 F.3d 442, 456 (4th Cir. 2011) ("[T]he state court did not act unreasonably in refusing Petitioner's attempt to upend his conviction and sentence based on the information that he failed to timely provide to counsel.").

Owens also discusses the shooting of Reverend Davenport, asserting that this information should have been presented to the jury. As mentioned above, this shooting resulted in an arrest warrant being issued for Owens, but ultimately no charge or conviction, as the case was apparently dropped after he was arrested for the Graves murder. It is not clear why he believes that he would have been less likely to receive a death sentence if he had admitted to the attempted murder of a clergyman during the short period between his release from prison and the Graves

murder.[5] There is certainly a "reasonable argument that counsel satisfied *Strickland*'s deferential standard" in not putting this matter in front of the jury. *Harrington*, 562 U.S. at 105.

For these reasons, Owens has failed to establish that the PCR court's denial of his claims in Ground 1 was contrary to or involved an unreasonable application of clearly established federal law, or was the result of unreasonable factual findings. *See* 28 U.S.C. § 2254(d); *Harrington*, 562 U.S. at 101. Accordingly, the Court concludes that he has not met his burden and is therefore not entitled to relief on Ground 1.

B. Ground 2 - Failure to object to admission of prison disciplinary infractions

Ground 2 of the amended petition is as follows:

> Trial counsel was ineffective at Petitioner's 2006 sentencing proceeding for failing to object to the list of prison disciplinary infractions on Confrontation Clause and Due Process, Eighth Amendment and Proportionality Grounds.

ECF No. 117 at 6.

1. *Owens' claims*

At sentencing, the State attempted to introduce, through an SCDC records custodian, a list of Owens' prison disciplinary infractions. Sentencing counsel objected based on the trustworthiness of the records, but did not raise a Confrontation Clause objection. The

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[5] Owens refers to the shooting as an "amazing bit of insight into [his] alter life." ECF. No. 199 at 9.

trial court excluded a number of the infractions and some specific details of others, but ultimately allowed the State to introduce a list of twenty-eight infractions that included such incidents as "throws hot water on an inmate"; "stabs correctional officer Smith in the face with a shank"; "stabs Undra Golden in the shower"; possessing a shank on seven other occasions; and multiple other assaults on officers, staff, and inmates. ECF No. 16-3 at 458-60. Owens asserts that sentencing counsel were ineffective in failing to object based on Confrontation Clause grounds, and that if sentencing counsel had objected, this evidence would have been excluded, which would have resulted in a different outcome at sentencing.

2. *PCR order*

In the PCR order, the judge concluded that Owens could not establish either deficient performance or prejudice. ECF No. 16-14 at 157-160. As to deficient performance, the court concluded that the records were admissible under the business records exception to the hearsay rule and that non-testimonial business records do not implicate the Confrontation Clause. *Id.* at 157-58. The court concluded that these records "were not prepared in anticipation of producing testimony at trial, but rather in accordance with South Carolina statutory law for the administration of prison affairs." ECF No. 16-14 at 158-59. The PCR court also cited *Crawford v. Washington*, 541 U.S. 36 (2004) for the proposition that business records are non-testimonial and therefore not subject to confrontation. *Id.* at 158 (citing *Crawford*, 541 U.S. at 56). As to prejudice, the court concluded that a Confrontation Clause objection would have been

overruled and that it was harmless error in any event because "the State introduced overwhelming evidence of Owens' future dangerousness, bad character, and inability to adapt to prison life." *Id.* at 160.

3. *R&R*

In the R&R, the magistrate judge concluded that Owens failed to show that the PCR court unreasonably applied federal law in finding the disciplinary records to be non-testimonial in nature and therefore exempt from Confrontation Clause scrutiny. ECF No. 193 at 38-39. The magistrate judge noted that the PCR court cited South Carolina statutory and case law requiring SCDC to maintain inmate records to support the argument that the primary purpose of the records was not to "creat[e] an out-of-court substitute for trial testimony." *Michigan v. Bryant*, 562 U.S. 344, 358 (2011). The magistrate judge further noted that Owens did not point to any Supreme Court case to the contrary. Thus, the magistrate judge concluded that the PCR court did not unreasonably apply federal law in determining that the prison disciplinary records were non-testimonial in nature. ECF No. 193 at 40.

As to the PCR court's alternative finding that the disciplinary records were cumulative to other evidence already admitted, the magistrate judge found that there was support in the record for that conclusion. In particular, Major Thierry Nettles at Lieber Correctional Institution testified that Owens was "assaultive, destructive, and damaging . . . bar none, my most problematic inmate," and Dr. Schwartz-Watts testified regarding his extensive history of prison disciplinary infractions and she was questioned about the details of some of them. *Id.* at 40-41.

Finally, the magistrate judge concluded that, even if *de novo* review applied, Owens still would not be entitled to relief because the Confrontation Clause does not apply at sentencing, including capital sentencing. *Id.* at 41 (citing *United States v. Umaña*, 750 F.3d 320, 346 (4th Cir. 2014)).

4. *Objections*

In Owens' objections, he relies in large part on the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) for the proposition that the prison disciplinary records were testimonial in nature and, thus, even if they qualified as business records for hearsay purposes, they were still inadmissible under *Crawford*. He also quotes at length the opinion dissenting from the denial of rehearing en banc in *Umaña*. Owens asserts that he was prejudiced by the admission of these records because "the jury was allowed to consider highly prejudicial evidence that he had no opportunity to subject to adversarial testing." ECF No. 199 at 19. He does not address the R&R's conclusion that there is support in the record for the PCR court's alternative finding that the disciplinary records were "cumulative proof of aggravating factors." ECF No. 16-14 at 160.

5. *Analysis*

In arguing that his prison disciplinary records were testimonial in nature, Owens relies in large part on *Melendez-Diaz*, but that case is distinguishable. *Melendez-Diaz* involved a question of whether, in a drug case, state prosecutors could prove that the substance at issue was cocaine by relying on affidavits from forensic analysts, or whether the analysts were subject to confrontation. 557 U.S. at 307. The Supreme

Court concluded that the affidavits were testimonial, and the preparers therefore subject to confrontation, because they were "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,'" and the sole purpose of the affidavits was to provide evidence of the composition, quality, and weight of the substance. *Id.* at 311 (quoting *Crawford*, 541 U.S. at 52).

By contrast, the prison records in this case were not prepared for the purpose of establishing Owens' guilt for the offenses for which he was charged. As the PCR court concluded, these records were prepared "in accordance with South Carolina statutory law for the administration of prison affairs." ECF No. 16-14 at 158-59. Furthermore, the R&R correctly notes that both the Supreme Court and Fourth Circuit have held that there is no confrontation right at sentencing, even in capital cases.[6] *See Williams v. New York*, 337 U.S. 241, 246-48 (1949); *Umaña*, 750 F.3d at 346. Thus, this Court concludes that there is a "reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105.

In addition, Owens failed to object to the magistrate judge's conclusion that the PCR court did not make an unreasonable factual determination in concluding that the list of prison disciplinary infractions was cumulative. Because of the lack of objection, the Court is not required to give an

[6] Owens relies on the opinion dissenting from denial of rehearing en banc in *Umaña*, but that position has not prevailed on a majority of the Fourth Circuit or the Supreme Court, which denied certiorari in *Umaña*. 135 S. Ct. 2856 (2015).

explanation for adopting the recommendation, *see Camby*, 718 F.2d at 200, but the Court notes that there is support in the record for the PCR court's and the magistrate judge's conclusions.

For these reasons, Owens has failed to establish that the PCR court's denial of his claims in Ground 2 was contrary to or involved an unreasonable application of clearly established federal law, or was the result of unreasonable factual findings. *See* 28 U.S.C. § 2254(d); *Harrington*, 562 U.S. at 101. Accordingly, the Court concludes that he has not met his burden and is therefore not entitled to relief on Ground 2.

C. Ground 3 - Failure to object or request proper instructions regarding the crime scene video

Ground 3 of the amended petition is as follows:

> Trial counsel was ineffective at Petitioner's 2006 sentencing proceeding for failing to object or request proper instructions from the court regarding the crime scene video.

ECF No. 117 at 6.

1. *Owens' claims*

At Owens' sentencing, the State introduced, through the testimony of a responding officer, a convenience store video, which showed two armed, masked individuals entering the convenience store and Graves being shot. Owens summarizes the video as follows:

> The video does indeed show two masked men dressed in dark clothing entering the Speedway store, but it is impossible to

> determine their identities. After the two men enter, the video focuses primarily on a single man standing in front of the counter, directly opposite Ms. Graves and pointing a gun at her head. The second man is not visible for most of the remainder of the video. The man opposite the counter continues pointing his gun at Ms. Graves and then she falls backwards to the floor before the two men run away out of the store.

ECF No. 117 at 73 (citation omitted). At Owens' first two sentencing proceedings, his codefendant testified that he, not Owens, was the person primarily visible in the video, and the State introduced evidence showing that the fatal shot came from the person standing off-camera. The co-defendant did not testify at the third sentencing proceeding.

In his PCR application, Owens raised this issue by arguing that sentencing counsel were ineffective in "fail[ing] to object and/or request proper instructions from the court when the State played a crime scene video without further explanation or analysis." ECF No. 16-5 at 2. In his habeas petition, he argues that sentencing counsel were ineffective in "fail[ing] to object to [the responding officer's] testimony, seek an explanatory instruction or otherwise convey to the jury that no jury or judge had ever found that [Owens] was the triggerman." ECF No. 117 at 74. He asserts that, because the jurors had been told that he had been convicted of murder and that they would be seeing video evidence, they assumed that he was the person primarily visible in the video. *Id.* at 73. He also notes that the jurors in the third resentencing were

not told that the jury from the guilt phase could have found him guilty without first determining that he was the triggerman. *Id.* He asserts that "[t]he video's admission, under these particular circumstances and without further instruction, was misleading and prejudicial, and it undermined the jurors' ability to meaningfully consider that [he] may not have been the shooter." *Id.* at 75. He claims that there was no forensic evidence establishing that he fired the fatal shot and that the only other evidence that he was the triggerman was the "prior self-interested testimony" of his co-defendant and his "jilted ex-girlfriend." *Id.* at 79.

Additionally, in his petition, Owens argues that sentencing counsel had an obligation to affirmatively respond to the State's implication that he was the triggerman. *See id.* at 80 ("The state's presentation of aggravating testimony—even of such little evidentiary value, as described here—triggers counsel's obligation to rebut if there is a means by which to do so.").

2. *PCR order*

In the PCR order, the judge concluded that sentencing counsel were not ineffective in failing to object to the State playing the video because "there was nothing improper about the State's publication of the crime scene video to the jury." ECF No. 16-14 at 150. The court noted that "[t]he video was relevant to the aggravating factors alleged by the State, the circumstances of the crime, and the character of the defendant, all of which are proper factors for a sentencing jury in a capital trial to consider." *Id.* at 150-51. Thus, the court concluded that sentencing counsel were not ineffective in failing to object to the

video because there was no reasonable basis for an objection. *Id.* at 151.

As to any possible instruction from the judge regarding the video, the PCR court concluded that "any jury instruction that the court could have given regarding the contents of the video would have required the court to comment upon the facts of the case, which would have been improper." *Id.* The court also noted that sentencing counsel testified at the PCR hearing "that they knew that an instruction clarifying the content of the crime scene video would have violated South Carolina law and that a request for any such instruction would be denied." *Id.*

The PCR court also concluded that Owens was unable to show that he was prejudiced by sentencing counsel's failure to object or request an instruction. *Id.* The court noted that the jury "heard testimony that Owens was the triggerman, that he shot Graves while standing behind the counter and near the safe, and that he shot Graves because she would not open the safe." *Id.* The court concluded that in light of all the evidence presented, he could not prove that there was a reasonable probability that he would have received a life sentence had sentencing counsel objected or had the sentencing judge instructed the jury as to its contents. *Id.* at 152.

3. *R&R*

In the R&R, the magistrate judge found that the PCR court did not make unreasonable factual findings or unreasonably apply federal law when it denied Owens' claims on this ground. ECF No. 193 at 46-47. In responding to his argument that the PCR court unreasonably found that sentencing counsel testified

that they "knew" that a request for a clarifying instruction about the video would have been denied, the magistrate judge determined that "the PCR court reasonably concluded that sentencing counsel were not deficient for failing to object because there was no proper objection to be made . . . ." *Id.* at 44. The magistrate judge also determined that the record supported the PCR court's conclusion that Owens had not demonstrated that there was a reasonable probability that he would have received a life sentence had the State not played the video or had the judge instructed the jury as to its contents. *See id.* at 45-46.

Additionally, the magistrate judge concluded that, to the extent Owens' argument exceeded the claim that had been raised to and ruled on by the PCR court, the argument was procedurally barred. *Id.* at 46. Thus, the magistrate judge determined that his argument that sentencing counsel had an obligation to rebut the State's evidence that he was the triggerman was procedurally barred and that he had neither alleged nor demonstrated cause and prejudice to excuse the procedural bar. *Id.*

4. *Objections*

Owens' objections are consistent with the arguments he raised in his petition. *See* ECF No. 199 at 23-27. He did not specifically address the magistrate judge's conclusion that any argument that sentencing counsel had an obligation to rebut the State's evidence that he was the triggerman was procedurally barred.

5. *Analysis*

Regarding the video being shown to the jury, Owens must show that the PCR court made

unreasonable factual findings or unreasonably applied federal law in concluding that sentencing counsel were not ineffective in failing to object to the video being shown. He has not met that burden, as the PCR court correctly concluded that there was nothing improper about the video because it was relevant to the issues before the jury and there was no other reasonable basis for an objection. *See* ECF No. 16-14 at 150-51. Accordingly, there is at least a "reasonable argument that counsel satisfied *Strickland*'s deferential standard" in not making such an objection. *Harrington*, 562 U.S. at 105.

Similarly, regarding any instruction from the judge about the video, Owens cannot show that sentencing counsel were ineffective in failing to request some sort of clarifying instruction. The PCR court correctly noted any such instruction would have been improper. ECF No. 16-14 at 151 (citing S.C. Const. art. V, § 21).

Owens makes much of the fact that the PCR court states that sentencing counsel testified at the PCR hearing that they "knew" that a request for such an instruction would have been denied, even though they actually testified that they had not considered making such a request at the sentencing hearing. *See* ECF No. 16-6 at 28-29, 81. However, they did testify at the PCR hearing that they were aware that it would have been improper for the judge to have commented on the video. *See id.* at 61, 128. Contrary to Owens' argument, it is irrelevant that the PCR order was somewhat imprecise in implying that they had made a strategic decision to not object because they knew at the time that it would have been denied. The bottom

line is that a request for the judge to comment on what the video showed would have been denied based on South Carolina law, and it is not ineffective assistance to fail to recognize an opportunity to make a request that would be denied.

Owens also failed to demonstrate that the PCR court made unreasonable factual findings or unreasonably applied federal law in concluding that he could not prove that he was prejudiced by the failure to object to the introduction of the video or the failure to request a clarifying instruction about the video. The PCR court noted that the jury "heard testimony that Owens was the triggerman, that he shot Graves while standing behind the counter and near the safe, and that he shot Graves because she would not open the safe." ECF No. 16-14 at 151. He questions the reliability of the testimony implicating him as the triggerman by his "self-interested" co-defendant and his "jilted ex-girlfriend," but his own evaluation of their reliability does not make the PCR court's findings unreasonable. The Court cannot conclude that the PCR court made unreasonable factual findings or unreasonably applied federal law in reaching the conclusion that he failed to demonstrate prejudice. *See Cullen*, 563 U.S. at 181 (noting the "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt").

Finally, to the extent that Owens is arguing that sentencing counsel had an affirmative obligation to rebut the State's implication that he was the triggerman, the magistrate judge correctly determined that such an argument is procedurally

barred because it was not raised to the PCR court and Owens has failed to demonstrate cause and prejudice to excuse the default. *See Gray*, 518 U.S. at 162. Furthermore, as the magistrate judge noted, it is not clear from Owens' petition what evidence he believes sentencing counsel should have presented to rebut the State's argument that he was the triggerman. *See* ECF No. 193 at 46 n.14.

For these reasons, Owens has failed to establish that the PCR court's denial of his claims in Ground 3 was contrary to or involved an unreasonable application of clearly established federal law, or was the result of unreasonable factual findings. *See* 28 U.S.C. § 2254(d); *Harrington*, 562 U.S. at 101. Accordingly, the Court concludes that he has not met his burden and is therefore not entitled to relief on Ground 3.

D. Ground 4 - Failure to object to testimony from Officer Wood and Juliana Christy

Ground 4 of the amended petition is as follows:

> Trial counsel was ineffective at Petitioner's 2006 sentencing proceeding for failing to object to irrelevant, inflammatory, and prejudicial testimony from both Officer Joe Wood, who testified Petitioner gave him "cold chills," and Juliana Christy, a victims' advocate who testified this case was "the hardest case she ever had to work on" in fifteen years at the Greenville County Sheriff's Department.

ECF No. 117 at 6.

1. *Owens' claims*

Owens argues that sentencing counsel were ineffective in failing to object to certain testimony from Officer Joe Wood, who was one of the investigators on the Graves murder, and Juliana Christy, a victims' advocate with the Greenville County Sheriff's Department.

a. *Officer Wood*

Wood testified about his interview with Owens after he was arrested for the Graves murder. Wood testified, in relevant part, as follows:

> Q: We were at the point where you told Mr. Owens that what he was telling you was not adding up, or something to that effect?
>
> A: That's correct.
>
> Q: And did he say anything to you in response to that?
>
> A: He did.
>
> Q: What did he say?
>
> A: He said "the only thing I'm here for is to eat, sleep, shit and piss. I don't give a shit. I was born to be in jail."
>
> Q: After he made that comment, did you make any other comment to him?
>
> A: Yes, ma'am.
>
> Q: What was that?
>
> A: I asked him at that point if he was aware that his mother was—had indicated that she was going to turn him in.
>
> Q: Did he respond to that?

A: He did.

Q: What did he say?

A: He said "if my mom says anything, tell her I said adios, to kiss her ass too. She can kiss my ass too. Tell Ian and the rest of them assholes to fuck themselves. If I go to jail, I go to jail. I don't give a shit."

Q: After he made that comment, did you say anything to him or did he make any further comments to you about himself?

A: He was pretty much just talking and I was writing as fast as I could, because I wanted to make sure that I got everything written down. He pretty much just continued on from that point and he said "people tend to think I have a sick and evil mind, but I have a very educated mind. I would like to take the blame for all of this, but I'm not going to take it all myself. I made my mark on Hall Street after I got out of jail selling lots of drugs. I made lots of money. Yeah, I want to be remembered as the one who killed the most people in Greenville. I'm a real menace."

Q: Mr. Wood, what was Freddie Owens demeanor during this conversation that you had with him?

A: He was cocky. He had a don't-care attitude. He smiled a lot when he was saying this.

Q: How did he make you feel?

A: He's one of two people out of probably 25 years in homicide that I have interviewed that actually gave me cold chills.

ECF No. 16-3 at 164-65.

Owens argues that sentencing counsel were ineffective in failing to object to the "how did he make you feel?" question and the "cold chills" answer, as he asserts that this allowed "an arbitrary, speculative, inflammatory and irrelevant consideration into the jury's sentencing decision." ECF No. 117 at 84. He also asserts that sentencing counsel were ineffective in failing to object to the prosecutor's reference to the "cold chills" testimony in his closing argument. *Id.* at 85.

b. *Juliana Christy*

Christy testified about the morning she told Graves' two young children that their mother had been killed. She explained how she went to their house to notify the children, how the children reacted upon hearing about their mother's death, and how they had to go off with their grandmother, whom they barely knew. ECF No. 16-3 at 340-46. At the conclusion of Christy's testimony, she testified, in relevant part, as follows:

> Q: Now, Ms. Christy, how long have you been a victim advocate?
>
> A: 15 and a half years.
>
> Q: And in that 15 years, how many cases have you been involved in in which you assisted victims or their families on crimes?
>
> A: Thousands.
>
> Q: And how would you describe this event in your career?

> A: This was the hardest, hardest case I have ever had to work on. I have never had to do death notification before, or since, and this is definitely the hardest case I have. It affected me the most deeply, and still does.

ECF No. 16-3 at 347.

Owens argues that sentencing counsel were ineffective in failing to object to Christy's testimony describing the event in the context of her career, as he asserts that "[her] testimony relayed the impact that Ms. Graves' death had on her own life and career," which is not permissible victim impact evidence pursuant to *Payne v. Tennessee*, 501 U.S. 808 (1991). ECF No. 117 at 88. He also asserts that she improperly provided opinion testimony by saying that this case was worse than any other she had handled. *Id.* at 89. Finally, he asserts that this testimony was more prejudicial than probative. *Id.*

2. *PCR order*

In the PCR order, the judge concluded that Owens could not establish either deficient performance or prejudice as to the testimony from Wood or Christy.

As to Wood, the PCR court concluded that his entire testimony was admissible because it was introduced as evidence of Owens' character and future dangerousness. ECF No. 16-14 at 153. And because it was admissible, it was properly relied on by the State in closing. *Id.* Thus, the PCR court concluded that sentencing counsel were not deficient in failing to object to its admission. *Id.* Additionally, the PCR court concluded that, based on the entirety of the State's evidence, he could not prove that there was a reasonable probability that he would have received a

life sentence had sentencing counsel objected. *Id.* at 153-54.

As to Christy, the PCR court concluded that her entire testimony was also admissible because it was offered to show the harm that Owens caused by murdering Graves and it was relevant to a determination of his moral culpability. *Id.* at 154-55. As to the Rule 403 argument, the PCR court concluded that her testimony was properly admitted for the purposes permitted by *Payne*. *See id.* at 156. Finally, the PCR court concluded that he could not show prejudice because even if she had not testified, the State would have presented other evidence of the effect of Graves' murder on her children, and Christy's testimony was cumulative of other testimony in evidence. *See id.* at 156-57.

3. *R&R*

In the R&R, the magistrate judge concluded that Wood's testimony about Owens giving Wood "cold chills" can reasonably be interpreted as a description of a physical sensation that Owens' statements prompted in Wood, rather than an opinion. ECF No. 193 at 48. The magistrate judge further determined that "[i]t was not unreasonable for the PCR court to find that Wood's testimony concerning Owens's statements and demeanor constituted character evidence, and the 'cold chills' statement was part of that character evidence." *Id.*

As to Christy's testimony, the magistrate judge found that "a reasonable interpretation" of it was that "it served as further evidence of how deeply Graves's death impacted her children." *Id.* at 50. The magistrate judge concluded that the PCR court did not

make unreasonable factual findings or unreasonably apply federal law in making that finding. *Id.*

The magistrate judge also found that, even if sentencing counsel could have been successful in objecting to Wood's or Christy's testimony, Owens had to demonstrate to the PCR court that sentencing counsel's failure to object rendered their representation constitutionally insufficient, and that he failed to meet that burden. *Id.* at 51.

Finally, the magistrate judge concluded that the PCR court did not make unreasonable factual findings or unreasonably apply federal law in concluding that Owens could not show that he was prejudiced by these asserted errors. *See id.* at 52-53.

4. *Objections*

In his objections, Owens argues that Wood's "cold chills" testimony was "irrelevant, inflammatory, and prejudicial." ECF No. 199 at 28. Owens asserts that sentencing counsel should have known that this testimony was coming and objected to it because Wood made the same comment at the first two sentencings. *Id.* at 28-29. Owens argues that the PCR court did not explain how this testimony constituted non-opinion evidence or reflected his character, and that "the R&R confabulates a physical sensation with the ability to use that same sensation as a pathway to character evidence." *Id.* at 29-30.

In his objections regarding Christy's testimony, Owens asserts that *Payne* does not allow the testimony that she gave, and that she should not have been permitted to testify about the impact the death notification had on her own life and how it compared to other cases she has handled.

5. *Analysis*

Regarding Wood's testimony, Owens must show that the PCR court made unreasonable factual findings or unreasonably applied federal law in concluding that counsel were not ineffective in failing to object to Wood's "cold chills" testimony. Owens has not met that burden, as it was not unreasonable for the PCR court to conclude that the questioned portion of Wood's testimony constituted character evidence. As the State argued, Wood hearing Owens describe himself as "a real menace" and that he wanted "to be remembered as the one who killed the most people in Greenville," and then saying that these statements gave Wood, a veteran homicide detective, cold chills conveyed to the jury that he treated Owens' words as serious statements, not bravado. It is reasonable to conclude that Wood likely would not have felt that way if he thought Owens was embellishing his criminal exploits. Thus, the PCR court correctly concluded that there was nothing improper about Wood's testimony, and there is at least a "reasonable argument that counsel satisfied *Strickland*'s deferential standard" in not objecting to it. *Harrington*, 562 U.S. at 105.

Regarding Christy's testimony, the Court agrees with the magistrate judge that the PCR court did not make unreasonable factual findings or unreasonably apply federal law in finding it admissible. While the particular question at issue asked about the impact of "this event" on her career, ECF No. 16-3 at 347, it was clear from the context of the question that "this event" referred to the death notification, not the murder itself. She was not testifying about the impact the murder had on her; she was testifying about the

terrible impact the murder had on Graves' young children, who did not testify at the sentencing. The context of her testimony made it clear that when Christy said this case was harder for her than any other case she had handled, she felt that way because of the profound impact that the notification had on the children.

The fact that Christy's testimony was a step removed from the direct testimony of a family member that the Supreme Court permitted in *Payne* does not change the analysis. In his objections, Owens says that Christy, because she was not a member of Graves' family, "was therefore not within the narrow class of witnesses *Payne* permits to provide a quick glimpse of the victim's life." ECF No. 199 at 32 (italics added). *Payne*, however, contains no such limitation. Though the victim impact testimony in that case happened to come from the victim's mother, *Payne*, 501 U.S. at 814-15, the Supreme Court's decision did not hinge on that fact. The Court merely held that the Eighth Amendment "erects no *per se* bar" on a state "permit[ting] the admission of victim impact evidence and prosecutorial argument on that subject." *Id.* at 827. Owens does not cite any case law for the proposition that the testimony has to come directly from the affected family member.

Furthermore, to the extent Owens argues that Christy's testimony was inadmissible because she mentioned the impact it had on her, that argument is untenable. Even if her testimony should not have ventured into the impact the death notification had on her, he cannot show any prejudice from its admission. It is not reasonable to conclude that the jury, having

just heard the heart-wrenching story about how Graves' young children reacted to the news of her death, would have been influenced in any meaningful way by a sheriff's office employee also being upset about it.

For these reasons, Owens has failed to establish that the PCR court's denial of his claims in Ground 4 was contrary to or involved an unreasonable application of clearly established federal law, or was the result of unreasonable factual findings. *See* 28 U.S.C. § 2254(d); *Harrington*, 562 U.S. at 101. Accordingly, the Court concludes that he has not met his burden and is therefore not entitled to relief on Ground 4.

E. Ground 5 - Failure to object to improper closing argument and statements during jury selection

Ground 5 of the amended petition is as follows:

> Petitioner's rights under the Eighth and Fourteenth Amendments were violated as a result of the prosecution's improper closing argument and improper statements during jury selection, and trial counsel was ineffective for failing to object to the same.

ECF No. 117 at 6.

1. *Owens' claims*

Owens alleges that the solicitor made a series of statements in his closing argument that violated federal and state law. In his second amended PCR application, Owens challenged the following statements:

(1) "Only limited circumstances are allowed for us to seek the death penalty, and rarely do we seek the death penalty in all those cases that are eligible. In only certain cases do we choose to seek the death penalty." ECF No. 16-4 at 137.

(2) "There are mean and evil people in this world who do not deserve to continue to live with the rest of us, regardless of how confined they may be. The law limits the right to seek the death penalty to a very select number of cases, very few, and we seek the death penalty in only a few, but the circumstances where we seek it is available for mean and evil people who commit atrocious acts of murder; the worst of the worst. That is what the death penalty is reserved for. Those whose behavior sets them apart even from the criminal world, and that is Freddie Owens, and this murder and his behavior are one of those cases." *Id.* at 140-41.

(3) "Big prison is like a little city. In prison he will have all the necessities of life. Sure, he will be in solitary, but he will still have food to eat. They will provide him clothes. He will have books to read. He will be able to recreate and exercise. He will have doctors to take care of him. He will have the clothing that they provide, and he will have contact with his family and loved ones, and TV at times, and he will have family business. Not

> much more than a change of address for Freddie Owens. So don't think putting Freddie Owens in prison for the rest of his life is going to be a significant punishment for him. *Id.* at 146.
>
> (4) "They have said earlier that the solicitor is not satisfied with a life sentence, and I am not, and that's why we have asked for the death penalty. They told you that I was going to want the death penalty, and I do." *Id.* at 140.

See ECF No. 16-5 at 4.[7]

Owens argues that sentencing counsel were ineffective in failing to object to these statements. He asserts that evidence regarding general prison conditions is not relevant and that it was improper for the solicitor to inject his personal opinion into the jury's decision. ECF No. 117 at 98. He also asserts that the solicitor's arguments "undermined the concept of discretion afforded to a jury as required by the Eighth Amendment," and that "[t]hey are inconsistent with the Court's mandate in *Caldwell* [*v. Mississippi*, 472 U.S. 320 (1985)] that the jury cannot be '. . . led to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere.'" *Id.* at 99. Finally, he asserts that "the PCR court refused to consider the cumulative

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[7] To the extent Owens now seeks to challenge any other statements made in closing, such a challenge is procedurally defaulted because no other statements were raised in the PCR application, and he has not set forth cause and prejudice to excuse the default. *See Gray*, 518 U.S. at 162. Accordingly, the above statements are the only ones the Court will address.

impact of constitutional error and instead erroneously addressed each of the Solicitor's comments in turn." *Id.* at 104.

2. *PCR order*

In the PCR order, the judge concluded that the solicitor's first and second statements quoted above, to the effect that the State pursues a death sentence only rarely, were not improper, as the solicitor was merely explaining that the State does not pursue the death penalty in every death-eligible case. ECF No. 16-14 at 167.

The judge concluded that the third statement quoted above, to the effect that the death penalty was appropriate because a life in prison would have been too easy on Owens, was also not improper, as "[t]hese arguments were tailored to the specific crimes that Owens committed and to Owens himself." *Id.* The judge determined that, given some of Owens' statements to investigators after the Graves murder—that he "was born to be in jail" and "If I go to jail, I go to jail, I don't give a shit"—it was appropriate to argue that life in prison would not be a significant punishment for him. *Id.* at 168.

The judge also concluded that the fourth statement quoted above, to the effect that the solicitor himself wanted the death penalty, was not improper given the context in which it was made. *Id.* The judge determined that this was simply a statement that he was seeking the death penalty because it was appropriate under the facts of the case and that these comments merely explained the State's position. *Id.*

Additionally, the judge found that, even if Owens could establish deficiency, he could not prove

prejudice, as the challenged comments were only a small portion of a lengthy closing argument and the trial court told the jury that they were not required to return a death sentence. *Id.* The judge concluded that "[g]iven the admitted evidence of guilt, the circumstances of the crime, the curative jury instruction, and the great amount of evidence in aggravation, Owens is unable to prove that there is a reasonable probability that the jury would have returned a life verdict had the solicitor not made these comments." *Id.* at 169.

3. *R&R*

In the R&R, the magistrate judge concluded that "Owens has failed to show that the PCR court's conclusions rest on unreasonable factual findings or an unreasonable application of federal law." ECF No. 193 at 54. The magistrate judge found that the PCR court's reasoning was consistent with federal law and that Owens failed to demonstrate how the PCR court's conclusions were contrary to or an unreasonable application of federal law. *Id.* As to Owens' assertion that the PCR court did not consider the cumulative impact of constitutional error, the magistrate judge determined that "[w]hile the PCR court considered the propriety of each comment separately, it considered the comments together when determining whether [Owens] was prejudiced by sentencing counsel's failure to object." *Id.* at 55.

4. *Objections*

Owens argues that the solicitor's arguments "suggested that the jurors should defer to his expertise in evaluating the gravity of [Owens'] crime relative to other murders," and that the arguments "misle[d] the

jury into believing that a lifetime in prison would amount to a comfortable, easy life" for Owens. ECF No. 199 at 37. He argues that sentencing counsel were deficient in failing to object to these statements "both as they were individually stated during the course of the trial and in view of the cumulative impact it had." *Id.* at 38. He asserts that the PCR court did not address the cumulative impact of the asserted errors and that the R&R erroneously "continue[d] this piecemeal analysis rather than evaluate the cumulative effect the misstatements had on the jury's view of its role and responsibility." *Id.* at 39.[8]

5. *Analysis*

As to the solicitor's statements that the State only rarely pursues the death penalty, the PCR court did not unreasonably apply federal law in concluding that these statements were not improper. Owens does not cite any cases holding that it is improper for a prosecutor to explain that while most cases do not warrant pursuit of the death penalty, the particular case in question does warrant it.

Regarding the solicitor's statements about the relative ease of life in prison for Owens, the PCR court did not unreasonably apply federal law in concluding

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[8] Owens also argues that the solicitor misstated the law by arguing that it was Owens' burden to prove that he deserved a life sentence rather than the death penalty and that he improperly urged the jury to impose a death sentence for the greater good of the community. ECF No. 199 at 38. However, as noted above, these arguments were not raised to or ruled on by the PCR court and are therefore procedurally barred. *See Gray*, 518 U.S. at 162. Furthermore, in considering the argument in full and the judge's charge on the law, no relief is warranted.

that these statements were not improper. The PCR court properly recognized that, given Owens' statements to the effect that he was not concerned about being incarcerated, there was nothing wrong with the solicitor arguing that prison would not be an adequate punishment for him.

As to the solicitor's statements that he wanted the death penalty, the PCR court did not unreasonably apply federal law in concluding that these statements were not improper. As the PCR court recognized, these statements were merely the solicitor explaining the State's position that the death penalty was appropriate, and Owens has not cited any cases to the effect that such a statement is improper.

Finally, the PCR court did not unreasonably apply federal law when it concluded that, even if Owens could show deficiency, he could not show prejudice. He repeatedly asserts that both the PCR court and the R&R erred in not considering the cumulative impact of the statements, ECF No. 199 at 39, but that assertion is not accurate. As the magistrate judge noted, the PCR court evaluated each comment separately for deficiency purposes, but properly considered them together when evaluating prejudice. ECF No. 193 at 55 (citing ECF No. 16-14 at 167-69).

For these reasons, Owens has failed to establish that the PCR court's denial of his claims in Ground 5 was contrary to or involved an unreasonable application of clearly established federal law, or was the result of unreasonable factual findings. *See* 28 U.S.C. § 2254(d); *Harrington*, 562 U.S. at 101. Accordingly, the Court concludes that he has not met

his burden and is therefore not entitled to relief on Ground 5.

F. Ground 6 - Failure to present evidence of institutional negligence

Ground 6 of the amended petition is as follows:

> Trial and collateral counsel were ineffective to the prejudice of the applicant by failing to investigate, develop and present evidence of institutional negligence which would have mitigated the State's theory that the in-custody death of Mr. Lee conclusively established future dangerousness and the only sentencing option for the petitioner was death. Evidence from expert witnesses available at the time of the petitioner's sentencing trial demonstrated that institutional negligence in failing to classify, and detain the petitioner in accordance with that classification, was the proximate cause of the death of Mr. Lee. 5th, 6th, 8th and 14th Amendments to the Constitution of the United States of America; *Skipper v South Carolina*, 476 US 1 (1986).

ECF No. 117 at 6-7.[9]

1. *Owens' claims*

In Ground 6, Owens alleges that sentencing counsel were ineffective in failing to present evidence of Greenville County Detention Center's institutional negligence regarding the murder of Christopher Lee

[9] Owens acknowledges that this ground has not been exhausted and is being advanced pursuant to *Martinez*. ECF No. 117 at 112.

that Owens committed in the early morning hours of February 16, 1999, which was immediately after his conviction but before his first sentencing.[10] He

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[10] Owens gave the following written confession later that morning:

> At eleven p.m., on 2-15-99, myself and the other inmates in my cell block watched the news and saw that I was found guilty. I then worked out and took a shower. I went to bed and woke up whenever they came to get one of the other inmates to take him to Perry. This was around three a.m. While they were getting the guy ready to go to Perry, Christopher Lee said you won't be the only one because Freddie is coming down there with you. I told him to shut the fuck up. He told me his cousin was on the jury. I asked him if he knew that they convicted me. He said fuck you, I know because my cousin was on the jury. End quote. I then walked into his cell and hit him in the eye. He fell down on his back. I got on top and started hitting him mostly in the face and throat. I took a pen from his right hand and my right hand and stabbed him in his right eye. I then tried to stab him in his chest but the pen would not go in. I then stabbed him in his throat. I don't know if the pen went into his throat or not. He started bleeding out of his mouth. There was a sheet tied into a snare laying on his bed. I reached and got it and put it over his head onto his neck. I wrapped it around my left hand and pulled it tight. I started hitting him in the face with my right hand. Then I started choking him with my right hand and pounding his head against the floor. He never fought back after the first punch he was out of it. He was still breathing and the stuff coming out of his mouth stunk, so I stood up and stomped his head and body with my feet. I saw a black and blue lighter under the bunk. I grabbed it and burned him around the eye and on the left side of his head. I rammed his head into the wall. He was still moaning and breathing. I walked out of the cell to leave him alone. I heard the crazy moaning again, so I

acknowledges that this claim is procedurally defaulted, but attempts to overcome that bar by asserting that his PCR counsel was ineffective in failing to raise this issue. He also ties this claim in with Ground 7 by alleging that counsel should have "weav[ed] together" evidence of institutional negligence with evidence of brain damage. *Id.* at 109.

> grabbed the pen off the floor where I had thrown it and went back into his cell. I got back over him and rammed the pen up his right nostril. I closed his left nostril with my left hand and started choking him with my right hand. The sheet was still around his neck. I was choking him above the sheet. Throughout all of the above he was moaning and breathing. I kept checking him to see if he was dead. I would check his pulse on his wrist, and I put my ear beside his neck and chest to hear if he was breathing. I wanted him to be dead at that time. I finally thought he was dead, so I threw him on his bunk and covered him up. The first time I put him on the bunk he fell off. I then packed my stuff and put my mattress on the table and went to- sleep. While I packed my stuff, the black guy that had been on the top bunk of Christopher's cell the whole time this went on got down and put his mattress on the other table and sit down. Everyone in the cell block was awake when I left Christopher. I woke up when Hefner opened the door to bring in breakfast. When I got in the line I was third in line and Sergeant McNeill walked by and I told him to cuff me. He said he would not, and I told him he would if he with [sic] go into Christopher's cell. He looked into the cell and Hefner went into the cell. Sergeant McNeill told Hefner to cuff me, which he did. Sergeant McNeill then called someone on the radio. I really did it because I was wrongfully convicted of murder.

ECF No. 16-3 at 405-08.

Regarding the murder, Owens alleges, upon information and belief, that there was no correctional officer assigned to the cell block where Owens and Lee were housed, and that the visual security system was not in operation at that time. *Id.* at 104-05. Two years after the murder, Lee's personal representative brought a civil action against several defendants, including Greenville County and the Greenville County Detention Center. *Lee v. Greenville County, et al.*, No. 6:01-cv-00427-TLW (D.S.C.).[11] Owens was not a party to the case. Prior to jury selection, the case settled for $600,000.

2. *R&R*

In the R&R, the magistrate judge began by recounting the facts of Lee's murder, including Owens' written confession explaining in graphic detail how he carried out the murder. ECF No. 193 at 62-63. She then distinguished the facts in *Rompilla v. Beard*, 545 U.S. 374 (2005), cited by Owens, from the facts of this case. *Id.* at 65-66. She noted that, in contrast with *Rompilla*, sentencing counsel in this case were well-aware of the Lee murder and attempted to mitigate it by showing a change in Owens from the Lee murder in 1999 to the third sentencing in 2006. *Id.* at 66. Thus, she concluded that, although sentencing counsel were

[11] Owens asserts that he was unable to obtain a copy of the complaint in that case because the Court denied him permission to conduct discovery regarding that file. ECF No. 117 at 106. No order from this Court or the magistrate judge prevented him from obtaining the public filings in that case. Even if filed documents in older cases are not available on PACER, they are still readily available, as explained on the Court's website: https://www.scd.uscourts.gov/Records/record.asp.

not aware of the civil suit, they "were not willfully ignorant of the facts of his aggravating crime," and were therefore not deficient. *Id.* at 66-67.

Regarding PCR counsel's performance, the magistrate judge concluded that PCR counsel made reasonable efforts to investigate the issue, though her efforts to obtain Lee's family's litigation file were ultimately unsuccessful. *Id.* at 67.

The magistrate judge also concluded that sentencing counsel were not deficient in "failing to pursue a trial strategy that is borderline frivolous and potentially inflammatory." *Id.* She found that even if the detention center was negligent, that "does not diminish Owens's own criminal culpability in beating, burning, stomping, and choking Lee until he was sure that Lee was dead." *Id.* at 68.

Finally, the magistrate judge determined that even if sentencing counsel were deficient, Owens could not show that he was prejudiced because he had not shown that evidence of institutional negligence, whether or not in combination with evidence of a brain abnormality, would have rendered the Lee murder less aggravating. *Id.* at 69. She noted that attempting to shift blame for the murder to the detention center could have invited the idea that if he were sentenced to prison and he was not properly confined at all times, the result could be fatal. *Id.*

For these reasons, the magistrate judge concluded that Owens failed to present a substantial *Strickland* claim and that the procedural default therefore could not be excused pursuant to *Martinez*. *Id.*

3. *Objections*

In his objections to the R&R, Owens argues that mitigating the Lee murder was essential to obtain a life sentence and that his petition (with the attached affidavits) made a threshold showing that the claim had some merit. ECF No. 199 at 47. He also argues that the magistrate judge misapprehended "both the issue and the evidence" regarding institutional negligence. *Id.* He claims that "[t]he R&R in essence finds that future dangerousness in this case is irrebuttable and conclusive as a matter of law because of the brutality of the crime." *Id.* at 47-48. He argues that his evidence establishes that but for the institutional negligence by the detention center, Lee's death would not have occurred. *Id.* at 48.

4. *Analysis*

The Court agrees that attempting to mitigate the Lee murder was important to Owens' attempt to avoid the death penalty. But where his argument fails is that, unlike in *Rompilla*, his sentencing counsel were well-aware of the issue. Recognizing that they could not keep it from the jury, they attempted to mitigate it by arguing that he had changed in the time between the Lee murder in 1999 and the third sentencing proceeding in 2006. *See* ECF No. 16-6 at 130-32. While sentencing counsel did not know about the civil suit by Lee's family, they knew that the jail's security decisions that night were less than stellar. *See id.* at 133 ("For the jail to put him back in a pod with general population after being found guilty of murder under these circumstances was incredibly stupid."). Thus, as the magistrate judge concluded, they were not willfully ignorant of the facts of his aggravating crime,

and were therefore not analogous to counsel in *Rompilla*. ECF No. 193 at 66-67.

The magistrate judge also properly recognized that sentencing counsel were not deficient because trying to mitigate the Lee murder by blaming it on the jail would have been "borderline frivolous and potentially inflammatory." *Id.* at 67. Owens' prison expert's report on the incident concluded that "[i]f only basic necessary measures were taken regarding the above listed system issues leading up to the critical event, it is reasonable to conclude that the critical event involving the death of Mr. Lee would have been prevented." ECF No. 117-7 at 11. Taking this conclusion as correct—that Lee's murder would not have occurred if the jail had taken "basic necessary measures"—does not absolve Owens or mitigate his actions. While the jail's failure to keep Owens away from other inmates after his conviction may have contributed to Lee's death, it should go without saying that Lee would not have met his untimely death had Owens not murdered him. As the magistrate judge aptly recognized,

> The possibility that the detention center was negligent under a civil tort standard in failing to prevent Owens from having the opportunity to murder Lee does not diminish Owens's own criminal culpability in beating, burning, stomping, and choking Lee until he was sure that Lee was dead. And it would have been easy for a jury to see through such an attempt to shift blame.

ECF No. 193 at 68.

Furthermore, making such an argument to the jury may well have had an unintended result because, as the magistrate judge noted, it would have invited the idea that if he were sentenced to life and any mistakes were made by the prison system, the result could be fatal. *See Moody*, 408 F.3d at 151-52, 154 (finding no prejudice where the proposed evidence was as likely to harm the petitioner as to help him). This is particularly so when combined with the violence depicted in his prison disciplinary records, which included multiple assaults and stabbings, and multiple weapons possessions. This is also so regardless of whether evidence of the jail's negligence had been offered in combination with evidence of a brain abnormality.

For these reasons, the underlying ineffective assistance claim for this ground fails on the merits and Owens therefore cannot rely on *Martinez* to overcome the procedural default. Accordingly, he is not entitled to relief on Ground 6.

G. Ground 7 - Failure to present evidence of brain damage

Ground 7 of the amended petition is as follows:

> Trial and collateral counsel were ineffective to the prejudice of the applicant by failing to investigate, develop and present objective and scientific evidence of structural and functional brain damage resulting from early childhood trauma and materially limiting the applicant's ability to make informed decisions, learn from past behavior, and control impulses resulting from recurrence of situation prompts in daily living which were

> the same or similar to those of his early childhood. 5th, 6th, 8th, and 14th Amendments to the Constitution of the United States of America; Wiggins v Smith, 539 US 510 (2003).

ECF No. 117 at 7.[12]

1. *Owens' claims*

In this claim, Owens alleges that sentencing counsel were ineffective in "failing to investigate, develop[,] and present objective and scientific evidence of structural and functional brain damage resulting from early childhood trauma[,] which materially limits [his] ability to make informed decisions, learn from past behavior, and control impulses . . . ." ECF No. 117 at 113. He bases his argument on two reports.

The first report, by Dr. Ruben C. Gur, is a volumetric analysis of an MRI scan and a quantitative analysis of a PET scan performed by Dr. Gur and his colleagues at the University of Pennsylvania.[13] ECF No. 117-17. This report concluded that Owens has brain abnormalities that "indicate diminished executive functions such as abstraction and mental flexibility, planning, moral judgment, and emotion regulation, moderating limbic arousal, and especially impulse control." *Id.* at 4.

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[12] Owens acknowledges that this ground has not been exhausted and is being advanced pursuant to *Martinez*. ECF No. 117 at 125.

[13] The MRI and PET scans were performed at the Medical University of South Carolina, but the analyses were performed at the University of Pennsylvania.

The second report, by Dr. Stacey Wood, is a neuropsychological review and evaluation of Owens. ECF No. 117-18. Based on her review of various materials and evaluation of him, she concluded that he has "significant brain impairment." *Id.* at 17. She also stated that "[e]arly indicators of brain injury were present during the developmental period and warranted further investigation. As such, the possibility of an organic cause for some of Mr. Owen's [sic] profile should have at least been considered and explored during previous phases of this matter." *Id.* at 21.

Owens argues that sentencing counsel were ineffective in failing to further investigate whether he had brain deficiencies. He claims that sentencing counsel should have been alerted to investigate further because of two medical factors—the diagnosis of a seizure disorder and the thirteen-point difference between his verbal and performance IQ. ECF No. 174 at 126. He also claims that the sentencing testimony of Drs. Brawley and Schwartz-Watts undermines the claim that sentencing counsel's investigation was sufficient. *Id.*

2. *R&R*

In the R&R, the magistrate judge concluded that sentencing counsel were not deficient for failing to further investigate and present evidence regarding Owens' mental health and brain function. ECF No. 193 at 72. The magistrate judge determined that sentencing counsel, after an investigation by three mental health experts into Owens' mental health, were not presented with a reason to perform further investigation. *See id.* at 75-76. She noted that there

were "no indications that any of those experts advised sentencing counsel to obtain neuroimaging, and the conclusion of sentencing counsel's retained neuropsychologist was that Owens did not have any significant brain dysfunction." *Id.* at 75.

For these reasons, the magistrate judge concluded that Owens failed to present a substantial *Strickland* claim and that the procedural default therefore could not be excused pursuant to *Martinez*. *Id.* at 79.

3. *Objections*

In his objections to the R&R, Owens asserts that evidence was available to sentencing counsel that establishes that he "suffers with organic brain damage that material [sic] impacts his cognitive functioning including his ability to reason." ECF No. 199 at 49. He further asserts that sentencing counsel "did not consider investigating, developing and presenting such evidence." *Id.* He argues that the R&R excused these failures by pointing to what sentencing counsel did do rather than considering what they did not do. *Id.* He also asserts that the Court denied him the opportunity to present this evidence at an evidentiary hearing, which prevented him from presenting this evidence as it relates to moral culpability. *See id.* at 50.

4. *Analysis*

As the magistrate judge recognized, sentencing counsel developed a mitigation strategy that focused on how Owens' difficult childhood led him to the point where he committed the Graves murder, but argued that he had since reached out for help and was trying to better himself. ECF No. 193 at 73 (citing ECF No. 16-6 at 89-91). As part of that strategy, sentencing

counsel presented the testimony of three mental health experts—Drs. Cobb, Brawley, and Schwartz-Watts—who evaluated him and could testify regarding his past, present, and future. Nothing in the record indicates that any of these experts advised counsel to obtain neuroimaging, and Dr. Brawley's evaluation resulted in her concluding that Owens did not have any significant brain dysfunction. *See* ECF No. 16-4 at 18. Sentencing counsel were not ineffective in failing to pursue neuroimaging when none of their experts believed it to be necessary. *See Byram v. Ozmint*, 339 F.3d 203, 210 (4th Cir. 2003) ("[A] failure to 'shop around' for a favorable expert opinion after an evaluation yields little in mitigating evidence does not constitute ineffective assistance."); *Wilson v. Greene*, 155 F.3d 396, 403 (4th Cir. 1998) ("To be reasonably effective, counsel was not required to second-guess the contents of [their expert's] report. . . . [C]ounsel understandably decided not to spend valuable time pursuing what appeared to be an unfruitful line of investigation.") (citation omitted). The Court cannot conclude that counsel's failure to pursue neuroimaging in light of these facts "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

Additionally, as the magistrate judge noted, sentencing counsel had in their possession evidence very similar to what Owens now says they should have obtained. Specifically, they had the evaluation and prior testimony from Dr. James Evans, who testified at the second sentencing. His evaluation described certain brain abnormalities that "could be relatively severe in terms of temper-impaired attention,

behavioral impulsivity." ECF No. 15-7 at 420. However, sentencing counsel declined to use him as a witness for two primary reasons: (1) sentencing counsel wanted a witness whose testimony would "more easily dovetail in with Donna Schwartz-Watts and what Donna Schwartz-Watts had to say"; (2) Dr. Evans had sent his test "out west, like to California," and sentencing counsel were concerned about how that might play in front of a local jury. ECF No. 16-6 at 137-39. Thus, while sentencing counsel had similar evidence to what Owens now seeks, sentencing counsel made a strategic decision to not use that evidence and instead pursue a different mitigation angle, which is a decision that is entitled to great deference. *See Strickland*, 466 U.S. at 690 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . .").

For these reasons, the underlying ineffective assistance claim for this ground fails on the merits and Owens therefore cannot rely on *Martinez* to overcome the procedural default. Accordingly, he is not entitled to relief on Ground 7.[14]

H. Ground 8 - Failure to object to jury charge

Ground 8 of the amended petition is as follows:

> Trial and collateral counsel were ineffective to the prejudice of the applicant by failing to object to the court's recurring jury charge that a finding of life without parole must be

[14] Owens' concerns about the lack of an evidentiary hearing are discussed later in this order.

> unanimous when that charge was not in the sentencing statute, was false, materially misleading, coercive, abusive and irrelevant to the sentencing function. (5th, 6th, 8th and 14th Amendments to the Constitution of the United States of America; (*Winkler v South Carolina* not yet decided)

ECF No. 117 at 7.[15]

1. *Owens' claims*

In this claim, Owens asserts that sentencing counsel were ineffective in failing to object to five statements the trial court made during the jury instructions to the effect that the jury could recommend a life sentence and that any such recommendation had to be unanimous. The five statements that he points to are as follows:

> "Ladies and gentlemen, any decision that you make with regard to any sentence for this defendant must be unanimous. All twelve of you who deliberate must agree." Trans. p. 1585 [ECF No. 16-4 at 170].
>
> "However, a decision to impose a life sentence, like a decision to impose one of death, must be unanimous." Trans. p. 1594 [ECF No. 16-4 at 179].
>
> "Now the next document I believe that you have is the unanimous recommendation of a

[15] Owens acknowledges that this ground has not been exhausted and is being advanced pursuant to *Martinez*. ECF No. 117 at 133.

> sentence for life." Trans. p. 1597 [ECF No. 16-4 at 182].
>
> "Now, ladies and gentlemen, any decision that you make in this case must be unanimous. All twelve of you have to agree." Trans. p. 1598 [ECF No. 16-4 at 183].
>
> "You may impose a sentence of life imprisonment only if you unanimously find beyond a reasonable doubt one, or both, of the aggravating circumstances and agree that the sentence should be life imprisonment." Trans. pp. 1598-99 [ECF No. 16-4 at 183-84].

ECF No. 117 at 126. Owens asserts that these instructions were not consistent with S.C. Code Ann. § 16-3-20(C), which provides in relevant part as follows:

> The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided. If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment . . . .

Based on Owens' interpretation of this statute, he asserts that the trial court erred in telling the jury that any recommendation of life must be unanimous. ECF No. 117 at 128. He asserts that these instructions violated his rights under the Fifth, Sixth, and Eighth Amendments and that sentencing counsel were ineffective in failing to object to them. *Id.*

2. *R&R*

In the R&R, the magistrate judge concluded that there was no merit to Owens' argument. The magistrate judge noted that the following language in the statute contemplates the possibility of a unanimous recommendation of life: "If members of the jury after a reasonable determination cannot agree on a recommendation as to *whether or not* the death sentence should be imposed . . . ." ECF No. 193 at 80 (quoting S.C. Code Ann. § 16-3-20(C)) (emphasis added). The magistrate judge also points out that the South Carolina Supreme Court has repeatedly concluded that the statute contemplates a unanimous recommendation of life. *Id.* at 81. Accordingly, the magistrate judge concluded that counsel were not ineffective in failing to object to the challenged instructions, as any such objection would have been overruled because the instructions were correct statements of the law. *Id.*

For these reasons, the magistrate judge concluded that Owens failed to present a substantial *Strickland* claim and that the procedural default therefore could not be excused pursuant to *Martinez*. *Id.* at 81-82.

3. *Objections*

In his objections to the R&R, Owens asserts that the R&R "fail[s] to appreciate the insidious nature of an instruction that divests and coerces a minority juror into abandoning his or her view of the mitigation evidence and their decision to vote for life. The jury charge that a life without parole sentence must be unanimous is extra-judicial, contradicted by the statute and misleading." ECF No. 199 at 52. He asserts that "requiring a recommendation of life be

unanimous is inherently ambiguous, inaccurate and coercive and prevents a minority juror from giving full meaning to the mitigation evidence by voting and maintaining a minority position on the sentence." *Id.*

Owens cites *Boyde v. California*, 494 U.S. 370 (1990) for the proposition that "if there is a 'reasonable likelihood' that a minority juror would apply the instruction to mean that he or she would have to persuade the majority to change their opinion before the minority juror could give meaning to his or her own view then the charge violates the Fifth and Eighth, and Fourteenth Amendments." ECF No. 199 at 52-53. Similarly, he asserts that "[a]ny charge that a juror could reasonably interpret as restricting his or her review and use of mitigation evidence violates the Constitution." *Id.* at 53.

4. *Analysis*

At the outset, the Court notes that, as Owens acknowledges, the South Carolina Supreme Court has repeatedly rejected his interpretation of S.C. Code Ann. § 16-3-20(C). *See Winkler v. South Carolina*, 795 S.E.2d 686, 694 (S.C. 2016); *State v. Copeland*, 300 S.E.2d 63, 70 (S.C. 1982); *State v. Adams*, 283 S.E.2d 582, 587 (S.C. 1981), *overruled on other grounds by State v. Torrence*, 406 S.E.2d 315 (S.C. 1991). Thus, had sentencing counsel objected to the challenged instructions, the trial court would have overruled the objection.

Owens argues that the statute, as interpreted by the South Carolina Supreme Court, is unconstitutional, but there is no merit to that objection. His position that it is unconstitutional for a court to tell a jury that their sentencing decision,

whether for death or life, must be unanimous finds no support in case law. His analysis misapplies the cases he cites in his objections. For example, as noted above, he cites *Boyde* for the proposition that "if there is a 'reasonable likelihood' that a minority juror would apply the instruction to mean that he or she would have to persuade the majority to change their opinion before the minority juror could give meaning to his or her own view then the charge violates the Fifth and Eighth, and Fourteenth Amendments." ECF No. 199 at 52-53. That proposition finds no legal support in *Boyde*.

In *Boyde*, the jury was given a list of ten specific factors and a general catch-all factor to consider in making its decision on whether or not to recommend a death sentence. *Boyde*, 494 U.S. at 373-74. The jury was also told that, after considering all applicable aggravating and mitigating circumstances, the jury "shall impose" a death sentence if the aggravating circumstances outweighed the mitigating circumstances or "shall impose" a life sentence if the mitigating circumstances outweighed the aggravating circumstances. *Id.* at 374. The defendant argued that none of the listed factors allowed the jury to consider factors such as his background and character, which were the bulk of his mitigation case. *Id.* at 378. The Court held that, in a situation where "the instruction is ambiguous and therefore subject to an erroneous interpretation[,] . . . the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380. Applying this standard, the Court concluded that there was not a reasonable

likelihood that the jury interpreted the instructions to prevent consideration of his mitigating evidence of background and character. *Id.* at 381. That decision has no relevance to the issue Owens raises in this case—whether it is constitutional to inform a jury that its ultimate decision, whether for death or for life, must be unanimous.

The other primary case cited by Owens in his objections—*Mills v. Maryland*, 486 U.S. 367 (1988)—also affords him no relief. There, the United States Supreme Court reviewed a situation where a reasonable jury could have interpreted the jury instructions and verdict form "to require the imposition of the death sentence if the jury unanimously found an aggravating circumstance, but could not agree unanimously as to the existence of any particular mitigating circumstance." *Mills*, 486 U.S. at 371. The Court reversed because reasonable jurors "may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Id.* at 384. Like the holding in *Boyde*, this holding in *Mills* has no relevance to the question in this case, as there is no reasonable argument that the jurors here were prohibited from considering Owens' mitigating evidence.

Furthermore, Owens does not explain how this situation—where a jury must unanimously decide whether to impose a sentence of death or life imprisonment—is different from the guilt phase of the trial where the jury also must unanimously agree whether the defendant is guilty or not guilty. The fact that the South Carolina legislature decided to codify

the result of a hung jury in a capital sentencing—namely, that the defendant will be sentenced to life imprisonment—does not mean that the Constitution requires the jury to be informed of that outcome.

For these reasons, the underlying ineffective assistance claim for this ground fails on the merits and Owens therefore cannot rely on *Martinez* to overcome the procedural default. Accordingly, he is not entitled to relief on Ground 8.

I. Ground 9 Failure to present evidence of early childhood trauma and sexual abuse

Ground 9 of the amended petition is as follows:

> Trial and collateral counsel were ineffective to the prejudice of the applicant by failing to investigate, develop and present mitigation evidence that the applicant suffered from repeated early childhood trauma and sexual abuse. These abusive experiences resulted in organic brain injury, ambiguous sexual identity, and created within the applicant a sensitivity to common adult situational prompts that, in his case, lead to a recurrence of the earlier trauma and extreme preemptive fear aggression as the only behavioral response known to the applicant. 5th, 6th, 8th, and 14th Amendments to the Constitution of the United States of America; *Rompilla v Beard*, 545 US 374 (2005).

ECF No. 117 at 7.[16]

1. *Owens' claims*

Ground 9 is related to Ground 1. In this claim, Owens argues that sentencing counsel were ineffective in failing to conduct a full investigation into his background, which he says would have revealed more detailed information about the significant physical abuse suffered by his mother and him at the hands of his father and step-father. Specifically, he says that a further investigation would have uncovered evidence of beatings that his mother suffered during each of her pregnancies (including when she was pregnant with Owens) and an incident where his father violently shook him when he was about one year old.

In addition, Owens argues that a full investigation would have provided "a window into [his] hidden life that was never found, developed or presented; a life conflicted with shame, guilt, self-doubt and lack of self-esteem . . . ." ECF No. 117 at 139. Specifically, he says that evidence regarding the shooting of Reverend Davenport, discussed in Ground 1, should have prompted sentencing counsel to more fully investigate Owens' sexual history, which "would have at last given weight to this significant part of his life." *Id.* at 141.

2. *R&R*

In the R&R, the magistrate judge concluded that, as discussed in more detail in Ground 1, "sentencing

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[16] Owens acknowledges that this ground has not been exhausted and is being advanced pursuant to *Martinez*. ECF No. 117 at 142.

counsel and their team performed an extensive and thorough investigation." ECF No. 193 at 84. She noted that the investigators hired by sentencing counsel spoke with a number of his family members, including his mother, both sisters, one brother, and stepfather, as well as a number of non-family witnesses. *Id.* She also noted that, while the jury did not hear about the specific violent incidents that Owens now references, the jury did hear general testimony about the violence his mother and he experienced. *Id.*

In addition, the magistrate judge concluded that, even if Owens could show deficient performance, he could not show prejudice, as "there is no reasonable probability that the jury would have returned with a different sentence had they heard the evidence regarding *in utero* and early childhood physical abuse and Owens's full sexual history." *Id.* at 85. She notes that Dr. Schwartz-Watts was concerned about potential brain damage and requested a neuropsychological evaluation, which revealed no major brain malfunction. *Id.*

For these reasons, the magistrate judge concluded that Owens failed to present a substantial *Strickland* claim and that the procedural default therefore could not be excused pursuant to *Martinez*. *Id.*

3. *Objections*

In his objections to the R&R, Owens asserts that the magistrate judge "[did] not have the evidence to make that determination at this point because the case is at its beginning and not at its end." ECF No. 199 at 54. He further asserts that the magistrate judge "fail[ed] to assume that the substance of the affidavits and their inferences are true and then apply

those truths to the issue of whether [he] articulated a claim of some merit." *Id.* at 55.

4. *Analysis*

Though Owens asserts that the magistrate judge did not properly consider the affidavits that he submitted, that belief is not supported by the record. The R&R disputes neither the allegations of extreme violence perpetrated against his mother and him by his father and step-father, nor the allegations regarding his sexual history. The magistrate judge simply concluded that "sentencing counsel and their team performed an extensive and thorough investigation," that the investigators had appropriate discussions with his family members and other individuals, and that the witnesses put on by sentencing counsel adequately conveyed to the jury that violence was a significant part of Owens' life. ECF No. 193 at 84. The Court agrees.

As discussed in more detail in Ground 1, the jury heard about many troubling aspects of Owens' life, including the significant violence his family and he suffered at the hands of his father and step-father. Regarding his sexual history, as discussed in Ground 1, there were no records of him suffering any sexual abuse and he denied it when asked. And as previously noted, it is unclear how it would have been helpful to him to confess to the attempted murder of a clergyman during the short time between his release from prison and the Graves murder.

For the reasons discussed above and in Ground 1, the underlying ineffective assistance claim for this ground fails on the merits and Owens therefore cannot

rely on *Martinez* to overcome the procedural default. Accordingly, he is not entitled to relief on Ground 9.

J. Ground 10 - Failure to object to prison disciplinary infractions

Ground 10 of the amended petition is as follows:

> Trial, direct appellate and collateral counsel were ineffective to the prejudice of the applicant by failing to include as reversible error an objection to the trial court's decision to allow testimony of in-custody administrative rules violations as aggravation evidence supporting a sentence of death when those violations were disproportionate to the crime for which the jury was sentencing the petitioner, did not result in injury, were in part administrative violations common to every inmate and were not characterological of the petitioner's propensity for future violence.

ECF No. 117 at 7.[17]

1. *Owens' claims*

Ground 10 is related to Ground 2. As noted above, at sentencing, the State attempted to introduce a list of Owens' prison disciplinary infractions. The trial court excluded a number of the infractions and some specific details of others, but ultimately allowed the State to introduce the following list of twenty-eight infractions:

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[17] Owens acknowledges that this ground has not been exhausted and is being advanced pursuant to *Martinez*. ECF No. 117 at 146.

April 13, 2001:	breaks toilet, sink, and sprinkler
May 26, 2001:	throws hot water on another inmate
May 27, 2001:	had a six-and-a-half-inch shank made from fencing and toothbrush
June 14, 2001:	spat on a correctional officer
February 8, 2002:	had a fourteen-inch solid brass shank
March 29, 2002:	stabs correctional officer Smith in the face with a shank
June 12, 2002:	stabs Undra Golden in the shower
June 15, 2002:	kicks an inmate who is restrained in a restraint chair
August 5, 2002:	slaps a male nurse in the face
August 17, 2002:	throws a food tray and hits officer Guess in the head
August 23, 2002:	struck officer in the face with his fist
October 22, 2002:	hits officer Eaton in the face with the fist
October 23, 2002:	sets fire to cell

December 22, 2002:	shank made from fencing
December 30, 2002:	a ten-inch [shank] made from a push rod of the sink
July 17, 2005:	spits in the face of officer Jones
August 26, 2005:	slaps officer Henley in the face
August 31, 2005:	sets fire to cell
September 11, 2005:	threatens officer Jones
January 1, 2006:	a twelve-inch homemade knife
January 3, 2006:	breaks cell door window with broom stick
January 13, 2006:	throws feces on officer Williams, hitting him in the face
February 3, 2006:	spits in the face of another inmate
February 4, 2006:	orally threatens officer Jones
February 28, 2006:	a twelve-inch weapon hidden between the mattresses

April 4, 2006:	an eight-and-a-half-inch shank made from flat metal sharpened at the edge and wrapped with Ace bandage
May 1, 2006:	sets fire to his mattress
May 20, 2006:	throws coffee on officer Smith

ECF No. 16-3 at 458-60.

Owens asserts that sentencing and PCR counsel were ineffective in failing to object to the admission of these records on relevance grounds, as he asserts that they are "disproportionate to the type [of] violence necessary to sustain the State's stated purpose for their admission, that Owens is so violent that he cannot be safely managed while in custody." ECF No. 117 at 143. In making his argument, he asserts that these violations are "administrative regulatory in-custody violations common to most every inmate." *Id.* at 145. Thus, he asserts that these violations were irrelevant to the issues before the jury, particularly his future dangerousness. *Id.*

2. *R&R*

In the R&R, the magistrate judge concluded that sentencing counsel were not ineffective on this claim because there was no legal basis for the objection that Owens asserts that sentencing counsel should have made. *See* ECF No. 193 at 89. Additionally, the magistrate judge concluded that even if sentencing counsel had been deficient in failing to make the

objection, Owens could not show prejudice because the disciplinary violations were considered and testified to by his own mitigation witness, Dr. Schwartz-Watts. *Id.* at 89-90. Finally, the magistrate judge noted that even those infractions that could be characterized as non-violent could go to different sentencing characteristics, such as character, future dangerousness, and prison adaptability. *Id.* at 88.

For these reasons, the magistrate judge concluded that Owens failed to present a substantial *Strickland* claim and that the procedural default therefore could not be excused pursuant to *Martinez*. *Id.* at 90.

3. *Objections*

Owens objects to the R&R "on the grounds that it fails to parse evidence of administrative infractions against the issue to which they apply." ECF No. 199 at 55. He asserts that custodial infractions are relevant in support of a death sentence only if they "establish that the defendant may kill again." *Id.* at 56. He also asserts that the impact of this alleged deficiency and the impact of the testimony regarding the in-custody murder of Lee "renders the sentencing decision untrustworthy" based on the "cumulative prejudice" of those asserted errors. *Id.*

4. *Analysis*

Owens' petition does not set forth a clear basis for his belief that the prison disciplinary records that were read to the jury were not relevant to their determination of the appropriateness of the death penalty. The South Carolina Supreme Court has clearly and repeatedly held that information of this type is relevant at capital sentencing. *See State v. Hughes*, 521 S.E.2d 500, 503 (S.C. 1999) ("[I]t is well-

settled [that] evidence of the defendant's behavior in prison is admissible in capital sentencing because it bears upon his character."); *State v. Whipple*, 476 S.E.2d 683, 688 (S.C. 1996) ("[T]he disciplinary records were relevant to [the defendant's] future adaptability in prison, a matter which was clearly proper for the sentencing jury."). Similarly, in the context of considering whether a defendant's prior convictions for rape and escape were properly admitted, the South Carolina Supreme Court noted that, "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. The jury's attention must be focused on both the specific circumstances of the crime and the characteristics of the person who committed it." *State v. Tucker*, 478 S.E.2d 260, 270 (S.C. 1996) (citations omitted). Owens does not cite any authority calling into question the proposition that a capital defendant's prison disciplinary record is relevant at sentencing.

In his objections, Owens argues that evidence regarding custodial misconduct is relevant only if the evidence is offered to establish that "the most probable result" of not imposing the death penalty is that "the defendant may kill again." ECF No. 199 at 56. Again, he cites no specific authority for this proposition, nor is the Court aware of any.

Furthermore, despite Owens' characterization of his many violations as "administrative regulatory in-custody violations common to most every inmate," ECF No. 117 at 145, his misconduct was serious, violent, and certainly probative of issues relevant at capital sentencing, including his character, future

dangerousness, and adaptability to prison. *See Hughes*, 521 S.E.2d at 503; *Whipple*, 476 S.E.2d at 688. To reiterate, over a span of about five years, he stabbed an officer with a shank, stabbed an inmate with a shank, possessed shanks seven other times, assaulted officers eight times (in addition to the one officer stabbing), assaulted other inmates three times (in addition to the one inmate stabbing), verbally threatened officers twice, assaulted a nurse, and destroyed property in his cell five times (including setting fire to it three times). *See* ECF No. 16-3 at 458-60.

Finally, as the magistrate judge found, even if Owens could show deficient performance in sentencing counsel's failure to object on relevance grounds, he cannot show prejudice because the disciplinary violations were considered and testified to by his own mitigation witness, Dr. Schwartz-Watts. ECF No. 193 at 89-90.

For these reasons, the underlying ineffective assistance claim for this ground fails on the merits and Owens therefore cannot rely on *Martinez* to overcome the procedural default. Accordingly, he is not entitled to relief on Ground 10.

K. Ground 11 - Failure to object to *Brady* violation

Ground 11 of the amended petition is as follows:

> Trial counsel duly requested that the State disclose all evidence which might be favorable to the defense. Nonetheless, the State failed to disclose evidence that impeaches material witnesses against the applicant in violation of the Fifth, Eighth and Fourteenth

> Amendments to the Constitution of the United States of America; *Brady v Maryland*, 373 US 83 (1963) and *Wearry v Cain*, 136 S. Ct. 1002 (2016). Collateral counsel were ineffective to the prejudice of the applicant in failing to recognize that the State did not disclose material items that would have substantially improved the mitigation case and changed cross-examination tactics had the materials been timely disclosed.

ECF No. 117 at 7.

In his petition, Owens acknowledged that this claim had not been exhausted and was being advanced pursuant to *Martinez*. ECF No. 117 at 155. However, in response to the State's motion for summary judgment, he conceded that this claim is not cognizable under *Martinez*. ECF No. 174 at 154. Accordingly, the magistrate judge recommended that the State's motion for summary judgment be granted as to this claim, ECF No. 193 at 60-62, and he conceded the point in his objections, ECF No. 199 at 57.

For these reasons, the underlying ineffective assistance claim for this ground has been procedurally defaulted and Owens cannot rely on *Martinez* to overcome the procedural default. Accordingly, he is not entitled to relief on Ground 11.

L. Ground 12 - Failure to challenge the State's decision to seek the death penalty

Ground 12 of the amended petition is as follows:

> Trial and collateral counsel were ineffective to the prejudice of the applicant by failing to challenge the State's decision to seek the death penalty as the decision was motivated by arbitrary factors since the crime was disproportionate to the rare and exceptional case as required by the narrowing features of *Furman v Georgia* and *Gregg v Georgia* and the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States of America.

ECF No. 117 at 7.[18]

1. *Owens' claims*

In Ground 12, Owens argues that sentencing counsel were ineffective in failing to challenge the solicitor's decision to seek the death penalty in this case. ECF No. 117 at 156-57. He asserts that, had sentencing counsel filed such a motion, there is a reasonable probability that the trial court would have not allowed the State to pursue the death penalty against him. *Id.* at 157. His basic argument is that the murder of Graves was "the type of crime that commonly populates the criminal trial docket in Greenville County Court of General Sessions." *Id.* at 161. As such, he believes that this was not a case that warranted the death penalty. *See id.*

2. *R&R*

In the R&R, the magistrate judge concluded that there was no legal or factual basis for sentencing

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[18] Owens acknowledges that this ground has not been exhausted and is being advanced pursuant to *Martinez*. ECF No. 117 at 162.

counsel to have raised the objection. ECF No. 193 at 90. She concluded that Owens did not show that using armed robbery and larceny with a deadly weapon as aggravating circumstances to support the death penalty was incompatible with the Supreme Court's requirements for a death penalty case. *Id.* at 90-91. She noted that, while he characterized the event as a murder that occurred during an "unfortunate, but ordinary armed robbery," ECF No. 117 at 159, the State presented evidence that made this case unusual, including a lack of remorse from Owens and statements attributed to him to the effect that he wanted to murder a great number of people, *see* ECF No. 193 at 91. In addition, the magistrate judge noted that he had previously been incarcerated for burglary and assault with intent to kill. *Id.*

For these reasons, the magistrate judge concluded that Owens failed to present a substantial *Strickland* claim and that the procedural default therefore could not be excused pursuant to *Martinez*. *Id.* at 92.

3. *Objections*

In his objections, Owens asserts that the magistrate judge failed to recognize his explanation of the legal principles that apply to a proportionality review. *See* ECF No. 199 at 58. He also asserts that S.C. Code Ann. § 16-3-20(C)(a), which is a list of the statutory aggravating circumstances that could support application of the death penalty, "does not restrict the crimes for which death is a possible sentence but rather is an exhaustive list of virtually every conceivable murder." ECF No. 199 at 59. He characterizes the offense as an "unfortunate, but ordinary armed robbery." *Id.* at 60. Additionally, he

notes that proportionality review is mandated by statute in South Carolina. *Id.*

4. *Analysis*

Owens appears to be arguing that sentencing counsel were ineffective in failing to argue that the death penalty would be a disproportionate penalty given the facts of the case. This argument is not persuasive, as the South Carolina Supreme Court conducted the proportionality review required by S.C. Code Ann. § 16-3-25(C)(3). The court concluded that "the death penalty was not the result of passion, prejudice, or any other arbitrary factor," and that it "was neither excessive nor disproportionate." *Owens III*, 664 S.E.2d at 82. Though he may disagree with that court's determination, this Court cannot conclude that sentencing counsel were ineffective in allegedly failing to request something that Owens received.

Furthermore, while Owens asserts that he was unable to find any factually similar case that resulted in a death sentence, ECF No. 117 at 157, his query was directly answered by the South Carolina Supreme Court in his own direct appeal. In considering whether the death penalty in his case was disproportionate, the court cited two prior decisions affirming death sentences for individuals who committed murders during the commission of convenience store robberies. *See id.* (citing *State v. Simpson*, 479 S.E.2d 57 (S.C. 1996); *State v. Humphries*, 479 S.E.2d 52 (S.C. 1996)).[19] In addition, *Simpson* and *Humphries* cited

[19] In fact, like the murder Owens committed, both of these murders occurred in the Upstate region of South Carolina—*Simpson* in Spartanburg County and *Humphries* in Greenville

three other factually similar cases where the court affirmed death sentences. *See State v. Young*, 459 S.E.2d 84, 88 (S.C. 1995) (murder committed during an armed robbery); *State v. Sims*, 405 S.E.2d 377, 379-80 (S.C. 1991) (double murder committed during an armed robbery of a Domino's Pizza); *State v. Thompson*, 292 S.E.2d 581, 583 (S.C. 1982) (murder committed during an armed robbery of a small grocery store), *overruled on other grounds by Torrence*, 406 S.E.2d 315.

For these reasons, the underlying ineffective assistance claim for this ground fails on the merits and Owens therefore cannot rely on *Martinez* to overcome the procedural default. Accordingly, he is not entitled to relief on Ground 12.

IV. Motion for Evidentiary Hearing

Owens requests an evidentiary hearing as to both his exhausted and unexhausted claims.

A. Exhausted claims

As to each of his five exhausted claims (Grounds 1-5), Owens asserts that there is "a genuine dispute of material fact that requires an evidentiary hearing on the merits." ECF No. 174 at 5, 55-56, 66, 76, 87. Under the AEDPA, evidentiary hearings on habeas petitions are generally limited. *See Cullen*, 563 U.S. at 181 ("We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."). However, § 2254(e)(2) contains an exception to this general bar: "A petitioner who has diligently pursued his habeas

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County. *See Simpson*, 479 S.E.2d at 57; *Humphries*, 479 S.E.2d at 52.

corpus claim in state court is entitled to an evidentiary hearing in federal court, on facts not previously developed in the state court proceedings, if the facts alleged would entitle him to relief, and if he satisfies one of the six factors enumerated by the Supreme Court in *Townsend v. Sain*, 372 U.S. 293, 313 (1963)."[20] *Conaway v. Polk*, 453 F.3d 567, 582 (4th Cir. 2006).

Here, the magistrate judge properly concluded that Owens "failed to identify what particular factual disputes he believes entitle him to a hearing," and he has not "identified any circumstances that would entitle him to an evidentiary hearing based on any of the above exceptions to the general prohibition on evidentiary hearings in federal habeas corpus cases." ECF No. 193 at 58. The Court concludes that he is not entitled to an evidentiary hearing because, even assuming that he could meet at least one of the *Townsend* factors, he has not demonstrated that the facts alleged would entitle him to relief. In evaluating his exhausted claims, the Court considered as true the facts he alleged, but for the reasons set forth above,

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[20] The six *Townsend* factors are:

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

Townsend, 372 U.S. at 313.

those facts still did not entitle him to relief. Accordingly, his request for an evidentiary hearing as to his exhausted claims is denied.

B. Unexhausted claims

As to Owens' unexhausted *Martinez* claims (Grounds 6-10, 12),[21] he seeks to expand the record and requests an evidentiary hearing. As the magistrate judge recognized, "a court may exercise its discretion to expand the record when considering whether cause and prejudice excuse a petitioner's defaulted claim." ECF No. 193 at 93 (citing *Fielder v. Stevenson*, No. 2:12-cv-00412-JMC, 2013 WL 593657, at *3 (D.S.C. Feb. 14, 2013)). Here, the magistrate judge exercised her discretion to expand the record and consider information not presented to the state court in determining whether *Martinez* excuses the procedural default of these claims. *Id.* at 94.

Though the magistrate judge expanded the record as Owens requested, for the reasons set forth above, he failed to establish a substantial claim of ineffective assistance of counsel as to each claim. As the magistrate judge noted, he had an ample opportunity to submit evidence in support of his claims, and he has done so.[22] The magistrate judge and this Court fully

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[21] As discussed above, Owens now concedes that Ground 11 is not cognizable under *Martinez*. ECF No. 199 at 57.

[22] Owens implies that he is entitled to an evidentiary hearing because the affidavits that he submitted were not detailed enough. *See* ECF No. 199 at 46 ("[The affidavits] are not exhaustive of either credibility of the witnesses nor are they a complete statement of the evidence to be developed during an evidentiary hearing."). A party cannot submit threadbare affidavits and then use those inadequate affidavits to justify an

considered the evidence he submitted and took all of the new facts to be true, but concluded that he is not entitled to relief for the reasons set forth above. Accordingly, his request for an evidentiary hearing as to his unexhausted claims is denied.

V. Motion to Stay

Owens filed a motion to stay this case pending the Supreme Court's consideration of the Fifth Circuit's decision in *Ayestas v. Stephens*, 817 F.3d 888 (5th Cir. 2016). ECF No. 186. That motion is now moot, as the Supreme Court issued its decision in that case on March 21, 2018. *Ayestas v. Davis*, 138 S. Ct. 1080 (2018).

The Supreme Court's decision has no impact on this case. There, the Court concluded that the district court applied the incorrect standard when it outright denied a federal habeas petitioner's request for service provider funding to assist with the litigation of his petition. *See id.* at 1095. In contrast, this Court authorized substantial service provider funding in order to allow Owens to fully litigate his habeas petition. *See* ECF No. 79 (ex parte order authorizing

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evidentiary hearing. Here, the affidavits and documentation submitted were sufficient to evaluate his claims. *See Runningeagle v. Ryan*, 825 F.3d 970, 990 (9th Cir. 2016) ("Where documentary evidence provides a sufficient basis to decide a petition, the court is within its discretion to deny a full hearing."). Furthermore, as the magistrate judge recognized, an evidentiary hearing could only have weakened his petition because his witnesses would have been subject to vigorous cross-examination by the State, which may have called into question their opinions and factual statements. ECF No. 193 at 95 (citing *Runningeagle*, 825 F.3d at 990-91).

service provider funding). Accordingly, his motion for a stay is denied as moot.

VI. Conclusion

For the reasons stated, the R&R, ECF No. 193, is **ACCEPTED**, and Owens' objections to it, ECF No. 199, are **OVERRULED**. The State's motion for summary judgment, ECF No. 147, is **GRANTED**. Owens' amended petition for relief pursuant to § 2254, ECF No. 117, and motion for an evidentiary hearing, ECF No. 164, are **DENIED**. Owens' motion for a stay, ECF No. 186, is **DENIED AS MOOT**. This action is hereby **DISMISSED**.

The Court has reviewed this petition in accordance with Rule 11 of the Rules Governing Section 2254 Proceedings. In order for the Court to issue a certificate of appealability, Rule 11 requires that a petitioner satisfy the requirements of 28 U.S.C. § 2253(c)(2), which in turn requires the petitioner to make "a substantial showing of the denial of a constitutional right." The Court concludes that Owens has not made such a showing, and it is therefore not appropriate to issue a certificate of appealability as to the issues raised in this petition. He is advised that he may seek a certificate from the Fourth Circuit Court of Appeals under Rule 22 of the Federal Rules of Appellate Procedure.

IT IS SO ORDERED.

s/ Terry L. Wooten
Terry L. Wooten
Chief United States District Judge

May 29, 2018
Columbia, South Carolina

Appendix D

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
DIVISION OF MEDICAL & PROFESSIONAL HEALTH SERVICES

MEDICAL CLEARANCE FOR TRANSFER

DATE [handwritten: 7.25.06] TRANSFERRING INSTITUTION [handwritten: Lieber C.I.]

HEALTH SUMMARY REVIEWED ☑ Yes ☐ No

HEALTH SUMMARY UPDATED ☐ Yes ☑ No ☑ N/A

If transfer is inappropriate, Institutional Operations notified ☐ Yes ☐ No Explain_____

MEDICATION AND CORRESPONDING MEDICATION ADMISSION RECORD SENT ☐ Yes ☑ No ☑ N/A

PENDING APPOINTMENTS: [handwritten: 0]

NUMBER OF CONSULTS SENT: [handwritten: 0]

COMMENTS: [handwritten: 0 meds]

Signature/Title [handwritten: signature]

DATE [handwritten: 7-27-06]

RECEIVING INSTITUTION [handwritten: Perry]

ACTIVE PROBLEMS [handwritten: Hx. of seizures, mental health problems (impulse control D/O, ASPD)]

CURRENT MEDICATIONS [handwritten: Vistaril 50mg 2 tabs at AM, Depakote ER 500mg 1 tab PO BID, Risperdal M-Tab 1mg, 1 tab PO BID]

PRESCRIBED DIET [handwritten: regular]

MEDICAL SUPPLIES/PROSTHETICS_____

PENDING APPOINTMENTS: [handwritten: none]

DATE OF LAST TB SCREENING [handwritten: 5/1/06]

FOLLOW-UP NEEDED ☐ Yes ☑ No _____

DATE OF LAST RPR [handwritten: 4/11/06]

FOLLOW-UP NEEDED ☐ Yes ☑ No _____

LIST CHRONIC CARE CLINIC REFERRALS [handwritten: seizure]

COMMENTS: [handwritten: referral to CCC completed, NKDA]

Signature/Title [handwritten: signature]

SCDC #: [handwritten: 250460]

INMATE NAME [handwritten: Owens, Freddie Eugene]