APPENDIX VOLUME I

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APPENDIX A
THE STATE OF SOUTH CAROLINA
In The Supreme Court

Marion Alexander Lindsey, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2019-001271

ON WRIT OF CERTIORARI

Appeal from Spartanburg County
Paul M. Burch, Circuit Court Judge

Opinion No. 28304
Heard September 12, 2023 – Filed November 5, 2025

AFFIRMED IN RESULT

Chief Appellate Defender Robert Michael Dudek, Appellate Defender David Alexander, and Appellate Defender Lara Mary Caudy, all of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, and Senior Assistant Deputy Attorney General Melody Jane Brown,

all of Columbia, and Solicitor Barry Joe Barnette, of Spartanburg, for Respondent.

JUSTICE JAMES: This lengthy death penalty post-conviction relief proceeding began in 2007, and the PCR court denied relief in 2010. In 2014, we remanded to the PCR court for further proceedings, after which the PCR court again denied relief. We granted Marion Alexander Lindsey's petition for a writ of certiorari to review the PCR court's decision. Lindsey raises issues concerning the PCR court's signing of a proposed order submitted by the State, and he raises issues concerning trial counsel's preparation and presentation of his mitigation case during the penalty phase of his jury trial. We affirm the PCR court in result.

I. Background

On September 18, 2002, Lindsey murdered his estranged wife, Ruby Nell Lindsey (Victim), by shooting her as she sat in the back seat of her friend's car in the parking lot of the Inman Police Department. A Spartanburg County jury convicted Lindsey of murder and recommended a death sentence, which the trial court imposed. We affirmed the conviction and sentence. *State v. Lindsey*, 372 S.C. 185, 642 S.E.2d 557 (2007). The United States Supreme Court denied Lindsey's petition for a writ of certiorari. *Lindsey v. South Carolina*, 552 U.S. 917 (2007).

Lindsey filed for PCR in 2007. At the conclusion of Lindsey's 2010 PCR hearing, the PCR court requested and obtained proposed orders from both sides. The PCR court dismissed the application with prejudice in an order identical to the State's proposed order. Lindsey petitioned this Court for a writ of certiorari,

arguing the PCR court's verbatim adoption of the State's proposed order violated his constitutional rights. In our order dated September 30, 2014 (Remand Order), we vacated the dismissal of Lindsey's application and remanded the case to the PCR court, directing it to issue an order that (1) included findings of facts and conclusions of law on each issue presented in Lindsey's PCR application, with accurate references to the record and applicable law and (2) complied with *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992); *Hall v. Catoe*, 360 S.C. 353, 601 S.E.2d 335 (2004); and S.C. Code Ann. § 17-27-80 (2014).

On remand, the PCR court asked the parties for their original proposed orders. In response, Lindsey petitioned this Court for a de novo PCR hearing before a different judge, contending the PCR court violated our Remand Order by requesting the same proposed orders. We denied Lindsey's request. Subsequently, the PCR court issued an amended order, again denying Lindsey relief. Lindsey again petitioned this Court for a new hearing, arguing the amended order was the same as the original PCR order except for the correction of some typographical errors. We denied that petition as well.

Lindsey then petitioned this Court for a writ of certiorari, which we granted.

The following issues are before us:

1. Did the PCR court disobey this Court's order and violate state law and Lindsey's constitutional rights by adopting the State's proposed order of dismissal "under circumstances showing the PCR court failed to consider Lindsey's grounds for PCR and did not even read the proposed order before signing it"?

2. Did trial counsel provide ineffective assistance by failing to properly investigate and present an adequate mitigation defense?

II. Facts

On September 17, 2002, Lindsey was arrested on an outstanding criminal domestic violence warrant. The charge arose from an incident during which Lindsey hit Victim and tore off her jewelry in an Applebee's parking lot. He was released on bond the evening of his arrest.

The next evening, Victim's close friend, Celeste Nesbitt, picked up Victim from Victim's job at a local hospital to give her a ride home. Nesbitt was driving a Mercury sedan with tinted rear windows. Nesbitt's mother was in the front passenger seat, and Victim was seated in the back seat behind Nesbitt. Nesbitt's two daughters, aged four and nine, were in the back seat with Victim. Victim and Lindsey were separated at the time, and Victim was living with her mother. When Nesbitt and Victim neared Victim's mother's house, they saw Lindsey in his girlfriend's car. Instead of going to Victim's mother's house, Nesbitt pulled her car into a neighbor's yard, turned around, stopped in the middle of the road, rolled down her window, and spoke to Lindsey. Lindsey asked Nesbitt if she had spoken to Victim. Nesbitt, knowing Lindsey had recently threatened Victim, told Lindsey she had not seen Victim for three days. Nesbitt's four-year-old leaned forward in her car seat to say hello to Lindsey. Lindsey asked Nesbitt who else was in the back seat, and Nesbitt told him her other daughter was also in the back seat. Lindsey asked Nesbitt to roll down her back window so he could see who was in the back seat, but Nesbitt told him the window was broken. When

Lindsey said he would get out of his car and look, Nesbitt sped off and headed to the Inman police station, running stop signs and stop lights along the way. Lindsey followed closely behind.

Victim called 911 as Nesbitt drove to the police station, and both cars arrived at the same time. Lindsey exited his car and demanded Victim get out of Nesbitt's car. When Victim refused, Lindsey fired a handgun four times through the tinted rear driver's side window, killing Victim and narrowly missing the children in the back seat. A police officer in the parking lot fired at Lindsey. Lindsey was treated and hospitalized for gunshot wounds, including one to the head, which Lindsey claims he inflicted in an attempt to kill himself.

Lindsey was indicted for murder in October 2002, and the State served Lindsey with a death penalty notice, notice of intent to seek a life without parole sentence, and notice of statutory aggravating circumstances. The State listed one statutory aggravating factor: under section 16-3-20(C)(a)(3) of the South Carolina Code (2015), Lindsey's "act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person."

III. Trial

A.

During the guilt phase of his 2004 trial before then-circuit judge John C. Few, Lindsey admitted he shot and killed Victim. His defense centered on the theory that at the time of the shooting, he was depressed because Victim was keeping him from their two minor sons. He contended he snapped and killed Victim without the malice aforethought required for

murder. The State presented the narrative of a man who stalked his wife and killed her in cold blood. The jury found Lindsey guilty of murder.

B.

During the penalty phase, the State presented evidence of several instances in which Lindsey physically abused Victim, including those in which he: (1) hit Victim "so hard . . . he almost broke her jaw" in a parking lot while on a family vacation for "com[ing] back too late"; (2) hit Victim for not coming to pick up milk from him; (3) knocked out the window of Victim's car, sending broken glass over Victim and their son; and (4) assaulted Victim in an Applebee's parking lot. The State presented evidence showing Lindsey had been ordered to stay away from Victim by a magistrate the day before the murder. The State also presented evidence (1) Lindsey was convicted of assault and battery with intent to kill (ABWIK) after shooting an ex-girlfriend's new boyfriend through the man's car windshield;[1] (2) Lindsey had drug trafficking charges pending against him at the time of his murder trial; (3) Lindsey never attempted to gain custody of his children through legal means; and (4) Nesbitt's older daughter suffered emotional and psychological trauma as a result of the murder.

James Sligh, the Division Director of Classification of Inmate Records for the South Carolina Depart-

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[1] Stanford Wilkins testified during the penalty phase that Lindsey shot him with a .45 caliber handgun in February 1994. Wilkins was driving his vehicle on a public road in Spartanburg County with Jessica Cannon in the front passenger seat. Lindsey blocked Wilkins' vehicle with his Honda Accord and fired twice through Wilkins' windshield, striking Wilkins in the arm. Lindsey pled guilty to ABWIK.

ment of Corrections (SCDC), testified during the penalty phase that if Lindsey were sentenced to life imprisonment, he would be in contact with other inmates, hold jobs, participate in recreational activities, and have visitation rights. The State emphasized Lindsey murdered Victim at a police station—a public place that should have been a refuge for Victim and, in the process, put others in danger, including Nesbitt's children, who were seated in the back seat with Victim when Lindsey shot her.

C.

Lindsey claims trial counsel was ineffective in failing to prepare and present an adequate mitigation case. The mitigation case trial counsel presented during the penalty phase emphasized Lindsey's poverty-stricken upbringing, his depression, and his various intellectual deficiencies. The following is a summary of the testimony of Lindsey's mitigation witnesses.

1. Ann Howard

Ann Howard, a registered nurse and mental health professional employed by the Spartanburg County Mental Health Center, testified she met with Lindsey in the detention facility the night of the shooting. Though she was neither offered as an expert nor permitted to give any opinions, she testified Lindsey appeared depressed and suicidal, and she noted that after the shooting, a psychiatrist prescribed Lindsey antidepressants, mood stabilizers, and antipsychotic medications.

2. Margaret Melikian, M.D.

Margaret Melikian, M.D. was qualified before the jury as an expert in forensic psychiatry. At the time of trial, she was the Program Director of Forensic Psychiatry at the Medical University of South Carolina. Her duties included performing competency and criminal

responsibility evaluations for the Department of Mental Health. Before Lindsey's trial, she had been qualified as an expert in forensic psychiatry approximately ten times in South Carolina courts.

Dr. Melikian testified she reviewed Lindsey's school records and medical records, including records of a psychiatric hospitalization after Lindsey attempted suicide at age fifteen, and his neuropsychological records. She testified Lindsey had major depressive disorder and was significantly depressed at the time he shot Victim. Dr. Melikian based her diagnosis on Lindsey's school records, which showed he had learning and speech disabilities; his multiple past head injuries resulting from being run over by a car when he was about eighteen months old, a motorcycle accident, and a car accident; an incident in which he ingested kerosene as a baby; cognitive deficits affecting his fine motor skills, dexterity skills, memory, and verbal skills; his family's history of depression; a drug-overdose suicide attempt at age fifteen; and his suicidal ideation and extreme weight loss in the weeks leading up to the murder.

Dr. Melikian testified Lindsey's low intelligence limited his ability to cope with stress, and she testified the stress of separating from Victim further decreased his coping abilities. Dr. Melikian testified Lindsey reported he had been suicidal for several weeks before the murder and that during the three weeks before the murder, Lindsey's weight dropped from 225 pounds to 160 pounds.

She related to the jury that after the murder, Lindsey was evaluated at the William S. Hall Psychiatric Institute, a facility operated by the South Carolina Department of Mental Health. She testified test-

ing at Hall showed Lindsey had an IQ of 76, with retesting showing an IQ in the 80s. She testified Lindsey was diagnosed at Hall with borderline intellectual functioning. She recommended he be evaluated by a behavioral neurologist because of abnormalities in his psychological testing. Lindsey was seen by behavioral neurologist Dr. Absher, who reported Lindsey had a normal neurological exam.

Dr. Melikian testified Lindsey's neuropsychological testing (performed by Dr. Brawley) showed Lindsey "had some abnormalities having to do with naming and being able to copy designs, dexterity, and fine motor skills." She testified that based on those results, Lindsey had cognitive deficits, i.e., problems thinking or acting. She explained the deficits included decreased verbal fluency (naming words), processing memory, difference in dexterity on the right and left, and motor speed differences on the right and left. Dr. Melikian testified a brain abnormality was the cause of Lindsey's "low test scores and sudden neurological findings." She testified the brain abnormality was either something Lindsey was born with or was caused by a traumatic head injury or ingesting kerosene. She testified Lindsey put forth good effort during testing and was not malingering.

Dr. Melikian testified Lindsey used an imaginary friend named "Jimmy" as a coping mechanism when suffering stress. She testified Lindsey claimed Jimmy was present in the hospital after he attempted suicide at age 15. She acknowledged on cross-examination that Lindsey first mentioned Jimmy on the day he was served with the State's death penalty notice. However, she then testified it would not be unusual for Jimmy to appear on that day, because Lindsey used Jimmy as a mechanism to cope with stress, and receiving a death notice was undoubtedly one of the most

stressful things to ever happen to Lindsey. She persisted in her opinion that Lindsey was not malingering, stating quite clearly that she disagreed with Dr. Narayan, who was of the opinion Lindsey was malingering. Melikian testified Lindsey was using Jimmy as a coping mechanism, not as an alternative source of blame to escape responsibility for his crimes. She also insisted on cross-examination that the report of an imaginary friend has nothing to do with a diagnosis of mental illness, and she stated "[Lindsey] is suffering from depression regardless of whether he had the hallucination of the imaginary friend or not. I'm not sure that that would change, it would not change his neurological impairment or his low IQ."

Dr. Melikian also testified on cross-examination that Lindsey's depression, cognitive deficits, and low IQ did not cause or excuse the murder; she clarified "these are mitigating factors and should be considered in the imposition of a death penalty."

3. Virginia Lindsey

Virginia Lindsey, Lindsey's mother (Mother), testified she raised Lindsey and her three other sons in a small two-bedroom house. She and Lindsey's father never married, and Lindsey's father was never involved in his life. She testified Lindsey was one of four boys, but one drowned at a young age. She also testified she had a daughter who died at age seven months in a car accident. She described Lindsey as "a very loving, sweet child." Mother testified Lindsey ingested kerosene when he was nineteen months old, and about a month after that, Lindsey's uncle backed over his head with a car. She testified Lindsey was "slow in school," repeated eighth grade three times, and had speech problems. She knew of only one fight he had been in at school. She testified her other two

sons' father would pick them up on weekends[2] and leave Lindsey at home, which upset Lindsey greatly. She testified Lindsey was hospitalized after attempting suicide when he was fifteen. She told the jury Lindsey and Victim had a good relationship, she never saw Lindsey hit Victim, and Lindsey loved his sons very much. She also stated Victim had not allowed Lindsey to see his sons in the two months prior to the shooting, and she noted Lindsey was very depressed about not seeing his children. Mother asked the jury to show mercy to Lindsey.

4. Bill Burton

Bill Burton testified he was a lifeguard at a public pool in his teens and befriended Lindsey and his brothers when they were small and frequented the pool. He taught Lindsey how to swim. He took them to Spartanburg Phillies games, to Burger King, and fishing at a pond on his family's property. Burton testified Lindsey and his brothers were very polite to his parents. He testified Lindsey and his brothers grew up in a "rough situation" and in "desperate poverty," "without the benefit of parents like normal families." He said Lindsey and his brothers lived with their mother in a 1,000-square-foot home with several other people. Burton testified Lindsey was like many kids from poverty looking for attention. He testified he did not know Lindsey to be violent. Burton also testified that when Lindsey was about nineteen, he got Lindsey a job at the company where he was employed.

On cross-examination, Burton admitted he had just learned about Lindsey shooting Stanford Wilkins

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[2] In her testimony, forensic psychiatrist Margaret Melikian stated the notation that Lindsey repeated eighth grade three times was a misstatement—she testified the school records were confusing but reflect he repeated first grade and seventh grade.

through Wilkins' windshield. He also admitted there were many other disadvantaged children in the area who grew up without a mother or a father and Lindsey was lucky to have someone like him. He also testified that if Lindsey had called him to ask for help in getting visitation with his children, he would have helped him get a lawyer.

5. Leon McDowell

Leon McDowell, Lindsey's father, testified he was not involved in Lindsey's life other than occasionally giving him money. He testified he "was never a father to" Lindsey and regretted that fact. He also testified to the jury that "if [they] can see fit not to execute [Lindsey], maybe he can [be a] benefit to his kids somehow."

6. Chris Wilkins

Chris Wilkins testified he was related to Lindsey and they "were like brothers." He testified he had known Lindsey since they were thirteen years old. He testified Lindsey was a loving father, was very close to his children, and tried hard to provide for his family. He testified Lindsey, Victim, and their children lived with him for a time and they "raised [their] kids practically together." He never saw Lindsey hit Victim or hurt anyone on purpose. He testified Lindsey would mumble to himself on occasion, usually when he was stressed. Wilkins asked the jury to take into consideration the kind of father Lindsey was and asked the jury to show mercy to Lindsey. On cross-examination, Wilkins admitted Lindsey shot Stanford Wilkins through Stanford's windshield and that Lindsey cold cocked Victim in an Applebee's parking lot.

7. Steve Pilgrim

One of Lindsey's uncles, Steve Pilgrim, testified during the penalty phase. He testified he lived with

Lindsey, Mother, and Lindsey's brothers for about seven years while Lindsey was growing up. He testified he took Lindsey to the hospital after Lindsey's head was run over by a car as a child, and he also testified he was aware Lindsey ingested kerosene as an infant. Pilgrim testified he and his daughter suffered from panic attacks.

8. Bessie Smith

Bessie Smith, one of Lindsey's aunts, testified she and her husband lived with Lindsey, Mother, and Lindsey's brothers for a time. She testified that when Lindsey was a child, he had a kitten he adored. She testified one of Lindsey's uncles killed the kitten by throwing it into their house's heating unit. She testified Lindsey "was very hurt by that" and "talked about it for a long time."

9. Lindsey's Statement to the Jury

Lindsey did not testify during either phase of the trial, but during closing arguments, he asked the jury to spare him so he could be a father to his children. He stated that if he serves a term of life in prison, "I could still be of some use to my boys." He said he was the best father he could be. He expressed remorse for killing Victim and for all the pain he had caused to the family and to everyone who loved and missed Victim and stated he would do anything to bring her back.

10. Counsel's Closing Argument

While Mr. Bartosh's closing argument was not evidence, we summarize it nonetheless. He emphasized Dr. Melikian's testimony about Lindsey's cognitive deficits, his depression, and possible brain damage. He also recounted Mother's testimony about Lindsey's head injury, his inhaling kerosene, that he was "slow," had speech problems, did poorly in school, and repeated the eighth grade three times. He emphasized

Lindsey grew up without a father and wanted to be a father to his children so Lindsey's children would never experience the environment he experienced. He explained that even though Lindsey's issues did not excuse the murder, his background helped "explain to you how Marion Lindsey can end up sitting at that table" and that "[n]one of us can sit here and say how we view the situations like [Lindsey] did with his handicap." He also emphasized the evidence Lindsey was depressed, suicidal, and lost weight during his last separation from Victim. He noted Dr. Melikian's testimony about Lindsey's state of mind and argued "[a]ll of the frustration, all of the depression, all of the loss of his children all came together" at the time of the murder. He also noted Lindsey's attempt to commit suicide by shooting himself in the head while still in the parking lot.

The jury found the State proved the existence of a statutory aggravating circumstance and recommended Lindsey be sentenced to death. The trial court imposed a death sentence. We affirmed Lindsey's conviction and sentence. *Lindsey*, 372 S.C. at 188, 642 S.E.2d at 558. This PCR proceeding followed.

IV.PCR Hearing

A.

Several witnesses who testified during the PCR hearing provided testimony related to the preparation and presentation of mitigation evidence.

1. Doug Brannon

Mike Bartosh, Lindsey's lead trial counsel, passed away before the PCR hearing. Doug Brannon, a private attorney and second chair at Lindsey's trial, testified during the PCR hearing that he was not appointed to the case until March 5, 2004, roughly two months before trial began. Mr. Brannon testified Mr.

Bartosh was one of the finest lawyers he knew, and he jumped at the chance to assist. Mr. Brannon explained he mainly worked on the guilt phase of the trial, while Bartosh focused on the penalty phase. Brannon testified he was not privy to all of Bartosh's preparation for the penalty phase; however, Brannon testified he and Mr. Bartosh discussed Dr. Melikian's pending testimony about Lindsey's mental state. He explained Bartosh believed the best mitigation route was to emphasize Lindsey's troubled upbringing and borderline intelligence level.

2. Karen Quimby Hatcher

Ms. Hatcher, a Spartanburg County assistant public defender and third chair on the defense team, testified she was not appointed until after mid-March of 2004; her role was to organize files and act as a go-between for Bartosh and the mitigation investigator, Lenora Topp. Hatcher testified she had no part in calling witnesses or making strategic decisions.

3. Lenora Topp

Ms. Topp was a law enforcement officer from 1975-1990 and began private investigative work in 1991. She testified she was recommended to the defense team as a mitigation investigator by attorney Jeff Blume. She began working on the case on April 16, 2004, a little more than a month before trial began. She described her role as gathering records. She testified she did not have enough time to complete her investigation and was, therefore, unable to obtain Lindsey's aunts' medical records. She was also unable to contact Dr. Barry Henderson, Lindsey's childhood physician, until the day after the death sentence was delivered. She wanted Lindsey's medical records, but was not able to ask Dr. Henderson to testify during trial. She testified she learned from Dr. Henderson

that his children played with Lindsey when they were little, and that he would have been willing to testify. Dr. Henderson died in 2006, well before the PCR hearing.

On cross-examination, Topp testified she was a mitigation investigator in three other death penalty cases in South Carolina, and she did not have enough time to complete her investigation in any of those cases, having "no more than two months" for each one. She testified she had two major interviews with Lindsey and obtained a lot of information from him, such as being run over by a car, never having new clothes, living in a small house and sleeping in one bed with his brothers, being very poor, and not having a father figure. She testified "Jimmy" was not in the room when she talked to Lindsey. She testified Lindsey told her that on the day of the murder, he was very upset his wife was having an affair with a man who would take over raising his children. She testified Lindsey told her he was affected severely when his brother Paul drowned. She stated Lindsey described his older brother Timothy Sims as like a father. She testified Lindsey told her he sold drugs because he needed money and liked the lifestyle it allowed. She testified she was aware before trial that Lindsey shot another man through a car windshield, that he had relationships with other women while he was married, and that Lindsey supposedly had an imaginary friend named "Jimmy."

In sum, almost all of what Ms. Topp summarized during her PCR testimony was communicated to the jury by witnesses.

4. Mother

Mother's testimony during the PCR hearing was very similar to her trial testimony. Mother testified

she raised Lindsey in a "rough neighborhood" where drinking, drug dealing, and violence were normal. She testified Lindsey was raised in poverty in a small home with as many as twelve family members living there.

Mother testified her live-in boyfriend of twenty years had a "real bad drinking problem" and was violent toward Lindsey, even when Lindsey was a young child. Mother explained that while her other children spent time with their fathers, Lindsey's father was not a part of his life. She also noted her brothers lived with them and were violent, fought often, owned weapons, once got into a shootout at their home, and threw Lindsey's kitten into the house's heating unit. As she did during trial, Mother testified Lindsey suffered several medical emergencies as a child, including ingesting kerosene when he was a baby and his uncle backing over his head. She added head injuries she did not relate during her trial testimony, specifically Lindsey falling twice when he was six or seven and hurting his head and receiving another head injury when he was in a car wreck at sixteen years old. She recounted Lindsey's attempt to kill himself when he was fifteen years old. Mother stated Lindsey received poor grades in school, had to repeat some grades, and dropped out at age seventeen. She testified Lindsey sold illegal drugs to support the family, and even though he sometimes had "legal" jobs, he would quit because he made more money selling drugs. Mother stated Lindsey was a good father, and she said she never saw him hit Victim; she further testified that when Lindsey and Victim separated, Victim would not let Lindsey see his children. She testified he then became depressed and considered suicide, writing multiple suicide notes that she gave to Rodman Tullis, Lindsey's former attorney.

5. Bessie Smith and Steve Pilgrim

During their PCR testimony, Lindsey's aunt Bessie Smith and his uncle Steve Pilgrim—both of whom also testified during the penalty phase—provided similar accounts of the violence prevalent in Lindsey's childhood home and noted Lindsey's and his family's mental health struggles. Specifically, Ms. Smith testified Lindsey's uncles drank and were violent; Lindsey's other aunt had drug abuse problems; and Mother had drinking problems, leaving Lindsey's care to other family members. Smith testified that two weeks before Victim's murder, Lindsey was depressed and contemplated suicide, but his family decided not to seek professional or medical help for him. She also stated Lindsey was very upset about not being able to see his children. Mr. Pilgrim testified Mother and two of Lindsey's aunts had attempted suicide. Pilgrim testified Lindsey's other uncles and one of his aunts acted violently toward family members and others around Lindsey. He also stated he lived in the small house with Lindsey, and the house did not have indoor plumbing or air conditioning and had a coal/wood stove for heat.

6. Timothy Sims

Timothy Sims, Lindsey's younger brother by ten years, testified during the PCR hearing, but did not testify during the murder trial. Sims testified he was convicted of a drug offense in 2003, a year before the trial. He testified he received a suspended six-year sentence but was available to testify during the trial. Sims testified Lindsey was a father figure to him, and he lived with Lindsey, Victim, and their sons for a time. He said he never witnessed any physical violence between Lindsey and Victim. Sims testified that

two weeks before the murder, Lindsey cried and contemplated suicide. Sims stated he had never seen Lindsey cry before. Sims detailed that the day before the shooting, Lindsey suspected Victim was seeing another man and Lindsey asked Victim over the phone to let him visit with the boys. Sims stated Victim refused to let Lindsey's children see him, and he heard one of Lindsey's sons say, "I want my daddy," but Victim stated, "no, you don't, we is not living with him no more, that's not your daddy," and hung up the phone. Sims testified he spoke to Lindsey on the phone shortly before the shooting, and Lindsey was crying about Victim's new boyfriend and stated he felt like his head was "messed up," like he was "all out of his mind." According to Sims, when Lindsey asked him to check on Victim's home, Lindsey was trying to find out if Victim was seeing another man, not to find out how his children were faring.

7. Rodman Tullis

Mr. Tullis, Lindsey's former attorney, did not testify during the trial. At the time of the PCR hearing, Mr. Tullis had been disbarred for several years. *See In re Tullis*, 375 S.C. 190, 652 S.E.2d 395 (2007). He testified during the PCR hearing that at the time of the murder, he represented Lindsey in some pending cases in general sessions court and perhaps some traffic court and family court matters. He stated he had spoken to Lindsey about handling some domestic issues (including Victim's extramarital affair), and he stated Lindsey's biggest concern was being able to see his children. He and Lindsey discussed Lindsey making an offer to pay child support in exchange for visitation, but no pleadings were filed, and he did not know whether Lindsey ever communicated the offer to Victim. Tullis testified that about an hour before the murder, Lindsey left him a voicemail in which Lindsey

sounded emotional, distressed, and distraught but not angry or "manic." Tullis stated he visited Lindsey at the county detention center after Lindsey was released from the hospital after the murder. Tullis testified Lindsey's head was bleeding because he had been "bashing his head against the concrete wall" of his cell in an attempt to kill himself. Tullis testified Lindsey was put on suicide watch, lost a lot of weight, and told Tullis he wanted to die. Tullis also testified that a few weeks before the shooting, Mother gave him Lindsey's suicide notes, and he gave the suicide notes and the voicemail recording to the public defender's office.

On cross-examination, Tullis noted Lindsey had a criminal domestic violence case pending at the time of the murder. He stated Victim denied Lindsey access to his children "some weeks before the shooting," and there was a court order directing Lindsey to have no contact with Victim. He also confirmed Lindsey was accused of domestic abuse incidents allegedly occurring in August and October of 1996, February 1999, August 2000, and December 2001, with the murder occurring in September 2002.

8. Bill Burton

Burton's trial testimony is summarized above. With limited exceptions, his PCR testimony tracked his trial testimony. He testified Mr. Bartosh was very busy and difficult to contact before the trial. He had no one-on-one discussions with Bartosh before testifying. He testified he had no legal experience but "the case was unorganized and I was very concerned about it." He testified he was more prepared to testify about Marion before his PCR testimony than he was before the penalty phase. Again, however, much of his PCR

testimony tracked his trial testimony. He stated Lindsey was desperate for attention and "seemed [to be] a guy who wanted to have a family, who needed adult approval, and who didn't have it all." He said Lindsey did not do well in school, seemed to want a male figure in his life, and was "unsupervised." He testified he lost track of Lindsey when Lindsey was about nineteen. As he did during his trial testimony, he conceded on cross-examination that until the trial, he was not aware of Lindsey shooting Stanford Wilkins, dealing drugs, or having relationships with other women while he was married.

9. Mrs. Burton

She is identified in the PCR transcript as "Mrs. Burton" and in related filings as Patsy Burton, but it is clear she is Bill Burton's mother. She did not testify during trial. During the PCR hearing, she testified she loved Lindsey and would have testified during trial had she been asked. She stated she met Lindsey when he was six or seven, and she stated Lindsey was special to her son. Lindsey would come to her house "and fish and play." After Bill went to the Air Force Academy, Lindsey's brothers or cousins would bring him to the house on occasion. She testified she has gotten to know Lindsey better since he has been in the penitentiary, where she has visited him "many times." She testified she would have asked the jury to show Lindsey mercy if she had been called to testify.

During cross-examination, Mrs. Burton conceded that most of what she knew about Lindsey's family came from her son. She was not aware Lindsey was a drug dealer, she did not know his relationship with Victim or that he was involved in a shooting and criminal domestic violence incidents. She said "all I knew was that he was a happy little kid."

10. Vincent Bell

Vincent Bell was a paramedic who responded to the murder scene. He did not testify during trial. He testified during the PCR hearing that Lindsey stated at the scene that he shot his wife, then shot himself in the head, and wanted the paramedics to let him die. Bell also testified Lindsey told him he killed Victim because she was "fooling around" with another man. Bell testified he did not recall Lindsey saying anything about his children.

11. Tora Brawley

Tora Brawley, a clinical psychologist, testified during the PCR hearing, but not during trial. She was retained about a month before the murder trial and testified she "had been called in late in the game." She performed an "extended clinical interview and a battery of neuropsychological tests" and found Lindsey had neuropsychological deficits in verbal fluency, memory, and speed of mental tracking. She stated Lindsey informed her he had multiple instances of head trauma, problems in school, and had attempted suicide on four occasions. She scored Lindsey's full-scale IQ at 85. She testified she had no medical records, school records, or any other records pertaining to Lindsey. She testified her diagnosis was consistent with Dr. Melikian's. She gave a verbal report to Mr. Bartosh and a written report to Dr. Melikian and testified she did not know why she was not called to testify during trial. Dr. Brawley testified she performed several malingering tests which led her to conclude Lindsey was not malingering.

During cross-examination, Dr. Brawley noted she asked Lindsey about Jimmy and Lindsey told her Jimmy was like an older role model who came to live with him after Lindsey tried to commit suicide when

he was twelve. She shared that information with Dr. Melikian. She testified Lindsey told her he was hospitalized for over a month after the suicide attempt and also tried to kill himself in 2001 and August 2002, weeks before he murdered Victim.

12. Jan Vogelsang

Jan Vogelsang, an expert in clinical social work with expertise in bio-psychosocial assessments, testified during the PCR hearing that she conducted a bio-psychosocial assessment on Lindsey and his family. According to Vogelsang, a bio-psychosocial assessment is a gathering of extensive information in an effort to shed light on a person's behavior and determine how the person came to be in his current circumstances. Vogelsang interviewed Lindsey, his family, Topp, Tullis, Dr. Melikian, and Dr. Brawley; reviewed Lindsey's medical records, mental health records, prison records, suicide notes, legal/criminal records, and a letter he wrote to Victim's mother; reviewed the medical, mental health, and criminal records of Mother and other various family members; and visited the community where Lindsey grew up. Vogelsang explained Lindsey grew up in "abject poverty,"[3] and his family had a history of sexually inappropriate behavior, abandonment and desertion of children, drug dealing, domestic and non-domestic violence, imprisonment, untreated mental illnesses and suicide attempts, a lack of education, and a belief in and use of "roots."[4] Vogelsang stated Lindsey's childhood home

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[3] Vogelsang explained "abject poverty" means Lindsey's family "did go cold, did go hungry, that the children got up in the morning early to see who could be first to get one of [the family's three spoons] and eat first."

[4] Vogelsang testified "roots" is a cultural practice using liquids, powders, and plants to affect others' lives and is a form of voodoo

was a crowded four-bedroom home (it was actually a two-bedroom home with four rooms) with as many as ten people living together, with no indoor plumbing or heating, and was located in a rough neighborhood where drug-dealing was prevalent.

Vogelsang testified Lindsey was abandoned by his father, and Mother was not involved in important parts of his life, causing him to have an over-reactivity to rejection. She testified Lindsey did not have a strong adult male figure in his life, and one of the biggest risk factors for criminal activity and incarceration in a young male is the absence of a strong male figure in the young male's life. Vogelsang also testified Lindsey was corrupted or mis-socialized by watching his family's violent behavior, specifically by witnessing the males in his life beat their girlfriends and get into fights and witnessing Mother shoot at her boyfriend. In addition, Lindsey's uncles used him as a drug runner beginning at age twelve or fourteen. Vogelsang also testified Lindsey thought he was a good and loving father to his children. Vogelsang testified there was no evidence Lindsey abused his children. Vogelsang opined the family system and behaviors witnessed by Lindsey through his developing years caused an accumulation of risk factors affecting his decision-making, judgment, insight, and impulsivity and placed him at a higher risk of committing a "serious act."

On cross-examination, Vogelsang testified she also had experience as a social worker in family court child

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or black magic. Vogelsang explained children who grow up in violent or chaotic homes that practice roots "are simply further confused by the use of roots, and especially if it's being used to deal with problems in relationships."

custody cases. She testified she was not aware Lindsey had given one of his infant children beer in a baby bottle, but she conceded that would be something she would weigh against a parent having unsupervised visitation rights, as would dealing drugs, carrying a firearm, being violent toward the children's mother, and shooting someone (all of which applied to Lindsey before he murdered Victim). During cross-examination, Vogelsang also admitted Lindsey's belief he was a good father was based on his limited understanding of what fatherhood was, namely buying things for his children. She admitted that because of Lindsey's criminal history and abuse of Victim, she would have been hesitant to recommend to a family court judge that Lindsey have visitation rights, even with supervision. She also conceded on cross that Lindsey's uncle Steve Pilgrim was a father figure to Lindsey, spent time with Lindsey, and Lindsey liked being with him (though in Vogelsang's opinion, Pilgrim did not have "the skills" necessary to help Lindsey through "developmental stages"). She also confirmed on cross she had not spoken with eight other potential witnesses identified to her.

13. Dr. Melikian

Dr. Melikian, the forensic psychiatrist who testified for Lindsey during the penalty phase, also testified during the PCR hearing. She testified Lindsey's case was either her first or second death penalty case. She testified she was unable to fully prepare for trial because Mr. Bartosh contacted her only a month or so before trial. She testified the mitigation investigation was lacking, and she testified she was inexperienced in death penalty cases at the time of trial. Dr. Melikian testified she had six to seven times more records and information for the PCR hearing than she had at the time of trial, and she noted some of the new records

(Lindsey's suicide notes, some mental health and medical records, some prison records, and parts of the incident reports related to the shooting) might have impacted her view of the case. Dr. Melikian also testified she did not know Lindsey's family history at the time of trial or the extent to which he was suicidal at the time of the shooting. Dr. Melikian asserted this additional information "would have changed" her diagnosis because she did not "understand the seriousness of Mr. Lindsey's depression at the time of the incident."

Dr. Melikian testified Mr. Bartosh set up a time for her to call the trial judge so she could explain she was not ready to testify. Bartosh did not participate in this phone call and did not, to her knowledge, formally request a continuance. Dr. Melikian testified that even though she would have still diagnosed Lindsey with depression, the information she obtained after trial and before her PCR testimony would have allowed her to better understand and testify during trial about the depth of Lindsey's depression and explain to the jury the depression could have been the cause of his low cognitive ability at the time of the shooting.

Dr. Melikian also testified about Jimmy, Lindsey's alleged imaginary friend. She testified that at the time of trial, she believed Jimmy was merely a coping mechanism when Lindsey was under stress. She testified that had she known before trial that Lindsey apparently fabricated Jimmy, she would have made the fabrication the focus of her evaluation before trial because it might have provided evidence helpful to a mental health defense. However, on cross-examination, Dr. Melikian conceded she had learned since the trial that Lindsey invented Jimmy on the advice of fellow inmates, not for any reason related to his deficient mental status.

14. James Evans Aiken

Lindsey contends trial counsel was ineffective in failing to retain a prison adaptability expert to testify during trial. James Evans Aiken,[5] a prison adaptability expert, testified during the PCR hearing that he reviewed Lindsey's prior records from SCDC up until the 2004 trial and determined SCDC "has and can manage this type of offender for the remainder of his life without causing unreasonable risk of harm to staff, inmates, as well as the general community." However, on cross-examination, Aiken admitted the "best predictor of future behavior is past behavior," and he acknowledged Lindsey was previously convicted of ABWIK for shooting an ex-girlfriend's new boyfriend through the windshield of the man's vehicle and had been charged with criminal domestic violence several times. Aiken also admitted Lindsey got into multiple fights with other inmates while he was in prison, had been in an altercation with an officer who tried to break up one of the fights, and had been "gassed" by an officer who was attempting to break up a fight in which Lindsey was involved.

B.

The PCR court ruled trial counsel's investigation of the social history of Lindsey and his family members was reasonable. Pointing to the trial testimony of Mother, Chris Wilkins, Bill Burton, Leon McDowell, and Steve Pilgrim, the PCR court concluded that even though the investigation did not meet the ABA Guidelines, the investigation "uncovered matters necessary for the defense." The PCR court concluded the summaries of Lenora Topp's interviews of Lindsey

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[5] Mr. Aiken introduced himself to the jury as James Evans Aiken, but the transcript header refers to him as Rob Aiken.

and Mother, and Topp's PCR testimony about what Topp learned in 2004 are in virtually the same detail as the PCR testimony of Jan Vogelsang and Lindsey's family members. The PCR court explained that Jan Vogelsang's testimony, while "laborious," conveyed essentially the same information presented to the trial jury. The court also cited some less-than-helpful information imparted by Vogelsang, including her concession that she would not have recommended Lindsey have even supervised visitation with his children, in light of Lindsey's proclivity to deal drugs and act violently. The PCR court also noted that even though Vogelsang "presented a social history of known poverty and lack of a father figure . . . , she also confirmed that he had become a controlling and violent person."

The PCR court also ruled trial counsel's failure to call paramedic Vincent Bell as a witness was not deficient performance. The PCR court ruled the same information provided by Bell during the PCR hearing was conveyed to the jury by other witnesses.

V. PCR Court's Signing of the State's Proposed Orders

After the PCR hearing, the PCR court requested the parties to submit proposed orders. The PCR court signed the proposed order submitted by the State, making no changes or corrections. As noted, the PCR court dismissed Lindsey's PCR claim, finding, among other things, that Lindsey's three trial attorneys were not deficient in investigating or presenting his mitigation defense, and, even if they were deficient, Lindsey was not prejudiced.

The PCR court denied Lindsey's motion to reconsider. Lindsey petitioned this Court for a writ of certiorari, arguing the PCR court's verbatim adoption of the State's proposed order violated his constitutional

rights, and noting the order contained numerous typographical and grammatical errors, which Lindsey asserted cast doubt as to whether the PCR court even read the proposed order before signing it. We vacated the dismissal of Lindsey's application for PCR and remanded the case to the PCR court to issue a new order that (1) included findings of facts and conclusions of law on each issue presented in Lindsey's PCR application with accurate references to the record and applicable law and (2) complied with *Pruitt*; *Hall*; and section 17-27-80.

On remand, the PCR court asked the parties for the same proposed orders they previously submitted. In response, Lindsey filed a petition for extraordinary relief to this Court, asking for a new PCR hearing before a different judge and asserting the PCR court had violated this Court's order by requesting copies of the original proposed orders, which indicated it planned to adopt the State's order a second time. We denied the request for extraordinary relief.

Subsequently, the PCR court issued an amended order, again denying Lindsey PCR. The PCR court initialed each page of the 187-page order and made three handwritten and initialed edits to typographical errors in the amended order. Lindsey filed another petition for extraordinary relief, alleging the amended order was the same as the original PCR order except for the correction of some typographical errors. We denied that petition as well.

Lindsey moved in the circuit court for a new PCR hearing in front of a new PCR judge or, in the alternative, for reconsideration of the amended order of dismissal. During the hearing of this motion, the PCR judge admitted he read through the parties' proposed orders the first time "probably too hastily and [] didn't

make any corrections because of that." However, the judge noted the State's order "was exactly as I . . . saw the case that was presented to me." The PCR court explained during a post-remand hearing:

> [Y]'all would never even imagine the number of hours that [my law clerk] and I spent going through all these documents. And even after we loaded the final proposed order that, I even instructed [my law clerk] to not make some corrections on purpose to prove to everyone that could possibly be concerned on this case that I was involved in redrafting that order and there were many changes made. As I said, I purposely asked him to leave some errors in there so I could initial them to prove that point, and I even took the extra step to call the Clerk of the Supreme Court to let them know over there that I had purposely done that to prove what I'm just stating. So I wanted to put that on the record because I didn't want anybody to say well, [the PCR court] didn't even correct this last order. That was purposefully done.

The PCR court then denied Lindsey's recusal motion. After a second hearing on the motion to reconsider, the PCR court denied the motion.

VI. Discussion

A.

"A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "First, the defendant must show that counsel's performance was deficient." *Id.* "Second, the defendant must show that the deficient performance prejudiced

the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* "When a defendant challenges a death sentence, prejudice is established when 'there is a reasonable probability that, absent [counsel's] errors, the sentencer–including an appellate court, to the extent it independently reweighs the evidence–would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Council v. State*, 380 S.C. 159, 176, 670 S.E.2d 356, 365 (2008) (quoting *Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 823 (1998)). "The bottom line is that we must determine whether or not [the defendant] has met his burden of showing that it is reasonably likely that the jury's death sentence would have been different if counsel had presented additional" mitigating evidence. *Jones*, 332 S.C. at 333, 504 S.E.2d at 824. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687.

Generally, "[o]ur standard of review in PCR cases depends on the specific issue before us." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). "We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Id.* (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). "We review questions of law de novo, with no deference to trial courts." *Id.* at 180-81, 810 S.E.2d at 839. Whether trial counsel was deficient and whether any deficiency prejudiced a PCR applicant are questions of law.

B.

We first address Lindsey's argument that the PCR court violated our Remand Order and violated his constitutional and statutory rights by readopting the State's proposed order of dismissal after this Court's remand, asserting the PCR court did so without considering Lindsey's grounds for PCR or even reading the proposed order before signing it. Lindsey contends this Court, by citing *Pruitt* and *Hall* in the Remand Order, required the PCR court to draft its own order. Lindsey argues the PCR court ignored this directive by adopting the State's proposed order a second time without making any material changes to the order or even correcting a majority of the typographical errors. Lindsey requests de novo review of the factual findings of the PCR court or, in the alternative, a new PCR hearing.

Lindsey argues for de novo review, claiming the PCR court adopted the State's proposed order without reading it, which removes the "presumption of correctness" of the order. Lindsey cites federal habeas corpus cases he contends support this argument. *See Jefferson v. GDCP Warden*, 941 F.3d 452, 474 (11th Cir. 2019) (finding "the state habeas court's factual findings [were not] entitled to a presumption of correctness" because the state court deprived the defendant of a "full and fair hearing" by adopting an order "drafted exclusively by the State pursuant to an ex parte request made by [the judge's] law clerk," and the order showed the court "uncritically accepted findings prepared without judicial guidance" as shown by the court overlooking at least twenty-one typographical errors, inviting the inference that the court "failed to review the proposed order . . . before executing the final order").

A PCR court "shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." S.C. Code Ann. § 17-27-80. The commentary to Canon 3B(7) of the Code of Judicial Conduct states a court "may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions." *See* Commentary to Rule 3B(7), CJC, Rule 501, SCACR.

We have expressed a "concern with the increasing number of orders in PCR proceedings that fail to address the merits of the issues raised by the applicant" because this "deprive[s] the parties of rulings on the issues raised, [and] makes review by the appellate court more difficult and ultimately increases the work load of all involved[,]" often requiring a new hearing. *Pruitt*, 310 S.C. at 255-56, 423 S.E.2d at 128. In *Pruitt*, we stated, "Counsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it." *Id.* at 256, 423 S.E.2d at 128. Also, while we "strongly encourage[d] PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also acknowledge[d] that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency." *Hall*, 360 S.C. at 365, 601 S.E.2d at 341.

We hold the PCR court did not err in requesting proposed orders from the parties after remand or in adopting the State's proposed order. PCR courts can, and commonly do, request and adopt proposed orders from parties, even though PCR courts are encouraged to write their own orders in death penalty PCR cases.

See § 17-27-80; Commentary to Rule 3B(7), CJC, Rule 501, SCACR; *Hall*, 360 S.C. at 365, 601 S.E.2d at 341. This practice is proper, as long as: (1) the other parties are aware of the request for a proposed order and are allowed to respond to the proposed order; and (2) the PCR court carefully reviews the order before signing it. *Hall*, 360 S.C. at 365, 601 S.E.2d at 341; *Pruitt*, 310 S.C. at 255-56, 423 S.E.2d at 128. Here, the record shows that (1) after the initial PCR hearing, the PCR court requested a proposed order from the State in a letter sent to the State and copied to Lindsey's PCR counsel on May 2, 2011; (2) in a May 12, 2011 email to Lindsey's PCR counsel and copied to the State, the PCR court apologized for not requesting a proposed order from Lindsey, noting it had mistakenly believed Lindsey had already sent in a proposed order and stating it would hold the matter open for Lindsey to have time to submit a proposed order, which he did; (3) the State sent its proposed order to the PCR court and Lindsey on June 2, 2011, providing Lindsey with time to respond to the proposed order, which he did not; and (4) after this Court remanded the case to the PCR court for a new order, the PCR court emailed both parties asking the parties to send their initial proposed orders, not new orders, and in response, Lindsey filed a petition for emergency relief to this Court, which was denied. Thus, we believe Lindsey was aware of and had ample opportunity to respond to the State's proposed order.

The PCR court's post-remand statements at the hearing on Lindsey's motion to reconsider establish the PCR court sufficiently reviewed the State's proposed order before issuing the amended PCR order. Specifically, the PCR court stated: (1) the State's order "was exactly as I . . . saw the case that was presented

to me"; (2) the parties "would never imagine the number of hours" the PCR court spent working on the case; and (3) the PCR court purposefully left in errors so it could fix and initial the errors to prove it read the order. *See Hall*, 360 S.C. at 357, 365, 601 S.E.2d at 337, 341 (finding the PCR court "spent an adequate amount of time reviewing the [PCR] order before adopting it," where the PCR court adopted the State's proposed order "in full, without alterations" in a death penalty case but told the parties it would "carefully review the proposed order and insure that the facts and conclusions of law are as I find them to be"). Thus, the record demonstrates the PCR court adopted the State's proposed order only after carefully reviewing the State's initial proposed order. Therefore, we hold the PCR court did not adopt the amended order in violation of Lindsey's constitutional rights or South Carolina law.

Next, we address Lindsey's assertion that the amended PCR order violates our Remand Order because it does not contain specific findings of fact or conclusions of law with respect to each of his PCR claims. In Lindsey's post-PCR hearing memorandum, he listed each of his PCR claims, including his claims trial counsel was ineffective for failing to: (1) prepare Lindsey for his mental-health evaluations, spend enough time with him, and stop Lindsey from listening to "jailhouse lawyers" telling him to feign a mental illness; (2) adequately address the issue of malingering; (3) adequately prepare witnesses to request mercy for Lindsey or adequately defend the witnesses' right to request mercy for Lindsey during their trial testimony; (4) provide sufficient information to Dr. Melikian to allow her to both properly evaluate and testify regarding Lindsey's mental condition; (5) adequately present Lindsey's family history of mental illness and

impairment; (6) present evidence of Lindsey's adaptability to prison through an expert; (7) present an expert to discuss Lindsey's psycho-social history; (8) present EMS workers who treated Lindsey at the scene of the murder and said Lindsey said he shot himself and wanted to die; (9) "commit sufficient time to perform an adequate investigat[ion] for the penalty phase of the trial . . . [or] adequately prepare for the presentation of a case in support of mitigation"; and (10) argue against the aggravating factor raised by the State. In its amended order, the PCR court addressed each of these issues, evaluating the facts extensively and reaching legal conclusions as to each. Thus, we hold the PCR court articulated specific findings of fact and conclusions of law as to each issue raised by Lindsey, as required by our remand order and as required by *Pruitt*, *Hall*, and section 17-27-80. We hold the order comports with South Carolina law and our Remand Order. Accordingly, we will adhere to our normal standard of review. *See Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839 ("We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them," but "we review questions of law de novo, with no deference to trial courts").

We respectfully reject Lindsey's arguments and will defer to the PCR court's factual findings if they have evidentiary support. We also hold there is no justification for a new PCR hearing.

C. Lindsey's Ineffective Assistance Claims

Lindsey intersperses in his mitigation argument many allegations relative to the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines). Lindsey asserts trial counsel was deficient in failing to follow the ABA Guidelines in the

following particulars: (1) failing to obtain records concerning Lindsey's background or his family members who had mental illnesses; (2) not beginning the mitigation investigation until a month before trial; (3) failing to present evidence of Lindsey's "horrible childhood"; (4) failing to attend important interviews with the State's mental health expert; (5) losing the tape of Lindsey's voicemail to Tullis; (6) failing to call important mitigation witnesses, such as the paramedics who treated Lindsey at the scene of the incident, Lindsey's childhood doctor, and Sims, Lindsey's younger brother; (7) failing to prepare the mitigation witnesses to ask the jury for mercy for Lindsey; (8) failing to retain, prepare, and call Dr. Brawley, who tested Lindsey for cognitive impairments; (9) failing to retain a social work expert; and (10) failing to retain a prison adaptability expert to testify during trial. Lindsey also contends the PCR court erred in failing to rely upon the ABA Guidelines in determining whether trial counsel was deficient.

This Court has noted the *ABA Guidelines* in a PCR case are but one factor in determining whether trial counsel's performance in a death penalty case was deficient. *Council*, 380 S.C. at 172-73, 670 S.E.2d at 363. The *ABA Guidelines* purport to "set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction." *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* 1.1(A) (rev. 2003). "As soon as possible after designation, lead counsel should assemble a defense team," including "at least one mitigation specialist and one fact investigator" and "one member qualified by training and experience to screen individuals

for the presence of mental or psychological disorders or impairments." *ABA Guidelines* 10.4(C). "Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." *ABA Guidelines* 10.7(A).

> In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include the following: 1. Witnesses familiar with and evidence relating to the client's life and development . . . that would be explanatory of the offense(s) . . . or would otherwise support a sentence less than death; 2. Expert and lay witnesses along with supporting documentation (e.g., school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client's mental health and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s); to give a favorable opinion as to the client's capacity for rehabilitation, or adaption to prison; to explain possible treatment programs; or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor. . . .

ABA Guidelines 10.11(F).

As we noted in *Stone v. State*, 419 S.C. 370, 397 n.6, 798 S.E.2d 561, 576 n.6 (2017), the United States Supreme Court and this Court "have relied on the ABA Guidelines to determine whether counsel's performance was reasonable" under the *Strickland* deficiency prong. *See also Ard v. Catoe*, 372 S.C. 318, 332, 642 S.E.2d 590, 597 (2007). In *Bobby v. Van Hook*, the United States Supreme Court flatly rejected the

notion that the 2003 ABA Guidelines should be considered "inexorable commands" trial counsel must strictly follow:

> *Strickland* stressed, however, that "American Bar Association standards and the like" are "only guides" to what reasonableness means, not its definition. 466 U.S., at 688, 104 S.Ct. 2052. We have since regarded them as such. *See Wiggins v. Smith*, 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). What we have said of state requirements is a fortiori true of standards set by private organizations: "[W]hile States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." *Roe v. Flores-Ortega,* 528 U.S. 470, 479, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

558 U.S. 4, 8-9 (2009) (footnote omitted).

Lindsey's initial specific mitigation-related claim is that trial counsel waited too late to mount a pretrial mitigation effort. We disagree. In *Bobby*, the defendant's trial counsel met with one mitigation expert for the first time one month before trial and met with another for two hours one week before trial. *Id.* at 9-10. The Court found the timing of the retention of experts to be reasonable and rejected the lower court's holding that counsel waited until the last minute. Under the facts of this case, we hold the timing of the retention of Lindsey's experts was not unreasonable.

Lindsey contends trial counsel was deficient in failing to perform an adequate mitigation investigation; in failing to hire a social work expert to testify as

to his poor upbringing; and in failing to prepare Dr. Melikian for her testimony. Lindsey claims that had trial counsel performed according to accepted professional norms, it is reasonably likely the jury would not have recommended a death sentence. Lindsey argues he is entitled to a new sentencing trial because the mitigation evidence he presented during the PCR hearing was far from being merely cumulative to what he describes as trial counsel's "feeble" mitigation presentation.

Even if trial counsel's investigation and presentation of evidence was deficient, we hold Lindsey was not prejudiced. We first address Dr. Melikian's testimony. Even though Dr. Melikian testified during the PCR hearing that she was inexperienced at the time of trial and felt she did not have enough time to prepare for her penalty phase testimony, she very clearly and ably testified during the penalty phase that Lindsey had major depressive disorder at the time of the murder, had limited coping abilities at the time of the murder arising from his low intelligence and his cognitive deficits, and was not malingering. While Dr. Melikian testified during the PCR hearing that having additional records and information regarding Lindsey would have changed her understanding of the depth of Lindsey's depression, her trial testimony that Lindsey suffered from major depressive disorder at the time of the murder and was not malingering remained the same. It is apparent from Dr. Melikian's testimony as a whole that any lack of experience and other supposed shortcomings in available information did not hamper her ability to effectively provide relevant opinions during the penalty phase.

Lindsey claims the State's cross-examination of Dr. Melikian about Jimmy was particularly devastating. Dr. Melikian stated during her PCR testimony

that had she known before trial Lindsey "was malingering Jimmy," she could have tailored her testimony to explain "that with his level of depression and cognitive ability, he's believing [making up Jimmy] is a good idea." However, as we read Dr. Melikian's trial testimony, that is essentially what she did during her trial testimony. As summarized above, Dr. Melikian's trial testimony reveals that in the face of the State's cross-examination, she held fast to her opinion Lindsey was not malingering, and she expressed her frank disagreement with Dr. Narayan's assessment of malingering. Specifically, she insisted during cross-examination that Lindsey's report of an imaginary friend named Jimmy had nothing to do with her diagnosis of mental illness, stating "[h]e is suffering from depression regardless of whether he had the hallucination of the imaginary friend or not. I'm not sure that that would change, it would not change his neurological impairment or his low IQ."

Lindsey, not trial counsel or Dr. Melikian, fabricated Jimmy. Even if Dr. Melikian had known of the fabrication before her trial testimony, she would have still been cross-examined about the fabrication as it related to Lindsey's attempt to avoid responsibility for his actions. As noted above, she explained during her trial testimony why the fabrication did not impact her opinion Lindsey suffered from cognitive deficits, depression, and neurological deficits. And as also noted above, under cross-examination during the PCR hearing, Dr. Melikian admitted it appeared Lindsey fabricated Jimmy at the behest of his fellow jail inmates, not as a result of his mental health deficiencies. All in all, the damage to Lindsey's mitigation defense resulted from Lindsey's choice to fabricate Jimmy, not from Dr. Melikian's lack of knowledge or supposed unpreparedness.

Vogelsang's PCR testimony, considered in isolation or in conjunction with other evidence, does not establish Lindsey suffered prejudice from any supposed deficiency on the part of trial counsel. While Vogelsang's PCR testimony was certainly detailed, and while she talked to more people and considered more documentation than what was alluded to during trial, she provided information of the same substance as did Dr. Melikian and others during the penalty phase. The substance of Vogelsang's bio-psychosocial assessment contained much of the same evidence that was presented to the jury during the penalty phase: Lindsey grew up in extreme poverty. He was abandoned by his father, and his mother was not involved in important parts of his life. Lindsey felt rejected and suffered from major depression. Other family members suffered from mental illness. He ingested kerosene and his head was run over by a car when he was a very small child. He had cognitive deficits and did poorly in school. An uncle threw Lindsey's kitten to its death into a fire. Lindsey attempted suicide at age fifteen. Vogelsang provided additional details during the PCR hearing, such as Lindsey witnessing his mother shoot at her boyfriend; witnessing family members deal drugs; witnessing males in his family beat their girlfriends; and family members believing in the use of "roots." However, these additional details fall far short of establishing a reasonable probability that, had they been related to the jury, the jury would have recommended a sentence other than death.

Lindsey claims the penalty phase mitigation evidence that was communicated to the jury was communicated ineffectively. We disagree. Mother testified during the penalty phase that Lindsey attempted suicide at age fifteen, ingested kerosene and was run over by a car as a baby, and that Lindsey's father was not

involved in his life. She also testified Lindsey was depressed during the weeks leading up to the murder, and Burton, Lindsey's friend and mentor, testified Lindsey grew up in "desperate poverty" "without the benefit of parents like normal families." Uncle Steve Pilgrim testified Lindsey was run over as a baby, and he testified about his own mental health issues and his daughter's mental health issues. Aunt Bessie Smith testified that when Lindsey was a child, he witnessed his uncles throw his kitten into a heater.

We further hold that had Timothy Sims and Rodman Tullis testified during the penalty phase, there is not a reasonable probability the jury would have recommended a sentence other than death. Sims' testimony was essentially the same as that given by other family members. Tullis's testimony adds little to the mitigation case, and if he had testified during trial, he could have been effectively cross-examined on the nature of his legal representation of Lindsey (drug offenses, family court order of protection, and domestic abuse charges). That is true even though the jury heard evidence of these misdeeds during the penalty phase. As for Tullis's testimony that Lindsey sounded very depressed in his voicemail, Dr. Melikian testified Lindsey was depressed and suicidal at the time of the murder. Also, Ann Howard testified Lindsey was suicidal, and Mother testified Lindsey was very depressed. Finally, the evidence presented to the jury that Lindsey shot himself immediately after murdering Victim is certainly evidence of his suicidal intent.

Lindsey claims he was prejudiced by trial counsel's failure to prepare his mitigation witnesses to ask the jury for mercy. We reject this claim, as Lindsey's mother, father, and Chris Wilkins (who is "like a brother" to Lindsey), asked the jury to show mercy and not sentence Lindsey to death. There is no prejudice

when pleas for mercy would be cumulative. *See State v. Sapp*, 366 S.C. 283, 294, 621 S.E.2d 883, 888 (2005).

Lindsey next argues the PCR court erred in denying his claim that trial counsel was ineffective for failing to call EMS worker Vincent Bell to testify. Bell responded to the scene of the murder and testified during the PCR hearing that Lindsey told him he shot his wife and wanted to die. EMS worker Joseph Stewart testified for the defense during the guilt phase. He testified he treated Lindsey at the scene for multiple gunshot wounds, including one to the head. Stewart told the jury Lindsey stated he shot himself in the head after he shot Victim. Even though the jury did not hear Bell's testimony that Lindsey said he wanted to die, Lindsey's statement to Stewart that he shot himself after shooting Victim was a clear indication to the jury that Lindsey wanted to die. Also, Bell testified during the PCR hearing that Lindsey said he shot Victim because she "was fooling around" with another man. This testimony directly contradicted one of Lindsey's central claims—that he shot Victim because he was depressed over Victim not letting him visit his sons. Bell's testimony, if presented to the jury, would have painted Lindsey as an angry and jealous husband, not as a desperate and depressed father distraught over not being able to visit his children.

Lindsey also argues the PCR court erred in rejecting his claim that trial counsel provided ineffective assistance of counsel by failing to hire a prison adaptability expert to testify Lindsey "did not pose an unreasonable risk of harm to prison staff, other inmates, or the community." As noted above, prison adaptability expert Aiken testified during the PCR hearing. Lindsey contends the PCR court erred in: (1) disregarding Aiken's testimony that Lindsey could adapt to prison life and that SCDC could manage Lindsey; and (2)

speculating that Lindsey's trial counsel considered and had a reasonable trial strategy for not presenting a prison adaptability expert during trial, when no valid reason existed not to call a prison adaptability expert. Specifically, Lindsey asserts the only valid reason not to call such an expert would be if no expert would testify Lindsey could adapt to prison life. Lindsey further notes the PCR court speculated trial counsel did not procure testimony from a prison adaptability expert in an effort to keep Lindsey's prison altercations from being introduced during the penalty phase. Lindsey asserts the

State introduced this evidence anyway, and no expert testimony was offered to rebut the State's contention that Lindsey could not adapt to prison life. Lindsey asserts trial counsel's failure to present testimony from a prison adaptability expert prejudiced him because there was a reasonable probability that if the jury had heard he was adaptable to prison, the jury would not have recommended a death sentence, especially considering the "only" reason Lindsey's case was a death penalty case was because he killed Victim in a public place instead of a private one, "transforming a domestic homicide into a capital crime."

"In deciding which witnesses and evidence to prepare concerning [the] penalty [phase of a capital murder trial], . . . the areas counsel should consider include . . . [e]xpert and lay witnesses . . . to give a favorable opinion as to the client's capacity for rehabilitation, or adaptation to prison . . . ." *ABA Guidelines* 10.11(F). Our courts are not required to blindly adhere to the *ABA Guidelines*; however, the United States Supreme Court has held adaptability to prison life is constitutionally relevant. *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986), *as recognized by Chaffee v. State*, 294 S.C. 88, 91, 362 S.E.2d 875, 877 (1987).

We conclude the PCR court did not err in finding trial counsel did not provide ineffective assistance of counsel by failing to call a prison adaptability expert, but for a different reason than that expressed by the PCR court. The PCR court found Mr. Bartosh exercised "reasonable professional judgment" in not calling a prison adaptability expert, concluding testimony from an expert such as Aiken would have been unpersuasive, given Lindsey's history of fights in prison. However, this was error, because there is no evidence as to why Mr. Bartosh did not retain or call a prison adaptability expert to testify. We have held that neither the PCR court nor the appellate court can conclude trial counsel exercised a valid trial strategy unless evidence is presented as to what the strategy actually was. *See, e.g.*, *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014); *Smith v. State*, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010); *Gilchrist v. State*, 350 S.C. 221, 228 n.2, 565 S.E.2d 281, 285 n.2 (2002); *Bruno v. State*, 347 S.C. 446, 451, 556 S.E.2d 393, 395-96 (2001).

However, even if trial counsel was deficient in failing to present testimony from a prison adaptability expert, Lindsey was not prejudiced by this deficiency. As noted above, adaptability expert Mr. Aiken testified during the PCR hearing that he reviewed Lindsey's prior records from SCDC up until the 2004 trial. He testified SCDC "can manage this type of offender for the remainder of his life without causing unreasonable risk of harm to staff, inmates, as well as the general community." However, on cross-examination, Aiken admitted the "best predictor of future behavior is past behavior," and he acknowledged Lindsey's prior conviction for ABWIK after shooting Stanford Wilkins. Aiken also acknowledged Lindsey had been charged with domestic violence several times. Aiken's

testimony that SCDC could suitably manage Lindsey was also significantly neutered by evidence of Lindsey's prison fights, that a prison guard had been caught in the middle of one of the fights, and that Lindsey was gassed in order to break up one of the fights. Lindsey's commission of violent crimes and his violent conduct in prison severely contradicted Aiken's adaptability opinion and would have done so had he testified during the penalty phase. Because Lindsey did not establish prejudice, he is not entitled to relief on this ground.

VII. Conclusion

We hold the PCR court did not err in signing the amended PCR order. We also hold any deficiencies in trial counsel's investigation and presentation of a mitigation defense did not prejudice Lindsey. Even if trial counsel had secured a more robust mitigation investigation, and even if trial counsel had presented the mitigation evidence Lindsey presented during the PCR hearing, it is not reasonably likely the jury would have recommended a sentence other than death. *See Jones*, 332 S.C. at 338-39, 504 S.E.2d at 826 (holding the absence of "fancier" mitigation evidence does not render the prior mitigation case constitutionally inadequate where such evidence would not have any effect on the outcome of the trial). Lindsey has not made the requisite showing that trial counsel's errors, if any, were so serious so as to deprive him of a trial whose result was reliable. *See Strickland*, 466 U.S. at 687. Lindsey has not established "'there is a reasonable probability that, absent [counsel's] errors, the sentencer–including an appellate court, to the extent it independently reweighs the evidence–would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Council*, 380 S.C. at 176, 670 S.E.2d at 365 (quoting *Jones*, 332 S.C.

at 333, 504 S.E.2d at 823). The decision of the PCR court is therefore

AFFIRMED IN RESULT.

KITTREDGE, C.J., and Acting Justice Paula H. Thomas, concur. HILL, J., concurring in part and dissenting in part in a separate opinion, in which Acting Justice Donald W. Beatty, concurs.

JUSTICE HILL, concurring in part and dissenting in part:

I join Section VI.B of the majority opinion affirming that there was no error in the procedural aspects of the trial court's signing of the order. With great respect, I dissent from the majority's conclusion that Lindsey received the effective assistance of counsel at the sentencing phase of his death penalty trial.

I. Trial Preparation

Lindsey was indicted and served with the State's death penalty notice in October 2002. It appears Mr. Bartosh became Lindsey's counsel that same month. The trial began on May 17, 2004.

As lead trial counsel, Mr. Bartosh began to assemble his team two months before trial. Second chair counsel was not appointed until March 5, 2004. The second chair counsel was just three years out of law school and had never tried a capital case. Trial counsel did not engage a mitigation investigator to gather records of Lindsey's social history until April 16, 2004. Ms. Topp, the investigator, had also never worked on a death penalty case. Trial counsel waited until April 12, 2004, to contact Dr. Tara Brawley, a neurologist. Dr. Brawley first told trial counsel she could not work on the case, but due to a cancellation, she was able to work Lindsey in for an examination on April 27, 2004. The trial was then just twenty days away. Ms. Topp scrambled to obtain Lindsey's school and medical records. She was still sending out releases to obtain some of these records after the trial had started.

Trial counsel first contacted forensic psychiatrist Margaret Melikian on April 6, 2004, but she was not retained until April 16. Dr. Melikian shared something in common with second chair counsel and Ms.

Topp: like them, she had never worked on a death penalty case before. She had trouble obtaining Lindsey's records from trial counsel and did not receive anything until April 28. Her secretary noticed Lindsey had been given a competency and criminal responsibility exam after his arrest, but the report was not included in the records trial counsel sent. Dr. Melikian met with Lindsey on April 28 for an examination. Dr. Melikian soon advised trial counsel that she did not have adequate documentary evidence about Lindsey, nor the time to effectively prepare for her testimony. File notes reflect that trial counsel's response was that Dr. Melikian "knew the time constraints before she started and said she would be okay."

But it was not okay with Dr. Melikian after she realized the mitigation investigation was unorganized and incomplete. She explained to trial counsel that she felt unprepared; trial counsel told her she would have to call the trial judge, a bizarre request to make of an expert. It appears Dr. Melikian made this call, but no formal continuance motion was ever made. The only assistance trial counsel gave Dr. Melikian with testifying in her first death penalty case (which was broadcast by CourtTV) was a thirty-minute phone conversation the night before she took the stand.

II. The Sentencing Phase

Because we do not have the benefit of trial counsel's version of what his mitigation strategy was, we must rely on the record. Second chair counsel testified at the PCR hearing that he was responsible only for the guilt phase, and lead trial counsel was responsible for the sentencing phase. According to second chair counsel, his defense theory during the guilt phase was that Lindsey just "snapped. That's it." But mental ill-

ness or incapacity was not a defense available to Lindsey; there was no dispute he was competent and had criminal responsibility for his actions.

To this day, we do not know what trial counsel's sentencing strategy was. We must assume it echoed the "snapping" theory. We have to assume that, because trial counsel never told the sentencing jury what the theory was. His opening statement at the sentencing phase occupies just a few pages of transcript, and he merely asked the jury to "keep an open mind," remain "objective," and to consider whether the State had met its burden of proving the aggravating circumstance beyond a reasonable doubt.

Neither trial counsel, the State, nor the trial court mentioned the word "mitigation" in their opening remarks. Trial counsel did not explain to the jury how the sentencing phase works or what the death penalty statute says about mitigating circumstances. This is a crucial point, for the jury was not told until the trial court's final charge what mitigating circumstances Lindsey was relying upon. (There were two: that "[t]he murder was committed while the defendant was under the influence of mental or emotional disturbance" and "[t]he age or mentality of the defendant at the time of the crime." S.C. Code Ann. § 16-3-20(C)(b)(2), (7) (2015)). It was only then–after they had heard all the evidence and trial counsel's closing argument–that the jurors knew the legal framework for their sentencing decision, and how mitigating circumstances fit into the framework. It is true trial counsel did tell the jury during his closing that they could "consider the mitigating circumstances. His mental state, his cognitive deficit and any other factors that you may consider appropriate." But this fleeting reference–like most of trial counsel's efforts–

was so bereft of context that it must have puzzled rather than enlightened the jury. The thrust of trial counsel's closing argument was not about how the jury could use the mitigating circumstances recognized by the law and impose a sentence less than death. Reading trial counsel's closing leads one to conclude that he tried to convince the jury that Lindsey had indeed snapped, and a life sentence for him would be a worse punishment than death.

Trial counsel presented limited evidence at the sentencing phase. This evidence consumed less than one hundred transcript pages. Eight witnesses testified, all of whom were family or friends except for Ann Howard and Dr. Melikian.

III. The PCR Hearing Evidence

As will soon become obvious, the testimony at the PCR hearing did not just suggest trial counsel could have put on a "fancier" mitigation case. It proved that trial counsel failed to present an intelligible one. The core of death penalty mitigation is to humanize the defendant and offer evidence that would reduce his moral culpability for the horrible crime he committed. This must be done–if it is to be done competently–by presenting a coherent narrative that rational jurors can follow and understand. It requires that the story of the defendant's life be told with appropriate detail, so that jurors can be truly informed about the momentous, ultimate decision to either end or spare a fellow human's life.

Saying that the new mitigation evidence presented at the PCR hearing was simply "fancier" is the same as saying it is merely cumulative to the mitigation evidence put up at trial. A closer look at the new mitigation evidence shows that it was much different

in nature and degree than what the sentencing jury heard.

Take the testimony of Lindsey's mother. At the sentencing hearing, mother testified that she raised Lindsey by herself, along with his three half-brothers. They lived in a "very small home." Mother worked, and the boys' uncle, Steve Pilgrim, would stay with them. Mother recounted how another of Lindsey's uncles backed over him with a car when Lindsey was twenty months old, injuring his head and leaving a scar. A month before, he had ingested kerosene that had been left open in a jar beside the coal heater. Mother related that Lindsey was "slow" in school and had difficulty with his speech. He repeated several grades and dropped out at age seventeen in the ninth grade.

Mother testified Lindsey and Victim's relationship was "good"; although, they often would separate and then reconcile. Mother stated Lindsey's children were the most important part of his life, in part because his father had abandoned him.

Mother told the jury that her sister, Bessie Smith, had attempted suicide. When trial counsel attempted to explore whether Bessie had been treated for a mental illness, the State's objection was sustained for lack of foundation (when Ms. Smith later testified, the trial court sustained the State's objection to her testimony on this matter as well). Mother confirmed Lindsey was hospitalized after attempting suicide at age fifteen. When Mother saw Lindsey three days before the murder, he was "very depressed" and talked of hurting himself if he did not get to see his children and "could not get [his] family back."

At the PCR hearing, a different and decidedly bleaker picture of Lindsey's childhood emerged.

Mother explained, for the first time, that until Lindsey was seven, they lived in a two-bedroom home with her mother, two or three sisters, two of her brothers (sometimes three), her other three boys, and two of her sister's children. All told, nearly a dozen people were living in a home that had no indoor plumbing or central air conditioning and was heated by a wood stove. Mother admitted she experienced emotional problems after the death of her seven-month-old daughter in 1969.

Mother's PCR testimony also revealed for the first time that for some twenty years she had a live-in boyfriend who had a severe drinking problem and often became violent in front of Lindsey and the other boys, noting Lindsey often ran to his grandmother for help. Mother further testified that her sons, Lindsey included, sometimes took "the brunt" of her boyfriend's violence. Mother noted Lindsey "just had to live with" the violence because "he didn't have too much a choice" due to his young age. The family later moved to an even rougher neighborhood, where the children were exposed to drug dealing. Mother testified that her brothers Paul and Willie fought often and "beat their girlfriends." She told of one incident when her brother ran into the home and began shooting a firearm late at night while Lindsey and others were present.

Mother also told of two other incidents when Lindsey was around six and fell and hit his head, as well as a car wreck when he was sixteen that damaged his eye and caused other injuries.

Mother also put Lindsey's suicide attempt at age fifteen in context. Mother had attempted to break up a fight between Lindsey and his older half-brother. After Lindsey held Mother down on a bed, Mother told him she would never do anything else for him and that

she did not love him. Lindsey fled to the bathroom and swallowed an assortment of pain pills. He was hospitalized for several days and received inpatient psychiatric care for around two weeks.

After he left school at seventeen, Lindsey lived with a girlfriend and began selling drugs, though occasionally taking legitimate employment. Mother explained that she met with Ms. Topp and second chair counsel only once before the trial. The interview occurred about two weeks before the trial. It lasted one hour and never delved into Lindsey's detailed family background.

At the PCR hearing, Mother, for the first time, gave concrete detail as to what occurred when she saw Lindsey three days before the murder. Mother had been called from work by her son Timothy Sims, who claimed Lindsey was about to kill himself. She and other family members went to Lindsey and calmed him down. Lindsey had prepared suicide notes for Mother and three other family members. Mother later gave these notes to Rod Tullis, Lindsey's former attorney.

Attached to this dissent is an Appendix containing a table summarizing the enormous amount of mitigation evidence revealed at the PCR hearing and comparing it to the skeleton of facts heard by the jury at the sentencing trial. I will not burden the reader by rehashing them here. But it is crucial to understand the significance of the PCR testimony of four non-family members, three of whom did not testify at the trial: Rod Tullis, Dr. Melikian, Jan Vogelsang, and Dr. Brawley.

A. Rod Tullis

Tullis was an important witness who any reasonable lawyer would have called to testify at the penalty

phase. This is so for three reasons. First, Tullis had the best contemporaneous evidence about Lindsey's state of mind at the time of the murder. He had audio proof of Lindsey's state of mind in the form of an answering machine message Lindsey had left him shortly before the shooting. Tullis also had the suicide notes Lindsey had written his family members. The jury never heard about the message or the notes. And Tullis saw Lindsey in jail shortly after the murder. Second, Tullis could have related to the jury how concerned Lindsey was about losing custody of and contact with his children. Tullis could have testified that Lindsey consulted with him about his legal options as a father. This is a key point, for at the sentencing hearing the State again and again argued Lindsey had no concern for his children, and his disregard was proven by his failure to seek legal assistance in obtaining custody or visitation.

Third, and finally, Tullis saw Lindsey in jail a few days after the murder and observed injuries to Lindsey's head from bashing it against his cell wall in an attempt to kill himself, another detail that would have countered the State's suggestion that Lindsey's depression was nothing but a malingering ruse.

B. Dr. Melikian

As to Dr. Melikian, while her diagnosis that Lindsey suffered major depressive disorder did not change, her explanation of how it affected Lindsey's cognitive ability changed utterly. The table in the Appendix details the differences, but one of the most compelling is her explanation of the significance of Lindsey's IQ tests shortly after his arrest.

At the PCR hearing, Dr. Melikian explained that Lindsey's depression dramatically impaired his cognitive ability. His IQ, as tested shortly after the murder,

was 76, which placed him in the range of borderline intellectual functioning. When Dr. Brawley tested him almost two years later, it was 85, a number consistent with tests conducted years before the murder. Dr. Melikian was able to explain that Lindsey's depression was so severe that it caused the low score, signifying how much his ability to think clearly was impaired at the time of the murder. This would have tracked one of the statutory mitigators the sentencing jury (finally) heard about: Lindsey's mental and emotional state.

Also material is Dr. Melikian's cursory, rushed investigation before trial due to trial counsel's delay in hiring her. She did not have access to Tullis or Lindsey's phone message or suicide notes. Tullis and Lindsey's family members could have told her about Lindsey's self-harm and other details of his mental state.

Instead, the State was able to score points in its cross-examination of Dr. Melikian by forcing her to concede that she had not talked to a "single soul" who saw Lindsey the day of the murder. The State also showed that Dr. Melikian could not corroborate anything Lindsey had told her, a line of attack that could have been stifled had Dr. Melikian spoken with family members or Tullis.

C. Jan Vogelsang

Melikian surely would have benefitted from the exhaustive family history that Jan Vogelsang presented at the PCR hearing. Vogelsang's testimony demonstrated the abject failure of Lindsey's defense team to offer the jury a coherent narrative of Lindsey's life. Again, the Appendix table sets out her testimony in copious detail. Vogelsang was able to fill in compelling details of Lindsey's childhood poverty and to vividly illustrate that the poverty was not just economic.

Although the home at times only had three spoons, there was pervasive dysfunction. He had no father in his life, and his mother was not a real caretaker. The home model was one of abandonment, desertion, violence, substance abuse, and dislocation (not to mention belief in voodoo and the use of the "roots"). Vogelsang's testimony contrasted starkly with the brief, generic picture of his home life presented at the sentencing hearing. Unlike the initial defense team, Vogelsang had prepared explanatory charts and exhibits, including a genogram, a bread and butter mitigation exhibit. She demonstrated that Lindsey's family had pervasive mental health challenges, including several suicide attempts. Vogelsang's testimony pulled together the threads of Lindsey's life to provide the jury a complete narrative that would have allowed them to consider his moral culpability in full, and not just left them with disordered snippets of his story. Her testimony would also have enabled the jury to see how all the "stressors" working on Lindsey's mind–which was already "severely impaired" (in the words of Dr. Brawley, which the jury never heard about)–further disturbed his mental and emotional state at the time of the murder.

D. **Dr. Brawley**

Why trial counsel did not ask Dr. Brawley to testify is unknown. The majority opinion states that she testified at the PCR hearing in part about Lindsey's neuropsychological "deficits." Dr. Brawley's actual clinical characterization was much more pointed than that. She related that Lindsey's mental tracking, verbal fluency, naming ability, and verbal learning ability were all "severely impaired." Trial counsel's decision to let Dr. Melikian tell the jury about Dr. Braw-

ley's report was insufficient and unreasonable, especially in light of the State's damaging cross-examination of Dr. Melikian.

IV. The Standard for Ineffective Assistance of Death Penalty Counsel

To succeed on his PCR claim, Lindsey must prove both deficient performance by his trial counsel and prejudice. This is the familiar double prong test of *Strickland v. Washington*, 466 U.S. 668 (1984). There is little doubt that trial counsel was deficient. Professional standards in place impose an obligation on death penalty counsel to thoroughly and timely investigate their client's background. *Williams v. Taylor*, 529 U.S. 362, 395–96 (2000).

We have noted that evidence of mental impairment and low intellectual functioning is "powerful mitigating evidence." *Stone v. State*, 419 S.C. 370, 395, 798 S.E.2d 561, 574–75 (2017); *see also Tennard v. Dretke*, 542 U.S. 274, 288 (2004) ("Evidence of significantly impaired intellectual functioning is obviously evidence 'that might serve "as a basis for a sentence less than death."'" (quoting *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986))). The failure to adequately prepare and present mental health witnesses at the sentencing phase can amount to prejudicial ineffectiveness of counsel. *See Von Dohlen v. State*, 360 S.C. 598, 606–08, 602 S.E.2d 738, 742–43 (2004); *Council v. State*, 380 S.C. 159, 173–75, 670 S.E.2d 356, 363–64 (2008).

The purpose of a sentencing mitigation is to reduce the defendant's moral culpability for the crimes. To that end, as we have said, it is essential that trial counsel attempt to humanize his client and furnish a coherent narrative about his life history. *Weik v. State*, 409 S.C. 214, 234, 761 S.E.2d 757, 767 (2014)

("Evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background may be less culpable than defendants who have no such excuse." (quoting *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989))).

The death penalty lawyer has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Courts greatly defer to counsel's choices, and the field of discretion the lawyer enjoys in his representation is necessarily wide. But counsel's conduct must still be reasonable. Trial counsel's investigation started too late to have been effective. Ms. Topp was still desperately trying to gather basic records about Lindsey's life after the trial had begun. Any competent counsel would know that obtaining medical, school, and other protected records can be a difficult and drawn out process, even with a release from the client. Not beginning this process until a few weeks before trial was not just objectively unreasonable, it was reckless.

Relying on *Bobby v. Van Hook*, 558 U.S. 4 (2009), the majority opinion concludes that trial counsel's delay in preparing a mitigation case was reasonable. In *Van Hook*, though, the Supreme Court noted counsel started their mitigation investigation some three months before trial, and their investigation was both intensive and extensive. 558 U.S. at 9–12.

> Between Van Hook's indictment and his trial less than three months later, they contacted their lay witnesses early and often: They spoke nine times with his mother (beginning within a week after the indictment), once with

> both parents together, twice with an aunt who lived with the family and often cared for Van Hook as a child, and three times with a family friend whom Van Hook visited immediately after the crime. As for their expert witnesses, they were in touch with one more than a month before trial, and they met with the other for two hours a week before the trial court reached its verdict. Moreover, after reviewing his military history, they met with a representative of the Veterans Administration seven weeks before trial and attempted to obtain his medical records. And they looked into enlisting a mitigation specialist when the trial was still five weeks away.

Id. at 9–10 (internal citations omitted).

I cannot share the majority's belief that trial counsel's delay here was reasonable. Like all mortals, lawyers can only control time on the front end. This Court should not signal that it is acceptable to wait until a month before a death penalty trial is to begin to start planning a defense to the penalty. Not to begin working on the sentencing mitigation until less than a month before trial is indefensible. Mounting a competent mitigation case takes months and to suggest that it can be effectively slapped together at the last minute is at odds with how the world works. Rome could have been built in a day, but no one would have ever lived there.

This level of neglect is more akin to that condemned in *Williams v. Taylor*, where trial counsel did not begin preparing a mitigation defense until a week before trial and, even then, bungled things by not pursuing obvious leads or obtaining fundamental records. 529 U.S. at 395.

The mitigation evidence at the sentencing trial was sterile and bland. It is true, for example, that there was evidence that Lindsey grew up in "desperate poverty." But such saccharine phrases, empty of corroborating detail, pack little punch with a jury, especially a jury that has already heard gut wrenching, granular details about Lindsey's murder of his children's mother. The only way to counter the weight of that and other aggravating evidence on the State's side of the scales would be to present Lindsey's story by way of a narrative that could help the jury understand his conduct. The underlying theme of the law surrounding death penalty sentencing is that the jury must be allowed to make an individualized determination as to the defendant's fate. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (the constitution requires that the sentencer "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death") (emphasis in original); *State v. Plath*, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984) (holding it "is essential . . . that the jury have before it all possible relevant information about the individual whose fate it must determine" (quoting *Barefoot v. Estelle*, 463 U.S. 880, 897 (1983))).

Mitigating evidence is not designed to remove responsibility for the crime. Instead, it is offered to ensure the sentence reflects the defendant's individual moral culpability for the crime. As the United States Supreme Court has stated, "[r]ather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a 'reasoned *moral* response to the defendant's background, character, and crime.'" *Penry*, 492 U.S. at 328 (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring)).

The constitution commands that capital sentencing procedures permit extensive mitigation evidence to ensure the greatest punishment known to law is imposed only after a process of the greatest reliability. *Lockett*, 438 U.S. at 604; *see also Bowman v. State*, 422 S.C. 19, 36, 809 S.E.2d 232, 241 (2018) ("[T]he Eighth Amendment demands that a capital defendant be given wide latitude to present any relevant evidence of potentially mitigating value that might convince the jury to impose a sentence of life in prison instead of death.").

The Supreme Court recently summarized the court's task in deciding an ineffectiveness of counsel claim at the capital sentencing stage:

> When a capital defendant claims that he was prejudiced at sentencing because counsel failed to present available mitigating evidence, a court must decide whether it is reasonably likely that the additional evidence would have avoided a death sentence. This analysis requires an evaluation of the strength of all the evidence and a comparison

> of the weight of aggravating and mitigating factors.

Thornell v. Jones, 602 U.S. 154, 171–72 (2024). The Court in *Thornell* emphasized the defendant there was convicted of four aggravating factors related to "three gruesome killings, including the cold-blooded murder of a 7-year old girl," while attempting to steal a $2000 gun collection. *Id*. at 158, 170. Jones killed the little girl, her father, and her grandmother by beating them with a baseball bat. *Id*. at 158–59. He then used the stolen guns to pay for a trip to Las Vegas. *Id*. at 159. The majority noted Jones had not produced much new mitigation evidence, and much of what was new could not be causally linked to the murders. *Id*. at 166–70. The Court concluded that the new evidence would not have altered the picture of Jones the sentencing jury saw. The Court stressed that, after weighing Jones' relatively weak mitigation evidence against the multiple, horrific aggravating circumstances, the balance was so lopsided in the State's favor that a court applying the correct legal standard would have "no choice" but to deny Jones relief. *Id*. at 172.

To support its reasoning, the Court highlighted several capital habeas cases where relief was granted. It noted these cases shared common traits: trial counsel had "introduced little, if any, mitigating evidence at the original sentencing," and the sentencer usually found only one aggravator and at most a "few." *Id*. at 171.

Thornell's focus on weighing the mitigating evidence against the aggravating is important. After all, that is what the jury is supposed to do under South Carolina's statutory capital sentencing scheme. *See* S.C. Code Ann. § 16-3-20(B)–(C) (2015). But, at this

stage of the PCR process, we are required to add the new mitigating evidence to the pan. *See Jamison v. State*, 410 S.C. 456, 466, 765 S.E.2d 123, 127–28 (2014). After doing that, it seems clear that Lindsey's "sentencing profile" bears little resemblance to the Lindsey the jury saw. Of course, it is possible that a new jury would reach the same verdict. But that is not the test. The test is whether there is a reasonable probability that the sentence would be different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the first penalty trial. *Strickland*, 466 U.S. at 694. This inquiry means we must speculate as to whether it is reasonably probable that the new mitigation evidence would sway at least one juror to vote for a life sentence, rather than death. *Andrus v. Texas*, 590 U.S. 806, 823 (2020). The reasonableness inquiry takes into account not just the new mitigation proof, but compares it side by side with the aggravating circumstances. It is inescapable that Lindsey's crimes were brutal (what murder is not?), but they were fueled by the unchecked passion of a deluded father, a passion that was as wrong as it was compulsive and uncontrolled. A reasonable juror could likely conclude Lindsey's erratic and fatal choices deserve harsh punishment, but he should not be counted among "the worst of the worst." The aggravating circumstances in a capital murder trial are by definition heinous, but it must be remembered that there was only one aggravator here: "The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person." S.C. Code Ann. § 16-3-20(C)(a)(3) (2015).

There is no denying Lindsey's unhinged, fatal shooting of Victim while she was in a car with three

others, including two children, and while she was seeking the refuge and sanctuary of the Inman Police Department was both cruel and reckless. But *Thornell* requires that we must in effect weigh or rank the aggravators. Is it reasonably probable a rational juror might weigh Lindsey's murder of his estranged wife differently than the crude bludgeoning of a seven-year-old girl and her father and grandmother in the course of a home invasion and robbery? Or a murder by poison or dismemberment? Or murders committed by a serial killer, accompanied by rape and torture? The catalog of evil is infinite, and *Thornell* reminds us that not all evil is created equal, and is not to be treated equally by a reviewing court.

This is not to say Lindsey's life before that fateful day was blameless. He dealt drugs, beat Victim, and even shot one of his previous girlfriend's suitors in the arm. But the question before us is whether Lindsey has shown there is a reasonable probability that one juror would have chosen life after hearing his full story. Because he has, I respectfully dissent.

Acting Justice Donald W. Beatty, concurs.

Appendix

Evidence Presented at the Sentencing Hearing Versus at the PCR Hearing		
Witness	Sentencing Hearing	PCR Hearing
Virginia Lindsey (Mother)	• Mother testified that she raised Lindsey by herself, along with his three half-brothers. • They lived in a "very small home." • Mother worked, and the boys' uncle, Steve Pilgrim, would stay with them. • Mother recounted how another of Lindsey's uncles backed over him in a car when Lindsey was twenty months old, injuring his head and leaving a scar. A month before this incident, he had ingested kerosene that had been	• Mother explained, for the first time, that until Lindsey was seven, they lived in a two-bedroom home with her mother, two or three sisters, two (sometimes three) of her brothers, her other three boys, and two of her sister's children. All told, nearly a dozen people were living in a home that had no indoor plumbing or central heat or air conditioning. • Mother admitted she experienced emotional problems after the death of her seven-month-old daughter in 1969. • Mother's PCR testimony also revealed for the first time that she had a live-in boyfriend, for some twenty years, who had a severe

	left open in a jar beside the coal heater. • Mother related that Lindsey was "slow" in school and had difficulty with his speech. He repeated several grades and dropped out at age seventeen in the ninth grade. • Mother testified that Lindsey and Victim's relationship was "good"; although, they often would separate and then reconcile. • Mother stated Lindsey's children were the most important part of his life, in part because his father had abandoned him. • Mother told the jury that her sister, Bessie Smith, had attempted suicide.	drinking problem and often became violent in front of Lindsey and the other boys, noting Lindsey often ran to his grandmother for help. Mother further testified that her sons, Lindsey included, sometimes took "the brunt" of her boyfriend's violence. • Mother noted Lindsey "just had to live with" the violence because "he didn't have too much a choice" due to his young age. • The family later moved to an even rougher neighborhood, where the children were exposed to drug dealing. • Mother testified that her brothers Paul and Willie fought often and "beat their girlfriends." She told of one incident when Lindsey and others were in the home, and her brother began shooting a gun in the house late at night.

	When trial counsel attempted to explore whether Bessie had been treated for a mental illness, the State's objection was sustained for lack of foundation (when Ms. Smith later testified, the trial court sustained the State's objection to her testimony on this matter as well). • Mother confirmed Lindsey was hospitalized after attempting suicide at age fifteen. • When Mother saw Lindsey three days before the murder, he was "very depressed" and talked of hurting himself if he did not get to see his children and "could not get	• Mother also told of two other incidents when Lindsey was around six and fell and hit his head in the same spot, as well as a car wreck when he was sixteen that injured his eye. • Mother also put Lindsey's suicide attempt at age fifteen into context. Mother had attempted to break up a fight between Lindsey and his older half-brother. After Lindsey held Mother down on a bed, Mother told him she would never do anything else for him and that she did not love him. This caused Lindsey to go into the bathroom and swallow an assortment of pain pills. He was hospitalized for several days and received inpatient psychiatric care for around two weeks. • After he left school at seventeen, Lindsey lived with a girlfriend and began selling

	[his] family back."	drugs, though occasionally taking legitimate employment. • Mother explained that she met with Topp and second chair counsel only once before the trial. The interview occurred about two weeks before the trial and lasted one hour. She was never asked about Lindsey's detailed family background. • Mother, for the first time, gave concrete detail as to what really occurred when she saw Lindsey three days before the murder. Mother had been called from work by her son Timothy Sims, who claimed Lindsey was about to kill himself. She and other family members went to Lindsey and calmed him down. Lindsey had prepared suicide notes for Mother and three other family members. Mother later gave these notes

		to Rod Tullis, Lindsey's former attorney.
Steven Pilgrim (Uncle)	• Pilgrim stated he lived with Lindsey and his brothers during Lindsey's childhood (total of 7 years). • Lindsey was run over by a car as a toddler; Pilgrim took Lindsey to the hospital to be treated for head trauma. • Pilgrim confirmed Lindsey inhaled kerosene as a young child. • Pilgrim stated he suffered from mental illness, and his daughter suffered from and was being treated for panic attacks.	• Lindsey's mother's childhood home included nine siblings and a father that never lived in the home. • Mother's siblings included Steven Pilgrim, Bessie Lindsey, Robin Pilgrim, Willie Pilgrim, and Paul Pilgrim. • Lindsey's Mother was suicidal during a period of Lindsey's childhood. • Lindsey's aunt Bessie Smith also attempted suicide during a period of Lindsey's childhood; Smith was hospitalized as a result. • Lindsey's aunt Robin attempted suicide on three occasions; she, too, was hospitalized multiple times. • Robin, as of the date of the PCR hearing, was incarcerated for an unnamed violent offense.

		• Willie and Paul have each been incarcerated for violent offenses. • When Lindsey was born, ten people lived in a four-bedroom house in Inman; Lindsey lived in that home until he was ten years old. • The house lacked indoor plumbing; it lacked air conditioning; the heating came from a furnace in which the family alternatively burned coal and wood. • Lindsey's uncles Willie Pilgrim and Paul Pilgrim routinely exhibited violent behavior toward the family and toward other people in the neighborhood, including firing guns inside and outside the home. • When Lindsey was less than a year old, his uncle Paul accidentally ran over Lindsey's head with his car. Lindsey was hospitalized and underwent

		surgery on his head; he returned home that night. • Lindsey sustained other significant head injuries throughout his childhood because he was left alone to "crawl outside." • Weeks before the shooting, Lindsey was suicidal. His mother, brother, aunts, and uncle visited him for several hours the night his ideations were the most acute. • Lindsey was crying, and he was "not usually like that." Pilgrim had never seen Lindsey cry as an adult. • Trial counsel did not meet with Pilgrim until one day before the trial began; the meeting lasted between 20 and 30 minutes. • The meeting with trial counsel was a "group meeting"—it included the defense team as well as another family member, Lindsey's aunt Bessie Smith.

		• Despite knowing he suffered from depression and anxiety, trial counsel did not seek any medical or psychological release from Pilgrim concerning his history with mental health issues. Pilgrim would have "been glad to [provide] it." • At all times between the shooting in 2002 and the trial in 2004, Pilgrim lived in Spartanburg county and was available for questioning by the trial counsel team. • Pilgrim would have asked the jury to show mercy at trial, but he was told not to by trial counsel.
Bessie Smith (Aunt)	• Smith stated she lived with Lindsey's family during a period of his childhood. • When Lindsey was a child, he had a kitten he was "crazy about."	• Smith had nine siblings, who were raised in childhood home of Smith and Mother. • Lindsey's uncle Paul Pilgrim was one of the few male role models in Lindsey's life. Paul Pilgrim constantly fought other males and

	• Smith's brothers, Paul and Willie, without Lindsey's knowledge, threw the kitten into a furnace while it was alive, killing it. • Lindsey was "hurt" and "talked about it for a long time." • Smith attempted suicide at some point in her life (additional testimony as to this issue was objected to by the State, and the trial court sustained the objection).	females in the neighborhood and abused alcohol. • Lindsey's aunt Robin Pilgrim babysat Lindsey during his childhood. Robin Pilgrim has since been intermittently incarcerated following periods of drug abuse and homelessness. • Mother's daughter, Vanessa, died as a child. Mother was left in a depressive state for nearly a year, often unable to get out of bed. • When Lindsey was two years old, Mother's husband left Mother to be with another woman following the death of Vanessa. Mother began to abuse alcohol as a result. • Mother's children, including Lindsey, "pretty much did for the[m]sel[ves]." Mother would "work all week and then on Friday night, when [she] got off work, then

		[she] would start drinking . . . and . . . go out." • Lindsey's grandmother and uncles (Steve Pilgrim, Paul Pilgrim, and Willie Pilgrim) were responsible for Lindsey's care when he was still young. • Lindsey and his other young siblings were often left in the care of their uncles or "whoever [else was] there" at nighttime while Mother and Grandmother left to play bingo. • When Lindsey was 12 or 13 years old, he went to live with Smith for several months. This move required some adjusting because Smith "didn't let [her] boys run around"; Smith's children played sports; Smith attended PTA meetings. Lindsey's mother, by contrast, "didn't do a whole lot of

		that" with Lindsey or Lindsey's siblings. • While he lived with Smith, Lindsey desperately wanted attention. "[H]e liked being at my house because . . . he could get that attention and he . . could feel like he was at home. He had that family home feeling when he was at my house." • In Smith's home, there were rules. "[I]t wasn't all lovey dovey. But we had that structure there. We had that foundation there. … But on the other hand in [Mother's home], Marion and them pretty much had they freedom." • Mother did not take an active role in Lindsey's (or his siblings') activities away from home, school, sports, or otherwise. • Lindsey often lacked clean clothes to wear at school. He and his siblings would hand

		wash their clothes and shoes when Mother could not afford to take them to the laundromat. • Lindsey's mother "never learned responsibility . . . [s]he didn't know what it was really to run a household. . . ." • When Lindsey was "15 or so," he attempted suicide by taking "a lot of pills." • Weeks before the shooting, Smith, Mother, and other family members went to Lindsey's house after Lindsey threatened to kill himself, recounting the same narrative as Pilgrim. • Lindsey was bereft at the threat of not having access to his children. • Lindsey "was really depressed at the time and he didn't want to––he act like he didn't want to live." • Lindsey's uncles "talked to Lindsey";

		Smith told Lindsey he "need[ed] to pray" and eventually, everyone left. •No one sought to get Lindsey treatment that night. •Smith did not see Lindsey in-person after that night. •Lindsey remained distraught because he believed he was losing access to his children. •Sometime later, Smith spoke with Lindsey on the phone. Lindsey was upset and "was talking about his boys, talking about—said that [Victim] was trying to take the children away from him and he wasn't gonna get to see his children no more. She was telling him he wasn't gonna get to see his children no more." •Lindsey repeatedly said that Victim "don't want me to see my children. … She ain't gonna—she don't

		want him to see his children no more." • The day after that phone call, Lindsey called Smith a second time. Lindsey had just been hired at BMW. Victim and Victim's mother took out warrants against Lindsey (impliedly with the knowledge that the police would visit Lindsey at his new workplace and he would lose his job as a result). • Lindsey was crying on the phone, still distraught, two or three hours prior to the shooting. • No more than a week before trial, trial counsel met with Smith to prepare for her testimony during the sentencing phase. The meeting lasted between thirty and forty-five minutes, and there was little to no discussion of Lindsey's family history. • There was no formal preparation or practice

		before Smith testified at trial.
Leon McDowell (Father)	• When Lindsey was born, his father was married to someone other than his mother. • McDowell admitted he "really wasn't a father to [Lindsey]." • McDowell occasionally provided money for clothes or a bicycle, but played no role in Lindsey's emotional well-being. • McDowell would not attend baseball games or other of Lindsey's school functions.	• Father did not testify at the PCR/
Timothy Sims (Brother)	• Sims did not testify at the sentencing hearing.	• Lindsey took over the role of parenting Sims when Sims was eleven years old and Lindsey was twenty-one years old. • Lindsey was Sims' father-figure for eight years; Lindsey

		"treated [Sims] like a son, like he want his father to treat him because [Lindsey] never had a father." • Sims lived with Lindsey and Victim while they were married. • When Lindsey was dealing drugs, Lindsey spent the money he earned on his family and Victim's family, including their children. • Several weeks prior to the shooting, Lindsey took Victim, their children, Sims, Sims' wife and newborn baby, and multiple others out to eat together. • Shortly after that night, multiple family members, including Sims, went to Lindsey's house after learning that Lindsey was threatening to take his own life. • In a phone call earlier that same day, Lindsey sounded "nervous and crying."

		• Sims saw Lindsey cry "twice in [Sims'] life": once that night and once the day of the shooting. • While the family members were at Lindsey's house following his suicidal ideations, Lindsey shared multiple suicide notes prepared for different family members, including one for Victim, one for his children, one for Sims, and one for Mother. • None of Lindsey's family members took Lindsey to the hospital or otherwise sought professional help for him that night or after that night. • Lindsey suspected Victim was "seeing another dude" and asked Sims to drive by Victim's home to confirm his suspicions. Sims did so, and there was another car parked at Victim's house that did not belong to Victim.

		• Sims lied to Lindsey about the presence of the vehicle to prevent "trouble." • Sometime later, Lindsey asked Sims to contact Victim on his behalf because Victim would no longer answer Lindsey's calls. • Sims called Victim the day before the shooting and listened to the call while Lindsey and Victim spoke. • During the call, Lindsey said, "I understand you don't want to be with me no more, just let me get the boys. And she, she was upset already at him." • Victim "started cussing" and replied "you not seeing them. I'm not dealing with you. We staying away from you." • Sims heard one of Lindsey's sons in the background say "I want my daddy." • Victim said, "no, you don't . . . that's not

		your daddy" and hung up the phone. • The day of the shooting, Lindsey called Sims again and requested that Sims contact a third person on Lindsey's behalf. Sims refused, but his roommate, Chawney, did as Lindsey asked. • Chawney later spoke with Lindsey again over the phone, and evidently confirmed Lindsey's suspicions that another man was with Victim. • Lindsey then called Sims a second time, crying and distraught. Sims asked Lindsey to meet him at their brother's home to "talk about the situation." Lindsey agreed to do so but never showed up. • The shooting took place shortly thereafter. • Sims was well-integrated with the rest of the family and "was available" to talk with

		trial counsel. No one from the trial counsel team ever contacted Sims. • Sims was present in the courtroom for the entire trial. He asked a member of the trial counsel to allow him to testify because Sims "kn[e]w more about [Victim] and Marion than anybody." • Lindsey's trial counsel said they would get back Sims concerning his testimony, but, despite his request, Sims never took the stand. • Sims admitted on cross-examination that he had been present at Applebee's when Lindsey removed Victim's jewelry and threw it in the road, but he claimed he never saw Lindsey physically assault Victim or tear her clothing. • Sims admitted on cross-examination that Lindsey did not

		actually attempt suicide the night the family went to Marion's home. • Sims admitted on cross-examination that Lindsey had multiple other girlfriends while married to Victim. On re-direct, Sims admitted to having suspicions that both Lindsey and Victim had relationships with others outside of their marriage, but that he was never able to confirm as much.
Rod Tullis (Lindsey's Former Lawyer)	• Tullis did not testify at the sentencing hearing.	• Tullis explained he was an attorney in Spartanburg, and he had represented Lindsey from the late 90s up until Victim's murder for criminal, family court, and traffic matters. • Tullis explained he knew the details of Lindsey's life, and Lindsey also did some repair and mechanic work for Tullis. • Tullis explained that in the weeks leading

		up to Victim's murder, Lindsey had met with him, his main concern was his children, and they had discussed "potential ways to resolve issues involving his children," including paying child support to secure visitation. However, Tullis did not know if this offer was ever actually made to Victim, and he admitted they didn't file anything in the family court, noting some concerns that such a filing would have affected pending drug charges Lindsey faced that Victim was potentially a witness in. • Tullis also stated Lindsey spoke to him about how Victim was seeing another man, and he was concerned about this affecting his relationship with his children, essentially taking his place as the children's father.

		• Tullis explained Lindsey tried to see him the day before the incident. He noted after he heard about the incident, he went to his office to prepare a notice of representation, and he listened to his answering machine, which used cassette tapes to record the messages. There was a message from Lindsey–made about an hour prior to the shooting–in which Lindsey stated he needed to talk to Tullis, and Lindsey sounded "very distressed, very distraught." Tullis explained he didn't sound angry or agitated, just "distraught, very emotionally down and upset. Not manic at all." • Tullis explained he was the attorney of record on this case for a short time, but shortly after, Bartosh became the attorney on the case. He told Bartosh about the

		message and gave the audiotape to Bartosh. • Tullis stated he visited Lindsey in prison after he was released from the hospital (following a surgery from his self-inflicted gun wound to the head). When he visited Lindsey, Lindsey was bleeding from the head because "he had been bashing his head against the concrete wall . . . and he had ripped . . . the stiches . . . and that he was attempting to kill himself by doing that." Tullis informed the jail about Lindsey's actions, and they put him on suicide watch. There was a jail incident report and photographs regarding this instance. • While Lindsey was in jail, he would write letters to Tullis saying "he just didn't want to live" and wanted to kill himself. Tullis explained Lindsey's demeanor had not

		changed from the voice message he left, rather he had "probably gotten worse, and it got worse over the weeks thereafter." • Tullis also stated "sometime probably immediately after the shooting occurred," Lindsey's Mother gave him some suicide notes that Lindsey had written a couple of weeks before the shooting. Tullis provided these letters to Bartosh. Tullis explained the letters indicated "a clear intention to do harm to himself," and were "consistent with the state of mind [he] observed in those weeks leading up to the shooting and the weeks immediately thereafter." • Tullis was not contacted by Lindsey's attorneys about the trial, which he found surprising because he thought he was "probably the best witness

		as to state of mind." He was subpoenaed by the State on May 21, 2004, and he went to the court and explained to the State the records he had provided to Mr. Bartosh and gave them documents he had at the time (this did not include the suicide notes). • On cross-examination, Tullis explained Lindsey did not want to leave Victim or his family, noting Lindsey seemed confused about what he wanted. Mainly, Tullis stated Lindsey seemed scared to lose access to his children, and he noted in the weeks before the shooting, Lindsey had been denied access to his kids. • Tullis did not recall having a conversation with Lindsey about the order of protection issued just days prior to Victim's murder.

		• Tullis admitted the voice message he received could have been left after the shooting, but insisted "it was contemporaneous" with the shooting whether it was before or after. However, he noted he didn't know how Lindsey would have been able to make the phone call after the shooting, as Lindsey himself was injured and arrested. • Tullis stated he told the prosecution about the existence of the voice message, but he did not give it to them because he had already given the tape to Bartosh. • Tullis stated he knew Lindsey was seeing other woman at the same time he was stating he wanted to get back together with Victim, and Tullis stated he expected Victim to file divorce proceedings. He was also aware of the domestic

		abuse charges and the series of incidents involving Victim. However, he stated Lindsey was not convicted of domestic violence. •Tullis admitted he had been disbarred since the time of Victim's murder.
Vincent Bell (Paramedic at Scene)	•Bell did not testify at the sentencing hearing.	•Bell explained he was one of the paramedics who responded to the scene of the shooting and took care of Lindsey. •He explained Lindsey was conscious at the scene, so he and the other paramedics asked him questions to try to ascertain how alert he was and if he was a danger to them. •Bell explained that when asked what happened, Lindsey stated "he shot himself . . . let me die." He also stated he shot himself and then his wife. •He also admitted he shot his wife because "his wife was fooling

		around with somebody." • Bell explained Lindsey was not cooperative as they treated him, "he basically told us that he wanted to die and let him die." • On cross-examination, Bell stated he gave a written statement to police about his interactions with Lindsey, and in the written statement, he said Lindsey stated he shot his wife then shot himself. • Also on cross, Bell stated he did not remember Lindsey ever mentioning his kids to the paramedics. • Bell did not remember speaking to any of Lindsey's counsel prior to his trial or Lenora Topp, the investigator.
Ann Howard (Mental Health Professional)	• Howard testified she was a "professional, mental health professional" and registered nurse.	• Howard did not testify at the PCR hearing.

	• She stated she met Lindsey the day of the shooting. When she met Lindsey, he was suicidal, crying, depressed, and said he heard voices. She did not give him a diagnosis because she did not have enough information, but she believed he was depressed and thought he needed further assessment from a psychiatrist. • She then saw Lindsey again two days later and made a deferred diagnosis of depression and got him in to see a psychiatrist. • She noted Lindsey was prescribed an antidepressant, mood stabilizer,	

	and an anti-psychotic. She stated Lindsey continued to take medications in jail, though the anti-psychotic was changed to a different brand.	
Dr. Margaret Melikian (Expert in Forensic Psychiatry)	• She reviewed some of Marion's medical records; psychiatric hospitalization records; head injury records; school records; and reports where he was evaluated. She met with him on 5/4/2004. • ***School records*** – Marion had problems and required learning disability classes, including speech therapy; he struggled in school and dropped out in ninth grade. • ***Physical injuries*** – he was	• ***Preparation*** – Dr. Melikian testified she was contacted on 4/6/2004 by Bartosh but did not start reviewing his records until 4/28/2004. Before showing up to testify she had worked on the case for 7 hours 45 minutes. She only spent 2 hours and 45 minutes with Marion during her evaluation. Marion was her first death penalty trial, and she recalled receiving documents and being concerned that she could not prepare for trial. Dr. Melikian did not feel prepared to testify and tried to set up a conference call with Bartosh and the trial judge. She was

	run over by a car when he was 18 months old and sustained head injury; he inhaled kerosene; had been in a motorcycle accident and a car accident and sustained several head injuries. •***Family history*** – Has a family history of depression and had been treated psychiatrically after an overdose when he was 15; met diagnostic criteria for depression at that time. •***Malingering*** – Marion's records "had malingering on them" because he discussed hearing voices and a friend, Jimmy. He saw Dr. Brawley, who	the only one on the conference call from the defense. She expressed her concerns to the trial judge. She only spent 30 minutes on the phone with Bartosh the night before she was supposed to testify at the original trial. Also, Dr. Melikian learned in late April that Dr. Brawley would not be testifying and, instead, Dr. Melikian would testify as to Dr. Brawley's report at trial. She did not feel comfortable doing that, so she requested a written report from Dr. Brawley. •***Records*** – Dr. Melikian did not receive all the records that were available or that she requested before trial. Bartosh did not provide the suicide notes, Marion's complete medical records, DOC records, or an incident report. Dr. Melikian said this information would have been important for her

	gave him a test to see if he was exaggerating a mental illness. Based on the results of that test, she did not make a diagnosis of malingering. Dr. Melikian explained Marion does not have the external incentive for malingering because he claimed that when he overdosed at 15 years old, his imaginary friend, Jimmy, came to visit him at the hospital, which was comforting to him. He claimed that whenever he gets stressed, Jimmy appears to comfort him. Dr. Melikian concluded Marion used Jimmy as a coping mechanism.	evaluation. She never received corroborating pictures about his suicides attempts – specifically of Marion banging his head on the wall when he was arrested after the incident. When she performed her evaluation, she did not give it much weight. • ***Malingering*** – Dr. Melikian learned since trial that during Marion's evaluation, he was pulling chairs out for Jimmy. She did not know that Marion spoke with Brannon and Bartosh about Jimmy before trial and this information would have been beneficial before trial. Also, had she known all of the information available about Jimmy, she would have focused her evaluation differently. • ***Family history*** – Dr. Melikian did not know much of Marion's fam-

	• ***Mental state*** – Marion said he had been suicidal for weeks leading up to the incident and was actually planning a suicide; he experienced decreased appetite, weight loss, feelings of hopelessness, and a sad mood. He met the criteria for depression at the time of incident. She described his depression as recurrent but could not determine whether it was chronic or acute since she did not know when his depression started. Marion wanted to commit suicide. He claimed that on the day of the incident, he just snapped and did not know his wife was shot	ily history and confirmed it's better to have other family or evidence corroborate his reports. She only learned about Marion's history during his one evaluation and from Topp the day of trial. • ***Conclusion*** – Knowing what she knows now, Dr. Melikian would have better explained the diagnosis she made because she did not understand the seriousness of Marion's depression around the time of the incident. She had no family history and not enough time with Marion to determine his functioning. She would have explained his diagnosis differently at trial. Since trial, she has visited him three times and believes she misjudged his cognitive ability and diagnosis since the first time she met him.

	until EMS told him. He told Dr. Melikian he asked EMS if they would just let him die. • ***Testing results*** – On testing, Marion was found to have below-average IQ. He was previously diagnosed with borderline intellectual functioning (diagnosis used for someone functioning close to the mildly mentally retarded range). However, after running tests, Dr. Melikian would not classify him as borderline intellectual functioning. Marion had cognitive deficits, or problems in thinking or acting; verbal fluency; processing memory; and dexterity.	• Dr. Melikian did not understand the severity of Marion's depression and was unaware of his phone call to Tullis, which would have been important in evaluating his mental state at the time of the incident. • At the original trial, the only school records she had were his grades. • She was unaware Jimmy first appeared in the record on the day Marion was served with the State's intent to seek the Death Penalty. This information would have been important so Jimmy could have been dealt with before trial. She now knows Marion was malingering Jimmy because some inmates told him to do it. If she had more time to meet with him before trial, she would have been aware of that information and

	These are all indicators of brain damage and brain abnormality, either genetic or from the trauma he experienced as a child. Marion had limited ability to cope due to his decreased intelligence in general. He had poor coping skills, as evidenced by Jimmy, his imaginary friend. His neurological problems appeared chronic because he had a history of problems in school. • ***Conclusions*** – Marion had had abnormalities with naming and the ability to copy designs; dexterity and fine motor skills. She further concluded he had cognitive deficits	provided much more effective testimony. • She diagnosed Marion with a major depressive disorder before the trial in 2004. She would still make that diagnosis today, as he still met the diagnostic criteria.

	and that he suffers from major depressive disorder. She recommended he see a behavioral neurologist. • She was not provided DOC records for Marion's time served for assault and battery with intent to kill. • She learned there was no mention of Jimmy until Oct. 10, 2002, the date the State sought the death penalty. She was also unaware that Jimmy was present for an interview conducted by Dr. Narayan on 7/18/2003. • She was unaware that he lied on a job application and claimed he finished high school. Bartosh	

	did not provide this information, and she said it might have been helpful to know this information. • She clarified that his depression was acute.	
Dr. Tora Brawley (Expert in Clinical Psychology)	• Dr. Brawley did not testify at the sentencing hearing.	• Bartosh called Dr. Brawley on 4/12/2004 and she initially declined to work on the case because it was too short notice. She had a cancellation and was able to see Marion on 4/27/2004. Bartosh gave her no records. She was only told there was a history of head trauma, a gunshot wound, and a car accident. After the evaluation, she provided Bartosh with the results but could not recall why she was not asked to testify. • She performed an extended clinical interview and neuropsychological tests. She provided verbal results to

		Dr. Melikian and Dr. Absher (a neurologist). • Marion reported that he fell on the steps, hit his head 4-5 times, he'd been run over by a car; was in the hospital for two weeks at one point; had surgery on his face; experienced 2-3 motorcycle wrecks – one with no helmet; a self-inflicted gunshot wound to the head in 2002; and a history of migraines. He claimed to have dropped out of school in the tenth grade. • ***Malingering*** – She conducted a test to figure out whether he was malingering–the only indication she had at the time of trial was that Bartosh told her about the imaginary friend and was aware that other doctors had diagnosed him with malingering. She did the memory malingering test, which is a recognition test, and he scored

		completely within normal limits. For malingering for psychiatric symptoms, he scored within normal limits. She said there was no indication he was malingering. On cross, Dr. Brawley said she asked Marion about Jimmy. Marion said Jimmy was like a role model, and he came to him at age 12 when he first tried to kill himself. He further claimed God sent him Jimmy to "help him out" and that he talks to Jimmy when he has a problem. Marion said Jimmy was not there in the meeting with them on 4/27. • ***Comparison to William S. Hall findings*** – When Marion was evaluated during his time at William Hall, the doctor who performed the evaluation there performed the same tests, which had different results;

		she said this could be due to the depression. •***Findings*** – There were some scattered neuropsychological deficits, including severely impaired speed of mental tracking (i.e., ability to sequence, like ABC's); severely impaired verbal fluency; severely impaired confrontation naming (i.e., ability to name objects); below average verbal memory; delayed visual memory; severely impaired verbal learning ability; and impaired ability to copy and recall a complex figure. Her conclusion was that he fell below the average range of normal brain function. However, because she had no records, she could not say whether the cognitive deficits were due to head injuries.
Jan Vogelsang (Expert	•Vogelsang did not testify at the	•Vogelsang interviewed Marion Lindsey, Virginia Lindsey, Bessie

in Clinical Social Work and Biopyschosocial Assessments)	sentencing hearing.	Smith, Steve Pilgrim, Timothy Sims, Patsy Burton, Rob Tullis, and Dr. Tora Brawley. She evaluated the family history, including mental health records of family members and any available court records. She reviewed Marion's medical, mental health, high school, and DOC records, his prior arrests, suicide letters, and records that were gathered after the incident. She visited the community where Marion lived. • ***Family history/patterns of behavior*** – His family exhibited patterns of abandonment and desertion. They lived in extreme poverty, meaning the children went hungry. Marion's grandfather was sexually inappropriate with several boys in the family. Marion's mother was abandoned by her father and raised by a

		mother who was unable to care for her children; she was sick often. Marion's father abandoned the family. Marion's mother was married before she met Marion's father. She had three children with her previous husband but five pregnancies, with 2 miscarriages. She suffered the loss of her daughter when she was 7 months old a few years before Marion was born. She never had intervention, treatment or grief counseling. After her child died, she partied, had several boyfriends, and was not present or at home for her children. Marion was cared for by his grandmother. There were patterns of divorce and separation, abuse, neglect, and abandonment in his home. There was a pattern of suicide attempts in his family – both his aunts had drug problems and

		attempted suicide; his other checked herself into the ER for an overdose following a conflict with Mr. Sims. Marion's brother, Fred, drowned. Marion felt guilt about their relationship and became depressed when Fred passed away. • ***Violence at home*** – Marion grew up witnessing violence. He had no one in his home guiding him, which affected his ability to determine how to behave in certain situations. He had no strong male influences. His family members resolved problems in relationships with violence. He witnessed his family members deal and use drugs between age 11 and 13. Marion watched his uncles beat their girlfriends and each other; some of his family members were charged with domestic violence, assault and battery with intent to kill. Marion

		witnessed his mother shoot at Mr. Sims. His uncles were in and out of prison – one of his uncles beat a man to death. The others were in trouble with the law for drugs and violent behavior. Marion witnessed his uncle throw his favorite pet into a fire. Marion's family practiced roots, which was confusing for him. His family members would "put roots" on their girlfriends or wives to make them sick or make them die. • ***Living conditions*** – When Marion was born, there were aunts and uncles living in the house. The living conditions in Marion's childhood home were crowded, with ten people often living in the home at one time. There was no indoor plumbing or hearing, and the neighborhood was considered "rough."

		• ***Injuries*** – Marion fell a lot as a child and would often have stitches in his head. He was run over by a car when he was very small, and his family delayed sending him to the hospital due to lack of resources. • ***School*** – Marion failed first grade. He started exhibiting behavioral problems when his mother started working third shift in eighth grade. He had to repeat eighth grade twice and dropped out of school before finishing eighth grade. When he dropped out, he became a drug runner in the neighborhood. The only one to graduate high school in his family was his Aunt Robin but she left the home to raise her own children. • ***Mental state*** – When Marion was 15, he took somewhere between 45 and 60 medications

		at one time and tried to take his life. He received treatment at the hospital, but his mother resisted the doctor's recommendations. •***Relationships*** – Marion was very reactive in romantic relationships. He shot one of his previous girlfriend's boyfriends. Marion had a chaotic relationship with Nell, the mother of his children. He was arrested for CDV during their relationship. •***Conclusion*** – There were so many stressors in Marion's life from the time he came into the world that it would be reasonable to conclude that it affected his insight, judgment, impulsivity, and decision-making and placed him at higher risk of committing a serious act.
Lenora Topp	•Topp did not testify at the sentencing hearing.	•Topp testified she started working on Lindsey's case on April

(Mitigation Investigator)		16, 2004, approximately a month before trial, and her job was "essentially a fact finder, getting records as needed, and . . . meeting with witnesses as necessary." • She spent approximately forty hours working on Lindsey's case before his trial began. She believed she did not have enough time to work on Lindsey's case, explaining it takes time to cultivate a relationship and get information from a defendant's family and that she was still seeking records during the trial. • She had never worked on a death penalty case before, had never been a mitigation investigator before, and had never worked on a South Carolina case before. • She explained she mainly tried to get to know about Lindsey's

		background through family members. • Mother told Topp about Dr. Barry Henderson (accidently giving Topp the wrong name–Hennison–but Lindsey eventually told Topp the right name during the trial), Lindsey's childhood doctor, and she attempted to find Dr. Henderson for medical records and to be a witness. Once Topp was able to get into contact with Dr. Henderson, the day after trial on May 25, 2004, Dr. Henderson stated he would have testified for Lindsey and how in the past he trusted Lindsey to play with the doctor's children. Dr. Henderson passed away prior to the PCR. • She was never asked to interview Rod Tullis. • Lindsey told Topp about his upbringing, being raised poor, not having his father in

		his life, being run over by a car. He also spoke about his desire for his kids to not be without a father figure like him. • He told Topp he could not remember "half" of what happened when he shot Victim, but "he was very upset about the, his wife having an affair with a gentleman who was going to take over raising his children." He told Topp he just wanted to know what was going on with his kids, but Nesbitt and Victim took off. He remembered following them, and that he shot into the car. • Lindsey told her his mother's and father's names, and he indicated he had hatred towards his father because his father never had anything to do with him. • Lindsey explained growing up they only had enough clothes for

		two days and had to wash their clothes every other night, drying them on a wood heater. • He also explained he was severely emotionally affected by the death of one of his brothers who drowned seven years prior. Lindsey's brother's body was never found. • He discussed only eating bologna sandwiches as a child because it was all they could afford, and how he hated bologna now, refusing to eat it when it was served at the jail. • He admitted he sold drugs to support his family, so he could have a better life-style for his kids. However, he claimed he never used drugs. • Topp admitted Lindsey got into fights at school with both other boys and some girls. • Lindsey told Topp about his uncles

		throwing his cat into a wood heater. • After Lindsey quit school, he got into a bad car accident, wherein his car flipped three times, he had memory loss after the accident, had to have facial surgery, and his hip broke. • He told Topp about his romantic relationships. He also spoke about his relationship to Bill Burton. • Topp stated based on her conversations with Lindsey, she believed he had a hard time in life, had turned to drug dealing to take care of Victim and their kids. • She also mentioned Lindsey told her he "was just resigned to dying and his biggest regret is not having enough time to spend with his children." • Topp also looked for mental health records for Bessie Smith, Lindsey's aunt.

		• Topp stated she was not sure if they had all of Lindsey's school record even at the time of the PCR. • Topp suggested to Bartosh that mental health issues ran in the family and that he should subpoena family members who had these issues, such as Bessie Smith, Steve Pilgrim, Paul Pilgrim, and Mother.

APPENDIX B

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT
MARION ALEXANDER LINDSEY, #6015 Applicant, vs. STATE OF SOUTH CAROLINA, Respondent.	C/A No. 2007-CP-42-2848 AMENDED ORDER DENYING POST-CONVICTION RELIEF

This matter is before this Court upon the Supreme Court of South Carolina's vacating and remanding this Court's Order of Dismissal for issuance of an amended order that complies with *Pruit v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992), and *Hall v. Catoe*, 360 S.C. 353, 601 S.E.2d 335 (2004), and with S.C. Code Ann. § 17-27-80 (2003). This Amended Order Denying Post-Conviction Relief follows.

This matter came before the Court on Marion Alexander Lindsey's application for post-conviction relief (PCR) filed on August 14, 2007, as amended August 6, 2009. The initial application was filed by his appointed appellate counsel, Robert M. Dudek, of the South Carolina Office of Appellate Defense. The Respondent made an initial Return and requested under

S.C. Rule of Civil Procedure, Rule 12(e), greater particularity and specificity on September 24, 2007. The Applicant, through appointed PCR counsel Richard Vieth and David Collins submitted an Amended Application for Post-Conviction Relief on August 6, 2009.

The matter was held before the Court on July 19-21, 2010. The Applicant was present and represented by court-appointed counsel Richard Vieth and David Collins. The Respondent was represented by Assistant Deputy Attorney General Donald Zelenka and Assistant Attorney General Al Simon. At the hearing, testimony was received from Douglas Brannon, Dr. Tora Brawley, Vincent Bell, Lenora Topp, Rod Tullis, James Aiken, Karen Hatcher, Bill Burton, Mrs. Burton, Virginia Lindsey, Bessie Smith, Steve Pilgrim, Tim Sims, Jan Vogelsang, and Dr. Margaret Melikian. At the conclusion of the hearing, post-hearing memoranda were allowed. The Applicant's memorandum was filed October 26, 2010. The Respondent's memorandum was made on April 1, 2011. On May 2, 2011, this Court requested a proposed order in the matter from Respondent and subsequently from Applicant.

I
PRIOR PROCEDURAL HISTORY

The Petitioner, Marion Alexander Lindsey, was indicted on October 3, 2002 by the Court of General Sessions for Spartanburg County for murder. The charge arose from the homicide of Ruby (Nell) Lindsey on September 18, 2002. On October 10, 2002, Solicitor Trey Gowdy served his notice of intent to seek the death penalty consistent with S.C. Code Ann. § 16-3-26. He further served an additional notice of life sentence pursuant to § 17-25-45(A) based upon Lindsey's February 20, 1994 conviction for assault and battery

with intent to kill. Both were served on Lindsey and his attorney, Michael Bartosh, personally.

A notice of statutory aggravating circumstances and evidence in support of aggravating circumstances was served on the Petitioner on March 10, 2004. The listed statutory aggravator was:

> That the defendant, Marion Alexander Lindsey, did murder Ruby Nell Lindsey, and by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person, Section 16-3-20(C)(a)(3) of the Code of Laws of South Carolina (1976) as amended (Cum. Supp. 1990).

Supplemental notices were made on May 11, 2004 and May 14, 2004.

On May 17, 2004, the matter was called for trial before the Honorable John C. Few. Petitioner was present and represented by Spartanburg County Public Defender Michael Bartosh, Doug Brennan and Karen Quimby (Hatcher). The prosecution was represented by Seventh Circuit Solicitor Harold "Trey" Gowdy and Deputy Solicitors Barry Barnette and Donnie Willingham. On May 21, 2004 the jury convicted Lindsey of murder at 4:45 p.m. R., Tr. p. 1718, I.14 - p. 1719, I. 5.

On May 22, 2004, the penalty phase began. After testimony, the jury was instructed to consider the sole aggravating circumstance involving "great risk of death to more than one person." R., Tr. 2152-53. The jury was also instructed to consider as mitigating circumstances:

1. Murder was committed while the defendant was under the influence of mental or emotional disturbance.

2. Age or mentality of the defendant at the time of the crime.

R. Tr. 2155-56. On May 24, 2004 the jury found the existence of the statutory mitigating circumstance and recommended a sentence of death. ROA., Tr. p. 2169-2171. Judge Few subsequently made findings that the evidence warranted the imposition of the death penalty and that its imposition was not as a result of passion, prejudice, or arbitrary factor. ROA., Tr. p. 2173, I1. 17-21. He then sentenced Lindsey to death in the manner provided by law. ROA., Tr. p. 2174.

The Petitioner made an appeal to the South Carolina Supreme Court. The Applicant was represented by Robert Dudek of the South Carolina Office of Appellate Defense. In the appeal, he raised the following questions presented:

1.

Whether the court erred by excusing potential Juror Krisher for cause, and ruling that Krisher's belief that life imprisonment without parole was a more substantial punishment that the death penalty was incompatible with South Carolina law, since Krisher stated that he could impose the death penalty and sign the death form and he was a qualified juror?

2.

Whether the judge erred by refusing to replace Juror Mauldin with an alternate where Mauldin was conducting his own measurements during a jury view of the automobile in which the decedent was shot, since a juror conducting his own measurements or experiments during a jury view was improper?

3.

> Whether the court erred by refusing to direct a verdict on the "great risk of death" aggravator since appellant shot his wife at close range and there was no evidence appellant knowingly created a risk of death to more than one person?

4.

> Whether appellant's death sentence should be vacated as both excessive and disproportionate since this case involves a domestic dispute pertaining to child visitation and no death sentence has been imposed in this state in the modem era under similar circumstances?

State v. Lindsey, *Final Brief of Appellant*, *p. 2.* The Respondent, through Assistant Deputy Attorney General Donald J. Zelenka, made its *Final Brief of Respondent.* On February 20, 2007, the South Carolina Supreme Court entered its opinion denying relief. *State v. Lindsey*, 372 S.C. 185, 642 S.E.2d 557 (2007). A petition for rehearing was made through appellate counsel. The petition was denied on April 4, 2007 in an unpublished order.

The Petitioner, through counsel Dudek, made a petition for writ of certiorari in the United States Supreme Court on June 29, 2007. *Lindsey v. South Carolina*, 07-5444. In the petition, Lindsey raised the following question:

> Whether juror Krisher's belief that life imprisonment without parole was a more substantial punishment than the death penalty was an acceptable reasons to disqualify him from service for cause under *Wainwright v. Witt*, 469 U.S. 412 (1985) where the juror testified

> he could impose death as punishment for murder, and his belief was not incompatible with the law as the trial court reasoned?

Petition, p. 2. The Respondents made a Brief in Opposition on August 20, 2007. The United States Supreme Court denied certiorari on October 1, 2007. *Lindsey v. S.C.*, 552 U.S. 917, 128 S.Ct. 274, 169 L.Ed.2d 200 (2007).

STATEMENT OF THE CASE

In the opinion of the South Carolina Supreme Court, the Court summarized the facts in the following manner:

> Appellant killed his estranged wife, Ruby Nell Lindsey (Victim), on September 18, 2002, in the parking lot of the Inman City Police Department. The jury found a statutory aggravator pursuant to S.C. Code Ann. § 16-3-20(C)(a)(3) (2003) and appellant was sentenced to death. We affirm.

FACTS

> Celeste Nesbitt, a close friend of Victim, was the State's witness-in-chief. On the day of the murder, Celeste gave Victim a ride home from work at about 8:00 p.m. In the car were Celeste's two young daughters, four-year-old Keysha and ten-year-old Kiera, who were in the back seat with Victim-Keysha in a car seat behind the front passenger seat, Kiera in the middle, and Victim behind the driver's seat. Celeste was driving and Celeste's mother was in the front passenger seat. The car was a Mercury sedan with dark tinted rear windows.

Victim was separated from appellant at the time and was staying with her mother. As they neared Victim's mother's house, they saw appellant in his girlfriend's car. Celeste pulled into the yard and turned the car around so appellant was facing them in a head-on direction. Celeste rolled down her window and greeted him. Appellant asked her if she had seen Victim. Because Celeste knew appellant had threatened to kill Victim, she lied and answered that she had not seen her in three days.

Celeste's youngest daughter, Keysha, leaned forward in her car seat and greeted appellant. Appellant then asked who else was in the back seat. Celeste told him Kiera, her older daughter, was lying on the back seat asleep. Because the windows were tinted, appellant asked Celeste to roll down the window so he could see. Celeste answered that the window was broken. When appellant said he would get out to look, Celeste sped off.

Celeste drove to the police department without stopping while Victim dialed 911. When they arrived, Celeste jumped out of the car and urged Victim to get out. Victim was still in the back seat when appellant pulled into the parking lot and ran toward the back of Celeste's car. Celeste saw him pull out a gun and shoot into the car through the rear windshield. She dove for cover as she heard additional shots.

Officer Godfrey was in the police department parking lot when the dispatcher informed him

there was a "rolling domestic," meaning a domestic dispute involving a vehicle. He saw the two cars pull into the parking lot, and saw appellant jump out and fire two rounds into Celeste's car. Officer Godfrey took cover and saw two more flashes from a gun. Appellant came around the front of the car and pointed his gun at Officer Godfrey who then fired four rounds at appellant. Appellant was wounded and fell to the ground.

Victim died at the scene. Four bullets from appellant's gun were recovered: three from Victim's head and one from the trunk of Celeste's car. [FN1] The bullet recovered from the trunk had traveled through the back seat of the car into the trunk. The car had two bullet holes in the rear driver's side window and two in the rear windshield.

> FN1. Five shell casings were found but the fifth bullet was not recovered. A paramedic testified for the defense that when he arrived on the scene to transport appellant to the hospital, appellant said he had shot himself in the head.

Other evidence indicated that during their marriage, appellant struck Victim several times in front of witnesses. In December 2001, he beat her in a restaurant parking lot and left the scene before the responding officer could arrest him. On September 17, 2002, the night before the murder, appellant was arrested on a warrant for criminal domestic violence arising from this incident. He was released on a

$1,000 bond; one of the conditions of bond was that he have no contact with Victim.

State v. Lindsey, supra. App. p. A1-A2.

II
ALLEGATIONS

In his initial application for post-conviction relief filed August 14, 2007 by appellate counsel Dudek, Lindsey made the following allegations:

I. Ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution for the reasons below and in the attachment to this Application. 10(A).

1. Defense counsel was ineffective for failing to present available evidence that petitioner was attempting to proceed in family court over the child visitation dispute. Petitioner had sought legal assistance and the failure to offer this available evidence constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution on a critical issue exploited by the State to petitioner's detriment. 10(b). (EVIDENCE OF FAMILY COURT VISITATION AND SEEKING LEGAL ASSISTANCE)

2. Defense counsel was ineffective for failing to properly argue the "great risk of danger" aggravating circumstance did not apply to petitioner's case since the shot was at close range and it was clear the decedent was the only intended victim. This failure by

trial counsel constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. This was also an Eighth Amendment violation since petitioner was wrongfully placed in the class of "death eligible" defendants. 10(c). (FAILURE TO ADEQUATELY ARGUE INAPPLICABILITY OF "GREAT RISK OF DEATH" AGGRAVATOR)

3. Defense counsel was ineffective for failing to present available evidence showing his wife was engaged in an adulteress relationship to counter the State's evidence that petitioner was completely at fault for the domestic dispute. Failure to present this evidence constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. 10(d). (EVIDENCE IN MITIGATION THAT WIFE WAS ADULTERESS AND PARTIALLY AT FAULT IN RELATIONSHIP)

4. Defense counsel was ineffective for failing to present available mitigating evidence regarding appellant's childhood and his mental capacity since this was relevant evidence. The failure to present available mitigating evidence constituted ineffective assistance of counsel in violation of his rights under the Sixth Amendment to the United States Constitution. 10(e).

(APPELLANTS CHILDHOOD AND MENTAL CAPACITY AS EVIDENCE IN MITIGATION)

5. Defense counsel was ineffective for failing to offer evidence that he was steadily employed to counter the State's evidence that he was a drug dealer. The failure to offer this evidence constituted ineffective assistance of counsel in violation to the Sixth Amendment to the United States Constitution. 10(f). (EVIDENCE IN MITIGATION OF STEADY EMPLOYMENT)
6. Defense counsel was ineffective for failing to offer evidence appellant was already lying on the ground when he was shot by the police officer. Allowing the state to distort the crime scene evidence to appellant's prejudice constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. 10(g). (FAILURE TO OFFER EVIDENCE THAT LINDSEY ON GROUND WHEN SHOT BY POLICE)
7. Defense counsel was ineffective in violation of the Sixth and Eighth Amendments to the United States Constitution, by virtue its inadequate *voir dire*, and the failure to challenge for cause certain members of the jury that should not have remained on the jury. A death prone jury was conse-

quently selected. 10(h). (INADEQUATE VOIR DIRE AND FAILURE TO CHALLENGE UNNAMED JURORS FOR CAUSE)

On August 6, 2009, received August 7, 2009, the Applicant, through current state PCR appointed counsel Vieth and Collins, made the following amended allegations:

10(a) Applicant was denied the effective assistance of counsel during the trial and sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments of the United States Constitution.

11. (A). Counsel failed to adequately investigate, develop and present mitigation evidence including, but not limited to, evidence of Applicant's adaptability to confinement. [Adaptability to Prison Evidence]

(B). Defense counsel was ineffective for failing to present available evidence that Applicant was attempting to proceed in Family Court over the child visitation dispute. [Evidence of Applicant's Attempt to Proceed in Family Court on Visitation]

(C). Applicant had sought legal assistance and the failure to offer this available evidence constituted ineffective assistance of counsel.

(D). Counsel failed to properly present the entire theme of the Applicant's life. [Failure to Present Theme]

(E). Counsel failed to produce a family historian to allow the jury to know the seriousness of his family history. [Failure to Present Family Historian]

(F). The Applicant's only expert was not provided with sufficient background information prior to trial to allow her testimony to be meaningful and accurate. [Failure to Present Dr. Margaret Melikian with sufficient background information]

Amended Application, ¶ 10, 11, page 3.

In his Post-Hearing Memorandum, the Petitioner set out the following ten specifications:

1. Ineffective Assistance of Counsel - FEIGNING MENTAL ILLNESS
   a. Failed to prepare Lindsey for pretrial evaluation.
   b. Inappropriately allowed Lindsey to take advice of jail house lawyer to feign Mental illness.
   c. Failed to spend sufficient time with Lindsey and thereby failed to learn intention to feign mental illness and dangers of course.

   MEMO, p. 43.
2. Ineffective Assistance of Counsel - CHALLENGE EVIDENCE OF MALINGERING
   a. Failed to present issue of malingering to jury.
   b. Failed to call Dr. Brawley in sentencing.
   c. Claims testimony could have refuted allegations that he was malingering when examined by court examiners and Dr. Melikian.

   MEMO, pp. 46-47.

3. Ineffective Assistance of Counsel - MERCY REQUESTS FROM FRIENDS AND FAMILY
   a. Failed to adequately present requests for mercy.
   b. Failed to prepare witnesses to testify and request jury to show mercy.
   c. Failed to call family and non-family members on mercy issue.
   d. Failed to ask witnesses appropriate questions to request mercy.
   e. Failed to argue the Court's refusal to allow witnesses to request mercy.
   f. Failed to preserve record on issue of mercy by not presenting adequate arguments in support of attempt to present mercy issue and not requesting proffer.

   MEMO, p. 47.
4. Ineffective Assistance of Counsel - FAILURE TO ADEQUATELY PRESENT DR. MELIKIAN
   a. Failed to Provide Sufficient Info to Dr. Melikian to allow evaluation of Lindsey.
   b. Failed to obtain and provide historical info and records of family members necessary for proper evaluation.
   c. Failed to seek continuance after Melikian informed them she needed additional time.
   d Failed to elicit from Melikian statutory mitigating factors during testimony.

   MEMO, p. 49.
5. Ineffective Assistance of Counsel - FAMILY HISTORY OF MENTAL ILLNESS
   a. Failed to present to jury family history of mental illness.

b. Failed to adequately interview family members to discover extent of mental illness.

c. Failed to prepare family to present extent and nature of illness within family.

d. Failed to adequately argue to court the admissibility of evidence of family mental illness.

e. Failed to adequately preserve the record relating to family mental illness in support of attempt to present evidence and failing to offer proffer.

MEMO, p. 50.

6. Ineffective Assistance of Counsel - PRISON ADAPTABILITY EXPERT

a. Failed to retain a prison adaptability expert to testify about Lindsey's ability to adapt to prison life others and the relevance of that information to the jury's decision.

MEMO, pp. 51-52.

7. Ineffective Assistance of Counsel - FAILURE TO RETAIN SOCIAL HISTORIAN/WORKER

a. Failed to retain mitigation expert regarding psycho-social history of Lindsey and relevance to jury determination.

MEMO, pp. 52-53.

8. Ineffective Assistance of Counsel - EMS WORKERS TESTIMONY ABOUT DESIRE FOR SUICIDE

a. Failed to elicit testimony from EMS workers - Joseph Stewart and Vincent Bell - regarding Lindsey's desire to commit suicide after Nell's death.

b. Failed to interview EMS workers to determine what info and testimony they could provide.

c. Failed to prepare EMS workers to testify in penalty phase.

d. Failed to ask appropriate questions to elicit admissible info about Applicant's state of mind.

e. Failed to adequately argue testimony of EMS workers related to Lindsey's words, actions and state of mind after shooting was admissible.

f. Failed to preserve record regarding EMS testimony by not presenting adequate arguments in support of attempt to present testimony.

MEMO, p. 53.

9. Ineffective Assistance of Counsel - TIME SPENT IN MITIGATION INVESTIGATION

a. Failed to commit sufficient time to perform adequate investigation in mitigation.

b. Failed to assemble complete defense team until one month prior to trial.

c. Failed to perform investigation of Lindsey's life/family history until two months prior to trial.

(1) First half of investigation done without mitigation investigator

(2) Investigation lasted only eight weeks

d. Failed to spend sufficient time interviewing witness to determine beneficial testimony.

e. Failed to spend sufficient time preparing witnesses to testify to allow a clear, logically structured and easily understood presentation

MEMO, p. 54.

10. Ineffective Assistance of Counsel - STATUTORY AGGRAVATING FACTORS
    a. Failed to argue against statutory aggravating factors alleged by state.
    b. Counsel did address aggravators, it was cursory and failed to present arguments against application to Lindsey.

    MEMO, pp. 58-60.

III
STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL

To establish deficient performance of counsel, a person challenging a conviction must show that "counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, at 688 (1984). A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Id.*, at 689. The challenger's burden is to show "that counsel made error so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*, at 687.

Strickland does not guarantee perfect representation, only a "reasonably competent attorney." *Id.* 466 U.S. 668, at 687 (quoting *McMann v. Richardson*, 397 U.S. 759, 770 (1970)); see also *Gentry*, supra, at 7. Representation is constitutionally ineffective only if it "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair trial. *Strickland*, supra, at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or

for failing to prepare for what appear to be remote possibilities.

An attorney can avoid activities that appear "distractive from more important duties." *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009). Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies. *See Knowles v. Mirzayance*, 556 U.S. 111 (2009); *Rompilla v. Beard*, 545 U.S. 374, 383 (2005); *Wiggins v. Smith*, 539 U.S. 510, 525 (2003); *Strickland*, 466 U.S. 668, at 699.

Although courts may not indulge "post hoc rationalization" for counsel's decision making contradicting the available evidence of counsel's actions, *Wiggins*, 539 U.S. 510, at 526-527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. *Strickland*, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. *Harrington v. Richter*, 562 U.S. 86 (2011). See also *Cullen v. Pinholster*, 131 S.Ct. 1388, at 1407 (2011) (citing with approval Chief Judge Kozinski's dissenting opinion below in which he stated that the court of appeals was required "to affirmatively entertain the range of possible reasons" that counsel may have had for proceeding as they did).

With respect to prejudice, a challenger must demonstrate "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." *Strickland*, 466 U.S. 688, 694. It is not enough "to show that the errors bad some conceivable effect on the outcome of the proceeding." *Id.*, at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*, at 687. See *Harrington v. Richter*, 562 U.S. 86 (2011). Stated another way, Petitioner has the burden of showing a reasonable possibility that, but for counsel's deficient performance, the death sentence would not have been imposed. *Wong v. Belmontes*, 558 U.S. 15, 130 S.Ct. 383, 386, 175 L.Ed.2d 328 (2009). For example, where the defendant claims ineffective assistance for failure to file a particular motion, he must "not only demonstrate a likelihood of prevailing on the motion, but also a reasonable probability that the granting of the motion would have resulted in a more favorable outcome." *Styers v. Schriro*, 547 F.3d 1026, 1030 (9th Cir. 2008).

"Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466. U.S. 688, 689-690. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the

record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689; *see also Bell v. Cone*, 535 U.S. 685, 702 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466. U.S. 688, 690.

In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. *See Wong v. Belmontes*, 558 U.S. 15 (2009) (per curiam); *Strickland*, 466 U.S. 688, 693. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. *Id.*, at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland's* prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." *Id.*, at 693,697. The likelihood of a different result must be substantial, not just conceivable. *Id.*, at 693. *Harrington*, supra.

Moreover, there may be a significant possibility that, had this highly speculative evidence been given any weight at all, it would have been treated as aggravating rather than mitigating. *See Atkins v. Virginia*, 536 U.S. 304, 321, 122 S.Ct. 2242 (2002). In *Cullen v. Pinholster*, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), for example, the Supreme Court found that new evidence of an "organic personality syndrome" and "brain damage" was "by no means clearly mitigating, as the jury might have concluded that [the defendant] was simply

beyond rehabilitation." *Id.* at 1396-97, 1410. The Court concluded that, in light of the ambiguous nature of the brain injury, "[t]here [wa]s no reasonable probability that additional evidence . . . would have changed the jury verdict." *Id.* at 1409.

IV.
FINDINGS AND CONCLUSIONS

This Court must conclude that the claims, as stated, are insufficient to show entitlement to relief under *Strickland v. Washington* based upon the entire record before the court. As *Strickland* and its progeny make clear, assessment of the entire record, including the trial record as well as the record from the collateral proceeding is necessary. As *Harrington v. Richter* makes clear, counsel is presumed to be competent in making strategic decisions. Here, the assessment and the burden of proof are important because the lead counsel, Michael Bartosh, died April 5, 2006 prior to this proceeding. It is evident from each of the attorneys involved in the Lindsey case - Doug Brannon and Karen Quimby Hatcher, that Mr. Bartosh was the primary counsel in the case and he particularly focused his efforts and strategy on the penalty phase of the trial. All 10 specifications of ineffective assistance of counsel address the penalty phase of the trial. In fact, the only relief sought in this action concerns sentencing. As stated in *Harrington*, "[A]lthough courts may not indulge 'post hoc rationalization' for counsel's decision making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.' *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam)."

Throughout the Applicant's post-hearing Memorandum he refers to the A.B.A. Guidelines as his standard. However, the United States Supreme Court recently clarified what *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) requires in the context of investigation and preparation of penalty phase mitigating evidence:

> The Sixth Amendment entitles criminal defendants to the "'effective assistance of counsel' "—that is, representation that does not fall "below an objective standard of reasonableness" in light of "prevailing professional norms." That standard is necessarily a general one. . . . Restatements of professional standards, we have recognized, can be useful as "guides" to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place.

Bobby v. Van Hook, 558 U.S. 4,130 S.Ct. 13, 16, 175 L.Ed.2d 255 (2009). Accord, *Cox v. McNeil*, 638 F.3d 1356 (11th Cir. 2011) (habeas relief not warranted even if counsel's performance fell short of standards for reasonableness as articulated by American Bar Association guidelines for capital defense work, absent showing that there was reasonable probability that outcome of either his guilt or penalty phase would have been different had his counsel discussed mitigation at greater length with potential jury members).

The U.S. Supreme Court held the Federal Circuit Court erred in applying the 2003 ABA guidelines pertaining to specifics defense counsel should investigate in preparing mitigation evidence, when such guidelines were announced 18 years after the defendant's trial. The Court then reiterated *Strickland's* emphasis

that such bar standards are "'only guides' to what reasonableness means, *not its definition*." *Id.*, at 17 (quoting *Strickland*, at 688).[1]

Any proper *Strickland* assessment must begin with the trial record and what defense counsel actually presented:

WHAT THE JURY HEARD

In the penalty phase, the defense called a series of mitigation witnesses. **Ann Howard,** Special Services with the Spartanburg County Mental Health Center testified that she had seen the Applicant on September 8, 2002 and he presented himself as suicidal, crying and very depressed. She opined under a deferred diagnosis and referred him to a psychiatrist, Dr. Freeman Smith. ROA. 1984-85. According to his notes, Dr. Freeman put Lindsey on an anti-psychotic drug (Zyphrexa), and Lindsey was currently on a drug for depression (Celexa) and a mood stabilizer (Abilify).

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[1] Petitioner points to the ABA Guidelines to suggest it is per se ineffective assistance of counsel to fail to do as it commands. But ABA Guidelines are not "inexorable commands"; rather, they are 'only guides' to what reasonableness means, not its definition." *Bobby v. Van Hook*, 558 U.S. 4, 130 S.Ct. 13, 17, 175 L. Ed. 2d 266 (2009) (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052) (internal quotations omitted). As the Strickland Court explained, "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." Id. at 688-89, 104 S.Ct. 2052. Lindsey's counsel were between a rock and a hard place in determining the best way to spare him a death sentence, given the overwhelming evidence of his guilt. See, *Post v. Bradshaw* 621 F.3d 406, 418 (6th Cir. 2010).

ROA. 1988-89. She testified that he is still receiving medication of Celexa, Depakote, and Abilify. ROA. 1989.

On cross-examination, she testified that on his intake interview that the Applicant told her that he did not remember anything about shooting and killing his wife. ROA. 1992.

Dr. Margaret Melikian, a forensic psychiatrist retained by the defense [Program Director of Forensic Psychiatry at M.U.S.C.] testified that she saw Applicant on May 4. She stated that she had reviewed:.

1. His medical records.

2 The records from a psychiatric hospitalization when he was a teenager.

3. The records from a head injury when he was an infant.

4. His neurological records.

5, His school records.

ROA. 2003. Dr. Melikian testified that she also reviewed the reports and records from the Hall Institute [DMH] evaluation. ROA. 2003.

Dr. Melikian opined that Lindsey had problems in school and had a learning disability and attended special classes for speech therapy. ROA 2004. She also reported that Lindsey was in an accident when he was run over by a car when he was 18/19 months old and suffered a head injury. Id. She further had information that he had inhaled kerosene at one point. Id. She reported that he had several head injuries. Id.

Dr. Melikian stated that Lindsey had completed the ninth grade and then dropped out of school in the tenth grade. ROA. 2004. She reported that he "had trouble with school." Id.

In reviewing his neuropsychological records, Dr. Melikian opined he had some abnormalities having to do with naming and being able to copy designs, dexterity and motor skills and that he had some cognitive deficits. Id.

She also opined that Lindsey had a "family history of depression." She reported that he was treated by a psychiatrist after he had an overdose when he was 15 years old. She opined that at the time of the incident, Lindsey appeared to satisfy the diagnostic criteria for depression. ROA. 2004, I. 23-25. She opined that he suffers from "'major depressive disorder." ROA. 2005.

Concerning malingering, she asserted that the records suggested that while he had been diagnosed with malingering because of his report of hearing voices and his friend Jimmy, by their objective testing, it suggested that he was putting forth good effort.

She reported that Lindsey was then seen by Dr. Tora Brawley, a forensic psychologist. Based upon this testing, Dr. Melikian opined that he was not malingering. ROA. 2005-06. She stated that the issue of malingering came up because Lindsey reports that when he was in the hospital at age 15 after an overdose, that an imaginary friend named Jimmy came to visit him and he heard voices that were comforting to him. She stated that he never discussed this with anyone but that his roommate noticed him talking to unseen others. Lindsey stated that when he is stressed that his friend Jimmy is with him and tells him good things and supports him. She stated that after the incident, Lindsey was nervous and reported that his friend Jimmy was with him. ROA. 2006-07. He told her that Jimmy first appeared after his overdose when he was in the hospital and felt he had no friends. ROA. 2007. She felt that he describes hearing a voice like

auditory hallucination. She asserted that it was atypical and would be misdiagnosed as malingering.

She also reported that the roommate that Lindsey had at the time looked like Charles Manson and that Lindsey was afraid of him and that was when Jimmy showed up. However, he reported that the roommate only looked scary and turned out to be a nice man. ROA. 2007.

As to whether Lindsey would have been operating under the influence of mental or emotional disturbance at the time of the incident, she opined that Lindsey had reported that he had been suicidal for several weeks prior to the incident. He reported that he had weight loss with decreased appetite, feelings of hopelessness and helplessness and sad mood. She felt that he would meet the criteria for depression at that time. ROA. 2008. His depression was recurrent. She opined that the depression was acute as opposed to chronic. ROA. 2008.

She opined that he had cognitive deficits. ROA. 2009. She reported that the testing at Hall Institute determined that he had well below average IQ and "borderline intellectual functioning" close to mildly retarded range with an IQ of 76. ROA. 2009. However, she noted that when Dr. Brawley tested him, the scores were in the 80's although it is still below average.[2] She stated that "I would not have made a diagnosis of borderline intellectual functioning" because he does function better than what his test scores look like. She stated that his intelligence is low, he had trouble in school, but he does have some functioning

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[2] Dr. Tora Brawley, a clinical psychologist with a specialty in neuropsychology made a written report to Dr. Melikian on May 20, 20024. Applicant's PCR Exhibit 11.

abilities that she would not say were the basis of worrying or seeing him clinically for decreased intelligence. ROA. 2009. She noted that he had problems with verbal fluency, naming words and processing memory. ROA. 2009. She opined that in her professional judgement Lindsey had some kind of brain abnormality that causes his low test scores and sudden neurological findings. She concluded that a source of the abnormality could have been from the head trauma or the incident when he inhaled kerosene when he 18/19 months old. ROA. 2010. She referred to a behavioral neurologist after receiving the results from the neuro-psychologist. She also stated that the suicide attempt at age 15 was the result of an overdose of Tylenol and other medications.

Dr. Melikian stated that his neurological problems were chronic. She stated that he had a limited ability to cope with things due to his limited intelligence and by his continuing to have an imaginary friend. She stated his stress with his wife and the separation added to the stress which decreased his coping skills. ROA. 2012. She stated that he described the killing of his wife. He told Dr. Melikian that his wife was leaving and taking the kids and that he would never see them again. ROA 2012-13. He told her that he had moved into his cousin's house and planned to committed suicide by driving off the cliff, but he was worried that he might not die. Id. He stated that he begged his wife to return and had written suicide notes, but did not recall what he said. He also told her that he planned to shoot himself and that his cousin had taken his keys and that his mother, brother and uncle and talked to him. He told her that he had been unable to reach his wife because she was blocking his numbers on the telephone. He said that he had been crying which was unusual for him. ROA. 2013. He

stated that he was able to get in touch with his wife at work where the numbers were not blocked.

Lindsey described his weight loss from 225 pounds to 160 pounds. ROA. 2013.

On the day of the incident, according to Lindsey, he talked with Latresse for a couple of hours and drove the car home. He stated to Dr. Melikian that he was tired and wanted to drive to his mother-in-law's and "blow his brains out" in front of the house. While there he was driving and talking to his wife's cousin and saw an image in the back and then saw his cousin drive off. ROA. 2013. He then stated that he just snapped. ROA. 2013, I. 25. Lindsey told her that he followed them, but did not remember that he shot his wife until the EMS people told him. ROA 2014. He said he shot four times and shot himself one time and that the police also shot him. Id. He stated that he had asked the EMS people at the scene to let him die. ROA. 2014.

She stated that he had a gunshot wound to the head. The wound exited, but did not penetrate the brain. He was shot multiple times by the police. ROA. 2014.

On cross-examination, Dr. Melikian admitted that she had not prepared a written report, although she admitted that she had prepared reports when she worked at Hall Institute. ROA. 2015. She stated that the first mention of Jimmy was on October 10, 2002 which was the same date that he was served with the notice to seek the death penalty. ROA. 2018. She denied that this was evidence of malingering. ROA. 2019. She saw this as a coping mechanism for Lindsey. Id. She admitted that he tried to saw [handwritten see] it was Jimmy's fault and to avoid responsibility. Id.

She also stated that Dr. Narayan reported in July 2003 that Lindsey was claiming that Jimmy was in the room and pulled a chair up for him and started a conversation with him, but she denied he was malingering. She also referred to Dr. Lauri Barwick's November 13, 2003 report. ROA. 2021.

Dr. Melikian confirmed that Lindsey was competent to stand trial, knew the difference between right and wrong and could conform his conduct. ROA. 2022.

She admitted that the neurologist, Dr. Absher concluded that he had a normal neurological examination. ROA. 2024.

She stated that she did not have his earlier Department of Corrections records when he was serving time for the earlier assault and battery with intent to kill in 1996. ROA. 2026-27. She stated that Lindsey had acute periods of depression that he recovered from in between. The State inquired whether he was suffering under depression in 1996 when he shot through the windshield of Stafford Wilkins and was convicted of assault and battery with intent to kill. ROA. 2027-28. She stated that she did not have a chronology of his moods for his entire life. ROA. 2028. She stated that she relied upon records of his 1988 suicide attempt. ROA. 2029-30. She stated that she had reviewed various school records and admitted that they were incorrect in that some showed he had quit in the 10th grade according to him yet others showed he had either repeated 8th grade three times or seventh grade twice instead. ROA. 2032. The state pointed out that Lindsey had lied on his application for employment at BMW that he Had graduated from Chapman High School. ROA. 2032-33.

She stated that it might have been helpful if she had been given a copy of the BMW application and

could not state that it would have been helpful to review the entire case file, or to speak with either Dr. Crawford or Dr. Narayan (who had diagnosed Lindsey with malingering) (because she had his report) or Officer Benny Godfrey, or Latresse Smith. ROA. 2037-38. She confirmed that much of what she testified to was based upon her discussion with Lindsey who she denied was malingering. Id.

She denied that depression or his low IQ or his neurological impairment caused him to gun down his wife. ROA 2041-42. She asserted that these should be considered mitigating factors. ROA. 2042. She opined that on September 2002 he was suffering from acute depression. ROA. 2043.

Virginia Lindsey, the Applicant's mother, testified that Marion was 30 years old at that time. ROA. 2044. She stated that she had four sons, but one died in a drowning. Id. She also had a daughter that had been killed in a car accident in 1969 when she was 7 months old. ROA. 2045. She stated that she was never married to Lindsey's father, Leon McDowell, Sr. and raised him by herself. His only male influence was his uncle Steve.

She described living in a two bedroom home with the boys all in one room sharing beds and her in another room. ROA. 2046. She stated that she worked at the Howard Johnson Motel from 8 am to 4 PM. She stated that Uncle Steve was with them when she went to work. ROA. 2046.

She described Lindsey as a very loving and sweet child. Id. However, she stated that Lindsey inhaled kerosene when he was 18 months old. She described that she was doing dishes and was crawling around the wood heater. She described hearing him scream and saw he had poured kerosene all over his face and

down his clothes. She stated that she grabbed him and tried to give him milk and carried him to the rescue squad and he was treated at the hospital for it. ROA. 2047. She stated that one month later, Lindsey was run over by a car driven by her brother - Paul Pilgrim - who accidentally backed up over his head which resulted in scars. She stated that he was treated at the hospital that night and returned home that date. ROA. 2048.

She described her son as slow in school. She stated that he had one fight in junior high school. She stated that her son did not study and did not like to study, but would go to school. ROA. 2048-49. She stated that he had problems with his speech and had to go to speech class. ROA. 2049. She said he repeated the eighth grade, but did not recall if he repeated first grade. Id.

Ms. Lindsey stated that her sons each had different fathers. She said that while the fathers would pick them up, Marion did not have his father visit him which caused him to get upset because he could not go with his brothers.

She said that he moved out when he was 20 and quit school when he was 17. ROA. 2050. She said that he went to work and gave her money to help pay the bills. ROA. 2051. Id.

According to Ms. Lindsey, the Applicant first met Nell Lindsey around 1995. He had been living with a different girlfriend - Stephanie - at that time. She said that Lindsey eventually moved in with Nell and that they had a child July 1995 and a second child in 2002. She described his relationship with Nell as a little arguing, but never saw violence and around her it was good. She described Nell as being like a daughter to her. She said that they would separate and then go

back together several times. She stated that Nell would go to her mother's house during the separations. ROA. 2053-54. She said that Lindsey would stay with friends then. Id.

She stated that Marion loved her sons and saw that they wore the best. He told her that he wanted to live them a father and did not want them to grow up without a father. They were the most important thing in his life. ROA. 2055. She said that he did not want anything to do with his own father.

Ms. Lindsey stated that she had four brothers (one of whom is dead) and three sisters. ROA. 2056. She stated that her sister Bessie Smith had attempted suicide. ROA. 2056. She stated that she had been treated. Id.

She said that Marion was 15 and was hospitalized for attempted suicide. She said he stayed in the hospital for four days and was afraid of the man in his room because he looked like Charles Manson. ROA. 2057.

She said that while he was in school she never had any teacher call and tell her that he was failing.

At the time of the incident, she thought that they had been separated for a few months. She said that she had attempted to see her grandchildren, but neither she nor Marion was allowed to see them. ROA 2057. She said this was for two months before the incident. She said that this made Lindsey upset because his kids had always been with him. She said that she tried calling Nell and learned the phone was blocked 4 days before the incident. ROA 2058. She said that this had an effect on him because all he wanted was to see his kids. Id. He told her that if he could not get his family back that he could not live any longer. She said that last time she saw Lindsey was three days

before the incident. She noted that he had lost weight and appeared worried and upset and was very depressed. ROA. 2059.

She stated that she heard about the incident at 8:15 on September 18, 2002. She stated that "'Marion is my son. I love him very much. And I ask mercy for my son not to be sentenced to death. I know that somebody else's child's life was took. But l don't want my child sentenced to death." ROA. 2060.

On cross-examination, Solicitor Gowdy pointed out that Rod Tullis, a lawyer, represented her son. Solicitor Gowdy further inquired whether her son had contacted legal aid. She stated that she did not know whether or not her son had taken efforts to talk to a lawyer about getting a court order to be able to see the children he wanted to see. ROA 2061.

Bill Burton testified that he knew Lindsey and ran a chemical company for a German firm. ROA. 2061. He said he met Lindsey while he was a lifeguard. Lindsey was 6-7 at the time. He said the kids would come to the pool. He said he taught Lindsey how to swim.

Burton described the fact that Lindsey lived in a pretty rough situation. He stated that he would take them to Spartanburg Braves/Phillies baseball games and then to Burger King. On occasion, he would take them to his house to go fishing. He said that he visited Lindsey's home and described it a "desperate poverty." ROA. 2063, I. 21. He said that house was about 1000 square feet with 8 people living in it. Id. He said all the children slept in a single bed. He said that house had since been condemned and was torn down. ROA. 2064.

Burton described Lindsey as a kid looking for attention and an adult to look up to. He said he never

saw violence in Lindsey from either him or his brothers. He said he knew him for 13 years. He said they came over to his house to fish over 20 times and would always call his mother and seek permission. ROA. 2065. He described Lindsey as "the picture of politeness" toward Burton's parents. ROA. 2065.

Burton stated that after he graduated from college, he became in the position to offer Lindsey a job. Lindsey then went to work for his company. ROA. 2064. He stated that Lindsey worked for his company for about a year. ROA. 2066.

He stated that Lindsey: "grew up in abject poverty without the benefits of parents like normal families. I knew him until he was 20 years old approximately. I never saw the kind of behavior or violent behavior of any sort during that period." ROA. 2067.

On cross-examination by Solicitor Gowdy, Burton stated that he had not learned of the incident when Lindsey at age 20 had shot Stafford Wilkins through the windshield with a hand gun until he came to trial. ROA. 2069.

Leon McDowell, Marion's father, declared he was not a father to Marion. ROA. 2070-71. He stated that he was married to someone else when Marion was born. He said he was never there with him to go to a baseball game or go to a movie. However, he said he gave them money for clothes and declared if not executed "maybe he can benefit his kids somehow". ROA. 2072

Chris Wilkins, a friend like a brother to Marion, hung out together since 13 and lived together sometimes with Marion and Nell, never saw Marion hit Nell, but saw them argue and believed that Marion loved her and asked for mercy. ROA. 2073-74. He stated that saw Lindsey with his sons and that he was

a loving father and proud of his boys. He said he was aware that the Lindseys would separate during their marriage. However, he never saw Lindsey hit Nell. He believed that he loved her.

Wilkins stated that he would hear Lindsey mumble to himself and appear to be chewing his tongue. ROA 2075. He stated that Lindsey tried hard to provide for his family. He never saw Lindsey hurt anyone on purpose. He asked the jury to take into consideration the kind of father he was and have mercy on him. He felt what happened was a big tragedy for everyone, but that Lindsey was a good person. ROA. 2076.

On cross-examination by Deputy Solicitor Willingham, he confirmed that he would have helped him if he wanted to have custody of his kids and get a lawyer. ROA. 2076-77. He admitted that he was aware of the incident when Lindsey shot through the windshield at Stafford Wilkins. ROA. 2077. However, he was not aware of the 2001 incident at Applebee's when he cold-cocked Nell in the parking lot, but has heard of it. ROA. 2077.

Steven Pilgrim, Lindsey's nephew testified that he lived with him for 7 years. ROA. 2078-79. He stated that he was present at car accident with Lindsey as a child and personally took him to Inman Emergency. ROA. 2079. He said that they took him to hospital and stayed with him. Id. He said that he also knew about when Marion inhaled kerosene. ROA. 2080-81. He stated that he suffered from high blood pressure and has a daughter that suffers from panic attacks. ROA. 2080.

Bessie Smith, Marion's aunt, testified that she lived at one time in house with Marion. ROA. 2081. She described a kitten being thrown by her brother into the heater. She said that Marion was hurt by this

action. ROA 2081. She also testified that she had attempted suicide. ROA. 2082.

The Applicant waived his right to testify in the penalty phase of the trial. ROA. 2084-2089.

The State's Case Against Lindsey

Any understanding of the facts of the case and the propriety of the harshest punishment must begin with a review of State Exhibit 21, the 911 tape, made on September 18, 2002. Within that tape reveals that this act was more than a single victim incident, although only one victim died. Within that tape reveals unique violence and blatant disregard of societal laws where Lindsey, ordered to avoid contact with the victim due to his prior criminal actions, tracks down the victim and kills the victim in cold blood who[handwritten i]le she is seeking respite at the Inman S.C. Police Station, in front of law enforcement.

State Exhibit 21, the tape of the 911 telephone call from Ruby Nell Lindsey to the Dispatcher revealed the following:

Dispatch: Spartanburg 911, what is your emergency?

Lindsey: Yes, I just got off work and my sister was going to drop me off and my husband, they signed a warrant on him last night and told him to stay away from me, now he's calling us, and I'm in Inman City. I'm on my way to the police station because he's behind us following us. He's coming down Main Street.

Dispatch: Okay, so you're ma'am! Wait a minute, don't hang up on me!

Lindsey: I'm not gonna hang up on you.

Dispatch: And he's "wanted" you said?

Lindsey: They already picked him up and the judge told him to stay away from me and here he is behind us and now following us.

Dispatch: What's your name?

Lindsey: Uh, Ruby Lindsey.

Dispatch: What's your phone number?

Lindsey: What's my phone number?

Dispatch: Yes ma'am, your cell phone number.

Lindsey: 978-xxxx. He's coming down right beside us.

Dispatch: What's his name?

Lindsey: Marion Lindsey.

Dispatch: Marion Lindsey?

Lindsey: Yep.

Dispatch: What kind of car are you in?

Lindsey: I'm in a gray car; I'm pulling into Inman City Police Station right now.

Dispatch: What kind of car is the male in?

Lindsey: He's in a Nissan Sentra.

Dispatch: What color?

Lindsey: Uh, gold.

Dispatch: Did he pull in behind you?

Lindsey: Yeah he pulled in behind us.

Lindsey: I'm not getting out!

(Children screaming in the background, conversation inaudible)

Dispatch: Hello?

(Child/Children crying in the background)

Dispatch Hello? Hello? Hello?

State Exhibit 21, 21(a), (tape, enhanced CD).

The evidence of this horrific scene at the sanctuary of the police station parking lot further reveals that the driver, Celeste Nesbitt, after driving them into the parking lot exited the vehicle, and tried to get the decedent to leave but she was talking on the telephone to 911. Unsuccessful, Nesbitt saw the Appellant pull into the lot, jump from his car, and run toward the back of the car. [Earlier, he had stopped them and Celeste told him, when he was unable to see through the tinted windows, that her daughters were in the back seat, but denied that there was anyone else there when he declared that somebody else is back there. Tr. p. 1526.] Celeste saw Lindsey pull out a gun and stick it to the rear passenger window and fire into the car. Celeste then crawled into the nearby police car for her own safety. After the shooting she was advised that they (the police) had got him and she was confronted with her oldest daughter screaming that Nell was dead. Tr. p. 1536.

Inman officer Godfrey described hearing about a "rolling domestic dispute" from the dispatcher. He stated that he saw the cars pull into the parking lot and saw Nesbitt jump out of the car and come running toward him and state that "he's going to get her . . .". He then saw the Appellant with a handgun point at the back glass. When Godfrey reached for his gun and hollered "don't," Lindsey ignored the demand and fired two shots into the back glass. Tr. p. 1567.

At that point, Godfrey took cover. He then saw two more flashes from Lindsey's weapon. Seconds later, Officer Godfrey came out and Lindsey pointed the firearm at him. Godfrey reacted and fired four times at Lindsey. ROA. 1567, 11. 19-24, p. 1575, 1.19-p. 1576,

1.8. Lindsey was hit by him according to Godfrey and went down.[3]

Ruby Nell Lindsey suffered four separate gunshot wounds. Three bullets entered and remained in her head. The first was to the back of the head, 3 1/4 inches from the top and 3/4 of an inch to the left of the midline. The second was to the left temporal region. The third was near the nape of the neck. The fourth wound grazed the lower postural neck midline. ROA 1654-1657.

In processing the scene, evidence revealed that shots went through the backside of the back window from the rear drivers side and also from the driver's side rear window where Mrs. Lindsey was seated. ROA. 1588-1590. As thoroughly set out in the prior arguments, it was by mere luck that the children seated in the back of the car were not killed or injured beyond the cuts and emotional trauma they received.

As Applicant recognizes the events evolved out of a domestic situation. The evidence presented revealed that Marion Lindsey had beaten his wife previously. ROA. 1775-1781, 1823. [Penalty Phase Testimony of Celeste Nesbitt, Sharon Smith] The victim had made calls contacting lawyers concerning a divorce. ROA 1782. The Applicant referred to his wife as "bitch" and threatened to kill her if "I catch you doing anything." ROA. 1782. Testimony was received about an assault by Applicant on his wife at Applebee's Restaurant in December 2001 which resulted in a criminal domestic violence warrant. ROA 1918-1921, 1924-1926. Evidence also revealed that the Appellant was involved

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[3] Lindsey sated to the paramedics that he had shot himself in the head. Tr. p. 1674. Lindsey sustained wounds to his hip and legs. ROA p. 1669.

in the sale and distribution of crack cocaine. ROA. 1830-1834, 1855-56, 1863-64, 1875 (11.41 grams of crack cocaine in the September 14, 2000 incident).

Importantly, Magistrate Sarah Simmons of Spartanburg County testified about the September 17, 2002 arraignment of the Applicant on a criminal domestic violence charge the night before the victim's murder. ROA. 1931. She stated that she directed Lindsey that "there was to be no contact with the victim who is Nell Lindsey. ROA. 1933-1936.

Concerning other violent incidents in Lindsey's past, there was evidence presented that on February 20, 1994, Lindsey blocked the vehicle being driven by Stafford Wilkins with Jessica Cannon as a passenger in the middle of the road. Lindsey then got out of his car and shot twice through his windshield, striking Wilkins in the arm. ROA. 1943, 1950-51. Lindsey was convicted of assault and battery with intent to kill after a no contest plea on December 14, 1996 and received a two year sentence, suspended to one year and one year probation with restitution. ROA. 1953.

At the sentencing proceeding for this case, victim impact evidence, in addition to the testimony concerning the effect of the trauma on Kiera, include testimony from Stanley Staggs, the victim's father. ROA Tr. p. 1954-1965. This testimony concerned the impact on his life and her children's lives. ROA Tr. p. 1961-1965.

The Prison Life Evidence at Trial

In the penalty phase, the State presented the testimony of James Sligh, Division Director of Classification and Records at the Department of Corrections. ROA 1908. In his testimony, he stated that a person sentenced to life imprisonment would initially be housed at a Level 3 high security institution. Id. He

stated the cell would be 75 by 100 with two inmates in the cell. He stated that they would have access to the yard and have contact with other individuals. He stated that there could be job assignments or educational classes in a classroom setting. ROA 1909-1910. There could also have contact visitation up to 8 visits a month. ROA. 1912.

On cross-examination from counsel Bartosh, Sligh indicated that there were 23,500 inmates. He guessed that about 1000 were serving life sentences. He described "patrol controlled movement" from cafeteria to the various assignments. He clarified that there was no milling around on the yard. ROA. 1914. He stated that it was based upon how the particular inmate is classified to determine his prison setting. ROA. 1916. This will initially be done at the Reception and Evaluation Center. ROA 1916. There will be testing then for academic level, mental health issues and security level. ROA. 1917.

No questions were asked concerning Lindsey adaptability to prison by either side at trial.

The picture that the prosecution and evidence revealed was harsh. The picture portrayed a violent tempered criminal involved in the drug trade. It also revealed a person who flaunted his ability to disobey authority, as well as a person with a past history for using a handgun and shooting through windshields. It painted a picture of the type of person that Marion Lindsey is – a violent person with a prior criminal history whose correctional rehabilitation had no effect in curbing his violent and unlawful ways, as was corroborated by his actions in this case.

The Defense's Proposed Witness List

Prior to trial, the defense, through appointed counsel Michael Bartosh made written notice of potential witnesses in the case. Particularly, counsel identified the following in his written notice:

LAY WITNESSES
Bill Burton*
Pat Burton
Beth Gregg
Alex Lindsey
Trey Lindsey
Virginia Lindsey*
Amy Osbey
Sharon Pilgrim
Steven Pilgrim*
Timothy Sims
Bessie Smith*
Kennia Wilkins
Kristopher Wilkins*

EXPERT WITNESSES
John Absher, Neurologist
Tora L. Brawley, M.D, USC School of Medicine
Margaret Melikian, D.O., MUSC Institute of Psychiatry*
Lenora Topp, Mitigation
Rod Tullis, Attorney at Law[4]
J. Benjamin Stevens, Attorney at Law

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[4] Rod Tullis was an attorney in Spartanburg. On September 19, 2002, Tullis wrote Sheriff Coffey and hand delivered a letter stating that he was Lindsey's attorney and that "Lindsey is asserting his Fifth Amendment right to remain silent." He further wrote that this will not be waived by Lindsey in the absence of his counsel. *Letter, Tullis to Sheriff Coffey, September 19, 2002.*

Counsel Bartosh also indicated at that time that additional witnesses may be called in his written notice. [Those marked with * testified].

ANALYSIS OF THE SPECIFICATIONS

I. INEFFECTIVE ASSISTANCE FEIGNING MENTAL ILLNESS

A. Counsel failed to prepare Lindsey for pretrial evaluation.

(1) inappropriately allowed Lindsey to take advice of jail house lawyer to feign Mental illness.

(2) Failed to spend sufficient time with Lindsey and thereby failed to learn intention to feign mental illness and dangers of course.

MEMO, p.43.

In his first allegation of ineffective assistance of counsel, he contends that his counsel failed to properly prepare him for his pretrial evaluation because Lindsey had allegedly followed the advice of a fellow jail detainee and feigned mental illness after his arrest by creating an imaginary person to try to dupe his counsel and the mental health evaluators.

In the post-hearing memorandum, the Applicant now contends that his counsel failed to maintain an adequate relationship with Lindsey which allowed the faked imaginary friend "Jimmy." Petitioner's Post-Hearing memorandum, p. 43-46. The Applicant now contends that the Applicant's attempt to feign mental illness suggests that his counsel failed to satisfy their duty "to consult with his client and to advise his client of the various aspects of his case", citing S.C.A.C.R. Rule 407, Rules of Professional Conduct, Rule. 1.4 and A.B.A. Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases

(2003), Guideline 10.5. He further contends within this section that capital counsel had a duty to be present when Lindsey was interviewed by the State mental health examiner, Dr. Pratap Narayan to insure that Lindsey understood the significance of statements made and potential legal challenges. Further, he now contends that the result of the proceeding would have been different if the relationship had been better with counsel.

This Court finds the Applicant has failed to prove either deficient performance or 6th Amendment prejudice. A defendant cannot be permitted to manufacture a winning IAC claim by sabotaging his own defense, or else every defendant clever enough to thwart her own attorneys would be able to overturn their sentence on appeal. Cases confirm that a client who interferes with her attorney's attempts to present mitigating evidence cannot then claim prejudice based on the attorney's failure to present that evidence. See *Gardner v. Ozmint*, 511 F.3d 420, 427 (4th Cir.2007) (relying on client's non-cooperation when rejecting ineffective assistance claim based on attorney's failure to investigate mitigation evidence); *Fautenberry v. Mitchell*, 515 F.3d 614, 624 (6th Cir.2008) (counsel is not ineffective for failing to persuade client to cooperate); *Lorraine v Coyle*, (6th Cir. 2002) ("Trial counsel cannot be faulted for their client's lack of cooperation."); *Taylor v. Horn* 504 F.3d 416, 454-56 (3d Cir.2007) (relying on client's refusal to allow attorney to call witnesses in rejecting ineffective assistance claim); *Roberts v Dretke* 356 F.3d 632, 638 (5th Cir.2004) (holding that "when a defendant blocks his attorney's & efforts to defend him, including forbidding his attorney from interviewing his family members for purposes of soliciting their testimony as mitigating evidence during the punishment phase of the

trial, he cannot later claim ineffective assistance of counsel."); *Bryan v. Mullin*, 335 F.3d 1207, 1223-24 (10th Cir.2003) (en banc) (counsel not ineffective for failing to present mental health evidence when client told counsel not to present any mental health evidence).

Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), does not change this result. *Rompilla* held that even when the defendant and the defendant's family tell counsel that no mitigating evidence exists, counsel must nevertheless make a reasonable investigation of evidence that counsel expects the prosecution to rely on at trial. *Id.* at 377, 125 S.Ct. 2456. That is not the situation here. Cf. *Keith v. Mitchell*, 455 F.3d 662, 671 (6th Cir.2006) (observing that *Rompilla* held only that "counsel must investigate evidence it knows the state will use against defendant"): *Owens v. Guida*, 549 F.3d 399, 412-413 (6th Cir. 2008). Here, defense counsel did investigate the "malingering issue" and addressed it in the penalty phase with Dr. Melikian - although the state did not use such evidence of malingering in its case in chief. He has failed in his burden of proof.

The Post-Conviction Testimony of Dr, Melikian

Dr. Margaret Melikian, the forensic psychiatrist retained by the defense prior to trial in 2004, testified that she spent 7 hours and 45 minutes in preparation for her earlier testimony. PCR Tr. 598, 11.17-19. Of that time, 2½ hours were actually spent with Lindsey on May 4, 2004. Dr. Melikian stated that she was concerned when she was retained whether she would be ready for trial due to her own lack of experience at the

time.[5] PCR Tr. 600. She stated that she accepted the case thinking that if all the mitigation investigation was done, she could be prepared. However, in hindsight, she now declared due to her own lack of experience, she did not understand how much was involved in gathering information, and that the mitigation had barely begun and she now felt that there was no way they could be prepared for trial.[6]

Dr. Melikian indicated that she had received records from defense counsel on April 28, 2004 and made a call on April 28 to get the mental health records from William S. Hall. PCR Tr. 601. Dr. Melikian confirmed that she had requested an opinion letter from Dr. Tora Brawley, a forensic psychologist, who had seen Lindsey. Dr. Melikian stated that she discussed Dr. Brawley's findings with her on April 29. PCR Tr. 601. She later requested a written report from Dr. Brawley on May 18. PCR Tr. 601.

Dr. Melikian stated she requested the written report from Dr. Brawley after she was advised that she would be the only one testifying and would put in Dr. Brawley's findings. Dr. Melikian received the written report on May 20 after the trial had already started on May 17. PCR Tr. 602.

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[5] Dr. Melikian stated this was either her first or second trial as a defense expert, PCR Tr. 599, 11.14-16. She stated that she was subsequently involved in 15-20 Cases. PCR Tr. 600, 1.22.

[6] Counsel for Applicant questioned her about an April 30.2004(Friday) note in counsel's record that an amount of documents had been sent to the witness on Monday and Tuesday and more was being sent that date. The note revealed that Dr. Melikian had stated "too much" and that she can't be ready, PCR Tr. 599. Notations included a written remark by Michael Bartosh that Dr. Melikian knew the time constraints before she got involved and said she said would be OK. PCR Tr. 599-600.

Dr. Melikian stated that "'in her limited evaluation", Lindsey did not seem to have a "mental illness defense." PCR Tr. 602, 11.17-20. She said she went right to mitigation, since he appeared to be competent. PCR Tr. 602, 11.17-23.

She stated that there was a difference between what she received in 2004 and the material she received in preparation for the PCR hearing which was 6 or 7 times as much. PCR Tr. 603. She stated she had suicide notes, in bits and pieces and did not have a "complete" file, mental health records, medical records, Department of Corrections' records, or the complete incident reports. PCR Tr. 603, 11.12-23. She stated that she was not given all the information that the 2004 defense team had acquired. PCR Tr. 603, 11.21-23. [Her original file was 3 to 4 inches thick]. PCR Tr. 603.

Dr. Melikian stated the additional material she reviewed would have changed her diagnosis because she did not understand the level of depression he was showing at the time of the evaluation and that way she looked at his cognition in his low testing results. PCR Tr. 604. She stated this was due to her lack of a family history and did not spend enough time with Lindsey to realize that he was not functioning at his best level.

Dr. Melikian opined that Lindsey does not show much emotion or depression. She declared again that in her one meeting with him, Lindsey was functioning pretty well. PCR Tr. 605. However, in her more recent meetings, she felt that she had misjudged him in 2004 and would have changed her testimony.

Particularly, Dr. Melikian stated that she would have explained the severity of his depression. She had already given that diagnosis in 2004, but saw rather

than being depressed and upset, but rarely suicidal to genuinely suicidal. She said he had lost a significant amount of weight with decreased energy. She felt he was not functioning well at all. PCR Tr. 605.

Dr. Melikian found his test scores at Hall Institute and with Dr. Brawley showed his level of cognitive ability decreases quite a bit with depression. She said that in 2004, Lindsey fit the overall picture because she was aware of his problems in school, his speech impediment and low scores. However, in 2004, with the other things he was able to do, she felt the "borderline intellectual functioning" diagnosis that others had given was probably not correct. In hindsight, she now thinks based upon further record review and I.Q. scores that it was likely due to his depression. PCR Tr. 606.

Dr. Melikian stated she had general information in 2004 about the CDV charges and the assault and battery with intent to kill charges. However, she claimed she did not know that he had not been convicted of most of the CDV and the family dynamics of how often the police were called and the severity of the incidents. In addition, she asserted that the assault and battery charge "appeared to have a large element of self-defense in that" which resulted only in a one year sentence "which would be unusual for a crime that severe." PCR Tr. 607. In addition, she claimed that she had not been aware that he had tried to turn himself in 4 times by going to the police. PCR Tr. 607, 11.1-6.

Dr. Melikian claimed this paints a different picture of Lindsey of rather than just showing that he had been charged and convicted of assault and battery with multiple CDV charges to "a more accurate picture of who this person is as opposed to just a list of

he's bad in school, his IQ is low, and he's had these charges in the past." PCR Tr. 607, 11.7-13.

In hindsight, Dr. Melikian stated that she did not feel that she was prepared to testify in 2004. She stated she was not aware of a suicide note, that she had called Bartosh's office and told them she was not prepared, and that she had set up a conference call with Judge Few on May 12 where she told him about not being ready to testify. PCR Tr. 607-08. Dr. Melikian testified that she had originally expected to testify on Monday, May 24, with preparation the day before, but was contacted Saturday night and told to be ready Sunday morning. PCR Tr. 608. She stated she spent 30 minutes on the phone with Bartosh Saturday night to prepare.

She described contacting Judge Few in a conference call on May 12 to tell him that she could not be ready for trial. PCR Tr. 608-10.

Dr. Melikian stated that she did not agree with the 2003 report from the State Hospital on Lindsey's competency. She stated they had diagnosed Lindsey with malingering and borderline intellectual functioning. Their reason for malingering was based on atypical symptoms, but by the objective testing, she felt he did not meet the criteria for malingering. She also noted that Dr. Brawley tested for malingering and that Lindsey did not malinger on those tests. PCR Tr. 610.

Dr. Melikian asserted her disagreement with the DMH diagnosis for borderline intellectual functioning. She found that he had higher IQ scores with Dr. Brawley and felt those scores were not accurate because he appeared to be functioning at a higher level, but now knows that he was functioning at a lower level due to his likely depression. PCR Tr. 611. She

thought he functioned at a higher level than borderline intellectual functioning [70-80 I.Q.] because he appeared a little better than that and his history revealed he had been able to hold some jobs and do some things at a higher level. PCR Tr. 611, 11.8-17.

Dr. Melikian's PCR Testimony About Jimmy - Direct Examination

Dr. Melikian stated that Hall Report that be was malingering was based upon atypical symptoms and his discussions of his friend "Jimmy." PCR Tr. 16-20. Given that and his test scores that showed he was not malingering, Dr. Melikian stated she disagreed with the diagnosis. Id. [This was consistent with her original trial testimony. ROA. 2005-2008].

Since the trial, Dr. Melikian said she had learned more information about what Lindsey did at the William S. Hall evaluation, that counsel Brannon described Lindsey talking to a hallucinatory person, Jimmy, who was in the room and pulling out chairs.[7] Dr. Melikian stated when she saw Lindsey in 2004 (and Dr. Brawley), Lindsey described Jimmy as an imaginary friend that he knew was not psychotic experience. PCR Tr. 613, 11.3-8. She felt that given his level of intelligence it was not far out to not believe that and

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[7] See *Testimony of Doug Brannon,* PCR Tr. 34-36 where Brannon describes meeting at Detention Center, Lindsey not letting him sit in Jimmy's chair and the continued presence of the empty chair at their meetings. See also, PCR Tr. 613, 11.13-25. See also *Testimony of Mitigation Investigator Lenora Topp* concerning April 2004 interview with Lindsey concerning "Jimmy". PCR 140 (Lindsey tell Topp that Jimmy can to him from God in his early teens). Also, Trial Evidence that "Jimmy" first discussed by Petitioner on date notice to seek death penalty served. ROA 136-137, 2017-2019 (no mention of Jimmy in reports until October 10, 2002, the same date that the notice of intent to seek the death penalty).

make a malingering diagnosis with the objective testimony that he was not.

Although Brannon had described his knowledge of Jimmy with Lindsey, Dr. Melikian testified that neither Brannon nor Bartosh told her about the particular experiences they had with Lindsey and Jimmy. Dr. Melikian stated she would have wanted to know this before she reviewed the Hall report. She admitted she questioned Lindsey about it on May 4 and that Lindsey described him as an imaginary friend, but not in a psychotic way, but as a way for someone with a low intelligence to cope. PCR Tr. 614. Lindsey told Dr. Brawley the same thing. "He did tell me that he had done that with Dr. Narayan and pulled a chair out and behaved in that manner," which she asserted because it was a hostile interview with Dr. Narayan. PCR Tr. 614-15. She recalled during the 2004 trial, he had behaved in the trial in that manner. PCR Tr. 615.

Dr. Melikian felt if she had known what he had done with his lawyers it would have been helpful. She stated in records she had reviewed since the trial, Lindsey was discussing Jimmy while he was incarcerated and made statements that Jimmy had taken over his body or been responsible for the shooting. If she had that information, she felt that "Jimmy" would have been more of a focus of her May 4 evaluation in the limited time that she had as a "mental health defense." PCR Tr. 615, 11. 6-16.

Concerning the jail incident where Lindsey hit his head and former counsel Tullis told them to keep an eye on his client, Dr. Melikian said she never saw pictures in the records she reviewed, although Lindsey told her about it. PCR Tr. 615. Since there was no corroboration provided to her, she did not give it much weight.

She stated that the history she received came from Lindsey, although she met with investigator Lenora Topp on the day of the trial and 30 minutes on the telephone with Bartosh the night before. PCR Tr. 616.

Dr. Melikian stated that Dr. Pamela Crawford was present and Melikian knew she was at court to critique her for the State. However, Dr. Melikian stated she already felt unprepared and did not want to speak with Dr. Crawford that day. She said she needed to continue to review records and reports, although she was not aware that Dr. Crawford had seen Lindsey briefly with Karen Quimby. PCR Tr. 617.

Dr. Melikian said since the trial she has met with Lindsey 3 times. She felt that she had previously misjudged his cognitive ability in the past. Particularly, she found that he was not depressed, got along with guards and he had contact visits. In reaction to questions about his adaptability in prison, Dr. Melikian described a visit when Lindsey was left unshackled in violation of SCDC policy and the resulting confusion over his shackling. However, she asserted that no one seemed concerned about her safety and that he seemed to be cordial to the guards. PCR Tr. 618-19.

Dr. Melikian, in a proffer after objection, opined this was the least prepared with the least amount of time, since she had been a death penalty case. She stated since then she had calls under similar time constraints and refused to participate. She said she had been bothered by the case since that date and wondered if she should have refused to testify since she was so unprepared. PCR Tr. 620.

Cross-Examination of Dr. Melikian

Dr. Melikian testified that her clinical diagnosis in 2004 had changed since because she did not understand the severity of his depression. PCR Tr. 621. However, she admitted her conclusions of mental illness under Axis I, II, III, IV would be the same thing. Id. She admitted that she testified he was depressed in 2004, but she could not elaborate in full the degree. She pointed out that she was aware of suicide notes, but had not seen them. Similarly, she was not aware of the telephone call to Rod Tullis, which would have been useful to understand his mental state close to the time of the offense. PCR Tr. 621-22.

Dr. Melikian confirmed that she had prior to her trial testimony his medical records, his teenage psychiatric hospitalization records, and his infant head injury records, although she now claimed they may have been incomplete. She admitted that as to neurological records in 2004, she had Dr. Brawley's letter and had spoken with the neurologist, Dr. Abshur. PCR Tr. 623. She stated she wanted Lindsey to see a behavioral neurologist, but he was seen by a clinical general neurologist who would not be specialized in behavior. Id. Also, she said in 2004 she had the school records, but claimed she did not have all of them. However, Dr. Melikian admitted she received 18 pages of school records faxed to her on May 4, 2004. PCR Tr. 624.

On cross, she admitted that during the trial, she claimed the only additional records she wanted were SCDC records. PCR Tr. 624-25. (See ROA 2031)

Further, in addition to Dr. Brawley's report, "Dr. Melikian confirmed that her conversation with Dr. Brawley included actual results of the other testing she did, that Lindsey had problems with attention and

concentration. PCR Tr. 626-27. She felt that he had been tested on the RAY Complex Figure Test and tested borderline, rather than the RAY malingering test. PCR Tr. 627. She said Lindsey had been tested for malingering on the SIRS tests and the Test of Malingered Memory (TOMM). PCR Tr. 627.

The Revelation of Feigning Jimmy During the Cross-Examination

Dr. Melikian acknowledged that in 2004 she sought to address the existence of "Jimmy." However, she did not know until the trial that the day "Jimmy" was reported was the day he was served the death notice. As Dr. Melikian stated on cross-examination:

> "One of the reasons that that information would of been so important to me to have is that issue of Jimmy I could have dealt with before trial. As a matter of fact, the first time I met with Mr. Lindsey in preparation, in preparation for this hearing, one of the first things he did was apologize for Jimmy. **When I look back and, you know, now with hindsight, I can see that Mr. Lindsey started out malingering Jimmy. He was told to do this by some other inmates is the information he's given me since, and he was feigning these symptoms became they told him to act crazy."**

PCR Tr. 629, 11. 11-22 (emphasis added). She stated that when she saw him two years later, he did not want to continue this and minimizing it which made it more believable. Dr. Melikian speculated that if she had spent more time with him in 2004 as opposed to meeting him once, "I probably would have gotten that information before trial and would have been able to

give much more effective testimony." PCR Tr. 630, 11.4-7, 12-16.

Dr. Melikian noted that she wished that she had the information in 2004 that he malingered mental illness at the State Hospital evaluation and with his lawyers because he thought it was in his best interest. PCR Tr. 630. She felt she could have explained it with his level of depression and cognitive ability. Dr. Melikian stated in 2004 that Lindsey had a passive suicidal ideation based upon his expressions that he wanted the death penalty. She stated that was suicidal regardless of why he wanted to die. PCR Tr. 631, 11.9-17.

Dr. Melikian admitted that in 2004 she testified that she would not have made a diagnosis of borderline intellectual functioning, that he did have chronic neurological problems, and that she was aware of the existence of the suicide notes from Lindsey. She confirmed that she had learned in 2004 that in 2001, at 15 years old, Lindsey had a gun and planned suicide but his cousin talked him out of it. PCR Tr. 632. She also recalled that he stated that he wanted to drive off a cliff, but was worried he wouldn't die. She stated that she learned from Lindsey about his weight loss prior to trial.

Although this was consistent with the information she testified about in 2004, Dr. Melikian opined it was less effective to state that Lindsey told her about his weight loss than records show be weighed 200 at one point and then was down to 180 or 160. However, she admitted the State never challenged the statement concerning weight loss. PCR Tr. 633.

She stated that the fact it was on T.V. did not concern her because she had forgotten about the cameras when she testified, but felt she was sleep deprived and

was more worried about her ethical duty to Mr. Lindsey due to her lack of preparation. PCR Tr. 634. Although she was not confident about her opinion when she was cross-examined at trial, she did not feel it was destroyed. PCR Tr. 634.

Dr. Melikian admitted that she met with investigator Lenora Topp, but could not recall the specifics of the information she was provided about Lindsey's family and Topp's interview with Lindsey. PCR Tr. 635. She stated that prior to the trial date she had only spent 2½ hours on record review, and then looked at records on that date, but could not recall whether she looked at the St. Luke records provided to her on April 30. However, she admitted she felt he met the diagnostic criteria for "major depression" whether she looked at those earlier records and still feel he does after reviewing more records given to her since the trial. PCR Tr. 635-36.

On re-direct, Dr. Melikian felt that she was not made privy to information from Brannon, Quimby and Topp concerning their interviews prior to the trial. She also claimed that she did not know much about Lindsey's family history. PCR Tr. 636. She felt this affected her credibility, although her diagnosis has not changed. PCR Tr. 637.

Dr. Melikian admitted that she had some family history, information about his earlier crime and a N.C.I.C. report. She stated her notes reflected that they had discussed his education and schools, the first time he thought about suicide and what was in his mind, and his problems in his interview with Dr. Narayan. PCR Tr. 638. She admitted that he had told her about trying to turn himself in four times concerning Standford Wilkins. She admitted that none of this was new information, but she asserted that she did not

have another opportunity to see him again, go through his history, review the record again, and corroborate what he told her even though most of it turned out to be true. PCR Tr. 639.

She stated that she would not - in the future - only see a death penalty inmate one time again. She felt repeated evaluations would build a support. She admitted that from May 4 (her meeting with Lindsey) until she testified on May 23, she was not denied access to Lindsey. PCR Tr. 640. She admitted she made no written report in 2004 and the only records were her notes introduced as Respondent's Exhibit 14. PCR Tr. 640.

PCR TESTIMONY of Dr. TORA BRAWLEY

Dr. Tora Brawley, a clinical psychologist with a specialty in neuropsychology, testified that she became involved in Applicant's defense on April 12, 2002 and advised of a May 17, 2002 trial date by Mike Bartosh. PCR Tr. 72. She became involved after a cancellation and met with Lindsey on April 27. Prior to the interview, she was not provided any records but learned certain information from counsel Bartosh. PCR Tr. 72. Particularly, she learned that it was a death penalty trial and Lindsey had a history of a head trauma, a gunshot wound, and a car accident. Bartosh also advised her that there was an issue of malingering. PCR Tr. 72.

Dr. Brawley stated she conducted an extended clinical interview and battery of neuropsychological tests. She also consulted with a neurologist, Dr. Abshur, after her testing. She summarized her findings as scattered neurological deficits and a recommendation that they obtain medical and school records and speak with collateral sources to investigate it. PCR Tr. 73.

Dr. Brawley stated Lindsey reported to her that he had fallen on steps, hit his head four to five times, and had stitches. He further told her he had been run over by a car at age two, blacked out, and was in a hospital for two weeks. PCR Tr. 74. He reported to her he had surgery on his face. According to Lindsey, he had two motorcycle accidents: in 1993 when he was not wearing a helmet and 1998 when he was thrown off and became dazed. PCR Tr. 74. She was also told about the 2002 self-inflicted gunshot wound and a history of migraine headaches.

As to his educational history, he reported to her that he quit school in the tenth grade and had to repeat the first and seventh grades. In addition, he reported to having speech therapy and learning classes with a problem in spelling.

As to psychiatric history, she stated that Lindsey reported to her that he had suicide attempts: age 12 with an overdose, a 2001 attempt, another in September 2002, and the September gunshot to his head. PCR Tr. 75.

Dr. Brawley noted that a history of depression could impact on test performance by slowing and a general decrease in test performance. In an April 27, 2002 I.Q. test, Lindsey had a Full Scale IQ of 85, verbal of 80 and performance of [92]. PCR Tr. 75. 9sic in Transcript of 82). [Applicant's Exhibit 11]

Dr. Brawley, in her 2004 written report to Dr. Melikian, listed a number of impairments, including severely impaired speed of mental tracking, below average accuracy of mental tracking, severely impaired verbal fluency, severely impaired confrontation at naming (ability to name objects), below average manual dexterity and speed, below average immediate

verbal memory, delayed visual memory, severely impaired verbal learning ability, impaired ability to copy and recall a complex figure. PCR Tr. 76-78. She opined that he fell below the average range of scoring. PCR Tr. 75.

Dr. Brawley could not give an opinion on what caused the brain dysfunction. She noted there were multiple possibilities from the damage to the brain. PCR Tr. 78. She pointed out that she lacked enough information to determine whether it was consistent with where it should be or was due to head injuries. PCR Tr. 78. She pointed out that she did not have medical or school records in 2004. PCR Tr. 78.

Dr. Brawley on Malingering

Concerning the question of malingering, she stated she considered the issue in 2004. PCR Tr. 79. She had learned from counsel Bartosh that Lindsey had an imaginary friend and the State doctors had determined he was malingering. She stated she did malingering tests for cognitive, for memory, and for psychiatric symptoms. She said she gave the Test for Memory Malingering (TOMM) and concluded he was within normal limits. She also gave the Structured Interview of Reported Symptoms (SIRS) test for malingering os psychiatric symptoms. PCR Tr. 80. He again tested within normal limits then. PCR Tr. 81. She determined during her April 2004 interview that there was no evidence of malingering in the testing and reported it to Dr. Melikian and counsel Bartosh. PCR Tr. 81. Dr. Brawley stated she spoke with Bartosh and gave him a verbal report of her conclusions. PCR Tr. 81. She provided the written report to Dr. Melikian

pursuant to her request.[8] However, she does not know why she was not called to testify. PCR Tr. 81.

Dr. Brawley stated that she recommended that medical and school records be obtained because she had not been provided with them and it would help indicate whether the deficits existed earlier. PCR Tr. 81-82. Dr. Brawley stated that she received school records after she had made her written report in 2004, but did not look at them because she had already been advised she was not testifying. PCR Tr. 82. In hindsight, she noted the records showed he had been in the eighth grade for 3 years, whereas he had reported repeating the seventh grade. PCR Tr. 82.

In addition to the school records, she received the report from Hall Institute [Applicant's Exhibit 12] and the raw test data. PCR Tr. 83. She noted his Hall IQ test was 76, where her IQ test was 85, with the discrepancy in performance IQ. She opined that the difference could have been due to depression in 2002. PCR Tr. 83-84. She opined that the subtests that reflected the difference in the IQ scores were "attention and concentration" and "abstract reasoning" which is a frontal lobe function. She also opined that Hall testing of the "repeatable battery for the assessment of the assessment of neuropsychological status" also had subtest that showed scattered deficits consistent with her findings. PCR Tr. 85. Dr. Brawley also confirmed that the State Hospital had also done malingering tests - the TOMM and SIRS - which did not indicate malingering. PCR Tr. 85.

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[8] In the Applicant's memorandum, he stated that Dr. Brawley did not produce a written report. Memo, p. 38. However, she did provide a report. Applicant's Exhibit 11.

Dr. Brawley on "Jimmy"

On cross-examination, Dr. Brawley indicated that she spent three (3) hours with Lindsey in 2004. She stated that Lindsey did not bring up "Jimmy", so she asked Lindsey about it and he told her "he's like an older role model", that Jimmy came to him at age 12 when he was in mental health for the first time and tried to kill himself. He told her he was in a room with an older man at the time and was scared. He told her that he doesn't tell him to do things but God sent him to Lindsey to help him out. PCR Tr. 87. He told her that he talked to him when he is in trouble and suicidal. PCR Tr. 87. However, Dr. Brawley said - unlike Doug Brannon's experience - he did not say Jimmy was in the room with him at the time. PCR Tr. 87.

Dr. Brawley stated she shared this information verbally with Dr. Melikian two days later on April 29. She stated she gave her the diagnostic impression that he was not a malingerer and that he had scattered neurological deficits. PCR Tr. 87.

More specifically, Lindsey told her about the suicide attempts. As to the incident at age 12, he had taken pills after he had a fight with his brother and his mother told him that he did not love her anymore resulting in his hospitalization for one and one half months. PCR Tr. 88. As to the 2001 attempt, Lindsey told her he was having troubles with his wife and took a gun, but his cousin took it away. As to the third one in August 2002, his wife had told him she was leaving with the kids and he planned to drive the truck off a cliff, but then decided not to do it. PCR Tr. 88, ll. 12-15. She described another incident in September 2002 when his family talked him out of suicide. PCR Tr. 88, ll. 15-17. The final attempt was the gunshot wound to

the head in September 2002 (during the arrest) and resulted in mental health at the jail. PCR Tr. 88.

Dr. Brawley testified about the series of neuropsychological tests she gave. PCR Tr. 89. She testified that he did not show deficits below normal on a number of the tests she gave including:

- immediate visual memory
- delayed verbal learning for stories
- manual speed on his left hand
- right banded manual dexterity
- trail making - Part B
- non-verbal abstract reasoning
- sequencing ability

PCR Tr. 90, ll. 9-23.

Dr. Brawley stated she shared this information about all the results with Dr. Melikian in the verbal consult. As to her written report, she put in the areas of deficits that she found, but not the test results. PCR Tr. 91.

Dr. Brawley confirmed that she consulted with Mr. Bartosh for one half hour on May 2, 2004. PCR Tr. 91, ll. 10-22. She stated she went over the test results and the other information that she had gathered in the interview. PCR Tr. 91. She recalled that she made a specific request for school records to Dr. Melikian and felt she asked Bartosh for medical records. She stated she received the records on May 20 after she wrote her report. PCR Tr. 92.

Dr. Brawley stated she consulted with Dr. Abshur, the neurologist, and shared her findings with him. PCR Tr. 92-93.

Dr. Brawley stated her information about suicide ideation came from Applicant PCR Tr. 94. Similarly,

the history represented in her report came from Lindsey that other family members suffered from depression, that he had a chaotic childhood, that his stepfather was a heavy drinker, that his mother worked most of the time, that Lindsey was responsible for his younger sibling and taking care of the home and meals, living with a cousin at the time of the incident, and separated from his wife. PCR Tr. 95-96.

Counsel Brannon's Interaction with Applicant about Jimmy

Counsel Doug Brannon testified that after he was appointed as second counsel on March 5, 2004, he met with Lindsey on March 12, 2004 at the detention center. PCR Tr. 13. He described his initial interview and how it impacted on how the defense handled the case:

> I went over to the Public Defender's Office, and then I, I rode over to the detention center in, in Mr. Bartosh's car, and Mike said something along the lines of Marion is a unique character, and we got over to the detention center and Pod 5 is the, is the, is the lock down pod. And when we got in there, they brought Marion in and there were four chairs around the table. Actually, actually there weren't four chairs around the table. There were four chairs in the room and three chairs around the table, and Marion sat down and I went to sit in the chair next to him and he said no, no, no, no, don't sit there. And, and I said okay, why not and he said cause Jimmy sits in that chair, and I looked at Bartosh and he just kind of pointed at the other chair that was away from the table and I went and drug the chair up to the table and I sat there.

> So, every time I met with Marion Lindsey there was an empty chair sitting at the table. Now, sometimes when I met with Marion it was with me and Mr. Bartosh and sometimes it was with me and Ms. Quimby. But there were two or three occasions where it was just he and I, but there was always an empty chair sitting at the table.

PCR Tr. 34,1. 14 - p. 35,1.11. Brannon testified that after the meeting Bartosh told him that he should have told him about "Jimmy" before their meeting. Brannon stated that in reviewing the reports, it was claimed that it dated back to when Lindsey was previously in the State Hospital and had a roommate who looked like Charles Manson. PCR Tr. 35. Importantly, Brannon stressed that Marion was friendly and that if you asked a question, Lindsey would answer and he never felt threatened by him. PCR Tr. 35-36.

Counsel Brannon stated that he was aware there were mental health issues, but they had Dr. Narayan's report. PCR Tr. 37. Although aware that Lindsey's IQ was lower, Brannon stated that other than the "Jimmy" issue, when asked a question Lindsey would give a clear and lucid answer. Id.

Mr. Lindsey indicated to Brannon that the reason for the crime was that he snapped and that he had contemplated his own demise, but not the murder of his wife. PCR Tr. 37. He said when Lindsey came upon Nell and others in the car and the other people were not his children, he did not know who had the kids and snapped. PCR Tr. 37.

Brannon, in addition to his awareness of Dr. Narayan's report, admitted that he had discussions with Bartosh about Dr. Melikian and Dr. Tom Brawley and the substance of their potential testimony. PCR Tr.

45. He recalled listening to a telephone conversation with Dr. Melikian. PCR Tr. 44. He stated that he talked at length with Bartosh about whether the information from Dr. Melikian and Dr. Brawley created any potential defense of either guilty but mentally ill or a lack of criminal responsibility and resolved it did not. PCR Tr. 46. Brannon stated the basis for everything was Dr. Narayan's report that Lindsey was malingering, but competent to stand trial. PCR Tr. 46. Instead, they desired to focus on the miserable life Lindsey had, but also that he was the life of any crowd he was in, however recognizing that he was involved in drug sales for years. PCR Tr. 47. They decided to play that he was just intelligent enough to pass the tests. Brannon felt it was believable to have "snapped," that based upon his miserable life and minimal intelligence level. PCR Tr. 47.

Counsel Brannon stated that he spoke with Dr. Narayan with Bartosh concerning his potential testimony in the case. PCR Tr. 60. Based upon their interview and his report, Brannon did not see any basis to call him as a witness in the guilt phase. Particularly, he summarized that Dr. Narayan would call Lindsey "a faker" and he did not want him anywhere near a witness stand. PCR Tr. 61. [Dr. Narayan did not testify in front of the 2004 jury for the State or the defense].

Counsel Brannon confirmed that he was in a factual box in the guilt phase defense. PCR Tr. 64. He was aware that he was not going to get a not guilty on manslaughter charge based upon facts he was presented. PCR Tr. 64. He was aware that the information was looked at to see if it had meaning in the penalty phase. PCR Tr. 64.

Brannon conceded that Lindsey did not gain anything by telling him that Jimmy was there. PCR Tr. 65. Similarly, counsel Brannon testified that they did not have the tape from Rod Tullis when he was handling the case. PCR Tr. 66, ll. 10-16. Counsel did not know if Tullis was subpoenaed for trial (although he was on the witness list).

Brannon recalled when he began his visits with Lindsey that he was on lock down and also wearing a "suicide gown." PCR Tr. 67.

Counsel stated that the reason why he interviewed the paramedic was to show that Lindsey had tried to shoot himself and kill himself. PCR Tr. 67.

Additional Evidence about Jimmy in 2002

Mitigation investigator Lenora Topp also testified at the hearing that she discussed "Jimmy" with Lindsey during her interview on April 16, 2004. She stated that he told her that he had a friend named Jimmy who told him that God sent him. PCR Tr. 140. In addition, he stated that he had arrived during his early teens. Id.

ANALYSIS

In this first allegation, the Applicant complains that the defense team performed deficiently because they failed to maintain an adequate relationship and consultation with Lindsey. Though Lindsey never testified at the PCR hearing that there was any relationship lacking, the record is replete with evidence that from the moment of the serving of the notice of intent to seek the death penalty throughout the trial, Lindsey was maintaining the charade of the existence of his imaginary friend Jimmy - an attempt to scam the state doctors and his lawyers by a suggestion that he was crazy. Simply put, this malingering of a mental illness by Lindsey was not the product of his lawyer's

work, neglect or omission on the case, but according to Dr. Melikian's recent discovery, Lindsey's own creation at the suggestion of other inmates - a suggestion that acting crazy would aid him. It is only Dr. Melikian's recent post-verdict speculation that had she spent more time with Lindsey prior to the trial, he would have uncloaked the fakery of Jimmy and she could have used it to explain his depression by accepting this action - an action taken by Lindsey only after the death verdict result remained.

The speculation within this allegation is simply unproven. There has been no showing that Mr. Bartosh did not regularly meet with Lindsey. To the contrary, the evidence was that Mr. Bartosh had, indeed, established a good relationship over the years of his representation. The alleged fact that Lindsey hid the truth concerning the malingering from counsel from October 2002 throughout the trial does not mean that a different attorney-client relationship could have forced the truth from Lindsey - particularly when he was confronted by additional friendly experts about the existence of Jimmy prior to the trial and after the state hospital evaluation in 2003.

Under any *Strickland* analysis, the matter must be viewed from trial counsel's perspective at the time of the trial in 2004. The fiction of Jimmy was imbedded into the meetings between counsel and Lindsey throughout the relationship from 2002 through the trial, as revealed through counsel Brannon and Lenora Topp's testimony. As revealed in the trial testimony and questioning of Dr. Melikian and the pretrial testimony of Dr. Narayan (ROA, 133-135), there was evidence of malingering and evidence from testing done by Dr. Brawley and the state hospital that reflected he was not malingering - other than the vision of Jimmy. In fact, at that pretrial competency hearing,

Dr. Narayan stated that morning: "we didn't find any evidence of his malingering symptoms today. There's no evidence of that. But we did find evidence of that on the three occasions that Mr. Lindsey came to our institution." ROA. 137,1. 13-16.

The reliance upon the ABA guidelines does not shift the burden or support speculation that counsel necessarily could or would have pieced the veil of fakery that Lindsey was intent on portraying through his statements and actions made in October 2002, actions taken during the competency evaluations with Dr. Musick and Dr. Narayan in April and June 2003, through interviews in 2004 with Doug Brannon, Lenora Topp, Dr. Melikian and Dr. Brawley prior to the trial. Although he has recanted presently after the fact of his conviction and sentence, the blame does not rest on prior counsel's shoulders. Further, prior counsel is not responsible for the notion that Dr. Melikian's speculation or hope that if she had spent more time with Lindsey, then he would not have fabricated Jimmy's existence.[9] The initial allegation is without merit because he failed in his burden of proof of any deficiency by his defense counsel in failing to make Applicant reveal to them that he had recently concocted "Jimmy" his imaginary friend to feign mental illness in the hopes of avoiding a death sentence at the suggestion of other jail inmates.

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[9] This Court recognizes that Applicant has not testified in this proceeding that he concocted Jimmy at the suggestion of other inmates to avoid the death penalty. Further, it is not apparent to the Court when or what Applicant finally came clean about his deception. Since the State has consistently since 2003 asserted that "Jimmy" was attempt to feign a mental illness – malingering – for purposes of this Order, the Court accepts that Lindsey how admits it was a charade.

II. Ineffective Assistance of Counsel - CHALLENGE EVIDENCE OF MALINGERING.

a. Failed to present issue of malingering to jury.

b. Failed to call Dr. Brawley in sentencing.

(1) Claims testimony could have refuted allegations that he was malingering when examined by court examiners and Dr. Melikian.

MEMO, p. 46-47.

In his second assertion, he argues - *inconsistently with argument 1* - claims that counsel failed to adequately rebut the issue of malingering before the jury. Essentially, he contends that while Dr. Brawley was retained by the defense to evaluate his mental condition, counsel failed to follow-up with her to refute the allegations. A review of the record at trial and now before the Court with the PCR testimony reveals that counsel did not perform deficiently on the issue of malingering.

As previously stated, the defense presented in mitigation testimony of Dr. Melikian, and within her testimony, she presented an opinion that Lindsey was not malingering. She also opined that Lindsey had a "family history of depression." She reported that he was treated by a psychiatrist after he had an overdose when he was 15 years old. She opined that at the time of the incident, Lindsey appeared to satisfy the diagnostic criteria for depression. ROA. 2004,1.23-25. She opined that he suffers from "major depressive disorder." ROA. 2005.

Concerning malingering, she asserted at trial that the records suggested that while he had been diagnosed with malingering because of his report of hearing voices and his friend Jimmy, by their objective testing, it suggested that he was putting forth good effort.

She reported that Lindsey was then seen by Dr. Tora Brawley, a forensic psychologist. Based upon this testing, Dr. Melikian opined that he was not malingering. ROA. 2005-06. Importantly, she reported that the results from the objective testing at Hall Institute did not support a conclusion of malingering. Further, she reported that Dr. Brawley retested Lindsey for malingering and he did not show that he was exaggerating a mental illness or faking on either test for symptoms of malingering. ROA. 2005. When asked if she believed he was malingering, Dr. Melikian declared that she did not. ROA. 2005-2007.

At trial, she then gave her reasons. She stated that the issue of malingering came up because Lindsey reports that when he was in the hospital at age 15 after an overdose, that an imaginary friend named Jimmy came to visit him and he heard voices that were comforting to him. She stated that he never discussed this with anyone but that his roommate noticed him talking to unseen others. Lindsey stated that when he is stressed that his friend Jimmy is with him and tells him good things and supports him. She stated that after the incident, Lindsey was nervous and reported that his friend Jimmy was with him. ROA. 2006-07. He told her that Jimmy first appeared after his overdose when he was in the hospital and felt he had no friends. ROA. 2007. She felt that be describes hearing a voice like an auditory hallucination. She asserted that it was atypical and would be misdiagnosed as malingering.

She also reported that the roommate that Lindsey had at the time looked like Charles Manson and that Lindsey was afraid of him and that was when Jimmy showed up. However, he reported that the roommate only looked scary and turned out to be a nice man. ROA. 2007.

ANALYSIS

Certain salient factors are not clear. First, the State did not affirmatively present testimony at the trial that Applicant was malingering. It was developed to the jury through the testimony of Dr. Melikian where she affirmatively disputed any conclusion that Lindsey was malingering and claimed the prior evaluators misdiagnosed it - apparently in anticipation that the state would challenge the finding on cross-examination of the psychiatrist. Second, although Dr. Brawley did not testify, her findings and conclusions on the issue of malingering were presented through Dr. Melikian. Therefore, plainly the issue of malingering was investigated by counsel and presented to the jury. It cannot be stated, that from counsel's perspective in 2004, that counsel failed to investigate or present evidence on the issue. He must be found to have failed in his burden of proof on that issue.

However, the Applicant has not proven the opposite of his claim - that in fact Lindsey was feigning mental illness when he was evaluated by the state examiners. As Dr. Melikian recently stated, Applicant revealed to her the creation of Jimmy was an attempt to feign mental illness symptoms, apparently for the purpose of duping them to think that he suffered a major illness. Accepting that admission, it undermines their claim and supports the correctness of Dr. Narayan and Dr. Musick's 2003 assessment that he was malingering. He has failed in his burden of proof.

Further, his complaint that Dr. Brawley was not called as a witness on the issue of malingering cannot be deemed to be ineffective. Her results were presented to the jury on the testing that was done and relied upon by Dr. Melikian – consistent with her oral consultation with her. This was not neglected by counsel, but reflects a conscious decision on counsel Bartosh's part on this issue. The evidence was admitted concerning both of Dr. Brawley's malingering tests as well as the conclusion that the state examiner's objective testing did not show malingering. Counsel cannot be deemed deficient under those circumstances. See *Harrington v. Richter*, supra.

Similarly the failure to present the cumulative evidence from Dr. Brawley cannot be deemed prejudicial under the Sixth Amendment and *Strickland v. Washington.* See, e.g., *Wong v. Belmontes*, 130 S.Ct. 363 at 387 ("Some of the evidence [trial counsel Schick was allegedly ineffective for not presenting] was merely cumulative of the humanizing evidence Schick actually presented; adding it to what was already there would have made little difference. . . . *Belmontes* cannot establish *Strickland* prejudice."); *Rhode v. Hall*, 582 F.3d 1273, 1287 (11th Cir.2009) (finding no prejudice and reasoning, inter alia, that "[c]ounsel is not required to present cumulative evidence"), cert. denied, 130 S.Ct. 3399, 177 L.Ed.2d 313 (2010).

III. Ineffective Assistance of Counsel - MERCY REQUESTS FROM FRIENDS AND FAMILY

a. Failed to adequately present requests for mercy.

b. Failed to prepare witnesses to testify and request jury to show mercy.

c. Failed to call family and non-family members on mercy issue.

d. Failed to ask witnesses appropriate questions to request mercy.

e. Failed to argue the Court's refusal to allow witnesses to request mercy.

f. Failed to preserve record on issue of mercy by not presenting adequate arguments in support of attempt to present mercy issue and not requesting proffer.

MEMO, p. 47.

In his third allegation, Applicant contends that counsel were ineffective in failing to present requests of family members for "mercy" in the case. This Court finds that the Applicant has failed to prove either deficient performance or prejudice.

In *State v. Sapp*, 366 S.C. 283, 292-294, 621 S.E.2d 883, 887-888 (S.C.2005), the Supreme Court clarified the limitations on certain witness requests of a jury. The Court declared:

In *State v. Johnson*, 338 S.C. 114, 525 S.E.2d 519, cert. denied, 531 U.S. 840, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000), this Court stated:

> *In [State v.] Torrence*, we adopted the Georgia Supreme Court's distinction between a plea for mercy and the ultimate question to be decided by the jury: "[A]lthough a defendant may present witnesses who know and care for him and are willing on that basis to ask for mercy on his behalf, **a defendant may not present witnesses to testify merely to their religious and philosophical attitudes about the death penalty. . . . Nor is**

a defendant entitled to present the opinion of a witness about what verdict the jury 'ought' to reach." *Torrence,* 305 S.C. at 45, 51, 406 S.E.2d 315, at 318 (quoting *Childs v. State*, 257 Ga. 243, 357 S.E.2d 48, 60 (1987)).

In *Johnson,* notwithstanding the ruling that the trial court should have permitted Johnson to inquire of his sister whether she wanted him to die, we found no prejudice to Johnson because the sister was able to make a general plea for mercy on her brother's behalf in the form of testimony concerning their abusive family life, and the fact that she expressed her love and affection for Johnson at trial.

More recently, in *State v. Wise,* 359 S.C. 14, 596 S.E.2d 475, 481-482, cert. denied 543 U.S. 948, 125 S.Ct. 355, 160 L.Ed.2d 263 (2004), we addressed the issue of whether the trial court erred in refusing to allow a surviving victim to testify on cross-examination during the sentencing phase of the trial that he did not personally believe Wise should receive the death penalty. We reiterated our holding in Johnson, stating, "[a] close relative of a defendant, such as his sister, may be asked whether she wants the defendant to die, which is akin to asking her to make a general plea for mercy and not explicitly directed toward eliciting her opinion of what verdict the jury should reach." *Id.*, 359 S.C. at 26; 596 S.E.2d at 481. FN2.

> FN2. However, in Wise, we held the trial court properly prohibited the defendant from inquiring of a security officer who had been shot by Wise whether he thought Wise should be sentenced to death, stating, "[w]e accept as true the proffer by Appellant's attorney Vance would testify he told the media shortly after the shootings he did not personally believe Appellant should receive the death penalty. However, such a statement by Vance would not constitute a plea for mercy on behalf of Appellant. Instead, it would constitute Vance' opinion of what verdict-life in prison versus the death penalty-the jury should reach. Accordingly, the trial judge properly disallowed the question, recognizing it was an attempt to elicit an inadmissible opinion from a witness." *Id.*, 596 S.B.2d at 482.

Under Johnson and Wise, Boles should have been permitted to answer the question as to whether she would like to see Sapp put to death. However, we find no prejudice. Initially, it is implicit from Boles' testimony that she would have answered that she did not wish to see Sapp put to death. Further, given Boles' testimony that she loved Sapp and had known him for years, we find her testimony akin to that in Johnson in which Johnson's sister was able to express her love for him,

State v. Sapp, 366 S.C. 283, 292-294, 621 S.E.2(1883, 887 - 888 (S.C.2005).[10]

Against this backdrop, counsel Bartosh made his decision on the witnesses to present and questions to ask. He presented as noted above in the trial summary, a series of family witnesses: mother Virginia Landsey[11], father Leon McDowell[12], cousin Chris Wtikens[13], uncle Steve Pilgrim[14] and aunt Bessie Smith. He also called friend mentor Bill Burton who requested: "please have mercy on him." ROA. 2076.

In their memorandum, Applicant claims that trial counsel failed to adequately present requests for mercy. He claims that counsel failed to locate and ask questions of family members and friends. However, the record of the trial disputes this assertion because four witnesses: mother, father, cousin and mentor - all made specific requests for mercy and that he not be

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[10] *State v. Sapp* was decided after the 2004 trial in 2005, but summarizes the Court's logic that existed before the 2004 trial.

[11] Mother Virginia Lindsey testified to the 2004 jury that: "Marion was her son I love him very much. And I ask mercy for my son not to be sentenced to death. I know that somebody else's child's life was took. But I don't want my child sentenced to death." ROA 2060.

[12] Father Leon McDowell asked the jury: "if they can see fit not to execute Marion maybe he can benefit to his kids." ROA. 2072.

[13] Cousin Chris Wilkins stated to the jury: "just please take into consideration the kind of father he was. Please have mercy on him. I know what happened was a big tragedy for everybody. But I mean he is a good person. ROA. 2076.

[14] Before the witness testified, a bench conference was held and Judge Few declared "that was last closing argument from the witness that I'm going to allow. I'm not going to allow any other witnesses to answer the question, is there anything you want to tell the jury?" ROA. 2078, 1. 15-19**.**

sentenced to death. Concerning mercy requests, contrary to the assertion in the post-hearing memorandum of Petitioner, p. 25, Virginia Lindsey testified that she did talk to the defense team and "they did" prepare her to request the jury to have mercy on her son. PCR Tr. 368,1. 14-18.[15] However, she *felt* she was not prepared to make a mercy request at trial. She claimed that if she was prepared, she would have asked for mercy on her son because she had lost a son and "would ask for mercy that he not get the death penalty." She stated that he had to be punished, but not the death penalty because it hurts to lose someone. She said she not only lost a son, but that she lost a daughter, a son, and two grandsons. PCR Tr. 369, ll. 1-8. However, the record reflected that she did make that request. ROA 2060. The claim must be denied.

In his memorandum, he also claims that if the court refused to allow the testimony about a request for mercy, counsel had an obligation to preserve the issue for an appeal. The record reveals, as stated above, after four witnesses had responded to open ended questions about whether there is anything they would like to tell the jury with requests for mercy and not a death sentence, Judge Few stated he would not allow that question to be asked. Counsel Bartosh did not object. When the remaining witnesses, Uncle

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[15] In the Petitioner's Post-hearing Memorandum, p. 25, they write that "one of the deficiencies that Mrs. Lindsey testified about was that she was directed by defense counsel not to ask the jury for mercy for her son." The record of Mrs. Lindsey's PCR testimony does not support this mischaracterization of her testimony. PCR Tr. 368-369

Steve Pilgrim[16] and aunt Bessie Smith[17], testified, no open ended question was asked and neither expressed an opinion on mercy - nor were they specifically asked. In light of counsel Bartosh's death, this Court is not aware why a different quest was asked eliciting a response on mercy consistent with *Torrence* and *Wise* (which was decided on May 11, 2004 just before the trial). However, counsel is presumed competent and the Applicant has failed to dispute it.

Apparently, he claims that had counsel objected it is likely the matter would have been reversed on appeal. However, he ignores the proper test that it is his burden to prove by a preponderance of the evidence that there is a reasonable probability that the result of the proceeding would have been different. To the contrary, four of his six witnesses had made specific mercy requests to the jury as family member and friend. Second, counsel Bartosh made a plea for mercy and a just punishment of life. ROA 2137, 2146. To that extent, the situation is similar to the situation in *State v. Sapp* where the Court concluded that reversible error could not be shown even though the trial court erred in excluding a question concerning mercy. As in *Sapp*, there is cumulative evidence of family and friends requesting mercy. He has failed to establish

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[16] Steve Pilgrim post-conviction testimony is set forth in detail within this memo. PCR Tr. 426-463. Pilgrim stated that counsel had prepared him to ask for mercy. PCR Tr. 445. He then asserted that they told him not to ask the jury for mercy. Id. He proffered what he would have told the jury if he had been asked about mercy that was his favorite nephew and he made a mistake and "I wouldn't want him to, you know, get the death penalty." PCR/ Tr. 445 l. 13-16.

[17] Bessie Smith's PCR testimony is summarized within. Unlike Pilgrim, she did not proffer any evidence concerning a request for mercy at the hearing. PCR, 388-425.

Sixth Amendment prejudice. See *State v. Sapp*, 366 S.C. 283, 294, 621 S.E.2d 883, 888 (S.C. 2005); *State v. Myers*, 359 S.C. 40, 596 S.E.2d 488, cert. denied, 543 U.S. 980, 125 S.Ct. 485, 160 L.Ed.2.d 359 (2004) (exclusion of testimony is harmless where it is *cumulative* to other testimony in the record).

IV. Ineffective Assistance of Counsel - FAILURE TO ADEQUATELY PRESENT DR. MELIKIAN.

A. Failed to Provide Sufficient Info to Dr. Melikian to allow evaluation on Lindsey

B. Failed to obtain and provide historical info and records of family members necessary for proper evaluation

C. Failed to seek continuance after Melikian informed them she needed additional time

D. Failed to elicit from Dr. Melikian statutory mitigating factors during testimony

MEMO, p. 49.

In his fourth specification, he contends that counsel failed to provide Dr. Melikian with sufficient information. He asserts that Dr. Melikian needed additional information related to his history to properly evaluate him and the defense team failed to locate and investigate his background and claims that they failed to provide her with information. As previously set forth, the summary of the evidence of the trial and the state PCR hearing shows that Dr. Melikian has the same opinion of the particular illnesses that she found the Applicant possesses. As revealed in the cross-examination during both the trial and the state PCR proceeding, her opinion and the material she additionally would have been required to reveal were a two

edged sword that failed to satisfy the *Strickland* prejudice prong. While more time and additional information may have made Dr. Melikian more comfortable with her assessment, it would not have changed the result, and thus, *Strickland* prejudice has not been shown. The Court finds that summaries of the witness testimony within the Petitioner's memorandum do not summarize any particular items that they feel counsel did not provide.

As shown within, a lot of Applicant's proffered mitigation testimony is double-edged or even aggravating. *See Suggs v. McNeil*, 609 F.3d 1218, 1231 (11th Cir.2010) (noting that "evidence of drug and alcohol use is often a 'two-edged sword' that provides an independent basis for moral judgment by the jury," and that evidence that the defendant spent time at military school because of behavioral issues "was potentially damaging" (quotation marks and citation omitted)); *Reed v. Secretary, Fla. Dept. Of Corrections*, 593 F.3d 1217 at 1246 (11th Cir. 2010) ("[I]t would have been all too easy for the State to use Reed's own mitigation witnesses to paint him as a violent, manipulative person with long-standing drug abuse issues and brushes with the law. . . . Here, it was not just a reasonable probability, but a virtual certainty that Reed's 'good' mitigation evidence would have led to the introduction of 'bad' evidence."). Nor would any new medical information radically buttress the experts' testimony, causing it to shift from mere "artifice" to game changing revelation that creates a reasonable probability of a different outcome. *Bean v. Calderon*, 163 F.3d 1073, 1081-82 (9th Cir.1998). His assertions must be denied.

The Post-Conviction Testimony of Dr. Melikian

Dr. Margaret Melikian, the forensic psychiatrist retained by the defense prior to trial in 2004, testified that she spent 7 hours and 45 minutes in preparation for her earlier testimony. PCR Tr. 598, ll. 17-19. Of that time, 2 ½ hours were actually spent with Lindsey on May 4, 2004. Dr. Melikian stated that she was concerned when she was retained whether she would be ready for trial due to her own lack of experience at the time.[18] PCR Tr. 600. She stated that she accepted the case thinking that if all the mitigation investigation was done, she could be prepared. However, in hindsight, she now declared due to her own lack of experience, she did not understand how much was involved in gathering information, and that the mitigation had barely begun and she now felt that there was no way they could be prepared for trial.[19]

Dr. Melikian indicated that she had received records from defense counsel on April 28, 2004 and made a call on April 28 to get the mental health records from William S. Hall. PCR Tr. 601. Dr. Melikian confirmed that she had requested an opinion letter from Dr. Tom Brawley, a forensic psychologist, who had seen Lindsey. Dr. Melikian stated that she discussed Dr. Brawley's findings with her on April 29. PCR Tr. 601. She

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[18] Dr. Melikian stated this was either her first or second trial as a defense expert. PCR Tr. 599, l. 14-16. She stated that she was subsequently involved in 15 to 20 cases. PCR. Tr. 600. l. 22.

[19] Counsel for Applicant questioned her about an April 30, 2004 (Friday) note in counsel records that an amount of documents had been sent to the witness on Monday and Tuesday and more was being sent that date. The note revealed that Dr. Melikian had stated "too much" and that she can't be ready. PCR Tr. 599. Notation included a written remark by Michael Bartosh that Dr. Melikian knew the time constraints before she got involved and said she would be OK. PCR Tr. 599-600.

later requested a written report from Dr. Brawley on May 18. PCR Tr. 601.

Dr. Melikian stated she requested the written report from Dr. Brawley after she was advised that she would be the only one testifying and would put in Dr. Brawley's findings. Dr. Melikian received the written report on May 20 after the trial had already started on May 17. PCR Tr. 602.

Dr. Melikian stated that "in her limited evaluation", Lindsey did not seem to have a "mental illness defense." PCR Tr. 602, ll. 17-20. She said she went right to mitigation, since he appeared to be competent. PCR Tr. 602, ll. 17-23.

She stated that there was a difference between what she received in 2004 and the material she received in preparation for the PCR hearing which was 6 or 7 times as much. PCR Tr. 603. She stated she had suicide notes, in bits and pieces, and did not have a "complete" file, mental health records, medical records, Department of Corrections' records, or the complete incident reports. PCR Tr. 603, ll. 12-23. She stated that she was not given all the information that the 2004 defense team had acquired. PCR Tr. 603, ll. 21-23. [Her original file was 3 to 4 inches thick]. PCR Tr. 603.

Dr. Melikian stated the additional material she reviewed would have changed her diagnosis because she did not understand the level of depression he was showing at the time of the evaluation and that way she looked at his cognition in his low testing results. PCR Tr. 604. She stated this was due to her lack of a family history and did not spend enough time with Lindsey to realize that he was not functioning at his best level.

Dr. Melikian opined that Lindsey does not show much emotion or depression. She declared again that in her one meeting with him, Lindsey was functioning pretty well. PCR Tr. 605. However, in her more recent meetings, she felt that she had misjudged him in 2004 and would have changed her testimony.

Particularly, Dr. Melikian stated that she would have explained the severity of his depression. She had already given that diagnosis in 2004, but saw rather than being depressed and upset, but rarely suicidal to genuinely suicidal. She said he had lost a significant amount of weight with decreased energy. She felt he was not functioning well at all. PCR Tr. 605.

Dr. Melikian found his test scores at Hall Institute and with Dr. Brawley showed his level of cognitive ability decreases quite a bit with his depression. She said that in 2004, Lindsey fit the overall picture because she was aware of his problems in school, his speech impediment and low scores. However, in 2004, with the other things he was able to do; she felt the "borderline intellectual functioning" diagnosis that others had given was probably not correct. In hindsight, she now thinks based upon further record review and I.Q. scores that it was likely due to his depression. PCR Tr. 606.

Dr. Melikian stated she had general information in 2004 about the CDV charges and the assault and battery with intent to kill charges. However, she claimed she did not know that he had not been convicted of most of the CDV and the family dynamics of how often the police were called and the severity of the incidents. In addition, she asserted that the assault and battery and charge "appeared to have a large element of self-defense in that" which resulted only in a one year sentence "which would be unusual for a

crime that severe." PCR Tr. 607. In addition, she claimed that she had not been aware that he had tried to turn himself in 4 times by going to the police. PCR Tr. 607, ll. 1-6.

Dr. Melikian claimed this paints a different picture of Lindsey of rather than just showing that he had been charged and convicted of assault and battery with multiple CDV charges to "a more accurate picture of who this person is as opposed to just a list of he was bad in school, his IQ is low, and he's had these charges in the past." PCR Tr. 607, Il 7-13.

In hindsight, Dr. Melikian stated that she did not feel that she was prepared to testify in 2004. She stated she was not aware of a suicide note, that she had called Bartosh's office and told them she was not prepared, and that she bad set up a conference call with Judge Few on May 12 where she told him about not being ready to testify. PCR Tr. 607-08. Dr. Melikian testified that she had originally expected to testify on Monday, May 24, with preparation the day before, but was contacted Saturday night and told to be ready Sunday morning. PCR Tr. 608. She stated she spent 30 minutes on the phone with Bartosh Saturday night to prepare.

She described contacting Judge Few in a conference call on May 12 to tell him that she could not be ready for trial. PCR Tr. 608-10.

Dr. Melikian stated that she did not agree with the 2003 report from the State Hospital on Lindsey's competency. She stated they had diagnosed Lindsey with malingering and borderline intellectual functioning. Their reason for malingering was based on atypical symptoms, but the objective testing, she felt he did not meet the criteria for malingering. She also noted

that Dr. Brawley tested for malingering and that Lindsey did not malinger on those tests. PCR. Tr. 610.

Dr. Melikian asserted her disagreement with the DMH diagnosis for borderline intellectual functioning. She found that he had higher IQ scores with Dr. Brawley and felt those scores were not accurate because he appeared to be functioning at a higher level, but now knows that he was functioning at a lower level due to his likely depression. PCR Tr. 611. She thought he functioned at a higher level than borderline intellectual functioning [70-80 I.Q.] because he appeared a little better than that and his history revealed he had been able to hold some jobs and do some things at a higher level. PCR Tr. 611, ll. 8-17.

Dr. Melikian PCR Testimony About Jimmy - Direct Examination.

Dr. Melikian stated that Hall Report that he was malingering was based upon atypical symptoms and his discussions of his friend "Jimmy." PCR Tr. 16-20. Given that and his test scores that showed he was not malingering, Dr. Melikian stated she disagreed with the diagnosis. Id. [This was consistent with her original trial testimony. ROA. 2005-2008].

Since the trial, Dr. Melikian said she had learned more information about what Lindsey did at the William S. Hall evaluation, that counsel Brannon described Lindsey talking to a hallucinatory person, Jimmy, who was in the room and pulling out chairs.[20]

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[20] See *Testimony of Doug Brannon*, PCR Tr. 34-36 where Brannon describes meeting at Detention Center, Lindsey not letting him sit in Jimmy's chair and the continued presence of the empty chair at their meeting interview with Lindsey concerning "Jimmy", PCR 140 (Lindsey tell Topp that Jimmy came to him from God in the early teens). Also, Trial Evidence that "Jimmy" first discussed by Petitioner on date notice to seek death penalty

Dr. Melikian stated when she saw Lindsey in 2004 (and Dr. Brawley), Lindsey described Jimmy as an imaginary friend that he knew was not psychotic experience. PCR Tr. 613, ll. 3-8. She felt that given his level of intelligence it was not far out to not believe that and make a malingering diagnosis with the objective testimony that he was not.

Although Brannon had described his knowledge of Jimmy with Lindsey, Dr. Melikian testified that neither Brannon nor Bartosh told her about the particular experiences they had with Lindsey and Jimmy. Dr. Melikian stated she would have wanted to know this before she reviewed the Hall report. She admitted she questioned Lindsey about it on May 4 and that Lindsey described him as an imaginary friend, but not in a psychotic way, but as a way for someone with a low intelligence to cope. PCR Tr. 614. He had told Dr. Brawley the same thing. "He did tell me that he had done that with Dr. Narayan and pulled a chair out and behaved in that manner," which she asserted because it was a hostile interview with Dr. Narayan. PCR Tr. 614-15. She recalled during the 2004 trial, he had behaved in the trial in that manner. PCR Tr. 615.

Dr. Melikian felt if she had known what he had done with his lawyers it would have been helpful. She stated in records she had reviewed since the trial, Lindsey was discussing Jimmy while he was incarcerated and made statements that Jimmy had taken over his body or been responsible for the shooting. If she had that information, she felt that "Jimmy" would have been more of a focus of her May 4 evaluation in

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served. ROA 136-137, 2017-2019 (no mention of Jimmy in reports until October 10, 2002, the same date that the notice of intent to seek the death penalty).

the limited time that she had as a "mental health defense." PCR Tr. 615, 11. 6-16.

Concerning the jail incident where Lindsey hit his head and former counsel Tullis told them to keep an eye on his client, Dr. Melikian said she never saw pictures in the records she reviewed, although Lindsey told her about it. PCR Tr. 615. Since there was no corroboration provided to her, she did not give it much weight.

She stated that the history she received came from Lindsey, although she met with investigator Lenora Topp on the day of the trial and 30 minutes on the telephone with Bartosh the night before. PCR Tr. 616.

Dr. Melikian stated that Dr. Pamela Crawford was present and Melikian knew she was at court to critique her for the State. However, Dr. Melikian stated she already felt unprepared and did not want to speak with Dr. Crawford that day. She said she needed to continue to review records and reports, although she was not aware that Dr. Crawford had seen Lindsey briefly with Karen Quimby. PCR Tr. 617.

Dr. Melikian said since the trial she has met with Lindsey 3 times. She felt that she had previously misjudged his cognitive ability in the past. Particularly, she found that he was <u>not</u> depressed, got along with guards and she had contact visits. In reaction to questions about his adaptability in prison, Dr. Melikian described a visit when Lindsey was left unshackled in violation of SCDC policy and the resulting confusion over his shackling. However, she asserted that no one seemed concerned about her safety and that he seemed to be cordial to the guards. PCR Tr. 618-19.

Dr. Melikian, in a proffer after objection, opined this was the least prepared she had been in a death

penalty case, with the least amount of time she was given to prepare. She stated since then she had calls under similar time constraints and refused to participate. She said she had been bothered by the case since that date and wondered if she should have refused to testify since she was so unprepared. PCR Tr. 620.

Cross-Examination

Dr. Melikian testified that her clinical diagnosis in 2004 had changed since because she did not understand the severity of his depression. PCR Tr. 621. However, she admitted her conclusions of mental illness under Axis I, II, III, IV would be the same thing. Id. She admitted that she testified he was depressed in 2004, but she could not elaborate in full the degree. She pointed out that she was aware of suicide notes, but had not seen them. Similarly, she was not aware of the telephone call to Rod Tullis, which would have been useful to understand his mental state close to the time of the offense. PCR Tr. 621-22.

Dr. Melikian confirmed that she had prior to her trial testimony his medical records, his teenage psychiatric hospitalization records, and his infant head injury records, although she now claimed they may have been incomplete. She admitted that as to neurological records in 2004, she had Dr. Brawley's letter and had spoken with the neurologist, Dr. Abshur. PCR Tr. 623. She stated she wanted Lindsey to see a behavioral neurologist, but he was seen by a clinical general neurologist who would not be specialized in behavior. Id. Also, she said in 2004 she had the school records, but claimed she did not have all of them. However, Dr. Melikian admitted she received 18 pages of school records faxed to her on May 4, 2004. PCR Tr. 624.

On cross, she admitted that during the trial, she claimed the only additional records she wanted were SCDC records. PCR Tr. 624-25. (See ROA. 2031).

Further, in addition to Dr. Brawley's report. Dr. Melikian confirmed that her conversation with Dr. Brawley included actual results of the other testing she did, that Lindsey had problems with attention and concentration. PCR Tr. 626-27. She felt that he had been tested on the RAY Complex Figure Test and tested borderline, rather than the RAY malingering test. PCR Tr. 627. She said Lindsey had been tested for malingering on the SIRS tests and the Test of Malingered Memory (TOMM). PCR Tr. 627.

The Revelation of Feigning Jimmy During the Cross-examination.

Dr. Melikian acknowledged that in 2004 she sought to address the existence of "Jimmy." However, she did not know until the trial that the day "Jimmy" was reported was the day he was served the death notice. As Dr. Melikian stated on cross-examination:

> "One of the reasons that that information would of been so important to me to have is that issue of Jimmy I could have dealt with before trial. As a matter of fact, the first time I met with Mr. Lindsey in preparation, in preparation for this hearing, one of the first things he did was apologize for Jimmy. **When I look back and, you know, now with hindsight, I can see that Mr. Lindsey started out malingering Jimmy. He was told to do this by some other inmates is the information he's given me since, and he was feigning these symptoms because they told him to act crazy**."

PCR Tr. 629, ll. 11-22 (emphasis added). She stated that when she saw him 2 years later, he did not want to continue this and minimizing it which made it more believable. Dr. Melikian speculated that if she had spent more time with him in 2004 as opposed to meeting him once, "I probably would have gotten that information before trial and would have been able to give much more effective testimony." PCR Tr. 630,11. 4-7, 12-16.

Dr. Melikian noted that she wished that she had the information in 2004 that he malingered mental illness at the State Hospital evaluation and with his lawyers because he thought it was in his best interest. PCR Tr. 630. She felt she could have explained it with his level of depression and cognitive ability. Dr. Melikian stated in 2004 that Lindsey had a passive suicidal ideation based upon his expressions that he wanted the death penalty. She stated that was suicidal regardless of why he wanted to die. PCR Tr. 631,11. 9-17.

Dr. Melikian admitted that in 2004 she testified that she would not have made a diagnosis of borderline intellectual functioning, that he did have chronic neurological problems, and that she was aware of the existence of the suicide notes from Lindsey. She confirmed that she had learned in 2004 that in 2001 at 15 years old, Lindsey had a gun and planned suicide, but his cousin talked him out of it. PCR Tr. 632. She also recalled that he stated that he wanted to drive off a cliff but was worried he wouldn't die. She stated that she learned from Lindsey about his weight loss prior to trial.

Although this was consistent with the information she testified about in 2004, Dr. Melikian opined it was less effective to state that Lindsey told her about his

weight loss than records to show he weighed 200 at one point and then was down to 180 or 160. However, she admitted the State never challenged the statement concerning weight loss. PCR Tr. 633.

She stated that the fact it was on T.V. did not concern her because she had forgotten about the cameras when she testified, but felt she was sleep deprived and was more worried about her ethical duty to Mr. Lindsey due to her lack of preparation. PCR Tr. 634. Although she was not confident about her opinion when she was cross-examined at trial, she did not feel it was destroyed. PCR Tr. 634.

Dr. Melikian admitted that she met with investigator Lenora Topp, but could not recall the specifics of the information she was provided about Lindsey's family and Topp's interview with Lindsey. PCR Tr. 635. She stated that prior to the trial date she had only spent $2^1/_2$ hours on record review, and then looked at records on that date, but could not recall whether she looked at the St. Luke records provided to her on April 30. However, she admitted she felt he met the diagnostic criteria for "major depression" whether she looked at those earlier records and still feel he does after reviewing more records given to her since the trial. PCR Tr. 635-36.

On re-direct, Dr, Melikian felt that she was not made privy to information from Brannon, Quimby and Topp concerning their interviews prior to the trial. She also claimed that she did not know much about Lindsey's family history. PCR Tr. 636. She felt this affected her credibility, although her diagnosis has not changed. PCR Tr. 637.

Dr. Melikian admitted that she had some family history, information about his earlier crime and a N.C.I.C. report. She stated her notes reflected that

they had discussed his education and schools, the first time be thought about suicide and what was in his mind, and his problems in his interview with Dr. Narayan. PCR Tr. 638. She admitted that he had told her about trying to turn himself in four times concerning Standford Wilkins. She admitted that none of this was new information, but she asserted that she did not have another opportunity to see him again, go through his history, review the record again, and corroborate what he told her even though most of it turned out to be true. PCR Tr. 639.

She stated that she would not - in the future - only see a death penalty inmate one time again. She felt repeated evaluations would build a support. She admitted that from May 4 (her meeting with Lindsey) until she testified on May 23, she was not denied access to Lindsey. PCR Tr. 640. She admitted she made no written report in 2004 and the only records were her notes, introduced as Respondent's Exhibit 14. PCR Tr. 640.

COMPARED TO 2004 TRIAL TESTIMONY

Dr. Margaret Melikian, testified in 2004 that she saw Applicant on May 4, 2004. She stated that she had reviewed:

1. His Medical Records
2. The records from a psychiatric hospitalization when he was a teenager.
3. The records from a head injury when he was an infant.
4. His neurological records.
5. His school records.

ROA. 2003. Dr. Melikian testified that she also reviewed the reports and records from the Hall Institute [DMH} evaluation. ROA. 2003.

Dr. Melikian opined that Lindsey had problems in school and had a learning disability and attended special classes for speech therapy. ROA. 2004. She also reported that Lindsey was in an accident when he was run over by a car when he was 18/19 months old and suffered a head injury. Id. She further had information that he had inhaled kerosene at one point. Id. She reported that he had several head injuries. Id.

Dr. Melikian stated that Lindsey had completed the ninth grade and then dropped out of school in the tenth grade. ROA. 2004. She reported that he "had trouble with school." Id.

In reviewing his neuropsychological records, Dr. Melikian opined he had some abnormalities having to do with naming and being able to copy designs, dexterity and motor skills and that he had some cognitive deficits. Id.

She also opined that Lindsey had a "family history of depression." She reported that he was treated by a psychiatrist after he had an overdose when he was 15 years old. She opined that at the time of the incident, Lindsey appeared to satisfy the diagnostic criteria for depression. ROA. 2004, 1.23-25. She opined that he suffers from "major depressive disorder." ROA. 2005.

Concerning malingering, she asserted that the records suggested that while he had been diagnosed with malingering because of his report of hearing voices and his friend Jimmy, by their objective testing, it suggested that he was putting forth good effort.

She reported that Lindsey was then seen by Dr, Tora Brawley, a forensic psychologist. Based upon this testing, Dr. Melikian opined that he was not malingering. ROA. 2005-06. She stated that the issue of malingering came up because Lindsey reports that

when he was in the hospital at age 15 after an overdose, that an imaginary friend named Jimmy came to visit him and he heard voices that were comforting to him. She stated that he never discussed this with anyone but that his roommate noticed him talking to unseen others. Lindsey stated that when he is stressed that his friend Jimmy is with him and tells him good things and supports him. She stated that after the incident, Lindsey was nervous and reported that his friend Jimmy was with him. ROA. 2006-07. He told her that Jimmy first appeared after his overdose when he was in the hospital and felt he had no friends. ROA. 2007. She felt that he describes hearing a voice like an auditory hallucination. She asserted that it was atypical and would be misdiagnosed as malingering.

She also reported that the roommate that Lindsey had at the time looked like Charles Manson and that Lindsey was afraid of him and that was when Jimmy showed up. However, he reported that the roommate only looked scary and turned out to be a nice man. ROA. 2007.

As to whether Lindsey would have been operating under the influence of mental or emotional disturbance at the time of the incident, she opined that Lindsey had reported that he had been suicidal for several weeks prior to the incident. He reported that he had weight loss with decreased appetite, feelings of hopelessness and helplessness and sad mood. She felt that he would meet the criteria for depression at that time. ROA. 2008. His depression was recurrent. She opined that the depression was acute as opposed to chronic. ROA. 2008.

She opined that he had cognitive deficits. ROA. 2009. She reported that the testing at Hall Institute determined that he had well below average IQ and

"borderline intellectual functioning" close to mildly retarded range with an IQ of 76. ROA. 2009. However, she noted that when Dr. Brawley tested him, the scores were in the 80's although it is still below average.[21] She stated that "I would not have, made a diagnosis of borderline intellectual functioning" because he does function better than what his test scores look like. She stated that his intelligence is low, he had trouble in school, but he does have some functioning abilities that she would not say were the basis of worrying or seeing him clinically for decreased intelligence. ROA. 2009. She noted that he had problems with verbal fluency, naming words and processing memory. ROA. 2009. She opined that in her professional judgement Lindsey had some kind of brain abnormality that causes his low test scores and sudden neurological findings. She concluded that a source of the abnormality could have been from the head trauma or the incident when he inhaled kerosene when he was an 18/19 month old. ROA. 2010. She referred him to a behavioral neurologist after receiving the results from the neuro-psychologist. She also stated that the suicide attempt at age 15 was the result of an overdose of Tylenol and other medications.

Dr. Melikian stated that his neurological problems were chronic. She stated that he had a limited ability to cope with things due to his limited intelligence and by his continuing to have an imaginary friend. She stated his stress with his wife and the separation added to the stress which decreased his coping

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[21] Dr. Tora Brawley, a clinical psychologist with a specialty in neuropsychology made a written report to Dr. Melikian on May 20, 2004. Applicant's PCR Exhibit 11. This is discussed within this pleading in the section related to preparation of Dr. Melikian.

skills. ROA. 2012. She stated that he described the killing of his wife. He told Dr. Melikian that his wife was leaving and taking the kids and that he would never see them again. ROA. 2012-13. He told her that he had moved into his cousin's house and planned to commit suicide by driving off the cliff, but he was worried that he might not die. Id. He stated that he begged his wife to return and had written suicide notes, but did not recall what he said. He also told her that he planned to shoot himself and that his cousin had taken his keys and that his mother, brother and uncle and talked to him. He told her that he had been unable to reach his wife because she was blocking his numbers on the telephone. He said that he had been crying which was unusual for him. ROA. 2013. He stated that he was able to get in touch with his wife at work where the numbers were not blocked.

Lindsey described to her his weight loss from 225 pounds to 160 pounds. ROA. 2013.

On the day of the incident, according to Lindsey, he talked with Latresse for a couple of hours and drove the car home. He stated to Dr. Melikian that he was tired and wanted to drive to his mother-in-law's house and "blow his brains out" in front of the house. While there he was talking to his wife's cousin and saw an image in the back and then saw his cousin drive off. ROA. 2013. He then stated that he just snapped. ROA. 2013. Lindsey told her that he followed them, but did not remember that he shot his wife until the EMS people told him. ROA. 2014. He said he shot four times and shot himself one time and that the police also shot him. Id. He stated that he had asked the EMS people at the scene to let him die. ROA. 2014;

She stated that he had a gunshot wound to the head. The wound exited, but did not penetrate the

brain. He was shot multiple times by the police. ROA. 2014.

On cross-examination, Dr. Melikian admitted that she had not prepared a written report, although she admitted that she had prepared reports when she worked at Hall Institute. ROA. 2015. She stated that the first mention of Jimmy was on October 10, 2002 which was the same date that he was served with the notice to seek the death penalty. ROA. 2018. She denied that this was evidence of malingering. ROA. 2019. She saw this as a coping mechanism for Lindsey. Id. She admitted that he tried to say it was Jimmy's fault and to avoid responsibility. Id.

She also stated that Dr. Narayan reported in July 2003 that Lindsey was claiming that Jimmy was in the room and pulled a chair up for him and started a conversation with him, but she denied he was malingering. She also referred to Dr. Lauri Barwick's November 13, 2023 report. ROA. 2021.

Dr. Melikian confirmed that Lindsey was competent to stand trial, knew the difference between right and wrong, and could conform his conduct. ROA. 2022.

She admitted that the neurologist, Dr. Absher concluded that he had a normal neurological examination. ROA. 2024.

She stated that she did not have his earlier Department of Corrections records when he was serving time for the earlier assault and battery with intent to kill in 1996. ROA. 2026-27. She stated that Lindsey had acute periods of depression that he recovered from in between. The State inquired whether he was suffering under depression in 1996 when he shot through the windshield of Stafford Wilkins and was convicted of assault and battery with intent to kill. ROA. 2027-28. She stated that she did not have a

chronology of his moods for his entire life. ROA. 2028. She stated that she relied upon records of his 1988 suicide attempt. ROA. 2029-30. She stated that she had reviewed various school records and admitted that they were incorrect in that some showed he had quit in the 10th grade according to him yet others showed he had either repeated eighth grade three times or seventh grade twice instead. ROA. 2032. The state pointed out that Lindsey had lied on his application for employment at BMW that he had graduated from Chapman High School. ROA. 2032-33.

She stated that it might have been helpful if she had been given a copy of the BMW application and could not state that it would have been helpful to review the entire case file, or to speak with either Dr. Crawford or Dr. Narayan (who had diagnosed Lindsey with malingering) (because she had his report) or Officer Benny Godfieyl, or Latresse Smith. ROA. 2037-38. She confirmed that much of what she testified to was based upon her discussion with Lindsey, who she denied was malingering. Id.

She denied that depression or his low IQ or his neurological impairment caused him to gun down his wife. ROA. 2041-42. She asserted that these should be considered mitigating factors. ROA. 2042. She opined that on September 2002 he was suffering from acute depression. ROA, 2043.

ANALYSIS

The Applicant has failed to show deficient performance or prejudice under *Strickland.* It is apparent that there was a difference in the quantity of material that Dr. Melikian reviewed in 2004 contrasted with this hearing. PCR Tr. 603. However, she was unable to state with any clarity what particular information

she lacked in 2004 was critical to a revision in her assessment. In 2004, she had his medical records, the records from a psychiatric hospitalization when he was a teenager, the records from a head injury when he was an infant, his neurological records, and his school records. ROA 2003. She also had the reports from Hall Institute. PCR Tr. 601. She also had consulted with Dr. Brawley who did a series of neuro-psychological testing and received and reviewed her written report. PCR Tr. 602. Although she complained in hindsight that she had not been provided all the information that the 2004 defense team acquired (PCR Tr. 603), Dr. Melikian was unable to cogently express what material made a difference to her conclusions, other than it would be corroborative evidence concerning information that she had learned and relied upon in 2004. Much of her renewed analysis did not concern the way she gave in rendering a mental health opinion, but was more directed toward a characterization that was being made of the Applicant by the state's evidence of his character. PCR Tr. 607 (information about arrests that she was not aware in 2004).

The problem with her retrospective analysis of her own testimony is that it ignored the danger that her review of the additional material presented and allowed the Respondent in this proceeding to additionally develop the negative evidence - as the prosecution would have been developed at trial, and as it was similarly done with the proffered social work testimony of Jan Vogelsang. In cross-examination, based upon her review and reliance upon information both developed by the original trial team and then enhanced by the collateral team, Dr. Melikian had to address the bad as well as the beneficial because of her reliance of the extensive, but limited data.

This Court finds that her 2010 PCR diagnosis of mental illness under Axis I, II, III, IV would be the same as her earlier conclusion, only that the degree of the severity of the depression was greater than she earlier thought. PCR Tr. 621. Similarly, although she was not aware of the telephone call to Rod Tullis, Dr. Melikian was not aware that there was no additional evidence from Lindsey himself that he ever made the call and no evidence that anyone - other than allegedly Tullis - had actually heard the alleged call, including her own discussion with Lindsey.

Although she now wished Lindsey had seen a behavioral neurologist rather than a clinical general neurologist, there is no evidence of what such an expert would have revealed that could have transformed her opinion. Although Dr. Melikian claimed she had limited school records, she admitted she received 18 pages of school records faxed to her on May 4, 2004. PCR Tr. 624. She pointed to the fact she now had better evidence of his weight loss but that it was consistent with her testimony. PCR Tr. 633.

Similarly, this Court concludes that had she been exposed and relied upon the material presented through Jan Vogelsang, the likelihood of a death verdict became even more enhanced.[22] Although she met with investigator Lenora Topp, who prepared extensive summaries of the family history from her interviews with Lindsey, his mother and aunt, Dr. Melikian could not recall the specifics of the information she was provided about Lindsey's family and Topp's interview with Lindsey prior to her trial testimony. PCR Tr. 635. Her ultimate conclusion in 2004 and now is the same - Lindsey met the diagnostic criteria for

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[22] See summary of PCR testimony of Jan Vogelsang, infra.

"major depression" whether she looked at those earlier records and still feel he does after reviewing more records given to her since the trial. PCR Tr. 635-37.

Even if we assume that counsel was ineffective in getting certain unidentified material to Dr. Melikian, the alleged deficiency has failed to show prejudice or even a different presentation. See *Wong v. Belmontes*, -- U.S. ----, 130 S.Ct. 383, 386,175 L.Ed.2d 328 (2009) (per curiam) (assuming, for purposes of analysis, that counsel's performance was deficient when prejudice inquiry was dispositive). Her allegation must be denied.

The Applicant does not argue, but claims that counsel erred in failing to request a continuance for Dr. Melikian to have more time to prepare. The Applicant has only shown that she wanted more time, hut not that counsel was deficient in failing to make the request nor any likelihood that it would have been granted. Where the defendant claims ineffective assistance for failure to file a particular motion, he must "not only demonstrate a likelihood of prevailing on the motion, but also a reasonable probability that the granting of the motion would have resulted in a more favorable outcome." *Styers v. Schriro*, 547 F.3d 1026, 1030 n. 5 (9th Cir.2008). Because it is unlikely that Judge Few would have granted the motion for delay, or that the results of any such testing would have changed the outcome of the sentencing, this Court cannot say the alleged deficiency was prejudicial. Dr. Melikian was able to render an opinion to a reasonable degree of medical certainty in her area of expertise. Counsel's failure to request a continuance to make her more comfortable has not been shown to be deficient. As shown above, even with the period of time since the trial her opinion of the particular diagnosis has not change, only an opinion - driven in part

by a revelation that Lindsey was intentionally feigning mental illness in 2003 and 2004 - the it suggested the severity of his depression was more severe in 2002 - the Applicant has made no probative showing that there was a reasonable probability that the result of the proceeding would have been a life sentence - nor even that Judge Few would have granted a continuance. To the contrary, the evidence was that he would have likely denied it - through her own testimony - and that she was directed by Mr. Bartosh to get the job done. See *Gardner v. Galetka,* 568 F.3d 862 (10th Cir 2009) (Capital murder defendant was not prejudiced by his counsel's failure to provide mental health expert with more time to prepare for penalty phase testimony; despite the limitations under which expert was operating, expert did an effective job of conveying mitigating evidence regarding defendant's family history, possible organic brain damage, and social circumstances, and there was a risk of opening the door to damaging evidence by introducing further potential mitigating circumstances).

Finally, Lindsey asserts, but does not argue that Dr. Melikian should have been asked if there was evidence related to specific statutory mitigating factors. While Applicant admits that some expert witnesses in capital cases are asked that question by some defense counsel, the Applicant has failed to show that counsel was deficient in failing to make any particular inquiry. In fact, the counsel specifically asked Dr. Melikian whether she could give an opinion as to "whether Mr. Lindsey would have been operating under the influence of mental or emotional disturbance when the incident occurred," a statutory mitigating circumstance. ROA 2007,1. 21-24.

Nevertheless, *Strickland* prejudice has not been shown.

Judge Few was responsible for reviewing the evidence and instructing on all statutory mitigating factors shown by the evidence. He specifically instructed on the two applicable:

1. Murder was committed white the defendant was under the influence of mental or emotional disturbance.
2. Age or mentality of the defendant at the time of the crime.

ROA. Tr. 2155-56, 2188. The alleged omission of this legal interpretation of her evidence by Dr. Melikian does not create that any omission of the question by counsel Bartosh created a reasonable probability that the result of the proceeding would have been different. It must be dismissed.

V. Ineffective Assistance of Counsel - FAMILY HISTORY OF MENTAL ILLNESS. Counsel failed to present to jury family history of mental illness.

a. Failed to adequately interview family members to discover extent of Mental illness.
b. Failed to prepare family to present extent and nature of illness within family.
c. Failed to adequately argue to court the admissibility of evidence of family mental illness.
d. Failed to adequately preserve the record relating to family Mental Illness in support of attempt to present evidence and failing to offer proffer.

MEMO, p. 50.

In his fifth allegation, he contends that counsel failed to adequately interview family members and

present evidence on mental impairments within the family. This issue weaves claims and testimony of family members, the surviving lawyers and investigator and proffered social workers. This Court finds that there was some evidence presented of some family members' mental health problems involving whether aunt Bessie Smith had attempted suicide (ROA 20__) (testimony of Virginia Lindsey) (2082)(testimony of Bessie Smith) and that Steven Pilgrim suffered from illnesses of panic attack and anxiety attack and that his daughter was being treated for an illness described as panic attack (ROA 2080) (testimony of Steve Pilgrim). See infra., Findings and Conclusion on Argument 7.

This Court finds that the Petitioner has failed to show either deficient performance or prejudice for the reasons set forth therein.

VI. Ineffective Assistance of Counsel - Failure to Retain Prison Adaptability Expert. (Memo - 51-52)

a. Failed to retain PRISON ADAPTABILITY EXPERT to testify about Lindsey's ability to adapt to prison life others and the relevance of that information to the jury's decision.

Memo., P. 51-52.

In his sixth allegation, Applicant asserts that counsel were ineffective in failing to present a "prison adaptability expert" during the penalty phase as evidence in mitigation. The Applicant relies upon *Skipper v. S.C.*, 476 U.S. 1 (1986) which concludes the evidence of prison adaptability which suggests the defendant would not pose a danger if his life was spared and he was incarcerated must be considered mitigating and admissible. He further seeks support from the

ABA Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases, Section 10.11 (2003) which states that defense counsel ***should consider*** presenting "expert and lay witnesses along with supporting documentation . . . to . . . give a favorable opinion as to his client's capacity for rehabilitation, or adaptation to prison. . ." He asserts that the defense team failed to retain and present a prison adaptability expert. He further contends that the failure to do so created a reasonable probability of a different verdict.

First, there has been no showing that the Applicant would have been "adaptable to prison in the future or was adaptable in the past." It was primarily prison consultant James Aiken's testimony that the Department of Corrections can manage this type of offender for the remainder of his life without causing an unreasonable risk of harm to staff, inmates, as well as the general community." PCR 207-208. Second, the record reveals a series of violent assaults and threats by the Applicant toward loved ones and others; despite the fact he was under orders to avoid them. Finally, it reveals he was a player in a drug dealing outfit. Further, the Petitioner presented a thorough case in mitigation about the Applicant's background and family, albeit with any evidence concerning prison adaptability.[23]

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[23] It is unclear from the allegation whether this is an issue related to the Defendant's mental capabilities, attitude or the prison system's ability to confine the Applicant. There may have been a strategic reason for the decision not to pursue this line of mitigation. Recently, the U.S. Supreme Court addressed strategic claims on deciding not to present mental health evidence. In addressing the decision, the Court stated:

The Applicant may be relying upon *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), and *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). It is unclear whether Lindsey suggests that his proffered evidence was in rebuttal to any specific evidence concerning prison life or otherwise. In *Gardner*, 430 U.S. at 358, 97 S.Ct. 1197, the United States Supreme Court held that a defendant is entitled to due process during the sentencing phase of a

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> Without expressing a view on the ultimate reasonableness of the decision not to pursue this evidence further, we note that the Eleventh Circuit majority observed that the state court could reasonably have determined that counsel had strategic grounds for their decision. In particular, evidence about Wood's mental deficiencies may have led to rebuttal testimony about the capabilities he demonstrated through his extensive criminal history, an extraordinarily limited amount of which was actually admitted at the penalty phase of the trial. Counsel's decision successfully thwarted the prosecutor's efforts to admit evidence that Wood murdered his ex-girlfriend while on parole for an attempted murder of a different ex-girlfriend that was strikingly similar in execution to the subsequent successful murder. App. 23-24. Moreover, as the Eleventh Circuit majority noted, evidence of Wood's mental deficiencies also could have undercut the defense's argument that he left school to support his family, suggesting instead that he left school because of educational difficulties. 542 F.3d, at 1305-1306. Counsel's decision about which avenues to investigate can therefore plausibly be described as strategic rather than necessarily being the product of "happenstance, inattention, or neglect," *post*, at ---.

Wood v. Allen, 558 U. S. _, 130 S.Ct. 841 (U.S. 2010) (emphasis added).

criminal trial. The Court concluded that the defendant was "denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Id.* at 362, 97 S.Ct. 1297.

In *Skipper*, 476 U.S. at 3, 8, 106 S.Ct. 1669, the United States Supreme Court held that the trial court erred in excluding evidence that the defendant was well-behaved in jail between the time of his arrest and trial and that such behavior was probative of his future adaptability in prison. The Court stated, "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination." *Id*. at 7, 106 S.Ct. 1669.

Critical to the assessment of counsel Bartosh's and the defense team's performance in not presenting such an expert is what information the defense team had about Lindsey's character and prior incarceration and their awareness of prison adaptability as mitigating evidence. As shown below, the Applicant has failed to satisfy his burden of proof. Although counsel Bartosh is deceased, the assessment by the Court must lead to the conclusion that he was not deficient in presenting the generalized testimony and the evident risk that it would have limited probative value and a higher risk of negatively revealing Lindsey's dangerousness and potential for violence in a prison setting due to his prior involvement in incidents in his earlier incarcerations, a point any prosecutor would seek to establish. The evidence conclusively reveals that the defense team was aware - through the notations of counsel Quimby Hatcher of the fact that prison adaptability evidence could be presented through lay and expert witnesses. In addition, the record is remote

with the facts of his involvement in violent prison incidents with inmates and guards before his death sentence (and after). A review of the testimony presented leads to the conclusion that there was neither deficient performance nor prejudice under *Strickland.*

Counsel's Testimony on Prison Adaptability Issue

Counsel Brannon testified that he had heard of prison adaptability before, but that was not his issue. Since Bartosh was concerned about sentencing, that was his issue. PCR Tr. 51. He knew it was potentially admissible mitigation evidence from the seminars he had attended. PCR Tr. 51. Brannon's experience with Lindsey at the detention center was within the conference room very cordial. However, he was aware that Lindsey had been in a fight in the jail and received a disciplinary that resulted in him being locked down at least for the first 3 to 4 weeks he was involved in the case. PCR Tr. 52. Brannon stated that they would bring him into the room for their interview "completely shackled." PCR Tr. 52.

Counsel Brannon confirmed that with the awareness of the admissibility of prison adaptability evidence and conduct in jail (and the fact Brannon called a witness in the penalty phase), he knew what witnesses Bartosh intended to call in the penalty phase and there were no jail guards on the witness list. PCR Tr. 53. Brannon admitted, however, that he did not review the records of the 1996 incarceration at SCDC. PCR Tr. 55.

Counsel Quimby Hatcher also testified about her records she made in the case.

Particularly, she had noted that as a mitigating circumstance to be considered was future adaptability to prison life. PCR Tr. 249. (Exhibit 18). However, she

did not know the particular reason Bartosh did not present evidence in the area. PCR Tr. 249-50. See also PCR Tr. 261-62 (Respondent's Exhibit 6). Her records also reflected summaries of the SCDC records and records from the Spartanburg County Detention Facility documenting his disciplinary history which jail and prison assaults and the potential witnesses from the incidents. PCR Tr. 282.83 (Respondent's Exhibit 9).

PCR Testimony of James Aiken

James Aiken, a former South Carolina Department of Corrections Warden, who has a consulting firm relating to death penalty proceedings and jail and prison security testified at the PCR hearing in support of the allegation. PCR Tr. 201-228. He testified that he had reviewed the correctional files concerning Mr. Lindsey, but had never met Lindsey. PCR Tr. 206. He opined that it was not necessary to meet Lindsey before he rendered an opinion about prison adaptability or future dangerousness. PCR Tr. 206. He stated that he relied upon the records of the Spartanburg County Detention Facility and the South Carolina Department of Corrections' records when Lindsey was incarcerated for seven and one half months in formulating his opinion. PCR Tr. He also admitted that he had reviewed the records since he was on death row, but claimed that it was not included in formulating his opinion. PCR Tr. 206-07. Aiken opined his observations were that Lindsey had been guilty of crimes of violence in the community and that the Department of Corrections "can manage this type of offender for the remainder of his life without causing unreasonable risk of harm to staff, inmates, as well as the general community." He indicated his opinion was based upon the fact that he had done time before and that SCDC had the capacity to classify him, evaluate his behavior, and had the necessary staff, equipment

and expertise to manage him. PCR Tr. 208. He noted that Lindsey did not have relationships with "security threat groups" or "gangs." PCR Tr. 208. Further, Aiken opined he had not demonstrated a propensity toward random and systematic violence against others while he's in prison. PCR Tr. 208. Aiken admitted that since prisons are dangerous, things can happen. He testified that a life sentence without parole is a severe sentence and reduces a person to the lowest common denominator. PCR Tr. 209. He stated he could have rendered the same opinion during the trial. PCR Tr. 209.

Aiken opined that he was qualified to give a favorable opinion as to Lindsey's capacity for adaptation to prison. PCR Tr. 210. He opined that lay witnesses were not so qualified. Id.

On cross-examination, the risk of this generalized adaptability testimony was presented. Particularly, he recognized that it was his opinion that inmates in the Department of Corrections can be managed to avoid injury to other inmates, the general public and prison guards. PCR Tr. 211,11.22-25. Aiken noted that you can never say never, but the vast majority of prisoners in SCDC can be incarcerated.

Aiken acknowledged that the best predictor of future behavior is past behavior. He was aware that the prior correctional records of the crime of assault and battery with intent to kill revealed circumstances where there was an altercation on a highway where shots were fired and the victim was wounded. It was then emphasized - like the present case - that he shot into a vehicle. PCR Tr. 214.

Similarly, he was aware that Lindsey had also been arrested for criminal domestic violence. However, in making the assessment, Aiken stated he had

no need to speak with Lindsey about his other arrests and crimes of violence he committed, because he was only basing it on adjudications and official records.[24] He stated that being accused of something and being guilty are two distinct matters. Aiken discounted the fact that he had a source in Mr. Lindsey to ask him whether he did do what he was charged with, but still found it unnecessary. PCR Tr. 215. I1. 5-11.

Aiken also admitted - though not mentioned in direct - that he saw in the prison records that he was recommended for "anger management." PCR Tr. 215, II. 21-22. He admitted that this reflected "the potential for violence is certainly there" and he felt the recommendation was to prepare him for his return to society. PCR Tr. 216.

Aiken also admitted that his prior prison record reflected he got into fights and indications he acted violently towards others. PCR Tr. 216. In addition to the March 24, 1996 fight at Dutchman, his jail records in Spartanburg reflected that he had a violent assault in the jail when he got into another altercation with an inmate and an officer. PCR Tr. 217. Aiken stated the incident was resolved by 20 days segregation and the inmate got gassed to control his behavior. Aiken noted that gassing an inmate in a fight is not automatic. PCR Tr. 217-18. He further opined that the use of gas against Lindsey appeared appropriate.

Concerning the fight in SCDC, the incident occurred outside the dining hall. However, the February 13, 2004 incident occurred when he left his cell. He

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[24] Even though original defense counsel had created a file and record of a number of violent incidents involving Lindsey against a number of individuals. See Respondent's Exhibits 8-10.

described how the officer who broke up the fight got caught in between and another officer gassed him.

Aiken also admitted that Lindsey had two incidents at Lieber since he was sentenced to death in December 2004 with inmate William Bell and a more aggressive fight in December 2006 with inmate Angel Vasquez. PCR Tr. 221-23. However, Aiken would not agree that the incidents showed on those dates that SCDC was unable to manage Lindsey to prevent violence against other inmates. PCR Tr. 223,11.9-15.

Aiken clarified that his opinion was only that he could be managed not to create an unreasonable risk of harm. PCR Tr. 224.

ANALYSIS

This Court finds that this claim is without merit. Deficient performance has not been shown. Evidence concerning prison adaptability by lay or expert witnesses as a response to claims of future dangerousness and the Applicant's character under *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) is admissible in mitigation in death penalty cases and should be considered by reasonable counsel.[25] While defense counsel did not retain an expert in this area, this Court must find that the defense team ***considered*** the issue.

The evidence concerning that of the defense team consideration of the issue is shown by the fact that

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[25] *See generally Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (evidence of good behavior in prison admissible in mitigation as relevant to future adaptability); *State v. Shafer*, 352 S.C. 191, 573 S.E.2d 796 (2002) (evidence of violent behavior in prison relevant to future dangerousness); *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996) (defendant's future dangerousness and his adaptability to prison life are legitimate interests in the penalty phase of a capital case).

counsel Quimby had included in her notes and summaries that future adaptability to prison life was a statutory mitigating factor. PCR 249. (Respondent Exhibit 18). Also included in the defense team material were the records of SCDC concerning the earlier incarceration and records from the Spartanburg Detention Center concerning his disciplinary history. PCR 282-283. In addition, counsel noted that evidence of prison adaptability could be introduced from a clinical psychologist. PCR 262. In addition, counsel Brannon stated that he was aware that evidence of prison adaptability was a proper matter for mitigation in a capital case from the seminars that he had attended. 51, 53. In addition, counsel was aware of the jail disciplinary issues that Lindsey had been a part in from the records and his visits to the jail where Lindsey was locked down. PCR 52.

The mere fact that Bartosh is not available to express his decision on why he did not specifically retain a correctional expert for trial does not shift the burden. As recognized *in Harrington*, although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, *Wiggins*, 539 U.S., at 526-527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam).

What is undisputed is that the defense team was aware of the potential for the admission of evidence of prison adaptability, acquired records of his current and prior incarceration and evidence of his actions in jail, which included gassing, segregation and anger

management courses. Further, the evidence is undisputed that as the defense team culled and created a witness list - with the understanding prison adaptability was a potential mitigating evidence basis - they did not include any witness on the list - jail or prison guards - to testify about this area. Additionally, Brannon opined that this decision would have been left up to Mr. Bartosh.

The failure to investigate or retain a private security expert in this case is supported by reasonable professional judgment. See *Strickland*, 466 U.S. at 690-91,104 S.Ct. 2052 (stating that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation"). Importantly, as in *Harrington*, the proffered evidence revealed the two-edged sword that a competent attorney would be able to recognize as a high risk of harmless information and could be emphasized by a prosecutor to illustrate an inmate's inconsistent history of being adaptable to prison life.

This Court finds that a trial counsel's not presenting this expert's future dangerousness testimony "falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. First, Aiken's opinions that Lindsey would be unlikely to harm guards or fellow inmates in prison were based in large part on the fact that prison authorities would classify him as a maximum security inmate based on his murder conviction. His opinion did not focus on any mitigating lack of propensity to violence in his character - because as shown he had propensity for violence and anger, but rather on the fact that the structured, maximum security prison setting likely would control Lindsey and not permit him to act on any desires to escape or commit acts of

violence to other inmates or guards, even though he had done so previously and while awaiting trial (as well as with two other death row inmates since his sentence). They also serve to emphasize the point, not favorable to Lindsey, that the prison system would classify him as a high security inmate because it would consider him to present a potential for violence. Aiken clarified that his opinion *was* only that Lindsey could be managed not to create an unreasonable risk of harm.

Further, a reasonable attorney could simply conclude that the experts' core opinion - that he could be managed and not be an unreasonable risk of harm to inmates, guards and the public in spite of his having recently attacked a jailer and a history of jail incidents - was weak and would not persuade Lindsey's jurors. Additionally, a reasonable lawyer would have known the evidence focused more on the prison's ability to control Lindsey and all inmates, rather than Lindsey own character, which would *have* been focused by the prosecution with Lindsey's violent incidents while in custody - with the underlying knowledge of his violence against others - male and female - in and out of custody. A decision to prevent or limit that comparison against the weakened evidence of prison administration would not be unreasonable. A reasonable attorney could decide that under the particular facts of this case the future dangerousness testimony concerning prison adaptability would not be helpful.[26]

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[26] This is not a case in which the State introduced expert testimony about the defendant's future dangerousness and the defendant was denied an opportunity to directly rebut that testimony with his own expert. *See Clisby v. Jones*, 960 F.2d 925, 929 n. 7(11th Cir.1992). Nor is this a case like *Williams v. Taylor* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). In which the

Further, Sixth Amendment prejudice was not shown by the failure to present similar testimony by James Aiken in 2004. As revealed in the cross-examination before this Court, the admission of such testimony was weakened and could have made a death sentence more likely rather than less likely since the risks of this generalized adaptability testimony was presented.

- Aileen noted that you can never say never, but the vast majority of prisoners in SCDC can be incarcerated. PCR 212.
- The best predictor of future behavior is past behavior.
    - the prior correctional records of the crime of assault and battery with intent to kill revealed circumstances where there was an altercation on a highway where shots were fired and the victim was wounded. It was then emphasized - like the present case - that he shot into a vehicle! PCR Tr. 214.

State's two expert testified there was a "high probability" that Williams posed a serious continuing security threat and defendant's attorneys failed to elicit: (1) evidence of William's "nightmarish childhood," including criminal neglect by his parents, severe abuse by his father, and his time in an abusive foster home; (2) that correctional officers were willing to testify Williams would not pose a danger while incarcerated; (3) that Williams received prison commendation for breaking up a drug ring and returning an officer's wallet; and (4) an admission *from the State's testifying future dangerousness experts* that the defendant would not post a threat in the future if kept in a structured environment. *Id.* At 368-71 & n. 4, 395-98, 120 S.Ct. at 1500-02 & n. 4, 1514-15.

- Lindsey had also been arrested for criminal domestic violence.
- Aiken never met with Lindsey about his other arrests and crimes of violence he committed and only based his opinion on paperwork. PCR Tr. 215, ll. 5-11.
- Aiken also admitted "the potential for violence is certainly there" and had failed to mention in direct - that he saw in the prison records that he was recommended for "anger management" PCR Tr. 215, ll. 21-22.
- His prior prison record reflected violence with fights and indications he acted violently towards others. PCR Tr. 216.
- March 24, 1996 fight at Dutchman.
- A Spartanburg Jail violent assault in the jail when he got into another altercation with an inmate and an officer. PCR Tr. 217.
- 20 days segregation and the inmate got GASSED to control his behavior.
- Aiken clarified that his opinion was only that he could be managed not to create an *unreasonable* risk of harm, not that he would not be harmful to others. PCR Tr. 224.

Even if counsel's performance was allegedly deficient for not presenting such an expert, no prejudice resulted. There is no reasonable probability that the outcome would have been different had such an expert testified because any possible benefit from such expert testimony would pale in comparison to Lindsey's actual behavior both prior to and after his arrest. The

mixed impact it could have had in this particular supports the conclusion that counsel was not ineffective. See *Parker v. Sec'y for the Dep't of Corr.,* 331 F.3d 764, 788-89 (11th Cir.2003) ("Given the strength of the aggravating factors and the relative weakness of the mitigating evidence Parker argues should have been presented, there is no reasonable probability that, absent the deficient. performance, the outcome of the proceedings would have been different. The aggravating factors in this case are substantial."). "Moreover, we have rejected prejudice arguments where mitigation evidence was a 'two edged sword' or would have opened the door to damaging evidence *Wood v. Allen,* 542 F.3d 1281, 1313 (11th Cir.2008), cert. granted, -- U.S. --, 129 S.Ct. 2389, 173 L.Ed.2d 1291 (2009) (citing *Gaskin v. Sec'y, Dep 't of Corr.* 494 F.3d 997, 1004 (11th Cir .2007); *Grayson v. Thompson,* 257 F.3d 1194, 1227 (11th Cir.2001)); see *Wong v. Belmontes,* 130 S.Ct. at 387-90 (finding no prejudice where proposed mitigation evidence was either cumulative of evidence already presented at penalty phase, or would have opened door to damaging testimony).

> Here, the thorough presentation of the horrific evidence in aggravation and the alleged omission of prison adaptability evidence would not have undermined confidence in the death sentence verdict. He has failed to show on this unique record which included evidence about his criminal character that there is a reasonable probability that the result of the proceeding would have been different under *Strickland*. The allegation must be dismissed.

VII. Ineffective Assistance of Counsel - FAILURE TO RETAIN SOCIAL HISTORIAN/SOCIAL WORKER

a. Failed to retain mitigation expert regarding psycho-social history of Lindsey and relevance to jury determination.

MEMO , p. 52-53.

In his seventh allegation, he contends that Lindsey failed to present a "family historian." This Court will combine the issues concerning the family history presentation of family and friends at trial, the reasonableness of the mitigation investigation and any deficiency and prejudice concerning the failure to retain a social worker to testify about the family history. These claims are encompassed in the Applicant arguments 5, 7, and 9 within his post-hearing memorandum. Although the record reveals that a social worker was not called as a witness by the defense, it revealed that friends and family members, as well as an expert witness, Dr. Melikian, a forensic psychiatrist, testified at trial. In addition, a mitigation investigator, Lenora Topp, a licensed investigator based in Asheville, N.C., was retained and used by the defense team in this matter. At the hearing, counsel presented family members (Virginia Lindsey, Bessie Smith, Steve Pilgrim, and Tim Sims), Lindsey's friends (Bill Burton and Pat Burton) as well defense counsel (Doug Brannon and Karen Quimby Hatcher) and retained mitigation investigator Lenora Topp. The focus of the testimony was on new witness -social worker Ian Vogelsang.

In his memorandum, the Applicant cites to *Eddings v. Oklahoma*, 455 U.S. 104 (1982) to suggest that a defense counsel has an obligation to present all

available mitigating evidence. However, he then asserts that the ABA guidelines states that counsel "should consider presenting "expert and lay witnesses along with supporting documentation … to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen that client's culpability for the underlying offense." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), § 10.11 - The Defense Case Concerning Penalty. He asserts that the defense team. failed to retain and present a social worker. However, other than that fact, he fails to point to any particular evidence that should have been presented or how it would have uniquely impacted upon the jury.

The Petitioner has failed to prove either deficient performance or prejudice concerning this matter. As revealed within the evidence, counsel retained a mitigation investigator Lenora Topp who acquired background data concerning the defendant, acquired a understanding of the family from Marion Lindsey and his mother and provided her summaries to the defense team for their use in deciding what information to present. The family background was investigated and not ignored. In addition, evidence was presented through lay witnesses at trial concerning the background in the guilt and penalty phases. The Applicant has failed to show how this evidence from the social worker - or its absence - undermined the confidence in the verdict under the standards of *Strickland*.

This Court finds that after reviewing the totality of the circumstances from counsel's conduct at that time, reveals that counsel was not deficient. An assessment of counsel's actions must begin with a review of the testimony concerning what was presented

at trial as previously set out in this Order at pages 17-28.

Counsel's Testimony

Next a review of the testimonies of counsel Doug Brannon and Karen Quimby Hatcher reveals the Applicant's mental, medical, and family history was reviewed and not ignored.

Counsel Brannon stated that Lenora Topp's name was on the witness list, but was not called. PCR Tr. 55. He stated that she was the mitigation investigator the defense had hired. PCR Tr. 55. He felt that she knew Lindsey's family history as well as Lindsey did. Brannon stated that she was helpful in locating witnesses and providing information about the family history and relationships. PCR Tr. 55.

Brannon stated that he relied upon Bartosh's decision as to who to actually call, describing him as "still is one of the best lawyers that I had ever met in my life." PCR Tr. 56. Brannon stated essentially that he did not question the decision by Bartosh on who to call or not call. PCR Tr. 56-57.

Counsel stated after the guilt phase verdict, they worked the entire day with Lenora Topp going over notes and sharing information that she had learned about the potential witnesses. PCR Tr. 57.

Brannon also testified that Karen Quimby, an assistant public defender, got involved one month prior to trial. He saw her role to assist in organizing the files and summarizing information within the file. PCR Tr. 58. Quimby would create short outlines for each witness and interject cases from research. Brannon felt that she was a full participant in the discussions. However, he recalled that she was not present when Brannon and Topp went to see Mr. Lindsey's mother and the cousin. PCR Tr. 59.

Counsel stated the only penalty phase witnesses he recalled personally interviewing were his mother and Bill Burton. He recalled he met with Mrs. Lindsey that week or ten days before the trial and he met with Burton during the 24 hour recess. PCR Tr. 61. He recalled meeting with the cousin, Chris Wilkins, on the day he met with Lindsey's mother. PCR Tr. 61. Also PCR Tr. 59. Brannon also recalled interviewing the paramedic by himself, but possibly over the telephone. PCR Tr. 61.

Counsel stated that he interviewed the paramedic to develop that Lindsey had tried to kill himself by shooting himself. PCR Tr. 67.

Counsel stated he interviewed Lindsey about the Wilkins incident.

Counsel said that Lindsey's consistent story was that he was selling drugs and made good money. PCR Tr. 68. He stated Nell would then tell him to stop because she did not want him to get caught and go to prison. Then, Lindsey would stop and get a regular job, but he was not making the money. Brannon opined that Lindsey felt if be kept selling drugs, Nell would leave him because of the potential danger. However, he also felt that if he quit and got a real job, she would leave him because he had no money. PCR Tr. 68.

Testimony of Lenora Topp (PCR Tr. 106-162)

During the PCR hearing, former private investigator Lenora Topp from Asheville testified that she was retained in Mr. Lindsey's case as a mitigation investigator around April 16, 2004, about one month prior to the trial. PCR Tr. 108-09. She stated that the Public Defender advised her that her main job was to gather records and claimed they did not discuss the

possibility of testifying as an expert witness until trial. PCR Tr. 108.

After reviewing her voucher and time spent on her mitigation investigation (PCR Tr. 109-113), she opined in hindsight that she did not have sufficient time to do the work that was needed. PCR Tr. 113. She stated that in a North Carolina case, she had spent 3 years in mitigation preparation. PCR Tr. 113. She stated she was not asked to do a genogram. PCR Tr. 113-14.

She testified that she attempted to locate Dr. Barry Henderson, the family doctor, after Virginia Lindsey met with her and Doug Brannon. PCR Tr. 114. She described Dr. Henderson as also a friend whose children played with Lindsey when he was growing up. Topp stated she had a dual purpose in seeking him out for Lindsey's medical records and whether he would be a mitigation witness for them. PCR Tr. 114. Topp said Virginia had initially given her the wrong name and Lindsey had corrected it while they were in court, but when she contacted his office there was no answer or response to a faxed request. PCR Tr. 116. After the trial, she asserted that Dr. Henderson contacted her stating he was sorry that he could not help, like and trusted Lindsey to play with his children and would have been glad to testify what a good person he was. PCR Tr. 117. Topp stated when she learned this she sent an email to Karen Quimby the day after the trial stating she had continued to contact Dr. Henderson and ask about Applicant's records. She stated – in the email - that Lindsey only told them in court that he wanted Dr. Henderson as a witness because he used to play with his children. In the email, Topp stated that Virginia has seen the doctor recently and had not asked him to be a witness. Topp also expressed in the email that she felt she had

not done enough for Lindsey. PCR Tr. 118. [Dr. Henderson died April 9, 2006]

Topp described that as a mitigation investigator it takes time and multiple meetings to get most witnesses to trust and divulge information. PCR Tr. 115-16. In addition, it may take time to jog memories she asserted. PCR Tr. 116.

Topp also stated that she was not aware of a note from the Solicitor's Office investigator to the defense by a person who had called indicating he had an affair with the e victim. She stated that had she known, she would have followed up on it. PCR Tr. 119. (Applicant's Exhibit 6). She stated that she was still seeking records on Robin Keith and (Aunt) Bessie Smith during the trial, with release forms dated May 21, 2004 and May 24. She stated that she was not asked to get family records, other than Marion's. PCR Tr. 120. In addition, she stated she was not asked to interview Rod Tullis. PCR Tr. 121.

On cross-examination, Topp stated this was her first case in South Carolina, but has since handled other cases in Greenville and Spartanburg Counties including Kamel Evans. She stated that she did not spend 3 years on those cases, asserted she had spent no more than two months on those also declaring "I didn't have enough time on those cases either." PCR Tr. 122.

Topp testified her first meeting with Lindsey was a 3 hour interview on April 16 when he provided "everything he could remember" about family background starting from the day he was born, the accidents he was in when he was run over, his very poor upbringing and how they shared rooms, and that he was not raised by his father. Lindsey told her he would not want his children raised without a father because he

never had a male figure in his life. PCR Tr. 123. She said they talked about everything up to the incident in the police parking lot. PCR Tr. 123.

Lenora Topp stated that she learned about Lindsey's imaginary friend Jimmy, but he was not in the room during her meeting. PCR Tr. 124.

Concerning the masons he shot his wife, Topp stated that Lindsey would not remember part of it stating he just went to his brother's house to calm down, but he was not there. He told her he was upset with his wife having an affair with a man who would take over raising his children. He told her he saw Celeste, but not who was in the back seat. He said he approached Celeste to ask what was going on and that he wanted to see his children and could not. He described to Topp that when he saw his wife in the back seat, he wanted them to pull over, but they drove off instead. PCR Tr. 124. Lindsey knew he followed them; he just shot when they got to the police station. PCR Tr. 125.

In discussing his mother, Lindsey told Topp she got names and addresses of potential witnesses from him. She recalled two major interviews with Lindsey on April 16 and April 25. PCR Tr. 125. She noted the summaries of the interviews - State Exhibit 2. The exhibit revealed information about Virginia and father Leon McDowell who had a distant relationship with Applicant and that Lindsey felt bitter towards him. PCR Tr. 127. She confirmed he had hatred towards him because they never could do anything together, describing how others would go off and fish, but not his father. PCR Tr. 128.

Topp stated that Lindsey claimed he had no clothes even though he had to wash them out every night. PCR Tr. 128-29.

Concerning his relationships with his brothers, Lindsey told her that brother Paul's drowning was emotional for him about 7 years ago. She stated she got his death certificate. PCR Tr. 129. His relationship with Paul Frederick was very close and Lindsey claimed the death affected him for 3 years. She recalled he had moved with Paul to work construction in (West) Virginia, but Applicant got homesick and came back. PCR Tr. 129.

She described that Lindsey felt Tim Sims was the father of the household for Lindsey and he followed him everywhere, but they had different fathers. PCR Tr. 129. She said that Sims' father was the only father figure Applicant had. PCR Tr. 130. Topp reported that Applicant told her that they would eat a lot of bologna as he was growing up as his main food. PCR Tr. 130.

Concerning his drug sales, Topp was told by Lindsey that he sold drugs on Ind off when he needed the money. He said the drugs afforded him the better lifestyle he wanted to live with including houses, cars and the ability to buy things for his children. PCR Tr. 130. However, Lindsey had denied that he ever used drugs. PCR Tr. 130.

Topp said she was told that his father's family had taken warrants against him (Leon McDowell, Jr.), got along with him (Teresa), and considered Applicant to be an outsider (Orlando). PCR Tr. 131-32. She was also told about how he related 'to Claude Lindsey's children. Id.

Topp stated her interview document with Lindsey (Respondent Exhibit 2) was given to Karen Quimby and also included educational history, which reported his school disciplinary actions. These reports included fights against boys and girls, that he was suspended for a week according to Lindsey. PCR Tr. 133.

She reported that Lindsey reported as a traumatic event when his two uncles threw his favorite cat into the wood heater while it was alive. PCR Tr. 134. Topp reported that she reacted with shock and tears and felt it should have impacted on his life and was disturbing. PCR Tr. 134.

She reported that he told her that he quit school and took some jobs. He reported to her a car accident when a tire blew out and claimed a loss of memory and had to have facial surgery and broke his hip. PCR Tr. 135. He told her he was out of work for a year. She received information from him that he worked at Burger King where his brothers worked but lost that job, then worked for United Cloth in Spartanburg. He told her that he thought it was a boring job and complained about the women gossiping, but felt he-advanced in the job. PCR Tr.136.

Topp reported that he advised her of his girlfriends. He reported to her that Stephanie Petty was his girlfriend from 1992-1996. Though Topp did not recall the reason for the break-up she did not recall it as an "ill-parting." PCR Tr. 137.

Topp also learned from Applicant about Bill Burton. He reported to her that Burton was a plant manager and bad offered him a job. Further, their relationship went back to when Burton was a lifeguard and began a friendship with him then and took him fishing at their pond PCR. Tr. 137. Further, Topp learned that when he was fired he tried to get him re-employed. Lindsey worked at the plant for two years. PCR Tr. 137. As to Burton's mother (Patsy), Lindsey reported to her that she was friendly and took care of him when Bill was not there (when he went fishing). PCR Tr. 138.

He also related to her generally about past incarcerations and the shooting of Stafford Wilkins. PCR Tr. 139.

Topp reported to the defense her general impressions of Lindsey. PCR Tr. 139. She stated to them that he had a hard time in life and did not want to be a drug dealer but ended up there because the money was good. PCR Tr. 140. She said he gave Nell money to take care of the children, but claimed she spent it on boyfriends. He said he also gave his mother-in-law money to fill her car with gas. Id. He tried to show that in his heart he was a good person and tried to keep the drug dealing from his mother because he did not want her to see his weakness. PCR Tr. 140.

Topp stated Applicant also told her about having a friend named Jimmy who told him God had sent him. Id. She reported that "Jimmy" had arrived in his early teens. Lindsey told her that he was resigned to dying and regretted that he did not have enough time to spend with his children. PCR Tr. 140.

Topp confirmed that her interview notes of the meeting on April 16, 2004 with the Applicant revealed a long interview. PCR Tr. 141. She had broken down her notes into various subsections, including Lindsey, background, educational and employment history, about Nell Lindsey and about his mother Virginia. PCR Tr. 141-42. (Respondent Exhibit 3). She stated she prepared the summaries of her interviews at counsel's request. PCR Tr. 142-43.

Topp also prepared a summary of her interview of Virginia Lindsey which occurred May 15, 2004. PCR Tr. 144. (Respondent's Exhibit 4).

Topp stated she was referred to the defense by Jeff Bloom. She stated the defense asked her to locate

identified witnesses, serve subpoenas, and try to get records. PCR Tr. 145.

Topp stated she got some mental health records of Lindsey and sought records for Bessie and Robin. She also retrieved hospital records related to Lindsey's prior injuries, including a return trip about the head trauma when he was run over as a child. PCR Tr. 146. She also received school records for Lindsey, though she said they may not have had all due to the school being burned down, PCR Tr. 147.

Topp stated her role as a mitigation investigator was to gather records and information "to keep him from getting the death penalty." PCR Tr. 147. She clarified that it was to gather information, both negative and positive and then let the counsel sort through it. PCR Tr. 148.

Topp identified and described her own attempts to communicate with Lindsey's former girlfriend, Stephanie Petty, up to 2 days prior to the trial. PCR Tr. 148-49.

Topp claimed she did not know she was to be a potential witness in the trial and has never testified in a death penalty trial. PCR Tr. 149-150. However, Topp stated she talked with counsel Quimby on a regular basis and was in her office frequently. PCR Tr. 150. She stated she continued to seek documents during the trial. PCR Tr. 150. During the trial, she also met with witnesses outside court to keep them calm and tell them to be honest and responsive to the questions. PCR Tr. 152. Prior to trial, she recalled the meetings with Virginia and talking with Bill Burton on the phone. PCR Tr. 153.

Topp recalled that around April 19 sending an email to counsel Bartosh about the impact of Lindsey's brother's death upon him and probably stated that the

psychiatrist would have a lot to work with and "he definitely had anger management problems throughout his life." PCR Tr. 154. Further, she recalled that around May 12, she reported to counsel questioning who tried to help this kid who from day one cried for help and no one did, after she had received school records. PCR Tr. 154-55. Topp also confirmed that she suggested subpoenaing the family members that were using mental health facilities - Bessie, Steve, Paul and Virginia. PCR Tr. 155.

She confirmed that she was not an expert in mental health area. PCR Tr. 158. She stated that she made notes and provided then to Quimby. PCR Tr. 160. She stated that she was not retained in the case in 2004, so she was not "involved immediately" in his defense. PCR Tr. 161.

Family and Friends PCR Testimony

At the PCR hearing, the Applicant presented a series of family members and friends who testified concerning the family history and their knowledge of Lindsey's life and worth implicitly the Applicant was claiming that such evidence would assist in presenting a background to a social historian and could have been presented in more detail or in a more persuasive manner. However, contrasted with the information that counsel had in 2004 and what was used at trial, it reflects a reasonable decision not to use in the unpersuasive and inconsistent detail it was presented. Additionally, the failure to present it in the manner did not show a reasonable probability that the result of the proceeding would have been different under the Strickland test. See, e.g., *Johnson v. Bell*, 344 F.3d 567, 573-74 (6th Cir.2003) (although testimony from family members would have helped to humanize the defendant, the jury could have concluded that he was

even more culpable because he had enjoyed a loving family and yet had murdered his wife); *Martin v. Mitchell*, 280 F.3d 594, 613-14 (6th Cir.2002) (defendant did not show prejudice at the mitigation phase where family members testified about his background and a psychological report was given to the jury); *Scott v. Mitchell*, 209 F.3d 854, 880-81 (6th Cir.2000) (finding that potential mitigating circumstances were overwhelmingly negated by other evidence about the defendant's background).

Virginia Lindsey's PCR Testimony

PCR Tr. 327-386

In his memorandum, the Applicant describes PCR testimony of Virginia Lindsey, the Applicant's mother, as "vastly different" than her trial testimony. Applicant's Memorandum, p. 21. This Court agrees that there was more detail in the post-conviction testimony. He now suggests, in lieu of the brevity of her trial testimony (ROA 1674-77, 2044-2061)[27], the alleged details within her PCR testimony were necessary to humanize Lindsey for the jury and to support the testimony of the mitigation expert. This Court concludes that neither deficient performance, nor prejudice has been shown by this reconstructed PCR testimony.

The Court will summarize her PCR testimony. Mrs. Lindsey testified that she grew up in Inman and went to the 10th grade. PCR Tr. 329. She described having three sisters and five brothers and was the third child. PCR Tr. 330. Only one of her sisters graduated from high school. Of the children, she thought only her brother Paul had difficulty learning.

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[27] A summary of Virgina Lindsey's trial testimony is set out in this Order, pages 22-24.

Her parents were Ruth and Smiley Pilgrim, her father leaving when she was 13. PCR Tr. 331. She said the two youngest were not Smiley's children. She said he stopped coming around for seven years, only stopping by later for couple of days when she was 20. PCR Tr. 332.

She said she went to work at Inman cotton mill from age 17 to 19. Although some of the family worked either in the mill or a nursing home, money was tight because her mother was unable to work causing them to pick peaches and cotton so they could survive because the father was not providing any money. PCR Tr. 333. She described their house (with 10 people) as a pretty big 2 story house with 4 bedrooms. They used a coal heater to keep warm and used quilts to keep the drafts out around doors and windows. PCR Tr. 333.

Her Children

Mrs. Lindsey stated she married her husband when she was 17 for three years before they divorced. She stated they had three children, Claude, Vanessa (who died in a car accident at 7 months) and Frederick. She 'stated she still lived with her mother all this time during the marriage. PCR Tr. 335. She described this house as a smaller 4 room house with only two bedrooms.

When Marion Lindsey was born, Mrs. Lindsey stated they lived in her own house on [REDACTED]. PCR Tr. 336. She recalled that the Applicant was 7 years old when they move out of her mother's house. She said at various times there were 11 to 12 people living in the 4 room house.

Mrs. Lindsey described her daughter Vanessa's death as "pretty hard" because they had to wait for someone to carry her to the hospital. She felt it took a

year to come to her senses and affected her ability to deal with day to day matters.

Mrs. Lindsey stated she had a live-in boyfriend for 20 years, Roger Sims [Tim Sims' father]. However, Roger had a drinking problem and became violent, including toward Marion and the boys. PCR Tr. 339. She said on occasion, the Applicant would run across the street to get her mother when Roger was fighting her and when she got there Roger would leave. PCR Tr. 339.

Mrs. Lindsey stated that the Applicant's father was Leon McDowell. She said he never lived with them and had his own family. PCR Tr. 340. McDowell did not have much interaction with Lindsey "like a father" and every once in a while he Would show up about once a year and give him money or allow them to use a credit card for his clothes. PCR Tr. 340-41.

Mrs. Lindsey described how the other children would get to spend time with their fathers on weekends, but Marion was left because his father was not visiting. PCR Tr. 341.

Mrs. Lindsey described head injuries that the Applicant received. She described when he was one year old, her brother Paul backed over him with a car, resulting in scars around his ear and head. PCR Tr. 342. When he was 6 or 7 he fell and injured the front of his head which required him being carried to the doctor. However, two weeks later, Lindsey fell off her girlfriend's porch and hit his head in the same place. Then, when he was 16 he had a. car accident and he was injured resulting in scars around his eye. PCR Tr. 342. The Applicant was also accidently poisoned by kerosene when Lindsey was 8 months old when he had poured a jar on his face and clothes and was gasping

to catch his breath. Although his mother tried unsuccessfully to get milk down him, they went to the police station and then the rescue squad took him to the hospital. PCR Tr. 344.

Mrs. Lindsey described her brothers, Paul and Willie, who were both heavy drinkers - Paul more than Willie - and would "love to fight a lot and beat their girlfriends." PCR Tr. 345. She described Paul getting into more fights and carrying guns and knives. PCR Tr. 346. She recalled a time when Paul got into a fight at 3 a.m. and came home and kicked in the door and got his mother's pistol and went out the door shooting and then someone shot back through the house. She described everyone getting down on the floor. PCR Tr. 346-47.

She also described an incident concerning Marion's kitten. She said Willie and Paul did not like the cat and one night threw the kitten in the heater. PCR Tr. 347. She said Lindsey was there when this happened. PCR Tr. 347-48.

She described one of the Applicant's brothers Frederick (known as Fred) as not getting along with Lindsey. She said Paul thought she cared more about Marion than him because when Fred and Marion stayed out one night, she; gave Paul "a whooping", but not Marion who she "sent to school to punish him." PCR Tr. 348. She said Fred 'drowned in Jocassee Lake in 1998 when he was 27 without finding his body. PCR Tr. 349. Marion was 23 at the time of his brother's death. Id.

While they were living on Bobo Street, she said they were exposed to drinking, drug dealing and violence in the neighborhood (but not in their apartment). PCR Tr. 350. However, she said Marion did not live with them much on Bobo - it was just Tim Sims

and her. PCR Tr. 350. She could not state that she saw Lindsey sell drugs on Bobo, but she had a feeling he was selling. PCR Tr. 350.

She described an event when Lindsey was 15 and got into a fight with Fred while she was at work. PCR Tr. 351. She said the oldest son, Claude, called her at work and told her to come home because Marion and Fred were fighting. When she arrived Fred and his half-brother were fighting Marion. Id. When she got there they bad the Applicant on the ground and Claude had a stick and they got off him. She told Fred and his half-brother to leave and don't come back. She said Fred stayed gone for a week or two before he came back. PCR Tr. 351.

She described another incident when Marion and Fred were fighting one night over the use of the telephone. When she tried to stop them, she said Marion "hauled off and held me down on the bed." She said she told Lindsey to never ask her for anything else in her life because she won't give him anything and "I don't love you no more and you don't treat your mama like that." PCR Tr. 353,Il. 6-15. She stated Lindsey did not like that; he then went into the bathroom and took a whole lot of pills. While she remained on the bed watching TV, she heard her son Tim call for his father. Next, Roger Sims came to her and told her to call the rescue squad because Marion had taken pills and was on his knees throwing up. She went and saw him by the commode and he had taken Tylenol, Advil, and. Ibuprofen. He was carried to the hospital where they pumped his stomach and then was put into mental health treatment for two weeks. She said they sent him home after that and did not tell her to bring him back. PCR Tr. 353. She never sought any follow-up. PCR Tr. 354.

She said Lindsey had difficulty in school. She stated he was always repeating, could not learn, and got D's and F's. PCR Tr. 354. She stated he left school at age 17. PCR Tr. 355.

Although he did not get a job when he left school, his mother felt he got money first from his girlfriend, Stephanie Petty, and then after that by selling drugs. PCR Tr. 355. She said his drug sales helped her because he made the house payments from his proceeds. He also used the money to help her with payments on the mobile home and groceries. PCR Tr. 355-56.

She said Lindsey would briefly get a legitimate job for 3 to 4 months and then quit it to go back into drug dealing. PCR Tr. 356.

Mrs. Lindsey stated that while Lindsey was living with Stephanie Petty, Nell got pregnant with the Applicant. PCR Tr. 356. She described Nell and her mother always showing up at Lindsey's house asking for things for herself and the baby. After a while, Stephanie got tired of it and left. PCR Tr. 357.

She stated that when Stephanie left, Lindsey got more serious and eventually got married after their oldest was 5 or 6. PCR Tr. 357. They had two children. She testified that she observed Marion, Nell, and the two boys at her house all the time. PCR Tr. 357. Mrs. Lindsey opined he took care of them by taking them to the barber, out to eat, to the park. PCR Tr. 358.

She described the relationship with Nell that they argues a lot, but she never saw Lindsey hit Nell and it was all right because everyone is going to have ups and downs. PCR Tr. 358. She said that Nell and Lindsey had already broken up before the shooting, but he had not told her or she did not know it, although he

hung at the house a lot. PCR Tr. 358.[28] She said she did not [and could not] have any conversation about a breakup, although Lindsey stayed around her house talking to Nell on her telephone. However, one night he asked her to take groceries over to Nell so the children would have food. PCR Tr. 359.

Concerning the first separation from Nell, she said Lindsey was not angry with her because she would go and come back:

She said that they were separated a month before the shooting, but Mrs. Lindsey felt they were still together because one Sunday they all went out to eat together. PCR Tr. 359. After they ate Lindsey dropped Mrs. Lindsey off and went off with Nell and the family. PCR Tr. 360.

Later, Mrs. Lindsey stated that she learned Lindsey was not seeing the children when he asked her to call Nell and tell her to bring the boys to her house so he could see them. When Mrs. Lindsey called, she said Nell's mother answered the telephone and in response Nell later returned the call and said for her to tell Marion that she was not bringing the boys over there and he was not seeing them. PCR Tr. 360. Mrs. Lindsey said she then called Lindsey and told him and he told her that if she was not going to let him see them that he was going over to get them. When she called Nell back, Nell told her to "come one, come on." PCR Tr. 361. She told him not to go over because, Nell would have the police waiting. Fifteen minutes later the police showed up at Mrs. Lindsey's house and she told them that Lindsey did not live there. When she called Nell and asked her why she sent the police, Nell denied sending them. PCR Tr. 361.

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[28] [contradiction]

Mrs. Lindsey stated after that she did not think Lindsey ever saw his sons. However, Mrs. Lindsey stated that Nell still carried her to bingo. One night, she asked to keep "the baby", and thought Nell would bring him back after she changed his clothes, but never did. PCR Tr. 362.

She described an incident the first week of September. PCR Tr. 362. She stated that she received a telephone call from Tim while she was at work that Marion had called him and was saying he would kill himself. After discussion that she told him to go and talk to Marion, she left work. She arrived with her brother Steve (Pilgrim), her sister Bessie, and Tim and tried to calm him down. She said Steve gave Marion "a nerve pill", Bessie prayed and they stayed with him until 8 p.m. PCR Tr. 362-63. She said Lindsey gave them some suicide letters for her, Time and Trey and Alex (his sons). PCR Tr. 363. She said she carried the notes to her house put them in a box and after the later shooting returned them to Rod Tullis. PCR Tr. 363. Though she requested that they call the rescue squad, her sister talked her out of it saying they did not need to. PCR Tr. 363-64.

Virginia Lindsey stated she met with Brannon and Lenora Topp on Saturday evening prior to trial for one hour. She said they talked about what happened and she told them she did not know what or why it happened. PCR Tr. 364. She said they also talked to Bessie that night.

Mrs. Lindsey claimed this was the only meeting in preparation for the testimony. In hindsight, she did not feel that they asked her enough questions and did not ask any background questions. PCR Tr. 365. She felt this meeting was about 2 weeks before the trial. She did not recall being asked to sign any releases for

her medical or school records, but would have done so if asked. PCR Tr. 366.

Mrs. Lindsey admitted that she talked to them about Dr. Barry Henderson. PCR Tr. 367. He was Marion's doctor from when he was a baby until grown. She said he had a relationship with Lindsey because he used to play with his children at a game room that Dr. Henderson owned. Id. She felt Dr. Henderson could have testified about his treatment of Lindsey, as well as what type person he was. PCR Tr. 368. He is now deceased though. PCR Tr. 368.

Concerning mercy requests, contrary to the assertion in the post-hearing memorandum of Petitioner, p. 25, Virginia Lindsey testified that she did talk to the defense team and "they did" prepare her to request the jury to have mercy on her son. PCR 368,1. 14-18.[29] However, she felt she was not prepared to make a mercy request at trial. She claimed that if she was prepared, she would have asked for mercy on her son because she had lost a son and "would ask for mercy that he not get the death penalty." She stated that he had to be punished, but not the death penalty because it hurts to lose someone. She said she not only lost a son, but that she lost a daughter, a son, and two grandsons. PCR Tr. 369, ll. 1-8.

Mrs. Lindsey asserted that over the last 6 months she had spent around 20 hours with professionals, investigators and attorneys. PCR Tr. 371.

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[29] In the Petitioner's Post-hearing Memorandum, p. 25, they write that "one of the deficiencies that Mrs. Lindsey testified about was that she was directed by defense counsel not to ask the jury for mercy for her son. The record of Mrs. Lindsey's PCR testimony does not support this mischaracterization of her testimony. PCR 368-369.

On cross-examination, Mrs. Lindsey admitted in her meetings with Doug Brannon and Lenora Topp that they may have also talked about family history. PCR Tr. 372. She corrected herself and admitted at some point that she told them about:

– having two miscarriages

– her first son was Claude

– her daughter Vanessa was killed in car crash

– her second son Frederick died in the lake and body was not found in 1998

– Marion's father was Leon McDowell who did not pay child support

– fourth son was Tim Sims

– Tim Sims, Sr. helped out with kids for 17 years

– Tim Sims was on disability from Milliken where he worked until he got sick with a series of strokes

PM Tr. 373-74.

Virginia also told Brannon and Topp:

– all three of her sons have children

– Marion was the only one who married the mother of his children

– none of her sons finished high school

– she worked shifts in factories, particularly the second shift

– that she had spoiled Marion "a little bit", because he did not have interaction with his father

– that her mother was deceased

– that she and her family were very poor

– that she had 8 siblings and each had 2 or 3 children

– that they grew up together

PCR 375-76.

Virginia Lindsey also testified that she told them Marion was run over as a child by her brother, but that she was at work when this happened and sister Bessie picked her up. She told them that this resulted in the bad cut to his ear and head. In addition, she told them about Marion falling and hurting his head on the concrete porch. PCR Tr. 377.

Concerning the pill incident, she confirmed that she talked with Brannon and Topp about it and that

– Fred ad Marion always argued.

– Marion took it hard

PCR Tr. 377-78. She told them about efforts to get the death certificates.

She also spoke with them about his relationship with Stephanie Petty and liking Petty's grandmother. PCR Tr. 378. Concerning Nell, she told them that she thought she was a nice girl and liked her and that Nell and Lindsey had problems over money. She stated to them:

– she knew Lindsey was selling drugs, but did not see it

– she knew he spent money on her and household from selling drugs

PCR Tr. 379.

Concerning the pill overdose incident, she did not recall telling the doctors that he was a stable kid and did not cause any major problems. PCR Tr. 380.

Mrs. Lindsey stated she talked with them about how his family was important to him but that she was

aware he had other girlfriends while he was married, including at the time of the shooting. PCR Tr. 380-81.

Concerning the car incident, she spoke to them about it, but admitted she did nothing to stop it. PCR Tr. 381.

While she admitted she thought about calling to get help at the September 2004 meeting about talking Lindsey out of suicide, she did not. She admitted the only time she sought help was when he took the pills. PCR Tr. 381. She recalled meeting with a doctor because of his release, but did not recall what they talked about other than that Mrs. Lindsey did not want him to go to a mental hospital because he was not crazy. PCR Tr. 382.

On re-direct, she stated that in discussions with Doug Brannon and Topp, she was confirming some information that they already knew. PCR Tr. 384. In addition, she admitted that there was a pattern of behavior in the family to have multiple girlfriends that Marion saw. In addition, she admitted that she saw the older uncles toss the cat into the fire, shoot guns through the house, get into fights in the neighborhood. PCR Tr. 385. She stated Lindsey experienced emotion in these events.

Mrs. Lindsey said she was afraid when the shots were fired through the house and was on the floor with Lindsey. PCR Tr. 385-86. Concerning the cat incident, she said she was surprised when they threw the cat into the heater while she was sitting there and it created an awful smell. She said she did not try to stop it because she was afraid of her brothers: "I didn't know what they might do cause they already done grabbed the cat up and thrown him in the heater. He might have thrown me in there, too." PCR Tr. 386-87.

Bessie Smith – PCR Testimony

Bessie Smith, the Applicant's aunt and Virginia Lindsey's sister, testified at the PCR hearing, as well as at trial. PCR Tr. 388-424. ROA 2080-82.

Smith testified initially about the family history. She testified that she grew up in Inman, S.C. with 9 brothers and sisters. PCR Tr. 389. Her father was Smiley Pilgrim, who left the family when she was in the 4th grade. She went to school until the 7th grade when she left to work to help by picking peaches. She said two years after Smiley left, stepfather Willie Farr came into the picture. Smith described Farr as a god-send and took care of them. She described her mother becoming depressed after Smiley left staying in the bed with the children having to bath and feed her. PCR Tr. 392.

They relied upon her grandmother to bring them food and clothes. Her step-dad did outside work and tried to keep food in the house. PCR Tr. 392.

Smith stated that her brothers and sisters got married and moved out, but Virginia returned home. PCR Tr. 392. Mrs. Smith got married and moved about 3 miles away. She stated she got a GED and studied at Spartanburg Technical College. She had 5 children. PCR Tr. 393.

She tried to emphasize that her children had a different life than Virginia and Marion. PCR Tr. 393. She described that although Paul was quiet, shy, and timid, yet after he caught his first girlfriend with another boy he was not the same PCR Tr. 394. She described him as getting into fights and drinking. He then went into the service. PCR Tr. 394. She said Paul gave her mother lots of trouble because he got into fights. She asserted that others were jealous of him and would pick at him, although he did not initiate

the fights. She stated that Paul was usually protecting himself "because he grew up without a. daddy", or older brother to run to, not because he was mean. PCR Tr. 394-95. She described a man who would come around the house and teach Paul how to open a hawk bill knife. She said Paul would use this technique with his knife to scare them "because Paul was a timid scary kind of person growing up." PCR Tr. 395, ll. 16-17.[30]

Bessie Smith described after Fred returned from the service, he came to live with their mother, got married, and had two girls. She acknowledged worse behavior came along after.

Bessie Smith stated that her sister Robin did not display the same drinking behaviors growing up; but she started having problems ("you know how teenagers are") with liking boys early. PCR Tr. 396-97. She was described as being smart in school and worked her senior year to pay for graduation by babysitting Marion. However, she stated using drugs resulted in being incarcerated, but claimed she was not violent or robbing people.[31]

Smit stated she was not living with Virginia when her daughter Vanessa died. PCR Tr. 398. She stated that Virginia was devastated and depressed along with her mother. She stated Virginia's mother felt blame for it. After the death, Virginia's husband began to drink more and then started dating Virginia's

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[30] She said she did not know much about Willie. She said he was away and "on the go." She said he would be out working on his car or out with his friends. PCR Tr. 394.

[31] However, Robin Keith is serving a sentence for assault and battery of a high and aggravated nature.

cousin that was raised with them. That relationship tore Virginia up and she separated from her husband.

After the separation, Virginia and her mother moved closer to Inman. At that time, Virginia started drinking and staying out late, but kept working. PCR Tr. 399. Smith described Virginia's drinking as not daily, but a weekend thing. To clarify, they would work all week and then go out Friday night when they got off work.

Because Virginia worked second shift (3 p.m. to 11/12 p.m.), Smith felt she did not see her children much and they cared for themselves. Virginia's mother would watch them while Marion was small playing outside. She said Steve Pilgrim (her brother) would be working on cars and motorcycles. She said Marion loved to hang around Steve "all the time." PCR Tr. 400.

She said her mother and Virginia also liked to play bingo, but she did not know how much time they spent playing it. PCR Tr. 401, ll. 1-10. She said when they went to play; the children were left with Steve or another uncle. She said they played "pretty good much" and "sometimes every night." PCR Tr. 401, ll. 17-20.

Bessie Smith described a period that Marion lived Avith her when he was around 12 to 13. PCR Tr. 401. She observed that Marion was always smiling, crazy about her husband who he teased about the way her husband talked. .PCR Tr. 402. She said Applicant did not like to be around his step-father, but loved being with her family. She said he might have stayed there a few months. PCR Tr. 403.

She described her home as different than Virginia's. She claimed that her sons were in sports and not allowed to run around. She said they knew that

they had to finish homework and chores. She said Marion "fell right in there." She said he was a sweet child who she cared about and that he wanted attention. PCR Tr. 403. She said she tried to listen to him, tease him.

Bessie Smith stated that she also worked like Virginia. She saw a difference - in addition to having both parents there - that she was more active in doing things with the children in their sports, activities and schoolwork. She felt Virginia did not push them, did not go to PTA meetings. She said that because she worked second shift, Virginia would be off to work. She said Lindsey's older brother, Bubba, sometimes had to wash the clothes and shoes by hand, claiming Virginia did not have the money to go to the Laundromat. PCR Tr. 405. She also claimed that sometimes the children did not go to school because they did not have clean clothes.

Smith admitted there were problems in her own family, but claimed she had structure with rules, Marion's family "had freedom." She asserted that Virginia loved and cared for her children, and gave them everything she could and that he would have more "bill money" in his pocket than Smith had. PCR Tr. 406. She said her mother took care of everything, so Virginia never learned about responsibility. PCR Tr. 406-07. Smith said she never gave her own children "bill money." She said though that Virginia was a good mother, but we all had a struggle growing up. PCR Tr. 407, ll. 10-15. She described her own life, growing up rough suggesting at a time she had nothing to eat, nothing to keep warm when her step-father left. PCR Tr. 407.

Bessie Smith described an event a couple of weeks before the shooting at Lindsey's house. She stated she

had heard from Virginia that the Applicant was going to kill himself and she went to his house with her sister and brother, Steve Pilgrim. She described Lindsey as being depressed, saying he did not have anything to live for and was tired of what was going on. She said they sat down and talked to Lindsey to try to find out why and that he had his whole life. She stayed with Lindsey about an hour or more. PCR Tr. 408-09.

She stated that she told Lindsey that he needed to pray. She left with her brother Steve. She recalled that no ambulance was called although Virginia mentioned that Bessie should call the rescue squad. She said Virginia told her he had tried to kill himself one time before when he took some pills and he stayed and got treatment PCR Tr. 410.

Bessie Smith stated she talked to Marion later but did not see him. Bessie said she called Lindsey on cell phone days later and he said Nell was trying to take his children from him and would not see them anymore. PCR Tr. 411-412. He told Bessie that he loved his children and Bessie said she knew that and don't worry about the woman, and that he'll get to see the children again. PCR Tr. 412. She said he was crying. PCR Tr. 412.

Bessie Smith described receiving a telephone call from him the next day when he stated that he was still upset. He claimed that he got a job at BMW and was supposed to start work that Monday, but that Nell and her mother had taken out warrants against him. He inquired how could he see his children if he did not have a job. He feared the police would arrest him at BMW and that he would have nothing and would lose the job. PCR Tr. 413. He denied to her what the warrants were for. PCR Tr. 414. She said while they were talking someone clicked in. PCR Tr. 415-16. She tried

to call back, but never could reach him. PCR Tr. 415-16. She said the incident happened about 3 hours later. PCR Tr. 416.

Smith said she told Marion that she had seen him with his boys at the duck pond, that Marion loved his children, that he bought shoes and clothes for them and their mother. She also said that he would give Nell money and she shopped all the time and would take them to eat.

She described a time one month before the shooting when Lindsey carried Nell, his mother and the boys to Greenville to eat and shop. PCR Tr. 414-15.

Preparation for Trial

Bessie Smith testified that prior to the trial; Mr. Bartosh, Mr. Brannon and a lady came out to her house a week or a few days before the trial. She said they asked questions and stayed 30 to 40 minutes. PCR Tr. 416. Smith said that she had already divorced her husband by trial time. She claimed this was the only meeting; PCR Tr. 417. She initially claimed they asked "what kind of child he was growing up," and asking "a lot of stuff about me" (Bessie) that she did not want to answer because she was not on trial. She said that they learned about Marion growing up and what type of house he grew up in. PCR Tr. 417.

Smith said she was told and agreed to testify. PCR Tr. 417. She claimed this was the only contact she had with counsel since the incident. She pointed out that she had more preparation in this hearing, meeting about 3 or 4 times. PCR Tr. 418.

On cross-examination, Bessie Smith stated Applicant's potential job at BMW and Nell's warrants that she had heard about it from someone other than Applicant. PCR Tr. 419.

Concerning her alleged telephone call with Applicant on the day of the incident, Smith said that Applicant did not say anything about tracking down his wife or looking for her because she had a boyfriend. PCR Tr. 40. She denied that Lindsey ever told her then that Nell and a boyfriend was helping take the kids away. She said Lindsey just kept saying that Nell did not want him to see the kids and was talking about taking the kids away from him. PCR Tr. 420.

Smith denied any knowledge on whether Applicant had a girlfriend during the course of his marriage. PCR Tr. 421. She described that Lindsey had various jobs working on motorcycles and working at the Zeman Plant.

She returned to when he was younger and lived with Smith. She 'confirmed that he was a "child who liked attention." PCR Tr. 422. During alleged suicide threat earlier in September, she stated that she and her brother talked to them. She confirmed that she left after an hour and a half because they thought he would not do it and her brother and sister stated he would be all right. She confirmed that there was a discussion about calling the rescue squad by Virginia and they deferred that decision to Virginia. The rescue squad was not called. PCR Tr. 422-23. She stated while "she loved Marion to death," she would "pretty much" have done something if she thought he was in danger, she also felt this was his mother's call. PCR Tr. 423.

Returning to the phone calls on the date of the incident, Lindsey did <u>not</u> tell her from where he was calling, did not tell her he was going anywhere that day, or about having a gun. Bessie Smith confirmed with Doug Brannon and Lenora Topp, that she told

them she had a phone conversation with Lindsey that day. PCR Tr. 424.

Steve Pilgrim (PCR Tr. 426-453)

Steve Pilgrim, the Applicant's uncle, had testified at the original sentencing proceeding. R. 2078-2080. During the PCR proceeding he testified that he was a lifetime resident of Spartanburg, growing up in Inman. PCR Tr. 427. He stated Smiley and Ruth Pilgrim were his parents. He was six when Smiley left[32]. PCR Tr. 428.

Pilgrim stated that he spent a good deal of time growing up with Virginia, Bessie, Robin (Keith), Paul, and Willie. PCR Tr. 430-31.

Pilgrim denied that Virginia had a problem with drinking and drugs. PCR Tr. 431, ll. 2-4. However, he stated at one time Virginia displayed suicidal behavior. Pilgrim then described that Marion was not taken care of by Virginia or Marion's father. Virginia allegedly got upset with the father and decided she did not want to live. PCR Tr. 431,Il. 13-17. However, he did not recall if she was hospitalized for it. PCR Tr. 431.

Pilgrim also described when he was around Mrs. Smith and she attempted suicide. He stated it was between her husband and it was rough taking care of them and they broke up 3 or 4 times and Bessie just

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[32] At this point a relevance objection was made. Counsel Collins asserted that this information should have been gathered by original counsel and second, the information was essential to later expert witnesses, Dr Melikian and Ms. Vogelsang. Third, he asserted this information supported their mitigating circumstances and humanized the defendant. Counsel declared he would have presented or proffered this evidence at trial. PCR Tr. 429. With the assertion that they claim all evidence should have been put into trial, the objection was withdrawn.

did not want to live anymore and was hospitalized. PCR Tr. 432.

As to Robin Keith, he thought she had tried to take her life 3 times. PCR Tr. 433. He described her being "kind of depressed for a long time." She also spent time in a hospital more than once.

Contrary to other testimony, Pilgrim stated that Robin had exhibited violent behavior around Marion, but Pilgrim could not remember any circumstances. He confirmed that she was presently incarcerated for violent behavior. PCR Tr. 434.

Pilgrim also stated that brothers Paul and Willie also went to prison for violent behavior. PCR Tr. 434.

Pilgrim testified about the house they lived in on Brock Street in Inman. (Exhibit 27). He stated 10 people lived in the 4 bedroom house, including Marion. PCR Tr. 434-35. He said the Applicant was born there and the family stayed in the house for 10 years. He stated the house lacked indoor plumbing, air conditioning, and was heated with a stove using either wood or coal. PCR Tr. 435.

Pilgrim stated Lindsey experienced violence while living in their house with the actions of Paul and Willie. He described them as being violent toward Pilgrim, other family members, people in the community, and women in their lives. PCR Tr. 436.

Pilgrim described accidents in Lindsey's life. He recalled Lindsey being run over by a car driven by Paul who backed up over him. PCR Tr. 437. When Steve realized it was baby Marion, he grabbed Lindsey and carried him to the Inman Police Department who took him to Spartanburg Regional Hospital. He said Lindsey never cried or moved. PCR Tr. 437. He responded while at the hospital. He was checked and received stitches on his head where the car ran over

him. He was released the same evening. PCR Tr. 437. Pilgrim blamed the fact that Marion would always try to follow him as the reasoning for the accident. He also stated, in general terms, that Lindsey would fall and hit his head other times. PCR Tr. 437-39.

Concerning Lindsey's suicide threat, he recalled about 3 weeks before the shooting, that he went over to Marion's with his sisters after they called stating Marion had said he was going to kill himself. He said they stayed with Marion 2 to 3 hours. Pilgrim found him very depressed, *which was unusual for Lindsey*, and talking about wanting to see his kids and that he was having problems with his wife. Pilgrim stated Lindsey was crying that night, which was the first time he had seen him cry. PCR Tr. 439. Pilgrim said that Lindsey had calmed down that evening. PCR Tr. 439.

The next week, Pilgrim stated he received a telephone call from Lindsey telling him that he wanted a gun. PCR Tr. 439-440. Steve Pilgrim thought he was the only one in the family with a gun because his older brothers are not allowed to possess guns (although they had them in the past). PCR Tr. 440. Pilgrim states he no longer has the gun that Applicant asked for. PCR Tr. 440. Pilgrim stated Marion did not get his gun. However, shortly after the phone call, someone broke into his house and trashed the house, but they did not find his gun. PCR Tr. 440.

Pilgrim denied getting another phone call from Lindsey after that. PCR Tr. 1-10.

Pilgrim stated that he would loan Lindsey money to take his wife out to eat because he was trying to get back with her. He stated she went out with him 3 to 4 times before this happened. PCR Tr. 441.

As to his trial preparation, he stated he met with the defense counsel one time the day before the trial started. PCR Tr. 442. He thought that it was on a Saturday for 30 to 40 minutes.

He recalled Mrs. Topp, Mr. Bartosh, Mr. Brannon, his sister Virginia, and sister Bessie the people that were going to be testifying. PCR Tr. 442. He stated they discussed his condition and what he was suffering from that resulted in his disability. He stated that he was depressed, had anxiety [and uncontrolled hypertension]. He stated that they did not request that any of them sign releases of medical or psychological records that he would have done. PCR Tr. 443.

He said he had lived in Spartanburg from the time of the incident to the trial and was available. In hindsight, he felt he was not adequately prepared to take the witness stand and testify. He said that he had never testified before and was nervous and they did not ask him anything, just about his health. PCR Tr. 444. He said they did not ask about the events leading up to the trial or Marion's personal history. In contrast, for the PCR hearing, Pilgrim described only talking about his health. PCR Tr. 445.

Pilgrim stated that they prepared him and asked him if he wanted to ask for mercy. PCR Tr. 445. In describing it though, Pilgrim stated "they told me not to ask for mercy." PCR Tr. 445, ll.1-8. Pilgrim stated that he would have asked for mercy, declaring that "we all make mistakes", "I care for my nephew", "he's my favorite nephew and he made a mistake", "and I wouldn't want him ... get the death penalty." PCR Tr. 445, ll. 11-17.

On cross-examination, Pilgrim clarified that he took the picture of the house (Exhibit 27) last Sunday. PCR Tr. 446. Pilgrim further did not recall that at the

2004 trial he testified about being a witness to the car accident (ROA 2079-2080), that he testified about the incident when Lindsey inhaled kerosene (ROA 2080), about how long he stayed with the family (ROA 2080) and his own health conditions of high blood pressure and panic attacks. PCR Tr. 448. Pilgrim admitted he would have provided this information to counsel. PCR Tr. 448.

Pilgrim testified that he had been followed by Lindsey and he taught him how to fix things and remained involved in his life after he moved out. PCR Tr. 449. He was consistently a contact with the Applicant throughout his life. PCR Tr. 449.

In explaining his earlier reference to violence in the home, he described it as going out and getting into fights, getting guns and shooting people. He further described drinking and cussing in the home and turmoil. PCR Tr. 450.

In explaining the discussion on mercy, he said it occurred in the 20 to 30 minute meeting with Mr. Bartosh and the others at the office. PCR Tr. 451.

Pilgrim stated that he was not present when either Virginia or Bessie attempted suicide. PCR Tr. 451. He said he was the contact person in the family and would be called whenever anything happened, but he did not see what they did. PCR Tr. 452.

As to Exhibit 27, he stated the house looked the same, except they would mow the grass. PCR Tr. 452.

Timothy Roger Sims (PCR Tr. 453-480)

The Applicant's younger brother, Tim Sims, testified that he is 10 years younger and did not share the same father. PCR Tr. 453. He described his relationship with Applicant as the person who raised him because his own father left when he was 11. Sims stated

that Lindsey treated him like he would have wanted his father to treat him. PCR Tr. 454. He said he was 19 when the shooting took place, so for 8 years Lindsey had stood in his place as a father. He said he would see Lindsey every day and was with him everywhere he went. PCR Tr. 455.

Sims stated that he got into trouble with the law and had a drug charge in 2003 initially on probation until he violated and got 6 months. PCR Tr. 455, ll. 7-16.

He stated that he had been working as a brick mason, but was not working presently. PCR Tr. 455. He said he was getting married next year.

He claimed at the time of the trial (in 2004) he did not have any criminal charges. PCR Tr. 456.

Sims stated that he knew everything about Lindsey's relationship with Nell because he had lived with them and his children. PCR Tr. 456. He described that everything was going good and he would do everything he could for her. However, he said everybody argues and fusses. He said he never saw Lindsey "put his hands on Nell", but he was not there all the time. PCR Tr. 457. He said their fusses were "normal arguments", again asserting that he never 'saw him hit her. PCR Tr.

Sims described his knowledge of the work history. He said Lindsey painted cars and worked at Milliken or a similar place. However, he said Lindsey got into the drug game to take care of his mother and the rest of the family. PCR Tr. 457, ll. 20-24. [He said his own father left after he got sick and went to live with his mother]. PCR Tr. 457.

Sims said Lindsey had to do what he had to do to survive. PCR Tr. 458. In using his drug proceeds, Sims

said Lindsey would take care of anything needed for any family member. PCR Tr. 458

Sims described three weeks before the shooting going to dinner with Lindsey and Nell at The Junction. He said Lindsey paid for the meals for all the family - Sims, his newborn, Sims' wife, his cousin and her newborn, his cousin's son and niece. PCR Tr. 458-59.

On that evening, he said that Lindsey and Nell picked him up and they went to pick up Lindsey's other son from his grandmother's house. PCR Tr. 459. After dinner, Lindsey drove everyone home, except for Nell and their children who left with Lindsey. PCR Tr. 459.

Sims described going over to Lindsey's home one day with his mother, Aunt Bessie and Steve after he thinks Lindsey had called him. PCR Tr. 460. Sims described Lindsey's voice as nervous and crying and that "I feel like I'm about to take my life." PCR Tr. 460, ll. 18-22. Sims said he told him not to and asked where he was and told him he would get there. Sims called his mother and they got to Lindsey in 30 minutes. PCR Tr. 461. He found Lindsey at his house lying in the bed, appearing to "let everything go." At that time, Lindsey gave them letters about what he was going to do. He described Lindsey crying for the first time (and a second time on the day of the shooting). PCR Tr. 461.

Sims recalled that he stayed with Lindsey from around 5-6 p.m. until 8:00-9:00 p.m. PCR Tr. 462, ll.3-5. He said they had talked to him, Uncle Steve gave him "a nerve pill" to calm him down, and left after it looked like everything was all right. PCR Tr. 462. [The alleged suicide threat notes were addressed to Nell, his boys, Tim Sims, and Virginia.] PCR Tr. 463. He

said his mother had the notes when they left that evening. PCR Tr. 463.

Sims said that Lindsey had expressed concern about Nell at the end after he handed them the notes. PCR Tr. 463. Sims felt he was still "down" though. PCR Tr. 463.

Sims described a subsequent situation a day before the shooting when he asked him to drive by Nell's house. Lindsey had called him because he thought she was seeing another man and wanted him to see if he saw a Lexus in the yard. PCR Tr. 464, ll. 21-25. He said he drove by, saw the Lexus, and kept going. However, Sims said he did not want to tell him he saw the car because he knew it would upset him, so he told him it was not there. PCR Tr. 465. He said he was familiar with Nell's car and it was not hers. PCR Tr. 465.

Sims said Lindsey was not able to contact Nell or able to see the children. He had been told not to see them. However, Sims said Lindsey told him to take them food so Sims would go to McDonald's get food and take it to them. PCR Tr. 465.

At one point, Sims said Lindsey called him to try to set up a 3-way call using his mother's phone that she would answer. When he did, he heard Lindsey tell Nell he knew she didn't want to see him, but to let him see the boys. PCR Tr. 466. In response, Sims said Nell started cussing and he told her no way and that we are staying away from them, while he heard a son in the background as she told him she did not live with him anymore and "that's not your daddy." PCR Tr. 466. This was the day before the shooting, according to Sims. PCR Tr. 466-67.

Sims said he did not see him. However, the next day, around 5 p.m., Lindsey called and asked her to go

down the street from "Shirley" who knew something about Nell. PCR Tr. 467, ll. 10-20. Sims said he wanted her to call him so get her number and give her his number. Sims said he took a shower and then Lindsey called back wanting to know if he had gotten the information. PCR Tr. 467. He told him no. He said Lindsey then sought to speak with his friend Chawny. Sims said Chawny left the house and returned. About 40 minutes later, Sims said Lindsey called back crying saying "she" had told him a lot about Nell and her new boyfriend and he was "going out of his mind" over what was told him. PCR Tr. 469, ll. 4-10. Sims told him to calm down and meet at his brother Claude's home. He said ok and Sims left to go to Claude's. Shortly thereafter the shooting took place. PCR Tr. 469.

Despite his earlier testimony, Sims claimed he did not know where Lindsey was living then, except that it was in Linville Hills. He estimated that it would take 15-20 minutes to get to his mother's house, and he would go by Celeste's house. He said he did not see Marion before the shooting. PCR Tr. 471.

Sims claimed that he never told this information to Bartosh, Brannon or Ms. Quimby. He claimed no one in 2004 talked to him. He said he was not in jail at the time of the trial and saw mother, Uncle Steve and Aunt Bessie on a regular basis.

However, he said he was present at the trial. He claimed to have approached Doug Brannon and told him "he knew more about Nell and Marion than anybody" and wanted to testify. Counsel told him he would get back to him, but never did. PCR Tr. 472-73.

Sims said if asked he would have testified similarly and would have asked for mercy. PCR Tr. 473. Sims testified that he would have stated that Nell did

not deserve what happened to her and Lindsey deserved to be punished, but did not deserve death because his wife was gone and we didn't need him gone. Sims stated his kids did not need to grow up without parents. He said their children would never be able to know what happened and they would want to ask their father what happened. PCR Tr. 473-74.

On cross-examination, Sims stated in reference to whether he had seen Lindsey violent towards Nell, he denied being aware of the August 1996 incident where he allegedly threatened to harm her and the October 1996 incident when he pushed and shoved her.

He confirmed that he was present at the December 2001 incident at Applebee's but denied seeing him slap or tear her clothes, claiming to be on the other side of the car. PCR Tr. 475, ll. 12-24.

He also confirmed that after he had received the telephone call from Lindsey a month before the incident that he did not attempt suicide at that time, just had talked about it, had no weapons and he felt comfortable enough to leave. PCR Tr. 476. Further, on the day of the shooting, Sims was under the impression that Lindsey was going to come to his house and they were going to play games and talk it over. PCR Tr. 476. He confirmed that there was no discussion on that date that Lindsey was looking for Nell, looking for a gun or having a gun. PCR Tr. 467, 1, 23 – p. 477, 1, 3.

Further, Sims confirmed that when Lindsey asked him to investigate Nell's house, he was looking to see if she was involved with someone else - not to check up on his children. PCR 477, ll.7-16. Sims confirmed that Lindsey was also involved with someone else and had girlfriends while he was married. PCR Tr. 477.

Concerning his drug charge, Sims confirmed that in August 2003, he pled guilty and was sentenced to 6 years, suspended to 11 months of probation and was on probation at the time of the May 2004 trial. However, he admitted that he had violated probation then and was waiting to go to court. PCR Tr. 478.

Concerning Lindsey's violence, Sims confirmed he had been a witness to Lindsey being violent in the past. PCR Tr. 478, ll. 19-21.

On re-direct, Sims stated that both Lindsey and Nell had affairs during their marriage. PCR Tr. 479-80.

PCR Testimony of The Burtons

During the PCR hearing, Applicant called Bill Burton who testified at the trial, and his mother, Mrs. Pat Burton, who was on the trial witness list, but did not testify.

Bill Burton's PCR Testimony

Bill Burton's testimony was similar to his trial testimony. PCR Tr. 304-05. He stated prior to his trial testimony, when he learned he would be a character witness, he tried to contact Mrs. Bartosh because it was his first court experience. He said that he wanted some background on the kinds of questions and information he should provide and how to prepare for trial. He found it difficult to contact Bartosh, an extremely busy man. He stated they met either the day before of the day of trial with many other witnesses and did not have any one-on-one discussions with him. PCR Tr. 305.

Burton stated that he sat in the trial for several days. PCR Tr. 306. He said he was aware that guilt was not as much an issue as sentencing. PCR Tr. 306.

He said he was told to "say what you know about Marion." However, Burton felt the case was disorganized and he was concerned about it and did not have a good feeling about preparation. "I wanted to understand the strategy" and how the facts could be used to defend Lindsey and avoid a death sentence. PCR Tr. 307.

Burton stated that he wanted to tell the jury that he got involved as a teenager with Lindsey when he was 6 years old when Burton was giving swimming lessons at a public pool. He found then that Lindsey wanted approval and a parent figure to look up to, anxious to show someone his achievements with swimming, jumping, and fishing. Burton said he later went to Lindsey's house, met his mother and rest of family and began a 13 year relationship. PCR Tr. 309.

Burton reiterated that Lindsey was desperate for approval, attention, and involvement with adults. Burton saw that Lindsey had no supervision at home and they did not have any help or encouragement with their studies which led to Lindsey having a difficult time at school. PCR Tr. 309. He described Lindsey's house, though clean, was falling apart.

Burton felt Lindsey wanted a (normal) family, but his environment made it difficult for him to prepare for that later in life. Lindsey lived on the street; did not do well in school and his education was very limited. PCR Tr. 310.

Burton stated Lindsey did not see much of his father. He saw his role with Marion as a male figure he could look up to and Burton declared he was happy to provide it. PCR Tr.11.His last contact with Lindsey was in 1990. PCR Tr. 311, ll.11-12.

Burton said his company was able to offer Lindsey a job in what he hoped would lead to a good future. However, Burton was transferred and lost touch with

Lindsey and learned Lindsey left "for reasons I don't recall." PCR Tr. 311, ll. 17-20.

On cross-examination, Burton did not recall his earlier testimony that when Lindsey left that he had tried to get him his job back. PCR Tr. 313. Although he lost touch in 1990's, Burton said he was aware that Lindsey was continuing to visit his farm and fish through his mother. PCR Tr. 313. He confirmed that he had no contact with Lindsey after he began his relationship with Nell or the actions of Lindsey after he moved. He admitted that he did not know until the trial of the shooting incident of Wilkens, the number of different incidents with his wife, the fact that he was involved in selling drugs, or the reasons why he was let go from the company or if it was due to a conflict with his supervisors. PCR Tr. 314.

Concerning "Jimmy", Burton claimed he was not aware of the imaginary friend during his relationship and became aware of it "later on." PCR Tr. 314-15.

Burton confirmed that in his discussions, he talked with Lindsey about his desires for family and children and having the "ideal family" was a major subject. Burton stated that when asked at trial whether he would have provided financial assistance to get an attorney to help see his children, that he was not aware Lindsey had seen Tullis to get help or Piedmont Legal Services. PCR Tr. 315.

Mrs. Pat Burton's PCR Testimony

Mrs. Burton said she was present at this hearing "because I love Marion." PCR Tr. 316-17. She recounted a letter she had written in 2008 to Judge Burch expressing that her son did not think he was properly prepared to testify. She also said she was not aware that she was on a witness list in 2004. She only

knew about the case through her son when they called him. PCR Tr. 317.

She proffered what her potential testimony in 2004 would have been. She declared that she met the Applicant when he was 6 or 7 years of age, when after the pool closed where her son was a lifeguard, he would bring a bunch of kids in a pick-up and they would fish and play in the lake. PCR Tr. 318. She thought that Lindsey was special to her son because they talked about him all the time, but not about the other kids he brought. She recalled Marion was happy with a smile. She knew that her son was proud of Lindsey when he learned to swim, but felt Marion was sorry he learned because her son would then spend more time teaching others. PCR Tr. 318.

She recalled that he came out to fish and play after her son went to the Air Force Academy and would always thank her. She stated Lindsey's brothers would bring him and Lindsey would always ask her if it was OK to use the pond - the only one who did this. PCR Tr. 319.

She felt that Lindsey became special to her also, even though she did not see him very much. She knew her son would go to Lindsey's house and describe how poor it was and how Lindsey did not have much. PCR Tr. 319. Her son would stop and see Lindsey when he occasionally came home from the Academy. PCR Tr. 319.

Mrs. Burton described her visits to Lindsey after he was sentenced to death. She has visited him "many times" and had written letters for three years once a week PCR Tr. 320. At one time, she said she talked Lindsey out of dropping his appeals, telling him they might outlaw the death penalty and maybe he would see his sons after they grew tip. PCR Tr. 321. She also;

described a poem he had written her after his experience and trying to teach others not to follow in his footsteps. She gave the poem to a minister who used it in his church. PCR Tr. 321.

She stated that when she visits death row, she sees the interaction he has with other inmates and guards, and asserted there was not a feeling that they were afraid, but one of comradery of a closely knit group. PCR Tr. 321-22.

Mrs. Burton regretted that she had not known him more when he was younger and that she could have been able to help him reach his potential. She said she would have asked for mercy "because I don't think one action on a part of the person defines that person's life." PCR Tr. 323, ll.4-6.

On cross-examination, she admitted that when he visited in his youth; she did not have any in depth conversations with Lindsey nor any discussions with him about his family. S he admitted that she was not, aware of his relationship with his wife, of his involvement with selling drugs, of his prior shooting incident, or of any of the incidents of criminal domestic violence. PCR Tr. 325. To the contrary, she only knew him as "a happy little kid" and "I did not know him intimately." PCR Tr. 325. Like her son, there was no discussion about Jimmy, the imaginary friend. She said she did not come to Lindsey's trial and did not offer to testify because she did not think she would be any good and was against the death penalty anyway. PCR Tr. 326.

Rod Tullis - PCR Testimony

During the PCR hearing, former attorney Rod Tullis testified. He stated that he had started representing Lindsey in the 1990's until the incident in 2004. PCR Tr. 163. These included criminal, family

court, and traffic concerns for Lindsey and family members. Id.

He stated the weeks before the incident; he was representing Lindsey concerning some drug cases and traffic cases in Greenville and Spartanburg. "There may have been something in Family Court near the end that he had spoken to me about." PCR Tr. 164. At some point he interviewed him about ways to resolve issues concerning his children. He felt surprised that Lindsey and his wife would have issues about his children and their discussion involved offering a payment of child support in order to secure some visitation. PCR Tr. 166, Il 11-18. He did not know if Lindsey ever offered to do that and Tullis never filed any papers in Family Court for him. Tullis stated that he had not been retained. PCR Tr. 166-67. Tullis felt that at the time of that meeting, Lindsey did not want to be separated from his wife and children nor end his marriage. PCR Tr. 167. He stated that they discussed that he had some evidence his wife may, have bad an extramarital affair and he was concerned because he did not want someone else to come in "and become daddy to his sons." PCR Tr. 167. Further, he feared if he began family court proceedings that there would be ramifications on the criminal side PCR Tr. 168. Tullis said Lindsey's fear was that his wife would become a witness for the State, which would also end his relationship with his children because of a prison sentence[33]. PCR Tr. 168.

Tullis claimed that shortly before the shooting took place in September 2002, Lindsey attempted to contact the office. Tullis claimed he learned of this contact after he heard about the incident and went to

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[33] This motivation was not developed by the State at trial.

his office to prepare a notice of representation. PCR Tr. 169. He had learned that Lindsey was in the hospital and had surgery. According to Tullis, when he listened to his answering machine, he heard Lindsey asking for him to pick up the phone. Tullis described Lindsey as sounding distressed and distraught. PCR Tr. 169. Since he claimed he left the office at noon, he thought the tape was made within the hour before the shooting. PCR Tr. 169-170. Tullis stated that the tone was not angry or agitated, but emotionally down and upset. PCR Tr. 170. Tullis recalled retaining the cassette tape fora period of time. PCR Tr. 170.

Tullis described providing his notice of appearance to the Sheriff, Solicitor, and hospital and was counsel of record for a short period of time. PCR Tr. 171.

Subsequently, the Public Defender's Office became involved to provide Lindsey with counsel. Tullis recalled contacting Mr. Bartosh and telling him that Lindsey had called his office, that a tape existed, and he was the first person to talk to him when he was released from the hospital to the detention center. He also stated to him that he could be a possible witness in the case. PCR Tr. 171. He stated that he was removed from the case.

Tullis said he later provided the audiotape to the Public Defender's Office. PCR Tr. 172, ll. 15-18. Tullis also stated that he was provided some suicide notes. Tullis said that Lindsey had been shot by officers and then tried to commit suicide by shooting himself in the head. When Tullis visited at the Center for the first time, Lindsey was bandaged and bleeding. Still drugged from the surgery, Lindsey told him he had been bashing his head against the cell concrete wall, the stitches had come lose and he was attempting to

kill himself. PCR Tr. 173. After he reported it, Tullis stated they put Applicant on suicide watch. PCR Tr. 173.

Tullis also declared he received notes from family members about an earlier incident when Lindsey threatened suicide weeks before the incident. PCR Tr. 175. Tullis stated that he handed the notes over to the Public Defender. PCR Tr. 175. He felt the Solicitor's Office was aware of the existence of the notes and that he had tamed them over to the Public Defender. PCR Tr. 176.

Tullis indicated that he was not contacted about testifying, but inquired about it as the case was proceeding.[34] He felt surprised because he thought he was the best witness as to the state of mind and involvement.

On cross-examination, Millis recalled that he had received the letters from the family immediately after the shooting. He had reported the jail incidents on October 1, 2002. PCR Tr. 181.

Tullis admitted that he was subpoenaed by the Solicitor's Office on May 21, 2004.[35] PCR Tr. 182. He said he provided the records to the State. PCR Tr. 183. However, he did not know what he provided to the State then, except he felt it was everything he had in possession of his files at that time. PCR Tr. 184. As to the information provided on his worksheet (Applicant

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[34] Note that Tullis was on the witness list by the Public Defender's Office. ROA 150.

[35] On redirect, Tullis indicated that he did not recall being subpoenaed. PCR Tr 195-196. However, he recalled that he would not have had anything to turn over as a result of the subpoena. PCR Tr. 196.

Exhibit 13), he did not recall when that was prepared. PCR Tr. 185.

Tullis asserted that some weeks before the incident, he learned that Applicant had been denied access to his children. However, he had no notes about that meeting. PCR Tr. 187. He was aware that the court had issued an "order of protection" just days prior to the incident which ordered him not to have contact with his wife. PCR Tr. 187. Tullis stated Lindsey never contacted him about advice concerning the impact of the order of protection. PCR Tr. 187-88.

As to the message on the answering machine, Tullis attempted to clarify that he did not review the machine until the day after the incident after he learned of the killing the night before. He felt it was probably left the day before, doubting the call was made the next day since he was unable to see him while he was in intensive care. PCR Tr. 189. Tullis also claimed that although he had provided the tape to the Public Defender, he advised the prosecution of it. However, he never provided the prosecution with any copy of the audiotape because he asserted that it was not in his possession when the subpoena was made because he had already given it to the defense. PCR Tr. 190.

Tullis agreed that when he prepared the information sheet, there was no discussion that he was being deprived of visitation rights. PCR Tr. 191. To the contrary, Tullis thought at that time when Lindsey and his wife came into his office that they were trying to work it out, but the meeting was in anticipation of a divorce or separation. Tullis, however felt that closer to the September incident things had changed. He noted that Lindsey was having relationships with other women, felt he wanted to get back with Nell, but

was aware that she was anticipating divorce proceedings. PCR Tr. 191. Tullis stated that Lindsey's impressions were not always because both Lindsey and Nell were involved with other people and she did not want to be married to him any longer. PCR Tr. 192. Tullis felt the children were being used as a pawn in the adult relationship. He agreed though that there were a series of incidents involving Nell in August 1996, October 1996, February 1999, August 2000 and December 2001. Oddly, Tullis reported that Nell would come and pay his fees in representing Lindsey in those incidents.

Tullis admitted that he was no longer practicing law and been disbarred. He stated that he was still a lawyer in May 2004 with an office in Spartanburg. He stated that he did not come to court while the trial was ongoing, allegedly, because he thought he would be a witness in the case and would have been sequestered. He was aware of the trial.

Tullis stated that he spoke with Bartosh and Ms. Quimby as the case was going on. Although he let them know he was available and ready to testify, he did not ask them why he was not being called as a witness or what their defense was, such that his information might not have been germane to their theory of the case. PCR 194-195.

> On re-direct, Tullis confirmed that Lindsey had a family court dispute ongoing with the grandparents at the time over the custody of the children. He stated that matters he had with respect to that dispute were still protected by the attorney-client privilege, including letters in that action. PCR 196. As to the timing of the taped call, he recalled that Lindsey was taken into custody immediately after

the shooting. He suggested that at that point of time he would not have had the ability to make phone calls given his medical care and his arrest. This suggested to him that the call had to have been made before the incident. Tullis stated that Lindsey had never been convicted of a criminal domestic violence charge against Mrs. Lindsey or anyone else. PCR 198. **This Court finds that the PCR. Testimony of Social Worker Vogelsang Presented The Particular Dangers of Presenting Family Background Testimony concerning Marion Lindsey.**

Jan Vogelsang - Social Worker (PCR Tr. 481-594)

Jan Vogelsang, a clinical social worker with expertise in bio-psychological assessments, testified that she conducted such an assessment of Marion Lindsey. She testified that as a part of the assessment she interviewed the Applicant, Virginia Lindsey, Bessie Smith, Steve Pilgrim, Timothy Sims, Patsy Burton, Robin Pilgrim (Keith), Lenora Topp, Rod Tullis, Dr. Melikian and Dr. Brawley. She also declared she had sat in court and heard testimony of the same. PCR Tr. 495. She described records she reviewed from Ms. Topp and Virginia Lindsey, including medical and criminal domestic violence records, of Bessie Smith (mental health and CDV offense), of Steve Pilgrim (mental health, prior crimes, and medical), of Tim Sims (birth, school, and SCDC records), and of Robin Pilgrim (medical, prison, and mental health and prison visit). PCR Tr. 496. She also reviewed Paul Lindsey's court order declaring death [from drowning disappearance at Jocassee]. PCR Tr, 496.

Concerning the Applicant, Ms. Vogelsang stated she reviewed his request for legal aid, his medical records, his school records, SCDC records regarding Stafford Wilkens incident, Lindsey's recent letter to the victim's mother, William S Hall - DMH records, reports of Dr. Narayan and Dr. Musick, and his mental health records. PCR Tr. 496-97. She also read the testimony of family members, Mr. Burton and Dr. Melikian. PCR Tr. 497. Vogelsang testified that she also visited the community and created a family tree. PCR Tr. 497.

Concerning the family tree, Ms. Vogelsang testified generally about the existence of various members. She identified the existence in some members of "substance abuse, possession or distribution", "any mental, emotional, or behavioral impairments," "sexually inappropriate behavior," and "charges of criminal domestic violence, assault, or having served time in prison." PCR Tr. 502. She noted that the members of the home had very difficult childhoods with issues of family poverty, particularly after Smiley left. PCR Tr. 502-03 . Vogelsang opined that this was abject poverty. She also asserted that their grandfather, Porter Pilgrim, was sexually inappropriate with some boys in the family. PCR Tr. 503. She opined that some of the experiences that had been described in the testimony of the aunts and uncles with whom Lindsey lived played a significant role in the things Lindsey experienced growing up in the household. PCR Tr. 504, ll. 20-24.

Vogelsang related that his mother Virginia was abandoned by her father and raised by an ill parent. Vogelsang questioned her parenting skills. PCR Tr. 505. As to Lindsey's father, Leon McDowell, she opined he had abandoned Applicant and never acted as a father and had his own family.

She stated that Mrs. Lindsey had been married to Claude with 3 children and had two miscarriages. Applicant was born in 1973 two years after she lost her seven month old daughter. Mrs. Lindsey had no intervention on the death or counseling. She stated Virginia changed after the death, working and would go out and party and was not involved in parenting. PCR Tr. 506.

She stated Lindsey was raised by his grandmother with mostly an absent mother and absent father. PCR Tr. 506. She opined no one was present to help him through the developmental stages. However, Steve Pilgrim was identified as the hardest working and cared deeply about Applicant, but claimed he was not there a lot. PCR Tr. 507. Virginia was working second or third shifts in the mill. PCR Tr. 507.

As to the home living conditions, Vogelsang described that, at times, there were ten people living in the home, sometimes a four bedroom home in rough neighborhoods where conditions were not good, sometimes without indoor plumbing and lacked heating. PCR Tr. 507-08.

Vogelsang identified photographs that she would have used at a trial. She suggested the early photos of Lindsey would have helped to humanize him. PCR Tr. 509.

She opined that Lindsey had traditional medical care, though she did not see his medical records. PCR Tr. 509. She stated that he saw Dr. Henderson and early critical care would, by anecdote, involve being carried to the police then to the hospital. She described his injuries as the car accident, the ingestion of kerosene, and falling off the porch. PCR Tr. 510.

She testified generally about child development. PCR Tr.-510-12. She opined that there was no one at

home to help Marion through his developmental stages. PCR Tr. 512. She opined that young boys need a strong male adult. She suggested the lack of a positive role model creates a higher risk to end up in trouble. PCR Tr. 513. This resilience to bad things happening in their lives is learned through child development. PCR Tr. 514.

She opined that Lindsey did not have any strong male figures in his life. PCR Tr. 514. While his family in the home loved and cared for each other, she opined Lindsey was not prepared to face adverse and violent situations and to resolve problems other than through violent options. PCR Tr. 515. She opined there was a lack of guidance and mental health intervention where recommendations were not followed. There were also within the family situation the existence of divorce, separation, and abandonment, as well as emotional abuse and neglect. PCR Tr. 516. She found that the care of children was not the primary concern. PCR Tr. 516. She found a lack of role models and consistent care giving, as well as an inability of trust in relationships. PCR Tr. 517. She also opined there was "worry about violence in the home", "impaired cognitive functioning", "inability to deal with aggressive feelings" (shown through use of guns, knives, and fists), repression of feelings (family representation to mental health staff that everything is O.K.), and a "sense of helplessness" (poor problem solving skills). PCR Tr. 517-18.

She opined that outside of home, Mr. Burton was a strong male influence on Lindsey. She opined Burton and his mother and their influence may have made a difference in his life and suggest the reason why his school records between 2nd and 6th grade reflect courtesy, respect for authority. PCR Tr. 518.

She opined that Applicant lived everyday with "a threat of harm", which makes children anxious. She asserted that the relationship with Burton gave him his strengths and gave him hope that he could provide. However, she felt his wanting a different type of family resulting in his guessing how to do that by giving material things. PCR Tr. 519-20.

Vogelsang opined that the community Applicant lived in became exposed to cocaine and crack. She asserts that when he was around 11 that he saw his family dealing and using drugs. PCR Tr. 520. Although there were programs in the community, such as Scouts to help his learning and mental health issues, they did not use them. PCR Tr. 521.

Concerning his schooling, she did not see the disciplinary or conduct problems in his records that the DMH evaluators had the impression of concerning misbehavior, although he did fail the first grade and had speech problems. PCR Tr. 521. She did find that Applicant had slapped a girl, got into a "wrestling match" with a boy when he was thrown and had to get medical treatment for an elbow, and bad a fight with another over a racial remark. PCR Tr. 522.

However, Vogelsang asserted in the eighth grade, Lindsey "succumbed to the streets" when Burton left, his mother started 3rd shift, he became absent from school and his brothers got involved with drugs, driving cars, buying jewelry and having girlfriends. PCR Tr. 522. After repeating 8th grade then placed in ninth grade, he quits school after becoming "a street person." PCR Tr.522.

Vogelsang stated Aunt Robin was the only member to graduate from high school but was never at home and eventually got addicted to crack cocaine. PCR Tr. 523. The others in the house were, including

Willie who went to prison for 15 years for killing Paul and got into trouble with drugs, and Bessie, Robin, and Steve who received mental health treatment. PCR Tr. 524.

She felt Lindsey would retreat to neighbors' homes to avoid the chaos and found him lonely and scared. PCR Tr. 524. She also asserted that when his mother got off work she frequently went with her mother to play bingo. PCR Tr. 524. His uncles were described as either beating on him, threw his cat into a heater, hit their girlfriends, revealing a powerful threat of harm. Further, he was claimed to have seen his mother shoot at Mr. Sims. Vogelsang stated that Lindsey had no oasis for peace unless he went to his neighbors or Mr. Burton. PCR Tr. 526.[36]

Vogelsang stated that Virginia had a volatile relationship with Mr. Sims - evidenced by fighting and arguing all the time. She stated that one time she shot at him several times and missed which Applicant witnessed. PCR Tr. 527. She also recalled that all of the family had guns. PCR Tr.527.

Concerning his suicide attempts, Vogelsang described the event which led to his hospitalization. She stated that Fred returned to the home demanding attention and Applicant needed attention from their mother. The brothers got into a fight and Lindsey went into the bathroom took between 50-60 over-the-counter medicine (Tylenol, Nuprin). PCR Tr. 527-28. At the hospital, Applicant told them initially that his

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[36] Vogelsang asserted that Paul shot at 3 cousins, had CDV charges, was involved in drugs and went to prison. She stated Willie served 15 years for ABHAN and was convicted of CDV. As to Robin, she was convicted of crack and serving a sentence from charges reduced involving an assault, kidnapping and robbery. PCR Tr. 526.

mother told him that she did not love him and that they were going to send him to a boy's home causing him to get upset and want to, at that moment, take his life. PCR Tr. 52B. However, Vogelsang reported that his mother told the staff he was stable, but they were looking at his recent fighting conduct school. His mother told them about his temper outbursts. Applicant reported to them that he was seeking attention of his mother and "he wanted to leave that place." PCR Tr. 528. Vogelsang stated his mother resisted the recommendations for further assessment and outpatient treatment. PCR Tr. 528-29. Vogelsang described the "red flag" that suicide gestures of a child and the need to stay in treatment. PCR Tr.529.

Vogelsang then reviewed the history of suicide "attempts" of Bessie, Robin, and Virginia and declared that the mental health center was not aware of their history when they saw Applicant or that the family members get depressed and take things ending up in mental health facilities. PCR Tr. S30. She felt the center, unaware of the family history, had little to work with, but they requested further evaluation. PCR Tr. 531.

Vogelsang next described the cultural practice of "roots." PCR Tr. 532. She distinguished its use between some families where it is taught and explained as part of their heritage and other families where there is mental illness and violence and this practice further confuses. Vogelsang found a note in the doctor's records treating Steven Pilgrim on July 15, 2002 who was taking Xanax asserting that he was anxious and feared his wife was "putting a root" on him and putting something in his drink or food claiming it caused his penis to draw up inside him. PCR Tr. 533, ll. 14-25. Vogelsang noted that Steve was the person

Lindsey looked up to. She reported Steve had previously shot a woman in an earlier relationship and the mental health records reported his conflicts with his wife. PCR Tr. 534.

Vogelsang reported on direct that Lindsey was confused by the practice of roots.[37] She reported that the use of "magical solutions" in a confusing and chaotic family environment only confuses things. PCR Tr. 534-35.

Vogelsang summarized Dr. James Garbarino's theory on psychological battering of children and asserted she would have used his model if she would have testified in 2004 with visual aids. PCR Tr. 535. She stated that there was rejection as revealed by his father's abandonment and his mother's alleged lack of involvement in his life. She points to claims that his brothers would leave with their fathers and Applicant would be left behind. She said that suggested his entry into "adulthood" with a fear of rejection and overreactivity to rejection. PCR Tr. 536.

Another Garbarino factor was "isolation" which she opined there was evidence of minimal exposure to church and scouts, although she claimed he tried to play football, but quit when no one would come to his games. She also saw "exposure to negative behaviors within the home" and other than Mr. Burton, his mother and Steve. PCR Tr. 536

As to "terrorism," she opined he witnessed his uncles fighting, beating up their wives and girlfriends, and throw his cat into the fire. As to the "ignoring" factor, she opined the parents failed to notice his

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[37] On cross-examination, Vogelsang admitted she had no reference to discussing "roots" with Lindsey in her interview notes from November 2009. PCR Tr.575-76,585.

needs for school, mental health, protection and supervision. PCR Tr. 537.

As to the "corruption" factor, she opined it was shown by his uncles' violence his mother shooting at her boyfriend's tires and boyfriend, and his uncle's profit from drugs. PCR Tr. 537. She suggested that these factors miss-socialized the child. PCR Tr. 538.

Vogelsang reported that Lindsey became involved in the drug trade around age 12 as a courier for his uncles. PCR Tr. 538. This initially provided him some money, and Vogelsang claimed he used the money to help pay for his grandmother's medicine, gave money to his mother, yet also used it to buy clothes and shoes for himself. PCR Tr. 539.

Concerning his school performance, she opined he had potential with extra help and tutoring. PCR Tr. 539. But opportunities were not present.

Vogelsang described Applicant's relationships with women as erratic and chaotic. PCR Tr. 540. An early relationship with an unbeknownst cousin and breakup demanded by his mother caused Applicant to become very sad and upset. She further equates his mother's alleged rejection prior to the pill injection at age 15.

Vogelsang describes that Lindsey began dating and when rejected becomes upset and over-reactive. She describes the shooting of Stafford Wilkins after he was in a "long-term" relationship with Stephanie, causing him to be sent to jail. PCR Tr. 540.

Concerning the victim Nell, Vogelsang reported that the relationship began at age 22. She found "incredible instability" in the relationship. She said the relationship with Nell began while living with Stephanie. He has a child with Nell. Although Vogelsang opines that Applicant loves being a father (PCR Tr.

541, ll. 14-15), she describes breakup where each returns to their mother, arguments and violence resulting in at least one conviction and multiple arrests. PCR Tr. 541. They were married in 1997 after he was released from jail after the Wilkins incident. A conflicted relationship, they have a second child in 1999. She reports that while Lindsey gets jobs for a period, he always reverts back to drug dealing "where he can get the money he needs to provide" for things he thinks he wants his family to have. PCR Tr. 542.

Vogelsang found that he wanted to be a father, but lacked knowing about fatherhood. She denied any knowledge that he ever abused or hit his children. PCR Tr. 543. He only found that his role was to give them things. PCR Tr. 543.

Vogelsang reported that there was, however, violence in his relationship with Nell. Though one CDV conviction, she had made other reports of violence or aggressiveness toward her. PCR Tr. 543.

Vogelsang stated the drowning of his brother, Fred, in 1998 was a major loss, even though this was the brother with whom he fought. PCR. Tr. 544. They had gotten closer and worked in Virginia together. After his death, she opined he got sad and depressed in a "normal grieving process." PCR Tr. 544.

She opined that Lindsey lacked an understanding of fidelity and being committed in a relationship. Vogelsang described a family pattern of marriage and additional involvement in other relationships. PCR Tr. 545. Vogelsang, however, stated this did not apply to Nell. However, Vogelsang opined that "he became extremely depressed over the loss of his boys" and Nell. Vogelsang pointed out that is when he threatened to take his life and no one called EMS or took him to the E.R. and "just left him there." PCR Tr. 545.

Vogelsang re-stated the major factor in his life was the family system and behaviors he had witnessed through his development years. She declared this affected his judgment, impulsivity insight, "and placed him at a higher risk to end up committing a serious act." PCR Tr. 567. She opined that had she been a witness in 2004, she would have testified whether Bessie Smith had attempted silicide or suffered mental illness based upon her knowledge of its foundation, although the Respondents objected to it under hearsay. PCR Tr. 549-550.

On cross-examination, the dangers inherent in presenting social history testimony were revealed. First, Vogelsang admitted that she misstated on direct that Uncle Willie has killed someone, when in fact it was only an assault. PCR Tr. 556-57. Further, she admitted that Lindsey was not identified in the pill incident as attempting suicide by the hospital, but that it was a gesture, that he had no suicidal ideation, did not realize the medicine was toxic and that he did it to get attention and not to kill himself. PCR Tr. 557-58.

Vogelsang again corrected herself concerning the incident three weeks before was not an attempted suicide, but was only a "threat." PCR Tr. 559. She argued there was no attempt or overt act on his part and suggest conflicted evidence that he had a gun, contrary to the family's earlier testimony. PCR Tr. 559. (See PCR Tr. 424, 440, 476-77).

Concerning her lack of a written report, Vogelsang declared she is not required to do a report unless requested. She denied that had she made a report that she would not have made factual mistakes. PCR Tr. 561. She admitted that as a member and past president of the National Association of Social Workers of

S.C., they have a national policy in opposition to the death penalty, but declared she did not vote on the policy. PCR Tr. 562.

Vogelsang then described what matters she reviews as an expert witness in child custody cases. She did not recall trial testimony that Lindsey had given his child alcohol at trial although she had admitted that she read the trial testimony. PCR Tr. 563. See ROA 1820 (Lindsey gave son a beer in a baby bottle). She suggested it would have stood out and it would have been a concern for her in a family court recommendation situation. Similarly, whether an individual carried a weapon, had shot at someone, sold drugs, and had multiple incidents of violence toward his wife would affect her recommendation. Vogelsang declared she would not have recommended visitation for that person, although she had earlier declared "from all sources he was a good father." She confirmed in a child custody situation - with her information - she would have been hesitant and would have recommended that the be no visitation without supervision from someone from the Court present. PCR Tr. 565, ll. 7-20.

Ms. Vogelsang admitted that she did not speak to victim's family members who had long-term relationship with the Applicant and his family or the mother of Lindsey other child. PCR Tr. 567-69.

Vogelsang admitted that his mother and grandmother - as care givers - had taken Lindsey to doctors for regular checkups. Vogelsang admitted that Steve Pilgrim was a person who was not threatening and a workaholic and supporter of the family. PCR Tr. 573. She stated though that he was not there for "child de-

velopment", pointing out that he "believed in the practice of roots" and "shot a girl," though Lindsey did not witness it. PCR Tr. 574.

When asked about what Marion told her about the practice of roots in the home (during her November 2009 interview), she asserted various matters including it was confusing to him, made him mixed-up between a difference between roots and home remedies, confused him about family members putting a root on people in their relationships to make them feel sick or die.[38] However, when asked to point out in any of her notes of the interview, she declared, prior to reviewing the notes, she "may not have written it down." PCR Tr. 575. When she reviewed her multiple page notes, she declared nothing was in there, although she remembered the conversation. PCR Tr. 576.

Vogelsang declared Lindsey "succumbed to the streets" at the eighth grade, as a runner for his uncles, but then could not clarify which uncle nor resolve that Willie was in jail at that period of time. PCR Tr. 578. She then switched it to drug dealing cousins rather than the uncles. PCR Tr. 578-79.

She confirmed that she failed to interview Stafford Wilkins, who Lindsey had shot. She stated she was unaware that Wilkins stated he thought Lindsey was his friend and did not know why he shot him, admitting that she had not read his trial testimony. PCR Tr. 579.

Concerning her reliance upon Rod Tullis' testimony and interview, she did not recall or know that it

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[38] The Court finds that Ms. Vogelsang's testimony on this "roots" point highly suspect. Additionally, when challenged on cross-examination concerning this conversation, it is telling that the Applicant was not called to corroborate it in this civil setting where he has the burden of proof.

conflicted with the defense lawyer's testimony.· PCR Tr. 581. See PCR Tr. 39-40. She also confirmed that when she interviewed Lindsey in November 2009, he never told her that he called his lawyer (Tullis) on the day of the crime and threatened to kill himself. PCR Tr. 585.

In suggesting a reason for the crime, she confirmed that he had declared to the EMS that he shot her because she had a boyfriend, not because she would not let him see his children. PCR Tr. 586. She also confirmed that he was under an order of protection not to see his wife, although she could not recall how long before the incident it had been in place. PCR Tr. 587. She confirmed that after the order was entered, Lindsey was not supposed to see his children or have contact with them. PCR Tr. 587.

While she had stated he had provided support for his children, she confirmed that he did not always provide them clothing, food, or try to have visitation. PCR Tr. 588. To the contrary, he had asserted in records that he was not providing any support 4 to 5 months prior to the incident. PCR Tr. 588.

Vogelsang also confirmed that Lindsey had a record of violence, not only toward Nell, but toward other females, including those he claimed to love. PCR Tr. 589. He also had indications of violence toward males.

Vogelsang stated she had talked with Lindsey about violent acts while dealing drugs, including fights and shootings. PCR Tr. 590. She described Lindsey as "controlling", but also scared half to death concerning the drug sales. PCR Tr. 590. She stated he had an "extremely overactive behavior involving violence." PCR Tr. 591, ll. 1-2.

Vogelsang also confirmed that his risk factors made it a high risk that he would end up committing

the very act he committed. PCR Tr. 593. She also admitted that the risk factors she found are not treated in the prison system. PCR Tr. 594.

ANALYSIS

The Investigation Concerning the Social History of Lindsey and the Family Members Was Reasonable.

Initially, the underlying issue concerns whether the investigation of the social history of Lindsey and his family was reasonable. Within his memorandum, Applicant does not point to any particular piece of evidence that critical to the defense and mitigation, but merely suggests that it was not done in the depth that he thinks counsel should have done. Although the investigations may not have included Ms. Topp's suggested preference of three years (or the claims of 1000 hours of the ABA average), it uncovered the matters necessary for the defense.

A review of the trial testimony of Virginia Lindsey (guilt and penalty), cousin Chris Wilkens (guilt and penalty) and the penalty phase testimony of Bill Burton, Leon McDowell and Steve Pilgrim suggests that the essential family background was revealed to the jury. Importantly, concerning the depth of the investigation, the summaries of the interviews that Ms. Topp had with Marion Lindsey and Marion Lindsey's mother in 2004, buttressed by Ms. Topp's own PCR testimony about what she learned in 2004 are virtually in the same detail that the post-conviction evidence from the family members and Jan Vogelsang's testimony in the PCR hearings.

Trial "counsel have a duty to make reasonable investigations or to make a reasonable decision that makes investigations unnecessary." *Strickland*, at

691, 104 S.Ct. 2052. "In assessing counsel's investigation, we 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, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (internal quotation marks and citations omitted). "In assessing counsel's performance in this context, we look to how counsel prepared for sentencing, what mitigating evidence counsel accumulated, what additional leads counsel had, and what results counsel could have reasonably expected from those leads." *Blanton v. Quarterman*, 543 F.3d 230, 236 (5th Cir.2008) (citing *Neal*, 286 F.3d at 237). Courts must consider "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527, 123 S.Ct. 2527.

Lenora Topp made detailed summaries of her interviews with Lindsey and Virginia Lindsey and these written interviews reveals virtually identical data to a significant portion of Social Worker Jan Vogelsang's PCR testimony. Respondent's Exhibit 2, 3, 4. The Applicant has failed to point out any new and critical data revealed post-trial. A review of the data received in 2004 by the defense team revealed that they were aware of Virginia Lindsey's background in detail as revealed first from Lindsey and then from Virginia, including her limited education, children and their different fathers, involvement of her mother in raising the children, her employment as a shift worker and not at home in evenings to help with food and homework, Lindsey' s lack of an active father to interact with, and Lindsey's opinion that the family was poor.

Respondent's Exhibit 2, 3, 4. Topp and the defense team also were aware of Virginia's 8 siblings. They were aware that all five of Bessie Smith's children - in contrast - had completed college. Respondent's Exhibit 2-4. From Virginia, she revealed that injuries that Marion has sustained while growing up - being run over by a car driven by her brother Paul when Lindsey was 19 months old, Lindsey falling and hitting his head frequently, Virginia also reported to Topp that Lindsey had tried to commit suicide by swallowing pills from the medicine cabinet and the reason that he was upset with her after a fight with the brother and she told him that she would not do anything for him again and had stayed in the hospital one week. Respondent Exhibit 4. Virginia had also reported to Topp that Lindsey had raised his younger brother Tim and that her son Fred died while canoeing and was never found. Id. She also reported to Topp about the incident when her brother threw Lindsey's cat into the furnace. She also described to Topp about Lindsey's earlier relationship with Stephanie Petty who they liked and got along. Id. Concerning the relationship between Nell and Lindsey, Virginia had reported that she liked and loved Nell, thought Nell's mother had too much influence on her and when there was an issue with money, there were problems in the relationship. Virginia stated to Topp that she knew that Lindsey sold drugs and that he spent money on Virginia and her family during those times.

In Lindsey's interviews with Topp on April 16 and 25, 2004, he reported similar details about the family background. Respondent Exhibit 2, 3. Particularly he noted his knowledge of his father Leon McDowell and referred to him as a "sperm donor" who did not want to get involved with him and Lindsey was bitter toward him. He noted to Topp that his other brothers

would·go on activities with their fathers and he was left out. Id. He noted that his mother struggled while he was growing up and that they did not have new clothes and had a wringing washer machine and ruined a new one through overuse. Lindsey reported to Topp that his brother Fred died in a canoeing accident when he was with a friend who survived, but Fred's body was never found. He reported that Fred's death affected him for at least three years. Id. He stated that he and Fred used to fight, but they became friends and worked together in West Virginia until Lindsey became homesick and moved back. Lindsey felt that he raised his brother Tim Sims who would follow him everywhere and that Tim's father was the only father figure in Lindsey's life. Respondent's Exhibit 2, 3.

Lindsey also reported to Topp that he did not know his sister Vanessa who was killed in a car accident. In describing growing up, he felt his family was very poor and that they could not afford to eat anything except bologna and that he currently cannot eat it.

Lindsey also reported to Topp that when he was 25, his father's children started to hang around him, although he claimed he was not selling drugs at the time. He noted that half-brother Leon McDowell also took out an assault warrant against him and that family considered him an outsider. Lindsey reported that he did get along with Claude, Marshall Martha Sammy and Kathy Lindsey. Respondent Exhibit 2, 3.

Lindsey also provided Topp a summary of his educational history through 10th grade when he quit school to work and help his mother. Id. He also described his recollection of disciplinary actions taken against him at school, including slapping a girl, being hit in the eye in junior high after a racial epithet but

having nothing done to the perpetrator after he reported it to the baseball coach though he was suspended for a week.

Lindsey reported to Topp that none of his family finished school. He stated to her that he played football in junior high, but quit when no one would come to watch. Respondent Exhibit 2, 3.

Lindsey advised Topp that he had two traumatic times in his life, pointing out the incident when his cat was thrown into the heater alive and when he tried to commit suicide when he was 12 years old. Id. He also described running away from home when he was seven because his mother would not let him go somewhere, but returned home when he got hungry.

Lindsey described that after he quit school, he started working with his brothers at Beecher's Plastic Co. He described having a bad car accident when the tire blew and the car flipped and he was out of work for a year due to injuries. He claimed that he lost his memory, broke his hip and had facial surgery. As a result of the totaling of the car, he stated his brothers also lost their jobs. He then went to work at Burger King where his brothers worked until he had words about 1 ½ years later with a female manager. After being out of work a month he then worked at Union Cloth in Spartanburg, but found it boring and had to work with a lot of gossiping women and left there after 6-7 months. Id.

Lindsey told Topp that he then stayed at home and took care of Claude's children by cooking and cleaning so that Claude and his sister could work.

Lindsey described his relationship with Stephanie Petty, working with his brother Fred in West Virginia and returning home.

Lindsey claimed that he partied, drank beer but never did drugs.

Concerning Bill Burton, Lindsey said he was his mentor while growing up and Burton got him a job at his plant when he was plant manager. He stated in his youth he would go fishing with Bill and met his mother. At the plant for 2 years, Lindsey said it was the best job he ever had. He stated that one evening he agreed to work overtime and described that he did all the work while others fooled around with girls. The next day, he stated that he was confronted by the supervisor as to why the work was not completed and when he advised the supervisor that he was the one who did it all, he felt he would not listen to him and Lindsey "jerked Mr. Green up by his shirt" and he was fired. He stated Burton tried to get his job back, but there was a no-rehire policy.

Unable to get a similar job, Lindsey stated that he started being a drug courier again for cocaine and crack - though he claimed he never used it. Id.

He described to Topp his various jobs after that with Thomas and Betts in Inman, Hudson International.

He also described his life with Stephanie who had moved in with them and her father threatening to kill him, but then would come over on weekends.

Lindsey described his other job at Budweiser as a fork lift operator until he was arrested for a traffic ticket and lost his job after he stayed in jail. He next worked at a body shop until it was shutdown.

Lindsey also described shooting Stafford Wilkins in 1994.

Lindsey, during the interview on April 16, 2004 also went into detail about his relationship with Nell

Lindsey. Within that part of the interview he described breaking up with Stephanie after Nell became pregnant, he stated that he would also take care of the children. He went into detail about their relationship leading up to the shooting. He told Topp that he had written suicide notes after Nell had moved back with her mother and told him that he could not see his children after a domestic violence order was taken out. Respondent's Exhibit 2, 3. He claimed to have lost weight from 225 to 160 in four weeks and was depressed all the time. He described his version of the day of the shooting including going to his brother hoping he would stop him, seeing Nell's cousin's car seeing Nell and then chasing them, not recalling the shooting, but recalling putting his gun to his temple and hearing a voice tell him to put the gun down, then being shot. Respondent Exhibit 2, 3.

This Court finds that the investigation concerning the social history of the family was constitutionally adequate. In addition to this information, the 2004 defense team was aware that there had been mental health concerns for Bessie Smith who had tried to commit suicide, and Steve Pilgrim who at least had nerve and anxiety problems.

"[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying heavy measure of deference to counsel's judgments." *Wiggins*, 539 U.S. at 521-22. "A defense attorney is not required to investigate all leads ...." *Bolender v. Singletary*, 16 F.3d 1547, 1557 (11th Cir.1994).[39] "A lawyer can almost always do some-

[39] Rejecting a per se rule of ineffective assistance where counsel does not consult family members, the 11th Circuit held in *Wil-*

thing more in every case. But the Constitution requires a good deal less than maximum performance." *Atkins v. Singletary*, 965 F.2d 952, 960 (11th Cir.1992). "The attorney's decision not to investigate must not be evaluated with the benefit of hindsight, but accorded a strong presumption of reasonableness. "*Mitchell v. Kemp*, 762 F.2d 886, 889 (11th Cir.1985).

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information." *Strickland v. Washington*, 466 U.S. at 691. "The reasonableness of the investigation involves 'not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.'" *St. Aubin v. Quarterman*, 470 F.3d 1096, 1101 (5th Cir.2006), quoting in part *Wiggins*, 539 U.S. at 527.

Applicant has failed to show what-material counsel was unaware of that was critical to the defense,

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liams v. Head, 185 F.3d 1223, 1237 (11th Cir.1999), that counsel's investigation was reasonable when he did not interview the defendant's sister or father, the latter because the defendant had not lived with him for very long. '[S]trategic 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 a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary *Strickland* [*v. Washington*,] 466 U.S. [668] at 690-91, 104 S.Ct. [2052] at 2066 [(1984)] . Accord*, Davis v. State*, 9 So.3d 539 (Ala.Crim.App., 2008).

just that in depth evidence was not presented. However, he has failed to show that counsel's investigation of the family background was unreasonable. With the further information about the family background, the psychiatric diagnosis is similar; the information provided by and to the social expert is similar to what the 2004 defense team was aware from their own interviews or Ms. Topp's interviews. The assertions otherwise must be denied.

More clearly, 6th Amendment prejudice has not been shown. Applicant has not pointed to any new information or a game changing revelation that creates a reasonably probability of a different outcome. *Bean v. Calderon*, 163 F.3d 1073, 1081-82 (9th Cir.1998). To the contrary, it is virtually the same information. The Applicant has failed to show that further investigation of the family history undermines confidence in the outcome of the case and creates a reasonable probability that the result of the proceeding would be a life sentence.

The Failure to Employ A Clinical Social Worker Does Not Require A New Trial.

It is undisputed that defense counsel in 2004 did not retain a clinical social worker such as Jan Vogelsang in 2002-2004, Although the decision not to retain a social worker is not reflected in the record due to counsel's death, this Court finds that the failure does not amount to deficient performance or prejudice under Applicant's argument.

As to deficient performance, Applicant appears to assert that the retention of a social worker is required in all capital cases. His reliance upon the ABA Standards notwithstanding, the 6th Amendment does not require the retention of any particular expert in every case. See *Durr v. Mitchell*, 487 F.2d 423 (6th Cir. 2007)

(no requirement to employ social worker and no prejudice for failure to do so.) Similarly in *Wiggins*, the Court did not hold that there was an error in retaining a social worker, but that it was not an unreasonable investigation to follow up on leads that would have led to a mental health issue. *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2007) (counsel ineffective based upon a failure to investigate and present, including retaining a social worker where funds were made available).[40] However, the Court need not address deficient performance where the Applicant has failed to satisfy the prejudice prong.

A review of social worker Vogelsang's testimony reveals that it was almost a reading of the reports completed by Ms. Topp in 2004. The Applicant has failed to point to the differences other than she could have presented hearsay testimony to support that Bessie Smith was hospitalized with an alleged attempted suicide and explained that Steve Pilgrim had

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[40] This case is decidedly different than the facts in *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004), in which the Court, relying on *Wiggins*, found counsel's investigation was unreasonable. ln *Von Dohlen*, the defense psychiatrist at trial opined that the defendant suffered from adjustment reaction disorder. However, upon learning additional records existed, and after having reviewed the additional record in the subsequent PCR action, the psychiatrist testified that his diagnosis would have been "major depressive episodes with severe symptoms of anxiety and possible prepsychotic features." *Von Dohlen*, 360 S.C. at 605, 602 S.E.2d at 741. Von Dohlen contended in his PCR action that trial counsel "fail[ed] to adequately prepare and present evidence in the penalty phase of the trial that he suffered from severe, chronic depression, a major mental illness, at the time of the murder." 360 S.C.at 605, 602 S.E.2d at 742. This Court agreed, finding that the medical records that affected the defense expert's opinion were available at the time of trial but not provided to him.

allegedly had mental health issues as well as a criminal record. The remainder of the focused testimony was known by counsel and reasonably understood by the jury after the testimony of the family and Dr. Melikian. Lindsey was raised solely by his mother and they were of very modest means. The Applicant has failed to pinpoint what difference any of the information Ms. Vogelsang laboriously testified about that would have an impact upon a jury in a manner that would undermine confidence in the verdict under *Strickland*.

Applicant failed to prove that there is a reasonable probability that the jury would have concluded that "the balance of aggravating and mitigating circumstances did not warrant death." See *Strickland*, 466 U.S. at 695,104 S.Ct. 2052. See, e.g., *Johnson v. Bell*, 344 F.3d 567, 573-74 (6th Cir.2003) (although testimony from family members would have helped to humanize the defendant, the jury could have concluded that he was even more culpable because he had enjoyed a loving family and yet had murdered his wife); *Martin v. Mitchell*, 280 F.3d 594, 613-14 (6th Cir.2002) (defendant did not show prejudice at the mitigation phase where family members testified about his background and a psychological report was given to the jury); *Scott v. Mitchell*, 209 F.3d 854, 880-81 (6th Cir.2000) (finding that potential mitigating circumstances were overwhelmingly negated by other evidence about the defendant's background).

Further, as pointed out in the cross-examination, the danger of using a social worker who relies frequently on anecdotal hearsay risks making a difficult case even worse. It would have presented an additional opportunity to focus upon certain errors in her presentation and negative factors related to Lindsey that would make a death sentence even more likely.

In the questioning concerning her expertise in child custody matters, she admitted that a person with the characteristics of Lindsey should not have been allowed to have visitation without court supervision, if at all, even though he had to be reminded that there was evidence that Lindsey had feed beer to his baby son in a baby bottle. PCR Tr. 563. See ROA 1820 (Lindsey gave son a beer in a baby bottle). PCR Tr. 565, ll. 7-20. She was insistent on what family members - uncles or cousins - he was running drugs. PCR Tr. 578. She also reiterated Lindsey had a record of violence, not only toward Nell, but toward other females, including those he claimed to love. PCR Tr. 589. In confirming that his risk factors made it a high risk that he would end up committing the very act he committed, she also admitted that the risk factors she found are not treated in the prison system. PCR Tr. 593-94.

"To assess the probability [of a different outcome under *Strickland*], we consider the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding-and reweigh it against the evidence in aggravation." *Sears v. Upton*, --- U.S. ---, 130 S.Ct. 3259; 3266, 177 L.Ed.2d 1025 (2010). (finding that a proper prejudice analysis must take into account the newly uncovered mitigating evidence, along with the mitigation evidence introduced during the defendant's penalty phase trial, to assess whether there is a reasonable probability that the defendant "would have received a different sentence after a constitutionally sufficient mitigation investigation"). The United States Supreme Court has stated that them "is no prejudice when the new mitigating evidence 'would barely have altered the sentencing profile presented' to the decision maker ...." *Id.* at 3266.

Here, the sentencing profile was not altered by the additional testimony of Ms. Vogelsang. Although she presented a social history of known poverty and lack of a father-figure – known to the sentencing jury, she also confirmed that he had become a controlling and violent person. Against the trial backdrop including the evidence in aggravation, as well as the family mitigation the jury actually heard, the burden of proof bas not been met by Applicant. The allegations must be denied.

VIII. Ineffective Assistance of Counsel - EMS·WORKERS TESTIMONY ABOUT DESIRE FOR SUICIDE.

a. Failed to elicit testimony from EMS worker - Joseph Stewart and Vincent Bell - regarding Lindsey's desire to commit suicide after Nell's death.

b. Failed to interview EMS workers to determine what info and testimony they could provide

c. Failed to prepare EMS workers to testify in penalty phase.

d. Failed to ask appropriate questions to elicit admissible info about Applicant's state of mind.

Memorandum 53-54.

In his eighth argument, he contends that defense counsel failed to present the testimony of Vincent Bell, an EMS worker who treated Marion Lindsey to give the jury a better idea as to Lindsey's state of mind at the time of the crime. He contends that it would have resulted in a different outcome of verdict. This Court finds that he has failed to show either deficient

performance or prejudice. This Court finds that the 2004 jury was given similar information. Deficiency and prejudice under *Strickland* has not been shown.

It is undisputed that the defense was aware of Vincent Bell, as well as Susan Horton and Joseph Stewart as the paramedics who arrived at the scene. They had included them on their listing and summary of state witness. State Exhibit 9. 277-279. Counsel had also presented evidence through Dr. Melikian that Lindsey had planned to commit suicide that day shot himself after the incident and told the EMS to let him die. ROA 2013. The hospital records confirmed that he had a head wound. ROA 2013-2014. In the guilt phase of the trial, Officer Godfrey denied that he had shot Lindsey in the head. ROA 1577. Defense counsel Doug Brennan called Jason Stewart in the guilt phase of the trial as a defense witness.[41] Stewart, an EMS worker, testified at trial, that he arrived on the scene on September 18, 2002 and saw the Applicant with a head wound. Stewart was asked whether Lindsey had said anything to him. ROA 1660-1670. At that point, the state objected that it was a self-serving statement by the defendant and inadmissible. However, the defense was able to present the testimony that Lindsey told him that he shot himself in the head. ROA 1674

Vincent Bell (Paramedic)

Vincent Beil testified that he was a paramedic at Spartanburg EMS on September 18, 2002 and responded to the Inman Police Department after the

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[41] Counsel Brannon testified that he interviewed paramedic Jason Stewart prior to trial. PCR Tr. 61. He stated that be interviewed him because he wanted to develop that Lindsey had tried to kill himself by shooting himself. PCR Tr. 67.

shooting. PCR Tr. 97. While he responded to the female, his partner went to Lindsey. When Bell went to Lindsey he was conscious and he was asked questions about what happened. Lindsey initially stated he shot himself and in a follow up question stated he shot himself, let me die, and then said "I shot myself and then I shot my wife."[42] PCR Tr. 99. Bell described Lindsey as not cooperative while they worked on his injuries. PCR Tr. 99. While on route, Bell again asked him what happened and he said "I shot myself and then I shot my wife." When Bell asked why, Lindsey then responded "his wife was fooling around with somebody." PCR Tr. 99-100.

On cross-examination, Bell confirmed that he had given a written statement to the police. (State Exhibit 1). In reviewing the statement Bell confirmed and corrected that Lindsey said "I shot my wife and I shot myself in the head", reversing the order of the shots. Bell confirmed that Lindsey did not indicate that he made any reference to his children as a reason for the shooting, but only that he shot her because she was fooling around with another man. PCR Tr. 103.

Bell stated he was subpoenaed for the trial but did not testify. However, he did not recall speaking with anyone at the trial. PCR Tr. 104.

ANALYSIS

The petitioner has failed to show deficient performance where the 2004 jury was told that Lindsey had shot himself in the head, that the police had not shot Lindsey in the head, that an EMS worker (Stewart) who arrived at the scene was told by Lindsey that he shot himself in the head and that Dr. Melikian stated

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[42] This version of the incident is inconsistent with the trial evidence.

that Lindsey told her that he shot himself in the head and told an EMS worker to let him die. The only difference in including Bell's testimony is that he was the worker that Lindsey said let him die. It is evident that the defense (as well as the jury) knew the existence of the paramedics, knew that Lindsey had shot himself and knew that he had told the paramedics that he had shot himself and knew that he had told the paramedics initially to let him die. The only omission was the failure to put up the paramedic who heard him say the "let him die" comment. This was clearly a strategic decision on counsel's part as to how to present the witnesses and which witness to present. Although the Applicant may claim that they did not interview Vincent Bell, it is uncontested that they were aware of the information.

Even if the Court would conclude it was deficient, Prejudice cannot be shown. Similar information was given to the jury within both the guilt and sentencing phase. Further, the comment was used by Dr. Melikian in her assessment of depression that she gave the jury. The "let me die" after a person had shot himself in the head fails to suggest how the failure of the additional witness would have the effect to have undermined confidence in the death verdict under the standards of prejudice set out in *Strickland*. They had heard similar evidence. He has failed in his burden of proof. Accord, *Wong v. Belmontes*, supra. Furthermore, "in order to establish prejudice, the new evidence that a habeas petitioner presents must differ in a substantial way, in strength and subject matter, from the evidence actually presented at sentencing." *Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir.2005). The witness of the "let me die" comment he now offers does not meet this test, but is cumulative, albeit somewhat more detailed. The new evidence does not differ in

subject matter-much less "in a substantial way"-from the evidence already presented at sentencing. It covers the exact same subject. Certainly this new evidence cannot be described as "shocking, disheartening, and utterly disturbing," the kind of evidence that courts have held would generally support a finding of prejudice warranting habeas relief. See *Beuke v. Houk*, 537 F.3d 618, 646 (6th Cir.2008). The Applicant fails to explain how such evidence, had it been presented, would have done anything to change the jury's perception of Lindsey's moral culpability or mental state for such a brutal and horrific crime. See *Jells v. Mitchell*, 538 F.3d 478, 498 (6th Cir.2008) ("Prejudice is established where, taken as a whole, the available mitigating evidence might well have influenced [the sentencer's] appraisal of [the petitioner's] moral culpability."). Relief must be denied.

IX. Ineffective Assistance of Counsel -TIME SPENT IN MITIGATION INVESTIGATION.

a. Failed to commit sufficient time to perform adequate investigation in mitigation

b. Failed to assemble complete defense team until one month prior to trial

c. Failed to perform investigation of Lindsey's life history, family history until 2 months prior to trial

d. First half of investigation done w/o mitigation investigator

e. Investigation lasted only 8 weeks

f. Failed to spend sufficient time interviewing witness to determine beneficial testimony

g. Failed to spend sufficient time preparing witnesses to testify to allow a clear, logically structured and easily understood presentation

Memo, p. 54-58.

In his ninth allegation, he contends that counsel spent insufficient time in preparation for the trial and sentencing proceedings. In the argument, he merely states that they failed to devote adequate time for preparation for the mitigation phase of the trial. Without designating any necessary item of evidence that the "insufficient time" suggested, he claims the result of the proceeding would have been different. Within his argument, he stated that studies reported that the average time spent by defense lawyers in capital cases was 1889 hours per case and normally 12 times more time spent in a capital case than a normal case. The Applicant solely relies upon the ABA Guidelines, § 10.7 and the comments concerning investigation and § 11.4.1. He also relies upon *Wiggins v. Smith*, supra, as citing to the ABA Guidelines as appropriate guides on whether counsel provided effective assistance of counsel.

This Court finds that counsel performed a reasonable investigation into mitigation in this case. The Court incorporates by reference the summaries of witness testimony from both the trial and PCR hearing set out in argument 8, infra. This Court assumes that this particular claim involves time spent on the investigation, since Applicant did not assert any particular evidence that was not disclosed to them from the investigation the 2004 defense team did that he now asserts was deficient.

If the Applicant's assertion that the ABA guidelines are not guides, but are requirements for capital defense counsel are accepted, it sets an almost impossibly high bar for defense counsel in capital cases. Defense counsel would now be required "to locate and interview the client's family members ... and virtually

everyone else who knew the client and bis family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation or parole officers, and others," *Van Hook v. Anderson*, 535 F.3d 458, 463·(6th Cir.2008) (quoting the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, ¶10.7, at 83); he must interview them long enough so that those interviews can be characterized as "extensive" and "in-depth," op. at 776; every conceivable family member must be contacted, no matter that defense counsel bas spoken with the defendant, his wife, mother, father, brother, sister, aunt, and cousin (along with several non-family members), op. at 778-81; and he must do all this even if he reasonably believes (based on the trial court's rulings and his own reasonable interpretation of state law) that the introduction of any evidence regarding the defendant's family background could open the door to truly disastrous rebuttal evidence by the prosecution. Nothing in *Strickland* or its progeny requires defense counsel to go to such extreme lengths in order to meet the (relatively low) threshold of "reasonably effective assistance." This assertion was reversed in *Bobby v. Van Hook*, supra., by the U.S. Supreme Court.

As stated previously, the Applicant has ignored what the 2004 defense team actually did in making his assertion and reliance upon the ABA Guidelines. What the defense team did during the period of representation:

1. Received medical history including Lindsey's ER records from 1973-1992 involving his. birth records (1973), kerosene ingestion (1975), fractured elbow (1981), Tylenol overdose (including Psychiatric

Ward) (1988), car wreck (1989), motorcycle wreck (1989), football injury (1990), and car wreck (1992).

2. Received Spartanburg Regional Medical Center Records from 2002 – 2004 concerning the incident and other matters.
3. FAMILY and Social History: Interviewed Mother and other family members prior to and during trial. Received information concerning poverty, domestic violence and neighborhood from Applicant and family. Interviewed Lindsey who gave an extensive family history about the family and his own history. Respondent's Exhibits2, 2, 4.
4. Educational History - received school records.
5. Job History - Learned from defendant of his employment history through interviews with social worker and mental health expert, as well as family members. Social Worker prepared an extensive written report from her interviews with Lindsey and mother. State Exhibit 2 (Lindsey Summary of His Life); State Exhibit 3 (Lindsey's Summary of His Mother's Life); State Exhibit 4 (Summary of Virginia Lindsey's Background Interview).
6. Prior Adult Prison and Jail Records - Acquired SCDC records, including disciplinary records from 1994 incident after 1996 plea and received jail records from current incident in 2004 until trial.

In addition,

1. Retained an experience mitigation investigator to assist in investigation two months before the trial.
2. Retained a psychiatrist who was able to render an opinion of mental illness, particularly depression used in mitigation.
3. Received opinion from retained mental health experts (Dr. Brawley and Dr. Melikian) to challenge the 2003 state examiner opinion of malingering.
4. Met with Applicant on numerous occasions at jail.
5. Had assistance of third lawyer who prepared extensive summaries of crime scene reports, prior prison history, prior criminal history, and summarized state discovery reviewed.

Further, counsel received the discovery from the state concerning the particular crime and other crimes involving Lindsey. See State Exhibits 9, 10, 11 (PCR 279,288).

As Applicant concedes by his claim, this is not a case where no investigation was done. Rather, absent Mr. Bartosh's testimony, it appears that the bulk of the preparation was done two months prior to the trial with the retention of the psychologist, psychiatrist and mitigation investigator in that period.

Trial "counsel have a duty to make reasonable investigations or to make a reasonable decision that makes investigations unnecessary." *Strickland*, at 691,104 S.Ct. 2052. "In assessing counsel's investigation, [a 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, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). "In assessing counsel's performance in this context, we look to how counsel prepared for sentencing, what mitigating evidence counsel accumulated, what additional leads counsel had, and what results counsel could have reasonably expected from those leads." *Blanton v. Quarterman*, 543 F.3d 230, 236 (5th Cir.2008).

A court must consider "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527, 123 S.Ct. 2527. The Supreme Court has held that "investigation into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence." *Id.* at 524, 123 S.Ct. 2527. However, "there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties." *Bobby v. Van Hook*, ---U.S.----, 130 S.Ct.13, 19, 175 LEd.2d 255 (2009). "[C]ounsel has a duty to make reasonable investigations *or* to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052 (emphasis added).

The amount of time trial counsel spent preparing for trial is not dispositive to claims of ineffective assistance of counsel. See, e.g., *Hopkinson v. Shillinger*, 866 F.2d 1185, 1217 (10th Cir.1989) (defendant must show specific errors, and cannot prevail because of limited time attorney spent on case) (citing *United States v. Cronic*, 466 U.S. 648, 666, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)), overruled on other grounds by *Sawyer v. Smith*, 497 U.S. 227, 110 S.Ct. 2822, 111

L.Ed.2d 193 (1990); *Owens v. Guida*, 549 F.3d 399, 408 (Tenn. 2008). Further, "[T]he failure to present additional mitigating evidence that is merely cumulative of that already presented does not rise to the level of a constitutional violation." *Nields v. Bradshaw*, 482 F.3d 442,454 (6th Cir.2007).

In this allegation, the Applicant has merely asserted a general claim that counsel must meet the checklist that he claims the A.B.A. has established. While it appears that counsel did wait to retain a mitigation investigator two months before the trial, he has not proven that no mitigation investigation was done. He has failed to show that the investigation was unreasonable. He failed to prove either deficiency or prejudice based on his "time spent" argument.

X. Ineffective Assistance of Counsel - Statutory Aggravating Factors

a. Failed to argue against statutory aggravating factors alleged by state.

b. Counsel did address aggravators, it was cursory and failed to present arguments against application to Lindsey

MEMO, p. 58-60.

In his tenth argument, raised for the first time in the Applicant's post-hearing memorandum, contends that counsel was ineffective in failing to argue against the sole statutory mitigating factor and did not address the aggravators. In the pleading, while conceding that counsel did argue against the applicability of the sole aggravating factor, he contends that his attempt to persuade the jury fell below the level required but does not specify what counsel failed to do. Memo. 58-59. He asserted that in general terms, why the factor does not support a death sentence but failed

to assert what the particular omission made by counsel in this area.

The Underlying Merits of the Claim Was Addressed in the Direct Appeal

The State sought the death penalty based upon S.C. Code Ann. § 16-3-20(C)(a)(3) (Supp. 1998). This aggravating circumstance authorizes the imposition of a death sentence where a defendant

> ... by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

The issue was raised in the direct appeal as a directed verdict issue. The South Carolina Supreme Court addressed the merits of the sufficiency of the evidence issue surrounding this factor in the following manner:

> 3. Directed verdict on aggravating circumstance
>
> Appellant moved for a directed verdict on the statutory aggravator provided in § 16-3-20(C)(a)(3) which states:
>
> > That the offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.
>
> Appellant contends that because be shot Victim at close range and no other person was endangered, this aggravator should not apply as a matter of law.
>
> The trial judge should submit a statutory aggravator to the jury if there is any evidence,

director circumstantial, to support it. *State v. Locklair*, 341 S.C. 352, 535 S.E.2d 420 (2000). Here, the police department parking lot is clearly a public place and a gun is a weapon hazardous to more than one person. *Id.* (shooting in church parking lot). Further, appellant knew there were other occupants in the car with Victim when he shot multiple times into the confined space of the car's interior-conduct a reasonable person would know presents a great risk of harm to more than one person. Appellant also pointed his gun at Officer Godfrey in the parking lot. This evidence supports the submission of the statutory aggravator to the jury.

Ignoring the conclusive evidence of the proximity of the two children in the vehicle's backseat with victim Ruby Nell Lindsey, the tinted glass preventing clear recognition, and the location of the bullet hole near the middle of car's backseat where Kiera Potlow's head would have been had she not leaned away, Lindsey claims that the statutory aggravating factor was inapplicable because the shooting was "at close range" and he did not mean to harm anyone other than his wife. *Initial Brief of Appellant*, p. 27. At no time does he ever discuss the underlying factual basis of the state's theory of the case of aggravation - the great risk of death to those within the vehicle and particularly Kiera, and instead makes reference to the fact that after shooting into the vehicle, he focuses upon a collateral fact that Lindsey did not shoot the officer when he could have done so. As shown by the evidence

> set out in Argument III, the evidence conclusively supports the "great risk of death" aggravator and the trial judge had a duty to deny the directed verdict motion. To do otherwise would have been an error of law.

State v. Lindsey, supra.

How the Issue Was Presented At Trial

At the conclusion of the State's penalty phase presentation, counsel Bartosh moved for a directed verdict on the "great risk of death" statutory aggravator. ROA 1972. He initially relied upon a Georgia case, *Pope v. State*, 256 Ga. 195, 345 S.E.2d 831, 845 (1986), to apparently contend that shooting someone at fairly close range does not, by itself, create a great risk of death to more than one person because others are in the vicinity. ROA 1974-75. Bartosh asserted that here you had someone firing at a fairly short distance at one person, it must be more than likelihood. ROA 1975-76. Counsel also apparently referred to an unpublished Fourth Circuit opinion, *Nolden v. U.S.*, 856 F.2d 187 (4th Cir. 1988)(unpublished), in support of bis position that a .38 caliber handgun (as opposed to an automatic weapon) does not fit the "weapon normally dangerous to the lives of more than one person" definition. ROA 1976-77.

Solicitor Gowdy relied upon *State v. Locklair*, 341 S.C. 352, 535 S.E.2d 420 (2000) in opposition to the motion. ROA 1977. He asserted *Locklair* stood for the proposition that the handgun satisfied the "weapon" definition. The prosecutor asserted that the parking lot of the Inman Police Station is clearly a "public place." ROA 1977. He noted that *in Locklair*, the attempted firing with the safety on satisfied the factor. ROA p. 1977, ll. 21-25.

Solicitor Gowdy argued that the facts in Lindsey were much more egregious than *Locklair*. Here, he noted, children were in the car, one leaning forward and one asleep. In addition, with the tinted windows, Lindsey fired two shots from the back of the victim's head and "then he walked around and fired two more times directly in the direction of the two children." ROA p. 1978, II. 6-8. Gowdy noted that one of the bullets lodged in the trunk. He noted further that the autopsy photographs revealed one of the bullets that struck the victim bad passed through both sides of her skull, lodging in her skin, with a possibility of clearing the skin and striking the children. ROA p. 1978, Il. 9-16.

In recognizing that under *Locklair* there is no requirement that bystanders be injured, he created a "great risk" where one did miss, which was sufficient. In addition, he added the fact that Officer Godfrey testified that after the shooting, Lindsey pointed the gun at him in the public place. Gowdy concluded that "but for the fact that her [Kiera's] head was laying either on the front, car seat or on her aunt's [victim] shoulder, we very well could have two homicides. ROA p. 1979, II. 4-9.

Judge Few rejected the defense motion with apparent ease:

> THE COURT: The facts of the Georgia case seem to me to be a good bit different. This case is pretty simple to me. The evidence is that on the two occasions that Mr. Lindsey apparently saw Ms. Nesbitt's car, he was unable to tell that Ms., that his wife was in there because of the tint in the windows. Once when he passed them and they were driving through Spartanburg to Inman. But more importantly as they

stopped side-by-side on the street in Inman outside of the house of Mrs. Nesbitt's mother I believe she said.

They were close enough to have a conversation through the window. And yet Mr. Lindsey could not tell that Mrs. Lindsey was in the back seat because of the tinted windows. Nevertheless, he fired shots into the window from two different angles while the vehicle was parked in a public place. And the second time around looking presumably to through the same window that he could not identify her through only minutes before. He fired shots in the direction of two children.

I have seen the bullet hole in the car, in the seat. The bullet hole is in the area that Kiera would have been sitting in. If she had decided in her -- none of us would know how to react to that situation. ...Certainly, a nine-year-old child is not going to have an ability to make a rational calculated decision as to how to best protect herself in the seconds that followed shots being fired into the head of the adult sitting next to her in the back seat. It is very possible that Kiera could have leaned the other way. She might could have leaned toward Nell for protection. And if she had done that, she would be dead. That bullet goes right through the space that she would have leaned into.

If she had not leaned away, from my view of the evidence she probably would have been hit. I've got absolutely no doubt that the facts in this case are sufficient to go to the jury on the aggravating circumstance of creating a great risk of death in a public place using a

> weapon that is capable of producing death. I did not get the language, I did not quote the statute. But I have no doubt that that is sufficient. Motion is denied.

ROA p. 1980, l. 10 - p. 1981, I. 6.

The solicitor's closing argument paralleled his response and the judge's order on the statutory aggravating factor, also noting that Kiera was cut by the glass and injured physically and psychologically. ROA 2108-2111. Defense counsel Bartosh challenged the credibility of the witnesses statements about Kiera's location in the car, almost claiming that if she was where she said she was, she would now be dead. See, ROA p. 2135, ll. 18-22.· He methodically went through the element of "public place," "knowingly" (asserted that Lindsey's depression, cognitive deficits and possible brain damage "a desperate man who isn't thinking about anything"), the great risk to more than one person factor (the bias of the officers and family who testified, the location of the girl and whether the state's theory was credible), and whether the gun satisfied the terms of a device normally hazardous to the lives of more than one person. ROA 2132-2137. Interestingly, the juror requested the testimony of Kiera and Officer Benny Godfrey be replayed, as well as the 911 audiotape. ROA 2164-65.

The jury found the existence of the statutory aggravating circumstance and recommended the death sentence. ROA 2169-2171. Defense counsel Bartosh made a motion for a new trial based upon the alleged failure of the state to satisfy its burden of proof on the statutory aggravating circumstance. ROA p. 2172, ll. 5-12. Judge Few denied the motion. ROA p. 2172, l. 13.

LAW/ANALYSIS

This Court must find the evidence conclusively supports the existence of the statutory aggravating factor of "great risk of death" as found as a matter of state law in the direct appeal. The two children in the back seat were unquestionably within a zone of danger as a result of the four gunshots into the vehicle, particularly when the shooting began through a tinted window at various dangerous angles and by the testimony showed the bullet that exited the neck of the decedent would have struck and killed the child in the middle of the seat, had she not moved to one side.[43] Nothing presented in the state PCR hearing undermines that legal conclusion.

In *State v. Locklair*, supra. the court found that the "great risk of death" aggravator was properly supported by the evidence. Lindsey attempts to distinguish *Locklair* by asserting that it was limited to·a situation where a murderer continued to try to fire his weapon after he had already shot and killed his girlfriend, albeit with the safety on. In *Locklair*, the Court held:

> **Locklair argues that this was a simple case of a victim being shot at close range, not the type of incident contemplated by the statute.** However, the trial testimony does not support this assertion. According to Nichols' testimony, Locklair put more than one person at great risk of danger because he attempted to fire the gun several times, but

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[43] This Court finds the summary of the 911 tape, including the children's screams as supportive of the knowledge of the existence of the children in the backseat. See Exhibit 21 (tape). See also, ROA. 1743-45 (opening by Deputy Solicitor Willingham).

> the safety was on. After he shot Bridges, Locklair pointed the gun at Williams' home where there were children inside. Nichols was forced to tackle Locklair to stop him and Robert Williams, the victim's stepfather, had to struggle with Locklair to retrieve the gun. According to the trial testimony, the gun was dropped several times during the struggle with shots being fired in different directions. Also, at the very least, Nichols and Robert Williams, were placed in great danger as they attempted to stop Locklair from firing and retrieve the gun. **Finally, Locklair put many people at great risk of danger. Nichols, Robert William, Betty Williams, Dewey Morgan, and several children playing in the street were all within firing range when the shooting occurred.**

Id., 341 S.C. at 366, 534 S.E.2d at,427.[44]

Lindsey contended that *Locklair* is dissimilar from his case. While not completely similar, as Solicitor Gowdy noted, the instant case is even more egregious and stronger on the actual risk of death shown toward the children in the back seat who were within the zone of danger and death from the actually fired bullets, whose lives were spared only due to fortuity of a leaning motion (or lack of movement) at the instant of the firing in a close area.

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[44] In *Locklair*, the Court also noted that other jurisdictions have held that a gun fired in the direction of two persons satisfies the similar statutory aggravator citing *State* (N. C.) *v. Moose*, 310 N.C. 482, 313 S.E.2d 507 (1984); *Jones v. Georgia*, 243 Ga. 820, 256 S.E.2d 907 (1979); *Moran v. Nevada*, 103 Nev. 138, 734 P.2d 712 (1987). *Id*. at n. 4.

Conversely, on appeal, he attempted to suggest that the "great risk of death'" only exists in a large, crowded setting such as a shopping mall, citing *State v. Ivey*, 325 S.C. 137, 481 S.E.2d 12 (1997). In *Ivey*, the defendant fired at a police officer in a shopping mall. The jury found *inter alia* the existence of the "great risk of death" aggravator. However, the Court's ruling did not address the sufficiency of the evidence supporting the aggravator or construe the statute. Nothing in *Ivey* suggests that the aggravator only applies in the setting suggested by the Applicant.

Wholly absent from the Applicant's argument on this issue is the undisputed fact that two children were seated in the back seat with the victim in close proximity. While the Applicant notes that the victim was shot with four shots, he makes no mention, conspicuously, of the fact of the bullet that grazed the victim and the bullet that entered the center of the seat where Kiera was sitting. Remarkably, the entire basis of the trial judge's ruling cannot vanish by ignorance. The reason for this failing is obvious - to admit its existence was to admit the existence of the aggravating factor. As the defense counsel cogently acknowledged in its closing, if the witness was correct in the statement of her location, she should be dead and that was the risk of her proximity to Mrs. Lindsey, as was portrayed by their screams in the 911 recording. Lindsey was not ignorant of their presence or their great risk of death while they were in the zone of danger. *Jones v. State*, 128 P.3d 521 (Okla. 2006) (evidence showed defendant killed victim while victim was sitting in vehicle with his sister and two young daughters and defendant knew of their presence when he shot victim); *State v. Burns*, 979 S.W.2d 276 (Tenn. 1998) (evidence supported aggravator of "great risk of death to two or more people" where defendant shot inside car in which

three people were sitting, killing one and wounding another then fired shots at another man who left car, which directly imperiled four men playing basketball nearby).

Since there is evidence to support the existence of the statutory aggravating factor, the trial court correctly denied the motion for a directed verdict as to the aggravating factor. Here, the evidence shows that Lindsey "by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person." It occurred in the Inman Police Department, which is a public place. The weapon was a .38 revolver which is the type of weapon recognized in *Locklair* as being hazardous to the lives of more than one person. Lindsey was aware that there was more than one person in the vehicle at the time of his shooting. And finally, the manner of his shooting, through tinted windows and then at various angles put "more than one person at great risk of death" with the children in the back seat, or was it fortuitous positioning that saved their lives from the bullets that struck and killed Nell Lindsey.

Trial Counsel Was Not Deficient

Ineffective assistance of counsel claims are not fungible but instead are highly fact-dependent. *Hemmerle v. Schriro*, 495 F.3d 1069, 1075 (9th Cir. 2007). Conclusory allegations not supported by specifics do not warrant relief. *Jones v. Gomez*, 66 F.3d 199, 204 (9th Cir. 1995); *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994); *U.S. v. Popoola*, 881 F.2d 811, 813 (9th Cir. 1989). A conclusory allegation of ineffectiveness raises no constitutional issue because a petitioner must show how counsel was deficient and how there was

prejudice. *Miller v. Johnson,* 200 F.3d 234, 282 (5th Cir. 2000). Vague and speculative assertions are deficient. *U.S. v. Taylor*, 802 F.2d 1108, 1119 (9th Cir. 1986), citing *U.S. v. Rogers*, 769 F.2d 1418, 1425 (9th Cir. 1985). And in order to prevail on an ineffectiveness claim, a petitioner must make a sufficient factual showing to substantiate the claims. *U.S. v. Schaflander*, 743 F.2d 714 (9th Cir. 1984).

Counsel Bartosh acted reasonably in his argument, legal and factual, against the applicability of the statutory aggravating factor. Applicant has not asserted, in any manner, what counsel could or should have done differently concerning the particular aggravating factor. *Strickland v. Washington*, 466 U.S. 668 (1984) is the foundation for the presumed effectiveness of counsel's conduct, reciting that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at p. 689, 104 S.Ct. p. 2065. In determining whether counsel's actions are reasonable, "the court should recognize that counsel is strongly presumed to have rendered adequate assistance." Against that presumption - without any contrary argument - his claim must fail.

STRICKLAND PREJUDICE NOT PROVED

Further, the South Carolina Supreme Court addressed the applicability of the particular statutory factor in the direct appeal. Current counsel has not pointed out any errors or flaws in that state law determination of the "great risk" factor. He only asserts that counsel was unsuccessful in arguing its inapplicability. The Applicant has failed to assert any act

or omission on counsel's part in this allegation, only a statement of lack of success in the motion. The South Carolina Supreme Court concluded that there was evidence to support the statutory aggravating factor. Counsel argued against its existence before the judge. He argued before the jury to give Lindsey the benefit of the doubt on whether the element of knowingly - based upon Lindsey's depression, cognitive deficient and brain damage, the element of great risk of death to more than one person - when the evidence suggested that if the little girl was where the state now asserts that she would be dead and therefore a reasonable doubt whether she was at risk, and whether the weapon satisfied the terms of a device that would normally be hazardous to the lives of more than one person. ROA 2134-36. He requested that the doubt be resolved in the favor of Lindsey. ROA 2133-2137.

Since the Applicant has not specific what counsel should have done, contrasted to what he did, *Strickland* prejudice clearly has not been shown. As the South Carolina Supreme Court stated in rejecting a proportionality review claim: "Applicant contends the imposition of death in his case is disproportionate to other death penalty cases because his case involves only a single victim and resulted from a domestic dispute. See S.C.Code Ann. § 16-3-25 (2003) (proportionality review). We find no support for Appellant's attempt to reduce this crime to simply "a domestic dispute." Appellant's culpability is not lessened by the fact that the victim was his wife. There is no evidence of any immediate dispute leading up to the murder, much less any provocation on Victim's part. In fact, appellant intentionally violated a court order forbidding contact with Victim." *State v. Lindsey*, supra. His Sixth Amendment allegation is without merit because

it lacked specificity and neither prong under *Strickland* has been proved by the Applicant.[45]

CONCLUSION

WHEREFORE, this Court finds that each and every allegation in the Application, as amended, is denied. Based on the foregoing, the application for post-conviction relief is denied in its entirety. Applicant has failed to show error, or if he established error, he failed to show prejudice such as would support the granting of either a new guilt proceeding, or a new sentencing proceeding. This Court advises Applicant that if he chooses to appeal, he must serve a notice of intent to appeal within thirty (30) days from the receipt of written notice of the entry of judgment, and file same. His attention is directed to Rules 203 and 227 of the South Carolina Appellate Court Rules for the appropriate procedures.

AND IT IS SO ORDERED THIS [handwritten 28th] day of [handwritten September], 2015.

[handwritten signature]
HONORABLE PAUL M. BURCH
Presiding Circuit Judge

Pageland, S.C.

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[45] This Court further concludes that the Applicant has abandoned claims of ineffective assistance of counsel set out in the Amended Application concerning issues related to evidence of visitation issues and evidence of seeking legal assistance for family court.

APPENDIX C

STATE OF SOUTH CAROLINA)		
)		IN THE COURT OF
COUNTY OF SPARTANBURG)		COMMON PLEAS
MARION ALEXANDER LINDSEY, #6015	)	C/A No. 07-CP-42-2848
Applicant,	)	ORDER DENYING MOTION TO RECUSE AND DENYING MOTION TO ALTER OR AMEND PURSUANT TO RULE 59
vs.	)	
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	

This Court denies the motion to recuse. This Court also denies the motion to alter and amend the October 5, 2015 Amended Order of this Court denying the application for post-conviction relief. This matter comes before this pursuant to the Order of the South Carolina Supreme Court on September 30, 2014 for an entry of an Order pursuant to Pruitt v. State, 310 S,E,2d 254, 423 S.E.2d 127(1992) and Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004). On October 5, 2015, the Court filed an Amended Order Denying Post-Conviction Relief.

On February 29, 2016, the Applicant filed a "Motion for Stay, For a New PCR Hearing Before a Different Judge, and Alternately, to Alter or Amend the

Judgment Pursuant to Rule 59(E). On September 22, 2016 a motion hearing was held in Spartanburg. The Applicant was present and represented by appellate counsel David Alexander and Lara Caudy and original PCR counsel Richard Vieth. The Respondent was represented by Assistant Deputy Attorney General Donald Zelenka and Assistant Attorney General Alphonso Simon. At the conclusion of the hearing the Court requested memorandum of law. Each side supplied an initial post-memorandum.

On February 20, 2019, an additional status and motion hearing was held on the status of this matter in the Darlington County Courthouse. The Applicant was present and represented by David Alexander of the South Carolina Office of Appellate Defense. The Respondent was represented by Deputy Attorney General Donald Zelenka and Assistant Attorney General Michael Ross. Argument was heard in the matter again with the Court being provide a copy of the transcript of the earlier Rule 59 hearing. The Court requested post-hearing memorandum from both parties. The Court further requested a proposed order from the Respondent denying the Rule 59 Motion, over objection of the Applicant.

The Applicant provided a Post-hearing Supplemental Memorandum on March 22, 2019. Respondent submitted an Amended Post-Hearing Memorandum on March 26, 2019. This Order follows:

MOTION FOR RECUSAL OF JUDGE IS DENIED

The Court denies the Motion to Recuse. The October 5, 2015 order consists of the findings of fact and conclusions of law it agrees with after review of the materials presented during the proceedings. It is the

intent of this Court to comply with the mandate of the South Carolina Supreme Court.

At the February 20, 2019 hearing, Applicant's counsel asserted that the Court should recuse itself because he contends that he did not follow the mandate of the Supreme Court to submit and order in compliance with Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992) and Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335(2004). He provided the Court with the earlier hearing transcript to supplement his arguments. He further provided a memorandum on March 22, 2019 urging the Court to recuse itself. The Court indicated at the February 20, 2019 hearing that it did not intend to recuse itself. The motion to recuse is denied because there is no requirement for the Court to do so under these circumstances.

The essence of Applicant's argument is that the October 2015 Amended Order was not in compliance with the remand order of the Supreme Court because it only made superficial changes and contained no new legal or factual conclusions and no different case citations. The Applicant urges that the recent PCR order on remand deprived Lindsey of due process of law and claimed that he was entitled to have a second judge for the mere purpose of determining whether an assertion by the Court that he read the order before signing it was a credibility determination. Lindsey's counsel indicated that the tribunal's integrity was in question by its actions. The Applicant contended that the signing of a similar order from the original order violated both the letter and spirit of the 2014 remand and that it required the Court to create a different order from scratch." Applicant further argued that the drafting of a new order over the passage of time was impossible and that there should be a hearing de novo.

This Court concludes that recusal is not appropriate and that the new order on remand did not violate that mandates of the remand from the South Carolina Supreme Court. In the September 30, 2014 Order, the Supreme Court issued a mandate to this Court "[I]n light of the Court's concern with the frequency and severity of the drafting errors in the Order of Dismissal, and this Court's admonishments to PCR judges in Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992), and Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004)." It was as follows:

> "we vacate the Order of Dismissal and remand the matter to the circuit court for the issuance of an amended order that complies with Pruitt [v, State, 310 S.C. 254, 423 S.E.2d 127 (1992),] and Hall [v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004),, and with S.C. Code Ann. § 17-27-80 (2003), to include specific findings of fact and conclusions of law on each issue presented, based on accurate references to the record and the applicable law. Petitioner may serve and file a new notice of appeal following the issuance of the amended order, or upon receipt of written notice of entry of an order ruling on any motion to alter or amend the judgment.

Marion Lindsey v. State, Appellate Case 2012-206087, Order (S.Ct.S.C September 30, 2014). This Court takes notice of the proceedings set out in the Respondent's March 26, 2019 memorandum at pages 4-10.

There is no basis for recusal. The Court prepared and reviewed the entirety of the amended order that it filed in this matter. In Applicant's pleadings and at the hearings, the Applicant concedes that numerous

changes were made by the Court in the Amended Order from the earlier Proposed Order, but suggests the changes, even the substantive changes, were not significant enough to comply with the Supreme Court's mandate. He complains that the mandate was not to merely correct the frequency and severity of the original drafting errors in the State's initial proposed order, but implicitly that the PCR Hearing Judge could not agree and adopt the findings and conclusions made in the original order, but somehow was required to make different findings and conclusions in the matters before him; albeit on the same issues. In other words it had to be a complete re-write bearing no similarity (or consistency) to the initial order. Under Applicant's theory, if the Court agreed with those findings and conclusions, he had violated the Court's mandate, apparently even if the original conclusions were consistent with his own findings.

The mere fact that the Court after remand requested a copy of proposed orders that had been submitted by both sides in 2011 does not evidence a "violation" of the Supreme Court's remand order. If fact, the Court had previously requested a copy of **Applicant's** proposed order granting relief in January 2015. Neither of these acts was in violation of the order of remand. To the contrary, the Court was gathering material to comply with the order of remand.

Similarly, the act of entering an amended order with numerous changes, albeit maintaining consistency with his original order's conclusions does not suggest either non-compliance with the Court mandate or violate the precepts of Pruitt v. State, 310 S.C. 254. 423 S.E.2d 127 (1992), and Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004). In Hall, the Court did not forbid the action Applicant suggests was in violation of it:

> **Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases,** we also acknowledge that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency. **In the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it.**

Hall v. Catoe, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004).

The Applicant's suggestion that this requires the this Court's removal and for a new evidentiary hearing to be held *de novo* is simply misreading those actions of the Court and the effect of the Supreme Courts remand, the decision in Hall and Pruitt and the subsequent order denying the initial petition for an extraordinary writ.

The fact the Court requested the 2011 proposed orders from each side in 2015 was not a basis for the Court to disqualify itself nor were other actions which occurred during the original PCR proceedings. What is initially extraordinary, is that - again in this Motion before the Court, the Applicant makes assertions challenging his impartiality at the PCR hearing. *Petition for Extraordinary Relief*, p. 5, citing App.p. 2714[1]; *Renewed Petition for Extraordinary Relief*, p. 8.

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[1] Lindsey's appellate PCR counsel suggested a brief reference during one witness's testimony in overruling the State's objection to the relevance of testimony, suggested some bias against the Applicant in favor of the State. This was a parsed and isolated comment in the context of the lengthy proceeding where fifteen (15) witnesses testified, 32 exhibits were submitted by the Applicant and 14 exhibits submitted by the Respondent. Subsequent

The direction by the Supreme Court to this Court was clear and unambiguous - "the issuance of an amended order that complies with Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992),] and Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004), and with S.C. Code Ann. § 17-27-80 (2003), to include specific findings of fact and conclusions of law on each issue presented, based on accurate references to the record and the applicable law." The actions of the Court in requesting prior pleadings made in the Court of Common Pleas during the original proceedings previously by each side and preparing his own order with a series

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to the hearing, the Court allowed counsel to wait for a transcript of the PCR hearing before post-hearing memorandum was received. App. 2933-2934. At conclusion of the hearing, the Court suggested briefing in 30 days after receipt of the transcript which was provided to Applicant's counsel by August 24, 2010 and the Applicant's post-hearing brief was filed October 26, 2010. Subsequent to request and the filing of requested proposed order from the Respondents on May 2, 2011, The Court allowed Applicant until July 27, 2011 to submit his proposed order. To characterize the Court's handling of the case as "impatience" is incorrect.

Applicant's complaint toward the Court about his alleged impatience with the case [suggesting an attitude against the Applicant] is more extraordinary and incorrect when considered in light of what occurred prior to the case. The Court appointed counsel Vieth and Collins on July 31, 2008 (after relieving prior appointments). An initial scheduling order was set on July 23, 2009 allowing for an amendment to be filed by August 1, 2009 (over one year after initial appointment) and setting January 1, 2010 for the hearing. Lindsey v. State, Scheduling Order, June 23, 2009. The Amended Application was filed August 6, 2009. App. 2210. On June 17, 2010, Respondents made a Return to the Amended Application and Second Rule 12(e) Motion for specificity. App. 2217. The hearing was convened July 19, 2010, nearly two years after counsel was appointed to represent the Applicant

of changes different from the initial proposed order and original order should not be deemed in direct violation of the Supreme Court's remand order nor suggest it was "flagrantly disobeyed" or in violation of the mandate of Hall v. Catoe.

The Applicant relies upon Anderson v. City of Bessemer, N.C., 470 U.S. 564 (1985) and Jefferson v. Upton, 560 U.S. 284 (2010) to support his conclusion that he should not have prepared an order similar to the prior order before the remand. First, Jefferson concerns a far different situation than Lindsey's case. In Jefferson, the Court applied the pre-AEDPA version of § 2254, holding that the state court had denied the death-penalty petitioner a full, fair, and adequate hearing, because: (1) the state court had adopted factual findings drafted exclusively by the state's attorneys, pursuant to an *ex parte* request from the state court judge; (2) the state court did not notify the petitioner of the request made to opposing counsel; and (3) the findings proposed by the state recounted evidence from a non-existent witness. See 560 U.S. at 292. Lindsey's case is both legally and factually distinguishable from Jefferson.

In rejecting a similar claim in Jones v. GDCP Warden, the Eleventh Circuit held:

> First, *Jefferson* never could have held, nor did it presume to hold, that this kind of adopted order is not entitled to AEDPA deference. *Jefferson* addressed a claim arising under the pre-AEDPA version of § 2254; the *Jefferson* Court was therefore operating under a different statute than the one controlling this case. Moreover, even absent that legal distinction, the facts of this case are critically different from *Jefferson*. There, the state court adopted

> a proposed order that it had obtained *ex parte* from the State, without notice to Jefferson. Here, notably, the state court requested that both Jones and the State prepare proposed orders. The court conducted an evidentiary hearing in August and September 2004, at which Jones was represented ably by his habeas counsel, who presented several witnesses and 125 exhibits spanning about 5,000 pages. The state court then took a year and a half to consider the party's submissions and only issued its order denying habeas relief in March 2006. In stark contrast to *Jefferson*, the circumstances here demonstrate that Jones received a full and fair hearing on all of his habeas claims.

Jones, 815 F.3d 689, 715 (11th Cir. 2016). Simply put, Jones concluded that the legal analysis in Jefferson does not apply to the post-AEDPA version of § 2254. *See Jones*, 815 F.3d at 715 (declining to apply ***Jefferson*** because "the facts of this case are critically different from *Jefferson*").

Here, notably, the Court requested to be provided the prior proposed orders submitted by the parties prior to remand with notice to both parties. The Court then took a year after remand to consider the party's prior submissions and issued its order denying PCR relief in October 2015. In stark contrast to Jefferson, the circumstances here demonstrate that Lindsey received a full and fair hearing on all of his habeas claims.[2]

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[2] Respondents have pointed out to this Court that the adoption of the proposed order by a state court has been held to not deny due process of law in many similar situations. Subsequent to Jefferson, the Missouri Court upheld the practice in Prince v. State,

The Applicant apparently asserts that the decision in Hall v. Catoe by the Supreme Court precludes assigned judges in post-conviction cases from either soliciting proposed orders from either party or adopting the order in full or part after a review. Hall does not stand for that proposition. Rather, Hall states: **"we *strongly encourage PCR judges to draft their own findings of fact and conclusions of law* in death penalty cases,"** but the opinion did not preclude it. Rather, in Hall, the Court pointed to the fact that "the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it." Here, as in Hall, the prior proposed orders were provided to this Court after remand in February 2015 and the order was not entered until October 2015. This Court spent a significant time reviewing and revising the order with his law clerk before signing it.

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390 S.W.2d 225 (Mo. App. 2013). Similarly in Miller v. State, 99 So.3d 349 (Ala. Crim. App. 2011), the Alabama Court found no due process violation in the submission and adoption of the proposed order. Van Pelt v. State, 202 So.3d 707, 723 (Ala. Crim. App. 2015) ("The 'adversarial tone' of the adopted order and the typographical errors contained in it do not, in and of themselves, establish that the circuit court's order ... was not the product of the court's own independent judgment."), Groover v. State, 640 So.2d 1077 (Fla. I994)(same - trial judge signs order three days after submission by prosecutor); Remsen v. State, 495 N.E.2d 184 (Ind. 1986) (same); State v. Combs, 100 Ohio App.3d 90, 652 N.E.2d 205 (1994) ("In the absence of demonstrated prejudice, it is not erroneous for the trial court to adopt, in verbatim form, findings of fact and conclusions of law which are submitted by the state."); Tharpe v. Warden, 834 F.3d 1323, 1334 (11th Cir. 2016) (affirming the district court's rejection of petitioner's argument that the state habeas court "had almost verbatim, and thus improperly, relied on the State's proposed order in issuing its own order") (citations omitted);

Here, nothing in the remand order prohibited the Court from re-soliciting the previously submitted orders from either or both counsel for its review. To the contrary, the Court could already take judicial notice of its records. Although Applicant's counsel indicated its position to Respondent's counsel that the PCR court should not have been allowed to receive or review any previously submitted proposed order from the parties, this position did not prohibit the Court from requesting the original proposed orders of both parties for its own purpose. There was no prohibition in the remand order of the Supreme Court by any reasonable reading of it. The prior proposed orders by each side were provided to the Court and opposing counsel upon a specific request by the Court's law clerk. As stated in Pruitt v. State, each side bad been given an opportunity to oppose the positions within the submissions prior to and after the order was signed.

This Court states that at the time of the submission of the earlier orders in 2011, he reviewed them too hastily and did not pick up the typographical errors. However, and importantly, the Court stated "but the base order was exactly as I saw the case that was presented to me." September 22, 2016 Hearing Tr. p. 19, 1.10-11.

This Court further states that after the remand it spent a number of hours with his law clerk going over the order and instructed his law clerk not to make certain corrections on purpose to prove to everyone that could be concerned "that I was involved in redrafting that order and there were many changes made." September 22, 2016 Hearing Tr. p. 19, 1. 16-19. This Court then initialed the pages that errors had purposely been left in to prove his point and advised the Supreme Court. Hearing Tr. 19-20. See Order, p. 21,

28. 84. Simply put, this Court is not in "flagrant disregard" of the Supreme Court's remand order as Applicant suggests. The Court made similar comments at the February 2019 hearing.

The Applicant has failed to show the Court has any bias against the Applicant. To justify recusal, "the alleged bias must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." See Berry v. State, 267 Ga. 605, 607-608(3), 481 S.E.2d 203 (1997). Thus, simply because the Court had approved the [disputed previous] order in this case would not show bias or prejudice so as to prevent his reviewing his action fairly and impartially. Otherwise, no judge could never rule on a motion to reconsider a previous order. Here the only bias alleged was that the Court, based on what he learned in the first evidentiary hearing and submission of an earlier proposed order, had previously ruled adversely to appellants' interests. As this was legally insufficient, the Court has correctly denied the motion to recuse. To accept this proposition, the use of Rule 59 would be a nullity in PCR actions.

A judge's partiality is to be evaluated on an objective basis and recusal is required where there is an appearance of bias or prejudice. Liteky v. United States, 510 U.S. 540, 548, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Recusal is required where "an objective, disinterested observer fully informed of the underlying facts [would] entertain significant doubt that justice would be done absent recusal." Diamondstone v. Macaluso, 148 F.3d 113, 120-21 (2d Cir.1998). Where, however, the motion to recuse is based upon the argument that the judge is ill equipped to review his own rulings in the case in which the motion is made, there is generally no basis to grant the motion to recuse.

United States v. Arena, 180 F.3d 380, 398 (2d Cir.1999); see Liteky, 510 U.S. at 555, 114 S.Ct. 1147 ("judicial rulings alone almost never constitute a valid basis for a bias or partiality motion").

Here, the motion to recuse is based not upon an allegation of personal bias against Lindsey. Instead, it is argued that this Court's impartiality is to be questioned because the remand motion specifically required the court to review its prior conduct. As a motion that calls upon the court to review its own ruling, it does not constitute a sufficient basis for automatic recusal. See Arena, 180 F.3d at 398. In conclusion, this Court reviewed the Order of Dismissal on remand and the findings of facts and conclusions of law made within the Order, as well as the corrections are the Court's own. The Court denies the motion to recuse.

REMAINING ISSUES OF THE RULE 59 MOTION

This Court further finds that the remainder of the Rule 59 motion should be denied. The Applicant has failed to show that the Court misunderstood, failed to fully consider, or failed to rule on an argument or issue or an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review. Our rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion: (1) a party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider to rule on it; and (2) a party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review. Elam v. South Carolina Dept. of Transp., 361 S.C. 9,

602 S.E.2d 772 (2004). As set forth below, the Motion must be denied.

A.

In his earlier written motion on February 29, 2016, counsel for the Applicant counsel set forth specific objections on four general grounds for relief. The Court will address each in the order presented:

1. **Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to conduct an adequate mitigation investigation and failing to prepare and present an adequate mitigation case at trial. (Motion, p. 4-10.)**

In his motion, he set forth his factual claims in items (a) through (g). Denial of the Rule 59 is appropriate.

a.

In particular, concerning whether Mr. Bartosh waited too long to begin preparations for the trial and sentencing proceeding (a), the Coun addressed the claim at Order at pages 171-176. The brief conclusory statement in the motion does not address any specific reason, other than a request for reconsideration, Motion, p. 4 - 5. Upon review of the order the reconsideration request should be denied.

In this allegation, the Applicant has merely asserted a general claim that counsel must meet the checklist that he claims the A.B.A. has established as a requirement. While it appears that counsel did not retain a mitigation investigator until months before

the trial, he has not proven that no mitigation investigation was done. He has failed to show that the investigation was unreasonable. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691, 104 S.Ct. 2052 (emphasis added). He failed to prove either deficiency or prejudice based on his "time spent" argument.

b.

In this portion, Applicant contends that counsel failed to adequately prepare Dr. Melikian·and failed to request a continuance so that she would be ready for trial. Motion, p. 5. This issue was addressed in the Order, p. 64-86. The Court finds that further fact-finding or reconsideration is not necessary.

He specifically asserts that the Court should reconsider whether counsel should have sought a continuance so that Dr. Melikian could have been better prepared. The Court addressed this also in §IV of the Order at pages 84 - 86. As the Court found "[T]he Applicant has only shown that she wanted more time, but not that counsel was deficient in failing to make the request nor any likelihood that it would have been granted." Order, p. 85. The Court found that even with the period of time since the trial Dr. Melikian's opinion of the particular diagnosis did not change, only an opinion - "driven in part by a revelation that Lindsey was intentionally feigning mental illness in 2003 and 2004 - that it suggested the severity of his depression was more severe in 2002" - the Applicant has made no probative showing that there was a reasonable probability that the result of the proceeding would have been a life sentence - nor even that Judge Few would

have granted a continuance. To the contrary, the evidence was that he would have likely denied it - through her own testimony - and that she was directed by Mr. Bartosh to get the job done." These conclusions and findings do not require reconsideration in light of the record support.

c.

In this subsection, Applicant re-asserts that counsel "allowed" Lindsey to follow the advice of a jailhouse lawyer to feign mental illness. Motion, p. 5. This issue was addressed in Order at pages 34-57 as allegation I(A). The Court found that the Applicant had failed in his burden of showing counsel's deficiency in failing to thwart these actions. Under a Strickland analysis, the matter must be viewed from trial counsel's perspective at the time of the trial in 2004. The Court reasonably found that the fiction of "Jimmy" was imbedded into the meetings between counsel and Lindsey throughout the relationship from 2002 through the trial, as revealed through counsel Brannon and Lenora Topp's credible testimony. As revealed in the trial testimony and questioning of Dr. Melikian and the pretrial testimony of Dr. Narayan (ROA 133-135), there was evidence of malingering and evidence from testing done by Dr. Brawley and the state hospital that reflected he was not malingering - other than the vision of Jimmy. In fact, at that pretrial competency hearing, Dr. Narayan stated that morning: "we didn't find any evidence of his malingering symptoms today. There's no evidence of that. But we did find evidence of that on the three occasions that Mr. Lindsey came to our institution." ROA 137, 1. 13-16. Although Lindsey has now recanted, the blame does not rest at prior counsel's feet as current counsel now speculate. Neither does the fact that Dr. Melikian's speculation or hope that had she spent more

time with Lindsey, he would have eliminated his lie of Jimmy's existence, Order, p. 55-58. Reconsideration of the Court's well founded conclusion is without merit because Applicant failed in his burden of proof of any deficiency by his defense counsel in failing to make Applicant reveal to them that he had recently concocted his imaginary friend "Jimmy" to feign mental illness in the hopes of avoiding a death sentence at the suggestion of other jail inmates.

d.

In his motion section 1. (d), he again contends that counsel failed to spend sufficient time to learn of Lindsey's intent to feign mental illness. Motion. p. 5. This issue was addressed by facts and conclusions set forth in the Order, p. 55-57. As noted above, there is factual support for the legal conclusions made previously. Reconsideration is denied.

e.

In subsection (e), Applicant asserts that trial counsel failed to respond to the issue of whether Lindsey was malingering during the penalty phase, specifically related to forensic psychologist Brawley's evaluation and testimony. Motion, p. 5-6. This issue was addressed by the Court within the Order, pages 57-60. Applicant has not asserted how the conclusion reached previously requires reconsideration. His complaint that Dr. Brawley was not called as a witness on the issue of malingering cannot be deemed to be ineffective. Her results were presented to the jury on the testing that was done and relied upon by Dr. Melikian. Although admissible, it would have been cumulative to the decision to call Dr. Melikian. Dr. Brawley stated that she had been advised prior to the trial that she would not be testifying and prepared her written report for use by Dr. Melikian - consistent with her oral

consultation with her. This was not neglect by counsel, but reflects a conscious decision on counsel Bartosh's part on this issue. The evidence was admitted concerning both of Dr. Brawley's malingering tests as well as the conclusions that the state examiner's objective testing did not show malingering. Counsel cannot be deemed deficient under those circumstances. Similarly the failure to present the cumulative evidence from Dr. Brawley cannot be deemed prejudicial under the Sixth Amendment and Strickland v. Washington. The request is without merit to alter or amend.

f.

In subsection (f), Lindsey contends that counsel Bartosh failed to preserve evidence or call Rod Tullis at trial. Motion, p. 6. The Court addressed Mr. Tullis's testimony in the Order at pages 140-145. Applicant asserts that former counsel Tullis had collected suicide notes and that Applicant's trial counsel Bartosh allegedly lost a tape received from Tullis containing a telephone message from Lindsey hours before the shooting. He complains that this reflected his state of mind before the killing and would have been useful if disclosed to his mental health experts as reflecting Lindsey was distressed and distraught and emotionally down on the message. PCR Tr. 169-170. Tullis testified that he had provided the tape and some suicide notes to the Public Defender's office and advised the prosecution of it. PCR TR. 172-173, 187-189. Tullis stated he had not given the tape or copy to the prosecution. Hearing Tr.p. 189-190. Dr. Melikian testified that she was aware of suicide notes, but had not seen them. Similarly, she stated she was not aware of the telephone call message to Rod Tullis and claimed it would have been useful to understand his mental state close to the time of the offense. PCR Tr. 621-22. Evidence also was present that Lindsey had told Dr.

Brawley of suicide attempts which she shared with Dr. Melikian prior to the trial. PCR 87- 88. Importantly, Doug Brannon testified that he did not have a tape from Tullis when he handled the case. PCR Tr.p. 66.

As noted within the Order evidence of the Applicant's mental state was being evaluated prior to the trial. In making a conclusion concerning Dr. Melikian, the Court concluded:

> This Court finds that her 2010 PCR diagnosis of mental illness under Axis I, II, III, IV would be the same as her earlier conclusion, only that the degree of the severity of the depression was greater than she earlier thought. PCR Tr. 621. Similarly, although she was not aware of the telephone call to Rod Tullis, Dr. Melikian was not aware that there was no additional evidence from Lindsey himself that he ever made the call and no evidence that anyone - other than allegedly Tullis - had actually heard the alleged call, including her own discussion with Lindsey.

Order, p. 83. This implicitly suggests that no one had heard the telephone message other than Rod Tullis or that Lindsey had ever confirmed making such a call. Nevertheless, the diagnosis remained the same. The Court does not need to resolve the factual conflict between Mr. Tullis who claimed he received a phone message and cassette tape of the message and counsel Brannon who stated that they did not have such a tape during his representation. Since evidence that Lindsey was allegedly suicidal several weeks before the incident was presented to the jury even if such a

cassette tape existed at some point, it was not presented at the proceeding or to any evaluators either at the time of the trial or since.

The Court finds that the failure to call Tullis was not ineffective where 6th Amendment prejudice cannot be shown. Similar evidence was presented through Dr. Melikian and other lay witnesses about the Applicant's mental state surrounding the incident and the basis for it arising from the separation from his children. She further testified about his expressed intent to commit suicide that date. App.p. 2012-2013. Evidence was also presented that Applicant was in a suicidal state due to the events around the time of the incident. During the guilt phase, it was developed through Celeste Nesbitt about the relationship between the Applicant and the victim and her intent to divorce Lindsey. ROA 1540, 1557-61. Further, it was developed that Nell was not allowing for Lindsey to see the children and that she had blocked his telephone calls. ROA App.p. 1675-76. Counsel developed that there was a head injury to Lindsey at the incident and he had declared that he had shot himself in the head. ROA App.p. 1674. Respondent submits that the jury had a reasonable understanding from expert and lay witnesses about the Applicant's mental state at the time. Although there is a factual issue concerning the existence and receipt of an answering machine tape, evidence supports that Tullis indicated to counsel Bartosh that Lindsey had called his office at some point and threatened to commit suicide. In light of the other evidence presented, including the evidence of his self-inflicted head wound on that date, the absence of Tullis's testimony does not undermine confidence in the verdict, applying the Strickland standard.

The Applicant failed in his burden of proof of showing the tapes existence and the impact, if any of

its value. To suggest otherwise is pure speculation. Reconsideration must be denied.

g.

In his motion at (g), he makes a contention that the reconsideration is proper because the Court erred in concluding that the counsel adequately presented the history of mental illness and impairment in Lindsey's own family, by not adequately interviewing them to learn of their own illnesses and failing to present them with a basis for admission of the evidence in mitigation. Motion. p. 6-7. This issue was addressed fully in the Order at pages 86-87, 99-l68. Other than conclusory statements, Applicant has failed to state with specificity any matter missed or mistaken fact relied upon. There is record evidence to support the Court's conclusions 163-168. This portion of the motion must be denied.

h.

In this portion of the motion (h), Applicants reasserts a claim related to failing to prepare witnesses to testify. Motion, p. 7. In particular, he claims it relates to a failure to present witnesses to request mercy and present arguments related to such a request. Id. Initially, he asserts it related to paramedic Vincent Bell. The Court addressed his testimony at Order, p. 168-171. Apparently, he contends that he wanted the jury to hear comments he made to Bell at the scene about the crime because his wife was fooling around with somebody, the fact he shot himself, and to let him die. PCR Tr. 168-169. The Court reasonably concluded it was not deficient or prejudicial. Order, p. 170-171.

In the next portion of the motion related to witnesses, he points to Bill and Patsy Burton. Motion, p. 7. These witnesses were addressed in the Order at pages 25-26, 60-64, 99-102, 107, 136-140, 145, 147-

149, 151, 157, 161-162. As to Bill Burton, be testified before the jury and requested: "please have mercy on him." ROA 2076. Concerning Patsy Burton who was not called and would have testified similarly, the Court's earlier conclusions support a finding that deficient performance was not shown by the failure to call her as a witness. The Court concluded that "As in Sapp, there is cumulative evidence of family and friends requesting mercy. He has failed to establish Sixth Amendment prejudice. …" Order, p. 64. See also, Order. p. 164. This Court finds the request to alter in reconsideration must be denied.

Concerning his mother, Virginia Lindsey, her trial testimony and post-conviction testimony was addressed in the Order at pages 22-24, 62, n. 11, 63, 86, 103-105, 108-109, 110-126, 144-146, 158-159. Virginia Lindsey testified to the 2004 jury that: "Marion is my son. I love him very much. And I ask mercy for my son not to be sentenced to death. I know that somebody else's child's life was took. But I don't want my child sentenced to death" ROA 2060. Virginia Lindsey testified that she did talk to the defense team and "they did" prepare her to request the jury to have mercy on her son. PCR 368, 1. 14-18. However, she felt she was not prepared to make a mercy request at trial. She claimed that if she was prepared, she would have asked for mercy on her son because she had lost a son and "would ask for mercy that he not get the death penalty." She stated that he had to be punished, but not the death penalty because it hurts to lose someone. She said she not only lost a son, but that she lost a daughter, a son, and two grandsons. PCR Tr. 369, 11. 1-8. However, the record reflected that she did make that request. ROA 2060.

The Court reasonably denied this allegation in its Order, p. 62-63. See also, Order, p. 86. The Court reasonably also concluded that "a review of the trial testimony of Virginia Lindsey (guilt and penalty), cousin Chris Wilkens (guilt and penalty) and the penalty phase testimony of friend Bill Burton, Leon McDowell and Steve Pilgrim reveal that the essential family background was revealed to the jury. Importantly, concerning the depth of the investigation, the summaries of the interviews that Ms. Topp had with Marion Lindsey and Marion Lindsey's mother in 2004, buttressed by Ms. Topp's own PCR testimony about what she learned in 2004 are virtually in the same detail that the post-conviction evidence from the family members and Jan Vogelsang's testimony in the PCR hearings." Order, p. 157-158. The request for reconsideration is denied.

In his next specification, he makes the same assertions about Bessie Smith's trial and· PCR testimony. The Court earlier addressed Ms. Smith, the Applicant's aunt, in the Order at pages 27, 62-63, n.17, 86-87, 99-100, 104, 108, 109-110, 116-118, 120-127, 129-130, 132-134, 145, 149-150, 153, 159, 163-164. The Court found "that the investigation concerning the social history of the family was constitutionally adequate. In addition to this information, the 2004 defense team was aware that there had been mental health concerns for Bessie Smith who had tried to commit suicide, and Steve Pilgrim who at least had nerve and anxiety problems." And that 6th Amendment prejudice had not been proven. Order, p. 163-164. The Court had also held that "at the PCR hearing, the Applicant present a series of family members and friends who testified concerning the family history and their knowledge of Lindsey's life and worth.

Implicitly, the Applicant was claiming that such evidence would assist in presenting a background to a social historian and could have been presented in more detail or in a more persuasive manner. However, contrasted with the information that counsel had in 2004 and what was used at trial; it reflects a reasonable decision not to use it in the unpersuasive and inconsistent detail that was presented at the PCR hearing. Additionally, the failure to present it in the manner did not show a reasonable probability that the result of the proceeding would have been different under the Strickland test." Order, p. 109-110. The Court properly applied Strickland to the facts of the case. The motion for reconsideration and altering judgment must be denied.

In the next specification, he makes similar assertions about Steve Pilgrim and Timothy Sims. The Order addressed Pilgrim's trial and PCR testimony at pages 23, 33, 63, 63, n. 16, 86, 111, 116, 122, 126-131, 145-146, 150, 155, 157, 163-164. The Order addressed Timothy Sims at pages 33, 105, 113, 118-119, 131-136, 145, 149, 160. As with the other family members, the Court concluded "that the essential family background was revealed to the jury. Importantly, concerning the depth of the investigation, the summaries of the interviews that Ms. Topp had with Marion Lindsey and Marion Lindsey's mother in 2004, buttressed by Ms. Topp's own PCR testimony about what she learned in 2004 are virtually in the same detail that the post-conviction evidence from the family members and Jan VogeJsang's testimony in the PCR hearings." Order p. 117-118. See also Order, p. 163 (finding investigation concerning the family history was adequate where it revealed nerve and anxiety problems of Pilgrim). Reconsideration is not warranted where

the record supports that Strickland was properly applied to find neither deficient performance or prejudice.

Finally on this assertion, Applicant notes generally that the counsel failed to adequately argue or preserve the record concerning mercy. Motion, p. 7 (h). This issue was specifically addressed in the Order at pages 60-64. The Applicant has failed to show how reconsideration is appropriate or required. It must be denied.

i.

In allegation (i), he contends that the counsel failed to adequately prepare or present EMS workers related to Lindsey's state of mind after the shooting. Motion, p. 7-8. The Court specifically addressed this issue at Order, pages 168- 171. The Court found that neither deficient performance or prejudice was shown under Strickland. Order, p. 170-171. Applicant has not suggested in any manner why reconsideration or altering the judge is required. It must be denied.

j.

In specification (j), Applicant contends the Court erred in concluding the argument only concerned the amount of time counsel spent in investigating and preparing a mitigation defense, where it was related to the evidence the jury never heard or the manner the witnesses testified. Motion, p. 8. First, the Applicant ignores that the portion of the Order Applicant appears to be complaining about Order, p. 171.-178, was a judicial response to the briefing in the Post-Hearing Memorandum of Law by the Applicant's PCR counsel, at Applicant's October 26, 2011 Post-Trial Memorandum, pages 54-58, which was limited to an argument concerning "time-spent." Further, the Ap-

plicant neglects that his concerns in his present motion were actually addressed in the Order at pages 157-167 which also addressed investigative preparation and presentation of the witnesses and whether deficient performance and prejudice had been shown. Reconsideration is not required where the matters were addressed in other portions of the Order from a reasonable reading, rather than a parsed reading.

k.

In item (k), Applicant contends the Court ignored the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. Motion, p. 8-9. To the contrary, the Court specifically addressed the guidelines in the Order, p. 14-16, 176. The Applicant continues to assert that the guidelines are a mandatory checklist rather than a guide. Motion, p. 8-9. The Court concluded that the investigation was not deficient. Order, p. 176- 177. The United States Supreme Court has "explicitly approved" using the ABA Guidelines "on attorney performance in effect at the time of a defendant's trial as 'guides to determining what is reasonable' performance by counsel." Padilla v. Kentucky, 559 U.S. 356, 366, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). Accord, Stone v. Stat, 419 S.C. 370, 397, 798 S.E.2d 561, 576, cert. denied, 138 S.Ct. 392, 199 L. Ed. 2d 290 (2017). The Court has also clarified that "[ABA] standards and the like' are 'only guides' to what reasonableness means, not its definition." Bobby v. Van Hook, 558 U.S. 4,.8, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009), quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052, 80 L.Ed.2d 674. It is clear that this Court was aware of the guidelines as a guide cited by Applicant during the presentation. In assessing whether counsel's performance was deficient, courts look to such factors as what counsel did to prepare for

sentencing, what mitigation evidence he had accumulated, what additional "leads" he had, and what results he might reasonably have expected from those leads. The reasonableness of counsel's investigation involves "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Wiggins v. Smith, 539 U.S. 510, 527 (2003). "[C]ounsel should consider presenting…[the defendant's] medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." Id. at 524 (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases § 11.8.6, at 133 (1989)). The Supreme Court stated in Wiggins that the "investigation into mitigating evidence should comprise efforts to discover all reasonably available mitigating evidence." Id. However, it is also clear the Court determined its application of Strickland based upon the totality of the evidence. Reconsideration is not required. [3]

l.

In item (l), he makes a broad contention that the Court erred in concluding that Applicant had failed to show prejudice under Strickland, Motion, p. 9-10. He contends that the Court's determination was based upon a claim that the Court found that because counsel presented some evidence it was *ipso facto* not prejudicial. Motion, p. 9. However, Applicant fails to point to any portion of the Order where the Court made that simplistic assessment. To the contrary, clear that Court weighed the evidence, where any deficiency was

[3] This issue was briefed in the Applicant's Post-Hearing Supplemental Memorandum (October 21, 2016), p.6-8.

found or asserted, the evidence that was actually presented to the jury with the evidence that was shown that it could have been presented to the jury and whether or not if the evidence have been presented whether there was a reasonable probability the result would have been different. Applicant's generalized characterization of the Court's conclusion is not supported by a reading of the Order.

2. Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to hire a social work expert who could testify regarding Marion Lindsey's horrible upbringing, his awful family history, and the effect this had on his mental state at the time of the shooting. Had trial counsel called an expert like Jan Vogelsang, the result of the proceeding would have been different. [Motion, p. 10-12]

In this portion of the Motion, Applicant contends that counsel was ineffective in failing to hire a social worker who could have testified at trial about Lindsey's life and development. He asserts that the Court's emphasis about Lenora Topp was misplaced concerning her investigation because she did not testify at the sentencing. He further contends that the concern about Vogelsang's potential testimony in hindsight is a red herring because the State was already allowed to present evidence in aggravation in the penalty phase. Motion, p. 11. The Court addressed this issue in its Order at pages 99-168. In particular, the Court found that "the PCR testimony of Social Worker Vogelsang presented the particular dangers of presenting family background testimony" and revealed why the Applicant had failed to satisfy the prejudice prong

of Strickland. Order, p. 145. Simply put, there was a plethora of negative information revealed by Vogelsang's PCR testimony. This was emphasized in the portion of the Order set forth at pages 164-168 where the Court determined that the prejudice prong bad not been satisfied. New PCR counsel representing Lindsey may not have been sensitive to the probative power of this finding by the Court who heard the testimony of Ms. Vogelsang and how it undermined the value of her testimony in this particular case:

> Further, as pointed out in the cross-examination, the danger of using a social worker who relies frequently on anecdotal hearsay risks making a difficult case even worse. It would have presented an additional opportunity to focus upon certain errors in her presentation and negative factors related to Lindsey that would make a death sentence even more likely. In the questioning concerning her expertise in child custody matters, she admitted that a person with the characteristics of Lindsey should not have been allowed to have visitation without court supervision, if at all, even though he had to be reminded that there was evidence that Lindsey had feed beer to his baby son in a baby bottle. PCR Tr. 563. See ROA 1820 (Lindsey gave son a beer in a baby bottle). PCR Tr. 565, ll. 7-20. She was inconsistent on what family members - uncles or cousins - he was running drugs. PCR Tr. 578. She also reiterated Lindsey had a record of violence, not only toward Nell, but toward other females, including those he claimed to love. PCR Tr. 589. In confirming that his risk factors made it a high risk that he would end up committing the very act he committed, she

> also admitted that the risk factors she found are not treated in the prison system. PCR Tr. 593-94.

Order, p. 166-167. The Court then applied the appropriate standard that Applicant asked to be applied for prejudice. "To assess the probability [of a different outcome under Strickland], we consider the totality of the available mitigation evidence both that adduced at trial, and the evidence adduced in the habeas proceeding and reweigh it against the evidence in aggravation." Sears v. Upton, 561 U.S. 945, 130 S.Ct. 3259, 3266, 177 L.Ed.2d 1025 (2010). As the Court concluded: "Here, the sentencing profile was not altered by the additional testimony of Ms. Vogelsang. Although she presented a social history of known poverty and lack of a father-figure - **known to the sentencing jury** - she also confirmed that he had become a controlling and violent person. Against the trial backdrop including the evidence in aggravation, as well as the family mitigation the jury actually heard, the burden of proof has not been met by Applicant." Order, p. 167-168. This ignores the fact that probative power of that negative evidence by Ms. Vogelsang was not presented to a jury at the trial - not that it could have otherwise been presented as Applicant suggests.[4] Simply put, Strickland confidence in the verdict was not undermined by the failure to present Vogelsang at the sentencing hearing. Her testimony would have made a death verdict more likely. Reconsideration must be denied.

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[4] Applicant also complains about the lengthy presentation about Lenora Topp's investigation and questions it relevance. This issue was addressing investigation of mitigating factors as well as presentation of the factors at the sentencing proceeding.

3. Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by hiring an inexperienced forensic psychiatrist one month before trial and failing to prepare her to testify. Margaret Melikian was ill-prepared in all respects for this trial. Trial counsel's decision to hire her and failure to prepare her was constitutionally deficient and prejudiced Lindsey. [Motion, p. 12-15].

In his motion, he initially contends that counsel was deficient in retaining Dr. Melikian only a month before trial and failed to give her complete records and violate the ABA guidelines concerning her late retention and limited preparation. As noted above at pages 21-22, this issue was generally raised in Section IV of the order at pages 64-87. The Applicant complains specifically the Court's conclusion that Applicant failed to show deficient performance because of a lack of specificity concerning the information she received and the lack of preparation as not being supported by the record. Motion, p. 13. Applicant claims that Dr. Melikian did not see the suicide notes written three weeks before,[5] did not know about the purported call to Mr. Tullis,[6] did not see photographs or pictures and had incomplete incident reports about Lindsey, self-

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[5] See Order, p. 39, citing PCR Tr. 607-608 about suicide note.

[6] See Order, p. 43, citing PCR Tr. p. 621-22 where Dr. Melikian testified that she was not aware of a telephone call to Tullis and opined that it would have been useful to understand his mental state close to the crime.

inflicted injuries at the Detention Center.[7] Motion, p. 13.

In the order the Court addressed the limited as follows:

> . It is apparent that there was a difference in the quantity of material that Dr. Melikian reviewed in 2004 contrasted with this hearing. PCR 603. ***However, she was unable to state with any clarity what particular information she lacked in 2004 was critical to a revision in her assessment.*** In 2004, she had his medical records, the records from a psychiatric hospitalization when he was a teenager, the records from a head injury when he was an infant, his neurological records, and his school records. ROA 2003. She also had the reports from Hall Institute. PCR 601. She also had consulted with Dr. Brawley who did a series of neuro-psychological testing and received and reviewed her written report. PCR 602. **Although she complained in hindsight that she had not been provided all the information that the 2004 defense team acquired (PCR 603), Dr. Melikian was unable to cogently express what material made a difference to her conclusions, other than it would be corroborative evidence concerning information that she had learned and relied upon in 2004**. Much of her renewed analysis did not concern the way she gave in rendering a men-

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[7] See Order, p. 42, citing PCR Tr. 615 concerning her testimony that she learned of the injury in the Detention Center from Lindsey, but did not see photographs.

tal health opinion, but was more directed toward a characterization that was being made of the Applicant by the state's evidence of his character. PCR 607 (information about arrests that she was not aware in 2004).

The problem with her retrospective analysis of her own testimony is that it ignored the danger that her review of the additional material presented and allowed the Respondent in this proceeding to additionally develop the negative evidence - as the prosecution would have been developed at trial, and as it was similarly done with the proffered social work testimony of Jan Vogelsang. In cross-examination, based upon her review and reliance upon information both developed by the original trial team and then enhanced by the collateral team, Dr. Melikian had to address the bad as well as the beneficial because of her reliance of the extensive, but limited data.

This Court finds that her 2010 PCR diagnosis of mental illness under Axis I, II, III, IV would be the same as her earlier conclusion, only that the degree of the severity of the depression was greater than she earlier thought. PCR Tr. 621. Similarly, although she was not aware of the telephone call to Rod Tullis, Dr. Melikian was not aware that there was no additional evidence from Lindsey himself that he ever made the call and no evidence that anyone - other than allegedly Tullis - had actually heard the alleged call, including her own discussion with Lindsey.

Although she now wished Lindsey had seen a behavioral neurologist rather than a

clinical general neurologist, there is no evidence of what such an expert would have revealed that could have transformed her opinion. Although Dr. Melikian claimed she had limited school records, she admitted she received 18 pages of school records faxed to her on May 4, 2004. PCR Tr. 624. She pointed to the fact she now had better evidence of his weight loss but that it was consistent with her testimony. PCR Tr. 633.

Similarly, this Court concludes that had she been exposed and relied upon the material presented through Jan Vogelsang, the likelihood of a death verdict became even more enhanced. Although she met with investigator Lenora Topp, who prepared extensive summaries of the family history from her interviews with Lindsey, his mother and aunt, Dr. Melikian could not recall the specifics of the information she was provided about Lindsey's family and Topp's interview with Lindsey prior to her trial testimony. PCR Tr. 635. Her ultimate conclusion in 2004 and now is the same - Lindsey met the diagnostic criteria for "major depression, whether she looked at those earlier records and still feel he does after reviewing more records given to her since the trial. PCR Tr. 635-37.

Even if we assume that counsel was ineffective in getting certain unidentified material to Dr. Melikian, the alleged deficiency has failed to show prejudice or even a different presentation. See Wong v. Belmontes, _ U.S. _, 130 S.Ct. 383, 386, 175 L.Ed.2d 328 (2009) (per curiam) (as-

> suming, for purposes of analysis, that counsel's performance was deficient when prejudice inquiry was dispositive). This allegation must be denied.

Order, p. 82-83 (emphasis added).

As with some of the earlier assertions in the Motion, this Order was in response to the earlier Applicant's October 26, 2011 Post-Trial Memorandum, page 49, wherein Applicant limited his argument in the following conclusory fashion

> Dr. Melikian needed information and documents related to Marion Lindsey's history in order to properly evaluate him and present her testimony during the sentencing phase of the trial. The defense team failed to perform a proper investigation to identify and locate the information needed by Dr. Melikian.
>
> Further, the failed to provide Dr. Melikian with the limited information they did have available to them. The defense team's failure to investigate Mr. Lindsey's background and to provide the information obtained to Dr. Melikian constituted ineffective assistance of counsel. There is a reasonable probability that the outcome of the sentencing phase of the trial would have been different if the defense team had not committed this error.

Applicant's October 26, 2011 *Post-Trial Memorandum*, page 49, As noted, the Applicant therein did not identify with any specificity any particular item of information or document. Further, during her trial testimony, Dr. Melikian identified the materials that she had reviewed which allowed her to give an opinion to a reasonable degree of medical certainty. ROA 2003,

See Order, p. 76-77. Within the Order, the Court summarized Dr. Melikian's PCR and trial testimony. Order, p. 66-82. The Court fully considered the evidence and the Order was in context to the manner the allegation was raised in the post-PCR hearing briefing. Reconsideration is denied.

In this portion, the Applicant re-asserts that the defense team failed to prepare Dr. Melikian concerning "Jimmy" and accusations of malingering and allegedly failed to provide Dr. Melikian with prison record's that "Jimmy had taken over his body and was responsible for the shooting,"[8] among other things concerning his interaction with counsel about "Jimmy."[9] Motion, p. 13-14. The Court specifically addressed the "Jimmy" and malingering issue in the Order at pages 34-60. This same assertion was addressed above at pages 13-14. The proper assessment was fully addressed in the Order in the analysis of Dr. Melikian and the Applicant's malingering in the creation of "Jimmy." Order, p. 55-57. Since these matters were addressed and considered by the Court in the Order, reconsideration and amendment of the original judgment was not required.

Further, Applicant seeks reconsideration of the Court's "double-edge sword" assessment. Motion, p. 14. This is a reference to the Order at page 65-66. The Court's order addressed the fact that Dr. Melikian's restructured testimony at the PCR hearing additionally presented evidence that was more aggravating

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[8] This was noted in the Order at page 41-42 in summarizing Dr. Melikian's testimony at PCR Tr.p. 615, 11. 6-16.

[9] This was addressed in the Order, p. 41 and particular p. 41, n.7 summarizing Dr. Melikian's testimony at 614-615 and Doug Brannon's testimony at PCR Tr.p. 343-36, 613.

about the Applicant's character. Although at the sentencing, the State was able to impeach and mitigate the effect of her testimony, the restructured PCR testimony presented significant opportunity to again challenge her findings and conclusions as previously addressed within the Order. The Applicant's current speculation that delay would have allowed her to better withstand cross-examination is not the test where her ultimate diagnosis remained the same. As stated earlier, at the time, "Jimmy" existed from counsel's and Dr. Melikian's perspective at the time of the trial and was part of that diagnosis that the defense had. The suggestion to recast the facts as Applicant now wants to do is not what counsel was dealing with in the sentencing proceeding. The Court's assessment properly applied the mandates of Strickland in denying relief where prejudice was not proven by the Applicant by their retrospective assertion. Reconsideration and amendment of the Order and judgment is not necessary.

4 Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to hire a prison adaptability expert who could dispute the State's aggravation evidence. Trial counsel presented nothing to counter the State's evidence that Lindsey posed a future danger.

In the final portion of the Motion, page 15-17, the Applicant contends that counsel was ineffective in failing to present a prison adaptability expert. The Applicant contends that the Court erred in concluding that there was "no showing" that Lindsey would have been adaptable to prison, claiming the Court disre-

garded James Aiken's testimony and speculated regarding the existence of a trial strategy in failing to put up such evidence. Motion. p. 16, ¶ 1. The Court addressed the issue in the Order at pages 87 through 99. Applicant claims that Aiken's opinion - standing alone - that Lindsey was adaptable to prison - was sufficient to demonstrate prejudice. He claims that because his case which involved the shooting of his wife in a public place "met only the bare minimum of qualification under the statutory aggravator", and therefore the evidence could have made a difference. Motion, p. 17.

The Court's order addressed each of the assertions. First, the Order addressed the lack of proof that Lindsey would have been adaptable specifically at Order, p. 87-88, 93-99. The court properly denied this 6th Amendment claim. Deficient performance has not been shown. The Court finds that evidence concerning prison adaptability by lay or expert witnesses as a response to claims of future dangerousness and the Applicant's character under Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed2d 1 (1986) is admissible in mitigation in death penalty cases and should be considered by reasonable counsel.[10] Although defense counsel did not retain an expert in this area, it is clear that the defense team ***considered*** the issue.

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[10] *See generally* Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (evidence of good behavior in prison admissible in mitigation as relevant to future adaptability); State v. Shafer, 352 S.C. 191,573 S.E.2d 796 (2002) (evidence of violent behavior in prison relevant to future dangerousness); State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996) (defendant's future dangerousness and his adaptability to prison life are legitimate interests in the penalty phase of a capital case).

The evidence concerning the defense team consideration of the prison adaptability issue is shown by the fact that counsel Karen Quimby had included in her notes and summaries that future adaptability to prison life was a statutory mitigating factor. App.p. 2583, PCR 249. (Respondent Exhibit 18). In fact, at some point, the reference to prison adaptability evidence was crossed out, suggesting consideration and rejection. See, App.p. 3071. Also included in the defense team material were the records of SCDC concerning the earlier incarceration and records from the Spartanburg Detention Center concerning his disciplinary history. App.p. 2566 - 67; PCR 282-283. In addition, counsel Quimby noted that evidence of prison adaptability could be introduced from a clinical psychologist. App.p. 2546; PCR 262. Counsel Brannon stated that he was aware that evidence of prison adaptability was a proper matter for mitigation in a capital case from the seminars that he had attended. App.p. 2335-37; PCR 51, 53. Counsel was aware of the jail disciplinaries that Lindsey had been involved in from the records and his own visits in the jail where he was locked down. App.p. 2336; PCR 52.

The fact that Bartosh is not available due to his intervening death to explain his decision on why he not specifically retains a correctional expert for trial does not shift the burden of proof. As recognized in Harrington, although courts may not indulge "post hoc rationalization" for counsel's decisionmaking that contradicts the available evidence of counsel's actions, Wiggins, 539 U. S., at 526-527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003)

(per curiam). See Burt v. Titlow, 571 U.S. at 12, 22-23 (2013) ("We have said that counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,' ... and that the burden to 'show that counsel's performance was deficient' rests squarely on the defendant ... . The Sixth Circuit turned that presumption of effectiveness on its head. It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance'"). See also Romine v. Head, 253 F.3d 1349, 1357 (11th Cir. 2001) (trial counsel's "I don't remember" responses will not satisfy a petitioner's burden of proof and overcome the strong presumption of reasonable assistance); Fretwell v. Norris, 133 F.3d 621, 623-24 (8th Cir. 1998) (reversing the district court's grant of the writ based in part on counsel's inability to recall because this is contrary to the presumption of reasonable assistance).

What is undisputed is that the defense team was aware of the potential for the admission of evidence of prison adaptability, acquired records of his current and prior incarceration. These records included evidence of his actions in jail, which included gassing, segregation and anger management courses. Further, the evidence is undisputed that as the defense team created witness lists- with the understanding prison adaptability was a potential mitigating evidence basis. They did not include any witness on the list - jail or prison guards - to testify about this area. Additionally, Brannon opined that this decision would have been left up to Mr. Bartosh.

The failure to investigate or retain a prison adaptability expert in this case is supported by reasonable professional judgment. See Strickland, 466 U.S. at

690-91, 104 S.Ct. 2052 (stating that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation"). Importantly, as in Harrington, the proffered evidence revealed the two-edge sword that any seasoned trial lawyer like Bartosh would have recognized as a high risk of harmless information and emphasis by a prosecutor lay in wait for this type of evidence to be presented due to inconsistent history on being adaptable.

The Court concluded a trial counsel's not presenting this expert future dangerousness testimony "falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Order. p. 95. There is support for the Court's conclusion in the record.

First, the Court concluded that Aiken's opinion that Lindsey would not be an unreasonable risk to harm guards or fellow inmates in prison was based in large part on the fact that prison authorities would classify him as a maximum security inmate based on his murder conviction. Order, p. 96. His opinion did not focus on any mitigating lack of propensity to violence in his character - because as shown he had propensity for violence and anger- but instead on the fact that the structured, maximum security prison setting likely would control Lindsey and not permit him to act on any desires to escape or commit acts of violence to other inmates or guards, even though he had done so previously and while awaiting trial (as well as with two other death row inmates since his sentence).[11]

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[11] Similar testimony may be inadmissible in some other states. including Virginia. See, Morva v. Commonwealth, 278 Va. 329, 351, 683 S.E.2d 553, 565 - 566 (Va., 2009) ("Whether offered by

PCR Tr.p. 216- 224. The evidence also served to emphasize the point, not favorable to Lindsey, that the prison system would classify him as a high security inmate because it would consider him to present a potential for violence. PCR Tr. 216-217. Aiken clarified that his opinion was only that Lindsey could be managed not to create an unreasonable risk of harm. PCR Tr. 224. Aiken noted that Lindsey "has issues in controlling his anger" just like many other inmates. PCR Tr.p. 225.

The Court reasonably concluded that a reasonable defense attorney could simply conclude that the adaptability experts' core opinion - that he could be managed and not be an unreasonable risk of harm to inmates, guards and the public - in spite of his having recently violently attacked a jailer and a history of jail incidents - was weak and would not persuade Lindsey's jurors. Additionally, a reasonable lawyer would have known the Aiken adaptability evidence focused more on the prison's ability to control Lindsey and all inmates, rather than Lindsey own character. It was shown before this Court that the prosecution would have focused upon Lindsey's violent incidents while in custody - with the underlying knowledge of his violence against others - male and female - in and out of custody. A decision to prevent or limit that comparison against the weakened evidence of prison administration would not be unreasonable. A reasonable attorney could decide that under the particular facts of

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an expert, or anyone else, evidence of prison life and the security measures used in a prison environment are not relevant to future dangerousness unless it connects the specific characteristics of a particular defendant to his future adaptability in the prison environment").

this case the future dangerousness testimony concerning prison adaptability would not be helpful.[12]

Further, the Court correctly determined that Sixth Amendment prejudice was not shown by the failure to present similar testimony by James Aiken in 2004. Order, p. 97. As shown in the cross-examination before the PCR Court, the benefit in mitigation of such testimony was weakened and could have made a death sentence more likely rather than less likely. The risks of this generalized adaptability testimony was evident where:

- Aiken noted that you can never say never, but the vast majority of prisoners in SCDC can be incarcerated. App.p. 2496; PCR 212.
- The best predictor of future behavior is past behavior.

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[12] We note that this is not a case in which the State introduced expert testimony about the defendant's future dangerousness and the defendant was denied an opportunity to directly rebut that testimony with his own expert. *See Clisby v. Jones*, 960 F.2d 925, 929 n. 7 (11th Cir.1992). Nor is this a case like *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), in which the State's two experts testified there was a "high probability" that Williams posed a serious continuing security threat and defendant's attorneys failed to elicit: (1) evidence of Williams's "nightmarish childhood," including criminal neglect by his parents, severe abuse by his father, and his time in an abusive foster home; (2) that correctional officers were willing to testify Williams would not pose a danger while incarcerated; (3) that Williams received prison commendations for breaking up a drug ring and returning an officer's wallet; and (4) an admission *from the State's testifying future dangerousness experts* that the defendant would not pose a threat in the future if kept in a structured environment. *Id.* at 368-71, 373 & n. 4, 395-98, 120 S.Ct. at 1500-02 & n. 4, 1514-15.

- the prior correctional records of the crime of assault and battery with intent to kill revealed circumstances where there was an altercation on a highway where shots were fired and the victim was wounded. It was then emphasized - like the present case - that he shot into a vehicle. App.p. 2498; PCR Tr. 214.
- Lindsey had also been arrested for criminal domestic violence.
- Aiken never met with Lindsey about bis other arrests and crimes of violence he committed and only based his opinion on paperwork. App.p. 2499; PCR Tr. 215, 11. 5-11.
- Aiken also admitted "the potential for violence is certainly there" and had failed to mention in direct - that he saw in the prison records that he was recommended for "anger management." App.p. 2499; PCR Tr. 215, 11. 21-22.
- His prior prison record reflected violence with fights and indications he acted violently towards others which had not been emphasized at the 2004 trial where the adaptability testimony had not been proffered. App.p. 2500; PCR Tr. 216.
    - The March 24, 1996 inmate fight at Dutchman Correctional Institution.
    - A Spartanburg Detention Center violent assault in the jail when he got into another altercation with an inmate and an officer. App.p. 2501; PCR Tr. 217.

- Lindsey received 20 days segregation and Lindsey got gassed by the officers to control his behavior.

- Aiken clarified that his opinion was only that he could be managed not to create an *unreasonable* risk of harm, not that he would not be harmful to others. App.p. 2508; PCR Tr. 224.

The Court's similar and earlier findings were not unreasonable nor do they require amendment. Even if counsel Bartosh's perforn1ance was allegedly deficient for not presenting such an expert, no prejudice resulted. There is no reasonable probability that the outcome would have been different had such an expert testified because any possible benefit from such expert testimony would pale in comparison to Lindsey's actual behavior both prior to and after his arrest. The mixed impact it could have had in this particular supports the conclusion that counsel was not ineffective. See Parker v. Sec'y for the Dep't of Corr., 331 F.3d 764, 788-89 (11th Cir.2003) ("Given the strength of the aggravating factors and the relative weakness of the mitigating evidence Parker argues should have been presented, there is no reasonable probability that, absent the deficient performance, the outcome of the proceedings would have been different. The aggravating factors in this case are substantial."). "Moreover, we have rejected prejudice arguments where mitigation evidence was a 'two-edged sword' or would have opened the door to damaging evidence." Wood v. Allen, 542 F.3d 1281, 1313 (11th Cir.2008), cert. granted, --- U.S. ---, l29 S.Ct. 2389, 173 L.Ed.2d 129l (2009) (citing Gaskin v. Sec'y, Dep't of Corr., 494 F.3d 997, 1004 (11th Cir.2007); Grayson v. Thompson, 257 F.3d 1194, 1227 (11th Cir.2001)); see Wong v. Belmontes, 130 S.Ct. at 387-90 (finding no prejudice where proposed

mitigation evidence was either cumulative of evidence already presented at penalty phase, or would have opened door to damaging testimony). The failure to present similar evidence from Aiken has been found by other courts to not be ineffective assistance of counsel. See Brant v. State, 197 So. 3d 1051, 1070 (Fla. 2016), reh'g denied, No. SC14-2278, 2016 WL 4446453 (Fla. Aug. 23, 2016) (Specific testimony that Brant was generally a nonviolent person and a good prisoner who would likely be able to adapt to prison life without causing any further harm to anyone would have added little to the evidence that was presented).

In his October 21, 2016 Post-Hearing Supplemental Memorandum, Applicant asserts for the first time that prejudice from the failure to call a similar witness to Aiken was present because in the penalty phase of the trial, the State called James Sligh concerning that Lindsey would have had access to the yard, possibly gone to school and other matters. This evidence was summarized by the Court in the Order at pages 32-33, citing ROA p. 1908-1917. He complains that the failure to call Aiken enhanced the potential prejudice from the evidence that he claims was a violation of the post-trial decisions in State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005) and State v. Burkhart, 271 S.C. 482, 640 S.E.2d 450 (2007). [13] [See,

[13] The Applicant's case was tried May 2004. The Applicant now notes that counsel did not object to the testimony in 2004 based upon an argument similar to Burkhart which was decided in 2007. An issue concerning the failure to object to the evidence was not presented at any time prior to this Rule 59 motion. To the extent he is attempting to raise a new ground of ineffective assistance of counsel which was never litigated at the time of the hearing or within any application, it is not properly before this Court. A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior

e.g., Kornahrens v. Evatt, 66 F.3d 1350, 1360 (4th Cir.1995) ("[T]he case law is clear than an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law."); see also Johnson v. Armontrout, 923 F.2d 107, 108 (8th Cir.1991) (stating that "counsel's failure to anticipate a change in existing law is not ineffective assistance of counsel")].

However, in his motion, counsel pointed out that Supreme Court had granted cert and was considering a similar issue in Marion Bowman v. State. The South Carolina Supreme Court has recently clarified that Burkhart, which found a statutory violation on direct appeal, does not support an automatic finding of prejudice once an arbitrary factor has been introduced. Bowman v. South Carolina, 809 S.E.2d 232, 245-46 (S.C. 2018) (Bowman II). Rather, collateral review of an ineffective assistance of counsel claim is subject to Strickland's prejudice prong. Id. at 246 (upholding the PCR court's finding of no prejudice under Strickland where the evidence of guilt and aggravating factors were overwhelming).

In Bowman II, the court described Bowman's claim as one "that trial counsel was deficient in failing to object to the State's cross-examination of prison-adaptability expert James Aiken[,]" where "Aiken's

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to the judgment but was not. Dixon v. Dixon, 362 S.C. 388, 608 S.E.2d 849 (2005) (issue raised for first time in Rule 59, SCRCP, motion is not preserved for review). See Brailsford v. Brailsford, 380 S.C. 443, 448, 669 S.E.2d 342, 345 (Ct.App.2008) (holding issue is not preserved for appeal where it was never presented to the trial court prior to the filing of the motion to alter or amend); Eaddy v. Oliver, 345 S.C. 39, 44, 545 S.E.2d 830, 833 (Ct.App.2001) (a party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial).

testimony transitioned from a discussion of prison adaptability into one about general prison conditions....” 809 S.E.2d at 234, 238. Bowman’s trial counsel had testified that he elicited testimony from Aiken that Bowman “was not going to a ‘kiddy camp’ and that he would not be ‘mollycoddled’ [as] a strategic choice, and counsel acknowledged that he expected the solicitor to respond with questions about some of the less harsh conditions of confinement.” Id. at 244. The solicitor did, in fact, elicit testimony from Aiken that prisoners could play basketball and exercise on their own and that they had access to libraries, movies, television, and other recreational activities. Id. at 238- 39. The South Carolina Supreme Court discussed at length “the unique distinction South Carolina jurisprudence has drawn between evidence of prison adaptability, which [the court has] held is relevant and admissible, and evidence of general prison conditions, which [the court has] held is not.” Id. at 241. Bowman’s trial, like Petitioner’s trial, occurred after Plath and Kelly v. South Carolina, 534 U.S. 246 (2002) but before the cases declaring evidence of prison conditions to be arbitrary under state law. Id. at 244.

The South Carolina Supreme Coun stated, in Bowman II, that Bowman’s counsel’s performance was not deficient and denied post-conviction relief, stating:

> By myopically considering our state’s nuanced and unique distinction between prison adaptability and general prison condition evidence, it might appear a finding of deficient representation is warranted. While we acknowledge that a close question is presented, in light of the state of the law at the time of Petitioner’s trial and the narrowly tailored scope of the prison conditions evidence

> elicited, we find there is evidence in the record to support the PCR court's finding. There is evidence that counsel articulated a valid reason for employing this strategy, and because the State's response was proportional and confined to the topics to which counsel had opened the door, we affirm the finding that counsel was not deficient in failing to object to the State's line of questioning.
>
> FN. We reiterate that the prison adaptability versus general prison condition distinction is a creation of state law and is not mandated by the Eighth Amendment or other constitutional provision.

Bowman II, 809 S.E.2d at 244 (citations omitted). At the time of Petitioner's trial, South Carolina law had not yet called conditions of confinement evidence an arbitrary factor. The PCR Court was right to note that "Strickland does not require counsel to anticipate changes in...the law, and thus counsel is not required to have foreseen the State Supreme Court would subsequently call conditions evidence arbitrary."

The Applicant also contends that Aiken's testimony was not seriously challenged at the PCR hearing. This is a misreading of the record. The Court's conclusion's recognized the weakness of the potential Aiken evidence in contrast to what the jury heard and the problems with the opinion. As noted, Aiken unsuccessfully attempted to mitigate the fact of Lindsey being in a prison anger management program and his prior history of violence in the prison, including being gassed to control his behavior which was developed in his testimony. PCR Tr.p. 216 -218. Aiken also based his ultimate opinion on the fact that Lindsey had not previously been in a "security threat group" or "gang"

based upon his information before his death sentence. Based upon the fact that he was not in a gang, he thought SCDC could manage him. However, Applicant ignored that Aiken's ability to render an appropriate opinion was impeached when he acknowledged that since his sentence, he had been in two fights with inmates on death row when SCDC was unable to manage Lindsey and prevent violence, contrary to Aiken's mistaken prediction. PCR Tr.p. 223-224. The Court was reasonable in questioning that Lindsey's prior prison violence history equated with an opinion that he would be adaptable to prison in the future when he had not been in the past.

Available counsel confirmed their awareness of the admissibility of prison adaptability evidence. Counsel also confirmed their knowledge of Lindsey's prison disciplinary record and violent history. Although the precise reasoning why counsel Bartosh did not pursue adaptability evidence is not known due to his death, his failure to automatically seek out an expert who would state that the prison system can manage all inmate who are not members of a prison gang, when the client had been involved in prior prison and jail violence, including situations involving being gassed is not surprising and certainly not deficient.

The Court reasonably assessed the thorough presentation of the horrific evidence in aggravation with the omission of proffered prison adaptability evidence and determined that it would not have undermined confidence in the death sentence verdict. He has failed to show on this unique record which included a plethora of evidence about his criminal character and incident of violence and misbehavior in a detention setting that there is a reasonable probability

that the result of the proceeding would have been different under Strickland. Further reconsideration and an amended order under this Motion is not required.

CONCLUSION

WHEREFORE, this Court finds that the Motion to Recuse and Motion to Alter and Amend dated February 29, 2016 to the Order of the Court filed October 2, 2015 are denied.

AND SO ORDERED THIS [handwritten 8th] day of [handwritten July], 2019

[handwritten signature]
HONORABLE PAUL M. BURCH
Presiding Circuit Court Judge

Pageland, South Carolina