

No. _____
(CAPITAL CASE)

IN THE
Supreme Court of the United States

GARY DUBOSE TERRY,
Petitioner,
v.

BRYAN P. STIRLING, Commissioner, South Carolina
Department of Corrections, and MICHAEL STEPHAN, Warden,
Broad River Correctional Institution,
Respondents.

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

APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-3

GARY DUBOSE TERRY,

Petitioner – Appellant,

v.

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

Respondents – Appellees.

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,

Amicus Supporting Appellant.

Appeal from the United States District Court for the District of South Carolina, at Florence.
Richard Mark Gergel, District Judge. (4:12-cv-01798-RMG)

Argued: January 25, 2021

Decided: May 5, 2021

Before WILKINSON, KEENAN, and DIAZ, Circuit Judges.

Affirmed by unpublished opinion. Judge Diaz wrote the opinion, in which Judge Wilkinson
and Judge Keenan joined.

ARGUED: Hannah Lyon Freedman, JUSTICE 360, Columbia, South Carolina, for
Appellant. William Edgar Salter, III, OFFICE OF THE ATTORNEY GENERAL OF

SOUTH CAROLINA, Columbia, South Carolina, for Appellees. **ON BRIEF:** Elizabeth Franklin-Best, ELIZABETH FRANKLIN-BEST, P.C., Columbia, South Carolina, for Appellant. Alan Wilson, Attorney General, Donald J. Zelenka, Deputy Attorney General, Melody J. Brown, Senior Assistant Deputy Attorney General, Caroline Scrantom, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellees. David B. Smith, Vice-Chair, Amicus Curiae Committee, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, Alexandria, Virginia; Marc Elias, Stephanie Command, Courtney Elgart, Washington, D.C., Reina Almon-Griffin, PERKINS COIE LLP, Seattle, Washington; Allison Franz, John H. Blume, CORNELL CAPITAL PUNISHMENT CLINIC, Ithaca, New York, for Amicus Curiae.

Unpublished opinions are not binding precedent in this circuit.

DIAZ, Circuit Judge:

Gary DuBose Terry brutally murdered Urai Jackson after disconnecting her telephone, breaking into her home, and raping her. He was convicted and sentenced to death by a South Carolina jury. He appeals the district court's grant of summary judgment to the respondent state officials Bryan P. Stirling and Michael Stephan on his petition for writ of habeas corpus, brought pursuant to 28 U.S.C. § 2254.

Terry contends that his trial counsel provided ineffective assistance by failing to thoroughly investigate and present available mitigating evidence of abuse Terry suffered as a child and by failing to adequately question the venire during jury selection. Terry also argues that counsel in his state postconviction proceeding were likewise ineffective by failing to raise or investigate these claims.

The district court denied Terry's petition, holding that Terry failed to demonstrate cause to excuse the procedural default of the claims. We agree with the district court.

We again accentuate the high procedural bar erected by *Martinez v. Ryan*, 566 U.S. 1 (2012), which Terry fails to overcome because his claims are insubstantial. In so concluding, we exercise our discretion to reconsider issues that we implicitly resolved in Terry's favor by granting his certificate of appealability. See *Owens v. Stirling*, 967 F.3d 396, 403 (4th Cir. 2020). Accordingly, we affirm.

I.

A.

Terry's convictions for murder, first degree burglary, first degree criminal sexual conduct, and malicious injury to a telephone system trace back to May 1994. As recounted by the Supreme Court of South Carolina:

The victim in this case, 47 year old Urai Jackson, was found beaten to death in her Lexington County home on May 24, 1994. The window on the carport door to her home had been broken out and the telephone wires had been pulled from the phone box. [Jackson]'s mostly nude body was found in the living room, and semen was found in her vagina. She had several blunt trauma wounds to the head, and a number of defensive wound injuries. The cause of death was blunt trauma with skull fracture and brain injury.

State v. Terry, 529 S.E.2d 274, 275–76 (S.C. 2000).

Terry's fingerprints were found on Jackson's telephone box, and the semen in Jackson's vagina contained Terry's DNA. Terry also admitted to police that he had sex with Jackson in her home and hit her with a blunt object.

B.

A Lexington County grand jury indicted Terry for the crimes described above. The state thereafter filed notice that it would seek the death penalty.

Terry was represented by Elizabeth Fullwood, the Lexington County Public Defender, and I. McDuffie Stone, a lawyer in private practice, who also served as a part-time prosecutor in another state judicial circuit and represented an entity that insures state

agencies and local governments.¹ They hired Vivian Massey, a mitigation specialist whom Fullwood had used in previous cases, to gather background and social history information from Terry.

During jury selection, Fullwood questioned a juror about her ability to impose either a life or a death sentence, and attempted to question the juror about her views on psychiatry. The court sustained the state's objection to this line of questioning.

Fullwood then questioned the juror about mitigation more generally, but again faced an objection when she began a question with "one reason to lessen the sentence under the law in this state is the mentality—[.]" J.A. 318. Fullwood argued that the line of questioning was appropriate under *Morgan v. Illinois*, 504 U.S. 719 (1992),² but the court again sustained the state's objection. It did, however, agree to read the relevant statutory mitigating circumstances from S.C. CODE ANN. § 16-3-20(C)(b)³ to the jurors and ask

¹ Terry argued before the district court that Stone was operating under an actual conflict of interest because he served as a prosecutor and had government clients. Terry doesn't raise this argument on appeal, however, and has thus abandoned it. *See United States v. Al-Hamdi*, 356 F.3d 564, 571 n.8 (4th Cir. 2004) ("[C]ontentions not raised in the argument section of the opening brief are abandoned.").

² Under *Morgan*, a capital defendant has the constitutional right to conduct sufficiently probing voir dire to discover, and exclude from the jury, prospective jurors who "would unwaveringly impose death after a finding of guilt." 504 U.S. at 733.

³ These circumstances were that (1) "[t]he murder was committed while the defendant was under the influence of mental or emotional disturbance"; (2) "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired"; and (3) "[t]he age or mentality of the defendant at the time of the crime."

whether they could consider that evidence. The court also read the relevant statutory aggravating circumstances from § 16-3-20(C)(a).⁴

When questioning juror Norwood Brown, who submitted a post-trial affidavit in this case, Stone asked:

[I]f you are in a position of sitting on a jury and you get in the position of finding somebody guilty of murder and another—like a rape or a burglary—and then you get into a sentencing phase, can you be fair to both the State and the defense and consider those aggravating and mitigating circumstances that the judge talked about earlier with you?

J.A. 496.

Brown answered, “Yes, sir.” *Id.* Stone then asked, “So you could consider life and you could consider death, either way, even after you found somebody guilty?” *Id.* Brown again answered yes. Stone asked nearly identical questions of, and elicited nearly identical responses from, Robin Ritchie, the other juror who submitted a post-trial affidavit.

Following a two-day presentation of evidence, and after less than two hours of deliberations, the jury found Terry guilty of the offenses charged in the indictment.

C.

1.

Terry’s sentencing proceeding began the next day. The state’s presentation included evidence of Terry’s extensive criminal history and violent character.

⁴ These circumstances were that “[t]he murder was committed while in the commission of the following crimes or acts: (a) criminal sexual conduct in any degree; . . . [and] (d) burglary in any degree.” § 16-3-20(C)(a).

In 1985, Terry stole several items from a business called Imports Plus, including approximately eighteen items “such as sanders, things that would be utilized in a body shop, . . . to repair damage . . . on a vehicle.” J.A. 361. That same year, Terry stabbed a woman in the throat, resulting “in a conviction for assault and battery of a high and aggravated nature.” *Id.* According to the victim’s statement, after stabbing her, Terry “just slowly walked to the door like he hadn’t done anything. He was just so calm.” J.A. 1135.

In 1988, Terry was convicted of resisting arrest, possessing a stolen vehicle, and other offenses. Terry committed additional infractions while in custody for these crimes, including disorderly conduct and bribery.

The state called several character witnesses. Jeffrey Douglas Ford testified that he had known Terry since 1988 and had helped Terry steal cars. While working with Terry to provide security at a bar, Ford saw Terry hit patrons with pool cues and rocks while breaking up fights. Ford also saw Terry hit a patron with a beer mug after the patron spilled beer on Terry’s jacket.

Tyrone Kelly testified that Terry intentionally hit his car, causing significant damage and nearly hitting him, following a dispute over money that Terry believed Kelly owed him. Kelly further testified that Terry and another man wanted the money to buy “something to smoke.” J.A. 363.

While in jail awaiting trial on Jackson’s murder, Terry smashed the wall of his cell with a fire extinguisher. The state also presented a letter found in Terry’s cell stating that Terry had conspired with Johnny Brewer, an inmate housed with Terry, to confess to a

murder for which Brewer was under arrest, whereupon Brewer would be released and then help Terry escape.

Angela Fedorchak testified about a violent incident involving Dianne Gibson, Fedorchak's friend and Terry's girlfriend.⁵ When Terry arrived at the house where Fedorchak and Gibson were staying, Fedorchak told him that Gibson wasn't there. Undeterred, Terry forced his way into the house. Terry hit Fedorchak with a screen door hard enough to slam her into a wall and cause internal bleeding for which Fedorchak required medical treatment. Terry then forced Gibson to leave with him.

Gibson also testified for the state. She experienced Terry's "hot temper" during their relationship and said that Terry would throw things if she didn't do what he wanted. J.A. 366. After one fight, Terry left Gibson at a friend's house and, when she arrived home, she discovered that Terry had "busted her answering machine, torn up pictures and thrown things about her room." *Id.* (cleaned up). After another disagreement, Terry "threw [Gibson's] kitten up against the wall and threw the T.V. off the shelf." *Id.* Gibson testified, "[Terry] never physically abused me other than a few times just grabbing [her] by the arm, but . . . he controlled [her] emotionally and mentally." *Id.*

According to Gibson, Terry never held a legitimate job, stole boat and car trailers, and took money from each of her paychecks to buy crack. Gibson also recalled Terry telling her about a time when he beat a man "half to death" because he swore at Terry when Terry had told him to be quiet. *Id.*

⁵ Terry was married at the time.

Gibson read the following excerpts from letters Terry sent her from prison:

Shit. I would not know how to change. I am me. Like I said, there is nobody like me and nobody will mess with me because they know I will hurt them. . . . I'm going to be just like I was before, maybe a little meaner than I was, but that's all. . . . I need to start calming down. I am getting too old for all this shit. I always loved to fight. I did it so good. It felt so good to hurt people that was bigger than me, but that's all behind me.

J.A. 367.

Gibson testified that Terry persuaded her to shoot him in the leg so that he could avoid going to court for back child support. She described how Terry had damaged her cars, once throwing a child's toy at, and kicking in the door of, her truck, when she tried to leave him. Terry burned one of Gibson's cars by "pouring lighter fluid in the dash and setting it on fire." J.A. 368 (cleaned up). Gibson recalled several incidents when she tried to leave Terry, and he threatened to burn her home or otherwise harm her family.

Gibson also testified about the incident Fedorchak had described. Earlier that evening, Gibson met up with Terry, who had been drinking. He gave her flowers and a bracelet. Gibson stated, "The conversation started off fine. I told him that I did not love him anymore, that I did not want to be with him. Then he got mad. He tried to punch out my passenger's side window of my truck." *Id.*

Gibson tried to leave, but Terry opened the hood of her truck and disabled the engine. Terry then promised to repair the engine if Gibson rode in his car with him. She did, and during the ride, Terry told her that he intended to force Gibson to watch him kill himself. Gibson jumped out of the car, but Terry picked her up and then took her back to

her truck and fixed the engine. Gibson left and eventually met up with Fedorchak before returning to her house.

Gibson then went into her bedroom, locked the door, and turned off the lights. She heard the altercation between Terry and Fedorchak, after which Terry broke into Gibson's room, grabbed her by the arm, and told her to leave with him. Gibson did, but drove very slowly, and when she saw blue lights behind her truck, she stopped and jumped out.

Gibson learned about Urai Jackson's murder the same day that Jackson's body was found. Three or four days later, Terry told her that a friend had gone to the crime scene and had told him that the phone box had been tampered with and that the glass on the carport was broken from the inside.

Tamatha Griffin, Terry's ex-wife, testified that Terry was physically abusive during their marriage and never provided well for the child they had together. Griffin filed for divorce on the basis of physical cruelty. She recounted the following:

Gary told me that he had stabbed a prostitute in the neck and he had to leave. So he left and went to Florida. But prior to this, he would grab a hold of my arm. He wanted to take my car one night and I didn't want him to take it. So I had the keys in my hand and he was twisting my arm and finally he got the keys and he said that he was going to take the car and I said, well, you are not going to take the car without me in it. We were going down a dirt road and he opened my door and tried to push me out of the car.

He's broken the windshield out of my stepfather's van. My stepfather took me to his mother's house and I got my car that was there and while I was trying to leave, he busted the windshield out of my car and the glass hit my face and cut my face.

J.A. 369–70. Griffin also testified that Terry raped her during their marriage.

2.

The state introduced statements that Terry made to the police regarding Jackson's murder. Terry first told police that he had never been alone with Jackson inside her home. But he later claimed that he and Jackson had consensual sex inside her home, and he then fought with Jackson when he tried to leave against her wishes.

The argument got pretty heated. I went to go out of the room and she grabbed me by the hair. I turned around and swung to get her off of me. I think I hit her and she went down to her knees.

I, again, tried to walk out of the room. I got almost to the end of the hallway. She grabbed me from behind again. I then lost my temper. I swung back at her again. I then got something into my hand. It was just there in the hall. She could have brought it with her. I started hitting her with it. I lost my temper and I hit her several times. I have a bad temper.

I then remembered leaving out of the same back door. I could have dusted [sic] a pane of glass on the door when I busted the door open.

I don't remember pulling the phone lines. I don't remember what I did with the object that I used to hit Ms. Jackson. I can't remember what it was. I remember that I could hold it in one hand and it wasn't as big as a baseball bat.

J.A. 370–71.

The state also played a video of the crime scene and presented a blood spatter expert, who testified that “Jackson was laying on the ground or could have been no higher than nine inches off of the ground when she received her head wounds.”⁶ J.A. 371. The state

⁶ We think the expert meant that Jackson's head, rather than her entire body, could have been no more than nine inches above the ground.

then called Dr. John B. Carter, the forensic pathologist who testified during the guilt phase, to more fully describe Jackson's injuries.

Carter testified that Jackson had a swollen right thumb, which "could have happened warding off a blow or it could have come from having the hand on the floor one side up or the other side up and then being stomped on or being struck sharply with a hard object." J.A. 372 (cleaned up). Jackson had other injuries to her arms consistent with defensive wounds, as well as extensive injuries to her right shoulder consistent with the use of two weapons. According to Carter, all of Jackson's injuries were consistent with "some type of a prolonged struggle and probably not a one blow to the ground type of episode." *Id.* (cleaned up).

As to Jackson's head wounds, Carter explained that there were "at least four different tracks that we can see, although, there may have been more blows superimposed on the original and the force was such that the skull just behind the right ear was crushed and depressed in multiple places." J.A. 373. Jackson's skull "was crushed and smashed inward somewhat like punching against an eggshell." *Id.* Jackson, said Dr. Carter, was found with her legs spread apart, with semen matched to Terry in her vaginal canal. He explained that "the position of the victim's body is very characteristic of positions the victims are found in that have been engaged in sexual activity or assault at the time of death. The legs are spread apart and death occurs and they stay that way." *Id.*

3.

In mitigation, Terry presented evidence of his upbringing and of damage to his brain. Terry's mother, Patricia, testified that, when Terry was about four years old, his

father, Bill Terry, was injured in an accident and could no longer work. Though Bill received workers' compensation, it wasn't enough to support the family. Patricia thus worked outside the home, first at a sewing room and then at a textile mill.

The accident not only made finances tight, but also changed Bill's personality, making him more irritable and unable to tolerate the noise of children playing. According to Patricia, Bill would leave the room when the children were playing. But she said nothing about him becoming angry at the children, let alone abusing them.

Patricia explained that Terry, the youngest of five, was a "loner" as a child and was content to play by himself. J.A. 686. Terry didn't participate in any traditional childhood activities, such as scouting or little league, because he "didn't have an attention span to sit . . . for longer periods." J.A. 687. In the second or third grade, Terry was tested and determined to have a learning disability and be "borderline retarded." *Id.* He was placed in special education classes, but his parents didn't tutor him or otherwise help him academically.

Patricia testified that, starting around age 13, Terry "and his brothers fought a lot. . . . And even though he's the smallest of them, he would still hang in there." J.A. 688. Terry also "had a lot of run-ins with his dad." *Id.* However, Patricia claimed that none of the fights required intervention by law enforcement.⁷

⁷ A defense expert later testified that Terry's parents had his brothers arrested for abusing him.

One night, when Terry was 13, he blocked the door of his bedroom with a dresser, wrapped himself “cocoon style” in a blanket, and inhaled the fumes from a can of glue remover and a tube of “airplane glue.” J.A. 689–90. Patricia and Bill forced their way into Terry’s bedroom and found him unconscious. Terry’s parents were able to revive him by taking him outside, but he was disoriented when he regained consciousness. Aside from having Patricia’s brother-in-law, who was a doctor, visit Terry at their house the following day, Terry’s parents didn’t seek any medical or mental health treatment for him.

When Terry was about 14, he got into a fight with one of his brothers, during which he threw a brickbat through the window of a van that his brother was restoring. Terry’s father tried to break up the fight, but when Terry “came at him,” Bill swung a board at Terry with enough force to break Terry’s collarbone. J.A. 692.

Patricia also testified to symptoms of apparent internal injuries and brain damage in Terry following a fall from a tree while working for a tree-trimming company in Florida, where he fled after committing the 1985 stabbing. Terry repeatedly coughed up blood while in jail for the stabbing and following his return home, though doctors were unable to determine the cause of the bleeding. Patricia also stated that:

I’ve seen him stagger before. I’ve seen him go do something and just completely forget what he was doing. And he’s—it’s like I said, he just staggers. I’ve never seen him completely black out, but I have seen him forget what he was doing or just completely stop and turn around. And they’ve given him all kinds of medicine. They’ve even taken him to the hospital and put medicine in his veins for migraine headaches and . . . they stop for a while and then they come right back.

J.A. 702.

Bill Terry described an incident when Terry, age 10 or 12 at the time, intervened when neighborhood children “started cursing . . . and throwing rocks” at Bill. J.A. 731. Bill said that Terry helped around the house and was a “good kid.” J.A. 732. Bill did not, however, testify to other mitigating circumstances in Terry’s life beyond affirming his wife’s testimony that his ability to provide for the family and to tolerate the noise of children playing diminished after his accident.

Lou Ann Smith Terry, Terry’s wife and the mother of four of his children, told the jury that Terry had a loving relationship with his children and that, despite his actions, she continued to love him. She also pled with the jury for Terry’s life.

On cross, the state confronted Ms. Terry with statements she had made during a psychosocial assessment of Terry as part of his admission to a hospital for drug treatment. Among these were assertions that Terry “lies compulsively,” “seems to have no boundaries,” is “very manipulative,” has a “violent temper,” “liked having his own way” or was “spoiled,” “is very immature and dependent,” “does not see himself as an addict or an alcoholic,” and “shows no concern for the rights or needs of . . . his wife or others.” J.A. 749–50. Ms. Terry did not deny making the statements, but could recall only some of them.

Counsel also presented four expert witnesses: Jan Vogelsang, an expert in social work; Dr. Robert Deysach, an expert in clinical neuropsychology; Dr. David Bachman, an expert in behavioral neurology; and Dr. Donna Schwartz-Watts, an expert in forensic psychiatry.

Vogelsang explained the relationship between Terry's upbringing and brain damage. Terry "was born to parents whose own lives and circumstances of their lives had made it very difficult for them to parent effectively and for that reason, they had great difficulty providing any more than very basic needs for their children. Especially[] after his father's accident." J.A. 769–70.

According to Vogelsang, Terry "did have some special developmental needs as well and there were no resources available for those and no family members close by who could . . . or who did step in and take over to help this family." J.A. 770. Vogelsang told the jury that one side of Terry's family has a history of alcohol abuse, and there is a pattern throughout the family of "some rather unusual medical problems" and "learning and emotional problems." *Id.* Vogelsang also said:

[Terry] has a documented history of learning disabilities and certainly a history with . . . [in]attentiveness[,] impulsivity, poor judgment, explosive outbursts and other behavioral indications that later have turned out to be attributable to a medical condition that causes changes in his behavior.

. . . . His ability to control these outbursts, to restrain his behavior, to forecast consequences, to learn from experience are greatly impaired. . . .

. . . [But], with medical intervention, it is entirely possible that he will be able to restrain himself, control his behavior and adapt to prison life.

J.A. 770–71.

Vogelsang interviewed Terry four times and also spoke with Terry's wife, mother, father, two sisters, two brothers, sister-in-law, former girlfriend, ex-wife, two sons, daughter, two aunts, uncle, great aunt, and great uncle. Vogelsang characterized Terry's parents as "the poster children for bad luck" and stated, "I think they did care. They just

simply either did not know what to do or did not have the energy to do it.” J.A. 785–86.

Notwithstanding Terry’s father breaking Terry’s collarbone with a board and his brothers being arrested at his parents’ behest for abusing him, Vogelsang explained:

[I do not mean to] imply that family violence was the same in this family as it is in a lot of families because that’s not what I found here. There is some violence. I would not say it’s the kind of pervasive violence you find in a lot of homes where battering takes place. But certainly, at an early age, I think [Terry] was already probably giving signs and cues that something was terribly wrong.

J.A. 784.

According to Vogelsang, Terry’s parents failed to seek help for him after they discovered him inhaling glue and that, when Terry was eight, he observed an older brother inhale gasoline fumes, also with no parental intervention. Though Vogelsang didn’t say that Terry suffered significant abuse, she did testify that Terry’s older brothers and his sister had all lost custody of their children because they either abused or neglected them. Vogelsang opined, “Because we have given so much attention to physical and sexual abuse, . . . we have not given enough attention to the impact of *neglect* on children and that . . . is one of the keys for children ending up in the criminal justice system.” J.A. 783–84 (emphasis added).

Next up in mitigation was Dr. Deysach, who testified that, based on various tests of Terry’s cognition and behavior, Terry had an abnormality in the right frontal lobe of his brain and that Terry’s behavioral abnormalities were consistent with his findings of damage to this area of the brain. Deysach’s findings were also consistent with a diagnosis Terry had received in 1994 of organic explosive disorder, a condition which interfered with

Terry's ability to regulate his behavior, particularly when he was under emotional strain.

Deysach concluded that Terry had a "neuropsychological deficit." J.A. 825.

Dr. Bachman showed the jury scans of Terry's brain which indicated an area of reduced activity in his right frontal lobe. Bachman then explained:

When somebody has an abnormality [sic] function in that part of the brain, there are two sets of problems that you see. On the one hand, they have difficulties on certain types of testing such as [those administered by] Dr. Deysach

The other thing that we know is that people who demonstrate those sorts of abnormalities . . . also frequently have other kinds of behavioral problems as well. And those behavioral problems include such things as irritability, impulsivity, aggressive behavior, explosive aggressive behavior, poor planning in terms of thinking about the [repercussions] of behavior[,] and these are very typical of patients who have had lesions such as head injury or other such abnormalities of that part of the brain.

So the fact that he has the . . . abnormality in the neurospect scan, the fact that he has the abnormality on the neuro-psyc[h] testing, it's very, very strong evidence that you would also expect to find these other behavioral problems.

J.A. 843. Bachman affirmed that his findings were consistent with Terry's earlier diagnosis of organic explosive disorder and explained that patients with this type of brain injury "don't necessarily come in conflict with the law, but they sure have come in conflict with their family." J.A. 844.

Dr. Schwartz-Watts diagnosed Terry with an "organic mental disorder" not otherwise specified. J.A. 867. She told the jury:

[I]t's a major mental disorder and it's organic in nature, meaning that it comes from the brain, brain damage or dysfunction in the brain compared to chemical imbalances or personality disturbances and it affects his thinking, his feelings and his behavior.

. . . .

The way it affects his thinking, people with this type of brain damage, as demonstrated by Dr. Deysach and Dr. Bachman, and also consistent with my clinical findings, they can at times become suspicious and paranoid.

....

And then in terms of behavior, they can be quite aggressive, explosive. They can have sexual indiscretions. They can be very impulsive, very, very impulsive people.

J.A. 867–68. Schwartz-Watts also stated that the aggravating circumstances the state presented were consistent with her findings.

In their closing arguments, Terry’s lawyers emphasized the impact of Terry’s brain damage on his violent behavior. Fullwood and Stone both stated that Terry’s parents were not at fault for his behavior. Fullwood argued that Terry’s parents “tried hard,” pointed to “their pain and their shame,” and said that there was “no reason to hurt them more” by executing Terry. J.A. 897.

After deliberating for a little over an hour, the jury recommended that Terry be sentenced to death. The court imposed that sentence, as well as consecutive sentences of life imprisonment for first degree burglary, thirty years for first degree criminal sexual conduct, and ten years for malicious injury to a telephone system.

D.

Terry appealed and the Supreme Court of South Carolina affirmed. *State v. Terry*, 529 S.E.2d 274 (S.C. 2000), *cert. denied sub nom. Terry v. South Carolina*, 531 U.S. 882 (2000). Terry thereafter sought postconviction relief in state court. Terry’s counsel raised multiple grounds for relief concerning trial counsel’s performance, none of which are at issue here. Following an evidentiary hearing, the state trial court denied Terry’s application

for postconviction relief and dismissed it with prejudice. The state Supreme Court affirmed. *Terry v. State*, 714 S.E.2d 326 (S.C. 2011), *cert. denied sub nom. Terry v. South Carolina*, 565 U.S. 1206 (2012).

E.

Terry next pursued habeas relief in federal court.⁸ His federal habeas petition raised five grounds for relief, two of which he pursues on appeal:

III. Petitioner's rights to the effective assistance of counsel and to a fair and impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was [sic] violated by trial counsel's failure to conduct adequate and appropriate voir dire or to adequately establish a record and appropriately object in order to preserve the issue for appellate review.

....

IV. Petitioner's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was violated by trial counsel's failure to develop evidence supporting a defense of guilty but mentally ill and failing to adequately investigate and present mitigation evidence during the trial and sentencing when trial counsel failed to present substantial and highly mitigating evidence of Gary Terry's childhood abuse.

J.A. 31, 35. Both grounds were procedurally defaulted, because Terry's counsel in the state postconviction proceeding didn't raise them.

Terry attached to his petition several affidavits (including from two of the experts who testified at trial) and other documentary evidence of childhood abuse that, he argues, trial counsel were deficient in failing to uncover and present as mitigating evidence. Terry

⁸ Terry also sought to exhaust his state remedies in a contemporaneously filed application for postconviction relief in state court. But the state court dismissed Terry's application as time-barred and improperly successive.

also attached affidavits from two jurors who say that they didn't consider a life sentence and that the jury didn't discuss giving Terry a life sentence during deliberations. Finally, Terry presented affidavits from his trial and state postconviction counsel to show that counsel had no strategic reason for failing to investigate or present evidence of abuse.

Terry's submission to the district court painted a picture of a childhood marred by his father's abuse. Some of the evidence appears in the notes of the experts retained by trial counsel. Massey's notes from a pretrial interview of Terry record the following description of Terry's childhood:

Discipline: Gary stated, "My daddy beat the shit out of me with a belt." He explained that his daddy has health problems (burned, busted back, migraines) and he has a temper. He (daddy) whipped hard enough for the whelps [sic] to bleed. He (daddy) slapped him (Gary) on his face, on the side of his head or whatever he could reach when he got mad. His daddy would cuss him when he got blamed for doing something. He said, "My brother Johnny would do stuff and blame it on me and I would catch hell for it." All of the children got whipped like that.

Gary remembered one time when he was in high school (16–17 years old) and was talking on the telephone at home. His daddy came by and said something . . . the cussing started and Gary tried to run away. His daddy hit him across the back with something and broke his shoulder blade. Gary remembers being taken to either Richland or Baptist Hospital.

Gary said his mother was usually home when all this was going on but she tried to stay out of the way. One time she got in between them and got hit. His mother didn't discipline him—she left it up to his daddy.

J.A. 55.

Vogelsang's handwritten notes from the interviews she conducted also refer to abuse. Terry's sister-in-law, Patty Terry, reported that "Patricia step[ped] in to stop Bill beating boys and would get it" and also that "Bill saw kids as workhorses . . . not allowed

to play.” J.A. 58, 345. Vogelsang’s notes following her interview with Terry’s brother, Billy Terry, reflect: “Daddy tore everyone up including him if Mom had to be awakened”; “Strap—hung behind door”; “couldn’t go to school—didn’t want teacher to see marks.” J.A. 345. From her interview with Faye Servoss, Terry’s sister, Vogelsang noted: “Fa [sic] wld tie kids to tree in front yard & have beat each other”; “Dad beat before accidents”; “Daddy made them fight each other”; and “Billy worked kids to death . . . like dogs.” J.A. 70, 75, 345–46.

In Vogelsang’s post-trial affidavit, she states, “[I]t is apparent that Gary and his siblings suffered significant abuse at home. It would have been typical of me to make this known to the attorneys and to stress the impact of trauma on development.”⁹ J.A. 78. Vogelsang does not, however, have any memory of this case, which, she assumes, was because Terry’s trial team was not “active and cohesive.” *Id.* Vogelsang explained that the lack of testimony concerning Terry’s abuse must have been attributable to “the lack of a true team effort, lack of funding, or trial counsel specifically instructing [her] not to talk about the abuse, or a combination of all three.” J.A. 79. But she dismissed lack of funding as a possible reason, because her professional ethics code would have required her to work

⁹ Because Vogelsang’s post-trial affidavit contradicts her trial testimony concerning the severity of the childhood abuse Terry suffered and the greater importance of neglect to Terry’s development, it doesn’t establish a genuine issue of material fact at summary judgment. *See Erwin v. United States*, 591 F.3d 313, 325 n.7 (4th Cir. 2010) (“[I]t is well established that a genuine issue of fact is not created where the only issue of fact is to determine which of the two conflicting versions of [an affiant’s] testimony is correct.” (cleaned up)). *See also Rohrbough v. Wyeth Lab’ys, Inc.*, 916 F.2d 970, 976 (4th Cir. 1990) (holding that an expert’s affidavit which contradicted his deposition testimony did not create an issue of fact at summary judgment).

on the case, once retained, even if she had not been paid. Vogelsang also doesn't remember state postconviction counsel speaking to her about the case.

In her affidavit, Patricia Terry states that Bill, Terry's father, "whipped the children with a belt almost daily." J.A. 82. Terry's father prohibited the children from playing outside, sometimes making them work until 10:00 at night. Patricia also provided an account of Bill breaking Terry's collarbone inconsistent with her account at Terry's sentencing proceeding (while indicating that she did not witness the actual incident):

Bill used to have the children "fight it out" among themselves. One day, when Gary was between 12–14 years old, he and Johnny were fighting in the garage area. Bill was there, too, but did not stop the fight. Johnny is much bigger and stronger than Gary. Gary picked up a brick and threw it at Johnny. The brick broke the windshield of Bill's car and then Bill hurt Gary. He broke his collarbone, and I think he did so by hitting him with a board that was in the garage. I was at work when this happened.

J.A. 83.

Patricia claimed that Bill would throw out the children's dinner if they were served before he was or if he didn't like what she cooked for dinner. Bill often threatened to "blow [her] brains out" in front of the children. J.A. 85. Patricia further explained, "I did not testify about the information included in this affidavit. I simply answered the questions asked of me and no one asked about these things while I was on the witness stand." *Id.* Patricia did not, however, say that she discussed this information with Terry's attorneys.

In a lengthy affidavit, Faye Terry Servoss, Terry's older sister (who was not a witness at Terry's trial), testified to her father's significant abuse of various family members, including severe beatings, animal torture, and seeing her father force her mother to eat a pack of cigarettes because he was angry about her smoking. Faye also testified that

her mother said, “that one’s ruined, that’s okay, we’ve got another” to her father after a neighborhood boy raped her when she was a child. J.A. 87 (cleaned up). But the only incident relating to Terry that she described in her affidavit was his father breaking Terry’s collarbone. Faye also stated that she would have testified at trial to the abuse if she had been subpoenaed.

Charles Register, Patricia Terry’s brother, provided a brief affidavit describing Terry’s father’s abuse of his wife and children. Register testified that he saw Terry’s father “viciously beat” Terry with a stick when Terry was six or seven years old. J.A. 94. Register also testified that “[he] was available and would have testified to these events had [he] been contacted by defense counsel.” J.A. 95.

Finally, Francis Terry, the former wife of Terry’s older brother Billy, submitted an affidavit in which she testified to severe abuse that Billy inflicted upon her and one beating that Billy told her his father had given him. But she also said that, though Terry’s father was “hard” and “real strict,” she never saw him hit his children. J.A. 98.

In her affidavit, Dr. Schwartz-Watts stated, “I did not review, because I was not provided, detailed interviews with various family members conducted by defense counsel’s mitigation investigator, Vivian Massey, nor did I review, because I was not provided, any of the materials assembled by Jan Vogelsang, the social worker hired by defense counsel.” J.A. 101.

After receiving this information and the affidavits of family witnesses from habeas counsel, Schwartz-Watts reexamined Terry in May 2012. Had Schwartz-Watts known about the abuse Terry suffered, she would have testified at trial that Terry suffered effects

from trauma, including missing memories, intrusive thoughts of childhood abuse, and inability to form healthy relationships. According to Schwartz-Watts, “[t]his information is mitigating in its own right, but is also significant with respect to significant brain dysfunction, as the abuse may have actually contributed to the dysfunction.” J.A. 102. “Terry,” she said, “had more neurological dysfunction than any patient I have ever evaluated, including those prior to 1997 and since.” *Id.* Dr. Schwartz-Watts didn’t recall hearing from Terry’s counsel in the state postconviction proceeding, although she knew and worked with these attorneys on other cases.

In her affidavit, Fullwood says that “[i]f the evidence of Gary Terry’s substantial physical abuse was not provided to Dr. Schwartz-Watts it should have been.” J.A. 47. Fullwood also did “not recall making any strategic decision to limit the mitigation testimony of Gary’s family members or to avoid presentation of evidence that he had suffered significant abuse as a child.” *Id.* She stated that it was her “intent to present all of the evidence of that nature that [she] could and all that [she] was aware of was presented.” *Id.* Fullwood also didn’t discuss the case with Terry’s counsel in the state postconviction proceeding before testifying. She deemed this unusual, since postconviction counsel generally interview trial counsel before calling them to the witness stand.

Terry’s postconviction counsel filed affidavits stating that they spoke with Terry’s parents and one of his ex-wives but did not develop additional mitigation evidence from these conversations. Their affidavits do not, however, specify whether they questioned

Terry's family members about abuse or indeed what they discussed with Terry's family members during the interviews.

Postconviction counsel didn't interview or speak with Massey or any of the four expert witnesses who testified at trial. They don't recall interviewing any jurors in Terry's trial. If they had known of the abuse Terry suffered as a child, they would have argued that trial counsel were ineffective for failing to present this issue to the jury.

The affidavits of jurors Brown and Ritchie assert that the jury didn't consider a life sentence for Terry. *See* J.A. 49 (Brown testifying, "[W]e made the [sentencing] decision easily and were all in agreement. We did not discuss giving [Terry] a life sentence."); J.A. 51 (Ritchie testifying, "We did not discuss giving [Terry] a life sentence."). Brown said, "Based on the fact that [Terry] committed a murder plus rape and burglary, there was nothing he could have said or done to make me give him a life sentence. I believe the death penalty is the right punishment for murder if there are also other crimes." J.A. 49. Ritchie stated that "the defense lawyers' attempts to evoke sympathy did not work" and explained, "[T]he evidence regarding his brain injury did not impact me. What I cared about was whether he knew right from wrong, and he did, so in my opinion he did not deserve a life sentence." J.A. 51.

The district court granted summary judgment to the state on Terry's habeas petition and adopted the magistrate's 144-page Report and Recommendation as the order of the court. *Terry v. Stirling*, No. 4:12-1798-RMG, 2019 WL 4723345, at *1 (D.S.C. Sept. 26, 2019). The district court also denied Terry's request for an evidentiary hearing. *Id.* at *9.

Terry, said the district court, had “not made specific factual allegations that, if true, would entitle him to habeas relief and ha[d] failed to demonstrate the substantiality of his underlying ineffective assistance of counsel claims.” *Id.* The district court arrived at this conclusion for four related reasons: (1) Terry’s trial counsel presented some evidence of Terry’s childhood abuse; (2) Terry presented no evidence that trial counsel knew more information about the abuse than they presented; (3) any deficiencies in trial counsel’s presentation were attributable to their experts’ failure to inform them of childhood abuse Terry suffered, for which trial counsel cannot be faulted; and (4) the record suggests that Vogelsang, counsel’s expert in social work, did not deem the abuse significant when she testified at Terry’s sentencing. *Id.* at 12.

The district court also held that Terry’s trial counsel conducted an adequate voir dire. It noted that counsel asked both jurors Brown and Ritchie¹⁰ whether they could consider either a life or a death sentence depending on the circumstances, even after finding Terry guilty of murder and other crimes, and both jurors answered in the affirmative. *Id.* at *11. Terry, said the district court, “was permitted to do exactly what *Morgan* requires, namely, he inquired whether each of these jurors had predetermined whether or not to impose the death penalty, with each one confirming, with the benefit of knowing both the statutory mitigating factors and that they would have already found Petitioner guilty of murder plus an additional criminal act, that they could impose either a sentence of life in

¹⁰ The district court refers to Brown and Ritchie as Juror #35 and Juror #214 respectively.

prison or death.” *Id.* at *12. And the trial court didn’t improperly curtail counsel’s voir dire, because South Carolina law prohibited the questions that counsel wished to ask regarding the jurors’ views of psychiatry. *Id.* at *11–*12.

This appeal followed.

II.

“We review the district court’s denial of habeas relief on summary judgment de novo.” *Sigmon v. Stirling*, 956 F.3d 183, 191 (4th Cir. 2020). “[U]nder certain circumstances, including raising a claim under *Martinez*, a petitioner may excuse a state court procedural default.” *Id.* (citing *Martinez*, 566 U.S. at 17). “In such cases, a federal court considers those claims de novo.” *Id.*

“We review a district court’s decision to deny a habeas petitioner an evidentiary hearing for abuse of discretion.” *Id.* at 198. “In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition’s factual allegations, which, if true, would entitle the applicant to federal habeas relief.” *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007).

“Generally, if a claim is procedurally defaulted in state court, federal habeas review is barred ‘unless the prisoner can demonstrate cause for the default and actual prejudice.’” *Sigmon*, 956 F.3d at 198 (quoting *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). “And ineffective assistance of state post-conviction counsel generally cannot establish cause for the default because there is no constitutional right to an attorney in state post-conviction proceedings.” *Id.* (cleaned up). “However, when state law requires ‘claims of ineffective

assistance of trial counsel [to] be raised in an initial-review collateral proceeding’ and not on direct review—which South Carolina law does—procedural default does not bar federal habeas review of ‘a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.’” *Id.* (quoting *Martinez*, 566 U.S. at 17).

“Accordingly, to invoke *Martinez* and obtain federal habeas review of a claim defaulted in state court, [Terry] must demonstrate that state habeas counsel was ineffective or absent, and that the underlying ineffective assistance of [trial] counsel claim is substantial.” *Id.* (cleaned up). “To demonstrate that ‘the underlying ineffective-assistance-of-trial-counsel claim is a substantial one,’ [Terry] must show ‘that the claim has some merit.’” *Id.* (quoting *Martinez*, 566 U.S. at 14).

“To demonstrate ineffective assistance of counsel, ‘[a] petitioner must show that counsel’s performance was deficient, and that the deficiency prejudiced the defense.’” *Id.* at 192 (quoting *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)). “A deficient performance is one that falls ‘below an objective standard of reasonableness.’” *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

“In this analysis, we must resist the temptation to second-guess counsel’s assistance after conviction or adverse sentence and instead must make every effort to eliminate the distorting effects of hindsight.” *Id.* (cleaned up). “The challenger’s burden is to show that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (cleaned up). As we recently held:

[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*.

Owens, 967 F.3d at 423.

A.

We first turn to Terry's argument that his trial counsel was deficient under *Strickland* for failing to present additional evidence of childhood abuse.¹¹ As we explain, we hold that this claim is insubstantial under *Martinez*.

1.

We begin our analysis by considering the actual performance rendered by trial counsel in sentencing. Though unsuccessful in persuading the jury, Terry's lawyers presented a coherent mitigation case with a clear theory for why the jury should have voted for life.

First, counsel attempted to humanize Terry and presented extensive evidence of his difficult childhood through testimony from his mother, father, and wife. Terry's mother testified to violent fights between Terry and his older brothers, Terry's possible teenage suicide attempt when he blocked the door of his room with a dresser and inhaled glue fumes until he lost consciousness, and the incident in which Terry's father broke Terry's collarbone with a board during a fight between Terry and one of his brothers. Indeed,

¹¹ Given our disposition, we don't address whether state postconviction counsel were ineffective in failing to exhaust the claim.

Terry's father breaking his collarbone is one of the few specific instances of abuse against Terry to which the affiants testify. *See* J.A. 83 (Terry's mother Patricia describing this incident); J.A. 90 (Faye Servoss, Terry's older sister, describing this incident, the only specific instance of abuse against Terry she mentions in her 36-paragraph affidavit).

Terry's mother also testified to obvious symptoms of brain damage, including headaches and times when Terry would stagger and forget what he was doing while doing something. Terry's father then testified to occasions when Terry helped his family, and Terry's wife testified to Terry's loving relationship with his children and the pain that his execution would inflict on them.

Terry's counsel didn't limit their mitigation case to testimony from his family members, however. They also called four experts, all of whom presented un rebutted evidence of Terry's brain damage and its effects on his behavior—particularly his ability to control his impulses and make decisions. Vogelsang, who interviewed multiple family members and also interviewed Terry four times, testified at length to the impact of Terry's neglectful, and at times violent, childhood on his character. Then in closing, Terry's counsel argued that the jury should spare his life, because executing him would inflict unnecessary additional pain and shame on his family, and because Terry's brain damage diminished his responsibility for his violent behavior.

2.

Terry's new lawyers now characterize Terry's childhood as far grimmer than even the less-than-idyllic picture that trial counsel painted. With the benefit of hindsight and

following an adverse sentence, Terry argues that trial counsel were deficient for failing to present this additional evidence of childhood abuse.

But the district court rejected this argument, and for good reason. The evidence shows that counsel, through the defense team, discovered and presented relevant information about abuse, particularly the incident in which Terry's father broke his collarbone with a board. *See* J.A. 692 (where Patricia describes this incident in her trial testimony).

Counsel also intended to present all evidence regarding abuse to the jury. And they don't say now that they knew about the evidence of abuse in the notes prepared by Massey and Vogelsang.

That said, it appears that Fullwood did have Massey's typewritten notes in her case file. Indeed, in the state postconviction proceeding, Fullwood referred to these notes in answering questions about information that Terry provided the trial team during the team's investigation. But Fullwood didn't testify (nor was she asked) whether she reviewed those portions of Massey's notes describing Terry's childhood abuse.

Though it's unclear whether Vogelsang's handwritten notes (which are difficult to read in places) were in counsel's file, Vogelsang presumably reviewed them and concluded that neglect had a greater impact on Terry's behavior than the abuse of which she was aware. Given that Vogelsang interviewed Terry multiple times and spoke with several of Terry's family members (including all but one of the relatives that have submitted post-trial affidavits), counsel had no reason to believe that Vogelsang's opinion was unfounded or that Vogelsang failed to fully inform them of the circumstances of Terry's childhood.

While counsel may not abdicate their responsibility to investigate their client's case, it's not unreasonable or contrary to prevailing professional norms for counsel to rely on a qualified mitigation investigator or other experts. *See Rhode v. Hall*, 582 F.3d 1273, 1283 (11th Cir. 2009).¹² Terry's counsel were also entitled to rely on Vogelsang's expert opinion concerning the causes of Terry's behavior. *See Wilson*, 155 F.3d at 403 (holding that, to be reasonably effective, trial counsel is not required to "second-guess" their expert's opinions).

But even if counsel could be faulted for not highlighting evidence of Terry's abuse more forcefully, they were by no means constitutionally deficient—particularly in light of the robust mitigation case that was presented. We agree with our sister circuit that "perfection is not the standard of effective assistance." *Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995) (en banc). And failures to present or develop certain evidence don't necessarily rise to deficient performance or prejudice under *Strickland*. *See Byram v. Ozmint*, 339 F.3d 203, 210–11 (4th Cir. 2003) (trial counsel not deficient for failing to obtain petitioner's adoption records, which might have provided additional evidence that he suffered from fetal alcohol syndrome and more evidence of childhood trauma, when counsel made reasonable efforts to obtain the records and otherwise presented a robust mitigation case concerning petitioner's "troubled childhood and adolescence").

¹² Nor is there a right to effective assistance of expert witnesses or mitigation investigators. *See Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir. 1998) ("The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness.").

Now, with the benefit of hindsight, Terry argues that counsel should have emphasized abuse and de-emphasized neglect in their mitigation case. But “[t]he widespread use of the tactic of attacking trial counsel by showing ‘what might have been’ proves that nothing is clearer than hindsight—except perhaps the rule that we will not judge trial counsel’s performance through hindsight.” *Waters*, 46 F.3d at 1514. We are satisfied that counsel conducted a reasonable investigation “and they cannot be held accountable for information Petitioner and his family failed to provide or their experts failed to convey.” *Terry*, 2019 WL 4723345, at *14.

The cases on which Terry relies to contend otherwise are distinguishable. In *Rompilla v. Beard*, 545 U.S. 374, 383 (2005), for example, the Supreme Court held that counsel were deficient for failing to review the record of the defendant’s prior conviction for rape and assault. The file at issue, which was a readily available public record, contained the transcript of the rape victim’s testimony that counsel knew the prosecutor intended to use as aggravating evidence at the sentencing phase of Rompilla’s trial. *Id.*

If counsel had reviewed the file, which also contained Rompilla’s prison records from his incarceration for that prior conviction, they would have “found a range of mitigation leads that no other source had opened up,” including evidence that Rompilla was raised in a “slum environment,” suffered from various psychological disorders, and had test scores indicating a third-grade level of cognition. *Id.* at 390–91. These records “would have destroyed the benign conception of Rompilla’s upbringing and mental capacity defense counsel had formed from talking with Rompilla himself and some of his family members, and from the reports of the mental health experts.” *Id.* at 391.

The facts of *Rompilla* are far removed from Terry's case. For starters, Terry neither alleges nor shows that trial counsel failed to examine records they knew, or should have known, that the state would use as aggravating evidence. He argues instead that counsel missed "numerous red flags," Appellant's Br. at 32, which should have alerted them to the abuse Terry suffered as a child, that they had no strategic reason to limit their investigation or presentation of this mitigating evidence, and that their failure to present the evidence of abuse they already had "suggest[s] that their incomplete investigation [and presentation] was the result of inattention, not reasoned strategic judgment." *Id.* at 31 (quoting *Wiggins*, 539 U.S. at 534).

But the record is, at best, ambiguous as to whether Terry's counsel failed to review the evidence of abuse they had. And even if they did, this error doesn't amount to deficient performance, particularly when juxtaposed with the robust mitigation case that they did present.

Terry also cites to *Winston v. Pearson*, 683 F.3d 489 (4th Cir. 2012) for the related propositions that attorneys are "obligated to be familiar with readily available documents necessary to an understanding of [their client's] case," and forbidden from relying on an expert to "ascertain their import." *Id.* at 505 (cleaned up). There, we held that Winston's counsel were deficient for failing to read his school records—which revealed an IQ low enough to qualify him as intellectually disabled, thus *barring his execution*—and weren't entitled to rely on an expert to ascertain the import of these records.

But *Winston* is distinguishable from this case for the same reasons *Rompilla* is: The records at issue were easy to obtain and required no effort on trial counsel's part to

decipher. *Winston* is also distinguishable because counsel's errors there led them to fail to raise the claim that Winston's intellectual disability categorically barred a death sentence. 683 F.3d at 492–93. Here, by contrast, the alleged deficiencies in not presenting the evidence of physical abuse merely failed to bolster an already strong mitigation case that included some evidence of abuse. And none of this evidence would have categorically barred the imposition of a death sentence.

Terry also relies on *Abdul-Salaam v. Secretary of Pennsylvania Department of Corrections*, 895 F.3d 254 (3d Cir. 2018), in which our sister circuit deemed counsel deficient for failing to investigate significant evidence of mitigating childhood abuse. But counsel in *Abdul-Salaam* presented a sum total of three witnesses, all family members, during the sentencing phase; didn't interview multiple other family members who would have testified to severe abuse; didn't call any mental health experts to the stand (and could give no cogent explanation for this decision); and didn't try to obtain any of Abdul-Salaam's school or juvenile records (which contained additional evidence of his troubled childhood). *Id.* at 258, 261.

Here, by contrast, counsel presented four expert witnesses—all of whom opined as to Terry's mental health and one of whom interviewed multiple family members and opined that neglect, rather than abuse, was the central problem in Terry's family. Counsel also put on extensive evidence of neglect in Terry's childhood. The robust mitigation case presented by Terry's lawyers is far removed from the performance criticized by our sister circuit in *Abdul-Salaam*. On this record, we decline to find that Terry's counsel were deficient.

3.

In any event, Terry suffered no prejudice from counsel's alleged deficiency. "The question of whether counsel's deficiency prejudiced the defense centers on whether there is a reasonable probability that, absent counsel's errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Sigmon*, 956 F.3d at 192 (cleaned up). A showing of prejudice "requires a 'substantial,' not just 'conceivable,' likelihood of a different result." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011). To establish *Strickland* prejudice, Terry must demonstrate "a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537. In determining whether Terry has shown prejudice, we review the "totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695.

Here, the jury heard substantial mitigating evidence—about both Terry's neglectful and somewhat violent childhood and his significant brain damage. Four experts testified (without rebuttal from the state) to the effects of brain damage on Terry's behavior, explaining in detail how Terry's brain dysfunction limited his ability to control his behavior and how the various aggravating circumstances raised by the state were consistent with Terry's mental impairment. Nevertheless, the jury took a little over an hour to recommend that Terry be sentenced to death.

The reason, in our view, is because the aggravating circumstances of Terry's crimes, and his propensity for violence, were too much to overcome. Before breaking into Jackson's house and murdering her, Terry disconnected Jackson's telephone so that she couldn't call for help. He brutally beat Jackson, likely striking her with two weapons and

hitting her head multiple times with a blunt object hard enough to crush her skull.¹³ See J.A. 372 (where Dr. Carter opined that Terry used two weapons during his assault on Jackson); *State v. Terry*, 529 S.E.2d at 276 (stating that Jackson’s “cause of death was blunt trauma with skull fracture and brain injury”). Terry also raped Jackson. This senseless murder was the culmination of a life littered with crimes and a pattern of violence, particularly toward women. In the face of the state’s case in aggravation, we agree with the district court that there’s no reasonable probability that Terry’s additional evidence of childhood abuse would have led even one juror to conclude that “the balance of aggravating and mitigating circumstances did not warrant death.” *Sigmon*, 956 F.3d at 192.

The affidavits from Vogelsang and Schwartz-Watts concerning the effect of Terry’s childhood abuse on their analyses confirms our conclusion. Vogelsang doesn’t explain how the additional evidence of abuse would have changed her opinion, other than saying that the evidence “could have shed light on why Gary is the way he is.” J.A. 79. Dr. Schwartz-Watts explains that, had she known that Terry suffered childhood abuse, she would have opined that the abuse was “mitigating in its own right” and “is also significant with respect to significant brain dysfunction, as the abuse may have actually contributed to the dysfunction.” J.A. 102. Schwartz-Watts also states, “Terry had more neurological dysfunction than any patient I have ever evaluated, including those prior to 1997 and

¹³ The record doesn’t specify the type of weapon, or weapons, Terry used to beat and ultimately murder Jackson.

since.” *Id.* But she doesn’t connect this observation to Terry’s childhood abuse.¹⁴ And as we have already explained, the evidence of abuse, though potentially mitigating in its own right, doesn’t overcome the mountain of aggravating evidence found in the record and is not prejudicial in light of the robust, and unrebutted, mitigation case Terry’s trial counsel did present. *See, e.g., McHone v. Polk*, 392 F.3d 691, 710 (4th Cir. 2004) (no prejudice from counsel’s failure to present evidence that as a child petitioner had witnessed his father “regularly inflict brutal beatings” on his mother and half-sister when counsel had presented evidence that petitioner’s father had engaged in “violent fights” with his mother).

In sum, we’re not persuaded that Terry’s new mitigation theory would have fared any better than the case that was actually presented. Thus, even if counsel’s performance was deficient, it wasn’t prejudicial under *Strickland* and thus doesn’t excuse procedural default under *Martinez*.

B.

Terry next argues that counsel were deficient in jury selection for failing to ferret out jurors Brown and Ritchie who, Terry argues, were unqualified under *Morgan*. Once again, we disagree.

“On habeas review, federal courts generally accord particular deference to the judgment of trial counsel during *voir dire*.” *Gardner v. Ozmint*, 511 F.3d 420, 426 (4th

¹⁴ Terry used Dr. Schwartz-Watts’s opinion regarding neurological dysfunction to support his argument to the district court that his counsel were deficient for failing to present a guilty but mentally ill defense. But he has abandoned that argument on appeal.

Cir. 2007) (cleaned up). Under *Morgan*, “[a] juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do.” 504 U.S. at 729. And “part of the guarantee of a defendant’s right to an impartial jury is an adequate *voir dire* to identify unqualified jurors.” *Id.* Nonetheless, “[t]he Constitution . . . does not dictate a catechism for *voir dire*, but only that the defendant be afforded an impartial jury.” *Id.*

Terry fails to overcome the presumption that trial counsel rendered effective assistance in jury selection. See *Strickland*, 466 U.S. at 689. Counsel asked jurors Brown and Ritchie whether they could impose either a life or death sentence, even after convicting a defendant of murder and other crimes. Both said they could.

Fifteen years later, after having heard all the evidence, and at variance with his answers during jury selection, Brown states that he “believe[s] the death penalty is the right punishment for murder if there are also other crimes.” J.A. 49. Ritchie is less categorical, saying that “the evidence regarding [Terry’s] brain injury did not impact me.” J.A. 51. These affidavits are of limited value to Terry, however, because “consideration of statements made by trial jurors after they experienced the entire trial and sentencing hearing and after deliberating on the verdicts are not reasonably probative of [the honesty of their answers to voir dire questions as to] whether [they] could consider the evidence with open minds and follow the court’s instructions on the law.” *Neill v. Gibson*, 278 F.3d 1044, 1056 (10th Cir. 2001) (cleaned up).

And even if Brown and Ritchie weren’t qualified under *Morgan*, Terry doesn’t explain how counsel’s questions constituted deficient performance. Indeed, Terry doesn’t

suggest questions that trial counsel failed to ask to determine whether the jurors would have considered mitigating evidence after finding Terry guilty of murder, rape, and burglary. Nor does he explain what else counsel could have done to push back against the trial court's limitations on the scope of their questions to prospective jurors.

The district court correctly rejected this claim.

C.

Finally, the district court didn't abuse its discretion by denying Terry an evidentiary hearing on his *Strickland* claims. To grant an evidentiary hearing, "there must be a viable constitutional claim, not a meritless one, and not simply a search for evidence that is supplemental to evidence already presented." *Segundo v. Davis*, 831 F.3d 345, 351 (5th Cir. 2016) (cleaned up).

Here, Terry has failed to present a viable constitutional claim of ineffective assistance of counsel, and the evidence of childhood abuse he now wishes us to consider is either supplemental to the evidence counsel presented at sentencing or was unavailable to trial counsel due to the errors of experts, for which counsel aren't responsible. We therefore decline to order an evidentiary hearing.

* * *

For the reasons given, the judgment of the district court is

AFFIRMED.

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION**

Gary Dubose Terry,	)	Civil Action No. 4:12-1798-RMG
	)	
Petitioner,	)	
	)	
v.	)	ORDER AND OPINION
	)	
Bryan P. Stirling, <i>Commissioner, South,</i>	)	
<i>Carolina Department of Corrections, and</i>	)	
Willie D. Davis, <i>Warden, Kirkland</i>	)	
<i>Reception and Evaluation Center,</i>	)	
	)	
Respondents.	)	
	)	

This matter is before the Court on the Report and Recommendation ("R & R") of the Magistrate Judge (Dkt. No. 142), recommending that the Court deny Respondent's motion to strike (Dkt. No. 131) and grant Respondents' motion for summary judgment (Dkt. No. 130) on Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Dkt. No. 16). For the reasons set forth below, the Court adopts the R & R as the Order of the Court, denies Respondent's motion to strike and grants Respondents' motion for summary judgment.

I. Background

The Court adopts the relevant facts and procedural history as outlined in the R & R. (Dkt. No. 142 at 2–17.) The Lexington County Grand Jury indicted Petitioner Gary Dubose Terry in July 1995 for the murder of Urai Jackson and for first degree burglary, first degree criminal sexual conduct, and malicious injury to a telephone system. The State then served notice of intent to seek the death penalty. On September 18, 1997, Petitioner was found guilty on all counts, and on September 21, 1997, the jury found the existence of two statutory aggravating factors, namely, that the murder was committed during a crime of sexual conduct and that the murder was committed during a crime of burglary. The jury recommended that Terry be sentenced to death and the trial

judge thereafter sentenced Petitioner to death.

On March 13, 2000, the South Carolina Supreme Court affirmed Petitioner's convictions and sentence. *State v. Terry*, 529 S.E.2d 274, 275 (S.C. 2000). The South Carolina Supreme Court denied Petitioner's petition for rehearing on April 19, 2000 (Dkt. No. 39-2 at 52–58), and the United States Supreme Court denied his petition for writ of certiorari on October 2, 2000, *Terry v. South Carolina*, 531 U.S. 882, 121 S.Ct. 197 (2000).

On November 30, 2000, through counsel, Petitioner filed his first application for post-conviction relief ("PCR"). Petitioner presented twenty-three grounds in his PCR application. (Dkt. No. 39-2 at 205 – 206.) The PCR court held an evidentiary hearing from July 10 – 12, 2006, and heard testimony from Petitioner's trial counsel (Elizabeth Fullwood and Isaac McDuffie Stone, III), the defense team's investigator, appellate counsel, South Carolina Law Enforcement Division ("SLED") personnel, three of Petitioner's friends and relatives, and a Lexington County Sheriff's Department detective. On February 18, 2009, the PCR court denied Petitioner's PCR application and dismissed it with prejudice. Petitioner filed a motion to alter or amend the PCR court's judgment, which the PCR court denied. Petitioner then filed a petition for writ of certiorari with the South Carolina Supreme Court, which the court granted on November 5, 2010. On August 29, 2011, after briefing and oral argument, the South Carolina Supreme Court affirmed the PCR court's decision. *Terry v. State*, 714 S.E.2d 326 (S.C. 2011); (Dkt. No. 42-4.) Petitioner filed a petition for writ of certiorari in the United States Supreme Court, which was denied on February 21, 2012. *Terry v. South Carolina*, 565 U.S. 1206, 132 S.Ct. 1548 (2012); (Dkt. No. 42-7.)

Petitioner timely filed the present habeas petition on June 29, 2012. (Dkt. No. 16.) On the same day, Petitioner also filed a second application for post-conviction relief in the state courts. (Dkt. Nos. 17; 117.) Based on the second PCR application, Petitioner filed a motion to stay this

matter pending resolution of his contemporaneously-filed second PCR application. (Dkt. No. 17.) On December 10, 2012, the Court granted Petitioner's motion. (Dkt. No. 53.) Petitioner's second PCR application was dismissed as successive on June 19, 2018. (Dkt. No. 117-1.) On July 13, 2018 the Court lifted the stay and allowed time for amended briefing. (Dkt. No. 119.)

Petitioner's habeas petition raises five grounds for relief: 1) Petitioner's trial counsel were ineffective for failing to object on the basis of prosecutorial misconduct to the trial court's exclusion of statements Petitioner made and for failing to concede guilt after informing the jury Petitioner had confessed; 2) Petitioner's trial counsel were ineffective for failing to disclose an actual conflict of interest; 3) Petitioner's trial counsel were ineffective for failing to conduct adequate and appropriate *voir dire*; 4) Petitioner's trial counsel were ineffective for failing to develop evidence supporting a defense of guilty but mentally ill or to adequately investigate and present mitigating evidence of Petitioner's abusive childhood, and; 5) Petitioner's trial counsel were ineffective in failing to object to or impeach aggravating testimony from Petitioner's ex-wife that he had raped her during their marriage. (Dkt. No. 16.)

Respondents moved for summary judgment on all grounds and moved to strike certain exhibits Petitioner submitted in support of his petition. (Dkt. Nos. 130, 131.) Petitioner opposed the motions. (Dkt. No. 137.) The Magistrate Judge issued an R & R recommending the Court grant Respondents' motion for summary judgment and deny Respondents' motion to strike. (Dkt. No. 142.) Petitioner filed objections to the R & R regarding Grounds One through Four and the denial of an evidentiary hearing, and Respondents filed a response. (Dkt. Nos. 149, 157.)

II. Legal Standard

A. Review of R & R

The Magistrate Judge makes only a recommendation to this Court that has no presumptive

weight. The responsibility to make a final determination remains with the Court. *See Mathews v. Weber*, 423 U.S. 261, 270–71 (1976). The Court may “accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). This Court must make a *de novo* determination of those portions of the R & R Plaintiff specifically objects. Fed. R. Civ. P. 72(b)(2). Where Plaintiff fails to file any specific objections, “a district court need not conduct a *de novo* review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.” *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (internal quotation omitted). “Moreover, in the absence of specific objections to the R & R, the Court need not give any explanation for adopting the recommendation.” *Wilson v. S.C. Dept of Corr.*, No. 9:14-CV-4365-RMG, 2015 WL 1124701, at *1 (D.S.C. Mar. 12, 2015). *See also Camby v. Davis*, 718 F.2d 198, 200 (4th Cir.1983).

Petitioner objects to the R & R regarding Grounds One through Four and the recommendation to not hold an evidentiary hearing. (Dkt. No. 149.) Therefore, those portions of the R & R are reviewed *de novo*. All other portions of the R & R are reviewed for clear error.

B. Summary Judgment

To prevail on a motion for summary judgment, the movant must demonstrate that there is no genuine issue of any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The party seeking summary judgment has the burden of identifying the portions of the “pleadings, depositions, answers to interrogatories, any admissions on file, together with the affidavits, if any, which show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The Court will construe all inferences and ambiguities against the

movant and in favor of the non-moving party. *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The existence of a mere scintilla of evidence in support of the non-moving party's position is insufficient to withstand a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). However, an issue of material fact is genuine if the evidence is such that a reasonable jury could return a verdict in favor of the non-movant. *Id.* at 257.

“When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). “In the language of the Rule, the nonmoving party must come forward with ‘specific facts showing that there is a genuine issue for trial.’” *Id.* at 587. “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Id.* (quoting *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)).

C. Habeas Corpus

i. Standard for Relief

Claims adjudicated on the merits in a state court proceeding cannot be a basis for federal habeas corpus relief unless the decision was “contrary to, or involved an unreasonable application of clearly established federal law as decided by the Supreme Court of the United States,” or the decision “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)(1), (2). Section 2254(d) codifies the view that habeas corpus is a “‘guard against extreme malfunctions in the state criminal justice systems,’ not a substitute for ordinary error correction through appeal.” *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011) quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment). “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.” *Id.* at 101 *quoting Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)); *see also White v. Woodall*, 572 U.S. 415, 419, 134 S. Ct. 1697, 1702 (2014) (stating that “[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement”) *quoting Harrington*, 562 U.S. at 103.

Therefore, when reviewing a state court’s application of federal law, “a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” *Williams v. Taylor*, 529 U.S. 362, 410 (2000); *see also White*, 572 U.S. at 419 (describing an “unreasonable application” as “objectively unreasonable, not merely wrong” and providing that “even clear error will not suffice”) (internal quotation marks and citation omitted). State court factual determinations are presumed to be correct and the petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

ii. Procedural Default

A habeas corpus petitioner may obtain relief in federal court only after he has exhausted his state court remedies. 28 U.S.C. § 2254(b)(1)(A). “To satisfy the exhaustion requirement, a habeas petitioner must present his claims to the state’s highest court.” *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997), *abrogated on other grounds by United States v. Barnette*, 644 F.3d 192 (4th Cir. 2011); *see also In re Exhaustion of State Remedies in Criminal & Post-Conviction Relief Cases*, 471 S.E.2d 454, 454 (S.C. 1990) (holding that “when the claim has been presented to the

Court of Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies”). To exhaust his available state court remedies, a petitioner must “fairly present[] to the state court both the operative facts and the controlling legal principles associated with each claim.” *Longworth v. Ozmint*, 377 F.3d 437, 448 (4th Cir. 2004) (internal quotation marks and citation omitted).

Generally, a federal habeas court should not review the merits of claims procedurally defaulted (or barred) under independent and adequate state procedural rules. *Lawrence v. Branker*, 517 F.3d 700, 714 (4th Cir. 2008). For a procedurally defaulted claim to be properly considered by a federal habeas court, the petitioner must “demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

D. Ineffective Assistance of Counsel

When claiming habeas relief due to ineffective assistance of counsel at trial, a petitioner must show (1) that his trial counsel’s performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that but for counsel’s error, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The Court must apply a “strong presumption” that trial counsel’s representation fell within the “wide range of reasonable professional assistance,” and the errors must be “so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.” *Harrington*, 562 U.S. at 104. This is a high standard, one in which a habeas petitioner alleging prejudice must show that counsel’s errors deprived him “of a fair trial, a trial whose result is reliable.” *Strickland*, 466 U.S. at 687. Petitioner must show that, “there is a reasonable probability

that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. *Harrington*, 562 U.S. at 112 ("The likelihood of a different result must be substantial, not just conceivable.").

The Supreme Court has cautioned that "[s]urmounting *Strickland*'s high bar is never an easy task[,] . . . [e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Harrington*, 562 U.S. at 105 quoting *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485 (2010). When evaluating an ineffective assistance of counsel claim, the petitioner must satisfy the highly deferential standards of 28 U.S.C. § 2254(d) and *Strickland* "in tandem," making the standard "doubly" more difficult. *Id.* In such circumstances, the "question is not whether counsel's actions were unreasonable," but whether "there is any reasonable argument that counsel satisfied *Strickland*'s 'deferential standards.'" *Id.*

Courts are reluctant to characterize tactical or strategic decisions by trial counsel as ineffective assistance. *Carter v. Lee*, 283 F.3d 240, 249 (4th Cir. 2002). A "strong presumption" exists that counsel's actions were the function of trial tactics and not "sheer neglect." *Harrington*, 562 U.S. at 109. This rule, however, is not absolute where the purported strategic decision is based upon an error or ignorance of the law by trial counsel. *Wilson v. Mazzuca*, 570 F.3d 490, 502 (2d Cir. 2009) (omissions based upon "oversight, carelessness, ineptitude or laziness" cannot be explained as "trial strategy"); *Ramonez v. Berghuis*, 490 F.3d 482, 488 (6th Cir. 2007) (a strategic choice made without a professionally competent investigation of the Petitioner's options is "erected upon . . . a rotten foundation" and is not entitled to deference).

III. Discussion

A. Ground One

In Ground One, Petitioner alleges that his trial counsel were ineffective for: (i) failing to object on the basis of prosecutorial misconduct to the trial court's exclusion of two statements Petitioner made and; (ii) for failing to concede guilt after informing the jury Petitioner had confessed during the opening statement. (Dkt. No. 16 at 7.)

Before trial, Petitioner's counsel moved to suppress a statement Petitioner made to police during the course of the criminal investigation. When police questioned Petitioner on March 24, 1995, the Petitioner gave a statement that he had consensual sex with Urai Jackson and, according to Petitioner, as he began to leave, an argument ensued, which led to Petitioner losing his temper and ultimately beating Ms. Jackson with some "object." (Dkt. No. 37-3 at 78-79.) Petitioner's trial counsel argued Petitioner made the statement involuntarily and had been ill when police interviewed him. The trial court conducted a *Jackson v. Denno*, 378 U.S. 368 (1964) hearing and found the statement admissible.

In his guilt-phase opening statement, assuming the State would introduce Petitioner's statement as evidence of guilt, Petitioner's trial counsel informed the jury that Petitioner had confessed to having sex and killing Ms. Jackson, and that Petitioner had confessed to another murder as well, but that his confession was unreliable. The State, however, never moved to admit Petitioner's March 24, 1995 statement in the guilt-phase. When the detective who had taken Petitioner's statement was called as a witness, the State moved to exclude the statement.

Petitioner's trial counsel argued Petitioner should be permitted to introduce the statement under South Carolina Rule of Evidence 804(B)(3) as a statement against interest because Petitioner, who exercised his right not to testify, was unavailable as a witness. The court ruled

Petitioner could not introduce the statement, finding that invoking his right not to testify did not allow Petitioner “to introduce a statement that the State does not put in in its case in chief in order to get around the issue of him not taking the stand.”¹ (Dkt. No. 36-4 at 21 – 38.)

On direct appeal, the South Carolina Supreme Court considered whether the trial court erred “in refusing to permit [Petitioner] to introduce his own statement to police into evidence” and “concur[ed] with the trial court’s ruling that [Petitioner] could not use his fifth amendment privilege against self-incrimination as both a sword and a shield.” *Terry*, 529 S.E.2d at 276 – 77.

In his PCR application, Petitioner asserted trial counsel were ineffective for conceding guilt in the opening statement, focusing on the fact that the March 24, 1995 statement did not confess to murder, only manslaughter, and additionally did not confess to burglary or criminal sexual conduct. (Dkt. No 39-2 at 205 – 206.) At an evidentiary hearing, Petitioner’s PCR counsel questioned his trial counsel and the prosecutors about the trial and any strategy underlying counsel’s decisions. The PCR court denied Petitioner’s claim. (Dkt. No. 40-4 at 28 – 45.)

i. Petitioner’s Statement and Prosecutorial Misconduct

On appeal from the PCR court’s decision, the South Carolina Supreme Court considered the issue now before this Court: whether trial counsel were ineffective for failing to object to the exclusion of Petitioner’s statement based on prosecutorial misconduct or for failing to adjust their strategy and concede guilt after telling the jury Petitioner had confessed. (Dkt. No. 42-4.) The South Carolina Supreme Court affirmed the dismissal of Petitioner’s PCR claims. (*Id.*)

Importantly, regarding counsel’s failure to assert prosecutorial misconduct as a ground for admitting Petitioner’s statement, the South Carolina Supreme Court held that:

Trial counsel testified he assumed the State would try to introduce the statement during the guilt phase because the State argued at the *Jackson v. Denno* hearing that

¹ The State later introduced both statements in the penalty phase. (See Dkt. No. 37-3 at 74–81.)

the statement was voluntarily given. He acknowledged, however, that no one from the prosecution team told him affirmatively that the State intended to introduce the statement during the guilt phase.

(*Id.* at 5.) Additionally, the court noted that, “[o]ne solicitor testified the State decided well before trial not to present petitioner’s statement during the guilt phase because it was contrary to what the State sought to prove.” (*Id.*) Therefore, the South Carolina Supreme Court concluded that “there is evidence to support the PCR judge’s finding trial counsel were not ineffective.... The solicitor’s decision not to present petitioner’s statement during its case in chief did not constitute prosecutorial misconduct, but was a matter of trial strategy.” (*Id.*)

Petitioner asserts the South Carolina Supreme Court’s finding constitutes an unreasonable application of federal law, focusing on the court’s application of *Old Chief v. U.S.*, 519 U.S. 172 (1997). Specifically, the South Carolina Supreme Court held that

“[I]t is generally recognized that the prosecution and the defense should be afforded wide discretion in the selection and presentation of evidence.” *State v. Johnson*, 338 S.C. 114, 525 S.E.2d 519 (2000).... It is “unquestionably true as a general matter” that “the prosecution is entitled to prove its case by evidence of its own choice” *Old Chief v. U.S.*, 519 U.S. 172 (1997).

(Dkt. No. 42-4 at 4 – 5.) Petitioner contends the court oversimplified the issue, misapplied the Supreme Court’s reasoning, and ignored relevant cases holding that a prosecutor may not make an “affirmative misrepresentation” regarding the “scope and nature of its case-in-chief which misleads the defense. (Dkt. No. 137 at 5.) Petitioner’s objections to Ground One simply re-asserts the same argument. (Dkt. No. 149 at 2.)

The Magistrate Judge carefully considered this argument in the R & R, examined each of the Supreme Court decisions Petitioner put forth as “relevant and controlling,” and found those cases relevant, but not dispositive of whether the State’s actions in this case constituted prosecutorial misconduct. (*See* Dkt. No. 142 at 43 – 47.) Therefore, the R & R concluded that

Petitioner failed to show the state court unreasonably applied federal law. The Court agrees.

As the Magistrate Judge correctly noted, the law holds prosecutors, as representatives of the state, to high ethical standards. *See, e.g., Berger v. United States*, 295 U.S. 78, 88 (1935) (“The prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all . . .”). Accordingly, prosecutors are bound by a “duty to refrain from improper methods calculated to produce a wrongful conviction.” *Id.* *See Brady v. Maryland*, 373 U.S. 83 (1963) (prosecutor cannot withhold exculpatory evidence); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (prosecutor cannot fail to correct false evidence); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (prosecutor cannot present perjured testimony). However, Petitioner has presented no decision, nor is the Court aware of any case, requiring a prosecutor to correct defense counsel’s undisclosed assumptions. Instead, cases cited by Petitioner indicate the concern is with affirmative misrepresentations or misleading actions. *See Lankford v. Idaho*, 500 U.S. 110, 111 S. Ct. 1723 (1991) (finding Constitutional violation where state sought death penalty after providing notice that it was not seeking the death penalty).

To the contrary, here, the State never represented that it would introduce the statement in the guilt phase. (Dkt. Nos. 39-3 at 67 – 68, 100; 40-1 at 22.) Further, while Petitioner challenges the application of *Old Chief*, Petitioner does not challenge the state court’s factual findings, which are supported by the record, that the State trial counsel made a tactical decision, well before trial, not to introduce Petitioner’s statement in the guilt phase, unless Petitioner testified. (Dkt. Nos. 39-3 at 92 – 93, 97, 101; 40-1 at 103 – 104.) Therefore, there is support in the record that the prosecutors contested the March 24, 1995 statement’s admissibility at the *Jackson v. Denno* to determine whether it could introduce the statement on cross-examination if Petitioner should take

the stand, which he did not, or later in the sentencing phase. (Dkt. No. 39-3 at 91 – 92.) Therefore, there is no dispute of material fact that the state court decision finding no prosecutorial misconduct was not contrary to, or an unreasonable application of, federal law and was not an unreasonable determination of the facts.

ii. Failure to Concede Guilt

Regarding trial counsel's failure to concede guilt, the South Carolina Supreme Court held:

Assuming trial counsel were deficient in not changing their trial strategy to gain credibility with the jury, petitioner has failed to meet his burden of showing he was prejudiced. Considering the evidence the State presented during the guilt phase of trial, petitioner cannot show the outcome of the penalty phase would have been different had trial counsel conceded petitioner's guilt in the guilt phase.

(Dkt. No. 42-4 at 6.) Petitioner asserts the state court unreasonably applied *Strickland* in finding that there was no prejudice from trial counsel's decision not to concede guilt after Terry's confession statement was excluded by the trial court. (Dkt. No. 137 at 14.) Petitioner further argues that South Carolina Supreme Court's prejudice analysis was improper under *Strickland* since it improperly weighed the strength of the State's evidence in determining whether the failure to concede guilt was prejudicial. (*Id.*)

However, as accurately noted by the Magistrate Judge, the South Carolina Supreme Court relied on a prejudice standard nearly identical to the standard articulated in *Strickland*. Further, the South Carolina Supreme Court did not apply a presumption, as Petitioner implies, and instead a reasonable reading of the court's decision indicates that the court evaluated the State's guilt-phase evidence and determined there was no "reasonable probability" that the failure to concede guilt changed the outcome. *Strickland*, 466 U.S. at 694. The Court therefore cannot find an unreasonable application of law or fact. See *Tice v. Johnson*, 647 F.3d 87, 108 (4th Cir. 2011) ("Mindful of the deference owed under AEDPA, we will not discern an unreasonable application

of federal law unless ‘the state court’s decision lies well outside the boundaries of permissible differences of opinion.’”).² For these reasons and the reasons stated in the R & R, the Court agrees with the Magistrate Judge’s assessment that the state court did not unreasonably apply *Strickland* or unreasonably interpret the facts in finding that, in this case, counsel’s decision not to concede guilt in the guilt phase did not prejudice Petitioner in the sentencing phase. Therefore, the Court denies Ground One.

B. Procedurally Defaulted Grounds

i. Standard of Review

Petitioner did not raise the remaining grounds in his initial PCR action.³ These claims are, therefore, procedurally defaulted. However, Petitioner argues that the default should be excused under *Martinez v. Ryan*, 566 U.S. 1 (2012). In *Martinez*, the Court held that ineffective assistance of counsel “at initial-review collateral review proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial” where:

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

Trevino v. Thaler, 569 U.S. 413, 423 (2013) quoting *Martinez*, 566 U.S. at 14, 17–18.

² Petitioner’s reliance on *Florida v. Nixon*, 543 U.S. 175, 125 S. Ct. 551 (2004) is misplaced. To begin, the case makes clear that conceding guilt, on its own, does not assure a life sentence. Additionally, to the extent Petitioner relies on *Nixon* to argue that Petitioner’s trial counsel lost credibility by promising to admit the confession and then failing to do so, necessitating a concession of guilt, the statements were ultimately admitted in the sentencing phase. (Dkt. No. 37-3 at 74–81.) Therefore the jury was aware at the time of sentencing that Petitioner’s trial counsel did not, in fact, mislead the jury regarding the confession.

³ He presented them to the highest state court in his second PCR application, which was denied as successive.

Thus, for each of the remaining grounds, Petitioner must “demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that . . . the claim has some merit,” and that his PCR counsel were ineffective for not raising that claim. *Martinez*, 566 U.S. at 14.

ii. Motion to Strike and Request for an Evidentiary Hearing

Petitioner provided additional exhibits outside of the record with his habeas petition and requested an evidentiary hearing in support of his procedurally defaulted grounds. (Dkt. Nos. 16; 137.) Respondents moved to strike all but two of those exhibits, asserting they go to the merits of his underlying claims, not solely whether he can show cause and prejudice to excuse their procedural default, and Petitioner does not satisfy the exceptions allowing a court to consider evidence outside of the record. (Dkt. No. 131 at 2–9). *See* 28 U.S.C. § 2254(e)(2). Respondents also oppose Petitioner’s request for an evidentiary hearing. (Dkt. No. 129 at 76.)

Regarding the motion to strike, the AEDPA generally prohibits federal habeas courts from considering extra-record evidence when applicants have failed to develop the factual bases for their claims in state courts. *See Schriro v. Landrigan*, 550 U.S. 465, 473 n.1 (2007) *citing* 28 U.S.C. § 2254(e)(2). However, expanding the record is appropriate in some instances, such as to assess whether cause and prejudice excuse a petitioner’s procedural default of a claim. *Fielder v. Stevenson*, No. 2:12-cv-412-JMC, 2013 WL 593657, at *3 (D.S.C. Feb. 14, 2013). The Magistrate Judge recommended denying the motion to strike and considering Petitioner’s exhibits for the purpose of assessing cause and prejudice. No Party has objected to this holding, and the Court finds it proper to consider the evidence to assess cause and prejudice, and therefore denies the motion to strike.

Regarding the evidentiary hearing, after considering Petitioner’s extra-record exhibits, the

Magistrate Judge found that the Petitioner failed to allege any substantial underlying claims of ineffective assistance of trial counsel and, thus, recommended denying his request for an evidentiary hearing on the defaulted grounds . (Dkt. No. 142 at 143–44.) Petitioner specifically objects and asserts he is entitled to an evidentiary hearing in general, and specifically in relation to Grounds Two and Four. (Dkt. No. 149 at 3 – 6.)

“In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition’s factual allegations, which, if true, would entitle the applicant to federal habeas relief.” *Schriro*, 550 U.S. at 474. Thus, to grant an evidentiary hearing, “there ‘must be a viable constitutional claim, not a meritless one, and not simply a search for evidence that is supplemental to evidence already presented.’” *Segundo v. Davis*, 831 F.3d 345, 351 (5th Cir. 2016) (citations omitted). Therefore, “[w]here documentary evidence provides a sufficient basis to decide a petition, the court is within its discretion to deny a full hearing.” *Runnigeagle v. Ryan*, 825 F.3d 970, 990 (9th Cir. 2016). *See also Schriro*, 550 U.S. at 474 (“[I]f the record refutes the applicant’s factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing”); *Segundo*, 831 F.3d at 351 (“*Martinez and Trevino* protect . . . habeas petitioners from completely forfeiting an [ineffective assistance of counsel] claim; neither entitles petitioners to an evidentiary hearing in federal court in order to develop such a claim.”). As explained below, the Court agrees with the Magistrate Judge and finds Petitioner has not made specific factual allegations that, if true, would entitle him to habeas relief and has failed to demonstrate the substantiality of his underlying ineffective assistance of counsel claims. Therefore, the Court finds that the Magistrate Judge properly denied Petitioner’s request for an evidentiary hearing.

As the Court has denied the motion to strike, the Court assess Grounds Two, Three, Four

and Five below with the benefit of Petitioner's submitted evidence to assess whether the procedural default should be excused.

C. Ground Two

In Ground Two, Petitioner asserts he was denied the effective assistance of counsel because one of his trial attorneys, Stone, was operating under an actual conflict of interest. While representing Petitioner, Stone also served as a part-time prosecutor in another judicial circuit and as a counsel for the Insurance Reserve Fund ("IRF"), an entity that insures state agencies and local governments. The Magistrate Judge found Petitioner failed to adequately show that Stone labored under an actual conflict of interest or that Petitioner's PCR counsel were ineffective for not raising this claim. (Dkt. No. 142 at 62–69.) The Court agrees with the Magistrate Judge's analysis.

"A criminal defendant's Sixth Amendment right to effective assistance of counsel includes a right to counsel unhindered by conflicts of interest." *Mickens v. Taylor*, 240 F.3d 348, 355 (4th Cir. 2001), *aff'd*, 535 U.S. 162 (2002). "To establish ineffective assistance of counsel based on a conflict of interest that was not raised before the trial court, the [petitioner] must demonstrate that (1) counsel operated under 'an actual conflict of interest' and (2) this conflict 'adversely affected his lawyer's performance.'" *Woodfolk v. Maynard*, 857 F.3d 531, 553 (4th Cir. 2017) *quoting* *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). "After a petitioner satisfies this two-part test, prejudice is presumed." *Mickens*, 240 F.3d at 355.

"A [petitioner] has established an adverse effect if he proves that his attorney took action on behalf of one client that was necessarily adverse to the defense of another or failed to take action on behalf of one because it would adversely affect another." *Id.* at 360. To make this showing:

[f]irst, the petitioner must identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued. Second, the petitioner must show that the alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney at the time of the attorney's tactical decision . . . [T]he

petitioner must show that the alternative strategy or tactic was “clearly suggested by the circumstances.” Finally, the petitioner must establish that the defense counsel’s failure to pursue that strategy or tactic was linked to the actual conflict.

Id. at 361 (citations omitted).

Petitioner alleges Stone’s simultaneous representation of the IRF created two conflicts: first, that the interests of South Carolina were adverse as the State was seeking the death penalty against Petitioner, and; second, that Stone received a substantial part of his income from the IRF, and therefore had a personal stake in continuing to receive appointments. (Dkt. No. 137 at 31.) Further, Petitioner focuses on Stone’s roles as a part-time solicitor in another circuit in South Carolina and previously as a special prosecutor in a single case in the same judicial circuit, which Petitioner asserts was an additional conflict of interest. (*Id.* at 34 – 35.)

Regardless of whether Stone’s representation of the IRF or simultaneous work as a prosecutor in another judicial circuit,⁴ Petitioner has failed to create any dispute of fact that there was an adverse effect from any alleged conflict. As the Magistrate Judge correctly noted, while the Petitioner made general conclusory allegations, the Petitioner has not identified any specific deficiency in his briefing, objections, or exhibits regarding Stone’s performance that relates to Stone’s alleged conflict. To the extent Petitioner is attempting to rely the other grounds for which he alleges he received ineffective assistance of trial counsel, Petitioner has not alleged a link between those deficiencies and Stone’s alleged conflict. Thus, Petitioner fails to adequately allege that Stone labored under an actual conflict of interest that adversely effected Stone’s performance. Accordingly, Petitioner has not alleged a substantial underlying ineffective assistance of counsel

⁴ The Fourth Circuit has declined to find a *per se* conflict on similar facts. *See Beaver v. Thompson*, 93 F.3d 1186, 1193 (4th Cir. 1996) (declining to find *per se* conflict of interest where defense counsel was part-time prosecutor in neighboring county). There is also no evidence that Stone remained a special prosecutor in the Eleventh Judicial Circuit, where Lexington County is located, at the time of Petitioner’s trial.

claim for this defaulted ground, and therefore ground two must be denied.

Regardless of failing to raise a substantial claim, necessary to overcome a procedural default, Petitioner nonetheless argues that PCR counsel should have investigated Stone's potential conflict. In his objections, Petitioner maintains that PCR counsel had an affirmative obligation to investigate Stone's conflicts of interest, that Petitioner has shown through affidavits that PCR counsel did not have a strategic reason for not investigating this claim and an "[a]n evidentiary hearing is now necessary" to determine cause and whether Petitioner was prejudiced by Stone's alleged conflicts. (Dkt. No. 149 at 3.)

However, as explained above, even had PCR counsel investigated the alleged conflict, there would be no cause to set aside the default as the underlying claim is not substantial. Further, Petitioner points to the fact that PCR counsel "was aware that [Stone] had some connection with the Insurance Reserve Fund," and had spoken to another attorney who raised the same issue in another capital PCR proceeding, *Aleksey v. South Carolina*, though there is no indication PCR counsel was aware of Stone's work as a part-time prosecutor. (Dkt. Nos. 16-3 at 11, 13; 16-4 at 33.)⁵ However, while Petitioner argues that this failure to more fully investigate and present the claim prejudiced Petitioner, "because if they had raised the issue, it would have been resolved in [Petitioner's] favor," record evidence demonstrates the contrary. (Dkt. No. 137 at 36.)

Notably, in *Aleksey v. South Carolina*, PCR counsel dedicated a substantial portion of their case to similar issues surrounding Stone's conflicts of interest stemming from his work for the IRF and as a prosecutor while representing Aleksey at trial. *See Aleksey v. Stirling*, 5:14-3016-JMC-

⁵ PCR counsel, however, was not aware that Stone was employed as a part-time solicitor in another judicial circuit. Regardless, as explained above, the underlying conflict of interest claim is not substantial.

KDW, Dkt. Nos. 43-4 at 192 – 200; 43-5 at 1 – 3; 44-1 at 27 – 53⁶ (hereinafter “*Aleksey* Dkt.”). Despite the fact that Aleksey’s PCR counsel raised and explored these issues in depth, the PCR court dismissed those grounds (*Id.*), and the South Carolina Supreme Court denied Aleksey’s appeal. (*Aleksey* Dkt. No. 41-10.) The Court offers no opinion on the PCR court’s decision or analysis in *Aleksey*, but notes only that the Court cannot assume in Petitioner’s case the state courts would have reached a different conclusion. Accordingly, even if PCR counsel was deficient for not further investigating this claim, Petitioner has failed to demonstrate how that alleged deficiency in failing to investigate Stone’s alleged conflict of interest creates a “reasonable probability” of a different outcome.

Therefore, as discussed above, Petitioner has not presented facts creating a dispute that Stone was ineffective, and the Court finds his claim not to be substantial under *Martinez*, and, further, Petitioner failed to show that PCR counsel’s failure to investigate was prejudicial. In addition, the Court rejects Petitioner’s request for an evidentiary hearing as his underlying claim lacks merit. Therefore, Ground Two is denied.

D. Ground Three

In Ground Three, Petitioner alleges that trial counsel was ineffective in failing to conduct an adequate and appropriate *voir dire* to identify to at least two jurors who allegedly believed the death penalty should be applied automatically upon conviction of murder. (Dkt. No. 16 at 22.) Petitioner focuses on the trial court’s refusal to permit Petitioner’s trial counsel from asking potential jurors about “exposure to...psychiatrists.” (Dkt. No. 31-1 at 44 – 45.) Specifically, in attempting to make a record, Fullwood indicated that trial counsel had planned to ask potential

⁶ The Court may take judicial notice of its own records. *See Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989) (“[T]he most frequent use of judicial notice is in noticing the content of court records.”).

jurors “their prior exposure to the field of psychiatry...their general attitudes about the field of psychiatry[, and] their knowledge of and opinion of the field of D.N.A. testing, genetic biology.” (*Id.* at 53 – 54.) The trial court prohibited all of this testimony, instead holding that counsel was not allowed to probe “exactly what this juror’s particular thrust is on a very minor issue.” (*Id.* at 52 – 53.) Instead, the trial court, at the request of Petitioner’s trial counsel, read the statutory mitigating circumstances to each juror and asked if the juror could consider the evidence. (Dkt. No. 34-1 at 55.)

Petitioner focuses on two jurors, Juror #35 and Juror #214, who Petitioner alleges both believed the death penalty should be automatically applied upon a conviction of murder, and further that Petitioner was prohibited from asking relevant questions to identify their beliefs. Juror #35, responding to the trial court, answered that the juror could return a sentence of life in prison or a sentence of death “depending upon the particular facts and circumstances[.]” (Dkt. No. 34-2 at 21 – 22.) Further, after counsel posed the hypothetical based on “finding somebody guilty of murder and another – like a rape or a burglary,” Juror #35 again confirmed to trial counsel that the juror could consider a sentence of either life in prison or the death penalty. (*Id.* at 26.)

Turning to Juror #214, the juror similarly answered that the juror could return a sentence of life in prison or a sentence of death “depending upon the particular facts and circumstances.” (Dkt. No. 34-3 at 24 – 25.) Similarly, in responding to questioning from counsel, counsel asked the juror whether, after the juror “already decided somebody is guilty of murder and guilty of rape or burglary or both,” the juror could consider either a life sentence or a death sentence. (*Id.* at 29 – 31.) Juror #214 similarly confirmed the juror could consider either option. (*Id.*)

The Court therefore agrees with the reasoning of the Magistrate Judge and can find no evidence that the trial court erred in applying the law or that trial counsel was ineffective in

performing an adequate *voir dire* or preserving the issue for appeal. Petitioner focuses extensively on *Morgan v. Illinois*, 504 U.S. 719, 112 S. Ct. 2222 (1992), which holds that:

A defendant on trial for his life must be permitted on *voir dire* to ascertain whether his prospective jurors function under such misconception. The risk that such jurors may have been empaneled in this case and “infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized.”... Petitioner was entitled, upon his request, to inquiry discerning those jurors who, even prior to the State's case in chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty.

Id. at 735 – 736 (citations omitted). However, here, Petitioner was permitted to do exactly what *Morgan* requires, namely, he inquired whether each of these jurors had predetermined whether or not to impose the death penalty, with each one confirming, with the benefit of knowing both the statutory mitigating factors and that they would have already found Petitioner guilty of murder plus an additional criminal act, that they could impose either a sentence of life in prison or death. Therefore, the Court cannot find that the trial court improperly curtailed Petitioner's right for an adequate *voir dire*. See *United States v. Tipton*, 90 F.3d 861, 878 (4th Cir. 1996) (“ a *voir dire* [must allow]...an inquiry sufficient to ensure—within the limits of reason and practicality—a jury none of whose members would ‘unwaveringly impose death after a finding of guilt’ and hence would uniformly reject any and all evidence of mitigating factors, no matter how instructed on the law.”) (citations omitted). Petitioner has failed to present any Supreme Court, or Fourth Circuit, case law to this court indicating that he was entitled to ask the questions trial counsel sought to ask. Indeed, as noted by the Magistrate Judge and the trial court, such questions are impermissible under South Carolina law. Without some binding precedent, and in light of the Supreme Court precedent indicating the contrary, the Court cannot find that there was any unreasonable or contrary holding of law or unreasonable finding of fact. Therefore, Petitioner's claim regarding an inadequate *voir dire* has no merit and is not substantial and the procedural default is not

excused.⁷

Further, as the Magistrate Judge correctly held, even if trial counsel was deficient, there is no indication of prejudice from the failure to conduct a more robust *voir dire*. To the contrary, the *voir dire* confirmed that the jurors would not automatically vote for the death sentence if they found Terry guilty of murder, including if they found him guilty of murder in addition to one of the other charges. It is unclear how any additional *voir dire* may have changed the outcome of the jury's decision or the jury makeup, and trial counsel, in maintaining the record, did not identify any questions which would have addressed the issue raised here. Therefore, Petitioner further does not show ineffective assistance of PCR counsel in failing to raise this claim as there is no indication that it was unreasonable to raise this claim or that the failure to raise the claim caused prejudice, as there is no indication it has merit.

As the claim is not substantial, and indeed the trial court's decisions were reasonable under federal law, and there is no showing of prejudice, the procedural default is not excused. Therefore, Ground Three is denied.

E. Ground Four

Petitioner asserts his trial counsels' mitigation investigation was deficient in failing to investigate, discover and present to the jury evidence of abuse as a child and that counsel failed to investigate, develop and present evidence that would support a finding that Petitioner was guilty but mentally ill ("GBMI"). (Dkt. No. 16 at 26.)

i. Physical Abuse

⁷ Petitioner also alleges trial counsel were inadequate in failing to create a sufficient record for appeal. To the contrary, Fullwood proffered the questions she would have asked potential jurors. (Dkt. No. 34-1 at 53 – 54.) There is therefore no merit to this contention and the claim is not substantial.

The Magistrate Judge examined the defense's sentencing phase case and found trial counsel were not deficient because trial counsel presented some evidence of Petitioner's childhood abuse, Petitioner has not presented any evidence that trial counsel knew more information about the abuse than was presented and cannot be faulted for their experts' failure to convey that information, and the record suggests counsels' expert did not find the abuse significant at the time. (Dkt. No. 142 at 104–06.) Petitioner does not specifically object to any of these findings but focuses instead on his GBMI claim and the Magistrate Judge's assessment of this ground without holding an evidentiary hearing. (See Dkt. No. 149 at 5.) Reviewing the record, the Court agrees with the R & R's determination.

Under *Strickland*,

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes that particular investigation unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments.

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

During the sentencing phase, the defense team's social work expert, Jan Vogelsang, testified that Petitioner experienced violence as a child and specifically testified to incidents of

abuse at home, such as where his brothers were arrested for beating up Petitioner, and that Petitioner's father broke Petitioner's collarbone with a board. (Dkt. No. 37-4 at 93.) Petitioner's mother, Patricia Terry, also testified that Petitioner and his brothers had physical altercations, that Petitioner "had a lot of run-ins with his dad" and also described the incident where Petitioner's father broke Petitioner's collarbone. (Dkt. Nos. 37-3 at 139; 37-4 at 1.)

Based on her extensive review of Petitioner's personal history, Vogelsang concluded that Petitioner's childhood environment was extremely neglectful and testified regarding potential impacts of that neglect. (Dkt. No. 37-4 at 78, 92-93.) As part of that discussion, Vogelsang discussed violence at home, but ended by stating, "Now, I'm not saying all of this to imply that family violence was the same in this family as it is in a lot of families because that's not what I found here. There is some violence. I would not say it's the kind of pervasive violence you find in a lot of homes where battering takes place." (Dkt. No. 37-4 at 93.)

Petitioner contends Vogelsang and the defense team's mitigation investigator, Vivian Massey, uncovered other evidence of abuse and that trial counsel were deficient for not presenting that evidence to the jury. There is some evidence suggesting that Petitioner and his family informed Vogelsang and Massey that Petitioner's father beat Petitioner with a belt, beat Petitioner so hard he would bleed, saw his children as workhorses and would not allow them to play, would tie the children to a tree and have them beat each other. (Dkt. No. 16-3 at 33 - 48.)

However, Fullwood, who was in charge of this portion of the penalty phase presentation, states in her affidavit:

I do not recall making any strategic decision to limit the mitigation testimony of Gary's family members or to avoid presentation of evidence that he had suffered significant abuse as a child. It was my intent to present all of the evidence of that nature that we could and all that I was aware of was presented.

(Dkt. No. 16-2 at 3.) Therefore, the evidence shows that counsel, through the defense team, did

discover relevant information about abuse and counsel intended to present all evidence regarding abuse to the jury. Thus, to the extent that any deficiency exists, it falls to Vogelsang or Massey for not conveying the full extent of Petitioner's abuse to counsel, and not to counsel. It is not unreasonable or against prevailing professional norms for counsel to rely on a qualified mitigation investigator or other experts, *see Rhodes v. Hall*, 582 F.3d 1273, 1283 (11th Cir. 2009), and there is no right to effective assistance of expert witnesses or mitigation investigators, nor are their deficiencies automatically imputed to counsel, *see Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir. 1998) ("The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness.").

Further, Vogelsang's own testimony reveals her position, at the time of trial, that the type of violence Petitioner experienced was not "the kind of pervasive violence you find in a lot of homes where battering takes place." (Dkt. No. 37-4 at 93.) Vogelsang expressly focused her testimony on neglect, rather than abuse. (Dkt. No. 37-4 at 92-93.) Trial counsel had every right to rely on their expert's informed assessment. *See Wilson*, 155 F.3d at 403 (finding attorneys are not required to second-guess the contents of expert reports).

Vogelsang now offers a different opinion, finding Petitioner's abuse significant and speculating as to why she would not have included additional information in her testimony. (Dkt. No. 16-4 at 3.) However, Vogelsang admits she "could recall almost nothing about this case." (*Id.*) Her speculation is not enough to overcome contradictory record evidence and create a genuine issue of fact and does not rebut the strong presumption that counsel performed reasonably.

Petitioner also asserts counsel and the defense team failed to discover additional details of Petitioner's father's abuse. He supports this claim with affidavits from Petitioner's mother, sister, uncle, and former sister-in-law. (Dkt. No. 16-4 at 5 - 23.) However, Vogelsang testified at trial

that she interviewed all but one of these witnesses. (Dkt. No. 37-4 at 74 – 75, Vogelsong stating she interviewed Petitioner’s mother five times, Petitioner’s sister, and Petitioner’s uncle). In addition, Vogelsang interviewed other family members who would have personal knowledge of Petitioner’s father’s abuse, including Petitioner’s other sister and two brothers. (*Id.*) Further, Vogelsang met with Petitioner four times. (*Id.* at 74.) Trial counsel testified they also met with Petitioner on numerous occasions, as did the team’s forensic psychiatrist, Dr. Donna Schwartz-Watts, Massey, and an investigator. (See Dkt. No. 39-3 at 20–21, 58; Dkt. No. 40-1 at 10–11.)

It would be “unreasonable to discount to irrelevance the evidence of [Petitioner’s] abusive childhood.” *Porter v. McCollum*, 558 U.S. 30, 43 (2009). However, the record suggests counsel conducted a thorough investigation of this issue and they cannot be held accountable for information Petitioner and his family failed to provide or their experts failed to convey. See *Wilson*, 155 F.3d at 403; *DeCastro v. Branker*, 642 F.3d 442, 456 (4th Cir. 2011) (“Regardless, the 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.”).

Considering the record and evidence before the Court, the Court finds Petitioner’s allegation that trial counsel conducted an unreasonable investigation into his childhood abuse lacks merit and is therefore not a substantial claim. Therefore, Petitioner fails to meet his burden under *Martinez* and this claim is procedurally defaulted and subject to summary judgment.

ii. Guilty But Mentally Ill

Petitioner further asserts trial counsel were ineffective for failing to share details of his abuse with the defense team’s forensic psychiatrist, Dr. Schwartz-Watts, which could have been used to testify that Petitioner was GBMI. (Dkt. No. 137 at 47–48.) As the Magistrate Judge correctly held, nothing in the record, including Dr. Schwartz-Watts’s affidavit, directly supports

this assertion.

In South Carolina,

[a] defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong as defined in Section 17-24-10(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.

S.C. Code Ann. § 17-24-20(A).

At trial, Dr. Schwartz-Watts opined that Petitioner suffered from an organic mental disorder, not otherwise specified. (Dkt. No. 37-5 at 57.) She explained that Petitioner's brain was damaged or dysfunctional in a way that impacted his thinking, feelings, and behavior. (*Id.*) Dr. Schwartz-Watts indicated his brain damage would cause Petitioner to be paranoid, suspicious, moody, aggressive, explosive, and very impulsive and to experience emotions out of context. (*Id.* at 57–58.) She testified that some of Petitioner's prior violent acts, Ms. Jackson's murder, and Petitioner's confession were all consistent with her diagnosis and showcased Petitioner's paranoia and memory loss. (*Id.* at 59–61.)

To form her opinion, Dr. Schwartz-Watts reviewed Petitioner's birth records, school records, prison records, hospital records, psychiatric records, and legal records. (*Id.* at 43–44.) She also interviewed Petitioner's mother and met with Petitioner on "numerous occasions." (*Id.* at 43, 45.) Dr. Schwartz-Watts ordered blood tests to test for medical conditions that could account for Petitioner's psychiatric condition, reviewed neuropsychological testing by another defense expert, and consulted with a neurologist and two forensic psychiatrists. (*Id.* at 44.) However, Dr. Schwartz-Watts states trial counsel did not provide her with the social history information gathered by Massey or Vogelsang and she was, thus, unaware of the extent of Petitioner's abuse. (Dkt. No. 16-4 at 25–26.)

In 2012, after receiving the new information, Dr. Schwartz-Watts reevaluated Petitioner

and found he “suffered effects from trauma,” such as intrusive thoughts, conflict avoidance, unhealthy and overprotective relationships, and drug use. (*Id.* at 26.) She also noted the physical abuse could have contributed to Petitioner’s brain dysfunction. (*Id.*) Dr. Schwartz-Watts concludes by stating that she was never asked about the possibility of pleading GMBI, but “[h]ad I been asked, I believe that this evidence certainly could have been presented during the trial.” (*Id.*)

There are multiple independent reasons why this fails to raise a substantial claim of ineffective assistance of trial counsel. To begin, assuming the truth of Dr. Schwartz-Watts’s affidavit, trial counsel made a decision to not admit guilt. This is consistent with trial counsel’s PCR testimony. At the PCR evidentiary hearing, Stone indicated they never engaged in plea negotiations and the solicitor’s office never offered a plea. (Dkt. No. 39-3 at 66.) Further, Stone testified that they decided not to concede guilt as “we felt like the best angle we might have, other than the organic brain damage, was that the jury would have some type of residual doubt.” (*Id.* at 66–67.) Based on the evidence presented, there is no indication that a viable option existed to enter a plea of GMBI, or indeed that trial counsel did not make a reasoned tactical decision that they believed offered them the “best angle” to avoid a death penalty. *Harrington*, 562 U.S. at 106 (“Rare are the situations in which the ‘wide latitude counsel must have in making tactical decisions’ will be limited to any one technique or approach.”) (quotations omitted). Most importantly, there is no evidence that any of the experts who examined Terry provided any relevant information to Petitioner’s counsel which would have alerted the trial counsel that GMBI was a viable option. Again, as above, there is no claim for ineffective assistance of an expert witness.

Petitioner’s only argument that counsel were ineffective for not providing with information about Petitioner’s childhood abuse to Dr. Schwartz-Watts relates to Dr. Schwartz-Watts’ inability

to then use that information to support a GBMI plea.⁸ (Dkt. Nos. 16 at 29 – 30; 137 at 47 – 48.) However, none of the effects of trauma Dr. Schwartz-Watts found during her 2012 reevaluation suggest Petitioner could not conform his conduct to the requirements of the law when he killed Ms. Jackson—the relevant GBMI issue. Further, Petitioner would have had to be amenable to pleading guilty, which the record does not indicate was the case. Thus, there is further no evidence in the record that providing Dr. Schwartz-Watts with the details of Petitioner’s childhood abuse would have supported a GBMI defense.

Petitioner has not alleged information suggesting that he had a viable GBMI plea, that he would have been willing to plead guilty, that trial counsel knew that a GBMI plea was available or, assuming without deciding that it was available, that trial counsel were deficient for failing to pursue a GBMI plea as opposed to their other reasoned trial strategy. Therefore, Petitioner has failed to demonstrate that he has a substantial claim for ineffective assistance of counsel on Ground Four. Regardless, Petitioner objects, asserting that he should have an opportunity to present evidence at an evidentiary hearing to resolve those issues. (Dkt. No. 149 at 5.) The Court disagrees. Petitioner has failed to allege how trial counsel were deficient for not pursuing this strategy. Therefore, the claim is not substantial and Ground Four should be denied.

⁸ The Court notes that Petitioner overstates the contents of Dr. Schwartz-Watts’s and Fullwood’s affidavits. Petitioner states that “had Dr. Watts been provided all of the available information AND been asked the question, she would have been prepared to testify that [Petitioner] meets the ‘standard of guilty but mentally ill based on his significant brain dysfunction.’” (Dkt. No. 16 at 29–30) (emphasis in original). (*See also* Dkt. No. 137 at 47–48). However, in her affidavit, Dr. Schwartz-Watts states merely that she found effects of trauma during her reevaluation and that she could have presented that evidence during trial. (Dkt. No. 16-4 at 26.) Dr. Schwartz-Watts does not express an opinion as to whether Petitioner met the GBMI standard or that she could have testified that he meets the standard. In addition, Petitioner states, “as Fullwood indicates, [trial counsel] never even considered a defense of guilty but mentally ill even though they possessed evidence supporting that diagnosis.” (Dkt. No. 137 at 48.) However, Fullwood states only that she does “not recall discussing whether to pursue a defense of [GBMI].” (Dkt. No. 16-2 at 3.)

iii. Prejudice

For the sake of completeness, the Court also agrees with the Magistrate Judge's finding that Petitioner has not shown any prejudice resulting from trial counsels' alleged deficiencies under Ground Four. To establish a Sixth Amendment violation, Petitioner "must show that but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence." *Porter*, 558 U.S. at 41. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. To assess that probability, the Court must consider "the totality of the available mitigation evidence—'both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweig[h] it against the evidence in aggravation.'" *Porter*, 558 U.S. at 41 *quoting Williams v. Taylor*, 529 U.S. 362, 397–98 (2000)).⁹

The Court fully adopts and incorporates the R & R's thorough summary of the aggravating and mitigating evidence presented throughout the sentencing phase of Petitioner's trial. (*See* Dkt. No. 142 at 91–96, 114–126.) The Court will not restate the mitigation and aggravation evidence presented in great detail by the Magistrate Judge. However, in brief, the State portrayed Petitioner as a violent individual with a propensity for violence against women, with evidence that Petitioner stabbed a prostitute, abused his first wife, and assaulted many other individuals throughout his life. Additionally, the State presented evidence of other criminal activity by Petitioner, and detailed evidence regarding Petitioner's burglary, rape and murder of Ms. Jackson. Petitioner's trial team, in contrast, focused on Petitioner's organic brain injury as a likely cause of his violent, impulsive

⁹ Even if the jury had found Petitioner GBMI, the law required Petitioner to "be sentenced . . . as provided by law for a defendant found guilty." S.C. Code Ann. § 17-24-70. In South Carolina, that includes the possibility of a death sentence. *See State v. Wilson*, 413 S.E.2d 19, 22 (S.C. 1992). Thus, the same prejudice analysis for sentencing would apply whether the jury found Petitioner guilty or GBMI.

behavior. Additionally, witnesses, including family members and experts, described Petitioner's upbringing. Looking at all the evidence, both in the record and as detailed by the Magistrate Judge, the Court agrees with the R & R that there is no reasonable probability that the jury would have reached a different sentencing decision if presented with the omitted evidence of childhood abuse. *See Strickland*, 466 U.S. at 700 ("Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed.").

Accordingly, Petitioner has failed to adequately allege a substantial underlying ineffective assistance of trial counsel claim and thus cannot meet his burden under *Martinez* to excuse the procedural default. Ground Four of the petition is therefore denied.¹⁰

F. Ground Five

In Ground Five, Petitioner asserts his trial counsel were ineffective for failing to object to his ex-wife, Tammy Griffin's, testimony that he raped her once during their marriage and failure to use certain information to impeach her credibility. (Dkt. No. 16 at 31.) The Magistrate Judge recommended granting summary judgment on this ground and neither Petitioner nor Respondents

¹⁰ As above, regarding Petitioner's objection to the Court's consideration of this claim without an evidentiary hearing, the Court finds Petitioner has not alleged any facts that would warrant habeas relief if proven and, thus, has not shown an evidentiary hearing is needed. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief."). Here, given the lack of evidence showing that trial counsel's actions were unreasonable or ineffective, there is no indication an evidentiary hearing would entitle Petitioner to habeas relief. Therefore, the Court finds the Magistrate Judge properly considered Petitioner's claims in Ground Four without convening an evidentiary hearing.

object to that recommendation.

Petitioner argues trial counsel should have objected based on the State's failure to provide specific notice of the contents of Ms. Griffin's testimony. "Only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible." S.C. Code Ann. § 16-3-20(B). In its pre-trial Notice of Evidence in Aggravation, the State indicated it planned to "present evidence as to the Defendant's adult and juvenile character, . . . prior and subsequent adult and juvenile acts and crimes of violence and bodily harm, . . . and other similar characteristics of [Petitioner], as an adult and a juvenile, by the testimony of victims, witnesses, . . . and other relevant testimony." (Dkt. No. 16-4 at 37.)

Ms. Griffin's testimony falls within this description as a prior act of violence and bodily harm. Further, Petitioner's defense team interviewed Griffin and was aware Petitioner had physically abused her. (*See* Dkt. No. 16-4 at 40 – 44.) Thus, although Petitioner's trial counsel may not have known of this particular incident of abuse, counsel knew Griffin was a likely witness and knew the aggravating nature of her testimony. Petitioner has therefore not demonstrated that trial counsel acted unreasonably in not objecting, especially where there was general notice and Petitioner was able to question Griffin during the mitigation investigation.

Petitioner further argues trial counsel should have impeached Ms. Griffin's testimony using letters she wrote to Petitioner after the rape, after they divorced, expressing her feelings for Petitioner and a desire to reconcile. (Dkt. No. 16-5 at 2 – 8.) The Court cannot find trial counsel ineffective for failing to impeach Griffin with letters she wrote to Petitioner. Fullwood, during cross-examination, took a different tactic with Griffin, focusing on Petitioner's immaturity and mental issues. (Dkt. No. 37-3 at 36 – 41.) Indeed, as the Magistrate Judge aptly noted, attempting to impeach Griffin's testimony could have easily been more damaging, both by seeming to attack

the credibility of an alleged rape victim and by potentially focusing the jury more on the alleged rape and Petitioner's violent character. While Fullwood could have handled the testimony differently, there is no indication counsel's conduct was deficient.

Finally, contrary to Petitioner's assertion that Ms. Griffin's testimony "offered a picture of [Petitioner] that suggested he was a serial rapist," (Dkt. No. 137 at 53), this incident was only one part of the voluminous aggravating evidence, including numerous other acts of violence. Therefore, as described above, the Court cannot find this failure to object or impeach prejudicial

Petitioner has not provided the Court with any evidence to find counsel deficient for failing to object to or impeach Ms. Griffin's testimony. Nor has Petitioner shown any resulting prejudice. Accordingly, Petitioner fails to present a substantial underlying claim of ineffective assistance of trial counsel and cannot meet his burden under *Martinez*. Ground Five is therefore denied.

IV. Certificate of Appealability

The governing law provides:

(c)(2) A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.

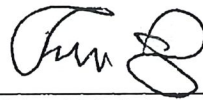
(c)(3) The certificate of appealability . . . shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253. A prisoner satisfies the standard by demonstrating that reasonable jurists would find the Court's assessment of his constitutional claims debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). Here, the legal standard for the issuance of a certificate of appealability has not been met because reasonable jurists would not find it debatable that the state court reasonably decided Ground One and that the remaining grounds for relief are procedurally barred and no exception applies. Therefore, a Certificate of Appealability is denied.

V. Conclusion

For the foregoing reasons, the Court **ADOPTS** the R & R (Dkt. No. 142) as the Order of the Court, **GRANTS** Respondents' motion for summary judgment (Dkt. No. 130), and **DENIES** Respondents' motion to strike (Dkt. No. 131). The Court **DENIES** Petitioner's petition for a writ of habeas corpus brought under 28 U.S.C. § 2254 and **DENIES** a Certificate of Appealability.

AND IT IS SO ORDERED.



Richard Mark Gergel
United States District Court Judge

September 26, 2019
Charleston, South Carolina

USCA4 Appeal: 20-3 Doc: 76 Filed: 06/02/2021 Pg: 1 of 1

FILED: June 2, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-3
(4:12-cv-01798-RMG)

GARY DUBOSE TERRY

Petitioner - Appellant

v.

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

Respondents - Appellees

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Amicus Supporting Appellant

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

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

For the Court

/s/ Patricia S. Connor, Clerk