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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF YORK | ) | |
| James D. Robertson, #5067, | ) | C/A 2011-CP-46-00072 |
| | ) | |
| Applicant, | ) | |
| v. | ) | ORDER |
| | ) | (DENYING RELIEF) |
| State of South Carolina, | ) | |
| | ) | |
| Respondent. | ) | |
| _____ | ) | |

This matter can before the Court upon an application for post-conviction relief filed by Applicant, James D. Robertson. Robertson is under a sentence of death and is currently confined in the Secure Facility at Broad River Correction. This is his second post-conviction relief (PCR) action. The action was originally dismissed as successive and untimely. However, on appeal, the Supreme Court of South Carolina remanded to this Court for a hearing to determine if prior PCR counsel met the statutory qualification for appointment, and, if not, did this "deficiency" result in prejudice to Robertson. *Robertson v. State*, 418 S.C. 505, 522, 795 S.E.2d 29, 38 (2016).

This Court held the remand hearing on Monday, August 9, 2021 through Wednesday, August 11, 2021. The Court heard testimony from Robert Burke, John Bailey, Dr. Charles Ewing, James Boyd, Sixteenth Circuit Solicitor Kevin Brackett, former Solicitor Tommy Pope, and Robertson. Robertson was represented during the hearing by appointed counsel, William Henry Ehlies, III, Esq., and Joseph Bradley, Esq. The State was represented by Senior Assistant Attorney General Ed Salter, along with Senior Assistant Deputy Attorney General Melody Brown, and Assistant Attorney General Tommy Evans. Robertson was initially present but he waived his presence after complaints concerning the security measures enforced by the Department of

Corrections.[1]

At the conclusion of the hearing, the Court directed the parties to submit concise post-hearing memoranda while the transcript was being produced. The parties submitted their memoranda and this Court has considered the testimony, exhibits, the transcript from the August 2021 proceedings, and all other submissions including the prior PCR Order and transcripts from the prior proceedings. The Court finds that Robertson has failed to show prejudice. As a result, the Court denies relief. The Court finds that he had full and fair PCR proceedings in the prior PCR action, and he is due no more.

***Scope of Proceedings on Remand***

As an initial matter, the parties disagreed on the scope of the remand. Respondent submitted a memorandum concerning the scope of the remand on August 5, 2021, filed August 10, 2021. In essence, Respondent argued that "a trial court has no authority to exceed the mandate of the appellate court on remand." *Prince v. Beaufort Memorial Hosp*., 392 S.C. 599, 605, 709 S.E.2d 122, 125 (2011) (quoting *S.C. Dep't of Soc. Servs. v. Basnight*, 346 S.C. 241, 250-51, 551 S.E.2d 274, 279 (Ct.App.2001)) (citing 5 Am.Jur.2d *Appellate Review* § 784, at 453 (1995)). Thus,

[1] At the outset of the hearing, Robertson's counsel asked that the restraints be removed from his hands so that "he [would] be more comfortable and [be] allowed to communicate with us with his hands …." Counsel asserted that shackling was improper under *Deck v. Missouri*, 544 U.S. 622 (2005) (the due process clause prohibits routine use of visible physical restraints during criminal jury trial, unless the trial court determines they are justified by state interest specific to particular trial without "a factual showing of a risk or danger to the people in this courtroom or flight risk."). ***PCR Tr. 5-11***. Both Respondent and SCDC opposed this request. The Court denied his motion and deferred to courtroom security, as it had in the April 2019 conflict hearing. ***PCR Tr. 5-11***. This Court notes that in the prior hearing, Robertson left his seat without permission and walked to the door leading to the hallway outside the courtroom where the holding area is maintained, expressing his desire to leave the courtroom. During the direct examination of Mr. Burke, Robertson expressed a desire to return to prison and not be present in light of the Court's refusal to remove the restraints in the present hearing. The Court addressed Robertson and ensured that he was making a knowing, intelligent, and voluntary waiver of his right to be present. ***PCR Tr. 69-73***. This Court finds the waiver was knowing, intelligent and voluntary.

the remand limited the scope of these proceedings. The Court agrees with Respondent.

While the Court accepted evidence at the August 2021 proceedings that Robertson offered as a basis for finding "deficient performance" over Respondent's objection, *see* ***PCR Tr. 18-24; 42-45; 103-04***, the Court has only considered such evidence in resolving the ultimate question of prejudice. Our Supreme Court remanded solely to allow Robertson a restricted opportunity for further litigation. The Court found summary dismissal was proper on all grounds except one: the Court found that the allegation that PCR counsel was not statutorily qualified for appointment in a capital PCR pursuant to S.C. § 17-27-160 was a cognizable claim in a successive PCR Application. *Robertson*, 418 S.C. at 522, 795 S.E.2d at 38. The Court specifically rejected all other possible allegations of deficient performance. *Id.* The Court not only *affirmed* the summary dismissal of all claims apart from the statutory qualification allegation; the Court *ruled* that a failure to meet the statutory qualifications is *per se* deficient*, i.e.,* by itself, no other proof at issue. *See* PER SE, *Black's Law Dictionary* (11th ed. 2019) ("Of, in, or by itself; standing alone, without reference to additional facts. This phrase denotes that something is being considered alone, not with other collected things."). Thus, the initial question before this Court was whether counsel was deficient under this narrow circumstance. By Order dated November 21, 2017, this Court granted summary judgment in Robertson's favor on that issue, finding prior PCR counsel did not meet the statutory qualifications.

Consequently, this left only the possible prejudice from the established deficiency to be determined. In short, at the time of the hearing, Robertson was only required to demonstrate that had prior PCR counsel pursued an allegation during the litigation of his first PCR action, there is a reasonable probability of a different result, *i.e.,* Robertson would have been entitled to post-conviction relief, whether a new trial or new sentencing proceeding. *Id.,* at 520-21 (embracing the

"*Strickland* test" and placing the burden on the applicant to show "non-compliance with section 17-27-160(B)" and prejudice).

**FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

Allegations of trial counsel error are evaluated under the familiar test found in *Strickland v. Washington.* 466 U.S. 668 (1984). To be entitled to relief on an ineffective assistance claim, Robertson had to show that (1) trial counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that but for counsel's error, the result of the proceeding would have been different. *Id.,* at 694. The Supreme Court of South Carolina instructed in the prior appeal that prejudice in this context should be guided by the *Strickland* prejudice test. *Robertson*, 418 S.C. at 521, 795 S.E.2d at 37. Therefore, the question is whether Robertson has shown a reasonable probability of different result. This Court concludes he has not.

**10(a).** ***Ineffective Assistance of Trial Counsel – Guilt Phase***

Robertson raised four issues of ineffective assistance of trial counsel for acts or inaction during the guilt phase that were not raised to Judge Few in the prior PCR action. As to each claim, he asserted that former "PCR counsel would have pursued and prevailed on this claim but for original PCR counsel's lack of statutorily required education and experience." The allegations are those in 11(a) of the Fifth Amended Application, and they are rejected as follows:

> 11(a)(i) *Counsel failed to object to the Solicitor's improper closing argument. The solicitor encouraged the jury to rely on their own emotions and passion, rather than the evidence presented, by telling the jury that they did not need to spend even five minutes deliberating because they knew in their hearts that the defendant was guilty. (Trial Tr. 1916). Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166(1998).*

Robertson first claims that trial counsel were ineffective for not objecting to then-Deputy Solicitor Brackett's "improper" guilt phase closing argument. Citing to *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998), he contends that Mr. Brackett encouraged jurors to rely on their own emotions and passion, rather than the evidence presented, by telling them that they did

not need to spend even five minutes deliberating because they knew in their hearts that the defendant was guilty." The Court finds that Robertson has not proven either deficient performance or prejudice under *Strickland* because the closing argument was not so prejudicial that it deprived him of due process.

The United States Supreme Court has held that "[the] central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (citing *United States v. Nobles*, 422 U.S. 225 (1975)). "To this end it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another." *United States v. Robinson*, 485 U.S. 25, 33 (1988). Therefore, a criminal defendant is not entitled to relief based upon the closing argument of a prosecutor, unless that argument so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). *See also Humphries v. State,* 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) ("Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument"); *State v. Brisbon*, 323 S.C. 324, 332, 474 S.E.2d 433, 438 (1996) ("The test of granting a new trial for alleged improper closing argument of counsel is whether the defendant was prejudiced to the extent that he was denied a fair trial").

The *Donnelly* standard is a very high standard for a defendant to meet. "'[I]t is not enough that the remarks were undesirable or even universally condemned.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). *See also Parker v. Matthews*, 567 U.S. 37, 47-48 (2012); *State v. Tubbs*, 333 S.C. 316, 321, 509 S.E.2d 815, 818 (1999). Further, "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting

through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly*, 416 U.S. at 647.

Mr. Brackett, who is now the Sixteenth Circuit Solicitor, testified credibly before this Court that he was not suggesting that jurors "shouldn't take their responsibility as jurors seriously, it was meant as a comment on the strength of our case, which, you know -- I mean, the case was overwhelming." ***PCR Tr. 408, lines 20-24***. Also, he had reviewed the State's overwhelming proof of guilt immediately before making the challenged remark. ***PCR Tr. 408-10***.[2] The Court finds that the record supports this assessment of his comments.

When placed in context, he argued that:

> LADIES AND GENTLEMEN, I SUBMIT TO YOU THERE CAN BE NO DOUBT THAT THE HORRIBLE CRIME THAT OCCURRED AT 2506 WESTMINSTER DRIVE ON NOVEMBER 25TH, 1997, THE BRUTAL BEATINGS THAT WERE ENDURED BY TERRY AND EARL ROBERTSON WERE INFLICTED BY ONE PERSON. THE EVIDENCE CAN LEAVE NO ROOM FOR SPECULATION AS TO WHO THAT PERSON IS. THE BLOOD WAS NOT JUST UP AND DOWN HIS CLOTHING, BUT UP AND DOWN THE EAST COAST IN A BAG WITH HIS BROTHER'S PRESCRIPTION BOTTLE, ON MEREDITH'S SWEATER, ON HIS PANTS, ON HIS HANDS.
>
> BUT JUST IN CASE, JUST IN CASE THERE IS ONE OF YOU SITTING IN THE BOX THAT SAYS I'M STILL NOT CONVINCED, MAYBE THERE'S ROOM FOR DOUBT, THERE IS ONE LITTLE PRESENT THAT THIS MAN PACKED AWAY IN HIS LITTLE BAG OF TRICKS BEFORE HE RAN UP THE COAST TO PHILADELPHIA, STATE'S EXHIBIT 53, … THE GRAY T-SHIRT THAT CLIPPINGS WERE TAKEN FROM. EVERYBODY HAS BEEN TO MYRTLE BEACH AND GATLINBURG AND SEEN THE T-SHIRT SHOPS THAT YOU CAN GO TO AND HAVE A PHOTOGRAPH PUT ON THERE. WHAT SHIRT DID MR. ROBERTSON CHOOSE TO WEAR WHEN HE

[2] Mr. Boyd testified before this Court that the State's evidence of Robertson's guilt was so strong that he and co-counsel, Mr. Hancock, felt guilt was "a foregone conclusion." So, the defense focused most of its efforts on the case in mitigation. ***PCR Tr. 369-71***. Robertson testified that counsel had explained this to him and that, although he disagrees with this strategy in retrospect, he had agreed with counsel's strategy at the time of trial. ***PCR Tr. 448-49***. *See Bell v. Evatt*, 72 F.3d. 421, 429 (4th Cir. 1995) (While "a defendant's consent to trial strategy in itself, [does not vitiate[] all claims of ineffective assistance of counsel … [his consent is] probative of the reasonableness of the chosen strategy and of trial counsel's performance").

> BUTCHERED HIS PARENTS? A T-SHIRT WITH HIS PICTURE ON IT. A BLOOD SOAKED T-SHIRT WITH HIM ON IT HAVING A GOOD TIME WITH A COUPLE OF HIS BUDDIES.
>
> LADIES AND GENTLEMEN, THEY PUT CHAIRS IN THE JURY ROOM SO THAT YOU CAN SIT DOWN AND DELIBERATE OVER THE EVIDENCE, SO THAT YOU CAN HAVE A PLACE TO SIT COMFORTABLY AND TALK ABOUT THE EVIDENCE THAT YOU'VE HEARD. I SUBMIT TO YOU THAT IN THIS CASE YOU DON'T NEED'TO USE THOSE CHAIRS. YOU GO IN THERE, TAKE A VOTE, YOU DON'T NEED TO SEE ANY OF THIS, YOU KNOW WHAT HAPPENED; YOU KNOW IN YOUR HEARTS THIS MAN IS GUILTY. DON'T YOU ... GIVE HIM THE SATISFACTION OF FIVE MTNUTES OF THINKING THAT MAYBE YOU'RE OUT THERE WONDERING WHETHER HE'S GUILTY. DON'T YOU GIVE HIM FIVE MINUTES. YOU GO BACK THERE; YOU TAKE YOUR VOTE; YOU COME BACK IN HERE AND YOU TELL THIS FILTHY MURDERER THAT' YOU KNOW HE KILLED HIS PARENTS. YOU TELL HIM HE'S GUILTY AND YOU DON'T GIVE HIM FIVE MINUTES SATISFACTION.
>
> LADIES AND GENTLEMEN, WE'VE CARRIED OUR BURDEN OF PROOF; WE'VE DONE OUR JOB. WE ASK THAT YOU DO YOUR'S. HURRY BACK TO THIS COURTROOM AND TELL THE WORLD THAT THIS MAN IS A MURDERER. THANK YOU.

***App. 1915, line 8 – 1916, line 23***.

The record shows nothing improper in the State's closing argument. At trial, Robertson's attorneys attacked Meredith Moon's credibility and the State's failure to prove Robertson's guilt beyond a reasonable doubt. ***App. 1920-40***. The prosecutor's comments were merely to the effect that – even though the State had presented numerous exhibits and lengthy testimony in the guilt phase demonstrating Robertson's guilt of the murders, this one exhibit (State's Ex. 53) conclusively proved that he brutally and murdered his parents beyond any *reasonable* doubt. As such, it should not take the jurors long to arrive at their verdict. A fair reading of the contemporaneous record shows the argument was fairly based upon facts in evidence and was proper. *See, e.g., Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) ("A solicitor has a right to state his version of the testimony and to comment on the weight to be given such

testimony") (citing *State v. Cooper*, 334 S.C. 540, 514 S.E.2d 584 (1999)). *See also United States v. Young*, 470 U.S. 1, 12 (1985) ("In order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo").

Robertson's reliance on *Simmons* is misplaced. In *Simmons*, "[t]he solicitor misstated the law in his closing argument by improperly injecting parole considerations into the jury's sentencing decision and equating a finding of guilty with a recommendation of mercy with a much lighter sentence or an acquittal." 331 S.C. at 338–39, 503 S.E.2d at 167. Our Supreme Court found that because the jury could either recommend mercy or not in the burglary conviction, even though the evidence against Simmons was "overwhelming," the comment "prevented the jury from fairly considering the guilty with a recommendation of mercy" thus was still prejudicial. Here, Mr. Brackett's closing did not misstate the law or the record, and there was no effort to appeal to jurors' emotions. Second, his argument merely commented on the strength of the prosecution's case. Third, the consideration of "mercy" in capital proceedings rests in the sentencing phase, not in the guilt phase. Fourth, the judge correctly charged that the jury was to make its determination on the evidence and "not … based on passion, prejudice, sympathy, sentiment, public feeling, public opinion, conjecture, speculation or any matters outside the record in this case." *See* ***App. 1958***.

Finally, any alleged impropriety could not have deprived Robertson of a fair determination of his guilt or innocence in light of the overwhelming evidence of his guilt of the charged offenses. This evidence included statements evincing express malice and motive (*i.e.*, such as his greed and his refusal to accept parental control over his misconduct), the extensive testimony of Meredith Moon, and copious forensic evidence, not the least of which was Robertson's t-shirt bearing his

own picture framed with his parents' blood. *Humphries,* 351 S.C. at 373, 570 S.E.2d at 166 (" The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process"). As a result, Robertson cannot prove any prejudice under *Strickland* arising from the failure of his original PCR attorneys to raise this claim.

*11(a)(ii) Counsel failed to challenge the State's theory of the case that the killings were motivated by a desire for financial gain.*

The Court rejects this claim because Robertson has failed to prove deficient performance or prejudice under *Strickland* on the part of trial counsel.

The evidence at trial including Robertson's own statements of what he wanted to do with his parents' money; his use of his father's card immediately after the murder; and the testimony showing that he and his brother stood to inherit his parents' substantial estate, which was valued at over $2,000,000.00, supports the State's theory that he had a financial motive for murdering his parents and that this was at least one reason for the murders. *See* ***App. 1527-28; 1533***.

When asked what challenge the defense team made this theory, Mr. Boyd testified that "I think the whole basis of the defense was that it was rage and anger over built up tension from what had happened to Mr. Robertson over the years." ***PCR Tr. 389***. His testimony before this Court was consistent with his testimony and that of Mr. Hancock at the original PCR hearing that their investigation led them to conclude that the prosecution had overwhelming evidence of guilt, that counsel did not find anything leading them to the conclude that either Meredith Moon or anyone else committed the murder, that they therefore primarily focused their efforts on the sentencing phase of the trial, and that they attempted to secure a sentence of life imprisonment without parole (LWOP) for Robertson. Both attorneys testified about their other steps to develop a mental health defense and to present evidence of physical and psychological abuse by the victims, while

attempting to not alienate jurors by doing so. *See* ***App. 3331-45; 3348-49; 3354-55; 3362-74; 3416-39; 43-47; 3497-3507; 3514-16; 3536-44; 3546-52***.[3]

Based on counsel's reasonable investigation, they made an extensive presentation of evidence of Robertson's mental illness (bipolar disorder, alcohol abuse, and poly-substance abuse), the interplay of his mental illness with his use and abuse of Ritalin and alcohol, and the dysfunctional elements within his family. Additionally, he presented evidence through a neurologist and neuro-psychologist that he has frontal lobe damage. The reasonableness of counsel's evidence presented in mitigation is discussed more fully in Ground 11(b)(ix).

The Court finds that it was reasonable for counsel to present this evidence in sentencing to disprove the State's theory of motive for the murders, even if a different attorney might have chosen a different strategy because *Strickland* emphasizes that "[t]here are countless ways to provide effective assistance in any given case," and "[e]ven the best criminal defense attorneys

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[3] The Court notes that counsel had the assistance and the opinions of the following experts:

- Dr. Ronald Pryor, a psychiatrist who had diagnosed Robertson at the William S. Hall Institute in 1995 (***App. 2420-46***);
- Dr. Jonathan Pincus, a neurologist (***App. 2458-2530***);
- Dr. James Evans, a neuropsychologist (***App. 2535-89***);
- Dr. Alexander Morton, a psycho-pharmacologist (***App. 2610-2736***);
- Toni Cascio, a social worker (***App. 2852-3031***);
- Julius "Skip" Myer, the treating therapist (***App. 2753-65***);
- John Blume, Esquire, who was the head of the Center for Capital Litigation at the time of trial; and
- Mr. Blume's wife, Drucy Glass, a mitigation specialist. (***App. 3426***).

would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. Further, the absence of prejudice on this allegation is demonstrated by Robertson's failure to present the Court with credible evidence of a different strategy to attack the State's theory of financial gain as a motive for the murders. Finally, to the extent Robertson intends to blend this allegation into his allegation of a "battered child syndrome" element to the crime, that claim is addressed in Ground 11(a)(iii).

> *11(a)(iii) Trial Counsel failed to investigate, develop and present guilt phase defenses involving battered child syndrome (see State v. Lopez, 306 S.C. 362, 412 S.E.2d 390 (S.C. 1991)). Counsel failed to consult with an expert in parricide who was familiar with the psychological theory of internal family systems. Specifically, that children who kill their parents after a prolonged period of abuse may result in a self-defense claim to murder and, alternatively, may be guilty only of voluntary manslaughter.*

In support of Ground 11(a)(iii), Robertson presented evidence from Dr. Charles P. Ewing, PhD, on evidence of abuse in Robertson's background, his mental health diagnoses, and the availability of a defense centered around abuse by parents. Dr Ewing testified that he had reviewed "thousands of pages of documents; family history documents, family health history, family mental health history, employment documents" for Earl Robertson, Sr., Terry Robertson, Earl "Chip" Robertson, Jr., and Robertson. Likewise, he had reviewed photographs and a summary of documents prepared by Robertson's current attorneys, and he had interviewed both Robertson and Robertson's younger brother, Chip. ***PCR Tr. 233-34***. After reviewing these matters and conducting the interviews, Dr. Ewing reached the following conclusions: (1) "Robertson has had a virtually [life-long] serious mental illness dating back to at least grade school, and that this is an illness best identified as Bipolar Disorder;" (2) Robertson in his late teens and into early adulthood "suffered from various forms of substance abuse and alcohol abuse; (3) Robertson was battered as a child and the abuse continued from early childhood until the murders; (4) he was raised "in a severely

dysfunctional family," and this contributed to and worsened his mental illness; and (5) that "at the time that he committed these homicides he was both mentally ill and under the influence of drugs." ***PCR Tr. 232, line 13 – 233, line 3***.

The Court finds that the absence of prejudice is readily apparent for several reasons. First, the background information was taken from a review of records that were not only available at trial, but were obtained and reviewed during trial counsel's investigation. Counsel thereafter presented much of the information contained in those records through the sentencing phase testimony of Julius "Skip" Myer (*see* ***App. 2750-2817***), and Toni Cascio, the defense's social worker. *See* ***App. 2852-3031***. Further, Dr. Ewing agreed with the mental health diagnosis of record, *i.e.*, bipolar disorder, and that Robertson's Ritalin abuse was a "major factor" that influenced his mental state at the time of the crimes. ***PCR Tr. 320***. In fact, when pressed on cross-examination that battered child syndrome could not account for a number of criminal acts before the murders or his actions while incarcerated on death row, Dr. Ewing replied, "I don't know what your issue is with regard to the diagnosis. [The] [d]iagnosis of Bipolar Disorder is everywhere in the records, it's all over the place," including the trial record. ***PCR Tr. 328, line 14 – 329, line 7***.

He also agreed with the results of sentencing phase testimony of Drs. Pincus and Evans that Robertson had brain damage and explained that "the literature with regard to serious child abuse seems to indicate that … being abused as a child can actively change the functioning of someone's brain." ***PCR Tr. 251***. Cross-examination revealed that he likewise agreed with many of the conclusions reached by Ms. Cascio[4] and Mr. Meyer, although he felt that Mr. Meyer was

[4] Ms. Cascio's "Records Reviewed Toni Cascio, Ph.D." (Respondent's Ex. 1) indicates on page 4 that, prior to testifying, she consulted Dr. Ewing's publication "*Fatal Families: The Dynamics of Intra-familial Homicide*," as well as a publication by another nationally recognized expert on parricide, Kathleen Heide, titled "*Why Kids Kill Parents: Child Abuse and Adolescent Homicide*." ***PCR Tr. 320-24***. *See also* ***PCR Tr. 314-15***.

"acting inappropriately by seeing [Robertson] under that circumstance because it was a dual relationship." ***PCR Tr. 298-302; 304-09; 320***.

Second, Dr. Ewing was terribly imprecise in his testimony regarding instances of abuse – at one point estimating a thousand or more times, but almost immediately reducing the number down to "hundreds." ***PCR Tr. 305, lines 2-6***. He also admitted that no abuse was ever reported to DSS, and no school or other records supported the claims of abuse. ***PCR Tr. 305, lines 7-19***.[5] Of note, the record reflects, as trial counsel noted in his PCR testimony, only a few instances.

Third, while Dr. Ewing seemed to think South Carolina recognized "battered child syndrome," he was simply wrong. Robertson's reliance on *State v. Lopez*, 306 S.C. 362, 412 S.E.2d 390 (1991) is misplaced for the reasons stated by Respondent at the evidentiary hearing. See ***PCR Tr. 228-31***. The trial judge in *Lopez* admitted testimony of the pathologist who performed the autopsy that based on the injuries he observed, the victim was a " 'battered child' and this was the cause of the child's death," as well as testimony by the neurosurgeon that the injuries found were consistent with shaken baby syndrome. *Id*. at 365, 412 S.E.2d at 391-92. In affirming the trial judge's ruling and holding that the evidence was admissible, the Court observed that behavior based syndromes are generally held to be insufficiently "reliable as scientific evidence to justify their use to prove a crime occurred." *Id*. at 367, 412 S.E.2d at 393 (citing

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[5] This makes questionable whether Dr. Ewing or a similar expert even could have testified at trial about the syndrome apart from deciding its relevance. *See State v. MacLennan*, 702 N.W.2d 219, 235 (Minn. 2005) ("MacLennan's offer of proof demonstrated a tense relationship between him and his father, but there was little demonstrable evidence of the type of relationship described by MacLennan's own expert that would give rise to battered child syndrome. Therefore, we conclude that MacLennan did not meet his burden of establishing the relevance of the expert testimony on battered child syndrome to his claim of self-defense.").

*People v. Pullins*, 145 Mich.App. 414, 378 N.W.2d 502 (1985)).[6]

The Court found, however that "[t]he finding of battered child syndrome and shaken baby syndrome is made based on a number of physical findings which are inconsistent with the history of the injuries given by the parents or caretakers. These syndromes have been developed as a result of extensive research and have become accepted medical diagnoses in other jurisdictions." *Id*. The evidence that Robertson seeks to introduce, however, is a "behavior based syndrome" and its introduction would be novel, if permitted at all. *See State v. McLennon*, 782 N.W.2d 219, 230-31 (Minn. 2005).

In sum, trial counsel could not be *Strickland* deficient in failing to present a novel theory of defense that had not been accepted by the South Carolina appellate courts at the time of Robertson's trial, and has, even today, very little acceptance. Requiring counsel to anticipate changes in the law would hold trial counsel ineffective based upon counsel's failure to utilize a

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[6] Dr. Ewing was quite clear that his theory was separate and apart from, and thus not to be confused with, the recognized "battered spouse syndrome" which may be admitted in support of claims of self-defense, necessity, or duress. *State v. Hill*, 287 S.C. 398, 400, 339 S.E.2d 121, 122 (1986); S.C. Code § 17-23-170(A). There is no similar recognition for parricide or battered child syndrome. Moreover, to the extent Robertson made reference to the *Menendez* case, the mere fact that he reaches to one California case from 1995 pushes to remote the viability of finding counsel ineffective for failing to consider parricide evidence as a way to establish self-defense. It is of no little note that, though the media reports of the *Menendez* case focused on the brother's allegations, the case law shows that the California courts denied (and the federal courts found no error in the denial of) a charge for imperfect self-defense, and limitation of the evidence received to prevent confusion and/or misleading of the jury. *See Menendez v. Terhune*, 422 F.3d 1012, 1030-34 (9th Cir. 2005). At any rate, even since that trial, the concept has had little acceptance as a defense. See Kristi Baldwin, *Battered Child Syndrome As A Sword and A Shield*, 29 Am. J. Crim. L. 59, 79–80 (2001) ("While courts have allowed the prosecuting attorney in Courtroom A to introduce battered child syndrome to prove a caretaker's intent to kill his child, they have largely prohibited the defense attorney in Courtroom B from introducing battered child syndrome to prove a child's justification for killing his abuser."); *see also* F. Lee Bailey and Kenneth J. Fishman*, 1 Criminal Trial Techniques § 36:3. Battered child syndrome*, (May 2021 Update)("One court has held that battered child syndrome is the functional and legal equivalent of battered woman syndrome and the same reasons which justify the admission of battered woman syndrome apply equally to the battered child syndrome.").

crystal ball, which is inconsistent with *Strickland*, which unerringly admonishes that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. *See also Burger v. Kemp*, 483 U.S. 776, 789 (1987) (quoting *Strickland*); *Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995) ("*Skipper* was on appeal to the Supreme Court at the time of Kornahrens's trial, and Runyon testified that he was aware of that fact. Nevertheless, the case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law"). Accordingly, counsel **cannot** be held ineffective for failing to raise issues based on anticipated changes, *even where there were indications at the time that the issues were questionable and under review by appellate courts*. *E.g.*, *id*. at 1357-60; *Jameson v. Coughlin*, 22 F.3d 427 (2nd Cir. 1994); *Lilly v. Gilmore*, 988 F.2d 783 (7th Cir. 1993); *Horne v. Trickey*, 895 F.2d 497, 500 (8th Cir. 1990).

Further, counsel did investigate for evidence of physical violence by the parents. Mr. Hancock testified in the first PCR proceeding that the defense's investigation did not uncover "any real physical abuse or tremendous physical abuse by Earl." Instead, there were "some isolated incidents over periods of time." Mr. Hancock characterized the family as "very confrontational" and he personally investigated the peril Earl placed Robertson in by holding him over a balcony in the house. They presented the evidence of abuse they found through their experts. ***App. 3430-31***. This is consistent with Mr. Boyd's recollections at the remand hearing. *See* ***PCR Tr. 368-71***.

Also, the record from the first PCR hearing shows Mr. Hancock explained that:

> WE WERE TRYING TO INDICATE THAT THE PARENTS WERE THE CAUSE [OF THE MURDERS] AND THAT THEIR PREVIOUS PROBLEMS. I THINK WE HAD EARL AND CHIP'S RECORDS. THERE WAS COUNSELING THERE. AND THAT THE FAMILY WAS DYSFUNCTIONAL

> AND BECAUSE OF THAT JIMMY HAD TURNED TO SOME ALCOHOL, DRUGS, RITALIN, AND THAT IT WAS BASICALLY THE PARENTS' FAULT FOR JIMMY HAVING KILLED THEM. I THINK THAT'S WHERE IT CAME OUT, IT FINALLY LANDED.
>
> WE WERE TRYING TO BALANCE BETWEEN HAVING TOTALLY TRASHED THE PARENTS AND SHOWING THAT THERE WAS SOME SYMPATHETIC PROBLEMS THAT COULD BE ASSOCIATED WITH THE FAMILY THAT THE JURY COULD FIND SOME SYMPATHY TOWARDS JIMMY.

***App. 3434, l. 11-22***.

However, the defense had to be careful not to alienate jurors by "trashing" the victims because "you can't go but so far in saying that a mama and daddy had made a son kill them." He also focused on the fact the trial was in York County, as opposed to a big city, and he testified that "we've still got some values that are there and things that people want to think about parents and what their role is." So, the defense presented evidence of the abuse that they uncovered in the manner that was done. ***App. 3434, l. 23 - 3335, l. 11***.

With the benefit of hindsight and its unerring superb visual acuity, all Robertson has done is suggest that trial counsel should have followed a different strategy. Instead of presenting evidence of how his substance abuse and bipolar disorder impacted his mental state at the time of the murders, he now suggests that counsel should have placed more emphasis on how the parents' psychological and physical abuse of Robertson may have impacted his mental state when combined with his bipolar disorder. Yet, as noted, *Strickland* emphasizes that "[t]here are countless ways to provide effective assistance in any given case," and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. The Court finds that trial counsel's chosen defense was reasonable under *Strickland*. Indeed, the Louisiana Supreme Court has stated that blaming the victim in a capital case is "an offensive argument to the jury" where there is "overwhelming evidence of the defendant's guilt." *See State*

*v. Hoffman*, 768 So.2d 542, 577 (La. 2000).

Finally, the Court finds that this allegation and Robertson's Ground 11(b)(x) are inconsistent with his attacks on counsel's decision to present Ms. Cascio in the sentencing phase of the trial, in light of Robertson's various admissions to her about the facts of the case. Dr. Ewing interviewed Robertson for a total of eight and a half hours. ***PCR Tr. 235***. Their conversations included statements by Robertson concerning his mental state and his actions at the time of the murders, and these statements were part of the basis for Dr. Ewing's conclusions. *See* ***PCR Tr. 293; 309-10***. Had Dr. Ewing testified before a jury, the prosecution could have, and quite obviously would have, elicited Robertson's various statements to him about the murders on cross-examination, as it had on cross-examination of Ms. Cascio. The State would have also been able to cross-examine Dr. Ewing on statements that Robertson has made while incarcerated. These statements include his March 23, 2009 statement to a correctional officer asking to be let out of his cell so that he could kill another inmate, and his March 8, 2001 statement that

> I don't think murder is addictive. Murder is an impulsive act. It's not [like] speeding or jaywalking. Speeding is flagrant. The speedometer is right there in front of you and you chose to ignore it. Jaywalking is also purposeful, you think before you get ready to cross that street. Now, when it comes to murder it just happens. When I did it my mind was set, no one could have talked me out of it[.]

***PCR Tr. 317***.

Therefore, the Court finds that Robertson has failed to show prejudice by PCR counsel for not raising a trial counsel error claim based on the same.

> *11(a)(iv) Trial Counsel failed to challenge the State's case concerning the lack of positive identification of the two bodies found at the scene.*

Robertson failed to directly present any specific evidence on this claim. To the contrary, he admitted in his video testimony that he had no evidence for this claim. *See* ***PCR Tr. 450-51***. Additionally, the Court notes that the State presented forensic pathologist Joel Sexton who testified

that he performed autopsies on Earl and Tammy Robertson. ***App 1784-1808***. As a result, Robertson has failed to demonstrate any prejudice under *Strickland* from the failure of his original PCR attorneys to raise this claim.

**10(b).** ***Ineffective Assistance of Trial Counsel – Penalty Phase***

> 11(b)(i) Trial Counsel incorrectly advised Applicant that any information he gave to testifying experts would be kept confidential and would NOT be admissible at trial. Applicant relied on this erroneous advice and told testifying experts extremely prejudicial, self-incriminating information that was later admitted into evidence at trial.

Robertson has failed to show the initial requirement of demonstrating prejudicial error because this allegation was not missed in the prior PCR. Judge Few's Order reflects that the allegation was presented in Issue 10 of the prior action in that Robertson alleged "Counsel did not adequately advise Robertson before he was evaluated by the prosecution's psychologists, Dr. Geoffrey McKee," (Order p. 7, **App. 3658**). Judge Few ruled on the merits of that allegation. Order pp. 58-69, ***App. 3709-20***. Further, to the extent Robertson asserted at the hearing that Dr. McKee was actually the court's witness and not a state's witness, his assertion lacks merit for the reasons set forth in Ground 11(b)(vi-vii).

> *11(b)(ii)Because Trial Counsel failed to attend the interviews between testifying experts and the client, Counsel did not discover that Dr. Toni Cascio, their novice testifying expert, had questioned the defendant about the circumstances of the crime and that the defendant had answered those questions. Counsel also failed to discover that she memorialized those details in her notes. Counsel failed to read the notes of Dr. Cascio before surrendering them to the prosecutor. Dr. Toni Cascio 's interview notes with the client included detailed and confidential, extremely damaging and prejudicial, self-incriminating statements. Trial Counsel did not make an informed strategic decision whether to surrender the notes to the State as a prerequisite to calling Dr. Cascio as a witness because Counsel did not know that the notes memorialized prejudicial, self-incriminating statements made by the defendant. As a result, the confidential and extremely damaging self-incriminating statements contained within the notes were entered into evidence for the jury's consideration through the testimony of Dr. Cascio on cross-examination. Ingle v State. 348 S.C. 467, 560 S.E.2d 401 (2002*).

The Court finds that these complaints were addressed in Judge Few's Order of Dismissal. Isssue 12 addressed in that Order was "Counsel was ineffective for presenting social worker Toni

Cascio as an expert witness because of (a) Cascio's lack of experience; (b) counsel's agreement to provide Ms. Cascio's notes to the State[]; (c) counsel's failure to discover Robertson's admissions about the crime in enough time to permit counsel to employ a different social worker; and (d) Counsel's presentation of Ms. Cascio as a witness." *See* Order p. 8, A***pp. 3559***. Judge Few specifically addressed these claims at length and rejected them on the merits. Order pp. 77-106, ***App. 3728-58***. Further, the Supreme Court of South Carolina rejected them on certiorari. Because Robertson has not presented this Court with any evidence that undermines the accuracy of Judge Few's findings,[7] the Court finds that he has not shown prejudice based upon this claim.

> *11(b)(iii) Trial Counsel abandoned the client. Counsel did not provide legal assistance during the client's critical interviews with testifying expert witnesses because they did not attend those interviews. (See Hancock November 23, 1998 letter). As a result, experts obtained damning confidential information about the details of the crime otherwise protected by the client's assertion of his Fifth Amendment right not to be a witness against himself. Trial Counsel's failure to be present resulted in testifying experts (Dr. Cascio being only one) asking questions that should not have been asked or answered.*

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[7] Robertson's primary complaint in this allegation is that counsel presented Cascio without knowing the damaging nature of Robertson's various admissions contained in her notes. However, the record supports the contrary conclusion. Specifically, Mr. Hancock testified in 2007 that he and Mr. Boyd knew about the notes when they made the decision to call Cascio, that he had personally read them before turning them over to the State, that he knew she would be cross-examined about the notes, and that the defense balanced the harm from cross-examination on the notes against the benefit of her testimony to the mitigation case in making the decision to call her. ***App. 3452-54***. Mr. Boyd's 2007 testimony was that counsel felt that it was necessary to present her as a witness because she was able to pull things together to which the other experts had testified. ***App. 3550, lines 2-7***. (Mr. Hancock testified similarly). Mr. Boyd again stressed the need for her testimony before this Court. *See* ***PCR Tr. 360; 378***. Also, in 2007, he testified that he was "sure" he read her notes before presenting her as a witness. Before this Court he clarified that although he had no independent recollection, it has always been his practice to review a document before providing it to opposing counsel in the course of his forty-three year career. ***PCR Tr. 377-78***. See also ***PCR Tr. 379***.

Moreover, as Judge Few correctly found "before the State began cross-examining Ms. Cascio about Robertson's admissions related to the murders, she was specifically asked whether she took Robertson's statements about the crime into consideration informing her evaluation of him. Ms. Cascio replied, "I was looking at early childhood history that could have led him to that point;' and she agreed that she factored Robertson's statements into her assessment." *See* Order p. 80, ***App. 3751*** (citing ***App. 3010, lines 10-22***).

*The horrendous and damning details, which the State would otherwise have never known, were then published to the jury.*[8]

*11(b)(iv) Trial Counsel failed to instruct, supervise, and manage, testifying expert witnesses. In particular Dr. Toni Cascio, who had never served as a testifying expert witness, to ensure that she, and all others, complied with the client's constitutional right and decision to remain silent concerning the details of the crime. Because Trial Counsel made an informed strategic decision to hire an inexperienced expert, Counsel incurred a heightened duty to instruct, supervise and manage her work.*

*(11)(b)(v) Trial Counsel failed to supervise and manage Applicant's interviews with all the testifying defense experts to ensure that Applicant's Fifth Amendment rights against self-incrimination were protected from disclosure to the jury.*

The Court finds that issues (11)(b)(iii) through (v) raise the same basic complaints and may be addressed together. The essence of Robertson's claims is that trial counsel were ineffective for not attending all interviews *with the defense experts and Robertson*, in an effort to prevent disclosure of facts that are unfavorable to his defense. Robertson cites no authority identifying a duty on counsel's part to attend a pretrial interview conducted by a defendant's own expert, in this case, a social worker who was recommended by experts in the development and presentation of mitigating evidence in capital sentencing proceedings. Further, Mr. Boyd's testimony before this Court and in the original PCR hearing, is particularly compelling in resolving this issue, as he noted in his decades of experience, it has never been his practice to instruct an expert he has employed how to practice his or her field of expertise because this is the expert's role. *See* ***PCR Tr. 3379; App. 3551, lines 1-6***. Moreover, the Court again notes that although original PCR counsel did not allege ineffective assistance based on counsel's failure to attend Ms. Cascio's various meetings with Robertson, they did not entirely miss this issue, as discussed in the preceding claim. *See* Order, pp. 88-106; ***App. 3739-58***. In the course of rejecting Issue 12(c), Judge Few specifically found that "*Strickland* does *not* require counsel to instruct defense experts on how they

[8] Robertson's claim in this and any other Ground that trial counsel "abandoned" him is addressed in Ground 11(g), *infra*.

should conduct their evaluations in their areas of expertise." Order p. 89, ***App. 3740***. This Court agrees with his reasoning and rejects Robertson's argument to the contrary.[9]

> *11(b)(vi) Trial Judge Hayes ordered Applicant to submit to a psychological evaluation to determine whether he was competent to assist with his defense and was sane at the time of the crime. Those were issues that were never raised by the defense at any time. Doing an evaluation of the Applicant on those issues required the Court's examiner to ask Applicant about the circumstances of the crime. The examiner was the Court's witness and was performing a function for the benefit of the Court. Trial Counsel failed to insist that the examiner's report be retained by the Judge alone thereby protecting the Applicant's right not to be a witness against himself, and protecting the contents within the report being kept from the prosecution unless and until issues of competency or sanity were raised by the defense. As a result of Trial Counsel's failure, Applicant's statements in violation of his Fifth Amendment rights came into evidence when the prosecution called the Court's examiner, Dr. McKee, as its rebuttal witness.*
>
> *11(b)(vii) Trial Counsel failed to object to allowing the State to utilize the Court's examiner as its rebuttal witness to the client's case in mitigation. The separate functions of serving the Court to determine competency and sanity became commingled within one witness. Trial Counsel's failure to object resulted in the Court's witness, armed with Constitutionally protected information, to also serve as the State's rebuttal witness and, in that role, to testify about the circumstances of the crime in violation of the client's Fifth Amendment rights to remain silent.*

The Court addresses Grounds 11(b)(vi) and (vii) together as they share the same factual basis. The Court finds that Robertson fails to show prejudice as he has failed to show a meritorious issue. First, as established at the hearing before this Court, Robertson is simply wrong that Dr. McKee was the court's examiner. The contemporaneous record reflects Dr. McKee was requested and retained by the prosecution, as does the State's motion for an independent psychological

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[9] The only testimony presented in PCR proceedings is that the defense hired Ms. Cascio as a social worker because Ms. Drucy Glass (a social worker with experience) and the Center for Capital Litigation, which specialized in providing assistance to defense lawyers trying capital cases, recommended that they hire her. Counsel were well aware of Ms. Cascio's limited experience and that she had never testified as a forensic social worker but were not overly concerned about her lack of experience. *See* ***App. 2852-55***; ***PCR Tr. 368-69; 472-73***. Also, counsel had met with Ms. Cascio a number of times over the course of a year to prepare her testimony, and Mr. Hancock did not report any problems in terms of her gathering information for Robertson's social history. Nor were counsel able to locate a more experienced social worker. ***App. 3428-31; 3497-3501; 3504-05; 3510-11; 3529-41; 3546-47***. The Court finds no prejudice to Robertson arising from counsel's decision in this regard.

evaluation and reciprocal discovery (Respondent's Ex. 3), the Return opposing the motion (Respondent's Ex. 2), the trial judge's February 1999 Order authorizing the independent evaluation (Respondent's Ex. 5), Dr. McKee's report faxed to Solicitor's Office (Respondent's Ex. 6), the bill from Dr. McKee (Respondent's Ex. 7), the receipt for payment to Dr. McKee (Respondent's Exhibit 8), as well as the testimony of Solicitor Brackett, Mr. Pope, and Mr. Boyd. *See* ***PCR Tr. 372-74; 397-408; 461-64***.

Second, Robertson's position is not supported by clearly established law. See *State v. Sloan*, 278 S.C. 435, 440, 298 S.E.2d 92, 94 (1982); *State v. Locklair*, 341 S.C. 352, 363-65, 535 S.E.2d 420, 426-27 (2000) (rejecting defendant's argument the trial judge abridged his Fifth Amendment rights by ordering him to submit to a psychiatric examination where he did not assert an insanity defense and did not give notice that he would plead GBMI and holding that "[t]he trial judge in this case has the inherent, discretionary authority to order an independent psychiatric evaluation of Locklair if he believed Locklair was not fit to stand trial or if he believed that Locklair's mental competency would be an issue at trial. The mental competency of the defendant to stand trial is a baseline inquiry by the court. In order to protect the legal process and preserve the integrity of the trial, a trial judge has the authority to order a psychiatric evaluation of the defendant when his or her competency may be in question"); *State v. Bixby*, 388 S.C. 528, 558-59, 698 S.E.2d 572, 588 (2010).

> 11(b)(*viii)* *Trial Counsel failed to insist that the State produce the notes of Dr. McKee in advance of his testimony. Because Trial Counsel did not have Dr. McKee's notes, they were unable to effectively cross-examine him and demonstrate that McKee's notes did not include all of the details of the crime to which Dr. McKee testified. Specifically, some of Dr. McKee's testimony came only from the contents within Dr. Cascio's notes. Therefore, McKee was not testifying from his own personal knowledge about all of the details of the crime, as represented to the jury, but also from some of Dr. Cascio's notes about the details of the crime which he had just been provided by Respondent and read moments before taking the witness stand. (App. Trans, pps.3046-3083; 3067).*

The Court finds that Ground 11(b)(viii) lacks merit because the uncontroverted evidence

is that Mr. Brackett received Dr. McKee's report and notes on the afternoon before the trial began and that he immediately turned over the report and notes to either defense counsel or a member of the defense team. The only portion of this information that he could not remember disclosing was the booklet containing actual test questions, which did not contain information related to Dr. McKee's opinions. ***PCR Tr. 407-08***.

Mr. Boyd had no independent recollection of whether the State disclosed the notes. ***PCR Tr. 387***. However, the record shows that at one point, Mr. Boyd objected to Dr. McKee reading from his notes, ***App. 3068, line 25- 3069, line 6***, and he testified before this Court that it was reasonable to assume from his objection that he had Dr. McKee's notes. ***PCR Tr. 389-90***. Because the State provided the notes to defense counsel, any objection that the notes had not been provided would have been frivolous and *Strickland* does not require counsel to make a frivolous objection or motion. See *United States v. Wright*, 573 F.2d 681, 684 (1st Cir. 1978); *Werts v. Vaughn*, 228 F.3d 178, 203 (3rd Cir. 2000) (counsel cannot be ineffective for failing to raise a meritless claim); *Kelly v. Lazaroff*, 846 F.3d 819, 831 (6th Cir. 2017) ("[C]ounsel cannot be considered ineffective for failing to raise a meritless claim").

> 11(b)*(ix)* *Trial Counsel failed to develop and present all available mitigation evidence from Applicant's life and background. Counsel did not retain a social historian that was familiar with internal family systems which was necessary to build an effective mitigation case for the defendant. This includes evidence regarding Applicant's long-standing, severe, improperly treated mental health issues; his family members' mental health issues; and the Robertson's internal family system dynamics.*
>
> *Trial counsel's failures left the State's aggravating portrayal of Applicant unrebutted and prevented the jury from understanding and giving mitigating effect to the long history of severe dysfunction that pervaded the family. The mitigation history as presented at trial failed to incorporate this social history, and other relevant mitigating evidence.*

The Court finds that Robertson cannot show deficient performance or prejudice under *Strickland* because the credible evidence presented at the 2007 hearing and before this Court reflects that trial counsel made an objectively reasonable investigation for and an extensive

presentation of evidence of Robertson's mental illness (bipolar disorder, alcohol abuse, and poly-substance abuse), the interplay of his mental illness with his use and abuse of Ritalin and alcohol, and the dysfunctional elements within his family. Additionally, he presented evidence through a neurologist and neuro-psychologist that he has frontal lobe damage. The Court notes that Judge Few relied upon much of this evidence in rejecting original PCR counsel's claims that counsel were ineffective in failing to present Dr. Hayne McMeekin, a treating psychiatrist who over-prescribed Ritalin (Issue 10(a)(1), Order of Dismissal, ***App. 3659-71***); that trial counsel were ineffective for neither advising Robertson to plead guilty but mentally ill (GBMI) or for not requesting that the trial judge submit a verdict of GBMI to the jury (Issue 10(a)(3), Order of Dismissal, ***App. 3675-88***); that trial counsel were ineffective for not adequately and properly advising Robertson before Dr. Geoffrey McKee, the State's forensic psychologist evaluated him (Issue 10(a)(10), ***App. 3709-20***); that counsel were ineffective for failing to introduce sufficient evidence of the Robertson family's mental health history (Issue 10(a)(11), Order of Dismissal, ***App. 3720-28***); and that counsel were ineffective for presenting their social worker, Ms. Cascio (Issue 10(a)(12), ***App. 3728-57***).

The Court finds that Robertson did not present the Court with any admissible evidence that is substantially different in kind or degree from the evidence presented in his original sentencing proceeding. Rather, as stated above, he has merely changed the emphasis that he thinks should have been placed on this evidence. Instead of presenting evidence of how his substance abuse and bipolar disorder impacted his mental state at the time of the murders, he now suggests, in hindsight, that counsel should have placed more emphasis on how the parents' psychological and physical abuse of Robertson may have impacted his mental state when combined with his bipolar disorder. Yet, this does not show prejudice from counsel's performance because *Strickland* emphasizes that

"every effort be made to eliminate the distorting effects of hindsight, … and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689 *Strickland* also states that "[t]here are countless ways to provide effective assistance in any given case," and that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id*. Again, the Court finds that trial counsel's chosen defense was reasonable under *Strickland*.

> 11(b)(x) Trial Counsel failed to investigate, develop and present penalty phase defenses involving battered child syndrome (*see* State v. Lopez, 306 S.C. 362, 412 S.E.2d 390 (S.C. 1991)) and parricide. Counsel failed to consult with an expert in parricide who was familiar with the psychological theory of internal family systems. Specifically, that children who kill their parents after a prolonged period of abuse have substantial mitigating circumstances that when presented properly reduce culpability for murder. *See also* Simpson v. Moore. 367 S.C. 24; 51 1 S.E.2d 689 (S.C. 2006). ….

This claim lacks merit for the reasons set forth in Ground (11)(a)(iii). Additionally, because counsel's reasonable investigation for evidence revealed only a small number of acts that constituted physical abuse, it was not unreasonable under *Strickland* for counsel to focus the mitigation case primarily on Robertson's mental illness (*i.e*., the diagnosis of bipolar disorder), his drug abuse, both before and on the morning that he murdered his parents, and his family history of mental illness and drug abuse. This decision was reasonable even if other attorneys would have focused on physical abuse, instead, because *Strickland* recognizes that "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. Further, there clearly cannot be any prejudice from counsel's decision to rely heavily on Robertson's mental illness. In addition to the previously-stated reasons, Respondent notes that Dr. Ewing testified at the end of cross-examination that the diagnosis of bipolar disorder was "all over the record."[10]

[10] To the extent that Robertson is claiming that trial counsel failed to adhere to the ABA Guidelines, the Court finds his claim lacks merit. "*Strickland* stressed … that 'American Bar Association standards and the like' are 'only guides' to what reasonableness means, not its definition." *Bobby v. Van Hook*, 558 U.S. 4, 8-9 (2009)). "[W]hile States are free to impose

> (xi) Trial Counsel failed to object to presentation of Applicant's prison disciplinary record by a single witness, who had not witnessed the presented events, in violation of the Confrontation Clause of the Sixth Amendment of the United States Constitution. (Trial Tr. 2129).

The Court finds that Robertson has waived this claim because he did not present any evidence to support it. Alternatively, the Court finds that the claim lacks merit.

The State introduced evidence of several of Robertson's convictions through SCDC's records custodian, Mike Stobbe. The trial judge overruled Mr. Hancock's objection that the records concerning Robertson 's misconduct while incarcerated were hearsay narratives. In response to an objection that the incident dated October 3, 1996 was dismissed, the State agreed to inquire only about infractions for which he was convicted. ***App. 2127-30***.

The State introduced evidence through Mr. Stobbe that between Robertson's admission on September 3, 1996 and his conditional release on Youthful Offender Act parole on July 31, 1997, he had a December 15, 1996 conviction for "damage, destroying property" (State's Ex. 201); a February 11, 1997 conviction for fighting without a weapon (State's Ex. 202); a February 11, 1997 conviction for lying to an employee and damage, destroying property (State's Ex. 203); and a September 11, 1998 conviction for refusing or failing to obey (State's Ex. 204). ***App. 2130-33; 2141-43***.

Mr. Hancock established on cross-examination that the charge of fighting without a weapon reflected in State's Ex. 202 was "a minor infraction" and that no one actually saw a fight. Rather, a correctional officer apparently heard a loud noise and, upon going into the dayroom to investigate, saw Robertson getting up off of the floor with a small cut on his cheek and swelling under his eye. Also, nothing in the report said that he hit or beat or threatened anyone else. ***App.***

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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." *Id*. at 9 (quoting *Roe v. Flores–Ortega*, 528 U.S. 470, 479 (2000).

***2133-35***.

Mr. Hancock's cross-examination also established that the charges in State's Exhibit 203 included possession of contraband, which was cigarettes, and that the damage to property charge resulted from Robertson tearing a hole in his jacket so that he could hide the cigarettes. Counsel likewise established that the incident documented by State's Ex. 201 resulted from Robertson breaking a window on a door by knocking too hard on the door. The trial judge sustained the State's objection when counsel attempted to establish that Robertson's motive for knocking on the door was to get assistance for another inmate. ***App. 2136-43***.

First, counsel was not ineffective for failing to anticipate at the time of Robertson's March 15-26, 1999, trial that the Supreme Court would overrule *Ohio v. Roberts*, 448 U.S. 56 (1980), five years later in *Crawford v. Washington*, 541 U.S. 36 (2004). Under the rule in *Roberts*, the Confrontation Clause did not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears "adequate 'indicia of reliability.' " The *Roberts* test was met when the evidence either fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." *Id*. at 66.

*Crawford* overruled *Roberts* and held that:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts,* and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial."

*Crawford*, 541 U.S. at 68.

As noted, under *Strickland*, an attorney is never required to anticipate or discover changes in the law or facts that did not exist at the time of trial. *See Strickland*, 466 U.S. at 689; *see also*

*Kornahrens*, 66 F.3d at 1360; *Patterson v. State*, 359 S.C. 115, 118, 597 S.E.2d 150, 151 (2004); *Gilmore v. State*, 314 S.C. 453, 445 S.E.2d 454 (1994) (attorney is not required to be clairvoyant or anticipate changes in the law which were not in existence at time of trial), *overruled on other grds.*, *Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999).

Further, a Confrontation Clause objection would not be well-founded even post-*Crawford*. "Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009). In *Melendez-Diaz*, the Supreme Court held that certificates or affidavits that had been signed under oath by forensic analysts affirming that a substance found in the defendants' possession was cocaine were inadmissible because they fell within the " 'core class of testimonial statements' " described in *Crawford*. *See Melendez-Diaz*, 557 U.S. at 310.

The Court explained that "not only were the affidavits "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,'" ... but under Massachusetts law the *sole purpose* of the affidavits was to provide "prima facie evidence of the composition, quality, and the net weight" of the analyzed substance ... . We can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose—as stated in the relevant state-law provision—was reprinted on the affidavits themselves." *Melendez-Diaz*, 557 U.S. at 311 (citations omitted) (emphasis in original). Notwithstanding Robertson's allegation, however, it is clear that the records of his prior convictions are business records and, therefore, nontestimonial statements under *Crawford*. *See People v. Moreno*, 192 Cal.App.4th 692, 710-11 (Cal. Ct.App. 2011).

In fact, a similar issue was presented and rejected in *State v. Owens*, 378 S.C. 636, 640-41, 664 S.E.2d 80, 82 (2008). *See also State v. Whipple,* 324 S.C. 43, 476 S.E.2d 683 (1996) (holding prison disciplinary records are admissible at the sentencing phase of a capital trial under the Uniform Business Records as Evidence Act, S.C. Code Ann. § 19–5–510). Accordingly, the Court finds that Robertson has failed to show reasonable probability that relief would have been granted had former PCR counsel pursued the issue.

> (xii) Trial Counsel failed to object to the State's improper questioning of the victims' family counselor, which suggested that victim, Terry Robertson, was a very private person and would have been deeply upset by the revelation of her counseling records. (Trial Tr. 2792). SCRE 403.

The Court finds that this claim lacks merit.

Robertson contends counsel were ineffective for not objecting to the following exchange on the State's cross-examination of Terry Robertson's therapist, Julius "Skip" Meyer:

> Q. AND IT'S HARD TO BE HERE TODAY FOR YOU, ISN'T IT?
>
> A. YES, SIR.
>
> THE COURT: KEEP YOUR VOICE. LEVEL UP.
>
> Q. YES, SIR. THIS GOES AGAINST THE GRAIN OF EVERYTHING A COUNSELOR IS TAUGHT IN TERMS OF CONFIDENTIALITY AND PRIVACY.
>
> A. THIS IS CORRECT.
>
> Q. AND TERRY ROBERTSON WAS AN EXCEEDINGLY PRIVATE WOMAN, WASN'T SHE?
>
> A. VERY MUCH SO.
>
> Q. SHE WOULD BE MORTIFIED TO KNOW WHAT IS GOING ON IN THIS COURTROOM TODAY, WOULDN'T SHE?
>
> A. YES, PERSONAL APPEARANCES MEANT A GREAT DEAL TO HER.

***App. 2792, lines 5-19***.

Robertson contends that this evidence should have been excluded under Rule 403, SCRE. The Court disagrees. Rather, the Court finds that this was properly admitted as victim impact evidence under *Payne v. Tennessee*, 501 U.S. 808, 825-27 (1991). In *Payne*, the United States Supreme Court partially overruled *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805, (1989), and held that the Eighth Amendment does not prevent juries in capital cases from hearing evidence and arguments regarding the victim and the impact of the murder on the victim's family. *Payne*, 501 U.S. at 825. *See also id*. at 830 (O'Connor, J., concurring) ("A State may decide also that the jury should see 'a quick glimpse of the life petitioner chose to extinguish,' … to remind the jury that the person whose life was taken was a unique human being") (citation omitted).

In *Stone v. State*, 419 S.C. 370, 381-82, 798 S.E.2d 561, 567 (2017), *cert*. *denied*, 138 S.Ct. 392 (2017), the South Carolina Supreme Court explained that:

> Under South Carolina law, "victim impact evidence is relevant for a jury to 'meaningfully assess the defendant's moral culpability and blameworthiness.' " *State v. Hughey*, 339 S.C. 439, 457, 529 S.E.2d 721, 730-31 (2000) (quoting *Payne v. Tennessee*, 501 U.S. 808, 825, 111 S.Ct. 2597, 2608, 115 L.Ed.2d 720, 735 (1991)), *overruled on other grounds by Rosemond v. Catoe*, 383 S.C. 320, 330, 680 S.E.2d 5, 10 (2009). The State may present victim impact evidence for the purpose of demonstrating "the 'uniqueness' of the victim and the specific harm committed by the defendant." *Hughey*, 339 S.C. at 457, 529 S.E.2d at 730 (quoting *State v. Rocheville*, 310 S.C. 20, 27, 425 S.E.2d 32, 36 (1993)). In *State v. Bennett*, we explained that evidence of "the specific harm caused by the defendant" can "includ[e] the impact of the murder on the victim's family and 'a quick glimpse of the life which the defendant chose to extinguish.' " 369 S.C. 219, 228, 632 S.E.2d 281, 286 (2006) (quoting *Payne*, 501 U.S. at 825, 822, 111 S.Ct. at 2608, 2607, 115 L.Ed.2d at 735, 733). Under *Payne*, "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar." 501 U.S. at 827, 111 S.Ct. at 2609, 115 L.Ed.2d at 736. However, when victim impact "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." 501 U.S. at 825, 111 S.Ct. at 2608, 115 L.Ed.2d at 735.

Here, the State's cross-examination only offered a "brief glimpse" of one aspect of why Terry Robertson's death represented a unique loss to society, her family, and friends. Accordingly, it was properly admitted under *Payne*.

The Court further finds that Robertson cannot show any conceivable prejudice from counsel's failure to object to this line of cross-examination. This was an extremely brief exchange in the course of an extraordinarily voluminous record. Also, the Solicitor used this evidence in closing to attack the sentencing phase presentation of evidence suggesting that Robertson's parents were responsible for their own murders. *See* ***App. 3141-44***. Further, the challenged cross-examination merely elicited testimony that was corroborative of and cumulative to evidence that was already properly before the sentencing jury.

Specifically, Linda Weaver testified that she had known Earl and Terry Robertson since May or June of 1978 and that she was a very close friend of Terry's. They talked daily for years. ***App. 2340; 2346***. Beginning in 1992, while Robertson was at Georgia Tech, Ms. Weaver noticed a change in Terry's personality. Terry would not call Ms. Weaver as often, they would not talk as much, and Terry stopped sharing the detail of her life.

> THEN SHE BEGAN TO TELL ME THAT JIMMY WAS HAVING PROBLEMS AT GEORGIA TECH, HE WAS FLUNKING MOST OF HIS COURSES. SHE WAS AFRAID HE WAS GOING TO GET KICKED OUT OF SCHOOL. HE HAD GAMBLING DEBTS. SHE WAS EMBARRASSED BECAUSE OF HER SON. .... SHE WASN'T THE TERRY I KNEW; SHE WASN'T AS TALKATIVE. SHE BEGAN TO GAIN WEIGHT.

***App. 2347, line 7 – 2348, line 3***.

The State later revisited the changes in Terry that Ms. Weaver had observed. Over trial counsel's unsuccessful objection (***App. 2362, line 25 – 2363, line 3***), Ms. Weaver testified that:

> TERRY, DIDN'T TALK AS MUCH; SHE DIDN'T DISCUSS HER FAMILY. WE COULDN'T GO, EAT AT CERTAIN RESTAURANTS BECAUSE SHE WAS EMBARRASSED. SHE WOULDN'T GO TO THE GROCERY STORE

> BECAUSE SHE WAS EMBARRASSED. ON OCCASION I'VE BEEN TO THE GROCERY STORE WITH TERRY THAT SHE WOULD ACTUALLY LOOK DOWN THE AISLE TO SEE WHO WAS COMING BECAUSE SHE WAS EMBARRASSED ... ABOUT THE THINGS THAT HER SON HAD DONE THAT OTHER PEOPLE KNEW ABOUT.

***App. 2363, lines 5-15***.

Also, Mr. Meyer gave similar testimony on direct examination of how Earl was embarrassed by the conduct of his children and in particular by Robertson. ***App. 2761-65***. Because the challenged cross-examination of Mr. Meyer only elicited evidence that corroborated and was cumulative to other evidence already before the sentencing jury, there was no prejudice under *Strickland* in failing to object to it. *See Burgess v. State*, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998) (holding the petitioner was not prejudiced by improper witness pitting in light of the other evidence presented in the case); *State v. Haselden,* 353 S.C. 190, 19697, 577 S.E.2d 445, 448-49 (2003) (admission of improper evidence is harmless when the evidence is merely cumulative to other evidence); *Hutto v. State,* 387 S.C. 244, 249, 692 S.E.2d 196, 198 (2010) ("No prejudice occurs, despite deficient performance, when there is overwhelming evidence of guilt."); *Forde v. State*, 289 Ga. App. 805, 809, 658 S.E.2d 410, 414 (2008) ("Although Forde's trial counsel performed deficiently in failing to raise a hearsay objection to the admission of B.F.'s statements contained in the videotaped interview, Forde has not shown that counsel's error prejudiced his defense. The statements made by B.F. during the videotaped interview were merely cumulative of the testimony she offered at trial, regarding which she was cross-examined by Forde's trial counsel, and were therefore harmless").

Moreover, this victim impact evidence could not have inflamed the jury nearly as much as the brutally malicious facts of the murders did. *See Payne*, 501 U.S. at 832 (O'Connor, J., concurring) ("I do not doubt that the jurors were moved by this testimony—who would not have

been? But surely this brief statement did not inflame their passions more than did the facts of the crime"). This evidence showed how Robertson brutally and maliciously murdered his parents and that the murder was motivated, at least in large measure, by his greed to obtain money from their estates or life insurance policies. In light of this evidence, including numerous statements by him evincing express malice, "there is [no] reasonable probability that ... the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. *See also Wiggins*, 539 U.S. at 537.

Finally, the trial judge further instructed the sentencing jury that it could only impose a death sentence if it first found the existence of one or more aggravating circumstances beyond a reasonable doubt. He also instructed jurors that they could only consider the statutory aggravating circumstances that the murder was committed while in the commission of robbery while armed with a deadly weapon, while in the commission of larceny with the use of a deadly weapon, physical torture, that the offender committed the murder for himself or another for the purpose of receiving money or a thing of value, and that two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct. ***App. 3203-26***. Given these sentencing phase instructions, which precluded jurors from sentencing Robertson to death based upon anything other than proof beyond a reasonable doubt of a *statutory aggravating circumstance*, the Court finds that the challenged evidence was not prejudicial. See *United States v. Olano*, 507 U.S. 725, 740 (1993) ("[It is] the almost invariable assumption of the law that jurors follow their instructions") (citation omitted); *Strickland*, 466 U.S. at 694 ("a court should presume ... that the judge or jury acted according to law").

Accordingly, Robertson is not entitled to relief because he cannot show prejudice from original PCR counsel's failure to raise this allegation.

(xiii) Trial Counsel failed to object to the State's improper statements during closing argument that Applicant's presentation of relevant mitigating evidence of his family's mental health history had been a "rape" of his mother Terry Robertson, and that this evidence had dragged Terry "through the mud." (Trial Tr. 3144,3142). Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

Robertson further claims that counsel were ineffective for not objecting to the Solicitor's sentencing phase closing argument, which he contends was improper. Again, however, the Court finds that counsel's performance was not deficient and that there was no prejudice.

In closing argument, the Solicitor suggested that Mr. Myers' testimony was that even though "Terry went through hell during the last three years of her life," she was beginning to come out of it, and she and Earl were "starting to put some structure on those kids." ***App. 3141-42***.

He then juxtaposed this evidence with Ms. Cascio's testimony:

BUT THIS LADY [MS. CASIO] WANTED TO TALK ABOUT ... TERRY, SHE SELF-MUTILATED HERSELF. TERRY, SHE WAS SUICIDAL. TERRY EVEN WENT SO FAR AS TO HAVE TO BE CHECKED IN THE HOSPITAL. AND THEY DRAG TERRY THROUGH THE MUD AND UP AND DOWN AND TALK ABOUT ALL THE MEDICATIONS, ALL THE THINGS THAT ARE HAPPENING PILED TOGETHER, ALL THE MEDICATIONS THAT CAME INTO THE HOUSE. BUT WHEN YOU PULL THEM APART, WHAT IS IT THAT YOU SEE. THREE YEARS. YES, SHE LOST HER MOTHER; SHE LOST HER FATHER; SHE WAS GOING THROUGH A ROUGH TIME. BUT IN THE MEANTIME SHE WAS HAVING TO DEAL WITH HIM; SHE WAS HAVING, TO DEAL WITH CHIP. AND IT WAS CAVING IN ON HER.

MS. CASCIO SPENT A GREAT DEAL OF TIME GOING THROUGH AND TELLING YOU BASICALLY WHAT A HORRIBLE SITUATION WENT ON AT THE ROBERTSON'S HOUSE. AND NO FAMILY IS PERFECT, AND I REALIZE THIS, AND THEY ALL HAVE PROBLEMS, THEY ALL HAVE SITUATIONS. YOU ALL HAVE PRIVATE MATTERS THAT YOU DON'T WISH TO BE PLAYED OUT IN THE COURTROOM. I THINK HE SAID THAT TERRY WOULD HAVE BEEN HORRIFIED IF SHE HAD KNOWN ALL OF HER PRIVATE THOUGHTS WERE LAID OUT HERE.

BUT FROM ALL THAT, WHERE DOES MS. CASCIO GO WITH IT? BECAUSE OF ALL OF THAT AND BECAUSE OF THE PHYSICAL ABUSE AND THE MENTAL ABUSE AND THE DETACHMENT AS A CHILD AND ALL THESE DIFFERENT THINGS, VIOLENCE WAS HIS ONLY

> ALTERNATIVE. AND I KEEP SAYING THAT WRONG. SHE SAID HE PERCEIVED VIOLENCE AS HIS ONLY ALTERNATIVE. AND THEN I THINK SHE SAID HE MAY PERCEIVE VIOLENCE AS HIS ONLY ALTERNATIVE. BECAUSE THE TRUTH OF THE MATTER WAS WHEN I STARTED QUESTIONING MS. CASCIO, AND I APOLOGIZE, I KNOW IT TOOK A LONG TIME, BUT THERE WAS SO MUCH. WHEN YOU SEPARATED THE WHEAT FROM THE CHAFF, IT WAS ONE INCIDENT, ONE INCIDENT OF PHYSICAL ABUSE. TWO INCIDENTS OF FIGHTING WITH THE BOYS. BUT FROM THAT, STUDIES SHOW AND IT'S CLEAR THAT THAT MUST BE THE CASE.
>
> SO EVERY TIME THEY FOUND ONE INCIDENT OR TWO INCIDENTS OVER, WHAT, TWENTY-SOMETHING YEARS OF MARRIAGE, TERRY WAS CRUCIFIED OR EARL WAS CRUCIFIED. THAT FAMILY, THAT EXPLAINS IT. BECAUSE AGAIN THEY'RE STARTING AT THE END, THEY'RE STARTING WITH THE BAT, THEY'RE STARTING WITH THE CLAW HAMMER AND TRYING TO WORK BACK AND SAY WHY DID THIS HAPPEN TO POOR JIMMY, WHY DID THIS HAPPEN TO HIM.
>
> WELL, I'LL SUBMIT TO YOU AS I WENT THROUGH WITH MS. CASCIO YOU SAW THAT EVERY SINGLE CARD SHE HAD STACKED WAS JUST THAT, A HOUSE OF CARDS. AND AS I''D POINT OUT ONE, IT WOULD FALL; I'D POINT OUT ANOTHER, IT WOULD FALL. AND WE WENT THROUGH EVERYTHING SHE SAID THAT ULTIMATELY LEADS TO THIS CONCLUSION THAT JIM ONLY HAD THE ALTERNATIVE FOR VIOLENCE. IT'S JUST NOT THERE.
>
> SO, I SUBMIT THAT ALL THAT REALLY HAPPENED -- YOU KNOW, SHE TALKED ABOUT TERRY BEING SEXUALLY ABUSED. TERRY HAS BEEN RAPED. SHE WAS RAPED IN THIS COURTROOM WHEN THEY TAKE HER THROUGH THIS BASED ON HIS ACTIONS.

***App. 3142, line 5 - 3144, line 6***.

"A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it. .... [However, a] solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." *Humphries*, 351 S.C. at 373, 570 S.E.2d at 166. As stated earlier, a criminal defendant is not entitled to relief based on the

closing argument of a prosecutor, unless that argument so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Donnelly*, 416 U.S. at 643. *See also Humphries,* 351 S.C. at 373, 570 S.E.2d at 166 ("Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument"). "'[I]t is not enough that the remarks were undesirable or even universally condemned.'" *Darden*, 477 U.S. at 181. *See also Parker*, 567 U.S. at 47-48.

Applying this standard to the present case, it is clear that Robertson cannot show either deficient performance or prejudice under *Strickland* resulting from counsel's failure to object to the Solicitor's sentencing phase closing argument. The Supreme Court in *Darden* held that a closing argument considerably more inflammatory than the one at issue here did not warrant habeas relief. *See Darden*, 477 U.S., at 180, n. 11 (prosecutor referred to the defendant as an " 'animal' "); *id*., at 180, n. 12 ("'I wish I could see [the defendant] with no face, blown away by a shotgun'"). Further, when the Solicitor's argument is placed in proper context, see *Young*, 470 U.S. at 12; *Donnelly*, 416 U.S. at 647, the Court finds that the Solicitor was merely addressing the defense's sentencing phase presentation of evidence through Ms. Casio.

Her testimony suggested that Robertson's parents were in large part to blame for their own murders and that Robertson may have perceived killing them as his only course of action. The Solicitor's comments were supported by evidence in the record concerning Terry's embarrassment over the behavior of Robertson and his brother. See ***App. 2347, line 7 – 2348, line 3; App. 2363, lines 5-15*** (Ms. Weaver)***; App. 2347, line 7 – 2348, line 3*** (Mr. Meyer). Also, Mr. Meyer gave similar testimony on direct examination of how Earl was embarrassed by the conduct of his children and in particular by Robertson. ***App. 2761-65***.

Additionally, and in spite of Robertson's attack on the challenged comments, the Court finds that the Solicitor's argument fairly characterized Ms. Casio's expert testimony, since she attributed the murders in large part – if not totally - to Robertson's parents and, more specifically, to Terry Robertson. ***App. 2852-3031***. Also, the Solicitor was merely contrasting the defense's presentation with the contrary evidence presented by the State. He had the right to do so.

The Court in *Payne* expressly observed that the "State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to this family." *Payne*, 501 U.S. at 825 (citation and internal quotation marks omitted). *See also Humphries v. Ozmint*, 397 F.3d 206, 225 (4th Cir. 2005) ("the *Payne* Court recognized that some comparisons would be made between the defendant and the victim") (citing *Payne*, 501 U.S. at 825). The Court further finds that Robertson's claim ignores that the Solicitor's comments were made in anticipation of the closing arguments of trial counsel.

Although trial counsel Hancock stated in closing that the defense was not saying that Earl and Terry Robertson were "bad people," he emphasized that "they could not control the lot the Good Lord gave them." ***App. 3174***. He thereafter argued that jurors needed to ask themselves why the murders occurred. He also contended that Robertson was not a diabolical criminal as the State had contended, he pointed out that Robertson did not suddenly decide one day to be bad or to have bipolar disorder, he responded to the State's suggestion that Dr. Pincus' opinion should not be believed because Dr. Pincus was retained by pointing out that Dr. McKee and many other prosecution witnesses were also paid, he pointed to the evidence supporting a diagnosis of bipolar disorder and explained that it was a mental disorder, and he emphasized that the defense experts

had testified to how Robertson's problems associated with bipolar disorder were exacerbated by drug and alcohol use, which was provided to Robertson. ***App. 3175-82***.

After then telling jurors, "We're not shifting the blame" away from Robertson, he made the following comments:

> WE STARTED WITH THE BASIC PREMISES UPON TESTIMONY OF WITNESSES THAT THE SOLICITOR PUT UP. I BELIEVE MRS. GEORGE, MRS. CISSY GEORGE, WE STARTED WITH THAT TESTIMONY AND I ASKED THEM QUESTIONS BECAUSE I KNEW WHAT WAS COMING. WE ESTABLISHED THAT TERRY WAS DOING ALL OF THESE WONDERFUL THINGS, AND SHE WAS. BUT SHE MIGHT NOT HAVE BEEN DOING QUITE IN THE MANNER IN WHICH HER FRIENDS PERCEIVED THEM BECAUSE I WILL TALK ABOUT MR. FAULKNER A LITTLE LATER.
>
> SHE'S DOING THESE THINGS, YET THEY DON'T KNOW WHAT'S GOING ON. BUT I ASKED THEM ONE THING. I SAID, TERRY IS A TRUTHFUL PERSON, ISN'T SHE? I DIDN'T RELISH IN PUTTING MR. MEYER UP HERE. I KNOW HE FELT UNCOMFORTABLE, BUT MR. MEYER SAW TERRY 170 TIMES IN THREE YEARS.
>
> WHEN WE GO TO LOOK AT WHAT WAS HAPPENING IN THE FAMILY AND WITH WHAT WAS GOING ON BEHIND CLOSED DOORS, AND I'M NOT SURE ANY OF US COULD SURVIVE THE SCRUTINY OF WHAT GOES ON BEHIND CLOSED DOORS IN A COURTROOM OF THIS MANNER, BUT HOPEFULLY WE WILL NEVER BE THE VICTIM, HOPEFULLY WE WILL NEVER BE INVOLVED IN A MURDER THAT LOOKS TO THE DEATH PENALTY.
>
> SO, IT'S SOMETHING THAT WHILE I DID NOT RELISH, YOU HAVE TO LOOK AT. YOU HEARD FROM MR. MEYER THAT TERRY WAS A VERY PRIVATE PERSON. AND SO THIS IS NOT AN EASY TASK FOR ANY OF US.
>
> THE PERSON THAT SPEAKS TO US IN THIS ENTIRE MATTER AND GIVES US SOME INSIGHT AS TO WHAT IS THERE IS TERRY ROBERTSON. AND I ASK, AND I ASK THAT YOU LOOK AT MORE THAN THE RECORDS THAT I SHOWED YOU. ALL OF MR. MEYER'S RECORDS ARE IN EVIDENCE; THEY ARE IN EVIDENCE, SO YOU DON'T HAVE TO JUST LOOK AT THE SELECTED THINGS THAT I BROUGHT UP. BUT I THINK FROM THEM ... WHAT WE PRESENTED TO YOU IS THAT THERE WAS INHERITED BIPOLAR MENTAL DISEASE WITH GENETIC OR

> OTHERWISE-- THEY SAID MORE THAN LIKELY IS GENETIC, IF I REMEMBER CORRECTLY.
>
> WE ALSO PRESENTED TO YOU THE RECORDS OF DR. MEYER THAT' INDICATE THAT TERRY ROBERTSON HAD MANY, MANY PROBLEMS BEFORE ALL OF THIS BEGAN.

***App. 3182, line 15 – 3184, line 6***.

Mr. Hancock then argued at length about Terry's problems that were in Mr. Meyers' records and to which Ms. Cascio testified. Mr. Hancock likewise urged that her problems, as well as Robertson's own mental health issues impacted him and his commission of the murders. ***App. 3184, line 7 – 3191, line 11***. Mr. Boyd made similar comments in his closing argument. ***App. 3194 – 3203, line 4***.

Because the challenged remarks were part of the Solicitor's broader response to the anticipated argument that the murders were somehow the result of Terry's psychological and personal issues, the comments were proper and counsel's failure to object was not deficient under *Strickland*. *See*, *e.g.*, *Parker*, 567 U.S. at 47-48; *Rogers v. State*, 957 So.2d 538, 549-50 (Fla. 2007), *as modified on denial of reh'g* (May 24, 2007) (defense counsel not ineffective for failing to object to prosecutor's sentencing closing that defendant was "'a violent, aggressive person and brain damage has nothing to do with it.'" Those remarks were not improper since they were made in response to defense counsel's argument that defendant's "aggressive behavior was due to a history of head trauma, a brain contusion, and damage to the frontal and temporal lobes of his brain"); *People v. Brooks*, No. 338267, 2019 WL 573049, at *5 (Mich. Ct. App. Feb. 12, 2019) (finding that counsel was not ineffective for failing to object to the prosecutor's closing argument that the defense was "victim blaming" in response to the defense closing that the action of the male manager to allow the female delivery person to approach the house with the pizza was an example of chivalry being "dead").

Further, Robertson was not prejudiced by counsel's failure to object. As discussed, the State's evidence showed how Robertson brutally and maliciously murdered his parents and that the murder was motivated, in large part, by his greed to obtain money from their estates or life insurance policies. In light of this evidence, including numerous statements by him evincing express malice, "there is [no] reasonable probability that ... the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland,* 466 U.S. at 695. *See also Wiggins*, 539 U.S. at 537. Thus, he is not entitled to relief because he cannot show prejudice from original PCR counsel's failure to raise this claim.

> 11(b)(xiv) Trial Counsel failed to investigate, develop and present evidence to challenge the prosecution's theory of the case. The State's theory was that the murders were financially motivated when the evidence of severe rage as documented in Dr. Sexton's autopsy reports demonstrated otherwise.

This claim lacks merit for the reasons stated in connection with Ground 11(a)(ii).

> 11(b)(xv) Trial Counsel failed to investigate, develop and present evidence supporting a defense based upon battered child syndrome (State v. Lopez. 306 S.C. 362, 412 S. E.2d 390 (1991)).

This claim lacks merit for the reason stated in connection with Grounds 11(a)(iii) and (x).

> 11(b)(xvi) Trial Counsel failed to challenge the State's case concerning the lack of positive identification of the two bodies found at the scene.

This claim lacks merit for the reasons set forth in connection with Ground 11(a)(iv).

**11 (c), (d), (e), (f), (h), (i), (j) and (k) Allegations of Trial Errors Other than Ineffective Assistance of Counsel.**

Robertson raises a series of alleged trial errors independent of a claim of ineffective assistance of counsel. He has failed to show prejudice by any error not so alleged by PCR counsel in the first PCR action as free-standing claims of error, apart from undiscovered violations, are not appropriate for PCR. "Under the doctrine enunciated in *Simmons v. State,* 264 S.C. 417, 215 S.E.2d 883 (1975), errors which can be reviewed on direct appeal may not be asserted for the first

time, or reasserted, in post-conviction proceedings." *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 519 (1993). Robertson cannot show prejudice regarding free-standing claims that could not have been properly raised in the prior PCR. While these general considerations may relate to prejudice of his ineffective assistance of counsel claims, they do not show prejudice because the freestanding claims are not appropriate for PCR.

To the extent that Robertson alleges in 11(c) that counsel "abandoned" him during interviews with "testifying experts," the Court finds that the evidence at the remand hearing conclusively demonstrated that counsel was prohibited by the trial court's order, consistent with state law, from attending the evaluation by the State's witness, Dr. McKee. *See State v. Hardy*, 283 S.C. 590, 592, 325 S.E.2d 320, 322 (1985) (finding counsel's presence at psychiatric examination "is not only unnecessary from a constitutional standpoint, it is also undesirable from a clinical perspective, for it would undoubtedly hinder the psychiatrist from effectively examining the defendant."). Further, the Fifth Amendment is not implicated where, as here, the evaluation is necessary because counsel intends to put on a "mental status" defense. *Buchanan v. Kentucky*, 483 U.S. 402, 423-25 (1987) (State's use of psychiatric report solely to rebut defendant's "mental status" defense did not violate defendant's Fifth or Sixth Amendment rights).

At any rate, the testimony from the prior PCR hearing is telling. Robertson testified in 2007 that his attorneys met with him before the evaluation by Dr. McKee. They advised him that he should meet with Dr. McKee and talk with him. Otherwise, they would not have a defense. Robertson later spoke to Dr. McKee. ***App. 3583-85***. He gave similar testimony on these same matters before this Court. ***PCR Tr. 449-50***.

It is clear from the testimony of trial counsel that because their investigation revealed overwhelming evidence establishing Robertson's guilt, they decided not to strongly contest guilt

and, instead, to focus mitigation. To this end, they made a strategic decision to present a mental health defense and eventually presented extensive evidence concerning the mental health history of Robertson and his family. They explained to him that the State had the right to an evaluation and that the defense could not present a mental health defense if he did not consent to the evaluation. (Mr. Boyd advised him not to make admissions about the crime in the evaluation). ***App. 3545; 3555-56***). Also, Robertson agreed with this decision to present such a defense and to participate in the evaluation. See ***App. 3333-37; 3419-35; 3441-43; 3497-98; 3503; 3506; 3537-38; 3544-45***.[11]

As to Robertson's suggestion of "structural error" in 11(f), he claims a "right to control his defense" concerning a "guilt phase defense." (Fifth Amended Application, p. 8. Robertson misconstrues *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018) (holding that the defendant, personally, has the right to determine whether to concede his guilt or maintain his innocence), and he ignores both that counsel did not concede his guilt in the guilt phase[12] and that he agreed with counsel's decision to focus primarily on sentencing rather than his guilt or innocence. *See Bell*, 72 F.3d. at 429 (While "a defendant's consent to trial strategy in itself, [does not vitiate[] all claims of

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[11] As in 2007, Mr. Boyd testified in 2021 that counsel explained to Robertson that he would be evaluated by the State's expert and advised him to take the Fifth Amendment "as to any questions concerning the details of the crime. However, Robertson did not follow counsel's advice. ***PCR Tr. 374***.

[12] Mr. Boyd testified that he would have "preferred to basically concede guilt and just argued the penalty." Yet, Robertson did not want to concede guilt, "even though he agreed that there was a very small chance of a not guilty verdict …." ***PCR Tr. 370***. So, counsel abided by his decision and did not admit his guilt in the guilt phase. *Accord McCoy*, 138 S.Ct. at 1510 ("we agree with the majority of state courts of last resort that counsel may not admit [their] client's guilt of a charged crime over the client's intransigent objection to that admission"); *see also id*. at 1512 ("The trial court's allowance of [counsel's] admission of McCoy's guilt despite McCoy's insistent objections was incompatible with the Sixth Amendment" and constituted structural error).

ineffective assistance of counsel … [his consent is] probative of the reasonableness of the chosen strategy and of trial counsel's performance").

However, under *Simmons* and *Drayton*, and the jurisdictional limitations of the PCR statute, these claims would not be cognizable. Therefore, Robertson has failed to show prejudice.

> 10 & 11(g) Trial Counsel's failure to manage and supervise their expert witnesses and failure to be present during all of the Applicant's experts' interviews resulted in the Applicant being without counsel at a critical stage of his case, thereby denying Applicant his Sixth Amendment right to effective assistance of counsel. *See* United States v. Cronic, 466 U.S. 648, 659 (1984). Counsel's systemic errors and omissions also caused a breakdown in the adversarial process that was violative of Applicant's Sixth Amendment right to effective assistance of counsel. *See id*. Original PCR counsel would have pursued and prevailed on this claim but for original PCR counsel's lack of statutorily required education and experience. *See* S.C. Code Ann. § 17-27-160; Robertson, 418 S.C. 505,795 S.E.2d 29.

Robertson asserts that trial counsel did not "manage and supervise their expert witnesses and" did not attend his "experts' interviews" of him; thus, he was denied counsel and prejudice should be presumed under *United States v. Cronic*, 466 U.S. 648, 659 (1984). He further argues that counsel's performance caused a "breakdown in the adversarial process" such that he should be relieved of showing prejudice. Defendants have the right to counsel at all critical stages of a criminal proceeding. *See, e.g.*, *Iowa v. Tovar*, 541 U.S. 77, 80 (2004). Defendants also have the right to effective assistance of counsel under *Strickland*. The Court finds that neither right was abridged. Further, Robertson misconstrues *Cronic*.

The Supreme Court in *Cronic* held that prejudice is presumed only if the defendant can show (1) a complete denial of counsel at a critical stage of the trial, (2) a constructive denial of counsel, or (3) that "the [circumstances surrounding the case] made it so unlikely that any lawyer could provide effective assistance," *Cronic*, 466 U.S. at 661. *See also Garza v. Idaho*, 139 S.Ct. 738, 744 (2019); *Nance v. Ozmint*, 367 S.C. 547, 553, 626 S.E.2d 878, 881 (2006) (finding that "the present case represents one of the rare cases where counsel "entirely fails to subject the

prosecution's case to meaningful adversarial testing"). "[U]nder the third scenario, ... the presumption of prejudice applies only in limited, egregious circumstances…." *United States v. Coleman*, 835 F.3d 606, 612 (6th Cir. 2016) (internal quotation marks omitted). Indeed, the Supreme Court in *Cronic* refused to apply the *per se* prejudice rule where "a young real-estate lawyer ... was allowed only 25 days of pretrial preparation in a complex mail fraud case." *Glover v. Miro*, 262 F.3d 268, 277 (4th Cir. 2001) (citing *Cronic*, 466 U.S. at 649).

The Court finds that neither the second nor third exceptions in *Cronic* are applicable and that Robertson's claim is fundamentally flawed because it ignores that interviews of a criminal defendant by retained experts and, for that matter, the defendant's participation in a court ordered psychiatric examination do not constitute a critical stage in the proceedings against a defendant. *See State v. Hardy*, 283 S.C. 590, 592, 325 S.E.2d 320, 322 (1985). The Court in *Hardy* further found that counsel's presence at a court ordered evaluation "is not only unnecessary from a constitutional standpoint, it is also undesirable from a clinical perspective, for it would undoubtedly hinder the psychiatrist from effectively examining the defendant." *Id*. Further, the Court has previously found that Robertson failed to prove that counsel were ineffective under *Strickland* in failing to attend any interview of him by any of the experts used by trial counsel. *See* Grounds 11(b)(iii-v).

**11(l). Allegations of Ineffective Assistance of Appellate Counsel.**

At the hearing, the Court sustained Respondent's objection to the amendment of Ground Five to include additional claims of ineffective assistance of appellate counsel (Robertson's Grounds 11(l)(i)-(ix) and his claim that Robertson did not knowingly and intelligently waive his right to appeal his convictions and sentence) because these are matters were conclusively decided by the Supreme Court of South Carolina on direct appeal.

The record reflects that Robertson successfully had two different appellate attorneys removed and ultimately proceeded *pro se* on appeal. One, Mr. Savitz, actually filed an Initial Brief of Appellant on Robertson's behalf. However, Robertson expressed displeasure with the manner in which appellate counsel was handling his appeal. He wrote the Supreme Court of South Carolina several times and asked the Court to relieve Mr. Savitz. Following an October 10, 2002 hearing before Judge Hayes on his competency to appear *pro se* and Judge Hayes' October 28, 2002 Report in the South Carolina Supreme Court, the Court filed an Order on November 21, 2002, relieving Mr. Savitz and permitting Robertson to appear *pro se*. Robertson thereafter filed a *pro se* Initial Brief of Appellant, dated July 25, 2003.

However, after the State filed the Initial Brief of Respondent on December 31, 2003, the Supreme Court dismissed and re-instated the direct appeal on several occasions because Robertson failed to comply with the South Carolina Appellate Court Rules (SCACR). Eventually, Robertson indicated to the Court that he wished to abandon his right to a direct appeal and after it was determined in a hearing before Judge Hayes that he was competent to do so,[13] the Supreme Court filed an Order on June 3, 2005, in which it agreed with Judge Hayes' finding that he was competent to waive his right to appellate review, conducted the proportionality review mandated by § 16-3-25, dismissed the appeal, and directed the Clerk of that Court to issue an execution notice pursuant to *In re Stays of Execution*, *supra*.

In light of this history, this Court will not revisit the waiver issue that our Supreme Court heard and decided because it is law of the case. In *Greenwood County v. Watkins*, 196 S.C. 51, 12 S.E.2d 545(1940), the Court stated that it was well settled in South Carolina that the rulings in a

[13] Although he had been represented by counsel at each of his hearings to relieve his appellate attorneys, Robertson appeared *pro se* and testified at the hearing. Mr. Salter represented the State.

case become the law of the case. The doctrine of "the law of the case" prohibits issues which have been decided in a prior appeal from being re-litigated in the trial court in the same case. 5 Am.Jur.2d *Appellate Review* § 605 (1995); *Sheppard v. State*, 357 S.C. 646, 662, 594 S.E.2d 462, 471 (2004) (holding when a ruling goes unchallenged, right or wrong, it becomes the law of the case). The law of the case applies both to those issues explicitly decided and to those issues that were necessarily decided in the former case. *Nelson v. Charleston & Western Carolina Railway Co.*, 231 S.C. 351, 357, 98 S.E.2d 798, 800 (1957) (where Court granted a new trial in first appeal for errors in the charge, it logically determined trial court had not erred in refusing defendant's motion for a directed verdict "for if there had been error in this respect it would have been unnecessary to consider any other questions"); *see also Warren v. Raymond*, 17 S.C. 163 (1882) (all points decided by the Court on appeal, or necessarily involved in what was decided, are res judicata and cannot be considered again in the cause); *Johnson v. Board of Com'rs of Police Ins. & Annuity Fund of State*, 68 S.E.2d 629, 633 (1952) ("[T]he rulings in a case even though admittedly wrong become the law of the case and res judicata between the parties).

Moreover, it is axiomatic that "a party may not complain on appeal of error ... which his own conduct has induced." *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006). *See also State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683 (1996), *cert. denied*, 519 U.S. 1045 (1996) (party cannot complain of error which his own conduct has induced). It is well-established that knowing and voluntary waivers, even of constitutional rights, are proper and binding when the record supports the knowing and voluntariness of the waiver.[14] *See, e.g., Pittman*

[14] Prior cases allowed the waiver of both the direct appeal and the statutory review under Section 16-3-25(C) (the sentence review). In 2011, well-after Robertson's direct appeal, our Supreme Court resolved that a death-sentenced inmate can most certainly "waive his personal right to a direct appeal" however, "he cannot waive this Court's statutorily-imposed duty to review his capital sentence." *State v. Motts*, 391 S.C. 635, 649, 707 S.E.2d 804, 811 (2011).

*v. State*, 337 S.C. 597, 600, 524 S.E.2d 623, 625 (1999) ("A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.' "). Further, this Court has disallowed further amendment to these claims against appellate counsel as further amendment in these circumstances would be futile.

Therefore, Robertson's pending ineffective assistance of appellate counsel claims should be summarily dismissed. Robertson cannot show prejudice as his underlying claims of error could not be heard because Roberts chose to represent himself on appeal, and he then voluntarily, knowingly, and intelligently abandoned the appeal himself.

**11(m). Allegations of Deficiency: Original Post-Conviction Relief Counsel.**

In Section 10(m) of his application, Robertson submits individual allegations of deficiency by prior PCR counsel. However, our Supreme Court has limited cognizable allegations to one – counsel's qualification under the statute. The remainder of the opinion specifically *rejects* that any other allegation of deficiency may be raised:

> …we hold that *Martinez* [*v. Ryan,* 566 U.S. 1 (2012)] does not afford Petitioner a right to file a successive PCR application by merely alleging ineffective assistance of prior PCR counsel.
>
> However, Petitioner's 2011 Application also alleged, ***as a separate and distinct ground not addressed by Aice***, that prior PCR counsel were not qualified under section 17-27-160(B). We conclude Petitioner's allegation that he was denied a state-created right to qualified counsel constitutes a "sufficient reason" to permit a successive PCR application under section 17-27-90.

*Robertson*, 418 S.C. at 516, 795 S.E.2d at 34–35 (emphasis added).[15]

[15] Further, the Supreme Court's concept of "permit" was also constrained. The Court noted that a hearing was allowed for the applicant to present evidence to demonstrate non-compliance, and, if so, *then* the opportunity to present evidence in support of prejudice, if any. Stated differently, an applicant who makes a timely, *prima facia* showing of support for the exception to the bars of successiveness or the statute of limitations is permitted the opportunity for a hearing to

Thus, this Court lacks jurisdiction to entertain any allegations of deficiency beyond qualification (which it has already ruled upon). The Supreme Court's opinion provides that once that finding is made, the first prong is met: "…we conclude that non-compliance with section 17-27-160(B) constitutes deficient performance per se." *Robertson*, 418 S.C. at 521. Consequently, the ability to entertain and rule on allegations of deficiency other than statutory qualification is beyond the jurisdictional limitations of remand.

"[A] trial court has no authority to exceed the mandate of the appellate court on remand." *Prince v. Beaufort Memorial Hosp*., 392 S.C. 599, 605, 709 S.E.2d 122, 125 (2011) (quoting *S.C. Dep't of Soc. Servs. v. Basnight*, 346 S.C. 241, 250–51, 551 S.E.2d 274, 279 (Ct.App.2001)) (citing 5 Am.Jur.2d *Appellate Review* § 784, at 453 (1995)). "The mandate of the appellate court is jurisdictional." *Id*. The trial court has a duty to follow the appellate court's directions. *Id*. (citing *Ackerman v. McMillan*, 324 S.C. 440, 443, 477 S.E.2d 267, 268 (Ct.App.1996)). The reversal and remand in this case was qualified and specific. The Supreme Court *affirmed* the summary dismissal of all claims apart from the statutory qualification allegation. The Court *ruled* a failure to meet the statutory qualifications is per se deficient*, i.e.,* by itself, no other proof at issue. *See* PER SE, *Black's Law Dictionary* (11th ed. 2019) ("Of, in, or by itself; standing alone, without reference to additional facts. This phrase denotes that something is being considered alone, not with other collected things.").

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prove the limited exception. *Robertson,* 418 S.C. at 519, 795 S.E.2d at 36 (citing *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2014)). If the applicant shows that counsel were not statutorily qualified, he then has the opportunity to demonstrate prejudice. *Id*. at 520-21, 795 S.E.2d at 36-37. It is a stepped process, and one correctly followed by this Court in the instant litigation, first finding Robertson carried his burden of proof in demonstrating non-compliance under Section 17-27-160, then conducting a hearing to allow him the opportunity to demonstrate prejudice.

Robertson presented two attorney witnesses at the evidentiary hearing to testify as experts in training and issue presentation to establish his alleged deficiencies of PCR counsel's representation from which prejudice would flow. This Court overruled the objection and allowed Robertson to make a record. Rather than aiding Robertson in any cognizable claim, though, the Court finds that their testimony demonstrates its irrelevance.

Respondent objected to Robertson's experts under Rule 702, SCRE as the proffered attorneys could offer no testimony that would aid this Court as the fact-finder because the Court had already determined the only allegation of deficiency that is allowed on remand and that the "prejudice" for the Court to determine necessarily must stem from trial counsel performance, not PCR qualification and/or perceived "best practices" in collateral litigation. *See McKnight v. State,* 378 S.C. 33, 56, 661 S.E.2d 354, 365–66 (2008) (finding expert testimony properly excluded regarding "prevailing professional standards" when testimony "not designed to assist the PCR court to understand certain facts, but rather, was a legal argument as to why the PCR court should rule that McKnight's trial counsel was ineffective."); *Green v. State,* 351 S.C. 184, 569 S.E.2d 318 (2002) (PCR applicant not entitled to present expert opinion on whether "trial counsel's actions fell below an acceptable legal standard of competence"). *See also Isom v. State*, No. 45S00-1508-PD-508, 2021 WL 2678553, at *24 (Ind. June 30, 2021) ("Although Rule 24 requires trained counsel in death-penalty cases, Isom's conclusion that the effectiveness of such attorneys is beyond the ken of post-conviction courts does not follow from his premise."); *Provenzano v. Singletary*, 148 F.3d 1327, 1331 (11th Cir. 1998) ("Even if the [public defender's] affidavit had said that its author would have insisted on a change of venue, it would establish only that two attorneys disagreed about trial strategy, which is hardly surprising. After all, '[t]here are countless ways to provide effective assistance in any given case,' and '[e]ven the best criminal defense

attorneys would not defend a particular client in the same way.' ") (quoting *Strickland,* 466 U.S. at 689).

Moreover, Robertson presented some testimony on federal habeas litigation. Yet, in Robertson's own appeal, the Supreme Court *rejected* the concept that federal law on procedural default and excuse procedures in federal habeas corpus proceedings allows an applicant to file a successive PCR. *Robertson*, 418 S.C. at 512, 795 S.E.2d at 32–33. The offered testimony did not center on South Carolina rules or even the facts of this case. Critically, the Court finds that Robertson did not provide his experts with a copy of the comprehensive 106 page Order by Judge Few for reference to the scope and decisions in the prior proceedings. Further, comments concerning the scope and applicability of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) were likewise irrelevant to these proceedings as AEDPA applies only to federal habeas corpus proceedings.[16] As to the "heightened requirements" for collateral counsel encouraged by AEDPA, Robertson's offered expert admitted nothing was specifically required such that South Carolina's provision could be contrary. Even so, the provisions regarding

[16] The witnesses at times spoke to the purpose and intent of the AEDPA as to having a goal of improving legal representation, and the ABA Guidelines as potential norms. Respondent submitted and relied upon these cases in countering the assertions: *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases"); *Williams v. Taylor*, 529 U.S. 420, 436 (2000) ("AEDPA's purpose to further the principles of comity, finality, and federalism"); *Bobby*, 558 U.S. at 8-9 ("*Strickland* stressed, however, that 'American Bar Association standards and the like' are 'only guides' to what reasonableness means, not its definition."); *Wong v. Belmontes*, 558 U.S. 15, 25 (2009) (Court considered Sixth Amendment ineffective assistance claim without addressing ABA Guidelines); *State v. Blakely*, 402 S.C. 650, 664–65, 742 S.E.2d 29, 36–37 (Ct. App. 2013) ("while the ABA standards may be useful or may offer assistance in the analysis of an issue, these standards are not controlling or dispositive"). The Court finds that the witnesses placed far too much emphasis on varied goals and presumed "best practices," which do not control in a Sixth Amendment effective representation analysis. Therefore, even if accepted, the testimony neither aids this Court in determining the only deficiency at issue (qualification under the South Carolina statute), or prejudice, which is controlled by *Strickland*.

heightened qualifications for state collateral attorneys apply to expedited timelines (shortening the statute of limitations from one year to six months), but if not afforded, federal habeas review still proceeds. *See Tucker v. Moore*, 56 F. Supp. 2d 611, 614 (D.S.C. 1999), *aff'd sub nom. Tucker v. Catoe*, 221 F.3d 600 (4th Cir. 2000). Again, the testimony proved its irrelevance.

Therefore, Applicant's claims of deficient representation in 11(m)(i)-(xiii) are beyond the jurisdictional limitations of remand.[17]

**10 and 11(n). Challenge to Judge Few's Order – unreasonable determination of facts.**

[17] To the extent that Robertson relies on allegations of misconduct resting on the Rules of Professional Conduct, his reliance is misplaced. *Jordan v. State*, 406 S.C. 443, 450, 752 S.E.2d 538, 541–42 (2013) ("The PCR judge cited a correct proposition of law in that the **"Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction."** (citing *Langford v. State,* 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993)) (emphasis added).

The Court further notes that none of the individual claims of ineffective assistance of original PCR counsel are of any moment, as they cannot establish both deficient performance and prejudice. For instance, his Ground 11(m)(ii) ignores that original PCR counsel did amend the original PCR counsel and that twelve specific allegations were addressed in the Order of Dismissal. *See* ***App. 3658-59***. Also, Ground 11(m)(ii) states that "Applicant's #5 … comingled Dr. Cascio's handwritten client interview notes with her typed report, and [Mr. Brown] represent[ed] to the Court that the report and notes were sent to trial counsel together on March 1, 1999." Yet, Mr. Hancock identified the handwritten notes and testified that they may have been sent together with the typed report. ***App. 3387-88***. Further, the Court notes that at the hearing before this Court, Robertson thought that State's Ex. 286, which was not introduced at trial, was Cascio's notes, whereas Solicitor Pope's testimony and the evidence log made it clear that State's Ex. 286 was her typed report, which he simply forgot to introduce. *Compare* ***PCR Tr. 416-20; 431-37***, *with* ***PCR Tr. 466-71***.

Ground 11(m)(vi) and (vii) lack plausible merit for the reasons stated. Ground 11(m)(viii) takes original PCR counsel's remarks out of context and ignores that the statement that Dr. McKee did not testify in as much detail about the facts of the crimes as did Cascio (***App. 3618***) is correct, since he did not relate any *verbatim* statement by Robertson (a matter with which counsel for Respondent, Mr. Salter, agreed) and merely stated that the information Robertson provided to him was consistent with that provided to Cascio. This claim likewise ignores that Judge Few was not misled and that the Order of Dismissal accurately summarizes Dr. McKee's trial testimony. *See* ***App. 3714-18***. The other allegations in Ground 11(m) lack merit for the reasons previously discussed in connection with Roberson's other claims.

As with the claims on alleged deficiency other than qualification under Section 17-27-160, the Court finds that this allegation also fails outside of allowed litigation under the remand order. Robertson seeks to have this Court declare that Judge Few's Order reflects an "unreasonable determination of fact" in resolving the issues presented in the first PCR based on "clearly erroneous presentations by PCR counsel pertaining to critical facts upon which Judge Few relied." (Fifth Amended Application, p. 15.

The Court further finds that Robertson's free-standing challenge to Judge Few's Order in 10(n), is not cognizable in this action. Our Supreme Court did not vacate the Order. Also, the reasonableness of the fact-finding of the prior PCR judge exceeds the jurisdictional limitations of the PCR Act. See S.C. § 17-27-20. Additionally, a request to vacate the Order or make void the findings of facts *in toto* is inconsistent with the parameters of the narrow relief ordered and the goal of this remand proceeding.

The only direction from our Supreme Court – after finding that counsel were not statutorily qualified - is for this Court to make the determination of whether Robertson was prejudiced by that deficiency: "If prior PCR counsel are deemed unqualified and, as a result, deficient, the PCR judge must make a determination whether under *Strickland*, Petitioner was prejudiced." *Robertson*, 418 S.C. at 522, 795 S.E.2d at 38. Thus, this Court is now tasked with making the factual determination of prejudice regarding cognizable PCR claims. That is all. Again, our Supreme Court neither vacated the prior Order of Dismissal, nor ordered a new post-conviction relief proceeding. However, and without doubt, this Court is free to accept the evidence it deems appropriate for the sole purpose of demonstrating prejudice.

The essence of this claim asks this Court to set aside the prior Order without Robertson making the necessary showing of actual prejudice.[18] The Supreme Court directed that Robertson has the burden of showing prejudice. *Robertson, supra.* For the reasons argued above, Robertson has not done so, and is entitled to no relief.

**PROPOSED ORDER PROCEDURE**

This Court advised the parties of its ruling by email dated July 12, 2022, which reflected the following:

> The claims of deficient performance of PCR are dismissed as they are beyond the jurisdictional limitations of the remand. This court accepted the evidence in a quest to determine prejudice resulting from lack of a certification as required by statute. No other issue is before the Court. Interestingly, the Court learned there does not exist a formal certification process for death penalty PCR, unlike the certification process for lead trial counsel for death penalty defense.

Further, this Court set out: "The question is whether or not Petitioner was prejudiced using the Strickland standard because his PCR lawyers were deficient where, as here, neither PCR lawyer complied with the statute rendering their performance deficient."

Further still, this Court advised: "After careful review of all materials, including but not limited to, Judge Few's order, transcripts, memorandums, statutes, live testimony and exhibits, the Court finds Petitioner failed to show that a reasonable probability exists that but for PCR counsels' error, the result of the proceeding would be different." The Court then directed the State to prepare a proposed order.

Robertson's counsel objected to the Court's request for the State to submit a proposed

[18] Indeed, it would be quite incongruous with the Supreme Court's opinion remanding this case for this Court to find that Robertson failed in his burden of proving actual prejudice from the failure of original PCR counsel to be statutorily qualified, yet grant relief based on a finding that the prior proceeding was "unfair" and the prior fact-findings "unreasonable." He simply is not entitled to any relief if he fails to show prejudice on a specific claim.

order. Though the motion was denied,[19] the Court notes that it invited opposing counsel to submit a proposed order, but Robertson's counsel declined. At any rate, this matter has been fully briefed and the parties' positions are fully before the Court. Both parties should be amply aware of the other's position and the facts and law supporting those positions. There is no surprise in fact or law – just a difference of opinion. Further, counsel has the opportunity to request reconsideration of any fact or conclusion in this order by way of filing a timely motion under Rule 59, SCRCP. *See Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589–90 (2019). The undersigned finds no error in calling for the State to prepare a proposed order, which followed the arguments and evidence before the Court, especially after having expressed its ruling.

Additionally, the undersigned notes that he has carefully reviewed each and every assertion herein and adopts the language as its own since it wholly and accurately reflects the decision of the Court not only in light of the allegations and arguments, but also this Court's independent review of evidence in this case – in particular, the prior PCR Order, the transcripts, memorandums, statutes, and live testimony and exhibits as presented in the August 2021 hearing. The Court affirms once again that it finds Applicant has failed to show that a reasonable probability exists that but for PCR counsels' error, the result of the proceeding would be different

**CONCLUSION**

THERFORE, Applicant, James D. Robertson, having failed to carry his burden of showing any prejudice from the finding of deficient performance by his prior PCR counsel (based solely on

[19] Robertson has relied in part upon *Hall v. Catoe*, 360 S.C. 353, 601 S.E.2d 335 (2004). Yet, the Court did not prohibit the practice in *Hall* and affirmed finding "the PCR judge spent an adequate amount of time reviewing the order before adopting it." 360 S.C. at 365, 601 S.E.2d at 341. *See also Richardson v. Kornegay,* 3F.4th 687, 406-407 (4th Cir. 2021) (noting North Carolina similarly allows proposed orders and, though acknowledging criticism of the practice, resolving to continue to honor "the state court judge['s] exercise[ of his] judicial discretion in adopting the State's Proposed order").

the failure to meet the heightened statutory requirements of S.C. Code § 17-27-160), is not entitled to a successive application or new proceedings in state court under the Post-Conviction Relief Act. Having had a full and fair "bite at the apple," Applicant is entitled to nothing further.

IT IS SO ORDERED.

R. Keith Kelly
R. Keith Kelly, Circuit Court Judge
By Special Assignment

This 26 day of August, 2022